510 NE2d 1173

Pre-emption 1337 IL

ILLINOIS v. CHICAGO MAGNET WIRE CORP.

Appellate Court of Illinois
First Judicial District

Opinion upholding dismissal of criminal indictments for workplace conditions on ground that Occupational Safety and Health Act pre-empts criminal prosecution.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant v. CHICAGO MAGNET WIRE CORP., an Illinois Corp., ANTHONY JORDAN, KEVIN KEANE, GERALD COLBY, ALLAN SIMON and FRANK ASTA, Defendants-Appellees, No. 86-0114, June 29, 1987.

Richard M. Daley, state's attorney, Chicago, Ill., for plaintiff-appellant.

George J. Cotsirilos and Robert M. Stephenson, Chicago, Ill., for Chicago Magnet Wire Corp.

Patrick A. Tuite, Chicago, Ill., for Kevin Keane.

Harvey M. Silets, Chicago, Ill., for Anthony Jordan.

William J. Martin, Oak Park, Ill., for Gerald Colby, Allan Simon and Frank Asta.

Before Justices O'Connor, Campbell and Buckley.

CRIMINAL PROCEEDINGS

Indictments — Conduct Relating to Working Conditions — Pre-emption by OSH Act ▸98.01 ▸5.15

Review of criminal indictments shows that conduct state is attempting to regulate is related to working conditions covered by federal Occupational Safety and Health Act, and although state has expressed valid and legitimate concerns about consequences of federal pre-emption on its ability to control activities of employers, Congress has evidenced intent that criminal sanctions not be imposed for activities involving workplace health and safety except in highly limited circumstances, which are not present here; accordingly, criminal indictments issued against corporation and its corporate officers are dismissed.

Full Text of Decision

JUSTICE O'CONNOR delivered the opinion of the court:

This is an appeal from an order of the circuit court of Cook County dismissing various indictments and informations against Chicago Magnet Wire Corporation (CMW), and five corporate officials, Anthony Jordan, Kevin Keane, Gerald Colby, Allan Simon, and Frank Asta. The sole issue on appeal is whether state criminal prosecutions based on conditions in the workplace are preempted by the Occupational Safety and Health Act of 1970 (OSHA) (29 U.S.C. §651 *et. seq.* (1982).) We affirm.

On June 26, 1985, the Grand Jury of Cook County voted indictments against CMW and five of its corporate officials, charging each with multiple counts of aggravated battery and reckless conduct pursuant to Ill. Rev. Stat. 1985, ch. 38, pars. 12-4(a) and (c) and 12-5 and with violating the conspiracy statute. Ill. Rev. Stat. 1985, ch. 38, par. 8-2(a).

One set of aggravated battery indictments, charging a violation of Ill. Rev. Stat. 1985, ch. 38, par. 12-4(a), alleged that CMW and the individual defendants, while acting in their official capacity, exposed the named employees to numerous federally regulated substances in the workplace; failed to provide necessary safety instructions and equipment and health monitoring systems in the workplace; provided inadequate ventilation in the workplace and maintained dangerously overheated working conditions while the employees were exposed to the federally regulated substances. It was alleged that as a consequence of these acts, defendants violated their duty to provide a safe workplace for employees and caused great bodily harm to the named employees with the conscious awareness that a substantial probability existed that their acts would cause great bodily harm.

The second set of aggravated battery indictments alleged that CMW and the individual defendants knowingly committed acts which would cause named employees to take by deception and for other than medical purposes federally regulated substances and that such acts harmed the employees in violation of Ill.Rev.Stat. 1985, ch. 38, par 12-4(c).

The reckless conduct charges alleged that defendants, in conducting the business of coating wire, grossly deviated from the standard of care which a reasonable employer would exercise in the same situation and thereby violated their duty to provide a safe workplace in violation of Ill.Rev.Stat. 1985, ch. 38, par. 12-5.

The conspiracy indictment charged both CMW and the individual defendants with conspiring against the named employees with the intent to commit aggravated battery in violation of Ill.Rev.Stat. 1985, ch. 38, par. 8-2(a).

Lexis 8/4/88

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LS "Michigan v Hegedus 6/88

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PRIVILEGED AND
"CONFIDENTIAL MATERIAL
SUBJECT TO PROTECTIVE
ORDER"

UCC 079528

Defendants filed a joint motion to dismiss and on December 13, 1985, the court dismissed all charges against them, finding that OSHA preempted Illinois from applying Illinois criminal law to conduct involving federally regulated occupational safety and health issues within the workplace. The State filed various informations which were dismissed on the same basis and this appeal followed.

The State contends that the indictments should be reinstated as the prosecutions were undertaken in pursuance of the state's police power which was neither expressly nor impliedly preempted by Congress. The defendants contend that the criminal charges are expressly preempted by OSHA and that the dismissal of the charges should be affirmed.

State laws are preempted when Congress has declared its intent, either explicitly or implicitly, to occupy a certain area of law. (*Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 248, 78 L.Ed.2d 443, 104 S. Ct. 615; *Jones v. Rath Packing Co.* (1977), 430 U.S. 519, 525, 51 L.Ed.2d 604, 97 S. Ct. 1305.) Where preemptive intent is not expressly stated in the statute, the intent of Congress must be derived from the statutory language, from the comprehensiveness of the regulatory scheme, from the legislative history of the statute, or from the fact that the Federal and State statutes at issue conflict. (See *Hillsborough County, Florida v. Automated Medical Laboratories* (1985), ___ U.S. ___, 85 L.Ed.2d 714, 105 S. Ct. 2371.) In our view, the comprehensiveness of the Occupational Safety and Health Act, in conjunction with the fact that the states have been afforded the opportunity to develop their own regulatory schemes, evidences a Congressional intent to preempt the State from applying its criminal statutes to conditions in the workplace that are specifically regulated by OSHA.

Congress enacted OSHA in 1970 "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." (29 U.S.C. sec. 651(b) (1982).) Section 655 of the Act expressly provides for the adoption of Federal standards of industrial safety, and while the Federal standards are given primacy under the statute, the states are permitted to exercise independent state action under certain circumstances.

A State agency may assert jurisdiction over an occupational safety or health issue if there is no Federal standard in effect (29 U.S.C. sec. 667 (a)), or a State may submit its own enforcement plan to the United States Secretary of Labor for approval pursuant to 29 U.S.C. sec. 667(b). In the absence of a State plan which has been approved by the Secretary of Labor, State laws related to working conditions regulated by OSHA are preempted.

The preemptive effect of section 667(b) was recognized by the Illinois Supreme Court in *Stanislawski v. Industrial Commission* (1983), 99 Ill.2d 36, 39–40, 457 N.E.2d 399, in which the court stated that under OSHA, "the only method by which a State may assume responsibility for development and enforcement of safety and health standards with respect to which Federal standards have been adopted" is through an approved State plan under the Act. (See also *United Air Lines, Inc. v. Occupational Safety & Health Appeals Board* (1982), 32 Cal.3d 762, 772, 654 P.2d 157 (a State is preempted from regulating matters governed by OSHA standards in the absence of the adoption of a federally approved State plan); *Five Migrant Farmworkers v. Hoffman* (1975), 136 N.J.Super. 242, 247, 345 A.2d 378, (OSHA supersedes all State laws with respect to general working conditions).)

