

F. Conclusion

Despite industry opposition and shifting political winds, Congress managed to enact a surprisingly strong piece of legislation. The "superfund" begins where the Resource Conservation and Recovery Act stopped. Systematic regulation and tracking of hazardous wastes are now backed by a funding mechanism for corrective action. Still needed, however, are devices to assure that those responsible for hazardous substance injuries will bear the costs and that those harmed will receive compensation.¹⁴⁶

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 begins to deal with a massive social and environmental problem. Resolution of that problem must await further changes in attitude, practices, and the law.

II. DEVELOPMENTS IN NUCLEAR

WASTE DISPOSAL..... STEVEN SIMONS

A. Introduction

The proper role of states in nuclear waste disposal is an increasingly debated legal issue.¹⁴⁷ Under the Atomic Energy Act of 1954,¹⁴⁸ the federal government is responsible¹⁴⁹ for management and regulation of high-level nuclear waste disposal.¹⁵⁰ Nevertheless,

146. Environmental Action lobbyist Marchant Wentworth labeled the Act "a property bill and not a victims bill." 11 ENVIR. REP. (BNA) 1232 (1980). Similarly, Senator George Mitchell (R-Maine) found the law deficient "because while it provides for the cleanup of places and compensation for damage to things, it provides nothing for what is the most important part of the problem, damage to people." 11 ENVIR. REP. (BNA) 1097 (1980). Upon CERCLA's passage, both Rep. James Florio (D-NJ and sponsor of H.7020) and Rep. John La Falce (D-NY and representing the Love Canal district) indicated they would seek victim compensation legislation in the Ninety-seventh Congress. 11 ENVIR. REP. (BNA) 1261 (1980).

147. See 65 KY. L. J. 917, 930 (1977).

148. 42 U.S.C. §§ 2011-2296 (1976).

149. *Id.* at § 2021(C).

Although the Act makes the federal government responsible for high-level waste regulation, some aspects of nuclear regulation may be delegated. See Swan, *Management of High-Level Radioactive Wastes: The AEC and the Legal Process*, 1973 LAW & SOC. ORD. 263, 286.

150. High-level wastes are a by-product of the reprocessing of spent fuel for further use as nuclear fuel. Linker, Beers, & Lash, *Radioactive Wastes: Gaps in the Regulatory System*, 56 DEN. L.J. 1, 5 (1979) [hereinafter cited as *Gaps in the Regulatory System*.] Federal regulations define high-level wastes as "those aqueous wastes resulting from the operation of the first cycle solvent extraction system, or equivalent,

states desire a role in permanent repository siting decisions.¹⁵¹ State efforts to regulate repositories face invalidation since federal law preempts nuclear energy matters.¹⁵² Without the cooperation of state and local governments, however, federal development of permanent disposal facilities is politically impossible.¹⁵³ This conflict illustrates the need for meaningful state participation in siting decisions.

B. *State Interests and State Exclusion from Decision Making*

Existing federal law fails to provide effective state involvement in nuclear waste disposal.¹⁵⁴ High-level waste disposal is specifically excluded from state regulation.¹⁵⁵ Federal agency policy emphasizes the crucial importance of state participation in siting decisions.¹⁵⁶ Yet, federal agencies frequently fail to inform states of the intended use of the site at the inception of the site exploration.¹⁵⁷ In addition, federal regulatory bodies often provide insufficient responses to state concerns.¹⁵⁸ Consequently, local opposition may develop and result

and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels." 10 C.F.R. § 50 app. F. (2) (1981). This Article does not examine problems presented by the disposal of military wastes.

151. See generally Comment, *Federal Preemption of State Laws Controlling Nuclear Power*, 64 GEO. L.J. 1323 (1976). For the reasons prompting states to challenge exclusive federal regulation see notes 153-67 and accompanying text *infra*.

152. See *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972); notes 173-77 and accompanying text *infra*.

153. Seiberling, *Radioactive Waste Disposal: The Emerging Issue of States' Rights*, 13 AKRON L. REV. 261, 273 (1979) [hereinafter cited as *The Emerging Issue*].

154. See Note, *Nuclear Waste Management: A Challenge to Federalism*, 7 ECOLOGY L.Q. 917, 919-20, 931-36 (1979) [hereinafter cited as *A Challenge to Federalism*].

155. Atomic Energy Act § 274(c), 42 U.S.C. § 2021(c) (1976).

156. The Department of Energy (DOE) is illustrative of the need for state cooperation and participation. DOE is required by statute to give appropriate consideration to the needs of states where proposed actions conflict with a state energy plan. 42 U.S.C. § 7113 (Supp. III 1979). In creating the DOE Congress sought to establish effective mechanisms to allow direct participation of governments in energy policy making. S. Rep. No. 164. 95th Cong., 1st Sess. 2, 3, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 854, 874. See generally *Informational Hearings on Nuclear Fuel Reprocessing and Waste Disposal Before the California Energy Resources Conservation and Development Commission* 12-13 (Jan. 31, 1977) (statement of Dr. George W. Cunningham).

