



Winter 1991

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Douglas Meiklejohn

Recommended Citation

Douglas Meiklejohn, *The New Mexico Solid Waste Act: A Beginning for Control of Municipal Solid Waste in the Land of Enchantment*, 21 N.M. L. Rev. 167 (1991).

Available at: <https://digitalrepository.unm.edu/nmlr/vol21/iss1/9>

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THE NEW MEXICO SOLID WASTE ACT: A BEGINNING FOR CONTROL OF MUNICIPAL SOLID WASTE IN THE LAND OF ENCHANTMENT

DOUGLAS MEIKLEJOHN*

I. INTRODUCTION

New Mexico State Senator Roman Maes (Democrat, Santa Fe), who is also a realtor, received a phone call in the fall of 1988 from an individual who said that he wanted to buy 200 acres of the most unsightly land in Santa Fe County. When the Senator asked about the caller's intended use for this unsightly land, he was told that the land was to be used as a landfill. Senator Maes advised the caller that he would have to comply with the state laws governing landfills, but the caller responded that there were no such laws in New Mexico. Following this conversation, Senator Maes investigated the caller's assertion and found that it was accurate: New Mexico did not have a law governing landfills.

That discovery prompted Senator Maes to initiate the struggle that led to the enactment of the New Mexico Solid Waste Act,¹ an effort that involved two legislative sessions, a year of interim legislative committee hearings, and a gubernatorial veto. This article discusses the need for the statute, the statute's major provisions, and the work that has yet to be done to regulate disposal of municipal solid waste² effectively in New Mexico.

II. THE NEED FOR THE SOLID WASTE ACT

A. *Proper disposal of solid waste presents significant problems.*

Several major problems must be addressed in order to regulate solid waste effectively. First, such overwhelming amounts of waste are being generated that efforts must be made to reduce, reuse, and recycle waste. Second, improper disposal of solid waste causes serious pollution problems, especially in an arid state like New Mexico, which depends so heavily on groundwater. Third, funding must be provided for proper disposal and cleanup of pollution from solid waste, which is extremely expensive. Fourth, responsibility must be determined for the costs of pollution cleanup. Fifth, applicants for solid waste disposal facility permits

* Director, New Mexico Environmental Law Center, Santa Fe, New Mexico. Transcripts referred to within this article and not generally available are on file with the author.

1. N.M. STAT. ANN. §§ 74-9-1 to -42 (Repl. Pamp. 1990).

2. The Solid Waste Act defines solid waste as including virtually every type of garbage and other discarded material, but it exempts industrial, agricultural, mining, and various other wastes. *Id.* § 74-9-3.

must be required to disclose information concerning their owners and their environmental and criminal records so that the state and local governments know who is applying for permits. Sixth, the risks posed by disposal of solid waste are such that people in the areas that will be affected by solid waste disposal facilities have a right to be informed about applications both for new facilities and modifications of existing facilities. Seventh, intrastate and interstate transportation of solid waste for disposal in communities where the waste was not generated presents serious risks for those communities. Finally, there must be a comprehensive approach to solid waste regulation that addresses all of these issues.

1. The United States, including New Mexico, generates overwhelming amounts of solid waste.

America faces a growing garbage crisis. According to the United States Environmental Protection Agency and the Office of Technology Assessment of the United States Congress, the United States produces approximately 160 million tons of trash annually.³ Concern, Inc., a private non-profit organization, has estimated that between 179 and 268 million tons of trash are generated in the United States each year.⁴ That figure is rising about one percent per year⁵ and may reach 193 million tons per year by the year 2000.⁶ The current rate at which Americans generate garbage amounts to 400,000 tons per day, enough to fill the New Orleans Superdome twice every day.⁷ The Office of Technology Assessment has indicated that each American produces an average of 3.6 pounds of waste per day, and this figure is expected to rise to 3.9 pounds per day by 2000.⁸ According to Concern, Inc., the figure is already four to six pounds per day.⁹ The Environmental Protection Agency calculates a current average of 1,300 pounds of garbage produced per year for each individual in the United States.¹⁰

Like most Americans, New Mexicans generate enormous amounts of waste. Residents of Albuquerque create an average of 4.3 pounds of garbage per day,¹¹ and the entire state generates approximately one million tons of trash each year.¹²

3. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF SOLID WASTE MUN. SOLID WASTE TASK FORCE, *THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 1* (1989) [hereinafter *THE SOLID WASTE DILEMMA*]; OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, *FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE?* 3 (1989) [hereinafter *FACING AMERICA'S TRASH*].

4. CONCERN, INC., *WASTE: CHOICES FOR COMMUNITIES 2* (1988) [hereinafter *CONCERN, INC.*].

5. *FACING AMERICA'S TRASH*, *supra* note 3, at 4.

6. *THE SOLID WASTE DILEMMA*, *supra* note 3, at 6.

7. Bean, *The Need for Waste Reduction*, *GREEN FIRE REP.*, Nov.-Dec. 1989, at 1.

8. *FACING AMERICA'S TRASH*, *supra* note 3, at 4.

9. *CONCERN, INC.*, *supra* note 4, at 2.

10. *THE SOLID WASTE DILEMMA*, *supra* note 3, at 11.

11. *FACING AMERICA'S TRASH*, *supra* note 3, at 77.

12. *NEW MEXICO SOLID WASTE MANAGEMENT TASK FORCE, INTEGRATED SOLID WASTE MANAGEMENT: A VIABLE SOLUTION I* (Report to Governor Garrey Carruthers and the Thirty-Ninth New Mexico State Legislature) (1989) [hereinafter *INTEGRATED SOLID WASTE MANAGEMENT*].

Disposal of these amounts of waste would be a problem regardless of the composition of the waste. The content of the waste makes proper disposal more difficult, however, because although most of the waste is not toxic, enough toxic waste is present to create substantial environmental and public health problems. Using weight as a measure, municipal solid waste consists of the following amounts of the indicated substances: paper and paperboard (35-49%); yard waste (15-20%); plastics (6-8%); glass (8%); metals (8-9%); food waste (7-9%); rubber and leather (1-3%); wood and textiles (4-6%); and other items (1-2%).¹³ Much of this waste contains harmful substances, such as the mercury in household batteries, mirrors, fluorescent light bulbs, and thermometers; the lead in automobile batteries, solder, paints, and plastics; and the cadmium in paints, rechargeable batteries, inks, and plastics.¹⁴ There are also many other common household substances that contain hazardous materials. These include solvents, pesticides, herbicides, and drain cleaners.¹⁵ Although these hazardous substances constitute only about one percent of the waste stream, that is a substantial amount of hazardous waste. For example, Albuquerque generates approximately two million pounds of waste per day. This means that Albuquerque citizens produce about 20,000 pounds of hazardous waste per day, and five million pounds of such waste per year. A town of 5,000, on the other hand, would probably generate about 46,000 pounds of household hazardous waste per year.¹⁶

The principal difficulty with all of this waste is that it must be disposed of properly in order to prevent air, water, and soil pollution. Burial of waste in landfills and incineration can cause serious pollution if they are done improperly. Management of waste disposal poses other problems as well, including providing funding for local governmental efforts to dispose of waste properly, determining liability for cleanup in the event of pollution, regulating intrastate and interstate transportation of waste, scrutinizing the records of applicants for solid waste disposal facility permits, and providing appropriate public notice concerning applications for those permits. There must also be an extensive effort to educate the public about the hazards posed by disposal of solid waste and the need to reduce, reuse, and recycle waste. In addition, solving all of these problems requires an overall comprehensive approach to solid waste management. Each of these issues is outlined below.

2. Improper disposal of solid waste in landfills pollutes groundwater, soil, and air.

Virtually all municipal solid waste that is not recycled is disposed of either in landfills or incinerators. Each of these methods of disposal can lead to serious pollution problems if it is done improperly.

13. Warren, *Waste Disposal - The Final Putdown: Landfilling of Municipal Solid Waste*, GREEN FIRE REP., Nov.-Dec. 1989, at 2; see also FACING AMERICA'S TRASH, *supra* note 3, at 5; THE SOLID WASTE DILEMMA, *supra* note 3, at 7; CONCERN, INC., *supra* note 4, at 2.

14. FACING AMERICA'S TRASH, *supra* note 3, at 86.

15. Warren, *supra* note 13, at 2. See FACING AMERICA'S TRASH, *supra* note 3, at 88-89 for a list of hazardous ingredients in common household products.

16. Warren, *supra* note 13, at 2.

The principal problems with landfills are pollution of groundwater and generation of gas. Because about three-quarters of the waste in municipal garbage is organic,¹⁷ and because the process of burying waste in landfills involves compacting it by machinery and weight,¹⁸ waste disposed of in landfills decomposes.¹⁹ When liquids, such as rain or liquids contained in the waste, percolate through the waste, they pick up chemicals, including the hazardous waste disposed of in the landfill, and form a solution known as leachate.²⁰ That leachate, which may contain hazardous materials such as lead, cadmium, iron, chloride, manganese, trichloroethylene, benzene, toluene, arsenic, chromium, nickel, and selenium,²¹ percolates to the bottom of the landfill and into the soil and groundwater unless there is a barrier, such as a liner.²²

Methods of preventing this pollution include placement of synthetic or natural liners at the bottom and on the sides of landfills, installation of leachate collection systems, and covering the tops of landfills to prevent infiltration of rain and other liquids.²³ Unfortunately, these systems are not foolproof. Synthetic liners can crack or be torn during installation or the operation of the landfill.²⁴ Clay liners must be compacted consistently in order to be effective and can crack while they are drying during installation.²⁵ Moreover, some researchers assert that there is not enough information about the ability of clay to absorb chemicals,²⁶ and other recent research indicates that contaminants may move through water in clay even though the clay retains the water.²⁷ Landfill covers, or caps, are also vulnerable. They can be penetrated by erosion, roots, rodents,²⁸ and even lightning.²⁹

Finally, most existing landfills do not have these systems for protection of the environment and public health. Approximately seventy percent of the landfills in existence now were established before 1980, and many of them do not have liners or leachate collection systems.³⁰ Only eleven percent of the landfills currently being used have leachate collection systems.³¹

17. *FACING AMERICA'S TRASH*, *supra* note 3, at 275.

