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## CONGRESSIONAL RECOGNITION OF STATE AUTHORITY OVER NUCLEAR POWER AND WASTE DISPOSAL

While the federal government was promoting the development of peaceful uses of nuclear energy,<sup>1</sup> the question of effective, long-term nuclear waste disposal was left in blissful confidence to the success of future scientific research.<sup>2</sup> This failure to establish a national policy to insure a proper and safe method for the disposal of radioactive waste has been called “unconscionable”<sup>3</sup> and criticized as a “nonpolicy of indecision and delay.”<sup>4</sup> Recently, Congress attempted to legislate a national solution to the problem of radioactive waste disposal. After extensive debate, Congress pared down a comprehensive, national program<sup>5</sup> to a simple bill which delegated “responsibility” for one type

1. In the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2284 (1976 & Supp. III 1979), Congress declared:

Atomic energy is capable of application for peaceful as well as military purposes. . . . [T]herefore . . . (a) the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, . . . and (b) the development, use, and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. § 2011 (1976).

2. The Senate Committee on Energy and Natural Resources has reported that:

Over the past twenty years, operating civilian nuclear powerplants have generated considerable volumes of spent fuel and other radioactive wastes of varying lifetimes and toxicities. During this time the establishment by the Federal Government of a definitive policy for the long-term storage or disposal of these wastes has not been granted high priority. Meanwhile the quantities of civilian nuclear wastes have continued to grow.

S. REP. No. 548, 96th Cong., 2d Sess. 10, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 6933, 6934 [hereinafter cited as S. Rep.].

The courts have also been confronted with cases challenging this failure to provide adequate disposal facilities. For example, in *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 582 F.2d 166 (2d Cir. 1978), the plaintiff sued to compel the administrative agency responsible for implementing the Atomic Energy Act to determine whether radioactive waste could be safely disposed of before granting new licenses for nuclear power generation. The court noted that “it is clear that from the very beginnings of commercial nuclear power the Congress was aware of the absence of a permanent waste disposal facility, but decided to proceed with power plant licensing.” *Id.* at 170. The United States Nuclear Regulatory Commission [hereinafter cited as NRC] had premised its decision to continue licensing, even though no technology for waste disposal exists, on its “reasonable confidence that wastes can and will in due course be disposed of safely.” *Natural Resources Defense Council, Denial of Pet. for Rulemaking*, 42 Fed. Reg. 34,391, 34,393 (1977). *See also* *Minnesota v. United States Nuclear Regulatory Comm'n*, 602 F.2d 412, 417 (D.C. Cir. 1979) and Seiberling, *Radioactive Waste Disposal: The Emerging Issue of States' Rights*, 13 AKRON L. REV. 261, 263-67 (1979) (failure of governmental agencies to develop effective waste disposal programs).

3. 126 CONG. REC. S9975 (daily ed. July 28, 1980) (remarks of Sen. Randolph).

4. 126 CONG. REC. S10264 (daily ed. July 30, 1980) (remarks of Sen. Jepsen).

5. The original bill was introduced in the Senate on July 28, 1980, 126 CONG. REC. S9970, and described in S. Rep., *supra* note 2, at 6939-47. For a discussion of the original bill, *see* notes 118-43 and accompanying text *infra*.

of radioactive waste to the states. This compromise bill was enacted as the Low-Level Radioactive Waste Policy Act.<sup>6</sup>

Prior to the passage of the Low-Level Waste Act, many state legislatures had established regulatory schemes imposing state conditions on the nuclear industry. In turn, many courts found the state regulations unconstitutional under the doctrine of federal preemption,<sup>7</sup> holding that these regulations were superseded by the Atomic Energy Act of 1954<sup>8</sup> and its amendments,<sup>9</sup> and that they were obstacles to the federal goal of encouraging the growth of a nuclear industry.<sup>10</sup> Other courts upheld state regulations where it was shown that the purpose of the regulations was one other than to protect the state from the hazards associated with radioactive processes and materials.<sup>11</sup> The existence of state efforts to control and influence nuclear policy revealed local dissatisfaction with federal nuclear policy. However, the various judicial interpretations of the Atomic Energy Act created uncertainty as to the validity of these efforts to control the presence of nuclear facilities and radioactive materials within their state.

Due to state and local opposition to the prospect of hosting a federal nuclear waste facility,<sup>12</sup> Congress determined that each state must be responsible for the disposal of one type of radioactive waste generated within its borders. The Low-Level Waste Act<sup>13</sup> significantly altered the division of state-federal responsibilities with regard to low-

6. Pub. L. No. 96-573, 94 Stat. 3347, 42 U.S.C. §§ 2021b-2021d (Supp. IV 1980) [hereinafter cited as the Low-Level Waste Act].

7. Preemption occurs when "state regulation falls . . . because, under the supremacy clause of Art. VI, the 'supreme' congressional law supersedes or preempts state law. . . . State authority is barred as well when congressional action is an *implicit* barrier—*e.g.*, when state regulation would interfere unduly with the accomplishment of congressional objectives." G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 344 (10th ed. 1980). For a detailed discussion of the doctrine of federal preemption and its judicial application, see Note, *State Regulation of Nuclear Power Production: Facing the Preemption Challenge From a New Perspective*, 76 Nw. U.L. REV. 134 (1981).

8. 42 U.S.C. §§ 2011-2284 (1976 & Supp. III 1979) [hereinafter cited as the AEA].

9. The AEA was amended in 1959 to clarify the role of the states in nuclear development. Pub. L. No. 86-373, 73 Stat. 688 § 1, 42 U.S.C. § 2021 (1976 & Supp. III 1979). In the Energy Reorganization Act of 1974, Pub. L. No. 88-489, §§ 5-8, 78 Stat. 603, 42 U.S.C. § 2073 (1976 & Supp. III 1979), the functions of the Atomic Energy Commission were divided between the Nuclear Regulatory Commission (licensing) and the Energy Research and Development Commission (research and development of nuclear energy). Pub. L. No. 93-438, 88 Stat. 1233, 42 U.S.C. §§ 5801-5891 (1976 & Supp. III 1979). The AEA was also amended by the Department of Energy Organization Act of 1977, Pub. L. No. 95-91, 91 Stat. 565, 42 U.S.C. §§ 7101-7352 (Supp. III 1979).

10. See, *e.g.*, Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). See notes 26 to 43 and accompanying text *infra*.

11. See, *e.g.*, Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d 266 (1975). See also notes 62-85 and accompanying text *infra*.

12. See notes 151-52 and accompanying text *infra*.

13. 42 U.S.C. §§ 2021b-2021d (Supp. IV 1980).

level radioactive waste materials, or materials contaminated with radioactivity. Congress ceded authority over this type of nuclear material to the states, in contradistinction to prior findings of exclusive federal control.<sup>14</sup> It also consented to state burdens on interstate commerce, in order to insure that the control ceded to the states would be broad enough to meaningfully regulate low-level radioactive waste disposal.<sup>15</sup>

This note will explore the changes made by the Low-Level Waste Act. It will begin with an analysis of the two approaches developed by the courts, first, in defining the scope of state power, and, second, in interpreting federal nuclear policy and objectives. The state-federal problems which gave rise to the Act as revealed through judicial decisions will be described. Congress' approach to the resolution of the problems created by the exclusion of the states from decisions regarding the hazards of nuclear technology then will be examined. Finally, the recent effort of the state of Washington to control the flow of radioactive materials into that state will be analyzed in light of the changing federal policies.

## PREEMPTION OF STATE REGULATIONS

### *The Atomic Energy Act*

The Atomic Energy Act (AEA) of 1954 and its amendments established a comprehensive "program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public."<sup>16</sup> The Atomic Energy Commission (AEC), replaced by the Nuclear Regulatory Commission (NRC) in 1974,<sup>17</sup> was vested with the responsibility of overseeing the transition from a federal monopoly over nuclear research and development to privately owned and operated nuclear power facilities.<sup>18</sup> The authority granted the AEC, and subsequently

14. *Id.* at § 2021b(a)(1)(A). See notes 26-61 *infra*, for a discussion of cases which have held state regulations concerning nuclear waste or emissions from nuclear plants to be preempted by federal law.

15. See 42 U.S.C. §§ 2021d(a)(2)(A). See also notes 205-43 and accompanying text *infra*.

16. 42 U.S.C. § 2013(d) (1976).

17. Energy Reorganization Act of 1974, 42 U.S.C. §§ 5841-5851 (1976 & Supp. III 1979).

18. 42 U.S.C. §§ 2011-2013 (1976). "The sole purpose of the 1954 amendments was to relinquish or forfeit ownership and production rights to private enterprise where certain conditions were met." *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1150 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). Prior to 1954, the federal government retained complete control over nuclear materials and technology. "This federal monopoly ended with passage of the Atomic Energy Act of 1954, which allowed private industry to participate for the first time in the development of nuclear power. The 1954 Act authorized private industry to conduct research and build

the NRC, created "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives."<sup>19</sup>

Included in the statutory scheme was a set of provisions for "Cooperation with States."<sup>20</sup> Although the purpose of the section was "to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear development and use and regulation of byproduct, source, and special nuclear materials,"<sup>21</sup> both state and federal courts have struggled with defining the scope of state and federal authority. Section 2021, which the Low-Level Waste Act amends,<sup>22</sup> consists of fifteen subsections detailing, *inter alia*, activities subject to regulation by the state or federal government,<sup>23</sup> a procedure for "turnover agreements" whereby the governor and the Commission agree to discontinue certain regulatory functions of the Commission,<sup>24</sup> and notice provisions to insure that state and federal programs will be "coordinated and compatible."<sup>25</sup>

### *Judicial Interpretation*

The leading case addressing the scope of state and federal author-

commercial reactors, under licenses from the AEC." *Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n*, 659 F.2d 903, 920 (9th Cir. 1981). *See also* *Public Serv. Co. v. United States NRC*, 582 F.2d 77, 84 (1st Cir. 1978).

19. *Westinghouse Elec. Corp. v. United States NRC*, 598 F.2d 759, 771 (3d Cir. 1979) (quoting *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968)).

20. *Atomic Energy Act of 1959*, 42 U.S.C. § 2021 (1976 & Supp. III 1979).

21. *Id.* § 2021(a)(3) (1976). Under the AEA, the term "byproduct material" means:

(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

*Id.* § 2014(e) (1976 & Supp. III 1979). The AEA defines "source material" as:

(1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

*Id.* § 2014(z) (1976). "Special nuclear material" is defined as:

(1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

*Id.* § 2014(aa).

22. 42 U.S.C. §§ 2021b-2021d (Supp. IV 1980).

23. 42 U.S.C. §§ 2021(b), (c), (i), (k), (m) and (o) (1976 & Supp. III 1979).

24. *Id.* §§ 2021(b), (c), (d), (i) and (j).

25. *Id.* §§ 2021(e), (g) and (l).

ity over nuclear facilities under the AEA is *Northern States Power Company v. Minnesota*.<sup>26</sup> In that case, the court held that stringent state standards limiting the amount of radioactive gaseous discharges a nuclear power plant could emit were preempted by the AEA and federal regulations.<sup>27</sup> The court rejected the state's arguments that (1) federal regulation applied to the operation of a nuclear facility, but state authority extended to matters of waste control,<sup>28</sup> and (2) the state police power over the environment and the health, safety and welfare of its citizens was concurrent with federal authority in the area of nuclear regulation.<sup>29</sup> In support of its holding, the court said that

through direction of the licensing scheme for nuclear reactors, Congress vested the AEC with the authority to resolve the proper balance between desired industrial progress and adequate health and safety standards. . . . Were the states allowed to impose stricter standards on the levels of radioactive waste releases discharged from nuclear power plants, they might conceivably be so overprotective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy for the production of electric power.<sup>30</sup>

The *Northern States* opinion was one of the first interpretations of the section of the AEA dealing with "Cooperation with States."<sup>31</sup> In synthesizing the many provisions of that section, the court focused on two subsections detailing permissible "turnover agreements"<sup>32</sup> despite

26. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). This case has been described as "undoubtedly the leading case on the issue of federal pre-emption of the field of nuclear power plant construction and operation." Annot., 82 A.L.R.3d 751, 755 (1978). One author has commented that "application of the preemption doctrine in the nuclear area follows in almost lockstep fashion from the landmark ruling in *Northern States*, with little regard for any new or distinguishing factor that might justify a state's exercise of its police power." Moran, *On Preempting State Initiatives Relating to the Disposal of Nuclear Waste*, 61 CHI. B. REC. 179, 186 (1979). Another author has stated: "Nuclear energy preemption cases that have reached the courts subsequent to *Northern States* have followed the case very closely, especially its reading of the legislative history." Note, *State Regulation of Nuclear Power Production: Facing the Preemption Challenge From a New Perspective*, 76 Nw. U.L. REV. 134, 156 (1981).

