NOTES

THE HAZARDOUS WASTE WARS: AN EXAMINATION OF THE ORIGINS AND MAJOR BATTLES TO DATE, WITH SUGGESTIONS FOR ENDING THE WARS

INTRODUCTION

The hazardous waste wars are upon us. These wars have pitted hazardous waste importing states against hazardous waste exporting states. The waste importing states are fighting to slow the flow of out-of-state waste to facilities within their borders, while the waste exporting states are fighting to retain access to the facilities located in the waste importing states. Although there were indications for several years that conflict was imminent, the wars were touched off in 1986 by the "state capacity assurance provisions" that Congress included in the Superfund Amendment and Reauthorization Act ("SARA").[1]

Hazardous waste disposal is regulated in the United States by the Resource Conservation and Recovery Act ("RCRA").[2] Although RCRA does not regulate the disposal of all waste that poses a hazard to human health and the environment,[3] it does regulate approximately 250 million tons of hazardous waste generated in the United States each year.[4] Under RCRA,

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1. Superfund Amendments and Reauthorization Act of 1986 ("SARA"), § 104(k), Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. § 9604(c)(9) (1988)); *see infra* notes 99-107 and accompanying text (discussing the capacity assurance provision and EPA's implementation of the provision).

2. Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992 (1988)).

3. For instance, RCRA does not cover radioactive waste. 42 U.S.C. § 6903(27) (1988). Nor does it cover household hazardous wastes, *id.*, which have recently been a focus of attention in the greening of America's consumer products.

4. NATIONAL SOLID WASTES MANAGEMENT ASS'N, INTERCHANGE OF HAZARDOUS WASTE MANAGEMENT SERVICES AMONG STATES 4 (1990). Roughly a third of all RCRA regulated hazardous waste is disposed of at "RCRA exempt" facilities. *Id.* "Exempt wastes" are wastewaters that qualify as hazardous waste under RCRA, but are treated in accordance with a permit issued pursuant to the Federal Water Pollution Control Act. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)). Nevertheless, even after subtracting "exempt wastes," 169 million tons of hazardous waste were disposed of in accordance with RCRA in 1987. NATIONAL SOLID WASTES MANAGEMENT ASS'N, *supra*, at 4.

hazardous waste management has evolved from unregulated dumping of waste into a complex and expensive maze of regulations[5] and treatment technologies.[6] Waste treatment today is quite waste-specific, and in many instances a single waste stream is subjected to multiple treatment technologies.[7] Yet, despite the technological advances, hazardous waste generators still rely heavily on hazardous waste landfills to meet their disposal needs. For instance, in 1987, four and one-half million tons of RCRA hazardous waste were landfilled.[8]

A cursory examination of statistics on hazardous waste disposal might leave one wondering why the interstate wars are being fought. This is because 96% of all RCRA regulated hazardous waste is treated "on-site," in private facilities operated by the generator for the purpose of treating its own waste.[9] An additional 1.5% is disposed of off-site within the state of generation.[10] As a result, only about 2% of all the RCRA-regulated hazardous waste generated in the United States actually crosses state lines for treatment and disposal, essentially all of which is treated and disposed of at commercial hazardous waste facilities.[11]

The interstate hazardous waste wars are being fought over only 2% of all hazardous wastes, but this figure is somewhat misleading. The figure is misleading because the wars are really being fought over interstate disposal of waste at commercial hazardous waste landfills. There are only twenty-one such landfills, located in sixteen states, in operation in the United

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5. For example, the regulations listing standards applicable to hazardous waste treatment, storage, and disposal facilities cover 176 pages in the Code of Federal Regulations. *See* Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 40 C.F.R. § 264 (1992).

6. *See* AILEEN SCHUMACHER, A GUIDE TO HAZARDOUS MATERIALS MANAGEMENT 140-48 (1988).

7. *Id.*

8. NATIONAL SOLID WASTES MANAGEMENT ASS'N, *supra* note 4 (figure extrapolated from data).

9. *Id.* at 16.

10. *Id.* (figure extrapolated from data).

11. *Id.* A small amount of waste is shipped across state lines by generators for treatment at a centralized private facility. Although there are no exact figures on just how much waste this comprises, it is assumed to be a relatively small amount. *Id.*

States today.[12] Capacity at these twenty-one facilities is ever more precious because during the last ten years no new commercial hazardous waste landfills have opened,[13] and in 1987 two such facilities stopped taking waste.[14] Despite the small number of facilities, one-third of the hazardous waste that crosses state lines is landfilled at these facilities.[15] Viewing these figures from a slightly different perspective, 27% of all waste disposed at landfills is disposed outside the state of origin.[16]

The states that are home to commercial hazardous waste landfills are concerned with the amount of out-of-state waste flowing into these facilities. The desires of these states to slow down the flow of wastes to these facilities is at the heart of the wars. The wars broke out because the states are not alone in their concerns. In 1986, Congress included in SARA the state hazardous waste capacity assurance provision.[17] The provision prohibits the U.S. Environmental Protection Agency ("EPA") from spending Superfund money in a state unless the state can demonstrate the availability of adequate disposal capacity for all hazardous wastes generated within its borders during the next twenty years.[18] Congress hoped that the provision would spur the states to take an active role in insuring the existence of adequate hazardous waste capacity nationwide. Instead of solving the nation's hazardous waste capacity shortage, the provision touched off the hazardous waste wars.

Part I of this note examines the history of hazardous waste in America, with particular emphasis on America's awakening to the problems of hazardous waste. Part II describes the federal legislation that currently governs hazardous waste, focusing on those sections that have played a central role in the wars. Part III analyzes the early battles in the hazardous waste wars, battles fought in the courts. Part IV describes how the battles have

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12. Chemical Waste Mgmt., Inc. v. Hunt, 112 S. Ct. 2009, 2011 (1992).

13. Hunt v. Chemical Waste Mgmt., Inc., 584 So. 2d 1367, 1373 (Ala. 1991), *rev'd*, 112 S. Ct. 2009 (1992).

14. NATIONAL SOLID WASTES MANAGEMENT ASS'N, *supra* note 4, at 18.

15. *Id.*

16. *Id.*

17. SARA § 104(k), 42 U.S.C. § 9604(c)(9) (1988).

18. *Id.*

shifted from the courts to Congress, and critiques a number of bills introduced to bring an end to the wars. Part V concludes with a proposal for ending the hazardous waste wars.

This note proposes a solution to the hazardous waste wars that accommodates the waste importing states' cries for relief, yet does not do so at the expense of the nation's interest in assuring adequate hazardous waste disposal capacity. The solution presented is to amend SARA's hazardous waste capacity assurance process in a way that assures that all states are treated fairly, but also assures that all states act for the common good of the nation.

I. BACKGROUND TO THE HAZARDOUS WASTE WARS

Although the chemical industry in America traces itself back to the early seventeenth century,[19] the widespread use of synthetic materials began during the 1930s, and by 1938 the chemical industry was producing more than 170 million pounds of synthetic-organic chemicals on an annual basis.[20] The years following World War II were characterized by massive industrialization and proliferation of the chemical industry, a period labeled by many as the start of the "chemical revolution."[21] During the first twenty-five years of this era little attention was paid to the adverse environmental impacts of this massive industrialization.[22] However, this changed during the early 1970s with the

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19. CHRISTOPHER HARRIS ET AL., HAZARDOUS WASTE: CONFRONTING THE CHALLENGE 5 (1987).

20. *Id.*

21. *Id.* The authors refer to the period as "a technological watershed that transformed America's way of life" and state that "[t]here can be little doubt that the successes of the chemical revolution have vastly enhanced this country's standard of living." *Id.* Whether the rapid proliferation of synthetic chemicals has been a good thing is something about which reasonable persons disagree. Regardless of whether one characterizes these events as generally positive or generally negative, there can be little doubt that chemicals have had a major impact on virtually every aspect of our lives.

22. During this period, and even earlier, environmental problems were addressed primarily through private common law actions by private individuals against particular polluters, the most prevalent actions being nuisance actions. *See* WILLIAM H. RODGERS, JR., HANDBOOK ON ENVIRONMENTAL LAW 101 (1977). Although there was federal environmental legislation prior to the 1970s, the major federal pollution control initiatives began during the 1970s, a decade that has been termed "the environmental decade." One commentator has stated that until the late 1960s "the problems of air and water pollution, toxic and hazardous wastes, and chemical poisoning . . . largely were not perceived by

enactment of major federal legislation designed to limit or eliminate the release of industrial pollutants into the air,[23] rivers, streams, and lakes,[24] and into the ocean.[25] In response to this legislation, hazardous waste generators increasingly turned to land disposal of their wastes, as land disposal was both unregulated and economical.[26] Land disposal was economical because it typically involved nothing more than taking untreated waste and dumping it on one's own land or someone else's land.[27]

Not only was hazardous waste disposal unregulated,[28] but very little was even known about how much was being disposed.[29] The first attempt to quantify the amount of hazardous

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professionals or the public as general problems." Henry P. Caulfield, *The Conservation and Environmental Movements: An Historical Analysis, in* ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 13, 52 (James P. Lester ed., 1989).

23. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1988)).

24. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)).

25. Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. No. 92-532, 86 Stat. 1052 (codified as amended at 33 U.S.C. §§ 1401-1445 (1988)).

26. HARRIS ET AL., *supra* note 19, at 8. EPA estimated that between 1973 and 1975 over 80% of all hazardous waste generated by American industry was disposed of on land. THE CONSERVATION FOUNDATION, STATE OF THE ENVIRONMENT 1982, at 149 (1982). Former EPA Administrator Douglas Costle has written that "[m]any [hazardous] wastes have been simply left by the back door of the factory, so to speak, at slight cost to the producer." Douglas M. Costle & Eckardt C. Beck, *Attack on Hazardous Waste: Turning Back the Tide*, 9 CAP. U. L. REV. 425, 425-26 (1980).

The Council on Environmental Quality, in its 1979 report, acknowledged that the federal pollution control initiatives had contributed to the increase in the land disposal of hazardous wastes. This report stated that "[t]he increasing tempo of the cleanup of lakes and streams is literally driving pollution underground. The past decade has been marked by a phenomenal increase in surface and subsurface disposal and storage of wastes." THE COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY 1979, at 110 (1979).

27. In a 1989 article, which was part of a series reflecting on the 1970s, a reporter described one of many dumps he covered during the 1970s: "[T]here were big pits in the ground; trucks would drive up and pour chemicals straight into them. No treatment, no liners, no sumps, no 3-D computer records." *Today's Toxics: Disposal*, NEWSWEEK, July 24, 1989, at 38.

28. Striking a somewhat facetious chord regarding the lack of regulation of hazardous waste, then EPA Administrator Douglas Costle wrote: "More effort has gone into regulation of restaurants and taxicabs than into establishing a safe network for waste disposal." Costle & Beck, *supra* note 26, at 426.

29. HARRIS ET AL., *supra* note 19, at 5.

waste being disposed was commissioned by EPA in 1974.[30] Congress' passage of the Resource Conservation and Recovery Act in 1976 marked the beginning of federal regulation of hazardous waste, and RCRA's legislative history indicates that Congress was becoming aware of the problems the country would face as a result of past hazardous waste disposal practices.[31] However, it would be nearly two years before revelations about abandoned hazardous waste sites would shock the nation and spur Congress to take seriously the problems presented by both past and present hazardous waste management; this led to the passage of the Superfund legislation and the development of a comprehensive hazardous waste regulatory scheme.

In 1976, EPA and the New York State Department of Environmental Conservation began investigating reports of chemical wastes seeping into the basements of residents in an area of Niagara Falls, New York that would soon be known to the nation as Love Canal.[32] By the end of 1978, a health emergency

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30. *Id.* That study, which was done by the Battelle Memorial Institute, estimated that American industry was producing 8.9 million metric tons of hazardous waste on an annual basis. However, the study was generally thought to be flawed, and a 1979 study commissioned by EPA estimated the annual figure at 33.8 million metric tons. *Id.* A study commissioned to determine how much hazardous waste was generated in 1981 concluded that over 264 million metric tons were produced during that year. *Id.* at 6. The great disparity in these estimates reflects just how little actually was known about hazardous waste management practices in the United States. Prior to the passage of RCRA in 1976, no one even knew how many hazardous waste sites were in existence. THE CONSERVATION FOUNDATION, *supra* note 26, at 152. A 1979 study estimated that there were 32,000 to 50,000 hazardous waste sites in the United States. *Id.*

31. *See* H.R. REP. NO. 1491, 94th Cong., 2d Sess. 17-24 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6254-92. The report cites examples of hazardous waste sites where improper hazardous waste disposal in the past was causing current problems. *Id.* Noticeably absent from the list was Love Canal in Niagara Falls, New York, a former waste site that ultimately played a leading role in focusing the nation's attention on hazardous waste. *See infra* notes 32-34 and accompanying text.

