THE STATUTORY TREATMENT OF WASTES: A LEGISLATOR'S PERSPECTIVE

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The quantity and makeup of waste deposited in the State of New Jersey each year bears witness to the affluence and productivity of the citizens and industries of this State. For example, over $18 billion was paid by those companies collectively classified as the chemical and allied products industry to its hundreds of thousands of New Jersey employees.[1]

With the benefits of high productivity and a strong economy come many detriments. The same sector of the manufacturing industry that produces such great economic benefits to the people of New Jersey also produces approximately 2.5 million tons each year of potentially hazardous waste.[2] This type of waste constitutes a most sobering responsibility. The high standard of living which it symbolizes can be dangerously eroded if it is not managed properly and disposed of safely. Such wastes threaten the present and future quality of life in this State. Historically, the State has not managed its wastes safely. The lethal materials recklessly stored at the Chemical Control Corporation site in Elizabeth just a few years ago almost precipitated New Jersey's own Love Canal. Of the 400 uncontained sites of abandoned hazardous wastes identified by the United States Environmental Protection Agency as the nation's most dangerous, sixty-five are located in New Jersey.[3] Reports of water supplies contaminated by toxic substances from leaching landfills and the like are a regular feature of the State's daily newspapers.

Solid and hazardous wastes pose a dilemma for public officials. It is the Legislature's dual responsibility to assure and protect the public health and safety without crippling the industries or precluding the manufacture of the products which are essential to the State's economic well-being. This article is intended to present a legislator's perspective on two of the most important statutes enacted by the New Jersey Legislature in response to the economic and environmental needs of its citizens.

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[1] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 3 1977 CENSUS OF MANUFACTURERS pt. 2, at 14 (1981).

[2] *Hazardous Waste Disposal, Hearings Before the Subcomm. on Oversight & Investigations on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 1st Sess. 353 (1979) (Statement of Glenn Paulson, Asst. Commissioner for Science & Research, N.J. Dep't of Envir. Protection).

[3] Identified on the "Proposed National Priorities List" as provided for in § 105(8)(b) of The Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. § 9605(8)(b) (Supp. IV 1980)).

The Spill Compensation and Control Act

In 1976, with the prospect of off-shore exploratory drilling operations for oil and natural gas at hand, and the memories of the Santa Barbara, California oil spill disaster still vivid, the New Jersey Legislature wisely began to formulate legislation that would provide a measure of insurance for New Jersey against a similar disaster. The result was the Spill Compensation and Control Act.[4] The core provisions of this Act created a New Jersey Spill Compensation Fund. This reserve fund would make revenues available for the cleanup and removal of hazardous discharges as well as provide compensation for resultant damages without going through litigation to identify the culpable party or parties.[5] The Fund was to be financed by a tax equal to "the greater of $0.01 per barrel or 0.4% of the fair market value of the product."[6] The tax is levied upon "hazardous substances" transferred into the State.[7] Fortunately, the broad definition given to "hazardous substances" resulted in the discovery of hundreds of contaminated sites representing the legacy of several decades of irresponsible and illegal dumping of hazardous substances. The abatement of these threats to public health and safety thus falls well within the purview of the Act.[8]

Since the original intent of the Act was substantially at variance with the new environmental requirements of the State, the measure has been subject to three major amendments since its enactment.[9] The most obvious problem inherent in the original bill was the inequality which developed over the respective tax obligations of the petroleum and chemical industries. The per barrel basis of the tax financing the Fund inevitably resulted in contributions by the petroleum industry disproportionate with

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[4] N.J. STAT. ANN. §§ 58:10-23.11a to -23.11z (West 1982).

[5] *Id.* §§ 58:10-23.11g, -23.11o (West 1982).

[6] *Id.* § 58:10-23.11h(b) (West 1982).

