

# THE NEW HAMPSHIRE/VERMONT SOLID WASTE PROJECT: IS THERE A SOLUTION?

## INTRODUCTION

The New Hampshire/Vermont Solid Waste Project (Project) is a regional solid waste management cooperative established to manage municipal solid waste (MSW) for twenty-nine communities located in New Hampshire and Vermont.<sup>1</sup> The Project, established pursuant to an interstate compact, is meant to provide the region with an economically viable method of addressing the solid waste dilemma facing the nation.<sup>2</sup> Since its inception, the Project has been the focus of a number of environmental and economic controversies.<sup>3</sup> Most of these problems center around a waste-to-energy incinerator built to meet the region's projected solid waste disposal needs.<sup>4</sup>

The Project contracted with a private company to construct and manage the waste-to-energy incinerator.<sup>5</sup> The contract, written when waste generation projections were high, made member communities pay more than market price to dispose of their MSW.<sup>6</sup> As a result, the Project filed for Chapter 9 bankruptcy<sup>7</sup> to force the private contractor, Wheelabrator, to renegotiate more favorable contract terms and to prevent Wheelabrator from terminating its contractual obligations to accept waste from the Project's communities.<sup>8</sup>

In light of the bankruptcy court's decision not to grant the Chapter 9 petition, the Project will have to pay greater than market price to Wheelabrator to maintain access to the incinerator. Potential litigation will result in even higher solid waste disposal fees for the towns.<sup>9</sup> Higher costs bring increased incentives for private generators and haulers to circumvent

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1. See discussion *infra* Part III. The member communities have formed solid waste districts within their respective states.

2. Consent to New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, art. 1, § A, 96 Stat. 1207 (1982). "The regional approach allows communities to achieve economies of scale through better utilization of capital and more efficient management." UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DECISION-MAKERS GUIDE TO SOLID WASTE MANAGEMENT 13 (1989) [hereinafter DECISION-MAKERS GUIDE].

3. See discussion *infra* Parts III.A-III.C.

4. *Id.*

5. See *infra* notes 118-39 and accompanying text.

6. *In re Sullivan County Regional Refuse Disposal Dist.*, 165 B.R. 60, 66 (Bankr. D. N.H. 1994).

7. *Id.* at 64.

8. Letter from Allen Dusault, former Project Director, New Hampshire/Vermont Solid Waste District, to Project Representatives and Member Municipalities (Oct. 7, 1993) [hereinafter Dusault letter] (on file with author).

9. See discussion *infra* Part III.B.

the facility and to dispose of their solid waste elsewhere.<sup>10</sup> As the quantities of solid waste delivered to the incinerator from the member municipalities decreases, the per ton disposal costs will continue to increase.<sup>11</sup>

In the past, the community members of the Project tried to meet their contractual obligations by requiring private generators and haulers within their communities to deliver all MSW to the incinerator.<sup>12</sup> This option, however, is no longer available to states or their subdivisions due to a recent United States Supreme Court decision.<sup>13</sup> In *C & A Carbone, Inc. v. Town of Clarkstown*, the Supreme Court held that a solid waste "flow control" ordinance, intended to guarantee delivery of adequate quantities of MSW to a municipal contractor, violated the Commerce Clause.<sup>14</sup>

It is unclear whether this flow control prohibition is applicable to the Project. While Congress has the exclusive authority to regulate commerce, because Congress consented to the New Hampshire/Vermont Solid Waste Compact, the Project may have limited authority to restrict the flow of solid waste in interstate commerce.<sup>15</sup>

This Note seeks to clarify both the solid waste and the separation of power issues as they pertain to the Project. Although the Commerce Clause prohibition against state regulation of solid waste may not be applicable to the Project, independent legislative action by Congress, Vermont, and New Hampshire may change the current situation. Recently, Congress sought to pass legislation exempting existing, local flow control ordinances from Commerce Clause restrictions where necessary to satisfy contractual obligations.<sup>16</sup> Additionally, Vermont passed unilateral legislation restricting the Project's ability to act without first obtaining State approval.<sup>17</sup> It is questionable whether Vermont can amend the agreement without ratification by New Hampshire and the consent of Congress.<sup>18</sup> While New Hampshire, which hosts the waste-to-

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10. *Sullivan County*, 165 B.R. at 66.

11. VERMONT DEPARTMENT OF ENVIRONMENTAL CONSERVATION, STATE OF VERMONT SOLID WASTE MANAGEMENT PLAN 4-17 (1989) [hereinafter VERMONT PLAN].

12. Letter from Kevin O'Halloran, Coopers & Lybrand Financial Advisory Services, to Allen Dusault, former Project Manager, New Hampshire/Vermont Solid Waste Project (Dec. 14, 1993) [hereinafter O'Halloran letter] (on file with author).

13. *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994).

14. *Id.* at 1680.

15. See *infra* Part VI.

16. H.R. 4683, 103d Cong., 2d Sess. (1994).

17. 1994 Vt. Laws 205.

18. See *infra* Part VII.B.

energy facility, has yet to address the problems related to the Project, the State convened a legislative study group to analyze the controversy.<sup>19</sup>

Part I of this note considers the solid waste crisis facing the nation. Part II discusses the solid waste problems facing New Hampshire and Vermont and describes each state's statutory scheme for managing MSW. Part III evaluates the creation of the Project and its economic, environmental, and logistical problems. Part IV of the note provides a concise overview of the development of the United States Supreme Court's dormant Commerce Clause jurisprudence and analyzes the Court's treatment of solid waste in interstate commerce. Part V addresses the unique character of interstate compacts. Part VI examines the implications of the melding of general principles of interstate commerce with compact law under the legacy of the New Hampshire/Vermont Solid Waste Compact (Compact). Part VII outlines the recent federal and state legislative efforts that will directly affect the future of the Project. The Note concludes with suggestions regarding how the Project may avoid some future problems.

## I. THE MUNICIPAL SOLID WASTE DILEMMA

Solid waste<sup>20</sup> management is a growing problem in the United States. The amount of waste destined for available landfills, the traditional method of solid waste disposal, increased drastically between 1960 and 1990.<sup>21</sup> The United States Environmental Protection Agency (EPA) expects the volume of waste to continue to rise in this country.<sup>22</sup> Continued growth in the volume of solid waste increases pressure on available disposal

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19. 1994 N.H. Laws 323.

20. The Resource Conservation and Recovery Act (RCRA) defines solid waste as: [A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33 [Clean Water Act], or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923).

42 U.S.C. § 6903(27) (1988).

21. While 88.2 million tons of MSW was landfilled in 1960, that figure grew to 129.0 million tons in 1990. *The EPA Municipal Solid Waste Factbook*, Software Ver. 2.0 (May 24, 1995) [hereinafter *Factbook*].

22. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1990 UPDATE ES-3 (1990) [hereinafter *MUNICIPAL SOLID WASTE*].

facilities. EPA projects MSW<sup>23</sup> to increase 1.6% annually through the year 2000, and 1.5% annually between the years 2000 and 2010.<sup>24</sup> Each person in the United States generates approximately 1500 pounds of MSW per year.<sup>25</sup> By 2010, each person will generate 1775 pounds of MSW per year.<sup>26</sup>

In 1976, Congress enacted the Solid Waste Disposal Act, commonly referred to as the Resource Conservation and Recovery Act (RCRA).<sup>27</sup> RCRA declared that waste should be managed "to minimize the present and future threat to human health and the environment."<sup>28</sup> The Act establishes a legal framework for federal, state, and local control of solid waste.<sup>29</sup> Under its statutory scheme, the federal government establishes national standards to protect human health and the environment.<sup>30</sup> The states then develop and implement solid waste management programs addressing state-specific conditions and needs.<sup>31</sup> To satisfy national standards, and to protect human health and the environment, EPA requires states to classify existing municipal landfill disposal sites as either "sanitary landfills" or "open dumps" in their solid waste management plans.<sup>32</sup> RCRA requires each state to prepare schedules for the closing or upgrading of all sites listed as open dumps.<sup>33</sup> The overall objective of the

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23. MSW is defined as:

[W]astes such as durable goods, nondurable goods, containers and packaging, food wastes, yard wastes, and miscellaneous inorganic wastes from residential, commercial, institutional, and industrial sources. Examples of waste from these categories include appliances, newspapers, clothing, food scraps, boxes, disposable tableware, office and classroom paper, wood pallets, and cafeteria wastes. MSW does not include wastes from other sources, such as municipal sludges, combustion ash, and industrial nonhazardous process wastes that might also be disposed of in municipal waste landfills or incinerators.

*Id.* at ES-2. "EPA more recently [expanded the definition of municipal solid waste] to include household hazardous waste (HHW) and conditionally exempt hazardous waste from small-quantity generators (SQG waste) for the purposes of its Interim Municipal Settlement Policy" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) 42 U.S.C. §§ 9601-9675. John R. Jacus, *CERCLA Liability for Municipal Solid Waste*, NATURAL RESOURCES & ENV'T, Fall 1994, at 24.

24. MUNICIPAL SOLID WASTE, *supra* note 22, at 62.

25. EPA estimated that 4.21 pounds of MSW would be generated per person per day by 1995. *Id.* at 61. At that rate, each person would generate 1536.35 pounds of MSW per year.

26. EPA estimates that 4.86 pounds of MSW will be generated per person per day by 2010. *Id.* At this rate, each person will generate 1773.9 pounds of MSW per year.

27. 42 U.S.C. §§ 6901-6992k (1988).

28. *Id.* § 6902(b).

29. *See generally* 16 U.S.C. §§ 6941-6987 (1988).

30. 42 U.S.C. § 6907(a).

31. *Id.* § 6942(c).

32. Solid Waste Disposal Facility Criteria, 56 Fed. Reg. 50,978, 50,983 (1991).

33. 42 U.S.C. § 6945(a).

solid waste management plan is to recover valuable energy and material from the waste stream and to reduce the local burdens of increasing volumes of MSW.<sup>34</sup>

Landfilling reached its peak as a preferred method of solid waste management in 1980 when 81.4% of all generated MSW was disposed in landfills.<sup>35</sup> While 45% of solid waste landfills reached capacity in 1991, the tonnage of waste delivered to landfills almost doubled between 1960 and 1990.<sup>36</sup> Two hurdles must be overcome to site new landfills. The first is EPA's stringent guidelines for landfill siting.<sup>37</sup> The second is community reluctance to support solid waste facilities due to their negative environmental and aesthetic impact, also known as NIMBYism.<sup>38</sup> Despite this resistance to landfill siting, communities may have to site facilities in order to comply with the requirement to implement state solid waste management plans under RCRA.<sup>39</sup>

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34. *Id.* §§ 6941, 6941a.

35. *Factbook*, *supra* note 21.

36. 56 Fed. Reg. 50,980; *Factbook supra* note 21.

37. See Criteria for Municipal Solid Waste Landfills, 40 C.F.R. § 258 (1994) (establishing expanded criteria for landfill siting).

38. NIMBY stands for "not in my back yard." "[W]hile many are willing to generate waste . . . few are willing to help dispose of it. Those locales that do provide disposal capacity to serve foreign waste effectively are affording reduced environmental and safety risks to the States that will not take charge of their own waste." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 369 (1992) (Rehnquist, C.J., dissenting) (footnote omitted).

39. Each state is required to develop and implement a solid waste management plan which meets minimum federal guidelines for disposal and storage of solid waste. 42 U.S.C. § 6942 (1988).

## II. SOLID WASTE MANAGEMENT IN NEW HAMPSHIRE AND VERMONT

New Hampshire and Vermont dispose of 990,000<sup>40</sup> and 426,000<sup>41</sup> tons of MSW per year respectively.<sup>42</sup> In this stringent regulatory climate plagued by NIMBYism, reduction of the amount of MSW sent to landfills may be the best indication of a successful waste management program. New Hampshire has had better success than Vermont at reducing the quantity of MSW sent to landfills.<sup>43</sup> New Hampshire landfills 58% of its MSW while Vermont landfills 68%.<sup>44</sup> New Hampshire reduced landfilling primarily by diverting approximately 26% of its MSW to incinerators.<sup>45</sup>

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40. NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES, STATE OF NEW HAMPSHIRE SOLID WASTE MANAGEMENT PLAN, VOLUME I: THE ACTION PLAN VI-5 (1993) [hereinafter N.H. PLAN VOL. I]. This figure is for all MSW. It includes both residential and commercial/industrial MSW and does not include select wastes such as motor vehicle wastes and construction and demolition debris. The total solid waste generated is estimated to be 1,109,000 tons per year. NEW HAMPSHIRE DEPARTMENT OF ENVIRONMENTAL SERVICES, STATE OF NEW HAMPSHIRE, SOLID WASTE MANAGEMENT PLAN, VOLUME II: AN OVERVIEW, Table B-1 (1993) [hereinafter N.H. PLAN VOL. II].

41. Vermont currently has no accurate MSW figures. The 1987 estimate for MSW generated in Vermont is approximately 416,700 tons. VERMONT PLAN, *supra* note 11, 2-15 to 2-16. This number was extrapolated from the State of Vermont's Solid Waste Management Plan and includes 330,000 tons of non-hazardous mixed solid waste as defined by federal regulations, 6700 tons of appliances, and 80,000 tons of wastes diverted through on-site disposal, re-use, and recycling. *Id.* Total solid waste generated in Vermont, using the 1987 numbers for MSW and special wastes, is approximately 545,000 tons. *Id.* It is estimated that 700,000 tons of solid waste was generated in 1994. Telephone Interview with Vicky Viens, Recycling Specialist with the Department of Environmental Conservation, Vermont Agency of Natural Resources (Nov. 17, 1994). This number may not include hazardous wastes and tires. *Id.*

42. Solid waste which can be incinerated in an MSW Waste-to-Energy incinerator includes "household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and [] solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under [42 U.S.C. § 6921]." 42 U.S.C. § 6921(i)(1) (1988).

43. While reduction in the amount of waste sent to a landfill is only one aspect of effective solid waste management, it may be the most pressing day-to-day concern of an MSW manager/planner. In the long run, the environment, public health and welfare, and economic constraints will necessarily be part of long-range planning. In this light, even though Vermont landfills more MSW, it may be seen as having a better MSW program.

It should be noted that combustion of MSW can cause potentially harmful emissions and can result in concentrating heavy metals in combustion ash. While household hazardous waste is excluded from regulation under RCRA, ash resulting from the incineration of MSW, if it contains substances such as heavy metals, must be regulated as hazardous waste. *See City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588 (1994).

44. *Factbook*, *supra* note 21. The New Hampshire figure may be higher as this number presumes a recycling capture rate of 10%. The State estimates a recycling capture rate of 6.9% for combined municipal and commercial/industrial solid waste. N.H. PLAN VOL. I, *supra* note 40, at VI-9 (1993).