157. See *A Challenge to Federalism*, *supra* note 154, at 933-36. ERDA did not clarify whether proposed drilling in Michigan was exploratory in nature or whether the site had been selected for waste disposal. *Id.* at 934.

158. See generally SUBCOMM. ON ENERGY AND THE ENVIRONMENT OF THE COMM. ON INTERIOR AND INSULAR AFFAIRS OF THE U.S. HOUSE OF REPRESENTA-

in termination of the project.¹⁵⁹

Federal efforts to manage temporary storage of radioactive wastes have proven technically inadequate.¹⁶⁰ Numerous spills and leaks have occurred at temporary disposal facilities.¹⁶¹ Such failures diminish public confidence in the federal government's ability to devise a safe permanent disposal scheme.¹⁶² As a result, state legislatures often enact statutes which seek to exclude waste repositories.

States claim an interest in site selections because of potentially severe rational health and safety effects.¹⁶³ Many states enacted laws designed to prevent the federal government from locating repositories within those states. Some have attempted to do so by prohibiting siting of repositories within the state unless their ban is overridden by

TIVES, PROPOSED NUCLEAR WASTE STORAGE IN MICHIGAN 2-3, 95th Cong., 1st Sess., (Comm. Print 3 1977). A local congressman questioned the safety of an AEC project in Kansas after AEC failed to give satisfactory responses. *Id.*

159. Carter, *Radioactive Wastes: Some Urgent Unfinished Business*, 195 SCIENCE 661, 665 (1977) (describing that ERDA decided to suspend field studies when confronted with state and local opposition to exploratory work). See generally *A Challenge to Federalism*, *supra* note 154, at 934.

160. The history of waste management is a record of errors and disappointments. See generally *A Challenge to Federalism*, *supra* note 154 at 923 (urging that the federal government's poor record should move the federal government to adopt as extensive regulatory control of waste management as has been adopted in other areas of nuclear energy use); *Gaps in the Regulatory Framework*, *supra* note 150, discussing the serious flaws in the federal government's regulatory framework for nuclear waste).

Uncertainty over the proper disposal techniques and the risks inherent in disposal methods, leads some commentators to favor postponement of continued waste generation. Some go so far as to urge a ban on the construction of new nuclear power plants. *A Challenge to Federalism*, *supra* note 154, at 917. Even if new plant construction is halted and presently operating plants are shut down, the wastes that will be produced through defense and research activities will present a disposal problem. *Nuclear Waste and Facility Siting Policy: Hearings on S. 594, S. 685, S. 701, and S. 797 Before the Comm. on Energy and Natural Resources Part I*, 96th Cong., 1st Sess. 42 (1979) (statement of John V. Evans).

161. See *Gaps in the Regulatory System*, *supra* note 150, at 7-11.

162. See Lash, *A Comment on Nuclear Waste Disposal*, 4 J. CONTEMP. L. 267, 278 (1978) (citizens in states where site exploration announced perceive that ERDA's program is inadequate).

163. See Helman, *Pre-emption: Approaching Federal-State Conflict Over Licensing Nuclear Power Plants*, 51 MARQ. L. REV. 43, 59-60 (1967) (arguing that the interest of a state in public health and safety is so great that the state should not be precluded from exercising regulatory authority); Recent Cases, 25 VAND. L. REV. 418, 424 (1972) (reasoning that states have a pressing and legitimate interest in protecting health and safety of citizens); Note, *Nuclear Waste Disposal: A Federal and State Problem*, 65 KY. L.J. 917, 931 (1977) (noting that local citizens feel that local officials are better able to protect their health and safety interests).

a vote of Congress.¹⁶⁴ Others states condition siting on approval by a state agency, or one or both houses of the state legislature.¹⁶⁵ Still others prohibit the disposal within their boundaries of high-level waste generated in other states.¹⁶⁶ Enactment of such restrictions or bans on repositories illustrates state dissatisfaction with present federal practices.¹⁶⁷

Despite such efforts at restricting repository site selection, states do not possess legal authority to regulate or exclude repositories.¹⁶⁸ Under federal law waste facilities must be located on federally owned land.¹⁶⁹ The doctrine of federal property¹⁷⁰ restricts state regulation of activities on federal land.¹⁷¹ States may regulate federal property

164. Maryland, for example, forbids storage within the state of nuclear wastes, "except as expressly otherwise required by Federal Law." MD. ANN. CODE, art. 43, § 689C (Supp. 1981). See also MASS. GEN. LAWS ANN. chap. 21D, § 7 (West Supp. 1981).

