

SOLID WASTE MANAGEMENT POLICY REVIEW TASK FORCE

Constitutional Provisions Relating to State's Regulation of Interstate Movement of Solid Waste

September 22, 1999

Commerce Clause of the U.S. Constitution:

"The Congress shall have the power . . . [t]o regulate Commerce with foreign nations and among the several States, and with the Indian tribes." U.S. Const. Art. I, § 8, cl. 3.

"Dormant" or "Negative" Commerce Clause

- Generally, if Congress has not acted in a given area of commerce, States can legislate over that area until Congress chooses to step in; State laws remain on the books until Congress chooses to override them and then the State laws will become preempted, although the presumption exists that State laws are not preempted unless the intent to do so is clearly expressed.
- An exception to the general rule of preemption has been adopted by federal courts, known as the "dormant" (or "negative") Commerce Clause doctrine, which may or may not have been intended by the Founding Fathers.
- The dormant Commerce Clause doctrine provides that where Congress has not acted to regulate an area of "Commerce . . . among the several states" (a subject committed by the Constitution to the Congress alone), regulation by a state or political subdivision that interferes with interstate commerce with regard to that area may constitute a violation of the Commerce Clause and may be unconstitutional.¹

Prepared by Nicholas S. Nadzo, Esq., Jensen Baird Gardner & Henry, Ten Free Street, P.O. Box 4510, Portland, ME 04112 – counsel for Regional Waste Systems, Inc. and Mid-Maine Waste Action Corporation.

¹ In re State Freight Tax, 82 U.S. 232, 272 (1872) (" . . . no State legislation should be sustained which . . . assumes to regulate, or control subjects committed by th[e] Constitution exclusively to the regulation of Congress").

- State may not isolate itself from the national economy by erecting barriers to interstate commerce.²
- When a State statute discriminates on its face against out-of-state commerce, the statute is subject to a “per se” rule of invalidity under the Commerce Clause.³
- When a State regulation has only “incidental” effects on interstate commerce, the regulation will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to accepted local benefits which cannot be equally satisfied with a lesser impact on interstate activities.⁴

Commerce Clause as Applied to Solid Waste

- Interstate movement of solid or liquid wastes is “commerce” within the meaning of the Commerce Clause, notwithstanding that those wastes cannot be put to effective use.⁵

Unconstitutional State Regulation of Solid Waste Disposal

- State and any of its subdivisions (i.e. counties and municipalities) may not forbid disposal of solid waste from other States or other subdivisions of the State at private disposal facilities.⁶
- State and its subdivisions may not charge a higher disposal fee or impose a higher tax on out-of-state waste than for local waste, even if the higher fees are to compensate for local investment in the disposal facility.⁷

² Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992) (State statute that discriminates against interstate commerce “will be struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism”); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949).

³ City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (“Where simple economic protectionism is effected by State legislation, a virtual per se rule of invalidity has been erected.”); Oregon Waste Systems v. Dep’t of Environmental Quality, 511 U.S. 93, 98 (1994) (discrimination means “differential treatment of in-state and out-of-state economic interests that benefit the former and burdens the latter”).

⁴ Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). See also, Maine v. Taylor, 477 U.S. 131, 149 (1986) (facial discrimination against out-of-state articles of commerce was justified because discrimination prevented local public health threat that could not be addressed by other non-discriminatory methods.)

⁵ City of Philadelphia v. New Jersey, 437 U.S. 617, 626-627 (1978) (State may not prohibit importation of waste generated or collected outside of the State).

⁶ Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992).

⁷ Oregon Waste Systems v. Dep’t of Environmental Quality, 511 U.S. 93, 93 (1994); Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 344 (1992).

- State and its subdivisions may not enforce laws which require that locally generated solid waste be directed to a specific facility (i.e., flow control), unless the State or subdivision (i) can show valid objectives for the ordinance, other than economic protectionism, and (ii) can demonstrate the unavailability of reasonable alternatives to achieve the objectives.⁸
- State may not forbid the disposal of out-of-state waste for failure of the out-of-state community which generated the waste to adhere to a State-approved recycling program.⁹

