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Brief for the Appellee: Fifth Annual Pace National Environmental Moot Court Competition

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No. 92-21

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ENVIRONMENTAL DISPOSAL CORP. and
CLEANFILL SERVICES, INC.

Appellants,

v.

STATE OF NEW UNION

Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR THE APPELLEE*

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*This brief has been reprinted in its original form. No revisions have been made by the editorial staff of the Pace Environmental Law Review.

QUESTIONS PRESENTED

1. Whether a state that requires all hazardous waste treatment and disposal facilities within its borders to be located on state owned land can legitimately enact an import ban prohibiting out-of-state hazardous waste from entering the state?

2. Assuming the validity of the import ban, can a state impose an export ban prohibiting the transportation of waste generated within the state to any other states?

3. Where a state imposes an export ban on the assumption that the import ban is valid, does invalidation of the import ban require that the export ban be struck down?

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STATEMENT OF FACTS

The Environmental Disposal Corporation ("EDC") and Chemical Services, Inc. ("CSI") are in the business of treating and disposing hazardous waste. (Record p. 2 "R. 2"). Both EDC and CSI operate facilities in the Union-Hampshire tri-state region.[1] *Id.* EDC and CSI's facilities represent two of the fourteen hazardous waste treatment and disposal facilities located within this region. *Id.* Of these fourteen facilities, ten are located in New Union, two in North Hampshire, and two in South Hampshire. *Id.* Disposal of the hazardous waste generated in the region is principally allocated among these fourteen facilities. *Id.*

EDC operates one of the ten facilities in New Union. *Id.* This facility, located in Springfield, New Union, consists of a hazardous waste incinerator and landfill. *Id.* EDC, as well as other operators of treatment and disposal facilities in New Union, lease the land on which their facilities are sited from the State of New Union. (R. 3). This lease arrangement is mandated by the New Union Resource Conservation and Recovery Act of 1977 ("NURCRA"), which authorizes treatment and disposal facilities only on state-owned land. *Id.*

Pursuant to NURCRA, the state awards a hazardous waste treatment and disposal operator a 99 year lease to the land, on the condition that certain requirements are satisfied. *Id.* First, the operator must agree to remain responsible for necessary expenses associated with the construction and operation of the facility. *Id.* Second, the operator must agree to capitalize a closure fund for the landfill. (R. 3). Finally, the operator must consent to pay the State of New Union ten percent of the facility's annual profits as rent for the land. (R. 3).

EDC's Springfield facility is in full compliance with the requirements and conditions set forth in NURCRA. *Id.* In addition, the operator of the Springfield facility has obtained the appropriate federal and state permits to operate the facility. (R. 2). The State of New Union operates its hazardous waste

1. The tri-state region includes New Union, North Hampshire, and South Hampshire. (R. 2).

regulation program independently of the federal Resource Conservation and Recovery Act ("RCRA"). *Id.* Hence, facilities in New Union must comply with the requirements of both federal RCRA and the state hazardous waste management program.

CSI's facility, located in Maywood, North Hampshire, is a hazardous waste chemical treatment facility and landfill. *Id.* North Hampshire, unlike New Union, has applied for and obtained authorization from the Environmental Protection Agency ("EPA") to implement and enforce its own hazardous waste management program in lieu of the federal RCRA program. (R. 3). Like EDC, CSI has obtained all the appropriate permits necessary to operate a hazardous waste treatment and disposal facility. *Id.*

The treatment processes employed at the CSI facility differ from those used at EDC's facility. (R. 2). CSI's Maywood facility chemically treats all hazardous waste and disposes of the resulting compound in a specially constructed landfill. *Id.* In contrast, EDC's Springfield facility burns hazardous waste at high temperatures in an incinerator and disposes of the residual ash in a specially constructed landfill adjacent to the incinerator. *Id.* Both treatment processes reduce the hazardous nature of the waste prior to disposal in the landfill. *Id.*

The popularity of EDC's Springfield facility has escalated in recent years due to the requirement in EPA's land ban regulations that any waste containing a mixture of DBCP be incinerated using special safeguards. (R. 3). In the State of New Union, these safeguards are present only at EDC's Springfield facility. *Id.* Neither the operators of the facilities in North Hampshire nor the operators of the facilities in South Hampshire have expended the resources necessary to comply with the federal land ban regulations. *Id.*

As such, generators of hazardous waste in North Hampshire and South Hampshire must rely on EDC's Springfield facility for disposal of waste containing DBCP. *Id.* This reliance is exacerbated by the fact that 100% of the waste generated in North Hampshire and South Hampshire contains traces of DBCP, thereby requiring disposal at a facility in compliance with EPA's land ban regulations. *Id.*

Unlike North Hampshire and South Hampshire, the hazardous waste generated in the State of New Union is disposed of at both in-state and out-of-state disposal facilities. *Id.* Fifty percent of New Union's hazardous waste is shipped to North Hampshire and South Hampshire for disposal. *Id.* The remaining waste is allocated as follows: twenty-five percent is disposed of at EDC's Springfield facility and twenty-five percent is allocated among the other nine in-state treatment and disposal facilities. *Id.*

Apart from the shipment of DBCP from North Hampshire and South Hampshire, the hazardous waste shipped in the tri-state region is relatively homogenous. (R. 4). DBCP is unique because it's deleterious effects are instantaneous. (R. 3). The properties of DBCP resemble those of nerve gas. *Id.* Accidental exposure to traces of DBCP, either through inhaling a tiny drop or by touching skin to a contaminated surface, will cause convulsions within seconds, and moments later, will paralyze the entire nervous system as well as cause the victim's lungs to fail, leading to inevitable death. (R. 3). A victim of DBCP exposure can only be saved if an antidote is administered within a few minutes of exposure to the chemical. *Id.*

The horrific effects of DBCP have been felt in both the Springfield, New Union community as well as the neighborhoods surrounding the city. *Id.* In 1990, a truck carrying a two gallon container of pure DBCP from North Hampshire to EDC's Springfield facility for treatment and disposal overturned only two miles outside of the city of Springfield.[2] *Id.* The accident caused the DBCP container to rupture off the side of the road near a farm. *Id.* The vapors wafting from the ruptured cylinder killed 40 cows in a matter of moments. *Id.* The cows' owner, a local farmer, rushed to identify the cause of the commotion. *Id.* Unfortunately, the unsuspecting farmer, like the deceased cows, was exposed to DBCP and immediately thereafter began to convulse. *Id.*

Fortuitously, the truck driver survived the serious truck

2. The pure DBCP came from one of three 3 factories in New Hampshire where pure DBCP is a waste by-product. Two facilities in South Hampshire also produce a pure DBCP waste by-product. (R. 3).

accident, observed what was happening, immediately donned protective clothing and administered the appropriate antidote to the farmer. *Id.* However, had the truck driver not survived the accident or not administered the antidote quickly enough, the farmer, like his cows, would have been the victim of DBCP. *Id.*

The New Union Department of Emergency Response spent approximately $1,400,000 for response costs associated with the 1990 trucking accident. (R. 4). Efforts by the Department to obtain reimbursement from North Hampshire and the private firms involved in the 1990 shipment of DBCP have failed miserably. *Id.* These parties maintain that New Union officials are simply "over-react[ing]" to the accident. (R. 4). New Union has filed actions pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to recover response costs. *Id.*

Shortly after the accident, in response to citizens' concerns, New Union legislators held hearings regarding the hazardous waste dilemma facing the State. *Id.* At one of the hearings, the chair of the Senate's Environmental Protection Committee asked the General Counsel of the New Union Department of Environmental Affairs whether the State legislature could enact bans on the import and export of hazardous waste and whether, if the ban on imports was invalidated by the courts, the export ban would necessarily be struck, making the entire act void. *Id.* The General Counsel affirmed the validity of such actions. *Id.*