165. See, e.g., ALASKA STAT. § 18.45.025 (Michie Supp. 1980) (forbids siting of nuclear waste facility unless (1) permit granted from Department of Environmental Conservation, (2) legislature approves permit by concurrent resolution, (3) local government having jurisdiction over the territory in which the repository is to be sited, approves the permit, and (4) the governor approves the permit); CONN. GEN. STAT. § 22a-135 to -137 (Supp. 1981) (general assembly must find no "significant adverse effect" on health before siting will be allowed); KY. REV. STAT. § 211.852 (Supp. 1980) (siting conditioned on approval by Departments of Human Resources and Natural Resources & Environmental Protection, filing of environmental impact statement, conduction of public hearings in the affected county, and approval by majority vote of both houses of the state legislature).

166. See, e.g., ARIZ. REV. STAT. ANN. §§ 30-691 to -696 (Supp. 1980) (prohibits storage of waste from outside the state); COLO. REV. STAT. § 25-11-201 (Supp. 1980) (no out of state waste may be stored unless governor and general assembly approve).

167. See REPORT TO THE PRESIDENT BY THE INTERAGENCY REVIEW GROUP ON NUCLEAR WASTE MANAGEMENT (TID-29442) 3 (1979) [hereinafter cited as IRG REPORT] (report arguing that views favoring state veto legislation are a product of dissatisfaction with the federal government's historic approach).

168. See notes 173-76 and accompanying text *infra* (discussion of federal preemption).

169. 10 C.F.R. § 50 app. F(3) (1981).

170. The doctrine of federal property is rooted in U.S. CONST. art. I § 8 cl. 17. The doctrine expressed in clause 17 provides that sites of governmental operations are the property of the United States when control is essential to federal activities. See *S.R.A. Inc. v. Minnesota*, 327 U.S. 558, 564 (1946); Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 297 (1976) (finding that the property to which clause 17 applies must be purchased with the state's consent).

171. Jaksetic, *Legal Aspects of Radioactive High-Level Waste Management*, 9 ENV'T'L L. 347, 395 (1979) (if the United States has exclusive jurisdiction under clause 17, any state attempt to regulate property is precluded).

only when Congress clearly and unambiguously authorizes such regulation.¹⁷² No state regulation of federal property is permitted under present law.

Federal law governing nuclear energy matters preempts state efforts to frustrate the congressional goal of permanent waste disposal.¹⁷³ State regulation is preempted by Section 274 of the Atomic Energy Act¹⁷⁴ and Nuclear Regulatory Commission regulations.¹⁷⁵ In *Northern States Power Co. v. Minnesota*,¹⁷⁶ the Eighth Circuit held that Congress asserted exclusive federal authority over high-level

172. *Hancock v. Train*, 426 U.S. 167 (1976). See also *A Challenge to Federalism*, *supra* note 154, at 937.

173. The doctrine of preemption arises from the supremacy clause of the Constitution which elevates federal law above that of the states. U.S. CONST. art. VI, cl. 2. Note, *Preemption Under the Atomic Energy Act of 1954: Permissible State Regulation of Nuclear Facilities Location, Transportation of Radioactive Materials and Radioactive Waste Disposal*, 11 TULSA L.J. 397, 397 (1976) [hereinafter cited as *Permissible State Regulation*].

The essence of the supremacy clause is that the federal government may preclude state regulation of matters within the realm of the federal government's enumerated powers. *Campbell v. Hussey*, 368 U.S. 297 (1961). The federal law regulating nuclear energy is based on an enumerated power—the power to regulate interstate commerce. Only the commerce power could support the broad federal preemption found in *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). For a discussion of preemption in the context of nuclear power, see Parenteau, *Regulation of Nuclear Power Plants: A Constitutional Dilemma for the States*, 6 ENV'T L. 675, 699-705 (1976) [hereinafter cited as *A Constitutional Dilemma*].

174. Atomic Energy Act § 274(c), 42 U.S.C. § 2021(c) (1976).

The Atomic Energy Act presents a situation where the existence of a comprehensive federal plan over a particular area raises a spectre of preemption. See *Permissible State Regulation*, *supra* note 173, at 397.

The Eighth Circuit in *Northern States Power Co. v. Minn.*, 447 F.2d 1143 (8th Cir. 1971) *aff'd mem.*, 405 U.S. 1035 (1972), relied on four factors to infer preemption of nuclear energy: (1) the statutory language of the 1959 Amendments to the AEA made it clear Congress intended AEC to possess sole authority; (2) the existence of federal regulations aimed at protecting health and safety; (3) the regulation of radioactive waste requires a uniform framework by a national agency; and (4) independent state licensing would block the effectiveness of AEC. *Id.* at 1146-47. See also *Recent Cases*, 37 Mo. L. REV. 106, 108-15 (1972).

