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Commencing the Decade With Environmental Reform: The 1980 Kentucky General Assembly Implements the Resource Conservation and Recovery Act of 1976

BY HENRY L. STEPHENS, JR.*

INTRODUCTION

Within the recent past an immense transformation has occurred in the public concern about the environment. . . . Now that environmental anxieties have coalesced, they will be a permanent part of the American awareness, part of the set of beliefs, values, and goals within which U.S. business operates.

The new awareness brings a danger of its own, stepping up the urgency of our situation. Unless we demonstrate, quite soon, that we can improve our environmental record, U.S. society will become paralyzed with shame and self-doubt.¹

This call to action, issued nearly a decade ago, succinctly embodied the feelings of impending environmental disaster which engendered the ecology movement of the early 1970's. Since the first Earth Day in the spring of 1970, public concern has been focused on environmental degradation and its toll in terms of human consequences.² Such awareness culminated in

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¹ THE ENVIRONMENT, A NATIONAL MISSION FOR THE SEVENTIES 7 (1970).

² The "human" consequences of rotting drums of hazardous wastes have been realized by the residents of the Love Canal near Niagara Falls, N.Y., as evidenced by initial studies showing chromosome damage as well as blood and liver abnormalities

public support for federal legislation to remedy a host of environmental ills.

Consequently, throughout its sessions during the 1970's, Congress enacted legislation embodying regulatory schemes designed to ameliorate, if not eradicate, most known environmental harms.³ Utilizing the plenary power of the Commerce Clause,⁴ many of these statutes conceive a broad set of federal environmentally-protective performance standards applicable to the states. Those statutes include the proviso that the states can obtain federal monies and achieve primary responsibility for enforcing the provisions of these statutes by enacting state laws and by promulgating regulations which meet the mandated minimum federal requirements.⁵

The directives embodied in one such federal environmentally-protective statute, the Resource Conservation and Recovery Act of 1976 (RCRA), provided the 1980 Kentucky General Assembly with two choices: either to promulgate state statutes which mirror the provisions of this federal act and thereby obtain federal funding or to allow the federal govern-

among some of the area's inhabitants. *See generally* Courier Journal, May 22, 1980, § A, at 1, cols. 4-6.

³ The first major attempt to account for environmental concerns at the federal level was enactment of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1977), which requires statements of the impacts of "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332 (2)(C). *See also* W. RODGERS, HANDBOOK OF ENVIRONMENTAL LAW 1 (1977).

Other significant pollution control measures were embraced in the Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 136-136y (1977 & Supp. II 1979); the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-2629 (1977); the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. II 1979); the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1977 & Supp. II 1979); the Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857-1858a (1977 & recodified in scattered sections at Supp. II 1979); and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1977 & Supp. II 1979) [hereinafter cited as RCRA].

⁴ *See, e.g.,* the Clean Air Act Amendments of 1970, 42 U.S.C. § 1857(a)(1)(1977), wherein Congress found "that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more states."

⁵ *See, e.g.,* Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1342(b) (1977); Surface Mining Control and Reclamation Act of 1977, 42 U.S.C. § 1253 (Supp. II 1979); RCRA, 42 U.S.C. §§ 6941-6949 (1977).

ment to enforce its own program under RCRA within the Commonwealth before the end of the year.⁶ Wisely, the General Assembly opted for the first choice.

This article will analyze the specific provisions of the bills enacted by the 1980 Kentucky General Assembly to comply with RCRA's requirements for state programs and will examine the extent to which such enactments actually comply with federally-required standards. Initially, an analysis of the hazardous waste and solid waste disposal provisions of RCRA itself will be undertaken. Next, the General Assembly's response to such requirements as well as the political climate which influenced the language of the various bills will be explored with particular attention given to the Commonwealth's waste disposal problems, which are in need of stringent regulation. Finally, this article will examine the probability of Kentucky's statutory and regulatory programs under RCRA being approved by the Federal Environmental Protection Agency (EPA).^{6.1}

I. THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976

A. *Background and Legislative History*

Although Congress assumed a regulatory posture respecting the problems of air and water pollution in the early 1970's,⁷ the management of solid waste was not affirmatively regulated by the federal government prior to the enactment of the Resource Conservation and Recovery Act of 1976. The

⁶ RCRA, 42 U.S.C. § 6930(b) (1977) provides that regulations applicable to the generation, transportation, treatment, storage or disposal of hazardous waste shall take effect on the date six months after the date of their promulgation. On February 26, 1980, the Environmental Protection Agency (EPA) promulgated regulations setting standards for generators and transporters of hazardous waste. See 45 Fed. Reg. 12722-44 (1980) (to be codified at 40 C.F.R. §§ 260-263). Regulations which included permit procedures, guidelines for the approval of state hazardous waste programs and an additional listing of hazardous wastes appeared in the May 19, 1980 Federal Register. 45 Fed. Reg. 33063-285 (1980) (to be codified at 40 C.F.R. §§ 261, 264-265). A listing of additional substances denominated as hazardous wastes was published in the July 16, 1980 Federal Register. 45 Fed. Reg. 47833 (1980) (to be codified at 40 C.F.R. §§ 261.31-.32).

^{6.1} [Editor's note: As this article was going to press, Kentucky's hazardous waste program was approved by the EPA on April 1, 1981. See 46 Fed. Reg. 19,819 (1981).]

⁷ See the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1977 & Supp. II 1979); Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857-1858a (1977 & recodified in scattered sections of Supp. II 1979).

only federal expression of interest in the problem of solid waste disposal was contained in the decidedly non-regulatory Solid Waste Disposal Act of 1965, as amended by the Resource Conservation and Recovery Act of 1976,⁸ which provided federal grants and assistance for the promotion of new technologies, for the improvement of management systems, for personnel training, and for state and regional solid waste planning.⁹

By the mid-1970's, state management of the solid waste disposal problem was insufficient, as evidenced by Environmental Protection Agency reports to Congress showing an increasing volume of solid waste requiring disposal coupled with little real progress toward protecting the environment from such waste pollution.¹⁰ As a result of the environmental controls administered by the Clean Air Act and the Federal Water Pollution Control Act Amendments of 1972,¹¹ 1976 saw the federal government spending billions of dollars to remove pollutants from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner.¹² It thus became painfully obvious that a multifaceted federal regulatory approach was needed to solve the problems associated with the estimated three to four billion tons of discarded material generated each year.¹³ Consequently, the sweeping regulation of land disposal of discarded materials and hazardous wastes undertaken by RCRA in 1976 was hailed as eliminating the last remaining loophole in environmental regulation.¹⁴

⁸ 42 U.S.C. §§ 3251-3259 (1970) (current version in scattered sections of 42 U.S.C. §§ 6901-6987 (1977)).

⁹ Bryson, *Solid Waste and Resource Recovery*, FED. ENV'T'L. L. 1291 (1974).

¹⁰ See Kovacs & Klucsik, *The New Federal Role in Solid Waste Management: The Resource Conservation and Recovery Act of 1976*, 3 COLUM. J. ENV'T'L. L. 205, 216 n.64 (1977).

¹¹ Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1376 (1977 & Supp. II 1979); Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857-1858a (1977 & recodified in scattered sections of Supp. II 1979).

¹² H.R. REP. No. 1491, 94th Cong., 2d Sess. 4, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6238, 6241-42.

¹³ These figures represent an alarming annual increase in the volume of such wastes of at least eight percent. *Id.* at 6239.

¹⁴ *Id.* at 6241. Nevertheless, it is believed that industry grossly underrated the

Of particular concern to Congress was the problem of achieving better solid waste management practices while at the same time affirming the need for local control.¹⁵ In an effort to strike a balance between these two, perhaps conflicting, objectives,¹⁶ RCRA included a Congressional finding that

[W]hile the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices.¹⁷

To that end, Subchapter IV of RCRA, dealing with state or regional discarded materials plans,¹⁸ provides for publication of guidelines for states electing to implement such plans. Although implementation of these plans is discretionary with the states, a state seeking federal financial and technical assistance to develop a discarded materials plan must promulgate a program that conforms to federal guidelines.¹⁹

Similarly, Subchapter III of RCRA,²⁰ while providing for federal administration of the hazardous waste disposal provisions of the Act through the EPA, nevertheless affords the states the option of primary regulation of hazardous waste, contingent upon the enactment of a state program found to be

onerous regulatory consequences of RCRA, since it was enacted with very little fanfare under the shadow of the much publicized Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601-2629 (1977). *Program, The Resource Conservation and Recovery Act of 1976—The Newest Environmental "Sleeper."* 33 BUS. LAW. 2555 (1978) (remarks by Turner T. Smith, Jr., before the second annual spring meeting of the A.B.A. Section of Corporation, Banking and Business Law on May 7, 1977).

¹⁵ See generally H.R. REP. NO. 1491, *supra* note 12, at 6242.

¹⁶ Although the need for federal regulation was obvious, Congress was nevertheless urged to provide flexibility in RCRA to serve the particularized land disposal problems of various localities. See, e.g., 122 CONG. REC. 33,818 (1976).

¹⁷ 42 U.S.C. § 6901(a)(4) (1977).

¹⁸ 42 U.S.C. §§ 6941-6949 (1977 & Supp. II 1979).

¹⁹ H.R. REP. NO. 1491, *supra* note 12, at 6242.

²⁰ 42 U.S.C. §§ 6921-6931 (1977 & Supp. II 1979).

equivalent to the federal program by the EPA administrator.²¹

Having thus melded the interests of the proponents of federal regulation over solid waste disposal with those of advocates of local control, RCRA received the resounding approval of the House of Representatives by a vote of 367 to 8.²² The Senate gave the bill eleventh-hour approval on September 30, 1976, the day before Congress adjourned.²³ RCRA became law when signed by President Gerald Ford on October 21, 1976.²⁴

In order to comprehend the direction of solid and hazardous waste legislation enacted by the 1980 Kentucky General Assembly, an explanatory overview of RCRA followed by a detailed analysis of its requirements will be instructive.

B. RCRA: An Overview of Regulatory Accomplishments

In regulating the disposal of solid and hazardous wastes,²⁵ RCRA conceives of an attack on all fronts. To centralize the execution of functions mandated under the Act, RCRA established the Office of Solid Waste within the EPA,²⁶ thus placing the solid and hazardous waste program on par with federal air and water pollution abatement programs.²⁷

Regarding hazardous waste disposal, the attack mounted by RCRA is a full-fledged frontal assault. Subchapter III provides performance standards applicable to generators (producers) of hazardous waste²⁸ as well as to transporters of hazard-

²¹ *Id.* See also H.R. REP. No. 1491, *supra* note 12, at 6242-43. Notwithstanding EPA approval of a state program, federal inspections and enforcement are authorized. 42 U.S.C. §§ 6927-6929 (1977 & Supp. II 1979).

²² 122 CONG. REC. 32,632-33 (1976).

²³ 122 CONG. REC. 33,818-19 (1976).

²⁴ 12 WEEKLY COMP. OF PRES. DOC. 1560 (Oct. 22, 1976).

²⁵ "Hazardous waste" is included within the definition of "solid waste." Compare RCRA, 42 U.S.C. § 6903(5) (1977) with RCRA, 42 U.S.C. § 6903(27) (1977). Further, the definition of "solid waste" includes solid, liquid, semisolid or contained gaseous discarded material. *Id.*

²⁶ 42 U.S.C. § 6911 (1977).

²⁷ H.R. REP. No. 1491, *supra* note 12, at 6249. See also, Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 WIS. L. REV. 635, 646 n.71, (creation of the Office of Solid Waste gave waste disposal programs an added "aura of respectability" within EPA).

