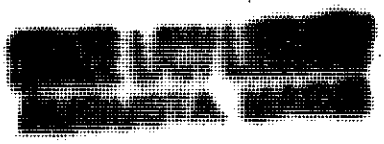

STATE OF MAINE
113TH LEGISLATURE
FIRST REGULAR SESSION

SUMMARY
of
STUDY OF
SOLID WASTE MANAGEMENT AND
DISPOSAL POLICY IN MAINE

June 11, 1987

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Rep. Neil Rolde*
Rep. Eleanor M. Murphy*

* Study subcommittee members

aff:
lliam T. Glidden, Legislative Analyst
o Flatebo, Legislative Analyst
rtley Palleschi, Research Assistant

Office of Policy and Legal Analysis
Room 101, State House--Sta. 13
Augusta, Maine 04333
(207) 289-1670

FINDINGS & RECOMMENDATIONS

1. Introduction

During the Second Special Session of the 112th Maine Legislature, the Energy and Natural Resources Committee considered legislation establishing a moratorium on the importation and disposal of solid waste in Maine. The committee rejected this action after hearing testimony that such a moratorium posed serious constitutional problems. Instead, the committee decided to undertake a more comprehensive study of state solid waste policy. This legislation (P&SL 1985, c.137) directed the Energy and Natural Resources Committee to "conduct a study of the laws and regulations governing the disposal of solid waste in Maine." This report provides the general and specific findings and recommendations of this study and background information compiled during the study.

The committee examined the State's general solid waste policy as expressed in statute, regulation and departmental programs. The committee reviewed the current solid waste management system in order to understand the current capabilities, responsibilities and powers of each level of government and the private and public sectors. The committee focused on three major questions:

1. What are the basic objectives of Maine's solid waste management and disposal system?

2. Is the current division of responsibility for solid waste management and disposal appropriate to meet the state's objectives? If not, how should it be altered?

3. Are the financial and technical resources sufficient for the task? If not, what mechanisms can be employed to equitably increase the availability of these resources?

2. General Policy Findings and Recommendations

The committee finds that the primary objective of the solid waste management and disposal system is to minimize the volumes of waste produced so as to reduce the environmental and financial impacts of solid waste disposal on the citizens and businesses of the state. The committee recommends that the state observe a preference for options which reduce waste volumes or reuse solid wastes. The committee further recommends that the state actively encourage and support recycling efforts.

The committee also finds that disposal capacity is a resource vital to the economy of the state and to the well-being of the citizens of Maine. Sites suitable for disposal facilities are in limited supply in Maine due to the state's hydrogeology and its heavy reliance on ground water for drinking water. The rising costs of siting, constructing and operating a disposal facility to modern standards requires a considerable committment of technical and financial resources. The committee recommends that the state establish a process to ensure that disposal capacity sufficient to meet Maine's needs is developed in an environmentally sound and cost-effective manner.

The committee further finds that a solid waste management and disposal system with a range of technical options offers the promise of reduced environmental risk and greater cost-efficiency in the long run. These options currently include the reduction of waste generation, recycling and reuse of waste, composting, incineration and landfilling. The committee finds that each of these approaches has an appropriate role in the overall system. The committee recommends that the state's solid waste management program encourage a wide range of management and disposal options.

The committee further finds that the traditional division of responsibilities for solid waste and the availability of technical and financial resources is not adequate to meet the state's needs. The committee recommends that, in general, the state take a more active role in promoting the management options outlined above. Equally important, the state should devote more technical and financial resources to the resolution of waste management problems including the clean-up and closure of landfills, the promotion of recycling and the development of adequate disposal capacity.

3. Specific Findings and Recommendations

The committee's specific findings and recommendations fall into four general areas:

1. The need for the state to clean-up (remediation) and close existing municipal and abandoned landfills in a timely manner, particulary those poorly-sited facilities which pose threats to ground water quality;

2. The role of the state in developing and supporting effective recycling and source reduction efforts throughout the state;

3. The disposal facility siting process with regard to environmental considerations, relationship to recycling efforts and objectives, the state's capacity needs, and the mechanisms for obtaining effective public participation; and

4. The adequacy of the Department of Environmental Protection's statutory authority to effectively regulate solid waste management and disposal and miscellaneous provisions of solid waste law.

Cross references to the bill reported from committee (a new draft of LD 1499) have been added parenthetically.

Landfill Remediation and Closure

While municipal solid waste disposal has traditionally been a local responsibility, it has become evident that the technical sophistication and financial committment required to operate the town landfill have outstripped the capabilities of most municipalities. There are exceptions to this generalization but the broad trend is demonstrated by the rapid shift of literally hundreds of Maine towns to regional disposal facilities. This trend has left a legacy of over two hundred municipal landfills that will have to be closed in the next several years. Proper closure of these facilities is vital and can be expensive, even in the absence severe environmental problems.

Evidence presented to the committee demonstrates that approximately 25% of all active municipal landfills are located over sand and gravel aquifers; the primary sources of drinking water in many areas of the state. The ground water monitoring that has been done at these and other sites indicates that contamination has occurred at virtually all monitored sites.

The committee finds that, because of the hazards of widespread ground water contamination and the related threat to public health, there is a pressing need to close and, where necessary, clean-up a substantial number of municipal landfills throughout the state. In addition, it appears likely that some number, as yet undetermined, of abandoned landfills of both municipal and industrial ownership will require attention. Both the broad scope of the environmental risk and the costs of such a program require that the state provide the lion's share of the technical and financial resources needed.

On the basis of this finding the committee recommends the implementation of a comprehensive remediation and landfill closure program administered by the DEP in close cooperation with the municipalities (see Section 25, 38 MRSA §1310-C et seq of draft legislation). To ensure a consistent, methodical and efficient effort, the committee has proposed a three step process to 1) establish remediation and closure priorities on the basis of environmental hazard; 2) evaluate, at state expense, individual sites and develop R&C plans for each site; and 3) implement the plans with a substantial state cost-share (up to 90%).

The committee recommends that the first two steps, setting priorities and evaluating sites, be undertaken by the DEP in order to apply a consistent methodology across the state. The committee recommends that the bulk of this effort be accomplished by DEP through the use of contractors in order to minimize the needs for additional state personnel and to tap most directly the available technical expertise. Such expertise is likely to come from both in-state and national engineering consulting firms. The committee recommends that the third and final step be managed by the party or parties responsible for the site in question under DEP oversight. In most instances the party will be a municipality.

The committee recommends provisions for operational issues that have posed problems for similar programs in the past. These include:

1. Formal public input at key stages of the process through rule-making and, at individual sites, adjudicatory proceedings.

2. A clear time schedule for the ranking and evaluation components and a mechanism for scheduling the implementation of individual plans in light of available disposal alternatives and level of environmental risk.

3. Flexible, minimum requirements for the components of the evaluation effort at individual sites.

4. A protective but realistic environmental standard for clean-up efforts based on ground water quality.

5. Identification of parties responsible for remediation and closure plan implementation.

6. Authority for the DEP to implement remediation and closure plans where responsible parties cannot be identified or have failed to meet established schedules. In the latter instance the DEP could sue to recover costs.

7. Authority for citizen suits to force compliance with evaluation and implementation schedules and procedures.

8. Clear authority for fast action on specific sites at any time where existing information allows implementation of effective remediation and closure efforts.

The committee finds that ground water and public health concerns posed by these municipal landfills are issues of state concern and are not simply the sole responsibility of a municipality. Ground water contamination moves across town boundaries and may affect citizens in the entire region surrounding a landfill. Furthermore, it is in the interests of the entire state to effect a rapid and safe closure of the many poorly sited landfills. Therefore, the committee recommends

passage of a bond issue for $40,000,000 to fund this remediation and closure program. On the basis of initial calculations, the committee recommends that $10,000,000 be allocated to the evaluation component administered directly by the DEP, $25,000,000 for cost share grants to municipalities for implementation of the remediation and closure plans and $5,000,000 be allocated for development and implementation of remediation and closure plans for abandoned landfills. Cost share implementation grants are available only for municipalities.

The committee further recommends that closure requirements administered by the DEP for all existing private landfills and new landfills of any ownership be consistent with the standards developed under the proposed remediation and closure program.

Recycling and Source Reduction

As the rising environmental and economic impacts of solid waste disposal become more apparent, the option of shrinking the waste stream through recycling or elimination of waste at the source becomes increasingly attractive. Maine's efforts have fallen in three areas. Most prominent is the beverage container deposit law or "Bottle Bill". Best estimates indicate that this program results in the recycling of approximately 5-6% of the municipal solid waste stream. While testimony received by the committee indicates that markets for this material can be uneven, it appears that virtually all of returned beverage containers are recycled into new products.