18. *CONCERN, INC.*, *supra* note 4, at 7.

19. *FACING AMERICA'S TRASH*, *supra* note 3 at 274; *CONCERN, INC.*, *supra* note 4, at 7.

20. *FACING AMERICA'S TRASH*, *supra* note 3, at 274; *CONCERN, INC.*, *supra* note 4, at 7; Warren, *supra* note 13, at 1.

21. Warren, *supra* note 13, at 1. See *FACING AMERICA'S TRASH*, *supra* note 3, at 280 for a list of concentrations of substances in municipal solid waste landfills and existing exposure standards for those substances.

22. *CONCERN, INC.*, *supra* note 4, at 7; Warren, *supra* note 13, at 1.

23. *FACING AMERICA'S TRASH*, *supra* note 3, at 277-81; Warren, *supra* note 13, at 2.

24. *FACING AMERICA'S TRASH*, *supra* note 3, at 278; Warren, *supra* note 13, at 2.

25. *FACING AMERICA'S TRASH*, *supra* note 3, at 278; Warren, *supra* note 13, at 2.

26. *FACING AMERICA'S TRASH*, *supra* note 3, at 281.

27. Johnson, Cherry, & Pankow, *Diffusive Contaminant Transport in Natural Clay: A Field Example and Implications for Clay-Lined Waste Disposal Sites*, 23 *ENVTL. SCI. & TECH.* 340 (1989); McCarthy & Zachara, *Subsurface Transport of Contaminants: Mobile Colloids in the Subsurface Environment May Alter the Transport of Contaminants*, 23 *ENVTL. SCI. & TECH.* 496 (1989).

28. Warren, *supra* note 13, at 2.

29. Rachel's Hazardous Waste News, April 18, 1990.

30. *FACING AMERICA'S TRASH*, *supra* note 3, at 284.

31. *Id.* at 281.

The second major problem that results from burying waste in landfills is the generation of gases, principally methane,³² which results from anaerobic decomposition of the waste.³³ Some of these gases are carcinogenic.³⁴ Methane can be used as fuel, but it is explosive at certain levels³⁵ and must be either vented or collected.³⁶

Given all of these hazards, it is not surprising that municipal solid waste landfills have caused serious environmental and public health problems. Of the 850 sites proposed to be listed on the Superfund National Priorities List³⁷ in 1986, 184, or twenty-two percent, were municipal solid waste landfills.³⁸ Although one review indicated that all but two of those landfills had received hazardous wastes, other researchers assert that municipal waste alone will cause the pollution found at the landfills on the Superfund List.³⁹ Moreover, according to the United States Environmental Protection Agency, 2,300 violations of state groundwater, air, surface water, and subsurface methane standards have occurred at municipal solid waste landfills.⁴⁰ The Environmental Protection Agency also studied 163 landfills, consisting primarily of landfills not on the Superfund List, and found that 135 of them were a threat to the environment or public health, principally because of threats to groundwater.⁴¹ In addition, of the 184 municipal solid waste landfills on the Superfund List, 132 have affected groundwater and sixty-eight were listed solely because of their impacts on groundwater.⁴²

The situation with regard to landfills in New Mexico is similar. First, very few of the landfills in the state have been monitored or controlled.⁴³ In addition, one New Mexico landfill is on the Superfund List and several others are being considered for that list.⁴⁴ Third, several New Mexico

32. *Id.* at 286. Municipal solid waste landfills also generate approximately twenty other hazardous gases. *Id.* at 286-87.

33. *Id.* at 275.

34. *Id.* at 286.

35. *Id.*

36. *Id.* at 282.

37. The list was established pursuant to the Federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (1983 & Supp. 1991).

38. FACING AMERICA'S TRASH, *supra* note 3, at 284 (citing UNITED STATES ENVTL. PROTECTION AGENCY, REPORT TO THE CONGRESS: SOLID WASTE DISPOSAL IN THE UNITED STATES, Vol. II (1988)).

39. FACING AMERICA'S TRASH, *supra* note 3, at 284.

40. *Id.* This is a conservative figure because these violations are detected by monitoring, but very few landfills conduct monitoring. As of 1986, groundwater was monitored at only twenty-five percent of all municipal solid waste landfills. *Id.*

41. *Id.*

42. *Id.*

43. 1989 Solid Waste Management Regulations: Hearing Before the New Mexico Envtl. Improvement Bd., hearing transcript 29 (1988) (statement of Raymond Sisneros, Program Manager, Special Waste Bureau, Solid Waste Section, New Mexico Env't Dep't) [hereinafter 1989 SWMR hearing transcript]. At that hearing, Chris Shuey, the Coordinator of the Community Water Quality Groundwater Program at Southwest Research and Information Center in Albuquerque ("Shuey"), testified that the materials in the landfill or the groundwater below it were being analyzed at only eight or nine of the 216 landfills then registered with the Environmental Improvement Division. *Id.* at 697.

44. 1989 SWMR hearing transcript, *supra* note 43, at 221 (statement of Phillip Westen, Envtl. Scientist, Solid Waste Section, Special Waste Bureau, New Mexico Env't Dep't).

landfills are known to have caused groundwater and air pollution. The Lee Acres landfill near Farmington has polluted air, groundwater, and soil in the area,⁴⁵ and the contaminant plume from it and a nearby refinery has reached wells 3,000 feet down gradient.⁴⁶ The Carnuel-Deadman's Curve landfill, which is east of Albuquerque and has apparently received gasoline and petroleum wastes, has also polluted groundwater.⁴⁷ Groundwater pollution has been caused as well by the Los Angeles landfill in Albuquerque,⁴⁸ which has received only commercial and residential waste and small amounts of hazardous waste.⁴⁹ Finally, monitoring wells in and around the Los Angeles landfill have detected methane in potentially explosive concentrations.⁵⁰

These problems are particularly critical in New Mexico, where nine out of ten people depend upon groundwater for their drinking water. Despite that, eighty-nine percent of the landfills in New Mexico are located above groundwater that might be used for drinking water and is apparently appropriate for livestock, and fifty-eight percent of New Mexico's landfills are over shallow groundwater that appears to be fit for human consumption. In addition, thirty-five percent of the state's landfills are within twenty-five to thirty-five feet of groundwater, and many are in alluvial systems or soils that are relatively permeable.⁵¹

3. Incineration of solid waste without necessary safeguards poses substantial risks for public health and the environment.

Incinerating municipal solid waste can cause significant problems if it is done improperly. Although there are no municipal solid waste incinerators currently operating in New Mexico, the United States Department of Energy recently proposed to build one in Los Alamos.⁵² In addition, there are about twenty-five biomedical waste incinerators at hospitals in the state,⁵³ and one commercial biomedical waste incinerator in Sunland

45. AEPSCO, INC., REPORT TO THE UNITED STATES DEP'T OF THE INTERIOR, BUREAU OF LAND MANAGEMENT ON THE LEE ACRES SITE, FARMINGTON, NEW MEXICO (May 30, 1986); *Hearings Before the Subcomm. on Env't, Energy, and Natural Resources of the Senate Comm. on Gov't Operations* (Dec. 15, 1986) (statement of Dennis M. McQuillan, Water Resource Specialist, Groundwater/Hazardous Waste Bureau, New Mexico Env't Dep't).

46. 1989 SWMR hearing transcript, *supra* note 43, at 694-97 (statement of Shuey).

47. *Id.* at 691-92.

48. *Id.* at 689-90, 693-94.

49. BAKER, LOS ANGELES LANDFILL SITE SUMMARY, CITY OF ALBUQUERQUE, NEW MEXICO (Oct. 1988).

50. *Id.*

51. 1989 SWMR hearing transcript, *supra* note 43, at 699-700 (statement of Shuey). For more complete information on the state's landfills, see NEW MEXICO ENV'T DEP'T, SOLID WASTE IMPACT SUMMARY REPORT (June 1988).

52. The incinerator would have burned about ninety-five tons of municipal solid waste per day, and an air quality permit for the incinerator was issued to the Department of Energy by the New Mexico Environment Department. The Department of Energy shelved the project, however, when the lowest bid it received for construction of the incinerator was almost twice the amount of the Department's budget for it.

53. *Proposed Air Quality Control Regulation 2020—Biomedical Waste Combustion: Hearing Before the New Mexico Env'tl. Improvement Bd.*, written statement at 9 (Dec. 1990) (written statement of Gale Harms, Program Manager, Control Strategy Section, Air Quality Bureau, New Mexico Env't Dep't) [hereinafter Harms written statement].

Park.⁵⁴ Incinerators reduce the volume of municipal solid waste by about sixty to seventy percent,⁵⁵ and the Environmental Protection Agency projects that twenty percent of municipal solid waste will be incinerated by 1992.⁵⁶ Incineration is appropriate for certain types of wastes, such as liquids, which should not be disposed of in landfills.⁵⁷ The problems associated with incineration of solid waste are therefore pertinent.

