

MINUTES

**MONTANA HOUSE OF REPRESENTATIVES
52nd LEGISLATURE - 2nd SPECIAL SESSION**

COMMITTEE ON NATURAL RESOURCES

Call to Order: By BOB RANEY, CHAIRMAN, on July 14, 1992, at 1:00 P.M.

ROLL CALL

Members Present:

Bob Raney, Chairman (D)
Mark O'Keefe, Vice-Chairman (D)
Beverly Barnhart (D)
Vivian Brooke (D)
Ben Cohen (D)
Ed Dolezal (D)
Orval Ellison (R)
Russell Fagg (R)
Mike Foster (R)
Bob Gilbert (R)
David Hoffman (R)
Dick Knox (R)
Bruce Measure (D)
Tom Nelson (R)
Bob Ream (D)
Jim Southworth (D)
Howard Toole (D)
Dave Wanzenried (D)

Members Excused: None

Members Absent: None

Staff Present: Michael S. Kakuk, Environmental Quality Council
Theda Rossberg, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion: CHAIRMAN RANEY, announced the time on this hearing would be limited to one hour. Testimony has to be limited to 20 minutes for proponents and opponents, so that the sponsors can open and close because the members of this committee are also on other committees.

He said, we will open the hearing on both HB 58 and HB 59 at the same time so your comments can be addressed to both bills.

He said, this committee will take executive action

immediately following the hearings in order for these to go through the process.

HEARING ON HB 58 & HB 59

Presentation and Opening Statement by Sponsor:

REP. MADISON said, I represent House District 75 which includes the Montana City area where the Ashgrove Cement plant is located. HB 58 and HB 59 proposed to put a moratorium on the burning and importing of hazardous waste until October 1, 1993. The plan to create a moratorium was not a grand plan of some environmentalist but a grass-roots effort sparked by the fear of my constituents in Northern Jefferson County. I have included the cement plant at Trident and also the proposal in White Sulphur Springs to burn medical waste in the moratorium.

He said what I hope to accomplish is to buy some time because what we should have done during the '91 regular session was to pass a very strict siting act with high standards as to where hazardous or medical waste should be burned, how emissions are to be monitored and how remaining ash is to be handled and stored. The law should also contain provisions for the transportation of such waste.

He said if the moratorium is passed by both houses and signed by the governor and yet the executive branch sits on its hands and does nothing until the 93 Legislature meets? It is my sincere hope that for the safety and well-being of the citizens of this state and especially our children that the executive branch would proceed with a sense of urgency to prepare legislation for submission to the 1993 Legislature on this subject.

He said we have to decide whether or not this proposed legislation is unconstitutional because one of the bills would unduly interfere with interstate commerce. I do believe that the bill is unconstitutional. From my limited information, I understand that Montana is a participant in CAP which is Capacity Assurance Program which includes a loose grouping of 17 western states. The question is, will our sister states throw Montana out of CAP if we have the moratorium?

The situation would be different if Montana was currently importing and burning hazardous waste. A moratorium would only continue what we are currently doing. I believe that our sister states will continue to work with us to develop a solution to our mutual problems.

There is a possibility of the federal government withholding EPA funds if we pass a moratorium. I am not sure that will not happen. I can only hope that the folks in Washington D.C. are reasonable and the long-term objective of this land is make a

safe and healthy place to live. I sincerely believe that the state of Montana desperately needs a strict siting act to control where and in what form substances can be burned in this state. Let's request the 1993 Legislature to develop a siting act and give the Department of Health the time to write and adopt regulations.

There are some amendments we will submit to both of these bills.
EXHIBIT 1.

REP. FOSTER spoke in support of the moratorium. He said he will be addressing the Ringling situation with the medical waste burning proposal.

There is something wrong with the permitting system when the general public becomes aware of a major proposal so important and the potential impact. It was only a month ago that the public became knowledgeable of this proposal. The permitting process has been going on for 2 years. In 1990 the Air Quality permit was granted and in '91 another permit was granted. All legal requirements were met, but I think it is important to pursue the public interest. I believe there is definitely something wrong with this system and we need time to make the necessary adjustments to allow the Legislature and the Department of Health to work on this. We all recognize that medical waste is a problem in this state.

In conclusion, I ask your approval of the moratorium.

Proponents' Testimony:

Allen. S. Lefohn, PHD from Clancy, Montana, said the purpose of his testimony is to support the moratorium for the burning of hazardous waste. He passed around a map he received in Kansas City when he attended a meeting two weeks ago at an Air and Waste Management Association Trade meeting. At that meeting he was informed by the representative of the company that Montana was a targeted area for the Chem-Fuel hazardous waste process. He questioned if it was really proposed and he was told no, it was a done deal. See **EXHIBIT 2** for map and testimony.

Dave Anderson, Jefferson County Commissioner residing at Boulder, Montana and representing northern Jefferson County, said, he was here to speak in support of HB 58 and HB 59. **EXHIBIT 3.**

He said he would like to present some philosophical things to think about. In opposition to these bills you will be accused of numerous things that will include remarks such as, this moratorium is a waste of time and money, this legislation is superfluous and unnecessary and will have no net effect on anybody and it is political grand-standing, the issue is a non-issue and is harassing and discriminating legislation. That is what is being said in the hallways. It concerns me because I wonder if all of these statements are true.

He said, this is an issue all over the state, not just Jefferson County, Ringling and Bozeman. One of the reasons for the great amount of money and high-powered lobbying being done here has to do with the tremendous amount of corporate profit that stands to be made by companies if they become licensed. It is my feeling they are not doing it as a favor to anyone else. It is my understanding that the corporate profit of the plant in Nebraska generates somewhere between \$5 to \$6 per bucket that goes into the kiln and 20 to 30 buckets per minute, 24 hours a day and 365 days a year.

In closing, I urge your support of HB 58 and HB 59.

CHAIRMAN RANEY asked the spectators who will be giving testimony to try not to be repetitious and that way the committee can pick up new information from these people.

Martha Collins a member of **Montana Against Toxic Burning** which is a Gallatin County based group said, I represent the 3,000 petitioners requesting a moratorium on hazard waste burning. We collected these signatures in less than a 2 month period.
EXHIBIT 4.

She said, we are concerned about transporting hazard waste on our county roads. Particularly in the Three Forks area where the ground water comes right up to the surface. We are also concerned about the hazardous waste from the cement kiln. We feel the regulations from the federal government are grossly inadequate. There are two different regulations for burning hazardous waste which doesn't make sense. We strongly feel we should be adopting rules and regulations that are more strict. The regulations the Department of Health has adopted regulating landfills, should not be allowed.

The proximity of both these plants located near homes, schools, major water supplies and hospitals are also a major concern.

She said, we ask you to pass the moratorium on HB 58 and HB 59. We need to look carefully at what is happening nationwide. We need to adopt responsible policies for hazardous waste treatment and disposal. If we move toward incineration, then we need to look at it at a statewide level or regionally. Because of this, a siting law is important at this time. We must look at least 50 years down the road and visualize the products of today's actions.

Elizabeth Bruer from Ringling Montana said, the lady who gave testimony before me, (**Martha Collins**) voiced my concerns perfectly. We must consider the impact what any waste incinerator would have on our water, livestock, wildlife, etc. before we act on this. I urge your support of HB 58 and HB 59.

Ann Johnson from the Gallatin valley in Bozeman and representing the Gallatin County Physicians said, I have a petition signed by

58 of 60 physicians in the Bozeman area who are opposed to hazardous burning at Trident. See **EXHIBIT 5**.

Emergency Room Physician at St. Peters Hospital in Helena and a resident of Montana City said, he spent the last 3 months reviewing information from the Montana Environmental Information Center as well as Ashgrove Cement Company. My concern is the heavy metals that will be released and what the effect will be on the children of Montana. From a medical standpoint on hazardous burning, I support HB 58 and HB 59 until further study has been done.

Rachael Sirs from Clancy, Montana said, my husband and 4 children live in the Montana City area and we are concerned because of potential health hazards from the burning of toxic waste. I have some letters and a petition with approximately 200 names supporting HB 58 and HB 59. **EXHIBIT 6**.

(PLEASE NOTE: due to the time factor, the committee was unable to hear all of the proponents testimonies, their names and addresses are listed below)

Jim Hoyne, M.D., Saddle Mountain, Clancy, Montana. **EXHIBIT 7**.

Paul A. Smietanka, Blue Sky Heights, Clancy, Montana. **EXHIBIT 8**.

M.A. Welbank, Blue Sky Heights, Clancy, Montana. **EXHIBIT 9**.

Redge Meierhenry, Clancy, Montana. **EXHIBIT 10**.

Margaret Stuart, Clancy, Montana. **EXHIBIT 11**.

Dan and Denise Nottingham, Jefferson Hills, Clancy, Montana. **EXHIBIT 12**.

Dan and Margaret Pittman Saddle Mountain, Clancy, Montana. **EXHIBIT 13**.

Karen L. Semple, Clancy, Montana **EXHIBIT 14**.

Marlyn Grossberg Atkins, Clancy, Montana. **EXHIBIT 15**.

Gordon Tallent, Clancy, Montana. **EXHIBIT 16**

Jackie Forba, Clancy, Montana. **EXHIBIT 17**.

Edwin L. Hall, Montana City, Clancy, Montana. **EXHIBIT 18**.

Charles H. Atkins, Clancy, Montana. **EXHIBIT 19**

Rancie C. Keep, Helena, Montana. **EXHIBIT 20**.

Jean Ward, Helena, Montana. **EXHIBIT 21**.

Kathy Sherwood, Helena, Montana. **EXHIBIT 22**.

Mark Albee, John G. Mine, Helena, Montana. EXHIBIT 23.

Penny Koke, East Helena, Montana. EXHIBIT 24.

Sue Keep, Helena, Montana. EXHIBIT 25.

Douglas R. Elson, M.D., Bozeman, Montana. EXHIBIT 26.

Samuel J. Rogers, Montana State University, Bozeman, Montana.
EXHIBIT 27.

John Hanewald, White Sulphur Springs, Montana. EXHIBIT 28.

Phil White Hawk, Ringling, Montana. EXHIBIT 29.

Connie Bellet, Ringling, Montana. EXHIBIT 30.

Roger E. Carey, Helena, Montana, prepared a document on "How To Keep A Moratorium From Being Declared Unconstitutional". EXHIBIT 31.

Becky Johnston, White Sulphur Springs, Montana. EXHIBIT 32.

Walter Foster, Park City, Montana. EXHIBIT 33.

Greg & Dawn Field, Townsend, Montana. EXHIBIT 34.

Lester & Patricia Field, Townsend, Montana. EXHIBIT 35.

Opponents' Testimony:

Ron Drake, Professional Chemical Engineer, Helena, Montana, said, "...I am appalled that this Legislature continues to dodge or postpone every major and important issue which comes before it. Bans and moratoriums will not solve the very real problems associated with disposal of wastes..." EXHIBIT 36.

Tom Daubert, Environmental & Public Relations Consulting firm, Helena, Montana, said, one of my clients is Ashgrove Cement Company. Many of you have been misled involving this complicated issue. I applaud everyone who has come here today to get involved in the process.

He said, he believes a lot of folks are acting upon fear and misinformation. I also applaud the Legislature that it will take a closer look at the issues in 90 days.

The permitting process that Ashgrove will be subject to does not yet exist. It will not exist until the work the state Health Department has been conducting is completed this fall. The permit review process is about the most technical, comprehensive and exhaustive permit process that exists in this country. The Health Department and Ashgrove Cement Company agree that the process will probably take at least 3 years and possibly 5 years

to complete.

He said, the reason he opposes this legislation on behalf of Ashgrove Cement Company is not because I don't want you to have the chance to consider this subject matter indepth, it's because I fear that a moratorium such as this will further delay the process that the Health Department has been doing, learning more about this technology, what kinds of rules it would recommend and more about the questions you may have next January during the full session.

I fear if you pass this legislation, next January the Health Department will not be able to advise you any better than it can today. In many instances the Health Department would not be able to answer many of your questions at that time. **EXHIBIT 37.**

Tim Smith, President, Boilermakers Local D-435, East Helena, Montana, said, as an employee of Ashgrove Cement Company, I oppose HB 58 and HB 59. **EXHIBIT 38.**

Dick Johnson, Northern Jefferson County, said, I am also employed by Ashgrove Cement Company. I am irritated with what has been going on in our state. It started with environmental groups, which said "take this out of the hands of the technical people and put in into the hands of the politicians". That is exactly what has happened. Most of the Legislatures have a good strong science background and understand the issues quite well.

With all the incineration of hazardous waste, medical waste, etc. all you have done is say, "this is scary, let's back away from it and not address the issue." I plead with you to put this issue back into the hands of the people with the Department of Health and let them judge each issue to see of it can be done safely.

He said we don't need lawyers, rich people and legislatures making technical decisions. These decisions affect our employment and our future; we cannot let people who do not work in this state dictate how we are going to run our state.

Dan Peterson, Plant Manager, Ashgrove Cement Company, said this is an extremely important issue. We do compete with some cement plants that burn hazardous waste, but this cement plan has been in operation for 30 years. The Ashgrove Cement Company operates 8 cement plants and 3 of those burn hazardous waste. In Arkansas, they have developed a procedure to burn hazardous waste safely.

He said there are 27 plants in the United States that are burning hazardous waste in their kilns. South of Dallas, Texas there are 3 cement plants of which, 2 burn hazardous waste. They have 2.25 million tons annual capacity which they burn in 7 kilns. We only have one kiln and produce 300,000 tons. The Texas Air Quality Control Bureau has said the emissions are safe and meet all acceptable limits.

We already burn alternative fuel, we used to burn gas and coal, but they were too expensive. We are now burning heavy oil from the Cenex Refinery in Laurel. Basically, what we are trying to do is change our fuel source again so we can stay in business. Hazardous waste is growing immensely and we feel we can destroy that waste and utilize the energy.

He said there is a procedure in place where the Department of Health and Environmental Sciences have the expertise to deal with this. We would like to see if that would work first. **EXHIBIT 39.**

Sherry Doig, Representing Western Recovery, Ringling, Montana, said, the Legislature has worked very hard, but the system we are proposing exceeds your requirements. I am wondering how you will deal with all of the hospitals in Montana that are out of compliance with federal statutes in April, 1993? I urge each of you to spend an equal amount of time in obtaining a solution to the medical waste problem. **EXHIBIT 40.**

Joe Scheeler, Environmental Safety Manager, Ashgrove Cement Company said, Ashgrove Cement Company has gone to great lengths to keep the community informed regarding the burning of hazardous waste, with picnics, newsletter, etc. There is an extremely rigorous document that goes into every detail regarding this project.

Our concern with these proposed bills is, the state of Montana is currently developing rules to guide this activity. The delay of 14 months will put us 14 months behind. We ask you to oppose this legislation and we ask the Health Department to continue the rule-making activities and evaluate our application when received on the scientific intent and merit. **EXHIBIT 41.**

George M. Schiller, East Helena, Montana. **EXHIBIT 42.**

CHAIRMAN RANEY said, further opponents may sign the "Sign-In" sheets at the door and they will be recorded into the record.

No Position:

Jerome Anderson, Attorney, Representing the Cement Company at Trident, Montana, said, he was here to testify for **William Springman** who was unable to be here due to a death in the family. **EXHIBITS 43, 44.**

Support Amendments:

David Nation, Butte, Montana. **EXHIBIT 45.**

Wayne Klinkel, Clancy, Montana. **EXHIBIT 46.**

Montana Against Toxic Burning, submitted the Assessment of the Boiler and Industrial Furnace Rules. **EXHIBIT 47.**

REP. HOFFMAN asked Steve Pilcher, Department of Health, how many permits have you given under Section 75-2-215 MCA? Mr. Pilcher said he would have to ask the staff as he did not have the numbers.

REP. HOFFMAN asked, do you still have rules to adopt under Section 75-2-215 MCA? Mr. Pilcher said yes.

REP. HOFFMAN asked how long will it be before those are adopted? Mr. Pilcher said we received about 700 comments and are sorting through those, trying to develop rules that will provide adequate protection to public health and the environment.

REP. HOFFMAN asked, if these two bills pass, would you continue to accept applications and continue with the rule-making process? Mr. Pilcher said, It was his opinion that they would proceed with the promulgation of those rules. He thought they have an obligation to carry out those obligations and proceed with the applications after the rules have been adopted.

{PLEASE NOTE: the tape recorder did not work beyond this point}

REP. COBB said if we do this, we as the Legislature may have some problems. We want this to continue. What is the Statement of Intent as to the objectives for the permit review process between now and the next legislative session?

REP. BROOKE said they had a hearing on the burning of hazardous waste and it was her understanding that it was the Department of Health that wanted the moratorium on this.

REP. GILBERT said, Ashgrove Cement Company has been there since 1962. Now do you think we can move Ashgrove Cement Company or require the statute to protect the environment.

Closing by Sponsor:

REP. MADISON said, "I want to thank everyone for coming to this meeting as it is important to hear both sides". He said, it was his intent to exempt the transportation of hazardous waste in and out of the state.

REP. O'KEEFE said, he supported these bills but he did not understand what the objectives are. If we pass them it will slow down the permit system. I am not sure if we need to put together a statement of intent.

REP. MEASURE said, Section 75-2-215 MCA needs a two-thirds vote for a statement of intent.

CHAIRMAN RANEY said, we could amend it now or wait until it goes to the floor of the house with proponents and opponents. He asked REP. FOSTER to work with the Montana City people and advise this committee of your action before we take this up on the floor and

also work with REP. MADISON since this is his bill.

EXECUTIVE ACTION ON HB 58

Motion: REP. FOSTER moved DO PASS on HB 58.

Discussion:

REP. GILBERT said, he would support this bill but could see no reason for it. If the permit process is inappropriate it would no longer be in effect.

Amended Motion/Vote: CHAIRMAN RANEY moved DO PASS AS AMENDED. Motion PASSED UNANIMOUSLY.

EXECUTIVE ACTION ON HB 59

Motion/Vote: REP. FOSTER moved HB 59 DO PASS. Motion PASSED by 14-4 Roll Call Vote.

REP. GILBERT said if we all know this bill is unconstitutional we don't need this law. I agreed to extend the moratorium if the goal is achieved, but I am concerned about another unconstitutional statute on the books.

ADJOURNMENT

Adjournment: 2:20 P.M.

Bob Rane

BOB RANEY, Chair

Theda Rossberg

THEDA ROSSBERG, Secretary

BR/TR

HOUSE OF REPRESENTATIVES
NATURAL RESOURCES COMMITTEE

ROLL CALL ~~VOTE~~

DATE 7/4/92 BILL NO. _____ NUMBER _____

MOTION: _____

Present Absent

NAME	AYE	NO
REP. MARK O'KEEFE, VICE-CHAIRMAN	/	
REP. BOB GILBERT	/	
REP. BEN COHEN	/	
REP. ORVAL ELLISON	/	
REP. BOB REAM	/	
REP. TOM NELSON	/	
REP. VIVIAN BROOKE	/	
REP. BEVERLY BARNHART	/	
REP. ED DOLEZAL	/	
REP. RUSSELL FAGG	/	
REP. MIKE FOSTER	/	
REP. DAVID HOFFMAN	/	
REP. DICK KNOX	/	
REP. BRUCE MEASURE	/	
REP. JIM SOUTHWORTH	/	
REP. HOWARD TOOLE	/	
REP. DAVE WANZENRIED	/	
REP. BOB RANEY, CHAIRMAN	/	
TOTAL		

HOUSE STANDING COMMITTEE REPORT

July 15, 1992

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report that HB 58 (first reading copy -- white) do pass as amended .

Signed: Bob Raney
Bob Raney, Chairman

And, that such amendments read:

1. Title, line 6.

Strike: "A PERMIT"

Insert: "CERTAIN PERMITS"

2. Page 2, line 2.

Following: "on"

Insert: "certain"

3. Page 2, line 3.

Following: "permits."

Strike: "Until"

Insert: "Except for remedial actions pursuant to Title 75, chapter 10, part 7, or corrective actions pursuant to 75-10-405(2) (c) or 75-10-416, until"

4. Page 2, line 4.

Following: "permit"

Strike: "under"

Insert: "to a solid or hazardous waste incinerator subject to the requirements of"

Following: "75-2-215"

Strike: "for a solid or hazardous waste incinerator"

5. Page 2, line 7.

Following: "permits."

Strike: "Until"

Insert: "Except for remedial actions pursuant to Title 75, chapter 10, part 7, or corrective actions pursuant to 75-10-405(2) (c) or 75-10-416, until"

6. Page 2, lines 9 and 10.

Following: "the" on line 9

Strike: "applicant also requires a permit under"

Insert: "facility is also subject to the requirements of"

Following: "75-2-215" on line 10

Strike: "for the same facility"

2/15/92

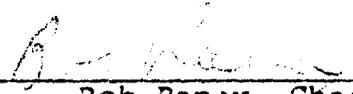
HOUSE STANDING COMMITTEE REPORT

July 15, 1992

Page 1 of 1

Mr. Speaker: We, the committee on Natural Resources report
that HS 59 (first reading copy -- white) do pass .

Signed: _____



Bob Raney, Chairman

90751SC.HRT

Bob Ramey -

Vote me yes (do pass) on
HB 58 + 59, and with
you on any amendments.

Bob Ramey

HOUSE OF REPRESENTATIVES
NATURAL RESOURCES COMMITTEE

ROLL CALL VOTE

DATE 7/14/92 BILL NO. 59 NUMBER _____

MOTION: by Rep. Justin Do Pass
Against transparency of
Hazardous Waste

NAME	AYE	NO
REP. MARK O'KEEFE, VICE-CHAIRMAN	✓	
REP. BOB GILBERT		✓
REP. BEN COHEN	✓	
REP. ORVAL ELLISON	✓	
REP. BOB REAM	✓	
REP. TOM NELSON		✓
REP. VIVIAN BROOKE	✓	
REP. BEVERLY BARNHART	✓	
REP. ED DOLEZAL	✓	
REP. RUSSELL FAGG		✓
REP. MIKE FOSTER	✓	
REP. DAVID HOFFMAN	✓	
REP. DICK KNOX		✓
REP. BRUCE MEASURE	✓	
REP. JIM SOUTHWORTH	✓	
REP. HOWARD TOOLE	✓	
REP. DAVE WANZENRIED	✓	
REP. BOB RANEY, CHAIRMAN	✓	
TOTAL		

Passed 14-4

Amendments to House Bill No. 58
First Reading Copy

Requested by Rep. Madison
For the Committee on Natural Resources

Prepared by Michael S. Kakuk
July 14, 1992

1. Title, line 6.
Strike: "A PERMIT"
Insert: "CERTAIN PERMITS"
2. Page 2, line 2.
Following: "on"
Insert: "certain"
3. Page 2, line 3.
Following: "permits."
Strike: "Until"
Insert: "Except for remedial actions pursuant to Title 75,
chapter 10, part 7, or corrective actions pursuant to 75-10-
405(2)(c) or 75-10-416, until"
4. Page 2, line 4.
Following: "permit"
Strike: "under"
Insert: "to a solid or hazardous waste incinerator subject to the
requirements of"
Following: "75-2-215"
Strike: "for a solid or hazardous waste incinerator"
5. Page 2, line 7.
Following: "permits."
Strike: "Until"
Insert: "Except for remedial actions pursuant to Title 75,
chapter 10, part 7, or corrective actions pursuant to 75-10-
405(2)(c) or 75-10-416, until"
6. Page 2, lines 9 and 10.
Following: "the" on line 9
Strike: "applicant also requires a permit under"
Insert: "facility is also subject to the requirements of"
Following: "75-2-215" on line 10
Strike: "for the same facility"

Section 1. Moratorium on certain solid and hazardous waste permits. Except for remedial actions pursuant to Title 75, Chapter 10, Part 7, or corrective actions pursuant to 75-10-405(2)(c) or 75-10-416, until October 1, 1993, the department may not issue a permit to a solid or hazardous waste incinerator subject to the requirements of 75-2-215.

Section 2. Moratorium on certain solid waste facility permits. Except for remedial actions pursuant to Title 75, Chapter 10, Part 7, or corrective actions pursuant to 75-10-405(2)(c) or 75-10-416, until October 1, 1993, the department may not issue a license under 75-10-221 for a solid waste facility if the facility is also subject to the requirements of 75-2-215.

EXHIBIT 2
DATE 7/14/92
HB 58 & 59

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 4th day of July, 1992.

Name: Allen S. Lefohn

Address: PO Box 196

CLANCY MT 59634

Telephone Number: 443-3389 or 933-5390

Representing whom?

Self

Appearing on which proposal?

HB 58 & HB 59

Do you: Support? Amend? Oppose?

Comments:

Montana needs to assess whether or not
it wants hazardous waste & toxic wastes
as well as medical wastes imported and
burned in Montana. We need the time
for this assessment and the moratorium
gives us that chance.

EXHIBIT 2
Allen S. Lefohn, Ph. D. DATE 7/19/92
HB 58+59

TESTIMONY

1. AS AN ENVIRONMENTAL SCIENTIST, MUCH OF MY WORK IS ASSOCIATED WITH ASSESSING THE POTENTIAL IMPACT OF HUMAN ACTIVITIES ON THE ENVIRONMENT. MANY TIMES WE HAVE TO ASSUME THE WORST CASE AND GUESS WHAT WILL HAPPEN.
2. JUST TO SAY MONTANA IS MEETING EPA GUIDELINES IS NO LONGER ADEQUATE.
3. PRESIDENT'S COMPETITIVE COUNCIL IS OVERRULING EPA.
4. DOES MONTANA WANT TO ACCEPT LARGE AMOUNTS OF HAZARDOUS WASTE AND MEDICAL WASTE MATERIALS FROM OUTSIDE ITS BORDERS? IF SO, WHAT PROTECTION TO HUMAN HEALTH AND ENVIRONMENTAL CONCERNS SHOULD WE HAVE?
5. WE NEED TIME TO CONCERN OURSELVES WITH HAZARDOUS WASTE, MEDICAL WASTE, AND ANY OTHER WASTES THAT EITHER MONTANA COMPANIES OR COMPANIES OUTSIDE OF MONTANA WANT TO SEND TO MONTANA.
6. THE STATE GOVERNMENT MUST OBTAIN ITS OWN DATA AND DRAW ITS OWN CONCLUSIONS.
7. BESIDES THE ENGINEERING REQUIREMENTS, IT IS IMPORTANT TO THINK ABOUT WORSE-CASE SCENARIOS. EVEN THE BEST-PLANNED ENGINEERING FACILITIES BREAK DOWN. SITING MUST BE AN IMPORTANT CRITERIA.
8. A SPECIAL COMMITTEE SHOULD BE ESTABLISHED THAT IS COMPOSED OF LEGISLATIVE, EXECUTIVE BRANCH PERSONNEL, AND CITIZENS WHO ARE KNOWLEDGEABLE OF THE SUBJECT.
9. THOSE OF US WHO HAVE RAISED OUR CHILDREN IN MONTANA HAVE A DUTY TO FUTURE GENERATIONS OF MONTANANS. WE NEED TO GUARANTEE THAT MONTANA REMAINS THE MONTANA AS WE KNOW IT TODAY.
10. WE NEED THE TIME TO DO THE RESEARCH AND CONSIDER WHAT THE COSTS AND BENEFITS ARE TO MONTANANS THAT ARE ASSOCIATED WITH BURNING HAZARDOUS, TOXIC WASTES AND MEDICAL WASTES. THIS IS NOT A SIMPLE PROBLEM THAT IS EASILY SOLVED WITH INSTANT REGULATIONS.
11. THE LEGISLATURE, THE EXECUTIVE BRANCH AND MONTANA'S CITIZENS MUST CAREFULLY EVALUATE THIS VERY IMPORTANT ISSUE. WE NEED THE TIME.

**HAZARDOUS WASTE PROCESSING
AND KILN RECYCLING NETWORK**

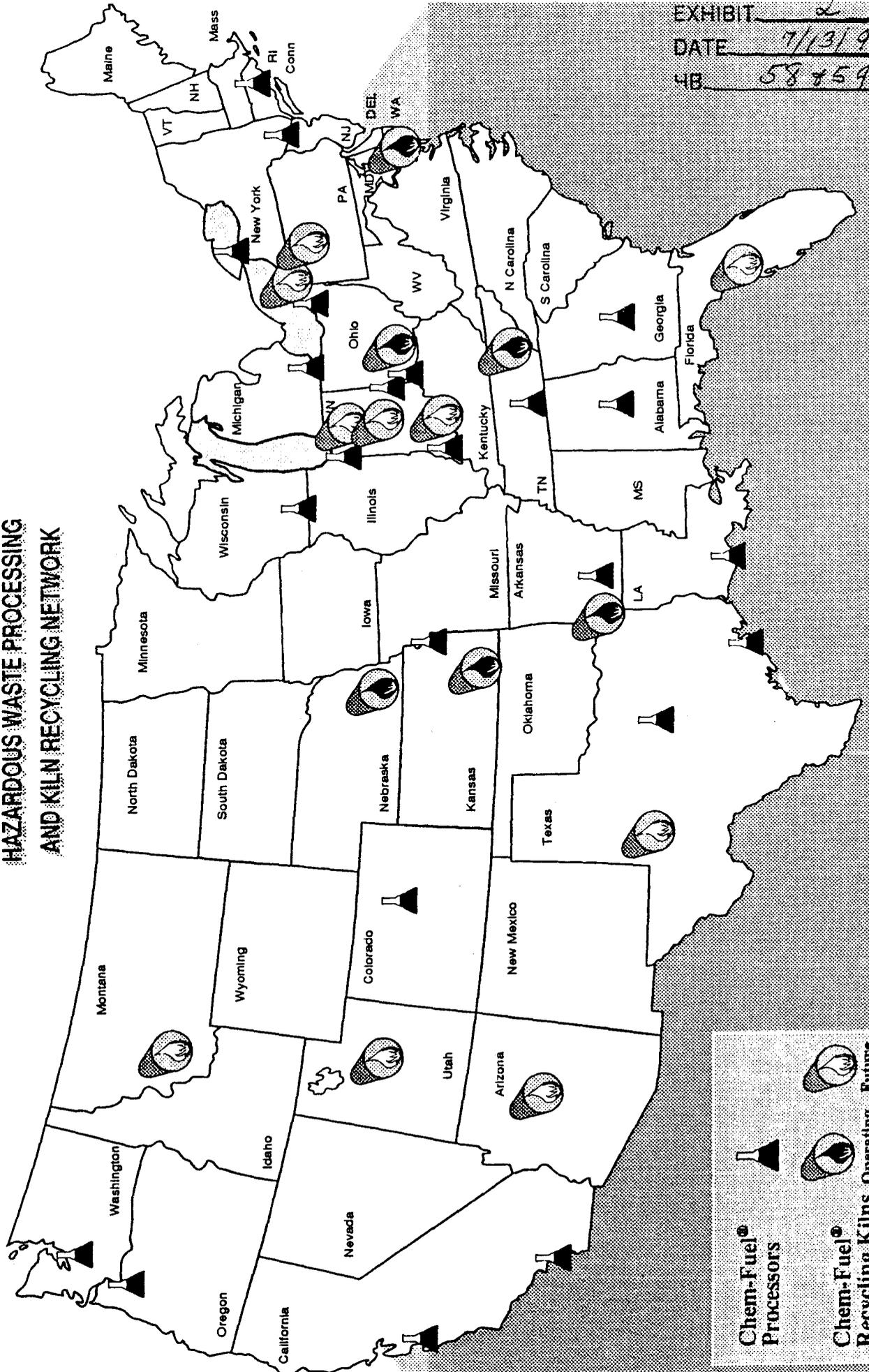


EXHIBIT 2
DATE 7/13/92
58859

**Chem-Fuel®
Processors** 

**Chem-Fuel®
Recycling Kilns Operating Future** 

EXHIBIT U
DATE 7/14/92
HB 58 & 59

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1991.

Name: DAVE ANDERSON

Address: Box H
Boulder MT 59632

Telephone Number: 225-4251

Representing whom?
Gefferson Co. Commissioner

Appearing on which proposal?
HB 58 & 59

Do you: Support? X Amend? Oppose?

Comments:

4
This petition is to prevent the construction of waste and disposal incinerators in Montana, until our legislature can act to protect the public health and environment.

WHEREAS: the burning of solid wastes does not destroy its toxic substances;

WHEREAS: the burning creates new substances like the highly toxic dioxins that were not in the waste to begin with;

WHEREAS: the burning results in the creation of toxic ash within which is concentrated heavy metals such as mercury, lead and cadmium;

WHEREAS: the disposal of these ashes continues our reliance on leaking land fills that leach into our groundwater;

WHEREAS: the burning of solid wastes destroys reusable resources such as paper, glass and metals, and competes with, and discourages recycling and composting;

WHEREAS: widespread and liability free facilities to burn solid and hazardous wastes encourages industry to maintain inefficient and dirty processes, and to continue to use deadly and unnecessary toxic chemicals...

WE THE UNDERSIGNED CITIZENS OF MEAGHER COUNTY DO ADVOCATE THE FOLLOWING LEGISLATION:

A complete moratorium of incinerator construction to be continued until state codes regarding transportation, facility location, and permitting process are modernized. The proposed new code should include the following provisions:

- A) Give local government final authority, protect the local economy and to reveal the company's compliance with environmental and other laws.
- B) The facility operator must demonstrate that there is no feasible or safer method of disposal, and that the facility will not significantly adversely affect public health of the environment including bio-accumulation in the food chain. An environmental impact statement is also required.
- C) Declares solid waste incinerator ash a hazardous waste, imposes strict ash management standards and prohibits use of ash for road paving or any other purpose.
- D) Prohibits the incineration of batteries, chlorinated plastics, consumer electronic components and other materials which generate toxic air emissions.
- E) Prohibits the improper location of incinerators or landfills in or near towns, sensitive food producing regions or wilderness areas.
- F) Promulgates siting and operational regulations for landfilling, incineration and transportation of wastes in order to preserve Montana's abundant natural beauty, human and wildlife habitat, and abundant agricultural productivity for future generations.
- G) Protects Montana's tourism and health by limiting disposal here of the hazardous medical waste of other states.

Exhibit 4 also contains 202 pages of petition signatures. The originals can be found at the Historical Society, 225 N. Roberts, Helena, MT. (406)444-4775.

EXHIBIT 5
DATE 7/14/92
HB 58 & 59

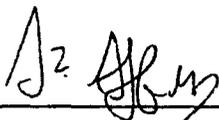
January 31, 1992

Mr. Dennis Iverson
Ms. Patti Powell
Department of Health and Environmental Sciences
Cogswell Building
Helena, MT 59620

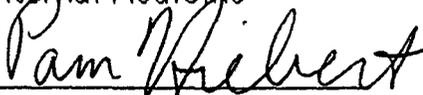
Dear Mr. Iverson and Ms. Powell:

We are writing to you to express our concern regarding the proposal to burn hazardous waste at the Trident Cement Plant in Three Forks, MT as well as our concerns about the BIF regulations surrounding cement plant incineration of hazardous wastes. As physicians in Gallatin county we oppose the plan to burn hazardous waste at the Trident plant because of significant health and environmental risks. We also feel that the federal regulations as outlined in BIF are too lenient and that Montana should adopt stricter regulations regarding the incineration of hazardous waste at cement kilns.