²⁸ 42 U.S.C. § 6922 (1977 & Supp. II 1979).

ous wastes²⁹ and to facilities for hazardous waste treatment, storage or disposal.³⁰ As such, hazardous waste is said to be regulated, in common parlance, "from cradle to grave."³¹ The standards themselves are mandatory and *will* be enforced by EPA³² unless a state promulgates a hazardous waste program which is equivalent to the federal program.³³

Concerning non-hazardous solid waste disposal, Subchapter IV reaffirms the primary role of the states and urges, rather than requires, the development of solid waste plans according to the standards of the Act.³⁴ If approved, such a plan triggers state eligibility for federal financial assistance in the form of monies for facility planning and expert consultation, as well as for related legal and planning expenses.³⁵ While many of the requirements for plan approval mandated by the Act are confused and contradictory,³⁶ one salient theme prevails: to win approval, state law must provide for the current upgrading and for the future prohibition of open

²⁹ 42 U.S.C. § 6923 (1977 & Supp. II 1979).

³⁰ 42 U.S.C. § 6925 (1977 & Supp. II 1979). Collectively, these facilities are called hazardous waste management (HWM) facilities.

³¹ This phrase is so widely employed as to appear in the Federal Register. *E.g.*, 45 Fed. Reg. 12722 (1980).

³² RCRA, 42 U.S.C. § 6927 (1977 & Supp. II 1979) gives inspection rights to EPA investigators to insure compliance with mandated performance standards whether or not a state program has been approved by the EPA administrator.

³³ RCRA, 42 U.S.C. § 6926 (1977 & Supp. II 1979) delineates the guidelines for approval of a state hazardous waste management program. If a state program has been approved, the EPA must give 30 days notice to the state prior to taking any enforcement action for violations of the Act, presumably to afford the state an opportunity to correct the violation itself. *Id.* § 6928.

³⁴ RCRA, 42 U.S.C. § 6941 (1977), provides:

The objectives of this subchapter are to *assist* in developing and *encouraging* methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources and to encourage resource conservation. Such objectives are to be accomplished through Federal technical and financial assistance to states or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry.

Id. (emphasis added). See text accompanying notes 10, 15-17 *supra* for further discussion of Congress' concerns in dealing with solid wastes.

³⁵ 42 U.S.C. § 6948(a)(2)(A) (1977). Land acquisition and actual construction costs, however, will not be subsidized with federal funds. *Id.*

³⁶ See Andersen, *supra* note 27, at 665-71.

dumps and must establish sanitary landfills meeting EPA standards.³⁷

In addition to imposing requirements on the states for the disposal of solid hazardous and non-hazardous wastes, RCRA requires the federal government to clean its own house. To effectuate this objective, Subchapter VI mandates that federal facilities comply with all federal, state, interstate and local requirements respecting control and abatement of solid or hazardous waste in the same manner as any other person subject to such requirements, including payment of reasonable service charges.³⁸ The President, however, may exempt any federal facility from any of these requirements upon finding such an exemption to be in the paramount interest of the United States.³⁹ Absent an exemption, federal facilities are subject not only to RCRA, but also to the varying requirements of state and local laws including injunctive orders emanating from state courts.⁴⁰

Finally, in order to implement RCRA's goal of promoting the recovery and recycling of solid waste,⁴¹ which reduces land disposal of solid waste, Subchapter VI requires federal agencies, where practicable, to procure items composed of the highest percentage of recovered materials consistent with maintaining a satisfactory level of competition.⁴² Accordingly, RCRA operates to reduce the consumption of virgin materials at the federal level, thereby potentially motivating other levels of government and industry to use greater amounts of recovered materials.⁴³

In analyzing the following sections detailing RCRA's requirements for disposal of hazardous and solid waste, the

³⁷ See 42 U.S.C. §§ 6943-6945 (1977). RCRA defines "open dump" as "any facility or site where solid waste is disposed of which is not a sanitary landfill which meets the criteria promulgated under section 6944 of this title and which is not a facility for disposal of hazardous waste." *Id.* § 6945(a). See also *id.* § 6903(14); 40 C.F.R. § 241.101(m) (1979) ("open dump" definition for EPA regulations).

³⁸ 42 U.S.C. § 6961 (Supp. II 1979).

³⁹ *Id.*

⁴⁰ *Id.* See also Kovacs & Klucsik, *supra* note 10, at 222.

⁴¹ 42 U.S.C. § 6902(6) (1977).

⁴² *Id.* § 6962(c)(1) (Supp. II 1979).

⁴³ H.R. REP. No. 1491, *supra* note 12, at 6245, 6289-90.

reader should remain cognizant that RCRA vests considerable flexibility in the EPA. In this new area of regulatory responsibility, such flexibility is significant and unusual when compared with the very detailed and explicit requirements of the Federal Water Pollution Control Act Amendment of 1972 and other environmental legislation of the early 1970's⁴⁴ which gave EPA very little discretion. Consequently, under RCRA, the agency will not be able to say, as it could under earlier legislation: "Don't blame us for what we have to do. It's written right into the law and we have no discretion."⁴⁵

C. Hazardous Waste Disposal Requirements

1. Standards Applicable to Generators of Waste

In implementing a "cradle to grave" regulatory scheme governing the disposal of hazardous waste, RCRA logically launches the regulatory process in Subchapter III by imposing requirements on generators of hazardous waste. Central to determining the scope of the regulatory effort is the process of defining what wastes are deemed to be hazardous.⁴⁶ RCRA requires the EPA administrator to "develop and promulgate criteria for identifying the characteristics of hazardous wastes, . . . taking into account toxicity, persistence, degradability in nature, potential for accumulation in tissue, and other related

⁴⁴ See, e.g., The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1311 (1977 & Supp. II 1979) (limitations applicable to industrial and municipal discharges within explicit technological parameters).

⁴⁵ Program, *supra* note 14, at 2557 (remarks of Roger Strelow). Considerable discretion is vested in the EPA administrator under RCRA, 42 U.S.C. § 6921(a) (1977), wherein he is authorized, after appropriate consultations, to develop criteria for identifying the characteristics of hazardous waste. Such criteria must merely *take into account* toxicity, degradability, potential for accumulation in human tissues and other related factors. *Id.* (emphasis added).

⁴⁶ RCRA, 42 U.S.C. § 6903(5) (1977) provides that:

The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, 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.

factors such as flammability, corrosiveness, and other hazardous characteristics."⁴⁷ These guidelines for promulgating criteria to aid in identifying characteristics of hazardous waste are broad enough to give the EPA administrator considerable discretion in determining which wastes shall be labeled hazardous.⁴⁸

Having developed criteria for determining whether various wastes are hazardous or non-hazardous, the EPA administrator is mandated by the Act to promulgate regulations which identify characteristics of hazardous wastes and to list any particular hazardous wastes subject to the regulatory scheme.⁴⁹ Thereafter, any person generating,⁵⁰ transporting or treating any substance listed as either hazardous or as possessing characteristics labeled hazardous by the EPA must provide notification to the EPA (or to the state if the state has an authorized hazardous waste program) stating "the location and general description of such activity and the identified or listed hazardous wastes handled by such person."⁵¹ This requisite preliminary notification must be made no more than ninety days after the promulgation of regulations identifying the characteristics of and listing particular hazardous wastes.⁵²

RCRA requires that the activities of any person generat-

⁴⁷ RCRA, 42 U.S.C. § 6921(a) (1977). This section orders regulations detailing the criteria for hazardous waste identification to be promulgated not later than 18 months after the date of enactment. Accordingly, such regulations should have been promulgated on or before April 21, 1978. On January 3, 1979, the EPA was ordered to issue regulations under this section by December 31, 1979. *Illinois v. Costle* [1979] IX ENVIR. L. REP. (ELI) 20,243 (D.D.C. Jan. 3, 1979). On December 18, 1979, this order was modified to require the EPA to use its best efforts to meet an April 1980 promulgation date. *Illinois v. Costle*, [1979] 10 ENVIR. REP. (BNA) 1673. The regulations were finally promulgated on May 19, 1980. 45 Fed. Reg. 33084 (to be codified in 40 C.F.R. Part 261).

⁴⁸ See text accompanying notes 44-45 *supra* for discussion of the discretion vested in EPA.

⁴⁹ RCRA, 42 U.S.C. § 6921(b) (1977). Regulations identifying the characteristics of hazardous waste were promulgated on May 19, 1980. See note 47 *supra* for the various timetables relating to this promulgation.

⁵⁰ RCRA defines "hazardous waste generation" as "the act or process of producing hazardous waste." 42 U.S.C. § 6903(6) (1977).

⁵¹ *Id.* § 6930(a) (1977).

⁵² *Id.*

ing a hazardous waste that is listed or whose characteristics have been identified in the regulations be subjected to standards protective of human health and the environment as shall be delineated in regulations to be promulgated by the EPA administrator.⁵³ All performance standards and permit requirements imposed by RCRA are applicable six months after the promulgation date of such regulations.⁵⁴

Record-keeping requirements constitute the primary restrictions applicable to generators since RCRA does not contemplate regulation of the generation process itself.⁵⁵ The most important of the record-keeping requirements is the mandate that generators of hazardous waste must use a manifest⁵⁶ which, similar to the bill of lading, includes the names of the generator, each transporter, a qualitative and quantitative description of the hazardous waste being shipped, and the name and address of the facility designated to receive the waste.⁵⁷

The manifest thus operates as the cornerstone of the "cradle to grave" regulatory scheme. Prior to transportation, each generator must comply with the applicable U.S. Department of Transportation regulations⁵⁸ concerning packaging, labeling, marking, and placarding of the waste being shipped.⁵⁹ Further, each generator must file an annual report with the EPA,⁶⁰ keep copies of each manifest for three

⁵³ 42 U.S.C. § 6922 (1977 & Supp. II 1979).

⁵⁴ *Id.* § 6930(b). Thus, the generator and transporter performance standards and permit requirements for HWM's will become effective on November 19, 1980. See notes 6 & 47 *supra* for further discussion of the timetable for promulgation of standards under the RCRA.

⁵⁵ H.R. Rep. No. 1491, *supra* note 12, at 6264.

⁵⁶ 42 U.S.C. § 6922(5) (Supp. II 1979). "'Manifest' means the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage." *Id.* § 6903(12) (1977).

⁵⁷ See generally 45 Fed. Reg. 33143 (1980) (to be codified in 40 C.F.R. §§ 262.20-.23).

⁵⁸ See 49 C.F.R. Parts 172-173, 178-179 (1979).

⁵⁹ 45 Fed. Reg. 33143 (1980) (to be codified in 40 C.F.R. §§ 262.30-.31).

⁶⁰ 45 Fed. Reg. 33144 (1980) (to be codified in 40 C.F.R. § 262.41). The preamble to these regulations recites that the EPA will enforce the manifest system even if the state in which the waste is generated has received interim authorization to conduct a hazardous waste management program in lieu of a program pursuant to 42 U.S.C.

years,⁶¹ and advise the EPA if a manifest has not been returned to him signed by the owner or operator of the designated disposal facility within thirty-five days of the time the waste initially was accepted for transportation.⁶² The record-keeping requirements provide the EPA administrator with information on the volume of waste being generated and on its location. Additionally, transporters will have knowledge of the content of their cargo and will have a warning as to its characteristics or nature. Similarly, the Hazardous Waste Management (HWM) facility receiving the waste for treatment, storage or disposal will be apprised of the characteristics and constituents of the waste prior to handling it.⁶³

2. *Standards Applicable to Transporters of Hazardous Waste*

The second vital link in "cradle to grave" surveillance of hazardous waste is established by the requirements imposed on transporters. The primary obligation imposed upon transporters of hazardous waste under RCRA⁶⁴ is to comply with the manifest system initiated by the generators of the waste being transported.⁶⁵ Accordingly, rather than regulating the routes and manner of transportation, RCRA merely seeks to prevent the common past practice of unloading hazardous waste along the roadside or at a nearby landfill.⁶⁶

The regulations issued by the EPA administrator do not require the transporter to certify the accuracy of the manifest⁶⁷ but do prohibit accepting hazardous waste unless ac-

§ 6926(c) (Supp. II 1979). 45 Fed. Reg. 33142 (1980). Presumably, this will allow a nationally uniform manifest system to be underway at the time the various states obtain final authorization for their programs under RCRA. See text accompanying notes 96-103 *infra* for a discussion of federal authorization of state programs under RCRA.

⁶¹ 45 Fed. Reg. 33144 (1980) (to be codified in 40 C.F.R. § 262.40).

