

3-1-1983

Waste Disposal: The Commerce Clause and the Resource Conservation and Recovery Act of 1976

Steven J. Christiansen

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Commercial Law Commons](#)

Recommended Citation

Steven J. Christiansen, *Waste Disposal: The Commerce Clause and the Resource Conservation and Recovery Act of 1976*, 1983 BYU L. Rev. 147 (1983).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1983/iss1/4>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Waste Disposal: The Commerce Clause and the Resource Conservation and Recovery Act of 1976

I. THE PROBLEM

An inevitable by-product of American productivity is the creation of enormous amounts of waste.¹ Disposing of the waste presents increasingly complex problems. Despite a congressional attempt—the Resource Conservation and Recovery Act of 1976² (RCRA)—to encourage states to develop regional and local waste disposal systems, some states shift rather than solve the problems of waste disposal. They contract with private waste disposal businesses in other states and then send their waste into interstate commerce. When receiving states respond with legislation to restrict or prohibit importation of waste, commerce clause challenges arise.

Both Congress and the states need to improve their performance in regulating waste disposal. Four propositions emerge from analysis of state and federal waste disposal legislation: (1) state statutes that discriminate against out-of-state waste do not pass commerce clause scrutiny; (2) state statutes making no distinction between local and imported waste will probably be upheld; (3) RCRA's nationally uniform hazardous waste standards show Congress at its best in attempting to control waste disposal; and (4) RCRA's provisions for regionally cooperative non-hazardous waste systems must be strengthened. This Comment concludes that the current judicial interpretation of the commerce clause should prompt state legislatures to abandon attempts at isolation, to participate in interstate programs, and to raise local waste disposal standards. Furthermore, Congress should exercise its extensive powers under the commerce clause to foster regional nonhazardous waste programs and to regulate

1. "Hazardous wastes are generated in substantial quantities . . . : the Environmental Protection Agency estimates the annual total industrial waste stream to be some 260 million tons, of which perhaps 25 million tons are deemed hazardous; this figure is 2.5 times the level reported to Congress in 1974." W. RODGERS, ENVIRONMENTAL LAW § 6.10, at 689 (1977) (footnote omitted). Adding to the overall problem, organized crime is making inroads into the waste disposal industry. See Press, *How the Mob Really Works*, NEWSWEEK, Jan. 5, 1981, at 34, 39.

2. 42 U.S.C. § 6901-6987 (1976 & Supp. III 1979), amended by Solid Waste Disposal Act Amendment of 1980, Pub. L. No. 96-482, 94 Stat. 2334.

interstate dumping as effectively as it has regulated hazardous waste.

II. PROTECTIONIST STATUTES AND THE COMMERCE CLAUSE

A. *Statutes Prohibited*

Recently the United States Supreme Court and the Court of Appeals for the Tenth Circuit have held that the commerce clause³ prohibits two kinds of state protectionist statutes: those that exclude all imported waste and those that accept out-of-state waste only on a reciprocal basis. In *City of Philadelphia v. New Jersey*,⁴ the Supreme Court struck down a New Jersey statute that prohibited, with limited exceptions, out-of-state waste from being brought into the state.⁵ Writing for the 7-2 majority, Justice Stewart ruled that the New Jersey law was a protectionist measure, facially discriminatory against interstate commerce.⁶

Justice Stewart avoided dealing with New Jersey's environmental motives in passing the prohibitory statute by stating that "the evil of protectionism can reside in legislative means as well as legislative ends."⁷ Because the law employed unconstitutional means, there was no need to consider the ends the legislature sought to achieve. The statute was protectionist; therefore it came under a "virtually per se rule of invalidity."⁸ Justice Stewart held that New Jersey was, in essence, trying through discriminatory means to give its residents a preferential right to its natural landfill resources. He stated a rule of constitutional law that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders."⁹ The Court distinguished the quarantine cases, which allow States to prohibit certain articles from coming within their borders, by insisting that the quarantine exception applies only to those articles whose "very movement

3. U.S. CONST. art. I, § 8, cl. 3. The Constitution provides in relevant part: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . ."

4. 435 U.S. 617 (1978).

5. *Id.* at 618-20 & n.2.

6. *Id.* at 628.

7. *Id.* at 626.

8. *Id.* at 624.

