

GENERAL ASSEMBLY: PROHIBITED SOLID WASTE TRANSPORT LEGISLATION.

CONSTITUTION OF THE UNITED STATES: COMMERCE CLAUSE.

Proposed legislation prohibiting solid waste transport on Commonwealth's navigable waterways that regulates evenhandedly in effecting legitimate local public interest, and only indirectly affects interstate commerce, will not violate Commerce Clause unless burden on such commerce is excessive in relation to local health or safety benefits. Such legislation, in seeking to protect Virginia's environment and applying equally to all waste, regardless of point of origin, would be constitutional, provided it neither practically or purposefully discriminates against, nor places excessive burdens on, interstate commerce in relation to environmental concerns it alleviates.

The Honorable William C. Bolling

Member, Senate of Virginia

December 15, 1998

You advise that you desire to propose legislation for consideration in the 1999 Session of the General Assembly that prohibits the transporting of solid waste on the Commonwealth's navigable waterways. You ask whether such legislation would violate either federal or state law.

You relate that the proposed prohibition would protect Virginia's waterways from pollution and possible contamination. It is my understanding that the increased use of barges on the navigable waterways of the Commonwealth to transport solid waste to landfills, in lieu of the traditional means of transporting such waste overland, gives rise to your concern that the Commonwealth's waterways will be vulnerable to increased pollution and contamination as a result of seepage or spillage of such waste therein. You state that such prohibition will apply equally to all waste, whether generated from an in-state or out-of-state source.

The Commerce Clause of the Constitution of the United States provides that Congress shall have the power "[t]o regulate commerce ... among the several states."¹ "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."²

"[T]he first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'³ With respect to the restriction of interstate movement of waste, the Supreme Court of the United States has held that a New Jersey statute prohibiting the importation of out-of-state solid waste violates the Commerce Clause.⁴ Noting that the flow of out-of-state waste merits Commerce Clause protection, the Court found that the statute's purpose, be it economic or

environmental protectionism, "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."⁵

With regard to the legislation you propose, and following the legal framework of the Supreme Court case, it is necessary first to determine whether the prohibition discriminates against out-of-state interests either facially, in its practical effect, or in its purpose.⁶ Thus, even when a statute does not facially discriminate against out-of-state interests, it is still examined in light of its practical effect or purpose.⁷ Therefore, it must be determined whether the proposed prohibition operates in a discriminatory manner against out-of-state interests.⁸

"To date, the Supreme Court has upheld ... discriminatory laws only where the discrimination was justified by the threat of death or disease,"⁹ along with "the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."¹⁰ Accordingly, if the proposed legislation is found to operate discriminatorily, it would violate the Commerce Clause, unless the discrimination is based upon a bona fide health or safety concern and nondiscriminatory alternatives are unavailable.

Even when a law does not discriminate against interstate commerce, the Commerce Clause inquiry does not end. If a state law "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."¹¹ Thus, if the proposed prohibition against transporting waste on Virginia's navigable waterways operates evenhandedly and only indirectly affects interstate commerce, it must still pass this second test comparing the burdens on commerce to the benefits conferred.

With respect to this second test, the Supreme Court has indicated that evenhanded, nondiscriminatory measures pass constitutional muster. For example, an evenhanded, nondiscriminatory limitation on the amount of disposable waste that does not discriminate on the basis of the waste's origin would withstand Commerce Clause scrutiny.¹² Additionally, the Court has stated that "a per-mile tax on *all* vehicles transporting hazardous waste across [a state's] roads"¹³ is consistent with a state's concern with environmental conservation and the health and safety of its citizens, but which does not vary with the waste's state of origin and is within a "State's power to monitor and regulate more closely the transportation and disposal of ... waste within its borders."¹⁴ Similarly, it is arguable that a uniformly applied prohibition against the use of a state's waterways to transport solid waste is a constitutionally permissible means of addressing the pollution and ensuing health and safety concerns associated with such transport.

Accordingly, it is my opinion that legislation which seeks to protect Virginia's environment by prohibiting the transportation of solid waste on the Commonwealth's navigable waterways and which is applied equally to all waste, regardless of its point of origin, would be constitutionally permissible, provided the legislation does not, in its practical operation or purpose, work discrimination against interstate commerce and does not place excessive burdens thereon in relation to the concerns it alleviates.

¹U.S. Const. art. 1, § 8, cl. 3.

²Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. 93, 98 (1994).

³*Id.* at 97 (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)).

⁴Philadelphia v. New Jersey, 437 U.S. 617 (1978).

⁵*Id.* at 626-27.

⁶See Chambers Medical Technologies of S. C. v. Bryant, 52 F.3d 1252, 1256 (4th Cir. 1995) (holding that "if a state statute discriminates against interstate commerce on its face, in its practical effect, or in its purpose, 'a "virtually *per se* rule of invalidity" applies." (Citations omitted.)).

⁷For example, a South Carolina law in contention included a limitation on all hazardous waste buried within the state, regardless of its source. See Environmental Technology Council v. Sierra Club, 98 F.3d 774, 780 (4th Cir. 1996), *later proceeding*, South Carolina v. Environmental Technology Council, 520 U.S. 1113, *cert. denied*, 117 S. Ct. 2478, 138 L. Ed. 2d 987 (U.S. 1997). This limitation, however, was capable of being lifted upon certification that the burial of more waste was necessary to protect the citizens of South Carolina. 98 F.3d at 780. South Carolina argued that because the limitation was evenhanded and did not burden interstate commerce any more than intrastate commerce, it should be upheld. *Id.* at 787. The Fourth Circuit found that "[t]he limit does not have the same effect on in-state as out-of-state wastes because the limit can be lifted [on behalf of South Carolina]." *Id.* "Thus, the overall limit is not facially neutral, but rather discriminatory." *Id.* at 788. See also C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 391 (1994) (holding that flow control ordinance applicable to out-of-state processors "is no less discriminatory because in-state or in-town processors are also [affected]").

⁸Whether the proposed prohibition operates in a discriminatory manner requires a factual determination. Compare Chambers Medical Technologies of S. C. v. Bryant, 52 F.3d at 1252 (remanding court of appeals case to district court for factual determination whether state regulation imposing fluctuating treatment cap was discriminatory in purpose).

⁹Environmental Technology Council v. Sierra Club, 98 F.3d at 785 (citing Maine v. Taylor, 477 U.S. 131 (1986) (upholding Maine's prohibition on importing live baitfish because of potential for destruction of Maine's fisheries)); Clason v. Indiana, 306 U.S. 439 (1939) (upholding Indiana's restrictions on transporting dead animals without license because of potential for disease).

¹⁰Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334, 342 (1992) (quoting Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977)).

¹¹Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

¹²See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 367 (1992).

¹³Chemical Waste Management, Inc. v. Hunt, 504 U.S. at 345.

¹⁴*Id.* at 345-46.