JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 15, 1983

Honorable Judy C. Kany
Chairman, Joint Standing Committee on
Energy and Natural Resources
State House
Augusta, Maine 04333

Dear Senator Kany:

You have asked whether, if the State of Maine were to establish a site for the disposal of low level radioactive waste,[1] it could constitutionally limit use of that site to waste generated entirely within the state. Since no court has ruled directly on this question, the response of this Department must necessarily be somewhat uncertain. Nonetheless, it appears that the state may well be constitutionally able to operate a low level radioactive waste site in the manner set forth.

The exclusion of low level radioactive waste from a state operated disposal site presents difficulties under two clauses of the United State Constitution. The first is the Supremacy Clause, Article VI, clause 2, which provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land.

---

[1] Low level radioactive waste is defined by federal law as "radioactive waste not classified as high-level radioactive waste, transuranic waste, spent nuclear fuel or ['byproduct material']," 42 U.S.C. § 2021b(2), and includes such things as "filter sludges, resins, filter bottoms, used gloves and protective clothing, rags, tools, papers, plastic and materials used in the manufacture of smoke detectors, luminous dials and emergency exit signs." Washington State Building and Construction Trades Council v. Spellman, infra at 629.

Under this clause, state activity may be invalidated if the United States Congress enacts legislation which either clearly expresses its intention to preempt such activity, or is interpreted by the courts to constitute a pervasive statutory scheme whose purpose would be frustrated by the state's actions. Fidelity Federal Savings and Loan Association v. de la Cuesta, ____ U.S. ____, 73 L.Ed 2d 664, 674-676 (June 28, 1982), quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (express preemption) and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (implied preemption). See also Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); Hines v. Davidowitz, 312 U.S. 52 (1941). The federal statute which might be found to prohibit the exclusion of out-of-state wastes from a state-operated low-level radioactive waste site is the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq., particularly as it has been amended by the Low-Level Radioactive Waste Policy Act of 1981, 42 U.S.C. §§ 2021b-2021d.

In addition, even if the State's proposed activity were found not to be preempted by the Atomic Energy Act, as amended, it might still be found to violate the Commerce Clause, Article I, Section 8, clause 3. That clause provides:

> The Congress shall have Power . . . To regulate Commerce . . . among the several States.

and has been held to impose restraints independent of any federal legislation on state action which unreasonably affects the flow of interstate commerce. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). This Opinion will therefore discuss in turn the application each of these clauses to the question presented.

I. Supremacy Clause

In 1954, the Congress enacted the Atomic Energy Act with the general objective of encouraging the development of the safe generation of nuclear power. Since that time, considerable debate has occurred over the extent to which Congress, in enacting and amending the Act, intended to preempt state power to regulate various aspects of nuclear power plants. See e.g., Washington State Building and Construction Trades Council v. Spellman, 684 F.2d 627, 630 (9th Cir. 1982), petition for cert. filed sub nom. Don't Waste Washington Legal Defense Foundation v. Washington, 51 U.S.L.W. 3421 (U.S. Nov. 15, 1982) (No. 82-841); Pacific Legal Foundations v. State Energy Resources Conservation & Development Comm'n, 659 F.2d 903, 919-928 (9th Cir. 1981), cert. granted sub nom. Pacific

Gas & Electric Company v. State Energy Resources Conservation & Development Comm'n, 50 U.S.L.W. 3998.01 (U.S. June 21, 1982) (No. 81-1945); Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147-52 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972).[2] The precise question presented here is whether the Congress, in passing the Atomic Energy Act in its amended form, intended to preempt a state from excluding out-of-state low-level radioactive wastes from a state-owned disposal site.

