



COMMONWEALTH of VIRGINIA

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The Honorable Donald W. Merricks
Member, House of Delegates
Post Office Box K
Chatham, Virginia 24531

Dear Delegate Merricks:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You ask whether a locality may: (i) limit or restrict uranium mining to certain zoning districts; (ii) implement more stringent air and water quality standards than those permitted by state and federal law; (iii) require additional bonding for uranium mine reclamation purposes in addition to or beyond those required by state and federal law; (iv) impose civil penalties or liability for depreciation in the value of real estate located within a defined geographic area of a uranium mining operation site; and (v) impose civil penalties or liability for loss of revenue by agriculturally based operations due to cancellation, rescission, or modification of agriculturally based contracts due to uranium mining.

Response

It is my opinion that a locality currently cannot regulate uranium mining in any fashion because uranium mining is not a permitted activity within the Commonwealth. It is further my opinion that, should the General Assembly act to permit and provide for the regulation of uranium mining, a locality's authority related to uranium mining will depend upon federal and state law in effect at that time, including the enabling legislation for uranium mining enacted by the General Assembly. It is further my opinion, as detailed below, that a locality does not have authority under existing federal and state law to take certain of the actions about which you inquire.

Background

Section 45.1-283 of the *Code of Virginia* provides, "[n]otwithstanding any other provision of law, permit applications for uranium mining shall not be accepted by any agency of the Commonwealth prior to July 1, 1984, and until a program for permitting uranium mining is established by statute." Currently, there is no program for the permitting of uranium mining within the Commonwealth. The Department of Mines, Minerals and Energy, in consultation with the Virginia Department of Health, permits exploration

activity for uranium mining,¹ but no agency of the Commonwealth accepts applications for the actual mining of uranium.

On January 19, 2012, the Governor issued a directive to establish a Uranium Working Group to “provide a scientific policy analysis to help the General Assembly assess whether the moratorium on uranium mining in the Commonwealth should be lifted, and if so, how best to do so.”² The Governor’s directive enumerated eighteen tasks for the working group to complete, including the creation of a draft statutory and conceptual regulatory framework.³ The working group presented its report to the Governor on November 30, 2012.⁴

Legislation to permit and regulate uranium mining was introduced in the 2013 Session of the General Assembly, however, it did not pass.⁵

Applicable Law and Discussion

The Constitution of Virginia allows the General Assembly to confer broad authority on local governments relating to the welfare of its citizens, through the shared exercise of the Commonwealth’s general “police power.”⁶ Virginia, however, follows the Dillon Rule of strict construction with respect to the existence of local authority.⁷ The Dillon Rule provides that “municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”⁸ Its corollary states that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication.”⁹ The Dillon Rule is applicable to the initial determination of whether a local power exists at all and “[i]f the power cannot be found, the inquiry is at an end.”¹⁰ Therefore, to have the authority to act in a certain subject matter area, local governments must have express enabling legislation or authority that is necessarily implied from expressly granted powers.

¹ See VA. CODE ANN. § 45.1-278 (2002).

² Governor of Virginia, Directive Re: Establishment of Uranium Working Group (Jan. 19, 2012), available at <http://www.governor.virginia.gov/utility/media/Governor%27s%20Directive.pdf>.

³ *Id.*

⁴ See VA. DEP’T OF MINES, MINERALS & ENERGY, VA. DEP’T OF ENVTL. QUALITY, VA. DEP’T OF HEALTH, COMMONWEALTH OF VIRGINIA 2012 URANIUM WORKING GROUP REPORT (2012), available at <http://www.governor.virginia.gov/utility/docs/UWG%20Report%20-%20FINAL%2030Nov2012.pdf>.

⁵ See S.B. 1353, 2013 Reg. Sess. (Va.), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=131&typ=bil&val=SB1353>.

⁶ See VA. CONST. art. VII, § 3; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (noting that local zoning ordinances “must find their justification in some aspect of the police power, asserted for the public welfare.”).

⁷ *Commonwealth v. County Bd.*, 217 Va. 558, 573-575, 232 S.E.2d 30, 40-41 (1977); see also *City of Richmond v. Bd. of Supvrs.*, 199 Va. 679, 684-85, 101 S.E.2d 641, 644-45 (1958); 2005 Op. Va. Att’y Gen. 54, 55.

