

5-1-1992

The Constitutionality of Utah's Hazardous Waste Disposal Fee

Troy Fitzgerald

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Troy Fitzgerald, *The Constitutionality of Utah's Hazardous Waste Disposal Fee*, 6 BYU J. Pub. L. 279 (1992).
Available at: <https://digitalcommons.law.byu.edu/jpl/vol6/iss2/5>

This Comment is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Constitutionality of Utah's Hazardous Waste Disposal Fee

I. INTRODUCTION

The interstate shipment of hazardous wastes has become a matter of increasing national concern. Each year the United States produces over 275 million tons of garbage, making the nation the largest per capita producer of waste on the planet.¹ The crush for landfill space is ever increasing, particularly in the densely populated Northeast.² In the search for additional space and lower costs, waste producers are willing to ship their garbage hundreds of miles for disposal. Ohio alone imports over 7,000 tons of solid waste daily from the Eastern seaboard where landfill charges are much higher.³ A typical Long Island landfill charges \$125 per ton to dump municipal waste. In contrast, a typical Indiana landfill charges \$12 per ton. With transportation costs at only \$33 to \$35 per ton from New York to Indiana, it is clear that shipping is a cost effective measure.⁴

Recycling technology is lagging far behind the country's ability to make trash, and people understandably have the Not In My Back Yard (NIMBY) syndrome.⁵ Legislators in various states have heard the cries of their constituents and in recent years have enacted statutes which prohibit, limit, or tax the importation of hazardous and solid wastes from other states.⁶ Industry, in turn, contends that the interstate shipment of waste is necessary for its survival. Many companies claim that

1. Debora MacKenzie, *If You Can't Treat It, Ship It*, NEW SCIENTIST, Apr. 1, 1989, at 24.

2. Robert Meltz, *State Discrimination Against Imported Solid Wastes: Constitutional Roadblocks*, 20 ENVTL. L. REP. 10383 (1990).

3. Anthony J. Celebrezze Jr., *Ohio Proposes Solutions for Its Solid Waste Problems*, 18 ENV'T REP. (BNA) 2303 (1988).

4. See *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 753 F. Supp. 739, 748 (S.D. Ind. 1990).

5. *Government Suppliers Consolidating Services, Inc. v. Bayh*, 734 F. Supp. 853, 855-56 (S.D. Ind. 1990).

6. The states include Alabama, California, Delaware, Indiana, Louisiana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Utah and others.

states have failed to establish adequate sites for waste treatment, while other corporations assert they have developed centralized waste sites for their factories, which require waste shipments across state boundaries.⁷

Utah has not been immune from all the furor. In June of 1991, Utah officials took a militant stand against out-of-state shipments of hazardous waste when the "Cancer Cannonball" raced from South Carolina to Utah.⁸ Utah legislators have also imposed a hazardous waste disposal fee which is more than two times higher for out-of-state generators.⁹ This legislation has constitutional implications.

The courts have not allowed states to discriminate against interstate commerce on the theory of a political union. The increase in legislation regulating the transportation of hazardous and solid waste has led to a corresponding rise in litigation challenging these laws.

This comment will examine the problem of the interstate shipment of hazardous wastes by focusing on the constitutionality of Utah's hazardous waste disposal fee. Next, it will look at the hazardous waste regulatory scheme and national case law on disparate hazardous waste fees as violations of the Commerce Clause. Finally, this comment will explore current Utah bills and pending national legislation which could completely change the present trend.

II. THE HAZARDOUS WASTE REGULATORY SCHEME

In 1976, Congress enacted the Resource Conservation and Recovery Act (RCRA) to regulate the generation, transportation, and disposal of solid waste.¹⁰ One of Congress' main objectives was to establish a viable Federal-State partnership to carry out the purposes of RCRA.¹¹ In order to facilitate the partnership, Congress authorized state or regional solid waste plans to be developed by the individual states.¹² Recently, Utah joined the ranks of states which have and manage

7. *Waste Shipment Bans Seen Danger to Chemicals; Hazardous Waste Transportation Policy*, CHEMICAL MARKETING REP., Vol. 239 No. 19, May 13, 1991, at 3.