45. *Factbook*, *supra* note 21. However, New Hampshire estimated in 1992 that it burned approximately 23.8%. N.H. PLAN VOL. I, *supra* note 40, at VI-9. "Incineration of solid waste reduces its volume by as much as 90 percent and its weight by 80 percent . . ." Edward J. Stana, *Packaging and the Environment*, NATURAL RESOURCES & ENV'T, Fall 1994, at 16, 19. "The

New Hampshire estimates that it sends 22% of its MSW to waste-to-energy facilities.<sup>46</sup> This rate of incineration is matched by only three other states.<sup>47</sup> Vermont has only a 4% combustion rate.<sup>48</sup> Additionally, both states have set 40% recycling goals for the year 2000.<sup>49</sup> To date, Vermont has achieved a 28% recycling capture rate as compared to only 16% achieved by New Hampshire.<sup>50</sup>

While the amounts of MSW generated in both Vermont and New Hampshire are dwarfed by national production levels,<sup>51</sup> both states still must satisfy RCRA's mandate to develop environmentally sound methods of solid waste disposal that maximize the capture of valuable resources.<sup>52</sup> New Hampshire and Vermont are rural states where federal requirements may impose an extraordinary burden. Waste management is particularly expensive because each state is remote from the major secondary materials markets on the east coast,<sup>53</sup> and because larger areas must cooperate in

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reduction in landfill volume, after accounting for the in-place densities of mixed waste and ash is approximately 60-70%." VERMONT PLAN, *supra* note 11, at 5-8.

46. N.H. PLAN VOL. I, *supra* note 40, at VI-9. New Hampshire estimates that it sends 1.6% of its solid waste to non waste-to-energy incineration. N.H. PLAN VOL. II, *supra* note 40, at Figure E-2 (1993).

47. Only Massachusetts, Maine, and Connecticut exceed this combustion rate. *Factbook*, *supra* note 21.

48. *Id.* This is the MSW which is being delivered to the Claremont waste-to-energy facility operated by Wheelabrator for the Southern Windsor/Windham Counties Solid Waste Management District. Interview with Vicky Viens, *supra* note 41. Vermont delivers 20,000 tons of waste per year to the Claremont facility. VERMONT PLAN, *supra* note 11, at 1-6.

49. *Factbook*, *supra* note 21. N.H. REV. STAT. ANN. § 149-M:1-a(III) (Supp. 1995). The general court further declares that the goal of the state, for the period 1990-2000, is to achieve a 40 percent minimum weight reduction in the solid waste stream on a per capita basis. Weight reduction shall be measured with respect to changes in the total waste stream generated. The goal of weight reduction shall be achieved through source reduction, recycling and reuse, and composting, or any combination of such methods. *Id.* Vermont's recycling goal for the year 2000 is limited to newspaper. See 1989 Vt. Laws 289, § 9(b); see also VT. STAT. ANN. tit. 10, § 6622a (1993) (establishing annual recycled newsprint report).

50. *Factbook*, *supra* note 21. Capture rate is the percentage of recyclables that are removed from the MSW stream. The capture rate depends upon a recycling program's: residential participation, convenience of collection, cost effectiveness, and material integrity. See DECISION-MAKERS GUIDE, *supra* note 2, at 67 (discussing principles of storage and collection).

51. EPA estimated that without source reduction, 200 million tons of MSW was generated in 1995. MUNICIPAL SOLID WASTE, *supra* note 22, at ES-3.

52. 42 U.S.C. § 6941 (1988).

53. The major markets for secondary (recycled) materials in New England are located in Boston, New York City, and Montreal. VERMONT PLAN, *supra* note 11, at 2-4. Scrap metal was the leading bulk cargo oceanborne export and waste paper was the leading general cargo oceanborne export by weight from the Port of New York and New Jersey in 1993. PORT AUTHORITY OF NEW YORK AND NEW JERSEY, OCEANBORNE FOREIGN TRADE HANDBOOK 1993, 41, 44 (1994). Scrap metal is probably the leading oceanborne export by weight and waste paper is within the top four oceanborne exports by weight from the Boston region. Telephone Interview with Gretchen Sheehan, Massport

collection, transportation, and planning to achieve economies of scale.<sup>54</sup> As demand for secondary materials increases, the net cost of recycling will decrease. Falling waste management costs stimulate an increased diversion of MSW to recycling.<sup>55</sup> While economies of scale reduce the cost of recycling, the cost reduction is matched by an ever-increasing per unit disposal cost of the remaining MSW as decreasing quantities of MSW are collected from scattered locations.<sup>56</sup> The EPA has alternate siting guidelines for small, rural landfills where siting and operational costs are significant.<sup>57</sup> Unfortunately, neither New Hampshire nor Vermont communities will be eligible for exemption under the siting criteria.<sup>58</sup>

### A. New Hampshire's Municipal Solid Waste Management Strategy

In response to the RCRA mandate, New Hampshire enacted its own Solid Waste Management Act in 1982.<sup>59</sup> The purpose of the statute is to "ensure benefit to the citizens of New Hampshire by providing for solid waste management options which will meet the capacity needs of the state while minimizing adverse environmental, public health and long-term economic impacts."<sup>60</sup> The statute provides a hierarchy of preferred waste-stream reduction options: source reduction, recycling and reuse, composting, waste-to-energy incineration, incineration, and landfilling.<sup>61</sup>

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Analyst (Feb. 8, 1994).

54. The term "economies of scale" refers to the reduced per unit cost of processing greater volumes of MSW. A "greater volume of business will allow costs to be spread over a greater number of services, resulting in an overall cost savings." *Albertson's Inc. v. State Dep't Public Regulation*, 658 So. 2d 134, 138 n.3 (Fl. Ct. App. 1995).

55. "The amount of material . . . recycled will depend on the cost of collection and transportation compared to the value of the material." VERMONT PLAN, *supra* note 11, at 4-2.

56. *Id.* at 4-17. "[B]y limiting potential disposal volumes for any particular site, various fixed costs will have to be recovered across smaller volumes, increasing disposal costs per unit . . ." *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 370 (Rehnquist, C.J., dissenting) (citing 56 Fed. Reg. 50,987 (1991)).

57. *See* 56 Fed. Reg. 50,988-50,991 (1991) (discussing the landfill siting criteria as they are to be applied to small landfills).

58. A landfill will be exempt from being closed if: (1) it receives less than 20 tons per day; (2) it has no groundwater contamination; and (3) it has either (a) annual transportation interruptions for at least three consecutive months, or (b) less than 25 inches of rain annually coupled with a lack of other practicable waste management alternatives. 40 C.F.R. § 258.1(f)(1) (1995). The exemption was written for a location other than New England where snow accumulation prevents dependable transportation services and/or for a location which has minimal rainfall. *Id.*

59. N.H. REV. STAT. ANN. §149-M (1995).

60. *Id.* § 149-M:10-c(II).

61. *Id.* § 149-M:1-a(II). While the New Hampshire regulations do not define source reduction, it is probable that source reduction correlates with the definition provided for waste reduction. "Waste reduction" means the reduction of waste at the source by changing industrial processes,

The regulation of solid waste in New Hampshire, including the closure of solid waste facilities, is accomplished through a permitting system.<sup>62</sup> The Division of Waste Management (Division) establishes standards for solid waste facilities which include waste-to-energy plants, recycling stations, and landfills.<sup>63</sup> In issuing a permit, the Division considers whether a solid waste facility provides a substantial public benefit based upon the short- and long-term need for the facility, compliance with the solid waste management plan and other state goals, public and political subdivision comments, and economic viability.<sup>64</sup>

Each municipality must form or participate in a solid waste district that provides or promises access to a solid waste facility.<sup>65</sup> A solid waste management district is autonomous from the municipal government or governments from which it is formed and is responsible for managing all MSW within its jurisdiction.<sup>66</sup> Districts may participate in regional cooperatives for the disposal of particular components of the solid waste stream.<sup>67</sup> Regional cooperatives, like districts, are encouraged because they have the potential to achieve economies of scale.<sup>68</sup>

technologies, and product components with the specific objective of reducing the generation of waste." *Id.* § 149-M:1(XXIV). While recycling is defined by statute, reuse is not. Reuse likely means exactly what it says; the product may be reused more than once without being reprocessed. "'Recycling' means the collection, storage, processing, and redistribution of separated solid waste so as to return material to the marketplace." *Id.* § 149-M:1(XVII). "'Compost' for the purposes of this chapter means a stable, humus-like substance which is derived from a process involving the biological decomposition of any readily biodegradable material, such as animal manure, garbage, other organic solid wastes, yard waste, septage or sludge, and which can be beneficially re-used for land application." *Id.* § 149-M:1(IV-a). Waste-to-energy, incineration, and landfilling are not defined in the New Hampshire statute. Waste-to-energy is the production of energy through the combustion of waste; incineration generally refers to the combustion of waste without energy recovery; and landfilling is the disposal of solid waste through land application.

62. *Id.* §§ 49-M:3(IV), 149-M:3(IV-a). *See id.* § 149-M:10 (describing the permitting system requirements).

63. *Id.* § 149-M:8(IV)(b).

64. *Id.* §§ 149-M:10-c(III)-(IV).

65. *Id.* §§ 149-M:18(I), 149-M:13(I).

66. *See* N.H. REV. STAT. ANN. § 53-B:1-a (1994) (enacted by 1994 N.H. Laws 367). A solid waste management district must develop an organizational plan which includes chairmanship, representation, periodic meetings, expenditure of funds agreed upon by the towns for planning, cost sharing formulas, necessary committees, staff, and any other matters deemed appropriate. N.H. REV. STAT. ANN. §§ 149-M:18(II)(a)-(f). "A solid waste management district . . . shall be a body politic and corporate. . . ." N.H. REV. STAT. ANN. § 53-B:7.

67. N.H. REV. STAT. ANN. § 149-M:13(IV). A regional cooperative can serve district, multiple districts or parts of districts. Telephone Interview with Pat Burke, New Hampshire Division of Solid Waste, Department of Environmental Services (Nov. 10, 1994).

68. *Id.* § 149-M:24. *See id.* § 149-M:10-c(II) (establishing purpose of minimizing adverse long-term economic impacts).

In addition to the state solid waste management plan, each solid waste management district must prepare a district plan.<sup>69</sup> While state solid waste plans outline overall policy objectives, district plans implement programs consistent with the state plan.<sup>70</sup> District plans must include an estimate of the present and future generation of waste stream components<sup>71</sup> and identify the location, type, and capacity of any facility proposed for use.<sup>72</sup> The Division may deny approval of proposed district plans if they do not serve the purpose of promoting cooperative, environmentally sound, and economically efficient, area-wide solid waste plans.<sup>73</sup>

### *B. Vermont's Municipal Solid Waste Management Strategy*

Vermont sets out an ambitious statutory control of solid waste, noting that the developed world is depleting resources by burning and burying resources as waste.<sup>74</sup> The Vermont Code identifies the problems with improper solid waste management<sup>75</sup> and declares that their correction is "a matter statewide in scope and in concern," requiring planning and regulation to achieve environmental and economic goals.<sup>76</sup> Like New Hampshire,<sup>77</sup> Vermont has established a hierarchy of solid waste management methods.<sup>78</sup> Vermont's solid waste management plan gives priority to reduced solid waste generation, reuse, recycling, compaction, and landfilling.<sup>79</sup> Incineration and waste-to-energy incineration are conspicuously absent.

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69. *Id.* § 149-M:18(IV).

70. *Id.*

71. *Id.* § 149-M:19(I)(a).

72. *Id.* § 149-M:19(I)(c).

73. *Id.* §§ 149-M:8(VII), 149-M:18(I), 149-M:17(I), 149-M:17(I)(c).

74. VT. STAT. ANN. tit. 10, § 6601(a) (1993).

75. *Id.* These include scenic blights, hazards to public health, air and water pollution, pests and disease, the adverse effect on land values, nuisance, and interference with community life and development. *Id.* However, there is no indication whether the policy and purposes identified are to be given any sort of hierarchical relationship to each other.

76. VT. STAT. ANN. tit. 10, § 6601(b) (1993).

77. *See supra* note 61 and accompanying text.

78. VT. STAT. ANN. tit. 10, § 6604(a)(1) (1993). Landfilling and incineration would appear to be unacceptable means of solid waste disposal. *See* VT. STAT. ANN. tit. 10, § 6601(a). In fact, State funding is unavailable for sanitary landfills or incinerators. VT. STAT. ANN. tit. 10, § 6603c(a)(2) (1993). The State solid waste management plan shall also include "strategies to assure recycling in the state, and to prevent the incineration or other disposal of marketable recyclables." VT. STAT. ANN. tit. 10, § 6604(a)(2)(A) (1993).

79. *Id.* § 6604(a)(1). Compaction is the reduction of the municipal waste stream volume. *See id.* § 6604(a)(1)(C). It is worth noting that the relative priorities given source reduction, reuse, and recycling are flexible to achieve the most cost effective method of waste reduction. *Id.* § 6604(a)(1).

The Agency of Natural Resources (ANR) implements and enforces Vermont's solid waste plan.<sup>80</sup> The Department of Environmental Conservation, within ANR, administers Vermont's solid waste.<sup>81</sup> The Secretary of ANR develops a state solid waste management plan under consultation with a technical advisory group.<sup>82</sup> The goal of the statewide solid waste management plan is to reduce and remove material from the waste stream.<sup>83</sup> The solid waste management plan must include an analysis of the volume and nature of the waste generated.<sup>84</sup> As in New Hampshire, Vermont's solid waste management plan must be revised at least once every five years.<sup>85</sup>

Vermont has a solid waste facility permitting system similar to New Hampshire's program.<sup>86</sup> The construction, alteration, or operation of a solid waste management facility is allowed only upon certification by the Secretary.<sup>87</sup> The facility certificate will specify the projected amount and types of waste to be disposed,<sup>88</sup> provide for environmental monitoring during the life of the landfill and after its closure,<sup>89</sup> and include plans for site closure.<sup>90</sup> After the facility receives certification, the state may order

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80. VT. STAT. ANN. tit. 10, §§ 6602(1), 6603 (1993).

81. VT. STAT. ANN. tit. 3, § 2873(a) (1995).

82. VT. STAT. ANN. tit. 10, § 6603e(b). The Governor appoints at least 10 individuals to the advisory committee. VT. STAT. ANN. tit. 10, § 6603e(a). Qualifications for appointment include technical competence in some aspect of solid waste management or specific knowledge of troublesome elements within the waste stream. *Id.* The committee shall be chaired by the Secretary of the ANR and shall include members who represent local government, industry, affected businesses and industry, and the general public. *Id.*

83. VT. STAT. ANN. tit. 10, § 6604(a)(2)(A). Note that the goal of removing material from the waste stream may be accomplished by product and packaging bans and tax incentives. *Id.* §§ 6604(c)(2)(A)-(C).

