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February 4, 1988

ATTORNEY GENERAL OPINION NO. 88- 16

The Honorable Leroy F. Fry
State Representative, One Hundred Fifth District
Statehouse, Room 272 West
Topeka, Kansas 66612

Re: Public Health -- Solid and Hazardous Waste; Hazardous Wastes -- Location of Disposal Facilities

Synopsis: State regulation of hazardous materials must not be inconsistent with federal law. Local legislation regulating hazardous waste must not be inconsistent with state and federal law. Thus, a county ordinance prohibiting a hazardous waste incinerator within the county's borders would not be a valid exercise of home rule powers, and a popular vote of local electors may not be required prior to granting a permit to a hazardous waste treatment facility.

State requirements may be more stringent than those imposed by federal law, as long as the state law is consistent with federal law. The proximity of a natural area or endangered species habitat is a factor to be considered in granting a facility permit. A state may prohibit siting a facility in close proximity to such an area or habitat, subject to constitutional considerations. The state may not place a surcharge or ban on incineration of out-of-state waste. Cited herein: K.S.A. 1987 Supp. 19-101a; K.S.A. 32-501; 32-506; 65-3430; 65-3433; 65-3434; K.S.A. 1987 Supp. 65-3436; K.S.A. 65-3438; 74-6601; 74-6603; 74-6604; 74-6607; 74-6609; 76-338; U.S. Const., Art. I, § 8, cl. 3; 42 U.S.C. §§ 6901; 6926(b); 6929; 9601, 9614

(1986); 49 U.S.C. §§ 1801; 1805; 1811 (1986); 40 C.F.R. § 271.4 (1986).

* * *

Dear Representative Fry:

As Representative for the One Hundred Fifth District, you have requested our opinion concerning the treatment of hazardous waste. Specifically, you have inquired about several issues regarding the siting of hazardous waste incinerators.

As a general overview, the treatment, storage and disposal of hazardous waste is regulated under authority of the Resource Conservation and Recovery Act of 1976, Pub.L. 89-272, Title II (now codified at 42 U.S.C. § 6901 et seq., hereinafter referred to as RCRA). Pursuant to 42 U.S.C. § 6926(b), a state may operate its own hazardous waste program in lieu of the federal program if the state plan is approved. The State of Kansas operates its own program, codified at K.S.A. 65-3430 et seq., final federal authorization of which was effective on October 17, 1985. 50 Fed. Reg. 40377, October 3, 1985. This approval is subject to the federal regulatory program if federal law, specifically the Hazardous and Solid Waste Amendments of 1984, Pub.L. 98-616, is more stringent. If state law is more stringent, however, then it controls, 50 Fed. Reg. 40378, October 3, 1985, though state law may not be so strict as to be in conflict with the congressional objectives of providing a safe and responsible means of handling hazardous waste.

I. Your first question is whether a county may use its zoning power to prohibit the location of hazardous waste incinerators within the county. County home rule powers are established by K.S.A. 1987 Supp. 19-101a. Subsection (a)(1) of that statute states that counties are subject to legislative acts having uniform applicability to all counties. In Missouri Pacific Railroad v. Board of Greeley County Comm'rs, 231 Kan. 225 (1982), the court held that counties were empowered to perform local legislation as may be appropriate. However, if the state legislature manifests a clear intention that the state law is applicable throughout the state, then the local body is preempted from enacting ordinances which are conflicting. 231 Kan. at 227. We believe that such intent is manifest in the hazardous waste statutes. The secretary of health and environment issues permits to treatment facilities. K.S.A. 65-3433(a). A local ordinance, permit or other requirement may not prohibit construction or modification of, or transportation to a facility, K.S.A. 1987

Supp. 65-3436(a), or prohibit the operation of such a facility. K.S.A. 65-3438.

As in Missouri Pacific Railroad, the legislature has enacted a comprehensive regulatory framework, and has manifested an intent to preempt local action which would nullify a state permit. While the term "local" is not defined for purposes of this act, it is our opinion that it includes counties. It is therefore our opinion that a county could not enact a resolution, through its zoning powers or otherwise, prohibiting a hazardous waste treatment facility within its borders.

II. Your second question is whether the state could enact legislation requiring local approval of the siting of the facility. In Stablex Corp. v. Town of Hooksett, 18 ERC 1671 (N.H. S.Ct. 1982) it was held that a local ordinance requiring a positive popular vote prior to constructing a hazardous waste facility was preempted by New Hampshire law. The question of federal preemption was not raised. Federal preemption was raised, however, in ENSCO v. Dumas, 807 F.2d 743, 25 ERC 1486 (8th Cir. 1986), when the court struck a county ordinance banning storage, treatment or disposal facilities within its borders. While 42 U.S.C. § 6929 (quoted infra, at page 4) prevents the conclusion that all state and local regulation is preempted, such regulation is invalid to the extent it conflicts with federal law. A voter approval requirement could effectively nullify any chance of a facility being sited in the state. This would be contrary to the Congressional findings in RCRA, i.e., there is a need for safe disposal and treatment of hazardous waste. A law authorizing a practical ban on such waste would result in its handling in a manner not deemed safe by Congress and the EPA. 807 F.2d at 745. Therefore, it is our opinion that to the extent that requiring a popular vote prior to granting a facility a permit conflicts with the Congressional purpose of RCRA, such a law would be preempted by federal law.