32. Steven Cohen & Marc Tipermas, *Superfund: Preimplementation Planning and Bureaucratic Politics, in* THE POLITICS OF HAZARDOUS WASTE MANAGEMENT 42, 42 (James P. Lester & Ann O'M. Bowman eds., 1983). Love Canal was an uncompleted waterway begun during the late nineteenth century by William T. Love. It was used as a chemical dump during the 1930s, 40s, and 50s. In 1953, Hooker Chemical Company, which had acquired the canal during the 1940s, sold the property to the Niagara Falls Board of Education under threat of having the property taken by eminent domain. The school board built a school and sold the rest of the land to a developer who constructed houses on the site. The incident at Love Canal began with the seepage of chemicals into the basements of those houses. MARY D. WOROBEC & GIRARD ORDWAY, TOXIC SUBSTANCES CONTROLS GUIDE 160-61 (3d ed. 1989).

had been declared at Love Canal and 237 families were evacuated from the area.[33] During 1978, several other incidents dramatically illustrated the threat past hazardous waste disposal practices presented to human health and environmental integrity.[34] These incidents turned hazardous waste into a household term and made hazardous waste a hot political issue.[35] Although Congress reacted legislatively,[36] the public reacted with heightened opposition to proposed hazardous waste facilities.[37]

It is ironic that the revelations simultaneously heightened public opposition to the siting of new hazardous waste facilities and prompted state and federal governments to regulate hazardous waste disposal. This in turn led to the closure of old sites and heightened demand for new facilities.[38] Indeed, the public's success in opposing the opening of new sites has created a "dilemma," in that "[e]fforts to end 'midnight dumping' and to eliminate unsafe disposal sites are doomed to failure unless new,

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33. *Recent Toxic Waste Incidents*, 1979 NAT. J. 605. In February, 1979, another 100 families were advised to leave. Health officials at the time reported abnormally high rates of miscarriages, birth defects, and underweight children. *Id.* Although others have subsequently questioned whether there really were any significant adverse health effects at Love Canal, see, for example, Clark W. Heath, M.D. et al., *Cytogenic Findings in Persons Living Near the Love Canal*, 251 J. AM. MED. ASSOC. 1437 (1984), there is no dispute that Love Canal played a significant role in focusing the attention of the nation on the problems resulting from past hazardous waste disposal practices.

34. One of the more publicized incidents was at the "Valley of the Drums" in Kentucky. In December, 1978, heavy flooding caused some 55-gallon drums filled with chemicals to be swept into a tributary of the Ohio River. Discovery of the drums led to a further investigation that found four sites containing up to 100,000 55-gallon drums of discarded chemicals. At least some of the drums were leaking. *Recent Toxic Waste Incidents*, *supra* note 33, at 605.

35. The Carter Administration, which initially dragged its feet in implementing hazardous waste regulations under RCRA, announced that hazardous waste was its top environmental priority. Tom Alexander, *The Hazardous Waste Nightmare*, TIME, Apr. 21, 1980, at 52.

36. *See infra* part II.C.

37. *See, e.g.*, Susan Saiter, *Local Opposition Is Stalling Development of Waste Sites*, N.Y. TIMES, June 18, 1983, at A6. The article states that public fears at the time brought development of new hazardous waste sites to a standstill throughout the country. *Id.* According to a hazardous waste consultant quoted in the article, "'[t]he words "hazardous waste" simply send shivers down spines.'" *Id.*

38. Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, *in* RESOLVING LOCATIONAL CONFLICT 159, 159 (Robert W. Lake ed., 1987). The authors report that no new off-site hazardous waste facilities were approved during the three-year period following the revelations about Love Canal. *Id.*

safe disposal facilities can be built, but no community appears willing to accept a new hazardous waste facility."[39] In 1982, The Conservation Foundation reported that there appeared to be a shortage of commercial facilities, a trend that seemed likely to continue into the future.[40] State governments, which like the federal government had traditionally done very little with regard to the siting or regulation of hazardous waste facilities, responded by enacting legislation designed to ease the siting gridlock.[41]

Although there are indications that the siting gridlock that ensued immediately following the Love Canal incident has eased somewhat,[42] the siting of hazardous waste facilities remains a contentious issue.[43] More importantly, much of the recent siting success involves private, on-site facilities.[44] It is still quite difficult to site commercial hazardous waste facilities, relatively few commercial facilities have been sited during the last decade, and it is generally acknowledged that the country will need more commercial facilities to insure that during the coming years all waste is handled in an environmentally safe manner.[45] More important to the hazardous waste wars is the fact that no

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39. *Id.*

40. THE CONSERVATION FOUNDATION, *supra* note 26, at 165.

41. A recent report from the National Governor's Association ("NGA") notes that in 1977 three states had statutes governing the siting of hazardous waste management facilities, but by 1988 forty-one states had such laws in place. 4 NATIONAL GOVERNOR'S ASS'N, SITING NEW TREATMENT AND DISPOSAL FACILITIES vii (1989) (available from National Governor's Association, Washington, D.C.). The approaches those laws utilize and their success rates vary tremendously. The problems associated with siting hazardous waste facilities have stimulated much research and scholarship. *See, e.g.*, THE POLITICS OF HAZARDOUS WASTE MANAGEMENT, *supra* note 32; *see also* DIMENSIONS OF HAZARDOUS WASTE POLITICS AND POLICY (Charles E. Davis & James P. Lester eds., 1988).

42. 4 NATIONAL GOVERNOR'S ASS'N, *supra* note 41, at 20.

43. *See, e.g.*, Sarah Crim, *The NIMBY Syndrome in the 1990s: Where Do You Go After Getting to 'NO'?*, 21 Env't Rep. (BNA) 132 (May 4, 1990); *see also Today's Toxics: Disposal*, *supra* note 27, at 38 (describing current citizen opposition to the siting of hazardous waste facilities).

44. 4 NATIONAL GOVERNOR'S ASS'N, *supra* note 41, at 21. The NGA reports that a study of attempts to site hazardous waste facilities found that during the period 1980 to 1986, 96% of all attempts to site non-commercial facilities were successful. *Id.*

45. *Id.* at 4. The NGA reports that during the period 1980 to 1986, 56% of all attempts to site commercial facilities were successful. *Id.* at 21. However, the majority of the sited facilities were transfer or treatment facilities. *Id.* This is significant because the hazardous waste wars for the most part involve landfills, the ultimate destination even for many wastes treated at treatment facilities.

commercial hazardous waste landfills have been sited during the last decade.[46]

The relative scarcity of commercial hazardous waste facilities has created two interrelated problems. The first problem is that unless additional facilities are sited, the country will not have adequate disposal capacity. Second, those states that are home to commercial facilities resent being dumping grounds for the other states. The waste wars were touched off when these host states transformed their resentment into action.

Before discussing the early battles in the waste wars, it is necessary to examine the legal background to the wars, the federal statutes governing hazardous waste. This discussion is limited generally to those provisions directly involved in the wars.

II. FEDERAL REGULATION OF HAZARDOUS WASTE: RCRA AND CERCLA

Today the federal government is the dominant player in the regulation of hazardous waste management and cleanup, and hazardous waste dominates the federal government's environmental agenda, at least in terms of dollars spent.[47] This, however, has not always been the case. Waste management and disposal was traditionally considered the responsibility of state and local government.[48] Federal involvement in waste management really began in 1965 with the passage of the Solid Waste Disposal Act.[49]

A. Solid Waste Disposal Act

With the passage in 1965 of the Solid Waste Disposal Act ("SWDA"), the federal government became involved in waste

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46. *Id.* at 4.

47. For instance, EPA's proposed budget for 1993 is about $7 billion, of which approximately $2.1 billion is budgeted for RCRA and CERCLA. *Summaries of 1993 EPA Budget Request,* 22 Env't Rep. (BNA) 2317 (Jan. 31, 1992).

48. Although regulation fell under the rubric of police power of the state, state and local governments' involvement in waste was generally limited to collecting domestic waste and running dumps for the disposal of garbage.

49. Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, 79 Stat. 997 (codified as amended at 42 U.S.C. §§ 6901-6992k (1988)).

management. The SWDA limited federal involvement in solid waste management to initiating national research and development on solid waste disposal methods, and providing technical and financial assistance to state and local governments' solid waste disposal programs.[50] This limited involvement reflected the belief that regulating the disposal of waste was the province of state and local governments.[51] Significantly, the SWDA did not distinguish between hazardous and non-hazardous solid wastes,[52] indicative of the widespread ignorance about the unique problems hazardous waste posed.[53] However, by the time Congress again focused its attention on waste disposal, this ignorance was well on its way to being replaced by shock and outrage.

B. RCRA and Amendments

Congress amended SWDA with the passage of the Resource Conservation and Recovery Act of 1976.[54] During the eleven years between the passage of SWDA and RCRA, the country had begun to awaken to the dangers that hazardous wastes created beyond those posed by solid wastes generally. In fact, RCRA was enacted in response to congressional concerns about the dangers hazardous waste posed to the public and to the environment.[55] Congress created a hazardous waste program that would regulate

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50. *Id.* § 202(b).

51. *Id.* § 202(a)(6). The congressional findings accompanying the SWDA reflected this. "[T]he collection and disposal of solid wastes should continue to be primarily the function of the State, regional, and local agencies . . . ." *Id.*

52. *Id.* § 203(4). The SWDA defined solid waste as "garbage, refuse, and other discarded solid materials, including solid-waste materials resulting from industrial, commercial, and agricultural operations, and from community activities . . . ." *Id.*

53. The House Report on the SWDA makes no distinction between hazardous, or even industrial, waste and household waste. The report refers to a wide variety of interest groups that gave oral or written testimony on the SWDA, but the report gives no indication that any of this testimony attempted to alert Congress to the special problems posed by the management and disposal of hazardous wastes. H.R. REP. NO. 899, 89th Cong., 1st Sess. 7-9 (1965), *reprinted in* 1965 U.S.C.C.A.N. 3608, 3613-15.

54. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992 (1988)).

55. H.R. REP. NO. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241. The purpose and summary section of the report stated that "[t]he overriding concern of the Committee however, is the effect on the population and the environment of the disposal of discarded hazardous wastes—those which by virtue of their composition or longevity are harmful, toxic or lethal." *Id.*

the handling of hazardous waste from generation through disposal, from "cradle to grave."

A thorough examination of the statutory provisions of RCRA is beyond the scope of this note, but it is necessary to examine briefly the sections that have played a leading role in the genesis of the hazardous waste wars, particularly the sections that established performance standards and permitting requirements for hazardous waste treatment facilities. In addition, this note briefly examines the RCRA state authorization program. A brief overview of RCRA's other major hazardous waste provisions serves to introduce these sections.

RCRA defines hazardous waste as:

> [A] solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—
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> > (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
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> > (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.[56]

Section 3001 required EPA to develop criteria for identifying and listing wastes as hazardous.[57] Section 3002 required EPA to establish standards applicable to those who generate wastes classified as hazardous under § 3001.[58] The most important requirement imposed on generators is the use of a "manifest system" to assure that all the hazardous waste they generate is treated and disposed of at a RCRA permitted facility.[59] Section 3002 also required EPA to promulgate regulations imposing record-keeping and reporting requirements on generators, as well

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56. RCRA § 1004(5), 42 U.S.C. § 6903(5).

57. *Id.* § 3001, 42 U.S.C. § 6921.

58. *Id.* § 3002, 42 U.S.C. § 6922; *see* 40 C.F.R. § 262 (1992) (codifying standards applicable to generators of hazardous waste).

59. RCRA § 3002(5), 42 U.S.C. § 6922(a)(5).

as setting minimum standards for the containers and labels to be used in handling hazardous waste.[60]

Section 3003 called on EPA to promulgate regulations establishing requirements applicable to transporters of hazardous waste.[61] Congress directed that such regulations require transporters to maintain records of the source and destination of waste they transported and that such regulations prohibit transporters from transporting waste unless it was properly labeled in accordance with the requirements of § 3002.[62] In addition, § 3003 directed EPA to promulgate regulations requiring transporters to comply with the manifest waste tracking system established under § 3002 and, in conjunction with this, to require transporters to deliver waste only to the facility that the generator of that waste listed on the manifest.[63]

1. Sections 3004 and 3005: Standards Applicable to Treatment, Storage, and Disposal Facilities

Sections 3004 and 3005 address hazardous waste treatment, storage, and disposal facilities. Section 3004 called on EPA to enact performance standards applicable to treatment, storage, and disposal facilities.[64] Section 3005 made it illegal for a hazardous waste treatment, storage, or disposal facility to treat, store, or dispose of waste listed as hazardous under § 3001 unless that facility had a permit to do so issued by EPA or a state agency authorized by EPA.[65] Section 3005 further provided that no facility could receive a permit unless that facility complied with the performance requirements of § 3004.[66]

Sections 3004 and 3005 have played a central role in the hazardous waste wars because they led to the closure of many old disposal sites, thus reducing the disposal options of many

60. *Id.* § 3002, 42 U.S.C. § 6922.

61. *Id.* § 3003, 42 U.S.C. § 6923; *see* 40 C.F.R. § 263 (1992) (codifying standards applicable to transporters of hazardous waste).

62. RCRA § 3003(1), (2), 42 U.S.C. § 6923(a)(1), (2).

63. *Id.* § 3003(3), (4), 42 U.S.C. § 6923(a)(3), (4).

64. *Id.* § 3004, 42 U.S.C. § 6924; *see* 40 C.F.R. §§ 264, 265, 267 (1992) (codifying standards applicable to owners and operators of treatment, storage, and disposal facilities).