84. *Id.* § 6604(a)(2). As of November 1994, the State had yet to develop an accurate analysis of its solid waste stream. Interview with Vicky Veins, *supra* note 41.

85. VT. STAT. ANN. tit. 10, § 6604(a)(2).

86. See *supra* notes 62-64 and accompanying text.

87. VT. STAT. ANN. tit. 10, § 6605(a) (1993). The statute requires that the facility be recertified every five years. *Id.* New landfills are subject to very stringent guidelines which require that they be lined, have a leachate treatment system, and receive 10% or less of compostable, recyclable, and hazardous materials generated by the facility users. VT. STAT. ANN. tit. 10, §§ 6605(d)(1)-(2) (1993).

88. VT. STAT. ANN. tit. 10, § 6605(b)(3) (1993).

89. VT. STAT. ANN. tit. 10, §§ 6605(b)(5)-(6) (1993).

90. *Id.* § 6605(b)(5). Solid waste management facilities which are unable to obtain a certificate under the requirements set forth in Section 6605 may be able to obtain an interim certification if the public benefit outweighs the environmental and public health risks. VT. STAT. ANN. tit. 10, §§ 6605b(a)-(b) (1993 & Supp. 1995).

remedial action or closure of the landfill if it poses a significant risk to public health or the environment.<sup>91</sup>

Each municipality is responsible for developing regulations and managing solid waste storage and collection within their jurisdiction.<sup>92</sup> They may also issue local franchises and make rules consistent with the State Solid Waste Management Plan.<sup>93</sup> While municipalities have little control over whether a facility is located within their jurisdiction, the facility must notify the appropriate municipality when submitting applications for certification or recertification to the state.<sup>94</sup> They are also permitted to enter and monitor newly sited landfills in their jurisdiction.<sup>95</sup>

Municipalities must either join or participate in a solid waste management district or help the regional planning commission develop a solid waste implementation plan.<sup>96</sup> As in New Hampshire, a district takes

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91. VT. STAT. ANN. tit. 10, § 6605a(b) (1993). Risk to the environment is determined by the landfills impact on both ground and surface water, and air quality. VT. STAT. ANN. tit. 10, § 6605a(a)(1) (1993). Risk to public health is determined by the proximity to drinking water supplies or buildings in regular use, the nature and extent of the environmental contamination, the disposition of the adjacent lands, and the size, age, capacity, and use of the landfill. VT. STAT. ANN. tit. 10, §§ 6605a(a)(3)(A)-(D) (1993). If the public need for the landfill is compelling it may be eligible for a provisional certification. VT. STAT. ANN. tit. 10, § 6605d (1993 & Supp. 1995). Compelling needs include the need for municipal disposal capacity and the generation of revenue for closure. *Id.* § 6605d(2).

92. VT. STAT. ANN. tit. 24, § 2202a(a) (1992 & Supp. 1995). In Vermont, "a municipality has only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof." *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486, 380 A.2d 64, 66 (1977) (citation omitted). "[A] single municipality, acting alone, does not have the authority to implement its own recycling plan, even though it is in conjunction with the regulation of residential solid waste." *Central Vermont Quality Servs., Inc. v. City of Rutland*, 780 F. Supp. 218, 220 (D. Vt. 1991).

93. VT. STAT. ANN. tit. 24, § 2202a(a) (Supp. 1995). Franchising may be invalid if it impacts interstate commerce given the Supreme Court's decision prohibiting flow control. *See C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) (discussed *infra* notes 231-54 and accompanying text). A municipality may satisfy the requirements of the State Solid Waste Management Plan through agreement with any other government unit or facility operator having a permit. VT. STAT. ANN. tit. 24, § 2202a(b) (1992).

94. VT. STAT. ANN. tit. 10, § 6605(f) (1993 & Supp. 1995). If the facility is located on the municipality's border, adjacent municipalities must also be notified. *Id.*

95. VT. STAT. ANN. tit. 10, § 6605(d)(3).

96. VT. STAT. ANN. tit. 24, § 2202a(c)(1) (1992 & Supp. 1995). Municipalities may form their own solid waste management district and develop their own implementation plan. "Act 78 places responsibility for solid waste planning on the regional planning commissions, rather than at the local level. . . . The implementation of solid waste programs is a matter for a formal legal entity, such as a solid waste district, and not for a regional planning commission." *Central Vermont Quality Servs.*, 780 F. Supp. at 219-20.

Municipalities that use landfills or incinerators, which by necessity means nearly all of them, are encouraged to develop solid waste management implementation plans. VT. STAT. ANN. tit. 10, §§ 6605(b)(3)(A)-(B) (1993). Municipalities that deliver solid waste to a solid waste facility and do not have a solid waste management implementation plan are required to remove 75% of the marketable

on powers distinct from that of the municipality or municipalities in which it is formed.<sup>97</sup> Any solid waste implementation plan must be consistent with the State Solid Waste Management Plan.<sup>98</sup> Those municipalities that fail to join a solid waste management district or participate in regional planning are ineligible for state solid waste management funding.<sup>99</sup> In addition, the municipality will be unable to use a facility that is certified by the state for use by the region or district.<sup>100</sup>

Regional planning commissions or solid waste management districts are allowed to apply for solid waste management implementation grants.<sup>101</sup> However, these grants are not available for sanitary landfills or incineration facilities.<sup>102</sup> Vermont uses its funding leverage to ensure compliance with the State Solid Waste Management Plan.<sup>103</sup> During the grant process, solid waste management districts must analyze both regional conditions and alternative options for solid waste management.<sup>104</sup> The districts must be incorporated in a solid waste management implementation plan in order to obtain funding.<sup>105</sup>

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recyclables, household hazardous waste, and small generators of hazardous waste. *Id.* § 6605(b)(3)(B). Municipalities that have an approved solid waste management implementation plans are only required to remove recyclables and hazardous waste in accordance with the terms incorporated within the implementation plan. *Id.* § 6605(b)(3)(A). While the requirements of a management plan can be more stringent than the 75% removal rate, it is likely that an approved implementation plan will be case specific and will vary somewhat from the flat across the board 75% removal rate. A municipality or district that has an ordinance which provides for enforcement provisions, and requires source separation of at least five of the materials listed in Section 6622(b)(3), shall receive priority consideration for implementation grants. VT. STAT. ANN. tit. 10, § 6622(d) (1993). The Secretary of the Agency of Natural Resources may issue implementation grants to a municipality, or groups of municipalities organized as a solid waste management district or acting through or as a regional planning commission, for up to 40% of the cost of construction of solid waste management facilities. VT. STAT. ANN. tit. 10, § 6603c(a)(1).

97. *See supra* note 67. "[T]he union municipal district shall become a body politic and corporate with the powers incident to a public corporation." VT. STAT. ANN. tit. 24, § 4865 (1992).

98. VT. STAT. ANN. tit. 10, §§ 6602(20)-(21) (1993). *See* VT. STAT. ANN. tit. 10, § 6605(b)(3)(A)-(B). A district or regional planning commission need not have a solid waste management implementation plan if it lacks funding or has not finished a landfill evaluation. VT. STAT. ANN. tit. 24, § 2202a(c)(2) (1992 & Supp. 1995).

99. VT. STAT. ANN. tit. 10, § 6603c(a)(1) (1993 & Supp. 1995); VT. STAT. ANN. tit. 24, § 2202a(c)(3) (1992).

100. VT. STAT. ANN.

101. VT. STAT. ANN. tit. 10, § 6603c(b)(1) (1993).

102. VT. STAT. ANN. tit. 10, § 6603c(a)(2) (1993).

103. *See* VT. STAT. ANN. tit. 10, § 6603c (1993 & Supp. 1995).

104. *Id.* § 6603c(b).

105. *Id.* § 6603c(c)(2)(C).

## III. THE NEW HAMPSHIRE/VERMONT SOLID WASTE PROJECT

Subchapter IV of RCRA advocates cooperative efforts between states, local communities, and private industry to achieve state or regional solid waste plans.<sup>106</sup> In December 1981, the Sullivan County Regional Refuse Disposal District and the Southern Windsor/Windham Counties Solid Waste Management District (Districts) were formed in New Hampshire and Vermont respectively.<sup>107</sup> The Districts were established to allow communities to manage MSW on a regional interstate basis.<sup>108</sup> Vermont and New Hampshire ratified the Compact with the consent of Congress in 1982.<sup>109</sup> The Compact establishes and authorized the Project.<sup>110</sup>

The Compact has two main components: a statement of policy and a section dealing with procedures and conditions for the intergovernmental agreement.<sup>111</sup> The policy section contains a list of state objectives that provide incentives for municipalities in each state to enter into an interstate

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106. 42 U.S.C. § 6941 (1988).

The objectives of this subchapter are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources, including energy and materials which are recoverable from solid waste, and to encourage resource conservation. Such objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry. In developing such comprehensive plans, it is the intention of this chapter that in determining the size of the waste-to-energy facility, adequate provision shall be given to the present and reasonably anticipated future needs, including those needs created by thorough implementation of section 6962(h) of this title, of the recycling and resource recovery interest within the area encompassed by the planning process.

*Id.*

107. *In re Sullivan County Regional Refuse Disposal District*, 165 B.R. 60, 65 (Bankr. D. N.H. 1994). New Hampshire municipalities that make up the Sullivan County Regional Refuse Disposal District are: Acworth, Center Harbor, Claremont, Cornish, Croydon, Goshen, Grantham, Langdon, Lempster, Meredith, New London, Newport, Plainfield, Springfield, and Sunapee. N.H. PLAN VOL. II: APPENDIX, *supra* note 40, at C-23. The Vermont municipalities that comprise the Southern Windsor/Windham Counties Solid Waste Management District are: Andover, Ascutney, Baltimore, Brownsville, Cavendish, Chester, Grafton, Ludlow, Reading, Rockingham, Springfield, Westminster, Windsor, and Plymouth. *Sullivan*, 165 B.R. at 64 n.3. The Town of Acworth has attempted to withdraw from the Sullivan County Regional Refuse Disposal District over the objection of the District. Paul Clifton-Waite, *Acworth answers Project lawsuit*, EAGLE TIMES, May 21, 1995, at 1, 8; See Les Kozaczek, *Acworth leaves trash district*, KEENE SENTINEL, March 9, 1994, at 1, 4.

108. See New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, art. 1, § A, 96 Stat. 1207, 1207 (1982).

109. See N.H. Rev. Stat. Ann. § 53-D (1991); VT. STAT. ANN. tit. 10, §§ 1222-1224 (1984); New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, 96 Stat. 1207 (1982).

110. *Sullivan*, 165 B.R. at 64.

111. *Id.*

solid waste agreement.<sup>112</sup> The objectives are: to allow cost sharing; to eliminate duplication of services; to gain economies of scale; to meet the increasing challenge of the waste disposal problem; to reduce the demand for imported energy; and to promote employment.<sup>113</sup> In addition to the economic objectives, the states recognize the need to collaborate in order to maintain a healthy environment.<sup>114</sup> Procedurally, the agreement requires: that at least one community join the Compact from each state; that any agreement must be approved by both the New Hampshire Division of Solid Waste Management and the Vermont Department of Environmental Conservation; that any facility must be compatible with the state solid waste plan for the state in which it is located; and that all municipalities which are party to the agreement must be represented by a joint board.<sup>115</sup> The Compact also provides for the purchase of property, financing, the establishment of a fee structure, arbitration procedures, withdrawal of membership, and procedures for the amendment or termination of the agreement.<sup>116</sup>

The Districts independently entered into a Waste Disposal Agreement (WDA) with the New Hampshire/Vermont Energy Recovery Corporation in April 1985.<sup>117</sup> The WDA was established to enable a private contractor to design and build a waste-to-energy incinerator and receive the combustible waste from member communities in both states.<sup>118</sup> Under the provision of a reciprocal agreement, the Project agreed to site a lined landfill receiving the ash residue from the Claremont incinerator.<sup>119</sup> Within three months, SES Claremont Company replaced the New Hampshire/Vermont Energy Recovery Corporation in this contractual arrangement.<sup>120</sup> Shortly thereafter, Wheelabrator acquired SES Claremont Company and became party to its contract with the Districts.<sup>121</sup> The contractual agreement between the Districts and Wheelabrator stipulates that the Districts deliver a guaranteed annual tonnage (GAT) of MSW to the incinerator, pay a service fee for use and reservation of the

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112. N.H. REV. STAT. ANN. § 53-D:1, art. I(A).

113. *Id.*

114. *Id.*

115. *Id.* § 53-D:1, art. II.

116. *Id.* § 53-D:1, art. II(E).

117. *Sullivan*, 165 B.R. at 65.

118. *Id.* Under RCRA, the technology to recover energy from solid waste must be commercially feasible. 42 U.S.C. § 6941a(5) (1988).

119. The facility is the Newport Ash Landfill located in Newport, New Hampshire. *In re Appeal of Working on Waste*, 577 A.2d 403, 404 (N.H. 1990).

120. *Sullivan*, 165 B.R. at 65.

121. *Id.*

incinerator's capacity, and have an absolute obligation to pay the fees for the minimum tons stipulated or actual tons delivered.<sup>122</sup> Probably the most controversial contractual restriction on the Project is that the Districts will not be able to satisfy their GAT by funneling waste from non-district sources to the waste-to-energy incinerator.<sup>123</sup> Additionally, the WDA contains a provision for liquidated damages which includes continued payment of the monthly service fees.<sup>124</sup>

On May 16, 1989, the Districts joined the Project by ratifying a separate document, the New Hampshire/Vermont Solid Waste Project Cooperative Agreement (Cooperative Agreement).<sup>125</sup> A waste-to-energy incinerator, capable of accepting 200 tons per day, was eventually sited in Claremont, New Hampshire.<sup>126</sup> The Cooperative Agreement set up an Executive Committee and a Joint Committee.<sup>127</sup>

There are a number of Vermont and New Hampshire laws which influence the Project and Wheelabrator's incinerator. Although New Hampshire now prefers waste-to-energy incineration over landfilling as a method of solid waste management, it had not established this preference when the Wheelabrator facility was sited.<sup>128</sup> While the New Hampshire Division of Waste Management must assess a one dollar per ton surcharge on the disposal of out-of-state waste,<sup>129</sup> waste received from the Vermont District is exempt from this requirement. New Hampshire districts may

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122. *Id.* The absolute and unconditional obligation prevents the Districts from counterclaiming, setting off, deducting, abating, releasing, discharging, or in any way changing the fee payment. *Id.* The obligation to pay fees for the greater of minimum tons stipulated or actual tons delivered is known as a "put-or-pay" provision. A put-or-pay provision in an MSW disposal contract guarantees that the solid waste generator will either deliver a predetermined quantity of MSW to a solid waste disposal provider (the "put"), or compensate the solid waste disposal provider in the event that a shortfall occurs in the quantity of MSW generated and delivered (the "pay"). See *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1693 (1994).

