

Sixth Circuit: Federal Atomic Energy Act Preempts State Solid Waste Law

The United States Court of Appeals for the Sixth Circuit has held that federal laws governing radioactive materials preempt the State of Kentucky's solid waste laws. As a result, the State's environmental agency cannot impose restrictions on the disposal of solid wastes generated by the United States Department of Energy (DOE) in a DOE landfill on the basis of the radioactive nature of the wastes.

In 1995, the Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet) issued DOE a permit to construct a solid waste landfill for contained solid wastes generated by DOE's Paducah Gaseous Diffusion Plant, a facility designed to produce enriched uranium fuel. In 1996, the Cabinet issued DOE an operating permit for the landfill which imposed restrictions on the radioactivity levels of solid wastes that could be placed in the landfill.

Through Kentucky's administrative processes, the DOE appealed the permit restrictions that related to radioactive characteristics of the wastes that the DOE could dispose of in the landfill. But the Cabinet affirmed the permit restrictions. The DOE then sued the Cabinet in state court for a review of the Cabinet's decision.

In April 1999, following the DOE's unsuccessful administrative appeal of the State's permit restrictions and before its proceedings in state court, the DOE sued the State of Kentucky in the United States District Court for the Western District of Kentucky. The DOE sought an order from the District Court invalidating the State's restrictions on the DOE's handling of radioactive solid wastes.

The DOE argued in the District Court that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2297g-4, preempts state regulations relating to disposal of radioactive materials. Moreover, the DOE contended that the federal government is immune from state regulation. The State countered that the District Court should dismiss the DOE's suit, arguing that under prior precedent, the District Court should accord discretion to the Cabinet and decline jurisdiction over the case.

Preemption

Article VI, Section 2 of the U.S. Constitution provides that notwithstanding anything in a state's laws or constitution, laws of the United States authorized by the U.S. Constitution "shall be the supreme Law of the Land." In accordance with the U.S. Constitution, the U.S. Supreme Court's precedents have articulated two ways in which state laws may be preempted by federal laws:

1. Congress clearly indicates its intent to completely occupy a given field of regulation, leaving virtually no room for regulation by the states; and
2. Even if Congress has not completely displaced state regulation in a given field, state law is still preempted to the extent that it conflicts with federal law, either when it is impossible to comply with both state and federal law or when state law presents an obstacle to the accomplishment of Congress' legislative intent.

The District Court compared the treatment by federal agencies of the two federal laws addressing wastes – the Resource Conservation and Recovery Act (RCRA) and the Atomic Energy Act. Under RCRA, the United States promulgated regulations governing the generation, treatment, and disposal of hazardous wastes. RCRA authorizes states to enforce RCRA regulations in lieu of the federal government. Under the Atomic Energy Act, the DOE promulgated regulations governing the handling of radioactive materials. But the Atomic Energy Act does not authorize states to regulate radioactive wastes in lieu of the federal government.

Moreover, the District Court observed that in cases involving mixed wastes – that is, wastes containing both hazardous wastes and radioactive wastes – RCRA, which may be enforced by states, governs the hazardous waste portion of the wastes, while the Atomic Energy Act, which is not enforced by the states, governs the radioactive portion of the mixed wastes.

Thus, because the solid wastes generated by the Paducah DOE Plant were potentially subject both to RCRA and the Atomic Energy Act, only the federal

government could impose conditions on the plant's disposal of radioactive materials. Therefore, the District Court concluded that the State of Kentucky's attempt to regulate the radioactive materials was preempted by federal law.

The State appealed the District Court's decision to the Court of Appeals, arguing that the Cabinet has authority under Kentucky solid waste laws to regulate solid waste disposal, including solid wastes that contain radioactive materials. The mere fact that the Paducah DOE Plant generates state regulated solid wastes that happen to contain radioactive materials should not, according to the State, preclude state regulation. Moreover, the State argued that the Atomic Energy Act does not expressly regulate solid wastes contaminated with radioactive materials.

But the Court of Appeals pointed out that the disputed permit conditions expressly limited the amount of radioactivity that the DOE may place in its landfill. Those conditions represented a clear attempt by the State to regulate materials exclusively regulated by the Atomic Energy Act. Under U.S. Supreme Court precedent, *Pacific Gas & Electric Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190 (1983), the Supreme Court has held that "the federal government has occupied the entire field of nuclear safety concerns."

Thus, concluded the Court of Appeals, "[w]hile federal law does not preempt state solid waste regulations, . . . states may not regulate the radioactive component of solid waste." Therefore, the State's permit conditions regulating the radioactive content of solid wastes are preempted by federal law.

But in its appeal, the State contended that the District Court did not explain why the State's regulation of solid wastes that happened to also be radioactive conflicted with the Atomic Energy Act. The Court of Appeals emphasized, however, that because, under the Supreme Court's *Pacific Gas & Electric* decision, the federal government completely occupies the field of regulation of radioactive materials, DOE had no need to identify

specific conflicts between the State's permit conditions and federal law in order to show that the permit conditions were preempted by federal law.

Because the District Court found the State's permit requirements preempted by federal law, the District court did not consider the DOE's argument that the federal government's radioactive materials management practices were immune from regulation by the State. However, the Court of Appeals addressed the question by simply noting that the RCRA definition of solid waste expressly excludes radioactive materials regulated under the Atomic Energy Act. Thus, although RCRA contains provisions expressly waiving federal sovereign immunity with respect to state solid waste regulation, the United States has not, under RCRA or any other law, waived immunity from state regulation of radioactive materials. Therefore, the DOE facility was immune from state regulation of its radioactive materials.

Abstention

The State of Kentucky vigorously argued that the District Court should not have even considered DOE's case because the court should have accorded discretion to the State under prior precedent and law. The State contended that because the DOE's law suit was still pending in state court, the District Court should have abstained from hearing the DOE's case and dismissed the federal law suit. However, the Court of Appeals quoted prior 6th Circuit precedent, which stated:

When state and federal courts have concurrent jurisdiction to decide preemption questions, a federal court should abstain to allow the state court to decide the preemption issues. However, . . . if the issues present facially conclusive claims of federal preemption, we will not abstain, but instead will decide the preemption question.

GTE Mobilnet of Ohio v. Johnson, 111 F.3d 469, 475 (6th Cir. 1997).

The Court of Appeals agreed with the District Court's conclusion that the DOE's claim that the Atomic Energy Act facially preempted state solid waste laws, and obviated any state court findings.

Because the Court of Appeals agreed with the District Court's finding that the Atomic Energy Act preempts state solid waste regulations to the extent that such regulations control handling of radioactive materials and could see no justification for abstaining from addressing the DOE's claim, the 6th Circuit affirmed the District Court's ruling that state permit conditions relating to disposal of radioactive materials were preempted by federal law.

United States v. Kentucky, No. 00-5247 (6th Cir. June 5, 2001)

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