TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79–602
of	:	August 24, 1979
GEORGE DEUKMEJIAN Attorney General	:	
Warren J. Abbott Assistant Attorney General	:	

SUBJECT: RADIOACTIVE MATERIALS—Under present California and federal statutes and regulations, a city in California may not prohibit the transportation of radioactive materials within the boundaries of the city.

The Honorable Carol Hallett, Assemblywoman from the Twenty-Ninth District, has requested an opinion on the following question:

May a city in California by ordinance prohibit the transportation of radioactive materials within the boundaries of the city?

CONCLUSION

Under present California and federal statutes and regulations, a city in California may not prohibit the transportation of radioactive materials within the boundaries of the city.

ANALYSIS

The question presented deals with the powers of California cities measured against existing state and federal regulations on the same subject, the transportation of radioactive materials. The question is whether a prohibition against such transportation enacted by a city is preempted by state or federal law on that subject.

Current interest on the subject of radioactive materials is, of course, focused on fuel for nuclear power plants and its by-products and wastes. The scope of radioactive materials, however, is substantially wider, ranging from nuclear weapons to radioactive materials for medical treatments to oil well logging instruments, for example (see *Radioactive Materials in California*, Report of the Secretary of Resources State Task Force on Nuclear Energy and Radioactive Materials, pp. 8–9 (1979)), and the question presented is not limited to nuclear power plant materials. The regulation of radioactive materials is also broad, both on the federal and state level.[1]

We shall first examine the constitutional and statutory powers of cities and limitations thereon. We will then measure that power against the provisions of state law relating to the transportation of radioactive materials and two relevant federal laws, the Hazardous Materials Transportation Act (Pub.L. No. 93–633, 88 Stat. 2156 (Jan. 3, 1975), 49 U.S.C. § 1801 *et seq*.) and the Atomic Energy Act (68 Stat. 921,42 U.S.C. § 2011 *et seq*.).

I. Introduction—Powers of Cities

A. State Preemption Doctrine

Article XI, section 7 of the California Constitution provides:

> "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with

[1] See, e.g., Control of Radioactive Contamination of the Environment Act (Health & Saf. Code, § 25600 *et seq*.), Transportation of Radioactive Materials Act (Health & Saf. Code, § 25650 *et seq*.); Radiologic Technology (Health & Saf. Code, § 25600 *et seq*.); Atomic Energy Development Law (Health & Saf. Code, § 25700 *et seq*.); Radiation Control Law (Health & Saf. Code, § 25800 *et seq*.); Nuclear Medicine Technology (Health & Saf. Code, § 25625 *et seq*.); California Hazardous Substances Act (Health & Saf. Code, § 28740 *et seq*); Federal Hazardous Material Transportation Act (Pub.L. No. 93–633, 88 Stat. 2156 (Jan. 3, 1975), 49 U.S.C § 1801 *et seq*.) and regulations (49 C.F.R. ch. 1, subchapter b (1977)); Atomic Energy Act as amended (68 Stat. 921; 42 U.S.C. § 2011) and regulations (10 C.F.R. ch.1 (1978)).

general laws."

This provision is applicable to general law and charter cities and is supplemented by Government Code section 37100:

> "The legislative body [of cities] may pass ordinances not in conflict with the Constitution and laws of the State or the United States."

In addition, the California Constitution contains a home rule provision for chartered cities in Article XI, section 5(a):

> "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters with respect to municipal affairs shall supersede all laws inconsistent therewith."

These provisions set two rules. First, as to general law cities, any conflict with state law invalidates the local ordinance. (*Lancaster v. Municipal Court* (1972) 6 Cal. 3d 805, 807; 59 Ops. Cal. Atty. Gen. 461, 463 (1976),) A local ordinance may be invalid if it attempts to impose additional requirements in a field occupied by the general law of the state. (*In re Lane* (1962) 58 Cal. 2d 99, 109; 59 Ops. Cal. Atty. Gen., *supra*, 463.) As we concluded in 62 Ops. Cal. Atty. Gen. 90, 95 (1979):

> "A direct conflict will arise if the local ordinance attempts to permit what the state law prohibits. (See In re Iverson (1926) 199 Cal. 582, 587.) Conversely, a direct conflict will arise if the local ordinance attempts to prohibit what state law permits. (*Monterey Oil Co. v. City Court* (1953) 120 Cal. App. 2d 31, 36; *Markus v. Justice's Court* (1953) 117 Cal. App. 2d 391, 396; 59 Ops. Cal. Atty. Gen. 461, 478 (1976).) . . . ."

The courts have frequently dealt with the meaning of "conflict" in Article XI, section 7:

> ". . . The word 'conflict' is to be given a broad construction; there may be a conflict even though there is no actual grammatical conflict between the statute and the ordinance; and if it is determined, under the general principles developed by the cases, that the state has occupied the field, any local provisions are deemed to be in conflict with the state legislation. (*Pipoly v. Benson* [(1942)] 120 Cal. 2d 366, 370–371." (See *In re Lane* (1962) 58 Cal. 2d 99, 106 (conc. opn.).)

