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Judges' Bench Brief Questions Presented: Fifth Annual Pace National Environmental Moot Court Competition

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ENVIRONMENTAL DISPOSAL CORP.
Appellant

v.

STATE OF NEW UNION
Appellee

Civ. No. 92-21

CLEANFILL SERVICES, INC.
Appellant

v.

STATE OF NEW UNION
Appellee

JUDGES' BENCH BRIEF
QUESTIONS PRESENTED

Environmental Disposal Corporation and Cleanfill Services, Inc., have appealed the decision of the United States District Court for the District of New Union in their consolidated cases, docketed in that court as Civ. No. 92-538 and 92-813.

Each party is instructed to brief the following questions:

(1) Is the hazardous waste interstate import ban of the New Union Hazardous Waste Self-Sufficiency Act (NUHWSSA) valid? New Union and Cleanfill Services, Inc. claim that it is; Environmental Disposal Corporation claims that it is not.

(2) Is the hazardous waste interstate export ban of the NUHWSSA valid? Environmental Disposal Corporation claims that it is; Cleanfill Services, Inc. claims that it is not. New Union claims that the export ban is valid, but

adds that if the import ban is invalid, then the export ban is invalid also.

Parties are limited in their briefs to the above issues and positions, but are not limited to reasons advanced for these positions to only those raised in the court below.

For purposes of briefing and argument, federal statutory law to be considered is that which is law as of September 15, 1992, and nothing beyond the record shall be briefed or argued regarding the nature of DBCP.

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PROCEDURAL POSTURE OF THE CASE

This case is properly in the federal district court on federal question jurisdiction. The case comes to the Twelfth Circuit Court of Appeals on appeal from a decision of the lower court upholding in its entirety the validity of NUHWSSA. All parties concede venue in the Twelfth Circuit Court of Appeals is proper under 28 U.S.C. §§ 127, 1391(e) (1988).

STATEMENT OF THE CASE

Appellant Environmental Disposal Corp. ("EDC") operates a waste treatment and disposal facility in New Union and appellant Cleanfill Services, Inc. ("CSI") operates a facility in North Hampshire. Their operations have been adversely affected by a statute enacted by New Union. The statute is entitled the New Union Hazardous Waste Self-Sufficiency Act ("NUHWSSA"). It caused EDC and CSI to initiate separate actions in the United States District Court for the District of New Union. Appellants appeal the lower court's decision, dated April 23, 1992, which upheld the NUHWSSA. These cases have been consolidated upon appeal to the United States Court of Appeals for the 12th Circuit.

In February 1991, the state of New Union enacted the NUHWSSA. The legislature found that hazardous waste is a threat to human health and environment, and additionally that hazardous waste originating outside of New Union is more dangerous than hazardous waste originating inside New Union. The Act's purpose is to enable New Union to become self-sufficient in its disposal of hazardous waste generated in-state. The New Union legislature claims to be acting in accordance with the Congressional policy favoring hazardous waste self-sufficiency, as expressed in section 104(c)(9) of the Com-

prehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9604(c)(9) (1988). NUHWSSA bans all export and import of hazardous waste for treatment, storage or disposal in New Union or any other state as of March 1, 1993.

The following NUHWSSA provisions are relevant to this appeal:

> **Section 1. Findings.**
>
> (a) The New Union legislature finds that hazardous waste is a threat to human health and the environment.
>
> (b) The legislature further finds that hazardous waste originating outside of New Union is more dangerous to human health and the environment than waste originating inside New Union.
>
> **Section 2. Policy.** The New Union legislature seeks hazardous waste self-sufficiency. The legislature endorses the United States Congress' policy reflected in section 104 (c) (9) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9604(c)(9), requiring, as a condition of funding under this federal program, each state to assure capacity for disposal of its own hazardous waste, either in-state or through an interstate agreement. No interstate agreement has been reached with neighboring states.
>
> **Section 3. Export Ban.** Effective March 1, 1993, no hazardous waste may be transported from New Union to any other state.
>
> **Section 4. Import Ban.** Effective March 1, 1993, no hazardous waste may be transported from any other state to New Union, whether for treatment, storage, or disposal in New Union or any other state.

> **Section 5. Title.** This Act may be cited as the New Union Hazardous Waste Self-Sufficiency Act.

During legislative hearings, the chair of the New Union Senate's Environmental Protection Committee asked the General Counsel of the New Union Department of Environmental Affairs whether: (1) the state legislature could enact bans on the export and import of hazardous waste; and (2) if the ban on imports was struck down by a reviewing court, would the export ban necessarily be struck down as well. The General Counsel responded affirmatively to both questions.

The three states of New Union, North Hampshire and South Hampshire have fourteen hazardous waste treatment and disposal facilities: ten in New Union, two in North Hampshire and two in South Hampshire. Prior to the enactment of NUHWSSA, all waste generated in the tri-state area was treated and disposed of within the region. Appellant EDC operates the Springfield facility in New Union. The Springfield facility is located on land owned by the state of New Union, but leased to EDC for a term of ninety-nine years. Under the terms of the lease, New Union receives 10% of the facility's annual profits as rent, and EDC capitalizes a closure fund for the landfill. The placing of the facility on state land and the terms of the lease are specified pursuant to the New Union Resource Conservation and Recovery Act ("NURCRA"), as enacted in 1977. Appellant CSI operates the Maywood facility in North Hampshire which is a hazardous waste chemical treatment facility and landfill.

Half of the hazardous waste generated in New Union is disposed of in-state, with ¼ at the Springfield facility. NURCRA provides a hazardous waste management program under state law that is separate from the federal Resource Conservation and Recovery Act ("RCRA"). New Union has never sought or received approval to implement RCRA. The Springfield facility possesses all the necessary permits from the EPA under RCRA and from the New Union Department of Environmental Affairs. New Union exports the remaining half of its waste to facilities in North Hampshire and South Hampshire. All of North and South Hampshire's waste is disposed

of at the Springfield facility in New Union.

According to the EPA's land ban regulations under RCRA, waste containing any amount of DBCP must be incinerated according to safeguards that are only available at the EDC facility in New Union. DBCP is a nerve gas-like agent. A small drop of DBCP absorbed through the skin or inhaled will cause convulsions within seconds and death within minutes unless an antidote is applied immediately. In 1990, the New Union Department of Emergency Response spent approximately $1.4 million responding to an accident where a truck carrying two gallons of pure DBCP from North Hampshire to the EDC Springfield facility overturned in New Union, killing forty head of cattle and threatening the life of a farmer. Each significant source of hazardous waste in North Hampshire and South Hampshire produces waste with traces of DBCP. Additionally, three factories in North Hampshire and two factories in South Hampshire produce pure DBCP as waste. After NUHWSSA is effective, North Hampshire and South Hampshire will no longer be able to dispose of any waste, including waste containing DBCP, at the EDC Springfield facility. The hazardous waste produced in the tri-state region is fairly homogeneous, except for DBCP.

SUMMARY OF THE ISSUES

1. Is the NUHWSSA import ban invalid as a burden on interstate commerce as protected by the Commerce Clause of the U.S. Constitution?

2. Is the NUHWSSA export ban invalid as a burden on interstate commerce as protected by the Commerce Clause of the U.S. Constitution?

3. Statutory construction issues:

   a. Whether the remainder of the NUHWSSA would survive should a court declare unconstitutional and

void either section 3 (the export ban) or section 4 (the import ban) of the Act, where no severability clause exists within the statute?

b. What weight, if any, should be given the legislative hearing responses of the General Counsel of the New Union Department of Environmental Affairs as to the state's ability to enact bans on the import and export of hazardous waste, as well as the consequences of a court declaring unconstitutional the import ban on the statute's remainder?

SUMMARY OF THE ARGUMENTS

I. VALIDITY OF THE IMPORT BAN

A. *Preemption*

EDC may move that the federal Resource Conservation and Recovery Act (RCRA) prohibits New Union from enacting legislation that interferes with the interstate transportation and disposal of hazardous waste. New Union may counter this argument by pointing out that RCRA allows the states to supplement its provisions.

B. *Authorization under CERCLA*

New Union may move that section 104(c)(9) of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) authorizes states to erect barriers to the interstate shipment of hazardous waste in the interest of hazardous waste self-sufficiency. CSI may attempt to counter this by arguing that section 104(c)(9) does not authorize an interference with interstate commerce such as the import ban of NUHWSSA.

