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FEDERAL AND STATE AUTHORITY TO REGULATE RADIOACTIVE WASTE DISPOSAL AND TRANSPORTATION

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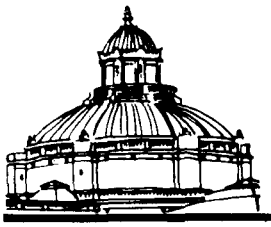

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ABSTRACT

There appears to be a growing controversy concerning whether a state has the authority to prevent the federal government from disposing of nuclear wastes within it and transporting nuclear wastes through it. Several states have statutes purporting to veto the federal government's action in these areas. This report investigates whether these state statutes may be unconstitutional and pre-empted by federal statutes and regulations.

CONTENTS

FEDERAL AND STATE AUTHORITY TO REGULATE RADIOACTIVE WASTE DISPOSAL AND TRANSPORTATION

INTRODUCTION

The Manhattan Project, created to develop atomic bombs for use in World War II, was the beginning of the nuclear energy program in the United States. During this initial period, the field of atomic energy was highly secret and was monopolized by the federal government. The Atomic Energy Act of 1946[1/] continued the federal monopoly over atomic energy. It created the Atomic Energy Commission in order to develop atomic energy, and it restricted private activity to contractual operations for the federal government.

In the 1950's the federal government began encouraging private industry and states to participate in the development of peacetime uses of atomic energy. The Atomic Energy Act of 1954[2/] opened the door to participation by private industry by creating a comprehensive statutory program of federal licensing and regulation. A 1959 statute[3/] recognized the "interests of the states in the peaceful uses of atomic energy"[4/] and established a program which gives the states limited authority over certain types of nuclear materials.

However, at about the time that the federal government appeared willing to relinquish its monopoly over nuclear energy, state governments and

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1/ 60 Stat. 755.

2/ 68 Stat. 919, as amended, 42 U.S.C. §§ 2011 et seq.

3/ 73 Stat. 688, as amended, 42 U.S.C. § 2021.

4/ 42 U.S.C. § 2021 (a)(1).

environmental groups became increasingly concerned with the radiation hazards of nuclear reactors, radioactive waste disposal, and transportation of radioactive wastes. As a result, many states have challenged the traditional notion of the federal government's jurisdiction over the nuclear energy program, often by attempting to veto federal decisions concerning disposal or transportation. For example, according to the Nuclear Regulatory Commission's Office of State Programs, a majority of states have passed laws or resolutions concerning the prohibition of high-level radioactive waste disposal within their boundaries.[5/] Applicable federal statutes do not spell out what, if any, role that the states have in regulating nuclear waste disposal and transportation. Both the 96th and 97th Congresses have considered enacting legislation to set up a federal nuclear waste program and to clarify the federal and state roles, but the Congress has not yet passed a comprehensive bill to deal with nuclear waste. Although House and Senate committees have approved bills concerning this issue, much work remains before a program is enacted. This report analyzes legal authority of federal and state governments to regulate the disposal and transportation of nuclear wastes.

DOCTRINE OF PRE-EMPTION

Much of the problem concerning whether a state has the power to veto the federal government's decisions concerning disposal or transportation of radioactive wastes involves the application of the doctrine of pre-emption. Pre-emption rests upon the Supremacy Clause[6/] of the Constitution, which states that

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all

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5/ See Appendix for summaries of the statutes and resolutions.

6/ U.S. Const. art. VI, cl. 2.

> Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Frequently, Congress does not expressly delineate in a statute the intended extent of pre-emption. In the absence of such congressional guidance, courts faced with pre-emption issues must determine whether pre-emption is implied. Justice Black discussed the doctrine of implied pre-emption when he stated that, if the federal government in exercising its delegated powers "has enacted a complete scheme of regulation . . ., states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." 7/ If there is not complete federal regulation over a particular area, a court may have a somewhat more difficult problem in determining whether state regulation is impliedly pre-empted.

> There is not--and from the very nature of the problem there cannot be--any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. 8/

7/ Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

8/ Id., 67.

CONSTITUTIONAL BASIS FOR ATOMIC ENERGY LEGISLATION

Because the Constitution establishes a federal government of enumerated powers, a fact reflected in the Tenth Amendment, which reserves to the states or the people the powers not delegated to the United States by the Constitution nor prohibited by it to the states, Congress must have a constitutional basis for regulating the disposal and transportation of nuclear wastes in order to pre-empt state laws in these areas. Congress appears to have relied on several constitutional grounds when it enacted the Atomic Energy Act of 1954. These grounds include its war powers,[9/] its power to regulate interstate and foreign commerce,[10/] and its power to make "all needful Rules and Regulations" concerning United States property.[11/] In the Act's statement of congressional findings, Congress referred to its spending powers when it stated that "Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare."[12/] When Congress later abandoned mandatory government ownership of special nuclear material, it appeared to eliminate its "property power" as a basis for federal regulation.[13/] However, at the same time, Congress asserted its belief that its war powers and its power to regulate interstate and foreign commerce provided an adequate

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9/ U.S. Const. art. I, § 8, cls. 11-14.

10/ Id., cl. 3.

11/ Id., art. IV, § 3, cl. 2.

12/ 42 U.S.C. § 2012(g). See Murphy and LaPierre, "Nuclear Moratorium Legislation in the States and the Supremacy Clause: A Case of Express Preemption," 76 Colum. L. Rev. 392, 434 (1976).

13/ Private Ownership of Special Nuclear Materials Act, Pub. L. 88-491, 76 Stat. 602.

basis for regulation of nuclear energy.[14] In the 1954 Act, Congress stated that

> The processing and utilization of source, by-product, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.
>
> The processing and utilization of source, by-product, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.
>
> Source and special nuclear material production facilities, and utilization facilities are affected with the public interest, and regulating by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.
>
> The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce. . . . [15]

Thus, it is arguable that Congress has several constitutional bases for the regulation of the nuclear energy field.[16] Only one case, Pauling v. McElroy, questioning the constitutionality of the Act has been found, and in it the United States District Court for the District of Columbia stated that "The Act is a valid exercise of the authority of Congress to promote and protect the national defense and safety under the constitutional war power." Pauling, at 393.

14/ Murphy, p. 435.

15/ 42 U.S.C. § 2012 (c)-(f).

16/ 164 F. Supp. 390 (D.D.C. 1958), aff'd 278 F.2d 252 (D.C. Cir. 1960), cert. den. 364 U.S. 835 (1960).