65. RCRA § 3005(a), 42 U.S.C. § 6925(a).

66. *Id.* § 3005(c); 42 U.S.C. § 6925(c)(1).

generators.[67] Indeed, the Council on Environmental Quality recognized this problem even before the regulations implementing §§ 3004 and 3005 were finalized.[68] In its annual report for 1979, the Council reported that only 10% of hazardous waste was being disposed of in a way that would comply with the pending regulations.[69] They also cited a survey conducted by the Chemical Manufacturer's Association which indicated that out of the 475 surface impoundments its members were using to store hazardous waste, only one would meet the requirements of the pending regulation.[70] The Council went on to report that many of these facilities would not be able to comply and would be forced to close.[71] Because of this, they estimated that as many as fifty to sixty new disposal facilities would be needed to meet the nation's long-term disposal demands.[72]

2. The 1984 Amendments to RCRA

In 1984, Congress amended RCRA with the Hazardous and Solid Waste Amendments ("HSWA"), and in doing so made two changes of significance to the waste wars.[73] First, the amendments imposed more stringent technological requirements on

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67. There are no reliable figures on how many disposal sites are no longer used as a result of RCRA. That is because prior to RCRA hazardous waste disposal was not at all regulated. Although EPA studies gave rough indications of how waste was being disposed of, those studies did not identify the locations of disposal sites. A rough indicator of the number of old sites that closed as a result of RCRA is the number of sites identified as needing cleanup under CERCLA. Any such estimate would of course be very rough since many CERCLA sites ceased operation years before the passage of RCRA.

68. THE COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 26, at 186.

69. *Id.*

70. *Id.*

71. *Id.* at 187.

72. *Id.* The study also pointed out that siting these facilities would be extremely difficult. It reported that "[l]ocal public opposition to new disposal facilities has proved to be almost unanimous," and it predicted that opposition to siting would probably get worse. *Id.* The Council's fears with respect to the difficulty of siting facilities were borne out. *See supra* notes 35-46 and accompanying text.

73. Hazardous and Solid Waste Amendments of 1984 ("HSWA"), Pub. L. No. 98-616, 98 Stat. 3221 (1984) (codified at 42 U.S.C. §§ 6901-6992 (1988)). The HSWA of 1984 was actually the second set of amendments of RCRA. Four years earlier Congress amended RCRA with the Solid Waste Disposal Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980) (codified as amended at 42 U.S.C. §§ 6901-6992 (1988)). Those amendments will not be discussed because the changes do not directly bear on the issues addressed by this note, and a complete discussion of the history of RCRA is beyond the scope of this note.

hazardous waste treatment facilities.[74] With respect to landfills, this required the installation of double liners and leachate collection systems.[75]

In contrast to RCRA, the 1984 amendments specified in great detail how permitted facilities must handle wastes. The disposal in landfills of bulk liquids or liquids not in containers was now prohibited.[76] Moreover, the amendments significantly restricted the land disposal of hazardous waste.[77] The "land-ban" provisions prohibit land disposal[78] of hazardous waste unless EPA "determines [that] the prohibition on one or more methods of land disposal of [a given] waste is not required in order to protect human health and the environment for as long as the waste remains hazardous."[79] An attorney and advisor at EPA has characterized the "land disposal" provisions as actually "represent[ing] a creative statutory method for ensuring that EPA establish [treatment] standards for hazardous wastes destined for land disposal."[80] Ironically, these changes have contributed to the waste wars. By increasing the costs and complexity of hazardous waste treatment, some generators have been forced to cease their own treatment operations. This, in turn, has increased the demand for commercial treatment facilities.[81]

The amendments' second significant change subjects "small-quantity" generators, generators who produce between one hundred and one thousand kilograms of a waste per month, to RCRA's requirements.[82] This is important because small generators rely heavily on commercial waste disposal capacity to

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74. HSWA § 3304(*o*), 42 U.S.C. § 6924(*o*).

75. *Id.* § 3004(*o*)(A)(i), 42 U.S.C. § 6924(*o*)(A)(i).

76. *Id.* § 3004(c), 42 U.S.C. § 6924(c).

77. *Id.* § 3004(d)-(k), 42 U.S.C. § 6924(d)-(k).

78. The amendments define "land disposal" as "any placement of such hazardous waste in a landfill, surface impoundment, waste pile, injection well, land treatment facility, salt dome formation, salt bed formation, or underground mine or cave." *Id.* § 3004(k), 42 U.S.C. § 6924(k).

79. *Id.* § 3004(d), 42 U.S.C. § 6924(d).

80. Randolph L. Hill, *An Overview of RCRA: The "Mind-Numbing" Provisions of the Most Complicated Statute,* 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,254 (May, 1991). At the time of publication Mr. Hill was an attorney and advisor in EPA's Office of General Counsel. *Id.*

81. HARRIS ET AL., *supra* note 19, at 93.

82. HSWA § 3001(d), 42 U.S.C. § 6921(d).

dispose of their waste,[83] thereby resulting in an increased demand for commercial hazardous waste capacity. The irony of the HSWA is that they simultaneously increased the demand for hazardous waste capacity while decreasing the supply of such capacity.

3. Section 3006: Authorization of State Hazardous Waste Programs and the Consistency Requirements

Section 3006 provides a mechanism whereby states can petition EPA for authority to run their own hazardous waste program.[84] Section 3006 dictates that before authorizing a state program, EPA must, among other things, determine the following: (1) that the state's program is equivalent to the federal RCRA program; (2) that it is "consistent" with the federal and other state programs; and (3) that the state has adequate enforcement resources.[85]

EPA first promulgated consistency regulations in May, 1980.[86] The regulations state that "[a]ny aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes . . . for treatment, storage, or disposal" at authorized facilities is inconsistent with the federal program.[87] State laws that acted as a prohibition on hazardous waste treatment were also inconsistent unless there was a "basis in human health or environmental protection."[88] EPA's explanatory comments noted that "this section provides that any aspect of a State program which operates as a ban on the interstate movement of hazardous wastes is *automatically* inconsistent."[89]

Five years later, EPA had at least a temporary change of position on what counted as inconsistent. In announcing that it

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83. *See* HARRIS ET AL., *supra* note 19, at 128-38.

84. RCRA § 3006, 42 U.S.C. § 6926.

85. *Id.*

86. 45 Fed. Reg. 33,066 (1980) (initially codified at 40 C.F.R. § 123.32 (1981), currently codified at 40 C.F.R. § 271 (1991)).

87. 45 Fed. Reg. 33,066, 33,465-66 (1980).

88. *Id.* at 33,466.

89. *Id.* at 33,395. EPA's explanation cited for support City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (emphasis added).

was authorizing South Carolina's hazardous waste program, EPA stated that the consistency regulation did not "by its terms prohibit any restrictions or impediments, only those that are unreasonable."[90] The discussion went on to say that "EPA does not agree that *any* disparity in treatment between in-State and out-of-State wastes is *per se* unreasonable."[91]

C. CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in October, 1980.[92] CERCLA was enacted to clean up the inactive hazardous waste sites the country had recently discovered.[93] In short, CERCLA authorizes EPA to clean up sites that threaten the public health or welfare and then sue the responsible parties for the cleanup.[94] Alternatively, EPA may sue a responsible party before the site is cleaned up, and force that party to pay for the cleanup.[95]

Almost from its inception, CERCLA was embroiled in controversy.[96] While political scandals were rocking EPA,[97] Congress was discovering that problems inherent in the statute were also impeding EPA's progress.[98] In 1986, Congress attempted to address those problems by passing the Superfund Amendments and Reauthorization Act.[99] Although SARA made

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90. 50 Fed. Reg. 46,437, 46,439 (1985). EPA included this discussion because South Carolina's program imposed a higher disposal fee on out-of-state waste than it did on in-state waste. *Id.*

91. *Id.*

92. Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

93. *See supra* notes 47-53 and accompanying text.

94. CERCLA § 104, 42 U.S.C. § 9604.

95. *Id.* § 106, 42 U.S.C. § 9606.

96. *See* Robert Shepard, *EPA Says Superfund Will Live on in Face of Budget Cuts*, UPI, Nov. 16, 1981, *available in* LEXIS, Nexis Library, UPI File (discussing fact that President Reagan had slashed the 1982 budget for CERCLA by a third).

97. HARRIS ET AL., *supra* note 19, at 23-47.

98. *See* H.R. REP. NO. 253, 99th Cong., 1st Sess. 54-56 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2836-38.

99. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1988)).

sweeping changes to CERCLA, this note's focus is limited to the changes Congress made to CERCLA's capacity assurance requirements.

SARA amended CERCLA § 9604 to include the following capacity assurance provision:

> (9) SITING. — Effective 3 years after [the enactment of the Superfund Amendments and Reauthorization Act of 1986], the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which—
>
> (A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed,
>
> (B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,
>
> (C) are acceptable to the President, and
>
> (D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.[100]

Congress was concerned that local opposition to siting new hazardous waste facilities impeded progress in implementing RCRA and CERCLA. In particular, Congress was concerned that CERCLA sites could not be cleaned up if there were no facilities where the removed waste could be sent for safe disposal.[101] In Congress' words, "[t]he broader social need for safe hazardous waste management facilities often has not been strongly represented in the siting process."[102] The capacity assurance provi-

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100. *Id.* § 104(k), 42 U.S.C. § 9604(c)(9).

101. S. REP. NO. 11, 99th Cong., 1st Sess. 22-23 (1985).

102. *Id.*

sion was intended to provide a strong incentive to the states to assure that needed facilities would be sited within their borders.

To meet the capacity assurance requirements, states were required to submit by October 17, 1989, a capacity assurance plan ("CAP") describing how the state was fulfilling its statutory obligations. EPA issued a guidance document to help states both understand and fulfill their obligations.[103]

In the guidance document, EPA interpreted "interstate" and "regional" agreements to include interstate compacts that guarantee signatory states access to facilities in other signatory states, contracts with private facilities, and state or local ownership and operation of facilities.[104] The correctness of EPA's interpretation is borne out by SARA's legislative history. A Senate report states that "[u]se of binding [interstate] agreements . . . is only one example of how a State may provide the requisite assurances. . . . [C]ontracts with private facilities may also suffice."[105] Although EPA's interpretation reflected congressional intent, it had two important ramifications for the waste wars. First, it removed much of the incentive for waste exporting states to site new facilities. Second, it effectively precluded waste importing states from gaining any control over the flow of waste to facilities within their borders.

Despite this, in 1989, the State of Alabama attempted to exert control over the flow of out-of-state waste to a commercial hazardous waste landfill located in the center of the state. Alabama claimed that it needed to exert such control to comply with SARA's capacity assurance provisions. Shortly thereafter, South Carolina followed Alabama's lead. The fighting in the hazardous waste wars began when the hazardous waste treatment industry challenged these actions, claiming these actions violated the Commerce Clause of the U.S. Constitution. This note now examines the battles that ensued.

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103. DEPARTMENT OF ENVTL. PROTECTION, U.S. ENVTL. PROTECTION AGENCY, OSWER DIRECTIVE NO. 9010.00, ASSURANCE OF HAZARDOUS WASTE CAPACITY: GUIDANCE TO STATE OFFICIALS (1988).

104. *Id.* at 3.

105. S. REP. NO. 11, 99th Cong., 1st Sess. 22 (1985).

III. THE EARLY STAGES OF THE WAR: THE BATTLES IN THE COURTS

Alabama and South Carolina each contain one of the twenty-one commercial hazardous waste landfills currently in operation. There are indications that prior to the SARA CAP requirements, both states were concerned with the increasing volume of out-of-state waste flowing into their facilities.[106] After the passage of SARA, both states clearly demonstrated their displeasure. Alabama and South Carolina each erected statutory barriers to the disposal of out-of-state waste at the commercial hazardous waste landfills within their borders. In doing so, both states argued that they needed to preserve that capacity for in-state waste if they were to meet their SARA capacity assurance requirements. They also argued that such measures would help further SARA's goal of assuring adequate long-term capacity for the nation as a whole.[107]

The hazardous waste treatment industry immediately challenged the actions of both states. The most cogent challenge mounted was that such measures violated the "dormant" Commerce Clause of the U.S. Constitution. A brief review of the "dormant" Commerce Clause serves to introduce a discussion of these challenges.

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106. For instance, Alabama, home to the nation's largest landfill, petitioned EPA not to issue the landfill a RCRA permit. When that effort failed, Alabama unsuccessfully sued EPA in an attempt to force it to rescind the permit. *See* Alabama *ex. rel.* Siegelman v. United States Envtl. Protection Agency, 925 F.2d 385 (11th Cir. 1991).

107. One battle in the hazardous waste wars not discussed in detail in this note is the battle in New York, which is home to the only commercial hazardous waste landfill in the northeastern United States. *Capacity Assurance Plans Inadequate, New York Says in Filing Suit Against EPA*, 22 Env't Rep. (BNA) 2099 (Jan. 3, 1992). About 70% of the waste handled at the New York facility is generated outside New York. *Id.* In 1989, to meet their obligations under SARA's capacity assurance provision, 12 northeastern states and the District of Columbia entered into a regional waste disposal agreement. New York refused to sign the agreement. EPA approved the agreement anyway, even though the agreement relied heavily on New York's landfill. *Id.* New York responded by suing EPA, alleging that EPA violated a "non-discretionary" duty in approving the plan, and that "the regional agreement submitted to EPA is not lawful and binding under CERCLA." *Id.* Although the State of New York survived a motion to dismiss by the EPA, it appears that New York will not prevail, for the court noted "its concern about whether plaintiffs, upon further discovery, will be able to present sufficient evidence to withstand a motion for summary judgment." New York v. Reilly, No. 91-CV-418, 1992 U.S. Dist. LEXIS 15872, at *17 (N.D.N.Y. Oct. 16, 1992).

A. The "Dormant" Commerce Clause: Constitutional Limitation on the Rights of States to Regulate Interstate Commerce

The Commerce Clause of the U.S. Constitution states: "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[108] Over the last fifty years the Supreme Court has interpreted this grant of authority to Congress so expansively that today it generally is acknowledged that there are few, if any, meaningful limits on Congress' authority to regulate interstate commerce.

