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RCRA Reauthorization: Moving the Incineration Issue to the Front Burner

Marylou Scofield*

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RCRA REAUTHORIZATION: MOVING THE INCINERATION ISSUE TO THE FRONT BURNER

INTRODUCTION

In preparing the Resource Conservation and Recovery Act (RCRA)¹ for reauthorization this year, Congress will be asked to consider several proposed amendments which address the continuing public concern with the nation's hazardous and solid waste disposal policies. The amendments address an array of issues that fall within RCRA's regulatory jurisdiction;² they include a proposal for a moratorium on construction of any new municipal solid waste (MSW) incinerators,³ addressing a state's right to restrict use of their landfills to solid waste that is generated locally,⁴ changing mandatory levels for solid waste source reduction and recycling,⁵ and creating stricter disposal guidelines for incinerator ash.⁶ Implied in the range of issues being addressed is a critical question; what should the nation do about municipal solid waste incineration? The level of activity in the Legislative Branch on this issue alone signals the breadth of public concern over the use of MSW incinerators in the nation's communities. Should we decide to do away with MSW incineration, as advocated by many community leaders and environmentalists? If so, viable waste reduction and disposal alternatives will be needed to address the increase in the solid waste stream that will immediately result.⁷

1. Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6992 (1988).

2. WALLIS E. McCLAIN, JR., U.S. ENVIRONMENTAL LAWS 3-1 (BNA 1991). RCRA provides not only for the regulation of hazardous waste disposal and treatment, but for the "day-to-day" management of all municipal solid waste including household trash. *Id.*

3. H.R. 3253, 102d Cong., 1st Sess., § 2 (1991). RCRA defines solid waste as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semi-solid, or contained gaseous materials resulting from industrial, commercial, mining and agricultural operations, and from community activities . . ." 42 U.S.C. § 6903(27) (1988).

4. H.R. 3865, 102d Cong., 1st Sess., § 106 (2013)(k) (1991) (the original "reauthorization bill" written by Senator Swift's Subcommittee on Transportation and Hazardous Materials). One component of the Bill proposes that states be given the authority to impose differential fees when accepting out-of-state waste. *Id.*

5. *Id.* at § 301(4301).

6. S. 2146, 102d Cong., 2d Sess. (1992) (a proposed amendment to the Solid Waste Disposal Act that would require certain solid waste to be managed as hazardous waste).

7. See H.R. 3253, 102d Cong., 1st Sess. § 4011(e)(1) (1991). The term "municipal solid waste incinerator" is defined as:

[a] distinct operating unit of any facility which combusts any solid waste material from commercial or industrial establishments or the general public (including single and multiple residences, hotels, and motels). Such term does not include . . . units required to have a permit under § 3005 of SWDA [hazardous waste incinerators] . . . materials recovery facilities [smelters] . . . small power production facilities . . . producing electric energy . . . air curtain incinerators [which] only burn wood wastes, yard wastes, and clean lumber . . . or incinerators . . . that burn infectious medical waste.

This Note examines the impact that these amendments might have on MSW incineration, future public health and safety, and the environment. Part I provides a historical perspective on the incineration issue, and looks at the political and administrative policies that have set the stage for proposed amendments to the RCRA guidelines. Particular emphasis is placed on the Environmental Protection Agency's (EPA) administrative role under this congressional mandate⁸ and the problems municipalities have encountered in following RCRA guidelines and regulations while administering MSW disposal plans. Part II reviews the most widely known RCRA reauthorization bills:⁹ the original reauthorization bill, *The National Waste Reduction, Recycling and Management Act* (Swift Bill),¹⁰ *The Pollution Prevention, Community Recycling and Incinerator Control Act* (Kostermayer Bill),¹¹ and the *Solid Waste Disposal Act Amendment: S.2146* (Durenberger Bill).¹² Part III analyzes the key provisions of the bills to determine whether the proposed amendments are likely to bring about the resolution of our current waste disposal problems.

The conclusion argues that the bills deserve Legislative approval, notwithstanding some needed adjustment and clarification in certain areas. It also recommends that administrative changes be made in the area of MSW management that do not appear to be addressed in the current proposals, with the view that public health and safety be given priority in the planning process.

I. EXISTING RCRA LEGISLATION AND SOLID WASTE MANAGEMENT

Utilization of MSW incineration has always created controversy.¹³

See infra part II for more discussion of alternative methods of MSW disposal.

8. WALTER A. ROSENBAUM, *ENERGY, POLITICS, AND PUBLIC POLICY* 61-63 (1987). The EPA, established in 1970 by executive order, is the regulating authority for all air, water and noise pollution legislation. The EPA was the nation's largest regulatory agency during the 1980's; in the '90's the EPA has come under criticism for failing to work in partnership with state regulatory bodies and for not promoting its original mission. *Id.*

9. There have been at least eight other bills introduced to amend or reauthorize RCRA during the first session of the 102d Congress. Stephen Johnson, *Recyclable Materials and RCRA's Complicated, Conflicting and Costly Definition of Solid Waste*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,357 n.10 (July, 1991). The three bills cited above appear to cover the scope of all proposals and have been chosen for a discussion of relevant issues in this Note.