8. Margaret E. Kriz, *The Big Stink*, NAT'L J., Vol. 23 No. 42, Oct 19, 1991, at 2540.

9. See UTAH CODE ANN. § 19-6-118 (1991).

10. See 42 U.S.C. §§ 6901 to 6992(k) (1991).

11. See 42 U.S.C. § 6902(a)(7) (1991).

12. See 42 U.S.C §§ 6941 to 6949(a) (1991).

their own form of the RCRA scheme.¹³

In development of its plan, the Utah legislature included a fee on the disposal of both hazardous and nonhazardous solid wastes. The nonhazardous solid waste management fee is a flat rate imposed upon all owners or operators of disposal or incinerator sites.¹⁴ The hazardous waste disposal fee falls upon the generators of hazardous waste. In-state generators pay a fee of \$8 dollars per ton while out-of-state generators pay \$20 dollars per ton.¹⁵ This statute apparently violates the Commerce Clause of the United States Constitution.

III. THE COMMERCE CLAUSE

The Commerce Clause states that "[t]he Congress shall have Power . . . [3.] To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."¹⁶ This clause gives Congress plenary power to regulate interstate commerce.

When examining Commerce Clause cases, the Supreme Court will immediately strike down any state statute that directly violates a federal statute.¹⁷ When the state statute does not conflict directly with existing federal legislation, the Court interprets the statute in accordance with the dormant Commerce Clause. The Court has developed several tests to determine whether a state statute is constitutional. The Court evaluates a statute differently depending on whether it is facially neutral or facially discriminatory. There is also a defense for the state if it is acting as a market participant.

13. See UTAH CODE ANN. § 19-6 (Supp. 1991).

14. See UTAH CODE ANN. § 19-6-119 (Supp. 1991).

15. UTAH CODE ANN. § 19-6-118 (Supp. 1991).

(1)(a) An owner or operator of any commercial hazardous waste disposal or treatment facility that primarily receives wastes generated by off-site sources not owned, controlled, or operated by the facility or site owner or operator, and that is subject to the requirements of Section 19-6-108, shall collect from the generator:

(i) a fee of \$8 per ton, or fraction thereof, on all hazardous waste generated in this state that is received at the facility or site for disposal or treatment; and

(ii) a fee of \$20 per ton, or fraction thereof, on all hazardous waste generated outside of this state that is received at the facility for disposal or treatment.

16. U.S. CONST. art. I § 8, cl. 3.

17. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

A. *The Quarantine Cases and Wastes as Objects of Commerce*

The United States Supreme Court first entered the battle over interstate movement of solid wastes in *City of Philadelphia v. New Jersey*.¹⁸ This case is the touchstone for all subsequent decisions on the topic of transboundary movement of hazardous and solid wastes. New Jersey captured two dissenting votes by analogizing the movement of hazardous wastes to the movement of quarantined items.¹⁹

According to a line of quarantine cases, states can ban the importation of items "which, on account of their existing condition, would bring in and spread disease, pestilence, and death, [which], from their condition and quality, [are] unfit for human use or consumption."²⁰ These quarantine laws are not considered forbidden protectionist measures even though the state statutes discriminate against interstate commerce.²¹ The *City of Philadelphia* Court recognized that individual states have the authority to prohibit noxious articles from entering the state even though this prohibition discriminates against interstate commerce.

Writing for the majority in *City of Philadelphia*, Justice Stewart distinguished prior cases by saying that "quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin."²² By summarily removing the quarantine defense, the Court held that solid waste was an article of commerce, not a noxious item since the harm does not arise until it is placed in the landfill. Once in the landfill, out-of-state garbage is the same as in-state garbage.²³

The Supreme Court's holding in *City of Philadelphia* has nullified the "quarantine" defense for statutes which ban the movement of solid waste into a particular state. The Supreme

18. 437 U.S. 617 (1978).

19. See *Id.* (Rehnquist, J., dissenting) (joined by Chief Justice Burger).

20. *Bowman v. Chicago and Northwestern Ry.*, 125 U.S. 465, 489 (1888).

21. See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 525 (1935); *Sligh v. Kirkwood*, 237 U.S. 52, 59-60 (1915); *Asbell v. Kansas*, 209 U.S. 251, 254 (1908); *Railroad Co. v. Husen*, 95 U.S. 465, 472 (1878).

22. *City of Philadelphia*, 437 U.S. at 628-29.

23. *Id.* at 629.

