Defending Liberty
Pursuing Justice

ENVIRONMENT

# Waste Management Committee Newsletter

**Vol. 6, No. 2** **August 2004**

## COMMENTS FROM THE CHAIR

**John Milner**

Welcome to the second newsletter of the Waste Management Committee. Our Committee was created in 2003 to focus on legal issues concerning (1) non-hazardous solid waste and, (2) RCRA and state regulation of hazardous waste. This edition of the Newsletter features articles that concentrate on non-hazardous solid waste legal issues.

David Biderman, general counsel of the National Solid Waste Management Association (NSWMA), takes a reflective look back at the impact in the U.S. Court of Appeals of the U.S. Supreme Court's *Carbone* decision concerning flow control solid waste. Arthur Siegal of Jaffe, Raitte, Heuer & Weiss in Detroit, Michigan, discusses Michigan's recently enacted set of solid waste control statutes, including its "arguably illegal" surcharge on Michigan solid waste generators. Mike McLaughlin of SCS Engineering in Reston, Virginia, addresses recent EPA enforcement trends against municipal solid waste landfills concerning the EPA Subpart WWW landfill gas collection and control system regulations. Newsletter Editor Steve Mossman of Mattson, Ricketts, Davies, Stewart & Calkins in Lincoln, Nebraska, focuses on a recent federal district court decision ruling that an exclusive franchise for solid waste collection violates the Commerce Clause of the U.S. Constitution and its conflict with an 8th Circuit Court of Appeal's decision reaching the opposite conclusion.

The Committee leadership hopes that you will find these articles interesting and beneficial to your practice. We invite you to propose Newsletter article ideas and to author articles for upcoming newsletter additions. Please contact me or any of the Committee vice chairs to get involved in the Committee's activities and to write for the Newsletter. Our contact information is listed under the Waste Management Committee in the Section's Web site, www.abanet.org/environ.

*John Milner is the chair of the ABA Section of Environment, Energy, and Resources' Waste Management Committee. He is a partner in the Jackson, Mississippi, law firm of Brunini, Grantham, Grower & Hewes, PLLC.*

## EDITOR'S NOTE

**Stephen D. Mossman**

The Commerce Clause and waste management. These two concepts are fertile grounds for litigation as evidenced by this edition of the Waste Management Committee Newsletter, which I'll call the "Commerce Clause

**Waste Management Committee Newsletter**
**Vol. 6, No. 2, August 2004**
***Stephen D. Mossman, Editor***

***In this issue:***

Comments from the Chair
*John Milner* ..... 1

Editor's Note
*Stephen D. Mossman* ..... 1

10 Years after *Carbone* – A Split in the Circuits Looms on Flow Control
*David Biderman* ..... 2

The Tech Corner – Landfill Gas and New Source Performance Standards under the Clean Air Act
*Mike McLaughlin* ..... 5

It's Dirty Work: Solid Waste Legislation in Michigan
*Arthur H. Siegal* ..... 10

Editor's Column
*Stephen D. Mossman* ..... 12

Like to Write? ..... 14



This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60610.

Issue." Inside you will find articles by David Biderman, general counsel for the National Solid Wastes Management Association, discussing a looming split in the circuits on flow control, Arthur Siegal discussing the state of Michigan's solid waste law and my column analyzing two challenges to exclusive solid waste franchises. While this area of the law is unsettled and will be for some time, there are other substantive areas of Waste Management law that need a little attention. If you would be interested in writing an article for the next newsletter on a waste management topic of your choice, please contact me at 402/475-8433 or sdm@mattsonricketts.com. Thanks for your interest.

## 10 YEARS AFTER *CARBONE* – A SPLIT IN THE CIRCUITS LOOMS ON FLOW CONTROL

**David Biderman**

While the solid waste industry recently noted the tenth anniversary of the Supreme Court's decision in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), recent developments are undercutting the vitality of that historic flow control decision. A split between two federal appeals courts on the applicability of *Carbone* is likely to develop later this year, and it may be necessary for the Supreme Court to resolve the split and provide guidance to the industry, local governments and others.

Flow control refers to local laws directing or encouraging all waste be disposed at designated, often city or county-owned, disposal facilities. Flow control developed in the late 1970's and 1980's as a means of ensuring a steady steam of garbage – and revenue – so that bond payments associated with new, publicly-funded disposal facilities could be guaranteed. Essentially a financing mechanism, this was particularly important for

facilities requiring large capital investments, such as waste-to-energy incinerators. An EPA study of flow control has concluded that flow control does not help protect human health or the environment, or is necessary to promote recycling. U.S. EPA, *Report to Congress on Flow Control and Municipal Solid Waste* (March 1995).

In 1995, a federal judge wryly commented that the federal court system is "clogged" with garbage cases. *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995). It remains true today. There are numerous "flow control" and "interstate" cases pending in the federal courts. In each of these cases, the basic issue is whether state or local governments are permitted, under the dormant Commerce Clause, to restrict the location at which waste materials are disposed. Although a few states (*e.g.*, Michigan) continue to enact laws that interfere with the interstate transportation of waste materials, the vast majority of these cases involve flow control laws. Since solid waste companies often prefer to dispose the waste they collect at their own facilities, or at the cheapest or most convenient disposal facility, it is perhaps not surprising that flow control lawsuits are being filed with increased frequency.