> """As defined by the cases the constitutional phrase 'conflict with general laws' (art. XI, § 11 [now § 73] may arise in several different ways. It may grow out of the exact language of the state and municipal laws [citations] or from a local attempt 'to impose additional requirements in a field that is preempted by the general law' [citations] or from the state's adoption of 'a general scheme for the regulation of a particular subject' [citations]. But if the state's preemption of the field or subject is not complete, local supplemental legislation is now deemed conflicting to the extent that it covers phases of the subject which have not been covered by state law. [Citations.]"' (*Robins v. County of Los Angeles* (1966) 248 Cal. App. 2d 1, 8–9 [56 Cal. Rptr. 8533, quoting from In re Martin (1963) 221 Cal. App. 2d 14. 16–17 [34 Cal. Rptr. 2991.)" (*Baron v. City of Los Angeles* (1970) 2 Cal. 3d 535, 541; see 58 Ops. Cal. Atty. Gen. 519, 523–525 (1975).)

The determination of whether a conflict exists between a local ordinance and general law must be made on a case by case basis. (*In re Hubbard* (1964) 62 Cal. 2d 119, 128; 58 Ops. Cal. Atty. Gen., *supra*, at 525.) There are some areas of regulation, however, where the courts have held that the state law preempted local regulations. For example, see *Los Angeles Ry. Corp. v. Los Angeles* (1940) 16 Cal. 2d 779 (the regulation and operation of an intercity street car system); *Pac. Tel. & Tel. Co. v. City & County of S. F.* (1959) 51 Cal. 2d 766 (construction and maintenance of telephone lines in the streets and other public places); *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal. App. 2d 16 (county water ordinance not applicable to public utility companies subject to regulation by the Public Utilities Commission). *City of LaFayette v. County of Contra Costa* (1979) 91 Cal. App. 3d 749, 754–755 legislature has preempted entire field of motor vehicle traffic control.

In addition, this office has also concluded that some areas of state regulation have preempted local control within the meaning of article XL, section 7. See, for example, 62 Ops. Cal. Atty. Gen. 96, *supra* (state regulation of herbicides precludes local regulation); 57 Ops. Cal. Atty. Gen. 159 (1974) (State Hazardous Waste Control Law preempts local regulations relating to processing, handling and disposal of hazardous and extremely hazardous waste materials); 58 Ops. Cal. Atty. Gen. 729 (1975) (state legislation preempts local regulation of construction of nuclear power plants); 53 Ops. Cal. Atty. Gen. 313 (1970) (regulation and control of traffic on the streets and highways is a matter of state concern); and see 38 Ops. Cal. Atty. Gen. 174 (1961) (statewide system of fees established by Radiation Control Law (Health & Saf. Code, § 25800–25870) prohibits the charging of a fee by city or county).

The second rule is that established by the home rule provision: As to "municipal affairs" a charter provision prevails over general state law. (*Birkenfeld v. City of Berkeley* (1976) 17

Cal. 3d 129, 141; *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal. 3d 296, 315.) As to matters of statewide concern, however, charter cities remain subject to state law. (*Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 61–62; *Bellus v. City of Eureka* (1968) 69 Cal. 2d 336, 346.) The determination of what is a municipal affair also requires a case by case analysis. (*Bishop v. City of San Jose, supra*, 1 Cal. 3d at 61–63; 58 Ops. Cal. Atty. Gen., *supra* at 521–523.) As the court stated in *Sonoma County Organization of Public Employees v. County of Sonoma*, *supra*, (23 Cal. 3d at 316):

> "What constitutes a strictly municipal affair is often a difficult question; ultimately it is an issue for the courts to determine. In *Bishop v. City of San Jose*, *supra*, 1 Cal. 3d 56, 63, we made it clear that while a court will accord great weight to the purpose of the Legislature in enacting general laws which disclose an attempt to preempt the field to the exclusion of local regulation, the fact that the Legislature has chosen to deal with a problem on a statewide basis is not determinative of whether the statute relates to a statewide concern."

Again, the courts have many times examined particular activities to determine whether they are municipal affairs within the meaning of the home rule provision. (See *Weekes v. City of Oakland* (1978) 21 Cal. 3d 386, 404–405 for a partial list and analysis.)

The task, then, will be to determine whether an ordinance of a city which prohibits the transportation of radioactive materials is (1) in conflict with state general law, and (2) as to chartered cities relates to a municipal affair.

B. Federal Preemption Doctrine

As Government Code section 37100, *supra*, recognizes, local ordinances may not conflict with the Constitution and laws of the United States. This is based on the supremacy clause of the Constitution, article VI, clause 2:

> "This Constitution, and the laws of the United States . . . shall be the supreme law of the land; . . . anything in the Constitution or laws of any State to the contrary notwithstanding."