The Commerce Clause expressly granted to Congress the power to regulate interstate commerce, but it left unanswered the question of whether in doing so the Commerce Clause negated state power to regulate commerce. Questions about the effect of the Commerce Clause on state power to regulate interstate commerce are referred to as questions about the negative or "dormant" aspect of the Commerce Clause. Almost since its inception, the Supreme Court has struggled with the question of whether the Commerce Clause left the states with any authority to regulate interstate commerce, and if so, what limits there are on that authority. The failure by the Court to articulate a clear standard during its first 150 years led one commentator to state that the only general principle that could be gleaned from the Court's dormant Commerce Clause jurisprudence was that "the states may regulate interstate commerce some, but not too much."[109] In 1970, in *Pike v. Bruce Church, Inc.*, the Court articulated the test that continues to guide its dormant Commerce Clause cases.[110]

In *Pike*, the Court struck down an Arizona statute that prohibited cantaloupe growers in Arizona from shipping their cantaloupes out of state unless the melons were packed in containers that identified them as Arizona cantaloupes.[111] This requirement placed a tremendous burden on the plaintiff grower

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108. U.S. CONST. art. I, § 8.

109. Robert L. Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446, 452 (1951).

110. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

111. *Id.* at 146.

because it would have required the grower to build a packing facility in Arizona, unnecessarily duplicating a facility in California where the cantaloupes were shipped for packaging.[112] The Court held that any local interest Arizona had in having the cantaloupes identified as Arizona cantaloupes was outweighed by the burden the requirement placed on interstate commerce.[113] The Court articulated the rule as follows:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[114]

This test has guided the Supreme Court's dormant Commerce Clause decisions over the last twenty years.[115]

Despite the importance of *Pike v. Bruce Church, Inc.*, the dormant Commerce Clause case with the greatest precedential value in the Alabama and South Carolina cases was the U.S. Supreme Court's decision in *City of Philadelphia v. New Jersey*, decided eight years after *Pike v. Bruce Church, Inc.*[116] *City of Philadelphia v. New Jersey* raised the issue of whether New Jersey could block the flow of out-of-state non-hazardous wastes into its landfills. Because of its relevance, a discussion of the Court's decision in *City of Philadelphia v. New Jersey* serves to introduce the legal framework governing the Alabama and South Carolina cases.

In 1974, the State of New Jersey enacted a statute prohibiting the importation of liquid or solid waste into New Jersey until the commissioner of environmental protection has "determine[d]

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112. *Id.* at 145.
113. *Id.* at 146.
114. *Id.* at 142.
115. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 242 (7th ed. 1991).
116. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State."[117] The commissioner promulgated regulations that permitted four categories of waste to be imported.[118] With the exception of these narrow categories, New Jersey banned the disposal of all out-of-state wastes within its borders.[119] Private landfill owners in New Jersey, and cities outside of New Jersey that had contracts with those landfills, brought suit against New Jersey, claiming that the New Jersey statute violated the Commerce Clause of the U.S. Constitution.[120] The trial court granted summary judgment for the plaintiffs, holding that the law discriminated against out-of-state waste in violation of the Commerce Clause.[121] The New Jersey Supreme Court reversed, holding that the statute did not violate the Commerce Clause because it furthered important health and environmental objectives, it did not discriminate against interstate commerce, and it placed only minimal burdens upon interstate commerce.[122]

In a seven-to-two decision, the U.S. Supreme Court reversed the decision of the New Jersey Supreme Court.[123] Justice Stewart, writing for the majority, stated that "[t]he crucial inquiry [is] . . . whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."[124] Justice Stewart stated that where state legislation amounts to nothing more than "simple economic protectionism . . . a virtually *per se* rule of invalidity has been

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117. 1973 N.J. Laws 363, N.J. STAT. ANN. § 13:1-10 (West Supp. 1978), *repealed by* 1981 N.J. Laws 78 (effective Mar. 25, 1981).

118. The four categories were very limited in scope. They allowed for the importation of: (1) garbage that was to be fed to pigs; (2) sorted materials that were to be recycled; (3) municipal solid waste that would be used in a secondary manner such as being burned for energy; and (4) certain hazardous wastes that were not going to be disposed of in the land. N.J. ADMIN. CODE tit. 7, § 1-4.2 (Supp. 1977).

119. *City of Philadelphia*, 437 U.S. at 619.

120. *Id.*

121. *Id.*

122. *Id.* at 620.

123. *Id.* at 629.

124. *Id.* at 624.

erected. . . . The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders."[125] In contrast, where a statute advances legitimate objectives and "there is no patent discrimination against interstate trade," the Court relies on the balancing test developed in *Pike v. Bruce Church, Inc.*[126]

New Jersey argued that the statute was not a protectionist measure because it was passed in furtherance of legitimate local purposes.[127] The Court discounted New Jersey's argument, stating that New Jersey's purpose in passing the statute was not dispositive of whether the statute constituted economic protectionism because "the evil of protectionism can reside in legislative means as well as legislative ends."[128] New Jersey could, consistent with the Commerce Clause, protect its environment and the health of its citizens by enacting legislation slowing the flow of all waste into New Jersey landfills, even though such action would have an incidental effect on interstate commerce.[129] But, whatever New Jersey's purpose was, no matter how laudable, it could not accomplish that purpose "by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[130] Because New Jersey conceded that its own trash presented as great a threat to its citizens and the environment as did trash imported from out of state,[131] the statute was impermissible under the Commerce Clause.[132]

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125. *Id.*

126. *Id.* (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

127. *City of Philadelphia*, 437 U.S. at 625. The legislative findings accompanying the statute stated that the legislature was concerned about the risks that waste disposal posed to New Jersey's citizens and environment. *Id.*

128. *Id.* at 626.

129. *Id.*

130. *Id.* at 626-27.

131. *Id.* at 629.

132. *Id.* In dicta the Court stated that "[t]omorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders." *Id.* Little could the Court have known that New Jersey would find it necessary to send most of its solid waste out-of-state. The issue of interstate disposal of solid waste has become the subject of a regional dispute between exporting states such as New Jersey and importing states in the Midwest. *Senator Sees Civil War over Waste Imports; Coats Says He Will Offer Import Ban Bill Again*, 22 Env't Rep. (BNA) 485 (June 21, 1991). During the last two congressional sessions, Senator Coats of Indiana has introduced legislation that would allow states to

Justice Rehnquist, dissenting, felt that the "quarantine" cases were controlling and dispositive of the issue.[133] Justice Rehnquist stated that the majority's decision presented New Jersey with a "Hobson's Choice": namely, prohibiting all landfilling of trash or completely opening its doors to out-of-state waste, thereby "multiplying the health and safety problems which would result if it dealt only with such wastes generated within the State."[134] Justice Rehnquist called the majority's attempt to distinguish the quarantine cases "unconvincing" because he could not understand why a state could ban items whose *movement* presented risks to the citizenry and the environment, yet could not ban items whose *disposal* presented risks to the citizenry and the environment.[135] Thus, Justice Rehnquist concluded that New Jersey should be allowed to limit the flow of out-of-state waste into its landfills.[136]

Both Justice Stewart's majority opinion and Justice Rehnquist's dissent have played a prominent role in defining the arguments advanced in the Commerce Clause challenges to the Alabama and South Carolina measures. The next section examines those challenges, the first battles in the hazardous waste wars.

B. The First Battle in Alabama: The Holley Bill

The United States' largest commercial hazardous waste landfill is located in Emelle, Alabama.[137] The Emelle landfill is the only commercial hazardous waste treatment and disposal

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ban imports of non-hazardous solid waste. Ironically, the legislation's fiercest opponents have been New Jersey's senators. *Id.* Just as the Supreme Court had speculated might happen, Senator Bill Bradley admitted that "New Jersey now exports large quantities of solid waste." *Id.* at 486.

133. *City of Philadelphia*, 437 U.S. at 632. The "quarantine cases" are a line of cases in which the Court has upheld state laws that banned the importation of various articles because the banned articles by their "very movement risked contagion and other evils." *Id.* at 629; *see, e.g.*, Asbell v. Kansas, 209 U.S. 251 (1908).

134. *City of Philadelphia*, 437 U.S. at 631.

135. *Id.* at 632.

136. *Id.*

137. National Solid Wastes Mgmt. Ass'n v. Alabama Dep't of Envtl. Mgmt., 729 F. Supp. 792, 797 (N.D. Ala. 1990), *rev'd*, 910 F.2d 713 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991) [hereinafter *NSWMA I*].

facility in Alabama.[138] In 1989, an estimated 800,000 tons of hazardous wastes were landfilled at Emelle.[139] That same year, in response to SARA's capacity assurance requirements, and to more general concerns about increasing amounts of out-of-state hazardous waste being shipped to Emelle, the Alabama Legislature enacted the Holley Bill.[140] The Holley Bill made it unlawful for commercial hazardous waste treatment or disposal facilities in Alabama to treat or dispose of hazardous wastes generated in other states if the state of origin: (1) prohibited the treatment or disposal of hazardous wastes within its borders and had no permitted treatment or disposal facility; or (2) had no permitted treatment facility and had not entered into an interstate agreement with Alabama, pursuant to CERCLA § 104(c)(9),[141] for the safe disposal of its hazardous wastes.[142] The Holley Bill mandated the Alabama Department of Environmental Management to establish and maintain a list, to be revised monthly, of states whose waste could not be treated or disposed of in Alabama.[143] The Holley Bill also prohibited hazardous waste treatment and disposal facilities operating in Alabama from contracting with other states to satisfy those states' capacity assurance requirements.[144]

The National Solid Wastes Management Association, a waste disposal industry trade group, and Chemical Waste Management,

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138. National Solid Wastes Mgmt. Ass'n v. Alabama Dep't of Envtl. Mgmt., 910 F.2d 713, 715 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991) [hereinafter *NSWMA II*].

139. *NSWMA I*, 729 F. Supp. at 797. The court noted that despite the quantity of waste disposed of at Emelle, it amounted to less than three-tenths of 1% of all the hazardous waste generated in the United States during 1989. *Id.* This figure, although accurate, is somewhat misleading given the fact that 96% of all hazardous waste is treated on the site where it is generated, and that about 20% of all the hazardous waste transported across state lines to landfills went to Emelle. *See* NATIONAL SOLID WASTES MANAGEMENT ASS'N, *supra* note 4 (source of data used to calculate statistics).

140. 1989 Ala. Acts 788, ALA. CODE § 22-30-11 (1989). In a press release announcing his signing of the Holley Bill, Governor Guy Hunt said that Alabama was "becoming the waste dump of the nation." *NSWMA II*, 910 F.2d at 717 n.6. The Holley Bill was prefaced with extensive legislative findings detailing the congressional reasoning for including the capacity assurance requirements in SARA, and explaining why the Holley Bill would further the congressional purpose of encouraging development of new hazardous waste facilities. 1989 Ala. Acts 788.

141. *See supra* notes 100-07 and accompanying text.

142. 1989 Ala. Acts 788, § 2.

143. *Id.*

144. *Id.*

the owner and operator of the Emelle facility, filed suit to enjoin the State of Alabama from enforcing the Holley Bill, claiming that it violated both the Commerce Clause[145] and the Supremacy Clause[146] of the U.S. Constitution.[147] The U.S. District Court for the Nothern District of Alabama found that the Holley Bill did not violate either clause.[148]

The district court began by distinguishing the case at bar from the Supreme Court's decision in *City of Philadelphia v. New Jersey*.[149] The court reviewed a series of lower court decisions involving solid waste that had distinguished *City of Philadelphia v. New Jersey*, and had utilized the *Pike* balancing test[150] to uphold discriminatory solid waste laws.[151] Relying in part on these decisions, the court distinguished the present case from *City of Philadelphia* on the basis that the Holley Bill, unlike the New Jersey law at issue in *City of Philadelphia*, did not prohibit importation of all waste into Alabama.[152] The court reasoned that because the Holley Bill did not close Alabama's borders to all out-of-state hazardous wastes, it was not a simple protectionist measure of the sort prohibited by *City of Philadelphia*.[153]

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145. U.S. CONST. art. I, § 8, cl. 3; *see supra* text accompanying note 108 (providing text of the Clause).

146. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2.

147. *NSWMA I*, 729 F. Supp. at 792.

148. *Id.* at 805. This note addresses only the court's Commerce Clause analysis.

149. *NSWMA I*, 729 F. Supp. at 800.

150. *Pike*, 397 U.S. at 142.

151. *NSWMA I*, 729 F. Supp. at 801-02. The court cited: Harvey & Harvey v. Delaware Solid Waste Auth., 600 F. Supp. 1369 (D. Del. 1985); J. Filiberto Sanitation, Inc. v. Department of Envtl. Protection, 857 F.2d 913 (3d Cir. 1988); and Lefrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987).

152. *NSWMA I*, 729 F. Supp. at 804.

153. *Id.* Echoing the language of the Supreme Court in *City of Philadelphia v. New Jersey*, the court stated that the Holley Bill was "not an effort to isolate Alabama from the national economy." *Id.* The court's opinion on this point could have been more persuasive had it paid more careful attention to the specific language of the Holley Bill. Specifically, the court might have focused on legislative finding number 14 accompanying the Holley Bill, which stated that "[t]he imposition of the requirements contained in this legislation will encourage the development of new waste disposal facilities in other states in accord with the intentions of the Congress in enacting Section 42 U.S.C. § 9604(c)(9)." 1989 Ala. Acts 788, § 1(14). This language, arguably, indicates that Alabama was not attempting to isolate itself from national problems, but that one of its purposes was to help solve the problem of inadequate hazardous waste management capacity.

