RECENT DECISIONS GIVE LIMITED GUIDANCE ON STATE RCRA REGULATION OF HAZARDOUS WASTE

I. INTRODUCTION

Originally, the Resource Conservation and Recovery Act of 1976[1] (RCRA) was passed by Congress to create a federal program to manage toxic and hazardous waste as it was produced by industrial activity. To some extent, both public and private local entities throughout the nation had assumed responsibility for the handling of municipal solid waste. However, Congress recognized that the states and their political subdivisions were not regulating industrial hazardous waste.[2] In a break from past comprehensive federal legislation, and by congressional design, RCRA implementation depended upon a federal/state partnership.[3] The Congressional power to regulate commerce[4] and the states' police powers were combined to enforce federal regulations.[5]

This federal/state partnership scheme of RCRA, along with other environmental legislation of the 1970s, was contrary to traditional major federal programs enacted from the 1930s through the 1960s.[6] Pre-1970s, as Congress would delineate a national purpose or problem, it would simultaneously create a totally federal program to implement the needed supervision and action. Defining a national problem, creating federal standards, and then utilizing state government resources to manage the federally designed programs was a different approach for Congress.

Addressing the clear danger that hazardous waste presented to the health and safety of the population and to the quality of the environment,[7] the federal environmental goals of RCRA were to regulate the generation, transportation, storage, and disposal of hazardous wastes.[8] Environmental regulations of this

1. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795, as amended by the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C.S. §§ 6901-6981 (Law. Co-op. 1982 & Supp. 1993)). [hereinafter RCRA].

2. In 1976, although 46 states had some regulatory power over hazardous waste, only seven states had comprehensive hazardous waste management laws. The Environmental Protection Agency (EPA) had identified approximately 50 state employees in 25 states that worked primarily on hazardous waste management. One-third of that number were employed in California's program. In most states, three employees were considered an unusually large staff. H.R. REP. No. 1491, 94th Cong., 2d Sess. 23-24 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6261-62.

3. David Schnapf, *State Hazardous Waste Programs Under the Federal Resource Conservation and Recovery Act*, 12 ENVTL. L. 679, 681 (1982).

4. U.S. CONST. art. I, § 8, cl. 3.

5. Robert E. Manley, *Federalism and Management of the Environment*, 19 URB. LAW. 661, 664 (1987).

6. *Id.* at 665-66. Examples of systems of federal legislation that were centralized in federal bureaus and agencies are the Food and Drug Administration, the Interstate Commerce Commission, the Securities and Exchange Commission, and the National Labor Relations Board.

7. H.R. REP. No. 1491, *supra* note 2, at 3.

8. H.R. REP. No. 1491, *supra* note 2, at 5.

scope resulted in substantial expense to industry through major renovations, closure of numerous old plants, and increased cost of production.[9] This became a source of conflict in RCRA's federal/state partnership scheme.

Political friction caused by the conflicting public interests of the two sets of governments and the unequal distribution of powers made federal/state implementation of RCRA's hazardous waste regulation appear unworkable from its inception. Enforcement by state government of federal environmental regulations was viewed as opposition to state economic development policies. Fear of unemployed and unhappy voters created a political incentive for state governments to go slowly in implementing federal regulations.[10]

Moreover, there was an existing federal/state conflict in the area of interstate commerce relative to the restraint of trade, as individual states strove to preserve the disposal capacities for their in-state industry. Some states and their political subdivisions moved to ban the importation of wastes.[11] In a seeming contradiction to promotion of economic interests, states also resisted further development of commercial disposal facilities. This occurred because state government could be influenced by local environmental interests that perceived any growth in disposal capacity as a threat to natural resources. Local political interests would also demand that states create greater protective measures than the federal RCRA standards. Congress made provision for local protectionism,[12] but did not make interstate commerce exemptions.

