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March 19, 2012

Honorable Bob Smith
216 Stelton Rd., Suite E-5
Piscataway, New Jersey 08854

Dear Senator Smith:

You have requested a legal opinion as to whether Assembly Bill No. 575 of 2012, which prohibits the treatment, discharge, disposal, or storage in New Jersey of wastewater from hydraulic fracturing, violates the Commerce Clause of the United States Constitution. Please be advised that the proposed ban on treatment, discharge, disposal, or storage of the wastewater, if enacted into law, probably would withstand a Commerce Clause challenge. However, because a Commerce Clause analysis is fact dependent, this conclusion is based upon assumptions concerning the purposes of the legislation and the unique nature of wastewater generated by hydraulic fracturing, as discussed below.

Article I, Section 8, clause 3 of the United States Constitution gives Congress the power "[t]o regulate Commerce with foreign nations, and among the several States. . . ." Although the Commerce Clause is a direct grant of power to Congress, it has been held to restrict a state's freedom to enact laws that interfere with interstate commerce. See Hughes v. Oklahoma, 441 U.S. 322 (1979). This limitation is applied when a state act conflicts with a congressional act or with the "negative implications" of the Commerce Clause. The negative implications (or "dormant" Commerce Clause as it is commonly called) limit state regulation of interstate commerce even where Congress has not preempted the field. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330, 338 (2007).

Even though states are prevented from regulating in certain ways that interfere with interstate commerce, they may make laws governing matters of local concern which may to some degree affect interstate commerce. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669 (1981); Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945). The courts impose two levels of scrutiny when determining whether a state has overstepped its role in regulating interstate commerce. Maine v. Taylor, 477 U.S. 131 (1986). If a state law discriminates against interstate commerce, on its face or in effect, the state must demonstrate that it serves a legitimate local purpose and that the purpose cannot be served by an available nondiscriminatory means. Id. at 138; Philadelphia v. New Jersey, 437 U.S. 617 (1978); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). In those cases where the state law or regulation has been found to discriminate against out-of-state interests in favor of in-state interests, the courts give heightened scrutiny with a virtually per se rule of invalidity. Philadelphia, 437 U.S. at 624; Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981). However, if a state law regulates evenhandedly to effectuate a legitimate local purpose and its effects on interstate commerce are incidental, then the courts use a balancing test to weigh whether the burden on interstate commerce is excessive in relation to the local benefits. United Haulers Ass'n, Inc., 550 U.S. at 346; Pike v. Bruce Church, 397 U.S. 137 (1970).

As noted above, a Commerce Clause analysis is dependent on the facts of each case. Whether a particular regulatory scheme is violative involves a detailed examination of the specific legislation and its effects, and may involve a determination of the intent of the Legislature, or the purposes of the legislation. See Philadelphia, 437 U.S. at 624; Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 400 (3rd Cir. 1987).

To determine whether a law violates the dormant Commerce Clause, the courts first examine whether the law discriminates against interstate commerce. The courts look at whether the law treats in-state economic interests the same as out-of-state economic interests. Oregon Waste Sys., Inc. v. Dep't of Envt'l. Quality of Oregon, 511 U.S. 93 (1994). A state law may violate the Commerce Clause if it discriminates on its face, has a discriminatory purpose, or results in a discriminatory effect. Eastern Kentucky Resources v. Fiscal Court of Magoffin County, 127 F.3d 532 (6th Cir. 1997); Norfolk Southern Corp., 822 F.2d at 400.

Assembly Bill No. 575 would prohibit wastewater resulting from hydraulic fracturing in any state from being treated, discharged, disposed of, or stored in New Jersey. On its face, the bill does not treat hydraulic fracturing wastewater generated within the State differently from wastewater generated outside of the State. Thus, the law regulates evenhandedly.