10. H.R. 3865, 102d Cong., 1st Sess. (1991).

11. H.R. 3253, 102d Cong., 1st Sess. (1991).

12. S. 2146, 102d Cong., 2d Sess. (1992).

13. *See* NEW YORK CITY DEP'T OF SANITATION, *A BRIEF HISTORY OF WASTE DISPOSAL IN NEW YORK CITY SINCE 1930* 1 (1985). Mayor Jimmy Walker is quoted as saying in 1931:

We have found that everybody is in favor of incinerators, but nobody desires them as neighbors. I am assured, however, that these plants will be scientifically built and their operation will be attended neither by objectionable odor,

When first introduced as a waste disposal option, incinerators were touted as being capable of drastically reducing the amount of waste being landfilled, which had become a tremendous problem in large cities like New York by the 1930's.¹⁴ In New York City, where landfill space is expected to run out completely between the years 2003-2011,¹⁵ municipal leaders have always believed that MSW incineration is the only viable method for solid waste disposal.¹⁶ Although incinerators have been used for MSW disposal purposes since 1904 in New York City, citizen opposition did not rise to its current level until a proposal for large-scale, city-wide garbage incineration was developed in 1977.¹⁷ The proposal came at a time of rising public health and environmental concerns, marked by the passage of the Clean Water Act in 1970 and the RCRA legislation in 1974; air pollution from MSW incineration was of "special concern to City residents . . . because a very large and densely settled population would be exposed to it."¹⁸ Local citizens' groups were responsible for the postponement of construction of the Brooklyn Navy Yard MSW incineration facility, suing to become legal parties to the permit proceedings and presenting testimony at public hearings in opposition to city administrators pushing for its approval.¹⁹ The court's denial of the new incinerator permit is an example of a conflict common to municipal leaders today in their efforts to implement solid waste management policy.²⁰

noise, nor smoke We have to build these plants to dispose of our refuse We cannot kick the garbage around the city. We cannot wait until there is risk of an epidemic.

Id.

14. *Id.*

15. ELIZABETH HOLTZMAN, CITY OF NEW YORK OFFICE OF THE COMPTROLLER, *BURN BABY BURN: HOW TO DISPOSE OF GARBAGE BY POLLUTING LAND, SEA AND AIR AT ENORMOUS COST 24-25* (1992) [hereinafter *COMPTROLLER'S REPORT*] (arguing that Fresh Kills Landfill is approaching the end of its useful life. The estimate given does not include any increase in total solid waste deposited at Fresh Kills if commercial waste could no longer be exported from the City).

16. NORMAN STEISEL, CITY OF NEW YORK DEP'T OF SANITATION, *STATEMENTS IN SUPPORT OF THE PROPOSED BROOKLYN NAVY YARD WASTE-TO-ENERGY PROJECT 25* (August 15, 1985). Despite statements to the contrary by local citizens' groups, the Department of Sanitation believes that there are little, if any, additional hazards imposed on New Yorkers as a result of MSW incineration. Telephone Interview with Paul Bekowies, Technical Director, City of New York Dep't of Sanitation [hereinafter *Bekowies Interview*] (Apr. 6, 1992).

17. *COMPTROLLER'S REPORT*, *supra* note 15, at 35 n.56.

18. *Id.* at 35. The *COMPTROLLER'S REPORT* argues that New York City air was already unhealthy at the time of the proposed expansion, citing Clean Air Act violations that existed then and continue today. *See id.* at 35 n.55.

19. *See generally In re Application of Signal Envtl. Sys., Inc.* for permits to construct and operate the proposed Brooklyn Navy Yard Resource Recovery Facility in Brooklyn, New York, DEC Project No. 20-85-0306 (1987) [hereinafter *Navy Yard Hearings*]; *see also COMPTROLLER'S REPORT*, *supra* note 15, at 35 n.56.

20. *See COMPTROLLER'S REPORT*, *supra* note 15, at 29-30 n.45 and accompanying text; *see also Incinerators: Burners on Defensive in Five States*, American Political Network, Inc., Sept. 9, 1991, available in LEXIS, Nexis Library, WIRES file [hereinafter *Burners On Defensive*].

While RCRA guidelines impose the burden of developing long-term MSW disposal policies on local administrators,²¹ the regulations have not addressed the administrators' need for research and development support, guidance in implementation, or a greater federal role in financing the costs of planning and implementation. Historically, the administration of RCRA guidelines under the EPA have had a significant impact on local policymaking and planning in the area of municipal solid waste management. The EPA's policies have frequently been responsible for the poor planning that has occurred locally, leaving many municipalities in a state of crisis management when it comes to handling their solid waste.²²

Current RCRA provisions regulate the administration of all forms of solid waste disposal.²³ Within the realm of solid waste disposal management, the ultimate decisions about how to dispose of waste are left to local municipal, state or regional administrators.²⁴ These administrators are required to develop a Solid Waste Management Plan which is in conformity with federal standards developed by the EPA and is approved by both the public and the EPA.²⁵ A municipality may oversee many types of incineration activities, including industrial processing, hazardous waste incineration, medical waste incineration (including cremation) and MSW incineration.²⁶ Of the different types of incineration, MSW incinerators are financed and operated like other public facilities, and because taxpayer dollars are involved, are likely to undergo even more public scrutiny and suspicion than the industry-supported activities of hazardous or medical waste incineration. In capital costs alone, millions of dollars²⁷ are at stake when a community considers building a MSW

21. 42 U.S.C. §§ 6941-6949 (1988) (subchapter IV - State or Regional Solid Waste Plans outlines guidelines for identification of regions, state plans, requirements for approval of plans, criteria, and procedures for development and implementation).

22. See Thomas J. Lueck, *Long Island Landfill Trial is Postponed by Subpoena Challenge*, N.Y. TIMES, Mar. 18, 1992, at B2; see also Joseph F. Sullivan, *Debate Rages Over Site Proposed for Incinerator: Linden Residents Fear Rise in Air Pollution*, N.Y. TIMES, Mar. 28, 1992, at B28.

23. In addition to solid waste management, RCRA provides for hazardous waste management (subchapter III), regulation of underground storage tanks (subchapter IX) and medical waste tracking (subchapter X). 42 U.S.C. §§ 6921-6939(b), 6991-6992(k).