⁸ *Bd. of Supvrs. v. Countryside Investment Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting *Chesapeake v. Gardner Enters.*, 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997)).

⁹ *County Bd. v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); accord *Advanced Towing Co., LLC v. Fairfax County Bd. of Supervisors*, 280 Va. 187, 193, 694 S.E.2d 621, 624, *cert. denied*, 131 S. Ct. 524 (2010).

¹⁰ *Commonwealth*, 217 Va. at 575, 232 S.E.2d at 41; accord *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 416-17, 690 S.E.2d 84, 88 (2010); 2005 Op. Va. Att’y Gen. 54, 55.

State law also may block local authority in three ways: (1) preemption through explicit statutory language; (2) conflict preemption – a local government may not exercise its police power by adopting a local law inconsistent with constitutional or general state law;¹¹ and (3) field preemption – a locality may not exercise its police power when the legislature has preempted the area of regulation through a comprehensive state program.¹² The legislative intent to preempt may be stated expressly, but need not be: “It is enough that the legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area.”¹³ Federal law may preempt state and local action in legally analogous ways.¹⁴

Conflict preemption ensures that local enactments are consistent with the laws of the Commonwealth. The “fundamental rule is that local ordinances must conform to and ‘not be inconsistent with’ the public policy of the State as set forth in its statutes.”¹⁵ Thus, a locality may not “attempt to authorize ... what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required.”¹⁶ Ordinances and the laws of the Commonwealth must be able to “coexist;” they “are not deemed inconsistent because of mere lack of uniformity in detail.”¹⁷

Field preemption is an exception to the general rule that it is possible to have concurrent state and local jurisdiction over the same subject matter. The mere fact that the State, in the exercise of its police power, has made regulations with respect to a subject does not prohibit a locality from legislating on the

¹¹ See VA. CODE ANN. § 1-248 (2011); *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576, 727 S.E.2d 40, 44 (2012) (“when a statute enacted by the General Assembly conflicts with an ordinance enacted by a local governing body, the statute must prevail”); *Allen v. City of Norfolk*, 195 Va. 844, 848-49, 80 S.E.2d 605, 607 (1954) (finding invalid a city ordinance that added a material provision not found in the authorizing statute). See also 2008 Op. Va. Att’y Gen. 90 and cases cited therein (opining that a college, through its board of visitors, has express and implied power to act as necessary to effectuate its powers expressly granted, but that authority does not supersede statutes concerning specific topics).

¹² See *City of Lynchburg v. Dominion Theatres Inc.*, 175 Va. 35, 42-43, 7 S.E.2d 157, 160 (1940); *New York State Club Ass’n v. City of New York*, 505 N.E.2d 915, 917 (N.Y. 1987), *aff’d*, 487 U.S. 1 (1988). See also 2002 Op. Va. Att’y Gen. 67, 69 (opining that “the state occupies the field of sewage sludge disposal, treatment and management” and a local ordinance “is preempted by the comprehensive state program”); 1983-84 Op. Va. Att’y Gen. 86, 87 (opining that the Commonwealth and a county “may have concurrent jurisdiction over the same subject matter, and the fact that the State, in the exercise of its police power, has made regulations with respect to a subject does not prohibit a county from legislating on the same subject, unless the State regulations are so comprehensive that the State may be considered to occupy the ‘entire field’ of such regulation.”).

¹³ *New York State Club Ass’n*, 505 N.E.2d at 917.

¹⁴ See e.g., *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990).

¹⁵ *Klingbeil Mgmt. Group Co. v. Vito*, 233 Va. 445, 449, 357 S.E.2d 200, 202 (1987) (citing *King v. County of Arlington*, 195 Va. 1084, 1090, 81 S.E.2d 587, 591 (1954)).

¹⁶ *King*, 195 Va. at 1090-91, 81 S.E.2d at 591; *accord Blanton v. Amelia County*, 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001), *superseded by statute on other grounds*, VA. CODE ANN. § 62.1-44.19:3, *as stated in O’Brien v. Appomattox County*, 293 F. Supp. 2d 660, 663 (W.D. Va. 2003).