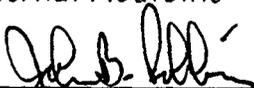
Sincerely,



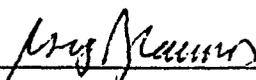
Steve Shaneyfelt M.D.
Internal Medicine



Pam Hiebert M.D.
Internal Medicine



John Robbins M.D.
Internal Medicine



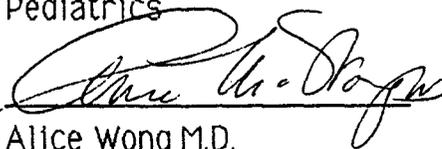
George Saari M.D.
Internal Medicine



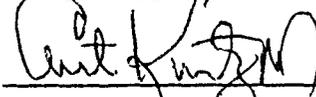
Peter O'Reilly M.D.
Anesthesia

By Phone

Paul Visscher M.D.
Pediatrics



Alice Wong M.D.
Obstetrics/Gyn



Curt Kurtz M.D.
Family Practice

D.C. Lehfeldt

D.C. Lehfeldt M.D.
Pathology

John Mathews

John Mathews M.D.
Orthopaedic Surgery

Dan Gannon

Dan Gannon M.D.
Orthopaedic Surgery

By PHONE

Frank Humberger

Frank Humberger M.D.
Orthopaedic Surgery

David King

David King M.D.
Family Practice

Doug Elson

Doug Elson M.D.
Emergency Medicine

Steve Gipe

Steve Gipe D.O.
Emergency Medicine

Charles Fritz

Charles Fritz M.D.
Emergency Medicine

John Cunningham

John Cunningham M.D.
Family Practice

Brian Rogers

Brian Rogers M.D.
Dermatology

Ralph Berry

Ralph Berry M.D.
MSU Student Health

Bob McKenzie

Bob McKenzie M.D.
MSU Student Health

By PHONE

Kerry Reif

Kerry Reif M.D.
MSU Student Health

Kathie Lang

Kathie Lang M.D.
MSU Student Health

Tom Goldsmith

Tom Goldsmith M.D.
MSU Student Health

By PHONE

Marjorie Foulkes

Marjorie Foulkes M.D.
MSU Student Health

Pat Holland

Pat Holland M.D.
Obstetrics/Gyn

Steve Ley

Steve Ley M.D.
Anesthesia

Dan Ireland

Dan Ireland M.D.
Obstetrics/Gyn

John Patterson

John Patterson M.D.
Family Practice

Dennis Rich

Dennis Rich M.D.
Radiology

Jay Jutzy

Jay Jutzy M.D.
Radiology

Dean Center

Dean Center M.D.
Family Practice

Dell Fuller

Dell Fuller M.D.
Family Practice

Ladd Rutherford

Ladd Rutherford M.D.
Hand Surgery

Ken Conger

Ken Conger M.D.
Family Practice

Annie Castillo

Annie Castillo M.D.
Internal Medicine

Lowell Anderson

Lowell Anderson M.D.
Orthopaedic Surgery

Dave Abrams

Dave Abrams M.D.
Ophthalmology

Ken Lane

Ken Lane M.D.
Anesthesia

Jim Feist

Jim Feist M.D.
Pediatrics

Eric Livers

Eric Livers M.D.
Pediatrics

Julie Courtner ^{M.D.} _{BY PHONE}

Julie Courtner M.D.
Pediatrics

Bob Flaherty

Bob Flaherty M.D.
Family Practice

Bill Peters

Bill Peters M.D.
Obstetrics/Gyn

BY PHONE

Bill Newsome M.D.
Internal Medicine

Tim Adams

Tim Adams M.D.
Internal Medicine

Gabor Benda

Gabor Benda M.D.
Family Practice

Fred Bahason

Fred Bahason M.D.
Otolaryngology

Verner Albertson

Verner Albertson M.D.
Radiology

DATE 7/13/92

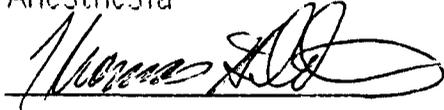
HB 58 & 59

By PHONE

Ed Allen M.D.
Family Practice



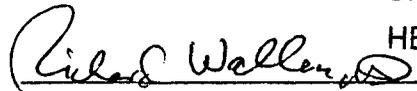
Larry Thayer M.D.
Anesthesia



Tom Hildner M.D.
Family Practice



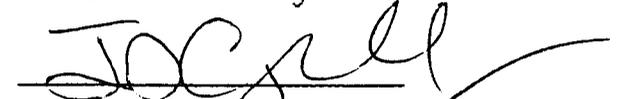
Dave Stewert M.D.
MSU Student Health



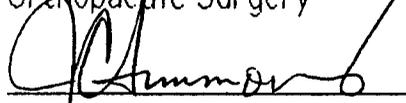
Rich Wallace M.D.
Radiology



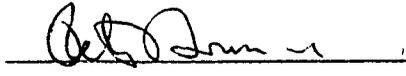
Phil Cory M.D.
Anesthesia/Pain Mgt.



John Campbell M.D.
Orthopaedic Surgery



Jim Simmons M.D.
Anesthesia



Peter Townes M.D.
Obstetrics/Gyn

- cc: Rep. Joe Barnett
- Rep. Beverly Barnhart
- Sen. Don Bianchi
- Rep. Dorothy Bradley
- Sen. Dorothy Eck
- Rep. Sam Hoffman
- Rep. Bob Raney
- Sen. Jack Rea
- Rep. Wilbur Spring
- Rep. Norm Wallin

EXHIBIT 6
DATE 7/14/92
HB 58+59

HOUSE OF REPRESENTATIVES
WITNESS STATEMENT

PLEASE PRINT

NAME RACHAEL SIRS BILL NO. 58/59

ADDRESS BOX 928 MCR CLANCY DATE 7-14-92
MT 59634

WHOM DO YOU REPRESENT? MY HUSBAND, SELF, & FOUR KIDS

SUPPORT OPPOSE _____ AMEND _____

COMMENTS: SUPPORT MONITORING TO GIVE
93 LEGISLATURE TIME TO POSSIBLY
COME UP WITH STRICTER GUIDELINES
INCLUDING SITING. I'M CONCERNED
ABOUT EMISSIONS.

Erik & Rachael S. SHIL
Box 938 MCR.
Clancy, MT
59634

EXHIBIT 6

DATE 7/19/92

HB 58 & 59

GOOD AFTERNOON, MY NAME IS RACHAEL

RAUE SIRS. MY HUSBAND, I, AND OUR FOUR

CHILDREN LIVE IN SADDLE MOUNTAIN ESTATES

IN THE MONTANA CMT AREA. CURRENTLY

I'M JUST A FULL TIME MOM. EN DEGREE

AND PRIOR PROFESSION I'M A PETROLEUM

ENGINEER WHO HAD TO DEAL WITH DISPOSING

HAZARDOUS WASTE ON A DAILY BASIS SO WHEN

PLANS WERE ORIGINALLY ANNOUNCED TO BURN

HW IN MONTANA I WAS OPTIMISTIC. THEN

I STARTED READING. I FOUND OUT THAT

NO ONE - NOT THE CEMENT COMPANIES,

THE DUES, THE EPA, OR ANY EXPERT

CAN TELL US EXACTLY WHAT IS

EMITTED WHEN A CEMENT KILN BURNS

HW, HW "FUELS", ~~AS THE CEMENT COMPANY~~

~~CALL THEM~~, ARE MADE UP OF A VARIETY

EXHIBIT 6

DATE 7/14/92

HB 58 & 59

OF CHEMICALS. WHEN ALL THESE

DIFFERENT CHEMICALS ARE BURNED THEY

ARE COMBINING AND RECOMBINING, AND WE

CAN'T KEEP TRACK OF ALL THE COMBINATIONS,

WE DO KNOW THAT URBAN WASTE BLENDED

FUELS ARE BURNED, PORTIONS ARE EMITTED

IN THEIR ORIGINAL FORMS AND SOME

RE COMBINE TO FORM NEW TOXIC COMPOUNDS

SOME EVEN MORE TOXIC THAN THEIR PARENT

COMPOUNDS, CALLED PICS, OR PARTICLES OF

INCOMPLETE COMBUSTION. SOME OF THE

MOST DANGEROUS PICS ARE DIOXINS AND

FURANS. NOT MANY OF THE PICS HAVE

EVEN BEEN IDENTIFIED YET. ALSO, HEAVY

METALS SUCH AS LEAD, ARSNIC, & MERCURY CAN

NOT BE DESTROYED OR DETACHED BY

EXHIBIT 6

DATE 7/14/92

HB 58459

~~OF DETERMINATION~~ BY FIRE SO THEY ARE
ONLY REDISTRIBUTED THROUGH AIR EMISSIONS,
FLY ASH DUST, AND CONCRETE PRODUCTS...
SO WE HAVE CEMENT KILNS BURNING
MIXTURES OF A HUNDRED OF CHEMICALS
MANY OF WHICH ARE NOT WELL KNOWN,
AND COMBINATIONS OF WHICH ARE NOT
WELL UNDERSTOOD. THAT'S WHY WE
DON'T KNOW EXACTLY WHAT'S COMING OUT
OF THE STACK, THIS IS WHY MY HUSBAND
AND I SUPPORT THE MORATORIUM. WE
FEEL IT WILL GIVE THE 93 LEGISLATURE
TIME TO DEAL WITH ALL OF THIS AND
PREVENT ANY "GRANDFATHERING IN" TO
HAPPEN. I'VE BEEN TOLD BY
MAY BE DIES, THEY WILL BE DONE
DON'T ADDRESS SIGNS
WITH THEIR RULES AT THE END OF

AUGUST AND THESE COMPANIES WILL
BE ABLE TO START THE PERMITTING

PROCESS [ALSO, AT THE BALCONY SENATE
HEARING ^{WHICH I ATTENDED} IN MARCH BOTH FERRIS COMPANIES

SAID THIS WOULD NOT CAUSE THEM TO
GO UNDER. IN A STUDY OF CEMENT ^{WHICH COMPARES}

SALES WITH GEOGRAPHY IT WAS FOUND
THAT ON THE AVERAGE 60% OF CEMENT

IS USED WITH IN 100 MILES, 23% WITH IN
100 MILES, AND ONLY 1% IS USED MORE

THAN 1500 MILES SINCE THE CLOSEST
CEMENT KILNS WHICH HAVE THE SO

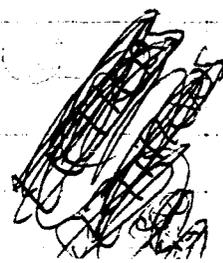
^{ECONOMIC} CALLED "ADVANTAGE" OF BREWING. HAZARDOUS

WASTE ARE IN SOUTHERN CALIFORNIA

AND EASTERN KANSAS, WE ARE NOT
COMPETING AGAINST THEM.

PLEASE SUPPORT HB 58459

ONLY EVEN



WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of JULY, 1991.

Name: Jim Hojne MD

Address: BOX 927 SADDLE MTN
PLANCY, VT

Telephone Number: 449 2562

Representing whom?
SELF

Appearing on which proposal?
HB 58, 59

Do you: Support? X Amend? Oppose?

Comments:

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of JULY, 1991.

Name: PAUL A. SMIETANKA

Address: 94 BLUE SKY HEIGHTS
CLANCY MT 59634

Telephone Number: 933-5789

Representing whom?

SELF

Appearing on which proposal?

HB 58, HB 59

Do you: Support? Amend? Oppose?

Comments:

INCENERATION OF HAZARDOUS WASTE IS NOT AN
APPROPRIATE ADEQ FOR IMPLEMENTATION BY A FOR-
PROFIT ENTERPRISE. WHEN THE FOR-PROFIT ENTERPRISES
HAVE DISSOLVED AND/OR LEFT, THE CITIZENS OF THIS STATE
AND THE LOCAL GOVERNMENTS WILL BE THERE TO REMEDY
THE AFTERMATH IF IT CAN BE REMOVED. WE SHOULD NOT
NOW ACT HASTILY WITH THE IMPORTATION & INCENERATION
OF WASTE AND SOLID WASTE FROM NOW ON. WE SHOULD NOT
MAKE WORSE THAN NEEDS. MONTANA SHOULD FULLY EXPLORE
YOUR OPTIONS AND POTENTIAL EFFECTS BEFORE
ALLOWING FOR DEPOSIT OF MONTANA'S OR ANY
OTHER STATES WASTE BY PRIVATE ENTERPRISE

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 17 day of July, 1991.

Name: M A Wellbank (Smetanka)

Address: 94 Blue Sky Hs (Clarey MT)

Telephone Number: 933-5789

Representing whom? self + family

Appearing on which proposal? HB 58 + 59 - Supporting Moratorium

Do you: Support? Amend? Oppose?

Comments:

We have a crucial decision to make here that affects the future of Montana & our children. Let us not make it hastily. Support the moratorium & think about the impact on our children & their future.

We need more information about the waste & the chemical compounds they form in the air above the incinerator.

Please support HB 58 + HB 59.

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1991.

Name: Ridge Meierhenry

Address: Box 235
Clancy, MI

Telephone Number: 406 444-2900

Representing whom?

Appearing on which proposal?

HB 58 59

Do you: Support? Amend? Oppose?

Comments:

1) Lets not allow the targeting of MI for dumping hazardous waste Lets have capacity analysis.
2) When the technical experts argue over the merits of incineration, we - you and I are sorley in danger. Lets have siting restrictions.

EXHIBIT 11

DATE 7/14/92

HB 58 * 59

July 14, 1992

To whom it may concern:

I am in favor of the moratorium on the burning of hazardous waste at the Ash Grove Cement Plant in Jefferson County. Any hasty decision in this matter would be extremely foolish.

Mrs. Margaret Stuart
Box 941 MCR
Clancy, MT 59634

449-6911

Gentlemen,

We are writing this letter to ask all of our Rep. to vote for the moratorium against the burning of hazardous wastes in Montana. We feel that burning of this waste so close to populated areas could pose a threat to our's and our children's health and needs more study.

Sincerely
Dan & Ann's
Mottifler

#24 Jefferson Hills

EXHIBIT 13
DATE 7/14/92
HB 58759

JULY 12, 1992

DANNY L. PITTMAN & MARGARET A. PITTMAN
913 SADDLE MOUNTAIN DRIVE
CLANCY, MONTANA 59634

TO WHOM IT MAY CONCERN:

WE OPPOSE THE BURNING AND STORAGE OF ANY TOXIC WASTE
MATERIALS AT FACILITIES IN MONTANA.

WE SUPPORT THE PROPOSED MORATORIUM OF ANY BURNING AND STORAGE
OF TOXIC WASTE MATERIALS IN MONTANA.

SINCERELY,


DANNY L. PITTMAN


MARGARET A. PITTMAN

EXHIBIT 17
DATE 7/19/92
HB 58 & 59

To Whom This May Concern,

My name is Karen Semple and I live in Montana City. I support the moratorium on toxic waste burning in the State of Montana. A great need exists for the true facts of the matter to be examined thoroughly before ~~it~~ ^(toxic waste burning) is permitted - even on an interim basis.

Thank you,

Sincerely,

Karen Semple

Karen L Semple

Star Rt 175

Clancy, MT

59634

HOUSE OF REPRESENTATIVES

WITNESS STATEMENT

PLEASE PRINT

NAME Marlyn Grossberg Atkins BILL NO. 58459
ADDRESS Box 166 MCR Clancy MT DATE 7-14-92
WHOM DO YOU REPRESENT? myself / ^{Charles Hail Atkins} my husband written testimony
SUPPORT X 58459 OPPOSE _____ AMEND _____

COMMENTS: I took time off from work because I feel
very concerned about the issue of hazardous waste
incineration. But the most important reason I came to
this hearing is that I love Montana and want what
best for all of us. I'm scared that too many times we
rush ahead and pay the price later. I believe it is
extremely important to take time to gather information
so rule and regulations can be written appropriately.
The siting issue is extremely critical and the
possibility of companies applying to burn
hazardous waste being "grandfathered in" worries
me a great deal. Past environmental disasters,
even where we've been reassured "that all was fine
now" taught me to distrust and question.
I'm not so naive - ~~that~~ I do realize there is
a great deal of power and money behind
the opposition to these bills - please, lets
not sell off our state. Lets not rush, if
we need to, err on the side of caution
I urge your support on this moratorium.

HR:1991
CS15

Thank you
Marlyn Grossberg Atkins

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1991.

Name: GORDON TALLENT

Address: Box 154 STAR RT
CLARK MT

Telephone Number: 402-4487

Representing whom?
MT City School Board

Appearing on which proposal?
58-59 Home RT

Do you: Support? Amend? Oppose?

Comments:
I support the ban on burning
because we are worried about
CHIEFPERSON OF THE SCHOOL BOARD AND WE
ARE CONCERNED THAT THIS COULD PUT
our children and community at risk

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of JULY, 1991.

Name: JACKIE GREZIS FORBA

Address: S.R. Box 180
CLARCK, MT 59634

Telephone Number: 443-0792

Representing whom?
SELF

Appearing on which proposal?
HB 58+59

Do you: Support? Amend? Oppose?

Comments:
- concern regarding siting
- potential environmental, health + economic effects
- need more time to develop comprehensive plan for disposal of Montana wastes
- too many unknowns in process
- MDAES rules currently being developed do not + will not address the issue of siting unless the legislature directs them to do so.

EXHIBIT 10
DATE 7/14/92
HB 58 & 59

July 14, 1992

Bob Raney, Chair
House Natural Resources Committee

Dear Representative Raney and members of the Committee:

I write to you in support of HB58 and HB59. I urge your approval of these bills.

As a resident of the Montana City area living in the shadow of Ash Grove Cement, I ask you not to let Montana become the handmaiden of hazardous waste, the consort to the nation's garbage. We need not play the role of prostitute as our state has too often in the past. Rest assured no one would have testified in past legislatures that the smelter at Anaconda would pollute the ground water in Milltown with heavy metals or make the Clark Fork a major clean up project. No one would admit that lead or arsenic would make the yards of East Helena toxic and unsafe to children. No one would come before this Committee to say we are going to pollute the land and water of Livingston. And on and on. Until there is firm, clear and convincing evidence to the contrary, I urge you each to protect us and not to sell us to special interest.

I am not saying never can waste be burnt but I am saying we don't know enough yet to make a well informed decision. Rest assured the captains of industry will not agree. What fox would say the chicken coop is not strong enough? Yet we are discussing my health not the wealth of others.

I do not intend to whine anymore nor cry the sky is falling but simply ask that you make a well considered decision to hold toxic waste disposal until we are best able to make informed and rational decisions. Recall that industries don't vote, the soil doesn't vote, nor do trees or water, but people do; it is people who you must protect. The captains of industry will leave someday. What superfund cleanup may we find in their wake unless we proceed with some caution, deliberation and intelligence?

Sincerely,



Edwin L. Hall

DATE 7/14/92

HB 58259

Because I cannot attend this hearing, I have my wife read this short statement.

My name is Charles Hall Atkins. I am a fifth-generation Montanan and currently I am completing thesis research for a Master's of Science degree in Environmental Engineering at the Montana School of Mineral Science & Technology.

I have considered Ashgrove's proposal to burn hazardous waste in their cement kiln and have concluded that it does not bode well for the Jefferson Co. site nor for Montana.

First of all, a kiln is not an incinerator. They are maintenance intensive and subject to more mechanical breakdowns and human error.

Secondly, Ashgrove's plan to dump flue dust into a quarry could eventually permit extremely hazardous contaminants to migrate in to ground water.

Thirdly, Ashgrove's numerous air and water violations demonstrate that they are not responsible stewards and should not be allowed to conduct environmentally sensitive operations.

Fourthly, opening the floodgates to other states' waste is inviting a deluge of long-term problems.

Inviting hazardous waste into Montana is not good business; it is short-sighted folly. Please support representative Madison's moratorium on burning hazardous waste.

Charles H. Atkins

Box 166 MCR

Clancy, MT 59634

EXHIBIT 20
DATE 7/14/92
HB 58859

20

July 11, 1992

Natural Resources Committee
Capitol Station
Helena, MT 59620

RE: Moratorium on Permitting of
Burning or Importing of Medical
or Hazardous Waste

Dear Committee Member:

I am writing this letter to ask for your support of Representative Madison's moratorium on permitting burning or importing of medical or hazardous waste.

Through continued efforts by those only interested in making a quick buck we are on the verge of licensing a medical waste incinerating facility in Ringling, MT. Gordon Doig and Jay Doig who are major partners, in this proposed venture have stated that an environmental impact statement is not necessary. This comes from men who have in the past turned a clean fresh running stream into an ooze of pig sewage from their hog confinement operation, men who have dumped raw industrial waste into Sixteen Mile Creek from their ethanol plant and men that continue to blatantly violate water quality laws and ignore directives that have instructed them to take corrective action.

Although I am concerned with the proposed incinerator in Ringling this issue is a much larger one. We do not want Montana to become the hazardous waste depot for the nation. Please help to keep Montana the beautiful and great state that it is through legislation aimed to protect the environment, but more importantly the health of all Montanans!

Thank you.

Sincerely yours,



Randie C. Keep
Concerned Citizen
Helena, MT

EXHIBIT 21

DATE 7/14/92

HB 58 & 59

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1991.

Name: Jean Ward

Address: 571 S. Rodney
Helena mt. 59601

Telephone Number: 449 7819

Representing whom?
my family

Appearing on which proposal?
Bill # 58 & 59

Do you: Support? yes Amend? Oppose?

Comments:
No toxic or Medical waste
burning in Montana.

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14th day of June, 1992.

Name: Kathy Sherwood

Address: P.O. Box 9086, Helena, MT. 59604

Telephone Number: 449-3917

Representing whom?

Climbing Arrow Ranch, Maudlow, MT.

Appearing on which proposal?

HB 58 & 59

Do you: Support? Amend? Oppose?

Comments:

My family owns a large cattle ranch on Sixteenmile Creek downstream from the proposed medical waste incinerator site by Western Recovery Systems in Ringling, Montana. Upon reviewing the Environmental Assessment completed of this proposal which resulted in the granting of a permit I am alarmed at the status of this permit granting process. Montana needs to educate themselves on the waste incineration process and we need to enact laws regulating transport of waste & ash, disposal of ash, emissions controls and standards, protection of employees handling waste and ash. EPA regulations and recommendations concerning waste incineration should not be blindly accepted as safe and relevant for our state. I would like to see Montana take the initiative in designing guidelines & regulations

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY to protect the citizens and environment of our state that go beyond EPA regulations & recommendations.
Kathy Sherwood

EXHIBIT 23

DATE 7/14/92

HB 58#59

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14th day of July, 1992.

Name: Mark Albee (Economist, MT. DNRC)

Address: 11 John G. Mink Rd.
Helena, MT. 59601

Telephone Number: 458-9602

Representing whom?
Self

Appearing on which proposal?
HB 58/59

Do you: Support? Amend? Oppose?

Comments:
The long-term interests of Montanans are not served by developments which slide through our regulatory system by means of loopholes - especially when those developments threaten the health and safety of our citizens and their children. Intense public scrutiny must come to bear on any hazardous waste incineration proposal. A moratorium on imports and burning gives us time to develop strict siting criteria and standards. Short-term profit and marginal employment growth is no excuse for subjecting our children to threats to their health and the beautiful environment we all cherish. Indeed, long-term economic growth requires us to eliminate such threats and concentrate on recycling

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY and source reduction.

EXHIBIT 24
DATE 7/14/92
HB 58 & 59

JULY 14, 1992

HOUSE BILL 58 AND 59

Penny Koke, Superintendent of Montana City School District #27 of Jefferson County. I am here representing the Board of Trustees.

The Board of Trustees has sent written record to both the Senate Subcommittee on Environmental Protection and the Montana State Department of Health and Environmental Sciences supporting adoption of rules and regulations pertaining to the burning of hazardous waste in boilers and industrial furnaces.

If it is in the best interests of the State of Montana and local communities to take an additional year to draft these rules and regulations we strongly support such legislation. It is important that we proceed with proper caution and the best rules and regulations when we are taking action on matters with such far reaching effects.

The Montana City School is located one half-mile from the Ash Grove Cement Plant. The school and playground environment are the recipients of the emissions from the stacks and it is important the the long term health and welfare of the students and community be of first priority.

Thank You for this opportunity to speak.

EXHIBIT 25
DATE 7/14/92
HB 58 & 59

July 11, 1992

Natural Resources Committee
Capitol Station
Helena, MT 59620

RE: Moratorium on Permitting of
Burning or Importing of Medical
or Hazardous Waste

Dear Committee Member:

I am writing this letter to ask for your support of Representative Madison's moratorium on permitting burning or importing of medical or hazardous waste.

Please help in keeping Montana the beautiful and great state that it is through legislation aimed to protect the environment, but more importantly the health of all Montanans!

Thank you.

Sincerely yours,

Sue Keep

SUE B. KEEP
Concerned Citizen

EXHIBIT 26
DATE 7/18/92
HB 58 + 59

Senate Testimony of Douglas R. Elson M.D. regarding hazardous waste incineration at cement kilns, Saturday, March 28, 1992.

Senator Baucus:

My name is Doug Elson. I am a physician in Bozeman, MT. I received an undergraduate degree in Biology from Middlebury College, Middlebury, Vermont. I attended the University of Washington School of Medicine through the Montana WAMI program and completed a residency in Family Practice at Swedish Hospital Medical Center in Seattle, Washington. I am now in full time practice in Emergency Medicine at Bozeman Deaconess Hospital in Bozeman, MT. I have several concerns regarding the potential health risks of incinerating hazardous waste at cement kilns in general and at the proposed Trident Cement plant in Three Forks, MT in particular. These concerns are primarily around the toxicities of heavy metals to a great degree and organic hydrocarbons to a lesser degree. I am not a toxicologist, and do not consider myself an expert in this field. I am however a physician, and thus a health care advocate for my patients. As such I have spent a fair amount of time researching this subject and would like to share my concerns with you.

EXHIBIT 26
DATE 7/14/92
HB 58 + 59

I first became concerned about this issue after attending an informational forum regarding the proposal by the Holnam Company to burn hazardous waste at the Trident Cement plant. That meeting included speakers from the State Department of Health and Environmental Sciences as well as speakers from what is now Montanans Against Toxic Burning (MATB). As a result of this meeting my partner Dr. Steve Gipe and I asked the president of the Gallatin County Medical Society, Dr. Ladd Rutherford, to bring this issue to the medical community of Bozeman so physicians could be informed about the potential health impacts of burning hazardous wastes. At the December meeting of the Gallatin County Medical Society, speakers from Holnam, the Environmental Toxicology Institute (ETI), a consulting firm employed by Holnam, and representatives from Montanans Against Toxic Burning addressed both sides of this issue. The meeting was not well attended, and no strong consensus other than the statement that potential health risks exist and more study is needed was obtained. Although the majority of the medical community was not represented at this meeting, a large proportion had responded to an informal poll conducted by Dr. Steve Gipe. This poll showed widespread opposition to Holnam's proposal on the basis of potential health risks to the community. As a result, a letter was drafted to Dennis Iverson at the Department of Health and Environmental Sciences, a copy of which I have supplied to you. This letter was signed by 57 of the approximate 72 physicians in Gallatin county, including 7 of 8 Primary Care Internists, 10 of 13 Family Physicians, 4 of

4 Pediatricians, 4 of 4 Obstetricians and 3 of 3 Emergency Physicians representing 31 of 33 primary care physicians in Gallatin County. In talking with most of these physicians I do not believe this was a hasty decision, but well considered regarding the potential health risks to their patients. Several weeks later I was asked to speak before the Gallatin County Health Board by County Commissioner Deb Bergland. As a result of that meeting the Gallatin County Health Board also endorsed the same statement as the 57 local physicians.

With regard to my specific concerns, I will start with what I feel is the most important, the concern regarding heavy metal toxicities. As you know, the hazardous waste to be burned at cement kilns will have varying amounts of the heavy metals, including lead (Pb), mercury (Hg), cadmium (Cd) and arsenic (As). The fact that these metals are toxic in relative large doses has been well known for quite some time. What is becoming apparent, however, is that there are significant toxicities to heavy metals at very low doses, especially in children, and especially with long term, chronic exposure. The symptoms of chronic heavy metal exposure are very non-specific and difficult to diagnose, often being mistaken for psychosomatic illnesses or chronic fatigue. In addition, the threshold levels that are considered acceptable for these metals has been decreasing. The most well known example of this is lead. The threshold level of concern for lead poisoning that was 60 in the 1960's has been reduced each decade, and recently was again

reduced to 10 by the Center for Disease Control. The concern is highest in children, where chronic low level lead poisoning is associated with decreased cognitive abilities and behavioral disturbances such as hyperactivity and poor attention span. Recent evidence has shown that very low level methyl mercury ingestion in pregnant monkeys results in behavioral and cognitive defects in the offspring. The researchers concluded that there may very well be no safe threshold for mercury ingestion during pregnancy. Mercury and lead are probably the best researched of the heavy metals. I have significant concerns that the other heavy metals could well have significant toxicities at levels far below what is now considered "acceptable".

> With regard to the current BIF regulations, I feel that there are several problems concerning the heavy metals. First, the allowed concentrations are based upon a risk of no greater than 1/100,000 additional cancer cases. As discussed above, the primary toxicity of heavy metals is not cancer, but subtle neurologic manifestations, and this toxicity occurs at significantly low levels of exposure. In addition, I question the assumption, as have others, that there is any truly safe threshold for exposure to children and pregnant women. All of the heavy metals that are transported to the kiln will stay in the area. Heavy metals are not destroyed, but just redistributed in either particulate emissions or in the residue of the burning process, fly ash and kilndust. The BIF regulations are based upon a three tier system: Tier I is feed rate based, tier II is emission based, and tier III

Page 26
Date 7/14/92
HB 58 & 59

is dilutional based. In both tier II and tier III there is no regulation concerning the amounts of heavy metals in the fly ash and kiln dust. Although this metal is not being widely distributed, it accumulates in significant concentration at the disposal site and will probably distribute through leaching into ground water. The BIF regulations do not address the storage of fly ash and kiln dust. In fact they are exempt from the regulations regarding hazardous waste storage, despite the fact that they are high in heavy metals. Heavy metals all tend to bioaccumulate in the food chain, and mercury, in particular, bioaccumulates in fresh water fish, a frequently eaten item in Gallatin Valley. The fact that the Holnam site is within 1/4 mile of the headwaters of the Missouri river, a pristine wetlands, makes this fact particularly worrisome.

There are conflicting studies with regard to the amount a heavy metal that is distributed through emissions. ETI, Holnam's consulting group, states that there is no significant increase in the amount of heavy metal emissions from traditional coal fired cement kilns compared to hazardous waste burning kilns. They have not presented any data on this except their own studies. In contrast there are several studies that show significant increases in the heavy metal emissions, up to 16.6x that in coal fired plants. It appears that there are varying study designs and fuels that account for these differences, making the actual amount of heavy metal emissions difficult to assess. Monitoring of heavy metal emissions would certainly be difficult considering the varying fuel composition with regard to

heavy metal concentration.

With regard to the organic hydrocarbons, I have several concerns. Dioxins and furans are known potent carcinogens. What is more concerning are the products of incomplete combustion (PIC). These are the recombination of halogenated hydrocarbons in the stack, and they are poorly characterized. The potential toxicities of these PICs is high, and according to the EPA they may be more toxic than their parent compounds. PICs tend to occur during "upsets" at the kiln, periods when the kiln puts out black smoke. Cement kilns seem to be prone to these upsets, and in fact the Holnam plant has had more than 70 upsets in the past 10 months. In addition, BIF regulations do not call for actual measurement of PICs, but rather monitor carbon monoxide as an indirect measure of complete combustion. There has been criticism of this approach, stating that there is poor correlation between CO and PIC concentrations.

My final concern has to do with the siting of a hazardous waste incinerator. It appears reasonable that if we are to burn hazardous waste, we should choose a site that will have the least impact on health and the environment. The site would ideally be away from population centers and food producing areas, be away from waterways that could distribute toxic materials, and be in a geologically stable area. Utah has in fact adopted regulations addressing some of these concerns. Inherent in the problem of cement kiln incineration of hazardous waste is the fact that the plant already exists, and therefore siting concerns can not be entertained.

This is demonstrated in the Trident case where the proposed hazardous waste incinerator is within 1/4 mile of the Missouri river, clearly not the best place to locate such a facility. It is expedient to use cement plants to burn hazardous waste, and cheap. The risks, however, are high.

As a physician, I often must make decisions based on a risk/benefit ratio. Most of the things I do carry risks to my patients, and the potential benefit must outweigh the risk. I feel this same thinking can be applied to both the Holnam proposal as well as to the BIF regulations. With regard to the Holnam proposal, I feel the risks are quite high. There is the risk of heavy metal accumulation in the Gallatin Valley, with significant toxicities at low levels. There is poor siting, as the plant is next to the Missouri river, and the unregulated fly ash and kiln dust disposal site can easily leach heavy metals into the river which can bioaccumulate in fish and wildlife. In addition, I feel regulation would be very difficult for the state with limited funds for this type of regulation. Finally, I think the plant would actually impose an economic burden on the valley which is currently experiencing economic growth. Tourism and real estate values could well suffer, and business may choose not to relocate to the Gallatin Valley. In fact, Patagonia, an outdoor equipment and clothing company, has publicly stated that they will not relocate other aspects of their company to Bozeman if Trident is allowed to burn hazardous waste. The benefits, on the other hand, are fairly small, at least for the average citizen of Gallatin Valley. Holnam will make a great deal of money, which

is attractive for them, but most of that capital will not stay in the valley.

Approximately 20 new jobs will be created, a small, but significant number. In addition, hazardous waste from around the state will be disposed of, although it is estimated that 85% of the waste will be from out of state.

In terms of the risks of cement plant incineration of hazardous waste in general there are several. I feel the heavy metal problem is really not being adequately addressed with the present regulations. Threshold levels of safety for many heavy metals really have not been established or are being re-evaluated. Storage of the fly ash and kiln dust must be regulated and made safe. In addition, it is not clear if the cement itself may pose health risks, and at least one municipality in Ohio has refused to use cement from hazardous waste burning kilns in its water pipes. Adequate studies have not been done addressing this problem. Siting is a significant issue, with many cement plants being in much less than optimal locations for hazardous incineration. Finally the regulation of PICs is perhaps less than optimal and should be re-evaluated.

The benefits of cement kiln burning include financial expediency. The plants exist now and have the capacity to burn at no cost to society. In fact, it is quite financially rewarding for the companies involved. And, the process would allow us to burn off organic waste that must be disposed of somehow.

It is my my opinion that the risks clearly outweigh the benefits. In my opinion and in the opinion of my colleagues in Bozeman's medical community, we should

EXHIBIT 26
DATE 7/14/92
HB 58059

not allow the incineration of hazardous waste at cement kilns under the current
BIF regulations.

July 13, 1992

TESTIMONY OF SAMUEL J. ROGERS
D.V.M., Ph.D. Biochemistry
Current employment
Associate Professor in Chemistry
Montana State University

This testimony is in regard to the Environmental Assessment (EA) prepared by the Environmental Sciences Division/Solid and Hazardous Waste Bureau of the application by Western Recovery Systems, Inc. for the construction and operation of a medical waste incinerator facility at Ringling, Montana.

The EA discusses a number of procedures involving both operation and maintenance of the facility, the operating characteristics of the facility and the impact on the site and surroundings during normal operation and during times when there are operational problems. I would like to address issues and questions that came to mind when I read the EA.

I. page 2 paragraph C. The incinerator will be operated 24 hours per day, seven days a week. This will require delivery of 50, 000 pounds of waste a day. It is realistic that some storage will be required to compensate for irregularities in delivery and shut down during incinerator servicing. The storage of medical waste is a very serious problem. The following is a quote the EPA Handbook-Operation and Maintenance of Hospital Medical Waste Incinerators.

"The treatment of infectious waste as soon as possible after generation is preferable. However, because same-day treatment is not always possible, the incinerator operator may be responsible for waste storage. If the waste must be stored prior to incineration, four factors should be considered:

1. Maintaining container integrity and minimizing handling;
2. Storage temperature;
3. Storage duration; and
4. Location of the storage area.

The waste storage area should be a "secure" area, out of the way from normal hospital traffic and should have restricted access. Certainly, the area should be secure from public access. The storage area and/or the containers should be secure from rodents and vermin which can contract and transmit disease.

As temperature and storage time increases, decay occurs and unpleasant odors result. There is no unanimous opinion on acceptable storage temperature or times. The EPA Office of Solid Waste simply recommends that storage times be kept as short as possible. (EPA, 1986, Guide for Infectious Waste Management (EPA/530-SW-86-014), May, 1986). Some States do regulate storage times. For example, Massachusetts allows infectious waste to be stored for 24 hours (1 day) at room temperature or for 72 hours (3 days) at refrigerated temperatures (34 degrees to 45 degrees F). (EPA, 1986,

DATE 7/19/92

HB 58659

Guide for Infectious Waste Management (EPA/530-SW-86-014), May, 1986)." ."

I have included this extensive quote for two reasons. (1) There are common sense problems in the storage of waste that can decay. This is a matter of time, temperature and circumstances. (2) The medical waste that is proposed to be delivered will have had a varying history of time, temperature and circumstances. Situations have arisen recently when barges and freight cars have been loaded with urban garbage which subsequently decayed while a landfill was found that would accept the garbage.

THESE ISSUES WERE NOT DISCUSSED IN THE EA.

The statement was made in paragraph C that nonhazardous waste will be hauled to the Broadwater County Landfill by commercial waste haulers. No mention was made as to how the hazardous ash which will inevitably be generated will be disposed.

II. paragraph D Waste Handling. The problem resulting from the inadvertant inclusion of radioactive materials in the regular medical waste was not adequately addressed. In the case of the discovery of radioactive waste mixed in with all the rest of the medical waste in an identified container, the re-packaging in steel drums and transport by an approved carrier to an approved disposal site can take months. This requires a sophisticated on-site storage facility and competent personnel such as a Radiological Safety Officer and an operation licensed by the Nuclear Regulatory Commission.

THIS ISSUE WAS NOT DISCUSSED IN THE EA

III. paragraph E Description of Wastes

1) Isolation wastes. A more complete description is needed.

6) Contaminated animal carcasses, body parts, and bedding. What percentage of the 50,000 pounds per day would be included in item 6?

10) Discarded medical equipment and parts. What percentage of the 50,000 pounds per day would be metals and and other non-combulstible materials?