24. See generally 42 U.S.C. §§ 6901-6992 (1988).

25. 42 U.S.C. §§ 6941-6949 (1988) (all states must develop and submit to the EPA a Solid Waste Management Plan; requirements for approval include identifying responsibilities in the implementation of the Plan, providing provisions that will encourage recycling and establishing resources to conduct feasibility studies on waste management activities).

26. Incineration of hazardous and medical waste present a vast array of issues and are beyond the scope of this Note.

27. Peter H. Kostermayer, *Incinerators: A Problem, Not a Solution*, N.Y. TIMES, Sept. 21, 1991, at A21. The average capital costs to build an incineration plant can run to \$600 million. New York City is considering spending \$1 billion on three new incinerators while simultaneously asking the state to approve reduced recycling goals; see also Calvin Sims, *Court Orders Dinkins to Obey Recycling Law*, N.Y. TIMES, Feb. 5, 1992, at B1. On Feb. 3, 1992, a New York court held that the Dinkins Administration violated the city's mandatory recycling laws. In the Matter of the Application of NRDC, Inc. for

incinerator, and the risk of creating harmful externalities is high.²⁸

A common problem for state and municipal solid waste administrators is that after submitting a RCRA-mandated solid waste management plan, they are left to their own devices to enforce and finance it.²⁹ Many municipalities have been able to overcome this hurdle by "pooling" expertise and financial resources to form regional plans that address common needs and/or problems.³⁰ But major cities such as Detroit and New York are not able to garner this form of regional support; the MSW needs for large metropolitan areas encompass a different scope and may require a different type of solution. The current guidelines do not address this difference or the special problems administrators of large urban areas must tackle.

States and municipalities have learned that the EPA has not always been reliable in administering and enforcing RCRA guidelines as they are translated into state and local codes, rules and regulations.³¹ In addition to the general problems encountered by the EPA administration in attempting to administer a sometimes complicated and over-broad doctrine,³² there is also criticism that the EPA has not been able to keep up with the enforcement and education initiatives necessary for ensuring compliance.³³

RCRA exhibits other drafting failures. RCRA's silence on important regulatory issues may be the result of compromises made at the drafting table in order to affect passage or just lack of foresight.³⁴ The controversy over interstate transport of waste delineates that confusion, as shown in *City of Philadelphia v. New Jersey*, where local efforts to limit landfilling of out-of-state garbage were found to violate constitutional protections under the Commerce Clause.³⁵ The Supreme Court decision

a Judgement Pursuant to N.Y. Civ. Prac. L. & R. Art. 78 v. New York City Dep't of Sanitation, No. 12648-91 (N.Y. Sup. Ct. Feb. 3, 1992).

28. *Mercury Level in Lakes Stirs New Health Fears*, CHI. TRIB., Aug. 26, 1991, at C14 (scientists say the principal source of mercury emissions comes from coal-burning power plants, MSW incinerators, and smelters).

29. 42 U.S.C. §§ 6941-6949 (1988); see also E. Donald Elliott, *Keynote Presentation: Making the Partnership Work*, 22 ENVTL. L. REP., (Envtl. L. Inst.) 10,010 (Jan. 1992) (discusses the paucity of federal funds available to assist state or regional solid waste management efforts).

30. Linda Lipp, *Waste Not: County Gets a Big Jump on Dumping*, CHI. TRIB., Nov. 17, 1991, at L3.

31. ROSENBAUM, *supra* note 8, at 61-63.

32. Johnson, *supra* note 9, at 10,357 (criticizing draftsmanship of RCRA for lack of clarity).

33. Miriam Feder, *Failures of the Current Waste Management Policy: The Permit Application Process Under RCRA - A Lament*, 18 ENVTL. LAW 671, 672 (1988) (examines RCRA's complex regulatory requirements which pose disincentives to industry and hamper compliance efforts of local solid waste administrators).

34. Telephone Interview with Michael Berk, Assistant to Rep. Kostermayer (Feb. 14, 1992) (explaining that compromises were crucial to passage of the original legislation).

35. 437 U.S. 617, 625-28 (1978) (New Jersey ban on accepting out-of-state trash imposed excessive burdens on interstate commerce without any rational justification for treating out-of-state waste differently from in-state waste).

to qualify garbage as a product within the meaning of interstate commerce did not point to related RCRA guidelines for its rationale. Although the guidelines contain a subchapter discussing the duties of the Secretary of Commerce, there is no discussion of how interstate waste disposal is to be regulated.³⁶

The state-federal relationship in solid waste management planning established by RCRA is also an issue. E. Donald Elliott, Assistant Administrator and General Counsel to the EPA, acknowledges that the federal/state "partnership" in the environmental area requires much improvement.³⁷ According to Mr. Elliott, the old notion of the EPA setting the policy and state and local administrators blindly attempting to carry it out (from implementation to the financing phase) has proven to be naive.³⁸ This "communication gap" between the EPA, state and local administrators has resulted in disparate approaches to the regulation of solid waste management nationally, and raises questions as to whether local municipalities should have the ultimate power to determine their own waste management plans.³⁹ Because many of the problems encountered in today's communities were not anticipated with the initial authorization of RCRA, states and municipalities continue to move ahead on their own. The result has been a proliferation of local laws and regulations regarding solid waste management.⁴⁰ While the EPA has been criticized for poor national leadership, state and municipal administrators are not entirely blameless for the municipal solid waste disposal crisis. Local administrators have contributed to that crisis by ignoring the need for long-range planning and succumbing to political pressures.