[7] *Id.*

[8] *Id.* § 58:10-23.11b(k) (West 1982). The statute reads as follows:

> [S]uch elements and compounds, including petroleum products, which are defined as such by the department, after public hearing, and which shall be consistent to the maximum extent possible with, and which shall include, the list of hazardous substances adopted by the Federal Environmental Protection Agency pursuant to Section 311 of the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 (33 U.S.C. 1251 et seq.) and the list of toxic pollutants designated by Congress or the EPA pursuant to Section 307 of that act; provided, however that sewage and sewage sludge shall not be considered as hazardous substances for the purposes of this act . . . .

Id.

[9] Act of Feb. 9, 1981, ch. 25, 1981 N.J. Laws 59; Act of July 24, 1980, ch. 73, 1980 N.J. Laws 233; Act of Jan. 23, 1980, ch. 346, 1979 N.J. Laws 1412.

petroleum related pollution. These cleanup expenditures were made primarily as a result of chemical pollution. The first substantive amendment to the Act attempted to redress this imbalance in two ways.[10] First, it made the basis of the tax on hazardous substances other than petroleum or petroleum products the greater of $0.01 per barrel or 0.4% of the fair market value of the product transferred.[11] The practical effect of the change was to increase greatly the chemical industry's contributions into the Fund. The prices of chemical substances are usually disproportionately greater than their volume. Second, the amendment reduced the production capacity threshold of taxable facilities creating hazardous substances from 400,000 gallons to 50,000 gallons.[12] This reduction substantially increased the number of taxpayers from the chemical industry. The amendment also authorized the Department of Environmental Protection to respond to *potential* discharges of hazardous substances whose characteristics pose a substantial risk to the public health and safety.[13] Finally, it increased the minimum balance in the Fund from $25 to $50 million dollars.[14]

The next substantive amendment addressed another aspect of the imbalance between the two contributing industries. When the measure was originally drawn, a "fail-safe" feature was included due to a fear that emergency monies might not be available when needed.[15] Specifically, the Act provided that the tax be levied "until the balance in the Fund equals pending claims against the [F]und."[16] Representatives of the petroleum industry successfully argued that the fail-safe provision dramatized the Act's inherent inequality. Industry lobbyists argued that the provisions should be bifurcated. If a spill from a chemical manufacturer draws down the balance in the Fund, the tax rate on petroleum products should not be increased. The same principle would apply if a petroleum product caused the depletion. Consequently, the second substantive amendment provided for the separation of "accelerators."[17] Now the tax obligation of the

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[10] N.J. STAT. ANN. § 58:10-23.11h (West 1982); *See also Hearings on A. 3542 Before the Assembly Comm. on Agriculture and Environment*, 198th Leg., 2nd Sess. (1979).

[11] N.J. STAT. ANN. § 58:10-23h(b) (West 1982).

[12] *Id.* § 58:10-23.11b(l)(1)-(2) (West 1982).

[13] *Id.* § 58:10-23.11f(b)(1)-(3) (West 1982).

[14] *Id.* § 58:10-23.11h(b) historical note (West 1982).

[15] Spill Compensation and Control Act, ch. 141, §9, 1976 N.J. Laws 621 (codified as amended at N.J. STAT. ANN. § 58:10-23.11h (West 1982)).

[16] *Id.* § 9(b), 1976 N.J. Laws 621 (codified as amended at N.J. STAT. ANN. § 58:10-23.11h(b)).

[17] Act of Jan. 23, 1980, ch. 346, §6, 1979 N.J. Laws 1420 (codified as amended at N.J. STAT. ANN. § 58:10-23.11h(b) (West 1982)).

industry principally "responsible" for the spill depleting the Fund will be multiplied, while the other will remain at the base level.[18]