As a result of this advice, the New Union Legislature enacted the New Union Hazardous Waste Self Sufficiency Act ("NUHWSSA" or "the Act") in February 1991. *Id.* The specific provisions of the Act are set forth in the Appendix. As evidenced by the language in Section 1 of the Act, the New Union legislature recognized the substantial threat to human health and the environment posed by the DBCP-tainted out-of-state hazardous waste. *Id.* In section 2 of the Act, the legislature affirmed its commitment to comply with section 104(c)(9) of the Superfund Amendments and Reauthorization Act ("SARA"). 42 U.S.C. section 9604(c)(9). *Id.* Neither EDC nor CSI contest Sections 1 or 2 of the Act. (R. 5)

EDC originally filed suit against New Union in May 1991, seeking to enjoin enforcement of section 4, the import ban, of the NUHWSSA. EDC asserts that the import ban violates the Commerce Clause of the United States Constitution. *Id.* However, it maintains that invalidation of the import ban does not require striking the export ban, as provided in section 3 of the NUHWSSA. (R. 5). CSI filed a separate suit in June 1991, alleging the invalidity of the export ban. *Id.*

The cases were consolidated and heard by the District court for the District of New Union. (R. 1). The District Court upheld NUHWSSA in its entirety and thereby denied any injunctive relief. (R. 6). The court specifically found that the NUHWSSA was a balanced act, imposing equal hardship on in-state and out-of-state hazardous waste generators. *Id.* Appellants EDC and CSI appeal the District Court decision. (R. 1).

STATEMENT OF THE ARGUMENT

As the District Court correctly held, the NUHWSSA is valid in its entirety. Appellants CSI and EDC challenge sections 3 and 4 of the Act, respectively, as being impermissible restraints on interstate commerce. (R. 5). However, contrary to Appellants' belief, these sections of the Act are, in fact, immune from scrutiny under the Commerce Clause of the United States Constitution, and therefore must be upheld as valid.

The import ban, which Appellant EDC contests, falls within the well-established market participant exception to the Commerce Clause. The State of New Union qualifies as a market participant because, as the lessor of the land on which the in-state hazardous waste treatment and disposal facilities are sited, the State participates in the market as a seller of landfill services. (R. 3). As a seller, the state exercises the right to select its own trading partners. The import ban is an example of New Union's ability to exercise this fundamental right.

The export ban, challenged by Appellant CSI, is also immune from Commerce Clause attack because Congress, in en-

acting SARA section 104(c)(9), authorized states to interfere with interstate commerce to meet the federally-mandated requirement of assuring adequate long term hazardous waste disposal capacity. Of the alternatives for compliance with section 104(c)(9), New Union selected the option of ensuring adequate long term disposal within the state, as opposed to joining interstate compacts. Based on this decision, the legislature enacted the export ban to effectuate Congressional intent with regard to section 104(c)(9). The export ban, however, was enacted based solely on the premise that the State of New Union, as a market participant, validly enacted the import ban. The export ban was unmistakably authorized by Congress given that the explicit purpose for enacting section 104(c)(9) was to combat the pervasive "not in my backyard" ("NIMBY") syndrome plaguing the nation and to force states to deal with their own hazardous waste problems, as opposed to shipping their problems elsewhere. Thus, New Union's export ban must be upheld as valid because it falls within the scope of activities authorized by Congress.

Even if this court finds that the import and export bans are subject to Commerce Clause scrutiny, the bans must be upheld as valid because they serve compelling, legitimate state interests which cannot be successfully achieved by any nondiscriminatory alternatives. The import ban serves the compelling state interests of protecting the health, safety and welfare of the citizens of New Union and the integrity of the environment from the risks caused by the transportation of uncontrolled volumes of out-of-state hazardous waste, all of which contains the lethal chemical DBCP.

DBCP, unlike other hazardous waste, has properties like nerve gas. (R. 3). Exposure to DBCP can kill a victim within moments if the proper antidote is not applied. *Id.* The effects of DBCP are not a mystery to the citizens of New Union, but a reality. (R. 3). In 1990, a trucking accident which caused the release of DBCP killed 40 cows and almost took the life of the cows' owner. *Id.* The New Union legislature clearly has a legitimate interest to protect the future health and safety of its citizens. Because all waste imported into New Union contains DBCP, the state's compelling interest cannot be achieved by

any less discriminatory alternative. Thus, the import ban must be upheld as valid.

New Union also has a legitimate state interest in the effective management of hazardous wastes generated within its borders. This interest is compelled, in part, by SARA section 104(c)(9), which requires states to develop long term capacity assurance disposal plans. Assuming the validity of the import ban, there were no other nondiscriminatory alternatives by which the state of New Union could achieve its compelling state interest.

If this court deems it necessary to strike down the import ban, the export ban must also be invalidated. The legislative history of the NUHWSSA unmistakably indicates that the export ban was contemplated only to exist in tandem with the import ban. Failure to strike the export ban after invalidating the import ban would thwart the dominant purpose of the statute.

ARGUMENT

I. THE IMPORT AND EXPORT BANS SET FORTH IN THE NUHWSSA ARE IMMUNE FROM COMMERCE CLAUSE SCRUTINY.

The District Court correctly held that the NUHWSSA is valid in its entirety. No other conclusion is warranted because the challenged sections of the Act are immune from scrutiny under the Commerce Clause of the United States Constitution ("Commerce Clause"). U.S. Const. art. I, § 8, cl. 3. The import ban, which Appellant EDC challenges, falls squarely within the market participant exception to the Commerce Clause and, as such, is not subject to the restraints of the Commerce Clause. The export ban, contested by Appellant CSI, is also invulnerable to Commerce Clause attack because Congress, in enacting section 104(c)(9) of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), authorized states to restrict the interstate flow of hazardous waste in order to meet the federally-mandated requirement that states demonstrate adequate long term hazardous waste disposal capacity. 42 U.S.C. § 9604(c)(9) (1989).

A. *The Import Ban is Valid Because the State of New Union Participates in the Landfill Services Market as a Seller and, Therefore, Possesses the Right to Select its Own Trading Partners.*

The import ban is justifiable because New Union, as a seller of landfill services, "unquestionably fits the 'market participant' label." *Reeves v. Stake*, 447 U.S. 429, 440 (1980). The Supreme Court has thrice recognized that "[n]othing in the . . . Commerce Clause prohibits a state . . . from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap, Corp.*, 426 U.S. 794, 810 (1976); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 207 (1983); *Reeves*, 447 U.S. at 436. Thus, whenever a state acts as a "market participant," as opposed to a "market regulator," the state is not subject to the restraints of the Commerce Clause. *White*, 460 U.S. at 208.

The United States Supreme Court first enunciated the market participant exception to the Commerce Clause in *Alexandria Scrap*, 426 U.S. 794. The Court therein upheld a state statute which discriminated against out-of-state businesses because the state had entered the market as a purchaser to bid up the price of a good. *Id.* at 808. The market participant doctrine has been further refined and expanded in *Reeves*, 447 U.S. 429, and *White*, 460 U.S. 204. The principles set forth in these latter cases clearly indicate that the State of New Union, in enacting the import ban, acted as a market participant, not a market regulator.

In *Reeves*, the Supreme Court upheld a preferential state policy which restricted the sale of cement manufactured at the state owned and operated cement plant to in-state residents during periods of short supply. *Reeves*, 447 U.S. at 446. The *Reeves* court concluded that states, when acting as proprietors, resemble private businesses and, as such, should share the same benefits and freedoms as their private market counterparts, including the right to exercise discretion as to the parties with whom they choose to deal. *Id.* at 439 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

The Supreme Court further extended the market participant doctrine in *White*, by upholding an executive order of the Mayor of Boston which required that any construction project funded in whole or in part with city funds be performed by a work force comprised of at least fifty percent Boston residents. *White*, 460 U.S. at 214. While recognizing the limits of the states' ability to impose restrictions that "reach beyond the immediate parties with which the government transacts," the Supreme Court failed to define the limits of the state's power with precision. The Court, however, did hold that the City of Boston was not required to "stop at the boundary of formal privity of contract." *Id.* at 211.

