

January 1999

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Recommended Citation

Christine LaRocca, *New Jersey's Solid Waste Flow Control Regulations Have Been Trashed: Are Environmental Investment Charges the Answer?*, 17 Pace Envtl. L. Rev. 123 (1999)

DOI: <https://doi.org/10.58948/0738-6206.1280>

Available at: <https://digitalcommons.pace.edu/pelr/vol17/iss1/5>

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COMMENTS

New Jersey's Solid Waste Flow Control Regulations Have Been Trashed: Are Environmental Investment Charges the Answer?

CHRISTINE LARocca*

I. Introduction

Americans generate an ever-increasing amount of municipal solid waste.¹ One has only to visit any supermarket chain and purchase a foil-lined drink box "decorated with a plastic-wrapped straw, and shrink-wrapped in plastic"² to understand the nature of the municipal solid waste management challenge that faces the nation. The United States Environmental Protection Agency (USEPA) reports that Americans produced 88 million tons of municipal solid waste in 1960.³ By the year 2000, USEPA predicts that Americans will generate 222 million tons of municipal solid

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1. See N.J. STAT. ANN. § 13:1E-3.b (West 1994). Solid waste is defined as: garbage, refuse, and other discarded materials resulting from industrial, commercial and agricultural operations, and from domestic and community activities, and shall include all other waste materials including liquids, except for solid animal and vegetable wastes collected by swine producers licensed by the State Department of Agriculture to collect, prepare and feed such wastes to swine on their own farms.

Id.

2. U. S. ENVTL. PROTECTION AGENCY, REPORTING ON MUNICIPAL SOLID WASTE: A LOCAL ISSUE, EPA 530-K-93-002, at 1 (Mar. 1995).

3. See *id.*

waste per year.⁴ This increasing production of municipal solid waste poses an environmental, economic, and technical challenge throughout the United States, but especially in the densely populated northeastern states.⁵

During the 1960s and early 1970s, much of the municipal solid waste generated in the United States was disposed of in open dumps or was incinerated in uncontrolled burners.⁶ In New Jersey, public concern over the health impacts of improper municipal solid waste disposal, coupled with a shortage of available landfill space, caused the state to declare a solid waste disposal crisis.⁷ Projections made by the New Jersey Department of Environmental Protection (NJDEP) in the early 1970s indicated that available landfill space would be fully depleted by 1982.⁸ The fact that many landfills had been sited within ecologically sensitive areas, such as wetlands, caused additional concern over the disposal of municipal solid waste in New Jersey.⁹

As a result of this perceived solid waste disposal crisis, New Jersey passed the Solid Waste Management Act¹⁰ (SWMA) and the Solid Waste Utility Control Act,¹¹ (SWUCA) which established a complex and comprehensive program for regulating the treatment and disposal of solid waste. The SWMA established twenty-two solid waste management districts throughout the state.¹² Each district was delegated the responsibility for developing a "District Solid Waste Management Plan" for the disposal of municipal solid waste generated within the respective district.¹³ New Jersey's solid waste management program relied on a system of

4. *See id.* at 14.

5. *See id.* at 2.

6. *See* U. S. ENVTL. PROTECTION AGENCY, CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1997 UPDATE, EPA 530-R-98-007, at 118 (May 1998).

7. *See* Southern Ocean Landfill, Inc. v. Mayor of Ocean, 314 A.2d 65, 66 (N.J. 1974).

8. *See* Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 348 A.2d 505, 516 (N.J. 1975).

9. *See id.*

10. Solid Waste Management Act, N.J. STAT. ANN. §§ 13:1E-1-13:E-207 (West 1994).

11. Solid Waste Utility Control Act, N.J. STAT. ANN. §§ 48:13A1-48:13A-16 (West 1994).

12. *See id.* N.J. STAT. ANN. § 13:1E-19 (West 1994). The statute provides that "every county in the State of New Jersey and the Hackensack Meadowlands District is hereby designated a solid waste management district." *Id.*

13. *See id.* § 13:1E-20.

flow controls¹⁴ to manage the disposal of solid waste in the state.¹⁵ The SWMA allowed the districts to delegate the responsibility for managing solid waste to other entities, including municipal utilities authorities, county improvement authorities, and pollution control financing facilities.¹⁶ New Jersey's statutory solid waste management program resulted in the construction and operation of numerous solid waste management facilities, including sanitary landfills and transfer stations.¹⁷ Five districts invested in state-of-the-art energy recovery incinerators,¹⁸ designed to recover energy from the burning of municipal solid waste. These new solid waste management facilities, constructed in conformance with the state's legislative mandate, were funded in most cases with public bonds.¹⁹ The districts relied on the revenues generated through the flow control system to recover the debt incurred in the construction of the facilities.²⁰

Flow control of solid waste remained in place in New Jersey until May 1997, at which time the Third Circuit Court of Appeals held that New Jersey's waste disposal regulations discriminated against out-of-state facilities in violation of the Commerce Clause of the United States Constitution,²¹ and were therefore illegal.²² The districts are now faced with the immediate challenge of devel-

14. See U. S. ENVTL. PROTECTION AGENCY, REPORT TO CONGRESS ON FLOW CONTROL AND MUNICIPAL SOLID WASTE, EPA 530-R-95-008, at I-1, I-3-4 (Mar. 1995). Flow controls are legal authorities that allow state and local governments to mandate where municipal solid waste must be taken for processing, treatment, or disposal. These processing, treatment and disposal facilities may include, but are not limited to, landfills, transfer stations, and resource recovery facilities. Flow control laws allow designated management facilities to establish a monopoly on municipal solid waste. This monopoly is used by state and local governments to finance the construction of new waste management facilities, such as transfer stations and incinerators, which are typically financed through the sale of public bonds. State and local governments also find flow controls useful to finance the cost of other local solid waste management programs, such as curbside recycling, household hazardous waste collection, and public education, that do not lend themselves to the collection of revenues in the same manner as disposal of waste at a landfill or transfer station. Flow controls have been used to support these other waste management services through the revenues generated by tipping fees, which can be set at rates higher than prevailing market prices due to the monopoly provided by flow control laws. See *id.*

15. See N.J. STAT. ANN. § 13:1E-2.c (West 1994).

16. See *id.* at § 13:1E-2.b(1), (2) (West 1994).

17. See *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 931 F. Supp. 341, 347 (D.N.J. 1996).

18. See *id.* at 346.

19. See *id.*

20. See *id.* at 348.

21. U.S. CONST. art. I, § 8. "The Congress shall have Power . . . to regulate Commerce . . . among the several States." *Id.*

oping nondiscriminatory alternatives to flow control, while still recouping the outstanding debt on solid waste treatment and disposal facilities that is estimated at \$1.6 billion dollars state-wide.²³ Without flow control, the tipping fees²⁴ at current disposal facilities have plunged to competitive levels, but these new levels cannot pay for the hidden costs associated with solid waste disposal that resulted in inflated fees in the first place, most notably debt service.²⁵ Since the New Jersey State Legislature has failed to enact any legislation to answer this challenge, the burden has fallen squarely on the shoulders of the districts.

The NJDEP issued a guidance document in 1997 to assist the districts in conforming to a post-flow control environment.²⁶ The guidance document suggested the assessment of an Environmental Investment Charge (EIC)²⁷ as one of the options available to local agencies to compete with private solid waste operators.²⁸ The guidance document stated that an EIC could be utilized to recoup debt service, as well as host community benefits, state taxes, system-wide rate components, and other ancillary charges, thereby eliminating these charges from facility tipping fees.²⁹ However, the municipalities that are required to pay the EIC charges view them as illegal taxes and filed challenges to the EIC assessments.³⁰

22. See *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 112 F.3d 652, 667 (3d Cir. 1997), *cert. denied sub nom. Essex County Utils. Auth. v. Atlantic Coast Demolition & Recycling, Inc.*, 118 S. Ct. 412 (1997).

23. See John Rooney, Editorial, *Solving the Trash Mess: The \$1.6 Billion Debt Must be Shouldered Fairly*, THE RECORD (Northern New Jersey) July 23, 1998, available in 1998 WL 5816067.

24. See REPORTING ON MUNICIPAL SOLID WASTE, *supra* note 2. Tipping fees are defined as "the amount the operator charges for each ton of waste delivered to the facility." *Id.*

25. See James Ahearn, *A Garbage Monopoly Collapses*, THE RECORD (Northern New Jersey) Dec. 7, 1997, available in 1997 WL 691589.

26. N.J. Dep't of Env'tl. Protection, GUIDANCE DOCUMENT IN RESPONSE TO THE MAY 1, 1997 COURT DECISION ON SOLID WASTE FLOW CONTROL (Aug. 1997) [hereinafter GUIDANCE DOCUMENT].

27. EIC is defined as "a charge designed to generate funds to assure payment of debt incurred by utility authorities to fund local implementation of state solid waste management policies." *In re Passaic County Utils. Auth. Petition*, 728 A.2d 323, 326 (N.J. Super. Ct. App. Div. 1999).

