Inter-Agency Memorandum

To: Michael Nork, Materials Management, Education, & Planning Section Supervisor, SWMB, N.H. Dept. of Environmental Services

From: K. Allen Brooks, Senior Assistant Attorney General KAB

Date: December 14, 2021

RE: New Hampshire Solid Waste Working Group

You have asked that I provide some background material on the commerce clause and state preemption. The following may be shared with the working group.

A. Commerce clause.

Pursuant to Article I, § 8, cl. 3, of the U.S. Constitution, Congress may regulate interstate commerce. The Constitution does not say that states cannot regulate commerce; however, courts have found that this authority constrains State action even when Congress is not actually using it – i.e., when this authority lay dormant.

> The Commerce Clause empowers Congress to regulate commerce "among the several states." Although the clause "do[es] not expressly restrain 'the several states' in any way, [the Supreme Court] ha[s] sensed a negative implication in the provision since the early days." This negative implication, referred to as the dormant Commerce Clause, "prevents state and local governments from impeding the free flow of goods from one state to another" and "prohibits protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors."

Constr. Materials Recycling Ass'n Issues & Educ. Fund, Inc. v. Burack, 686 F. Supp. 2d 162, 166–70 (D.N.H. 2010) (internal citations omitted); *see also Deere & Co. v. State*, 168 N.H. 460, 466 (2015) (wherein the N.H. Supreme Court provides a similar treatment of the commerce clause). Courts analyze laws to determine if they run afoul of the dormant commerce clause using various levels of scrutiny depending on the purpose and effect of the law.

> Laws that discriminate against out-of-state interests are treated differently under the dormant Commerce Clause from laws that affect interstate commerce even-handedly. "A discriminatory law is virtually per se invalid ... and will survive only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives." In contrast, a non-discriminatory law that nevertheless burdens interstate commerce "will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits."
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> In the context of a dormant Commerce Clause challenge, discrimination "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Even a facially neutral law will be considered discriminatory if it is discriminatory in either its purpose or its effect. As the First

> Circuit has recognized, however, "[i]ncidental purpose, like incidental effect, cannot suffice to trigger strict scrutiny under the dormant Commerce Clause."

Constr. Materials Recycling Ass'n, 686 F. Supp. 2d at 166–70 (internal citations omitted). New Hampshire has first-hand experience with respect to application of the federal commerce clause to waste management. In 2007, the New Hampshire legislature placed restrictions on the burning of construction and demolition debris. National organizations in support of the reuse or burning of such debris filed suit in federal court. The plaintiffs agreed that the law was facially neutral but argued that it was motivated by protectionism. Plaintiffs cited to statements by proponents of the bill that they feared that "New Hampshire could become the 'dumping ground' for construction and demolition debris in the Northeast." *Id.* The resulting U.S. District Court decision provides an excellent summary of the application of the commerce clause.

> Although "the Supreme Court has not directly spoken to the question of what showing is required to prove discriminatory effect where ... a statute is evenhanded on its face and wholesome in its purpose," the First Circuit has held that this showing must be "substantial." A plaintiff, therefore, must "submit some probative evidence of adverse impact ... the mere fact that a statutory regime has a discriminatory *potential* is not enough to trigger strict scrutiny under the dormant commerce clause." This burden cannot be met merely by showing that a statute favors one product over another. As I have noted, discrimination claims under the dormant Commerce Clause target "differential treatment of instate and out-of-state economic interests that benefits the former and burdens the latter." Thus, while the adversely affected products need not be entirely out of state and, conversely, the favored products need not be entirely in state, a statute ordinarily must predominately benefit in-state products at the expense of out-of-state products to support a discrimination claim based solely on the statute's unintended discriminatory effect.

Id. (internal citations omitted). The Court found that the law was not discriminatory. However, excessively burdensome regulation also receives a more strict level of review. The court stated:

> Having concluded that the C & D legislation is not discriminatory, I must next determine whether it "burdens commerce in a way that is clearly excessive in relation to the putative local benefits to be derived therefrom." Under the *Pike* balancing test, "laws that regulate evenhandedly and only incidentally burden commerce are subjected to less searching scrutiny," and are therefore upheld unless the burdens that they impose upon commerce "clearly outweigh" their state or local benefits. "If a legitimate local purpose is found, then the question becomes one of degree ... the extent of the burden that will be tolerated will [ ] depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Id. (internal citations omitted). The court then outlined how the balancing test described above must be applied.