C. *Dormant Commerce Clause Analysis*

EDC may argue that the import ban is facially discriminatory and it should be declared invalid as a burden on interstate commerce under the Commerce Clause of the U.S. Con-

stitution. The court will use the heightened scrutiny test where a statute is facially discriminatory. Since facial discrimination is not enough for the court to invalidate the statute, EDC may continue to argue that the local purpose is not legitimate and, even if it is legitimate, there were less discriminatory means available to achieve this purpose. New Union will argue that the purpose was legitimate and that there were no less discriminatory alternatives available.

D. *Quarantine Cases*

EDC may argue that the NUHWSSA import ban is a burden on interstate commerce since all of North and South Hampshire's waste is disposed of at their facility in New Union and that there is no other facility available in the region to dispose of DBCP-laden waste. New Union may argue that NUHWSSA is a proper exercise of its police power authority and it should not be required to wait until the transport of DBCP-laden hazardous waste causes harm to its residents or to the environment until it takes action. It may follow the rationale of "quarantine" cases that dealt with the transport of noxious articles of commerce.

II. VALIDITY OF THE EXPORT BAN

A. *Dormant Commerce Clause Analysis*

CSI may argue that the export ban is facially discriminatory and it should be declared invalid as a burden on interstate commerce under the Commerce Clause of the U.S. Constitution. The court will use the heightened scrutiny test where a statute is facially discriminatory. Since facial discrimination is not enough for the court to invalidate the statute CSI may continue to argue that the local purpose is not legitimate and even if it is legitimate there were less discriminatory means available to achieve this purpose. New Union will argue that the purpose was legitimate and that there were no less discriminatory alternatives available.

B. *Market Participant*

New Union may argue that, because it is a "market participant," the export ban should not be subjected to traditional commerce clause analysis. CSI may argue that the market participant exemption does not apply to New Union because the state does not own and control the Springfield facility.

III. STATUTORY CONSTRUCTION

A. *Severability of the New Union Legislation*

Appellee NU may argue that in the absence of a severability clause a court's determination that the section 4 Import Ban is unconstitutional will cause the section 3 Export Ban to fail as well. Additionally, Appellee NU may attempt to argue that this was the intent of the legislature, and that without Section 4 the entirety cannot be given effect. Appellant EDC may counter that although the section 4 Import Ban is constitutionally defective, it is severable from the act, and that the Export Ban and the remainder are unaffected and can stand on their own as fully operative law. Likewise, Appellant CSI may pose a similar argument, but submit that while the section 3 Export Ban is invalid the other statutory provisions (to include the section 4 Import Ban) remain valid and can stand alone.

B. *Weight and Effect of the General Counsel's Opinion*

Appellee NU may argue that the General Counsel's responses during the legislative hearings are entitled to considerable weight due to their influence and role in the legislative process, as well as being an interpretation of an agency official regarding an enabling act that it is charged to administer. Both Appellant EDC and Appellant CSI may argue that the statute is clear on its face, and that resorting to the remarks of an administrative agency personnel is not needed nor should be given any weight or deference. The appellant may also proffer that the comments of the General Counsel are unreliable and are not indicative of legislative intent.

DISCUSSION

This brief discusses the validity of New Union's Hazardous Waste Self Sufficiency Act ("NUHWSSA"). The stated purpose of NUHWSSA is to enable the state to become self-sufficient in the disposal of the hazardous waste generated in the state. The statute contains an import ban and an export ban. The import ban will be scrutinized under Commerce Clause Doctrines. The effect of congressional action on New Union's ability to legislate in the area of hazardous waste will also be discussed. Additionally the import ban will be scrutinized as a discriminatory action interfering with interstate commerce. Likewise, the brief will examine how the export ban may be affected by challenges under Commerce Clause doctrines, including the market participant doctrine. Next, statutory construction is examined to ascertain possible severability of either the import or the export ban should one be declared unconstitutional. Finally, the weight of the General Counsel's opinion during drafting will be discussed as to its effect as an extrinsic source on legislative history.

I. IMPORT BAN

The Founders envisioned a free, unrestricted marketplace where every farmer, craftsman, etc., could be certain that he would have free access to every market in the nation and that his products would not be banned from any state because of customs, duties, or regulations.[1] The Commerce Clause[2] protects this vision. It states that "Congress shall have "[t]he Power . . . [t]o regulate Commerce with foreign nations, and among the several states . . . ." "[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace."[3] The Supreme Court has found that hazardous waste is an article of commerce and therefore given Commerce Clause protection.[4]

1. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).
2. U.S. CONST. art. I, § 8, cl. 3.
3. Reeves, Inc. v. Stake, 447 U.S. 429, 436-37 (1980).
4. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2013 n.3 (1992).

A. *Commerce Clause*

A state can protect the health and safety of its citizens and the integrity of its natural resources as long as it does not needlessly obstruct interstate trade or try to economically isolate itself.[5] The philosophy behind the United States' Constitution is that "the peoples of the several states must sink or swim together . . . in the long run prosperity and salvation are in union and not division."[6] A state cannot isolate itself from the nation's problems by protecting its own residents' economic interests by discriminating against out-of-state consumers.[7] Economic protectionism is almost always found to be an illegitimate objective[8]

By blocking interstate trade through import and export bans, a state may attempt to isolate itself from the nation's problems in violation of the Commerce Clause. The disposal of waste is a major problem for every state in this nation. By enacting the NUHWSSA, New Union is attempting to create a plan where it can be self-sufficient in its disposal of hazardous waste.[9] Through this plan, New Union will neither allow exportation of any waste generated in-state,[10] nor accept waste generated out-of-state.[11] This blockage of interstate trade will place New Union in economic isolation, regarding the disposal of hazardous waste.

The Supreme Court has also found that a state cannot restrict its natural resources for in-state users[12] because a restriction by one state would cause a restriction by another state until all states had such restrictions causing interstate

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5. Maine v. Taylor, 477 U.S. 131, 151 (1986).

6. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

7. *Id.* at 527.

8. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981); Norfolk S. Corp. v. Oberly, 822 F.2d 388, 401 (3d Cir. 1987).

9. NUHWSSA § 2.

10. NUHWSSA § 3. "EXPORT BAN. Effective March 1, 1993, no hazardous waste may be transported from New Union to any other state." *Id.*

11. NUHWSSA § 4. "IMPORT BAN. Effective March 1, 1993, no hazardous waste may be transported from any other state to New Union . . ." *Id.*

12. West v. Kansas Natural Gas Co., 221 U.S. 229 (1911); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

commerce to cease.[13]

B. *Effect of Congressional Action*

Actions taken by Congress under the Commerce Clause may effect the ability of the states to legislate in a manner that interferes with interstate commerce. Congress may enact a statute that preempts action by the states,[14] or Congress may pass legislation that authorizes the states to act in ways that restrict interstate commerce.[15] At issue here is what extent Congress has preempted the States from legislating on the subject of hazardous waste by its enactment of the Resource Conservation and Recovery Act ("RCRA"),[16] and the extent Congress has authorized the states, under section 104(c)(9) of CERCLA,[17] to act in the interest of hazardous waste self-sufficiency as New Union has done.[18]

1. Preemption

The U.S. Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding."[19] RCRA is a federal statutory scheme estab-

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13. City of Philadelphia v. New Jersey, 437 U.S. 617 (1977); West v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1911) (regulation restricting oil and gas commerce void; this court uses the dominant approach used by courts which address state regulation of the export of natural resources). *See also* Pennsylvania v. West Virginia, 262 U.S. 553 (1923); H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) (permit required for export of groundwater; facially discriminatory; state failed to show a close fit between a reciprocity agreement and the asserted local purpose); New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (restriction on export of hydroelectric power produced by a federal facility void); Hughes v. Oklahoma, 441 U.S. 322 (1979) (restriction on export of minnows, licenses and fees required, held void.).

14. *See, e.g.*, Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984).

15. *See, e.g.*, Northeast Bancorp, Inc. v. Board of Governors, 472 U.S. 159, 174-75 (1985).

16. 42 U.S.C. §§ 6921-6939b (1988).

17. 42 U.S.C. § 9604(c)(9) (1988).

18. NUHWSSA § 2.

19. U.S. CONST. art. VI, § 2.

lishing uniform and minimum standards for the storage, transportation and disposal of hazardous waste.[20] State law may be preempted by: (1) Congress enacting a federal law that expressly preempts state authority, (2) Congress enacting a pervasive scheme of federal regulation that leaves the states no room to supplement the scheme, or (3) direct conflict between state and federal law.[21] Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . ."[22] or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[23] Thus, the import ban enacted under NUHWSSA will be held invalid if: (1) Congress has expressly preempted all state legislation in the area of hazardous waste, (2) Congress has enacted a federal scheme that does not allow for further state legislation in the area of hazardous waste, or (3) the import ban conflicts with federal law.