By an unequal distribution of powers, RCRA gave the executive branch of the federal government through the Environmental Protection Agency the authority to administer and enforce a federal program in any state that did not implement a program which was substantially equivalent to the federal program.[13] When the federal government can compel state government to comply with a federal program and enforce that program as it applies to the private sector, a partnership does not exist. The coercion element occurs because states must make one of two choices. Either a state must accept a federally administrated EPA program which negatively impacts economic growth and citizen interests, or the state can conduct an EPA mandated program that is cost prohibitive and carries a great administrative burden. The tension severely strains the EPA's relationship with the states.[14]

The federal judicial system became the means through which this statutorily created, decentralized, environmental, decision-making system would

9. Manley, *supra* note 5, at 666-67.

10. Manley, *supra* note 5, at 666-67.

11. H.R. REP. No. 1491, *supra* note 2, at 3.

12. "Nothing in this title 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." RCRA, 42 U.S.C.S. § 6929 (Law. Co-op. Supp. 1993).

13. Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal program pursuant to this subtitle.

42 U.S.C. § 6926(e) (1988).

14. Schnapf, *supra* note 3, at 682, 686.

move toward resolution of its inherent conflicts between the more powerful federal program and each multi-faceted state program.[15] Communication through major court decisions has led Congress to amend environmental legislation to correct gaps and loopholes in the regulatory scheme.[16] Litigation, in turn, has clarified regulatory intent and pointed out the effects of various provisions of RCRA.[17] The initial, defining conflict occurred in 1978, when the Supreme Court invoked the Commerce Clause to strike down New Jersey's protectionist measures which banned out-of-state solid and hazardous waste from the state's remaining landfill space.[18]

The Court defined the issue of governmental sovereignty in federal/state regulatory schemes in 1981, when it examined the Surface Mining Act.[19] The *Hodel* Court held that if a state does not choose to submit a permanent program to implement the regulations, then the full regulatory burden must be borne by the Federal Government.[20] *Hodel* also advanced the concept of "cooperative federalism," in which states are allowed, within limits established by federal minimum standards, to enact and administer their own regulatory programs, which are structured to meet the state's particular needs.[21]

A decade and a half of litigation and judicial review primarily delineated federal powers. Three federal cases during 1992-1993 have identified certain powers that states may exercise in their RCRA authority to meet their responsibilities to regional interests. With varying degrees of clarity, these three cases have moved federal/state hazardous waste regulation further toward the concept of "cooperative federalism."[22]

In *Chemical Waste Management, Inc. v. Hunt,*[23] the Supreme Court gave guidance to state governments when it addressed the issue of preemption by the Commerce Clause of state regulatory measures affecting out-of-state hazardous waste in an Alabama landfill. The U.S. Court of Appeals for the Third Circuit allowed additional state measures regulating transportation of hazardous waste in *Old Bridge Chemicals, Inc. v. New Jersey.*[24] Most recently, in *United States v. Colorado,*[25] the U.S. Court of Appeals for the Tenth Circuit ruled that Colorado has the authority to enforce its hazardous waste laws at federal facilities within its boundaries.

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15. Patricia M. Wald, *The 1991 Bellagio Conference on U.S.-U.S.S.R. Environmental Protection Institution: The Role of the Judiciary in Environmental Protection*, 19 B.C. ENVTL. AFF. L. REV. 519 (1992).

16. Federal Facility Compliance Act of 1992, § 102(a), (b), 42 U.S.C.S. § 6961 (Law. Co-op. Supp. 1993). Congress expressly passed this amendment to RCRA to overrule the Supreme Court holding in U.S. Department of Energy v. Ohio, 112 S.Ct. 1627 (1992) (found federal sovereign immunity for a DOE facility from civil punitive fines imposed by a state). H.R. CONF. REP. No. 886, 102d Cong., 2d Sess. 18 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1317, 1318.

17. Wald, *supra* note 15, at 520.

18. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

19. Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264 (1981).

20. *Id.* at 288.

21. *Id.*

22. Wald, *supra* note 15, at 522.

23. 112 S.Ct. 2009 (1992).

24. 965 F.2d 1287 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 602 (1992).

25. 990 F.2d 1565 (10th Cir. 1993).