A second area of recycling effort has occurred in the industrial sector. Although the committee did not investigate this area in detail, it is apparent that rising environmental control costs and raw material costs have driven efforts to reclaim materials from industrial waste streams for reuse and to modify industrial processes to reduce waste generation.

The third area of recycling effort has occurred at the municipal level in the form of local recycling programs. These have traditionally been organized town-by-town (with one exception) and have relied heavily on voluntary labor and participation. While these efforts have taken root successfully in a few towns (notably Brunswick), most local programs appear to be severely hamstrung by lack of access to and fluctuation in recycling markets, low citizen participation rates, and a number of other factors. Testimony presented to the committee indicates that these problems have been effectively addressed and overcome by programs in some other states.

Recycling markets are currently serviced by a network of recycling brokers and end-users. Brokers, particularly scrap metal dealers, face problems as the environmental hazards of certain scrap materials become evident. Variation in the quality of recycled materials, including scrap metals and

paper, reduces the value of the material and hinders recycling. The scarcity of instate, end-use markets for many recyclable materials also hinders their efforts.

The committee finds that waste recycling and source reduction holds considerable promise to reduce both the economic and environmental costs of solid waste management and disposal. The committee further finds that fulfilling this promise will require a coordinated state-level effort to overcome the barriers faced by the local programs and the limits of existing markets. State technical and financial assistance will be required. In certain instances, a direct state role may be warranted in developing recycling markets or in performing specific market functions where the private sector cannot currently act profitably.

Office of Waste Recycling and Reduction. The committee recommends that an Office of Waste Recycling and Source Reduction be established in the State Development Office to fill this role (see Section 25, 38 MRSA §1310-K et seq). Unfortunately, the current knowledge of recycling and source reduction options appropriate for Maine is inadequate. Therefore, the committee recommends that the first job of the Office be to conduct an assessment and evaluation of the following elements:

1. The current level of public recycling efforts.

2. The current market structure of the recycling industry in the state and in those areas receiving recycled materials from the state.

3. The potential for recycling in various regions of the state including an analysis of the economic and institutional obstacles to increased recycling.

4. The categories of industrial waste which present opportunities for reuse in other industrial processes.

5. Opportunities to reduce waste quantities by reducing generation at the source.

The committee further recommends that the Office then develop an action plan with the following program elements for submission to the Legislature:

1. A program of public education in support of the state recycling plan.

2. A market development strategy including methods of collecting and marketing of recyclable materials, an incentives program to encourage end-users of recyclable materials to locate or expand their operations within the state, a program for facilitating the marketing of recyclable materials, and the establishment of an

industrial materials exchange to promote the reuse of industrial wastes.

3. A program of technical and financial assistance for municipalities, groups of municipalities and regional councils.

4. A program of recycling to reduce the generation of solid waste by state agencies.

5. A recommended waste reduction strategy for Maine.

The committee recommends that this effort be undertaken with the assistance of a Recycling Advisory Council to be composed of representatives from the recycling and waste generating industries, local and regional agencies, conservation groups and the general public.

The committee recommends that the Office carefully review recycling and source reduction programs undertaken in other states as part of its efforts. These states include Illinois, Michigan, New Hampshire, New York, New Jersey, Oregon, Rhode Island and Vermont.

Because of the urgency of the solid waste problem in Maine, the committee recommends that the Office submit an interim progress report to the Legislature in the spring of 1988 with recommendations for any pilot recycling projects or regional programs that could be funded and implemented quickly. Drawing on the experience of these efforts, the Office is directed to complete its state recycling plan and recommendations by January, 1989 and report to the Legislature on the actions needed for effective implementation of the State's recycling and source reduction program. The Legislature at that time will be able to formally adopt the plan and provide the necessary statutory authority.

Contract limitations affecting recycling. The committee finds that in the process of developing regional waste disposal facilities, a number of towns have entered into contracts with the facility operators which could have the effect of limiting or discouraging recycling efforts in some instances. Therefore the committee recommends enactment of three provisions to mitigate this situation. First, the committee recommends amending the municipal flow control statutes to make it clear that a municipality may, at its option, declare materials in its waste stream to be recyclable and thus not subject to flow control ordinances requiring delivery to a particular disposal facility (see Section 15).

Second, the committee recommends waste disposal contracts not limit the ability of any town to recycle portions of its waste stream so long as any contractual requirements are met for minimum waste quantities and, in the case of energy recovery facilities, minimum energy content (see Section 17).

Third, the committee recommends that waste disposal contracts not limit the ability of a municipality to meet its contractual obligations to supply certain minimum waste quantities with waste generated outside its borders (see Section 17). It is the committee's intent that this option be available only to facilitate the town's recycling efforts. It is the committee's intent that in such situations the municipality be responsible for all the consequences of the waste it uses to satisfy such a contract regardless of where the waste was generated.

The committee finds that, consistent with other areas of state regulation to protect the public health, safety and welfare, the solid waste industry has a long history of governmental regulation. Indeed, many of the waste disposal contracts reviewed by the committee include change of law provisions in anticipation of such changes. It is the committee's intent that the waste disposal contract provisions included in the committee's legislation be retroactive in their application in order to carry out the State's significant and legitimate interest in minimizing the quantities of solid waste generated in the state and the corresponding risk to public health and safety. The committee has carefully reviewed a variety of means to achieve this objective and has, in fact, recommended other, compatible measures which, taken together, form a comprehensive and rational approach to solid waste management. The committee finds that this approach minimizes unnecessary or burdensome requirements on the solid waste industry. In most cases, the actual operation of existing contracts will not be affected in terms of delivery of quantities of solid waste sufficient to operate the disposal facilities. Finally, it is the committee's intent that these provisions concerning waste disposal contracts be applied to all existing and future solid waste disposal contracts.

State Purchasing of Recycled Products. The committee finds that state purchasing of recycled products is desireable. Current law directs the Bureau of Purchasing to give a preference to recycled products meeting state needs. The committee recommends that the Bureau report to the Legislature on accomplishments in this area along with recommendations for improvements in the program or any changes needed in statutory authority (see Section 1). The committee further recommends that the Bureau coordinate its efforts with the Office of Waste Recycling and Reduction.

Facility Siting

The siting of solid waste disposal facilities in Maine has historically been driven by convenience. Growing awareness of the environmental and public health hazards posed by solid waste has stiffened environmental criteria in siting and operation. However, the legal framework which governs the state siting process (administered by the BEP) operates on a case-by-case basis and remains essentially reactive.

The committee finds that the shift to regional and in some cases statewide facilities as mentioned earlier has elevated the status of these siting decisions to a matter of statewide concern. The scarcity of sites suitable for these facilities reinforces this status.

In addition, the committee finds that the relatively small number of disposal facilities likely to be developed in the future means that each facility will take on much greater importance to the state than in the past. This will be true from economic, environmental and social perspectives. The future facility will be larger and more expensive than the old town dump. Potential environmental hazards will be more concentrated. Technical sophistication will have to increase substantially. Host municipalities are increasingly reluctant to shoulder the risks of such a facility. Yet the well-being of citizens and businesses throughout the state will be directly tied to the existence of well-designed and sited disposal capacity sufficient to their needs. In spite of this, the state siting process does not yet reflect these changes or recognize the state's responsibilities for sound solid waste management.

In view of these findings, the committee suggests that the development and management of solid waste disposal capacity is a matter of paramount state importance and that the Board of Environmental Protection (BEP) siting process must be strengthened to reflect this importance. In addition to the strict environmental criteria currently employed, the committee recommends that five additional criteria and requirements be added to the siting decisions for disposal facilities including both landfills and energy recovery facilites (see Section 25, 38 MRSA §1310-N et seq).

Public benefit. The first criterion entails a BEP finding of public benefit through a demonstration that the proposed facility would be designed, located and operated so that it met, at a minimum, an appropriate share of the disposal requirements of the state as identified through a capacity needs analysis conducted and adopted by the BEP. The committee recommends that the BEP and future applicants be afforded substantial flexibility in working out the operational means of making this demonstration. It is, however, the committee's intent that the siting and development of solid waste disposal capacity in Maine be driven primarily by the needs of Maine's citizens and businesses. In this regard, it is the committee's intent that a disposal facility owned and operated by a Maine business for the disposal of waste it generates as a direct result of its operations in Maine is clearly providing a substantial public benefit. The committee finds that publicly-owned waste disposal facilities which provide waste disposal services exclusively to their member towns also provide a clear public benefit. A specific presumption of this benefit is included in the legislation.

It is the intent of the committee that the BEP adopt a conservative approach to estimating Maine's future capacity needs in order to avoid underestimating the need that may arise due to unforeseen circumstances. In this regard the committee encourages the BEP to make frequent use of its authority to update the capacity needs analysis to reflect changes in the state's economic base and growth patterns.

