

March 19, 1999

The Honorable James J. Nakatani  
Chairperson, Board of Agriculture  
Department of Agriculture  
State of Hawaii  
1428 South King Street  
Honolulu, Hawaii 96814-2512

Dear Chairperson Nakatani:

Re: Proposed Amendment to Article 8, Relating to  
Nuclear Energy, Chapter 14 of the Hawaii County  
Code

This opinion is written in response to your January 21, 1999 request that this office review the issues raised by Hawaii County Corporation Counsel's Opinion No. 98-5 (Opinion No. 98-5) concerning a ballot initiative proposed to amend article 8, titled "Nuclear Energy," of chapter 14 of the Hawaii County Code (HCC), which article shall hereinafter be referred to as "Article 8." As you stated in your January 21, 1999 request, while the proposed amendment was narrowly defeated in the November 3, 1998 election, a formal complaint has since been filed with the Hawaii State Supreme Court to declare the votes cast for the proposed amendment invalid and to have a new vote. We thus address the proposed amendment as if it were still proposed in order to answer the questions raised by your department.

The issue raised by Opinion No. 98-5 is whether the proposed amendment would impermissibly prohibit the transportation into, and storage of in, the County of Hawaii of any radioactive materials used in commercial irradiation facilities. A broader issue raised by the proposed amendment is whether Article 8 is itself constitutionally infirm, in that it similarly prohibits the transportation into and storage of certain types of radioactive material, as well as prohibiting the construction of a nuclear energy facility in Hawaii County. We have addressed this second issue at length because as an amendment to Article 8, the proposed amendment is not valid if Article 8 is, itself, invalid.

After reviewing the law cited in Opinion No. 98-5 and conducting our own legal research, we conclude that the proposed amendment, as written, is vulnerable to a constitutional attack on the following grounds: (1) pursuant to Article VI, Clause 2 of the United States Constitution (the Supremacy Clause), Article 8 and the proposed amendment are preempted by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2297g-4 (1994) (AEA);<sup>1</sup> and (2) pursuant to Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause), the proposed amendment impermissibly regulates the flow of interstate commerce and thus violates the Commerce Clause.

## I. ARTICLE 8 AND THE PROPOSED AMENDMENT

Article 8 provides, in pertinent part:

Section 14-44. Purpose. ([top](#))

The purpose of this article is to maintain a clean and healthy environment for present and future generations in the County [of Hawaii], 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.

. . . .

Section 14-46. Transportation of radioactive material, unlawful.

It shall be unlawful for any person to transport radioactive material within or through the County.

Section 14-47. Storage of radioactive material, unlawful.

It shall be unlawful for any person to store radioactive material within the County.

Section 14-48. Nuclear energy facilities, prohibited. ([top](#))

It shall be unlawful for any person to locate or build a nuclear energy facility which utilizes nuclear material for the production of energy within the County.

Section 14-45(a)(6) of Article B further provides that "[r]adiation sources or material employed in . . . commercial devices, processes, or facilities" are excluded from the definition of a "radioactive material or substance," thus excepting such commercial uses of radioactive material from Article 8's purview.

However, the proposed amendment would eliminate this exception, and would add to the current definition of a "radioactive material or substance" "[a]ny quantity of radioactive materials used in commercial irradiation facilities." Consequently, the proposed amendment would, as is its apparent purpose, prohibit the transportation into or storage of any radioactive material that could be used, e.g., in an irradiation facility.

## II. THE SUPREMACY CLAUSE AND PREEMPTION

However, Article 8 harbors at least one constitutional infirmity because it is preempted by the AEA, and thus violates the Supremacy Clause. The proposed amendment is also most likely preempted by the AEA (1) as an amendment to a facially preempted ordinance, and (2) because the proposed amendment, itself, attempts to regulate the same material as the AEA. ([top](#))

Generally, the doctrine of preemption evolved from the Supremacy Clause, which provides that the United States Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (discussing the origin of the preemption doctrine). The U.S. Supreme Court recognizes three types of preemption: conflict preemption; field preemption; and express preemption. International Ass'n of Indep. Tanker Owners v. Locke, 148 F.3d 1053, 1060-61 (9th Cir. 1998) (citing Cipollone, 505 U.S. at 516). These types of preemption occur as follows:

[(1)] Conflict preemption occurs when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. [(2)] Field preemption exists when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it. [(3)] Finally, express preemption exists when Congress explicitly states its intent to displace state law in the statute's language. ([top](#))

Id. at 1061 (quotation marks and citations omitted); see also English v. General Elec. Co., 496 U.S. 72, 78-9 (1990) (explaining the three preemption doctrines).

In the instant case, Article 8 and the proposed amendment violate the Supremacy Clause because the AEA preempts them under at least two of the above preemption doctrines.

