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March 11, 1980

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ATTORNEY GENERAL OPINION NO. 80-65

The Honorable LeRoy F. Fry
State Representative, 106th District
155-E, State Capitol
Topeka, Kansas 66612

Re: Public Health--Solid and Hazardous Waste--Local
Prohibition of Storage of Nuclear Waste

Synopsis: County legislation enacted pursuant to K.S.A. 48-1617
which would prohibit the storage of nuclear waste
within the territorial boundaries of the county
would be invalid and ineffective.

A charter resolution, by which the county would
exempt itself from the provisions of K.S.A. 65-3401
et seq. so as to prohibit the storage of nuclear
wastes in the county, would also be ineffective
since the latter act is applicable uniformly to
all counties and not subject to exemption by such
charter resolution, as prescribed by K.S.A. 1979
Supp. 19-101a.

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Dear Representative Fry:

You have asked for our opinion whether state law precludes the
exercise of county home rule powers so as to prohibit the storage
of nuclear waste within the territorial boundaries of a county.
Specifically, you inquire whether a county may enact a charter
resolution by which the county would exempt itself from provisions
of K.S.A. 1979 Supp. 65-3402 and from the state's regulatory
scheme relating to storage or disposal of hazardous wastes.

Before addressing your specific question, we think it important to note that under our state's Nuclear Energy Development and Radiation Control Act, K.S.A. 48-1601 et seq., the Kansas Legislature has provided for some measure of local regulation of radioactive materials. K.S.A. 48-1617 provides:

"Ordinances, resolutions, or regulations, now or hereafter in effect, of the governing body of a municipality or county or board of health relating to by-product, source and special nuclear materials, radiation producing devices and electronic products shall not be superseded by this act: Provided, That such ordinances or regulations are and continue to be consistent with the provisions of this act, amendments thereto and rules and regulations hereunder."
(Emphasis added.)

Under K.S.A. 48-1603, "by-product material" is defined as "any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to radiation incident to the process of producing or utilizing special nuclear material." "By-product material" thus includes within its definition radioactive waste material, including waste material produced in the generation of electricity in a nuclear power plant. The question arises, then: Is local legislation which prohibits the storage of nuclear waste, or nuclear by-product material, within the territorial boundaries of the local unit of government, consistent with the provisions of the Nuclear Energy Development and Radiation Control Act, K.S.A. 48-1601 et seq? We think not, for several reasons.

First, as expressly stated in K.S.A. 48-1601, the legislature declared that the state, in the development and utilization of sources of radiation for peaceful purposes, should

"institute and maintain a regulatory program for sources of radiation so as to provide for (1) compatibility [sic] with the standards and regulatory programs of the federal government, (2) an integrated, effective system of regulation within the state, and (3) a system consonant insofar as possible with those of other states." (Emphasis added.)

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In pursuance thereof, the legislature authorized the governor to enter into agreements with the federal government "providing for discontinuance of certain of the federal government's responsibilities with respect to sources of radiation and the assumption thereof by this state." K.S.A. 48-1616(a). Federal law authorizes the federal government to make such agreements, under 42 U.S.C.A. §2021. Such an agreement was entered into in 1964, pursuant to the aforementioned statutes, and provides, in pertinent part, that the Commission [at that time, the Atomic Energy Commission, now the Nuclear Regulatory Commission (NRC)] shall retain authority and responsibility for regulation of the "disposal of such other byproduct, source or special nuclear material as the Commission from time to time 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." Agreement, Article II, D, p. 2; see also, 42 U.S.C.A. §2021(c)(4).

As manifested in its regulations, the NRC has determined to retain some measure of regulatory authority over the disposal of high-level radioactive material, such as that material produced by nuclear power plants. NRC regulations state, in pertinent part:

"Persons in agreement States [those States which have entered into agreements with the AEC or NRC, as noted above] are not exempt from the Commission's licensing and regulatory requirements with respect to the following activities:

. . . .

(4) The transfer, storage and disposal of radioactive waste material resulting from the separation in a production facility of special nuclear material from irradiated nuclear reactor fuel." 10 CFR Part 150, §150.15(a)(4).

Under Kansas law, including K.S.A. 48-1601 et seq. and K.S.A. 65-3401 et seq., the Secretary of Health and Environment is empowered to adopt rules and regulations, consistent and compatible with federal regulations on the subject, and to issue permits for the construction, alteration and operation of hazardous waste storage, treatment or processing facilities or disposal areas. See, particularly, K.S.A. 1979 Supp. 65-3407.