After the *Carbone* decision, many thought that flow control as a solid waste planning tool was dead. However, a few federal courts created some limited "exceptions" to *Carbone*. *See, e.g.*, *On the Green Apartments LLC v. City of Tacoma*, 241 F.3d 1235 (9th Cir. 2001) (intrastate exception); *Houlton Citizens Coalition v. Town of Houlton*, 175 F.3d 178 (1st Cir. 1999) (non-discriminatory exception); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995) (market participant exception). Then, in 2001, the Second Circuit, which has issued several decisions narrowly construing *Carbone*, issued its controversial decision in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Authority*, 261 F.3d 245 (2d Cir. 2001).

In *United Haulers*, an upstate New York solid waste authority enacted flow control laws, and the district court, after a lengthy delay, issued an injunction declaring the laws to be unconstitutional under the Commerce Clause. In July 2001, the Second Circuit reversed, ruling that the *Carbone* analysis does not apply to flow control situations when the local government owns the designated disposal facility. Drawing on threads of language from various portions of the *Carbone* decision, but relying most heavily on the dissenting opinion, the appeals court concluded that the lenient *Pike v. Bruce Church*, 397 U.S. 137 (1970), balancing test applies when the designated disposal facility is publicly-owned. Under this test, a local law is upheld unless the adverse impact on interstate commerce substantially outweighs the local benefits. Although the appeals court declined to conduct the balancing, perhaps because no discovery has taken place yet, on remand it provided very specific guidance to the district court on how to balance and what the likely outcome should be. A federal magistrate recently issued a recommendation that the authority's flow control laws be upheld, and a federal district judge is currently reviewing the magistrate's recommendation.

Although the *United Haulers* decision is facially inconsistent with several other post-*Carbone* flow control decisions, *see, e.g.*, *Waste Management, Inc. v. Metropolitan Gov't*, 130 F.3d 731 (6th Cir. 1997); *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders*, 48 F.3d 701 (3d Cir. 1995), a number of local governments promptly enacted or resurrected flow control regimes, trying to take advantage of the new "public-private distinction" invented by the Second Circuit. In North Carolina, a county filed a motion to modify a seven-year old consent order, alleging the *United Haulers* decision constituted a "significant change in the law" under Federal Rule of Civil Procedure 60(b). A federal district judge denied the motion, noting that *United Haulers*, a decision from another

Circuit, does not meet that standard. *Waste Management of Carolinas, Inc. v. New Hanover Cty*. (E.D.N.C. Feb. 21, 2003). The court further stated it "is not convinced that there is a brightline rule permitting flow control ordinances favoring publicly-owned facilities," citing four circuit courts cases to the contrary. *Id.* at 4 n. 3.

Several months later, another federal court issued a decision disagreeing with the *United Haulers* analysis. In the summer of 2002, the cities and counties in a Mississippi waste authority passed flow control laws directing all waste generated within the authority's boundaries to the authority's landfill. The laws were passed because the authority was not receiving sufficient waste to meet its financial obligations. The National Solid Wastes Management Association (NSWMA) and two of its members filed a lawsuit. Following a bench trial, in April 2003, a federal district court ruled the flow control laws discriminate against interstate commerce in violation of the dormant Commerce Clause. *NSWMA v. Pine Belt Solid Waste Mgmt. Authority*, 261 F. Supp.2d 644 (S.D. Miss. 2003). Noting that *Carbone* "did not draw a distinction between publicly and privately owned facilities for purposes of its analysis of the Clarkstown flow control ordinance," *id.* at 649, the court declined to follow *United Haulers*. The court stated:

> The authority has drawn a ring around itself. Solid waste collected within that ring must be processed at its preferred transfer stations and landfill. These flow control ordinances prevent everyone except the favored local operator from processing solid waste collected within its boundaries and deprives outside access to the local waste disposal market.

*Id.* at 650.

Critically, the court added that even if it agreed with *United Haulers* that there is a public/private distinction and the *Pike* balancing test should apply, the Pine Belt's flow control laws violate the Commerce Clause. Citing *Carbone*, the court observed the Pine Belt's need to generate revenue is "not a permissible basis for interference with interstate commerce." *Id.* at 651. The court identified a number of alternative steps that the Pine Belt could have taken to ensure its economic viability without resorting to flow control.

The case has been appealed to the Fifth Circuit, and oral argument took place in early May. While one should hesitate to make predictions about the outcome on appeal, it is likely the appeals court will affirm the district court's decision. This would create a split with the Second Circuit's *United Haulers* decision, and could lead to the Supreme Court granting certiorari in a flow control case if a "cert petition" is filed. After issuing six solid waste Commerce Clause decisions in the late 1980's and early 1990's, the Supreme Court has declined to review a number of appeals court decisions involving flow control or interstate issues.

