

EXHIBIT 1

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FILED

AUG 23 1990

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
CITY OF OAKLAND, CALIFORNIA,
Defendant.

No. C-89-3305 JPV
MEMORANDUM OF OPINION
AND ORDER GRANTING
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
ENTERED IN CIVIL DOCKET

8/24 90

INTRODUCTION

Plaintiff's Motion for Partial Summary Judgment, Defendant's Motion for a Continuance Pursuant to Rule 56(f), and Defendant's Cross-Motion for Summary Judgment were heard on April 27, 1990. Richard C. Stearns of the Department of Justice appeared on behalf of plaintiff. Peter J. Busch of Howard, Rice, Nemerovski, Canady, Robertson & Falk appeared on behalf of defendant. The court has considered the briefs filed by the parties and various amici curiae, as well as the oral arguments of counsel. Good cause appearing, the court now GRANTS plaintiff's motion for partial summary judgment, and DENIES defendant's motions.

BACKGROUND

1
2 The City of Oakland's Nuclear Free Zone Act, Ordinance
3 No. 11062 (the "Ordinance"), was adopted by the voters of
4 Oakland, by initiative, on November 8, 1988. Plaintiff brought
5 suit in September 1989, challenging certain portions of the
6 Ordinance as facially unconstitutional and preempted by certain
7 federal statutes, regulations, and executive orders.

8 The Ordinance prohibits any person, within the City of
9 Oakland, from knowingly engaging in "nuclear weapons work," which
10 is defined as "any work that has as its purpose the development,
11 testing, production, maintenance or storage of nuclear weapons,
12 the components of nuclear weapons, or any secret or classified
13 research or evaluation of nuclear weapons." The definition of a
14 "person" contained in the Ordinance includes the federal
15 government and private firms performing under contract to the
16 federal government.

17 The Ordinance also restricts the transportation of
18 "nuclear weapons or other hazardous radioactive materials"
19 through Oakland, and prohibits any person from reprocessing,
20 storing, dumping, or using "hazardous radioactive materials"
21 within Oakland. Further, the Ordinance prohibits Oakland, except
22 in certain limited situations, from contracting with, investing
23 in any person or company "knowingly engaged in nuclear weapons
24 work," or with their "agent, subsidiary or parent organization."
25 It also bans the operation or construction of nuclear reactors in
26 Oakland, and requires facilities engaged in nuclear weapons work

1 to post signs, "clearly visible to any passing person," bearing
2 the legend "Nuclear Weapons Work Conducted Here." It requires
3 annual reports by persons engaged in activities covered by the
4 Ordinance describing those activities and the "steps being taken
5 to cease such activities within two years" of the Ordinance's
6 passage. It contains civil enforcement provisions, including
7 authorization of citizen suits, and provides criminal penalties
8 for violations of its provisions.

9 Plaintiff attacks those portions of the Ordinance that
10 purport: 1) to prohibit nuclear weapons work; 2) to regulate the
11 use or transportation of nuclear weapons and hazardous
12 radioactive materials; 3) to prohibit, with some exceptions,
13 Oakland from contracting with, or investing in nuclear weapons
14 makers; 4) to prohibit operation and construction of nuclear
15 reactors; 5) to require the posting of signs at facilities
16 engaged in nuclear weapons work; and 6) to require annual reports
17 by persons engaged in activities covered by the Ordinance.

18 Plaintiff does not challenge those portions of the
19 Ordinance that regulate investments by the City of Oakland in
20 United States Treasury securities and that require the posting of
21 "Nuclear Free Zone" signs at city boundaries.

22 Plaintiff asserts in its complaint that various portions
23 of the Ordinance violate the Supremacy Clause (Art. VI, cl. 2),
24 the War Powers Clauses (Art. I, sec. 8, sub. 11-14, and Art. IV,
25 sec. 4), the Commerce Clause (Art. I, sec. 8), the Property
26 Clause (Art. IV, sec. 3, cl. 2), and the Enclave Clause (Art. I,

1 sec. 8, sub. 17) of the United States Constitution. Plaintiff
2 also asserts that various portions of the Ordinance are preempted
3 by the Hazardous Materials Transportation Act, 49 U.S.C. §1801 et
4 seq., and regulations issued thereunder; the Atomic Energy Act,
5 42 U.S.C. §2011 et seq.; and federal regulations, statutes, and
6 executive orders prohibiting the public disclosure of classified
7 and sensitive unclassified information.