27. 447 F.2d at 1154.

28. *Id.* at 1145.

29. *Id.*

30. *Id.* at 1153-54.

31. 42 U.S.C. § 2021 (1976 & Supp. III 1979). Seven years before the *Northern States* decision, the California Supreme Court had interpreted Section 2021 as reserving to the states the power to regulate certain aspects of nuclear safety. *Northern California Assoc. to Preserve Bodega Head & Harbor, Inc. v. Public Utilities Comm'n*, 61 Cal. 2d 126, 390 P.2d 200, 37 Cal. Rptr. 432 (1964) (In Bank). To the question, "Has the federal government preempted the question of the safety of the location of atomic reactors?" the court answered simply, "No." *Id.* at 133, 390 P.2d at 204, 37 Cal. Rptr. at 436. The *Northern States* court did not refer to the California case in its opinion.

For a discussion of *Bodega Head*, see notes 66-70 and accompanying text *infra*.

32. 42 U.S.C. § 2021(b) (1976 & Supp. III 1979) states that:

Except as provided in subsection (c) of this section, the Commission is authorized to

the fact that Minnesota had not entered into such an agreement with the Commission.<sup>33</sup> Additionally, Section 2021(k), which provides that “[n]othing in this section shall be construed to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards,”<sup>34</sup> was read by the court to mean “that the states possess no authority to regulate radiation hazards unless pursuant to the execution of an agreement surrendering federal control.”<sup>35</sup> By subjecting the effect of section 2021(k) to the existence of a turnover agreement, the court failed to consider that the section does not preclude state authority over radiation “activities” if the state’s *purpose* is unrelated to protecting against the dangers of radioactivity.<sup>36</sup>

The *Northern States* court failed to inquire into the purpose of the Minnesota pollution control regulations, as required by section 2021(k).

enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority . . . with respect to any one or more of the following materials within the State—(1) byproduct materials as defined in section 2014(e)(1) of this title; (2) byproduct materials as defined in section 2014(e)(2) of this title; (3) source materials; (4) special nuclear materials in quantities not sufficient to form a critical mass. During the duration of such agreement it is recognized that the State shall have authority to regulate materials covered by the agreement for the protection of the public health and safety from radiation hazards.

Section 2021(c) reads:

(c) No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of —

- (1) the construction and operation of any production or utilization facility;
  - (2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;
  - (3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;
  - (4) the disposal of such other byproduct, source, or special nuclear materials as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.
- The Commission shall also retain authority under any such agreement to make a determination that all applicable standards and requirements have been met prior to termination of a license for byproduct material, as defined in section 2014(e)(2) of this title. Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

33. 447 F.2d at 1148-49.

34. 42 U.S.C. § 2021(k) (1976).

35. 447 F.2d at 1149-50.

36. Turnover agreements involve the discontinuance of Commission authority, and are regulated under statute. 42 U.S.C. § 2021(b) & (c) (1976 & Supp. III 1979). For the text of these sections see note 32 *supra*. When Commission authority is not relinquished, “[t]here is nothing in the statutes which expresses a clear Congressional intent to prohibit the states from taking *additional* reasonable steps deemed necessary to control air, water and land pollution whether the pollution be by radiation or otherwise.” 447 F.2d at 1157 (Van Oosterhout, J., dissenting) (emphasis added).

It observed that the “regulation of the radioactive effluents discharged from a nuclear power plant is inextricably intertwined with the planning, construction and entire operation of the facility.”<sup>37</sup> Because the state laws would *affect* the construction and operation of the plant, and the AEC was prohibited from relinquishing control over the construction and operation of nuclear plants under a turnover agreement,<sup>38</sup> the state regulations were held preempted. Congress did not intend, in the court’s view, “to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating by-product, source, or special nuclear materials.”<sup>39</sup> Furthermore, the court said that the Minnesota emission standards were an attempt to regulate radiation hazards and thus were impermissible under section 2021(k) as well, regardless of Minnesota’s purpose in establishing those standards.<sup>40</sup>

In addition to interpreting section 2021, the court’s opinion contained broad statements of federal nuclear policy and the perceived intent of state regulation. The court said that the AEA “evinces a legislative design to foster and encourage the development, use and control of atomic energy so as to make the maximum contribution to the general welfare and to increase the standard of living.”<sup>41</sup> This federal goal to promote the use of atomic energy required that state action which impeded that goal must be held invalid under the Supremacy Clause.<sup>42</sup> Furthermore, the court found that Congress had “inescapably” implied that the federal government was to retain exclusive authority over nuclear development, absent a grant of power to a state in a turnover agreement.<sup>43</sup>

Relying on the strong policy statements on the question of federal preemption in *Northern States*, other courts sustained challenges to state regulation or action concerning emissions from nuclear plants. For example, an Illinois appellate court<sup>44</sup> in a short *per curiam* opinion, held that portions of the state Environmental Control Act were uncon-

37. *Id.* at 1153.

38. 42 U.S.C. § 2021(c)(1) (1976 & Supp. III 1979). See note 32 *supra*, for the text of this section.

39. 447 F.2d at 1149.

40. *Id.* at 1150-52.

41. *Id.* at 1153.

42. *Id.* at 1154. See text accompanying note 30 *supra*, for the court’s reasoning in concluding that state regulation was incompatible with the AEA and thus preempted.

43. 447 F.2d at 1150.

44. *Commonwealth Edison Co. v. Pollution Control Bd.*, 5 Ill. App. 3d 800, 284 N.E.2d 342 (1972). Referring to the *Northern States* opinion, the court said: “The affirmance of the Circuit Court of Appeals’ decision by the United States Supreme Court in our opinion is conclusive of the issue presented on this appeal and the only conclusion is that state control and regulation has been



stitutional under *Northern States*. In New Jersey, the state supreme court held that the state Department of Environmental Protection could not recover damages from a nuclear power company for the death of 500,000 pounds of fish<sup>45</sup> allegedly caused by the emergency discharge of cold water into a stream because the discharge was part of the company's radioactive waste disposal system.<sup>46</sup> The New Jersey court noted that the discharge had been authorized by the AEC and that "AEC regulations prohibited [the power company] from operating in any other manner. . . . Interference by the State, whether by statutory penalty, injunction or monetary damages . . . is not permissible."<sup>47</sup> The court acknowledged that section 2021(k) reserved power over non-radiation hazards to the state, but held that under *Northern States*, the subject matter of radioactive emissions was preempted by the AEA.<sup>48</sup>

Recently, several federal district courts invalidated state schemes concerning nuclear waste disposal facilities without addressing the distinction between state action directed at regulating the level of radioactive discharges "from the standpoint of radiological health and safety"<sup>49</sup> and state action for "purposes other than protection against radiation hazards."<sup>50</sup> In two separate actions,<sup>51</sup> Illinois federal district courts granted summary judgment to operators of waste facilities on the ground that, under *Northern States*, "the NRC has exclusive jurisdiction over matters relating to radiation hazards."<sup>52</sup> In *Illinois v. Kerr-McGee Chemical Corp.*, the state of Illinois and a municipality sought to prosecute a waste disposal operator for violation of Illinois public nuisance, pollution and refuse disposal laws.<sup>53</sup> The other action<sup>54</sup> in-

preempted by the statutes of the United States." *Id.* at 801, 284 N.E.2d at 342. The Illinois case was decided two months after the Supreme Court affirmed *Northern States* without an opinion.

45. New Jersey Dep't. of Envir. Protection v. Jersey Cent. Power & Light Co., 133 N.J. Super. 375, 382, 336 A.2d 750, 753 (1975), *rev'd* 69 N.J. 102, 351 A.2d 337 (1976).

46. New Jersey Dep't. of Envir. Protection v. Jersey Cent. Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976).

47. *Id.* at 115, 351 A.2d at 344.

48. *Id.* at 112-13, 351 A.2d at 343.

49. See 10 C.F.R. § 8.4 (1981).

50. 42 U.S.C. § 2021(k) (1976).

51. *Illinois v. Kerr-McGee Chemical Corp.*, No. 80 C 2776 (N.D. Ill. Jan. 8, 1981), *rev'd and remanded*, 677 F.2d 571 (7th Cir. 1982). See note 53 *infra*. *General Elec. Co. v. Fahner*, No. 80 C 6835 (N.D. Ill. Oct. 12, 1981), *aff'd in part*, 683 F.2d 206 (7th Cir. 1982).

52. *Illinois v. Kerr-McGee Chemical Corp.*, No. 80 C 2776, slip op. at 3.

53. *Id.* The disposal site was located near the city of West Chicago, which alleged that its operation constituted a nuisance. The city sought injunctive relief. The district court rejected the city's argument that the relief sought was not barred by federal preemption because the AEA did not extend to "municipal regulation of non-radiological health, safety and welfare violations." *Id.* at 2-3.

The United States Court of Appeals for the Seventh Circuit recently reversed the district

volved a challenge to the Illinois Spent Fuel Act, which subjected the importation of radioactive wastes and the operators of waste facilities to certain state conditions.<sup>55</sup> Two California cases<sup>56</sup> involved challenges to the California Nuclear Laws, one of which imposed a moratorium on the construction of nuclear power plants until a permanent method of radioactive waste disposal is found.<sup>57</sup> Both of the district courts found the laws unconstitutional, but were reversed on appeal to the Ninth Circuit, which found that the laws were enacted for economic and environmental purposes, and therefore not preempted under section 2021(k).<sup>58</sup> In the state of Washington, a federal district court<sup>59</sup> held that an initiative passed by the voters to bar the importa-

court's ruling. 677 F.2d 571 (1982). The court, relying on the reasoning of the Ninth Circuit Court of Appeals in *Pacific Legal Found. v. State Energy Resources Conservation and Dev. Comm'n.*, 659 F.2d 903 (1981), held that "[r]egulation of non-radiation hazards by the states or their political subdivisions has not . . . been preempted." 677 F.2d at 581. The court remanded the case to the district court for a determination of whether the city sought to regulate radiation or non-radiation hazards. *Id.* at 584.

54. *General Elec. Co. v. Fahner*, No. 80 C 6835 (N.D. Ill. Oct. 12, 1981), *aff'd in part*, 683 F.2d 206 (7th Cir. 1982). In recently affirming the district court's decision on the merits, the court held that the Illinois Spent Fuel Act, (*see note 55 infra*) violated the Commerce Clause by discriminating against interstate commerce and was preempted under the Supremacy Clause. 683 F.2d at 213-14. This decision comports with federal nuclear policy in that the Illinois statute purported to regulate high-level radioactive waste, which is not covered by the Low-Level Waste Act. *See notes 177 and 206 and accompanying text infra.*

The court reversed the district court's decision in a consolidated suit, *Illinois v. General Electric Co.*, No. 81 C 0461 (N.D. Ill. Oct. 12, 1981), on the procedural matter of whether the enforcement action brought by the state in state court was properly removed to federal court. The court found that the removal was improper. 683 F.2d at 208. Since the court reached the merits in one suit, the outcome of the state litigation will most likely follow the federal court's decision.

