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Steven G. Slater

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THE BREAKDOWN IN MICHIGAN'S SOLID WASTE REGULATION

I. INTRODUCTION

Within the last fifteen years, our society has realized that the environment can no longer be a convenient receptacle of society's waste.¹ An increased awareness of the environmental problems that can develop from substandard disposal practices has arisen because society's methods of production and subsequent disposal of waste products, which were once thought to be satisfactory, have now created many problems. The unwarranted injection of pollutants into the air, water and land has led to an abundance of legislation regulating such waste.²

The recent emphasis of environmental legislation has been the regulation of toxic or hazardous waste by federal and state environmental agencies.³ However, the disposal of highly toxic waste is not the only serious waste disposal problem facing the nation.⁴ The most pressing problem of

1. Note, *Garbage, The Police Power, and the Commerce Clause: City of Philadelphia v. New Jersey*, 8 CAP. U. L. REV. 613 (1979) (discussing the right of states to exclude out-of-state waste from entering another state as it relates to the commerce clause and waste disposal in general).

2. Clean Water Act of 1977, 33 U.S.C. §§ 1251-1376 (1982) (declared the policy of Congress to encourage the conservation of water and related land resources on a coordinate basis with federal, state, local and private cooperation); Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-87 (1982 & Supp. II 1984) (adopted to encourage the development of comprehensive solid waste disposal plans by providing technical and financial assistance to the states); Clean Air Act, 42 U.S.C. §§ 7401-7626 (1982) (meant to accelerate research, provide technical and financial assistance to the states, and assist development of regional air pollution control programs).

3. The Solid Waste Disposal Act, 42 U.S.C. § 6903(5) (1982), has defined "hazardous waste" as:

[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 of the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

4. S. REP. NO. 172, 96th Cong., 2nd Sess., *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5019 (saying that although hazardous waste is a serious problem, the increase in population and the lack of appropriate disposal sites are also serious problems).

This note does not address problems relating to the disposal of such solid wastes as toxic metals, chemicals, flammables, explosives or radioactive materials. These wastes are commonly referred to as hazardous wastes and pose special problems beyond those found in the disposal

waste disposal⁵ is the disposal of millions of tons of nontoxic, or ordinary garbage produced in our homes, industrial complexes, and institutions.⁶ Proper disposal of solid waste⁷ may prove to be the key to effective environmental pollution control.⁸ However, without enforceable regulations that mandate proper disposal, the full scope of needed regulation will not be

of solid waste. For information relating to the extraordinary problem of disposing of hazardous waste, see generally, Canter, *Safe Hazardous Waste Disposal: Sure, But Where?*, 55 FLA. B.J. 813 (1981); Danner, *Federal Regulation of Nonnuclear Hazardous Wastes: A Research Bibliography*, 46 LAW & CONTEMP. PROBS. 285 (1983); Eckhardt, *The Unfinished Business of Hazardous Waste Control*, 33 BAYLOR L. REV. 253 (1981); Ryan, "Cradle to Grave": *Comprehensive Regulation of Hazardous Waste*, 7 VA. B.A.J. 11 (1981).

5. The Solid Waste Disposal Act, 42 U.S.C. § 6903(3) (1982) defines "disposal" as :

[T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

6. I A F. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4.01, at 4-6 (1985) (covering the regulation of air and water pollution, solid waste, and noise pollution, and also covering radiation pollution, pesticide, and fertilizer pollution as well as stressing conservation rather than pollution "control").

7. "Solid Waste" is defined by The Solid Waste Disposal Act, 42 U.S.C. § 6903 (27) (1982) as:

[A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended. . . .

Michigan's definition of solid waste is somewhat modified in that it defines "solid waste" as:

[G]arbage, rubbish, ashes, incinerator ash, incinerator residue, street cleanings, municipal and industrial sludges, solid commercial and solid industrial waste, and animal waste, but does not include human body waste, liquid or other waste regulated by statute, ferrous or nonferrous scrap directed to a scrap metal processor or to a reuser of ferrous or nonferrous products, and slag or slag products directed to a slag processor or to a reuser of slag or slag products.

MICH. COMP. LAWS ANN. § 299.407 (West 1984).

8. F. GRAD, *supra* note 6, at 4-3.

Not only have environmental authorities recognized the importance of proper solid waste disposal, but Congress has also recognized its importance. The Interstate and Foreign Commerce Committee stated that the approach taken by Congress in enacting The Resource Conservation and Recovery Act eliminated the last remaining loophole in environmental law: that of unregulated land disposal of discarded materials and hazardous wastes. Further, the Committee believed that this legislation was necessary if other environmental laws were to be both cost and environmentally effective. The Committee also found that the federal government is 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. The existing methods of land disposal often result in air pollution, subsurface leachate, and surface run-off, which affect air and water quality. See generally H.R. REP. NO. 1491-Part I, 94th Cong., 2d Sess., *reprinted* in 1976 U.S. CODE CONG. & AD. NEWS 6238, 6241.

accomplished. Therefore, state and federal environmental agencies should now regulate the disposal of solid waste in a strong, comprehensive, and effective manner.⁹

This note will discuss the problems surrounding the disposal of solid waste and the importance of that disposal for complete environmental control.¹⁰ Additionally, this note will examine the existing framework of regulations that now govern the disposal of solid waste.¹¹ More specifically, this note will discuss Michigan's attempt to regulate solid waste through the enactment of the Solid Waste Management Act, also known as Act 641 of 1978.¹²

Michigan enacted Act 641 amid a growing awareness of contamination to the state's ground water by leachate from faulty landfills.¹³ In opposition to the realization that Michigan's waste disposal practices had to be upgraded, was the citizen's concern over the tax increases necessary to cover the cost of improvements. This basic conflict sets the stage for the focus of this note. As to Act 641, probably the greatest barrier to full implementation of the Act are two recent court decisions.¹⁴ These two decisions state that because of Michigan's tax and expenditure limitation amendment (Headlee Amendment),¹⁵ the State Department of Natural Resources can-

9. See *supra* note 4. The proper disposal of solid waste is a narrow aspect of complete and effective environmental regulation. However, the complexity of the issues as well as the nature of this note demand a narrower focus. Consequently, the scope of this note is limited to the problems surrounding the disposal of only solid waste and the importance of that disposal for complete environmental control.

10. See *infra* notes 18-43 and accompanying text.

11. See *infra* notes 44-102 and accompanying text.

12. MICH. COMP. LAWS ANN. §§ 299.401-.437 (West 1984 & Supp. 1986). Act 641 provides for the regulation and management of solid waste, sets out the powers and duties of certain officials, provides penalties for infractions, and requires promulgation of rules to carry out the Act.

13. Improper disposal of solid waste materials can result in chemical and biological pollution of ground and surface water from the movement of water through the waste. As the water percolates through the waste it is contaminated by the chemical content of the waste as well as by the byproducts of biological decomposition. Such contaminated water is called leachate. Occasionally, landfill materials are of such a nature that biological decomposition produces a quantity of moisture greater than that which may be absorbed by the solid waste material. This excess moisture, in addition to the surface water that has percolated through the waste, may result in contamination of ground water. See P. CHEREMISINOFF & K. GIGLIELLO, *LEACHATE FROM HAZARDOUS WASTE SITES* (1985).

14. *South Haven Township v. Dept. of Natural Resources*, 132 Mich. App. 222, 346 N.W.2d 923 (1984) (holding that a landfill which did not meet the requirements of Act 641 could still stay open despite its continued pollution); *Delta County v. Mich. Dept. of Nat. Resources*, 118 Mich. App. 458, 325 N.W.2d 455 (1982) (holding that the state could not deny a license to the public landfill in Delta County despite its refusal to comply with Act 641).

15. MICH. CONST. art. IX, §§ 25-34. See *infra*, note 103 for complete text of the Headlee Amendment.

not require local units of government to comply with the new requirements imposed by Act 641 unless it reimburses them for the costs they otherwise would have to bear. The requirements of Act 641 are a major improvement in the effectiveness of solid waste regulation in Michigan. However, because of these two recent decisions, the requirements of Act 641 were held not to apply to publicly owned landfills.

The gap in enforcement created by Michigan's Headlee Amendment is significant. In Michigan, there are only 71 privately owned landfills as opposed to approximately 100 publicly owned landfills.¹⁶ All of the publicly owned landfills could potentially refuse to comply with Act 641 if the Headlee Amendment is allowed to block enforcement of the Act.¹⁷

The existence of this bifurcated regulatory scheme between public and private landfills cannot be allowed to exist if environmentally sound solid waste disposal is to be achieved. Michigan needs to close substandard facilities and develop landfill facilities that are safe. Only by completely meeting these two goals for both private and public landfills will Michigan be able to adequately cleanse its ground water of the leachate currently created by substandard landfills.

II. GENERAL OVERVIEW

A. *The Earth's Water*

The environment is an integrated whole. The main factor contributing to the interdependence of the environment is the hydrogeologic cycle.¹⁸ The earth's renewable supply of water constantly circulates from the sea, to the

16. Letter from Alvin J. Hoekman, State of Michigan Representative, to Steven G. Slater (October 29, 1985) (discussing requested information on landfill statistics).

17. Although the public landfills can refuse to comply, private landfills are not affected by the Headlee Amendment. The problem is strictly fiscal. Private landfills must comply because they are not financed through the tax base. Only public landfills would supposedly have to increase taxes to pay for the increased cost of operating a landfill. Because the Headlee Amendment limits such tax hikes, the public landfills have a basis on which to refuse to comply. The result, of course, is to create a bifurcated regulatory scheme. One set of regulations for public landfills, another for private landfills.

18. The earth's renewable supply of water does not include the vast underground aquifers of ground water. The nation's ground water is stored in porous layers of underground rock. Once depleted, most ground water cannot be recharged readily or practically because it has accumulated over geologic time. *See generally* 1983 14TH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY at 72, 86 (dealing extensively with the status of the environment in the United States and how the EPA is implementing its various programs) [hereinafter 1983 14TH ANNUAL REPORT].

In contrast to ground water, the earth's renewable supply of water constantly circulates from the sea, to and through the atmosphere, and to the land. Eventually, water returns to the sea by water flow patterns, or to the atmosphere by evaporation. This circulation is termed the hydrogeologic cycle. *Id.* at 72.

atmosphere, to and through the land, then back to the sea. This constant circulation affects the water, the objects the water contacts, and the land through which the water percolates.¹⁹ The quality of the water is affected by the chemical components of the air and land. Likewise, the water that carries these chemicals affects the land where it falls.²⁰ Eventually, the water collects into rivers and flows to the sea, further disseminating the collected pollutants. Each sector of the environment is dependent on and affects other sectors of the environment, thus creating an interdependent system.²¹

The interdependence of these sectors inherently requires interdependent environmental legislation in order to effectively monitor and eventually control the environment. On the federal level, the passage of the National Environmental Policy Act (NEPA)²² was the catalyst that began a long progression of environmental legislation.²³ Each step in this progression

19. *Id.*

20. An example of water's affect on the land is evidenced by the problem of acid rain. Acid rain results from precipitation picking up pollutants in the atmosphere produced by industry, cars, and coal-fired electric plants. Steps have been taken to stop the pollution at its source through the use of "scrubbers." These scrubbers cleanse the emissions of the particulate matter in the emissions. However, if the residue is not disposed of in an environmentally sound manner nothing will have been accomplished. Instead of entering the environment through precipitation, it will just enter the environment through rainfall percolating through the accumulated residue.

