



DOW CHEMICAL U.S.A.

April 13, 1981

MIDLAND, MICHIGAN 48640

Dr. John W. Cooper
U.S. Nuclear Regulatory Commission
Region III
799 Roosevelt Road
Glen Ellyn IL 60137

Dear Dr. Cooper:

Per your phone request of March 16, 1981, please find enclosed three letters of opinion from the Michigan Attorney General's office and some applicable statutes regarding Michigan's statutory authority over ionizing radiation and radioactive material. The information contained in these enclosed documents is current and is submitted to the NRC in support of Dow's incineration application, dated October 29, 1980.

To summarize this information, Frank J. Kelley, Michigan Attorney General, stated that a "turn over" agreement is necessary for the State of Michigan to lawfully exercise health and safety control of those radiation sources defined in the Federal Atomic Energy Act e.g. source, by-product and special nuclear materials. A "turn over" agreement has to be "ratified by law" and would require enactment by the Michigan legislature and subsequent action by the Governor (MCLA 3.801). To date, this regulatory jurisdiction has not been transferred to the State of Michigan (MCLA 333.13506 (6)). Therefore, the State of Michigan has no enacted regulations regarding incineration of by-product material.

Having been issued a Type A By-Product Materials License, Dow generates low-level radioactive waste that must be disposed of at licensed disposal sites. In May, 1981, Dow will be shipping low-level waste to Barnwell, South Carolina. Many of the wastes included in this shipment are contaminated materials that could alternately be disposed of by incineration and still represent an equal if not lower radiological risk to the general public. It would not be in the public's, the NRC's or Dow's best interest to dispose of these materials in dwindling shallow land burial sites and I respectfully urge you to expedite the processing of our application.

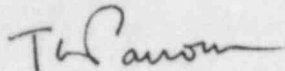
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Dr. Cooper

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April 13, 1981

Dow believes that the enclosed documents and the original application of October 29, 1980, provide sufficient information to complete application requirements. If this is not true, please contact me personally as soon as possible.



T. W. Parsons
Industrial Hygiene Laboratory
Health & Environmental Sciences
1803 Building
517/636-3205

mmb/Enclosure

police vehicle will have to be equipped with a flashing, oscillating or rotating red light in order to be entitled to certain exemptions provided in the Michigan vehicle code.

FRANK J. KELLEY,
Attorney General.

ATOMIC ENERGY:

A "turn-over agreement" is necessary so that the State of Michigan may have control over radiation hazards arising out of the use of sources of atomic energy defined under the Federal Atomic Energy Act.

No. 4073

October 31, 1962.

The Honorable John B. Swainson
Executive Office
The Capitol
Lansing, Michigan

You have made the following inquiry of the Attorney General:

"For some time, I have been concerned with the question of whether legislation should or need be enacted to aid and assist in the development of the nuclear energy industry in Michigan, and to safeguard our public health and safety in this field.

"Before submitting legislative proposals, it appears that there is a question of law to be answered, viz., whether the authority of the federal government in the nuclear energy field supersedes Michigan's right to enact and enforce health and safety regulations with reference thereto. Specifically, I seek your opinion as to whether a so-called 'turn-over' agreement with the Atomic Energy Commission is necessary before state agencies may exercise health and safety control over source, special nuclear, and by-product material used within the State of Michigan."

Prior to the 1959 amendment to the Atomic Energy Act of 1954, which contains the "turn over" agreement¹ to which you refer, the need for clarification of the States' role in exercising their traditional police powers in the atomic energy field was the subject of concern of States, legal writers and the Joint Committee on Atomic Energy of the Congress of the United States.² For a brief general analysis of the Act as it then stood, we quote from the documented background material prepared by the staff of the Congressional Joint Committee on Atomic Energy:³

¹ Act of Sept. 23, 1959, Pub. L. 86-373, sec. 1 (73 Stat. 688, 42 U.S.C.A. 1961 Cum. Supp. sec. 2021).

² Senate Report No. 870, Sept. 1, 1959, 86th Cong. 1st Sess. (U.S. Code Cong. and Admin. News page 2875).

Selected material on Federal-State Cooperation in the Field of Atomic Energy, Joint Committee on Atomic Energy (Committee Print—86th Cong. 1st Sess.)

³ Same, pages 2-3.

"The Atomic Energy Act of 1954, which superseded the original Atomic Energy Act of 1946, provides a statutory framework for development of the peaceful uses of atomic energy, and Federal regulation of most, but not all, radiation sources. Thus, the act defines three types of radioactive materials—source, byproduct, and special nuclear materials—and prohibits generally the possession or use of such materials except under license from the Federal Atomic Energy Commission. The act also provides that special nuclear material (which includes enriched uranium, the fuel supply of most United States of America reactors), shall be the property of the United States. Private ownership of 'utilization facilities,' or nuclear reactors, is permitted, but a construction permit and an operating license must first be obtained from the AEC, and the AEC retains continuing responsibilities as to the health and safety features by means of the license and periodic inspections throughout the life of the reactor.