FEDERAL STATUTES AND REGULATIONS CONCERNING RADIOACTIVE WASTE DISPOSAL

The Atomic Energy Act of 1954 provides that a license issued by the AEC (now NRC) is required for the possession, transfer, or use of special nuclear material,[17] source material,[18] and byproduct material.[19] The act also requires a license for any person to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility without a license issued by the Commission;[20] authorizes the Commission to issue licenses for commercial utilization facilities;[21] to distribute special nuclear material for use in these facilities;[22] and to conduct research in the utilization of atomic energy for the generation of usable energy.[23] The 1954 Act makes no mention of state authority to regulate byproduct, source, and special nuclear materials; instead, Congress

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17/ 42 U.S.C. §§ 2073 and 2077(a). "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 42 U.S.C. § 2071, 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. 42 U.S.C. § 2014(aa).

18/ 42 U.S.C. §§ 2092 and 2093. "Source material" is defined as (1) uranium, thorium, or any other material which is determined by the Commission pursuant to 42 U.S.C. § 2091 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. 42 U.S.C. § 2014(z).

19/ 42 U.S.C. § 2111. "Byproduct material" is defined as 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. 42 U.S.C. § 2014(e).

20/ 42 U.S.C. § 2131.

21/ 42 U.S.C. §§ 2132, 2133, 2134(b).

22/ 42 U.S.C. § 2073(a)(3).

23/ 42 U.S.C. § 2051(a)(4).

appeared more concerned with defining the limits of private industry in the development of atomic energy.

42 U.S.C. § 2021, enacted in 1959 as § 274 of the Atomic Energy Act, appears to provide a rather careful delineation of federal and state authority over nuclear energy development. Subsection (b) of this statutory provision authorizes the Commission to enter into agreements with the governor of any state for discontinuance of the Commission's regulatory authority with respect to byproduct materials, source materials, and/or special nuclear materials in quantities not sufficient to form a critical mass. During the effective period of agreement, the state has authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards. Subsection (c) of the statutory provision reserves certain areas of regulation exclusively for the Commission. These include:

> the disposal into the ocean or sea of byproduct, source or special nuclear waste materials as defined in regulations or orders of the Commission;
>
> the disposal of such other byproduct, source, or special nuclear material 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. 24/

State standards for protection against radiation hazards should be "coordinated and compatible" 25/ with the standards of the Commission. The Commission can terminate or suspend its agreement with the state and reassert its licensing and regulatory authority if it finds that termination or suspension is required

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24/ 42 U.S.C. § 2021(c)(3)-(4).

25/ 42 U.S.C. § 2021(g).

to protect the public health and safety or if an emergency situation exists creating danger which requires immediate action to protect the health or safety of persons within or outside the state and the state has failed to take steps necessary to contain or eliminate the cause of the danger within a reasonable time after the situation arose.[26/]

Pursuant to statutory provisions concerning the licensing requirements for source material,[27/] byproduct materials,[28/] and special nuclear materials,[29/] the Commission has adopted regulations governing waste disposal. With limited exceptions, the regulations provide that the Commission must approve the proposed disposal procedures for licensed material.[30/] High-level wastes[31/] shall be transferred to a federal repository no later than ten years following separation of fission products from the irradiated fuel. Upon receipt, the federal repository will assume permanent custody of these radioactive waste materials, and NRC will take title to the radioactive waste material upon transfer to a federal repository.[32/] Disposal of high-level radioactive fission product waste material will be permitted only on land owned and controlled by

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26/ 42 U.S.C. § 2021(j).

27/ 42 U.S.C. §§ 2092 and 2093.

28/ 42 U.S.C. § 2111.

29/ 42 U.S.C. §§ 2073 and 2077(a)

30/ 10 C.F.R. § 20.301. Licensed material appears to mean source, byproduct, and special nuclear material for which the Commission regulations require a license. 10 C.F.R. § 20.3(8).

31/ High-level liquid, radioactive wastes are aqueous wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels. 10 C.F.R. Pt. 50.

32/ Id.

the federal government.[33] In general, low-level wastes[34] should be disposed of on land owned by the federal government or a state government.[35] Further, the Commission is empowered by 42 U.S.C. § 2201(b) and (p) to issue regulations which it deems necessary to "protect health or to minimize danger to life or property" and "as may be necessary to carry out the purposes of this Act."

The Nuclear Regulatory Commission has also issued regulations relating to areas which cannot be subjects of turn-over agreements and must remain within the authority of the Commission.[36] These areas include special nuclear material sufficient to form a critical mass and nuclear material which is so hazardous that it should not be disposed of without a license. Since the Program appears to permit states to regulate special nuclear materials not sufficient to form a critical mass, the Commission defines such nuclear materials.[37]

33/ 10 C.F.R. Pt. 50, App. F(3).

34/ Low-level wastes are, in layman's terms, wastes which have a radioactive content sufficiently low to permit discharge to the environment with reasonable dilution or after relatively simple processing. See 1 Southern Interstate Nuclear Board, Radioactive Waste Management 37 (1974). Besides high-level and low-level wastes, the other major category of radioactive waste is spent fuel. We are informed by NRC that spent nuclear fuel is viewed as a category separate from high-level wastes because the agency has not yet determined whether the commercial value of spent fuel precludes its being considered as waste. Spent fuel contains both byproduct material (fission products) and special nuclear material (plutonium).

35/ See 10 C.F.R. § 20.302(b).

36/ 10 C.F.R. Part 150.

37/ 10 C.F.R. § 150.11.

FEDERAL STATUTES AND REGULATIONS CONCERNING RADIOACTIVE WASTE TRANSPORTATION

Although federal statutes and regulations concerning transportation of radioactive wastes appear to be less extensive than in the area of radioactive waste disposal, Congress has legislated in this area. NRC has the authority to control the "transfer" and "possession" of special nuclear material, source material, and byproduct material.[38/] The Commission has the general duty to establish standards and instructions with respect to these three types of nuclear materials which it deems necessary to "promote the common defense and security or protect health or minimize danger to life or property"[39/] and "as may be necessary to carry out purposes of this act."[40/] Under the Energy Reorganization Act of 1974,[41/] NRC is directed to evaluate ways of monitoring, testing, and recommending upgrading of systems designed to prevent substantial health or safety hazards and methods of transporting special nuclear and other nuclear materials and of transporting and storing high-level radioactive wastes to prevent radiation hazards to employees and the general public.[42/] NRC has adopted regulations establishing the requirements for transporting and packaging licensed material.[43/] Other federal bodies, such as the Department of Transportation, have adopted regulations relating to transporting and packaging nuclear material.[44/]

38/ 42 U.S.C. §§ 2077(a), 2092, and 2111.

