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## Battle over Control of Low-Level Radioactive Waste: Some States Are Overstepping Their Bounds

### I. INTRODUCTION

In 1979, all existing nuclear power plants, government and private, disposed of their low-level radioactive waste (LLRW)<sup>1</sup> at only three sites: one in Nevada, one in Washington, and one in South Carolina.<sup>2</sup> The governors of two of the states threatened to block out-of-state waste from entering the sites in their states because they believed that it was inequitable for their states to dispose of the entire nation's LLRW.<sup>3</sup> To appease these three governors and to avoid the national crisis of having no place to dispose of LLRW, Congress enacted the Low-Level Radioactive Waste Policy Act (LLRW Policy Act)<sup>4</sup> to encourage every state to take responsibility for its own waste, to enable states to form compacts, to choose sites for and license regional disposal facilities, and to encourage development of other sites to dispose of LLRW.<sup>5</sup>

Twenty years later, the nation still only has three active LLRW disposal facilities, and disposal of radioactive waste remains a hot political issue.<sup>6</sup> As the issue continues to heat up, states are taking action to prevent waste from entering their borders.<sup>7</sup> However, in some cases,

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1. "The term 'low-level radioactive waste' means radioactive material that is not high-level radioactive waste, spent nuclear fuel, or byproduct material . . . and [that] the Nuclear Regulatory Commission, consistent with existing law[,] . . . classifies as low-level radioactive waste." 42 U.S.C. § 2021b(9) (2000).

2. "The first commercial LLRW disposal site opened in Beatty, Nevada in 1962." Greta Joy Dicus, Commissioner, U.S. Nuclear Regulatory Commission, *National Low Level Radioactive Waste Disposal Policy: A Success or a Failure?*, Address at NRC Regulatory Information Conference (Apr. 14, 1998), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/1998/s98-11.html>. By 1971, six sites operated in Nevada, Kentucky, South Carolina, New York, Washington, and Illinois. However, the New York, Illinois, and Kentucky sites were closed due to "leakage at the sites." *Id.*

3. *Id.*

4. 42 U.S.C. §§ 2021b–2021j.

5. In 1986, Congress amended the Act to provide additional deadlines and monetary incentives to encourage states to comply with the Act. Pub. L. No. 99-240, 99 Stat. 1842. See generally Deborah M. Mostaghel, *The Low-Level Radioactive Waste Policy Amendments Act: An Overview*, 43 DEPAUL L. REV. 379 (1994).

6. See *infra* note 42.

7. See *infra* Part II.C.

this state action is undermining the federal scheme of atomic energy regulation.<sup>8</sup> Specifically, three states have shifted the national issue of LLRW disposal into the local political arena by requiring a prospective facility to obtain approval from the legislature, the governor, and/or the voters.<sup>9</sup> These statutes have overstepped their authority because the political approval statutes violated the Supremacy Clause of the United States Constitution. As this Comment was going to press, the Utah Legislature proposed and passed a bill, Senate Bill 24, that bans Class B and C LLRW from being disposed in the state of Utah.<sup>10</sup>

LLRW regulation is governed by a complicated scheme in which the United States has ceded some of its regulatory authority to the states, with the mandate that state LLRW programs be coordinated and compatible with federal goals.<sup>11</sup> If a state enacts a statute that conflicts with federal goals for LLRW, then the statute is preempted by federal law.<sup>12</sup>

This Comment examines both the political approval requirements and Utah SB 24 and concludes that an outright ban of LLRW and some political approval requirements are unconstitutional under the Supremacy Clause because they conflict with the federal goal to encourage efficient disposal for LLRW. Part II discusses the federal statutory scheme that regulates atomic waste disposal and three state statutes that require a prospective LLRW facility to obtain political approval.<sup>13</sup> Part III discusses Supreme Court authority on federal conflict preemption and other decisions that give a framework to analyze the constitutionality of political approval statutes. Part IV argues that federal law preempts state statutes that ban LLRW disposal, that function in the nature of a de facto ban of LLRW, or that regulate LLRW in a manner that is not reasonably related to achieving a legitimate state interest. Part V offers a brief

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8. *See infra* Part IV.

9. *See infra* Part II.C.

10. Joe Bauman, *House Votes To Ban Importing of B, C Wastes*, DESERET MORNING NEWS, Feb. 10, 2005. Senate Bill 24 passed the Senate on February 3, 2005, without dissent and then passed the House five days later with a 57 to 13 vote. *Id.* The bill modifies Utah Code Annotated section 19-3-307 and reads, as enacted, "No entity may accept in the state or apply for a license to accept in the state for commercial storage, decay in storage, treatment, incineration, or disposal: class B or class C low-level radioactive waste or radioactive waste having a higher radionuclide concentration than the highest radionuclide concentration allowed under licenses existing on the effective date of this section that have met all the requirements of Section 19-3-105." *Id.*

11. *See infra* Part II.

12. *See infra* Part III.

13. Vermont and Maine have agreements similar to Utah's agreement with the United States, but for simplicity, this Comment uses Utah's agreement as the example.

conclusion. The scope of this Comment is limited to whether federal law preempts these statutes. It does not suggest whether preempting state statutes is the best policy decision, nor does it analyze states' legitimate policy concerns surrounding disposal of LLRW within their borders.

## II. BACKGROUND

This Section gives background on federal regulation of nuclear power and explains the complex system of regulating LLRW. Initially, this Section outlines federal law governing nuclear power and explains the congressional system of delegating some responsibility over LLRW to the states. In conclusion, this Section outlines three relevant state statutes that regulate LLRW.

### *A. The Federal Scheme of Regulating Low-Level Radioactive Waste*

The federal government had a monopoly over the operation of nuclear-power facilities until 1954, when Congress enacted the Atomic Energy Act (AEA).<sup>14</sup> The AEA permitted private entities to own nuclear power facilities because Congress believed that the private sector could serve the national interest in developing nuclear power if the federal government encouraged the private sector to develop atomic energy for peaceful purposes, supervised by a federal system of regulation and licensing.<sup>15</sup> Through the AEA, Congress opened "the door to private construction, ownership, and operation of commercial nuclear-power reactors."<sup>16</sup> The AEA vested all power to regulate every condition or element dealing with the safety of atomic energy in the Atomic Energy Commission.<sup>17</sup> The Energy Reorganization Act, a supplement to the AEA passed in 1974, abolished the Atomic Energy Commission, created the Nuclear Regulatory Commission (NRC), and gave the NRC licensing and regulatory duties formerly carried out by the Atomic Energy Commission.<sup>18</sup> Congress believed that a uniform system of regulation

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14. 42 U.S.C. §§ 2011–2284 (2000); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1240 (10th Cir. 2004) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)).

15. See *English*, 496 U.S. at 81.

16. *Id.*

17. See *Skull Valley*, 376 F.3d at 1240–41.

18. *English*, 496 U.S. at 81. Congress prohibited states from regulating the safety of atomic energy facilities because it believed that the Commission was more qualified to set safety standards in the complex area of atomic energy than were state governments. For more, see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250 (1984), discussed *infra* at Part III.A.

vested in the federal government would promote the congressional goal of encouraging the United States to develop and use nuclear energy as a power source.<sup>19</sup>

In 1980, Congress enacted the LLRW Policy Act<sup>20</sup> to encourage more sites to dispose of LLRW. After a deliberative discussion with the governors of the fifty states, Congress developed the Policy Act to persuade states to take title to their own waste and to encourage regional cooperation in disposing of waste.<sup>21</sup> The ultimate goal of the Policy Act was to encourage more states to construct disposal sites to unburden the three states that bore the sole responsibility for disposing of all of the nation's LLRW. Congress recognized the "acute national problem of a high demand for storage [of LLRW] and a dwindling supply of storage capacity"<sup>22</sup> and recognized the need for a unified system of regulation.<sup>23</sup> Viewed in light of this backdrop, the congressional intent in both the AEA and the Policy Act was to promote and encourage additional sites to dispose of LLRW.

### *B. Agreement States*

In conjunction with § 274 of the AEA,<sup>24</sup> the LLRW Policy Act permits the United States to delegate certain aspects of LLRW regulation to the states.<sup>25</sup> The United States transfers authority to states through § 274 of the AEA by entering into an agreement with the state ("274 Agreement"), signed by the governor of the state and the NRC

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19. *Silkwood*, 464 U.S. at 250; *Skull Valley*, 376 F.3d at 1240–41.

20. Pub. L. No. 96-573 (Dec. 23, 1980).

21. The take-title provisions of the Policy Act were struck down by the United States Supreme Court in *New York v. United States*, 505 U.S. 144 (1992), because they violated the Tenth Amendment. See generally Rhett Traband, *New York v. United States: The Constitutional and Environmental Fallout of Low-Level Waste Disposers*, 5 VILL. ENVTL. L.J. 267 (1994).

22. *Wash. State Bldg. & Constr. Trades Council AFL-CIO v. Washington*, 518 F. Supp. 928, 932 (E.D. Wash. 1981), *aff'd sub nom.*, *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627 (9th Cir. 1982); see Dicus, *supra* note 2 (discussing the background of the LLRW Policy Act and Congress's intent in adopting the Act).

23. *Washington*, 518 F. Supp. at 932–33.

24. 42 U.S.C. § 2120c (2000).