55. Ill. Rev. Stat. Ann. ch. 111½, ¶ 230.22 (Smith-Hurd Supp. 1981). The statute prohibits the disposal and storage of spent nuclear fuel, which is high-level radioactive waste, unless it was generated within the state, or the state in which it was produced also provides facilities for radioactive waste disposal and has a reciprocity agreement for disposal with Illinois.

56. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 489 F. Supp. 699 (E.D. Cal. 1980), *rev'd sub nom. Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n.*, 659 F.2d 903 (9th Cir. 1981), and *Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n.*, 472 F. Supp. 191 (S.D. Cal. 1979), *rev'd*, 659 F.2d 903 (9th Cir. 1981).

57. Cal. Pub. Res. Code § 25524.2 (West 1977 & Supp. 1980) provides in part:

No nuclear fission thermal powerplant . . . shall be permitted land use in the state, . . . until both conditions (a) and (b) have been met:

(a) The commission finds that there has been developed and that the United States through its authorized agency has approved and there exists a demonstrated technology or means for the disposal of high level nuclear waste.

(b) The commission has reported its findings and the reasons therefor . . . to the Legislature.

Another California law prohibits the certification of any nuclear plant until the state energy commission submits a study on "berm containment," or underground foundation safety, to the legislature. *Id.* at § 25524.3. *See Pacific Legal Found. v. State Resources Conservation & Dev. Comm'n.*, 659 F.2d 903, 907-09 (9th Cir. 1981).

58. *Id.* at 923-26.

59. *Washington State Bldg. & Constr. Trades Council v. Spellman*, 518 F. Supp. 928, 931 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627 (1982).

tion of certain radioactive wastes was unconstitutional because "Congress intended that the transportation and storage of all materials which pose radiation hazards would be regulated by the federal government except when jurisdiction was expressly ceded to the states,"<sup>60</sup> and because the ban was an impermissible burden on interstate commerce.<sup>61</sup>

In a separate line of cases, where the courts have examined the purposes of the state action at issue, they have been less willing to conclude that any action concerning waste or discharge from a nuclear facility is preempted. In *Pacific Legal Foundation v. State Resources Conservation and Development Commission*, the Court of Appeals for the Ninth Circuit reviewed two district court cases which had concluded that California's Nuclear Laws were unconstitutional.<sup>62</sup> The court found that the state legislature was motivated by economic and environmental concerns in banning the further construction and operation of nuclear power plants until a permanent method of radioactive waste disposal was found.<sup>63</sup> Rejecting the notion that safety and protection against radiation hazards were the purposes of the Nuclear Laws, the court found that "the lack of a federally approved method of waste disposal created a 'clog' in the nuclear fuel cycle; more wastes were continually being produced, storage space was limited, and no permanent means of disposal was available. . . . The costs of nuclear power were escalating sharply, and . . . increasing disappointments in portions of the fuel cycle were a contributing factor."<sup>64</sup> Given the uncertainty regarding permanent disposal of radioactive materials, the court found that California could reasonably conclude that nuclear power sources were uneconomical. "The legislature has chosen to mandate reliance upon other energy sources until these uncertainties . . . are resolved. We find that such a choice is expressly authorized under sections 271 and 274(k) of the Atomic Energy Act."<sup>65</sup>

This holding is consistent with an early California Supreme Court decision, in which the court stated that section 2021 of the AEA did not

60. 518 F. Supp. at 933-35.

61. See notes 196-234 and accompanying text *infra*.

62. 659 F.2d 903 (9th Cir. 1981) *rev'g* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 489 F. Supp. 699 (E.D. Cal. 1980), and Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 472 F. Supp. 191 (S.D. Cal. 1979). See note 57 *supra*, for the text of the California Nuclear Laws.

63. 659 F.2d at 923-26 (9th Cir. 1981).

64. *Id.* at 924. In enacting its nuclear laws, the California Assembly found that both industry and government representatives, and critics of nuclear energy "stipulated" that the absence of a federally approved method for radioactive waste disposal was a major problem. *Id.*

65. *Id.* at 925. See 42 U.S.C. §§ 2018 and 2021(k) (1976).

preempt state efforts to regulate the location of a nuclear plant. In *Northern California Association to Preserve Bodega Head and Harbor v. Public Utilities Commission*,<sup>66</sup> the court drew a distinction between radiation hazards regulated by the federal government and non-radiation hazards left to state control under section 2021(k). It said:

[S]ince the location of an atomic reactor at or near an active earthquake fault zone involves safety considerations in addition to radiation hazards, it is clear that the federal government has not preempted the field, at least with respect to the phase of protecting the public from hazards other than radiation hazards, and that the states' powers in determining the location of atomic reactors are not limited to matters of zoning or similar local interests other than safety.<sup>67</sup>

The court was reviewing the refusal of the state Public Utilities Commission to reopen hearings on the certification of a nuclear reactor to be built near the San Andreas Fault.<sup>68</sup> Certain commissioners had indicated that their decision was based on the existence of federal authority over nuclear power plant operations and on the notion that federal review would be adequate. The court rejected this as a basis for refusing to reconsider the petitioner's claims, stating that the state commissions had the independent authority to consider non-radiation hazards to the public.<sup>69</sup> It affirmed the commission's decision nevertheless, because the petitioner had failed to appeal the decision within the statutory time frame.<sup>70</sup>

The Michigan Court of Appeals, in a case brought by a state resident alleging that a nuclear power plant's cooling system constituted a nuisance by creating fogging and icing, held that these effects were not radiation hazards and thus were proper subjects for state regulation.<sup>71</sup> The court pointed out that "the Atomic Energy Act, in § 2021(k), specifically allowed state regulation of nonradiation hazards,"<sup>72</sup> and that "[h]ere a finding of nonradiological nuisance would not impinge on AEC regulation of radiation hazards."<sup>73</sup>

A Missouri appellate court,<sup>74</sup> while acknowledging that the federal

66. 61 Cal. 2d 126, 390 P.2d 200, 37 Cal. Rptr. 432 (1964) (In Bank).

67. *Id.* at 133, 390 P.2d at 204, 37 Cal. Rptr. at 436.

68. *Id.* at 130 n.2, 390 P.2d at 20 n.2, 37 Cal. Rptr. at 434 n.2.

69. *Id.* at 133, 390 P.2d at 206, 37 Cal. Rptr. at 436.

70. *Id.* at 133-36, 390 P.2d at 206-07, 37 Cal. Rptr. at 437.

71. *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 237 N.W.2d 266 (1975).

72. *Id.* at 262, 237 N.W.2d at 282.

73. *Id.*, 237 N.W.2d at 281.

74. *State ex rel. Utility Consumers Council v. Pub. Serv. Comm'n*, 562 S.W.2d 688 (Mo. Ct. App.), *cert. denied*, 439 U.S. 866 (1978).

government preempted state authority to determine the safety of a nuclear facility, defined the scope of state and federal power as follows:

The federal regulations pertain to plans, specifications, safety mechanisms and the like. The [state] Commission's considerations pertain to economic feasibility, need for power and financing. It is obvious that the considerations of the State of Missouri do not affect the control of *how* the nuclear facility will be constructed and physically maintained. The considerations of the Commission do not attempt to protect the citizens of Missouri against radiation hazards.<sup>75</sup>

In New Jersey, the Superior Court, Law Division, dismissed various tort claims against a power company for damages caused by the infestation of shipworms attracted to plaintiffs' property by the warm, saline water discharged from the company's radioactive waste cooling system.<sup>76</sup> The court said that the effort to recover money damages "constitute[d] at least an indirect interference with the defendant's radwaste discharge system," and therefore was preempted by federal law.<sup>77</sup> However, it let stand a claim for compensation for inverse condemnation because that right depends on state, not federal, law, and does not involve radiation hazards, either directly or indirectly.<sup>78</sup>

These courts expressed views of federal nuclear objectives which contrast sharply with the *Northern States* conception of encouragement and promotion.<sup>79</sup> The Missouri court stated that "[t]he federal government regulates *how* nuclear plants will be constructed and maintained; the State of Missouri regulates *whether* they will be constructed."<sup>80</sup> In minimizing possible conflict between state and federal objectives,<sup>81</sup> the Michigan court pointed out that, "most importantly, the license granted

75. *Id.* at 698.

76. *Van Dissel v. Jersey Cent. Power & Light Co.*, 152 N.J. Super. 391, 377 A.2d 1244 (1977).

77. *Id.* at 403, 377 A.2d at 1250. The court referred to the plant's radioactive waste cooling and discharge system as its "radwaste" system. *Id.*

78. *Id.* at 412, 377 A.2d at 1254. The court described inverse condemnation as a remedy designed to protect a landowner from a *de facto* taking of private property by either the sovereign or by another "clothed with the sovereign's power." *Id.* at 403, 377 A.2d at 1250.

79. See notes 41-43 and accompanying text *supra*. The court in *Northern States* quoted a commentator to point out that "[t]he Commission's licensing system is but a part of an intensive program to promote the public and private development and utilization of atomic energy." 447 F.2d at 1153 (quoting STASON, ESTEP & PIERCE, *ATOMS AND THE LAW* (1954)).

80. *State ex rel. Utility Consumers Council v. Pub. Serv. Comm'n*, 562 S.W.2d 688, 698 (Mo. Ct. App.), *cert. denied*, 439 U.S. 866 (1978).

81. *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 259, 237 N.W.2d 266, 280-81 (1975). Quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960), the Michigan court reiterated the Supreme Court's admonition that courts must not "[seek] out conflicts between state and federal regulations where none *clearly* exist." 65 Mich. App. at 260, 237 N.W.2d at 281 (emphasis added). In *Huron Portland Cement Co. v. Detroit*, the Court upheld the application of Detroit's stringent smoke emission standards to ships which traveled on interstate waters despite the existence of federal regulations governing aspects of the ships' construction and operation. 362 U.S. at 442.

by the AEC is merely a permit to construct a power plant, not a Federal order to do so. Therefore, a state which . . . stopped a power company from operating until it met reasonable state standards or abated a nuisance under state law could not be frustrating a Federal mandate."<sup>82</sup> The Ninth Circuit Court of Appeals, more emphatically stated that "Congress has not 'unmistakably . . . ordained' a goal of promoting nuclear power, but has instead regarded nuclear power as one option which the states may choose."<sup>83</sup> By enacting the Atomic Energy Act, Congress "struck a balance between state and federal power to regulate. Inherent in the states' regulatory authority is the power to keep nuclear plants from being built, if the plants are inconsistent with the states' power needs, or environmental or other interests."<sup>84</sup> The court recognized that regulation of nuclear power essentially represents policy decisions which will determine the future responsibilities of local as well as of the federal government. Quoting the United States Supreme Court, it said that "[t]ime may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment."<sup>85</sup> California made its decision, and the court respected and upheld its choice.

In summary, the *Northern States* decision has been interpreted to stand for the proposition that state efforts to regulate or otherwise affect radioactive waste disposal or emissions are preempted by the AEC jurisdiction over the operation and construction of nuclear power plants. The federal nuclear policy was perceived as one encouraging the use of nuclear power, and state action which curtailed or inhibited the use of nuclear facilities was preempted because it obstructed federal objectives. A second line of reasoning has developed, articulated most recently by the Court of Appeals for the Ninth Circuit in *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*.<sup>86</sup> The courts subscribing to this second approach recognize that the purpose of state regulation which affects radioactive discharge or waste systems is the controlling factor in determining whether the action is permissible under the AEA. These cases view the

82. 65 Mich. App. at 259, 237 N.W.2d at 280.

83. *Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n*, 659 F.2d 903, 928 (9th Cir. 1981).

84. *Id.* at 926. See note 30 and accompanying text *supra*, for the contrasting approach of the *Northern States* court to the possibility of state obstacles to nuclear development.

85. *Id.* at 928 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978)).

86. 659 F.2d 903 (9th Cir. 1981).

Commission as a licensing agency insuring the technical integrity of nuclear facilities, but reserve to the states the ultimate decision on whether a nuclear power facility is appropriate and should be built.

