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PROBLEMS ASSOCIATED WITH THE MANAGEMENT OF SOLID WASTES: IS THERE A SOLUTION IN THE OFFING?

Within the past decade, the level of environmental consciousness within our society has increased appreciably with the recognition of how delicate the ecological balance is and how easily it may be disrupted.¹ Such consciousness has manifested itself primarily in stricter standards governing the emission of pollutants into the air and water. Unfortunately, this justifiable preoccupation with the quality of our air and water has overshadowed the needless desecration of America's land resources through the inadequate and environmentally unsound practices associated with the disposal of solid wastes.²

¹ Note, *Garbage, The Police Power, and the Commerce Clause*, 8 CAP. U. L. REV. 613 (1979) [hereinafter cited as *Garbage*].

² The Solid Waste Disposal Act, 42 U.S.C. § 6903(27) (1976), defines solid waste as:

[A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, land agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges. . . .

The West Virginia Legislature has defined solid waste as:

[A]ll putrescible and nonputrescible solid waste substances, except human excreta, including but not limited to garbage, rubbish, ashes, incinerator residue, street refuse, dead animals, demolition and construction waste, vehicles and parts thereof, tires, appliances, sewage plant sludge, commercial and industrial waste and special waste, including but not limited to explosives, pathological waste and radioactive material, except those commercial and industrial wastes and special wastes which are under the control of the department of natural resources or the West Virginia air pollution control commission, or both, or of the United States government.

W. VA. CODE § 16-26-3(12) (1979 Replacement Vol.).

This article does not address problems relating to the disposal of such solid wastes as explosives, radioactive wastes or toxic materials. These wastes are commonly referred to as hazardous wastes and pose special problems pertaining to their treatment, transportation and storage.

The purposes of this Note are to identify the scope of the solid waste disposal problem both nationally and in West Virginia; to examine the federal and state legislative responses to this problem; to analyze whether the West Virginia statutory scheme is effective in the disposition of the problem; and, finally, to advance recommendations which will facilitate the realization of environmentally sound solid waste disposal practices.

I. GENERAL OVERVIEW

The increased pollution of our land via improper solid waste disposal practices can be attributed to three sources. First, increased population has proportionately increased the generation of solid wastes.³ Second, the increased affluence of the American lifestyle, with its emphasis on convenience, has further compounded the problem. Finally, with open burning and dumping into water largely precluded as disposal methods by federal legislation,⁴ dumping on land has become the only remaining and most convenient method of disposal due to the virtual non-existence of active regulatory control.⁵

Currently, most solid waste disposal is accomplished through the utilization of landfills.⁶ Landfills can be characterized as either open dumps⁷ or sanitary facilities,⁸ with the former often-times categorized as such simply to provide a facade of compli-

³ Congress has determined that the annual amount of solid waste generated nationwide is approximately four billion tons. An annual increase of eight percent is anticipated based on current growth patterns. H.R. REP. NO. 94-1491, 94th Cong., 2nd Sess. 3, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6238, 6240.

⁴ See, e.g., 33 U.S.C. §§ 1251-1376, 1401-1444 (1976).

⁵ R. Andersen, *Resource Conservation and Recovery Act of 1976*, 1978 Wis. L. REV. 635.

⁶ *Garbage*, supra note 1, at 613.

⁷ An open dump "means a land disposal site at which solid wastes are disposed of in a manner that does not protect the environment, is susceptible to open burning, and is exposed to the elements, vectors and scavengers." 40 C.F.R. § 241.101(m) (1979).

⁸ A sanitary landfill is:

[A] land disposal site employing an engineered method of disposing of solid wastes on land in a manner that minimizes environmental hazards by spreading the solid wastes in thin layers, compacting the solid wastes to the smallest practical volume, and applying and compacting cover material at the end of each operating day.

40 C.F.R. § 241.101(s) (1979).

ance with local health laws.⁹ It is estimated that fully ninety-five percent of all disposal sites are open dumps and that such "operations" handle well over half of the nation's waste.¹⁰

The hazards attendant to improper solid waste disposal practices are manifold. Congress has identified at least seven significant dangers.¹¹ These include:

1) Fire hazards which result from the burning of solid waste. Many open dumps are intentionally burned to reduce volume while other fires are started indiscriminately. Due to the physical and chemical nature of open dumps, it is practically impossible to extinguish an open dump fire. Specifically, few efforts are maintained to establish earthen fire breaks in an open dump such as those incorporated into sanitary landfill design.¹²

2) Air pollution via open burning. Open burning of solid waste material is considered to be one of the largest contributors of particulate matter and, as such, definitely affects air quality.¹³

3) Explosive gas migration into neighboring areas. A highly combustible gas generated in open dumps is methane, a by-product of organic decomposition. Migration of such gas certainly facilitates conflagration.¹⁴

4) Surface and ground water contamination. Water quality is negatively affected by improper solid waste disposal practices, particularly open dumps. Such dumps, by their physical nature, allow rainfall, springs and surface water to enter and influence the chemical and biological processes which are active or potentially active in waste material. This water leaves the dump area as leachate¹⁵ and characteristically carries suspended or dissolved substances wherever it flows. Some of the substances commonly

⁹ Andersen, *supra* note 5, at 645.

¹⁰ *Id.* at 646.

¹¹ H.R. REP. No. 94-1491, 94th Cong., 2nd Sess. 37, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6238, 6275.

¹² MID-OHIO VALLEY REGIONAL PLANNING AND DEVELOPMENT COUNCIL, SOLID WASTE 6-7 (1979) [hereinafter cited as MOVRC].

¹³ *Id.* at 6.

¹⁴ *Id.* at 7.

¹⁵ Leachate is a "liquid that has percolated through solid waste and has extracted dissolved or suspended materials from it." 40 C.F.R. § 241.101(j) (1979).

contained in leachate are heavy metals such as chrome and lead.¹⁶ This contamination of water supplies is probably the greatest concern because once polluted, an aquifer may not be usable as a drinking water source for decades.¹⁷

5) Disease transfer through vectors such as rats and flies. Solid waste disposal facilities typically attract and harbor rats, flies, scavenger birds, dogs and other biological vectors. When an open dump reaches its capacity to carry vermin, the excess population migrates from the dump in search of a new home. Oftentimes, such vermin will take up residence near areas of human habitation, transporting infectious diseases with them. Such health hazards are effectively eliminated in properly designed and operated sanitary landfills.¹⁸

6) Personal injury. Solid waste collection and disposition is a hazardous occupation. Collection and disposal workers suffer injuries at four times the rate of all industry.¹⁹ Additionally, improper disposal enhances the risk of injury to unauthorized scavengers who frequent open dumps in search of salvageable material.

