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Constitutional Law -- Federal Preemption of State Regulatory Authority -- Federal Government has Sole Authority Under Atomic Energy Act to Regulate Radioactive Wastes Discharged form Nuclear Power Plants -- Northern States Power Co. v. Minnesota

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Constitutional Law—Federal Preemption of State Regulatory Authority—Federal Government has Sole Authority under Atomic Energy Act to Regulate Radioactive Wastes Discharged from Nuclear Power Plants—*Northern States Power Co. v. Minnesota.*[1]—In 1967, the Atomic Energy Commission (AEC) issued to the Northern States Power Company (Northern), a Minnesota corporation, a construction permit to build a nuclear-fueled electric power plant in Minnesota. The permit placed a ceiling on the amount of radioactive effluents which the plant could discharge in the course of its operations. Pursuant to a Minnesota statute,[2] Northern applied to the Minnesota Pollution Control Agency for a waste disposal permit. The state permit was issued subject to the requirement that the plant's level of radioactive liquid and gaseous discharges comply with Minnesota standards more restrictive than those of the AEC. The state further required monitoring programs for the detection of such releases.

In response to the strict Minnesota requirements, Northern filed suit in the United States District Court for the District of Minnesota against the state and the Minnesota Pollution Control Agency. The power company sought a judgment declaring Minnesota to lack the authority to regulate discharges of radioactive wastes because this field of regulation had been preempted by the federal government under the Atomic Energy Act.[3] Defendants denied that Minnesota was without such authority and asserted that the state has the right under the Tenth Amendment to protect the health of its citizens and to regulate and prevent pollution within its borders. The federal district court entered final judgment with a declaration favorable to Northern.[4] On appeal, the United States Court of Appeals for the Eighth Circuit HELD: affirmed; the United States has sole authority under the Atomic Energy Act to regulate the construction and operation of nuclear power plants, and this authority necessarily includes regulation of the levels of radioactive effluents discharged from the plant.[5]

The Eighth Circuit reasoned that the regulation of radioactive effluents is intimately and inextricably connected with the planning, construction and operation of nuclear power plants. Furthermore, notwithstanding the fact that no provision of the Atomic Energy Act, its amendments, or its legislative history had expressly preempted state regulation[6] of radioactive wastes discharged from nuclear power plants, the *Northern* court found that Congress had manifested an intent to displace concurrent state regulation in this field. In making that determination, the court was persuaded by (a) the pervasiveness

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1 447 F.2d 1143 (8th Cir. 1971).
2 Minn. Stat. Ann. § 115.03 (1964).
3 42 U.S.C. §§ 2011 et seq. (1970).
4 Northern States Power Co. v. Minnesota, 320 F. Supp. 172 (D. Minn. 1970).
5 447 F.2d at 1154.
6 447 F.2d at 1147.

of the regulatory scheme as authorized and directed by the Act and as applied by the AEC;[7] (b) the nature of the subject matter, which required exclusive federal regulation in order to effectuate uniform standards and controls;[8] and (c) the fact that the Minnesota statute hampered the accomplishment and execution of congressional purposes and objectives as expressly stated within the Act.[9]

Since the issue of the preemptive right of the federal government to regulate radioactive wastes presents a matter of first impression for the federal appellate courts, this note will first examine the doctrine of preemption and the various factors which establish congressional intent to preempt a field of regulation. The *Northern* holding that the federal government, under the doctrine of preemption, has sole authority to regulate radioactive pollution from nuclear power plants will then be discussed in light of the police power of the states to protect and promote the health, safety and general welfare of their citizens. The note will conclude with an analysis of the dissenting opinion in *Northern*, and will suggest the need for an amendment to the Atomic Energy Act.

Preemption is a judicially applied doctrine based on Article VI, clause 2 of the United States Constitution—the Supremacy Clause—which elevates federal law above that of the states.[10] Under this doctrine, Congress, acting pursuant to a constitutionally delegated power, may establish exclusive federal regulation of a particular area, thus precluding the states from asserting concurrent jurisdiction.[11] Judicial inquiry into the preemptive status of a federal law usually begins with a determination of whether Congress enacted the legislation pursuant to a constitutionally delegated power.[12] Once such a determination has been made, the court then considers the various principles of preemption to determine whether Congress has expressly or impliedly preempted the field of regulation in question.[13] Under this examination, where Congress has introduced regulatory measures such that "compliance with both federal and state regulations is a physical impossibility,"[14] the state law is held to be automatically preempted.

