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No. 92-21

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ENVIRONMENTAL DISPOSAL CORP. and
CLEANFILL SERVICES, INC.
Appellants,

v.

STATE OF NEW UNION
Appellee.

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

BRIEF FOR THE 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

(1) Is the Hazardous Waste Interstate Import Ban of the New Union Hazardous Waste Self-Sufficiency Act (NUHWSSA) valid?

(2) Is the Hazardous Waste Interstate Export Ban of the New Union Hazardous Waste Self-Sufficiency Act (NUHWSSA) valid?

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SECONDARY AUTHORITIES:

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OPINIONS BELOW

The District Court for the District of New Union deemed NUHWSSA was within constitutional limits and also concluded that NUHWSSA imposed an equal burden on out-of-state and in-state generators of hazardous waste. The lower court also found that hazardous waste was legally distinguishable from solid waste. From the District Court's findings, Environmental Disposal Corporation (EDC) and Cleanfill Services Incorporated (CSI) petition for appeal to the Twelfth Circuit.

STATUTES INVOLVED

The texts of the following statutes relevant to the determination of the present case: The Commerce Clause, Article I, section 8 of the U.S. Constitution; The Supremacy Clause, Art. VI. cl. 2 of the U.S. Constitution; Resource Conservation and Recovery Act of 1976 § 3009, 42 U.S.C. § 6929; § 1002 (b)(7),(8), 42 U.S.C. § 6901 (b)(7), (8); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 104(c)(9), 42 U.S.C.
604(c)(9).

SEVERABILITY

New Union asserts that if either section 3 or section 4 of NUHWSSA are invalid, then the entire Act becomes invalid. No provision in NUHWSSA, however, allows for this type of total invalidation. If the legislature intended to include such a provision, they had ample opportunity to do so while drafting NUHWSSA. This issue of severability was addressed by New Union's General Counsel of State Environmental Affairs who happened to reaffirm New Unions severability position. Opn. at 4.

New Union argues that if the import ban is found invalid, the export ban must be invalidated as well. New Union asserts there would be no politically viable reason to enact the export ban without the corresponding import ban. Opn. at 5. The relevant inquiry in evaluating severability of unconstitutional provisions from the remainder of a statute is whether the stat-

ute will function in a manner consistent with legislative intent without the provision. Alaska Airlines v. Brock, 480 U.S. 678, 680 (1987). The export ban alone, however, will serve New Union's policy objectives under NUHWSSA. To allow New Union's legislature to "after the fact" add an invalidity clause is not only inconsistent with legislative discretion, but defies the plain language of NUHWSSA.

STANDARD OF REVIEW

Under *de novo* review, the appellate court is neither compelled to adhere to the district court's interpretation of state law, nor does it give great weight to its interpretation. Rather, the appellate court makes its own independent determination of state law issues based upon recognized sources available to the parties. U.S. v. Nacrdi, 63 3 F.2d. 977 (9th Cir. 1981).

EDC maintains that other standards would not serve the interests of justice for two reasons. On the one hand, if the court employs a "clearly deferential standard," then appellate courts typically examine whether plausible support existed for the district judge's decision thus affording it presumptive validity. e.g. King v. Horizon Corp., 701 F.2d. 1313 (10th Cir 1983); Loveridge v. Dreagoux, 678 F.2d. 870 (10th Cir. 1982) ; Walgreen Ariz. Drug Co. v. Levitt, 670 F.2d. 860 (9th Cir. 1982). When validity is presumed, the right to appellate review is severely curtailed and there is no full, independent review by the appellate court unless clear error is determined. Bernhardt v. Polygraphic Co., 350 U.S. 198, 209 (1956) .

On the other hand, appellate courts often interpret "clear error" to mean they are bound by the district court's decisions unless the district court was "clearly erroneous" *Id.* at 209. To the extent the "clear error" standard rests on the faculties of a federal judge interpreting state law without clear guidance from the state's supreme court, the district court decisons run the risk of being overly subjective. McLinn v. F/V Fjord, 739 F.2d. 1395, 1404 (9th Cir. 1984).

The Ninth Circuit in *McLinn v. F/V Fjord* subsequently determined that the only standard of review that appropriately served the appellate function was the *de novo* standard;

thus, it adopted that standard of review for the Ninth Circuit. *Mc Linn*, 735 F. 2d at 1397. As the first appellate interpretation of NUHWSSA proceeding without official guidance from New Union's Supreme Court, EDC respectfully requests a *de novo* standard of review. Under present circumstances, *de novo* review is the best method to ensure that an independent review is conducted.

STATEMENT OF THE CASE

EDC operates a hazardous waste facility at a site in Springfield, New Union. New Union is one of the states in the tri-state Union-Hampshire region, consisting of New Union, North Hampshire, and South Hampshire. The EDC facility at Springfield is one of ten hazardous waste sites located in New Union. There are four other hazardous waste facilities in the entire tri-state region, two each in both North Hampshire and South Hampshire. Almost all of the hazardous waste generated within the three states is disposed of within the region. Approximately one half of the waste generated in New Union is treated at the four sites in North Hampshire and South Hampshire. The remaining waste generated in New Union is treated within New Union itself.

The EDC facility treats and disposes of approximately one quarter of all waste generated within the State of New Union. This facility also handles most of the hazardous waste generated in the neighboring States of North and South Hampshire. The primary reason for the large volume of waste processed at the EDC facility is its ability to treat DBCP, a deadly toxic waste. According to the Resource Conservation and Recovery Act (RCRA) "land ban" regulations, DBCP must be incinerated. The Springfield site uses a type of high temperature incineration which is suited for DBCP treatment. After incineration, the remaining ash is placed in a specially constructed container for storage.

The facility at Springfield is the only hazardous waste site in the tri-state region that can treat DBCP. DBCP is an unintended by-product in many manufacturing processes. Three North Hampshire factories and two South Hampshire

factories produce pure DBCP as a waste by-product. EDC's Springfield facility also has a federal RCRA permit allowing it to treat DBCP.