¹⁷ *King*, 195 Va. at 1090-91, 81 S.E.2d at 591; *accord West Lewinsville Hgts. Ass’n v. Bd. of Sup.*, 270 Va. 259, 265-66, 618 S.E.2d 311, 314 (2005). See generally 2005 Op. Va. Att’y Gen. 54; 1998 Op. Va. Att’y Gen. 12; 1998 Op. Va. Att’y Gen. 13; 1980-81 Op. Va. Att’y Gen. 418.

same subject.¹⁸ But state law preempts all local regulation on a subject if the state regulations “are so comprehensive that the state may be considered to occupy the ‘entire field.’”¹⁹

Local Authority with Respect to Uranium Mining Generally

Each of your questions asks about local authority to enact regulations related to uranium mining. If an activity is authorized by and conducted in compliance with state law, a Virginia locality cannot impose a ban on that otherwise legal activity.²⁰ The opposite is also true – a locality cannot authorize what the State currently prohibits.²¹ Because state law does not permit uranium mining at all,²² and ordinances must be consistent with state policy and general law,²³ localities currently do not have the authority to regulate uranium mining.

If the General Assembly chooses to establish a permitting program for uranium mining and milling operations within the Commonwealth and provides for related regulation, such legislation will affect local government authority to regulate such operations by ordinance. The General Assembly may choose to have the state preemptively occupy the field, and the locality could not regulate further. On the other hand, the General Assembly could enable concurrent regulatory authority to its appropriate agencies and localities, in which case the locality could exercise such authority so long as such exercises do not conflict with federal or state law.²⁴

Another important factor is the significant role played by the federal government in the regulation of uranium mining and milling activity. For example, the Nuclear Regulatory Commission (“NRC”) licenses and regulates uranium milling operations.²⁵ The Environmental Protection Agency (“EPA”) is

¹⁸ See *Vito*, 233 Va. at 449, 357 S.E.2d at 202; *King*, 195 Va. at 1088, 81 S.E.2d at 590; 1983-84 Op. Va. Att’y Gen. 86, 87.

¹⁹ *Id.* See also *supra* notes 12-14 and accompanying text.

²⁰ See *supra* note 16 and accompanying text; 2013 Op. Va. Att’y Gen. No. 12-102 (a local governing body cannot ban exploration for and drilling of oil and natural gas within the locality’s boundaries), *available via link at* <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2013opns/Jan13opndx.html>; 1998 Op. Va. Att’y Gen. 12, 12-13 (localities lack express or implied authority to enact moratorium on intensive corporate and contract swine production); 1998 Op. Va. Att’y Gen. 13, 14 (county has no authority to adopt ordinance limiting circumstances in which agricultural operations may be deemed to constitute a nuisance or trespass).

²¹ See *supra* note 15 and accompanying text. Regulation controls, directs, or establishes rules for activity. See BLACK’S LAW DICTIONARY 1398 (9th ed. 2009) (defining “regulation”); DICTIONARY.COM UNABRIDGED (Random House 2013), *at* <http://dictionary.reference.com/browse/regulate> (last visited Sept. 3, 2013). There is at least implied authorization of activity that conforms to the regulation.

²² See VA. CODE ANN. § 45.1-283 (2002).

²³ See *supra* notes 15-16 and accompanying text.

²⁴ For example, Article 8 of Chapter 6 of Title 32.1 of the *Code of Virginia*, §§ 32.1-227 through 32.1-238, designates the Department of Health as the state radiation control agency, VA. CODE ANN. § 32.1-228.1(A) (Supp. 2013), and grants the State Board of Health regulatory powers with respect to sources of radiation, *see* VA. CODE ANN. § 32.1-229 (2011), but provides that local ordinances and regulations are not superseded, “provided that such ordinances or regulations are and continue to be consistent with” state law. VA. CODE ANN. § 32.1-237 (2011).

²⁵ See 10 C.F.R. Part 40 (2012). If the Commonwealth lifts its current moratorium on uranium mining and wants to regulate uranium milling operations, it first would need to ask the NRC to delegate that regulatory authority to the Commonwealth through an amendment to the Commonwealth’s current agreement with the NRC. *See* 42 U.S.C. § 2021 (2011).

authorized to set health and environmental standards to govern the stabilization, restoration, disposal and control of effluents and emissions at both active and inactive mill tailings sites.²⁶ The Federal Mine Safety and Health Administration enforces occupational health and safety laws for workers at a uranium mine and/or milling operations.²⁷ The Price-Anderson Act governs “any legal liability arising out of or resulting from a nuclear incident.”²⁸ Any local action related to uranium mining would need to survive preemption analysis with respect to applicable federal law too.