## A. The Atomic Energy Act

The AEA "grew out of Congress' determination that the national interest would be best served if the Government encouraged the private sector to become involved in the development of atomic energy for peaceful purposes under a program of federal regulation and licensing." Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 207 (1983); see also Illinois v. Kerr-McGee Chem. Corp., 677 F.2d 571, 579 (7th Cir.), cert. denied, 459 U.S. 1049 (1982) (outlining the history of the AEA). To this end, "[t]he federal government's monopoly over nuclear materials was to be shared only with those who complied with the strict licensing scheme administered by the Atomic Energy Commission." Kerr-McGee Chem. Corp., 677 F.2d at 579. The Act thus provides, among other things, federal standards to "regulate the radiological safety aspects" of the operation and construction of a nuclear power plant. Pacific Gas, 461 U.S. at 205. ([top](#))

Besides regulating the uses of nuclear materials for nuclear power plants, Congress also found the Act necessary because "[t]he processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest." 42 U.S.C. § 2012(c) (1994). The Act thus expressly regulates the use, ownership, and transportation of byproduct material for, inter alia, "agricultural uses, or such other useful applications as may be developed." 42 U.S.C. § 2111 (1994) (emphasis added). Cobalt-60, a radioactive material commonly used in the food irradiation process (which may be considered an "agricultural use"), falls under the definition of a "byproduct material." See 10 C.F.R. pt. 30, app. B (listing Cobalt-60 as a regulated byproduct material). The express language of the AEA and Congress' intent thus indicates that, as discussed below, the Act regulates the same area (1) regulated by Hawaii County in Article 8, and (2) which the proposed amendment seeks to regulate. ([top](#))

### 1. Case Law Precedent

In fact, the broad scope of the AEA has led the Supreme Court to observe that with the AEA, "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." Pacific Gas, 461 U.S. at 212 (emphasis added). In the landmark case of Pacific Gas, the Supreme Court held: ([top](#))

When the Federal Government completely occupies a given field or an identifiable portion of it, as it has done [with the AEA], the test of pre-emption is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the [National Resource Council [NRC]] . . . . A state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use--and would be pre-empted for that reason. ([top](#))

Id. at 212-13 (emphases added) (citations and quotation marks omitted); see also County of Suffolk v. Long Island Lighting Co., 728 F.2d 52, 58 (2d Cir. 1984) (similarly discussing Pacific Gas and the Supreme Court's treatment of preemption); Nieman v. NLO. Inc., 108 F.3d 1546, 1550-51 (6th Cir. 1997) (discussing the same); Roberts v. Florida Power & Light Co., 146 F.3d 1305, 1308 (11th Cir. 1998) (discussing the same).

A year after Pacific Gas was decided, the Supreme Court reiterated that "[s]tates are precluded from regulating the safety aspects of nuclear energy." Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 240-41 (1984). The Supreme Court observed that:

Congress' decision to prohibit the States from regulating the safety aspects of nuclear development was premised on its belief that the Commission was more qualified to determine what type of safety standards should be enacted in this complex area. As Congress was informed by the AEC, the 1959 legislation provided for continued federal control over the more hazardous materials because "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future." ([top](#))

Id. at 250 (quoting H.R. Rep. No. 1125, 86th Cong., 1st Sess., 3 (1959)). Thus, though a local entity's implementation of laws premised on non-radiological considerations (such as economic ones, see Pacific Gas at 205, 213-14), may not be preempted by the AEA, a local regulation that is directed at the public health and safety concerns surrounding radiological hazards is, clearly, preempted--particularly in regards to nuclear power technology, but also in regards to byproduct material used for agricultural uses. ([top](#))

The issue of whether the AEA preempts a statute that regulates health and safety aspects of nuclear technology is not novel to our federal jurisdiction.<sup>/2</sup> In Washington State Building & Construction Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), the State of Washington passed an initiative prohibiting the transportation and storage within Washington of low-level radioactive waste produced outside of the state. Id. at 629. The United States Court of Appeals for the Ninth Circuit summarily held that "[t]he initiative violates the Supremacy Clause because it seeks to regulate legitimate federal activity and to avoid the preemption of the Atomic Energy Act." Id. at 630. The court thus held the initiative to be unconstitutional.

Similarly, in a persuasive decision by the United States Court of Appeals for the Third Circuit, Jersey Central Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir.), cert. denied, 475 U.S. 1013 (1985), the township of Lacey passed an ordinance banning the transportation or storage within the county's borders of any radioactive waste. The Third Circuit court held: ([top](#))

Inasmuch as Congress has specifically established this pervasive scheme of federal regulation established by the AEA and NRC regulations, and inasmuch as the legislative history of the AEA and the regulations implementing it establish beyond dispute that it is congressional intent that federal law should regulate the radiological safety aspects of the nuclear power industry . . . we find that the ordinances under our review are unconstitutional.

Id. at 1112. The court thus affirmed the lower court's ruling that the local ordinance violated the Supremacy Clause.