IV. Details of Incineration Process

The EA briefly describes the incineration process as if process were similar to a furnace burning some homogeneous fuel such as coal or wood. Hospital wastes are, in fact, quite heterogeneous and contain wastes that are similar to generic wastes from institutions and residences. Paper products, cans, diapers, food as well as chemicals that can include disinfectants, alcohols, heavy metals, such as mercury, antineoplatic agents that can be very potent carcinogens. All of these wastes are mixed with potentially infectious wastes. The maintenance of the temperatures

of 1450 degreesF in the primary chamber and temperatures of 1800 degreesF in the secondary chamber becomes critical. Wastes can be characteri

zed by the four following composition categories: (a) volatile matter, carbon compounds that are volatilized by heat alone and then are ready for combustion (b) fixed carbon is the nonvolatile carbon of the waste and must be burned to be volatilized and be held in the chamber for an increased duration in the chamber to allow complete combustion, (c) moisture, passes through the chamber as water vapor which results in reducing the residence time for the combustible materials as well as reducing the temperature in the combustion chambers, (d) Inorganic materials unlike organic materials are not destroyed by the combustion process but pass through the combustion chambers and become bottom ash or as effluents in the combustion gasses. The metal gasses can then become a part of a heterogeneous particulate or as a metal particulate. Particulates of this nature can be small, less than one micron in diameter, a size that deposits deep in the lung and enriched in certain heavy metals depending on the vapor characteristics of the particular metal.

The point of the above discussion is to point out the difficulty of maintaining ideal temperature and residence times for complete combustion and complete sterilization of infectious wastes. Very careful monitoring and introduction of the four category of wastes into the chambers must be done to optimize the completeness of the combustion reaction.

A further complication in the combustion process is the chemical composition of the waste materials. The following is a quote from EPA Handbook on the Operation and Maintenance of Hospital Medical Waste Incinerators previously referred to in this testimony.

"The chemical composition of the waste materials also may affect pollutant emissions. Wastes containing metals and plastics are of particular concern. Metals which vaporize at the primary combustion chamber temperature (e.g. mercury) may become metal oxides with particle size distributions primarily in the size range of 1 microns or less. These small particles may become easily entrained and exhausted with the combustion gases with limited capture by conventional air pollution control equipment. Halogenate plastics, such as polyvinyl chloride, will produce acid gases such as HCl. The presence of the chlorinated waste also may contribute to the formation of toxic polycyclic organic material such as dioxins and furans under poor operating conditions."

It is important to point out that these chlorinated and non-chlorinated polycyclic organic hydrocarbons are among the most carcinogenic compounds known. Examples of other kinds of chlorinated hydrocarbons that are among the anticipated emissions from medical waste incinerators are: tetrachloroethylene, trichloroethylene, carbon tetrachloride and 1,1,2-trichloro-1,2,2 trifluoroethane. These types of chlorinated hydrocarbons are known to be potent carcinogens.

THE DIFFICULTY OF COMPLETE COMBUSTION AND THE SUBSEQUENT EMISSION OF TOXIC MATERIALS SUCH AS MUTAGENS, TERATOGENS AND CARCINOGENS WAS NOT DISCUSSED IN THE EA

V. paragraph G-Ash Handling

Paragraph G discusses the disposal of ash that will be collected from the primary chamber and the baghouse discharge. Due to the complexity of the combustion process, there is no doubt that ash will be generated that will be categorized as hazardous waste. There is no detailed information in the EA as to the the procedures to be employed for the identification, processing, transport and disposal of the ash that is hazardous waste. Hazardous waste is difined by EPA as to solid waste that has one or more of the following characteristics:

Ignitability

Corrosivity

Reactivity

Extraction Procedure (EP) Toxicity

It is relatively easy to test for the chemical properties of ignitability, corrosivity and reactivity. The EP toxicity is much more difficult to assay. These complexities of EP toxicity testing has caused EPA to not test for carcinogenicity, mutagenicity, bioaccumulation and phytotoxicity. Since it is a known fact that carcinogens will be emitted from a medical waste incinerator with full knowledge of the EPA and the EPA will not regulate these emissions, the regulatory agencies are not establishing guidelines that will protect the public from these toxic materials. Further, no add on air pollution control system can achieve no more than limited control of toxic organics. (ref. Table 3-1 EPA Handbook Operation and Maintenance of Hospital Medical Waste Incinerators.)

VI. Benefits and Purpose of Proposal:

A benefit of the facility was the reduction of the mass and volume of the waste. A figure of 95 percent reduction of mass and/or volume was proposed in the EA. Other figures in EPA documents suggest a more realistic range would be from 80 to 90 percent. A 90 percent reduction would lead to the scenario of ten trucks in and one truck out with ash of questionable safety. A 80 percent reduction would result in ten trucks in and two out with ash and partially combusted materials.

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1991.

Name: John Haneward

Address: Box 472
W.S.S. mt

Telephone Number: 547-2232

Representing whom?
Leg of the Best Coalition

Appearing on which proposal?
Supporting Moratorium

Do you: Support? Amend? Oppose?

Comments:

JOHN HANEWALE

P.O. BOX 472
WHITE SULPHUR SPRINGS, MT
59645

EXHIBIT 28
DATE 7/14/92
HB 58459

(CONTINUED)

IS THE STATE OF MONTANA GOING TO USE THE EP TOX TEST OR TCLP TEST ON THE ASH?

WHAT ABOUT EARTHQUAKES - WILL THE PROPOSED BUILDING BE ABLE TO WITHSTAND AN EARTHQUAKE OF A MAGNITUDE OF 6?

IF WE HAVE AN EARTHQUAKE, WHAT IS GOING TO HAPPEN TO THE MEDICAL WASTE AT THE FACILITY?

COULD AN EMPLOYEE AT THE ALCOTECH INCINERATOR BECOME INFECTED WITH A VIRUS, SUCH AS AIDS OR HEPATITIS B, BY BEING POKED BY A NEEDLE OR FROM A LEAKING BOX?

COULD THE AIDS VIRUS LIVE IN ANOTHER CULTURE OR WITH ANOTHER VIRUS AND BE TRANSMITTED TO AN EMPLOYEE, EITHER THROUGH BREATHING THE VIRUS OR THROUGH A PUNCTURE?

IS IT ILLEGAL TO SPREAD WASTE MATERIAL OR ASHES ON THE GROUND AT THE PRESENT ALCOTECH ETHANOL PLANT?

WHAT IS THE CURRENT FEDERAL EMISSION LIMIT FOR MERCURY FROM A MEDICAL WASTE INCINERATOR?

WHAT IS THE CURRENT STATE EMISSION LIMIT FOR MERCURY FROM A MEDICAL WASTE INCINERATOR?

WHY ISN'T EACH HEAVY METAL TESTED SEPARATELY, INSTEAD OF BEING THROWN INTO ONE CATEGORY?

WHAT HEAVY METALS IN IN INCINERATOR ASH?

WHAT ARE THE FEDERAL EMISSION LIMITS FOR ALL HEAVY METALS TOXICITY?

WHAT ARE THE STATE EMISSION LIMITS FOR ALL HEAVY METALS TOXICITY?

HOW MANY POUNDS OF HEAVY METALS WILL GO UP THE STACK IN ONE YEAR'S TIME?

HOW MANY POUNDS OF HEAVY METALS WILL GO INTO THE ASHES IN ONE YEAR'S TIME?

HOW MANY POUNDS PER YEAR OF EACH CHEMICAL WILL BE IN THE EMISSIONS/ASHES? (SUCH AS DIOXINS, FURANS, ETC.)- IF NOT MEASURED IN POUNDS, THEN WHAT AMOUNT OF GASES IN CUBIC FEET WOULD BE RELEASED?

(continued)

EXHIBIT 28
DATE 7/14/92
HB 58 & 59

THERE ARE HOWEVER A FEW DIFFERENCES BETWEEN MUNICIPAL WASTES AND INFECTIOUS WASTES. PLASTICS MAKE UP 3% TO 7% OF MUNICIPAL WASTE, BUT 14% TO 30% OF INFECTIOUS WASTE. BECAUSE PLASTICS ARE THE MAJOR SOURCES OF CADMIUM AND LEAD, MEDICAL WASTE INCINERATORS EMIT MORE OF THESE TOXIC METALS, PER POUND OF BURNED WASTE, THAN DO MUNICIPAL INCINERATORS. (RACHEL'S HAZARDOUS WASTE NEWS #179, May 2, 1990)

THE EDF STUDY SHOWS THAT MSW INCINERATOR ASH CONTAINS "VERY HIGH LEVELS" OF LEAD, ARSENIC, CADMIUM AND MERCURY, ALL OF WHICH ARE TOXIC METALS. (HWN #22, April 27, 1989)

PEOPLE CONCERNED ABOUT LAND FILLS OR ABOUT "MASS BURN" INCINERATORS NEED TO PAY CLOSE ATTENTION TO THE TOXIC METAL LEAD. MANY NEW STUDIES SHOW IT IS MORE TOXIC, ESPECIALLY TO CHILDREN, THAN PREVIOUSLY THOUGHT. LEAD IS ONE OF THE 92 CHEMICAL ELEMENTS THAT FORM THE BASIC BUILDING BLOCKS FOR THE WHOLE UNIVERSE. IT HAPPENS TO BE VERY TOXIC. BECAUSE IT IS AN ELEMENT, LEAD NEVER BREAKS DOWN OR BIODEGRADABLES OR GOES AWAY. (HWN #36, August 3, 1987)

THE NEW YORK TIMES, NOVEMBER 15, 1989, page 1, said 25 states have petitioned the U.S. EPA TO HAVE INCINERATOR ASH OFFICIALLY DECLARED "NON-HAZARDOUS" SO IT CAN BE DUMPED IN MUNICIPAL LAND FILLS AND NOT HANDLED (EXPENSIVELY) AS LEGALLY HAZARDOUS WASTE.

THE EXPERTS SAID INCINERATORS DO NOT DESTROY 99.99% OF THE TOXIC WASTE BURNED AS THE INDUSTRY CLAIMS (Haut, The Daily Item, Sunbury, Pa., Feb. 19, 1992)

CHEMICALS CAUSE CANCER IN WORKERS AND NEARBY RESIDENTS, 9 MORE STUDIES SHOW. (Rachels Hazardous Waste News, February 26, 1992)

BIRTH DEFECTS IN U.S. DOUBLE IN 25 YEARS. (New York AP, Dr. Peter Budetti)

IT IS EASIER FOR THE COMPANIES TO TRANSFER THE LIABILITIES OFF THEIR PLANT SITES AND INTO SOMEONE ELSE'S BACKYARD. (The Burning Question - A Pittsburg Press)

THE EPA DOES NOT KNOW THE SAFETY STANDARDS. THEY ADMIT THEMSELVES THEY DO NOT KNOW THE EFFECTS ARE OF THESE HAZARDOUS CHEMICALS COMING OUT, BECAUSE THEY HAVE NO WAY OF MEASURING WHAT THE CHEMICALS ARE OR WHAT THE HAZARDS FROM THESE CHEMICALS ARE.

EPA UPON CLOSER SCIENTIFIC INSPECTION, DIOXIN LOOKS MORE DANGEROUS TO HUMAN HEALTH NOW THAN EVER (U.S. NEWS & WORLD REPORT, April 6, 1992)

Mr. Craig Stagner
Bureau of Solid and Hazardous Waste
Dept. of Health and Environmental Science
Cogswell Building
Helena, Montana 59620

Dear Mr. Stagner:

The following is to be included in the official record.

On the cover page of the Environmental Assessment issued by your office on May 19, 1992, it states that the purpose of the Environmental Assessment is to inform all interested governmental agencies, public groups, or individuals of the proposed action (Western Recovery Systems, Inc.'s application for a proposed medical waste incinerator), and to determine whether or not the action may have a significant effect on the human environment. It is highly significant that your office proceeded to formally notify only the three addresses in the Ringling area, and neglected to notify Fish and Wildlife, who were later forced to challenge your Environmental Assessment on multiple points at the White Sulphur Springs Public Information meeting on June 30th. The lack of readily and widely disseminated announcements and lack of coordination between State agencies with vital interests in the proposal highlights a deeply flawed and ill-coordinated permitting process.

Since very few people were initially granted access to the E.A., the resultant scramble by individuals and organizations to obtain this essential document clearly demonstrates the inadequacy and the arbitrariness of the announced 30-day comment period. The subsequent 30-day extension has also undeniably demonstrated its inadequacy. Decisions of this magnitude, with pervasive effects upon the health of entire populations, the future productivity of their farms, the safety of their animals, and the degrading of their property values, cannot be mechanistically whipped through an assembly line process in a mere 60 days. To do so stresses, humiliates, and disempowers the very people your office is charged with protecting.

On page two of the E.A., in paragraph C, we are informed that Western Recovery Systems expects to receive 50,000 lbs. of waste per day (approximately five 10,000 to 12,000 lb. truck loads), and will have 3½ days worth of waste storage to accommodate incinerator servicing. According to Department Rules (ARM 16.14.523), solid waste must be transported in such a manner as to prevent its dumping, spilling, or leaking from the transport vehicle. Since uncombustibles such as glass and metal constitute 5% of the waste stream, the simultaneous transportation of this kind of material along with other, less durable elements such as blood, carcasses, and pathologicals, virtually guarantees container leakages due to laceration and abrasion.

The arrival of leaking containers and truck/trailers at the Ringling facility will be common and inevitable. Fluids will leak from damaged containers, out of the trailer, and onto the roads during transit, and

will present a hazard to personnel doing the offloading by hand at the incinerator site.

The siting of the incinerator in Ringling invites catastrophe because of the year-round nature of the incoming and outgoing truck traffic, and because of the condition of the Montana feeder highways to Ringling. The Montana Highway Traffic Safety Division has reported seven major truck/trailer accidents in the past two year period on Highway 12 between Townsend and Harlowtown, and Highway 89 between Livingston and Great Falls. This figure includes five rollovers. (MHD, June, 1992)

If there is a spill upon either of these feeder highways, both of which follow river drainages, the entire ecosystem will suffer major damage. Health of humans and wildlife will be threatened, water rights and property values will be degraded, and the taxpayer will be presented with an horrendous clean-up bill which will not reverse the damage.

According to the U.S. Census data, 1980, property values in communities host to incinerators are 38% lower than the national average. In communities where incinerators are proposed, average property values are 35% lower. A 1984 report, commissioned by the California Waste Management Board, recommended that incinerators could be most easily sited in communities "least likely to express opposition: older, conservative, and lower socio-economic neighborhoods. (Cerrell, 1984)

According to page 3, paragraph F of the E.A., the input to the incinerator is a motorized conveyor system culminating in an automatic ram feeder. There is no mention whether or not this feeder is equipped with a manual override. If leaking or damaged biomedical containers are placed upon this conveyor system, the belts, rollers, sprockets, and underlying areas will become contaminated with infectious materials.

The ram feeder is a critical component in the contamination chain, because of the pressure required to move the biomedical wastes by reciprocating plunger. This system, with its hoses, fittings, bearings, and hydraulic components will be particularly difficult to decontaminate, and in all probability will remain infectious from the first spillage until the entire unit is replaced due to old age. "Fugitive emissions and accidental spills may release as much or more toxic material to the environment than direct emissions from incomplete waste incineration. A potential exists for environmental and human exposures as chemicals are removed from storage containers at the generator site, moved to transportation vehicles, shipped to the incinerator, and moved about within the incinerator facility." (U.S. EPA, 1985) I.e., people who handle and transport the wastes may be exposed to twice the level of toxic pollutants as those who merely live nearby. "Humans may be exposed to incinerator pollutants through inhalation, or ingestion of contaminated food products, or drinking water. Many incinerator pollutants are known to be taken up by, or deposited on, food crops, and to accumulate in fish and animal tissues, including meat, milk, and eggs. Local exposures for each pollutant vary with the persistence of each chemical, and meteorological conditions. Pollutant dispersion may also occur over long distances, leading to exposure far beyond local areas." (U.S. EPA 1985a)

The spill protocol advanced by Western Recovery Systems calls for "exposure to a chemical disinfectant by covering all surfaces with one of the following for three minutes:

- 1) Quaternary Ammonium Solution (440 ppm active agent)
- 2) Sodium hypochlorite solution (500 ppm active chlorine)
- 3) Phenolic solution (500 ppm active agent)
- 4) Iodoform (100 ppm available iodine)"

After decontamination, these liquids are to be stored in a closed system for later injection by fluid atomizer into the kiln itself. However, "water increases dioxin in whatever is burned." (Chemosphere, Vol. 9, pp. 597-602, T. Webster, Center for Biology of Natural Systems, Flushing, N.Y.) This procedure is designed to mitigate temperature excursions and other incinerator upsets. Subject to the high primary chamber temperature (1600 degrees, operating temp.), the injected fluid will explosively convert to steam, the pressure of which will activate the dump stack. This excess pressure will be vented into the environment directly without passing through the pollution control devices. National studies clearly demonstrate that these upsets are common wherever incinerator technology is employed, and make a mockery of the claims of incinerator manufacturers that their equipment is "state of the art." A bad and inappropriate technology that is "state of the art" is still a bad and inappropriate technology. If we have an ordinary carpenter's hammer, we can probably sell it for \$15.00. If we call it a kinetic metal impaction device, we can probably sell it to the Pentagon for \$1500.00, and if we call it a State of the Art Kinetic Metal Impaction Device, they will eagerly give us \$15,000.00 for it.

"The complete combustion of all hydrocarbons to produce only water and carbon dioxide is theoretical and could only occur under ideal conditions. Real-world combustion systems (e.g. incinerators), however, virtually always produce PICs (products of incomplete combustion), some of which have been determined to be highly toxic." (U.S. EPA, 1990). To purposely introduce a hypochlorite solution with an active chlorine component into the kiln by means of a fluid atomizer is the height of folly. "Organochlorines build up in the tissues of living organisms because most organochlorines are more soluble in oils and fats than in water. They tend to migrate from the environment into the fatty tissues of living things. For instance, TCDD (the most toxic form of dioxin, also known as 2,3,7,8, tetrachlorodibenzo-p-dioxin) has been shown to accumulate in fish tissues at concentrations up to 159,000 times greater than the concentration in the water in which the fish swam." (U.S. EPA, 1988) "Comprehensive tests have established that all waste incinerators, independent of type of incinerator or waste composition, are likely to produce all of the possible 75 PCDP and PCDF isomers and congeners, as well as about 400 other organic compounds." (British Review, U.K. DOE, 1989)

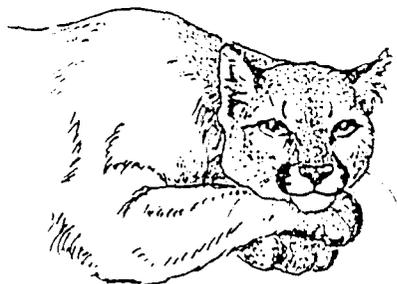
On page 4 of the E.A., paragraph G, it is stated that the 30 cubic yard container of ash from the Ringling incinerator is to be covered with a tarp and taken to the Broadwater County landfill. This landfill is a Class II landfill and legally may not receive these ashes. According to Administrative Rule ARM 16.14.503 (A)(ii), incinerator ash is classified as a Group I hazardous waste and must be disposed of in a Class I landfill. If this were not enough, the County Commissioners of

Broadwater County have officially denied the use of their Class II landfill for the disposal of the ashes from the proposed Ringling incinerator. The DHES Environmental Assessment was shown to be hopelessly outdated and inaccurate within a week of its release. Incinerator ashes must never be placed in a Class II landfill. The law specifically forbids it. Incinerator ash must be assumed to be hazardous. The burden of proof as to its declassification as a hazardous waste rests with the disposers, requiring the independent testing of every container.

On page 5 of the E.A., it states that "For the scope of the applicants' intentions, no other alternatives to infectious waste incineration were considered." This is remarkable! As late as July 9 in the Meagher County News, Western Recovery Systems spokesman Gordon Doig stated, "If we feel it (the incinerator) is unsafe or is a major threat to the health or the economic well being of the community, we are not dedicated to go ahead with the project." If this is true, why all the resistance to safe cogeneration alternatives? Alternative technology that is appropriate to eliminate the proposed infectious waste burning technology has been proposed to all respective parties, including the DHES, Gordon Doig, and The Last of the Best Coalition. If Western Recovery Systems is, as they say, "not dedicated to go ahead with the project," then there must be more than sufficient time to investigate this alternative appropriate technology linkage.

Cogeneration at Alcotech can be accomplished inexpensively by means of an anaerobic methane digester. The resultant fuel, methane (CH₄), is the cleanest burning of all fuels. Currently, methane emissions from the Alcotech sediment ponds place them in non-compliance with their Air Quality permit regulations, which require all "fragrances" to be confined on premises. The byproduct of ethanol production, DDG, can be utilized in methane production, then retrieved as SSG (single-cell protein) and still be marketed as livestock feed. With methane technology, Alcotech can cogenerate, clean up odors, maintain the cattle feed supplement business, and create an entirely new fertilizer business. Why the rush to burn infectious medical wastes?

Phil White Hawk
pres
Last of Best
Ringling



"I Scratch For A Living"

CONNIE BELLET

Artist and Scrimshander

EXHIBIT 30

DATE 7/14/92

HB 58459

Fickle Finger Flats
Box 111
Ringling, Montana 59642
(406) 547-2272

July 9, 1992

Mr. Craig Stagner
Bureau of Solid and Hazardous Waste
Department of Health and Environmental Sciences
Cogswell Building
Helena, Montana 59620

Dear Mr. Stagner:

Thank you for the opportunity to enter testimony regarding the feasibility of the proposed infectious medical waste incinerator in Ringling, Montana. As citizens, many of us are not convinced of the safety of the proposed facility, and the burden of proof of this lies with Western Recovery Systems and the DHES itself. As a private citizen, I have a great many concerns which need to be addressèd, but in the interest of avoiding duplication of efforts, I will confine my testimony to biological and health issues, excluding water quality and fisheries issues, which will be addressed by others.

In 1991, the EPA did an 11 city study, which showed that 65,000 people per year were dying from legal levels of particulate pollution in the environment. (Science News) Particulate pollution, either airborne, in the soil, or in the water, is produced by incineration. This indicates that EPA legal limits are too high to protect the populace, and that each state must determine and enforce legal and safe standards for incinerator emissions and ash disposal. The Dept. of Health and Environmental Sciences, in conjunction with the State Legislature, must be held liable for protecting human health, as well as the industries of agriculture, tourism, and real estate development. To fulfill this obligation, a great deal of research needs to be done and baseline toxicity levels established by means of an EIS, and then the Legislature needs to enact far more stringent regulation of siting, waste stream reduction, waste handling, incineration temperature control, worker exposure to pollutants, transportation of infectious and toxic materials, liability and bonding requirements in case of spills, and disposal of ash in sealed, corrosion-proof containers in special landfills which are properly sited. I would submit that since the applicant for any kind of incinerator permit would be the party responsible for all the above concerns, that the cost of the EIS should be borne by that applicant, not the taxpayers.

EXHIBIT 30
DATE 7/19/92
HB 58459

-2- Mr. Stagner, DHES

Since the applicant, Western Recovery Systems, Inc., is proposing a facility whose input and output could pose serious health threats to both human residents and wildlife over a large area, and since safety and security of plant workers, residents, and local industries depends on constant compliance of all regulations and protocols by the applicant, then it is necessary that a DHES inspector thoroughly inspect the facility operation at least once a week. The licensed professional engineer, as mentioned on page 8 of the E.A., should do a maintenance inspection at least three times a year. The fee for both inspectors should be paid by the applicant. If Western Recovery Systems is found to be in violation of State regulations, the resulting fine should be substantial enough to deter further violations. If the fine is not paid or the company continues to violate permit standards, it should be required to close down until it is proven that the problem is solved. If the problem cannot be solved, permanent closure should be mandated and the site reclaimed for an alternate use. I noted that on the application for the solid waste management license, on the checklist page, numbers 12 and 13, there was no calculation of site life and no closure plan attached. Those two items should definitely be required. Also, since compliance is such an important factor in the safety of the proposed installation, the DHES should be required to research the compliance record and the worker safety record of every business the business partners of Western Recovery Systems have run in the past 15 years. This kind of background check should be the norm for all incinerator permit applicants. If past compliance records are inadequate, the permit should be denied.

In neither the EA nor the Solid Waste Management License Application, nor any of the other material available at the City Library did I discover what kind of protection the plant workers would be wearing under ordinary working conditions. If their protection is any less than the garments required around a biomedical waste spill, worker protection is inadequate. There is no way of knowing how long and under what conditions infectious medical waste was stored at the generating facility. Health workers that I have asked have told me it is being kept down in the furnace room, not under refrigeration. Jostling of the stacked boxes on bumpy, twisting Montana roads does, according to the Montana Highway Traffic Safety Division, cause loads to shift (MHTSD, June 1992). Plastic lined cardboard boxes can indeed become weakened by such stresses to the point where they can break open when handled. Offloading by forklift or other mechanical device to reduce worker exposure to infectious waste can also damage the boxes. There was also no description of worker decontamination facilities or worker protective inoculation programs. As of May, 1992, there were 91 reported cases of AIDS and fewer than five cases of infectious TB in Montana (U.S. News and World Report), but if infectious medical waste is allowed into Montana from other states, workers would be exposed to a vast array of highly infectious diseases, and should be examined by a physician on a regular basis. No provision was made

for baseline health studies on either workers or residents of the Ringling area, so that future effects could be determined. It is especially important for baseline health studies to be performed on local women and children because women have a higher fat ratio in their bodies and are thus more susceptible to organochloride contamination and can pass on the contamination to children through the placenta as well as through breast milk. (Thornton, 1991) According to a report for Environment Canada, similar effects can be expected to occur in both humans and wildlife, but the larger size and slower reproductive cycles of humans "require more time to observe patterns of effects on the most sensitive life-stage--the unborn and future generations" (Muir 1987)

Because the air quality here in Meagher County ranks in the top three counties in Montana, we have, within 40 miles of Ringling, several families whose members have been chemically poisoned, and rendered hypersensitive to any kind of chemical contamination. These people, along with their spouses, are mostly small business entrepreneurs who are productive members of their communities. One man is a highly-regarded medical researcher who was poisoned when he lived within five miles of an incinerator. All of these people, in the course of dealing with their afflictions, have learned a great deal about particulate pollution, products of incomplete combustion, and other chemical health hazards. Their reactions to common pollutants range from brain seizures to severe asthmatic attacks to vertigo and migraines. Yet, we feel very honored to have these productive citizens as members of our community because their very presence verifies that here in Meagher County, we have what is truly "the last of the best." According to the National Academy of Sciences, 37 million people are presently chemically affected. By the end of next year, the number will rise to 74 million. In 20 years, 20% of the population will be chemically affected. Of people who suffer from chemical poisoning, over 50% are from formaldehyde, 41% from pesticides, and the rest from other chemicals such as chlorine and lead. As far as formaldehyde is concerned, EVERY major government health agency (NIOSH, OSHA, CDC, EPA, etc.) says that up to 20% of the population will be susceptible to adverse health effects for ANY exposure level. It seems to be that the closer we come to our own chemical thresholds, the more sensitive we become to any pollutant.

Pollution emitted from the incinerator is not merely an air quality problem. Particulate matter does indeed fall back to the ground with wind currents and precipitation. How far it will travel is a matter of some concern, which needs to be addressed in a full EIS, because local meteorology was not even addressed on the EA. Since the wind does blow persistently from any direction on the compass, and since winds can be strong enough to sling sheets of 3/4" plywood through the air, a thorough meteorological study is warranted. High winds have been known to rip the tarps right off semi trucks, too and if that were to happen with an ash hauler, the results could be extremely hazardous. It would be nearly impossible to clean up an ash spill or a dispersion of particulate matter.

The big question is about the composition of the stack emissions and the ash. Any metals found in the waste feed will be found in the stack

-4- Mr. Stagner, DHES

effluent, the captured fly ash, and the bottom ash. Because many of the heavy metals, even in trace amounts (e.g. lead, mercury, cadmium, chromium, etc.), are known toxicants, their exposure to humans and the general environment is a matter of some concern. It is abundantly clear that avoiding putting metals into an incinerator is far superior to capture efforts following incineration. (Cook, 1989) Furthermore, sampling and analysis techniques are not available to identify or quantify many of the compounds emitted (stack gases). It is, at present, impractical to design a monitoring scheme to identify and quantify the individual toxic compounds in incinerator stack emissions. (US EPA 1989a) Mr. Doig maintains that his proposed incinerator will produce only 11 tons, or 22,000 pounds of ^{emissions} per year. The lowest estimate I could find for an active rotary kiln of the same capacity was 55,700 pounds per year. Clearly, there are large discrepancies between manufacturer's specifications and real-world situations. Insufficient testing for metals levels in incinerator emissions has been conducted to determine the average or reasonable worst-case levels of metal emissions to be expected. (U.S. EPA 1990) It seems idiotic to me to take stable, inert, and relatively non-biodegradable materials such as plastics and then incinerate them, releasing toxins in fine, particulate form. Humans may be exposed to incinerator pollutants through inhalation or ingestion of contaminated food products and drinking water. Many incinerator pollutants are known to be taken up by, or deposited on, food crops and to accumulate in fish and animal tissues, including meat, milk, and eggs. Local exposures for each pollutant vary with the persistence of each chemical and meteorological conditions. Pollutant dispersion may also occur over long distances, leading to exposure far beyond local areas. (U. S. EPA 1985a) According to the EPA, there is no safe level of particulate pollution, especially for children. There is no evidence of a clear threshold for the expanded population, either. The only correlation is that the higher the concentration of particulate pollution in the environment, the higher the percentage of the population will be negatively affected. (Federal Register, Vol. 126, July, 1989 pg. 24-642)

The agriculture industry will most certainly be affected by the presence of an infectious medical waste incinerator. In the Netherlands, it took 17 years for the cattle downwind of a municipal incinerator to become hazardous waste. Beef and dairy cattle have been shown to accumulate significant levels of dioxins and compounds with generally related structures, such as PCBs, DDT, and PBBs following administration in the diet or ingestion of contaminated soils. (U.S. EPA 1988a) Drinking one liter of milk produced near an incinerator location was found to give the same dioxin dose as breathing the air for eight months. (Connett and Webster, 1987) Dioxins, PCBs, and PBBs are members of a family of compounds called organochlorines. Organochlorines build up in the tissues of living organisms. Because most organochlorines are more soluble in oils and fats than in water, they tend to migrate from the environment into the fatty tissues of living things. For instance, TCDD (the most toxic form of dioxin, also known as 2,3,7,8,-tetrachlorodibenzo-p-dioxin) has been shown to accumulate in fish tissues at concentrations

-5- Mr. Stagner, DHES

up to 159,000 times greater than the concentration in the water in which the fish swam (U.S. EPA 1988). As I mentioned on page 2, these organochlorides can be passed through the placenta and in breast milk. Infants born to fish-eating mothers had an impaired ability to learn. After five and seven months, these infants performed poorly on visual recognition tasks. After four years, the children born to fish-eating mothers showed impaired short-term memory in both verbal and quantitative tests. (Jacobson 1988, Great Lakes Study.) This is the reason why there is a warning on the Michigan fishing license to not eat the fish. A great number of people from Michigan and other contaminated Midwestern states come to Montana to catch and eat our fish, resulting in a growing tourism and outfitting industry. Ringling is in the middle of a watershed area, near the source of Sixteen Mile Creek, the Smith River, the Musselshell River, and the Shields River, all blue-ribbon trout streams. The Shields River Valley has long been touted as being the home of the world's largest breeding herds of purebred Hereford cattle. This is an immensely productive region featuring native grasses that have tested up to 18% protein, perfect for feeding breeding herds. However, many organochlorines and such heavy metals as lead, manganese, mercury, and cadmium all have negative effects on human and animal reproduction.

There is some disagreement as to how dioxins are formed, as well as at what temperature they are destroyed. According to the California Air Resources Board, in a report issued May, 1990, "Laboratory tests indicate that 1650 degrees Fahrenheit is the theoretical temperature necessary for dioxin destruction." Other studies dispute this figure, calling for temperatures of 1800 degrees F. and 4000 degrees F. But that may be a moot point as the California study also indicates that dioxins form, or re-form, as the hot emission gases cool in the cogenerator and emission stacks. Further study needs to be done on this issue.

Birds, with their high metabolic rates and peak position on the food chain, are extremely sensitive to particulate emissions, which bioaccumulate in their food supply. Dr. Al Harmata from MSU has found that both resident and migratory eagles exhibit elevated lead levels in their blood already. This area has been known since the time the Crow Indians lived here as The Valley of the Eagles. I have counted as many as 60 eagles, both bald and golden, in the air along Highway 89. It is an awesome sight to watch territorial golden eagles fiercely chase the migrating balds away from their nesting and hunting areas. This is a part of our heritage, something that is unique to our Valley of the Eagles.

I took a survey of the birds that I have personally observed within ten miles of Ringling. I counted 13 raptors, including the occasional migratory Arctic gyrfalcon and snowy owl. There are at least nine water birds, including the tall sandhill cranes that nest along Sixteen Mile Creek. We have three upland ground birds, including the Hungarian partridges that patrol our yard. I have identified some 25 passerine

birds, not counting a lot of small brownish "tweety birds" that I really should look up. Many of these birds are insectivorous, so they would be at considerable risk of bioaccumulation of toxins. I am attaching my list of observed birds and mammals so that some sort of baseline data can be built around our wildlife. This list is by no means complete, as I have not personally observed several species that I know live here, such as sage grouse and blue grouse. All of these birds, and many of the mammals, can and have performed as "miner's canaries" which indicate when we, as a species, are in serious danger of contamination. Despite certain variations, humans are essentially similar in genetic code and metabolic systems to the species in which epidemic health effects have been documented. (Muir, 1987) Mr. Muir was referring to adverse health effects in cormorants and other fish-eating birds that had become contaminated by organochlorines. Living organisms do not have the capacity to break down or secrete organochlorines, because they are almost completely foreign to nature and only came into existence in the last 100 years. (S.A.B. 1989) The concentrations of organochlorines in these wild populations (in which epidemic health effects have occurred) are in the same general range as those found in human populations. Because of their short generation times, populations of fish and wildlife may be showing effects that will appear later in human populations. (Vallentyne, 1989)

From all of the research that I have read, I conclude that we do not know anywhere near enough about the nature of incineration of biomedical waste to be able to deal with it in a manner that will solve more problems than it causes. I would not consider this proposed Ringling facility to be "state of the art" at all, mainly because it does not employ closed-loop technology and the ash is neither vitrified nor composted to remove the heavy metal content. The ash is not even buried in sealed, plastic-coated containers. This is supposed to be a "low emission" facility with output compared to "two wood stoves." Let us have a reality check; nobody burns that in their wood stove! Besides, it should be noted that facilities that have low emissions can have greater risks than facilities with higher emissions because of longer operating hours, differing combustor designs, short stack heights, or differing meteorological conditions. (CA ARB, pg. 14, 1991) In short, a great deal needs to be learned before we make a mess that we cannot clean up--ever.

EXHIBIT 30

DATE 7/14/192

HB 58 & 59

ATTACHMENT A

RAPTORS:

Golden Eagles, Bald Eagles

Marsh Harriers

Red-Tailed Hawks, Ferruginous Hawks, Swainson's Hawks

Prairie Falcons, Peregrine Falcons, Kestrels

Rare: Arctic Gyrfalcons

Great Horned Owls, Short-Eared Owls

Rare: Snowy Owls

WATERFOWL:

Great Blue Herons, Sandhill Cranes

Mallard Ducks, American Coots, Cinnamon Teal, Pintail Ducks

Canada Goose

Killdeer, Common Snipe

UPLAND GROUND BIRDS:

Common Nighthawk

Greater Prairie Chicken, Hungarian Partridge

PASSERINE BIRDS:

Mourning dove, Band-Tailed Pigeon

Barn Swallow, Tree Swallow

Hairy Woodpecker, Red-Shafted Flicker

Calliope Hummingbird, Rufous Hummingbird

American Goldfinch, Yellow Warbler, Western Meadowlark

Yellow-Headed and Red-Winged Blackbirds

Bullock's Oriole, Evening Grosbeak, American Robin

Eastern Kingbird, Bronze-Headed Cowbird, Mountain Bluebird

Belted Kingfisher, White-Crowned Sparrow, Starling, Magpie, Crow

Raven, Western Tanager, House Sparrow, Redpoll

EXHIBIT 50
DATE 7/18/42
HB 58459

ATTACHMENT B

SMALL RODENTS AND LAGOMORPHS:

Deer Mouse , Meadow Vole, Richardson's Ground Squirrel
Yellow-Bellied Marmot, Bushy-Tailed Pack Rat, Wood Rat, Water Shrew
Muskrat, Beaver, Porcupine

Cottontail Rabbits, White Tailed Jackrabbits

MUSTELIDS:

Striped Skunk, Badger, Short-Tailed Weasel, Wolverine

PROCYANIDS

Raccoon

URSIDS:

Black Bear

UNGULATES:

Rocky Mountain Elk, Mule Deer, Whitetail Deer, Pronghorn

CHIROPTERA:

Little Brown Bat

CANIDS:

Coyote, Red Fox

FELIDS:

Feral Housecats (Bobcats and Cougars rarely seen)

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1991.

Name: Roger E. Carey

Address: 116 Wedgewood Lane

Telephone Number: (406) 443-5284

Representing whom?
last of the Best Coalition

Appearing on which proposal?
Supporting Moratorium

Do you: Support? Amend? Oppose?

