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Ninth Circuit Upholds Nuclear Power Moratorium Provision

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NOTES

NINTH CIRCUIT UPHOLDS NUCLEAR POWER MORATORIUM PROVISION

NUCLEAR POWER REGULATION—PREEMPTION: The Ninth Circuit holds that California laws imposing a moratorium on the construction of new nuclear power plants are neither in conflict with the objectives of the Atomic Energy Act nor within the area of regulation reserved exclusively to the Nuclear Regulatory Commission under the Act. *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission,* 659 F.2d 903 (9th Cir. 1981).

INTRODUCTION

In 1974, the California legislature passed the Warren-Alquist Act in furtherance of the state's responsibility to ensure a reliable source of electrical energy.[1] Toward that end, the Act established a five-member Energy Commission (the Commission) to coordinate, *inter alia,* energy planning and forecasting, resource management, and energy conservation and research. The Act also authorized the Commission to regulate the construction and operation of new nuclear power plants.

California's regulatory scheme for both nuclear and nonnuclear power plants is similar to those found in a number of other states.[2] The scheme conditions construction of any power plant upon the Commission's certification of both the proposed plant and the site.[3] Certification involves a two-step procedure. First, the utility planning to build a plant must submit a "notice of intention" containing information on the need for the plant, its proposed design, and the relative merits of at least three alternative sites.[4] The Commission reviews this data, holds hearings, consults other agencies and approves the notice of intention only if certain site requirements are met.[5] Second, the utility must submit an application to the Commission prior to actual construction, with further detailed information on the plant, including an assessment of its potential environmental

1. The Warren-Alquist State Energy Resources Conservation and Development Act, CAL. PUB. RES. CODE §§ 25000–25986 (West 1977 & Supp. 1980), also known as the Warren-Alquist Act.

2. Twenty-three states with regulatory schemes similar to California's filed *amicus* briefs and statements of interest in the consolidated actions considered by the Ninth Circuit.

3. Warren-Alquist Act § 25500, *supra* note 1.

4. *Id.* §§ 25502–25504.

5. The Commission must find at least two of the proposed sites acceptable or that one site is acceptable and the utility made a good faith effort to find an alternative. *Id.* § 25516.

impact.[6] After additional review and hearings, including the solicitation of rate structure and economic reliability recommendations from the state Public Utilities Commission, the Energy Commission issues a written decision. The decision contains findings which address, among other things, the efficiency of the proposed plant operation, its compliance with health, safety and environmental standards, and its conformity with projected power needs.[7]

The California legislature added several provisions to the Warren-Alquist Act in 1976 applicable solely to nuclear power plants.[8] These provisions, known as the Nuclear Laws, impose a moratorium on certification of new nuclear power plants until the Commission submits findings to the legislature that a federally approved method of nuclear waste disposal exists.[9] In *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission,*[10] several California utilities and other interested parties argued in consolidated appeals that the Nuclear Laws and various provisions of the Warren-Alquist Act conflicted with and were preempted by the Atomic Energy Act (AEA).[11] The courts below had invalidated portions of the Warren-Alquist Act on the grounds that the AEA preempts such state regulation in the area of nuclear power. On appeal, the Ninth Circuit held that the California laws were neither in conflict with the objectives of the AEA nor within the area of regulation reserved exclusively to the Nuclear Regulatory Commission (NRC) under the AEA. The court thus concluded that the AEA did not preempt the California laws at issue.[12]

HISTORICAL BACKGROUND OF THE AEA

The AEA of 1954 ended federal monopoly in the area of nuclear power by permitting private industry to build commercial reactors under licenses

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6. *Id.* §§25519-25521.
7. *Id.* §§25519-25523, 25216.3, 25402(d).
8. *Id.* §§25524.1-25524.3.
9. *Id.* §25524.2.
10. 659 F.2d 903 (9th Cir. 1981). The Ninth Circuit consolidated the cases of Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n., 472 F. Supp. 191 (S.D. Cal. 1980), and Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n., 489 F. Supp. 699 (E.D. Cal. 1980). In the former case, the plaintiffs challenged only §25524.2 of the Nuclear Laws, which imposes the moratorium on new nuclear plants. The plaintiffs included a nuclear engineer who had lost his job when the proposed nuclear power plant project on which he was working was abandoned, a branch of the American Nuclear Society, a San Diego building trades council, and two non-profit corporations, the Pacific Legal Foundation and the San Diego Coalition. In the latter case, two utilities brought a broad challenge to both the Nuclear Laws and the Warren-Alquist Act. The Ninth Circuit determined that the nuclear engineer did not have standing to sue and that the only provisions of the California laws which were ripe for review were §25524.2 (the moratorium provision) and §25503 (the section requiring that utilities file applications with at least three alternative sites for proposed plants).
11. 42 U.S.C. §§2011-2282 (1976 & Supp. III 1979).
12. Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 659 F.2d 903, 928 (9th Cir. 1981).