## 2. Application to Article 8 ([top](#))

In order to understand why the proposed amendment is invalid, we first analyze the ordinance that it seeks to amend. In the instant case the proposed amendment would amend Article 8, which bans the transportation into or storage in the County of Hawaii of most radioactive materials or substances. Article 8 also goes further than did the statute in Spellman or the ordinance in Jersey Central Power by prohibiting the construction of a nuclear energy facility.

As stated in section 14-44, the purpose of Article 8 is to: [m]aintain a clean and healthy environment for present and future generations in the County [of Hawaii], 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. [Emphasis added.] ([top](#))

This purpose places Article 8 squarely within the prohibited arena. As the Supreme Court stated, above, "[a] state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC[.]" Pacific Gas, 461 U.S. at 213. By banning the transportation or storage of radioactive material in or through Hawaii County, Article 8 also thwarts the AEA's policy to "strengthen free competition in private enterprise," 42 U.S.C. § 2011(b), and "to protect the public and to encourage the development of the atomic energy industry." 42 U.S.C. § 2012(i).

Article 8 thus presents a classic scenario of a preempted ordinance: it expressly contradicts the purpose and provisions of a federal statute, and it regulates a field that the federal government has declared an intent to exclusively occupy. According to the language provided in the AEA as well as the courts' interpretations in Pacific Gas, Spellman, and Jersey Central Power, the AEA preempts Article 8 under the doctrines of express and field preemption. As such, it violates the Supremacy Clause and is facially invalid, which violation renders any amendment to it similarly defective.

### 3. Application to the Proposed Amendment ([top](#))

Besides the defects arising from Article 8, the proposed amendment also raises a separate question of field preemption, conflict preemption, or both. This is because while the amendment does not regulate any use of atomic energy, it does attempt to regulate "byproduct material" for an agricultural use (i.e., irradiating agricultural products), which regulation, as discussed below, the AEA has expressly reserved for the federal government, absent a state's license from the NRC.

In implementing the AEA, Congress found that "[t]he processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest." 42 U.S.C. § 2012(c). To that end, the AEA provides:

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material, except to the extent authorized by this section, section 2112 or section 2114 of this title. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed.

42 U.S.C. § 2111 (emphases added). The AEA defines "byproduct material" as:

(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content. ([top](#))

42 U.S.C. § 2014(e); see also 42 U.S.C. §§ 2111-2114 (1994) (regulating the use, ownership, and distribution of byproduct material). Material used in the irradiation process, such as Cobalt-60, falls under section 2014(e) (1). See 10 C.F.R. pt. 30, app. B (listing Cobalt-60 as a byproduct material for which a domestic license is necessary). Under section 2111, the AEA thus regulates the transport and possession of Cobalt-60 for any useful application, including agricultural. Accordingly, the AEA preempts the proposed amendment because the amendment's provisions expressly conflict with the federal statute and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." International Assoc. of Indep. Tanker Owners, 148 F.3d at 1060. ([top](#))

The AEA does not, however, totally preclude a state from regulating byproduct material. In 1959, Congress amended the AEA to include a provision for a federal-state agreement for the regulation of byproduct material. 42 U.S.C. § 2021 (1994) (section 274).<sup>/3</sup> Section 274 provides that if a state wishes to regulate byproduct, source, or special nuclear material, it must enter into an agreement with the NRC. 42 U.S.C. § 2021(b). Absent such an agreement, the state has no jurisdiction to regulate byproduct material. As a General Counsel opinion published by the NRC concluded, "States which have not entered into a section 274 agreement with the [Atomic Energy Commission (now the NRC)] are without the authority to license and regulate, from the standpoint of radiological health and safety, byproduct, source, and special nuclear material or production and utilization facilities." 34 Fed. Reg. 7273, 7274 (1969). Having never entered into such an agreement, the State of Hawaii has no jurisdiction to regulate byproduct, source, or special nuclear materials; even if the State was a party to such an agreement, it is not clear that the County of Hawaii would also be a party. See United States v. City of New York, 463 F. Supp. 604, 612 (S.D.N.Y. 1978) (holding that in regards to section 274, a city or county cannot be an "agreement state"). (top)

As the General Counsel's opinion stressed:

[i]t seems completely clear that the Congress, in enacting section 274, intended to preempt to the Federal Government the total responsibility and authority for regulating, from the standpoint of radiological health and safety, the specified nuclear facilities and materials; that it stated that intent unequivocally; and that the enactment of section 274 effectively carried out the Congressional intent[.] (top)

34 Fed. Reg. at 7274. This opinion is congruent with the Supreme Court's interpretation of preemption, which is that "[w]hen the Federal Government completely occupies a given field or an identifiable portion of it, as it has done [with the AEA], the test of pre-emption is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act."<sup>/4</sup> Pacific Gas, 461 U.S. at 213 (emphases added) (quotation marks and citation omitted).