For a discussion of acid rain, especially as it pertains to United States-Canada relations, see generally Clapham, *Coal, Cars, and Questions: Knowns and Unknowns About Acid Rain*, 5 CAN. U.S. L. J. 32 (1982); Cowling, *Acid Rain: An Emerging Ecological and Public Policy Issue*, 5 CAN. U.S. L. J. 23 (1982); Martin, *Acid Rain from Source to Receptor*, 5 CAN. U.S. L. J. 16 (1982).

21. Although solid waste deposited in the ground does not disseminate into the environment in its deposited form, the waste's chemical components will "leach" out of the waste and in that manner pollute the water that percolates through the waste. For an excellent primer and guide to sampling and examining leachate from solid and hazardous waste see *supra* note 13.

22. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-35, 4341-47, 4361-70 (1982 & Supp. III 1985) (declaration of national policy to encourage productive yet responsible use of the environment).

23. 1983 14TH ANNUAL REPORT, *supra* note 18, at 2. The following are the major pieces of legislation passed on the federal level after the passage of NEPA. The Clean Air Act, 42 U.S.C. §§ 7401-7626 (1982) (providing for standards to be achieved in air pollution control); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-45 (1982) (promotion of research in marine technology); Clean Water Act of 1977, see *supra* note 2, (stating findings and objectives in curing water pollution); Toxic Substances Control Act, 15 U.S.C. §§ 2601-29 (1982) (providing for greater control of toxic substances); Hazardous Materials Transportation Act of 1975, 49 U.S.C. App. §§ 1801-12 (1982 & Supp. II 1984) (setting higher standards for the transportation of hazardous materials); Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 136-136y (1982 & Supp. III 1985) (attempt to control pollution caused by pesticides used in agriculture); Solid Waste Disposal Act of 1965 42 U.S.C. §§ 3251-59 (1976) (RCRA replaced the Solid Waste Disposal Act of

blocked or regulated another source of pollution. Unfortunately, this step-by-step, source-by-source approach merely created a displacement of pollution, rather than a containment of pollution.²⁴ A practical example of this approach is that millions of dollars are now being spent to scrub sulphur out of power plant emissions.²⁵ However, the sulphur often ends up as sludge stored on the ground. At that point the hydrogeologic cycle takes over and disseminates the sulphur into the ground water and into our lakes and streams.²⁶ Therefore, in order to effectively cleanse our environment, we must have an effective waste disposal system which can contain the pollutants extracted from the air and water and contain the equally dangerous solid waste from our homes.

The hydrogeologic cycle is only one factor which requires effective solid waste disposal.²⁷ Operation of an open dump²⁸ instead of a regulated sanitary landfill creates at least seven significant dangers: fire hazards, air pollution, explosive gas migration, surface and ground water contamination, disease transfer (via agents such as rats and flies), personal injury (to unauthorized scavengers), and aesthetic blight.²⁹ These dangers only worsen an already problematic situation, reinforcing the need for an effective solid waste disposal system.

B. Land as a Waste Receptacle

Environmentally sound disposal of solid waste is particularly important because, unlike water and air, land has no natural cleansing or assimilative capacity.³⁰ The contamination of land can result in long-lasting and far-

1965); Superfund or Environmental Response Act, 42 U.S.C. §§ 9601-57 (1982 & Supp. III 1985) (setting up a fund to assist clean-up of hazardous waste sites).

24. 1983 14TH ANNUAL REPORT, *supra* note 18, at 7.

25. *Id.*

26. *Id.*

27. See *supra* notes 18-21 and accompanying text.

28. "The term 'open dump' means 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." 42 U.S.C. § 6903(14) (1982). A more complete definition is found in H.R. REP. NO. 1491-PART I, 94th Cong., 2nd Sess., reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6238, 6275. [hereinafter H.R. REP. NO. 1491]. "An open dump is defined as a land disposal site where discarded materials are deposited with little or no regard for pollution controls or aesthetics, where the wastes are left uncovered, and where frequently the use of the site for waste disposal is neither authorized nor supervised."

29. *Id.*

30. F. GRAD, *supra* note 6, at 4-2.1, 4-3. Given enough time, both water and air are capable of self-renewal as long as the natural cleansing capacity of water or air are not exceeded. *Id.* In contrast, solid waste deposited on land requires transportation and once deposited only mingles with the soil to a very minor degree. *Id.*

reaching effects to the air and water³¹ in addition to the land itself.³² Because of the effect improper disposal can have on the environment, the major requirement in the management of solid waste is the integration of an effective regulatory and enforcement scheme into the existing environmental legislative framework.³³

Land is a finite resource; however, despite its limited quantity and potential problems, land disposal is currently still the best alternative for effective solid waste disposal. Ocean disposal has only limited utility since it is only feasible for coast-line cities. Furthermore, its impact on the ocean raises questions concerning the prudence of such disposal.³⁴

An alternative more logical than ocean disposal is resource recovery. Resource recovery includes material recycling, material conversion, and energy conversion;³⁵ however, resource recovery has proven to be economically prohibitive and therefore difficult to use on a large-scale basis.³⁶ Lastly, resource recovery³⁷ has also proven to be ineffective because society is slow to

31. H.R. REP. NO. 1491, *supra* note 28, at 6275. As discussed earlier, leachate can contaminate both surface and ground water. In addition, open dumps may lead to air pollution from open dump burning, gas migration, and excessive odor.

32. Although improper disposal can result in land that is totally useless, proper planning coupled with regulated disposal techniques can save the land for a use other than garbage disposal in the future. For example, the Canyon Park Landfill in Duarte, California, was a landfill for 10 years until 1974. Now it is the site of a nine-hole golf course and driving range. Not only is the land being used, but the methane gas created by the decomposing garbage is extracted and used to fuel a generator which produces electricity and is sold to the local utility. See *Closed Landfill Provides Recreation and Royalties*, AM. CITY & COUNTY, December, 1982, at 13.

33. H.R. REP. NO. 1491, *supra* note 28, at 6248.

34. For an in-depth analysis of the legal as well as the environmental issues involved in ocean dumping, see generally Comment, *Ocean Dumping: Progress Towards a Rational Policy of Dredged Waste Disposal*, 12 ENVTL. L. 745 (1982); Kindt, *Solid Wastes and Marine Pollution*, 34 CATH. U. L. REV. 37 (1984); *contra* Osterberg, *Rubbish on the High Seas*, NEWSWEEK, October 7, 1985, at 18 (arguing in an editorial fashion that the vastness of the ocean makes it self-evident that no harm will result from ocean dumping).

35. 1975 *Third Report to Congress: Resource Recovery and Reduction 1* (comprehensive survey of the current status of resource recovery and waste reduction and an analysis of potential uses).

36. For a basic discussion of possible resource recovery options see generally Note, *Conserving Natural Resources: Toward a Comprehensive State Solid Waste Recycling Program Under The Federal Resource Conservation and Recovery Act*, 10 N.Y.U. REV. L. & SOC. CHANGE 469 (1981); Mouat, *Cities Frustrated by Garbage Pileups Look Closer at Recycling* 77 CHRISTIAN SCIENCE MONITOR 5 (1985).

37. Resource, or waste reduction, is prevention of waste at its source, either by redesigning products or by otherwise changing societal patterns of consumption and waste generation. This concept should not be confused with "volume reduction" which is used in the solid waste industry to refer to compaction or baling. 1975 *Third Report to Congress: Resource Recovery and Waste Reduction*, *supra* note 35, at 4.

change its consumption patterns or to accept new packaging innovations.³⁸ Land disposal provides a perfect opportunity to create a "container" for waste.³⁹ Disposal in a sanitary landfill prevents the introduction of leachate into the ground water where the contaminants can be dispersed throughout the environment by the hydrogeological cycle.⁴⁰ Because of the lack of viable alternatives, land disposal is the only practical means of disposal at the present time.⁴¹ However, most landfills are unacceptable in location, operation, or both.⁴² Therefore, the current situation in land disposal dictates that effective disposal regulation be integrated into the existing framework

38. *Id.*

39. For proper landfill design, a complete study of the potential site is required. Factors such as biological surveys, geologic and hydrogeologic surveys, and an archeological survey should be completed.

After a potential site has been located, the actual design of the landfill requires use of either a natural (clay) or synthetic liner to create a "bowl" or "container" into which the waste will be disposed. The land is excavated to create the "hole." Then the liner is laid down along with an extensive leachate collection system of pipes from which the leachate can be pumped out of the container, or landfill, before it has an opportunity to seep into the ground water. See J.L. Roberts & J.A. Susan, *Landfill Design Protects Sole Source Aquifer*, AM. CITY & COUNTY, December, 1982, at 28.

40. A specific example of this technique where a "container" was created is in DuPage County, Illinois. Located in the Blackwell Forest Preserve near Chicago, its intended use when the landfill is closed will be ski slopes and toboggan runs.

The actual construction of the landfill began by excavating a marshy pit. The excavated clay was used to form an impermeable barrier upon which the garbage could be deposited without danger of ground water contamination by leachate. The mountain is being built in a honeycomb of cells, or containers, for the waste. Each cell layer is surrounded by a thick clay wall. In this manner a series of smaller "containers" create a larger "container" which can then be used in the future for a use other than solid waste disposal. See F. GRAD, *supra* note 6, at 4-13.

41. Comment, *Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem*, 10 FORDHAM URB. L. J. 215, 216 (1982) (a broad survey of the problems currently encountered in the waste disposal area, the current regulation on the federal level, and an analysis of bans on the importation of intrastate waste).

In total tonnage, the amount of solid waste generated by our nation exceeds 4 billion tons per year. H.R. REP. NO. 1491, *supra* note 28, at 6240.

To complicate matters, as the amount of waste increases, the amount of available land decreases. The decrease in available land is due to a lack of land suitable for a solid waste site, restrictive and exclusionary zoning, and public opposition to the location of sanitary landfills. For a broad survey of waste disposal in Michigan, see generally 1972 SOLID WASTE MANAGEMENT PLAN FOR MICHIGAN, at 23-75 (this report was prepared by Capitol Consultants Inc. for the Michigan Department of Public Health); H.R. REP. NO. 1491, *supra* note 28, at 6240; Comment, *Municipal Solid Waste Regulation: An Ineffective Solution to a National Problem*, 10 FORDHAM URB. L. J. 215 (1982).

