The State of South Carolina

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OPINION NO. _____ August 23, 1989

SYLLABI:

1. Sections 1, 2, 3, 4, 5, 6, 7 and 8 of Act No. 196 of 1989 are not inconsistent as defined in 40 C.F.R. 271.4(a).

2. However, Section 9 of the Act raises the more difficult legal question of whether this provision is consistent for purposes of 271.4(a) and with the Commerce Clause of the federal Constitution.

3. Recently, the United States Supreme Court stated with regard to the Commerce Clause: "[e]ven overt discrimination against interstate trade may be justified where ... out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the integrity of its natural resources ... ." Maine v. Taylor, 477 U.S. at 151 (1986).

4. Moreover, in City of Philadelphia v. New Jersey, it was stated: [A state] ... must out of sheer necessity treat and dispose of its ... waste in some fashion .... It does not follow that [such State] must, under the Commerce Clause, accept [hazardous] ... waste ... from outside its borders .... City of Philadelphia v. New Jersey, 437 U.S. at 632-633 (Rehnquist, J., dissenting).

5. South Carolina possesses an overriding interest in limiting the flow of additional hazardous waste into the State. Such importation of large volumes of waste from states not willing to handle their own hazardous by-products, seriously threatens South Carolina's already delicate environmental balance. Even more persuasive is the fact that, rather than placing a total ban upon the importation of all waste, the State has chosen in Act No. 196 to act in a more limited way by simply requiring each state to handle its own waste more responsibly.

6. In conclusion, while we recognize that the argument exists that various Supreme Court decisions may call into question portions of Act No. 196 as inconsistent with the Commerce Clause, we believe that the better view, in light of more recent Supreme Court decisions such as Maine v. Taylor, is that Act No. 196 (and Executive Order 89-17) are constitutionally valid. This statute and its predecessor Executive Order are deemed essential for the protection of the health and safety of South Carolina citizens. The "storage of toxic waste is properly the subject of intense public concern." Thus, until the United States Supreme Court speaks further on this issue, we believe that Act No. 196 (and Executive Order 89-17) are consistent, as defined in 40 C.F.R. 271.4(a).

TO: The Honorable Michael D. Jarrett
Commissioner, South Carolina Department
of Health and Environmental Control

FROM: T. Travis Medlock
Attorney General

QUESTION: Is Act No. 196 of 1989 which substantially amends the Hazardous Waste Management Act, consistent with 40 C.F.R. 271.4(a)?

APPLICABLE LAW: 40 C.F.R. 271.4(a); Maine v. Taylor, 477 U.S. 131 (1986); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976); Evergreen Waste Systems v. Metro Service Dist. 820 F.2d 1482 (9th Cir. 1987); Industrial Maint. Serv. v. Moore, 677 F.Supp. 436 (S.D. W.Va. 1987).

DISCUSSION:

You have requested that this Office provide you with an opinion concerning Act No. 196 of 1989, which substantially amends the Hazardous Waste Management Act. More specifically, you seek advice as to whether the Act is consistent with 40 C.F.R. 271.4(a). This Regulation deems inconsistent any aspect of a state hazardous waste management program "which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program ...." We understand that this opinion is sought pursuant to a request by the United States Environmental Protection Agency pursuant to 40 C.F.R. Section 271.21(d) as expressed in a letter to you dated July 6, 1989.

A summary of Act No. 196 of 1989 is set forth in the title of the enactment. Such title provides as follows:

> AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTIONS 44-56-35, 44-56-165, AND 44-56-205 SO AS TO AUTHORIZE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL TO PROMULGATE REGULATIONS ESTABLISHING STANDARDS FOR THE LOCATION OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES TO ENSURE LONG-TERM PROTECTION OF HUMAN HEALTH AND THE ENVIRONMENT, AND REQUIRE THAT ALL HAZARDOUS WASTE TREATMENT AND DISPOSAL FACILITIES IN THIS STATE SHALL GIVE PREFERENCE TO HAZARDOUS WASTE GENERATORS WITHIN THE STATE FOR TREATMENT AND DISPOSAL OF HAZARDOUS MATERIALS AT LICENSED FACILITIES IN THE STATE, TO DESIGNATE THAT A PORTION OF THE FEE IMPOSED UNDER SECTION 44-56-170(C) BE USED TO FUND HAZARDOUS WASTE REDUCTION AND MINIMIZATION ACTIONS OF THE DEPARTMENT AND TO ENFORCE BANS PROVIDED FOR IN SECTION 44-56-136(4), (5), AND (6); TO AMEND CHAPTER 56 OF TITLE 44 AND BY ADDING ARTICLE 2 SO AS TO PROVIDE THAT THE ENTITY PROVIDING FINANCIAL ASSISTANCE FOR A HAZARDOUS WASTE TREATMENT OR DISPOSAL FACILITY OR SITE MUST, UPON WRITTEN REQUEST OF THE DEPARTMENT, FURNISH THE DEPARTMENT INFORMATION CONCERNING ITS FINANCIAL INTEGRITY, TO PROVIDE THAT THE DEPARTMENT MAY REQUIRE CERTAIN INFORMATION, TO AUTHORIZE THE DEPARTMENT TO REVIEW THE NATURE, EXTENT, AND SUFFICIENCY OF THE INFORMATION SUPPLIED, TO AUTHORIZE THE DEPARTMENT TO VERIFY THE INFORMATION WHICH IS FURNISHED: TO AMEND CHAPTER 56 OF TITLE 44 BY ADDING ARTICLE 9 SO AS TO CREATE THE HAZARDOUS WASTE MANAGEMENT RESEARCH FUND, TO PROVIDE THE PURPOSES OF THE FUND, TO SPECIFY THE PURPOSES FOR WHICH MONIES FROM THE FUND MAY BE EXPENDED, REQUIRE CERTAIN FEES TO BE REMITTED FOR CREDIT TO THE FUND; AUTHORIZE THE SOUTH CAROLINA UNIVERSITIES RESEARCH AND EDUCATION FOUNDATION TO EXPEND MONIES FROM THE FUND, REQUIRE ACCOUNTING OF MONIES SPENT BY THE FOUNDATION, TO CREATE A HAZARDOUS WASTE MANAGEMENT SELECT OVERSIGHT COMMITTEE, TO PROVIDE FOR ITS PURPOSES, RESPONSIBILITIES, AND MEMBERSHIP; TO AMEND SECTION 44-56-60, RELATING TO THE REQUIREMENTS FOR THE ISSUANCE OF A PERMIT FOR THE OPERATION CONSTRUCTION, OR ALTERATION OF A HAZARDOUS

WASTE TREATMENT, STORAGE, OR DISPOSAL FACILITY, SO AS TO REQUIRE EVIDENCE OF FINANCIAL ASSURANCE AS THE DEPARTMENT DETERMINES PRIOR TO THE ISSUANCE OF A PERMIT; TO AMEND SECTION 44-56-130, RELATING TO UNLAWFUL ACTS REGARDING HAZARDOUS WASTE, SO AS TO PROHIBIT THE TREATMENT, STORAGE, OR DISPOSAL OF HAZARDOUS WASTE IN THIS STATE GENERATED IN ANOTHER STATE WHICH PROHIBITS THE TREATMENT, STORAGE, OR DISPOSAL OF THAT SUBSTANCE WITHIN ITS OWN BORDERS; TO AMEND SECTION 44-56-160, AS AMENDED, RELATING TO THE HAZARDOUS WASTE CONTINGENCY FUND, SO AS TO MAKE CORRECTIONS IN REFERENCES TO FEES LEVIED PURSUANT TO OTHER CODE SECTIONS; AND TO AMEND SECTION 44-56-170, RELATING TO HAZARDOUS WASTE CONTINGENCY FUND REPORTS, FEES, AND ADMINISTRATION OF THE HAZARDOUS WASTE CONTINGENCY FUND, SO AS TO INCREASE THE FEE IMPOSED ON HAZARDOUS WASTES GENERATED IN AND OUT OF THIS STATE.