In 1977 New Union enacted a hazardous waste treatment program entitled the New Union Conservation and Recovery Act (NURCRA). This program is not approved by the federal government under RCRA, and New Union never sought such approval. Under NURCRA, all hazardous waste treatment and disposal facilities may only be sited on state-owned land. In exchange for a ninety-nine year lease with New Union, facility operators must pay all necessary operating and construction costs for the site. NURCRA also requires operators to pay New Union ten percent of each year's profits as rent on the land.

In 1990 an accident occurred involving the transportation of DBCP. A truck carrying a two gallon container of DBCP overturned on a New Union highway. The container ruptured and DBCP vapors escaped, exposing a local farmer to the toxin. DBCP's effects on humans is similar to nerve gas and can cause paralysis leading to death. The truck driver saved the farmer by administering an antidote. The New Union Department of Emergency Response spent approximately $1,400,000 responding to the accident. The State requested CERCLA reimbursement from the parties involved in transporting DBCP.

Later that year, New Union held legislative hearings regarding hazardous waste. The Chair of the State Senate's Environmental Protection Committee asked the General Counsel of New Union's Department of Environmental Affairs about the legality of hazardous waste import and export bans. Upon an affirmative response the State enacted the New Union Hazardous Waste Self-Sufficiency Act (NUHWSSA). NUHWSSA bans both hazardous waste imports and exports. New Union justified NUHWSSA as a step toward both hazardous waste self-sufficiency, and compliance with CERCLA section 104(c)(9). EDC took action against New Union in May 1991, claiming the import ban of NUHWSSA violates the Commerce Clause of the United States Constitution. New Union responded by maintaining the import ban was a proper

exercise of state police power. CSI, which owns a hazardous waste chemical treatment facility located in North Hampshire, also filed suit against New Union, challenging the validity of New Union's export ban.

SUMMARY OF THE ARGUMENT

The District Court improperly upheld the constitutionality of NUHWSSA by declaring it balanced act on the whole. EDC believes the import ban is invalid and that New Union's export ban should remain valid. To support these contentions EDC's arguments fall into three broad categories: 1) Dormant Commerce Clause issues, 2) Resource Conservation and Recovery Act issues, and 3) Comprehensive Environmental Response, Compensation, and Liability Act and related policy arguments.

I.

The export ban survives Dormant Commerce Clause scrutiny. New Union's policy concerning the health, safety, and general welfare of its citizens and environment enables the state to impose the export ban as a valid exercise of the state's police power. As a result, New Union's compelling local interests cause only incidental effects on interstate commerce and enable the state to pass the tripartite *Pike v. Bruce Church* test. The test examines (1) 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; (2) whether the statute serves a legitimate local purpose, and if so; (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. Moreover, the nature of New Union's health and safety objectives cannot be served as well by non-discriminatory alternatives. With regard to the "stricter scrutiny" test under *Hughes v. Oklahoma,* EDC believes the magnitude of New Union's police power concerns withstands stronger constitutional examination. Upon examining cases under the market participant exemption, New Union falls within the protection of this

doctrine.

Regarding the import ban, EDC advocates that the overwhelming weight of precedent makes import bans facially discriminatory. Facially invalid import bans invoke the strictest scrutiny of the state's purported legitimate purpose and nondiscriminatory alternatives. Applying anything less than strict scrutiny runs against established precedent and the latest Supreme Court decisions regarding the Dormant Commerce Clause and hazardous waste management.

II.

RCRA defines the federal role in the joint state and federal regulation of hazardous waste. RCRA provides a pervasive, cradle-to-grave federal regulatory program for hazardous waste generators, transporters, and operators of treatment storage, and disposal (TSD) facilities.

New Union's import ban prohibiting hazardous waste similarly subverts federal objectives by directly impairing specific provisions in RCRA dealing with the transportation, storage or disposal of hazardous waste. EDC believes New Union's import ban requires preemption for two reasons. First, the import ban stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and thereby requires preemption under the Supremacy Clause. Second, since case law interpreting RCRA section 3009 only provides for more stringent requirements than those imposed by the federal government, *not* outright bans on such activity, New Union's attempt to ban imports falls outside its delegated authority.

III.

New Union's attempt to justify its import ban based on section 104(c)(9) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is inconsistent with both case decisions and congressional intent. Regarding congressional intent, even though Congress had the opportunity to include provisions allowing import bans in the 1986 CERCLA amendments, no such measures were taken.

Moreover, Congress included an import ban in the language of the Low Level Radioactive Waste Policy Act (LLRWPA) and would have presumably done the same in CERCLA if it desired. In *National Solid Waste Management Ass'n. v. Alabama,* the Eleventh Circuit invalidated a similar import ban. Interpreting section 104(c)(9), the court provided viable options for achieving the goals of section 104(c)(9) short of an impermissible import ban. EDC maintains the real intent behind the statute is not to comply with 104(c)(9), but to impose protectionist measures to keep DBCP and other contaminants from state highways.

ARGUMENT

I. ALTHOUGH NUHWSSA'S EXPORT BAN IS A PROPER EXERCISE OF NEW UNION'S POLICE POWER, NUHWSSA' IMPORT BAN IS UNCONSTITUTINAL UNDER THE DORMANT COMMERCE CLAUSE.

A. *New Union's Export Ban survives the Pike v. Bruce Church balancing test under the Dormant Commerce Clause*

Article I, section 8 of the U.S. Constitution provides, "The Congress shall have power to regulate Commerce with foreign Nations and among the several States . . . " U.S. CONST. art. I, sec. 8. The Commerce Clause enables Congress to regulate commerce between the states and to directly limit the power of the states to discriminate against interstate commerce. Limits on states' power to advance their own commercial interests by burdening commerce are called the "dormant or negative aspect" of the Commerce Clause.
H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535, 69 S. Ct. 657, 663 (1949). If a state's regulatory measure promotes economic protectionism, or promotes in-state interests at the expense of eliminating or unduly discriminating against out-of-state competitors, then the regulation will be held invalid. The statute will be held valid, however, if the state can prove a legitimate state interest unrelated to economic protection-

ism and the absence of nondiscriminatory alternatives. Maine v. Taylor, 477 U.S. 135, 137, 106 S. Ct. 2440, 2447 (1986).