9. *Id.* at 627.

risk[s] contagion and other evils.”¹⁰ Justice Stewart continued:

The New Jersey statute is not such a quarantine law. There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible. The harms caused by waste are said to arise after its disposal in landfill sites, and at that point, as New Jersey concedes, there is no basis to distinguish out-of-state waste from domestic waste. If one is inherently harmful, so is the other. Yet New Jersey has banned the former while leaving its landfill sites open to the latter.¹¹

In dissent, Justice Rehnquist, joined by Chief Justice Burger, argued that the New Jersey law came within the quarantine exception.¹² Justice Rehnquist viewed the majority’s attempt to distinguish the quarantine cases as “unconvincing” and found “pointless” the distinctions drawn between articles dangerous during movement and those dangerous only after disposal.¹³

In 1978 and 1980 in *Hardage v. Atkins*,¹⁴ the Court of Appeals for the Tenth Circuit invalidated Oklahoma’s statute restricting out-of-state waste. The Oklahoma statute prohibited the importation of *industrial* waste unless the exporting state entered into a reciprocity agreement with the State of Oklahoma and enacted standards for controlling industrial waste disposal substantially similar to those of Oklahoma.¹⁵ In the 1978 *Hardage* decision (*Hardage I*) Judge McWilliams, writing for a unanimous court, found the reciprocity portion of the statute to be unconstitutional under the Supreme Court decisions in *Great Atlantic & Pacific Tea Co. v. Cottrell*¹⁶ and *City of Philadelphia v. New Jersey*.¹⁷ In *Cottrell* the Court had invalidated a Mississippi statute permitting importation of milk into Mississippi only if the exporting state “received and accepted milk produced in Mississippi on a reciprocal basis.”¹⁸ The reciprocity requirement was found to violate the commerce clause. In *Hardage I* the Oklahoma legislation was struck down on the same grounds.

10. *Id.* at 629.

11. *Id.*

12. *Id.* at 632 (Rehnquist, J., dissenting).

13. *Id.* at 632-33.

14. 582 F.2d 1264 (10th Cir. 1978); 619 F.2d 871 (10th Cir. 1980).

15. 582 F.2d at 1265 (quoting OKLA. STAT. tit. 63, § 2764 (1976) (repealed 1981)).

16. 424 U.S. 366 (1976).

17. 437 U.S. 617 (1978).

18. 582 F.2d at 1266.

In the 1980 *Hardage* decision (*Hardage II*), the court of appeals struck down, as violative of the commerce clause, that portion of the Oklahoma statute allowing importation of industrial waste from other states only if the exporting state had enacted standards for controlled industrial waste substantially similar to those of Oklahoma.¹⁹ The court, again relying on the *Cottrell* decision, concluded:

In reality . . . Oklahoma is forcing its judgment with respect to hazardous wastes on its sister states "at the pain of an absolute ban on the interstate flow of commerce." [citation omitted] As we view the situation, Oklahoma cannot "use the threat of economic isolation as a weapon to force" other states to enact substantially similar legislation any more than Oklahoma can impose a reciprocity agreement against a sister state. [citation omitted] Thus, the mandatory nature of the device or implement is the objectionable part.

Our conclusion is then that the "substantially similar standards" provision is not different from the required reciprocity agreement. Both constitute a mandatory scheme which violates the Commerce Clause.²⁰

In striking down the New Jersey and Oklahoma statutes restricting out-of-state waste, the federal courts were merely reaffirming a long line of commerce clause decisions that prohibit

19. 619 F.2d at 873.