"Acting under this statutory framework, the Commission has promulgated licensing regulations which prescribe the type of information that must be submitted by applicants for a license, * * * and other substantive and procedural requirements. In addition, part 20 of the AEC Regulations, on 'Standards for Protection Against Radiation,' provides maximum permissible limits on radiation exposure, limitations on waste disposal, requirements for personnel monitoring, instruction of personnel, records and reports, and other provisions prescribed for all AEC licensees. In addition to its licensing program, the AEC controls radiation sources and activities of its contractors by special contract provisions."

In the Atomic Energy Act the Congress of the United States expressly determined that "the development, utilization, and control of atomic energy for military and for *all other purposes* are vital to the common defense and security"⁴ of the United States.⁵ (Emphasis supplied) The Congress also made the following "findings:"

"(b) In permitting the property of the United States to be used by others, such use must be regulated in the national interest and in order to provide for the common defense and security and *to protect the health and safety of the public.*

"(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

"(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and *to protect the health and safety of the public.*

⁴ 42 U.S.C.A. Sec. 2012 (a).

⁵ The term "common defense and security" is defined by the Act to mean "the common defense and security of the United States." 42 U.S.C.A. 1961 Cum. Supp. sec. 2014 (g).

⁶ 42 U.S.C.A. sec. 2012.

"(e) So utilization f. by the Un energy and in the natio to protect i

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¹ Under section defined as equip capable of mak the health and : in such a mann of production f:

² See 42 U.S. Joint Committe Congress.

³ In 1956 an increased partic in the Atomic 86th Cong. 1st follows:

"S. 4298, 841 would have au

"(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith *is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.*" (Emphasis supplied)

To implement the purpose of the Act, it:

Directs the Commission to arrange for research relating to "the protection of health and the promotion of safety during research and production activities." 42 U.S.C.A. Sec. 2051 (a) (5)

Directs that agreements relative to research and development shall contain provisions "(1) to protect health, (2) to minimize danger of life and property, and (3) to require the reporting and to permit the inspection of work performed thereunder, as the Commission may determine." 42 U.S.C.A. 2051 (d)

Authorizes the Commission to:

"(b) establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or *to protect health or to minimize danger of life or property.*" 42 U.S.C.A. 2201 (Emphasis supplied)

Section 2073, 42 U.S.C.A. relates to standards to protect life and property in connection with distribution of special nuclear material; section 2111 relates to safety standards in connection with byproduct material; and sections 2131-2133 relate to safety standards established by the Commission as a condition of commercial licenses for transfer or receiving in interstate commerce, manufacturing, producing, transferring, acquiring, possessing, using or exporting any utilization or production facility.⁷

Prior to the 1959 amendment the Congressional Joint Committee on Atomic Energy⁸ recognized that clarification by Congress of the respective roles of the Federal, State, and local agencies with respect to health and safety aspects of atomic energy was necessary.⁹ That Committee stated:

⁷ Under section 2014 (aa), 42 U.S.C.A. 1961 Cum. Supp. utilization facility is defined as equipment or device, determined by rule of the Commission, to be capable of making use of special nuclear material in such quantity as to effect the health and safety of the public or adapted for making use of atomic energy in such a manner as to affect the health and safety of the public; See definition of production facility in Section 2014 (t), 42 U.S.C.A. 1961 Cum. Supp.

⁸ See 42 U.S.C.A. Sections 2251 et seq. providing for establishment of the Joint Committee on Atomic Energy and its powers and duties to report to the Congress.

⁹ In 1956 and 1957 bills had been introduced in the Congress dealing with increased participation by States in the exercise of their traditional police powers in the Atomic energy field. They were summarized in Senate Report No. 870, 86th Cong. 1st Sess. (U.S. Code Cong. and Administrative News, p. 2875) as follows:

"S. 4298, 84th Congress, 2d session, introduced by Senator Anderson in 1956, would have authorized the Commission to enter into compacts or agreements

"* * * with respect to health and safety, the act does not expressly state whether Congress intended, by its enactment, to leave room for State regulation of radiation sources licensed by AEC, and if so, over what types of sources and to what extent. A number of excellent law review articles have ably discussed the constitutional question of whether Congress has 'preempted the field' of health and safety regulations to the exclusion of the States, or whether room is permitted for concurrent 'nonconflicting' regulation by the States over radiation sources on which AEC licenses are required. In any event, in view of the increasing interests, activities and regulations by many State governments, many commentators have urged congressional clarification of the respective roles of Federal, State, and local agencies, rather than leaving the question for a case-by-case determination by the courts."¹⁰

In 1959, the Congress added Section 274 to the Atomic Energy Act of 1954¹¹ which except as to certain responsibilities¹² authorized the Commission to relinquish to the States under agreement the Commission's regulatory authority with respect to byproduct materials; source materials; and special nuclear materials in quantities not sufficient to form a critical mass.

The basic question posed by your inquiry is whether or not the so-called "turn over agreement" with the AEC is necessary before state agencies may exercise health and safety control over source, special nuclear and byproduct materials used within the State of Michigan.

