STATE OF MAINE

Inter-Departmental Memorandum Date December 31, 1974

To William R. Adams, Jr., Commissioner — Dept. Environmental Protection
Donaldson Koons, Commissioner — Dept. Conservation
Philip M. Savage, Director — State Planning Office

From Jon A. Lund, Attorney General — Dept. Attorney General

Subject State Regulation of Federal Construction Projects

The United States Air Force proposes to construct and operate a radar system in the State of Maine, consisting of a transmitter to be located in the Town of Moscow and the Plantation of Caratunk and a receiver to be located in an unorganized township in Washington County. Department of Defense Directive No. 5100.50, relating to the "protection and enhancement of environmental quality, with regard to defense components," states that such components

> "are not required to apply for State and local air and water pollution control permits or licenses for the construction or operation of facilities. . ." Id. §VBle.

The Board of Environmental Protection, which has responsibility for issuing land use permits within the organized territories of the State of Maine and air and water pollution permits throughout the state generally; the Department of Conservation, which, through its Land Use Regulation Commission, has primary responsibility for issuing land use permits in the unorganized territories of the state, and, through its Bureau of Public Lands, exercises control over all public lands in the State; and the State Planning Office have asked whether the statement of the law in DOD Directive No. 5100.50 is correct.

It is difficult to answer this question in the absence of more specific facts as to the precise manner in which a state agency might wish to regulate this project. All that can be said at present is that while a state agency may not prohibit the construction of a federal project whose purpose is the protection of the national defense, it may regulate such a project through the imposition of reasonable conditions in permits or licenses for the use of the state's land, air and water, "reasonable" conditions being those which would not interfere with or severly impede the project, but which have as their object the protection of the public health, safety and welfare. The following discussion provides the basis on which this general conclusion rests.

I. Amenability of Federal Construction Projects to State Regulation Generally

In the Boulder Dam case in 1931, Justice Brandeis made the following statement with regard to the amenability of the Federal government to state regulation:

> "The United States may perform its functions without conforming to the police regulations of a State. Johnson v. Maryland, 254 U. S. 51 Hunt v. United States 278 U. S. 96." Arizona v. California 283 U. S. 423, 451 (1931).

This statement is, as an examination of the citations on which it relies will show, based on a long history of Supreme Court doctrine originating with McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316 (1819). The general thrust of this doctrine is that, so long as the Federal government is pursuing one or more of the functions delegated to it by the states in the Constitution (its "enumerated powers,") as those powers are expanded by Article I, Section 8, clause 18 of the Constitution (the "necessary and proper" clause), its acts, by virtue of Article VI, Section 2 of the Constitution (the "supremacy" clause) may not be interfered with by any state, notwithstanding the provisions of the Tenth Amendment of the Constitution which reserves to the states "/t/he powers not delegated to the United States by the Constitution." The Tenth Amendment is thus regarded not as an explicit grant of powers to the states, but as an expression of the fact that the states are the residual repositories of all powers[1/] inhering in government generally which, in the United States, have not been explicitly delegated to the Federal government. Or, as the Court said in United States v. Darby 312 U. S. 100 (1941):

1/ These powers all have as their general purpose the protection of the public health, safety and welfare, and since the 1840's have been known as "police" powers. A history of their origins may be found in Munn v. Illinois, 94 U. S. 113, 124-25 (1876).

> ". . . The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.
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> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." Id. at 124. (citations omitted).

The question, then, when determining the amenability of a particular federal construction project to state regulation is not whether the public health, safety or welfare is so threatened by such action as to justify state action (though every state action must be so justified), but whether there is a basis for the Federal government's activity in the Federal Constitution. In general, Federal activity may be so justified in one of two ways. First, the Federal government may be found to be acting directly, or with the aid of the "necessary and proper" clause, in pursuance of one of its enumerated ends. Second, it is permissable for the Federal government to act in pursuance of an end not enumerated in, but rather extraneous to, the Federal Constitution,

so long as such activity is taken in conjunction with, or incidental to, some action which is in pursuance of an enumerated end. An example of the former might be the construction of a dam for the purpose of facilitating the flow of navigation on a river. An example of the latter might be the construction of a larger dam to enable it to generate hydro-electric power. The first action could be justified as being in furtherance of the regulation of interstate commerce, an enumerated power of the Federal government. The second, which cannot be so justified (the Constitution containing no provision specifically enabling the Federal government to engage in the business of power generation), may, nevertheless, be sustained because it is incidental to an action which does have a basis in the Federal Constitution. The distinction between enumerated and extraneous action is fundamental to any analysis of the propriety of federal construction activity, and any state seeking to determine the extent to which it may interfere with a proposed federal project must take it into account. For a general discussion see Engdahl, Constitutional Power-Federal and State, Chapters I-III (1974).