Contra, Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?* 7 *Ecology L.Q.* 594, 679 (1979) (degree to which Congress preempted states from regulating for purposes of protection from radiation hazards is still an open question).

175. See Murphy & La Pierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392 (1976).

176. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

waste disposal through enactment of the Atomic Energy Act (AEA).¹⁷⁷ Thus, states are constitutionally precluded from regulating or excluding repositories.

C. *Proposed Legislation*

During the Ninety-Sixth Congress several pieces of legislation were introduced which could have removed obstacles preventing states from effectively regulating disposal facilities. Congress will be considering similar legislation in its Ninety-Seventh session.¹⁷⁸ This section examines the legislation proposed during the past Congress in order to discern potential changes in the role of states for future siting decisions.

Congressional proposals of permanent waste repository legislation fall into three basic categories: (1) proposals failing to explicitly

177. *Id.* at 1154.

178. Several bills have been introduced during the 97th Congress addressing the problems associated with nuclear waste repository siting. Senate Bill 1662 provides for the selection of three sites for "testing and evaluation" (T&E) facilities by 1984, with the President designating a final site by 1985. The bill anticipates the site will be operational by January 1, 1981. The Bill recognizes some role for states in the siting decision. A state's objection to siting will be sustained if one house of Congress passes a resolution favoring the objection. "Away from reactor" (AFR) facilities—facilities used for the storage of spent fuel rods—may be sited in a state despite objection if the President chooses to override the state's objection. The Bill does not grant Congress the power to disapprove the President's decision.

On the House side the Science and Technology Subcommittee has proposed a bill entitled "The High-Level Radioactive Waste Management and Policy Act". The Bill favors establishment of T&E facilities, with three sites selected within one year after passage of the Bill. The Bill would allow a state to veto a siting decision if one House of Congress approves the veto. As an inducement to state cooperation in siting, the federal government will pay a state three-million dollars as soon as an area within the state have been identified as a potential site. If a facility is constructed, the state will receive federal payments of ten-million dollars annually until decommission of the facility.

House Bill 3809, sponsored by Congressman Udall, provides for a major role for the states in repository siting. The Bill provides for the siting of permanent rather than T&E facilities. Unlike the permanent facilities, T&E facilities are unlicensed by NEPA. They involve elaborate and expensive testing before nuclear waste is brought to the site. Environmentalists fear that because of the great expense in setting up the T&E project, the government will be reluctant to find an established T&E facility unsuited for storage of nuclear waste. The Bill prefers permanent siting in the hope that more care will be exercised in initial siting decisions. In addition, the Bill allows a state to veto a siting within the state, unless within ninety days of the veto both Houses of Congress pass resolutions of disapproval.

mention the role of states;¹⁷⁹ (2) those providing states with a veto power over the siting of repositories;¹⁸⁰ and (3) those allowing states a consultation and concurrence power.¹⁸¹

1. Legislation Ignoring State Interests

Senate bill 685¹⁸² (S.685) typifies proposals in the first category.¹⁸³ The bill would establish a comprehensive program for the long-term storage of high-level waste.¹⁸⁴ Until a permanent disposal technology is available, wastes would be maintained in temporary storage facilities.¹⁸⁵ The Secretary of the Department of Energy (DOE) would select the technology and the sites for a system of permanent

179. See S. 685, 96th Cong., 1st Sess. (1979).

180. For examples from the Ninety-sixth Congress, see S. 1443, 96th Cong., 1st Sess. (1979) (allowing veto by governor or state legislature); S. 701, 96th Cong., 1st Sess. (1979) (allowing veto by governor or state legislature); H.R. 5923, 96th Cong., 1st Sess. (1979) (allowing veto by state legislature); H.R. 2762, 96th Cong., 1st Sess. (1979) (veto by governor or legislature); H.R. 1791, 96th Cong., 1st Sess. (1979) (veto by governor or legislature); H.R. 1071, 96th Cong., 1st Sess. (1979) (veto by legislature or statewide referendum).

181. For examples from the Ninety-sixth Congress, see S. 1821, 96th Cong., 1st Sess. (1979) (would establish a Nuclear Waste Management authority to develop a waste disposal plan); S. 1521, 96th Cong., 1st Sess. (1979) (state may disapprove and submit objections on an individual basis); S. 1360, 96th Cong., 1st Sess. (1979) (Secretary of DOE negotiates with state to establish concurrence); S. 742, 96th Cong., 1st Sess. (1979) (establishes a Nuclear Waste Repository Review Panel which reports to Congress); H.R. 4019, 96th Cong., 1st Sess. (1979) (alternative to consultation and concurrence); H.R. 3298, 96th Cong., 1st Sess. (1979) (establishes a Nuclear Waste Management Authority).