Illinois submitted a State plan, but it was withdrawn on June 30, 1975. (See *Stanislawski v. Industrial Commission* (1983), 99 Ill.2d 36, 39, 457 N.E.2d 399.) The State's position, however, is that it was under no obligation to comply with section 667(b) by developing a State plan in order to prosecute defendants under State criminal laws. The State argues that the preemptive effect of sections 667(a) and (b) is limited to State administrative schemes, such as the one at issue in *Stanislawski*, which duplicate OSHA's regulation of health and safety standards, but that it was not intended to extend to state criminal laws as they might apply in the workplace.

The main thrust of the State's argument is that the prosecutions at issue here are not preempted because they are based on the application of general criminal laws rather than on the enforcement of specific workplace health and safety regulations. To support its assertion that Congress explicitly intended to leave preexisting State criminal laws undisturbed, the state cites section 653(b)(4) of the Act which provides:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workman's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and emplo- [illegible] under any

through employee's skin result embolism.

SHIP REPAIRING

5. Open Decks — Lack of Guardr Impossibility of Compliance ▸ ▸110.510

Employer established that until ol was replaced, it was not possible to guardrails on rusted open deck b deck did not provide adequate supp railing thereby requiring vacation o tion for alleged violation of 29 1915.73(d), for failure to place gua around open deck, on ground that c ance with cited standard was impossi

6. Personal Flotation Devices ▸270.

Although employer did provide pe flotation devices to welders working vessel's unguarded deck edge, employ not require welders to wear those d thereby violating 29 CFR 1915. which requires employees to wear pe flotation devices when exposed to dro hazard.

7. Bench and Portable Grinders — G ing — Protective Eye Equipment ▸270.

Totality of evidence establishes tha ployer knew that bench grinder lacked rest, that cursory examination would detected lack of guarding on portable g er, and that employees' failure to wear tective eye equipment while grinding not isolated occurrence but resulted employer's failure to establish unifo communicated and enforced work rul quiring use of eye protective equipm accordingly, citations for violations o CFR 1915.134(c), and 29 C 1915.134(j), are affirmed.

Digest of Judge's Report

[*Digest*] Following an inspection of worksite, B. B. Riverboats, an operato excursion vessels on the Ohio River, cited for ten violations of the Occupatic Safety and Health Act stemming from drowning death of a welder who was p forming repair work on the *Captain Ber* company vessel. In this proceeding, B Riverboats contests all of the citations.

In defense to the citations, B. B. Ri boats, citing Section 4(b)(1) of the Occu tional Safety and Health Act, argues t the Occupational Safety and Health A ministration lacks jurisdiction over the co pany's activities because the U.S. Co Guard exercises comprehensive author law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment. 29 U.S.C. §653(b)(4) (1982).

In our view, this section of the Act does not permit the State to prosecute conduct or conditions in the workplace under State criminal laws in so far as the conduct or conditions are regulated by OSHA. The courts which have interpreted section 653(b)(4) have consistently found that the purpose of this section was to preserve the existing private rights of injured employees relative to workman's compensation, State tort law, and other common law remedies against employers but not to create any additional civil remedies in favor of employees. See, *e.g. Johnson v. Koppers Co. Inc.* (N.D.Ohio 1981), 524 F.Supp. 1182, 1189, *appeal dismissed* (6th Cir. 1982), 705 F.2d 454; *United Steelworkers of America v. Marshall* (D.C. Cir. 1980), 647 F.2d 1189, 1235-36 [8 OSHC 1810, 1840], *cert. denied* (1981), 453 U.S. 913 [11 OSHC 1264]; *Berardi v. Getty Refining & Marketing Co.* (1980), 435 N.Y.S.2d 212, 215-216, 107 Misc.2d 451.

The determinative factor is not whether the State is seeking to enforce a criminal law of general application rather than specific workplace health and safety regulations but what conduct the state is seeking to regulate. (See *NDK Corp. v. Local 1550 of the United Food and Commercial Workers International Union* (1984), 128 Ill.App.3d 207, 470 N.E.2d 565.) The State would not be foreclosed from applying its criminal laws in the workplace if the prosecutions charged the defendants with crimes not involving working conditions. The conduct the State seeks to regulate here, however, as evidenced by the language of the indictments, is conduct related to working conditions now regulated by OSHA. We therefore believe that the trial court properly found that the prosecutions were preempted.

The State's reliance on *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 238, 78 L.Ed.2d 443, 104 S.Ct. 615, is misplaced. In *Silkwood*, the Supreme Court reversed a Court of Appeals decision which held that the Atomic Energy Act, and the Nuclear Regulatory Commission established by it, preempted State law and precluded an award of punitive damages for injuries caused by exposure to radiation. The Supreme Court held that the award of punitive damages under State tort law was not preempted in that allowing a plaintiff to recover for injuries caused by nuclear hazards was not inconsistent with the Federal regulatory scheme developed by the Nuclear Regulatory Commission. *Silkwood v. Kerr-McGee Corp.* (1984), 464 U.S. 239, 257-58, 78 L.Ed.2d 443, 104 S.Ct. 615.

Silkwood was decided under the Atomic Energy Act, to which OSHA does not apply. In addition, the Court in *Silkwood* distinguished between "state regulation of the safety aspects of nuclear energy," which was held preempted, and State law to compensate injured persons, which the Court held was not preempted. Here, although the State characterizes its purpose as punitive and deterrent and therefore permissible under *Silkwood*, in fact it seeks to regulate occupational safety and health through the application of criminal laws, which is impermissible under section 18(b) of OSHA. 29 U.S.C. §667(b)(1982).

The State has expressed valid and legitimate concerns about the consequences of preemption of its ability to control the activities of employers. But Congress has evidenced an intent that criminal sanctions should not be imposed for activities involving workplace health and safety except in highly limited circumstances, and that health and safety requirements should be established through standard-setting, which provides employers with clear and detailed notice of their legal obligations. Illinois' view that employers may be held criminally liable for workplace injuries or illness, regardless of their compliance with OSHA standards, would lead to piecemeal and inconsistent prosecutions of regulatory violations throughout the states, a result that Congress sought to preclude in enacting OSHA.

For the foregoing reasons, we affirm the decision of the circuit court of Cook County dismissing the indictments against Chicago Magnet Wire and its corporate officers.

Judgment affirmed.

CAMPBELL and BUCKLEY, J.J., concur.

ESTABLISHMENT INSPECTION OF ST. CHARLES MANUFACTURING CO.