25. U.S. Nuclear Regulatory Commission, Agreement State Program, available at <http://www.nrc.gov/what-we-do/state-tribal/agreement-states.html> (last modified Nov. 22, 2004); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 209 (1983) (interpreting 42 U.S.C. § 2021(b) (2000)); see *infra* Part III.A. "Authority could be shifted to the States for control over byproduct and source material, and over special nuclear material 'in quantities not sufficient to form a critical mass.'" *Pac. Gas & Elec.*, 461 U.S. at 209 n.20.

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chairman.<sup>26</sup> In each agreement the United States permits the state to engage in “coordinated and compatible” regulation of certain nuclear materials.<sup>27</sup>

In allowing the United States to delegate its authority to states, Congress was clearly interested in encouraging effective nuclear waste disposal and in encouraging states to dispose of waste within their borders.<sup>28</sup> Additionally, Congress emphasized that delegation of its authority to states did not affect the federal goals for and ultimate control over radioactive waste.

Nothing contained in [the LLRW Policy Act] or any compact may be construed to confer any new authority on any . . . State to regulate the . . . treatment, storage, disposal, or transportation of low-level radioactive waste in a manner incompatible with the regulation of the Nuclear Regulatory Commission.<sup>29</sup>

An “Agreement State” has qualified authority to regulate byproduct materials, source materials, and special nuclear materials.<sup>30</sup> The NRC directly cooperates with the state in forming standards to regulate radiation hazards and standards to issue licenses.<sup>31</sup> When a state reaches an agreement with the NRC and the agreement is approved by Congress, the state becomes an “Agreement State.”<sup>32</sup>

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26. *Pac. Gas & Elec.*, 461 U.S. at 209 n.20; *see also* 42 U.S.C. § 2021. “NRC assistance to States entering into Agreements includes review of requests from States for 274b Agreements (or amendments to existing agreements), meetings with States to discuss and resolve NRC review comments, and recommendations for Commission approval of proposed 274b agreements.” U.S. Nuclear Regulatory Commission, Agreement State Program, *supra*, note 25. The NRC also conducts training courses and workshops for states, evaluates states’ technical licensing requirements, reviews state inspection issues, evaluates state rule changes, and involves states in NRC rule making and regulatory efforts. *Id.*

27. *See* 42 U.S.C. § 2021(a)(1) and (g); *see also* *Skull Valley*, 376 F.3d 1223, 1241 (10th Cir. 2004).

28. “Nothing . . . shall be deemed to prohibit a State, subject to the provisions of its compact, . . . from accepting [low-level radioactive waste].” 42 U.S.C. § 2021c.

29. 42 U.S.C. § 2021d(b)(3)(A).

30. *Wash. State Bldg. & Constr. Trades Council AFL-CIO v. Washington*, 518 F. Supp. 928, 931–32 (E.D. Wash. 1981).

31. *Pac. Gas & Elec.*, 461 U.S. at 210 n.21; *see also* 42 U.S.C. § 2021(b), (d). *See generally* 42 U.S.C. § 2021.

32. 42 U.S.C. § 2021b defines an “agreement State.” “The term ‘agreement State’ means that a State that (A) has entered into an agreement with the Nuclear Regulatory Commission under § 274 of the Atomic Energy Act of 1954; and (B) has authority to regulate the disposal of low-level radioactive waste under such agreement.” Pub. L. No. 99-240 (1986). Each of these agreements is reported in the Federal Register. *See, e.g.*, Notice of Proposed Amended Agreement with State of Utah, 54 Fed. Reg. 50,454 (Dec. 6, 1989). Vermont’s agreement with the NRC is reported at 62 Fed.

The NRC has published guidelines delineating the scope of an Agreement State's authority to regulate waste within its borders.<sup>33</sup> Specifically, the guidelines require that a state's law governing atomic energy not conflict with the federal scheme of regulation.<sup>34</sup> In addition, the NRC, in an effort to help Agreement States keep their programs compatible with federal law, has issued a directive reiterating § 274's command that all state programs be "coordinated and compatible."<sup>35</sup>

To determine whether a state program is compatible with federal regulations, the directive articulates standards that consider primarily how the state's action or inaction affects "the regulation of agreement material on a nationwide basis or on other jurisdictions."<sup>36</sup> A program becomes incompatible with federal law if its regulations preclude a practice that is in the national interest.<sup>37</sup> A state is permitted to place "additional requirements when required to protect public health and safety"<sup>38</sup> without making its program incompatible with federal regulations.

In 1989, Utah and the United States entered into an agreement (the "Agreement") pursuant to § 274 that gave Utah the authority to license and regulate LLRW disposal within its borders.<sup>39</sup> Utah's Agreement with the United States is an example of a typical 274 Agreement. The Agreement recognized that, in accordance with federal requirements, Utah law provides a system to license facilities<sup>40</sup> and that Utah's system for disposing of LLRW is compatible with federal objectives.<sup>41</sup> The

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Reg. 6281 (Feb. 11, 1997). Maine's agreement with the United States is reported at 63 Fed. Reg. 67,945 (Dec. 9, 1998).

33. See U.S. NUCLEAR REGULATORY COMM'N, PROCESSING AN AGREEMENT, PROCEDURE NO. SA-700 (Apr. 2, 2001).

34. *Id.* § 4.1.1.2b-d, at 13.

35. See U.S. NUCLEAR REGULATORY COMM'N, DIRECTIVE NO. 5.9, ADEQUACY AND COMPATIBILITY OF AGREEMENT STATE PROGRAMS (Feb. 27, 1998).

36. *Id.* at 1.

37. *Id.* at 5.

38. PROCESSING AN AGREEMENT, *supra* note 33, § 4.1.1.2d.

39. Notice of Proposed Amended Agreement with State of Utah, 54 Fed. Reg. 50,454 (Dec. 6, 1989).

40. *Id.* at 50,455 (noting that sections 26-1-27 through 26-1-29 of the Utah Code provide a mechanism for the State Department of Health, now the Department of Environmental Quality, "to issue licenses to, and perform inspections of users . . . of radioactive materials . . . and otherwise carry out a total radiation control program").

41. *Id.* at 50,455-56 ("The Utah regulations provide for land disposal of low-level radioactive waste received from other persons which are compatible with the applicable technical definitions, performance objectives, technical requirements and supporting sections [of the NRC regulations] set out in 10 CFR part 61.").

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agreement was proper under § 274 because Utah's Radiation Control Rules "were compatible with the Commission's regulations."<sup>42</sup> Maine and Vermont also have entered into 274 Agreements with the United States.<sup>43</sup>

*C. Suspect State Statutes*

However, some states have exceeded their delegated authority to regulate LLRW under their § 274 Agreements by passing statutes that conflict with federal objectives and are not coordinated and compatible with the federal regulation scheme. For example, Utah passed a bill to completely ban importation of Class B and C LLRW and a few other states require that a prospective LLRW facility obtain political approval before it can operate. For example, a previous Utah statute required a prospective facility that disposes of Class B and Class C LLRW<sup>44</sup> to be approved by both the legislature and the governor before it can operate in the state.<sup>45</sup> The same requirement applied to an existing commercial LLRW facility that seeks to expand or to receive a different class of LLRW.<sup>46</sup> Under the statute, a prospective facility must apply for and receive a license and then seek approval from the legislature and governor. The approval statute does not list any criteria under which a prospective facility will be analyzed but gives the legislature and governor the unfettered ability to deny an applicant for any reason or no reason at all.

Similarly, Maine requires that a prospective LLRW disposal facility obtain approval from its legislature<sup>47</sup> and the majority of the voters in a

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42. *Id.* at 50,456 ("The Utah regulations contain provisions relating to the disposal of radioactive materials into the air, water and sewer and burial in soil which are essentially uniform with those of 10 CFR part 20 . . . . The waste disposal requirements include a waste classification scheme and provisions for waste form equivalent to that in 10 CFR part 61.").

43. *Id.* at 50,454. Vermont's agreement with the NRC is reported at 62 Fed. Reg. 6281 (Feb. 11, 1997). Maine's agreement with the United States is reported at 63 Fed. Reg. 67,945 (Dec. 9, 1998).

44. There are three different categories of LLRW, categorized according to the amount of radiation that each emits. Class A LLRW emits the lowest amount of radiation, followed by Class B and C wastes, respectively. *See* 10 C.F.R. § 61.55 (defining each type of waste).

45. UTAH CODE ANN. § 19-3-105 (2003); UTAH CODE ANN. § 19-3-105(2)(b)(iii) ("A person may not construct a new commercial radioactive waste transfer, storage, decay in storage, treatment, or disposal facility until . . . the governor and the Legislature have approved the facility."). The statute does not apply to Class A radioactive waste.

46. UTAH CODE ANN. § 19-3-105(2)(c).

47. ME. REV. STAT. tit. 38, § 1479 (West 2003).

A low-level radioactive waste disposal or storage facility may not be established in the

statewide election<sup>48</sup> before it can be constructed. Vermont takes a slightly different approach and requires that the municipality in which the prospective facility would be located hold a “duly warned meeting” and “obtain the consent of a majority of the voters, present and voting” at the meeting.<sup>49</sup> Similar to the Utah statute, the Maine and Vermont statutes do not list any standards that an applicant facility must comply with to receive approval or any criteria under which a facility will be evaluated.

Even though the federal government expressly ceded qualified regulatory responsibilities over byproduct materials, source materials, and special nuclear materials to each of these states, the United States did not cede all control over low-level wastes.<sup>50</sup> To the extent that these three statutes conflict with the requirement that the state programs be “coordinated and compatible” with Congress’s goals for LLRW disposal, they violate the Supremacy Clause<sup>51</sup> of the United States Constitution and are preempted by federal law.