Allowable State Regulation of Solid Waste Disposal

- State can limit the total amount of solid waste accepted at private disposal facilities by regulating disposal capacity.¹⁰
- State may require separation of out-of-state solid waste according to types of material prior to entering the State.¹¹
- State and its subdivisions may set rules on the type and origin of waste accepted at a facility under the “market participant” doctrine, if the facility is owned by the State or subdivision and the operation of the facility is controlled by the State or subdivision, either directly or under contract. (i.e., State or locally-owned disposal facility could impose restrictions on out-of-state waste importation, such as: total ban, volume limit, higher disposal fee and volume controls.)¹²

⁸ C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (flow control ordinances discriminate against interstate commerce by prohibiting availability of waste in interstate trade); see also Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 112 F.3d 652 (3rd Cir. 1997); City of Auburn v. Tri-State Rubbish, Inc., 630 A.2d 227 (Me. 1993) cert. den. 511 U.S. 1106 (1994); Tri-State Rubbish, Inc. v. Town of Gray, et al., 632 A.2d 134 (Me. 1993) cert. den. 511 U.S. 1106 (1994).

⁹ National Solid Wastes Management Association v. Meyer, 165 F.3d 1151 (7th Cir. 1999) (Wisconsin’s statute which bars out-of-state waste unless the municipality in which the waste is created enacts an ordinance meeting Wisconsin’s recycling standards violates Commerce Clause).

¹⁰ Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992).

¹¹ National Solid Waste Management Association v. Meyer, 63 F.3d 652, 662 (7th Cir. 1995) cert. den. 517 U.S. 1119 (1996).

¹² SSC Corp. v. Town of Smithtown, 66 F.3d 502, 510 (2d Cir. 1995) cert. den. 516 U.S. 1112 (1996) (“when a state engages in market ‘participation’ – that is, when it enters the open market as a buyer or seller on the same footing as private parties – there is less danger that the state’s activity will interfere with Congress’s plenary power to regulate the market”); Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245, 250 (3rd Cir. 1989); cert. den. 493 U.S. 1077 (1990) (Pennsylvania County may charge a lower rate at county-operated landfill for disposal of waste generated in the county than waste generated elsewhere); Evergreen Waste Systems, Inc. v. Metropolitan Service District, 643 F.Supp. 127, 131 (D. Or. 1986) *aff’d on other grounds* 820 F.2d 1482 (9th Cir. 1987) (publicly owned and operated landfill may ban waste from outside of the three Oregon counties served, since Commerce Clause does not apply “when states or their

- State and its subdivisions may contract with private haulers for solid waste collection and transportation to publicly-financed, but privately owned and operated, disposal facility with which the State or subdivision has a long-term put or pay agreement, where contract provides for reimbursement of tip fee paid by hauler for disposal.¹³
- State and its subdivisions may contract with single hauler, while prohibiting all other haulers, to collect waste in designated area and allow hauler to dump for free at local facility to guarantee disposal of all waste, with a combination of taxes and fees charged to generators of waste to finance the system.¹⁴
- State and its subdivisions may require haulers to bring municipal solid waste picked up in the municipal boundaries to designated facility selected by a process which was open, fair and competitive (i.e., determined by objective criteria which do not have the effect of favoring in-state interests).¹⁵
- State or subdivision may require that waste generated in the State or subdivision and destined for in-state disposal be delivered to a designated facility, provided the requirement does not apply to waste

subdivisions act as market participants rather than market regulators”); Lefrancois v. Rhode Island, 669 F.Supp. 1204, 1208 (D.R.I. 1987) (by ownership and operation of the landfill, State could prohibit out-of-state waste in the landfill within “market participant” exception to Commerce Clause, even though it was the only landfill in the State); Shayne Bros., Inc. v. District of Columbia, 592 F.Supp. 1128, 1133 (D.D.C. 1984); County Commissioners of Charles County v. Stevens, 473 A.2d 12, 18 (Md. 1984). See also C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 422 (1994) (Souter, J., dissenting) (the local ordinance at issue does not unfairly burden people outside the municipality, and is therefore not “economic protectionism”).

¹³ SSC Corp. v. Town of Smithtown, *supra*. (town did not act to regulate interstate commerce but was a buyer of collection and transportation services from the contract hauler and of disposal services from the disposal facility, resulting in “market participant” exception to the dormant commerce clause); see also National Solid Waste Management Association v. Williams, 146 F.3d 595 (1998) *cert. den.* 119 S.Ct. 531 (1998).