The committee is concerned over the monopolistic potential that appears to be latent in the commercial solid waste disposal industry, particularly within geographic regions. While capacity development should be primarily related to the needs of the state, the committee also intends that the capacity needs and siting process sustain a level of competition in the solid waste disposal industry sufficient to offset monopolistic tendencies.

Recycling. The second new criterion recommended by the committee entails the explicit consideration of recycling in the siting process in three ways. First, this is expected to occur through the capacity needs analysis mentioned above as recycling tempers the actual need for new disposal capacity.

Second, the developer of new or expanded disposal capacity will be required to ensure that waste accepted at the facility is subject to recycling and source reduction programs at least as effective as those imposed by Maine law. The only current recycling requirements are those imposed through the "Bottle Bill". It is the committee's intent that this requirement be performance-based. For example, waste imported from a state without a beverage container deposit law could be disposed of in Maine if the in-state facility operator developed an effective recycling component of its disposal facility for beverage containers covered by Maine law. After a transition period, this requirement would be applied to all exisiting solid waste disposal facilities.

Third, the applicant for development of new or expanded disposal capacity will be required to demonstrate consistency with the state recycling plan adopted by the Legislature. It is the intent of the committee that the over-development of future disposal capacity not be allowed to undermine the implementation of recycling and source reduction efforts. These efforts may reduce the disposal capacity needed and accomplish the ultimate aims of waste management in an economically and environmentally desirable manner.

It is the committee's intent that the meaning of the statutory language "reduced to the maximum practical extent" in 38 MRSA §1310-N, sub§1, ¶C is defined solely by the statutory language following in the same section, sub§5. Waste generated within the state meets the standard established in 38 MRSA §1310-N, sub§5, ¶A by definition. It is further the committee's intent that any recycling standards used in facility siting under the authority of 38 MRSA §1310-N, sub§5,

¶B require review and approval by the Legislature (pursuant to 38 MRSA §1310-M, sub§3) prior to application.

Criminal and civil record. The third new criterion requires consideration of the applicant's record of compliance with environmental and other relevant federal and state laws, including the laws of other states. This would give the BEP the authority to reject an application on the basis of the applicant's inability to provide reasonable assurance of compliance with Maine solid waste laws. It is the committee's intent that the BEP consider the record of any party with an legal interest in the proposed facility including individuals, general partners, limited partners, stockholders, holding companies and other corporate structures for controlling a waste disposal organization.

Escrow accounts. The fourth new element of the siting process is a requirement for operator-established escrow accounts to provide adequate funds for closure and long-term, post-closure care of disposal facilities. It is the committee's intent that this requirement be tailored by the BEP, through rulemaking, to meet the specific characteristics of different types of disposal facilities. For example, amounts accrued and the duration of the escrow account may be substantially less for an energy recovery facility than for a landfill.

Because municipalities can be held accountable for their facilities virtually indefinately, municipally-owned facilities are exempt from the escrow requirements. It is not the committee's intent that this exemption imply any lesser standard of care in closure or post-closure maintenence of municipally-owned facilities.

Public participation. The fifth new element of the siting process is a new, coordinated model for public participation in the siting process with particular emphasis on the host community. The development and siting of adequate disposal capacity for the state will be impossible without a clear licensing procedure and the active participation and cooperation of the affected public. Thus, the committee recommends that the applicant notify the host municipality at the time of application and that the BEP conduct its public hearing on the application in the immediate vicinity of the proposed site.

The committee further recommends that the host municipality be automatically assigned the status of an intervenor in the state siting process and that the direct expenses of such intervention be supported by a grant or reimbursement of costs of up to $50,000. The applicant is assessed a corresponding fee to cover this cost. The unused portion of this assessment will be returned to the applicant with interest. It is the committee's intent that, through such assistance, the municipality will become a key player in the technical aspects

of the site review process at the state level. The costs of technical consultants, legal assistance and relevant analyses would all be eligible for such assistance. The committee recommends that the BEP adopt rules governing these grants including provisions for categories of expenses eligible for grant assistance and for accountability and management of the grant. It is the committee's intent that, if the municipality collects licensing or other fees from an applicant under separate local authority and uses this money to support intervention in the state siting process, that the assistance grant be reduced in direct proportion.

The committee recommends (one subcommittee member objecting) that municipal regulation of the technical, environmental aspects of hydrogeolgical and engineering design criteria for solid waste disposal facilities be limited to standards no more stringent than those imposed by state law. The committee recommends that municipal control of all other aspects of a solid waste disposal facility remain as they currently exist under state statutes and the Home Rule provisions of the Maine constitution. This authority would still include all local land-use planning and subdivision control, health ordinances, traffic safety and other areas of traditional municipal control.

Moratorium. The 112th Legislature imposed a moratorium on the development of new and expanded commercial landfill development for a period of approximately eleven months. The purpose of this action was to give the state time to review and update its solid waste management statutes and regulations. It is the intent of the committee that the legislation accompanying this report and the regulations adopted by the BEP in the latter half of 1987 at the direction of P&SL 1987, c.28 apply to all pending commercial landfill applications and applications filed after the effective date of the act. The legislation accompanying this report contains explicit transition provisions to govern the application of any new requirements. It is the intent of this committee that the licenses of solid waste facilities licensed prior to the effective date of this Act continue to be valid for the term of the license. At that time, relicensing of the facilities is subject to the provisions of this legislation according to the transition provisions cited above.

Current DEP Statutory Authority

Throughout the study process, the committee's attention was drawn to numerous examples of inadequate statutory authority inhibiting the DEP's ability to effectively regulate the management and disposal of solid waste. Several of the major areas have been discussed in the preceeding sections on remediation and closure of landfills, recycling and facility siting. Other examples, however, require attention. The committee finds that a sound, comprehensive framework of

statutory authority is required to adequately protect the public health and welfare and recommends that the following provisions be enacted.

Disposal and licensing fees. A substantial quantity of solid waste is now imported to the state for disposal. The costs of ensuring sound management of these materials both on the road and at the disposal site are increased by the fact that the material is generated by sources outside the state's jurisdiction and is then moved into the state, frequently by third parties who may or may not be familiar with Maine's environmental requirements. The expense of enforcing Maine's requirements on those responsible for these materials is borne entirely through general tax revenues, a source to which the out-of-state generator makes no contribution. Therefore, the committee recommends that the DEP be given the authority to establish, by rule, a schedule of transporter license and disposal fees for all wastes transported or disposed of in Maine (see Sections 9 and 13). The committee further recommends that the department set the fee based on:

1. The level of potential environmental hazard posed by specific waste types, setting higher fees for higher risk materials; and

2. After evaluating the costs of enforcement, the degree to which enforcement costs are borne through state or local taxes, setting higher disposal fees on wastes generated by parties not paying Maine taxes. It is the committee's intent that any difference in the disposal fees for wastes of the same type (similar physical or chemical characteristics) be based solely on the costs of enforcing Maine environmental requirements.

Transportation and handling. While the DEP has clear authority to regulate the handling and transportation of legally-defined hazardous waste, its authority on the same elements of non-hazardous solid waste management is less clear. Therefore, the committee recommends that the DEP be given clear authority to regulate the transportation of all solid wastes and the handling of all special wastes. The committee feels that this authority is vital in view of the increasing levels of interstate shipment of waste (see above and Section 6). It is the committee's intent that any costs of such regulation be recovered through a system of transporter licensing fees. The committee recommends that such fees be based on the factors discussed above. It is further the committee's intent that this authority include the authority to exempt clearly defined categories of waste generators and transporters from the licensing and handling requirements and the related fees.

Landspreading The committee finds that landspreading of certain solid wastes offers an attractive method of conserving scarce landfill capacity, reducing disposal costs and deriving

some residual value from the waste material. Evidence presented to the committee indicates that these benefits are not being fully realized due to unnecessarily complex and time consuming review of individual landspreading sites. The committee conditions this finding and the following recommendation on the requirement that the benefits of landspreading not come at the expense of any reduction in the level of environmental and public health protection achieved under current regulation without further review by the Legislature.

The committee recommends that the BEP work with the regulated community and other interested parties to develop a regulatory scheme to reduce unnecessary delays in licensing of landspreading operations for wood boiler ash, paper mill sludges and sludges from municipal waste water treatment plants (see Section 12). It is the committee's intent that such a scheme entail thorough testing of the waste in question on a source-specific basis (e.g. a specific wood boiler or pulp digester). The department may license for landspreading a waste from a specific source when:

1. Test results are within environmentally acceptable limits;
2. The applicant commits to using landspreading sites with certain characteristics (soils, slope etc); and
3. The spreading itself is subject to performance standards governing spreading operation requirements (season of operation, storage, setbacks, etc) and further periodic testing (on a time or quantity basis).