II. AREAS OF STATE/FEDERAL CONFLICT IN RCRA

A. Preemption

Clearly in keeping with the Supremacy Clause powers,[26] Congress expressly created a partial preemption scheme for hazardous waste regulation in RCRA that retained federal authority for minimum standards.[27] After the EPA promulgated minimum standards for the regulation of hazardous waste management, any state that submitted a state hazardous waste program equivalent to the federal standards could be authorized to administer that program in lieu of the federal program.[28] If a state program is not administered or enforced in accordance with the federal standards, the EPA is authorized to withdraw the state's authorization and establish a federal program in the state.[29]

Several years after the enactment of RCRA, Congress concluded that "the task of comprehensive hazardous waste management is one of unparalleled scope and complexity."[30] As a result of its concern about the scope of the task, Congress passed the 1984 Hazardous and Solid Waste Amendments (HSWA).[31] To strengthen regulatory oversight abilities of the RCRA program, the HSWA expressly preserved the rights of the states in their application of an authorized program to impose requirements more stringent than federal regulations.[32] Besides a general "rights" statement, Congress specifically designated site selection as a matter for additional state requirements.[33] This express grant of authority to state programs has been referred to as the "savings clause."[34]

Since the enactment of the original 1976 RCRA laws, other areas of authority besides site selection have been expressly carved out of federal authority and granted to the state programs. For example, HSWA requires an applicant to take corrective action for any releases of hazardous wastes or hazardous constituents at pre-RCRA constructed facilities seeking permanent permits for treatment, storage, or disposal.[35] The EPA actively recruited state

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26. U.S. CONST. art. VI, cl. 3. Under the Supremacy Clause, federal law can invalidate state law in three ways. First, Congress may preempt state law in express terms in legislation. Second, Congress's intent to preempt state law can be inferred if the federal legislation is so comprehensive there is no room left for additional state regulation. Third, if Congress has not completely precluded state law in a particular area, the state law will be preempted when compliance with both laws is impossible or the state law is an obstacle to federal objectives. *See* Hillsborough County v. Automated Medical, Lab., Inc., 471 U.S. 707, 713 (1985).

27. H.R. REP. No. 1491, *supra* note 2, at 31-32.

28. "Such State is authorized to carry out such program in lieu of the Federal program under this subtitle in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste. . . ." RCRA, 42 U.S.C.S. § 6926(b) (Law. Co-op. Supp. 1993).

29. RCRA, 42 U.S.C. § 6926(e) (1988).

30. H.R. REP. No. 198, Part I, 98th Cong., 2d Sess. 20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5576, 5579.

31. Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (codified as amended at 42 U.S.C.S. §§ 6901-6981 (Law. Co-op. 1988 & Supp. 1993)).

32. 42 U.S.C.S. § 6929 (Law. Co-op. Supp. 1993).

33. *Id.*

34. *Id.*

35. HSWA, 42 U.S.C.S. § 6928(h) (Law. Co-op. Supp. 1993).

programs to include corrective action oversight in an effort to leverage state resources to get the work done.[36] Giving states oversight of federal facilities was another authority granted to state programs.[37] Originally, Congress exempted federal facilities from all state hazardous waste plans in 1976,[38] but that particular sovereign immunity was expressly waived in later legislation so that the full range of enforcement tools would be available.[39]

Preemption is the first constitutional hurdle any state hazardous waste law must meet when confronted by a regulated party or legally challenged by a citizen/group seeking increased enforcement measures. When the federal government relies upon state police powers to enforce an essentially federal program, the various court systems must maintain neutrality, vigilant oversight, and the expertise to differentiate technical nuances to determine if conflict between regulations, and therefore preemption, actually exists.