28. See GUIDANCE DOCUMENT, *supra* note 26, at 12.

29. See *id.*

30. See Elizabeth Moore, *Paterson Sues Utilities Agency to Stop Garbage Surcharge*, THE STAR-LEDGER (Newark, N.J.), Jan. 8, 1998, available in 1998 WL 3382353; see Barbara Fitzgerald, *Carters Challenge New County Fees File Suit*

This article reviews the theory behind the challenges to the EIC assessments and discusses the legality of the EICs. Part I introduces the context in which the issue of assessing EICs arose in New Jersey. Part II describes the legislative history of New Jersey's solid waste management program, and briefly reviews the legal challenges that resulted in the demise of New Jersey's flow control system. Part III discusses the challenges to the EICs that were filed in Atlantic and Passaic counties, and the response handed down by the Appellate Division in May 1999. Part IV explores the reasoning behind the decision, and analyzes the reasons why the courts should have declared the EICs an illegal tax, despite the dire economic straits faced by many of the counties in New Jersey. This section also reviews the enabling legislation under which the municipal utilities authorities were organized and finds that the state legislature did not grant the authorities the ability to levy an EIC. Therefore, the EIC assessments constitute an illegal tax under current New Jersey law and should have been declared such by the courts.

II. Background and History

A. Legislative History

New Jersey adopted the SWMA in 1970 to "establish a statutory framework within which all solid waste collection, disposal and utilization activity" in New Jersey could be coordinated.³¹ The intent was to prevent piecemeal reaction to local solid waste management issues, and promote coordinated regional planning.³² To implement this legislation, the state directed the NJDEP to develop extensive regulations governing solid waste collection and disposal.³³ The SWMA also established twenty-two solid waste management districts comprised of the twenty-one counties in New Jersey and the Hackensack Meadowlands Development Commission.³⁴ Each of the solid waste management districts was required to develop a "District Solid Waste Management Plan" to define existing solid waste management practices and to develop future solid waste management solutions

Against Debt-Ridden Agencies, THE RECORD (Northern New Jersey), Apr. 22, 1998, available in 1998 WL 5803761.

31. See N.J. STAT. ANN. § 13:1E-2.b(1) (West 1994).

32. See *id.* § 13:1E-2.a.

33. See N.J. ADMIN. CODE Solid Waste Planning Regulations 6, §§ 7:26-1.1-7:26-17.26 (1998).

34. See N.J. STAT. ANN. § 13:1E-19 (West 1994).

for all waste generated by the municipalities within the respective district.³⁵ The SWMA also required that the NJDEP develop a Statewide Solid Waste Management Plan designed to promote resource recovery and establish objectives, criteria, and standards for the formulation of the district plans.³⁶ Each solid waste management district was required to submit its plan to the NJDEP for review and approval prior to implementation.³⁷

Each district's solid waste management plan mandated the disposal locations for solid waste generated in that district.³⁸ Although ideally each district was to provide for appropriate treatment and disposal of solid waste within the district, the NJDEP did allow for interdistrict solutions if new facilities could not be sited within a district.³⁹ Most districts created a separate governmental authority with the power to acquire, construct, operate, or contract for solid waste disposal services within the district. Among the twenty-two solid waste management districts in New Jersey, the power to control solid waste disposal has been delegated to eleven utilities authorities, four improvement authorities, and two pollution control financing authorities, with four counties and the Hackensack Meadowlands Development Commission retaining direct control.⁴⁰ This system resulted in the construction of five municipal solid waste incinerators in Camden, Essex, Gloucester, Union, and Warren counties for a total cost of almost \$1 billion dollars, all funded with public bonds.⁴¹ Other counties constructed solid waste transfer stations and landfills, resulting in

35. *See id.* § 13:1E-20, 21.

36. *See id.* § 13:1E-6.

37. *See id.* § 13:1E-24.

38. *See id.* § 13:1E-21(b)(3).

39. *See* N.J. ADMIN. CODE Solid Waste Planning Regulations 6, § 7:26-6.10 (1998).

40. *See* N.J. Dep't of Env'tl. Protection, *Solid Waste Management Officials* (visited January 6, 1999) <<http://www.state.nj.us/dep/dshw/swr/fees.htm>>. The eleven utilities authorities are: Atlantic County Utilities Authority, Bergen County Utilities Authority, Cape May County Municipal Utilities Authority, Essex County Utilities Authority, Hunterdon County Utilities Authority, Middlesex County Utilities Authority, Morris County Municipal Utilities Authority, Passaic County Utilities Authority, Salem County Utilities Authority, Sussex County Utilities Authority, and Union County Utilities Authority. The four improvement authorities are Cumberland County Improvement Authority, Gloucester County Improvement Authority, Hudson County Improvement Authority, and Mercer County Improvement Authority. The two pollution control financing authorities are Camden County Pollution Control Financing Authority and Warren County Pollution Control Financing Authority. Burlington, Monmouth, Ocean, and Somerset Counties retain direct control of solid waste management within the county. The Hackensack Meadowlands Development Commission is also designated as a solid waste management district. *See id.*

41. *See* Ahearn, *supra* note 25.

a total outstanding solid waste debt of approximately \$1.6 billion dollars.⁴² These solid waste treatment and disposal facilities were financed with fifty-three separate bonds issued by the local authorities and counties prior to 1995.⁴³ Flow control of solid waste was relied on to provide the revenue for these facilities and to recover the debt incurred to construct them.⁴⁴ The system has been characterized as monopolistic, and many critics argued that the county-run facilities inflated their trash disposal fees to cover the costs of inefficient operations.⁴⁵ The loudest critics accused the agencies of running grossly overstaffed and overpriced political patronage mills, resulting in the highest trash disposal costs in the nation.⁴⁶

However, defenders of flow control argue that it enables local governments to expand waste management services to include programs such as curbside recycling, household hazardous waste collection, and public education.⁴⁷ A local community implementing flow control can pay for these ancillary services through the tipping fees at solid waste disposal facilities, which, in a flow control regulatory environment, can exceed market prices.⁴⁸ In addition, there is a valid concern that without flow control, market factors would result in the disposal of municipal solid waste at the cheapest facilities, not necessarily the most environmentally sound.⁴⁹ Since improper disposal of solid waste can have grave environmental consequences, including groundwater and surface water contamination, proponents of flow control argue that it is prudent to allow local governments to steer solid waste away from poorly managed sites, and into safely constructed disposal facilities.⁵⁰

42. See Rooney, *supra* note 23.

43. See *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County*, 931 F. Supp. 341, 348 (D.N.J. 1996).

44. See *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County*, 112 F.3d 652, 665 (3d Cir. 1997), *cert. denied sub nom. Essex County Utils. Auth. v. Atl. Coast Demolition & Recycling, Inc.*, 118 S.Ct. 412 (1997).

45. See Tom Johnson, *Jersey Loses Appeal to Retain Trash Rules: Haulers Cannot be Forced to Use County Sites*, THE STAR-LEDGER (Newark, N.J.), May 2, 1997; see Ahearn, *supra* note 25.

46. See Bret Schundler, Editorial, *The Last Thing New Jersey Needs is a New Trash Tax*, THE RECORD (Northern New Jersey), Aug. 27, 1998.

47. See U. S. ENVTL. PROTECTION AGENCY, REPORT TO CONGRESS ON FLOW CONTROL AND MUNICIPAL SOLID WASTE, EPA 530-R-95-008 at ES-2 (Mar. 1995).

48. See *id.*

49. See *id.* at I-A-39.

50. See *id.*

The response is that flow control is an economic scheme, not an environmental one. It is important to consider that eighty percent of the municipal solid waste generated in the United States is disposed of in landfills and incinerators.⁵¹ These types of disposal facilities are controlled by comprehensive state and federal regulations.⁵² The regulatory requirements are administered through permitting and compliance programs that afford a level of protection deemed adequate to protect human health and the environment.⁵³ As stated in its *Report to Congress on Flow Control and Municipal Solid Waste*,⁵⁴ USEPA found that "[t]here is no evidence that flow control either positively or negatively impacts the statutorily assured level of environmental protection, because the underlying regulatory requirements are controlling."⁵⁵

B. Challenges to Flow Control

In 1994, the United States Supreme Court declared that a local ordinance in the town of Clarkstown, New York that directed all solid waste generated by a municipality to a designated processing facility discriminated against interstate commerce on its face and was therefore invalid.⁵⁶ The Court stated, "[s]tate and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities."⁵⁷ This decision removed the constitutional foundation of New Jersey's solid waste management system. While NJDEP chose not to dismantle its solid waste management scheme without a direct court review of its own regulations, it was not long before the State of New Jersey was presented with this opportunity.

In 1995, the Third Circuit Court of Appeals ruled in *Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*⁵⁸ that New Jersey's flow control system discriminated against interstate commerce and was therefore uncon-

51. See *id.* at II-5.

52. See U. S. ENVTL. PROTECTION AGENCY, REPORT TO CONGRESS ON FLOW CONTROL AND MUNICIPAL SOLID WASTE, EPA 530-R-95-008 at II-6 (Mar. 1995).