8 Plaintiff moved for summary judgment in January, 1990 on
9 all causes of action in its complaint except the second, which
10 alleges that the Ordinance violates the Commerce Clause of the
11 Constitution. The City of Oakland opposed plaintiff's motion,
12 and filed a cross-motion for summary judgment on all causes of
13 action in the complaint and a motion for a continuance to permit
14 discovery on outstanding factual issues. Fed. R. Civ. P. 56(f).

15 On January 29, 1990, plaintiff filed a motion for a
16 protective order staying discovery. Because it appeared that
17 there were threshold legal issues to be resolved, the court
18 granted that motion by order dated February 1, 1990, and stayed
19 discovery pending the outcome of the motions for summary judgment
20 now before the court.

21 DISCUSSION

22 The court finds that there are no genuine issues of
23 material fact, and that good cause exists to grant plaintiff's
24 motion and to deny defendant's motions. The Ordinance taken as a
25 whole is so comprehensive, so complete, so all-encompassing that
26 it cannot help but conflict with the rights and authority of the

1 federal government. In arriving at this conclusion, the court is
2 not unmindful of two important legal considerations. First,
3 whenever possible, statutes should be construed so as to avoid
4 conflict with the Constitution. Second, there is a presumption
5 against preemption of state law by federal law, and generally
6 state laws should be analyzed point by point for actual conflicts
7 with federal law.

8 1. Federalism:

9 By creating a federal system in which power is shared by
10 states and the federal government, and distributed among branches
11 of government, the framers of our Constitution carefully ensured
12 that no single individual or group gained unchecked power. These
13 divisions do not merely preclude the majority from infringing
14 upon the rights of a minority -- they also ensure that a
15 minority, which is locally influential, does not act outside its
16 zone of authority and thereby interfere with the will of the
17 broader majority.

18 Under the framers' plan, a zone of authority is reserved
19 for the states (and derivatively for local governments), and
20 another is granted the federal government. Some matters lie
21 beyond the authority of both the states and the federal
22 government, and others lie within the authority of both.
23 However, where there is a conflict, the federal government, if
24 acting within its demarcated bounds, is supreme. Thus, in
25 McCulloch v. Maryland, 17 U.S. 316, 436 (1819), Chief Justice
26 Marshall wrote: "the states have no power by taxation or

1 otherwise to retard, impede, burden or in any manner control, the
2 operations of the constitutional laws enacted by Congress to
3 carry into execution the powers vested in the general
4 government."

5 Defense policy is clearly within the zone of authority
6 granted the federal government. U. S. Constitution, Art. I, sec.
7 8, sub. 11-14. As to defense policy, the people of the City of
8 Oakland are not without a voice; however, theirs is not the only
9 voice.

10 Thus, to some extent, the people of the City of Oakland
11 sacrifice self-determination. However, absolute self-
12 determination would undermine democracy, as well as the rule of
13 law. In a democracy, those in the minority must sacrifice self-
14 determination and agree to abide by, and live under the law of
15 the majority.

16 An example from history illustrates this point. The
17 Kentucky and Virginia Resolutions, constructed by Thomas
18 Jefferson and James Madison, presumed that any state could render
19 a federal law unenforceable by determining that the law exceeded
20 the limits of federal authority. These resolutions were invoked
21 at the time of the Civil War. If we learned any lesson from that
22 war, it is that localities that have views that differ from those
23 of the nation as a whole may not exempt themselves from the duly
24 enacted laws of the nation.

