2002

WASTE MANAGEMENT IN THE U.S. CONTEXT: TRADE OR ENVIRONMENTAL ISSUE?

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INTRODUCTION

Let me preface my remarks by saying that I was born and raised in Michigan. Hopefully, that fact will not influence my remarks too much.

I should also say that I am a visiting professor at Florida State University this semester. I had some students coming in with questions about the exam, and I told them that I would not be around Thursday or Friday. They asked why, and I said I had to go to Cleveland to talk trash.

THE MOVEMENT OF WASTE PRODUCTS

There are three or four general categories of "waste." There is "municipal solid waste" (the waste that comes out of households, hotels, restaurants, businesses, etc.), "hazardous waste," and "nuclear waste," the latter of which is sometimes divided into low-level and high-level nuclear waste. (My remarks today will focus almost exclusively on municipal solid waste and hazardous waste).

How, Why, and How Much Waste Moves

Regardless of how we come out on the question of whether waste is a trade or environmental issue or whether we say it is both, it is certainly a political issue. Anyone who has read The New York Times in the last couple of days may be aware that the governor of South Carolina, a Democrat, is threatening to have the state police block shipments of weapons-grade plutonium coming from Colorado that will be converted into nuclear fuel in South Carolina. However, the conversion technology has not been fully developed yet, and South Carolina is worried that the nuclear waste will end

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up staying in the state should the technology not perform as promised 2—much to the detriment of a Democratic governor and to the benefit of a Republican senator in Colorado, both of whom are running for reelection. It is important to keep in mind that this is a highly political issue, not just with respect to nuclear waste, but also with respect to hazardous waste and municipal solid waste.

All of us are most familiar with municipal solid waste. Where does municipal solid waste end up? The vast majority of U.S. municipal solid waste—57 percent—goes to landfills. 3 Twenty-two percent of U.S. municipal solid waste is recycled, 4 fifteen percent is incinerated, 5 and six percent is composted. 6 Over thirty million tons of that waste—that is, over 11 percent of the total waste stream—crosses state lines each year. 7 Eighty percent of that waste goes to a neighboring state; going through one state to take the trash to another is much less common. 8

Why does waste move across boundaries both between states and between Canada and the United States? People are trying to dispose of their waste at the lowest cost, and there are several reasons why we might move trash across the border. It might be more convenient; the closest landfill may not be within your state or province, but just across the border. It may also be that you have a shortage of landfills in your home state or province. Another reason that waste can move is because of differences in regulatory regimes between jurisdictions. In fact, a study commissioned by the North American Commission for Environmental Cooperation found that the increased level of hazardous waste exports from the United States to Canada between 1993 and 1998 was attributable to the lower standards for the disposal of hazardous waste in Ontario and Quebec. 9

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2 See id.
3 See ENVIRONMENTAL PROTECTION AGENCY, MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1999 FINAL REPORT 16 (1999).
4 Id. at 3.
5 See id. at 15.
6 Id. at 3.
8 See id. at 89 (statement of Bruce Parker, Executive Vice President, National Solid Wastes Management Association).
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regulations have been tightened, so that trend may be reversing a little bit. Lastly, waste may move simply because there are no safe means of disposal in the jurisdiction the waste was produced. Certain types of hazardous wastes require specialized disposal facilities, and there may not be any located within the jurisdiction in question.

Waste Imports from Canada

For some states, trash imports are of particular concern. Twenty percent of Michigan's waste stream comes from outside the state; forty-five percent of that out-of-state waste stream comes from Canada, much of it from Toronto. One of the big worries for Michigan is that Toronto is in the process of closing down its lone remaining landfill. Toronto was going to ship its waste by train and dump it in an abandoned mine north of the city, but that project was not approved. Therefore, Michigan is not only worried about current levels of waste imports, but anticipates receiving even more garbage from Toronto in the future.

Canadian trash is not a political issue in Michigan alone, but it is where the issue is most prominent. The other two states that are taking the highest percentage of Canadian trash, as a percent of out-of-state waste, are New York and Washington. Other states are less concerned with Canadian imports and more concerned with waste coming from other states. For example, Virginia imports about 27 percent of its waste stream from out-of-

10 Since Ontario and Quebec have tightened their environmental standards to match those of the United States, British Columbia may become the next popular destination for U.S. hazardous wastes. See Martin Mittelstaedt, B.C. Agrees to Take Tonnes of Dioxin-Laced U.S. Waste, GLOBE & MAIL, Jan. 24, 2002, at A1.


