Pace Environmental Law Review

Volume 10
Issue 2 *Spring 1993*

Article 9

April 1993

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

Widener University School of Law

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 APPELLANT*

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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

I. Does the hazardous waste interstate export ban enacted by New Union in the New Union Hazardous Waste Self-Sufficiency Act violate the Commerce Clause of the United States Constitution?

II. Is the hazardous waste interstate import ban enacted by New Union in the New Union Hazardous Waste Self-Sufficiency Act valid under the Commerce Clause of the United States Constitution?

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CONSTITUTIONAL PROVISION INVOLVED

The provision at issue, the Commerce Clause, provides: "The Congress shall have the power . . . [t]o regulate commerce with foreign nations and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

STATEMENT OF THE CASE

Appellant, Cleanfill Services, Inc. ("CSI") operates a hazardous waste chemical treatment facility and landfill in Maywood, North Hampshire ("Maywood facility"). *Environmental Disposal Corp. v. New Union*, No. 92-538, slip op. at 2 (D.N.U. Apr. 23, 1992). The facility has all the necessary permits under state and federal law to treat several types of hazardous wastes.[2] *Id.* at 3. The Maywood facility is able to treat only waste generated in New Union. *See Id.*

Federal law strictly regulates the management of hazardous waste facilities such as CSI's. The Environmental Protection Agency ("EPA") has promulgated regulations concerning the treatment, transportation and disposal of hazardous waste under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6987 (1976). These regulations impose stringent requirements on generators, transporters, and treatment, storage and disposal ("TSD") facilities in order to ensure that hazardous wastes are handled in a manner that minimizes health and environmental risks. *See, e.g.*, 42 U.S.C. §§ 6922-6925 (1976).

RCRA regulates TSD facilities in great detail. Under RCRA, formal approvals must be obtained prior to construction of a TSD, and before any waste may be treated at the facility. 40 C.F.R. § 270.1 (1991). A facility must also meet federal standards concerning design requirements, location standards, training of personnel, inspection of facilities, plans to minimize the likelihood of an emergency, and responses to an emergency. 40 C.F.R. §§ 264.1-264.1065 (1991). Additionally, in 1984, Congress enacted amendments to RCRA, specifying that disposal of hazardous waste in landfills is permitted only after the waste is treated with the best available technology in order to reduce the waste's toxicity and mobility. 42 U.S.C. § 6924(d)-(m) (1984).

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2. Hazardous wastes are defined as materials which are either: (1) specifically designated as "hazardous" by the Environmental Protection Agency; (2) are a mixture of solid waste and designated hazardous substances; or (3) exhibit ignitability, corrosivity, reactivity or toxicity. *See* 40 CFR §§ 261.3, 261.20-261.24, 261.30-261.33 (1991).

Federal law regulates the transportation of hazardous materials with equal vigor. *See generally* 49 U.S.C. app. §§ 1801-1819 (1992). Packaging requirements, shipping containers and procedures for loading and unloading are all detailed with specificity. 49 C.F.R. § 173.1-173.34 (1991). The Department of Transportation also details explicit procedures to be followed if the vehicle transporting the hazardous material becomes disabled, is involved in an accident or if a container holding the material leaks while in transit. 49 C.F.R. §§ 177.853-177.861 (1991).

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9657 (1980), encourages states to assure adequate capacity for disposal of their own hazardous waste, either through in-state facilities or through interstate agreements. The statute does this by conditioning receipt of federal CERCLA funding for remedial measures upon a state's proof of adequate hazardous waste disposal capacity. 42 U.S.C. § 9604(c)(9) (1991).

A state may forego implementation of a federal waste disposal program and enact its own, provided that the requirements of the state plan are equal to or more stringent than the federal regulations. 42 U.S.C. § 6926(b) (1976); 40 C.F.R. § 271.1(i)(1) (1991). New Union has neither sought nor received federal authorization from the EPA to implement the federal RCRA. *Environmental Disposal*, No. 92-538 at 2. Instead, the state operates its own hazardous waste regulation program under the New Union Resource Conservation and Recovery Act. *Id.* at 2, 3.

The Act regulates the hazardous waste by-products of several area manufacturing plants. *Id.* at 3. An unintended by-product of certain manufacturing processes is an exceptionally lethal compound known as DBCP. *Id.* Accidental exposure to a mere trace of DBCP causes immediate convulsions, and moments later, paralysis of the nervous system, cardiopulmonary failure and death. *Id.* The only known antidotes must be administered within minutes to spare the victim's life. *Id.*

The dangers inherent in the transport of DBCP have been graphically demonstrated by an accident that occurred

in 1990. *Id.* A truck carrying a two gallon container of DBCP from North Hampshire overturned just two miles from its destination, Environmental Disposal Corporation's ("EDC") facility in Springfield, New Union ("Springfield facility"). *Id.* The container of DBCP ruptured, releasing the compound into the environment. Forty cows on a nearby farm died from the effects of the vapors that escaped. *Id.* The farmer, who went to the scene to investigate, was also exposed to the vapors and immediately went into convulsions. *Id.* If the driver of the truck, who survived the accident by donning protective gear, had not administered the proper antidote to the farmer immediately, the farmer would have died. *Id.* The New Union Department of Emergency Response spent an estimated $1,400,000 responding to the accident, and is now embroiled in costly complex litigation in an attempt to recover the cleanup costs. *Id.* at 3-4.

All of the significant generators of hazardous waste in North Hampshire and South Hampshire produce waste that contains DBCP. *Id.* at 3. Pure DBCP is a waste by-product of five factories located in North Hampshire and South Hampshire. *Id.* Under EPA regulations concerning disposal of hazardous waste in landfills, any waste mixture containing even trace amounts of DBCP must be incinerated using special treatment technology. *Id.* EDC's Springfield facility is the only facility in the tri-state region that possesses this technology; therefore, it is the only facility in the region that can legally accept and dispose of these wastes. *Id.*

At least seventy-five percent of the hazardous waste generated in New Union contains no DBCP. *See Id.* Fifty percent of the hazardous waste generated in New Union is currently disposed of in facilities in North Hampshire and South Hampshire that cannot treat DBCP-tainted waste, and an additional twenty-five percent is disposed of at facilities in New Union that cannot treat waste tainted with the compound. *Id.* It is undisclosed how much of the remaining twenty-five percent of New Union's waste that is treated at the Springfield facility contains the compound.