This provision, which is the heart of the federal preemption doctrine, is obviously binding on local subdivisions, whether chartered or general law cities which obtain their powers from the state constitution and laws.

In one of the more recent reviews of this preemption doctrine, the United States Supreme Court summarized the rules as follows:

"The Court's prior cases indicate that when a State's exercise of its police power is challenged under the Supremacy Clause, '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.' *Rice v. Santa Fe Elevator Corp*., 331 US. 218, 230 (1947); *Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977). Under the relevant cases, one of the legitimate inquiries is whether Congress has either explicitly or implicitly declared that the States are prohibited from regulating the various aspects of oil-tanker operations and design with which the Tanker Law is concerned. As the Court noted in *Rice*, *supra*, at 230:

"'[The congressional] purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws of the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission,* 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.,* 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co., supra*.'

Accord, *City of Burbank v. Lockheed Air Terminal, Inc*., 411 U.S. 624, 633 (1973).

"Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found 'where compliance with both federal and state regulations is a physical impossibility *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143 (1963), or where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Jones v. Rath Packing Co*., *supra*, at 526, 540–541. *Accord, De Canas v. Bica,* 424 U.S. 351, 363 (1976)." (*Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 157–158.) (See discussion in 61 Ops. Cal. Atty. Gen. 159, 167–169 (1978).)

We shall now examine the pertinent state and federal statutes and regulations in light

of the above authorities on preemption.

II. California Statutes

In 1961, the California Legislature adopted a statute (Stats. 1961, ch. 1705, hereafter referred to as "Transportation Act") regulating the transportation of radioactive materials. Section 1 of that Act added chapter 7.3 (commencing with § 25650) to division 20 of the Health and Safety Code.[2] Section 25650 defined radioactive materials to include "any material or combination of materials that spontaneously emits ionizing radiation." Section 25651 provides:

> "The department [of Health Services] shall adopt, in accordance with the provisions . . . [of the Administrative Procedures Act] reasonable regulations which, in the judgment of the department, shall promote the safe transportation of radioactive materials. Such regulations shall prescribe the use of signs designating radioactive material cargo; may designate routes in this state which are to be used for the transportation of cargoes of hazardous radioactive materials, as defined by regulations, and the manner in which the shipper shall give notice of such shipment to appropriate authorities; and shall prescribe the packing, marketing, loading and handling of radioactive materials, and the precautions necessary to determine whether the material when offered is in proper condition to transport, but shall not include the equipment and operation of the carrier vehicle. *Such regulations shall be compatible with, but not more restrictive than, those established by the federal agency or agencies required or permitted by federal law to establish such regulations."* (Emphasis added.)

Section 5 of chapter 1705 also amended section 33000 of the Vehicle Code to read:

> "Transportation of radioactive materials shall be in accordance with Chapter 7.3 (commencing with Section 25650) of Division 20 of the Health and Safety Code."

The predecessors of the Department of Health Service, pursuant to the Transportation Act and the Radiation Control Law also adopted in 1961 (Stats. 1961, ch. 1711)[3] adopted regulations relating to the interstate transportation of radioactive materials.

---

[2] All unidentified section references hereinafter are to the Health and Safety Code unless otherwise noted.

[3] See further discussion concerning the Radiation Control Law, *infra*, under discussion of federal Atomic Energy Act.

(Cal. Admin. Code, tit. 17, § 30365 *et seq*.) Section 30373 of those regulations provides:

> "No person shall transport any radioactive material outside the confines of his facility or other authorized location of use, or deliver any radioactive materials to a carrier for transportation, unless he complies with the applicable requirements of the regulations, appropriate to the mode of transport of the United States federal government (10 C.F.R. Part 71; 49 C.F.R. Parts 170–189; 14 C.F.R. Part 103; 46 C.F.R. Part 146; at 39 C.F.R. Parts 14 and 15)[4] insofar as such regulations relate to the packaging of radioactive materials, marking and labeling of the packages, loading and storage of packages, placarding of the transportation vehicles, monitoring requirements and accident reporting. . . ."

These regulations govern only intrastate transportation not otherwise governed by federal regulations. (Cal. Admin. Code, tin. 17, § 30365.)

Thus, the regulation of transportation of radioactive materials, to the extent California has jurisdiction, is accomplished by incorporation of the appropriate federal regulations. Those of the Nuclear Regulatory Commission pursuant to the Atomic Energy Act relate to packaging and transportation of fissile materials (uranium-233, uranium-235, plutonium-238, plutonium-239 and plutonium-241) and require a license issued by the Commission. (10 C.F.R. Part 71(1978).)[5] The regulations of the Department of Transportation (49 C.F.R. Parts 170–189 (1977)) contain comprehensive provisions for the packaging, labeling and transportation of hazardous materials in interstate commerce.[6] By incorporation, of course, these regulations apply to intrastate carriers in California, by

---

[4] The references to 14 Code of Federal Regulations (Federal Aviation Administration), 46 Code of Federal Regulations (Coast Guard) and 39 Code of Federal Regulations (Postal Service) are now superfluous, they having been repealed and replaced. Under the Transportation Safety Act of 1974 (Pub.L. 93.633 (1977) 88 Stat. 2156 (Jan. 3, 1975), 49 U.S.C. § 1801 *et seq*.), the Department of Transportation Regulations (49 CF.R. Parts 170.189) now include the modes of transportation regulated by the other agencies.