⁶² 45 Fed. Reg. 33144 (1980) (to be codified in 40 C.F.R. § 262.42).

⁶³ H.R. REP. NO. 1491, *supra* note 12, at 6264.

⁶⁴ 42 U.S.C. § 9623(a)(3) (1977 & Supp. II 1979).

⁶⁵ See text accompanying notes 55-62 *supra* for a discussion of generators' responsibilities concerning manifests.

⁶⁶ H.R. REP. NO. 1491, *supra* note 12, at 6265.

⁶⁷ See Anderson, *supra* note 27, at 654. These regulations were issued in revised form on May 19, 1980. 45 Fed. Reg. 33150 (1980) (to be codified in 40 C.F.R. Part

accompanied by a signed manifest.⁶⁸ Furthermore, the transporter must ensure that the manifest accompanies the hazardous waste⁶⁹ during transportation and must keep a signed copy of the manifest for a period of three years from the date the waste initially was accepted.⁷⁰ Additionally, transporters are required to undertake emergency measures in the event of a discharge of hazardous waste during transportation, a situation that sometimes requires the transporter to clean up any hazardous waste discharge that occurs en route.⁷¹ Finally, RCRA imposes criminal liability on transporters who knowingly carry hazardous waste to a facility that does not have a permit or who knowingly make false statements in connection with any document required to be filed or maintained under the Act.⁷²

3. *Standards Applicable to Waste Treatment and Disposal Facilities*

The third and final link in the regulatory scheme is control of the ultimate disposal of hazardous waste. In addition to standards governing the manner in which hazardous waste is stored or treated,⁷³ RCRA also requires the issuance of permits to each person owning or operating any HWM facility.⁷⁴ Unlike its approach to generators and transporters,⁷⁵ RCRA seeks to dictate operational methods to be employed in the ultimate treatment, storage or disposal of hazardous waste. Additionally, at this juncture the EPA administrator is vested

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⁶⁸ 45 Fed. Reg. 33151 (1980) (to be codified in 40 C.F.R. § 263.20).

⁶⁹ *Id.*

⁷⁰ 45 Fed. Reg. 33152 (1980) (to be codified in 40 C.F.R. § 263.22(a)). While RCRA, 42 U.S.C. § 6923(a)(2) (1977), allows transportation of waste only if properly labeled, the regulations applicable to transporters do not embody this requirement. Instead, the regulations impose the labeling requirement on generators. *See* 45 Fed. Reg. 33143 (1980) (to be codified in 40 C.F.R. § 262.31).

⁷¹ 45 Fed. Reg. 33152 (1980) (to be codified in 40 C.F.R. §§ 263.30-31). One sincerely doubts the willingness of transporters to clean up hazardous waste discharges themselves.

⁷² 42 U.S.C. § 6928(d)(1)(3) (Supp. II 1979).

⁷³ *Id.* § 6924 (1977).

⁷⁴ *Id.* § 6925 (1977 & Supp. II 1979).

⁷⁵ *See* text accompanying notes 46-72 *supra* for a discussion of the regulatory approach of RCRA concerning transporters and generators.

with the broadest discretion concerning operating methods.⁷⁶

With regard to operational standards for HWM facilities, the EPA believes that the process of promulgating regulations detailing national technical standards for some types of facilities may consume several years.⁷⁷ Consequently, the EPA's current regulations governing facility standards, Phase I, are deemed to be interim and will become more detailed with the promulgation of Phase II and Phase III regulations.⁷⁸ The interim operational controls merely speak in general terms to the use and management of containers, tanks, surface impoundments, waste piles, landfills, incinerators and chemical, physiological and biological treatment.⁷⁹

Apart from the operational standards, two problems associated with hazardous waste disposal were of particular concern to Congress. The first of these concerned the problem of operator responsibility for monitoring the disposal site, both when accepting waste and afterward.⁸⁰ Pursuant to broad authority granted by RCRA,⁸¹ the EPA administrator promulgated interim status regulations requiring each owner or operator of any disposal facility to have a written, EPA-approved plan which identifies the necessary procedures to close completely the facility at any point during its intended life and at the end of its intended life.⁸² Further, a post-closure plan indicating the activities which will be carried on after the facility, or a part thereof, has been closed must be approved by the EPA.⁸³ Such plan must include provisions for ground water monitoring, maintenance of waste containment systems and, in certain circumstances, maintenance of any required surveillance and security systems.⁸⁴

⁷⁶ See, e.g., 42 U.S.C. § 6924(3) (1977) wherein the EPA administrator is directed to promulgate standards for operating methods, techniques and practices for hazardous waste treatment, storage or disposal "as may be satisfactory [to the EPA administrator]."

⁷⁷ See 45 Fed. Reg. 33156 (1980).

⁷⁸ *Id.*

⁷⁹ See generally 45 Fed. Reg. 33232-53 (1980) (to be codified in 40 C.F.R. § 265).

⁸⁰ H.R. REP. NO. 1491, *supra* note 12, at 6266.

⁸¹ 42 U.S.C. § 6924(6) (1977).

⁸² 45 Fed. Reg. 33243 (1980) (to be codified in 40 C.F.R. § 265.112).

⁸³ 45 Fed. Reg. 33243 (1980) (to be codified in 40 C.F.R. § 265.118).

⁸⁴ 45 Fed. Reg. 33243 (1980) (to be codified in 40 C.F.R. § 265.117).

The second concern of Congress regarding hazardous waste disposal facilities concerned the need for HWM operators to demonstrate financial responsibility sufficient to carry out their obligations under the Act. RCRA provides authority to the EPA to promulgate regulations respecting financial responsibility,⁸⁵ but the Act falls short of mandating a blanket performance bond requirement.⁸⁶ Thus, the interim status regulations require an HWM operator only to maintain and revise annually an estimate of the costs of closing the facility and of providing post-closure monitoring and maintenance.⁸⁷

RCRA requires owners and operators of HWM facilities to obtain a permit⁸⁸ and directs the EPA administrator to issue regulations prescribing the content of permit applications. Those regulations require applications to include estimates of the composition, quantities and concentration of any hazardous waste as well as the time and manner of disposal.⁸⁹ The Act contemplates granting an interim permit⁹⁰ to any existing facility owner or operator who provided preliminary notification of his activity within six months after the promulgation of regulations listing and identifying hazardous waste.⁹¹ Any existing facility owner qualifying for interim status must comply with the interim status standards discussed above.⁹²

An application for a permit for a new HWM facility may not be filed, however, until after the promulgation of Phase II regulations delineating design criteria and operation standards.⁹³ Applications for both existing facility permits and

⁸⁵ 42 U.S.C. § 6924(6) (1977).

⁸⁶ *Id.* Section 6924 merely provides that private entities which provide "assurances" of financial responsibility will not be precluded from owning or operating a disposal facility. *Id.* See also Andersen, *supra* note 27, at 657.

⁸⁷ 45 Fed. Reg. 33242-44 (1980) (to be codified in 40 C.F.R. §§ 265.142, .144).

⁸⁸ 42 U.S.C. § 6925 (1977 & Supp. II 1979).

⁸⁹ *Id.*

⁹⁰ *Id.* (e).

⁹¹ *Id.* § 6930(a). See also 45 Fed. Reg. 33433 (1980) (to be codified in 40 C.F.R. § 122.22). This preliminary notification must be provided by November 19, 1980. See note 6 *supra* for a discussion of the timetable built into the RCRA.

⁹² See text accompanying notes 73-87 *supra* for a discussion of these standards.

⁹³ 45 Fed. Reg. 33433 (1980) (to be codified in 40 C.F.R. § 122.22). See text accompanying note 78 *supra* for a discussion of the phased implementation of facility standards.

new facility permits require a very general description of the processes to be used in managing the waste delivered to the facility, a scaled map showing past, present and future areas of disposal or treatment, the name and telephone numbers of the owner, and the latitude, longitude and address of the facility.⁹⁴ If the standards applicable to any permit are not complied with, RCRA authorizes permit revocation.⁹⁵

Through its prescription of operational controls and its stipulation that HWM facilities be operated only by authorized permit holders, RCRA thus provides supervision of the conclusion of the hazardous waste life cycle.

4. *Requirements for Authorization of State Programs*

Of primary concern to the 1980 Kentucky General Assembly was RCRA's approach to approving state hazardous waste programs. The Act contemplates two phases of state authorization: interim authorization and final authorization.

Interim authorization is permitted where, within ninety days after the date federal regulations are promulgated prescribing standards for generators, transporters and disposers of hazardous waste,⁹⁶ a state submits a program deemed to be *substantially equivalent* to the federal program.⁹⁷ In such event, the state can receive authorization to conduct its program for a two-year period beginning November 19, 1980.⁹⁸

Final authorization is contingent upon the EPA administrator finding, after providing notice and an opportunity for a public hearing, that (1) the state program is equivalent to the federal program, (2) the state program is consistent with programs applicable in other states, and (3) the state program

⁹⁴ See 45 Fed. Reg. 33434 (1980) (to be codified in 40 C.F.R. §§ 122.24-25).

⁹⁵ 42 U.S.C. § 6928(a)(3) (1977). Any permit suspension or revocation order becomes final if the person(s) named therein does not request a public hearing within 30 days following service of such order. *Id.* at (b).

⁹⁶ These regulations were promulgated on May 19, 1980. See note 6 *supra* for a discussion of the timetable contemplated by the Act for implementation of the regulations.

⁹⁷ RCRA, 42 U.S.C. § 6926(c) (Supp. II 1979).

⁹⁸ *Id.* This section provides that authorization begins six months after the date of promulgation of regulations under §§ 6922 and 6925. Since regulations under these sections were published on May 19, 1980, the effective date of interim authorization is November 19, 1980.

provides for enforcement deemed adequate to ensure compliance with its requirements.⁹⁹ Accordingly, a *substantially equivalent program* will receive interim authorization, but only a program ruled *equivalent* to federal requirements and *consistent* with other state programs will receive final authorization.

To be considered equivalent, RCRA makes clear that state program requirements must be at least as stringent as federal program requirements.¹⁰⁰ However, EPA regulations expressly allow state adoption of more stringent standards.¹⁰¹ To be consistent with federal requirements and approved programs operative in other states, any state applying for approval must implement an equivalent manifest system, avoid restricting movement of hazardous waste across state lines and avoid absolute prohibitions of treatment, storage or disposal of hazardous waste except on grounds related to human health or environmental protection.¹⁰²

Once given, any authorization may be withdrawn, after a public hearing upon a finding that the state is not administering or enforcing the program as approved and where the state fails to initiate corrective action within a ninety-day period following notice of deficiencies from the EPA.¹⁰³

While these provisions collectively required the 1980 Kentucky General Assembly to enact provisions at least as stringent as those of RCRA, hazardous waste disposal problems present within the Commonwealth made adoption of softer regulations an unpalatable option.

II. IMPLEMENTATION OF A HAZARDOUS WASTE PROGRAM IN KENTUCKY

A. *Practical Background*

According to EPA estimates, Kentucky will generate more than 990,000 tons of hazardous waste in 1980. While

⁹⁹ 42 U.S.C. § 6926(b) (1977).

¹⁰⁰ *Id.* § 6929.

¹⁰¹ 45 Fed. Reg. 33457 (1980) (to be codified in 40 C.F.R. § 123.1(k)(1)).

¹⁰² 45 Fed. Reg. 33465-66 (1980) (to be codified in 40 C.F.R. § 123.32).

¹⁰³ 42 U.S.C. § 6926(e) (1977).

Kentucky ranks twenty-second among states in the amount of toxic wastes produced, it is surrounded by six of the top twelve producers: Illinois, Indiana, Ohio, Virginia, Tennessee and Missouri. Collectively, these six states will generate almost 17 million tons of toxic wastes in 1980, more than a quarter of the nation's total.¹⁰⁴ Kentucky's location as well as its predominantly rural character make it a likely dumping ground for waste generated in neighboring, highly-industrialized states. This fact in large measure spurred the 1980 Kentucky General Assembly to take drastic measures to prohibit environmentally unsafe disposal practices.