12 See id. 11,872,507 cubic yards of waste are imported into Michigan each year, and 5,894,738 cubic yards of this are coming from Canada, or 49.65% of total imports.


15 Fifteen percent of New York and Washington State's imports of MSW come from Canada. See House Hearing on MSW, supra note 7, at 45.
state and foreign sources, but the majority of those imports come from New York, Maryland and Washington, D.C.

In terms of hazardous waste, 96 percent of Canada’s imports and 97 percent of its exports are with the United States. We often hear complaints from Toronto and other parts of Ontario regarding hazardous waste imports because most of the hazardous waste exported from the United States is going to Ontario and Quebec. (To paraphrase a frequent refrain from Ontario: “Sure, we are sending you our municipal solid waste, Michigan, but you in the United States are sending us your hazardous waste, and that is not a fair trade.”). However, Canada’s imports of hazardous waste amount to only one-tenth of the production of hazardous waste within Canada. Imports, while not miniscule, are still relatively small.

WASTE AS TRADE: DORMANT COMMERCE CLAUSE JURISPRUDENCE

The question now becomes: under what rules does garbage move? One of the reasons it moves is because it is allowed to move. In fact, under the legal rules that are established for trade in municipal solid waste and hazardous waste, it is encouraged to move.

The Open-Border, Non-Discrimination Model: Philadelphia v. New Jersey

In the United States, there are constitutional rules that deal with trade, including trade in garbage, between the states. We have a provision in the U.S. Constitution called the Commerce Clause, an explicit grant of power to the Congress to regulate interstate and foreign commerce. For well over 150 years, the courts have interpreted the Commerce Clause to also impose limits on states discriminating against or unduly burdening interstate and foreign commerce, even in those situations where Congress does not utilize its Commerce Clause powers to preempt the states. In other words, even where Congress’ Commerce Clause powers lie dormant, there are limits on

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16 Out of the 14,884,106 tons of MSW placed in Virginia landfills, 4,098,684 tons, or 27.5%, came from out-of-state sources. COMMONWEALTH OF VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, SOLID WASTE MANAGED IN VIRGINIA DURING CALENDAR YEAR 2001 i (2002).
17 Id.
20 See Backgrounder, supra note 18.
state actions under the aptly-named dormant Commerce Clause. The landmark dormant Commerce Clause case dealing with waste trade is *Philadelphia v. New Jersey.* In the 1970s, Philadelphia, a big urban area with little of its own landfill space, sent its garbage to New Jersey for disposal. However, New Jersey decided not to accept any more out-of-state trash, with a few narrow exceptions. The Supreme Court struck down New Jersey’s nearly complete ban on waste imports under the dormant Commerce Clause. The Court held that although garbage may sometimes be considered valueless it is to be treated no differently than other interstate commerce in terms of dormant Commerce Clause constraints. Indeed, garbage trade involves purchases of transportation and disposal services that clearly are interstate commerce. The Court rejected New Jersey’s attempt to analogize to cases involving quarantine laws that deal with dangers arising from the very movement of noxious articles. State regulations targeting waste from foreign countries for discriminatory treatment as opposed to all out-of-state waste have also been invalidated under the dormant Commerce Clause.

After the *Philadelphia* decision, a few states tried new (and more creative) methods to inhibit the influx of out-of-state and foreign waste. For instance, the State of Michigan said that it would not erect a barrier at the state line, but instead permit counties to refuse to accept out-of-county waste. This resulted in counties discriminating against not only out-of-state and foreign waste but also a good deal of in-state waste (by not accepting waste from any place else in the state). The Supreme Court said *nice try,* but the same problem still exists. The Court found the Michigan law indistinguishable from that considered in *Philadelphia v. New Jersey,* ruling based on prior precedent that a state may not avoid dormant Commerce Clause constraints “by curtailing the movement of articles through subdivisions of the State, rather than through the State itself.”