42. See *supra* note 8 and accompanying text. Even though land disposal is decidedly more effective than other alternatives, the amount of waste that must be disposed of is staggering. The annual collection from residential, commercial and institutional sources includes 30 million tons of plastic, 100 million tires, 30 billion bottles, 60 billion cans, millions of tons of demolition debris, grass and tree trimmings, food wastes and sewage sludge, and millions of tons of discarded cars and major appliances. F. GRAD, *supra* note 6, at 4-7.

of environmental law.⁴³

C. Federal Law

Congress' first attempt to control the disposal of solid waste began in 1965 with passage of the Solid Waste Disposal Act.⁴⁴ This early federal effort was only a small step in controlling the disposal of solid waste. That Act authorized the Secretary of Health, Education, and Welfare primarily to conduct and encourage research into the solution of solid waste problems, including resource recovery.⁴⁵ The Act also allowed for grants to be made to states and interstate agencies for similar research activities.⁴⁶ This modest start by Congress was the first in a series of more substantial solid waste disposal controls.

By 1970 the environmental movement had gained momentum and in

43. Information on numbers, sizes, and locations of open dumps can be estimated from two separate surveys which have been conducted. The U.S. Public Health Service's Bureau of Solid Waste Management in 1968 found that based on extremely modest criteria, 94 percent of the 6,000 sites surveyed were unacceptable in location, operation, or both. A more recent survey conducted in 1974 reported the existence of 18,539 known land disposal sites of which only 5,596 were permitted or recognized as being in compliance with state regulations. These statistics do not include irregularly or infrequently used "promiscuous" or unauthorized dumps. H.R. REP. NO. 1491, *supra* note 8, at 6277.

A more recent survey covered the state directors of solid and hazardous wastes. All 50 states as well as the District of Columbia were surveyed. The response rate was 100 percent.

Regional Breakout

Region	Sanitary Landfills Operator*			Open Dumps Operator*			Hazardous Waste Sites Operator*		
	Total	Public	Private	Total	Public	Private	Total	Public	Private
New England	875	745	130	99	87	12	13	9	4
Middle Atlantic	1,002	585	407	117	71	46	37	0	37
East North Central	1,932	1,238	694	545	136	83	50	1	49
West North Central	1,056	855	201	479	372	7	18	—	17
South Atlantic	1,252	949	303	197	171	26	347	318	29
East South Central	532	364	168	167	139	28	254	—	254
West South Central	1,403	1,160	243	895	494	131	221	—	219
Mountain	655	546	109	475	460	14	74	7	67
Pacific	755	435	320	321	106	35	2	1	1

*Operators of some facilities were not identified.

PUBLIC WORKS *Inventory and Operational Data on Solid and Hazardous Waste Disposal Sites*, September, 1982, at 94.

44. Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, tit. II, 79 Stat. 997 (1965) (codified at 42 U.S.C. §§ 3251-59 (1970)) (adopted primarily to conduct and encourage research into the solution of solid waste problems). The Resource Conservation and Recovery Act of 1976 (RCRA) replaced the Solid Waste Disposal Act of 1965. RCRA is found at 42 U.S.C. §§ 6901-87 (1982 & Supp. II 1984).

45. 42 U.S.C. § 3254 (1970).

46. See Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 WIS. L. REV. 635.

1976 Congress passed a substantially more complete and effective version of the Solid Waste Disposal Act called the Resource Conservation and Recovery Act (RCRA).⁴⁷ Unlike the Solid Waste Disposal Act, RCRA adopted a multi-faceted approach to the disposal of waste. RCRA addresses the establishment of an office of solid waste,⁴⁸ the regulation of hazardous waste,⁴⁹ and the establishment of state or regional solid waste plans.⁵⁰ These provisions, among others, offer a more comprehensive approach to the federal regulation of solid waste disposal than did the Solid Waste Disposal Act.

RCRA has altered the traditional focus of solid waste disposal, shifting the focus from a municipal problem to a national problem. Although waste disposal remains a national problem, under RCRA the federal government has left the bulk of the responsibility to regulate the disposal of solid waste to the states.⁵¹ Statements in the legislative history provide that federal preemption of state solid waste regulation would be undesirable and inefficient as well as being a disincentive to local initiative.⁵² Based on this premise, RCRA sets forth guidelines that states may wish to follow⁵³ and promotes cooperation between states.⁵⁴ Although not mandatory, Congress, through RCRA, does set guidelines and does offer financial assistance to those states which meet those guidelines and apply for assistance.⁵⁵

The Supreme Court has followed Congress' deference to state regulation. In *City of Philadelphia v. New Jersey*,⁵⁶ the Court held that Congress did not intend to preempt solid waste disposal regulation.⁵⁷ The Court found that Congress expressly provided that the collection and disposal of solid waste should continue to be primarily the function of state, local, and

47. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2796 (codified as amended at 42 U.S.C. §§ 6901-87 (1982 & Supp. III 1985)). [Hereinafter RCRA].

48. RCRA, *supra* note 47, at §§ 6911-16.

49. *Id.* at §§ 6921-34.

50. *Id.* at §§ 6941-49.

51. For an explanation of the history and current status of the federal regulation of solid waste, see generally Anderson, *supra* note 46.

52. H.R. REP. NO. 1491, *supra* note 8, at 6271.

53. RCRA, *supra* note 47, at § 6907. The guidelines suggested provide a technical and economic description of the performance levels to be achieved, the quality of water and air to be attained, and the minimum criteria which define what constitutes open dumping of solid and hazardous waste.

54. *Id.* at §§ 6904(a), 6941-49. Cooperation is attained by allowing interstate agencies to develop regional plans for the disposal of solid waste.

55. *Id.* at §§ 6942-49. Congress has appropriated \$30 million for fiscal year 1978, \$40 million for fiscal year 1979, \$20 million for fiscal year 1980, \$15 million for fiscal year 1981, \$20 million for the fiscal year 1982, and \$10 million for each of the fiscal years 1985 through 1988.

56. 437 U.S. 617 (1978).

57. *Id.* at 620 n.4.

regional agencies.⁶⁸ The only sanction available to persuade the states to comply with RCRA is the loss of federal funds to those states which do not participate.⁶⁹ Because RCRA's standards are not mandatory,⁶⁰ proper disposal of solid waste is dependent on effective, comprehensive and enforceable state regulation. RCRA has only set forth the intended objectives of proper solid waste disposal. Thus, the focus of analysis must turn to individual state regulation to determine if Congress' stated objective is being met.⁶¹

58. *Id.*; RCRA, *supra* note 47, at § 6901(a)(4). As to Sub Chapter IV of RCRA, the legislative history also indicates that the federal guidelines under that title were not mandatory on the states unless a state received federal financial and technical assistance to develop a state's solid waste plan. If a state plan is approved by the Administrator of the EPA pursuant to 42 U.S.C. § 6943(a), and if the state subsequently received funding, only then must the state meet the federal guidelines. H.R. REP. NO. 1491, *supra* note 28, at 6242.

59. RCRA, *supra* note 47, at §§ 6942-49.

60. *See supra* note 58.

61. The Congressional findings and objectives can be found in RCRA, *supra* note 47, at §§ 6901-02.

§ 6902. Objectives

The objectives of this Act [42 USCS §§ 6901 et seq.] are to promote the protection of health and the environment and to conserve valuable material and energy resources by

(1) providing technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will promote improved solid waste management techniques (including more effective organizational arrangements), new and improved methods of collection, separation, and recovery of solid waste and the environmentally safe disposal of nonrecoverable residues;

(2) providing training grants in occupations involving the design, operation, and maintenance of solid waste disposal systems;

(3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health;

(4) regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment;

(5) providing for the promulgation of guidelines for solid waste collection, transport, separation, recovery, and disposal practices and systems;

(6) promoting a national research and development program for improved solid waste management and resource conservation techniques, more effective organizational arrangements, and new and improved methods of collection, separation, and recovery, and recycling of solid wastes and environmentally safe disposal of nonrecoverable residues;

(7) promoting the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources; and

(8) establishing a cooperative effort among the Federal, State, and local governments and private enterprise in order to recover valuable materials and energy from solid waste.

D. Status of Michigan's Environmental Legislation

Michigan has taken an aggressive stance in combating environmental abuse by devising a comprehensive environmental regulation framework.⁶² Although the framework is in place for effective regulation of the environment, meaningful enforcement of the existing statutes is necessary before the regulations will have their desired effect. In particular, effective enforcement of Michigan's Solid Waste Management Act (Act 641)⁶³ is extremely critical to create an effective environmental regulatory scheme.⁶⁴ Only through proper enforcement of Act 641 will an effective stop be put to the introduction of pollutants into the hydrogeological cycle and only then will Michigan's environmental regulation be efficient and effective.

Although Michigan has a severe problem with the disposal of hazardous waste,⁶⁵ disposal of Michigan's solid waste is also a significant problem. Following national trends,⁶⁶ Michigan will also experience great increases in the amount of solid waste produced within its borders.⁶⁷ The improper

62. The following are the more prominent Michigan acts enacted to protect the environment.

Michigan Environmental Protection Act, MICHIGAN COMP. LAWS ANN. § 691.1201 (1984 & Supp. 1986) (generally for the protection of air, water and other natural resources); Water Resources Act, MICH. COMP. LAWS ANN. §§ 323.1-.412 (1984 & Supp. 1986) (enacted to create a water resources commission to protect and conserve the water resources of the state); Department of Natural Resources Act, MICH. COMP. LAWS ANN. §§ 291.1-299.6 (1984 & Supp. 1986) (department to apply and enforce environmental legislation); Endangered Species Act of 1974, MICH. COMP. LAWS ANN. §§ 299.221-.230 (1984 & Supp. 1986) (act to provide for the conservation, management and protection of endangered species); Resource Recovery Act, MICH. COMP. LAWS ANN. §§ 299.301-.321 (1984) (promoting conservation of natural resources); Hazardous Waste Management Act, MICH. COMP. LAWS ANN. §§ 299.501-.551 (1984 & Supp. 1986) (act controlling transportation and disposal of hazardous waste); Environmental Response Act, MICH. COMP. LAWS ANN. §§ 299.601-610 (1984 & Supp. 1986) (providing for identification and action against environmental problems in the state).

63. MICH. COMP. LAWS ANN. §§ 299.401-.437 (1984 & Supp. 1986).

64. See *supra* notes 18-29 and accompanying text.

65. Currently, Michigan has a severe problem with the proper disposal of hazardous waste. Over twenty hazardous waste sites are on the National Priorities List of Superfund sites. Superfund sites are previous hazardous waste sites which have become exceptionally dangerous to the surrounding community. Federal funds are targeted to clean up these areas. Cleanup of these sites is inevitable and current methods of cleanup may necessitate transfer of the waste to a more secure disposal site. Those sites must be available to accept the waste, and once used they must be environmentally sound and effectively regulated. See generally 1983 14TH ANNUAL REPORT, *supra* note 18, at 61.

66. See *supra* note 42.

67. Per capita estimates will continue to rise due to an increase in per capita generation of wastes and an increase in state population. The resulting generation of residential, commercial, industrial, municipal and institutional waste will be more than 377 million tons per year by 1990, over twice as much as in 1973. 1972 *Solid Waste Management Plan for Michigan* at 92. However, accurate estimates are difficult to make because:

management of any process used in the disposal of solid waste has the potential of affecting the health of individuals, as well as affecting the environment itself.⁶⁸ Substandard disposal may cause pollution of the water, air or land, as well as the pollution of areas of natural beauty.⁶⁹

The potential for harm in these areas is significant. Michigan health department records for 1970 show that there were over 600 licensed land disposal sites in the state.⁷⁰ Of those 600, only 60% were classified as sanitary landfills.⁷¹ It must be recognized, however, that these numbers do not include back yard, unauthorized, or clandestine dumps. Therefore, the actual number of sites may actually be much higher.