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[7] Id. at 1152-53.

[8] Id. at 1153.

[9] Id. at 1154.

[10] In passing on the issue of whether a state statute conflicts with or is preempted by a federal statute, the United States Supreme Court has stated that "[a]ny such preemption or conflict claim is of course grounded in the Supremacy Clause of the Constitution: if a state measure conflicts with a federal requirement, the state provision must give way." Swift & Co., Inc. v. Wickham, 382 U.S. 111, 120 (1965).

[11] See Hines v. Davidowitz, 312 U.S. 52, 62-66 (1940).

[12] Id. For a thorough analysis of the constitutional bases for congressional exercise of regulatory control over atomic energy, see generally Estep & Adelman, State Control of Radiation Hazards: An Intergovernmental Relations Problem, 60 Mich. L. Rev. 41 (1962) [hereinafter Estep & Adelman]; and Estep, Federal Control of Health and Safety Standards in Peacetime Private Atomic Energy Activities, 52 Mich. L. Rev. 333 (1954).

[13] Id.

[14] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

Where such direct conflict is absent, the court must determine whether Congress *intended* to displace coincident state regulation.[15] This intent is most easily discerned from an unequivocal and express congressional declaration, in either the statute or its legislative history, that federal authority is exclusive.[16]

However, where Congress has neither expressly prohibited dual regulation nor unequivocally declared the exclusivity of federal authority, intent to preempt may be inferred from the statute or its legislative history.[17] In addition, other factors may indicate that Congress has impliedly preempted a field of regulation. For example, such an implication may arise where the federal scheme is so pervasive as to make reasonable the inference that Congress left no room for state supplementation;[18] where the nature of the subject matter to be regulated is one which demands uniform national standards;[19] and where the state law serves to impede the realization of congressional purposes and objectives.[20] No one factor will necessarily suffice to persuade a court to rule that Congress has preempted a field of regulation by implication. Rather, a court must take into consideration all the foregoing factors, and inferences arising therefrom, in making its determination.[21]

The Supreme Court's most recent attempt to formulate a comprehensive articulation of the preemption doctrine was set forth in *Florida Lime & Avocado Growers, Inc. v. Paul*.[22] In that case, a California statute had barred importation of Florida avocados not meeting California's minimum oil content standard of maturity. However, those same avocados were considered to be mature and in compliance with federal marketing standards under the Agricultural Adjustment Act.[23] Rejecting the Florida corporation's contention that the state law had been preempted by the federal enactment, the Supreme Court determined that the Supremacy Clause did not prohibit California from excluding Floridian avocados certified as mature under the Federal regulations. The test, the Court declared, is "whether both [federal and state] regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."[24] Finding that the two statutes were not in conflict, the Court held that "federal regulation of a field of

[15] 447 F.2d at 1146.

[16] See Campbell v. Hussey, 368 U.S. 297 (1961).

[17] See Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 772 (1947); Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 613 (1926).

[18] See Pennsylvania v. Nelson, 350 U.S. 497, 502-04 (1956); Pennsylvania R.R. v. Public Services Comm'n, 250 U.S. 566, 569 (1919).

[19] See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 241-44 (1959); Guss v. Utah Labor Relations Bd., 353 U.S. 1, 10-11 (1957).

[20] Hines v. Davidowitz, 312 U.S. 52, 67 (1940).

[21] See Pennsylvania v. Nelson, 350 U.S. 497, 501-09 (1956).

[22] 373 U.S. 132 (1963).

[23] 7 U.S.C. §§ 601 et seq. (1970).