Thus, to the extent that the proposed amendment regulates the transport and possession of an agricultural use of a nuclear byproduct material, the AEA preempts it, because our State and its political subdivisions have no jurisdiction to regulate this area. See Rollins Env'tl. Serv. (FS), Inc. v. Parish of St. James, 775 F.2d 627, 635 (5th Cir. 1985) (holding that "[i]nsofar as [the disputed ordinance] amounts to an outright ban [or] prohibition of appellant's PCB disposal activities, it has the illegitimate objective of regulating a field preempted by Congress"). Just as Article 8's ban on the construction of nuclear power facilities flies in the teeth of Congress' intent to regulate the safety and health aspects of nuclear technology, so does the proposed amendment by banning the transport and possession of byproduct material for an agricultural purpose. The amendment is thus preempted under the doctrines of conflict and field preemption. (top)

#### B. Other Federal Regulations

Other federal regulations promulgated by the Food and Drug Administration (FDA), the United States Department of Agriculture (USDA), and the NRC similarly suggest that the proposed amendment might be preempted under the doctrines of conflict or field preemption. Three statutory schemes indicate a federal intent to entirely occupy the field of food irradiation: (1) the FDA's regulations interpreting the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 (1994 & Supp. 1998) see 21 C.F.R. pt. 179 (1998); (2) the USDA's regulations regarding the irradiation of Hawaii fruit and vegetables, see 7 C.F.R. § 318.13-4f (1998); and (3) the NRC's safety regulations regarding food irradiation, found at 10 C.F.R. pt. 36 (1998).

First, 21 C.F.R. part 179 sets forth the FDA's safety regulations regarding the proper use of nuclear materials in the food irradiation process. Section 179.21 provides various safety regulations for the use of source material in the

irradiation process, such as Cobalt-60; section 179.25 provides general safety provisions with which an irradiation facility must comply, including radiation dosage, irradiation procedures, recordkeeping, and packaging requirements; and section 179.26 regulates the type of material that may be used in the ionizing radiation process.

[\(top\)](#)

Second, the USDA has set forth regulations governing the irradiation of certain fruit and vegetables in Hawaii. See 7 C.F.R. § 318.13-4f (entitled "Administrative instructions prescribing methods for irradiation treatment of certain fruits and vegetables from Hawaii"). Section 318.13-4f provides methods for the irradiation of certain Hawaii fruits and vegetables, including the food's treatment; standards for the packaging and shipping, interstate, of these fruit and vegetables, and safety standards. The regulations also approve of an irradiation facility located in Hawaii or in a non-fruit fly supporting state, see 7 C.F.R. § 318.13-4f(b) (2), which irradiator the USDA's administrator could approve or disapprove. 7 C.F.R. § 318.13-4f(d) (2). These regulations again raise the question of whether the proposed amendment's purpose of making safe irradiation in Hawaii by banning it is preempted under either the field or conflict preemption doctrines, because the federal government has already shown an interest in regulating this area.<sup>5</sup>

Finally, the NRC has safety regulations that govern the licensing of food irradiators. See 10 C.F.R. pt. 36. Part 36 sets forth the federal government's licensing of irradiators and contains specific licensing requirements. See 10 C.F.R. §§ 36.11 - 36.19. The regulations also provide extensive design and performance requirements for irradiators, 10 C.F.R. §§ 36.21 - 36.41, the type of training and operating procedures necessary for an irradiator, 10 C.F.R. §§ 36.51 - 36.69, necessary recordkeeping, 10 C.F.R. §§ 36.81 - 36.83, and enforcement policies and penalties, 10 C.F.R. §§ 36.91 - 36.93. These regulations further support an argument for conflict or field preemption, in that if a county banned an irradiator regulated by the NRC because of safety and health concerns, the ban would contradict the purpose of the federal regulations. [\(top\)](#)

As the Supreme Court has stated, the federal government's intent to exclusively occupy a field can "be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." English v. General Elec. Co., 496 U.S. at 79 (quotation marks, ellipses, brackets, and citations omitted). A court could make a reasonable inference from the above three sets of regulations that a pervasive "scheme of federal regulation" exists in regards to irradiation facilities. However, the question of whether these regulations preempt a county's ban on food irradiators and their products is, as yet, untested in the courts. Consequently, while these regulations indicate that the proposed amendment is preempted on the grounds of field, implied, or conflict preemption, no case precedent directly supports this conclusion. [\(top\)](#)

### C. Exceptions to Preemption

However, the doctrine of preemption does not completely displace a local entity's police power, particularly where the power exercised is one that traditionally rests with the state. Cipollone, 505 U.S. at 516. Thus, if the purpose of the regulation is not radiological health and safety concerns, then the proposed amendment may not be preempted. Though the purpose of the AEA is to regulate the health and safety aspects of nuclear technology, it is true that if a regulation is implemented for, e.g., a purely economic purpose, Pacific Gas, 461 U.S. at 205-06, or to regulate a non-radiological nuisance, Illinois v. Kerr-McGee Chem. Corp., 677 F.2d at 581, then a local entity can exercise its police power to regulate that area, unless Congress' intent is "clear and manifest" to exclusively occupy that concern. [\(top\)](#)

Cipollone, 505 U.S. at 516.