In determining whether a state overstepped its role in regulating interstate commerce, courts recognize two classes of state statutes. The first class, which incidentally burden interstate commerce, are examined under the *Pike v. Bruce Church* test. Pike v. Bruce Church, 397 U.S. 137, 90 S. Ct. 844 (1990) . The second class, which facially discriminate against interstate transactions, must overcome the rigid standard applied in *Hughes v. Oklahoma.* Hughes v. Oklahoma, 441 U.S. 322, 99 S. Ct. 1727 (1979) .

EDC urges using the more flexible test set forth in *Pike v. Bruce Church.* Under similar facts in *Harvey & Harvey v. Delaware Solid Waste*, 600 F.Supp. 1369 (D. Del. 1985), a U.S. District Court validated a comparable export ban. The court found the state regulation attached to an important state health concern, and thereby did not materially favor in-state economic interests, causing incidental impacts on commerce between the states. 600 F. Supp. at 1381.

Examining state regulations that incidentally burden commerce, *Pike v. Bruce Church* posed a three part test; (1) 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; (2) whether the statute serves a legitimate local purpose, and if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce. Hughes v. Oklahoma, 99 S. Ct. at 1736.

Involving the first prong of the *Pike* test, New Union's ban only regulates against exports of hazardous wastes while allowing exports of non-hazardous solid wastes. Thus, EDC argues the challenged ban regulates evenhandedly with only incidental effects on interstate commerce. The ban is not facially discriminatory and can be distinguished from *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (1992). In *Hunt*, Alabama imposed an additional fee on hazardous waste generated outside of the state and disposed of within the state. The U.S. Supreme Court held that Alabama's differential fee was facially discriminatory and thereby violated the

Commerce Clause. *Hunt*, at 2011. New Union's ban does not impose differential fees on out-of state wastes, and out-of-state wastes are not given differential treatment. NUHWSSA allows the import of wastes while keeping New Union's hazardous wastes at home. Dissenting in *Hunt*, Justice Rehnquist argued that states may take actions legitimately directed at the preservation of the State's natural resources, even if those actions incidentally disadvantage some out-of-state generators. *Hunt*, at 2017. If a state can take action to protect its natural resources, then a state should also be afforded this same defference when taking steps to retain hazardous wastes to ensure their safe and proper disposal. Since NUHWSSA does not treat out-of-state waste differently, the challenged ban regulates evenhandedly with only incidental effects on interstate commerce.

The second part of the *Pike* test involves the legitimacy of the state's local purpose. States retain authority under their general police powers to regulate matters of 'legitimate local concern' even though interstate commerce may be affected. Maine v. Taylor, 477 U.S. 131, 135, 106 S. Ct. 2440, 2447. Under the State's police power, New Union's local interest protects the health and safety of its citizens and environment. EDC maintains the first step toward this goal is to eliminate the transportation of hazardous wastes across state lines. New Union enacted NUHWSSA in the aftermath of a highly toxic chemical spill. Opn. at 4. The spill occurred during transport, and New Union's policy protects the health and safety of its citizens by reducing the distance hazardous chemicals are transported within its boundaries. By disposing hazardous waste at one of New Union's ten intrastate disposal facilities, the distance traveled by hazardous wastes is reduced drastically. By reducing the distance traveled, EDC believes New Union's policy minimizes risks of future accidents that could deathly harm New Union's citizens. This is a legitimate local purpose and by keeping the wastes within New Union, NURCRA ensures that the state's concern will be accomplished. The ban ensures that DBCP and other hazardous wastes will be disposed of safely. Moreover, if New Union's citizens do not favor the export ban, then New Union's citi-

zens can amend NUHWSSA. This will also protect the out-of-state disposal sites who may be affected by the export ban. The third prong of the *Pike* test is whether alternative means could promote this local purpose as well without discriminating against interstate commerce. The extent of the burden tolerated depends upon the legitimacy of the local interest involved, and on whether it could have been promoted with a lesser impact on interstate commerce. Hughes v. Oklahoma, 99 S. Ct. at 1736. To the extent other alternatives exist, they frustrate NUHWSSA's health and safety objectives. For example, New Union could impose price reductions on facilities, encouraging generators to dispose of hazardous waste in state. With each New Union facility only possessing a one-tenth market share, they arguably charge competitive market prices. To artificially reduce these prices would cause in-state facilities to reduce operating expenses such as possibly safety regulations, monitoring efforts, and cleanup measures.

As a result, non-discriminatory alternatives do not serve the state's purpose in protecting environmental health and human safety. In light of compelling health and safety efforts, it cannot be successfully argued that the export ban is an example of economic protectionism. The state regulation attaches to an important health and environmental concern. There are no alternative means which can promote the local interest as well without discriminating against interstate commerce.

The facts on hand can be distinguished from *Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, 112 S. Ct. 2019 (1992). In *Fort Gratiot,* Michigan banned private landfill operators from accepting solid waste originating outside the county. The U.S. Supreme Court found the statute violated the Commerce Clause since other less discriminatory alternatives existed, and the Court could not find any legitimate reason for allowing petitioner to accept waste from inside the county but not waste from outside the county. *Fort Gratiot,* at 2028. NUWUSSA's valid export ban allows wastes from outside of the state as well as those within the state to be disposed of within New Union. Opn at 3. To this extent, New Union attempted to make a good faith effort to deal with the hazard-

ous waste disposal problem by ensuring that hazardous wastes are disposed of within the state under NURCRA guidance.

B. *NUHWSSA'S Export Ban survives the Commerce Clause Strict Scrutiny Test*

The second class of state statutes, which facially discriminate, are subject to the more demanding test applied in *Hughes v. Oklahoma*, 99 S. Ct. at 1737. Such facial discrimination by itself may be a fatal defect regardless of the state's purpose because the "evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 1737. According to *Hughes,* " . . . such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Id.* at 1737-38. Like the *Pike* test, the *Hughes* test compares the burdens and benefits flowing from the regulation, but the purported state interest is examed under stricter scrutiny. Maine v. Taylor, 477 U.S. 139, 106 S. Ct. 2440 (1986).

