Supremacy and Commerce Clause Issues Regarding State Hazardous Waste Import Bans

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I. INTRODUCTION

The enforceability of state hazardous waste requirements is a timely issue, because in the past year a number of states have acted to ban importation or disposal of foreign hazardous waste. In turn, the Environmental Protection Agency ("EPA") has charged that such acts violate the commerce clause, and has threatened sanctions under the Resource Conservation and Recovery Act (RCRA)[1] or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[2] Congress may tilt the balance of power in favor of either the states or EPA, through additional legislation. This article will examine the preemption and negative commerce clause doctrines as applied to the policies and legislative intent of RCRA and CERCLA, in order to suggest whether under present law EPA could or should preempt stringent state hazardous waste requirements that have the effect of import bans.

A. *The Hazardous Waste Civil War*

A recent survey of forty-seven states found that of eighty-one siting applications for commercial hazardous waste treatment and disposal facilities, only fourteen have been approved, and of those, only six are operating.[3] The survey also found that "only one permit application has been approved in the nine states that allow for the greatest amount of public participation."[4] This

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1. 42 U.S.C. §§ 6901-6991 (1982 & Supp. V 1987).

2. 42 U.S.C. §§ 9601-9657 (Supp. V 1987).

3. 18 Env't Rep. (BNA) 1103 (Aug. 21, 1987) (citing survey of the New York Legislative Commission on Toxic Substances and Hazardous Wastes).

4. *Id.* at 1104.

highlights the "Not In My Backyard" ("NIMBY") nature of the problem, and suggests that the solution will have to be commensurately political.

An example of the NIMBY problem is South Carolina's reaction to perceived provocation by North Carolina. In June of 1987, North Carolina passed a hazardous waste facility permitting law that requires that point source discharges be diluted by a factor of one thousand.[5] The effect of this expensive requirement would be to prohibit siting of a proposed commercial treatment facility in the south-central part of the state.[6] Local officials led the opposition to this siting,[7] which the North Carolina governor's advisor said was really rooted in local opposition to accepting "large amounts of waste from a nearby [South Carolina] superfund site."[8] The general counsel of the Hazardous Waste Treatment Council predicted that North Carolina's law would precipitate a "hazardous waste civil war."[9] Counsel's foresight was keen, judging from South Carolina's recent response. In March, 1989, South Carolina banned "disposal of waste from any state that refused to take steps to dispose of it itself," thus effectively banning thirty-two states and Puerto Rico.[10] A South Caro-

5. 18 Env't Rep. (BNA) 1756 (Nov. 20, 1987).

6. 18 Env't Rep. (BNA) 1806 (Dec. 4, 1987).

7. *Id.*

8. 18 Env't Rep. (BNA) 1757 (Nov. 20, 1987).

9. 19 Env't Rep. (BNA) 173 (June 3, 1988) (quoting David R. Case). An earlier skirmish in the waste disposal civil war occurred in 1986, when North Carolina representatives walked out of a meeting of the Southeast Compact Commission for Low-Level Radioactive Waste Management. *See* 17 Env't Rep. (BNA) 794 (Sept. 26, 1986). North Carolina has disposed of low level radioactive wastes for years at the Chem-Nuclear facility in Barnwell, South Carolina, 14 Env't Rep. (BNA) 276 (June 17, 1983), and in 1983 North Carolina formally joined the Southeast Interstate Low-Level Radioactive Waste Management Compact. 14 Env't Rep. (BNA) 629 (August 12, 1983). The Barnwell facility was scheduled to close in 1992, and the Southeast Compact Commission selected North Carolina as the most suitable member state to host the succeeding radioactive waste disposal facility. 17 Env't Rep. (BNA) 794 (Sept. 26, 1986). North Carolina environmental groups vigorously opposed siting such a facility in their state, one lobbyist remarking, "We should not have joined in 1983, and we should have pulled out before we were selected." *Id.* at 795. North Carolina seriously considered withdrawing from the compact, but modified its stance to require assurances that the host site would later rotate among the other member states. *See* 17 Env't Rep. (BNA) 1235 (Nov. 21, 1986); 17 Env't Rep. (BNA) 1843 (Feb, 27, 1987).

10. *South Carolina Bars 32 States on Disposal of Hazardous Waste*, Washington Post, March 1, 1989, at A7, col. 5.

lina state official stated that EPA had "betrayed" South Carolina by allowing North Carolina's law to stand.[11]

Other states on the east coast and around the country have joined the fray, by moving to adopt rules that have the effect of a ban on foreign hazardous waste. In February, 1988, a "Stop the Dump" group introduced a bill in the Mississippi legislature to require county referendums to permit hazardous waste facility siting.[12] In May, 1988, Alabama passed a law creating legislative veto power over hazardous waste facility siting.[13] Alabama's governor explained that "Alabama is not going to be the dumping ground for the rest of the nation."[14] In December, 1988, the Utah Solid and Hazardous Waste Committee approved stringent state siting criteria for hazardous waste treatment, storage, and disposal, declaring that "The [public] perception is Utah is going to be the dumping area of the country."[15] EPA has expressed concern over the rules adopted in at least six states,[16] and the Hazardous Waste Treatment Council has identified twenty states with restrictive siting laws.[17]

Additional pressure on the states is created by a recently passed CERCLA hammer deadline.[18] Section 104(c)(9) of CERCLA requires that by October 17, 1989, each state must provide sufficient assurance to EPA that it has adequate capacity for the treatment or disposal of all hazardous wastes that are reasonably expected to be generated within that state during the next twenty years.[19] Until EPA has approved a state's Capacity Assurance Plan ("CAP"),[20] a state will be ineligible to receive federal Superfund remedial cleanup funding.[21]

11. 19 Env't Rep. (BNA) 268 (June 24, 1988) (quoting Moses Clarkson, board chair of the S.C. Department of Health and Environmental Control).

12. 18 Env't Rep. (BNA) 2149 (Feb. 12, 1988).

13. 19 Env't Rep. (BNA) 103 (May 27, 1988).

14. 18 Env't Rep. (BNA) 2147 (Feb. 12, 1988) (quoting Governor Guy Hunt).

15. 19 Env't Rep. (BNA) 1786 (Dec. 30, 1988) (quoting committee member Gerald Maloney).

16. 18 Env't Rep. (BNA) 2111 (Feb. 5, 1988).

17. 19 Env't Rep. (BNA) 739 (Aug. 26, 1988).

18. 18 Env't Rep. (BNA) 1104 (Aug. 21, 1987).

19. 42 U.S.C. § 9604(c)(9) (Supp. V 1987) (originally enacted as Superfund Amendments Act of 1986, Pub. L. No. 99-499, § 104, 100 Stat. 1613, 1782) [hereinafter Section 104(c)(9)]. For the full text of this law, *see infra* note 174.

20. Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, Directive No. 9010.00, Assurance of Hazardous Waste Capacity, Guidance to State Officials (1988) [hereinafter Guidelines].

21. Section 104(c)(9), *supra* note 19.

Similar interstate friction will probably occur in the near future over nonhazardous solid waste disposal issues. A RCRA reauthorization bill recently submitted in the Senate contained a measure that "would require states to establish solid waste management plans identifying anticipated future waste generation and waste disposal needs and setting up management strategies."[22] If passed, this bill would lead to the same dilemma now faced by the states regarding hazardous waste disposal capacity.

B. *Possible Violations of the Supremacy and Commerce Clauses*

Even before other states reacted to North Carolina's de jure ban on hazardous waste imports, EPA recognized the consequences of an emerging trend.[23] While the North Carolina bill was being debated, EPA announced that the ban would violate the comprehensive hazardous waste program set out in Title III of RCRA.[24] After passage of the bill, EPA alleged twenty-five legal violations, and considered initiating proceedings to withdraw federal approval of North Carolina's state hazardous waste program.[25] In addition to preemption by RCRA, EPA charged that the state import ban violated the commerce clause by restricting "the free movement of hazardous waste across state borders."[26]

EPA did not, however, immediately undertake the withdrawal proceedings. Publicity over North Carolina's law, combined with congressional concern, spurred EPA into a more comprehensive review of state hazardous waste program consistency with federal requirements.[27] Moreover, the North Carolina deputy attorney general had raised an interesting point when he defended his state's law on health and safety grounds, stating, "It seems states can't be less stringent than EPA, but they also can't be tougher."[28] In order to preserve state authority over hazardous

22. 19 Envtl. L. Rep. (Envtl. L. Inst.) 10020 (Jan. 1989).

