# Interstate Transportation of Hazardous Waste Materials

by Greg Cooper

Publicity focusing on the treatment and disposal of hazardous waste has risen tremendously within the United States over the past decade. The public's negative perception of hazardous waste treatment and disposal facilities has grown rapidly as more information about the dangers inherent in these wastes is released. With public pressure comes legislative action, and in 1980 this pressure caused Congress to enact the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) with the resulting Superfund Amendments and Reauthorization Act of 1986 (SARA).

SARA's main thrust was to appropriate more funds to site cleanups, raise current cleanup standards and require extensive public disclosure of hazardous waste treatment and disposal practices. Because of the immensity of the problem and the federal government's involvement, states have decided that it is in their best interest to address their own hazardous waste treatment and disposal issues. The mounting power of the NIMBYs (Not In My Back Yarders) has forced state legislatures to take a hard look at the hazardous waste treatment and disposal practices occurring in their state.

Many states believe their best course of action is to stop the siting of new hazardous waste treatment and disposal facilities within their borders. This philosophy, coupled with the inability to identify and extract money from Potentially Responsible Parties (PRPs) and the restrictive requirements imposed by CERCLA and SARA have had a significant effect on the construction of new treatment and disposal facilities. Lack of development of new facilities has caused a shortage in the availability of hazardous waste treatment and disposal capacity in many states. To combat this, many states have begun transporting hazardous wastes to other states which have excess facilities.

Interstate transportation of waste is not a new phenomenon. Solid waste has been transported between states for many years. However, with the environmental movement gaining momentum, the public's concern over waste treatment and disposal practices has brought pressure on state legislatures to stop the importation of solid and hazardous wastes. Residents of states importing these wastes feel their state should not have to be the dumping ground of others.

## ALABAMA'S ATTEMPTED SOLUTION

One of the most important cases involving the right of a state to restrict the importation of hazardous waste from out-of-state is National Solid Waste Management Association v. Alabama Department of Environmental Management.[1] NSWMA was an action brought by the owner of the largest commercial hazardous waste disposal facility in the country, Chemical Waste Management, and a the National Solid Waste Managers Association (NSWMA). The action sought declaratory and injunctive relief from the Alabama Department of Environmental Management's (ADEM) enforcement of a state statute, nicknamed the "Holley Bill." The statute restricted the transportation, treatment and disposal of hazardous wastes imported from out-of-state if one of two conditions where not met by the exporting state. The exporting state either had to be conducting treatment and disposal activities within its borders, or it had to be a part of an interstate or regional agreement of which Alabama was also a part.

The Holley Bill was enacted by the Alabama State Legislature in 1989 in response to the public's concern over the amount of hazardous waste being imported into Alabama. Their

concern was not unwarranted: Alabama imported over 500,000 tons of hazardous wastes for treatment and disposal in 1987, accounting for 85% of the wastes treated and disposed of in the state. The Governor of Alabama, in a press release shortly after the statute's enactment, stated that Alabama was "becoming the waste dump of the nation."

Even though hazardous substances are recognized as being far more lethal than ordinary municipal solid waste, the question addressed by the court in NSWMA was whether a state has the power to restrict interstate commerce. The decision by the court was based on a combined interpretation of the commerce clause of the U.S. Constitution and SARA.

## SARA AND THE COMMERCE CLAUSE

The commerce clause gives Congress complete authority over interstate trade. Thus Congress has power over what commerce may be banned from interstate transportation. Congress may allow state control of certain objects of commerce that pose a sufficient threat to the public. The court had to decide if there was a significant local concern to warrant the enactment of Alabama's hazardous waste importation restriction without congressional approval.

SARA was implicated in the case because the commerce in question was hazardous waste. ADEM claimed that provisions in SARA, specifically §9604(c)(9), made it necessary to enact Alabama's restrictive legislation on hazardous waste importation. This section requires that states prepare 20 year capacity assurance plans for the disposal of hazardous wastes generated within their state and allows these capacity assurance requirements to be met through the use of other states' facilities. Congress deemed capacity assurance plans necessary because many states were not planning for their long-term hazardous waste disposal needs. Interstate transportation of hazardous waste was allowed because not all states have the ability, geologically and demographically, to build suitable treatment and disposal sites. ADEM claimed that the disposal capacity being consumed by out-of-state waste was needed by Alabama to meet its capacity assurance needs for hazardous waste. The court had to interpret SARA to see if, by condoning the use of out-of-state facilities to meet capacity requirements, it was responsible for Alabama having to enact the Holley Bill.