Under these conditions, it is the intent of the committee that the BEP waive the requirement for prior review of individual spreading sites. It is further the intent of the committee that the waste generator notify the DEP and the municipality within which a spreading site is located prior to actual spreading operations.

Assistance to municipalities and small hazardous waste generators. The committee finds that there are a number of municipal solid wastes which pose difficult disposal problems beyond the resources of most municipalities. These include such items as white goods (refrigerators, stoves, etc.), used tires, demolition debris and household hazardous wastes (paint thinners, drain cleaners, etc.). While some towns are moving toward regional solutions with the technical assistance provided by regional councils, the committee finds additional state technical and financial assistance would speed development and implementation of these efforts and would extend the benefits of such programs to other municipalities in need. Therefore, the committee recommends that the DEP develop a program of technical and financial assistance to municipalities on this subject (see Section 12).

Regulatory revision. During the study, the DEP expressed its intention to undertake certain revisions to the solid waste rules under its existing authority as a partial measure addressing the concerns raised by the study. These changes included:

1. More specific categorization of and requirements for special wastes including asbestos, inert fill and incinerator ash;

2. Some revision of the siting, design, construction and operation of solid waste landfills;

3. The establishment of financial guarantees for closure and post-closure care; and

4. Other revisions necessary to prepare for the recommencement of disposal facility licensing.

The committee supports the intended revisions subject to the the normal rule-making requirements of the Maine Administrative Procedures Act.

At least three applications for commercial landfill facilities will require action after the moratorium imposed by PL 1985, c.822 expires in September, 1987. Because it is essential that the proposed revisions be accomplished prior to the lifting of the landfill moratorium, the committee recommends the emergency appropriation of $25,000 to accomplish these rule revisions in a timely manner.

Statutory structure. The committee finds that the current organization of the solid and hazardous waste statutes is confusing and hinders clear interpretation of legislative intent. Therefore, the committee recommends that these statutes be reorganized to consolidate into five subchapters the provisions affecting all wastes generally, solid wastes specifically and hazardous and oily wastes specifically. It is the committee's intent that, with the exception of designating "red-bag waste" as hazardous, there be no substantive change in the provisions of Maine law concerning hazardous and oily waste (see Sections 7, 8, 10, 13, 18 through 21, 23, 24, 28 and 29). Several technical corrections are made to avoid potential errors in interpretation which could result from this restructuring. A number of cross references in existing law have been corrected to reflect these structural changes (see Sections 3, 11, 26, 27, 30 and 31).

A. Legal Memoranda on Commerce Clause and Contract Issues

HELEN T. GINDER, DIRECTOR
HAVEN WHITESIDE, ASST. DIRECTOR
GILBERT W. BREWER
DAVID C. ELLIOTT
GRO FLATEBO
MARTHA E. FREEMAN, SR. ATTY.
JERI B. GAUTSCHI
CHRISTOS GIANOPOULOS
WILLIAM T. GLIDDEN, JR.

STATE OF MAINE
OFFICE OF POLICY AND LEGAL ANALYSIS
ROOM 101/107
STATE HOUSE STATION 13
AUGUSTA, MAINE 04333
TEL.: (207) 289-1670

JULIE S. JONES
JOHN B. KNOX
EDWARD POTTER
MARGARET J. REINSCH
LARS H. RYDELL
JOHN R. SELSER
CAROLYN J. CHICK, PARALEGAL
ROBERT W. DUNN, RES. ASST.
HARTLEY PALLESCHI, JR., RES. ASST.
KATHRYN VAN NOTE, RES. ASST.

MEMORANDUM

July 1, 1986

TO: Tim Glidden, Policy Analyst

FROM: Peggy Reinsch, Esq.
Legal Analyst

SUBJECT: Commerce Clause Issues and the Importation of Solid Waste

I. QUESTION: Can the State of Maine limit or completely prohibit the disposal in Maine of solid waste generated out-of-state?

II. ANSWER: The State may not statutorily prohibit the importation into and disposal in Maine of out-of-state solid waste; however, there may be other options for controlling imported waste which may be available to the State.

III. DISCUSSION OF COMMERCE CLAUSE ISSUES

A. City of Philadelphia v. New Jersey

1. History

In 1973, the New Jersey Legislature, faced with dwindling landfill capacity and a lack of land area for new landfills, enacted a statute which basically prohibited the importation and disposal in New Jersey of most solid or liquid waste generated or collected out-of-state.

The operators of private landfills in New Jersey and several cities in other states, which had agreements for waste disposal with the landfills, challenged the statute on several state and federal grounds. The

trial court declared the law unconstitutional because it discriminated against interstate commerce. The New Jersey Supreme Court reversed, finding that the law advanced important health and environmental objectives while involving no economic discrimination, and causing little or no burden on interstate commerce. 68 NJ 451, 348 A2d 505.

On appeal, the United States Supreme Court remanded the case back to the New Jersey Supreme Court for a ruling on whether the then-new Resource Conservation and Recovery Act of 1976 (90 Stat. 2795, codified at 42 USC §6901 et sec) preempts state action in this area. 430 US 141, 97 SCt 987

If the federal statute were found to preempt state law, the New Jersey statute would have been found invalid and the inquiry would have ended there. The New Jersey court found no federal preemption of state law, 376 A2d 888, and the case came once again to the United States Supreme Court.

The Supreme Court agreed that the RCRA did not preempt the state law either explicitly or because of direct conflict with provisions or objectives of the federal law. 437 US 617, 620, 98 SCt 2531, 2533-2534. The Court ruled, however, that New Jersey's statute violated the commerce clause of the United States Constitution (US Const. Art. I, §8, cl. 3) by discriminating against, or unduly burdening, interstate commerce. (Justice Rehnquist and Chief Justice Burger dissented.)

The Court first determined that the waste in question was an article of commerce. 457 US, at 626, 98 SCt, at 2536. (The New Jersey Supreme Court had ruled that "wastes which can(not) be put to effective use." are not commerce. 348 A2d at 514) The Court then refused to give weight to the legitimacy of the purposes behind the New Jersey statute. (A usual step in Commerce Clause analysis is to at least examine the state interest.) "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." 437 US, at 627-628, 98 SCt, at 2537.

The waste coming from outside New Jersey was the same as the waste generated inside the State, so New Jersey had no constitutional basis for placing the full burden of preserving New Jersey landfill space on other states. New Jersey could limit the amount of solid waste disposed of in its landfills, but not by treating other states differently.

(The offending New Jersey statute has since been repealed.)

2. Analysis

The Commerce Clause test which emerges from Philadelphia v. New Jersey is much stricter than the analysis applied in other cases. The Court labeled the statute as "protectionist", without specifically finding a prohibited economic motivation. This results in a per se rule that all state statutes which involve discriminatory methods are invalid, no matter what state interests are being served. In addition, the Court refused to acknowledge the deference that state environmental laws have traditionally received. Huron Portland Cement Co. v. Detroit, 362 US 440, 445-46 (1960) (city's ordinance regulating ship boilers for air pollution control purposes a legitimate state interest despite effect on interstate commerce), and Hudson County Water Co. v. McCarter, 209 US 349, 355 (1908) (statute prohibiting transportation of state's fresh waters into another state did not violate commerce clause because of the State's quasi-sovereign power to protect the public interest and its police power to protect the water within its territory).

In short, using Philadelphia v. New Jersey as a guide, any facially discriminatory state regulation will be invalidated without the state having an opportunity to defend it in a balancing process. This is somewhat different from the usual commerce clause analysis, and may be applied in other solid waste importation cases.

B. Borough of Glassboro v. Gloucester County Board of Chosen Freeholders

1. History

The New Jersey Legislature enacted the Solid Waste Management Act (SWMA) (NJSA 13:1 E-1 to -38) in 1970; The Act established the State policy to provide a coordinated approach to solid waste disposal by creating 22 solid waste management districts (consisting of 21 counties and the Hackensack Meadlowlands district). Each district is charged with the responsibility of developing and implementing comprehensive solid waste management plans. NJSA 13:1E-2b (2). Any waste which is transported into a solid waste management district must be done under an interdistrict agreement. NJSA 13:1E-21b(3). This is necessary to allow the district to effectively plan for the disposal of that waste. An important aspect of the interdistrict agreements, however, is that they do not affect existing contracts concerning waste disposal.

The controversy centers on the Kinsley Landfill, regulated by the New Jersey Department of Environmental Protection and the New Jersey Public Utilities Commission. The Kinsley Landfill obtained a permit in 1980 authorizing the dumping of solid waste at the landfill to a height of 164 feet. Most of the solid waste which comes from New Jersey and is disposed of at Kinsley comes from Gloucester, Camden and Salem counties.