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State, unless the Legislature has, by Private and Special Act, approved the establishment of that facility. The Legislature shall act expeditiously after a decision by the United States Nuclear Regulatory Commission to approve a facility, but may not act until after the conclusion of any judicial review of the decision and any resulting administrative proceedings.

*Id.*

48. *Id.* § 1493.

A low-level radioactive waste disposal or storage facility may not be constructed or operated in the State unless the construction or operation is approved by a majority of the voters voting on the construction or operation in a statewide election. The election must be held in the manner prescribed by law for holding a statewide election and in accordance with the procedures set forth in Title 35-A, § 4302. The voters must be asked to vote on the acceptance or rejection of construction or operation by voting on the following question: “Do you approve (insert construction or operation) of a low-level radioactive waste (insert disposal or storage) facility as proposed for (insert location)?” This question must be submitted to the legal voters of the State at the next following statewide election after a decision by the United States Nuclear Regulatory Commission to approve a low-level radioactive waste facility. The construction or operation of the facility may not commence prior to the election.

*Id.*

49. VT. STAT. ANN. tit. 10, § 7012 (f)(5) (2003).

50. *See, e.g.*, Notice of Proposed Amended Agreement with State of Utah, 54 Fed. Reg. 50,454 (Dec. 6, 1989).

51. U.S. CONST. art. VI, cl. 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”).

### III. THE SUPREMACY CLAUSE AND FEDERAL PREEMPTION OF NUCLEAR WASTE REGULATION

“The Supremacy Clause ‘embodies the fundamental principle that in certain areas the United States must act as a single nation, led by the federal government, rather than as a loose confederation of independent sovereign states.’”<sup>52</sup> A federal law preempts state law if either Congress expressly declares that the law is intended to preempt state law or the federal law impliedly preempts state law.<sup>53</sup> There are two types of implied preemption: field preemption<sup>54</sup> and conflict preemption.<sup>55</sup> In either case, “the question of preemption is one of determining Congressional intent.”<sup>56</sup> Federal law trumps state law through conflict preemption when “compliance with both federal and state regulations is a physical impossibility,”<sup>57</sup> or when state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>58</sup>

This Part discusses relevant precedent showing when state action that affects waste disposal should be preempted by federal law. Section A looks at Supreme Court precedent discussing when federal law preempts state statutes governing atomic energy, Section B reviews the Tenth Circuit’s reasoning in *Skull Valley Band of Goshute Indians v. Nielson*,<sup>59</sup> and Section C explores analogous cases that determine when state action conflicts with federal objectives in the Resource Conservation and Recovery Act.

52. *Skull Valley*, 376 F.3d 1223, 1239 (2004) (quoting *Abraham v. Hodges*, 255 F. Supp. 2d 539, 549 (D.S.C. 2002)).

53. *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

54. Field preemption is the dominant analysis applied to cases that discuss when a state statute that affects high-level nuclear waste should be preempted. Field preemption does not apply to LLRW because Congress does not occupy any field with relation to LLRW; Congress has expressly delegated authority to the states to regulate LLRW. Therefore, the only type of implied preemption that applies to state statutes governing LLRW is conflict preemption. This Comment does not discuss portions of cases that use a field preemption analysis and focuses only on relevant conflict preemption analysis that is binding on statutes that regulate LLRW.

55. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

56. *Skull Valley*, 376 F.3d at 1240 (citing *Wardaid Canada Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 6 (1986)).

57. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).

58. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See *supra* note 54 and *infra* note 63 for a discussion of why field preemption is not an issue with the suspect state statutes examined in this Comment.

59. *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223 (10th Cir. 2004), *aff’g sub nom.*, *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232 (D. Utah 2002).

*A. Supreme Court Precedent*

Three Supreme Court decisions have shaped the preemptive effect of the AEA, concluding that states cannot use statutes, whatever their purported purpose, to subvert the United States' power to regulate atomic energy programs.<sup>60</sup> Even though in each case the Supreme Court determined that the AEA did not preempt the state statute at issue, the cases outline a framework that shows that federal law preempts statutes that conflict with or frustrate congressional goals to promote atomic energy.

In the following three cases, the Supreme Court noted that the state statutes at issue could be preempted either by field preemption<sup>61</sup> or conflict preemption. Through its 274 Agreement with Utah, Vermont, and Maine, the United States has ceded some of its authority to these states and expressly permitted them to enact safety requirements that are more demanding than current federal requirements.<sup>62</sup> Because Congress explicitly permitted these states to regulate nuclear safety concerns, the doctrine of field preemption cannot be applied to preempt laws in Agreement States that regulate LLRW out of safety concerns.<sup>63</sup>

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, a utility company challenged a California statute that imposed a moratorium on the construction of new nuclear power plants while the state investigated whether adequate storage facilities and means of disposal were available. A utility company attempted to enjoin the enforcement of a moratorium so that it could construct a new nuclear power plant.<sup>64</sup>

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60. *English*, 496 U.S. at 80–90; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248–51 (1984); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203–23 (1983).

61. *Pac. Gas*, 461 U.S. at 204. “Absent explicit pre-emptive language, Congress’ intent to supercede state law altogether may be found from a ‘scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it . . . .’” *Fidelity Fed. Sav. & Loan Ass’n v. Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

62. *See supra* Part II.B.

63. Even though the field preemption analysis was the primary focus of each case, this Comment focuses only on the conflict preemption analysis of the following cases because that is the only portion that governs state laws regulating LLRW.

64. *Pac. Gas*, 461 U.S. at 204. The Supreme Court first engaged in a field preemption analysis.

The Court noted that federal law preempts state laws to the extent that they actually conflict with the federal program for atomic energy.<sup>65</sup> The statute did not conflict with the federal goals because it did not frustrate or thwart the federal goal to develop nuclear power<sup>66</sup> and because the statute did not conflict with the AEA.<sup>67</sup> The moratorium was not a complete ban on construction of nuclear power facilities but was a reasonable state measure to ensure that the state had the ability to dispose of nuclear waste. The statute did not hinder the development of nuclear power plants but merely sought to ensure that nuclear power was regulated in an efficient and responsible manner. Because California did not use the moratorium to impose its own standards on nuclear waste disposal or to prevent construction of nuclear power plants in the state, the statute did not conflict with federal law.

Similarly, in *Silkwood v. Kerr-McGee Corp.*,<sup>68</sup> a nuclear power plant challenged a state statute that authorized punitive damages to be awarded in negligence cases. The plant challenged the statute because a jury awarded punitive damages to a plaintiff that was exposed to radioactive materials at the power plant.<sup>69</sup> The Supreme Court determined that the statute did not conflict with federal law and should not be preempted.<sup>70</sup> Federal law regulated the safety aspects of nuclear power plants, but individual causes of action against power plants for torts were governed by state law. When Congress enacted the AEA, it knew that state negligence laws were in place and “intended to stand by both concepts and to tolerate whatever tension there was between them.”<sup>71</sup>

Additionally, the state law and the AEA did not conflict because it was possible for a power plant to pay both federal fines and state-imposed punitive damages.<sup>72</sup> Exposing the power plant to punitive damages did not frustrate any purpose of the federal remedial scheme.<sup>73</sup> Just as the moratorium in *Pacific Gas* was not preempted even though it had an incidental effect on nuclear power by temporarily delaying its cultivation in California, the punitive damage statute’s effect on the

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65. *Id.* at 204.

66. *Id.* at 219.

67. *Skull Valley*, 376 F.3d 1223, 1243 (2004) (discussing *Pac. Gas*, 461 U.S. at 222).

68. 464 U.S. 238 (1984).

69. *Id.* at 248–57.

70. *Id.* at 257–58.

71. *Id.* at 256.

72. *Id.* at 257.

73. *Id.*

power plant did not conflict with the federal goals, even though it affected a nuclear power plant, because it regulated something outside nuclear power and was not aimed to hinder it. “The promotion of nuclear power is not to be accomplished at all costs.”<sup>74</sup>

If the state statute permitting punitive damages awards in negligence cases were specifically targeted at nuclear power plants to place burdens on them or to discourage their operation, the conflict preemption doctrine would have preempted the state punitive damage statute because the state law would have undermined the federal goals underlying the AEA.<sup>75</sup> However, the state tort law did not undermine those goals because punishing a facility for its negligence does not frustrate Congress’s desire to promote waste disposal.<sup>76</sup> One of Congress’s main goals in enacting the AEA was to ensure safety in nuclear energy and disposal; the state tort law effectuated, rather than undermined, that intent.<sup>77</sup> A state law cannot be preempted through conflict preemption unless it actually conflicts with or undermines the objectives of the federal legislation. The punitive damage award did not conflict with the objects of federal law.

In a later case, *English v. General Electric Co.*,<sup>78</sup> a power plant challenged an employee’s state law claim against it for intentional infliction of emotional distress. An employee filed suit against her nuclear power plant employer after it allegedly retaliated against her for reporting that the plant had violated nuclear safety standards.<sup>79</sup> The plant appealed the award, alleging that the award should be preempted by federal law because it burdened nuclear power. The Court determined that a tort cause of action for intentional infliction of emotional distress was not preempted through conflict preemption because the tort did not conflict with the intent or the operation of the AEA.<sup>80</sup>

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74. *Id.* (quoting *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 222 (1983)).