We have been advised by legal counsel for the South Carolina Department of Health and Environmental Control that several sections of Act No. 196 of 1989 raise no questions regarding consistency as defined above. Sections 1 and 6 require demonstrations of financial assurance from any applicant for a hazardous waste disposal facility. Section 2 requires site suitability standards. Section 3 establishes a Hazardous Waste Research Fund from fees already imposed by statute and creates an oversight committee. Section 4 promotes waste minimization. Section 7 amends the existing statute dealing with a contingency fund established to assure long-term post-closure maintenance of disposal sites. Section 5 expresses a preference for in-state waste, but imposes no barriers, express or implied to out-of-state waste. Thus, we concur with DHEC counsel that the foregoing provisions are not inconsistent as unreasonably operating as a ban on the free movement of hazardous waste.

Section 8 increases the fees charged for waste disposal. Previously, EPA has concluded that a differential between the $15/ton charged in-state generators and the $18/ton charged out-of-state generators was not inconsistent as defined. See 50 Fed. Reg. No. 217, p. 46437-40 (November 8, 1985). The present amendment simply raises the fees to $25 and $30 respectively. Based upon the foregoing EPA ruling and the reasons stated therein, we believe Section 8 is consistent as defined in 40 C.F.R. Section 271.4(a).

Section 9 of the Act raises a more difficult legal question. This Section amends Section 44-56-130 of the 1976 Code and bans treatment, storage or disposal of waste from "any jurisdiction which

prohibits by law the treatment [or storage or disposal] of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment [or storage or disposal] of hazardous waste." This provision raises the issue of whether such limitation is consistent with the Commerce Clause of the federal Constitution and the decisions of the United States Supreme Court interpreting this Clause. See e.g., Philadelphia v. New Jersey, 437 U.S. 617 (1978); A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976). Although the question is a close one, it is our opinion that Section 9 is also consistent as defined above.

In Philadelphia v. New Jersey, supra, the United States Supreme Court held that a New Jersey statute prohibiting the importation of most "solid or liquid waste which originated or was collected outside the territorial limits of the State" was inconsistent with the Commerce Clause. The Court rejected the argument that the New Jersey statute served as a quarantine law because there was "no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible." 437 U.S. at 629. Such statute was thus found to discriminate against interstate commerce.

Justice Rehnquist and the Chief Justice strongly dissented. Justice Rehnquist observed that he saw no reason why "a State may ban the importation of items whose movement risks contagion but cannot ban the importation of items which, although they may be transported into the State without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety." 437 U.S. at 632-633. To the argument that New Jersey's statute discriminated between domestic waste and that transported into the State, Justice Rehnquist responded:

> New Jersey must out of sheer necessity treat and dispose of its solid waste in some fashion, just as it must treat New Jersey cattle suffering from hoof-and-mouth disease. It does not follow that New Jersey must, under the Commerce Clause, accept solid waste ... from outside its borders ....

Supra.

It would appear, at first glance, that Philadelphia v. New Jersey and other cases such as A & P Tea Co. v. Cottrell are controlling with respect to Section 9. We do not think such a conclusion necessarily follows, however.

First of all, Philadelphia v. New Jersey involved virtually an absolute ban upon out-of-state waste, of all forms. Section 9 of Act No. 196 does not reach nearly so far. Instead, Section 9 forbids the shipment, storage or disposal of waste from any jurisdiction which prohibits by law the treatment, storage or disposal of that waste or which has not entered into an interstate or regional agreement for the safe treatment, storage or disposal of hazardous waste. Unlike the unrelenting ban in Philadelphia, here other states may control their own destiny with respect to the management of that state's hazardous waste. In other words, the goal of Act No. 196 is to insure that each state act responsibly in the management of its waste. There is no effort here, such as the Supreme Court found in the Philadelphia case, to engage in economic "protectionism".

Lower courts have recognized the importance of limiting Philadelphia's holding to its unique set of facts. In Evergreen Waste Systems v. Metro Service Dist., 820 F.2d 1482 (9th Cir. 1987), the Court distinguished New Jersey's "total ban on out-of-state waste", present in the Philadelphia case, from the ordinance in Evergreen which applied to only one landfill and barred waste "from most Oregon counties as well as out-of-state waste." In Evergreen, the Court upheld the ordinance, finding that, unlike the statute in Philadelphia, it was not "a law that overtly blocks the flow of interstate commerce at a State's borders." 820 F.2d at 1484. We believe, therefore, that the Philadelphia case should be limited to its facts.