Thus, the fact that the State of New Union is not in direct contractual privity with the buyers of the landfill services is irrelevant. In *White*, "[e]veryone affected by the order [was], in a substantial if informal sense, 'working for the city [of Boston],' " because the resident-hiring restriction imposed on the city contractors involved the receipt of city funds. *Id.* Similarly, the buyers of the landfill services in New Union are in a "substantial if informal" sense contracting with the State of New Union for the sale of landfill services because the provision of those services involves state-owned land. The State of New Union, therefore, is, in practical effect, a seller of landfill services.

Such a characterization is particularly appropriate in light of New Union's substantial financial stake in the in-state hazardous waste treatment and disposal industry. Indeed, New Union's stake in these facilities increases exponentially when one considers the potential liability the state faces if it is ever determined that the land on which the facilities are sited is contaminated. *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988) ("[t]he plain language of § 107(a)(2) extends liability to owners of waste facilities regardless of their degree of participation in the subsequent disposal of hazardous waste"); *Transtech Industries Inc. v. A & Z Septic Clean*, 798 F. Supp. 1079, 1084 (D.N.J. 1992) (remediation costs ranged between $13 and $100 million).

As a seller, New Union may exercise discretion as to the trading partners with whom it will deal. *Reeves*, 447 U.S. at

439. This discretion allows New Union to restrict the provision of landfill services to in-state residents, via the import ban. Such a restriction guarantees that the benefits of the state's hazardous waste treatment and disposal program inure to those who "fund the state treasury." *Id.* at 442.

The ability of states acting as market participants to favor in-state residents is well-recognized in the solid waste landfill services market. *See, County Commissioners of Charles County v. Stevens*, 473 A.2d 12 (1984) (upheld a statute restricting the disposal services of a county-operated landfill to county residents); *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) (upheld a discriminatory rate structure for disposal services offered by the state-operated solid waste facility; the rate structure strictly benefitted in-state residents); *Lefrancois v. State of Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987), (upheld a statute prohibiting disposal of out-of-state waste at a state-owned landfill).

The import ban falls squarely within the parameters of the market participant exception to the Commerce Clause, and therefore should be upheld as valid. Nonetheless, Appellants will argue that the import ban fails to qualify for this exception for three reasons: (1) the State acted in a protectionist manner which unnecessarily burdened interstate commerce, (2) the state hoarded natural resources, or (3) the state held a monopoly in the landfill services market. These arguments, addressed below, are misplaced and erroneous given the facts and circumstances of the case at bar.

1. Assertions of Protectionism are Inapposite Because New Union is a Market Participant.

Appellant EDC's argument that the import ban is protectionist in that it unnecessarily burdens out-of-state businesses and interstate commerce is without merit. Arguments of protectionism are apposite only in instances where the State acts a market regulator. *See, e.g., Reeves*, 447 U.S. at 446 (States, acting as market participants, can overtly favor in-state residents); *Alexandria Scrap*, 426 U.S. at 808 (statute arguably

protectionist on its face upheld because state entered the market as a purchaser). One example of a state acting as a market regulator is *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), where the court invalidated a solid waste import ban because the state prohibited the disposal of out-of-state waste at both in-state private and state-owned disposal facilities.

New Union's import ban is clearly distinguishable from the one struck down as protectionist in *City of Philadelphia*. The critical distinction is that New Union is not regulating private actors. As the lessor of the land on which all privately-owned facilities are sited, New Union operates distinctly as a market participant.[3] The Supreme Court in *City of Philadelphia* noted this distinction when it reserved expressing an opinion "about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources." *City of Philadelphia*, 437 U.S. at 627. Other courts have emphasized the importance of this oft-noted distinction when upholding state statutes under the market participant exception to the Commerce Clause. *Lefrancois*, 669 F. Supp. at 1208 (application of the state statute to only a state-funded facility was central to the court's decision to uphold the statute under the market participant exception.); *Stevens*, 473 A.2d at 19 (upheld county regulation under market participant exception noting that the regulation applied only to the county-operated landfill). Thus, where states act as market participants, as opposed to market regulators, any policy that restricts the sale of goods or services to in-state residents is " 'protectionist' only in the sense that it limits benefits generated by the state program to those who fund the state treasury." *Reeves*, 447 U.S. at 442.

The fact that a state statute burdens interstate commerce also does not preclude invocation of the market participant exception. *White*, 460 U.S. at 210 (only when the state acts as a market regulator is an analysis of the burden on interstate commerce appropriate). States that act as market participants, however, are subject to one restriction: they may only

3. NURCRA requires this leasing arrangement. (R. 3). The validity of this statute is not at issue in the present proceeding.

impose burdens on commerce within the market in which they participate. *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 97 (1984) (state policy requiring buyers of state timber to process the timber in-state prior to export was invalidated because the state was not a participant in the timber-processing market).

New Union participates in the landfill services market. When a hazardous waste generator purchases landfill services, it is paying a fee to ensure that its hazardous waste is treated and disposed of in accordance with relevant federal and state regulations. *Lefrancois*, 669 F. Supp. at 1211. New Union's import ban restricts the sale of this particular service; it does not effect services rendered in other markets, such as the hauling market, nor does it in any way restrict the pre- or post-purchase activities of buyers. Thus, in enacting the import ban, New Union legitimately imposed burdens on interstate commerce within the landfill services market.

2. By Voluntarily Engaging in the Costly, Risky, and Complex Industry of Hazardous Waste Treatment and Disposal, New Union is Not attempting to Hoard Any Natural Resources.

Although the Supreme Court in *Reeves* stated that stricter Commerce Clause scrutiny may be appropriate in cases involving natural resources, the Court has never specifically addressed whether a natural resources exception to the market participant doctrine exists. *Reeves*, 447 U.S. at 443. The Court has noted, however, that a state's endowment of a natural resource is a product of "happenstance," rather than hard work. *Sporhase v. Nebraska*, 458 U.S. 941, 957 (1982). In addition, it has distinguished items, like cement, that are the end-product of a "complex" process, from natural resources, such as coal, timber, wild game or minerals. *Reeves*, 447 U.S. at 444.

The hazardous waste treatment and disposal service is similar to cement manufacturing in that it involves a "complex process whereby a costly physical plant and human capital" act on hazardous wastes to change their physical and

chemical structure in such a way as to make the end-product less dangerous. *Id.* For purposes of hazardous waste treatment and disposal, the "costly physical plant" is either an incinerator which burns hazardous waste at high temperatures or a chemical treatment facility. (R. 2) In accordance with the *Reeves* complex-process distinction, hazardous waste treatment and disposal facilities are not natural resources.

Moreover, the Supreme Court's finding that solid waste landfills constitute natural resources is not dispositive. *City of Philadelphia*, 437 U.S. at 627. *City of Philadelphia* involved the validity of a solid, as opposed to hazardous, waste import ban. *Id.* Hazardous wastes, unlike solid wastes, are inherently dangerous and require complicated treatment prior to disposal. As the record indicates, both EDC's and CSI's landfills were "specially constructed" to comply with relevant federal and state environmental laws; these landfills, therefore, were not the product of "mere happenstance." (R. 2, 3); *Sporhase*, 458 U.S. at 957.