III. Your next inquiry is whether it would be permissible for the State to expand on current environmental criteria set by the EPA for siting of hazardous waste incinerators, including more stringent emission standards for incineration. We have previously cited 42 U.S.C. § 6929 which retains a certain amount of authority in state and local governments. That section of the federal act states in relevant part:

> "Nothing is this chapter shall be construed to prohibit any State or political subdivision thereof from

> imposing any requirements, including those for site selection, which are more stringent than those imposed by [regulations promulgated under RCRA]." 42 U.S.C. § 6929 (1986).

In City of Philadelphia v. New Jersey, 437 U.S. 617, 57 L.Ed. 2d 475, 11 ERC 1770 (1978), the Court held that, while a New Jersey statute prohibiting importation of out-of-state waste violated the Commerce Clause, based upon a prior version of §6929, the state law was not preempted. The requirement of consistency has been adopted by the EPA in the form of regulation 40 C.F.R. § 271.4. That section requires that to obtain approval, a state program must be consistent with federal law. Subsection (b) of that regulation provides:

> "Any aspect of state law or of the state program which has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage or disposal of hazardous waste in the state may be deemed inconsistent." 40 C.F.R. § 271.4(b) (1986).

Based on the foregoing, it is our opinion that more stringent emission standards which have a basis in human health or environmental protection would be a valid exercise of state power. Such standards would be inconsistent with federal law if they were not based on health or environmental protection concerns, and if they served as a practical ban on any facility being sited in the state.

IV. Your third and fifth questions have been consolidated as they are closely related. You ask whether it would be permissible to deny the siting of a facility within a certain radius of a natural area listed on the Kansas Biological Survey's natural heritage inventory, and whether the natural and scenic areas preservation act or the nongame and endangered species conservation act affect the siting decision.

The Kansas Biological Survey is operated by the University of Kansas, and is established pursuant to K.S.A. 76-338. The powers and duties of the Survey are outlined in the natural and scientific areas preservation act, K.S.A. 74-6601 et seq. One function of the Survey is to develop an inventory of natural and scientific areas. K.S.A. 74-6607(e). Natural and scientific areas are defined by K.S.A. 74-6603(a). According to the statutory definition, such an area need not be kept completely natural and undisturbed. An area may be deemed suitable for inclusion in the state system of natural

and scientific preserves and formally dedicated as such. K.S.A. 74-6604, 74-6609. A preserve is defined as an area

> "to be maintained as nearly as possible in its natural condition and to be used in a manner and under limitations consistent with its continued preservation, without impairment, disturbance, or artificial development except that deemed necessary for scientific research, education, or public interpretation of the area." K.S.A. 74-6603(b).

The nongame and endangered species conservation act, K.S.A. 32-501 et seq., empowers the Department of Wildlife and Parks to develop information and list wildlife whose continued existence is in jeopardy. One aspect of the act includes the commission's authority to acquire land or aquatic habitats for the conservation of endangered species. K.S.A. 32-506.

General reference appears in the hazardous waste statutes which reflects environmental concerns. See, e.g., K.S.A. 65-3434. While citation to the specific acts discussed above is not made, the probable effect on the environment is one factor to be included in the public notice which is required prior to a public hearing on a proposed facility. It would appear that environmental concerns are important considerations in approving a facility application. In short, we believe that the proximity of a natural and scientific area or preserve, or the presence of an endangered species do not automatically result in denial of an application for a permit, however, such factors are important considerations.

In addition, we believe that legislation could require that a facility not be sited within a certain distance from an area listed on the natural heritage inventory. We stated previously that 42 U.S.C. § 6929 allows a state to impose requirements which are more stringent than those imposed by federal law, subject to the provisions of 40 C.F.R. § 271.4 mandating consistency with federal law. As noted, state programs having no basis in health or environmental protection may be deemed inconsistent. In our opinion, a state law would be valid if based on a legislative finding that, in order to protect the environment, no hazardous waste facility may be constructed near such an area. Caution should be used, however, to avoid vagueness or use of an arbitrary distance.

VI. Your sixth question is whether it would be permissible to amend the state statutes to (1) allow local legislation which requires reporting shipments of waste to local law enforcement

for escort service, (2) mandate the creation of an environmental trust fund in the name of the locality to cover accidents, and (3) provide for civil liability for third party claims.