123. Open Letter from the Town of Springfield, Vermont Board of Selectmen to the Vermont Legislature [hereinafter Springfield Letter] (on file with author). While the Districts are unable to fill their quotas in the spot market, Wheelabrator is replacing the lost fuel for its waste-to-energy incinerator by charging the spot market half of what the Districts pay. *Id.*

124. *Sullivan*, 165 B.R. at 70.

125. *Id.* at 64 n.4.

126. N.H. PLAN VOL. II, *supra* note 40, at H-8.

127. See *id.* at 65, 70-72.

128. The solid waste management method hierarchy was enacted in 1990. N.H. REV. STAT. ANN. § 149-M:1-a(II) (Supp. 1995).

129. N.H. REV. STAT. ANN. § 149-M:3(IV-b) (Supp. 1995). This provision may be void given the Supreme Court decision prohibiting surcharging waste from another state. See *Oregon Waste Sys., Inc. v. Department of Env'tl. Quality*, 114 S. Ct. 1345, 1355 (1994) (discussed *infra* notes 224-30 and accompanying text). "Out-of-state solid waste" in New Hampshire is defined to exclude any solid waste generated or originating from communities participating in cooperative agreements under Section 53-D. N.H. REV. STAT. ANN. § 149-M:1(XI-a) (Supp. 1995).

displace or limit competition and enterprise without violating state or federal anti-trust laws.<sup>130</sup> However, solid waste being shipped out of Vermont is subject to taxation.<sup>131</sup>

While neither the Sullivan County Regional Refuse Disposal District nor the Project directly control the Wheelabrator incinerator, that facility must satisfy the New Hampshire law requiring compliance with public benefit criteria prior to siting.<sup>132</sup> In New Hampshire, solid waste destined for disposal in a private landfill<sup>133</sup> with a leachate program, must first be reduced in weight by twenty percent through recycling, composting, resource recovery, or other approved methods.<sup>134</sup> The New Hampshire Division of Waste Management will not enforce the forty percent reduction goal if the regional solid waste districts would have to violate prior legal obligations to private facilities.<sup>135</sup>

The regional cooperative agreements forming the Districts in each state "empower the [respective] Districts to assess the member municipalities for any shortfall in meeting their operational liabilities if the Districts' revenues are otherwise insufficient."<sup>136</sup> This assessment power was later incorporated by reference in the Cooperative Agreement.<sup>137</sup> Assessment powers are meant to allow the Districts to assess their member municipalities for the cost of running the facility, but, instead, the Districts use them to increase tipping fees based upon the prior year's delivery of MSW to the incinerator.<sup>138</sup>

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130. N.H. REV. STAT. ANN. § 149-M:21 (1990).

131. VT. STAT. ANN. tit. 32, § 5952(a)(2) (1994). The tax rate is \$2.40 per cubic yard or \$6.00 per ton. VT. STAT. ANN. tit. 32, § 5952(a)(1) (1994).

132. Any facility owned and controlled by a solid waste district in New Hampshire is deemed to satisfy the public benefit criteria under which a facility is to be permitted. N.H. REV. STAT. ANN. § 149-M:10-c(VII) (Supp. 1995).

133. "Private facility" is defined as a facility "whose permit is held by an individual, partnership or corporation." N.H. REV. STAT. ANN. § 149-M:1(XIV) (Supp. 1995).

134. N.H. REV. STAT. ANN. § 149-M:22(II) (1990).

135. N.H. REV. STAT. ANN. § 149-M:1-a(V) (Supp. 1995).

136. *Sullivan*, 165 B.R. at 65.

137. *Id.* at 65-66 n.9.

138. *Id.* at 66.

### A. Solid Waste Disposal Costs

Opponents of the Project focus their criticisms on the poor administration of the Claremont incinerator and the Newport Ash Landfill.<sup>139</sup> Over \$500,000 has been spent as a direct result of litigation over those proposals.<sup>140</sup> In response to this opposition, the Project has been required: to construct wetlands to mitigate losses associated with construction of the Newport Ash Landfill; to ship the Newport Ash Landfill's leachate out of state even if a local facility is capable of receiving it; and to terminate the voluntary practice of accepting waste on behalf of Wheelabrator to allow the Project to meet its GAT from the spot market.<sup>141</sup>

The Compact was meant to reduce costs of solid waste management by creating economies of scale.<sup>142</sup> Still, sufficient numbers of communities must aggregate their wastes to attain that objective. Vermont's failure to enforce closure deadlines for unlined landfills, as required by RCRA, could prevent the Project from meeting its GAT<sup>143</sup> and therefore jeopardize the potential accomplishments of communities committed to the Project and the goal of responsible waste management.<sup>144</sup> Most Vermont communities joined the Project to comply with statutory deadlines, but those operating unlined landfills can still accept waste diverted from the waste-to-energy incinerator while benefitting from the high tipping fees collected under the Project.<sup>145</sup>

The Project has overcome a number of substantive and procedural hurdles in its effort to develop an economically and environmentally sound

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139. Opponents of the waste-to-energy incinerator monopolized hearings held by the Vermont Legislative Study Committee. Springfield Letter, *supra* note 123.

140. Letter from Allen Dusault, former Project Director, New Hampshire/Vermont Solid Waste Project to Vermont Governor Howard Dean, 7-8 (Feb. 2, 1994) [hereinafter Dusault/Dean Letter] (on file with author).

141. *Id.* at 8.

142. See *supra* note 113 and accompanying text. Under the WDA, as the total amount of MSW delivered to Wheelabrator's facility falls below the GAT, the total costs to the Project are projected to steadily increase. Memorandum prepared by Bower Rohr & Assocs., discussing the Alternatives for the New Hampshire/Vermont Solid Waste Project, at 1 (June 16, 1995) [hereinafter Bower Rohr & Assocs. Memo] (on file with author).

143. Springfield Letter, *supra* note 123.

144. See Resignation Letter of Allen Dusault, former Project Director, New Hampshire/Vermont Solid Waste Project, 3 (Feb. 1994) [hereinafter Resignation Letter] (on file with author). See *supra* note 90 and accompanying text (allowing certification of temporary facilities when necessary for the public welfare); VT. STAT. ANN. tit. 10, § 6605(c) (1993) (describing the procedures required for the extension of landfill closure deadlines); VT. STAT. ANN. tit. 10, § 6605(e) (1993) (describing closure extension orders).

145. Springfield Letter, *supra* note 123.

MSW management program. The Compact provides guidelines for the establishment of interstate agreements but it has been nearly impossible to establish an ash landfill in the midst of complex contract negotiations and a constantly changing regulatory atmosphere.<sup>146</sup> The Project has also made its own mistakes including: failing to secure legal counsel representing only its interests; hiring favoritism; voting on contractual issues without obtaining expert advice or ignoring available advice; and, most significantly, unwillingness to resolve difficult political decisions necessary to provide for long-term success.<sup>147</sup> The Project has also suffered from the excess charges of protracted litigation related to Stage I of the Newport Ash Landfill.<sup>148</sup>

The Executive Committee of the Project has been criticized both for making decisions without going to the Project members for authorization, and, conversely, for failing to take decisive action.<sup>149</sup> The technical, economic, political, and legal issues surrounding the Project are numerous and complex. It is not surprising that the Executive Committee, comprised entirely of volunteer members, is unable to develop an effective strategy to address the various problems which the Project faces.<sup>150</sup> One particularly problematic issue is the debt owed to Wheelabrator as the result of contractual agreements. Given the complexity of this problem, the Project is seeking to escape the debt load by reorganizing under Chapter 9.

### *B. The New Hampshire/Vermont Solid Waste Project Files for Bankruptcy*

In July 1993, Wheelabrator notified the Project that it would no longer accept solid waste from member municipalities due to outstanding debts.<sup>151</sup> On September 16, 1993, the Project filed for bankruptcy on liabilities totalling \$1.33 million.<sup>152</sup> Over \$1 million of this debt resulted from the Districts' default on Wheelabrator's service fees spanning a two-

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146. Resignation Letter, *supra* note 144, at 2; see also Springfield Letter, *supra* note 123.

147. Resignation Letter, *supra* note 144, at 2.

148. Dusault/Dean Letter, *supra* note 140, at 6.

149. Resignation Letter, *supra* note 144, at 4.

150. One former representative to the Project has criticized the inability of the Project to resolve its problems efficiently as the result of failure to adopt effective business practices. Memorandum from Tom Graves, former New Hampshire Representative to the Sullivan County Regional Refuse Disposal District, to the Representatives of the New Hampshire/Vermont Solid Waste Project (Feb. 28, 1994) (on file with author).

151. *Sullivan*, 165 B.R. at 67-68.

152. *Id.* at 64.

year period.<sup>153</sup> The court noted that the Districts could assess their member communities who in turn could raise the necessary revenues through taxation.<sup>154</sup> The Project filed for bankruptcy out of desperation; the municipalities shared the costs and responsibilities of MSW management and they felt that the contract with Wheelabrator did nothing but defeat their waste management purposes.<sup>155</sup> The Districts hoped to obtain neutral third party arbitration, consolidate negotiations of the debt owed to Wheelabrator with collateral debts, and prevent Wheelabrator from terminating their obligation to accept solid waste at the waste-to-energy incinerator.<sup>156</sup>

The contractual problems with Wheelabrator were connected to the high GAT which contractually had to be delivered to the Claremont incinerator.<sup>157</sup> The Districts could have assessed their member communities additional fees for insufficient delivery of waste in previous years but instead chose to meet their put-or-pay requirement by raising annual tipping fees.<sup>158</sup> This retroactive assessment worked for a while but eventually the tipping fees increased until they were among the highest in the country.<sup>159</sup> Higher tipping fees raise the cost of conducting business by increasing the costs associated with managing waste and consequently drive businesses to locate elsewhere.<sup>160</sup>

On September 15, 1993, the Districts tried to use their assessment powers to satisfy GAT shortfalls and service fees.<sup>161</sup> In accordance with

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153. "Wheelabrator gave clear and repeated notices of the increasing defaults." *Id.* at 67.

154. *Id.* at 66.

155. *See id.* at 71-72 (citing Letter from Allen Dusault, former Project Director, to Member Municipalities and Project Representatives (Sept. 20, 1993)). *See also supra* note 113 and accompanying text.

156. *Sullivan*, 165 B.R. at 71 (citing Letter from Allen Dusault, Member Municipalities and Project Representatives (Sept. 20, 1993)). The Project repeatedly tried to get Wheelabrator to agree to binding arbitration to resolve the conflict. Wheelabrator declined and instead demanded payment for services, without any set-offs, as an absolute contractual right under the WDA. *Id.* at 69-70. The Project was interested in off-setting the debt owed Wheelabrator with the over \$600,000 in receivables due the Project from Wheelabrator. Resignation Letter, *supra* note 144, at 1. The Project and Wheelabrator eventually adopted an accord to amend the WDA, lowering annual payments from the Project to Wheelabrator by \$1.2 million and reducing the GAT to 40,000 tons. Rick Jurgens, *Trash District OKs New Pact*, VALLEY NEWS, Jan. 11, 1996, at A1, A9; George Cahlink, *Vermont says yes: Project pact wins approval*, EAGLE TIMES, Jan. 12, 1996, at 1, 6.

157. Although the GAT was set at 47,500 tons, only 42,000 tons were being delivered to the waste-to-energy incinerator. *Sullivan*, 165 B.R. at 66.

158. *Id.*

159. *Id.*

160. The increased fees lead to what the court termed a "death spiral." *Id.* With increased fees, less waste is delivered to the waste-to-energy incinerator, with less waste being delivered, less revenues are raised. *Id.*

161. *Id.*

the Cooperative Agreement, the Project's Joint Committee Meeting raised a motion directing the two Districts to assess the member municipalities an amount proportional to the tonnage of waste they generate, not to exceed \$830,000.<sup>162</sup> The motion was rejected by the Joint Committee and by both Districts in separate meetings.<sup>163</sup> The next day, the Districts filed Chapter 9 petitions<sup>164</sup>

On October 27, 1993, New Hampshire filed an objection to the Sullivan County Regional Refuse Disposal District's Chapter 9 petition challenging the District's authorization to file for bankruptcy relief.<sup>165</sup> The Bankruptcy court rejected New Hampshire's objection, recognizing the Districts as "bod[ies] politic and corporate" with powers and duties similar to those of municipalities.<sup>166</sup>

The court found that pursuant to those powers, the Districts were "generally authorized" to file for bankruptcy under Chapter 9.<sup>167</sup> The Districts satisfied the insolvency requirement under the Bankruptcy Code but the court found that the Districts' failure to exercise their assessment

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162. *Id.* at 71.

163. *Id.*

164. *Id.* at 64. The total outstanding bonded indebtedness of the Project was \$4.95 million. *Id.*

Chapter 9 is available if a number of conditions exist. An entity can file and seek relief from debt if: it is an insolvent municipality "authorized" to be a debtor under state law and desires to resolve its debt problem. 11 U.S.C. §§ 109(c)(1)-(4) (1994). Additionally, the municipality must have attempted to negotiate in good faith with the majority of its credit holders, and be unable to continue negotiation because it is impracticable. 11 U.S.C. §§ 109(c)(5)(A)-(C) (1994). The creditor must also believe that a debtor will attempt to obtain a transfer which is avoidable under Section 547 of the Code. 11 U.S.C. § 109(c)(5)(D) (1994).

165. *Sullivan*, 165 B.R. at 64, 73 n.38.

166. *Id.* at 73-76. Under the Bankruptcy Code, municipality is defined as a "political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40) (1994).

The court avoided any consideration of the Project, which it termed a "nonentity." *Id.* at 64. The separation of powers doctrine, reflected in our Constitution, raises concerns about the bankruptcy court's finding that the Compact did not create a sovereign interjurisdictional agency. While Congress may delegate statutory authority to bankruptcy courts to resolve cases in accordance with statutory guidelines, these legislative courts do not have jurisdiction to decide constitutional issues. "[A] power definitely assigned by the Constitution to one department can neither be surrendered nor delegated by that department, nor vested by statute in another department or agency." *Williams v. United States*, 289 U.S. 553, 580 (1933) (emphasis omitted). See *Crowell v. Benson*, 285 U.S. 22 (1932). Both Article III courts and state courts have jurisdiction over cases on constitutional questions such as interpreting and enforcing an interstate compact. See generally *infra* Part V. The Supreme Court may also have original jurisdiction because a compact is an agreement between two or more states and the Supreme Court has jurisdiction over suits between states. U.S. CONST. art. III, § 2.