In-state producers, however, provided even stronger motivation for legislative action. Kentucky's awareness of the hazardous waste disposal problem was aroused on March 29, 1977, when operators of Louisville's Morris Forman Sewage Treatment Plant discovered that the plant had been contaminated with toxic organic chemicals that totally disabled it. Over the next ten weeks, while the plant's biological treatment systems were being restored, approximately seven billion tons of raw sewage were channeled into the Ohio River. Contamination of the plant subsequently was traced to illegal discharges from Kentucky Liquid Recycling, Inc., a small pesticide manufacturer.¹⁰⁵

The Morris Forman Sewage Treatment Plant incident was but a foreshadowing of the macabre discovery in December, 1978, of approximately 17,000 drums, many of them oozing their toxic contents, on a seven-acre site in Bullitt County. The press labeled this site "Valley of the Drums."¹⁰⁶ Because

¹⁰⁴ The Courier-Journal, November 25, 1979, § A, at 14, col. 4.

¹⁰⁵ [1979] IX ENVIR. L. REP. (ELI) 10168. Actions seeking damages were filed by several municipalities which were forced to undergo extraordinary measures to insure the safety of drinking water. See *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979), cert. denied sub. nom. *Louisville and Jefferson County Metropolitan Sewer Dist. v. City of Evansville*, 100 S.Ct. 689 (1980), ___ U.S. ___ (1980).

¹⁰⁶ OFFICE OF SOLID WASTE, U.S. ENVIRONMENTAL PROTECTION AGENCY, "EVERYBODY'S PROBLEM: HAZARDOUS WASTE" SW-826, at 2 (1980). By November 25, 1979, the EPA had spent in excess of \$300,000 in fees to contractors who grouped the barrels according to contents, crushed unusable empties, dug a system of trenches to collect leaking chemicals and installed a carbon filtering system to remove chemicals from a small creek. An additional \$25,000 from state funds was used to pay workers who

of national press coverage, the "Valley of the Drums" incident rapidly focused public attention on the need for a comprehensive program to develop environmentally sound methods for managing, handling and disposing of hazardous waste in Kentucky.

In an effort to halt the tide of waste disposal disasters, Governor Julian M. Carroll created the Governor's Commission on Hazardous Waste Management¹⁰⁷ on March 14, 1979, and charged the Commission with two primary functions. First, fully cognizant that federal officials would be enforcing RCRA in Kentucky in 1980 unless a Kentucky program was approved by the EPA,¹⁰⁸ the Governor directed the Commission to conduct a comprehensive study and review of existing hazardous waste practices and to devise legislation where necessary to implement a state program. Second, as an immediate stopgap measure, the Commission was directed to recommend proposals for interim state hazardous waste regulations to both the Governor and the Department of Natural Resources and Environmental Protection (DNREP).¹⁰⁹

In seeking to draft a program which would be *substantially equivalent* to the federal program,¹¹⁰ the Commission planned to use the EPA's final regulations, originally due on December 31, 1979.¹¹¹ EPA's inability to promulgate final regulations by that date, however, necessitated Commission reliance on the EPA proposed regulations.¹¹²

Due to a sense of urgency resulting from the discovery of the Valley of the Drums and the justifiable suspicion that many more such sites were waiting to be discovered, regulations drafted by the Commission throughout the spring and

monitored the filter system. Courier Journal, *supra* note 104, cols. 5-6.

¹⁰⁷ Exec. Order No. 79-251 of Governor Julian M. Carroll (March 14, 1979).

¹⁰⁸ See note 6 *supra* for a discussion of the timetable contemplated by RCRA.

¹⁰⁹ Exec. Order No. 79-251, *supra* note 107.

¹¹⁰ See text accompanying notes 99-100 *supra* for a discussion of the origin and significance of the "substantially equivalent" standard.

¹¹¹ See note 47 *supra* for a discussion of the timetable concerning this promulgation.

¹¹² See Memorandum from Hugh N. Archer, Staff Attorney for Governor's Commission on Hazardous Waste, to Harry Kletter, Special Executive Assistant in charge of Hazardous and Solid Wastes (December 26, 1979). The proposed federal regulations appear at 43 Fed. Reg. 58946 (1978).

summer of 1979 were promulgated in emergency form by an executive order of Governor Carroll on October 17, 1979.¹¹³ These regulations were as stringent as the proposed federal regulations¹¹⁴ but were no harsher. Indeed, a substantial roadblock faced the proponents of a Kentucky program which would have surpassed the proposed requirements of federal law: existing Kentucky law required that state regulations regarding hazardous and solid waste be no more stringent than federal requirements.¹¹⁵ As will be discussed herein, the repeal of this statutory prohibition by the 1980 General Assembly marked a turning point in Kentucky environmental law and afforded the Commonwealth an opportunity to be a leader, rather than a follower, in the area of hazardous waste management.¹¹⁶

Much to the chagrin of everyone, including newly-inaugurated Governor John Y. Brown, Jr., the long-awaited permanent federal regulations still had not been promulgated on February 14, 1980, the expiration date of Kentucky's emergency regulations.¹¹⁷ Consequently, Kentucky was in no better a position to draft a program that was *substantially equivalent* to the federal program than it had been the previous October. Rather than have the entire hazardous waste management industry go unregulated by the Commonwealth,

¹¹³ Exec. Order No. 79-992 of Governor Julian M. Carroll (October 17, 1979), 6 Ky. Admin. Reg. 247 (December 1, 1979). Being emergency in form, such regulations were scheduled to expire on February 14, 1980, 120 days from the date of promulgation. 401 KAR 2:100E, 6 Ky. Admin. Reg. 248 (December 1979). See also Ky. Rev. Stat. § 13.085(2) (1980) [hereinafter cited as KRS].

¹¹⁴ Compare 401 KAR 2:100E, 6 Ky. Admin. Reg. 248 (December 1979) with 43 Fed. Reg. 58996 (1978) (to be codified in 40 C.F.R. § 250.41).

¹¹⁵ KRS § 224.252 (Supp. 1978). The existence of this statute posed a thorny problem for the Governor's Commission endeavoring to carry out its charge to draft interim regulations because the statute could be construed to mean that in the absence of permanent federal regulation, *any* regulation promulgated by Kentucky would be more strict than the not yet finalized federal regulations.

¹¹⁶ See text accompanying notes 121-23 *infra* for a discussion of the repeal of KRS § 224.252. See also Courier Journal, January 17, 1980, § A, at 10, cols. 1-5. Kentucky took an early lead in hazardous waste management by enacting KRS § 224.890 (1977) in 1974, two years prior to RCRA; the Kentucky statute requires permits for collecting, hauling and disposing of hazardous waste.

¹¹⁷ See notes 112-13 *supra* and accompanying text for a discussion of the federal timetable in promulgating these regulations.

Governor Brown issued an executive order directing a second emergency promulgation of the hazardous waste management regulations.¹¹⁸

Because the Governor's Commission on Hazardous Waste was charged with making recommendations for needed legislation as well as for interim regulations, the proximity of the 1980 session of the Kentucky General Assembly required the Commission to undertake both tasks concurrently. The administrator of EPA Region IV had determined that without amendment Chapter 224 of the Kentucky Revised Statutes (KRS) would be insufficient authority upon which to promulgate a state program *substantially equivalent* to the federal program.¹¹⁹ Accordingly, rather than advocating wholesale adoption of a proposed "Hazardous Waste Management Act," the Commission deemed amendments to KRS Chapter 224 the more palatable alternative.¹²⁰ The ensuing discussion analyzes the various House and Senate Bills comprising these amendments.

B. *The Needed Legislation*

1. *Senate Bill 268*

To clear the way for pervasive regulation of the hazardous waste management industry in Kentucky, repeal of the statutory requirement that Kentucky regulation over hazardous waste be no more stringent than federal regulation¹²¹ was axiomatic. Further, the existence of this statutory ceiling on the quantum of regulation posed the nagging question of whether, in the absence of permanent federal regulations, Kentucky had any authority to promulgate emergency hazardous waste regulations.¹²² In one simple sentence, Senate Bill

¹¹⁸ Exec. Order No. 80-118 of Governor John Y. Brown, Jr. (Feb. 14, 1980), 6 Ky. Admin. Reg. 398 (March 1, 1980).

¹¹⁹ See "Overview of the Hazardous Waste Issue In Kentucky: For Preparation for Initial Statement to the Governor's Hazardous Waste Commission" at 6 (April 18, 1979). (Enclosure 4 of documents submitted to members of the Governor's Commission on Hazardous Waste Management).

¹²⁰ See Memorandum *supra* note 112 at 4.

¹²¹ See note 115 and accompanying text *supra* for a discussion of KRS § 224.252.

¹²² *Id.* See also Memorandum, *supra* note 112, at 5-6.

268¹²³ repealed the statutory prohibition of state regulation more stringent than federal law and opened the door for a full panoply of regulatory schemes necessary to regulate hazardous waste management within the Commonwealth, irrespective of the federal approach.

2. *Senate Bill 267*

Senate Bill 267 constitutes the backbone of the hazardous waste legislation enacted by the 1980 General Assembly and represents the principal effort in obtaining interim program authorization under RCRA.¹²⁴

First, the bill repeals Kentucky law considered inconsistent with RCRA. Prior to 1980, the only Kentucky statute speaking to hazardous waste was KRS section 224.890, which required permits issued by the DNREP prior to engaging in the generation, storage, treatment, recycling or disposal of hazardous waste.¹²⁵ While RCRA provides for the issuance of permits to HWM facilities, neither generators nor transporters are required to obtain permits.¹²⁶ Requiring generators and transporters of hazardous waste to obtain permits, in addition to the imposition of a burdensome regulatory process on the administering agency, may have resulted in a program which would not have been *substantially equivalent* to the approach of RCRA. Further, and of greater importance, this statute did not sufficiently detail financial responsibility and long-term care requirements, generator standards or other important statutory policy bases upon which a regulatory program *substantially equivalent* to the federal program could be designed.¹²⁷ Accordingly, KRS section 244.890 was repealed by Section 14 of Senate Bill 267, thus wiping the slate clean and allowing for statutory enactments deemed more consistent

¹²³ Ch. 265, 1980 Ky. Acts 829.

¹²⁴ See text accompanying notes 97-99 & 119 *supra* for a discussion of authorization of Kentucky's interim program under RCRA.

¹²⁵ KRS § 224.890 (Supp. 1978).

¹²⁶ See text accompanying notes 50-95 *supra* for the federal approach to permit requirements, and *compare* RCRA, 43 U.S.C. §§ 6923-6924 (1977 & Supp. II 1979), with KRS § 224.890 (Supp. 1978).

¹²⁷ See generally KRS § 224.890 (1977).

with RCRA.

Section 1 of Senate Bill 267 embodies the findings and declarations of the General Assembly regarding hazardous waste practices, including a statement encouraging performance by the private sector of hazardous waste management functions.¹²⁸ Making specific references to RCRA,¹²⁹ Section 1 affirms the Commonwealth's policy of encouraging the development of HWM facilities that utilize environmentally sound alternatives to land disposal of hazardous waste.¹³⁰ Interestingly, this policy statement generated much debate in the hearings before the Senate Subcommittee on Natural Resources and the Environment.¹³¹ The proponents of the cheapest method of hazardous waste disposal, landfilling, desired a policy which placed landfilling on par with other "environmentally sound methods."¹³²

Following the RCRA approach of vesting the EPA administrator with wide discretion,¹³³ Section 2 of the Bill amends KRS section 224.033 (24) by authorizing the DNREP to promulgate rules, regulations, guidelines and standards to implement a comprehensive statewide plan for hazardous waste management and to assess current techniques within the Commonwealth for hazardous waste generation and disposal.¹³⁴

Section 4 directs the DNREP to promulgate regulations establishing standards for generators of hazardous waste.¹³⁵ While the term "generator" is not defined in the bill itself, "generating" is defined as the act or process of producing waste. The bill, however, contains the significant proviso that

¹²⁸ Ch. 264, § 1(5), 1980 Ky. Acts 817.