20. *Id.* (quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 379-80 (1976)). Recent decisions by state courts of last resort are testing the "outer limits" of the rule set down by the Supreme Court in *City of Philadelphia v. New Jersey*. In *Browning-Ferris, Inc. v. Anne Arundel County*, 292 Md. 136, 438 A.2d 269 (1981), and *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 417 N.E.2d 74, 435 N.Y.S.2d 962 (1980), ordinances which prohibited the dumping of out-of-town or out-of-county refuse in the town or county landfills were invalidated on commerce grounds. In *Dutchess* the interstate commerce clause was held to be violated since the evidence established that out-of-state firms "were desirous of patronizing [the plaintiff's] landfill." 51 N.Y.2d at 673, 417 N.E.2d at 76, 435 N.Y.S.2d at 963. However, in the companion case to *Dutchess*, *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 417 N.E.2d 78, 435 N.Y.S.2d 966 (1980), a 4-3 decision of the New York Court of Appeals upheld an ordinance similar to that in *Dutchess* that prohibited the dumping of out-of-town refuse in the town's sanitary landfill. The majority upheld the statute since "there is no contention or indication that any of the refuse originates beyond the State borders." 51 N.Y.2d at 684, 417 N.E.2d at 80, 435 N.Y.S.2d at 968. The dissent, led by Judge Fuchsberg, argued that the ordinance and the majority ignored "the fact that the effect of the ordinance is to make it impossible for out-of-state carting companies to offer their business to the plaintiff or for the out-of-town customers who are engaged in or whose activities affect interstate commerce to continue to use the plaintiff's landfill." 51 N.Y.2d at 686, 417 N.E.2d at 82, 435 N.Y.S.2d at 969 (Fuchsberg, J., dissenting).

states from enacting isolationist or protectionist statutes.²¹ The underlying rationale in striking down protectionist statutes was set forth by Justice Cardozo: "The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."²²

This philosophy applies to waste disposal. If any state were allowed to prohibit the importation of waste, other states would probably enact similar legislative barriers. Such an "ecological Balkanization" of the states would, in turn, discourage national and regional waste disposal programs.²³ Interstate solutions are not only consonant with the philosophy underlying the commerce clause but are also essential to solve national waste disposal problems—such as those of nuclear waste—which are too big for a single state.²⁴ As interpreted, the commerce clause prevents isolation, while at the same time allowing states to moderately regulate the dumping of waste within their borders.

B. Statutes Upheld

Current judicial interpretation suggests that the commerce clause can serve more as a spur than as a barrier to states and cities wishing to develop more effective regional and local non-hazardous waste disposal systems. Local requirements which do not discriminate against outside interests are upheld against commerce clause attacks. In *Hybund Equipment Corp. v. City*

21. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Baldwin v. G.A.F. Sellig, Inc.*, 294 U.S. 511 (1935); *Buck v. Kuykendall*, 267 U.S. 307 (1925).

22. *Baldwin v. G.A.F. Sellig, Inc.*, 294 U.S. 511, 523 (1935).

23. Note, *Constitutional Law—Commerce Clause: Local Discrimination in Environmental Protection Regulation*, 55 N.C.L. REV. 461, 473 (1977).

24. Note, *Commerce Clause Limitations on a State's Regulation of Waste Disposal*, 18 NAT. RESOURCES J. 925, 931 (1978). Recognizing this need, two recent federal district court decisions have sustained commerce clause attacks on state laws prohibiting storage within the state of radioactive waste that originated in another state. *General Elec. Co. v. Fahner*, No. 80 C 6835 (N.D. Ill., Oct. 12, 1981) (available on LEXIS, Genfed Library, Dist file); *Washington State Bldg. & Const. Trades Council v. Spellman*, 518 F. Supp. 928 (E.D. Wash. 1981). In both *Fahner* and *Spellman* the district courts followed the Supreme Court's interpretation of the commerce clause in *City of Philadelphia v. New Jersey* to invalidate the protectionist state laws. In *Fahner* the court rejected an argument that the "quarantine" exception to the commerce clause allowed the state to prohibit the storage of out-of-state nuclear waste within its borders. The *Fahner* court refused to apply the quarantine exception since "the inherent danger applies equally to all people" and "there is no basis to distinguish between the danger to Illinois residents and that affecting the residents of the other forty-nine states." No. 80 C 6835, slip op. at 10.

of Akron,²⁵ the Sixth Circuit upheld a city ordinance requiring all private garbage collectors within the city to deposit their refuse at the city's waste incinerating plant. The City of Akron had developed the plant partly to dispose of waste efficiently, since landfill was scarce, but primarily to develop steam energy for the city.²⁶ The Department of Justice, Environmental Protection Agency, and Department of Energy filed an amicus brief arguing that the city's ordinance and waste disposal plan should be upheld because they furthered the national policies of waste disposal set forth in statutes such as RCRA.²⁷ The Sixth Circuit distinguished *Hybund* from *City of Philadelphia v. New Jersey* on the grounds that Akron's ordinance applied only to garbage collection in Akron and thus was not a prohibited protectionist measure.²⁸ The *Hybund* case affords legal precedent while the Akron waste disposal system presents a technological solution that other cities may well follow.