RCRA section 3009 provides that states may supplement its federal regulatory scheme.[24] Congress has not expressly

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20. *See Supra* note 16; *see* H.R. REP. No. 1491, 94th Cong., 2d Sess., 29-32 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6267-70.

21. Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983); *see* DANIEL P. SELMI & KENNETH A. MANASTER, STATE ENVIRONMENTAL LAW § 5.04 (1991).

22. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

23. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978); *see* SELMI & MANASTER, *supra* note 21, § 5.04[4].

24. 42 U.S.C. § 6929 (1988). Section 3009 provides that:

> [u]pon the effective date of regulations under this subtitle no State or political subdivision may impose any requirements less stringent than those authorized under this subtitle respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subtitle is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. Nothing in this title shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations. Nothing in this title (or in any regulation adopted under this title)

preempted state legislation nor has Congress enacted a scheme that does not allow for supplemental state action. The issue then is whether New Union's import ban conflicts with federal law. RCRA provides for the uniform national regulation of hazardous waste, creating minimum requirements for the storage, treatment and disposal of hazardous wastes.[25] Section 3009 allows a state to supplement RCRA general requirements with specific requirements of local concern.[26] The Environmental Protection Agency's ("EPA") regulations for state programs approved under RCRA provide that approved state programs, in order to be consistent with the federal scheme, cannot unreasonably interfere with interstate commerce.[27] The New Union hazardous waste management program is not approved under RCRA and as an unapproved state program, is not covered by the EPA's RCRA regulations.

The authority for a state to regulate hazardous waste derives from the state's authority to enact legislation in the interest of the public health, safety and welfare.[28] Therefore,

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shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State.

Id. For the EPA regulations interpreting and implementing this section *see* 40 C.F.R. § 271.1(i) (1992).

25. Old Bridge Chem. Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287, 1292 (3d Cir. 1992).

26. Ogden Envtl. Serv. v. City of San Diego, 687 F. Supp. 1436 (S.D. Cal. 1988) (reversing the local denial of a conditional use permit for a hazardous waste incinerator).

27. 40 C.F.R. § 271.4 (1992). The regulation reads as follows:

§ 271.4 Consistency

(a) Any 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 from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.

(b) Any aspect of State law or of the State program which 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 may be deemed inconsistent.

Id.

28. Celebreeze v. Environmental Enter., Inc., 559 N.E.2d 1335, 1336 (Ohio 1990); *see* Luckie v. Gorsuch, 13 Envtl. L. Rep. (Envtl. L. Inst.) 20,406-07 (D. Ariz. Feb. 25,

NUHWSSA may be seen as a valid exercise of the New Union's police power.

2. "Authorization" under CERCLA

In section 2 of the NUHWSSA, the New Union legislature declared that it was acting in accord with the congressional policy favoring hazardous waste self-sufficiency, as expressed in section 104(c)(9) of CERCLA.[29] Section 104(c)(9) was added to CERCLA by the Superfund Amendments and Reauthorization Act of 1986 ("SARA").[30] Section 104(c)(9) provides that:

> [e]ffective 3 years after October 17, 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 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 sub-

1983) (this authority is commonly known as a state's police power).

29. 42 U.S.C. § 9604(c)(9) (1988). The section reads as follows:

SECTION 2. POLICY. The New Union legislature seeks hazardous waste self-sufficiency. The legislature endorses the United States Congress' policy reflected in section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9604(c)(9), requiring, as a condition of funding under this federal program, each state to assure capacity for disposal of its own hazardous waste, either in-state or through an interstate agreement. No interstate agreement has been reached with neighboring states.

NUHWSSA § 2.

30. Pub. L. No. 99-499, § 104, 100 Stat. 1613, 1617-25 (1986).

> title C of the Solid Waste Disposal Act [RCRA, 42 U.S.C. §§ 6921-39b].[31]

Under section 104(c)(9), Congress established a scheme whereby states would attain hazardous waste self-sufficiency by October 17, 1989. States unable to show self-sufficiency after that date are barred from receiving any federal monies from the Fund established under CERCLA for the cleanup of spills and other releases of hazardous substances.[32]

In *Northeast Bancorp, Inc. v. Board of Governors*, the Supreme Court noted that "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."[33] However, in a dispute involving a Nebraska statute that prohibited the export of its groundwater without a permit, the Court noted that even though Congress had deferred to state water law in 37 statutes, there was no "persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce" at issue.[34] If section 104(c)(9) of CERCLA "plainly authorizes" restrictions on interstate commerce in the interest of hazardous waste self sufficiency, then New Union's import ban would be valid. Following the *Sporhase* reasoning, New Union's unilateral action in seeking hazardous waste self-sufficiency through isolation would be seen as creating an unreasonable burden on interstate commerce when enacted without "plain authorization" from Congress.

The Circuit Court of Appeals in interpreting section 104(c)(9) has not found a clear grant of authorization for the states to erect barriers to interstate commerce. "[N]othing in SARA evidences congressional authorization for each state to close its borders to waste generated in other states to meet

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31. 42 U.S.C. § 9604(c)(9).

32. H.R. REP. No. 253, 99th Cong., 2d Sess. 130 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2912.

33. 472 U.S. 159, 174-75 (1985). At issue in Northeast Bancorp was a system of regional banking that excluded bank holding companies from outside the Northeast from doing business in the region. *Id.* at 162-65. The Court upheld the restriction on interstate commerce on the basis that Congress had authorized such state actions. *Id.* at 174-75.

34. Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 958-60 (1982).

federally mandated hazardous waste management requirements. SARA places the burden of making capacity assurance for future hazardous waste management on the *generating state* and imposes a sanction on that state for failure to satisfy its obligation."[35] The Fourth Circuit found that the language of RCRA and section 104(c)(9) of CERCLA does not indicate "an unmistakably clear congressional intent to permit states to burden interstate commerce" nor has the State presented "legislative history from the two statutes that demonstrate such intent."[36] An argument for an implied grant of authorization under section 104(c)(9) based on *Northeast Bancorp* was rejected in *Hazardous Waste Treatment Council v. South Carolina*.[37]

Likewise, the Supreme Court has noted that states may not impose penalties on conduct already penalized under a federal statutory scheme. *Wisconsin Department of Industry v. Gould, Inc.*[38] Section 104(c)(9) of CERCLA creates a federal penalty by denying Fund monies to states not in compliance.[39] The court may view New Union's import ban as a penalty on both North Hampshire and South Hampshire because those states must now find new means to dispose of their hazardous waste. If New Union's import ban is seen as creating a penalty under state law, then the import ban is void due to conflict with and preemption by federal law.

C. *Dormant Commerce Clause*

Decades ago the Supreme Court recognized that a state has unquestioned power to protect the health and safety of its citizens.[40] However, a state cannot use economic measures to

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35. National Solid Waste Management Ass'n v. Alabama Dep't of Envtl. Management, 910 F.2d 713, 721 (11th Cir. 1990), *modified*, 924 F.2d 1001 (1990), *reh'g en banc denied*, 932 F.2d 979, *cert. denied*, 111 S. Ct. 2796 (1991).

36. Hazardous Waste Treatment Council v. South Carolina, 945 F.2d 781, 792 (4th Cir. 1991).

37. 766 F. Supp. 431, 439-40 (D.S.C.), *modified*, 945 F.2d 781 (4th Cir. 1991).

38. 475 U.S. 282, 286 (1986).

39. H.R. REP. No. 253, 99th Cong., 2d Sess. 130 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6238, 6267-70.

40. Dean Milk Co. v. City of Madison, 340 U.S. 349, 353 (1951).

protect a local industry if adequate reasonable, non-discriminatory alternatives can be used instead.[41] Even when a state is regulating in an area of legitimate local concern, limitations still exist due to the "dormant commerce clause,"[42] which defines the effect of the Commerce Clause on state and local regulations.[43] The Commerce Clause is referred to as dormant when Congress has not expressly used its powers in regulating in this area.[44] The state's regulation will be contrasted against the effect that the regulation has on interstate commerce. A regulation enacted for legitimate reasons will be found to be invalid if its effects on local problems are marginal, while the burden it imposes on interstate commerce is substantial.[45] Generally, the key concept in a dormant commerce clause analysis is to "weigh the state regulatory concerns against the burden imposed on the course of interstate commerce."[46] In reviewing the import ban enacted by New Union, the court will consider the State's concern over its disposal of hazardous waste and also the burden that NUHWSSA imposes on interstate commerce.