Applying the strict scrutiny test, the Supreme Court in *Hughes* found an import ban violated the Commerce Clause even though the state proved to have a legitimate local interest. *Hughes*, however, can be distinguished because other nondiscriminatory alternatives existed which paralleled the local purpose. *Hughes,* 99 S. Ct. 1727 at 1737. For example, when Oklahoma wanted to avoid the removal of inordinate numbers of minnows, the court determined Oklahoma officials chose the most discriminatory means available. *Hughes,* 99 S. Ct. 1727 at 1737. Oklahoma chose an export ban in lieu of viable alternatives such as placing limits on the amounts of minnows taken by local dealers. *Hughes,* at 1737. Moreover, there is a fundamental difference between minnows and hazardous waste. Minnows cannot "manifest themselves [having] properties as nerve gas . . . [where] even a tiny drop inhaled can cause convulsions, and moments later . . . paralyze the nervous system leading to lung failure and inevitable death." Opn. at 3. As the dissent noted in *Fort Gratiot Landfill v. Michigan Dep't of Natural Resources,* local interests should be recognized because "Nothing in the Commerce Clause re-

quires [states] to adopt an 'all or nothing' regulatory approach for hazardous materials." Fort Gratiot Landfill v. Mich. Dep't of Natural Resources, 112 S. Ct. 2009, 2018 (1992) (citing Mintz v. Baldwin, 53 S. Ct. 611 (1932)).

In short, New Union's ban protects the health and safety of its citizens and of its environment. This is a legitimate state purpose because nondiscriminatory alternatives fail to adequately serve similar and important needs. Therefore, to the extent NUHWSSA incidentally burdens interstate commerce, New Union's policy survives the Dormant Commerce Clause analysis espoused in *Pike*. Even if the export ban is found to be discriminatory on its face, this court should recognize a state's power to manage hazardous waste for legitimate health and safety concerns.

C. *New Union is a market participant regarding the Export Ban*

When a state enters the market as either a purchaser or seller of interstate commerce, it is considered a market participant and nothing in the Dormant Commerce Clause prohibits its own purchases or limits its own sales to its citizens. Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810, 96 S. Ct. 2488, 2498 (1976). A bright line does not exist between market participant and market regulator; the issue "is a fuzzy one that has perplexed courts and commentators alike." Alaska v. Anchorage, 953 F. 2d. 1173, 1177 (9th Cir. 1992). Nonetheless, when a state tries to impose its will by force of law, or compels private action through the exercise of raw governmental power, the state is generally deemed to be acting as a market regulator. Coenen, *Untangling the Market Participant Exemption to the Dormant Commerce Clause,* 88 MICH. L. REV. 395, at 411 (1989).

The distinction between a market participant and a market regulator caused considerable dispute within the Supreme Court. The Supreme Court through four cases attempted to delineate the market participant exception to the commerce clause. These cases provide insight into a working definition. To understand why New Union acts as a market participant

as opposed to a regulator, it is essential to examine three cases upholding the market participant doctrine and the one plurality case that limits the doctrine.

The three cases upholding the market participant exception are: Hughes v. Alexandria Scrap Corp., 426, U.S. 794, 96 S. Ct. 2488 (1976); Reeves, Inc. v. Stake, 447 U.S. 429, 100 S. Ct. 2271 (1980) ; White v. Mass. Council of Construction Employees, 460 U.S. 204, 103 S. Ct. 1042 (1983) . In *Alexandria Scrap*, the Supreme Court upheld Maryland's statutory scheme to rid the state of derelict automobiles even though the plan involved two types of discrimination. First, Maryland paid bounties to in-state scrap auto hull processors while refusing to pay bounties to out-of-state processors on the same terms. Second, Maryland paid bounties only for vehicles formerly titled in Maryland. Maryland's discriminatory practice was allowed since the state was deemed a market participant because of its position in the commercial stream. As stated in *Alexandria Scrap*, "nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Hughes v. Alexandria Scrap,* 426 U.S. 794 at 810. Under New Union's leasehold arrangements, the state receives a 10% annual share in the profits from its hazardous waste facilities. Opn. at 3. By taking an active stance in the operation and success of its hazardous waste facilities, EDC asserts New Union has the right to favor its own citizens over others as demonstrated in *Alexandria Scrap.*

In *Reeves v. Stake*, the Court embraced the market participant exception even though South Dakota confined the sale of cement by a state operated cement plant to residents of South Dakota. *Reeves* held the state was a market participant even though an out-of-state corporation, which purchased about 95% of its cement from South Dakota's plant for over twenty years, was forced to cut production by over 75% as a result of the policy. *Reeves*, 447 U.S. at 433, 100 S.Ct. at 2286. The Court concluded that, "South Dakota as a seller of cement clearly fits the market participant label." *Id.* at 433, 100 S. Ct. at 2286. The Court relied upon, "the long

recognized right of traders or manufacturers engaged in an entirely private business freely to exercise their own independent discretion as to parties with whom he will deal." *Id.* at 2274. As in *Reeves*, New Union qualifies as a seller because it leases to operators while maintaining a partnership interest in each site. By holding leases to the hazardous waste facilities, it appears that New Union holds a comparable merchant position to South Dakota. Moreover, under CERCLA § 101 and 107, New Union qualifies as an "owner" because of the leasehold and ten percent profit arrangement. 42 U.S.C. § 9601(20)(A), § 9607(a). New Union should be afforded similar discretion regarding domestically processed hazardous waste.

Further, the Supreme Court in *White v. Massachusetts Council of Construction Employers* found that a local action fell within the market participant doctrine even though the statute required federally funded construction projects to employ at least fifty percent local residents. This requirement directly influenced private firms' employment and hiring practices. *White*, 460 U.S. 204 at 211. North and South Hampshire may assert that New Union's export ban affects out-of state entitles that do not have a legislative voice within New Union. Southern Pacific v. Arizona, 325 U.S. 761, 767, 65 S.Ct. 1515, 1519. The Supreme Court recognized, however, that the Commerce Clause places no limitations on a State's refusal to deal with particular parties when the State participates in the interstate market. *Reeves*, 100 S. Ct. at 2244.