Court has declared that solid waste is an object of commerce that should be treated like any other article which travels in interstate traffic.²⁴

The holding in *City of Philadelphia* left open the question of whether hazardous wastes could be considered noxious. Hazardous wastes are a subcategory of solid wastes that are innately more dangerous than other solid wastes. The question of whether hazardous wastes should be common articles of commerce comes down to whether their use in interstate commerce outweighs the dangers of transporting them. The Eleventh Circuit answered this question by proclaiming that hazardous wastes are an object of commerce subject to the Commerce Clause. The Eleventh Circuit Court of Appeals relied on the Supreme Court's reasoning in *City of Philadelphia* in reaching its decision.²⁵

A federal district court in *Chemical Waste Management, Inc. v. Temple*,²⁶ bolstered the Supreme Court's stance by stating that the federal government has developed a comprehensive scheme (RCRA) for regulating hazardous waste which can, and does, provide for its safe transportation. Since the dangers of moving hazardous waste does not outweigh the benefits, courts have found that hazardous waste, as well as solid waste, is an object of commerce.

B. Statutes Which Are Facially Discriminatory

Courts first analyze whether the statute is neutral or discriminatory on its face. If the court finds the legislation discriminatory on its face, there is a virtual per se rule of invalidity.²⁷ However, if the state has a legitimate local concern for enacting the statute, the court may not strike it down.²⁸

The inquiry, therefore, is whether the statute is a protectionist measure or is legitimately directed at local concerns with only incidental effects on interstate commerce.²⁹ The Su-

24. *Id.* at 622.

25. See *National Solid Wastes Management Ass'n v. Alabama Dep't of Envl. Management*, 910 F.2d 713, 719 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991).

26. 770 F. Supp. 1142 (M.D. La. 1991).

27. *City of Philadelphia*, 437 U.S. at 624; See *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 524, 537-38 (1949); *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948).

28. See *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299, 320 (1852).

29. *City of Philadelphia*, 437 U.S. at 624; *National Solid Waste Management Ass'n v. Voinovich*, 763 F. Supp. 244, 259-60 (S.D. Ohio 1991).

preme Court test is fundamentally one of strict scrutiny. If the state does not have a compelling reason for placing a burden on interstate commerce, the statute is struck down as unconstitutional no matter how slight the burden on commerce.³⁰ Laws, such as the new Utah law, must have a compelling reason for placing the burden of a higher fee on interstate commerce.

National Solid Waste Management Association v. Voinovich,³¹ provides an excellent illustration of this analysis. In *National Solid Waste*, a corporation challenged an Ohio statute on Commerce Clause grounds. The statute imposed a fee on the disposal of wastes within the state of Ohio. This fee was \$0.70 for wastes generated within the management district and \$1.20 for waste generated outside the management district. For out-of-state generated garbage the fee was set at \$1.70.³² Furthermore, other fees and charges could be added by the various districts on their own accord.³³

The court determined that fees of 42 to 300% higher for out-of-state generators were discriminatory and asked the state to show a legitimate local concern that would provide a compelling reason for placing a burden on interstate commerce. The state offered three reasons for the need to tax out-of-state wastes at a higher rate. First, Ohio claimed that the increasing amount of waste flowing into the state was a sufficient reason in and of itself. Second, Ohio claimed that there were additional regulatory problems when the wastes came from out-of-state. There was no way to inspect them at the point of origin, and determining their composition at the point of disposal was more costly. Third, the state argued that the increased threat of hazardous materials coming into the state justified taxation by placing higher fees on the foreign waste.³⁴

The court quickly dispatched the first and third reasons by saying that there was no evidence or reason for treating out-of-state wastes differently.³⁵ As to the second reason, the court said that the state could impose a higher fee for inspection, but concluded that the purpose of the statute was more for raising

30. *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 958 (1982); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977).

31. 763 F. Supp. 244 (S.D. Ohio 1991).

32. See OHIO REV. CODE ANN. § 3734.57(a) (Anderson 1991).

33. See OHIO REV. CODE ANN. § 3734.57(b) (Anderson 1991).

34. *National Solid Waste*, 763 F. Supp. at 262.