Question 1: Limiting Uranium Mining to Certain Zoning Districts

Your first question is whether a locality may limit or restrict uranium mining to certain zoning districts.

“Zoning is a legislative power vested in the Commonwealth and delegated by it, in turn, to various local governments for the enactment of local zoning ordinances.”²⁹ Section 15.2-2280 of the *Code of Virginia* specifically provides localities with the authority to enact zoning ordinances regulating the use of land. This delegation of authority by the Commonwealth is a delegation of the Commonwealth’s police power to legislate in this area.³⁰ If any doubt remains as to the existence of such power in view of all the facts, that doubt must be resolved against the locality.³¹ Local zoning ordinances are presumed to be reasonable in the first instance, but the classifications an ordinance contains, and the distinctions that it draws, must not be arbitrary or capricious either in their terms as written or in their application.³²

Should the General Assembly authorize permitting of uranium mining and milling operations, and not otherwise fully preempt the regulation thereof, then whether localities could adopt zoning ordinances relating to district regulation of uranium mines will be dependent upon the general principle that the ordinances not be drafted in such a way as to be arbitrary or capricious either in their terms as written or in their application.³³ Further, such zoning ordinances could not be so restrictive as to impose a ban on that otherwise legal activity.³⁴

²⁶ See Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021 (codified as amended at 42 U.S.C. §§ 7901-7942 (2011)); 40 C.F.R. Part 192 (2012).

²⁷ See 30 C.F.R. Parts 56-58 & 62 (2012).

²⁸ See 42 U.S.C. § 2014(w) (2012). See also *El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 476-77 (1999) (setting forth the history of the Price-Anderson Act and the amendments to it).

²⁹ *Byrum v. Bd. of Supvrs.*, 217 Va. 37, 39, 225 S.E.2d 369, 371 (1976). Article 7 of Chapter 22 of Title 15.2 of the *Code of Virginia*, §§ 15.2-2280 through 15.2-2316 (2012 & Supp. 2013), contains Virginia’s zoning enabling statutes, which authorize local land use ordinances.

³⁰ *Bd. of Supvrs. v. Rowe*, 216 Va. 128, 134, 216 S.E.2d 199, 206 (1975); accord *Cochran v. Fairfax County Bd. of Zoning Appeals*, 267 Va. 756, 764, 594 S.E.2d 571, 576 (2004).

³¹ *City of Richmond*, 199 Va. at 684, 101 S.E.2d at 645 (quoting *Donable v. Harrisonburg*, 104 Va. 533, 535, 52 S.E. 174, 175 (1905)); accord *Bd. of Supvrs. v. Town of Purcellville*, 276 Va. 419, 437, 666 S.E.2d 512, 521 (2008).

³² See *Bd. of Supvrs. v. Southland Corp.*, 224 Va. 514, 522, 297 S.E.2d 718, 722 (1982); *City of Manassas v. Rosson*, 224 Va. 12, 17-18, 294 S.E.2d 799, 802 (1982), *appeal dismissed*, 459 U.S. 1166 (1983).

³³ See *id.*

³⁴ See *supra* notes 16 and 20 and accompanying text.

Question 2: More Stringent Air and Water Quality Standards

Your second question asks whether a locality may implement more stringent air and water quality standards than provided for in state or federal law.