For example, in Pacific Gas, the Supreme Court explained that under the AEA, "the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." 461 U.S. at 205. The Court pointed out that "the [NRC] . . . was not given authority over the generation of electricity itself, or over the economic question whether a particular plant should be built." Id. at 207. Consequently, in Pacific Gas, the Court concluded that the states have control over purely economic considerations that touch upon the field of nuclear safety. Id. at 207, 212. This opinion affirmed the lower court's ruling, which was made in the Ninth Circuit. See Pacific Legal Foundation v. State Energy Resources Conservation & Dev. Comm'n., 659 F.2d 903 (9th Cir. 1981), aff'd, Pacific Gas, 461 U.S. 190 (1983). ([top](#))

Similarly, in a Seventh Circuit case the court explained that Congress' intent in enacting the AEA was not to "impair the State authority to regulate activities of AEC licensees for the manifold health, safety, and economic purposes other than radiation protection." Kerr-McGee Chem. Corp., 677 F.2d at 580 (citation omitted). The court held that where the state filed a complaint against Kerr-McGee Chemical Corporation claiming that conditions at its facility, where radioactive waste was stored, violated the state's environmental protection act, the claims were not preempted by the AEA. Kerr-McGee argued that the state's claims were preempted by the AEA, insofar as the NRC had exclusive jurisdiction to regulate radiation hazards. However, the hazards cited by the state were non-radiological, namely, open pits filled with refuse and chemicals, holes in floors, fallen walls and debris, abandoned equipment and chemicals, fallen roofs, and other hazards not associated with the storage of radioactive waste. Id. at 582. The court thus held that the AEA did not preempt the state's claims, because the state retains the right to regulate non-radiation hazards. "In line with [other case precedent], we hold that the Atomic Energy Act has expressly and impliedly preempted regulation by the states of the radiation hazards associated with nuclear materials. Regulation of non-radiation hazards by the states or their political subdivisions has not, however, been preempted." Id. at 581. ([top](#))

In the instant case, proponents of the amendment originally opposed irradiation facilities because of the health and safety aspects of building such facilities and of consuming food processed through irradiation. In that case, as with the above discussion of Article 8's health and safety purpose, the proposed amendment would violate the Supremacy Clause, because the AEA governs this area of radiological safety concerns. ([top](#))

However, the proponents of the amendment have recently argued that an irradiation facility in the County of Hawaii may pose a geological hazard, in that the island of Hawaii is in a geologically active zone. The proponents may argue that, in light of the threat of a geological hazard such as an earthquake or volcanic eruption, the decision as to where an irradiation facility is placed is one that falls under the county's traditional police powers. Depending on the underlying facts, this argument might have merit, though there is not enough case law to make a true determination. ([top](#))

At least one case has, however, held that the AEA preempts a city's "siting" regulation of nuclear reactors. United States v. City of New York, 463 F. Supp. 604 (S.D.N.Y. 1978). In City of New York, the city enacted an ordinance that gave it the discretion to deny an application for a nuclear reactor, which the city did after Columbia University proposed to build the reactor in a populated area. The city denied the application in order to safeguard the public from possible injury arising from an accidental release of radiation. The city argued that the ordinance was a "siting" regulation beyond the responsibility or expertise of the NRC, and that Congress did not intend for the AEA to preempt the city's police power in this regard. Id. at 607. The court disagreed, and held that the AEA's express provisions required that the NRC make local siting determinations before issuing a license for

the construction of a nuclear reactor. Id. at 613. The court stated that "no nuclear reactor will be licensed by the Commission unless it determines that, among other things, the proposed facility can be constructed and operated 'at the proposed location without undue risk to the health and safety of the public.'" Id. (quoting 10 C.F.R. § 50.35(a)). The court thus concluded that "the City's argument that the Commission's scope of responsibility does not include consideration of local siting matters or that the Commission considers only generic safety factors and not peculiarly local ones in reviewing an operation license, must be rejected." Id.

According to City of New York, in the instant case, the alleged geological hazard "siting" argument may be untenable.<sup>6</sup> However, this issue has not been fully developed by the courts. In any event, as it is currently written, the proposed amendment does not fall under an exception and is preempted by the AEA.

### III. THE COMMERCE CLAUSE ([top](#))

Furthermore, as it is currently written and proposed, the proposed amendment is invalid because a court could determine that it violates the Commerce Clause.

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Our Supreme Court has commented that "[a]lthough the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized it also limits the power of the States to erect barriers against interstate trade."<sup>7</sup> Maine v. Taylor, 477 U.S. 131, 137 (1986) (quotation marks and citation omitted). This doctrine stems from the premise, "well established by the history of the Commerce Clause, that this Nation is a common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 803 (1976); see also Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571-72 (1997) (similarly summarizing the history of the Commerce Clause).