Clarification by the Supreme Court would likely be welcome by both the solid waste industry and local governments. The uncertainty created by the *United Haulers* decision is encouraging some local governments to enact or consider new flow control laws. Several upstate New York counties resurrected their flow control laws in the wake of *United Haulers*. In March 2004, a Kentucky county passed a flow control law. NSWMA has filed a lawsuit in federal court challenging its legality under the Commerce Clause. In June 2004, a New York City Department of Sanitation (DOS) official mentioned at a public hearing that the DOS was considering flow control of commercial waste to new DOS-owned transfer stations that may open in a few years. New York City businesses generate about 10,000 tons per day of waste. If private sector transfer station owners are deprived of that waste, it would have a substantial financial impact.

*David Biderman is the general counsel for the National Solid Wastes Management Association (NSWMA). He can be reached at 202/364-3743 or davidb@envasns.org. NSWMA monitors flow control developments throughout the United States. NSWMA publishes a monthly newsletter, the Legal Bulletin, that keeps members and subscribers up-to-date on flow control, interstate and other legal decisions affecting the solid waste industry.*

## THE TECH CORNER – LANDFILL GAS AND NEW SOURCE PERFORMANCE STANDARDS UNDER THE CLEAN AIR ACT

**Mike McLaughlin**

The U.S. Environmental Protection Agency (EPA) promulgated New Source Performance Standards (NSPS) for municipal solid waste (MSW) landfills on March 12, 1996. The NSPS, found at 40 CFR 60, Subpart WWW, require owners and operators of relatively large landfills to design, install, operate and monitor a landfill gas collection and control system (GCCS) on a specific time schedule, and to file a number of compliance reports with the appropriate regulatory agency.

Recent enforcement initiatives in EPA Region 3 and elsewhere have shown that compliance with the NSPS regulations is challenging for a number of sites. From EPA's perspective, NSPS inspections are "productive," in the sense that inspections have uncovered areas of noncompliance requiring enforcement orders and penalties. This article will summarize the NSPS regulations, and then discuss several areas of concern for landfill owners and operators based on recent enforcement actions, together with strategies for compliance.

As written, the NSPS for landfills is based on control of non-methane organic compounds (NMOCs) present in landfill gas. Methane and carbon dioxide are the predominant components of landfill gas, and NMOCs typically make up only a small fraction (a few hundred parts per million, or ppm) of landfill gas at a typical site. Older landfills that may have received significant amounts of solvents may have higher concentrations of NMOCs.

### Applicability of NSPS

NSPS applies to active and closed landfill sites. In EPA's view, landfills that are affiliated in some way with nearby active or closed landfills may be aggregated for purposes of determining applicability of NSPS. All of the following criteria must be met for NSPS to apply:

1. The facility must be an MSW landfill, in part or in full. The rule does not apply to hazardous waste landfills, sludge landfills, industrial landfills, or construction and demolition debris landfills.

2. The facility must have received MSW waste on or after Nov. 8, 1987. Landfills that had ceased receiving MSW prior to that date are not captured by the NSPS rule.

3. The facility must have a design capacity at or above 2.5 million metric tons (Mg), and 2.5 million cubic meters of MSW. Design capacity is usually based on permits held with state solid waste regulatory agencies. Since a landfill containing 2.5 million Mg almost certainly will have a volume greater than 2.5 million cubic meters, the 2.5 million-Mg value will control NSPS applicability.

4. The facility must be shown to emit more than 50 Mg per year of NMOCs. This determination is made by applying any of several models established by EPA, using either default values or site-specific values. Use of site-specific values will almost certainly yield a lower NMOC emission rate than use of EPA's default values.

**Compliance Schedule**

Compliance with NSPS requires a sequence of activities, beginning with a determination of whether a given landfill meets the four criteria listed above. For large landfills that first received waste on or after May 30, 1991, (the date of the first draft publication of the NSPS rules in the Federal Register), or that increased their capacity to become a large landfill after that date, specific deadlines were included in the rule, as follows:

- 03/12/96 – NSPS rule promulgated.
- 06/10/96 – Design Capacity Report due.
- 06/10/96 – Tier 1 gas model due (if applicable).
- 12/07/96 – Tier 2 report due (if performed).
- 06/10/97 – Tier 3 report due (if performed).
- 06/10/97 – GCCS Design Plan due (if required).
- 12/10/98 – System construction complete (if applicable).
- 03/10/99 – Surface emissions monitoring, first round due (if applicable).
- 06/08/99 – Initial operations report due (if applicable).

For other landfills, the specific deadlines for NSPS compliance reporting are a function of state Emission Guideline (EG) program requirements and formal approvals (of the state programs) by EPA. The following schedule applies:

- 0 days – effective date of EG.
- 90 days from effective date above – Design Capacity Report due.
- 90 days from effective date above – Tier 1 gas model due (if applicable).
- 180 days from Tier 1 above – Tier 2 report due (if performed).
- 1 year from Tier 1 above – Tier 3 report due (if performed).
- 1 year from Tier 1 above - GCCS Design Plan due (if required).
- 18 months from Design Plan above – System construction complete (if applicable).
- 3 months from system construction above – Surface emissions monitoring, first round due (if applicable).
- 180 days from system construction above – Initial operations report due (if applicable).