75. *Id.*

76. *Id.*

[I]nsofar as damages for radiation injuries are concerned, pre-emption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damage action would frustrate the objectives of the federal law.

*Id.* at 256.

77. *Id.* at 257–58.

78. 496 U.S. 72 (1990).

79. *Id.* at 76.

80. *Id.* at 87–90.

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First, the court looked at whether the statute on its face conflicted with the AEA and concluded that it did not.<sup>81</sup> Next, the court declared that it needed to look for “special features warranting preemption.”<sup>82</sup> The Court did not articulate any criteria to indicate what such a “special feature” would be but analyzed three special features of the AEA provision that the district court had identified.<sup>83</sup> The Court determined that none of the features warranted preemption, but in analyzing each of the features, the Court laid a foundation for when a state statute regulating atomic energy should be preempted by state law.

The Court started with the text of the federal statutes to determine whether it indicated that a similar state law should be preempted.<sup>84</sup> Next, it looked at the legislative history of the federal act to determine whether it revealed “a clear congressional purpose to supplant state-law causes of action that might afford broader relief.”<sup>85</sup> It suggested that a state statute is only preempted through conflict preemption if the action of preemption would serve a federal interest.<sup>86</sup> Neither the text of the statute nor the legislative history indicated an intent to preempt state-law punitive damage awards against nuclear power plants for retaliating against whistleblowers.<sup>87</sup>

The Court also noted that preemption is “ordinarily not to be implied absent an ‘actual conflict’” and that “[t]he ‘teaching of [the] Court’s decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.’”<sup>88</sup> *English* specifically discusses delegation of authority to states under § 274<sup>89</sup> and forecloses the possibility that a state requirement can be insulated from preemption

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81. *Id.* at 87.

82. *Id.*

83. The special features were (1) that language in the AEA provided that certain requirements of the AEA should not apply when an employee deliberately causes a violation of a requirement of the Act, (2) that the AEA did not generally authorize the award of punitive damages who engage in retaliatory conduct, and (3) that the statute of limitations to report a safety violation under the state law were longer than those provided under the AEA. *Id.* at 87–90.

84. *Id.* at 88 (“As an initial matter, we note that [the provision of the AEA at issue] specifically limits its applicability . . . and does not suggest that it bars state-law tort actions.”).

85. *Id.*

86. *Id.*

87. “Absent some specific suggestion in the text or legislative history . . . , which we are unable to find, we cannot conclude that Congress intended to preempt all state actions that permit the recovery of exemplary damages [against nuclear power plants].” *Id.* at 89.

88. *Id.* (alteration and omission in original) (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 466 (1960)).

89. *Id.* at 81.

based on an agreement with the United States by reiterating the statutory requirement that Agreement State actions have to be “coordinated and compatible” with the NRC.<sup>90</sup>

The *English* opinion demonstrates that to determine whether state action is preempted, one has to look both at the Atomic Energy Act and the Low-Level Radioactive Waste Policy Act, which specifically create a federal scheme for governing LLRW.<sup>91</sup> The tort action did not conflict with the AEA because it “encourage[d] employees to report safety violations and establishe[d] a procedure to protect them from any resulting retaliation.”<sup>92</sup> Like the statute in *Pacific Gas*, the statute in *English* functioned in harmony with federal goals; thus, without a conflict, there was no conflict preemption.

Even though the Supreme Court determined in each case that the AEA did not preempt the state statute at issue, these cases illustrate several important principles regarding preemption. First, a state law conflicts with a federal law if it is impossible to comply with the requirements of the state law and the requirements of the federal law. Second, if a state law is specifically designed to thwart or frustrate the objectives of the federal law, or if the effect of the state law is to an unnecessary hurdle on the federal scheme of regulation, the statute is preempted if it conflicts with federal law.

*B. The Tenth Circuit’s Application of Supreme Court  
Precedent in Skull Valley Band of Goshute Indians v. Nielson*

Similar to the Supreme Court cases, the Tenth Circuit recently determined that a state statute is preempted if it is designed to hinder or prevent a nuclear waste disposal facility from operating in the state. In *Skull Valley Band of Goshute Indians v. Nielson*,<sup>93</sup> the Tenth Circuit struck down a series of Utah state laws designed to prevent a licensed high-level waste facility from operating in the state.<sup>94</sup> Two classes of those laws were preempted through conflict preemption: (1) a statute that eliminated the statutory and common-law limited liability of directors,

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90. *Id.* (quoting 42 U.S.C. § 2021(g) (2000)).

91. *See id.*

92. *Skull Valley*, 376 F.3d 1223, 1243–44 (10th Cir. 2004) (discussing *English*, 496 U.S. at 82).

93. 376 F.3d 1223 (2004).

94. The Tenth Circuit struck down five different classes of statutes; however, this Comment focuses its analysis of *Skull Valley* to the two classes of statutes that were preempted through conflict preemption.

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officers, and shareholders of a high-level waste disposal facility<sup>95</sup> and (2) a statute that required the operator of a high-level waste facility to give the state seventy-five percent of the “unfunded potential liability” of the site.<sup>96</sup>

Section 19-3-318 of the Utah Code abolished limited liability for shareholders in companies operating disposal facilities. The statute conflicted with federal law because it “upend[ed] a fundamental principle of corporate law as applied to SNF storage facilities [and] disrupt[ed] the balance that Congress sought to achieve.”<sup>97</sup> The court noted that “Congress’ purpose [in allowing the private sector to participate in nuclear power] was to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power.”<sup>98</sup> The overarching federal goal with respect to nuclear waste is to promote states and private entities to participate in producing nuclear energy and disposing of nuclear waste.<sup>99</sup>

Because stockholders are generally not personally liable under Utah law for the debts of a corporation, the statute conflicted with federal objectives because “the abolition of limited liability attempts a sea change in the law of corporations and is targeted at the nuclear industry only.”<sup>100</sup> The statute’s direct aim at the nuclear industry indicated that the statute was intended to undermine the federal purpose of promoting efficient waste disposal. The Utah statute directly undermined that objective because it directly discouraged commercial involvement in high-level waste by taking away the financial incentive of commercial disposal by exposing shareholders to potential liability.<sup>101</sup>

Similarly, Section 19-3-319 of the Utah Code, the portion of the Utah licensing scheme that required a disposal facility to pay the state seventy-five percent of the “unfunded potential liability” of the

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95. UTAH CODE ANN. § 19-3-316 (2003).

96. UTAH CODE ANN. § 19-3-319(3).

97. *Skull Valley*, 376 F.3d at 1251. The court also rejected Utah’s argument that the statutes were similar to the statutes in *Silkwood* and *English* because “the abolition of limited liability attempts a sea change in the law of corporations and is targeted at the nuclear industry only” rather than involving “a state tort remedy that existed prior to the enactment of federal legislation regarding nuclear power.” *Id.*

98. *Id.* (internal quotation marks omitted) (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978)).

99. *See id.*

100. *Id.* at 1251.

101. *Id.*

facility,<sup>102</sup> conflicted with federal law. The federal scheme vested the NRC with the authority to determine when to license a facility and to determine the amount of liability insurance that a facility must obtain.<sup>103</sup> Section 319, by imposing its own independent determination of potential liability, conflicts with the objectives of federal law.<sup>104</sup>

The court distinguished Section 319 from tort laws in *Silkwood* and *English* by noting that the tort laws were existing state law remedies but that Section 319 was directly targeted at the nuclear waste disposal industry. Additionally, Section 319 should be preempted because, unlike the tort laws in the other cases, it affected limitations on liability, indemnification, and determination of financial responsibility of disposal facilities.<sup>105</sup> As the district court noted, the disposal facility was a limited liability corporation and the statute would subject directors, officers, and shareholders in the corporation to unlimited risk.<sup>106</sup> “Such individual risk would more likely than not have the effect of preventing the construction and operation of a SNF storage facility.”<sup>107</sup>

*C. Conflict Preemption Applies to Section 274 Agreements  
with States over LLRW*

The exact limits on a state’s ability to regulate LLRW under § 274 has not been widely litigated, likely because of the few prospective facilities and the massive investment involved in challenging a state statute. The issue has never reached the Supreme Court, and only one circuit court has determined the scope of a state’s authority to regulate LLRW after it has entered into an agreement with the NRC.<sup>108</sup>

This Section takes the limited precedent available and shows that states’ actions to regulate LLRW pursuant to a 274 Agreement are limited and discusses that states cannot enact regulations that impair the United States’ goal to promote atomic energy development and disposal.

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102. UTAH CODE ANN. § 19-3-319(3) (2003).

103. *Skull Valley*, 376 F.3d 1223, 1250 (10th Cir. 2004).

104. *Id.* at 1249–52 (distinguishing Utah’s law from the laws in *Silkwood* and *English* because Utah’s law could not be “characterized as ‘existing state tort law remedies’” (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 252 (1984)).

105. *Id.* at 1250.

106. *Skull Valley*, 215 F. Supp. 2d at 1246.

107. *Id.* at 1246–47.

108. *See Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627 (9th Cir. 1982).