In response to the dangers posed by DBCP, the legislature held hearings to reevaluate New Union's policies regard-

ing hazardous waste. *Id.* at 4. The legislature found that hazardous waste is a threat to the health of New Union's citizens and its environment, and that hazardous waste generated outside of New Union is more dangerous to the public health than waste generated within New Union. *Id.*; N.U. Code § 1 (1991). These findings prompted the state to enact the New Union Hazardous Waste Self-Sufficiency Act ("NUHWSSA"). *Environmental Disposal*, No. 92-538 at 4. The stated policy reason behind the enactment was to "seek[] hazardous waste self-sufficiency." *Id.*; N.U. Code § 2 (1991). NUHWSSA contains an export ban, providing that "no hazardous waste may be transported from New Union to any other state," and an import ban, providing that "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." N.U. Code §§ 3, 4 (1991); *Environmental Disposal*, No. 92-538 at 4.

EDC subsequently initiated a suit against New Union, alleging that Section Four of NUHWSSA, the import ban, violates the Commerce Clause of the United States Constitution, and sought to enjoin its enforcement. *Environmental Disposal*, No. 92-538 at 5.

New Union countered EDC's allegations by defending NUHWSSA in its entirety on the grounds that the statute is a proper exercise of the state's police power. *Id.* Though the Act contains no severability clause, New Union contended that if the district court found Section Four to be invalid, then the entire Act must be invalid. *Id.*

CSI then initiated a suit against New Union, alleging that Section Three of NUHWSSA, the export ban, is invalid. *Id.* New Union once again contended that the entire Act is valid. *Id.* However, the state indicated that it would agree with CSI that Section Three is invalid, but only if Section Four were found to be invalid. *Id.*

After consolidating the two lawsuits, the district court upheld NUHWSSA in its entirety. *Id.* at 5,6. The court found that NUHWSSA is a balanced act that imposes the same level of hardship on in-state and out-of-state generators of hazardous waste. *Id.* at 6. Additionally, the court held that New

Union was justified in treating hazardous waste differently than solid waste, specifically because it poses dangers to the public health and environment that ordinary solid waste does not. *Id.* Because the court upheld NUHWSSA in its entirety, it did not need to decide whether the inclusion of one unconstitutional provision in the Act would necessarily invalidate the entire statute. *Id.*

SUMMARY OF ARGUMENT

The provisions disputed in this action are Section Three and Section Four of the New Union Hazardous Waste Self-Sufficiency Act. Section Three provides that "no hazardous waste may be transported from New Union to any other state." N.U. Code § 3 (1991). Section Four provides that "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." N.U. Code § 4 (1991).

The Supreme Court has explicitly held that hazardous waste is an article of commerce. *Chemical Waste Management, Inc. v. Hunt*, ___ U.S. ___, ___, 112 S. Ct. 2009, 2012 n.3 (1992). Therefore, the constitutionality of both the hazardous waste export and import bans must be examined under the auspices of the Commerce Clause.

In order to determine the constitutionality of a statute challenged under the Commerce Clause, a court must first determine whether the statute "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

If this Court finds that the statute regulates evenhandedly, and imposes only an incidental burden on interstate commerce, the local benefit conferred by the statute must outweigh the burden it places on interstate commerce in order for the court to declare the statute valid under the Commerce Clause. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). However, if this Court determines that the statute is discriminatory either on its face or in effect, it may declare the statute constitutional only after examining it with the strictest scru-

tiny. *Hughes*, 441 U.S. at 337. "The state bears the burden of justifying the discrimination by showing the following: (1) the statute has a legitimate local purpose; (2) the statute serves this interest; and (3) nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not available." *Government Suppliers Consolidating Servs., Inc. v. Bayh*, 753 F. Supp. 739, 763 (S.D. Ind. 1990), *aff'd in part and rev'd in part on other grounds*, No. 92-1318 (7th Cir. Sept. 17, 1992). Furthermore, if the statute is not only facially discriminatory, but is a blatant attempt at "economic protectionism" through economic isolation, the statute will be deemed unconstitutional *per se* and stricken down without further inquiry. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Section Three of NUHWSSA, the hazardous waste interstate export ban, violates the Commerce Clause of the United States Constitution. The export ban is discriminatory both on its face and in effect, because it expressly promotes New Union's economic interests above the national interest in the free flow of commerce. It neither regulates evenhandedly, nor imposes merely an incidental burden on interstate commerce. Therefore, the provision is invalid *per se*, as its purpose is solely to protect New Union's local economy. Additionally, it advances no legitimate state purpose that cannot be achieved by less restrictive means. Therefore, it cannot pass constitutional muster under the strict scrutiny test and is invalid under the Commerce Clause.

It is not always clear whether a statute is discriminatory or regulates evenhandedly. *Medigen of Kentucky, Inc. v. Public Serv. Comm'n*, 787 F. Supp. 590, 597 (S.D. W. Va. 1991)("*Medigen I*"). If this Court finds that New Union's export ban is not discriminatory, it must evaluate its constitutionality using the standard set forth in *Pike v. Bruce Church, Inc. See Chemical Waste*, ___ U.S. at ___, 112 S. Ct. at 2014 n.5; *Pike*, 397 U.S. at 142. In determining the constitutionality of a neutral statute under the Commerce Clause, the Supreme Court has adopted a balancing test: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed upon such

commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

Even under this less stringent balancing test, Section Three fails in its quest for constitutionality. An absolute ban on the export of all hazardous waste is the most oppressive burden that can be placed on interstate commerce. In order to justify this devastating burden on interstate commerce, the state must advance a benefit conferred by the export ban that is so substantial that it overcomes this severe restriction. *Id.* The state has advanced no such benefit; the only local benefit stemming from the export ban is an economic one. Because New Union's export ban offers no other putative local benefit aside from an economic one, and the burden it places on interstate commerce is not justified by its benefit, the provision violates the Commerce Clause. Therefore, the decision of the district court finding Section Three of NUHWSSA constitutional is clearly erroneous.

However, the hazardous waste interstate import ban of NUHWSSA is valid under the Commerce Clause of the United States Constitution. Although the import ban of NUHWSSA is discriminatory on its face, it is a valid exercise of the state's police powers to protect the health, safety and welfare of its citizens. This interest in public health and safety is a legitimate state interest that, in this instance, cannot be served by a less discriminatory alternative. Therefore, the provision survives the test of strict scrutiny and is valid under the Commerce Clause.

It cannot be credibly disputed that New Union has a legitimate interest in minimizing the critical danger to the public health and welfare created by the mass transportation of lethal hazardous waste into the state. Additionally, although a state normally may not enact a statute which discriminates against articles of interstate commerce, a statute which is facially discriminatory will pass constitutional muster if the state can advance a legitimate reason, apart from the articles' origin, to discriminate against the commerce. *Philadelphia*, 437 U.S. at 627. The increased risk associated with hazardous waste generated outside of New Union that is not present with hazardous waste generated locally affords the state a le-

gitimate reason, apart from the origin of the waste, to discriminate against the commerce.