Finally, in a plurality decision in *Wunnicke*, the Court struck down the conclusion that the Alaska was a market participant and expressed limits to the market participant doctrine. *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237. The Court noted, "That Alaska's policy crossed the line distinguishing participation from regulation because the conditions it attached to its timber sales amounted to 'downstream regulation' of the timber processing market of which it is not a participant." *Id.* at 2246. In the instant case, the export ban does not regulate downstream into other markets; it merely designates a preference for using its own waste sites for its own hazardous wastes. The plain

language of *Wunnicke* serves to prevent states from affecting subsequent or collateral markets. Since New Union's presence in the disposal market places it at the 'end of the disposal ladder,' it cannot adversely affect subsequent markets. By New Union's very position it is the furthest downstream entity. Therefore, New Union has not crossed the *Wunnicke* line and retains its market participant protection. Moreover, *Wunnicke* is only a plurality opinion.

By applying the reasoning from the four cases, New Union is a market participant in the hazardous-waste disposal market. If Maryland may decree that only those with Maryland's auto hulks will receive state bounties, then New Union can similarly decree that its hazardous wastes will be disposed in state. If South Dakota gave preferential treatment to its citizens' cement sales, then New Union may also give preference to its localized hazardous waste concerns. Finally, if Boston can limit jobs to local residents, then New Union can employ measures to show preference by keeping only hazardous wastes in state. Swin Resource Systems, Inc., v. Lycoming County, 883 F.2d 245 at 250 (3rd. Cir. 1989) . Therefore by applying the above mentioned cases, EDC maintains the export ban is valid since New Union is a market participant in the waste disposal market.

D. *New Union's Import Ban cannot withstand the insurmountable precedent opposing protectionist interstate trade practices.*

A number of U.S. Supreme Court and federal court decisions have ruled that, absent an express grant of authority from the Congress, states are powerless to ban the importation of out-of-state waste into landfills located in their jurisdictions. Any such restriction is deemed impermissible discrimination against interstate commerce, as was found in the following cases: *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1977) ; *Chemical Waste Management v. Hunt*, 112 S. Ct. 2009 (June 1, 1992); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (June 1, 1992); *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980) ;

Washington Bldg. & Constr. Trades Council v. Spellman, 684 F.2d 627 (9th Cir. 1982), cert. denied, 461 U.S. 913 (1983) ; *Industrial Maintenance Service v. Moore*, 677 F. Supp. 436 (S.D. W.VA 1987) ; *Government Suppliers Consol. Services, Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990) ; *National Solid Waste Management Ass'n v. Voinovich*, 763 F.Supp. 244 (S.D. Ohio 1991), appeal pending, No. 91-3466 (6th Cir.); *National Solid Waste Management Ass'n v. Alabama Dep't of Envtl. Management*, 910 F.2d 713 (11th Cir. 1990), modified, 924 F.2d 1001, cert. denied 111 S. Ct. 2800 (1991). These cases reflect the court's alertness to guard against economic protectionism, and isolationism, while recognizing that incidental burdens on interstate commerce may be unavoidable when a state passes waste bans in order to safeguard the health and safety of its citizens.

City of Philadelphia v. New Jersey, 98 S. Ct. 2531, is the benchmark Supreme Court case on this issue. The Supreme Court stated that the crucial inquiry was to determine, "If the regulation was a protectionist measure or whether it could be viewed as a law directed at legitimate local concerns with incidental effects on interstate commerce." *Id* at 2535. The risks of New Union's protectionist measures become evident upon examining the tri-state hazardous waste market. None of the other states can legally dispose of the DBCP. Opn. at 3. EDC's Springfield facility is the *only* RCRA permitted facility capable of incinerating this highly toxic substance. Opn at 3. By banning imports of hazardous wastes, the monumental burden on the out-of-state generators, transporters, and citizens would be both costly and dangerous. Moreover, the monumental burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Pike*, 90 S. Ct. at 847.

New Jersey's holding was one of the first cases that seemed to apply a *per se* rule of invalidity to discriminatory statutes that promoted economic protectionism. Other decisions followed *New Jersey's* lead. For example, in *Hughes v. Oklahoma*, the Court stated that, " . . . such facial discrimination by itself may be a fatal defect, regardless of the State's purpose, because the evils of protectionism can reside in legis-

lative means as well as legislative ends." Hughes v. Oklahoma, 99 S. Ct. at 1737. EDC believes both New Union's legislative means and ends directly discriminate against interstate trade. New Union's means banned any and all imports of hazardous waste without regard to federal or state concerns about hazardous waste management. Opn. at 3. New Union's protectionist ends resemble the interstate economic balkanization that the Commerce Clause was historically designed to prevent. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 587 (1852) .

The Supreme Court continued to state that such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose. Applying this strict scrutiny standard to the facts on hand, the import ban must fall. If New Union wants to keep hazardous wastes out of the state, they have other nondiscriminatory alternatives. For instance, New Union could increase the price of disposal making it unattractive for states to send their hazardous wastes to EDC. Since other alternatives exist, New Union's health and safety concerns cannot justify the state's import ban. In essence, as was the case in *New Jersey*, "Regardless of the state's purpose, it cannot accomplish its purpose by discriminating against articles of commerce coming from outside the state." City of Philadelphia v. New Jersey, 98 S. Ct. 2531 at 2537.