Any scarcity of hazardous waste disposal facilities and landfills is an artificial rather than a geologic phenomenon. *Swin*, 883 F.2d at 254. Every state, even those that have no such facilities sited within their boundaries, are geologically capable of supporting such facilities. *Id.* The scarcity results only from public opposition, because few citizens, if any, desire a hazardous waste disposal facility in their backyard. Because hazardous waste landfills are man-made, engineered facilities which exist and operate only in states which authorize them to exist, they do not constitute natural resources.

3. The Market Participant Exception Applies Regardless of Whether the State Holds a Monopoly in Landfill Services.

The State of New Union, arguably, has a monopoly over landfill services within New Union. The Supreme Court has never explicitly commented on the significance of a monopoly with regard to the market participant doctrine. The Court, however, has indirectly indicated that a monopoly does not bar application of the doctrine. For example, in *South-Cen-*

tral, the Supreme Court noted that if Alaska had used its monopoly position in the timber market to restrict the sale of timber to Alaska processors through direct subsidy or vertical integration, the Alaska ordinance would likely have been upheld. *South-Central*, 467 U.S. at 99. In addition, the Supreme Court by upholding the preferential-residency policy in *Reeves*, in effect, affirmed application of the market participant exception to monopolies because the state-owned cement plant was the only cement plant in the state. *Reeves*, 447 U.S. at 439; *Lefrancois*, 669 F. Supp. at 1204 (state-owned landfill was the only landfill operating in the state at the time the court upheld the state solid waste import ban as valid under the market participant exception to the Commerce Clause).

In upholding the state's residential-preference policy, the Court in *Reeves* limited its holding by stating that "private firms or sister states" are not restricted from setting up similar plants in the State. *Reeves*, 447 U.S. at 444. Lower courts in upholding solid waste import bans under the market participant exception have extended *Reeves*, by requiring not only that private facilities be free to develop landfill facilities in the state, but also that such facilities be able to accept waste regardless of origin. *Lefrancois*, 669 F. Supp. at 1211; *Stevens*, 473 A.2d at 19. This extension of *Reeves* is inapplicable in the case of New Union for two reasons.

First, these lower courts were faced with a solid waste problem, as opposed to a hazardous waste problem. This is an important distinction because the hazardous waste market is different from almost all other markets. Hazardous wastes, unlike solid wastes, are inherently dangerous. Opening a hazardous waste treatment and disposal facility is vastly more complicated than opening a solid waste disposal facility. Businesses that seek to operate such hazardous waste facilities must obtain authorization from appropriate authorities as well as comply with complex federal and state regulations. 40 C.F.R. § 264 (1991). In addition, owners of hazardous waste facilities, pursuant to CERCLA section 107(a)(1), are strictly liable for all costs associated with remedial actions taken at the facility's site. 42 U.S.C. § 9607(a)(1) (1989).

Second, these lower court cases did not involve a statute

similar to NURCRA, which authorizes hazardous waste treatment and disposal facilities only on state-owned land. (R. 3). NURCRA illustrates the State of New Union's recognition of a civic responsibility to become involved in the hazardous waste treatment and disposal industry. The State of New Union, by participating in the landfill services market, is taking a substantial financial risk because as the owner of the land on which the facilities are sited, it is strictly liable for any costs incurred in remedial cleanup actions. 42 U.S.C. § 9607(a)(1) (1989); *Monsanto*, 858 F.2d at 168.

In light of these significant factual distinctions, this court should uphold the import ban as valid under the market participant exception and reject the extension of *Reeves* established by the lower courts in *Lefrancois*, 669 F. Supp. at 1211, and *County Commissioners*, 473 A.2d at 19. Any holding to the contrary would be inequitable because it would 'rob the [State of New Union] of its foresight, risk, and [commitment]" for entering the hazardous waste treatment and disposal market. *Reeves*, 447 U.S. at 446. Moreover, it would serve as a strong disincentive for similar useful state projects.

Because the import ban withstands scrutiny under the economic protectionism, natural resources, and monopoly arguments set forth above, the import ban unquestionably falls within the limits of the well-established market participant exception, and as such, should be upheld as valid.

B. *The Export Ban is Invulnerable to Commerce Clause Attack Because Congress, In Enacting the Capacity Assurance Provisions of SARA, Authorized States to Manage the InterState Flow of Hazardous Waste.*

It is well-established that once Congress has authorized state regulation of interstate commerce, any action taken by a state within the scope of Congressional authorization is immune from Commerce Clause scrutiny. *South Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Western & Southern Life Insurance Co. v. State Board of Equalization of California*, 451 U.S. 648 (1981); *White*, 460 U.S. at 213 (where "state or local

government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce").

Many courts have required that Congressional authorization be "expressly stated." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982); *National Solid Waste Management Association v. Alabama Department of Environmental Management*, 910 F.2d 713, 721 (11th Cir. 1990); *Sporhase*, 458 U.S. at 960. There is, however, "no 'talismanic significance' to the phrase 'expressly stated.' " *South-Central*, 467 U.S. at 91. Instead, this phrase merely states one way of meeting the requirement that for state regulations to be exempt from Commerce Clause scrutiny, "[C]ongressional intent must be unmistakably clear." *Id.*

In announcing the "unmistakably clear" standard, the Supreme Court failed to repudiate its earlier conclusion that Congressional consent may be established through implied authorization. *White*, 460 U.S. at 213, 215 (court found that the City of Boston's Executive Order "strikes a harmonious note" with the federal legislation and was "affirmatively sanctioned" by the regulations). Regardless of whether this court employs the "unmistakably clear" or "implied authorization" standard, it is undeniable that Congress, in enacting the capacity assurance requirements set forth in section 104(c)(9) of SARA, authorized states to impede the interstate flow of hazardous waste. 42 U.S.C. § 9604(c)(9) (1989).

The capacity assurance provisions specifically provide that a state shall not receive Superfund monies for long term remedial actions occurring in the state unless the state can effectively demonstrate that it will have adequate capacity available to dispose of or otherwise manage the hazardous wastes generated within its state for the next 20 years.[4] *Id.*

The express language of SARA section 104(c)(9) coupled

4. Congress enacted section 104(c)(9) to respond to the pervasive "not in my backyard" ("NIMBY") syndrome plaguing the nation. S. Rep. No. 11, 99th Cong., 1st Sess. 22 (1985). Congress specifically recognized that "few, if any, [states] have developed policies and siting programs that will assure continued facility capacity in the long term." *Id.*

with the legislative history indicate that Congress authorized the states to erect barriers to the interstate movement of hazardous waste in an effort to meet the federally-mandated capacity assurance requirements. The statute specifically provides:

> [that] the [generating] 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 . . . [and]
> (B) are within the State *or* outside the State in accordance with an interstate agreement or regional agreement or authority. (emphasis added).

42 U.S.C. § 9604(c)(9) (1989).

The legislative history lends further insight into Congressional intentions:

> [for states] [t]o avoid a cutoff of funds, each state is required to develop State policies and siting programs that will make the best use of existing facilities in the short term and will assure continued facility capacity in the long term. *The details of the siting process will differ depending on the circumstances of each state* . . . . Use of binding agreements through interstate compacts is only *one example* of how a state may provide the requisite assurances. State or local ownership and operation of facilities or contracts with private parties may also suffice.

S. Rep. No. 11, 99th Cong., 1st Sess. 22 (1985) (emphasis added).

The statute and the Senate Committee report confirm two important points. First, the burden for compliance with section 104(c)(9) resides with the waste-generating state. As Senator Chafee so aptly stated on the date the legislation passed the Senate, "the objective of the [CAP provisions] is to force states to provide safe and adequate disposal for [their own] toxic and hazardous waste." 132 Cong. Rec. S. 14924 (1986).