Like landfills, garbage incinerators pose two environmental and public health problems. The first is the emissions into the air from the incinerators, and the second is the disposal of the ash the incinerators generate. Every incinerator operation produces a variety of air emissions,⁵⁸ which may consist of hundreds of different gaseous, liquid, and solid pollutants.⁵⁹ These pollutants can include organic and inorganic chemicals, acid gases, and metals.⁶⁰ Among the organic chemicals are two similar families of chlorinated organic compounds known as dioxins and furans, both of which can have serious public health effects.⁶¹ The tetrachloro-dibenzo-dioxin isomer in particular has carcinogenic, reproductive, immunotoxic, and teratogenic impacts even at very low concentrations, and some researchers regard it as the most toxic chemical known.⁶² Incinerators also produce other organic chemicals, although the information concerning them is not complete.⁶³ The acid gases that may be emitted by incinerators include hydrogen chloride, hydrogen bromide, hydrogen fluoride, sulfuric acid, sulfur dioxide, and nitrogen oxides, all of which may affect the public health and the environment.⁶⁴

Waste incinerators also emit various metals, including antimony, arsenic, beryllium, cadmium, chromium, lead, mercury, and nickel.⁶⁵ These metals may pose the greatest threat to human health and the environment of

54. NEW MEXICO ENV'T DEP'T AIR QUALITY BUREAU SURVEY OF BIO-MEDICAL WASTE DISPOSAL FACILITIES 37 (1990).

55. FACING AMERICA'S TRASH, *supra* note 3, at 217.

56. THE SOLID WASTE DILEMMA, *supra* note 3, at 22-23.

57. Tarr, *Solid Waste Incineration Problems and Control Strategies*, GREEN FIRE REP., Nov.-Dec. 1989, at 3.

58. *Proposed Air Quality Control Regulation 2000—Municipal Waste Combustion: Hearing Before the New Mexico Env'tl. Improvement Bd.*, hearing transcript at 19 (Jan. 1990) (statement of Bill Blankenship, Program Manager, Air Quality Bureau, New Mexico Env't Dep't) [hereinafter AQCR 2000 hearing transcript]. The concentrations of various substances in incinerator emissions generally, pollutant concentrations measured at specific incinerators, and contributions of substances in incinerator emissions to cancer risks are set forth in FACING AMERICA'S TRASH, *supra* note 3, at 227, 228, and 240. Some of the major health effects of several pollutants emitted from incinerators are explained in CONCERN, INC., *supra* note 4, at 9.

59. AQCR 2000 hearing transcript, *supra* note 58, at 19.

60. *Id.* at 24; FACING AMERICA'S TRASH, *supra* note 3, at 226.

61. AQCR 2000 hearing transcript, *supra* note 58, at 24. An explanation of the processes by which dioxins and furans are formed in the incineration of waste is set forth in FACING AMERICA'S TRASH, *supra* note 3, at 226-29.

62. AQCR 2000 hearing transcript, *supra* note 58, at 24.

63. FACING AMERICA'S TRASH, *supra* note 3, at 229-30.

64. AQCR 2000 hearing transcript, *supra* note 58, at 20-21; FACING AMERICA'S TRASH, *supra* note 3, at 230-31.

65. FACING AMERICA'S TRASH, *supra* note 3, at 242; AQCR 2000 hearing transcript, *supra* note 58, at 272 (statement of Don Fisher, M.D.).

all incinerator emissions.⁶⁶ The Environmental Protection Agency considers antimony, arsenic, beryllium, cadmium, chromium, and nickel to be possible human carcinogens.⁶⁷ Lead is a neurotoxin,⁶⁸ and airborne lead and mercury can cause neurological problems, kidney diseases, and reproductive abnormalities.⁶⁹ Metals that are emitted from incinerators can also be taken into the food chain because they accumulate on plants, land, and water surrounding incinerators.⁷⁰ Finally, biomedical waste contains three to four times as much plastic as other municipal solid waste, and incineration of biomedical waste has a proportionately higher potential for toxic and suspected carcinogenic emissions resulting from combustion of plastics.⁷¹

The impacts of waste incinerator air emissions would be exacerbated in New Mexico by three factors. First, the majority of the population lives in low areas, such as river valleys, where emissions from incinerators would settle because emissions are heavier than air. Second, the soil in New Mexico has a very low organic content, which means that the toxic elements in incinerator emissions will not be absorbed by the soil but will wash into arroyos and percolate into groundwater. It also means that children, who are close to the soil and who play in arroyos, will be particularly affected by incinerator emissions. Third, a relatively large percent of New Mexico's population has respiratory problems, having moved here to avoid pollutants and pollens in other parts of the country. These people are especially susceptible to the effects of the gases emitted from incinerators, including hydrogen chloride, sulfur dioxide, oxides, and nitrogen.⁷²

The second major environmental and public health problem caused by waste incinerators is that the fly and bottom ash⁷³ that they create can be toxic. Several toxicity tests have determined that almost all fly ash, and between one-third and one-half of all bottom ash, is toxic and should be treated as hazardous waste, principally because they contain concentrations of metals from the incinerated waste.⁷⁴ Volatile metals, such as arsenic, cadmium, lead, and mercury, are concentrated in fly ash, and bottom ash typically has concentrations of less volatile metals, such as aluminum, chromium, iron, nickel, and tin.⁷⁵ Although these metals are generally inert and therefore not a threat to public health before they are incinerated, the process of incineration makes them more mobile and

66. AQCR 2000 hearing transcript, *supra* note 58, at 22.

67. FACING AMERICA'S TRASH, *supra* note 3, at 242.

68. *Id.*

69. AQCR 2000 hearing transcript, *supra* note 58, at 263.

70. *Id.* at 192 (statement of Steven Pike, M.D.).

71. Harms written statement, *supra* note 53, at 4.

72. AQCR 2000 hearing transcript, *supra* note 58, at 269-71.

73. Incinerators create both fly and bottom ash. Fly ash is the noncombustible residue that collects within the boiler system, and bottom ash is the residue that is deposited on the incinerator grate. FACING AMERICA'S TRASH, *supra* note 3, at 247.

74. AQCR 2000 hearing transcript, *supra* note 58, at 197; CONCERN, INC., *supra* note 4, at 5.

75. FACING AMERICA'S TRASH, *supra* note 3, at 247. For a more complete list of substances found in both bottom and fly ash, see *id.* at 248.

they can leach out of the incinerator ash into the surrounding environment.⁷⁶ When ash enters water or becomes airborne during handling or transportation, people can be exposed to these metals through inhalation, ingestion of food or water, or dermal exposure.⁷⁷

4. Proper management of solid waste requires funding, regulation of liability, disclosure by companies engaged in waste disposal, adequate public notice, management of intrastate and interstate transportation of solid waste, and a comprehensive approach to solid waste.

As explained above, there are significant pollution problems that may occur if waste is disposed of improperly. In order to prevent pollution problems and to provide a means of dealing with pollution that does occur, adequate funding must be provided for solid waste management. Proper disposal of solid waste is expensive. It would probably have cost between \$880 million and \$1.3 billion for the United States to comply with the landfill regulations that were proposed in 1988 by the Environmental Protection Agency pursuant to the federal Resource Conservation and Recovery Act. The cost of compliance with those regulations for New Mexico would have been between \$9.6 million and \$12.1 million.⁷⁸ A limited national survey indicated that the total cost to communities for disposal of solid waste ranges from \$77 to \$230 per ton.⁷⁹ Although operating costs were found to average only about \$25 per ton for communities that relied solely on landfills (which includes almost all communities in New Mexico), and \$46 for communities that also had incinerators,⁸⁰ capital costs are expensive. Even without taking into account the price of land, development of a landfill can cost from \$110,000 to \$950,000,⁸¹ and closure of a landfill may cost up to \$30,000 per acre.⁸² Upgrading existing landfills in order to prevent pollution is also expensive. The cost of the improvements that would have prevented the pollution caused by the Lee Acres landfill has been estimated at \$10.5 million,⁸³ and bringing a local landfill in the northeastern United States into compliance with the regulations applicable in that area may cost \$200,000

76. AQCR 2000 hearing transcript, *supra* note 58, at 196-97.

77. FACING AMERICA'S TRASH, *supra* note 3, at 254. For a discussion of the pollutants in leachate from incinerator ash, see *id.* at 250-55.

78. 1989 SWMR hearing transcript, *supra* note 43, at 260 (statement of Anna Weniger Lamberson, Ph.D.). William F. Fulginiti, Director of the New Mexico Municipal League, has asserted that the actual cost to New Mexico will be higher than this estimate because of the large number of small communities in the state. *Hearing Before the Interim Env't, Land Use, and Solid Waste Comm. of the New Mexico Legislature*, hearing transcript at 5 (June 1, 1989) (statement of Fulginiti) [hereinafter *Interim Env't Hearing*].

79. FACING AMERICA'S TRASH, *supra* note 3, at 62.

80. *Id.* at 59, 62. The survey also found that landfill pollution controls add about \$10 per ton to the cost of waste disposal in communities that rely solely upon landfills. *Id.* at 62.

81. INTEGRATED SOLID WASTE MANAGEMENT, *supra* note 12, at 29.

82. CONCERN, INC., *supra* note 4, at 10.

83. 1989 SWMR hearing transcript, *supra* note 43, at 265-66.

per acre.⁸⁴ The need for funding to upgrade existing facilities and to ensure that future facilities will protect the environment was underscored by the appeal of the 1989 Solid Waste Management Regulations filed by approximately eighty New Mexico local governments.⁸⁵ In that appeal, the local governments claimed that they did not have the financial resources to implement the new regulations and that the promulgation of the regulations without funding violated article X, section 8 of the New Mexico Constitution.

Proper disposal of solid waste is relatively cheap compared to the cost of cleaning up solid waste pollution. The cleanup costs for the plume at the Lee Acres site could run as high as \$50 million,⁸⁶ and the expense of cleaning up pollution from a solid waste disposal facility can be ten times as high as the cost of proper design and operation of the facility.⁸⁷ These funding problems should be addressed both by providing funds to appropriate governmental agencies for regulation of facilities and cleanup of pollution and by requiring owners and operators of solid waste disposal facilities to provide financial assurances to cover expenses that occur at those facilities.

