



(FORM UPDATED: 08/11/2010)

**WISCONSIN STATE LEGISLATURE ...  
PUBLIC HEARING - COMMITTEE RECORDS**

**2005-06**

(session year)

**Senate**

(Assembly, Senate or Joint)

**Committee on Natural Resources and  
Transportation...**

**COMMITTEE NOTICES ...**

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

**INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL**

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)  
(**ab** = Assembly Bill)                      (**ar** = Assembly Resolution)                      (**ajr** = Assembly Joint Resolution)  
(**sb** = Senate Bill)                              (**sr** = Senate Resolution)                              (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

# Vote Record

## Committee on Natural Resources and Transportation

Date: 1-5-06

Moved by: KAPANKE

Seconded by: BRESKE

AB \_\_\_\_\_

SB \_\_\_\_\_

Clearinghouse Rule 05-032 (UNSPECIFIED MODIFICATIONS)

AJR \_\_\_\_\_

SJR \_\_\_\_\_

Appointment \_\_\_\_\_

AR \_\_\_\_\_

SR \_\_\_\_\_

Other \_\_\_\_\_

A/S Amdt \_\_\_\_\_

A/S Amdt \_\_\_\_\_ to A/S Amdt \_\_\_\_\_

A/S Sub Amdt \_\_\_\_\_

A/S Amdt \_\_\_\_\_ to A/S Sub Amdt \_\_\_\_\_

A/S Amdt \_\_\_\_\_ to A/S Amdt \_\_\_\_\_ to A/S Sub Amdt \_\_\_\_\_

Be recommended for:

- |                                       |                                    |                                       |   |  |
|---------------------------------------|------------------------------------|---------------------------------------|---|--|
| <input type="checkbox"/> Passage      | <input type="checkbox"/> Adoption  | <input type="checkbox"/> Confirmation | <input type="checkbox"/> Concurrence    | <input type="checkbox"/> Indefinite Postponement |
| <input type="checkbox"/> Introduction | <input type="checkbox"/> Rejection | <input type="checkbox"/> Tabling      | <input type="checkbox"/> Nonconcurrence |  |

Committee Member

**Senator Neal Kedzie, Chair**

Aye    No    Absent    Not Voting

**Senator Cathy Stepp**

**Senator Dan Kapanke**

**Senator Roger Breske**

**Senator Robert Wirch**

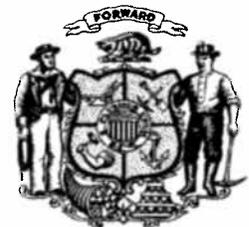
**Totals:**    4    \_\_\_\_\_    1    \_\_\_\_\_

Motion Carried

Motion Failed



# WISCONSIN STATE LEGISLATURE



Before the Senate Committee on Natural Resources and Transportation  
Testimony of Patricia Chabot  
On Clearinghouse Rule 05-032, Hazardous Waste  
January 5, 2006

My name is Pat Chabot. I am the Hazardous Waste Team Leader in the Bureau of Waste Management at the Department of Natural Resources. Thank you for the opportunity to testify today on behalf of the Department on the proposed revisions to the Hazardous Waste rules.

These rules are the result of a 3-year effort. The rules are intended to replace and update current rules that regulate the generation, transportation, recycling, treatment, storage and disposal of hazardous waste and used oil. As part of the rule revision process, the Department asked stakeholders to review and provide comment on draft rules through out the process. We had two public comment periods, in March, 2004 and May, 2005. Only a few comments were received. Of the comments received, the proposed manifest fee increase was the most controversial item.

The new rules are based on U.S. EPA's hazardous waste regulations already in effect, and they revise our current rules to more closely follow the form and content of the federal regulations. To comply with state law and to maintain DNR's authorization to administer the federal hazardous waste program in Wisconsin, DNR's rules must be at least as stringent as the federal hazardous waste regulations.

The new rules are easier to understand and improve consistency with other states. They also reduce paperwork for businesses, encourage legitimate recycling and allow more flexibility in the design and operation of hazardous waste facilities. Finally, they generate additional revenue to administer the program. These rules do not impose any new requirements not currently in federal rules, and they promote and encourage activities to legitimately recycle hazardous waste.

State statute requires DNR to promulgate by rule a graduated schedule of reasonable fees for certain hazardous waste activities. The current fee schedule has been in place since 1994. The new rules increase hazardous waste treatment, storage and disposal facility license and plan review fees, transportation service license fees, and manifest fees.

Most of the fee increases reflect an annual 3% adjustment for inflation since 1994, while some fees are reduced or eliminated, and a few fees increased at a higher percentage. In addition, hazardous waste transportation service license fees include a new, per vehicle fee, which parallels the current solid waste transportation service license vehicle fee. Manifest fees increase from \$2 to \$6 per manifest submitted, which is consistent with the fees charged in surrounding states, and is necessary to recover our costs related to manifests. This will be offset in part by provisions in the new rules that exempt more generators from having to use manifests.

Fee increases are proposed because inflation increased the cost of salaries, fringe benefits, supplies and services, and because revenue from the hazardous waste fees approved in 1994 never met expectations. General Program Revenue and Segregated Environmental funds are decreasing, and federal funds have also decreased. The Hazardous Waste Program Revenue account currently has a deficit. The funding shortfall for FY06 is projected to be \$320,000.

The program has already had staff reductions from 43 FTE in the mid-1990s to 28 FTE currently. Without the proposed fee increases, even fewer staff may be available for Green Tier and Remediation clean-up projects, and more of the routine compliance inspections in Wisconsin would have to be done by U.S. EPA staff from Chicago. Reduced complaint follow-up and technical assistance would affect our ability to consistently assure compliance and would also jeopardize maintaining a state operated program.

Fee revenue supports hazardous waste treatment, storage and disposal facility licensing and plan reviews, inspections, complaint response and technical assistance. Manifest fees are used for management of the data. These activities ensure that hazardous waste is managed in ways that protect human health and the environment. Preventing pollution through proper management of hazardous waste is a good investment.

Without additional revenue, the Department's Waste Management Program will be unable to provide the same level of products and services we currently deliver to our customers and stakeholders. This could lead to detrimental effects on the environment.

We carefully considered the amount of fee increases, recognizing that any increase will have an impact on businesses in the state. However, we believe the proposed fees are reasonable, will not unduly burden businesses, and are necessary to maintain an effective state-run hazardous waste program. For these reasons, the Department asks this Committee to approve Clearinghouse Rule 05-032. I'd be happy to answer you may have on this rule package.



State of Wisconsin  
Department of Natural Resources  
*(PAT) (SHABO)*  
**PATRICIA M. CHABOT**  
Hazardous Waste Team Leader  
Bureau of Waste Management

*1106*  
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Recycled Paper

*Dialysis*

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# Wisconsin Motor Carriers Association

Good stuff.

"Promoting Safe and Reliable Truck Transportation"

www.witruck.org



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Mike Natallizio  
HNI Risk Services

PRESIDENT  
Thomas A. Howells  
thowells@witruck.org

January 5, 2006

To: Members,  
Senate Natural Resources & Transportation Committee

Subject: Opposition to Clearinghouse Rule 05-032

On behalf of the 1,250 members of the Wisconsin Motor Carriers Association (WMCA), I am appearing today in opposition to Clearinghouse Rule 05-032 pertaining to the provision that establishes a \$35 per-vehicle fee to the Transportation Service License fee.

New fee

The WMCA opposes this provision because of our belief that the fee would violate the Commerce Clause of the United States Constitution. That opinion is shared by the American Trucking Associations as well. Please refer to their attached memo that concludes that:

"There is little question in our minds that if Wisconsin promulgates the flat, \$35 per-truck hazardous waste transporter fee that has been proposed, it would be vulnerable to constitutional challenge under the Commerce Clause."

It should be pointed out that a similar hazardous materials transporter fee proposed in Wisconsin by the State Emergency Response Board (SERB), was ruled unconstitutional by the Court of Appeals in 1996 because the flat per-carrier hazardous materials transporter fees at issue in that litigation failed the internal consistency test. The Wisconsin Supreme Court denied review of the case on December 17, 1996. In that case (please see attached), the Court of Appeals found:

"Flat, unapportioned hazardous materials transportation registration fee imposed by Wisconsin regulation on persons offering or transporting hazardous materials in commerce violated Commerce clause: while possible fee of \$2,000 may not have been burdensome for intrastate carrier, cost of doing business for interstate carrier would be prohibitive if same of similar fees were imposed by each state, fees were unrelated to extent of carrier's use of Wisconsin facilities or mileage traveled within state, and fee could not be justified solely because agency promulgating fee or regulation had not made studies necessary to structure constitutionality apportioned fees."

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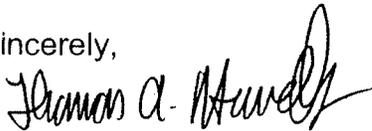
Page 2

Most trucking companies travel in numerous states and therefore must comply with a multitude of regulations and pay a variety of user fees. As a result, most fees paid by the industry are paid on a mileage pro-ration basis. The International Fuel Tax Agreement (IFTA) apportions a company's fuel tax based on mileage traveled in each state. A similar agreement, the "International Registration Plan" apportions vehicle registration fees based on mileage traveled in each state.