On February 12, 1980, the President by Executive Order established a State Planning Council. Its purpose is to effectuate a process of consultation and concurrence. Congress must approve legislation to make the Council permanent. 126 CONG. REC. H811 (daily ed. Feb. 12, 1980) (message from President Carter).

Consultation and concurrence refers to a process by which individual states and the federal government participates in an on going dialogue. See *Nuclear Waste Management: Hearings Before the Subcomm. on Energy Research and Production of the House Comm. on Science and Technology*, 96th Cong., 1st Sess. 54 (1979) (replies to questioning follows testimony of Warth Bateman).

182. S. 685, 96th Cong., 1st Sess. (1979). See note 179 and accompanying text *supra*.

183. *Id.*

184. S. 685, 96th Cong., 1st Sess. § 102 (1979) (establishes policy for long-term storage of high-level waste, accelerates consideration of alternative technologies for ultimate disposal, and improves efficiency of process for siting and licensing of nuclear power plants). See note 179 and accompanying text *supra* (discussion of S. 695).

185. S. 685, 96th Cong., 1st Sess. § 201 (1979).

waste facilities¹⁸⁶ subject to approval by Congress.¹⁸⁷ No provision in S.685 delineates the authority of states. The bill does not specify that the Secretary of DOE is to inform state officials of site exploration. One may infer that S.685 envisions no change in the role of states in nuclear waste disposal. Thus, the sole responsibility for siting remains with the federal government.

2. Legislation Granting States Veto Rights

Senate bill 1443¹⁸⁸ (S.1443) is representative of the second category of proposals permit a state to make the final decision regarding a repository site.¹⁸⁹ If enacted, S.1443 would require the Secretary of DOE to notify the governor and leaders of the state legislature of DOE's intention to explore potential repository sites within the state.¹⁹⁰ Prior to federal exploration the governor may disapprove a potential site by filing formal objections.¹⁹¹ The state legislature may concur or issue a nonconurrence in the governor's disapproval.¹⁹² The governor or legislature may suggest alternatives to the site under federal consideration which could eliminate difficulties with the site.¹⁹³ No federal exploration is permitted until state objections are satisfactorily resolved.¹⁹⁴ If state and federal authorities are cannot

186. *Id.* § 102(c).

187. *Id.* § 306.

188. S. 1443, 96th Cong., 1st Sess. (1979). *See* note 180 and accompanying text *supra* (discussion of S. 1443).

189. *Id.*

190. *See* S. 1443, 96th Cong., 1st Sess. § 107B(a) (1979) (investigating potential suitability for possible disposal); S. 701, 96th Cong., 1st Sess. § 2 (1979) (before investigating any site for construction of facility); S. 594, 96th Cong., 1st Sess. § 242e (1979) (intent to explore site for purpose of evaluation); H.R. 5923, 96th Cong., 1st Sess. §§ 107(g), 93a(1) (1979) (notify of a proposal to use a site); H.R. 2762, 96th Cong., 1st Sess. § 242A (1979) (intent to explore site for purpose of evaluation); H.R. 1791, 96th Cong., 1st Sess. § 5817(g) (1979) (notify of a decision or approval of a state); H.R. 1071, 96th Cong., 1st Sess. § 2 (1979) (intent to investigate).

191. S. 1443, 96th Cong., 1st Sess. § 107C(b) (1979). *See* note 180 and accompanying text *supra* (discussion of S. 1443).

192. S. 1443, 96th Cong., 1st Sess. § 107C(b) (1979).

193. *Id.* § 107C(a).

194. *Id.* (no federal action unless objection resolved); S. 701, 96th Cong., 1st Sess. § 2 (1979) (if legislature or voters disapprove of proposed construction no further activity permitted); S. 594, 96th Cong., 1st Sess. § 242e (1979) (no further proceedings unless objection resolved); H.R. 5923, 96th Cong., 1st Sess. §§ 107(g)(3), 93b (1979) (no further action if disapproval of site); H.R. 2762, 96th Cong., 1st Sess. § 242e (1979) (no further proceedings unless objection resolved); H.R. 1791, 96th Cong., 1st