167. *Sullivan*, 165 B.R. at 73-74. Each District had been "generally authorized" to seek federal bankruptcy protection because they are able "to sue or be sued, to incur debts and bear the obligation to repay the debts, and to negotiate contracts which create obligations and debts." *Id.* at 74.

powers before the debt became unmanageable was a failure of the debtors to negotiate in "good faith" and to develop a payment plan before seeking relief.<sup>168</sup> A good faith bankruptcy filing comes as a last recourse, not as a "litigation tactic to hold off Wheelabrator's threatened shut-out" and to force a compromise.<sup>169</sup> Thus, the Districts' Chapter 9 bankruptcy petitions were denied.<sup>170</sup>

These bankruptcy proceedings cost the Project \$500,000.<sup>171</sup> Representatives of the Project voted to assess member towns in order to raise the \$1.1 million needed to pay Wheelabrator.<sup>172</sup>

### *C. Investigation of the New Hampshire/Vermont Solid Waste Project by the Vermont Attorney General*

On January 28, 1994, the Office of the Vermont Attorney General issued a memorandum on the WDA between the Vermont and New Hampshire Solid Waste Districts and Wheelabrator.<sup>173</sup> The purpose of the memorandum was to analyze the arguments which could be made to void the WDA.<sup>174</sup> The memorandum argued that the Vermont District did not

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168. *Id.* at 75-82. Insolvency is defined by the Bankruptcy Code as a failure to pay debts when due because of inability to pay or because the debt is the subject of a bona fide dispute. 11 U.S.C. § 101(32)(C) (1994). Under the premise that the ability to assess member communities is an asset, the court found that a District does not negotiate in good faith when it "chooses to ignore clear, unambiguous contractual rights of the other party and, more importantly, refuses to acknowledge or throw into the negotiating equations a large and significant asset that it holds." *Sullivan*, 165 B.R. at 78. Although the Project Director asserted that Wheelabrator refused to negotiate, the court found that Wheelabrator's unconditional right to payment precluded it from having to "negotiate against itself." *Id.* at 79 n.54.

169. *Id.* at 82. A court "may dismiss the petition [for bankruptcy] if the debtor did not file . . . in good faith: . . ." 11 U.S.C. § 921(c) (1994).

170. *Sullivan*, 165 B.R. at 83.

Municipalities that wish to come into bankruptcy under Chapter 9 . . . must, at a minimum, demonstrate that before filing they either used their assessment or taxing powers to a reasonable extent, or in their pre-petition negotiations have committed to the use of those powers as part of a comprehensive and appropriate work out of their financial problems.

*Id.*

171. Telephone Interview with Robert Watts, Interim Project Director, New Hampshire/Vermont Solid Waste Project (Sept. 21, 1994).

172. See N. Kelly, *N.H., Vt. Towns Face \$1.1M Bill*, BOSTON GLOBE, March 19, 1994, at 21. In 1995, the Project and Wheelabrator did reach agreement to wipe out \$1.2 million in unpaid service fees. Ed Ballam, *NH/VT District Strikes Deal: Wheelabrator Agrees To Erase \$1.2 Million of Disputed Charges*, VALLEY NEWS, Sept. 2, 1995, at A4.

173. Memorandum from Dinah Yessne, Office of the Attorney General, State of Vermont, to Charles Bristow, Legislative Council, on NH/VT Solid Waste Management Project Analysis (Jan. 28, 1994) [hereinafter Yessne Memo] (on file with author).

174. *Id.* at 1.

have the authority to enter into a contract.<sup>175</sup> When the District was formed, it was understood that the waste-to-energy facility would be owned and operated by the District.<sup>176</sup> Additionally, relying upon Vermont caselaw, the District was not authorized to enter into "speculative contracts that impose unconditional, long-term obligations in the face of 'if any' disclaimers."<sup>177</sup>

There are two arguments supporting the position that the Vermont District lacked authority to enter the WDA. First, the Compact authorizes interstate agreements allowing for the construction and maintenance of a waste-to-energy facility<sup>178</sup> but it does not allow municipalities from the two states to arrange to compensate a private third party for the construction of an incinerator.<sup>179</sup> Second, even if third party agreements were permissible, the agreement is void for not meeting Vermont's statutory requirements of intergovernmental agreements as authorized by the Compact.<sup>180</sup> Contrary to Vermont's procedural requirements for securing municipal bonds, public hearings were never held and voter approval of the WDA was never obtained.<sup>181</sup> The need to acquire voter approval is even more essential when the public taxing power is used as security against the risk that a private enterprise will fail.<sup>182</sup> In the alternative, even if the Vermont District had the authority to enter an unconditional obligation, the WDA was void because it delegated too much authority.<sup>183</sup> Based upon these arguments, a case could be made that the WDA contract was void.<sup>184</sup>

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175. *Id.* at 2, 5.

176. *Id.* at 5.

177. *Id.* at 6 (citing *State Dep't of Pub. Serv. v. Massachusetts Mun. Wholesale Elec. Co.*, 151 Vt. 73, 78, 558 A.2d 215, 218 (1988)).

178. VT. STAT. ANN. tit. 10, § 1222 (1984).

179. Yessne Memo, *supra* note 173, at 9.

180. "Agreements hereunder shall be adopted in accordance with existing statutory procedures for the adoption of intergovernmental agreements between municipalities within each state." VT. STAT. ANN. tit. 10, § 1223.C. (1993).

181. Yessne Memo, *supra* note 173, at 12, 13.

182. *Id.* at 14-28.

183. *Id.* at 36. "There is a deep rooted principle of law that 'the delegate of power from the sovereign cannot without permission recommit to another agent or agency the trust imposed upon its judgement and discretion.'" *Id.* (quoting *State Dep't of Pub. Serv.*, 151 Vt. at 81, 558 A.2d at 220).

184. *Id.* at 41. "[T]he nonenforcement of illegal contracts is a matter of common public interest . . . validity cannot be given to an illegal contract through any principle of estoppel. . . ." *Id.* (quoting *State Dep't of Pub. Serv.*, 151 Vt. at 91, 558 A.2d at 225 (citations omitted)). As this Note was going to publication the Vermont Attorney General's Office had filed a suit to invalidate the WDA between Wheelabrator and the fourteen Vermont communities because of the failure to obtain approval from each municipality for contract ratification. *Vt. Seeks to Void Wheelabrator Contract*, MANCHESTER UNION LEADER, May 30, 1996, at A5. Vermont District officials did not support the

In addition to concerns about the legality of the contractual agreements associated with the Project, there are two constitutional issues which must be analyzed to understand the legal status of the Project. First, the Project was formed through an interstate compact and therefore is subject to limitations different than those of a state or federal entity. Second, since Congress consented to the management of MSW on an interstate basis, the Project may not be subject to traditional Commerce Clause restrictions against the regulation of interstate commerce. The Commerce Clause is addressed in Part IV of this Note and interstate compacts are examined in Parts V and VI.

#### IV. INTERSTATE COMMERCE AND SOLID WASTE

The Commerce Clause may prohibit municipalities from directing private haulers to deliver solid waste to the Claremont incinerator.<sup>185</sup> Therefore it is necessary to understand how the Supreme Court has applied its dormant Commerce Clause analysis in analogous cases.

##### A. Commerce Clause Analysis

The United States Constitution grants Congress the power to regulate interstate commerce.<sup>186</sup> The Commerce Clause was designed to prevent states from engaging in interstate protectionism.<sup>187</sup> To further this goal, the language of the Constitution has been interpreted to have an inverse application, such that the dormant Commerce Clause prevents states from discriminating against articles of interstate commerce based upon their origin.<sup>188</sup> The dormant Commerce Clause "prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.'"<sup>189</sup> States lack

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Attorney General's action. *Id.*

185. O'Halloran Letter, *supra* note 12.

186. The United States Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

187. "The Framers [of the Constitution] granted Congress plenary authority over interstate commerce in 'the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" Oregon Waste Sys., Inc. v. Department of Env'l. Quality, 114 S. Ct. 1345, 1349 (1994) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)).

188. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

189. Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 504 U.S. 353, 359 (1992) (quoting H.P. Hood & Sons, Inc. v. Du Mond, Inc. 336 U.S. 525, 535 (1949)). Justice Frankfurter was the first Supreme Court justice to adopt the term 'dormant Commerce Clause' in

the "power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State."<sup>190</sup>

The Supreme Court has, however, recognized exceptions to dormant Commerce Clause restrictions on the states' ability to control interstate commerce. First, the Constitution authorizes Congress to regulate interstate commerce and, in turn, Congress may allow states to exercise that power.<sup>191</sup> Second, states are permitted to control interstate commerce when they additionally act as market participants and not only as regulators of the market.<sup>192</sup>

When Congress has not given a state the power to regulate interstate commerce, and a state regulation restricts such trade, a distinction is drawn between intentional and incidental discrimination.<sup>193</sup> If the discrimination is intentional, it is unlawful, unless the state can demonstrate that the act serves a legitimate local purpose which could not be served as well by available, non-discriminatory methods.<sup>194</sup> If the regulation is not unlawful on its face but is only incidentally discriminatory, then the Court questions whether the local benefits of the regulation outweigh any burden on interstate commerce.<sup>195</sup> Whether the discrimination is intentional or incidental, "the critical consideration is the overall effect of the statute on both local and interstate activity."<sup>196</sup>

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reference to the impact of the Commerce Clause on state regulations even absent an act of Congress. See *Hill v. Florida ex rel. Watson*, 325 U.S. 538, 547-48 (1945) (Frankfurter, J., dissenting).

190. *City of Philadelphia*, 437 U.S. at 627 (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928)). "The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests." *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1683 (1994).

191. "Congress may use its powers under the Commerce Clause to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy.'" *New England Power Co. v. New Hampshire*, 455 U.S. 331, 340 (1982) (quoting *Lewis v. BT Investment Managers, Inc.* 477 U.S. 27, 44 (1980)). See *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (finding that a state tax on out of state business, when no such tax was levied on state firms, was not a violation of the Commerce Clause when such action had been consented to by Congress).

192. "[I]f a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984).

193. *Oregon Waste Sys.*, 114 S. Ct. at 1350.

194. *Maine v. Taylor*, 477 U.S. 131, 138 (1982).

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

196. *Brown-Forman Distillers Corp. v. New York Liquor Auth.*, 476 U.S. 573, 579 (1986).

The analytical differences between the Supreme Court's analysis of intentional and incidental discrimination is at best minimal. When the Court determines that a regulation is intentionally or facially discriminatory, it is per se invalid unless the state can show overriding legitimate state interests. See *supra* notes 193-95 and accompanying text. When the Court has determined that the

Although economic protectionism is not a legitimate basis on which to discriminate against interstate commerce,<sup>197</sup> the preservation of public health and safety may be a sufficient justification.<sup>198</sup> Regulation of a resource to protect the public health is an appropriate and legitimate use of a state's police power.<sup>199</sup> Still, not all legitimate exercises of state power survive judicial review under the Commerce Clause. Given a legitimate state purpose, the method of regulating interstate commerce must be carefully crafted to ensure that the burden on interstate commerce is minimal.<sup>200</sup> The onus is on the state to establish that there are no alternative, less-restrictive means to achieve this legitimate purpose.<sup>201</sup>

### B. Commerce Clause Waste Cases

The Supreme Court has clarified its dormant Commerce Clause analysis through a series of cases dealing with solid waste.<sup>202</sup> In the first case, *City of Philadelphia v. New Jersey*, the Court found that the state regulation of solid waste, an article of interstate commerce, was subject to review under the Commerce Clause.<sup>203</sup> The regulation at issue was a New Jersey statute which prohibited the importation of "solid and liquid

discrimination is incidental, it has applied what has commonly been referred to as the *Pike* balancing test. See *infra* note 200 and accompanying text. The only obvious distinction between the two analyses is that intentionally discriminatory regulation will fail if any alternatives exist while incidentally discriminatory regulations will fail if less discriminatory alternatives exist.

197. "[O]ne state in its dealings with another may not place itself in a position of economic isolation." *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

198. "The Court generally defers to health and safety regulations because 'their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.'" *C & A Carbone*, 114 S. Ct. at 1689 (O'Connor, J., concurring) (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978)).

199. *Sporhase v. Nebraska*, 458 U.S. 941, 958 (1982).

200. "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." *Pike*, 397 U.S. at 142.

201. "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." *Id.*

202. It should be noted that the Supreme Court has had to address issues related to waste as far back as 1905. See *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) (finding that state police powers, and the public benefits conferred by disposal of waste, outweighed any personal property interest in waste); *Gardner v. Michigan*, 199 U.S. 325 (1905) (same).

203. "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." *City of Philadelphia*, 437 U.S. at 622.

waste . . . which originated or was collected outside the State . . . ."<sup>204</sup> The New Jersey statute was based upon the state's police power.<sup>205</sup> The Court did not reach the question of whether or not the purpose of the statute—to protect the quality of the New Jersey environment—was legitimate. The Court concluded that the statute violated the Commerce Clause because New Jersey's purpose was deemed discriminatory on its face and in its effect.<sup>206</sup> Even if landfill space is a scarce natural resource, a state may not "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade."<sup>207</sup> It is not the transportation of waste which poses a threat but its disposal in landfills, and once disposed, there is "no basis to distinguish out-of-state waste from domestic waste."<sup>208</sup>

The *City of Philadelphia* decision remained the only modern Supreme Court case dealing with waste and interstate commerce until 1992. Between 1992 and 1994, the Supreme Court decided four cases involving these issues. The decision in the first of these cases, *Chemical Waste Management, Inc. v. Hunt*, mirrored the reasoning applied in *City of Philadelphia*.<sup>209</sup> The Supreme Court invalidated a state regulation, assessing higher fees for disposal of out-of-state hazardous waste than for the disposal of domestic hazardous waste at a commercial hazardous waste landfill.<sup>210</sup> The Supreme Court found that the means chosen by the State to protect public health was not legitimate<sup>211</sup> and that the fee was facially

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204. *Id.* at 618.

205. "[T]he public health, safety and welfare require that treatment and disposal within the State of all wastes generated outside the State be prohibited." *Id.* at 625. A "police power regulation[] must be substantially related to the advancement of the public health, safety, morals, or general welfare." *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting) (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

206. "[W]hatever 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." *City of Philadelphia*, 437 U.S. at 626-27.

207. *Id.* at 628. "New Jersey may pursue [economic protectionism or save remaining open lands from pollution] by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." *Id.* at 626.

208. *Id.* at 629. It should be noted that it is conceivable that any waste delivered to a solid waste facility may contain hazardous waste. Out-of-state waste has the potential to be more lethal than domestic waste either because a hauler is trying to escape more stringent enforcement regulations elsewhere or the waste disposal facility is less discriminating in its inspection of the solid waste it receives.

209. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992).

210. *Id.* at 348.