At the outset it must be kept in mind that the Act does not cover regulation of activities of a licensee of the Commission for purposes other than radiation protection. Subsection (k) of Section 2021, of 42 U.S.C.A., provides:

'delineating the separate responsibilities' of the AEC and the States with respect to health and safety aspects of activities licensed under the act, and to transfer to States such regulatory authority as it finds them competent to assume. H.R. 8676, 84th Congress, 2d session, introduced by Congressman Durham in 1956, would have directed the AEC to transfer jurisdiction over health and safety in areas in which a Governor certifies that his State has a competent agency, within 6 months after receiving such certification.

"The AEC-proposed bill, forwarded to the Joint Committee in late June 1957, would have authorized concurrent radiation safety standards to be enforced by the States 'not in conflict' with those of the AEC. It provided that the States might adopt, inspect against, and enforce radiation standards for the protection of health and safety in areas regulated by AEC. Thus, the bill proposed by the AEC in 1957 would have permitted dual regulation by both Federal and State Governments of byproduct, source, and special nuclear materials for protection against radiation hazards."

¹⁰Joint Committee on Atomic Energy, "Selected Material on Federal-State Cooperation in the Atomic Energy Field." (Committee Print—86th Congress, 1st Sess.) pages 3-4.

¹¹42 U.S.C.A. 1961 Cum. Supp. Sec. 2021.

¹²Same Sec. 2021 (c).

"Nothing in this act shall prevent any State or local agency from exercising protection against"

We have approached Congress has the Commission safety aspects of radiation grounded upon its power, its power to regulate defense, and probably the Energy Act, as last a question of Congressional safety by Federal, State

We are convinced that the history of the 1959 act and meaning,"¹³ Congressional responsibility for regulation health and safety in the and special nuclear materials Commission and that for limited relinquishment.

We are not in a position to scope of the act, which hazards. But the opinion categories of radiation radiation emitting elements the definition of "source machines, including fluid"

¹³Senate Report 870 tended to make it clear activities of AEC licensee other than radiation exclusive authority to time as the State enters responsibility."

¹⁴U. S. Const., Art. I, decided because of the the final analysis, the time as conflicts arise cause of the breadth and thus the final answer

¹⁵U. S. Const., Art. I, For discussion of Radiation Hazards: A p. 41 et seq.

¹⁶Lane, Secretary of

¹⁷The Congress has may be interim legislation which provides that other things, "to recognize effectively such material"

"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."¹³ (Emphasis supplied)

We have approached the question you ask upon the assumption that Congress has the Constitutional power to exclusively regulate health and safety aspects of radiation protection of peacetime atomic energy operations grounded upon its power over disposition and use of Government property,¹⁴ its power to regulate interstate commerce,¹⁵ to provide for the common defense, and probably others.¹⁶ Thus assuming that no part of the Atomic Energy Act, as last amended, will be held unconstitutional, it becomes a question of Congressional intent with respect to regulation of health and safety by Federal, State and local agencies.

We are convinced that under the terms of the Act viewed in the legislative history of the 1959 amendment in light of "all that bears upon its purpose and meaning,"¹⁷ Congress intended to place the exclusive and primary responsibility for regulation of radiation hazards for the protection of public health and safety in the peaceful use of atomic energy; i.e., source, byproduct and special nuclear material as defined in the Act in the Atomic Energy Commission and that it has preempted this field of regulation, with provision for limited relinquishment thereof, under the terms of authorized agreements.¹⁸

We are not in a position to determine sources of radiation, outside the scope of the act, which are subject to State regulation, and involve radiation hazards. But the opinion has been expressed that there are at least three categories of radiation sources not covered by the Act, namely, natural radiation emitting elements, such as radium, which are not included in the definition of "source material" in the act; X-ray and gamma ray machines, including fluoroscopes; and radioisotopes produced in high energy

¹³ Senate Report 870, 86th Cong. 1st Sess. states that: "This subsection is intended to make it clear that the bill does not impair the state authority to regulate activities of AEC licensees for the manifold health, safety and economic purposes other than radiation protection. As indicated elsewhere, the Commission has exclusive authority to regulate for protection against radiation hazards until such time as the State enters into an agreement with the Commission to assume such responsibility."

¹⁴ U. S. Const., Art. IV, § 3(2). The broad constitutional question cannot be decided because of the impossibility of deciding such question in a vacuum. In the final analysis, the constitutional question will be decided over a period of time as conflicts arise in various areas of regulation and fact situations. Because of the breadth of the field, it is expected that many conflicts can arise and thus the final answer cannot be found immediately.

¹⁵ U. S. Const., Art. I, § 8(3).

¹⁶ For discussion of this subject see Estep and Adelman, State Control of Radiation Hazards: An Intergovernmental Relations Problem, 60 Mich. L. Rev., p. 41 et seq.

¹⁷ Lane, Secretary of the Interior v. Hoglund, 244 U.S. 175.

