JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 28, 1984

Honorable Dennis L. Dutremble
Maine State Senate
State House Station #3
Augusta, Maine 04333

Honorable Edith S. Beaulieu
Maine House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Senator Dutremble and Representative Beaulieu:

Legislative Document 1935, "An Act Relating to Occupational Safety and Health of Agricultural Workers," proposes to transfer the authority to regulate safety and health conditions of agricultural employment from Maine's Commissioner of Agriculture to Maine's Commissioner of Labor. You have asked, on behalf of the Joint Standing Committee on Labor, whether the federal Occupational Safety and Health Act of 1970 (OSHA) preempts any assertion of state jurisdiction over agricultural worker safety and health conditions, such as L.D. 1935 contemplates, and more specifically, whether OSHA would preempt state standards regulating field sanitation conditions affecting agricultural workers.

As explained below, it is the Opinion of this Department that OSHA and regulations issued pursuant to it do not ipso facto override the power that would be vested in the

Commissioner of Labor by L.D. 1935. Depending on the subject matter, however, particular exercises of the power could be preempted by federal OSHA standards governing the same occupational issues. On the limited question of whether OSHA regulations preempt state standards regulating field sanitation conditions for agricultural workers, it is the Opinion of this Department that such regulations would not at this time be preempted by OSHA standards.

By virtue of its powers under the Commerce Clause, Art. I, § 8, and the operation of the Supremacy Clause, Article VI, cl. 2, Congress has the power to override state regulation of a particular subject area. Congress may do so expressly; or its intent to do so may be inferred from statutory structure and purpose, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), from the blanket authority given to a federal agency to regulate the subject, or from the necessity for exclusive federal control of the area. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The determinative factor, in this is whether Congress intended to preempt state regulation of the field.1/

When the provisions of OSHA are evaluated with these principles in mind, it is evident that Congress expressly did not intend to oust all state regulatory authority over safety and health conditions of agricultural workers. OSHA does authorize the Secretary of Labor to issue standards governing health and safety in the work place, 29 U.S.C. § 655, and the Secretary has construed his authority to extend to agricultural workers by issuing regulations governing sanitation practices in temporary labor camps. 29 C.F.R. § 1910.142; see Secretary of Labor v. C. R. Burnett & Sons, Inc., OSHRC Dkt. No. 78-1103 (Nov. 3, 1980). But OSHA also expressly contemplates continuing state regulation over worker safety and health conditions. 29 U.S.C. § 667(b) through (h) authorize the various states to submit, and the Secretary of Labor to approve, state plans to develop and enforce health and safety requirements in areas where the Secretary has already issued

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1/ Even when Congress does not intend to preempt all state regulation in a particular area, state regulations that actually conflict with a federal statute or valid federal regulation, or that thwart the purposes of the federal regulation, are nullified. See Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141, 152-54 (1982). But as our attention has not been drawn to any conflicting federal statutes or regulations on the matter of field sanitation for agricultural workers, we find no such grounds for preemption.

federal regulations. The states can impose stricter requirements in such plans; in fact, to approve such plans, the Secretary must find that the state standards "are or will be at least as effective in providing safe and healthful employment as the standards promulgated [by the Secretary] under this title which relate to the same issues, . . ." 29 U.S.C. § 667(c)(2).

For states without a Secretary-approved plan, OSHA prescribes a more limited regulatory role. 29 U.S.C. § 667(a) reserves to such states the power to "assert . . . jurisdiction under State law over any occupational safety or health issue with respect to which no standard [issued by the Secretary of Labor under 29 U.S.C. § 655] is in effect . . ." (emphasis added). The courts have indicated in their decisions to date that this statutory reservation means what it says: that states without a Secretary-approved plan still may regulate occupational safety and health conditions where the Secretary has elected not to do so. See Robinson Pipe & Cleaning Co. v. Department of Labor & Ind., 2 OSHC 1114, 1116 (D.N.J. 1974) ("State regulations remain in effect for those aspects of the occupational safety and health field not touched by federal regulation."); Green Mt. Power Corp. v.. Commission of Labor & Ind., 383 A..2d 1046, 1051 (D. Vt. 1979) ("Nothing in the Act prevents any state from asserting jurisdiction, under state law, over any occupational safety or health issue with respect to which no federal standard is in effect"); United Airlines v. Occupational Safety, Etc., 187 Cal. Rptr. 387, 393-94, 654 P.2d 157 (Cal. 1982) ("a state may continue enforcement of its own standards if no pertinent standard is in effect . . .").