23. *See generally* 18 Env't Rep. (BNA) 1756-57 (Nov. 20, 1987).

24. *Id.*

25. *Id.*

26. *Id.* at 1757.

27. 18 Env't Rep. (BNA) 2110-11 (Feb. 5, 1988).

28. 18 Env't Rep. (BNA) 1806 (Dec. 4, 1987) (quoting Mr. John Simmons). This statement underscores the irony of RCRA § 3009 which preserves the rights of the states to pass hazardous waste standards which are more stringent than federal standards. *See infra* text accompanying notes 74-75.

waste programs, EPA shifted the focus of its attack from state RCRA programs to CERCLA.[29]

Under the CERCLA Section 104(c)(9) CAP requirements, EPA can sanction states by withholding federal funds.[30] A state that bans foreign hazardous waste may in turn be precluded from disposing its own hazardous waste in other states, thereby failing to assure adequate waste disposal capacity. Thus, the state could be punished under CERCLA instead of RCRA. Since the states would retain more autonomy under this approach, EPA characterized it as a "more flexible, less hostile process" to restrict excessively stringent state hazardous waste standards.[31] Other commentators, however, felt that coercing the states under Section 104(c)(9), while allowing state import ban laws to stand, would increase the likelihood of, not prevent, a hazardous waste "civil war."[32]

C. *Differing Views on How to Implement Section 104(c)(9) CAPs*

The differing views on how best to regulate the states without precipitating a hazardous waste war came to a head when EPA contracted for the National Governors Association ("NGA") to write alternative draft guidelines for implementing the Section 104(c)(9) requirements.[33] Section 104(c)(9)(B) provides that if a state's CAP relies on out of state hazardous waste disposal, the CAP must include an interstate or regional agreement to that effect. The NGA would implement this over an adjustment period of four years.[34] In the year-one CAP submission, a state would include a generalized agreement in which the state acknowledges the current status quo of interstate hazardous waste shipments and promises to participate in an EPA managed adjustment process.[35] Based on all the states' year-one CAP data, EPA would refine "reasonableness criteria" to which the states had bound themselves to adhere, and would identify any states which had un-

29. 19 Env't Rep. (BNA) 173 (June 3, 1988).

30. *See supra* text accompanying notes 18-19.

31. 19 Env't Rep. (BNA) 739 (Aug. 26, 1988) (quoting EPA Assistant Administrator for Solid Waste and Emergency Response J. Winston Porter).

32. *Id.*, quoting Executive Director of Hazardous Waste Treatment Council Richard Fortuna.

33. *See* EPA Draft State Hazardous Waste Capacity Assurance Guidance, 53 Fed. Reg. 33,618 (1988).

34. *Id.* at 33,651-52 (Appendix A).

35. *Id.*

reasonably high hazardous waste exports.[36] High exports would be unreasonable, if the state had neither increased any *feasible* in-state disposal facilities nor entered into any interstate export agreements.[37] If the state was still unreasonably exporting at the end of the four-year adjustment period, then EPA would allow its counterpart importing state to bar those imports, without penalty. However, the exporting state's CAP would be disproved,[38] thereby incurring the Section 104(c)(9) remedial cleanup funding sanctions.

In contrast to the NGA draft guidelines, EPA adopted final guidelines which require that initial CAP submissions be much more substantially finalized plans.[39] Exporting states would submit year-one interstate agreements that agree on base year and projected exports and imports, and that are based on detailed waste flow quantities described in the CAP.[40]

The primary difference between the NGA proposed and EPA final guidelines is that NGA would have EPA intervene and arbitrate reasonable export/import standards between the states over a period of several years,[41] whereas EPA has essentially decided to let the states find their own solutions immediately.[42] NGA has warned that the EPA guidelines will "pit the states against one another."[43] This prediction seems credible, in light of the hostilities already displayed between North and South Carolina as well

36. *Id.*

37. *Id.* at 33,652 (Appendix A).

38. *Id.*

39. *See* Guidelines, *supra* note 20.

40. *Id.* at 8.

41. *See* 19 Env't Rep. (BNA) 987 (Sept. 16, 1988) (NGA director says the "NGA's approach would bring states to a bargaining table where disagreements between states could be resolved by states and EPA").

42. *See id.* (stating that the EPA project manager of the guidelines "said the agency wants the states to resolve the disputes among themselves rather than looking to EPA"). In November, 1988, EPA addressed the states' desire for an arbitration mechanism by developing a new draft guidelines option which provides for a limited EPA arbitration role, but still requires final CAPs in year-one and sanctions against states that do not obtain immediate approval of their CAPs. 19 Env't Rep. (BNA) 1464 (Nov. 18, 1988). The final guidelines merely state, "[s]tates may choose to enter into agreements to assure access to facilities . . . . Clearly, such agreements will reflect substantial interstate dialogue regarding actual and projected waste flows. Further, discussions among states are likely to raise distributional and equity concerns." Guidelines, *supra* note 20, at 8.

43. 19 Env't Rep. (BNA) 987 (Sept. 16, 1988) (quoting NGA Director of Natural Resource Policy John Thomasian).

as subsequent moves by other states to ban hazardous waste imports.[44]

D. *Congress to the Rescue?*

Congress may soon intervene to resolve both supremacy and interstate commerce issues by expressly allowing the states to ban importation of foreign hazardous waste. In the fall of 1988, as EPA contemplated whether to attack state bans under RCRA or under CERCLA,[45] a Senate Environmental and Public Works Committee staffer who had worked on the Section 104(c)(9) amendment expressed confidence that this dilemma would force congressional debate regarding the Section 104(c)(9) guidelines during reauthorization hearings for RCRA.[46] Also, in response to EPA's proposed sanctions against North Carolina's stringent hazardous waste standards, six senators cosigned a letter to EPA Administrator Lee Thomas stating that "it was the 'clear intention' of Congress through RCRA to allow states to go beyond federal law to meet specific environmental or other requirements."[47] This statement undoubtedly refers to RCRA Section 3009, which states that, "Nothing in this chapter [Hazardous Waste Management] shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations."[48] In light of the recent trend toward banning foreign hazardous waste,[49] it is conceivable that Congress would expressly authorize such actions.

However, the legislative history of CERCLA Section 104(c)(9) shows a strong congressional awareness that both RCRA and CERCLA depend upon interstate cooperation. The Senate Committee Report stated,

> Pressures from local citizens place the political system in an extremely vulnerable position. . . . A common result has been that facilities have not been sited . . . . This is the NIMBY syndrome (not in my backyard). Yet if the RCRA and Superfund pro-

44. *See supra* notes 5-17 and accompanying text.

45. *See supra* notes 22-31 and accompanying text.

46. 19 Env't Rep. (BNA) 987 (Sept. 16, 1988).

47. 18 Env't Rep. (BNA) 2110 (Feb. 5, 1988). *See infra* note 169 and accompanying text.

48. 42 U.S.C. § 6929 (1982 & Supp. 1987). The original intent of the Senate sponsor of this language in Section 3009 does not seem to have been to allow local governments to ban hazardous waste disposal. *See infra* notes 162-65 and accompanying text.

49. *See supra* notes 3-17 and accompanying text.

> grams are to work . . . the necessary sites must be made available. . . . The process of site selection should find a way to transcend blanket local vetoes. No community should be able to remove itself from consideration on political grounds alone.[50]

Thus, whereas the ninety-ninth Congress indicated that it might not intend to authorize hazardous waste import bans, there are some indications that the present Congress may be willing to do so.

II. PREEMPTION BY RCRA

One argument that EPA has considered in attacking state bans on foreign hazardous waste importation is that such bans are preempted by RCRA.[51] This would involve application of general federal preemption doctrine to the text and objectives of RCRA.