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ADEM also contended the Holley Bill did not violate the commerce clause because it was protecting the public health and welfare. Their contention rested on the Supreme Court decision in Bowman v. Chicago.[2] Bowman held that "a state may restrict interstate movement of an object when, on account of the object's existing condition, it would bring in and spread disease, pestilence and death."[3] The Alabama Legislature, when enacting the bill, felt that the transportation, treatment and disposal of hazardous waste was threatening the public health and welfare, and therefore, the state had the power to restrict its importation.

No one doubts that the Alabama Legislature was attempting to protect the health and welfare of its citizens and the environment by enacting the Holley Bill. The question that needed to be answered was whether they accomplished the goal in a fair and just way within the state's prescribed powers. Was the Holley Bill a violation of the commerce clause? Does SARA promote inequities in hazardous waste disposal between states? The decision in this case will have a major impact on the power of states to control not just hazardous waste commerce but all types of commerce.

The plaintiffs (NSWMA) declared that the Holley Bill violated the commerce clause and was preempted by federal regulation law. The plaintiffs had a substantial financial interest in the legality of the statute because a majority of the hazardous waste being disposed of were received from out-of-state sources. The plaintiffs' argument rested on a prior decision holding

that solid waste is an object of commerce, City of Philadelphia v. New Jersey.[4] Plaintiffs also relied upon SARA §9604(c)(9), specifically item B which states that capacity assurances can be met "within the State or outside the State," to permit interstate transportation of hazardous waste.

The trial court identified the major inquiry as being whether the Holley Bill was a protectionist measure implemented by the state to control commerce or whether the statute was enacted to serve a legitimate public concern. Prior cases interpreting the commerce clause had held that when a protectionist measure is enacted by a state for strictly economic benefit then the measure is invalid. However, when a measure is enacted that hinders interstate commerce while serving other legitimate objectives of the state, the question of its validity must be put to a balancing test.

The district court chose to apply the balancing test articulated in Pike v. Bruce Church Inc.[5] The test favored the power of a state to erect barriers to interstate commerce, if legitimate state objectives were being advanced in the process. The perceived benefits of the Holley Bill (public health and welfare and capacity assurance for the state) needed to be weighed against the cost of preventing the importation of hazardous waste. The district court upheld the validity of the Holley Bill on the grounds that it's benefits outweighed the costs incurred by the plaintiff from limiting the importation of hazardous waste for treatment and disposal.

*Alabama does not have the authority to regulate interstate commerce.*

NSWMA appealed the district courts decision and presented its case before the 11th Circuit Court of Appeals, which disagreed with the district court's judgment. The Court of Appeals held that the Holley Bill was unneeded to comply with SARA §9604(c)(9) capacity assurance requirements, was a protectionist measure not based adequately on legitimate local concern, did not qualify as a quarantine law.

The appellate court stated that Alabama does not have the authority to regulate interstate commerce. The court, relying on City of Philadelphia, found hazardous waste to be an object of commerce regulated by Congress under the commerce clause of the U.S. Constitution.

The court used the balancing test applied in City of Philadelphia to reach a decision on the legitimacy of the Holley Bill. In City of Philadelphia, the Supreme Court ruled that "when the dangers inhering in an object's movement far outweigh its worth in interstate commerce, a state can prohibit transportation of the object across state lines"[6] The Court of Appeals' decision implies that the benefits of interstate transportation of hazardous wastes exceed the dangers involved in its movement and that the "Holley Bill" was not enacted to serve a legitimate local concern. The court had three rationales for its ruling.

First, it found that the Holley Bill was not necessary for the State to meets its own capacity assurance standards as required by SARA §9604(c)(9). Alabama attempted to claim that §9604(c)(9) forced the State to restrict interstate transportation of waste because it needed the capacity consumed by out-of-state wastes to satisfy SARA requirements. The court held that Alabama had many options other than the enactment of the Holley Bill to ensure hazardous waste disposal capacity. Alabama could have built new facilities, entered into more regional and interstate agreements for disposal, or contracted with the plaintiff for the necessary disposal capacity thus preventing importation of other waste.