Another kind of statute that has passed judicial scrutiny under the commerce clause is one that regulates the importation of waste by placing a "nondiscriminatory, across-the-board limitation on the quantity, type or state of waste"²⁹ disposed of within a state's borders. In *Al Turi Landfill, Inc. v. Town of Goshen*,³⁰ a federal district court upheld a nondiscriminatory city ordinance against a commerce clause challenge. The ordinance limited the amount of land that could be used for solid waste disposal, limited the size of solid waste disposal facilities, and imposed an inspection fee on solid waste disposal construction and operation applications. The plaintiff sought declaratory and injunctive relief since the ordinance thwarted his plans to build a large sanitary landfill facility to serve both in- and out-of-state customers. But the court upheld the ordinance, finding it "a non-discriminatory, across-the-board limitation on the construction or expansion of all landfills within the Town."³¹

An Illinois statute prohibits imported waste if it is to be dumped at a facility that does not conform to minimum pre-

25. 654 F.2d 1187 (6th Cir. 1981).

26. *Id.* at 1188.

27. *Id.* at 1191 n.4.

28. *Id.* at 1194.

29. *Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 677, 417 N.E.2d 74, 78, 435 N.Y.S.2d 962, 966 (1980).

30. No. 81 Civ. 4010 (CBM) (S.D.N.Y. Feb. 1, 1982).

31. *Id.*, slip op. at 14.

scribed standards.³² Although no challenge has been brought against the law, it appears to satisfy commerce clause requirements because it sets uniform, minimum standards for all waste disposal facilities. The statute not only raises waste disposal standards in Illinois, but encourages surrounding states that have exported troublesome wastes to begin developing effective waste disposal systems on their own or in cooperation with their neighbors.

III. THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976

In the Resource Conservation and Recovery Act of 1976 (RCRA),³³ Congress has attempted to encourage cooperation among the states in solving many waste disposal problems.³⁴ The Act gives Congress' consent to interstate compacts for the proper disposal of solid waste and authorizes the Administrator of the Environmental Protection Agency to provide technical and financial assistance to state and regional agencies in developing solid waste disposal programs.³⁵ However, RCRA makes clear that the disposal of solid waste will continue to be primarily a state function.³⁶ The Supreme Court has bolstered this provision of RCRA by holding in *City of Philadelphia v. New Jersey*³⁷ that RCRA does not preempt similar state law on waste disposal.

A. Hazardous Waste

Subchapter III of RCRA³⁸ deals with the disposal of hazardous solid waste. The Act defines hazardous solid waste in part as those wastes that "pose a substantial present or potential hazard to human health or environment."³⁹ RCRA establishes minimum standards applicable to generators and transporters of hazardous waste and to operators of hazardous waste treatment and disposal facilities.⁴⁰ State hazardous waste programs must con-

32. ILL. ANN. STAT. ch. 111½], § 1021(e) (Smith-Hurd Supp. 1981-82).

33. 42 U.S.C. §§ 6901-6987 (1976 & Supp. III 1979), amended by Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334.

34. *Id.* § 6904 (1976).

35. *Id.* §§ 6904(a), 6904(b), 6912(a)(3) (1976).

36. *Id.* § 6901(a)(4) (1976 & Supp. III 1979).

37. 437 U.S. at 620.

38. 42 U.S.C.A. §§ 6921-6934 (West 1977 & Supp. 1981).

39. 42 U.S.C. § 6903(5) (1976).

40. *Id.* §§ 6922-6924 (amended 1980).

form to both the standards set by RCRA and the guidelines established by the EPA.⁴¹ The Administrator of the EPA is to allocate federal funds among the qualifying programs according to "the extent to which hazardous waste is generated, transported, stored, and disposed of within such State."⁴² The overall effect of RCRA on nationwide disposal of hazardous solid waste has been summarized by the Supreme Court of New Jersey:

This Subchapter [III] may fairly be characterized as an effort to achieve a degree of uniformity in hazardous waste control. The federal guidelines pertaining to parties involved in the generation, transportation and disposal of such waste establish a minimum national standard below which a state hazardous waste program may not operate. However, the Act does not prevent the State from imposing more stringent standards to hazardous waste operations within its borders.⁴³

Federal standards for hazardous waste disposal are mandatory, applying to all owners and operators of hazardous waste disposal facilities.⁴⁴ If a state-operated hazardous waste disposal program is not administered in accordance with federal standards, it will lose federal technical and financial assistance.⁴⁵ In addition, a private citizen or the Administrator of the EPA may bring a civil suit against the United States or any other governmental body (to the extent permitted by the 11th Amendment) or against any private person for violations of the hazardous waste provisions of the RCRA.⁴⁶ These provisions of the

41. *Id.* § 6926 (1976 & Supp. III 1979).