Air quality is the subject of an extensive statutory and regulatory system that “represents decades of thought by legislative bodies and agencies and the vast array of interests seeking to press upon them a variety of air pollution policies. To say this regulatory and permitting regime is comprehensive would be an understatement.”³⁵

Pursuant to the Clean Air Act, EPA has “develop[ed] acceptable levels of airborne emissions, known as National Ambient Air Quality Standards (NAAQS).”³⁶ NAAQS “are meant to set a uniform level of air quality across the country,” but “decisions regarding how to meet NAAQS are left to individual states.”³⁷ States must create State Implementation Plans (“SIPs”), which then must be submitted to the EPA for approval and which become enforceable federal law once approved by the EPA.³⁸ Virginia’s SIPs was submitted in 1972 and has been amended numerous times since then.³⁹ Virginia’s air quality regime includes statutes, regulations adopted by the State Air Pollution Control Board (the “Board”), and permitting, enforcement, and other processes administered by the Virginia Department of Environmental Quality (“DEQ”).⁴⁰

It is unnecessary to reach herein any conclusion with respect to field preemption and air quality because the General Assembly has established explicit preemptive limitations upon local authority. Since 1972, any local governing body that proposes to adopt or amend any ordinance relating to air pollution must obtain the approval of the Board as to the provisions of the ordinance, and the Board may not approve an ordinance regulating any emission source that is required to register with the Board or to obtain a permit pursuant to state law.⁴¹ Accordingly, it is my opinion that a locality lacks authority to implement more stringent air quality standards than provided for under federal and state law without the prior approval of the Board.

Water quality also is the subject of an extensive statutory and regulatory system, beginning with the Clean Water Act (“CWA”).⁴² The United States Supreme Court has stated that “Congress intended the [CWA] to ‘establish an all-encompassing program of water pollution regulation.’”⁴³ The CWA

³⁵ North Carolina *ex rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010).

³⁶ *Id.* The Clean Air Act may be found at 42 U.S.C. §§ 7401 to 767/g.

³⁷ North Carolina *ex rel. Cooper*, 615 F.3d at 299.

³⁸ *Id.*

³⁹ VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY (DEQ), THE STATE IMPLEMENTATION PLAN, *available at* <http://www.deq.virginia.gov/Programs/Air/AirQualityPlans/TheStateImplementationPlan.aspx> (last visited Sept. 3, 2013).

⁴⁰ *See generally* VA. CODE ANN. §§ 10.1-1300 through 10.1-1328 (2012); DEQ, AIR – LAWS, REGULATIONS, AND GUIDANCE, *available at* <http://www.deq.virginia.gov/Programs/Air/LawsRegulationsGuidance.aspx> (last visited Sept. 3, 2013).

⁴¹ VA. CODE ANN. § 10.1-1321 (2012).

⁴² The Clean Water Act is the name of the comprehensive 1972 amendments to the Federal Water Pollution Control Act and may be found at 33 U.S.C. §§1251 to 1387.

⁴³ *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981)).

established the National Pollutant Discharge Elimination System (“NPDES”), a permit program to regulate the discharge of polluting effluents.⁴⁴ The EPA has delegated authority to Virginia to issue NPDES permits under the Virginia Pollutant Discharge Elimination System Permit program, and Virginia’s water quality regime involves statutes, regulations adopted by the State Water Control Board, and administrative authority exercised by DEQ.⁴⁵

Other federal and state laws address certain types or bodies of water. For example, the federal Safe Drinking Water Act (“SDWA”) regulates public water systems,⁴⁶ and the Virginia Groundwater Management Act of 1992 aims to ensure the public welfare, safety, and health by providing for management and control of ground water resources.⁴⁷

Although there exists no Virginia statute that establishes explicit limits on the enactment of ordinances relating to water quality, with respect to the particular action that is the subject of your question – local implementation of more stringent water quality standards than provided under federal and state law – it is my opinion that the federal and state regulatory scheme preempts this field so as to prohibit such an exercise of local authority.⁴⁸ As noted above, the degree of federal and state regulation of water quality standards is comprehensive.⁴⁹

Question 3: Additional Bonding

Your third question asks whether a locality can require additional bonding for uranium mine reclamation purposes in addition to or beyond any similar bonding requirements under state or federal law. The nature and extent of uranium mining bonding requirements, and the locus of authority for setting bonding requirements, will depend on such future legislation as may be passed by the General Assembly, as well as such agreed delegation of authority as may be entered into between the Commonwealth and the NRC. It is therefore impossible to opine conclusively upon this question at this time.

⁴⁴ *Id.* at 489 (citing 33 U.S.C. § 1342).