B. Commerce Clause

In the United States, the transportation, storage, treatment and disposal of hazardous waste are primarily commercial enterprises and not government services. Consequently, state regulations of these activities spurred by local interests may face a Commerce Clause challenge. *City of Philadelphia v. New Jersey*[40] clearly established the principle that articles of commerce coming from outside a state's boundaries cannot be discriminated against by a state's waste management regulations. The state regulation will be struck down, if its means or ends is economic protectionism, even if the regulation has not been preempted by federal legislation and the legislative purpose is environmental protection. This does not render quarantine laws invalid if there is a legitimate state interest and no other means to achieve that interest.[41]

The *Philadelphia* Court stated that the test for state waste management regulations that evenhandedly regulated in-state and out-of-state waste and credibly advanced other legislative objectives was the approach found in *Pike v. Bruce Church, Inc.*[42] In *Pike*, if a state regulation with a credible legislative

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36. Joseph Carra, *The RCRA and New Amendments*, HAZARDOUS MATERIALS CONTROL, Jan.-Feb. 1989, at 51, 63. In reference to the federal program, Mr. Carra, Director of Permits and State Programs in the Office of Solid Waste at EPA stated, ". . . the cleanup program will completely overwhelm RCRA resources we'd prefer to spend on preventive measures."

37. RCRA, 42 U.S.C.S. § 6961 (Law. Co-op. Supp. 1993).

38. H.R. REP. No. 1491, *supra* note 2, at 24. "State hazardous waste plans do not apply to Federal facilities, nor should such State plans take into account hazardous waste generated on such facilities."

39. Sovereign immunity is expressly waived with respect to any substantive or procedural provision of law respecting control, abatement or management of solid waste or hazardous waste. In doing so the conferees reaffirm the original intent of Congress that each department, agency, and instrumentality of the United States be subject to all of the provisions of federal, state, interstate, and local solid waste and hazardous waste laws and regulations.

H.R. CONF. REP. No. 886, *supra* note 16, at 18.

40. 437 U.S. 617, 622 (1977). "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."

41. *Id.* at 629.

42. Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Cement Co.

purpose can survive preemption by an existing federal regulation and the per se discrimination against interstate commerce, it must be measured by the degree of incidental burden on interstate commerce.

To determine which elements bring a state's hazardous waste regulations into conflict with interstate commerce, the EPA drafted regulations which stated that a state program should not unreasonably restrict, impede, or operate as a ban on the free movement of hazardous waste across a state border.[43] Further, the federal regulations stated that when a state regulation or program incidently burdens interstate commerce, it must have a basis in human health or environmental protection. Otherwise, the state regulation would be deemed inconsistent, and therefore unconstitutional.[44]

Technically, it is usually impossible to distinguish properties of out-of-state generated wastes that are more harmful than the wastes generated within a state. Hazardous waste facilities can not be regulated to ban out-of-state wastes and still continue to serve in-state needs without discriminating against interstate commerce. Therefore, despite the provisions of the 1984 HSWA allowing more stringent regulations,[45] states have consistently run afoul of the Supremacy Clause and the interstate Commerce Clause when implementing state RCRA programs that address local interests.

III. *CHEMICAL WASTE MANAGEMENT, INC. V. HUNT*

Chemical Waste Management operates the largest hazardous waste landfill in the country at Emelle, Alabama. Ninety percent of the tonnage permanently buried each year was shipped in from other states. Alabama's state regulatory program enacted a fee of $25.60 per ton on in-state generated waste and $72.00 per ton on out-of-state generated waste. When the statute went into effect in 1990, the volume of hazardous waste buried at Emelle dropped from 791,000 tons in 1989 to 290,000 tons in 1991.[46]

The Supreme Court in *Hunt* continued to affirm the holding in *Philadelphia* and found that a differential fee charged to a commercial hazardous waste landfill facility for accepting out-of-state generated waste was a per se violation of the interstate Commerce Clause.[47] The Court agreed to the legitimacy of Alabama's local purposes, which were: (1) protection of the health and safety of the citizens of Alabama from toxic substances; (2) conservation of the environment and the state's natural resources; (3) provision for compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama; (4) reduction of the

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v. Detroit, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. 137, 142 (1970).

43. 40 C.F.R. § 271.4(a) (1992).

44. *Id.* § 271.4(b).

45. 42 U.S.C.S. § 6929 (Law. Co-op. Supp. 1993).

46. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2011, 2012, 2014 at n.4 (1992).

47. *Id.* at 2017.

overall flow of wastes traveling on the state's highways, which flow creates a great risk to the health and safety of the state's citizens.[48] However, the state was targeting only interstate hazardous waste to meet those purposes.