A. Amenability to State Regulation of Federal Construction Projects Justified as in Pursuance of an Enumerated Power

The general rule, quoted above, is that so long as the Federal government is performing "its functions" (to use Brandeis' word), it is not subject to State police regulation. This raises the question of whether the successful invocation of an enumerated power shuts off state regulation entirely or whether only inconsistent regulation (defined as regulation which, if undertaken, would thwart or seriously impede the federal purpose) is so precluded. There is little law involving federal construction projects on this point. Arizona v. California, supra, does involve such an activity, the Boulder Dam, which was justified as being in furtherance of an enumerated end, the regulation of navigation in interstate commerce. It is clear, however, from a close reading of the case and the arguments presented to the Court that the Arizona State Engineer (whose permit the Federal government refused to seek) was not seeking to regulate the construction of the project, but rather to prohibit it

altogether. Since prohibition of the project was obviously fatal to its accomplishment, the Court declined to require the Federal government to apply for a permit. Oklahoma ex rel. Phillips v. Atkinson Co., 313 U. S. 508 (1941) also involved a federally constructed dam, but did not involve a construction permit; the state simply sought (unsuccessfully) to have construction of the dam enjoined as not in pursuance of an enumerated end. The only other cases which can be found in which states attempted to interfere with federal construction projects are those involving federal housing projects such as: United States v. Chester, 144 F.2d 415 (3rd Cir., 1944) and United States v. City of Philadelphia, 56 F. Supp. 862 (E. D. Pa. 1944), aff'd 147 F.2d 291 (3rd Cir. 1945), in which the Federal government sought to erect temporary but substandard housing for national defense purposes under the Lanham Act during World War II, and Oklahoma City v. Sanders, 94 F.2d 323 (10th Cir. 1938) in which the government sought to construct low income housing pursuant to the National Industrial Recovery Act. In the Lanham Act cases, the local authorities sought not to regulate, but to prohibit the various projects altogether through the refusal of building permits, but the Court found them without power to do so. In Sanders, while the project in question was not justified on the basis of the war powers, and thus possibly subject to state regulation, the State of Oklahoma had ceded jurisdiction over the territory involved (See notes 2 and 4 infra).

In view of the absence of case law on the degree to which a state might regulate (though not prohibit) a federal construction project, it may be profitable to review the well-developed body of law on the somewhat analagous question of federal "pre-emption" of state regulation, or the degree to which a state may regulate in an area which the Federal government is also regulating in pursuance of its enumerated powers. Here the rules are quite plain. A state may regulate in such an area so long as its activities do not conflict with the accomplishment of the federal purpose. Askew v. American Waterways Operators, Inc., 411 U. S. 325, 337-344 (1973); Florida Lime and Avacado Growers v. Paul, 373 U. S. 132, 141-42 (1963); Huron Portland Cement Co. v. Detroit, 362 U. S. 440 442-43 (1960); Exxon v. City of New York, 356 F. Supp. 660 (S. D. N. Y. 1973), and F. Supp. , 4 ELR 20565; Portland Pipe Line

Corp. v. Environmental Improvement Commission, 307 A.2d 1 (Me. 1973), appeal dismissed, 414 U. S. 1035 (1973). See also Penn Dairies, Inc. v. Milk Control Commission of Pa., 318 U. S. 261 (1943). Moreover, even if a conflict does exist, state regulation will not be pre-empted unless the Federal government can be shown to have manifested such an intention. Askew, supra, at 329-337, Mintz v. Baldwin, 289 U. S. 346 (1933). For cases where such an intention was found, see Burbank v. Lockheed Air Terminal, 411 U. S. 624 (1973); Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 230-31 (1947); Northern States Power v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd without opinion, 405 U. S. 1035 (1972).

It may be that the teachings of these cases are relevant to the question of state regulation of federal construction projects, for they seem to imply that so long as such regulation does not conflict with (i. e. thwart or impair) the federal purpose, or if so, so long as the Federal government does not object, such regulation may be undertaken, so long as it is rationally related to the protection of the public health, safety and welfare. There would seem to be no sound policy reason why a state could not be empowered to impose reasonable conditions on a federal project to insure that its citizens will not be harmed by the project. To hold otherwise might be to permit the federal government to select small areas of the country to be subjected to pilot projects of some danger to the local citizenry, in order to test to see whether such projects were, in fact, dangerous.