¹²⁹ *Id.* § 1(3).

¹³⁰ *Id.* § 1(6).

¹³¹ Conversation with Roger Blair, Director of the Division of Hazardous Materials and Waste Management, Kentucky Department for Natural Resources and Environmental Protection, in Frankfort, Ky. (May 1, 1980).

¹³² The recent discoveries at the Love Canal render suspect the applicability of the term "environmentally sound" to traditional landfill disposal techniques. See note 2 *supra* for a discussion of the Love Canal incident.

¹³³ See text accompanying notes 44-45 & 76 *supra* for a discussion of the wide discretion allowed by RCRA.

¹³⁴ Ch. 264, § 2(24), 1980 Ky. Acts 817.

¹³⁵ *Id.* § 4.

any person who produces hazardous waste in amounts not determined to be harmful to public health or the environment, as determined by regulations promulgated by DNREP (to be modeled after RCRA's permanent regulations), is not deemed to be engaged in the generation of hazardous waste.¹³⁶

When finally promulgated on May 19, 1980, the permanent federal regulations applicable to generators provided an exemption from the notification, reporting and record-keeping requirements for any person generating less than 1,000 kilograms of hazardous waste a month.¹³⁷ Following the statutory mandate of section 4 requiring consistency of Senate Bill 267 with RCRA's regulations, Kentucky's final regulations, promulgated on June 4, 1980, incorporate this federal exemption by reference.¹³⁸ While seemingly justified by the EPA,¹³⁹ the exemption nevertheless constitutes one of the principal complaints raised by environmentalists concerning the breadth of coverage of the permanent federal regulations.¹⁴⁰

While utilizing slightly different language, the section 4 statutory mandate to the DNREP requiring promulgation of regulations which establish standards applicable to hazardous waste generators essentially mirrors RCRA's direction to the EPA administrator concerning the establishment of such standards.¹⁴¹ Further, Kentucky's permanent regulations promulgated pursuant to section 4 are virtually identical to their counterparts in the federal regulations with respect to record-keeping and reporting.¹⁴²

Section 4 of Senate Bill 267 duplicates RCRA's requirements for generators by: (1) obligating the DNREP to promulgate regulations specifying the determinative criteria for

¹³⁶ *Id.* § 3(12).

¹³⁷ 45 Fed. Reg. 33120 (1980) (to be codified in 40 C.F.R. § 261.6).

¹³⁸ 401 KAR 2:050(17) (1980).

¹³⁹ The EPA justifies the exemption of these so-called small generators with figures which demonstrate that while this category of generators comprises 91% of all hazardous waste generators, collectively these generators produce only 1% of the annual volume of hazardous waste. See 45 Fed. Reg. 33102-03 (1980).

¹⁴⁰ Courier Journal, May 6, 1980, § A, at 1, col. 6.

¹⁴¹ Compare Ch. 264, § 4, 1980 Ky. Acts 817 with RCRA, 42 U.S.C. § 6922 (1976 & Supp. II 1978).

¹⁴² Compare 45 Fed. Reg. 33142-48 (1980) (to be codified in 40 C.F.R. Part 262, Subpart D) with 401 KAR 2:070 § 12 (1980).

categorizing a waste as hazardous and to compile a list of known hazardous wastes;¹⁴³ (2) requiring generators to use such criteria to determine whether they are generating any waste deemed hazardous;¹⁴⁴ and (3) ordering persons generating a waste, either meeting the hazardous waste criteria or identified on the hazardous waste list, to notify the DNREP within ninety days of the promulgation of regulations under section 4.¹⁴⁵ Accordingly, final regulations having been promulgated by the DNREP on June 4, 1980, generators of hazardous waste were required to register with the Department on or before September 4, 1980.¹⁴⁶

For the sake of simplicity, and to resolve any doubts about the substantial equivalency of Kentucky's program, section 4 incorporates the determinative criteria and hazardous waste list promulgated by the EPA.¹⁴⁷ As Kentucky's record-keeping and reporting requirements mirror those of RCRA in its regulations;¹⁴⁸ likewise the category of generators subject to regulation in Kentucky includes the federal categorization.

Section 8 of Senate Bill 267, however, undertakes regulation of generators of high volume/low toxicity waste although such wastes are excluded from the definition of "hazardous waste" in the federal regulations.¹⁴⁹ Denominated "special wastes," these by-products include sewage and water treatment facility sludge, cement kiln dust, gas and oil drilling muds, oil production brines, and, of particular significance in Kentucky, mining wastes.¹⁵⁰ With the exception of generators of mining wastes, which section 8 relegates to regulation under KRS Chapter 350, generators of other designated spe-

¹⁴³ Ch. 264, § 4(3), 1980 Ky. Acts 817.

¹⁴⁴ *Id.* § 4(2).

¹⁴⁵ *Id.* § 4(3).

¹⁴⁶ 401 KAR 2:060 § 1(3) (1980).

¹⁴⁷ Ch. 264, § 4(3), 1980 Ky. Acts 817. See also notes 47-50 and accompanying text *supra* for a discussion of the EPA regulations on criteria for and lists of hazardous wastes. Had Kentucky chosen different criteria or a different list, RCRA could have preempted Kentucky law on this point. For a thorough discussion of RCRA's preemptive capabilities, see Andersen, *supra* note 27.

¹⁴⁸ See note 142 *supra* for a comparison of the RCRA and Kentucky requirements.

¹⁴⁹ 45 Fed. Reg. 33120 (1980) (to be codified in 40 C.F.R. § 261.4).

¹⁵⁰ Ch. 264, § 8(1)(a), 1980 Ky. Acts 817.

cial wastes are subject to the manifesting, record-keeping, and reporting requirements of section 4.¹⁵¹

Nevertheless, section 8 mandates that regulations implementing such requirements shall recognize the distinct differences between special wastes and other hazardous and solid wastes.¹⁵² Facilities disposing of such special wastes are exempt from the operating standards applicable to HWM facilities unless and until a specified site or facility is determined to pose a probable threat of imminent hazard to public health or to present a danger of substantial environmental impact.¹⁵³ While the EPA presently has no plans to undertake regulation of this category of waste,¹⁵⁴ section 8 requires the DNREP's regulations to incorporate any federal regulations consistent with the policies of RCRA that may be forthcoming in the future.¹⁵⁵

Finally, Senate Bill 267 authorizes the Department to require generators who register with the DNREP and applicants for disposal facility permits to pay a fee which shall be reasonably related to the administrative cost of verifying the data submitted by the generator or the applicant.¹⁵⁶ Since Kentucky has no hazardous waste analysis laboratory of its own, the payment of this fee will reimburse the DNREP for costs incurred in having data analyzed by private laboratories or laboratories operated by other states.¹⁵⁷

The most onerous regulation conceived by Senate Bill 267 concerns facilities for the treatment, storage or disposal of hazardous waste. Garnering features from various regulatory programs operative in other states, the bill subjects HWM facilities to standards far exceeding those mandated by federal regulations.¹⁵⁸ At the outset, Kentucky regulations imple-

¹⁵¹ *Id.* § 8(1)(c).

¹⁵² *Id.* § 8(1)(d).

¹⁵³ *Id.* § 8(1)(b). For a discussion of standards applicable to hazardous waste disposal facilities see text accompanying notes 158-65 *infra*.

¹⁵⁴ See 45 Fed. Reg. 33087 (1980).

¹⁵⁵ Ch. 264, § 8(1)(d), 1980 Ky. Acts 317.

¹⁵⁶ *Id.* § t.

¹⁵⁷ Conversation with Hugh N. Archer, staff attorney for the Governor's Commission on Hazardous Waste, in Frankfort, Ky. (April 15, 1980).

¹⁵⁸ See generally text accompanying notes 73-95 *supra* for a discussion of the

menting the permitting and performance standard requirements of section 5 of Senate Bill 267 provide that HWM facilities in existence on or before June 4, 1980 may register and provide generalized information concerning their activities to the DNREP in lieu of making application for a permit.¹⁵⁹ The regulations, however, authorize the DNREP to require a full permit application from any existing facility where the information disclosed in the registration form demonstrates a threat of imminent hazard to public health or a danger of substantial environmental impact.¹⁶⁰ New HWM facilities cannot be constructed or operated without first having obtained a permit.¹⁶¹

The information required in a permit application includes exhaustive descriptions of operational techniques, topographical, geological and hydrologic information, as well as contingency plans for emergencies,¹⁶² thus implementing the edict of section 5 that no permit for an HWM facility be issued unless the proposed facility can be integrated into the surroundings in an environmentally compatible manner.¹⁶³ The DNREP is statutorily directed to evaluate the permit application and to consider the feasibility of locations and treatment methods besides those proposed by the applicant and to analyze the anticipated public health, safety, social and economic impacts on the community where the site will be located; the relationship of the proposal to local planning and existing development is to be examined as well.¹⁶⁴

Accordingly, these required evaluations collectively obligate the DNREP to prepare an environmental impact statement prior to issuing a permit for a proposed facility. Additionally, the permanent regulations allow the Department to impose a full array of special conditions on the issuance of the permit to the extent necessary to ensure compliance with law

standards mandated by RCRA.

¹⁵⁹ 6 Ky. Admin. Reg. 663 § 1(4) (1980) (to be codified in 401 KAR 2:060).

¹⁶⁰ *Id.* § 1(5).

¹⁶¹ *Id.* § 2(5).

¹⁶² 6 Ky. Admin. Reg. 664 § 3 (1980) (to be codified in 401 KAR 2:060).

¹⁶³ Ch. 264, § 5(1), 1980 Ky. Acts 817.

¹⁶⁴ *Id.*

and to ensure an environmentally safe operation.¹⁶⁵

Considering the parade of horrors emanating from the Love Canal,¹⁶⁶ a decision to place a hazardous waste disposal site in a particular location understandably can generate fear and controversy among the citizens living in the surrounding area. Just such a controversy arose among Lewis Countians over the February, 1980 proposal of Waste Management, Inc. to locate a chemical waste disposal site near the community of Tollesboro.

Prior to its amendment in 1980, KRS section 224.855(5) required the approval of the majority of the members of both houses of the Kentucky General Assembly and the Governor prior to the issuance of a permit for the disposal of long-lived waste.¹⁶⁷ Accordingly, Waste Management, Inc. launched the permit application process hoping to obtain such approval prior to the end of the 1980 session of the General Assembly.¹⁶⁸ In a move spearheaded by state Senator John Berry and U.S. Representative Carl Perkins, however, more than one hundred Lewis Countians voiced their vehement objections to the proposed site to the General Assembly.¹⁶⁹ The ensuing furor culminated in a significant addition to Senate Bill 267 which affords local governments a conditional right to veto the siting of a proposed landfill within the governing groups' jurisdictional boundaries.¹⁷⁰

Proposals to amend KRS section 224.855(5) ranged from affording local governments an absolute veto right¹⁷¹ to the creation of a state board governing siting of HWM facilities.¹⁷²

¹⁶⁵ 6 Ky. Admin. Reg. 665 § 7(2) (1980) (to be codified in 401 KAR 2:060).

¹⁶⁶ See note 2 *supra* for a discussion of the Love Canal incident.

¹⁶⁷ KRS § 224.855(5) (Supp. 1978).

¹⁶⁸ Conversation with Roger Blair, *supra* note 131.

¹⁶⁹ The Courier-Journal, March 8, 1980, § B, at 1, cols. 1-5.

¹⁷⁰ Ch. 264, § 11, 1980 Ky. Acts 817.

¹⁷¹ Conversation with Hugh N. Archer, *supra* note 157.