U.S. District Court for the Northern District of Illinois

Ruling upholding U.S. Magistrate's award of attorneys' fees but denying costs incurred in prosecuting employer for contempt in refusing to obey OSHA inspection warrant.

and indeed the purpose and effect of the program is solely to protect commercial timber interests and private property, including, of course, national forests in which more draconian steps can be taken to eliminate the beetle. The extensive cutting in the Wilderness Areas that was being carried out under the program until preliminarily enjoined was conducted solely to aid outside adjacent property interests, not to further wilderness interests or to further national wilderness policy.[1]

Both plaintiffs and the Secretary agree that Congress also intended by Section 4(d)(1) to authorize the Secretary to take actions within Wilderness Areas where necessary to control fire, insects, or disease from spreading beyond the areas and harming adjacent or neighboring private or commercial interests. The legislative history sustains this view. Plaintiffs' case therefore poses the declared national policy to preserve pristine wilderness ecology and values into sharp juxtaposition with the program's effectiveness, or lack of effectiveness, in controlling the harm being caused by pine beetles on adjacent property. Management of wilderness areas as such is not involved and the program could not be approved as a wilderness-management program.

Unfortunately, the material submitted on the motion provides no clear answers to the dilemma suggested. Pine beetles have a considerable range of flight and studies leave in doubt the extent to which they may migrate to or from adjacent pine land. There is no way the Court can determine from the material submitted to what extent beetle migration out of these particular Wilderness Areas into commercial timber properties may be adequately controlled under the program. Nor is it clear whether adjacent properties can be equally well controlled against beetle infestation by measures taken outside of the Wilderness Areas that would be wholly inappropriate within the Wilderness Areas.

Thus this case does not involve the management of Wilderness Areas as such. Rather, it presents a different question, one that is not fully addressed by the Act itself. That question is whether the Secretary has been given the same Section 4(d)(1) broad management discretion previously noted when he takes actions within the Wilderness Areas for the benefit of outside commercial and other private interests. This question must be answered in the negative because in a situation like this the Secretary is not managing the wilderness but acting contrary to wilderness policy for the benefit of outsiders.

A fair reading of the Wilderness Act places a burden on the Secretary affirmatively to justify his actions under these circumstances. Where such actions are shown to contravene wilderness values guaranteed by the Wilderness Act, as they do here, then the Secretary must, when challenged, justify them by demonstrating they are necessary to effectively control the threatened outside harm that prompts the action being taken. Here the Secretary has not addressed this affirmative burden.

Plaintiffs have amply demonstrated that the Southern Pine Beetle program as carried out in these three Wilderness Areas was wholly antithetical to the wilderness policy established by Congress.

The destruction of many acres of pine trees by chain sawing, and chemical spraying accompanied by noise and personnel in a continuing process unlimited in scope, is hardly consonant with preservation and protection of these areas in their natural state. These are delicate, sensitive places where the often mysterious and unpredictable process of nature were to be preserved for the study and enjoyment of mankind. Congress directed that man must tread lightly in these areas, in awe and with respect. Ruthless intrusion in disregard for these values was condemned as a matter of national policy. While many facts remain unclear, the record before the Court suggests that within Wilderness Areas, as mature pines are destroyed by the beetle there will be less and less possibility of outbreaks infecting neighboring areas. Only a clear necessity for upsetting the equilibrium of the ecology could justify this highly injurious, semi-experimental venture of limited effectiveness.

The Secretary has failed to demonstrate that the Southern Pine Beetle program as carried out in the three Wilderness Areas is necessary to control the presence of that pest in neighboring pine forests or that it has in any way been more than marginally effective in doing so. There is little evidence relating to the effect of the program on the beetle's tendency, if any, to move out of the Wilderness Areas. Conversely, the Court has not received any material indicating whether adjacent pine land, which has been already infected by the beetle, could be managed with less effective controls in the absence of the accompanying Wilderness authority. Nor is the Secretary's weighing of alternatives apparent. The record strongly suggests that the beetle cannot be irradicated and the solution of the problem is long-term, dependent for its ultimate efficacy upon further research and scientific study.

While the Secretary's program covers the South, this particular case only concerns a limited aspect. Serious problems exist in other southern regions and indeed the United States District Court for the Eastern District of Texas has before it a challenge to the Southern Pine Beetle program as it affects five Wilderness Areas in Texas, *see Sierra Club v. Lyng*, No. L-85-69-CA (E.D.Tex.). That Court has also been awaiting the EIS. The problems in different regions in all probability vary and what may be a necessity in one Wilderness Area, or effective there, may not be so in another. The very generality of the Secretary's approach suggests inadequate sensitivity to his wilderness duties.

Because this Court's analysis raises issues not fully addressed in the papers and because it suggests a need to particularize any approach to the Southern Pine Beetle program in terms of each Wilderness Area, area by area, the Court has concluded that final resolution of the motion can most appropriately await the EIS. The Court directs the parties to file further papers in support of or opposition to the motion within 30 days of the publication of the final EIS with emphasis upon the Secretary's burdens as set out herein in the light of whatever Southern Pine Beetle program emerges in the EIS. In the meantime, the preliminary injunction remains in effect and final action on the motion will be held in abeyance. An appropriate Order is filed herewith.

1. To the extent any cutting may have been desirable to prevent undue harm to the red-cockaded woodpecker, such cutting would be minor due to the very few woodpecker habitats in these areas. This issue could be addressed in specific terms along the lines suggested by the Court's preliminary injunction if the program were abandoned.

Environmental Encapsulating Corp. v. City of New Y rk

No. 87 Civ. 2604 (JMW) (666 F. Supp. 5335) (S.D.N.Y. July 31, 1987)

The court holds that New York City's training and certification program for asbestos workers is not preempted by the Occupational Safety and Health Act (OSHA) or its regulations. The court first holds that OSHA can preempt municipal laws, although the OSHA section discussing preemption of local laws only refers to "state" laws. Since a municipality is a political subdivision of a state, the preemption of a state law also preempts identical municipal laws. Moreover, to exempt municipal laws from preemption analysis under OSHA would undermine the Act's goal of standardizing certain workplace safety requirements throughout the country.

The court holds that OSHA and its regulations do not explicitly preempt the New York City asbestos certification and training program. Plaintiffs have failed to show any direct conflict between the city program and OSHA or its regulations. The court also holds that the city program does not relate to an issue on which a federal standard has been promulgated. New York City's program goes beyond OSHA's revised construction standard, which only addresses worker protection, by attempting to protect the health both of asbestos workers and the public. That the Occupational Safety and Health Administration considered but rejected promulgating regulations establishing a similar training and certification course does not indicate that OSHA's revised construction standard is intended to preempt such local programs. The court also holds that OSHA does not implicitly preempt the city program. OSHA does not bar all state programs that address the public health threat of asbestos, and it is logical for New York City to include training measures for the safe handling of asbestos in the same certification program that addresses public health concerns. The language in OSHA does not express an intent to supersede all state laws and, in fact, OSHA encourages states to assume responsibility for administering and enforcing occupational safety and health laws. The Asbestos Hazard Emergency Response Act invites state governments to develop comprehensive training and certification programs for workers dealing with asbestos, and notes the lack of general federal regulation concerning the hazards of asbestos exposure. The court distinguishes another decision invalidating a state asbestos training program on the grounds that the program at issue in that case did not address public health concerns falling outside of OSHA's ambit to the same extent that New York City's program does. To the extent that the cases are not distinguishable, the court declines to follow the reasoning of the other decision. The court refuses to consider invalidating only the aspects of the New York program that relate to worker health because to do so would be to dictate to the local government what topics its training program must teach, and such an approach would subject states to intolerable supervision and render the training courses incomplete and misleading.