A. *General Federal Preemption Doctrine*

The supremacy clause[52] mandates that federal law preempts state law when Congress has manifested such intent.[53] Congress may expressly state that it is entirely or partly preempting state law,[54] or it may manifest that intent by such " 'pervasive [regulation] as to make reasonable the inference that [it] left no room for the States to supplement it.' "[55] Preemption also occurs when state law actually conflicts with federal law, to the extent that either compliance with both is a "physical impossibility,"[56] or would interfere with the "execution of the full purposes and objectives" of the federal law.[57]

The Supreme Court is reluctant to infer congressional intent to preempt, and therefore uses a test which is weighted to defer to the states. The Court has stated, "It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to

50. S. REP. No. 11, 99th Cong., 1st Sess. 22-24 (1985).

51. *See supra* text accompanying notes 23-26.

52. U.S. CONST. art. VI, cl. 2.

53. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

54. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

55. Pacific Gas & Electric Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983) (citation omitted).

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

57. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

be presumed."[58] Even comprehensive federal legislation on social issues does not manifest preemption, without further evidence of legislative intent.[59] For instance, the Court has held that state oil pollution regulators were not preempted just because the subject is regulated by a federal act which imposes a "pervasive system."[60] Thus, since there is a "twilight zone"[61] where the line between federal and state jurisdiction is not clear, the Court has held that courts must closely examine the facts of each case.[62]

B. *RCRA Preemption Case Law*

Most RCRA preemption cases to date concern local government bans on hazardous waste disposal. Since these bans constitute de facto bans on importation, principles derived from these cases are useful by way of analogy to the present issue. One case that did address a state ban on solid waste importation was the Supreme Court's benchmark case, *City of Philadelphia v. New Jersey*.[63]

In *Philadelphia*, the state of New Jersey had enacted a law which barred importation of foreign "solid or liquid waste" unless permitted by the state Department of Environmental Protection.[64] Implementing regulations specifically applied this law to hazardous waste, except when imported for the purpose of land disposal.[65] On appeal, the issues were both preemption and violation of the commerce clause.[66] The Court disposed of the preemption issue in one sentence of text and a footnote.[67]

Addressing solid waste (and apparently ignoring any distinction from hazardous waste), the *Philadelphia* Court found "no 'clear and manifest purpose of Congress' to pre-empt the entire field of interstate waste management" in RCRA.[68] Instead, the Court found that Congress expressly provided that solid waste disposal

58. Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).
59. New York State Dep't of Social Services v. Dublino, 413 U.S. 405, 414-15 (1973).
60. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 330 (1973).
61. *Id.* at 344.
62. Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 719 (1963).
63. 437 U.S. 617 (1978).
64. *Id.* at 618-19.
65. *Id.* at 619 n.2.
66. *Id.* at 620.
67. *Id.* at 620 n.4.
68. *Id.* at 621 n.4. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

regulation was not preempted, citing RCRA Section 1002(a)(4) which states: "while *the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies*, the problems as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership. . . ." (Emphasis added).[69] The Court quoted only the emphasized portion, thus construing the language to avoid preemption expressly. Alternatively, the Court could have stressed the latter half of the sentence, thus construing it to show preemption due to interference with federal purposes. Instead, the Court found that there was no "square conflict with particular provisions of federal law or . . . general incompatibility with basic federal objectives."[70]

One year after *Philadelphia* was decided, a state supreme court held that a local ban on *hazardous waste* disposal *was* incompatible with the basic objectives of RCRA's Title III hazardous waste management provisions.[71] The court in *Rollins Environmental Services of Louisiana, Inc. v. Iberville Parish Police Jury* found that a Louisiana parish ordinance that barred hazardous waste disposal within the parish was preempted by both RCRA and state law, because "spotty . . . parochial control would be [an] ineffective" way to deal with a problem of national concern. Citing the legislative history of RCRA, the court stated, "An announced congressional purpose in establishing *federal minimum standards* governing . . . disposal of hazardous waste was to provide *uniformity* among the states in the field of hazardous waste disposal regulation."[72] Although one might reason that minimum standards would not necessarily lead to uniformity, the court apparently reconciled this discrepancy between "minimum standards" and "uniformity" by noting that if one parish could ban hazardous waste disposal, then "in short order" they all would,[73] thus presumably defeating

69. 42 U.S.C. § 6901(a)(4) (1982).

70. 437 U.S. at 621 n.4. In line with the canon of statutory construction that calls for avoiding unnecessary constitutional issues, as well as its general reluctance to infer congressional intent to preempt (*see supra* text accompanying notes 58-62), the Court may have simply been deferring on the preemption issue because it could still rely on broader commerce clause grounds to strike down the New Jersey law. *See infra* text accompanying notes 127-28.

71. Rollins Envtl. Servs. of La., Inc. v. Iberville Parish Police Jury, 371 So. 2d 1127 (La. 1979).

72. *Id.* at 1132 (emphasis added) (citing H.R. REP. No. 1491, 94th Cong., 2d Sess. 3).

73. *Id.*

an objective of the federal program. In this way, *Rollins* illustrates the emerging issue of whether an outright ban is too stringent in a program that prescribes only minimum standards.

One year after *Rollins*, Congress amended RCRA in a way that set the issue in its present form. Whereas Section 3009 previously stated that "no State or political subdivision may impose any requirements *less* stringent than those" in RCRA's hazardous waste chapter,[74] the 1980 amendments added a sentence stating, "[n]othing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are *more stringent* than those imposed by such regulations."[75] Thus, the issue fully matured to be whether, in a program that sets minimum standards and expressly allows more stringent standards (especially regarding waste disposal site selection), is an outright ban too stringent? In other words, did this new Section 3009 "savings clause" save state or local hazardous waste import bans from preemption?

The Section 3009 savings clause issue was not addressed by the first post-amendment court that reached the issue of federal preemption.[76] Instead, the court in *Sharon Steel Corp. v. City of Fairmont* relied on another savings clause, RCRA Section 7002(f)[77] which states,

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or requirement relating to the management of solid waste or hazardous waste, or to seek any other relief (including relief against the Administrator or a State agency).

The city ordinance in question defined and prohibited hazardous waste disposal as a nuisance.[78] Therefore, the *Sharon* court distinguished the *Rollins* disposal law as "regulatory" whereas the *Sharon* ordinance was "penal."[79] The court reasoned that the ordinance, which was specifically passed to prevent a coking plant

74. 42 U.S.C. § 6929 (1982 & Supp. 1987) (emphasis added). For the full text of this law as it is presently written, *see infra* note 160.

75. *Id.* (emphasis added) *as amended by* Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 14.

76. *See* Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985). *See also* Stablex Corp. v. Town of Hooksett, 456 A.2d 94 (N.H. 1982) (discussing RCRA, but preempting a local hazardous waste disposal ban on state preemption grounds).

77. 42 U.S.C. § 6972(f) (1982).

78. *Sharon*, 334 S.E.2d at 619 n.2.

79. *Id.* at 620.

from disposing of its hazardous waste,[80] was merely preserving common law rights and therefore was not preempted by RCRA.[81] Although the logic of this opinion seems dubious,[82] it does illustrate the general reluctance to find preemption, and consequent willingness to interpret a savings clause broadly.

The Section 3009 savings clause was finally interpreted by two federal courts.[83] In the first case, a county passed an ordinance for the specific purpose of preventing appellee Ensco from incinerating acute hazardous waste in the county.[84] These were dioxin-containing hazardous wastes numbered F020 in RCRA Section 3004(e)(2)(A), which bans land disposal for such wastes.[85] Noting that RCRA Section 1003 (a)(6) sets forth a general objective favoring treatment over land disposal,[86] and that RCRA Section 1002(b)(7) sets forth a general policy to minimize or eliminate land disposal,[87] the court concluded that a local ban on incineration of F020 wastes thwarted Congress' and EPA's determination of how these wastes could most safely be handled.[88] Since the ban subverted federal objectives, the court held it was preempted. The court in *Ensco, Inc. v. Dumas*, reasoned that the Section 3009 savings clause "acknowledges only the authority of state and local governmental entities to make good-faith adaptations of federal policy to local conditions."[89]

The court in *Ogden Environmental Services v. City of San Diego* found the same restrictions on the Section 3009 savings clause, under similar circumstances.[90] Plaintiff Ogden had received EPA research, development and demonstration permits to operate a

80. *Id.* at 619.

81. *Id.* at 624.