In addition, lack of federal funding has left local administrators with enormous waste disposal bills, severely straining financial resources and limiting administrative options. For example, the New York community of Westbury is charging taxpayers five times as much for waste disposal as it did fifteen years ago, yet it has little or no say in how the regional

36. 42 U.S.C. §§ 6951-6956, (1988) (Subchapter V - Duties of the Secretary of Commerce in Resource and Recovery; duties are chiefly to develop markets for recycled products and to provide assistance to state and local governments for developing expertise in marketing of recovered materials).

37. Elliott, *supra* note 29, at 10,010.

38. *Id.* at 10,010-11. Mr. Elliott points out that over the past two decades, the EPA has left more of the burdens and responsibilities of administering State Implementation Plans (SIPS) to the states; leaving the EPA to function mainly as a policy-making unit. Today states receive only about 40% of their funding for environmental initiatives from EPA grants. EPA leaves most enforcement activities up to the states, with 70% of enforcement proceedings being brought by the states. Because EPA still does allow states a role in policy development, friction has resulted between state and federal administrators. The EPA is currently trying to address this. *Id.*

39. *Id.* at 10,012; see also Jonathan P. Meyers, Note, *Confronting the Garbage Crisis: Increased Federal Involvement As a Means of Addressing Municipal Solid Waste Disposal*, 79 GEO. L.J. 567, 569 (1991) (federal government has focused primarily on hazardous waste during the 1980's, leaving the disposal of municipal solid waste to the states).

40. Lipp, *supra* note 30, at L3.

system it belongs to operates.⁴¹

Finally, the RCRA guidelines providing for citizens suits have made municipal administrators and the contractors of MSW incinerators susceptible to costly building delays and cancellations.⁴² Extended permit and hearing procedures, as well as infractions once operations are underway, are almost certain hazards for anyone planning to construct a MSW facility. For example, the New York City Department of Sanitation issued a request for proposals for a MSW incineration facility in 1980, and selected Signal Environmental Systems, Inc. as a contractor that same year. By 1987 lack of permit approval caused by citizens' opposition had managed to delay construction of any new MSW incineration facilities in New York City.⁴³ Under New York State Law, the Commissioner may conduct public hearings to discuss permitting the construction or expansion of any solid waste facility and the state solid waste management plan must also undergo public approval before it is authorized by the state legislature.⁴⁴

Citizen suits brought with regard to MSW incineration facilities already operating have relied on the 1984 RCRA amendment⁴⁵ giving citizens standing to sue to abate an "imminent and substantial endangerment".⁴⁶ Many citizens groups are simply putting pressure on their City

41. Sarah Lyall, *From L.I. to Angry Illinois: A Five-Day Trash Odyssey*, N.Y. TIMES, Dec. 26, 1991, at A1. Problems encountered when Village of Westbury, N.Y. is not allowed to use an incinerator in Hempstead only one-half a mile away, and must instead send trash to a transfer station which charges \$40 more per ton. Under the state's flow-control law, all Westbury's garbage belongs to the town, whose garbage must be shipped to a landfill in Taylorville, Illinois. *Id.*

42. See 42 U.S.C. § 6972 (1988).

43. See generally, Navy Yard Hearings, *supra* note 19.

44. See N.Y. Env'tl. Conserv. Law. § 27-0702(4) (Consol. 1991).

45. Ann Powers, *Environmental Citizen Suits*, 21 ENVTL. L. 343, 366-67 (Feb. 1991).
42 U.S.C. § 6972(a) provides the following:

[A]ny person may commence a civil action on his own behalf -

(1)(A) against any person (including (a) the United States, and (b) or any other governmental instrumentality or agency . . .) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order [under the Act]; or

(B) against any person, including the United States or any other governmental instrumentality or agency . . . and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

46. See *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). (commenting on EPA rule-making under the Administrative Procedure Act (APA), stated that EPA provisions cannot contravene the broad enforcement authority that RCRA grants to members of the general public in its citizen-suit provision). *Id.* at 765; see also *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) (affirming plaintiffs right to bring

Council members or similar elected officials to force shut-downs of operating incinerators.⁴⁷ Since citizen protest will not abate until better public health and safety protections are developed in the solid waste management planning stage, perhaps a greater role for citizen participation at that level would be useful.

Taken together, these criticisms demonstrate that RCRA is often an inefficient, burdensome and accordingly costly statutory scheme. In its present state, it is unlikely to provide much in the way of a solution to the nation's long-term solid waste management needs. The EPA and Congress must begin to develop ways to improve solid waste management — including increased recycling, reducing waste at its source, expanding markets for recyclables, and other alternative strategies — by using regulatory and policymaking strategies cooperatively.

II. PROPOSED RCRA AMENDMENTS

The three bills discussed below have been proposed in response to the mounting concern among citizens and environmental groups about the long-term safety, financial cost and environmental impact of MSW incineration facilities, and offer a positive approach to national waste management policy.⁴⁸ The two most comprehensive bills, those proposed by Representatives Swift and Kostermayer, reach a consensus as to the need for drastic reductions in the generation of municipal solid waste through recycling and source reduction.⁴⁹ The Kostermayer and the Durenberger Bills⁵⁰ both propose amendments subjecting the handling of incinerator ash to management standards currently used for hazardous waste.⁵¹ However, aside from increasing recycling goals, and redefining MSW incinerator ash, the bills present sharply different ideas about solving the waste crisis.

compliance suit under RCRA); *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 805 (D.C. Cir. 1983) (suit against EPA Administrator allowed under RCRA).

47. *Burners on Defensive*, *supra* note 20, at 1 (Baltimore MSW incineration facility is target of protests from environmentalists).