Once a state advances a legitimate purpose to support its restriction on interstate commerce, a court must then inquire "whether alternative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes*, 441 U.S. at 336. In the instant case, there are no less discriminatory alternatives to mitigate the hazards of DBCP, because one hundred percent of the hazardous waste imported into New Union by North Hampshire and South Hampshire contains DBCP. However, only a small amount, if any, of the waste generated within New Union contains DBCP. Therefore, the nature of the waste dictates that the restriction must discriminate against hazardous waste generated outside of the state in order to adequately protect the citizens of New Union. Any alternative less restrictive than a complete ban will not effectively accomplish this goal.

Because the health and safety of the citizens of New Union constitutes a legitimate local purpose for the enactment of the hazardous waste import ban, and there are no viable less restrictive alternatives to achieve the same level of protection afforded by the import ban, Section Four of NUHWSSA represents a legitimate exercise of the police power of the state. Therefore, the district court was correct in holding that the provision is valid under the Commerce Clause of the United States Constitution.

Section Three should be severed from NUHWSSA and the remainder of the Act be deemed constitutional. A provision is severable if the remainder of the statute is fully operative as a law, and if there is evidence that the legislature would have enacted the statute regardless of the presence or absence of the provision. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). NUHWSSA, absent the export ban, still effectuates the legislative purpose of protecting the health and safety of the citizens of New Union, and no provision of the Act is dependent upon the export ban to give it meaning or the full binding effect of law. Therefore, Section Three may be severed without emasculating the remainder of the statute,

and NUHWSSA, absent its export ban, may be deemed constitutional.

ARGUMENT

Section Three of the statute disputed in this action, the New Union Hazardous Waste Self-Sufficiency Act, provides that "no hazardous waste may be transported from New Union to any other state." N.U. Code § 3 (1991). As a blatant attempt at economic protectionism, this hazardous waste interstate export ban is discriminatory on its face, and violates the Commerce Clause of the United States Constitution because it does not advance a local purpose for which there are no less discriminatory alternatives.

Even if this Court finds that Section Three regulates evenhandedly and imposes only an incidental burden on commerce, the provision fails a less rigorous test of constitutionality because the burden it places on interstate commerce outweighs the putative local benefits it confers.

However, the district court was correct in holding that Section Four of the NUHWSSA is valid under the Commerce Clause. This provision states that "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." N.U. Code § 4 (1991). Because Section Four's import ban serves a legitimate local purpose for which there are no less restrictive alternatives, the provision survives the strict scrutiny test and comports with the Commerce Clause.

Additionally, the Act is fully operative as a law without Section Three, and there is evidence that the legislature would have enacted NUHWSSA regardless of the presence or absence of the provision. Therefore, the district court's failure to find Section Three unconstitutional and sever it from the remainder of the Act is clearly erroneous.

I. THE HAZARDOUS WASTE INTERSTATE EXPORT BAN OF THE NEW UNION HAZARDOUS WASTE SELF-SUFFICIENCY ACT VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Supreme Court has explicitly held that hazardous waste is an article of commerce. *Chemical Waste*, ___ U.S. at ___, 112 S. Ct. at 2012 n.3. Therefore, the constitutionality of both the hazardous waste export and import bans must be examined under the auspices of the Commerce Clause.[3]

The Commerce Clause of the United States Constitution provides that "Congress shall have the power . . . [t]o regulate commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Clause was designed to promote "the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). "It means that in the matter of interstate commerce we are a single nation— one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it." *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923). To give effect to this meaning, the federal courts of the United States have interpreted the Commerce Clause to possess a dual faceted power: the express power conferred upon Congress to regulate interstate commerce between the states, and the implied power to limit the states' ability to regulate interstate commerce. *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 779 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991). This implied limitation

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3. New Union merely leases the land on which the state's TSD facilities are located, and charges the facilities' owners a percentage of their profits as rent. *Environmental Disposal*, No. 92-538 at 3. New Union has no other connection with the facilities or their owners. *See Id.* The fact that New Union leases the land to TSD facility owners is not sufficient, by itself, to classify New Union as a market participant. *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 250 (3d Cir. 1989). Because New Union is not a market participant, the constitutionality of NUHWSSA is not exempt from evaluation under the Commerce Clause. *See South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984).

has been referred to as the "dormant" Commerce Clause. *Id.*

The dormant Commerce Clause's limitation on a state's power may often conflict with a state's right to promulgate laws protecting the health and safety of its people. *Id.* at 780-81. In order to determine the constitutionality of a statute posing an apparent conflict, a court must first determine "whether the challenged statute regulates evenhandedly, with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect." *Hughes*, 441 U.S. at 336.

If this Court finds that the statute regulates evenhandedly, and imposes only an incidental burden on interstate commerce, the local benefit conferred by the statute must outweigh the burden it places on interstate commerce in order for the court to declare the statute valid under the Commerce Clause. *Pike*, 397 U.S. at 142. However, if this Court determines that the statute is discriminatory either on its face or in effect, it may declare the statute constitutional only after examining it with the strictest scrutiny. *Hughes*, 441 U.S. at 337. "The state bears the burden of justifying the discrimination by showing the following: (1) the statute has a legitimate local purpose; (2) the statute serves this interest; and (3) nondiscriminatory alternatives, adequate to preserve the legitimate local purpose, are not available." *Government Suppliers*, 753 F. Supp. at 763. Furthermore, if the statute is not only facially discriminatory, but is a blatant attempt to promote "economic protectionism" through economic isolation, the statute will be deemed unconstitutional *per se* and stricken down without further inquiry. *Philadelphia*, 437 U.S. at 624.

A. *The Hazardous Waste Interstate Export Ban violates the Commerce Clause because it is discriminatory on its face, and does not advance a legitimate local purpose that may be served by less restrictive means.*

Section Three of NUHWSSA, the hazardous waste interstate export ban, is both discriminatory on its face and in effect because it expressly promotes New Union's economic in-

terests at the expense of the national economy. The provision neither regulates evenhandedly nor imposes merely an incidental burden on interstate commerce. To determine whether the statute is constitutional, it must be examined with the strictest scrutiny to determine whether the statute has a legitimate purpose that cannot be served by less restrictive means. *Hughes*, 441 U.S. at 337. Because the sole purpose of the export ban is economic protectionism, it advances no legitimate state purpose that cannot be achieved by less restrictive means. *See Philadelphia*, 437 U.S. at 624. Therefore, it cannot pass constitutional muster under the strict scrutiny test and is invalid under the Commerce Clause.