Many states have attempted to impose flat, per vehicle fees, but literally scores of them have been struck down under the principle that it violates the Commerce Clause. In most cases, local trucks derive far greater economic benefit from a flat fee and those types of fees usually discriminate against out-of-state truckers by subjecting them to a higher charge per-mile traveled.

We hope that you will oppose the provision in CR 05-032 that creates a per-vehicle transporters fee.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas A. Howells". The signature is fluid and cursive, with a large loop at the end.

Thomas A. Howells  
President

Attachment



# ATA LITIGATION CENTER, INC.

2200 Mill Road ★ Alexandria, VA 22314-4677 ★ Tel: (703) 838-1865 ★ Fax: (703) 683-3226

May 26, 2005

Mr. Thomas A. Howells  
President  
Wisconsin Motor Carriers Association  
562 Grand Canyon Drive  
Madison, WI 53719

*The Internal Consistency Test*

Re: Proposed \$35 Per-Truck Hazardous Waste Transportation License Fee

Dear Mr. Howells:

You have asked the ATA Litigation Center's view as to whether a proposed annual \$35 per-truck hazardous waste transporter license fee ("license fee") would violate the Commerce Clause of the United States Constitution. As discussed below, in our view unapportioned state flat per-truck charges like the proposed license fee inherently discriminate against and burden interstate commerce and are unconstitutional. Indeed, direct United States Supreme Court precedent and a holding by the Court of Appeals of Wisconsin in a challenge to similar unapportioned hazardous material transporter fees leave little room for doubt that the proposed license fee would violate the Commerce Clause. See, American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987) ("Scheiner"); American Trucking Associations, Inc. v. State of Wisconsin, 556 N.W. 2d 761 (Wis. Ct. App. 1996), *cert. denied*, 560 N.W. 2d 274 (Wis. 1996) ("State of Wisconsin").

In Scheiner, the U.S. Supreme Court examined two unapportioned per-truck charges imposed by the Commonwealth of Pennsylvania: a \$ 36 per-axle truck tax and a \$25 per-truck fuel identification marker fee. The Court's analysis made clear that such flat taxes are structurally flawed and are both malapportioned and discriminatory in effect. Exposure of interstate transportation activities to a crippling cumulative tax burden is one of the principal structural infirmities of the flat fee form of taxation. Applying its "internal consistency test," which looks at the impact on interstate commerce if all states imposed identical flat fees, the Court concluded that "flat taxes would occasion manifold threats to the national free trade area" and "divide and disrupt the market for interstate transportation services." 483 U.S. at 285.

In State of Wisconsin, the Court of Appeals found that the flat per-carrier hazardous materials transporter fees at issue in that litigation failed the internal consistency test. The Court first recognized that the "Wisconsin hazmat fee is one which

in form or substance can be repeated by other states in such manner as to lay an added burden on interstate transportation commerce." Then, with the cumulative burden of such a nation-wide system of flat fees in mind, the Court observed that "[w]hile such a fee for an intrastate carrier may not be burdensome, if the same or similar fees were imposed by each state, the cost of doing business for an interstate carrier would be prohibitive." 556 N.W. 2d at 766.

The proposed \$35 per-truck hazardous waste transporter fee would similarly fail internal consistency. A motor carrier with a ten-truck fleet would have to pay \$350 (\$35 X 10 trucks) to operate in Wisconsin. A motor carrier doing an identical level of business, but spread equally among the contiguous 48 states in interstate commerce would have to pay 48 times that amount or \$16,800 just to secure the privilege of being able to operate nationwide. As the Court of Appeals observed, "the cumulative effect does not result from mileage or distance traveled, but from the interstate character of the journey [], [t]he same mileage in one state would result in only one tax." *State of Wisconsin*, 556 N.W. 2d at 766 (citation omitted). The cumulative burden imposed on interstate motor carriers by the proposed \$35 per-truck flat fee leaves "no conceivable doubt that commerce among the states would be deterred." *Scheiner*, 483 U.S. at 284.

The failure of the proposed \$35 per-truck flat hazardous waste transporter license fee of the internal consistency test establishes as a matter of law that the charge would violate the Commerce Clause. See, *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) ("A failure of internal consistency shows as a matter of law that a state is attempting to take more than its fair share from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.")

In addition to exposing interstate commerce to a cumulative burden, flat annual per-truck fees inevitably lead to a cost per-mile discrimination in favor of locally based carriers. The U.S. Supreme Court in *Scheiner* recognized that intrastate or local motor carriers inevitably, on average, have more concentrated operations in a state than interstate motor carriers. See, *Scheiner*, 483 U.S. at 291 (explaining that intrastate carriers, which use the state's roads whenever in operation, are the primary beneficiaries of a flat per-truck tax); see also, *id.* at 284 n 16 (explaining that "the very nature of market that interstate operators serve prevents them from making full use of the privilege of doing business for which they have paid the State.") For example, under a \$100 flat annual tax, an interstate truck that only uses a state's road's 100 miles per-year pays \$1.00 per mile, while a local carrier that uses the roads 10,000 miles pays 1 cent per mile. This inevitable result places a discriminatory share of the State's regulatory costs on interstate motor carriers, while protecting intrastate and local motor carriers from their appropriate share of the state's costs.

Since the announcement of the *Scheiner* decision, more than a score of flat state per-truck taxes and fees have been struck down under its principles as violative of the Commerce Clause, including flat per-truck hazardous waste transporter fees. The

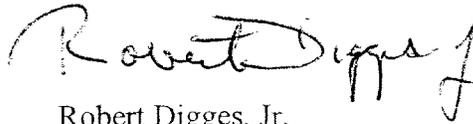
LEL. COUNCIL BELIEVE  
IT WOULD VIOLATE,  
BUT COMPELLING  
ARGUMENTS COULD  
BE MADE ON  
BOTH SIDES, IF  
THE RULE WERE  
CHALLENGED

Mr. Thomas A. Howells  
May 26, 2005  
Page 3

Supreme Judicial Court of Massachusetts struck down a \$200 per-truck hazardous waste transporter fee imposed by that State. *American Trucking Associations, Inc. v. Secretary of Administration*, 613 N.E. 2d 95 (1993). The Massachusetts Court determined that the flat, annual fee violated the internal consistency test, noting that “[i]f each state imposed flat fees of [this] type for passing through its jurisdiction, an impermissible interference with free commerce would result.” *Id.* at 101. The Court also found it “intuitively obvious [that] local trucks derive far greater economic benefit from [] the challenged fee[] than do interstate trucks” and concluded that the flat fee “discriminate[s] against out-of-state truckers by subjecting them to a higher charge per-mile traveled in Massachusetts.” *Id.* at 101, 103. Similarly, the Supreme Court of New Jersey recently struck down its State’s \$212 combination unit, flat per-truck hazardous waste transporter license fee. *American Trucking Associations, Inc. v. State of New Jersey*, 852 A. 2d 142 (2004). The New Jersey Supreme Court interpreted *Scheiner* as finding flat per-truck fees “*per se* unconstitutional” and concluded that “the transporter fees fail the internal consistency test [and] discriminate against interstate commerce.” *Id.* at 151, 164.

Based on the above precedent, there is little question in our minds that if Wisconsin promulgates the flat, annual \$35 per-truck hazardous waste transporter fee that has been proposed, it would be vulnerable to constitutional challenge under the Commerce Clause.

Sincerely yours,



Robert Digges, Jr.

▷

Court of Appeals of Wisconsin.

AMERICAN TRUCKING ASSOCIATIONS, INC.,  
Groendyke Transport, Inc., National Tank  
Truck Carriers, Inc., and TNT Holland Motor  
Express, Inc., on Behalf of  
Themselves and all Others Similarly Situated,  
Plaintiffs-Appellants,

v.

The STATE of Wisconsin, James E. Doyle, the  
Attorney General of the State of  
Wisconsin, Charles H. Thompson, Secretary of the  
Department of Transportation;

State Emergency Response Board, Robert W. Link,  
Tariq Akmut, Edward W.

Mishefske, Gloria G. Steffen, Jay G. Kopplin,  
Craig Olson, Thomas N.

Anderson, Caryl E. Terrell, William Singletary,  
David Woodbury, Dean R.

McKenzie, Lewis B. Harned, James Barrett and  
Joseph E. Tregoning, Defendants-  
Respondents. [FN < < dagger > > ]

FN < < daggr > > Petition for review denied.

No. 95-1714.

Oral Argument March 14, 1996.

Opinion Released Oct. 17, 1996.

Opinion Filed Oct. 17, 1996.

Action was brought seeking, inter alia, declaratory judgment as to constitutionality of hazardous materials transportation registration fee under commerce clause. The Circuit Court, Dane County, George A.W. Northrup, J., denied plaintiffs' cross-motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Robert D. Sundby, Reserve Judge, held that: (1) federal statute authorizing state to impose fee related to transporting hazardous material if fee is fair and used for purpose relating to transporting hazardous material did not remove state's registration fee from reach of dormant commerce clause, and (2) fee violated commerce clause.

Reversed and remanded with directions.

West Headnotes

[1] Judgment ⇨ 186

228k186

When confronted with cross-motions for summary judgment, court must rule on each party's motion on individual basis.