[5] The Nuclear Regulatory Commission has adopted interim regulations concerning the security and transportation of spent nuclear reactor fuel. (See 44 Fed. Reg. 34466 (June 15, 1979).)

[6] Although the pertinent federal statute (49 U.S.C.A. § 1804) which authorizes the Secretary of Transportation to issue regulations concerning the transportation of hazardous materials defines "commerce" (49 U.S.C.A. § 1802(1)) to include ". . . trade, commerce, or transportation, within the jurisdiction of the United States, (A) between a place in a State in any place outside of such State, or (B) which affects trade, traffic, commerce, or transportation described in clause (A)," the Department has taken the position that its regulations presently only govern interstate shipments and not intrastate commerce which may "affect" interstate commerce. (See Inconsistency Ruling (IR-1) April 4, 1978, 43 Fed. Reg. 16954 (Apt. 20, 1978).)

whatever mode of transportation. (Cal. Admin. Code, tit. 17, § 30365 *et seq*.) The Hazardous Materials Transportation Regulations include the transportation of virtually all radioactive materials (see 49 C.F.R. § 173.389 (1977) for definition of radioactive materials) and in simplified terms require strict labeling and protection of such materials for transportation. No license is required by these regulations, nor is the transportation of such materials prohibited, either generally or on specific routes. The Department of Transportation is considering, however, the adoption of regulations establishing routing requirements. (43 Fed. Reg. 36492 (Aug. 17, 1978).) The key point is, however, that current state law permits the transportation of radioactive materials, subject to strict labeling and packaging requirements, and does not prohibit it anywhere.

We turn then to the preemption provisions of the state statute. Section 25653, part of the Transportation Law, provides:

> "It is the legislative intention in enacting this chapter that the regulations adopted by the department pursuant to this chapter shall apply uniformly throughout the State, and no state agency, city, county, or other political subdivision of this State, including a chartered city or county, shall adopt or enforce any ordinance or regulation which is inconsistent with the regulations adopted by the department pursuant to this chapter."

Also, Vehicle Code section 21 provides:

> "Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein."

As noted above, of course, the Vehicle Code provisions (§ 33000) as to transportation of radioactive materials are those of the Transportation Act, and thus under Vehicle Code section 21 are uniform and applicable throughout the state as to highway transportation.

From these provisions we reach two conclusions. First, transportation of radioactive materials is of statewide concern and not a municipal affair within the meaning of California Constitution, article XI, section 5(a). Although the authorities listed in section 1(A) above indicate that the determination of whether a matter is a municipal affair requires a case by case analysis and is a judicial issue, past cases and authorities leave little doubt that the subject of transportation of radioactive materials is of statewide concern. Foremost are the legislative declarations in section 25653 and Vehicle Code section 21 *supra*, which are entitled to great weight. (*Sonoma County Organization of Public Employees v. County*

of Sonoma, supra.) The courts have held that the regulation of highway traffic *(Pipoly v. Benson* (1942) 20 Cal. 2d 366, 370), and interurban transportations systems (*Bay Cities Transit Co. v. Los Angeles* (1940)16 Cal. 2d 772) are of statewide concern and not municipal affairs. (See also 57 Ops. Cal. Atty. Gen. 159 (1974) (the California Hazardous Waste Control law is of statewide concern and preempts local law).) Certainly, the transportation of radioactive materials affects the possible health and safety of more than just the citizens of any given chartered city. It is our opinion, then, that the subject of transportation of radioactive materials is of statewide concern and not a municipal affair. Thus, chartered cities are governed by the provisions of the state Transportation Law.

Secondly, we conclude that the Transportation Act does not permit a city to prohibit the transportation of radioactive materials. As noted, section 25653 prohibits the enforcement of any ordinance or regulation which is inconsistent with the regulations of the Department of Health Services. We would normally have no hesitancy in concluding that a prohibition by a local agency of an activity which is permitted, even though stringently regulated, by state law, is inconsistent with that state law. *Monterey Oil Co. v. City Court* (1953)120 Cal. App. 2d 31, 36; *Markus v. Justice's Court* (1953) 117 Cal. App. 2d 391; 62 Ops. Cal. Atty. Gen. 90, 95 (1979); 59 Ops. Cal. Atty. Gen. 461, 478–479 (1976).

