

***OPINION NO. 98-5***

August 31, 1998

Honorable John Ray  
Hawaii County Council  
25 Aupuni Street  
Hilo, Hawaii 96720

Dear Councilman Ray:

Re: Proposed Amendment to Chapter 14 of the Hawaii County Code  
Relating to Nuclear Energy

We have examined the proposed ordinance which would amend Chapter 14 of the Hawaii County Code relating to nuclear energy by adding "any quantity of radioactive materials used in commercial radiation facilities" to the list of "radioactive materials or substances" which may not be transported or stored in the county. It has been and continues to be the opinion of this office that the regulation of nuclear material as set forth in Chapter 14 and in the proposed amendment to Chapter 14, is invalid as attempting to legislate in an area of law pre-empted by the federal government.

The doctrine of preemption is based upon Article VI, Clause 2 of the United States Constitution, the "Supremacy Clause," which provides that:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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."

Therefore, the doctrine of preemption holds that when Congress legislates pursuant to its delegated powers, the supremacy clause directs that any conflicting state law must yield. *Gibbons v. Ogden*, 22 U.S.1 (1824).

The question then presented is whether Congress has legislated in the field of nuclear energy, pursuant to its delegated powers, and the answer is that it has.

When atomic energy was first developed, the federal government maintained exclusive control of it under the Atomic Energy Act of 1946. Under the provisions of this Act, the Atomic Energy Commission (AEC) was given full responsibility for controlling the development of nuclear energy with private industry participating only in contractual work performed for the AEC. *Atomic Energy Act of 1946*, Ch. 724, §4.<sup>1</sup>

The *Atomic Energy Act of 1954*, 42 U.S.C. §§2011-2296, permitted private enterprise to participate in the development and use of atomic energy if licensed by the AEC.

In 1959, the Act was amended again to include a section which addressed the issue of the relationship between the federal and state governments in the regulation of nuclear materials.

Section 2021 provides, in pertinent part, as follows:

"(a) **Purpose.** It is the purpose of this section--

(1) to recognize the interests of the States in the peaceful uses of atomic energy, and to clarify the respective responsibilities under this Act of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials;

(2) to recognize the need, and establish programs for, co-operation between the States and the Commission with respect to control of radiation hazards associated with use of such materials;

(3) to promote an orderly regulatory pattern between the Commission and State governments with respect to nuclear

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<sup>1</sup>The Atomic Energy Commission was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801, et seq. This act transferred the regulatory functions of the Atomic Energy Commission to the Nuclear Regulatory Commission. The scope of federal regulatory power was not changed.

development and use and regulation of byproduct, source, and special nuclear materials;

(4) to establish procedures and criteria for discontinuance of certain of the Commission's regulatory responsibilities with respect to byproduct, source, and special nuclear materials, and the assumption thereof by the States;

(5) to provide for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with the States; and

(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable.

(b) **Agreements with Governors.** Except as provided in subsection (c) , the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission ... with respect to any one or more of the following materials within the State--

(1) byproduct materials ...;

(2) byproduct materials ...;

(3) source materials;

(4) special nuclear materials in quantities not sufficient to form a critical mass.

During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards.

(c) **Retention of authority and responsibility by Commission.** No agreement entered into pursuant to subsection (b) shall provide for discontinuance of any authority and the

Commission shall retain authority and responsibility with respect to regulation of--

- (1) the construction and operation of any production or utilization facility or any uranium enrichment facility;
- (2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;
- (3) the disposal into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;
- (4) the disposal of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission.

The Commission shall also retain authority under any such agreement to make a determination that all applicable standards and requirements have been met prior to termination of a license for byproduct material, as defined in section 11 e. (2). (Citation omitted.) Notwithstanding any agreement between the Commission and any State pursuant to subsection (b), the Commission is authorized by rule, regulation, or order to require that the manufacturer, processor, or producer of any equipment, device, commodity, or other product containing source, byproduct, or special nuclear material shall not transfer possession or control of such product except pursuant to a license issued by the Commission.

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(g) **Radiation standards.** The Commission is authorized and directed to cooperate with the States in the formulation of standards for protection against hazards of radiation to assure that State and Commission programs for protection against hazards of radiation will be coordinated and compatible.

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(k) **State regulation of activities for purposes other than protection against radiation hazards.** Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

We note that under Section 2021(6)(b), the state would be able to regulate certain materials in the area of protection of public health and safety from radiation hazards if done pursuant to an agreement with the governor and the Nuclear Regulatory Commission. These would include regulation of byproduct materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. There is no such agreement at the present time.<sup>2</sup>

Hawaii County Code, Section 14-44, provides that:

The purpose of this article is to maintain a clean and healthy environment for present and future generations in the County, to protect the health and safety of the residents of the County from radiation exposure resulting from dangers of accidents involving the transportation or storage of nuclear materials or the development of nuclear reactors, and to protect the general health, safety, comfort and welfare of the citizens of the County.

The United States Supreme Court in the 1983 case of *Pacific Gas and Electric v. State Energy Resources Conservation and Development Commission*,

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<sup>2</sup>The Hawaii State Constitution in Article XI, § 8, provides that: "No nuclear fission power plant shall be constructed or radioactive material disposed of in the State without the prior approval by a two-thirds vote in each house of the legislature."

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461 U.S. 190, 103 S.Ct. 1713 (1983), held that Congress, in passing the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, et seq., and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects involved in the construction and operation of all nuclear facilities, but that the states retain their traditional authority over economic issues such as determining questions of need, reliability, cost, and other state concerns. In its opinion, the United States Supreme Court stated:

The federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 236, 67 S.Ct. at 1155. A state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objection to insure that nuclear technology be safe enough for widespread development and use--and would be preempted for that reason. 461 U.S. at 212-213, 103 S.Ct. at 1726-1727. (Emphasis added.)