Note that the EG program for older landfills includes interim deadlines not contained in the program for newer landfills. These deadlines follow submission of the GCCS Design Plan, and require awarding a contract for construction of the GCCS within four months of submitting the plan, and commencing construction no later than six months thereafter.

**Testing for 50 Mg/Year NMOC Threshold: Trail of Tiers**

The astute reader will note there are three tiers of testing and gas models provided in the NSPS rule for the purpose of determining whether the NSPS threshold of 50 Mg per year is triggered. The three different models require an increasing amount of site-specific information as Tier 1 yields to Tier 2 yields to Tier 3 testing. In summary:

- Tier 1 uses a gas production model that results in high NMOC emission rates. Assumes NMOC content of landfill gas is 4,000 ppm.

- Tier 2 uses actual NMOC concentration of landfill gas at the site is measured, and substituted for 4,000 ppm value used in Tier 1. Based on results collected by our firm from almost 200 landfills, NMOC concentrations in modern landfills range between about 50 and 1,000 ppm, with an average concentration of 340 ppm and a median concentration of about 290 ppm. Thus, typical NMOC concentrations are more than an order of magnitude below the 4,000 ppm default assumption used by EPA.

- Tier 3 uses actual NMOC concentrations for the site (based on sampling as in Tier 2), and site-specific gas generation characteristics (based on a pump test).

What this means is that many landfills that "fail" Tier 1 (and thus would be subject to NSPS) would "pass" under Tier 2 or Tier 3 testing (and thus not be subject to NSPS). Landfills that already had GCCS installed at their landfills in the mid-1990s were tempted to forego the small expense of conducting Tier 2 testing, for example, on the theory that since they already had a system installed that they were required to operate under a state permit, so there was no reason to try to escape regulation under NSPS.

However, many landfills that could have but did not perform Tier 2 testing and escape NSPS later realized that the burden of monitoring landfill gas systems and reporting under NSPS is substantial. Some such landfills performed a "late" Tier 2 test, and then approached either EPA or their state to obtain concurrence that NSPS does not apply to their landfill. EPA in some cases has accepted "late" Tier 2 test results (particularly where the testing was not "too late"), and in some cases has rejected them. Similarly, some states have accepted "late" Tier 2 results and incorporated them into a subsequent Title V permit ostensibly not subject to NSPS, and some states have rejected "late" Tier 2 tests.

Where they have been accepted "late," EPA has gone to great pains to say that the landfill will not gain an extension of the ultimate compliance schedule as a result of a "late" Tier 2 test that shows the landfill is over the 50 Mg NMOC threshold, and that other elements of compliance (*e.g.*, GCCS design plan) acts as a space saver for the Tier 2 test.

Some in the industry take the view that it should not matter when a Tier 2 test demonstrates that the landfill does not meet the 50 Mg NMOC threshold, and even a facility that already has installed a GCCS should be allowed as a policy matter to avoid the burden of operating the system pursuant to NSPS requirements if it clearly does not emit 50 Mg/year of NMOCs, no matter when that fact is uncovered.

**GCCS Design Plans**

Under the Design Plan requirements, a gas collection system must cover all areas of a landfill that are 2 years or older if closed to solid waste receipt, or 5 years or older if still active. These ages apply to waste appearing at any depth in a given area. For example, if the active working face rests atop trash that is 5 years old or older at depth, a gas system must be installed in this location, even if the shallower refuse is (obviously) much younger.

The above age criteria are used to delineate the portions of the landfill that must receive initial coverage from LFG collection. In addition, NSPS requires that an existing NSPS-compliant gas system regularly be expanded to accommodate on-going expansion of the landfill, as old cells are closed, or as active areas have refuse somewhere in the vertical column that passes 5 years in age.

There have been a number of points of discussion between EPA and the regulated community regarding the scope of GCCS system design and construction. For example, the GCCS is required to extend over the portion of the landfill site that contains waste. It is not required to extend to appurtenant structures outside the waste footprint (*e.g.*, a leachate collection tank outside the waste boundary that produces its own gas), unless these appurtenant structures convey landfill gas from an area requiring control.

Fundamentally, NSPS requires certain performance criteria to be met by the GCCS, including landfill surface emission monitoring (SEM) and GCCS wellhead monitoring. Any GCCS design that can achieve these performance criteria should be acceptable –

there is no requirement in the rule for specific numbers of extraction wells, blowers, etc.

**System Monitoring and Reporting**

**SEM**. NSPS requires that quarterly SEM be conducted over all portions of landfills that are to be NSPS-compliant (*i.e.*, areas containing wastes that meet the 2-year and 5-year rules discussed earlier), and that emissions from these areas be below 500 ppm methane. Testing is to be conducted with a hand-held gas monitoring device such as an organic vapor analyzer (OVA) or a flame ionization detector (FID). A monitoring technician is to hold this device with its inlet wand at an elevation of 5 to 10 cm above the ground surface. The technician is then to walk over the eligible area, in straight lines arranged in a serpentine fashion to provide complete landfill surface coverage. Lines in the serpentine pattern are to be placed 30 meters (100 feet) apart.