The Court found the hazardous waste from Alabama was physically the same as that generated out-of-state and once waste crossed the borders, the miles traveled over state highways were equal for all wastes. Therefore, the Court concluded that Alabama's waste management plan discriminated against interstate commerce both on its face and in its practical effect.[49]

Delivering the opinion of the Court and in deference to Alabama's concern on the volume of waste entering the Emelle facility, Justice White listed three alternatives that would be less discriminatory and which would have the effect of reducing volume from all sources:[50]

1) [a] generally applicable per-ton additional fee on all hazardous waste disposed of within Alabama;[51]
2) [a] per-mile tax on all vehicles transporting hazardous waste across Alabama roads;[52] or
3) [a]n even-handed cap on the total tonnage landfilled at Emelle.[53]

Although these alternatives had precedent in previous court decisions, it is not an exclusive list of options that a state may employ. While firmly remaining with the Commerce Clause principle of enjoining point-of-origin discrimination, Justice White addressed Alabama's concern with environmental conservation and the health and safety of its citizens. In an implied reference to the state's power through the RCRA "savings clause" to impose more stringent regulations than authorized by RCRA, Alabama was reminded, "it remains within the State's power to monitor and regulate more closely the transportation and disposal of *all* hazardous waste within its borders."[54]

IV. *OLD BRIDGE CHEMICALS, INC. V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION*

Ten days after the Supreme Court's *Hunt* opinion, the U.S. Court of Appeals for the Third Circuit issued an opinion on an interstate commerce challenge to a New Jersey waste classification regulation.[55] New Jersey had expanded its definition of hazardous waste to include recycled by-product materials with hazardous characteristics. While both federal and state regulations classified these raw materials as solid waste, the federal definition of hazardous waste excluded any materials that were recycled "as effective

48. *Id.* at 2014.

49. *Id.* at 2015 n.7, 2016. The risk created by hazardous waste is proportional to volume, and measures which reduced the significantly higher interstate volume effectively met the state's purpose. However, this fact did not bear on the Court's decision.

50. *Id.* at 2015.

51. *Id.* (citing Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619 (1981), *reh'g denied*, 453 U.S. 927 (1981)).

52. *Id.* (citing American Trucking Ass'ns., Inc. v. Scheiner, 483 U.S. 266, 286 (1987)).

53. *Id.* (citing City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978)).

54. *Id.* at 2016.

55. Old Bridge Chemicals, Inc. v. New Jersey Dep't. of Envtl. Protection, 965 F.2d 1287 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 602 (1992).

substitutes for commercial products."[56] Utilizing the EPA's characteristic hazardous waste code, New Jersey required recyclable hazardous wastes to be labelled and identified for record keeping and shipped under manifest in the same manner as hazardous waste intended for treatment or disposal.[57]

Assessing the New Jersey regulation's impact on interstate commerce,[58] the court decided to apply the *Pike* balancing test.[59] Because all commerce was evenhandedly burdened, the court concluded that the state regulation did not incidentally burden interstate commerce.[60] Without an incidental burden on interstate commerce, an analysis of the "putative benefits" of the New Jersey regulation or a consideration of the alternatives was not necessary.[61]

Old Bridge Chemicals, Inc. continued to argue that the additional classification was facially inconsistent with the federal RCRA scheme and, therefore, disruptive.[62] The Third Circuit Court examined the "savings clause" in 42 U.S.C. § 6929 and determined that the EPA's RCRA standards were to be the minimum standards for hazardous waste management. "Thus, RCRA sets a floor, not a ceiling, for state regulation of hazardous wastes."[63] The court reasoned that because RCRA allows states to adopt more stringent standards, such a state regulation does not violate RCRA solely on grounds of mere inconsistency.[64]

In addition, further intent of uniformity with RCRA standards was found because New Jersey utilized the standard federal manifest designed by the EPA to identify the hazardous materials being transported. The federal manifest form specifically contained spaces for listing "state or other wastes."[65]

The analysis in *Old Bridge Chemicals* appears to give state governments a stronger position with respect to promulgating regulations that address a local interest in the management of hazardous waste. When the federal RCRA standards are considered a "floor rather than a ceiling" and the state regulation only creates a mere inconsistency with a federal purpose without thwarting a federal purpose, the state regulation appears to be defensible if it affects all commerce evenhandedly. The reasoning in *Old Bridge Chemicals* was recently applied in a Texas case where a state siting law applicable to cement kilns seeking permits to burn hazardous waste was found to be constitutional.[66] The federal district court determined that a state statute prohibiting

56. 40 C.F.R. § 261.2(e)(1)(ii) (1992).