#### STATE PARTICIPATION IN ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW

Under either of the above approaches to the preemption question, the states are precluded from directly acting to regulate for protection against radiation hazards. As the California legislature recognized, however, in passing the Nuclear Laws and in imposing a moratorium on the construction of nuclear plants,<sup>87</sup> a method of permanent disposal of radioactive wastes does not exist.<sup>88</sup> The NRC has had to deal with both the practical problems arising from the shortage of on-site commercial storage space<sup>89</sup> and the policy questions regarding whether operating or disposal licenses should be issued or amended given the continuing uncertainty over disposal methods.<sup>90</sup> As will be shown, the states have had little success in influencing the NRC's decisions on these issues.

Under the AEA, section 189, the NRC "shall grant a hearing upon the request of any person whose interest may be affected" by a proceed-

87. See note 57 *supra*.

88. See note 64 *supra* and accompanying text.

89. The Court of Appeals for the District of Columbia described the nuclear fuel cycle and the problems arising from an accumulation of waste materials as follows:

A nuclear reactor core contains a number of fuel assemblies, bundles of thin tubes (or "fuel rods") containing pellets of enriched uranium. The build-up of neutron-absorbing "poisons" during the chain reaction reduces the ability of the fuel to sustain an efficient chain reaction. "Spent" fuel assemblies must therefore be removed periodically from the reactor core and replaced with fresh fuel. When removed from the core, the assemblies generate enormous heat and contain highly radioactive uranium, actinides and plutonium. Under current practice, the assemblies are placed vertically on racks in a "spent fuel pool" adjacent to the reactor within the containment vessel. . . .

It was anticipated, when most of the nuclear power plants now in operation in the United States were licensed, that spent fuel would be stored at the reactor site only long enough to allow the fuel assemblies to cool sufficiently to permit safe shipment off-site for reprocessing (the extraction from the rods of usable uranium and plutonium) or permanent disposal. Spent fuel storage capacity at these plants is therefore limited.

Plans for off-site reprocessing or storage have not materialized. . . . The availability of off-site storage facilities, not involving reprocessing, is limited, and no additional capacity is currently projected.

Minnesota v. United States NRC, 602 F.2d 412, 413-14 (D.C. Cir. 1979). See also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 528 n.6 (1978); Illinois v. United States NRC, 591 F.2d 12, 13 n.1 (7th Cir. 1979); Lower Alloways Creek Twp. v. United States NRC, 481 F. Supp. 443, 445 (D.N.J. 1979); Seiberling, *Radioactive Waste Disposal: The Emerging Issue of States' Rights*, 13 AKRON L. REV. 261, 263 (1979).

90. See Westinghouse Elec. Corp. v. United States NRC, 598 F.2d 759 (3d Cir. 1979); Natural Resources Defense Council, Inc. v. United States NRC, 582 F.2d 166 (2d Cir. 1978); and cases cited in note 89 *supra*.

ing commenced to obtain or amend a license from the NRC.<sup>91</sup> Pursuant to this section, the state of Illinois sought a review of a NRC license issued to General Electric for the operation of a "fuel recovery plant"<sup>92</sup> in *Illinois v. United States NRC*.<sup>93</sup> The state argued that because (1) reprocessing, or fuel recovery, had been indefinitely postponed by the federal government<sup>94</sup> and (2) the technology for reprocessing did not exist, the General Electric site was in fact a long-term storage facility, and should be licensed as such.<sup>95</sup> The NRC had refused to re-examine the status of the plant and the Court of Appeals for the Seventh Circuit affirmed its decision, holding that the state could not compel the NRC to hear its concerns.<sup>96</sup> The NRC was required to hold hearings "only after a formal proceeding has already begun. . . . As there was no proceeding in this case and as the Act contains no provision for a hearing when no proceeding has been commenced under this section, the state is clearly without a right to a hearing."<sup>97</sup>

91. 42 U.S.C. § 2239 (1976 & Supp. III 1979). The statute reads in relevant part:

(a) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, . . . dealing with the activities of licensees . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding. . . . In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment . . . upon a determination by the Commission that the amendment involves no significant hazards consideration.

92. A fuel recovery plant would "reprocess" radioactive waste, or separate elements of uranium and plutonium from spent fuel and fabricate it into new, mixed oxide nuclear fuel. See *Westinghouse Elec. Corp. v. United States NRC*, 598 F.2d 759, 762 n.4 (3d Cir. 1979).

93. 591 F.2d 12 (7th Cir. 1979).

94. *Id.* at 16. In 1977, President Carter declared that his administration would "defer indefinitely the commercial reprocessing and recycling of plutonium produced in U.S. nuclear power programs." Statement by the President on Nuclear Power Policy, 13 WEEKLY COMP. OF PRES. DOC. 502, 503 (1977). The NRC accordingly placed a two year moratorium on proceedings for reprocessing licenses, and that action was upheld in *Westinghouse Elec. Corp. v. United States NRC*, 598 F.2d 759 (3d Cir. 1979).

95. 591 F.2d at 16.

96. *Id.* at 14.

97. *Id.* But see *Natural Resources Defense Council, Inc. v. United States NRC*, 606 F.2d 1261, 1265 (D.C. Cir. 1979), where the court found that an NRC decision not to license temporary radioactive waste storage tanks was a final order reviewable by the court of appeals. "Since a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license, we hold that the NRC's decision was 'entered in a proceeding' for 'the granting . . . of any license'."

See also *Sholly v. United States NRC*, 651 F.2d 780, 786 (D.C. Cir. 1980), cert. granted 101 S. Ct. 3004 (1981), in which the court held that the NRC could not dispense with a requested hearing on a change in an operating license under 42 U.S.C. § 2239(a) (1976 & Supp. III 1979). See note 91 *supra*, for the text of the statute. In that case, the NRC had concluded that "no significant



In *Minnesota v. United States NRC*,<sup>98</sup> the NRC had commenced proceedings to amend the operating license of the Northern States Power Company "to permit the expansion of on-site capacity for the storage of spent nuclear fuel assemblies."<sup>99</sup> The state of Minnesota intervened and raised the same questions that Illinois had attempted to compel the NRC to address.<sup>100</sup> Minnesota contended that the uncertainty as to the feasibility of permanent disposal of radioactive wastes raised the possibility that the power plant's "temporary storage" would become a long-term storage site. Therefore, the NRC should consider the "safety and environmental implications of indefinite storage on-site" in the proceedings.<sup>101</sup> The Commission refused to consider the state's concerns and "premised its denial on its 'reasonable confidence' that wastes can and will in due course be disposed of safely."<sup>102</sup>

In its review of the Commission's action, the court noted that "[n]o one disputes that solutions to the commercial waste dilemma are not currently available."<sup>103</sup> The court, nonetheless, upheld the Commission's decision not to consider the issue of waste disposal at each hearing to license or amend a license.<sup>104</sup> The NRC could resolve the "complex issue of nuclear waste disposal in a 'generic' proceeding"<sup>105</sup> because "[t]he breadth of the questions involved and the fact that the ultimate determination can never rise above a prediction suggest that the determination may be a kind of legislative judgment for which rulemaking would suffice."<sup>106</sup> The state had argued that such a "generic" proceeding, with the adopted policy decision then applied uniformly,<sup>107</sup> would "deprive it of procedures such as cross-examination, to test the evidence."<sup>108</sup> In response to this argument, the court re-

hazards" were involved in the venting of radioactive gas from the disabled Three Mile Island reactor, and that, therefore, a hearing had not been necessary. 651 F.2d at 783.

98. 602 F.2d 412 (D.C. Cir. 1979).

99. *Id.* at 413.

100. See notes 92-97 and accompanying text *supra*.

101. 602 F.2d at 415.

102. *Id.* See 42 Fed. Reg. 34,393-94 (1977), for the NRC's statement of policy on waste disposal.

103. 602 F.2d at 416. See also *Natural Resources Defense Council, Inc. v. United States NRC*, 582 F.2d 166 (2d Cir. 1978).

104. 602 F.2d at 416. See also *Natural Resources Defense Council Inc. v. United States NRC*, 582 F.2d 166 (2d Cir. 1978), wherein the plaintiff sought to compel the NRC to find, as a matter of policy, that the absence of an adequate method of permanent or long-term waste disposal made the further licensing of nuclear plants a danger to the public.

105. 602 F.2d at 416.

106. *Id.* at 417.

107. *Id.* Once the NRC adopted a policy regarding the expansion of radioactive waste storage facilities, it could "then apply its determination in subsequent adjudicatory proceedings." *Id.* at 416.

108. *Id.* at 417.

manded the case to the NRC, which was at the time holding rulemaking hearings on the issue of permanent waste disposal,<sup>109</sup> for NRC consideration of the state's concerns.<sup>110</sup>

Similar arguments were discussed by the court in *Lower Alloways Creek Township v. United States NRC*,<sup>111</sup> in which a local government brought suit in federal district court to prevent the NRC from expanding the waste storage capacity of a New Jersey power plant. The township alleged that the NRC had refused to consider its concerns about radiological hazards associated with the storage of large amounts of radioactive materials<sup>112</sup> and that the NRC proceedings were inadequate.<sup>113</sup> The court dismissed the action, directing the township to exhaust its administrative remedies within the NRC,<sup>114</sup> but it reserved jurisdiction in the event that the NRC attempted to give immediate effect to a decision adverse to the township before administrative and judicial review were complete.<sup>115</sup>

Barred from directly regulating radioactive hazards, the state and local governments in Illinois, Minnesota and New Jersey attempted to influence federal actions relating to radioactive wastes within the NRC's administrative structure.<sup>116</sup> Dissatisfied with the NRC's treatment of their concerns, the states appealed to the courts in an effort to compel the NRC to hear their concerns. However, because judicial review of administrative hearings is limited,<sup>117</sup> the states obtained little, if any relief from the federal courts. Congress, however, remained an arena for airing state concerns surrounding radioactive hazards.

109. "[T]here is now pending before the Commission a related generic proceeding—the so-called 'S-3' proceeding, in which the issues of the storage and disposal of commercial nuclear wastes are of central concern. *Id.* See 10 C.F.R. § 51.20(e) (1981) for a description of this proceeding.

110. 602 F.2d at 418.

111. 481 F. Supp. 443 (D.N.J. 1979).

112. *Id.* at 449.

113. *Id.* at 451.

114. *Id.* at 454.

115. *Id.* The NRC regulations provide for the immediate effectiveness of orders amending a license or permit. 10 C.F.R. § 2.764(a) (1981). The court reserved jurisdiction in the event that the NRC attempted to give its order immediate effect, so that the township's access to judicial review would not be rendered futile. 481 F. Supp. at 454.

116. See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972); *Commonwealth Edison Co. v. Pollution Control Bd.*, 5 Ill. App. 3d 800, 284 N.E.2d 342 (1972); and *New Jersey Dep't of Environmental Protection v. Jersey Cent. Power & Light Co.*, 69 N.J. 102, 351 A.2d 337 (1976).

117. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25 (1978), in which the Court held, "Administrative decisions should be set aside . . . only for substantial procedural or substantive reasons . . . not simply because the court is unhappy with the result reached." *Id.* at 558.