Finally, the court holds that the certification program does not violate the due process rights of the city contractors involved in asbestos removal. State and local goverments have broad powers to protect public health and safety, and states may require training and licensing for workers involved in hazardous work. The city provided adequate notice of the date when asbestos workers were required to have certificates, established a sufficient number of training courses for the community's asbestos workforce, and issued precise regulations specifying the requirements of the program.

Counsel for Plaintiffs
Paul A. Gallay, Sharon E. Jaffe
Cole & Deitz
175 Water St., New York NY 10038
(212) 269-2500

Counsel for Defendants
Virginia Waters
Office of Corporate Counsel
100 Church St., New York NY 10007
(718) 566-3929

WALKER, District Judge:

INTRODUCTION

Plaintiffs Environmental Encapsulating Corp. ("Environmental Encapsulating"), *et al.* are New York City contractors engaged in the work of asbestos removal incidental demolition or renovation. Plaintiffs ve brought the instant action for a deratory judgment invalidating certain gulations ("the DEP regulations"), opted on November 19, 1986 by Defendts The City of New York ("the City") and e New York Department of Environmen- Protection ("the DEP"). These regulans require a training program for emyees who handle asbestos, after which se employees receive a certificate authoing their future work with asbestos he certification program").

Plaintiffs have moved for a preliminary unction preventing the enforcement of DEP regulations. Defendants have ss-moved for summary judgment dissing plaintiffs' complaint.[1]

For the reasons set forth below, plaintiffs' motion for a preliminary injunction is denied. Defendants' motion for summary judgment is granted.

STATEMENT OF FACTS

On November 20, 1985, the New York City Council enacted Local Law 76, which required the DEP to establish "criteria for certifying programs as approved safety and health programs."[2] In the preamble to Local Law 76, the Council announced the law's purpose: to correct health and safety hazards to workers and the public caused by airborne asbestos:

> [T]he predominant cause of asbestos becoming airborne is due to the performance of building renovation and demolition without adequate adherence to procedures for safeguarding workers and the general public, by persons who have not received adequate training in the handling of materials containing asbestos.
>
> Therefore, it is the purpose of this law to safeguard the public health by requiring that renovation or demolition projects which disturb asbestos be conducted in accordance with the procedures established pursuant to the provisions of this local law and that workers who handle materials containing asbestos receive appropriate training.

Accordingly, the local law states: "It shall be unlawful for any individual to handle friable asbestos material in the course of performing work for compensation unless such individual is a holder of a current, valid asbestos handling certificate." N.Y. City Admin.Code § 24-146.1(b)(1). The law further mandates: "The [DEP] commissioner shall promulgate regulations establishing criteria for certifying individuals as eligible to receive an asbestos handling certificate and for certifying programs as approved safety and health programs. The commissioner may restrict the asbestos handling certificate as to certain supervisory and non-supervisory functions and responsibilities." *Id.* at § (d)(1).

On November 19, 1986, the DEP first published the mandatory curriculum for the certification program in the City Record. This publication was repeated on December 1, 1986. Neither issue of the City Record specified the date when the certification requirement would become effective.

On December 16, 1986, the City mailed notices to approximately 1,200 contractors, including the five plaintiffs bringing the instant action, stating that the City would require employee certification as of April 1, 1987. On December 22, 1986, Mayor Koch signed Local Law 80, passed by the New York City Council on November 20, 1986 as Intro. No. 731 of 1986, which required asbestos workers to hold the prescribed training certificate as of April 1, 1987. After this date, unless contractors could show that each employee working on any renovation or demolition project involving asbestos held a valid certificate, defendants would refuse to grant those contractors a building or demolition permit. Under the DEP regulations, defendants also could fine contractors up to $10,000 "per viola-

1. The Court also heard oral argument and received papers in opposition to plaintiffs' motion from two groups appearing as *amicus curiae*. The law firm of Berle, Kass & Case served as amicus counsel for a group of seven organizations: The Brooklyn Lung Association, The New York City Clean Air Campaign, The National Campaign Against Toxics, The New York City Committee for Occupational Safety and Health, The New York Public Interest Research Group, The Natural Resources Defense Council, and The Alliance for Consumer Rights. The offices of Morris J. Eisen, P.C., served as amicus counsel to the White Lung Association, which offers a certification training course approved by the City.

2. The substantive provisions of Local Law 76 of 1985 are codified at N.Y. City Code § 24-146.1.

tion" for using uncertified employees, and could revoke previously issued building and demolition permits.

Under the DEP regulations promulgated pursuant to Local Law 76 (hereinafter cited as *Asbestos Regulations*), where asbestos is to be "disturbed" by a building renovation or demolition worker, that worker must possess a valid "handling certificate." An employee seeking to acquire a handling certificate must complete a four-day training course, taught in a program approved by the DEP, at the conclusion of which the employee must pass a two-hour written examination. *Asbestos Regulations* §§ 8110–11. The certificate is renewable every two years, upon completion of an additional six hours of classes. *Id.* at §§ 8122, 8133. Employees overseeing asbestos work must have a "supervisor's certificate," issued after the employee has received an additional six hours of instruction beyond that required for a "handling certificate." *Id.* at § 8112.

The DEP regulations specify that any course leading to employee certification must cover specific subjects related to asbestos work, including: 1. A discussion of asbestos-related diseases and methods for preventing them (*id.* at §§ 8111(4), 8111(5)); 2. Methods for minimizing the generation of airborne asbestos fibers (*id.* at § 8111(12)); 3. Methods for minimizing the spread of any airborne asbestos fibers generated by asbestos work (*id.* at §§ 8111(13), 8111(14)); 4. Methods for minimizing asbestos contamination during an emergency situation, such as an explosion or fire (*id.* at § 8111(15)); 5. Personal hygiene techniques designed to reduce the amount of asbestos fibers carried from a worksite on employees' clothes or bodies (*id.* at § 8111(16)).

Plaintiffs estimate, and defendants do not dispute, the total cost to each worker of obtaining a certificate, including both a $100 certification fee payable to the City and training course fees, to be about $600 per worker. As of May 11, 1987, about 1,200 workers had received certificates after completing the required course at one of 15 approved training classes.[3] Defendants estimate that at least 200 to 250 additional workers will have received these certificates each week since May 11.

The certification program is the most recent part of a broader city initiative aimed at reducing public exposure to asbestos fibers. In 1972, the New York City Council enacted New York City Air Pollution Control Code § 24-141, which prohibited the use of asbestos in building construction or repair. In 1983, the City initiated a $24 million Asbestos Evaluation Program, designed to measure the level of asbestos concentration at some 1,500 buildings and to fund corrective work at the most toxic of these sites.

On April 17, 1987, this Court entered a temporary restraining order preventing the City from enforcing the certification program against plaintiffs for 10 days. Subsequently, all parties agreed to extend this temporary restraining order until the date of this Court's decision on plaintiffs' motion for a preliminary injunction.