7) Aesthetic blight. Open dumps, litter and other inept solid waste disposal practices do not lend themselves to the aesthetic potential of any geographical area.²⁰ It is this sensitive perception which probably inspires the most intense agitation over environmentally unsound disposal methods.²¹

II. SCOPE OF THE PROBLEM IN WEST VIRGINIA

West Virginia's experience with solid waste disposal is indicative of the problem nationwide. Comprehensive approaches to state and local solid waste management are rare,²² particularly in West Virginia.²³ A number of factors militate against the develop-

¹⁶ MOVRC, *supra* note 12, at 6.

¹⁷ U.S. ENVIRONMENTAL PROTECTION AGENCY, SOLID WASTE FACTS 4 (1978).

¹⁸ MOVRC, *supra* note 12, at 7.

¹⁹ U.S. ENVIRONMENTAL PROTECTION AGENCY, *supra* note 17, at 3.

²⁰ MOVRC, *supra* note 12, at 8.

²¹ H.R. REP. NO. 94-1491, 94th Cong., 2nd Sess. 37, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6238, 6275.

²² Andersen, *supra* note 5, at 675.

²³ There is, however, one area of the state which is doing a credible job to-

ment of solid waste management systems, especially collection and disposal operations. Some of the more prominent elements include an inadequate number of permissible disposal sites, insufficient collection accessibility, public opposition and, most importantly, legal impediments.³⁴ Each factor will be individually addressed in the following section with the exception of legal barriers, which will be discussed under a subsequent analysis of this state's statutory scheme for regulating solid waste collection and disposal operations.

A. *Inadequate number of permissible disposal sites*

According to data compiled by the West Virginia State Department of Health,³⁵ there are approximately 562 solid waste disposal sites throughout the state. Of these, only sixty-seven are "legal" in that they have been issued operational permits in compliance with Health Department criteria.³⁶ Of the remaining 495 illegal sites, 141 are categorized as sponsored in that someone acknowledges responsibility for exercising a degree of control over

ward coping with solid waste disposal problems on a comprehensive basis. Considerable success has been achieved in the geographic area serviced by the Region VIII Solid Waste Authority. The Region VIII Solid Waste Authority, located in Petersburg, is a semi-independent entity, created in 1974 under the auspices of the Region VIII Planning and Development Council. (For a discussion of regional planning and development councils and their *raison d'etre*, see note 29 *infra*). This Authority operates three sanitary landfills serving Hampshire, Hardy, Mineral, Pendleton and Grant Counties. Prior to the opening of its first sanitary facility in 1976, open dumping was the most prevalent disposal method in the area.

³⁴ There are additional factors which adversely affect the establishment of solid waste disposal systems. These include economic limitations, low population densities and poor road conditions. The population and road factors will not be discussed in this article because they have an incidental impact on the development of comprehensive solid waste management programs. For a more detailed treatment of these factors, see MOVRC, *supra* note 12, at 1, 3, 4. Economic limitations will be addressed under a subsequent analysis of the effectiveness of the current statutory delineation of solid waste powers and responsibilities.

³⁵ See SOLID WASTE DIVISION, WEST VIRGINIA STATE DEP'T OF HEALTH, A REPORT ON SOLID WASTE DISPOSAL IN WEST VIRGINIA 1-82 (1979).

³⁶ The West Virginia State Department of Health issues three different classes of permits depending upon the type of waste to be disposed of in the landfill. Class I permits are issued for facilities handling hazardous wastes; Class II permits are issued for facilities containing decomposable waste; and Class III permits are issued those sites accepting only inert materials. W. VA. STATE DEP'T OF HEALTH, FUNCTIONS OF THE SOLID WASTE DIVISION 2 (1979).

the facility.²⁷ The other 354 sites are considered promiscuous for lack of an identifiable sponsor.²⁸ Hence, over eighty-eight percent of all solid waste disposal in West Virginia is illegal, pointing out the need for comprehensive solid waste management.

A more drastic situation exists in the geographical area comprising Region V.²⁹ There are 68 identified solid waste disposal facilities in the region,³⁰ serving an estimated population of 160,000.³¹ Only one facility, however, possesses a Health Department permit.³² This site is located in the north-central area of the region, well over 100 miles from various regional locales.³³ The remaining 67 sites are open dumps, with 52 listed as promiscuous.³⁴ Additionally, there exist numerous small dumps, utilized by only a few individuals, which have not been inventoried due to time and manpower constraints.³⁵

²⁷ SOLID WASTE DIVISION, *supra* note 25, at i.

²⁸ *Id.* Practically speaking, an accurate count of these sites can never be given because their number and location change overnight.

²⁹ Region V (Mid-Ohio Valley Regional Planning and Development Council) encompasses Calhoun, Jackson, Pleasants, Ritchie, Roane, Tyler, Wirt and Wood Counties and maintains its offices in Parkersburg, West Virginia. It is one of eleven regional planning and development councils created by the West Virginia Regional Planning and Development Act of 1971 [codified at W. VA. CODE §§ 8-25-1 to -15 (1976 Replacement Vol.)]. This Act authorized the designation of planning and development regions to facilitate intergovernmental cooperation in comprehensive planning and development because "problems of growth and development so transcend the boundary lines of governmental units that no single unit can plan for the solution of problems without affecting other units of government" W. VA. CODE § 8-25-1 (1976 Replacement Vol.).

Due to the unavailability of statewide information, data compiled by the Region V administrative staff will be utilized in addressing certain factors which militate against the development of solid waste management systems.

³⁰ MOVRC, *supra* note 12, at 5.

³¹ *Id.*

³² SOLID WASTE DIVISION, *supra* note 25, at 80.

³³ MOVRC, *supra* note 12, at 5.

³⁴ SOLID WASTE DIVISION, *supra* note 25, at 11, 25, 55, 65-68, 72-73, 79-81.

³⁵ The following table illustrates disposal facilities and open dumps within Region V on a county by county basis.

B. Insufficient collection accessibility

Only fifty-eight percent of the population of Region V³⁶ has access to regular solid waste collection services. Approximately one-half of these individuals derive their service from municipal operations³⁷ while the remaining households obtain their services from privately owned collection companies.³⁸ Thus, over forty-two percent of the regional population does not have access to regular collection service. This unavailability significantly affects disposal practices, for households have no other alternative but to resort to open dumping.

On the other hand, regular collection service does not necessarily insure proper disposal. As has previously been noted, only one permitted facility exists in Region V, thus guaranteeing that a significant proportion of collectors dispose of their haul illegally.³⁹

<i>County</i>	<i>Population</i>	<i>Permitted Sites</i>	<i>Open Dumps</i>
Wood	87,449	1	17
Wirt	4,523	—	3
Tyler	9,979	—	4
Roane	14,274	—	9
Ritchie	10,274	—	15
Pleasants	7,717	—	8
Jackson	22,144	—	7
Calhoun	7,588	—	4

MOVRC, *supra* note 12, at 5.