from the Atomic Energy Commission, the predecessor of the NRC.[13] Two sections of the AEA address division of regulatory responsibility between the states and the federal government. Section 271 provides that nothing in the Act shall be construed to affect state regulation of the generation, sale and transmission of electric power by nuclear facilities.[14] Congress included this section in the 1954 Act to ensure that the states' authority to regulate utilities, including electricity produced by nuclear power plants, would remain unchanged.[15]

In 1959, Congress added § 274 to the AEA in an effort to draw a more precise line between federal regulatory authority under the Act and state regulation.[16] Section 274 permits the states to assume regulatory responsibility for radioisotopes and less hazardous nuclear materials.[17] Pursuant to § 274(c)(1), however, the federal government retains sole responsibility for regulation of more hazardous activities, including the construction and operation of all nuclear reactors.[18] Section 274(k) qualifies this reservation of federal regulatory power with the proviso that "[n]othing in this section shall be construed to affect the authority of any state . . . to regulate activities for purposes other than protection against radiation hazards."[19]

Since 1959, courts have faced the question of how to accommodate these provisions of the AEA. Judicial inquiry has focused on the preemptive scope of § 274(c) and that section's interaction with § 274(k).

DECISIONS OF OTHER JURISDICTIONS

Courts that have considered the relationship between state and federal regulation of nuclear power have concluded that the AEA preempts only state regulation of radiation hazards. In *Northern States Power Co. v. Minnesota*,[20] the Eighth Circuit concluded that the AEA preempted a Minnesota statute which regulated the level of radioactive discharges from

13. The Energy Reorganization Act of 1974, 42 U.S.C. § 5814 (1976), dismantled the AEC and transferred its regulatory functions to the NRC.

14. 42 U.S.C. § 2018 (1976).

15. 100 CONG. REC. 12015, 12197, 12198–99 (1954) (remarks of Sen. Hickenlooper & Sen. Humphrey); H.R. REP. NO. 657, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 2775–2779.

16. 42 U.S.C. § 2021 (1976); S. REP. NO. 870, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2872–74, 2878–80.

17. In enacting § 274, Congress sought to increase cooperation between the states and federal government in order to permit states to assume independent regulatory jurisdiction over certain nuclear byproduct and source materials whose hazards were local and limited in nature. The provision applied principally to radioisotopes, because radiation hazard from such materials is similar to that from radiation sources already regulated by the states, e.g. X-ray machines and radium. S. REP. NO. 870, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2872–2883.

18. 42 U.S.C. § 2021(c)(1) (1976).

19. 42 U.S.C. § 2021(k) (1976).

20. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

nuclear power plants. The court found that §274 of the AEA vested the federal government with sole authority to regulate radiation hazards, but observed that "[t]he only logically acceptable reason for inclusion of subsection (k) within [§274] was to make it clear that Congress was not, by subsection (c) of [§274] in any way further limiting the power of the states to regulate activities, *other than radiation hazards* . . ." (emphasis in the original).[21] The court also noted that promotion of nuclear power was one of the congressional objectives behind the AEA, and that Minnesota's regulation was inconsistent with the purposes of the AEA because it inhibited nuclear power development.[22]

In *United States v. City of New York,*[23] the municipality objected to the operation of a research reactor at Columbia University because of the danger of accidental radiation leaks. The federal district court held that the city's attempt to prohibit operation of the reactor was "radiological regulation of the operation of nuclear reactors" and therefore preempted under §274 of the AEA.[24]

State courts, like their federal counterparts, have consistently interpreted the AEA as preempting only regulation of radiation hazards. The Michigan Court of Appeals, in *Marshall v. Consumers Power Co.*,[25] considered the question of whether a nuclear plant could be challenged on the basis of common law nuisance. Persons living near the plant alleged that the plant's emergency core cooling system was ineffective. The plaintiffs complained further that steam, fog and ice created by the plant's cooling pond caused damage to their property and created safety hazards. The court held that §274 of the AEA preempted consideration of radiological matters such as the core cooling system, but that §274(k) provided for state consideration of nonradiological matters. Thus, plaintiffs could challenge the plant on a theory of common law nuisance. The

21. 447 F.2d at 1149–50. *See also* Commonwealth Edison Co. v. Pollution Control Bd., 5 Ill. App.3d 800, 284 N.E.2d 342 (1972), where the court found the AEA preempted a state statute regulating the level of radioactive discharge from a nuclear plant; and, N.J. Dep't of Evnt'l Protection v. Jersey Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976), where the court held that the state regulation at issue conflicted with and was thus preempted by the AEA, noting however, that not all state regulation was preempted.

