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## Charging a Higher Fee for Disposal of Out-of-State Hazardous Waste: Will the Dormant Commerce Clause Become Dormant?

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## *Charging a higher fee for disposal of out-of-state hazardous waste: Will the dormant Commerce Clause become dormant?*

by Robert H. Abrams

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**Chemical Waste Management, Inc.**

v.

**Guy Hunt, Governor of Alabama**

(Docket No. 91-471)

*Argument Date: April 21, 1992*

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As the environmental and public health risks associated with the disposal of hazardous waste have gained notoriety, the NIMBY phenomenon (Not In My Back Yard) has restricted severely the number of hazardous-waste disposal facilities that have been sited nationwide. On another front, the increasingly stringent regulation of existing hazardous-waste disposal facilities has forced many to close at the same time as other existing facilities are running out of space to receive additional waste. With the conjunction of these trends, the few licensed facilities having significant capacity to receive hazardous waste are serving increasingly large geographic areas. In this case, Emelle, Alabama, finds itself home to the nation's largest such facility and also finds that the vast majority of the waste being deposited there is "imported" from other states throughout the nation. Beginning in 1990, Alabama imposed a mandatory additional tipping fee (i.e. a tax) for the disposal of out-of-state waste, a practice that the Emelle facility's owner claims is an unconstitutional discrimination against interstate commerce.

### ISSUE

Does the Alabama statute imposing an additional fee of \$72 per ton for the disposal of out-of-state generated hazardous waste violate the Commerce Clause of the United States Constitution?

### FACTS

Factually, this is a very simple case. Chemical Waste Management, Inc. (CWM) operates one of the nation's largest hazardous-waste disposal facilities in Emelle, Alabama. That facility accepts large amounts of hazardous waste, more than three quarters of a million tons of it in 1989 alone. Of that waste, 85 percent to 90 percent originates in states other than Alabama.

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Beginning in 1987, when the United States Environmental Protection Agency (EPA) granted CWM a permit to operate the Emelle facility, Alabama, led by Governor Guy Hunt, began a campaign to limit the amount of out-of-state hazardous waste that Emelle would accept. In a press release dated Aug. 27, 1987, the governor was quoted as saying:

"I wish to make it absolutely clear that we will take any and all action available to us to keep out-of-state waste out of Alabama. We will handle our own problem but we don't want anybody else's problems."

Alabama made several unsuccessful efforts to thwart CWM's operation of the Emelle facility. It challenged EPA's licensure of the facility and lost. *See Alabama ex. rel. Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990). It tried to block an EPA cleanup of a Texas contamination site on the ground that polychlorinated biphenol (PCB) waste was going to be disposed of at the Emelle facility, and lost. *See Alabama v. EPA*, 871 F.2d 1548 (11th Cir. 1989).

In May, 1989, the Alabama legislature passed a measure, popularly known as the Holley Bill, that effectively barred the treatment in Alabama of hazardous waste generated elsewhere if the state of origin had no hazardous waste disposal facilities of its own or had not entered into an agreement for the disposal of its waste with the state of Alabama. This statute was invalidated in *National Solid Wastes Management Association v. Alabama Department of Environmental Management*, 910 F.2d 713, *as modified* at 924 F.2d 1001 (11th Cir. 1990).

Undeterred, Alabama passed Alabama Act No. 90326 (codified at Ala. Code 2230B1.1 *et seq.*), the law at issue in this case. That statute has three parts: a "Base Fee" of \$25.60 per ton charged to commercial facilities on all hazardous waste they accept without regard to its origin, a \$72.00 per ton "Additional Fee" charged only for accepting waste originating out-of-state, and a provision restricting the total amount of waste that any facility accepting over 100,000 tons per year could accept to an amount equal to the amount accepted during a statutorily defined benchmark period (the "Cap"). When challenged by CWM, an Alabama circuit court invalidated the Additional Fee and generally upheld both the Base Fee and the Cap. The Alabama Supreme Court, in *Hunt v. Chemical Waste Management, Inc.*, No. 1901043 (Ala. S.Ct. July 11, 1991), affirmed the rulings in favor of the Base Fee and the Cap and reversed the invalidation of the Additional Fee provision. Certiorari was subsequently granted by the United States Supreme Court, limited to the issue of the constitutionality of the Additional Fee.

## BACKGROUND AND SIGNIFICANCE

The treatment and disposal of hazardous waste is a major industry in this country. Annually more than 240 million tons of hazardous waste are generated by approximately 80,000 different generators. The largest proportion of this total is comprised of waste corrosives and acids produced by the chemical industry, although the petroleum refining, metal finishing, electronics, health services, printing, manufacturing, and transportation industries also produce substantial amounts of hazardous waste annually. Since 1976, and especially since 1984, subtitle C of the Resource Conservation and Recovery Act (RCRA) has provided stringent regulation of treatment, storage, and disposal facilities (TSDFs).

RCRA's subtitle C TSDF regulation is quite exacting. The most basic command of that legislation is that all materials fitting the statute's definition of hazardous waste must be disposed of at a licensed TSDF. Pursuant to RCRA, EPA has promulgated detailed regulations prescribing minimum operating standards for the management of hazardous waste at the approximately 4,700 facilities nationwide that hold TSDF licenses. These regulations address areas such as site characteristics, inspection, testing, method of treating incompatible types of waste, groundwater monitoring, insurance requirements, recordkeeping and reporting obligations, facility closure and post-closure requirements, contingency planning, and much, much, more. The regulations are sufficiently burdensome and compliance with them is sufficiently expensive that many of the smaller firms currently operating TSDFs are closing down their operations.