The potential for harm and the number of substandard landfills are not the only problems. Currently, Michigan is having difficulty enforcing its existing legislation. Individual opposition to proposed disposal sites,⁷² decreasing federal revenues to the state,⁷³ increased costs of complying with existing regulations,⁷⁴ and practical limitations on enforcement⁷⁵ all block effective enforcement. To compound the problems of inadequate disposal

1) of the existence of individual disposal methods such as garbage grinders, private incinerators, back yard burning, burying, composting or extended storage practices. Therefore, the quantities determined "as collected" will be substantially less than the actual amount generated.

2) quantitative studies have usually considered only municipal collection. Private haulers and individuals collect, and in some cases, dispose of a large percentage of the solid waste generated, particularly from industrial sources. *Id.* at 43.

68. 1973 *Solid Waste Management Plan for Michigan* at 51 (leachate eventually mingles with ground water used for consumption; improper covering techniques allow rodents to flourish as well as allow garbage to blow away).

69. *Id.* Even incineration, reclamation or some other type of reduction will leave some residue which must be disposed of on land. Also, this residue is often more toxic than the original substance. *Id.*

70. 1973 *Solid Waste Management Plan for Michigan* at 59.

71. *Id.* Since 1970, the number of landfills has decreased. *See supra* note 16. However, the ratio of sanitary landfills to open dumps has remained consistent. *See supra* note 43 and accompanying text.

72. Individual opposition to proposed disposal sites often stems from the following:

1. Popular misconception that all land disposal, including sanitary landfills, are similar to open dumps.

2. Concern over increased traffic to and from the disposal site.

3. Fear of nuisance problems: noise, dust, odors, blowing paper and an ugly view.

1973 *Solid Waste Disposal Plan for Michigan*, at 66.

73. 1983 14TH ANNUAL REPORT, *supra* note 18, at 66.

74. Already, the cost of collecting and disposing of solid waste has gone so high that only education and road construction are more expensive items in the typical local budget. H.R. REP. NO. 1491, *supra* note 28, at 6247.

75. State records show that as of the beginning of 1984, the backlog of cases at the Michigan Attorney General's office concerned with the closing of substandard landfills had grown to 253, an increase of almost 40% from January, 1983. In 1983, 198 new cases were started, but only 126 were resolved. Grand Rapids Press, May 14, 1984, at 1A.

sites and poor enforcement, the proliferation of solid waste requires a uniform statewide approach rather than individual action by municipalities.⁷⁶ Isolated and fragmented municipalities lack the finances, land, and expertise to develop effective solutions to their solid waste problems.⁷⁷ An examination of the current breakdown in Michigan's solid waste regulation will show that Michigan no longer has an effective state-wide plan as intended by the legislature. Instead, the regulatory scheme covering solid waste has been reduced to an optional program for municipally-operated landfills.

III. MICHIGAN'S SOLID WASTE REGULATION

A. Michigan Constitution

Michigan's Constitution evidences a strong commitment to protect both Michigan citizens and the environment. Article IV Section 51 states that the public health and general welfare of the people of the state are of primary public concern.⁷⁸ One way to protect the people of the state is to control and to limit the pollution of the state's water resources as well as its land resources.⁷⁹ Michigan's Constitution goes one step further and deals explicitly with the status of Michigan's natural resources and environment and its effect on the public. Article IV Section 52 specifically states that in the interest of the people of Michigan, the legislature must protect the air, water, and other natural resources of the state from pollution.⁸⁰ The Constitution holds that this goal is of paramount public concern.⁸¹

The noticeable difference between Section 51 and Section 52 is the urgency of their individual mandates. Section 51 states that the public

76. Comment, *supra* note 41, at 244.

77. *Id.*

78. MICH. CONST. art. IV, § 51. The section in full states that: "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health."

79. Section 51 has been used to address various issues. The following cases are representative. *People v. Ham-Ying*, 142 Mich. App. 831, 371 N.W.2d 874 (1985) (limitation on how much responsibility can be delegated to an unlicensed physician); *Blue Cross and Blue Shield of Michigan v. Milliken*, 422 Mich. 1, 367 N.W.2d 1 (1985), *appeal dismissed*, 106 S. Ct. 40 (1985) (used for injunction against use of Health Care Corporation Reform Act in conjunction with § 52); *Eyde v. Charter Tp. of Lansing*, 420 Mich. 287, 363 N.W.2d 277 (1984) (challenge by property owners of special assessments for drain improvements).

80. MICH. CONST. art. IV, § 52. Section 52 states in full that:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

81. *Id.*

health and general welfare of the people is of primary concern. However, Section 52 goes beyond a primary concern to state that the conservation of natural resources is of *paramount* public concern.⁸² The Michigan Supreme Court has found that the language of Section 52 creates a mandatory duty to provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction.⁸³ The legislature has taken action to protect natural resources,⁸⁴ but without effective enforcement of the regulations that exist the result will be a framework for change without actual change.⁸⁵

82. MICH. CONST. art. IV, § 52. Preservation and protection of the environment requires adoption of the feasible and prudent alternative *least likely* to impair or pollute the environment. *Oscoda Chapter of PBB Action Committee, Inc. v. Dept. of Natural Resources*, 403 Mich. 215, 268 N.W.2d 240, 256 (1978). Clearly, when presented with alternatives, courts have a duty to evaluate not only whether an alternative is feasible and prudent, but also whether the alternative is consistent with the public welfare. *Id.*

83. *Michigan State Highway Commission v. Vanderkloot*, 392 Mich. 159, 220 N.W.2d 416, 426-27 (1974). The court also held that the responsive action by the legislature could be in specific provisions, or in the terms of general legislation. *Id.* At that time, they found that the enactment of the Michigan Environmental Protection Act fulfilled the legislature's duty. Michigan's Solid Waste Disposal Act could be considered a specific provision or a pertinent enactment.

84. The Michigan legislature has begun to act on the conflict between act 641 and the Headlee Amendment. The proposal set forth is embodied in House Bill 4489 as passed by the House and the Senate Substitute Bill 4489 (S-1).

With certain exceptions, the bill would prohibit a municipality, county, or authority composed of municipalities and/or counties from owning or operating disposal areas. The prohibition would not apply if the local unit passed an ordinance or resolution that required itself to construct, upgrade and operate the disposal area according to the act and authorized the DNR or local certified health department to enforce the ordinance or resolution.

The prohibition would not be enforced against a municipality, county or authority that did all of the following: agreed to close its disposal area; applied for a closure grant under the Clean Michigan Fund Act to be created by House Bill 4490; and, either agreed not to accept solid waste at the disposal area or agreed to enter into a compliance agreement with the DNR. The compliance agreement would have to establish a mutually agreeable manner of operating the disposal area until closure was completed, and would not have to meet the operating standards of the act. The agreement could neither preclude the operation of the disposal area nor permit the expansion of it. Enforcement of the prohibition would remain suspended until the municipality, county or authority received a grant under the Clean Michigan Fund Act and completed closure of the disposal area.

Although the legislature has attempted to remedy the problem, the bills are currently in committee and may never be passed into law. The proposal suggested by this Note is just as effective and does not require additional legislation to effectuate its purpose.

85. The most recent Constitutional mandate to protect the environment is the Natural Resource Trust Fund, MICH. CONST. art. IX, § 35. The money in the fund is to be used: "[F]or the acquisition of land or rights in land for recreational uses or protection of the land because of its environmental importance or its scenic beauty. . . ." This money could arguably be applied to properly operate a solid waste disposal facility which currently is threatening the land or interfering with scenic beauty. The provision, which became effective at the end of 1984, has not yet been extensively used. Although unused, the legislature has taken action to make the trust fund a reality. *See generally* MICH. COMP. LAWS ANN. § 318.501-.516 (Supp.

B. Statutory Provisions

The proper disposal of solid waste is a necessary part of an effective method to protect natural resources. Michigan municipalities have been granted broad powers to establish, operate and control their own solid waste disposal systems.⁸⁶ Although municipalities have broad powers, starting in 1965 the municipalities had to comply with certain regulations concerning solid waste disposal. In 1965, the Michigan legislature passed the Garbage and Refuse Disposal Act (Act 87).⁸⁷ The stated purpose of Act 87 was to license and regulate garbage and refuse disposal and to provide a penalty for violation of the Act.⁸⁸ Enactment of Act 87 was in response to the passage of the federal Solid Waste Disposal Act of 1965.⁸⁹ Although both Act 87 and the federal Solid Waste Disposal Act addressed the problem of proper disposal techniques, neither took a very aggressive stance.⁹⁰ Therefore, with the rise in environmental awareness, change was virtually inevitable.

In 1978, the Michigan legislature followed the enactment of RCRA⁹¹ by enacting the Solid Waste Management Act (Act 641).⁹² The provisions of Act 641 greatly increased licensure and monitoring requirements of both the transportation of solid waste and the disposal of the waste into licensed sanitary landfills.⁹³ In addition, Act 641 requires that operators are bonded to ensure that each facility is properly closed and monitored after closing.⁹⁴

1986).

86. Solid waste management at the municipal level is regulated by state law, local ordinance and charter provisions. State acts that have delegated certain powers to the states political subdivisions have allowed those subdivisions substantial control over their waste disposal. The following acts mark a progression of control.

1883 Mich. Pub. Act 137; 1895 Mich. Pub. Act 3; (These Acts concern health requirements and duties of health officers in municipalities, including inspection of garbage disposal systems.); 1917 Mich. Pub. Acts 167, 298 (Allows cities of under 250,000 to tax in excess of general law for solid waste collection/disposal.); 1923 Mich. Pub. Act 116 (Allows townships and villages to maintain garbage disposal systems.); 1947 Mich. Pub. Act 359 (Allows charter townships to install garbage disposal systems.); 1951 Mich. Pub. Act 266 (Allows city or village to provide for a garbage disposal equipment system.); 1939 Mich. Pub. Act 342; 1957 Mich. Pub. Act 185 (Authorizes counties to provide services with regard to solid waste management services.)

Combined, these Public Acts give power to almost all political subdivisions to provide for a solid waste disposal system. See 1973 *Solid Waste Management Plan for Michigan* at 16-20.

87. MICH. COMP. LAWS §§ 325.291-.298 (1975); 1965 Mich. Pub. Act 87.

88. *Id.*

89. See *supra* notes 44-46 and accompanying text.

90. *Id.*

91. RCRA, *supra* note 47, at §§ 6901-41.

92. MICH. COMP. LAWS §§ 299.401-.437 (1984 & Supp. 1986); 1978 Mich. Pub. Act 641.

93. *Id.* at §§ 299.408-.418, .420a, .421a-.422.

94. *Id.* at § 299.419.