³⁶ *Id.* at 4.

³⁷ The following municipalities operate their own solid waste collection services: Elizabeth, Grantsville, Parkersburg, Pennsboro, Ripley, Sistersville, Spencer, St. Marys. *Id.* at 4.

³⁸ *Id.*

³⁹ In fact, private collectors of solid waste, who are required to obtain certificates of public convenience and necessity pursuant to W. VA. CODE § 24A-2-5 (Cum. Supp. 1979), are not required to demonstrate that they will be dumping their wastes in an approved landfill prior to the issuance of such certificates. Only when a public hearing is held concerning the issuance of such certificates will the PSC require an applicant to swear under oath that he will dump in a permitted facility. PSC officials readily concede that "lip service" is more or less paid to this requirement. Furthermore, public hearings are only held when other certificate holders within the proposed certificate area protest the issuance of any such certificate. Interview with William M. Sloan, Director of the Motor Carrier Division of the W. Va. Public Service Commission, in Charleston, W. Va. (June 1, 1979).

C. *Public opposition*

Public opposition to proper solid waste management can generally be characterized in one of two ways. Resistance may be focused on the actual establishment of landfills or it may take the form of reticence to use or pay for disposal services after a landfill is developed. The former type of opposition is primarily evidenced in the extreme difficulty of acquisition of solid waste disposal sites. Individuals are oftentimes reluctant to sell available land for fear they will jeopardize the value of surrounding realty.⁴⁰ The latter resistance arises from long-standing habits and attitudes. People accustomed to disposing of their trash at little or no cost are reluctant to bear the expense and inconvenience of environmentally sound solid waste disposal. This is particularly true of rural residents who have traditionally dumped their refuse "at the back acre" or along the roadside as their families have done for generations.⁴¹

At this point, it becomes necessary to examine the various legislative responses, both federal and West Virginia, to this recognition that affirmative measures must be undertaken to cope with the solid waste enigma. The adequacy of these responses will ultimately determine whether or not proper solid waste management will be achieved.

III. FEDERAL STATUTORY RESPONSE

Federal concern for inept solid waste disposal practices was first enunciated with the passage of the Solid Waste Disposal Act of 1965.⁴² This legislation, however, has been superceded by the Resource Conservation and Recovery Act of 1976.⁴³ Whereas the primary purposes of the 1965 Act were: "(1) to initiate a national research and development program relating to solid waste disposal, including studies directed toward conserving natural resources and recovering and utilizing potential resources in solid wastes and (2) to provide technical and financial assistance to

⁴⁰ See *Rural West Virginia Counties Work Together to Operate Sanitary Landfill*, SOLID WASTES MANAGEMENT, July, 1979, at 50.

⁴¹ *Id.* at 51-52.

⁴² 42 U.S.C. §§ 3251-3259 (1976) [transferred to or repealed by U.S.C. §§ 6901-6987 (1976)].

⁴³ 42 U.S.C. §§ 6901-6987 (1976) [hereinafter referred to as RCRA].

State and local governments and interstate agencies in planning, developing, and conducting solid waste disposal programs,"⁴⁴ the RCRA goes considerably further in its scope. In addition to providing extensive technical and financial assistance, the RCRA's objectives are to actually regulate the treatment, transportation, storage and disposal of hazardous waste, to produce energy from discarded materials through resource recovery techniques and to expressly prohibit the open dumping of waste materials.⁴⁵

The most pertinent aspect of the RCRA to this discussion, however, is Title IV, which mandates the development of state solid waste plans.⁴⁶ To be approved, the state plan must conform to guidelines published by the Administrator of the Environmental Protection Agency.⁴⁷ The state plan must also meet certain minimum requirements,⁴⁸ which include:

1) A prohibition on the establishment of new open dumps and a requirement that all solid waste shall be utilized for resource recovery or disposed of in an environmentally sound manner;⁴⁹

2) A plan to close or upgrade all existing open dumps;⁵⁰

3) The establishment of regulatory powers necessary to implement the plan;⁵¹

4) Provisions that no local government within the state shall be prohibited from entering into long-term contracts for the supply of solid waste to resource recovery facilities;⁵² and,

5) Provisions for resource conservation or recovery and for the disposal of solid waste in sanitary landfills or any combination of practices which will insure use or disposal of solid waste in an

⁴⁴ H.R. REP. No. 899, 89th Cong., 1st Sess. 11, *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 3608, 3618-19.

⁴⁵ H.R. REP. No. 94-1491, 94th Cong., 2nd Sess. 52, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6238, 6290-91.

⁴⁶ 42 U.S.C. §§ 6941-6949 (1976).

⁴⁷ The guidelines are codified at 40 C.F.R. §§ 256.01-256.64 (1979).

⁴⁸ 42 U.S.C. § 6943 (1976).

⁴⁹ *Id.* § 6943(2).

⁵⁰ *Id.* § 6943(3).

⁵¹ *Id.* § 6943(4).

⁵² *Id.* § 6943(5).

environmentally sound manner.⁵³

In addition to prescribing minimum requirements for state plans, Title IV also outlines the procedure each state must follow for the development and implementation of the plan. It requires the governor of each state, after consultation with local elected officials, to identify the boundaries of each area within the state which are appropriate for carrying out regional solid waste management. In establishing these boundaries, factors such as urban concentration and geographic conditions and markets are to be accorded substantial weight.⁵⁴ The RCRA also mandates that the governor identify agencies which will develop and implement the state plan in addition to delineating which solid waste functions are to be performed by the state and which functions are to be carried out by regional or local bodies.⁵⁵

Against the backdrop of the RCRA, an examination of the statutory delegation of solid waste responsibilities in West Virginia becomes appropriate. It is through these existing vehicles that West Virginia will attempt to comply with the RCRA.

IV. THE WEST VIRGINIA STATUTORY SCHEME

At first glance, it would appear that West Virginia is in the forefront in providing appropriate statutory mechanisms for complying with the RCRA mandates. Several state agencies have been delegated regulatory authority over solid waste disposal practices with one such regulatory body entrusted with the responsibility of developing and implementing the State Solid Waste Plan as required by the RCRA.⁵⁶ In conjunction with this compulsory implementation requirement, the legislature has created a public corporation whose sole mission is to actively participate in sound solid waste management. On the local front, the legislature has granted political subdivisions extensive authority to establish and manage solid waste collection and disposal operations.

The following breakdown demonstrates the relative responsi-

⁵³ *Id.* § 6943(6).

⁵⁴ *See Id.* § 6946(a).

⁵⁵ *Id.* § 6946(b).

⁵⁶ *See Id.* As previously mentioned, this section requires the governor of each state to identify an agency to develop and implement the State Solid Waste Plan.

bilities at both the state and local levels.