¹⁸ The Congress has indicated and recognized that its legislation on this subject may be interim legislation. See 42 U.S.C.A. 1961 Cum. Supp. Sec. 2021 (a) (6) which provides that the purpose of "agreement" provision of the Act is, among other things, "to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable."

machines, such as particle accelerators, and by processes *other than* exposure to radiation in reactors.¹⁹

PROVISIONS OF THE 1959 AMENDMENT

The purpose of the 1959 amendment is set forth in the Act itself (42 U.S.C.A. 1961 Cum. Supp. Sec. 2021 [a]) and we quote therefrom in part:

"(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;"

"(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 by the States;"

Under Section 2021 (b) the Commission is authorized to enter into agreements with a State "for *discontinuance* of the regulatory authority of the Commission" with respect to the following materials within a State: Byproduct, source and special nuclear materials in quantities not sufficient to form a critical mass.

This subsection also expressly provides:

"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.*" (Emphasis supplied)

Section 2021 (c) limits the possible scope of any agreement and provides:

"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 byproducts, source, or special nuclear material as the Commission determines by regulation or order

¹⁹ Selected Materials on Federal-State Cooperation in the Atomic Energy Field, page 3.

Samuel D. Estep and Martin Adelman, State Control of Radiation Hazards: An Intergovernmental Relations Problem, 60 Michigan Law Review, p. 60.

should, because so disposed of (supplied)

The above statutory the regulation of atomic protection of public established beyond 1959 amendment.

Prior to the 1959 made extensive preparations in the atomic volume entitled "Selected Atomic Energy Field" which were published materials on the subject to the Governors of the the factual and legal were expressed, including to.

As a background of the Joint Commission industrial radioactive Development held public compensation.

The Atomic Energy substantially the same some amendments by Committee held public the subject of Federal examination of this thoroughly presented fields of atomic energy

Senate Bill S 2568 Bill H.R. 8755, 86th representatives. The Joint on each bill in identical Report No. 1125 to lieu of the House bill. thereof and particularly

"It is not intended concurrent jurisdiction relating byproduct to have the material or by the State

²⁰ Hearings before Joint see pages 3-4 for outline

should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission." (Emphasis supplied)

LEGISLATIVE HISTORY

The above statutory provisions evidence an intent of Congress to pre-empt the regulation of atomic energy, to the extent covered by the act, for the protection of public health and welfare; and that this intent is clearly established beyond peradventure of doubt by the legislative history of the 1959 amendment.

Prior to the 1959 amendment, the Joint Committee on Atomic Energy made extensive preparations for public hearings on Federal-State relationships in the atomic energy field. The Committee prepared a 520 page volume entitled "Selected Materials on Federal-State Cooperation in the Atomic Energy Field" which contains reports and analyses of the problems which were published for the first time together with re-prints of published materials on the subject. A review of this volume, which was distributed to the Governors of all the States, discloses that differing points of view on the factual and legal aspects of the subject of State and Federal regulation were expressed, including the text of the prior proposed bills above referred to.

As a background for these hearings, the Special Subcommittee on Radiation of the Joint Committee on Atomic Energy held public hearings on industrial radioactive waste disposal and the Subcommittee on Research and Development held public hearings on employee radiation hazards and workmen's compensation.

The Atomic Energy Commission drafted a new proposed bill, which is substantially the same as Senate Bill 2568, 86th Cong. 1st Sess., which after some amendments by the Joint Commission, was later enacted. The Joint Committee held public hearings on this new AEC proposed bill and on the subject of Federal-State cooperation in the atomic energy field. An examination of this hearing discloses all aspects of this subject were thoroughly presented to the Committee by outstanding authorities in the fields of atomic energy, health and law.²⁰

Senate Bill S 2568 (later the 1959 amendment) and an identical House Bill H.R. 8755, 86th Cong. 1st Sess., was introduced in the House of Representatives. The Joint Committee on Atomic Energy reported favorably on each bill in identical reports, being Senate Report No. 870 and House Report No. 1125 to accompany each bill. The Senate bill was passed in lieu of the House bill. These reports advised the Congress on each provision thereof and particularly as follows:

"It is not intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source, or special nuclear materials. The intent is to have the material regulated and licensed either by the Commission, or by the State and local governments, but not by both. The bill is

²⁰ Hearings before Joint Committee on Atomic Energy, 86th Cong. 1st Sess. see pages 3-4 for outline of subjects and list of witnesses.

intended to encourage States to increase their knowledge and capacities, and to enter into agreements to assume regulatory responsibilities over such materials.

"The Joint Committee believes it important to emphasize that the radiation standards adopted by States under the agreements of this bill should either be identical or compatible with those of the Federal Government. For this reason the committee removed the language 'to the extent feasible' in subsection g. of the original AEC bill considered at hearings from May 19 to 22, 1959. The committee recognizes the importance of the testimony before it by numerous witnesses of the dangers of conflicting, overlapping, and inconsistent standards in different jurisdictions, to the hinderance of industry and jeopardy of public safety."