Also, Act 641 provides various enforcement remedies.⁹⁵

The provisions of Act 641 were intended to apply to all landfills, not just those operated by the private sector.⁹⁶ Without enforcement of Act 641, public landfills are regulated only by the inadequate provisions of Act 87.⁹⁷ Act 87 requires neither an effective liner nor needed monitoring equipment.⁹⁸ Without these requirements, contamination of ground water is likely,⁹⁹ and therefore, compliance with Act 641's stricter requirements is needed.¹⁰⁰ Despite the strong constitutional mandate to protect the environment,¹⁰¹ and despite compliance with that mandate through enactment of Act 641, the Michigan judiciary has blocked enforcement of Act 641 against publicly owned landfills by its interpretation of the Headlee Amendment.¹⁰²

IV. THE HEADLEE AMENDMENT

The Headlee Amendment¹⁰³ is Michigan's tax and expenditure limitation presently used by municipalities to avoid the cost of complying with

95. *Id.* at §§ 299.433, .436 (providing for the Attorney General to bring an action, a municipality to request an injunction and providing that violations of Act 641 will be deemed a misdemeanor and a violator may be fined up to \$100 per day for each violation).

96. *Id.* at § 299.410(1).

97. *See supra* notes 86-90 and accompanying text.

98. MICH. COMP. LAWS ANN. §§ 325.291-298 (1975).

99. *See supra* notes 18-43 and accompanying text.

100. Although Act 641 repealed Act 87, in the absence of any requirement to comply with Act 641, the less stringent provisions of Act 87 continue to apply.

101. *See supra* notes 78-85 and accompanying text.

102. *See supra* notes 12-17 and accompanying text.

103. The full text of the Headlee Amendment is found in MICH. CONST. art. IX, § 25-34. It states in full:

§ 25. VOTER APPROVAL OF INCREASED LOCAL TAXES; PROHIBITIONS; EMERGENCY CONDITIONS; REPAYMENT OF BONDED INDEBTEDNESS GUARANTEED; IMPLEMENTATION OF SECTION

Sec. 25. Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval. The state is prohibited from requiring any new or expanded activities by local governments without full state financing, from reducing the proportion of state spending in the form of aid to local governments, or from shifting the tax burden to local government. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guaranteed. Implementation of this section is specified in Sections 26 through 34, inclusive, of this Article.

§ 26. LIMITATION ON TAXES; REVENUE LIMIT; REFUNDING OR TRANSFERRING EXCESS REVENUES; EXCEPTIONS TO REVENUE LIMITATION; ADJUSTMENT OF STATE REVENUE AND SPENDING LIMITS

Sec. 26. There is hereby established a limit on the total amount of taxes which may be imposed by the legislature in any fiscal year on the taxpayers of this state. This limit shall not be changed without approval of the majority of the qualified electors voting thereon, as provided for in Article 12 of the Constitution. Effective with fiscal year 1979-

Act 641. Michigan's first attempt at placing a constitutional lid on taxes

1980, and for each fiscal year thereafter, the legislature shall not impose taxes of any kind which, together with all other revenues of the state, federal aid excluded, exceed the revenue limit established in this section. The revenue limit shall be equal to the product of the ratio of Total State Revenues in fiscal year 1978-1979 divided by the Personal Income of Michigan in calendar year 1977 multiplied by the Personal Income of Michigan in either the prior calendar year or the average of Personal Income of Michigan in the previous three calendar years, whichever is greater.

For any fiscal year in the event that Total State Revenues exceed the revenue limit established in this section by 1% or more, the excess revenues shall be refunded pro rata based on the liability reported on the Michigan income tax and single business tax (or its successor tax or taxes) annual returns filed following the close of such fiscal year. If the excess is less than 1%, this excess may be transferred to the State Budget Stabilization Fund.

The revenue limitation established in this section shall not apply to taxes imposed for the payment of principal and interest on bonds, approved by the voters and authorized under Section 15 of this Article, and loans to school districts authorized under Section 16 of this Article.

If responsibility for funding a program or programs is transferred from one level of government to another, as a consequence of constitutional amendment, the state revenue and spending limits may be adjusted to accommodate such change, provided that the total revenue authorized for collection by both state and local governments does not exceed that amount which would have been authorized without such change.

§ 27. EXCEEDING REVENUE LIMIT; CONDITIONS

Sec. 27. The revenue limit of Section 26 of this Article may be exceeded only if all of the following conditions are met: (1) The governor requests the legislature to declare an emergency; (2) the request is specific as to the nature of the emergency, the dollar amount of the emergency, and the method by which the emergency will be funded; and (3) the legislature thereafter declares an emergency in accordance with the specific of the governor's request by a two-thirds vote of the members elected to and serving in each house. The emergency must be declared in accordance with this section prior to incurring any of the expenses which constitute the emergency request. The revenue limit may be exceeded only during the fiscal year for which the emergency is declared. In no event shall any part of the amount representing a refund under Section 26 of this Article be the subject of an emergency request.

§ 28. LIMITATION ON EXPENSES OF STATE GOVERNMENT

Sec. 28. No expenses of state government shall be incurred in any fiscal year which exceed the sum of the revenue limit established in Sections 26 and 27 of this Article plus federal aid and any surplus from a previous fiscal year.

§ 29. STATE FINANCING OF ACTIVITIES OR SERVICES REQUIRED OF LOCAL GOVERNMENT BY STATE LAW.

Sec. 29. The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. The provision of this section shall not apply to costs incurred pursuant to Article VI, Section 18.

§ 30. REDUCTION OF STATE SPENDING PAID TO UNITS OF LOCAL GOVERNMENT

Sec. 30. The proportion of total state spending paid to all units of Local Government, taken as a group, shall not be reduced below that proportion in effect in fiscal year

was in 1932.¹⁰⁴ This prior limitation amendment capped the total amount of

1978-79.

§ 31. LEVYING TAX OR INCREASING RATE OF EXISTING TAX; MAXIMUM TAX RATE ON NEW BASE; INCREASE IN ASSESSED VALUATION OF PROPERTY; EXCEPTIONS TO LIMITATIONS

Sec. 31. Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on the new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the General Price Level from the previous year, the maximum authorized rate applied thereto in each unit of Local Government shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the General Price Level, as could have been collected at the existing authorized rate on the prior assessed value.

The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment.

§ 32. SUIT TO ENFORCE SECTIONS 25 TO 31

Sec. 32. Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

§ 33. DEFINITIONS APPLICABLE TO SECTIONS 25 TO 32

Sec. 33. Definitions. The definitions of this section shall apply to Section 25 through 32 of Article IX, inclusive.

"Total State Revenues" includes all general and special revenues, excluding federal aid, as defined in the budget message of the governor for fiscal year 1978-1979. Total State Revenues shall exclude the amount of any credits based on actual tax liabilities or the imputed tax components of rental payments, but shall include the amount of any credits not related to actual tax liabilities. "Personal Income of Michigan" is the total income received by persons in Michigan from all sources, as defined and officially reported by the United States Department of Commerce or its successor agency. "Local Government" means any political subdivision of the state, including, but not restricted to, school districts, cities, villages, townships, charter townships, counties, charter counties, authorities created by the state, and authorities created by other units of local government. "General Price Level" means the Consumer Price Index for the United States as defined and officially reported by the United States Department of Labor or its successor agency.

§ 34. IMPLEMENTATION OF SECTIONS 25 TO 33

Sec. 34. The Legislature shall implement the provision of sections 25 through 33, inclusive, of this Article.

Enactment ratified Nov. 7, 1978, Eff. Dec. 23, 1978.

104. MICH. CONST. art. X, § 21 (1908) (amended 1948) provides:

The total amount of taxes assessed against property for all purposes in any one year shall not exceed one and one-half percent of the assessed valuation of said property, except taxes levied for the payment of interest and principal on obligations heretofore incurred, which shall be separately assessed in all cases: Provided, that this limitation may be increased for a period of not to exceed twenty years at any one time, to not more than

taxes assessed against property in any one year to fifteen mills.¹⁰⁵ Unfortunately, this limitation amendment was easily undermined by the legislature whenever the legislature passed a statute allowing a political subdivision to levy a tax in excess of the stated limit. The limit was also exceeded whenever the legislature created a new political subdivision with specified taking powers. These exceptions were held by the courts to apply whether the tax was authorized by a home rule charter,¹⁰⁶ adopted by the people for their own self government,¹⁰⁷ or when authorized by a statutory charter authorizing the city to impose particular taxes.¹⁰⁸

Because of the legislative undermining of the people's intent in enacting the initial tax limitation amendment, on November 7, 1978, Michigan voters approved an amendment to the Michigan Constitution,¹⁰⁹ the ultimate purpose of which was to place public spending under direct popular control.¹¹⁰ Commonly referred to as the "Headlee Amendment," this provision also sought to prohibit the state from shifting the responsibility from the state to municipalities to pay for existing responsibilities currently paid for by the state¹¹¹ or for the cost of governmental regulation newly created by the state.¹¹² The intent of the electorate when they ratified the Headlee Amendment was to prevent the state legislature from enacting more costly

a total of five percent of the assessed valuation, by a majority vote of the electors of any assessing district, or when provided for by the charter of a municipal corporation: Provided further, that this limitation shall not apply to taxes levied in the year 1932.

105. *Id.* A "mill" is a term, or value, used in assessing property taxes. Although not negotiable in coin form, its value is one-tenth of a cent or one one-thousandth of a dollar. As an example, if real property is assessed at \$100,000 and the property tax rate is 10 mills, the tax due would be \$1000.

106. A home rule charter is an organizational framework of a municipality, analogous to a constitution of the state, drawn by the municipality itself and adopted by popular vote of its people. BLACKS LAW DICTIONARY 660 (5th ed. 1979).

107. *School District v. City of Pontiac*, 262 Mich. 338, 247 N.W. 474 (1933) (discussing the constitutionality of MICH. CONST. art. X, § 21 and holding that school district could not enjoin city from adopting a budget).

108. *City of Hazel Park v. Municipal Finance Comm'n*, 317 Mich. 582, 27 N.W.2d 106 (1947) (holding that no home rule charter limitation should prevent collection of full amount of taxes to pay a bond issue approved by election).

109. Proposal E, ratified on November 7, 1978, and effective December 23, 1978, amended various sections of MICH. CONST. art. IX, §§ 25-34. *East Jackson Public Schools v. State*, 133 Mich. App. 132, 348 N.W.2d 303, 306 n.10 (1984) (holding that there is no constitutional obligation to provide equal per student funding between districts).

110. *Waterford School District v. State Bd. of Education*, 98 Mich. App. 658, 296 N.W.2d 328, 331 (1980) (challenge to reduction in state aid for education to the school district in order for the school district to meet its education responsibilities).