B. Amenability to State Regulation of Federal Construction Projects Justified as Constitutionally in Pursuance of an Extraneous Power

As indicated above, it is constitutionally possible for the Federal government to take action for a purpose other than one enumerated in the Constitution, even without the aid of the necessary and proper clause. This may occur in a situation where the Federal government is engaging in multi-purpose activity where at least one of the purposes is related, whether directly or through the necessary and proper clause, to an enumerated end. Engdahl, supra, §3.04, citing United States v. Darby, supra at 114-17. There are no cases what-

ever, however, involving an attempt by a state to regulate, or even prohibit, a federal construction project undertaken for extraneous ends. In the analagous area of pre-emption, however, it has been argued that if the Federal government is regulating for a purpose extraneous to the Constitution, a state is not pre-empted from taking action with regard to that purpose, even if such action is inconsistent with the federal action. The reason for this is that the supremacy clause, on which the pre-emption doctrine is based, applied by its terms only to the "Constitution, and the laws of the United States which shall be made in pursuance thereof." (emphasis added). Thus, "federal policies with respect to /matters extraneous to the Constitution,/ effectuated only by the exercise of some enumerated power as a means" do not pre-empt inconsistent state activity.2/ Engdahl, supra, §4.02.

2/ A further refinement of this last point exists with respect to certain clauses of the Constitution which appear, like the necessary and proper clause, to constitute not independent grants of power themselves, but rather grants of specific means to permit the Federal government to achieve its enumerated ends. In this category are the power to tax and spend (Article I, Section 8, clause 1) and the two clauses dealing with acquisition, ownership and regulation of Federal government property (Article I, Section 8, clause 17 and Article IV, Section 3, clause 2). It has been argued that while these powers may be used to promote extraneous ends, when they are so employed, they do not enjoy pre-emptive capability. Engdahl, supra, §§6.08, 7.09, Chapter VIII. Thus, for example, the powers of the Federal government over federally-owned land for purposes extraneous to those enumerated in the Constitution are no greater than any other private proprietor and are, therefore, subordinate to state regulation (so long as the state, pursuant to the Article I property clause, has not ceded general governmental jurisdiction to the Federal government). Colorado v. Toll, 268 U. S. 228 (1925); Kansas v. Colorado, 206 U. S. 46, 92 (1907); Texas Oil & Gas Corp. v. Phillips Petroleum, 277 F. Supp. 366, 368 (D. Okla. 1967), aff'd 406 F.2d 1303 (10th Cir. 1969); Macomber v. Bose, 401 F.2d 545 (9th Cir. 1968).

If this argument is true, the implication of it for state control over federal construction projects is clear. When the Federal government is undertaking such a project in pursuit of ends extraneous to the Constitution, a state (since it may act inconsistently with the federal purpose) may not only regulate, but may actually prohibit the project to the extent that it cannot be justified under the doctrine of enumerated powers. On its face, this result may appear somewhat astonishing, but the severity of that reaction should be tempered somewhat when it is remembered that in situations such as the one described, the Federal government is, by definition, acting in an area reserved by the Constitution to the states, and that while such action is constitutionally permissible, it may be suggested with reason that such action ought not to be undertaken without the consent of the state within whose borders it is to take place.

II. Amenability of the Proposed Air Force Project to Regulation by the State of Maine

In applying these general principles to the proposed federal activity which has given rise to the request for this opinion, the first step is to determine whether the project is being undertaken in furtherance of an end enumerated in or extraneous to the Constitution. The answer here is clear: the construction of a radar system to assist the Air Force in detecting the advance of hostile aircraft bears an obvious and direct relation to the powers vested by the Constitution in the Congress for the protection of the national defense, the so-called "war powers," Article I, Section 8, clauses 11-17.3/ The only questions, then, assuming the aptness of the analogy of the pre-emption cases to the construction area, are

3/ It is of no significance therefore whether the property which the Air Force proposes to use is presently in private or state ownership. As the Supreme Court said in Oklahoma v. Atkinson Co., supra, at 534." /t/he fact that land is owned by a state is no barrier to its condemnation by the United States." The condemnation must simply be in pursuance of an enumerated end and be accompanied by just compensation.

whether the proposed regulation of the activity is inconsistent with the federal purpose and whether the Federal government has manifested its intention to be free from such regulation. These questions are best answered separately for each proposed type of regulation.

A. Land Use Permits

Since the project as proposed will fall in both the organized and unorganized parts of the state, it would, under ordinary conditions, require land use permits from the Board of Environmental Protection, under the Site Location of Development Law, 38 M.R.S.A. §§481, et seq. and the Land Use Regulation Commission, under the provisions of its law regarding permits for the erection of structures in the unorganized territories, 12 M.R.S.A. §685-B. Since the substantive standards in these two laws are nearly identical, compare 38 M.R.S.A. §484 with 12 M.R.S.A. §685-B(4), they may be treated as one for purposes of analysis.

1. Consistency with Federal Purpose. The authorities cited above indicate that a state is forbidden from regulating a federal activity only if such regulations will interfere with the accomplishment of a legitimate federal purpose. Of particular interest here is the following statement by the Supreme Court in Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525 (1885):

> "Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent,4/ they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government,

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4/ (See page 10 for this footnote.)