Comments:
Entering my ~~is~~ testimony, Testimony for Phil White Hawk, Connie Bellet

HOW TO KEEP A MORATORIUM FROM BEING DECLARED UNCONSTITUTIONAL

1. State legislatures cannot favor instate waste permits over out-of-state waste permits, this is a violation of the Commerce Clause of the US Constitution. Diamond Waste, Inc. v. Monroe County, Ga., 939 F.2d 941 (11th Cir. 1991).
2. States must have pressing and explained reasons for a moratorium that override the adverse effect on interstate commerce. Id.
3. An outright ban on importation of waste by denying permits could be unconstitutional. Omni Group Farms, Inc. v. County of Cayuga, 766 F.Supp. 69 (N.D.N.Y. 1991).
4. A higher tax on out-of-state waste may be unconstitutional. National Solid Waste Management Ass'n v. Voinovich, 763 F.Supp. 244 (S.D.Ohio 1991).
5. Local regulation of non discriminatory permits with overall state plan appears to be acceptable to federal courts. Bill Kettlewell Excavating v. Michigan DNR, 732 F. Supp. 761 (E.D.Mich. 1990).



Roger E. Carey

Attorney for Last of the Best Coalition, Ringling, MT
116 Wedgewood Lane, Helena, MT
(406) 443-5284

DATE 7/19/92
HB 58459

customer. Mrs. Murray denied exercising any actual control over the way in which Godfrey drove (RE 69). En route she told Godfrey to pull over and stop at a drive-in so that she could get a soft drink. Pressed about this occurrence, she stated that she asked Godfrey to stop, that she could not "by herself" direct him to stop but said that if she asked him if he would stop to get her a soft drink and he refused she "could have made him do it . . . or fired him if she wished to" (RE 66).

Godfrey testified that Mrs. Murray was his boss and had the right to control his actions on the job while he was working. To a question of whether she was his supervisor, he responded: "Yes, she was the boss, owner, yes sir."

The district court instructed the jury that Godfrey was an employee and working within the scope of his employment, so that if he was negligent his negligence was chargeable to the corporation. The correctness of this instruction is not questioned.

With respect to Mrs. Murray, the court charged:

"Now, you have another features in this case. The evidence shows that Mrs. Murray was riding with Mr. Godfrey. She is vice president of the corporation. She is in a position that she, plainly speaking, is his boss and she has a right to control what he does. It doesn't mean that she has to control. It simply means she has a right to control what he did because of the relationship between the two, what the law calls privity [sic] between them.

So that means if Mr. Godfrey was negligent at this time and place then that's imputed to her or chargeable to her. She is just as responsible as he would be for any negligence. That's what we mean by imputed negligence in this case.

(RE 72.)
Georgia is a comparative negligence state. The court gave additional instructions explaining that if Godfrey's negligence exceeded negligence of defendants the plaintiffs could not recover, and if Godfrey's negligence were less than negligence

of defendants plaintiffs' damages would be reduced accordingly.

The Murrays objected to the instruction on imputation of Godfrey's negligence to them, as follows:

"We believe that the correct statement of law is that at best that is a jury question as to whether or not she was directing him at that time; that the negligence is not imputable as a matter of law and that was in effect a directed verdict on the issue of imputed negligence.

(RE 77)

The court responded:
For all intents and purposes of the record, I think you can say to imputed negligence between Mr. Godfrey and Mrs. Murray I did direct a verdict.

(RE 77)

Thus the issue comes down to the correctness of the instruction—or as the court saw it, its directed verdict—concerning imputation of Godfrey's negligence to Mrs. Murray.

There is no evidence that Mrs. Murray in her individual capacity was Godfrey's principal or that Godfrey was the agent of Mrs. Murray individually, and the district court's instruction is consistent with that state of the evidence. The basis for the court's instruction was Mrs. Murray's status as vice-president of the corporation ("his [Godfrey's] boss") which gave her a right to control what he did. This relationship the court described as privity between them.

Mrs. Murray asserts that because Mrs. Maid was the principal and she and Godfrey were merely agents of the corporation, the driver's negligence may be imputed solely to the corporation and not to her. This presents us with interpretation of O.C.G.A. § 51-2-1, which provides:

For the negligence of one person to be properly imputable to another, the one to whom it is imputed must stand in such a relation or privity to the negligent person as to create the relation of principal and agent.

We then face this question: If a corporate vice-president, by reason of her position with a small family corporation, has power

of control over a corporate employee driving a company vehicle in which she is a passenger on company business, are they, within the meaning of § 51-2-1, in such "relation or privity" that the relation of "principal and agent" is created between them (she as principal and he as agent), with a consequence that the driver's negligence is imputed to her as her contributory negligence?

The instruction given by the court is predicated upon Mrs. Murray's right to control, which the court drew from her status as vice-president. This presents us with a second question: Does a corporate vice-president of a small family corporation, as a matter of law, solely by reason of her position as vice-president, have the right to control a driver-employee in the operation of a company vehicle in which she is a passenger on company business or is right to control an issue of fact to be decided by the jury based upon all the circumstances? Mrs. Murray contends that her actual duties—manual labor, book-keeping, calls on customers—are the duties of a co-employee, that as co-employee she was accompanying Godfrey on a mission separate from his, and that these duties did not put her in a supervisory position to exercise control over Godfrey; that is, she says, the power implied solely from her status as vice-president does not as a matter of law include the power to control operation of a company vehicle in which she is a passenger on company business, so that right to control is a jury issue. Moreover, as pointed out above, her testimony describing her perception of her ex officio power is not wholly consistent, and Godfrey's testimony with respect to her right to control differs from hers.

We therefore certify the following questions:

(1.) If a corporate vice-president, by reason of her position with a small family corporation, has power of control over a corporate employee driving a company vehicle in which she is a passenger on company business, are they, within the meaning of § 51-2-1, in such "relation or privity" that the relation of "principal and agent" is

created between them (she as principal and he as agent), with a consequence that the driver's negligence is imputed to her as her contributory negligence?

(2.) Does a corporate vice-president of a small family corporation, as a matter of law, solely by reason of her position as vice-president, have the right to control a driver-employee in the operation of a company vehicle in which she is a passenger on company business or is right to control an issue of fact to be decided by the jury based upon all the circumstances?

Our statement of the questions is not designed to limit the inquiry of the Georgia Supreme Court. The particular phrasing used in the certified questions does not restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

The entire record in this case, together with copies of the briefs of the parties, is transmitted herewith for any assistance it might provide to the Court in answering the certified questions.



DIAMOND WASTE, INC.,
Plaintiff-Appellee,

v.
MONROE COUNTY, GEORGIA, Monroe
County Board of Commissioners, Tom-
my Wilson, Jim Ham, R.T. Bunn, Larry
Evans, James Long, Defendants-Appel-
lants.

No. 90-8298.
United States Court of Appeals,
Eleventh Circuit.
Aug. 23, 1991.

Landfill operator brought action seeking declaratory judgment that county's ap-

publication of Georgia statute governing transportation of refuse violated commerce clause's right to engage in interstate commerce without discriminatory intervention. The United States District Court for the Middle District of Georgia, No. CIV-89-380-2-MAC, Wilbur D. Owens, Jr., Chief Judge, 731 F.Supp. 505, held that county's application of statute violated commerce clause and entitled operator to injunction, and county appealed. The Court of Appeals, Clark Circuit Judge, held that: (1) county's application was not per se invalid, but (2) county's application violated commerce clause, in that county could have achieved its objectives with a lesser impact on interstate commerce.

Affirmed in part, vacated in part.

1. Commerce §52.10

County's application of Georgia statute governing transportation of refuse to prohibit landfill operator from transporting waste from outside county and state was not per se invalid under commerce clause, in that the county's application treated interstate waste and intrastate waste on an equal basis, and county had legitimate legislative interest in extending life of only existing landfill within its jurisdiction and in protecting its residents and its environment from increased pollution and traffic that regional landfill would create. O.C.G.A. § 36-1-16; U.S.C.A. Const. Art. 1, § 8, cl. 3.

2. Commerce §52.10

County's resolution governing transportation of refuse, which prohibited landfill operator from transporting waste from outside county and state, violated commerce clause, in that impact on interstate commerce could have been substantial and county could have achieved its objectives in less burdensome manner; county could have reduced amount of garbage by setting reasonable daily tonage limits or auctioning permits for dumping fixed amounts of im-

* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting

ported waste. O.C.G.A. § 36-1-16; U.S. Const. Art. 1, § 8, cl. 3.

W. Franklin Freeman, Jr., James A. Vaughn, Mills, Freeman, Vaughn & Sosebee, Forsyth, Ga., Frederick L. Wright, Smith, Currie & Hancock, Atlanta, Ga., for defendants-appellants.

L. Robert Lovett, Smith, Hawkins, Almand & Hollingworth, Macon, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TJOFLAT, Chief Judge, CLARK, Circuit Judge, and KAUFMAN*, Senior District Judge.

CLARK, Circuit Judge:

This appeal raises the question of the constitutionality of Monroe County's ban on the importation of out-of-county waste. We hold that the County resolution at issue violates the commerce clause but that the Georgia statute from which Monroe County may have derived its authority to impose the ban is constitutional.

I. BACKGROUND

Monroe County, Georgia and the City of Forsyth, located in Monroe County, jointly operated a waste disposal dump in an unincorporated area of the county for several years. Forsyth owned the land where the dump was located. Under the terms of a joint agreement, Forsyth was responsible for one-third of the operating costs, and Monroe County was responsible for the remaining two-thirds. In late 1988 or early 1989, Forsyth informed Monroe County that the dump, which was receiving approximately fifty tons of garbage daily, was reaching capacity and would need to be closed within two years at most. On September 19, 1989, Forsyth received a letter from Monroe County stating that Monroe County's engineers believed that the landfill was reaching capacity, that Monroe

County did not believe the landfill should continue to operate past December 26, 1989, and that Monroe County would not bear any of the expenses of closing the site. The joint landfill agreement terminated on December 31, 1989.

On October 12, 1989, Forsyth contracted with Diamond Waste, Inc., to assume the operation of the dump. Under this agreement, Diamond Waste was given permission to convert the dump into a regional landfill. Diamond Waste planned to extend the life of the landfill by using more efficient techniques and by expanding onto an unused portion of the landfill site. While Forsyth's garbage would be disposed of at no cost, Monroe County would have to pay for any garbage it wanted to dump in the landfill. The rationale for the regional landfill was that the waste generated solely within Monroe County could not support the maintenance of an environmentally safe landfill. Diamond Waste has subsequently received offers for importation of waste from out of state totalling 180 tons daily. On October 17, 1989, Diamond Waste informed Monroe County that it had taken over the operation of the landfill. The minutes of the October 25, 1989, meeting of the Monroe County Commission reflect the following:

Comm. Long made the following motion: "Because the City of Forsyth has attempted to breach their agreement with Monroe County regarding the current operation of the landfill and the City of Forsyth has agreed with a private company to jointly create a Regional Landfill in Monroe County to be operated by Diamond Waste Management, Inc.; 'I move that the Board of Commissioners resolve to prevent the creation of this Regional Landfill, by legal action if necessary, so that we will prevent garbage, trash, or waste of any kind from being

1. No person, firm, corporation, or employee of any municipality shall transport, pursuant to a contract, whether oral or otherwise, garbage, trash, waste, or refuse across state or county boundaries for the purpose of dumping the same at a publicly or privately owned dump, unless permission is first obtained from the governing authority of the county in

transported into Monroe County from other counties and locations." The resolution was unanimously passed.

The district court found that O.C.G.A. § 36-1-16, gave the County authority to pass such a resolution, although we find no reference to the statute by the county commissioners. Nor does the October 25, 1989 letter from the County's attorney to the attorneys for Forsyth and Diamond Waste, discussed by the district court, make any reference to the statute. Nor do we find in the record any application from the City of Forsyth or Diamond Waste for permission to operate a dump as required by the statute. Be that as it may, we will review this case in the context of the district court's opinion.

On November 7, 1989, the president of Diamond Waste presented three proposals to the Monroe County Commissioners for the operation of the dump. These proposals were rejected because they all involved the creation of a regional landfill. Monroe County has since made arrangements with other counties for the temporary disposal of its own garbage. On the same day, Monroe County filed an action in Monroe Superior Court to enjoin Diamond Waste and Forsyth from operating a regional landfill. Later on that day, Diamond Waste filed the instant action in the district court. On December 1, 1989, the Superior Court held that section 36-1-16 was constitutional and enforceable against Diamond Waste and Forsyth. This decision was reversed on July 5, 1990, by the Georgia Supreme Court, which held that the district court's intervening ruling of unconstitutionality operated as an estoppel by judgment.²

On February 22, 1990, the district court held that section 36-1-16 as implicated by the Monroe County resolution was unconstitutional. Monroe County was permitted which the dump is located and from the governing authority of the county in which the garbage, trash, waste, or refuse is collected. The subsequent amendment to section 36-1-16 has no bearing on this appeal.

2. *Mayor and Alderman of Forsyth v. Monroe County*, 260 Ga. 296, 392 S.E.2d 865 (1990).

recently enjoined from interfering with Diamond Waste's operation of the dump.³

II. THE CONSTITUTIONAL LAW BASICS

The Supreme Court has established the parameters of our analysis under the Constitution's commerce clause:

The opinions of the Court through the years have reflected an alertness to the evils of "economic isolation" and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach, the general outlines of which were outlined in *Pike v. Bruce Church, Inc.*⁴

The Court's opinion in *Pike*⁵ describes a test requiring a permissible regulation to operate "even-handedly," to result from a "legitimate local purpose," and to have only an "incidental" impact on interstate commerce.⁶ Such a regulation "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . 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."⁷

III. PER SE INVALIDITY

(1) The Monroe County resolution does not constitute sheer economic protectionism against out-of-state commerce and so is not invalid *per se*.⁸ The resolution treats interstate waste and intrastate waste on an equal basis.⁹ Monroe County also has legitimate legislative interests in extending the life of the only existing landfill within its jurisdiction and in protecting its residents and its environment from the increased pollution and traffic that a regional landfill would create. Indeed, many private residences are adjacent to the landfill, as are Monroe County's mental health center and an elementary school.

IV. THE PIKE TEST

(2) Whatever were the motives in passing the resolution, our consideration of the factors laid out in *Pike* leads us to conclude that Monroe County's resolution must be invalidated. For the reasons discussed in the previous section, we find that the resolution is applied relatively "even-handedly" and accomplishes a "legitimate local purpose." However, we are loathe to characterize the possible effects of the resolution on interstate commerce as "incidental." There was evidence that Diamond Waste had already received inquiries concerning the importation of 180 tons of waste daily from outside of Georgia. Although there is at present but one landfill in one county that would be affected by the resolution, were other counties to adopt the same reg-

ulation in response, the impact on interstate commerce could be substantial.¹⁰

Even more crucial to our decision is the fact that Monroe County could have achieved its objectives "as well with a lesser impact on interstate activities."¹¹ If Monroe County's goals are to preserve existing landfill space and to prevent environmental damage, these goals could be met just as effectively by less discriminatory measures. Section 36-1-16 requires "per-mission" from counties prior to the importation of wastes from elsewhere. The statute does not establish how counties should regulate the dispensation of their permission or what counties may request in exchange for their permission. Under the statute, Monroe County could reduce the amount of garbage deposited by setting reasonable daily tonnage limits on imported waste and granting permission to dump on a "first come, first served" basis. Or Monroe County could auction permits for dumping fixed amounts of imported waste. Or dumping rights for out-of-county garbage could be established by lottery. While this is not an exhaustive list of alternatives available to Monroe County, this list does show that Monroe County can avoid burdening interstate commerce while feasibly protecting available landfill space, its citizens, and the environment.¹²

Our decision is informed by the Supreme Court's holding in *Dean Milk Co. v. City of Madison*.¹³ There, the city of Madison, Wisconsin had adopted an ordinance preventing the sale of milk that was not bottled within five miles of the city's central square. This ordinance had the effect of preventing Illinois milk suppliers from selling their milk in Madison. The Supreme Court held that Madison's objective of ensuring that the milk was produced under sanitary conditions could be met as well by having city officials inspect the milk or by relying on inspections conducted by the United States Public Health Service. The Court wrote:

To permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invade a multiplicity of preferential trade areas destructive of the very purpose of the Commerce Clause. Under the circumstances here presented, the regulation must yield to the principle that "one state in its dealings with another may not place itself in a position of economic isolation."¹⁴

Similarly, Monroe County could achieve its objectives in a less burdensome manner. We recognize that other courts have reached opposite conclusions in somewhat comparable settings.¹⁵ Indeed, we might

3. *Diamond Waste, Inc. v. Monroe County*, 731 F.Supp. 505 (N.D.Ga.1990).

4. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 633-24, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978) (citations omitted).

5. 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

6. 397 U.S. at 142, 90 S.Ct. at 847.

7. *Id.* (citation omitted).

8. *Cf. City of Philadelphia*, 437 U.S. at 625-29, 98 S.Ct. at 2535-38 (voiding New Jersey's ban on out-of-state waste as facially violative of the commerce clause).

9. *See Evergreen Waste Sys., Inc. v. Metropolitan Serv. Dist.*, 820 F.2d 1482, 1484 (9th Cir.1987) ("Unlike New Jersey's total ban on out-of-state waste [returned in *City of Philadelphia*], Metro's ordinance applies to only one of Oregon's many landfills and bars waste from most Oregon counties as well as out-of-state waste.").

11. *Pike*, 397 U.S. at 142, 90 S.Ct. at 847.

12. *See BFI Medical Waste Sys., Inc. v. Whatcom County*, 756 F.Supp. 480, 486 (W.D.Wash.1991) (reversing county's ban on importation of medical wastes: "If the [county's] objective is to provide safeguards during the transportation of medical wastes, it could address that problem directly."); *Dutchess Sanitation*, 51 N.Y.2d at 677, 417 N.E.2d at 78, 435 N.Y.S.2d at 966 ("[T]he only legitimate goal [of] protection of community health—might have been adequately effected . . . through nondiscriminatory, across-the-board limitation on the quantity, type or

10. *See Dutchess Sanitation Serv., Inc. v. Town of Plattekill*, 51 N.Y.2d 670, 676, 417 N.E.2d 74, 77, 435 N.Y.S.2d 962, 965 (1980) (invalidating similar prohibition on out-of-municipality waste: "Efflor purposes of deterring the presence of efflor on interstate commerce, not only the impact of a particular instance of regulation, but a projection of the cumulative burden that would result if similar regulations were adopted elsewhere is to be considered.")

13. 340 U.S. 349, 71 S.Ct. 295, 93 L.Ed. 329 (1951).

14. 340 U.S. at 356, 71 S.Ct. at 299 (citation omitted); *see also Great Atl. & Pac. Tea Co. v. Correll*, 424 U.S. 366, 376-78, 96 S.Ct. 923, 930-31, 47 L.Ed.2d 55 (1976).

15. *See supra* text accompanying notes 11-12.

16. *See Evergreen Waste*, 820 F.2d at 1485 (upholding ban on out-of-municipality waste without determining availability of less restrictive alternatives); *County of Washington v. Cassella Waste Management, Inc.*, 1990 WL 208709, *4.

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 strike a different balance under *Pike* if Monroe County had demonstrated a more pressing need for preserving landfill space—for example, if no other landfill space within or without the county was available for Monroe County's use.¹⁷ But under the particular circumstances at issue, the fact that less restrictive alternatives are available to Monroe County makes the burden imposed by the absolute ban clearly excessive in relation to the local benefits created.

V. CONCLUSION

The Monroe County resolution adopted October 25, 1989, preventing Diamond Waste, Inc. from importing waste of any kind into Monroe County from other counties and other locations violates the commerce clause. The district court declared the statute under which the County passed the resolution, O.C.G.A. § 36-1-16, unconstitutional "as applied." We note that the statute is nevertheless constitutional. It permits Georgia counties to require an application for a permit from those who would bring across state or county boundaries garbage, trash, waste, or refuse for the purpose of dumping such at a publicly or privately owned dump.

We affirm the district court's decision to enjoin the County from an outright ban on the importation of waste across county and state boundaries. We vacate so much of the district court's order indicating that the County has no interest in the landfill to protect, since it is clear that the Georgia statute gives Georgia counties a role in protecting the public health and welfare

1990 U.S. Dist. LEXIS 16941, *11-14 (N.D.N.Y. 1990) (same); *Bill Kentlewell Excavating, Inc. v. Michigan Dept. of Natural Resources*, 732 F.Supp. 761, 765-66 (E.D.Mich.1990) (same), *aff'd*, 931 F.2d 413 (6th Cir.1991); *cf. Smith Resource Sys., Inc. v. Licking County*, 883 F.2d 245, 248-55 (3d Cir.1989) (applying "market participant exception" to reject commerce clause challenge to preference given to county residents in use of county-operated landfill), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1127, 107 L.Ed.2d 1033 (1990); *Waste Aid Sys., Inc. v. Citrus County*, 613 F.Supp. 102, 105-07 (M.D. Fla.1985) (rejecting equal protection challenge

with respect to the operation of waste dumps within their respective boundaries.

AFFIRMED.



Johnny Mac BROWN,
 Plaintiff-Appellant,

AMERICAN HONDA MOTOR COMP.

NY, INC., Jerry Felly,
 Defendants-Appellees,

Phillip R. Hughes, Ashley D. Hughes,
 Hughes Auto Sales, Inc.,
 Intervenor-Defendants,

No. 90-8487.

United States Court of Appeals,
 Eleventh Circuit.

Aug. 23, 1991.

Rejected black applicant for automobile dealership sued manufacturer under § 1981. The United States District Court for the Northern District of Georgia, No. 1:85-cv-1582-HTW, Horace T. Ward, J., entered summary judgment for manufacturer. Applicant appealed. The Court of Appeals, Roney, Senior Circuit Judge, held that: (1) evidence supported finding that business reasons advanced by manufacturer were not pretext for intentional discrimination in county's ban on dumping of out-of-county waste in county-owned landfill).

17. *Cf. Borough of Glassboro v. Gloucester County Bd. of Chosen Freeholders*, 100 N.J. 134, 495 A.2d 49, 55 (1985) (affirming entry of injunction barring import of waste into private landfill; "[The injunction's] purpose is to permit emergency access to [the landfill] for the protection of the health, safety, and welfare of a limited number of municipalities in the tri-county area that have no alternative means of disposing of solid waste."); *cert. denied*, 474 U.S. 1008, 106 S.Ct. 532, 88 L.Ed.2d 464 (1985).

ation, and (2) court properly denied applicant's motion to reopen discovery.

Affirmed.

1. Federal Civil Procedure ⇨2491.5

Despite general presumption against using summary judgment to resolve largely factual questions concerning discriminatory intent in § 1981 actions, it is possible for defendant to present such strong evidence of nondiscriminatory rationale that summary judgment is warranted. 42 U.S.C.A. § 1981.

2. Civil Rights ⇨240(1)

In § 1981 actions, if defendant's proffer of credible, nondiscriminatory reasons for its actions is sufficiently probative, then plaintiff must come forward with specific evidence demonstrating that reasons given by defendant were pretext for discrimination. 42 U.S.C.A. § 1981.

3. Civil Rights ⇨118

Rejected black applicant for automobile dealership failed to show that manufacturer awarded dealership to white applicant for racially discriminatory reasons, and thus, black applicant could not recover under § 1981; manufacturer offered legitimate, nondiscriminatory reasons for selecting white applicant, i.e., he was only applicant who had prior experience in sales and service of manufacturer's automobiles and he was only applicant who would exclusively sell manufacturer's automobiles, black applicant failed to show those reasons were pretextual, and, even though manufacturer's expressed preference for existing dealer did not appear in its manual, that practice affected two rejected white applicants in precisely same manner that it affected black applicant. 42 U.S.C.A. § 1981.

4. Civil Rights ⇨118

Under § 1981, contract may be granted for good reason, bad reason, reason based on erroneous fact, or for no reason at all, as long as it is not for discriminatory reason. 42 U.S.C.A. § 1981.

5. Civil Rights ⇨118

In § 1981 action by rejected black applicant for automobile dealership, fact that of approximately 860 of defendant manufacturer's dealers nationwide, only two were black, did not demonstrate that reasons espoused by manufacturer for rejecting black applicant were not legitimate; there was no evidence of how many blacks had applied and failed, and no comparison of that number to success rate of equally qualified white applicants. 42 U.S.C.A. § 1981.

6. Civil Rights ⇨118

In § 1981 action by rejected black applicant for automobile dealership, it was not sufficient for black applicant to show that defendant manufacturer was aware that particular practice of choosing dealers would have discriminatory impact; rather, black applicant was required to show that defendant chose policy for precisely that purpose. 42 U.S.C.A. § 1981.

7. Civil Rights ⇨242(1)

To rebut prima facie case of discrimination shown by rejected black applicant for automobile dealership, defendant manufacturer was not required to demonstrate that individual selected for dealership was actually more qualified than black applicant, but rather, manufacturer was only required to show that it had legitimate nondiscriminatory reason for its action. 42 U.S.C.A. § 1981.

8. Federal Civil Procedure ⇨1271

In § 1981 action against automobile manufacturer by rejected black applicant for dealership, court properly denied black applicant's motion to reopen discovery to make inquiries into Equal Employment Opportunity Commission (EEOC) agreement with manufacturing component of defendant's operations; hiring practices used by related subsidiary involved in production and located in different state were not relevant to intent of separate corporation involved in sales and located in Georgia. 42 U.S.C.A. § 1981.

9. Federal Civil Procedure ⇨1588

In § 1981 action by rejected black applicant for Georgia automobile dealership, district court properly denied black applicant's motion to compel production of infor-

illogical to construe an agreement, providing for repayment or default in the event of certain contingencies, as permitting the creditor, in the absence of the occurrence of those contingencies, to terminate the agreement without any cause whatsoever. Under such a construction, the enumerated conditions would be rendered meaningless.

821 F.2d at 14 (original emphasis). The Fleet-Liuzzo RCA is similar to the one described in this passage from *Reid* in that it contains no demand provision, but it does list eighteen events of default, any of which enable Fleet to demand immediate and full repayment of the loan. If it is implicit in the *Reid* contract that the bank may not terminate the agreement on "a whim," this is equally true of the Fleet-Liuzzo contract.

[5] To determine, then, whether Fleet's pre-October actions were justified, it is necessary to determine whether or not Liuzzo's actions during this time period constituted an event or events of default as defined by the loan agreement. Because the characterization of these actions is so thoroughly surrounded by dispute and contradictions, the Court is unable to make such a determination at this juncture in the proceedings. Consequently, the motions of both parties for summary judgment on Liuzzo's second claim, for breach of good faith and fair dealing, are denied. Thus Liuzzo's second counterclaim, as well as the identical claim, Count 2 of his complaint, survive.

The Court now comes to Liuzzo's final claim, Count 3 of his complaint, alleging that Fleet breached its fiduciary duty to Liuzzo. Here, Liuzzo's claim is not crystal clear. He alleges that in 1986, at the start of a prior loan agreement between the parties, Fleet insisted that Liuzzo retain the firm of G. William Miller & Co., Inc., ("Miller & Co.") as financial advisors. Through its relationship with Miller & Co., Fleet had access to information about Liuzzo which, according to Liuzzo, it "exploited [in] its position as the lender in the RCA to acquire priority interests in real property, personal

property, collateral and assets of the plaintiffs." Count 3 of Liuzzo's complaint.

On the subject of the existence of a fiduciary relationship, the Rhode Island Supreme Court has said:

There are no hard and fast rules about when a confidential relationship will be found. The court may consider a variety of factors, including the reliance of one party upon the other, the relationship of the parties prior to the incidents complained of, the relative business capacities or lack thereof between the parties, and the readiness of one party to follow the other's guidance in complicated transactions.

Simpson v. Dailey, 496 A.2d 126 (R.I. 1985).

In a complex international banking and trade case, the United States Court of Appeals for the Second Circuit, following New York law, found no fiduciary relationship between a bank and a borrower. The borrower/plaintiff claimed that it was owed a fiduciary duty by the bank because the bank served both plaintiff and its "closely-related" affiliate and had access to the financial records of both corporations. The Court dismissed these claims, however, explaining:

Notwithstanding [plaintiff/borrower's] allegations, New York law is clear that the usual relationship of bank and customer is that of debtor and creditor. And in this case, there is no evidence to indicate that either [defendant/bank] or [plaintiff/borrower] intended that their relationship be something more than just the debtor-creditor relationship.

Aaron Ferrer & Sons Ltd. v. Chase Manhattan Bank, 731 F.2d 112, 122 (1984).

[6] In the case before the Court, there is similarly no evidence that Liuzzo and Fleet intended a fiduciary relationship to exist beyond the terms of their contractual debtor-creditor relationship. It is probable that a fiduciary relationship existed between Liuzzo and Miller & Co., and if Miller & Co. disclosed Liuzzo's confidential financial information to Fleet, that might give rise to a claim by Liuzzo against Miller & Co. for breach of its fiduciary duty to

Cite as 766 F.Supp. 69 (N.D.N.Y. 1991)

him. But neither that relationship, nor the accompanying duties, would extend to Fleet, despite Fleet's insistence that Liuzzo seek financial advice from Miller & Co. in a prior financial transaction.

In short, this Court concludes that Liuzzo has completely failed to plead or offer any evidence which raises an issue that a fiduciary relationship ever existed between Fleet and Liuzzo as part of this or prior transactions between the parties. As the Supreme Court wrote in *Cetolzer Corp. v. Catrel*:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Because Liuzzo would have the burden of proving at trial that a fiduciary relationship existed between him and Fleet, and because there is no indication that he can prove that element of his case, the Court grants Fleet's motion for summary judgment on Count 3 of Liuzzo's complaint.³

Conclusion

A recap of the claims and their disposition in the interest of clarity follows. Fleet's suit comprised five counts. Counts 1, 4 and 5 taken together constitute a single breach of contract claim. The Court has decided this claim in Fleet's favor. The loan is accelerated and Liuzzo presently owes the full amount borrowed plus interest and other costs. Count 2 of Fleet's complaint is a fraud claim for damages against Liuzzo. Only Liuzzo made a motion on this count and that motion is denied. Count 3 is a claim of misrepresentation. Liuzzo did not pursue this claim in his court.

tion against Liuzzo's lawyer. No motions were made on this claim.

Liuzzo's complaint contains three claims. The first claim is to estop Fleet from accelerating the loan. Fleet's motion for summary judgment on this claim is granted and Liuzzo's is denied. (This ruling encompasses Liuzzo's identical first counterclaim).

Liuzzo's second claim alleges that Fleet's early attempts to accelerate the loan and the ultimate acceleration both constitute breaches of Fleet's duty of good faith and fair dealing. Although Fleet's actual October 27, 1989, acceleration was justified and represented no breach of good faith, the characterization of the actions taken by Fleet to terminate the loan before October 27, 1989, is disputed. Therefore, both parties' motions on this claim (contained in both Count 2 of the complaint and the second counterclaim) are denied.

Fleet's motion for summary judgment on the third count in Liuzzo's complaint, that Fleet breached its fiduciary duty, is granted.

Because of Fed.R.Civ.P. 54(b), no judgment shall enter until the remaining issues in these lawsuits are resolved.

It is so Ordered.



OMNI GROUP FARMS, INC., Cayuga
Meadows, Inc. and Michael
O'Neill, Plaintiffs,
v.

The COUNTY OF CAYUGA, Defendant.
No. 90-CV-1208.

United States District Court,
N.D. New York.
June 12, 1991.

Landowners who sought to operate
compositing business brought action chal-
lenging, nor did he make any motion on it.

DATE 7/14/92
HB 58+59

lenging county laws precluding the deposit in the county of sludge collected from outside the county. On motion to dismiss, the District Court, McCurn, Chief Judge, held that: (1) landowners did not allege selective enforcement directed toward them, and (2) landowners did not allege facts which would show that the burden on interstate commerce imposed by the county laws was excessive in relation to the local benefits. Dismissed without prejudice.

1. Civil Rights \approx 234

Civil rights complaint must contain more than conclusory, vague, or general allegations of constitutional deprivation; those allegations must be amplified by specific instances of misconduct or some specific allegations of fact indicating a deprivation of civil rights. 42 U.S.C.A. § 1983.

2. Civil Rights \approx 206(1)

County was a person for purposes of federal civil rights statute. 42 U.S.C.A. § 1983.

3. Constitutional Law \approx 250.1(3)

Law which is fair on its face may be applied so arbitrarily and unfairly as to amount to a violation of constitutional rights. 42 U.S.C.A. § 1983.

4. Civil Rights \approx 111

Purposeful discrimination giving rise to civil rights violation is demonstrated when it is shown that government selected or reaffirmed particular course of action at least in part because of, not merely in spite of, its adverse effects upon the plaintiff. 42 U.S.C.A. § 1983.

5. Constitutional Law \approx 250.1(3)

In addition to proving purposeful discrimination, plaintiff alleging selective enforcement of action must specify instances in which he has been singled out for unlawful oppression in contrast to others similarly situated. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

6. Constitutional Law \approx 250.1(3)

Plaintiff claiming selective enforcement must demonstrate that the govern-

ment's prosecution has been invidious, in bad faith, or based upon government's desire to prevent the exercise of constitutional rights, and the conscious exercise of some selectivity in enforcement does not, by itself, deny equal protection. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

7. Criminal Law \approx 37.10(1)

Selectivity in enforcement without malicious intent may be justified when test case is needed to clarify a doubtful law or when officials seek to prosecute a particularly egregious violation and thereby deter other violators.

8. Health and Environment \approx 39

Landowners did not show that any discrimination on the part of county in enforcement of local law prohibiting the deposit in county of sludge originating outside the county was directed toward landowners, even though they alleged that the failure to enforce against other persons was intentional, discriminatory, purposeful, and arbitrary. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. § 1983.

9. Civil Rights \approx 110

Claim that local ordinances created an unreasonable burden on interstate commerce could be asserted in a federal civil rights action. 42 U.S.C.A. § 1983; U.S.C.A. Const. Art. 1, § 8, cl. 3.

10. Commerce \approx 13.5

In the absence of federal preemption of specific subject matter, states may, in the exercise of their police power, regulate matters of legitimate local concern even though the legislation has a concomitant effect upon interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

11. Commerce \approx 52.10

Where state acts evenhandedly to promote legitimate local concern, such as protecting the environment, and where the effect upon interstate commerce is merely incidental, state regulation will be upheld unless the burden on commerce is clearly excessive in relation to the putative local benefits. U.S.C.A. Const. Art. 1, § 8, cl. 3.

12. Commerce \approx 52.10

Complaint challenging county laws prohibiting the deposit in the county of sludge brought in from outside the county did not allege facts indicating that the burden on interstate commerce was excessive in relation to the local benefits to the county.

Manes Riften Frankel & Greenman, Syracuse, N.Y., for plaintiffs; Theodore Lyons Araujo, of counsel.

Pinsky & Skandalis, Syracuse, N.Y., for defendant; Neil M. Gingold, of counsel.

MEMORANDUM-DECISION AND ORDER

McCURN, Chief Judge.

On November 7, 1980 the plaintiffs, Omni Group Farms, Inc., ("Omni"), Cayuga Meadows Inc. ("Meadows") and Michael O'Neill ("O'Neill"), filed a complaint against defendant County of Cayuga ("County") alleging that the defendant passed legislation which interfered with certain existing and possible future contract rights of the plaintiffs. Plaintiffs' first cause of action, brought under 42 U.S.C. § 1983, claims that the defendant has enforced certain town ordinances in a discriminatory manner against them, thereby violating plaintiffs' Fourteenth Amendment rights to equal protection of the law. Plaintiffs' second cause of action claims that the legislation at issue imposes an unreasonable burden on interstate commerce, and was adopted by the County in an arbitrary and capricious manner. Plaintiffs further allege that as a result of this legislation, they have been damaged in the amount of \$3 million.

On December 3, 1980, the defendant brought this motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.Proc. 12(b)(6). For the reasons stated below, this court grants the defendant's motion.

Omni and Meadows are closely-held corporations which are licensed to do business under the laws of the State of New York and which have their principal places of business in Skaneateles, New York. O'Neill is the president and principal shareholder of both Omni and Meadows. The defendant County of Cayuga is a municipal corporation duly organized and existing under the laws of the State of New York.

In 1986, Omni, Meadows and O'Neill leased 400 acres of land in Cayuga County. The following year, Omni acquired fee title to approximately 50 acres of land in this same County. The plaintiffs allege that they acquired all of this land for the express purpose of handspreading and composting certain types of sludge, primarily food processing, brewery, winery and cannery waste.

On October 29, 1987, Omni entered into a contract with Anheuser-Busch, Inc. ("Anheuser-Busch") wherein Omni agreed to handspread and/or compost Anheuser-Busch's brewery waste on the Omni property in return for that company's promise to pay Omni an estimated \$12,000 per month, over a one year period, for such handspreading. In order to fulfill their respective obligations under this contract, the plaintiffs and Anheuser-Busch each obtained permits from the New York State Department of Environmental Conservation ("DEC") which allowed Omni to handspread the waste. Soon thereafter, the defendant adopted Local Law # 5 for the year 1987, ("Local Law # 5") which has been in full force and effect since the date of its adoption. Section 1 of this law provides that:

[It] shall be unlawful for any person, firm, corporation, partnership or other legal entity to deposit sludge which originates within nine years.

nated or was collected outside the territorial limits of Cayuga County in any town or village (all municipalities outside of the City of Auburn), located in the County of Cayuga, henceforth.