22. 447 F.2d at 1154. The Northern States court had no occasion to consider state regulation other than the clearly preempted regulation of radioactive hazards before it. Although the court mentioned in dicta that the state regulation "might conceivably be so overprotective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy," *id.* at 1154, the case does not stand for the proposition that states can never take actions which may inhibit the use of nuclear power. The United States Supreme Court in Train v. Colo. Pub. Interest Research Group, 426 U.S. 1 (1976), suggested that the Northern States result would have been different had the state been regulating thermal pollution rather than radioactive discharges. *Id.* at 16–17 & n. 14.

23. 463 F. Supp. 604 (S.D. N.Y. 1978).

24. *Id.* at 612.

25. 65 Mich. App. 237, 237 N.W.2d 266 (1975).

appellate court, however, agreed with the trial court's finding that plaintiffs had failed to allege facts sufficient to constitute a present or definite future nuisance.[26]

The California Supreme Court determined that states could restrict the location of nuclear reactors in *Northern California Association to Preserve Bodega Head & Harbor, Inc. v. Public Utility Commission*.[27] The court held that the state could restrict plant construction in earthquake zones because the restriction involved "safety considerations in addition to radiation hazards."[28]

Thus, the courts have consistently interpreted § 274 of the AEA to preempt only the regulation of radiation hazards.[29] Section 274(k) leaves states free to exercise traditional police powers over nonradiation hazards to protect the health, safety and welfare of their citizens.

THE *PACIFIC LEGAL FOUNDATION* DECISION

In *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, the Ninth Circuit concluded, in line with decisions in other jurisdictions, that Congress intended to permit state regulation of nuclear power for purposes other than protection against radiation hazards.[30] The court began its analysis of the preemption question with a review of the legislative history behind the AEA, focusing on the question of relative federal and state authority under the Act. Concluding that states could regulate apart from radiation hazards, the court then examined the California statutes at issue to determine whether they addressed radiation hazards. The court found that the challenged laws addressed economic concerns rather than radiation hazards and therefore were permissible. Finally, the court considered whether the challenged statutes, while permissible in substance, conflicted with and were therefore preempted by the AEA.

Analysis of Pertinent AEA Provisions

The utilities in *Pacific Legal Foundation* argued that § 274(c) of the AEA gives the NRC broad, exclusive authority to regulate the construction and operation of nuclear plants. This broad grant of authority to the federal

26. *Id.* 237 N.W.2d at 283.

27. 61 Cal.2d 126, 37 Cal. Rptr. 432, 390 P.2d 200 (1964).

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

29. *See also* State *ex rel.* Util. Consumers Council v. Public Serv. Comm'n, 562 S.W.2d 688 (Mo. App. 1978); Public Interest Research Group v. Dep't of Envt'l Protection, 152 N.J. Super. 191, 377 A.2d 915 (1977); Van Dissell v. Jersey Cent. Power & Light Co., 152 N.J. Super. 391, 377 A.2d 1244 (1977); Cleveland v. Public Util. Comm'n, 64 Ohio St.2d 209, 414 N.E.2d 718 (1980).

30. 659 F.2d at 921.

agency preempts the moratorium provision of the Nuclear Laws and the three-site requirement for certification under § 25503 of the Warren-Alquist Act. The Ninth Circuit construed § 274(c) more narrowly and stressed that it must be read in conjunction with §§ 271 and 274(k) of the AEA.