A. *State Level*

At present, there are three agencies or commissions which are at the forefront of state solid waste involvement.⁵⁷ They are:

1) West Virginia State Department of Health

The Health Department is the lead agency for solid waste disposal regulation in West Virginia. The Department possesses jurisdiction over the regulation of all solid waste matter with the exception of industrial process wastes. It is responsible for the issuance of permits to all persons or entities desiring to establish solid waste disposal facilities as well as for the promulgation of plans and specifications with which each facility must comply in

⁵⁷ Solid waste disposal is not within the exclusive domain of these entities. Other agencies which play an incidental role in solid waste regulation are:

1) West Virginia Department of Natural Resources

The Water Resources division of this agency is entrusted with the responsibility of regulating industrial process waste which is typically discharged into rivers and streams. W. VA. STATE DEP'T OF HEALTH, FUNCTIONS OF THE SOLID WASTE DIVISION 3 (1979). This regulatory authority includes the ability to require any proposed or existing disposal operation which discharges waste material into any of the waters of the state to obtain a discharge permit. W. VA. CODE § 20-5A-5 (Cum. Supp. 1979). The Water Resources division may also require the prior submission of plans, specifications and other data relative to the issuance of any discharge permit. W. VA. CODE § 20-5A-3(12) (Cum. Supp. 1979). Furthermore, the Department of Natural Resources is authorized to promulgate rules and regulations setting water quality standards which govern waste discharges and to inspect facilities, issue orders to compel compliance and revoke permits where non-compliance results in a reduction in water quality below the standards established by their rules and regulations. W. VA. CODE §§ 20-5A-3a(a), -3a(c), -8 (Cum. Supp. 1979).

2) West Virginia Department of Highways

This Department's authority over solid waste disposal is rather limited. It is authorized to require and issue permits for any facility which is utilized as a salvage yard. W. VA. CODE § 17-23-3 (1974 Replacement Vol.). This requirement is applicable to open dumps and sanitary landfills provided they also engage in salvage operations. W. VA. CODE § 17-23-2(b) (1974 Replacement Vol.).

3) West Virginia Air Pollution Control Commission

This Commission is authorized to require and issue permits for solid waste disposal which is accomplished through stationary sources of air pollutants (i.e., incinerators) as long as such stationary facilities are in compliance with rules and regulations promulgated by the Commission. W. VA. CODE § 16-20-11b (1979 Replacement Vol.).

order to obtain and retain the required permit.⁵⁸ The department is further empowered to issue orders requiring owners of landfills to make such alterations as may be necessary to correct conditions which are violative of its regulations.⁵⁹ Additionally, the Department has been designated as the appropriate agency for developing and implementing the State Solid Waste Plan as required by the RCRA.⁶⁰ This effort is currently underway with completion anticipated by January, 1981.

2) West Virginia Resource Recovery - Solid Waste Disposal Authority

Created by the West Virginia Resource Recovery - Solid Waste Disposal Act of 1977,⁶¹ this body is a direct response to the problems identified and addressed in the RCRA. The Authority is a governmental instrumentality of the state and is designated as a public corporation.⁶² It holds no regulatory powers but is authorized to designate and establish solid waste disposal sheds.⁶³ Further, the Authority

may initiate, acquire, construct, maintain, repair and operate solid waste disposal projects or cause the same to be operated pursuant to a lease, sublease or agreement with any person or governmental agency; may make loans or grants to persons and to governmental agencies for the acquisition or construction of solid waste disposal projects . . . ; and may issue solid waste disposal revenue bonds of this state, payable solely from reve-

⁵⁸ W. VA. CODE § 16-1-9 (1979 Replacement Vol.).

⁵⁹ *Id.*

⁶⁰ See note 56 *supra*.

⁶¹ Codified at W. VA. CODE §§ 16-26-1 to -25 (1979 Replacement Vol.) [hereinafter referred to as the Authority].

⁶² W. VA. CODE § 16-26-4 (1979 Replacement Vol.).

⁶³ A solid waste disposal shed is "a geographical area . . . [designated] for solid waste management." *Id.* § 16-26-3(15).

The authority shall designate the sheds so that: (1) The goal of providing solid waste collection and disposal service to each household, business and industry in the State can reasonably be achieved. (2) The total cost of solid waste collection and disposal and the cost of solid waste collection and disposal within each shed and per person can be kept as low as possible. (3) Solid waste collection and disposal service, facilities and projects can be integrated in the most feasible, dependable, effective, efficient and economical manner.

Id. § 16-26-8.

nues, to pay the cost of, or finance, in whole or in part, by loans to governmental agencies, such projects.⁶⁴

In short, the Authority is empowered to participate, either directly or indirectly, in the development and operation of environmentally sound sanitary landfills.

3) West Virginia Public Service Commission

The Public Service Commission's role in solid waste is at the opposite end of the spectrum from that of the Health Department and the Authority. Although it is also a regulatory body, its endeavors are focused on the collection rather than the disposal aspects of solid waste management. The PSC is delegated the responsibility of regulating any person or entity desiring to serve as a solid waste hauler or collector. Such private haulers come under the jurisdiction of the PSC by virtue of their statuses as common carriers.⁶⁵ In order to engage in such an enterprise, the collector must obtain a certificate of public convenience and necessity from the PSC.⁶⁶ In the course of issuing such certificate, the PSC is authorized to initially set⁶⁷ and continually regulate the rates to be levied by the collector.⁶⁸ Additionally, the PSC is authorized to prescribe rules and regulations governing the quality of service rendered.⁶⁹

⁶⁴ *Id.* § 16-26-5.

⁶⁵ A common carrier is "any person who undertakes, whether directly or by lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public over the highways of this State by motor vehicles for hire, whether over regular or irregular routes . . ." W. VA. CODE § 24A-1-2 (1976 Replacement Vol.).

⁶⁶ *Id.* § 24A-2-5 (Cum. Supp. 1980).

⁶⁷ As a practical matter, the rates stated in the application for the certificate of public convenience and necessity are generally approved. Only when a protest is filed or when the rates are clearly exorbitant will the PSC disapprove them. Interview with William M. Sloan, Director of the Motor Carrier Division of the W. Va. Public Service Commission, in Charleston, W. Va. (June 1, 1979).

⁶⁸ W. VA. CODE § 24A-2-4 (1976 Replacement Vol.).

⁶⁹ *Id.* § 24A-2-3. The quality of solid waste collection service to be rendered by holders of certificates of public convenience and necessity is prescribed in PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, RULES AND REGULATIONS FOR THE GOVERNMENT OF MOTOR CARRIERS OF PASSENGERS AND PROPERTY, §§ 7.00-7.03 (1977).

B. Local Level

At the local level, the involvement of county commissions and municipalities is primarily directed towards their ability to actively engage in collection and disposal operations.