Importantly, not all of the TSDFs are approved to receive all of the various types of hazardous materials. For example, the Emelle, Alabama, facility that is the focus of this litigation is one of two facilities located east of the Mississippi River approved to accept PCBs. Similarly, owing to its advanced design and subsurface geology, the Emelle facility is among the few disposal sites in the entire nation that is licensed to accept non-pretreated hazardous waste. This is particularly noteworthy because in 1984 amendments to RCRA, Congress sought to phase out almost all land disposal of hazardous waste, preferring treatment. Until sufficient treatment capacity is developed, however, a very few sites, including Emelle, are licensed to accept untreated waste.

As suggested by the facts of this case, large quantities of hazardous waste currently move in interstate commerce on their way to TSDFs. Avoiding burdensome and discriminatory taxes is a key element in maintaining competitiveness in that market. Moreover, keeping facilities like Emelle viable as a repository for even distant waste may have important national safety benefits. Emelle is the largest facility in the country, having a usable area that covers 2,700 acres. CWM estimates that the facility could continue to operate for another century at present, or even increased, rates of disposal. These sorts of volumes are of national significance. Perhaps more critically, among the reasons Emelle was able to obtain its licensure is the presence of a unique geologic feature, the Selma Chalk formation. Although there

is conflicting testimony in the case regarding permeability rates due to fractures that may be present, intact portions of the formation would, according to EPA, prevent leachate from reaching the aquifer below for upwards of 330 years. CWM estimates place the period before any leachate reaches the aquifer at 10,000 years.

When the national importance of the hazardous-waste disposal problem is taken into account, this becomes a very vital case on at least three levels. First, this case will determine whether states can charge grossly disproportionate fees for the disposal of out-of-state hazardous waste at licensed facilities located within their borders. As such, this case will contribute significantly to defining the degree to which states can put the force of their legislative authority behind the NIMBY sentiments of their residents when it comes to the disposal of out-of-state hazardous waste. Politically, the lesson of this case will not go unnoticed—what is good intrastate politics for Governor Hunt in Alabama (“... we don't want anybody else's problems...”) will be good intrastate politics in every other state that finds itself “importing” large quantities of out-of-state hazardous waste.

Second, on an economic level, this case could play havoc with the financial incentives operating in the hazardous-waste industry. Imagine momentarily that the fee-charging state, rather than seeking to block imports of hazardous waste, merely seeks to tax those imports to relieve its own citizens of alternative taxes. (Being cynical, the state can have it both ways, i.e., play to the NIMBY fervor while still filling the state's coffers.) By charging disproportionate fees to out-of-state disposers in a market where the supply of hazardous-waste disposal capacity is severely limited due to government regulation, the state can skim a major portion of the economic rent that would otherwise be captured by the facility operator. Better still, the state gathers this revenue for itself while freeing its own in-state hazardous-waste generators from the financial effects of the tax. Note also that the amounts involved are non-trivial. Here, for example, if the increased fee at Emelle does not reduce the amount of interstate business done (due to the absence of less-expensive alternative facilities) the state will capture an annual Additional Fee of \$56 million.

Finally, on a legal level, as highlighted in the arguments of the parties that appear below, a decision upholding the differential fee would mark a significant change in dormant Commerce Clause jurisprudence. (The operation of the commerce clause in this setting is referred to as “dormant” because the power of the federal government acts as a limit on state power without affirmative congressional legislative action.) As recently as 1978 the United States Supreme Court in *Philadelphia v. New Jersey*, 437 U.S. 617, had little difficulty in striking down a statute that burdened the unrestrained interstate movement of solid waste. Such discriminatory laws, the Court noted, were subject to a virtual “per se rule of invalidity.” There has been a slight change in the legal landscape since 1978, largely due to the intervening case of *Maine v. Taylor*, 477 U.S. 131 (1986), which upheld

Maine's ban on the importation of baitfish. Even so, *Maine v. Taylor* is sufficiently distinguishable from both *Philadelphia* and the present case that to follow it here would announce a far more lenient attitude toward state-imposed burdens on interstate commerce than had been displayed in prior cases.

#### ARGUMENTS

***For Chemical Waste Management, Inc.*** (Counsel of Record, Andrew J. Pincus; Mayer, Brown & Platt, 2000 Pennsylvania Ave., NW, Washington, DC 20006; telephone (202) 778-0628):

1. The facially discriminatory \$72 per ton Additional Fee violates the Commerce Clause.
2. Facially discriminatory laws have repeatedly been subjected to a virtually per se rule of invalidity.
3. The Additional Fee cannot survive the strict scrutiny prescribed by *Philadelphia v. New Jersey* in that (1) there is no meaningful distinction between in-state and out-of-state hazardous waste and (2) there are less interstate discriminatory means available to Alabama that would accomplish its legitimate health, safety, and environmental interests.
4. The legislation in this case is avowedly protectionist.

***For Guy Hunt, Governor of Alabama*** (Counsel of Record, Bert S. Nettles; Spain, Gillon, Grooms, Blan & Nettles, 2117 2nd Avenue N., Birmingham, AL 35203; telephone (205) 328-4100):

1. Alabama's facially discriminatory Additional Fee is justified by legitimate state concerns regarding the large volume of hazardous waste being imported into Alabama.
2. *Philadelphia v. New Jersey* is not controlling because that case, involving mere municipal solid waste, did not present the real and substantial health, safety, and environmental risks present in this case.
3. The Additional Fee is a valid exercise of the state's police power under *Maine v. Taylor* and older cases involving quarantine of intrinsically harmful materials.
4. The Additional Fee serves a legitimate police power interest that cannot be served adequately by any less burdensome alternative.
5. The public interest in the safe management of hazardous waste would be better served by recognizing, rather than limiting, the ability of the states to control the interstate movement of hazardous waste.