Courts use three approaches when deciding whether a statute violates the Commerce Clause: (1) a heightened scrutiny approach, (2) a balancing test and (3) a highly deferential approach. Heightened scrutiny is applied if the statute is facially discriminatory or is discriminatory in its effects. The other two approaches are used when a statute is not so obviously discriminatory. The balancing test compares the statute's effect on interstate commerce with local benefits.[47] The

41. *Id.* at 354.

42. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471; Hughes v. Oklahoma, 441 U.S. 322, 326 (1979).

43. Norfolk Southern Corp. v. Oberly, 822 F.2d 388, 390, 399 (3d Cir. 1987).

44. Lisa J. Petricone, *The Dormant Commerce Clause: A Sensible Standard of Review*, 27 SANTA CLARA L. REV. 443 n.6 (1987).

45. Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981).

46. Direct Auto. Imports Ass'n, Inc. v. Townsley, 804 F.2d 1408, 1416 (5th Cir. 1986) (citing Kassel v. Consol. Freightways Corp., 450 U.S. 662, 670-71 (1981)).

47. A balancing test is used if a statute is not facially discriminatory so that it only incidentally burdens interstate commerce. If the burden on interstate commerce is "clearly excessive in relation to the putative local benefits" then the statute will be found to be invalid. Pike v. Bruce Church Inc., 397 U.S. 137, 142 (1970).

highly deferential approach gives great deference to the legislature and is only used in limited circumstances.[48] The heightened scrutiny and balancing approaches are most commonly used, and unfortunately no "clear line" indicates which test to use.[49] The New Union statute is facially discriminatory since NUHWSSA sections 3 and 4 expressly prohibit the import or export of any hazardous waste. Therefore, based upon the discriminatory wording of the statute, the heightened scrutiny is the most appropriate test for the court to use.

If the court applied the Pike test to the facts of this case it would attempt to find whether there is a legitimate local purpose, what the burden on interstate commerce is and then it will balance this local purpose against the burden on interstate commerce. The purpose of the NUHWSSA is to protect the residents of the state and the environment from the dangers of hazardous waste, especially that which originates outside of New Union since it is more dangerous than waste originating inside New Union; in addition the state is attempting to become self sufficient in its treatment of in-state hazardous waste. The import ban does pose a burden on interstate commerce since New Union has the only facility in the region that is equipped to handle DBCP-laden waste.

The following are some recent environmental cases that have used a balancing approach: Old Bridge Chem. Inc. v. New Jersey Dep't of Envtl. Protection, 965 F.2d 1287 (3d Cir. 1992) (upholding New Jersey's regulations relating to the recyclable by-products of hazardous waste); Diamond Waste, Inc. v. Monroe County, Ga., 939 F.2d 941 (11th Cir. 1991) (enjoining a ban on importation of solid waste to a county owned facility); J. Filiberto Sanitation v. New Jersey Dep't of Envtl. Protection, 857 F.2d 913 (3d Cir. 1988) (county regulation requiring most types of solid waste to be deposited only at a specified transfer station upheld); DeVito v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I. 1991) (regulation requiring waste generated in-state to be disposed of in-state held void); Washington Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982) (ban on importation of low-level radioactive waste held in violation of Commerce Clause). Evergreen Waste Sys. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987) (ban on the importation of solid waste from outside of a three-county region held to be a valid exercise of police power).

48. The highly deferential approach is generally used in the area of highway safety. Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); *see* SELMI & MANASTER, *supra* note 21, § 5-26. The Court is reluctant to extend this to other areas. Norfolk Southern Corp. v. Oberly, 822 F.2d 388 (3d Cir. 1987). Many modern Supreme Court cases using this test find that the presumption of validity fails. SELMI & MANASTER, *supra* note 21, at n. 103 (citing Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 442 (1978)).

49. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, n.5 (1992).

1. Heightened Scrutiny

Even though a statute affirmatively discriminates against interstate transactions, either on its face or in its practical effect, it is not automatically invalidated. If the statute can be considered part of the State's police powers, the burden shifts to the state to prove that the statute serves a legitimate local purpose and that less discriminatory means were not available.[50] The availability of nondiscriminatory means to serve the intended purpose can only be determined through an extensive factual analysis.[51] The statute will be held valid if the state meets this heavy burden.[52]

Recent environmental cases have used the heightened scrutiny approach.[53] In each case the Supreme Court found the statute discriminatory but went on to consider each state's local purpose and whether less discriminatory means were available. The statute was upheld in one case and invalidated in the other, proving that facially discriminatory statutes are not always struck down.[54] A state regulation discriminating against interstate commerce may be found to be constitutional if: (1) the statute serves a legitimate local purpose, and (2) it is not possible to serve the purpose equally well by an

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50. Maine v. Taylor, 477 U.S. 131, 138 (1986); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 36 (1980).

51. *See* Maine v. Taylor, 477 U.S. at 141-43.

52. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 957 (1982); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977) (outright ban of apples sold in closed containers must be identified by federal grade or designated ungraded; alleged purpose was to protect consumers from fraud but less discriminatory alternatives were available); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) (municipal ordinance forbidding the sale of milk in the city as pasteurized unless it was processed within 5 miles of the city; alleged purpose was protection of the public's health and safety by the sanitary regulation of milk).

53. *See also* National Solid Wastes Management Ass'n v. Alabama Dept. of Envtl. Management, 910 F.2d 713 (11th Cir. 1990), *modified*, 924 F.2d 1001 (11th Cir.), *cert. denied* 111 S. Ct. 2796 (1991) (prohibited "in-state treatment facilities from accepting hazardous waste generated in any state that prohibits treatment of such waste within that state"); Chemical Waste Management, Inc. v. Templet, 967 F.2d 1058 (5th Cir. 1992) (ban on hazardous waste from Mexico because they have less stringent controls).

54. Maine v. Taylor, 477 U.S. 131 (1986); Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992).

available nondiscriminatory means.[55]

In *Chemical Waste Management v. Hunt*, the statute at issue was reviewed under heightened scrutiny and found to be invalid. The statue imposed a fee on out-of-state hazardous waste which was to be landfilled in-state.[56] The state argued that the purpose of the additional fee was to protect the health and safety of its citizens. The Court found the statute void because there was no evidence that the waste generated outside of the state was more dangerous than waste generated inside the state, and that the waste's origin was the only basis for the additional fee. The Supreme Court listed alternatives that it deemed acceptable to the fee that Alabama imposed on foreign hazardous waste disposed of in-state.[57] These alternatives included: (1) a per-mile additional fee on all vehicles transporting hazardous waste over Alabama roads, (2) a per-ton additional fee on all hazardous waste disposed of in Alabama and (3) an "even-handed cap" on all waste disposed of at the facility in question.[58] The Court emphasized the nondiscriminatory nature of each of these alternatives.[59] All of these alternatives would affect in-state and out-of-state citizens equally.[60] The majority held that the imposition of an additional fee only on hazardous waste imported into the state and no similar fee imposed on in-state waste was unconstitutional.[61]

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55. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988); Maine v. Taylor, 477 U.S. 131, 140 (1986); Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941, 958 (1982); Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

56. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992).

57. *Id.* at 2015.

58. *Id.*

59. *Id.*

60. The dissent points out that under these other alternatives state residents would be faced with additional taxes, since residents already pay general taxes that go toward the landfill. *Id.* at 2017.

61. In Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992), the Supreme Court again stated that "there is, however, no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount that the operator may accept from inside the State." *Id.* at 2027.