1) County Commissions

County commissions are empowered to acquire lands for the establishment of sanitary landfills and to operate and maintain such facilities.⁷⁰ In addition to these powers, county commissions are also authorized

to establish, operate and maintain, either directly or by contract, garbage and refuse collection and disposal services, and to pay for . . . such collection and disposal services . . . either out of general funds . . . or out of special funds to be derived from fees charged to and paid by the users of such services . . .⁷¹

This authority, however, is limited in that the commissions cannot exercise such authority within municipalities unless they enter into contracts with the respective cities or towns.⁷² Furthermore, where an area is furnished garbage and refuse collection service by an existing carrier under a certificate of public convenience and necessity issued by the PSC, the commissions may enter into contracts or agreements with such carrier to supplement such existing service, but they cannot enter into competing service without authority from the PSC.⁷³

In 1977, at the same time it was enacting the West Virginia Resource Recovery - Solid Waste Disposal Act, the legislature passed similar enabling legislation authorizing county commissions to create and establish public corporations to be known as county solid waste authorities.⁷⁴ The powers and duties of these entities are virtually the same as those possessed by the State Authority. The only noticeable exception is that county authorities are not expressly authorized to make loans to other governmental agencies.

⁷⁰ W. VA. CODE § 7-1-3(e) (1976 Replacement Vol.).

⁷¹ *Id.* § 7-1-3(f).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *See Id.* §§ 7-16-1 to -8 (Cum. Supp. 1980).

2) Municipalities

In certain respects, municipalities have broader powers when it comes to solid waste than do county commissions. They are similarly authorized "[t]o construct, establish, acquire, equip, maintain and operate . . . facilities for the efficient removal and destruction of garbage, refuse, wastes, ashes, trash and other similar matters . . ."⁷⁶ They are also empowered to impose upon the users of collection and disposal services reasonable rates, fees and charges.⁷⁶ The primary difference in their authority vis-à-vis that of county governments is that municipalities may mandatorily impose such fees on all members of their constituency since they are authorized to prohibit the accumulation and to *require* the disposal of garbage and refuse.⁷⁷ County commissions cannot force their constituencies to utilize solid waste collection and disposal operations; they may only seek voluntary participation.

V. ANALYSIS

An analysis of the current West Virginia statutory scheme yields two very critical shortcomings which will significantly impede the development of comprehensive solid waste management in this state. The first deficiency relates to the inability of local political subdivisions to raise the revenues necessary for the development of sanitary landfills. The second shortcoming pertains to the unavailability of an adequate statutory mechanism for delivering solid waste disposal services on a regional and, hence, a cost effective basis. Unless these obstacles are eliminated, effective disposition of the problem will largely be precluded.

With respect to the first deficiency, the West Virginia Constitution⁷⁸ prohibits local governmental units from incurring any indebtedness which cannot be paid out of funds on hand for the current fiscal year unless all questions connected with the indebtedness have first been submitted and ratified by three-fifths of the voters at either a special or general election.⁷⁹ This prohibition has also been engrafted into the statutory jurisprudence of

⁷⁶ *Id.* § 8-12-5(11) (1976 Replacement Vol.).

⁷⁶ *Id.* § 8-13-13.

⁷⁷ *Id.* § 8-12-5(10).

⁷⁸ W. VA. CONST. art. 10, § 8.

⁷⁹ *Davis v. Wayne County Court*, 38 W. Va. 104, 18 S.E. 373 (1893).

West Virginia.⁸⁰ Interpreted, these provisions prohibit long-term fiscal obligations to be paid from general revenue funds. Thus, even though local governmental units are granted sweeping authority to combat solid waste disposal problems, they can only expend monies which are available in a current fiscal year for the development of sanitary landfills. It is highly questionable, however, whether county commissions or municipal councils have sufficient general revenue monies on hand to operate solid waste management systems. Solid waste disposal is an expensive business with only education and road construction as more expensive budgetary items for those governmental units which engage in solid waste disposal.⁸¹ Once established, a typical sanitary landfill will cost approximately \$50,000 per year to operate.⁸² This figure does not take into consideration the colossal disbursements necessary to initially establish a solid waste disposal operation. Such introductory expenditures as real property acquisition costs, engineering feasibility costs and equipment disbursements coupled with ongoing outlays for personnel, utilities and equipment amortization demand a "deep pocket." It is virtually impossible for rural West Virginia counties and municipalities to raise the large revenues needed to engage in disposal operations because of their limited tax bases and other public service commitments. In fact, it is doubtful whether the more urban counties and municipalities can afford such heavy expenditures.⁸³

⁸⁰ See W. VA. CODE § 11-8-26 (1974 Replacement Vol.), which provides that: "a local fiscal body shall not expend money or incur obligations: (1) In an unauthorized manner; (2) For an unauthorized purpose; (3) In excess of the amount allocated to the fund in the levy order; (4) In excess of the funds available for current expenses . . ."

⁸¹ H.R. REP. No. 94-1491, 94th Cong., 2nd Sess. 9, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6238, 6247.

⁸² W. VA. STATE DEP'T OF HEALTH, *supra* note 26, at 2.

⁸³ The following table amply demonstrates the limited general revenue sources of the municipalities within Region V:

	Estimated Revenues General Fund
Class II	
Parkersburg	3,412,890
Vienna	555,767
Class III	
Paden City	100,266

Furthermore, the provision whereby indebtedness may be incurred with the consent of the voters⁸⁴ is, as a practical matter, of little help for those political subdivisions desiring to operate disposal facilities. Their ability to cope with solid waste problems will be contingent upon the will of the voters. In the wake of such events as the Proposition 13 tax revolt, it may be unlikely that voters will voluntarily increase their taxes to provide proper solid waste disposal, particularly when many people fail to perceive improper solid waste disposal practices as a significant problem.

In lieu of voter approved indebtedness, municipalities and county solid waste authorities may issue revenue bonds to finance solid waste disposal projects.⁸⁵ This avenue, at first glance, would appear to resolve the anticipated fiscal problems of local entities because the constitutional prohibition is inapplicable where the indebtedness constitutes the issuance of revenue bonds to be

Ravenswood	284,907
Ripley	178,778
St. Marys	210,675
Sistersville	142,306
Spencer	199,277
Williamstown	114,595
Class IV	
Auburn	799
Belmont	11,300
Cairo	4,496
Elizabeth	53,540
Ellenboro	6,823
Friendly	2,164
Grantsville	102,826
Harrisville	30,384
Middlebourne	36,582
Pennsboro	43,073
Pullman	1,555
Reedy	2,701
TOTAL	5,495,704

MID-OHIO VALLEY REGIONAL PLANNING AND DEVELOPMENT COUNCIL, GOVERNMENT
 20 (1976).