The operation of nuclear reactors and critical fissionable assemblies and the regulation of radiation hazards from nuclear materials is not subject to municipal regulation and supervision. All local regulation of the health and safety aspects of nuclear power production is federally preempted. McQuillin Mun Corp § 24.226.

Therefore, because the federal government has occupied the entire field of nuclear safety concerns, the states have no power to regulate in this area, and because the counties derive their powers from the state, the counties cannot enact legislation which the state has no power to enact. The powers and duties of the County officers can be no greater than those delegated to them by the legislature. See, 1 Municipal Mun Corp § 1.77 (3rd Ed.); *In Re Application of Anamizu, et al.*, 52 Haw. 550, 553 (1971); *Holt v. Izumo Taisha Kyo Mission*, 42 Haw. 671, 702 (1958).

An ordinance which had the effect of banning the construction or operation of a commodities irradiator on the basis of health and safety concerns would be just as unconstitutional and invalid as the County's current nuclear energy ordinance.

We note that subdivision (k) of 42 U.S.C. § 2021 empowers the state to regulate nuclear facilities with respect to matters other than radiation hazards.

It has been held, based upon this subdivision, that the federal government has not preempted the question of the safety of the location of atomic reactors. *Northern California Association to Preserve Bodega Head and Harbor, Inc. v. Public Utilities Commission*, 390 P.2d. 200 (1964). The case involved an application by an utility company to the Public Utilities Commission for a certificate for construction of a nuclear power unit. The court held that:

[I]n view of subdivision (k) of section 2021, respondent commission unquestionably has authority to inquire into safety questions apart from radiation hazards. Accordingly, since the location of an atomic reactor at or near an active earthquake fault zone involves safety considerations in addition to radiation hazards, it is clear that the federal government has not preempted the field, at least with respect to the phase of protecting the public from hazards and other than radiation hazards, and that the states' powers in determining the locations of atomic reactors are not limited to matters of zoning or similar local interests. p. 204

The case of *State ex rel. Utility Consumers Council of Missouri v. Public Service Commission of Missouri*, 562 S.W.2d 688 (1978), *cert. denied*, 439 U.S. 866, also dealt with the issue of matters subject to state regulation. The case concerned the Missouri Public Service Commission which granted an electric company a certificate of convenience and necessity to construct and operate a nuclear-powered electric plant. The extent of permitted regulation by the state was discussed as follows:

"The federal government regulates how nuclear power plants will be constructed and maintained; the State of Missouri regulates whether they will be constructed. The federal regulations pertain to plans, specifications, safety mechanisms and the like. The Commission's considerations pertain to economic feasibility, need for increased power and financing. It is obvious that the considerations of the State of Missouri do not affect the control of how the nuclear facility will be constructed and physically

maintained. The considerations of the Commission do not attempt to protect the citizens of Missouri against radiation hazards. The issue of safety rests in the exclusive domain of the federal government." pp. 698-699

Therefore, it seems it is possible for a state to refuse to allow a particular nuclear facility as part of its regulation of public utilities.

However, a legislative body's stated purpose or concern will not in itself be enough to bring an act within the exception provided by subsection (k), and it is not possible to totally ban nuclear power plants. *Pacific Legal Foundation v. State Energy Resources*, 472 F.Supp. 191 (1979), concerned a California statute which provided that no nuclear power plant would be certified until a state commission found that the United States agency had approved a technology for the construction and operation of nuclear fuel reprocessing plants. The state commission would then submit its findings to the state legislature which could disaffirm them.

The court reassured that this process would impede certification of nuclear power plants in the state and stated:

Congress' policy to encourage the development and utilization of nuclear energy would decidedly be frustrated if all fifty states had statutes similar to California Public Resources Code section 25524.2. Although the Atomic Energy Act certainly leaves room for the states to regulate on the subject of nuclear energy within the confines of Sections 2021(k) and 2021(b), the power to regulate is not necessarily the power to prohibit. There seems little point in enacting an Atomic Energy Act and establishing a federal agency to promulgate extensive and pervasive regulations on the subject of construction and operation of nuclear reactors and the disposal of nuclear waste if it is within the prerogative of the states to outlaw the use of atomic energy within their borders. p. 200

The proposed ordinance clearly intends to ban totally the use of nuclear power within the county thus frustrating the purpose of the federal legislation and, according to the above case, cannot be allowed.

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Regarding the transportation of radioactive materials, the Department of Transportation has the authority to regulate the transportation of radioactive materials. Thus preemption applies also in the area of state or local regulation of the transportation of nuclear materials. In 1975, Congress enacted the Hazardous Materials Transportation Act, 49 U.S.C. app. §§ 1801, et seq. The Act set forth uniform national regulations concerning the transportation of hazardous materials. This Act was subsequently amended by enacting the Hazardous Materials Transportation Uniform Safety Act of 1990, 49 U.S.C. app. §§ 1801-1819 (HMTUSA).

Under the Act, the Secretary of Transportation is given power to "issue regulations for the safe transportation of hazardous materials in intrastate, interstate, and foreign commerce.

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The regulations issued under this section shall govern any aspect of hazardous materials transportation safety which the Secretary deems necessary or appropriate." 49 U.S.C. § 1804(a)(1).

Under the Act, a state or political subdivision may apply for a waiver of prescription if its regulation provides equal or greater level of protection and does not unreasonably burden commerce. 49 U.S.C. app. § 1811(d). Perhaps an application could be made but it is likely that a total ban on the transportation of these materials would be found to be an unreasonable burden on commerce.

Sincerely,

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By \_\_\_\_\_  
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APPROVED:

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