Second, states have a variety of options for compliance with the capacity assurance requirements. For example, a state can either provide assurances that the waste generated in-state will be disposed of in-state *or* that the waste will be disposed of out-of-state pursuant to interstate compacts. 42 U.S.C. § 9604(c)(9)(2) (1989). The legislative history clearly states that forming interstate compacts is only one way to comply with section 104(c)(9). S. Rep. No. 11, 99th Cong., 1st Sess. 22 (1985). Other means for complying with § 104(c)(9) include state ownership of facilities or contracting with private parties. *Id.* However, these alternatives for compliance are by no means absolute. The proper solution for complying with section 104(c)(9) depends upon the unique circumstances of each state. *Id.*

New Union, recognizing its choices, took charge of its own hazardous waste disposal problems and elected not to enter into an interstate compact. (R. 4). Instead, to satisfy the purposes, intent, and requirements of SARA section 104(c)(9), it elected to: (1) contract with private hazardous waste treatment and disposal facilities, pursuant to lease agreements, and (2) enact an export ban. This scheme, as well as the decision to forego joining any interstate compacts, was, of course, premised on the notion that the state as a market participant could legitimately ban the import of hazardous waste. The record clearly supports this contention.

Specifically, the record indicates that prior to enacting the NUHWSSA, the New Union Legislature asked the General Counsel of the New Union Department of Environmental Affairs whether invalidation of the import ban by a court would necessarily require that the export ban be struck. (R. 4). Because the General Counsel answered affirmatively, the legislature enacted the NUHWSSA. *Id.* Thus, the legislature contemplated the existence of the export ban only in conjunction with the import ban.

Presuming the validity of the import ban, the New Union legislature enacted the export ban in an effort to effectuate Congressional intent with regard to section SARA 104(c)(9), 42 U.S.C. 9604(c)(9). Although not specifically required by SARA, the export ban was unmistakably authorized given

that the explicit purpose for enacting section 104(c)(9) was to combat the pervasive "not in my backyard" ("NIMBY") syndrome plaguing the nation and to force states to deal with their own hazardous waste problems, as opposed to shipping their hazardous waste headaches elsewhere. S. Rep. No. 11, 99th Cong., 1st Sess. 22 (1985). In enacting the export ban, New Union took affirmative measures to counter the NIMBY syndrome by ensuring that the waste it generates during the next two decades will be disposed of in the place of generation; such action is exactly what section 104(c)(9) specifically requires and unmistakably authorizes.

New Union's export ban is also authorized because Congress specifically acknowledged that the details of a state's capacity assurance plan should differ depending upon the unique circumstances of each state. *Id.* The unique circumstances in New Union's case are that the state as a market participant validly enacted an import ban and that the state did not enter into any interstate agreements.

In light of these facts, New Union had no alternative but to enact an export ban to ensure the long term existence of its ten in-state treatment and disposal facilities. (R. 2). New Union's import ban will substantially reduce the flow of waste entering New Union for disposal, and thereby significantly decrease the profits of in-state disposal facilities. The impact of the import ban is likely to be particularly severe given that 100% of the waste generated outside of New Union in the tri-state region was, prior to the ban, shipped to New Union for treatment and disposal. (R. 3) Without an export ban, it is highly probable that the import ban will force some of New Union's hazardous waste treatment and disposal facilities out of business due to an inability to remain economically viable. The loss of even one facility, however, would seriously undermine the State's efforts to comply with SARA section 104(c)(9) because the State elected to comply with the capacity assurance requirements by ensuring adequate *in-state* disposal capacity, as opposed to ensuring capacity via interstate agreements. To guarantee in-state disposal capacity for twenty years, New Union heavily relied on the continued existence of each of the ten in-state treatment and disposal

facilities.

The penalty for failure to ensure adequate capacity is the revocation of Superfund monies, a penalty which if imposed would paralyze New Union given the exorbitant costs of remedial actions.[5] 42 U.S.C. § 9604(c)(9) (1989). In an effort to assist states to avoid such a drastic penalty, Congress provided options for compliance and specifically authorized a state to develop capacity assurance requirements based upon its unique circumstances. S. Rep. No. 11, 99th Cong., 1st Sess. 22 (1985). In the case of New Union, the unique circumstances require an export ban. Thus, the export ban is clearly within the scope of Congressional authorization, and is therefore exempt from Commerce Clause scrutiny.

New Union's case is distinguishable from *South Central* and *Sporhase*, where the courts rejected claims of Congressional authorization for states to restrict interstate commerce, because authorization pursuant to section 104(c)(9) of SARA was not at issue in these cases. *South-Central*, 467 U.S. at 92; *Sporhase*, 458 U.S. at 959. In *South-Central*, the court held that state regulations which are either consistent with federal policy or which further federal policy represent an "insufficient indicium of congressional intent." *South-Central*, 467 U.S. at 92.

In enacting the export ban, the state of New Union was not merely regulating consistently with federal law, but was actively developing a policy required for compliance with the purposes and intent of the federal statute. In addition, unlike *Sporhase*, the State of New Union is not claiming that its export ban is authorized because of a traditional deference to state environmental laws. *Sporhase*, 458 U.S. at 959 (court rejected authorization argument finding that a deference to state water laws was insufficient to show Congressional authorization).

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5. New York recently sued EPA for failure to carry out its duty under SARA section 104(c)(9) to sanction states that have failed to develop adequate hazardous waste disposal capacity. *New York v. Reilly*, 91-CV-1418 (N.D.N.Y.) (court denied defendant EPA's motion to dismiss). This case illustrates the reality that, someday soon, EPA, by its own volition, or by court mandate, will sanction states with inadequate hazardous waste disposal capacity by withholding Superfund monies.

New Union's case is also distinguishable from *National Solid Waste Mang't.*, 910 F.2d at 721, where the court rejected the claim that Congress, under SARA section 104(c)(9), authorized Alabama to impose selective import restrictions.[6] Contrary to *National Solid Waste Mang't.*, where the state selectively barred importation of hazardous waste in an effort to enforce the provisions of SARA section 104(c)(9), New Union enacted the export ban in an effort to effectuate Congressional policy and comply with the provisions of section 104(c)(9). *National Solid Waste Mang't.*, 910 F.2d at 721. In addition, New Union's export ban, unlike an import ban, has the practical effect of easing the burden on other states to meet their own obligations under SARA section 104(c)(9) by reducing the amount of waste with which such states must contend. Thus, an export ban facilitates, as opposed to forces, compliance with SARA section 104(c)(9). 42 U.S.C. § 9604(c)(9) (1988).

Finally, the court in *National Solid Waste Mang't.*, in dismissing the section 104(c)(9) authorization argument, noted that the state could simply have contracted with private facilities in-state. The State of New Union, as previously noted, satisfied this requirement by engaging in a lease arrangement with the operators of the hazardous waste treatment and disposal facilities. *Id.* at 720; (R. 3).

Thus, the export ban enacted by the State of New Union stands in direct contrast to those cases where the Congressional authorization theory was struck down. New Union's export ban clearly falls within the scope of Congressional authorization and, as such, must be upheld as valid.

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6. The Supreme Court has not addressed the issue of whether state policies impeding interstate commerce are authorized pursuant to section 104(c)(9) of SARA. *Chemical Waste Management, Inc. v. Hunt*, U.S. , 112 S.Ct. 2009, 1016 (1992) (court did not address the authorization issue because of a failure by the parties to argue the issue).

II. NEW UNION'S IMPORT AND EXPORT BANS, AS PROVIDED IN THE NUHWSSA, SURVIVE COMMERCE CLAUSE SCRUTINY BECAUSE THEY SERVE COMPELLING LEGITIMATE STATE INTERESTS WHICH CANNOT BE ACHIEVED BY ANY NONDISCRIMINATORY ALTERNATIVES.