The latest of the substantive amendments[19] to the Spill Compensation and Control Act[20] expanded the purposes to which the monies in the Fund can be applied. The Act is essentially prospective in its application. Except within the limits specifically provided, the revenues of the Fund can be used only for discharges which occur after the effective date of the Act. However, the 1981 amendment made an exception for claims against the Fund to restore, replace, or connect "to an alternative water supply . . . any private residential well destroyed, contaminated, or impaired as a result of a discharge" prior to 1976.[21] A total of $500,000 was available for the period between 1981 to 1983.[22] Thereafter, $500,000 per year would be available for the cleanup of potable water sources.[23] Property owners shall have this money available to them upon approval of the DEP and, among other relevant factors, the priorities among conflicting demands on the limited revenues available in the Fund.[24] These amendments have refined and improved the original Act, honing its provisions to better accomplish those public purposes we have intended it to serve. In addition, we have striven to make the Act's implementation as fair as possible to contributor and beneficiary alike.

Today's Spill Compensation and Control Act is by no means a finished product. Like any other piece of legislation, it must be constantly modified to meet changing circumstances. In an effort to make the tax more accurately reflect risk and at the same time raise more revenue, the author has worked with industry representatives to revise some aspects of the Act. Specifically, a two-tier tax system is being analyzed which would replace the market value basis. The two-tiered system would tax separately, the generation and disposal of hazardous waste. This type of tax structure will significantly increase the number of taxpayers in the system, thus easing the burdens on individual companies, while augmenting total Fund revenues. The additional revenues, in turn, could fund other proposals currently before the Legislature. Proposals that this author has sponsored include the establishment of clinics for the diagnostic testing of

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[18] *Id.*

[19] Act of February 9, 1981, ch. 25, 1981 N.J. Laws 59.

[20] N.J. STAT. ANN. §§ 58:10-23.11 to -23.19 (West 1982 & Supp. 1983-84).

[21] *Id.* § 58:10-23.11f(e) (West 1982).

[22] *Id.*

[23] *Id.*

[24] *Id.*

potential victims of hazardous exposure,[25] the creation of a toxic task force to develop a procedure for the cleanup of hazardous discharge sites,[26] and finally the Environmental Cleanup Responsibility Act, which will require that companies detoxify their sites in accordance with a plan approved by the Department of Environmental Protection prior to transferring its assets or ceasing operations.[27]

In one form or another, the Spill Compensation and Control Act,[28] since its enactment five years ago, has served as the centerpiece of New Jersey's hazardous waste cleanup program. In fiscal 1980 alone, it contributed more than $28 million to the cleanup of 125 sites of toxic contamination, and also funded research and monitoring projects.[29] The Act also provided the monies required to meet the cost-sharing obligation of the State for Superfund revenues pursuant to the Federal Comprehensive Environmental Response Compensation and Liability Act of 1980.[30]

These necessary and immediate benefits notwithstanding, the Spill Compensation and Control Act[31] could not exist unless it were supported by sound and defensible public policy considerations.[32] A viable tax plan must do more than generate needed revenues; it must also promote societal objectives, or at least encourage socially desirable behavior. In a free enterprise system, pricing signals can accomplish these objectives, and the spill compensation tax sends these signals. Prior to the imposition of the spill tax, hazardous waste generating products competed favorably in the marketplace with more environmentally benign alternatives. The reasons are obvious: the market price of products that generated hazardous waste did not reflect all the social, economic, and environmental costs involved in getting them to the shelves. The costs of establishing standards and procedures for siting hazardous waste disposal facilities, adopting and enforcing regulations for hazardous materials transportation, conducting water quality monitoring programs, and cleaning up sites of toxic discharge, which imperil the public health and safety are a few examples of

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[25] A. 3080, 200 Leg., 2d Sess. (1983).

[26] A. 1255, 200 Leg., 2d Sess. (1983).

[27] A. 1231, 200 Leg., 1st Sess. (1982).

[28] N.J. STAT. ANN. § 58:10-23.11 (West 1982).

[29] DIVISION OF STATE AUDITING, N.J. OFFICE OF LEGISLATIVE SERVICES, AUDIT REPORT OF THE NEW JERSEY SPILL COMPENSATION FUND FOR FISCAL YEAR 1980 15 (1982).