[2] Carriers ⇨ 12(5)

70k12(5)

[2] Commerce ⇨ 63.15

83k63.15

Federal statute authorizing state to impose fee related to transporting hazardous material if fee is fair and used for purpose relating to transporting hazardous material did not remove state's hazardous material transportation registration fee from reach of dormant Commerce Clause; Congress had not determined what fee was fair for license or permit to transport hazardous material, nor had it delegated to states authority to determine what fee was "fair." U.S.C.A. Const. Art. 1, § 8, cl. 3; Hazardous Materials Transportation Authorization Act of 1994, § 1(d)(g)(1), 49 U.S.C.A. § 5125(g)(1); W.S.A. 166.20(7g)(a, b); Wis.Admin. Code § SERB 4.03(2)(a-e).

[3] Commerce ⇨ 12

83k12

Commerce clause is described as "dormant" because it may not be invoked to permit courts to refuse state taxes or regulations authorized by Congress. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[4] Commerce ⇨ 12

83k12

[4] Commerce ⇨ 62.71

83k62.71

For state regulation to be removed from reach of dormant Commerce clause, congressional intent must be unmistakably clear. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[5] Carriers ⇨ 12(1)

70k12(1)

[5] Commerce ⇨ 63.15

83k63.15

Flat, unapportioned hazardous materials transportation registration fee imposed by Wisconsin regulation on persons offering or transporting

(Cite as: 205 Wis.2d 494, 556 N.W.2d 761)

hazardous materials in commerce violated Commerce clause; while possible fee of \$2,000 may not have been burdensome for intrastate carrier, cost of doing business for interstate carrier would be prohibitive if same or similar fees were imposed by each state, fees were unrelated to extent of carrier's use of Wisconsin facilities or mileage traveled within state, and fee could not be justified solely because agency promulgating fee regulation had not made studies necessary to structure constitutionally apportioned fee. U.S.C.A. Const. Art. 1, § 8, cl. 3; W.S.A. 166.20(7g)(a, b); Wis. Admin. Code § SERB 4.03(2)(a-e).

\*496 For the plaintiffs-appellants the cause was submitted on the briefs of Daniel Barney and Robert Digges, Jr. of ATA Litigation Center of Alexandria, VA; Andrew L. Frey and Charles Rothfeld of Mayer, Brown & Platt of Washington, D.C.; and Ann Ustad Smith and \*\*763 Randall J. Ney of Michael, Best & Friedrich of Madison.

For the defendants-respondents the cause was submitted on the brief of James E. Doyle, Attorney General, and Peter C. Anderson, Asst. Attorney General.

Before DYKMAN, P.J., and PAUL C. GARTZKE and ROBERT D. SUNDBY, Reserve Judges.

SUNDBY, Reserve Judge.

In this appeal, we hold that the Hazardous Materials Transportation Registration Fee (HazMat fee) imposed by the State Emergency Response Board (Board) from July 1, 1993 to June 30, 1995, on persons offering or transporting hazardous materials in commerce violated the Commerce Clause of the United States Constitution, Article 1, Section 8.

\*497 By § 166.20(7g)(a), Stats., the legislature required the Board to establish, by rule, registration fees to be paid annually to the Department of Transportation by persons required to file hazardous materials transportation registration statements with the federal department of transportation under 49 U.S.C. Appendix § 1805(c). 1991 Wis. Act 104, § 13. The Board established such fees effective July 1, 1993. Wis. Admin. Code § SERB 4.03(2)(a)-(e) (June 1993). [FN1] SERB 4.03(1) imposed a registration fee on any person who "offers or transports in commerce": (a) radioactive material;

(b) explosive material; (c) material extremely toxic by inhalation; (d) hazardous material in a bulk package; and (e) bulk packaging of hazardous material requiring placarding under 49 C.F.R. § 172.500. For each activity engaged in, the transporter or offeror paid an annual fee of \$400. SERB 4 fees were imposed on a per company, rather than a per vehicle, basis. The fees generated were used to partially fund the cost of state and local response to emergencies resulting from the accidental release of hazardous materials.

FN1. WISCONSIN ADM. CODE ch. SERB 4 (June 1993) was renamed ch. ERB 4 pursuant to § 13.93(2m)(b)7, Stats., in September 1994. Chapter ERB 4 (September 1994) (Note). Chapter ERB 4 as it existed on November 30, 1995, was repealed and a new ch. ERB 4 was created effective December 1, 1995. Chapter ERB 4 (November 1995) (Note).

When the Board adopted SERB 4, it anticipated that a new fee structure would be developed as experience in administering the HazMat fee was gained and additional information and data were collected. [FN2] The Board ultimately adopted revised fees \*498 to go into effect December 1, 1995. WIS. ADM. CODE ERB 4 Note (Nov. 1995). [FN3] However, the legislature amended § 166.20(7g)(b), Stats., to direct that the HazMat fees "be the amount of the fees established in s. ERB 4.03(2) Wis. adm. code as shown on June 30, 1995." 1995 Wis. Act 113, § 107b. The amendment took effect on December 21, 1995. 1995 Wis. Act 113, § 9400.

FN2. Affidavit of David Woodbury, Immediate Response Coordinator, Department of Natural Resources, Bureau of Law Enforcement.

FN3. By 1993 Wis. Act 253 the legislature continued the HazMat fees, but required the fees to be paid into the transportation fund, with the programs formerly supported by those fees to be funded from the transportation fund. Fiscal Estimate, March 14, 1995, included in Materials submitted to the President of the Senate by the chair of SERB, June 23, 1995, under Clearinghouse Rule 95-051 (hereafter SERB Materials). The Fiscal Estimate states: "The revised rule includes a proposed fee structure which assesses fees in a more equitable fashion based on activities of participation, mileage and volume." *Id.* The Final Regulatory Flexibility Analysis states that Clearinghouse Rule 95-051 is

(Cite as: 205 Wis.2d 494, \*498, 556 N.W.2d 761, \*\*763)

the result of the direction of the trial court in this case "that efforts to develop a fee structure which adequately reflects hazards presented should continue." SERB Materials.

SERB based the proposed new fee structure on activities of participation, with a supplemental fee for those activities designated by the United States Department of Transportation as being significantly more serious hazards. *Id.* "Furthermore, a fee would be assessed on transporters based on the number of hazardous material miles traveled in or through Wisconsin and the volume of hazardous material transported in or through Wisconsin." *Id.*

Because plaintiffs appeal from the judgment entered March 20, 1995, we are limited in our review to that judgment and the issues arising thereunder. However, because we conclude that the HazMat fee which is the subject of the declaratory judgment violates the Commerce Clause of the United States \*\*764 \*499 Constitution, Article I, Section 8, we need not address plaintiffs' other issues.

[1] We reverse the declaratory judgment and remand the cause to the trial court to enter judgment for the plaintiffs on their cross-motion for summary judgment. [FN4]

FN4. When confronted with cross-motions for summary judgment, the reviewing court must rule on each party's motion on an individual basis. *City of Edgerton v. General Cas. Co.*, 172 Wis.2d 518, 529, 493 N.W.2d 768, 772 (Cl.App.1992), *rev'd in part on other grounds*, 184 Wis.2d 750, 517 N.W.2d 463 (1994). Each motion must be denied if material factual issues exist as to the motion. *Id.* (citing 10A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2720 (2d ed. 1983); *Ziegler Co., Inc. v. Rexnord, Inc.*, 139 Wis.2d 593, 595 n. 1, 407 N.W.2d 873, 875 n. 1 (1987); *Grotelueschen v. American Family Ins. Co.*, 171 Wis.2d 437, 492 N.W.2d 131 (1992) (Abrahamson, J., dissenting)).

#### I.

#### MAY WE REVIEW SERB 4 UNDER THE "DORMANT" COMMERCE CLAUSE?

[2] We first address the State's claim that we are not free to review SERB 4's HazMat fee under the dormant Commerce Clause. The Commerce Clause provides:

The Congress shall have the power ... [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

U.S. CONST. art. I, § 8, cl. 3.

[3] The Commerce Clause is described as "dormant" because it may not be invoked to permit the courts to review state taxes or regulations authorized by Congress. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55, 102 S.Ct. 894, 910-11, 71 L.Ed.2d 21 (1982), the Court explained:

\*500 [W]e only engage in this [Commerce Clause] review when Congress has not acted or purported to act. Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action. Courts are final arbiters under the Commerce Clause only when Congress has not acted.

(Citations omitted.)

The State argues that Congress has struck the balance it deems appropriate in 49 U.S.C. § 5125(g)(1), which provides:

A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

We disagree that by this enactment Congress has "struck the balance it deems appropriate." Congress has not determined what fee is fair for a license or permit to transport hazardous material; nor has it delegated to the states the authority to determine what fee is "fair." Congress first addressed the problem of uniformity of state motor carrier transportation of hazardous materials November 16, 1990, when the Secretary of Transportation established a working group for the purpose of "determining whether or not to limit the filing of any State registration and permit \*501 forms and collection of fees therefor to the State in which a person resides or has its principal place of business." 49 U.S.C.App. § 1819(a)(2). Congress directed the secretary to issue regulations recommended in the report of the working group to be transmitted to the secretary not later than thirty-

six months after November 16, 1990. 49 U.S.C. App. § 1819(c) and (d). However, Congress precluded the secretary from issuing regulations defining or limiting the fees which may be imposed or collected by any state. Title 49 U.S.C. App. § 1819(d)(3) provides in part: "Regulations issued under this section shall not define or limit the amounts of any fees which may be imposed or collected by any State."