We have previously noted that local law may not be inconsistent with federal law. Further, state and local legislation is restricted by the Commerce Clause of the United States Constitution. Regarding local regulation of hazardous waste transportation, we note that Congress has enacted the Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801 et seq. (1986). Pursuant to that act, the United States Secretary of Transportation is authorized to promulgate rules and regulations for handling hazardous materials. 49 U.S.C. § 1805. We know of no regulation specifically dealing with law enforcement escorts for carriers. The act specifically provides that the state and its political subdivisions may regulate such transportation to the extent such laws are not inconsistent with federal law. 49 U.S.C. § 1811. See generally, City of New York v. U.S. Dept. of Transp., 715 F.2d 732 (2d Cir. 1983); National Tank Truck Carriers v. City of New York, 677 F.2d 270 (2d Cir. 1982). A state or local government may petition the secretary for a determination of whether a statute or ordinance is preempted. 49 U.S.C. § 1811(b).

A further constraint on local legislation is state law which specifically deals with transportation of hazardous waste, either by statute or by regulations promulgated by the Kansas Corporation Commission or Kansas Department of Transportation. Currently, state law prohibits a local ordinance which restricts transportation to a facility. K.S.A. 1987 Supp. 65-3436(a).

Regarding costs to cover liability compensation, cleanup and emergency response for hazardous waste accidents, Congress enacted the "Superfund" legislation known as CERCLA, 42 U.S.C. §§ 9601 et seq. As originally enacted, ambiguity resulted in varying interpretations of section 114 of the act, codified at 42 U.S.C. § 9614. Section 114(c) prohibited states from requiring contribution to any fund, the purpose of which was to compensate for response costs or damages otherwise compensable under CERCLA. This provision was held to preempt state law in part. See generally, Exxon Corp. v. Hunt, ___ U.S. ___, 89 L.Ed.2d 364 (1986). Section 114(c) was amended by P.L. 99-499, the Superfund Amendments and Reauthorization Act of 1986 (SARA) (codified in scattered sections throughout Title 42), to clarify that states were preempted only to the extent that they could not require contribution to funds, the purpose of which was to pay costs

or damages actually compensated by the Superfund. 1986 U.S. Code Cong. & Ad. News 2865-66. States are not preempted from imposing requirements for liability regarding hazardous substances which are in addition to CERCLA. 42 U.S.C. § 9614(a). While a trust fund could therefor be created for the benefit of the locality, and while liability for third party claims could be provided for, such legislation would be subject to the provisions of CERCLA.

VI. Your final question is whether a state may place a higher surcharge on out-of-state waste or prohibit incineration of out-of-state waste at a state or privately owned facility. We believe that such action would violate the Commerce Clause of the United States Constitution, U.S. Const., Art. I, § 8, cl. 3.

In City of Philadelphia v. New Jersey, 437 U.S. 617, 57 L.Ed.2d 475, 11 ERC 1770 (1978), the issue of state protectionism in light of the commerce clause was squarely addressed. It was held that a statute prohibiting the importation of hazardous waste burdened interstate commerce and was therefore unconstitutional. We find no reason why the rule laid down in that case would not still obtain.

Even if such a requirement were to survive constitutional scrutiny, we believe that the state program may have difficulty obtaining federal approval. As previously noted, a state program must be consistent with the federal program. By regulation,

> "[a]ny aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approval State program shall be deemed inconsistent." 40 C.F.R. § 271.4(a) (1986).

In Attorney General Opinion No. 87-43, we stated that the rule announced in Washington State Bldg. & Const. Trades v. Spellman, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913, 77 L.Ed.2d 282 (1983) was abrogated to some extent by subsequent amendments to the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. 99-240. Therefore, it was our opinion that out-of-state disposal could be restricted subject to exceptions. Opinion No. 87-43, at page 12. We are not inconsistent with our

previous opinion when we adhere to City of Philadelphia because of our previous reliance on federal law requiring states' individual responsibility for their own low-level radioactive waste. But for the Congressional action, the rule in Spellman would have prevailed.

VII. In conclusion, it is our opinion that state and local legislation regarding hazardous materials may not be inconsistent with federal law nor may local legislation in this area be inconsistent with state law. Thus, a county ordinance prohibiting a hazardous waste incinerator within its borders would not be a valid exercise of its home rule powers, and a popular vote prior to granting a permit to an applicant is invalid as it is contrary to the Congressional purpose of RCRA. The state may require more stringent emission standards for facilities than what federal law requires, so long as state law is not inconsistent with federal law. The proximity of a natural area listed on the Biological Survey's Natural Heritage Inventory, or the presence of an endangered species are factors which may be taken into consideration in granting a permit. A state law which prohibits the siting of a facility near an area described on such inventory, or which would be near a habitat of an endangered species, may be valid as it is based on environmental protection. The state may not place a surcharge on, or prohibit, incineration of out-of-state waste at a state or privately owned facility.

Very truly yours,

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