[24] 373 U.S. at 142.

commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[25]

In light of the *Florida Lime* decision, and because no provision of the Atomic Energy Act had expressly preempted state authority to regulate radiation emissions from nuclear power plants, the *Northern* court found it necessary to examine the statute, its legislative history and administrative interpretation in order to determine whether Congress had manifested an implied intent to displace concurrent state regulation. The court analyzed the historical development of the Act and observed that atomic energy first became the subject of federal legislation with enactment of the Atomic Energy Act of 1946,[26] which created a federal monopoly for the production and use of fissionable materials. The Act expressed the congressional policy that

> subject at all times to the paramount objective of making the maximum contribution to the common defense and security . . . 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.[27]

The Act provided for the establishment of the Atomic Energy Commission and delegated to that Commission a dual function: to develop a nuclear program to encourage scientific and industrial progress and to safeguard the public health and safety.[28] Ownership of all nuclear production plants and all fissionable material was vested in the AEC as agent for the United States.[29]

The development of atomic energy for peaceful purposes progressed so rapidly that Congress in 1954 amended the Act to remove atomic energy development from exclusive government control and to encourage the growth of atomic energy in private industry.[30] The

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[25] Id.

[26] Ch. 724, 60 Stat. 755-75 (1946), as amended 42 U.S.C. §§ 2011 et seq. (1970).

[27] Atomic Energy Act § 1(a), ch. 724, § 1(a), 60 Stat. 755 (1946), as amended 42 U.S.C. § 2011 (1970).

[28] Atomic Energy Act § 1(b), ch. 724, § 1(b), 60 Stat. 756 (1946), as amended 42 U.S.C. § 2013 (1970).

[29] Atomic Energy Act § 4(c)(1), ch. 724, § 4(c)(1), 60 Stat. 760 (1946), as amended 42 U.S.C. § 2061 (1970).

[30] 42 U.S.C. §§ 2011-20, 2022-96 (1970). See Helman, Pre-Emption: Approaching Federal-State Conflict Over Licensing Nuclear Power Plants, 51 Marq. L. Rev. 43, 53 (1968). The effect of the 1954 Amendment is described by Helman as having changed the role of the Commission "from exclusive developer to promoter and co-participant-sponsor of private development of peaceful uses of atomic energy; and shifted the posture of the Commission in matters relating to health and safety from contract administrator to regulator." Id. at 54. The states however, "have looked at the transfer of development responsibility from government, to government and industry jointly, as a surrender of a federal interest; and the establishment of extensive licensing procedures

Atomic Energy Act of 1954 encouraged the licensed private ownership and operation of utilization facilities,[81] the licensed private ownership of by-product[82] and source material,[83] and the licensed leasing of special nuclear material.[84]

In 1959, Congress further amended the Act "to clarify the respective responsibilities . . . of the states and the Commission,"[85] and to provide for the discontinuance of federal regulatory authority with respect to certain materials and the assumption of such regulatory authority by the states.

In effect, Congress indicated that each government was to have only those powers which were defined in the Act.[86] Section 274(b) authorized the AEC to enter into "turn-over" agreements with the states with respect to by-product materials in quantities not capable of sustaining a nuclear chain reaction. Such agreements were to provide for the discontinuance of federal regulatory authority over those materials and the turn-over of exclusive regulatory authority to the states.[87] According to section 274(b), states which entered into the agreements were entitled to "regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards."[88] However, states which entered into turn-over agreements had to provide licensing and regulatory programs "compatible" with the AEC's licensing and regulatory program.[89] The criterion used by the AEC to measure "compatibility" was, simply, uniformity with respect to the maximum permissible doses and levels of radiation and concentrations of radioactivity as established by AEC regulations.[40]

In light of the AEC's compatibility criterion, it is arguable that states which entered into turn-over agreements were thereby authorized to regulate radioactive waste releases from atomic energy plants, provided that the states' standards did not fall below those of the federal government. Notwithstanding the feasibility of this proposition, however, Minnesota was precluded from making such an argument because the state had not entered into a turn-over agreement with the AEC.[41] Moreover, as Minnesota acknowledged, radioactive effluents do not fall into any of those classifications of materials enumerated in section

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as the initiation of a new federal interest which needed to be weighed as a separate concern against the states' interest in regulating public health and safety." Id.

81 42 U.S.C. §§ 2133-34 (1970).

82 42 U.S.C. § 2111 (1970).

83 42 U.S.C. §§ 2092-93 (1970).