Even if this court finds that the import and export bans are subject to Commerce Clause scrutiny, the bans must be upheld as valid because they serve compelling, legitimate state interests which cannot be successfully achieved by any nondiscriminatory alternatives. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). State statutes, such as the NUHWSSA, that interfere with interstate commerce must be analyzed under either the strict scrutiny test or the more deferential balancing test.[7]

Under the strict scrutiny test, a state statute is deemed constitutional if the state can establish that the statute serves a legitimate local interest and that the means adopted are the least discriminatory alternative available. This test generally applies to statutes that are discriminatory either on their face, in purpose, or in effect. *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977); *Dean Milk v. City of Madison*, 340 U.S. 349 (1951); *Maine v. Taylor*, 477 U.S. 131 (1986). In contrast, the more deferential balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), applies to those statutes which regulate evenhandedly to effectuate a legitimate state interest and which have only incidental effects on interstate commerce.[8] Under *Pike*, a regulation will be upheld unless the burden imposed on interstate commerce

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7. These tests are not set forth in the United States Constitution. The Commerce Clause is actually silent with respect to the states ability to impede the flow of interstate commerce. U.S. Const. art. I, § 8, cl. 3. However, it is well-established that the Commerce Clause "limits the powers of the states to erect barriers against interstate trade." *Lewis v. BT Investment Managers*, 447 U.S. 27, 35 (1980). Such constraints on state power have developed gradually through Supreme Court decisions. These decisions are collectively referred to as the dormant or negative commerce clause. *H.P. Hood Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949).

8. As the District Court found, the NUHWSSA was a "balanced act" which regulated evenhandedly because it effected in-state and out-of-state generators symmetrically.

is "clearly excessive in relation to the putative benefits." *Id.*; *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir. 1987).

There is no bright line test to determine whether a state statute should be evaluated under the strict scrutiny or *Pike* balancing approach. *J. Filiberto Sanitation v. New Jersey Dep't of Envt'l. Protection*, 857 F.2d 913, 918 (3d Cir. 1988). This hazy distinction between tests, however, is irrelevant because New Union's import and export bans clearly pass the strict scrutiny test. *A fortiori*, the bans satisfy the more deferential *Pike* balancing test.

A. *New Union's Import Ban is Constitutional Because it is a Valid Exercise of the State's Police Power and it Satisfies Both Prongs of the Strict Scrutiny Test.*

1. The Import Ban Furthers the Compelling, Substantial Interests of Protecting the Health and Safety of the Citizens of New Union.

The import ban serves the compelling, legitimate state interests of protecting the health, safety and welfare of the citizens of New Union and the integrity of the environment from the risks caused by the transportation of uncontrolled volumes of out-of-state hazardous waste. This interest is especially compelling because of the unique nature of the waste generated outside the State of New Union. (R. 4). All parties to this suit concur that the hazardous waste in the tri-state region is homogenous in its dangers, except with respect to DBCP, trace amounts of which are found in *all* waste generated out-of-state in the tri-state region and imported into New Union. *Id.* There are no indications in the record that any hazardous waste generated in New Union contains DBCP. Unlike other hazardous wastes, DBCP has properties which resemble nerve gas and which, upon exposure, can cause death in a matter of moments. (R. 3).

New Union's import ban is strikingly analogous to the import ban in *Taylor*, 477 U.S. 131, which prohibited the transportation of live baitfish contaminated with parasites into the State of Maine. The substantial state interest in *Tay-*

lor was to protect the fragile and unique Maine fisheries from exposure to out-of-state parasites. *Taylor*, 477 U.S. at 141. The *Taylor* court held that the state had a legitimate interest in banning the importation of such contaminated fish. *Id.* at 148.

New Union faces a threat similar to the one posed in *Taylor*. In New Union, instead of contaminated out-of-state baitfish threatening the existence of fisheries, DBCP threatens the existence of the citizens of the state. The citizens of New Union are intimately familiar with the horrific effects of DBCP. In 1990, two miles outside of the city of Springfield, a truck overturned causing a container of pure DBCP to rupture near a local farm, killing 40 cows in a matter of moments, and almost taking the life of the cows' owner. (R. 3). Had the truck driver involved in the accident not survived or not administered the DBCP antidote quickly enough, the unsuspecting farmer, like his cows, would have been the victim of DBCP. *Id.*

The probability of additional, more serious accidents occurring is tremendous, especially considering that all out-of-state waste is tainted with DBCP and that the only facility in the tri-state region currently capable of treating such waste is EDC's facility in Springfield New Union. *Id.* To date, EDC's Springfield facility is the only facility out of fourteen in the region that has expended the resources necessary to comply with federal regulations governing treatment and disposal of DBCP. *Id.*

The possibility exists that the state of New Union will not be as fortunate the next time a DBCP container ruptures en route to the EDC facility. Had the accident in 1990 occurred any closer to the City of Springfield, many lives would have been lost; one truck driver could certainly not have administered the antidote in the necessary amount of time.

Thus, given the real threat of future catastrophic accidents involving DBCP, New Union has a compelling, substantial interest in protecting the health and safety of its citizens. Unlike *Taylor*, 477 U.S. at 148, where the court found the state's interest in protecting fisheries legitimate despite the substantial uncertainty regarding the actual effect of the para-

sites, New Union is not hypothesizing about the potential effects of DBCP. These effects are well-known to the citizens of New Union.

Moreover, New Union's interest in protecting the safety and well-being of its citizens is even more compelling because the "field of safety" is an area of "traditional local concern," where courts have consistently accorded great deference to state legislatures. *Kassel v. Consolidated Freightways, Corp.*, 450 U.S. 662, 670 (1981); *Brotherhood of Locomotive Firemen & Engineermen v. Chicago, Rock Island and Pacific R.R.*, 393 U.S. 129, 138 (1968) (the question of safety is "essentially a matter of policy . . . [which can] be fixed by the people acting through their elected representatives"). Courts will not second-guess the legislative judgment about the importance of the safety justifications in comparison with their related burdens on interstate commerce, unless the safety justifications are merely illusory, *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 449 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (safety regulations must overcome a "strong presumption of validity"). As previously noted, in New Union's case, the safety justifications are not merely illusory. The import ban, which was enacted shortly after the 1990 accident, was specifically designed to protect the health and safety of the state's citizens both in their homes and on the highways from the dangerous DBCP-tainted out-of-state waste.

New Union's import ban is clearly distinguishable from other restrictions on interstate commerce which have been struck down, because the purpose supporting New Union's import ban is a compelling, legitimate health and safety concern as opposed to mere economic protectionism. *City of Philadelphia*, 437 U.S. 617 (solid waste import ban); *Fort Gratiot*, U.S. , 112 S.Ct. 2019 (1992) (solid waste import ban); *National Solid Waste Mang't.*, 910 F.2d at 713 (hazardous waste import ban); *Hunt*, 432 U.S. 333 (marketing restrictions on apples); *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (tax credit program). In each of these cases the state statutes were invalidated because the courts found that the states discriminated against out-of state articles of commerce solely on the

basis of origin.

In striking down the solid waste import ban in *City of Philadelphia* as protectionist, the Supreme Court noted that "whatever the state's purpose, it may not be accomplished by discriminating against articles from outside the state *unless* there is some reason, apart from origin, to treat [the wastes] differently." *City of Philadelphia*, 437 U.S. at 626-27 (emphasis added). This "reason" for discrimination, although absent in *Philadelphia*, 437 U.S. 617, as well as the other cases cited above, exists for New Union because all waste currently generated outside the state and shipped into New Union contains traces of the lethal DBCP. Thus, in sharp contrast to these earlier cases, New Union's import ban is justified by factors wholly unrelated to economic protectionism. *See*, *Fort Gratiot*, 112 S.Ct. at 2031 (court stated its conclusions would have been different had a legitimate health and safety rationale been established).

