

Memorandum

To: Joint Standing Committee on Natural Resources

From: Jerry Reid, AAG, Chief, Natural Resources Division

Date: May 13, 2010

Subject: Commerce Clause Limitations on State Regulation of Solid Waste; Legal Restrictions on Unlined Landfills

I. Commerce Clause

You have requested advice from this Office concerning the limitations that the Commerce Clause of the U.S. Constitution places on the ability of states to regulate the flow of solid waste. In this memorandum, I have attempted to summarize the essentials of this issue in a manner that is concise and accurate, but not unnecessarily technical. As you will see, some of the tests courts use to evaluate potential Commerce Clause violations are subjective, leaving room for interpretation and argument. In fact, the Supreme Court cases in this area often sharply divide the Court. This means that it can be difficult to predict with confidence how various legislative proposals might fare under judicial review. However, the caselaw does provide certain guideposts that are helpful to bear in mind during the drafting and consideration of this type of legislation, and this memorandum attempts to identify and explain them.

A. The Commerce Clause Prevents States from Banning the Importation of Solid Waste.

The clearest and most important effect of the Commerce Clause on the regulation of solid waste is to prevent states from banning its importation. This principle was established in the

landmark Supreme Court case of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In determining whether legislation constitutes an impermissible ban, courts evaluate whether the law discriminates against interstate commerce. In this context “discrimination” means giving in-state economic interests preferential treatment as against their out-of-state counterparts. *Oregon Waste Sys. v. Department of Env'tl. Quality*, 511 U.S. 93, 99 (1994). If the court concludes a law’s discriminatory treatment is motivated by simple economic protectionism, it will almost certainly be found unconstitutional. *Id.* A law discriminating on its face against out-of-state interests will be upheld against a Commerce Clause challenge only upon a showing that it is the only means to advance a legitimate local purpose. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986) (upholding a state ban on the importation of baitfish to prevent the spread of communicable fish-borne disease).

B. States Have Discretion to Control the Flow of Solid Waste When They Are Acting as “Market Participants” Rather Than Regulators.

Courts have recognized an important exception to the general rule preventing states from banning out-of-state waste from their landfills. When states act as “market participants” rather than regulators, states may restrict the type of waste they accept without running afoul of the Commerce Clause. *United Haulers Assn. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 344 (2007). A state acts as a “market participant” when, for example, it owns the landfill in question, as the State of Maine owns the Juniper Ridge Landfill. Under these circumstances, the State may limit the waste it accepts for disposal at the facility based on type, volume, place of origin or other characteristic in the same way that any private, commercial operator of a landfill is entitled to make such business decisions. State actions that are protected by the “market participant” doctrine include purchasing, selling, hiring or subsidizing of services. *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1990).

The premise upon which courts have recognized this exception is that when a state is acting as the owner of a public landfill, its decisions are presumed to be motivated by legitimate public health, safety and welfare interests. By contrast, when a State exercises its regulatory authority in a manner that benefits local businesses and burdens out-of-state competitors, courts often find the law to be economic protectionism that violates the Commerce Clause. *United Haulers*, 550 U.S. at 342.

Most lower courts have also held that when a state, by law, directs the proprietary activities of a municipality, the state is acting as a market participant rather than a regulator. *National Solid Waste Mgmt. Ass'n. v. Williams*, 146 F.3d 595, 597 (8th Cir. 1998); *Smith Setzer & Sons v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1319-20 (4th Cir. 1994); *Big Country Foods Inc. v. Board of Educ.*, 952 F.2d 1173, 1179 (9th Cir. 1992); *Trojan Tech. Inc., v. Pennsylvania*, 916 F.2d 903, 911 (3rd Cir. 1990).¹ The basic premise for this conclusion is that local governments are simply political subdivisions of the state, and therefore the state may direct their purchasing decisions in the same way it may do so for any of its agencies. While the Supreme Court has yet to address the issue, the weight of legal authority indicates that state legislatures may control municipal decisions governing the purchasing, selling, hiring or subsidizing of solid waste services just as they may control those decisions at the state level.

C. Conclusion

Court decisions reviewing solid waste legislation under the Commerce Clause can be fact-specific, and often turn on the application of legal standards that are subject to differing interpretations. For instance, judges on the same court will often disagree on the extent to which a law burdens out-of-state interests, or whether a law should be considered an exercise of regulatory or proprietary authority. Given this subjectivity, we recommend that the Committee

¹ The Seventh Circuit reached a contrary conclusion in *W.C.M. Window., Inc. v. Bernardi*, 730 F.2d 486, 494 (7th Cir. 1984).

work closely with both its legislative analyst and the Attorney General's Office when considering this type of legislation in order to achieve its policy objectives while minimizing constitutional risks.

II. State and Federal Regulations that Effectively Prohibit Unlined Municipal Landfills

You have also asked for citations to state and federal regulations that have the effect of prohibiting unlined municipal landfills. At the federal level, the Environmental Protection Agency has promulgated regulations requiring composite liners in municipal landfills pursuant to the Resource Conservation and Recovery Act ("RCRA"). 40 CFR 258.40. The Maine DEP has also adopted such requirements in its Chapter 401, *Landfill Siting, Design and Operation*. 06-096 CMR ch. 401(2)(D)(1). These regulations appear to be the most pertinent to your interest.