DISCUSSION

In urging this Court to invalidate the certification program, plaintiffs' primarily argue that the federal Occupational Safety and Health Act preempts this state regulation. Plaintiffs also argue that the substance and implementation of the certification program violates the due process clause of the fourteenth amendment. For the reasons set forth below, these arguments are without merit.

A. OSHA PREEMPTION.

In determining whether federal law preempts an otherwise valid state law or regulation, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). *Accord Pettis Moving Co. v. Roberts*, 784 F.2d 439, 441 (2d Cir.1986). Congress must state its intent to preempt state law with particular emphasis and clarity "when local health and safety provisions are endangered," as in the instant case. *Ohio Manufacturers' Association v. City of Akron*, 801 F.2d 824, 831 (6th Cir.1986); *accord Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309–10, 51 L.Ed.2d 604 (1977).[4]

Congress adopted the Occupational Safety and Health Act ("OSHA") of 1970, "to assure so far as possible every working man and woman in the Nation safe and healthful conditions and to preserve our human resources. . . ." 29 U.S.C. § 651. In pursuit of this goal, the Act authorized the Secretary of Labor to promulgate standards that assure "the greatest protection of the safety or health of the affected employees." *Id.* at § 655(a). Plaintiffs assert that either the statutory provisions of OSHA or the accompanying administrative standards preempt the City's certification program.

1. *Applicability of OSHA.*

In opposition to plaintiffs' preemption argument, defendants first argue that the OSHA Revised Construction Standard cannot preempt the City's certification program, since at most OSHA may preempt state law, not local or municipal law. Defendants base this argument on the fact that the OSHA section discussing preemption of local laws uses the term "state," as opposed to "states and their political subdivisions." 29 U.S.C. §§ 652(7), 667. Defendants read this language as evidencing a congressional intent only to preempt state laws in conflict with OSHA, while preserving all worker safety programs passed by municipal and other local governments—a reading endorsed by one recent decision. *Ohio Manufacturers Association v. City of Akron*, 801 F.2d 824, 828–31 (6th Cir.1986).

The Court rejects defendants' contention that Congress did not intend to preempt any municipal laws in enacting OSHA. The Court begins with the settled proposition that "a municipality is merely a political subdivision of the State from which its authority derives." *United Building & Construction Trades Council v. Mayor & Council of the City of Camden*, 465 U.S. 208, 215, 104 S.Ct. 1020, 1026, 79 L.Ed.2d 249 (1984). *Accord Trenton v. New Jersey*, 262 U.S. 182, 187, 43 S.Ct. 534, 536–37, 67 L.Ed. 937 (1923); *Standard Scale Co. v. Farrell*, 249 U.S. 571, 576, 39 S.Ct. 380, 382, 63 L.Ed.2d 780 (1919). To hold that a federal statute may preempt various state laws but not identical local laws would contravene this established principle by allowing local governments broader legislative powers than the superior state governments. Previous preemption decisions typically have refused to apply different standards to state legislation and municipal ordinances, but instead have held that "for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

A holding that OSHA preempts only state legislation also would prove inconsistent with a congressional purpose underlying the adoption of this act. Courts have recognized that the goal of standardizing certain workplace safety requirements throughout the United States constitutes

3. Of the fifteen approved training courses, eight are taught in New York, three in New Jersey, one in Philadelphia, one in Maryland, and one in Washington, D.C.

4. Like federal statutes, administrative provisions adopted pursuant to a federal law may preempt state and local statutes. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985); *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141, 153–54, 102 S.Ct. 3014, 3022–23, 73 L.Ed.2d 664 (1982).

.ne of the purposes that led to the enactment of OSHA—and a central purpose underlying the statute's preemption provision. *See, e.g., Ohio Manufacturers' Association v. City of Akron*, 801 F.2d 824, 831 (6th Cir.1986); *Donovan v. Oil, Chemical & Atomic Workers International Union*, 718 F.2d 1341, 1353 (5th Cir.1983), *cert. denied*, 466 U.S. 971, 104 S.Ct. 2344, 80 L.Ed.2d 818 (1984). If the adoption of differing worker safety standards in each of the fifty states would prove inconsistent with this goal, the presence of differing standards in each of the nation's thousands of municipalities would prove a far greater obstacle to achieving uniformity.

The Court thus concludes that OSHA may preempt laws passed by municipal and local government, and turns to the question of whether OSHA preempts the certification program challenged in the instant case.

2. *Preemptive Effect of OSHA.*

Federal statutes or regulations may bar state and local legislation either through explicit preemption or implicit preemption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Fidelity Federal Savings & Loan Association v. De La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Plaintiffs argue that the OSHA statute and regulations both explicitly and implicitly preempt the certification program. The Court finds neither explicit preemption or implicit preemption argument persuasive, and accordingly declines plaintiffs' invitation to invalidate the certification program on preemption grounds.

a. *Explicit Preemption.*

Explicit preemption occurs when the express language of a federal statute or regulation conflicts with a program or policy promulgated by a state or local government. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 203, 103 S.Ct. 1713, 1721-22, 75 L.Ed.2d 752 (1983); *Fidelity Federal Savgs & Loan Association v. De La Cuesta*, 3 U.S. 141, 152, 154-55, 102 S.Ct. 3014, 22-24, 73 L.Ed.2d 664 (1983) (Federal me Loan Bank Board regulations empt California state case law limiting der's rights against property owners). h a conflict may occur either because local law directly contradicts the lange of the federal statute, or because federal statute includes a provision mpting all state legislation in a certain . *Silkwood v. Kerr-McGee*, 464 U.S. 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 l); *Jones v. Rath Packing Co.*, 430 519, 525, 97 S.Ct. 1305, 1309-10, 51 .2d 604 (1977).

In the instant case, plaintiffs have failed to show any direct conflict between the City's certification program and any OSHA statutory provision or agency regulation. *Cf. National Tank Truck Carriers, Inc. v. City of New York*, 677 F.2d 270, 274-75 (2d Cir.1982). Plaintiffs' claim of explicit preemption thus rests on the argument that the OSHA statute and accompanying regulations explicitly proscribe all state and local legislation providing for employee education on asbestos hazards.

Section 18 of OSHA generally discusses the extent to which the Act preempts state law:

> (a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect....
>
> (b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated ... shall submit a State plan for development of such standards and their enforcement.

29 U.S.C. § 667. Since the City has not submitted the certification program for OSHA approval, the relevant inquiry in this case is whether the certification program relates "to any occupational safety or health issue with respect to which a Federal standard has been promulgated." If OSHA has promulgated a standard that covers the same subject matter as the certification program, the OSHA regulations would preempt the certification program under Section 667(b). However, if the agency has not promulgated such a standard, Section 667(a) would govern, and the certification program would remain viable. *See New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir.1985) ("state laws are expressly preempted only to the extent that a federal standard regulating the same issue is already in effect....").

Plaintiffs contend that an OSHA "Revised Construction Standard," 29 C.F.R. § 1926.58, preempts the City's certification program. This standard provides various regulations applicable to employees who handle asbestos and was clearly designed to benefit asbestos workers. The topics covered in the OSHA Revised Construction Standard include maximum asbestos exposure levels (*id.* at § 1926.58(c)), respirator use by employees working with asbestos (*id.* at § 1926.58(h)), and preventive health care (*id.* at § 1926.58(m)). The standard also requires that employers provide an annual training program, designed to inform employees of the health dangers accompanying asbestos work and the means of minimizing these risks. *Id.* at § 1926.58(k)(3).