¹⁷² The recommendation to establish a siting board emanated from the staff of the Governor's Commission on Hazardous Waste but was rejected by the full Commission. The Courier-Journal, *supra* note 116, at col. 2. Such a siting board is operative in Michigan and is comprised in part of residents of the municipality containing the proposed site. The proposal is reviewed only after a showing that it satisfies all legal and technical requirements. Further, the siting board utilizes uniform criteria for assessing the impact of the proposed landfill on traffic, property values and social

The language that was adopted finally in section 11 of Senate Bill 267 amends KRS section 224.855 to afford a veto right with certain caveats to the fiscal court of the county or to the governing body of an incorporated city of the proposed location of the site.¹⁷³ The veto right applies only to proposed landfills, not to incinerators, and requires the local governing body to consider the social and economic impacts of the proposed site, including certain intangibles such as community perception and psychic costs. If the site is disapproved, the reasons for disapproval must be clearly and concisely recorded in the minutes of the meeting; if the procedural requirements are satisfied, the DNREP is forbidden to issue a permit for the proposed site.¹⁷⁴

Interestingly, section 4 of House Bill 703 encourages local governments to approve location of hazardous waste disposal facilities, both landfills and incinerators, by allowing county fiscal courts to impose a license fee of up to two percent of the gross receipts of such facility, provided that the treatment, storage or disposal activities of the facility are not incidental to a manufacturing operation also occupying the disposal site.¹⁷⁵

Concerning RCRA's requirement that proposed facility operators demonstrate financial responsibility, the General Assembly imposed obligations clearly surpassing those of RCRA.¹⁷⁶ Although RCRA stops short of requiring from applicants a blanket performance bond for an HWM facility,¹⁷⁷ Senate Bill 267 imposes bonding requirements in the form of a closure fund as well as a post-closure monitoring and maintenance fund.¹⁷⁸

and economic conditions. *See generally* MICH. COMP. LAWS ANN. § 299.517 (Supp. 1980).

¹⁷³ Ch. 264, § 11, 1980 Ky. Acts 817.

¹⁷⁴ *Id.*

¹⁷⁵ Ch. 197, § 4, 1980 Ky. Acts 605.

¹⁷⁶ See text accompanying notes 85-87 *supra* for a discussion of the financial obligations imposed by RCRA.

¹⁷⁷ *Id.*

¹⁷⁸ Ch. 264, § 5(3), 1980 Ky. Acts 817. "Closure" is defined as the time at which a waste treatment, storage or disposal facility permanently ceases to accept additional waste and includes those actions taken by the owner or operator of the facility to prepare the site for post-closure monitoring and maintenance or to make it suitable

Provisions establishing the closure fund require that prior to the issuance of a permit the applicant must make an estimate of the cost of closure.¹⁷⁹ Thereafter, he must deposit cash, irrevocable letters of credit, or other sureties satisfactory to the Department in an interest bearing account in an amount equal to the applicant's cost estimate or to the estimate as revised by the DNREP. Financial institutions approved by the Department act as escrow agents and are obligated to disburse funds upon receiving an administrative order of forfeiture issued pursuant to a hearing determining the existence of one or more closure violations. Upon compliance with the closure operating standards, the permit holder may apply to the DNREP for release of the principal and interest held in the closure fund, whereby the funds shall be returned if the Department determines that closure has been satisfactorily accomplished.¹⁸⁰

A similar fund ensures proper post-closure monitoring and maintenance. An estimate of the cost of providing such maintenance for a minimum of twenty years after the facility is closed must be submitted and approved by the DNREP. Subsequently, an applicant must deposit annually a portion of this estimate prorated over the pre-closure operating life of the facility or over twenty years, whichever is shorter. Such deposits are made to an interest bearing escrow account managed by an approved financial institution. As with the closure fund, the escrow agent of the post-closure monitoring and maintenance fund is obligated to disburse monies to the DNREP upon receipt of a forfeiture order issued after a hearing indicating one or more post-closure monitoring and maintenance violations. One year after closure and annually thereafter, the permit holder who has complied with all post-closure monitoring and maintenance requirements may apply to the DNREP for reimbursement in an amount equal to the

for other uses. *Id.* § 3(5). "Post-closure monitoring and maintenance" means the routine care, maintenance and monitoring of a solid waste or hazardous waste treatment, storage or disposal facility following closure of the facility. *Id.* § 3(14).

¹⁷⁹ An estimate of closure costs is all that is mandated by RCRA's permanent regulations. See text accompanying notes 85-87 *supra* for a discussion of the financial responsibilities involved in closure under RCRA.

¹⁸⁰ Ch. 264, § 5(3)(a), 1980 Ky. Acts 817.

costs incurred in providing monitoring and maintenance during the past year, plus interest accumulated on the portion of the fund attributable to such year. The DNREP will evaluate the submitted list of costs and will authorize reimbursement of funds if the costs were incurred in accordance with the operation plan approved by the Department.¹⁸¹

Additionally, applications for a permit must be accompanied by evidence satisfactory to the Department of financial responsibility in an amount and for a duration sufficient to ensure the applicant's ability to satisfy personal injury or property damage claims resulting from the escape of hazardous substances. While this requirement can be satisfied by evidence of self-insurance, financial responsibility must be maintained during the entire operating life of the facility as well as during closure and post-closure monitoring and maintenance until such time as the owner's responsibility for the facility shall have been terminated.¹⁸²

Upon successful completion of post-closure monitoring and maintenance functions, the operator's financial responsibility is absolved and "termination" occurs.¹⁸³ While regulations regarding termination are not yet promulgated, termination can occur no sooner than twenty years following closure.¹⁸⁴ The termination hearing provisions of the Kentucky statute are modeled after a hearing procedure planned for implementation in Wisconsin¹⁸⁵ and provide for termination only after the operator demonstrates, by clear and convincing evidence, that additional post-closure monitoring and maintenance are not necessary for adequate protection of public health or the environment. Following the termination hearing, the DNREP may order termination or alternatively may require additional post-closure monitoring and maintenance or any other appropriate remedial measure, including the imposition of restrictive covenants on the future use of

¹⁸¹ *Id.* § 5(3)(b).

¹⁸² *Id.* § 5(3)(c).

¹⁸³ "Termination" is defined as the final actions taken by the DNREP after closure and post-closure monitoring and maintenance of an HWM facility cease. *Id.* § 3(21).

¹⁸⁴ *Id.* § 5(4).

¹⁸⁵ Conversation with Hugh Archer, *supra* note 157.

the property.¹⁸⁶ Thus, operator responsibility is not relieved easily or as a matter of right after the expiration of the minimum twenty year post-closure monitoring and maintenance period.

Senate Bill 267 also exceeds RCRA in the area of criminal penalties for violations. RCRA requires that an approved state program provide for criminal fines of up to \$10,000 and imprisonment for at least six months for each day during which a knowing violation of the transportation, disposal or record-keeping requirements continues.¹⁸⁷ Section 13 of Senate Bill 267 emphasizes that hazardous waste regulation is serious business. Under Senate Bill 267, a knowing violation of the transportation, disposal or generation requirements of the Kentucky Revised Statutes or their regulations or a false statement knowingly made on a required form is punishable as a Class D felony with a maximum fine of \$25,000 for each day of violation, with imprisonment for a term of one to five years, or both.¹⁸⁸ Considering the havoc wreaked upon the Commonwealth by knowing violations in prior years,¹⁸⁹ exacting such a penalty for a deliberate violation appears to be both an appropriate and necessary concomitant to an effective enforcement scheme.

Civil penalties are levied for violations which are not committed knowingly and which do not endanger the health or welfare of citizens or the welfare of natural resources.¹⁹⁰ Further, a penalty is assessed only after the violator fails to comply with a notice to correct a violation within thirty days after the notice is issued.¹⁹¹ In such event, the violator may be subject to an injunction prohibiting the continuance of the violation, as well as to a civil penalty not to exceed \$25,000 for

¹⁸⁶ Ch. 264, § 5(4), 1980 Ky. Acts 817.

¹⁸⁷ 45 Fed. Reg. 33462 (1980) (to be codified in 40 C.F.R. § 123.9(3)(i)(B)).

¹⁸⁸ Ch. 264, § 13(6), 1980 Ky. Acts 817.

¹⁸⁹ See text accompanying notes 105-08 *supra* for a discussion of hazardous waste contamination in Kentucky.

¹⁹⁰ See text accompanying note 188 *supra* for a discussion of the criminal penalties under the statute. KRS § 224.071 provides authority to the DNREP Secretary to issue an *ex parte* order to abate and alleviate a condition deemed hazardous to the health of citizens or to the environment.

¹⁹¹ Ch. 264, § 13(5), 1980 Ky. Acts. 817.

each day that the violation occurs after the thirty-day grace period.¹⁹² The provision allowing a thirty-day abatement period without penalty was included at the urging of industry¹⁹³ and is consistent with RCRA's approach of allowing those states with EPA interim authorization approval to have thirty days to correct a violation before an enforcement action will be instituted by the EPA.¹⁹⁴

The obligation of transporters to comply with the manifest system and other record-keeping and reporting requirements is addressed very generally in Senate Bill 267. Section 10 provides that the DNREP is obliged to promulgate regulations establishing such standards.¹⁹⁵ In order to regulate fully the transportation phase of hazardous waste disposal, section 10 envisions cooperative efforts among the Departments of Transportation, Justice, and Natural Resources and Environmental Protection in implementing and enforcing transportation controls over hazardous wastes. To define fully the scope and details of this cooperative effort, section 10 requires a formal agreement acceptable to all Departments.¹⁹⁶

To ensure transporter compliance with the manifest system, the permanent regulations implementing Senate Bill 267 require a generator to inquire into the location of any hazardous waste shipment if the owner or operator of the facility designated by the manifest to accept the waste has not returned a signed copy of such document to the generator within thirty-five days of the time the waste was accepted for transportation.¹⁹⁷ After inquiry, the generator must file an exception report with the DNREP if a signed copy of the manifest is not returned to him within forty-five days of the date the waste was shipped.¹⁹⁸

While Senate Bill 333 speaks tangentially to transporters by prohibiting transportation to any site which has not ob-

¹⁹² *Id.*

¹⁹³ Conversation with Roger Blair, *supra* note 131.

¹⁹⁴ 42 U.S.C. § 6928(a) (1976).

¹⁹⁵ Ch. 264, § 10, 1980 Ky. Acts 817.

¹⁹⁶ *Id.*

¹⁹⁷ 401 KAR 2:070 § 12(7) (1980).

¹⁹⁸ *Id.* § 12(8).

tained a disposal permit from the DNREP,¹⁹⁹ and Senate Bill 267 contains the provisions discussed above, the bulk of authority to impose regulatory requirements upon transporters is contained in House Bill 863.

3. *House Bill 863*

To supplement and implement the general authority to regulate transporters embodied in Senate Bill 267, House Bill 863 exhaustively controls the transportation of hazardous materials,²⁰⁰ including hazardous waste, and vests regulatory jurisdiction in the Department of Transportation. Effective January 1, 1981, intrastate or interstate transporters of hazardous waste materials must obtain a permit from the Department of Transportation.²⁰¹ Further, in the event of an accident while transporting hazardous materials, the operator of the vehicle must notify the state police within one hour and must provide copies of shipping orders to state and local emergency response authorities;²⁰² importantly, the driver must carry in the vehicle transporting hazardous material a copy of the manifest describing such material.²⁰³ Finally, any vehicle used for transporting hazardous material must have personal injury and property damage liability insurance in the sum of one million dollars for each person and each occurrence.²⁰⁴

To ensure compliance with these requirements, field investigations, including passive and active surveillance, are to be conducted by the Department of Transportation if a request is made by the Secretary or General Counsel of the

¹⁹⁹ Ch. 284, § 3(1), 1980 Ky. Acts 920.

²⁰⁰ "Hazardous materials," as defined in Ch. 384, § 2(3), 1980 Ky. Acts 1209, means a substance designated hazardous by the federal Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (1976), and the regulations issued pursuant thereto. Generally speaking, hazardous materials have value as components of the manufacturing process while hazardous wastes are by-products of such processes.

²⁰¹ Ch. 384, § 4(1)-(2), 1980 Ky. Acts 1209. For interstate shipments, this permit requirement is mandated unless such requirement is found to be inconsistent with the federal Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (1976).

²⁰² Ch. 384, § 5(2)(a)-(b), 1980 Ky. Acts 1209.

²⁰³ *Id.* § 5(3).

²⁰⁴ *Id.* § 8(6).