82. The better interpretation of Section 6972(f) is that it preserves common law rights when nuisances occur, not that it can be used to create and codify new *nuisances per se*. The cases cited by *Sharon* to support its decision actually seem to support this commentator's view. *See Sharon*, 334 S.E.2d at 623.

83. *See* Ensco, Inc. v. Dumas, 807 F.2d 743 (8th Cir. 1986); Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436 (S.D. Cal. 1988).

84. *Ensco*, 807 F.2d at 744. The ordinance was passed in response to Ensco's announcement that it would seek EPA certification to incinerate hazardous waste. The ordinance barred "storage, treatment, or disposal of 'acute hazardous waste.' "

85. 42 U.S.C. § 6924(e)(2)(A) (Supp. V 1987).

86. 42 U.S.C. § 6902(a)(6) (Supp. V 1987).

87. 42 U.S.C. § 6901(b)(7) (Supp. V 1987).

88. *Ensco*, 807 F.2d at 745.

89. *Id.*

90. *See* Ogden Envtl. Servs. v. City of San Diego, 687 F. Supp. 1436 (S.D. Cal. 1988) (citing *Ensco*).

circulating bed combustor hazardous waste incinerator at an existing research facility in the defendant city.[91] EPA issued these permits under RCRA Section 3005(g)[92] and CERCLA Section 311,[93] both of which provided for special programs to develop innovative hazardous waste treatment alternatives. The city, however, passed an ordinance requiring a municipal permit for such activities, and then denied a permit to Ogden.[94] Noting the general policy of RCRA Section 1003 to encourage treatment over land disposal,[95] and the specific objectives of RCRA Section 3005 and CERCLA Section 311, the *Ogden* court held that the city's ban was preempted.[96]

The *Ogden* court reasoned that the Section 3009 savings clause did not save the city ban from preemption because the cumulative effect of absolute bans by local governments would frustrate the objectives of RCRA.[97] Stating that Section 3009 allows "good-faith adaptations of federal policy to local conditions,"[98] the court stressed that the city ban was preempted because it was based on generalized environmental, health, and safety concerns which EPA had already found to be acceptable. If the city had shown specific reasons to ban hazardous waste treatment, its stringent standards might have been saved by Section 3009.[99]

C. *Summary of RCRA Preemption Case Law*

The Supreme Court has held that the pervasiveness and objectives of RCRA as a whole would not be impaired by a state ban on solid waste imports.[100] Addressing hazardous waste, a pre-Section 3009 savings clause state court has found that RCRA Title III

91. *Id.* at 1437-38.

92. 42 U.S.C. § 6925(g) (Supp. V 1987).

93. 42 U.S.C. § 9660(b) (Supp. V 1987).

94. *Ogden*, 687 F. Supp. at 1440-41.

95. 42 U.S.C. § 6902(b) (Supp. V 1987).

96. *Ogden*, 687 F. Supp. at 1442-44, 1448.

97. *Id.* at 1446.

98. *Id.* (quoting *Ensco*, 807 F.2d at 745).

99. *Ogden*, 687 F. Supp. at 1448. *Cf.* Browning-Ferris, Inc. v. Anne Arundel County, 438 A.2d 269, 276-77, 292 Md. 136, 150-53 (1981) (holding that an absolute ban on hazardous waste disposal violates the commerce clause, but that county licensing requirements are neither in violation of the commerce clause nor preempted, because they serve local interests).

100. City of Philidelphia v. New Jersey, 437 U.S. 617 (1978), *supra* text accompanying notes 63-70.

general objectives would be impaired by state bans.[101] While one post-Section 3009 state court found no preemption of a local ban based on nuisance theory,[102] two federal courts have since found preemption despite Section 3009, based on impairment of special programs set up in RCRA and CERCLA.[103] The most recent federal court decision implies in dictum that a local ban would not be preempted if it were based on specific local concerns that had not already been addressed by the federal government.[104] Therefore, since the enactment of the Section 3009 savings clause, no court has ruled on whether a general state or local ban of hazardous waste disposal would be preempted in the absence of a special conflicting RCRA or CERCLA program.

D. *Analogies to Other Environmental Laws*

Some of the gaps in post-Section 3009 RCRA case law have, by analogy, been addressed in cases dealing with other environmental laws. Absolute bans in the face of savings clauses have been addressed under the Toxic Substances Control Act ("TSCA"),[105] and absolute bans in the face of a federal program which encourages interstate disposal compacts have been addressed under the Low-Level Radioactive Waste Policy Act of 1980 ("LLRWPA").[106]

In *Warren County v. North Carolina*, the EPA had approved the state of North Carolina's plan to dispose, in a landfill in Warren County, of soil contaminated with polychlorinated biphenyls ("PCBs").[107] The county enacted an ordinance which banned all PCB disposal based on the rationale that "Warren County is peculiarly unsuited for the disposition of PCB's because there is a generally high ground water table in the county and most of the

101. Rollins Envtl. Servs. of La., Inc. v. Iberville Parish Police Jury, 371 So. 2d 1127 (La. 1979), *supra* text accompanying notes 71-73.

102. Sharon Steel Corp. v. City of Fairmont, 334 S.E.2d 616 (W. Va. 1985), *supra* text accompanying notes 78-82.

103. *Ensco*, 807 F.2d 743; *Ogden*, 687 F. Supp. 1436, *supra* text accompanying notes 83-99.

104. *Ogden*, 687 F.Supp. 1436, *supra* text accompanying note 99.

105. 15 U.S.C. § 2601-2629 (1982). *See* Warren County v. North Carolina, 528 F. Supp. 276, 288-90 (E.D.N.C. 1981).

106. 42 U.S.C.A. § 2021b-2021j (Supp. V 1987). *See infra* text accompanying notes 180-88. A discussion of the LLRWPA will be more illuminating after the commerce clause issue of waste import bans is described below in Section III of this article; therefore, only the TSCA cases are discussed in this present section.

107. *Warren*, 528 F. Supp. at 281.

soils of the county are highly permeable, so that [disposal] . . . would constitute an extreme danger to human health and life."[108] The county argued that it was not preempted by TSCA because TSCA Section 18[109] constituted a savings clause. Section 18, entitled "Preemption," reads,

> [N]othing in this chapter shall affect the authority of any State or political subdivision [to regulate] . . . any chemical . . . except . . . if the Administrator prescribes a rule or order under Section 5 or 6[110] . . . no State or political subdivision . . . may . . . establish . . . any requirement . . . unless such requirement (i) is identical to the requirement prescribed by the Administrator . . . or (iii) prohibits the use of such substance . . . .[111]

The *Warren* court acknowledged that the purpose of this savings clause is to allow "states and localities some leeway to impose more stringent disposal requirements than" TSCA.[112] However, the court concurred with the defendant's contention "that the better interpretation . . . is that they authorize only those state and local regulations which are consistent with national disposal objectives; that is, regulations which impose requirements reasonably dictated by local geographical or other physical conditions."[113] Since the cumulative effect of absolute bans in other counties would frustrate the objectives of TSCA, the court held that Warren County's ordinance was preempted.[114]

An analogy between *Warren* and RCRA preemption issues may or may not be appropriate. The language of the savings clauses in TSCA and RCRA differs, perhaps significantly. However, if the analogy is accepted, it is instructive to note that the *Warren* court held that in spite of a savings clause that allows local governments to "prohibit" regulated chemicals, an absolute ban is preempted because the cumulative effect of such bans would frustrate federal objectives. This reasoning is tantamount to a post-RCRA Section 3009 savings clause court holding that, even in the absence of a

108. *Id.* at 288.

109. 15 U.S.C. § 2617 (1982).

110. *Id.* at §§ 2604, 2605.

111. *Id.* at § 2617(a).

112. *Warren*, 528 F. Supp. at 289.

113. *Id.*

114. *Id.* at 290. *See also* Sed, Inc. v. City of Dayton, 519 F. Supp. 979 (S.D. Ohio 1981) (holding that TSCA Section 18 does not save a city ordinance barring PCB disposal from preemption).

special program, absolute bans on hazardous waste disposal are preempted by the general objectives of RCRA Title III.[115]

III. THE NEGATIVE COMMERCE CLAUSE DOCTRINE

The second argument that EPA has considered in attacking state bans on foreign hazardous waste importation is that such bans violate the interstate commerce clause.[116] This would involve application of general commerce clause doctrine.