48. Kostermayer, *supra* note 27, at A21. See also Peter Eisler, *Congress Talks Trash: To Burn Or Not To Burn*, Gannett News Service, Jan. 21, 1992, available in LEXIS, Envirn Library, PUBS File ("waste-disposal controversies raging in cities and towns nationwide are reaching both the House and Senate, where lawmakers are mulling bills to revamp the main federal law governing how states and municipalities get rid of refuse").

49. H.R. 3865, 102d Cong., 1st Sess. § 301 (1991); H.R. 3253, 102d Cong., 1st Sess. § 2 (1991).

50. H.R. 3253, 102d Cong., 1st Sess. § 3 (1991); S. 2146, 102d Cong., 2d Sess. (1992).

51. It should be noted that landfilling of incinerator ash is widely recognized as being more hazardous than landfilling of unrefined municipal solid waste. The danger arises when toxins leak from landfill sites into the surrounding water, topsoil and air. While many environmentalists criticize the air pollution caused by incineration, ground, water and air contamination through unprotected landfilling may pose a greater danger. COMPTROLLER'S REPORT, *supra* note 15, at 49-50.

A. *The Swift Bill*

The Swift Bill presents a comprehensive and viable approach toward amending RCRA. One very important feature is a discussion of the need for creating industry incentives and cooperative initiatives among federal, state and private interests in developing successful solid waste management policy. The Swift Bill also introduces provisions to "clarify the federal-state relationship in waste management, assist states in stimulating markets [for recyclables], promote source reduction in packaging, and encourage recycling."⁵²

The key provisions include:

- 1) requiring that state solid waste management plans be updated;⁵³
- 2) allowing states to impose differential fees on out-of-state municipal solid waste;⁵⁴
- 3) establishing stricter federal standards for handling of MSW incinerator ash;⁵⁵
- 4) establishing programs to encourage recycling of tires and batteries, wastes that pose particular problems.⁵⁶
- 5) establishing statewide recycling rates for MSW;⁵⁷
- 6) requiring reduction of toxic metals in packaging,⁵⁸ and
- 7) expanding the federal government's role in procurement of recycled products;⁵⁹

Representative Swift has proposed additions to EPA federal guidelines, requiring the agency to assist states with the development of their solid waste management plans, including implementation of national standards for technological and market measurements to be used in solid waste management planning.⁶⁰ The Bill would also impose additional criteria which state and municipal administrators would be required to address at the planning stage.⁶¹

B. *The Kostermayer Bill*

With regard to MSW incineration, the Kostermayer Bill takes a strict

52. *National Waste Reduction, Recycling and Management Act: Hearings on H.R. 3865 Before the House of Representatives*, 102d Cong., 1st Sess., (1991) (statement of Rep. Swift) [hereinafter *Swift Hearing*].

53. *Id.* at § 102.

54. *Id.* at § 106.

55. *Id.* at § 202.

56. *Id.* at § 204, § 303.

57. *Id.* at § 301.

58. *Id.* at § 302.

59. *Id.* at § 304.

60. *Id.* at § 101.

61. *Id.* at § 102. This criteria includes expanded requirements for solid waste management plans, which must include consideration of the following: "solid waste management capacity estimates and planning; waste inventory; source reduction and recycling programs; diversion programs; public education and personnel training; scrap tire management; provisions for the management of specific wastes, such as household hazardous waste and yard wastes; and procurement of recycled products." *Id.*

approach. In addition to strong recycling measures, the amendments advocated by Representative Kostermayer address the concern "that no major recycling gains will be made as long as the nation continues to build more incinerators."⁶² The Kostermayer Bill proposes a moratorium on construction or expansion of MSW incinerators until December 31, 1999.⁶³ It also establishes stricter requirements for granting permits to new or expanded solid waste incinerators after that date.⁶⁴ The relevant proposed provisions state:

- 1) applicants must conduct a waste composition analysis and show that waste composition is in compliance with EPA guidelines;⁶⁵
- 2) minimum recycling requirements must be met for the following materials: glass (65%), newspapers (65%), other paper (65%), metals (80%), plastics (50%), yard waste (90%), food waste (10%);⁶⁶
- 3) the applicant must demonstrate that the new facility will not interfere with the rates above;⁶⁷
- 4) the applicant must demonstrate that it is not feasible to manage the remaining solid waste through source reduction, reuse, or recycling;⁶⁸
- 5) the applicant must demonstrate that operation of the facility will not adversely affect the environment or human health;⁶⁹
- 7) demonstrate that the facility will not harm the local economy or negatively affect property values.⁷⁰
- 8) the applicant must show that the cost of the facility over its entire life will be less costly than reducing, recycling, or composting waste.⁷¹

The Bill provides that:

The Federal agency, State or local government, or other waste management jurisdiction shall conduct a full public participation process, including public hearings [In addition,] the applicant shall provide to local community groups concerned about the project a technical assistance grant of at least \$50,000. The applicant shall renew the grant every six months [until the permit is granted].⁷²

The Bill also proposes that all incinerator ash be considered hazardous waste and disposed of only in specially designated and treated landfills,⁷³

62. Eisler, *supra* note 48.

63. H.R. 3253 § 2(a), 102d Cong., 1st Sess. (1991); see Chapter 82, Solid Waste Disposal Act, 42 U.S.C. 6905 (1988), Application of Chapter and Integration with other Acts (explaining that SWDA is also known as RCRA).

64. H.R. 3253 § 2(a)(4011)(b).

65. *Id.* at § 2(a)(4011)(b)(1).

66. *Id.* at § 2(a)(4011)(b)(2).

67. *Id.* at § 2(a)(4011)(b)(3).

68. *Id.* at § 2(a)(4011)(b)(4).

69. *Id.* at § 2(a)(4011)(b)(5).