On or about March 16, 1988, the defendant adopted Local Law # 4 for the year 1988 ("Local Law # 1"). Section 3 of this ordinance makes it unlawful for any entity to bring into the County any solid waste for disposal at a landfill. Those convicted of violating these ordinances may be fined up to \$10,000 and imprisoned for a period of no longer than one year. Additionally, these laws provide that each day during which a violation occurs is to be deemed a separate violation of the same.

The materials which the plaintiffs have contracted to landspread and compost are sludge and/or solid waste as these terms are defined by Local Laws # 4 and # 5. Plaintiffs contend that the defendant enacted these ordinances with the specific purpose of preventing them from depositing the waste they receive from Anheuser-Busch in Cayuga County. Plaintiffs further claim that these laws have impaired their contractual obligations with Anheuser-Busch, and that they have been deprived of the income they would have realized pursuant to said contract by the defendants' local laws. Specifically, plaintiffs' first cause of action alleges that William Catto ("Catto"), the Director of the Cayuga County Health Department, advised plaintiff O'Neill that the defendant would enforce Local Law # 5 against the plaintiffs. They also contend that, upon information and belief, the County has chosen not to enforce Local Laws # 4 and # 5 against other business entities which have deposited solid waste and sludge obtained from outside of the territorial limits of Cayuga County in the County? They further allege that the defendant's failure to enforce these local laws against individuals other than the plaintiffs has been intentional, purposeful, arbitrary and in violation of the equal protection rights afforded by 42 U.S.C. § 1983. Plaintiffs' second cause of action alleges that these laws create an

unreasonable burden on interstate commerce and that such violations are redressable under 42 U.S.C. § 1983.

The County brings the instant motion seeking dismissal of plaintiffs' complaint. The defendant contends that: (i) the County is not a "person" within the meaning of § 1983; (ii) the contract rights of which the plaintiffs seek redressment are not redressable under § 1983; and (iii) claims alleging violations of the Commerce Clause can not be brought under 42 U.S.C. § 1983.

Discussion

(a) The standard for review of plaintiffs' complaint.

[1] A motion to dismiss for failure to state a claim tests only the sufficiency of the complaint. *Green v. Marrao*, 722 F.2d 1013, 1015 (2nd Cir.1983), quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). It is well established that a complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Green*, 722 F.2d at 1013-1016, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); see also *Anderson v. Coughlin*, 700 F.2d 37, 40 (2d Cir.1983). However, a civil rights complaint must contain more than conclusory, vague or general allegations of constitutional deprivation. *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987); *Neustein v. Orbach*, 732 F.Supp. 333, 346 (E.D.N.Y.1990); *Thomas v. Beth Israel Hosp. Inc.*, 710 F.Supp. 935, 942 (S.D.N.Y.1989). Such allegations must be amplified by specific instances of misconduct, *Ostler v. Aronwald*, 567 F.2d 551, 553 (2d Cir.1977), or some specific allegations of fact indicating a deprivation of civil rights rather than conclusions. *Koch v. Yurich*, 533 F.2d 80, 85 (2d Cir.1976); *Whelehan v. County of Monroe*, 558 F.Supp. 1093, 1100 (W.D.N.Y.1983). See also *Fonte v. Board of Managers of Continental Towers*, 848 F.2d 24, 26 (2d Cir. 1988).

OMNI GROUP FARMS, INC. v. COUNTY OF CAYUGA
Cite as 766 F.Supp. 69 (N.D.N.Y. 1991)

(b) Plaintiffs' first cause of action.

In order to prevail on a claim alleging a violation of 42 U.S.C. § 1983, a plaintiff must demonstrate that the conduct complained of was committed by a "person", acting under color of state law, and that such conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States. See *Oberlander v. Perales*, 740 F.2d 116, 119 (2d Cir.1984); *Weg v. Macchiarola*, 729 F.Supp. 328, 333 (S.D.N.Y.1990); *Di Giovanni v. City of Rochester*, 680 F.Supp. 80, 83 (W.D.N.Y.1988); *Ross v. Coughlin*, 669 F.Supp. 1235, 1238 (S.D.N.Y.1987).

[2] Initially, the defendant contends that the County of Cayuga is not a "person" within the meaning of § 1983. However, the cases which the defendant cites in support of this contention are no longer authoritative statements of the law since the landmark case of *Monell v. Dep't of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (1978).

In *Monell*, the Supreme Court held that Congress intended municipalities and other local governmental units to be included among those persons to whom § 1983 applies. *Id.* at 690, 98 S.Ct. at 2035. Subsequent decisions by numerous courts have specifically held that counties are "persons" under § 1983. See, e.g., *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *Lucas v. O'Loughlin*, 831 F.2d 232, 234 (11th Cir. 1987), cert. denied 485 U.S. 1035, 103 S.Ct. 1595, 99 L.Ed.2d 909 (1988); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872 (9th Cir.1987), cert. denied, 488 U.S. 827, 109 S.Ct. 79, 102 L.Ed.2d 55 (1988); *Starrett v. Wadley*, 876 F.2d 808 (10th Cir.1989); *Hammond v. County of Madera*, 859 F.2d 797, 801 (9th Cir.1988); *Anderson v. Gutschmitter*, 836 F.2d 346, 349 (7th Cir.1988), citing *Pembaur v. City of Cincinnati*, 475 U.S. 452 (1986); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 326 (2d Cir.1986), cert. denied, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987); *Doe v. New York City, Dep't of Social Services*, 670 F.Supp. 1145,

1184 (S.D.N.Y.1987); *Aranchia v. Berry*, 603 F.Supp. 931, 936 (S.D.N.Y.1985). Thus, the defendant's contention that it is not a person within the meaning of § 1983 is wholly without merit.

[3]-71 Turning to the substantive elements of a claim alleging violations of the equal protection clause of the U.S. Constitution, it is well established that a law which is fair on its face may be applied so arbitrarily and unfairly as to amount to a violation of constitutional rights. *Cook v. City of Price*, 566 F.2d 699, 701 (10th Cir. 1977), citing *Vick Wo v. Hopkins*, 118 U.S. 356, 374, 6 S.Ct. 1064, 30 L.Ed. 220 (1887). In the present case, the plaintiffs allege that the County has chosen to enforce these laws against the plaintiffs while choosing not to enforce these ordinances against other individuals. To support a claim of selective enforcement, however, a plaintiff must allege purposeful discrimination. *Albert v. Corovano*, 851 F.2d 551, 573 (2d Cir.1988); *Tarkowski v. Robert Bartlett Realty Co.*, 644 F.2d 1204, 1206 (7th Cir.1980); *Cook*, 566 F.2d at 701, citing *Snowden v. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 307, 401, 88 L.Ed. 497 (1941); *Friedlander v. Cimino*, 520 F.2d 318, 320 (2d Cir.1975); *Birbaum v. Trussell*, 347 F.2d 86, 90 (2d Cir.1965); *Whelehan v. County of Monroe*, 558 F.Supp. 1093, 1100 (W.D.N.Y.1983). Such purposeful discrimination is demonstrated when it is shown that the defendant selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of", its adverse effects upon the plaintiff. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2232, 2296, 60 L.Ed.2d 870 (1979); *McCleskey v. Kemp*, 481 U.S. 279, 298, 107 S.Ct. 1756, 1770, 95 L.Ed.2d 262 (1987), *rev'd denied* 482 U.S. 920, 107 S.Ct. 3199, 96 L.Ed.2d 686 (1987). In addition to proving purposeful discrimination, a plaintiff alleging selective enforcement as the basis for an equal protection cause of action must specify instances in which he has been singled out for unlawful oppression in contrast to others similarly situated. *Albert*, 851 F.2d at 573; *University Club v. City of New York*,

655 F.Supp. 1328, 1328 (S.D.N.Y.1987), *aff'd* 842 F.2d 37 (2d Cir.1988), quoting *United States v. Bertos*, 501 F.2d 1207, 1211 (2d Cir.1974). Moreover, a plaintiff must demonstrate that the government's prosecution has been invidious, in bad faith or based upon a government's desire to prevent the exercise of constitutional rights. *University Club*, 655 F.Supp. at 1328. The conscious exercise of some selectivity in enforcement does not, by itself, deny equal protection. *Bertos*, 501 F.2d at 1211; *University Club*, 655 F.Supp. at 1328, citing *Ogler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 505-06, 7 L.Ed.2d 446 (1962). Such enforcement without malicious intent may be justified when a test case is needed to clarify a doubtful law; *Cook* 566 F.2d at 701, citing *MacKoy Telegraph Co. v. Little Rock*, 250 U.S. 94, 100, 39 S.Ct. 428, 430, 63 L.Ed. 863 (1919), or when officials seek to prosecute a particularly egregious violation and thereby deter other violators. *Cook*, 566 at 701, citing *People v. Ulrica Daw's Drug Co.*, 225 N.Y.S.2d 128, 16 A.D.2d 12 (1962).

[8] In the present case, plaintiffs' complaint fails to allege any factual instances which support their claim that the defendant has not enforced Local Laws # 4 and # 5 against other individuals who are violating these ordinances. Nor does the complaint state any facts indicating that such individuals and business entities possessed waste similar to that of the plaintiffs. Additionally, the plaintiffs do not allege any facts indicating that the defendant purposefully discriminated against them, or that the government's prosecution of them was based upon impermissible considerations. Such allegations are necessary for a claim alleging selective enforcement. See, e.g., *Bertos*, *supra*, 501 F.2d at 1211. The

plaintiffs do allege that the defendant's failure to enforce Local Laws # 4 and # 5 against individuals other than the plaintiffs has been intentional, discriminatory, purposeful and arbitrary.³ However, purposeful discrimination in claims alleging selective enforcement must be directed towards the plaintiffs in such actions. See *Tarkowski*, 644 F.2d at 1206, citing *Ellenluck v. Klein*, 570 F.2d 414, 430 (2d Cir. 1978).

Therefore, as alleged, the plaintiffs' first cause of action fails to sufficiently state a claim upon which relief may be granted.⁴ Accordingly, the defendant's motion to dismiss plaintiffs' first cause of action must be granted without prejudice to the plaintiffs to file and serve an amended complaint which alleges such claims with the requisite specificity.

(c) Plaintiffs' second cause of action.

In their second cause of action, plaintiffs contend that some of the solid waste and sludge materials which they were to landspread and/or compost are derived from sources outside of New York and are in the stream of interstate commerce.⁵ After the plaintiffs' composting operations are completed, some of the solid waste and sludge will allegedly be put back into the stream of commerce as fertilizer.⁶ Plaintiffs allege that by enacting Local Laws # 4 and # 5 the defendant created an unreasonable burden on interstate commerce.

The County initially argues that the plaintiffs' allegation that its legislation created an unreasonable burden on interstate commerce is not redressable under § 1983. In doing so, the defendant relies heavily on *Consolidated Freightways Corp. of Dela-*

§ 1983 based simply on the doctrine of *respondeat superior*. See *id.*, 436 U.S. at 663 n. 7, 98 S.Ct. at 2022 n. 7; *Villanis v. Department of Corrections*, 786 F.2d 516, 519 (2d Cir.1986); *Martin v. City of New York*, 627 F.Supp. 892, 898 (E.D.N.Y.1985); *Acyes v. City of Albany*, 594 F.Supp. 1147, 1156 (N.D.N.Y.1984).

5. See Verified Complaint, ¶¶ 53, 54.
6. *Id.*, ¶¶ 56, 57.

ware v. Kassel, 730 F.2d 1139, 1144 (8th Cir.1984), *cert. denied* 469 U.S. 834, 105 S.Ct. 126, 83 L.Ed.2d 68 (1984), which held that claims under the Commerce Clause are not cognizable under § 1983 because among other things, "the Commerce Clause does not establish individual rights against the government, but instead allocates power between state and federal governments." *Id.* at 1144.

[9] However, the Supreme Court has recently held that suits alleging violations of the Commerce Clause may be brought under 42 U.S.C. § 1983. *Dennis v. Higgins*, ___ U.S. ___, 111 S.Ct. 865, 867, 112 L.Ed.2d 969 (1991). In *Dennis*, the Supreme Court held that a broad construction of § 1983 is required by the statutory language, "which speaks of deprivations of any rights, privileges, or immunities secured by the Constitution and laws." *Id.* at ___, 111 S.Ct. at 868 (emphasis in original). The Court concluded by finding that the Supreme Court of Nebraska erred in holding that petitioner's Commerce Clause claim could not be brought under 42 U.S.C. § 1983. *Id.* 111 S.Ct. at 873. Thus, plaintiffs' second cause of action may not be dismissed simply because it was brought under § 1983.

[10, 11] It is clear that in the absence of federal preemption of specific subject matter, states may, in the exercise of their police power, regulate matters of legitimate local concern even though such legislation has a concomitant effect upon interstate commerce. *Lorello Winery, Ltd. v. Gazzara*, 601 F.Supp. 850, 857 (S.D.N.Y. 1985), *modified* 761 F.2d 140 (2d Cir.1985), citing *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980). Where a State acts evenhandedly to promote a legitimate local concern, such as protecting the environment, and the effect upon interstate commerce is merely incidental, the state regulation will be upheld unless "the burden on such commerce is clearly excessive in relation to the putative local benefits." *Lorelto*, 601 F.Supp. at 857, quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970); see

also *Norfolk Southern Corporation v. O'Brien*, 822 F.2d 368, 405 (3rd Cir.1987).

The court in *Energreen Waste Systems, Inc. v. Metropolitan Service District*, 820 F.2d 1482 (9th Cir.1987) was faced with an issue similar to that before this court. In *Energreen*, Oregon waste haulers sought to enjoin the enforcement of an ordinance which prevented individuals from depositing waste obtained from an out of a state district in a landfill owned and operated by a metropolitan service district and the City of Portland. *Id.* at 1483. The ordinance in question was designed to restrict the flow of waste going into the landfill, thereby extending its useful life. *Id.* at 1484. The statute in *Energreen* applied to only one of Oregon's many landfills and banned waste from most of Oregon's counties in addition to out-of-state waste. *Id.* The *Energreen* court found that the ordinance regulated evenhandedly because "evenhandedness requires simply that most out-of-state waste be treated no differently than in-state waste." *Id.* at 1484, citing *Washington State Trades Council v. Spellman*, 684 F.2d 627, 631 (9th Cir.1982), *cert. denied*, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983).

Because the ordinance regulated waste disposal evenhandedly, the *Energreen* court applied the *Pike* balancing test, noted *supra*, which provides that where a State acts evenhandedly to promote a legitimate local concern, and the effect on interstate commerce is merely incidental, the state regulation will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits. *Pike*, 397 U.S. at 142, 90 S.Ct. at 847; *Energreen*, 820 F.2d at 1485. In applying this test to the facts before it, the *Energreen* court held that the ordinance served a legitimate public purpose because it extended the useful life of the landfill. *Id.* The court also found that the ordinance placed a minimal burden on interstate shipments of waste, and that the burden was outweighed by the putative benefit to the defendants—extending the useful life of the landfill so as to give the metropolitan

DATE 7/19/92

EXHIBIT

3

area time to find a new site for a landfill.

with sufficient specificity within thirty days of the date of this order.
IT IS SO ORDERED.



UNITED STATES of America, Plaintiff,

v.
Silas ONYEMA, Defendant.

No. CR-90-521.

United States District Court,
E.D. New York.

June 5, 1991.

or the disposal of solid waste generated within the boundaries of Cayuga County. *Evergreen*, 820 F.2d at 1485; *Bill Kettlewell Excavating, Inc. v. Michigan Dept. Nat'l Resources*, 732 F.Supp. 761, 766 (E.D. Mich. 1990), *aff'd* 931 F.2d 413 (6th Cir. 1991). The burden the ordinance places on interstate commerce may not be "clearly excessive in relation to the putative local benefits." If there are alternative landfill sites widely available in the State, thereby resulting in a minimal burden on such commerce. *Evergreen*, 820 F.2d at 1485; *Bill Kettlewell*, 732 F.Supp. at 766. The plaintiffs' complaint does not allege facts which indicate that the burden on interstate commerce imposed by the subject ordinance is nearly excessive in relation to the putative local benefits to the County of Cayuga. However, such may be the case. Accordingly, the defendant's motion to dismiss the plaintiffs' second cause of action is granted without prejudice to the plaintiffs to file and serve an amended complaint on the defendant which details specifically any burden on interstate commerce the subject ordinances allegedly impose.

Conclusion

The defendant's motion to dismiss the plaintiffs' first and second causes of action is granted without prejudice. Plaintiffs may file and serve an amended complaint on the defendant which alleges their claims

After defendant was convicted of importing heroin into the United States from Nigeria, he moved to suppress evidence used to obtain his conviction. The District Court, Korman, J., held that extended detention of defendant incommunicado and chained to metal bid for approximately 78 hours violated defendant's Fourth Amendment rights and required suppression of evidence, absent exigency to prevent customs officers from obtaining judicial authorization during the 19 hours before the traveler's first bowel movements.
Ordered accordingly.

1. Customs Duties (26 U.S.C. § 1261)

Extended detention of air traveler suspected of carrying drugs in his alimentary tract violated his Fourth Amendment rights and required suppression of evidence absent exigency preventing customs inspectors from obtaining judicial authorization during the 19 hours before the traveler's first bowel movement; traveler was held incommunicado and was shackled to metal bed. U.S.C.A. Const.Amend. 4.

2. Customs Duties (26 U.S.C. § 1261)

Once suspect is firmly in custody, customs inspectors should present evidence to

support detention of suspect to neutral and detached magistrate. U.S.C.A. Const. Amend. 4.

3. Customs Duties (26 U.S.C. § 1261)

Customs inspectors may, without prior judicial authorization, take traveler entering United States into initial custody if traveler is reasonably suspected of carrying narcotics in alimentary tract, but officials must promptly bring evidence supporting reasonable suspicion before judicial officer if detention threatens to require prolonged application of highly intrusive procedures, such as holding suspect incommunicado and in chains for extended periods of time. U.S.C.A. Const.Amend. 4.

4. Customs Duties (26 U.S.C. § 1261)

Holding detained air traveler in custody, incommunicado, and in chains for nearly 78 hours on suspicion of smuggling drugs in his alimentary tract without seeking authorization of judicial officer was unreasonable and violated the Fourth Amendment requiring suppression of the evidence, even though initial seizure of the traveler was reasonable. U.S.C.A. Const. Amend. 4.

5. Criminal Law (18 U.S.C. § 391.4(9))

Customs inspectors could not have had good faith belief that it was reasonable to detain suspect incommunicado and chained to metal bed for over 78 hours on suspicion of smuggling narcotics in alimentary tract without some kind of judicial authorization, and, thus, application of exclusionary rule to evidence was appropriate. U.S.C.A. Const.Amend. 4.

Richard W. Levitt, New York City, for plaintiff.
Stanley Okula, Asst. U.S. Atty., Brooklyn, N.Y., for defendant.

MEMORANDUM

KORMAN, District Judge.

On June 6, 1990, Silas Onyema arrived at John F. Kennedy Airport ("JFK") on Nigerian Airlines Flight 850. Review of Mr. Onyema's documents and the search of his

luggage at the Customs area, as well as a brief questioning by the attending Customs Inspector, revealed facts sufficient to arouse a reasonable suspicion that Mr. Onyema was attempting to import narcotics into the United States and, given stomach medication found in his luggage and the absence of any visible contraband, that he was carrying the drugs in his alimentary tract. The Customs Inspector informed Mr. Onyema of his suspicions and asked him to consent to an x-ray. Upon hearing this accusation, Mr. Onyema became extremely agitated and verbally abusive and asked to see an attorney. He was then escorted by the Customs Inspector and another customs official to a private customs search room and asked to take a seat. Mr. Onyema began to sit but sprang up immediately, pushed the official and kicked the inspector in the shin. The two then subdued the screaming Mr. Onyema, restrained him by handcuffing his arms behind his back and read him the Miranda warnings.

At this point, the rather ordinary and customary (if somewhat excited) border search and seizure changed character dramatically. Mr. Onyema was driven to a two-level trailer that housed twelve hospital beds—a so-called "medical van"—so that the Customs Inspectors could monitor his bowel movements. All requests to make a telephone call, either to an attorney or to anyone who might be expecting his arrival, were denied. When he entered the trailer, Mr. Onyema was asked to remove his clothing and was given a hospital gown to wear. He was then instructed to lie on one of the beds and was shackled to the frame hand and foot, one wrist handcuffed to the side of the bed and an ankle chained to the frame using a leg iron. A group of Customs Inspectors then took shifts waiting for Mr. Onyema to move his bowels and confirm his guilt or innocence and, if the former, to deliver up all the contraband. When Mr. Onyema indicated that he needed to use a bathroom, he was released from the bed, the handcuffs were removed and his legs were shackled together with the leg iron. He was then directed to sit

FB 58859
DATE 11/19/92

1186; 1188 (7th Cir.1974)). The Court further holds that the deputies did not "intercept" any "wire, oral, or electronic communication" when they later replayed and transcribed the contents of the tapes. This finding is in accord with *United States v. Turk*, 526 F.2d 654 (5th Cir.1976), cert. denied, 429 U.S. 823, 97 S.Ct. 74, 50 L.Ed.2d 84 (1976), one of the principal cases cited by defendants. In *Turk*, the court found that a definition of "intercept" which excludes the replaying of a previously recorded conversation "has a much firmer basis in the language of § 2510(4) and in logic, and corresponds more closely to the policies reflected in the legislative history." *Id.* at 653. The court, thus, rejected the argument that a different "aural acquisition" occurs each time a recording of an oral communication is replayed. *Id.*

Based on the foregoing, the Court finds that no violation of Title III, as amended by the ECPA, or of Ohio Rev.Code §§ 2933.51, et seq., occurred and, therefore, no sanction is warranted under 18 U.S.C. § 2511. The Court, moreover, doubts that even if such a violation had occurred, suppression would have been available given the Court's determination that there was no constitutional violation. See *Meriwether*, 917 F.2d at 960 ("the ECPA does not provide an independent statutory remedy of suppression for interceptions of electronic communications").

IV.

For all of the above reasons, defendants' motions to suppress evidence and supplemental motions to suppress evidence are DENIED.

IT IS SO ORDERED.



NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION, Plaintiff,

George V. VOINOVICH, Governor State of Ohio, et al., Defendants.

No. C2-89-85.

United States District Court, S.D. Ohio.

May 1, 1991.

Trade association whose members were engaged in solid waste management business brought action challenging constitutionality of provisions of Ohio's solid waste disposal statute. On cross motions for summary judgment and Ohio's motions to dismiss and to strike, the District Court, George C. Smith, J., held that: (1) association had standing to bring action; (2) abatement was not appropriate; (3) provisions of statute which levied higher taxes on disposal of solid wastes imported into state unconstitutional; (4) provision of statute requiring filing of documents consenting to jurisdiction and service of process prior to transportation of wastes into state impermissibly discriminated against interstate commerce. Ordered accordingly.

1. Federal Civil Procedure ≈2547

Plaintiff's memorandum in response to defendant's response to plaintiff's notice of additional authority was not warranted by court rule. U.S. Dist. Ct. Rules S.D. Ohio, Rule 4.0.2.

2. Federal Courts ≈5

Federal courts have power to hear and decide only cases which are authorized by Article III of Constitution or statutes enacted by Congress. U.S.C.A. Const. Art. 3, § 1 et seq.

3. Federal Civil Procedure ≈1032

Constitutional Article III requires party who invokes court's authority to show that he has personally suffered some act-

Cite as 763 F.Supp. 244 (S.D. Ohio 1991)

al or threatened injury as result of putatively illegal conduct of defendant, and party must also show that injury can be fairly traced to challenged action and that it is likely to be redressed by favorable opinion. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Constitutional Law ≈12(1)

Beyond constitutional requirements for standing, there are also prudential limits. U.S.C.A. Const. Art. 3, § 1 et seq.

5. Federal Civil Procedure ≈1032

To have standing in federal court, plaintiff must fall within zone of interest arguably protected by constitutional provision in question.

6. Federal Courts ≈33

Factual predicate for jurisdiction must be demonstrated from record and may not be inferred.

7. Associations ≈20(1)

In order for association to assert representational standing, it must establish that its members would otherwise have standing to sue in their own right; interests it seeks to protect are germane to organization's purpose; and neither claim asserted nor relief requested requires participation of individual members in lawsuit.

8. Constitutional Law ≈12(17)

Trade association whose members were engaged in solid waste management business had standing to challenge constitutionality of Ohio's solid waste statute imposing higher taxes on disposal of out-of-state wastes and imposing consent to jurisdiction and service of process requirements; mere requirement of filing consent-to-sue form was injury enough for individual members to bring suit on their own behalf, and association provided affidavits of president or vice president of three of its member corporations, each of which claimed actual injury stemming from Ohio law. U.S.C.A. Const. Art. 1, § 8, cl. 3; Ohio R.C. §§ 3734.131, 3734.57(A), B).

9. Constitutional Law ≈16(1)

Like doctrine of standing, ripeness is also based on dual grounds of compliance with Article III of Constitution and pruden-

tial concerns. U.S.C.A. Const. Art. 3, § 1 et seq.

10. Federal Courts ≈12

Ripeness doctrine requires court to exercise its discretion to determine if judicial resolution of case is desirable; ripeness concerns arise in multitude of fashions and are appropriately considered in their individual settings. U.S.C.A. Const. Art. 3, § 1 et seq.

11. Federal Courts ≈13

Application of ripeness doctrine to constitutional attack on state statute only required that court determine whether there was actual controversy coupled with immediate or threatened harm.

12. Federal Courts ≈13

Constitutional challenge to provisions of Ohio's solid waste disposal statute under which, if solid waste management districts chose to levy fees, out-of-state wastes had to be taxed at three times rate of in-district wastes, was ripe for review regardless of whether statute had actually been applied, as facial constitutionality of statute was challenged. Ohio R.C. § 3734.57(B); U.S.C.A. Const. Art. 3, § 1 et seq.

13. Federal Courts ≈13

Trade association whose members were engaged in solid waste management business produced evidence that several of Ohio's waste management districts had adopted discretionary fee provisions of solid waste management statute, rendering ripe for review association's constitutional challenge to provisions, which required that out-of-state wastes be taxed at three times rate of in-district wastes, even assuming that claim could not be ripe absent actual imposition of alleged discriminatory fees. Ohio R.C. § 3734.57(B); U.S.C.A. Const. Art. 3, § 1 et seq.

11. Federal Courts ≈12

Ripeness doctrine did not require district court to consider suitability of claims for review purely at time of filing. U.S.C.A. Const. Art. 3, § 1 et seq.

15. Federal Courts ≈41

"Abstention" is judicially created exception to general grant of jurisdiction set

EXHIBIT 31
DATE 7/14/92

(5)

forth in Constitutional Article III; abstention doctrine permits federal courts to postpone or decline exercise of jurisdiction in order for state court to have opportunity to resolve matters at issue. U.S.C.A. Const. Art. 3, § 1 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

16. Federal Courts ⇨11

Abstention from exercise of federal jurisdiction is exception and not rule; abdication of obligation to decide cases can be justified only in exceptional cases when there is important countervailing state interest which will be served by judicial restraint. U.S.C.A. Const. Art. 3, § 1 et seq.

17. Federal Courts ⇨19

District court must abstain from review of cases which would unduly interfere with legitimate activities of state, most notably, pending state criminal proceedings. U.S.C.A. Const. Art. 3, § 1 et seq.

18. Federal Courts ⇨12

District court may justify abstention where there is complex state regulatory scheme which would be disrupted by federal review and where there is state-created forum with special competence in particular area, but this form of abstention is not appropriately invoked merely because resolution of federal question may result in overturning of state policy; state must have overriding interest in subject matter and centralized review in forum with special competence. U.S.C.A. Const. Art. 3, § 1 et seq.

19. Federal Courts ⇨12

Critical inquiry for purposes of *Burford* abstention is whether erroneous federal decision could impair state's effort to implement its policy. U.S.C.A. Const. Art. 3, § 1 et seq.

20. Federal Courts ⇨17

For purposes of *Burford* abstention, challenge to very existence of statutory scheme is not appropriately left to review process established under the law itself. U.S.C.A. Const. Art. 3, § 1 et seq.

21. Federal Courts ⇨59

Abstention was inappropriate in action challenging facial constitutionality of provisions of Ohio's solid waste disposal statute imposing taxation scheme which allegedly discriminated against disposal of out-of-state wastes and imposing allegedly burdensome and unnecessary consent-to-jurisdiction filing requirements on persons who imported solid wastes; action questioned provisions' compatibility with commerce clause, an issue which state Environmental Board of Review had no special competence to consider, and court was not being called upon to determine issues of state law. U.S.C.A. Const. Art. 3, § 1 et seq.; Ohio R.C. §§ 3734.131, 3734.57(A), (B), 3745.04, 3745.06.

22. Commerce ⇨62.70

Commerce clause, even without implementing legislation by Congress, is limitation upon state's power to tax. U.S.C.A. Const. Art. 1, § 8, cl. 3.

23. Commerce ⇨48, 52

Under Commerce clause, measures employed by states to safeguard health and safety of their people may be upheld if treatment of intrastate and interstate commerce is evenhanded and if effects on interstate commerce are only incidental, but "protectionist" measures employed by states to favor local commerce are subject to virtually per se rule of invalidity. U.S.C.A. Const. Art. 1, § 8, cl. 3.

24. Commerce ⇨12

Once court ascertains that statute treats intrastate commerce and interstate commerce differently and that there is no compelling reason for distinction, statute violates commerce clause regardless of actual burden imposed on interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

25. Commerce ⇨63.10

Health and Environment ⇨25.5(2)
Ohio statute which levied higher taxes on disposal of solid wastes imported into state unconstitutionally burdened interstate commerce, despite allegedly increasing amount of solid wastes being shipped into state, difficulty in policing transportation of hazardous wastes, and allegedly

higher cost of inspecting out-of-state wastes; statute was intended primarily to raise money to offset state's obligations under Comprehensive Environmental Response, Compensation, and Liability Act, rather than to reimburse state for costs of inspecting in-state and out-of-state waste. Ohio R.C. § 3734.57(A), (B); U.S.C.A. Const. Art. 1, § 8, cl. 3; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 101 et seq., 42 U.S.C.A. § 9601 et seq.

26. Commerce ⇨62.70

Taxes are subject to exacting scrutiny under commerce clause and are deemed unconstitutional when they ebb free flow of interstate commerce, as power to tax presents more imposing threat to exchange of commerce than state's use of its police power. U.S.C.A. Const. Art. 1, § 8, cl. 3.

27. Commerce ⇨12

State may not provide its own citizens a preferred right of access over consumers in other states to natural resources located within its borders. U.S.C.A. Const. Art. 1, § 8, cl. 3.

28. Commerce ⇨52.10

Health and Environment ⇨25.5(2)
Amendments to Ohio's solid waste disposal statute which merely reduced time frame in which consent-to-jurisdiction form had to be filed before shipment of waste into state and discarded annual filing in favor of required consent to be filed every four years did not remove offensive aspects of statute so as to warrant dismissal of commerce clause challenge. Ohio R.C. § 3734.131; U.S.C.A. Const. Art. 1, § 8, cl. 3.

29. Commerce ⇨12

When burden placed on interstate commerce by state regulation ebbs its flow in manner not applicable to local commerce, local interests must yield to greater federal interest in maintaining free and open market. The Act as signed into law differs significantly from the text of the bill approved by the Ohio General Assembly. Governor Celeste vetoed provisions of the bill which expressly excluded importation of solid wastes generated outside of

30. Commerce ⇨52.10

Health and Environment ⇨25.5(2)
Provision of Ohio's solid waste disposal statute requiring filing of documents concerning prior to transportation and service of process prior to transportation of wastes into state impermissibly discriminated against interstate commerce; statute did not treat all waste disposers equally, nor did it expand scope of Ohio's long-arm jurisdiction or otherwise purport to provide state with any other benefit or interest. Ohio R.C. § 3734.131; U.S.C.A. Const. Art. 1, § 8, cl. 3.

Michael Roy Szolosi, Columbus, Ohio, for plaintiff.

Bryan Frank Zima, Ohio Atty. Gen., Columbus, Ohio, for defendants.

OPINION AND ORDER

GEORGE C. SMITH, District Judge.
Plaintiff, National Solid Waste Management Association (NSWMA), brings this action challenging the constitutionality of certain provisions of Ohio's solid waste disposal statute. Ohio Rev. Code § 3734.131 and § 3734.57. The NSWMA asserts that the Act violates the Commerce Clause of the U.S. Constitution, art. I, § 8, by discriminating against and placing undue burdens on interstate commerce. This cause is currently before the Court on the parties' respective Motions for Summary Judgment and on the State's Motion to Dismiss plaintiff's challenge to § 3734.131.

On June 24, 1988, Governor Richard Celeste signed House Bill # 592, amending Ohio Rev. Code §§ 3734.01 et seq., into law. The statute is a comprehensive scheme designed to correct past improper waste disposal practices. Under the Act, disposal of the state and which imposed a \$75,000 per ton tax on such wastes.

2. It appears that since the early 1970s, Congress and the States have endeavored to remedy the perceived waste disposal crisis. In 1976, Con-

EXHIBIT

DATE 7/13/92

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of all solid waste in Ohio is regulated by Ohio's Director of Environmental Protection as well as management districts which may include one or more counties. Each of these districts is required to prepare solid waste management plans which provide for the disposal of waste that is generated within the district. In addition, the districts are given substantial leeway to levy fees on the disposal of waste within their own jurisdictions.

The Act, as characterized by defendants, includes four major components. It upgrades the technical requirements for solid waste disposal and improves enforcement of the solid waste requirements. It creates a comprehensive solid waste disposal planning program to ensure adequate capacity for the state disposal of waste. It creates a background investigation program to ensure the reliability of operators of solid waste facilities. Finally, it provides funding mechanisms to finance the programs and provide the revenue required by the Comprehensive Environmental Response Compensation Liability Act, amending 42 U.S.C. § 6901 *et seq.*

Many of the provisions of the Act have yet to become effective. Plaintiff admits that these provisions are not yet ripe for judicial consideration and reserves the right to challenge those provisions at a later date. The present action is limited to the provisions of Ohio Rev. Code § 3734.57 and § 3734.131.

Specifically, Section 3734.57(A) imposes fees on the disposal of waste, the amount of which is determined by the source of the wastes' origin. Section (A)(1) imposes a gross pass the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, which addressed environmental concerns relating to the disposal of waste materials. It did not, however, include a comprehensive regulatory scheme to deal with waste disposal. In response, the individual states began enacting their own disposal management statutes. Most notably, New Jersey enacted legislation which imposed an outright ban on the importation of waste from other states, and which was subsequently struck down by the Supreme Court as being violative of the Commerce Clause of the U.S. Constitution. *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). In 1980, the EPA adopted regulations

tax of seventy cents (\$.70) per ton on wastes generated within a management district.³ On the disposal of wastes generated outside of the management district but within the state, a fee of one dollar and twenty cents (\$.1.20) per ton is imposed. Finally, a fee of one dollar and seventy cents (\$.1.70) per ton is levied on wastes generated outside of the state.

Section (B) authorizes the individual districts to impose fees, in addition of those required by Section (A) on the basis of tons or cubic feet of wastes disposed. Fees levied on wastes generated within the district are required to be no more than one half of the fees imposed on wastes generated outside of the district but within the state. Fees imposed on wastes from outside the state must be three times the amount of the tax on wastes from within the district. In addition, under Section (C), a municipal corporation or township in which a solid waste disposal facility is located may levy a fee of no more than twenty-five cents (\$.25) per ton on wastes disposed of at the facility regardless of where the wastes are generated.

Certain wastes are excluded from the tax provisions under Section (D). Wastes which are disposed of at a facility which is owned by the generator of the wastes are exempt. Wastes generated from the combustion of coal or those from outside of the district but which are covered by an agreement for the joint use of disposal facilities are also tax exempt. Likewise, waste which is incinerated or disposed of in an energy recovery facility may not be taxed.

designed to carry out the provisions of the RCRA, but these were also found to be inadequate. Finally, in 1980, Congress passed the Comprehensive Environmental Response Compensation Liability Act, which required states to pay 10% to 50% of the cost of clean-up of dumps owned by the states. House Bill # 592 is the most recent effort by the Ohio General Assembly to keep pace with the federal regulatory requirements.

3. The Act provides for increases over a two year period. The amounts reflected above are those in effect twenty-four months after the effective date of the Act.

In addition to Ohio Rev. Code § 3734.57, the Act requires consent to jurisdiction and service of process prior to the transportation of wastes into the state. Ohio Rev. Code § 3734.131. Solid wastes may not be transported into the state unless each of the following persons consents in writing to the jurisdiction of the courts of the State of Ohio:

- (a) The person who actually transports the waste;
- (b) The business concern that employs the person described in division (A)(1)(a) of this section;
- (c) The person or persons who have contracted with the transporter for transportation of the waste to a facility in this state;
- (d) The person or persons who have contracted with the owner or operator of the facility for treatment, transfer, storage, or disposal of the waste at the facility in this state.

