

MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

May 20, 1983

Honorable Joseph E. Brennan
Governor of Maine
State House Station #1
Augusta, Maine 04333

Dear Governor Brennan:

You have asked whether Legislative Document No. 373, "AN ACT to Limit the Storage of Spent Fuel at Nuclear Reactor Facilities," which has been passed by both Houses of the Legislature and awaits your approval, is constitutional. For the reasons which follow, it is the opinion of this Department that the bill, if approved by you, would violate Article VI of the United States Constitution, in that the power of the states to legislate in the area which is the subject matter of the bill has been preempted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011, et seq.

The thrust of L.D. 373, as it has been amended by the Legislature through Committee Amendment "A", No. H-186 (111th Legis. 1983), is quite simple. The bill limits the number of spent fuel assemblies which may be stored, either on a temporary or a permanent basis, at the Maine Yankee Atomic Power Plant, the only nuclear power plant in the State, to 1,259.^{1/} The purpose of the limitation is made clear by the Statement of Fact to L.D. 373:

^{1/} The bill also provides that in the event that it is necessary to move any or all of the fuel assemblies currently in active use at the plant, those additional assemblies may be stored with the spent assemblies for a limited period of time.

A large increase in radioactive inventory represents a needless increase in the threat to the health of Maine citizens. It could also lead to a large unanticipated financial burden on the State, if there are further delays in the national permanent radioactive waste program, or if unforeseen problems develop in spent fuel storage.

The significance of the number 1,259 is further explained by the Statement of Fact to Committee Amendment "A" to the bill:

This amendment sets the allowable number of fuel assemblies at a level consistent with expansion by reracking, but not by pin compaction at Maine Yankee.

The Legislature has thus indicated its concern that should the capacity of the storage facility at the Maine Yankee Plant be expanded by the method of storage known as pin compaction, for which the company has an application pending before the Nuclear Regulatory Commission,^{2/} a serious threat to the public health of the citizens of the State will be presented.^{3/}

The Supremacy Clause of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI, cl. 2.

Thus, when it is acting pursuant to its enumerated powers, the United States Congress has the power, under this Clause, to

^{2/} The State of Maine, acting through this Department, has intervened in this proceeding for the purpose of raising various contentions as to the safety aspects of both the reracking and pin compaction methods of storage. Maine Yankee Power Co. (Maine Yankee Atomic Power Station), Docket No. 50-309-OLA (Spent Fuel Compaction).

^{3/} The bill also contains a provision prohibiting the transfer of spent fuel assemblies to a nuclear power plant in the State from any other nuclear power plant. No opinion is expressed herein on the constitutionality of this provision.

preempt state legislative activity. The question which you present is whether the Congress has acted in such a way as to preempt L.D. 373.

The basic federal statute in the field of regulation of nuclear power is the Atomic Energy Act of 1954, 42 U.S.C. § 2011, et seq. The history of this Act, and the amendments thereto, have been extensively set forth by this Department in a prior opinion, and need not be repeated here. Op. Me. Att'y. Gen. 79-215, 3-6. Only last month, this history was reviewed by the United States Supreme Court in the context of a case involving the issue of whether a statute of the State of California which prohibited the construction of any new nuclear power plants until the federal government has determined that adequate permanent storage facilities for nuclear waste were available was preempted. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n., --U.S. --, 51 U.S.L.W. 4449 (U. S. April 20, 1983).

In sustaining the statute at issue, the Supreme Court drew a clear distinction with regard to the aspects of the generation of nuclear power which may and may not be regulated by the states under the Atomic Energy Act. The Court held:

[T]he federal government maintains complete control of the safety and "nuclear" aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like. Id., at 4454.

The Court found that the California statute was directed at controlling the economic consequences of the generation of nuclear power, and not the safety thereof, and it therefore found that the statute was not preempted. The Court went on to observe, however, that state legislation seeking to regulate "the construction or operation of a nuclear power plant. . . , even if enacted out of non-safety concerns," would be "impermissible," as would "[a] state moratorium on nuclear construction grounded in safety concerns." In short, "[T]he federal government has occupied the entire field of nuclear

safety concerns." Id. at 4455.^{4/}

As indicated above, the principal purpose of L.D. 373 is to mitigate the threat to the health of the citizens of Maine posed by the use of the temporary storage facility for spent nuclear assemblies at the Maine Yankee Power Plant for increasingly greater numbers of such assemblies. The bill proposes to accomplish this objective by placing a numerical limit on the number of assemblies that may be stored at the plant. It is therefore difficult to see how such a prohibition could be interpreted as anything other than a safety measure.^{5/} That being the case, the bill would fall squarely within the class of regulatory activities which the Supreme Court in the Pacific Gas & Electric Co. case found to have been reserved by the Congress, through the Atomic Energy Act, exclusively to the federal government. Therefore, if the

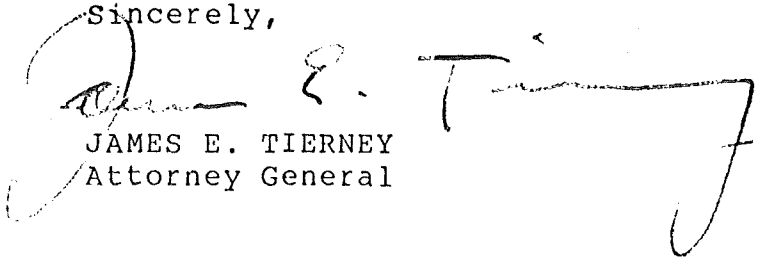
^{4/} As the concurring opinion of Justice Blackmun, representing the views of only two of the nine justices, points out, these observations are "unnecessary to the Court's holding,s" and should not be considered strictly a part thereof. Id. at 4458. However, in view of the strength of the language of the Court's discussion and and the size of the majority supporting it, it would appear extremely unlikely that any safety-motivated state legislation in the field of the regulation of the generation of nuclear power would survive preemption scrutiny.

^{5/} An examination of the debate on the bill on the floors of both houses of the Legislature reveals that the proponents of the legislation were uniformly concerned about the safety consequences of the increasing use of the Maine Yankee storage facility. The only indication, therefore, in the entire legislative history of the bill that it was intended for anything other than safety purposes is the remark in the Statement of Fact to L.D. 373 itself, quoted above, that the increase in the radioactive inventory at Maine Yankee "could lead to a large unanticipated financial burden on the State." It is unlikely that this single statement would be found by a court to constitute the true legislative objective of the bill, particularly in view of the court's traditional reluctance to look behind avowed legislative intent. See Pacific Gas & Electric Co., at 4456.

bill were to become law, it would violate the Supremacy Clause.^{6/}

I hope the foregoing answers your question. Please feel free to reinquire if any further clarification is necessary.

Sincerely,

A handwritten signature in dark ink, appearing to read "James E. Tierney". The signature is fluid and cursive, with a large, sweeping "J" at the beginning and a long, horizontal stroke extending to the right.

JAMES E. TIERNEY
Attorney General

JET/dab

^{6/} In view of this conclusion that L.D. 373 would be preempted by the Atomic Energy Act, it is unnecessary to answer an additional question which you ask as to whether the bill would also be preempted by the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101, et seq., except to note that the Supreme Court found that it was premature to determine the preemptive effect of that statute (which it misidentified as the Nuclear Waste Disposal Act of 1982, and miscited as P.L. 97-42 (instead of P.L. 97-425)) on the California law. Pacific Gas & Electric Co. at 4452, n. 16.