On October 11, 1984, Kinsley notified its customers that it would soon reach its permit height and would close on October 28, 1984. The Borough of Glassboro, one of the municipalities using the Kinsley Landfill, brought suit to enjoin the closure and to enjoin the use of the landfill for solid waste originating in Philadelphia.

The trial court found that Kinsley should be closed, but that, even though use of the landfill beyond the permit level would endanger the health and safety of people near the site, the closure of the landfill would cause irreparable harm to the citizens of Glassboro and certain other municipalities who had no other landfill to use. The court restrained the closure and directed Gloucester County to establish an alternative site.

The court, with input from the New Jersey Department of Environmental Protection, raised the height limit at the Kinsley Landfill to 180 feet. With DEP's help, the counties could open alternate landfills by November of 1985. The increase in the height of the landfill, and then-current rates of disposal, would give the affected parties only 3 1/2 months, however. Philadelphia was contributing over half of all the solid waste since July of 1983; prohibiting the dumping of solid waste from Philadelphia would give the New Jersey customers more time to develop alternative sites. Philadelphia had made its case even worse by refusing, since 1980, to enter into an interdistrict agreement with Gloucester County.

The trial court issued a preliminary injunction which provided:

(1) Municipalities in the 3 counties could continue to use Kinsley up to the 180-foot height. Meanwhile, alternative sites would be developed, to be in operation by November, 1985.

(2) The Kinsley Landfill could no longer accept solid waste generated in Philadelphia, other Pennsylvania communities, or any other district outside of Gloucester County not subject to an interdistrict agreement.

(3) The municipalities using Kinsley must maximize their recycling efforts.

(4) The Kinsley Landfill would close when the 180-foot level was reached.

(5) Kinsley would close for all sludge disposal on March 15, 1985.

Philadelphia appealed the injunction, but the Appellate Court (488A. 2d 562 (1985)) and the Supreme Court of New Jersey affirmed. 495 A.2d 49 (1985). The Supreme Court refused to hear Philadelphia's appeal of the New Jersey Supreme Court's ruling, allowing the injunction to stand ____US ____, 106 SCt 532 (1985). (Philadephia was denied a request for a stay of the injunction by both the New Jersey Supreme Court (485 A.2d 299 (1984)) and a single United States Supreme Court Justice.) Philadelphia is thus prohibited from disposing of solid waste at the Kinsley Landfill in Gloucester County, New Jersey.

2. Analysis

The result in Glassboro may look more far-ranging than it actually is. Four important aspects to keep in mind are that: 1) The prohibition against Philadelphia solid waste applies as well to all New Jersey solid waste, except from the 3 designated counties. This satisfies the commerce clause non-discrimination requirements. The existence of interdistrict agreements was very important to the court. 2) The prohibition against Philadelphia solid waste applies only to the Kinsley Landfill. Philadelphia is free to contract with any other New Jersey landfill (provided the county enters into an interdistrict agreement with Philadelphia). 3) The prohibition against Philadelphia solid waste is made through a court-issued injunction, not a New Jersey legislative action. The court issued the injunction as the most equitable remedy, not necessarily as the most politically satisfactory. If Philadelphia had been in the same position as most of the municipalities in Gloucester, Camden and Salem counties (no alternative site and no transfer stations or vehicles to move the solid waste to another site), the court may have fashioned a drastically different injunction. 4) The injunction addressed a crisis situation in which, without court intervention, the landfill would be closed to everyone. This would have disastrous effects on the municipalities in the 3 New Jersey counties.

In upholding the injunction, the New Jersey Supreme Court thoroughly analyzed the Commerce Clause issue. The court noted that the injunction was not a ban on all out-of-state solid waste as was the case in Philadelphia v. New Jersey: The injunction is not discriminatory on its face. (495 A.2d at 49) It does however, have some effect on interstate commerce. The court then weighed the burden placed on interstate commerce with the local benefits the injunction is designed to achieve. Although Philadelphia must bear the financial cost of using other, often more expensive landfills, the communities which may still use the Kinsley Landfill must also assume substantial obligations in establishing new sites and vigorous recycling programs. In addition, the cost of using Kinsley has been increased. Philadelphia, therefore, is not the only one to bear a burden.

The local benefit the injunction provides is to give emergency access to the Kinsley Landfill for the municipalities which have no current alternative. Such access avoids the public health and safety problems that the complete, immediate closing of Kinsley would have created. This benefit, to the court, clearly outweighs the burden placed on Philadelphia.

In addition, the court used language from Philadelphia v. New Jersey to uphold the injunction. That United States Supreme Court decision observed that a statute regulating the flow of articles of commerce might be upheld when there was "some reason, apart from their origin, to treat them differently." 437 US at 626-27, 98 SCt at 2536-37.' 495 A2d at 55. Place of origin, for commerce clause purposes, the New Jersey Supreme Court concluded, was unrelated to the injunction; thirteen New Jersey counties were excluded along with Philadelphia.

The court also used the four factors utilized by the United States Supreme Court in sustaining water conservation measures in Sporhase v. Nebraska, 458 US 941, 956-57, 102 SCt 3456, 3464-65 (1982). (Nebraska statute which prohibits export of Nebraska ground water unless the export is reasonable, not contrary to conservation and use of ground water, not otherwise detrimental to the public, upheld.) The first factor is whether the restriction on interstate commerce is an exercise in economic protectionism or of the police power. The New Jersey Supreme Court found the injunction to be "a measured response to a genuine local health problem" (495 A2d at 57) (police power function).

The second factor is whether a legal expectation exists that the use of the resource might be restricted. The statute created the legal expectation that the state and local governments will manage the disposal of solid waste in New Jersey, which entails regulation and limits of the use.

The third consideration is based on the public ownership or nature of the resource. In New Jersey, landfills are classed as public utilities, and must be operated in the public interest. NJSA 48:13A-1. This can support a limited preference for the State's own citizens in use of the resource. Sporhase 458 US at 956, SCt at 4364.

The last factor involves the extent of the State's efforts to conserve the resource. The comprehensive scheme followed by New Jersey on the state and local levels indicates that, at least in this particular situation, the extra landfill space actually becomes a form of "a good publicly produced and owned in which the state may favor its own citizens in times of shortage." Sporhase, 458 US at 957, 102 SCt at 3464.

Philadelphia appealed the decision of the New Jersey Supreme Court to the United States Supreme Court, which declined to hear the appeal. US 106, SCt 532 (1985). Denial of certiorari has the effect of allowing the State Court decision to stand. It is often cited as the Supreme Court's approval of the result, although the Court may not necessarily rule that way if it had agreed to hear the case.

C. Commerce Clause Analysis

There now appear to be three pertinent analyses which the Supreme Court may apply in determining if a state statute or regulation places an undue burden on interstate commerce, prohibited by the constitution.

1. Philadelphia v. New Jersey

This is a strict standard which applies when the state regulation demonstrates economic protectionism. Once discrimination is shown, the state is usually afforded an opportunity to justify the regulation based on the local benefits which result and the unavailability of nondiscriminatory alternatives. The Supreme Court's decision in Philadelphia does not appear to have fully allowed this second part of the analysis.

Simple economic protectionism, where one state extends a clear preference to its citizens, is the most obvious offense the commerce clause was designed to prevent. Isolation of each state would be inimical to

the structure of the government as a whole, and counterproductive for the states. Therefore, when this strict standard of analysis is applied, the regulation is usually ruled invalid.

Maine's statute (17 MRSA §2253), if challenged, would be ruled unconstitutional.

2. Pike v. Bruce Church

A more flexible standard is applied when the statute does not facially discriminate in favor of instate business or citizens, but still has an effect on interstate commerce. Pike v. Bruce Church, Inc., 397 US 137, 142, 90 SCt 844, 847 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. ... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

This analysis, basically a weighing process, is used fairly often. The Philadelphia decision cited it, without actually using it. (Bruce Church struck down an Arizona statute which required that all melons grown and picked in Arizona must be packed and crated in Arizona.)

3. Sporhase v. Nebraska

The third analysis is relatively new and, developed in a decision on use of ground water, applies well to resource conservation issues. Sporhase v. Nebraska, 458 US 941, 102 SCt 3456 (1982). The Glassboro court applied it in addition to Bruce Church. The case itself involves a Nebraska statute which requires a permit to withdraw ground water and transport it to another state. If the Director of the Department of Water Resources determines that the request is reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare, the Director must grant the permit. 458 US at 944, 102 SCt at 3458. (The Court struck down the additional requirement that the receiving state grant reciprocal rights for Nebraska to use its ground water. Reciprocity requirements are uniformly

invalidated, with few exceptions, as imposing impermissible burdens on interstate commerce.) The Nebraska Supreme Court upheld the statute by finding that ground water is not an article of commerce, and therefore not subject to the commerce clause.