A. *General Commerce Clause Doctrine*

The commerce clause grants power to the Congress to regulate interstate commerce.[117] The Supreme Court has stated, "The Commerce Clause has . . . been interpreted . . . not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation."[118] The Court has also held that state regulation of solid waste importation affects interstate commerce, and is therefore subject to this negative commerce clause doctrine.[119]

To determine whether a state regulation violates the negative commerce clause, the courts first determine if it is a protective, discriminatory, or evenhanded law, or if the state is acting as a market participant. The type of law determines the test that is applied.

Purposeful economic protectionism is "virtually per se" invalid.[120] In comparison, a law which uses discriminatory means to achieve legitimate ends, by benefitting one class to the burden of another, will be subjected to a balancing test which is weighted against it. The state will be required to " 'justify it both in terms of the [overriding] benefits' . . . and . . . the absence of nondiscriminatory alternatives."[121] If the law simply has a discriminatory effect, it will be subject to the same test, which may be applied less stringently.[122] However, "[w]here [a law] regulates

115. *See supra* text following note 104.
116. *See supra* text accompanying notes 23-26.
117. U.S. CONST. art. I, § 8, cl.3.
118. Hughes v. Oklahoma, 441 U.S. 322, 326 (1979) (footnote omitted).
119. *Philadelphia*, 437 U.S. at 621-22.
120. *Id.* at 624.
121. *Hughes*, 441 U.S. at 336-37 (citation omitted).
122. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

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."[123]

In one major exception to the general doctrine, a state or local government is permitted to discriminate for the benefit of its own citizens when it acts not as a market regulator, but as a market participant.[124] However, the state may lose this privilege if it affects downstream activities in a clearly regulatory fashion.[125]

B. *Waste Import Ban Case Law*

About eleven commerce clause cases have been reported so far concerning solid or hazardous waste import bans. Although many of those cases concern local government bans, the negative commerce clause doctrine has generally been applied in the same way as when applied to states.[126] The reported cases treat both solid and hazardous waste bans in the same manner.

Philadelphia is the benchmark Supreme Court case on this issue.[127] Without resolving the question of whether the state's ban on foreign solid waste imports was simple economic protectionism, the Court found that even discriminatory *means* to protect the public health, safety and welfare were unacceptable. The Court rejected an analogy to quarantine cases under the commerce clause, because unlike contagious livestock, the mere movement of solid waste does not risk "contagion and other evils." The Court found that if other states could enact similar bans, the cumulative impact would be an unacceptably great burden on inter-

123. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

124. Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

125. South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). In *South-Central*, the state of Alaska planned to sell timber with the contractual restriction that a purchaser must partially process the timber in Alaska before shipping it out of state. *Id.* at 84. The Court held that the state was not acting merely as a *participant* in the *timber* market, but was also "using its leverage in that market to exert a *regulatory* effect in the *processing* market." *Id.* at 98 (emphasis added). "Instead of merely choosing its own trading partners, the State [was] attempting to govern the private, separate economic relationships of its trading partners," *id.* at 99, and in so doing was "impos[ing] substantial burdens on interstate commerce." *Id.* at 98. Therefore, the state would not be shielded by the market participant exception.

126. The noteworthy exception is Evergreen Waste Syss., Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987). *See infra* text accompanying notes 160-62.

127. *See supra* notes 63-70 and accompanying text.

state commerce. Therefore, the *Philadelphia* Court held that the state ban violated the negative commerce clause.[128]

Although the *Philadelphia* Court did not resolve the question of economic protectionism, two other cases did, in the context of reciprocity agreements.[129] The court in *Hardage v. Atkins* held that where a state barred toxic waste imports except from states which had reciprocity agreements, this was economic protectionism and therefore violated the commerce clause.[130] In *Borough of Glassboro v. Gloucester County Board of Chosen Freeholders,* a local landfill was almost full, and replacement landfills were not yet operational. In order to extend the useful life of the landfill, the state barred disposal of solid wastes from any other municipalities except neighboring towns and those with reciprocity agreements. Since this was a "balanced and fair" approach to deal with a crisis, the *Glassboro* court held that it did not constitute impermissible protectionism.[131]

Several other cases, dealing with counties that banned wastes from all other counties and states, have cited *Philadelphia* as standing for the proposition that either economic protectionism or discriminatory means are invalid under the commerce clause.[132] In *Shayne v. Prince George's County,* the District Court of Maryland held that a county ban on disposal of all foreign solid wastes violates

128. *See Philadelphia,* 437 U.S. at 624-29. Justice Rehnquist dissented because he found the analogy to quarantine cases apt. *Id.* at 629-33.

129. *See* Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978); Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders, 485 A.2d 299 (N.J. 1984). In *Hardage,* the state of Oklahoma enacted a statute that barred importation of industrial wastes "unless the state of origin . . . has enacted substantially similar standards for . . . waste disposal as, and has entered into a reciprocity agreement with, the State of Oklahoma." *Id.* at 1265. The opinion does not state what purpose may have underlain this statute. The *Hardage* court construed *Philadelphia* to invalidate "purely . . . economic protectionist measure[s]." *Id.* at 1266. Since the *Hardage* court found, without explanation, that the reciprocity agreement constituted protectionism, it struck down the statute. *Id.* at 1266-67.

130. *Hardage,* 582 F.2d at 1266. The *Hardage* court cites *Philadelphia,* and in so doing further obscures the line between economic protectionism and discriminatory means. *Philadelphia* had somewhat blurred this line by referring to New Jersey's law as a "protectionist measure," although the Court acknowledged that it was at least partly based on legitimate state police power concerns. *See Philadelphia,* 437 U.S. at 624-25.

131. *Glassboro,* 485 A.2d at 303.

132. *See* Evergreen Waste Syss., Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987); Shayne Bros. Inc. v. Prince George's County, Md., 556 F. Supp. 182 (D. Md. 1983); Browning-Ferris, Inc. v. Anne Arundle County, Md., 438 A.2d 269, 292 Md. 136 (1981). *Philadelphia* blurred the line between protectionism and discrimination in the pursuit of legitimate ends. *See supra* note 130.

the commerce clause.[133] Similarly, in *Browning-Ferris, Inc. v. Anne Arundle County, Md.*, the Court of Appeals of Maryland held that a county ban on disposal of certain hazardous wastes violated the commerce clause.[134] However, in *Evergreen Waste Systems, Inc. v. Metropolitan Service District,* the Court of Appeals of the Ninth Circuit forged a unique doctrine regarding a similar district ban. Since the ban applied to all other districts in the state, as well as to other states, the *Evergreen* court concluded that this was not discriminatory but rather evenhanded.[135]

Since the ban in *Evergreen* was held to be evenhanded, the court applied the more lenient balancing test described in *Pike v. Bruce Church, Inc.*[136] The *Evergreen* court held that the local purpose of extending the useful life of a landfill was legitimate and outweighed the incidental burden placed on other districts to use alternative available landfills.[137] In *Browning,* the court found that a county license and manifest requirement for transporting hazardous waste through the county was evenhanded, since all county and foreign carriers were treated similarly. However, the local benefit was small because the requirements duplicated state rules, and the cumulative burden on commerce would be excessive. Therefore, the *Browning* court held that this evenhanded requirement violated the commerce clause.

A sub-category of "evenhandedness" is the states' right to direct foreign or instate waste streams by restricting which disposal sites may receive them.[138] In *Harvey & Harvey, Inc. v. Delaware Solid Waste Authority,* the state required that all waste generated within the state must be disposed of at a state regulated facility.[139] One effect of this law was to ban *exports* of instate generated wastes. The plaintiff's business was based in part upon transporting wastes out of state,[140] and therefore plaintiff argued that the ban discriminated based on the source of wastes.[141] However,

133. *Prince George's,* 556 F.Supp. at 185.

134. *Browning,* 292 Md. at 142, 438 A.2d 269 at 271-72.

135. *Evergreen,* 820 F.2d at 1484-85 (misconstruing Washington State Trades Council v. Spellman, 684 F.2d 627, 631 (9th Cir. 1982)).

136. *See infra* note 148 and accompanying text.

137. *Evergreen,* 820 F.2d at 1485.