57. *Old Bridge Chemicals*, 965 F.2d at 1295.

58. *Id.* at 1293. The court found there was no conflict with RCRA regulations from other states; New Jersey was not projecting its legislation into other states; no out-of-state companies were required to abandon commerce in other states; nor were other states required to alter their programs to conform with New Jersey's.

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

60. *Old Bridge Chemicals*, 965 F.2d at 1295.

61. *Id.*

62. *Id.* at 1296.

63. *Id.*

64. *Id.*

65. *Id.* at 1289-90.

66. LaFarge Corp. v. Campbell, 813 F. Supp. 501, 514 (W.D. Tex. 1993).

the burning of hazardous waste in a cement kiln within one-half mile of an established residence was not preempted by RCRA or the EPA's Boiler and Industrial Furnaces regulations.

V. *UNITED STATES V. COLORADO*

The court in *Colorado*[67] examined whether or not a federal facility must comply with a state's hazardous waste program that has been authorized by the EPA to regulate in lieu of RCRA.[68] Clearly a preemption issue, the conflict was which agency had authority to supervise corrective action and clean-up at the site.[69] Should it be the EPA under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[70] or the Colorado Department of Health (CDH) under RCRA?

A. Facts

In *Colorado* the Rocky Mountain Arsenal,[71] a U.S. Army facility, applied for a RCRA permit from the EPA in November 1980 for Basin F, a liquid hazardous waste disposal unit.[72] In May of 1984, the EPA gave the Army notice of deficiency in the permit application.[73] In October of 1984, the Army started a CERCLA remedial investigation/feasibility study, the first step in a CERCLA remedial action.[74] One month later the EPA authorized Colorado to implement RCRA through the Colorado Hazardous Waste Management Act (CHWMA).[75] This authorization followed EPA's goal of utilizing the states' resources to accomplish site clean-ups.[76] Also, in November of 1984, the Army resubmitted its RCRA permit application containing the uncorrected deficiencies to the CDH.[77]

Initially, in 1981, CERCLA authority with respect to Department of Defense facilities was granted to the Secretary of Defense rather than the EPA.[78] This authority was later revoked and given to the EPA.[79]

In May 1986, the CDH issued a final RCRA/CHWMA modified closure

67. United States v. Colorado, 990 F.2d 1565 (10th Cir. 1993).

68. RCRA, 42 U.S.C.S. § 6926(b) (Law. Co-op. Supp. 1993).

69. *Colorado*, 990 F.2d at 1565.

70. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980), as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C.S. §§ 9601-75 (Law. Co-op. 1989 & Supp. 1993) and 26 U.S.C.S. § 9507 (Law. Co-op. Supp. 1993)). [hereinafter CERCLA]. The purpose of CERCLA is to remediate past contamination from inactive facilities and sites.

71. "[O]ne of the worst hazardous waste pollution sites in the country . . . ." Daigle v. Shell Oil Co., 972 F.2d 1527, 1531 (10th Cir. 1992).

72. *Colorado*, 990 F.2d at 1571.

73. *Id.*

74. *Id.*

75. *Id.*

76. Carra, *supra* note 36. To achieve the corrective action Congress added to the RCRA responsibilities, the EPA actively recruited the states' administrative and oversight resources through their equivalent state RCRA programs.

77. *Colorado*, 990 F.2d at 1571.