COOPERATIVE AGREEMENTS

The cooperative agreement contemplated by this Act (42 U.S.C.A. Sec. 2021) is basically for the State's assumption of full and complete regulation of those atomic materials covered by the agreement and to the extent found compatible with the Atomic Energy Commission's program (by the Commission) for the protection of public health and safety from radiation hazards. The State's program, under the agreement, must meet the approval of the Commission both as to the standards to be enforced and adequacy. To this end, the Commission is authorized to cooperate with States in formulating standards of protection, to provide training of State personnel for inspection and other functions, and to render other appropriate assistance to the State or its subdivisions.

The Act provides that the agreement is to be entered into with the Governor of the State, who is required to certify "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."

CONCLUSION

There is no blanket basis for the Federal Government's exercise of police power, as such, in connection with atomic energy; and its authority in this field over a specific operation must find as its basis the Federal Government's power over its property, commerce, national security or other granted power. As atomic energy is more widely used by industry, instances will arise challenging the Federal Government's power in connection with some particular safety regulation. Should it be found that the Federal Government is powerless in a specific operation, the public might be left unprotected in the absence of operative State regulations.

The limits of the field covered by the Federal Atomic Energy Act are not static but subject to change by the Commission through its definition of "special nuclear material." There is an area of radiation not covered by the Act over which the inherent power of the State to protect the health and safety of the public is operative. It will require the constant vigilance

of qualified scientists to Federal power to regulate exercise thereof.

To answer the specific "turn over" agreement to exercise health and safety use, in Michigan, of the in the Federal Atomic nuclear materials.

1. At the present time Governor to enter into a Governments has done and these are available for

2. There must be an of radioactive hazards public Resources Commission and has issued orders radioactive waste. The limiting the use of radioactive of ionizing regulation public of 1919 as amended. If present laws are sufficient

3. In the event that work is not provided, it providing for a regulatory commission or other type has prepared several drafts and these can be used as

4. We attach copies Resources Commission the latest bill regulating ture and copies of model which can be used for

of qualified scientists to determine the areas included and excluded from Federal power to regulate under the Act irrespective of the Commission's exercise thereof.

To answer the specific question you ask, it is now our opinion that a "turn over" agreement is necessary for the State of Michigan to lawfully exercise health and safety control over radiation hazards arising out of the use, in Michigan, of those radiation sources from atomic energy defined in the Federal Atomic Energy Act being source, byproduct and special nuclear materials.

RECOMMENDATIONS

1. At the present time there is no statutory authority empowering the Governor to enter into an agreement with the AEC. The Council of State Governments has done considerable work on drafts of model legislation, and these are available for State use.
2. There must be an adequate statutory framework for State regulation of radioactive hazards pursuant to the agreement. At the present time Water Resources Commission is operating under Act 245, Public Acts of 1929, and has issued orders pursuant to such Act regulating the disposal of radioactive waste. The Health Department has enacted regulations governing the use of radioactive isotopes, x-ray radiation and all other forms of ionizing regulation passed under the authority of Act 146, Public Acts of 1919 as amended. It will be necessary to determine whether or not the present laws are sufficient to satisfy the needs of AEC.
3. In the event that the AEC determines that sufficient statutory framework is not provided, it will be necessary for the State to enact a statute providing for a regulatory framework consisting of either a coordinator, a commission or other type of structure. The Council of State Governments has prepared several drafts of legislation meeting the needs of the AEC, and these can be used as models for the preparation for the legislation.
4. We attach copies of reports by the Health Department and Water Resources Commission indicating their activities together with a copy of the latest bill regulating radiation hazards formerly proposed in our legislature and copies of model acts as prepared by Council of State Governments which can be used for the preparation of necessary legislation.

FRANK J. KELLEY,
Attorney General.

Library References

Infants \S 16 et seq.
States \S 6, 123.

C.J.S. Infants \S 93 et seq.
C.J.S. States \S 10, 156.

3.706 Enforcement of compact

Sec. 6. The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdiction. P.A.1958, No. 203, \S 6, Eff. Sept. 13.

Library References

Infants \S 16 et seq.
States \S 6.

C.J.S. Infants \S 93 et seq.
C.J.S. States \S 10.

IONIZING RADIATION

Caption editorially supplied

P.A.1965, No. 54, Imd. Eff. June 18

AN ACT authorizing the governor to enter into agreements with the federal government and the states of the union relative to responsibilities over sources of ionizing radiation.

The People of the State of Michigan enact:

3.801 Agreement for discontinuance of federal responsibility

Sec. 1. The governor, on behalf of the state, is authorized to enter into agreement with the federal government providing for discontinuance of certain of the federal government's responsibilities with respect to sources of ionizing radiation and the assumption thereof by this state pursuant to Public Laws 86-373, federal-state amendments to the atomic energy act of 1954.¹ Such agreements shall become effective only when ratified by law. P.A.1965, No. 54, \S 1, Imd. Eff. June 18.

¹ 42 U.S.C.A. \S 2021, 2138.

Library References

States \S 4.19.

C.J.S. States \S 1, 7.

