LLRWPAA OF 1985: IMPROVING RADWASTE DISPOSAL THROUGH INCREASED APPLICATION OF FEDERALISM

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ABSTRACT

The Low-Level Radioactive Waste Policy Amendments Act of 1985 imposes unique liabilites upon the states for failure to take actions mandated by the federal government. The states are commanded and regulated as citizens rather than treated as sovereigns. However, the states obtain substantial privileges and benefits from this legislation, including incentives to form interstate compacts to provide new disposal capacity on a regional basis. The major such incentive is the authority of compact members to exclude waste generated from non-member states. Because this incentive would be ineffective if states that were not compact members could also exclude waste, attempts by non-member states to exercise exclusionary authority should be found unconstitutional.

The structure whereby each state is liable for the disposal of the waste generated within that state provides direct political accountability for the decision to generate the waste, forces consideration of the environmental consequences of that decision, and increases the likelihood of distributional equity in the siting of new facilities. These features provide advantages over a process whereby the federal government would have the decisionmaking authority and responsibility for finding new sites. These advantages and the participation of the states in the political process that led to the passage of the Act provide strong support for the constitutionality of the Act.

INTRODUCTION

One of the most controversial provisions in the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPAA) concerns the imposition of liability directly upon a state for failure to provide disposal capacity within the state or compact region by January 1, 1996.(1) Unlike the provisions relating to earlier milestones, which impose penalties upon the generators of the waste for a state's or region's failure to meet a milestone, this provision imposes a penalty directly upon the state. In effect, the states are commanded and regulated by the Congress in the same manner as persons and citizens, rather than treated as sovereigns. This imposition of this type of liability upon a state is virtually unprecedented and raises significant constitutional issues as to whether this is an impermissible infringement upon state sovereignty.

An examination of the privileges and benefits obtained by the states from this legislation, including the benefit of local accountability for local decisions, provides persuasive reasons to conclude that on balance the LLRWPAA is beneficial to the states. Recent events concerning the progress in implementing the LLRWPAA support this conclusion. Moreover, a comparison with the implementation of the federal government's high-level nuclear waste program emphasizes that the state-oriented approach towards the establishment of new disposal sites is preferable to the alternative of a federal-oriented approach. The participation of the states in the development of the state-oriented approach, and the benefits obtained thereunder, provide strong arguments in favor of its constitutionality.

Prior to turning to these issues, it first is necessary to examine an issue that has arisen regarding the interpretation of the LLRWPAA--whether a state that is not a member of a compact may exclude waste generated outside the state from disposal within the state. Congress expressly conferred exclusionary authority only upon approved regional compacts. The legislation does not address the issue of exclusionary authority for non- member states. This issue is important because the intents and purposes of Congress in enacting the LLRWPAA probably would not be achieved if non- member exclusionary authority were permitted. Accordingly, the exercise of such authority should be found unconstitutional.

"GO-IT-ALONE" AUTHORITY

Congress intended in both the Low-Level Radioactive Waste Policy Act of 1980 (the "1980 Act") (2) and the LLRWPAA that the states be responsible for low-level radioactive waste disposal, and that this responsibility be satisfied on a regional basis. Requiring each state to construct and operate its own disposal site was unnecessary politically and extremely uneconomical. To encourage the compacting process, Congress authorized approved compacts to exclude from disposal within the region waste generated outside the region. Absent Congressional authorization such state action would be prohibited by the commerce clause of the constitution.

The commerce clause prohibits state action that imposes an undue burden on interstate commerce. Generally, state action that discriminates against out-of-state articles of interstate commerce is considered to be an undue burden on interstate commerce. In Philadelphia v.

New Jersey,(3) the Supreme Court held that a state's restriction of disposal facilities within the state to waste generated within that state constituted an undue burden on interstate commerce.

In Washington State Building & Trades Council v. Spellman,(4) the U.S. Court of Appeals for the Ninth Circuit held that the constitutional prohibition on discriminating against articles in interstate commerce applies specifically to low-level radioactive waste shipped for disposal in interstate commerce. The court thus held that the State of Washington could not exclude from its low-level radioactive waste disposal facilities low- level radioactive waste generated outside the state.