Second, Alabama claimed that the purpose of the law was to protect the environment and the public health from risks associated with the transportation, treatment and disposal of hazardous waste. The court felt this was a legitimate state concern and agreed with the notion that abundant interstate movement of wastes would increase the probability of accidents. It questioned the law, however, because the law did not restrict all interstate transportation of hazardous waste and, therefore, did not regulate wastes evenly. The court held the Holley Bill was not being enforced evenhandedly and termed the law a "selective ban."

Last, Alabama tried to defend the Holley Bill as a valid quarantine law. Under quarantine law, a state has the power to institute a ban on an object of commerce if the object is highly dangerous. Quarantine laws do not violate the commerce clause. They "simply prevent the traffic in noxious articles, whatever their origin."[7] The court rejected this defense because the Holley Bill only excluded hazardous wastes from certain states and did not regulate importation according to toxicity, volatility, or by type of hazardous waste.

The Court of Appeals vacated the district court's decision, held in favor of NSWMA, and remanded the case to the district court to award summary judgment to the NSWMA. The State of Alabama attempted a writ of certiorari to the Supreme Court, but the Supreme Court denied the petition,[8] and the Court of Appeals decision stands.

## CONSEQUENCES OF NSWMA v. ADEM

Interstate transportation of hazardous waste has become big business. However, due to the extreme health and environmental dangers associated with these wastes, disputes concerning their transportation, treatment, and disposal are bound to continue to find their way into the courts. As the NIMBY movement continues to grow, more and more states are going to feel pressured to protect their borders from the importation of hazardous wastes. States are also realizing that hazardous waste disposal sites have a limited future in terms of land-use options. For states that put a high price on the value of land, hazardous waste disposal facility construction and operation will be considered a burden with great risks. These states will opt to transport their wastes to other states which value their land to a lesser degree. This will inevitably cause more disputes. The NSWMA case set the standard by which courts will now judge these disputes.

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The Court of Appeals ruling was significant because it clearly recognized hazardous waste as an object of commerce and dictated that legislation restricting interstate transportation shall be evaluated using the City of Philadelphia balancing test. Because of this, future cases disputing the right to restrict the transportation of hazardous wastes will be decided on the court's interpretation of the commerce clause and a balancing of the costs and benefits.

The NSWMA court left a window of opportunity for future legislation restricting hazardous waste importation to succeed. The court's decision was primarily because of the inequities involved in the "Holley Bill" implementation (restricting importation from only certain states), and not the purpose it was trying to serve. Throughout the case the court implied that, if enforced evenhandedly, the Holley Bill would have had a much better chance of being upheld, so long as a legitimate public concern was identified. Future legislation which restricts the importation of hazardous waste will undoubtedly be designed to satisfy this requirement of being enforced evenhandedly. If enforced evenly, another court may be able to distinguish its case from the decision reached in NSWMA.

The reauthorization of the Resource Conservation and Recovery Act may also have an impact of the success of future restrictive legislation. Some proposals for the reauthorization include permitting states to charge increased disposal rates for out-of-state wastes. It would not allow a state to ban importation of hazardous waste nor have any bearing on private disposal facilities, but it could increase the cost of exporting to a point where exportation would become too expensive to continue.

In the opinion of this writer, hazardous wastes will not be treated like other forms of commerce for long. The increasing frequency of accidents from the transportation and disposal of wastes coupled with growing negative perceptions about such activities will force governments, both federal and state, to place more restrictions on its movement. Not only will these

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restrictions reduce accidents, but they will also alleviate the current inequities among states in the quantities of hazardous wastes being disposed. Toxic discrimination is already prevalent throughout the country. Wealthier states are generating the majority of hazardous wastes, while some of the largest treatment and disposal facilities are located in poor rural states. The issue of hazardous waste exportation is coming to a boiling point and it will be up to future courts to revisit the decision in NSWMA and determine whether it adequately addressed the balance between the need to have hazardous waste disposal sites and the public's right to health and safety.

ENDNOTES

[1]910 F.2d 713 (11th Cir. 1990), *cert. denied* 111 S.Ct. 2800 (1990).
[2] 125 U.S. 465 (1888).
[3] *Id.* at 489.
[4] 437 U.S. 617 (1978).
[5]397 U.S. 137 (1970).
[6]City of Philadelphia, *supra*, note 4, at 622.
[7]City of Philadelphia, 439 U.S. at 629.
[8]*See* 111 U.S. 2800 (1991).

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