138. *See* Harvey & Harvey, Inc. v. Delaware Solid Waste Auth., 600 F. Supp. 1369 (D. Del. 1985); City of Elizabeth v. New Jersey Dep't of Envtl. Protection, 198 N.J. Super. Ct. 41, 486 A.2d 356 (1984).

139. *Harvey,* 600 F. Supp. at 1372.

140. *Id.* at 1371.

141. *Id.* at 1380.

the *Harvey* court held that there was no significant discrimination against out of state economic interests [to the benefit of instate economic interests]. Therefore, the court held that the *Pike* even-handedness test would apply, and it dismissed the complaint for failure to state a claim.[142] In *City of Elizabeth v. New Jersey Department of Environmental Protection,* the court found that a state law specifying which instate disposal facilities could receive foreign wastes was not protectionist.[143] Since the law was based on a legitimate concern for inadequate waste disposal capacities in some parts of the state, and since it did not ban imports, the *Elizabeth* court held that directing the waste streams did not violate the commerce clause.[144]

Although the *Philadelphia* Court did not have reason to rule on the market participant exception to the negative commerce clause,[145] lower courts have been uniformly willing to uphold that exception.[146] In *Lefrancois v. Rhode Island,* the state barred all foreign waste disposal at the state subsidized central landfill, which was the only landfill in the state which accepted certain types of solid waste.[147] In *Shayne v. District of Columbia,* the District banned all foreign waste from District owned disposal facilities. In *County Commissioners of Charles County v. Stevens,* the county barred solid waste disposal in the county owned landfill, which was the only landfill in the county. The courts in all three cases upheld the bans, based on the market participant exception.[148]

The effective landfill monopolies which the state, district, and county had in these cases was irrelevant to their status as market participants. Since the government was merely withholding its own landfill *services*, while private persons were free to construct

142. *Id.* at 1380-81. The court stated that under the evenhandedness standard, plaintiff had failed to claim that there was a clearly excessive burden on out of state interests. Under *Pike,* the courts should have stated that plaintiff must show a clearly excessive burden on interstate commerce. *See infra* text accompanying note 148.

143. 486 A.2d at 361.

144. *Id.*

145. *See Philadelphia,* 437 U.S. at 627 n.6. This "pregnant footnote" states that the Court "express[es] no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources."

146. *See* Lefrancois v. Rhode Island, 669 F. Supp. 1204 (D.R.I. 1987); Shayne Bros., Inc. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984); County Comm'rs of Charles County v. Stevens, 473 A.2d 12 (Md. 1984); *cf.* Shayne Bros., Inc., v. Prince George's County, Maryland, 556 F. Supp. 182 (D. Md. 1983).

147. *Lefrancois,* 669 F. Supp. at 1206.

148. *See Lefrancois,* 669 F. Supp. at 1208-12; *Shayne v. District of Columbia,* 592 F. Supp. at 1134; *County Comm'rs,* 473 A.2d at 16-22.

and operate landfills if they chose to, then the government was not hoarding natural *resources*.[149] In *Prince George's,* the county owned or subsidized both existing landfills, and passed an ordinance which generally banned foreign waste disposal. Since the ordinance would prevent foreign waste disposal even at private landfills, the county could not defend its action based on the market participant exception.[150]

C. *Summary of Negative Commerce Clause Waste Ban Case Law*

An import ban at the state level, for the purpose of protecting the health, safety, and welfare of state citizens, has been struck down as discriminatory by the Supreme Court.[151] Similarly, a state reciprocity requirement was struck down as protectionist by a federal court.[152] A county level reciprocity requirement was upheld by a state court, where the rule was enacted to alleviate an impending landfill shortage crisis.[153]

Absolute import bans at the county level have generally been struck down as either protectionist or discriminatory,[154] although one federal court, misconstruing precedent, upheld a ban as evenhanded because it applied to all other instate counties as well as to other states.[155] An evenhanded county ban may be upheld if its legitimate purpose of extending the life of a landfill outweighs the burden on other counties to use alternative available landfills.[156]

The courts have upheld absolute state and local import bans when the government acted as a market participant. To be valid,

149. *Id.* The courts in both *Lefrancois* and *County Comm'rs* used this argument to distinguish the dictum in *Reeves, Inc. v. State* that a state, even as market participant, could not hoard unprocessed natural resources. *Reeves*, 447 U.S. 429, 443-44 (1980).

150. *Prince George's*, 556 F. Supp. at 186.

151. City of Philidelphia v. New Jersey, 437 U.S. 617 (1978), *supra* text accompanying notes 127-28.

152. Hardage v. Atkins, 582 F.2d 1264 (10th Cir. 1978), *supra* text accompanying note 130.

153. Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders, 485 A.2d 299 (N.J. 1984), *supra* text accompanying note 131.

154. Shayne Bros. Inc. v. Prince George's County, Md., 556 F. Supp. 182 (D. Md. 1983); Browning-Ferris, Inc. v. Anne Arundle County, Md., 438 A.2d 269, 292 Md. 136 (1981), *supra* text accompanying notes 132-34.

155. Evergreen Waste Syss., Inc. v. Metropolitan Serv. Dist., 820 F.2d 1482 (9th Cir. 1987), *supra* text accompanying note 135.

156. *See supra* text accompanying notes 136-37.

such bans must only apply to government funded disposal facilities, while allowing private facilities to accept foreign wastes.[157]

The courts have also upheld state laws that direct waste streams to specific disposal sites within the state.[158]

IV. CONGRESSIONAL PREROGATIVE AND JUDICIAL CONSTRUCTION

In light of the case law, it seems clear that many, if not all, of the state bans on foreign hazardous waste importation as described in the introduction to this paper[159] would violate the negative commerce clause, unless approved by Congress. Likewise, Congressional intent must be ascertained in order to decide whether RCRA Section 3009 saves such state bans from preemption by Title III of RCRA.

A. *RCRA Section 3009*

The language of the text of Section 3009 is ambiguous.[160] The statute speaks of "requirements," not "bans." However, states may impose more stringent requirements on "site selection;" hence, the argument that this authorizes local or state wide bans.[161]

The legislative history of the Section 3009 savings clause is sparse. Senator Bumpers proposed the clause as a floor amend-

157. *See supra* text accompanying notes 145-50.

158. *See supra* text accompanying notes 138-44.

159. *See supra* notes 5-17 and accompanying text.

160. 42 U.S.C. § 6929 (1982 & Supp. V 1987). Section 3009 states in full:

> Upon the effective date of regulations under this subchapter no State or political subdivision may impose any requirements less stringent than those authorized under this subchapter respecting the same matter as governed by such regulations, except that if application of a regulation with respect to any matter under this subchapter is postponed or enjoined by the action of any court, no State or political subdivision shall be prohibited from acting with respect to the same aspect of such matter until such time as such regulation takes effect. *Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.* Nothing in this chapter (or in any regulation adopted under this chapter) shall be construed to prohibit any State from requiring that the State be provided with a copy of each manifest used in connection with hazardous waste which is generated within that State or transported to a treatment, storage, or disposal facility within that State. (Emphasis added).

161. *See e.g., Ensco*, 807 F.2d at 744. Union County argued that an absolute ban on F020 wastes "is merely a more stringent requirement on disposal and a regulation of site selection."

ment to the 1979 Senate bill amending RCRA.[162] In addition to a short speech, Senator Bumpers inserted into the record a news article describing Love Canal. The latter half of this article asserts that EPA had resisted implementing RCRA, and cites an EPA official as stating that the agency's policy was to overlook dangerous landfill operations. The article further opines that EPA's responsibilities are so numerous that it could not perform its functions without the assistance of state and local governments. In his short speech, Senator Bumpers stated four times that the purpose of his proposed amendment was to allow the "States to adopt standards more stringent than the Federal standards when selecting sites for the disposal of hazardous waste materials."[163] As an example, the senator stated that the town of Hope, Arkansas, was in danger of meeting "Federal standards, and, thus, qualify[ing] as a location for a hazardous waste facility."[164] However, the senator never used language referring to outright siting bans.

Senator Bumpers' speech does not clearly show whether he intended to authorize outright bans on hazardous waste disposal. His example of Hope, Arkansas could be seen as supporting such bans. However, taken together with the assertions in the news article which he cited, it seems more likely that he meant to confine his proposal to the plain meaning of "more stringent standards," by which local government agencies could implement RCRA in the situations where EPA would, or could, not do so.