If a crack in the cover, distressed vegetation or other visual indication of a release of landfill gas is observed, the 30-meter serpentine pattern is to be supplemented with SEM measurements at the crack or distressed vegetation. However, SEM should not be required for appurtenant structures located outside the waste footprint.

Any exceedances of the 500 ppm standard are to be carefully marked in the field so they can be remediated. Remediation can involve well field adjustment, cover compaction, adding additional cover thickness or even just wetting the cover. After these actions are taken, all marked exceedances are to be re-tested within 10 days. If some locations fail again, another round of remediation and re-test is allowed 10 days after that. Eventually, compliance with the 500 ppm methane standard is usually achieved, and the remediation and 10-day re-testing is completed. One additional round is then required 30 days after the last exceedance for the remediated area, and if it passes again, then the quarterly round has been successfully completed.

If surface emission testing continues to fail at one or more locations, more drastic remediation is required. A physical upgrade to the LFG collection system must be performed within 120 days.

**Wellhead Monitoring.** Monthly monitoring for oxygen or nitrogen, temperature and pressure is required at each wellhead of the GCCS system. These parameters are useful in determining if a given well is under vacuum (a requirement), and if so whether there is too much vacuum on the well (which can lead to a subsurface fire). Too much oxygen (over 5 percent) or nitrogen (over 20 percent) indicates that air (as opposed to landfill gas) is being drawn into the well. Too much temperature (over 55 degrees Celsius) might indicate there is a subsurface fire near the well.

Under NSPS, if an exceedance of gas composition targets, temperature targets or pressure targets occur at any given well during any given round, the gas system owner/operator is given the opportunity to correct the situation. Alternatively, if it is believed that gas compositions and targets in excess of the value specified above are acceptable, and do not indicate an over-withdrawal of collected landfill gas or support of a subsurface fire, higher values are allowed on an ongoing basis. To achieve the acceptability of such higher values, a specific report must be submitted known as a "Higher Operating Value Demonstration."

**Control System Monitoring**. NSPS requires the control system (*e.g.*, blower and flare) to be monitored essentially on a continuous basis. The best way to accomplish this is the installation of strip chart recorders or electronic data recorders that track blower flow rate and flare combustion temperature.

NSPS specifically allow either utility flares or enclosed flares, calling both Best Demonstrated Technology (BDT). It should be noted that the use of enclosed flares physically allows the collection of post-combustion gas samples.

Such testing is required under NSPS, and local air regulators may add more testing requirements to the federal tests. Utility flares can not be physically sampled for post-combustion gas samples, and testing of such gases is therefore not required by NSPS. For enclosed flares, NSPS requires that the flare be operated at near the temperature used for any demonstration stack test, while there is no corresponding requirement for utility flares. Thus, where they are allowed, utility flares are easier to monitor and simpler to use for NSPS control purposes.

**Start-up, Shut-down and Malfunction (SSM)**. NSPS provides that gas collection systems need not be operated in the event of SSM events, provided that SSM events may not last longer than 5 days for collection systems. In the event of a SSM incident involving a treatment or control device, then the gas collection system must be shut off within one hour, in order to limit the quantity of landfill gas vented to the atmosphere. In either event, the GCCS must be re-started within the five-day period caused by the SSM, or the landfill is out of compliance.

**Compliance Reports**. Periodic compliance reports are required under NSPS, to include certification of compliance together with any exceptions such as SEM exceedances, well head monitoring deviations, or control system monitoring problems and corrective measures taken.

### Compliance Suggestions

Experience has shown that monitoring under NSPS can be difficult under some conditions, and that landfills seldom will "pass" in all locations during a quarterly or monthly monitoring round. A few practical suggestions:

- NSPS allow you to exclude from SEM testing all steep slopes and other "dangerous areas." Take advantage of this provision, and conduct testing where it is safe to do so. Interestingly, the NSPS rules do not explicitly exclude the active working face from SEM. Define the active working face as a dangerous area (it typically is), and exclude it from surface emission testing.

- As written, NSPS say that SEM testing should only be performed in typical weather conditions. Exclude times of heavy rain or unseasonably high winds. Also, a round in January may find your landfill covered with 2 feet of snow and ice. Some states have recognized the folly of surface emission monitoring in winter (when these conditions can be found). Minnesota (for example) has deleted the requirement for a winter round altogether, and requires only 3 annual testing rounds. Fortunately, a snow- and ice-covered landfill is unlikely to exceed the 500 ppm methane. Consider deleting the round at your own initiative if these conditions create "dangerous areas" atop the whole site.