39/ 42 U.S.C. § 2201(b).

40/ 42 U.S.C. § 2201(p).

41/ 42 U.S.C. §§ 5801 et seq.

42/ 42 U.S.C. § 5843(b)(2)(A)-(B).

43/ 10 C.F.R. Parts 71 and 73.

44/ See 49 C.F.R. Parts 171-179 and 397.

FEDERAL PRE-EMPTION OF STATE REGULATION OF RADIOACTIVE WASTE DISPOSAL AND TRANSPORTATION

From the above discussion, it appears that there is no federal statute or regulation expressly pre-empting state laws concerning radioactive waste disposal and transportation. However, it is possible to argue that the statutes and regulations are sufficiently complete that they impliedly pre-empt state laws in these areas.

According to 42 U.S.C. § 2021, states which have agreed with the Commission to assume some of NRC's regulatory power cannot regulate special nuclear material sufficient to form a critical mass.[45/] A facility for the storage and disposal of high-level nuclear waste could possibly be deemed to involve quantities of special nuclear material sufficient to form a critical mass and thus not be a permissible subject of a turn-over agreement. Further, the Commission cannot relinquish its authority over nuclear material which is so hazardous that it should not be disposed of without a license. We are informed by NRC that high-level nuclear wastes will likely be determined by the agency to be materials that should not be disposed of without a license from the Commission. If so, whatever authority NRC possesses over the radiation hazards of high-level nuclear wastes could not be delegated to the states. Since spent fuel contains both byproduct material (fission products) and special nuclear material (plutonium), it, too, would likely be an impermissible subject for state turn-over agreements. Therefore, it can be argued that states may not legally exercise licensing

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45/ As to states which are not members of the Agreement States Program, it may be argued that they have none of NRC's regulatory power, but at any rate it seems apparent that they have no more authority than states which are members of the Program.

or other veto authority over federal long-term storage and disposal facilities for high-level nuclear wastes and spent nuclear fuel on the basis of radiation hazards.

State efforts to prevent transportation of high-level wastes and spent fuel may fail by application of the same principles under which state efforts at regulating disposal of high-level wastes and spent fuel may be struck down. There do not appear to be any decided cases on this issue, but a Department of Transportation notice 46/ states that a section of the New York City Health Code forbidding the transportation of most commercial shipments of radioactive materials in or through the city is not inconsistent with the Hazardous Materials Transportation Act which DOT administers. However, the notice goes on to state that

> The legal validity of § 175.111 is still subject to serious doubt. This opinion deals only with highway carriage. . . . Air, rail, and water carriage are more thoroughly imbued with a Federal interest and this opinion does not apply to transportation by those modes. New York City and any other jurisdictions which have, or are contemplating similar ordinances, should also bear in mind the fact that § 175.111 may be preempted by the Commerce Clause of the United States Constitution, or by the Atomic Energy Act of 1954 and regulations issued thereunder. 47/

It may be argued that states have limited authority over disposal and transportation of low-level wastes, which is the other major type of radioactive wastes. Federal policy concerning low-level wastes is that 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

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46/ 43 Fed. Reg. 16, 954 (1978).

47/ Id., at 16, 958.

within its borders except for waste generated as a result of defense activities.[48] However, state standards for protection against radiation hazards should be "coordinated and compatible" with the standards of the Commission.[49] Further, under the Agreement States Program, the Commission can suspend or terminate the state's authority if it finds that this will be in the interest of public health and safety.[50]

Thus, the overall effect of the statutory provisions and regulations appears to be to authorize a pervasive federal presence in regulating much nuclear waste disposal and transportation. Even without a provision expressly pre-empting state laws in these areas, the federal statutes and regulations arguably are sufficiently complete that they impliedly preempt state laws in the areas. As indicated, the resolution of an implied pre-emption question typically involves the consideration of several factors. Among these factors, the following may have particular relevance to the issues of nuclear waste disposal and transportation.

1. Pervasiveness of the federal scheme of regulation. A scheme of federal regulation may be so complete as to make reasonable the inference that Congress left no room for the states to supplement it. There would seem to be sound basis for arguing that such a degree of pervasiveness is present in nuclear waste disposal and transportation.

2. Importance of the federal interest. Ample evidence of the importance of nuclear power promotion in federal policy appears in the Atomic Energy Act and its legislative history.

48/ Pub. L. No. 96-573, § 4(a)(1)(A), 94 Stat. 3348.

49/ 42 U.S.C. § 2021(g).

50/ 42 U.S.C. § 2021(j).

3. Possibility that a state law might thwart the realization of a federal objective. Allowing states to veto the siting of a disposal facility within their borders or the transportation of nuclear wastes through them would arguably constitute a thwarting of federal policy favoring development of nuclear power. 51/

Some further support for federal pre-emption over nuclear waste disposal and transportation might derive from Northern States Power Co. v. Minnesota.[52/] This case held that the federal government has exclusive authority under the Atomic Energy Act to regulate radioactive effluent discharged from nuclear powerplants. Although the district courts found express pre-emption, the Eighth Circuit found implied pre-emption. At any event, the pre-emption arguments accepted as valid in that case would likely be raised in challenging a state veto of a federally approved disposal site or of transportation of nuclear wastes. Minnesota had asserted that § 274(c) of the Atomic Energy Act prohibited only the total relinquishment of federal power over nuclear powerplants but did not bar the concurrent exercise of state control. The Eighth Circuit rejected this argument, stating that

> While the 1959 amendment does not use the terms "exclusive" or "sole" in describing existing regulatory responsibilities of the Commission, we think it abundantly clear that the whole tone of the 1959 amendment, upon examination of statutory language alone, demonstrates Congressional recognition that the AEC at that time possessed the sole authority to regulate hazards associated with by-product, source, and special nuclear materials and with production and utilization facilities. 53/

51/ The Supreme Court has frequently relied on the presumptive indices of congressional intent in order to exclude state regulation of a field. See, e.g., Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), and Hines v. Davidowitz, 312 U.S. 52 (1941).

52/ 320 F. Supp. 172 (D. Minn. 1970), aff'd 447 F.2d 1143 (8th Cir. 1971), aff'd per curiam 405 U.S. 1035 (1972).

53/ 447 F.2d 1143, 1149 (8th Cir. 1971).