Unlike the OSHA standard, the City's certification program, while addressing employee health and safety concerns, goes considerably further: It focuses on public health protection that is largely absent from the OSHA standard. Specific requirements mandated in the City certification program that receive no mention in the OSHA standard include: 1. Proper methods for preparing work areas to minimize the amount of asbestos dust that remains after asbestos removal is completed (*Asbestos Regulations* § 8111(10)), 2. Proper methods for collecting asbestos in "bulk samples," to reduce the contamination that occurs when asbestos dust is released into the atmosphere (*id.* at § 8111(12)), 3. Proper methods for decontaminating buildings after the completion of asbestos work (*id.* at § 8111(13)), 4. Proper methods for ensuring that untrained individuals do not inadvertently spread asbestos from a work area (*id.* at § 8111(14)), and 5. Proper methods for containing any asbestos contamination that would accompany a fire, explosion, or other accident (*id.* at § 8111(15)).[5] In short, it is clear that the thrust of the City's certification program goes well beyond that of the OSHA Revised Construction Standard.

Plaintiffs recognize these dissimilarities between the federal and municipal asbestos regulations, but nonetheless argue that the OSHA Revised Construction Standard must be read to explicitly preempt regulations such as the City's certification program, on the ground that OSHA considered but rejected requiring a training course very similar to that embodied in the City's certification program. 51 Fed.Reg. 22,725. The claim that the failure to adopt a certain program as part of a federal regulatory scheme amounts to a disapproval of the omitted program runs contrary to settled principles of interpreting congressional and agency intent. It is well settled that a mere refusal by Congress or an agency to enact a specific provision provides no evidence that the government body disapproved of the rejected provision. *See, e.g., De Canas v. Bica*, 424 U.S. 351, 360 n. 9, 96 S.Ct. 933, 939, 47 L.Ed.2d 43 (1976); *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034, 1053 (5th Cir. 1982), *cert. denied*, 459 U.S. 1170, 103 S.Ct.

5. The training provision of the OSHA Revised Construction Standard mentions, without elaboration, that employee training may include, "as applicable," instruction relating to "work practices", "housekeeping practices", "hygiene facilities", "decontamination procedures", and "emergency procedures". 29 C.F.R. § 1926.58(k)(3)(D).

815, 74 L.Ed.2d 1014 (1983); *Sears, Roebuck & Co. v. Brown*, 641 F.Supp. 878, 892 n. 22 (D.Conn.1985), *aff'd*, 806 F.2d 399 (2d Cir.1986). The omission from the Construction Standard of an asbestos certification program provides as much support for the argument that OSHA intended to leave such programs to the discretion of local government, as for plaintiff's contrary contention that OSHA intended to preclude local governments from adopting such educational programs. This omission, in and of itself, simply does not indicate that OSHA's adoption of the Revised Construction Standard was intended to preempt regulations such as the City's certification program.

Accordingly, the Court rejects plaintiff's argument that OSHA explicitly preempts the City's certification program.

b. *Implicit Preemption.*

Plaintiffs also argue that the OSHA regulatory scheme implicitly preempts the City's certification program. In the absence of explicit language, a court may find implicit preemption if "the scheme of federal regulation ... [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or because "the Act of Congress ... touch[s] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject...." *Fidelity Federal Savings & Loan Association v. de La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed. 664 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) (United States Warehouse Act, 7 U.S.C. § 241, *et seq.* preempts Illinois state warehouse regulations).

The appropriateness of reading a federal statute as implicitly preempting related state or local programs thus will vary in differing fields. Courts may invalidate state or local programs as implicitly preempted where such programs touch on areas traditionally regulated by the federal government,[6] such as foreign affairs[7] or labor relations.[8] Conversely, where a state or local government seeks to implement health and safety regulations, such as the certification program challenged in the instant case, courts should hesitate to invalidate such an exercise of traditional state police powers. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) (California statute providing quality standards for avocados not preempted by federal regulations); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).[9] For example, in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) the Supreme Court held that federal Food and Drug Administration regulations designed to protect the quality of blood donations did not preempt more stringent local regulations.

In assessing plaintiffs' argument that OSHA implicitly preempts the City's certification program, this Court starts from the settled proposition that OSHA regulations do not preempt state laws addressing subjects other than worker safety. *See, e.g., Manufacturers Association of Tri-County v. Knepper*, 801 F.2d 130, 142 (3d Cir.1986); *New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir.1985) ("Because OSHA standards by definition govern occupational safety and health issues, they do not preempt state laws that regulate other concerns."); *Township of Greenwich v. Mobil Oil Corp.*, 504 F.Supp. 1275, 1279 (D.N.J.1981). Given this principle, defendants argue that the certification program is designed to protect the general public, rather than employees, and that OSHA cannot preempt this program. As evidence that the certification program was adopted to protect the public health, rather than the health and safety of asbestos workers, the City points to mandatory training course instruction on methods to prevent asbestos contamination of public places in both ordinary and extraordinary circumstances. *See, e.g., Asbestos Regulations*, §§ 8111(15), 8111(16). Defendants also describe the certification program as part of a broader city policy to reduce public exposure to asbestos, citing earlier enactments, such as the 1983 program for locating asbestos-contaminated buildings, as evidence of such a policy.

However, defendants' argument ignores the fact that some aspects of the certification program are designed primarily to protect workers, rather than the general public. For example, a substantial amount of course time is devoted to the proper use of respirators by asbestos workers. *Asbestos Regulations*, § 8111(6). The certification course also instructs workers on protective clothing (*id.* at § 8111(7)) and personal hygiene techniques (*id.* at § 8111(16)) designed to reduce their exposure to asbestos.

In short, the Court cannot accept defendants' characterization of the certification training program as designed solely to promote the public health, or plaintiffs' characterization of the program as relating solely to worker safety issues. Instead, the Court finds that the adoption of the certification program was motivated by both purposes: 1. Protection of the public health, and 2. Protection of employee health and safety. Given the presence of these dual purposes, the Court concludes that OSHA does not implicitly preempt the DEP regulations.[10]

The law is well settled that OSHA does not bar all state programs that, like the certification program, address the public health threat posed by asbestos. *See, e.g., New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir.1985) (describing argument that OSHA preempts "all the environmental protection provisions" of state law as "unpersuasive"); *United Steelworkers of America v. Auchter*, 763 F.2d 728, 735 (3d Cir.1985); Note, *The Preemptive Effect of OSHA's Hazard Communication Standard Outside the Manufacturing Sector*, 1985 B.Y. U.L.Rev. 815, 826. *See also west Virginia Manufacturers Association v. West Virginia*, 714 F.2d 308, 314 (4th Cir.1983). Such state public health programs would prove virtually impossible to implement unless states could ensure that those working directly with asbestos did not inadvertently spread this toxic substance. The New York City program designed to abate the toxic effects of asbestos on the public by locating structures that contain unusually high asbestos concentrations would prove of little value, unless the City could insure that workers did not disperse large quanti-

6. *See generally Morseburg v. Balyon*, 621 F.2d 972, 976–77 (9th Cir.), *cert. denied*, 449 U.S. 983, 101 S.Ct. 399, 66 L.Ed.2d 245 (1980); Pierce, *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U.Pitt.L.Rev. 607 (1985).