⁴⁵ See generally the State Water Control Law, VA. CODE ANN. §§ 62.1-44.2 through 62.1-44.34:28 (2006 & Supp. 2013); DEP’T OF ENVTL. QUALITY, WATER – LAWS, REGULATION, AND GUIDANCE, at <http://www.deq.virginia.gov/Programs/Water/LawsRegulationsGuidance.aspx> (last visited Sept. 3, 2013).

⁴⁶ The SDWA can be found at 42 U.S.C. §§ 300f to 300j-21.

⁴⁷ VA. CODE ANN. § 62.1-254 (2006). The Ground Water Management Act of 1992 is codified at VA. CODE ANN. §§ 62.1-254 through 62.1-270 (2006 & Supp. 2013).

⁴⁸ See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 & n.7 (2008) (explaining that the CWA preempts claims that standards should be different from those provided by the CWA, unlike private claims for economic injury that do not threaten to interfere with federal regulatory goals). Cf. *Lockett v. EPA*, 319 F.3d 678, 683 (5th Cir. 2003) (noting that citizens may not bring suit under the CWA if federal or state administrative authorities are pursuing an action to require compliance); *Mattoon v. City of Pittsfield*, 980 F.2d 1, 4-6 (1st Cir. 1992) (“concluding that Congress occupied the field of public drinking water regulation with its enactment of the SDWA,” such that the plaintiffs’ other claims were barred).

⁴⁹ The General Assembly has granted localities only limited powers related to water. For example, as part of overseeing the development of territory within its jurisdiction, a locality may include in its comprehensive plan a “designation of areas for the implementation of reasonable ground water protection measures.” See § 15.2-2223(C)(4) (Supp. 2013). Localities also may create water authorities, which are granted certain powers by statute. See §§ 15.2-5102 and 15.2-5114 (2012).

Question 4: Civil Penalties and/or Liability for Declines in Real Estate Value

Your next question is whether a locality has authority to subject a uranium mining operation to civil penalties or liability for depreciation in the value of real estate that is located within a defined proximity to the mining operation site.

“The Supreme Court [of the United States] has concluded that ‘the safety of nuclear technology [is] the exclusive business of the Federal Government...’⁵⁰ The Court explained that state law “is not pre-empted only when it conflicts with federal law. Rather, the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.”⁵¹

Under the Price-Anderson Act, legal liability arising out of or relating to a “nuclear incident” is part of this broad preemption, in that the “public liability action” created by the Price-Anderson Act reflects Congressional intent to “supplant all possible state causes of action when the factual prerequisite[s] of the statute are met.”⁵² “In short, a plaintiff who asserts any claim arising out of a ‘nuclear incident’ ... ‘can sue under the [Price-Anderson Act] or not at all.’”⁵³

“The term ‘nuclear incident’ means any occurrence ... within the United States causing ... bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.”⁵⁴ “Source” material includes uranium and uranium ore.⁵⁵ The term “nuclear incident” does not include depreciation in real estate value due to proximity to a uranium mining operation.

Federal courts have held that there cannot be any legal liability without a nuclear incident.⁵⁶ The United States Court of Appeals for the Tenth Circuit has held specifically that a mere decline in real estate value cannot establish a nuclear incident, explaining that diminution of real estate value might be a measure of damages but is insufficient to show the actual loss or damage that satisfies the nuclear incident requirement:

⁵⁰ *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998) (quoting *Pacific Gas & Electric Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 208 (1983)) (second alteration in original); *see also Hanford Nuclear Reservation Litig. v. E.I. DuPont de Nemours & Co.* (In re Hanford Nuclear Reservation Litig.), 534 F.3d 986, 1003 (9th Cir. 2008).

⁵¹ *Pacific Gas & Electric*, 461 U.S. at 212.

⁵² *Cotroneo v. Shaw Env’t & Infrastructure, Inc.*, 639 F.3d 186, 192 (5th Cir. 2011) (quoting *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 857 (3d Cir. 1991)) (alteration in original); *see also El Paso Natural Gas Co. v. Neztosie*, 526 U.S. 473, 484 n.6 (1999) (the Price-Anderson Act’s preemption structure “resembles what we have spoken of as complete pre-emption doctrine”) (quotation marks omitted).

⁵³ *Cotroneo*, 639 F.3d at 192 (quoting *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1553 (6th Cir. 1997)).

⁵⁴ 42 U.S.C. § 2014(q) (2011).