35. *Id.*

revenue than to clean up the state's landfills.³⁶ Still, the court asserted that even if the higher fee was to inspect, there was no evidence to show that it cost more to examine garbage arriving from outside the state.³⁷ The court found the statute unconstitutional as a "transparent attempt to discourage the shipment of solid wastes into Ohio."³⁸

Although the Ohio law placed a fee upon solid wastes, a court's analysis would be very similar when applied to the Utah fee on hazardous wastes. The state of Utah may always assert that the health of its citizens is paramount. This may be a compelling reason for placing a burden on interstate commerce. However, Ohio was not able to meet the test of strict scrutiny.

Utah's law will also hit the same snag as Ohio's statute. The statute states that the fees will be used to carry out hazardous waste monitoring and response programs.³⁹ It will be extremely difficult for Utah to show that the costs of monitoring out-of-state wastes is more expensive than monitoring in-state wastes when the garbage is sitting in the same storage or disposal site.

In *Government Suppliers Consolidating Service, Inc. v. Bayh*,⁴⁰ the constitutionality of an Indiana solid waste statute was also subject to strict scrutiny. The Indiana legislation called for a fee of \$0.50 for every ton of Indiana waste deposited in an Indiana landfill. The fee for waste generated outside the state of Indiana was equal to the fee for dumping the trash at a site closest to the location where the trash was generated, less the fee charged by the Indiana landfill for dumping garbage there.⁴¹ In other words, it would cost out-of-state generators the same amount to dump in Indiana as it would to dump the waste at the nearest landfill, except transportation costs would be higher to ship to the more distant Indiana disposal site.

The court found the statute discriminatory on its face and applied an elevated version of the strict scrutiny test. In *Government Suppliers*, the court said that the "state bears the

36. *Id.* at 264.

37. *Id.*

38. *Id.* at 265.

39. See UTAH CODE ANN. § 19-6-118(1)(b)(ii) (Supp. 1991).

40. 753 F. Supp. 739 (S.D. Ind. 1990).

41. See IND. CODE § 13-9.5-5-1 (Supp. 1991).

burden of justifying the discrimination by showing the following: "(1) the statute has a legitimate local purpose; (2) the statute serves this interest; and (3) nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not available."⁴² This is an elevated version of the traditional test of strict scrutiny that places the responsibility of proving the existence of a compelling reason upon the state.

The court held that there was a legitimate local purpose but also pointed out that this purpose can not be a "post hoc" rationalization. The governor claimed that the health and welfare of Indiana's citizens necessitated the statute. The court did not argue with the claim but struck down the statute on the third part of the test. The court stated that many reasonable nondiscriminatory alternatives were available to the Indiana legislature.⁴³ These included charging a flat fee to slow the flow of all wastes into the state's landfills⁴⁴ or tying the amount of the tipping fee to the state's costs rather than to the hauler's costs.⁴⁵

The court struck the Indiana statute down for basically the same reasons that the *National Solid Waste* court did in Ohio. The state failed to assert any difference between Indiana waste and imported waste that would justify the discriminatory treatment. Due to the fact that reasonable nondiscriminatory alternatives existed, the court declared that the statute violated the Commerce Clause.

Utah's law possesses the same flaws as the Indiana statute. The in-state fees differ from out-of-state fees, and there is no reasonable justification for the different amounts. Utah, like Indiana, may claim that health and welfare are the reasons supporting the legislation, but reasonable nondiscriminatory alternatives to the fee will always exist. Thus, Utah's law likely is unconstitutional under the *Government Suppliers* test as well.

In a footnote, the court in *Government Suppliers* discussed

42. *Government Suppliers*, 753 F. Supp. at 763; (citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977), *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951), for the original tests).

43. *Government Suppliers*, 753 F. Supp. at 770.

44. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978).

45. See *Al Turi Landfill, Inc. v. Town of Goshen*, 556 F. Supp. 231, 238-39 (S.D.N.Y. 1982) *aff'd mem.*, 697 F.2d 287 (2d Cir. 1982).

the fact that the statute may be found neutral on its face.⁴⁶ While this seems incredible, the court stated that the Indiana law had the possibility of only charging a fee of \$0.50 on out-of-state generators as well, though this would clearly be only a hypothetical place.⁴⁷ If a court were to somehow find Utah's law facially neutral, the court would apply a different type of test.