25 2. Constitutionality of the Ordinance:

26 Among other things, Oakland's Ordinance prohibits nuclear

1 weapons work; regulates the use or transportation of nuclear
2 weapons and hazardous radioactive materials; prohibits, with some
3 exceptions, Oakland from contracting with, or investing in
4 nuclear weapons makers; requires the posting of signs at
5 facilities engaged in nuclear weapons work; and requires annual
6 reports by persons engaged in activities covered by the
7 Ordinance. These provisions, in purpose and effect, interfere
8 with the federal government's constitutional responsibility and
9 authority to provide for the common defense. The exercise of war
10 powers is the exclusive province of the federal government under
11 the Constitution. See Tarble's Case, 80 U.S. 397, 408 (1871).
12 States and localities may not enact legislation that impedes or
13 hinders the national defense, regardless of whether the defense
14 activities are carried out directly by agencies of the federal
15 government, or by private contractors acting as agents of the
16 federal government. As the New York Court of Appeals stated in
17 Fosella v. Dinkins, 494 N.Y.S.2d 878, 880, 110 A.D.2d 227 (N.Y.),
18 aff'd., 66 N.Y.2d 162, 495 N.Y.S.2d 352, 485 N.E.2d 1017 (1985):

19 [a] State or political subdivision of a State may
20 not hinder the Federal Government's deployment of
21 conventional or nuclear weapons within its
22 territory simply because of a concern -- perceived
23 in good faith as it might be -- that the presence
24 of such weapons would constitute a danger to the
25 local population. This becomes apparent when one
26 reflects that if every local government was given
the power to restrict the establishment and
operation of Federal military installations or
weaponry located within its geographic
jurisdiction, the power of the Federal Government
to raise and maintain an army or navy would, as
warned by the United States Supreme Court in
Tarble's Case, be destroyed.

1 In City of Los Angeles v. United States, 355 F.Supp. 461,
2 464 (C.D. Cal. 1972), Los Angeles sought damages from the United
3 States for failure to pay municipal pilotage fees for entering
4 and departing Los Angeles Harbor. All of the vessels listed in
5 the complaint (except two) were United States Naval ships. All
6 were involved in defense related activities. The court ruled for
7 the United States, finding that Los Angeles was impermissibly
8 trying "to regulate and control the manner in which [the United
9 States] shall carry on War or provide for the National Defense."
10 See also Feliciano v. United States, 297 F.Supp 1356 (D.P.R.
11 1956), aff'd., 422 F.2d 943 (1st Cir.), cert. denied, 400 U.S.
12 823 (1970) (Puerto Rico could not render inapplicable executive
13 order that created the Culebra Island Naval Defensive Sea Area).

14 Defendant argues that a local enactment may not be
15 invalidated on the basis of the War Powers Clauses unless the
16 interference with the federal government is direct or
17 substantial. In support of this standard, defendant cites De
18 Canas v. Bica, 424 U.S. 351, 354-55 (1976) (local regulation
19 upheld if it "has some purely speculative and indirect impact" on
20 an exclusive federal power), and Penn Dairies v. Milk Control
21 Commission, 318 U.S. 261, 275 (1943) ("An unexpressed purpose of
22 Congress to set aside statutes of states regulating their
23 internal affairs is not lightly to be inferred and ought not to
24 be implied where the legislative command . . . is ambiguous.").
25 The court disagrees with defendant's statement of the applicable
26 standard.

1 However, even if the standard advanced by defendant
2 applied, the court would reach the same conclusion. The
3 Ordinance's interference with the federal government may be small
4 relative to the global extent of defense operations, and no one
5 would argue that Oakland's Ordinance, in and of itself, poses an
6 insurmountable risk to national security. However, the Ordinance
7 is so broad that it will clearly interfere with United States
8 defense policy directly and substantially.

9 Defendant also cites Arthur D. Little, Inc. v.
10 Commissioner of Health & Hospitals, 395 Mass. 535, 481 N.E.2d 441
11 (1985). In Arthur D. Little, the Supreme Judicial Court of
12 Massachusetts upheld a local prohibition against "testing,
13 storage, transportation and disposal" of five highly toxic
14 chemical warfare agents within city limits. The court noted that
15 "not every regulation which has some incidental effect on a
16 defense program is invalid under the supremacy clause." Id. at
17 449.