It may be argued that even though the bill does not treat in-State and out-of-State waste differently, in effect it discriminates against interstate commerce by barring the importation of

waste into the State because hydraulic fracturing does not occur in New Jersey. Moreover, hydraulic fracturing is unlikely to occur in the State in the near future (there is currently a one year moratorium in effect, imposed by P.L.2011, c.194), and hydraulic fracturing waste is currently generated only outside of the State. However, simply because out-of-state firms are the only ones affected by an evenhanded law, the courts have not subjected such laws to the heightened scrutiny standard. Norfolk Southern Corp., 822 F.2d at 402-403; see also Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (where law barring petroleum producers from owning gas stations was upheld even though no producers operated in the state) and Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (where Court upheld local tax that fell largely on out-of-state coal purchasers). The bill cannot be characterized as a protectionist measure because it does not protect any in-state commercial interests. As the Court noted in Philadelphia v. New Jersey, when it invalidated a law that blocked out-of-State solid waste from entering the State, New Jersey could have pursued its legislative ends by slowing the flow of *all* waste into the State's remaining landfills. 437 U.S. at 626. Indeed, the Court in Norfolk Southern v. Oberly noted that it is not the "blockage" of interstate flow that triggers heightened scrutiny, but rather the discrimination of interstate versus intrastate movement of goods. 822 F.2d at 401. Therefore, it is our opinion that the courts will not view the provisions of Assembly Bill No. 575 as discriminating against out-of-State interests and therefore will not apply the heightened scrutiny standard for Commerce Clause cases.

If a state law does not discriminate against interstate commerce and regulates evenhandedly, then the courts will uphold it unless the burden imposed on the course of interstate commerce outweighs the state regulatory concern. Pike, 397 U.S. at 142. If the burden on interstate commerce is clearly excessive in relation to the putative local benefits, then the courts will invalidate the state regulation. Ibid.

The courts have generally recognized that local government has a legitimate interest in regulating matters affecting the public health, safety and welfare as long as the burden imposed is not clearly excessive in light of the putative local benefits. See, e.g., Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (upholding local ordinance establishing smoke abatement code on ships engaging in interstate commerce). That environmental matters are an appropriate area of public concern which may legitimately prompt the imposition of state laws affecting interstate commerce is evident from numerous cases. See, e.g., Minnesota, 449 U.S. at 471 (concerning state law that banned sale of milk in plastic nonreturnable, nonrefillable containers to reduce solid waste volume and encourage reuse and recycling); Maine, 477 U.S. at 142 (concerning law that banned importation of live baitfish to protect native fish populations). The Commerce Clause does not displace the states' authority to shelter their people from menaces to health and safety. American Trucking Assoc. v. Michigan Public Service Comm'n, 545 U.S. 429, 434 (2005).

Although the bill is silent about the purpose of the ban on the treatment or disposal of hydraulic fracturing wastewater, for the purposes of this opinion we will assume the purpose of the bill is environmental protection, based upon the testimony submitted and the news articles published on the issue with regard to a similar bill last session when it was considered by the Assembly Environment and Solid Waste Committee on November 28, 2011. For example, opponents of hydraulic fracturing argue that the chemical contents of the wastewater are not disclosed. They further argue that the wastewater cannot be treated properly without knowing the chemicals contained therein. See, Testimony submitted by Food & Water Watch to Assembly Environment and Solid Waste Committee, November 28, 2011. Moreover, the bill's sponsor noted that until the State is convinced that the science indicates that treated wastewater is safe, "we should put a brake on it." "Committee Says NJ Won't Treat Wastewater from Hydraulic Fracturing," NJ Spotlight, November 29, 2011.[1] If the purpose of the bill is to protect the environment from the effects of the discharge of hydraulic fracturing wastewater, then it would likely be concluded that the State has a legitimate purpose for the regulation because the treatment and disposal of hydraulic fracturing wastewater might have a serious impact on environmental quality and public health. The inclusion of findings and declarations in the bill that delineate the State's interest in regulating in this matter would provide a reviewing court with evidence of the State's purpose and would strengthen the arguments in favor of its constitutionality.