FROM THE NUCLEAR WASTE POLICY ACT TO THE LOW-LEVEL  
RADIOACTIVE WASTE POLICY ACT: AN ADJUSTMENT OF  
FEDERAL-STATE RESPONSIBILITIES

Congress has repeatedly considered the problem of radioactive waste disposal,<sup>118</sup> and in 1980 the Senate Committee on Energy and Natural Resources introduced a comprehensive "Nuclear Waste Policy Act" in the Senate.<sup>119</sup> This bill and the Committee report accompanying it<sup>120</sup> bear little resemblance to the Low-Level Waste Act<sup>121</sup> which was ultimately adopted by Congress. The transformation which occurred on the floor of Congress indicates the range of concerns raised by the problem of radioactive waste disposal. It also reveals that "the technical problems with nuclear waste are no more severe than the practical political problems involving our States and the people within them."<sup>122</sup>

Originally the Nuclear Waste Policy Act called for the establishment of a federal program whereby ownership of commercial radioactive waste<sup>123</sup> would be transferred to the United States Department of Energy for permanent management and storage.<sup>124</sup> The cornerstone of the Committee's bill was a provision for the construction of "Away from Reactor" storage.<sup>125</sup> A site for the facility to house this waste was

118. Congress is currently considering additional legislation in an effort to establish national leadership in resolving the nuclear waste disposal crisis. At least five House bills have been drafted and one bill has surfaced in the Senate, but passage of any one bill is considered unlikely this session. 12 *Envir. Rep.* (BNA) 694-96 (1981).

For a history of congressional review of the question of radioactive waste disposal since 1959, see *Natural Resources Defense Council, Inc. v. United States NRC*, 582 F.2d 166, 170 n.8 (2d Cir. 1978).

119. S. 2189, 96th Cong., 2d Sess. (1980). See 126 *CONG. REC.* S9970 (daily ed. July 28, 1980).

120. S. Rep., note 2 *supra*, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 6933. The report was prepared by the Energy and Natural Resources Committee and in no way describes the Low-Level Waste Act, which was passed in its stead. It does, however, reflect the concerns of the committee members and the situation which gave rise to the bill.

121. Pub. L. No. 96-573, 94 Stat. 3347, 42 U.S.C. §§ 2021b-2021d (Supp. IV 1980).

122. 126 *CONG. REC.* S10003 (daily ed. July 28, 1980) (remarks of Sen. Domenici). See *id.* at S9988 (remarks of Sen. Cochran) and S. Rep., note 2 *supra*, at 30, reprinted in [1980] U.S. CODE CONG. & AD. NEWS at 6953-54.

123. The bill was to cover nuclear waste from civilian activities, including waste from nuclear power plants. S. 2189, 96th Cong., 2d Sess. § 301 (1980). See 126 *CONG. REC.* S9970 (daily ed. July 28, 1980); S. Rep., note 2 *supra*, at 18, reprinted in [1980] U.S. CODE CONG. & AD. NEWS at 6941. The Low-Level Waste Act also applies to civilian waste only, excluding federally produced waste in §§ 3 & 4 of the bill. Low-Level Waste Act §§ 3 & 4, 42 U.S.C. §§ 2021b-2021d (Supp. IV 1980).

124. S. 2189, 96th Cong., 2d Sess. §§ 401 & 402 (1980). See S. Rep., note 2 *supra*, at 20, reprinted in [1980] U.S. CODE CONG. & AD. NEWS at 6944.

125. S. 2189, 96th Cong., 2d Sess., tits. III & IV (1980). The Senate Energy and Natural Resources Committee reported that it "recognizes that existing onsite storage facilities have been designed for temporary storage of spent fuel only. This fact, and the Administration policy decision to defer the licensing of facilities for the reprocessing of spent fuel, makes the construction of

to be proposed by the Secretary of the Department of Energy within one year of the bill's passage, and its completion was projected for the mid-1980s.<sup>126</sup> "[T]he temporary storage of spent fuel at individual powerplant storage pools [was] to be maximized, and the Secretary of Energy, the Nuclear Regulatory Commission and other appropriate agencies [were] to encourage and expedite the use of available storage at these sites consistent with certain conditions."<sup>127</sup> Much of the bill focused on the technical aspects of implementing the plan for federal ownership and storage.<sup>128</sup>

The authors of the Committee's bill accepted federal responsibility for the waste disposal crisis facing the nuclear industry,<sup>129</sup> and intended the Department of Energy and the NRC to be ultimately responsible for waste disposal.<sup>130</sup> According to the Committee's bill, the role of the federal government was to be expanded to include ownership and management of both federally produced and commercially produced radioactive waste.<sup>131</sup> The role of the states, by contrast, was not mentioned, except in the Supplemental Views of Senators Hatfield<sup>132</sup> and Domenici.<sup>133</sup> Senator Domenici advocated the establishment of a "process whereby states could 'consult and concur' on the creation of nuclear waste facilities,"<sup>134</sup> and criticized the bill as "totally unsatisfactory" should no provision for state involvement in siting and protection of the public be included.<sup>135</sup>

In both the Committee Report<sup>136</sup> and on the floor of the Senate,<sup>137</sup>

additional spent fuel storage facilities inevitable." S. Rep., note 2 *supra*, at 18, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6941.

126. *Id.* at 12, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6935.

127. *Id.* at 15, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6939. This position contrasts sharply with that of Minnesota, in *Minnesota v. United States NRC*, 602 F.2d 412 (D.C. Cir. 1979), that of Illinois, in *Illinois v. United States NRC*, 591 F.2d 12 (7th Cir. 1979) and that of a New Jersey township, in *Lower Alloways Creek Twp. v. United States NRC*, 481 F. Supp. 443 (D.N.J. 1979), where the governments sought to prevent the expansion of storage space in existing power plant facilities. See notes 93-115 and accompanying text *supra*.

128. S. 2189, 96th Cong., 2d Sess., tits. III, IV & V (1980). See S. Rep., note 2 *supra*, at 18-23, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6941-46.

129. S. 2189, 96th Cong., 2d Sess., § 101 (1980). See S. Rep., note 2 *supra*, at 17, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6941.

130. S. 2189, 96th Cong., 2d Sess., tit. IV (1980). See S. Rep., note 2 *supra*, at 20-23, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6944-46.

131. S. 2189, 96th Cong., 2d Sess., tit. III (1980). See S. Rep., note 2 *supra*, at 18-20, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6941.

132. S. Rep., note 2 *supra* at 29, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6952.

133. *Id.* at 30, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6953.

134. *Id.*

135. *Id.*

136. *Id.* at 11-12, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6934-35.

137. 126 CONG. REC. S9973 (daily ed. July 28, 1980) (remarks of Sen. McClure). Commenting on the House version of the bill, Rep. Dingell said:

a sense of the urgency of the radioactive waste disposal crisis was expressed. Recurring questions of safety and of state involvement in the disposal decisions, however, surrounded and indeed displaced discussion of the more technical aspects of implementing the plan for federal control. The bill's sponsor asserted that radioactive waste could be safely stored and disposed of,<sup>138</sup> while other Senators insisted that the technology was "at best rudimentary"<sup>139</sup> or "still does not exist."<sup>140</sup> Against this backdrop, the question of federal-state relations in the nuclear field was debated. Several amendments were introduced to insure that the states would be involved in any action taken by the federal government regarding the location or operation of a disposal facility.<sup>141</sup> As he had promised, Senator Domenici introduced an amendment requiring the Department of Energy to "consult and concur" with the states before proposing a site to Congress, and after extensive debate, the amendment was adopted by the Senate.<sup>142</sup> In explaining the motive behind a similar amendment, a sponsor said: "Because of the unfortunate history of State-Federal relations in this area, States today view Federal nuclear waste programs with extreme distrust and many States have taken action, in fact, to block any Federal activities within their borders which might lead to the development of permanent waste disposal facilities."<sup>143</sup> It was hoped that through

"the amount of waste is growing. The peril is here. The need to resolve the problem is present and I call upon my colleagues to have a keen knowledge that whether you are for nuclear power or not, the question of the storage of this waste lies strongly upon our backs."

126 CONG. REC. H11767 (daily ed. Dec. 3, 1980).

138. "After 500 to 600 years there is no gamma radiation at all, and as one distinguished scientist put it, after that period of time you could eat your lunch on top of the waste and there would be no problem. I do not recommend that, but that is what he said." 126 CONG. REC. S9971 (daily ed. July 28, 1980) (remarks of Sen. Johnston).

139. *Id.* at S9975 (remarks of Sen. Randolph).

140. *Id.* at S9976 (remarks of Sen. Hart).

141. The Percy-Glenn amendment, S. 2189, 96th Cong., 2d Sess., amend. 1449, 126 CONG. REC. S9981 (daily ed. July 28, 1980), introduced by Sen. Domenici, was to provide "a sure and certain mechanism for addressing the competing interests of the State and the Federal Government" by involving states in the Department of Energy's studies on proposed facility sites. *Id.* at S9985 (remarks of Sen. Glenn).

Another amendment, S. 2189, 96th Cong., 2d Sess., amend. 1454, 126 CONG. REC. S10060 (daily ed. July 29, 1980), was introduced "to provide consultation with State officials with respect to siting of *temporary*, away-from-reactor storage of civilian nuclear powerplant wastes." *Id.* (emphasis added).

142. 126 CONG. REC. S10009 (daily ed. July 28, 1980). Amend. 1449 was adopted unanimously by 83 votes, with 17 Senators not voting.

143. *Id.* at S9985 (daily ed. July 28, 1980) (remarks of Sen. Glenn). In the House, Rep. Markey of Massachusetts explained, "The reason that we need that rule [for state participation] is that the Department of Energy and its predecessor agencies have had a miserable record in implementing any kind of nuclear waste program." *Id.* at H11764 (daily ed. Dec. 3, 1980).

See also Seiberling, *Radioactive Waste Disposal: The Emerging Issue of States' Rights*, 13

“consultation and concurrence” this distrust could be assuaged.

The amendment that later became the Low-Level Waste Act was introduced by Senators Thurmond and Hollings, both of South Carolina.<sup>144</sup> It provided that the policy of the federal government would be that each state is responsible for the disposal of low-level radioactive waste generated within its borders.<sup>145</sup> Low-level waste is any material contaminated by or exposed to radioactivity, and includes water, work clothes and equipment.<sup>146</sup> It is produced in the medical use of radioactive isotopes to diagnose disease, in research laboratories, and, in small amounts, in nuclear power plant cooling systems.<sup>147</sup>

The low-level waste amendment presented a new approach to the problem of the shortage of disposal facilities.<sup>148</sup> Perhaps because the technology for low-level waste disposal is “well-understood,”<sup>149</sup> and therefore requires little federal technical assistance, Congress could as a practical matter delegate this responsibility to the states.<sup>150</sup> But aside

AKRON L. REV. 261, 263-64 (1979) where Rep. John Seiberling of Ohio described the federal efforts to establish disposal facilities in the state of Washington. At the Hanover Reservation, unexpected, and, for a period of months, undetected leaks resulted in the loss of 423,500 gallons of highly radioactive wastes, which were absorbed into the ground.

144. S. 2189, amend. 1453, 96th Cong., 2d Sess., 126 CONG. REC. S10057 (daily ed. July 29, 1980).

145. Sen. Thurmond was not shy in explaining the motivation behind his amendment: “I suppose one might say that the matter of low-level waste disposal is no immediate problem, unless one lives in or represents, as we do, one of the three States serving as a ‘dumping ground’ for the rest of the Nation.” 126 CONG. REC. S10058 (daily ed. July 29, 1980). *But see* S. Rep., note 2 *supra*, at 14-15, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6938, for more general concern over low-level nuclear waste disposal. In the House, Rep. Dingell of Michigan said: “The Low-Level waste issue is the most immediate problem confronting us, and it is essential that the Congress act expeditiously on this matter if we are to avoid an impending crisis.” 126 Cong. Rec. H11765 (daily ed. Dec. 3, 1980).

146. The Low-Level Waste Act defines low-level radioactive waste by exclusion:

The term “low-level radioactive waste” means radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel, or byproduct material as defined in section 11e(2) of the Atomic Energy Act of 1954.

Low-Level Waste Act, § 2, 42 U.S.C. § 2021b(2) (Supp. IV 1980).

147. S. Rep., note 2 *supra*, at 15, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS, at 6938.

148. Low-level radioactive wastes do not present exactly the same problems as high-level, spent-fuel wastes, which are stored “temporarily” at nuclear reactor sites. *See* note 89 *supra*. Nevertheless, commercial low-level waste disposal sites have come under “increased criticism” and of the six facilities in operation in the 1960s, only two are presently accepting materials. S. Rep., note 2 *supra*, at 15, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6938.