18 Without necessarily agreeing with the reasoning or
19 outcome of Arthur D. Little, the court finds it distinguishable.
20 The regulation in Arthur D. Little was a relatively narrow public
21 health and safety regulation. On the other hand, Oakland's much
22 broader Ordinance, which regulates city investments and
23 contracts, and which expresses a general disapproval of nuclear
24 weapons, is clearly designed to interfere with, and encourage
25 change in federal nuclear policy.

26 Finally, defendant cites Board of Trustees v. City of

1 Baltimore, 317 Md. 72, 562 A.2d 720 (1989), in support of its
2 position that the Ordinance's restrictions on contracting and
3 investing are constitutional. In Board of Trustees, the Court of
4 Appeals of Maryland upheld two Baltimore City ordinances
5 requiring Baltimore employee pension systems to divest their
6 holdings in companies doing business in South Africa.

7 However, Board of Trustees did not involve interference
8 with the national defense authority of the United States, and the
9 United States was not a party to the action. Furthermore, in
10 Board of Trustees, the court found that Baltimore's ordinances
11 did not "interfere" with or "frustrate" federal law, and that the
12 effect of the ordinances was "minimal and indirect." Id. at 743,
13 744 and 746. In contrast, Oakland's effort to "punish" firms for
14 performing nuclear weapons work constitutes a direct interference
15 with exclusive federal war powers.

16 The court concludes that those provisions of the
17 Ordinance that prohibit nuclear weapons work; regulate the use or
18 transportation of nuclear weapons and hazardous radioactive
19 materials; prohibit, with some exceptions, Oakland from
20 contracting with, or investing in nuclear weapons makers; require
21 the posting of signs at facilities engaged in nuclear weapons
22 work; and require annual reports by persons engaged in activities
23 covered by the Ordinance, violate the War Powers Clauses of the
24 Constitution.

25 3. Preemption:

26 Various provisions of the Ordinance are also inconsistent

1 with, and preempted by certain federal statutes, regulations, and
2 executive orders. The court recognizes that there is a
3 presumption against preemption of state law by federal law.
4 Furthermore, unless the federal government "evidences an intent
5 to occupy a given field," there must be an actual conflict
6 between state and federal law for the state law to be preempted.
7 Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984).

8 The Ordinance restricts transportation of "nuclear
9 weapons or other hazardous radioactive materials." These
10 provisions are preempted by the Hazardous Materials
11 Transportation Act ("HMTA"), and regulations issued thereunder,
12 which occupy the field of radioactive materials transportation
13 safety. See Department of Transportation Inconsistency Ruling
14 No. IR-30, 55 Fed. Reg. 9678 (March 14, 1990) (finding that the
15 provisions of the Ordinance that apply to the transportation of
16 hazardous materials, including the loading, unloading, and
17 storage incidental to that transportation, are inconsistent with
18 the HMTA and its regulations).

19 The Ordinance also regulates the military applications of
20 atomic energy and the safety aspects of nuclear development. In
21 these respects, it is preempted by the Atomic Energy Act. See 42
22 U.S.C. §§2013(c) and 2021; Silkwood, 464 U.S. at 250; Stokes v.
23 Bechtel North American Power Corp., 614 F.Supp. 732, 739-41
24 (N.D.Cal. 1985). Defendant argues that the City of Oakland may
25 regulate civilian nuclear reactors, and plaintiff concedes in its
26 briefs "that the City has a very limited role to play in the

1 location and construction of civilian nuclear reactors." Reply
2 Memorandum in Support of Plaintiff's Motion for Partial Summary
3 Judgment at 20 n.22. However, the Ordinance extends beyond the
4 bounds of Oakland's limited role.

5 Finally, the reporting provisions of the Ordinance are in
6 actual conflict with, and therefore preempted by, the federal
7 regulations, statutes and executive orders that prohibit the
8 disclosure of classified and sensitive unclassified information.
9 See, e.g., 42 U.S.C. §§2163, 2165, 2168 and 2274; Executive
10 Order 12356 (50 U.S.C. §410 Note) and 10 U.S.C. §130.