A second problem with cleaning up pollution from a solid waste disposal facility is establishment of liability to the state or other governmental entity for the costs involved.⁸⁸ New Mexico law requires proof of fault for a determination of liability,⁸⁹ but fault may be difficult or impossible to prove with regard to pollution from solid waste facilities. For example, landfills, in which almost all of the solid waste in New Mexico is buried, generally receive waste from many sources, such as individual households and businesses, and tracing pollution to any specific source is difficult at best. It may be equally difficult to demonstrate that pollution is the fault of the landfill operator because landfills may leak even if they are properly designed and operated.⁹⁰ Finally, it may take many years for pollution to develop and be detected.⁹¹

Funding must therefore be provided for prevention of pollution and cleanup of pollution that does occur, and regulations which help to prevent such pollution should be adopted. Further, the entities that apply for permits to own and operate solid waste management facilities must be strictly scrutinized. Unfortunately, the two largest waste disposal firms in the country do not have clean records with regard to environmental

84. CONCERN, INC., *supra* note 4, at 10.

85. *City of Alamogordo v. New Mexico Env'tl. Improvement Bd.*, No. 11469 (N.M. Ct. App. filed May 12, 1989).

86. 1989 SWMR hearing transcript, *supra* note 43, at 265.

87. *Id.* at 28-29.

88. This article is concerned only with the cleanup of pollution and not with consequential damages, such as those that might be suffered by third parties who are caused personal or property damage by solid waste pollution. Issues of liability to those third parties are therefore not addressed here.

89. *Scott v. Rizzo*, 96 N.M. 682, 634 P.2d 1234 (1981).

90. The United States Environmental Protection Agency has concluded that all landfills will eventually leak. INTEGRATED SOLID WASTE MANAGEMENT, *supra* note 12, at 31.

91. *Warren*, *supra* note 13, at 2.

protection. Subsidiaries of Waste Management, Inc., the largest firm, have been fined millions of dollars and have agreed to pay millions more in cleanup costs.⁹² A subsidiary of the second largest company, Browning-Ferris, has had substantial difficulty in its handling of the disposal of hazardous waste.⁹³ Browning-Ferris has also been accused of anticompetitive activities.⁹⁴ This is a particular problem in the solid waste disposal business because a community that hires a private company to dispose of its waste may not be able to take over disposal of the waste again easily, and the community may be vulnerable to unreasonable price increases and other inappropriate activities.⁹⁵ Organized crime is also involved in the waste hauling and disposal businesses.⁹⁶

Another issue that must be resolved in connection with management and disposal of solid waste is the notice to be given to the public concerning establishment and modification of solid waste disposal facilities. The impacts that solid waste can have on public health and safety and the environment are significant, and people in the areas where solid waste disposal facilities are located, or proposed to be located, have a right to know about and be involved in decisions concerning those facilities. Unfortunately, prior to passage of the Solid Waste Act, the general rule in New Mexico was that such notice was given to the public through publication of notices in newspapers of general circulation.⁹⁷ These notices reach very few people, particularly if they are published in the classified or legal advertisements, and some other form of notice must be provided if the public is to be informed.

A fifth major aspect of solid waste management that must be addressed in order to protect New Mexico's public health and environment is intrastate and interstate transportation of waste for purposes of disposing of the waste in communities other than those in which it was generated. Transportation of waste for disposal elsewhere is important because it transfers the impacts and risks of solid waste from the community where it was generated to the community that disposes of it. This has two effects. First, the ability to dispose of waste by sending it, and its impacts and risks, elsewhere diminishes considerably the incentive that a community has to reduce its waste. Second, the community that receives the waste assumes the impacts and risks associated with it and must deal with those impacts and risks with its own resources.

Interstate transportation of garbage is already occurring on a massive scale throughout the United States. Each day, 28,000 tons of trash are

92. *Legal Challenges, Environmental Claims*, Albuquerque J., Mar. 6, 1988, at A8, col. 1; see also ENVIRONMENTAL RESEARCH FOUND., PRESS REPORTS ABOUT VIOLATIONS OF LAW BY WASTE MANAGEMENT, INC. (1988).

93. N.Y. Times, Mar. 15, 1990, at D5, col. 1.

94. Klemple, *Legal Target: The Trials of Browning-Ferris*, HOUS. BUS. J., Feb. 6, 1984, at 1; see also ENVIRONMENTAL RESEARCH FOUND., PRESS REPORTS ABOUT VIOLATIONS OF LAW BY BROWNING-FERRIS, INC. (BFI) (1989).

95. Interim Env't Hearing, *supra* note 78, at 12-13.

96. Beck, Hager, King, Hutchinson, Robins, & Gordon, *Buried Alive*, NEWSWEEK, Nov. 27, 1989, at 68 [hereinafter Beck].

97. See, e.g., Solid Waste Management Regulations § 202 (1989).

transported on the nation's highways.⁹⁸ New York, Pennsylvania, and New Jersey export a combined total of eight million tons of garbage each year, and each Long Island, New York township spends an average of \$23 million per year shipping its trash to other states for disposal.⁹⁹ Predictably, the areas to which garbage is being or will be shipped are reacting negatively to it. The City of Benton, Arkansas planned to make money by burying garbage from New York City in a local landfill, but there has been a substantial public reaction against doing so.¹⁰⁰ The State of Indiana enacted a law requiring payment of higher fees for disposal in Indiana landfills of waste from other states.¹⁰¹ United States Senator Dan Coats, an Indiana Republican, has sponsored legislation that would permit states to ban imports of garbage from other states.¹⁰² Kentucky has imposed a ban on permits for new landfills and waste incinerators, in part because of interest in importing out-of-state waste into Kentucky for disposal.¹⁰³ Michigan's response to importation of solid waste was to enact a statute that prohibits disposal of solid waste within a county from outside that county, unless the disposal is specifically authorized by the county solid waste management plan.¹⁰⁴ The Ohio Attorney General has asserted that in 1987 his state received 7,000 tons of waste per day from East Coast states.¹⁰⁵ Ohio enacted a statute that required payment of one fee for disposal of waste generated within a waste management district, a higher fee for disposal of in-state waste generated outside of the district, and a still higher fee for disposal of out-of-state waste.¹⁰⁶ Pennsylvania has instituted a program of inspection at the state's borders, landfills, and transfer stations for vehicles carrying waste from other states.¹⁰⁷ The Pennsylvania Governor has also issued an executive order prohibiting the permitting of new solid waste landfills and limiting out-of-state waste to thirty percent of the total amount of waste disposed

98. Beck, *supra* note 96, at 67.

99. *Id.*

100. Barden, *Garbage is One Thing, But Garbage From New York? Forget It*, N.Y. Times, Feb. 12, 1989, § 1, at 26, col. 2.

101. Proulx, *Trash Trucks Denied Use of Indiana Landfills*, WASTE TECH NEWS, Apr. 9, 1990, at 1, 12. The statute was determined to violate the Commerce Clause of the United States Constitution in *Government Suppliers Consol. Serv. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990). For a discussion of this case see *infra* notes 127-28 and accompanying text.

102. Gold, *New Jersey Officials Defend Policy of Exporting Trash*, N.Y. Times, July 19, 1990, at B2, col. 3; Gold, *Shipping Trash Out-of-State Stirs Backlash, Other States Are Critical of New York and New Jersey*, N.Y. Times, July 18, 1990, at B1, col. 5.

103. Proulx, *Kentucky Halts Permitting to Revise Waste Rules*, WASTE TECH NEWS, Mar. 26, 1990, at 3.

104. MICH. COMP. LAWS ANN. §§ 299.413a, 299.430(2) (West Supp. 1991).

105. Meltz, *State Discrimination Against Imported Solid Waste: Constitutional Roadblocks*, 20 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,383 n.1 (Sept. 1990) (citing Celebrezze, *Ohio Proposes Solutions for Its Solid Waste Problems*, 18 *Env't Rep. (BNA)* 2303 (Feb. 26, 1988)).

106. OHIO REV. CODE ANN. § 3734.57(A), (B) (Anderson Supp. 1990). As indicated *infra* notes 124-25 and accompanying text, the statute has been held to violate the Commerce Clause of the United States Constitution.

107. Proulx, *Governor Casey to Haulers: Don't Trash Pennsylvania*, WASTE TECH NEWS, Apr. 9, 1990, at 3.

of within the state.¹⁰⁸ South Dakota has imposed a two-year moratorium on landfills capable of disposing of 150,000 tons of waste per year and incinerators in which more than 750 pounds of waste would be burned per hour.¹⁰⁹ Finally, the National Governors' Association has called for assistance to states that receive large amounts of waste from other states.¹¹⁰

New Mexico is the target of several efforts to import waste from other states. The Driggs Corporation, a Maryland company, and its New Mexico subsidiary, Innovative Environmental Systems of New Mexico, have proposed to open a 23,000 acre landfill near Lordsburg in order to dispose of waste generated in other states.¹¹¹ If it is opened, the landfill will receive between 10,000 and 20,000 tons of waste each day, and up to seven million tons per year, making it the largest landfill in the United States in acreage and close to the largest in terms of the amount of waste handled.¹¹² The proposed landfill site is over the Valley Alluvial Aquifer, the source of Lordsburg's drinking water, and is within fifty feet of the aquifer.¹¹³

The Driggs Corporation's proposal is not the only plan for importation of out-of-state waste into New Mexico. The State Environment Department has received both an application for a 9,000 acre landfill in Lincoln County to receive out-of-state waste and inquiries about importing out-of-state waste into the Vaughn and Albuquerque areas.¹¹⁴ In addition, former Albuquerque Mayor Harry Kinney, who was a Republican candidate for governor in the June 1990 primary, advocated bringing one-quarter of the nation's waste (100,000 tons per day and 36.5 million tons per year) to New Mexico for disposal.¹¹⁵

The law governing interstate transportation of solid waste is still evolving. The starting point is the Commerce Clause of the United States Constitution, which reserves regulation of interstate commerce to the United States Congress.¹¹⁶ In *Philadelphia v. New Jersey*,¹¹⁷ the United States Supreme Court ruled that solid waste is an article of commerce and that states may not prohibit its transportation across state lines. New Jersey had enacted a statute prohibiting the importation of solid waste on the ground that this ban was necessary to preserve the state's remaining landfill space.¹¹⁸ The Court pointed out that the law impermissibly placed

108. *NSWMA Sues Over Pennsylvania Landfill Moratorium*, WASTE TECH NEWS, Jan. 29, 1990, at 2, 16.

