by William L. Kovacs

William L. Kovacs is partner in the Washington, D.C. and Portland, Oregon offices of Dunn, Carney, Allen, Higgins & Tongue. He was the chief counsel for the House of Representatives Subcommittee on Transportation and Commerce during the development and enactment of the Resource Conservation and Recovery Act in 1976. This article is an edited version of the paper given at the Association of State and Territorial Solid Waste Management Officials 1990 National Solid Waste Forum.

Cooperative efforts among states will achieve better results than will restrictive measures, bans, disposal prohibitions, or federal assistance.

Solid waste and packaging: the second great war between the states?

Pick up any newspaper in any place in the United States and you will find an article on solid waste. Some group is opposing a landfill or waste-to-energy facility. Some legislator is proposing, or some governor is signing, legislation to ban polystyrene, nonbiodegradable products, or the interstate transportation of wastes from other states.

For the last several years, over 2,000 bills per year concerning solid waste have been introduced by state legislators. This is more proposed legislation than on any other subject including education, crime or banking.

Restrictive solid waste measures, packaging and product bans, prohibitions on the siting of disposal facilities are even being enacted at the local level. For example, Berkeley, California and Portland, Oregon have banned polystyrene packaging.

Such product and packaging bans, although praised as necessary environmental protection, are simply token efforts to save landfill capacity, which has been reduced by 75 percent in the last two decades. Of the remaining landfills, one-third will close in the next five years, and by the year 2000 this nation is expected to be 56 million tons short of disposal capacity.

Restrictions on waste

Currently, more than 20 states have enacted some type of a barrier to the interstate movement of waste. The barriers have taken the form of taxes on out-of-state wastes, police searches for waste containing recyclables, and the imposition of impossible technical and financial requirements on facilities receiving out-of-state wastes.

These barriers are a direct attempt to stop the daily movement of more than 28,000 tons of garbage per day on the U.S. highways and the annual interstate movement of nearly three-quarters of a billion pounds of hazardous wastes.

Ironically, the states that are the leading importers of waste (Illinois, Indiana, Kentucky, Michigan, New Jersey, Ohio and Pennsylvania) are also the states that export the most wastes.

Even the federal courts are now finding reasons to circumvent the landmark Supreme Court decision in State of New Jersey v. City of Philadelphia, which holds that garbage is an article of commerce and the respective states cannot unreasonably interfere with the movement of waste across state lines.

The most significant decisions permitting states to close their borders to out-of-state garbage are based on (1) the market participation exemption from the commerce clause of the U.S. Constitution; (2) the interpretation that the capacity assurance requirements of CERCLA (Comprehensive Environmental Response, Compensation and Liability Act of 1980, more commonly known as Superfund legislation) permit a state to close its borders to states that have not planned for adequate hazardous waste treatment and disposal capacity; and (3) Minnesota v. Cloverleaf Creamery.

The market participation exemption to the commerce clause of the U.S. Constitution permits any state that participates in the market for a particular article of commerce to compete in that market like any other private participant, including the right to deal with or exclude out-of-state competitors or to favor in-state operators over out-of-state operators. What the federal courts, including decisions by the U.S. Supreme Court, fail to discuss is that the states are exempt from the federal anti-trust laws. Therefore, when a state acts as a market participant, it is exempt from all restraints in its commercial endeavors.

In Lefrancois v. State of Rhode Island, the court held that as long as the State of Rhode Island participated in the landfill market (as a participant, not
as a regulator), it was free to reject waste from any source, including out-of-state waste, and the commerce clause of the U.S. Constitution did not apply. Similar decisions are found in the District of Columbia, Maryland and Oregon.

- An Alabama decision, *NSWMA v. Alabama Department of Environmental Management*, holds that a state that has met its capacity requirements under CERCLA can ban the waste from other states not meeting their capacity requirements without violating the commerce clause.

- The often-cited *Minnesota v. Cloverleaf Creamery* case stands for the proposition that a state can ban any product for which there is an alternative. In that case, the U.S. Supreme Court upheld a law prohibiting the retail sale of milk in plastic, nonreturnable, nonrefillable containers, but permitted the sale of milk in other nonreturnable, nonrefillable containers. The court found that the law did not favor local products over products from other states and that it was only an incidental burden on commerce.