- Most failures recorded at landfills come from leaks around well heads, and from obvious cracks in the surface cover. Visually observe the apparent cause of an exceedance, and plan remediation accordingly. Usually a landfill cover crack can be easily remediated with soil compaction, soil wetting, and/or additional cover soil application. Cracks around well heads can be remediated in a similar fashion, or by applying an apron around the well head and atop adjacent soil.

### Conclusion

NSPS for MSW landfills have been in place for more than eight years. Recent enforcement actions by EPA and state agencies have uncovered a number of compliance problems, as well as areas in which the NSPS are unclear. Owners and operators of active and closed MSW landfills would be wise to review their landfill gas control practices in light of the

lessons learned following early enforcement activities.

*Mike McLaughlin is an attorney and engineer at SCS Engineering in Reston, Virginia. He is a senior vice president for the firm's Environmental Services Practice. He serves as vice chair of the ABA Section of Environment, Energy, and Resources' Waste Management Committee and as its resident "Techie."*

## IT'S DIRTY WORK: SOLID WASTE LEGISLATION IN MICHIGAN

**Arthur H. Siegal**

In response to significant political pressure, in March, 2004, Michigan enacted eleven bills – the "solid waste control package." These bills effectively close Michigan's borders to out-of-state waste.

Despite the high public and political profile of these concerns, studies indicate that there was no basis for concerns. A 2003 report found that, of more than 4,600 garbage loads inspected, only 18 (less than one half of one percent) contained any garbage prohibited from landfilling in Michigan, such as appliances or truck batteries. The vast majority of the offending loads were from Michigan and Indiana – not Canada. However, the percentage of waste landfilled in Michigan originating in Canada has been increasing, particularly after Toronto's landfills closed. This has caused a bi-partisan firestorm of support for efforts to halt the influx of waste.

The acts require that the Michigan Department of Environmental Quality (MDEQ) create an approved list of jurisdictions from which waste can come into Michigan if those jurisdictions bar the disposal of the same wastes as Michigan. Landfill owners are barred from accepting solid waste generated outside of Michigan unless the jurisdiction is on the MDEQ's approved list, the waste was processed through a disposal facility which documents the removal of prohibited items or the waste is composed of uniform material and meets Michigan's disposal requirements.

The acts prohibit landfill disposal of beverage containers, whole tires, yard clippings, used oil, lead acid batteries, low-level radioactive waste, hazardous or liquid waste, sewage, PCBs and asbestos waste (in certain circumstances), in addition to medical waste, which was previously banned.

The remainder of the legislation provides definitions, authorizes the MDEQ to halt waste disposal that poses a threat, imposes a 2-year moratorium on new landfill construction permits, strengthened landfill reporting on sources of waste received, increased fines for violations and enhanced landfill inspections.

This package has been challenged by the National Solid Waste Management Association which filed a lawsuit in the Eastern District of Michigan on April 5, 2004, Case No. 04-71271, arguing that, taken together, *inter alia,* they violate the dormant Commerce Clause, the foreign Commerce Clause, and the foreign affairs power. NSWMA argues that the new laws are discriminatory and that the purpose behind the new laws and their effect violates NSWMA's constitutional rights.

The Commerce Clause of the U.S. Constitution empowers Congress to "regulate commerce with foreign nations, and among the several states." Courts have held the Clause implicitly restrains states from discriminating against, or imposing substantial burdens upon, interstate or foreign commerce. This limitation on a state's power to burden interstate commerce is known as the negative or "dormant" Commerce Clause. It is well-settled that solid waste and solid waste disposal services are protected commerce. *Fort Gratiot Sanitary Landfill, Inc v.*

*Mich Dept of Natural Res*, 504 US 353, 359 (1992).

In 2003, Wayne County, Michigan, adopted an ordinance making it illegal for a landfill to accept solid waste from any place or generator that is not regulated by a beverage container deposit law comparable to Michigan's law. The district judge in *The National Solid Waste Mgmnt Ass'n v. Wayne Cty*, Case No. 03-60188 (Feb. 3, 2004) held the ordinance to be discriminatory in effect and intent and unconstitutional. The prior lawsuit reflects how federal courts have interpreted solid waste legislation, and may predict the result in the current suit.

A statute can violate the Commerce Clause by discriminating against out-of-state interests in three different ways: a) facially, b) purposefully, or c) in practical effect. *Eastern Kentucky Resources v. Fiscal Court of Magoffin County Kentucky*, 127 F3d 532, 540 (CA 6 1997). In determining whether legislation is discriminatory in purpose, a court can refer to the words of the legislators in enacting the provision. Many allegations in the recent suit reference statements by senators, the House Democratic leader and the governor.

When legislation is not facially discriminatory, the test imposed by the courts is whether the legislation "imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits." Courts will look at the impact the legislation would have on interstate commerce if all States passed similar legislation. *U & I Sanitation v. City of Columbus*, 205 F3d 1063, 1069 (CA 8 2000). In the *Wayne County* case, the court rejected arguments of neutrality and held that applying a standard that appeared neutral but which Michigan generators could meet without any effort merely by virtue of being in Michigan was facially discriminatory and could not be justified on police power grounds.