The export ban, because it is a measure designed to block the flow of commerce in order to promote economic protectionism, is invalid *per se*. A statute is generally considered *per se* invalid and stricken down without further inquiry when it "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests . . . ." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

The export ban discriminates against interstate commerce on its face. A statute is facially discriminatory when it allows a state to "plac[e] its parochial interests above the national interest in the free flow of interstate commerce." *Hazardous Waste Treatment Council v. South Carolina*, 766 F. Supp. 431, 438 (D.S.C.), *aff'd in part and remanded in part*, 945 F.2d 781 (4th Cir. 1991). Section Three directly promotes local parochial interests at the expense of interstate commerce, because enforcement of the export ban necessarily results in the treatment and disposal of all waste generated in the state by facilities within the state. This creates an unfair economic advantage for local waste treatment facilities. Out-of-state facilities are denied the opportunity to offer their services to generators in New Union, and local generators are unable to choose among several competitive treatment facilities, or to procure these services at competitive prices.

The Supreme Court has noted that "[t]he clearest example" of a facially discriminatory statute is one "that overtly

blocks the flow of interstate commerce at a State's borders." *Philadelphia*, 437 U.S. at 624. *See also Waste Systems Corp. v. County of Martin*, 784 F. Supp. 641, 644 (D. Minn. 1992); *DeVito*, 770 F. Supp. at 782.

Section Three of NUHWSSA explicitly provides that "no hazardous waste may be transported from New Union to any other state." N.U. Code § 3 (1991). This provision, a blanket ban on the export of any and all hazardous waste, is an "overt block" on the flow of interstate commerce. It is therefore discriminatory on its face, and must be stricken down as *per se* invalid without further inquiry. *See Brown-Forman*, 476 U.S. at 579. However, even if the provision is not deemed *per se* invalid, it must still be examined under the strict scrutiny test to determine whether the provision advances a legitimate local purpose that may not be served by less discriminatory means. *See Hughes*, 441 U.S. at 336.

This is a case of first impression. Although several courts have ruled on the constitutionality of export bans on solid waste, no court has specifically addressed the constitutionality of an export ban on hazardous waste. *See, e.g., J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection*, 857 F.2d 913 (3d Cir. 1988); *DeVito*, 770 F. Supp. 775; *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369 (D. Del. 1985). However, in *Medigen I*, a West Virginia district court addressed the constitutionality of a state statute that restricted the export of infectious medical waste. *Medigen I*, 787 F. Supp. at 592-93. The statute required out-of-state waste carriers to obtain a "certificate of convenience and necessity" from the Public Service Commission of West Virginia before operating within state boundaries. *Id.* at 592.

The district court determined that the statute placed a direct burden on interstate commerce and therefore examined its constitutionality under the strict scrutiny test. *Id.* at 600. The defendant in *Medigen I* offered an argument similar to that of New Union in the present action, contending that the restriction on interstate commerce was necessary to protect public health and safety. The *Medigen I* court rejected this contention, stating:

> The argument that a state may serve the admittedly legitimate purpose of protecting the health, safety and welfare of its citizens by suppressing competition has been soundly rejected as being contrary to a basic ten[et] underlying the Commerce Clause: "[E]very consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."

Id. at 601 (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 59 (1949)).

The court ordered the parties to present further evidence on the question of whether the statute served a legitimate state purpose that could not be accomplished by less restrictive means. *Medigen I*, 787 F. Supp. at 601. After examining the newly presented evidence, the court struck down the statute. *Medigen of Kentucky, Inc. v. Public Serv. Comm'n*, 787 F. Supp. 602, 609 (S.D. W. Va. 1992)("*Medigen II*"). The state contended that the statute was designed to protect the public health and welfare; however, the court found the statute to be an ineffective and impermissible means of accomplishing this purpose. *Id.* The state could offer no convincing evidence that the infectious waste either posed any particular risk of disease transmission to the public, or that any risk of transmission could not be eliminated by less restrictive means. *Id.* at 607-08.

In assessing the statute's constitutionality, the court found a significant economic purpose behind the enactment of the statute. *Id.* at 605. Companies that had already obtained authorization to transport infectious waste had an obvious interest in thwarting potential competitors through the existing certification system. *Id.* The state, on the other hand, presented no evidence to demonstrate that an unburdened economy would preclude the state from obtaining infectious waste transportation services at competitive prices. *Id.* The court, therefore, considered the absence of a legitimate state purpose that could not be served by less restrictive means, coupled with the statute's obvious economic purpose, and held that the statute violated the Commerce Clause. *Id.* at 609.

New Union's hazardous waste export ban provision is

analogous to the statute examined in *Medigen I* and *II*. Both seek to regulate the transportation of a form of hazardous waste across state lines. However, New Union asserts that an outright ban on the transportation of hazardous waste out of the state does not violate the Commerce Clause. *Environmental Disposal*, No. 92-538 at 5. Because a mere restriction on the transportation of hazardous waste is sufficiently discriminatory to be examined under the strict scrutiny test, the test must necessarily be appropriate for an outright ban on the export of hazardous waste. Therefore, New Union must prove not only that the export ban serves a legitimate state purpose, but also that it is the least restrictive means available to serve this purpose. *See Hughes*, 441 U.S. at 336-37.

New Union has advanced no such legitimate state purpose for enacting the export ban. Their expressly stated purpose in enacting NUHWSSA is to "seek[] hazardous waste self-sufficiency." N.U. Code § 2 (1991).[4]

In reality, however, the actual purpose and effect of the New Union hazardous waste export ban is economic protectionism. NUHWSSA contains a valid provision which bans the import of all hazardous waste into the state for health and safety reasons. N.U. Code § 4 (1991). The economic impact of the import ban is to reduce the volume of hazardous waste that can be treated at local facilities. To offset this economic loss, New Union instituted an export ban to ensure an adequate flow of waste into its facilities, thereby maintaining the facilities' profitability. However, this is impermissible under the Commerce Clause. A state may not restrict the flow of commerce in order to confer an advantage on local economic interests, therefore, the adverse economic impact created by

4. The state supports the validity of this proposition through reliance on the policy reflected in Section 104(c)(9) of CERCLA, in which Congress mandated that each state ensure sufficient capacity for disposal of its own hazardous waste in order to qualify for federal funding. 42 U.S.C. § 9604(c)(9) (1991). *See also* N.U. Code § 2 (1991). Though a state may choose to secure sufficient disposal of its hazardous waste through in-state facilities or interstate agreements, whatever method it chooses must be constitutional. CERCLA's requirement that a state must provide for disposal of its hazardous waste does not exempt the state's chosen method of compliance from examination under the Commerce Clause. *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 789-90 (4th Cir. 1991).

the valid import ban cannot be used to justify the invalid export ban. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (holding that an export ban of electricity designed to gain an economic advantage is "precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states"); *Hughes*, 441 U.S. at 338 (striking down a ban on the export of minnows as an economically protectionist measure "repugnant to the Commerce Clause"); *H.P. Hood & Sons*, 336 U.S. at 535 (condemning "economic restraints on interstate commerce for local economic advantage").