Here, the analysis is made more complicated by the incorporation into state regulations of the federal regulations, and federal interpretation thereof. On the question of whether a prohibition against transportation of radioactive materials was inconsistent with the federal regulations contained in 49 Code of Federal Regulations Parts 170–189, in the opinion of the Acting Director, Materials Transportation Bureau, Department of Transportation concluded there was no inconsistency. (Inconsistency Ruling (IR-1), April 4, 1978; 43 Fed. Reg. 16954 (Apt. 20, 1978).) The City of New York had adopted an ordinance which had the practical effect of prohibiting the transportation by highway of radioactive materials within the city. The Acting Director's opinion concluded there was no inconsistency with the federal regulations because the latter did not require such transportation and dealt essentially with packaging and labeling.[7]

We need not, however, adopt the analysis or reasoning of the Acting Director's opinion. The authorizing California statute (§ 25651) prohibits state regulations more restrictive or stringent than federal regulations. A prohibition against transportation of radioactive materials is unquestionably more restrictive than a scheme which allows such transportation, as under the present regulations of the federal government. Thus, we conclude that under state law, a prohibition against such transportation by a city, whether

[7] The opinion specifically did not analyze whether the city's prohibition was preempted by the Commerce Clause or by the Atomic Energy Act. (43 Fed. Reg. 16958 (Apt. 20, 1978).)

chartered or general law, would be inconsistent with the state regulations within the meaning of section 25653, and therefore not permitted.

III. Federal Statutes

Although the conclusion that a particular given municipal ordinance is preempted by state law, as reached above, is dispositive of the question presented, the issue of regulation of radioactive materials is of sufficient concern that we deem it appropriate to discuss briefly the federal preemption aspects of the question.

A. The Hazardous Materials Transportation Control Act (49 U.S.C.A. § 1801 *et seq*.)

The Congress, as part of the Transportation Safety Act of 1974 (Pub.L. No. 93–633, 88 Stats. 2156 (Jan. 3, 1975)) substantially amended, the Hazardous Materials Transportation Control Act of 1970. It is pursuant to section 105 of this revision (49 U.S.CA. § 1804) that the current federal regulations were adopted. Section 112 (49 U.S.C.A. § 1811) contains the following preemption provision:

> "(a) Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is preempted.
>
> "(b) Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this chapter, or in a regulation issued under this chapter, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this chapter or of regulations issued under this chapter and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.
>
> ". . . . . .

In the regulations implementing this Act, the Secretary of Transportation has indicated that:

> ". . . . . .

"(c) In determining whether a State or political subdivision requirement is inconsistent with [section 112 (a) 2 the Act or the regulations issued under the Act, the Director, OHMO, considers:

"(1) Whether compliance with both the State or political subdivision requirement and the Act or the regulations issued under the Act is possible; and

"(2) The extent to which the State or political subdivision requirement is an obstacle to the accomplishment and execution of the Act and the regulations issued under the Act.

". . . . . (49 C.F.R. § 107.209(c) (1977).)

These standards, of course, are those set forth by the courts to be applied when Congress does not foreclose state legislation in a particular area to determine if state regulations conflict with the federal regulations. (See *Ray v. Atlantic Richfield Co., supra*, 435 U.S. at 158.) As noted above, the Acting Director of the Materials Transportation Bureau of the Department of Transportation has opined that a local prohibition against transportation of radioactive materials is not inconsistent with the Department's regulation. (43 Fed. Reg. 16954 (Apt. 20, 1978).) We also noted that the Department is considering establishing routing requirements (as a result of its opinion in the New York City matter). (43 Fed. Reg. 36492 (Aug. 17, 1978).) If such were adopted, the question of such inconsistency would have to be reexamined. (See *Ray v. Atlantic Richfield Co*., *supra*, 435 U.S. at 173–178 (state prohibition against oil tankers in excess of a specified size held to conflict with exercises of Secretary of Transportation's authority to establish "vessel size and speed limitations").)

Subdivision (b) of section 112 of the Hazardous Materials Transportation Control Act, of course, permits the Secretary of Transportation to allow a preempted state or local regulation to be enforced if the Secretary finds (1) that the regulation affords an equal or greater level of protection to the public than the federal regulations and (2) does not unreasonably burden commerce. Upon such determination, the state or local regulation is not preempted so long as the state or local agency continues to administer and enforce effectively such requirements. It is our conclusion that local political subdivisions in California may not take advantage of the provision in light of the existing provisions of the California Transportation Act. As noted in section II of this opinion, California law prohibits state or local regulations more restrictive than the applicable federal regulations on transportation of radioactive materials, and a local prohibition is more restrictive, irrespective of whether such is inconsistent with the federal law. We therefore conclude that since under current state law, a city has no power to enact a more restrictive provision,

it has no authority to seek a non-preemption ruling from the Secretary of Transportation.