The court went on to find in the Atomic Energy Act a "congressional recognition and intention that the states possess no authority to regulate radiation hazards unless pursuant to the execution of an agreement surrendering federal control over the three categories authorized under section 2021(b)."[54/]

However, the usefulness of Northern States may have been somewhat diluted by the Clean Air Amendments of 1977 (P.L. 95-95, 95th Cong., 1st Sess.) and the legislative history of these amendments. Section 116 of the Act, as amended, states:

> . . . [N]othing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution . . .

House Conference Report No. 95-564 at page 143 states:

> [R]adioactive pollutants, including source material, special nuclear material, and byproduct material, are covered by Section 116 of the Clean Air Act. Thus, any State, or political subdivision thereof may establish standards more stringent than Federal, or where a Federal standard has not been established, may establish any standards they deem appropriate. Thus the provision would not preempt States and localities from setting and enforcing stricter air pollution standards for radiation than the Federal standards, and would not follow the holding of Northern States Power Co. v. State of Minnesota [citations omitted] in the context of radioactive air pollution.

Therefore, a state may be able to prohibit certain types of radioactive waste disposal, such as ground burial, on the basis that the waste will emit air pollutants in violation of its emission standards.

54/ Id., at 1149-1150.

Although the usefulness of Northern States as support for federal pre-emption may have been diminished by the Clean Air Amendments of 1977, two relatively recent cases would seem to provide additional support for federal pre-emption in the atomic energy area. The U.S. District Court for the Southern District of New York held in United States v. City of New York[55/] that a New York City ordinance requiring licensing of nuclear reactors is pre-empted by the Atomic Energy Act. In 1967 Columbia University applied for a permit from the Atomic Energy Commission to build and operate a research nuclear reactor. After complying with the federal two-step licensing procedure, Columbia was issued a federal operating license in 1977. During these federal licensing proceedings, New York in 1976 amended its Health Code to require city licensing in addition to federal licensing of nuclear reactors. Acting on this amended ordinance, the city's Commissioner of Health denied Columbia's application for a city license on the basis of potential injury to public health and safety resulting from accidental release and radiation. The United States and Columbia then brought suit to declare the local ordinance void under the federal pre-emption doctrine embodied in the Supremacy Clause of the Constitution. Discussing earlier judicial application of federal pre-emption in the area of nuclear energy, the court set forth general principles to be applied in any case concerning concurrent local nuclear regulation. According to the court, the Atomic Energy Act of 1954 is intended to provide federal regulatory occupancy of the field of radiation hazards except where jurisdiction is expressly ceded to the states. Further, the Act prohibits administrative delegation of certain activities to state regulatory authorities, including regulation of construction or operation of nuclear reactors.

55/ 463 F. Supp. 604 (S.D. N.Y. 1978).

New York argued that the legislative history of section 274 of the Act showed that Congress intended to leave a "gray area" of regulation which could not be pre-empted by federal regulation. According to the city, that gray area includes siting regulations, and it sought to characterize its licensing ordinance as a siting regulation based upon radiological safety criteria. After examining the legislative history of the Act, the court disagreed with the city. It found "an unmistakable congressional intent that radiological regulation of the operation of nuclear reactors be pre-empted from concurrent state and local regulation." In response to the city's argument that, as a siting regulation, the ordinance constituted a legitimate exercise of its police power, the court said that federal licensing criteria should include examination of the risks of proposed sites and that, in the case of the Columbia reactor, the Atomic Energy Commission considered and entered specific findings of fact concerning the location of the reactor. The court believed that the city could not argue that the scope of federal responsibility does not include local siting considerations. In conclusion, the court stated that "Congress did not leave room for dual federal-state regulation of radiation hazards associated with the operation of nuclear reactors."

Washington State Building and Construction Trades Council v. Spellman[56/] concerned a suit brought to challenge the constitutionality of a Washington state initiative attempting to ban storage and transportation to any storage site in Washington of all nonmedical radioactive waste generated outside of the state. The court held that the initiative was unconstitutional because it violated both the Supremacy Clause and the Commerce Clause of the Constitution. As for the Supremacy Clause violation, the court found that the

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56/ 518 F. Supp. 928 (E.D. Wash. 1981).

initiative attempted to regulate legitimate federal activity and that it was pre-empted because Congress did not expressly cede regulation of either high-level or low-level radioactive wastes to the states. On the latter point, the court stated at 931:

> By reviewing the pervasive federal statutory schemes for the regulation of radioactive waste, the Atomic Energy Act, the Low-Level Radioactive Waste Policy Act and the Hazardous Materials Transportation Act, and applying established judicial reasoning, I am convinced that Congress intended that the transportation and storage of all materials which pose radiation hazards would be regulated by the federal government except where jurisdiction was expressly ceded to the states.

With respect to the Commerce Clause violation, the court found that there was no valid justification for the initiative's discrimination against interstate commerce. Thus even in the absence of federal preemption, the state law would unconstitutionally burden interstate commerce.

However, although 42 U.S.C. § 2021(c) states that the Commission shall not relinquish certain areas of authority and responsibility to the states pursuant to the Agreement States Program, 42 U.S.C. § 2021(k) provides that "Nothing in the 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." Where states prohibit nuclear waste disposal on the general basis of radiological safety, this provision may be unimportant. However, if a state tries to regulate nuclear waste disposal for a purpose other than protection against radiation hazards, it may be important to determine the actual purpose of the state regulation and the permissible scope of its effects on federal plans concerning nuclear waste disposal.

Traditional zoning may be one area in which states or local governments can exercise some control over powerplants. An example of an acceptable

state or local attempt at such regulation might be the prohibition of a nuclear waste disposal facility in a zone which excludes all industrial plants from areas not zoned for industrial use. Another might be a state's inquiry into safety questions, apart from radiation hazards, concerning the location of a nuclear reactor.[57] However, if a local government excluded a nuclear waste disposal facility on the ground that the facility required a large site for an "exclusion area,"[58] thus lowering the locale's desired density of industrial development, this regulation might be determined to be based on a concern about radiation hazards.

Similarly, if a state were to impose thermal discharge standards more stringent than environmentally necessary pursuant to section 316(a) of the Clean Water Act and this action effectively prohibited the discharge of radioactive wastes, this state regulation might be struck down as interfering with the federal goals in the Atomic Energy Act. The decision in the Northern States case would appear to provide further support for federal pre-emption over a state action of this type.

A recent case, Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission,[59] sets forth a situation in which it has been held that a state may regulate nuclear activities for purposes other than protection against radiation hazards. It also illustrates that the controversy concerning pre-emption in the nuclear area continues and

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57/ See, e.g., Northern California Association to Preserve Bodega Head and Harbor v. Public Utilities Commission, 37 Cal. 432, 390 P. 2d 200 (1964).