The record clearly indicates that New Union's import ban is justified by valid health and safety concerns, as opposed to economic protectionism. First, in enacting the NUHWSSA, the legislature recognized that out-of-state waste which contains DBCP is of a different nature than in-state waste. (R. 4). This recognition is embodied in section 1 of the Act, which states that "hazardous waste originating outside New union is more dangerous than waste originating within the state." *Id.* This section of the Act is not contested by Appellant EDC and therefore one can appropriately conclude that Appellant EDC does not dispute that there are inherent differences between in-state and out-of state waste. Moreover, there is no evidence in the record that New Union, in fact, generates any DBCP; the record indicates only that 100% of out-of-state waste shipped into New Union contains traces of DBCP. (R. 3).

Second, there are no indications in the record to support the conclusion that the import ban was enacted either at the behest or for the benefit of in-state generators. In *Hunt*, the record contained strong indications of protectionism. *Hunt*, 432 U.S. at 352. Specifically, the state Agricultural Commissioner, when considering a possible exemption to the statute,

reserved comment on the exemption until he could "[get] the sentiment from [the] local apple growers since they were mainly the ones responsible for the legislation." *Id.*; *See, New Energy*, 486 U.S. at 279 ("it could not be clearer" that the health and safety purpose of the tax-credit program is but "an occasional and accidental effect of achieving what . . . its purpose [is:] favorable tax treatment for Ohio-produced ethanol." In contrast to *Hunt*, the New Union legislature enacted the import ban in response to the 1990 tricking accident. This is clearly illustrated by the fact that the hearings on the Act were held shortly after the 1990 accident in response to public outcry. (R. 4).

Finally, the effects of the import ban alone demonstrate that it was not a protectionist measure. The import ban significantly reduced the profits at the EDC Springfield facility, where 100% of the out-of-state waste in the tri-state region was treated and disposed. The substantial reduction in business at the EDC facility, *a fortiori*, means a substantial reduction in the amount of rent EDC will pay the State of New Union, since the lease payments are conditioned on each facility's annual profits. (R. 3). Thus, New Union, in enacting its import ban, certainly was not attempting to advance its own commercial interests at the expense of others. *See e.g., Hunt*, 432 U.S. at 351.

Unlike many other cases where the purported health and safety interest was a mere pretext to a protectionist rationale, or where the state failed to sustain its burden of proof at trial, the State of New Union has successfully established in the court below that it has a legitimate, compelling interest in protecting the health, safety and welfare of its citizens and maintaining the integrity of its environment.

2. New Union's Import Ban Serves a Legitimate State Purpose Which Cannot Be Adequately Served By Any Nondiscriminatory Alternative.

The health and safety purpose achieved by the import ban cannot be achieved through less discriminatory alternatives. The only alternative would be to reduce the amount of

hazardous waste being transported into New Union. This alternative, however, would not satisfy the State of New Union's compelling state interest of protecting the health and safety of its citizens, because a reduction in quantity would not eliminate the lethal DBCP from entering the borders of New Union, given that all out-of-state waste in the tri-state region is tainted with DBCP. (R. 3). The sole reason such waste is shipped into New Union is because the EDC Springfield facility is the only one so far in the region that has installed the appropriate safeguards required under federal law to treat and dispose of DBCP. *Id.*

Although new technology may be developed to reduce the irreparable harm caused by DBCP transportation accidents and thereby lessen the need for an import ban, the State of New Union does not bear the burden of developing such technology. As the Supreme Court noted in *Taylor*, "[a] state must make reasonable efforts to avoid restraining the flow of trade across its borders, but it is not required to develop new and unproven means of protection at an uncertain cost." *Taylor*, 447 U.S. at 147 (upheld state statute finding that no nondiscriminatory alternative existed to protect against the threat of infection of Maine's fisheries). Currently, there is no less discriminatory alternative to meet the State of New Union's interest in protecting its citizens from the deleterious chemical DBCP, which infects all waste generated out-of-state.

Because New Union's import ban serves a compelling, legitimate state interest that cannot be achieved by any nondiscriminatory alternative, the import ban satisfies the strict scrutiny test, and therefore must be upheld as valid. Such a result is entirely consistent with the outcome in *Taylor*, 447 U.S. 131.[9]

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9. As the court noted in *Taylor*, "[e]ven overt discrimination may be justified where . . . out of state goods . . . are particularly likely for some reason to threaten the health and safety of a state's citizens . . . and where 'outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of [protection].'" *Taylor*, 477 U.S. at 150 (quoting *Lewis*, 447 U.S. at 43).

B. *Assuming the Validity of the Import Ban, New Union's Export Ban is Constitutional Because it Serves a Legitimate State Interest Which Cannot be Achieved by Any Less Discriminatory Alternative.*

1. New Union Has a Legitimate State Interest in Accepting Full Responsibility for Managing the Hazardous Waste Generated Within its Borders.

It is undisputable that New Union has a legitimate state interest in effectively managing the hazardous wastes generated within its borders. SARA section 104(c)(9) actually compels states to assume such responsibility, by conditioning the receipt of Superfund monies for remedial actions on whether a state has provided adequate assurances for the disposal of the hazardous waste it contemplates generating during the next 20 years. 42 U.S.C. § 9604(c)(9) (1989). The State of New Union clearly delineated its legitimate interest in assuring hazardous waste self-sufficiency, as required by SARA section 104(c)(9), in the "Policy" section of the NUHWSSA, (i.e., section 2). Notably, Appellant CSI does not challenge the validity of this interest; instead, it challenges only the validity of section 3 of the NUHWSSA, the export ban.

There are two compelling reasons that New Union's export ban serves a legitimate state interest. First, by prohibiting the export of its own waste, the State of New Union is assuming responsibility for its hazardous waste problems as opposed to succumbing to the NIMBY attitude. Congress enacted Section 104(c)(9) in direct response to NIMBY, recognizing that it had previously failed to fully consider "the intensity of public opposition to new and expanded [hazardous] waste management facilities." 132 Cong. Rec. S. 14924 (1986). The principal concern with NIMBY is that the public health dangers and the risk of potential catastrophic environmental damage are transferred to states in perpetuity and avoided by those in other states who simply pay to transfer the risk. Thus, the export ban embodies the type of responsibility that Congress sought to engender in enacting SARA section 104(c)(9).

Second, if "easing solid waste disposal problems" is a le-

gitimate state interest, hazardous waste management planning, mandated by federal statute, unquestionably passes the legitimate interest test. *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. 456, 473 (1980). The export ban, which is an integral component in New Union's scheme for effective hazardous waste management, in practical effect, eases hazardous waste disposal problems, by reducing the amount of foreign waste with which a state must contend. Thus, the export ban facilitates, as opposed to forces, compliance with SARA section 104(c)(9). Facilitating compliance and forcing compliance are two wholly distinct concepts; the former of which is valid and the latter of which is impermissible, given that it interferes with federal enforcement powers. *National Solid Waste Mang't.*, 910 F.2d at 721.

New Union's legitimate state interest cannot be attacked as a pretext for hoarding natural resources located within the state. As previously discussed, New Union's case is clearly distinguishable from those cases where courts have struck down state statutes which have had the effect of preserving for in-state residents a "preferred right of access . . . to natural resources located within [the state's borders]." *City of Philadelphia*, 437 U.S. at 627.

Hazardous waste landfills, unlike seined minnows or timber, do not exist by happenstance, and therefore are not natural resources. *Hughes v. Oklahoma*, 441 U.S. at 337; *Sporhase*, 458 U.S. at 957; *South-Central*, 467 U.S. 82. Landfills are man-made engineered facilities which exist and operate only in states which authorize them to exist. Moreover, development of a hazardous waste treatment and disposal facility and landfill requires a substantial initial capital investment as well as continued investments to upgrade the facilities to ensure proper compliance with federal and state regulations. As such, any argument that New Union hoarded a natural resource is wholly misplaced.