53. See *id.*

54. U. S. ENVTL. PROTECTION AGENCY, REPORT TO CONGRESS ON FLOW CONTROL AND MUNICIPAL SOLID WASTE, EPA 530-R-95-008 (Mar. 1995).

55. *Id.* at II-6.

56. See *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

57. *Id.* at 393.

58. *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County*, 48 F.3d 701 (3d Cir. 1995).

stitutional, unless, on remand, the State could demonstrate that it served a valid public purpose that could not be achieved by other means.⁵⁹ Subsequently, in 1996, after hearing additional arguments from the litigants, the District Court held that New Jersey's flow control system was unconstitutional to the extent that it discriminated against interstate commerce.⁶⁰ In order to allow New Jersey to develop constitutional alternatives to replace the flow control system, the court issued a stay of two years following all rights of appeal from enforcing a permanent injunction against the flow control regulations.⁶¹

On appeal, the Court of Appeals for the Third Circuit affirmed that New Jersey's flow control regulations were unconstitutional.⁶² Furthermore, the two-year stay of the injunction ordered by the District Court was lifted.⁶³ All appeals to the lifting of the injunction were exhausted as of November 10, 1997, the date that the United States Supreme Court denied certiorari to the petitioners.⁶⁴ On December 1, 1997, NJDEP adopted amendments to the solid waste planning regulations to bring the existing flow control system into compliance with the decision rendered by the Third Circuit.⁶⁵ Thus ended New Jersey's solid waste flow control system.

As a result of the deregulation of the solid waste industry in New Jersey, generators of solid waste are now permitted to dispose of their waste at whatever facility they choose. Within two days of the United States Supreme Court's decision not to grant certiorari, solid waste disposal fees in New Jersey fell by thirty-five to forty percent.⁶⁶ By January 1999, tipping fees at virtually all of the county operated facilities in New Jersey dropped considerably.⁶⁷ County facilities slashed their prices presumably to re-

59. *See id.*

60. *See* Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County, 931 F. Supp. 341 (D.N.J. 1996).

61. *See id.*

62. *See* Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County, 112 F.3d 652 (3d Cir. 1997), *cert. denied sub nom.* Essex County Utils. Auth. v. Atl. Coast Demolition & Recycling, Inc., 118 S.Ct. 412 (1997).

63. *See id.*

64. *See id.*

65. *See* 29 N.J. Reg. 5084(a) (1997).

66. *See* Ahearn, *supra* note 25.

67. *See* N.J. Dep't of Env'tl. Protection, 1999 *New Jersey Facility Tipping Fees* (last modified Jan. 6, 1999) <<http://www.state.nj.us/dep/dshw/swr/fees.htm>>.

The following table compares the fees charged at each county-operated facility before and after the end of flow control:

main competitive with private haulers. However, questions concerning the financial viability of the county facilities caused Moody's Investors Service, Inc.⁶⁸ (Moody's) to downgrade the bond rating of five solid waste facilities in New Jersey.⁶⁹ Moody's determined that "a scenario in which flow control is eliminated and these enterprises must face market competition could very well result in their demise, with attendant debt service defaults and potential bankruptcy filings."⁷⁰

The Third Circuit considered the financial crisis facing the solid waste facilities in New Jersey, as noted in the following language:

| County Facility | Rate on 11/12/97 (cost per ton) | Rate on 1/6/99 (cost per ton) |
|---|------------------------------------|----------------------------------|
| Atlantic County U.A.*—Transfer Station | \$120.42 | \$47.00 |
| Bergen County U.A.—Transfer Station | \$101.88 | \$54.00 |
| Burlington County—Landfill | \$49.50 | \$50.50 |
| Camden P.C.F.A.**—R.R.F.*** | \$93.21 | \$50.00 |
| Cape May County U.A.—Landfill, Transfer Station | \$92.75 | \$76.48 |
| Cumberland County—Landfill | \$60.37 | \$60.47 |
| Essex County U.A./American Refuel—R.R.F. | \$72.75 | \$50.00 |
| Gloucester County I.A.—R.R.F. | \$101.32 | \$59.75 |
| Hudson County I.A.—Landfill | \$63.27 | \$59.67 |
| Hunterdon County U.A.—Transfer Station | \$93.50 | \$57.00 |
| Mercer County I.A.—Transfer Station | \$117.81 | \$98.25 |
| Middlesex County U.A.—Landfill | \$55.42 | \$51.00 |
| Monmouth County—Landfill | \$75.10 | \$55.20 |
| Morris County U.A.—Transfer Station | \$88.40 | \$83.40 |
| Ocean County—Landfill | \$63.17 | \$55.05 |
| Passaic County U.A.—R.R.F. (Essex) | \$104.74 | \$49.25 |
| Salem County U.A.—Landfill | \$64.00 | \$63.88 |
| Somerset County—Transfer Station | \$132.93 | \$72.85 |
| Sussex County U.A.—Landfill | \$108.55 | \$58.00 |
| Union County U.A.—R.R.F. | \$83.05 | \$49.50 |
| Warren P.C.F.A.—R.R.F. | \$100.26 | \$48.00 |

* U.A. – Utilities Authority

** P.C.F.A. – Pollution Control Financing Authority

*** R.R.F. – Resource Recovery Facility

See *id.*

68. Moody's Investors Service, *About Moody's* (last visited Jan. 17, 1999) <<http://www.moody.com/moodys/mdyindex.htm>>. Moody's Investors Service uses a AAA (highest rating) through C (lowest rating) system of rating to evaluate the investment potential of municipal bonds. See *id.*

69. See Martha M. Canan, *Moody's Drops Five New Jersey Waste Ratings to Junk Designation After Court Ruling*, 311 THE BOND BUYER 29591 (Feb. 21, 1995), at Vol 311, No. 29591.

70. *Id.*

The . . . elimination of flow control laws will force local waste disposal authorities to compete with out-of-state firms. Competition, in turn, will preclude local facilities from charging inflated tipping fees. Consequently, local facilities constructed with bond money will attract lower volumes of waste and will lose operating revenue, reducing their ability to pay off their debt to the bondholders. Debt issues will risk default, and local waste disposal facilities will incur operating deficits. Finally, default on the solid waste disposal facilities will affect the health of debt instruments issued by other government entities in New Jersey.⁷¹

While accepting this characterization of New Jersey's dire financial condition, the court held that the state failed to demonstrate why the current flow control system was the only viable means of ensuring the financial integrity of its solid waste management districts.⁷² The court would not permit New Jersey to continue to discriminate against out-of-state industry simply to raise funds to service waste management debt.⁷³ Sympathy towards New Jersey's plight was not permitted to cloud reason.⁷⁴

C. The State Response

In anticipation of a final judgment in the *Atlantic Coast* case, Assembly Bill No. 50 was introduced in the New Jersey State Assembly in 1996 to address unrecoverable debt costs.⁷⁵ The proposed law, entitled the "Solid Waste Management and Environmental Investment Cost Recovery Act," introduced the term "environmental investment charge" and defined the costs that could be recovered as "any expenses of a public authority or county related to . . . the planning, acquisition or construction of solid waste facilities, including debt service on bonds . . . to finance solid waste facilities, including abandoned or canceled solid waste facility projects"⁷⁶ New Jersey municipalities have harshly

71. *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. County*, 112 F.3d 652, 664 (3d Cir. 1997), *cert. denied sub nom. Essex County Utils. Auth. v. Atl. Coast Demolition & Recycling, Inc.*, 118 S.Ct. 412 (1997).

72. *See id.* at 665.

73. *See id.*

74. *See id.*

75. *See* A. 50, 207th Legis. Sess. 1 (N.J. 1996).

76. *Id.* The legislation was summarized in the Committee Statement as follows: In response to the May 1, 1997 *Atlantic Coast* decision . . . the Assembly Committee Substitute for Assembly Bill No. 50 would revise the solid waste management statutes and provide a mechanism for the recovery of the environmental investment costs incurred by the public authorities

criticized EIC proposals because the charges would be assessed based on the tonnage these towns generated historically, regardless of whether the municipality continued to utilize the county facility.⁷⁷ A municipality has no method to generate the revenue to pay for an EIC assessment except raising property taxes, which is an unpleasant prospect for any municipal government. Ultimately, this law was not passed,⁷⁸ but the New Jersey State Legislature is considering other proposals.⁷⁹

Senator McNamara sponsored a bill introduced on May 18, 1998 that would create a State Solid Waste Facility Debt Retirement Fund.⁸⁰ This fund would be used to pay the debt service on county facilities that cannot compete in a post-flow control environment with private solid waste operators.⁸¹ Funding for this program would be generated by a three percent tax on the gross revenues of all solid waste operators in the state.⁸² This method of assisting the debt-ridden county facilities is arguably fairer than an EIC because it distributes the tax burden more evenly throughout the state. Despite the urging of proponents of the bill that the state should "accept its moral obligation and pay for the stranded debt incurred by the counties at the state's direction,"⁸³ the bill has not made it out of committee.⁸⁴

and counties in implementing State-mandated district solid waste management plans. The bill would make numerous changes to existing law so that the statutes conform to the new solid waste management system established under the bill The bill authorizes every public authority and county to establish and implement a system to calculate, charge and collect environmental investment charges (EICs) as may be necessary to recover the environmental costs incurred by the public authority or county. . . . EICs may be collected by a public authority or county that has assumed responsibility for the collection of EICs, as follows: (1) as a portion of the tipping fee charged to users for solid waste disposal at the district solid waste facility; (2) as a separate bill to all previous users of the district solid waste facility; (3) as a separate bill to the constituent municipality or county for inclusion as an item in the municipal budget or the county budget, or any combination thereof, for the payment of environmental investment costs; or (4) in any other manner reasonably established by the public authority or county.