In *Maine v. Taylor*,[62] the Court found that an import ban on live baitfish was constitutional.[63] The statute was facially discriminatory, but the court reviewed its purpose and the availability of less discriminatory means. Previously, the District Court had found that Maine had a legitimate and substantial purpose in prohibiting this importation of live fish, due to the uncertain affect of parasites in the fish and of the non-native fish on the environment. Additionally, it found that less discriminatory means were not currently available, and that there was a substantial delay in producing new testing procedures. The First Circuit noted that "several factors 'cast doubt' on the district court's finding of a legitimate local purpose."[64] These factors included: (1) the fact that Maine was the only state in the nation which banned the importation of live fish, (2) that parasites and other non-native fish could be brought into the state by other methods that did not fall under this statute, and (3) that Maine had a method to inspect other freshwater fish that it imported. The Supreme Court rejected the Court of Appeal's rationale and agreed with the district court. The Supreme Court based its conclusion on the fact that other nondiscriminatory alternatives were not available; the abstract possibility that a testing procedure could be developed did not indicate that nondiscriminatory alternatives were available. The state was not required to develop "new and unproven means of protection at an uncertain cost," nor wait until environmental damage occurs before taking action to protect its environment.[65] The district court found that Maine's ban on the importation of baitfish served a legitimate local purpose, which could not possibly be served as well by available nondiscriminatory means.[66] According to the Court in *Maine v. Taylor*, a state must show that "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[67] The object of

62. 477 U.S. 131 (1986).
63. *Id.* at 143.
64. *Id.*
65. *Id.* at 147-48.
66. *Id.* at 143.
67. Wyoming v. Oklahoma, 112 S. Ct. 789, 800 (1992).

the discrimination should pose a "unique threat" which the state desires to avoid.[68] The Sixth Circuit has noted that "a state's justification for regulating the influx of potentially hazardous waste and preserving its natural resources is a material issue of fact under the Commerce Clause."[69]

NUHWSSA should be subjected to heightened scrutiny because the statute is discriminatory on its face since it directly discriminates against the import and export of hazardous waste. This barrier to interstate trade is not allowed by the Commerce Clause, so the burden shifts to New Union to prove that this statute serves a legitimate local purpose and that less discriminatory means are not available.

NUHWSSA's import ban may be seen as serving a legitimate local purpose because the DBCP present in the waste imported from North Hampshire and South Hampshire poses a "unique threat" to the public health, safety and welfare of New Union, particularly the waste that is pure DBCP. It appears that nondiscriminatory alternatives are available, in particular, either the per-mile or the per-ton additional fee alternative described by the Supreme Court in *Chemical Waste Management* would serve New Union's purpose.[70] However, neither of these alternatives would address the specific and unique threat posed by DBCP. Relying on the fact that DBCP is such an unusual waste, New Union could have drafted draconian regulations to ensure that if DBCP was carried into New Union, it would be transported safely.[71] Thus, NUHWSSA's import ban may be held invalid if the court determines that nondiscriminatory alternatives are available.

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68. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2017 (1992); *see also* Maine v. Taylor, 477 U.S. at 140-43. Last term, the Supreme Court noted that "[t]here is . . . no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the state, but not the amount the operator may accept from inside the state." Fort Gratiot Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2027 (1992).

69. National Solid Wastes Management Ass'n v. Voinovich, 959 F.2d 590, 593 (6th Cir. 1992).

70. *Id.*

71. *See* RCRA § 3009, 42 U.S.C. § 6929 (1988), preserving the States' authority to supplement the federal scheme for the storage, transportation and disposal of hazardous waste.

2. Quarantine Cases

In some environmental cases, parties have tried to use arguments posed in the "quarantine cases" where facially overt discrimination was sustained if out-of-state goods threatened the safety of the state's citizens or its natural resources.[72] In these cases the "outright prohibition of entry rather than some intermediate form of regulation is the only effective method of protection."[73] Two Supreme Court cases in which these "quarantine" arguments have been used are: *Philadelphia v. New Jersey*[74] and *Chemical Waste Management v. Hunt*.[75]

In *Philadelphia v. New Jersey*, the court found that the ban on the importation of waste generated out-of-state was invalid.[76] The Supreme Court rejected the argument that the statute was analogous to quarantine laws. It distinguished diseased animals from solid waste, since solid waste was only harmful after it was disposed of in a landfill and at that point there was no reason to distinguish between in-state and out-of-state waste since one is as harmful as the other.[77] There was no claim that the movement of waste into or through New Jersey endangered health. The majority found that quarantine laws were bans on the

> importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles,

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72. Clasen v. Indiana, 306 U.S. 439 (1939); Oregon-Washington R.R. & Navigation Co. v. Washington, 270 U.S. 87 (1926); Asbell v. Kansas, 209 U.S. 251 (1908); Reid v. Colorado, 187 U.S. 137 (1902); Bowman v. Chicago, 125 U.S. 465 (1888).

73. Lewis v. B.T. Inv. Managers, Inc., 447 U.S. 27, 43 (1980) (court held that some intermediate type of regulation of bank holding companies could be enacted instead of an outright prohibition).

74. City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).

75. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2016 (1992).

76. 437 U.S. 617, 629.

77. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2027 (1992); Maine v. Taylor, 477 U.S. 131 (1986).

whatever their origin.[78]

New Jersey could not try to conserve its landfills by burdening out-of-state residents only. In his dissent, Justice Rehnquist stated that he would have analogized this case to the quarantine cases. He argued that solid waste cannot be distinguished from germ infected rags, diseased meat, etc., and that the transportation of hazardous waste through a state may pose health hazards.[79]

In *Chemical Waste Management v. Hunt*,[80] the Court repeats the proposition that if an article of commerce poses health concerns, those concerns will not vary with the origin of the waste — in-state waste can be just as harmful as out-of-state waste.[81] The Court states that its holding would be different if the imported waste raised health concerns not presented by in-state waste.

In various environmental cases statutes have been held unconstitutional because the court found no difference between in-state and out-of-state waste. The out-of-state waste that is imported into New Union is much more dangerous than in-state waste so the court may find New Union's ban on the waste valid. Citing *Maine v. Taylor*, New Union can assert that it should not have to wait until environmental damage occurs before taking action. DBCP is very dangerous, and the ban on the import of out-of-state waste (the majority of which is laden with DBCP) is a means of protecting its citizens from accidents which may occur in the transport of DBCP and also from the possible harmful effects that the treated waste may have after it is disposed in a New Union landfill. Arguments used from the quarantine cases might be successfully used in this case since the transport of this waste creates great risks[82]

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78. 437 U.S. at 628-29.

79. *Id.* at 632. (Rehnquist, C.J., dissenting).

80. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992).

81. *Id.* at 2010; Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Maine v. Taylor, 477 U.S. 131 (1986).

82. A truck carrying a two gallon container of pure DBCP from North Hampshire into New Union for disposal overturned. Forty cows died from the escaping

as did the articles transported in quarantine cases.

Other constitutional clauses may have significant impact on environmental regulation but they have not yet been widely tested in the courts. Therefore, even if Congress allows a state to regulate in a certain area, and even if the statute would probably be held valid under the Commerce Clause, it is important to be aware that it still might fail under the equal protection, contract and the privileges and immunities clauses of the United States' Constitution.[83]

II. EXPORT BAN

Section 3 of the NUHWSSA prohibits the export of hazardous waste from New Union.[84] Many of the Commerce Clause doctrines previously discussed under the import ban also apply to the export ban. The Supreme Court has noted that states may not "advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state."[85]

A. *Heightened Scrutiny*

Like the import ban, the export ban will be subjected to heightened scrutiny because it is facially discriminatory.[86] Similarly, for the export ban to be upheld, New Union must show that the statute serves a legitimate local purpose and that it is not possible to serve the purpose as well by available nondiscriminatory means.[87]

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vapors and a farmer was exposed and would have died if the truck driver had not donned protective clothing and administered an antidote that he had in his truck. New Union spent approximately $1,400,000 responding to this accident and is still waiting for reimbursement from North Hampshire and private firms. New Union has filed an action under CERCLA to recover its response costs.

83. United Building & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 220 (1984); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

84. The section reads as follows: "SECTION 3. EXPORT BAN. Effective March 1, 1993, no hazardous waste may be transported from New Union to any other state." NUHWSSA § 3.

85. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949).

86. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 336-37 (1979).

87. Maine v. Taylor, 477 U.S. 131, 140 (1986). Environmental cases addressing restrictions on the export of solid waste have upheld such restrictions where there has

The New Union legislature offered no purpose for the export ban beyond the general policy of hazardous waste self-sufficiency.[88] Nondiscriminatory alternatives to the export ban might include efforts to increase the capacity of hazardous facilities in New Union.