\*\*765 The working group was named the Alliance for Uniform HazMat Transportation Procedures. The Alliance submitted its report to the secretary November 17, 1993. The Alliance recommended a base state system pursuant to which each participating jurisdiction will assess a registration fee on motor carriers that transport hazardous materials within its borders. However, a single base state will be responsible for collecting the registration fees for all states and distributing the fees accordingly. Participating jurisdictions will issue a reciprocal national permit that will allow a motor carrier to transport hazardous materials in all participating jurisdictions. On July 1, 1993, the Alliance began a four-state pilot program to test its recommendations. The major objectives of the pilot program include testing the reciprocity provisions.

The Alliance noted that industry representatives expressed concerns as to flat fees because of recent court decisions. The Alliance achieved a consensus that any registration fee should be equitable. As a result of \*502 discussions, the Alliance decided "to strongly encourage states to adopt fee structures that take into account the apportioned hazardous materials transportation activities by a carrier within their state." The Alliance stated that although the definition of equity of a fee structure is left to the individual states, "the use of an apportioned method of fee calculation is strongly encouraged."

The report of the Alliance makes clear its understanding that when Congress enacted 49 U.S.C. § 5125(g)(1), it did not intend to define or limit the amount of any fee which may be imposed or collected by any state. The regulations ultimately adopted by the Secretary of Transportation will depend on the outcome of the pilot program initiated by the Alliance.

This history negates the State's argument that in 49

U.S.C. § 5125(g)(1), Congress intended to remove state regulation of the transportation of hazardous materials from the jurisdiction of the states and the reach of the dormant Commerce Clause. As in *Norfolk Southern Corp. v. Oberly*, 822 F.2d 388, 397 (3d Cir.1987), "the evidence demonstrates that Congress intended to encourage the states to use their existing powers more effectively."

[4] "[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91, 104 S.Ct. 2237, 2242, 81 L.Ed.2d 71 (1984), quoted in *Norfolk Southern*, 822 F.2d at 397. Congress has not made it unmistakably clear that it has removed Wisconsin's HazMat fee from the reach of the dormant Commerce Clause.

#### \*503 II.

#### CHAPTER SERB 4

[5] The State distinguishes the SERB 4 fees from the flat fees which the United States Supreme Court in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), found to violate the Commerce Clause. Pennsylvania imposed lump-sum annual taxes on the operation of trucks and truck tractors. The Court quoted *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079, 51 L.Ed.2d 326 (1977):

A state tax on interstate commerce does not offend the Commerce Clause ... if that tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the state.

*Scheiner*, 483 U.S. at 277, 107 S.Ct. at 2836. The Court said that Pennsylvania's taxes failed the third "prong" of the *Complete Auto* standard which prohibits discrimination against interstate commerce. *Id.* We conclude that Wisconsin's flat tax fails the second "prong" of the *Complete Auto* standard in that SERB 4 is not fairly apportioned. Because the fee offends the Commerce Clause in this respect, we need not consider whether the exemption from the SERB 4 fee for Wisconsin facilities which must pay a hazardous chemical inventory form fee violates the Commerce Clause. See § 166.20(7)(a)2, Stats.

(Cite as: 205 Wis.2d 494, \*503, 556 N.W.2d 761, \*\*766)

\*\*766 The United States Supreme Court has described its responses to claims that specific state tax measures unduly burden interstate commerce as a "quagmire." \*504 *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-58, 79 S.Ct. 357, 361-62, 3 L.Ed.2d 421 (1959), cited in *Scheiner*, 483 U.S. at 280, 107 S.Ct. at 2838. The Court has, however, settled on what it calls the "internal consistency" test, which demands that a state tax must be of a kind that "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Id.* at 284, 107 S.Ct. at 2840 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 2623, 81 L.Ed.2d 540 (1984)). The *Scheiner* Court said that "[i]f each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred." *Id.*

Interstate and intrastate offerors and transporters of hazardous waste materials in Wisconsin may be required to pay annual fees of \$2,000. While such a fee for an intrastate carrier may not be burdensome, if the same or similar fees were imposed by each state, the cost of doing business for an interstate carrier would be prohibitive. A half century ago, one commentator observed:

True, each fee is imposed upon the use of different states' highways, but the cumulative effect does not result from the mileage or distance traveled, but from the interstate character of the journey. The same mileage in one state would result in only one tax.

Lockhart, *State Tax Barriers to Interstate Trade*, 53 HARV.L.REV. 1253, 1269 (1940), quoted in *Scheiner*, 483 U.S. at 284 n. 16, 107 S.Ct. at 2840 n. 16.

The latest effort of the United States Supreme Court to extricate its decisions from the "quagmire" of its previous efforts is *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). \*505 Oklahoma imposed a sales tax on the full price of a ticket for bus travel from Oklahoma to another state. The Court held that the tax was consistent with the Commerce Clause. The Court relied primarily on the "dash of ... pragmatism" which it found in Justice Stone's opinion in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938). Justice Stone examined New

Mexico's franchise tax, measured by gross receipts, as applied to receipts from out-of-state advertisers in a journal produced by the taxpayer in New Mexico but circulated both inside and outside the state. *Jefferson Lines*, 514 U.S. at ----, 115 S.Ct. at 1336. Justice Stone noted that "[t]he tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine." *Id.* at ----, 115 S.Ct. at 1337 (quoting *Western Live Stock*, 303 U.S. at 260, 58 S.Ct. at 550).

However, Wisconsin's HazMat fee is one which in form or substance can be repeated by other states in such manner as to lay an added burden on interstate transportation commerce. The *Jefferson Lines* Court concluded that the sale of a bus ticket was a "local activity" which was not taxable by another state. *See id.* at ---- - ----, 115 S.Ct. at 1342-43. The taxpayer argued that there was no difference between Oklahoma's sales tax on bus travel and New York's gross receipts tax on transportation services struck down in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633 (1948). However, the *Jefferson Lines* Court pointed out that *Central Greyhound* did not rest simply on the mathematical and administrative feasibility of a mileage apportionment, but on the seller-taxpayer's exposure to taxation by New Jersey and Pennsylvania \*506 on portions of the same receipts that New York was taxing in their entirety. *Id.* at ----, 115 S.Ct. at 1341.

The Court distinguished Oklahoma's sales tax from New York's transportation tax: "The taxable event [sale of a bus ticket] comprises agreement, payment, and delivery of some of the services in the taxing State; no other State can claim to be the site of the same combination." *Id.* Wisconsin's "tax" is not, however, imposed on the "agreement, payment, and delivery" of disposal services in the state. Such a fee would closely resemble Oklahoma's sales tax on the event of the sale of a bus ticket. All carriers, interstate or intrastate, would pay the same facility fee. True, all other states could impose similar taxes on services provided by disposal facilities in those states. That would be constitutionally\*\*767 permissible under the Commerce Clause because the tax would be imposed on the delivery of services within the state. Chapter SERB 4 fees are not related to the services provided by in-state disposal facilities to interstate transporters but to carriers

(Cite as: 205 Wis.2d 494, \*506, 556 N.W.2d 761, \*\*767)

who cross the state line to use a facility in Wisconsin. Such fees are not "apportioned" in that they are unrelated to the extent of the carrier's use of Wisconsin's facilities or the mileage traveled within the state. Such a flat tax or fee clearly violates the spirit of the Commerce Clause to avoid the economic Balkanization that plagued relations among the Colonies and later among the States under the Articles of Confederation. See *id.* at ---, 115 S.Ct. at 1336 (citing *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 7, 106 S.Ct. 2369, 2372-73, 91 L.Ed.2d 1 (1986); *Hughes v. Oklahoma*, 441 U.S. 322, 325-26, 99 S.Ct. 1727, 1730-31, 60 L.Ed.2d 250 (1979); *The Federalist* No. 42 (J. Madison), 7 (A. Hamilton), 11 (A. Hamilton) (J. Cooke ed. 1961)).

\*507 A decision which evoked considerable discussion by the Alliance was *American Trucking Ass'ns, Inc. v. Secretary of State*, 595 A.2d 1014 (Me.1991). The Alliance stated its understanding of the decision as follows: "The court implicitly rejected, by not addressing, the state's argument that a flat hazardous materials fee was equitable under the Hazardous Materials Transportation Uniform Safety Act...." Maine imposed a flat tariff of \$25 per truck for a one-year permit and \$15 per truck for a five-day trip permit for carriers transporting hazardous materials. The Alliance was incorrect in concluding that the Maine Supreme Court did not address the validity of the state's hazardous waste carrier fee. The court specifically held that the statute imposing such fees violated the Commerce Clause. *Id.* at 1018. The court concluded that *Scheiner* superseded earlier cases which held that a flat hazardous material license fee was constitutional. *Id.* at 1016-17 (citing *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43 (1st Cir.1984); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972)). The court concluded that Maine's waste carrier fee "flunked" *Scheiner's* internal consistency test.