Some analyses have concluded that the Supreme Court's market- participation doctrine may provide a way to escape this prohibition. This doctrine holds that a state may avoid the prohibition on discriminating against articles of interstate commerce if the state is acting as a participant in the market rather than as a regulator of the market.

In Hughes v. Alexandria Scrap,(5) the Court upheld a Maryland program that provided bounties to persons processing junked automobiles for scrap. The state imposed more stringent documentation requirements upon out-of-state processors than upon in-state processors. The Court rejected the commerce clause challenge to the state action, holding that "[n]othing in the purposes animating the Commerce Clause prohibits a state, in the absence of Congressional action, from participating in the market and exercising the right to favor its own citizens over others."

In Reeves, Inc. v. Stake,(6) the Court upheld the preferential sale by the State of South Dakota of cement produced by a state-owned plant to in- state customers. The court also added another important rationale for the application of the market-participation doctrine. According to the Court, a sovereign state should be permitted to act as a trader to further the interests of its citizens, and if the state so acts, then the state should be subject to the same restrictions and freedoms as a trader, including, in the absence of Congressional action, freedom from the restraints of the commerce clause.

Reeves indicated that the courts will look to Congress to evaluate the validity of state proprietary action. The Court stated that cases involving such action "often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis." Hence, the "adjustment of interests in this context is a task better suited for Congress than this Court."

In order for a state to utilize the market-participant doctrine, the state would have to construct and operate a low-level waste disposal facility itself, in the same manner as a private party. However, even if a state satisfied this condition, other prerequisites for the application of the doctrine could not be satisfied.

First of all, Alexandria Scrap holds that the doctrine is to be applied only in the absence of congressional action. To date, the market participation doctrine has been applied only in instances where Congress has been silent. A state seeking to operate its own disposal facility would do so against an extensive background of federal legislation.

The Court's deference to Congress on issues of state sovereignty espoused in Reeves indicates that when Congress has addressed the issue of protections for the states, then any such protections are to be found in the federal action. The Supreme Court made clear its preference for finding protections for state sovereignty in the political rather than judicial process in Garcia v. San Antonio Metropolitan Transit Authority.(7) In Garcia the Court held that the constitution provides for protections for state sovereignty through the national political process, and that the courts, when reviewing federal legislation, should not impose protections for state sovereignty under the tenth amendment in addition to those provided by the Congress.

The LLRWPAA contains substantial protections for state sovereignty-- such as the ability to join into compacts with other states and the resulting authority to exclude out-of-region waste. The LLRWPAA establishes a procedure whereby the states may maximize the benefit from the use of radioactive materials with a minimal as practicable obligation to bear the burden of disposing of waste from other states.

Against this background of extensive federal action and protections for the states, the Court should decline to find additional protections for state sovereignty through the market participant doctrine. Congress has delicately balanced the interests of the states, and the Court should not disturb this balance by finding exceptional protections for states not granted by the Congress.

The supremacy clause provides another basis for prohibiting exclusionary authority by a go-it-alone state. The supremacy clause preempts state action that is either expressly forbidden by the federal statute or that would conflict with federal law. Under the latter test, state action will be preempted if it stands as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."(8) The exercise of exclusionary authority by non- member states would stand as an obstacle to the accomplishment of the intent of Congress for the states to develop new disposal sites on a regional basis.

The elimination of the political disincentive for a state to provide disposal for low-level radioactive waste generated outside that state or its region was a basic motivation for the enactment of the 1980 Act and the LLRWPAA.

The political unwillingness to host a national disposal facility led to the threatened closure of the three existing sites in 1980 and 1985 and the reluctance of any state to step forward, in the absence of any exclusionary authority, to create a new site. Although prior to the passage of each Act the states expressed a willingness to bear the burden of regional disposal, no state indicated any willingness to assume a national burden. The economic incentive in favor of a national disposal site located within a state of increased revenues from out-of-region generators utilizing the state facility never has been strong enough to overcome the political disincentive against out-of-region disposal.

The political incentive for the development of regional disposal facilities was provided by the granting of exclusionary authority to regional compacts. States that formed compacts assuming a regional burden for waste disposal would be guaranteed that they would not have to assume a national burden, and states that failed to form such compacts would risk loss of access to sites in other regions. The states could thereby accomplish the Congressional intent of achieving low-level radioactive waste disposal on a regional basis.