*I. Agreement States' power to regulate LLRW is limited*

Congress did not cede all of its authority over LLRW to the states, and the states cannot regulate in a way that undermines the federal goal of promoting waste disposal.<sup>109</sup> The Ninth Circuit, the only circuit to squarely address the scope of an Agreement State's authority to regulate LLRW, determined that, although the United States ceded some of its authority to regulate LLRW to the states through 274 Agreements, "complete control of [waste disposal] sites [does] not pass with the assignment of regulatory responsibilities."<sup>110</sup> In *Wash. State. Bldg. & Constr. Trades Council v. Spellman*, the State of Washington, a 274 Agreement State, banned out-of-state waste from entering the state for disposal.<sup>111</sup> Washington argued that the ban was permissible because, through its 274 Agreement and the LLRW Policy Act, the United States ceded all control over low-level waste disposal to Washington.<sup>112</sup>

The Ninth Circuit rejected Washington's argument and held that Washington's 274 Agreement gives it only limited control over LLRW. "The regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not waived or delegated its authority over the subject."<sup>113</sup> Further, neither the agreement between the United States and Washington nor the LLRW Policy Act "is a grant of total authority to the states over the disposal of low-level wastes within their own borders."<sup>114</sup> An initiative to ban out-of-state waste is preempted by federal law through conflict preemption because closing a

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109. *English v. Gen. Elec. Co.*, 496 U.S. 72, 81 (1990).

110. *Spellman*, 684 F.2d at 630.

111. *Id.* In the LLRW Policy Act, Congress provides that states can enter into compacts with other states to provide a site to dispose of LLRW. 42 U.S.C. § 2021d. Once a group of states has entered into a compact and identified a facility to dispose of waste for their compact, Congress gives the members of the compact the authority to exclude waste from a state outside of the compact from being disposed of at their site. *Id.* Congress placed some conditions on the ability of a compact site to exclude noncompact waste. *Id.* One of those conditions was that a compact could not exclude waste until after 1986. *Id.* § 2021d(c). The site that attempted to exclude waste in *Spellman* was the designated site for a compact, so it would have been permitted to exclude waste after 1986. *Spellman*, 684 F.2d at 629–31. However, even though the LLRW Policy Act permits a designated compact disposal site to exclude noncompact waste, nothing in the Act gives a compact state the right to exclude out-of-state waste from entering its borders at a site other than the compact site.

112. *Id.* at 629.

113. *Id.* at 630.

114. *Id.*

state's borders to LLRW "would significantly aggravate the national problem of low-level waste disposal."<sup>115</sup>

## 2. States cannot use delegated authority to thwart federal objectives

Other similar cases under the Resource Conservation and Recovery Act ("RCRA") help identify the limits of state action when it affects a federal regulatory scheme. The federal system of regulating solid waste under the RCRA closely parallels the regulation of LLRW under the Act and § 274. RCRA regulates the disposal of solid waste.<sup>116</sup> RCRA permits states to assume some responsibility over their waste disposal by entering into an agreement with the United States, similar to a 274 Agreement under the AEA.<sup>117</sup> Further, just as Agreement States under the AEA have authority to enact additional regulations,<sup>118</sup> RCRA provides that states can adopt disposal regulations that are more stringent than those required under the federal system.<sup>119</sup> This provision is commonly called "the RCRA Savings Clause."

Purporting to act under the RCRA Savings Clause, several localities passed laws or ordinances banning disposal of solid waste within their borders.<sup>120</sup> In all these cases, the courts determined RCRA prevented local actions, even if allegedly enacted under the RCRA Savings Clause. The ordinances were preempted because they thwarted the goal of RCRA, which is to promote waste disposal, by making it more difficult or impossible to dispose of solid waste.<sup>121</sup>

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115. *Id.* at 631. *But see* Susan L. Satter, *Congressional Recognition of State Authority over Nuclear Power and Waste Disposal*, 58 CHI.-KENT L. REV. 813, 839-41 (1982) (criticizing *Spellman* as disregarding the practical effect of congressional intent). "In another instance of inverting congressional intent, the court correctly noted that the Low-Level Waste Act 'recognizes the particularly acute national problem of a high demand for storage and a dwindling supply of storage capacity.'" *Id.* at 839.

116. 42 U.S.C. §§ 6901-6992k (2000).

117. *See supra* Part II.

118. *Id.*

119. *See* 42 U.S.C. § 6929. This clause that allows states to enact more stringent regulations than that provided in federal law for solid waste is often referred to as the RCRA Savings Clause. *See* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125, 1149 (1999).

120. *See generally* *Blue Circle Cement, Inc. v. Bd. of County Comm'rs*, 27 F.3d 1499 (10th Cir. 1994), *remanded to* 917 F. Supp. 1514 (N.D. Okla. 1995).

121. *See Blue Circle*, 27 F.3d 1499 (holding that a conditional-use permit that functioned in the nature of a de facto ban would conflict with the goals of RCRA because instead of facilitating waste disposal it prevented it); *ENSCO, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986) ("A county cannot, by attaching the label 'more stringent requirements' or 'site selection' to an ordinance that in language and history defies such description, arrogate to itself the power to enact a

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For example, in *Blue Circle Cement, Inc. v. Board of County Commissioners*, a county enacted an ordinance that required every disposal facility to obtain a conditional-use permit.<sup>122</sup> A prospective facility sought injunctive relief from the ordinance because it suspected that the county would not grant any conditional-use permits and was using the ordinance as a scheme to effectively ban waste disposal.<sup>123</sup> Similar to the conflict preemption analysis that the Supreme Court used in *English, Silkwood*, and *Pacific Gas*, the Tenth Circuit identified the purpose of RCRA and determined that the county ordinance would be preempted if it conflicted with the purpose. It determined that the ordinance was contrary to the intent of the RCRA because the ordinance “thwart[ed]” the federal RCRA policy.<sup>124</sup> Although there is no direct link between the solid waste cases and the atomic energy cases, the framework in *Blue Circle* is helpful in determining whether political approval requirements for LLRW facilities are preempted because the dual federal/state regulation of RCRA closely parallels the dual federal/state regulation of LLRW.

*Blue Circle* articulated two factors to determine whether a state regulation conflicts with federal law: (1) regulations that amount to an explicit or de facto total ban of an activity that is otherwise encouraged by the system of federal regulation will ordinarily be preempted through conflict preemption;<sup>125</sup> (2) regulations that fall short of imposing a total ban on encouraged activity will ordinarily be upheld so long as they (a) are supported by a record establishing that they are reasonable responses to a legitimate local concern for safety or welfare and (b) do not actually conflict with federal law.<sup>126</sup>

Under the first factor, a regulation that is either a ban or a de facto ban of an activity that is encouraged by RCRA is preempted. The purpose of RCRA is to “assist states and localities in the development of improved solid waste management techniques to facilitate resource

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measure that as a practical matter cannot function other than to subvert federal policies concerning the safe handling of hazardous waste.”); *Rollins Env'tl. Servs. of La., Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127, 1132 (La. 1979) (holding that RCRA preempted a parish ordinance’s flat ban on hazardous waste disposal because “spotty . . . parochial control” in the nature of a “stifling prohibition” would undermine RCRA’s hazardous waste management goals).

122. *Blue Circle*, 27 F.3d. at 1502.

123. *See id.* at 1509–10.

124. *Id.* at 1504–06.

125. *Id.*

126. *Id.* at 1507–09.

recovery and conservation.”<sup>127</sup> Waste disposal is “an activity that is otherwise encouraged by RCRA.”<sup>128</sup>

A state or locality cannot ban an activity that RCRA encourages without directly undermining the goals of RCRA.<sup>129</sup> If the federal RCRA scheme is designed to promote waste disposal, a state cannot use its regulatory authority to completely ban the activity. By “attaching the label ‘more stringent requirements’ or ‘site selection’ to an ordinance that in language and history defies such description,” a state or locality cannot “arrogate to itself the power to enact a measure that as a practical matter cannot function other than to subvert federal policies.”<sup>130</sup> If individual states or localities started to ban waste disposal “through artfully designed ordinances, the national goal for safe, environmentally sound toxic waste disposal would surely be frustrated.”<sup>131</sup> The result would be a “stifling prohibition” on RCRA’s hazardous waste management goals.<sup>132</sup> A regulation that bans waste disposal under RCRA conflicts with federal law because it defeats safe federal solutions and directly subverts RCRA.<sup>133</sup> Similarly, courts have uniformly held that state action to ban high-level waste disposal conflicts with federal law.<sup>134</sup>

A regulation that functions in the nature of a de facto ban causes a conflict with federal law that is just as unconstitutional as an explicit ban. In *Blue Circle*, the local ordinance requiring a disposal facility to obtain a conditional-use permit did not impose an explicit ban on waste disposal, so the Tenth Circuit remanded the case to the district court for the parties to develop a factual record, through presentation of experts and examination of legislative intent, to determine whether the ordinance imposed a de facto ban.<sup>135</sup> On remand, the district court determined that

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127. *Id.* at 1506 (citing 42 U.S.C. § 6902(a)(1) (1994)).

128. *Id.* at 1508.

129. *See* *ENSCO, Inc. v. Dumas*, 807 F.2d 743, 745 (8th Cir. 1986); *Rollins Envtl. Servs. of La., Inc. v. Iberville Parish Police Jury*, 371 So. 2d 1127, 1132 (La. 1979).

130. *ENSCO*, 807 F.2d at 745.

131. *Rollins Environmental Servs. (FS), Inc. v. St. James*, 775 F.2d 627, 637 (5th Cir. 1985).

132. *Iberville Parish*, 371 So. 2d at 1132.

133. *See* *Hermes Consol., Inc. v. People*, 849 P.2d 1302, 1311 (Wyo. 1993).