**Federal involvement is not needed**

The result of these court decisions and the significant number of state laws banning out-of-state wastes or certain products from entering their territory is that the federal government through its decades of indecision (Does it regulate solid waste, or not?), inconsistent policy (Does it subsidize the burning of waste paper at $60 per ton, or mandate collection for materials use?) and failure to impose the real cost of waste disposal on the generator, has lost the ability, perhaps permanently, to regulate the management of solid waste and those avenues of interstate commerce that affect solid waste-packaging and the movement of waste between the states.

Sen. Baucus (D-MT) recently stated that "Congress will not stop states’ rights to protect citizens from environmental degradation." However, the federal government needs to take a strong role in solid waste management, therefore, to that end states "... need federally approved plans".

You may think that I am about to lament the loss of a national solid waste strategy. Nothing could be further from the truth. Every time you want the federal government to help you out by making the difficult decision, just remember that it takes the U.S. Environmental Protection Agency three to six years to promulgate a regulation. It takes another two to four years for the courts to decide on a regulation’s validity. And these time frames are conservative.

How can federal legislation improve state and local solid waste plans without providing any new funds? Certainly no one believes Congress has several hundred million dollars in the budget for solid waste planning!

While the states were staffing up to deal with municipal solid waste in the mid-80s EPA reduced its solid waste staff to zero. Why should anyone believe EPA’s new hires have greater wisdom on the right way to manage municipal solid waste than the states, which have been dealing daily with this difficult issue for the last several years?

The next time a state begins to believe it needs the federal government as a partner in order to help manage its municipal solid waste, just remember the federal government is a very inconsistent partner (see sidebar).

Our solid waste problem is a reflection...
of a larger problem in which the people mistrust the politicians and the politicians fear the people. Therefore, it is difficult to find leadership on the issue. Are we stuck with the inevitable loss of all disposal capacity? Are we destined to be short 56 million tons of disposal capacity by the year 2000? If we are so destined, then it may be either the end of industrial society as we know it, or it will be the end of environmental protection as we know it. This either/or situation will occur be-

**Down memory lane: the federal record in recycling**

- RCRA required the Department of Commerce to develop guidelines for industry in substituting recyclable materials for virgin materials in its industrial processes. This program was never funded.
- The Department of Commerce was to undertake market development studies. One study on newsprint in the Southeast was funded. The program was discontinued.
- A waste management information network was established in 1976 to assist local and state governments. Described by Congress as “a very efficient system to disseminate expertise and everyone involved supports such a concept,” by 1978, this program was repealed.
- It took EPA 13 years and a court order before it fulfilled the RCRA re-

requirement to issue guidelines for the federal purchase of products made from recycled materials.
- NECPA, the National Energy Conservation Policy Act, required all basic United States industries to establish targets for increasing the use of recyclable materials in lieu of virgin materials to obtain the maximum feasible increase in using energy-saving recovered materials by January 1, 1987. NECPA was effectively dead by 1980 and was repealed in 1986. Although the purpose of NECPA was energy conservation and not solid waste, you cannot help but wonder what such a policy would have done to increase the markets for recyclables between 1978 and 1990!
- Did you know that one of the goals of the Department of Energy is to promote recycling?
- Did you know what Congress thought of solid waste and recycling weeks and years before the barge incident gave them a guaranteed thirty second television spot? Nothing. In fiscal years 1986 and 1987 Congress appropriated $0 for state solid waste management. With this unenviable record, are you really sure you want the federal government as a partner, as a reviewer and approver or disapprover of your solid waste management plans and marketing efforts, or as a source of financial support?
cause industry cannot produce goods and consumers cannot purchase goods without disposal capacity. Conversely, if we do not have sufficient disposal capacity and we choose to maintain our high levels of consumption, environmental protections will be loosened or eliminated so they do not interfere with our consuming habits.