Permitting non-member states to exercise this exclusionary authority would remove the significant political incentive for compact membership for large generating states. To date, for large generating states the political disincentive to compact membership has been stronger than the economic incentive towards membership. It therefore could be expected that permitting exclusionary authority for non-member states would lead to the development of several exclusive disposal facilities in the large generating states and the continuation of the disposal crises in the many small generating states. This would frustrate the goal of regional disposal of low-level radioactive waste.

The progress in implementing the LLRWPAA supports this analysis. Of the thirteen states that generated the greatest volumes of low- level radioactive waste accepted for disposal in 1987, nine are members of compacts.(9) Of the four that are not, California, which is proceeding to site a facility within the state, has passed legislation authorizing entry into a compact, and intends to form a compact. New York, which is proceeding to site a facility within the state, has left open the possibility of compact membership. Massachusetts, which has passed legislation authorizing a facility to be sited within the state, is examining the option of compact membership. Texas, which is proceeding to site a new facility, and which previously stated an intent to go-it-alone, is now studying the possibility of compact membership with other states.(10)

Not only are the large national and regional generators joining compacts, but it is these generators that are establishing new sites. Of the thirteen states generating the greatest volumes of waste nationwide, seven intend to develop new sites. The largest generator within a compact is hosting the facility in seven of the ten existing or potential compacts. Of the thirty-one states shipping the least amount of waste for disposal, only one--Maine--has indicated any intent to develop its own site. Nonetheless, twenty-six of these thirty-one states are members of a compact.(9,10)

Many of the large generators that have entered or intend to enter into a compact have done so in order to gain the exclusionary authority provided by compact membership. Were it possible for non-member states to exercise exclusionary authority without compact membership, it is likely that they would do so. Disposal crises then would arise in most, if not all, of the states generating smaller volumes of waste, which is a majority of the states.

This progress illustrates the effectiveness of the incentives established by the LLRWPAA towards the establishment of new regional disposal sites. Generally, the large generators are members of compacts or working towards that goal, and are proceeding to establish new disposal sites. In this manner, the states have been implementing the LLRWPAA in furtherance of the original Congressional goals. Exclusionary authority for non-member states easily could undermine this achievement, and therefore should be prohibited by the supremacy clause.

BENEFITS FOR THE STATES IN THE LLRWPAA

Practical Benefits

To date, the 1980 Act and the LLRWPAA have resulted in the greatest burdens for low-level waste disposal being assumed by those obtaining the greatest benefits for low-level waste generation. This optimization of the association of benefits and burdens from low-level waste generation stems from its state-oriented approach and is one of the major achievements of the LLRWPAA.

The use of the interstate compact process is one cornerstone of the state-oriented approach. The ability of several states to enter into an interstate compact to resolve a dispute or advance mutual interests is a constitutional preservation of the sovereign power of the states that existed prior to the adoption of the constitution. The compact process "adopts to our Union the age-old treaty making power of independent sovereign nations."(11) The use of the compact process to establish new waste disposal sites thus allows for considerable expression of state sovereignty.

The LLRWPAA provides significant substantive benefits to both sited and unsited states as well. The overwhelming support from all states for the passage of this bill indicates that these benefits outweighed any burdens that may also have been contained in the bill.

For the sited states, there were several benefits. First, unambiguous exclusionary authority was granted to the sited regions as of January 1, 1993, regardless of the

progress of the unsited states towards the establishment of new facilities or the ratification of other compacts. Although January 1, 1986, may have been the original date anticipated in the 1980 Act for the exercise of this authority, this date proved to be politically and technically unrealistic soon after the passage of the 1980 Act. The establishment of the fixed 1993 date thus must still be viewed as a benefit to the sited states.

Moreover, as another benefit, the sited states were compensated for this extension. Their responsibility for the disposal of out-of- region waste was limited annually by volume, and they obtained authority to impose financial surcharges on waste disposed during this period.

The unsited states also received considerable benefit. One benefit was guaranteed access for seven more years to the facilities in the sited regions. Although as a strictly legal matter the sited regions may not have been able to discriminate against out-of-state waste, as a practical matter it was not difficult to create disruptions in the disposal of out-of-region waste and disposal crises in the unsited states. The LLRWPAA provided assurances to the unsited states that such disruptions would not occur.