In addition to the Commerce Clause, federal treaties and agreements entered into by the U.S. prevent states from passing legislation impacting the free flow of solid waste from Canada. Under the General Agreement on Tariffs and Trade (GATT) Canada and Mexico are afforded "Most-Favored Nation" status. Part 1, Article 1 of GATT, provides that countries with "Most-Favored Nation" status must be treated similarly. Solid waste legislation that impacts only Canada would arguably violate GATT as it would treat Canada and Mexico differently.

The North American Free Trade Agreement (NAFTA) contains provisions barring regulations affecting the free flow of goods from Canada. Chapter One, Article 102 of NAFTA states that one of NAFTA's objectives is to "eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties." The solid waste legislation will hinder rather than facilitate the cross-border movement of goods and services between Canada and the United States.

Finally, the 1986 Canada -U.S. Transboundary Agreement states that "the close trading relationship and the long common border between the United States and Canada engender opportunities for a generator of hazardous waste [and municipal solid waste] to benefit from using the nearest appropriate disposal facility, which may involve the transboundary shipment of hazardous [and municipal solid] waste." The agreement requires the signatories to permit the export, import, and transit of hazardous and solid waste across their common border for legal treatment, storage, or disposal. Arguments have been made by Michigan legislators that the EPA and Canada have failed to adhere to the strict terms of the agreement which includes a requirement that the government of the exporting country provide a detailed notice to the government of the importing country not only of the fact of exportation of waste but also details such as the exporter's name, address and telephone number. Where this demand might backfire is

that far much more information is required regarding shipments of hazardous waste and Michigan is a net exporter to Canada of hazardous waste.

In addition to the already passed legislation, Michigan has proposed a $3.00-per-ton surcharge to be assessed against virtually all generators of solid waste who dispose of their solid waste in Michigan, regardless of whether the generators are businesses or residents. This was proposed, in part, to control out-of-state and Canadian solid waste by making Michigan disposal less competitive as it directly charges the generator instead of the landfill operator. It was also proposed in part by Michigan grocers and bottlers to head off a proposed expansion of Michigan's somewhat infamous bottle bill.

This "surcharge" is arguably an illegal unstated tax under Michigan law. *Bolt v. Lansing*, 459 Mich. 152 (1998) set a three-part test:

- A fee serves a regulatory purpose rather than a revenue-raising purpose;
- Fees collected must be proportionate to the necessary cost of the service; and
- A fee must be voluntary.

The proposed $3.00 surcharge does not satisfy this test. In *Bolt*, the court stated that for the charge to be a fee instead of a tax, it must reflect a corresponding benefit to the person paying the charge "which benefit is not generally shared by other members of society." *Bolt,* 459 Mich. at 165. The "distinction between a fee and a tax is one that is not always observed with nicety in judicial decisions, but according to some authorities, any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax." *Id*. at 165-166.

The proposed surcharge is a tax rather than a fee. Its primary purpose is to raise revenue to fund recycling and litter prevention. There is no real regulatory purpose behind the surcharge. In fact, Michigan already charges its landfills a surcharge to fund governmental permitting and regulation of those landfills – an example of a true fee. Other courts have also held that similar surcharges are a tax rather than a fee. *American Landfill, Inc. v. Stark*, 166 F.3d 835 (CA 6, 1999); *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130,136 (4th Cir. 2000).

*Arthur Siegal is a partner and one of the chairs of the environmental law group of Jaffe, Raitt, Heuer, & Weiss, P.C., based in Detroit, Michigan.*

## EDITOR'S COLUMN

**Stephen D. Mossman**

Does a municipality granting an exclusive franchise for solid waste collection violate the dormant Commerce Clause? The answer to this question may depend on what court is hearing the case. Recently, a federal district court in Florida found that a franchise did violate the dormant Commerce Clause, at least as it pertained to construction and demolition waste (C & D). At about the same time, the 8th Circuit Court of Appeals summarily affirmed a federal district court decision from Nebraska reaching the opposite conclusion. Are franchises the next battleground in the flow control battle? An analysis of these two very different unreported decisions may provide the answer.

In *Southern Waste Systems, LLC v. City of Delray Beach, Fl.,* U.S. District Court, Southern District of Florida, West Palm Beach, Opinion Filed April 29, 2004, United States District Judge Kenneth L. Ryskamp granted partial summary judgment finding a Commerce Clause violation. The case was brought by Southern

Waste which was in the business of hauling C & D in the City of Delray Beach. The City awarded by ordinance an exclusive franchise for the collection of solid waste, vegetative waste and recycling collection services to BFI Waste Systems of North America which was later sold to Waste Management, Inc. The City later adopted an ordinance that required all residential, commercial and industrial entities that generate waste to employ Waste Management. Under the scheme, the City bills residential customers directly but Waste Management bills commercial and industrial entities. When one of Southern Waste's customers was cited and the City refused to allow Southern Waste to keep its containers at the site of one of its other customers, Southern Waste filed a suit for declaratory and injunctive relief under the dormant Commerce Clause.