84 42 U.S.C. § 2073 (1970).

85 42 U.S.C. § 2021(a)(1) (1970).

86 Estep & Adelman, supra note 12, at 58-59.

87 42 U.S.C. § 2021(b) (1970).

88 42 U.S.C. § 2021(b) (1970).

89 42 U.S.C. § 2021(d)(2) (1970).

40 Green, Radiation Standards: Federal/State Relations, 12 Atomic Energy L.J. 402 (1970).

41 447 F.2d at 1148-49.

274(b) with respect to which federal authority may be shared with the states.[42] Therefore, the argument that states which participate in turn-over agreements are thereby authorized to regulate radioactive wastes is not supported by section 274(b) and is tenuous at best.

The *Northern* court viewed section 274(c)(1) as further evidence of a congressional intent to preempt state regulation. Section 274(c)(1) provides:

> 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 the regulation of—
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> (1) the construction and operation of any production or utilization facility.[43]

In *Northern*, this section was used by both parties to support two substantially different arguments. The plaintiff contended that section 274(c)(1) delegated to the Commission complete and exclusive control over "the construction and operation of any production or utilization facility," which necessarily included the discharge of radioactive effluents from the facility or plant.[44] Essentially, the plaintiff argued that it is impossible to regulate a plant's discharge of radioactive effluents without also affecting the "construction and operation" of that facility—*i.e.*, more stringent emission standards would require plaintiff's development and use of more sophisticated equipment and procedures. The defendant, Minnesota, argued on the other hand, that while section 274(c)(1) prohibited states from entering into agreements with the AEC for assumption of any of the Commission's exclusive responsibility for regulating radiation hazards, states were not

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[42] Id. at 1148.

[43] 42 U.S.C. § 2021(c)(1) (1970).

[44] 447 F.2d at 1149. Accepting plaintiff's argument, the *Northern* court concluded that "[t]here can be no doubt but that AEC control over 'the construction and operation of any production or utilization facility' necessarily includes control over radioactive effluents discharged from the plant incident to its operation." Id. at n.6. In making that determination the court cited the AEC counsel's analysis of § 2021(c) in the Hearings before the Joint Committee on Atomic Energy:

> The activities covered under this provision (i) include but are not limited to the possession and storage at the site of the licensed activity of nuclear fuel, and of source special nuclear material and byproduct materials used or produced in the operation of the facility; and the transportation of nuclear fuels to and from the reactor site and *the discharge of effluent from the facility.*
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> [T]he purpose of this provision is to retain under Commission regulatory control the operation of the reactor. We did not feel that we could begin to cut up that into pieces, so to speak. The discharge of effluents from the reactor involves many questions relating to the design and construction and operating procedures. We did not think it could be considered by itself and broken away from overall responsibility for reactor operation.

447 F.2d at 1149 (emphasis added). The court also noted a stipulation by the parties at the district court level that "[w]aste disposal requirements affect the design, manufacture, cost and sale of nuclear reactor plants and associated equipment." Id.

thereby barred from implementing stricter safeguards fashioned to supplement federal standards.

In striking down the defendant's argument the court reasoned that, notwithstanding the Atomic Energy Act, if states possessed concurrent jurisdiction to regulate radiation hazards attributable to the materials enumerated in section 274(b), there would have been no necessity for Congress affirmatively to recognize state regulatory authority vis-à-vis federal-state "turn-over" compacts. Furthermore, there would have been no need to limit the states' authority to the provisions and the duration of such an agreement. In addition, the court reasoned that the language of section 274(c) (*e.g.*, "discontinuance" and "retention")[45] implied that Congress had not intended to provide concurrent state control over nuclear reactors since the language of that section was in the form of an exclusive disjunction. The court thus construed section 274 as providing that the authority to regulate radioactive wastes was either to be retained by the AEC or acquired by the state, but not both.