[30] 42 U.S.C. § 9604(c)(3) (Supp. IV 1980).

[31] N.J. STAT. ANN. §§ 58:10-23.11 to -23.19 (West 1982 & Supp. 1983-84)).

[32] *Cf.* Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393 (1981), where the author concludes that "attempts to base environmental law on economic theory must fail." *Id.* at 1396.

"invisible" back-end costs. These costs are borne by the State and local governments out of general revenues. Thus what are actually spinoff costs of doing business are assessed and perceived by the consumer as costs of government regulation. Consequently, they play no part in the thousands of consumer decisions made yearly which contribute to the problem. It is not suggested that the spill compensation tax has changed all this; nor that given the choice, most people would not pay a little more for products that they regard as more convenient or desirable. What is important, however, is that a tax on certain hazardous substances may externalize the costs and risks involved in their management and disposal. This would indirectly promote the public interest without economically disadvantaging individual competitors dealing in these substances. Inevitably, the manufacturer's pass the tax burden along to consumers. At the same time, revenues are made available to protect the public health and safety. Thus, the spill compensation tax meets all the tests which are germane to the promotion of good public policy.

Solid Waste Management Act

The collection, transportation, and disposal of solid waste represents a less dramatic, though more pervasive potential environmental threat. The hub of New Jersey's solid waste management and disposal machinery is the Solid Waste Management Act.[33] It was conceived and drawn to address a number of problems that developed with respect to an industry characterized by piecemeal and uncoordinated management of solid waste; financial and technological limitations under which local governments labored in dealing with a growing problem; and increasingly frequent breakdowns in collection and disposal operations.[34]

To respond to these problems, the Act established a statutory framework to coordinate all solid waste collection, disposal, and utilization operations in the State. Specifically, it designated New Jersey's twenty-one counties and the Hackensack Meadowlands Development Commission as solid waste management districts.[35] Each district was charged with developing and implementing a comprehensive ten-year solid waste management plan to meet the needs of the municipalities in their districts.[36] These plans were to identify the solid waste disposal strategy to be applied

[33] N.J. STAT. ANN. §§ 13:1E-1 to -48 (West 1979 & Supp. 1982-83).
[34] *Id.* § 13:1E-2(a) (West 1979).
[35] *Id.* § 13:1E-19 (West 1979).
[36] *Id.* § 13:1E-20(a)(1) (West 1979).

in the district, including practicable uses of resource recovery procedures and terminated landfill disposal sites.[37] In addition, the Act calls for the drafting of district site plans identifying solid waste facilities and designating suitable sites to treat and dispose of projected amounts of waste in the future.[38] The Act also required owners and operators of sanitary landfill facilities to prepare, file, and secure approval from the Department of Environmental Protection of registration statements and engineering designs for their facilities.[39]

The Solid Waste Management Act[40] appeared to work reasonably well for several years. Limited personnel and limited funds available for enforcement hindered its effectiveness, and were responsible for some serious breakdowns. The 1976 amendment to the Act known as the "Kin-Buc" supplement recognized that hazardous materials as opposed to solid wastes were being deposited at landfill sites.[41] Specifically, it incorporated into the Solid Waste Management Act[42] definitions of chemical and hazardous wastes.[43] It also precluded the siting of landfill facilities in flood hazard areas;[44] required the separate listing of hazardous wastes received for disposal;[45] required the installation of monitoring wells at sites receiving hazardous wastes;[46] and further required the installation of systems for interception, collection, and treatment of leachates.[47] Nevertheless, in the past few years, the breakdowns have occurred more often, and the whole system now seems to be straining as a result of the volume of the solid waste generated, and the decreasing landfill capacity to absorb it.