The obvious place to look to determine the Congress's intention on this point are the amendments to the Atomic Energy Act enacted at the end of 1980 which deal expressly with the problems of low-level radioactive waste.[3] These amendments, titled the Low-Level Radioactive Waste Policy Act, and found as indicated above at 42 U.S.C. §§ 2021b-2021d, establish federal policy as to the disposal of low-level radioactive waste. Their principal thrust was to encourage the development of regional sites for the disposal of low-level radioactive waste. To accomplish this goal, the amendments place on each state the responsibility of disposing of all low-level radioactive waste generated within its borders, but allow any state to discharge this responsibility by entering into an interstate compact, as contemplated by Article I, Section 10, clause 3 of the United States Constitution, which compact could restrict the use of any disposal facility located with the territory of the compacting states to low-level radioactive waste generated within that territory. 42 U.S.C. § 2021d(a).

---

2 The history of the Atomic Energy Act and its amendments has been described by this Department in an earlier opinion. See Op. Me. Atty. Gen., December 14, 1979 at 3-6.

3/ Prior to these amendments, the most relevant portion of the Atomic Energy Act would have been the 1959 amendment thereto, 73 Stat. 688, enacting 42 U.S.C. § 2021, which attempted to clarify the respective authorities of the state and federal governments with regard to the regulation of radioactive material which until then had been within the exclusive jurisdiction of the federal government. On its face, however, this amendment did not address the question of the regulation of low-level radioactive waste, its scope being limited to "byproduct, source and special nuclear materials," which terms are defined in Section 2014 of the Act not to include low-level radioactive waste. In any event, whatever Congressional intent were to be inferred from the 1959 amendments would have to be regarded as now superseded by the 1981 amendments which specifically address the subject of low-level radioactive waste.

The clear implication of this scheme is that a state may not unilaterally ban the importation of low-level radioactive waste unless it enters into an approved compact containing such a prohibition. That was the holding of the United States Court of Appeals for the Ninth Circuit in the Washington State case, supra at 630, in which the Court invalidated a Washington initiative which enacted such a ban. But neither the Low-Level Radioactive Waste Act, nor the Washington State case, addresses the question of whether a state may deny access to out-of-state radioactive waste to a disposal site operated by the state itself. Thus, it must be concluded that the Congress has simply not expressed itself on this point.

In the absence of an express Congressional directive preempting a state from operating its own disposal site in the manner just described, the only remaining question is whether such an intention may be inferred because such a ban would interfere with a "pervasive statutory scheme." It is difficult to see, however, how such an interference might be found to occur. A state is under no obligation whatever under the Low-Level Radioactive Waste Policy Act to operate a low-level radioactive waste disposal site of its own. If it voluntarily undertakes to do so, but wishes to restrict access to the site in some way, the national waste disposal problem addressed by Congress in the Act will nonetheless be significantly alleviated. So long as the state does not directly restrict the flow of out-of-state waste across its borders, or prohibit the disposal of such waste at all sites, public or private, on its territory, it should not be found to be interfering with any federal policy, whether expressed in the Atomic Energy Act or elsewhere, simply by operating a limited-access facility of its own. Consequently, this Department is of the view that such action on the part of a State would not be impliedly preempted by the Atomic Energy Act.4/

4/ In reaching this conclusion, this Department offers no opinion as to what its view might be if the out-of-state waste which was to be disposed of at the proposed state facility was generated by the federal government itself. The fact that some of the waste prohibited from crossing the state line in Washington State was federally generated was apparently of concern to the court since it found that the state's prohibition was seeking, in part, to "regulate legitimate federal activity", and therefore violated the Supremacy Clause independent of any act of Congress. Washington State, supra at 630. See also the District Court opinion in the same case which treats this point at greater length . Washington State Building and Construction Trades Council v. Spellman, 518 F.Supp. 928, 931 (E.D. Wash. 1981), citing, inter alia, Mayo v. United States, 319 U.S. 441 (1943).