70. *Id.* at § 2(a)(4011)(b)(7).

71. *Id.* at § 2(a)(4011)(b)(8).

72. *Id.* at § 2(a)(4011)(b)(9).

73. *Id.* at § 3. RCRA defines hazardous waste as a:

solid waste, or combination of solid wastes, which because of its quantity, con-

which would result in an increase in the disposal cost to communities and operators of the facilities.⁷⁴

In addition to the proposed moratorium and recycling goals, the bill discusses how the proposed monitoring and review procedures (developed for already-operating facilities) will insure safety, optimal operation (which will lower costs to citizens) or where necessary, provide measures for facility shut down or rejection of permits.⁷⁵ Finally, section four of the bill would prohibit incineration of the following materials: household hazardous waste, batteries, chlorinated plastics, consumer electronics, and yard waste.⁷⁶

Although the Kostermayer Bill has supporters across the country,⁷⁷ it is sure to face strong opposition from many fronts. Municipal administrators, who view it as a limitation on their disposal options, solid waste management companies, contractors, and building trade unions, whose livelihoods will be threatened by such a ban,⁷⁸ and even EPA officials acting under Presidential mandate⁷⁹ will argue against its adoption. In

centration, or physical chemical, or infectious characteristics, may: A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed. 42 U.S.C. § 6903 (1988).

74. The higher costs would be offset by overall reduction in amounts incinerated and savings from recycling and marketing of recyclables. H.R. 3253 § 5(3021)(b); *see also infra* note 82.

75. H.R. 3253 § 2(a)(4011)(b)(10-12).

76. H.R. 3253 § 4(3001)(k). The Kostermayer Bill's concern with incineration of these materials stems from evidence indicating that much of the solid waste burned contains chemicals and toxic heavy metals and converts those into "highly volatile compounds." Kostermayer, *supra* note 27, at A21. Kostermayer explains that today's "state of the art" incinerator technology is responsible for releasing a range of heavy metals into the air, including mercury, lead and cadmium, dioxins and PCBs. Increased mercury emissions in particular are of great concern in the area of public health, since they are linked to neurological damage, blindness and birth defects. *Id.*

77. *See generally* Letter from Twelve Groups Sponsoring the Kostermayer Bill, H.R. 3253, to U.S. House of Representatives (July 31, 1991) [hereinafter Letter] (On file with the Office of Representative Kostermayer). Sponsors of the bill include Clean Water Action, National Toxics Campaign, Natural Resources Defense Council, Sierra Club, Southwest Research and Information Center, United Methodist Church, Board of Church and Society, U.S. PIRG, Environmental Action, Environmental Defense Fund, Friends of the Earth, Greenpeace Action, National Council of Churches, as well as representatives in the House, including those from California and Maine. *Id.*

78. In fact, an estimated \$100 billion market has emerged to facilitate the "handling, treating and disposing of hazardous wastes" in the United States. Vince Gagetta, *Growing Greens: Local Firms Lead the Way Cleaning Up and Preventing Environmental Damage*, BUSINESS DATELINE, July 1991, at 24. *But see* Henry Stein, *Waste-Burning Capacity Growth Slows*, ELECTRIC LIGHT & POWER, July 1991, at 20. Kidder, Peabody & Co. complains that business is slowing, and that "the Clean Air Act Amendments may adversely affect waste-to-energy plants because of their emissions, which may include combinations of dioxins, furans, SO(2), NOx, carbon monoxide, lead, cadmium and mercury." *Id.*

79. Eisler, *supra* note 48. The Bush Administration does not want to see RCRA amended, and promotes incineration as the solution to the nation's waste disposal

fact, the Bush Administration's National Energy Strategy (NES) calls for a seven-fold increase in MSW incineration by 2010.⁸⁰

C. *The Durenberger Bill*

The Durenberger Bill establishes criteria for determining when solid waste is hazardous. Written in response to a decision by the Court of Appeals for the District of Columbia which vacated two EPA rulings regulating the disposal of incineration ash as hazardous waste,⁸¹ the Bill would label hazardous any mixture of solid waste and hazardous waste. The Durenberger Bill also addresses the importance of EPA re-promulgating the mixture and derived-from rules.⁸² These rules have been criticized by the Bush Administration and the industrial community as being overly inclusive,⁸³ forcing the costs incurred in the disposal of incinerator ash to be higher.⁸⁴

Adoption of the Bill this year will provide clarification of the EPA rules and reduce future litigation of this issue by placing the rules within the statute.⁸⁵ The legislation was presented with the concern that without the bill or these rules, hundreds of thousands of tons of hazardous waste could become automatically deregulated.⁸⁶

III. POTENTIAL IMPACT OF THE PROPOSED REAUTHORIZATION

It appears likely that if the proposed measures were approved they could substantially benefit state and municipal governments in their efforts to administer more effective solid waste management planning. Perhaps the most obvious way the bills will improve RCRA administration is that they propose more particular criteria for both the develop-

problems. EPA Chief William Reilly has followed suit, discouraging proposals to reduce levels of "incinerator-bound" waste. *Id.*

80. Letter, *supra* note 77, at 1.

81. *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991).

82. See *Solid Waste Disposal Act Amendments: Hearings on S. 2146 Before the Senate Comm. on Environment and Public Works*, 102d Cong., 2d Sess. (1992) (statement of Sen. Durenberger) [hereinafter *Durenberger Hearing*].