⁸⁴ See W. VA. CONST. art. X, § 8.

⁸⁵ See W. VA. CODE § 8-16-2 (1976 Replacement Vol.) wherein municipalities are authorized "to issue revenue bonds to pay the costs of . . . public works and properties . . ." See also *Id.* § 7-16-5(4) (Cum. Supp. 1979) wherein county solid waste authorities are authorized to "[i]ssue solid waste disposal revenue bonds and notes . . . payable solely from revenues of projects operated by the authority."

paid solely from the revenues derived from the project financed. Such an obligation is not deemed to be a debt within the meaning of the constitutional provision.⁸⁶ Additionally, the comparable statutory limitation is inapplicable where the funds are derived not from taxes (*i.e.*, general revenues) but from service charges.⁸⁷ Thus, counties and municipalities could issue revenue bonds and adjust the fees charged for the use of solid waste disposal facilities to repay the bonds. As a practical matter, however, this is not a feasible solution. Because of the exorbitant costs involved in establishing sanitary landfills, a substantial sum of money would have to be financed. In turn, the debt service requirements (that amount which would need to be repaid through installments) would be high. To meet such installment payments, the operators of the disposal facility would have to charge relatively high fees. Such a result is not desirable because one of the factors militating against sound solid waste management is the reluctance on the part of the public to bear the expense of proper solid waste disposal. Those who are accustomed to dumping their trash for free will continue their traditional practices rather than pay a high price for disposal.⁸⁸ Thus, to encourage proper solid waste disposal practices it is virtually mandatory that low service charges be made. The same is true with respect to private haulers of solid waste. If collectors are charged excessive fees for dumping, they will simply pass these costs on to their consumers. Many households may, in an attempt to avoid such expense, decide to dispose of their own trash.

Since low service charges are desirable to encourage sound solid waste disposal practices, it is unlikely that the revenues derived from such charges would be sufficient to meet debt service requirements.⁸⁹ As noted above, the long-term commitment of general tax revenue is constitutionally and statutorily prohibited. Therefore, such monies could not be utilized to supplement this deficiency. Hence, in the long run, local governments will only be

⁸⁶ *Casto v. Town of Ripley*, 114 W. Va. 668, 173 S.E. 886 (1934).

⁸⁷ *United States v. City of Charleston*, 149 F. Supp. 866 (S.D. W. Va. 1957).

⁸⁸ Some sanitary landfills in southern West Virginia do not charge individuals dumping simple household refuse in an effort to encourage usage of their facilities.

⁸⁹ The experiences encountered by the Region VIII Solid Waste Authority demonstrate that revenues derived from fees charged for disposal service are insufficient to meet even operational expenses.

able to float bonds for the amount which reasonable service fees will cover, which in all probability will be insufficient to meet expenses.

An alternate source of funding for local solid waste disposal projects is the West Virginia Resource Recovery - Solid Waste Disposal Authority. The Authority is authorized to issue solid waste disposal revenue bonds to finance solid waste disposal projects through loans to governmental agencies.⁹⁰ A restriction, however, is placed on this avenue of financing. The Legislature has limited the aggregate amount of all issues of bonds and notes outstanding from exceeding that amount capable of being serviced by revenues received from such local efforts.⁹¹ Thus, an analogous predicament exists when the Authority attempts to make loans as when local governments attempt to float their own revenue bonds. Revenues derived from reasonable service charges will also be insufficient to meet the Authority's debt service requirements, thus necessitating the constitutionally prohibited long-term commitment of general tax revenues.⁹² In short, the West Virginia statutory scheme, while conferring requisite authority for comprehensive solid waste management, is, in actuality, impotent in the face of constitutional and statutory fiscal restraints. Unless the prohibition against long-term indebtedness can somehow be circumvented, solid waste disposal problems will continue to haunt West Virginia and will impede compliance with the RCRA.

A second major shortcoming in the West Virginia statutory scheme is the absence of enabling legislation authorizing the establishment of regional solid waste authorities. A regional approach may be the most realistic and cost-effective method of eliminating environmentally unsound solid waste disposal prac-

⁹⁰ W. VA. CODE § 16-26-5 (1979 Replacement Vol.).

⁹¹ *Id.* § 16-26-10.

⁹² It should be noted that the State Authority is also empowered to make grants to persons and to governmental agencies for the acquisition or construction of solid waste disposal projects. *Id.* § 16-26-5. Since such grant monies are not generated through the issuance of revenue bonds, political subdivisions would not be required to repay the Authority. Hence, if enough grant money were allocated to a local government to cover those expenses which could not be serviced by the imposition of reasonable service fees, the local entity could float revenue bonds to finance their share of the project costs.

tices. The desirability of regional solid waste management is evidenced by State Authority's enabling legislation. In directing the Authority to designate geographical areas for solid waste management,⁹³ known as solid waste disposal sheds, the legislature has expressly commanded that such designations be made to provide economical solid waste disposal service.⁹⁴ In fact, in identifying such sheds, the Authority must consider the current boundaries of existing regional planning and development councils.⁹⁵ In June, 1978, the Authority designated interim disposal sheds and utilized those precise boundaries.⁹⁶

The advantage of a regional solid waste authority encompassing several counties and municipalities is the ability of the participating subdivisions to pool their limited financial resources and develop a few strategically located disposal sites when the development of individual facilities is economically prohibitive.

At present, there are two mechanisms whereby comprehensive solid waste management could be rendered on a regional basis. Each mechanism, however, lacks the viability and permanence that an independently organized regional authority would possess. The first mechanism is the existing State Solid Waste Authority. The State Authority is empowered to maintain and operate sanitary landfills throughout the state and to maintain regional sub-offices.⁹⁷ Nonetheless, many of the Authority's officials perceive their roles as mainly providing technical and financial assistance to local governmental units rather than actively engaging in solid waste management. This perception is evidenced by the fact that the Authority is currently attempting to operate only one disposal facility in West Virginia.⁹⁸ This lack of active management, coupled with the Authority's short existence, demonstrates the need for independent problem solving. If local officials wait for the state to solve their disposal problems, com-

⁹³ See note 63 *supra*.

⁹⁴ W. VA. CODE § 16-26-8 (1979 Replacement Vol.). See also note 63 *supra*.

⁹⁵ *Id.* For a general discussion of regional planning and development councils, see note 29 *supra*.

⁹⁶ W. VA. RESOURCE RECOVERY - SOLID WASTE DISPOSAL AUTHORITY, DESIGNATION OF INTERIM SOLID WASTE DISPOSAL SHEDS (1978).

⁹⁷ W. VA. CODE § 16-26-6(3)-(6) (1979 Replacement Vol.).

⁹⁸ This facility is located in Monongalia County and services the greater Morgantown area.

pliance with the RCRA may be a long time in coming.