134. *United States v. Kentucky*, 252 F.3d 816, 822–25, 828 (6th Cir. 2001); *Jersey Central Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1109 (3rd Cir. 1985); *Illinois v. Gen. Elec. Co.*, 683 F.2d 206 (7th Cir. 1982). None of these cases are helpful to the discussion of banning LLRW because all three cases are based solely on a field preemption analysis. *See supra* note 54 (discussing why field preemption does not apply to state regulations of LLRW).

135. *Blue Circle*, 27 F.3d 1499, 1510 (10th Cir. 1995).

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the conditional-use permit requirement effected a de facto ban on waste disposal.<sup>136</sup>

The scheme was a de facto ban because no property located in the county could meet the location requirements to obtain a permit.<sup>137</sup> The county did not produce any evidence to show that an acceptable site existed and argued that the ordinance was not a de facto ban because the county might relent and grant a permit to a facility that applied for a license or that the county might rezone so that other possible sites would become available.<sup>138</sup> The court held that a hypothetical, standardless possibility that a site might be approved did not overcome the contention that the regulation imposed a de facto ban.

Further, a standardless permit scheme can be unconstitutional as a de facto ban because it creates the potential for “sham” and “subterfuge.”<sup>139</sup> The courts have noted that they cannot allow a state to “completely evade judicial review simply by requiring a conditional use permit, which is then granted or denied at the discretion of local decision-makers.”<sup>140</sup> For example, in *Ogden Environmental Services. v. City of San Diego*, the City of San Diego enacted an ordinance requiring an RCRA disposal facility to apply for and receive a conditional use permit before it could operate in the city.<sup>141</sup> The ordinance did not provide any standards to govern the issuance of a permit and the City Council did not adopt any specific requirements for disposal facilities.<sup>142</sup>

Allowing a city to deny a permit on vague and unspecified reasons or on the “generalized environmental or health and safety concerns” without articulating specific health or safety concerns or setting forth particular environmental requirements which the facility must meet to obtain a permit frustrates congressional intent.<sup>143</sup> The standardless scheme was preempted because it functioned as a de facto ban.

Under the second prong, an ordinance is preempted as a sham or a naked attempt to sabotage federal policy of encouraging efficient waste

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136. *Blue Circle*, 917 F. Supp. 1514, 1520 (N.D. Okla. 1995).

137. The statute required an acceptable site to be a 160-acre plot situated in an industrially zoned area, whose boundaries are at least one mile from any platted residential area. *Blue Circle*, 27 F.3d at 1518–20.

138. *Id.*

139. *Ogden Env'tl. Servs. v. City of San Diego*, 687 F. Supp. 1436, 1446–47 (S.D. Cal. 1988).

140. *Id.* at 1446.

141. *Id.*

142. *Id.*

143. *Id.* at 1448.

disposal “if the ordinance is not addressed to a legitimate local concern, or if it is not reasonably related to that concern.”<sup>144</sup> To determine whether a regulation is an attempt to thwart federal policy, the court must review the purpose of the local regulation.<sup>145</sup> The state bears the burden to identify a legitimate local concern and to show that the regulation is a reasonable response to that concern.<sup>146</sup>

As part of the inquiry, the court needs to examine the impact of the local ordinance on the objective of federal law because, “there can be no implied preemption unless the local ordinance thwarts the federal policy in a material way.”<sup>147</sup> Further, no matter what the stated purpose of a regulation, “preemption analysis cannot ignore the effect of the challenged state action.”<sup>148</sup> Any other approach would enable statute legislatures to “nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.”<sup>149</sup>

On remand, the County attempted to demonstrate the local concern over disposal in three ways: (1) an unsupported assertion that disposal threatened health and safety on persons and the environment, (2) a portion of a law review article attached to its brief that discussed disposal issues but did not support the county’s position, and (3) the deposition testimony of a disposal facility employee indicating that the facility had not met emission standards promulgated by the EPA.<sup>150</sup> The court determined that none of the evidence demonstrated that the ordinance was addressed to a legitimate local concern for safety or welfare and none demonstrated that the ordinance was a reasonable response to a local concern.<sup>151</sup>

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144. *Blue Circle*, 27 F.3d 1499, 1508 (10th Cir. 1994).

145. “It is, after all, very difficult to determine the bona-fides of a collective legislative body where motivation may vary among the members of that body and where, in most cases, the motivations may be complex and easily disguised.” *Id.*

146. *Id.*

147. *Id.* at 1508–09. “Whatever the purpose or purposes of the state law, preemption analysis cannot ignore the effect of the challenged state action on the preempted field.” *Id.* at 1509 (quoting *Gade v. Nat’l Solid Waste Mgmt. Ass’n*, 505 U.S. 88, 107 (1992)).

148. *Blue Circle*, 27 F.3d at 1509.

149. *Id.* (internal quotation marks omitted) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 107 (1992)).

150. *Blue Circle*, 917 F. Supp. 1514, 1520–21 (N.D. Okla. 1995).

151. *Id.*

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The ordinance was preempted because it functioned in the nature of a de facto ban of waste disposal, because the county did not show a legitimate health and safety interest, and because the county did not demonstrate that the criteria of the ordinance were reasonably related to a legitimate local interest.

The two-principle test in *Blue Circle* is the best test to determine whether a statute requiring a potential LLRW facility to obtain additional approval or permits conflicts with federal law because it balances the intricacies of the dual system of state and federal regulation of LLRW.

#### IV. FEDERAL LAW PREEMPTS POLITICAL APPROVAL REQUIREMENTS STATUTES

This Part applies the analysis from *Blue Circle* to the political approval statutes, showing that a modified version of the *Blue Circle* test encompasses all of the guidance from *Pacific Gas, English*, and *Silkwood*. It determines that the political approval statutes are preempted because they conflict with the federal goals for atomic energy regulation by discouraging rather than promoting efficient waste disposal, and then concludes by offering a suggestion to states on how to regulate legitimate concerns surrounding waste disposal without crossing the conflict preemption line.

The *Blue Circle* test is the most effective test that may be applied to state statutes that seek to regulate LLRW. *Pacific Gas, English*, and *Silkwood* are binding precedents that stand for the general principle that a statute that undermines the federal goal of encouraging states to develop atomic energy is preempted through conflict preemption.<sup>152</sup> The adapted *Blue Circle* test takes the Supreme Court precedents and works them into a test that applies to the special circumstances in which a state is using its regulatory authority to enact a “more stringent” regulation as a guise to thwart federal policy. The *Blue Circle* test specifically accounts for (1) the dual federal/state system of regulation through 274 Agreements, (2) Congress’s mandate that state programs be “coordinated and compatible” with federal objectives, and (3) situations in which states intend to ban or discourage waste disposal.

##### A. *The New Blue Circle Test for LLRW*

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152. See *supra* Part III.A.

This Section applies the *Blue Circle* test to political approval statutes and shows that the approval statutes function as a de facto ban. Approval statutes are not a reasonable response to a legitimate state interest, and they directly conflict with federal goals to promote efficient waste disposal. This Subsection examines the approval statutes under both of the prongs in the new test and concludes that they will be preempted under either prong.

*1. States cannot ban or effectively ban LLRW disposal*

Under the first prong of the test, a state statute regulating LLRW is preempted through conflict preemption if it either explicitly imposes a ban on LLRW disposal or if it functions in the nature of a de facto ban. None of the three statutes imposes an explicit ban on LLRW disposal but this Section briefly discusses why an explicit ban of LLRW is unconstitutional.

During his first State of the State address, Utah Governor Jon Huntsman Jr. suggested that Class B and C LLRW could be banned from Utah during the current legislative session.<sup>153</sup> He said, “My position is clear: B and C waste will not be dumped in Utah,” and he stated further that, by the time the current legislative session is over, “we should no longer be discussing the possibility [of the hotter waste coming to Utah].”<sup>154</sup> The Utah Legislature responded to the Governor’s request and passed a bill that banned Class B and C waste from being disposed of in the state.<sup>155</sup> The state did not base its ban on articulated safety concerns.<sup>156</sup>

Just as the Ninth Circuit determined in *Spellman*, Utah—or any other state—does not have the authority to ban LLRW because the action runs afoul of the congressional mandate upon which 274 Agreements are conditioned: the state program must be coordinated and compatible with the federal program. “The regulation of the disposal of low-level radioactive waste is a legitimate federal activity, and Congress has not

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153. Bob Bernick, Jr. & Joe Bauman, *Huntsman Calls for Ban on Import of ‘Hotter’ Nuclear Wastes*, DESERET MORNING NEWS, Jan. 18, 2005; Lisa Riley Roche, *New Vision in Utah’s Old Statehouse*, DESERET MORNING NEWS, Jan. 19, 2005.