149. 126 CONG. REC. S10058 (daily ed. July 29, 1980) (remarks of Sen. Thurmond).

150. In discussing the scope of state power under 42 U.S.C. § 2021(k) the Michigan appellate court in *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 250, 237 N.W.2d 266, 276 (1975) said:

Congress, thus, recognized the need for expertise and uniformity of regulation with regard to the handling of nuclear materials sufficient to form a critical mass, whose potential danger is clear. This potential danger and lack of expertise by state authorities required Federal preemption. Congress authorized the turnover to states of those less-hazardous aspects of nuclear power which state agencies might be trained to regulate.

*See also* notes 71-73 and accompanying text *supra*.

from the technical question, the amendment's sponsor articulated a political problem which he intended to solve. He said:

It is extremely unfair to allow three States to become the "dumping grounds" for waste which all 50 States generate. If other States are to share in the benefits of nuclear power production and nuclear medicine, they must begin to share in the responsibilities which include the unpleasant task of waste disposal.<sup>151</sup>

This attitude surfaced repeatedly in the debates on the nuclear waste bills.<sup>152</sup>

While requiring each state to provide for the disposal of waste generated within its borders, the low-level waste amendment also declared that the disposal problem "can be most efficiently managed on a regional basis."<sup>153</sup> It authorized and encouraged states to form compacts<sup>154</sup> or agreements with neighboring states, to establish regional facilities, and gave advance congressional consent to the states to bar the importation of wastes generated outside the region after January 1, 1986.<sup>155</sup> In contrast to the mandatory statement that each state is responsible for the disposal of waste generated within its borders, the compact provision was intended to be permissive.<sup>156</sup>

The low-level waste amendment was the only provision of the Nuclear Waste Policy Act to survive the House-Senate Conference Committee. With minor changes in language, it was enacted into law.<sup>157</sup>

151. 126 CONG. REC. S10058 (daily ed. July 29, 1980) (remarks of Sen. Thurmond).

152. For example: "In the interest of fairness, I do not believe we should expect the people of New York, or Illinois, or South Carolina to bear this burden of temporary storage with all of its implications." *Id.* at S10255 (daily ed. July 30, 1980) (remarks of Sen. Randolph). The following colloquy between Sen. Magnuson of Washington and Sen. McClure of Idaho illustrates the special concerns of a state hosting a national disposal site:

Sen. Magnuson: We are willing to have a facility to take care of the nuclear waste for the region, but we do not want it shipped from other places, outside the region. We want some other States to bear the burden also. No State wants nuclear waste. No State wants it, no State.

Sen. McClure: I say to the Senator from Washington there is a very strong statement in the bill with respect to the responsibility of States to in effect be responsible for those wastes generated within their own States.

*Id.* at S10258 (daily ed. July 30, 1980). *See also id.* at S10264 (remarks of Sen. Percy). In the House debate, *see, e.g.*, 126 CONG. REC. H11753 (daily ed. Dec. 3, 1980) (remarks of Rep. Udall).

153. Low-Level Waste Act, § 4(a)(1)(B), 42 U.S.C. § 2021d(a)(1)(B) (Supp. IV 1980).

154. The United States Constitution provides:

No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State.

U.S. CONST. art. I, § 10, cl. 3. Congress has encouraged the states, for example, to form compacts for solid waste disposal, 42 U.S.C. § 6904(a), (b) (1976 & Supp. III 1979) and water pollution control, 33 U.S.C. § 1253 (1976).

155. Low-Level Waste Act, § 4(a)(2), 42 U.S.C. § 2021d(a)(2) (Supp. IV 1980).

156. The compact provision states that "States *may* enter into such compacts as *may* be necessary." *Id.* (emphasis added.)

157. 126 CONG. REC. S16545 (daily ed. Dec. 13, 1980); *id.* at H12494.

After exempting nuclear materials produced by the federal government, the Low-Level Waste Act declares:

Section 4 (a)(1) It is the policy of the Federal Government that—

(A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders . . .

(B) low-level radioactive waste can be most safely and efficiently managed on a regional basis.

(2)(A) To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.

(B) A compact entered into under subparagraph (A) shall not take effect until the Congress has by law consented to the compact. Each such compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent. After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region.<sup>158</sup>

#### RETURN TO STATE JURISDICTION—AUTHORITY OVER LOW-LEVEL RADIOACTIVE WASTE AND ASSOCIATED RADIATION HAZARDS

In passing the Low-Level Waste Act, Congress established state authority over a problem of nuclear development from which the states had been barred<sup>159</sup> or allowed only indirect control<sup>160</sup> under the doctrine of federal preemption. Aware of the dissatisfaction of many state legislatures with federal nuclear policy, Congress created an area in which the states are to be primarily responsible for the local disposal of certain radioactive wastes. In reserving this responsibility for the states, Congress ceded to them a degree of control over the extent of nuclear benefits available in the state.<sup>161</sup> A state which fails to provide for the disposal of low-level radioactive waste generated within its borders would presumably thus limit itself in the use of nuclear processes and materials which would generate such waste.

By this grant of responsibility to the states, Congress consented to the states' exercise of their police power over an area formerly occupied exclusively by the federal government. Although Congress can legislate to occupy a field, and thus preempt state action,<sup>162</sup> it can also re-

158. Low-Level Waste Act, § 4(a), 42 U.S.C. § 2021d(a) (Supp. IV 1980).

159. See notes 26-61 and accompanying text *supra*.

160. See notes 62-86 and accompanying text *supra*.

161. See note 151 and accompanying text *supra*.

162. See *Hines v. Davidowitz*, 312 U.S. 52 (1941).



turn or reserve the power to regulate to the states.<sup>163</sup> Congress may be motivated by the need to involve the states to insure the effectiveness of a federal program<sup>164</sup> or by the understanding that federal expertise and national guidance are no longer required.<sup>165</sup>

The Low-Level Waste Act makes a clear statement of non-preemption by declaring each state responsible for local waste disposal,<sup>166</sup> and the legislative history supports the clear meaning of the language used.<sup>167</sup> The legislative history also reveals that the bill's purpose was to prevent the few states with commercial waste facilities from becoming "dumping grounds for the nation"<sup>168</sup> and to compel other states to share in the "unpleasant task of waste disposal."<sup>169</sup>

163. *E.g.*, *Prudential Life Ins. Co. v. Benjamin*, 328 U.S. 408 (1946); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), wherein the Court stated: "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it." *Id.* at 315.

164. In debate on S. 2189, 96th Cong., 2d Sess., 126 CONG. REC. S9970 (daily ed. July 28, 1980), one Senator said:

Mr. President, I really believe that one of the greatest obstacles toward solving the waste problem has been the past inability on the part of the Federal Government to work in partnership with the States in addressing their very real and sincere concerns and their fears in this area.

*Id.* at S9978 (remarks of Sen. Simpson). The Senate was aware that at least thirteen states had taken action to block the possible siting of a federal disposal facility within their borders. *Id.* at S9987 (remarks of Sen. Percy). See also Seiberling, *Radioactive Waste Disposal: The Emerging Issue of States' Rights*, 13 AKRON L. REV. 261 (1979); Note, *State Regulation of Nuclear Power Production: Facing the Preemption Challenge From a New Perspective*, 76 NW. U.L. REV. 134, 135 n.5 (1981).

165. In *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 18-19 (1976), the Court quoted with approval Rep. Stanton, a member of the House Committee on Public Works:

But atomic energy is a peculiar field. To date, the operation of the atomic energy program has been under the control of the Commission itself. Eventually, such control will be delegated to the States as more and more knowledgeable people at the State level become involved in the atomic energy program. That time, however, has not yet arrived (quoting 1 Legislative History of the Water Pollution Control Act, Amendments of 1972, 93 Cong. 1st Sess. 554-55 (1973)).

In that case the Court held that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1976 & Supp. IV 1980), did not grant to the Environmental Protection Agency or to the states the authority to require operators who produced radioactive wastes to secure permits regulating that waste. 426 U.S. at 25. Congress responded to the Court's decision in *Train* by passing an amendment to the Federal Water Pollution Control Act, which expressly subjects radioactive pollutants to state and federal environmental programs. 33 U.S.C. § 1319 (Supp. IV 1980). See Meek, *Nuclear Power and State Radiation Protection Measures: The Impotence of Preemption*, 10 ENVIR. REP. (BNA) 1, 17-20 (1979).

166. The Low-Level Waste Act declares that "each State is responsible for providing . . . for the disposal of low-level radioactive waste generated within its borders." Low-Level Waste Act, § 4(a)(1)(A), 42 U.S.C. § 2021b(a)(1)(A) (Supp. IV 1980).

167. The Supreme Court has required reference to the legislative history to discern the "plain meaning" of statutory language, especially when a direct interpretation would mark a "significant alteration of the pervasive regulatory scheme embodied in the AEA." *Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 23-24 (1976). See note 165 *supra*.

168. 126 CONG. REC. S10058 (daily ed. July 29, 1980) (remarks of Sen. Thurmond).

169. *Id.*

In an action indicative of many states' efforts to control the flow of radioactive waste across their borders, the people of the state of Washington passed by initiative the Radioactive Waste Storage and Transportation Act.<sup>170</sup> The Initiative "called for a ban on the 'importation and storage of nonmedical radioactive wastes generated outside Washington, unless otherwise permitted by interstate compact.'"<sup>171</sup> It authorized the state to enter into agreements with other states for the regional storage of radioactive waste, subject to approval by the state legislature and by Congress.<sup>172</sup>

The Initiative was challenged in federal district court<sup>173</sup> and declared unconstitutional in *Washington State Building and Construction Trades Council v. Spellman*.<sup>174</sup> The court based its holding on the findings that the initiative (1) was preempted by federal law<sup>175</sup> and (2) imposed an impermissible burden on interstate commerce.<sup>176</sup> Although the court gave special attention to the Low-Level Waste Act, it failed to apply it in a manner consistent with either its "plain meaning" or the legislative intent. The court began its analysis by acknowledging that the Low-Level Waste Act "does constitute a valid but limited grant of authority to effectively ban the storage of certain waste."<sup>177</sup> It proceeded, however, to negate that grant of authority by applying "established judicial reasoning."<sup>178</sup>

The Low-Level Waste Act contains two substantive provisions. One grants each state the responsibility for providing for the disposal or storage of low-level waste generated within its borders<sup>179</sup> and the

170. See Washington Initiative No. 383, 11 ENVIR. REP. (BNA) 1030 (1980).

171. *Id.*

172. *Id.* Governor Spellman of Washington indicated that negotiations for a regional compact would be a top priority of his administration. *Id.*

173. The initiative was challenged in two cases, *Washington State Bldg. & Constr. Trades Council v. Spellman*, 518 F. Supp. 928 (E.D. Wash. 1981), and *United States v. Washington*, No. C-81-190 (filed April 13, 1981) (E.D. Wash.), 11 ENVIR. REP. (BNA) 2251 (April 24, 1981).

174. 518 F. Supp. 928 (E.D. Wash. 1981). The United States Court of Appeals for the Ninth Circuit recently affirmed the district court's decision and reasoning. 684 F.2d 627 (1982). The following discussion is based on the district court's opinion, but references to relevant portions of the court of appeals opinion will be made in accompanying footnotes.

175. 518 F. Supp. at 933.

176. *Id.* at 935.

177. *Id.* at 932, *aff'd*, 684 F.2d at 630. The Low-Level Waste Act grants the states responsibility over a limited class of radioactive wastes, excluding high-level radioactive wastes or spent fuel, Low-Level Waste Act, § 2, 42 U.S.C. § 2021b(2) (Supp. IV 1980), and federally produced radioactive waste. *Id.* at §§ 3, 4, 42 U.S.C. §§ 2021b-2021d (Supp. IV 1980). Thus the district court and the court of appeals properly held that the state could not ban such radioactive waste under the authority of the Low-Level Waste Act.