⁵⁵ 42 U.S.C. § 2014(z) (2011); *accord* VA. CODE ANN. § 32.1-227 (2011).

⁵⁶ *See Cotroneo*, 639 F.3d at 195-97 (explaining that a Texas “offensive contact battery” claim was preempted because “recovery on a state law cause of action without a showing that a nuclear incident has occurred would circumvent the entire scheme governing public liability actions” by allowing a plaintiff to recover without establishing public liability); *Cook v. Rockwell Int’l Corp.*, 618 F.3d 1127, 1139-41 (10th Cir. 2010) (holding that “the occurrence of a nuclear incident ... constitutes a threshold element of any [Price-Anderson Act] claim” and that merely claiming the presence of nuclear material creates increased risk, whether of radiation-related damage to property or injury, is insufficient to show a nuclear incident).

Diminution of value, however, cannot establish the fact of injury or damage. Otherwise, reduced value stemming from factors unrelated to any actual property injury, such as unfounded public fear regarding the effects of minor radiation exposure, could establish “damage to property” and “loss of use of property.” Public perception and the stigma it may attach to the property in question can drastically affect property values, regardless of the presence or absence of any actual injury or health risk. Instead, courts have traditionally utilized diminution of value as a measurement of damages rather than proof of the fact of damage.^{57]}

Accordingly, it is my opinion that federal law precludes a locality from subjecting a uranium mining operation to civil penalties or liability for declines in the value of real estate located within a defined proximity of such an operation.

Even if federal law did not preempt local creation of such liability, operation of the Dillon Rule would appear to do so under current Virginia law. In Virginia, civil causes of action and liability arise from statutes or the common law, both of which are bodies of state law interpreted and adjudicated in state or federal courts. Localities have not been granted a general power to create civil penalties or liability, nor a specific power to do so with respect to uranium mining. A locality may not so act without a grant of power from the General Assembly.^{58]}

Question 5: Civil Penalties or Liability for Loss of Revenue Related to Agricultural Contracts

Your final question asks whether a locality may subject a uranium mining operation to civil penalties or liability for loss of revenue by agricultural operations for cancellation, rescission, or modification of agricultural contracts due to uranium mining. For the reasons given in my response to your preceding question, it is my opinion that a locality may not do so.^{59]}

Conclusion

Accordingly, it is my opinion that a locality currently cannot regulate uranium mining in any fashion because uranium mining is not a permitted activity within the Commonwealth. It is further my opinion that, should the General Assembly act to permit and provide for the regulation of uranium mining, a locality’s authority related to uranium mining will depend upon federal and state law in effect at that time, including the enabling legislation for uranium mining enacted by the General Assembly. It is

^{57]} *Cook*, 618 F.3d at 1141 n.12.

^{58]} *See supra* notes 7-10 and accompanying text for discussion of the Dillon Rule and related citations. It is true that localities have been granted authority to take action with respect to public nuisances. *See* VA. CODE ANN. § 15.2-900 (2012). The essence of a public nuisance, however, is that the condition in question is dangerous or hazardous to the public. *See id.*; *Breeding by Breeding v. Hensley*, 258 Va. 207, 213, 519 S.E.2d 369, 372 (1999). The determination of whether a dangerous or hazardous condition exists related to uranium mining is a safety determination committed to federal law and regulation, except as may be expressly delegated to states. *See supra* notes 50-53 and accompanying text.

^{59]} Virginia law provides for liability by a non-party for causing the end of a contract only in limited circumstances, through an action for “tortious interference.” *See generally* *Lewis-Gale Med. Ctr., LLC v. Alldredge*, 282 Va. 141, 149-50, 710 S.E.2d 716, 720 (2011) (discussing what a plaintiff must show for such a claim). It would require knowing and applying the relevant facts and circumstances of a particular, *in futuro* situation, to determine the viability (under Virginia law and with respect to federal preemption analysis) of a tortious interference claim against a uranium mining operation, and this Office refrains from commenting on matters that would require additional facts or the application of such facts to law. *See* 2010 Op. Va. Att’y Gen. 56, 58.

Honorable Donald W. Merricks

October 11, 2013

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further my opinion, as detailed above, that a locality does not have authority under existing federal and state law to take certain of the actions about which you inquire.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken C. II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General