The consent-to-service document is required to be filed three days before transportation of solid wastes into the state and must be renewed every four years. Furthermore, no owner or operator of a solid waste treatment facility may accept shipment of waste unless a copy of the consent-to-service document is received at the facility.

Plaintiff, National Solid Waste Management Association, is a not-for-profit trade association whose members are engaged in the solid waste management business. The association is charged with protecting the interests of its members and assisting governments with development and refinement of laws and regulations relating to waste management. Members of the NSWMA are engaged in the business of disposing of solid wastes in Ohio and other states and are currently shipping and receiving solid wastes for disposal in Ohio.

The NSWMA brings this cause of action challenging the constitutionality of Ohio Rev. Code §§ 3734.57(A) and (B), and § 3734.131. Specifically, the NSWMA asserts that the Act discriminates against the disposal of out-of-state wastes by imposing taxes that are 42% to 300% higher than

those imposed on in-state wastes, and by allowing for a separate tax structure to be imposed by the management districts under which out-of-state wastes must be taxed at three times the rate of in-state wastes. In addition, plaintiff claims that the provisions of § 3734.131 impose highly burdensome and unnecessary filing requirements on persons who import solid wastes. Plaintiff asserts that these provisions violate the Commerce Clause of the U.S. Constitution, art. I, § 8, by unduly discriminating against the disposal of out-of-state wastes and by placing undue burdens on interstate commerce.

[1] We note the procedural context of the case. Plaintiff filed its Motion for Summary Judgment before the State answered the complaint. The State moved for a continuance to respond until time for discovery had been provided. This Court granted the extension and aided the parties in discovery, after which the State filed its Memorandum in Opposition and its own Cross-Motion for Summary Judgment. On January 10, 1991, plaintiff moved this Court for leave to file notice of additional authority which was granted. The State responded in accordance with Rule 4.02 of the Rules for the U.S. District Court for the Southern District of Ohio. Thereafter, plaintiff filed a responsive memorandum to which the State moved to strike arguing that the response was not allowed by Order of the Court or by rule. Finding both that plaintiff's response is not warranted by the Rule and that additional authority and arguments are unnecessary, we hereby GRANT the State's motion to strike and do not consider plaintiff's Reply to defendant's Responsive Memorandum Regarding the *Government Suppliers* Decision. Finally, on February 1, 1991, the State moved the Court to Dismiss for mootness plaintiff's challenge to Section 3734.131 on the basis of legislative amendment. As we note below, the State's motion to dismiss is without merit, therefore we proceed to resolve the parties' respective motions for summary judgment.

The State denies the claims and asserts that the Court should abstain from consid-

ering the allegations, that the NSWMA lacks standing to bring suit, and that the challenge to § 373.457(B) is not yet ripe for review. Plaintiff now moves this Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for an Order granting Summary Judgment in its favor, arguing that no genuine issues of material fact need be resolved at trial. The State has also Cross-Motioned for an Order granting Summary Judgment in their favor.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lastlee v. Sumner*, 570 F.2d 107, 111 (6th Cir. 1973). Summary judgment, therefore, will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In a motion for summary judgment, the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1593, 1608, 26 L.Ed.2d 142 (1970); accord *Adams v. Union Carbide Corp.*, 737 F.2d 1453, 1455-1456 (6th Cir.1984). The moving party is entitled to summary judgment "where it is quite clear what the truth is and where there are no unexplained gaps in documents submitted by the moving party pertinent to material issues of fact." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 461, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962); accord *County of Oakland v. Berkley*, 742 F.2d 289, 297 (6th Cir.1984); *Adickes*, 398 U.S. at 157-60, 90 S.Ct. at 1608-10; *Smith v. Hudson*, 600 F.2d 60, 65

(6th Cir.), cert. dismissed, 414 U.S. 986, 100 S.Ct. 495, 62 L.Ed.2d 415 (1979).

If the moving party meets its burden and if adequate time for discovery has been provided, the opposing party is required to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof as well. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). The mere existence of a scintilla of evidence in support of the opposing party's motion will be insufficient; plaintiff "must set forth specific facts showing that there is a genuine issue for trial." *Davis v. Robbs*, 794 F.2d 1129, 1130 (6th Cir.1986) (emphasis in original). As is provided in Fed.R.Civ.P. 56(e):

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Therefore, a party may not rest on the allegations contained in his pleadings to overcome a properly supported motion for summary judgment. *First National Bank v. Citic Service Co.*, 391 U.S. 253, 259, 88 S.Ct. 1575, 1577, 20 L.Ed.2d 569 (1968) (footnote omitted).

Before a ruling on a motion for summary judgment can be made, the dispositive issues and factual inquiries relevant to the motion must be clearly delineated. With this standard in mind, the Court will proceed to consideration of the pending motion.

Standing

[2. 31] In its cross-motion, the State asserts that the NSWMA lacks standing to seek redress for the alleged injuries to its members. Federal courts have power to hear and decide only cases which are autho-

Cite as 763 F.Supp. 244 (S.D. Ohio 1991)

rized by Article III of the Constitution or statutes enacted by Congress. *Bender v. Williamsport Area School District*, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). At a minimum, Article III requires that the party who invokes the court's authority "show that he has personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979). The party must also show that the injury can be fairly traced to the challenged action and that it is likely to be redressed by a favorable opinion. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976).

[4. 51] Beyond the Constitutional requirements, there are also prudential limitations. *Clontara, Inc. v. Runkel*, 722 F.Supp. 1442 (E.D.Mich.1989). A plaintiff must also fall within the "zone of interest arguably protected by the constitutional provision in question." *Id.* at 1450. See also WRIGHT, MILLER & COOPER, *Federal Practice and Procedure: Jurisdiction* 2d § 3531.2.

[6.] The NSWMA bears the burden of affirmatively showing that jurisdiction is proper. The factual predicate for jurisdiction must be demonstrated from the record and may not be inferred. *Bender*, 475 U.S. at 547, 106 S.Ct. at 1334. Moreover, as NSWMA is a representative association, it carries additional burdens to show that it has standing.

[7.] An association may have standing to assert the claims of its members even if it has suffered no injury from the challenged activity. *Warth v. Seldin*, 422 U.S. 490, 511, 515, 95 S.Ct. 2197, 2211, 2213, 45 L.Ed.2d 343 (1975). *National Motor Freight Traffic Assn. v. United States*, 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed.2d 709 (1963). *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1981, 31 L.Ed.2d 636 (1972). It must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged state action of the sort that would make out a justiciable case had the members brought suit on their own behalf. *Warth* 422 U.S. at 511, 95 S.Ct. at 2211. If this can be established, and if the nature of the relief sought does not render each member indispensable to the suit, the association may be the appropriate representative of its members and be entitled to the court's jurisdiction. *Id.*, see also *NAACP v. Alabama*, 357 U.S. 449, 458-460, 78 S.Ct. 1163, 1169-1171, 2 L.Ed.2d 1488 (1958); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 183-187, 71 S.Ct. 624, 653-656, 95 L.Ed. 817 (1951) (Jackson, J., concurring); *Gillis v. United States Dept. of Health and Human Services*, 759 F.2d 565 (6th Cir.1985). Therefore, in order for an association to assert representational standing, it must establish that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Com.*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); accord *Bronson v. Board of Education*, 573 F.Supp. 767 (S.D. Ohio 1983), *Clontara, Inc. v. Runkel*, 722 F.Supp. 1442, 1451 (E.D.Mich.1989), *Huebner v. Oshberg*, 87 F.R.D. 449, 453 (E.D. Mich.1980), *Gillis v. United States Dept. of Health & Human Services*, 759 F.2d 565 (6th Cir.1985). After reviewing the pleadings and affidavits, the Court concludes that the NSWMA meets the indicia of *Hunt* and has standing to bring the present claims.

[8.] It is clear that the members of the NSWMA may raise identical claims in their own right as to all three of the issues presented because each member which imports solid waste into Ohio is currently subject to the taxing scheme and filing requirements of the Act. Secondly, the its members' refusal to sign the consent-to-sue form which has caused their injuries rather

DATE 7/14/92
FILED 58859

express purpose of the organization is to protect the interests of those engaged in the business of solid waste management, thus, it meets the second prong of *Hunt*. Finally, the participation of the individual members is not required for effective adjudication of the claims. Since plaintiff attacks the Act as being unconstitutional on its face, an actual application of the provisions is not necessary. We need not consider the separate factual scenarios involving the individual members because they will not have a bearing on the constitutional issues presented.

Despite the fact that the criteria of *Hunt* have unquestionably been met, the State challenges the NSWMA's standing by citing *National Collegiate Athletic Association v. Califano*, 622 F.2d 1382 (10th Cir. 1980), for its position that if "certain members" of an association are opposed to the suit, it strips the organization of standing. The contention is meritless as *Califano* does not support the proposition for which it is cited. The *Califano* Court stated that "if more members of the association declare against the association's position than declare in favor of it, the association does not have standing." *Id.* at 1392 (emphasis added).⁵ This circuit is in accord. In *Gillis*, 759 F.2d at 573 (6th Cir.1985), the court held that as long as the association has alleged an actual or threatened injury to any one of its members, a conflict between

than the provision itself. The argument is meritless. Viewed from plaintiff's perspective, § 3734.131 imposes burdens on transporters of solid waste who are unwilling to submit to the jurisdiction of the Ohio courts. Since plaintiff questions whether the State can impose such burdens, the mere requirement is injury enough for the individual members to bring suit on their own behalf.

⁵ *Califano* is also inapposite to the case at bar. There, the NCAA was challenging regulations which would place women's intercollegiate sports programs on par with the men's. Many of the colleges which belonged to the NCAA also belong to a women's international collegiate sports association, the AIAW, which was on the other side of the litigation. In that situation, it was incumbent on the NCAA to show that most of its members supported the action. There is no such demonstrable split in the NSWMA's

the association's members does not strip it of standing.

The State's claim that the NSWMA has failed to allege that it has the support of its membership is also without merit. The NSWMA has provided affidavits of the president or vice president of three of its member corporations, each of which have claimed actual injury stemming from the Act. Having alleged actual injury to its members "or any one of them," *Warth*, 422 U.S. at 511, 95 S.Ct. at 2211, plaintiff has secured representational standing. Moreover, our reading of *Gillis* and *Califano* indicates that the State bears the burden of showing that the association does not have the support of its members. The State has failed entirely to show that any of the NSWMA's members oppose its position, and, contrary to its brief, there is no authority which suggests that plaintiff must supply the Court with the results of vote by the membership showing its support for the action nor is the State entitled to an inference that the NSWMA does not have the support of its members.⁶ See e.g., *National Maritime Union v. Commander, Military Sealift Command*, 824 F.2d 1228, 1233 (D.C.Cir.1987).

In its responsive memorandum regarding the December 27, 1991 decision in *Government Suppliers Consolidating Services Inc. v. Bayh*, 753 F.Supp. 739⁷ (S.D.Ind. 1991) the State again attempts to circumvent membership, thus, the Court may assume that the NSWMA has the support of its members.

⁶ The State offers the affidavit of E. Dennis Muchnicki, Chief of the Environmental Enforcement Section of the Ohio Attorney General's Office, in which he claims to have received a phone call from counsel for a non-Ohio solid waste disposal company who opposes the NSWMA's suit. He fails, however, to identify either the caller or the company. Moreover, the fact assertion in the affidavit (the unidentified caller's assertion that the solid waste disposal company he represents opposes the suit) is inadmissible hearsay. The affidavit does not establish that there is difference of opinion amongst the membership much less that a majority of members oppose this suit.

⁷ On January 10, 1991, plaintiff was granted leave to file notice of additional authority. See discussion at pg. 261, *infra*, fn. 11.

vent the criteria of *Hunt* by arguing that the NSWMA lacks standing because it may pass the cost of its injuries to its customers. The State relies on that portion of *Government Suppliers* in which the court indicated in *dictum* that there may be middle level trash brokers who would not be seriously affected by solid waste taxing schemes such that their asserted role could only be to protect the national marketplace. Such a generalized grievance would not be sufficient to serve as the basis for standing. *Government Suppliers dictum* at 758. The *Government Suppliers dictum* is of no relevance primarily because the holding of the court squarely addresses the type of standing scenario presented in this case. The *Government Suppliers* Court stated that because the volume of Indiana business would be reduced due to the taxing scheme, the plaintiff had standing even though it may be able to shift some of those losses to its customers. "This is precisely the type of economic injury that is consistently found to satisfy the constitutional injury in fact requirement." *Id.* at 759. The NSWMA has asserted that its members will incur economic hardship to due the Ohio taxing scheme; therefore, it has alleged injury sufficient to support standing.

We note further that unlike the hypothetical trash broker in the *Government Suppliers dictum*, the NSWMA has no means of shifting losses to customers. The NSWMA has no customers to speak of as it is a representative organization comprised of haulers of solid waste, thus it incurs no economic losses directly from the taxing scheme which it may shift to customers. Therefore, we reject the State's reliance on *Government Suppliers* and find that the NSWMA has standing to bring the present action on behalf of its members.

Ripeness

[9] The State asserts that plaintiff's attack on Section 3734.57(B) does not present an issue that is currently ripe for judicial review. Like the doctrine of standing, ripeness is also based on the dual grounds of compliance with Article III of the Constitution and prudential concerns. *Poe v. Ull*,

man, 367 U.S. 497, 508-509, 81 S.Ct. 1752, 1758-1759, 6 L.Ed.2d 989 (1961). There is a historically defined limited nature of the function of courts. Within the framework of the adversary system, the adjudicatory process is most solidly based when exercised "under the impact of a lively conflict between antagonistic demands, actively passed, which make resolution of the controverted issue a practical necessity." *Id.* at 503, 81 S.Ct. at 1755; see also *Little v. Bowers*, 134 U.S. 547, 558, 10 S.Ct. 620, 623, 33 L.Ed. 1016 (1890); *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314, 13 S.Ct. 876, 878, 37 L.Ed. 747 (1893); *U.S. v. Frauehauf*, 365 U.S. 146, 157, 81 S.Ct. 547, 553, 5 L.Ed.2d 476 (1961). Justice Frankfurter often wrote of the primary conception of judicial review with regard to the ripeness of claims. "Federal judicial power," he wrote, "is to be exercised to strike down legislation, whether state or federal, only at the insistence of one who is himself immediately harmed or immediately threatened with harm by the challenged action." *Poe* 367 U.S. at 504, 81 S.Ct. at 1756. Whereas standing is designed to determine who may institute an asserted claim for relief, ripeness addresses a timing question: When is it appropriate to bring the asserted claim?

[10] The Supreme Court has indicated that the question of ripeness turns on the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Dev. Com.*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983); *Buckley v. Valeo*, 424 U.S. 1, 114, 96 S.Ct. 612, 680, 46 L.Ed.2d 659 (1976); accord *Young v. Klutznick*, 652 F.2d 617 (6th Cir.1981). There is, however, no tried and true method of determining ripeness which this Court is required to apply. Ripeness concerns arise in a multitude of fashions and are appropriately considered in their individual settings. The doctrine requires the court to exercise its discretion to determine if judicial resolution of the case is desirable. *Brown v. Ferro Corp.*, 763 F.2d 798 (6th Cir.1985), cert. denied, 474 U.S.

EXHIBIT 31
DATE 7/14/92

947, 106 S.Ct. 344, 88 L.Ed.2d 291 (1985), *United Steelworkers of America, Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 194 (6th Cir.1988).

The State places extraordinary weight on the "two-prong ripeness test" established in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) to support its claim. Its reliance on *Abbott*, however, is misplaced as it does not address the type of ripeness claim the State raises. The trilogy of *Abbott*, *Toilet Goods Association v. Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967), and *Gardner v. Toilet Goods Association*, 387 U.S. 167, 87 S.Ct. 1526, 18 L.Ed.2d 704 (1967), examined the extent to which pre-enforcement review of agency regulations is authorized and within the jurisdiction of the federal courts. The Court's concern was with the rule-making process of administrative bodies. In this context, the Court stated that the basic rationale of the ripeness doctrine is to "prevent courts, through the avoidance of premature adjudications, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott*, 387 U.S. at 148, 87 S.Ct. at 1515.

[11] Although *Abbott* is correctly cited for the general proposition that the fitness for the issues for judicial review and the hardship on the parties of withholding consideration must be reviewed, it deals specifically with rules and orders of administrative agencies rather than the more traditional constitutional challenge to legislative enactments. To that extent, the Court established a three prong test to determine the fitness of the issues which considers whether the claims are purely legal, whether the administrative action is final, and, alternatively, the harm in postponing review. The State attempts to force the case at bar into the *Abbott* mold arguing that the challenge is generalized and that there is likely to be a more concrete, factual setting more appropriate for review in the

future. However, we are unable to reconcile the *Abbott* analysis with the present case because we are not dealing with an administrative agency. A constitutional attack on a state statute does not require determination of finality or whether the claims presented are purely legal, nor would it be appropriate to do so. For purposes of the case at bar we need only to determine if there is an actual threatened coupled with immediate or threatened harm. *Young v. Klutznick*, 652 F.2d 617, 625-626 (6th Cir.1981).

[12, 13] On the present record, we find that plaintiff's challenge to Ohio Rev.Code § 3734.57(B) is ripe for review. The claim is fit for consideration in the sense that the statute is in effect and currently being applied. In addition, the harm to plaintiff is not abstract or attenuated, but rather, real and concrete. Although the provisions of Section (B) are within the discretion of the individual districts to apply, if they do choose to levy Section (B) fees, the section requires that out-of-state wastes be taxed at three times the rate of in-district wastes. Plaintiff claims that this provision is unconstitutional on its face, therefore, an actual application of the statute is not necessary to ripen the claim for review. *See e.g. Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), *Black & Decker Corp. v. American Standard Inc.*, 679 F.Supp. 1183 (D.Del.1988), *SCA Services of Indiana, Inc. v. Thomas*, 634 F.Supp. 1355 (N.D.Ind.1986), Courts often conclude that a plaintiff is entitled to challenge the legality of an action that has not yet occurred. *Bowsher v. Synar*, 478 U.S. 714, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986), *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Com.*, 461 U.S. 190, 201, 103 S.Ct. 1713, 1720, 75 L.Ed.2d 752 (1983). Moreover, plaintiff has also produced evidence that several of the management districts have actually adopted discretionary fee provisions. (Plaintiff's Reply, Exh. A). Thus, even if we were to accept the State's position that the claim could not be ripe absent an actual imposition of the alleged discriminatory fees, the fact that these fees

have in fact been adopted compels us to reject its ripeness argument.

[14] The State also asserts that at the time of filing, no district had elected to impose the additional fees, therefore the claim is not ripe for review. Since, however, ripeness is a question of timing, we are not required to consider the suitability of the claims for review purely from the point of filing. It is sufficient that at this juncture an actual controversy exists and the harm to the plaintiff is real and present. Accordingly, we find that plaintiff's claims are ripe for review.

Abstention

The State's third jurisdictional argument asserts that the Court should properly abstain from consideration of the case at bar under the doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). The State alleges that the Act involves a complex regulatory scheme in which the State has an overriding interest and which creates a central forum for review by a tribunal with special competence. For this Court to exercise jurisdiction, the State claims, would unduly burden the State in its efforts to further important state policies.

[15, 16] Abstention is a judicially created exception to the general grant of jurisdiction set forth in Article III of the Constitution. *See Railroad Com. of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). The doctrine permits federal courts to postpone or decline the exercise of jurisdiction in order for a state court to have the opportunity to resolve the matters at issue. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976), *reh'g denied*, 426 U.S. 912, 96 S.Ct. 2239, 48 L.Ed.2d 839 (1976). Abstention from the exercise of federal jurisdiction, however, is the exception and not the rule. *Id.* Abdication of the obligation to decide cases can be justified only in the exceptional case where there is an important countervailing state interest which will be served by judicial restraint. *Id.*

[17] The Supreme Court has defined three categories of abstention. *See Accident Fund v. Bauerwaldt*, 579 F.Supp. 729, 731 (W.D.Mich.1984). Abstention may be appropriate where the resolution of uncertain state law issues could render the federal constitutional issue moot or cause it to be presented in a different posture.

Pullman, 312 U.S. 496, 501, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941); *see County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959), *Lake Carriers' Assn. v. MacMillan*, 406 U.S. 498, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972); *accord United States v. Anderson County*, 705 F.2d 184 (6th Cir.1983), *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 538, 563 (6th Cir.1982). The Court must abstain from review of cases which would unduly interfere with legitimate activities of the state—most notably, pending state criminal proceedings. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971); *see Justice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977), *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); *see also Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), *United States v. Anderson County*, 705 F.2d 184 (6th Cir.1983) (asking if there is an adequate state proceeding to raise constitutional challenges in a non-criminal proceeding). Finally, the Court has upheld abstention "where the exercise of federal review of the [state law] question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation District*, 424 U.S. at 814, 96 S.Ct. at 1244 (discussing *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943)).

[18] In the final category, the *Burford* exception, a court may justify abstention where there is a complex state regulatory scheme which would be disrupted by federal review and where there is a state-created

EXHIBIT

DATE

7/14/92

HB

58*59

forum with special competence in the particular area. *Burford* at 327, 332-33, 63 S.Ct. at 1104, 1106-07, *ADA-Cascade Hatch Co. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897, 903 (6th Cir.1983), *Carrus v. Williams*, 807 F.2d 1286, 1290 (6th Cir.1986), *North Dixie Theatre, Inc. v. McCullion*, 613 F.Supp. 1339, 1343 (S.D. Ohio 1985). In *Burford*, the Texas legislature had centralized the administration of a regulatory scheme for oil and gas in one agency with judicial review in a single state district court. *Burford* 319 U.S. at 325-326, 63 S.Ct. at 1103-1104. The federal courts had consistently interpreted state law which required a specialized knowledge of oil and gas matters. This resulted in uncertainty and confusion in the state's conservation program. The Supreme Court found that these circumstances justified abstention and dismissed the action noting that "delay, misunderstandings of local law", and needless federal conflict with the state policy would be the inevitable product of this double system of review." *Id.* at 327, 63 S.Ct. at 1104.

[19] The *Burford* abstention is not appropriately invoked merely because resolution of a federal question may result in the overturning of a state policy. *Zablocki v. Redhail*, 434 U.S. 374, 380 n. 5, 98 S.Ct. 673, 678 n. 5, 54 L.Ed.2d 618 (1978), *Colorado River*, 424 U.S. at 815-816, 96 S.Ct. at 1245-1246. The state must have an overriding interest in the subject matter and centralized review in a forum with special competence. *North Dixie Theatre Inc. v. McCullion*, 613 F.Supp. 1339, 1345 (S.D. Ohio 1985), *United States v. Matchler*, 559 F.2d 955 (5th Cir.1977), *Nasser v. Home-wood*, 671 F.2d 432, 440 (11th Cir.1982), *ADA-Cascade*, 720 F.2d at 903. If there is adequate state court review based on predominantly local factors, federal jurisdiction may not be necessary. *Alabama Public Service Com. v. Southern R. Co.*, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951). The critical inquiry, then, is whether an erroneous federal decision could impair the state's effort to implement its policy. *ADA-Cascade* at 903.

Burford and its progeny also indicate that there may be a further limiting factor in the application of abstention principles. The *Burford* line of abstentions rest on admittedly valid state regulatory systems rather than constitutional attacks on state law. See e.g. *Alabama Public Service Com. v. Southern R. Co.*, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951), *J.V. Peters & Co. v. Hazardous Waste Facility Approval Board*, 596 F.Supp. 1556 (S.D. Ohio 1984), *Bath Memorial Hospital v. Marine Health Care Finance Com.*, 853 F.2d 1007, 1013 (1st Cir.1988). For example, in *ADA-Cascade Hatch Co. v. Cascade Resource Recovery, Inc.*, 720 F.2d 897 (6th Cir.1983), plaintiff challenged the state's refusal to issue a permit for a waste disposal facility. The statutory scheme itself was not at issue, and the court abstained from interfering with a valid regulatory scheme noting that the federal court was ill equipped to review state regulations that had an entirely local effect. Likewise, *Crossridge, Inc. v. Ohio Environmental Protection Agency*, Case No. C2-88-231 (S.D. Ohio, March 1, 1988) (Graham, J.), *Browning-Ferris, Inc. v. Baltimore County*, 774 F.2d 77 (4th Cir.1985) and *J.V. Peters & Company v. Hazardous Waste Facility Approval Board*, 596 F.Supp. 1556 (S.D. Ohio 1984), cited by defendants, did not involve challenges to state regulatory schemes, but rather, the application of state law. In each instance the courts were asked to intervene in an essentially local problem where a substantial federal question was not presented. *Burford* itself involved an admittedly valid statutory scheme with the federal question being an alleged violation of due process. The State has produced no authority, nor are we aware of any, for the proposition that a federal court may properly abstain from considering a constitutional attack on a state statute that does not involve substantial questions of the application of local law.

[20] We also note that the State's reliance on *Interstate Bi-Modal, Inc. v. State of Ohio*, Case No. C2-88-880 (September 1, 1988) (Graham, J.), is wholly misplaced. The State goes to great lengths to cite *Interstate Bi-Modal* as support for its

contention that questions involving the Ohio Environmental Protection Agency qualify for *Burford* type abstention. However, the State completely ignores the fact that this Court actually reached the merits of the Commerce Clause claim presented in *Interstate Bi-Modal* before abstaining on the due process claim, which involved application of state law. The Court found that it could not properly address a due process claim where the plaintiff had not pursued the administrative appeal process specifically designed to review actions of the Director of the OEP. The distinction present in *Interstate Bi-Modal* is telling. Since the Court considered the broad constitutional challenge to the validity of the state law and refused to address its specific application even though framed in terms of a constitutional violation, we must find that a challenge to the very existence of a statutory scheme is not appropriately left to the review process established under the law itself.

Although the State admits that the Environmental Board of Review is not empowered to rule upon the constitutionality of the very statute by which it was created (Defendants' Reply, p. 8), it insists that the Court should defer to the EBR for resolution of this matter. The State cites *Canton v. Whitman*, 44 Ohio St.2d 62, 73 O.O.2d 285, 337 N.E.2d 766 (1975), and *Cincinnati ex rel Crotty v. Cincinnati*, 50 Ohio St.2d 27, 4 O.O.3d 83, 361 N.E.2d 1340 (1977) for the proposition that constitutional claims may be adequately addressed within the administrative scheme. Once again, however, the State fails to draw the distinction between a federal constitutional attack challenging a statute's validity and constitutional claims which arise from the construction of the state law. In both *Canton* and *Crotty*, the Ohio Supreme Court was called to determine if the Director's order to fluoridate public water supplies was within the police power of the

state as defined by the Ohio Constitution. An order of the Director is expressly provided for in the Act's appeal process. However, in the case at bar, we are not presented with an exercise of power pursuant to the Act, but rather, the constitutionality of the Act itself. Neither *Canton* nor *Crotty* addresses the latter issue, and neither can be construed to support federal abstention in this case.⁸

[21] It is not disputed that the State of Ohio has a legitimate interest in the subject matter of the regulatory scheme. The disposal of solid wastes is a matter of substantial public concern. Land use questions, including the regulation of waste dumps, are of particular concern to state and local governments "and traditionally, federal courts have not interfered with state courts in the area of land use policy." *Muskogon Theatres, Inc. v. Muskogon*, 507 F.2d 199 (6th Cir.1974), *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959). Nevertheless, we find that abstention is inappropriate in this case because plaintiff claims that the Act is unconstitutional on its face and because Ohio's solid waste disposal statute does not provide a centralized forum appropriate to review the pending issues as contemplated in *Burford*.

The provisions of the Act on which the State relies to fulfill the requirements of *Burford* are limited in their scope. Section 3743.04 provides that any person who is a party to a proceeding before the director may pursue an appeal with the Environmental Board of Review. Likewise, Section 3745.06 provides that "any party adversely affected by an order of the environmental board of review, may appeal to the court of appeals of Franklin county..." (emphasis added). Thus, it appears to the Court that the language of the statute supports only review of actions by

⁸ In addition, we note that *GSX Chemical Services of Ohio, Inc. v. Stark*, EBR Case No. 181897, which is currently on appeal to the Environmental Board of Review, does not compel us to abstain from review of Section 3734-131. *GSX* presents a challenge to the Director's choice of consent-to-jurisdiction form, and his

alleged failure to provide notice and opportunity to comment on the form as required by Ohio's Administrative Procedure Act. Ohio Rev. Code § 119.01 et seq. The case does not present a challenge to the consent-to-jurisdiction provision of the Act itself.

the Director taken pursuant to his authority under the Act. Importantly, plaintiffs have not challenged any action of the Director which would be reviewable under these provisions, nor does it present a question concerning the construction of Ohio law. Instead, plaintiffs question the Act's compatibility with the Commerce Clause of the U.S. Constitution, an issue which the EBR has no special competence to consider.

Plaintiff attacks the solid waste disposal statute as it is written. Permitting federal court review of this kind of constitutional claim would not interfere significantly with the workings of a lawful state system, as such intervention threatened in *Burford* and *Southern Railway*. The Court is not being called upon to determine issues of state law; thus, review here would not create a parallel regulatory review institution in the federal court. The risks here are no greater than those present whenever a federal court decides whether a state regulatory statute is unconstitutional. At issue is not any fact-based agency determination, but a legislative enactment with a clear meaning not subject to modification or interpretation in the agency regulatory process. Moreover, the regulations in question do not have an entirely local effect. To the contrary, the statute has a far reaching effect on the national disposal of solid wastes, making the claims appropriate for federal review. Accordingly, the Court declines the opportunity to abstain from considering the issues presented by plaintiff.

Commerce Clause—Section 3734.57

By its terms, the Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States. . . ." Long ago it was settled that even in the absence of a congressional exercise of power, the Commerce Clause prevents the states from erecting barriers to the free flow of interstate commerce. *Coley v. Board of Wardens*, 12 How. 299, 13 L.Ed. 996 (1852); see *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 370-371, 96 S.Ct. 923, 927-928, 47 L.Ed.2d 55 (1976). At the same time, however, the courts have never doubted that much state

legislation, designed to serve legitimate state interests and applied without discrimination against interstate commerce, does not violate the Commerce Clause even though it affects commerce. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535-532, 69 S.Ct. 657, 661-662, 93 L.Ed. 861 (1949); see *Gibbons v. Ogden*, 9 Wheat. 1, 203-206, 6 L.Ed. 23 (1824). "In areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make the delicate adjustment of the conflicting state and federal claims." *H.P. Hood & Sons, Inc. v. Du Mond*, *supra*, 336 U.S. at 553, 69 S.Ct. at 679 (Black, J., dissenting). . . ."

Great A & P Tea Co. v. Cottrell, *supra*, 424 U.S. at 371, 96 S.Ct. at 928; see *Hunt v. Washington State Apple Advertising Com.*, 432 U.S. 333, 350, 97 S.Ct. 2434, 2445, 53 L.Ed.2d 383 (1977).

[22] In this process of "delicate adjustment," the Court has employed various tests to express the distinction between permissible and impermissible impact upon interstate commerce, "but experience teaches that no single conceptual approach identifies all of the factors that may bear on a particular case." *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429, 441, 98 S.Ct. 787, 794, 54 L.Ed.2d 664 (1978). Although the Court has described its own decisions in this area as a "quagmire" of judicial responses to specific tax measures, *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458, 79 S.Ct. 357, 361-362, 3 L.Ed.2d 421 (1959), the Court has steadfastly adhered to the central tenet that the Commerce Clause, "by its own force created an area of trade free from interference by the States." *Boston Stock Exchange v. State Tax Com.*, 429 U.S. 318, 328, 97 S.Ct. 599, 606, 50 L.Ed.2d 514 (1977), *American Trucking Assoc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987). One primary consequence of this constitutional restriction on state taxing powers, frequently asserted in litigation, is that "a

State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Id.*; see also *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403, 104 S.Ct. 1856, 1865, 80 L.Ed.2d 388 (1984). The Commerce Clause even without implementing legislation by Congress is a limitation upon the states' power to tax. *Boston Stock Exchange*, 429 U.S. at 329, 97 S.Ct. at 607. For that reason, "[i]n State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Id.*; see also *Halliburton Oil Well Cementing Co. v. Reilly*, 373 U.S. 64, 83 S.Ct. 1201, 10 L.Ed.2d 202 (1963); *Nippert v. Richmond*, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760 (1946); *LM Darrell & Son Co. v. Memphis*, 208 U.S. 113, 28 S.Ct. 247, 52 L.Ed. 413 (1908); *Guy v. Baltimore*, 100 U.S. 434, 25 L.Ed. 743 (1880).

The Court must consider the issue of discrimination against interstate commerce raised in this case in light of the balance that must be maintained between the purpose of the Commerce Clause, to foster the free exchange of trade among the several states, and the "legitimate interest of the individual States in exercising their taxing powers. . . ." *Boston Stock Exchange*, 429 U.S. at 329, 97 S.Ct. at 329. We note that this balancing of interests requires careful analysis of the facts of each individual case.

[T]he delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers requires a case-by-case analysis and such analysis has left much room for controversy and confusion and little in the way of precise guidelines to the States in the exercise of their indispensable power of taxation.

Westinghouse Electric Corp. v. Tully, 466 U.S. 388, 403, 104 S.Ct. 1856, 1865, 80 L.Ed.2d 388 (1984) (citation omitted). Thus, every commerce clause challenge turns upon the specific facts presented.

[23] The Court also notes the distinction established by the Supreme Court be-

tween "protectionist" measures employed by states to favor local commerce and measures employed by states to safeguard the health and safety of their people. While the latter may be upheld if treatment of interstate and interstate commerce is even-handed and if effects on interstate commerce are only incidental, the former are subject to a "virtually per se rule of invalidity." *Philadelphia v. New Jersey*, 437 U.S. 617, 623-624, 98 S.Ct. 2531, 2535-2536, 57 L.Ed.2d 475 (1978) (striking down a New Jersey statute prohibiting importation of solid wastes originating outside of the state). See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471-472, 101 S.Ct. 715, 727-728, 66 L.Ed.2d 659 (1981) (upholding Minnesota statute banning retail sale of milk in plastic non-returnable containers); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 841, 847, 25 L.Ed.2d 174 (1970) ("Where the statute regulates *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.") (emphasis added). "The critical inquiry, therefore, must be directed to determining whether [the Act] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey*, 437 U.S. at 624, 98 S.Ct. at 2536 (1978).

[24] Understandably, the State's argument proceeds on the basis that the Ohio law is an exercise of the state's police power designed to preserve Ohio's resources and its environment. Therefore, the State asserts, the relevant inquiry is whether the local interest outweighs the burdens on interstate commerce. The State fails to acknowledge, however, that the Court does not engage in this type of balancing test if the legislation in question does not apply even-handedly to both interstate and interstate commerce, unless the State offers a compelling reason for the disparate treatment. Once the Court ascertains that the statute treats interstate

EXHIBIT

DATE 7/14/92

commerce and interstate commerce differently and that there is no compelling reason for the distinction, the actual burden it imposes on interstate commerce is not relevant. The statute violates the Commerce Clause.⁹

Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), and *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986), both cited by the State, illustrate the point. In *Pike*, an Arizona statute required that all fruit growers in the state package their fruit in approved containers before shipping it out of the state. A cantaloupe grower in Parker, Arizona who sent his fruit to a packing plant it owned in California challenged the statute. The Court engaged in a balancing of the local interest against the burden on interstate commerce only after noting that the statute applied evenhandedly to both interstate and intrastate commerce. In *Maine*, the state banned entirely the importation of live fishbait. The Court found that the legislation passed constitutional muster even though it did not apply evenhandedly. The state had a compelling reason to discriminate against interstate commerce—there were substantial uncertainties surrounding the effects that fishbait parasites and non-native species would have on the wild fish population of Maine. Thus, the Court properly engaged in the balancing approach. These two cases illustrate when it is appropriate to engage in a balancing of interests—when the statute in question applies equally to interstate and

intrastate commerce, or when the statute discriminates against interstate commerce but for a compelling reason.

To the contrary, the Court has taught that when the state discriminates against interstate commerce without a compelling reason to do so, the legislation is unconstitutional regardless of how slight the burden is on interstate commerce or how legitimate the state interest. For example, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the Supreme Court invalidated Hawaii's excise tax on sales of wholesale liquor that exempted several kinds of locally produced wines and spirits. Hawaii defended the facially discriminatory exemptions by arguing that they were a reasonable means of promoting the consumption of liquors made from indigenous Hawaiian plants. The Court rejected the State's justification for the discriminatory exemption and held that it is a "cardinal rule" that "[i]n State, consistent with the Commerce Clause, may impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Bacchus* at 268, 104 S.Ct. at 3053 (quoting *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 97 S.Ct. 599, 606, 50 L.Ed.2d 514 (1977)). The means chosen to promote the consumption of Hawaiian liquor—levying a tax on out-of-state competitors—violated the primary function of the Commerce Clause of forbidding such preferential treatment. See also *Maryland v. Louisiana*, 451 U.S. 725, 101

9. In its Responsive Memorandum Regarding the December 27, 1990 decision in *Government Suppliers Consolidating Services, Inc. v. Bayh*, 753 F.Supp. 739 (S.D.1990) (See discussion at pg. 261, *infra*, n. 11, the State again argues that the Court must engage in a three prong standard of review which contemplates the purpose of the legislation, its effectiveness, and its reasonableness. This inquiry, however, is not applicable when the statute in question is discriminatory on its face. The courts have repeatedly preferred further inquiry on the evenhanded application of the legislation. See e.g., *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371-372, 96 S.Ct. 923, 927-928, 47 L.Ed.2d 55 (1976); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 815, 4 L.Ed.2d 852 (1960). *Bill Kestelwell Excavating, Inc. v. Michigan Department of Natural Resources*, Co., 732

S.Ct. 2114, 68 L.Ed.2d 576 (1981) (invalidating Louisiana's "first-use" tax on natural gas because in-state users were favored by a series of exemptions and credits); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977) (invalidating a New York stock transfer tax scheme because it reduced the tax payable by non-residents when the transfer involved an in-state sale, and also set a maximum limit to the tax payable on an in-state, but not an out-of-state, sale).