The second mechanism for cooperative regional problem solving can best be characterized as a "backdoor" approach. As previously indicated, county commissions are authorized to create public corporations known as county solid waste authorities.⁹⁹ The commissions are further authorized to cooperate with federal, state and local governments in the exercise of their powers, duties and responsibilities.¹⁰⁰ Additionally, West Virginia, statutorily, recognizes and grants to public agencies¹⁰¹ the ability to jointly exercise powers or authority which such agencies could exercise alone.¹⁰² Since county commissions may individually create solid waste authorities, several commissions could jointly exercise this authority, thus forming a regional solid waste authority. To accomplish this result, each county commission would be required to enter into a written intergovernmental agreement with the other participating county governments.¹⁰³ Municipal corporations, however, would be unable to join in such an intergovernmental agreement for they are not authorized to create independent solid waste authorities. Thus, to insure their participation, it would be incumbent upon the participating county commissions to individually contract with their respective municipal governments to provide solid waste disposal service. Contracts between public agencies where one entity agrees to perform any govern-

⁹⁹ See W. VA. CODE §§ 7-16-1 to -8 (Cum. Supp. 1979).

¹⁰⁰ *Id.* § 7-1-3(i) (1976 Replacement Vol.).

¹⁰¹ A public agency is defined as "any municipality, county or other political subdivision of this State, or any county board of education of this State . . ." *Id.* § 8-23-2(i).

¹⁰² *Id.* § 8-23-3.

¹⁰³ *Id.* This section provides that:

Any such agreement shall specify the following:

- (1) Its duration;
- (2) The precise organization, composition and nature of any separate legal or administrative entity created thereby, together with the powers delegated thereto, provided such entity may be lawfully created;
- (3) Its purpose or purposes;
- (4) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor;
- (5) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination; and
- (6) Any other necessary and proper matters.

mental service or activity which each party is authorized by law to perform are expressly recognized statutorily.¹⁰⁴

There are, nonetheless, several reasons why this "backdoor" approach is a far less desirable method of establishing a regional authority than having one expressly created by the legislature. First, all intergovernmental agreements and contracts are limited in duration to one fiscal year with a right of annual renewal.¹⁰⁵ The only means through which an agreement or contract may be operative for a period in excess of one fiscal year is if such agreement or contract is ratified by a majority of the legal votes cast by the qualified voters of the several jurisdictions at a regular or special election.¹⁰⁶ This procedure is closely akin to the previously noted method for affording counties and municipalities the right to incur long-term indebtedness. It also presents similar problems in that it is unrealistic to expect voters to express a high degree of concern about solid waste disposal practices. Hence, without a binding, long-term agreement many public agencies may refuse to continue in the cooperative effort, thus frustrating the primary rationale behind a regional authority (*i.e.*, pooling of limited resources to accomplish a cost effective disposition of the problem).¹⁰⁷

A second reason militating against the "backdoor" approach is the requirement that every agreement must be submitted to the Attorney General for a determination as to whether the agreement is in proper form and compatible with state laws.¹⁰⁸ Additionally, any agreement which deals in whole or in part with the providing of services or facilities over which an officer or agency of the state has power of control must be submitted to and approved by such officer or agency as a condition precedent to its

¹⁰⁴ *Id.* § 8-23-7. This section mandates that "[s]uch contract shall set forth fully the purposes, power, authority, rights, objectives and responsibilities of the contracting parties."

¹⁰⁵ *Id.* § 8-23-8.

¹⁰⁶ *Id.*

¹⁰⁷ The Region VIII Solid Waste Authority utilizes this "backdoor" mechanism as the basis for its legal existence. Each year the Solid Waste Authority's director must renew the intergovernmental agreements and hope that each participating county is inclined to continue being cooperative as well as obtain the requisite approval of all state agencies and officers having power of control over the providing of services and facilities which are the subject matter of the agreement.

¹⁰⁸ W. VA. CODE § 8-23-3 (1976 Replacement Vol.).

effectiveness.¹⁰⁹ Thus, any agreement would probably need the approval of such agencies as the Department of Health, the State Solid Waste Authority, the State Air Pollution Control Commission, the Department of Natural Resources and the Department of Highways because each agency exercises some degree of regulation with respect to solid waste. Needless to say, such painstaking procedures are cumbersome and time-consuming. As a practical matter, these procedures may deter concerned officials from attempting to resolve solid waste disposal problems. Furthermore, the required agency approval may not be forthcoming since considerable resistance may be incurred from those agencies who feel their particular functions are being usurped. Such perceptions will impede the formation of a regional authority.

Thus, the two mechanisms for establishing a regional authority are grossly inadequate in that they lack the continuity and viability a permanently organized authority enjoys. Unless the solid waste problem is tackled on a regional basis, comprehensive and affordable solid waste disposal practices will remain elusive.

VI. RECOMMENDATIONS

The existing deficiencies in the West Virginia statutory scheme relating to the fiscal restraints imposed upon local governmental units and the absence of a viable regional problem solving mechanism must be obviated if proper solid waste management is to be achieved. The purpose of this section is to advance recommendations which will facilitate the realization of environmentally sound solid waste disposal practices.

In addressing the revenue generating problems of local governments, the most feasible method for skirting the constitutional and statutory provisions prohibiting county and municipal governments from incurring long-term financial obligations is to classify solid waste authorities as public utilities. The Supreme Court of Appeals has held that:

Long-term municipal contracts for light and water have been excepted from the constitutional inhibition against contraction of future indebtedness, provided the payments due for the first year under the contracts could be made from current le-

¹⁰⁹ *Id.* § 8-23-5.

vies. Since counties are classed with cities in Article X, section 8, and both are governmental agencies, no valid reason appears for not including like county contracts within the exception.¹¹⁰

Additionally, the Attorney General considers a contract between a county and a power company for the furnishing of electricity for a period in excess of one year similarly within the constitutional exception.¹¹¹ This exception has also received legislative notice in that Public Service Districts are statutorily authorized to contract with municipal corporations for a period not exceeding forty years.¹¹² The purpose of Public Service Districts is to supply water and sewerage facilities to unincorporated areas¹¹³ which are considered public utilities by the Attorney General.¹¹⁴

Thus, in summary, local governments are not prohibited from incurring long-term indebtedness when such obligation is made with a public utility. The question remains, however, whether a solid waste authority can be considered a public utility. Since it is not expressly classified as such, an answer to this question requires case and statutory interpretation.

