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Exclusionary Policies Regarding Municipal Solid Waste and Hazardous Waste

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On June 1, 1992, the United States Supreme Court decided two cases in which it strongly reaffirmed the following two major holdings of its 1978 decision, *Philadelphia v. New Jersey*:[1] first, waste materials are articles of commerce within the scope of the Constitution's commerce clause;[2] and second, a state or local government may not exclude waste generated in another state from privately owned disposal facilities by imposing restrictions or discriminatory taxes on out-of-unit waste. The two cases were *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*[3] and *Chemical Waste Management, Inc. v. Hunt*.[4]

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources

By statute, Michigan required each of its counties to develop a solid waste management plan showing how the county would dispose of municipal solid waste generated in the county during the next twenty years. The law provided that waste generated outside the county would not be accepted at disposal facilities in the county unless the county plan expressly authorized such disposal. The St. Clair County solid waste management plan did not authorize disposal of out-of-county waste. The owners of the Fort Gratiot Sanitary Landfill, a privately owned facility in St. Clair County, applied to the county in 1989 for permission to accept up to 1,750 tons of waste a day that was generated outside the county. The county did not amend its plan to grant Fort Gratiot's application, and Fort Gratiot sued, alleging that the restrictions imposed by the state statute violated the commerce clause.

The Supreme Court held that Michigan's statute allowing counties to ban out-of-county waste from private disposal facilities violated the commerce clause. The Court found nothing to distinguish the Michigan prohibition from the one held unconstitutional in *Philadelphia v. New Jersey*. Michigan contended that its prohibition operated even-handedly against both waste from other states and waste from other Michigan counties and therefore did not discriminate against out-of-state waste. The Court rejected this contention, relying on previous cases that had held that blocking the movement of out-of-state goods through a political subdivision of a state was just as much a violation of the commerce clause as blocking their movement through the state itself. The Court also rejected the state's argument that the restriction was a health measure necessary to conserve local landfill capacity and protect the health of Michigan citizens. Finding nothing in the record to show that waste from other states was more harmful than waste generated in St. Clair County, the Court said that if the county wished to conserve landfill space it could impose a limit on all waste deposited, regardless of the source.

The Court expressly noted that its decision applies only to restrictions on private facilities and not to

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1. 437 U.S. 617. This case and other exlusionary cases are discussed in Campbell, "Solid-Waste Management: Local Government Exclusionary Policies," *Popular Government* 55 (Spring 1990): 44.

2. U.S. CONST. art. I, § 8, cl. 3.

3. 60 U.S.L.W. 4438 (June 1, 1992). The decision was seven to two, Chief Justice Rehnquist and Justice Blackmun dissenting.

4. 60 U.S.L.W. 4433 (June 1, 1992). The decision was eight to one, Chief Justice Rehnquist dissenting.

publicly owned landfills and other disposal facilities that exclude out-of-unit waste. The leading cases on exclusionary policies by publicy owned facilities remain *Evergreen Waste Systems, Inc. v. Metropolitan Service District*,[5] *Hancock Industries v. Schaeffer*,[6] *Lefrancois v. Rhode Island*,[7] and *Charles County Commissioners v. Stevens*,[8] each of which upheld exclusionary policies against commerce clause challenges.

Congressional committees have nearly completed work on two bills, S. 976 and H.R. 3865, that reauthorize the Resource Conservation and Recovery Act, and the *Fort Gratiot* decision will probably intensify pressures on Congress to allow states to restrict the importation of out-of-state waste.[9] In their current forms, S. 976 would allow governors to ban outside waste from disposal facilities provided the ban does not breach any existing disposal contracts, and H.R. 3865 would allow local governments to ban out-of-state waste from landfills that did not accept out-of-state waste before November 26, 1991.[10]

Chemical Waste Management, Inc. v. Hunt

Chemical Waste Management operates one of the largest hazardous waste landfills in the nation in Emelle, Alabama. By 1989, approximately 90 percent of the waste disposed of in the landfill was shipped to Alabama from other states. In 1990, Alabama enacted legislation to cap the amount of waste that could be disposed of in any one year and also imposed fees on the facility for the disposal of waste. The legislation imposed a base fee of $25.60 a ton on all hazardous waste disposed of at the facility, regardless of its origin, and an additional fee of $72.00 a ton on waste generated outside Alabama. Chemical Waste Management sued to enjoin collection of the additional fee on the ground that it violated the commerce clause.

The Supreme Court held the additional fee on shipments of waste from other states invalid under the commerce clause. The fee was a form of economic protectionism declared invalid in *Philadelphia v. New Jersey* and was also a tax discriminating against interstate commerce, contrary to a long line of cases dealing with state taxation of interstate commerce. The Court stated that Alabama could not justify the additional fee on health and safety grounds because it had not shown that hazardous waste generated in other states was more dangerous than hazardous waste generated in Alabama. The Court suggested that if Alabama wanted to reduce the amount of hazardous waste entering the state or being disposed of at the Emelle landfill, several acceptable alternatives were available: it could impose the additional fee on all hazardous waste disposed of; it could levy a per-mile tax on all vehicles transporting hazardous waste on Alabama roads; or it could cap the total tonnage landfilled at Emelle. But excluding or discriminating against interstate waste was not an acceptable method of limitation.

This decision, as with the *Fort Gratiot* case, is likely to bring pressure on Congress to allow states, either individually or through interstate or regional agreements, to impose limits on imported hazardous waste. The federal Comprehensive Environmental Response, Compensation, and Liability act (Superfund) requires states to provide adequate capacity for treating or disposing of hazardous waste or lose federal funds for the cleanup of hazardous waste sites.[11] Although the act currently states that this "adequate capacity" may be provided either "within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,"[12] it seems clear from this case that if a state that provides a disposal facility for other states through an agreement wishes to exclude waste from states that are not parties to the agreement, then the states using the facility must form a true interstate compact, which is a time-consuming process and an arrangement that must have congressional approval.[13] An agreement among states to exclude hazardous waste from non-party states that is not an interstate compact will no longer suffice.

5. 820 F.2d 1482 (9th Cir. 1987).
6. 811 F.2d 225 (3d Cir. 1987).
7. 669 F. Supp. 1204 (D.R.I. 1987).
8. 299 Md. 203, 473 A.2d 12 (1984).
9. Phillip A. Davis, "Rulings on 'Imported' Waste Weigh on RCRA Rewrite," *Congressional Quarterly* 50 (1992): 1601.
10. *Id.*
11. 42 U.S.C. § 9604(c)(9).
12. *Id.* § 9604(c)(9)(B).
13. The Southeast Interstate Low-Level Radioactive Waste Management Compact (see N.C. GEN. STAT. Ch. 104F) is a true interstate compact, and in the event a disposal site is located in North Carolina, low-level radioactive waste from states other than the eight members of the compact may be excluded. The Supreme Court's recent decision in New York v. United States, 60 U.S.L.W. 4603 (June 19, 1992), which declared invalid the take-title provisions of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985, found the exclusionary provisions of the act—which are the source of the exclusionary provisions in the southeast compact—to be valid.

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