The other benefit for the unsited states was the ability to exclude out-of-region waste for such states that formed an interstate compact which established a disposal site. This rare privilege to discriminate against interstate commerce guaranteed to the presently unsited states that once they became sited states they too would not face the potential burden of being required to dispose of waste for the entire nation.

In view of these benefits, the provisions that by themselves could be considered to interfere with state sovereignty, such as the imposition of liability directly upon a state for failure to meet the 1996 milestone, should not be considered unduly burdensome. The experience with the 1980 Act indicated to Congress that some direct liability upon the states for failing to act in a timely manner would be necessary to avoid facing another rewrite of the legislation at the 1993 deadline. Because economic sanctions imposed solely upon generators may not translate into political incentives for state officials, such sanctions may not be effective in catalyzing state action.

If direct liability such as that found in the LLRWPAA were invalidated, Congress probably would either impose harsher sanctions upon beneficiaries of waste activities for failure to meet milestones, or discard the state- oriented approach altogether as too weak and adopt a federal- oriented approach. As a practical matter, the liability provisions should be viewed as part of the price for a statute that overall provides significant benefits to the states.

Political Benefits

The structure of the LLRWPAA provides three major political benefits to the states. This structure improves political accountability for the decision to generate the waste, forces consideration of the environmental consequences of that decision, and increases the likelihood of distributional equity in the siting of new facilities. A comparison of the progress of the states in implementing the LLRWPAA with the progress of the federal government in implementing the Nuclear Waste Policy Act of 1982 (NWPA) (12) for high-level waste provides strong evidence that these benefits are being realized.

One of the major objections to federal legislation that requires state enforcement and implementation is that such a scheme "blurs the lines of political accountability."(13) Federal officials can avoid accountability for their actions because the states are implementing the program, and state officials appear ineffective and unresponsive to local concerns because they must follow a federal mandate.

The structure of the LLRWPAA avoids blurring accountability by requiring those who benefit from the generation of nuclear waste to assume responsibility for its disposal. The sanction for failure to provide a disposal facility for generated waste is liability for that waste. It clearly promotes political accountability to make those who permit the generation of radioactive waste liable for the consequences of any resulting inability to dispose of the waste.

Political accountability leads directly to the other two political benefits. First, political accountability for the generation and disposal of the waste forces consideration of the environmental consequences of the decision to generate the waste. This should optimize the balance between the necessity to generate the waste and the necessity to minimize adverse environmental impacts.

Political accountability for generation and disposal of waste will most likely lead decisionmakers and citizens to terminate waste generating activities which impose undue burdens upon the environment. Similarly, decisionmakers and citizens will be more likely to accept the environmental burdens of waste disposal in order to continue essential activities that generate waste. Acceptance of the responsibility for waste disposal would be much more difficult if there were no loss of benefits or adverse consequences for failure to do so.

Finally, political accountability promotes distributional equity in the siting of new facilities. States suffering the least adverse consequences for failure to establish a new facility will be those least likely to establish any such facility. Those at risk of losing the most benefits from waste generation if new disposal sites are not established will most

likely be the ones to accept the burdens of disposal and accept a new facility.

Thus, it can be expected that new sites will be developed in a regional manner, with those generating the greatest amount of low-level radioactive waste within each region assuming the burden for disposing of the waste within that region. Furthermore, it can be expected that the waste disposed of within each region will be minimized in order to reduce the burden for such disposal states.

The experience with the implementation of the LLRWPAA indicate that these political benefits are being realized. Political accountability for the generation and disposal of waste has resulted in a system whereby those states benefiting the most from the generation of low-level waste have been the states that have assumed the greatest burden for the disposal of that waste. Generally, it is the largest generating states that either have initiated the construction of a site with the intent to form a compact later or have the obligation within an existing compact to site a new regional disposal facility. This indicates substantial progress towards increased equity in the distribution of disposal facilities.

It would be surprising if the federal government could have obtained similar state acceptance of federally sited facilities in each of the states that has made its own decision to accept a facility. Although the siting process is still in delicate and controversial stages in some of the states, states have made substantial and noteworthy progress towards the establishment and acceptance of these facilities. Much more hostility and objection would have been generated if these siting decisions had been imposed upon the states by unaccountable and seemingly unresponsive federal officials.