B. *Market Participant*

In *Hughes v. Alexandria Scrap*, the Supreme Court recognized that in the absence of congressional action, nothing in the Commerce Clause prohibits a State "from participating in the market and exercising the right to favor its own citizens over others."[89] At issue in *Alexandria Scrap* was a subsidy offered by the State of Maryland to scrap dealers who processed worn out or abandoned cars.[90] To collect the bounty offered by the State, a Maryland processor needed only to show an indemnity agreement provided by the person who delivered the car to the dealer. Non-Maryland dealers were required to show one of four documents establishing legal title to a car.[91] The Court found that Maryland had elected to enter the market. It paid state funds for the removal of automobile "hulks," rather than engaging in regulatory activity. It had become a market participant and had not acted in violation of the Commerce Clause.[92]

Subsequent Supreme Court decisions have strengthened and clarified the market participant exception.[93] The Court

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been "an important state health and environmental concern, which does not appear to materially favor in-state economic interests, but which may have some incidental impact on commerce between the states." Harvey & Harvey, Inc. v. Delaware Solid Waste Auth., 600 F. Supp. 1369, 1380 (D. Del. 1985); *see* J. Filiberto Sanitation v. New Jersey Dep't of Envtl. Protection, 857 F.2d 913 (3d Cir. 1988); *but see* Waste Sys. Corp. v. County of Martin, Minn., 784 F. Supp. 641 (D. Minn. 1992) (striking down as an impermissible discrimination against interstate commerce a requirement that all compostable solid waste be delivered to the local waste facility).

88. NUHWSSA, § 2.

89. 426 U.S. 794, 810 (1976).

90. *Id.* at 796-802.

91. *Id.* at 800-01.

92. *Id.* at 809-10.

93. Reeves, Inc. v. Stake, 447 U.S. 429 (1980) (South Dakota's preference on sale of cement to state residents); White v. Massachusetts Council of Const. Employers, 460 U.S. 204 (1983) (Boston's requirement that city financed construction projects

has applied the market participant exception where a State was acting as a proprietor or spending its funds directly.[94] Other courts have held that reserving space in publicly-owned landfills for residents is within the market participant exception.[95] The Supreme Court has also held that the exception is limited to markets in which a state is participating in directly.[96]

Here, the question exists whether the market participant exception applies to New Union because its state hazardous waste management statute requires, amongst other things, that all hazardous waste facilities be located on state land. As it relates to the management of a proprietary resource, the export ban would be valid if New Union operated the facility directly.[97] However, because the land is under a 99-year lease by which New Union receives only 10% of the net-profits as annual rent, New Union may not necessarily qualify as a market participant. Also, because New Union has such a *de minimis* interest in the profits of the Springfield facility, the export ban may be seen as an impermissible "downstream regulation."[98]

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had to be performed by workers at least half of whom were bona fide city residents); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984) (invalidating Alaska requirement that timber cut from state lands be processed in-state; the Court found this to be an impermissible attempt at "downstream regulation"); *see also* City of Philadelphia v. New Jersey, 437 U.S. 617, 627-28 n.6 (1978).

94. *Alexandria Scrap*, 426 U.S. at 809-10; *White*, 460 U.S. at 209-10.

95. County Comm'r of Charles County v. Stevens, 473 A.2d 12 (Md. 1984); Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1127 (1990); LeFrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987); Shayne Bros., Inc. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984); *see* Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2019 (1992) (Rehnquist, C.J., dissenting).

96. *South-Central Timber Dev.*, 467 U.S. at 98-99.

97. County Comm'r of Charles County v. Stevens, 473 A.2d 12 (Md. 1984); Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 110 S. Ct. 1127 (1990); LeFrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987); Shayne Bros., Inc. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984); *see* Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2019 (1992) (Rehnquist, C.J., dissenting).

98. *South-Central Timber Dev.*, 467 U.S. at 98-99.

III. STATUTORY CONSTRUCTION

A. *Severability and the New Union Legislation*

In February 1991, New Union enacted the New Union Hazardous Waste Self-Sufficiency Act (NUHWSSA). The statute contains five major sections. The first section explains the legislature's findings, describing hazardous waste as a threat to human health and the environment. It also indicates that hazardous waste produced out-of-state is more dangerous than that produced in the state. The second section deals with the legislature's policy, which is to further self-sufficiency and compliance with CERCLA.[99] The third and fourth sections explicitly deal with export and import bans. The final section provides the Act's title. The Act contains no severability clause. A severability clause, if present, would provide that the entire act would not fail because a portion or portions of the Act are deemed invalid.

The Appellee may attempt to argue that due to the absence of a severability clause the unconstitutionality of one provision may cause the entire act to fall. On the other hand when a provision is determined unconstitutional and is severable from the act, the Appellants may argue that the remainder is unaffected and will stand on its own as fully operative law. Determining the correct outcome will involve an examination of statutory construction, as well as legislative history and intent.

1. Lack of a Severability Clause

A common question pertaining to statutory interpretation relates to the effect on an act when one of its provisions has been declared unconstitutional. During the 1980s, the United States Supreme Court answered this question authoritatively.[100] In the *Regan v. Time, Inc.* case, the Court stated:

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99. NUHWSSA § 2. *See also* Comprehensive Environmental Response, Compensation, and Liability Act § 104(c)(9), 42 U.S.C. § 9604(c)(9) (1988).

100. Regan v. Time, Inc., 468 U.S. 641 (1983); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1982).

> In exercising its power to review the constitutionality of a legislative Act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. As this court has observed, "whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act so far as it is valid." *El Paso & Northeastern Ry. Co. v. Gutierrez*, 215 U.S. 87, 96 (1909). Thus, this court has upheld the constitutionality of some provisions of a statute even though other provisions of the same statute were unconstitutional. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) . . . we have often refused to resolve the constitutionality of a particular provision when the constitutionality of a separate, controlling provision has been upheld.[101]

The *Regan* court believed several controlling factors existed in the determination of severability. Initially, it determined that a court must ascertain whether the remaining provisions could survive in the absence of the unconstitutional provision.[102] It then proffered that severability of an unconstitutional provision was "largely a question of legislative intent, but the presumption is in favor of severability." [103] The court summarized that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[104]

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101. Regan v. Time, Inc., 468 U.S. at 652-53. *See also* Brockett v. Spokane Arcades, Inc., 479 U.S. 491 (1985) (a later Supreme Court case stating that severability can be granted where the parts are wholly independent of one another and where the constitutional part can stand where the unconstitutional part falls); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684-87 (1986) (citing Regan v. Time, Inc., and stating that in the absence of strong evidence indicative of legislative intent to the contrary, the objectionable portion of a statute can be excised from the remainder); New York v. United States, 112 S. Ct. 2408 (1992).

102. *Regan*, 468 U.S. at 653.

103. *Id.*

104. *Id.*; *See also* Alaska Airlines, Inc. v. Brock, 480 U.S. at 684 (stating that the standard for severability is whether the legislature would have enacted the provisions within its power independently from those which it could not); New York v. United

The *Regan v. Time, Inc.* decision's reasoning closely followed that of another case in the same time period. The *Immigration and Naturalization Service v. Chadha* case specifically dealt with a statutory clause providing for a one-house legislative veto in Congress. The court noted its own recent activity in the area which reaffirmed earlier case law that held that provisions should be severed unless it is evident that the legislature would not have enacted the legislation absent the unconstitutional provision.[105] In the challenged statute, a severability clause was present and the *Chadha* court noted that its presence gave rise to a presumption that Congress did not intend the validity of an act to depend on whether all its parts are valid.[106] The court added that "[a] provision is further presumed severable if what remains after 'is fully operative as a law'."[107]

Both the *Regan* and *Chadha* decisions reflect a growth in judicial interpretations on this topic. As early as 1880, the Supreme Court stated that unconstitutional parts of legislation can be severed where after removing the offending part(s): (1) the object of the law is not destroyed, (2) the remainder can stand alone, and (3) the whole is not invalidated by a single unconstitutional part.[108] Another Supreme Court decision proffered that "if an obnoxious section is of such import that other sections without it would cause results not contem-

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States, 112 S. Ct. 2408, 2434 (following the *Regan* and *Alaska Airlines* rationale).

105. Immigration & Naturalization Serv. v. Chadha, 462 U.S. at 932 (citing Champlin Ref. Co. v. Corporation Comm'n of Okla., 268 U.S. 210, 234 (1932)).

106. *Id.*

107. *Id.* at 934 (quoting Champlin Ref. Co. v. Corporation Comm'n of Okla., 286 U.S. at 234).