Likewise, we conclude that Wisconsin's flat fee for the transportation of hazardous materials fails the internal consistency test.

### III.

#### THE "IMPRACTICABILITY" ARGUMENT

In its brief and oral argument, the State emphasized the difficulty in apportioning the State's

cost of hazardous materials response preparedness. It \*508 pointed to a train derailment near Superior--representing a very low probability event carrying a high risk of harm. Certainly, the recent similar experience in Weyauwega dramatically illustrates how a single event in a relatively isolated area can require enormous response costs. We acknowledge that disasters associated with the transportation of hazardous materials cannot be predicted and can occur in wholly unexpected places. Nonetheless, there is a relation between the extent of a carrier's transportation of such materials and the risk of harm, and the State does not argue otherwise. In fact, the State acknowledges that the number of miles traveled or the number of shipments "tend to reflect degree of risk."

The State's complaint of impracticability is not based so much on the lack of apportionment factors upon which a tax or fee could be based but on the unavailability of information which would have allowed the State to construct a more equitable tax or fee. The apportioned fee which SERB proposed to substitute for SERB 4 is calculated by the number of transporter activities, the total Wisconsin hazardous material miles traveled within or through Wisconsin, and the total Wisconsin hazardous material in pounds transported within or through Wisconsin during the reporting period. WIS. ADM. CODE § ERB 4.04(1) (November 1995). Under the rule, the transporter is required to keep records verifying its mileage and volumes of hazardous material. Report on Changes Made to CR 95-051 as a Result of the Public Hearings, *included in SERB Materials*: § ERB 4.03(4). Recognizing the administrative difficulty of keeping records as to hazardous waste mileage and volumes, § ERB 4.06(1) permits a transporter to submit a \*509 consolidated fee in lieu of the fee determined under § ERB 4.04(1).

\*\*768 SERB has demonstrated that enacting an apportioned fee for the transportation of hazardous materials is not impracticable. In fact, it has proposed just such an apportioned fee structure. We conclude that SERB prematurely established a hazardous materials registration fee before it could justify that fee under the constitutional commands of the Commerce Clause. It cannot justify imposing a flat unapportioned fee solely because it had not made the studies necessary to structure a constitutionally apportioned fee.

(Cite as: 205 Wis.2d 494, \*509, 556 N.W.2d 761, \*\*768)

For these reasons, we declare that SERB 4 violated the Commerce Clause. We therefore remand this cause to the trial court with directions that plaintiffs' motion for summary judgment be granted.

with directions.

205 Wis.2d 494, 556 N.W.2d 761, Fed. Carr. Cas.  
P 84,035

Judgment and orders reversed and cause remanded

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560 N.W.2d 274 (Table)  
207 Wis.2d 285, 560 N.W.2d 274 (Table)  
(Cite as: 207 Wis.2d 285, 560 N.W.2d 274)

**H**  
(The decision of the Court is referenced in the North Western Reporter in a table captioned "Petitions to Wisconsin Supreme Court to Review Court of Appeals Opinions".)

Dec 17, 1996

Disposition: Final Disposition by Denial of Review.

Disposition: 12/17/96.

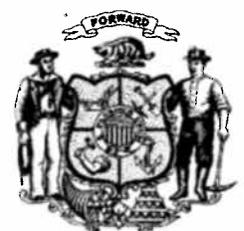
207 Wis.2d 285, 560 N.W.2d 274 (Table)

Supreme Court of Wisconsin,  
American Trucking  
v.  
State  
NO. 95-1714

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# WISCONSIN STATE LEGISLATURE





State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

Jim Doyle, Governor  
Scott Hassett, Secretary

101 S. Webster St.  
Box 7921  
Madison, Wisconsin 53707-7921  
Telephone 608-266-2621  
FAX 608-267-3579  
TTY Access via relay - 711

January 18, 2006

Honorable Neal J. Kedzie, Chair  
Senate Committee on Natural Resources and Transportation  
Room 313 South  
State Capitol

Re: Clearinghouse Rule No. 05-032  
Hazardous waste management

Dear Senator Kedzie:

In response to your letter dated January 5, 2006, the Department of Natural Resources agrees to consider modifications to Clearinghouse Rule No. 05-032 relating to hazardous waste management.

As required by s. 227.19(4)(b), Stats., the Department will notify your Committee when a decision has been made on the proposed modifications.

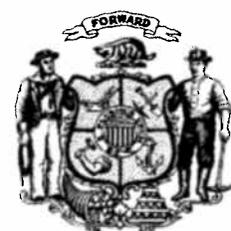
Sincerely,

Scott Hassett  
Secretary

cc: Pat Chabot – WA/3  
Joanie Burns – WA/3  
Carol Turner – LS/5  
Pete Flaherty – LS/5



# WISCONSIN STATE LEGISLATURE



NR 600s, Wis. Adm. Code  
Hazardous waste management

Board Order No. WA-10-05  
Clearinghouse Rule No. 05-032

**Basis and Purpose of the Proposed Rule**

The proposed rules will replace and update current rules that regulate the generation, transportation, recycling, treatment, storage and disposal of hazardous waste and used oil. The proposed rule includes new state rules based on federal hazardous waste regulations already in effect, and revises current rules to more closely parallel the format and content of the federal regulations.

The Department is required to adopt rules that are at least equivalent to U.S. EPA's regulations under the Resource Conservation and Recovery Act, as amended, (RCRA) to comply with state law and to maintain Wisconsin's authorization to administer the federal hazardous waste program. The hazardous waste rule revisions are intended to:

- Provide an easier to understand set of requirements
- Eliminate out-dated provisions and replace them with updated U.S. EPA regulation language
- Provide consistency with other states in our region that have adopted U.S. EPA regulations
- Reduce the regulatory burden through paperwork reductions for businesses, facilitate legitimate recycling and provide increased flexibility in design and operation of hazardous waste facilities
- Generate sufficient revenue to administer the program
- Simplify future rule revisions
- Reduce potential confusion by the regulated community, thereby increasing compliance with the rules

The revisions add a number of federal provisions that Wisconsin is not currently authorized by U.S. EPA to administer, such as air emission standards for containers and tanks, the recovery of precious metals and standards for boilers and industrial furnaces. The Order incorporates updates to these U.S. EPA regulations, including revisions that reduce the paperwork burden on generators, and allow alternate standards for contaminated soils from clean-up sites, emergency response actions and activities at military installations.

The revised rules continue to require Wisconsin small quantity hazardous waste generators to submit annual reports and pay an annual, environmental repair fee for hazardous waste generated, and submit copies of designated facility-signed manifests for out-of-state hazardous waste shipments. The annual reports summarize the amounts and types of waste generated and how the waste was managed. These reports are significantly reduced in scope as compared to the reporting requirements for large quantity generators.

Under both the current and proposed rules, companies that generate very small quantities of hazardous waste (less than 220 pounds per month) are exempt from most of the hazardous waste requirements. They must comply with the management standards for the safe storage of wastes in containers and tanks. For recordkeeping requirements, very small generators are only required to submit copies of final, signed manifests for hazardous waste shipped to out-of-state treatment, storage or disposal facilities, and keep final copies of the manifests for three years if the generator uses a manifest (the use of a manifest is not required).

The rules continue to require hazardous waste transporters operating in Wisconsin to be licensed by the Department, as required by s. 291.23, Stats. Under the federal regulations, hazardous waste transporters are not required to be licensed by U.S. EPA.

The rules continue to prohibit land treatment of hazardous waste. Under the federal regulations, land treatment of hazardous waste is allowed if it meets the applicable requirements of Subpart M – Land Treatment of 40 CFR Part 264 or 265. The rules also continue to prohibit underground injection of hazardous waste through a well, except for certain underground injection of contaminated groundwater as part of a Department-approved remedial action necessary for the cleanup of soil or groundwater contamination. Under the federal regulations, underground injection of hazardous waste for disposal is allowed if it meets applicable federal requirements.

The rules continue to regulate, as hazardous waste household hazardous waste which has been separated from household solid waste and managed at a regulated collection facility, to ensure the safe management and legitimate recycling or disposal of the wastes. The revised rules codify the Department's 1995 Interim Guidance for Household and Very Small Quantity Generator Hazardous Waste Collection Facilities. This is more stringent than federal requirements, but less stringent than fully regulating household and conditionally exempt small quantity generator hazardous waste collection facilities as hazardous waste management facilities.

The process to obtain an operating license for new or expanding treatment, storage or disposal facilities in Wisconsin is comparable to the federal facility permitting process, but also includes additional unique state statutory requirements. The revised rules continue to require interim licenses for the operation of existing facilities that become subject to hazardous waste regulation due to changes in the law, while federal regulations simply confer interim status on these operations.

## **Fees**

The Order includes an increase in the hazardous waste plan review, license and manifest fees. The current hazardous waste fee schedule has been in place since 1994. The Order increases all hazardous waste plan review and license fees effective October 1, 2006. The majority of the fee increases represent about a 3% increase per year since 1994 to account for inflation. A few of the fees represent a higher percentage increase and there are some fees that are decreasing or being eliminated.

