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Opinion No. 05-060

Validity of Pending Legislation Allowing Local Governments to Impose Fees on Federal Facilities Related to Storage and Disposal of Solid and Radioactive Waste

QUESTION

Is Senate Bill 892, which would amend Tennessee's Hazardous Waste Management Act of 1977, Tenn. Code Ann. §§ 68-212-101 to 68-212-121, by permitting local governments to impose storage and disposal fees on federal facilities that generate solid waste that has a radioactive component, consistent with federal constitutional law?

OPINION

It is the opinion of this Office that pending Senate Bill 892, as amended, is not constitutionally defensible. Insofar as the bill would allow counties and municipalities to impose fees on federal facilities that generate solid and radioactive waste, whose treatment, storage and disposal is actually regulated by state and federal authorities, the bill would not fall within the federal law waiver of sovereign immunity from reasonable service charges.

ANALYSIS

Senate Bill 892 proposes to amend Tennessee's Hazardous Waste Management Act of 1977 (HWMA), Tenn. Code Ann. §§ 68-212-101 to 68-212-121, by allowing counties and municipalities to impose annual fees on federal facilities within their jurisdictions that treat, store or dispose of any "solid waste that is also source, special nuclear or byproduct material subject to the Atomic Energy Act of 1954 and the Federal Facilities Compliance Act of 1992." Senate Bill 892, Section 1. The bill therefore seems to be aimed at regulating some radioactive waste. According to our information, the City of Oak Ridge and Anderson County, Tennessee, would be most affected by this legislation since the United States Department of Energy's Oak Ridge Reservation (ORR) and its plants and facilities are located there.

By way of background, we note that the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992, sets federal standards regulating hazardous waste treatment, storage and disposal. RCRA also regulates some radioactive waste or "mixed waste," which is defined as waste that "contains both hazardous waste and source, special nuclear, or by-product

material subject to the Atomic Energy Act of 1954." 42 U.S.C. § 6903(41). Under certain circumstances and conditions, RCRA permits states to administer their own hazardous waste and solid waste programs in lieu of the federal program. 42 U.S.C. § 6926. By virtue of the Federal Facility Compliance Act (FFCA), which amended RCRA in 1992, federal facilities must comply with those state laws. *See* 42 U.S.C. § 6961. In fact, the FFCA expressly requires federal facilities to comply with all state laws "respecting control and abatement of *solid waste or hazardous waste* disposal and management." 42 U.S.C. § 6961(a) (emphasis supplied). Tennessee has such an authorized state program and the HWMA and the Solid Waste Disposal Act (SWDA), Tenn. Code Ann. § 68-211-101 to 68-211-124, are our counterparts to RCRA. Consequently, the United States Department of Energy (DOE) facilities in Oak Ridge are subject to state regulation under the HWMA and the SWDA.

RCRA, as amended by the FFCA, 42 U.S.C. § 6961, provides, in pertinent part, that facilities owned by the federal government that are engaged in

> the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural . . . , respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of *reasonable service charges.*

42 U.S.C. § 6961(a) (emphasis supplied). The federal courts have construed this language as a waiver of the federal government's sovereign immunity from state or locally-imposed "reasonable" fees. *State of Maine v. Department of the Navy*, 973 F.2d 1007, 1011-1012 (1st Cir. 1992). At issue in *Maine* was the reasonableness of an annual licensing fee that the state sought to recover from the Navy for operating its shipyard, which handled hazardous waste. The court, referencing cases that interpreted similar language in other environmental statutes, drew the following conclusions:

> A regulatory, or licensing, fee, insofar as it is reasonable, seems properly viewed as a kind of charge for a regulatory, or administrative, "service.". . . ("[L]evies assessed for regulatory . . . purposes, even though they may also raise revenues, are generally not 'taxes.'"). They are like a "classic 'regulatory fee' . . . imposed by an agency upon those subject to its regulation," and used, for example, to "rais[e] money placed in a special fund to help defray the agency's regulation-related expenses."

On its face, Senate Bill 892 does not reflect what types of regulatory services local governments would be providing to justify such annual storage and disposal fees, and this Office is not aware of any services that the City of Oak Ridge or Anderson County provide to the DOE because the storage and disposal of the federal government's solid and radioactive waste at ORR is regulated entirely by the state and federal governments. Since neither the city nor the county appears to have any regulatory authority over this activity and they are not providing any specific

services for which the charge is imposed, the charge in this bill appears to be for general revenue-raising purposes and therefore should be characterized as a tax under Tennessee law. As such, it would be beyond the scope of the waiver of sovereign immunity in 42 U.S.C. § 6961(a).

Moreover, whether described as a fee or a tax, it appears unlikely that the charge in question, as a practical matter, would apply to any entities other than the federal ORR facilities. If the charge affects only federal facilities, it would fail the requirement of § 6961(a) that the charge be "nondiscriminatory" and would, in a general sense, violate the Supremacy Clause. *See United States v. Tennessee*, 531 F. Supp. 62 (E.D. Tenn. 1981), *aff'd*, 709 F.2d 511 (6th Cir. 1983). It is therefore the opinion of this Office that Senate Bill 892 would not result in a "reasonable" service charge within the meaning of 42 U.S.C. § 6961 because it is not related to any services provided by local governments over the control and abatement of waste that is both solid and radioactive.

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