The New Union export ban is virtually identical to the ordinance addressed by a Minnesota district court in *Waste Systems*. At issue in *Waste Systems* was an ordinance requiring that all compostable solid waste generated within the county be disposed of in a county facility. *Waste Systems*, 784 F. Supp at 642. The county explained that the ban was enacted to "assur[e] both the reliability and financial security of [the Facility] . . . . Without an adequate supply of waste, [the Facility] cannot be financially successful." *Id.* at 644-45.

The court found the ordinance to be discriminatory, because it was designed to "generate revenues to support the facility at the expense of discriminating against interstate commerce." *Id.* at 645. The court therefore examined the ordinance using the strict scrutiny test, and found that it was simply an exercise in economic protectionism. *Id.* Although the state's goal of having a financially viable composting facility may have been legitimate, it was "not the type of compelling purpose which permits interference with interstate commerce." *Id.* Therefore, the court held that the ordinance imposed an impermissible burden on interstate commerce. *Id.*

The same fate must befall New Union's export ban. New Union's purpose in enacting the export ban is simple economic protectionism.. The purpose of the New Union statutory provision, to ensure an adequate flow of waste into the state's facilities, is identical to the purpose of the ordinance in *Waste Systems*. *See Id.* at 644-45. The state has advanced no other purpose for the export ban; therefore, it does not pass constitutional muster and is invalid under the Commerce

Clause.

However, even if this Court finds that New Union may properly regulate interstate commerce in order to maintain the economic viability of its in-state hazardous waste facilities, an outright ban on the export of all hazardous waste is not the least restrictive means available to accomplish this goal.

New Union may ensure the economic viability of its hazardous waste treatment facilities by making up the difference between the cost of using the in-state facilities and the cost of transporting the waste out of the state. *See Id.* at 645. By eliminating the economic advantage of sending the waste out of New Union, the state may encourage local generators to utilize local facilities for treatment and disposal of their waste.

The New Union export ban is discriminatory on its face because it favors local economic interests over the national interest by burdening interstate commerce. Courts have consistently held that economic protectionism, the export ban's sole purpose, is insufficient to burden interstate commerce. *See New England Power*, 455 U.S. at 339; *Hughes*, 441 U.S. at 338; *H.P. Hood & Sons*, 336 U.S. at 535. Even if this Court finds that economic protectionism is a legitimate purpose, less restrictive means of accomplishing this purpose are available. Because Section Three, a ban on the export of all hazardous wastes, does not meet the standards of constitutionality under the strict scrutiny test, it is invalid under the Commerce Clause. Therefore, the district court's decision upholding the provision's constitutionality is clearly erroneous.

B. *The Hazardous Waste Interstate Export Ban violates the Commerce Clause because the burden it imposes on interstate commerce is clearly excessive in relation to the putative local benefits.*

It is not always clear whether a statute is discriminatory or regulates evenhandedly. *Medigen I*, 787 F. Supp. at 597. If this Court finds that New Union's export ban is not discriminatory and imposes only an incidental burden on interstate

commerce, the constitutionality of Section Three must be evaluated using the standard set forth in *Pike v. Bruce Church, Inc.* In determining whether a neutral statute is constitutional under the Commerce Clause, the Supreme Court has adopted a balancing test: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142. If this Court finds that New Union's economic interest is a legitimate purpose for the export ban, "the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

Even under this less stringent balancing test, the statute fails in its quest for constitutionality. The burden that the New Union export ban places on interstate commerce outweighs any benefit that may be conferred upon local economic interests.

The burden of Section Three, an absolute ban on the export of any hazardous waste, is the most oppressive burden that can be placed on interstate commerce. The ramifications of enacting such a burden are devastating to the free flow of commerce in the tri-state region, and to CSI in particular.

Virtually all the hazardous waste generated in New Union, North Hampshire, or South Hampshire is treated and disposed of in one of the three states. *Environmental Disposal,* No. 92-538 at 2. CSI owns and operates a hazardous waste treatment facility and landfill in Maywood, North Hampshire. *Id.* This facility does not have the capability of treating DBCP-tainted waste. *See Id.* at 3. Though every significant source of hazardous waste from North Hampshire or South Hampshire is tainted with DBCP, at least seventy-five percent, if not more, of New Union's hazardous waste is not tainted with DBCP. *See Id.* Therefore, New Union is essentially the only significant source of waste that can be processed at the Maywood facility. If the export ban is de-

cleared constitutional, the Maywood facility will be forced out of business, specifically because it is unable to treat any waste except that which originates from New Union.

Not only will CSI, as the owner of an existing facility, be forced out of business, but an absolute ban on the export of hazardous waste forecloses the possibility of any other competitor opening a facility in North Hampshire or South Hampshire that does not treat DBCP-tainted waste. The ban also revokes a New Union generator's right to choose any facility, regardless of its location, that may offer similar services at prices more competitive than those in New Union.

In order to justify this devastating burden on interstate commerce, the state must advance a putative local benefit conferred by the export ban that is so substantial that it overcomes this severe restriction. *Pike*, 397 U.S. at 142. The state has advanced no such benefit; the only local benefit stemming from the export ban is an economic one.

In *Tenneco, Inc. v. Sutton*, 530 F. Supp. 411 (M.D. La. 1981), a Louisiana district court examined regulations that impeded the interstate flow of natural gas to determine whether a local economic benefit was sufficient to outweigh the burden the regulations placed on interstate commerce. The court expressly concluded that the regulations, which could have caused the interstate market to be "completely deprived of natural gas[,]
. . . cause[d] an onerous burden on interstate commerce and operate[d] to defeat the purpose of the Commerce Clause. Therefore, even assuming a legitimate purpose, the Louisiana provisions unduly burden[ed] interstate commerce." *Id.* at 442.

If an economic benefit is insufficient to validate a mere regulation that might operate to deprive the interstate market of commerce, an economic benefit will certainly be insufficient to validate an outright ban on the export of goods. Therefore, Section Three fails the less stringent balancing test, because it offers no other putative local benefit aside from an economic one, and the burden it places on interstate commerce exceeds this economic benefit. Consequently, Section Three is a violation of the Commerce Clause, and the district court's finding

that the provision is constitutional is clearly erroneous.

