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Honorable Judy C. Kany
House of Representatives
State House
Augusta, Maine 04330

Dear Representative Kany:

You have asked several questions regarding the constitutional power of the Legislature to prohibit the transportation, treatment, and disposal in Maine of hazardous materials and wastes originating outside of the State. More specifically, you have inquired as to whether the State may prohibit the transportation, treatment, and disposal of such materials and wastes at sites owned by private persons or municipalities, at sites owned by the State itself, or at sites owned by the federal government. For the reasons which follow, it is our opinion that, with the exception of the operation of State-owned disposal sites, the State may constitutionally undertake none of these activities. The State may regulate the transportation, treatment and disposal of specific substances, but only on the basis of the danger to the public health posed by the substance itself and not solely on the basis of its place of origin.

A discussion of the powers of states to interfere with the interstate movement of hazardous materials and wastes should begin with the recent decision of the United States Supreme Court in Philadelphia v. New Jersey, 437 U.S. 617 (1978). In that case, the Supreme Court held that a New Jersey statute prohibiting the importation of solid and liquid waste from out of state violated Article I, Section 8, clause 3 of the United States Constitution

(the "Commerce Clause").[1] After finding that the interstate movement of wastes constituted "commerce" within the meaning of the clause, id. at 621-23, the Court found (1) that the New Jersey statute overtly discriminated against wastes coming from outside the State, and (2) the State had failed to show that landfilling of such wastes was any more dangerous to the health of New Jersey residents than landfilling of wastes generated within the State such as to justify discriminatory treatment. Thus, the statute was found to violate the Commerce Clause.[2] Id. at 623-29. The Court acknowledged the

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1/ The Commerce Clause provides that "The Congress shall have Power . . . To regulate Commerce . . . among the several States." It is not necessary, however, for the Congress to have enacted legislation in order for the clause to be violated. Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851).

Before reaching the question of whether the New Jersey statute violated the Commerce Clause itself, the Court made it clear that the Congress had enacted no statute, pursuant to the Commerce Clause or any other clause of the Constitution, pre-empting the states from regulating in the area of waste disposal, expressly finding that various federal acts dealing with waste disposal, including the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6901 et seq., contained no expression of preemptive intent. Philadelphia v. New Jersey, supra, at 620, n. 4. This means, of course, that any regulations promulgated by the Environmental Protection Agency pursuant to RCRA would also lack preemptive force. This is not to say, however, that any failure of the State to comply with the requirements of RCRA would be without consequences. It is possible that the enactment of a statutory barrier against the interstate movement of waste might jeopardize state eligibility for funds from the Environmental Protection Agency. See Sections 3006(b) and 3009 of RCRA, 42 U.S.C. §§ 6926(b), 6929; 40 C.F.R. § 123.32 (1980).

2/ Pursuant to this decision, our office issued an opinion shortly thereafter indicating that 17 M.R.S.A. § 2253, a Maine statute identical to that of New Jersey, was similarly unconstitutional. Opinion of the Attorney General to Henry A. Warren (October 18, 1978).

existence of certain older cases sustaining various state quarantine laws against Commerce Clause challenge, Asbell v. Kansas, 209 U.S. 251 (1908) (diseased cattle); Reid v. Colorado, 187 U.S. 137 (1902) (diseased cattle); Bowman v. Chicago & Northwestern R. Co., 125 U.S. 465, 489 (1888) (legislation regulating transportation of liquor not a quarantine law), but distinguished those cases on the ground that, while they involved discrimination against out-of-state commerce, the discrimination was justified in that the cases concerned articles whose very movement risked contagion and required immediate destruction. Philadelphia v. New Jersey, supra, at 628-29.3/

In addition to the Philadelphia case, a subsequent decision of the Tenth Circuit Court of Appeals, Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978) is relevant to your inquiry in that it invalidated on Commerce Clause grounds an Oklahoma statute which authorized the prohibition of the importation of hazardous wastes.4/ In Hardage, the Court, on the strength of the Philadelphia case, reversed a lower court ruling that hazardous wastes were not within the purview of the Commerce Clause, and found that the Oklahoma statute was discriminatory against interstate commerce and therefore unconstitutional. The court did not, however, determine whether the statute concerned articles whose very movement endangered the public health such as to bring it within the quarantine cases, supra.

The principle which emerges from the foregoing, therefore, is that the State may not prohibit the transportation, treatment or disposal of hazardous materials or wastes originating from outside

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3/ The Court also indicated, quoting Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), that where a state statute contained no overt discrimination against interstate trade, it will generally be sustained against Commerce Clause challenge if it can be shown that it serves a "legitimate local public interest," and that its effects on interstate commerce are only "incidental." Philadelphia v. New Jersey, supra, at 624. Where the statute facially discriminates against interest commerce, as would be the case with virtually all of your proposals, this test would appear inapplicable.

4/ The Court adhered to this holding in a second appeal of the same case decided a year and a half later, in which the plaintiff disposal facility operator sought to have the Court reverse its prior judgment on grounds not relevant here. Hardage v. Atkins, 619 F.2d 871 (10th Cir. 1980).

its borders solely on the basis of their origin. The only way in which such a general prohibition may be sustained is if it concerns a specific hazardous material or waste which can be shown to be so dangerous to the public health in and of itself as to warrant restrictions or prohibitions on its movement, treatment or disposal.5/

We do not think that your proposed legislation would fall within this latter rule. Under such a proposal, as we understand it, the State would permit the transportation, treatment or disposal of domestically generated hazardous materials or wastes, but would prohibit the disposal of identical wastes which are produced elsewhere. Such a scheme would appear to fall squarely within the facts of the Philadelphia case, since its purpose would be to attempt to reserve the State's finite disposal resources for state-generated wastes, a purpose clearly violating the Commerce Clause's ban on "economic protectionism." As the Supreme Court recognized, a state might attempt to protect its resources by slowing the flow of all wastes into its disposal sites,6/ Philadelphia v. New Jersey, supra, at 626, but it may not do so by discriminating against

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5/ In saying this, we offer no judgment as to whether any particular hazardous waste is in fact so dangerous as to warrant such a prohibition, or as to what degree of proof of a hazard would be necessary to sustain such a statute in court.