Having distinguished *City of Philadelphia*, the court utilized the *Pike* balancing test[154] to determine that the Holley Bill did not violate the Commerce Clause.

Examining the "local purposes" side of the balance, the court found that the Holley Bill served several legitimate local purposes. It insured that Alabama could meet its SARA capacity assurance requirements; that all hazardous waste stored in Alabama, and all hazardous waste generated in Alabama, would be treated in the most environmentally protective manner; and that Alabama would not become a dumping ground for those states which refused "to 'clean up their act' under federal law."[155]

Considering the effects on interstate commerce, the other side of the balance, the court found that the Holley Bill did not confer "a 'significant benefit on in-state economic interests' or impose[] 'a significant burden on out-of-state economic interests.'"[156] The court concluded that the Holley Bill was constitutional under the *Pike* balancing test because the bill's effect on interstate commerce was "incidental and not excessive in relation to the local benefits,"[157] and granted summary judgment for the State of Alabama.[158]

On appeal, the U.S. Court of Appeals for the Eleventh Circuit reversed the district court's judgment, remanded the case, and ordered the district court to enter summary judgment for the plaintiffs.[159] The court of appeals concluded that the district

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154. *See supra* notes 110-15 and accompanying text.

155. *NSWMA I*, 729 F. Supp. at 804.

156. *Id.* (citations omitted). Unfortunately, the court's analysis concerning the effects on interstate commerce amounted to little more than bare conclusions. The court might have discussed the fact that the effects were minimal because a "blacklisted" state could be quickly removed from the blacklist by taking steps to create waste management capacity within its borders or by entering into a waste management agreement with the State of Alabama.

157. *NSWMA I*, 729 F. Supp. at 804.

158. *Id.* at 805.

159. *NSWMA II*, 910 F.2d at 725. The court of appeals also ordered the district court to grant plaintiffs' summary judgment on two sets of hazardous waste regulations that Alabama had promulgated. *Id.* Although the district court opinion did not discuss the plaintiffs' challenge of the regulations, it did grant the defendant's summary judgment on those challenges. *NSWMA I*, 729 F. Supp. at 805. In granting summary judgment for the

court was wrong to apply the *Pike* balancing test[160] because the Holley Bill was "a protectionist measure not based adequately on a legitimate local concern."[161] The court noted that complying with SARA's capacity assurance requirements was not a legitimate local concern for purposes of Commerce Clause analysis because Alabama could comply with the capacity assurance requirement without resorting to the Holley Bill.[162] Specifically, Alabama could satisfy its SARA capacity assurance requirements in any of three ways: (1) by creating new in-state capacity; (2) by entering into interstate regional agreements to secure access to capacity at out-of-state facilities; or (3) by contracting directly with private waste facilities.[163] Thus, if Alabama's capacity assurance plan relied on facilities such as Emelle, the state "should contract . . . for that capacity, instead of blocking the private facility from accepting wastes from other states."[164] Because Alabama's interest in meeting its capacity assurance requirement did not suffice for an adequate local interest, the court concluded that the Holley Bill was simply a protectionist measure designed to isolate Alabama from the national problem of inadequate hazardous waste disposal capacity.[165]

On February 7, 1991, the Eleventh Circuit Court of Appeals denied Alabama's request for a rehearing.[166] On June 10, 1991, the U.S. Supreme Court denied Alabama's petition for a writ of certiorari.[167]

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plaintiffs, the court of appeals did specifically discuss the challenged regulations. *NSWMA II*, 910 F.2d at 722-25. Because the regulations bear no necessary relationship to the Holley Bill, this note does not address them. The plaintiffs also alleged that the Holley Bill violated the Due Process, Takings, and Contract Clauses of the U.S. Constitution. *Id.* at 715 n.1. However, neither court addressed these allegations.

160. *Pike*, 397 U.S. at 142.

161. *NSWMA II*, 910 F.2d at 720.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. National Solid Wastes Mgmt. Ass'n v. Alabama Dep't of Envtl. Mgmt., 924 F.2d 1001 (11th Cir. 1991). In denying a rehearing, the court modified its ruling on an issue unrelated to the Commerce Clause challenge of the Holley Bill.

167. Alabama v. National Solid Wastes Mgmt., 111 S. Ct. 2800 (1991).

C. The Second Battle in Alabama: Act No. 90-326

In April 1990, the Alabama Legislature passed Act No. 90-326, which took effect on July 15, 1990.[168] The Act imposed a yearly cap on the amount of hazardous waste that could be disposed of at any commercial hazardous waste facility operating in Alabama.[169] The cap applied to any facility that disposed of more than 100,000 tons of hazardous waste annually.[170] It was set equal to the amount of waste disposed of at that facility during the one-year period beginning July 15, 1990.[171] The Act also levied hazardous waste disposal fees on these facilities,[172] with a "base fee" of $25.60 a ton for waste generated in-state,[173] and an additional fee of $72.00 a ton levied on all wastes generated out-of-state.[174]

On June 5, 1990, Chemical Waste Management, the operator of the Emelle landfill, filed suit in Alabama Superior Court, claiming, *inter alia*, that the disposal cap and the disposal fees violated the Commerce Clause of the U.S. Constitution.[175] On February 28, 1991, in an unreported decision, the trial court declared that the cap and base fee provisions were constitutional, but that the additional fee levied on out-of-state waste violated the Commerce Clause.[176] Both parties appealed to the Alabama

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168. 1990 Ala. Acts 326. The Act was passed after the district court opinion in *NSWMA I*, but before the court of appeals reversed the district court. Nothing in Act No. 90-326 refers to the Holley Bill or the litigation concerning its constitutionality, but the Alabama Legislature and Governor Hunt were undoubtedly keenly aware of what was happening with the Holley Bill at the time of the passage of Act No. 90-326.

169. 1990 Ala. Acts 326, § 9. Although the statute applied to any facility meeting the statutory requirements, it was really designed to limit disposal of waste at Chem-Waste's facility in Emelle. That is because the facility at Emelle was the only commercial facility in Alabama licensed for the disposal of hazardous waste.

170. *Id.*

171. *Id.*

172. *Id.* § 3.

173. *Id.* § 3(a).

174. *Id.* § 3(b).

175. Hunt v. Chemical Waste Mgmt., 584 So. 2d 1367 (Ala. 1991), *rev'd*, 112 S. Ct. 2009 (1992). The complaint also alleged that the cap and fees violated the Equal Protection Clause of the U.S. Constitution, that it was preempted by various federal statutes, and that it violated the equal protection and due process clauses of the Alabama Constitution. *Id.* at 1370. This note examines only the Commerce Clause issues raised in the case.

176. *Id.*

Supreme Court. On July 11, 1991, the Alabama Supreme Court affirmed the judgment of the trial court that the cap and base fee were constitutional, but reversed the trial court's judgment on the additional fee on out-of-state waste, holding that the additional fee did not violate the Commerce Clause.[177]

1. The Waste Cap

Because the cap provision applied equally to in-state and out-of-state waste, the court used the *Pike* balancing test[178] to assess the validity of the cap provision. The court concluded that the cap provision did not violate the Commerce Clause.[179] On the "local purpose" side of the *Pike* balancing test, the court found that Alabama had a "clear and legitimate interest" in conserving its natural resources threatened by the Emelle landfill, in protecting the health and safety of its citizens, and in extending the life of the facility for the benefit of both in-state and out-of-state waste generators.[180]

Addressing the "burdens on interstate commerce" side of the *Pike* balancing test, the court found that any burdens were merely "speculative"[181] because the cap did not create a "discriminatory burden on existing levels of commerce or on existing rates of waste" flowing into the facility.[182] Further, the cap provision permitted the governor to raise the cap if necessary.[183] Thus,

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177. *Id.* at 1390. The Supreme Court adopted verbatim the decision of the trial court with respect to the cap and the base fee. For that reason the discussion in this note is limited to the Supreme Court's opinion.

178. *Pike*, 397 U.S. at 142.

179. *Hunt*, 584 So. 2d at 1380.

180. *Id.* The latter interest mentioned by the court is clearly a reference to language in *City of Philadelphia v. New Jersey*, which suggested that a state could, consistent with the Commerce Clause, slow the flow of waste to a landfill provided it slowed the flow of in-state as well as out-of-state waste. *See supra* text accompanying note 129.

181. *Id.* at 1381.

182. *Id.* The cap did not create a discriminatory burden on present levels of waste disposal because the cap was to be determined by current levels of waste.

183. 1990 Ala. Acts 326, § 9. The Act provided that the governor could allow the cap to be exceeded if it was "necessary to protect human health or the environment in the state, or to allow the State to comply with its obligations to assure disposal capacity pursuant to applicable state or federal law . . . ." *Id.*

the court concluded that the cap did not violate the Commerce Clause.[184]

2. The Base Fee

The court also applied the *Pike* balancing test to the base fee and concluded that Chemical Waste Management's challenge of the base fee was without merit.[185] According to the court, Alabama "clearly" had a legitimate state interest in levying fees on waste disposed of within its borders because such fees are necessary to address the "serious" financial and environmental risks that landfilled hazardous wastes pose.[186] In addition, any deterrent effect the disposal fee had on hazardous waste in Alabama served a legitimate state interest because EPA's waste reduction program specifically authorizes disposal fees as one way in which states may promote waste reduction.[187] Addressing the burden on the interstate commerce side of the *Pike* balancing test, the court merely stated that any deterrent effect the base fee had on waste disposal at Emelle would be a benefit rather than a burden.[188]

3. The Additional Fee on Out-of-State Waste

The trial court determined that it was bound by the U.S. Supreme Court's decision in *City of Philadelphia v. New Jersey* and concluded that the additional fee discriminated against interstate commerce in violation of the Commerce Clause.[189] The Alabama Supreme Court reversed the trial court, holding that the additional fee was constitutional even though it discriminated "on its face" against interstate commerce.[190]

The Alabama Supreme Court began its analysis by distinguishing *City of Philadelphia v. New Jersey*. The court placed great weight on the fact that *City of Philadelphia* involved solid

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184. *Hunt*, 584 So. 2d at 1380.
185. *Id.* at 1378.
186. *Id.* at 1376.
187. *Id.* at 1377 n.3.
188. *Id.* at 1377.
189. *Id.* at 1387.
190. *Id.* at 1390.

waste that was only of "questionable environmental concern," whereas the instant case involved hazardous waste that created "legitimate" environmental concerns.[191] The court reasoned that *City of Philadelphia* does not stand for the proposition that a state may not limit importation of wastes to protect the health of its citizens and its environment, but instead stands for the proposition that a state may not do so for "simple economic protectionism."[192] Thus, the court noted that the decision in *City of Philadelphia* acknowledged that facially discriminatory measures can sometimes survive Commerce Clause scrutiny.[193] Having distinguished *City of Philadelphia* factually, the court turned its analysis to the additional fee provision.

The court tested the additional fee provision against the rule articulated by the U.S. Supreme Court in *New Energy Co. v. Limbach*.[194] Under the *New Energy* test, a facially discriminatory statute can survive Commerce Clause scrutiny if "it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[195] The Alabama Court stated that the U.S. Supreme Court has made clear that even under "strict scrutiny" Commerce Clause analysis, "environmental measures are entitled to greater deference than ordinary legislative acts."[196]

The court listed four legitimate local purposes that could not be served adequately by the additional fee.[197] The four purposes

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191. *Id.* at 1389. The court's characterization of dangers posed by wastes disposed of at Emelle was quite dramatic. The court said that "[t]here is no dispute that the wastes dumped at Emelle include known carcinogens and materials that are extremely *hazardous* and can cause birth defects, genetic damage, blindness, crippling, and death." *Id.*

192. *Id.* at 1387.

193. *Id.* at 1389.

194. *Id.* (citing New Energy Co. v. Limbach, 486 U.S. 269 (1988)).

195. *Hunt*, 584 So. 2d at 1386 (quoting *New Energy Co.*, 486 U.S. at 278). The Alabama Supreme Court, like other courts and commentators, referred to the *New Energy* test as "strict scrutiny . . . Commerce Clause analysis." *Hunt*, 584 So. 2d at 1389. The *New Energy* test is an adaptation of the *Pike* balancing test. The test is different from the *Pike* test in that the *New Energy* test applies in cases involving facially discriminatory statutes, and the *Pike* test applies when the challenged statute regulates evenhandedly.

196. *Hunt*, 584 So. 2d at 1388 (citing Maine v. Taylor, 477 U.S. 131, 141 n.18 (1986)).

197. *Id.* at 1389. The four purposes articulated by the court were:

> (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens

are more properly distilled to one: spreading the costs and risks associated with hazardous waste disposal more equitably between the citizens of Alabama and those who send their waste into Alabama for disposal. Alabama was "merely asking the states that are using Alabama as a dumping ground for their hazardous wastes to bear some of the costs for the increased risk they bring to the environment and the health and safety of the people of Alabama."[198] The imported wastes stay in Alabama permanently, imposing risks and costs on the citizens of Alabama "in perpetuity."[199] Thus, the court concluded that requiring out-of-state waste generators to pay more than in-state generators is a legitimate local purpose because it spreads the costs of hazardous waste disposal more equitably among out-of-state waste generators, in-state waste generators, and the citizens of Alabama.[200]

Moreover, the court concluded that Alabama did not have any reasonable nondiscriminatory alternatives to imposing the additional fee.[201] The court reasoned that taxing out-of-state generators at the same rate as in-state generators was not a reasonable nondiscriminatory alternative because under such a rate structure, Alabama, including its waste generators, would bear a disproportionate share of the burdens.[202] Since in-state generators pay Alabama taxes and conduct their business within Alabama's borders, their burden extends beyond fees specifically levied on the disposal of waste, and includes the general burden borne by all who live and do business within Alabama's borders. As such, this burden is greater than that borne by out-of-state generators who are only burdened by the disposal fees. Charging higher fees to out-of-state waste thus equalized the burden in a way that a uniform fee structure could not. Since the additional fee served legitimate local purposes that could not be served by

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that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.