The argument has been put forward that the state cannot require a local subdivision to comply with a state statute in an area regulated by federal law, relying on the *First Iowa* line of cases. (*First Iowa Coop. v. Power Comm'n* (1946) 328 U.S. 152 and particularly *City of Tacoma v. Taxpayers* (1958) 357 U.S. 320.) In those cases, the Supreme Court, in examining section 9(b) of the Federal Power Act, which required applicants for licenses to build and operate dams to submit evidence of compliance with state law, held that the Federal Power Act preempts or supersedes state law on the subject, and therefore section 9(b) requires only the submission of legal information as to compliance, but does not require actual compliance with state law. (*First Iowa Coop*., *supra*, 328 U.S. at 177; City of Tacoma v. Taxpayers, *supra*, 357 U.S. at 338–339. See also, *Public Utility District No 1 v. Federal Power Com.* (D.C. Cir. 1962) 308 F.2d 318, 322–323; *State of Wash. Dept. of Game v. Federal Power Com*. (9th Cir. 1953) 207 F.2d 391, 396.)

The theory presented here, is that since the federal law gives a right to states and political subdivisions to obtain a non-preemption ruling, and the regulations of local subdivisions are preempted only if "inconsistent" with federal regulations as determined by federal law, state government may not further restrict the regulations to be imposed by local subdivisions. The *First Iowa* line of cases, however, stand for the proposition that even though state law authorizes a state chartered entity or political subdivision to enter a particular business and to apply for a Federal Power Commission license, that applicant is subject to federal laws as to that licensing matter, and the state may not impose its own regulations or requirements on the issuance of licenses by the FPC, that having been preempted by Congress. Here, we are not dealing with an agency authorized by state law to obtain a federal license. Rather, the state law has explicitly limited the power of the local entity to act, and the federal law may not expand that power.

B. The Atomic Energy Act (42 U.S.C. § 2011 *et seq*.)

The Atomic Energy Act of 1954 (68 Stat. 919,42 U.S.C. § 2011 *et seq*.) is a comprehensive statutory scheme of nuclear regulation. (*Northern States Power Company v. State of Minnesota* (8th Cir. 1971) 447 F.2d 1143, 1147–1148; aff'd. mem. *Minnesota v. Northern States Power Co.* (1972) 405 U.S. 1035; see discussion in 61 Ops. Cal. Atty. Gen. 159, 160–164 (1978).) The 1959 amendment, which added 42 United States Code, section 2021[8] set up a mechanism for assuring this regulation with the states, and authorize agreements to accomplish this. The California Radiation Control Law, *supra* (§ 25800 *et seq*.) authorizes the Governor to enter into such an agreement (§ 25830), and that agreement exists today (§ 25876). As to those areas where, pursuant to the agreement,

[8] Due to its length footnote 8 is Located at the end of this opinion.

federal jurisdiction is discontinued and state regulation authorized, the California Transportation Law, *supra*, applies and the discussion of the effect of that law above is pertinent.

Title 42, United States Code, section 2021 (c), however, requires the Nuclear Regulatory Commission to retain authority and responsibility with respect to regulation of, among other items, "(1) the construction and operation of any production or utilization facility . . . In short, the federal government has not discontinued or passed on to an Agreement state, regulation of construction and operation of nuclear power plants. (*Northern States Power Company v. State of Minnesota*, *supra*: 61 Ops. Cal. Atty. Gen., *supra*, at 175.) Although section 202 1(k) of the Atomic Energy Act makes it clear that states may regulate nuclear power plants and activities for purposes other than protection against radiation hazards (see *Northern Cal. Ass. v. Public Util. Com*. (1964) 61 Cal. 2d 126), the *Northern States Power Company* case makes it amply clear that as regards radiation hazards in connection with the construction and operation of a nuclear power plant, the jurisdiction of the Nuclear Regulatory Commission is plenary, and state regulation is completely preempted. (See also *Train v. Colorado Pub. Mt. Research Group* (1976) 426 U.S. 1, 15–17; *United States v. City of New York* (S.D.N.Y. 1978) 463 F. Supp. 604, 609.) The questions then become (1) whether a prohibition by a city against the transportation of radioactive materials would be for purposes of control of radiation hazards and (2) whether transportation of nuclear fuel and waste to and from a nuclear power plant is the 'operation" of such a plant.

To ask the first question is to answer it. We have been presented with no theory, nor can we conceive of one whereby the basis for a municipal prohibition against transportation of radioactive materials would be for other than the protection of the health and safety of the community from radiation hazards.

The second question, however, is more difficult. In the *Northern State Power Company* case, the court was dealing with a Minnesota system regulating radioactive waste release from nuclear power plants. As the court described it (447 F.2d at 1145):

> "Northern applied to the Minnesota Pollution Control Agency for a waste disposal permit for the Monticello [nuclear power] plant. It was issued May 20, 1969, subject to specified conditions regulating the level of radioactive liquid and gaseous discharges and requiring monitoring programs for the detection of such releases. The conditions imposed by Minnesota embrace the same area as, but are substantially more stringent than, those imposed by the AEC under the federal law . . . ."

The court concluded:

> "Accordingly, for the reasons stated, we hold that the federal government has exclusive authority under the doctrine of pre-emption to regulate the construction and operation of nuclear power plants, which necessarily includes regulation of the levels of radioactive effluents discharged from the plant." (447 F.2d at 1154.)