The *Northern* court then considered Section 274(k) of the Act, which provides that "nothing in [Section 274] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."[46] The court reasoned that subsection (k) evidenced a congressional intent that states should not possess authority to regulate radiation hazards unless pursuant to a turn-over agreement as authorized by section 274(b); and that subsection (k) clearly indicated that subsection (c) did not limit the states' power to regulate the construction and operation of nuclear power plants "for purposes other than protection against radiation hazards." Further, the court determined that in the absence of an exclusive federal regulatory authority over radiation hazards, the inclusion of the phrase "for purposes other than protection against radiation hazards" would have been meaningless and unnecessary.[47] In addition, the existence of turn-over agreements, which provide for cession to the states of regulatory authority over those activities enumerated in section 274(b), and the specific prohibition against the relinquishment of federal authority over other activities listed in section 274(c), supported the conclusion that the federal government possessed exclusive authority over radiation hazards, save for those instances where states have entered into turn-over agreements.

The finding in *Northern* that Congress intended to vest the federal government with complete regulatory control over all radiation hazards, except where jurisdiction was expressly given to the states, is also supported by the legislative history accompanying the 1959 Amendment to the Atomic Energy Act.[48] In its report accompanying

[45] See text at note 43 supra.
[46] 42 U.S.C. § 2021(k) (1970).
[47] 447 F.2d at 1149-50.
[48] 2 U.S. Code Cong. & Ad. News. 86th Cong., 1st Sess., 2872-83 (1959).

proposed legislation which was later to become the 1959 Amendment, the Joint Committee on Atomic Energy indicated that the licensing and regulation of nuclear reactors should remain under the exclusive authority of the AEC.[49] In addition, the committee report noted that the states should be prohibited from exercising concurrent regulatory jurisdiction over radiation hazards, even where the states had regulatory authority over by-product, source or special nuclear materials.[50] Those materials were to be regulated and licensed either by the AEC or by the state and local governments, but not by both.[51]

In the section by section analysis of the bill, the Joint Committee's report noted that subsection (c) prohibited the inclusion of certain matters in the turn-over agreements entered into pursuant to subsection (b).[52] The construction and operation of nuclear power plants were among those subjects excluded because the committee believed that continued federal responsibility in these areas was desirable.[53] The report further stated that subsection (k) was intended to make clear that section 274 did not impair state regulatory authority over AEC licensees concerning health, safety and economic purposes *other* than radiation protection.[54] The *Northern* court interpreted the committee report as clearly indicating a congressional intent to preempt state licensing and regulation of nuclear reactors, and concurrent state regulation of radiation effluents, even where a pollution hazard resulted from activities conducted pursuant to a turn-over agreement.[55]

The court's rationale was also supported by the Atomic Energy Commission's interpretation of the Atomic Energy Act, and the scope of the administrative regulatory authority. The Commission's interpretation of the Act as embodied in AEC regulations unequivocally recited that, for reasons of radiological safety and health, states lacked authority to regulate nuclear power plants and the attendant discharge

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[49] The Joint Committee noted that "[l]icensing and regulation of more dangerous activities—such as nuclear reactors—will remain the exclusive responsibility of the Commission." Id. at 2879.

[50] The committee report stated that the Amendment "is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source, or special nuclear materials. The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both." Id.

[51] Id.

[52] The report stated:

> Subsection c. of the bill excludes certain areas from an agreement under subsection b. between the Commission and the Governor of a State. These are areas which, because of their special hazards, or for reasons of Federal responsibility, are believed desirable for continued responsibility by the Commission. They include the construction and operation of production or utilization facilities, including reactors . . . .

Id. at 2880-81.

[53] Id.

[54] Id. at 2882.

[55] 447 F.2d at 1153-54.

of radioactive effluents.[56] In addition, the pervasiveness of the federal regulatory scheme indicated an implied congressional intent to preempt. One commentator has observed that:

> The federal licensing scheme to control the development and utilization of atomic energy, as established by Congress and implemented by the AEC, is extraordinarily pervasive . . . . Furthermore, the Commission's licensing system is but a part of an intensive program to promote the public and private development and utilization of atomic energy.[57]