DNREP.²⁰⁵ While the DNREP has primary responsibility for initiating legal proceedings, Department of Transportation personnel are required to provide evidentiary and testimonial support where necessary.²⁰⁶

The provisions of House Bill 863 now subject haulers of hazardous materials and hazardous wastes to rigid scrutiny by Kentucky enforcement personnel. Thus, despite the virtual dearth of federal enforcement within the Commonwealth,²⁰⁷ the longstanding and wide enforcement gap in transportation of hazardous materials and hazardous wastes in the Commonwealth has now been filled.

4. *Senate Bill 266*

Besides providing the housekeeping measures necessary to implement the legislation previously analyzed, Senate Bill 266 also surpasses the minimum requirements mandated by RCRA by providing economic incentives to reduce transportation of hazardous wastes and to implement the statutory preference for disposal of hazardous wastes by means other than landfilling.²⁰⁸

Senate Bill 266 authorizes the imposition of assessments on the generators of hazardous wastes to achieve the dual goals of financing the state hazardous waste management program while simultaneously reducing the amount of waste generated.²⁰⁹ The assessment applies to every generator of hazardous waste except those generating special wastes and those retailers who generate waste oil.²¹⁰ Anticipating greater federal regulation over generators, the bill provides that if a federal law is enacted which imposes a similar fee, the amount owed to the Commonwealth shall be reduced by any sums

²⁰⁵ *Id.* § 3(3)(b).

²⁰⁶ *Id.* § 3(3)(d).

²⁰⁷ To date, the federal Department of Transportation provides Kentucky with only two inspectors to enforce the provisions of 49 C.F.R. §§ 171-179 (1978) promulgated pursuant to the federal Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1812 (1976). Conversation with Hugh Archer, *supra* note 157.

²⁰⁸ See text accompanying notes 128-32 *supra* for a discussion of the Commonwealth's position on land disposal of hazardous wastes.

²⁰⁹ Ch. 263, § 1(1), 1980 Ky. Acts 813.

²¹⁰ *Id.* § 1(6).

paid pursuant to such federal statute, provided that the federal law authorizes return of such funds to the Commonwealth.²¹¹ The bill prescribes the precise rate of the off-site disposal fee and provides incentives to avoid the transportation of hazardous waste by reducing the assessment by one-half if the waste is landfilled on-site. Further, to discourage landfilling and to encourage other methods of hazardous waste disposal, on-site disposal facilities treating hazardous waste by means other than landfilling are exempt from the generation fee altogether.²¹²

Kentucky alone assesses fees against generators of hazardous waste, but other states assess fees against disposal facilities.²¹³ Kentucky, however, also assesses disposal facilities fees. To allow start-up time for the operation of permitted hazardous waste disposal facilities and to allow Kentucky facility owners to charge back the fee against out-of-state generators who dispose of hazardous wastes within the Commonwealth, the fee assessment against hazardous waste disposal facilities shall commence July 1, 1984; the assessed fee will be based on the volume of hazardous wastes treated and disposed of at the facility.²¹⁴

The fees paid by generators and, after July 1, 1984, by disposal facilities, are deposited in a fund within the state treasury denominated the Hazardous Waste Management Fund.²¹⁵ The purposes for which monies from the fund can be expended are threefold: (1) to provide allotments to allow the DNREP to respond effectively to environmental emergencies created by the release of hazardous substances, (2) to fund the DNREP's statutory responsibility to provide perpetual post-closure monitoring and maintenance upon the termination of such responsibilities by operators, and (3) to finance efforts

²¹¹ *Id.*

²¹² *Id.* § 7. This approach was modeled in part after the fee system applicable to water pollution dischargers in Vermont, wherein the fee varies with the amount of environmental damage caused by the pollutants being discharged. Conversation with Hugh Archer, *supra* note 157. See VT. STAT. ANN. tit. 10, § 1265(e) (1973 & Supp. 1979).

²¹³ See, e.g., MICH. COMP. LAWS ANN. § 299-542 (Supp. 1980).

²¹⁴ Ch. 263, § 1(6), 1980 Ky. Acts 813.

²¹⁵ *Id.* § 1(12).

undertaken by the DNREP in making abandoned hazardous waste sites environmentally safe.²¹⁶ In all events, the DNREP is directed to first use any federal monies available except when immediate measures are necessary to protect public health or the environment.²¹⁷ If funds are used pursuant to an environmental emergency, the DNREP is required to recover its actual and necessary expenditures from any responsible party²¹⁸ or to pursue reimbursement of the fund by any available federal monies.²¹⁹ The generation fee and the creation of the Hazardous Waste Management Fund provide some modicum of assurance that disasters of the Love Canal type will not occur in the Commonwealth.

The principal housekeeping effort undertaken by Senate Bill 266 identifies the DNREP as the lead agency for coordinating state efforts to handle emergencies created by spills of hazardous substances.²²⁰ As lead agency, the DNREP is directed to promulgate regulations designating the hazardous substances subject to prospective emergency spill response efforts by state agencies.²²¹ The monies necessary to fund the emergency spill response effort are derived from the Hazardous Waste Management Fund;²²² to reimburse the fund, the DNREP is afforded a right of action to recover actual costs against any persons deemed liable for the creation of the emergency.²²³ By vesting the DNREP with the authority to coordinate emergency spill response efforts, the General Assembly has recognized that proper disposal of hazardous sub-

²¹⁶ *Id.* § 1(3)(a)-(c). Since monies from the fund may be spent only for designated purposes and are thus not to be included within general fund reserves, no fees are collected after the balance exceeds six million dollars until the balance falls below three million dollars. *Id.* § 1(12).

²¹⁷ *Id.* § 1(13). An emergency presumably would prevent the DNREP from taking the time necessary to pursue a request for federal funds.

²¹⁸ *Id.* § 1(4).

²¹⁹ *Id.* § 1(13).

²²⁰ *Id.* § 2(5).

²²¹ *Id.* § 2(2). As defined in Section 2, the term "hazardous substance" includes both hazardous wastes and hazardous materials as well as any substance which poses a risk of death or serious illness. *Id.* § 1(12).

²²² See text accompanying note 216 *supra* for a list of the permissible expenditures from the Hazardous Waste Management Fund.

²²³ Ch. 263, § 1(12), 1980 Ky. Acts 813.

stances accidentally released should prevail over any other related government efforts such as restoration of traffic flow or resumption of public utility service.

C. *The Outlook for EPA's Approval of Kentucky's Program*

On July 22, 1980, the DNREP submitted to the EPA its draft application for interim authorization approval of its hazardous waste program.²²⁴ According to the statutory timetable and the Department's current schedule, the final application was submitted to EPA Region IV on September 19, 1980.²²⁵ Preliminary discussions between DNREP and officials of EPA Region IV indicate the EPA's tentative concurrence with the Department's position that the statutes and regulations heretofore described are sufficient to justify awarding interim authorization approval to Kentucky's program.²²⁶

Nevertheless, Kentucky's unwillingness to abide by the EPA's nonregulatory directives concerning the rights of citizens to intervene in administrative processes may be an issue during negotiations concerning interim authorization approval. The EPA's permanent regulatory requirements for interim authorization of state hazardous waste programs require citizen input in the state's enforcement process by one of two methods: (1) either the state must provide for intervention as a matter of right in any civil or administrative enforcement action by any citizen having an interest which is or may be adversely affected, or (2) the state must (a) provide assurances that it will investigate and provide written responses to any citizen complaints, (b) not oppose intervention by any cit-

²²⁴ The DNREP submitted its draft application to EPA Region IV on July 22, 1980 under cover of letter dated July 18, 1980. Conversation with Roger Blair, Director of the Division of Hazardous Materials and Waste Management, Department for Natural Resources and Environmental Protection, in Frankfort, Ky. (September 5, 1980).

²²⁵ 42 U.S.C. § 6926(c) (Supp. II 1979); Conversation with Roger Blair, Director of the Division of Hazardous Materials and Waste Management, Department for Natural Resources and Environmental Protection, in Frankfort, Ky. (October 23, 1980).

²²⁶ Conversation with Karen Cummings, Executive Assistant to the Director, Division of Hazardous Materials and Waste Management, Department for Natural Resources and Environmental Protection, in Frankfort, Ky. (July 15, 1980).

izen where permissive intervention is authorized by statute, rule or regulation, and (c) publish proposed settlements of enforcement action for thirty days in order to allow public comment prior to final approval.²²⁷ While the language of this requirement clearly seems to allow the states to opt for either method of allowing citizen intervention, preliminary discussions seem to indicate the EPA's decided preference, albeit informally, for a state program which allows *both* methods of citizen intervention.²²⁸ Although Kentucky law presently allows citizen intervention in the administrative process,²²⁹ such intervention requires the citizen to demonstrate standing by showing that he has an interest which is or may be adversely affected.²³⁰

Accordingly, Kentucky law presently satisfies the first alternative method for providing citizen intervention. Kentucky, however, has neither statutes nor regulations prohibiting the DNREP from opposing intervention by any citizen where permissive intervention is authorized by a statute, rule or regulation. While it is the DNREP's position not to oppose any non-frivolous petition to intervene filed by an interested party, the Department has asserted that it has a legal right and duty to oppose any intervention undertaken by a petition deemed frivolous.²³¹ Further, the DNREP has firmly resisted publishing proposed settlements of state enforcement actions and allowing public comment thereon, adhering to the belief that only persons who would be adversely affected by the settlement have constitutional and statutory standing to comment.²³²

²²⁷ 45 Fed. Reg. 33482 (1980) (to be codified in 40 C.F.R. § 123.128(f)(2)).

²²⁸ Conversation with Karen Cummings, *supra* note 226.

²²⁹ KRS § 224.081(2) (1977 & Supp. 1978) provides the opportunity to petition for intervention to any party who has not been previously heard in connection with the issuance or modification of any order issued by the Department.

²³⁰ The standing requirement initially was espoused in *Sierra Club v. Morton*, 405 U.S. 727 (1972). See also *S.O.S., Inc. v. Fiscal Court*, 446 S.W.2d 565 (Ky. 1969); *Lexington Retail Beverage Dealers Ass'n v. Alcoholic Beverage Control Bd.*, 303 S.W.2d 268 (Ky. 1957).

²³¹ General Counsel's Statement for Interim Authorization Phase I, Department for Natural Resources and Environmental Protection, at 37 (July 16, 1980).

²³² *Id.* See *S.O.S., Inc. v. Fiscal Court*, 446 S.W.2d 565 (Ky. 1969); *Lexington Retail Beverage Dealers Ass'n v. Alcoholic Beverage Control Bd.*, 303 S.W.2d 268

Because the express language of the permanent federal regulations clearly does not require states to allow both modes of citizen participation in order to obtain interim authorization approval, the EPA seems hard pressed to exact such a requirement of a state that satisfies one method or the other. Accordingly, the EPA's informal preference for the fullest possible citizen involvement, notwithstanding regulations to the contrary, cannot realistically pose an obstacle to approval of Kentucky's program, which includes a plethora of regulatory requirements surpassing those of other states as well as RCRA itself.

III. STATE AND REGIONAL SOLID WASTE PLANS UNDER SUBCHAPTER IV OF RCRA: KENTUCKY'S RESPONSE

While the disposal of wastes labeled hazardous received the most attention from the 1980 General Assembly, the legislature also implemented the provisions of Subchapter IV of RCRA, which allows federal funding for approved state and regional solid waste plans. Such funding is permitted although such plans are not mandatory under Subchapter IV; nor does the Subchapter undertake federal regulation in the absence of a state plan.²³³

RCRA contemplates that state or regional solid waste plans are to be developed according to guidelines promulgated by the EPA.²³⁴ The requirements for EPA plan approval provide that the principal planning effort undertaken by the states must be one to upgrade existing open dumps, coupled with the prohibition of new open dumps within the state.²³⁵ It should be noted that Subchapter IV expressly prohibits open dumps except those existing pursuant to an approved state plan regulating the upgrading of such dumps according to an

(Ky. 1959); KRS § 224.081 (2) (1977 & Supp. 1978).

²³³ See text accompanying notes 34-37 *supra* for a discussion of the relevant portions of the RCRA.