109. *South Dakota Legislature Bans Commercial Landfills, Incinerators*, WASTE TECH NEWS, Mar. 26, 1990, at 11.

110. Barron, *Governors Urge Export Fees on Some Solid Waste*, WASTE TECH NEWS, Mar. 12, 1990, at 2, 15.

111. Interim Env't Hearing, *supra* note 78, at 7; Gallagher, *New Mexico Dump Planners Buy Shipping Pier on East Coast*, Albuquerque J., Mar. 26, 1989, at A1, col. 1.

112. Gallagher, *supra* note 111, at A1, col. 2.

113. *Id.* at A3, col. 2.

114. Interim Env't Hearing, *supra* note 78, at 7.

115. Robinson, *Talking Trash May Translate Into Big Bucks*, Albuquerque J., Dec. 3, 1989, at C1, col. 1.

116. U.S. CONST. art. I, § 8, cl. 3.

117. 437 U.S. 617 (1978).

118. *Id.* at 625.

the entire burden of achieving that goal upon out-of-state transporters of solid waste, even though solid waste from other states was not shown to be more harmful than New Jersey waste, and concluded that the law violated the Commerce Clause.¹¹⁹

The Supreme Court has interpreted the Commerce Clause to permit states to favor their residents when the states are participants in the market involved,¹²⁰ and lower federal courts have applied that exception to the disposal of solid waste.¹²¹ In addition, there are two cases in which restrictions on interstate transportation of solid waste have been upheld by the courts. In *Bill Kettlewell Excavating, Inc. v. Michigan Department of Natural Resources*,¹²² the Sixth Circuit Court of Appeals ruled that the Michigan statute referred to above, which requires county permission for disposal in the county of waste generated elsewhere, did not discriminate impermissibly against out-of-state solid waste for two reasons. First, the statute discriminated against all out-of-county waste, whether it was generated within or outside the state. Second, the statute provided the benefit of a systematic planning process for counties, which was not clearly outweighed by the impacts on interstate commerce. The Ninth Circuit Court of Appeals reached a similar result in *Evergreen Waste Systems, Inc. v. Metropolitan Service District*.¹²³ In that case, the Metropolitan Service District adopted an ordinance prohibiting disposal in its landfill of waste from outside the District's three-county area. The court determined that, like the Michigan statute, the ordinance treated equally in-state and out-of-state waste from outside the District, and it served the legitimate purpose of extending the life of the landfill.

On the other hand, there are several cases in which states' efforts to deal with out-of-state trash have been determined to violate the Commerce Clause. In *National Solid Waste Management Association v. Voinovich*,¹²⁴ the United States District Court for the Southern District of Ohio ruled that the Commerce Clause did not permit Ohio's different charges for disposal of waste generated within a waste management district, waste produced outside the district but within the state, and waste generated outside the state.¹²⁵ In addition, the United States District Court for the Middle District of Georgia invalidated a Georgia law that required permission of the county governing body for disposal of out-of-county and out-of-state waste at any public or private landfill within the county.¹²⁶

119. *Id.* at 629.

120. *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

121. *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245 (3rd Cir. 1989); *Lefrancois v. Rhode Island*, 669 F. Supp. 1204 (D.R.I. 1987).

122. 931 F.2d 413 (6th Cir. 1991).

123. 820 F.2d 1482 (9th Cir. 1987).

124. 763 F. Supp. 244 (S.D. Ohio 1991).

125. The fees were \$.70 per ton for waste generated within the waste management district, \$1.20 per ton for waste produced outside the district but within the state, and \$1.70 per ton for waste generated outside the state.

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

Finally, an Indiana law that addressed interstate transportation of waste has been challenged and was determined to violate the Commerce Clause in *Government Suppliers Consolidating Service v. Bayh*.¹²⁷ That statute required payment of a special fee for disposal in Indiana of waste generated elsewhere¹²⁸ and maintenance of extensive records concerning that waste. The court found that there was no health or safety justification for treating out-of-state waste differently, that Indiana did not use the required records, and that the statute imposed a burden on interstate commerce.

To be effective, a program for solid waste management must also include public education. The need for such education is demonstrated by the enormous quantity of waste that Americans and New Mexicans generate, an amount that is twice that produced by Europeans and Japanese.¹²⁹ Residents of the United States and New Mexico also do very little recycling.¹³⁰ For example, despite the ease and profit involved in recycling aluminum, Americans throw away enough of it every three months to rebuild the nation's entire commercial airline fleet.¹³¹

The need for public education and awareness is also evident from the lack of attention that has been paid to landfills, which have been left unmonitored despite their potential to cause serious pollution problems. This point is particularly applicable in New Mexico, where there was no state regulation of landfills until the spring of 1989, and where legislation governing disposal of solid waste was enacted only after the state was threatened with the importation of massive amounts of waste from other states.

Protection of public health and the environment from the hazards caused by solid waste pollution requires a comprehensive approach to solid waste management. Prevention and cleanup of pollution from solid waste disposal facilities depends not only upon appropriate construction and operation of the facilities, but also upon such factors as reduction and control of the waste that is disposed of in the facilities, adequate funding and determinations of responsibility for any pollution that does occur, disclosure of the environmental and criminal records of the entities that apply for permits to own or operate the facilities, effective notice to the public of applications for those permits, management of importation of large amounts of waste from other states, and public education. Solid waste, therefore, cannot be managed effectively on a piecemeal basis; rather, there must be a comprehensive approach to the problem.

127. 753 F. Supp. 739 (S.D. Ind. 1990).

128. The fee required to be paid was the difference between \$.50 per ton, the fee charged for disposal of waste generated in Indiana, and the fee charged for disposing of the waste at the disposal facility nearest to the site where the waste was generated.

129. Begley & King, *The Supply-Side Theory of Garbage*, NEWSWEEK, Nov. 27, 1989, at 76.

130. There are only a few community-wide recycling programs in New Mexico, including relatively new operations in Albuquerque, Los Alamos, and Santa Fe.

131. Begley, Takayama & Hager, *Teeing Off on Japan's Garbage*, NEWSWEEK, Nov. 27, 1989, at 70.

B. Prior to enactment of the Solid Waste Act, New Mexico law and regulations did not protect the state from improper disposal of solid waste.

The Solid Waste Act is the first New Mexico statute that addresses management of solid waste in a systematic manner and provides protection for the state from the hazards posed by that waste. The state's efforts to regulate solid waste before the Solid Waste Act consisted of several statutes giving local governments and the Environmental Improvement Board general authority over waste disposal, and three sets of guidelines and regulations. None of these dealt adequately with the issues and problems of solid waste management.

New Mexico municipalities and counties are authorized to collect and dispose of refuse,¹³² but they have no authority to regulate garbage in a comprehensive manner on a statewide basis: neither is authorized to require reduction of waste, to establish liability for pollution from waste disposal facilities, or to regulate companies involved in the waste disposal business. Although both counties and municipalities have means of raising funds for solid waste disposal, they and many other New Mexico local governments have taken the position that these means are inadequate.

Municipalities are authorized to assess each person who owns property within the municipality for garbage collection and disposal services;¹³³ counties may charge for use of waste disposal facilities,¹³⁴ and both entities have the authority to sell bonds to generate funds for solid waste disposal.¹³⁵ Despite these abilities, when the New Mexico Environmental Improvement Board promulgated the 1989 Solid Waste Management Regulations, approximately eighty New Mexico local governments appealed on the ground that the Regulations violated article X, section 8 of the New Mexico Constitution because the state did not provide the local governments any funding with which to implement the Regulations.¹³⁶

The New Mexico Environmental Improvement Act¹³⁷ is similarly deficient. It provides only that the Environmental Improvement Board ("Board") shall promulgate regulations and standards concerning "liquid waste and solid waste sanitation and refuse disposal," among other

132. The municipalities' authority is set forth in N.M. STAT. ANN. §§ 3-48-1 to -5 (Repl. Pamp. 1984); the counties are authorized to act by N.M. STAT. ANN. §§ 4-56-1 to -3 (Repl. Pamp. 1984).

133. N.M. STAT. ANN. § 3-48-3 (Repl. Pamp. 1984); *City of Hobbs v. Chesport, Ltd.*, 76 N.M. 609, 417 P.2d 210 (1966).

134. N.M. STAT. ANN. § 4-56-3(E) (Repl. Pamp. 1984).

135. Counties are provided with this authority by the County Pollution Control Revenue Bond Act, N.M. STAT. ANN. §§ 4-60-1 to -15 (Repl. Pamp. 1984), which covers pollution caused by disposal of solid waste. *Id.* § 4-60-2(G). The Pollution Control Revenue Bond Act, N.M. STAT. ANN. §§ 3-59-1 to -14 (Repl. Pamp. 1984), which also covers solid waste disposal pollution, authorizes the issuance of such bonds by municipalities. *Id.* § 3-59-2(F).

136. *City of Alamogordo v. New Mexico Envtl. Improvement Bd.*, No. 11469 (N.M. Ct. App. filed May 12, 1989). The local governments also filed an action in Santa Fe County District Court to stop implementation of the Regulations. *City of Alamogordo v. New Mexico Envtl. Improvement Bd.*, No. SF-89-960C.