What are we to do?
How can we manage our solid waste in a manner that protects the environment while permitting our industry to continue and to compete effectively in a world economy? I have several suggestions:

- Look not to the federal government, dear states, but to yourselves. There will simply be no money or assistance coming out of the federal government in the near future.
- Remember, the waste being shipped to you by your neighbor might be from a product that an industry in your state sold to the neighboring state. Your neighbor’s next step might be to ban your state’s product because it does not have sufficient disposal capacity.
- Do not view your neighboring state as a competitor in the solid waste problem. For example, when markets for recyclables are not available, do not fall prey to the simple solution of paying higher avoided costs in order to entice someone to take your recyclables. This only substitutes one state’s recyclables for another and does not create new markets. All states must work together to expand markets for recyclable materials removed from the waste stream.
- The number one export out of the Port of New York is scrap steel; the number two export is waste paper. These commodities are being used by the mills of the world because they are a cheap source of industrial raw materials and their use saves significant amounts of energy. Using recyclable materials ensures a competitive price advantage for the user.
- The states have a tremendous opportunity to turn their solid waste problem into a long-term benefit. For example, states can use recycling as the basis for a new industrial policy. There is no law of nature that demands that U.S. industries use virgin resources and provide favorable tax advantages to the users. Those states that are legislatively the most oriented to economic growth will be the beneficiaries. Already the Northeast and West Coast states will get new recycled newsprint mills as a result of creative market development legislation.
- To this end, the states need to organize into economic regions to develop markets for their recyclables and to encourage industry to use available recyclable materials as its raw material supply. This process has already started in the Northeast and the West. Such regional development permits states to develop uniform recycled products procurement standards; provide a larger market for recycled products; attract more industry into the region because of the expanded market and greatly enhanced financial power of the participating states; and share the benefits and burdens of siting new industries. It should be noted that in May 1990 the U.S. Senate tabled a bill that would have allowed states to form interstate compacts with each other to assure adequate solid waste disposal for multi-state regions.
The states need to meet with existing local industry to determine what can be done about source reduction and recycling.

States and local governments must understand industry’s quality requirements before embarking on mandated collection programs. The right quality of materials in sufficient quantities can always find a home. Unfortunately, poorly segregated waste becomes an orphan at the taxpayers’ expense.

If a state competes in the market as a participant and subsidizes its services with taxpayer monies to compete with the private sector (e.g., processing of recyclables), it may not have certain private sector operations in its state. You may not like the private sector, but try solving the solid waste problem without it.

It may be easy to ban a product, such as polystyrene food containers; it may even be politically smart to do so. Remember, however, that its replacement, coated paper, may be heavier and not recyclable. If this is the case, you have just compounded your problem.

Never close your border to another state - open borders keep the commercial union together. The movement of commerce between states is not the cause of the problem. Rather, the solid waste problem is caused by the lack of courage to create more disposal capacity, the failure of industry to use more recyclables as its raw material supply, the failure to make the public pay the real cost of waste disposal, and, of course, our NIMBYs and NIMTOs (Not In My Back Yard and Not In My Term Of Office).

Simple bans can be two-edged swords

The federal government in its proposed solid waste legislation is prepared to let states erect barriers to the interstate movement of waste. Most states appear ready to buy into this simple solution. Yet in truth, if you first ban waste, you will next ban products.

In charting your course, remember the ancient story about the young boy, who tried to trick a wise old man. The boy asked him: “Oh wise one, I have a bird between my hands, is it dead or alive?” The old man answered, “It is your decision, young man, because in your hands you have the power to crush it or let it go free.”

So too, with this nation’s commerce, which is both its products and the discards of the products. The states have the power to crush commerce by banning products and materials and by restricting their movement, or they have the ability to free commerce by siting new disposal capacity, creating new markets for recycled products and by helping to make local industry more competitive nationally and internationally by establishing a new industrial policy based on recycling.

The choice is in our hands. If we are creative, cooperative and courageous, we will manage the solid waste problem, conserve energy and materials, and become more competitive internationally. Further, all of this will improve state and regional economic development. There are tremendous benefits to be derived from what looks like a bad situation. Let us shoot for the stars. Just remember, however, we can never hit the stars if we shoot at each other.