resolve the dilemma, DOE is precluded from siting the repository.¹⁹⁵

3. Legislation Allowing States Consultation and Concurrence Power

Typical of the third category is Senate bill 742¹⁹⁶ (S.742) which allows states to participate fully in all siting procedures except the final determination.¹⁹⁷ The bill would establish a Nuclear Waste Management Planning Council (NWMP) consisting of state officials and members of the public appointed by the President.¹⁹⁸ NWMP, as an independent executive agency, would advise the President and federal authorities on siting and other waste facility issues.¹⁹⁹ In addition, the bill would create a Nuclear Waste Coordinating Committee (NWCC) comprised of federal officials.²⁰⁰ NWCC would coordinate waste management activities by federal agencies. An official of NWCC must notify the governor of the federal government's intent to examine the suitability of land within the state for use as a repository.²⁰¹ After the NWCC notification, the governor may establish a Nuclear Waste Repository Review Panel (NWRRP).²⁰² The NWRRP, comprised of state officials,²⁰³ would evaluate the proposed site.²⁰⁴ NWCC in close cooperation with NWRRP would prepare a repository analysis report.²⁰⁵ The governor as chairperson of the NWRRP may present the state's objections

Sess. § 5817(g) (1979) (no construction until approved); H.R. 1071, 96th Cong., 1st Sess. § 2 (1979) (if legislature or voters disapprove no further activity permitted).

195. S. 1443, 96th Cong., 1st Sess. § 107C(e) (1979); S. 594, 96th Cong., 1st Sess. § 242g (1979); H. R. 2762, 96th Cong., 1st Sess. § 242g (1979).

196. See note 181 and accompanying text *supra* (discussion of S. 742).

197. *Id.*

198. See S. 742, 96th Cong., 1st Sess. § 201 (1979).

199. *Id.* § 201-03.

200. *Id.* § 301.

201. S.1821, 96th Cong. 1st Sess. § 405(a) (1979) (selection of a site); S. 1521, 96th Cong., 1st Sess. § 7(a) (1979) (prior to site exploration); S. 1360, 96th Cong., 1st Sess. § 242 (1979) (intent to explore); S. 742, 96th Cong., 1st Sess. § 303(e)(1) (1979) (study for determination of suitability); H.R. 4019, 96th Cong., 1st Sess. § 11(a) (1979) (as early as possible of proposed construction); H.R. 3298, 96th Cong., 1st Sess. § 203(b) (1979) (when proposed to be a site).

202. S. 742, 96th Cong., 1st Sess. § 401 (1979). See note 181 and accompanying text *supra* (discussion of S. 742).

203. S. 742, 96th Cong., 1st Sess. § 403(a) (1979).

204. *Id.* §§ 401-03.

205. *Id.* § 303.

to selection of the site and offer compromise plans to NWCC.²⁰⁶ The NWCC must incorporate NWRRP comments in its final repository report to Congress.²⁰⁷ Ultimately, Congress would be responsible for the siting decision.²⁰⁸

D. *Analysis*

The first category of proposed legislation,²⁰⁹ clearly, does not respond to state opposition to nuclear waste repository siting. By granting federal authorities sole responsibility for siting decisions, the present problems would persist²¹⁰—states would continue to enact laws that restrict or exclude repositories and federal agencies would ignore the state concerns during site exploration. Local opposition would increase, ultimately resulting in the failure to establish repository sites.²¹¹ Eventually, federal courts would be compelled to decide whether state law restrictions are preempted.²¹² Preemption might eliminate symptoms of the problem but it fails to deal with the cause—an ineffective state role in siting decisions.²¹³ Preemption, the antithesis of state involvement, would only serve to exacerbate the problems attendant to the absence of federal-state cooperation.

The federal government is understandably reluctant to invalidate state laws on constitutional grounds.²¹⁴ Although preemption would remove significant obstacles to the federal permanent waste program,²¹⁵ the preemption of state laws restricting site selection would surely aggravate the federal-state relationship needed to effectively deal with nuclear waste. To avoid antagonizing the states, the federal

206. S. 1821, 96th Cong., 1st Sess. § 401(g)(1) (1979) (filed with Executive Director of Nuclear Waste Management Authority); S. 1521, 96th Cong., 1st Sess. § 7(b) (1979) (submitted to Chairman of NRC); S. 1360, 96th Cong., 1st Sess. § 242(b) (1979) (filed with Secretary of DOE); S. 742, 96th Cong., 1st Sess. § 403 (1979) (submitted to Nuclear Waste Coordinating Committee); H.R. 4019, 96th Cong., 1st Sess. § 11 (1979) (submitted to Secretary of DOE); H.R. 3298, 96th Cong., 1st Sess. § 203(c)(1) (1979) (submitted to Director of Nuclear Waste Management Authority).

207. S. 742, 96th Cong., 1st Sess. § 303 (1979).

208. *Id.* § 303(f).

209. *See* note 179 *supra*.

210. *See* notes 154-67 and accompanying text *supra*.

211. *See* note 159 *supra*.

212. *See* note 173-77 and accompanying text *supra*.

213. *See* note 154 and accompanying text *supra*.