II. Commerce Clause

The question of whether the state may deny access at its own disposal site to radioactive waste generated out-of-state without violating the Commerce Clause has been addressed by this Department once before. Op. Me. Att'y Gen., No. 81-7 (Jan. 20, 1981).5/ On page 5 of that Opinion, a copy of which is attached, the Department noted that in Philadelphia v. New Jersey, 437 U.S. 617 (1976), the United States Supreme Court had expressly not ruled on this question, leaving open for further argument the possibility that a state operating in such a manner might qualify for the so-called "market participant" exception to the Commerce Clause, wherein states are permitted to engage in legitimate business activities which discriminate in favor of their own resident businesses. Id. at 627, n. 6. The Opinion also cited the then recent case of Reeves, Inc. v. Stake, 447 U.S. 429 (1980) for the same proposition. The Opinion thus concluded that since no court had foreclosed a state from so restricting the use of its own disposal site, "an argument can be made" that a state may do so.

The only question to be answered here, therefore, is whether any court has addressed this question since this Department's 1981 opinion. The only case of which we are aware which comes close to doing so is Washington State, supra, where the Ninth Circuit examined the Washington importation ban to determine whether it qualified for the "market participant" exception. The Court found that ban did not so qualify, for three reasons:

> The measure is based on public safety rather than on economic considerations. The measure denies entry of waste at the state's borders rather than at the site the state is operating as a market participant. The measure establishes civil and criminal penalties which only a state and not a mere proprietor can enforce. Id. at 631.

Under the proposal which you describe, it would not appear that any of these concerns would be violated. The purpose of establishing a state-owned site for the use of businesses operating within the state would obviously be to facilitate the

---

5/ The issue in the 1981 opinion was access to a state-owned disposal site for hazardous waste, not low-level radioactive waste. For purposes of the Commerce Clause, however, the nature of the waste is of no constitutional significance, since the Supreme Court held, in the Philadelphia case, infra, that waste is an article of commerce.

continued operation of those enterprises, not to guard against any particular disposal hazard. The prohibition against out-of-state waste would be at the site, not at the state's border; low-level radioactive waste would remain free to enter the state for disposal somewhere else, subject, of course, to any necessary state permits (See note 7, infra). And no civil or criminal penalties would be established. Thus, the Washington State case would appear to be inapplicable and the 1981 Opinion would continue in force.6/

* * *

For the foregoing reasons, it is the opinion of this Department that the denial of access to a state-owned facility for the disposal of low-level radioactive waste to waste generated out-of-state would not violate the Supremacy or

---

6/ There is one other point that deserves mention, though it has not been the subject of any direct holding by any court. In Reeves, Inc. v. Stake, supra, the Supreme Court intimated that the result in that case might have been different if the state were operating a business for the purpose of hoarding a natural resource. Since the subject of the business in that case - cement - was held not to be such a resource, the Court did not deny "market participant" status to the state of South Dakota. However, in Philadelphia v. New Jersey, supra, the Court found that landfill space in New Jersey was a scarce natural resource, and was therefore protected by the Commerce Clause. Thus, it might be argued that an attempt by Maine to limit access to a state-owned low-level radioactive waste landfill to in-state businesses might be an invalid attempt to conserve its natural resources. This, of course, was the issue expressly not resolved by the Supreme Court in the Philadelphia case, as indicated at the outset of Part II of this Opinion. This Department is inclined to think, however, that the sheer size of the State of Maine, coupled with its relatively sparse population, might make a court reluctant to conclude that landfill space was a scarce resource, as it might well be in the New Jersey suburbs of Philadelphia. Thus, the Department's 1981 view of the applicability of the Commerce Clause to the situation presented remains unchanged.

Commerce Clause of the United States Constitution.7/ If any of the foregoing is unclear, or if you have any further questions, please feel free to reinquire.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ll

7/ You should also note that this Opinion deals only with constitutional restriction on state action. Obviously, neither the Supremacy or Commerce Clauses operate as a restriction on private activity at all. Thus, should any private person establish a low-level radioactive waste site in Maine (which establishment would require a permit from the Maine Board of Environmental Protection pursuant to the Maine Hazardous Waste, Septage, and Solid Waste Management Act, 38 M.R.S.A § 1301 et seq., as well as any other federal or local licenses) such person would be free to allow or deny access to anyone at all for any reason.

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

January 20, 1981

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

---

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

---

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

---

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,

James E. Tierney

JAMES E. TIERNEY
Attorney General

JET:mfe

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.