108. Tiernan v. Rinker, 102 U.S. 123 (1880). *See also* Dorchy v. Kansas, 264 U.S. 286 (1923) (echoing the same thoughts as did the *Tiernan* court forty years earlier); Tilton v. Richardson, 403 U.S. 672, 684, *reh'g denied*, 404 U.S. 874 (1971) (the primary emphasis is to save and not destroy legislation). State courts of that period and later have also adhered to the same concepts. *See, e.g.*, Chicago, B. & Q. R. Co. v. Jones, 37 N.E. 247 (Ill. 1894), *error dismissed*, 41 L. Ed. 1184 (1896); Newton v. City of Tuscaloosa, 36 So. 2d 487 (Ala. 1903); State v. Robb, 60 A. 874 (Me. 1905); Lee v. Smith, 198 So. 296 (Miss. 1940); Oglesby v. Pacific Fin. Corp. of Cal., 38 P.2d 646 (Ariz. 1934); Castle v. Gladden, 270 P.2d 682 (Or. 1954); City of Saint Paul v. Dalsin, 71 N.W.2d 855 (Minn. 1955); State v. Green, 355 So. 2d 789 (Fla. 1979) (enumerating five indicia needed for severability).

plated or desired by the legislature, the entire statute must be held inoperative."[109] These two concepts provided the foundation for another Supreme Court decision which held that words could not be added after severing an unconstitutional provision in order to enable remaining provisions to become effective.[110] Emerging from these decisions, the Supreme Court felt that it was "the duty of the court to sever and maintain the constitutionality of the remaining provisions."[111]

Several state and federal courts have attempted to develop tests or conditions on which to base severability. The Eighth Circuit said that in order to grant severability, two "indispensable conditions" must be met: (1) the constitutional and unconstitutional provisions are capable of being separated; and (2) the unconstitutional part is not so connected with the general scope of the law as to make it impossible, if stricken out, to give effect to the intent of the legislature.[112] The Ohio Supreme Court stated that a "definite" test existed which it described as:

> whether the parts are so mutually connected with and dependent on each other, and each is such a consideration or compensation for the other as to make it probable that if both could not be made effective, the legislature would not have passed the other. There can be no interdependence of the provisions on each other in the statute.[113]

Other courts have avoided the formulation of tests and based their decisions on the existence of presumptions and legislative intent. In determining legislative intent, the Louisiana Supreme Court proffered that where a court is doubtful as to the intent of the legislature regarding severability, the whole

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109. Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 565 (1902).

110. Butts v. Merchants Trans. Co., 230 U.S. 126, 134 (1912). *Contra* Springfield Gas & Elec. Co. v. City of Springfield, 126 N.E. 739, 745 (Ill. 1920) (holding that "words in a statute may be modified, altered, or supplied so as to obviate any repugnance or inconsistency with legislative intention, although in doing so particular provisions of an act may not be read or construed according to their literal reading").

111. El Paso & Northeastern Ry. Co. v. Gutierrez, 215 U.S. at 97.

112. Cella Comm'n Co. v. Bohlinger, 147 F. 419, 423 (8th Cir. 1906).

113. State v. Kassay, 184 N.E. 521, 523 (Ohio 1932).

statute must fail.[114] As can be seen, the recurring themes of the various courts emerge in the Supreme Court's *Regan* articulation.

2. Presence of a Severability Clause

When a severability clause is present, a slightly different analysis emerges. A leading casebook on the legislative process states that the "severability clause seeks to preserve other provisions of the proposed legislation if other provisions are invalidated."[115] In the late 1920s, the Supreme Court explained that a presumption exists that the legislature intends an act to stand in its entirety, or not at all.[116] It added that a severability clause operates to overcome this presumption acting as an indicator of the legislature's intent that the act be divisible, and after the removal of invalid portions, the legislature would be content with what remains.[117] Other Supreme Court cases have also avowed this line of thought.[118] Later Supreme Court decisions developed this concept further, and provided significant, detailed explanations of it. In 1931, the court ventured that:

> While this declaration [severability clause] is but an aid to interpretation and not an inexorable command, (citation omitted) it has the effect of reversing the common law presumption, that the legislature intends the act to be effective as an entirety, by putting in its place the opposite presumption of divisibility . . .[119]

The case of *Carter v. Carter Coal Co.* took these concepts even further by offering that when a severability clause is present, two rules come into play.[120] First, that without the sever-

114. City of Gretna v. Bailey, 75 So. 491 (La. 1917).

115. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION 836 (1988).

116. Williams v. Standard Oil Co., 278 U.S. 235, 241 (1928).

117. *Id.* at 242.

118. *See, e.g.*, Champlin Ref. Co. v. Corporations Comm'n of Okla., 286 U.S. 210 (1931).

119. Utah Power & L. Co. v. Pfost, 286 U.S. 165, 184 (1931).

120. Carter v. Carter Coal Co., 298 U.S. 238, 312 (1935).

ability clause, the burden of proof is upon the supporter of the legislation to show the severability of the provisions involved.[121] The second rule, however, provides that when a severability clause is present the burden of proof is shifted to the assailant to show its inseparability.[122] A subsequent decision directed that when Congress places in legislation the presumption of divisibility in the form of a severability clause, the courts should keep in mind that "when validity is in question, divisibility and not integration is the guiding principle. Invalid parts are to be excised and the remainder enforced. When we are seeking to ascertain the congressional purpose, we must give heed to this explicit declaration."[123]

Later federal decisions have also continued along these same lines. In 1986, the Supreme Court again spoke of statutory interpretation and severability clauses in *Alaska Airlines v. Brock*.[124] The Court in *Alaska Airlines* echoed the interpretations of previous courts that a severability clause created a presumption that Congress did not intend the validity of the statute to rest on the constitutionality of a provision within it.[125] It stated that in the "absence of a severability clause, however, Congress' silence is just that - silence - and doesn't raise a presumption against severability."[126] However, the court added the caveat that "Congress could not have intended a constitutionally flawed provision [to be severed] from the remainder of the statute if the balance of the legislation is incapable of functioning independently."[127]

Other federal courts have also provided valuable insight into this issue. The federal district court in New Hampshire offered that the effect of a "savings [severability] clause is merely to reverse the common law presumption that the legis-

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121. *Id.*

122. *Id.*

123. Electric Bond Co. v. Securities & Exchange Comm'n, 303 U.S. 419, 434 (1938).

124. 480 U.S. 678 (1987).

125. *Id.* at 686. *See also* Wyoming v. Oklahoma, 112 S. Ct. 789 (1992).

126. *Alaska Airlines*, 480 U.S. at 686.

127. *Id.* at 684.

lature intends the act to be effective as a whole."[128] It added that absence of a severability clause means the common law presumption exists, but is not conclusive since severability will depend on the intent of the legislature.[129] A Federal Court of Appeals decision stated that "the ultimate determination of severability will rarely turn on the presence or absence of such a [severability] clause."[130] It directed that "the court must inquire into whether Congress would have enacted the remainder . . . in absence of the invalid provision."[131] Concluding, the court said, with regards to interpretation, "[c]ongressional intent and purpose are best determined by analysis of the language of the statute in question."[132]

In deciding New Jersey law, the Third Circuit, likewise arrived at an interesting result in a case dealing with a state statute regulating the disposal of solid and hazardous waste.[133] The statute disqualified individuals from licensing if they engaged in criminal or anti-social behavior. It also required information disclosures. The plaintiff trade group alleged that sections of the statute were unconstitutional. This caused the court to discuss the severability issue. The court held that "[s]everability is, with limited exceptions, an issue of state law."[134] It added that "[u]nder New Jersey law the question of severability of a statute is one of legislative intent" and the "presence or absence of a severability clause in a statute is not dispositive."[135] The court indicated that one must look to such items as the state's statutes of general application. Within New Jersey, it found a general statutory provision for enforcing severability.[136] The court instructed that a case by case

128. Coe v. Reynolds, 592 F. Supp. 488, 490 (D.N.H. 1982).

129. *Id.* at 491.

130. Equal Employment Opportunity Comm'n v. Hernando Bank, Inc., 724 F.2d 1188, 1190 (5th Cir. 1984) (citing U.S. v. Jackson, 390 U.S. 570, 585 n.27 (1968)).

131. *Id. See also* National Advertising Co. v. Town of Niagara, 942 F.2d 145, 148 (2d Cir. 1991) (proffering that the focus remains whether the legislature would have wanted severability or total rejection of the act).

132. 724 F.2d at 1190.

133. Trade Waste Management Ass'n v. Hughey, 780 F.2d 221 (3d Cir. 1985).

134. *Id.* at 231 (citing Fox Film Corp. v. Miller, 296 U.S. 207 (1935)).