Indeed, the Supreme Court cases decided since Philadelphia, reflect that the Court has narrowly confined its holding in that case. In Reeves, Inc. v. Stake, 447 U.S. 429 (1980), for example, the Court held that the State, as a market participant (owner of cement plant) may discriminate against in-state customers during a cement shortage without violating the Commerce Clause.

Moreover, in Maine v. Taylor, 477 U.S. 131 (1986), the Supreme Court appears to have undermined its holding in Philadelphia. There, the Court recognized that, where it is necessary to protect the health and safety, a state may ban the importation of items such as particular types of baitfish which, when integrated into its own fisheries, threaten its fish population and aquatic ecology. In Taylor, the Court held:

> The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not

> needlessly obstruct interstate trade or attempt to "Place itself in a position of economic isolation," ... it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court's findings that Maine's ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against commerce; the record suggests that Maine has legitimate reasons, "apart from their origin, to treat [out-of-state baitfish] differently ... ."

477 U.S. at 151. The Court went on to say that

> Not all intentional barriers to interstate trade are protectionist ... and the Commerce Clause "is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community." ... Even overt discrimination against interstate trade may be justified where ... out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens or the integrity of its natural resources, and where "outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecti[on]." .... (emphasis added).

477 U.S. at 148.

Executive Order No. 89-17, which preceded Act No. 196, clearly reflects the State's concerns regarding the dangers of importing hazardous waste into the State. The Order notes that the volume of "hazardous waste disposed of in South Carolina is disproportionate[] [to] ... out-of-state waste.". Further, the Order recognizes that other states "have failed to act responsibly in disposing of their own hazardous waste" by implementing legal barriers to the disposal in those states. In addition, the Order notes the overriding concern in South Carolina that the unabated importation of hazardous waste into this State "threatens our environment and the mental well-being of our citizens ..." It is South Carolina's purpose "to

protect the health of the citizens of South Carolina and the environment of the state of South Carolina by providing a 'cradle to grave' approach to the management of hazardous waste ..."

Clearly, the regulation of importation of hazardous waste into the State "serves a legitimate local public purpose." Evergreen Waste Systems v. Metro Service Dist., 820 F.2d at 1484. The Governor and Legislature have determined that this purpose could not be served by narrower measures.

The same fundamental state interests underlying the Court's decision in Maine v. Taylor are present here. The Court in Taylor concluded that Maine possessed an overriding interest in limiting the importation of live baitfish into the State because such introduction "could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species or by disrupting the environment in more subtle ways." 477 U.S. at 141. In other words, Maine determined that its environment could not withstand further quantities of live baitfish without severely jeopardizing its ecological balance. Thus, the Court permitted a total ban upon importation even though baitfish were not similarly restricted in Maine. Likewise, South Carolina possesses an overriding interest in limiting the importation of additional hazardous waste into the State even though waste from this State must also be disposed of, because such importation of large volumes of waste from states not willing to handle their own hazardous by-products seriously threatens South Carolina's already delicate environmental balance. Even more persuasive is the fact that, rather than placing a total ban upon the importation of all waste, South Carolina chooses to act in a more limited way than did Maine in Taylor by merely requiring each state to handle its own waste more responsibly. This is an "intermediate form of regulation". Maine v. Taylor, supra.

In short, we know of no United States Supreme Court decision invalidating a statute similar to Act No. 196. To the contrary, as has been argued in other jurisdictions, the Supreme Court case of Maine v. Taylor, supra "signals a shift [by the Supreme Court] away from the analysis articulated in City of Philadelphia." See, Industrial Maint. Service, Inc. v. Moore, 677 F.Supp. 436 (S.D. W.Va. 1987) 1/ Clearly, a state's power to regulate commerce is greatest when the State acts upon matters of local concern;

1/ We recognize that in Industrial Maintenance Service, Inc., supra, the Court held that an Executive Order prohibiting the importation of solid waste into West Virginia for disposal was

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state regulations enacted to promote public health and safety are accorded particular deference. Burlington Northern R. Co. v. State of Neb., 802 F.2d 994 (8th Cir. 1986).