211. "No State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Id.* at 339-40.

discriminatory against out-of-state commerce.<sup>212</sup> The fee was deemed facially discriminatory because even though hazardous waste is "inherently dangerous to human health and safety,"<sup>213</sup> the risks to be born by the state do not vary with the waste's state of origin.<sup>214</sup> While Alabama claimed that the additional fee was necessary to achieve a legitimate state interest,<sup>215</sup> it failed to establish that there were no less discriminatory alternatives such as: an across-the-board fee on all hazardous waste, a per-mile tax on vehicles transporting such wastes, or an even-handed cap on all tonnage landfilled.<sup>216</sup>

The next interstate commerce waste case is the companion case to *Chemical Waste Management, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*.<sup>217</sup> The Court found that a waste import restriction within Michigan's Solid Waste Management Act impermissibly discriminated against interstate commerce. The waste import restriction prohibited the disposal of solid waste in any county landfill from another county, state, or country unless explicitly authorized by the receiving county's solid waste management plan.<sup>218</sup> The Court expanded upon *City of Philadelphia* determination that solid waste was an item of interstate commerce, holding that this impediment to solid waste disposal services impermissibly restricted an item of interstate commerce.<sup>219</sup> Additionally, the Court found that even though the restriction targeted waste from other counties within Michigan and thus applied to both intrastate and interstate commerce, the restriction on

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212. "The Act's additional fee facially discriminates against hazardous waste generated in States other than Alabama . . . . Such burdensome taxes imposed on interstate commerce alone are generally forbidden: '[A] State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Id.* at 342 (quoting *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984)) (alteration in original).

213. *Id.* at 337.

214. *Id.* at 343-44.

215. Alabama claimed that the regulation was necessary for: the health and safety of its citizens, conservation of the environment and natural resources, revenue to compensate the state for costs and burdens of taking the wastes for other states, and the reduction of risks to citizens from the transport of hazardous waste within the state. *Id.* at 343.

216. *Id.* at 344-45.

217. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992).

218. *Id.* at 357.

219. "Whether the business arrangements between out-of-state generators of waste and the Michigan operator of a waste disposal site are viewed as 'sales' of garbage or 'purchases' of transportation and disposal services, the commercial transactions unquestionably have an interstate character." *Id.* at 359.

interstate commerce was unconstitutional.<sup>220</sup> This waste import restriction permitted each county to isolate itself from interstate commerce and protected local waste producers against competition from local waste producers.<sup>221</sup> The state and the county failed to show that no less discriminatory alternatives existed to further public health and safety concerns.<sup>222</sup> The Supreme Court was now well-alerted to the invalidity of regulations seeking to discriminate against solid waste because of its origin.<sup>223</sup>

In *Oregon Waste Systems v. Department of Environmental Quality*, the Supreme Court invalidated a surcharge on the disposal of out-of-state waste.<sup>224</sup> The Court found that the surcharge was facially discriminatory and therefore subject to strict scrutiny.<sup>225</sup> Oregon failed to show that it cost more to dispose of out-of-state waste or that public health or safety concerns justified the discrimination between out-of-state and in-state waste.<sup>226</sup> Oregon instead provided two justifications for the surcharge, characterizing it as either a compensatory tax or as a means of resource protectionism.<sup>227</sup> Neither explanation survived the scrutiny of the Court's dormant Commerce Clause analysis. A facially discriminatory interstate compensatory tax must impose "an identifiable and 'substantially similar'

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220. "[A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Id.* at 361.

221. *Id.*

222. *Id.* at 366. Michigan and the county claimed that the Waste Import Restrictions enable counties to make adequate plans for the safe disposal of future wastes. "[A]ccurate forecasts about the volume and composition of future waste flows may be an indispensable part of a comprehensive waste disposal plan, [and this objective must be attained] without discriminating between in- and out-of-state waste." *Id.* at 366-67.

223. "There is . . . no valid health and safety reason for limiting the amount of waste that a landfill operator may accept from outside the State, but not the amount the operator may accept from inside the State." *Id.* at 367.

224. *Oregon Waste Sys.*, 114 S. Ct. at 1355. The "surcharge" was a fee charged to "every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site." *Id.* at 1348 (quoting OR. REV. STAT. § 459.297(1) (1991)). The legislature directed the Oregon Environmental Quality Commission to set the fee "based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for" under specified statutes." *Id.* (quoting OR. REV. STAT. § 459.298 (1991)). In addition, the legislature set a fixed fee that would be assessed against in-state and out-of-state waste. If the surcharge survived an expected judicial challenge, the out-of-state shippers would be reimbursed for the fixed fee and only the in-state users would be assessed. *Id.*

225. *Id.* at 1351.

226. *Id.*

227. *Id.* at 1350-51, 1353-54.

tax on intrastate commerce" to comply with the Commerce Clause.<sup>228</sup> In addition, the tax must be levied on "substantially equivalent events."<sup>229</sup> The Court held that a state may not reserve its non-essential natural resources for its own inhabitants when the resource shortage is common to all states.<sup>230</sup>

The last case in the quintet of commerce clause waste cases is *C & A Carbone, Inc. v. Town of Clarkstown*.<sup>231</sup> In *Carbone*, the Supreme Court held that a town regulation controlling the flow of solid waste was designed to regulate and impermissibly discriminate against interstate commerce.<sup>232</sup> The town contracted for the construction of a solid waste transfer station to separate recyclables from non-recyclables.<sup>233</sup> In exchange for construction of the facility, Clarkstown agreed that a GAT would be delivered to the waste facility through a put-or-pay provision.<sup>234</sup> Clarkstown also agreed to allow the contractor to charge a tipping fee to haulers that exceeded the disposal costs on the private market.<sup>235</sup> To achieve its GAT, Clarkstown passed a flow control ordinance requiring all material recovery facilities to bring all non-recyclable and non-hazardous residue to the town-contracted facility.<sup>236</sup>

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228. *Id.* at 1352. The Court alludes to a different analysis, as a user fee, if the "charge[s] were] imposed by the State for the use of state-owned or state-provided . . . facilities and services." *Id.* at 1352 n.6 (quoting *Edison Co. v. Montana*, 453 U.S. 609, 621 (1981)). In the end, the Court states that "[even] as a user fee, it could not be sustained as such, given that it discriminates against interstate commerce." *Id.*

229. *Id.* at 1353.

230. *Id.* at 1354.

231. *C & A Carbone*, 114 S. Ct. at 1677.

232. *Id.* at 1684. "Flow control is an attempt to capture or hoard the waste generated within the state for use by designated waste facilities to assure that these facilities receive a sufficient waste stream to be financially viable." Sidney M. Wolf, *Article: The Solid Waste Crisis: Flow Control And The Commerce Clause*, 39 S.D. L. Rev 529, 532 (1994) (citation omitted).

233. *C & A Carbone*, 114 S. Ct. at 1680.

234. *Id.*

235. *Id.*

236. *Id.* at 1680-81. "All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility . . . ." *Id.* at 1686 (quoting TOWN OF CLARKSTOWN LOCAL LAW NO. 9 § 3(C) (1990)). Acceptable Waste is defined as "[a]ll residential, commercial and industrial solid waste as defined by New York State Law, and Regulations, including Construction and Demolition Debris. Acceptable Waste shall not include Hazardous Waste, Pathological Waste or sludge." *Id.* at 1684 (quoting TOWN OF CLARKSTOWN LOCAL LAW NO. 9 § 1 (1990)) "It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code." *Id.* at 1687 (quoting TOWN OF CLARKSTOWN LOCAL LAW NO. 9 § 5(A) (1990)).

Justice Kennedy, writing for the Court, found that the ordinance fostered economic protectionism by facially discriminating against interstate commerce and, therefore, was subject to strict scrutiny.<sup>237</sup> The ordinance had "economic effects that [were] interstate in reach" because it raised "the costs for out-of-state interests to dispose of their solid waste."<sup>238</sup> Additionally, the ordinance prevented out-of-state interests from competing in Clarkstown's market for solid waste disposal.<sup>239</sup> Although this law did not discriminate against waste due to its origin, it discriminated against MSW services.<sup>240</sup> Clarkstown relied upon a private contractor to supply disposal services for its MSW, and thus could not regulate the flow of MSW for the benefit of that contractor.<sup>241</sup> Therefore, the town had less-discriminatory means to regulate in order to protect public health and promote environmental safety.<sup>242</sup> Moreover, the town could have used general taxes or municipal bonds to achieve the legitimate purpose of financing its transfer station.<sup>243</sup>

In a concurring opinion, Justice O'Connor held that the local ordinance discriminated evenhandedly against local and out-of-state competitors.<sup>244</sup> The local interest in ensuring proper waste disposal is legitimate,<sup>245</sup> but the town's ordinance sought to ensure financial viability<sup>246</sup> and only incidentally provide for public health and safety. Ensuring financial viability of an MSW facility is a significant local interest but it

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237. *C & A Carbone*, 114 S. Ct. at 1682. Under a strict scrutiny dormant Commerce Clause analysis, the municipality has the burden of establishing that there are legitimate local interests and that there are no other means available to advance that interest. See *supra* notes 193-201 and accompanying text. In each of the five Commerce Clause waste cases the Supreme Court has found that the legislation at issue, banning or restricting the free movement of solid waste across borders, was facially discriminatory.

238. *C & A Carbone*, 114 S. Ct. at 1681.

239. *Id.*

240. *Id.* at 1682-83.

241. "[H]aving elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State." *Id.* at 1684.

242. *Id.* at 1683.

243. *Id.*

244. *Id.* at 1689. "Local Law 9 'discriminates' evenhandedly against all potential participants in the waste processing business, while benefitting only the chosen operator. . . ." *Id.* (O'Connor, J., concurring). In addition to benefitting a chosen operator it should be acknowledged that the Town of Clarkstown also benefitted from Local Law No. 9. *Id.*

245. "The local interest in proper disposal of waste is obviously significant . . . [T]he town could ensure proper processing by setting specific standards with which all the town processors must comply." *Id.* at 1690.

246. *Id.* Justice O'Connor noted that, "[t]he town could finance the project by imposing taxes, by issuing municipal bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities." *Id.*

is not an interest "that can justify discrimination against interstate commerce."<sup>247</sup> The municipality could have used its power of taxation to achieve financing with "a less dramatic impact on the flow of goods."<sup>248</sup>

Justice O'Connor also addressed practical considerations regarding flow control of MSW. Twenty or more states authorize municipal flow control ordinances<sup>249</sup> and if those powers were exercised, the country would face the type of Balkanization in restricted commerce that the Commerce Clause is meant to prevent.<sup>250</sup> If flow control regimes became pervasive, they could cause interstate conflicts, restricting the movement of waste between jurisdictions.<sup>251</sup> Under RCRA, "Congress expected local governments to implement some form of flow control" but that statute gives the EPA sole authority to "secure the supply of waste."<sup>252</sup> EPA has determined that state solid waste management plans should prevent local governments from restricting the movement of solid waste.<sup>253</sup> Without explicit congressional authorization of flow control, the burden on interstate commerce is excessive in relation to the putative local benefits.<sup>254</sup>

In sum, the solid waste Commerce Clause cases perpetuate the general prohibition against state regulation of articles in interstate commerce. The Court has repeatedly reaffirmed that solid waste and disposal services are items of interstate commerce against which a state or political subdivision may not discriminate.<sup>255</sup> Although the Court refuses to allow intentional state discrimination against interstate commerce in order to protect natural

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247. *Id.* at 1684.

248. *Id.* at 1690.

249. "The Petitioners' Brief listed 27 states which authorized flow control." Wolf, *supra* note 232, at 536 n.50 (citing Brief for the Petitioners, *C & A Carbone, Inc. v. Town of Clarkstown*, (No. 92-1402)). "According to EPA, 35 states have laws authorizing their political subdivisions to use flow control." David E. Bonior, *Local Government Flow Control Act: H.R. 4683*, WIIIP ADVISORY, Sept. 29, 1994. While New Hampshire does not have a flow control ordinance, Vermont does. It reads as follows: "If an area to be served is subject to a duly adopted flow control ordinance, the entity that adopted the flow control ordinance . . . shall specify the facility or facilities which must be the recipient of the waste from that area." VT. STAT. ANN. tit. 10, § 6607a(a) (1993 & Supp. 1995).

250. *C & A Carbone*, 114 S. Ct. at 1690 (O'Connor, J., concurring) (citing *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525, 537-38 (1949)).

251. *Id.* at 1690. "Nondiscriminatory state or local laws which actually conflict with the enactments of other States are constitutionally infirm if they burden interstate commerce." *Id.* (citing *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-30 (1959)).

252. *Id.* at 1692 (citing 42 U.S.C. § 6948(d)(3)(C)).

253. *Id.* "EPA has stated in its implementing regulations that the 'State plan should provide for substate cooperation and policies for free and unrestricted movement of solid . . . waste across State and local boundaries.'" (quoting 40 C.F.R. § 256.42(h) (1993)). *But see* DECISION-MAKERS GUIDE, *supra* note 2, at 74. "Flow control ordinances can be designed to encourage recycling and to ensure a steady flow of materials to municipal solid waste combustion facilities." *Id.*

254. *Id.*

255. *See*

resources.<sup>256</sup> Some opinions suggest a tendency to view solid waste management laws as only incidental discrimination.<sup>257</sup> The Court's analysis of intentional and incidental discrimination is almost identical, however, but even an apparent semantic change may indicate the Court's willingness to facilitate state and municipal regulation of solid waste. A relaxed level of scrutiny will not ensure added constitutional viability of solid waste regulations, but local industries interested in sound regulation of solid waste may provide legitimate local interests which outweigh incidental burdens on interstate commerce.<sup>258</sup>

While the interstate commerce waste cases address municipal, county, and state regulations of solid waste, they have not addressed the regulation of solid waste under an interstate compact. Waste regulation under interstate compacts may have a stronger likelihood of surviving Commerce Clause challenges.

#### V. CONSTITUTIONAL IMPLICATIONS OF AN INTERSTATE COMPACT

The Compact is a unique effort to manage solid waste.<sup>259</sup> As an interstate compact, it is authorized by Congress and may not be susceptible to a Commerce Clause challenge.<sup>260</sup> This result may depend on the judicial interpretations of operational mechanisms of interstate compacts.

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256. "[A] State's power to regulate . . . [a resource] for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of the police power." *Sporhase*, 458 U.S. at 956. A state should be able to "take actions legitimately directed at the preservation of the State's natural resources, even if those actions incidentally work to disadvantage some out-of-state waste generators." *Chemical Waste Management*, 504 U.S. at 349 (Rehnquist, C.J., dissenting).