Maine does not now have in effect a Secretary-approved plan for the development and enforcement of state occupational safety and health standards; and thus Maine's prerogatives to regulate in this field is the more limited option to regulate those "issues" not addressed by federal OSHA regulation.[2/] It follows that L.D. 1935, which would enable the Commissioner of Labor to regulate agricultural work conditions but does not direct him necessarily to regulate matters already covered by OSHA regulations, is not ipso facto nullified by federal law. Only particular exercises of the Commissioner's power, if overlapping in areas already addressed by federal OSHA regulation, could be preempted.

2/ The Code of Federal Regulation, at 29 C.F.R. Pt. 1952, lists the states with approved plans. Maine does not appear on the list.

Whether state regulation of field sanitation conditions is preempted depends on whether this subject is "an occupational safety or health issue" already addressed by OSHA regulations. It appears that the Secretary of Labor has exercised relatively little authority in this area. Part 1928 of 29 C.F.R., entitled "Occupational Safety and Health Standards for Agriculture," prescribes only safety equipment standards for tractors, and expressly incorporates only a very few of the more general OSHA regulations for agricultural workers. In particular, 29 C.F.R. § 1928.21(b) provides that, except for certain enumerated OSHA regulations governing temporary labor camps, storage and handling of anhydrous ammonia, and slow moving vehicles, none of the general OSHA provisions apply to agricultural workers.

There are general OSHA standards specifically pertaining to toilet, handwashing and drinking water facilities in the field. Subpart J of 29 C.F.R., entitled "General Environmental Control," and specifically 29 C.F.R. § 1910.141, entitled "Sanitation," requires employers to provide potable water for drinking, specified numbers of toilet facilities, and handwashing facilities ("lavatories") in all "places of employment." However, as noted above, 29 C.F.R. § 1928.21 exempts agricultural operations from these standards.

There are also OSHA standards pertaining to such facilities for agricultural workers residing in "temporary labor camps." 29 C.F.R. § 1910.142. These require the provision of an adequate water supply "in each camp"; toilet facilities "adequate for the capacity of the camp", and handwashing facilities. These regulations, however, do not by their terms extend to the field.

In the view of this Department, the "temporary labor camp" regulations do not concern the same "issue" that would be addressed by state regulation of field conditions. Some agricultural workers are not covered by these regulations--those who do not live in such camps. For those who are covered, camp sanitation facilities may avail them little while working in the field. For non-agricultural workers, at least, OSHA has made the judgment that toilets at home do not satisfy needs in the workplace; OSHA or a state agency may reach a similar judgment for agricultural workers. In short, since field sanitation regulations would include a larger group of workers than labor camp regulations, and respond to related but distinct needs of such workers, we anticipate that a court would find that the separate regulations concern different "issues" within the meaning of 29 U.S.C.§ 667(a).

Research discloses few court decisions addressing these questions; what little guidance the cases provide reinforces the conclusion that state regulations of field sanitation conditions is not preempted. In Five Migrant Farmworkers v. Hoffman, 345 A.2d 378 (N.J. Super. 1975), the court held that state regulation of sanitary conditions in labor camps was preempted by federal OSHA regulation of labor camp conditions. The court did not consider whether state regulation of field conditions was preempted, but later, in Harrington v. Department of Labor and Industry, 395 A.2d 533 (N.J. Super. 1978), the court upheld state regulation of field conditions against a claim that such regulation, being a part of the same statute as the labor camp regulation nullified in the Five Migrant Farmworkers case, was not severable and therefore likewise a nullity. In the Harrington case, the court expressly noted that "[t]here [was] no contention that the field sanitation provisions are preempted." 395 A.2d at 534. Apparently, in both cases the parties conceded and the court assumed that the Secretary's temporary labor camp regulations concerned a "safety and health issue" different from the state's field sanitation regulations.