137. N.M. STAT. ANN. §§ 74-1-1 to -10 (Repl. Pamp. 1990).

items.¹³⁸ This provision has been interpreted as giving the Board paramount, state-wide authority over the disposal of waste;¹³⁹ but, it does not authorize the Board to address many of the problems related to disposal of waste.¹⁴⁰

The Board has no authority under the Environmental Improvement Act to deal with the overwhelming amounts of garbage being generated in New Mexico. The most effective way to approach that problem is to mandate reduction, reuse, and recycling of waste, but the Environmental Improvement Act's mandate is limited to regulation of sanitation and disposal of waste. The Act therefore gives the Board no power either to mandate reduction, reuse, and recycling of waste, or to regulate matters such as government preferences for goods made of recycled materials, which is an effective means of promoting markets for such materials.

The Environmental Improvement Act also does not confer on the Board the ability to provide funding for treatment and disposal of solid waste or even to assess fees for that purpose. There is, as well, no authorization in the Act permitting the Board to determine liability for the costs of cleaning up pollution from solid waste disposal sites, to require disclosure by applicants for solid waste disposal facility permits, or to manage in any manner the transportation of solid waste for disposal in communities other than those in which it was generated. The Act also gives the Board no authority to implement a public education program. Moreover, the regulations adopted by the Board in the past pursuant to this authority have not addressed the problems of solid waste management and disposal.

The first regulations governing disposal of solid waste adopted by the Environmental Improvement Board were the 1974 Solid Waste Management Regulations;¹⁴¹ unfortunately, they did not address the problems posed by solid waste.¹⁴² The 1974 Regulations provided that solid waste collection, transportation, and disposal systems must be registered with the New Mexico Environment Department, but they did not require that state permits be obtained for those systems.¹⁴³ The Regulations set forth minimal requirements for solid waste storage, transportation, and disposal in landfills,¹⁴⁴ but they neither resolved those issues adequately nor addressed the other problems of solid waste management.

138. *Id.* § 74-1-8(A)(3).

139. *New Mexico Mun. League v. New Mexico Env'tl. Improvement Bd.*, 88 N.M. 201, 539 P.2d 221 (Ct. App. 1975).

140. This is a particular problem because the Board is created by statute and therefore has no common law powers. *Public Serv. Co. of N.M. v. New Mexico Env'tl. Improvement Bd.*, 89 N.M. 223, 549 P.2d 638 (Ct. App.), *cert. denied*, 89 N.M. 321, 551 P.2d 1368 (1976).

141. The New Mexico Department of Public Health had also issued Recommended Standards for Sanitary Landfills in New Mexico in April of 1967. As their title indicates, those standards were recommendations only; they contained no requirements governing landfills.

142. The Regulations were characterized by the Environment Department Special Waste Bureau's Program as "some of the weakest, if not the weakest in the nation." 1989 SWMR hearing transcript, *supra* note 43, at 28.

143. Solid Waste Management Regulations § 103 (1974) [hereinafter 1974 SWMR].

144. *Id.* §§ 105-08.

For example, the 1974 Regulations' provisions concerning storage of waste required that facilities be fly and rodent proof and reasonably clean.¹⁴⁵ The same provisions mandated that containers have safe, usable handles and be compatible with collection vehicles.¹⁴⁶ Collection vehicles were only required to have covers to prevent waste from blowing away, and to be leakproof and clean.¹⁴⁷ The Regulations set forth general requirements for landfills, such as the provision that they not be located or operated in a manner that causes a public nuisance or a hazard to the public health or welfare,¹⁴⁸ but the only specific standards included were minimal ones. Landfills were required to be located twenty feet from groundwater, to have daily and final cover, and to prevent runoff water from entering the fill.¹⁴⁹

The requirements of the 1974 Regulations were insufficient to adequately address solid waste management and disposal. The Regulations did not even address reduction, reuse, or recycling of waste. The sections of the Regulations concerning waste disposal made no provision for appropriate siting of landfills or incinerators, or for landfill liners, leachate collection systems, methane venting or collection, incinerator pollution controls, or other methods of preventing the pollution that can result from improper disposal of solid waste. The Regulations also failed to address the issues of funding, liability, disclosure, notice, intrastate and interstate transportation of waste, and public education.

Funding, liability, disclosure, intrastate and interstate transportation of waste, and public education are also not addressed in the Environmental Improvement Board's 1989 Solid Waste Management Regulations. The 1989 Regulations make no provisions for waste reduction, reuse, or recycling, although the Environment Department indicated at the hearing on the Regulations that it would encourage recycling.¹⁵⁰ There are also serious deficiencies in the 1989 Regulations' provisions on the important issues that they do address.

The 1989 Regulations do not provide adequate protection against the pollution that can result from disposal of solid waste because most of the Regulations' requirements for such protection are discretionary, not mandatory. For example, the 1989 Regulations prohibit landfills in several areas, including floodplains, watercourses, and areas where the distance between the bottom of the landfill and groundwater is less than fifty feet.¹⁵¹ There is no direct prohibition against pollution of groundwater by landfills, and the only mention of that issue in the 1989 Regulations is an indication that if a landfill is to be located over an aquifer, the Environment Department may require the applicant for the landfill permit

145. *Id.* § 105(C).

146. *Id.* § 105(D).

147. *Id.* §§ 106(C), 107(C).

148. *Id.* § 108(E)(9).

149. *Id.* § 108(E)(2), (5), (10), (11).

150. 1989 SWMR hearing transcript, *supra* note 43, at 127.

151. Solid Waste Management Regulations § 201(A)(3) (1989).

to demonstrate that the landfill will not discharge contaminants in violation of the New Mexico Water Quality Control Commission's water quality standards.¹⁵² The 1989 Regulations also leave to the discretion of the Environment Department whether to require a demonstration that the landfill will not pollute surface water¹⁵³ and whether to require water and gas monitoring wells.¹⁵⁴

The provisions of the 1989 Regulations governing disposal of municipal waste incinerator ash are not adequate. Despite the demonstrated toxic nature of much of that ash, there are no mandates that ash be tested for toxicity, or for special treatment of ash that is determined to be toxic.¹⁵⁵

The Regulations require financial assurances only for landfills, and the financial assurances need only cover the cost of closure and post-closure care.¹⁵⁶ There is no mandated assurance for other costs, such as the expenses of cleaning up polluted soil or water.

The 1989 Regulations' public notice requirements are minimal. With the exception of people who have requested notification, the public is to be notified of an application for a solid waste disposal facility permit only by publication of a notice in a newspaper of general circulation in the state and in the county in which the facility is to be located. Posting of that notice at the Environment Department office in that county is also required.¹⁵⁷

The 1989 Regulations also do not set forth any comprehensive plan, or any mechanism for preparation and implementation of such a plan, for solid waste management throughout New Mexico. Rather, they address only issues pertaining to specific solid waste disposal facilities. The solid waste problem cannot be addressed adequately on this basis.

The last problem with the 1989 Regulations pertains not to their content, but to their application. Until September 1990, the Regulations did not apply to almost one-half of the landfills in the state.¹⁵⁸ After the Regulations were promulgated, but before they took effect,¹⁵⁹ approximately eighty New Mexico local governments filed an appeal of the Regulations in the court of appeals,¹⁶⁰ as well as an action challenging them in the

152. *Id.* § 201(C)(1)(h).

153. *Id.* § 200(C)(1)(i).

154. *Id.* § 201(C)(1)(e)(i).

155. *Id.* § 305.

156. *Id.* § 303.

157. *Id.* § 202.

158. In an affidavit filed in *City of Alamogordo v. New Mexico Env'tl. Improvement Bd.*, No. 11469 (N.M. Ct. App. filed May 12, 1989), Raymond Sisneros of the Solid Waste Section, Special Waste Bureau, Environment Department, stated that there were about 300 landfills in the state, 120 of which were owned and operated by local governments. Sisneros affidavit at 5.

159. N.M. STAT. ANN. § 74-1-9(G) (Repl. Pamp. 1990), part of the Environmental Improvement Act, provides that the Board's regulations do not take effect until thirty days after they have been filed with the State Records Center pursuant to the State Rules Act.

160. *City of Alamogordo v. New Mexico Env'tl. Improvement Bd.*, No. 11469 (N.M. Ct. App. filed May 12, 1989). Other local governments intervened as appellants in the case, and about 100 local governments were eventually involved.

Santa Fe County District Court.¹⁶¹ In each case, the local governments sought a ruling that the Regulations violated article X, section 8 of the New Mexico Constitution.¹⁶² The local governments also sought and obtained in each case an order staying application of the 1989 Regulations pending a determination on the merits of the litigation.¹⁶³ The parties to the cases have since settled, based upon the Solid Waste Act's funding for local government efforts concerning solid waste.¹⁶⁴

III. THE SOLID WASTE ACT

The legislative effort to enact the Solid Waste Act began when Senator Roman Maes sponsored the Resource Conservation and Recovery Act during the 1989 legislative session. Both houses of the legislature passed the bill, but it was vetoed by the Governor.¹⁶⁵ Following a year of hearings by the interim Environment, Land Use, and Solid Waste Committee, Senator Maes introduced the Solid Waste Act in the 1990 session. It, too, passed both houses, after which it was approved by the Governor.

The Solid Waste Act¹⁶⁶ ("Act") addresses many of the problems connected with the management and disposal of solid waste. Although some issues must be resolved by regulations, the Act provides a framework for those regulations.

A. The Act requires New Mexico to deal with solid waste in a comprehensive manner.

The need for a comprehensive approach to solid waste is recognized by the Act. Its initial purpose is to establish a comprehensive solid waste management program for the state.¹⁶⁷ More specifically, the Act requires the Environment Department to prepare a comprehensive solid waste management plan, which is to be submitted to the Environmental Improvement Board for approval.¹⁶⁸ The plan is important not only because it provides a comprehensive approach to solid waste disposal in the state, but also because consistency with the plan is required for any regulation adopted to implement the Act, for any action taken by the Environment Department under the Act, and for any county or municipality to obtain

161. *City of Alamogordo v. New Mexico Env'tl. Improvement Bd.*, No. SF-89-960C.