²³⁴ 42 U.S.C. § 6942 (1977). Such guidelines appear at 44 Fed. Reg. 45066 (1979) (to be codified in 40 C.F.R. Part 256).

²³⁵ 42 U.S.C. § 6943 (1977).

established timetable.²³⁶ Consequently, Kentucky's choice to enact legislative authority for a state solid waste plan was of principal benefit to existing open dump operators.

In seeking to afford DNREP the authority to promulgate a state solid waste plan, the General Assembly deemed that amendments to KRS Chapter 109 were not feasible for a variety of reasons. Primary was the fact that Chapter 109, while requiring cities and counties to promulgate solid waste plans, is unclear regarding the criteria for plan approval or disapproval by the DNREP.²³⁷ Additionally, Chapter 109 vests the primary responsibility for adequate disposal of solid wastes in cities and counties;²³⁸ while this may be a sound approach with respect to non-hazardous solid waste, the feeling was widespread among members of the General Assembly that cities and counties should not be vested with the primary responsibility for disposal of hazardous waste,²³⁹ which RCRA includes within the broad definition of solid waste.²⁴⁰ Thus, while not repealed, KRS Chapter 109 was substantially replaced by the provisions of Senate Bill 333. Anticipating a need to resolve inconsistencies between the existing and new legislation, House Concurrent Resolution 81 requests the Interim Joint Committee on Agriculture and Natural Resources to conduct a review of waste statutes of the Commonwealth during the 1980-81 interim and to submit its recommenda-

²³⁶ *Id.* § 6945(c).

²³⁷ KRS § 109.022(2) (Supp. 1980). Although KRS § 109.022(5) (Supp. 1980) assumes DNREP approval of such plans, the statute contains no criteria for approval or disapproval. *See generally* KRS Chapter 109.

²³⁸ KRS § 109.011(6) (Supp. 1980). The confusion created by KRS Chapter 109 was demonstrated in litigation presently pending before the Kentucky Court of Appeals on the issue of a city's right to veto the siting of a proposed landfill ordered by the county fiscal court. *See City of Elizabethtown v. Hardin County Fiscal Court*, Hardin Cir. Ct. No. 79-CI-385 (1979), *appeal docketed*, No. 79-CA-194B-MR (Ky. Ct. App. Dec. 12, 1979).

²³⁹ Conversation with Roger Blair, *supra* note 131.

²⁴⁰ *See* note 25 *supra* for a discussion of the types of wastes included in the definition of "solid waste." Further vesting of the authority to control hazardous wastes in local governments may have caused the EPA to question whether Kentucky's interim authorization program under Subchapter III of RCRA was *substantially equivalent* to the federal program. *See* text accompanying notes 96-103 *supra* for a discussion of the RCRA requirements for authorization of state programs.

tions to the 1982 General Assembly.²⁴¹

To provide definitions consistent with RCRA while simultaneously providing for local government control over solid waste and state control over hazardous waste, Senate Bill 333 defines "hazardous waste" and "solid waste" without reference to each other. Hazardous waste is defined as discarded material which may contribute significantly to an increase in mortality or serious irreversible or incapacitating illness or which may otherwise pose a potential hazard to human health or to the environment when improperly managed.²⁴² Solid waste, as defined, includes virtually every type of rubbish, refuse or other discarded material in either solid, liquid or gaseous form, except coal mine wastes and discharges permitted under the Federal Water Pollution Control Act.²⁴³

By utilizing RCRA's definition of open dump,²⁴⁴ section 3 of Senate Bill 333 prohibits open dumps except those operated under a DNREP approved timetable for converting such dump into a sanitary landfill within five years.²⁴⁵ Enforcement controls are exerted by prohibiting the disposal of waste through the use of any facility other than one which has received a waste disposal permit issued by the DNREP or the transportation of waste to any facility not possessing a permit.²⁴⁶

Since 1974, Kentucky has prohibited the construction or operation of a solid waste disposal facility in the absence of a DNREP-issued permit,²⁴⁷ thus predating the permit requirements of RCRA and the guidelines promulgated thereunder.²⁴⁸ However, 1980 saw the General Assembly strengthen the requirements necessary to obtain a permit, particularly in

²⁴¹ Ch. 398, 1980 Ky. Acts 1313.

²⁴² Ch. 284, § 1(24)(a), 1980 Ky. Acts 920.

²⁴³ *Id.* § 1(24)(b).

²⁴⁴ See note 37 *supra* for the definition of "open dump."

²⁴⁵ Ch. 284, § 3(2), 1980 Ky. Acts 920.

²⁴⁶ *Id.* § 3(1).

²⁴⁷ KRS § 224.880 (1977).

²⁴⁸ 42 U.S.C. § 6942 (1977). The guidelines issued pursuant to RCRA require an approved state solid waste management plan to include provisions for the issuance of permits to disposal facilities. 44 Fed. Reg. 45082 (1979) (to be codified in 40 C.F.R. § 256.21).

the areas of financial responsibility demonstrations and personnel training requirements.

Section 7 of Senate Bill 333 obligates the DNREP to promulgate regulations requiring operators to (1) attend Department-sponsored training sessions on operation of various types of facilities, (2) demonstrate adequate performance on an examination prescribed by DNREP designed to measure skill and competency for proper operation of waste disposal facilities, and (3) pay fees reasonably related to the cost of training sessions and examinations.²⁴⁹ Satisfactory performance on such examination affords the individual a certificate of competence; no person is allowed to have primary responsibility for the operation of any disposal site without such a certificate.²⁵⁰

Once again surpassing the requirements of RCRA and its guidelines, section 8 of the bill requires a performance bond of at least \$10,000 per site to be filed with the DNREP prior to the issuance of any permit for a disposal site.²⁵¹ The operator may recover the bond upon successful completion of filling and revegetation requirements prescribed by DNREP regulations on reclamation; however, any bond deposited may be forfeited upon the operator's failure to fulfill such requirements.²⁵² Any forfeited bond monies are deposited in the Solid Waste Disposal Site Restoration Fund, the proceeds of which are available to reclaim the site for which the bond was posted as well as for other improperly reclaimed disposal sites.²⁵³

As an added incentive to proper operation, no future permits will be issued to any operator whose inadequate reclamation of a site necessitated bond forfeiture unless the bond

²⁴⁹ Ch. 284, § 7(1), 1980 Ky. Acts 920.

²⁵⁰ *Id.* § 7(2).

²⁵¹ *Id.* § 8(1). While the amount of the bond may be increased or decreased during the operational life of the site, depending upon the amount of acreage affected by disposal operations, in no event may the bond be reduced below \$10,000. *Id.* § 8(2).

²⁵² *Id.* § 8(3). Curiously, this provision does not require a hearing prior to forfeiture. Without such a hearing, the forfeiture of a bond appears constitutionally suspect. See generally *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

²⁵³ Ch. 284, § 8(4), 1980 Ky. Acts 920.

amount and additional monies paid by the operator were sufficient to reclaim such site without cost to the state.²⁵⁴ Further, in the event of a bond forfeiture, the DNREP may perform the necessary reclamation itself²⁵⁵ or may enter into contracts of reclamation with other agencies or persons.²⁵⁶ Moreover, a statutory right of access to the land in need of reclamation is afforded to any person or agency operating pursuant to such contract.²⁵⁷

Interestingly, Senate Bill 333 exempts local governments from all bonding requirements.²⁵⁸ Although local government coffers are preserved by this provision, the DNREP's experience to date reportedly indicates that landfills operated by local governments pose perhaps greater cause for bonding than those operated by the private sector.²⁵⁹

The DNREP is presently in a formative stage in preparing its state solid waste disposal program pursuant to Senate Bill 333.²⁶⁰ Although cities and counties are required to submit regional solid waste plans to the DNREP,²⁶¹ the General Assembly anticipated that such local plans would attempt to mirror the state plan if it is approved. Accordingly, to allow time for EPA approval of the state plan and drafting of local government plans modeled after the state plan, Senate Bill 308 extends the existing January, 1981 deadline for submission of local government plans to July 1, 1982.²⁶² An additional six-month extension is authorized for cities and counties demonstrating a good faith effort to develop a plan.²⁶³

The net effect of Senate Bills 333 and 308 is to encourage a cooperative effort among cities, counties and the state to pursue EPA guidelines which, hopefully, will culminate in

²⁵⁴ *Id.* § 8(5).

²⁵⁵ *Id.* § 8(7).

²⁵⁶ *Id.*

²⁵⁷ *Id.* § 8(9).

²⁵⁸ *Id.* § 8(10).

²⁵⁹ Conversation with Roger Blair, *supra* note 131.

²⁶⁰ Conversation with Karen Cummings, *supra* note 226.

²⁶¹ See text accompanying notes 237-40 *supra* for a discussion of KRS Chapter 109 requirements for solid waste management in Kentucky.

²⁶² Ch. 279, § 1(2), 1980 Ky. Acts 847.

²⁶³ *Id.*

eradicating health hazards posed by existing open dumps. Such efforts should simultaneously create usable land resources and accomplish beautification of the Commonwealth. EPA approval of the forthcoming state plan will provide the much needed federal money to effectuate the noble goals embodied in these bills.

CONCLUSION

Seeking to devise a scheme which would allow the full implementation of RCRA under Kentucky law, the 1980 General Assembly delved into unknown territory regarding hazardous waste, but cautiously followed the federal lead with regard to solid waste. Kentucky's recent discovery of many hazardous waste horrors which RCRA was designed to prevent, coupled with sluggish regulatory efforts at the federal level, necessitated state legislation which would close RCRA's loopholes and provide specific remedies for the Commonwealth's waste disposal problems.

Surpassing the contemplation of RCRA, the enacted legislation provides incentives to reduce hazardous waste generation in Kentucky by imposing fees on that activity. Furthermore, regulation of generators of special wastes is mandated. The transportation of hazardous wastes to off-site disposal facilities now is subjected to rigid scrutiny by Kentucky Department of Transportation officials, whereas only minimal enforcement from federal officials was available in the past. Additionally, exacting financial responsibility demonstrations in excess of those of RCRA provides a more feasible mechanism for ensuring fiscally sound management of HWM facilities in the future than does the RCRA approval. Finally, subjecting knowing violators of the hazardous waste program to punishment as Class D felons is commensurate with the degree of harm worked upon society by haphazard disposal practices and is indicative of the Commonwealth's perception of such violators, notwithstanding the lesser punishment meted out by RCRA.

Whether the far-reaching goals of this legislation are to be realized remains to be seen. EPA approval of Kentucky's legislative and regulatory efforts seems imminent, however,

thus providing the Commonwealth the maximum degree of control over its own hazardous waste problems.

Solid waste disposal problems, while prevalent within the Commonwealth, nevertheless pose less onerous consequences for human health and the environment than do their hazardous waste counterparts. For that reason, along with RCRA's predominantly non-regulatory posture vis-à-vis solid waste, the legislation, rather than a matter of necessity, is viewed properly as a measure designed to take advantage of a desirable option, federal funding. Accordingly, the General Assembly was content to draft skeletal legislation mirroring federal requirements, while leaving the major regulatory effort to DNREP regulations promulgated pursuant to federal guidelines. Seemingly this approach is the safest course of action to ensure EPA approval of the state plan. However, until repealed, the vestiges of KRS Chapter 109 may justifiably create apprehension within the EPA concerning the soundness of Kentucky's statutory base for such a plan. As one measure to ensure approval of Kentucky's plan, pursuant to House Concurrent Resolution 81, the Interim Joint Committee on Agriculture and Natural Resources should recommend forthwith the repeal of KRS Chapter 109 and make its position known to the EPA.

While Kentucky's new solid and hazardous waste legislation represents a gallant effort at "closing the last remaining loophole" in environmental regulation, it was drafted at a time when scientific knowledge concerning waste disposal, not to mention the state of the art, is at best sketchy and inexact. Although this legislation anticipates further federal regulation over the problem area, future sessions of the General Assembly should continue to avoid being stymied by federal approaches where newer technologies and methods can be implemented feasibly in Kentucky.