No other cases touch so closely on the issue. The decision in West Va. Mfgrs. Assn. v. State of W. Va., 714 F.2d 308 (4th Cir. 1982), illustrates that some courts will give a narrow construction to the preemptive scope of OSHA regulation. In that case, the court noted that state regulations requiring that employers disclose to their employees the presence of hazardous substances in the workplace was not preempted by federal OSHA regulations governing permissible worker exposure level to hazardous wastes. The court affirmed the trial court's ruling that the federal exposure and state disclosure standards had different objects and purposes, and dealt with different "issues" within the meaning of 29 U.S.C. § 667(a).

While not as authoritative as judicial decisions, certain administrative actions undertaken by OSHA and legislative initiatives by several states lend additional support to this conclusion. In 1976, while the sanitation regulations governing non-agricultural workers and temporary labor camps were in effect, the Secretary of Labor proposed new regulations covering field sanitation conditions. 41 Fed. Reg. 17576 (April 27, 1976). These regulations were not adopted, but the very fact they were proposed suggests that, in the Secretary's view, federal OSHA regulations did not then cover field sanitation conditions. Similarly, six states--California,

Connecticut, Florida, New Jersey, Oregon and Texas[3]--now have laws or regulations in effect requiring employers to provide toilets, handwashing facilities and drinking water in the field, and four other states--Idaho, Minnesota, New York and Pennsylvania[4]--have laws or regulations imposing one or more of these requirements. Some of these states do not have Secretary-approved plans, and apparently acted on the assumption that OSHA regulations had not preempted state authority to regulate in this area. In fact, in a recent Advance Notice of Proposed Rulemaking, 48 Fed. Reg. 8493 (March 1, 1983), the Secretary of Labor approvingly noted the efforts of these and other states in "responding to the need for such [sanitation] facilities by developing regulations or guidelines which would require employers to provide drinking water, handwashing facilities, and/or toilets in the field." 48 Fed. Reg. 8494.

To summarize: while the question of preemption will always turn on the facts and circumstances peculiar to a proposed state regulation, this Department is reasonably confident that a court would not find field sanitation regulations preempted by current OSHA regulation of temporary labor camp.[5]

This state of affairs could change in the next several years. Our attention has been drawn to the case of National Congress of Hispanic American Citizens v. Marshall, Dkt. No.

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[3] Cal. Health & Safety Code, §§ 5474.20-5474.29; Cal. Admin. Code, TI 17-8000 et seq.; Conn., Dept. of Health, Public Health Code §§ 19-13-B53; Fla. Admin. Code, § 10D-10.24; N.J. Stat. Ann. § 34:9A-37 et seq.; Ore. Labor Code, § 22-140; Vernon's Civ. State of Tex., Art. 4477-1, §§ 2(f), 3(b) & 19(a) (interpreted by Texas Dept. of Health to include agricultural workers in the field).

[4] 8A Idaho Code §§ 44-1901 et seq. (toilet facilities); Minnesota Stat. Ann. § 181.84 (drinking water); N.Y. Labor Law, § 212 (drinking water); Pa. Stat. Ann., Tit. 43, § 1301..08 (drinking water and toilet faclities).

[5] To confirm the conclusions expressed in this opinion, Assistant Attorney General Robert S. Frank telephoned Mr. Donald McKenzie, the Regional Administrator of OSHA in Boston, Massachusetts, on February 24, 1984. In the course of the conversation, Mr. McKenzie indicated that in his view current OSHA regulations do not preempt state regulation of field sanitation conditions.

73-2142 (D.C. Cir.), in which, after 11 years of litigation, the parties have agreed to a court-ordered consent decree requiring OSHA to "make a good faith effort to complete a field sanitation standard or publish in the Federal Register a determination that no such standard is needed." 48 Fed. Reg. 8495 (March 1, 1983). Under the decree, OSHA is required to propose such standards by January 15, 1984, and decide to adopt or not adopt such standards by February 15, 1985. The January 15 deadline passed without standards having been proposed, but yesterday, under threat of contempt of a Federal judge, the Secretary published proposed standards. [A New York Times article describing yesterday's events is attached]. If and when OSHA chooses to adopt such standards, they will preempt any Maine standards governing the same subject matter in the absence of a Secretary-approved state plan adopted in the interim.

I hope this information is helpful to you and the Committee. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET:sl

cc: Stewart N. Smith, Commissioner
Department of Agriculture
William R. Malloy, Commissioner
Department of Labor

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One ignored a protest by Mrs.

Annapolis.