In analyzing the Atomic Energy Act, the court cited and relied on some legislative history indicating that control of transportation of nuclear fuels to and from the reactor's site was intended to remain in the federal government.[9]

---

[9] "There can be no doubt but that AEC control over 'the construction and operation of any production or utilization facility' necessarily includes control over radioactive effluents discharged from the plant incident to its operation. In analyzing § 2021 (c) (1) in the Hearings before the Joint Committee on Atomic Energy, Mr. Lowenstein of the AEC at p. 306 explained:

"'The activities covered under this provision (i) include but are not limited to the possession and storage at the site of the licensed activity of nuclear fuel, and of source special nuclear material and byproduct materials used or produced in the operation of the facility; *and the transportation of nuclear fuels to and from the reactor rite and the discharge of effluent from the facility.*

"'Coming to the question you asked before, Mr. Ramey, Executive Director, Joint Committee], the purpose of this provision is to retain under Commission regulatory control the operation of the reactor. We did not feel that we could begin to cur up that into pieces, so to speak. The discharge of effluent from the reactor involve many questions relating to the design and construction and operating procedures. We did not think it could be considered by itself and broken away from overall responsibility for the reactor operation.'

"Moreover, the agreed statement of facts submitted in the district court 'included, the stipulation that '[w]aste disposal requirements affect the design, manufacture, cost and sale of nuclear reactor plants and associated equipment.'" *Northern State Power Company v. State of Minnesota*, *supra*, 447 F.2d at 1149, footnote 6. (Emphasis added.)

Currently, the regulation of transportation of nuclear fuel and waste to and from nuclear power plants is the subject of a Memorandum of Understanding between the Atomic Energy Commission (now Nuclear Regulatory Commission) and the Department of Transportation of March 22, 1973. (38 Fed. Reg. 8466 (Apt. 2, 1973).) The Commission's regulations (10 C.F.R. § 71.5 (1978)) set up a strict licensing system and require compliance with the Department of Transportation's regulations contained in 49 Code of Federal Regulations Parts 170–189. As noted, however, the Nuclear Regulatory Commission has issued interim regulations dealing with security during transportation of shipments of spent fuel. (44 Fed. Reg. 34466 (June 15, 1978).)

From the provisions of the Atomic Energy Act, its legislative history, the regulations and the Northern States Power Company case, we conclude that transportation of nuclear fuel and waste radioactive products to and from a nuclear power plant is included within the phrase 'construction and operation of any utilization facility within the meaning of 42 United States Code section 2121 (c) (1). Consequently, regulation of that activity is vested exclusively in the federal government, and states and local government are preempted from regulating such transportation. (*Cf. Northern States Power Company*, *supra*.) Accordingly, it is our opinion that the city may not prohibit the transportation of nuclear fuel or byproducts and waste to and from a nuclear power plant.

*****

---

[8] Section 2021 reads as follows:

"(a) 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 chapter 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, cooperation 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 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 with the States;

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

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

"(b) Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V, VI, and VII of this chapter, and section 2201 of this title, with respect to any one or more of the following materials within the State—

"(1) byproduct materials as defined in section 2014(e) (1) of this title;

"(2) byproduct materials as defined in section 2014(e) (2) of this title;

"(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) No agreement entered into pursuant to subsection (b) of this section 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;

"(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 2014(e) (2) of this title. Notwithstanding any agreement between the Commission and any State pursuant to subsection (b) of this section, 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.

"(d) The Commission shall enter into an agreement under subsection (b) of this section with any State if—

"(1) The Governor of that State certifies that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement, and that the State desires to assume regulatory responsibility for such materials; and

"(2) the Commission finds that the State program is in accordance with the requirements of subsection (o) of this section and in all other respects compatible with the Commission's program for the regulation of such materials, and that the State program is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement.

"(e) (1) Before any agreement under subsection (b) of this section is signed by the Commission, the terms of the proposed agreement and of proposed exemptions pursuant to subsection (f) of this section shall be published once each week for four consecutive weeks in the Federal Register; and such opportunity for comment by interested persons on the proposed agreement and exemptions shall be allowed as the Commission determines by regulation or order to be appropriate.

"(2) Each proposed agreement shall include the proposed effective date of such proposed agreement or exemptions. The agreement and exemptions shall be published in the Federal Register within thirty days after signature by the Commission and the

Governor.

"(f) The Commission is authorized and directed, by regulation or order, to grant such exemptions from the licensing requirements contained in subchapters V, VI, and VII of this chapter, and from its regulations applicable so licensees as the Commission finds necessary or appropriate to carry out any agreement entered into pursuant to subsection (b) of this section.

"(g) 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.