The United States Supreme Court disagreed, partly based on the great importance of water to that section of the country. The Court did, however, uphold the statute (except the reciprocity requirement). Its analysis of the statute's constitutionality started with Bruce Church, then progressed to include 4 basic considerations (discussed in Glassboro):

(1) Nebraska was "protecting the health of its citizens - and not simply the health of its economy - (which) is at the core of its police power." 458 US at 956, 102 SCt at 3464.

(2) The legal expectation that under certain circumstances a state may restrict use of the waters within its borders has been furthered over the years in many ways. 458 US at 956, 102 SCt at 3464.

(3) Nebraska's claim to ownership of the ground water "may support a limited preference for its own citizens in the utilization of the resource." 458 US at 956, 102 SCt at 3464.

(4) Nebraska's conservation efforts have helped to make more ground water available. This serves as evidence that the ground water now available is a good which is publicly produced and owned, and "in which a state may favor its own citizens in times of shortage." 458 US at 956, 102 SCt at 3464.

IV. DISCUSSION OF POSSIBLE ALTERNATIVES

A. Multi-state regionalization

Maine could, instead of banning out-of-state waste, opt for a cooperative approach with one or more states to deal with the solid waste disposal issue on a regional basis. The drawback is that Maine could still become the disposal site for more than Maine's garbage. The somewhat-silver lining is that at least the State could plan for the volume of solid waste coming into Maine where interstate agreements exist, if, of course, such agreements are required. However, such an agreement would not necessarily preclude the import of solid wastes not party to the agreement.

B. Use Tax

A non-discriminatory use tax, levied on everyone who disposes of solid waste in a Maine landfill would satisfy commerce clause scrutiny. The higher the use tax, the less attractive Maine sites would be. (There is some discussion that New Jersey's low fees created its problem in the first place. If the fees had been higher initially, Philadelphia may have gone elsewhere. See Note. The Commerce Clause and Interstate Waste Disposal: New Jersey's Options After the Philadelphia Decision, 11 Rutgers - Camden L.J. 31, 56 (1979). This may, of course, cause problems for Maine municipalities.

C. Proprietary exclusion

The proprietary exclusion concept comes from the theory that states can spend their own money to benefit their own citizens, provided it is not in a regulatory manner. For example, the State of South Dakota owned the only cement plant in the State. It chose to sell cement to only South Dakotans. The United States Supreme Court upheld the discrimination because South Dakota was acting as a proprietor (in a traditionally non-governmental business) as opposed to a regulator. Reeves v. Stake, 447 US 429, 100 SCt 2271 (1980). In another case, the State of Maryland paid a bounty on Maryland-titled wrecked cars delivered to processors for the purpose of ridding the state of wrecked and abandoned cars. The State required out-of-state processors to obtain more elaborate title documentation than instate processors. This resulted in few car hulks being delivered to out-of-state processors. The United States Supreme Court upheld the statute because Maryland was actually participating in the market (of car hulks), not regulating it. There was no impermissible trade barrier preventing the flow of Maryland hulks out-of-state. Hughes v. Alexandria Scrap Corp., 426 US 794, 96 SCt 2488 (1976). See also American Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972), affirmed mem., 409 US 904, 93 SCt 240 (1972).

1. Subsidies

The State could agree to pay each Maine landfill operator a set fee per ton of waste originating in Maine which is disposed of in each Maine landfill. Operators would prefer to accept profitable in-state waste rather than waste coming from out-of-state. This seems to fit the Alexandria Scrap scenario very well. The drawback is the expense of the subsidies.

Subsidizing landfills on the contingency that the landfill not accept out-of-state waste runs much closer to the facts in Philadelphia; the landfill operator may be viewed as an agent of the State.

Thus, the likelihood of the program being found to be cunconstitutional is very high.

2. State ownership

Another option may be for the state to actually own and operate its own landfills. There would be no prohibition on others operating landfills. The State could then charge higher fees for waste originating out-of-state. This is discriminatory on its face, but the state would actually be a market participant rather than a regulator, as in Reeves and Alexandria Scrap. The drawback is that other landfill operators could still accept out-of-state waste. A prohibition on the existence and operation of other (private) landfills may drop the situation out of the Reeves pattern, and put the State in a more governmental, rather than proprietary, position.

D. Comprehensive waste management scheme

Maine could develop a comprehensive statewide waste management program, which New Jersey has done to some extent. In New Jersey, each district, not the State, has the responsibility for developing a solid waste management plan, subject to state approval. There is not, however, a statewide plan, per se. Maine could do the same, providing on the state level: Policy, establishment of districts, authority for districts, guidelines and plan approval system.

The use of districts could be quite helpful in regulating the disposal of solid waste. As in New Jersey, a district could charge higher disposal fees for out-of-district waste sent to a landfill. Because this would not be facially discriminatory (York County would treat New Hampshire and Cumberland County the same), yet still affects interstate commerce, the Commerce Clause analysis would consist of applying the Bruce Church balancing test: Do the local benefits outweigh the burden on interstate commerce? The factors could include population pressures, diminishing suitable land space and ground water contamination.

It is not clear what would be the outcome of a challenge to a State's use of the conservation of suitable land space as a basis for strict regulation of landfills, which affects the importation of solid waste. Whether the State must then take into account the same type of resource available in other states and those states' need for that space, and the space in Maine, has not yet been answered.

The State may require a "need analysis" before each new or modified permit for a landfill is issued. The applicant would have to demonstrate a definite need for the space; other states' need for landfill space would not necessarily be enough for the State to issue the permit.

Whatever plan the State chooses to follow, it must deal with the private as well as the municipal landfills.

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HELEN T. GINDER, DIRECTOR
HAVEN WHITESIDE, ASST. DIRECTOR
GILBERT W. BREWER
DAVID C. ELLIOTT
GRO FLATEBO
MARTHA E. FREEMAN, SR.ATTY.
JERI B. GAUTSCHI
CHRISTOS GIANOPOULOS
WILLIAM T. GLIDDEN, JR.

STATE OF MAINE
OFFICE OF POLICY AND LEGAL ANALYSIS
ROOM 101/107
STATE HOUSE STATION 13
AUGUSTA, MAINE 04333
TEL.: (207) 289-1670

JULIE S. JONES
JOHN B. KNOX
EDWARD POTTER
MARGARET J. REINSCH
LARS H. RYDELL
JOHN R. SELSER
CAROLYN J. CHICK, PARALEGAL
ROBERT W. DUNN, RES. ASST.
HARTLEY PALLESCHI, JR., RES. ASST.
KATHRYN VAN NOTE, RES. ASST.

MEMORANDUM

March 5, 1987

To: Tim Glidden, Policy Analyst

From: David Elliott, Legal Analyst

Subj: Legal Issues Related to the Legislature's Solid Waste Management Study

I. Background

Currently, waste disposal facilities in Maine accept waste generated both in-state and out-of-state. It was largely the concern over the importation of waste into this state which prompted the study now under way by the Energy and Natural Resources Committee. The Committee has already considered the issue of prohibiting the importation and disposal of out-of-state waste and rejected that option as violative of the Commerce Clause of the U.S. Constitution.[1]

Recently a trend toward incineration of trash both to dispose of solid waste and to generate electricity which may be sold at a profit has begun. Three energy recovery facilities are currently under construction which it is anticipated will have the capacity to handle about 60% of the municipal solid waste generated in-state as well as waste imported from out-of-state. Many contracts have already been entered into with municipalities to supply their solid waste to those resource recovery facilities. Among the provisions contained in those contracts are: (1) prohibitions or limitations on participation in recycling programs by the municipalities, (2) requirements that municipalities supply all their waste to the energy recovery facility and (3) requirements that municipalities supply a guaranteed annual tonnage of waste and a minimum BTU level per ton or a quantity of waste sufficient to produce a minimum BTU level when incinerated.

It is in this context (admittedly much abbreviated here) that the study Committee is considering options for development of a comprehensive solid waste management policy.

II. Committee Deliberations

Among the proposals which the Study Committee has under consideration are: (1) the establishment of a program of mandatory recycling and the creation of a governmental or quasi-governmental entity to implement it and (2) the establishment of a performance standard which must be met by any waste accepted by a Maine facility. That standard would be the same for all waste, whether generated in-state or out-of-state.

You have asked whether incorporation of these proposals into the Committee's recommendations raises any legal problems. It is difficult to answer without reservation not having seen specific statutory language embodying the proposals. However, there are some principles which may be helpful to you and the Committee in developing specific language and recommendations. This memo discusses Commerce Clause and Contract Clause requirements of the U.S. Constitution and other contract issues in general terms. If specific proposed statutory language is developed along the lines described above, further review of that language may be necessary.

