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On August 7, 1977, the Congress passed the Clean Air Act Amendments of 1977 [Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 amending 42 U.S.C. § 7401 (1977)]. The amendments place regulation of radioactive air pollutants under the authority of the Environmental Protection Agency (hereafter EPA) and ultimately, through provisions of the Clean Air Act, with the states [Clean Air Act, 42 U.S.C. §§ 7408, 7409, 7410, 7416, 7422 (Supp. 1 1977)]. By placing regulation of radioactive air pollutants under the authority of the EPA and the states, Congress has terminated the Nuclear Regulatory Commission's exclusive control over the regulation of all radioactive emissions from nuclear power facilities [Northern States Power Co. v. Minnesota, 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). (Here the 8th Circuit held that the NRC had exclusive power to regulate radioactive emissions from nuclear power facilities.)]. The amendments reverse a number of judicial decisions which have held that the NRC has exclusive power to regulate radioactive emissions (Id. 447 F.2d at 1154). This reallocation of power from the domain of the NRC to the EPA and the states suggests that there may be a trend toward more state involvement in other health and safety areas involving nuclear power facilities. By providing the states with the power to regulate radioactive air emissions, Congress may have provided the states with an effective means to curb future expansion of nuclear facilities within their borders.

To understand the impact of the 1977 amendments, a short history of atomic energy regulation is helpful. The atomic energy program in the United States had its roots in the Manhattan Project which created the atomic bombs used in World War II [Murphy, Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption, 76 Colum. L. Rev. 392, 394 (1976)]. At this time, the federal government had exclusive control over every aspect of atomic energy use (Id. at 395). This exclusive control was maintained when regulatory power over atomic energy was formally vested in the Atomic Energy Commission (hereinafter AEC) through the Atomic Energy Act of 1946 [Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1946)]. In 1954, whenthe Atomic Energy Act was rewritten to provide for the private ownership of atomic reactors [Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919, as amended 42 U.S.C. §§ 2011-2296 (1970)], the exclusive regulatory control was again maintained by the AEC (Murphy, supra note 5, at 397-98).

By 1959, the use of atomic energy had grown sufficiently to cause concern among many states over the hazards of radiation. The states pressured for some role in the regulatory process and Congress responded with the 1959 amendment to the Atomic Energy Act [Act of September 23, 1959, Pub. L. No. 86-373, 73 Stat. 688, as amended by 42 U.S.C. § 2021 (1970)]. Through this legislation, the AEC was authorized to hand certain limited regulatory functions over to the states through formal agreements and according to specific procedures [42 U.S.C. § 2021(b) (1970)]. It is clear from the legislative history of the amendment that the only regulatory power the states were intended to have resulted by entering into an agreement with the AEC (S. Rep. No. 870, 86th Cong., 1st Sess., reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2872, 2879).

Despite the straightforward language of the 1959 amendment and its legislative history, a number of states began to pass their own laws purporting to regulate various aspects of nuclear energy use. Finally, in 1971, a dispute arose between a power company and the state of Minnesota. In Northern States Power Co. v. State of Minnesota [447 F.2d 1143 (1971)], Northern applied to the Minnesota Pollution Control Agency for a waste disposal permit to allow it to discharge wastes into an adjacent river. The agency issued the permit subject to its own standards which regulated the amount of radioactive discharge that was permitted. These agency standards were more stringent than those imposed by the AEC over the same subject matter. The plant had, in fact, complied with all federal requirements (Id. at 1145).

Northern went to court seeking a judgment declaring that Minnesota was without authority to regulate discharges of radioactive wastes to the environment since the field of regulation of radioactive hazards was preempted by the Atomic Energy Act. The court agreed with Northern and held that the AEC did have exclusive authority to regulate the construction and operation of nuclear power plants "which necessarily includes regulation of the levels of radioactive effluents discharged from the plant" [Id. at 1154. The opinion of the 8th Cir. was affirmed per curium by the Supreme Court. 405 U.S. 1035 (1972)].

At its narrowest, Northern concerns only radioactive discharges into waterways, but the wording of the holding has been read far more broadly. Thus, Northern has stood for the proposition that the AEC (today the Nuclear Regulatory Commission) [(The Energy Reorganization Act of 1974 abolished the AEC and created the NRC to handle regulation and licensing matters.) 42 U.S.C. §§ 5801-91 (Supp. IV, 1974)] has exclusive power to regulate all radioactive discharges from nuclear power plants [Train v. Colorado Public Interest Research Group, 426 U.S. 1, 17-18 (1976)]. This holding has been followed in later state court decisions [See State v. Jersey Central Power & Light, ____ N.J. 351 A.2d 337 (1976)].

The presumed autonomy of the NRC in this field was reinforced in Train v. Colorado Public Interest Research Group [426 U.S. 1 (1976)]. The Court held here that despite the broad mandate given the EPA to regulate water pollutants under the Federal Water Pollution Control Act [33 U.S.C. § 1251 (Supp. 1 1977)], the grant of authority did not reach materials

regulated by the NRC [426 U.S. at 24-25 (1976)]. This excluded regulation of all radioactive discharges into waterways from the jurisdiction of the EPA

Until 1977, few would have disputed that the NRC enjoyed a unique position of power in the field of radiation regulation. Then, on August 7, 1977, the Clean Air Act Amendments of 1977 became law. To fully appreciate the implications of the amendments, an introduction to the workings of the Clean Air Act is appropriate.

42 U.S.C. § 7408 requires the Administration of the EPA to publish a list of air pollutants which may be hazardous to the public health and safety and to set air quality criteria for each. 42 U.S.C. § 7422, a provision enacted in the 1977 amendments, directs one Administrator to include dangerous radioactive air emissions on the list required by § 7408, thus calling for appropriate air quality criteria. The Administrator under 42 U.S.C. § 7409 is required to publish national ambient air quality standards for each air pollutant for which air quality criteria have been issued under § 7408. 42 U.S.C. § 7410 requires each state to devise a plan to implement, maintain and enforce national primary ambient air quality standards for air pollutants set under § 7409. Section 7422 authorizes the Administrator to include radioactive air pollutants with all other air pollutants for which ambient air quality standards are set, thus bringing them within the states' control under § 7410. Finally, and perhaps most significantly, is the effect of 42 U.S.C. § 7416 which allows a state to set standards of its own as stringent or more stringent than those set by the EPA.

The impact of these sections on the traditional power of the NRC to control radioactive discharges is obviously enormous. First, the EPA is given independent authority to set standards and, second, the states may either adopt EPA standards in their implementation plans or set their own standards that are more stringent than the EPA standards. The 1977 Amendment reverses the results of the Northern with respect to radioactive discharges to the air [123 Cong. Rec. H8671 (daily ed. Aug. 4, 1977) (remarks of Mr. McCormack and Mr. Rogers)]. The legislative history behind § 7422 supports the conclusion that the states have unexpectedly been handed unprecedented power to control radioactive pollutants and theoretically the future growth of the nuclear industry itself (Id). at 8663. By allowing states to set standards more stringent than those set by the EPA, a state that wished to ban all nuclear power plants from its borders need only set emission standards which technology is incapable of achieving.

The amendments create implications of the future role of the states in regulating the radioactive hazards from nuclear power plants. Whether this amendment is the first step toward reallocating power to the states in the field of radiation hazard regulation is difficult to determine at this point. Perhaps the Congress will be watching closely to see how responsibly and competently the states use their newfound power and base future decisions on these performances. These amendments will be welcomed by those who are most likely to be effected by the health and safety impacts of Nuclear activities and maybe should be the ones who regulate these aspects of the activity.