In addition, a per-vehicle fee is added to the Transportation Service License fee. This will make the hazardous waste transportation license similar in structure to the solid waste transportation license. The Order also proposes an increase in the Manifest Fee from \$2 to \$6 per manifest effective January 1, 2006.

Wisconsin's manifest revenue at the \$2/manifest level has never generated sufficient funds to cover the costs of managing the manifest data. The current fees are roughly half of the revenue projected when the fee was implemented in 1994. Wisconsin's current manifest fee is also significantly below that of neighboring states. See Attachment A for details on the current and proposed fees, along with explanations for the various levels of fee adjustments.

Fee increases are proposed because inflationary costs have affected salaries, fringe benefits, and supplies and services, and because revenue from the hazardous waste fees approved in 1994 has never met expectations. Two new hazardous waste positions approved in the 2001-03 Biennial Budget were never filled because of lack of sufficient revenue. Based on current revenue and expenditure levels, we are projecting a deficit in the hazardous waste program revenue account at the end of FY2005.

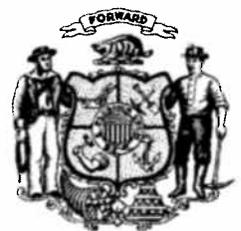
The Waste Management Program uses General Program Revenue (GPR), Program Revenue and federal grant funding to cover the costs of operating the hazardous waste program in Wisconsin. Through the last several biennial budget cycles, the amount of GPR available to the Waste Management Program has decreased. In addition, the amount of hazardous waste federal funding the Department receives from U.S. EPA has remained at the same level since FY1995, and was actually decreased in FY2005. As a result, we are no longer able to cover the costs necessary to operate the hazardous waste program.

If the Department is not able to bring in additional revenue, the Waste Management Program will need to reduce staffing levels. This will affect its ability to continue the current level of hazardous waste licensing and plan review, inspections, complaint response, and technical assistance. These activities ensure that hazardous waste facilities are managed in ways that protect human health and the environment. Mishandling of the generation, transport and disposal of hazardous waste can cause serious threats to human health and the environment through soil and groundwater contamination. Preventing pollution through proper management of hazardous wastes is a good investment.

Reducing staff available to work on hazardous waste management activities will also jeopardize Wisconsin's hazardous waste program authorization from U.S. EPA. Being an authorized state allows hazardous waste facility owners and operators to work directly with Department staff that are familiar with and located near their facilities. If Wisconsin loses its program authorization, the hazardous waste management activities in Wisconsin would be carried out by U.S. EPA staff. Reduced staffing levels would also result in Wisconsin not being able to earn the federal grant money it currently receives from U.S. EPA, which would cause a further reduction in federal funding available to the Department.



# WISCONSIN STATE LEGISLATURE



## **Hazardous Waste Rule Revision Package CR 05-032**

### **Public Comment Period: Input Relating to the Proposed Per-Truck Fee and Relevant Dates**

#### **May 11-13, 2005 – Public Hearings**

Four public hearings were held on the proposed rules. One hearing was held in Madison on May 11, 2005. We held hearings in Eau Claire and Wisconsin Rapids on May 12, 2005 and in Waukesha on May 13, 2005. Three persons submitted appearance slips at the May 11 hearing. One person submitted an appearance slip at the May 12 hearing, and provided comments in opposition to the proposed transportation license fee increases.

Mr. Thomas Howells, representing the Wisconsin Motor Carriers Association, provided verbal comments at the May hearing. Mr. Howells made passing reference to the proposed \$35 per-truck fee being contrary to the US Constitution's Commerce clause. DNR Council is on record as requesting written supporting information on the legal issue raised by Mr. Howells, who indicated he would submit a written comment to this effect at a later date.

#### **May 30, 2005 – Public Comment Period Ends**

The public comment period ended on May 30, 2005. The Department received 23 written and electronic comments during the public comment period. The majority of public comments were related to the proposed fee increases and the Household Hazardous Waste and Very Small Quantity Generator Collection Facility rule. Comments on proposed fee increases pertained mainly to an increase in the existing manifest fee. The Department did not receive written comments regarding the proposed \$35 per-truck fee from Mr. Howells, or from any other member of the public.

#### **January 5, 2006 – Senate Committee on Natural Resources and Transportation**

A Senate Natural Resources Committee hearing was held on January 5, 2006. Mr. Howells provided oral testimony against the proposed \$35 per-truck fee, again questioning the constitutionality of the fee. Once again, the Department did not receive any written comments from Mr. Howells.

#### **January 18, 2006 – Assembly Natural Resources Committee Hearing**

An Assembly Natural Resources Committee hearing was held on January 18, 2006. At this hearing, Mr. Howells submitted a copy of a letter he received from the American Trucking Association Inc.'s litigation center, setting out legal arguments against the proposed \$35 per-truck fee. The letter was dated May 26, 2005. This was the first time it had been seen by any representative of the Department.

DNR Council has conducted a review of relevant case law, with a view to preparing conclusions relating to this matter.

*Paper From DNR*

**Briefing on Hazardous Waste Rule Revision Package CR 05-032  
January 4, 2006**

• **Goals of NR 600 rule revisions**

- To update current rules to eliminate outdated rule language and add new federal rule language, and streamline how we adopt rules in the future.
- To more closely parallel the format and content of the federal regulations.
- To be consistent with other states that adopt EPA regulations.
- Paperwork reductions (eg. generators will only send one copy of the manifest to DNR when the waste is shipped out-of-state; small generators reclaiming waste under a contract are exempt from using manifests.)
- More exemptions to encourage legitimate recycling (eg. exclusion for recycling precious metals in electroplating wastes.)
- Flexibility in standards for design and construction of licensed treatment, storage and disposal facilities (Meet standards, not use specific technology)
- Phase IV Land Disposal Restriction rules (allows alternate treatment standards for contaminated soils from remediation sites.)

• **Universe of Hazardous Waste Generators and Facilities and Quantities of Waste Generated.**

Refer to handouts.

• **Proposed Hazardous Waste Fee Increases:**

- FY06 \$320,000 deficit projected

**Background:** Program Revenue Streams for Hazardous Waste Program  
GPR; Environmental Seg; Federal Grant

Decreases or stagnant funding => 35% staff reduction in 8 years

**Increases:** Last increased in 1994

- Licensed treatment, storage and disposal facility plan review and licenses @ 3%/year (rate of inflation)
- Transportation license fee: \$35/vehicle
- Manifest fee: \$2 → \$6

**Issues:**

Statutory Authority for treatment/storage/disposal facility fees only, not the generators

Increase passed on to customers: on average customer increase \$32/year; increase to one large commercial SD ~ \$7800/year

Generators will go out of state: Regionally comparable fees.

*FY 06  
28 FTE's  
HW Program*

Attachment B: Hazardous Waste Program Revenue Projections with Proposed Fee Increases