214. *See A Challenge to Federalism, supra* note 154, at 949.

215. Once held preempted, state laws are invalid and thus ineffective.

government abandons projects when faced with local opposition.²¹⁶ Nevertheless, such deference to local interests has practical limits. A policy of deference cannot guarantee states significant involvement, since federal authorities may at some time determine deference is not in the public interest.²¹⁷ In addition, although state statutes barring nuclear repositories may meet deference from the federal government, such statutes may be susceptible to challenge by private parties.²¹⁸ Thus, an affirmative congressional grant of effective state involvement must replace a policy of deference.

The second category of proposed legislation²¹⁹—legislation granting states a veto power over repository siting—creates several advantages. The veto not only allows states the ultimate control of siting but grants states substantial political leverage against the federal government.²²⁰ The veto permits states to exact concessions such as financial and technical assistance in return for approval. A further advantage is disclosure of information. Senate Bill 1443 requires that federal agencies disclose all relevant information.²²¹ In addition, federal authorities must strictly comply with applicable regulations. If states are not fully informed or involved a veto will result.²²² Senate Bill 1443 also reduces the possibility of improper evaluations by requiring detailed investigation before a state veto power is invoked.²²³

Existence of a veto capability, however, creates problems for elected state officials.²²⁴ Individuals opposing nuclear power might pressure elected officials into vetoing repository sites. The threat of

216. *A Challenge to Federalism*, *supra* note 154, at 950 n.190.

217. *See* note 155 and 173-77 *supra*.

218. A private plaintiff with standing may challenge a state statute restricting nuclear power. *See Pacific Legal Foundation v. State Energy Resources Conservation and Dev. Comm'n*, 472 F. Supp. 191 (S.D. Cal. 1979) (employee of a utility company has standing to challenge a state law prohibiting the licensing of nuclear power plants).

219. *See* note 180 *supra*.

220. *A Challenge to Federalism*, *supra* note 154, at 953 n.205.

221. S. 1443, 96th Cong., 1st Sess. § 107B (1979).

222. Invocation of a veto registers state dissatisfaction with federal policies.

223. S. 1443, 96th Cong., 1st Sess. § 107B (1979). *See also Nuclear Waste Management: Oversight Hearings Before the Subcomm. on Energy and the Environment of the Comm. on Interior and Insular Affairs*. 96th Cong., 1st Sess. 251 (1979) [hereinafter cited as *Oversight Hearings*] (comments of the Union of Concerned Scientists) (granting states a veto will insure the best choice for a site).

224. *Nuclear Waste and Facility Siting Policy: Hearings on S. 594, S. 685, S. 701*

defeat at election time may persuade state officers to veto the best available repository site.²²⁵ Conversely, interested parties may pressure elected officials into approving a less than satisfactory site.²²⁶ Consequently, unchecked state political considerations pose a direct threat to the welfare of all citizens.

Once a state invokes a veto, no further federal action is allowed.²²⁷ Senate Bill 1443 provides for an on going federal-state dialogue after the state issues objections.²²⁸ The federal government may reply to the objections and suggest points of possible compromise. The state may decide, however, to ignore federal proposals. Strained federal-state relations will most likely result.²²⁹ Thus, existence of a state veto does not permit the degree of state and federal cooperation needed to solve the national nuclear waste storage problem.²³⁰

Finally, constitutional limitations apply even if states are specifically allowed to veto a site.²³¹ If each state possesses absolute control of siting within its borders, conceivably no state will allow construction of a repository.²³² To protect the use of nuclear energy from being disabled by the states, the federal government must obtain a judicial determination of whether state action is preempted.²³³ Although state regulation or restriction of repository siting would likely be held preempted by federal interests, strained state and federal relations would result.²³⁴

and S. 797 Before the Comm. on Energy and Natural Resources, 96th Cong., 1st Sess., pt. 2, at 293-433 (1979).

225. *Id.*

226. Note, 1979 U. ILL. L. F. 915, 933 n.123 (allowing a veto power may thwart federal attempts to choose the best possible disposal site).

227. S. 1443, 96th Cong., 1st Sess. § 107C(e) (1979). See note 34 and accompanying text *supra* (discussion of S. 1443).

228. S. 1443, 96th Cong., 1st Sess. 107C(e) (1979).

229. See notes 154-67 *supra*.

230. See IRG REPORT, *supra* note 167, at 95 (veto does not permit an on-going dialogue).

231. See *A Challenge to Federalism*, *supra* note 154, at 952.

232. See *Oversight Hearings*, *supra* note 223, at 44 (statement of James Cubie) (would result in Congressional or Presidential override). See also *id.* at 252 (comments of the Union of Concerned Scientists) (Congress could provide for an override by the President or Congress).