> The balancing of benefits and burdens required by *Pike* is accomplished in three steps. "First, we are to evaluate the nature of the putative local benefits advanced by the statute. Second, we must examine the burden the statute places on interstate commerce. Finally, we are to consider whether the burden is 'clearly excessive' as compared to the putative local benefits." Courts must be careful not to second-guess reasonable legislative judgments when evaluating the local benefits of challenged legislation. Emphasizing that *Pike* mandates an inquiry only into the "putative" benefits of the challenged legislation, the First Circuit has observed in this regard that "it matters not whether these benefits actually come into being at the end of the day."

Id. (internal citations omitted). Eventually, the court found that the law passed the relevant commerce clause tests.

The analysis above differs when the State is acting as a market participant providing that it is directing its own activities and not regulating the field.

> At the threshold of its Commerce Clause analysis, the Supreme Court has drawn an important distinction between "regulation" of, and "participation" in, a market. 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. As the Court has explained, the Commerce Clause "restricts 'state taxes and regulatory measures impeding free private trade in the national marketplace,' but '[there] is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market.'" Pursuant to this doctrine—the "market participant" exception to the dormant Commerce Clause—states are permitted to enter a market with the same freedoms and subject to the same restrictions as a private party. To the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals—just as if it were a private party.

SSC Corp. v. Town of Smithtown, 66 F.3d 502, 510 (2d Cir. 1995). Courts are divided on whether a similar rule applies when the State acts as a market participant through a subdivision such as a municipality. *Compare National Solid Waste Mgmt. Ass'n. v. Williams*, 146 F.3d 595, 597 (8th Cir. 1998) (finding "no compelling analytical difference between a local government unit and central state agencies") *with W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 495 (7th Cir. 1984) (finding that a State directing local activities without funding is regulation and not participation). Recall that in New Hampshire, as noted below, the relationship between the State government and municipalities is more direct than some other jurisdictions.

B. State Preemption of Local Laws

In New Hampshire, State law takes precedence over local laws. When analyzing the impact of local zoning on solid waste management in *Town of Pelham v. Browning Ferris Indus. of New Hampshire, Inc.*, the N.H. Supreme Court stated:

> Towns are merely subdivisions of the State and have only such powers as are expressly or impliedly granted to them by the legislature. Local regulation is repugnant to State law when it expressly contradicts a statute or is contrary to the legislative intent that underlies a statutory scheme. Any power that towns might have to regulate solid waste, cannot be exercised in a way that is inconsistent with State law.

Town of Pelham v. Browning Ferris Indus. of New Hampshire, Inc., 141 N.H. 355, 357–64 (1996) (internal citations and quotations omitted).

Therefore, State laws will sometimes preempt local laws. Preemption may arise in a number of ways and is subject to various descriptions. The terms conflict preemption, field preemption, obstacle preemption, implied preemption, and express preemption all describe different aspects of the general concept.

Field preemption occurs when regulation of an entity with primacy, like the federal or State government, occupies the "entire field" of an issue such that, even if there is no direct conflict, such regulation leaves no "room" for others. Although RSA 149-M "constitutes a comprehensive and detailed regulatory" scheme that would normally be said to occupy the entire "field" of solid waste regulation, the statute itself allows for some municipal involvement. Similar provisions in federal law that preserve State authority that would otherwise be preempted are called "savings" clauses. This means that some aspects of local control survive. In *Town of Pelham*, the N.H. Supreme Court held that closure of a facility was exclusively within the control of the State; however, it also held that other ancillary local rules might still apply. The Court stated:

> Nonexclusionary aspects of the town's site plan review process, however, remain unaffected. [L]ocal regulations relating to such matters as traffic and roads, landscaping and building specifications, snow, garbage, and sewage removal, signs, and other related subjects, to which any industrial facility would be subjected and which are administered in good faith and without exclusionary effect, may validly be applied under the town's site plan review process.

Town of Pelham, 141 N.H. at 357–64 (internal quotations and citations omitted).

Therefore, some aspects of local control like the building code applicable to structures or height restrictions are preempted whereas other aspects such as those quoted above or the general siting of a facility are not preempted.

Nevertheless, the extent of this savings clause must be interpreted narrowly. The N.H. Supreme Court has stated:

> As required by the spirit and objectives of RSA chapter 149–M, State law preemption of local regulation of solid waste management facilities must be the norm, not the exception. Accordingly, when evaluating whether a particular local regulation conflicts with the State scheme, courts should err on the side of

> finding State law preemption, unless the local regulation concerns where, within a town, a facility may be located.

N. Country Env't Servs., Inc. v. Town of Bethlehem, 150 N.H. 606, 610–22 (2004).

C. Conclusion

I hope this provides you with a framework for discussion of the commerce clause and State preemption.