II. THE HAZARDOUS WASTE INTERSTATE IMPORT BAN OF THE NEW UNION HAZARDOUS WASTE SELF-SUFFICIENCY ACT IS VALID UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Because Section Four of NUHWSSA, the hazardous waste interstate import ban, is discriminatory on its face, the provision must be examined with the strictest scrutiny to determine whether it is a valid exercise of the state's police powers to protect the health, safety and welfare of its citizens. It is subject to the same inquiries as the export ban: Whether it serves a legitimate purpose, and whether this purpose may be achieved by less restrictive means. *Hughes*, 441 U.S. at 336-37. New Union has a critical interest in safeguarding the health and safety of its citizens. Additionally, the nature of the hazardous waste at issue renders the public health a legitimate state interest that cannot be served by a less discriminatory alternative. Therefore, Section Four, NUHWSSA's hazardous waste import ban, survives the test of strict scrutiny and is valid under the Commerce Clause.

A. *The Hazardous Waste Interstate Import Ban serves a legitimate state purpose.*

The hazardous waste originating outside of New Union is significantly different than waste generated locally, because virtually all of the hazardous waste generated outside of the state is, by the very nature of its composition, exceptionally lethal to the citizens of New Union. *See Environmental Disposal*, No. 92-538 at 3. It cannot be credibly disputed that New Union has a legitimate interest in minimizing or, if possible, eliminating the critical danger to the public health and welfare created by the mass transportation of this lethal hazardous waste into the state.

1. Protection of the health and safety of the citizens of New Union is a legitimate state purpose.

The Supreme Court of the United States has expressly held that protecting the health and safety of its citizens is a legitimate state purpose for enacting an import ban. *Maine v. Taylor*, 477 U.S. 131, 151 (1986). In *Maine*, the Supreme Court of the United States addressed the constitutionality of an import ban that was promulgated by the State of Maine for public health and safety reasons. *Id.* The statute at issue sought to ban the import of all baitfish because the imported fish may have contained parasites and non-native species that had the potential to destroy native wildlife. *Id.* at 132, 141.

The Court noted that the Commerce Clause's limitations on state regulatory power are not absolute. Under the authority of its general police power, a state may " 'regulate matters of "legitimate local concern," even though interstate commerce may be affected.' " *Id.* at 138 (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980)). The Court found that the import ban was discriminatory on its face and examined the statute with the strictest scrutiny to determine whether it had a legitimate local purpose that could not be served by less discriminatory means. *Maine*, 477 U.S. at 138. Maine was able to demonstrate a legitimate local purpose through evidence that the imported baitfish posed two serious threats to native fisheries and their ecosystems: parasites and the introduction of non-native species. *Id.* at 141. Also, there were no satisfactory alternatives to ensure that the baitfish were free of parasites. *Id.* at 146. Therefore, the statute survived the test of strict scrutiny and was valid under the Commerce Clause. *Id.* at 151-52.

Since its decision in *Maine*, the Supreme Court has repeatedly affirmed that a discriminatory statute may be "justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988). *See also Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, ___ U.S. ___, 112 S. Ct. 2019 (1992); *Chemical Waste*, ___ U.S. ___, 112 S. Ct. 2009. A serious health and safety concern may be just such a valid factor. *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, ___

U.S. ___, ___, 112 S. Ct. 2365, 2372 (1992).

In *Guy v. Baltimore*, 100 U.S. 434 (1880), the Court expressly held that "[i]n the exercise of its police powers, a State may exclude from its territory . . . any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people." *Id.* at 443. Recently, the Supreme Court acknowledged this concept in the context of hazardous waste, stating that protection of the health and safety of the public from toxins, conservation of the environment, and a reduction of the amount of noxious waste travelling on the state's highways are all legitimate local interests. *See Chemical Waste*, ___ U.S. at ___, 112 S. Ct. at 2014. Additionally, in *Maine*, the Supreme Court expressly held that

> [A state] has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. "[T]he constitutional principles underlying the commerce clause cannot be read as requiring [a state] to sit idly by and wait until potentially irreversible environmental damage has occurred . . . before it acts to avoid such consequences."

Maine, 477 U.S. at 148 (quoting *United States v. Taylor*, 585 F. Supp. 393, 397 (D. Me. 1984), *rev'd*, 752 F.2d 757 (1st Cir. 1985), *rev'd sub nom. Maine v. Taylor*, 477 U.S. 131 (1986).

The circumstances surrounding the enactment of New Union's import ban are analogous to the dilemma that faced the state in *Maine*. The hazardous waste originating outside of New Union is significantly different than waste generated locally, because virtually all of the hazardous waste generated outside of the state is, by the very nature of its composition, exceptionally lethal to the citizens of New Union. *See Environmental Disposal*, No. 92-538 at 3. Virtually all of the hazardous waste currently imported into New Union contains an exceptionally lethal compound known as DBCP. *Id.* New Union has a critical interest in preventing DBCP-tainted hazardous waste from crossing its borders. Accidental exposure to a mere trace of DBCP causes immediate convulsions, and mo-

ments later, paralysis of the nervous system, cardiopulmonary failure and death. *Id.* The only known antidotes must be administered within minutes to spare the victim's life. *Id.*

This danger is not merely speculative; it was graphically demonstrated in a near fatal incident that occurred in 1990. *Id.* A truck carrying a single two-gallon container of DBCP, en route from North Hampshire to EDC's Springfield facility, overturned on a New Union highway. *Id.* The container ruptured, releasing DBCP into the environment. *Id.* A citizen of New Union was exposed to the vapors and went into convulsions. *Id.* If not for the timely administration of an antidote to DBCP, he would have died. *Id.* The incident cost New Union $1,400,000 in cleanup costs, and the state is currently embroiled in costly complex litigation in an attempt to recover these costs. *Id.* at 4. Because DBCP-tainted waste poses critical dangers to the health and safety of the citizens of New Union, the state has a legitimate purpose for enacting the import ban.

2. The increased risk of harm associated with the DBCP-tainted hazardous waste is a legitimate reason, apart from its origin, to discriminate against the waste.

Though a state normally may not enact a statute which discriminates against articles of interstate commerce, a discriminatory statute will pass constitutional muster if the state can advance a legitimate purpose, apart from the articles' origin, to discriminate against the commerce. *Philadelphia*, 437 U.S. at 627. In the instant case, the critical health and safety risks posed by DBCP-tainted waste constitutes a legitimate reason, apart from the waste's origin, for enacting New Union's import ban.