"(h) The Administrator of the Environmental Protection Agency shall consult qualified scientists and experts in radiation matters, including the President of the National Academy of Sciences, the Chairman of the National Committee on Radiation Protection and Measurement, and qualified experts in the field of biology and medicine and in the field of health physics. The Special Assistant to the President for Science and Technology, or his designee, is authorized to attend meetings with, participate in the deliberations of, and to advise the Administrator. The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. The Administrator shall also perform such other functions as the President may assign to him by Executive order.

"(i) The Commission in carrying out its licensing and regulatory responsibilities under this chapter is authorized to enter into agreements with any State, or group of States, to perform inspections or other functions on a cooperative basis as the Commission deems appropriate. The Commission is also authorized to provide training, with or without charge, to employees of, and such other assistance to, any State or political subdivision thereof or group of States as the Commission deems appropriate. Any such provision or assistance by the Commission shall take into account the additional expenses that may be incurred by a State as a consequence of the State's entering into an agreement with the Commission pursuant to subsection (b) of this section.

"(j) The Commission, upon its own initiative after reasonable notice and opportunity for hearing to the State with which an agreement under subsection (b) of this section has become effective, or upon request of the Governor of such State, may terminate or suspend all or part of its agreement with the State and reassert the licensing and regulatory authority vested in it under this chapter, if the Commission finds that (1) such termination or suspension is required to protect the public health and safety, or (2) the State has not complied with one or more of the requirements of this section. The Commission shall periodically review such agreements and actions taken by the States under the agreements to ensure compliance with the provisions of this section.

"(k) 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.

"(l) With respect to each application for Commission license authorizing an activity as to which the Commission's authority is continued pursuant to subsection (c) of this section, the Commission shall give prompt notice to the State or States in which the activity will be conducted of the filing of the license application; and shall afford reasonable opportunity for State representatives so offer evidence, interrogate witnesses and advise the Commission as to the application without requiring such representatives to take a position for or against the granting of the application.

"(m) No agreement entered into under subsection (b) of this section, and no exemption granted pursuant to subsection (f) of this section shall affect the authority of the Commission under section 2201(b) or (i) of this title to issue rules, regulations, or orders to protect the common defense and security, to protect restricted data or to guard against the loss or diversion of special nuclear material. For purposes of section 2201 (i) of this title, activities covered by exemptions granted pursuant to subsection (f) of this section shall be deemed to constitute activities authorized pursuant to this chapter; and special nuclear material acquired by any person pursuant to such an exemption shall be deemed to have been acquired pursuant to section 2073 of this title.

"(n) As used in this section, the term 'State' means any State, Territory, or possession of the United States, the Canal Zone, Puerto Rico, and in the District of Columbia. As used in this section, the term 'agreement' includes any amendment to any agreement.

"(o) In the licensing and regulation of byproduct material, as defined in section 2014 (e) (2) of this title, or of any activity which results in the production of byproduct material as so defined under an agreement entered into pursuant to subsection (b) of this section, a State shall require—

"(1) compliance with the requirements of subsection (b) of section 2113 of this title (respecting ownership of byproduct material and land), and

"(2) compliance with standards which shall he adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose, including requirements and standards promulgated by the Commission and the Administrator of the Environmental Protection Agency pursuant to sections 2113, 2114, and 2022 of this title, and

"(3) procedures which—

"(A) in the case of licenses, provide procedures under State law which include—

"(i) an opportunity, after public notice, for written Comments and a public hearing, with a transcript.

"(ii) an opportunity for cross examination, and

"(iii) a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period

and which is subject to judicial review;

"(B) in the case of rulemaking, provide an opportunity for public participation through written comments or a public hearing and provide for judicial review of the rule;

"(C) require for each license which has a significant impact on the human environment a written analysis (which shall be available to the public before the commencement of any such proceedings) of the impact of such license, including any activities conducted pursuant thereto, on the environment, which analysis shall include—

"(i) an assessment of the radiological and nonradiological impacts to the public health of the activities to be conducted pursuant to such license;

"(ii) an assessment of any impact on any waterway and ground water resulting from such activities;

"(iii) consideration of alternatives, including alternative sites and engineering methods, to the activities to be conducted pursuant to such license; and

"(iv) consideration of the long-term impacts, including decom missioning, decontamination, and reclamation impacts, associated with activities to be conducted pursuant to such license, including the management of any byproduct material, as defined by section 2014(e) (2) of this title; and

"(D) prohibit any major construction activity with respect to such material prior to complying with the provisions of subparagraph (C).

"If any State under such agreement imposes upon any licensee any requirement for the payment of funds to such State for the reclamation of long-term maintenance and monitoring of such material, and if transfer to the United States of such material is required in accordance with section 2113(b) of this title, such agreement shall be amended by the Commission to provide that such State shall transfer to the United States upon termination of the license issued to such licensee the total amount collected by such State from such licensee for such purpose. If such payments are required, they must be sufficient to ensure compliance with the standards established by the Commission pursuant to section 2201(x) of this title. No State shall be required under paragraph (3) to conduct proceedings concerning any license or regulation which would duplicate proceedings conducted by the Commission.