178. 518 F. Supp. at 931.

179. Low-Level Waste Act, § 4(a)(1)(A), 42 U.S.C. § 2021b(a)(1)(A) (Supp. IV 1980).

other provides for the formation of regional compacts.<sup>180</sup> The *Washington State* court failed to distinguish these provisions and thereby negated the actual consent conferred to the individual states to control exclusively local low-level waste.

The court found a "Congressional plan to place future responsibility on the individual states to dispose of their waste."<sup>181</sup> It applied the permissive compact provision<sup>182</sup> which contains an exclusivity and consent provision to become effective on January 1, 1986, to the mandatory provision delegating responsibility to the states.<sup>183</sup> Contrary to the court, Congress did not intend to postpone local responsibility for low-level waste for five years. Indeed, in the Senate Committee report,<sup>184</sup> and on the floors of the Senate and the House,<sup>185</sup> the need for prompt action was stressed. Senator Hollings, a sponsor of the low-level waste amendment, stated the need for immediate action when he said:

[t]he situation regarding the management of low-level waste has become acute due to a lack of a clear national policy. . . .

The amendment . . . makes it clear that every State is responsible for the disposal of low-level radioactive waste generated . . . within its borders.

The Congress must proceed immediately to enact a clear national policy.<sup>186</sup>

The bill did not contain a provision for delayed effectiveness, and therefore it became effective when signed by the President.<sup>187</sup>

The relationship of the compact section to the rest of the Act requires immediate state authority over locally generated waste. The amendment's sponsor explained it as follows: "we believe that threatened closure or gradual reduction of intake at one or more of the existing commercial sites can be used as an effective mechanism to encourage cooperative action by other States."<sup>188</sup> The scheme provides a strong bargaining position to states like Washington, which have com-

180. *Id.* at § 4(a)(1)(B), 42 U.S.C. § 2021b(a)(1)(B) (Supp. IV 1980).

181. 518 F. Supp. at 933.

182. *Id.* at 931.

183. *Id.* at 933.

184. S. Rep., *supra* note 2, at 15, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 6938-39.

185. *See* note 137 *supra*.

186. 126 CONG. REC. S10060 (daily ed. July 29, 1980) (remarks of Sen. Hollings).

187. The United States Constitution declares:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it . . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it.

U.S. CONST. art. I, § 7, cl. 2.

188. 126 CONG. REC. S10058 (daily ed. July 29, 1980) (remarks of Sen. Thurmond).

mercial storage sites, in negotiations with neighboring states regarding regional storage. Because states without disposal sites are now obligated to provide local state facilities, they will either cooperate with states which have such facilities “[w]ith the idea of eventually establishing an efficient, safe system of regional disposal sites . . . subject to ratification by Congress at a later date,”<sup>189</sup> or establish their own state-wide facility. The court in *Washington State*, however, focused on the date for prior consent to exclusive compacts as the controlling date for the implementation of the Low-Level Waste Act, and thereby undermined the system of incentives and compulsion created by Congress.<sup>190</sup> The Washington Initiative, by authorizing the state to enter into compacts with other states, in fact, complemented the federal scheme.

In another instance of inverting congressional intent, the court correctly noted that the Low-Level Waste Act “recognizes the particularly acute national problem of a high demand for storage and a dwindling supply of storage capacity.”<sup>191</sup> When the bill was pending, only two commercial low-level disposal sites were operating, one of which accepted only limited types of low-level waste.<sup>192</sup> Of the six facilities in operation in the 1960s, four had been closed amid “increas[ing] criticism regarding their methods of operation.”<sup>193</sup> The solution to this shortage of space was to encourage each state to provide for the disposal of locally produced waste, for “[i]f other States are to share in the benefits of nuclear power production and nuclear medicine, they must begin to share in the responsibilities.”<sup>194</sup> Congress expressed confidence that the states would cooperate to meet this responsibility<sup>195</sup> and in the “great ingenuity and creativity on the part of the States.”<sup>196</sup> The solution was to increase the supply of storage space available by promoting state action. The court in *Washington State*, however, held that the state’s action would “obstruct the efforts of Congress toward an orderly resolution of a significant [waste] problem.”<sup>197</sup> This holding is

189. *Id.*

190. 518 F. Supp. at 933. See 684 F.2d at 630. The Washington Initiative expressly authorized the state to enter into compacts with other states to provide them with access to its disposal site. See notes 170-71 and accompanying text *supra*. It also delayed the imposition of the law for one year to provide incentives to other states to enter into negotiations for a regional compact. 518 F. Supp. at 933.

191. *Id.* at 932.

192. *Id.* at 930.

193. S. Rep., *supra* note 2, at 15, reprinted in [1980] U.S. CODE CONG. & AD. NEWS at 6938.

194. 126 CONG. REC. S10058 (daily ed. July 29, 1980) (remarks of Sen. Thurmond).

195. *Id.* See National Governors’ Association Task Force of Low-level Radioactive Waste Disposal, Exhibit I, reprinted *id.* at S10058-59.

196. *Id.* at S10060 (remarks of Sen. Hatfield).

197. 518 F. Supp. at 933.

inconsistent with Congress' expressed confidence and intent that individual state action would encourage and require other states to increase the supply of storage space.

The *Washington State* decision, decided three and a half months before the Ninth Circuit's decision in *Pacific Legal Foundation v. State Resources Conservation and Development Commission*,<sup>198</sup> expresses the broad federal policy objectives upon which the *Northern States* opinion<sup>199</sup> was based.<sup>200</sup> It failed to recognize that the federal government has made nuclear power an option—not a mandate.<sup>201</sup> The *Washington State* court further found the purposes of the Initiative unacceptable. The Initiative “was expressly based upon the State’s police power to protect the health, safety and welfare of the citizens of Washington State.”<sup>202</sup> Although the court found this objective illusory,<sup>203</sup> this purpose was not reserved to the states under section 2021(k), and thus would be preempted by the AEA.<sup>204</sup> However, the Low-Level Waste Act ceded to the states authority over low-level radioactive wastes regardless of purpose. Congress expanded the scope of state authority to include all responsibility for low-level wastes, including the power to regulate to protect against radiation hazards. Given this broadening of state authority, and the Ninth Circuit’s understanding of federal policy as presenting an *option* to use nuclear science and power, the Washington Initiative should not have been found preempted by federal law.

### *Consent to State Jurisdiction and to Consequential Burdens on Interstate Commerce*

The *Washington State* decision was also based on the court’s finding that the Initiative violated the Interstate Commerce Clause,<sup>205</sup> because it impermissibly barred out-of-state waste from being transported into and stored in Washington. Insofar as the Initiative covered high-level and federally generated radioactive waste, the court was cor-

198. 659 F.2d 903 (9th Cir. 1981). See notes 62-85 and accompanying text *supra*.

199. 447 F.2d 1143 (8th Cir. 1971), *aff’d mem.*, 405 U.S. 1035 (1972). See notes 26-61 and accompanying text *supra*.

200. The *Washington State* court held that “since the Initiative significantly impairs the federal interest in encouraging the peaceful use of radioactive material and in solving the radioactive waste problem, the Initiative cannot be harmonized with the Commerce Clause.” 518 F. Supp. at 935.

201. See *Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm’n*, 659 F.2d 903, 928 (9th Cir. 1981).

202. 518 F. Supp. at 932.

203. *Id.* at 935.

204. See notes 34-40 and accompanying text *supra*.

205. U.S. CONST. art. I, § 8, cl. 3.

rect.<sup>206</sup> However, in the Low-Level Waste Act, Congress consented to state barriers to the interstate movement of privately produced low-level radioactive wastes.

The United States Constitution provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."<sup>207</sup> Congress can assert this power over a subject matter to preclude local regulations or obstacles to interstate movement<sup>208</sup> or it can withdraw a class of material from interstate commerce so as to subject it to local regulation.<sup>209</sup>

A clear example of congressional consent to state regulation is the McCarran-Ferguson Act,<sup>210</sup> wherein Congress declared:

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.<sup>211</sup>

In rejecting a commerce clause attack upon a South Carolina statute that discriminated against foreign insurance companies, the Supreme Court in *Prudential Insurance Co. v. Benjamin*<sup>212</sup> stated that there is "no question of the validity of such a [discriminatory] state tax where Congress had taken affirmative action consenting to it or purporting to give it validity."<sup>213</sup> The Court noted that the authority to adjust state and federal power over interstate commerce lay with Congress; it was only in the absence of congressional action that the courts were required to step in.<sup>214</sup> Furthermore, the Court assumed that Congress "must have

206. 518 F. Supp. at 931. See note 177 *supra*.

207. U.S. CONST. art. I, § 8, cl. 3.

208. See discussion in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-30 (1947), and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

209. In *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917), the Court held that alcoholic beverages were subject to state regulation under the Webb-Kenyon Act, 27 U.S.C. § 122. The *Clark Distilling* Court interpreted the statute "to validate states' laws prohibiting the shipment of intoxicating liquor into the state, . . . and establishing that Congress does have some power to remove from the states disabilities which, in the absence of congressional action, inhibit the states in the regulation of interstate commerce." Note, *Congressional Consent to Discriminatory State Legislation*, 45 COLUM. L. REV. 927, 935 (1945). In *Seagram & Sons, Inc. v. Hofstetter*, 384 U.S. 35, 42 (1966), the Court said that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. Cf. *Palladio, Inc. v. Diamond*, 321 F. Supp. 630, 635 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1319 (2d Cir.), *cert. denied*, 404 U.S. 983 (1971) (trade in alligator and crocodile hides barred from interstate commerce under federal statute; trader subject to state penalties); *Proctor & Gamble Co. v. Chicago*, 509 F.2d 69 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975) (upholding Chicago's ban on the use of phosphates in detergents as a reasonable exercise of state police power with only incidental effects on commerce).

210. 15 U.S.C. §§ 1011-1015 (1976).

211. *Id.* at § 1012(a).

212. 328 U.S. 408 (1946).

213. *Id.* at 421.

214. *Id.* at 423-25.

had full knowledge" of the existence of state regulatory systems.<sup>215</sup> By declaring that insurance companies were subject to state law, "Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance."<sup>216</sup> This consent was effective notwithstanding prior judicial decisions invalidating similar laws.<sup>217</sup>

By consenting to discriminatory state regulation, Congress can tackle exactly the kind of state-federal problems which arose under the Atomic Energy Act.<sup>218</sup> By insuring that "the immunity characteristics of interstate commerce . . . [will not] in effect afford a means by subterfuge and indirection" to avoid local accountability,<sup>219</sup> Congress can subject a class of materials otherwise in interstate commerce to state control. Such immunity is imperative if the grant of power to the states is not to be used to invert "state and national power, each in alternation to ward off the other's incidence."<sup>220</sup>

In returning control over low-level radioactive waste to the states, Congress consented to state regulation over that material and to the state action necessary to effectuate the policy of local control. This action not only removed the preemption objections to state regulation, but it effectively removed low-level radioactive waste from interstate commerce protections. Congress "regulated" low-level waste by consenting to individual, and possibly conflicting, state regulation.<sup>221</sup>

215. *Id.* at 430.

216. *Id.* at 429.

217. *Id.* at 425. The theory of congressional consent to state burdens of interstate commerce has been explained as follows:

The trial courts would operate out on the front line, where the impact of state action on interstate commerce is first felt, and they could appraise at close range the conflicting state and national interests. . . .

If, the state law complained of were sustained in the courts, Congress could step in and occupy the field if in its judgment the state action went too far. On the other hand, Congress could obviate the results by giving its consent for the operation of the law.

Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 23 (1940). An example of the operation of this theory was congressional reaction to *Train v. Colorado Pub. Interest Group, Inc.*, 426 U.S. 1 (1976). See note 165 *supra*.

218. One Congressman described the states' role in nuclear waste policy as "the dilemma which has faced all of the branches of Government throughout the history of this Republic. That is, how to adequately protect the States without violating the Federal good. . . . It raises the State fist to, but does not intrude upon, the Federal nose." 126 CONG. REC. H11763 (daily ed. Dec. 3, 1980) (remarks of Rep. Williams).