Id.

198. *Id.* at 1388.

199. *Id.* at 1389.

200. *Id.*

201. *Id.*

202. *Id.*

reasonable nondiscriminatory alternatives, the court ruled that the additional fee did not violate the Commerce Clause.[203]

Chemical Waste Management filed a petition for certiorari with the U.S. Supreme Court on September 20, 1991, seeking review of its Commerce Clause challenges of the cap, the base fee, and the additional fee.[204] On November 12, 1991, the Supreme Court invited the U.S. Solicitor General to submit a brief expressing the views of the United States.[205] On January 27, 1992, the Supreme Court granted Chemical Waste Management's petition for certiorari, but limited the writ to the validity of the $72.00 per ton additional fee on out-of-state waste.[206]

In an eight-to-one decision, the U.S. Supreme Court reversed the Alabama Supreme Court's judgment on the additional fee, holding that the additional fee burdened interstate commerce in violation of the Commerce Clause.[207] The Court rejected the Alabama Court's attempt to distinguish *City of Philadelphia v. New Jersey*[208] factually, stating that a "narrow focus on the intended consequence of the additional fee does not conform to our precedents."[209] The Court concluded that the additional fee could not stand because the State of Alabama had failed to meet its burden of demonstrating that the discrimination was "justified by a valid factor unrelated to economic protectionism."[210] In sum, the Court struck down the fee because the out-of-state waste posed no more of a threat than did the in-state waste.

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203. *Id.* at 1390.

204. Hunt v. Chemical Waste Mgmt., Inc., 112 S. Ct. 964 (1992).

205. Chemical Waste Mgmt., Inc. v. Hunt, 112 S. Ct. 413 (1991).

206. Chemical Waste Mgmt., Inc. v. Hunt, 112 S. Ct. 964 (1992). In granting certiorari, the Court granted the Hazardous Waste Treatment Council leave to file a brief as amicus curiae. *Id.*

207. Chemical Waste Mgmt., Inc. v. Hunt, 112 S. Ct. 2009 (1992). Chief Justice Rehnquist dissented for the same reasons that he dissented in City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). *Hunt*, 112 S. Ct. at 2017 (Rehnquist, C.J., dissenting).

208. *City of Philadelphia*, 437 U.S. 617.

209. *Hunt*, 112 S. Ct. at 2015 n.6.

210. *Id.* at 2015 (quoting Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)).

D. The Battle in South Carolina

There are three commercial hazardous waste treatment facilities located in South Carolina; one is primarily a secure landfill, the other two are primarily waste incinerators.[211] All three facilities have processed out-of-state wastes from the time they began operations.[212] However, beginning in 1988, South Carolina enacted a series of laws and regulations designed to slow the flow of imported wastes to these South Carolina facilities.

The first provision, Department of Health and Environmental Control Regulation 61-99, attempted to restrict the issuance of permits to new in-state hazardous waste facilities. Permits could be obtained only if the applicants could demonstrate a need for the facility based solely on South Carolina generated hazardous waste.[213]

On January 19, 1989, South Carolina Governor Carroll Campbell issued Executive Order Number 89-03,[214] a measure quite similar to Alabama's Holley Bill.[215] The Order prohibited commercial hazardous waste facilities in South Carolina from accepting out-of-state wastes from any state that by statute, regulation, or administrative decision prohibited the disposal of that waste within its own borders.[216] The Order, like the Holley

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211. Hazardous Waste Treatment Council v. South Carolina, 766 F. Supp. 431, 433 (D.S.C. 1991), *aff'd in part, remanded in part*, 945 F.2d 781 (4th Cir. 1991) [hereinafter *HWTC*]. The largest facility, the landfill, is located in Pinewood, and the incinerators are located in Roebuck and Rock Hill. *Id.*

212. *Id.* As is the case with the landfill at Emelle, Alabama, the majority of wastes disposed of at the Pinewood landfill are imported from other states. *Ban on Imports of Other States' Waste Goes into Effect Under Executive Order*, 19 Env't Rep. (BNA) 2378, 2379 (Mar. 10, 1989). In 1987 for instance, 135,000 tons of hazardous waste were sent for disposal to the hazardous waste landfill at Pinewood. *Id.* Approximately 95,000 tons of that waste were shipped from out of state, nearly 45,000 tons of it from North Carolina. *Id.* Indeed, North Carolina sent 56% of the waste it exported to the Pinewood facility. *Legislature Passes Waste Management Act: South Carolina to Review Law Before Reconsidering Ban*, 20 Env't Rep. (BNA) 207, 208 (June 2, 1989).

213. S.C. Reg. 61-99.

214. *HWTC*, 766 F. Supp. at 436 (citing Exec. Order No. 89-03). Although the various acts do not specifically mention North Carolina by name, South Carolina's actions were in large part directed at North Carolina. *Governors Fight It Out over Waste*, 21 Env't Rep. (BNA) 2141 (Apr. 5, 1991).

215. *See supra* note 140 and accompanying text.

216. Exec. Order No. 89-03, at 4.

Bill, resulted in a "blacklisting" of states that were prohibited from sending waste to any South Carolina facility.[217] In June, 1989, the South Carolina Legislature passed Act 196, a modified version of the Order.[218] In addition to the blacklist, Act 196 mandated that South Carolina treatment facilities give preference to in-state generated wastes.[219] South Carolina followed the passage of Act 196 with another Executive Order, later enacted legislatively as Act 590. This Act further limited the import of hazardous waste to South Carolina's facilities. It also placed a cap on the amount of waste that any hazardous waste facility could accept annually, and set limits on the amount of that waste that could be imported from other states.[220]

On June 28, 1990, the Hazardous Waste Treatment Council ("HWTC") filed suit against South Carolina, alleging, *inter alia*, that Regulation 61-99 and Acts 196 and 590 violated the Commerce Clause of the U.S. Constitution.[221] On January 11, 1991, the U.S. District Court for the District of South Carolina granted a preliminary injunction, enjoining enforcement of the challenged laws pending trial on the merits.[222]

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217. *Id.*

218. 1989 S.C. Acts 196, § 9 (codified at S.C. CODE ANN. § 44-56-130(4)-(6) (Supp. 1992)). Act 196 was even more similar to the Holley Bill, for it added a provision that allowed states that had entered into an interstate waste disposal agreement to ship their waste to South Carolina. The relevant language from Act 196 states:

> It is unlawful for any person who owns or operates a waste treatment facility within this State to accept any hazardous waste generated in any jurisdiction which prohibits by law the treatment of that hazardous waste within that jurisdiction or which has not entered into an interstate or regional agreement for the safe treatment of hazardous waste . . . .

S.C. CODE ANN. § 44-56-130(4) (Supp. 1992).

219. S.C. CODE ANN. § 44-56-130(4)-(6) (Supp. 1992).

220. 1990 S.C. Acts 590, § 1 (codified at S.C. CODE ANN. § 44-56-60 (Supp. 1992)). Act 590 placed the cap at 120,000 tons for the one-year period beginning July 1, 1990. Beginning July 1, 1991, the annual cap was reduced to 110,000 tons. S.C. CODE ANN. § 44-56-60 (Supp. 1992). Executive Order 89-25 had reserved 54,000 tons per year for South Carolina generated waste. Exec. Order No. 89-25, at 3. As a result, Act 590 effectively reduced the amount of out-of-state waste to no more than 66,000 tons for the one-year period beginning July 1, 1990, and 56,000 tons for all years thereafter. These were sharp restrictions when one considers that in 1987 North Carolina alone sent nearly 50,000 tons to the Pinewood facility. The South Carolina cap, unlike the Alabama cap, showed a clear preference for in-state generated waste.

221. *HWTC*, 766 F. Supp. at 431. Hazardous Waste Treatment Council, a national organization of companies in the hazardous waste treatment business, filed suit on behalf of itself and of its members seeking preliminary and permanent injunctive relief. *Id.*

222. *Id.* at 442.

In its opinion, the district court essentially limited its discussion of the Commerce Clause issues raised by the case to a single statement: the Supreme Court's decision in *City of Philadelphia v. New Jersey* was "[o]f binding precedential value in this case."[223] The court quoted the rule from *City of Philadelphia* that "whatever [a state's] ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin to treat them differently."[224] The court concluded that because South Carolina had "erected an unlawful economic barrier at its border,"[225] it was likely that HWTC would succeed on the merits of its Commerce Clause challenge.[226]

South Carolina appealed the granting of the preliminary injunction to the U.S. Court of Appeals for the Fourth Circuit. The court of appeals affirmed the decision in part and remanded the decision in part.[227] It affirmed the district court's granting of HWTC's request for a preliminary injunction, agreeing that HWTC's challenge raised a grave and serious Commerce Clause issue.[228] However, the court remanded the case to allow the district court to modify its order making clear that it did not enjoin any parts of the laws not implicated by HWTC's Commerce Clause challenge.[229] The court also remanded to allow the district court to "balance the hardships" of the parties with regard to HWTC's challenge[230] of Regulation 61-99, and to make clear that the order did not decide the case on the merits.

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223. *Id.* at 439.

224. *Id.* (citing City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); *NSWMA II*, 910 F.2d 713 (11th Cir. 1990)).

225. *Id.* at 442.

226. *Id.*

227. Hazardous Waste Treatment Council v. South Carolina, 945 F.2d. 781 (4th Cir. 1991) [hereinafter *HWTC II*].

228. *Id.* at 782.

229. *Id.*

230. *Id.* The court's concern was not whether HWTC was likely to succeed on the merits in its challenge of Regulation 61-99, for the court opined that HWTC did have a "substantial argument that Regulation 61-99 is unconstitutional." *Id.* at 788. Rather, the court was concerned that the district court had not done a thorough balancing of the hardships that would result to the parties should Regulation 61-99 be preliminarily enjoined. *Id.*

In affirming, the court of appeals stated the rule of decision for the case: "If the challenged statute 'clearly discriminate[s] against interstate commerce,' the court must strike it down, 'unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.'"[231] Applying this rule, the court stated that South Carolina's statutes and regulations appeared "facially to discriminate against out-of-state hazardous waste," giving preference to in-state waste.[232] This indicated that South Carolina was attempting to isolate itself from "'a problem common to many by erecting a barrier against the movement of interstate trade,'" a course of action forbidden by the Commerce Clause.[233] The court acknowledged that Act 196 prevented citizens in certain states from doing business with South Carolina's private waste facilities simply because South Carolina believed that those states had not met their capacity assurance obligations under SARA § 104(c)(9).[234] Although South Carolina's desire to have other states comply with the capacity assurance requirements was "laudable," South Carolina could not accomplish that purpose by infringing upon the constitutional right of citizens of other states to engage in interstate commerce.[235] The court concluded by stating that "in a national economy filled with benefits and burdens, South Carolina may not be permitted to stop the flow of hazardous waste at its time of treatment and disposal at the borders."[236]

Although Alabama and South Carolina have both lost the battles in the courts, they have not given up the fight. To the contrary, they have stepped up the fight. Rather than attempt to enact state legislation that would not violate the Commerce Clause, both Alabama and South Carolina have turned to Congress, seeking authorization to enact the types of legislation struck down by the courts. There is no question that Congress

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231. *HWTC II*, 945 F.2d at 790 (citing New Energy Co. v. Limbach, 486 U.S. 269 (1988)).

232. *Id.* at 790.

233. *Id.* at 791 (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978)). The court went on to note that Act. No. 196 bore a "marked resemblance" to the Holley Bill, and noted that the Holley Bill had recently been struck down by the Eleventh Circuit Court of Appeals. *Id.*

234. *Id.*

235. *Id.* at 792.

236. *Id.*

can authorize states to engage in actions that would otherwise violate the Commerce Clause, but giving states authority to control hazardous waste imports is not the best way to end the hazardous waste wars. Accordingly, this note evaluates Alabama's and South Carolina's attempts to gain congressional authorization for control over hazardous waste imports, then concludes by offering an alternative solution to the hazardous waste wars.

IV. THE BATTLE SHIFTS TO THE U.S. CONGRESS

During the 102d Congress, members of Congress from Alabama and South Carolina introduced a series of bills designed to give states the authority to restrict the importation of and to levy fees on out-of-state hazardous waste. Although several bills were introduced, the bills varied little in either purpose or means of accomplishing that purpose. Each of these bills died in committee with the close of the 102d Congress, but it is likely that these same or similar bills will be introduced during the 103d Congress. For that reason, this section discusses two of the bills introduced in the Senate, one by Senator Richard Shelby of Alabama, the other by Senator Ernest Hollings of South Carolina.