3.802 Agreements with other states

Sec. 2. The governor, on behalf of the state, is authorized to enter into agreements with other states of the union in order to facilitate interstate cooperation in accomplishing the purposes of this act. Such agreements shall become effective only when ratified by law. P.A. 1965, No. 54, \S 2, Imd. Eff. June 18.

Historical Note

Prior Laws:

C.L.1970, § 325.460.

P.A.1972, No. 303, § 10.

Library References

Health and Environment 25.5(7).

C.J.S. Health and Environment §§ 91
et seq., 106 et seq., 129 et seq.**333.13506 Exempted sources and conditions**

Sec. 13506. Sections 13505 and 13515 to 13536¹ do not apply to the following sources or conditions, except as noted:

(a) Electrical or other equipment or material not intended primarily to produce radiation which, by nature of design, does not produce radiation at the point of nearest approach at a weekly rate higher than $\frac{1}{10}$ the appropriate limit generally accepted by the medical profession for any critical organ exposed. The production testing or production servicing of the equipment is not exempt.

(b) A radiation machine during process of manufacture or in storage or transit. The production testing or production servicing of the machine is not exempt.

(c) A radioactive material while being transported under the jurisdiction of and in conformity with regulations adopted by the nuclear regulatory commission or the United States department of transportation, or their successors, specifically applicable to the transportation of such radioactive material.

(d) Sound waves, radio waves, and visible, infrared, or ultraviolet light.

(e) A production or utilization facility, as defined in the federal atomic energy act of 1954, 42 U.S.C. 2011 to 2281, or a source of ionizing radiation used in or in connection with the operation of a production or utilization facility pursuant to a license from the federal nuclear regulatory commission or successor thereto. However, the department may collect radiation data and perform environmental monitoring in connection with the operation of the facility in accordance with this part.

(f) A source material, by-product material, or special nuclear material over which the federal nuclear regulatory commission or a successor thereto has exclusive regulatory jurisdiction under the federal atomic energy act of 1954, which jurisdiction has not been transferred to this state pursuant to an agreement under Act No. 54 of the Public Acts of 1965, being sections 3.801 and 3.802 of the Michigan Compiled Laws.

P.A.1978, No. 368, § 13506, Eff. Sept. 30.

¹ Sections 333.13505, 333.13515 to 333.13536.



U.S. Department
of Transportation

Research and
Special Programs
Administration

400 Seventh Street, S.W.
Washington, D.C. 20590

DOT-E 8359

1. Dow Chemical Company, (DCC), Midland, Michigan is hereby granted an exemption from those provisions of this Department's Hazardous Materials Regulations specified in paragraph 5 below to transport certain radioactive materials short distance within plant over public streets without use of packaging, marking, labeling, placarding and shipping papers that otherwise would be required for transport in commerce. This exemption authorizes transport of radioactive materials in packages or contained in instruments on the public street between the buildings identified in the application provided these movements are under the responsible cognizance or escort of the Radiological Safety Officer, or his designee, for Dow Chemical identified on the by-product material license held by that unit of Dow Chemical Company. This exemption provides no relief from any regulation other than as specifically stated.
2. BASIS. This exemption is based on DCC's letter of application dated January 2, 1980, submitted in accordance with 49 CFR 107.103 and the public proceeding thereon.
3. HAZARDOUS MATERIALS (Descriptor and class). Quantities of radionuclides in the applicant's by-product materials license and those identified in the January 2, 1980 application; Hazard class - radioactive materials.
4. PROPER SHIPPING NAME (49 CFR 172.101). Radioactive material, n.o.s.; Radioactive material, special form, n.o.s.; Radioactive material, limited quantity, n.o.s.; and Radioactive device, n.o.s.
5. REGULATION AFFECTED. 49 CFR Part 172, §§ 173.389-173.398, as applicable; Part 177.
6. MODES OF TRANSPORTATION AUTHORIZED. Motor vehicle.
7. SAFETY CONTROL MEASURES.
 - a. All movements of radioactive materials between the buildings designated in the application shall be conducted under the cognizance or appropriate supervision of the Radiological Safety Officer at times of day other than peak traffic on the street used, and under conditions that will not present unnecessary radiation exposure to the public and the personnel moving the materials.
 - b. All movements of quantities exceeding a Type A quantity shall be escorted by the Radiological Safety Officer or his designated representative who has technical competence to cope with any unanticipated radiological situation that might occur during the movement.

8. SPECIAL PROVISIONS.

a. A copy of this exemption must accompany each movement of materials made under this exemption, and the copy shall show the initialed approval by the Radiological Safety Officer on the day of the movement. The Radiological Safety Officer may designate this responsibility as he deems appropriate provided there is no compromise of radiation safety to the public or personnel associated with the movements.

9. REPORTING REQUIREMENTS. Any incident resulting in release of contents from the packages or instrument or results in unexpected radiation exposure during movements of materials under provisions of this exemption must be reported to the Office of Hazardous Materials Regulation.

10. EXPIRATION DATE. January 31, 1983.

Issued at Washington, D.C.:



Alan I. Roberts
Associate Director for
Hazardous Materials Regulation
Materials Transportation Bureau

MAR 10 1981

(DATE)

Address all inquiries to: Associate Director for Hazardous Materials Regulation, Materials Transportation Bureau, Research and Special Programs Administration, U.S. Department of Transportation, Washington, D.C. 20590. Attention: Exemptions Branch.