42. 42 U.S.C. § 6931(b) (1976).

43. *City of Philadelphia v. State*, 73 N.J. 562, 568, 376 A.2d 888, 891 (1977), *rev'd*, 437 U.S. 617 (1978).

44. 42 U.S.C. § 6924 (1976) (amended 1980).

45. *Id.* § 6926(e).

46. *Id.* at §§ 6972-6973. See also *United States v. Solvents Recovery Serv.*, 496 F. Supp. 1127 (D. Conn. 1980); *United States v. Vertac Chemical Corp.*, 489 F. Supp. 870 (E.D. Ark. 1980).

The effectiveness of the federal legislation in the hazardous waste area has been further buttressed by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (to be codified at 42 U.S.C. §§ 9601-9657). Sections 9604 and 9611 of CERCLA empower the President to provide remedial action to clean up hazardous substances released into the environment. The money for this undertaking is provided by the Hazardous Substance Response Trust Fund established in § 9631. However, § 9607(a)(4) establishes that those who are responsible for the hazardous waste spill shall be liable for the costs of removal and other necessary costs, and for damages to natural resources. This fund is a needed insurance policy to protect the people and the environment from the problems created by hazardous waste spills where industry is unable to provide the necessary funds for the cleanup

RCRA may well result in the uniformity in hazardous waste control that Congress seeks. Both the allure of federal money and the threat of civil penalties encourage the states to cooperate in developing and maintaining proper hazardous waste disposal projects.

B. Nonhazardous Waste

While the approach Congress has taken in RCRA toward waste disposal may achieve the goal of a uniform national policy of hazardous waste control, RCRA will not, without some refinement, reach its objectives in the area of nonhazardous waste disposal. Subchapter IV of RCRA deals with the disposal of nonhazardous solid waste—waste that is “environmentally sound.”⁴⁷ Seeking to promote both interstate and intrastate solutions to solid waste disposal problems, the Act directs the Administrator of the EPA to “publish guidelines for the identification of those areas that have solid waste management problems and that are appropriate units for planning regional solid waste management services.”⁴⁸ If an identified region crosses state boundaries, the governor of each state must approve the waste disposal plan for the region.⁴⁹

The subchapter reflects a congressional objective to improve waste disposal procedures within identified solid waste management regions by offering generous grants to state and local governments.⁵⁰ However, the states’ waste disposal procedures must be approved by the Administrator of the EPA⁵¹ and meet minimum federal standards⁵² in order to receive the federal funds.

RCRA does not adequately motivate regional planning for nonhazardous waste. True, the EPA is requested to formulate guidelines that identify interstate regions needing coordinated solid waste disposal plans.⁵³ But Congress used this same ap-

operation.

47. 42 U.S.C. §§ 6941-6949 (1976) (amended 1980).

48. *Id.* § 6942(a). The guidelines are found at 40 C.F.R. 256.01-.64 (1981).

49. 42 U.S.C. § 6946(c) (1976). *See also* City of Philadelphia v. State, 73 N.J. 562, 572, 376 A.2d 888, 893 (1977), *rev’d*, 437 U.S. 617 (1978).

50. 42 U.S.C. §§ 6901(a)(4), 6947(b), 6948(a) (1976 & Supp. III 1979) (amended 1980). *See* F. GRAD, 1A TREATISE ON ENVIRONMENTAL LAW § 4.02[2][a], at 4-36 to -37 (1981).

51. 42 U.S.C. §§ 6943, 6947 (1976 & Supp. III 1979) (amended 1980).

52. *Id.*

53. 42 U.S.C. §§ 6942(a), 6946(c) (1976).

proach in the 1965 Solid Waste Disposal Act,⁵⁴ the Resource Recovery Act of 1970,⁵⁵ and the Federal Water Pollution Control Act.⁵⁶ For two reasons the approach has proven to be slow and unproductive.