In *Philadelphia*, the Supreme Court invalidated a New Jersey statute that prohibited the importation of most solid or liquid waste that originated outside of the state. *Id.* at 629. The Court acknowledged that New Jersey had a legitimate purpose in protecting the state's economy and environment; however, it found that the waste originating outside the state

contained essentially the same components as the local waste. *Id.* Therefore, because there was no basis for discriminating against waste originating outside of the state, the statute was held invalid as an impermissible restriction on interstate commerce. *Id.*

Since its decision in *Philadelphia*, the Supreme Court has invalidated facially discriminatory restrictions upon the import of hazardous waste only when the state could advance no legitimate reason for treating the waste that was generated outside of the state differently from the waste that was generated locally. *See Fort Gratiot*, ___ U.S. at ___, 112 S. Ct. at 2027; *Chemical Waste*, ___ U.S. at ___, 112 S. Ct. at 2017. *But see Maine*, 477 U.S. at 151-52 ("[T]he record suggests that Maine has legitimate reasons, 'apart from their origin, to treat [out-of-state baitfish] differently.' ").

The increased risk associated with the waste generated outside New Union that is not present with hazardous waste generated locally differentiates New Union's import ban from the ban addressed in *Philadelphia*. All of the significant sources of waste entering New Union from North Hampshire and South Hampshire are, at the very least, tainted with DBCP. *Environmental Disposal*, No. 92-538 at 3. Furthermore, five significant sources of hazardous waste generate pure DBCP as a by-product. *Id.* However, at least seventy-five percent of the waste generated within the boundaries of New Union does not contain any DBCP whatsoever. *See Id.* Because the waste generated outside of New Union poses significantly different and greater risks to the populace than the waste generated within New Union, the state is justified in treating the waste generated outside of the state differently than that generated locally.

The cases addressing so-called "quarantine laws," banning the import of noxious substances into a state, compel the same conclusion. Though some courts have mistakenly held that "innately harmful articles 'are not legitimate subjects of trade and commerce,' " *Philadelphia*, 437 U.S. at 622 (quoting *Bowman v. Chicago & N.W. R.R.*, 125 U.S. 465, 489 (1888)), the Supreme Court dispelled this notion in *Philadelphia*, stating that

> [a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset. In *Bowman* and similar cases, the Court held simply that because the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines.

Philadelphia, 437 U.S. at 622.

It is undisputed that a state may legally prohibit the import of noxious or dangerous materials that will subject its citizens to a "measurable, identifiable harm." *Government Suppliers*, 753 F. Supp. at 765. Waste tainted with DBCP is just such a noxious material. DBCP is an exceedingly dangerous, potentially lethal substance, and the dangers associated with the compound have been graphically identified. *See Environmental Disposal*, No. 92-538 at 3. Therefore, it is a legitimate target of a quarantine ban.

In several cases, the Supreme Court has interpreted the quarantine cases to hold that a quarantine law must ban all traffic in noxious articles, whatever their origin. *See generally Chemical Waste*, ___ U.S. at ___, 112 S. Ct. at 2016-17 & nn.10-11. However, as applied to New Union's import ban, this interpretation is illogical.

In *Clason v. Indiana*, 306 U.S. 439 (1939), the seminal quarantine case, the Supreme Court upheld a statute banning the transport of dead animals across state lines. It cannot seriously be proposed that this statute regulated evenhandedly without regard to the dead animal's origin. According to the Supreme Court's interpretation in *Chemical Waste*, in order to be valid, the Indiana statute at issue in *Clason* must have banned all transport of animals that died in the state, as well as those that died out of state. *See Chemical Waste*, ___ U.S. at ___, 112 S. Ct. at 2016-17 & nn. 10-11. Logically, Indiana's legislature could not possibly have intended to ban the transport of dead animals within the state, for there would then be no way to transport an animal that had died in the state to a proper disposal facility, regardless of whether that facility was located either in the state or outside of the state. According to

the interpretation in *Chemical Waste*, the citizens of Indiana would have had to simply leave their animals at the location of their deaths in order to comply with the law.

Chemical Waste's interpretation of the quarantine cases, applied to the facts at bar, would compel an equally absurd result. If this Court were to hold that NUHWSSA, in order to be valid under the Commerce Clause, must ban transportation of hazardous waste within the state, any local generator of DBCP-tainted waste would be forbidden to transport that waste to any disposal facility located either inside or outside of New Union. Therefore, generators would be forced to simply allow the waste to accumulate untreated at the generation site. This is a completely unacceptable danger to the public health and safety.

The more logical interpretation of the quarantine cases, consistent with *Clason*, is that which accepts that New Union may legitimately ban the transport of noxious articles into the state in order to protect the public health and safety, yet still allow any small amount of DBCP-tainted waste generated in New Union to be transported to a proper treatment facility.

DBCP is present in every significant source of waste generated outside of New Union, while very little, if any, of the waste generated within New Union contains the compound. *Environmental Disposal*, No. 92-538 at 3. DBCP is a highly noxious substance which poses potentially lethal dangers in its transport; therefore, the import ban protects the health and safety of New Union's citizens and environment. This is a legitimate state purpose that is sufficient to justify the import ban under the Commerce Clause.

B. *There are no less discriminatory alternatives available that will accomplish New Union's legitimate purpose as effectively as the Hazardous Waste Interstate Import Ban.*

Once a state advances a legitimate purpose to support its restriction on interstate commerce, the court must then inquire "whether alternative means could promote this local purpose as well without discriminating against interstate com-

merce." *Hughes*, 441 U.S. at 336. In the instant case, there are no less discriminatory alternatives that will safeguard the health and safety of New Union's citizens and environment against the hazards of DBCP as effectively as a ban on the import of waste generated outside of the state.

The most significant hazards of DBCP lie in its transportation. Those who are involved in either the generation or the disposal of DBCP are highly trained in emergency response procedures. 29 C.F.R. § 1910.120(b), 1910.120¶(8)(iii) (1991). Therefore, any accident that occurs at a generation or disposal site will be handled in the safest manner possible with a minimal risk of harm to people and the environment. However, there is a substantial risk to both people and the environment when a truck transporting DBCP is involved in an accident on the open road. Properly trained emergency response personnel may not be immediately available. In addition, although the driver of a truck transporting DBCP must be trained in emergency response procedures, 49 C.F.R. §§ 177.800(b), 177.853-177.861 (1991), there is a serious risk that he will be incapacitated in an accident. Furthermore, even if he is in possession of his faculties, it is unlikely that he alone will be able to effect an adequate response to an accident of any significant magnitude.