233. Moran, *Regulating Nuclear Waste Disposal: Has Illinois A Role?* 68 ILL. B. J. 378, 381 (1980) (federal judiciary has developed a rule mandating preemption if state action thwarts or prevents use of nuclear energy).

234. See notes 154-78 *supra*.

The third category of statutory proposals respecting repository siting²³⁵ grants states a consultation and concurrence power.²³⁶ "Consultation and concurrence" implies a continuing dialogue from the inception of planning through operation of the site.²³⁷ If compelling state interests are advanced, the likelihood of congressional approval of a site is reduced.²³⁸ If a state presents persuasive technical or empirical evidence against a repository, it will not be sited. Other contentions, such as the proximity of large population centers, may convince federal authorities to not choose the site.²³⁹

A number of commentators question the ability of state officials to render independent decisions under a concurrence scheme.²⁴⁰ Authorities fear a rubber stamp role for NWRRP since it depends on DOE for assistance and information.²⁴¹ Unlike the veto situation,²⁴² state approval is unnecessary because Congress makes the final decision whether to site a repository.²⁴³ Thus, federal agencies need not make full disclosure of data. Yet, strict regulations mandating full disclosure could eliminate this problem.²⁴⁴

Under the consultation and concurrence proposal, Congress ultimately must decide whether or not a repository is sited.²⁴⁵ Despite the absence of a veto power a state may nevertheless stop repository placements.²⁴⁶ As a practical matter, if a state does not want an installation, the repository is difficult to force upon it. Federal authori-

235. See note 181 *supra*.

236. *Id.*

237. See IRG REPORT, *supra* note 167, at 95 (concurrence implies an on-going dialogue during entire period of planning and operation).

238. See also *Oversight Hearings*, *supra* note 223, at 11 (statement of Rep. Udall) (as a practical matter if states do not want an installation then it is difficult to force it upon them).

239. See generally *The Emerging Issue*, *supra* note 153.

240. *Oversight Hearings*, *supra* note 223, at 262 (Comments of the Union of concerned Scientists) (rubber stamp role for State Planning Council since dependent on DOE for information).

241. S. 742, 96th Cong., 1st Sess. § 403 (1979).

242. See notes 199 and accompanying text *supra*.

243. S. 742, 96th Cong., 1st Sess. § 302 (1979).

244. Federal agency compliance with regulations is subject to judicial review. States by seeking judicial review of agency action could enforce strict regulations.

245. S. 742, 96th Cong., 1st Sess. § 302 (1979).

246. *Oversight Hearings*, *supra* note 223, at 14 (testimony of John M. Deutch) (as a practical matter a state can always stop something it does not want).

ties hesitate to site waste repositories opposed by local residents.²⁴⁷ Under any of the three legislative proposals, just as under present law, the cooperation of state and local authorities is necessary for successful waste management.

E. Conclusion

A cooperative effort between states and the federal government is essential for a comprehensive nuclear waste disposal program. Problems exist in the current regulatory framework for high-level wastes. Presently, hazardous and risk-laden evaluations are sheltered from direct state participation. States are willing to assume a more meaningful role in waste regulation. Unless Congress grants states an effective role in waste decisions, however, permanent repositories will not be sited.

III. UNDERGROUND WASTE INJECTION NANCY HENTIG

A. Introduction

During the 1970's public concern about the quality of the environment grew. Congress responded with several programs aimed at studying and controlling man's effect on the environment.²⁴⁸ To protect the underground sources of drinking water,²⁴⁹ Congress passed the Safe Drinking Water Act of 1974 (SDWA).²⁵⁰ The act's Underground Injection Control Program²⁵¹ enables the EPA to regulate a major source of groundwater pollution in order to ensure safe drinking water.²⁵²

The law has traditionally made a strict distinction between under-

247. See notes 153, 159 and accompanying text *supra*.

248. Some of the acts passed by Congress during the 1970's are The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-43 (1976), The Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-87 (1976), The Air Pollution Prevention and Control Act of 1977, 42 U.S.C. §§ 7401-7642 (1976 & Supp. I 1977), and The Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1976 & Supp. III 1979).

249. See *Safe Drinking Water Act Oversight: Hearing Before the Subcomm. on Environmental Pollution of the Comm. on Environmental and Public Works, United States Senate*, 95th Cong., 2d Sess. 5 (1978) [hereinafter cited as *SDWA Oversight*] (statement of Thomas C. Jorling).

250. 42 U.S.C. §§ 300f-j (1976 & Supp. III 1979).

251. Subtitle C, Underground Injection Control Program, 42 U.S.C. §§ 300f, 300h (1976).

252. See *SDWA Oversight, supra* note 249, at 225 (statement of Jacqueline M. Warren).