78. Exec. Order No. 12,316, 3 C.F.R. 168 (1982).

79. Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

plan[80] for Basin F, which requested immediate implementation.[81] In June 1986, the Army announced it was taking CERCLA interim response action on Basin F.[82] When the Army indicated it would not implement the closure plan for Basin F, Colorado filed suit in state court to halt the Army's alleged violations of CHWMA and to enforce the closure plan. The case was removed to the U.S. District Court of Colorado.[83]

Several significant events occurred as the resulting suits tortuously made their way through the courts. The Army contracted with Shell Chemical Company to construct the storage tanks to hold the Basin F liquids. After the EPA, Army, Shell, and Colorado agreed on a Basin F interim response action in June 1987, Colorado did not file requested responses to the Army's plan.[84] In October 1987, the Army notified Colorado that it was withdrawing its RCRA/CHWMA permit application and intended to remediate Basin F pursuant to CERCLA.[85] Following more decision documents, the Army began clean-up after January 1988. Although the work was completed in December 1988, the millions of gallons of liquid wastes have not been incinerated as required in the Basin F interim response action.[86]

In July 1987, the EPA listed the Rocky Mountain Arsenal, *excluding* Basin F, on the CERCLA national priority list, "because the EPA believed that Basin F might be subject to RCRA Subtitle C corrective action authorities and thus might be appropriate for deferral."[87] In February 1989, the district court denied the Army's motion to dismiss Colorado's CHWMA enforcement action.[88] A month later the EPA placed Basin F on the CERCLA national priority list, indicating that Basin F should not have been excluded from the 1987 list because it had stopped receiving wastes prior to July 26, 1982.[89] In September 1989, under their RCRA/CHWMA authority and in compliance with the district court order, the CDH issued a final amended compliance order to the Army addressing clean-up measures and monitoring. The CDH also required that the Army not implement any closure or work plan until approved by the CDH.[90] The United States filed the declaratory action which led to the current appeal and the Tenth Circuit decision. Twenty-two states supported Colorado's appeal.[91]

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80. 40 C.F.R. § 264.228 (1992). The EPA requirements for closure of hazardous waste treatment, storage and disposal facilities include corrective action and clean-up of contamination caused by the functioning facility.

81. *Colorado*, 990 F.2d at 1571-72.

82. *Id.* at 1572.

83. Colorado v. United States Dep't. of the Army, 707 F. Supp. 1562, 1563, 1565 (D. Colo. 1989).

84. *Colorado*, 990 F.2d at 1572.

85. *Id.*

86. *Id.* at 1572 n.11.

87. *Id.* at 1573 n.14.

88. Colorado v. United States Dep't of the Army, 707 F. Supp. at 1569-70.

89. *Colorado*, 990 F.2d at 1573 n.14.

90. *Id.* at 1573.

91. *Id.* at 1565. The amici curiae were: Alaska, Arkansas, California, Connecticut, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Utah, and Wyoming.

B. Decision

The court upheld Colorado's authority under the CHWMA to enforce its hazardous waste management laws at a site undergoing a CERCLA response action.[92] The court reasoned that since the arsenal was subject to regulation under RCRA,[93] it came under the enforcement powers of Colorado under CHWMA. This is because any action taken by Colorado would have the same effect as action taken by the EPA.[94]

To address the CHWMA relationship to the Army's CERCLA claim, the CERCLA "savings provision" states, "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."[95] A "person" as defined by CERCLA includes the United States government.[96] Furthermore, CERCLA states that, in relationship to other law, "[n]othing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such state."[97]

Consequently, the court found that the CDH's compliance order, including the provision requiring the CDH's approval of the Basin F closure plan prior to implementation, was not a challenge to the CERCLA action.[98] Colorado did not ask to halt the CERCLA interim response action; rather, it sought the Army's compliance with CHWMA during the course of the action.[99] Therefore, the court held that Colorado's RCRA authority was not preempted.

A basis for the court's decision in justifying Colorado's interest was a quote from the U.S. District Court of Colorado's opinion that pointed out a possible conflict of interest within the federal government.[100] The district court noted, the Army, as a responsible party, has an "obvious financial interest . . . to spend as little money and effort as possible on the cleanup."[101]

The result of this ruling is that Colorado's CHWMA/RCRA authority over closure of a hazardous waste facility operated by the federal government will be additive to the CERCLA clean-up response required by the EPA. The Court of Appeals for the Tenth Circuit, in delineating RCRA authority for Colorado in this case, clearly expects federal/state cooperation in the management of hazardous waste.