Dist: FHWA

STATE OF MICHIGAN
FRANK J. KELLEY, ATTORNEY GENERAL

CONSTITUTION OF MICHIGAN: Art 4, §§ 23, 26, 33

WORDS & PHRASES: "Ratified by law," "law"

FEDERAL STATE RELATIONS: Agreement with federal government concerning assumption of responsibility with respect to sources of ionizing radiation

ATOMIC ENERGY: Agreement with federal government concerning assumption of responsibility with respect to sources of ionizing radiation

An agreement between the state and the federal government providing for assumption by the state of regulation of sources of ionizing radiation becomes effective only when "ratified by law." The term "ratified by law" means a bill passed by the legislature and acted upon by the governor.

Opinion No. 5164

APR 07 1977

Maurice S. Reizen, M.D.
Director
Department of Public Health
3500 North Logan
Lansing, Michigan 48909

You have requested my opinion on the following question:

What is the meaning of "ratified by law" in the Act [1965 PA 54]? Is concurrence of the agreement by branches of the legislature required, or must the agreement be passed as a law?

The phrase "ratified by law" to which you refer appears twice in 1965 PA 54; MCLA 3.801-3.802; MSA 3.27(101-102). The act, in toto, provides:

"Sec. 1. The governor, on behalf of the state, is authorized to enter into agreement with the federal government providing for discontinuance of certain of the federal government's responsibilities with respect to sources of ionizing radiation and the assumption thereof by this state pursuant to Public Laws 86-373, federal-state amendments to the atomic energy act of 1954. Such agreements shall become effective only when ratified by law."

Opinion No. 5164

"Sec. 2. The governor, on behalf of the state, is authorized to enter into agreements with other states of the union in order to facilitate interstate cooperation in accomplishing the purposes of this act. Such agreements shall become effective only when ratified by law." [Emphasis supplied]

It is clear from an examination of Const 1963, art 4, that the term "law is intended to mean the formal and completed process of legislative activity starting with the introduction of a bill and normally ending with the Governor's approval.^[1] Examples which illustrate the intent of the framers of the Constitution to restrict the meaning of the word "law" in the sense in which it is used in 1965 PA 54, supra, include the following excerpts from Const 1963, art 4:

"Sec. 23. The style of the laws shall be: The People of the State of Michigan enact."
[Emphasis supplied]

"Sec. 26. No bill shall be passed or become law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house. . . ." [Emphasis supplied]

"Sec. 33. Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have fourteen days measured in hours and minutes from the time of presentation in which to consider it. If he approves, he shall within that time sign and file it with the secretary of state and it shall become law. . . ." [Emphasis supplied]

In addition to the fact that the above provisions of the Constitution make it clear that the use of the word "law" means a

[1] In the event that the Governor vetoes a bill sent to him by the legislature, such bill may still become law pursuant to the provisions of Const 1963, art 4, § 33 by the reconsideration of

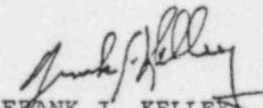
Opinion No. 5164

bill which has been passed by the legislature and acted upon by the Governor, the Supreme Court defined the term in Fennell v Common Council of Bay City, 36 Mich 186, 190 (1877) where the court said:

" . . . The term law, as defined by the elementary writers, emanates from the sovereignty and not from its creatures. The legislative power of the state is vested in the state legislature, and their enactments are the only instruments that can in any proper sense be called laws. . . ." [Second emphases added]

See also, Lobaudo v Department of Corrections, 37 Mich App 171; 194 NW2d 444 (1971), OAG 1967-1968, No 4637, p 241, 242-243 (May 16, 1968).

It is my opinion, therefore, that the term "ratified by law" means an enactment by the legislature and action by the Governor.


FRANK J. KELLEY
Attorney General

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

ATOMIC ENERGY: Control of transport of nuclear waste

PUBLIC HEALTH, DEPT. OF: Control of transport of nuclear waste

UNITED STATES: Preemption of state law

The state is preempted, by congressional enactment of the Atomic Energy Act, from controlling the transport of nuclear waste, spent fuel elements and other radio active materials. This responsibility is under the sole control of the Federal Nuclear Regulatory Commission in the absence of a turnover agreement vesting the state with duties and powers to control such transport.

Opinion No. 4979

Maurice S. Reizen, M.D., Director
Michigan Department of Public Health
3500 North Logan Street
Lansing, Michigan

APR 23 1976

You have asked my opinion on the following:

To what degree is the state preempted by the Nuclear Regulatory Commission and the U. S. Department of Transportation from controlling the transport of nuclear waste, spent fuel elements and other radio active materials; and to what extent does 1972 PA 305, Section 11(c) limit the department's control over such transport?