Substantive changes were again required to address specific problems that developed and to provide incentives to reverse the ominous trend. Two supplements to the Solid Waste Management Act[48] were passed last year to effect the changes. The first of these, the Sanitary Landfill Facility Closure and Contingency Fund Act,[49] attacks two threats perceived by the

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[37] *Id.* § 13:1E-21(b)(2) (West 1979).
[38] *Id.* § 13:1E-21(b)(3) (West 1979).
[39] *Id.* § 13:1E-5(a) (West 1979).
[40] *Id.* §§ 13:1E-1 to -48 (West 1979 & Supp. 1982-83).
[41] *Id.* §§ 13:1E-38 to -42 (West 1979).
[42] *Id.* §§ 13:1E-1 to -48 (West 1979 & Supp. 1982-83).
[43] *Id.* § 13:1E-38(b),(c) (West Supp. 1982-83).
[44] *Id.* § 13:1E-39 (West 1979).
[45] *Id.* § 13:1E-40 (West 1979).
[46] *Id.* § 13:1E-41 (West 1979).
[47] *Id.* §§ 13:1E-41, -42 (West 1979 & Supp. 1982-83).
[48] *Id.* §§ 13:1E-1 to -48 (West 1979 & Supp. 1982-83).
[49] *Id.* §§ 13:1E-100 to -116 (West Supp. 1982-83).

Legislature. With the costs of solid waste disposal operations and facility closure escalating sharply, it was becoming common for unscrupulous and irresponsible landfill owners to abandon their facilities once capacity was reached (or more often exceeded), leaving the host municipality with a relatively worthless piece of real estate and a potentially serious and costly environmental hazard. Accordingly, the Closure Act imposes a tax of $0.30 per cubic yard for solid and $0.004 per gallon for liquid wastes accepted for disposal.[50] The revenue derived from the tax is deposited in an interest-bearing escrow account.[51] The purpose of the account is to provide landfill owners with a fund from which they may draw money to finance the proper termination of their business when capacity is reached.[52] The availability of a ready reserve fund dedicated to closure expenses will surely serve as a disincentive to landfill abandonment, and at the very least, provide municipalities burdened with abandoned sites with revenues to properly secure the "terminated" landfill.

The Sanitary Landfill Facility Closure and Contingency Fund Act also creates a spill fund for solid waste.[53] It imposes an additional levy of $0.15 per cubic yard of solid and $0.002 per gallon of liquid waste disposal.[54] The funds collected are to be deposited on a monthly basis[55] into a Sanitary Landfill Facility Contingency Fund.[56] The Fund is to be administered by the Department of Environmental Protection and is to be strictly liable for all direct and indirect damage resulting from the operations or closure of a sanitary landfill.[57] The Fund is necessary not only because of the increasing number of abandonments and improper closures of facilities, but also because of the common practice, by unscrupulous disposers, of including hazardous materials with the solid waste that they deposit at the site.

Like the Spill Compensation and Control Act,[58] the Closure Act[59] is not a finished product. It, too, will require refinements, some of which were foreshadowed in 1976. The commingling of hazardous and solid wastes at landfill sites, not merely by irresponsible and illegal actions, but

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[50] *Id.* § 13:1E-109(a) (West Supp. 1982-83).
[51] *Id.*
[52] *Id.* § 13:1E-109(a), (b) (West Supp. 1982-83).
[53] *Id.* § 13:1E-105 (West Supp. 1982-83).
[54] *Id.* § 13:1E-104(a) (West Supp. 1982-83).
[55] *Id.* § 13:1E-104(b)(1) (West Supp. 1982-83).
[56] *Id.* § 13:1E-105 (West Supp. 1982-83).
[57] *Id.* §§ 13:1E-105, 106(a) (West Supp. 1982-83).
[58] *Id.* § 58:10-23.11 to -23.19 (West 1982 & Supp. 1983-84).
[59] *Id.* §§ 13:1E-100 to -116 (West Supp. 1982-83).

by all of us, is inevitable. Thousands of household products are carelessly discarded daily that may contain hazardous material. The regulations presented here are difficult to enforce despite our best efforts.