C. *Facially Neutral Statutes*

If a court were to find that the Utah law dealt with in-state and out-of-state generators evenly, the court would apply the balancing test found in *Pike v. Bruce Church, Inc.*⁴⁸ The test is used "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental."⁴⁹ The statute would be upheld unless the burden imposed on commerce is excessive in relation to the local benefits.

In order to apply this test to the Utah law, a court would be forced to balance safety and welfare against the economic effects of the legislation. This is close to impossible, as there is no effective method of arriving at a legitimate figure for either category. However, the court in *Government Suppliers* believed that the test was the same whether the statute was neutral or not since there was a legitimate state interest.⁵⁰ The court in *National Solid Waste* may have thought along similar lines when it stated that there should be a balancing test where there is a compelling reason for the different fees.⁵¹

When a court begins balancing local versus national interests, the national interests are bound to prevail. However, it is a balancing test. A court may go either way on the issue, but the weight of the limited authority available clearly points towards unconstitutionality.

D. *The Market Participant Defense*

Up to this point in the analysis, the Utah law seems fatally flawed. However, the state of Utah has a defense. If Utah is

46. *Government Suppliers*, 753 F. Supp. at 766-67 n.34.

47. *Id.*

48. 397 U.S. 137, 142 (1970).

49. *Id.*

50. *Government Suppliers*, 753 F. Supp. at 767.

51. 763 F. Supp. 244, 260 (1991).

able to show that it is acting as a market participant rather than a market regulator, the statute will be allowed to stand. The question of whether a landfill operated by the state could fall within the market participant doctrine was expressly reserved by the Supreme Court in *City of Philadelphia*.⁵²

The theory behind the exception is that the state, when acting directly in the marketplace, is analogous to a private business. The test is simply whether the state is acting in the marketplace or if it is regulating the market.⁵³ The defense is limited in that the state can regulate no further "downstream" than it is acting as a participant.⁵⁴

The Third Circuit found that a landfill charging different fees was a market participant in *Swin Resource Systems, Inc. v. Lycoming County*.⁵⁵ In *Swin*, the county charged one rate for waste generated locally and a rate which was three times higher for waste generated outside of a five and a half county area. The county operated the landfill and, therefore, was entitled to act as any other landfill operator. Since a private landfill operator may raise her rates for generators outside a given area, the county was permitted to do the same.⁵⁶

This would mean that Utah could raise its rates, or charge fees for all waste coming from out-of-state, if the storage or disposal site was owned and operated by the state. However, all private landfill and incinerator operators would not be subject to the fees. A court analyzing the situation would probably hold that the statute is unconstitutional because it affects both private and public disposal sites. If Utah were to alter the law to affect only the state, county or city owned dumps which accepted hazardous waste, the statute could be allowed to stand.

IV. RECENT DEVELOPMENTS

In the past year on both a national and state level, legislators have introduced bills which would significantly change the current law on the matter of hazardous waste disposal fees.

52. 437 U.S. 616, 627 n.6 (1978).

53. *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

54. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984).

55. 883 F.2d 245 (3d Cir. 1989) *cert. denied*, 493 U.S. 1077 (1990).

56. *Id.* at 250.

These bills are working their way through Congress and the Utah State Legislature. Utah is examining various changes to Utah Code Section 19-6-118 (1990), while Congress seeks to amend the Resource Conservation and Recovery Act.

A. *Proposed Changes to Utah Code Section 19-6-118*

Early in January 1992, bills were introduced into both the House and the Senate of the Utah Legislature. Both bills aimed to change the hazardous waste disposal fee provision currently in Utah law. However, the two bills varied radically in their approach.

The first bill was introduced to the Utah Senate on January 13, 1992 by Senator Stephen J. Rees.⁵⁷ The bill was designed to amend several of Utah's hazardous and solid waste statutes, among which, the hazardous waste disposal fee is included. During the last days of the 1992 session, Senator Rees' bill was passed into law.⁵⁸

The changes in the law will be significant. The new law will expand the number of disposal sites that will be required to collect the fee for the state. The law will include sites that burn hazardous wastes in the fee scheme along with formerly covered waste disposal or treatment facilities.⁵⁹ Additionally, the new law will change the fee scale. After July 1, 1992, hazardous waste generated within the state will be charged a fee of \$10 per ton or fraction of a ton. This fee will raise \$2 each July 1st for the next two years, making the fee \$14 per ton after July 1, 1994.⁶⁰ Also on July 1, 1992, out-of-state wastes would be subject to a fee of \$25 per ton or fraction thereof. The out-of-state fee will also escalate by \$5 each July resulting in a fee of \$35 per ton after July 1, 1994.⁶¹