Such is the case here. While we recognize that the argument exists that various Supreme Court decisions 2/ may hold that portions of Act No. 196 are inconsistent with the Commerce Clause, we

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1/ Continued from Page 8

invalid pursuant to the Commerce Clause. Again, that case involved an absolute ban, more similar to the City of Philadelphia case. Moreover, in the West Virginia case, the Court distinguished Maine v. Taylor, on the basis that there was no difference between in-state waste and out-of-state waste, and thus there was no need to treat the two forms of waste differently. Here, as noted, the Executive Order states in great detail why a limitation upon importation into South Carolina is necessary, i.e. the fact that other states are not managing their own waste properly and the importation of large quantities of additional waste into the State threatens South Carolina's ecological balance. While a court could find the rationale in Industrial Maintenance Service Inc. controlling, we believe that case and others like it are distinguishable.

2/ We do not view A & P Tea Co. v. Cottrell, supra, to be apposite to this situation. Mississippi argued that its regulation, which provided that milk from other states may be sold in Mississippi provided that state accepted Mississippi milk products on a reciprocal basis, served its vital interests in maintaining health standards. The Court concluded that this argument "borders on the frivolous", 424 U.S. at 375, because in no way did the Regulation promote "any higher Mississippi milk quality standards." Hazardous waste regulation is clearly different from that of milk. South Carolina is attempting to limit the importation of such waste from those states who do not wish to manage their own waste problems or are unwilling to reciprocate with South Carolina for joint handling of waste matters. Moreover, with respect to hazardous waste, volume is important from the standpoint of safety. See Philadelphia v. New Jersey, supra, 437 U.S. at 632-633 (Rehnquist, J. dissenting) [waste which continues to "pile up ... [is] an ever increasing danger to the public health and safety."] With respect to milk, it is the quality, not quantity, which is important. See, 50 Fed. Reg. No. 217, p. 46439, supra.

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believe that the better view, in light of more recent Supreme Court decisions such as Maine v. Taylor, is that Act No. 196 (and Executive Order 89-17) are constitutionally valid. This statute and its underlying Executive Order were deemed essential for the protection of the health and safety of South Carolina citizens. See, Browning-Ferris Industries v. Pegues, 710 F.Supp. 313 (M. D. Ala. 1987). The "storage of toxic waste is properly the subject of intense public concern." Supra. Thus, until the United States Supreme Court speaks further on this issue, we believe that Act No. 196 is consistent, as defined in 40 C.F.R. 271.4(a). 3/

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Likewise, the recent decision, Healy v. The Beer Institute, 57 U.S.L.W. 4748 (June 19, 1989) is not controlling. There, a statute discriminated against brewers and shippers of beer engaged in interstate commerce. In Healy, the Court did not view the State's interest nearly so great as that asserted in Maine and there was no claim in Healy of any overriding interest in health and safety. Moreover, the Court in Healy distinguished the Maine case on the basis of the existence in the latter case of a "valid factor unrelated to economic protectionism." 57 U.S.L.W. at 4753. We believe our case is more akin to Maine than to Healy.

3/ We note that EPA has previously stated that it is "not required to adopt the Constitutional test" [Commerce Clause] in determining whether there is a conflict with its own regulations. EPA has interpreted 40 C.F.R. Section 271.4(a) as requiring that "the unreasonableness of the restriction or impediment ... should be measured by the impact or likely impact on the actual flow of waste. In applying this test, EPA will look to all relevant factors. The Agency will primarily focus on any available evidence on the quantities of wastes that are imported and exported." 50 Fed. Reg. No. 217, p. 46439, supra. We do not concede that a constitutional test is required for purposes of 271.4(a). However, to the extent that EPA's standard is less stringent than the Constitution, we believe that a priori, such standard is met by Act No. 196.