Once a legitimate local purpose is established, it is necessary to evaluate the extent of the burden that the proposed legislation places on interstate commerce. The courts have recognized that even purely intrastate regulation may have some effect on interstate commerce, without rising to a violation of the Commerce Clause. Huron Portland Cement, 362 U.S. at 443. Therefore, the relevant inquiry in a Commerce Clause analysis in determining whether the burden imposed by an evenhanded regulation is incidental is whether greater costs are imposed on out-of-state interests as compared to in-state interests. Norfolk Southern, 822 F.2d at 406. In this case, the legislation would apply uniformly to in-state interests and out-of-state interests. In Philadelphia v. New Jersey, where the court invalidated a New Jersey law that prohibited the shipment and disposal of out-of-State solid waste into the State, the

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[1] In other states, news articles suggest that hydraulic fracturing wastewater has caused various environmental problems and there may be radioactive elements in the waste that could be discharged into surface waters. Pro Publica, October 20, 2011. "Ohio Tries to Escape Fate as a Dumping Ground For Fracking Fluid, "Business Week, February 1, 2012; "Ohio Earthquake Likely Caused by Fracking Wastewater," Scientific American, January 4, 2012. Furthermore, there are no federal standards for the treatment of wastewater generated by the hydraulic fracturing process. "EPA Plans to Issue Rules Covering Fracking Wastewater," Pro Publica, October 20, 2011.

Court wrote that it may be assumed that New Jersey may pursue its legislative goals by slowing the flow of all waste, regardless of the origin, into the State's landfills even though interstate commerce may be incidentally affected. 437 U.S. at 626. Thus, it is likely that the courts would hold that the burden placed by the bill on interstate commerce is incidental. The bill then is more akin to those laws upheld by the courts that regulate in-state activities. Norfolk Southern Corp., 822 F.2d at 401.

Finally, it is necessary to evaluate whether the purposes of the legislation could be accomplished as well by other means which would have a lesser impact on interstate commerce. The extent of the burden that will be tolerated by the courts depends on the nature of the local interest, and whether the local interest could be promoted with a lesser impact on interstate activities. Minnesota, 449 U.S. at 471. In evaluating the nature of the local interest, courts review the factual record to determine the strength of the State's rationale for the law. Kassel, 450 U.S. at 671-672. We assume, in the absence of a factual record, that the State's rationale for the legislation is strong in light of the reports of environmental contamination resulting from current methods for disposing of hydraulic fracturing wastewater. We also assume for the purposes of this opinion that wastewater generated from the hydraulic fracturing process is unlike other industrial wastewater already treated in the State, due to its varied and unknown chemical constituents as well as its potential radioactivity. See, Testimony Submitted by Environment New Jersey to Assembly Environment and Solid Waste Committee, November 28, 2011. In addition to the variation in the types and concentrations of the chemicals used in the injection process, the hazardous substances and radioactive components that may be released from each well into the wastewater may vary as well. See, Testimony submitted by Food & Water Watch to Assembly Environment and Solid Waste Committee, November 28, 2011.[2] In view of the lack of information concerning the contents of the wastewater, the reported heavy reliance on surface waters for drinking water purposes in the State, and the radioactivity that may be found in the wastewater, it is unlikely that a court would find that the purposes of the legislation could be achieved by another, less burdensome means. Furthermore, as noted by the Supreme Court in Maine v. Taylor, although a "State must make reasonable efforts to avoid restraining the free flow of commerce across its borders," it "is not required to develop new and unproven means of protection at an uncertain cost." 477 U.S. at 147.

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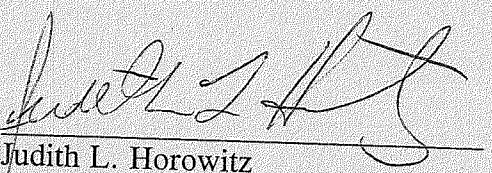
[2] Also, it has been reported that wastewater treatment plants are not designed to treat the levels of radioactivity that may be present in wastewater generated from hydraulic fracturing. "New Fracking Worries: Methane Leaks, Radioactive Water," Discover Magazine, December 20, 2011.

In conclusion, based upon the assumptions made concerning the purposes of the legislation, and the nature of the wastewater from hydraulic fracturing, it is our opinion that Assembly Bill No. 575 of 2012, proposing a ban on the treatment, discharge, disposal, or storage in New Jersey, of wastewater from hydraulic fracturing does not violate the Commerce Clause because it imposes the same restrictions on interstate and intrastate businesses, and the burden on commerce is incidental in relation to the putative local benefits if the legislation were enacted into law. The inclusion of findings and declarations in the bill that delineate the State's interest in regulating in this matter would provide a reviewing court with evidence of the State's purpose and would strengthen the arguments in favor of its constitutionality.

Very truly yours,

Albert Porroni
Legislative Counsel

By: 
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