It is well settled that Congress can authorize states to regulate interstate commerce in a manner that would otherwise violate the Commerce Clause. The Supreme Court first addressed the issue in 1891 in *In re Rahrer*.[237] In *Rahrer*, the Supreme Court upheld a state prohibition law reasoning that Congress, through the Wilson Act, had authorized the state's action.[238] Fifty years later, in *Prudential Insurance Co. v. Benjamin*, the Court reaffirmed the doctrine of *Rahrer*, upholding a South Carolina tax on out-of-state insurance companies.[239] The Court held that the discriminatory South Carolina tax did not violate the Commerce Clause because Congress had specifically authorized such discriminatory taxes in the McCarran-Ferguson Act.[240] Over the last fifty years, the Supreme Court has consis-

237. *In re* Rahrer, 140 U.S. 545 (1891).

238. *Id.* at 546.

239. Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946).

240. *Id.* at 427.

tently reaffirmed the power of Congress to permit states to engage in actions that would otherwise violate the Commerce Clause.[241]

A. Senate Bill 592

On March 7, 1991, Senator Shelby of Alabama introduced S. 592,[242] which in his words "would greatly enhance the State's ability to address substantively and responsibly its hazardous and solid waste problem."[243] The root problem, according to Senator Shelby, is that states do not have control over the importation of out-of-state waste. Given the scarcity of commercial hazardous waste treatment and disposal facilities, those states that do have commercial facilities have seen those facilities handle increasing amounts of imported waste.[244] Although SARA's capacity assurance requirements were enacted to address such problems,[245] EPA's failure to sanction states that are not complying with the capacity assurance requirements has made the problem worse.[246] Senator Shelby claimed that S. 592 would remedy the problem by forcing each state to "take responsibility for the solid and hazardous waste generated within [its] borders," and by allowing those states which had fulfilled their capacity assurance requirement to limit the importation of out-of-state waste.[247]

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241. *See, e.g.*, South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984).

242. S. 592, 102d Cong., 1st Sess. (1991). Senators Hollings and Thurmond of South Carolina co-sponsored S. 592. 137 CONG. REC. S2,935 (daily ed. Mar. 7, 1991). On January 23, 1991, Representatives Erdreich and Harris of Alabama introduced H.R. 607, which is exactly like S. 592 except that it does not authorize states to impose differential fees on out-of-state wastes. H.R. 607, 102d Cong., 1st Sess. (1991). Representative Erdreich's extended remarks accompanying H.R. 607's introduction noted that the bill was necessary so that states like Alabama would not have to "allow their backyard to become the dumping ground for the Nation's hazardous waste." 137 CONG. REC. E279 (daily ed. Jan. 23, 1991). On January 30, 1991, Representatives Erdreich and Harris of Alabama and Representative Derrick of South Carolina introduced H.R. 724, which is exactly like S. 592. H.R. 724, 102d Cong., 1st Sess. (1991). On February 5, 1991, Representative Owens of Utah introduced H.R. 816, which confers the same authority upon states that S. 592 confers, but unlike S. 592 confers this authority upon all states, not just those states that have an approved hazardous waste capacity assurance program. H.R. 724, 102d Cong., 1st Sess. (1991).

243. 137 CONG. REC. S2,935 (daily ed. Mar. 7, 1991) (statement of Sen. Shelby).

244. *Id.*

245. *See supra* notes 99-105 and accompanying text.

246. 137 CONG. REC. S2,935 (daily ed. Mar. 7, 1991) (statement of Sen. Shelby).

247. *Id.* at S2,936.

Senate Bill 592 would amend RCRA by adding a new section, providing that any state whose capacity assurance plan has been approved may restrict the amount of out-of-state waste that may be imported for treatment, storage, or disposal.[248] The bill provides qualified states with three tools for restricting the flow of out-of-state waste. First, qualified states may ban the importation of out-of-state hazardous waste from any or all other states.[249] Second, qualified states may prohibit the importation of particular types of waste from all other states.[250] Third, qualified states may levy hazardous waste disposal fees that "differentiate rates or other aspects of payment on the basis of waste origin."[251]

Such a law would give the states even broader authority to restrict the importation of out-of-state hazardous waste than either Alabama or South Carolina originally sought. Although S. 592 would give the states essentially the same authority to levy disposal fees as Alabama's Act 90-326, it would place no meaningful restrictions on the states' power to ban the importation of out-of-state waste. The Holley Bill permitted Alabama to ban wastes only from those states that: (1) had not entered into an interstate agreement with Alabama; or (2) had enacted statutory barriers to in-state waste disposal. South Carolina's power to ban was slightly more restricted than Alabama's. It only permitted South Carolina to blacklist those states that had not entered into a hazardous waste disposal regional agreement with any other state or group of states, and those states that had enacted statutory barriers to in-state disposal. In contrast, S. 592 would allow states to ban the importation of waste from any state, including those states that are carrying their fair share of the hazardous waste disposal burden and that have entered into a legitimate interstate hazardous waste disposal agreement with other states. Such open-ended authority to ban out-of-state waste would merely tempt major waste importing states to ban imported waste as a quick-fix solution to the problem of excessive imports.

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248. S. 592, § 2, 102d Cong., 1st Sess. (1991).

249. *Id.* § 2(a)(1).

250. *Id.* § 2(a)(2).

251. *Id.* § 2(a)(3).

B. Senate Bill 1086

On May 16, 1991, Senator Hollings of South Carolina introduced S. 1086,[252] a bill described as "different from, yet entirely compatible with, [S. 592]."[253] Senator Hollings stated that upon "further reflection" he was convinced that S. 1086 was necessary because EPA had failed to enforce SARA's capacity assurance provisions and because the courts had refused to "allow States to do the enforcement job that EPA has abdicated."[254]

Senate Bill 1086 is actually an expanded version of S. 592. Senate Bill 1086 contains three substantive sections, including one that grants states the same authority to ban or place fees on out-of-state waste that S. 592 grants.[255] However, Senate Bill 1086 expands on S. 592 by amending both SARA § 104(c)(9) and RCRA § 3005. Senate Bill 1086 amends SARA § 104(c)(9) by expanding the sanctions against states that fail to comply with SARA's capacity assurance obligations.[256] Senate Bill 1086 gives the President the option to withhold from non-complying states either the full amount of Superfund monies due for cleanups in that state, as SARA presently mandates, or to withhold twenty-five percent of such monies due.[257] The bill further directs that if a non-complying state is authorized under RCRA § 3006 to run its own hazardous waste program, EPA "shall" withdraw that authorization until the state complies with SARA's capacity assurance obligations.[258]

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252. S. 1086, 102d Cong., 1st Sess. (1991). A companion bill to S. 1086 was introduced at about the same time by Representative Spratt of South Carolina. H.R. 2216, 102d Cong., 1st Sess. (1991).

253. 137 CONG. REC. S6,035 (daily ed. May 16, 1991).

254. *Id.* Senator Hollings' introductory remarks to S. 1086 mentioned the district court decision in *Hazardous Waste Treatment Council v. South Carolina*. 137 CONG. REC. S6,035 (daily ed. May 16, 1991). Senator Hollings actually misrepresented the nature of the district court's decision, claiming that the court had held unconstitutional South Carolina's attempts to restrict out-of-state waste. *Id.* In fact, the district court only granted plaintiffs a preliminary injunction, enjoining the measures pending trial on the merits. *HWTC*, 766 F. Supp. 431, 442 (D.S.C. 1991).

255. S. 592, § 3, 102d Cong., 1st Sess. (1991).

256. S. 1086, § 1, 102d Cong., 1st Sess. (1991).

257. *Id.*

258. *Id.*

Senate Bill 1086 amends RCRA § 3005 by allowing states to deny permits for hazardous waste treatment, storage, and disposal facilities if such facilities provide disposal or treatment capacity that is "not needed, according to the State's [approved] capacity assurance plan."[259] This provision is very similar to South Carolina Regulation 61-99.[260] Both allow states to reduce the flow of out-of-state waste by limiting commercial hazardous waste capacity in the state to the point that the state has no excess capacity for out-of-state waste.

C. Analysis of State Control Legislation

Proponents of state control over hazardous waste imports claim that such control is necessary because EPA has failed to sanction non-complying states. An official from the Alabama Department of Environmental Management told a House subcommittee that "[a]s Alabama progressed through the planning process . . . it became clear that in many States the process was a sham, and that many States would continue to rely primarily on out-of-State facilities."[261] Proponents contend that state control actually furthers the goals of the capacity assurance process.

First, state control would "require States to take responsibility for the hazardous and solid waste generated within their borders."[262] Those states that currently rely heavily on out-of-state facilities would be forced to create in-state capacity. In the long run, creation of additional capacity would assure that the nation has adequate disposal resources that are more equitably distributed across the states.

Second, state control would further the goal of equity in the short run. It would permit states that had complied with the capacity assurance process to "refuse to be taken advantage of by States that refuse to do their part."[263] States with adequate

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259. *Id.* § 2(j).

260. *See supra* note 213.

261. *Interstate Transportation of Solid Wastes: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce*, 102d Cong., 1st Sess. 102 (1991) [hereinafter *Interstate Transport Hearings*] (statement of Sue Robertson).

262. 137 CONG. REC. S2,937 (daily ed. Mar. 7, 1991) (statement of Sen. Hollings).

263. *Id.*

in-state capacity could reserve their capacity for future in-state wastes, thereby preventing other states from depleting that capacity. In addition, increased disposal fees on out-of-state waste would compensate the waste importing states for "additional expenses associated with regulating a facility that accepts out-of-state waste, as well as additional risks, perceived or otherwise, incurred by the citizens of the host state."[264]

Representatives of the hazardous waste treatment and disposal industry[265] agree that the present capacity assurance process is not working, but take issue with the proponents of state control. These industry representatives[266] contend that proponents of state control fail to comprehend how interdependent the states are with regard to hazardous waste disposal.[267] For example, in 1987 every state in the United States, including the major waste importing states exported some hazardous waste.[268] Overall, thirty-five of the fifty states were net exporters of waste.[269] On average, states exported waste for twelve types of

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264. *Interstate Transport Hearings*, *supra* note 261, at 107.

265. This terminology should not be taken to suggest that there is complete unanimity among the "hazardous waste industry." The term is used only for convenience. However, two major industry groups, the Hazardous Waste Treatment Council and the National Solid Wastes Management Association, have publicly taken the positions attributed to the industry.

266. One national environmental organization, the Natural Resources Defense Council ("NRDC") expressed general agreement with the hazardous waste industry over state control measures. *Congress Should Not Allow States to Ban Interstate Transport of Waste, Industry Says*, 22 Env't Rep. (BNA) 107 (May 10, 1991) (NRDC scientist states that the right to ban out-of-state waste would "take away treatment technologies available to states"). In contrast, another national environmental organization, Friends of the Earth, favors some form of state control. *Interstate Transport Hearings, supra* note 261, at 227 (statement of Velma M. Smith, Director of the Groundwater Project, Friends of the Earth). Ms. Smith told the sub-committee:

> [I]f you decide that States should assume responsibility for assuring capacity, then you must grant the States the authority to control flow of waste, to ration capacity in accord with reasonable plans, and to clearly say no to facility proposals that are at odds with State plans and projected needs.

Id. at 228.

267. *See, e.g., Waste Shipment Bans Seen Danger to Chemicals; Hazardous Waste Transportation Policy*, CHEMICAL MARKETING REP., May 13, 1991, at 3. The hazardous waste industry's use of the term "market" to describe the transportation and disposal of hazardous waste follows from their conviction that hazardous waste is best understood as a commodity of commerce rather than an evil to be regulated.

268. NATIONAL SOLID WASTES MANAGEMENT ASS'N, INTERCHANGE OF HAZARDOUS WASTE MANAGEMENT AMONG STATES 17 (1991).

269. *Id.* at 8.

treatment in nineteen other states, an indication of both the extent of state interdependence and of the complexity of hazardous waste treatment.[270] Nearly eighty percent of all waste generators utilize commercial hazardous waste facilities for some of their waste, and small quantity generators are particularly dependent on commercial hazardous waste facilities.[271]

An example drawn from these statistics illustrates how waste import bans could wreak havoc on the national hazardous waste market. If Alabama were to place severe restrictions on out-of-state access to the Emelle facility, out-of-state generators who rely on that facility would experience difficulty, at least in the short run, finding alternative landfill disposal space. The greater the difficulty a generator experiences in disposing of its waste, the more likely the generator will resort to a less sound or even illegal disposal practice. To the extent that this happens, state control of hazardous waste imports would frustrate RCRA's and SARA's overarching goal of assuring that all hazardous waste generated in the United States is treated and disposed of in an environmentally sound manner.[272]

Opponents of state control also argue that state controls may frustrate or undermine important hazardous waste policies and goals. Opponents voice concern that waste import barriers would undermine RCRA's directive to treat waste in the most environmentally sound manner because generators might be forced to send their wastes to in-state facilities regardless of whether those facilities provided the best treatment.[273] Opponents also fear that the erection of waste import barriers may lead to unneeded duplication of specialized facilities in the various states.[274] Moreover, opponents fear that state controls would be detrimental

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270. *Id.*

271. *Id.* at 17. Small quantity generators rely on commercial hazardous waste facilities because it is less expensive to ship waste to off-site commercial facilities than it is to invest in an on-site treatment facility that would handle only small amounts of waste. *Id.* at 11.

272. *See* S. REP. NO. 11, 99th Cong., 1st Sess. 23 (1985).

273. *Interstate Transport Hearings*, *supra* note 261, at 200 (statement of Richard Fortuna, Executive Director, Hazardous Waste Treatment Council). This concern is heightened by the fact that many waste streams require multiple treatments at specialized facilities, often located in different states. *Id.* at 189.