58/ "Exclusion area" means that area surrounding the reactor in which the reactor licensee has the authority to determine all activities including exclusion or removal of personnel and property from the area. 10 C.F.R. § 100.3(a).

59/ 659 F.2d 903 (9th Cir. 1981).

that the courts appear not to have established exactly what in the nuclear area is pre-empted and what remains within a state's jurisdiction. This case was a consolidation of two lower federal court decisions, Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission[60/] and Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission,[61/] both of which held that certain provisions of the California Public Resources Code invaded a field of regulation pre-empted by the Atomic Energy Act of 1954.

In the lower court case of Pacific Legal Foundation plaintiffs challenged the constitutionality of three provisions of the Code: sections 25524.1, 25524.2, and 25524.3. Section 25524.1 provides that no new nuclear fission thermal powerplant requiring the reprocessing of fuel rods shall be permitted land use in the state or certified by the State Energy Resources Conservation and Development Commission until the Energy Commission finds that the appropriate United States agency has approved a technology for the construction and operation of nuclear fuel rod reprocessing plants and the Commission has reported its findings to the state legislature, which has the power to disaffirm them. The provision also requires the state commission to make a case-by-case determination that adequate fuel rod reprocessing capacity or waste storage capacity will be available by the time a particular facility requires reprocessing or waste storage. Section 25524.2 provides that no new nuclear powerplant shall be certified by the state commission until it finds that the authorized United States agency has approved a technology

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60/ 472 F. Supp. 191 (S.D. Cal. 1979).

61/ 489 F. Supp. 699 (E.D. Cal. 1980).

for disposal of high-level nuclear wastes and the commission has reported its findings to the state legislature, which has the power to disaffirm them. Section 25524.3 applies to nuclear powerplants for which notices of intent are filed with and accepted by the state commission after January 1, 1980. The commission cannot certify these plants until it completes a study of the necessity, effectiveness, and economic feasibility of berm containment and locating reactors underground and the legislature evaluates the study.

As a preliminary matter, the court noted that sections 25524.1 and 25524.3 were rendered moot by the decisions of the California Energy Commission. The commission determined that section 25524.1(a) does not apply to any reactors proposed for California and that section 25524.1(b) requires a case-by-case evaluation of fuel storage capacity at individual reactor sites. Section 25524.3 is not implicated in the present controversy because by its terms it applies only to powerplants for which a notice of intent is accepted after January 1, 1980. Thus, the court concluded that only section 25524.2, requiring the existence and approval of a high-level waste disposal technology which the Energy Commission has determined not to exist, impeded certification of nuclear powerplants in California.

After a finding of the existence of standing to sue and ripeness, the court discussed the merits of the case. The court held that section 25524.2 was pre-empted both because Congress has impliedly foreclosed state legislation on the subject of nuclear waste disposal and because the statute stands as an obstacle to the purposes and objectives which Congress stated in the Atomic Energy Act of 1954. In ruling on whether the federal government has pre-empted the sphere of radiological hazard regulation, the court cited Northern States and City of New York, discussed supra.

Defendants suggested that 25524.2 is valid because it was enacted for the economic purpose of insuring that Californians will not have to bear the financial risk of funding nuclear powerplants which may later be shut down because of inadequate permanent waste disposal activities and not for the prohibited purpose of radiation control. The court found that the suggestion that the provision was predicated upon an economic purpose was not a sufficient condition for a finding of constitutionality. Instead of focusing narrowly on the issue of California's legislative purpose, the court examined whether the provision impinged upon the sphere of exclusive regulatory jurisdiction reserved to NRC. The court found that the question of whether nuclear powerplants may be constructed and operated in the absence of a demonstrated technology for the permanent disposal of nuclear waste is exclusively reserved to NRC by 42 U.S.C. § 2021(c) and that state regulation on this subject is impliedly pre-empted. The court stated at 200: "There seems little point in enacting an Atomic Energy Act and establishing a federal agency to promulgate extensive and pervasive regulations on the subject of construction and operation of nuclear reactors and the disposal of nuclear waste if it is within the prerogative of the states to outlaw the use of atomic energy within their borders."

In the Pacific Gas and Electric Company case, plaintiffs brought suit to ask that the California statutory scheme regulating the construction and operation of nuclear powerplants be held unconstitutional. At issue were the following sections of the California Public Resources Code: 25524.1; 25524.2; 25524.3; 25528 insofar as it applies to nuclear fission thermal powerplants; 25500, 25502, 25504, 25511, 25512, 25514, 25516, 25517, 25519, 25520, 25523, and 25532 insofar as they authorize or require defendants to regulate or monitor the construction or operation of any nuclear powerplant

or to deny construction of any nuclear powerplant on the basis of determinations falling within the regulatory jurisdiction of NRC; and 25503, 25504, and 25516 insofar as they (a) require an applicant to provide information to defendants concerning any nuclear powerplant site not proposed by the applicant to NRC or (b) require defendants to conduct proceedings or make determinations concerning the site. Plaintiffs' suit was based on the claim that these nuclear power statutes are pre-empted under the Supremacy Clause of the Constitution by congressional enactment of the Atomic Energy Act.

After deciding the issue of standing, the court addressed the merits of the case. It held that the provisions in question of California's nuclear regulatory scheme are "either in conflict with or substantially impede the regulation of nuclear energy reserved to the federal government by the Atomic Energy Act of 1946, its various amendments and the power to regulate delegated pursuant to that legislation."[62/] According to the court, nuclear power and its exploitation have been a uniquely national concern since the enactment of the first Atomic Energy Act in 1946. The court also relied on the decision in Northern States in determining that the California statutes in question are pre-empted by federal law.

However, after consolidation the Ninth Circuit Court of Appeals reversed the lower courts' decisions. The court held that the statutory provisions in question were directed toward purposes other than protection against radiation hazards and were therefore not pre-empted by federal statutes.

62/ 489 F. Supp. at 704.