The court looked to the legislative history of the AEA to determine the intent of Congress in passing §§ 271 and 274. The court found congressional intent with respect to § 271 clear: that section was meant to preserve the states' traditional authority over electrical utilities, including decisions as to whether the state needed additional power plants, nuclear or otherwise.[31]

Relying on the committee report for § 274(k), the court found congressional intent behind that provision nearly as clear. The report explained that "[t]his subsection is intended to make it clear that the bill does not impair the State authority to regulate activities of [NRC licensed plants] for the manifold health, safety, and economic purposes other than radiation protection."[32]

The Ninth Circuit thus found that the specific nonpreemptive language of §§ 271 and 274(k) controlled the general language of § 274(c) and concluded that Congress intended to preempt only state regulation of radiation hazards, not state regulation for other purposes.[33] The court found support for its reading of the statutes in "the consistent position of the NRC, the AEC, and the courts, that states are permitted to regulate in such areas as economics and the environment."[34] The court found additional support for its holding in the case of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council.*[35] In that case, the United States Supreme Court cited § 274(k) of the AEA to support the following observation:

> There is little doubt that under the Atomic Energy Act of 1954, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power. . . . The [NRC's] prime area of concern in the licensing context, on the other hand, is national security, public health and safety.[36]

The Moratorium Provision

Having concluded that the AEA preempted only regulation of radiation hazards, the court turned to the question of whether the moratorium

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31. *Id.*

32. *Id.* at 921–22, *quoting* S. REP. NO. 870, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2872, 2882.

33. *Id.* at 922. The court noted, however, that if state regulations conflicted directly with NRC regulations, the AEA would preempt them even though the state had enacted the provisions for purposes other than protection against radiation hazards. *See infra* text accompanying notes 49–54.

34. *Id.*

35. 435 U.S. 519 (1978).

36. *Id.* at 550.

provision of the Nuclear Laws sought to regulate such hazards. In construing the moratorium provision, the court noted that the statute was part of a legislative package enacted as an alternative to Proposition 15, a proposed voter initiative. Proposition 15 dealt with a range of perceived problems with nuclear power, some of which were safety related and some of which were economic.[37]

Proposition 15 would have banned any nuclear plants in California unless the state legislature found that nuclear wastes could be disposed of "with no reasonable chance . . . of . . . escape of . . . radioactivity . . . which will adversely affect . . . the people . . . of California."[38] Thus, had Proposition 15 become law, the California legislature would have had to evaluate the safety of waste disposal methods—an action which would clearly conflict with § 274(c)'s reservation of radiation hazard regulation to the federal government.

The Ninth Circuit relied heavily upon a report published by the California Assembly Committee on Resources, Land Use, and Energy in distinguishing the Nuclear Laws from Proposition 15.[39] According to the report, the Committee saw the lack of a federally approved waste disposal method as one "largely economic or the result of poor planning, *not* safety-related" (emphasis in original).[40] The Committee reasoned that the absence of an approved waste disposal method created a "clog" in the nuclear fuel cycle due to continued production of waste materials and current storage space limitations.[41] The Committee report emphasized that one of the "major distinguishing features" between Proposition 15 and the moratorium provision was that "[w]aste disposal *safety* is not directly addressed by the [Laws], which ask only that a method be chosen and accepted by the federal government" (emphasis in original).[42]

Based on the Committee report, the Ninth Circuit concluded that the purpose of the moratorium provision was other than protection against radiation hazards and therefore not preempted by the AEA. The court observed:

> 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

37. 659 F.2d at 924.
38. Proposition 15, § 1 (Proposed Cal. Gov. Code § 67503(b)(2)).
39. California Assembly Committee on Resources, Land Use, and Energy, *Reassessment of Nuclear Energy in California: A Policy Analysis of Proposition 15 and Its Alternatives* (1976).
40. *Id.* at 18.
41. *Id.* at 27–28.
42. *Id.* at 156.

authorized under sections 271 and 274(k) of the Atomic Energy Act of 1954.[43]

The Alternative Site Provision

The Ninth Circuit also concluded that §25503 of the Warren-Alquist Act (requiring utilities to submit three alternative sites for proposed plants) was unrelated to protection against radiation hazards and therefore not preempted by the AEA.[44] In reaching this decision, the court relied on testimony presented at the congressional hearings on §274. This testimony stressed that §274(k) would give courts latitude to sustain state and municipal zoning requirements for purposes other than control of radiation hazards.[45]

The court also relied on the NRC Authorization Act for Fiscal Year 1980,[46] which explicitly recognized the states' authority to regulate in the areas of land use and nuclear plant siting. An NRC ruling provided further support for the court's decision. The ruling recognized that states "retain the right . . . to preclude construction on such bases as . . . the environmental unacceptability of the proposed facility or site."[47]

Conflict with Federal Purposes and Objectives

Having concluded that Congress did not intend to preempt state regulations of the type at issue, the court next considered whether those regulations conflicted with the AEA. The United States Supreme Court has held that a conflict with federal law exists if compliance with both state and federal regulations is impossible or state regulations hinder achievement of congressional objectives.[48, 49]