This bill faces the same constitutional questions that face the current Utah law. The tariff on the disposal of hazardous wastes places a greater burden on wastes generated outside of Utah. This is an unconstitutional burden on interstate com-

57. S. 25, 49th Leg., Gen. Sess., 1992 Utah S.B. 25.

58. Jerry Spangler and Lois Collins, *Utah could become cleaner and safer due to environmental bills*, DESERET NEWS, Feb. 27-28, 1992, at A4.

59. S. 25, 49th Leg., Gen. Sess., 1992 UT S.B. 25 § 19-6-118(1)(a) and (b), as amended on the Senate floor.

60. S. 25, 49th Leg., Gen. Sess., 1992 UT S.B. 25 § 19-6-118(2)(a), as amended on the Senate floor.

61. S. 25, 49th Leg., Gen. Sess., 1992 UT S.B. 25 § 19-6-118(2)(b), as amended on the Senate floor.

merce.

The second bill was introduced to the Utah House just three days after Senate Bill 25 was advanced.⁶² Mr. H. Craig Moody's House Bill 165 also sought to change the existing disposal fee by imposing an escalating scale on the discarding of hazardous waste.⁶³ However, this bill's approach is far different than Senate Bill 25, which was eventually passed by the legislature. Examination of the house bill's approach is still pertinent, as it may be the approach Utah takes in the future if the existing Utah law is found unconstitutional.

House Bill 165 sought to base the fee on the amount of waste disposed of rather than on where the waste was generated. The first hundred tons of waste thrown away would be charged a fee of \$8 per ton.⁶⁴ For disposal of hazardous waste in excess of 100 tons, but less than 300 tons, a fee of \$50 per ton or fraction of a ton would be charged.⁶⁵ For each ton of hazardous waste in excess of 300 tons, the fee would be a whopping \$80 per ton.⁶⁶ The bill limits the fee for dumping hazardous waste to \$8 per ton for Utah sites that are listed as EPA Superfund sites as of December 17, 1991, regardless of the tonnage dumped.⁶⁷

The fees which would be charged by this bill are astronomical, but constitutional. House Bill 165 wanted to remove the disparate fee for waste generated out of the state of Utah. This would have removed all of the constitutional questions from Utah Code Section 19-6-118.

B. Resource Conservation and Recovery Act Amendments of 1991

On April 25, 1991 United States Senators Baucus, Chafee, and Burdick introduced a bill entitled the Resource Conservation & Recovery Act Amendments of 1991.⁶⁸ Hearings on the

62. Utah Bill Tracking, 1992 UT H.B. 165.

63. H.R. 165, 49th Leg., Gen. Sess., 1992 UT H.B. 165 § 19-6-118.

64. H.R. 165, 49th Leg., Gen. Sess., 1992 UT H.B. 165 § 19-6-118(1)(a)(i), as amended and substituted by the Committee on Health and Environment.

65. H.R. 165, 49th Leg., Gen. Sess., 1992 UT H.B. 165 § 19-6-118(1)(a)(ii), as amended and substituted by the Committee on Health and Environment.

66. H.R. 165, 49th Leg., Gen. Sess., 1992 UT H.B. 165 § 19-6-118(1)(a)(iii), as amended and substituted by the Committee on Health and Environment.

67. H.R. 165, 49th Leg., Gen. Sess., 1992 UT H.B. 165 § 19-6-118(1)(b), as amended and substituted by the Committee on Health and Environment.

68. S. 976, 102nd Cong., 1st Sess. (1991).

bill have been held by the Senate Subcommittee on Environmental Protection for several months, and a vote on the bill is expected soon.⁶⁹ This bill, if enacted into law, will change the methods of waste disposal in this country overnight.

The entire bill would make several changes and alterations to the current version of RCRA, including a new section to Subtitle D.⁷⁰ This new section would give authority to the states to impose restrictions on interstate wastes and to charge separate fees for the disposal of in-state and out-of-state waste.

