

STATE OF TENNESSEE

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Opinion No. 08-94

Validity of Pending Legislation Affecting Processing and Disposal of Radioactive Waste Material

QUESTION

Do the provisions of House Bill 2771/Senate Bill 2836 and House Bill 3156/Senate Bill 2733, which purport to regulate the processing and disposal of radioactive waste material, violate the Commerce Clause of the United States Constitution?

OPINION

It is the opinion of this Office that House Bill 2771/Senate Bill 2836, which would require rules to provide notice of certain permit hearings, poses no Commerce Clause implications. But House Bill 3156/Senate Bill 2733, which would essentially prohibit the processing or disposal of radioactive waste material in any municipal or private landfills, although evenhanded in purpose and effect, does not, on its face, advance any legitimate public concerns for the prohibition. Absent such an articulation, it is the opinion of this Office that House Bill 3156/Senate Bill 2733 is constitutionally suspect.

ANALYSIS

You have inquired whether House Bill 2771/Senate Bill 2836 and House Bill 3156/Senate Bill 2733 place an unreasonable burden on interstate commerce in violation of the Commerce Clause of the United States Constitution. House Bill 2771/Senate Bill 2836 would amend the Solid Waste Management Act, found at Tenn. Code Ann. §§ 68-211-801 to 68-211-874, by requiring the Department of Environment and Conservation to promulgate rules to provide for adequate public notice of any hearing relating to “bulk survey for release” (BSFR) permit applications. We understand Tennessee’s BSFR program was developed to standardize the process for analyzing materials with extremely low levels of radioactive contamination for disposal in specified Class I solid waste landfills.

House Bill 3156/Senate Bill 2733 would amend the Radiological Health Service Act, found at Tenn. Code Ann. §§ 68-202-201 to 68-202-217, by prohibiting the acceptance, processing, or disposal of radioactive waste material in any solid waste landfill in this state, while providing an exemption for federal entities processing or disposing of such waste on site, as permitted under federal law. We construe this latter bill as targeting not only the BSFR materials that would be addressed in House Bill 2771/Senate Bill 2836, but also the processing or disposal of any material

that emits radiation at any level above “background,” as that term is defined in the bill. It is our understanding that this includes many materials in ordinary municipal garbage.*

Your Commerce Clause inquiry focuses on what has long been understood as the negative aspect of the clause, which limits the power of states to impose burdens on interstate commerce. When legislating in areas of local concern, such as environmental protection, states are somewhat constrained by the Commerce Clause. *See, e.g., Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980). This limitation on state power, however, is not absolute. In the absence of conflicting federal law, the states retain authority under their police powers to regulate matters of legitimate local concern, even though interstate commerce may also be affected. *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986); *Pike v. Bruce Church, Inc.*, 397 U.S. 139, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 530 (Tenn. 1993).

In analyzing whether a law violates the dormant Commerce Clause, it must first be determined whether the law is discriminatory on its face, such that it provides differential treatment of in-state and out-of-state economic interests “that benefits the former and burdens the latter.” *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). If a restriction on commerce is discriminatory because it effects a form of economic protectionism, it is virtually *per se* invalid, *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978), unless it can be demonstrated that there is no other means to advance a legitimate public purpose. *Maine*, 477 U.S. at 138, 106 S.Ct. at 2447. By contrast, nondiscriminatory laws that have a legitimate public purpose and only incidental effects on interstate commerce are valid unless “the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142, 90 S.Ct. at 847.

Applying this analysis to the pending bills that are the subject of your inquiry, we note that House Bill 2771/Senate Bill 2836, which would require the promulgation of rules to provide notice of BSFR permit hearings, would not impose any burdens on interstate commerce and, thus, poses no Commerce Clause implications. But House Bill 3156/Senate Bill 2733, which would essentially prohibit the processing or disposal of radioactive waste material in any municipal or private landfills, does have the potential to affect interstate commerce. Since the ban on processing and disposal applies regardless of whether the radioactive waste originates inside Tennessee or outside the state, we believe the proposed bill is evenhanded in its purpose and effect. It negates the existence of any local market for processing and disposal of radioactive waste with which out-of-state commercial enterprises might compete and, therefore, it does not effect economic protectionism. While the bill does afford an exemption for federal facilities in Tennessee, the Supreme Court recently observed that laws benefitting governmental entities, while treating all

*The Tennessee Municipal Solid Waste Advisory Committee, in its report issued August 20, 2007, following its study of the BSFR program, found that “[m]any of the materials that are typically found in solid waste and are disposed at all municipal solid waste landfills . . . have levels of radioactivity that equal or exceed that of BSFR material. Therefore, the use of the ‘no radioactivity’ standard would do much more than end the BSFR program; it would mean the closure of all landfills.” Report, pp. 2-3, located at www.state.tn.us/environment/rad/pdf/bsfr-recommend.pdf.

private businesses alike, do not discriminate against interstate commerce, since, unlike private enterprise, the government is obligated to protect the health, safety, and welfare of its citizens. *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786, 1795, 167 L.Ed.2d 655 (2007).

Even though House Bill 3156/Senate Bill 2733 appears to operate evenhandedly, we must still analyze it under the test set forth in *Pike*, which is reserved for laws “directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.” *Philadelphia v. New Jersey*, 437 U.S. at 624, 98 S.Ct. at 2536. The proposed bill does not, on its face, identify any legitimate public concerns for the prohibition against processing or disposal of radioactive waste material in any municipal or private landfills.

We understand that the Tennessee Department of Environment and Conservation approved a BSFR licensing process to allow disposal of materials with extremely low levels of radioactive contamination at four different Class I landfills in Tennessee. According to the Department’s web site, BSFR waste cannot contribute more than five percent of the total landfill waste, or a dose of more than one millirem per year to any member of the public. Thus, the agency charged with protecting the health, safety, and welfare of the public has already made a determination that the limited disposal of materials with extremely low levels of radioactive contamination does not present a hazard to the public. And, as noted above, the prohibition that House Bill 3156/Senate Bill 2733 would put in place could conceivably foreclose the disposal of even ordinary municipal garbage. It is, therefore, the opinion of this Office that, absent the articulation of a legitimate state interest, House Bill 3156/Senate Bill 2733 would be constitutionally suspect.

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