#### A. Testing the Commerce Clause ([top](#))

As the Ninth Circuit has observed, the Supreme Court has outlined a two-tiered approach for analyzing an ordinance or statute under the Commerce Clause. National Collegiate Athletic Ass'n v. Miller, 10 F.3d 633, 638 (9th Cir. 1993) (citing Healy v. Beer Inst., 491 U.S. 324, 337 n.14 (1989)). First, one must ask whether the ordinance or statute (a) directly regulates interstate commerce, (b) discriminates against interstate commerce, or (c) favors in-state economic interests over out-of-state interests. Id. If the ordinance or statute "does any of these things, it violates the Commerce Clause per se, and [a court] must strike it down without further inquiry." Id. However, "[i]f [a court] determine[s] that the [ordinance] or Statute has only indirect effects on interstate commerce and that it regulates evenhandedly, then [a court] must apply the balancing test."<sup>8</sup> Id.

On the other hand, neither test need apply if the government entity meets one of two established exceptions: (1) it is a market participant; or (2) the discrimination is necessary for quarantine purposes. See City of Philadelphia v. New Jersey, 437 U.S. 617, 622-25 (1978) (discussing the quarantine exception); Spellman, 684 F.2d at 631 (discussing the market participant and quarantine exceptions).

#### B. Application of the Test to the Facts ([top](#))

Applying the above test to the immediate facts, the proposed amendment, as written, directly regulates interstate commerce by placing a prohibition on the free flow of trade across county lines, e.g., prohibiting the importation of commercial uses of radioactive material. As such, it is facially discriminatory, because "[t]he 'negative' or 'dormant' Commerce Clause prohibits interstate

curtailment of commerce to advance a particular state's interest." BFI Med. Waste Sys. v. Whatcom County, 983 F.2d 911, 913 (9th Cir. 1993). Furthermore, "[o]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." 9 Id. (quoting Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 361 (1992)) (ellipses and brackets omitted). Thus, according to the Ninth Circuit's test, a court should strike down the proposed amendment without further inquiry, because it directly regulates interstate commerce by curtailing it. See Healy, 491 U.S. at 337 n.14 (cited in National Collegiate Athletic Ass'n, 10 F.3d at 638). ([top](#))

However, though the Ninth Circuit's test is "well settled," National Collegiate Athletic Ass'n, 10 F.3d at 638, in fact courts are reluctant to simply strike down a facially unconstitutional statute. Rather, a strict scrutiny test is applied: "the [ordinance] must serve a legitimate local purpose, and the purpose must be one that cannot be served as well by available nondiscriminatory means." Taylor, 477 U.S. at 140. For example, in Spellman, a state initiative banned the transportation or storage of low-level radioactive waste within Washington state. The Ninth Circuit held that "[t]his facial discrimination . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." Spellman, 684 F.2d at 631 (quotation marks and citation omitted). The court thus held that the initiative violated the Commerce Clause, because the ordinance's health and safety purpose was not legitimate, and there were nondiscriminatory alternatives available. Id. ([top](#))

The instant proposed amendment, in its current form, is similarly constitutionally infirm. First, the local health and safety purpose allegedly served by the proposed amendment may not be legitimate. 10 As previously discussed, Article 8's purpose, which would become the proposed amendment's, is preempted by the AEA. Furthermore, the FDA has, after at least a decade of research and public comment, declared the irradiation process to be safe for food, concluding that "all of the available information from the results of chemical analyses suggests that there is no reason to suspect a toxicological hazard due to consumption of an irradiated food." 62 Fed. Reg. 64107, 64111 (1997) (explaining the safety of irradiated food and irradiation processes) (entitled "Final Rule: Irradiation in the Production, Processing and Handling of Food"); see also 54 Fed. Reg. 387 (1989) (addressing several health-related questions concerning the consumption, handling, irradiation, and transportation of irradiated fruit from Hawaii) (entitled "Final Rule: Use of Irradiation as a Quarantine Treatment for Fresh Fruits of Papaya From Hawaii"). In regards to irradiation facilities, the FDA has concluded that, regarding

[c]oncern that the transport of nuclear materials and the operation of irradiation facilities would pose environmental dangers[,] [t]he [NRC] is responsible for ensuring that irradiation facilities are constructed and operated in a safe manner. We must assume that any facility approved for operation by NRC will meet all necessary safety standards. ([top](#))

54 Fed. Reg at 388. In light of these safety determinations, if the proposed amendment was enacted in its current form, Hawaii County would need to rebut the FDA's conclusions in order to show that its health and safety concerns were legitimate. ([top](#))

As to the second prong of the test, there are less discriminatory alternatives other than prohibition available to the county, such as allowing the commercial use of radioactive material to the extent that it is allowed under federal law.