6/ We make no distinction here between disposal at private or municipal sites. It should be noted, however, that several cases have sustained local prohibitions against the disposal of out-of-town wastes at a municipal landfill on the ground that such prohibitions do not discriminate against interstate commerce and otherwise satisfy the requirement of the Pike v. Bruce Church, Inc. test, see note 3 supra, for such non-discriminatory prohibitions. Greenwillow Landfill, Inc. v. Akron, 485 F. Supp. 671, 678-79 (N.D. Ohio 1979); Dutchess Sanitation Service v. Plattekill, 426 N.Y.S. 2d 176 (App. Div. 1980); Monroe-Livingston Sanitary Landfill, Inc. v. Caledonia, 422 N.Y.S.2d 249 (App. Div. 1979).

interstate commerce.[7]

The situation may be somewhat different, however, if the State were to operate a treatment or disposal site itself[7] and seek either to restrict access to the site to its residents or to impose substantially larger fees on non-resident users. The Supreme Court left this question open in Philadelphia, expressly directing the reader's attention to Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 805-10 (1976). Philadelphia v. New Jersey, supra, at 627, n. 6. In that case, the Court held that the Commerce Clause was not violated when the State entered the market to encourage the removal of abandoned automobiles from its streets by paying a bounty to resident "processors" for each vehicle which they destroyed. The Court found that this kind of subsidy to encourage desirable behavior on the part of resident businesses did not impermissibly burden interstate commerce. It is possible to argue, therefore, that by establishing a hazardous waste treatment, storage or disposal site by limiting access to residents and resident businesses only, the State of Maine would only be engaging in a similar form of subsidy for the benefit of its resident businesses. See Reeves, Inc. v. Stake, __ U.S. __, 48 U.S.L.W. 4746 (June 19, 1980). That being the case, we would think that an argument can be made that the State may limit access to such a site to its residents.[8]

7/ You have also asked whether this result might be any different if the State were to distinguish in its prohibition between types of hazardous wastes, such that if certain wastes were generated within the State, similar wastes would be allowed in for disposal, but all other hazardous wastes would be prohibited. While such a scheme might be drafted in a manner which facially treated residents and non-residents equally, the fact remains that place of origin would still determine, albeit in a somewhat different fashion, whether or not a particular waste could be disposed in Maine. Given the broad language in the Philadelphia decision that control of hazardous waste disposal "may not be accomplished by discrimination against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently," 437 U.S. at 626-27 (emphasis added), we doubt that such a scheme could survive a Commerce Clause challenge. As indicated above, the State might be able to restrict importation of specific substances, but only if it could be shown that their very movement into the State endangered the public health.

8/ By a "state site," we mean one which is either owned by or leased to the State, and operated by it, either by its own employees or by a contractor.

9/ In reaching this conclusion, we do not address the question of whether the State, having established a treatment, storage or disposal site of its own, may also prohibit the establishment of other privately-owned or operated sites.

A similar approach might be used to sustain the imposition of substantially higher fees on non-resident users of a State-owned site against Commerce Clause challenge. In addition, however, such a plan would require scrutiny under the Privileges and Immunities and Equal Protection Clauses of the Fourteenth Amendment of the Constitution. There is, however, substantial authority for the proposition that such higher fees do not violate these clauses when, as here, the resource or facility in question is being managed or financed through taxes paid by the State's residents. See, e.g., Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371 (1978) (higher non-resident fee for non-resident hunting license); Hooban v. Boling, 503 F.2d 648 (6th Cir. 1974), cert. den. 421 U.S. 920 (1975) (higher non-resident tuition for state university.) It is impossible to say, of course, how high a fee must be before it becomes constitutionally infirm.10/ The most that can be said at present is that a substantial discrimination may be made.

Finally, you ask whether the State may impose restrictions on the disposal of hazardous wastes originating out of state at a site owned by the federal government. The answers here would appear to be the same as for restrictions on disposal at private or local sites; the prohibition is discriminatory against interstate commerce on its face and is not justified with regard to the hazards posed by particular substances. It therefore violates the Commerce Clause. In addition, this proposal poses the further constitutional problem that in establishing such a site, the federal government would doubtless be acting in pursuit of one of the enumerated powers granted to it by the states in enacting the United States Constitution, and may therefore be immune to any regulation whatever by the states. Arizona v. California, 283 U.S. 423 (1931); Hunt v. United States, 278 U.S. 96 (1928); Johnson v. Maryland, 254 U.S. 51 (1920). Without knowing the exact purpose of such a site, we cannot answer this question with any certainty. The problem, however, is clearly quite substantial.

I hope the foregoing answers your questions. Please feel free to reinquire if further amplification is needed.

Sincerely,

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10/ In Baldwin, the differential was as high as 2500 percent ($9 fee for residents and $225 fee for non-residents to hunt elk). Baldwin v. Montana Fish & Game Comm'n., supra, at 373.