257: Chief Justice Rehnquist stated that a restriction on the flow of solid waste to preserve the state's natural resource is valid even if it has an incidental impact on interstate commerce. *Chemical Waste Management*, 504 U.S. at 349 (Rehnquist, C.J., dissenting). Even though Justice O'Connor found that the discrimination in *C & A Carbone* was unconstitutional, she found the regulation was not facially invalid because it did not discriminate on the basis of the origin of waste. *C & A Carbone*, 114 S. Ct. at 1689 (O'Connor, J., concurring). In dissent, Justice Souter stated in *C & A Carbone* that the ordinance did not facially discriminate on the basis of origin and therefore should be subject to the 'softer' standard of *Pike v. Bruce Church*. *Id.* at 1698-99 (Souter, J., dissenting) (citing *Pike*, 397 U.S. at 142). Since Justice Blackmun, who joined the Chief Justice in dissenting in the last three interstate commerce solid waste cases, has left the Court, it remains to be seen how Justices Breyer and Ginsberg will interpret future solid waste or natural resource commerce clause cases.

258. See *Fort Gratiot*, 504 U.S. at 372 (Rehnquist, C.J., dissenting); see also *C & A Carbone*, 114 S. Ct. at 1696-97 (Souter, J., dissenting) (characterizing the sole economic beneficiary of the regulation as the agency facilitating the municipality's fulfillment of its duties).

259. "This is the first interstate compact under the Resource Conservation and Recovery Act of 1976, . . ." H.R. REP. NO. 724, 97th Cong., 2d Sess. 26 (1982).

260. See *supra* note 191 and accompanying text.

Interstate compacts provide a means for the resolution of conflicts between two or more states.<sup>261</sup> They are a device whereby interstate problems that exceed the remedial resources of any one state can be resolved through joint action.<sup>262</sup> Interstate compacts have been developed to deal with many issues including: energy conservation, nuclear waste, taxation, transportation, fisheries, flood control, corrections, and mass transit.<sup>263</sup>

The United States Constitution provides the authority for interstate compacts.<sup>264</sup> Any interstate compact that affects the political balance of the federal system or encroaches upon an area delegated to the federal government must receive congressional consent in order to be enforceable.<sup>265</sup> Congressional consent need not be obtained when an interstate compact is an arrangement which does not bind a state or create powers in a third level of government that the member states did not possess independently.<sup>266</sup> Congressional consent need not be explicit, as it may be implied from acts of Congress.<sup>267</sup>

"[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause."<sup>268</sup> This language implies that a compact is federal law, but the Supreme Court has held that a compact is only federal law for the purposes of United States Supreme Court jurisdiction.<sup>269</sup> Although early decisions of the Supreme Court imply that Congress lacked the power to

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261. Kevin J. Heron, *The Interstate Compact In Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 ST. JOHN'S L. REV. 1, 1 (1985).

262. *Id.* at 2 n.7 (citing Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study In Interstate Adjustments*, 34 YALE L.J. 685, 729 (1925)).

263. *Id.* at 2.

264. "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . ." U.S. CONST. art. 1, § 10, cl. 3.

265. *Id.*

266. See *United States Steel Corp. v. Multistate Tax Commission*, 452 U.S. 452, 473 (1978).

267. See *Virginia v. Tennessee*, 148 U.S. 503, 522 (1893) (holding that Congress's long-term implicit acknowledgment of the border between Tennessee and Virginia satisfied the congressional assent requirement of the Compact Clause).

268. *Cuyler Correctional Superintendent v. Adams*, 449 U.S. 433, 440 (1981). *But See* FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* 7 (1976). "While a dispute over the interpretation of an interstate compact raises a federal question such as may be determined in the federal courts, a compact itself is not federal law even where an act of Congress consenting thereto sets forth the text of the compact being approved." *Id.* (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)).

269. See *Delaware River Joint Toll Bridge Comm'n v. Colburn*, 310 U.S. 419 (1940).

permit state regulation of interstate commerce,<sup>270</sup> in more recent decisions, the Court has held that Congress can grant state cooperatives the authority to regulate interstate commerce.<sup>271</sup> The existence of an interstate compact does not, however, indicate that Congress consents to unreasonable burdens on interstate commerce.<sup>272</sup>

## VI. APPLICATION OF THE INTERSTATE COMPACT TO SOLID WASTE: THE NEW HAMPSHIRE/VERMONT SOLID WASTE PROJECT

Although RCRA directs states to develop and implement strategies for the management of MSW,<sup>273</sup> an act providing for state authority over a resource "is in no sense an affirmative grant of power to the state to burden interstate commerce."<sup>274</sup> Congress can restrict the movement of MSW but states can not regulate MSW without congressional consent.<sup>275</sup> This Part addresses whether the Compact, passed pursuant to RCRA, gives New Hampshire and Vermont the authority to regulate interstate commerce.

The Compact provides that "[n]othing contained in the compact . . . shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of the agreement."<sup>276</sup> Nothing in the legislation authorizing the Project expressly incorporates congressional powers, but the Compact may

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270. See *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. 299, 300 (1851). *But see Florida v. Georgia*, 58 U.S. 478, 494 (1854) (finding that Congress has continuing authority and interest in interstate compacts in order "to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others"). A compact cannot "operate as a restriction upon the power of congress under the constitution to regulate commerce among the several States. . . . Otherwise congress and two States would possess the power to modify and alter the constitution itself." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 433 (1855).

271. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

272. "[T]he fact that Congress has . . . been willing to let the States settle their differences [and arguably to develop regional strategies to common problems] . . . through mutual agreement [does not] constitute[] persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce." *Sporhase v. Nebraska*, 458 U.S. 941, 960 (1982) (footnote omitted).

273. See *supra* note 106 and accompanying text. The one restriction which is placed upon the creation of solid waste interstate compacts is that they must be approved by both the EPA and Congress. 42 U.S.C. § 6904(b).

274. *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) (citation omitted).

275. "Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement." *City of Philadelphia*, 437 U.S. at 622-23.

276. *New Hampshire/Vermont Solid Waste Compact*, Pub. L. No. 97-278, art. III, § 2, 96 Stat. 1207, 1209 (1982).

have sufficient substance to prevent the inverse condemnation of interstate regulations under the dormant Commerce Clause.

Interstate agencies established by compact are organs of the party governments which may receive and exercise power as well as appropriate and expend revenues.<sup>277</sup> Historically, compacts were used to resolve conflicts between states,<sup>278</sup> but today they often address problems common to participating states.<sup>279</sup> Some modern compacts establish interjurisdictional cooperative agreements and rely on existing state agencies for implementation, while others establish interjurisdictional administrative bodies.<sup>280</sup> The interjurisdictional body can serve an advisory function or may possess independent authority.<sup>281</sup> The Compact was intended to create a cooperative working agreement between Vermont and New Hampshire; however, only the language of the compact, its legislative history, and the existing arrangements determine whether the Project is vested with independent authority. The dormant Commerce Clause analysis may turn on the issue of whether the Project has interjurisdictional authority or merely provides for cooperation among regional solid waste districts.

The Compact authorizes cooperative agreements between two or more municipalities in New Hampshire and Vermont,<sup>282</sup> but does not delegate interjurisdictional authority to the Project. As the House Report states, "[t]he compact establishes procedures and conditions governing cooperative agreements for solid waste disposal."<sup>283</sup> Future cooperative agreements promulgated in compliance with the Compact must establish an administrative body.<sup>284</sup> Nevertheless, the selection of the Executive Board from municipal representatives in New Hampshire and Vermont as

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277. ZIMMERMANN & WENDELL, *supra* note 268, at 11.

278. Heron, *supra* note 261, at 7.

279. ZIMMERMANN & WENDELL, *supra* note 268, at 40-44. Compacts have also been categorized based upon their power and authority as either technical, analytical, or operative. RICHARD H. LEACH & REDDING S. SUGG, JR., *THE ADMINISTRATION OF INTERSTATE COMPACTS* 18-20 (1959).

280. ZIMMERMANN & WENDELL, *supra* note 268, at 44-46; Note, *Congressional Supervision of Interstate Compacts*, 75 *YALE L.J.* 1416, 1425-29 (1966).

281. ZIMMERMANN & WENDELL, *supra* note 268, at 44-46.

282. New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, art. II, § A, 96 Stat. 1207, 1208 (1982).

283. H.R. REP. No. 724, 97th Cong., 2d Sess. 2 (1982).

284. "Agreements entered into pursuant to this compact shall . . . [p]rovi[de] for a joint board and/or administrator, responsible for administering the cooperative undertaking and the powers to be exercised thereby." New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, art. II, § E, 96 Stat. 1207, 1209 (1982). If omission is any indication of intent, there is little likelihood that this agreement can be perceived as creating an agency or commission with an advisory capacity.

well as the holding of joint meetings, suggest that an interjurisdictional administrative body has taken shape.

Although the bankruptcy court held that the Project is not a political body with sovereign authority, but only two cooperating districts,<sup>285</sup> that is not clearly the case. The legislative history for the Compact does suggest such a limitation in its deference to state law for contract agreements and approval of solid waste management plans.<sup>286</sup> The Compact may not explicitly provide for the establishment of a body politic with independent authority, but it does stipulate that all municipalities will be represented on a joint board with designated powers.<sup>287</sup> The establishment of joint board meetings may indicate an intent to create an autonomous agency.<sup>288</sup>

Additionally, agencies with interjurisdictional authority have "financial, operational and construction powers" including the authority to develop and administer joint public works and facilities.<sup>289</sup> The Compact certainly provides such powers.<sup>290</sup> Indeed, one important indicator of independent, interjurisdictional authority is an ability to appropriate and spend money. The Project cannot appropriate funding directly. The House Report acknowledges that the Compact "does not directly provide budget authority."<sup>291</sup> Yet the language of the Compact states that subsequent agreements must provide for appropriation and spending authority.<sup>292</sup> Moreover, the Project clearly appropriates funding indirectly through assessments on community members.<sup>293</sup>

New Hampshire argued that State law prevented the Sullivan County Regional Refuse Disposal District from filing for bankruptcy,<sup>294</sup> but the

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285. See *supra* note 166.

286. "The adoption of agreements and the approval of plans are to be governed by the law of each state." H.R. REP. No. 724, 97th Cong., 2d Sess. 2 (1982).

287. New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, art. II, § E, 96 Stat. 1207, 1209 (1982).

288. "[T]he voting arrangements by which decisions [are made] are a significant indication of administrative strength." ZIMMERMANN & WENDELL, *supra* note 268, at 49 (citing WALLACE R. VAWTER, INTERSTATE COMPACTS—THE FEDERAL INTEREST 14-16 (1954)).

289. ZIMMERMANN AND WENDELL, *supra* note 279, at 46.

290. "Any two or more municipalities, one or more located in [each State] may enter into cooperative agreements for the construction, maintenance, and operation of a . . . facility." New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, art. II, § A, 96 Stat. 1207, 1208 (1982).

291. H.R. REP. No. 724, 97th Cong., 2d Sess. 3 (1982).

292. The Agreements shall contain "[t]he manner of financing the cooperative undertaking and establishing a budget . . ." New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, art. II, § E, 96 Stat. 1207, 1209 (1982).

293. See *supra* note 116 and accompanying text.

294. See *supra* note 166 and accompanying text.

New Hampshire Governors Council rejected all responsibility for debts from the Project.<sup>295</sup> Given that the establishment of an administrative agency with budgetary authority arises from the passage of an additional agreement, it is unclear from the language or the legislative history of the Compact whether or not the administrative body is an agency with interjurisdictional authority. Yet provisions in the original Compact which allow for the exercise of necessary powers and provide for future conditions must govern.<sup>296</sup>

This federal question must be resolved by looking to state law as well as the language of the Compact and policy considerations.<sup>297</sup> While state and federal courts and state governments may wish to limit recognition of interjurisdictional agencies, participating municipalities and their citizens prefer to view the Project as an interjurisdictional agency that is not only accountable to the federal government but also to those forced to fund its operation.

## VII. RECENT LEGISLATIVE ACTION

As a result of the controversy surrounding the Project, both New Hampshire and Vermont have passed legislation which will influence the future of the Project. The federal courts' interpretation of the relationship between solid waste disposal and interstate commerce will also impact on the Project's authority to regulate solid waste. Congress has introduced legislation that would allow for the increased regulation of solid waste despite the Commerce Clause.

### A. Federal Flow Control Proposals

In *C & A Carbone v. Town of Clarkstown*, Justice O'Connor's concurring opinion held that it was constitutionally permissible for Congress to enact legislation that would make flow control ordinances comply with the strictures of the Commerce Clause.<sup>298</sup> Although such legislation was introduced and passed in the House of Representatives

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295. Yessne Memo, *supra* note 173, at 26 (citing Resolution of the Governor of New Hampshire and his Council under RSA 162-I:9 (June 26, 1985)).

296. See ZIMMERMANN & WENDELL, *supra* note 268, at 10-11.

297. "[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express term." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

298. "Should Congress . . . enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to that legislative judgement." *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1692 (1994) (O'Connor, J., concurring).

during the 103d Congress, it failed to come up for a vote in the Senate.<sup>299</sup> House Bill 4683, the flow control legislation was intended to provide congressional authorization of state control over intrastate transportation of MSW.<sup>300</sup> A second more restrictive flow control bill, Senate Bill 2345, was also passed in the House.<sup>301</sup> Like House Bill 4683, Senate Bill 2345 failed to obtain Senate approval.<sup>302</sup> Opponents of flow control legislation view it as economic protectionism.<sup>303</sup>

House Bill 4683 would have authorized flow control ordinances for identified facilities proposed prior to May 15, 1994.<sup>304</sup> Additionally, the bill validated MSW management contracts formed by state or political subdivisions prior to that date.<sup>305</sup> The bill authorized state or political subdivisions that diverted recyclables from the MSW stream to establish new flow control restrictions as necessary for the management of MSW.<sup>306</sup> The adopting body was also required to designate that any facility benefitting from a flow control ordinance or law secured that benefit through open competition.<sup>307</sup>

### *B. Vermont's Unilateral Revision of the New Hampshire/Vermont Solid Waste Compact*

States have the authority to ratify interstate agreements with amended language,<sup>308</sup> but they may not modify an interstate compact unilaterally.<sup>309</sup>

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299. Telephone Interview with Kurt Johnson, Legislative Aide to former Congressman Dick Swett of New Hampshire (Nov. 3, 1994).

300. 140 CONG. REC. D1165-01 (daily ed. June 29, 1994); H.R. 4683, 103d Cong., 2d Sess. § 4011(a) (1994).

301. Interview with Kurt Johnson, *supra* note 299.

302. *Id.* Five additional flow control bills were introduced during the 104th Congress but none was able to garner the support necessary to be enacted. See H.R. 1085, 104th Cong., 1st Sess. (1995); H.R. 485, 104th Cong., 1st Sess. (1995); H.R. 1180, 104th Cong., 1st Sess. (1995); S. 534, 104th Cong., 1st Sess. (1995); H.R. 2838, 104th Cong., 1st Sess. (1995).

303. See *House Approves Restrictions On Hauling Waste*, 52 CONGRESSIONAL QUARTERLY 2787, (1994) (citing Rep. Thomas Manton (D-N.Y.)).