There being no justification, as the proposed amendment is currently proposed and written, for banning commercial uses of radiation, in particular materials used in irradiation facilities, the proposed amendment fails the strict scrutiny standard imposed on facially discriminatory statutes or ordinances. Consequently, a

court would most likely find that the proposed amendment violates the Commerce Clause. [/11](#)

### C. The Two Exceptions Are Excluded ([top](#))

However, there are exceptions to this analysis. One might argue that the ordinance does not violate the Commerce Clause because the county is a market participant, or because the prohibition is necessary for quarantine purposes. Neither exception, however, is present in the instant case.

First, a state or municipality can act as a "market participant" when it enters into the flow of commerce as a participant rather than a regulator, such as where it pays a bounty to scrap processors for abandoned motor vehicles licensed by the state, Alexandra Scrap Corp., 426 U.S. at 809-10, or restricts the sale of products from state-owned cement plants. Reeves, Inc. v. Stake, 447 U.S. 429, 440 (1980). Though these acts might stem the flow of interstate commerce, they are acceptable because "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Alexandra Scrap, 426 U.S. at 810 (footnotes omitted).

However, if the proposed amendment passed in its current form, it does not appear likely that the County of Hawaii could claim that it was entering into the market, such as by owning or operating an irradiation facility. Rather, by erecting a barrier against trade for a public purpose, the county would be regulating the market in the most pure sense: prohibition of commerce. It could thus be argued that the proposed amendment is not an indicator of market participation, but of economic isolationism, which isolationism can be enforced with criminal penalties. See HCC § 14-49 (providing that a violation of Article 8 constitutes a misdemeanor offense, with a concomitant fine or prison term). This kind of regulation shows that the county would be acting as a regulator, not a participant. See Spellman, 684 F.2d at 631 (holding that where a state initiative is cast in regulatory rather than proprietary terms and provides for civil and criminal penalties, the State is not acting as a market participant). ([top](#))

Second, the prohibitions that would be imposed by the county under the proposed amendment do not fall under the "quarantine" exception. As the Supreme Court has explained, the quarantine exception arose out of laws that "banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils." City of Philadelphia, 437 U.S. at 629. Thus, "[u]nder the quarantine theory, a state may close its borders to protect citizens against health hazards such as epidemics." Spellman, 684 F.2d at 632. However, if the item is not diseased but is, actually, an article of interstate commerce, even if the item is waste to be dumped in landfills, City of Philadelphia, 437 U.S. at 629, or is radioactive, see Spellman, 684 F.2d at 631-32, the quarantine theory does not apply. A state or municipality cannot, under the guise of a necessary quarantine, "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." City of Philadelphia, 437 U.S. at 628. ([top](#))

In the instant case, the proposed amendment's prohibition of radioactive material that has "commercial uses" is obviously targeted at material that is used in interstate commerce, and for which the FDA has set acceptable standards of use and care. Thus, it does not fall under the quarantine exception, but rather appears to be an attempt to isolate Hawaii County from a perceived problem by erecting a barrier against trade--despite the fact, as discussed above, that federal regulations encourage trade in such matters and, to that end, provide a panoply of safeguards for the transportation, use, and storage of radioactive materials.

The proposed amendment thus violates the Commerce Clause because it is facially discriminatory and does not fall under either of the two exceptions. ([top](#))

IV. Conclusion

In sum, we conclude that Article 8 is preempted by the AEA, as is the proposed amendment, and that the proposed amendment, in its current form, also violates the Commerce Clause.

Very truly yours,  
Adina L.K. Cunningham  
Deputy Attorney General

APPROVED:  
Margery S. Bronster  
Attorney General of Hawaii

HMR/AC:eti

Irrad.op ([top](#))

- Article 8 and the proposed amendment may also be subject to a preemption challenge under the Hazardous Materials Transportation Uniform Safety Act of 1996, 49 U.S.C. §§ 5101-5127 (Supp. 1996) (HMTUSA), formerly the Hazardous Materials Transportation Uniform Safety Act of 1990, 49 U.S.C. §§ 1801-1819 (1994). The HMTUSA provides regulations for the transport of hazardous materials. 42 U.S.C. § 5103. The Act's primary purpose is "to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation." 42 U.S.C. § 5101. As such, Article 8 and the proposed amendment may be preempted by the HMTUSA insofar as they prohibit the transportation of radioactive material. See generally Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 991 F.2d 458 (8th Cir. 1993) (similarly holding that regulations adopted by an Indian tribe were preempted insofar as they imposed greater restrictions than the HMTUSA); Chlorine Inst., Inc. v. California Highway Patrol, 29 F.3d 495, 496 (9th Cir. 1994) (holding that regulations adopted by the Department of the California Highway Patrol regarding the transportation of hazardous waste were preempted to the extent that they went beyond the requirements imposed by the HMTUSA); Colorado Pub. Util. Comm'n v. Harmon, 951 F.2d 1571 (10th Cir. 1991) (similarly so holding regarding regulations adopted by the Colorado Public Utilities Commission).([top](#))