162. N.M. CONST. art. X, § 8 provides that no state rule or regulation which mandates new or increased services by cities or counties shall be effective unless the state provides funding for that service.

163. On May 12, 1989, the Santa Fe County District Court entered a temporary restraining order and stay preventing the Regulations from taking effect with regard to the plaintiffs in that suit. The court of appeals entered an order on June 6, 1989, staying the effect of the Regulations pending the disposition of appeal number 11469.

164. The parties to the district court case stipulated to its dismissal, and a settlement and order of dismissal were entered in the court of appeals litigation on September 24, 1990.

165. Although the bill was passed by wide margins in both the House and the Senate, an effort to override the veto failed by three votes in the Senate.

166. N.M. STAT. ANN. §§ 74-9-1 to -42 (Repl. Pamp. 1990).

167. *Id.* § 74-9-2.

168. *Id.* §§ 74-9-4 to -7.

a grant pursuant to the Act.¹⁶⁹ The Act sets forth specific requirements for the plan, including priorities for treatment and disposal of waste¹⁷⁰ and specific elements that must be covered by the plan, such as solid waste facility capacity for each solid waste district designated under the Act.¹⁷¹ The Act also mandates that the Environment Department obtain information concerning these priorities and elements from New Mexico local governments for use in the plan.¹⁷²

The Environment Department is required to prepare and implement a solid waste management program.¹⁷³ The program is to be based upon the plan and designed to achieve several objectives, including state-wide solid waste treatment and disposal and coordinated regional activity for managing solid waste disposal.¹⁷⁴ The Act also requires the Environmental Improvement Board to adopt implementing regulations regarding the prevention of pollution from solid waste disposal facilities. An initial set of regulations is to be adopted and then reviewed in light of the plan after it has been adopted.¹⁷⁵

B. New Mexico is mandated by the Act to reduce the amount of waste it produces.

The Solid Waste Act contains several provisions designed to reduce the amount of waste that will be disposed of in New Mexico solid waste disposal facilities. The purposes of the Act include promoting reuse, reduction, and recycling as alternatives to disposal of waste in landfills, and requiring the state and its political subdivisions and agencies to promote recycling.¹⁷⁶ In addition, the solid waste management plan that is to be developed must include the following three priorities for treatment of solid waste: first, source reduction and recycling; second, environmentally safe treatment of waste by means other than burying it in landfills; and, third, environmentally safe landfill disposal.¹⁷⁷ The plan is also required to address source reduction, recycling, and composting, and must include goals to divert twenty-five percent of all solid waste from solid waste facilities by July 1, 1995, and fifty percent of all solid waste from solid waste facilities by July 1, 2000.¹⁷⁸ These goals must be included in the implementing regulations to be adopted under the Act.¹⁷⁹

In addition to these general requirements, the Act includes two more specific mandates concerning state governmental agencies and post-secondary institutions. First, all state governmental agencies and post-sec-

169. *Id.* § 74-9-5.

170. *Id.* § 74-9-4.

171. *Id.* § 74-9-5.

172. *Id.* § 74-9-7.

173. *Id.* § 74-9-12.

174. *Id.*

175. *Id.* §§ 74-9-8 to -11.

176. *Id.* § 74-9-2.

177. *Id.* § 74-9-4.

178. *Id.* § 74-9-6(J).

179. *Id.* § 74-9-10.

ondary institutions must develop source reduction and recycling programs.¹⁸⁰ Second, and more importantly, the state purchasing agent and the purchasing agents of individual agencies must take steps to purchase recycled products and must give a five percent price preference to those products that are made in whole or in part from recycled materials.¹⁸¹ This is an extremely important provision because recycling is feasible only if there are markets for recycled products. It is therefore particularly appropriate for the state to provide such markets and to set an example for other purchasers to do so.

C. The Act establishes a framework for prevention of solid waste disposal pollution.

The problem of solid waste pollution is addressed in the Act in two ways. First, the Act makes prevention of such pollution a priority and provides the means for redressing the problem. Second, the Act requires adoption of regulations governing specific pollution sources.

The purposes of the Act include protection of the environment from the effects of solid waste disposal.¹⁸² The solid waste management plan is required to cover special waste and household hazardous waste, as well as solid waste facility siting, and to prefer source reduction and recycling to treatment of waste¹⁸³ by any means. These measures are appropriate because of the risks of waste disposal in incinerators and landfills.¹⁸⁴

The Act also makes it illegal to: (1) dispose of solid waste in any place other than a disposal facility that has a permit for the disposal of that waste; (2) construct, operate, modify, or close a solid waste disposal facility without a permit from the state to do so; and (3) dispose of solid waste in a manner that the person knows or should know harms the environment or endangers the public health or safety.¹⁸⁵ Violation of any of these prohibitions is punishable by criminal penalties. The punishment for disposing of waste illegally depends upon the cost of cleaning up the waste. If the cleanup cost is less than \$10,000, the offense is a misdemeanor; if the cleanup cost is \$10,000 or more, the offense is a fourth degree felony.¹⁸⁶ In addition, violations of solid waste incinerator emissions regulations are fourth degree felonies,¹⁸⁷ as are willful failure to disclose information and providing false information on an application for a permit under the Act.¹⁸⁸

180. *Id.* §§ 74-9-15 to -16.

181. *Id.* § 74-9-19.

182. *Id.* § 74-9-2(D).

183. *Id.* § 74-9-4.

184. *Id.* § 74-9-18(B), (C). With regard specifically to household hazardous waste, the Environment Department is required to develop a public information program and to provide technical assistance to governmental entities that have programs for handling such waste.

185. *Id.* § 74-9-31(A).

186. *Id.* § 74-9-37(A), (B).

187. *Id.* § 74-9-14. Although this provision is not codified as part of the Solid Waste Act, it was enacted in the legislation.

188. *Id.* § 74-9-37(C).

The Environment Department is given broad authority to enforce the Act.¹⁸⁹ The Department may enter, inspect, and take samples at solid waste facilities, and it may also inspect vehicles and facilities of commercial solid waste haulers.¹⁹⁰ The Department is authorized to issue compliance orders and to assess penalties up to \$5,000 for violations of the Act, its implementing regulations, or any permit issued pursuant to the Act.¹⁹¹ For violations of compliance orders, the Department may assess penalties up to \$10,000 per day of noncompliance.¹⁹² Violations of solid waste incinerator emissions regulations are punishable by imposition of civil penalties of up to \$10,000 per violation.¹⁹³ The Department may also sue to enforce the Act.¹⁹⁴

The statute requires that the Environmental Improvement Board adopt implementing regulations which address particular potential causes of pollution from solid waste disposal.¹⁹⁵ Specifically, the regulations must cover: construction, operation, maintenance, and closure and post-closure care of solid waste facilities; special wastes and detoxification of those wastes; classifications of solid waste facilities and the wastes that may be disposed of in them; performance standards for solid waste treatment and disposal facilities; standards for commercial haulers of waste; procedures for obtaining variances under the Act; and recordkeeping procedures.¹⁹⁶

The statute also makes protection of the public health and the environment a basis for determining whether to grant permits for solid waste disposal facilities. The Environment Department may deny an application for a permit if granting the permit would be contrary to the Act or any regulation promulgated pursuant to it,¹⁹⁷ or if the Department Secretary has reasonable cause to believe that any person required to be listed on the application has had any permit revoked or permanently suspended for cause under any state or federal environmental law or has exhibited a history of willful disregard for any such laws.¹⁹⁸

D. The legislation provides funding for proper solid waste disposal and cleanup of solid waste pollution.

Appropriate funding for solid waste management is a priority of the Solid Waste Act. One of the Act's purposes is to provide assistance and incentives to counties and municipalities for solid waste management.¹⁹⁹ The solid waste management plan and program each include financial

189. *Id.* §§ 74-9-14, -15, -17, -18.

190. *Id.* § 74-9-33.

191. *Id.* § 74-9-36.

192. *Id.* § 74-9-36(C)(1).

193. *Id.*

194. *Id.* § 74-9-36(A)(2).

195. *Id.* § 74-9-8.

196. *Id.*

197. *Id.* § 74-9-24(A).

198. *Id.* § 74-9-24(B).

199. *Id.* § 74-9-2(B).

elements, and the program is specifically required to provide for financial assistance to state agencies, local governments, and others for waste treatment and disposal.²⁰⁰

The legislation establishes direct funding mechanisms to cover New Mexico municipalities' and counties' costs of solid waste management and disposal. The Act creates the solid waste facility grant fund, into which both penalties and the solid waste assessment fee are to be paid,²⁰¹ and from which the Environment Department may make grants to counties and municipalities for solid waste management.²⁰² Counties and municipalities are authorized to impose gross receipts taxes to cover solid waste management expenses.²⁰³ The importance of this last provision is evidenced by the dismissal of litigation brought by New Mexico local governments challenging the 1989 Solid Waste Management Regulations on the ground that the state had not provided funding for their implementation.²⁰⁴

The Act also establishes criteria for the regulations that the Environmental Improvement Board is to adopt governing financial assurances from applicants for permits to operate solid waste disposal facilities.²⁰⁵ The assurances must be designed to ensure that there are sufficient funds to cover: closure and post-closure inspection, monitoring, and control; removal and disposal of improvements; reclamation of affected or contaminated lands and waters; construction of any cover or containment system that is required; stabilization and treatment of any contaminated material; decontamination and treatment of equipment; operation of monitoring systems; and conducting post-closure monitoring and inspections.²⁰⁶ The amounts of financial assurances required shall be determined by the Environment Department.²⁰⁷ All forms of financial assurance are required to be payable to the New Mexico governmental entity that owns or operates the solid waste disposal facility involved, or to the State of New Mexico if the facility is privately owned and operated.²⁰⁸ Failure to meet the financial assurance requirements is a basis for denial of an application for a permit.²⁰⁹

The Act provides as well that the regulations to be adopted by the Environmental Improvement Board shall establish a fee schedule for processing applications for permits under the Act,²¹⁰ which is a means

200. *Id.* §§ 74-9-6(G), -12(B)(4).