In the summary judgment order, the court first dismissed the City's claim that it was acting as a market participant finding that, "Because no private entity could engage in such activity, the City is acting as a market regulator." The court then examined whether the bidding process was open and freely accessible. The court rejected the analysis conducted by the 1st Circuit in *Houlton Citizen's Coalition v. Town of Houlton*, 175 F.3d 181 (1st Cir. 1999), finding that it must consider whether the town has truly taken over the market. The court found that the market remained in place but described the scheme as a forced business transaction which the court held was discriminatory. The court found that the agreement and ordinance are no less discriminatory even though the prohibited group includes both in state and out of state haulers. The court found the ordinance per se invalid requiring the City to show that it had no less restrictive alternatives to its interest in taking over the waste collection market. The court found that the City's mere allegations did not demonstrate that the scheme was the least restrictive means of taking over the waste collection market. The court concluded that the franchise agreement and ordinance were in violation of the Commerce Clause as they pertained to the collection of C & D and enjoined the City from enforcing the C & D portions of the franchise and ordinance.

In *Barker Sanitation v. City of Nebraska City, Nebraska*, 2004 U.S. App. LEXIS 12836 (8th Cir. 2004) the 8th Circuit arrived at a much different conclusion. In that case, the City of Nebraska City following an open public bidding process, entered into an exclusive franchise agreement with a hauler and also adopted an ordinance. In addition, the City leased its transfer station to the hauler for a term concurrent with the franchise agreement. Barker Sanitation, which did not exist at the time of the bidding process, attempted to haul residential and commercial waste in the City. After being warned that its activities violated the ordinance, Barker Sanitation brought suit in the U.S. District Court for the District of Nebraska alleging that the city's activities violated the Commerce Clause and caused a taking of Barker Sanitation's property rights. The hauler that had been awarded the franchise intervened. The district court granted Nebraska City and the hauler partial summary judgment finding that Barker Sanitation could not pursue its taking claims and that Barker Sanitation lacked standing to argue that the bidding process was not fair and open. The matter was tried to the bench. Following trial, the district court issued a Memorandum and Order which dismissed the remaining Commerce Clause challenge.

The district court rejected Barker Sanitation's arguments that the ordinance and franchise agreement violated the Commerce Clause on its face, through its effects or because it was adopted for a discriminatory purpose. The court then analyzed the scheme under the well known *Pike v. Bruce Church*, *Inc.*, 397 U.S.137 (1970) benefits v. burdens test. With respect to the burden on interstate commerce, the court held, "It is difficult to detect what burden on interstate commerce is imposed by the Ordinance in this case when the Ordinance does not prohibit [the

hauler] from taking Nebraska City waste to any in-state or out-of-state transfer facility or landfill (so long as it is a licensed subtitle D landfill disposal facility) and when the Ordinance in no way restricts out-of-state waste from being brought to, and processed in, the Nebraska City Transfer Station." The court outlined numerous local benefits concluding that the local benefits outweighed any "incidental burden the Ordinance and associated agreements impose upon interstate commerce".

On appeal to the 8th Circuit, Barker Sanitation continued to advance its arguments that the ordinance was adopted for the purpose of economic protectionism and through its effect of preventing out-of-state companies from being able to compete for the processing of solid waste in Nebraska City. I represented the hauler awarded the franchise as an intervenor in the case during all stages of the proceedings. At oral argument, the three judge panel posed only one question to counsel for Nebraska City. In a fashion unique to my oral argument experience, I was asked no questions. Not surprisingly, the panel rejected Barker Sanitation's contentions in an unpublished opinion released eight days after oral argument. The 8th Circuit held, "Because we have nothing to add to the district court's analysis, we affirm without extended discussion."

Can the summary judgment issued by the district court in Florida and the cursory dismissal by the 8th Circuit be reconciled? Not on their face, but the answer may be that municipalities awarding exclusive franchises should consider two things. First, the municipality needs to make a record during the bidding process and any court challenge concerning the non-discriminatory local benefits which require that a franchise agreement be awarded. Nebraska City convinced the district court and the 8th Circuit that its local benefits were much stronger on balance than any effect on interstate commerce. Second, the municipality may want to consider truly taking over the entire solid waste market and retaining the billing function. This distinction may have made the difference in the *City of DelRay Beach* case.

Given the recent interest in parties challenging exclusive solid waste franchises, it appears that the days when Commerce Clause challenges to solid waste schemes are determined under a settled body of law are not coming any time soon.

*Stephen D. Mossman is a vice chair of the ABA Section of Environment, Energy, and Resources' Waste Management Committee and the editor of its Newsletter. He is a partner in the Lincoln, Nebraska, firm of Mattson, Ricketts, Davies, Stewart and Calkins.*


## LIKE TO WRITE?

The Waste Management Committee welcome the participation of members who are interested in preparing this Newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact the editor Stephen D. Mossman at sdm@mattsonricketts.com or 402/475-8433.

Back issues of this Newsletter can be viewed at *http://www.abanet.org/environ/committees/solidwaste/newsletter/archives/home.html.*