However, it is not clear that this Act is entirely applicable to the instant case. Thus, while we note that the Act may present a preemption question, we do not address it. ([top](#))

- We refer to federal cases rather than state cases because the discourse on this issue has primarily been carried on at the federal level. ([top](#))
- 42 U.S.C. § 2021 provides, in pertinent part:

Cooperation with States

(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 chapter of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials; ([top](#))

(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;(top)

(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;(top)

(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;(top)

(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.(top)

4. The statute then provides for the various terms by which agreements with the states shall be made.(top)

As the Fifth Circuit noted in regards at a similar ordinance that banned the use of PCBs (which are federally regulated by the federal Toxic Substances Control Act (TOSCA)), this type of prohibitory ordinance cannot stand in the face of a federal statute that regulates, in any way, the same material, because

[i]f the Supremacy Clause of the Constitution means anything it must mean that a county may not pass an ordinance, the effect of which is to totally frustrate an entire statutory plan enacted by the Congress for the protection of citizens in all fifty states. Were the Court to approve this ordinance, no doubt the other . . . counties . . . would quickly enact identical bans . . . [The ordinance] clearly stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . and, therefore, is void.

Rollins Env'tl. Serv., (FS), Inc. v. Parish of St. James, 775 F.2d 627, 634 n.8 (5th Cir. 1985) (quoting Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981)) (brackets omitted).(top)

5. This issue may become moot, however, if a rule currently being proposed by the Department of Agriculture is passed. See 63 Fed. Reg. 31675 (1998) (to be codified at 7 C.F.R. pt. 318) (entitled "Proposed Rule: Fruit from Hawaii"). This rule proposes an amendment to the above regulation to include in the list of irradiated fruit and vegetables aba, atemoya, lonan, rambutan, and sapodilla, with irradiation treatment to be conducted either in Hawaii or in non-fruit fly supporting areas of the mainland United States. The amendment expressly provides that, pursuant to Executive Order 12988, "All State and local laws and regulations that are inconsistent with [the] rule [would] be preempted" by the proposed federal amendment. Clearly, as with the AEA in regards to atomic energy plants, a ban on irradiation facilities would be "inconsistent" with a federal rule encouraging the irradiation of certain fruits and vegetables in Hawaii. Thus, if the proposed amendment to Article 8 is not conflict-preempted by the current 7 C.F.R. § 318.13-4f, it would be expressly preempted by the proposed federal amendment.(top)
6. This geological hazard "siting" argument could also be invalid because it could be interpreted as a "sham" argument. Several courts have looked unfavorably upon a city or county's changing its intent in enacting an

unconstitutional ordinance simply in order to appease the court, or to achieve indirectly a goal that it could not achieve directly. See City of New York, 463 F. Supp. at 614 (stating that where the city argued that its concerns were based on non-radiological safety concerns, the argument would not be considered where the ordinance's actual application contradicted it); Ogden Env'tl. Serv., Inc. v. City of San Diego, 692 F. Supp. 1222, 1225 (S.D. Cal. 1988) (holding that where a list of justifications for why the City's claims were not preempted by the AEA were designed "merely to appease the court," such justifications would not be considered); Rollins Env'tl. Serv., Inc., 775 F.2d at 634-35 (holding that the ordinance in question was "indeed a sham" and a "total subterfuge" where the city parish passed it after a previous ordinance was found preempted by TOSCA).[\(top\)](#)

7. We note that in the instant case, the Cobalt-60 would be purchased from a Canadian corporation. This raises the troubling question of whether Article 8 attempts to regulate not only intra- and interstate commerce, but also foreign commerce.[\(top\)](#)
8. This balancing test asks whether the ordinance or statute (1) regulates evenhandedly; (2) accomplishes a legitimate local public purpose; and (3) has only an incidental effect on interstate commerce. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (cited in Spellman, 684 F.2d at 630-31); see also Hass v. Oregon State Bar, 883 F.2d 1453, 1462 (9th Cir. 1989) (discussing similar factors).[\(top\)](#)
9. This argument assumes that the proposed amendment would pass, in which case Hawaii County would become the amendment's defender, though we recognize that at present, the County does not support a ban on irradiation facilities.[\(top\)](#)
10. However, if the proposed amendment was enacted because of a valid geological hazard concern, the amendment might not violate the Commerce Clause, because such a siting decision might be a legitimate exercise of the county's police power. However, such facts are not well-developed and further information is needed to analyze them.
11. In light of the facially unconstitutional nature of the proposed amendment, we need not apply the standards set forth in Pike v. Bruce Church, Inc., 397 U.S. at 142, though the amendment would obviously fail these, also. See supra n.8.

[\(top\)](#)

---