III. Commerce Clause Issues

A. QUESTION: Can the State enact legislation restricting the type, form or treatment of waste (waste generated both in-state and out-of-state) to be accepted by waste disposal facilities operating in the State, notwithstanding that there may be some impact on interstate commerce?

B. ANSWER: Yes, because the restriction does not, on its face, discriminate against out-of-state waste, because it serves a legitimate state concern and because any impact which it may have on interstate commerce is minor in comparison to the environmental, public health and resource conservation benefits which it seeks to achieve.

C. DISCUSSION: The Constitution specifically grants to Congress the power to regulate international and inter-state commerce:

> "Congress shall have power ... to regulate Commerce with foreign Nations, and among the several States ... " (U.S. Constitution, article I, §8, clause 3.)

In formulating its analytical framework for Commerce Clause cases, the Supreme Court has recognized that the rationale for the Commerce Clause was to foster the development of a

"common market" among the States by disallowing internal trade barriers. If discriminatory economic laws enacted by one state were allowed to stand, retaliatory legislation by the burdened States would be encouraged which would lead to economic chaos.

The first issue to consider in analyzing the proposals before the Committee is: whether solid waste constitutes "commerce" within the meaning of the Commerce Clause of the Constitution. City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531 (1978), clearly answers that question. "All objects of interstate trade merit Commerce Clause protection and none is excluded from the definition of commerce at the outset." (p. 2534).

That issue disposed of, the cases indicate the court will review cases involving Commerce Clause challenges on two levels.

1. Facial discrimination. First, the statute will be examined to see if it discriminates against interstate waste, i.e. is it a case of economic protectionism by the enacting state. If so, the law is unconstitutional on its face, and analysis need proceed no further. As the court said in City of Philadelphia v. New Jersey:

> "Thus, where simple economic protectionism is effected by state legislation, a virtual 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." (p. 2535)

And further:

> "The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space." (p. 2537)

The proposal before the Committee in general terms does not discriminate against interstate wastes on its face. In fact, it appears to treat both in-state and out-of-state waste equally. Therefore, the court will review the legislation further.

2. Effect on interstate commerce balanced against public benefit. The second level of analysis seeks to determine, if no outright discrimination is present, whether there is any burden on interstate commerce; and, if so, whether the benefits to public health and safety and the environment outweigh that burden. As the court has stated:

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Pike v. Bruce Church, Inc., 397 US 137, 142, 90 SCt 844, 847 (1970).

The elements of the court's review in such cases are likely to be: (1) is the regulation even-handed, (2) are the purposes behind the regulation legitimate, (3) is the burden imposed on interstate commerce relatively minor in comparison to the benefit to the State, and (4) is this the available approach with the least impact on interstate commerce. (See Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S. Ct. 715, 727-729 (1981).) This is basically a balancing test and is frequently employed by the courts in Commerce Clause cases.

3. Application to proposals before the Committee. The elements of the test might be applied to the general proposal being considered by the Committee as follows. As stated above, the proposal appears to be even-handed - it does not on its face favor in-state waste over out-of-state waste. Second, the proposal is to further a legitimate state concern - environmental protection, public health and resource conservation - and the State also actively seeks to limit environmental damage from waste generated in state. Third, in light of the benefit to the State of a decreased quantity of waste in the waste stream, the burdens imposed on interstate commerce are modest. Finally, no other feasible alternative proposals have been put forward to accomplish the same objectives with less impact on commerce.

Therefore, if carefully tailored, the legislative proposal could withstand a Commerce Clause challenge.

IV. Contract Clause Issues

A. QUESTION: Can the State enact legislation establishing a mandatory recycling program which is contrary to, or invalidates part of, existing contracts between energy recovery facilities and municipalities?

B. ANSWER: Yes, because the proposal would not substantially impair existing contracts, or, if it did, the proposal is designed to serve a significant and legitimate state purpose and is a reasonable and narrowly tailored means of achieving that purpose.

C. DISCUSSION: The U.S. Constitution provides: "No state shall ... pass any ... law impairing the Obligation of Contracts." (U.S. Constitution, article 1, §10, the Maine Constitution has an identical provision applying to the Maine Legislature at article 1, §11). The purpose of the clause is to provide a stable economic environment by prohibiting states from enacting laws that would retroactively interfere with existing contractual agreements between citizens or between citizens and the government.

Although little relied on earlier in this century, the Contract Clause was revived by a series of cases in the late 1970's. However, even in its present revived form, the Contract Clause does not, in all cases, prohibit a State from adversely affecting pre-existing contracts. Under certain conditions, a State may constitutionally impair existing contractual obligations.

The controlling case in this area appears to be Energy Reserves Group, Inc. v. Kansas, 459 U.S. 400 103 S.Ct. 697 (1983). In that case the Supreme Court upheld, against a Contract Clause challenge, a Kansas law which prohibited the enforcement of an indefinite price escalator clause in a natural gas supply contract between the gas supplier and the purchasing utility. Under Energy Reserves, the court will employ a three step analytical process.

1. Substantial impairment. First, the court will ask whether the statute has created a substantial impairment of a pre-existing contractual relationship. Although there may be a number of factors bearing on the degree of impairment, the court in Energy Reserve focused on the history of government regulation of the activity involved. "In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." Energy Reserves at p.411. It found the State's authority to regulate natural gas prices well established. Moreover, the contract itself recognized the role of government regulation by providing that the contract terms are subject to present and future state and federal law.

2. Significant and legitimate interest. Even where there is substantial contract impairment, the legislation may not be unconstitutional. In the second step, the court will examine whether the statute is designed to promote a significant and

legitimate state interest. If it is, the law may survive a Contract Clause challenge. The court in Energy Reserve found that exercising its police powers to protect consumers from increased gas prices was a "significant and legitimate" state interest. Among the factors which may influence the court are whether the statute benefits the public generally or is designed to serve only a small segment, and whether the law is general in its approach and its effect on contracts is merely incidental to its broader purpose or whether the law is specifically directed at pre-existing contracts.

3. Reasonable and narrowly tailored. In the third step of its inquiry, the court will determine whether a law which impairs contract rights and obligations was a reasonable and narrowly tailored means of promoting the significant and legitimate public purpose identified in step 2. Citing, among other factors, the deference properly accorded to legislative determinations of reasonableness and necessity, the court in Energy Reserve upheld the challenged legislation.

4. Law Court interpretation. The Maine Supreme Judicial Court will apparently follow the U.S. Supreme Court's analysis described above when deciding cases under the Contract Clause of the Maine Constitution. See Atlantic Oceanic Kampgrounds v. Camden National Bank, 473 A, 2d 884 at 889-890, Glassman, J., concurring.

5. Application to proposals before the committee.

a. Step One - Using the test (in step one of the analysis described above) of the historical level of government regulation of solid waste disposal facilities, it seems likely that analysis of the proposals under consideration by the Committee would find there was no substantial impairment of existing contractual obligations or rights. That is so because the siting, construction and operation of waste disposal facilities is an activity already considerably regulated by existing state law, particularly the Site Location of Development Law and various other water quality and land use laws.

Similarly, the existence of contract provisions acknowledging the possibility of state regulatory activity (the so-called change of law provisions which some of the contracts contain) would bolster the argument that government regulation is commonplace in this field and that no substantial impairment would occur.

Were the court to agree that there is no substantial impairment of contract relationship, the analysis should end there. In the event that substantial impairment were found, the court would proceed to steps two and three of the analysis described above.

b. Step Two - Step two involves the determination of whether a "significant and legitimate state interest" is served by the legislation which impairs contractual relations. An important element in that analysis is the breadth of application of the statute said to impair contracts. If the statute is directed toward a broad segment of society, rather than a narrow part, and if it aims to affect pre-existing contracts only incidentally in achieving its broader purpose, rather than specifically targeting pre-existing contracts, then the statute will likely be found to be serving a significant and legitimate purpose. The proposals before the Committee for discussion have a broad focus. They are directed at all waste disposal facilities (although that is, by definition, a small group) and do not single out some of that group for special treatment. Likewise, the proposals are not directed specifically at pre-existing contracts, but affect those contracts only incidentally in achieving the broader purposes of energy conservation, waste reduction, environmental protection and public health.

Some cases and commentators draw a distinction between impairment of contracts between private persons and contracts between governmental entities and private persons. See United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) and 89 Yale L.J. 1623 (1980). Generally, the court has held governmental units to their contractual obligations when they enter the contractual market-place. In entering into the contract, the government had the opportunity to negotiate contract terms and committed itself to honoring them. It should not be allowed to alter that commitment by enacting legislation impairing the contract rights of private citizens with whom it has contracted. "... complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake... If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." U.S. Trust Co. at 26.