As defined by statute, public utility "shall mean and include any person . . . or association of persons, . . . whether incorporated or not, including municipalities, engaged in any business, . . . which is, or shall hereafter be held to be, a public service."¹¹⁵ In determining whether or not a person, firm or corporation is a public utility, a test has been devised by the Supreme Court of Appeals. To meet the requirements of this test,

there must be a dedication or a holding out either express or implied that . . . [a] person, firm or corporation is engaged in the business of supplying his or its produce or services to the public as a class or any part thereof as distinguished from the serving of only particular individuals.¹¹⁶

¹¹⁰ *Appalachian Elec. Power Co. v. State Road Comm'n*, 117 W. Va. 200, 203, 185 S.E. 223, 225 (1936) (citations omitted). See also *State ex rel. Hensen v. Gore*, 151 W. Va. 97, 150 S.E.2d 575 (1966).

¹¹¹ 48 OP. ATT'Y GEN. 60, 62 (1959).

¹¹² W. VA. CODE § 16-13A-3 (1979 Replacement Vol.).

¹¹³ *Id.* § 16-13A-1. See also *State ex rel. McMillion v. Stahl*, 141 W. Va. 233, 89 S.E.2d 693 (1955).

¹¹⁴ 50 OP. ATT'Y GEN. 447 (1963).

¹¹⁵ W. VA. CODE § 24-1-2 (1980 Replacement Vol.).

¹¹⁶ *Wilhite v. Public Service Comm'n*, 150 W. Va. 747, 760, 149 S.E.2d 273,

The court has further pointed out that:

[I]t is immaterial what a person, firm or corporation is called or how and in what manner service to the public is furnished, whether it is by special contract or otherwise, if such person, firm or corporation *dedicates* himself or itself to public service and holds himself or itself out to serve the public with a product such as gas, oil, electricity or water.¹¹⁷

Application of this test to a solid waste authority would appear to merit its classification as a utility. Disposal operations readily provide service to the public at large, whether that public be individuals or firms engaged in the business of collecting solid waste. The Court's enumeration of representative utilities such as gas, oil, electricity or water should cause little consternation because the use of the phrase *such as* implies that such enumeration is not exclusive. Thus, if the issue were raised, it would appear that a solid waste authority could be classified as a utility by judicial determination. The State Authority has indicated that it might bring a certified question before the Supreme Court of Appeals seeking a determination whether that body is a public utility.

To aid the court in making such determination, at least with respect to the State Authority, an analysis of its enabling legislation is most appropriate. Since the PSC's jurisdiction is strictly confined to the regulation of entities classified as public utilities,¹¹⁸ a legislative pronouncement that the State Authority is subject to the jurisdiction of the PSC would be tantamount to an express declaration that the Authority is a public utility. Prior to the 1980 Legislative Session, under the Legislature's prescription of general powers and duties, the Authority was authorized to charge, alter and collect rentals and other charges for the services of any solid waste disposal project *but subject to the prior approval of the PSC*.¹¹⁹ Since this statute required PSC approval, it would have appeared that the Legislature intended for the Authority to be considered a public utility. However, this statute was amended in the 1980 Legislative Session, deleting the re-

281 (1966). *Accord*, United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890, cert. denied, 396 U.S. 116 (1969).

¹¹⁷ Wilhite v. Public Service Comm'n, 150 W. Va. 747, 764, 149 S.E.2d 273, 283 (1966).

¹¹⁸ *Id.* at 759, 149 S.E.2d at 281.

¹¹⁹ See W. VA. CODE § 16-26-6(16) (1979 Replacement Vol.).

quirement that charges and rentals imposed by the Authority be subject to the prior approval of the PSC.¹²⁰

There are two further statutory provisions relating to the imposition of service charges by the Authority. One provision provides that:

[N]otwithstanding any provision to the contrary elsewhere contained in this Code, in [the] event of any default by a governmental agency under . . . a loan . . .

(1) the authority may directly impose, in its own name and for its own benefit, service charges . . . upon all users of the solid waste disposal project to be acquired or constructed pursuant to such loan agreement¹²¹

The other provision pertains specifically to solid waste disposal projects owned by the Authority. It provides that "rentals, fees, service charges or other charges shall not be subject to the supervision or regulation of any other authority, department, commission, board, bureau or agency of the State . . ." ¹²² Therefore, the legislature has specifically decided not to place the State Authority within the jurisdiction of the PSC. In the absence of PSC jurisdiction, it would seem to be inappropriate to classify the State Authority as a public utility.¹²³ Nonetheless, if the State Authority meets the "test" developed by the supreme court, utility classification should be granted. Such classification would subject the State Authority, as well as local and regional authorities, to the jurisdiction of the PSC, which would therefore permit such entities to enter into long-term contracts with local governmental units. This result would follow even though the Legislature has apparently evinced an intent to exclude these entities from PSC jurisdiction.

The resolution of the second deficiency in the current state statutory scheme, *i.e.*, the absence of a viable regional problem solving mechanism, requires appropriate legislative action. Such action should take the form of enabling legislation authorizing the

¹²⁰ *Id.* (Cum. Supp. 1980).

¹²¹ *Id.* § 16-26-7(1) (1979 Replacement Vol.).

¹²² *Id.* § 16-26-16.

¹²³ See *OP. ATT'Y GEN.*, Nov. 1, 1978. This opinion similarly holds that the State Authority is not required to submit to the PSC those charges, rentals or fees provided for in *W. VA. CODE* §§ 16-26-7(1), -16 (1979 Replacement Vol.).

establishment of regional solid waste authorities. Regional problem solving is a rapidly growing concept as is demonstrated by the enactment of the West Virginia Regional Planning and Development Act of 1971 which authorizes the designation of regions to facilitate intergovernmental cooperation in comprehensive planning and development on a regional basis.¹²⁴ Similarly, both the RCRA and the West Virginia Resource Recovery - Solid Waste Disposal Act emphasize the need for regional problem solving to produce environmentally sound and cost efficient solid waste disposal facilities.

In enacting regional enabling legislation, the legislature should delegate such regional entities the same powers and responsibilities currently exercised by both the state and county authorities. Additionally, in designating such regions, the boundaries of the existing regional planning and development councils should be followed as the State Authority has done in its designation of interim solid waste disposal sheds.

VII. CONCLUSION

West Virginia has a long way to go, as does the rest of the nation, before the objectives of the RCRA will be fully realized. The development of sanitary landfills, the expansion of refuse collection services and the re-conditioning of public attitudes will aid in resolving the solid waste enigma. But unless the constitutional and statutory impediments are overcome, these efforts will have only a minimal impact on the problem. Aside from the fiscal constraints and the unavailability of viable regional problem solving mechanisms, the existing statutory scheme in West Virginia presents a good foundation from which to build sound solid waste management systems. The attainment of utility status for those entities which deliver solid waste disposal services, coupled with the enactment of regional solid waste authority enabling legislation, will further solidify and strengthen this foundation. If these modifications are made, West Virginia can take a place in the front ranks of those states which can be characterized as true guardians of our health and environment.

Jeffrey M. Wakefield

¹²⁴ See note 29 *supra*.