Id.

77. See Schundler, *supra* note 46.

78. See Rooney, *supra* note 23.

79. See Schundler, *supra* note 46.

80. See S. 1056, 208th Leg. Sess. (N.J. 1998).

81. See *id.*

82. See *id.*

83. Rooney, *supra* note 23.

84. See *id.*

The New Jersey Legislature has offered limited relief to the counties by appropriating \$20 million dollars in the 1998 state budget to subsidize county or county authority debt service payments for environmental investments incurred as of June 30, 1997.⁸⁵ The appropriation is intended to provide short-term financial assistance to entities that face significant stranded investment debt. To receive funds, the county or county authority must submit to an audit performed by the State Treasurer, and must implement the auditor's recommendations.⁸⁶ The audit is intended to insure that all available cost savings measures have been taken prior to receiving funds.⁸⁷ However, these funds are limited and are unlikely to offer significant relief to counties.

The concept was expanded in a statewide ballot proposal that was presented to New Jersey voters in November 1998.⁸⁸ Voters approved a proposal to forgive a debt to the state of \$160 million dollars that was advanced to Camden, Essex, Gloucester, Union, and Warren Counties for the construction of incinerators, and to Atlantic and Burlington Counties for the building of landfills and recycling facilities.⁸⁹ The proposal is only a small step towards solving the problem of New Jersey's debt-ridden agencies, as it leaves the counties to deal with a remaining debt of more than \$1 billion dollars.⁹⁰

III. Environmental Investment Charges

A. Description of Environmental Investment Charge Proposals

NJDEP has asked each of the solid waste management districts to submit solid waste management plan amendments to conform to the *Atlantic Coast* decision.⁹¹ The plan amendments must "define their revised solid waste disposal strategy in light of *Atlantic Coast*."⁹² The NJDEP recommended that the districts focus on

85. See GUIDANCE DOCUMENT, *supra* note 26, at 20.

86. See *id.*

87. See *id.* at 21.

88. See Eugene Kiely, *N.J. Trash Loan Forgiveness Wins Narrow Victory at Polls*, THE RECORD (Northern New Jersey) Nov. 4, 1998, available in 1998 WL 5824078.

89. See *Court Backs County Fees to Help Pay Trash Debts*, N.Y. TIMES, May 14, 1999, at B6; see Tom Johnson, *State Debates Bailout of Costly Trash Sites - Millions on the Ballot for Incinerator Debts*, THE STAR LEDGER (Newark, N.J.) Oct. 27, 1998, available in 1998 WL 16969574.

90. See Kiely, *supra* note 88.

91. See Letter from Gary Sondermeyer, Director, N.J. DEP'T OF ENVTL. PROTECTION, Division of Solid and Hazardous Waste to All Solid Waste Coordinators and Authority Officials (Aug. 22, 1997) (on file with author).

92. See GUIDANCE DOCUMENT, *supra* note 26, at 7.

the disclosure of the revised system strategy each district is adopting in the plan amendments, particularly EIC assessments.⁹³

As of January 1999, twenty of the twenty-two solid waste management districts had submitted proposed plan amendments to the NJDEP.⁹⁴ Nine of the plans propose the assessment of an EIC of some form.⁹⁵ In Atlantic, Cape May, Gloucester, Passaic, and Union Counties, the NJDEP has allowed county utility and county improvement authorities to begin assessing EICs ranging between \$22 and \$30 per ton.⁹⁶ Many municipalities expected to pay the EICs oppose them, and have filed nineteen lawsuits throughout the state.⁹⁷

B. The *City of Paterson*⁹⁸ Challenge

1. Background

In 1987, Passaic County created the Passaic County Utilities Authority (PCUA) under the authority of the Municipal and County Utilities Authorities Law⁹⁹ (MCUAL) and delegated solid waste planning responsibilities to the agency. The NJDEP and the Board of Public Utilities (BPU) granted the PCUA the exclusive right to control and provide for the disposal of solid waste generated within Passaic County.¹⁰⁰ Initially, the PCUA adopted a solid waste disposal scheme that involved the construction of a

93. See *id.* The N.J. Dep't of Env'tl. Protection requires that a plan amendment proposing the assessment of an EIC contain the following elements: i) analysis of the current tipping fee to determine the various EIC components; ii) analysis of how costs of various EIC components could be reduced; iii) determination of the means of calculating the EIC; iv) determination of the billing mechanism for collecting the EIC; and v) analysis to demonstrate justness and reasonableness of the final EIC and ability to meet debt obligations. See Letter from Gary Sondermeyer, Director, N.J. Dep't of Env'tl. Protection, Division of Solid and Hazardous Waste to All Solid Waste Coordinators and Authority Officials (Aug. 22, 1997) (on file with author).

94. See N.J. Dep't of Env'tl. Protection, *Certification/Administrative Actions of the District Solid Waste Management Plan Amendments* (visited Jan. 26, 1999) <<http://www.state.nj.us/dep/dshw/recycle/admentme.htm>>.

95. See *id.* Those counties include Atlantic, Burlington, Camden, Cape May, Gloucester, Hudson, Passaic, Salem, and Union.

96. See *Court Backs County Fees to Help Pay Trash Debts*, N.Y. TIMES, May 14, 1999, at B6; see Fitzgerald, *supra* note 30.

97. See Dena Aubin, *Moody's Says Plan Could Be Subject to Lawsuits*, CAPITAL MARKETS REPORT, Apr. 5, 1999.

98. *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

99. Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-1 - 69 (West 1994).

100. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d 323, 326 (N.J. Super. Ct. App. Div. 1999).

municipal solid waste incinerator¹⁰¹ based on plans that had been initiated by Passaic County in 1986, a year before the PCUA was created.¹⁰² To carry out the project, PCUA acquired 13.5 acres of property in Passaic County for siting the incinerator, developed site plans, initiated the permitting process, and began excavation of the incinerator site.¹⁰³

To fund its solid waste planning activities, which focused initially on incineration, the PCUA issued revenue bonds. The PCUA issued a \$57,998,886 bond series during 1987, which Passaic County guaranteed.¹⁰⁴ In 1992, PCUA refunded \$29,595,000 of the 1987 bonds using the proceeds of a bond issue of \$30,930,000.¹⁰⁵ PCUA issued additional bonds to refund the remainder of the 1987 bonds in 1996.¹⁰⁶ In 1991, the PCUA issued an additional \$36,495,000 bond series that was not guaranteed by Passaic County.¹⁰⁷

The incinerator project was undertaken at a time when the NJDEP was actively promoting the construction of resource recovery facilities.¹⁰⁸ Subsequently, public sentiment against the siting of incinerators caused the state to impose a virtual moratorium on this technology, which prevented PCUA from obtaining a permit.¹⁰⁹ Ultimately, the plan to construct an incinerator was abandoned, but the county incurred substantial debt associated with the development costs of the incinerator and the acquisition of alternative means of solid waste disposal.¹¹⁰

In response to the failure of the incinerator project, PCUA altered its long-term disposal method of choice.¹¹¹ PCUA elected

101. See Certification of the Oct. 1, 1997 Amendment to the Passaic County District Solid Waste Management Plan signed by Commissioner Robert C. Shinn Jr. on Nov. 10, 1997.

102. See Brief and Appendix on Behalf of Respondent, Passaic County Utilities Authority at 8, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

103. See *id.*

104. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 326.

105. See *id.*

106. See *id.*

107. See *id.*

108. See Brief and Appendix on Behalf of Respondent, Passaic County Utilities Authority at 8, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

109. See *id.*

110. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 326.

111. See Brief and Appendix on Behalf of Respondent, Passaic County Utilities Authority at 8, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

not to own or operate its own solid waste treatment and disposal facility.¹¹² Instead, PCUA contracted with two private hauling companies, Grinnell Solid Waste Haulers, Inc. and Spectrasen, Inc., to bring waste to one of three private transfer stations owned and operated by Pen Pac Inc., which was under contract with PCUA to process solid waste generated in the county and ultimately dispose of it out-of-state.¹¹³ While flow control was still in effect, the PCUA assessed tipping fees of \$103 per ton for use of the transfer stations.¹¹⁴ The rate included fees assessed by the haulers and owner of the transfer station plus PCUA's administrative costs and debt service.¹¹⁵ The debt service component of the charge included the costs incurred during the planning phases of the incinerator project.¹¹⁶ With the demise of "flow control," the PCUA could no longer guarantee a flow of waste into the designated county facilities, placing the PCUA in financial jeopardy due to the significant stranded debt.¹¹⁷ None of the municipalities in Passaic County use the PCUA system because the debt service incurred when flow control was in effect prevents the PCUA from

112. *See id.*

113. *See* Certification of the Oct. 1, 1997 Amendment to the Passaic County District Solid Waste Management Plan signed by Commissioner Robert C. Shinn Jr. on Nov. 10, 1997.