Although the contracts in question here involve governmental units -- various municipalities -- the present situation may be distinguishable from the U.S. Trust Co. case. In that case, the challenged State law relieved the State of its own contractual

obligation. The proposals under consideration by the Committee do not affect contracts between the State and private persons. It is municipalities, not the State, who are parties to the contracts which would arguably be impaired by enactment of the proposals under consideration. It is not a contractual obligation of its own which the State would be affecting by legislative action. Therefore, the increased scrutiny called for by U.S. Trust Co. may not be appropriate.

Furthermore, U.S. Trust Co. does not stand for the proposition that governmental contractual obligations may not be constitutionally impaired under any circumstances. Rather, that case indicates that the court will give such cases a closer review to ensure that the act is reasonable and necessary. It is possible that the State may have important energy conservation, waste reduction, environmental and public health concerns which would justify contract impairment even where governmental obligations are involved.

c. Step three - The third step in the court's analysis involves determining whether the law (which impairs contractual rights but is designed to promote a significant and legitimate public purpose) is a reasonable and narrowly tailored means of promoting that public purpose. There are several areas the court could investigate to make that decision. Is the law a temporary emergency measure or is it permanent? What role has the State played in the past in regulating this area? Is the State's method of advancing its asserted purpose reasonable and practical? Are there alternative means to further the State interest? How effective or burdensome are they?

While the proposals before the Committee do not satisfy all of those tests, they do appear to satisfactorily address most of them. In light of that and of the deference cited in Energy Reserves due to legislative judgment in this area, it seems likely the State plan would be found sufficiently reasonable and narrowly tailored to survive Contract Clause challenge.

V. Other Contract Issues

A. QUESTION: Would enactment of the proposals under consideration affect the existing contracts between energy recovery facilities and municipalities for the supply of waste to an energy recovery facility? If so, how?

B. ANSWER: Yes; although the nature of the impact would depend on the particular wording of each contract.

C. DISCUSSION:

1. Contract provisions. Apparently, dozens of contracts for the supply of waste exist between each of the three prospective operators of energy recovery facilities and individual municipalities. Although many of the contracts are similar, each one would have to be examined to determine the effect of enactment of mandatory recycling provisions.[2] Some of the important contract provisions are summarized below.

a. Delivery of waste. Provisions in the contracts which I have seen regarding delivery of waste to an energy recovery facility take two tacks. PERC contracts require municipalities to provide at least a minimum annual tonnage stated in an appendix to each contract. That minimum volume may be exceeded up to a maximum annual tonnage (125% of the minimum).

In order for waste to be acceptable, it must (among other requirements) have a BTU content of at least 4000 per pound. So, for example, for a municipality with a minimum annual tonnage of 25,000 tons, PERC would be able to count on at least 200 trillion BTU's per year from that contract. Of course, the actual BTU's generated might be much higher both because the town might supply waste up to its maximum annual tonnage and because most waste may exceed the minimum 4000 BTU's per pound.

RWS contracts, on the other hand, require municipalities to supply all acceptable waste generated in the municipality.

Each contract specifies that the facility will be paid a fee by the municipality for each ton of waste delivered.

b. Recycling. PERC contracts permit recycling without facility permission only if (1) such recycling does not significantly reduce the BTU content of the municipality's waste or (2) the facility is not presently combusting that type of materials to generate electricity.

RWS contracts do not permit recycling without facility permission.

c. Change of law provisions. PERC contracts contain a specific "change in law" article. That article provides that if, as a result of a change in the law affecting the construction, operation

or maintenance of the facility, there is an increased cost for the financing, construction, modifying, operating or maintenance of the facility exceeding $100,000, PERC may increase the tipping fee until the excess costs are recovered.

RWS contracts do not contain a change of law provision.

d. Penalties and damages. PERC contracts provide for damages to be paid by the municipality in the event it fails to deliver its minimum tonnage requirement. Those damages consist of the value of (1) the tipping fee lost by the facility for waste not delivered and (2) the cost of purchasing alternate fuel of equivalent BTU value.

RWS contracts have two applicable provisions. First, provision is made to adjust the tipping fee during the year to reflect substantial and unanticipated costs, decreases in revenue or changes in waste delivered. Second, if the municipality fails to deliver all its waste to the facility, damages equal to 125% of the tipping fee times the number of tons not delivered shall be awarded.

2. Reopening contracts. The general question under consideration is whether enactment of a mandatory recycling program, which makes it impossible for municipalities to comply with the pre-existing contracts with energy recovery facilities for the supply of municipal solid waste, would permit those facilities to reopen these contracts for the purpose of renegotiating the tipping fee or other payments due to the facility. The answer to that question depends on the specific provisions of each contractual agreement and of any recycling program ultimately adopted. There may, in fact, be several specific answers to the general question.

In general, there is no right for one party to unilaterally "reopen" or otherwise affect modification of a contract. The assent of both parties is essential to any modification, since the effect of any change in terms is to substitute a new contract for the old. (Simpson on Contracts, second edition, p. 186) In the absence of mutual modification of pre-existing contracts, a court could rule some or all of the contracts discharged under the doctrine of supervening impossibility of performance. That would set the stage for renegotiation. Under the doctrine of impossibility, an unforseen event, occurring

subsequent to the formulation of the contract, which makes performance of a contractual duty impossible excuses the promisor from performing. (6 Corbin on Contracts §1321)

a. Impossibility by legal prohibition or act of the State. The general rule is:

> "A contractual duty or a duty to make compensation is discharged, in the absence of circumstances showing either a contrary intention or contributing fault on the part of the person subject to the duty, where performance is subsequently prevented or prohibited (a) by the Constitution or a statute of the United States, or of any one of the United States whose law determines the validity and effect of the contract, or by a municipal regulation enacted with constitutional or statutory authority of such a State,...." Restatement of Contracts, §458.

The rationale for such a rule as stated by Williston is that:

> "It would obviously be a gross injustice if the law should hold a promisor liable for failing to perform the promised act after the law itself had prohibited its performance, though at the time of the contract the undertaking was legal." 6 Williston, Contracts (Rev ed) §1938.

See also American Mercantile Exchange v. Blunt, 102 Me 128, 66 A 212 (1906), (contract to perform certain debt collection services included some actions later prohibited by statute).

In light of the general rule, the question then becomes whether, if the mandatory recycling program is enacted, compliance with both that statute and with the waste supply provisions or recycling provisions of the various existing contracts is legally impossible. If it is, the contract is discharged and both parties are excused from performance. (6 Corbin on Contracts §1343.) In such a circumstance, the whole contract would be open for renegotiation.[3]

The answer to the question posed in this section depends on the performance contemplated by the contracts (which will vary between the different energy recovery facilities and may vary between contracts with different municipalities and the same facility). Under a contract which requires delivery

of all municipal waste to a facility (as RWS's does) enactment of a subsequent recycling program which requires participation by the municipality would make it impossible for the municipality to legally comply with the terms of the contract. Under the general rule discussed above, the contract would thus be extinguished and the way would be paved for the parties to renegotiate based on the changed circumstances.

Where the contract calls for the delivery of a minumum annual tonnage and, therefore, a minimum annual BTU level, (as PERC's does) enactment of a mandatory recycling program would not necessarily make compliance impossible. Whether it did or not in each case would depend on whether participation in the recycling program would reduce the municipality's available waste below the minumum annual tonnage to which it is committed. There are a number of factors which might tend to indicate that, in many instances, the minimum would continue to be met. First, municipalities are likely to have been conservative in setting the minimum annual tonnage figure to avoid penalties for non-compliance. Second, some contracts provide that a municipality will not be penalized for failure to provide its minimum annual tonnage where the facility receives the total minimum annual tonnage from all its contracts. In other words, a community supplying less than its required tonnage can be saved from penalty if other municipalities provide above their minimums. Third, the volume of waste is likely to grow naturally over time all other factors remaining constant. By the time a recycling program comes on line, a municipality may be able to comply with both mandatory recycling requirements and its contractual obligations.

If the provisions of any state law imposing a mandatory recycling program on municipalities did not cause a municipality to fall short of its contractual obligations, performance of the contract would not be discharged and there would be no need for reopening the negotiations, although the parties could mutually agree to do so.

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[1]See City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2531 (1978) and Reinsch, M., Legal Analyst Memorandum: Constraints on Importation of Solid Waste: Commerce Clause Implications (July 22, 1986).

[2]At this point, I have reviewed sample contracts for Penobscot Energy Recovery Company (PERC) and Regional Waste System (RWS) only and, so, can speak only in general terms about the effect of legislative changes on those contracts.

[3]In addition, there may be an issue of damages for losses incurred when the contract is discharged by impossibility. As the court said in Albre Marble & Title Co. v. John Bowen Co. (155 NE1d 437 at 444) "The problems of allocating loses where a ... contract has been rendered impossible of performance by a supervening act not chargeable to either party is a vexed one." The subject of damages, not being directly at issue here, is not discussed.