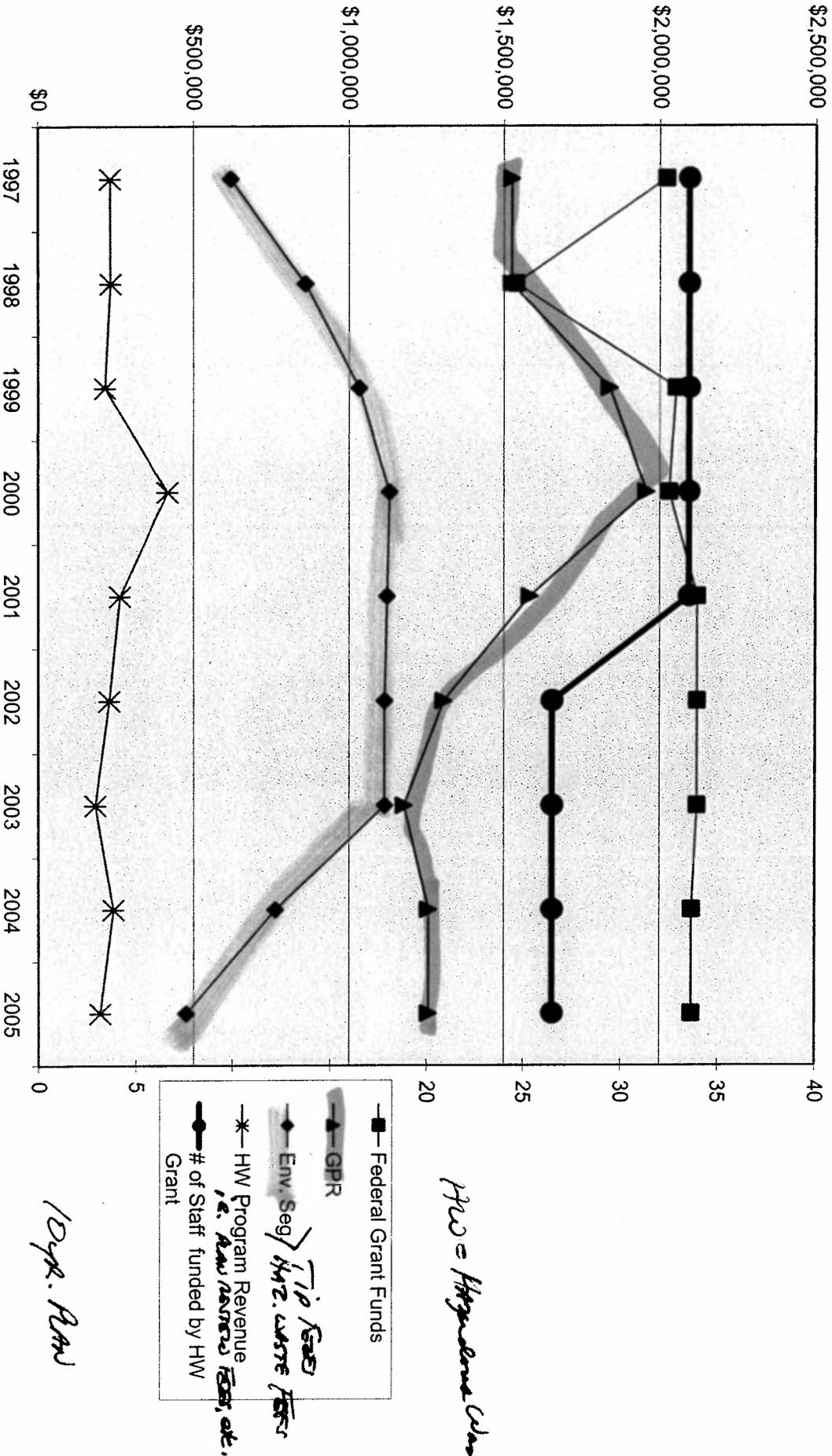
*Go into effect Oct. 1, 2006*

	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008
Beginning Balance	\$437,650	\$501,474	\$344,877	\$112,292	(\$23,208)	(\$206,498)	(\$321,953)	(\$345,668)
Revenue from Current Plan Review and License Fees	\$193,280	\$159,515	\$126,225	\$185,640	\$147,000	\$156,300 *	\$156,300 *	\$156,300
Proposed Add'l Plan Review and License Fee Revenue						\$64,400	\$64,400	\$64,400
Revenue from Current Manifest Fees	\$68,298	\$67,962	\$56,928	\$55,334	\$51,844	\$49,800 **	\$49,800 ***	\$48,400
Proposed Add'l Manifest Fees							\$95,600 ***	\$95,600
Total Revenue from Plan Review, License and Manifest Fees	\$261,578	\$227,477	\$183,153	\$240,974	\$198,844	\$270,500	\$366,100	\$364,700
Expenditures	(\$197,754)	(\$384,074)	(\$415,738)	(\$376,474)	(\$382,134)	(\$385,955)	(\$389,815)	(\$393,713)
<b>Total</b>	<b>\$501,474</b>	<b>\$344,877</b>	<b>\$112,292</b>	<b>(\$23,208)</b>	<b>(\$206,498)</b>	<b>(\$321,953)</b>	<b>(\$345,668)</b>	<b>(\$374,681)</b>

**Assumptions**  
 Revenue and On-going Expenses for FY2001, FY2002, FY2003, FY2004 and FY2005 are based on Actuals.  
 Expenditures for FY2006 and FY2007 based on prior year estimates plus 1% inflationary adjustment.

**Footnotes**  
 \* The estimate for plan review and transportation license fees are based on the averages of the past four years since FY04 revenues were unusually high in these categories.  
 \*\* Revenue reduced to reflect decrease in number of manifested shipments due to the Tolling Agreement Exemption in place for 6 months.  
 \*\*\* Revenue reduced to reflect decrease in number of manifested shipments due to the Tolling Agreement Exemption in place for a full year.

# History of Waste Management Program Funding



*HW = Hazardous Waste*

*TIP Fees  
Env. Seg HWZ. Waste Fees*

*HW Program Revenue  
(e.g. Raw Materials Fees, etc.)*

*10yrs. RAW*

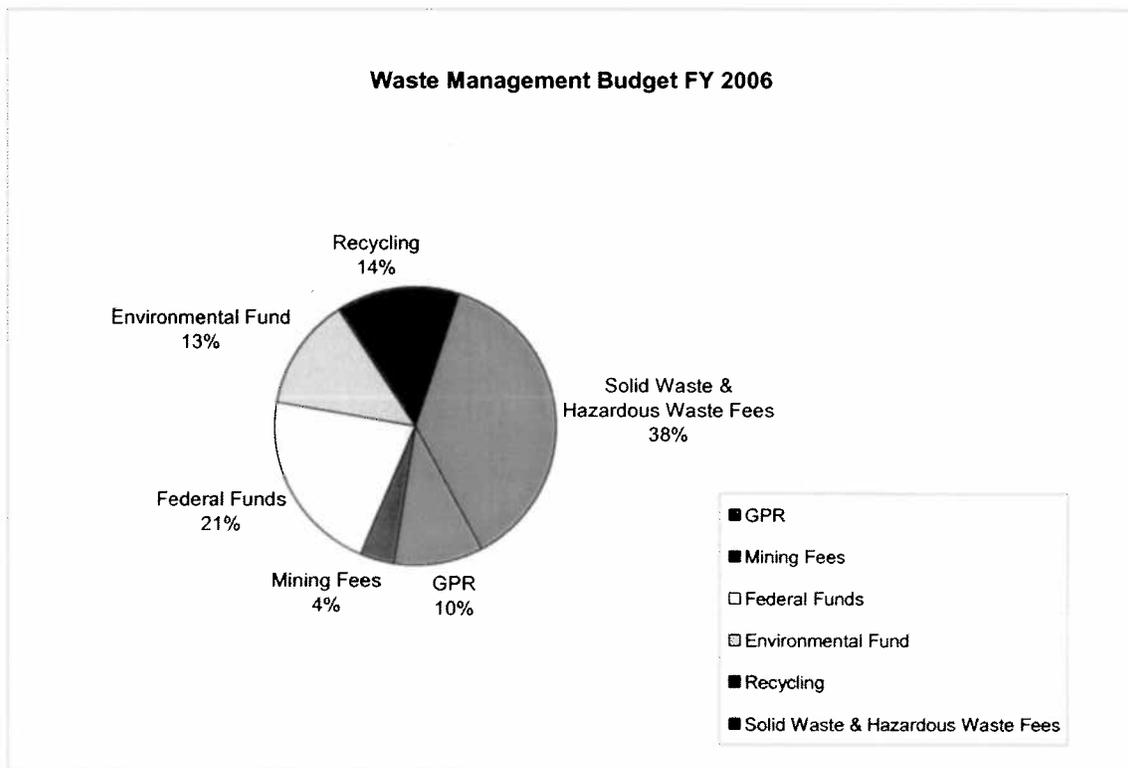
*Vehicle License  
Aircraft Fees  
also contribute a portion of the \$*

*\$2 now \$6.00 now per manifest of HW*

## Waste Management Program Finances

The Waste Management Program currently has the following resources:

Funding Source	Budget	Staff
GPR	\$775,600	9.00
Solid & Hazardous Waste Program Revenue	\$2,816,200	30.00
Mining Fees	\$295,400	2.00
Federal Funds	\$1,621,756	23.00
Environmental Fund	\$974,800	10.16
Recycling Fund	\$1,064,500	12.00
<b>Total</b>	<b>\$7,548,256</b>	<b>86.16</b>



Six additional FTE will be cut at the end of FY07 as part of the 2005-07 Biennial Budget reductions.

## WASTE MANAGEMENT FUNDING SOURCES

Funding Source	Restrictions
GPR - 201	
PROGRAM REVENUE - 221	SW & HW Activities
MINING - 231	Only metallic mining related activities.
FEDERAL GRANTS - HW - 241	Only HW grant eligible activities.
FEDERAL GRANTS - DSMOA - 241	Only DSMOA Grant (Dept of Defense) Related Activities - Corr. Action at Federal Facilities
ENV REPAIR SEG - 275	
RECYCLING - 277	Only Recycling related activities

*Must have a matching  
for fed. grants*

### SOURCES OF FUNDING

GPR - 201	General Tax Revenues
Program Revenue - 221	SW & HW Plan Review and License Fees, 15 cents/ton landfill license fee surcharge, HW Manifest Fee
MINING - 231	Metallic Mine Plan Review Fees
FED GRANTS - HW - 241	RCRA HW Federal Grant Funding
FED GRANTS - DSMOA - 241	Federal Dept. of Defense Funding
ENV REPAIR SEG - 275	Tonnage Fees - Groundwater & Well Compensation Fees, Environmental Repair Fee, HW Generator Fee
RECYCLING - 277	Non-Metallic Mining Reclamation Fees
	Recycling Fee - \$3/ton tipping fee

## Program – Hazardous Waste

Total FTE Planned for		Funding Sources:
FY 03-04 30	FY 05-06 28	A Federal Grant from EPA supports the majority of the program, with additional funding from state Program Revenue, Environmental Seg. and GPR accounts.

### Background

The state Hazardous Waste Program is a federally authorized environmental protection program that governs the generation, transportation, storage, treatment and disposal of hazardous wastes to help protect Wisconsin's ground and surface water, soil and air. In 1978, the Legislature created the state hazardous waste program. In 1981, the DNR developed rules to implement the basic program and in 1986, Wisconsin received authorization from EPA to administer the federal program in the state.