11 4. Severability:

12 The Ordinance has a severability provision that provides
13 that "[i]f any section, subsection, paragraph, sentence or word
14 of this [Ordinance] shall be held to be invalid, either on its
15 face or as applied, the invalidity of such provision shall not
16 affect the other sections" Defendant has argued that
17 this severability provision should be applied to retain those
18 portions of the Ordinance that plaintiff does not challenge.

19 So many provisions of the Ordinance are either
20 unconstitutional or preempted that the court could easily
21 conclude that the few provisions that remain cannot stand
22 separate from the whole and still reflect the will of the people.
23 However, this issue is not before the court and will not be
24 addressed at this time. Those portions of the Ordinance that are
25 not challenged by plaintiff shall remain in effect, and are not
26 affected by this order.

ORDER

1
2 Accordingly, IT IS ORDERED AS FOLLOWS:

3 1) The Court declares those portions of the Ordinance
4 that prohibit nuclear weapons work; that regulate the use or
5 transportation of nuclear weapons and hazardous radioactive
6 materials; that prohibit, with some exceptions, Oakland from
7 contracting with, or investing in nuclear weapons makers; that
8 require the posting of signs at facilities engaged in nuclear
9 weapons work; and that require annual reports by persons engaged
10 in activities covered by the Ordinance, facially unconstitutional
11 and invalid, in violation of the War Powers Clauses of the United
12 States Constitution.

13 2) The Court declares those portions of the Ordinance
14 that restrict transportation of nuclear weapons or other
15 hazardous radioactive materials; that regulate the military
16 applications of atomic energy and the safety aspects of nuclear
17 development; and that require reports by persons engaged in
18 activities covered by the Ordinance, preempted by the Hazardous
19 Materials Transportation Act, 42 U.S.C. §1801 et seq., and
20 regulations issued thereunder; the Atomic Energy Act, 42 U.S.C.
21 §2011 et seq.; or federal regulations, statutes and executive
22 orders prohibiting the disclosure of classified information and
23 sensitive unclassified information.

24 3) The Court enjoins enforcement of all substantive
25 provisions of the Ordinance with the exception of Section
26 7(b)(i), (ii) and (iii) (which relate to investment by the City

1 of Oakland in United States Treasury securities), and with the
2 exception of that portion of Section 9(a) that requires the
3 posting of signs on city streets at the city boundary.

4 4) Plaintiff's Motion for Partial Summary Judgment is
5 GRANTED.

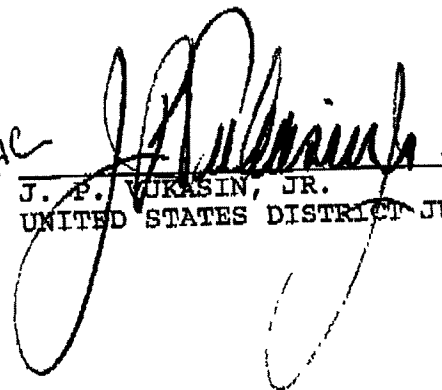
6 5) While plaintiff does not move for summary judgment on
7 its second cause of action, that cause of action, which alleges
8 that portions of the Ordinance violate the Commerce Clause, is
9 moot as a result of this order.

10 6) Defendant's Motion for a Continuance pursuant to Rule
11 56(f) is DENIED.

12 7) Defendant's Cross-Motion for Summary Judgment is
13 DENIED.

14 IT IS SO ORDERED
AUG 20 1990

15 DATED: _____

JHC


J. P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE

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AUG 23 1990

**RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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**UNITED STATES OF AMERICA,
Plaintiff,
v.
CITY OF OAKLAND, CALIFORNIA,
Defendant.**

No. C-89-3305 JPV

JUDGMENT

ENTERED IN CIVIL BOOKET

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Pursuant to and in accordance with this court's Order dated August 20, 1990 granting plaintiff's Motion for Partial Summary Judgment, judgment is hereby entered in favor of plaintiff and against defendant.

IT IS SO ORDERED

DATED: AUG 26 1990

J.P. Vukasin

J. P. VUKASIN, JR.
UNITED STATES DISTRICT JUDGE