114. *See* N.J. Dep't of Env'tl. Protection, 1998 *New Jersey Facility Tipping Fees* (visited Nov. 1, 1998) <<http://www.state.nj.us/dep/dshw/swr/fees.htm>>.

115. *See* Certification of the Oct. 1, 1997 Amendment to the Passaic County District Solid Waste Management Plan signed by Commissioner Robert C. Shinn Jr. on Nov. 10, 1997.

116. *See* Brief for Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 19, City of Paterson v. Passaic County Bd. of Chosen Freeholders (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

117. *See In re Passaic County Utils. Auth. Petition*, 728 A.2d 323, 327 (N.J. Super. Ct. App. Div. 1999).

Stranded debt is outstanding public debt issued to fund activities which, due to the invalidation of a regulatory scheme, prevents the use of the facility or activity funded by the debt. The cessation or diminution of revenue from the facility or activity renders the debt underfunded or unfunded or "stranded." . . . stranded debt bears some similarity to "stranded costs." The concept of stranded costs had been encountered in the deregulation of utilities, primarily electric, gas and telecommunications. Under former regulatory schemes in which basic utility services were provided through a single provider whose level of service and rate schedule were approved by a central rate-making board, regulated utilities incurred certain costs. Some of these costs were incurred to build infrastructure required to deliver the service or to assure universal access to the service. The advent of competition in the industry impedes and in certain circumstances prevents the recovery of these costs. Thus, these unrecoverable costs are termed "stranded."

Id.

offering a competitive price.¹¹⁸ Substantial public debt and inability to compete with private markets puts the PCUA in danger of defaulting on its bonds.¹¹⁹

2. PCUA's Debt Repayment Plan

The PCUA and Passaic County jointly developed a plan to repay the debt service incurred while flow control was in effect.¹²⁰ On March 3, 1995, PCUA filed a petition with the Local Finance Board (LFB) of the State Department of Community Affairs¹²¹ asserting that the PCUA was in financial trouble.¹²² The petition alleged that since the solid waste management system of flow control, on which the PCUA depended, was likely to be invalidated, the LFB should approve a financial plan.¹²³ This petition was held in abeyance pending the outcome of the *Atlantic Coast* trial.¹²⁴

After a decision was handed down in the *Atlantic Coast* case, the PCUA filed an application with the LFB on November 19, 1997, for approval of a plan to refinance its debt.¹²⁵ The LFB held hearings on December 10 and 16, 1997.¹²⁶ The plan submitted to the LFB called for refinancing PCUA's outstanding debt through the issuance of refunding bonds not to exceed \$50,000,000 to repay \$21,400,000 of the \$27,000,000 balance of the 1991 bond series.¹²⁷

118. *See id.* at 328.

119. *See* Chee Mee Hu and Charles E. Emrich, *Solid Waste Flow Control and Municipal Bond Credit Ratings*, U. S. Senate, Comm. on the Envtl and Public Works, Cong. Testimony, Mar. 18, 1997.

120. *See In re Passaic County Utils. Auth. Petition*, 728 A.2d 323, 328 (N.J. Super. Ct. App. Div. 1999).

121. Under N.J. STAT. ANN. § 40A:5A-18 and 19, the Local Finance Board has the authority to order the imposition of fees or charges necessary for local government entities in financial difficulty to assure satisfaction of outstanding obligations. EIC proposals must be reviewed by the NJDEP to assure that they are consistent with the local government entity's obligation to assess just and reasonable charges. They must also be reviewed by the Local Finance Board to ensure that the EIC is sufficient for the local government entity to meet its financial obligations. *See* GUIDANCE DOCUMENT, *supra* note 26, at 12.

122. *See* Brief and Appendix on Behalf of Respondent, *Passaic County Utilities Authority at 3, City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

123. *See id.*

124. *See id.*

125. *See In re Passaic County Utils. Auth. Petition*, 728 A.2d at 328.

126. *See* Brief and Appendix on Behalf of Respondent, *Passaic County Utilities Authority at 3, City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

127. *See In re Passaic County Utils. Auth. Petition*, 728 A.2d at 328.

PCUA proposed to repay the bonds through the assessment of an EIC on all municipal, commercial, and industrial users that utilized the PCUA system prior to the demise of "flow control," based on historical tonnage figures.¹²⁸ The EIC is not dependent on any entity's use of PCUA's waste treatment and disposal services.¹²⁹

On November 19, 1997, the same day that PCUA filed its refinancing proposal to the LFB, PCUA asked the board to approve a Deficiency Agreement between PCUA and Passaic County.¹³⁰ Under the terms of the agreement, Passaic County agreed to cover any shortfall in the EIC assessments.¹³¹ The Deficiency Agreement states that PCUA will provide solid waste services to Passaic County, which in return "will pay to the PCUA an amount equal to any shortfall in revenue which the PCUA may experience."¹³² Passaic County approved an amendment to the Deficiency Agreement on December 17, 1997, whereby the county agreed to "secure the balance of the 1991 bonds that are not refunded with the proceeds of the refunding bonds."¹³³ In essence, the Deficiency Agreement provides the security for the PCUA's additional debt.¹³⁴

The LFB approved the PCUA's financing plan by a resolution issued on December 16, 1997.¹³⁵ The LFB determined that the PCUA was experiencing and would continue to experience financial difficulties "which jeopardize the payment of debt service on issued obligations and that these difficulties will likely impair the credit of the PCUA and the County of Passaic."¹³⁶ The LFB approved an EIC of \$29.64 per ton.¹³⁷ This EIC is an "allocation of

128. *See id.*

129. *See* Certification of the Oct. 1, 1997 Amendment to the Passaic County District Solid Waste Management Plan signed by Commissioner Robert C. Shinn Jr. on Nov. 10, 1997.

130. *See In re Passaic County Utils. Auth. Petition*, 728 A.2d at 328.

131. *See id.*

132. *Id.*

133. *Id.*

134. *See id.*

135. *See Resolution of the New Jersey Local Finance Board Ordering the Implementation of a Financial Plan Pursuant to the Provisions of N.J.S.A. 40A:5A-19 Providing for the Imposition and Collection by the Passaic County Utilities Authority of an Environmental Investment Charge to Assure the Payment of All Debt Service Incurred by the Authority in Connection with the Development and Implementation of its Solid Waste System and Facilities Including Certain Costs Relating to the Billing and Collection Thereof and Other Incidental Operating Expenses to the Authority*, Dep't of Community Affairs, Local Fin. Bd., Dec. 16, 1997.

136. *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 328.

137. *See Resolution of the New Jersey Local Finance Board Ordering the Implementation of a Financial Plan Pursuant to the Provisions of N.J.S.A. 40A:5A-19 Providing*

the PCUA's total debt (including \$28 million dollars in unsecured debt) which, along with an administration fee, is imposed on a per ton basis on all municipalities in the County of Passaic based on their 1996 municipal waste generation, and on all commercial and industrial generators based upon their average flows from 1993 through 1996."¹³⁸ The charge is "to be paid quarterly over a ten-year period, independent of and unrelated to any solid waste services being provided by PCUA"¹³⁹ to the entities being assessed.

3. The City of Paterson's Lawsuit

The City of Paterson received its first EIC bill from the PCUA on January 21, 1998 for a total assessment of \$2,500,122 to be paid in quarterly installments of \$625,031 each.¹⁴⁰ The PCUA also issued notice to the city that Paterson's total EIC over a ten-year period will be \$20,704,613.¹⁴¹ The charge was assessed despite the fact that since November 10, 1997, the City of Paterson has procured its own solid waste disposal services at a lower rate than if the city used the designated PCUA facility.¹⁴²

On January 6, 1998, the City of Paterson and its mayor, Martin G. Barnes, filed an action seeking injunctive relief restraining Passaic County from guaranteeing the payment of previously issued bonds in accordance with the Deficiency Agreement.¹⁴³ The plaintiffs also sought a declaration that the Deficiency Agreement was unconstitutional.¹⁴⁴ The plaintiffs' action against Passaic County and the PCUA challenged the county's decision to enter into the Deficiency Agreement with the PCUA in 1997, "and to thereby assume an obligation for payment of \$27,905,000 in out-

for the Imposition and Collection by the Passaic County Utilities Authority of an Environmental Investment Charge to Assure the Payment of All Debt Service Incurred by the Authority in Connection with the Development and Implementation of its Solid Waste System and Facilities Including Certain Costs Relating to the Billing and Collection Thereof and Other Incidental Operating Expenses to the Authority, Dep't of Community Affairs, Local Fin. Bd., Dec. 16, 1997.