The court summarized:

> As the committee report makes clear, section 25524.2 [the moratorium on new nuclear plants] is directed toward purposes other than protection against radiation hazards . . . . Until a method of waste disposal is approved by the federal government, California has reason to believe that uncertainties in the nuclear fuel cycle make nuclear power an uneconomical and uncertain source of energy. The legislature has chosen to mandate reliance upon other energy sources until these uncertainties associated with nuclear power are resolved. We find that such a choice is expressly authorized under sections 271 and 274(k) of the Atomic Energy Act of 1954.
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> The requirement that utilities submit three alternate sites for their proposed plants . . . is also unrelated to protection against radiation hazards. The requirement applies to all power plants, nuclear and non-nuclear. It provides California with an efficient means of deciding where a proposed power plant should be located. Such decisions have been regarded as within the states' authority, for nuclear as well as other power plants. During hearings on section 274 of the Atomic Energy Act, it was agreed that state and municipal zoning regulations (establishing, for example, residential, commercial, or industrial zones) would apply to nuclear plants. . . . The AEC's general manager pointed out that section 274(k) would permit the courts latitude in sustaining "certain types of zoning requirements which have purposes other than control of radiation hazards, even though such requirements might have an incidental effect upon the use of . . . nuclear materials licenses [sic] by the Commission." . . . More recently, Congress passed legislation explicitly recognizing the states' authority to impose "requirement[s] relating to land use or respecting the siting" of nuclear plants. 63/

63/ 659 F.2d at 925.

SUPREME COURT CASES CONCERNING PRE-EMPTION IN AREAS OTHER THAN RADIOACTIVE WASTE

Since it is not possible to be certain as to a court's finding federal pre-emption in the areas of radioactive waste disposal and transportation, the Supreme Court's views over the past ten years of pre-emption in other areas may be instructive. Askew v. American Waterways Operations,[64/] held in an opinion by Justice Douglas that Florida's liability scheme imposing cleanup costs and no-fault liability on shore facilities and ships for any oilspill damage complemented a federal law concerned solely with recovery of actual cleanup costs incurred by the federal government and which textually presupposed federal-state cooperation. The Court stated at 328 that "We find no constitutional or statutory impediment to permitting Florida, in the present setting of this case, to establish any "requirement or liability" concerning the impact of oil spillages on Florida's interests or concerns" and at 329 that "It is clear at the outset that the Federal Act does not preclude, but in fact allows, state regulation."

Also in 1973 the Supreme Court in City of Burbank v. Lockheed Air Terminal,[65/] struck down a city ordinance placing an 11 p.m. to 7 a.m. curfew on jet flights from the city airport where federal regulation of aircraft noise was of such pervasive nature as to leave no room for state or local regulation. The Court held that, although control of noise is deep-seated in the police power of the states, the Noise Control Act of 1972 leaves no room for local curfews or other local controls and, therefore, pre-empts state or local laws in this area. The Court at 640 stated

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64/ 422 U.S. 325 (1973).

65/ 411 U.S. 624 (1973).

that "We are not at liberty to diffuse the powers given by Congress to FAA and EPA by letting the States or municipalities in on the planning. If that change is to be made, Congress alone must do it."

Farmer v. Carpenters[66/] concerned an action for damages against unions and union officials brought in a state court by a plaintiff who alleged that, because of a disagreement between him and the union officials over internal union policies, defendants had intentionally engaged in outrageous conduct, threats, and intimidation and had caused him to suffer emotional distress which resulted in bodily injury. The California Court of Appeal held that state courts had no jurisdiction over the complaint because the crux of the action concerned employment relations and involved conduct arguably subject to the National Labor Relations Board's jurisdiction. However, the Supreme Court reversed and held that the National Labor Relations Act did not pre-empt plaintiff's action. The Court stated at 296-297 that

> We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of Garmon if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.

Since the Court found that no provision of the NLRA protects the outrageous conduct of which the plaintiff complained and that the state has a substantial interest in protecting its citizens from the type of abuse alleged, the Court concluded that Congress did not intend to oust state court jurisdiction over actions for tortious activities of this type.

66/ 430 U.S. 290 (1977).

Jones v. Rath Packing Co.[67] concerned a conflict between a California statute and a federal regulation relating to commodity packaging weights. The federal regulation permitted reasonable variations in the packaging weight caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviation in good manufacturing practice. The California statute did not allow this type of variation in commodity packaging weights, and, as a result, the plaintiff ordered removed from sale bacon and flour packaged by defendant packing companies. The Supreme Court held that, because the California statute is different from the federal requirement and prevents the accomplishment and execution of the full purposes and objectives of Congress, the state law must yield to the federal.

Ray v. Atlantic Richfield Co.[68] is an important pre-emption case. In this case appellees challenged the constitutionality of the Washington State Tanker Law, which regulates the design, size, and movement of enrolled (engaged in domestic or coastwise trade) and registered (engaged in foreign trade) oil tankers in Puget Sound. Three provisions of the state law were involved in the case: (1) a requirement (§ 88.16.180) that enrolled and registered oil tankers of at least 50,000 deadweight tons carry a Washington-licensed pilot while navigating the Sound; (2) a requirement (§ 88.16.190(2)) that enrolled and registered oil tankers of from 40,000 to 125,000 DWT satisfy certain design or safety standards or use tug escorts while operating in the Sound; and (3) a ban on the operation in the Sound of any tanker exceeding 125,000 DWT (§ 88.16.190(1)).

67/ 430 U.S. 519 (1977).

68/ 435 U.S. 151 (1978).

The Supreme Court held that the Federal Ports and Waterways Safety Act of 1972 (PWSA) pre-empted certain provisions of the Washington law: (1) The state is precluded by 46 U.S.C. §§ 215 and 364 from imposing its own pilotage requirements on enrolled tankers. Section 88.16.180 of the state law is, thus, invalid as to its requirement that enrolled tankers carry state-licensed pilots. However, both 46 U.S.C. § 215 and the PWSA permit the state to impose pilotage requirements on registered vessels entering and leaving its ports. (2) In Title II of the PWSA, Congress intended uniform national standards for design and construction of tankers, thus foreclosing the imposition of different or more stringent state requirements. Since the federal scheme has the same goal as § 88.16.190(2) of the state law, the different and higher design requirements of that provision are invalid under the Supremacy Clause. (3) The alternative tug requirement of § 88.16.190(2) does not conflict with the PWSA, because, until the Secretary of Transportation promulgates his own tug requirement for Puget Sound tanker navigation or decides that there should be no such requirement, the state's tug escort requirement is not pre-empted by the federal scheme. (4) Title I of the PWSA and the Secretary's actions under it, as well as the legislative history showing that Congress intended that there be a single federal decision-maker to promulgate limitations on tanker size, invalidate the exclusion from Puget Sound of any tanker exceeding 125,000 DWT pursuant to § 88.16.190(1) of the state law. (5) Because the tug escort requirement does not demand a uniform national rule nor impede the free flow of interstate and foreign commerce, it does not violate the Commerce Clause. (6) Because the tug escort provision does not interfere with the government's attempt to achieve international agreement on the regulation of tanker design, it does not interfere with the government's authority to conduct foreign affairs.