Several states tried levying extra fees on out-of-state and foreign waste. In Alabama, the state imposed extra fees on out-of-state hazardous waste. A case from Oregon dealt with regular municipal solid waste. However,

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24 *Id.* at 478 n.2.
25 Justice Potter Stewart, writing for the majority, notes that garbage is akin to any other “[article] of commerce” that comes from out of state, and, unless New Jersey could find “some reason, apart from their origin, to treat them differently,” the statute forbidding its entry into the State violated the nondiscrimination principle of the dormant Commerce Clause. *Id.* at 626-627.
27 See *id.* at 358.
28 See *id.* at 361.
the Supreme Court struck them both down, ruling that fee-based discrimination, although not an absolute ban on interstate waste movement, still facially discriminates against out-of-state and foreign waste and is therefore per se invalid under the dormant Commerce Clause.\textsuperscript{31} Oregon tried to justify the extra fees as a legitimate compensatory tax.\textsuperscript{32} (The best example of this is use taxes being valid compensatory taxes for sales taxes.\textsuperscript{33}) Oregon observed that in-state businesses pay for environmental protection through the income tax structure. Accordingly, it claimed that the reason why the state was charging out-of-state waste a higher fee is because those who are benefiting from its disposal have not paid general Oregon income taxes that, among other general revenue expenses, pay for environmental protection.\textsuperscript{34} However, the Court rejected the compensatory tax rationale. Prior cases established that any legitimate compensatory tax must be on an event “sufficiently similar in substance to serve” as a proxy\textsuperscript{35} to the event on which in-state businesses must pay taxes, and the Court logically ruled that earning income and utilizing landfills were not similar events.\textsuperscript{36}

Thus, the Supreme Court has adopted an open border, non-discrimination model for the movement of waste. In doing so, the Court has relied on the underlying purposes of the Commerce Clause: to prevent the Balkanization of the States and to prevent international retaliation from foreign trading partners.\textsuperscript{37} The Supreme Court is unwilling to allow a state to isolate itself from problems, such as a shortage of landfill sites, common to many states.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{31} Id. at 108; Chemical Waste, 504 U.S. at 337.
\item \textsuperscript{32} See, e.g., Oregon Waste, 511 U.S. at 102.
\item \textsuperscript{33} Use taxes are permissible if they do not discriminate against interstate commerce. See id. at 103 n.6., 105.
\item \textsuperscript{34} See id. at 104.
\item \textsuperscript{35} Id. at 103 (citations and internal quotations omitted).
\item \textsuperscript{36} Id. at 104-105.
\item \textsuperscript{38} See Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978):
\begin{quote}
Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.
\end{quote}
\end{itemize}

The open border, non-discrimination model for waste trade has a strong base of support within the Court. It is highly unlikely that the Court would ever reverse itself on the open border, non-discrimination model. In the waste trade cases, even Justices Scalia and Thomas, both staunch defenders of states' rights and dubious of the current breadth of the dormant Commerce Clause, usually join five other justices in the majority. Chief Justice Rehnquist typically has just one justice join him in dissent. The U.S.-Canada bilateral treaty on waste trade also encourages waste trade by claiming that "the close trading relationship and common border between the United States and Canada engenders opportunities for generators to benefit from using nearest appropriate disposal facility."

Problems with the Open-Border, Non-Discrimination Model

What are the problems that people see with the Supreme Court's non-discrimination model? The most frequent attack on an open market model is to declare that there are externalities – costs that the market does not take into account. Externalities that critics of the open borders, non-discrimination model point to include: 1) extra paper work, more inspections, and higher administrative costs; 2) falling real estate values as no one wants to live next to a landfill; 3) infrastructure and transportation costs to accepting out-of-state waste (e.g., one of the complaints from Michigan is that there are 180 trucks coming from Canada with garbage every day, and that imposes a cost on the road infrastructure); and 4) nuisance costs and the costs of stigmatization, for no state wants the moniker of "Garbage State."

39 In all the cases mentioned in this Article concerning waste, Rehnquist dissented. See Philadelphia, 437 U.S. at 629 (joined by Burger, C.J.); Chemical Waste, 504 U.S. at 349; Fort Gratiot, 504 U.S. at 368 (joined by Blackmun, J.); Oregon Waste, 511 U.S. at 108 (joined by Blackmun, J.). Rehnquist joined the dissenting opinion of Justice Souter in C & A Carbone v. Clarkstown, 511 U.S. 383, 410 (1994).


41 See V. Kerry Smith & William H. Desvousges, The Value of Avoiding a LULU: Hazardous Waste Disposal Sites, 68 REV. Econ. Stat. 293, 298 (1986) (A survey of Boston households revealed that the distance from a hazardous waste disposal site is valued at $330 to $495 per mile per year).