In addition, any concerns that the legitimate state interests unnecessarily burden unrepresented out-of-state interests are unfounded. There are no unrepresented interests that will bear the brunt of this export ban because the out-of-state generators's interests are identical to the in-state disposal fa-

cilities' interests and similarly the out-of-state disposal facilities interests are indistinguishable from the in-state generators' interests. *South-Central*, 467 U.S. at 92.

Finally, the traditional fear that other states will enact similar legislation and thereby prevent trade among the states is ephemeral. *Hood*, 336 U.S. at 538. If every state enacted an export ban, Congress would never have needed to invest valuable resources to enact section 104(c)(9) of SARA. However, even if this court dismisses this rationale, the likelihood of other states enacting similar bans is remote. The majority of states, like North Hampshire, are authorized pursuant to RCRA, 42 U.S.C § 3006, to operate their state hazardous waste management programs in lieu of the federal RCRA program. 42 U.S.C. § 6926 (1989). Such authorized states, however, are restricted by the regulations implementing section 3006, which specify that "any aspect of a state program which unreasonably restricts, impedes or operates as a ban on the free movement across the border of wastes . . . [is] inconsistent" with the federal program. 40 C.F.R. § 270 (1991). Consistency with the federal program is a condition upon which authorization is granted. Thus, authorized states who attempt to impose export bans will face losing authorization to administer their own hazardous waste management programs. *See*, 42 U.S.C § 6926(e).

New Union, however, is not a RCRA-authorized state, and therefore, unlike other states, is not faced with the prospect of losing "federal authorization." Moreover, other states are unlikely to enact an export ban to effectuate Congress' intent in enacting SARA section 104(c)(9), because few, if any, will be faced with the same unique wastestream from out-of-state which required, and authorized, the State of New Union to enact an import ban. (R. 3). The existence of the import ban was critical to New Union's decision to comply with SARA section 104(c)(9) by providing long term disposal capacity at in-state facilities, as opposed to providing capacity through interstate compacts. Thus, given the unique facts and circumstances of New Union's case, very few, if any, states will be able to enact similar export bans.

In enacting this export ban, New Union carefully weighed

and considered both in-state and out-of-state interests; the effect of the import ban; and finally the need to comply with a statutory mandate. Clearly, New Union has a legitimate state interest in complying with section 104(c)(9) and avoiding accusations of succumbing to the NIMBY rationale.

2. New Union's Export Ban Serves a Legitimate State Purpose Which Cannot Be Adequately Served By Any Nondiscriminatory Alternative.

Assuming the validity of the import ban, the only means by which the state of New Union can comply with the mandate of section 104(c)(9) and avoid the NIMBY syndrome is to erect an export ban prohibiting the shipment of wastes generated in New Union to other states. 42 U.S.C. § 9604(c)(9) (1988). If New Union had reduced the flow of hazardous waste shipped out-of-state as opposed to enacting an export ban, it would not have satisfied the purpose and intent of section 104(c)(9), which is to encourage states to avoid succumbing to the NIMBY philosophy and to assume full responsibility for their own waste.

Moreover, without the export ban, the import ban may substantially disrupt the in-state treatment and disposal industry, because of the substantial reduction in profits resulting from the loss of out-of-state customers. Loss of any one facility to business failure would substantially undermine New Union's efforts to comply with SARA section 104(c)(9), given its decision to provide adequate long term disposal capacity in-state. Such a loss may even result in a failure to comply with section 104(c)(9), the penalty of which is the revocation of Superfund remedial monies. This penalty could financially devastate the State of New Union, considering the high probability that at least one, and maybe more, of the state's hazardous waste treatment and disposal facilities will require costly remediation.[10] Clearly, any less discriminatory alternative would threaten New Union's ability to dispose of its own

10. Remediation costs per facility can be in excess of $100 million. *Transtech Industries*, 798 F. Supp. at 1084; *United States v. Rohm & Haas, Co.*, 721 F. Supp. 666, 674 (D.N.J. 1989).

waste, an option which SARA section 104(c)(9)(A)(2) specifically provides.

New Union's case stands in contrast to *National Solid Waste Mang't.*, where the state erected an import ban refusing to deal with states that had not satisfied their capacity assurance obligations. *National Solid Waste Mang't.*, 910 F.2d at 721. New Union is not policing states into complying with section 104(c)(9); instead, it is voluntarily taking the affirmative action that Alabama sought to induce, and that section 104(c)(9) requires (i.e., taking responsibility for the wastes generated within the State of New Union). It is only able to do so because of the existence of the import ban.

New Union's export ban is also distinguishable from the one struck down in *Hughes*. 441 U.S. at 338. (export ban invalidated because less discriminatory alternatives existed to conserve the supply of in-state minnows). Although section 104(c)(9) may be analogized to the conservation of minnows in *Hughes*, one striking difference exists. The conservation program in *Hughes* was voluntary, whereas New Union's efforts to provide assurances of adequate hazardous waste disposal capacity for the next 20 years is mandatory. The penalty for failing to comply with this section could paralyze the State.

Since New Union's export ban serves a legitimate state purpose which cannot be achieved by any other nondiscriminatory alternative, the export ban survives the strict scrutiny test and therefore must be upheld as valid.

III. INVALIDATION OF THE IMPORT BAN REQUIRES THIS COURT TO STRIKE DOWN THE EXPORT BAN

The import and export bans are inter-dependent. It is undeniable based on the record that the New Union legislators enacted the export ban with the intent that if the import ban was struck down, the export ban would also be invalidated. (R. 4). In fact, the legislature deferred enacting the NUHWSSA until it received proper assurances from the General Counsel of the New Union Department of Environmental Affairs that invalidation of the export would necessitate invali-

dation of the export ban. *Id.* This is clearly not a case of post-hoc rationalization. *Taylor*, 477 U.S. at 149.

If this court finds that the import ban is invalid, the export ban must accordingly be struck. Severability is a question of state law. *National Advertising Co., v. Town of Niagara*, 942 F.2d 145, 148 (1991). But, as a general rule, severability is inappropriate " '[if] it is evident that the legislature would not have enacted those provisions which are within its power, independently of those which are not.' " *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 932 (1983) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976)).

There are two critical reasons why the legislature of New Union, in an effort to comply with SARA section 104(c)(9), would never have enacted an export ban without the existence of the import ban. 42 U.S.C. § 9604(c)(9) (1989). First, section 104(c)(9) mandates that a state provide adequate assurances for the waste it generates for a twenty year period. Clearly, the New Union legislature would not have enacted a measure enabling the entire world to dispose of wastes in its state, while retaining a restriction that New Union could not dispose of its wastes out-of-state. New Union could never meet such an overwhelming demand for disposal service because the landfills would exceed capacity in a short amount of time, certainly less than twenty years.

Second, New Union enacted the export ban to ensure the continued profitability and existence of its in-state treatment and disposal facilities. The State's concerns regarding the profitability and continued existence of its treatment and disposal facilities are derived primarily from the fact that the import ban precludes one hundred percent of the waste generated out-of-state from being treated and disposed of in New Union. Without the export ban, several of the in-state facilities may have been forced out of business, thereby further frustrating the state's comprehensive plan to comply with the federally-mandated capacity assurance requirements.

Thus, voiding the import ban clearly thwarts the dominant purpose of the statute, and therefore, severability is inappropriate. If the import ban is struck, the export ban must

also be invalidated.

CONCLUSION

For the reasons set forth above, the judgment of the United States District Court for the District of New Union must be affirmed.