¹⁴ USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2nd Cir. 1995), *cert denied*, 517 U.S. 1135 (1996) (establishing waste district and prohibiting use in the district of any hauler other than hauler under contract to the Town constitutes “market regulation” (not “market participation”) but is not a violation of the dormant Commerce Clause since the prohibition evenhandedly regulated interstate commerce by denying all haulers access to the market).

¹⁵ Tri-County Industries v. County of Mercer, 68 F.3d 788 (3d Cir. 1995) *cert. den.* 516 U.S. 1173 (1996) (to determine whether out-of-state bidders did not enjoy equal access to the local market, courts must examine the designation process, the duration of the designation and the likelihood of an amendment to add alternative sites); United Waste Systems of Iowa, Inc., et al. v. Larry Wilson, 1999 WL 689471 (8th Cir., September 7, 1999).

destined for out-of-state disposal, and further provided the burden on interstate commerce is not excessive in relation to the benefits advanced by the designation.¹⁶

- State and its subdivisions may require all residential refuse generated within a municipality either (i) be made available by the Town residents for collection by the Town or its contractor, or (ii) be hauled by the resident to a transfer station designated by the Town.¹⁷
- State may require all municipalities or other public entities choosing to collect or dispose of solid waste, either directly or by contract with private haulers, to comply with their respective county's solid waste management plan.¹⁸
- State and its subdivisions may require that residents subscribe to garbage collection and disposal service provided by the State or subdivision through an exclusive franchisee.¹⁹

Proposed Congressional Regulation of Interstate Commerce as Relates to Transportation of Solid Waste

- Congress may, by specific legislation, permit States to regulate interstate commerce, such as transportation of solid waste.
- Identical legislation has been introduced in the U.S. Senate²⁰ and the U.S. House,²¹ which consist of two substantive sections, as follows:

- *Receipt and Disposal of Out-of-State Municipal Solid Waste* – This provision would ban out-of-state municipal solid waste (MSW) for disposal or incineration at a landfill or incinerator unless the waste is received pursuant to a host community

¹⁶ Ben Oehrleins & Sons & Daughter v. Hennepin County, 115 F.3d 1372, 1387 (8th Cir., 1997) cert. den. 118 S.Ct. 629 (1997) (intrastate designation does not discriminate against interstate commerce, and is thus contrary to the Commerce Clause only if the burden on commerce is clearly excessive in relation to the intended local benefits).

¹⁷ Houlton Citizen's Coalition v. Town of Houlton, 175 F.3d 178 (1st Cir. 1999).

¹⁸ National Solid Waste Management Ass'n v. Williams, 146 F.3d 595 (1998) cert. den. 119 S.Ct. 531 (1998) (statute requiring public entities, defined to include contractors hired by public entities, to comply with county's plan did not violate Commerce Clause because state was acting as market participant).

¹⁹ Individuals for Responsible Government, Inc. v. Washoe County, 110 F.3d 699 (9th Cir. 1997) cert. den., 118 S.Ct. 41 (1997).

²⁰ Solid Waste Interstate Transportation and Local Authority Act, S.663, 106th Cong., 1999 (introduced by Sen. Spector on March 18, 1999).

²¹ Solid Waste Interstate Transportation and Local Authority Act, H.1190, 106th Cong., 1999 (introduced by Rep. Greenwood on March 18, 1999).

agreement, or unless the disposal facility had received a State permit to accept out-of-state waste or had a binding contract which commits the facility to accept a specific quantity of out-of-state waste. A state would be able to limit the amount of total waste imports to a facility which received documented out-of-state waste prior to the effective date of the statute to the amount of out-of-state waste received in 1995. Permits issued or renewed after the effective date could impose a percentage limitation on out-of-state waste, limit the amount of out-of-state waste to 1995 levels, and impose a cost recovery surcharge on the processing, combustion or disposal of out-of-state waste.

➤ *Congressional Authorization of State and Local Municipal Solid Waste Flow Control* – This provision would permit state and local governments to control the movement of MSW to one or more designated waste management facilities, provided that such flow control authority is imposed through a law or ordinance in effect on the date of the Carbone decision (i.e., May 16, 1994) and such authority could be exercised only until the final maturity date of bonds issued for financing of the facility or until the expiration of any agreement which obligates a state or political subdivision to deliver MSW to a designated facility.