138. *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 328.

139. See Brief of Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 20, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

140. See *id.*

141. See *id.*

142. See *id.* at 17-18.

143. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 329.

144. See *id.*

standing debt”¹⁴⁵ on the PCUA revenue bonds issued in 1991. This action challenged the validity of the EIC, in addition to the Deficiency Agreement.¹⁴⁶ On January 7, 1998, the plaintiffs also filed an appeal of the LFB’s decision to impose the EIC, contending that the LFB lacked the power to order the implementation of an EIC.¹⁴⁷ On January 16, 1998, the City of Paterson filed an action against the Passaic County Board of Chosen Freeholders and the PCUA, challenging a pending amendment of the county’s Solid Waste Management Plan proposing the assessment of an EIC.¹⁴⁸ Ten additional municipalities intervened, and these cases were subsequently consolidated and transferred to the Appellate Division.¹⁴⁹

The City of Paterson’s primary challenge to the EIC assessment was based on the contention that the charge is *ultra vires* and is an unauthorized county tax, unenforceable as a matter of law.¹⁵⁰ The plaintiffs contended that the PCUA lacks the statutory authority to impose an EIC.¹⁵¹ According to the plaintiffs, since PCUA was created pursuant to the MCUAL,¹⁵² its powers are limited to those expressly stated in the enabling legislation.¹⁵³ Since this law only allows the assessment of service charges, and not general taxes, the assessment of this EIC, which is not based on any present service being provided by the PCUA, is illegal.

Plaintiffs also contended that the Deficiency Agreement entered into by the PCUA and Passaic County is unconstitutional, representing an arbitrary, and therefore illegal, guarantee of

145. See Brief of Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 4, City of Paterson v. Passaic County Bd. of Chosen Freeholders (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

146. See *id.* at 5.

147. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 329 (N.J. Super. Ct. App. Div. 1999).

148. See *id.*

149. See *id.* The ten interveners are: Township of Wayne, Borough of Totowa, Borough of West Paterson, City of Clifton, Borough of Wanaque, Borough of Bloomingdale, Borough of Hawthorne, Borough of Ringwood, Borough of Pompton Lakes, and Township of West Milford. See *id.*

150. See Brief of Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 27, City of Paterson v. Passaic County Bd. of Chosen Freeholders (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

151. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 330.

152. See Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-1 – 69 (West 1994).

153. See Brief of Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 27, City of Paterson v. Passaic County Bd. of Chosen Freeholders (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

PCUA's debt.¹⁵⁴ The plaintiffs claim that the agreement by which Passaic County secures the PCUA's debt is barred by Section 33 of the MCUAL.¹⁵⁵

The additional assertions made by the plaintiffs regard the LFB's approval of the PCUA refinancing plan. Specifically, plaintiffs asserted that the LFB's resolution is unenforceable, insofar as it purports to authorize the PCUA to assess an EIC.¹⁵⁶ They also claimed that the LFB's approval of the Deficiency Agreement has no legal force and effect.¹⁵⁷

On May 13, 1999, the Superior Court of New Jersey, Appellate Division, handed down a decision in favor of the defendants, PCUA and the Passaic County Board of Chosen Freeholders.¹⁵⁸ The Appellate Division held that the EIC was not an illegal tax but constituted an allowable service charge. In addition, the court concluded that the Deficiency Agreement was legal, and remained in full force and effect.¹⁵⁹

4. Is an EIC an Illegal Tax?

a. Enabling Legislation

The parties to the litigation agree that the powers of the municipal utilities authorities are limited by the enabling legislation under which they were formed.¹⁶⁰ The MCUAL controls and limits the activities of agencies in New Jersey that are engaged in pollution control activities, including the collection, treatment, and disposal of solid waste.¹⁶¹ The determination of the legality of an EIC depends on the proper interpretation of the MCUAL.

The MCUAL is intended, in part, to "foster and promote by all reasonable means . . . the collection, disposal and recycling of solid waste . . . in an environmentally sound manner."¹⁶² In general terms, the law provides for the collection of fees associated with the construction, operation, and maintenance of pollution control facilities, including solid waste treatment and disposal facili-

154. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 335.

155. See *id.*

156. See *id.* at 329.

157. See *id.*

158. See *id.* at 338.

159. See *id.*

160. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 330.

161. See Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-1 - 69 (West 1994).

162. Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-2 (West 1994).

ties.¹⁶³ The MCUAL authorizes “service charges to occupants or owners of property for direct or indirect connection with the use, products or services of [solid waste facilities] and providing for the establishment, collection and enforcement of such charges.”¹⁶⁴ The statute further limits the nature of the charges that may be assessed by a municipal utilities authority for solid waste services to

rents, rates, fees or other charges . . . for the use or services of the solid waste system.¹⁶⁵ Such solid waste service charges may be charged to and collected from the . . . owner or occupant . . . of any real property from or on which originates or has originated any solid waste to be treated by the solid waste system of the authority.¹⁶⁶

b. City of Paterson’s Argument

Plaintiffs argued that the language in the MCUAL limits the power of the PCUA to collect fees only from generators that are using the PCUA solid waste system and only for fees related to that use.¹⁶⁷ According to plaintiffs, PCUA’s assessment of EIC charges violates the statute because the City of Paterson is not currently using the PCUA system for the disposal of solid waste.¹⁶⁸ Since the city has not used the PCUA facilities since the demise of flow control, the PCUA is not authorized to assess an EIC from the city.¹⁶⁹

Plaintiffs relied on a comparison of Sections 40:14B-22 and 40:14B-22.1 of the MCUAL, which pertain to sewerage service charges¹⁷⁰ and solid waste charges¹⁷¹ respectively, to support

163. *See id.*

164. *Id.* at § 40:14B-2(2).

165. “Solid waste system” is defined as the physical property of an authority by which it provides collection, recycling or disposal services. *Id.* at § 40:14B-3(30).

166. *Id.* at § 40:14B-22.1.

167. *See* Brief of Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 30, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

168. *See id.*

169. *See id.*

170. *See* Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-22 (West 1994).

Every municipal authority is hereby authorized to charge and collect rents, rates, fees or other charges . . . for direct or indirect connection with, or the use or services of, the sewerage system In addition to any such sewerage service charges, a separate charge in the nature of a connection fee or tapping fee, in respect of each connection of any prop-

their position.¹⁷² The section, authorizing the collection of sewerage service fees, specifically allows the collection of a connection charge, which may include a component for the recovery of debt service on the capital used to construct the facilities.¹⁷³ Plaintiffs contend that the specific language of Section 40:14B-22 that allows a municipal utilities authority to assess charges unrelated to the use of the sewerage system, such as debt service, does not appear in Section 40:14B-22.1, and should not be read into it.¹⁷⁴ They argued that "if the legislature had intended to authorize the imposition of service charges for the past use of solid waste serv-

erty with the sewerage system, may be imposed upon the owner or occupant of the property so connected. Such connection charges shall be uniform within each class of users, and the amount thereof shall not exceed the actual cost of the physical connection, if made by the authority, plus an amount . . . representing all debt service, including but not limited to sinking funds, reserve funds, the principal and interest on bonds, and the amount of any loans and the interest thereon, paid by the municipal authority to defray the capital cost of developing the system . . .

Id.

171. *See id.* at § 40:14B-22.1.

Every municipal authority is hereby authorized to charge and collect rents, rates, fees, or other charges (in this act sometimes referred to as "solid waste service charges") for the use or services of the solid waste system. Such solid waste service charges may be charged to and collected from any municipality or any person contracting for such use or services or from the owner or occupant, or both of them, of any real property from or on which originates or has originated any solid waste to be treated by the solid waste system of the authority, and the owner of any such real property shall be liable for and shall pay such solid waste service charges to the municipal authority at the time when and place where such solid waste service charges are due and payable. Such rents, rates, fees and charges, being in the nature of use or service charges, shall as nearly as the authority shall deem practicable and equitable be uniform throughout the county for the same type, class and amount of use or service of the solid waste system . . .

Id.

172. *See* Joint Brief and Appendix of Amici Curiae National Solid Waste Management Association, Waste Management Association of New Jersey, BFI Waste Systems of New Jersey, Inc., Super Kwik, Inc., USA Waste of New Jersey, Inc. and Waste Management of New Jersey, Inc. at 13, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

173. *See* Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-22 (West 1994).