111. MICH. CONST. art. IX, § 29. "The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity. . . ."

112. *Id.* "A new activity or service or an increase in the level of an activity or service beyond that required by existing law shall not be required by the legislature . . . unless a state appropriation is made. . . ."

state laws and regulations without any financial support to pay for the increased expense of complying with the regulation.¹¹³ The Headlee Amendment grew out of the spirit of tax revolt and was ratified to limit state and local revenues through taxation.¹¹⁴

Such limits on state spending power are not new. Constitutional controls on state finances have taken the form of restrictions on local government finances, restrictions on financing of specific government programs, and restrictions on state government deficits.¹¹⁵ Today, these forms of restrictions are still prevalent.¹¹⁶

Although these older types of restrictions are still very much alive, the Headlee Amendment is one of the new wave of more sophisticated controls, called tax and expenditure limitations (TEL's).¹¹⁷ Older constitutional controls on state finances have taken the form of set limits on taxes and spending and absolute blocks to anything outside of what is specifically stated in the state's constitution. Modern provisions¹¹⁸ are termed tax and expenditure *limitations*, not absolute limits.¹¹⁹ The Headlee Amendment is also a limitation rather than a strict prohibition on state and municipal taxing and spending. An accurate and complete analysis of the Headlee Amendment

113. *Durant v. Dept. of Education*, 129 Mich. App. 517, 342 N.W.2d 591, 595 (1983) (action filed to compel the state Department of Education to fund the public school system in same proportion as during 1978-1979).

114. *Waterford School District v. State Board of Education*, 98 Mich. App. 658, 296 N.W.2d 328, 331 (1980) (challenged reduction in education funds on basis of shifting of responsibility to pay for education).

115. J. Hughes & G. Rieman, *A New Generation of State Tax and Expenditure Limitations*, 22 HARV. J. ON LEG. 269 (1985) (a broad survey and analysis of attempts to limit state and municipal expenditures through constitutional and/or statutory means).

116. *Id.* at 270.

117. Modern TELs can be classified into three categories: 1) TEL's that attempt to limit specific types of taxation and spending, such as roll backs in property tax rates. Many of these TELs bear on local government finances; 2) TELs that attempt to impose general limits on state government financing, taxation, or both; and, 3) TELs that place restrictions on how a state may spend its money. *Id.* at 272. For a more in depth discussion of modern tax and expenditure limitations see generally *id.*

118. At present, nine states have modern TELs in their constitutions: ALASKA CONST. art. IX, § 16; ARIZ. CONST. art. IX, § 20; CAL. CONST. arts. XIIa, XIIIb; DEL. CONST. art. VIII, § 6(b)-(d); HAW. CONST. art. VII, § 9; MICH. CONST. art. IX, §§ 25-33; MO. CONST. art. X, §§ 18-24; TENN. CONST. art. VIII, § 24; TEX. CONST. art. II, § 22.

In addition, ten states have statutory TELs: ALASKA STAT. § 37.07.020 (1985); COLO. REV. STAT. § 24-75-201.1 (Supp. 1982); IDAHO CODE §§ 67-6801 to 67-6803 (1980); LA. REV. STAT. ANN. §§ 47:5001 to 47:5010 (West Supp. 1985); MONT. CODE ANN. § 17-8-106 (1983); NEV. REV. STAT. § 353.213 (1983); OR. REV. STAT. § 291.355 (1985); R.I. GEN. LAWS § 35-3-7(5) (Supp. 1984); S.C. CODE ANN. §§ 11-11-410 to 440 (Supp. 1984); UTAH CODE ANN. §§ 59-21-1 to 59-27-12 (Supp. 1985).

119. J. HUGHES & G. RIEMAN, *supra* note 115. There is no absolute block to additional revenue raising as there might be with an absolute block or absolute limits in older provisions. *Id.*

shows that publicly owned landfills can comply with Act 641 without conflicting with the limits of the Headlee Amendment. In this way both the limits of the Headlee Amendment and the requirements of Act 641 can be met, therefore leading to environmentally safe disposal of solid waste.¹²⁰

Application of the Headlee Amendment to costs associated with construction or maintenance of a solid waste facility may raise financing problems for municipalities which must construct such facilities. The Michigan appellate court's use of the Headlee Amendment to block enforcement of Act 641 steps beyond the intent of the Amendment and subsequently interferes with the intent of Act 641. An analysis of recent Michigan court decisions allowing the Headlee Amendment to block enforcement of Act 641 will suggest possible means of meeting the requirements of both the Headlee Amendment and Act 641, therefore leading to a harmonious result.

The Michigan Appellate Court first dealt with the interaction of Act 641 and the Headlee amendment in *Delta County v. Michigan Dept. of Natural Resources*.¹²¹ The Department of Natural Resources (DNR) in *Delta* appealed a judgment enjoining the implementation of Act 641 against Delta County. Delta County had refused to upgrade its landfill to meet the requirements of Act 641 until the state legislature, as Delta County perceived the Headlee Amendment required,¹²² appropriated funds to pay for the increased activities required by Act 641.¹²³ The appellate court ultimately upheld the injunction.¹²⁴

The *Delta* court justified its decision by summarily rejecting the DNR's argument that Delta County had a preexisting constitutional duty to dispose of solid waste.¹²⁵ Instead, the court found that Act 641 was a "new activity . . . or an increase in the level of [an] activity" by local governments within the meaning of Section 29¹²⁶ of the Headlee Amendment.

120. Allowing the Headlee Amendment to interfere with enforcement of Act 641 will interfere with the continuing ability of Michigan to promulgate regulations. If the simple problem of raising more funds is held to be a necessary cost, the state's effectiveness in environmental areas will be severely curtailed. Moreover, to the extent that federal funding depends, as it often does, on compliance with federal minimum standards, the state's inability to enforce its laws could result in significant funding losses.

121. 118 Mich. App. 458, 325 N.W.2d 455 (1982).

122. MICH. CONST. art. IX, §§ 25, 29.

123. *Delta*, 118 Mich. App. at 460-61, 325 N.W.2d at 456.

124. *Id.* at 470, 325 N.W.2d at 460.

125. *Id.* at 463, 325 N.W.2d at 457; MICH. CONST. art. IX, § 29.

126. MICH. CONST. art. IX, § 29; Section 29 states:

A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.

Therefore, the court deemed Act 641 to be an additional burden on local governments and therefore not a preexisting constitutional duty.¹²⁷ In addition to finding that Act 641 imposed an increased duty on the municipality,¹²⁸ the court also held that those increased duties created "necessary increased costs"¹²⁹ as found in Section 29.¹³⁰ Therefore, because both components of Section 29 were deemed to be met, the court affirmed the trial court's finding and ordered the DNR to issue a license for the Delta County landfill even though it did not meet the requirements of Act 641.¹³¹

Following the precedent set by the *Delta* court,¹³² the Court of Appeals in another case again affirmed the trial court's decision to enjoin the closure of a publicly owned landfill based on the Headlee Amendment. In *South Haven Township v. Dept. of Natural Resources*,¹³³ South Haven Township's landfill had been operated by the plaintiff for approximately twenty years.¹³⁴ In 1981, the DNR refused to renew South Haven Township's license based on its failure to install a hydrogeological monitoring well¹³⁵ as required by Act 641.¹³⁶ The trial court reversed the DNR's decision to deny the license, and concluded that the DNR had impermissibly demanded compliance in violation of the Headlee Amendment.¹³⁷

As in *Delta*,¹³⁸ the appellate court concluded that Act 641 imposed an "increased activity" within the meaning of Section 29.¹³⁹ Furthermore, the *South Haven* court simply concluded that Act 641 also imposed "necessary increased costs" as to Section 29.¹⁴⁰ These two conclusions led the court to uphold the trial court's order enjoining the DNR from denying South Haven Township its license.¹⁴¹

MICH. CONST. art. IX, § 29.

127. *Delta*, 118 Mich. App. at 463, 325 N.W.2d at 457.

128. *Id.* at 466, 325 N.W.2d at 458.

129. *Id.* at 466, 325 N.W.2d at 459.

130. MICH. CONST. art. IX, § 29.

131. *Delta*, 118 Mich. App. at 470, 325 N.W.2d at 460.

132. *Id.*

133. 132 Mich. App. 222, 346 N.W.2d 923 (1984).

134. *Id.* at 225, 346 N.W.2d at 924.

135. Hydrogeological monitoring wells are wells placed at the perimeter of a landfill from which water samples are periodically drawn. On the basis of those water samples it can be determined whether or not leachate (*see supra* note 13) is seeping into the ground water. By use of monitoring wells, problems with a faulty liner in sanitary landfill (*see supra* note 39) can be corrected before excess seepage has occurred.

136. MICH. COMP. LAWS ANN. § 299.410(2) (West 1984).

137. MICH. CONST. art. IX, § 29.

138. *Delta*, 118 Mich. App. 458, 325 N.W.2d 455 (1982).

139. *South Haven*, 132 Mich. App. at 222, 228, 346 N.W.2d 923, 925 (1984).

140. *Id.* at 229, 346 N.W.2d at 926.

141. *Id.* at 231, 346 N.W.2d at 927.

V. FINANCE ALTERNATIVES NOT BLOCKED BY THE
HEADLEE AMENDMENT

The rationale of the Court of Appeals decision to block enforcement of Act 641¹⁴² is totally erroneous when viewed through the legislature's intent in passing Act 641,¹⁴³ the words and intent of the Headlee amendment,¹⁴⁴ and in light of Michigan's strong policy of protecting the environment.¹⁴⁵ The basis of the analysis begins with Section 29 of the Headlee Amendment. Section 29 states that the legislature cannot reduce the state financed proportion of existing requirements, and cannot impose a new activity or service, or increase the level of an existing activity or service unless the state pays for any necessary increased cost.¹⁴⁶ This provision applies whether the legislature or a state agency imposes the new responsibilities.¹⁴⁷

Section 29 clearly sets forth two requirements that must be met before a municipality can refuse to comply with the new regulation. The first requirement of Section 29 is that the imposition by the legislature or state agency must create a "new activity or service or an increase in the level of any activity or service."¹⁴⁸ The *Delta*¹⁴⁹ court, and subsequently the *South Haven*¹⁵⁰ court, correctly concluded that the enactment of Act 641 imposed an increase in the level of activity in the disposal of solid waste. Act 641 repealed the Garbage and Disposal Act (Act 87).¹⁵¹ Although Act 87 did provide for licensing and regulation of garbage and refuse disposal facilities, the prior Act imposed no mandatory duty upon local units of government as to solid waste management.¹⁵² In contrast, Act 641 imposed a mandatory duty to dispose of the waste,¹⁵³ imposed increased liner requirements,¹⁵⁴ required installation of hydrogeological monitoring wells,¹⁵⁵ and

142. See *supra* notes 121-141 and accompanying text.

143. See *supra* notes 92-102 and accompanying text.

144. See *supra* notes 102-120 and accompanying text.

145. See *supra* notes 62-102 and accompanying text.

146. MICH. CONST. art. IX, § 29. For full text see *supra* note 103.

147. *City of Ann Arbor v. State*, 132 Mich. App. 132, 136, 347 N.W.2d 10, 12 (1984) (because the providing of fire services is not required by state law, the state is not constitutionally required to reimburse municipalities for those services provided to state-owned facilities).

148. MICH. CONST. art. IX, § 29; see *supra* note 98.

149. *Delta*, 118 Mich. App. 458, 325 N.W.2d 455 (1982).