Kassel v. Consolidated Freightways Corporation[69] --a Commerce Clause and not a pre-emption case--was a suit brought to challenge an Iowa statute prohibiting the use of sixty-five-foot double-trailer trucks within its borders. No other Western or Midwestern state has such a statute. The appellee alleged that the Iowa statute unconstitutionally burdened interstate commerce because a trucking company, in order to move goods through Iowa, must either use shorter truck units, detach the trailers of a sixty-five-foot double and shuttle each through Iowa separately, or divert sixty-five-foot doubles around Iowa. Iowa defended the statute as a reasonable safety measure. The Court affirmed the lower courts' decisions that the state law impermissibly burdened interstate commerce, stating at 671 of the opinion:

> In Raymond Motor Transportation, Inc. v. Rice, the Court held that a Wisconsin statute that precluded the use of 65-foot doubles violated the Commerce Clause. This case is Raymond revisited. Here, as in Raymond, the State failed to present any persuasive evidence that 65-foot doubles are less safe than 55-foot singles. Moreover, Iowa's law is now out of step with the laws of all other Midwestern and Western States. Iowa thus substantially burdens the interstate flow of goods by truck. In the absence of congressional action to set uniform standards, some burdens associated with state safety regulations must be tolerated. But where, as here, the State's safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation , the state law cannot be harmonized with the Commerce Clause.

69/ 450 U.S. 662 (1981).

CONCLUSION

The extent to which a state can block federal government decisions authorizing nuclear waste transportation within its borders is not well settled. Several states have statutes purporting to veto a decision by the federal government to establish a nuclear waste repository within their borders. It is arguable that many of these state statutes are unconstitutional because of being pre-empted by federal statutes and regulations. These state statutes may contravene the Supremacy Clause of the Constitution and interfere with the legitimate exercise by Congress of its war powers and its authority to regulate interstate commerce. The Atomic Energy Act and the Low-Level Radioactive Waste Disposal Act, as well as other federal statutes, specifically delineate the rather narrow role that the states have in the area of atomic energy. Although express pre-emption language is absent from the statutes, it is arguable that the seemingly pervasive role that the federal government has in the area of atomic energy impliedly pre-empts state statutes prohibiting radioactive waste disposal and transportation. Nevertheless, cases interpreting the doctrine of pre-emption in this area have held some state and local laws to be pre-empted and other state and local laws to be not in conflict with federal laws and therefore not pre-empted. It is not easy to determine in many instances which state and local laws do in fact conflict with federal laws. For example, the provision in section 274(k) of the Atomic Energy Act, permitting a state or locality to regulate nuclear activities for purposes other than protection against radiation hazards, has been interpreted by at least one federal court in a broad manner. The controversy is likely to continue until Congress enacts legislation setting more definitive guidelines for state and local participation.

SUMMARIES OF SELECTED STATE LAWS AND RESOLUTIONS CONCERNING THE PROHIBITION OF RADIOACTIVE WASTE DISPOSAL OR TRANSPORTATION

ALABAMA

Code of Alabama, section 22-14-16 bars disposal of any spent fuel or other radioactive waste generated outside the state. Also prohibits storing or dumping of any nuclear spent fuel that is not generated or used in the state.

ALASKA

S-45 prohibits construction of a nuclear fuel production facility, utilization facility, reprocessing facility, or nuclear waste disposal facility in the state unless a permit is obtained from the Department of Environmental Conservation. No permit can be issued unless the legislature, local government, and governor have approved the permit. Enacted 7-17-81.

ARKANSAS

Arkansas Statutes Annotated, section 82-4222 empowers the Department of Pollution Control and Ecology to promulgate rules and regulations governing hazardous waste treatment, storage and disposal facilities, and to enter into agreements with the federal government or one or more states to provide a balance of facilities among the states. Makes it unlawful to transport hazardous waste, defined to include radioactive waste, into the state for the purpose of disposal, except as provided by interstate agreement, or to transport hazardous waste into or out of the state without first reporting to the Department of Pollution Control in a manner to be established by the Department.

SUMMARIES OF SELECTED STATE LAWS AND RESOLUTIONS CONCERNING THE PROHIBITION OF RADIOACTIVE WASTE DISPOSAL OR TRANSPORTATION (continued)

COLORADO

Colorado Revised Statutes, section 25-11-203 prohibits the construction of a facility or site for the disposal of radioactive waste unless the governor and legislature approve it.

Colorado Revised Statutes, section 25-8-505 prohibits anyone from storing or disposing of radioactive wastes underground unless a state commission has found beyond a reasonable doubt that no pollution will result from the action or that the pollution will be limited to waters in a limited area and that public need justifies the activity.

CONNECTICUT

Connecticut General Statutes Annotated, section 22a-137 bans the disposal of nuclear waste in the state unless the General Assembly approves it. Low-level medical and university wastes are exempted.

Connecticut General Statutes Annotated, section 19-409d requires that permits be obtained for the transportation of radioactive wastes through the state.

ILLINOIS

Smith-Hurd Illinois Annotated Statutes, 111-1/2 ¶ 230.22 prohibits the transportation into the state of any spent nuclear fuel for storage or disposal which was used in an out-of-state power generating facility unless the generating state has a reciprocity agreement with Illinois.

SUMMARIES OF SELECTED STATE LAWS AND RESOLUTIONS CONCERNING THE PROHIBITION OF RADIOACTIVE WASTE DISPOSAL OR TRANSPORTATION (continued)

KANSAS

S-532, enacted 5-14-80, prohibits any geologic investigation to determine the suitability of any site in the state for disposal or storage of radioactive waste materials from being undertaken until the governor and the legislature have first been notified of all details of the investigations.

KENTUCKY

Kentucky Revised Statutes Annotated, section 138.820 levies an excise tax of ten cents per pound to be paid by the processor on all radioactive waste material delivered to Kentucky for processing, packaging, storage, disposal, or burial.

H-98, enacted 3-3-80, sets the final authority for approving or disapproving the location, opening, closing, or reopening of a low-level radioactive waste disposal site or facility with the state legislature.

LOUISIANA

Louisiana Revised Statutes 51:1071 prohibits the use of salt domes as a temporary or permanent disposal site for radioactive waste or other radioactive material. No one shall undertake any tests to determine the suitability of geologic structures for disposal of radioactive wastes unless the local government in which the tests are to occur, the natural resources committees or both houses of the state legislature, and the secretary of the Department of Natural Resources have been notified and have not objected in writing to the tests.