201. *Id.* § 74-9-41.

202. *Id.* § 74-9-40.

203. This provision is not codified as part of the Solid Waste Act, but it appears as amendments to both the laws governing municipalities and counties and the tax code. *See id.* §§ 7-19(B)-1 to -7. In addition, the General Appropriations Act passed by the 1990 Legislature appropriated \$750,000 to the Environment Department for purposes of dealing with solid waste. 1990 N.M. Laws ch. 131.

204. *City of Alamogordo v. New Mexico Env'tl. Improvement Bd.*, No. 11469 (N.M. Ct. App. filed May 12, 1989).

205. N.M. STAT. ANN. § 74-9-35(A) (Repl. Pamp. 1990).

206. *Id.*

207. *Id.* § 74-9-35(C).

208. *Id.* § 74-9-35(D).

209. *Id.* § 74-9-24.

210. *Id.* § 74-9-8(I).

of covering the costs incurred by state agencies in processing applications. The statute also indicates that the fee may not exceed \$10,000.²¹¹

E. Responsibility is assigned by the Act for cleanup of solid waste pollution.

The Act enhances the ability of the state and local governments to recover costs for the cleanup of solid waste pollution.²¹² It provides that the following parties are strictly liable for costs incurred by the state or any of its political subdivisions or agencies related to releases or threatened releases of contaminants from a solid waste facility: the owner and the operator of the facility; any person who has a permit for the facility or is otherwise authorized to accept solid waste for disposal in the facility; any person who had a permit for the facility or was authorized to dispose of waste there at any time that waste was disposed of in the facility; any person who arranged for treatment or disposal of waste in the facility, transported waste to the facility, or accepted waste for disposal there; and the federal, state, or local governmental entity in whose jurisdiction the waste originated that was disposed of in the facility.²¹³ If there is more than one liable party, the court is directed to apportion damages on the basis of equitable principles.²¹⁴

Furthermore, the Act provides sanctions for parties who fail to act to prevent pollution. A party liable for a release or threatened release who fails, without sufficient cause, to take remedial or removal action in response to an order by the Environment Department is liable to the state or the appropriate political subdivision for punitive damages in the amount of three times the costs incurred as a result of the party's failure to act.²¹⁵ The Environment Department is specifically authorized to sue to collect this penalty.²¹⁶

The defenses to the liability established by the Act are limited. In order to avoid liability, a party must establish either that the release of contaminants and resulting damage were entirely the result of an act of God or an act of war, or that he is an owner of the solid waste facility property who acquired it without knowing or having any reason to know that the property had been used for a solid waste facility or who acquired the property by inheritance or devise.²¹⁷ Liability can also be avoided by a showing by a governmental agency that it acquired the property by escheat, eminent domain, or some involuntary transfer.²¹⁸

211. *Id.*

212. *Id.*

213. *Id.* § 74-9-34(B).

214. *Id.* § 74-9-34(E). The Act does not affect the rights between private parties arising from solid waste pollution. *Id.* § 74-9-34(H).

215. *Id.* § 74-9-34(D).

216. *Id.*

217. *Id.*

218. *Id.* § 74-9-34(C)(2)(b).

F. The Act requires disclosure by applicants for solid waste facility permits.

An application for a permit under the statute for a solid waste facility must include a disclosure statement on a form to be developed by the Environment Department,²¹⁹ which must include all information necessary for the Department to make a decision on the application.²²⁰ This information includes not only the applicant's history with regard to environmental laws, but also any convictions in the previous ten years for felonies involving moral turpitude or crimes defined by state or federal statutes as involving restraint of trade, price-fixing, bribery, or fraud.²²¹ Applicants who are corporations or officers or directors of corporations may avoid the disclosure statement requirement if they submit both evidence that the corporation is registered with the Federal Securities and Exchange Commission pursuant to the Securities Act of 1933²²² and the corporation's most recent annual 10-K or equivalent report.²²³ An applicant who does so must also submit the corporation's most recent 10-K report each year.²²⁴

G. Appropriate public notice is mandated by the Act.

The Act's public notice requirements ensure that the people who will be affected by solid waste disposal facilities will be aware of the decisionmaking process concerning those facilities. Every application for a permit under the Act is required to include proof that notice of the application, including information designated by regulations to be adopted by the Board, has been given to the public.²²⁵ Specifically, the notice must be sent by certified mail to owners of record of neighboring properties, which are defined separately for urban and rural settings.²²⁶ Certified mail notice is also required for all municipalities and counties within ten miles of the facility property.²²⁷ In addition, the notice is to be published in either the classified or legal advertisements section and at one other place in a newspaper of general circulation in each county in which the facility property is located, as well as posted in at least four accessible and conspicuous places on the facility property.²²⁸

H. The Act addresses both intrastate and interstate transportation of solid waste.

The statute also contains an appropriate approach to the problem of intrastate and interstate transportation of solid waste for disposal in

219. *Id.* § 74-9-20(B).

220. *Id.*

221. *Id.* § 74-9-24(B).

222. *Id.* § 74-9-21(E)(1), (2).

223. *Id.*

224. *Id.* § 74-9-21(E)(3).

225. *Id.* § 74-9-22.

226. *Id.* § 74-9-22(A).

227. *Id.* § 74-9-22(B).

228. *Id.* § 74-9-22(C).

communities other than those in which the waste was generated. The Act requires the establishment of solid waste districts, which may be designated by New Mexico local governments.²²⁹ The Act provides as well that the Environmental Improvement Board shall adopt regulations that district the entire state, taking into account the following factors: the impact of solid waste disposal on the environment; the costs to local governments of constructing and upgrading landfills; the risks to the environment and public health and safety associated with solid waste and transportation of solid waste; and existing political boundaries, commercial, population, and other centers, and landfill disposal service areas, agreements, and collection systems.²³⁰ Counties and municipalities may be divided by district boundaries, and district boundaries may cross state lines.²³¹

Payment of a solid waste assessment fee is required for the disposal of solid waste in a district other than the district in which the waste was generated.²³² The Environmental Improvement Board is to establish the fee, which shall remain in effect until July 1, 1992.²³³ The following factors are to be taken into account by the Board when it sets the fee: the impact of solid waste disposal on both the environment and the value of public and private property; the costs of protecting public health, safety, and welfare, as well as the environment, associated with the disposal of solid waste; and the costs of transportation of solid waste and inspections of out-of-district waste, as well as administrative costs incurred by the governmental entity that collects the solid waste assessment fee.²³⁴ The Environment Department is required to prepare a recommended fee structure and present it to the second regular session of the Fortieth Legislature for its consideration.²³⁵

I. Public education is required by the Act.

The Act mandates public education concerning solid waste management. The solid waste plan and program that are required to be adopted and implemented both have public education elements regarding environmentally safe and proper solid waste management.²³⁶

IV. CONCLUSION

The Act provides a sound basis for regulating solid waste in New Mexico. There is, however, an enormous amount of work left to do if

229. *Id.* §§ 74-9-7, -11.

230. *Id.* § 74-9-11(A), (B).

231. *Id.* § 74-9-11(B), (C).

232. *Id.* § 74-9-39(A). This section also contains a grandfather clause. It provides that the solid waste assessment fee is not required to be paid for disposal of out-of-district waste if the waste hauler was disposing of waste from that location within the district during the 1989 calendar year. *Id.* § 74-9-39(E)(2).

233. *Id.* § 74-9-39(B).

234. *Id.*

235. *Id.*

236. *Id.* §§ 74-9-6(F), -12(B)(5).

New Mexico is to be protected from the hazards posed by solid waste. The Environmental Improvement Board must promulgate effective initial regulations governing solid waste disposal facilities, financial assurances, commercial haulers, an application fee schedule, variances, recordkeeping, and source reduction and recycling programs.²³⁷ The Board is also required to work within the plan which is to be prepared by the Environment Department²³⁸ and to review the initial regulations in light of the plan.²³⁹ In addition, the Act mandates that the Board establish solid waste management districts and solid waste assessment fees to be paid for the disposal of out-of-district waste,²⁴⁰ as well as promulgate a regulation specifying the content of the notice of an application for a permit under the Act.²⁴¹

The Environment Department, on the other hand, must prepare and implement the solid waste management program mandated by the Act.²⁴² The Department is also responsible for preparation of a recommended fee structure for the solid waste assessment fee to be reviewed by the second session of the Fortieth Legislature.²⁴³

These are important tasks. The hazards posed by solid waste pollution are serious, and New Mexico's public health and environment will be protected only if the Environmental Improvement Board and the Environment Department enact and enforce stringent requirements that provide the maximum protection for the state. The Board and the Department are currently working on these matters,²⁴⁴ and the public should express to them its support for stringent regulation of solid waste management and disposal, as it did in support of the Solid Waste Act. The Act is a beginning, and it provides a sound framework for effective management of solid waste in the state, but it is not self-executing. The Board and the Department must implement the Act aggressively on behalf of public health and the environment in order for its purposes to be achieved.

237. *Id.* §§ 74-9-8 to -11.

238. *Id.* §§ 74-9-4 to -7.

239. *Id.* § 74-9-9.

240. *Id.* § 74-9-39.

241. *Id.* § 74-9-22.

242. *Id.* § 74-9-12.

243. *Id.* § 74-9-39(B).

244. As this article goes to press, the Board has conducted hearings on the initial regulations, and those regulations will be promulgated by the time this article is printed. The Department drafted the initial regulations and is now preparing the plan.