7. *See Hines v. Davidowitz*, 312 U.S. 52, 62–68, 61 S.Ct. 399, 401–05, 85 L.Ed. 581 (1941).

8. *See Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504, 521–26, 101 S.Ct. 1895, 1905–08, 68 L.Ed.2d 402 (1981); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959).

9. *See also Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 488 & n. 6 (9th Cir.1984), *cert. denied*, 471 U.S. 1140, 105 S.Ct. 2686, 66 L.Ed.2d 703 (1985); *Chrysler Corporation v. Tofany*, 419 F.2d 499, 511 (2d Cir.1969) (federal safety standard on motor vehicle lighting does not preempt state regulation of auxiliary headlamps on motor vehicles); Pierce, *Regulation, Dregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 U.Pitt.L.Rev. 607, 626 (1985) ("The few environmental cases decided so far indicate that the courts will give at least as much deference to state legislative or administrative efforts to balance state environmental interests against national economic interests as they do when the balance is between state health and safety interests and national economic interests.").

10. One other federal court decision considering this issue has held that OSHA preempts a state program having the "dual purposes" of protecting both worker health and public health. *New Jersey Chamber of Commerce v. New Jersey*, 653 F.Supp. 1453, 1465–66 (D.N.J.1987). For the reasons set forth in the text of this opinion, the Court declines to follow this reasoning of the *New Jersey Chamber of Commerce* decision.

ties of asbestos dust when removing this material. Worker education on safe methods for handling asbestos is logically an essential part of any public health program addressing the dangers raised by asbestos.[11]

This Court's refusal to read the implicit preemptive effect of OSHA more broadly is supported by the statutory language of the OSHA statute. As discussed above, Section 18 of the Act, 29 U.S.C. § 667, describes an ongoing state role in promoting employee health and safety. Where Congress has intended to preempt all state regulation in a particular field, statutes have used quite different language. For example, the Employee Income Retirement Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.*, states that its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employer benefit plan...." *Id.* at § 1144.[12] Not only does OSHA omit any statement of an intent to "supersede any and all State laws" related to worker safety, but instead this statute expressly encourages "the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws...." 29 U.S.C. § 651(b)(11).

The Court also notes that Congress actually has encouraged asbestos regulations similar to the City's certification program, which plaintiffs nonetheless describe as contravening federal law. The Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C.A. § 2641, *et seq.* (West Supp.1987), enacted in 1986, requires state governments to implement accreditation programs for asbestos contractors and their employees working in public schools, in conjunction with the Environmental Protection Agency ("EPA"). *Id.* at § 2646(b). Like the certification program, AHERA mandates that asbestos contractors and workers enroll in a training course, "achieve a passing grade on an examination[,] and participate in continuing education to stay informed about current asbestos inspection and response action technology." 15 U.S.C. § 2646(b)(1)(B).[13]

Although AHERA requires such training only for individuals working with asbestos in primary and secondary schools, language in the statute invites states to adopt more comprehensive public health regulations. The first section of AHERA warns that "[b]ecause there are no Federal standards whatsoever regulating the exposure to asbestos in other public commercial buildings, persons in addition to those comprising the Nation's school population may be exposed daily to asbestos." *Id.* at § 2641(a)(4). Accordingly, the Act requires the EPA "to conduct a study to find out the extent of the danger to human health posed by asbestos in public and commercial buildings and the means to respond to any such danger." *Id.* at § 2641(b)(2). In light of these AHERA provisions, plaintiffs' argument that the City's certification program conflicts with federal legislation or policy loses all force. *See also Ohio Manufacturers Association v. City of Akron*, 801 F.2d 824, 831 (6th Cir.1986) (primary purpose of OSHA "was to assure that the states would at least meet the minimum requirements of federal standards, and not attempt to undercut each other").

Plaintiffs argue that a federal district court decision invalidating a state asbestos training program, *New Jersey Chamber of Commerce v. New Jersey*, 653 F.Supp. 1453 (D.N.J.1987) requires this Court to invalidate the City's certification program. *New Jersey Chamber of Commerce* has little applicability to the instant case, since the New Jersey regulations successfully challenged applied only to "employers using their own employees to perform asbestos work in their own facilities...." *Id.* at 1455. Accordingly, the regulations invalidated in *New Jersey Chamber of Commerce* did not address public health concerns, falling outside the province of OSHA, to the same extent as the training program challenged in the instant case, which regulates contractors frequently working in or near public places. In any event, to the extent that the analysis found in the New Jersey district court decision differs from the approach employed in the instant case, this Court declines to follow *New Jersey Chamber of Commerce*.[14]

Plaintiffs also argue that if this Court does not invalidate the City's entire certification program, it should invalidate at least that portion of the course relating to worker safety as implicitly preempted by OSHA. There is authority to the effect that where a state regulatory program seeks to reduce the hazards associated with toxic materials through a number of different mechanisms—such as surveys, warning signs, labeling requirements, and educational courses—courts will consider whether federal law preempts each distinct program. *See Manufacturers Association of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir.1986). *See also New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir.1985).

This Court declines plaintiffs' invitation to dictate the precise topics that the City's certification courses must teach. This Court lacks both the expertise and the resources to undertake such a responsibility. As the Supreme Court has written in other contexts, such a lack of deference to the judgment of state officials would "subject the State to an intolerable supervision hostile to the basic principles of our Government...." *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93 (1963); *Sproles v. Binford*, 286 U.S. 374, 388, 52 S.Ct. 581, 585, 76 L.Ed. 1167 (1932). To require that the City delete any mention of the potential hazard faced by individuals working with asbestos from the certification courses, as plaintiffs urge, would render the courses at best incomplete, at worst seriously misleading.

To summarize, the Court does not find the City's certification program to be in conflict with the express language or implicit purposes of federal law. "The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem...." *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 415, 93 S.Ct. 2507, 2513–14, 37 L.Ed.2d 688 (1973); *accord Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715–17, 105 S.Ct. 2371, 2376–2377, 85 L.Ed.2d 714 (1985). The Court thus holds that OSHA does not preempt the City's certification program.

B. DUE PROCESS.

Plaintiffs also allege that the certification program constitutes a taking of property without due process of law, in violation of the fourteenth amendment. This argument borders on the frivolous.

State and local governments unquestionably possess broad discretion in the formulation and implementation of measures designed to protect public health and safety. *See, e.g., Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 108–09, 69 S.Ct. 463, 464–65, 93 L.Ed. 533 (1949); *New Jer-*

11. The Third Circuit Court of Appeals adopted similar reasoning in *Manufacturers Association of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986). The *Knepper* Court considered a Pennsylvania "Right to Know" statute, and held that this statute would be preempted if it were read to mandate "educational programs with respect to workplace hazards." However, the Court continued: "[I]f the Pennsylvania authorities so construe the Act, the provision that employees be educated *as to environmental hazards would not be preempted.*" *Id.* at 142 (emphasis added). *See also New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir.1985).