42 See Letter from the Honorable Dick Posthumus, Lieutenant Governor of Michigan, to the Honourable Betty Disero, Chair, Works Committee, Toronto City Council (Nov. 13, 2001) (available at http://www.michigan.gov/ltgov/1,1431,7-104-4944-,00.html).
However, one important question that needs to be asked in the context of waste trade (or waste moving across state or national borders) is whether out-of-state waste creates additional externalities? If the state has a landfill, it should not matter where the waste is coming from because for almost all the externalities listed above there is no difference between out-of-state waste and in-state waste with the exception of transportation costs. Generally, out-of-state waste will travel more miles across the state than in-state waste, although this obviously might not be true for any particular shipment. In any event, transportation infrastructure externalities are rather meager. For example, Oregon tried to break down the externalities to account for the $2.25/ton fee that was imposed on out-of-state waste (the one that was later struck down by the Supreme Court). As it turns out, only about four cents out of that $2.25 was attributable to transportation infrastructure costs. Thus, we can say there are some externalities associated with out-of-state and foreign waste greater than those associated with in-state waste, but they are not significant. Moreover, the issue of transport externalities could be best addressed through a per-mile fee rather than a differential fee for out-of-state waste (because, again, some in-state shipments will travel greater miles in the state than out-of-state shipments).

The other critical question to ask with respect to externalities is what devices that states and localities can employ to correct for them. A state or locality can use equal fees on in-state and out-of-state garbage being disposed in-state as a means of forcing companies to internalize these costs. The revenues from these fees can then be directed at economic development in the locality where the disposal site is located, such as paying for schools and roads. Indeed, since real estate values will likely drop along with property tax collections, the fees would need to be high enough to replenish this loss of revenue. However, some may want to be more paternalistic. Some may find it offensive that certain towns use a landfill as an economic development tool, just as some object to states or localities using gambling for similar purposes. Opponents of using landfills as an economic development tool may argue that the communities that accept waste simply do not have adequate bargaining power regarding fees or point to imperfections in local political processes. Opponents might also criticize other possible regimes of forcing an internalization of costs such as the tort liability regime (due to its high transaction costs) or federal regulations and enforcement (due to their weakness). But, again, the key point in rebuttal to these opponents is that the problems that exist in finding adequate means to

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43 Oregon Waste, 511 U.S. at 96.
44 About $0.03 was attributable to maintaining "publicly supported infrastructure"; $0.01 was compensation for "nuisance impacts from transportation." Id. at 109 n.1 (Rehnquist, C.J., dissenting).
correct for externalities has little or nothing to do with any inherent
differences between out-of-state and in-state waste.

It is interesting to discover that the open borders, non-discrimination
model for the waste trade disturbs even those we would associate most with
the law-and-economics perspective. Professor Richard Epstein, the
University of Chicago law professor whose name is most associated with the
law and economics movement, is uncomfortable with this open border, non-
discrimination model for trade in waste products. I, an economics major at
University of Chicago as an undergraduate, also am a bit uncomfortable with
the model standing by itself. My discomfort has less to do with possible
differential transportation infrastructure externalities or the fact that there
may be other small additional externalities connected with out-of-state waste
as opposed to in-state waste; rather, it has more to do with the additional
complexities of dealing with long-term environmental consequences. I think
it is very tough to quantify, and accordingly measure, these costs. As with
many other environmental problems such as global warming, the waste
disposal problem is intergenerational. Like the carbon dioxide that stays in
the atmosphere for 100 years, landfills not only affect the people that
approved of them; they potentially affect those who are around in the next
three to four generations. These future generations do not have a vote.
Thus, the model must be accompanied by flexible waste reduction strategies.

SOLUTIONS ON THE HORIZON?

Proposals for a “Proximity” or “Discrimination” Model for Waste Trading

The U.S. Congress has the power to pass legislation that would move us
toward a proximity and discrimination model of waste trade. Such
legislation would, in effect, overturn the Supreme Court’s dormant
Commerce Clause decisions. Under a proximity and discrimination model,
the presumption is that garbage should be disposed of in the state or locality
in which it is created and that states or localities can discriminate against out-
of-state or out-of-locality waste. Recall that the Commerce Clause grants
Congress the power to regulate interstate and foreign trade and that the
Supreme Court’s dormant Commerce Clause decisions apply only in the
absence of a Congressional view being expressed on the matter. Further,

45 For Epstein’s discussion of this issue, see Richard A. Epstein, Waste and the Dormant
46 See Environmental Protection Agency, Climate Science 3 (1997), at
47 I should note that new technologies are making creative use of old landfills and that
these new technologies will reduce potential impacts on future generations.
nothing in the Commerce Clause prevents the Congress from allowing or authorizing states to discriminate against waste from other states or Canada. In fact, there have been bills introduced in the Congress for the past ten years that would authorize states to restrict out-of-state and foreign waste flows. These bills contain a variety of restrictions that states would be allowed to utilize, including limiting waste imports to 1993 amounts, limiting imports to 20% of total waste disposal, differential surcharges on out-of-state waste, and allowing laws that restrict granting new licenses for waste disposal facilities based on the “needs” of the state. None of the bills has ever passed in part because the Supreme Court’s jurisprudence has left all of the leverage in the hands of the “exporting” states.