274. *Id.* at 4-5.

to efforts to promote hazardous waste recycling because those markets are extremely susceptible to economies of scale problems.[275] In sum, critics of state control argue that such controls stand as an impediment to assuring that all waste is treated in the most environmentally sound manner.

Although the industry's argument against state control emphasizes the complex technical nature of hazardous waste treatment and the health and environmental consequences of improper treatment, their argument is simply a specific manifestation of the general concerns that led to the inclusion of the Commerce Clause in the Constitution. The Commerce Clause was included in the Constitution because the framers believed that national regulation was necessary to keep states from waging "destructive trade wars" against one another.[276] The framers' concerns have as much force today as when the Constitution was drafted. Allowing states to restrict the interstate movement of hazardous waste would lead to a destructive war, a war with environmental as well as economic consequences.

If states are allowed to restrict hazardous waste imports, their actions may well frustrate national hazardous waste management goals. With respect to the capacity assurance process, Congress intended that each state should take responsibility for waste generated within its borders. Congress' overriding goal, however, was that all hazardous waste should be treated and disposed of in a safe manner, even if doing so required interstate disposal of hazardous waste. Congress stated that "[u]se of binding [interstate] agreements . . . is only one example of how a State may provide the requisite assurances, . . . contracts with private facilities may also suffice."[277] Allowing waste exporting states to fulfill their obligations through private contracts with out-of-state facilities strips waste importing states

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275. *Id.* at 190. In the context of hazardous waste disposal, economies of scale refer to the fact that in general, as the volume of waste treated increases, the total cost per unit of treating that waste goes down. In this note, problems of economies of scale refer to the situation in which a facility handles less waste than it needs to make the facility financially viable.

276. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-3, at 404 (2d. ed. 1988) (under the Articles of Confederation, states had resorted to such measures as discriminatory tariffs and restricting access of out-of-state goods to in-state markets).

277. S. REP. NO. 11, 99th Cong., 1st Sess. 22 (1985).

of almost all control over how much waste is sent to facilities within their borders. In doing so, Congress made clear that assuring for the proper disposal of all waste must take precedence over assuring equitable distribution of hazardous waste treatment and disposal throughout the states.

Supporters of state control are correct that the capacity assurance process has not worked. They are also correct that equitable distribution of the risks from hazardous waste treatment facilities is an important policy objective. However, those opposed to state control are equally correct that state controls over hazardous waste imports might obstruct fulfilling our broader national goal of assuring safe disposal of all hazardous waste. The hazardous waste wars erupted because under the current law these opposing interests are not being reconciled. This note advocates that Congress reconcile the states' interest in equity with the nation's larger interests by amending SARA's capacity assurance provision.

V. PROPOSAL: AMEND SARA CAPACITY ASSURANCE SECTION

Congress should amend CERCLA § 104(c)(9) to read as follows:

> (1) Effective two years after the passage of this act each State shall be required to enter into a contract or cooperative agreement with the President, and renew such agreement every three years, providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which:
>
> (a) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the twenty-year period following the date of such contract or cooperative agreement, and
>
> (b) are within the State, or if such facilities are located in another State, the capacity at such facilities has been assured through an interstate or regional agreement with the State in which such facility is located,
>
> (c) are acceptable to the President, and

(d) are in compliance with the Solid Waste Disposal Act and Amendments, 42 U.S.C. §§ 6921-6939 (1988).

(2) If the President finds that any State has not entered into a contract or cooperative agreement with the President pursuant to § 1 or is in violation of that agreement, the following sanctions will apply:

(a) The President shall withhold all Superfund monies for cleanup of hazardous waste sites within that State.

(b) If the State does not enter into an agreement within one year of being sanctioned pursuant to § 2(a), then the President shall withdraw that State's authorization, pursuant to 42 U.S.C. § 6926, to run the hazardous waste program within its borders. Such authorization will be withdrawn until the State enters into a valid agreement with the President pursuant to § 1. If the State is not authorized to run its hazardous waste program, then the President shall levy a non-compliance fine against that State in the amount of $1,000,000.

(c) If the State does not enter into an agreement within one year of being sanctioned pursuant to § 2(b) then the President shall levy an annual non-compliance fine against the State in the amount of $1,000,000 until such time that the State enters into a valid agreement with the President pursuant to § 1.

(3) The President shall not enter into an agreement or contract under § 1 with any State for which he finds that:

(a) Any law or aspect of that State's hazardous waste program: (1) more likely than not violates the Commerce Clause of the U.S. Constitution; or (2) otherwise unreasonably restricts, impedes, or operates as a ban on the free movement across State borders of hazardous waste from or to other States for treatment, storage, or disposal at permitted hazardous waste facilities, or

(b) the State has any law or regulation that has no basis in human health or environmental protection and which acts as a prohibition on the treatment, storage, or disposal of hazardous waste in the State, or

> (c) the State does not have in place a plan deemed adequate by the President to facilitate and encourage siting of hazardous waste facilities necessary to meet its obligations under § 1.
>
> (4) No State may refuse to enter into an interstate agreement with another State unless the refusing State can demonstrate that it refused to enter into an agreement because the other State had failed to substantially comply with its obligations under § 1, or that the other State refused to enter into an agreement that would lead to an equitable distribution of hazardous waste capacity among the States party to the agreement.
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> (5) No State may cancel or refuse to renew an interstate agreement with another State unless the canceling State can demonstrate that the other State had failed to comply substantially with its obligations under the current interstate disposal agreement.

This amendment reconciles the states' interest in equity with the nation's interest in assuring that all hazardous waste is properly treated and disposed. Similar to both S. 592 and S. 1086, this proposal requires every state to take responsibility for its own hazardous waste, and imposes heavy sanctions on non-compliant states. It differs from those bills because it gives EPA, rather than the states, the authority to decide whether the states are fulfilling their capacity assurance requirements and the authority to act against those states that are not fulfilling their requirements. Doing so assures that the recalcitrant states rather than the waste generators within their borders are punished, and assures that those waste generators retain access to RCRA permitted facilities.

Section 1(b) amends CERCLA in one fundamental way. This section makes clear that a state cannot meet its capacity assurance requirements by relying on contracts with private facilities in other states unless the state has also entered into interstate agreements with the facilities' host states that include the contracts with the private facilities. This amendment furthers the states' equity concerns because it keeps waste exporting states from taking advantage of states that do have adequate capacity. It also gives states some limited control over waste imports

because it forces waste-exporting states to negotiate with waste-importing states. In the course of coming to an agreement, a waste-importing state could require a waste-exporting state to commit to siting a particular type facility, one needed by generators in both states, as a condition for entering into an agreement. Forcing waste-exporting and waste-importing states to enter into interstate agreements creates a forum for coordinated decision making, one in which the states can decide together what constitutes the most equitable distribution of hazardous waste capacity.

Section 2 clarifies EPA's authority and duty. This section requires EPA to sanction those states that fail to fulfill their capacity assurance obligations. It levies sanctions and mandates a time schedule for increasing the severity of sanctions against states that continue to resist compliance. Those states that initially fail to satisfy their capacity assurance obligations lose access to Superfund cleanup money. This does not reflect a change in the current law. Under RCRA, if a non-compliant state fails to come into compliance during the next twelve months, EPA must withdraw that state's authority to run its own hazardous waste program. Additionally, under § 2 of the proposed amendment, those states not authorized to run their own hazardous waste program would be subject to a fine. After the first year of non-compliance, a state would be fined $1,000,000 a year until it did come into compliance. The graduated sanctions are designed to insure that recalcitrant states have increasingly stronger incentives to come into compliance. States value authorization to run their own hazardous waste program not only because it gives them a large degree of control over what goes on within their borders, but also because it makes them eligible for federal assistance. The fines are set at $1,000,000 because that figure is high enough to get the attention of politicians and citizens, and make clear to them that the state must take its capacity assurance obligations seriously.

Section 3 is designed to keep states from acting in a self-serving way that is contrary to the larger interests of the nation. Sections 3(a) and (b) are basically the "consistency requirements" applicable to states seeking authorization to run

the hazardous waste program in their state.[278] Section 3(a) makes clear that any law which more likely than not violates the Commerce Clause is inconsistent with EPA's national hazardous waste policy. A state which enacts any restrictive provision cannot be in compliance, even if that state has adequate in-state capacity to dispose of all its wastes. This will keep those states with commercial hazardous waste capacity from attempting to isolate themselves from the nation's hazardous waste problems by enacting bans, excessive disposal fees, or fees that discriminate against out-of-state waste. In addition, section 3(a) assures that even if a state is not in compliance, its waste can continue to be properly disposed of at out-of-state facilities. In doing so, this section places a limit on a states' ability to control waste imports to assure that all hazardous wastes, regardless of their state of origin, are treated and disposed of in a safe and effective manner.

Proponents of state control may contend that this proposal will delay achievement of equitable distribution of hazardous waste disposal. Under the proposal, waste imports would not decrease until waste-exporting states sited facilities, thereby reducing their dependence on out-of-state facilities. In contrast, state control would bring quicker relief to the waste-importing states. With state control, the waste importing states could immediately reduce their imports by enacting bans based upon waste content or waste origin. However, the instant relief would come at too high a price to the nation.

State control over waste imports would keep some generators from disposing of their waste in the best possible manner. In extreme instances this would result in unsafe and illegal disposal practices. In addition, state controls could stand in the way of important policy goals, such as encouraging both hazardous waste recycling and the development of innovative technologies. These goals must not be sacrificed in the blind pursuit of equity.

Section 3(b) assures that states cannot enact requirements, such as South Carolina Regulation 61-99,[279] which prohibit siting of facilities unless the facility can be justified solely on the basis of in-state need. This section will allow states to make

278. *See supra* notes 86-91 and accompanying text.

279. *See supra* part III.D.

"regionalized" decisions about needed facilities and insure that those facilities can be sited. It also prevents states from enacting laws that serve no purpose other than making it difficult to site needed facilities. This provision would discourage states from enacting "overly stringent" health and environmental requirements as a pretext for prohibiting the siting of needed facilities.

Section 3(c) requires each state to develop a functional strategy for siting facilities necessary under that state's capacity assurance plan. This would build trust among the states and facilitate negotiations over interstate agreements. States could feel somewhat confident that the states they were negotiating with could fulfill any promises made as part of an interstate agreement. Also, requiring each state to develop a strategic siting plan more directly furthers the goal of assuring adequate national disposal capacity. A study by the National Governor's Association found that siting hazardous waste facilities is easier in those states that have taken steps to facilitate siting.[280] This is particularly important because these findings relate to both commercial and on-site facilities.[281] The easier it is to construct on-site facilities, the less generators must rely on commercial facilities. The study concludes that the states must be allowed flexibility in developing their plans, but it also concludes that such plans are necessary to insure that the country remains able to dispose of all hazardous wastes safely.[282]

Sections 4 and 5 of the proposed amendment insure that the interstate disposal agreements required under § 1 are negotiated on a "level playing field." Section 4 prohibits a state from failing to enter into an interstate agreement with another state unless the refusing state can show good cause. To show good cause, a state must convince EPA that the other state refused to bargain in good faith toward reaching an agreement that was fair to all parties. Thus, a state could not refuse to enter into an equitable agreement simply because it wished to preserve its capacity for future in-state waste. By the same token, that same state could not be forced into entering into an agreement with a recalcitrant state. When disputes do arise between negotiating states, § 4

280. 4 NATIONAL GOVERNOR'S ASS'N, *supra* note 41, at 25.

281. *Id.* at 21.

282. *Id.* at 27.

assures that EPA, rather than one of the states involved, resolves such disputes. Under S. 592 and S. 1086, states upset by the actions of other states could retaliate by blocking waste imports from those states. Unilateral retaliatory actions by states have the potential to polarize the states from one another and exacerbate the nation's problems. In contrast, solutions crafted by EPA in conjunction with the disputing states are likely to minimize animosity between the states, assure equitable distribution of facilities, and further the nation's interest in minimizing the risks of hazardous waste disposal.

Section 5 allows a state to cancel an interstate agreement with another state when the other state has failed to fulfill its obligations pursuant to an interstate agreement. This provision insures that states which promise to site a new facility or otherwise expand capacity within their borders follow through on those promises. States must undertake seriously their commitments, and the states to whom those commitments are made can be confident that they will be met. If the commitments are not met, the agreement can be canceled. In short, § 5 facilitates negotiation between states and assures states that any agreements they enter into will be fulfilled.

In summary, the proposed amendment attempts to end the hazardous waste wars by bringing the parties together to work to eliminate the root causes of the wars. Under the proposed amendment, the key actors are the states. They are given ample room in which to negotiate the best deal for all parties. However, EPA is given sufficient authority to act as an arbiter of disputes and to void any agreement that does not further the interests of the nation as a whole. If this amendment is enacted, equity can be achieved without giving states the authority to control the interstate flow of hazardous waste, adequate national hazardous waste capacity can be secured without placing too heavy a burden on any one state, and all hazardous wastes can be treated in the safest possible manner.

CONCLUSION

The hazardous waste wars will not end overnight. The causes are too complex and the stakes too high. Nevertheless, one thing is clear: Congress must avoid the temptation of the quick-fix

solution of state control. Congress must craft a solution that furthers the states' interest in equity without infringing on the nation's ability to dispose of all its hazardous waste safely.

The genius of the framers lay in their vision of a unified national economy. Today, a similar vision of unity must guide our solutions to environmental problems. Leaders must realize that environmental problems do not recognize state borders. Their impacts are national, even global. To win the hazardous waste wars, Congress must craft a solution that protects both the national economy and the nation's environmental heritage.

William David Bridgers