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92. *Id.* at 1575.
93. 42 U.S.C.S. § 6961(a) (Law. Co-op. Supp. 1993).
94. 42 U.S.C. § 6926(d) (1988).
95. 42 U.S.C. § 9652(d) (1988).
96. 42 U.S.C. § 9601(21) (1988).
97. 42 U.S.C. § 9614(a) (1988).
98. United States v. Colorado, 990 F.2d 1565, 1576 (10th Cir. 1993).
99. *Id.*
100. *Id.* at 1573 n.13.
101. Colorado v. United States Dep't. of the Army, 707 F. Supp. 1562, 1570 (D. Colo. 1989).

VI. CONCLUSION

In practice, since the enactment of RCRA in 1976, state hazardous waste management programs have only been allowed to act as surrogates for the federal program. Congress recognized the need to utilize state police powers in tandem with federal standards to have the ability to enforce the provisions of hazardous waste management programs and limit the damages caused by indiscriminate waste handling and disposal. States' regional and local interests were subsumed in deference to federal interests. Thus, the federal/state partnership envisioned by Congress had a rough beginning. After more than fifteen years, it is apparent that federal standards and law alone have not had the capacity to smooth out specific regional problems. This discrepancy has begun receiving recognition in various courts. The power for states to implement stronger region-specific hazardous waste management programs already existed in the RCRA "savings clause"[102] created by the HSWA act of 1984. Three cases since 1992 may be an indication of a trend to guide states into creating regulations that address their regional interests.

Hunt struck down an Alabama law imposing deferential fees on interstate waste as a per se violation of the Commerce Clause. In an oblique reference to the "savings clause," the *Hunt* Court pointed out that a state could regulate to address concerns that touch environmental conservation and the health and safety of its citizens. Thus, so long as the resulting statute was not based on point of origin of the waste, it remained within the state's power to monitor and regulate more closely the transportation and disposal of all hazardous waste within its borders.

Old Bridge Chemicals, a Third Circuit decision, upheld a New Jersey law requiring hazardous waste designated for recycling to be labelled hazardous waste according to the EPA's characteristic waste code. This designation is not required by the federal RCRA regulations. The Third Circuit firmly declared that "RCRA sets a floor, not a ceiling, for state regulation of hazardous wastes."[103] Because the New Jersey law was evenhanded, the court found that it did not violate the Commerce Clause. The court determined that, because the state law varied from RCRA only by being more stringent, it was merely inconsistent and not a threat to uniformity in an area of federal importance. Therefore, a heightened scrutiny review was determined to be unnecessary. Thus, it appears that if a state statute is more stringent than RCRA statutes, affects all commerce evenhandedly, and does not threaten an area of federal importance, then the state statute could be allowed to stand.

In *Colorado*, the Tenth Circuit allowed a state corrective action and closure authorized by RCRA to be implemented in addition to an EPA-conducted CERCLA response action at a federal defense facility. One government's program did not preempt the other, and they would be expected to cooperatively administer the clean-up. The court acknowledged a conflict of interest concerning expense over thoroughness, when one federal agency

102. RCRA, 42 U.S.C.S. § 6929 (Law. Co-op. Supp. 1993).

103. Old Bridge Chemicals, Inc. v. New Jersey Dep't. of Envtl. Protection, 965 F.2d 1287, 1296 (3d Cir. 1992).

had sole oversight over the clean-up activities of another federal agency. There was also an awareness that state resources could augment the EPA's resources in implementation. The CERCLA response should comply with the purposes of both the state and the EPA.

The federal cases discussed in this note have recognized the continuing concern of states in addressing local hazardous waste management interests and the inability of generalized federal EPA standards to correct that concern. By emphasizing RCRA's "savings clause" and finding state RCRA and EPA CERCLA programs as applied to federal facilities additive rather than conflicting, the federal courts appear to be guiding the maturing RCRA program toward a realistic "cooperative federalism."

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