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Pearson, w— s developing a network of hotels in ored landmark buildings. "Thos— ects were too big."

"We aren . against all development, just the wrong kind," said Mrs. Wright.

Had it not been for Mrs. Wright and

The joke: is wild," said a cartoon in The Capital, an afternoon paper, depicting Mr. Cochran, the dress code's sponsor, as a court jester.

"I really wanted shirts and shoes required all over downtown," said Alderman Cochran.

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Mr. Woods urged mounta to put away their guns for t dents.

OSHA, Under Court Threat, Files Proposed Farm Sanitation Rules

By BEN A. FRANKLIN
Special to The New York Times

WASHINGTON, Feb. 27 — Under a threat of contempt by a Federal judge, the Occupational Safety and Health Administration has taken its second tentative step since it was sued in 1972 to protect the health of farm workers, the largely migrant "stoop laborers" who pick the country's fruits and vegetables.

Proposed regulations on field sanitation, which OSHA estimated would cover 766,000 farmhands, were filed Friday after working hours for publication Wednesday in the Federal Register.

The proposed regulations would require employers of 11 or more farm laborers to provide them with portable toilets and water for drinking and hand-washing.

The regulations were proposed after Federal District Judge June L. Green threatened last week to hold the agency in contempt of court if it did not show proof she had demanded days before from OSHA and the Office of Management and Budget were not stalling. The budget office reviews all proposed Federal regulations.

Part of Settlement

The Labor Department, of which OSHA is a part, had agreed last year in an out-of-court settlement with farm worker advocates to propose regulations by Jan. 16. The settlement followed years of litigation efforts that Judge Green said "belong in Alice in Wonderland's tales: each step forward brings two steps backward."

The Migrant Legal Action Project, a Federally funded advocacy group, sued OSHA in 1972 seeking to force the agency to use its regulatory powers to protect field hands from poor sanitation and exposure to pesticides. Farm workers are excluded from the Federal law guaranteeing "every working man and woman in the nation safe and healthful working conditions."

The rules face hearings and public comment before final regulations may be issued.

The last time field sanitation regulations were proposed was in 1976, under President Ford. But in the face of grower opposition, OSHA never issued any final rules.

The American Farm Bureau Federation, a trade association representing half a million farm employers, has opposed field sanitation regulations as socially and economically unjustified and the result of "Federally funded agitation" by legal advocacy groups.

Need for Rules Questioned

OSHA sounded a similarly questioning tone in 70 pages of legally required preamble to the three and a half pages of regulations, saying there was "serious question" whether available evidence "establishes the need for a field sanitation standard."

"Sufficient data do not currently exist" to support assertions that farm workers are at risk from poor sanitation practices, the preamble says, and voluntary employer action and state regulatory programs may "make a Federal standard unnecessary."

Charles Horowitz, a lawyer at the Migrant Legal Action Program, took note of the lack of action on the 1976 proposals, saying, "We will have to see." But he said, "We are obviously pleased with the proposal. On a scale of 10, this is a 6 or a 7."

Growers to Study Rules

Today, C.H. Fields, one of the farm employers' federation spokesmen here, said the federation would have to study the proposed regulations before assessing whether to oppose them. But he declared that OSHA "can't do this kind of rule-making just based on esthetics — that it's nicer to have a portable toilet in the fields." He said the Government would "have to show that there is a threat to the health and safety of the workers."

"This may not be good public relations," Mr. Fields said, "but we know that in the 12 states that have some kind of state regulation of these matters the workers ignore them."

The preamble notes that although the prevalence of fecal-oral parasitic illness is 2 or 3 percent in the population at large, a study of migrant farm workers found a prevalance of 48 percent. "From an environmental perspective," the preamble says, "the greatest potential problem in the ab sanitation standard is po water or edible crops by fe

The agency estimated that and maintaining the new sa cilities would cost grower $15.5 million and $22.5 mill but would raise the gr worker labor costs only 5 cents a day.

United Press

Students Reassured after Sniping Attack

A teacher hugging a pupil as classes resumed yesterday at the 49th Street Elementary School in Los Angeles where, on Friday, a sniper killed a 10-year-old girl and wounded 13 other people. Charles Jackson, the school's principal, told students at their weekl bly, "I want you to know that you're safe." A fied as Tyrone Mitchell apparently took his life ing into schoolyard from a house across th