83. Although the EPA reissued the same rules, it stated that they would expire by July 1993, and it would be rewriting the rules to address industry concerns. The rules were originally passed to "prevent industries from bypassing the law by mixing hazardous wastes with other substances and claiming they were nonhazardous by definition, or modestly treating wastes and claiming that was enough to satisfy the regulations." Keith Schneider, *E.P.A. To Reimpose Two Rules on Waste*, N.Y. TIMES, Feb. 19, 1992, at A15. Any waste with hazardous components have required disposal in a special hazardous waste landfill rather than those used for typical household garbage. *Id.*

84. *Durenberger Hearing*, *supra* note 82. "The derived-from rule provides that residue from the treatment storage, or disposal of hazardous waste remains hazardous." *Id.* Therefore, if MSW facilities accept any solid waste that could become hazardous through the incineration process, the ash from that process must be disposed of under hazardous waste guidelines in special landfills. *Id.*

85. *Id.* The bill attempts to protect the integrity of the EPA's hazardous waste program and the EPA's right to regulate this form of hazardous waste.

86. *Id.*

ment and implementation of solid waste plans, thus offering more guidance to municipal administrators. They may also help address the problems that affect the nation as a whole—for example, issues of interstate waste transportation and defining how incinerator ash should be disposed of. The amendments also address the public concern for health and environmental quality by providing communities with the resources to conduct the necessary research prior to implementation of potentially dangerous and impractical waste management practices.

As proponents of the Kostermayer Bill believe, “[b]y calling for a limited ‘time-out’ on the construction of new incinerators we will allow our nation to get back on track toward preventing and reducing wastes instead of continuing the hazards of managing wastes.”⁸⁷ The Swift Bill would introduce stronger state incentives to accept solid waste from others that have exceeded capacity. Representative Swift points out that:

[o]ne of the downsides of states moving ahead on their own is the proliferation of different state laws packaging, labeling, and recycling. In my view, it is essential that the federal government play a constructive leadership role by providing some degree of national uniformity on these issues and expanding markets for recyclables.⁸⁸

The Durenberger Bill would effect an agreement between industry and environmentalists as to what constitutes hazardous waste and allow efforts to regulate that waste to move forward.

Many of the proposals included in the amendments are already part of local practice. Some municipal administrations have already issued moratoriums on new construction, determining on their own that they do not want to assume the risks associated with such facilities.⁸⁹ Still, municipalities like Boston and New York continue to view solid waste incineration as a viable waste management option,⁹⁰ claiming that current recycling and landfilling plans do not go far enough to solve the problems encountered in large metropolitan areas.

87. Letter, *supra* note 77, at 2.

88. Swift Hearing, *supra* note 52 at 10,990-91.

89. See, e.g., 137 CONG. REC. E3424 (daily ed. Oct. 17, 1991) (statement of Rep. Kostermayer) (because of citizens groups' opposition to incineration, all proposals for new incinerators in the past five years were halted in California).

90. See *Burners on Defensive*, *supra* note 20 (Mass. Environmental Protection Commissioner Daniel Greenbaum quoted as saying, “[t]here is no single solution to solid waste problems. We would be just as foolish to put all our eggs in the recycling basket as we would to put them in the incineration basket.” The article also highlights recent praise for the Dinkins' proposal to build new trash incinerators, noting the Administration's assertion that, in spite of recycling efforts, the need for reduction of non-recyclable wastes makes incineration essential). As to environmentalist's claims of additional air and ground water pollution, City of New York Department of Sanitation Technical Director Paul Bekowies claims that based on their collection of data on stack emissions from area incinerators, pollutants such as mercury and lead from stack emissions contribute less than 1% of the total found in New York City air. Mr. Bekowies maintains that shutting down all the city's incinerators would result in no air quality improvement whatsoever. Bekowies Interview, *supra* note 16.

What is certain in this debate is that use of solid waste incineration facilities has created controversy nationwide, as shown in local litigation⁹¹ and legislative activity over the past decade.⁹² Naturally, as Congress begins to examine the proposed amendments, various forces will be on hand in an attempt to influence the outcome of the legislation. The proposed changes in MSW guidelines which relate to incineration⁹³ will augment the controversy between environmental and industrial interests during this Congressional reauthorization and this makes it much harder to predict the outcome. The Bush Administration will try to continue to exercise its influence on policy-making in the administration of MSW disposal,⁹⁴ while simultaneously proposing less financial responsibility for the implementation⁹⁵ of solid waste plans. State environmental planners and citizens' groups will seek a greater role in the policymaking process,⁹⁶ and more support for public interest research into aspects of MSW incineration which would provide the opportunity to conduct informed decision-making in the permitting process.⁹⁷ And finally, industry will seek greater government protection in the construction and operation of MSW incineration facilities as well as protecting prospects for future growth in the waste management industry.⁹⁸

While the industrial community is perhaps most concerned with the bills proposing stricter waste treatment and disposal guidelines and in-

91. See, e.g., *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d. 345 (7th Cir. 1991) (ash generated by a municipal solid waste incinerator requires special landfill treatment under RCRA); see *supra* note 46.

92. Lipp, *supra* note 30, at L2 (quoting Bill Barron, assistant county administrator for waste management, who claims, that in spite of the "flurry of waste management legislation . . . methods of disposal have not really changed"). See generally David Wallenberg, *Great Expectations: Reviewing the 101st Congress*, 21 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,008 (1991) (discussing S. 6014 and S. 6016, bills introduced by Sen. Chaffee [R - R.I.] calling for RCRA amendments that prioritize recycling, waste source reduction, etc., as well as RCRA amendments proposed by Sen. Baucus [D - Mont.] and Rep. Thomas Luken [D - Ohio]).