An analysis of the Atomic Energy Acts of 1946 and 1954, being 60 Stat 755 and 68 Stat 960; 42 USCA 2011 et seq, as well as the 1959 amendment to the Atomic Energy Act of 1954, (73 Stat 688; 42 USCA 2021), specifically as they pertain to the right of a state to enact and enforce health and safety regulations in the nuclear energy field is to be found at OAG 1961-62, No 4073, p 565 (October 31, 1962). Pertinent portions of that opinion are:

"We have approached the question you ask upon the assumption that Congress has the Constitutional power to exclusively regulate health and

safety aspects of radiation protection of peacetime atomic energy operations grounded upon its power over disposition and use of Government property, its power to regulate interstate commerce, to provide for the common defense, and probably others....

"We are convinced that...Congress intended to place the exclusive and primary responsibility for regulation of radiation hazards...in the Atomic Energy Commission and...it has preempted this field of regulation....

"We are not in a position to determine sources of radiation, outside the scope of the act, which are subject to State regulation, and involve radiation hazards. But the opinion has been expressed that there are at least three categories of radiation sources not covered by the Act, namely, natural radiation emitting elements, such as radium, which are not included in the definition of 'source material' in the act; X-ray and gamma ray machines, including fluoroscopes; and radioisotopes produced in high energy machines such as particle accelerators, and by processes other than exposure to radiation in reactors." OAG 1961-62, No 4073, pp 569-570; Emphasis in Original [Citing: 60 Mich L Rev 41, 60]

73 Stat 688, 42 USCA 2021 provides:

"(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 by the States;

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

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

"(b) 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;

"(2) source materials;

"(3) 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."

* * *

Opinion No. 4979

Your question is directed specifically to the transport of nuclear waste, spent fuel elements and other radioactive materials. Clearly, absent a "turnover agreement," there can be no regulation of the transportation of the byproduct, source, or special nuclear waste materials by the State for protection against radiation hazards. Northern States Power Co v Minnesota, 447 F2d 1143, (CA 8, 1971), Aff'd 405 US 1035; 31 L Ed 2d 576; 92 S Ct 1307 (1972). In Northern States Power Co., supra, it was noted:

"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 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 site...'" [Emphasis supplied]
447 F2d 1149

Additionally, it was stated in 60 Mich L Rev, 41, 51, (1961-62) that states can neither authorize nor prohibit shipments once they are in the possession of interstate carriers which are subject to regulations imposed by federal agencies upon interstate carriers which handle shipments of dangerous materials.

It should be noted, however, that 42 USCA 2021(k) recognizes by virtue of the following language the authority of any state or local agency to regulate activities (e.g. transportation) for purposes other than protection against radiation hazards:

Opinion No. 4979

"(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."

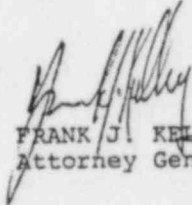
Your question refers to MCLA 325.461(c); MSA 14.528(311)(c), of 1972 PA 305, being MCLA 325.451 et seq; MSA 14.528(301) et seq, and asks the extent to which Section 11(c) limits the department's control over such transportation. This section reads:

"Section 3 to 10 shall not apply to the following sources or conditions except as noted:

* * *

"(c) Any radioactive material while being transported under the jurisdiction of and in conformity with regulations adopted by the federal atomic energy commission or department of transportation, or their successors, specifically applicable to the transportation of such radioactive material."

It is therefore my opinion that the state is preempted from controlling the transport of nuclear waste, spent fuel elements, and other radioactive materials. This responsibility is under the sole control of the Nuclear Regulatory Commission in the absence of a turnover agreement vesting the state with duties and powers pursuant thereto.


FRANK J. KELLEY
Attorney General

ATOMIC ENERGY COMMISSION
BYPRODUCT MATERIAL LICENSE
Supplementary Sheet

Page 4 of 4 Pages

License Number 21-00265-06

Amendment No. 22

(continued)

CONDITIONS

14. Pursuant to Sections 20.106(b) and 20.302, 10 CFR 20, the licensee is authorized to dispose of byproduct material by incineration provided the gaseous effluent from incineration does not exceed the limits specified for air in Appendix B, Table II, 10 CFR 20. Ash residues may be disposed of as ordinary waste provided appropriate surveys pursuant to 20.201 are made to determine that concentrations of byproduct material appearing in the ash residues do not exceed the concentrations (in terms of microcuries per gram) specified for water in Appendix B, Table II, 10 CFR 20.
15. Byproduct material shall not be used in or on human beings, in products distributed to the public or in field applications where activity is released.
16. Except as specifically provided otherwise by this license, the licensee shall possess and use byproduct material described in Items 6, 7, and 8 of this license in accordance with statements, representations, and procedures contained in applications dated April 3, 1956, June 10, 1966 and June 25, 1973; latter dated July 22, 1966, signed by William H. Beamer, and written procedures entitled "Radiation Protection Manual" and telegram dated May 25, 1967 from W. H. Beamer.

Date July 31, 1973

For the U. S. Atomic Energy Commission

Robert B. Beamer
by Materials Branch

Directorate of Licensing
Washington, D. C. 20545

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