135. *Id.*

136. *Id.*

analysis would be required in order to determine if a statutory provision which is invalid would cause the remainder to fail. Within the analysis, it must be ascertained whether the legislature would have enacted the remaining parts.[137] Finally, the court stated that the "presumption is that severability was intended so long as [the] objectionable features can be excised without substantial impairment of the principal legislative objective."[138] The concepts raised in this decision and those above have also been examined in depth by several state supreme courts.[139]

Regardless of whether a severability clause is present, a number of courts have held that severability is a matter of state law.[140] However, one court has proffered that where state courts have yet to decide an issue of state law, a federal court of appeals can "sit as a state court" and determine how the state would decide.[141] The record in this case fails to provide any guidance as to how New Union's courts would decide the severability issue.[142]

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137. *Id.*

138. *Id.*

139. *See, e.g.*, Barndollar v. Sunset Realty Corp., 379 So. 2d 1278 (Fla. 1979) (holding that a severability clause is not determinative of severability, and that to sever the court must conclude that the legislature would have been content to enact the act without the invalid provision); Sugarloaf Citizens Assoc. v. Gudis, 573 A.2d 1325 (Md. 1990) (providing that a severability clause is indicative of the intent of the legislature to sever, and the ultimate test of severability is the intent and what specifically the legislature would have done had they known the statute could only be partly effective).

140. Hooper v. Bernalillo County Assessor, 472 U.S. 612, 624 (1985) (whether or not an invalid portion should be severed or statute be rejected as a whole is a matter of state law); Bell v. Maryland, 378 U.S. 226 (1964); Old Coach Dev. Corp. v. Tanzman, 881 F.2d 1227 (3d Cir. 1989).

141. United States v. City of Humboldt, 628 F.2d 549, 551 (9th Cir. 1980).

142. It must be noted at this juncture that several abstention doctrines exist regarding situations wherein a federal district court may decline to exercise or postpone the exercise of jurisdiction on an issue before it which deals with state law. An argument may be made that severability is a matter of state law and should be decided by the courts of New Union. The United States Supreme Court has stated that abstention should be exercised in extraordinary circumstances, and that the ultimate test is whether the order to parties to repair to state court would clearly serve an important countervailing interest. County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, *reh'g denied*, 361 U.S. 855 (1959).

B. *The Weight and Effect of the General Counsel's Opinion*

In late 1990, the New Union legislature held hearings regarding the possible enactment of a statute dealing with the import and export of hazardous waste. The Chair of the State Senate's Environmental Protection Committee asked the General Counsel of the State's Department of Environmental Affairs two specific questions as to such legislation. The questions posed were whether: (1) the legislature could enact bans on the import and export of hazardous waste; and (2) if the ban on imports was held invalid by the reviewing court whether the ban on exports would be struck down as well? The General Counsel responded affirmatively to both questions. By February 1991, the legislature had enacted NUHWSSA, which contained both a ban on the import and export of hazardous waste, and which lacked a severability clause.

Both sides in this litigation may attempt to argue that the involvement of the General Counsel's opinion has an effect on the statute's interpretation. The weight of such opinion, its role in the legislative history, and the intent of the act varies based on the context used and case law of the jurisdiction.

The New Jersey Supreme Court has proffered that "[w]here the words of the statute are clear and explicit, courts should not resort to extrinsic material to determine that the Legislature intended something other than what it actually expressed. Extrinsic aids are never used to create an ambiguity, only to resolve one."[143] In this vein, statements by nonlegislative persons in the interpretation and drafting of legislation are seen as extrinsic aids to interpreting legislative history.[144] However, the weight courts give such extrinsic sources varies depending on the facts of case.

Generally, courts will give considerable weight to an executive department's (agency's) construction of an enabling

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143. Gauntt v. City of Bridgeton, 477 A.2d 381, 387 (N.J. Super. Ct. App. Div. 1984) (citations omitted).

144. *See generally* ESKRIDGE & FRICKEY, *supra* note 114, chapter 7.

statute which it is entrusted to administer, on the principle of deference to administrative interpretations.[145] The District of Columbia Circuit Court held that if reasonable, a court will give deference to an agency interpretation of its enabling statute if legislative history is sparse.[146] Where agency heads are involved in the drafting of legislation, their interpretation of such would be given greater than normal weight.[147] A number of courts have dealt with the issue of an Attorney General's interpretation of a provision, and most have held it to be only advisory, but often may be persuasive.[148] When viewed in regards to determining constitutionality of a statute, courts take conflicting positions regarding the weight of attorney general [extrinsic source] interpretations.[149] However, it must be noted that these court's decisions reflect an agency/executive branch interpretation which was provided after the legislation's enactment.

Regarding extrinsic source legislative materials which emerged during the hearing and drafting stages of the legisla-

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145. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1983). *See also* Howe v. Smith, 452 U.S. 473 (1980) (where the Supreme Court held that because the Attorney General and Commissioner of the Bureau of Prisons were charged with the administration of the statute, their views were entitled to great deference); Udall v. Tallman, 380 U.S. 1 (1964).

146. Alaska Energy Auth. v. FERC, 928 F.2d 1181 (D.C. Cir. 1991).

147. Howe v. Smith, 452 U.S. at 485 (where the Attorney General and Commissioner of the Bureau of Prisons not only drafted legislation but steered it through Congress); Zuber v. Allen, 396 U.S. 168, 192 (1969) (holding that the impact of an agency's interpretation carries the most weight when it participated in the drafting and directly made known its views to Congress in Committee hearings).

148. Hillhouse v. Rice Sch. Dist., 727 P.2d 843 (Ariz. Ct. App. 1986) (attorney general provisions are only advisory); Higgins v. Director of Revenue, 778 S.W.2d 24 (Mo. Ct. App. 1989) (an attorney general's provision is not binding on the courts or citizenry, but it may be and often is persuasive); Point Isabel Indep. Sch. Dist. v. Hinojosa, 797 S.W.2d 176 (Tex. Ct. App. 1990) (attorney general opinion is advisory but entitled to careful consideration).

149. *See, e.g.*, Mulligan v. Joliet Regional Port Dist., 527 N.E.2d 1264 (Ill. 1988) (a well reasoned opinion of the attorney general is entitled to considerable weight in resolving a question regarding the constitutionality of a state statute); Cooper v. Utah, 684 F. Supp. 1060 (D. Utah 1987) (only a court decree, and not an opinion of an attorney general, can effectively render a legislative enactment unconstitutional). *See also* Huntington v. Worthen, 120 U.S. 97 (1886) (stating in dictum that it may not be wise for subordinate executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties).

tion's enactment, courts have looked at various factual situations regarding deference and weight. The Supreme Court has held that when reports of an agency head or the Attorney General have not been entered into the public record they should not be given great weight or deference.[150] The court asserted this position because the ideas in such reports were not in the public record and thus should not be given weight in determining the legislators' intent.[151] Likewise, a circuit court stated that "the advocacy of legislation by an administrative agency — even the assertion of the need for it to accomplish a desired result — is an unsure and unreliable, and not a highly desirable guide to statutory construction."[152]

However, other courts have dealt specifically with the pre-enactment testimony at legislative hearings, and arrived at different results. In a 1984 decision, a New Jersey court held that the testimony of a mayor, who had appeared before a state senate committee on amending the laws regarding police chiefs, was not competent to express what was on the collective mind of the legislature.[153] A Massachusetts appellate court arrived at a different conclusion, and held that a mayor's pre-enactment testimony before the legislature regarding an act "shed light on the legislative intent in the enactment" of the statute.[154]

In conclusion, the general counsel's responses can play a very important and vital role in statutory interpretation. The responses can assist in ascertaining both the legislature's intent and purpose behind the act, and can help to determine if any constitutional concerns were raised. Finally, this type of extrinsic evidence may shed light on questions of severability as well.

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150. Kosak v. United States, 465 U.S. 848, 857 n.13 (1983) (dealing with a report by the legislation's drafter).

151. *Id.*

152. Advanced Micro Devices v. Civil Aeronautics Bd., 742 F.2d 1520, 1542 (D.C. Cir. 1984) (quoting American Trucking v, Atchison, Topeka, & Sante Fe R.R., 387 U.S. 397, 418 (1967).

153. Gauntt v. City of Bridgeton, 477 A.2d 381, 387 n.1 (N.J. Super. Ct. App. Div. 1984).

154. Boston Licensing Bd. v. City of Boston, 455 N.E.2d 469, 473-74 (Mass. App. Ct. 1983).

IV. SUMMARY AND CONCLUSION

For a brief summary of the arguments refer to page 773.
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