California and Illinois are perhaps the best examples of how the state- oriented approach has worked. California is now characterizing sites in the Mojave desert for its new facility. State and community acceptance does not appear to be an obstacle to the development of the facility. Similarly, Illinois has narrowed the search for a new site to several counties and is attempting to find a host county that will not object to the facility.

The significance of the progress in these and other states should not be underestimated. The history of the search for high-level waste disposal sites, the closure of half of the previously existing low-level waste sites for environmental reasons, and the general reluctance of the public to accept any radiological risks provide little grounds for optimism regarding the chances of success for any approach seeking to establish new radioactive waste disposal facilities. Nonetheless, the state-oriented approach embodied in the 1980 Act and the LLRWPAA appears to have spurred considerable progress towards the siting of new radioactive waste disposal facilities.

The implementation of the NWPA has enjoyed no similar success. This is partially attributable to its federal-oriented structure. The NWPA requires no accountability for disposal from those who generate the waste. Nor does the federal government, through the Nuclear Regulatory Commission, require such accountability or consider such consequences when permitting the waste to be generated. Those who decide to generate the waste do not have to consider the environmental consequences of that decision and those who may be required to bear the burden of disposal do not obtain any benefits from its generation.

This has resulted in a process whereby the generators of the waste, including the states, have maximized their efforts, with minimal consideration of the environmental consequences, to find a state to host the waste. Potential host states have most strenuously objected, with minimal consideration of the benefits of the generation of the waste, to hosting any such facility. With the passage of the Nuclear Waste Policy Act Amendments of 1987, (14) this structure of blurred accountability degenerated into the destruction of major elements of environmental protection and all distributional equity originally contained in the NWPA.

For example, the NWPA originally required the full characterization of three alternative sites prior to the selection of one for licensing. An environmental impact statement was to be prepared as part of the decision to select a single site. To achieve distributional equity, two repositories were to be built, one in the east, where most of the waste is generated, and one in the west.

Distributional equity was abandoned in the 1987 Amendments. The sole repository is to be in the west, despite the fact that most of the waste is generated in the east. Moreover, one of the technically most promising host rock types, granite, which is found mostly in the east, in not even permitted to be studied any longer, due to the objections from those eastern states, including waste generating states, with potentially suitable granite formations.

Provisions providing major environmental protections were similarly discarded. The requirement of characterization of multiple sites, which stemmed from the National Environmental Policy Act of 1969 (NEPA),(15) was eliminated. The requirement for consideration of environmental impacts prior to the selection of a single site has been emasculated, since no environmental impact statement requiring consideration of alternatives was prepared prior to the selection of the Yucca Mountain site.

During consideration of the 1987 Amendments the Senate soundly defeated an amendment that would have made the impact upon public health and safety the prime consideration in choosing the single site for further characterization. It is unlikely that any of the generating states

would have voted against such a provision were those states under consideration for the site.

The three states that were potential targets under the high- level waste program prior to the 1987 Amendments objected vociferously to the siting of any such facility within the state. There was no public acceptance for a high-level waste facility in any of the potential host states. The one state--Nevada--targeted under the amended approach is an avowed opponent of the repository, and has technical, legal, and political personnel devoted to keeping the repository out of the state. This is not surprising, since there are no benefits for a host state under the original or amended approach, and there is minimal support for strong environmental protections from the other states seeking to impose the facility upon Nevada.

This brief comparison should help place into perspective the advantages and progress of the state-oriented approach of the LLRWPAA. Other schemes for establishing new facilities have not yet succeeded to the same degree. In fact, the federal-oriented approach has made more progress towards the elimination of potential new disposal sites than towards the development of such sites.

In summary, the burdens imposed upon the states in the LLRWPAA are a worthwhile price to pay for the overall benefits provided by the statute. Under Garcia, the Supreme Court will decline to find that a statute impermissibly interferes with state sovereignty if the states have been able to participate in the political process leading to its enactment. The participation of the states in the development of the LLRWPAA, along with the benefits resulting from the statute, should provide convincing reasons for the courts to uphold the constitutionality of the statute.

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