E. *Applying any standard less than Strict Scrutiny to Import Bans undermines Stare Decisis.*

Regarding the overwhelming precedent strictly prohibiting import bans, if this court applied the lesser *Pike* standard it would depart from *stare decisis*. The line of cases dealing with import bans adhere to the strict scrutiny analysis developed in *Philadelphia v. New Jersey,* and reinforced in the Supreme Court's most recent decisions in *Fort Gratiot Landfill v. Mich. Dep. of Nat. Res.*, 112 S. Ct. 2019 (June 1992), and *Chemical Waste Management v. Hunt,* 112 S.Ct. 2009 (June 1992). Holding that " . . . no state may attempt to isolate itself from a problem common to the several states by raising barriers to the free flow of interstate commerce," the Court in

Hunt struck down a discriminatory fee that resulted in a *de facto* import ban. *Hunt,* 112 S. Ct. at 212. Therefore, after examining both standards of review, the Supreme Court's most recent decisions, and the *overwhelming* quantity of decisions holding import bans invalid, New Union's import ban is similarly invalid.

F. *New Union cannot qualify as a market participant regarding the Import Ban.*

The import ban facially discriminates against interstate commerce. Unlike the situation with the export ban, New Union may not claim the protection of the market participant doctrine. By extending its domestic policy into the tri-state hazardous waste market, New Union has gone into other states' markets and directly regulates collateral markets. For the export ban, however, New Union participated only in its domestic hazardous waste market. By contrast, the import ban directly regulates collateral markets, forcing out-of-state generators and transporters to seek other disposal sites. New Union has crossed the line becoming a market regulator. *Wunnicke,* 104 S. Ct. at 2244. At least with the export ban, New Union favored its own citizens over out-of-state residents, which is allowed under the market participant doctrine. *Alexandria Scrap,* 426 U.S. 794, 96 S. Ct. 2488 2498 (1976).

G. *New Union cannot justify the Import Ban under quarantine laws.*

The quarantine laws mostly banned diceased livestock and other noxious objects that had to be promptly destroyed as close to their point of origin as possible. City of Philadelphia v. New Jersey, 437 U.S. at 620, 98 S. Ct. 2534. Since there are no facilities outside of New Union capable of disposing DBCP, EDC's facility *is* the closest site to the toxin's point of origin . Banning the import of hazardous waste in this situation frustrates the the purpose of quarantine laws and would pose an unacceptable burden on interstate commerce. *Id.* at 2538.

II. NEW UNION'S IMPORT BAN IS INCONSISTENT WITH FEDERAL HAZARDOUS WASTE OBJECTIVES AND REQUIRES PREEMPTION UNDER THE SUPREMACY CLAUSE.

A. *Preemption is warranted to the extent New Union's Import Ban conflicts with specific federal law and exceeds delegated state authority.*

In 1976 Congress enacted RCRA because "the problems of waste disposal . . . had become a matter national in scope and in concern, and state waste management planning was inadequate or non-existent." 42 U.S.C. § 6901(a)(4); H.R. Rep. No 1491, 94th Cong., 2d Sess. 3 (1976); 1976 U.S.C.C.A.N 6238, 6240 *available in* WESTLAW, Lh Library. RCRA provides a pervasive, cradle-to-grave federal regulatory program for hazardous waste generators, transporters, and operators of treatment storage, and disposal (TSD) facilities.

The Supremacy Clause of the United States Constitution, art. VI. cl. 2, preempts any state or local laws that interfere with or are contrary to federal law. Hillsborough Co. v. Automated Medical Labs, Inc., 471 U.S. 707, 712, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985) . There are three ways that a federal law may preempt a state law. Ogden Envtl. Services v. City of San Diego, 687 F. Supp. 1436, 1442 (S.D. Cal 1988). First, federal law may contain an explicit preemption provision thus expressing Congressional intent. Rice v. Santa Fe Elevator, 331 U.S. 218, 236 (1947) . Second, federal law may be sufficiently comprehensive to create the inference that Congress intended to occupy the entire field of regulation. Pacific Gas & Electric v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983) . Finally, although the federal law may not entirely displace state law, a particular state regulation may actually conflict with federal law.
Michigan Canners & Freezers v. Agricultural Marketing & Bargaining Bd., 467 U.S. 461, 469, 104 S. Ct. 2158, 2523, 81 L.Ed. 2d. 3999 (1984) .

The third type of preemption, involving a conflict between state and federal law, may arise when compliance with state law "stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress." Philadelphia v. New Jersey, 437 U.S. 617, 621 (1978); Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 404, 85 L.Ed. 581 (1944). Although in *Philadelphia v. New Jersey*, the Supreme Court held the pervasiveness and objectives of RCRA as a whole could not be impaired by a state ban on hazardous waste, the Court's decision in *Philadelphia v. New Jersey* rested on "no square conflict with particular provisions of federal law or general incompatibility with basic federal objectives." Philadelphia v. New Jersey, 437 U.S. at 621.

In most RCRA preemption cases, state regulatory efforts effectuate implied bans on out-of-state transportation of hazardous waste. e.g. *Hardage v. Atkins*, 619 F.2d 871 (10th Cir. 1980); *Washington Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *Industrial Maintenance Service v. Moore*, 677 F. Supp. 436 (S.D. W.VA 1987) ; *Government Suppliers Consol. Services, Inc. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990); New Union, however, expressly banned imports by enacting NUHWSSA. Opn. at 4. These cases involving implied bans emphasize that if state law subverts federal purposes or objectives by impairing specific provisions in RCRA, then RCRA preempts state law. Ensco, Inc. v. Dumas, 807 F. 2d. 743 (8th Cir. 1986); Ogden Environmental Services v. San Diego, 687 F.Supp. 1436 (S.D. Cal. 1988); Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans*, 15 COLUM. J. ENVTL. L. 1 (January 1990) *available in* WESTLAW, Tp-All Library.

By denying North and South Hampshires' hazardous waste generators access to EDC's Springfield facility, the import ban violates RCRA's land ban provisions. 42 U.S.C. 6901(b)(7)-(8). These provisions seek to avoid substantial risk to human health and the environment by minimizing or eliminating land disposal. 42 U.S.C. 6901(b)(7)-(8). EDC's Springfield facility is the only facility in the tri-state area capable of disposing of DBCP. Opn. at 3. Forcing North and South Hampshire based generators to travel to other states increases their travel distance. As evidenced by the 1990 DBCP accident, the further the distance traveled the greater the risk to

human health and the environment.