First, the procedure, unlike the more effective hazardous waste standards, is not mandatory. Any proposals for an interstate region may be rejected by state politicians, the Administrator of the EPA, or Congress.⁵⁷ This point was recognized by the Supreme Court of New Jersey:

When federal guidelines as to proposed regions are in fact published, they may not even suggest or recommend that any part of New Jersey be joined with the City of Philadelphia in a common region. On the other hand, if such a suggestion or recommendation were to be made the Governor of Pennsylvania or the Governor of New Jersey may fail to approve it.⁵⁸

Second, the process of selecting waste disposal regions has been left up to state governors,⁵⁹ who have been slow in suggesting regional solid waste disposal systems.⁶⁰ In addition, once regions are suggested, state and local governments have been slow to plan and develop regional disposal programs in conformance with federal guidelines.⁶¹

C. Proposed Amendments to RCRA's Nonhazardous Waste Provisions

RCRA should be amended to include financial and regulatory incentives that will encourage states to develop waste disposal systems independently or in conjunction with other states. Two major changes are necessary. First, RCRA now gives the

54. Pub. L. No. 89-272, 79 Stat. 992, 997-1001 (current version codified at 42 U.S.C. §§ 6901-6987 (1976 & Supp. III 1979)).

55. Pub. L. No. 91-512, 84 Stat. 1227 (current version codified at 42 U.S.C. §§ 6901-6987 (1976 & Supp. III 1979)).

56. Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1376 (1976 & Supp. III 1979)). See W. RODGERS, *supra* note 1, § 6.3, at 630.

57. 42 U.S.C. § 6904(b) (1976). See F. GRAD, *supra* note 42, § 4.02 [3][b][ii][A] at 4-75.

58. *City of Philadelphia v. State*, 73 N.J. 562, 573-74, 376 A.2d 888, 893-94 (1977), *rev'd*, 437 U.S. 617 (1978). See also 42 U.S.C. § 6946(c) (1976).

59. 40 C.F.R. § 255.20 (1981).

60. See W. RODGERS, *supra* note 1, § 6.3 at 637.

61. See W. RODGERS, *supra* note 1, § 4.9, at 432-35, § 6.3, at 636-37. See also F. GRAD, *supra* note 42, § 4.02[3][b][ii][A] at 4-75 and 4-76. Cf. Note, *The Commerce Clause and Interstate Waste Disposal: New Jersey's Options After the Philadelphia Decision*, 11 RUT.-CAM. L.J. 31, 59-60 (1979).

EPA discretion in allocating funds to the states for their non-hazardous waste disposal systems.⁶² However, unlike the hazardous waste provisions which clearly cut off funds for noncompliance, the law does not explicitly state whether the Administrator can reduce or eliminate federal grants to uncooperative states. This provision should be amended to give the Administrator clear authority to reduce or eliminate federal waste disposal funds in those states that in his judgment are not actively seeking to develop adequate local or regional waste disposal systems.

Second, Congress should place greater restrictions on the interstate transportation of solid waste, encouraging local waste disposal unless exporting states show that dumping their waste in another state is the most practicable way to dispose of the waste. An exporting state could establish that interstate dumping is the best practicable method of disposal if (1) it has a bilateral or cooperative interstate agreement under RCRA to dispose of waste, or (2) the exporting state is not now capable of properly disposing of its own solid waste, but is developing such procedures in compliance with the minimum standards of RCRA to become effective within five years, or (3) the exporting state can show, in terms of overall societal safety and welfare, that the waste will be best disposed of in the importing state. Such legislation would prevent one state from casually dumping waste in another state and would encourage all states to help develop a system to solve present waste disposal problems.

IV. CONCLUSION

The federal courts are wisely pushing states toward local and regional solutions to our waste disposal problems by applying the commerce clause to invalidate state laws with blanket prohibitions on importation of waste. In order to regulate imported waste and yet avoid conflict with the commerce clause, states will have to fashion nondiscriminatory laws that raise the standards for disposing of any waste within the state—whether local or imported. Congress has encouraged a national approach to hazardous waste control through RCRA. However, RCRA's provisions for nonhazardous waste disposal must be strength-

62. 42 U.S.C. § 6948(b) (1976).

ened to encourage states to develop local as well as regional waste disposal plans.

Steven J. Christiansen