154. See Roche, *supra* note 153.

155. See *supra* note 10.

156. The legislative task force that drafted the bill did not receive any testimony from the Utah Department of Environmental Quality indicating that the waste could not be stored safely. Bauman, *supra* note 10. Contrarily, DEQ officials told the task force that “the current practices of disposal in our state guarantees safety.” *Id.*

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waived or delegated its authority over the subject.”<sup>157</sup> Because neither the LLRW Policy Act nor § 274 completely grants regulatory authority over LLRW to the states, a state cannot take action that undermines the federal goals to promote efficient waste disposal.<sup>158</sup>

Although they do not impose an explicit ban, the political approval statutes likely function as a de facto ban. The political approval statutes subject prospective disposal facilities that meet all applicable federal licensing standards to the political whims of a state legislature, of a governor, or of voters.<sup>159</sup> This means that a facility can be located in an optimal location, pose no unreasonable threat to the environment, meet all imaginable safety criteria, and still be denied access to operate in a state simply because the governor, legislature, or voters block the facility’s operation for no clear reason. Their decision can be made on any basis or even no basis at all. “[A]llowing a locality to completely evade judicial review simply by requiring [an additional approval requirement], which is then granted or denied at the discretion of local decision-makers, creates the potential for . . . ‘sham’ and ‘subterfuge.’”<sup>160</sup>

An ordinance is a de facto ban when it is impossible for a site to comply with the requirements of a conditional use permit.<sup>161</sup> In addition, a standardless permit scheme is unconstitutional as a de facto ban because the scheme creates the potential for “sham” and “subterfuge” by state actors charged with evaluating an application for approval.<sup>162</sup> None of the three statutes lists any requirements that a potential site needs to meet before it can be approved.<sup>163</sup> A statute that merely seeks to impose an additional approval requirement on a prospective facility will have the actual effect of functioning in the nature of a de facto ban if the facility is denied approval.<sup>164</sup> Just as the court noted in *Ogden*, a state cannot “completely evade judicial review” by requiring a potential LLRW facility to apply for approval from the governor, the legislature, and/or

157. Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman, 684 F.2d 627 (9th Cir. 1982); see *supra* Part III.C.1 (discussing limits on state action under 274 Agreements).

158. See *supra* Part III.C.3.

159. See *supra* Part III.C.3.

160. *Blue Circle*, 917 F. Supp. 1514, 1520 (N.D. Okla. 1995) (omission in original) (internal quotation marks omitted) (quoting *Ogden Env'tl. Servs. v. City of San Diego*, 687 F. Supp. 1436, 1446–47 (S.D. Cal. 1988) (holding that a standardless permit scheme amounted to a de facto ban)).

161. *Id.*

162. *Ogden*, 687 F. Supp. at 1446.

163. See *supra* Part II.B.

164. *Id.*

the voters when the approval is granted or denied at the unfettered discretion of the local decision-makers.

Since none of the statutes articulate specific health or safety concerns or set forth particular environmental requirements which the facility must meet to comply, all of the statutes appear to function in the nature of a de facto ban. Even though the *Blue Circle* court determined that it could not conclude whether the conditional use permit scheme imposed a de facto ban without a sufficient factual record, that case is distinguishable from the approval statutes because the conditional use permit ordinance listed several objective requirements that a facility had to comply with. The issue was a factual dispute as to whether a site existed in the county that was capable of meeting all of the requirements.

In this case, even though no factual record exists as to whether a potential LLRW facility would receive political approval in Utah, Maine, or Vermont, the statutes function in the nature of a de facto ban because they are conditionless. As a matter of law, the conditionless schemes in Utah, Vermont, and Maine are preempted because they are de facto bans.<sup>165</sup> Furthermore, the mere existence of the political approval requirement discourages any potential waste disposal sites from applying for a license in any of these three states because of the possibility that it will never receive the required political approval. Undertaking the investment to plan a facility and apply for a license is a financial risk since a licensed facility could be blocked from operating if it does not receive political approval.

The political climate against nuclear waste indicates that a new facility is not likely to receive political approval. In Utah, for example, it was front-page news for two days that the Governor was threatening to ban LLRW.<sup>166</sup> Furthermore, the intense social reaction to the possibility of a high-level waste facility west of Salt Lake City prompted the Utah legislature to enact a series of extreme statutory provisions designed to block its construction.<sup>167</sup> Utah also challenged the facility's license and then the authority of the federal government to issue a license.<sup>168</sup> Even though LLRW is less threatening than high-level waste, the drastic measures and intense response indicate that the political conditions in

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165. *Ogden*, 687 F. Supp. at 1446.

166. *See supra* note 153 and accompanying text.

167. *Skull Valley*, 376 F.3d 1223, 1228 (2004).

168. *In re Private Fuel Storage, L.L.C.*, 56 N.R.C. 390, 392 (2002) (determining that the NRC possessed the authority to license the PFS facility), *aff'd*, *Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536 (D.C. Cir. 2004).

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Utah, and likely in other states, are extremely hostile to waste disposal facilities because of the negative public perception toward them. This climate makes it unlikely that the legislature, the voters, and/or the governor will approve a prospective facility—showing that the approval requirement essentially functions as a de facto ban.

2. *State statutes must be a reasonable response to a legitimate state interest*

Further, even if the states were to prevail under the first part of the analysis and show that the approval requirements do not function as a de facto ban, each statute would still be preempted under the second prong of the test because a standardless political approval requirement cannot be a reasonable response to a legitimate local concern.

Under the second prong of the test, a statute that falls short of imposing a de facto ban on LLRW disposal will be upheld so long as it is supported by a record establishing that the statute is a reasonable response to a legitimate local concern. A state should be given latitude to enact statutes to regulate legitimate local concerns surrounding LLRW, especially in light of the NRC's directive establishing that Agreement States have authority to enact more stringent requirements than those required by the federal scheme.<sup>169</sup> However, if a statute does not regulate a legitimate local concern or the statute is not a reasonable response to such a concern, the statute may be preempted as “a sham and nothing more than a naked attempt to sabotage federal” LLRW policy and disposal.<sup>170</sup>

The state has the burden to prove that a statute regulating LLRW is a legitimate response to a local concern.<sup>171</sup> *Blue Circle* advocated using an objective analysis of the statute's purpose, but in the LLRW context, a subjective analysis is required. In *Skull Valley*, the Tenth Circuit declined to apply *Blue Circle*'s objective approach because it found that the standard in *Pacific Gas, English*, and *Silkwood* required a subjective analysis of the statute.<sup>172</sup>

None of the statutes list any legislative objective or local concern to which the legislature was reasonably responding by requiring political

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169. *See supra* Part II.

170. *See Blue Circle*, 27 F.3d 1499, 1508 (10th Cir. 1994).

171. *See Blue Circle*, 917 F. Supp. 1514, 1520 (N.D. Okla. 1995).

172. *Skull Valley*, 376 F.3d 1223, 1252 (10th Cir. 2004).

approval of a prospective site.<sup>173</sup> Even if, given the opportunity, each state could identify legitimate state interests surrounding the disposal of LLRW, the statutes will still fail because a standardless approval requirement can never be a reasonable response to even the more important local concerns. To be a reasonable response, the statute must be tailored to achieve its objective.

Giving a legislature or a governor unfettered power to veto approval of a facility is not a reasonable response to even the most pressing state concerns. Each state already has a comprehensive licensing process that accounts for safety and functional aspects of the facility.<sup>174</sup> Each state has implemented a response system and has identified a state agency to regulate and oversee storage facilities.<sup>175</sup> However, the approval statutes give authority to the legislature or the voters to approve a prospective facility—people who have no real understanding of how such a facility functions nor any comprehension of the unique and special considerations required by its location. Rather, the voters, as well as the legislators and governor whom they elect, are susceptible to scare propaganda and irrational decisions that have no bearing on a specific plant, and these actors are unlikely to be concerned with ensuring that their approval decision is coordinated and compatible with the federal objective of promoting efficient waste disposal. Thus, no state can meet the burden to show that a conditionless political approval requirement is a reasonable response to a legitimate local concern.

However, for a statute to be preempted under the second prong, it must actually conflict with the federal objective for LLRW.<sup>176</sup> A statute that frustrates the operation of federal law is preempted through conflict preemption.<sup>177</sup> “If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.”<sup>178</sup> The series of courts that have struck down similar measures imposing additional requirements or bans on RCRA disposal facilities noted that states undermine the federal scheme of regulation

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173. *See supra* Part II.

174. *See, e.g.*, UTAH CODE ANN. § 19-3-101 (2003).

175. *See, e.g., id.*

176. *See supra* Part III.C.

177. *Blue Circle*, 27 F.3d 1499, 1509 (10th Cir. 1994).

178. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (internal quotation marks omitted) (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

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when their requirements discourage rather than encourage disposal. Similarly, permitting states to exercise “spotty parochial control” over waste disposal “stifles” the federal goals for LLRW waste management.<sup>179</sup>

To determine whether a statute conflicts with the federal legislation, a court should consider how the state’s action or inaction affects “the regulation of agreement material on a nationwide basis or on other jurisdictions.”<sup>180</sup> The federal objective is to encourage facilities operating in each state to promote the efficient disposal of LLRW.<sup>181</sup> Since there are only three active LLRW disposal facilities in the country, even one state’s act of discouraging or preventing a potential LLRW site from functioning in its borders could have a large effect on the nationwide disposal of LLRW waste. One state’s action to prevent LLRW disposal “would significantly aggravate the national problem of low-level waste disposal.”<sup>182</sup>

The NRC’s directive counseled that looking at how a state’s action or inaction affected the entire federal scheme indicates whether it conflicts with federal law.<sup>183</sup> The potential outcome if all states enacted similar approval requirement statutes shows that they conflict with federal law. If states were permitted to impose impossible or arbitrary approval requirements or standards, then other states would likely adopt similar statutes to keep out undesirable waste and cripple the objectives of the LLRW Policy Act to encourage states to operate facilities. If all the states in the union, or even just these three, used their approval statutes to block potential facilities from operating, they would succeed in destroying Congress’s goal of encouraging states to develop their own system to dispose of LLRW waste.