An accident on the open road has the potential of exposing countless numbers of innocent bystanders to DBCP vapors, including the occupants of any other car involved in the accident, occupants of cars that come upon the accident site, local police and emergency personnel responding to the accident, motorists who may stop to offer assistance, and curious onlookers.

The law of averages dictates that the greater the amount of DBCP transported on New Union's highways, the greater the likelihood that an accident of catastrophic magnitude will occur.[5]

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5. Accidents occurring during the transport of hazardous waste are not uncommon. According to Department of Transportation statistics, there were 9,052 reported unintentional releases of hazardous materials during transportation in 1991. Hank Walshak, *The Move Is On To Cut Incidents Involving Hazardous Materials*, ECON,

There is no less restrictive alternative to mitigate this danger, because virtually one hundred percent of the hazardous waste imported into New Union by North Hampshire and South Hampshire contains DBCP. *Environmental Disposal*, No. 92-538 at 3. However, only a minor amount, if any, of the waste generated within New Union contains DBCP. *See Id.* Therefore, the nature of the waste dictates that the restriction must discriminate against waste generated outside of the state in order to adequately protect the citizens of New Union. Any alternative less restrictive than a complete ban will not effectively accomplish this goal.

In *Chemical Waste*, one of the two most recent cases in which the Supreme Court addressed restrictions on hazardous waste, the Court offered three alternatives to the discriminatory tax enacted by the Alabama legislature: "a generally applicable per-ton additional fee on all hazardous waste disposed of within [the state]," a per-mile fee that must be paid by all vehicles transporting hazardous waste on the state's highways, or a cap on the amount of hazardous waste disposed of at any given facility. *Chemical Waste*, ___ U.S. at ___, 112 S. Ct. at 2015. However, none of these alternatives would effectively protect the citizens of New Union from the hazards of DBCP.

If New Union were to enact an economically reasonable per-ton or per-mile fee on all hazardous waste transported into or within New Union, it would fail to significantly reduce the flow of DBCP-tainted waste transported within the state. Because New Union houses the only facility in the tri-state area that is capable of disposing of DBCP-tainted waste, local and out-of-state generators would still find it less costly to use New Union's facility than to transport the waste elsewhere for treatment and disposal. Any fee sufficiently exorbitant to make it more economical for generators not located within New Union to transport the waste outside of the tri-state region would have the same effect on local generators. It would then be more economically feasible for local generators to

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Nov. 1992, at 14.

transport their waste out of the tri-state region for disposal; therefore, the flow of DBCP-tainted waste transported within New Union will not be stemmed, its direction will simply be reversed.

A limit on the amount of DBCP-tainted waste that may be treated at New Union's facility will have the same effect as per-ton or per-mile fees. Though some local generators may be permitted to treat their waste at New Union's facility, other local generators must then transport their DBCP-tainted waste out of the tri-state area. Therefore, the stream of DBCP-tainted waste upon the highways will not be affected and the monumental risks associated with its transport will not be alleviated.

Because the health and safety of the citizens of New Union constitutes a legitimate local purpose for the enactment of the hazardous waste import ban, and there are no viable less restrictive alternatives to achieve the same level of protection afforded by the ban, Section Four of NUHWSSA represents a legitimate exercise of the police power of the state. Therefore, the district court was correct in holding that the provision is valid under the Commerce Clause of the United States Constitution.

III. SECTION THREE OF THE NEW UNION HAZARDOUS WASTE SELF-SUFFICIENCY ACT IS SEVERABLE FROM THE REMAINDER OF THE ACT BECAUSE THE ACT IS FULLY OPERATIVE AS LAW ABSENT SECTION THREE.

NUHWSSA is fully operative as a law without Section Three, and there is evidence that the legislature would have enacted the statute regardless of the presence or absence of the section. Therefore, the export ban should be severed and the remainder of the Act be deemed constitutional.

Simply because one provision of a statute is unconstitutional, it is not necessarily true that the entire statute does not pass constitutional muster. *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). In fact, the Supreme Court has noted that in reviewing a statute's constitutionality, "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." *Id.*

Although the standard for the severability of an unconstitutional provision of a state statute is generally a question of state law, in *Alaska Airlines,* Justice Blackmun noted that the standard is "well established: 'Unless 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.' " *Alaska Airlines,* 480 U.S. at 684 (quoting *Buckley v. Valeo,* 424 U.S. 1, 108 (1976)).

Although determining whether a provision is severable from a statute is generally an inquiry into the legislature's intent, there is a "strong presumption" in favor of severability. *Sugarloaf Citizens Ass'n, Inc. v. Gudis,* 573 A.2d 1325, 1333 (Md. App. 1990). *Accord Regan,* 468 U.S. at 653.

The legislature of New Union did not expressly include a clause in NUHWSSA stating that Section Three is severable from the remainder of the Act. *Environmental Disposal,* No. 92-538 at 5. Therefore, this Court must consider the purpose of the statute and the intent of New Union's legislature to determine whether the unconstitutional provision is severable. The intent and purpose of the legislature in enacting NUHWSSA is reflected in the Findings and the Policy sections of the Act itself. N.U. Code §§ 1, 2 (1991). Section One states that "[t]he New Union legislature finds that hazardous waste is a threat to human health and the environment . . . . 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." N.U. Code § 1 (1991). In order to ameliorate the increased risk posed by the waste originating outside New Union, the legislature enacted NUHWSSA to attain hazardous waste self-sufficiency. N.U. Code § 2 (1991).

The purpose of the Act, protection of the public health and safety, remains intact if Section Three is severed from NUHWSSA. Section Three was enacted solely as an economi-

cally protectionist measure designed to place New Union's local interests above the national interest in the free flow of commerce. It is Section Four, the provision banning the import of all hazardous waste, that is New Union's sole means of protecting the public health and safety. The import ban prevents the influx of DBCP-tainted waste, and therefore minimizes the potential of exposing and endangering the public through the hazards of DBCP.

NUHWSSA is fully operative as a law without Section Three's export ban, because the intent of New Union's legislature is still effectuated if the export ban is stricken. Additionally, no provision of the Act is dependent upon Section Three to give it meaning or the full binding effect of law. Therefore, Section Three of NUHWSSA may be severed without emasculating the remainder of the statute, and the Act, absent its export ban provision, is constitutional.

CONCLUSION

For the foregoing reasons, Appellant, Cleanfill Services, Inc., respectfully requests that the decision of the United States District Court for the District of New Union upholding the constitutionality of New Union Code Section Three be REVERSED, and the district court's decision upholding the constitutionality of New Union Code Section Four be AFFIRMED.