219. *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 324 (1917).

220. *Prudential Life Ins. Co. v. Benjamin*, 328 U.S. 408, 412 (1946).

221. *Cf. In re Rahrer*, 140 U.S. 545, 562 (1891). In that case, the Court upheld the validity of a Kansas statute which made it a misdemeanor to sell alcoholic beverages over a challenge that it unconstitutionally burdened interstate commerce. The Court found that Congress had "undenied" power to divest trade in alcoholic beverages of its interstate character and thereby subject it to local regulation. *Id.* In describing the relationship between federal and state regulatory power and the police power, the Court said: "the distinction which exists between the commerce power

The Washington Initiative, barring the importation of certain radioactive wastes absent an agreement with the exporting state, was found to impose an unconstitutional burden on interstate commerce by the court in *Washington State*.<sup>222</sup> The court recognized that the Low-Level Waste Act ceded some regulatory authority to the states.<sup>223</sup> It proceeded to analyze the state action under this authority not against the consenting statute, but against cases where Congress had not exercised its commerce power over a given subject.<sup>224</sup> The Supreme Court in *Prudential Insurance*<sup>225</sup> responded to a similar presentation of precedent by saying:

In each [case] the question of validity of the state taxing statute arose when Congress' power lay dormant. In none had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. Those cases therefore presented no question of the validity of such a tax where Congress had taken affirmative action consenting to it or purporting to give it validity. Nor, consequently, could they stand as controlling precedents for such a case.<sup>226</sup>

The Court in *Prudential Insurance* examined the words of the consenting statute and concluded that Congress had intended to validate existing state regulation by "removing obstructions which might be thought to flow from its own power, whether dormant or exercised,"<sup>227</sup> and by declaring it in the public interest for local state laws to control.<sup>228</sup> Such action was not beyond Congress' commerce power given that "[i]ts plenary scope enables Congress not only to promote but also to prohibit interstate commerce."<sup>229</sup> Similarly, looking to the Low-Level Waste Act, the court in *Washington State* would have discerned a congressional intent to consent to state control over low-level radioactive waste to the extent of excluding out-of-state waste from its territory.<sup>230</sup>

In holding the Washington Initiative to be unconstitutional under

and the police power, which 'though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding'. . . ." *Id.* at 557.

222. 518 F. Supp. 928, 935 (E.D. Wash. 1981), *aff'd*, 684 F.2d 627, 630 (9th Cir. 1982). See notes 174-206 and accompanying text *supra*.

223. 518 F. Supp. at 932, *aff'd*, 684 F.2d at 630.

224. 518 F. Supp. at 933-35. The court of appeals similarly applied a dormant Commerce Clause analysis. 684 F.2d at 630-31.

225. 328 U.S. 408 (1946).

226. *Id.* at 421.

227. *Id.* at 429.

228. *Id.* at 430.

229. *Id.* at 434. See *id.* at n.45 for other cases to the same effect.

230. See, e.g., 126 CONG. REC. S10263 (daily ed. July 30, 1981) (remarks of Sen. Riegle):

With respect to the storage and disposal of spent fuel . . . I believe that the role of the States must be absolute. . . . I believe it is essential that States be allowed to determine



the Commerce Clause, the *Washington State* court also relied on the Supreme Court's holding in the *City of Philadelphia v. New Jersey*.<sup>231</sup> In that case, New Jersey enacted a law banning the importation of solid waste materials, and operators of New Jersey land fills, as well as the city of Philadelphia, challenged the ban. New Jersey argued that the ban was a valid exercise of its police power to protect its citizens from the health hazards associated with the accumulation of chemical dumps and landfills,<sup>232</sup> but the Court held that "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."<sup>233</sup>

The sponsor of the low-level waste amendment and the National Governor's Association Task Force on Low-level Radioactive Waste Disposal, believed that the *City of Philadelphia* holding would not be controlling in cases arising under the Low-Level Waste Act if Congress expressly consented to individual, possibly discriminatory state action.<sup>234</sup> *City of Philadelphia* dealt with a single state unilaterally excluding out-of-state solid waste in contravention of a federal statute. The federal Solid Waste Disposal Act,<sup>235</sup> which creates a program of financial and technical assistance to improve methods of waste disposal, declares:

that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action.<sup>236</sup>

The statute authorized states to enter into compacts, subject to congressional approval, but it did not establish a policy of state responsibility nor did it cede primary control of the problem to the states. In contrast,

for themselves their own policies—especially when Federal policies may not adequately protect their local safety, health and environmental concerns.

See notes 188-189 and accompanying text *supra*.

231. 437 U.S. 617 (1978).

232. *Id.* at 625.

233. *Id.* at 626-27.

234. The National Governors Association Task Force report is reprinted in 126 CONG. REC. S10058-59 (daily ed. July 29, 1980). Discussing the *Philadelphia* decision, the report said:

While the Court might view the disposal of low-level waste as posing more of a transportation risk, the host state's authority to exclude out-of-state waste from its site is in considerable doubt. This doubt could be dispelled if Congress expressly gave the states such authority. For that reason, an exclusivity provision should probably be included in any Compact Consent legislation.

*Id.* at S10059. The report added in footnote 10 that "[i]t could be argued that exclusivity is necessary to the formation of a regional system."

235. 42 U.S.C. §§ 6901-6987 (1976 & Supp IV 1980).

236. *Id.* at § 6901(a)(4).

the Low-Level Waste Act broadly grants to the states the responsibility over civilian low-level nuclear waste, subject to no express limitation. The fact that Congress gave advance consent to the exclusivity provision of prospective interstate compacts illustrates Congress' awareness that exclusive, restrictive or otherwise discriminatory state action could promote a national policy and should be encouraged.<sup>237</sup>

The court in *Washington State* relied on *City of Philadelphia*, which is of questionable precedential value, in holding that Washington could not exclude low-level waste generated outside its borders.<sup>238</sup> *City of Philadelphia* was based on a different statutory scheme, and Congress, in passing the Low-Level Waste Act, discussed the case and expressed consent to exclusivity to distinguish it.<sup>239</sup> In addition, the holding in *City of Philadelphia* does not absolutely prohibit state bars to the importation of hazardous materials because when "articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines."<sup>240</sup> The *Washington State* court, in reviewing the Washington Initiative, minimized the state's health and safety concerns, which are raised by the storage or disposal of any kind of radioactive waste.<sup>241</sup> Congress was aware of the dangers "inhering in the very movement" of radioactive wastes,<sup>242</sup> and it could be inferred that it intended to minimize the need for such interstate movement by delegating the responsibility for disposal of such toxic wastes to state governments.

The attempt made by Washington voters to restrict access to state facilities for the disposal of radioactive waste did not survive challenge in federal court. Although the Initiative covered all radioactive waste

237. See note 234 *supra*, and text accompanying notes 188-190 *supra*.

238. 518 F. Supp. at 933-34, *aff'd*, 684 F.2d at 632.

239. See Low-Level Waste Act, § 4(a), 42 U.S.C. § 2021b(a) (Supp. IV 1980). See also note 234 *supra*.

240. 437 U.S. at 622.

241. 518 F. Supp. at 935.

242. See, e.g., Sen. Hart's comments on "away-from-reactor" storage:

[W]e are voting for massive transportation of nuclear waste and spent fuel all over this country, and when 1 year from now or 2 years from now or 3 years from now Governors rise up in arms, as they are going to do, and city councils rise up and mayors rise up, and citizens groups rise up against the transportation of tons and tons of nuclear waste across those roads and up and down the highways, through the towns, through the farmlands, near the schools, and everything else, I hope Senators understand that that is what they are voting for.

126 CONG. REC. S10252-53 (daily ed. July 30, 1980). See comments by Sen. Baucus for a version of Sen. Hart's nightmare in Missoula, Mont., where a local ordinance banned the shipment of nuclear materials through the city. *Id.* at S10263; and Seiberling, *Radioactive Waste Disposal: The Emerging Issue of States' Rights*, 13 AKRON L. REV. 261 (1979), for the reaction of the city council of Cuyahoga Falls, Ohio, to the transportation of radioactive waste from the Three Mile Island reactor through the state. See also note 230 *supra*.

materials, it comported with the intention of Congress regarding the solution to the low-level radioactive waste problem. The court's findings of preemption and of an unconstitutional burden on interstate commerce were not consistent with the provisions of the Low-Level Waste Act, were not mandated under prior judicial holdings of preemption under the Atomic Energy Act, and were not required under judicial precedent interpreting the interstate commerce clause. Washington's exclusion of out-of-state waste was an available and foreseeable form of pressure, consistent with the Low-Level Waste Act, to compel states without waste facilities to negotiate with Washington concerning regional access to Washington's facilities or to provide for their own local disposal.<sup>243</sup>

### CONCLUSION

Congress encountered serious political obstacles in its efforts to legislate a national program to solve the radioactive waste disposal problem. In response to the suggestions of state officials, Congress adopted a policy that returned to the states the power to regulate and control low-level radioactive waste materials. The states have reacted to this new policy in various ways, depending upon their dependence on the nuclear industry and upon their concerns about health and

243. Texas recently passed legislation closely tailored to the Low-Level Waste Act. 11 ENVIR. REP. (BNA) 2260 (1981). The state law "limits operators of processing and disposal sites from handling any [low-level] nuclear waste generated outside of Texas in the absence of an interstate compact or reciprocal agreement." *Id.* at 2261. Unlike the Washington Initiative, this statute does not cover any other type of waste, e.g. high-level waste or spent fuel, and therefore does not infringe upon the jurisdiction of the Department of Energy, 42 U.S.C. § 7133(a)(8) (Supp. III 1979), or the Nuclear Regulatory Commission. 42 U.S.C. §§ 2111-2114 (1976 & Supp. III 1979), as amended by the Energy Reorganization Act of 1974, 42 U.S.C. § 5841-91 (1976 & Supp. III 1979). In accordance with the Low-Level Waste Act, Texas is using the threat of exclusion as a means to encourage coordinated regional action on favorable terms.

Illinois has taken action to implement the Low-Level Waste Act, as well, despite continuing difficulties with low-level radioactive waste facilities. The legislature authorized the Department of Nuclear Safety to acquire "all . . . lands, buildings and grounds which are to be designated as sites for the concentration and storage of radioactive waste materials," and to retain permanent title and ownership of all waste stored at the site in the name of the State. Ill. Rev. Stat. Ann. ch. 111½, ¶ 230.6 (Smith-Hurd Supp. 1981). Although the Department of Nuclear Safety acknowledged that Illinois is not legally required to support the construction and operation of a low-level waste site in the state, 5 Ill. Admin. Reg. 8254-55 (Aug. 14, 1981), it has published guidelines for persons interested in building a facility in Illinois. *Id.* Illinois has also entered into negotiations with twelve midwestern states to form a compact pursuant to the Low-Level Waste Act. Chi. Sun-Times, Aug. 27, 1981, at 4. Perhaps because it generates the largest volume of low-level radioactive waste in the region, Illinois is willing to host a regional facility. 5 Ill. Admin. Reg. 8254-55 (Aug. 14, 1981). Incentives to permitting a site within its borders include the prospect of charging out-of-state users higher or additional fees, and the fact that Illinois uses a greater proportion of nuclear energy, and thus produces a greater amount of waste, than any of the other midwest states with which it is negotiating. *Id.*; Chi. Sun-Times, Aug. 27, 1981, at 4.

safety risks. By consenting to such diversity, which allows states, in a limited sense, to opt out of both the benefits and burdens of nuclear power and medicine, Congress took a positive step in bringing accountability and local choice to one of the more uncertain aspects of nuclear technology. A new danger, however, is that the courts will frustrate the effect of this shift by rigidly adhering to judicial decisions and conceptions of federal nuclear policy which no longer reflect the intent of Congress.

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