This construction of Senator Bumpers' clause is also supported by the prior, and subsequent, history of Section 3009. When the original version was passed in 1976, one of the purposes of requiring *minimum* federal standards was to utilize "equivalent" state programs to implement the federal objectives.[165] Moreover, Senator Bumpers was likely to have been aware of the 1978 Supreme Court opinion in *Philadelphia*, which held that a state ban on waste imports was not preempted by RCRA,[166] and therefore he would not have found it necessary to introduce a savings

162. 125 CONG. REC. 13,247-50 (1979). The subsequent House and Senate Conference Reports merely repeat the language of the clause. *See* S. REP. No. 1010, 96th Cong., 2d Sess., at 40-41 (1980); H.R. REP. No. 1444, 96th Cong., 2d Sess., at 40-41 (1980).

163. 125 CONG. REC. 13,248 (1979).

164. *Id.*

165. *See* H.R. REP. No. 1491, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6328, 6268. *See also supra* notes 71-73 and accompanying text.

166. *See supra* text accompanying notes 61-68.

clause regarding bans, unless he was also aware of and concerned by the 1979 state court decision in *Rollins*.[167]

In the 1984 amendments to RCRA, Section 3009 received additional language addressing different issues, but the savings clause was preserved unaltered.[168] At that time, the only cases addressing preemption of state import bans were *Philadelphia* and *Rollins*. Since the two cases can be distinguished because the former focuses on solid waste and the latter focuses on hazardous waste, and since there was, therefore, no clear trend of case law concerning hazardous waste import bans, there is little ground to presume that by re-enacting the savings clause Congress intended to adopt the rule of either case.

Other possible evidence of the original intent of the savings clause is found in the January 22, 1988, letter to the EPA from six senators,[169] in which the senators stated that it was "the 'clear intention' of Congress through RCRA to allow states to go beyond federal law to meet specific environmental or other requirements."[170] Senator Stafford, who signed the letter, had briefly colloquized with Senator Bumpers during the 1979 floor proposal of the Section 3009 savings clause, and thereby had become a cosponsor of the amendment.[171] The senators' letter was in response to an EPA review of state standards that had been motivated by North Carolina's restrictive regulations.[172] Although the regulations were regarded as a de jure ban of foreign hazardous waste imports, there is no evidence that the senators' letter meant to support absolute import bans rather than stringent standards.[173] Moreover, the probativity of this letter must be greatly

167. *See supra* text accompanying notes 71-73.

168. *See* Pub. L. No. 98-616, Title II, Section 213(b), 98 Stat. 3242 (1984).

169. *See supra* note 47 and accompanying text. The six senators were: Baucus (D-Mont.); Burdick (D-N.D.); Chafee (R-R.I.); Durenberger (R-Minn.); Mitchell (D-ME.); and Stafford (R-VT). Senator Bumpers was not a signatory, presumably because he is no longer a member of the Senate environment committee.

170. *Id.*

171. 125 CONG. REC. 13,250 (1979).

172. *See supra* text accompanying note 47.

173. Another interesting issue concerning legislative history subsequent to the enactment of the Section 3009 savings clause is addressed in Ogden Envtl. Services v. City of San Diego, 687 F. Supp. 1436, 1445 n.5 (S.D. Cal. 1988). Noting that the savings clause was added to Title III in 1980, and that the Section 3005 research and development permit program was added in 1984, the court presumed that Congress intended both provisions to coexist. Therefore, the court concluded that "[t]o the extent that state or local governments might exercise their rights under the older 'savings' clause to significantly undercut federal objectives embodied in the more recently adopted research . . . program,

discounted by the lapse of eight years between enactment of the legislation and the letter; the tenuous connection of the letter's signers to the legislation; and the politically charged context in which the letter was written.

For the reasons discussed above, the language, legislative history, and policy objectives of RCRA Section 3009 all seem to indicate that it was not enacted for the purpose of allowing state hazardous waste import bans. As will be discussed below, the language of CERCLA Section 104(c)(9), by not authorizing waste import bans as part of regional disposal compacts, fails to support the policy objectives of CERCLA.

B. *CERCLA Section 104(c)(9)*

The language of the text of Section 104(c)(9) offers no clear evidence of congressional intent to authorize state hazardous waste import bans.[174] Since the Supreme Court held in *Philadelphia* that state import bans violate the commerce clause,[175] Congress' failure to consent expressly to such a violation in Section 104(c)(9) would seem to withhold consent by negative implication. Additional support for this negative implication is found in the fact that Congress did consent to similar import bans in LLRWPA.[176] Since Congress had already demonstrated that it knew how to use express statutory language to consent to such

it is for Congress to rethink the existing division of regulatory authority." *Id.* Yet, the court then proceeded to hold that the city ban on hazardous waste incineration research *was* preempted by Section 3005, despite the savings clause! *See id.* at 1448.

174. Section 104(c)(9) states in full:

(9) Siting - Effective 3 years after October 17, 1986, the President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances deemed adequate by the President that the State will assure the availability of hazardous waste treatment or disposal facilities which -

(A) have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated or destroyed,

(B) are within the State or outside the State in accordance with an interstate agreement or regional agreement or authority,

(C) are acceptable to the President, and

(D) are in compliance with the requirements of subtitle C of the Solid Waste Disposal Act.

175. *See supra* text accompanying notes 127-28.

176. *See supra* notes 125-26 and accompanying text.

bans when it intended to, there is less reason to believe that it consented in Section 104(c)(9).

The legislative history of Section 104(c)(9) does lend some ambiguous support to the argument that Congress intended to allow import bans.[177] The Senate report states that "*[a]site in every State is not required.* In some cases, multi-state efforts may be appropriate. Use of binding agreements through interstate compacts guaranteeing access to a facility is only one example of how a State may provide the requisite assurances."[178] However, the report goes on to describe the NIMBY syndrome, and concludes that "[T]he process of site selection should find a way to transcend blanket local vetoes. No Community should be able to remove itself from consideration on political grounds alone."[179] A reasonable resolution of these apparently conflicting statements would be that Congress was willing to allow states which had joined regional disposal agreements to ban waste imports from non-agreement states. However, in the light of the express language of LLRWPA, it seems that in Section 104(c)(9) Congress did not consent to such bans. Therefore, it is instructive to examine the history of LLRWPA.

In *Washington State Building & Construction Trades v. Spellman,* the state of Washington had banned foreign imports of low level radioactive waste.[180] The Atomic Energy Act of 1954 preempts for federal regulation the entire field of atomic energy,[181] but provides that states may be authorized to assume limited regulatory authority if their proposed programs meet minimum federal standards.[182] Throughout the 1970s, numerous waste containment and safety problems had plagued commercial low level waste dis-

177. *See* S. REP. No. 11, 99th Cong., 1st Sess., at 21-24 (1985). *See also* H.R. CONF. REP. No. 962, 99th Cong., 2d Sess., 194 (1986); H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 5, at 8-9 (1985); H.R. REP. No. 253, 99th Cong., 1st Sess., pt. 1, at 120, 130-31 (1985) (statement of Lee M. Thomas, U.S. Environmental Protection Agency). Although the House version of the amendment was adopted in conference, the Senate report contains more substantive comments. The conference report describes the House and Senate provisions as "virtually identical."

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

179. *Id.* at 24. *See supra* text accompanying note 50.

180. Washington State Bldg. & Constr. Trades v. Spellman, 684 F.2d 627, 629 (9th Cir. 1982).

181. *See* 42 U.S.C. §§ 2011-2296 (1982 & Supp. V. 1987).

182. *See id.* § 2021.

posal facilities.[183] By 1979, only three states had operating low level waste sites.[184] In November, 1980, reacting to the containment problems, the voters of Washington passed a referendum barring imports of all foreign nonmedical radioactive wastes.[185] One month later, at the urging of all three waste facility states as well as the National Governors' Association and other groups,[186] Congress passed LLRWPA.[187] Subsequently, the state referendum banning imports was challenged in *Washington* on both preemption and interstate commerce grounds.[188]

In LLRWPA, Congress made each state responsible for ensuring adequate disposal capacity for waste generated within its borders. Congress expressly determined that low level radioactive waste "can be most safely and efficiently managed on a regional basis," and therefore provided that states could enter regional disposal compacts.[189] After January 1, 1986, approved compacts could bar wastes generated outside of the region.[190]

The *Washington* court acknowledged that under a federally approved regional disposal compact, a state could absolutely ban

183. H.R. REP. No. 314, 99th Cong., 1st Sess., pt. 2, at 17, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2974, 3006. For instance, radiation contaminated a creek near a Kentucky facility, and at a Nevada facility a truck load of waste arrived on fire.