> such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed." Id. at 539 (emphasis added).

It is difficult to see how merely requiring the Air Force to apply for a land use permit would damage the national defense. On the other hand, it is clear that the Board and Commission would be without power to totally refuse to grant a permit, since to do so would be to completely prevent the construction of a project which has been determined by the Federal government to be necessary to the furtherance of a federal concern. As indicated above, this, in effect, was what the Arizona State Engineer threatened in the Boulder Dam case, Arizona v. California, supra, and perhaps accounts for Justice Brandeis' unqualified statement quoted above, concerning state regulation of federal activity. The narrow issue, then, is whether and to what extent the Board and Commission could impose conditions on the project to insure the public health, safety and welfare. In the absence of any specific conditions, it is impossible

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4/ The State of Maine presently withholds such consent. In 1871 the Legislature enacted a statute which gave general consent to federal acquisition within the state, Laws of Maine of 1871, ch. 648, and in 1903 generally ceded jurisdiction over such areas, except for the service of state process therein. Laws of Maine of 1903, ch. 183. In 1959, however, the Legislature, while retaining the general consent section, 1 M.R.S.A. §15, repealed the provision regarding jurisdiction and replaced it with a new section providing, in pertinent part, that the state should retain "over such land or other area the same legislative jurisdiction which it exercises over land or other areas generally within this State." 1 M.R.S.A. §9.

to answer this question at this time. It is worth noting, however, that it is difficult to see how any condition imposed pursuant to the statutory standards set forth in either law involved here could in any way seriously hinder the accomplishment of the federal purpose.

2. Federal Intention to be Free from State Regulation. Both the legislation authorizing the proposed project, the Department of Defense Appropriation Authorization Act of 1975, Pub. L. 93-365 (1974), and the legislation appropriating funds for the project, the Department of Defense Appropriation Act of 1975, Pub. L. 93-437 (1974), are silent as to whether the Congress intended to exempt the project from state regulation, as distinguished, for example, from the defense related legislation in United States v. Chester, supra, where such an intention was made explicit. The problem, then, is to determine what effect to give this silence. The first point to be made is that, of course, a federal failure to exempt itself from state regulation does not mean that the state may turn around and prohibit the federal facility. The Supreme Court authorities cited above for the proposition that the Congress must express its intention in order to pre-empt (Askew v. American Waterways Operators, Inc., Mintz v. Baldwin) merely sustain concurrent state regulation. The State of Maine, therefore, could not prohibit the construction of the Air Force project even if the Congress is silent as to exemption from state interference. The question, then, is once again raised: how far can the state go in imposing restrictions on the project which are reasonably related to protecting the health, safety and welfare of its people. As in the preceding section of this opinion, it is difficult to answer this in the absence of a specific proposal. At the very least, the Congress' silence must be interpreted to mean that the federal government is amenable to and might be required to make some modification of its plans, short of seriously impeding the entire project, to accommodate legitimate state interests.

B. Water and Air Licenses

1. Consistency with Federal Purpose. The same analysis set forth with regard to land use permits applies with regard to water and air licenses. Restrictions as to water and air emissions may be imposed on the Air Force facility so long as they do not interfere with or seriously impede the federal purpose, and it is

difficult to see how either the mere act of applying for a permit or even the imposition of effluent or discharge limitations on the activity would so interfere or impede. In the absence of specific proposed conditions, however, the question cannot be answered with finality.

2. Federal Intention to be Free from State Interference. Far from expressing its intention that federal facilities be free from state regulation of their water and air discharges, the Congress has, in two separate statutes, indicated its affirmative desire that such facilities be subject to state law. Section 118 of the Clean Air Act Amendments of 1970, 42 U.S.C. §1857f, provides:

> "Each department, agency and instrumentality of the executive, legislative, and judicial branches of the Federal government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements."

A similar provision with respect to water is contained in Section 313 of the Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1323. The phrase requiring federal facilities to "comply with . . . state . . . requirements" has been held to require such facilities to apply for state permits (in a case involving the Department of the Army.). Alabama v. Seeber, F.2d , (5th Cir., Oct. 14, 1974).5/ It thus seems beyond question that the Air Force is obliged to apply for state air and water licenses for its radar system

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5/ (See page 13 for this footnote.)

facility, and, if it does not, the state may prohibit the unlicensed discharge of air contaminants and waste water from such facility.

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5/ In interpreting Section 118 of the Clean Air Act, the Fifth Circuit reached a different result from an opinion of the Sixth Circuit in Kentucky v. Ruckleshaus, 497 F.2d 1172 (6th Cir. 1974), and a conclusory opinion of a California District Court in California v. Stastny, 2 ELR 20561 (C. D. Cal. 1972). An appeal of the Stastny decision is pending.