The bill gives states authority to impose fees on interstate wastes, effective upon the enactment of the RCRA Amendments of 1991.⁷¹ Importing states may impose and collect fees for out-of-state municipal solid waste on an escalating scale.⁷² These fees start at two times the state's base in-state fee or \$4, whichever is greater, for wastes generated in contiguous states. This rises to five times the state's base in-state fee or \$10, again whichever is greater, for wastes generated in non-contiguous states. The bill defines "contiguous states" as states which share a common land border.⁷³ Since Utah's base in-state fee is only \$8, Utah would be able to charge five times \$10 on waste coming from California or any other non-contiguous state. This amounts to a \$50 per ton fee, which is more than double Utah's currently enacted fee.

This scale imposed by the bill escalates, and after thirty-six months, importing states may raise their fees again. Contiguous states pay a fee which is four times the greater of the base fee or \$10, while noncontiguous states pay ten times the base fee or \$50.⁷⁴ If this bill passes, California municipal waste could face a fee of \$500 per ton just to dump in Utah by 1994. This is in addition to transportation and dumping or incineration costs. Additionally, Utah has the authority to raise its in-state fee. This would mean that the fee could be even higher.

Additional escalation is both possible and probable. Each year after 1990 the fees listed above will increase by the Consumer Price Index for All Urban Consumers (CPI).⁷⁵ The bill

69. 1991 S. 976 Bill Tracking Report. 102nd Cong., 1st Sess.

70. The proposed statute would be designated as RCRA § 4013.

71. S. 976, 102nd Cong., 1st Sess., § 4013(2) (1991).

72. *Id.* § 4013(3).

73. *Id.* § 4013(3)(D).

74. *Id.* § 4013(3)(B).

75. *Id.* § 4013(3)(C).

allows this adjustment to be made if the increase keeps the CPI above the 1990 levels.⁷⁶ In other words, the fee can only go up, never down.

The bill provides an incentive for states to become an authorized state under RCRA.⁷⁷ A state may not impose the higher fees set forth above unless it is an authorized state. Also, after the initial thirty-six month period, a state is given authority to restrict or even impose a complete ban on waste generated in another state provided that the state has an approved plan under section 4013 and the exporting state does not have an approved plan.

The bill also promotes recycling. Fees may not be charged for waste that is moving in interstate commerce to be recycled.⁷⁸ Congress leaves the determination of the types of practices which will be considered recycling to the Environmental Protection Agency (EPA) and gives the EPA six months to propose regulations along those lines.

If Congress passes Senate bill 976, Utah's law will meet no resistance, as its constitutional status will no longer be in doubt. The Utah legislature will have authority given by the United States Congress to impose disparate fees on municipal solid waste, of which hazardous waste is a subcategory.

V. CONCLUSION

The constitutional validity of Utah's hazardous waste disposal fee is doubtful. A court which applies the Commerce Clause tests which have been set forth by the United States Supreme Court will find Utah's law unconstitutional. Utah's law is discriminatory on its face, and a version of strict scrutiny would be applied. Because there are less discriminatory and nondiscriminatory alternatives available, Utah's law would be struck down.

The market participant defense is inapplicable to Utah's law. The Utah law is applied to both private and public hazardous waste landfills and incinerators; therefore, the defense does not apply. However, if public landfills choose to apply the higher fee for wastes generated out-of-state, it should be allowed

76. *Id.*

77. An "authorized" state runs a program similar to the RCRA scheme on a state level. The EPA only oversees the operation, and is not actively involved. *See* 42 U.S.C. § 6943 (1991).

78. S. 976, 102nd Cong., 1st Sess., § 4013(4)(D) (1991).

under the market participant doctrine.

The new law passed by the Utah Legislature still leaves the question of constitutionality in the air. Senate Bill 25, the new law, will perpetuate the unequal fees and leave the statute in a perilous position. On the other hand, House Bill 165 would have completely removed the disparate fees from the statute and replaced them with a system that considered the amount of waste generated rather than the origin of the waste. This would have encouraged generators to lower the amount of waste produced rather than shop for the lowest costs.

The RCRA Amendments of 1991 provide Utah with the hope of keeping the hazardous waste disposal fee on discriminatory grounds. If this bill, or a substantially similar one is passed by Congress, Utah's law will be vested with Congressional authority. RCRA's 1991 amendments will have given the several states the power to legally discriminate against interstate commerce.

Troy Fitzgerald