Perhaps more to the point is the Court's discussion in *Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). In *Philadelphia*, the appellants challenged a New Jersey statute which banned entirely the importation of solid wastes into the state. In striking down the statute as unconstitutional, the Court did not engage in a balancing test as the state was discriminatory on its face and the State failed to prove a compelling need for distinguishing between in-state and out-of-state waste.¹⁰ It did not matter that the ultimate aim of the statute was to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution. *Id.* at 626, 98 S.Ct. at 2536. Whatever the ultimate purpose of the statute, the state could not accomplish its goals by discriminating against commerce coming from outside the state absent some reason, "apart from their origin," to treat them differently. *Id.* at 627, 98 S.Ct. at 2537. Both on its face and in its application, the legislation violated the principle of nondiscrimination. The Court went on to say,

The Court has consistently found parochial legislation of this kind to be unconstitutional.

10. In *Philadelphia*, the State of New Jersey actually conceded that there was no basis to distinguish out-of-state waste from domestic waste. Defendants cite this fact as the distinguishing feature between *Philadelphia* and the case at bar, arguing that Ohio does have a basis for distinguishing among various wastes. However, as we discuss *infra*, the State has failed to show the need to distinguish between in-state and out-of-state wastes.

We also are compelled to note that we may, as the State suggests, declare *Philadelphia* to be to the Commerce Clause what *Dred Scott* is to the Equal Protection clause and ignore it

tionally invalid, whether the ultimate aim of the legislation was to assure a steady supply of milk by erecting barriers to allegedly ruinous outside competition, *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. [511] at 522-524 [55 S.Ct. 497, 500-501, 79 L.Ed. 1032 (1935)]; or to create jobs by keeping industry within the State, *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 [49 S.Ct. 1, 3, 73 L.Ed. 147 (1928)]; *Johnson v. Haydel*, 278 U.S. 16 [49 S.Ct. 6, 73 L.Ed. 155 (1928)]; *Toomer v. Witsell*, 334 U.S. [353] at 403-404 [68 S.Ct. 1156, 1165-1166, 92 L.Ed. 1460 (1949)]; or to preserve the State's financial resources from depletion by fencing out indigent immigrants, *Edwards v. California*, 314 U.S. 160, 173-174 [62 S.Ct. 164, 166-167, 86 L.Ed. 119 (1941)]. In each of these cases, a presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy.

Philadelphia 437 U.S. at 627, 98 S.Ct. at 2537.

[25] To resolve the pending motion, the Court must determine if the Act treats interstate and intrastate commerce evenhandedly and if not, whether the state has articulated a compelling reason for distinguishing in-state wastes from out-of-state wastes. In either instance, the Court may engage in a balance of the state's interests with the burdens the legislation places on interstate commerce. If, however, the Court finds that the statute discriminates against out-of-state wastes without a compelling need to do so, we must find that it is incompatible with the Commerce Clause and strike it down.¹¹

This Court is strictly bound by relevant Supreme Court precedent and we are without authority to find it invalid.

11. Recently, the United States District Court for the Southern District of Indiana addressed a similar constitutional challenge as the case at bar. In *Government Suppliers Consolidating Services v. Bayh*, 753 F.Supp. 739 (S.D.1990), the court struck down an Indiana statute which placed onerous burdens on the interstate shipment of solid wastes into Indiana. The statute imposed a "tipping fee" on out-of-state wastes that was greater than that imposed on in-state

It is uncontroverted the provisions of Ohio Rev Code § 3731.57(A) and (B) treat in-state wastes differently than out-of-state wastes. Under Section (A), the tax levied on wastes imported into the State is as much as one dollar (\$1.00) more per ton than that placed on in-district wastes. The fee is not discretionary, nor is it based on any factors other than the wastes' place of origin. Likewise, Section (B) authorizes the individual management districts to impose disparate fees. Although the choice to actually impose the Section (B) taxes is left to the discretion of the management districts, if they are levied, "fees levied under division (B)(1) of this section shall always be equal to one-half of the fees levied under division (B)(2) of this section, and fees levied under division (B)(3), which shall be in addition to fees levied under division (B)(2) of this section, shall always be equal to fees levied under division (B)(1) of this section." (Emphasis added.) In other words, the tax on out-of-state wastes is required to be three times that imposed on in-district wastes.

[26] The fact that the Act discriminates on its face requires us to determine if the State of Ohio has articulated a compelling reason for distinguishing in-state and out-of-state wastes. Furthermore, we must consider the reasons proffered by the State in light of the careful review that is historically applied to taxes. Since the power to tax presents a more imposing threat to the exchange of commerce than a state's use of its police power, taxes are subject to exacting scrutiny and are deemed unconstitutional when they ebb the free flow of interstate commerce. *Freeman v. Hewitt*, 329

wastes; required certification that the wastes were not hazardous; and required disclosure of the point of the waste's generation. In striking down the statute, the Indiana court adopted substantially the same reasoning we do here, although rather than requiring the State to come forth with a compelling reason for the facially discriminatory taxing scheme, the court accepted the State's assertion that the provisions were justified as a means to protect the health and welfare of its citizens. The court, however, found that there were less drastic means of achieving that goal and struck down the statute. Our analysis differs in that we believe that *Pike, Tyler, Bacchus, and Maryland v. Louisiana*,

U.S. 249, 253, 67 S.Ct. 274, 277, 91 L.Ed. 265 (1946), *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987).

The State offers three reasons for the need to tax out-of-state wastes at a higher rate. First, it cites the ever-increasing amount of solid wastes that are being shipped into Ohio. In 1988 alone, according to defendants, over two billion tons of out-of-state waste was disposed of in Ohio—approximately 18% of the total amount of waste processed in the state. The sheer volume of waste flowing into the state, it asserts, is sufficient in and of itself to tax out-of-state wastes at a higher rate. Second, the State claims that foreign wastes present unique regulatory problems. Unlike wastes generated in the state, foreign wastes cannot be inspected at their point of origin. This allegedly presents financial and logistical problems. The source of the waste and its composition is more difficult and expensive to ascertain at the place of disposal. Finally, the State argues that the increased threat of hazardous waste materials entering Ohio requires the imposition of higher fees. None of these reasons offered by the State is sufficient to justify the distinction between domestic and foreign wastes and require the Court to engage in a balancing of the state's interests with the actual burden the Act places on interstate commerce.

[27] A state may not provide its own citizens a preferred right of access over consumers in other states to the natural resources located within its borders. *Phillips* discussed above, do not support the notion that anything less than a compelling reason may justify a facially discriminatory taxing scheme. We decline to engage in an analysis which requires us to accept the State of Ohio's asserted reasons for distinguishing between in-state and out-of-state tax rates and then search for less drastic means to validate those reasons. Nonetheless, the *Boyle* decision supports our finding here. Its thrust is that absent a showing of inherent differences between in-state and out-of-state wastes, discriminatory treatment of the latter is violative of the Commerce Clause.

Philadelphia, 437 U.S. at 627, 98 S.Ct. at 2537, *Weyl v. Kansas Natural Gas Co.*, 221 U.S. 229, 31 S.Ct. 564, 55 L.Ed. 716 (1911), *Pennsylvania v. West Virginia*, 262 U.S. 553, 43 S.Ct. 658, 67 L.Ed. 1117 (1923). The Supreme Court has consistently held that a state cannot prevent articles of trade from being shipped in interstate commerce on the basis that local demands require a state to use its resources to the exclusion of other states. *Foster-Fountain Packing Co. v. Hagdel*, 278 U.S. 1, 10, 49 S.Ct. 1, 3, 73 L.Ed. 147 (1928). Thus, it appears that despite concerns over the decreasing amount of dump space, the State may not, consistent with the constitution, refuse shippers of wastes access to Ohio's landfills and waste treatment facilities. The Supreme Court has expressly held that a state's legitimate desire to protect its environment may not be accomplished by discriminating against materials from outside the state unless there is some reason, "apart from their origin, to treat them differently." *Philadelphia*, 437 U.S. at 626, 98 S.Ct. at 2536 (1978).

The State's claim that the allegedly higher costs of inspecting out-of-state wastes requires it to treat domestic and foreign

12. The section reads, in pertinent parts:
 (A) For the purposes of paying the state's long-term operation costs or matching share for actions taken under the "Comprehensive Environmental Response, Compensation, and Liability Act of 1980," 94 Stat. 2767, 42 U.S.C. § 9601 et seq., as amended; paying the costs of measures for proper cleanup of sites where polychlorinated biphenyls and substances, equipment, and devices containing or contaminated with polychlorinated biphenyls have been stored or disposed of; paying the costs of conducting surveys or investigations of solid waste facilities or other locations where it is believed that significant quantities of hazardous waste were disposed of and for conducting enforcement actions arising from the findings of such surveys or investigation; and for paying the costs of acquiring and cleaning up, or providing financial assistance for cleaning up, any hazardous waste facility or solid waste facility containing significant quantities of hazardous waste, that constitutes an imminent and substantial threat to public health or safety or the environment....

(B) For the purpose of preparing, revising and implementing the solid waste management plans of county and joint solid waste management districts, including, without limitation, the

wastes differently is without support. The Court does not question the validity of state taxing schemes which place higher fees on foreign articles when the state incurs additional administrative costs in inspecting articles located outside the state. In fact, it appears that the Supreme Court has only found such fees invalid when they explicitly exempt local activities from the obligations imposed on comparable interstate enterprises. For example, in *Hale v. Binco Trading, Inc.*, 306 U.S. 375, 59 S.Ct. 526, 83 L.Ed. 771 (1939), the Court held unconstitutional a Florida statute which imposed an inspection fee 60 times the actual cost of inspection upon cement imported into the state, because the statute exempted locally produced cement from all inspection and inspection fees. Absent extreme situations such as in *Hale*, inspection fees are valid. The question, then, is whether Ohio's tax is to raise revenue or to reimburse the State for the costs of inspecting in-state and out-of-state waste.

The purpose of Section 3731.57 is definitively expressed in the section.¹² It goes to great length to describe in detail the nature of the taxing scheme and for what activities the State may generate revenue. Priority development and implementation of solid waste recycling or reduction programs; providing financial assistance to boards of health within the district in which solid waste facilities are located for the enforcement of sections 3731.01 and 3731.13 of the Revised Code and rules adopted and orders and terms and conditions of permits, licenses, and variances issued under those sections; providing financial assistance to the county to defray the added costs of maintaining roads and other public facilities and of providing emergency and other public services resulting from the location and operation of a solid waste facility within the county under the district's approved solid waste management plan; paying the costs incurred by boards of health for collecting and analyzing water samples from public or private wells on lands adjacent to solid waste facilities that are contained in the approved or amended plans of county or joint districts; and paying the costs of developing and implementing a program for the inspection of solid wastes generated outside the boundaries of this state that are disposed of at solid waste facilities included in the district's approved solid waste management plan or amended plan, the solid waste management policy committee of a county or joint solid waste management district may levy fees....

EXHIBIT 31
 DATE 7/19/92

mantly, the section is concerned with raising money to offset the State's obligations under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. To that extent, the State is authorized to tax activities related to the proper clean up of wastes. Importantly, Section (A) makes no reference to the costs of inspecting wastes that are generated either inside or outside the state. Section (B) authorizes the taxing of wastes for basically the same purposes although it does make reference to the inspection of foreign wastes. The individual management districts may levy fees to pay the costs of "developing and implementing" a program for inspecting out-of-state wastes.

A careful reading of the statute indicates that it is not designed to be a scheme for the inspection of waste. It is a piece of legislation geared toward raising revenue to offset the state's cost of cleaning up its landfills and disposal facilities. Therefore, we cannot lend any credence to the State's proposition that the disparity of fees is warranted by the alleged higher costs of inspecting out-of-state wastes. The challenged section is exhaustive in defining its purpose. It is designed primarily to raise revenue, not to reimburse the State for the costs of inspecting waste. Moreover, other provisions of the Act specifically deal with waste inspection.¹² We express no opinion as to those provisions; however, the State of Ohio has not endeavored to implement such legislation within the structure of Section 3437.57 and we are without authority to read into a statute provisions which the State has conspicuously omitted.

Even if we were to read the statute as authorizing fees commensurate with the costs of inspection, the State has not produced any evidence whatsoever that the cost of inspecting out-of-state wastes is significantly higher than the inspection of domestic wastes. The affidavits on which the state relies only illustrate the potential difficulties in evaluating waste materials from unknown sources. They provide no

data which shows that the inspection of out-of-state wastes costs up to 300% more than the inspection of in-state wastes. Even given the latitude which the Court must accord the opposing party in a motion for summary judgment, there is not a modicum of evidence to suggest that inspection costs justify the great disparity in the taxing scheme.

The State's third articulated reason for the discriminatory treatment of out-of-state wastes is the difficulty in policing the transportation of hazardous wastes. The State cites an incident in which it is believed that hazardous materials were illegally shipped into the state and caused an explosion, as well as other problems, in enforcing criminal restrictions for the transportation of hazardous materials. The Court appreciates the need to insure the safe disposal of waste materials, but the State's arguments have little to do with the statute in question. Section 3734.57 is purely a revenue raising provision, and the State has not articulated any connection between policing hazardous wastes and taxing wastes differently on the single basis of their place of origin.

The State has not provided any acceptable reasons or theories for treating interstate wastes differently from out-of-state wastes. Although the State raises numerous legitimate concerns other than those discussed above, they are largely irrelevant. We deal here only with the narrow issue of whether the discriminatory surcharges on out-of-state wastes impose constitutionally impermissible burdens on interstate commerce. The plain unambiguous language of the statute supports only the conclusion that the State is distinguishing between wastes based solely on their place of origin and placing excessively high premiums on out-of-state wastes. Since Ohio has demonstrated no compelling need to impose substantially higher taxes on out-of-state wastes than in-state wastes, the Court cannot engage in a balancing of in-

However, the justification for any such fees are more appropriately argued with respect to those sections.

Cite as 763 F.Supp. 241 (S.D. Ohio 1991)

interests; the actual burden the provision has on commerce is not relevant.

Ohio Rev Code § 3734.57 is a transparent attempt to discourage the shipment of solid wastes into Ohio. On its face, it discriminates against interstate commerce in violation of the constitution's proscription of such burdens. The State cannot solve its waste problems by blocking or rerouting the market's allocation of that waste, for the Commerce Clause can have no tolerance for parochial decisions "by one State to isolate itself in the stream of interstate commerce from a problem shared by all." *Philadelphia*, 437 U.S. at 629, 98 S.Ct. at 2538. "The peoples of the several states must sink or swim together, even in their collective garbage." *TRIBE, American Constitutional Law*, 2nd Ed., § 6-8 (1988) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523, 55 S.Ct. 497, 500, 79 L.Ed. 1032 (1935)). Accordingly, plaintiff's motion for summary judgment is hereby GRANTED as to Ohio Rev.Code § 3734.57.

Commerce Clause—Section 3734.131

[28] On February 1, 1991, the State filed a Motion to Dismiss plaintiff's challenge to Section 3734.131 on the basis of legislative amendments to the Section. After carefully reviewing the changes in the consent to service provisions, we find that although some portions of the challenged statute have been altered, those changes were minimal. The State merely reduced the time frame in which the consent-to-judisdiction form must be filed from seven to three days before the shipment of waste into the state and discarded annual filing in favor of requiring consent to be filed every four years. Therefore, the alleged offending aspects of the legislation remain, making review of the parties' motions for summary judgment appropriate.

[29, 30] The consent to service provisions of Section 3734.131 present similar constitutional concerns as do the provisions of Section 3734.57. When the burden a state regulation places on interstate commerce ebbs its flow in a manner not applicable to local commerce, the local interests must yield to the greater federal interest in

maintaining a free and open market among the several states. The consent provisions may either constitute discrimination that renders the regulation invalid without more, or requires us to weigh and evaluate the State's putative interest against the interstate restraints in order to determine if the burden imposed is a reasonable one. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970); *Brown—Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-579, 106 S.Ct. 2080, 2083-2084, 90 L.Ed.2d 552 (1986). After reviewing the pleadings and affidavits in a light most favorable to the State, we find that the burden imposed on interstate commerce by the consent to service statute exceeds any local interest the State may advance.

The Ohio statute before us may be held to discriminate impermissibly against interstate commerce without extended inquiry. It plainly draws a distinction between intrastate and interstate commerce and places impediments only on the latter. We reject the State's contention that the statute actually strives to achieve equality among all transporters of waste. It suggests that the provision is non-discriminatory because it compels entities who are not subject to the State's jurisdiction to consent to service of process in order to place them on par with persons who are already able to be served. It is simplistic to suggest that because the statute would lessen the burden on the State of serving carriers of waste that the statute treats in-state and out-of-state carriers equally. The State can no more justify the distinction between in-state and out-of-state carriers than it can domestic and foreign wastes. Thus, we may strike down the statute without further inquiry. *Brown—Forman*, at 579, 106 S.Ct. at 2084.

We proceed, however, to assess the interests of the State to demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints. As written, the statute seeks to secure service of process over those persons engaged in the interstate transporta-

DATE 7/19/92

LB 58859

tion of waste who transact business in the state or cause harm there. It reads, in pertinent parts:

(A)(1) ... no person shall transport or cause to be transported from outside this state to a solid waste facility, infectious waste treatment facility, or hazardous waste facility in this state any solid wastes, infectious wastes, or hazardous waste unless each of the following persons has first irrevocably consented in writing to the jurisdiction of the courts of this state and service of process in this state, including, without limitation, summons and subpoenas, for any civil or criminal proceeding arising out of or relating to the waste that is shipped to a facility in this state:

(a) The person who actually transports the waste;

(b) The business concern that employs the person described in division (A)(1)(a) of this section;

(c) The person or persons who have contracted with the transporter for transportation of the waste to a facility in this state;

(d) The person or persons who have contracted with the owner or operator of the facility for treatment, transfer, storage, or disposal of the waste at the facility in this state.

(2) The original of the consent-to-jurisdiction document shall be legible and shall be filed with the director of environmental protection on a form provided by the director. A legible copy of the completed document shall be filed with the owner or operator of each solid waste facility, infectious waste treatment facility, or hazardous waste facility to which the waste is transported. The original and each copy shall be sent by certified mail, return receipt requested, at least three days before the first shipment of solid

14. The Ohio long-arm statute, R.C. § 2307.381 provides, in pertinent part:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

wastes, infectious wastes or hazardous waste into this state.

(3) All consent-to-jurisdiction documents required under division (A)(1) or (2) of this section shall be refiled during the month of December, 1995 and during the month of December of every fourth year thereafter. Except as provided in division (D)(1) of this section, after December 31, 1995 or after the thirty-first day of December of every fourth year thereafter, whichever is applicable, no person identified in division (A)(1)(a) to (d) of this section shall continue to transport or cause to be transported any solid wastes, infectious wastes, or hazardous waste from outside this state to a solid waste facility, infectious waste treatment facility, or hazardous waste facility in this state unless the person refiles with the director and the owner or operator of each facility to which the waste is transported consent-to-jurisdiction documents, in the manner prescribed in division (A)(2) of this section, during the month of December next preceding the period for which the refiled document is required.

(B) A person who enters this state pursuant to a summons, subpoena, or other form of process authorized by this section is not subject to arrest or the service of process, whether civil or criminal, in connection with other matters that arose before his entrance into this state pursuant to the summons, subpoena, or other form of process authorized by this section.

Ohio Rev.Code § 3734.131 (emphasis added). We hasten to note that Ohio's long-arm statute would authorize service over the same persons and in the same circumstances as does § 3734.131, "therefore the

(3) Causing tortious injury by an act or omission in this state:

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state....

consent provisions would appear to be unnecessary. If the State believes that additional record keeping is desirable to readily identify waste disposers who may violate Ohio waste disposal laws and to insure that they are amenable to service of process, it is free to require waste disposers to maintain records of the business addresses of waste generator-disposers and records regarding their waste hauled to Ohio landfills. But such record-keeping requirements must apply alike to in-state and out-of-state waste disposers. As it stands, however, § 3734.131 does not treat all waste disposers equally, nor does it expand the scope of Ohio's long-arm jurisdiction or otherwise purport to provide the State with any other benefit or interest.

The consent provisions do, however, place burdens on interstate commerce. Many members of the NSWMA and others affected by § 3734.131 have no office in Ohio, are not registered to do business there, and have no agent appointed to accept service of process in the state. Nevertheless, in order to pursue their trade, every person linked to the transportation of solid wastes must consent to the jurisdiction of the Ohio courts by filing with the State before transporting waste across the state line.

We do not question that the State has a legitimate interest in facilitating service of process on foreign carriers. "The ability to execute service of process on foreign corporations and entities is an important factor to consider in assessing the local interest in subjecting out-of-state entities to requirements more onerous than those imposed on domestic parties." *Bentix Autolite Corp. v. Midesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 2222, 100 L.Ed.2d 896 (1988). It is true that serving foreign defendants may be more arduous than serving domestic persons; nevertheless, state interests are insufficient to withstand Com-

The Ohio long-arm statute has been interpreted to extend its courts jurisdiction to the constitutional limits of due process, at least with respect to the "transacting any business" provision of the statute. *In-Flight Devices Corp. v. Vardian Air, Inc.*, 466 F.2d 220, 225 (6th Cir.1972). *Cf. Ohio State Tire & Rubber, Inc. v. Paris Lumber Co.*, 8 Ohio App.3d 226, 238, 456 N.E.2d 1309

merce Clause scrutiny when they reach beyond what is necessary to meet their needs. Ohio already has a statutory scheme which is sufficient to meet its needs of securing service of process over those engaged in the interstate shipment of solid waste; thus, it has no need for the consent provisions. The consent to service provisions merely place arduous and unnecessary burdens on those who ship solid waste into Ohio.

Ohio cannot justify its statute as a means of protecting its residents and environment from illegal management of waste disposal by subjecting foreign carriers and others to the extreme provisions of § 3734.131. Ohio's long-arm statute is adequate to reach those persons who are properly and constitutionally amenable to suit. The State may not bottleneck interstate commerce by imposing strenuous filing burdens over any participant in the solid waste disposal arena. Accordingly, we find that Ohio Rev.Code § 3734.131 discriminates against and places undue burdens on interstate commerce in violation of Article I, Section 8 of the U.S. Constitution.

Defendant's Motion to Dismiss plaintiff's challenge to Section 3734.131 is DENIED. Defendant's Motion to Strike plaintiff's reply to defendant's responsive memorandum regarding the *Government Suppliers* decision is hereby GRANTED. Plaintiff's motion for summary judgment is hereby GRANTED. Defendant's cross-motion for summary judgment is hereby DENIED. The Clerk of Courts shall enter JUDGMENT for the plaintiff.



(1982); *Gold Circle Stores v. Chemical Bank*, 4 Ohio App.3d 10, 14, 446 N.E.2d 194 (1982). If the question is the identity and residence of waste disposal law violators, then Ohio is free to draft a provision which requires such records to be maintained by all waste disposers or waste haulers.

DATE 7/19/92
HB 58459

161 11. Indicia of improper property transfers, in light of the foregoing, exist in the present case. William L. and Myra L. Comer (Mr. and Mrs. Comer) transferred essentially all of their real and personal property, as well as all of Mr. Comer's future earnings, to the Family Trust in exchange for paltry consideration. Subsequent to this transfer, the Comers were, for all intents and purposes, insolvent. Thereafter, the Family Trust sold to third parties the original realty conveyed to the trust, while purchasing the 9260 property, levied-upon by the IRS and material to this action. The Comers continue to live in the 9260 property, and are therefore using the property as their own. Similarly, all of the property conveyed to the American Trust and to FEC originated with either Mr. Comer or the Family Trust, and the Comers continue to use such property. The "lease" of the 9260 property by FEC from the Family Trust, ostensibly as part of Mr. Comer's compensation as Executive Trustee of FEC, is of no consequence. The Court views any and all transactions between Comer-created trusts, or between the trusts and Mr. or Mrs. Comer, as legal nullities, effectively no more substantial than the intra-family transactions condemned in *Farrell*. No serious argument can be propounded that "arms-length" negotiations occurred between any of these entities respecting any lease or loan transaction when the grantors, trustees, and beneficiaries of the trusts are, without exception, Comer family members. Several instances concerning the signing of documents on behalf of the trusts demonstrate the Comers' disregard of each trust's legal form; the lease agreement between Family Trust and TRYE Trust is signed by William R. Comer as Family Trust's trustee, when he possessed no such capacity, and Mr. Comer signed a vehicle lease agreement as trustee of the American Trust on the date of its formation despite the fact that the declaration of trust identified only William R. and Myra Comer as American's trustees. Perhaps even more illustrative of the Comers' disregard of each trust's independent identity was Mr. Comer's response when queried about a possible conflict between his serving as Executive Trustee of TRYE Trust given the conveyance to the

Family Trust of all of his lifetime services; Mr. Comer simply asserted that he ignored the relevant language in the Family Trust's Declaration of Trust. Finally, and importantly, Mr. Comer offered no convincing evidence at trial indicating any independent economic purpose for the existence of any of his trusts. Close examination of the trusts' relationship demonstrates that their sole function is to manipulate the Comers' income and assets. The Court therefore concludes that, under Michigan law, the plaintiffs cannot assert ownership of the levied-upon property, and therefore lack standing to challenge the relevant levies.

12. The plaintiffs additionally argue that the IRS' assessments against the Comers are barred due to expiration of the statute of limitations. This argument, however, ignores the established principle that in § 7426 actions, the underlying tax assessment is presumed valid, and such assessment can only be challenged by the relevant taxpayer. *Rabino v. United States*, 329 F.Supp. 830 (S.D.N.Y.1971); *Shannon v. United States*, 521 F.2d 56 (9th Cir.1975), cert. denied, 424 U.S. 965, 96 S.Ct. 1458, 47 L.Ed.2d 731 (1976). Since plaintiffs are not the relevant taxpayer, this claim is rejected.

13. The plaintiffs' notice of levy argument is also defective. Service of notice of levy need not be made upon potential third party owners of levied-upon property to satisfy the notice provisions of the federal tax law. *Douglas v. United States*, 562 F.Supp. 593 (S.D.Ga.1983). Moreover, as the IRS served proper notice of levy regarding the 9260 property upon the Comers, the plaintiffs received a minimum constructive notice of this levy.

14. Finally, plaintiffs urge that the government is precluded from levying against the property at issue under the doctrines of res judicata, estoppel, and elections. This contention is derived from certain agreements between the Comers, the plaintiffs, and the IRS concerning tax liabilities for the years 1982 and 1983. Essentially, plaintiffs assert that these agreements, in that they reflect no tax liability on the plaintiffs' behalf for the pertinent years, prevent the government from thereafter attempting to assign tax liability

Cite as 732 F.Supp. 761 (E.D.Mich. 1990)

against the plaintiffs. Thus, plaintiffs argue, the government improperly levied against the property at issue in this case.

This Court's finding, reflected in this opinion, that the Comers own the property at issue for tax levy purposes renders the plaintiffs' final argument ineffective. Because plaintiffs have failed to demonstrate the required interest in the pertinent property, they cannot now claim that the government is violating the terms of an agreement allegedly absolving the plaintiffs from future tax liability. Simply put, the plaintiffs cannot assert any detriment from the government levying on someone else's property.

III. CONCLUSION

Based upon the preceding, the Court finds for the defendant, sustains the levies at issue, and ORDERS that the plaintiffs take nothing. Judgment shall enter accordingly.

IT IS SO ORDERED.



BILL KETTLEWELL EXCAVATING,
INC., d/b/a Fort Gratiot Sanitary
Landfill, Plaintiff,

v.

MICHIGAN DEPARTMENT OF NATURAL RESOURCES; David Hales, Director of Michigan Department of Natural Resources; St. Clair County Health Department; John B. Parsons, Director of St. Clair County Health Department; St. Clair County Metropolitan Planning Commission, and Gordon Rutan, Director; St. Clair County Solid Waste Planning Committee and Peg Clute, Chairperson, Defendants.

No. 89-CV-30015-PH.

United States District Court,
E.D. Michigan, S.D.

March 2, 1990.

Landfill owner brought action challenging county's decision to refuse to allow

732 F.Supp. -19

owner to dispose of out-of-county waste in landfill. On owner's motion for summary judgment, the District Court, James Harvey, J., held that: (1) amendments to Solid Waste Management Act requiring explicit county approval for disposal in county of waste generated outside county did not violate commerce clause, and (2) county's policy of refusing to dispose of waste generated outside county did not violate commerce clause.

Motion denied.

See also 716 F.Supp. 1012.

1. Commerce \Rightarrow 52.10

Health and Environment \Rightarrow 25.5(2)

Amendments to Solid Waste Management Act requiring explicit county approval for disposal in that county of waste generated outside county did not violate commerce clause on its face, inasmuch as authorization requirement applied equally to Michigan counties outside of county adopting plan as well as to out-of-state entities. U.S.C.A. Const. Art. 1, § 8, cl. 3; M.G.L.A. §§ 299.413a, 299.430(2).

2. Commerce \Rightarrow 52.10

Health and Environment \Rightarrow 25.5(2)

Practical effect of amendments to Solid Waste Management Act requiring explicit county approval for disposal in that county of waste generated outside county did not violate commerce clause; incidental effect on interstate commerce imposed by amendments was not clearly excessive in relation to benefits derived by Michigan from amendments. U.S.C.A. Const. Art. 1, § 8, cl. 3; M.G.L.A. §§ 299.413a, 299.430(2).

3. Constitutional Law \Rightarrow 278.1

Health and Environment \Rightarrow 25.5(5)

County's policy of banning all out-of-county waste from county landfills was related to county's goal of preserving and managing its landfill space and, thus, did not violate due process. U.S.C.A. Const. Amend. 14.

4. Commerce \Rightarrow 52.10

Health and Environment \Rightarrow 25.5(5)

County's policy of banning all out-of-county waste from county landfills did not

EXHIBIT

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violate commerce clause; benefits to county in extending useful lives of its landfills outweighed minimal burden on interstate commerce. U.S.C.A. Const. Art. I, § 8, cl. 3.

Daniel P. Perk, Robert A. Fineman, Honigman, Miller, Detroit, Mich., David R. Heyboer, Luce, Henderson, Port Huron, Mich., for plaintiff.

Frank J. Kelley, Atty. Gen., Thomas J. Emery, Leo H. Friedman, Asst. Attys. Gen., Natural Resources Div., Lansing, Mich., for defendants DNR and Hales.

Robert H. Cleland, St. Clair County Corp. Counsel, Port Huron, Mich., Lawrence R. Ternan, Beier Howlett Ternan Jones Shea & Hafeli, Bloomfield Hills, Mich., for all county defendants.

MEMORANDUM OPINION AND ORDER

JAMES HARVEY, District Judge.

Currently pending is the plaintiffs' motion for summary judgment requesting the following alternative relief: (1) a declaration that Mich. Comp. Laws Ann. §§ 299-413a and 299-480(2) are unconstitutional to the extent they pertain to disposal of waste generated outside the State of Michigan, along with an injunction prohibiting their enforcement; or (2) a declaration that various St. Clair County governmental entities, defendants herein, unconstitutionally applied these sections in denying the plaintiffs' application for a permit to import out-of-state waste to the Fort Gratiot Sanitary Landfill, along with an injunction prohibiting future unconstitutional permit decisions.

All defendants have responded, and the Court has heard oral argument. The Court is now prepared to rule.

I.

The plaintiff raises the due process and commerce clauses of the United States Constitution as bars to the enforcement of Waste Management Act (MSWMA), Mich.

Comp. Laws Ann. § 299-401 et seq. The challenged amendments provide as follows:

A person shall not accept for disposal solid waste that is not generated in the county in which the disposal area is located unless the acceptance of solid waste that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

In order for a disposal area to serve the disposal needs of another county, state, or country, the service must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan.

Mich. Comp. Laws Ann. §§ 299-413a, 299-430(2). In February of 1989, the plaintiff applied to the St. Clair County Metropolitan Planning Commission (the Commission) for approval of a plan that would allow the disposal of 1750 tons of waste per day, from sources originating outside of the County, at the plaintiff's private landfill. In rejecting the plaintiff's application, and pursuant to the authority granted in the MSWMA amendments, the Commission's Staff Report notes the County's policy banning importation of any waste, whether generated in other Michigan counties or landfills. The plaintiff now urges that the MSWMA amendments, by requiring explicit county approval for disposal of out-of-state waste, impermissibly discriminate against interstate commerce by placing the burden on preserving Michigan's landfill space on other states. Alternatively, the plaintiff asserts that the Commission's denial of the plaintiff's application to import out-of-state waste involved an unconstitutional application of the amendments to the plaintiff, in that inadequate criteria exist for evaluating permit applications to satisfy due process.

II.

Resolution of these issues requires analysis of the several Supreme Court deci-

sions addressing the "dormant" aspects of the commerce clause. More particularly, the Court must ascertain whether the MSWMA amendments represent "basically a protectionist measure, or whether [they] can fairly be viewed as [] law[s] directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2536, 57 L.Ed.2d 475 (1978). If the amendments are simply aimed at economic protectionism, the defendants must hurdle a "virtual" per se rule of invalidity "to survive constitutional challenge. *Id.* at 624, 98 S.Ct. at 2535. If, however, the amendments serve a legitimate public interest, and only incidentally burden interstate commerce, the amendments "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 815-16, 4 L.Ed.2d 852 (1960). In evaluating the protectionist character of legislation, courts must assess "legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 626, 98 S.Ct. at 2537.

The critical question, therefore, is whether the MSWMA amendments, either through their means or their ends, serve an economic protectionist purpose. In *Philadelphia*, the New Jersey statute (ch. 363) provided that

[n]o person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the state Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated regulations permitting and regulating the treatment and disposal of such waste in this State.

N.J.Stat. Ann. § 13:1-10 (West Supp. 1978). The New Jersey commissioner, acting pursuant to the statute's authority, promulgated regulations banning, with limited ex-

ceptions, the importation of out-of-state waste to any of New Jersey's landfills. The statute expressed its purpose as protecting New Jersey's environment through a limitation on the volume of waste transportable to state landfills. Notwithstanding this apparently legitimate purpose, however, the Supreme Court found the statute discriminatory and violative of the commerce clause:

[I]t does not matter whether the ultimate aim of ch 363 is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we assume New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch 363 violates this principle of nondiscrimination.

437 U.S. at 626, 627, 98 S.Ct. at 2537. Thus, the Supreme Court dictated its general belief concerning the priority of the commerce clause vis-a-vis state police powers: regardless of the legitimacy of the local purpose underlying a statute, such statute will not be upheld if its enforcement requires direct discrimination against interstate commerce.

For every rule, however, there exists an exception. Respecting commerce

clause/police power analysis, the exception is illustrated in *Maine v. Taylor*, 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). There, the Supreme Court held that "once a state law is shown to discriminate against interstate commerce 'either on its face or in its practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by

DATE 7/19/92 HB 58859

available nondiscriminatory means." *Id.* at 138, 106 S.Ct. at 2447. Although the second factor, concerning alternative means, avoided express mention in *Pittsylvania*, it appears the Supreme Court considered this factor when it noted that "it may be assumed that New Jersey may pursue [its legislative] ends by slowing the flow of all waste into the State's remaining landfills..." 437 U.S. at 626, 98 S.Ct. at 2537 (emphasis in original). In other words, there existed a less discriminatory alternative that would allow the protection of New Jersey's environment—banning all disposal of waste in the State's landfills.

Maine v. Taylor demonstrates application of these factors through the validation of a state law banning importation of certain species of live baitfish into Maine. First, the Supreme Court upheld the district court's finding of a legitimate local purpose for the ban, the Supreme Court next addressed the issue of availability of a less discriminatory alternative to the ban. Again, the Supreme Court exhibited deference to the district court's factual findings, and refused to set aside the conclusion that no scientifically-accepted techniques existed for the sampling and inspection of live baitfish. Given this, and given earlier precedent holding that states are not required to develop new and unproven means in order to create nondiscriminatory methods of achieving a legislative goal, the Supreme Court agreed that no less discriminatory alternative to an outright ban existed. 477 U.S. at 147, 106 S.Ct. at 2452. Thus, the statute withstood commerce clause scrutiny.

III.