The latest major supplement to the Solid Waste Management Act was enacted last year. The Recycling Act[60] attacks the solid waste dilemma from a different angle. It is designed to reduce the quantity of solid waste requiring disposal, thus relieving the strain on landfill capacity and, hopefully, turning the reclaimed materials into a useable resource.[61] The Recycling Act[62] imposes another tax on solid waste at the disposal site, namely, $0.12 per cubic yard or its equivalent,[63] to be deposited in a State Recycling fund.[64] Monies in the Fund, however, are dedicated to specific purposes. At least 45% of the monies in the Fund are to be returned to the municipalities in the form of recycling grants proportionate to the amount of refuse that the municipality has recycled.[65] Thus, a municipality can recover much of its money by developing and implementing a successful recycling program. The remainder of the Fund is to be used to provide, among other purposes, low interest loans and loan guarantees for recycling businesses and industries.[66] It is also to be used for program planning[67] and administration; county and municipal recycling program planning and funding;[68] public information and education programs concerning recycling and anti-litter activities,[69] in prescribed proportions.

To solid waste collectors, haulers, and disposers, these two supplementary acts seem to be simply additional bureaucratic schemes to extract more revenues from an industry already burdened by spiraling costs. While they do generate revenues, they also demonstrate some of the ways in which the government's taxing power can be used to promote environmentally sensitive behavior. The Sanitary Landfill Facility Closure and Contingency Fund Act[70] has the logic of an insurance policy, that is, pay small amounts at regular intervals, recover contributions when needed,

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[60] *Id.* §§ 13:1E-92 to -99 (West Supp. 1982-83).
[61] *Id.* § 13:1E-93 (West Supp. 1982-83).
[62] *Id.* §§ 13:1E-92 to -99 (West Supp. 1982-83).
[63] *Id.* § 13:1E-95(a) (West Supp. 1982-83).
[64] *Id.* § 13:1E-96(a) (West Supp. 1982-83).
[65] *Id.* § 13:1E-96(b)(1) (West Supp. 1982-83).
[66] *Id.* § 13:1E-96(b)(2) (West Supp. 1982-83).
[67] *Id.* § 13:1E-96(b)(3) (West Supp. 1982-83).
[68] *Id.* § 13:1E-96(b)(4) (West Supp. 1982-83).
[69] *Id.* § 13:1E-96(b)(5) (West Supp. 1982-83).
[70] *Id.* §§ 13:1E-100 to -116 (West Supp. 1982-83).

and, in certain emergency situations, amounts greater than those contributed. The Recycling Act,[71] on the other hand, is a forthright attempt to motivate certain kinds of behavior (i.e., recycling on the part of the public, and investment in recycling and resource recovery equipment on the part of industry). Hopefully, the Act will remove the financial and institutional obstacles to realizing the ultimate economies of reclamation, recycling, and resource recovery.

Conclusion

It is widely held that all government regulation consists simply of taxes and police power prohibitions. The ultimate consequence of that type of regulation, so the argument continues, is to drive industry from the State.

First, it should be stated that no tax, unless particularly oppressive, can drive out a large industrial or commercial concern, which looks principally to transportation accessibility, energy availability, and marketing potential when locating its operations. The more important point is that the pervasiveness of these products and their organic relationship to the economy make it impossible, as well as undesirable, to cripple the industries that generate them.

The regulation of solid and hazardous waste disposal has, over the last several years, challenged the ingenuity and the steadfastness of the Legislature as sternly as any other problem. They are indispensable to the lifestyle of everyone, yet the consequences of their mismanagement are literally life-threatening. To make matters more complex, these two problems have exacerbated the problem as a whole due to their commingling at thousands of dumpsites across the State. The regulation of hazardous and solid wastes has attempted to use the taxing and police powers of the State to deal with the sources, not just the consequences, of the problems posed. Incentives have been provided to both consumers and industries alike to act in ways that will promote the best interests of all. That is regulation at its best. Given the stakes, New Jersey can afford to do no less.

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[71] *Id.* §§ 13:1E-92 to -99 (West Supp. 1982-83).