Louisiana Revised Statutes 51:1072 prohibits transportation into the state of any high-level radioactive wastes for disposal or storage.

SUMMARIES OF SELECTED STATE LAWS AND RESOLUTIONS CONCERNING THE PROHIBITION OF RADIOACTIVE WASTE DISPOSAL OR TRANSPORTATION (continued)

MAINE

Title 10 of the Maine Revised Statutes Annotated, sections 251 et seq. prohibit the construction of a nuclear powerplant until the Public Utilities Commission finds that the United States has demonstrated an acceptable technology for the disposal of high-level nuclear waste.

1 Maine Revised Statutes Annotated section 15-A and 38 section 361-D ban the storage, deposit, or treatment of radioactive waste unless the legislature approves it and direct that a study be performed on the effects of the act, waste disposal methods prepared for Maine, and the amount of waste generated, treated, stored, or disposed of in Maine.

MARYLAND

Article 43, section 689C of the Annotated Code of Maryland prohibits a facility for the permanent storage or disposal of high-level nuclear wastes or transuranic wastes in the state except as otherwise required by federal law.

S-572, enacted 5-19-81, provides for the licensing and regulation of low-level nuclear waste transportation, treatment, storage, and disposal in accordance with the Department of Health and Mental Hygiene. Conditions the issuance of a permit for the disposal of certain low-level nuclear waste on an interstate compact with special provisions. Also provides for the siting of low-level waste disposal facilities.

S-573, enacted 5-19-81, prohibits a person from engaging in the generation of low-level waste unless the Department of Health and Mental Hygiene adopts a rule certifying that certain criteria have been satisfied.

SUMMARIES OF SELECTED STATE LAWS AND RESOLUTIONS CONCERNING THE PROHIBITION OF RADIOACTIVE WASTE DISPOSAL OR TRANSPORTATION (continued)

MICHIGAN

Sections 3.201, 3.301, 3.321, and 3.341 of the Michigan Compiled Laws Annotated prohibits acquisition by the United States of any land or building for the use of storing, depositing, or dumping any radioactive material.

Section 325.491 of the Michigan Compiled Laws Annotated directs that radioactive waste may not be deposited or stored in the state. The ban does not apply to facilities at educational institutions, spent fuel storage pools at nuclear powerplants, mill tailings from uranium mining within the state, medical uses of radioactive material, temporary storage of low-level waste for not more than six months, or waste which was being stored before January 1, 1970.

MINNESOTA

Minnesota Statutes Annotated sections 116C.72 and 116C.73 prohibit the construction or operation of a radioactive waste management facility within Minnesota unless authorized by the legislature and the transportation of wastes into the state for disposal or storage unless authorized by the legislature, except that radioactive wastes may be transported into the state for temporary storage for up to twelve months pending transportation out of state.

MONTANA

Montana Code Annotated section 75-3-302 prohibits the disposal of large quantities of radioactive materials produced in other states.

SUMMARIES OF SELECTED STATE LAWS AND RESOLUTIONS CONCERNING THE PROHIBITION OF RADIOACTIVE WASTE DISPOSAL OR TRANSPORTATION (continued)

NEVADA

S-86, enacted 4-21-81, provides the regulations for transporting and disposing radioactive materials and requires legislative approval of certain contracts and licenses respecting areas for waste disposal. Prohibits state agencies from contracting with anyone to operate state-owned areas for waste disposal and creates a trust fund for site maintenance of waste disposal facilities.

S-87, enacted 6-2-81, details requirements for ownership of waste disposal sites; assures that efforts will be made to provide for the safe disposal of uranium tailings, minimizing diffusion of radon, and reducing the need for long-term treatment and surveillance of uranium tailings.

NEW HAMPSHIRE

New Hampshire Revised Statutes Annotated sections 125:77a et seq. prohibit the storage or disposal of radioactive waste in the state unless appropriate approval is given. Spent fuel from other plants or facilities cannot under any circumstances be stored in the state.

NEW YORK

McKinney's Consolidated Laws of New York Annotated, Public Authorities Law, section 1854-a provides that no repository for the terminal storage of nuclear waste can be sited in the state unless the governor and legislature approve it by statute. Prior to approval, the New York State ERDA shall conduct a complete study on issues of waste disposal, prepare an environmental impact statement, certify that a particular site is suitable and a proven technology exists, conduct public hearings, and prepare a detailed estimate on the costs.

SUMMARIES OF SELECTED STATE LAWS AND RESOLUTIONS CONCERNING THE PROHIBITION OF RADIOACTIVE WASTE DISPOSAL OR TRANSPORTATION (continued)

NORTH DAKOTA

North Dakota Century Code, section 23-20.2-09 bans the disposal of radioactive waste in the state unless the legislature grants approval.

OREGON

Oregon Revised Statutes, section 469.525 bans the establishment or operation of radioactive material waste disposal facilities within the state.

S-108, enacted 8-17-81, provides that medical, industrial, and research wastes contained in small, sealed containers in which the radioactive material is dissolved in an organic solvent for liquid scintillation counting and experimental animal carcasses be disposed of at a hazardous waste facility. The facility must be licensed by the Department of Environmental Quality.

SOUTH DAKOTA

South Dakota Codified Laws, section 34-21-1.1 bans the containment, disposal, or deposit of high-level nuclear wastes, radioactive substances, or radioactively contaminated materials and bans the processing of high-level nuclear wastes within the state unless prior approval is granted by the legislature. Exempts uranium ore and mill tailings from these provisions.

TEXAS

HCR-21, adopted 3-4-81, directs the Texas Department of Health to suspend the licensing only of new commercial radioactive waste management sites until new legislation is passed.

SUMMARIES OF SELECTED STATE LAWS AND RESOLUTIONS CONCERNING THE PROHIBITION OF RADIOACTIVE WASTE DISPOSAL OR TRANSPORTATION (continued)

UTAH

S-18, enacted 3-26-81, prohibits the placement of high-level nuclear waste in Utah unless the governor, after consultation with the county commissioner of the affected county and with concurrence of the legislature, authorizes the placement.

WEST VIRGINIA

West Virginia Code, section 16-27-2 bans the storage or disposal of radioactive waste within the state except medical, educational, research, or industrial waste. The industrial waste may not include any materials produced in conjunction with the operation of a power reactor or reprocessing facility.

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