

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 05-011

Private Security Guard's Authority to Direct Traffic on Public Roads —
Partial Reconsideration of Attorney General's Opinion No. 03-022

QUESTION

Private security guards work for a private security company that has contracted with the United States Department of Energy (DOE) to provide security services at DOE-owned nuclear facilities. The guards are under the direction of the private security company, which, in turn receives its direction from DOE. May these private security guards direct traffic on public roads crossing DOE-owned land in emergency situations with public health or environmental ramifications when state and local law enforcement personnel are unavailable or unable to perform this function?

OPINION

Assume as follows: (1) a private security guard works for a private security company; (2) the company contracts with the United States Department of Energy to provide protective services at certain DOE facilities where nuclear materials are handled; (3) DOE owns the facilities and the land on which they are built; and (4) state public highways pass through the DOE-owned land. Within these narrow circumstances, a private security guard may direct traffic on the public roads on DOE-owned land when DOE has declared an emergency to public safety and health and local and state law enforcement are not available to direct traffic.

ANALYSIS

In Opinion No. 03-022, this Office concluded that the state Private Protective Services Licensing and Regulatory Act, Tenn. Code Ann. §§ 62-35-101 *et seq.* (the Act), authorizes licensed private security officers to direct traffic on private property but not in the public streets. This opinion dealt with private security guards who are employees of a private contract security company, are paid by the company, and are under the direct supervision of the company to provide security services under a contract between the company and the local, state, or federal government. In the opinion, this Office stated, "The directing of traffic on Tennessee's public streets and roads is the duty and prerogative of police officers who have been invested with that power by law." Op. Tenn. Att'y Gen. No. 03-022 (Feb. 25, 2003).

You have asked whether this conclusion applies to private security guards working for a private security company which has contracted with DOE, in limited nuclear safety emergencies where state and local law enforcement are unable or unavailable to direct the traffic on public roads which run through DOE-owned property or connect DOE-owned facilities. In other words, does federal law on nuclear safety preempt state law prohibiting private security guards from directing traffic on public roads?

You provided the following information: Federal law authorizes DOE to contract with private companies to provide security guards at federal facilities. *See* 42 U.S.C. § 2201(k). At the federal facilities in the Oak Ridge, Tennessee, area, DOE has contracted with a private security company to provide security services. State Highways 95 and 58 run through the DOE-owned property and connect three DOE-owned facilities¹ and provide general public access to the area. In an easement granted by the Atomic Energy Commission to the State, DOE reserved the authority to close Highways 58 and 95.

In certain situations related to nuclear safety and the public's health and safety, DOE may determine that it is necessary to close or limit access to the DOE-owned land and facilities. As a result of DOE's emergency action, the public might have limited or no access to the portions of the public roads that run through the DOE-owned land. Under such circumstances, it is asserted, the private security guards would be responsible for protecting the facilities, including directing traffic on public roads.

In the opinion request, it is asserted that, due to security and public safety concerns, these private security guards must have the authority to direct traffic on the public roads until state and local law enforcement respond to the emergency and arrive on the scene. Further, it is asserted that applicable federal law preempts any state law or regulation that prohibits private security guards from directing traffic on public roads in an emergency situation. If state and local law enforcement were not able to respond or encountered delays in responding, they would not be on site to direct traffic on the public roads. And, if private security guards are then not able, under state law, to direct traffic on public roads, a gap in security and public safety measures could occur.

The Supremacy Clause of the United States Constitution shields the activities of federal installations from direct state regulation unless Congress provides "clear and unambiguous" authorization for such regulation. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988). A presumption against preemption demands that Congress' intent be "clear and manifest." *English v. Gen. Elec. Co.*, 496 U.S. 72, 80 (1990). "Preemption is fundamentally a question of congressional intent." *Id.*, 496 U.S. at 78-79. First, Congress may have expressly preempted state law. *Id.* Second, "[i]n the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 80. Finally, federal law preempts state law where it is impossible for a private party to comply with both

¹ The Oak Ridge National Laboratory, the Y-12 National Security Complex and the East Tennessee Technology Park.

state and federal requirements or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.*

To determine whether federal law preempts state law on the question of whether private security guards may direct traffic on public roads in the case of a DOE-declared emergency at a DOE-owned nuclear facility, we apply the Supreme Court’s preemption tests. First, we have found no express Congressional statement of preemption nor explicit statutory language indicating state law preemption of a state law such as the Act. To the contrary, the Atomic Energy Act anticipates a role “for states to regulate nuclear power plants ‘for purposes other than protection against radiation hazards.’” *Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 199 (1983).