12. The Third Circuit Court of Appeals has noted that OSHA does not include the broad preemptive language used in ERISA. *See New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587, 593 (3d Cir.1985).

13. As of March 1, 1987, eighteen states, including New York, had developed certification programs for school employees pursuant to the act.

14. *See supra* note /10/.

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"CONFIDENTIAL MATERIAL SUBJECT TO PROTECTIVE PRIVILEGED AND *sey Chamber of Commerce v. Hughey*, 774 F.2d 587, 598 (3d Cir.1985). It is also established that states may require training and licensing of employees or companies engaged in potentially hazardous work, and may impose fines or other punishment against those who fail to obtain the requisite training. *See, e.g., Manufacturers Association of Tri-County v. Knepper*, 801 F.2d 130, 142 (3d Cir.1986); *Sucesion Suarez v. Gelabert*, 701 F.2d 231 (1st Cir.1983); *Nofalco Realty Corp. v. United States*, 521 F.Supp. 458, 461-62 (S.D.N.Y.1981).

Plaintiffs first contend that the City violated the due process clause by failing to provide adequate notice on the date when the City would require workers to possess an asbestos certificate. However, this contention receives no support from the factual record. The City gave notice of the certification course requirement as early as November 19, 1986, when defendants first published the DEP regulations in the City Record. On December 16, 1986, the City mailed notices informing about 1,200 contractors and builders, including plaintiffs, of the April 1, 1987 deadline for compliance with the DEP regulations. Given this mailing, the Court cannot find that the notice provided by defendants was inadequate. "The Fourteenth Amendment does not impose upon states and localities ... an Administrative Procedure Act to regulate every governmental action...." *BAM Historic District Association v. Koch*, 723 F.2d 233, 237 (2d Cir. 1983). *See also City of Las Vegas v. Clark County*, 755 F.2d 697, 704 (9th Cir.1984).

Plaintiffs also assert that defendants have failed to establish a sufficient number of courses to train New York's asbestos workforce. However, as of May 11, 1987, when this Court heard oral argument on these motions, defendants' attorneys represented that some 1,200 workers had completed the certification course, taught in several languages, and that defendants were certifying an additional 200 to 250 workers each week. Defendants further represented, and plaintiffs did not dispute, that a speedier schedule for certifying workers was planned, but that the failure of plaintiffs and other contractors to enroll their employees in available classes resulted in either their cancellation, or the holding of classes with less than the maximum enrollment.

As a final due process contention, plaintiffs argue that the challenged regulations are unconstitutionally vague. The basis for this argument remains a mystery to the Court. The City's program not only specifies those organizations authorized to teach the certification course, but also mandates the precise content of this course. Although plaintiff relies heavily on *Housworth v. Glisson*, 485 F.Supp. 29, 38 (N.D. Ga.1978), the ordinance invalidated in that case, which was "clearly subject to arbitrary and discriminatory enforcement and provide[d] no guidelines," bears little similarity to the regulations challenged in the instant case. "If anything, these standards are more specific than the criteria in other statutes authorizing summary administrative action that have been upheld against due process challenges." *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 302, 101 S.Ct. 2352, 2378, 69 L.Ed.2d 1 (1981). *See also PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 897 (1st Cir.1981).

To summarize, the Court holds that neither the content nor the implementation of the City's asbestos certification program violated plaintiffs' due process rights. Any failure of employees to complete the certification course follows from their employers' decision to challenge the DEP regulations, rather than to comply with the training mandated by those regulations. *See United States v. National Steel Corp.*, 767 F.2d 1176, 1181 (6th Cir.1985); *United States Steel Corp. v. Federal Power Commission*, 533 F.2d 1217, 1224 (D.C.Cir.1976).

CONCLUSION

This Court has approached the regulations challenged in the instant case with a recognition that courts should show substantial deference to the policy judgments of elected officials. "It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or some valid federal law.'" *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93 (1963) (quoting in part *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536, 69 S.Ct. 251, 257, 93 L.Ed. 212 (1949)).[15]

Plaintiffs have argued vehemently that requiring employers to pay the cost of the certification program, estimated at about $600/worker, will impose an unreasonable financial burden on construction companies, effectively putting their owners out of business. This Court is not the proper body to assess the validity of these contentions. Plaintiffs may urge the New York City Council to repeal or modify the certification program, and may ask Congress to adopt a statutory amendment explicitly prohibiting such local regulation. But since the City's certification program does not run afoul of any existing constitutional provision, federal statute, or agency regulation, this Court does not hestitate to uphold the regulations as valid.[16]

Plaintiffs' motion for a preliminary injunction is denied. Defendants' cross-motion for summary judgment is granted.

SO ORDERED.

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15. *See generally* Pierce, *Regulation, Deregulation, Federalism and Administrative Law: Agency Power to Preempt State Regulation*, 46 U.Pitt. L.Rev. 607, 661–62 (1985); Gray, *Regulation and Federalism*, 1 Yale J. on Reg. 93 (1983).

16. In passing, the Court notes that managing the large number of suits brought by victims of asbestos-related disease has posed a serious problem for the nation's courts. *See generally* Comment, *Coping With the Particularized Problems of Toxic Tort Litigation*, 28 Vill.L.Rev. 1298 (1983); Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 Fordham Urb.L.J. 55 (1978). To the extent that the future prevention of asbestos-induced diseases represents the optimal solution to the difficult legal and policy issues raised in these suits, the goals of programs such as the New York City asbestos regulations appear particularly laudable.

Eddleman v. Nuclear Regulatory Commission

No. 87-1018 (825 F.2d 46) (4th Cir. Aug. 10, 1987)

The court holds that petitioner citizen groups' procedural rights were not violated when the Nuclear Regulatory Commission (NRC) permitted the Shearon Harris Nuclear Power Plant in North Carolina to begin full operations. The court first holds that petitioners had no right to notice and an opportunity to present arguments when the NRC conducted its informal "immediate effectiveness review," allowing the plant to begin operations while the Commission's review of the licensing board's grant of an operating license was still pending. The court next holds that petitioners had no right to a hearing on their petition, filed pursuant to the NRC's regulation at 10 C.F.R. §2.206, asserting various safety concerns respecting the power plant. Because the disposition of such a petition is not a "proceeding" within the meaning of §189(a) of the Atomic Energy Act (AEA), petitioners have no basis for demanding a hearing. The court holds that the NRC did not err, when deciding petitioners' §2.206 petition, by considering facts not part of the adjudicatory record arising from the licensing proceedings. Such petitions can involve matters that are unrelated to the issues that were before the licensing board. Finally, the court holds that the NRC committed neither procedural nor substantive error when it granted defendant power plant an exemption from the NRC regulations' emergency response plan requirement. The court holds that NRC did not use the wrong procedural mechanism to resolve the exemption issue; the two available procedures in the regulations are closely related, and agencies are afforded discretion in construing their own enabling statutes. The court finds no basis in the record to dispute the NRC's