The purpose of this program is to prevent environmental contamination and threats to human health by ensuring that hazardous wastes are properly managed. This is accomplished by tracking the wastes from the point of generation to their ultimate disposal or recycling. A second important purpose of the program is to minimize the generation of hazardous wastes and promote their legitimate reuse and recycling.

In 2003, approximately 11,500 businesses, schools and governmental institutions generated almost 370,000 tons of hazardous waste. About five hundred of these hazardous waste generators are categorized as large quantity generators, and the rest are small or very small generators. In addition, at this time there are 18 licensed hazardous waste management facilities. The commercial hazardous waste facilities are primarily involved in the recycling of waste solvents and mercury, fuel blending of hazardous wastes for energy recovery, and storage and treatment of wastes prior to shipment out of state for recycling or disposal.

*1/2 commercial  
1/2 private  
ie. S.C. Johnson*

Hazardous Waste Program Staff are responsible for monitoring/compliance with the rules. The Hazardous Waste Team, formed in 1997, helps to implement the program's policy and direction. The team is composed of staff from the DNR Regional offices and the Central office. The Hazardous Waste Team Leader is responsible for program oversight, ensuring statewide consistency, policy development and administrative rule revisions, and program authorization and reporting to EPA.

The Regional Hazardous Waste staff conduct inspections of the hazardous waste generators, transporters and treatment, storage and disposal facilities (TSDs), provide technical assistance and take enforcement actions, as necessary. Regional staff review plans for design and operation of hazardous waste treatment, storage and disposal facilities and issue ten-year operating licenses. They also investigate citizen complaints that allege the improper handling and disposal of hazardous wastes, and provide outreach and education to individuals and industry groups.

Staff in the Central office coordinate program activities, assist in developing policy and guidance to provide clarification of the complex regulations, draft administrative rules and revisions to the rules and work with the U.S. Environmental Protection Agency (EPA) on oversight, reporting and re-authorization activities. Central office staff also track the program's performance measures, funding, enter information on program activities into several databases and provide quarterly and annual summary reports of activities for program managers and EPA.

**Attachment B: Hazardous Waste Program Revenue Projections with Proposed Fee Increases**

	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008
Beginning Balance	\$437,650	\$501,474	\$344,877	\$112,292	(\$23,208)	(\$206,498)	(\$321,953)	(\$345,668)
Revenue from Current Plan Review and License Fees	\$193,280	\$159,515	\$126,225	\$185,640	\$147,000	\$156,300 *	\$156,300 *	\$156,300
Proposed Add'l Plan Review and License Fee Revenue						\$64,400	\$64,400	\$64,400
Revenue from Current Manifest Fees	\$68,298	\$67,962	\$56,928	\$55,334	\$51,844	\$49,800 **	\$49,800 ***	\$48,400
Proposed Add'l Manifest Fees							\$95,600 ***	\$95,600
Total Revenue from Plan Review, License and Manifest Fees	\$261,578	\$227,477	\$183,153	\$240,974	\$198,844	\$270,500	\$366,100	\$364,700
Expenditures	(\$197,754)	(\$384,074)	(\$415,738)	(\$376,474)	(\$382,134)	(\$385,955)	(\$389,815)	(\$393,713)
<b>Total</b>	<b>\$501,474</b>	<b>\$344,877</b>	<b>\$112,292</b>	<b>(\$23,208)</b>	<b>(\$206,498)</b>	<b>(\$321,953)</b>	<b>(\$345,668)</b>	<b>(\$374,681)</b>

**Assumptions**

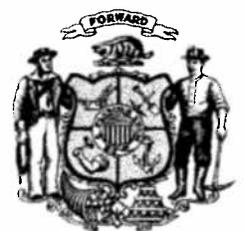
Revenue and On-going Expenses for FY2001, FY2002, FY2003, FY2004 and FY2005 are based on Actuals. Expenditures for FY2006 and FY2007 based on prior year estimates plus 1% inflationary adjustment.

**Footnotes**

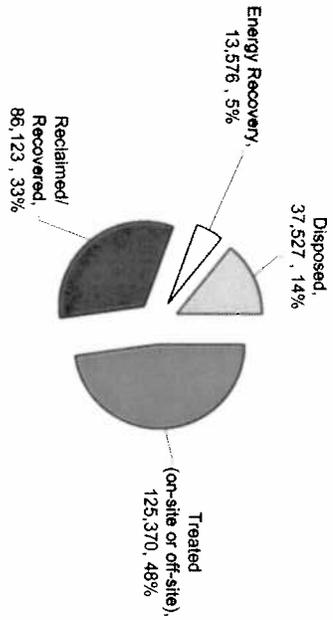
- \* The estimate for plan review and transportation license fees are based on the averages of the past four years since FY04 revenues were unusually high in these categories.
- \*\* Revenue reduced to reflect decrease in number of manifested shipments due to the Tolling Agreement Exemption in place for 6 months.
- \*\*\* Revenue reduced to reflect decrease in number of manifested shipments due to the Tolling Agreement Exemption in place for a full year.



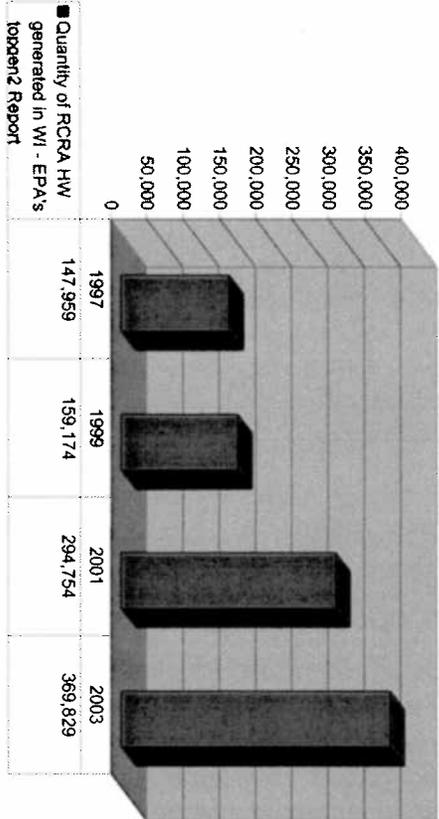
# WISCONSIN STATE LEGISLATURE



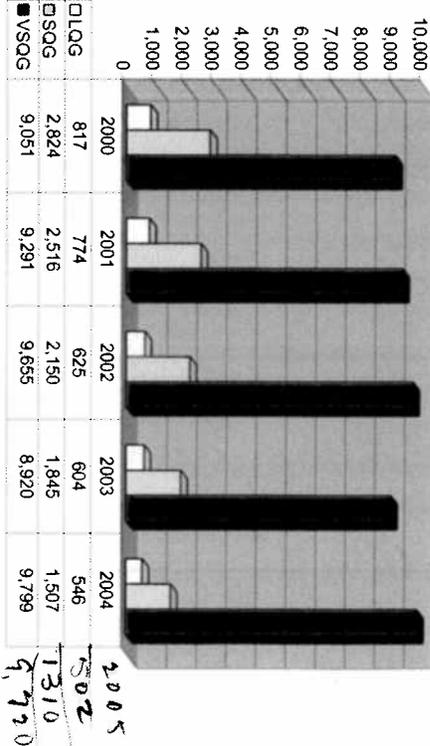
### Hazardous Waste Management Methods in Wisconsin Tons of Waste Generated - 2003



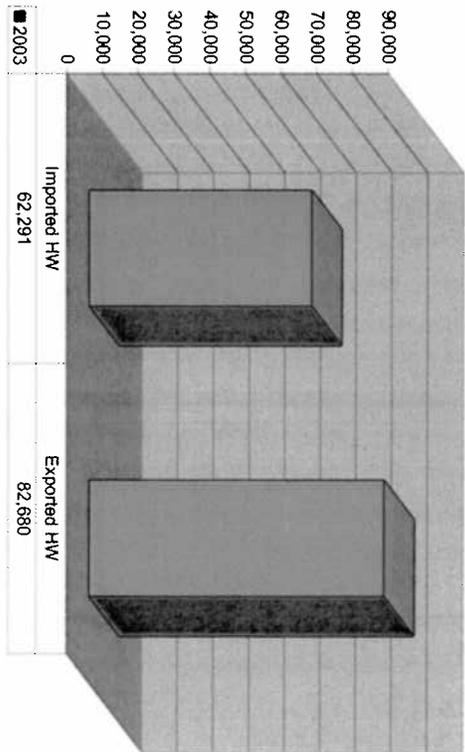
### Quantity of RCRA HW generated in WI (in tons) EPA's topgen2 Report



### Wisconsin Hazardous Waste Generators Counts for 2000-2004

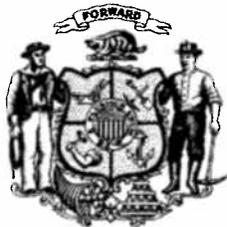


### 2003 HW Imports & Exports





# WISCONSIN STATE LEGISLATURE



- 1994 Cost- Fee increase

- There have a deficit in operating for the program even w/ new increases fees.

- Poor Review threatened \$ reduction in fees.

\* EXempts some small CS's from many fees.

MTA w/ Nat Charlot, DNR  
S, e Bengert, DNR

- If rule passed <sup>passed</sup>

would be subject to a Law Suit (Leg Council)

- The fee would be on the waste truck