184. *Id.*, pt. 1 at 14, 1985 U.S. CODE CONG. & ADMIN. NEWS at 2976. Those states were Washington, Nevada, and South Carolina.

185. *Id.* pt. 2, at 17, 1985 U.S. CODE CONG. & ADMIN. NEWS at 3006.

186. *Id.* at 18, 1985 U.S. CODE CONG. & ADMIN. NEWS at 3006-07.

187. Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347-49 (1980) (current version at 42 U.S.C. § 2021b-2021j (Supp. V 1987)).

188. *Washington*, 684 F.2d at 629.

189. 42 U.S.C. § 2021d(a)(1) (Supp. V 1987).

190. 42 U.S.C. § 2021d(c)(1) (Supp. V 1987). Section 4(a) of the 1980 Act reads as follows:

> (1) It is the policy of the Federal Government that-
> (A) each State is responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders except for waste generated as a result of defense activities of the Secretary or Federal research and development activities; and
> (B) low-level radioactive waste can be most safely and efficiently managed on a regional basis.
>
> (2)(A) To carry out the policy set forth in paragraph (1), the States may enter into such compacts as may be necessary to provide for the establishment and operation of regional disposal facilities for low-level radioactive waste.
> (B) A compact entered into under subparagraph (A) shall not take effect until the Congress has by law consented to the compact. Each such compact shall provide that every 5 years after the compact has taken effect the Congress may by law withdraw its consent. After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of low level radioactive waste generated within the region.

the import of radioactive waste. However, in this case Washington had unilaterally banned imports based on its own authority. Since it had not acted as part of a compact, the *Washington* court held that the state was preempted by the Atomic Energy Act.[191] This case illustrates how under LLRWPA, regional compacts act as both anti-preemption savings devices and as congressional consent to overcome the negative implications of the commerce clause.

In contrast to LLRWPA, CERCLA Section 104(c)(9) merely provides that states may use interstate disposal agreements as a means to assure EPA that they have adequate hazardous waste disposal capacity.[192] Both CERCLA and EPA's implementing guidelines provide for interstate agreements that *guarantee* waste imports, but they do not provide that such agreements can *bar* waste imports.[193] Moreover, EPA has taken the position that import bans are preempted by RCRA.[194]

In *Ensco* and *Ogden*, the courts held that the RCRA Section 3009 savings clause did not save local waste import bans from preemption when such bans would impair the objectives of special federal programs.[195] For instance, in *Ensco* a local ban on incinerators would have thwarted EPA's determination that F020 wastes are best disposed of by incineration.[196] One might argue that the CERCLA Section 104(c)(9) waste capacity assurance interstate agreements are a special program which likewise preempts state or local import bans. However, that leads to the awkward juxtaposition of two federal waste programs, one for radioactive waste

191. *Washington*, 684 F.2d at 630.

192. *See supra* text accompanying notes 18-21, 30-44.

193. The negative implication of Congress' failure to add specific waste import ban approval language to Section 104(c)(9) is strong. In 1982, the *Washington* court stated that, "Because Congress specifically gives permission for regional disposal in this Act, states signatory to a compact could exclude waste from nonsignatory states without violating the Supremacy or Commerce Clauses. Permission to exclude such wastes . . . is *conditioned* on participation in a compact." *Washington*, 654 F.2d at 630 (emphasis added). On October, 1985, just seven months after enacting CERCLA Section 104(c)(9), a House report on amendments to the LLRWPA stated, "States are prohibited by the Constitution from taking actions which interfere with the conduct of interstate commerce, among which would be restricting. . .the movement of low-level radioactive waste into or out of the state or compact region. . .[unless there is] Congressional ratification of the compact for their authority." H.R. REP. No. 314, 99th Cong., 1st Sess., pt. 1, at 26 (1985). Clearly, Congress knew how to authorize waste import bans when it meant to.

194. *See supra* text accompanying notes 23-26.

195. *See supra* text accompanying notes 83-99.

196. *Id.*

and one for hazardous waste, both relying on interstate compacts but one encouraging import bans and one prohibiting import bans. There ought to be a resolution to this apparent conflict of congressional policies.

C. *Radioactive Waste Program as a Model for the Hazardous Waste Program*

The resolution is simply that the radioactive waste program is a step ahead of the hazardous waste program. In 1980, when Congress passed LLRWPA in response to the radioactive waste NIMBY problem, its acknowledged purpose was "to lift the national burden of disposal from the three States with the only remaining commercial facilities."[197] By providing for regional compacts that could exclude imports from non-participating states, Congress achieved four things: (1) the states were forced to solve the NIMBY problem; (2) their solutions would be found basically in a free market; (3) states fortunate enough to have politically and geologically suitable disposal sites would be forced to share with some states in order to exclude others; (4) such states would be sure to receive a premium in return.

In comparison, the hazardous waste problem has been attacked piecemeal. First, RCRA Title III generally preempted the states.[198] As an afterthought, Section 3009 was amended to allow states to enact more stringent standards.[199] Then, as CERCLA cleanup activities exacerbated hazardous waste disposal problems, Section 104(c)(9) required waste capacity assurances and suggested interstate agreements as a means to accomplish them.[200] The hazardous waste program simply has not yet reached the more elegant solution that the radioactive waste program found in balancing national priorities with state autonomy.

A convergence of both programs can be seen by comparing the fine tuning of the radioactive waste program and the implementation of the hazardous waste capacity assurance program. Although the original LLRWPA provided that compact states could ban wastes from non-compact states starting in 1986, no

197. H.R. REP. NO. 314, 99th Cong., 1st Sess., pt. 2, at 14, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2974, 3002.

198. *See supra* text accompanying notes 71-73.

199. *See supra* text accompanying notes 74-75.

200. *See supra* text accompanying notes 18-21.

new disposal sites had become operational by 1985.[201] In order to avert a nuclear waste disposal crisis and a concomitant waste war between the states,[202] Congress extended states' access to the three available disposal sites by passing the Low-Level Radioactive Waste Policy Amendments Act of 1985.[203] In return for extending the cut-off time from 1986 to 1993, the amendments require that non-compact states must demonstrate milestones toward developing their own alternative sites, including joining compacts,[204] and penalties for failure to achieve milestones.[205] This approach is roughly similar to the NGA proposed guidelines for implementing the CERCLA Section 104(c)(9) hazardous waste capacity assurance requirements, which would allow the states to seek and adjust waste disposal accommodations over a period of several years.[206]

V. CONCLUSION

The recent trend of de jure or de facto state bans on hazardous waste importations is controversial in light of the October 17, 1989, CERCLA Section 104(c)(9) waste capacity assurance deadline. Most, if not all, state or local bans would probably be found to be preempted by Title III of RCRA and/or in violation of the negative commerce clause. Congress will probably address these issues in the near future. In light of the need for interstate cooperation to achieve the national, interdependent goals of RCRA and CERCLA, Congress will probably not authorize simple state hazardous waste import bans. However, the history of LLRWPA suggests that one practicable solution would be for Congress to amend CERCLA Section 104(c)(9) to authorize regional hazardous waste disposal compacts to ban imports from non-member states.

201. H.R. REP NO. 314, 99th Cong., 1st Sess., pt. 2, at 14, *reprinted in* 1985 U.S. CODE CONG. & ADMIN. NEWS 2974, 3003. By 1985, seven compacts with 39 states had been submitted for approval, but no new sites were projected to be operational until the 1990's. *Id.*

202. 16 Env't Rep. (BNA) 1663 (Dec. 13, 1985).

203. 42 U.S.C. § 2021b-2021j (Supp. V 1987).

204. *Id.* at § 2021e(e).

205. *Id.* at § 2021e(d).

206. *See supra* notes 33-44 and accompanying text.