Further evidence supporting the preemptive status of the federal regulation of radioactive effluents was found by the *Northern* court in the nature of the subject matter regulated, and the corresponding need for uniform controls in that area. The court relied upon congressional findings which had led to the drafting of the 1954 Amendment to the Atomic Energy Act. Those findings indicated that the processing and utilization of radioactive materials, including resultant effluents, must be regulated by the United States government in the national interest of (a) regulating commerce, (b) providing for the common defense and security, and (c) protecting the health and safety of the public.[58] In contrast, Minnesota argued that the subject matter was in fact the more narrow area of pollution control, which included the regulation of radioactive effluents discharged from the plaintiff's plant. In this regard the state contended that such pollution was a matter vitally related to the public health and safety of its citizens and thus within its police power to control.[59]

The *Northern* court rejected Minnesota's argument, characterizing it as "microcosmic."[60] The court noted that the argument disregarded the fact that regulation of radioactive effluents has significant effects beyond the area of pollution control; and that these wider considerations necessitated the removal of this subject matter from the ambit of the state's police power.[61] More specifically, the court

[56] AEC Reg., 10 C.F.R. § 8.4 (1971).

[57] E. Stason, S. Estep & W. Pierce, Atoms and The Law 1059 (1959).

[58] 447 F.2d at 1153. An analysis of the draft bill of the 1959 Amendment suggests "that the competence of the states to deal with radiation protection was not the sole criteria [sic] for deciding the scope of the responsibility that should be entrusted to them, the more basic question being the extent to which federal control was required in the radiation health and safety fields due to interstate, national and international atomic energy problems." Esgain, State Authority and Responsibility In The Atomic Energy Field, 1962 Duke L.J. 163, 179.

[59] In support of this argument, Minnesota cited Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). In *Huron*, the Supreme Court upheld the constitutionality of Detroit's Smoke Abatement Code, as applied to ships which were operated in interstate commerce.

[60] 447 F.2d at 1153.

[61] [R]egulation of the radioactive effluents . . . is inextricably intertwined with the planning, construction and entire operation of the facility. . . . [M]ajor generating plants . . . are part of an interstate transmission system which makes possible the purchase and sale of electric power between major systems

reasoned that the regulation of discharged radioactive effluents required jurisdictional control over the design, operation and construction of nuclear power plants which had been expressly and exclusively given to the AEC;[62] that Northern was an interstate supplier of electric power, participating in an interstate transmission system; and that Congress had vested the AEC with authority to find the proper balance between desired industrial progress and adequate health and safety standards.[63]

The court was of the opinion that exclusive authority to find such a proper balance had been given to the AEC because the states were not capable of objectively balancing the legitimate interests involved, and would set health and safety standards so high as to impede the necessary development and use of atomic energy for the production of electric power. Such an impediment to the national interest would be directly caused by state standards exceeding the ranges of present technological feasibility, or caused indirectly by the prohibitive costs necessary to construct and maintain nuclear power plants in conformity with local standards. For these reasons the *Northern* court rejected Minnesota's argument that the states should be permitted to impose higher standards on the discharge of radioactive effluents in order to protect the health and safety of their citizens.[64] Consequently, the court held that Minnesota's standard created " 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[65] Admittedly, Minnesota's standards, more strict than those fixed by the AEC, could successfully reduce the amount or concentration of radioactive effluents, thereby benefitting the health and welfare of Minnesota residents. However, the issue, the court noted, was not whether such reduction, even if feasible, might benefit Minnesota's public health, safety and welfare; rather, the issue was whether Congress had in fact preempted the field.

In a dissenting opinion[66] Judge Van Oosterhout reasoned that Congress had not "unmistakably" expressed an intent to preempt the field, and that the Act in fact did not preclude the imposition of stricter state standards. The dissent argued that the majority's "national interest" rationale was not persuasive when contrasted with the interest of the states in protecting the health and safety of their citizens

across the nation. Congressional objectives . . . evince a legislative design to foster and encourage the development, use and control so as to make the maximum contribution to the general welfare and to increase the standard of living . . . . Congress vested the AEC with the authority to resolve the proper balance between *desired industrial progress and adequate health and safety standards*. Only through the application and enforcement of uniform standards promulgated by a national agency will these dual objectives be assured.

Id. at 1153-54 (emphasis added).

62 42 U.S.C. § 2021(c) (1970).

63 42 U.S.C. § 2013 (1970).

64 447 F.2d 1153-54.