93. H.R. 3253, 102d Cong., 1st Sess. § 2 (1991).

94. See Eisler, *supra* note 48. The Bush Administration does not want to see RCRA amended, and promotes incineration as the solution to the nation's MSW disposal crisis. EPA Chief William Reilly (Bush appointee) has followed suit, discouraging proposals to reduce levels of "incinerator bound" waste. *Id.*; see also Keith Schneider, *Bush Names Panel For Environment*, N.Y. TIMES, July 24, 1991, at A14 (discussing recent appointments to an environment panel that would advise the White House on how to serve environmental needs without creating an "inordinate expense to business").

95. Elliott, *supra* note 29.

96. Telephone interview with Martin Brennan, Community Organizer, New York Public Interest Research Group (NYPIRG) (Oct. 1991) (discussing the need for better mechanisms for citizen participation in the MSW plan approval process and in the permitting process for incineration plants).

97. H.R. 3253, § 2 (4011)(b)(9).

98. Schneider, *supra* note 94, at A14. The White House Competitiveness Council, led by Vice President Quayle, blocked an EPA proposal requiring incineration facilities to promote recycling; and defeated a plan to discourage incineration of batteries, a leading cause of mercury emissions. Several members of the newly appointed Bush environment panel are leaders in the waste management industry. *Id.*

dustry incentives to recycle,⁹⁹ citizens and environmentalists are highly interested in measures that affect their waste management options. The aspects of particular concern to citizens and environmentalists address the use of incineration as an alternative to landfilling, recycling and source reduction measures¹⁰⁰ that many MSW administrators are now proposing.¹⁰¹

CONCLUSION

Regardless of claims that incineration poses no long-range negative impact,¹⁰² communities remain apprehensive about being test sites for this potentially dangerous disposal alternative. Most communities did not learn about toxic air emissions from the combustion process and water and soil contamination from landfill disposal of the ash until long after facilities had been built and operating for several years. It is not surprising that recent heightened public awareness of available alternatives; for example, recycling and inter-state disposal, has brought municipalities under pressure to look more carefully at their long-term strategies for municipal solid waste disposal.¹⁰³

Certainly the bills being proposed under the RCRA reauthorization reflect this heightened awareness and concern. The Bills will clarify planning criteria, acceptable air, water and other health and safety standard, and disposal requirements. They will also address the need for prioritizing reduction of packaging and recycling efforts. The Kostermayer Bill would additionally save millions in construction costs while the incinerator issue is more thoroughly researched and evaluated.

Solid waste management problems intrinsic to cities are not addressed in any of the proposals, however. Factors such as the tremendous volume generated daily in the nations' cities, the lack of landfill space in urban areas, the problem of siting facilities in densely populated communities, all need to be addressed in a way that is relevant to urban as well as local and regional areas. If states are allowed to impose restrictions on out-of-state waste, perhaps exceptions should be created for urban waste disposal needs.

Finally, Congress has not begun to talk about additional federal funding for planning and implementation, which is essential to better regulatory apparatus. Tracking and monitoring of new and existing programs should also be prioritized. Although the Swift Bill mentions programs to

99. *Id.*

100. *See generally* H.R. 3253, 102d Cong., 1st Sess. § 2(a) (1991); H.R. 3865, 102d Cong., 1st Sess. § 301 (1991).

101. COMPTROLLER'S REPORT, *supra* note 15, at 4 (claiming that NYC's MSW plans for incineration expansion is out-of-step with the current national trend away from burning). "A more than 40% decline in start-up capacity is predicted from 1991-1992, attributed to community and political opposition, environmental opposition, tax law changes, and stepped-up recycling efforts." *Id.* at 29 n.45.

102. Bekowies Interview, *supra* note 16.

103. McCLAIN, *supra* note 2, at 3-1.

promote industry acceptance of source reducing and markets for recyclables, plans should be drawn to bring together industry and community groups in developing those programs.

The time is ripe for reviewing the federal-state relationship during this RCRA reauthorization. State and municipal administrations have knowledge of local concerns and should be given more control over RCRA enforcement and policy-making.¹⁰⁴ At the same time, the amendments give federal administrators greater responsibility for reviewing state-wide and regional plans. The plans should address specific minimum needs and ensure that local laws are not in conflict with their regional counterparts or with federal mandates. Likewise, the federal government should play a stronger role in developing market incentives for better packaging and recycling efforts.

While environmentalists have given the Kostermayer Bill a warm reception, it is not likely to be adopted without additional provisions, particularly those addressed in the Swift Bill. The more comprehensive approach in the Swift Bill gives incentives to industry to create markets for recycled goods, a crucial part of any successful recycling and waste reduction effort. RCRA must also be amended to discourage the production of non-recyclable packaging, such as taxes on the use of metals or plastics, or rebates for introduction of recyclable packaging. The Durenberger Bill is also essential to establishing firm criteria for industrial waste disposal rather than allowing the continued use of unsafe and polluting waste disposal methods.

The amendments address the benefit of providing for citizen suits. Retaining a right to sue is necessary to correct real threats to public health or the environment, but in the alternative, citizens' suits are a costly and time consuming method for resolving the debate over whether and how much MSW should be incinerated. Perhaps limiting citizen suits to local administrative applicants and contractors would eliminate some of the more attenuated actions.

The strong public opposition to MSW incineration underscores the fact that a broad consensus already believes that improving environmental and public health protections while lowering MSW management and disposal costs must be integral to any municipal solid waste management plan. But as long as the public is kept out of the policy-making process, later public approval of the resulting programs is unlikely. Administrators must recognize that providing for public participation will save time and financial resources in the long run. It is time to develop alternative methods for determining what is best for a community—ideally before, not after, costly facilities are completed and operating.

Marylou Scofield

104. H.R. 3865, 102d Cong., 1st Sess. § 103 (1991) (giving state and municipal planners more involvement and responsibility in planning and implementation).