These political approval statutes are distinguishable from the California statute in *Pacific Gas*, which imposed a moratorium on the construction of nuclear power plants.<sup>184</sup> The moratorium complied with

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179. *Blue Circle*, 27 F.3d at 1506–07. *But see* Satter, *supra* note 115, at 840 (arguing that because Congress ceded power to regulate LLRW to the states regardless of the purpose for regulation, “Congress expanded the scope of a state authority to include all responsibility for low-level wastes”).

180. *Blue Circle*, 27 F.3d at 1506–07.

181. *See supra* Part II.

182. Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman, 684 F.2d 627 (9th Cir. 1982); *see also* Part III.C.1 (discussing the Ninth Circuit’s decision that Washington State’s ban on LLRW is preempted through federal law).

183. *See supra* Part II.

184. *See supra* Part III.A (discussing the Supreme Court’s decision in *Pacific Gas*).

all of the prongs of the modified *Blue Circle* test discussed in Part IV: it was not a complete ban on construction of nuclear power facilities but was a reasonable state measure to ensure that the State of California had the ability to dispose of nuclear waste. The moratorium was exactly the type of exercise of state power that the modified test is designed to protect. California identified a legitimate local economic concern about building more power plants and imposed a narrowly tailored moratorium on construction of new plants while it studied disposal issues.<sup>185</sup>

Unlike the punitive-damages tort awards in *English* and *Silkwood* that had an incidental effect on nuclear power plants, the political approval requirements are directly aimed at disposal facilities. The political approval requirements are similar to the unfunded potential liability statute and the statute eliminating limited liability of shareholders that the Tenth Circuit struck down in *Skull Valley*.<sup>186</sup> Just as those statutes directly undermined the commercial motivation to develop a high-level waste disposal facility by eliminating the financial incentives, the political approval requirements directly target potential LLRW disposal sites by subjecting them to arbitrary review after they have received a license to operate. The approval requirement effects a “sea change” targeted only at the nuclear industry, just as the statutes in *Skull Valley* did.

The political approval statutes are preempted because they conflict with federal goals by eroding cooperation between the states in controlling radiation hazards and inhibiting the orderly regulatory pattern that Congress contemplated for LLRW.<sup>187</sup>

### B. Acceptable State Statutes

This analysis does not suggest that Congress intended to deny states all control over prospective facilities seeking to operate within their borders. Rather, this analysis suggests that states need to regulate their concerns within the framework of power that Congress has expressly ceded to them. If Utah, Vermont, and Maine have enacted the approval requirements to give their legislatures, governors, and voters a chance to approve the impact of the facility on safety or the environment, the states

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185. See *supra* Part III.C.1 (discussing the *Pacific Gas* decision).

186. See *supra* Part III.C.2 (discussing the *Skull Valley* decision).

187. See Jane Chuang, *Who Should Win the Garbage Wars? Lessons for the Low-Level Radioactive Waste Policy Act*, 72 *FORDHAM L. REV.* 2403, 2467 (2004) (noting that the Policy Act did not resolve the conflict over LLRW disposal but just “shifted [it] to more local arenas”).

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are taking the wrong road. Other states, including Connecticut, have adopted statutes that list areas of legitimate local concern that a prospective facility must comply with. These types of statutes withstand the *Blue Circle* analysis because they are reasonably tailored to achieve their enumerated local concerns.

This Section starts by suggesting a route that states like Utah, Vermont, and Maine can take to protect their legitimate local concerns without running afoul of the Supremacy Clause. It discusses how these states can and cannot regulate local concerns and shows how other states have taken a wiser road by developing narrowly tailored requirements that list specific conditions for approval.

States cannot use their authority from 274 Agreements to enact stringent licensing requirements aimed to block facilities under the guise of enacting “more stringent regulations.” Similar to the conditional-use permit that the Tenth Circuit struck down in *Blue Circle*,<sup>188</sup> approval statutes giving legislatures the power to ban construction of all disposal facilities are preempted. Just as a state cannot place an outright ban on receipt of out-of-state LLRW waste,<sup>189</sup> it cannot use an approval statute to accomplish the same purpose.<sup>190</sup>

If Utah, Vermont, and Maine were attempting to regulate legitimate concerns through their political approval requirement statutes, they are not foreclosed from addressing these concerns. This analysis does not ignore the Supreme Court’s caution in *Pacific Gas* that “the promotion of nuclear power is not to be accomplished ‘at all costs.’”<sup>191</sup> The Supreme Court was expressly recognizing that states have legitimate local concerns that will warrant slowing or even stopping development of nuclear power or disposal of waste. However, the Court was not sanctioning all state activity designed to thwart federal objectives in the absence of a clearly articulated legitimate local concern and a reasonable solution to address the concern. Just as the moratorium in *Pacific Gas* was a legitimate local regulation to address economic issues surrounding nuclear power development, states can regulate similar issues surrounding LLRW disposal in their borders. To protect their legitimate local concerns, each state needs to develop a statute that specifically lists

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188. See *Blue Circle*, 27 F.3d 1499 (10th Cir. 1994).

189. See *supra* Part III (explaining that, while a compact facility has the authority to ban out-of-compact waste, a noncompact facility has no such authority).

190. *Blue Circle*, 27 F.3d at 1508.

191. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 222 (1983).

issues about which they are concerned and then require that a prospective facility comply with specific criteria. States can develop acceptable regulations either by (1) utilizing the concerns of the legislature and developing license requirements that will address these concerns or by (2) allowing a legislature to expressly evaluate how a prospective facility will affect the legislatures concerns, provided the statute gives reasonable criteria for evaluating whether a potential site meets the local concerns.

However, it must be possible for a potential facility to comply with the valid state regulations. The reason that a local ordinance requiring potential RCRA disposal facilities to obtain a conditional use permit in *Blue Circle* was struck down was not because it did not list specific conditions, but because it was not possible for a facility to comply with those conditions.<sup>192</sup> For example, if a state wanted to specify the type of location that would be suitable for a LLRW disposal facility, it could give a list of criteria that it must comply with: (1) the distance from residential areas, (2) the location of water and transportation, (3) the size of the required plot, (4) the economic feasibility of a waste disposal facility at a certain site, etc. If the state lists criteria that a potential facility can actually comply with, its regulation is more likely to be permissible.

For example, Connecticut has passed a statute that lists a number of factors to consider in locating a potential disposal site.<sup>193</sup> Some of the factors require the state to evaluate the risk that a facility poses to local public health, safety, and welfare; the effect of the facility on planned local land use and development; the effects of the facility on agricultural and natural resources and the availability of resources for mitigating or eliminating such adverse effects; the effect of a facility on private and public water supplies; and the current and projected population density in the area.<sup>194</sup>

Applying these criteria to a potential site evaluates whether the site will comply with these specifically listed local concerns. It would be a reasonable response to a legitimate local concern for a state to deny a potential facility from being constructed in an area that would threaten the state's water supply or in an area that was projected to be densely populated in the near future. These were the types of concerns that *Pacific Gas* recognized when it noted that nuclear power was not to be

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192. *See supra* Part III.C.3.

193. CONN. GEN. STAT. § 22a-163c (2002).

194. *Id.*

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developed at all costs. Just as some legitimate local concerns justified suspending or stopping construction of nuclear power plants,<sup>195</sup> some legitimate local concerns justify suspending or stopping waste disposal in a state.

However, each state needs to remember the *Blue Circle* admonition that the state bears the burden to develop a record to establish that any regulation of LLRW is a reasonable response to a legitimate local concern. Applying the modified *Blue Circle* test will determine which types of state regulation are a permissible exercise of state power and which types of regulation are a state legislature's attempt to nullify unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by a proposed state law.<sup>196</sup>

## V. CONCLUSION

Because both outright bans and standardless approval statutes that shift the political control over LLRW disposal facilities to the states function as a de facto ban, both types of statutes are preempted. Any other application of conflict preemption principles would undermine the effect of preemption mandated by the Supremacy Clause and cripple the application of the nation's LLRW policy. If the states are permitted to use regulatory-type statutes to keep waste disposal facilities from operating within their bounds, a race-to-the-bottom situation will develop, and the state of LLRW disposal will reach a crisis worse than the 1980 crisis that led Congress to adopt the LLRW Policy Act.

The Tenth Circuit in *Skull Valley* noted that waste disposal is a “matter which presents complex technological, economic, and political challenges to those seeking effective solutions.”<sup>197</sup> States with legitimate local concerns about waste disposal need to adapt their statutes to identify the local concerns and formulate a reasonable response to address the concern. Such an adaptation would avoid the appearance that a standardless approval requirement is a de facto ban on construction of LLRW disposal facilities. To the extent that Utah, Maine, and Vermont

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195. See *supra* Part III.A (discussing the holding in *Pacific Gas* that determined that a legitimate state interest justified stopping or slowing federal goals to develop nuclear power).

196. See *Blue Circle*, 27 F.3d 1499, 1509 (10th Cir. 1994).

197. *Skull Valley*, 376 F.3d 1223, 1254 (10th Cir. 2004) (discussing the disposal of high-level spent nuclear fuel not LLRW).

have legitimate local concerns surrounding disposal of LLRW that are not addressed in their licensing process, each state should address those concerns in a more narrow statute that reasonably responds to its state interests. Otherwise, the states will leave their citizens unprotected against potential dangers associated with waste disposal after their bans or approval statutes are struck down in court.

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