150. *South Haven*, 132 Mich. App. 222, 346 N.W.2d 923 (1984).

151. See *supra* notes 86-92 and accompanying text.

152. *Delta*, 118 Mich. App. at 463, 325 N.W.2d at 457; *South Haven*, 132 Mich. App. at 227, 346 N.W.2d at 925.

153. *Delta*, 118 Mich. App. at 465, 325 N.W.2d at 458.

154. *Id.*

155. *South Haven*, 132 Mich. App. at 228, 346 N.W.2d at 925 (holding that South Haven Township would have to install monitoring wells to comply with Act 641); MICH. COMP. LAWS ANN. § 299.414(2) (West Supp. 1986).

significantly increased the bond requirements.¹⁵⁶ In light of these requirements of Act 641, both the *Delta* and *South Haven* courts were correct in concluding that Act 641 imposed new or increased activities within the meaning of Section 29 of the Headlee amendment.

Although Act 641 did create "an increase in the level of an activity," the court's analysis fails because Act 641 did not increase "necessary costs" as defined by the legislature. The definition used by the legislature to determine "necessary costs" is the cost of a service required by state regulation unless the cost is recoverable from a federal or state categorical aid program or other financial aid.¹⁵⁷ The definition itself does not explicitly refer to the Headlee Amendment, yet several courts, including the *South Haven* court, have adopted this definition for use in the interpretation of the Headlee Amendment.¹⁵⁸

156. *South Haven*, 132 Mich. App. at 228, 346 N.W.2d at 926 (recognizing that Act 641 imposed greater bond requirements); MICH. COMP. LAWS ANN. § 299.419(1)(a) (West 1984).

157. MICH. COMP. LAWS ANN. § 21.233(6) (West 1981). The definition in full states:

(6) "Necessary cost" means the net cost of an activity or service provided by a local unit of government. The net cost shall be the actual cost to the state if the state were to provide the activity or service mandated as a state requirement, unless otherwise determined by the legislature when making a state requirement. Necessary cost does not include the cost of a state requirement if the state requirement satisfied 1 or more of the following conditions:

(a) The state requirement cost does not exceed a de minimus cost.

(b) The state requirement will result in an offsetting savings to an extent that, if the duties of a local unit which existed before the effective date of the state requirement are considered, the requirement will not exceed a de minimus cost.

(c) The state requirement imposes additional duties on a local unit of government which can be performed by that local unit of government at a cost not to exceed a de minimus cost.

(d) The state requirement imposes a cost on a local unit of government that is recoverable from a federal or state categorical aid program, or other external financial aid. A necessary cost excluded by this subdivision shall be excluded only to the extent that it is recoverable.

158. The *South Haven* court stated: "For guidance as to what constitutes increased 'necessary costs' for which the state must provide funds, we refer the parties to this court's recent decision in *Durant v. State of Michigan, on remand*, 129 Mich. App. 517, 342 N.W.2d 591 (1983)." *South Haven*, 132 Mich. App. at 229-30, 346 N.W.2d at 926.

In *Durant*, the court stated that Section 34 provides: "The legislature shall implement the provisions of Sections 25 through 33, inclusive of this article." *Durant*, 342 N.W.2d at 597. The *Durant* court went on to hold that: "The legislature's definition [of necessary costs] is consistent with the focus of the Headlee Amendment and should be adopted by this court." *Durant*, 342 N.W.2d at 597.

The Michigan Supreme Court again addressed this issue in *Durant v. State Board of Education*, 424 Mich. 364, 381 N.W.2d 662 (1985). Although the court affirmed the Court of Appeals' decision to apply the definition of "necessary costs" as defined by the legislature, the court did limit its application. The court refused to apply subsection 21.233(6)(d) in the context of a *reduction* of the amount of categorical aid. *Durant*, 424 Mich. at 384, 381 N.W.2d at 673. The situation in the present case differs in two respects. First, in the present case the issue

Examination of Michigan's definition of "necessary costs" shows that Act 641 does not result in increased "necessary costs," because it falls within the exception of alternative financing.¹⁵⁹ The *Delta* and *South Haven* courts were inaccurate in their analysis because they failed to fully examine the "necessary costs" aspect of Section 29.

Although the *Delta* court recognized that the issue of increased necessary costs should be addressed, it recognized neither the legislature's definition nor its exceptions.¹⁶⁰ The *Delta* court did recognize that compliance with Act 641 would cost approximately \$225,000,¹⁶¹ but that conclusion is not determinative. Essentially, the key issue is determining the *source* of the needed money.¹⁶² The definition of necessary costs only forbids enforcement of the increased activity if the added cost is not recoverable from a federal or state categorical aid program or other external financial aid.¹⁶³ The failure of the *Delta* court to complete the analysis leaves a faulty argument and an inaccurate conclusion that the costs of the solid waste disposal plan were still "necessary" as that term is used in the Headlee amendment.¹⁶⁴

An even more abbreviated approach was used by the *South Haven* court. The court simply made reference to *Durant v. Dept. of Education*.¹⁶⁵ The *Durant* court completely analyzed the term "necessary costs",¹⁶⁶ the

is the state's refusal to *increase* the amount of aid given to a municipality, not the municipality's complaint over a reduction in state aid. Second, the court in *Durant* addressed the question in the case of categorical aid. In contrast, this Note emphasizes the availability of funds from other external financial aid, not categorical aid. Therefore, the court's limitation on the use of the definition does not affect the conclusions of this Note.

The latest case to utilize this definition of "necessary cost" to interpret the Headlee Amendment is *Berrien County v. State*, 136 Mich. App. 772, 357 N.W.2d 764 (1984) (county challenged medicaid reimbursement system implemented by the state which required 90% reimbursement to the state of monies originally paid by the state).

159. MICH. COMP. LAWS ANN. § 21.233(6) (West 1981); see *supra* note 157.

160. The *Delta* court simply concluded that "we find the costs of the solid waste disposal plan 'necessary' as the term is used in the Headlee Amendment." *Delta*, 118 Mich. App. 458, 466, 325 N.W.2d 455, 458 (1982). Although it mentions the issue, the court fails to cite the definition of "necessary cost" or even to analyze briefly the rationale behind its conclusion. Likewise, the *South Haven* court only mentioned the necessary costs aspect of the analysis and merely referred the reader to *Durant*, 129 Mich. App. 517, 342 N.W.2d 591 (1983). *South Haven*, 132 Mich. App. at 229-30, 346 N.W.2d at 926.

161. *Delta*, 118 Mich. App. at 466, 325 N.W.2d at 459.

162. *Berrien County v. State*, 136 Mich. App. 772, 784, 357 N.W.2d 764, 770 (1984) (recognizing that the central issue is whether the "requirement increases the *necessary costs* of an existing requirement") (emphasis original).

163. See *supra* notes 157-58 and accompanying text.

164. *Delta*, 118 Mich. App. at 466, 325 N.W.2d at 459.

165. 129 Mich. App. 517, 342 N.W.2d 591 (1983).

166. *Id.* at 596-598.

South Haven court did not.¹⁶⁷ Furthermore, the *South Haven* court failed to evaluate alternative financing schemes that would have fit the exception to the definition of "necessary costs."¹⁶⁸

Both the *Delta* and *South Haven* courts simply ignored viable financing alternatives that would meet the requirements of Act 641 and the intent of the Headlee Amendment. Inevitably, spending will be increased to upgrade current systems of solid waste disposal.¹⁶⁹ Michigan will never reach the goals of Act 641 and RCRA without utilizing the full financing provisions allowed under the Headlee Amendment.

The intent of Michigan citizens and the Michigan legislature in protecting the state's natural resources may appear to conflict with the operation of the Headlee Amendment, but a full analysis dispels this contention. Alternative financing sources would accomplish the ends of Act 641 by providing the necessary funds. Likewise, alternative sources of money would not contravene the intent of the Headlee Amendment because it would only utilize funding sources that either were allowed prior to the passage of the Headlee Amendment¹⁷⁰ or do not amount to an increase in a tax.¹⁷¹ Therefore, by utilizing the financing alternatives available, both the requirements of Act 641 and the intent of the Headlee Amendment will be met.

The application of the Headlee Amendment to Act 641 is unwarranted because municipalities are able to cover the increased necessary costs through other sources. In that way, municipalities meet the exception of "necessary cost" as defined by the legislature. The rationale behind all of the exceptions relate to a *de minimus* argument.¹⁷² Like the first three exceptions, the fourth is also *de minimus* as to the municipality because the money is being recovered by means not prohibited by the Headlee Amendment.

Several sources of funds are allowed by Headlee. Because these sources of funds are allowed, they should be tapped to meet the cost of constructing a sanitary landfill or of upgrading an existing open dump. If these sources are not utilized, protection of Michigan's land and water will never be accomplished. Rather, the failure to secure available financing will perpetuate

167. *South Haven*, 132 Mich. App. at 229-30, 346 N.W.2d at 926.

168. *Id.*

169. F. GRAD, *supra* note 6, at 4-7.

170. The Headlee Amendment only disallows taxing when the municipality was not empowered to levy that tax prior to the passage of the Headlee Amendment. Therefore, a municipality that was empowered to levy a tax prior to the passage of the Headlee Amendment may still do so even though it had not yet exercised that power. *Bailey v. Muskegon County Bd. of Comm'rs*, 122 Mich. App. 808, 821, 333 N.W.2d 144, 148 (1983) (holding that county hotel accommodations tax does not violate express provisions of Headlee).

171. See *infra* notes 194-96 and accompanying text.

172. MICH. COMP. LAWS ANN. § 21.233(6)(a-d) (West 1981 & Supp. 1986).

a bifurcated regulatory scheme because private landfills must comply with Act 641 whereas public landfills will only comply with Act 87. If allowed, it will once again place control of solid waste in the hands of inexperienced and unmotivated municipalities.

A. Court Order Bond Act

Political subdivisions in Michigan have authority to issue revenue bonds for certain purposes which do not require voter approval under constitutional or statutory provisions. The Headlee Amendment does not block use of these powers so long as the power was granted prior to passage of the Headlee Amendment.¹⁷³ Section 31 of the Headlee Amendment allows the levying of any tax and allows increasing the rate of an existing tax as long as its was authorized by law prior to ratification of the Headlee Amendment.¹⁷⁴ The term “authorized by law” does not require that a tax actually have been levied on the date that the Headlee Amendment became effective.¹⁷⁵ Rather, the term requires that a local government be *empowered* to levy the tax on the date that the Headlee Amendment was ratified, even if the local government had not yet exercised its authority.¹⁷⁶ Therefore, Section 31, by its terms, does not apply to taxes already authorized by law.

When Section 31 was ratified on November 7, 1978, the Court Order Bond Act (COBA) was already authorized.¹⁷⁷ COBA authorizes imposition of unlimited taxes for the payment of debt incurred for reasons of public health.¹⁷⁸ COBA states in pertinent part that: “In accordance with and to the extent authorized by law, when the . . . department of natural resources . . . has ordered the installation . . . of a solid waste facility, . . . the legislative body . . . may issue and sell the necessary bonds for the . . . operation or improvement thereof. . . .”¹⁷⁹ In both *Delta* and *South Haven*, the Department of Natural Resources did order improvement in the operation of a solid waste facility.¹⁸⁰ Under COBA, the municipalities were empowered to raise funds through bonds. Therefore, in both cases the respective municipalities could have met their obligation by utilizing COBA

173. *Bailey v. Muskegon County Bd. of Comm’rs*, 122 Mich. App. 808, 333 N.W.2d 144, 148-49 (1983).