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Given the establishment of the above-described comprehensive regulatory scheme devised by the federal and state governments, as provided by federal and state law, and with due respect to the legislature's express declaration that the state's nuclear energy regulatory program should provide for "an integrated, effective system of regulation within the state," it is our judgment that county legislation prohibiting the storage or disposal of nuclear waste within county boundaries would not be local regulation consistent with relevant provisions of state law. Certainly, as K.S.A. 48-1617 expressly provides, counties and other units of local government are granted some measure of regulatory authority in such matters, although the extent and scope of that authority we have some difficulty to define. However, to construe the latter statute to empower counties or other local units of government to prohibit storage or disposal of nuclear waste within their respective territories would effectively impair or negate the regulatory authority of the Secretary of Health and Environment. If all of the 105 counties in the state prohibited the storage or disposal of nuclear waste under the statute, the authority granted to the Secretary would be meaningless, and the public policy goal of an "integrated, effective system of regulation within the state" would not be realized.

Moreover, as we said in Attorney General Opinion No. 79-110, the power to regulate, as a general rule, does not include within its meaning the power to absolutely prohibit, and that local legislation which would "forbid that which the legislature has expressly authorized" goes beyond the scope of permissible local regulation. *Id.*, pp. 4, 7. Accordingly, we conclude that county legislation enacted pursuant to K.S.A. 48-1617 which would prohibit the storage of nuclear waste within the territorial boundaries of the county would be invalid and ineffective.

With attention to your specific question, i.e., whether a county may enact a charter resolution by which the county would exempt itself from provisions of K.S.A. 1979 Supp. 65-3402 and from the above-described regulatory scheme relating to storage or disposal of hazardous wastes, you have correctly noted that, in response to the request of the Rice County Board of County Commissioners, Rice County Attorney James G. Kahler concluded that such a proposed charter resolution would be ineffective. He wrote, in pertinent part:

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"In Chapter 65, article 34 [Kansas Statutes Annotated], the Legislature makes it unlawful to store or process hazardous wastes anywhere in the State of Kansas, unless a permit is first obtained from the Secretary of Health and Environment.

"I am of the opinion that Chapter 65, article 34 in the area of storage and processing of hazardous waste which operates uniformly in all counties and therefore, a Home Rule Resolution would be unlawful and ineffective."

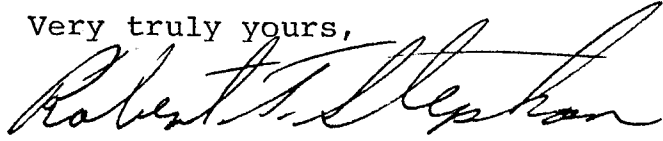
We concur in that conclusion. By its express terms, the act comprising K.S.A. 65-3401 et seq. is uniformly applicable to all counties in Kansas. K.S.A. 1979 Supp. 65-3405 required all counties within the state to submit, on or before June 30, 1974, a workable plan for the management of solid waste. Provisions relating to the storage, processing or disposal of hazardous wastes vest no regulatory authority in the governing bodies of counties or cities. Rather, as K.S.A. 1979 Supp. 65-3407 provides, only the Secretary of Health and Environment has authority to adopt rules and regulations and to issue permits for the construction, alteration and operation of hazardous waste storage, treatment or processing facilities or disposal areas. K.S.A. 1979 Supp. 19-101a, the county home rule statute, empowers counties to "perform such powers of local legislation and administration as they deem appropriate" subject to certain enumerated limitations and restrictions, including the limitation that "counties shall be subject to all acts of the legislature which apply uniformly to all counties. (Subsection (a) of K.S.A. 1979 Supp. 19-101a.) In our judgment, that limitation precludes the enactment of a charter resolution exempting the county from provisions of K.S.A. 65-3401 et seq., since the latter act is applicable uniformly to all counties, as discussed above.

In summary, we conclude that county legislation enacted pursuant to K.S.A. 48-1617 which would prohibit the storage of nuclear waste within the territorial boundaries of the county would be invalid and ineffective. Further, we conclude that a charter resolution, by which the county would exempt itself from the provisions of K.S.A. 65-3401 et seq. so as to prohibit the storage of nuclear wastes in the county, would also be ineffective, since the latter act is applicable uniformly to

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all counties and not subject to exemption by such charter
resolution, as prescribed by K.S.A. 1979 Supp. 19-101a.

Very truly yours,



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Steven Carr
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RTS:BJS:SC:jm