304. H.R. 4683, 103d Cong., 2d Sess. § 4011(a), (f) (1994).

305. *Id.* § 4011(f).

306. *Id.* § 4011(b).

307. *Id.* § 4011(c).

308. See ZIMMERMANN & WENDELL, *supra* note 268, at 9 n.21 (citing Reaffirmation and Acknowledgement of Compact, Oct. 2, 1951, pursuant to a determination of New England Governors' Conference, July 26-27, 1951) (noting that an acknowledgement by the New England Governors stated that even though Vermont passed legislation different from the other New England states, the Compact was valid in that the states were bound to one another to the extent of similarities between the respective language of the enactments).

On June 17, 1994, the Vermont General Assembly passed legislation substantially changing the language of the Compact.<sup>310</sup> The legislation follows the form of the Compact but goes into greater detail,<sup>311</sup> seeking to correct perceived problems with the original agreement.<sup>312</sup> However, Congress reserved the right to alter, amend or repeal it when it was approved.<sup>313</sup> Thus, any amendment proposed by Vermont, New Hampshire, or both states must be approved by Congress before it becomes binding.

Even without the explicit congressional language restricting amendment of the Compact, unilateral revision of an interstate compact is not permissible. An interstate compact is a contract.<sup>314</sup> It must possess all the elements of a contractual agreement to be valid.<sup>315</sup> The most significant difference between an interstate compact and a contract is that each state, as a signatory to the compact, applies its own contract law to the agreement.<sup>316</sup> As in contract law, states may not unilaterally modify<sup>317</sup>

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309. ZIMMERMANN AND WENDELL, *supra* note 268, at 43. "If uniform provisions are embodied in a compact, no state could subsequently destroy this uniformity by unilateral amendment of its own statute except to the extent that such variation might be permitted by specific provision of the compact." *Id.*

310. *See generally* 1994 Vt. Laws 205. In 1995, legislation failed to pass which would have repealed 1994 Vt. Laws 205. *See* Vt. H. 65, 1995 Adj. Sess.

311. The revised language changes the Compact as originally approved, establishes "charters" for the Districts, and amends the Southern Windsor/Windham Counties Solid Waste Management District Agreement. *Id.*

312. 1994 Vt. Laws 205.

The powers and duties of the joint meeting shall include the power to enter into contracts for refuse disposal with persons, non-member cities and towns as well as other bodies politic, and the United States of America; provided that no such contract entered after January 1, 1996 may include provisions that obligate the payment for disposal services on the basis of guaranteed amounts of solid waste, whether or not delivered for disposal and accepted for disposal.

1994 Vt. Laws 205, art. III(A)(1)(k). The original language only states that "[t]his compact shall become effective when ratified by New Hampshire and Vermont and approved by the United States Congress." New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, art. III(A), 96 Stat. 1207, 1209 (1982); VT. STAT. ANN. tit. 10, § 1224(A)(1)(k) (1984).

313. New Hampshire/Vermont Solid Waste Compact, Pub. L. No. 97-278, art. III, § 3, 96 Stat. 1207, 1209 (1982).

314. ZIMMERMANN & WENDELL, *supra* note 268, at 7-11.

315. The ratification of identical language by the legislatures of both New Hampshire and Vermont satisfies an offer and acceptance of identical language, a prerequisite of contract law. Additionally, the reciprocal obligation to perform would satisfy the element of consideration necessary to establish a contract. *Id.* at 9-10. *See* H.R. REP. 724, 97th Cong., 2d Sess. 5-25 (1982) (contain four copies of duplicate language, two from both legislative branches within New Hampshire and Vermont). Although there is some authority for allowing different language to be approved, only the common language is enforceable as a compact. *See supra* note 308 and accompanying text.

316. *See* ZIMMERMANN & WENDELL, *supra* note 268, at 2-3.

or even withdraw from a compact.<sup>318</sup> Additionally, since the Compact was ratified by both the New Hampshire and Vermont Legislatures, it is also codified as statutory law in both states.<sup>319</sup> As both a statute and a contract, an interstate compact supersedes conflicting state laws and takes precedence over subsequent state laws.<sup>320</sup> Pursuant to the Compact, other state statutes must be construed so as to be compatible with the Compact unless they directly conflict with its provisions.<sup>321</sup>

### C. New Hampshire's Review of the New Hampshire/Vermont Solid Waste Project

Like Vermont, New Hampshire has also passed legislation modifying the Project. On June 8, 1994, New Hampshire established a committee to study the Project's financial crisis.<sup>322</sup> The committee was required to cooperate with Vermont's Legislative Council and "determine what actions, if any, might be taken to benefit the affected municipalities or to avoid similar problems in the future."<sup>323</sup> The committee was also directed to study State policies regarding the formation and management of the New Hampshire/Vermont Solid Waste District.<sup>324</sup> The committee was comprised of eight voting members—four each from the New Hampshire General Assembly and Senate—and two nonvoting members, one of whom serves committee chair.<sup>325</sup>

The study committee was directed to issue its report to the New Hampshire Speaker of the House, Senate President, and Governor by November 1, 1994.<sup>326</sup> The deadline for the New Hampshire/Vermont Solid Waste District legislative study committee to report was extended to November 1, 1995.<sup>327</sup> Although the legislative study committee had the

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317. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. 1, § 10. "Valid interstate compacts are within the protection of the obligation of contracts clause." Heron, *supra* note 261, at 5 n.28 (citing S. DOC. NO. 39, 88th Cong., 1st Sess. 419 (1964)).

318. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

319. *See supra* note 109.

320. Heron, *supra* note 261, at 6.

321. It is a cardinal principle of statutory construction that the court should interpret a statute so as to avoid a conflict with the Constitution. *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

322. 1994 N.H. Laws 323.

323. *Id.*

324. *Id.* While the legislation uses the word District which would seem to imply the Sullivan County Refuge Disposal District, the Act is described as establishing a committee to study the New Hampshire/Vermont solid waste District created under RSA 53-D. *Id.*

325. *Id.*

326. *Id.*

327. *See* 1995 N.H. Laws 10, § 10.

potential to present a solution to the problems surrounding the Project, the only thing ever filed by the committee was a letter stating that the committee members would be prepared to introduce relevant legislation when and if it became appropriate.<sup>328</sup>

### CONCLUSION

Municipal management of solid waste is a necessary extension of the state police power.<sup>329</sup> It is a responsibility that, as the federal government acknowledges, should be left primarily to the government agencies best able to resolve the problem.<sup>330</sup> The federal guidelines for the management of MSW indicate that states must implement the means necessary for addressing the risk to the public health and safety.<sup>331</sup> Additionally, while New Hampshire, Vermont, and the federal government acknowledge that recycling is a preferred means for managing MSW, it is hard to believe that they would continue to allow communities to enter into put-or-pay contracts that financially penalize the communities for running a successful recycling program.<sup>332</sup>

The United States Supreme Court's application of the dormant Commerce Clause prevents states from excluding waste in discriminatory ways. Because of the Court's broad interpretation of the dormant Commerce Clause, states are unable to effectively manage MSW without violating its restrictions.<sup>333</sup> Judicial activism has led to the strict application of the dormant Commerce Clause, thus, Congress must now act to bolster the state's police power.<sup>334</sup> In addition to obtaining an

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328. Letter from State Rep. Richard T. Trelfa (R-Lisbon) written on behalf the New Hampshire/Vermont Solid Waste Project Legislative Study Committee (Oct. 18, 1995).

329. "[C]ontrol over the collection and disposal of solid waste [is] a legitimate, nonarbitrary exercise of police powers to protect health and safety." *Oregon Waste Sys. v. Department of Envtl. Quality*, 114 S. Ct. 1345, 1357 (1994) (Rehnquist, C.J., dissenting).

330. "[T]he collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies . . ." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 621 n.4 (1978) (quoting 42 U.S.C. § 6901(a)(4) (1976)).

331. 42 U.S.C. § 6907(a)(1988). "A shortage of available landfill space is upon us . . . and with it comes the accompanying health and safety hazards flowing from the improper disposal of solid wastes." *Oregon Waste Sys.*, 114 S. Ct. at 1356 (Rehnquist, C.J., dissenting) (citation omitted).

332. "[B]y having . . . successful recycling program[s.] taking much out of the waste stream, towns are financially penalized" under the WDA. Springfield Letter, *supra* note 123.

333. "The scope of the dormant Commerce Clause is a judicial creation." *C & A Carbone*, 114 S. Ct. at 1687 (O'Connor, J., concurring).

334. "Congress must be 'unmistakably clear' before [the Supreme Court] will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause." *Id.* at 1691 (citing *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984) (plurality opinion)).

explicit congressional statement of the state's power over this area, the states also have the burden of pointing to the source for their authority when invoking the police power.<sup>335</sup> In *C & A Carbone v. Town of Clarkstown*, Justice O'Connor's concurring opinion failed to find any explicit authorization for flow control within the language or legislative history of RCRA.<sup>336</sup> Justice O'Connor did find that EPA had the power to assist "local authority to 'secure the supply of waste.'"<sup>337</sup> It is important that the regulatory language cited by Justice O'Connor made reference to "substate cooperation and policies for free and unrestricted movement of solid . . . waste across State and local boundaries."<sup>338</sup> Given that the Project is a multi-state entity authorized by Congress, it may be exempt from the restrictions imposed by the EPA on "substate authority." If the Project is free from EPA restrictions, it may be able to apply flow control restrictions. While Sullivan County Regional Refuse Disposal District lacks state authority, and thus may be precluded from, controlling the flow of solid waste, the Southern Windsor/Windham Counties Solid Waste Management District may be able to regulate the flow of solid waste within its jurisdiction, because Vermont has authorized such action.<sup>339</sup>

Given this roadblock, the Project may have to continue to rely on its assessment powers if flow control is not an available option for enabling it to fulfill its contractual obligations. Yet even if flow control is available, the legal cost of preventing haulers from delivering solid waste generated within the Districts would be prohibitive.<sup>340</sup> It is the need to meet put-or-pay contracts that necessitates the need for local flow control of solid waste. The *C & A Carbone* decision, however, restricts the potential value of flow control ordinances.

The disposal of solid waste is a growing national problem. Market forces may be an economical way of dealing with the scarcity of landfill space. Put-or-pay contracts are one viable method for meeting the growing concern over landfill space. If Congress is serious about having local governments resolve local problems, then it must provide the means

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335. *Id.* "The State or locality has the burden of demonstrating this intent." *Id.* (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 456-58 (1992)).

336. "Congress expected local governments to implement some form of flow control. Nonetheless, [the statute and legislative history] neither individually or cumulatively rise to the level of the 'explicit' authorization required by [the] dormant Commerce Clause . . ." *Id.* at 1692.

337. *Id.*; see *supra* note 253 and accompanying text.

338. 40 C.F.R. § 256.42(h) (1993).

339. See *supra* note 249. It is ironic that some Vermont communities may be in a position to use flow control while others may be prevented from doing so for lack of congressional approval.

340. Springfield Letter, *supra* note 123.

for these local governments to develop creative solutions for resolving the solid waste crisis.

The Project is a unique jurisdictional entity, possibly having greater authority to regulate the flow of interstate commerce than that possessed by either state. Yet it is not the unconstitutionality of flow control which has resulted in the burdensome cost of tipping fees. Rather, the fees are the result of put-or-pay contracts that strap local communities with GAT requirements. Put-or-pay provisions are onerous because they may prevent municipalities from meeting their tonnage requirements with waste from outside their communities.<sup>341</sup>

The inability of the Districts to meet their GAT by funnelling waste from non-District sources is a continuing source of contention between the Districts and Wheelabrator under the contract. The Districts already pay some of the highest tipping fees in the country to dispose of their MSW.<sup>342</sup> Communities are hamstrung by their commitment to their Districts, and the Districts to the Project. While some communities have been using their taxing and assessing powers to meet their proportion of the commitment to Wheelabrator,<sup>343</sup> most pay a heavy tipping fee on every ton delivered to the facility. If the communities pay the fee themselves, there is little chance for abuse. On the other hand, if communities require private haulers to pay the District tipping fee when they arrive at the Wheelabrator facility, the haulers are likely to deliver their collections elsewhere at a lower rate or misstate the source of their loads and receive the spot market price.<sup>344</sup>

If communities are able to exercise flow control and require private haulers to deliver all MSW collected in their communities to the Wheelabrator facility, they will have legal grounds for ensuring that all MSW collected is credited to their GAT commitment. Yet the cost of monitoring collection and delivery practices of private haulers, as well as the cost of enforcing flow control, make this an unlikely proposition for small communities. The potential for abuse of this system requires that

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341. See Bower Rohr & Assocs. Memo, *supra* note 142, at 2 (discussing the saving that would accrue to the Project if they were able to meet their GAT from communities outside the project).

342. The tipping fee for MSW as of Summer 1995 was \$46/ton for the town of Lebanon and \$48/ton at the Chittenden (VT) Solid Waste District. Bower Rohr & Assocs. Memo, *supra* note 142, at 4. This was less than half of what the two Districts were paying. The Vermont District was paying \$102 per ton while the New Hampshire District was paying \$96 per ton in 1995. See Ballam, *supra* note 172, at A4. Under the accord reached to amend the WDA, tipping fees are estimated to be set at \$75 per ton. Jurgens, *supra* note 156, at A1; Cahlink, *supra* note 156, at 1.

343. Resignation Letter, *supra* note 144, at 2.

344. Robert Smith, *Rockingham Area Trash Haulers Admit to Waste Diversion*, RUTLAND DAILY HERALD, April 5, 1995, at 5, 6.

municipalities develop payment schedules for their GAT which eliminate opportunities for private haulers to work against both the contractual obligations and the financial commitments of the Districts. It has been suggested that the State should act, and condition closure extensions for unlined landfills, to prevent Districts from receiving MSW committed under the WDA to the waste-to-energy incinerator.<sup>345</sup>

While action by the state may be beneficial, federal action needs to be taken to provide the municipalities, who have found themselves obligated to manage MSW through an interstate compact, with the ability to overcome the procedural and substantive road blocks which face the Project. It would not have been unreasonable to expect Congress to fund an innovative interstate MSW program in order to obtain valuable knowledge with which to make such projects more effective in the future. Instead, Congress has left the Project with the burden of developing a program in an atmosphere of changing regulations, declining waste stream flows, and an uncertain legal climate. While Congress recognizes that solid waste disposal is an interstate problem by fostering interstate cooperation, the Compact remains an imperfect tool. The Compact should either be interpreted or amended to give the Project independent authority to manage MSW, or states should be given greater authority to regulate waste.<sup>346</sup>

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345. Springfield Letter, *supra* note 123.

346. "[R]egional problems [call] for regional solutions. . . . Regional interests, regional wisdom and regional pride must be looked to for solutions." Frankfurter & Landis, *supra* note 273, at 708.