Secondly, we have found no outright or actual conflict between federal and state law. First of all, no conflict would arise if state and local law enforcement were able to respond to the emergency immediately. They would be able to direct traffic on the public roads, and there would be no need for DOE-contracted private security guards to direct traffic. In that case, state and federal law would not conflict, and state law would apply prohibiting private security guards from directing traffic on public roads. Further, the state law at issue governs the licensing of private security companies and private security guards, not nuclear facilities security and safety. The state law’s general effect on nuclear security and safety would be incidental, at most, in normal circumstances.

The Act basically regulates applications and licensing of private security guards and private security companies. The statute includes general and some prohibited conduct. *See* Tenn. Code Ann. § 62-35-127. Federal law also regulates private security guards in certain respects. For example, it requires a private security company to have a safeguard contingency plan, which would involve private security guards such as those who have been described. 10 C.F.R. § 73.55(h); *see also* 10 C.F.R., Part 73, Appendix B. The federal regulations do not speak to directing traffic on public roads. They do not give the federal government authority over state public roads. They do not give private security guards the right to direct traffic on public roads. Also, a relevant federal statute allows certain employees, including employees of contractors engaged in the protection of property at nuclear facilities or transporting nuclear materials, to carry firearms and make arrests without warrants. 42 U.S.C. § 2201(k). Again, the federal statute does not give private security guards authority to direct traffic on state public roads.

Third, as noted, the federal law regulates the field of nuclear safety. *English*, 496 U.S. at 80. Nuclear safety is the “regulation of radiation hazards associated with plants handling nuclear material.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 246 (1984). DOE’s authority over its facilities and property are paramount in the field of nuclear safety. *See, e.g., Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm’n*, 461 U.S. 190, 212 (1983)(The federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.).

Federal government regulatory exclusivity in the field of nuclear safety does not necessarily mean, however, that every state law that may affect nuclear safety decisions made by those who build and run nuclear facilities runs afoul of federal law. *English*, 496 U.S. at 85 (state cause of action for intentional infliction of emotional distress not preempted); *see also Goodyear*, 486 U.S. at 182 (Ohio workers' compensation law not preempted); *Pacific Gas and Elec.*, 461 U.S. at 215 (California statute conditioning authority to build nuclear facility on adequate storage facilities and means of disposal not preempted). For the state law to be preempted, "it [the state law] must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Id.* at 85. State laws supported by nonsafety rationales do not lie within the preempted field of nuclear safety. *Id.* at 85. Furthermore, Congress has encouraged federal cooperation with the states. The Nuclear Regulatory Commission may enter into agreements with states providing for discontinuance of the Commission's regulatory authority with respect to (1) byproduct materials² and (2) source materials and special nuclear materials in quantities not sufficient to form a critical mass. 42 U.S.C. § 2021(a) and (b). Tennessee has such a contract, and, for the contract's duration, the State has the authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards. 42 U.S.C. § 2021(b).

In addition, compliance with both federal and state law is not necessarily impossible. Under normal, nonemergency circumstances, private security guards may control private roads on the federally-owned land and at the federally-owned nuclear facilities. State officers would direct traffic on the public roads. In an emergency situation, the private security guards would not, however, need to direct traffic on public roads where state or local law enforcement personnel were available and responded to the emergency situation.

On the other hand, state regulation might be a barrier to accomplishment of the federal law's objectives in narrow circumstances. State law that prohibits private security guards from directing traffic on public roads could become an obstacle to DOE's exercise of its responsibilities on nuclear safety, and thus the accomplishment and execution of Congressional objectives, under certain circumstances. If DOE declared a nuclear safety emergency that necessitated closing or diverting public traffic from the public roads connecting its facilities, and if local law enforcement were not available to direct the traffic, a gap in security could result.

Depending on the specific facts and circumstances, a court could conclude that federal law giving DOE exclusive jurisdiction over nuclear safety at DOE-owned facilities preempts state law, and private security guards employed by a private security company under contract with DOE could direct traffic on public roads to the extent necessary to maintain nuclear safety. We think the court

² The term "byproduct materials" is defined in 42 U.S.C. §§ 2014(e)(1) and (2).

would closely examine all the facts and circumstances of each particular incident in determining both preemption and the scope of preemption. The court would not presume that Congress has preempted the state law. *E.g., English*, 496 at 80.

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

KATE EYLER
Deputy Attorney General

Requested by:

The Honorable Randy McNally
State Senator
307 War Memorial Bldg.
Nashville, Tennessee 37243-0205