65 Id. at 1154.

66 Id. at 1154-58.

from radioactive pollution. Further, the dissent did not share the majority's fear that state standards might unduly interfere with the operation of nuclear power plants. Rather, it argued that the adequacy of state regulations should be judged in light of a standard of reasonableness which would sufficiently guard against abuse by the states.

The dissent seems to suggest that, in an area which may profoundly affect the environment, the states should be permitted to regulate radioactive pollution because of dissimilar local environmental problems. For example, highly populated, industrialized states with acute pollution problems may require radioactive emission standards more strict than those promulgated by the federal government, which are equally applicable to less populated, more remote areas of our nation. For this reason, it is argued, a *federal* standard which is demonstrably inadequate in a particular state should not preclude the promulgation of a *state* standard if the latter will more adequately protect the health and safety of the local citizenry. The dissent does not intimate that minimum federal standards for the control of radioactive pollution are dispensable. However, it does seem to suggest that where stricter state standards are technologically feasible and desirable, they should be employed.

The allowance of concurrent "reasonable" state regulation of pollution, as suggested by the dissent, is not a bold or untried concept. In recent federal enactments which have imposed controls on environmental pollution, Congress has provided for such a "reasonableness test" within the statutory framework of its regulatory scheme. In the Air Quality Control Act of 1967,[67] for example, the Department of Health, Education, and Welfare (HEW) was authorized to develop air quality criteria[68] for the various "air quality control regions"[69] of the country. The states were then required to establish air quality standards and enforcement measures consistent with the federal criteria. If HEW determined that the state standards were unreasonable or inadequate to protect the public health and safety, or were inconsistent with the federal criteria, HEW was authorized to promulgate standards for the offending state.[70] The Act specifically provided that the states were not precluded "from adopting standards and plans to implement an air quality program which will achieve a higher level of ambient air quality than approved by the Secretary."[71] The Act's provision for concurrent federal and state regulatory authority was based upon a congressional finding that prevention and control of air pollution was substantially a *state* responsibility.[72]

[67] 42 U.S.C. §§ 1857-857*l* (Supp. V, 1970), as amended 42 U.S.C. §§ 1857-857*l* (1970).

[68] The Air Quality Control Act of 1967, ch. 360, § 107(b), 81 Stat. 490.

[69] The Air Quality Control Act of 1967, ch. 360, § 107(a)(2), 81 Stat. 490.

[70] The Air Quality Control Act of 1967, ch. 360, § 105(c)(2), 81 Stat. 489.

[71] The Air Quality Control Act of 1967, ch. 360, § 109, 81 Stat. 497.

[72] The Air Quality Control Act of 1967, ch. 360, § 101, 81 Stat. 485, codified at 42 U.S.C. § 1857(n)(3) (1970).

However, the Air Quality Act of 1967 preempted state regulation of "pollutant emissions from *new* motor vehicles . . . on the theory that a multiplicity of state standards . . . would make it impossible for the automakers to meet all of them."[73] The preemption provision of the 1967 Act indicates that although pollution control was *generally* within the ambit of state regulatory authority, local regulation of an interstate pollution problem (new motor vehicles) was undesirable. Analogously, since electrical power is transmitted interstate, and, since it is undoubtedly more vital to the national interest than motor vehicles, regulation of radioactive emissions from atomic power plants should also be denied to the states. Admittedly, the Air Quality Control Act of 1967, unlike the Atomic Energy Act, *expressly* preempts state regulation. However, as the majority in *Northern* pointed out, the legislative history of the Atomic Energy Act indicates an implied congressional intent to preempt.

The Clean Air Amendments of 1970[74] retained the preemption provision of the 1967 Act, and expanded that provision "to include aircraft and aircraft engines as well as fuels."[75] Prior to enactment, the Senate version of the 1970 Amendments waived application of the preemption provision to a state "upon a showing that a more stringent standard was necessary and essential for the state to achieve the ambient air quality standards applicable to regions within its jurisdiction."[76] However, the waiver provision was later rejected by the House-Senate conferees who prepared the final draft of the 1970 Amendments.[77] It may be inferred that the interstate nature of the pollution problem was once again a controlling consideration.