The Eighth Circuit in *Ensco v. Dumas* determined a county ordinance prohibiting the "storage or disposal of acute hazardous waste within its boundaries" conflicted with RCRA's land ban provisions giving preference to treatment over land disposal of hazardous waste. *Ensco,* at 744 (citing 42 U.S.C. § 6901 (b)(7), (8).) According to the Eighth Circuit, "RCRA embodies . . . a national policy of requiring that hazardous waste be treated, stored, and disposed of in a manner that 'minimize[s] the present and future threat to human health and the environment" *Ensco,* at 744. (citing 42 U.S.C. § 6902 (a)(6)). Focusing on the conflict between the local ordinance and RCRA, the Eighth Circuit declared:

> Ordinance No. 171, however, ignores that FO20 series wastes do exist, and through its ban on storage, treatment, and *disposal* in essence mandates that these wastes . . . will not be handled in the manner deemed safest by Congress and the EPA. *Ensco,* at 745.

An import ban opposing these central objectives is "incompatible with both the basic purpose of RCRA's Title III hazardous waste management provisions and the underlying policy of uniformity of states in the field of hazardous waste disposal" and merits preemption. Rollins Environmental Services, Inc. v. Iberville Parish Policy Jury, 371 So. 2d. 121, 127 (1984). It is important to recognize the "residuum of power in the state to make laws governing matters of local concern," that gives states the authority to govern over matters concerning health, safety, and welfare of state citizens. *Hunt v. Washington Apple Advertising Comm'n.,* 432 U.S. 333, 350 (1967). Local government's residual authority to regulate hazardous waste is not unlimited. *Ogden,* 687 F. Supp. at 1446. Section 3009 of RCRA recognizes local interests by stating, " . . . Nothing in [RCRA] shall be construed to prohibit any State or political subdivision thereof from imposing any requirements . . . *more stringent* than those imposed by such regulations." 42 U.S.C. § 3009.

Both *Ensco v. Dumas* and *Ogden v. City of San Diego*

dealt with local regulations claiming to be "more stringent" than RCRA. In *Ogden Envt'l Services v. City of San Diego,* a California District Court examined similar problems regarding the savings clause. *Ogden,* 687 F. Supp. 1436 (S.D. Cal 1988). Facing a rigid conditional use permit operating as a ban on hazardous waste, the court crystallized the tension involving section 3009:

> On the one hand, as defendant suggests, to construe every permit denial as creating a *de facto* conflict with congressional objectives would substantially eviscerate the role of local governments in choosing one site over another, a role presumably envisioned by the "savings" clause. On the other hand, allowing a locality to completely evade judicial review simply by requiring a conditional use permit, which is then granted or denied at the discretion of the local decision-makers, creates the potential for a type of "sham" [or] "subterfuge" . . . *Ogden,* at 1446.

According to the District Court in *Ogden,* "the express language of the 'savings' clause only provides for more stringent requirements than those imposed by the federal government, *not* outright bans on such activity. *Id.* at 1446. Since "state and local enactments are nullified to the extent they actually conflict with federal law," New Union's 'more stringent' import ban overextends section 3009's residuum of state power and should be preempted. If New Union's "more stringent" regulations took the form of (1) new storage disposal capacity within the state, or (2) an interstate or regional agreement, or (3) a contract with private management facilities, all deemed consistent with federal hazardous waste management, then New Union's actions might be acceptable under section 3009. Solid Waste Management Ass'n. v. Alabama Dep't of Envtl. Management 910 F. 2d. 713 (11th Cir. 1990), *cert. denied.,* 111 S.Ct. 2800 (1991) .

The lessons learned from cases involving implied or *de facto* bans on hazardous waste are crucial. Both the courts in *Ensco* and *Ogden* found RCRA preemption necessary where state law subverts federal purposes or objectives by impairing specific provisions in RCRA. If state regulations violate this

standard by effectuating mere *de facto* bans on hazardous waste, it follows that New Union's blatant and explicit import ban should succumb to the same scrutiny.

Once held under this lens, EDC believes New Union's import ban requires preemption for two reasons. First, the import ban stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress by undermining RCRA's land ban provisions. Finally, since RCRA section 3009 only provides for more stringent requirements than those imposed by the federal government, *not* outright bans on such activity, New Union's attempt to ban imports falls outside its delegated authority.

B. *New Union's Export Ban under NUHWSSA parallels the purposes and objectives of hazardous waste regulation.*

One of RCRA'S express objectives is the establishment of a viable federal-state partnership to carry out the purposes of the Act. Ogden Envt'l Services v. City of San Diego, 687 F. Supp. at 1444. In developing RCRA, Congress was particularly concerned with the states' ability to guarantee waste volumes necessary to the success of waste disposal facilities. H.R. Rep. No. 1491(I) 94th Cong., 2d Sess. 3 (1976); 1976 U.S.C.C.A.N. 6272. *available in* WESTLAW, Lh Library. For similar reasons, New Union's export ban upholds Congressional intent regarding state planning under RCRA. Congress recognized that guaranteeing waste volume is necessary to the success of solid waste disposal facilities and concluded "private companies are capable of and willing to enter into resource recovery ventures if a sufficient volume of refuse can be guaranteed over a sufficiently long period of time." *Id.* at 1976 U.S.C.C A.N. 6272.

Before the export ban, fifty percent of New Union's waste was exported to four plants located in North and South Hampshire leaving the ten New Union based plants to vie for the remainder. Opn. at 3. Since the control of waste collection and disposal serves important health and safety functions, New Union's export ban ensures that a sufficient volume of

waste will enter disposal facilities to make then financially feasible. Central Iowa Refuse Sys., Inc. v. Des Moines Metro. Solid Waste Agency, 715 F.2d. 419, 421-22 (8th Cir. 1983) cert. denied, 471 U.S. 1003 (1985). In essence, if New Union based TSD facilities were forced to close due to insufficient flows, New Union's citizens would face substantial health and environmental risks. Therefore, EDC maintains that New Union's export ban is consistent with the states' police power and RCRA's legislative history.

III. NEW UNION IMPROPERLY CLAIMS THAT 104(c)(9) OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT JUSTIFIES THE STATE'S PROTECTIONIST TRADE MEASURES.