[1] Application of the foregoing principles to the MSWMA amendments is admittedly difficult. At the outset, the Court must examine whether the MSWMA, either

on its face or in its effect, discriminates against interstate commerce, or whether the MSWMA regulates evenhandedly, with only incidental effects on interstate commerce. Determination of a statute's facial validity requires an evaluation of whether the statutory language expresses favorable treatment to in-state entities. Thus, in *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), a statute that expressly prohibited the transportation of live minnows out of Oklahoma "on its face discriminat[ed] against interstate commerce," and was therefore subject to "the strictest scrutiny." *Id.* at 336, 337, 99 S.Ct. at 1736, 1737. The MSWMA suffers from no such defect. Clearly, the requirement that importers appear in a county waste disposal plan applies equally to Michigan counties outside of the county adopting the plan as well as to out-of-state entities. The Court therefore finds that the MSWMA does not discriminate against interstate commerce on its face.

[2] Next, the Court must ascertain whether the MSWMA, in practical effect, discriminates against interstate commerce. In this respect, it is important to recognize the functional difference between the New Jersey waste disposal statute at issue in *Pittsylvania* and the MSWMA. Unlike the New Jersey law, the MSWMA does not place the authority to issue a blanket preclusion against the importation of all out-of-state waste into one state official's hands. Instead, the MSWMA grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State. Although ultimate authority for acceptance of a county's plan resides with a single official under the MSWMA, Mich. Comp. Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this authority to reject county plans proposing the importation of out-of-state waste. In this regard the MSWMA does not, through its means, discriminate against interstate commerce in the manner of the New Jersey statute. As implemented, the MSWMA poses no flat prohibition against the importation of out-of-state

Cite as 732 F.Supp. 761 (E.D.Mich. 1990)

waste into Michigan's landfills. Thus, the Court finds that the MSWMA imposes only incidental effects upon interstate commerce, and may therefore be upheld unless the burden imposed "is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. at 847 (citation omitted).

Michigan promulgated the MSWMA as "[a]n act to protect the public health and the environment; to provide for the regulation and management of solid wastes; to prescribe the powers and duties of certain state and local agencies and officials; to prescribe penalties; to make an appropriation; and to repeal certain acts and parts of acts." Act No. 641, Public Acts of 1978. Thus, the MSWMA's putative benefits include the provision of a comprehensive plan for waste disposal, through which appropriate planning for such disposal can result, as well as the protection of the public's health, safety, and welfare. The burden on interstate commerce appears to be the requirement that out-of-state waste generators appear on a county's plan prior to disposal. Again, the plaintiff does not posit that appearance on a county plan, while ostensibly an insubstantial burden, nevertheless is a practical impossibility for any out-of-state waste generator seeking to utilize Michigan's landfills. Without such an allegation, the Court concludes that the incidental effect on interstate commerce imposed by the MSWMA is not clearly excessive in relation to the benefits derived by Michigan from the statute. The Court therefore holds that the MSWMA is not violative of the commerce clause of the United States Constitution.

IV.

[3] The plaintiff alternatively argues that even if the MSWMA is facially constitutional, the defendant St. Clair County governmental entities unconstitutionally applied the MSWMA in denying the plaintiff's permit application. More specifically, the plaintiff argues that the County's stated prohibition against importation of any waste into the County's landfills directly violates the commerce clause.¹

[4] Unquestionably, the County based its rejection of the plaintiff's application for out-of-county waste, "a policy" "to ban all out-of-county waste." Plaintiff's Brief, Exhibit B. As the plaintiff correctly notes, this policy provides no guidelines for importation of solid waste into the County; rather, the County, for whatever reason, has determined that importation of such waste is not a desirable activity. The County, in defense, notes first that the policy is evenhanded in that it applies to other Michigan counties as well as to out-of-state entities, and second that such policy, as long as it is reflected in the County's waste disposal plan, is consistent with the MSWMA.

Review of applicable case law reveals a single circuit court opinion addressing the fundamental issue posed by the parties. In *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 830 F.2d 1492 (9th Cir.1987), the court, in evaluating a local ordinance barring importation of all waste into a metropolitan planning area's landfill, held that "'evenhandedness' requires simply that out-of-state waste be treated no differently from most [in-state] waste." *Id.* at 1484, citing *Washington*

of the constitution's due process clause. *Id.* at 666.

The St. Clair County policy suffers no such infirmity. The stated blanket prohibition against waste importation is surely related to the County's goal of preserving and managing its landfill space. The plaintiff cannot, therefore, argue that the policy violates due process.

2. The plaintiff urges that *Evergreen* is of marginal precedential value in resolving the current dispute, in light of the district court's finding that the defendant acted as a market participant in barring importation of waste, and was there-

EXHIBIT 31
DATE 7/13/92
IB 58859

State Trades Council v. Spellman, 684 F.2d 627, 631 (9th Cir.1982), cert. denied, 461 U.S. 913, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983). Indisputably, St. Clair County's challenged policy treats most in-state waste in the same manner as out-of-state solid waste by prohibiting the importation of either into the county. The policy is therefore subject to the balancing test developed in *Pike, supra*.

St. Clair County's policy serves a legitimate local purpose by extending the useful lives of the County's landfills. Yet, as in *Evergreen*, the parties' positions conflict concerning whether the policy's burden on interstate commerce "is clearly excessive in relation to the putative local benefits...." *Evergreen* found that the availability of alternative landfill sites in Oregon evidenced the "minimal burden" imposed upon interstate commerce by the challenged local ordinance. 820 F.2d at 1485. Similarly, in the present case, the plaintiff does not allege that, as a result of St. Clair County's policy, disposition of out-of-state waste in Michigan is a practical impossibility. The Court concludes, therefore, that the County's policy minimally burdens interstate commerce. Weighed against the local benefits attributable to the challenged policy, the provision of a structured plan for disposal of the County's waste, the Court finds that the policy is a valid exercise of the County's police power.

Based upon the preceding, the Court DENIES the plaintiff's request for a declaratory judgment holding the 1988 amendments to the Michigan Solid Waste Management Act violative of the commerce clause of the United States Constitution, and therefore DENIES the plaintiff's request for an injunction prohibiting the amendments' enforcement; and DENIES the plaintiff's request for a declaratory

fore exempt from commerce clause coverage. *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 643 F.Supp. 127, 131 (D.Or. 1986). Yet, the Ninth Circuit unquestionably affirmed the district court by finding that the ordinance regulated evenhandedly, and that its

judgment holding the defendant St. Clair County Governmental entities' application of the Michigan Solid Waste Management Act in denying the plaintiff's permit application unconstitutional, and therefore DENIES the plaintiff's request for an injunction prohibiting future such applications of the MSWMA.

IT IS SO ORDERED.



Stuart M. BERGER, M.D., Plaintiff,

KING WORLD PRODUCTIONS, INC., Charles Lachman, Jane or John Doe, and Inside Edition, Inc., a/k/a Inside Edition, Defendants.

No. 90-CV-70109-DT.
United States District Court,
E.D. Michigan, S.D.
March 21, 1990.

Physician sued producers of television program seeking injunction to prevent telecasting of surreptitious videotape of interview with physician conducted by employee of producers pretending to be a patient. The District Court, Hackett, J., held that: (1) personal jurisdiction over individual defendants had not been properly secured by attempted service by mail, and (2) proper venue of case was the Southern District of New York, where all defendants resided and where claim arose.

Change of venue ordered.

burdens on interstate commerce were not clearly excessive in relation to the putative local benefits. Nowhere in the appellate decision does the court mention the market participant doctrine.

1. Injunction \approx 115
Plaintiff did not properly serve nonresident individual defendants by mail in suit seeking injunction barring transmission of television program; record did not indicate that defendants had completed and returned to plaintiff acknowledgment of service. Fed.Rules Civ.Proc.Rule 4(c)(2)(C)(ii), 28 U.S.C.A.

2. Injunction \approx 115

Plaintiff seeking injunction barring transmission of television program did not obtain jurisdiction over nonresident defendants through service by mail, under federal procedural rule allowing jurisdiction to be obtained pursuant to law of state in which court sits; Michigan law required that defendants acknowledge receipt of service by mail, and record did not indicate this was done. Fed.Rules Civ.Proc.Rule 4(c)(2)(C)(ii), 28 U.S.C.A.; M.C.L.A. \approx 600.1912; MCR 2.105(A)(2).

3. Federal Courts \approx 71

Venue of suit brought under federal wiretap statute seeking injunction barring transmission of television program was proper in the Southern District of New York; all defendants resided in that district and alleged interception of message took place there. 18 U.S.C.A. \approx 2511; 28 U.S.C.A. \approx 1391(b).

Anthony Mucciante and Russell Ethridge, Moll, Desenberg & Bayer, Detroit, Mich., for plaintiff.

Edward Rosenthal and Russell Smith, Frankfurt, Garbus, Klein & Selz, New York City, and Steven Cochell, Detroit, Mich., for defendants.

AMENDED ORDER OF TRANSFER TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

HACKETT, District Judge.

Plaintiff Stuart M. Berger, M.D., a New York resident, is a physician with a nationally-known diet program and medical practice. He has substantial business and corporate interests in Michigan and his diet

product is manufactured here. Defendant Inside Edition, Inc., a/k/a Inside Edition, is a profit-making New York corporation which produces and broadcasts a nationally-syndicated television program entitled "Inside Edition." It is televised regularly in Michigan and has Michigan sponsors. Defendant King World Productions, Inc., also a profit-making New York corporation, owns Inside Edition. Defendant Charles Lachman, a New York resident, is a producer of Inside Edition and defendant Amy Wasserstrom (designated as "Jane Doe" in the amended complaint) is an Inside Edition journalist and producer.

This suit arises from defendants' investigation into plaintiff's medical practice. In the course of this investigation defendants sent Wasserstrom on at least three occasions to plaintiff's New York office, where she gained entry claiming to be a patient. During these office visits, Wasserstrom caused videotapes of the office visit to be made surreptitiously. Defendants then informed plaintiff that they intended to broadcast the videotapes as part of their report on plaintiff's medical practice. Plaintiff objected and initiated this suit in the United States District Court for the Eastern District of Michigan.

Pursuant to 28 U.S.C. \approx 1404(a) defendants have filed a motion for transfer of venue to the United States District Court for the Southern District of New York.

Procedural Background

A.

Plaintiff initiated this suit on January 12, 1990, by filing his complaint and a motion for a temporary restraining order (TRO). The complaint and the motion for a temporary restraining order named only King Features Services, Inc. as defendant and alleged that defendant's acts constituted (1) violations of 18 U.S.C. \approx 2511(d), which prohibits the interception of a communication even when a party consents, if the interception is for the purpose of committing a crime or a tort; (2) invasion of privacy; and, (3) fraud. Plaintiff requested (1) that the court restrain defendant from broadcasting or otherwise using the information

EXHIBIT 31
DATE 7/14/92
HB 58#59

July 14, 1992

Mr. Chairman and Committee:

For the record, I am Becky Johnston and am testifying on behalf of myself and other concerned citizens from the White Sulphur Springs area. I am in complete support of HB #58 and #59 and encourage all of you to please support these bills introduced by Rep. James Madison.

It is my strong feeling that the Legislature needs to take another step in the process of licensing medical and hazardous waste - that step is the location of such facilities to protect not only our human environment but our fragile and pristine physical environment.

Concerns that I feel should also be taken into serious consideration consist of the following:

- * Ground water & surrounding streams, rivers, lakes etc.
- * Agricultural land and resources that may be affected
- * Transportation access and mode
- * Availability of emergency services
- * Impact on property values
- * Effect on recreation and tourism
- * Access to technical assistance near the site .

** Consideration of limiting the number of such facilities in the STATE of VT*
In summary, I sincerely believe that this is a one and only chance for the Legislature to have the opportunity to set guidelines and regulations to protect the entire state from having medical and hazardous waste facilities constructed in areas that could be completely destroyed without specific plans and foresight. Please, I ask you to support this bill.

Thank you.

Proposed

EXHIBIT 33
DATE 7/19/92
HB 58459

July 13, 1992

Mike Foster Representative
Capital Station
Helena, Montana 59620

RE: HB 99

Dear Mr. Foster.

With regard to HB99 the most appropriate response that the legislative assembly can take during this summer session is to support the further study of issues and concerns of citizens and possible appropriate alternatives before permitting hazardous waste to be imported within the state.

The issue at Ringling is a prime example. The principal of the company states on T.V. that he has not made a decision to proceed even if the permit is issued.

It is most appropriate then to study the most likely beneficial technology that is comprehensive enough and healthy in application with the likelihood to remedy the situation positively and most likely to be confirmed as an economic and ecological alternative to combustion of hazardous medical wastes proposed to be burned at Ringling.

I would like my concerns and opinions presented added in support of HB99.

Sincerely:



Walter K. Foster
Certified USDA
Bio-Conversion Technician
Park City, Montana 59063
633-2491

EXHIBIT 34
DATE 7/14/92
HB 58 & 59

Tri Mountain Angus
Greg and Dawn Field
2927 Hwy. 284
Townsend, MT 59644

July 11, 1992

Natural Resources Committee

Bob Raney

We are aware of the time constraints you are working against so we'll keep this brief.

As very concerned citizens, taxpayers, and voters of Montana we strongly urge you to support the proposed moratorium concerning the Ash Grove, Trident, and Ringling incinerators. In our opinion, we have the cleanest, most beautiful state in the nation and it is our fervant wish to see it remain so. The economic gain from allowing these projects is far outweighed by their aesthetic, enviromental, and health costs. Please vote to put in place the moratorium.

Sincerely,

Greg & Dawn Field

Greg and Dawn Field



TRI MOUNTAIN ANGUS

Buzz and Pat Field

Rt. 1 Box 88 - Townsend, Montana 59644

Phone (406) 266-3740

Natural Resources Committee

Mark O'Keefe

July 11, 1992

Dear Sir or Madam:

This is my urgent request that you declare a moratorium as regards to the proposed burning and landfilling of medical and hazardous wastes by the plants at Ringling, Trident, and Montana City.

If they are allowed to commence operations it will be a blight on our area, and I feel sure that it will be counter productive to our economy locally and indeed statewide. Yes, it will provide a few "grunt" type hazardous jobs for the locals crazy enough to work at these plants. This at the expense of our health and happiness, our state's #1 industry tourism, our #2 industry agriculture, declining land and livestock values, and reducing substantially the appeal of our area for clean industry and wealthy individuals and retirees to move here. Indeed, some of us may move out if we find we are making our livelihoods and living in what has become a disgusting national dump.

The one thing we do have in Montana is a clean and beautiful environment. This has already been parlayed into making tourism our #1

EXHIBIT 35
DATE 7/19/92
HB 58 & 59

industry. Let's not sacrifice this on the altar of the smooth talking,
non-trustworthy, fast and big-buck types hoping to take advantage of
our country ways and archaic laws.

Very truly yours,

Lester L. Field
Lester Field

Patricia Field
Patricia Field

Testimony of Ron Drake
Before the Montana House Natural Resources Committee
House Bill 58 # 59
July 14, 1992

Good afternoon. For the record, my name is Ron Drake. I reside at 690 Ronda Road in Helena, Montana. I appear before this committee to testify in opposition to the proposed legislation.

I am a professional chemical engineer, currently registered and maintaining a full-time practice in Montana as president of a small consulting firm.

I am a Montana native, born in Great Falls and raised in East Helena. I graduated with a bachelor of science degree in chemical engineering from Montana State University in 1972. Since that time, I have acquired 20 years of professional experience and expertise in research, development, design, construction, and operation of major facilities for pyrochemical processing and disposal of municipal, hazardous, and mixed wastes.

I am a life-long and devoted environmentalist and hold a membership in the Montana Environmental Information Center. Although the MEIC does much good work and has much to commend it, I find their support of this proposed legislation to be ill advised, based on misinformation and disinformation, and extremely counter-productive with respect to the environmental and moral values which the organization purports to espouse.

My personal feeling is that this unfortunate diversion from the primary mission of the current special session smacks mightily of cavalier pandering to a few vocal proponents of the politics of "NO!". It is truly unfortunate that such pandering and diversion has the potential to significantly damage Montana's environment, its peoples health, and our economy.

As a Montana citizen, a professional engineer, and as a taxpayer, I am appalled that this legislature continues to dodge or postpone every major and important issue which comes before it. Bans and moratoria will not solve the very real problems associated with disposal of waste. Simply saying "no" is not the answer.

Just as individuals and households have real and legitimate needs for access to appropriate, safe, and reasonable waste disposal services, so do business and industry. Consider if you will, the impacts on your own households, if in their laudable efforts to encourage you to recycle, a special interest group was able to have your garbage pick-up terminated, your kitchen disposal removed, and your toilet plugged. Undoubtedly, most of you would quickly reduce your waste production and become proficient at recycling metal, paper, glass, and perhaps even plastics; that is those items which are relatively easy to segregate and for which commercial recycling programs exist.

Some of you might even begin composting to take care of selected kitchen and yard wastes. But all of you would still be faced with the problem of disposing of your fair share of those most unsavory, and intractable mixed and putrescible wastes which all households produce. I believe you can imagine those wastes I am talking about.

With all customary and reasonable disposal alternatives denied, It is a safe bet that many of you would turn in desperation, and as a matter of survival, to unsanctioned disposal methods such as back-yard burial, midnight dumping, illegal haulers, and open burning or trash can incineration. In fact, it is precisely to avoid these activities that we provide households with safe, and generally well regulated, and inexpensive sewage and garbage disposal services.

Likewise, business and industry are in desperate need of technology and services to dispose of their unavoidable, intractable, and non-recyclable wastes. As a professional chemical engineer with extensive experience and expertise in pyrochemical processing of wastes, I can assure you that proper and well regulated incineration can provide an excellent and safe means of disposal for these materials. Furthermore, incineration can be employed safely in a timely manner. Unfortunately, instead of taking a proactive stance to help industry solve a this critical problem, this legislature is again playing ostrich and apparently bowing to political pressure from an ill-informed vocal minority who themselves cannot or will not present or even discuss reasonable options.

These people conveniently forget that we in Montana currently produce and export for disposal in other states, thousands of tons of hazardous wastes each year. How can the proponents of this legislation claim any moral high-ground when the net effect of the bill is to show Montana as a state full of hypocrites, loudly proclaiming the importance of a clean environment, while throwing our trash in our neighbor's yard. The administration and legislature continue to talk a good pro-business game, while denying industry the basic support services necessary to compete. Finally we justify procrastination under the colors of environmental concern, when such procrastination can only lead to further environmental degradation, risk to human health, and economic hardship.

Please, I urge you to summon up your courage and moral certitude, and cease further consideration of this untimely and ill considered legislation.

That completes my prepared testimony.

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14th day of July, 1991.

Name: Tom Daubert

Address: Daubert Assoc, Box 858, Helena 59624

Telephone Number: 449-2095

Representing whom?
Ash Grove

Appearing on which proposal?
HB 58, 59

Do you: Support? Amend? Oppose?

Comments:

Why No Action Is Needed on Cement Kiln Waste-Burning

EXHIBIT 37
DATE 7/14/92
HB 58 & 59

The Legislature is already assured of being able to consider the issues during the next regular session. There is absolutely no possibility that state permits could be granted before then.

- * While emotions and rhetoric in opposition to the cement companies have run high, the fact is that no specific and comprehensive proposal for a "Part B" permit by either cement company yet exists. It is not fair to pre-judge proposals that don't exist, before the companies have had a chance to describe fully and in writing the answers to all the questions a full permit application will require.
- * While opponents to the cement companies are clearly well-intentioned, the fact is that if you haven't had all your questions and concerns addressed by the companies, you haven't heard the full story.
- * Montana generates ever-increasing quantities of hazardous waste. Health department officials expect 1992's regulated waste to be more than twice the nearly 18,000,000 pounds reported from Montana generators in 1990 (1991 figures are not yet available). The main reason waste quantities continue to increase is that under federal regulations steadily broader and less dangerous materials have come under regulation as "hazardous."
- * A temporary moratorium now could interfere with the state health department's ability to continue studying and learning about potential options for state-of-the-science hazardous waste treatment and management -- and inhibit the department's ability to advise the 1993 Legislature.
- * **At least one -- maybe two -- regular sessions of the Legislature will take place before permits could even possibly be recommended by the state health department. The Legislature is *guaranteed* to have plenty of time to comprehensively consider the issues involved in this subject.**
- * No permitting process currently exists in Montana for the use of waste-derived fuels in cement kilns -- and none will exist, possibly until late 1992 at the earliest. The health department is still developing proposed rules, which will be subject to a second, extensive public involvement process before they could ever be adopted. The health department has said that it hopes to have proposed rules published in September, which would set some time in November as the earliest probable effective date.
- * **Both the health department and the cement companies agree that the "Part B" permitting process is likely to consume *at least three years*. In fact, similar processes in other states have already taken over five years, with no such permitting process yet completed. The Montana Legislature is already certain to be able to address these issues during regular sessions in 1993 and probably 1995.**

For more information, contact:

Tom Daubert, lobbyist for Ash Grove Cement Company, of Montana City (449-2095),
or Joe Scheeler, plant environmental and safety manager (442-8855),
Tim Smith, President and George Schiller, Vice-President, Local D-435 Boilermakers Union (442-8855).

International Brotherhood of

BOILERMAKERS, IRON SHIP BUILDERS



BLACKSMITHS, FORGERS & HELPERS

Local Lodge # D-435

406-227-8757

EXHIBIT 38

DATE 7/14/92

104 West Main
P.O. Box 1286
East Helena, MT 59635

HB 58+59

Dear Legislator:

I write on behalf of the 64 union employees and their families who work here at Ash Grove cement plant in Montana City, most all of whom live in Jefferson County or Helena.

We are deeply alarmed by the possibility that you may expand the scope of the current Special Session of the Legislature to consider a proposed moratorium on permitting activities by the state health department. Such an action would have a serious, negative effect on our plant and, in my opinion, the whole state.

Are you aware that the permitting process for our company's waste-derived fuel proposal is expected to take at least three years -- and that this permitting process hasn't even started yet? This means the Legislature will have at least one full regular session next winter during which to consider the many important issues involved. There is absolutely no reason to take any hasty action now.

In addition, I fear that a moratorium would completely freeze all progress the health department has made in developing new rules to govern the permitting process. Rule-writing began last year and is still not completed. Delaying for more than another year would mean that during the next regular session of the Legislature, the state regulators would know no more than they do now about the process and the technology we propose to use at our plant.

Montana has enough problems already with the waste we generate here and that we cause to be generated elsewhere. It is important that state government proceed to figure out the pros and cons of various technologies and possible solutions to the problems we face. Pretending that there is no problem and that we're not creating new environmental disasters now as a result of improper waste disposal is no solution at all.

That's why our international union, at my instigation, endorsed the waste-fuel technology at its convention last year -- because it represents a pro-environment and pro-jobs solution to the challenge of proper waste disposal.

Please don't stop the clock on us without first finding out the facts about our side of the story. My fellow workers and I would be glad to visit with you at the Capitol or to give you a tour of our cement plant at your convenience.

Sincerely,

Tim Smith
President, Local D-435

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1992

Name: Dan Peterson - Plant Manager

Address: 33 Cloverdown Helena, MT

Telephone Number: 442-0843 Home 442-8855 Work

Representing whom?
Ash Grove Cement Company

Appearing on which proposal?
HB 58 & 59

Do you: Support? Amend? Oppose?

Comments:
1 - Important issue for us - an addition effort to keep our facility competitive in the future.
2 - We feel it is a safe conversion for 20% of our fuel - used at 29 facilities already.
3 - Material must be dealt with - we present a Superior form of destruction plus utilize the energy.
4 - Procedure in place to handle our proposal - let it work first.

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1992

Name: Sherril Doig

Address: Box 756

White Sulphur Springs, Mt. 59645

Telephone Number: 547-3314

Representing whom?

Western Recovery

Appearing on which proposal?

Medical Waste Moratorium

Do you: Support? Amend? Oppose? oppose the moratorium

Comments:

My name is Sherril Doig
I represent Western Recovery -
I oppose the moratorium.

My charge to each and every one of you
who have so opposed this incineration
system is to spend an equal amount
of time & energy in obtaining an acceptable
solution to medical waste here in mt.

And to you legislators who worked so hard
coming up with the ^{good} regulations:

We are proposing a system that
exceeds your requirements - How

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

will you deal with all of the hospitals
in mt. that will be out of compliance
April 1992

EXHIBIT 41

DATE 7/14/92

HS 58459

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1991.

Name: Joe Scheer

Address: 108 Willow Ave.

Telephone Number: 442-2259

Representing whom?

ASH GROVE

Appearing on which proposal?

WASTE MONITORING

Do you: Support? Amend? Oppose?

Comments:

① MONITORING UNNECESSARY

② ALLOW DHE'S TO DO JOB

③ EIS ALLOWS SIGNIFICANT

OPPORTUNITY FOR PUBLIC COMMENT

④ PERMIT APPLICATION REVIEW

UNTIL AT LEAST 94.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

HOUSE OF REPRESENTATIVES

WITNESS STATEMENT

PLEASE PRINT

NAME GEORGE M SCHILLER BILL NO. 5859

ADDRESS Box 284 E. HELENA 227 E. MAIN DATE 7/14/92

WHOM DO YOU REPRESENT? MYSELF

SUPPORT _____ OPPOSE X AMEND _____

COMMENTS: I FEEL THAT THIS SPECIAL
SESSION SHOULD BE LIMITED TO
BUDGET ISSUES AND THIS "DO NOTHING"
LEGISLATION WILL ONLY IMPAIR THE
RULE MAKING PROCESS OF THE HEALTH
DEPARTMENT. PLEASE LET THE HEALTH
DEPARTMENT DO THEIR JOB OF RULE
MAKING AND YOU DO YOUR JOB OF
BALANCING THE BUDGET. THERE WILL
BE PLENTY OF TIME TO DEBATE THE
ISSUES BETWEEN NOW AND THE TIME
THE PERMITS ARE APPLIED FOR, AND MOST
CERTAINLY GRANTED OR TURNED DOWN

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 21st day of July, 1991.

Name: Jeanne Anderson

Address: P.O. Box 866
Helen, MA 01924

Telephone Number: 406-449-3118

Representing whom?
Helen, MA

Appearing on which proposal?
HB 58 + HB 59

Do you: Support? Amend? Oppose?
neither oppose or support

Comments:
In written statement that will
be submitted

COMMENTS ON BEHALF OF HOLNAM INC., REGARDING
THE PROVISIONS OF HB 58 AND HB 59

My name is William T. Springman. I am the Manager of the cement plant owned and operated by Holnam, Inc., located at Trident, Montana. I have held this position since 1985. My responsibilities include full management of the plant operation. The cement plant at Trident, Montana, commenced initial operations in 1910. Ideal Basic Industries, Inc., purchased the plant from Three Forks Portland Cement Company in 1917. Ideal merged into Holnam, Inc., in 1990. I had been employed by Ideal prior to the Holnam merger and my total employment period with both companies exceeds 29 years. Prior to becoming Manager of the plant, I worked with the plant through the Ideal corporate office from 1979 to 1985. Since 1910 millions of dollars have been spent at the Trident plant, both to increase its capacity and to keep the operation competitive by reducing its operating costs. A major expansion program was undertaken at Trident in 1970 when the plant changed from a dry to a wet cement production process which brought about numerous other changes. The present 12 foot diameter, 450 foot long kiln replaced older, 8 foot diameter, shorter kilns and a raw mill for making slurry was added. Additionally improvements were made in 1984 and the plant is constantly upgrading its operations to ensure the production of a quality product and compliance with environmental regulations.

The plant employs 94 employees who live mainly in Gallatin County. Many make homes in the Three Forks area with others living in or near Manhattan, Belgrade, and Bozeman. Holnam is the fourth largest tax payer in Gallatin County and also is about the fourth largest employer. Our total contribution to the local community in wages, benefits, taxes, and purchased goods and services exceeds \$20,000,000 annually. We produce approximately 350,000 tons of cement at the plant.

The area of Montana and the surrounding states was the historical marketing area for our cement product for many years. In more recent years however, due to the reduction in the construction of infrastructure and other uses of cement in the immediate Montana area, Holnam has expanded its market area to include outlets in the state of Washington and in Canada.

The cement industry in the United States is a highly competitive business. Prices are largely set by supply and demand conditions in the marketplace with little regard for brand name. To be successful under these conditions a cement plant must operate at full utilization and at the lowest possible cost. The past decade has been particularly difficult for the United States cement industry with imported cement capturing over 18 percent of the domestic market during the period of 1987 to 1989. Cement has been imported to the United States from as far away as Japan, Greece, Spain, and Venezuela. Since 1980 over 30 cement plants in the United States have shut down.

One of the principal operating costs for all cement plants, including the plant at Trident, is the cost of fossil fuels used to provide the heat required in a cement kiln to make a quality product. Being one of the smaller Holnam cement facilities the Trident plant is vulnerable to competitive pressures from larger rivals in the region. The plant has used coal as a fuel in the past and is now using natural gas.

In an effort to reduce operating costs, and to ensure that the plant will remain competitive, Holnam has begun the process of permitting the Trident facility to burn waste fuels, including those which contain RCRA listed or characteristic hazardous wastes. We would use such materials to provide approximately 50 percent of our fuel requirements. We do not propose to burn highly toxic materials. The materials to be burned would typically consist of such organic substances as petroleum oils and derivatives, vegetable oils and derivatives, alcohols, hydrocarbons, glycols, oil refining residues and others. They would essentially be wastes from various industries such as paint, ink, petrochemicals, refineries, and others.

Holnam's first activity with regard to exploring the possibilities of commencing the permit activities began in 1990 with contact with the Montana Department of Health and Environmental Sciences as well as with the appropriate federal agencies. Suffice to say, without detailing all of the application and permitting activities, the permitting process came to a standstill in the fall of 1991 because of changes in certain of the regulatory process. Holnam is now waiting for the Department of Health and Environmental Sciences to finalize its regulations governing permitting processes under the Boiler and Industrial Fuel Regulations. We do not anticipate that these regulations will be in place until sometime in the fall of 1992 and thus, the filing of additional applications will not occur until after those regulations have been put in force. We initially had thought that we possibly could commence burning hazardous waste as a part of our fuel requirement by the first quarter of 1992. That obviously has not occurred, and no burning of hazardous waste by Holnam at the Trident cement plant facility can or will be commenced until after the proper permits have been obtained and the required facility constructed. It now seems clear that the permitting process cannot be completed until sometime in 1994, at the earliest, and possibly in 1995. In turn the construction of the required facility for storing and handling hazardous waste at the plant will take some period of time and thus it seems it would not be until 1995 that we can commence burning hazardous waste, dependent upon, of course, the issuance of the proper permits.

Given the above timetable, it does seem unnecessary to us for the Legislature to enact legislation forcing a moratorium on our burning activities through October 1, 1993. We obviously will not be burning the subject waste materials prior to that time. In turn it does not seem to be necessary to delay the permitting process since it does not seem possible for permits to be issued prior to October 1, 1993.

EXHIBIT
DATE 7/14/92
HB 58 & 59

We recognize that the proposed legislation does not specifically delay the permitting process but rather simply delays the issuance of permits until after October 1, 1993. We fear, however, that enactment of the legislation may tend to have a delaying effect upon the permitting process because of the moratorium on permit issuance.

Because of the fact that the legislation does not directly effect our present plant operations and would not stop the processing of permits that we will file concerning our proposed burning of hazardous waste we do not oppose the two bills. However, we earnestly request that no language be added in the bills which in any way would delay the filing and consideration of our applications.

Thank you very much for your consideration of the above comments.

William T. Springman

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of JULY, 1991.

Name: DAVID K. NATION

Address: P.O. Box 4168
BRITTE VT 59702

Telephone Number: 406-782-4201

Representing whom?

SPECIAL RESOURCE MANAGEMENT, INC.

Appearing on which proposal?

HB 58 & 59

Do you: Support? Amend? Oppose?

Comments:

NEITHER SUPPORT NOR OPPOSE BUT
HAVE CONCERN ON EFFECTS

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 14 day of July, 1991.

Name: Wayne W. Kinkel

Address: 54 Jefferson Hills
Clancy, MT

Telephone Number: 443-5103

Representing whom?
Self

Appearing on which proposal?
HB 58/59

Do you: Support? Amend? Oppose?

Comments:
Neither support or oppose . . . Have
concerns over location of school and
effects. Also major concerns over
ash residue disposal & ground water
effects

This complete exhibit can be obtained at the Montana Historical Society, 225 N. Roberts, Helena, MT. Phone: (406) 444-4775)

EXHIBIT 47
DATE 7/14/92
HB 58 & 59

**Assessment of the
Boiler and Industrial Furnace Rules**

Prepared for
United States Senate
Subcommittee on
Environmental Protection
The Honorable Max Baucus, Chairman

Submitted by
Montanans Against Toxic Burning

March 28, 1992

Helena, Montana

Montanans Against Toxic Burning
P.O. Box 1082
Bozeman, Montana 59771

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Natural Resources COMMITTEE BILL NO. SB/59
DATE 7/14/92 SPONSOR(S) Madison

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Wayne Kinkel	self	X	
Janet Ellis	MT Audubon	HB 58.5 X	
Pamela Carlson	self	X!	
Penny Koke	Montara City School ^{Supt.}	X	
Joe Scheeler	ASH GWT		X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Natural Resources

COMMITTEE

BILL NO.

58-59

DATE

7/14/92

SPONSOR(S)

Madison

PLEASE PRINT

PLEASE PRINT

PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
RACHAEL SIRS	SELF	X	
Erik SIRS	Self	X	
Martha Collins	Montana Against Toxic	X	
Anne Johnson	Gall Co. Physicians Montana Against Toxic Burning	X	
JACKIE GREZIS FORBA	Self SR Box 180, CLANCY, MT	X	
Marlyn Grosshag, Atkins	Box 146 near Clancy MT	X	
Jim HOYNE MD	SELF Box 927 CLANCY	X	
Tom Daubert	Ash Grove		X
Dawn Field	Self		X
Jean K Ward	Self	X	
Linnæa DeVelice	SELF	X	
Stan Bradshaw	Montana T.U.	✓	
PAUL SMIETANKA	SELF	✓	
MARY ANN WELLBANK	SELF	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

DATE

7/1/92

COMMITTEE ON

Natural Resources

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
WILBUR WASSNER	ASH GROVE	58-59		X
Roy Anders	Ash Grove Cement			X
John Van Suxkingen	ASH GROVE CEMENT	5859		X
MARY SUDAN	AGC	5859		X
Pat Sember	AGC	58-59		X
Larry Sutton	AGC	5859		X
George M. Schuller	"	"		X
Jay Merritt	"	"		X
Stan Misch	AGC	11		X
Ron Drake	Drake Engineering Inc	58-59		X
Margy Grossberg Atkins	SELF	58-59	X	
Steve Gudwin	Halsnam Inc -	58-59		neutral
Dave Anderson	Self Co. Commission	HB 58-59	X	
Tom Daubert	Ash Grove	HB 58, 59		X
Jim Hoyme	SELF	HB 58, 59	X	
Kathy Sherwood	Self	HB 58, 59	X	
JERRI DOIG	Western Recovery			X of 100 monetary
Elizabeth Hall	Self	HB 58, 59	X	
William W. Hall	Self	HB 58, 59	X	
Herbert W. Bauer	Self	HB 58-59		X
Paul K. Kline	Self	HB 58-59	X	X
Mark Albee	Self	"	X	
Gordon Collier	MT ref School Board	58, 59	X	
DAVID K. NATION	SPECIAL RESOURCE MGMT INC	58/59		
Wayne W. Klinkel	Self	58/59	X	X
Eric Williams, Pegasus Gold	Pegasus Gold			

(Please leave prepared statement with Secretary)

DATE

7/1/92

COMMITTEE ON

Natural Resources

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
BACHAE RAUE SIRS	SELF	HB 58-59	X	
Elizabeth Brewer	Self	HB 58-59	X	
Allen S. Lefohn	Self	HB 58-59	X	
Erik Sigs	self	HB 58-59	X	
Dan Peterson	Ash Grove Cement Co	HB 58-59		X
Danni Peterson	Ash Grove	HB 58-59		X
Denise Kemp	Ash Grove	HB 58-59		X
Beryl Thiel	Ash Grove Cement Co	HB 58-59		X
Jessie Stupnick	↓	↓		X
Amelie	Ash Grove Cement Co	↓		X
Tim Smith	Boiler makers local D435	" "		X
Dick Van Dyke	Local D435 Boiler makers	" "		X
D. Kelly Hooper	Ash Grove Cement Co	" "		X
Jason Schutz	"	" "		X
Larry Philo	"	" "		X
JOHN S. COLBERT	"	" "		X
Scott T. Drip	AGCW	"		X
Jan Schulte	ACCW	"		X
Richard Johnson	ACCo.	"		X
Chris Fung	"	"		X
Cliff Smith	"	"		X
Bryan Wright	"	"		X
Robert Kimmel	"	"		X
Nancy McPaffie	Self		X	
Carl Sandt	Ash Grove Cement Co	58-59	X	X
Bonnie Ryan	ACCW	58-59		X

(Please leave prepared statement with Secretary)