The utilities in *Pacific Legal Foundation* contended that the Nuclear Laws impermissibly interfered with the federal goal of promoting nuclear power as expressed in the AEA. The court concluded that Congress intended to strike a balance between state and federal regulation of nuclear power, rather than promote nuclear power at all costs:

> Inherent in the states' regulatory authority is the power to keep nuclear plants from being built, if the plants are inconsistent with the states' power needs, or environmental or other interests. . . . A part of the state's power to issue certificates of public convenience and necessity

43. 659 F.2d at 925.
44. *Id.*
45. *Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Committee on Atomic Energy,* 86th Cong., 1st Sess., 500 (1959).
46. Pub. L. No. 96-295, § 108(f), 94 Stat. 780 (1980).
47. Consolidated Edison Co. of N.Y. (Indian Point Station, Unit No. 2), 7 N.R.C. 31, 34 (1978).
48. Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142–43 (1963).
49. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

> is the power to deny certification for an unnecessary or uneconomic nuclear plant. These state powers, recognized by sections 271 and 274(k), are inconsistent with a congressional goal of promoting nuclear power at all costs.[50]

The court looked to the entire AEA as well as to legislation passed subsequent to that act for indications of congressional intent regarding promotion of nuclear power. In the Energy Reorganization Act of 1974, the court found evidence of congressional concern that too great a bias existed in favor of nuclear energy development within the Energy Research & Development Administration (ERDA), the federal agency responsible for promotion of all sources of energy.[51] Moreover, Congress also passed the Federal Nonnuclear Energy Research and Development Act in the same year to pursue comprehensive nonnuclear energy research.[52] In the Clean Air Act Amendments of 1977, Congress gave states the express authority to regulate radioactive air emissions from nuclear plants and to set emission standards more stringent than those imposed by the NRC.[53]

The Ninth Circuit concluded that, in light of the congressional concerns demonstrated in such post-AEA legislation, the California laws at issue did not conflict with congressional goals and objectives. Rather, the AEA and the other federal statutes cited established a careful balance between state and federal regulatory responsibilities: "Congress has not 'unmistakenly . . . ordained' a goal of promoting nuclear power, but has instead regarded nuclear power as one option which the states may choose."[54]

CONCLUSION

The *Pacific Legal Foundation* decision is carefully reasoned and consistent with other opinions concerning state and federal authority under the AEA. As such, it provides a powerful weapon for the arsenal of antinuclear groups. The decision makes it clear that while states are prohibited from regulating with respect to the adequacy of waste disposal methods, they can achieve significant regulation of nuclear power development through legislation based on economic considerations—at least until such time as the federal government approves a waste disposal method.

The uncertainties associated with nuclear waste management are a

50. 659 F.2d at 926.

51. 42 U.S.C. § 5801(b) (1976) directs ERDA to develop all sources of energy, including nuclear but only "consistent with warranted priorities."

52. 42 U.S.C. §§ 5901–5917 (1976).

53. 42 U.S.C. §§ 7416, 7422 (Supp. III 1979). These provisions overturn the holding of the Northern States Power decision, discussed *supra* at note 22, in the specific context of regulating radioactive air pollutants.

54. 659 F.2d at 928.

current topic of intense debate and controversy.[55] As long as uncertainty shrouds the nuclear waste management issue, federal approval of a waste disposal method is unlikely. In the meantime, carefully drafted legislation along the lines of California's moratorium provision could have the practical effect of putting a halt to nuclear power development. The legislative history of the statutes at issue in *Pacific Legal Foundation* makes clear that the California legislature was cognisant of the preemptive force of §274(c) of the AEA and carefully drafted its legislative statement of purpose to avoid preemption. The committee report on the moratorium provision gave sufficient emphasis to economic considerations to render the provision a legitimate exercise of state police power, notwithstanding the disingenuous claim that the moratorium provision was not concerned with the safety of waste disposal methods.

Pacific Legal Foundation and the California laws at issue in the case provide those opposed to nuclear power with a well-defined and compelling strategy for temporary curtailment of nuclear power development. Moreover, if and when the federal government approves a waste disposal method, inflation and excessive interest rates may continue to make nuclear power an uneconomical source of energy. Thus, the economic rationale underlying the Ninth Circuit's decision could prove to be of major significance to nuclear power proponents and opponents alike.

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55. For a comprehensive overview of the uncertainties involved in nuclear waste management, *see Symposium on Nuclear Waste Management*, 21 NAT. RES. J. 693–894 (1981).