As noted in the discussion of the 1967 Act, Congress generally regarded the prevention and control of air pollution as substantially a state responsibility. However, this congressional position should not be construed as a conclusive validation of Minnesota's argument, in *Northern*, that the level of pollutants emitted by atomic energy plants should be controlled by the states for the health and safety of their citizens. As suggested by the *Northern* court, the states' interest in pollution control is outweighed by the national interest in uniform regulations that foster and encourage the development and use of atomic energy, promote the general welfare, and increase the standard of living.[78] This suggestion seems especially valid in light of the vital

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[73] Comment, The Clean Air Amendments of 1970: Better Automotive Ideas from Congress, 12 B.C. Ind. & Com. L. Rev. 571, 576-77 (1971). California was granted an exemption from the Act's preemption provision because it had "adopted standards . . . for the control of emissions from new motor vehicles" (42 U.S.C. § 1857f-6a(b) (1970) prior to enactment of the 1967 Act.

[74] 42 U.S.C. §§ 1857-857*l* (1970).

[75] 12 B.C. Ind. & Com. L. Rev. at 600.

[76] Id.

[77] Id.

[78] 447 F.2d at 1153.

contribution made by atomic-energy-produced electrical power to matters of national health, commerce and common defense.

In addition, Section 274(c)(1) of the Atomic Energy Act, which provides for exclusive federal regulation of "the construction and operation of any production or utilization facility,"[79] seems implicitly to preclude state regulation of radioactive pollutants emanating from atomic power plants. Since the level of radioactive discharges of an atomic power plant is determined, at least to some degree, by its physical layout and operation, state regulation of such discharges would necessarily infringe upon the exclusive federal authority granted to the AEC by Section 274(c)(1) of the Atomic Energy Act.

Unable to discern a direct conflict between federal and state regulation of radioactive pollution which would make compliance with both impossible, and noting that the Atomic Energy Act did not expressly provide for federal preemption of the field, the dissent also argued that since Congress could have *expressly* preempted the regulation of radioactive effluents, its failure to do so had not been an "oversight."[80] Therefore, the dissent argued, since the failure to expressly preempt was not an oversight, Congress had intended to permit states to take additional precautionary steps necessary to control air, water and land pollution whether caused by radiation or otherwise.

In making this determination, however, the dissent relied solely upon the absence of an express provision in the Act preempting state authority to regulate radiation hazards, and did not consider the relevant legislative history, which dictated a contrary result.[81] On its face, section 274(c)(1) may be construed as delegating to the AEC complete and exclusive control over "the construction and operation of any production or utilization facility," including the discharge of radioactive effluents from the facility. This interpretation is based on the fact that it is impossible to regulate a plant's radioactive discharges without also affecting the "construction and operation" of the facility. On the other hand, section 274(c)(1) may also be interpreted as granting the AEC only the authority to promulgate minimum requirements and that they are not barred from establishing stricter standards fashioned to meet peculiar local environmental situations.

Although it is a general rule of construction that statutory language takes precedence over legislative history, this rule only applies where the language is clear and unambiguous.[82] However, where, as in the Atomic Energy Act, the express provision of the statute permits more than one interpretation, the legislative history should be examined to remove the ambiguity.[83] By merely relying on the language of the statute, the dissent did not fully assess the intent of Congress.

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[79] 42 U.S.C. § 2021(c)(1) (1970).
[80] 447 F.2d at 1155.
[81] See textual discussion at pp. 819-20 supra.
[82] See Gemsco v. Walling, 324 U.S. 244 (1945).
[83] See Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 705-06 (1945).

It is submitted that the dissent misconstrued the scope of the federal regulatory scheme under the Atomic Energy Act. However, it is suggested that the minority opinion does indicate the need for Congress to clarify its intent by an amendment to the Act which would expressly declare that radioactive discharge standards are within the exclusive jurisdiction of the AEC. Such a clear statement would preclude the possibility of future judicial misinterpretation of the Atomic Energy Act and would avoid decisions tending to impede federal authority in a matter of considerable national interest.*

ALLEN N. ELGART

* The principal case was affirmed by the United States Supreme Court on April 3, 1972. — U.S. —, 40 U.S.L.W. 3479 (U.S. Apr. 4, 1972).