174. MICH. CONST. art. IX, § 31. See *supra* note 103 for full text of § 31.

175. *Bailey v. Muskegon County Bd. of Comm’rs*, 122 Mich. App. 808, 821, 333 N.W.2d 144, 148-49 (1983).

176. *Id.*

177. 1927 Mich. Pub. Act 767.

178. *State of Mich. v. City of Allen Park*, 501 F. Supp. 1007, 1023 (E.D. Mich. 1980) (holding that the City of Allen Park must bear their share of a large drain renovation despite Headlee because Allen Park had many available financing alternatives available).

179. MICH. COMP. LAWS ANN. § 123.247 (West 1967 & Supp. 1986).

180. *Delta*, 118 Mich. App. at 460-61, 325 N.W.2d at 456; *South Haven*, 132 Mich. App. at 224-25, 346 N.W.2d at 924.

to meet the cost of complying with Act 641.

A case analogous to the construction of a solid waste facility was set forth in *State of Mich. v. City of Allen Park*.¹⁸¹ In that case, the City of Allen Park refused to contribute funds to complete the restructuring of several contiguous municipal sewer systems.¹⁸² After construction had begun, Allen Park refused to pay for its respective share of the cost, relying on the Headlee Amendment to block enforcement of any order.¹⁸³ The federal district court found that funding for the project was not precluded by the Headlee Amendment because COBA existed three years prior to the passage of the Headlee Amendment.¹⁸⁴ The court concluded that the Amendment did not prevent Allen Park from financing its assessed portion of the project without public referendum by levying a tax under COBA.¹⁸⁵ The court's conclusion is equally applicable to the construction of a solid waste facility and should be required of municipalities.

COBA applies to "improvement or operation of a sewage system, [or a] solid waste facility. . . ."¹⁸⁶ *Allen Park* was concerned with the construction of a sewage system. *Delta* and *South Haven* were concerned with a solid waste facility. Although COBA encompasses both types of facilities, the result in the cases was totally opposite. *Delta* summarily dismissed use of the COBA and *South Haven* did not even mention its use. A full analysis of the Headlee Amendment, the definition of "necessary cost," the wording of COBA, and the analysis in *Allen Park* clearly shows that the conclusion of *Delta* and *South Haven* is extremely shortsighted. Not only is COBA a viable financing alternative, but there are also other alternatives that could contribute considerable funds to the construction of a solid waste facility and which will not run afoul of the Headlee Amendment.

B. User Fees

The increased cost of operating a sanitary landfill could be met, or partially met, by increasing the user fee. Section 31 of the Headlee Amendment contains a provision which prohibits the imposition of any new or increased tax without voter approval.¹⁸⁷ On November 4, 1980, the Missouri voters passed the Hancock Amendment, a tax expenditure limitation which was modeled after the Headlee Amendment.¹⁸⁸ A strong similarity in word-

181. 501 F. Supp. 1007 (E.D. Mich. 1980).

182. *Id.* at 1008-12.

183. *Id.*

184. *Id.* at 1023.

185. *Id.*

186. MICH. COMP. LAWS ANN. § 123.247 (West 1967 & Supp. 1986).

187. MICH. CONST. art. IX, § 31.

188. MO. CONST. art. X, § 22. For an excellent analysis of Missouri's tax and expenditure limitation see Robertson & Kincheloe, *Missouri's Tax Limitation Amendment: Ad Astra*

ing and intent exists between the two tax and expenditure limitations (TEs). Michigan's experience with the Headlee Amendment has demonstrated what Missourians may expect from the Hancock Amendment. Also, just as the Michigan court's interpretation of the Headlee Amendment is useful in analyzing the scope and intent of Missouri's provision, so will the growing body of case law on Missouri's provision aid interpretation of Michigan's TEL.

Like the Headlee Amendment, the Missouri TEL limits the ability of legislatures at the state and local level to increase taxes without voter approval.¹⁸⁹ A provision similar to Section 31 of the Headlee Amendment is used in Missouri's TEL.¹⁹⁰ However, in Missouri's TEL the same prohibition has been expanded to include "taxes, licenses and fees."¹⁹¹ A logical purpose of this modification would be to expand the coverage of the provision to all new or increased municipal charges. However, following Missouri's expansion to include licenses and fees, it is logical to conclude that Michigan's provision limits its coverage to only increased taxes. On similar grounds, this conclusion shows why Missouri's legislature modified its provision to include licenses and fees in addition to taxes. Therefore, an increase in a user fee would not be considered a "tax" within the meaning of the Headlee Amendment.

A further substantiation of this theory is derived from Missouri's Drafter's Notes. The Drafter's Notes stated that it was not the intent of the drafting committee to include user fees in the words "taxes, licenses or fees."¹⁹² They went further to specifically exclude the charge for collection of garbage which includes the cost of disposal into a sanitary landfill. Because the intent of the Missouri drafters was to limit their TEL to only taxes despite the use of the words "taxes, licenses and fees," and because Missouri's TEL was modeled after the Headlee amendment, it is reasonable to conclude that Michigan's use of the word "tax" would also be limited to only taxes, not user fees.

Per Aspera 52 U.M.K.C. L. REV. 1 (1983); Thomas, *The Hancock Amendment: The Limits Imposed on Local Governments* 52 U.M.K.C. L. REV. 22 (1983); Thomas, *Recent Developments in Missouri: Local Government Taxation* 49 U.M.K.C. L. REV. 491 (1981).

189. MO. CONST. art. X, § 22 (1970 & Supp. 1986).

190. *Id.*

191. *Id.*

192. See generally Thomas, *Recent Developments in Missouri: Local Government Taxation* 49 U.M.K.C. L. REV. 491, 495-505. Although the Tax Notes explicitly stated that the amendment did not include user fees, later Missouri case law rejected that argument. *Roberts v. McNary*, 636 S.W.2d 332 (Mo. 1982) (action to prevent the county from increasing fees charged for use of parks and building inspections).

Although Missouri has expanded the reach of their TEL, it is doubtful whether Michigan would expand the Headlee Amendment to include licenses and fees when Headlee explicitly limits its reach to "taxes."

Increasing user fees is an example of an alternative financing source for a municipality. Increasing the user fee would offset a considerable amount of the cost, make the fee structure more economically realistic, and would accomplish the ends of Act 641 without infringing on the stricture of Michigan's Headlee Amendment. In this way both the legislature's intent to improve the environment and the citizen's intent to limit taxes would be met.¹⁹³

C. *Special Assessments*

An additional alternative finance source that may be utilized to meet the cost of constructing environmentally sound landfills is the special assessment.¹⁹⁴ A charge imposed only on property owners benefitted by the assessment has been held to be a special assessment and not a tax.¹⁹⁵ Property owners in the area serviced by a solid waste facility are clearly benefitted by proper solid waste disposal. Even if a property owner does not dispose of his refuse in the landfill, protection of the ground water as well as prevention of aesthetic blight amounts to a benefit. A special assessment levied against only those property owners benefitted is not a tax, and therefore is not limited by the Headlee Amendment.

Even if a special assessment would be deemed a tax, the power to levy that tax may have existed prior to the passage of the Headlee Amendment. Therefore, the municipality would have the power to levy that tax, again avoiding any conflict with the Headlee Amendment.¹⁹⁶ Through either of these two avenues, a municipality could meet the cost of providing landfill services that meet the requirements of Act 641 without conflicting with the limitations imposed by the Headlee amendment.

D. *Franchising*

The concept of establishing a solid waste management system as a

193. In the context of refuse disposal, a user fee is commonly referred to as a dump fee. The dump fee is paid for the privilege of using a landfill and may represent all or a significant portion of the cost of such facility. H.R. REP. NO. 1491, *supra* note 8, at 6344.

As to private operations, the dump fee is the exclusive source of revenue to cover the cost of the capital investment, day-to-day operations, profit, closure and post-closure fees. Interview with George R. Slater (Oct. 31, 1985) (George Slater has been actively involved in the refuse business for thirteen years. In addition to owning and operating four separate collection services through that time, he was the sole developer and owner of the Orchard Hills Landfill, Watervliet, Michigan, from its inception in 1978 to its sale in 1981).

194. 1979 Op. Att'y Gen. No. 5562.

195. *Blake v. Metropolitan Chain Stores*, 247 Mich. 73, 225 N.W. 587 (1939) (holding that special assessment against property for expense of narrowing sidewalk as a necessary public improvement not a tax).

196. *See supra* notes 167-170 and accompanying text.

public utility would eradicate many of the problems associated with public control of such facilities.¹⁹⁷ Collection and disposal operations could be done by private firms under a contract or franchise agreement.¹⁹⁸ This would replace the public operation with a private operation, yet would allow public control over the service. Also, financing would, of necessity, come from a system of user fees.¹⁹⁹ Because the financing of the operation would no longer be under direct public control, neither Section 29 nor Section 31 of the Headlee Amendment would intervene to block enforcement of Act 641 against the operation.²⁰⁰ Also, the intent of the Headlee Amendment would be met because no tax would be increased in order to pay for the operation.

One current constitutional drawback to franchising is Article 7, Section 25 of the Michigan Constitution which does not allow a city or village to grant a nonrevocable public utility franchise unless approved by three-fifths of the voters.²⁰¹ However, if the legislature presents the community with a choice of increasing taxes or granting a franchise, it is likely that the community would grant the franchise. Franchising is another source of alternative financing to meet the requirements Act 641 and to meet the exception of "necessary cost." Hence, franchising is another valid means of meeting the requirements of Michigan's tax and expenditure limitation.

VI. CONCLUSION

Michigan has a long way to go, as does the rest of the nation, before the objectives of RCRA and Act 641 are met. The development of sanitary landfills, the expansion of alternative methods of disposal, and the re-conditioning of public attitudes will aid in solving the solid waste disposal problem. But unless the constitutional provisions of the Headlee Amendment are stopped from blocking the much needed upgrading of Michigan's disposal facilities, all efforts will have only a minimal impact on the problem.

Aside from the fiscal constraints of the Headlee Amendment, the existing statutory scheme in Michigan presents a good foundation from which to build sound solid waste management systems. Requiring municipalities to exploit all possible financing avenues to develop proper disposal facilities will further solidify and strengthen this foundation. If these requirements are imposed, Michigan can take a place in the front ranks of those states

197. Capitol Consultants, Inc., *Solid Waste Management Plan for Michigan* at 78 (1972).

198. *Id.*

199. *See supra* note 193 and accompanying text.

200. MICH. CONST. art. IX, §§ 29, 31. For complete text *see supra* note 103.

201. MICH. CONST. art. VII, § 25.

which can be characterized as true guardians of our health and environment.

STEVEN G. SLATER