Setting aside the political dynamics, there are many reasons to be wary of any dramatic or quick move away from the current open border, non-discrimination model. A proximity model translates into building a greater number of small landfills. The trend toward building larger, regional landfills that use vastly improved, “cleaner” technology has already resulted in the reduction of the number of landfills in the United States, from about 10,000 in 1990 to about 2,600 today. Many of the smaller landfills have been closed down because they could not comply with the federal Resource Conservation Recovery Act (RCRA) requirements.

Additionally, if elements of a discrimination model were not phased in over time, we run the risk that states will be forced into placing waste in temporary facilities that would not meet the relevant environmental standards. Moreover, as waste disposal and landfill companies have already made investments based on the long-standing Dormant Commerce Clause jurisprudence, there are reliance costs. Indeed, there is some possibility of creating a claim under NAFTA’s investment chapter that allows private investor to host state arbitration for violation of NAFTA’s investment obligations or even a claim for breach of NAFTA trade obligations.

49 According to the EPA, the number of landfills in the U.S. fell from about 8,000 in 1988 to about 2,300 in 1999. See Municipal Solid Waste: Basic Facts, at http://www.epa.gov/epaoswer/non-hw/muncpl/facts.htm (last visited July 3, 2002).
51 Id., § 6944.
52 See, e.g., S.D. Myers v. Canada, 40 I.L.M. 1408 (2001) (successful claim against Canada for ban on the export of PCBs to the detriment of S.D. Myers, which sought to process PCBs at a Cleveland facility. The arbitral tribunal found no environmental rationale for the measure other than keeping Canadian industry strong in order to assure continued disposal capacity; this could have been achieved by using a less discriminatory measure).
Creating Transnational Standards for Waste Reduction

While there are reasons to be wary of a leap to a proximity or discrimination model, there are also reasons to be wary of simply preserving the status quo. The status quo is likely to lead to ever increasing inventive attempts by individual states to circumvent the edges of dormant Commerce Clause jurisprudence. Moreover, even some legitimate attempts at waste reduction may be caught in the net of the dormant Commerce Clause. For instance, what happens if Michigan enforces a ban against the disposal of waste that includes plastic bottles? Michigan has a refundable deposit on plastic bottle beverages whereas Ontario simply has voluntary separation of such garbage by providing separate receptacles for consumer disposal (and as a result Toronto waste contains a greater amount of plastic bottles).

A possible alternative solution that would focus on reducing total waste creation rather than just looking at waste trade, that would take account of the potential intergenerational nature of the problem, that would also take account of the high degree of integration between the United States and Canadian economies, and that would minimize the uncertainty of go-it-alone approaches by individual states is for the Canadian and U.S. federal governments to negotiate (in consultation with provincial and state officials) some minimum standards in terms of waste reduction. A “one size fits all” standard for all states and provinces would be inappropriate. Instead some criteria for individualized action plans might be crafted that allows for needed (and efficient) flexibility. For instance, 41 percent of the waste in Toronto landfills is organic, so composting might be a realistic solution for Toronto, whereas, recycling might work best for another municipality. Such negotiations may gain increased support as the “importer-exporter state” distinction continues to break down as more and more states become both heavy exporters and importers of waste. Negotiations between the Canadian and U.S. governments could also eliminate or minimize any trade agreement problems (and thought should be given whether to include Mexico in such discussions as well).

One critical decision in any such negotiations is what to use as an enforcement device, namely whether a state would be authorized to impose discriminatory fees against waste from another state or province that did not create a satisfactory waste reduction plan according to the negotiated criteria. However, a decision on this can be deferred because any dramatic and quick change from the open border, non-discrimination model will cause the problems described above. Moreover, positive incentives can be utilized as an alternative. Specifically, the federal government could provide additional

monies for states that meet certain guidelines in establishing programs on waste reduction, recycling, or composting.

Thank you.