

Tartakoff, Daniel

From: Elwell, Caleb <Caleb.Elwell@maine.gov>
Sent: Wednesday, May 12, 2021 2:21 PM
To: Tartakoff, Daniel
Cc: Frey, Aaron; Taub, Christopher C; Boak, Scott; Malon, Marc
Subject: ENR Committee request, LD 911

This message originates from outside the Maine Legislature.

Good afternoon, Dan,

Our office's Natural Resources Division has been asked to look into the ENR Committee's questions outlined in your email below, and I have prepared the following response:

1. LD No. 911 raises significant concerns of constitutional validity and, if enacted, faces a substantial risk of being challenged and overturned on judicial review pursuant to the Commerce Clause. The Commerce Clause of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign nations, and among the several states." U.S. Const. art. I, § 8, cl.3. While not explicitly stated in the text, the Commerce Clause has long been interpreted by courts to contain an implicit restraint on state power to regulate interstate and foreign commerce, a doctrine which has come to be known as the "dormant Commerce Clause." *See e.g. Dennis v. Higgins*, 498 U.S. 439, 446 (1991).

LD No. 911 as currently written would be vulnerable to constitutional challenges raised pursuant to the dormant Commerce Clause. The bill proposes to prohibit importation of plastic waste that originates within "another jurisdiction or country." Although the term "jurisdiction" is not defined, as "country" is included separately within the bill, a reasonable interpretation of "jurisdiction" is that it refers to, among other possibilities, other states. Thus, if enacted, the bill could potentially be subject to challenge based on claims of facial discrimination against both foreign and interstate commerce. A "statute that facially discriminates against interstate or foreign commerce will, in most cases, be found unconstitutional." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 67 (1st Cir. 1999), *aff'd sub nom.*, 530 U.S. 363 (2000). Such a statute is "virtually *per se* invalid ... unless it advances a legitimate local purpose that cannot be served by reasonable non-discriminatory means." *All. of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 35 (1st Cir. 2005); *see also Maine v. Taylor*, 477 U.S. 131, 151 (1986).

Specifically, the United States Supreme Court has held that a law which prohibited the importation of out-of-state solid waste in order to conserve in-state landfill capacity fell "squarely within the area that the Commerce Clause puts off limits to state regulation" and was consequently invalid. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). Given the similarity between the activity found to be violative of the dormant Commerce Clause in *City of Philadelphia*, and that proposed here, namely, a prohibition which bans out-of-state waste importation while permitting in-state commercial waste activities to continue, LD 911 would face a serious risk of being overturned in federal court.

Laws which discriminate against foreign commerce are subject to additional and more exacting review than those which discriminate against purely interstate commerce. *See South-Central Timber Dev. Inc. v. Wunnicke*, 467 U.S. 82, 100 (1984). This is because it is necessary for the federal government to be able to "speak with one voice when regulating commercial relations with foreign governments." *Id.* Additionally, the exception known as the "market participant exception," which allows a state when acting as a market participant to discriminate against interstate commerce in a manner that would not be otherwise permitted, likely is not applicable with respect to foreign commerce in the First Circuit. *See Natsios*, 181 F.3d at 66. Accordingly, amending the bill so

that it prohibits only the importation of plastic waste from foreign nations would be unlikely to reduce the considerable risks associated with a challenge pursuant to the dormant Commerce Clause.

2. In addition to the significant risks associated with a potential Commerce Clause challenge, LD 911, which proposes to regulate international trade, may overlap or conflict with binding international agreements under certain scenarios. While this area of the law is less clear, it may present additional risks of a challenge to the validity of LD 911. The effect of international treaties on the transnational importation of plastic waste is complex and dependent on the nature of the waste at issue, the existence of any legal agreements between the countries in question, the domestic laws of the countries involved, and pending further regulation by international organizations. One pertinent international agreement is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. 28 I.L.M. 657 (1989); 1673 U.N.T.S. 125. This is a multilateral agreement governing exports and imports of primarily hazardous waste. While the United States is not a party to the Basel Convention, 187 countries and the European Commission are.

In 2019, the Basel Convention amended its rules in a manner that broadened the scope of waste covered. Now, only certain mixtures of non-hazardous plastic waste that are destined for “separate recycling in an environmentally sound manner” and are “almost free from contamination of other types of waste” are exempt from the Basel Convention requirements of written notice and consent. These operative terms were not defined by the 2019 Amendments, and are scheduled to be defined in the future.

Parties to the Basel Convention cannot trade Basel-covered waste with nonparties in the absence of a pre-determined agreement between the countries. The United States has one such agreement that addresses trade in non-hazardous plastic scrap with member countries of the Organization for Economic Cooperation and Development (OECD). However, based on objection by the United States to certain portions of the 2019 Basel Convention Amendments, the OECD has not currently adopted these amendments. This has left substantial uncertainty regarding what requirements OECD countries will impose on such trade, and some countries may elect to prohibit trade in non-hazardous plastic scrap with the United States. More specific information regarding the requirements OECD countries are choosing to apply regarding trade in non-hazardous plastic waste is available and updated on the [OECD website](#). Ultimately, the duties and obligations of the United States with respect to transnational plastic waste disposal do not appear subject to a single clear-cut rule but would likely turn on case-specific factors, including the details of specific shipments and the laws of the other countries involved.

A treaty entered into by the United States creates binding and preemptory federal law when it is either “self-executing,” or when Congress has enacted implementing statutes. *Medellin v. Texas*, 552 U.S. 491, 505 (2008). It is also unclear if OECD amendments, such as the one which governs transnational waste disposal, create binding federal law. If a legal challenge was brought on this basis, it is possible that a court might find OECD agreements governing import and export of waste materials are binding federal law and in conflict with a total ban on foreign plastic waste importation enacted by an individual state such as Maine. Put another way, and subject to some uncertainty, there is a risk of federal preemption under some potential fact-specific importation scenarios that would likely turn on the kinds of variables discussed above.

I hope the Committee finds this information helpful. Please let us know if you have further questions.

Best,

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From: Tartakoff, Daniel <Daniel.Tartakoff@legislature.maine.gov>
Sent: Wednesday, May 5, 2021 12:41 PM
To: Malon, Marc <Marc.Malon@maine.gov>
Cc: Taub, Christopher C <Christopher.C.Taub@maine.gov>
Subject: ENR Committee request, LD 911

Hi Marc –

I have been asked by the ENR Committee to request input from your office regarding the constitutional implications of LD 911, An Act To Prohibit the Reception of Foreign Waste Plastic in Maine Ports (<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0667&item=1&snum=130>). I have attached my bill analysis for reference.

The committee would like to know in particular:

1. What comments or input might your office have regarding any potential constitutional challenge to the proposal under the Commerce Clause of the United States Constitution? I was asked to note for you that some committee members are considering amending the bill to clarify that the prohibition only applies to waste from foreign countries (i.e., not from another US state or from one point in Maine to another point in Maine via vessel transport) in the event that change would affect any input your office provides; and
2. What comments or other input might your office have regarding concerns noted in the analysis from DEP over whether the transport of plastic waste from another country may be affected or even prohibited by certain international treaties or agreements (e.g., Basel Convention, OECD rules)?

It's not clear yet at what point this bill may be taken up again for work session. I will assume the earliest would be 5/12 but I have not specifically discussed that matter with the chairs. Please let me know if you would prefer that I submit this request in a more formal manner on committee letterhead.

Thanks,

Dan Tartakoff, Esq.
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