CERCLA became law by Congress in 1980. By passing CERCLA, Congress attempted to deal with the nationwide problem of hazardous waste disposal. United States v. Monsanto Co., 858 F.2d 160, 162 (4th Cir. 1988). CERCLA section 104(c)(9) was designed to induce states to adopt comprehensive waste management plans. Section 104(c)(9) requires states to submit an "adequate capacity assurance plan" to the EPA by 1989, or lose Federal funding for hazardous waste cleanup. 42 U.S.C.§ 9604(c)(9). Under this provision, a state must assure the EPA that the state has adequate capacity to treat and store hazardous waste for the next twenty years. 42 U.S.C. § 9604(c)(9).

New Union seeks to justify passing NUHWSSA on the basis of section 104(c)(9). Appellee posits that the provisions of NUHWSSA will enable it to achieve "hazardous waste self-sufficiency," as it claims Congress demands under section 104(c)(9). Opn at 3. The import ban imposed in section 4 of NUHWSSA, however, goes well beyond what is both required and allowed to achieve this goal. In addition to the constitutional limitations described above, New Union's import ban is not supported by cases interpreting Section 104(c)(9), nor the Congressional intent behind it. Stone, *Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Im-*

port Bans., 15 COLUM. J. ENVTL. L. 1 (January 1990) *available* in WESTLAW, Tp-All Library.

A. *Failure to include a provision in section 104(C)(9) of CERCLA is evidence that Congress did not intend to allow an Import Ban.*

The language of Section 104(c)(9) does not allow states to impose import bans. Moreover, in *Philadelphia v. New Jersey*, the Supreme Court expressly invalidated a New Jersey import ban of solid waste. If Congress desired to bypass the Supreme Court ban on importation of wastes, Congress would have explicitly done so in the 1986 amendments to CERCLA that established 104(c)(9). S. Rep. No. 11, 99th Cong., 1st Sess., at 21-24 (1985). In addition, the Low-Level Radioactive Waste Policy Act (LLRWPA), also indicates that Congress lacked the intent to allow import bans. 42 U.S.C. § 2021(b)-(j) (Supp. V 1987). LLRWPA allows states to implement import bans against radioactive waste entering from other states. 42 U.S.C. § 2021d(a)(1) (Supp. V 1987). Congress was undoubtedly familiar with LLRWPA's import ban provisions, but it refused to add similar provisions to CERCLA. National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management, 910 F.2d 713, 721 (11th Cir. 1990).

B. *Import Bans are not acceptable under case law interpreting CERCLA section 104(C)(9).*

An import ban similar to that found in NUHWSSA was presented before the Eleventh Circuit in *National Solid Wastes Management Ass'n v. Alabama Dep't of Envtl. Management*, *Id.* at 713. The Eleventh Circuit faced an Alabama Statute which banned the import of hazardous waste from states that did not comply with Alabama's statutory requirements. *Id.* at 713. Similar to New Union, Alabama asserted the statute was directed toward State compliance with section 104(c)(9) of CERCLA. *Id.* at 720. The Eleventh Circuit invalidated the statute, primarily on grounds that it violated the Commerce Clause. *Id* at 713. The Eleventh Circuit felt the

import ban exceeded the goals of CERCLA section 104(c)(9). *Id.* at 720. Although compliance with CERCLA was encouraged, the Eleventh Circuit determined the statute "is not required for Alabama to comply with section 104(c)(9)'s capacity assurance requirement." *Id.* at 720.

The court in *National Solid Wastes* noted three ways in which Alabama could comply with section 104(c)(9). It could (1) create new disposal capacity within the state, (2) enter into interstate agreements to gain access to use capacity in other states, and (3) it could contract with private waste management facilities to obtain further capacity. *Id.* at 720. In light of available options, NUHWSSA's import ban is not only inconsistent with constitutional doctrine, but over steps section 104(c)(9)'s interpreted meaning.

IV. CONCLUSION

Under the Dormant Commerce Clause the export ban should be valid. New Union's policy concerning the health, safety, and general welfare of its citizens is a valid exercise of the state's police power. As a result, New Union's compelling local interests cause only incidental effects on interstate commerce and enable the state to pass the tripartite *Pike v. Bruce Church* test. Moreover, the nature of New Union's health and safety objectives cannot be served as well by non-discriminatory alternatives. With regard to the "stricter scrutiny" test under *Hughes v. Oklahoma,* EDC believes the magnitude of New Union's police power concerns withstand stronger constitutional examination. Upon examining cases under the market participant exemption, New Union falls within the protection of this doctrine.

Regarding the import ban, EDC advocates that the overwhelming weight of precedent makes import bans facially discriminatory. Applying anything less than strict scrutiny runs against established precedent and the latest Supreme Court decisions regarding Dormant Commerce Clause and hazardous waste management.

New Union's import ban prohibiting hazardous waste subverts federal objectives by impairing RCRA provisions

dealing with the transportation, storage or disposal of hazardous waste. EDC believes New Union's import ban requires preemption for two reasons. First, the import ban stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and thereby requires preemption under the Supremacy Clause. Second, since RCRA section 3009 only provides for more stringent requirements than those imposed by the federal government, *not* outright bans on such activity, New Union's import ban exceeds the interpreted meaning of section 3009.

New Union's attempt to justify its import ban based on section 104(c)(9) of the CERCLA is inconsistent with both case decisions and congressional intent. Regarding congressional intent, Congress had the opportunity to include provisions allowing import bans in the 1986 amendments to CERCLA. Moreover, Congress included import ban in the language of the Low Level Radioactive Waste Policy Act (LLRWPA) and would have presumably done the same in CERCLA if it desired. In *National Solid Waste Management Ass'n. v. Alabama,* the Eleventh Circuit invalidated a similar import ban. Interpreting section 104(c)(9), the court provided viable options of achieving the goals of section 104(c)(9) short of an impermissible import ban.

For the reasons set forth above, Appellants respectually request that the judgment of the District Court for the District of New Union be overturned in part and affirmed in part.