174. *See* Joint Brief and Appendix of Amici Curiae National Solid Waste Management Association, Waste Management Association of New Jersey, BFI Waste Systems of New Jersey, Inc., Super Kwik, Inc., USA Waste of New Jersey, Inc. and Waste Management of New Jersey, Inc., at 14, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

ices or permit the PCUA to recover debt service costs, the language of 40:14B-22.1 would have explicitly reflected that purpose."¹⁷⁵

In addition, the plaintiffs cited Section 40:14B-33 to support their position that the EIC unfairly forced the City of Paterson to assume a debt incurred by the PCUA.¹⁷⁶ This section provides that

bonds or other obligations issued by a municipal authority . . . shall not be in any way a debt or liability of the State or of any such local unit . . . and shall not create or constitute any indebtedness, liability or obligation of the State or of any local unit . . . either legal, moral or otherwise.¹⁷⁷

The plaintiffs interpret the PCUA's attempt to raise the revenues for its bonds through the assessment of an EIC as a violation of this statute.¹⁷⁸

Plaintiffs construed New Jersey decisional law to support their position that PCUA lacks the authority to assess fees and charges that are unrelated to the current use of any PCUA service.¹⁷⁹ Citing *Airwick Industries, Inc. v. Carlstadt Sewerage Authority*,¹⁸⁰ the plaintiffs contended that non-users of a pollution control facility should not be required to bear the cost of construction of that system unless the existence of the system increases the value of land by making its development desirable.¹⁸¹ In

175. *Id.* at 14 (emphasis omitted).

176. See Brief of Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 28, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

177. Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-33 (West 1994).

178. See Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 28, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

179. See *id.* at 31; see also Joint Brief and Appendix of Amici Curiae National Solid Waste Management Association, Waste Management Association of New Jersey, BFI Waste Systems of New Jersey, Inc., Super Kwik, Inc., USA Waste of New Jersey, Inc. and Waste Management of New Jersey, Inc. at 16, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

180. 57 N.J. 107 (1970).

181. See Joint Brief and Appendix of Amici Curiae National Solid Waste Management Association, Waste Management Association of New Jersey, BFI Waste Systems of New Jersey, Inc., Super Kwik, Inc., USA Waste of New Jersey, Inc. and Waste Management of New Jersey, Inc. at 16, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

Airwick, property owners challenged the imposition of sewer connection fees that escalated depending on the date on which the user connected to the system.¹⁸² The court held that the escalating connection fee was valid because the existence of the sewerage system conferred a benefit to the property that enhanced its value, regardless of whether the property owner connected or not.¹⁸³ The existence of PCUA's solid waste management system provides no such enhancement to property, according to the plaintiffs, because in the absence of the services provided by PCUA, a thriving private solid waste collection and disposal industry could provide the same services at lower cost.¹⁸⁴

Plaintiffs drew additional support from *Ivan v. Marlboro Township Municipal Utilities Authority*.¹⁸⁵ In *Ivan*, the court held that those entities that do not use a utility system are in no way obligated to pay for operations, maintenance, or debt service, regardless of the benefits to their property resulting from the construction of the municipal system.¹⁸⁶ Plaintiffs argue that *Ivan* supports their position that, as a non-user, the city is not required to pay an EIC for the purpose of recovering debt.¹⁸⁷

c. PCUA's Response

While the City of Paterson contended that the statutory language of the MCUAL confines the PCUA's power to collect solid waste fees only to the users of the service,¹⁸⁸ the PCUA countered with the claim that the municipal utilities authorities have broad powers to assess fees under the MCUAL and that limitations on their powers should be construed liberally.¹⁸⁹ Rather than requir-

182. See *Airwick Indus.*, 57 N.J. at 122 (1970).

183. See *id.* at 121.

184. See Joint Brief and Appendix of Amici Curiae National Solid Waste Management Association, Waste Management Association of New Jersey, BFI Waste Systems of New Jersey, Inc., Super Kwik, Inc., USA Waste of New Jersey, Inc. and Waste Management of New Jersey, Inc. at 17, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

185. 162 N.J. Super. 466 (N.J. Super. Ct. App. Div. 1978).

186. See *id.* at 469.

187. See Brief of Plaintiffs/Appellants, *City of Paterson and Martin G. Barnes* at 31, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

188. See *id.* at 29.

189. See Brief and Appendix for Respondent, *Passaic County Utilities Authority* at 24, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5). PCUA relies on *Reahl v. Randolph Tp. Municipal Util. Auth.*, 163 N.J. Super. 501, 513 (N.J. Super. Ct.

ing charges to be assessed only from present users, the statute contemplates assessing fees based on past use, according to PCUA's interpretation.¹⁹⁰ PCUA asserted that the language in the statute allowing assessments on owners or occupants of property "from or on which originates or has originated any solid waste"¹⁹¹ contemplates assessment of fees based on historical use.¹⁹² Since Paterson used the PCUA solid waste disposal system during the period that flow control was in effect, the PCUA claimed that it is empowered, by the clear and unambiguous language of the statute, to assess an EIC against the city based on historical use.¹⁹³

PCUA relied on recent case law to support its position that stranded utility costs can lawfully be allocated among constituents of a deregulated utility system.¹⁹⁴ PCUA cited *Wanaque Borough Sewerage Authority v. Township of West Milford*,¹⁹⁵ where the court held that planning costs of a failed regional sewerage authority could be allocated among the municipalities within the service area, despite the fact that certain municipalities never entered into a service contract with the authority.¹⁹⁶ PCUA attempted to convince the court that

the legal standards governing judicial review of utility rates are sufficiently flexible to ensure that practical sense and reason prevail. Practical sense and reason dictate that, in a post-*Atlantic Coast* world, stranded debt costs be equitably allocated among the constituent municipalities of a solid waste district, irrespective of whether a municipality exercises its continued

App. Div. 1978) (applying liberal interpretation to the Municipal and County Utilities Act to uphold sewer charges imposed on residents not tied into the sewage collection system).

190. See *id.* at 28.

191. Municipal and County Utilities Authority Act, N.J. STAT. ANN. § 40:14B- 22.1 (West 1994).

192. See Brief and Appendix for Respondent, Passaic County Utilities Authority at 28, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

193. See *id.*

194. See *id.* at 25. PCUA relies on *Wanaque Borough Sewerage Auth. v. Tp. of W. Milford*, 144 N.J. 564 (1996) (holding that stranded costs of a failed regional authority were required to be equitably shared by the constituents.)

195. 144 N.J. 564 (1996).

196. See *id.* at 578.

right to use a county authority's solid waste system to dispose of its waste.¹⁹⁷

PCUA also relied on the publication of NJDEP's *Guidance Document in Response to the May 1, 1997 Court Decision on Solid Waste Flow Control*¹⁹⁸ as an indication of NJDEP's interpretation of the MCUAL.¹⁹⁹ PCUA urged the court to acknowledge the "presumptive correctness of an agency decision," especially when the subject matter is highly technical and specialized.²⁰⁰ Furthermore, PCUA claimed that the fact that the EIC system has been proposed in a number of districts facing similar problems to the PCUA's is evidence of its reasonableness and effectiveness.²⁰¹

d. The Appellate Division's Decision

Unimpressed with the City of Paterson's argument that the EIC is an unauthorized tax, the Superior Court of New Jersey, Appellate Division held that the EIC satisfies the three criteria required by Section 22.1 of the MCUAL²⁰² for a charge to be considered a solid waste service charge, and not a tax.²⁰³ The court identified the three criteria as follows: 1) The entity imposing the charge must be a municipal authority, as defined by the MCUAL; 2) the charge must be for authorized expenses; and 3) the charge must be "for use or service of a solid waste system."²⁰⁴ None of the parties to the lawsuit contested that PCUA is a municipal authority.²⁰⁵ The court analyzed Section 22.1 of the MCUAL and concluded that authorized expenses include both current operation and maintenance expenses, and debt service.²⁰⁶ With respect to the third criterion, which authorizes service charges only for use of the system, the court held that the language of Section 22.1, that permits an authority to charge fees to any municipality from

197. Brief for Respondent, Passaic County Utilities Authority at 30, *City of Paterson v. Passaic County Bd. Of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1993) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

198. See GUIDANCE DOCUMENT, *supra* note 26, at 7.

199. See Brief and Appendix for Respondent, Passaic County Utilities Authority at 26, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

200. *Id.*

201. *See id.*

202. See Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-22.1 (West 1994).

203. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 332.

204. *Id.* at 331.

205. *See id.*

206. *See id.*

which "originates or has originated any solid waste,"²⁰⁷ contemplates charges for past use.²⁰⁸ In addition, the court held that the plaintiffs' interpretation of Section 33 of the MCUAL was incorrect, in that the statute only "establishes that a municipal authority and the public entity which established it are separate entities. It does not preclude a municipal authority from making adequate provision for payment of debt service."²⁰⁹

The Appellate Division also disregarded the City of Paterson's interpretation of related case law.²¹⁰ The court held that the *Airwick* decision recognized two sources of revenue to pay for pollution control services: the current users of the system, and those properties where service is available but the potential user has not elected to utilize the service.²¹¹ The court construed *Airwick* in favor of the PCUA's position, stating that *Airwick*:

[P]rovides more support for the PCUA's position than plaintiffs' position because the decision is infused with the Court's recognition that the ordinary expenses of a utility authority are composed of current operating costs and the cost of the debt incurred to construct the facility as well as the recognition that a utility has the authority to equitably distribute the debt among actual users and potential users of the facility.²¹²

According to the Appellate Division, *Airwick* allows an authority to distribute debt service over current and future users, and recognizes the need for an authority to cover debt that arises from cessation of pollution control activities.²¹³

The court disposed of *Ivan* with little ceremony, stating that the case only addressed the illegality of forcing a non-user of a system to pay current operating expenses.²¹⁴ Since debt service was not an issue, the holding was therefore distinguishable from the case at bar.²¹⁵ The court, however, considered *Wanaque* directly on point, stating that the *Wanaque* court "recognized the need to fashion a remedy to equitably allocate the incurred ex-

207. Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B- 22.1 (West 1994).

208. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 331.

209. *Id.* at 333.

210. See *id.* at 334.

211. See *id.* at 332.

212. *Id.* at 333.

213. See *id.*

214. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 333.

215. See *id.*

penses [of a failed regional sewer authority] to assure that the entire financial burden would not fall upon a small sector of the community."²¹⁶

5. Is the Deficiency Agreement Illegal?

Plaintiffs contended that the Deficiency Agreement entered into between the PCUA and Passaic County is unconstitutional and an illegal guarantee of the PCUA's debt.²¹⁷ According to the Deficiency Agreement, Passaic County will be required to contribute to debt service payments in the event the PCUA cannot raise sufficient revenues through the assessment of EICs.²¹⁸ The plaintiffs argued that the language of Section 33 of the MCUAL, which prevents the debt of a municipal authority from becoming the debt of the state or of a local unit, bars Passaic County from securing PCUA's debt in this manner.²¹⁹ The court disposed of this argument by construing Section 33 as "no more than a statutory recognition that the various entities authorized to issue debt are separate entities and that none of the other entities can be considered responsible for that debt."²²⁰

Plaintiffs also contended that the Deficiency Agreement conferred a gift on holders of the \$28 million dollars in bonds that were not guaranteed by Passaic County.²²¹ By providing security for these bonds, Passaic County removed the risk that the bondholders incurred when the bonds were originally purchased.²²² Since the bondholders provided no consideration for this benefit, which is provided by the taxpayers of Passaic County, the Deficiency Agreement violates the donation clause of the New Jersey Constitution.²²³ The Appellate Division rejected this argument,

216. *Id.*

217. See Brief of Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 37, City of Paterson v. Passaic County Bd. of Chosen Freeholders (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

218. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 335.

219. See Brief of Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 40, City of Paterson v. Passaic County Bd. of Chosen Freeholders (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

220. *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 336.

221. See Brief of Plaintiffs/Appellants, City of Paterson and Martin G. Barnes at 37, City of Paterson v. Passaic County Bd. of Chosen Freeholders (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

222. See *id.*

223. See N.J. CONST. art. VIII, § 3, ¶¶ 2-3. These sections provide that:

2. No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be

based on the fact that Passaic County's bond rating will be damaged in the event that the PCUA defaults on its bonds.²²⁴ The court conceded that the ramifications of the PCUA's default on the bonds is merely speculative. However, the court questioned whether Passaic County "must experience a default and its ramifications before [taking] measures to avoid such an occurrence," noting that "[e]ven a temporary reluctance of private investors to purchase obligations of a Passaic County public entity may mean extra cost to taxpayers."²²⁵ Since the New Jersey Constitution does not prohibit a private benefit that is merely incidental, the court held that the Deficiency Agreement does not offend the New Jersey Constitution.²²⁶

C. The Township of Galloway²²⁷ Challenge

This case arose under similar circumstances as the PCUA case. In 1992, the Atlantic County Utilities Authority (ACUA) sold approximately \$87 million dollars in revenue bonds to finance the county solid waste system, resulting in annual debt service costs of \$8.1 million dollars.²²⁸ The county trash disposal system includes a landfill for the disposal of bulky wastes, a solid waste transfer station, and a recycling center.²²⁹ Under New Jersey's flow control system, the ACUA anticipated sufficient revenue to cover its operating expenses and recoup the debt service on the solid waste facilities.²³⁰ As a result of the deregulation of the solid waste industry, the ACUA lost its monopoly over solid waste in Atlantic County and was forced to lower its tipping fee to remain competitive in the market.²³¹ The tipping fee was dropped from \$120.47 per ton to \$52.50 per ton, which can no longer cover the

directly or indirectly the owner of any stock or bonds of any association or corporation.

3. No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever.

Id.

224. See *In re Passaic County Utils. Auth. Petition*, 728 A.2d at 338.

225. *Id.*

226. See *id.*

227. *Township of Galloway v. Atl. County Mun. Util. Auth* (N.J. Super. Ct. filed June 23, 1998), (No. ATL-C-90-98E).

228. See Brief in Support of Plaintiffs' Application for an Order to Show Cause at 2, *Township of Galloway v. Atl. County Mun. Util. Auth* (N.J. Super. Ct. filed June 23, 1998) (No. ATL-C-90-98E).

229. See *id.* at 5.

230. See *id.* at 2.

231. See *id.* at 3.

facility's debt service.²³² To make up the difference, the ACUA has imposed an EIC, which is assessed and billed to municipalities, homeowners, and business throughout Atlantic County.²³³

On January 7, 1998, the ACUA applied to the LFB for approval of an EIC to be imposed on all property owners in Atlantic County.²³⁴ The application was approved on January 14, 1998.²³⁵ Thereafter, "[o]n March 10, 1998, the Atlantic County Board of Chosen Freeholders adopted an ordinance . . . to amend Atlantic County's solid waste management plan to allow the ACUA to impose an EIC."²³⁶ The method used to collect the EIC for residential waste depends on the type of garbage collection utilized by the municipalities within Atlantic County.²³⁷

232. *See id.*

233. *See id.*

234. *See* Brief in Support of Plaintiffs' Application for an Order to Show Cause at 9, *Township of Galloway v. Atl. County Mun. Util. Auth* (N.J. Super. Ct. filed June 23, 1998) (No. ATL-C-90-98E).

235. *See id.*

236. *Id.* at 10.

237. The method for assessing the EIC is described as follows:

The ACUA has assessed an EIC on property owners it determined to be generating non-residential waste in Atlantic County. These non-residential waste generators, as identified by the ACUA, received bills directly from the ACUA for an EIC based on an estimate by the ACUA of the amount of waste generated by the property owner. . . . The ACUA has also assessed an EIC allegedly based on the generation of residential waste in Atlantic County. The method used to collect the EIC for residential waste depends on the type of garbage collection in the municipalities in Atlantic County. Twenty of the twenty-three municipalities in Atlantic County provide for the collection of the residential waste generated by its residents. The ACUA sent bills for the 1998 EIC directly to each of these twenty municipalities. The amount of each municipality's EIC bill was based on the amount of residential waste generated within that municipality in 1995. The ACUA apparently maintained records that provided this data . . . pursuant to the waste flow regulations The remaining three municipalities in Atlantic County, Galloway, Mullica and Port Republic, do not provide garbage collection services to their residents. The residents in these municipalities must contract directly with the waste haulers for the collection of their waste. The ACUA sent bills directly to each of the residential property owners it identified in these three municipalities. Unlike the amount of waste generated in the twenty municipalities that provide garbage collection services to their residents, the ACUA does not know the amount of waste generated by each residential property. In calculating the EIC for residential property owners in the three municipalities in Atlantic County that do not provide municipal garbage collection services to its residents, the ACUA estimated the amount of waste generated by each property owner.

Id. at 10 - 11 (citations omitted).

The Township of Galloway filed suit to enjoin the ACUA from imposing the EIC charge.²³⁸ Pointing to the MCUAL,²³⁹ the plaintiffs claim that the ACUA lacks the authority to impose the EIC because the utilities authorities can only charge fees to users of their services.²⁴⁰ The Township of Galloway characterized the EIC as an unauthorized tax, and with respect to both users and non-users of the ACUA system, claims that it is illegal on its face.²⁴¹

The Township of Galloway's action was originally filed in the Superior Court of New Jersey, Chancery Division.²⁴² After a preliminary ruling that the Superior Court had jurisdiction over the matter,²⁴³ the defendants moved to have the case transferred to the Appellate Division. On September 4, 1998, the court ruled that the Appellate Division had proper jurisdiction over the matter and the case was transferred.²⁴⁴ A determination on the merits is pending in the Appellate Division. It is certain that the Passaic County decision will control the final disposition of this challenge.

IV. Analysis

The powers of the municipal utilities authorities are limited by the enabling legislation under which they were formed.²⁴⁵ Arguments that the assessment of an EIC by a municipal utilities authority exceeds the power granted by statute are convincing despite the Appellate Division's disregard of this position. It is clear, according to the plain language of Section 40:14B-22.1 of the MCUAL, that agencies such as the PCUA and the ACUA can charge fees for the processing of solid waste delivered to their fa-

238. *See id.*

239. Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-1 - 69 (West 1994).

240. *See* Brief in Support of Plaintiffs' Application for an Order to Show Cause at 16, Township of Galloway v. Atlantic County Mun. Util. Auth (N.J. Super. Ct. filed June 23, 1998) (No. ATL-C-90-98E).

241. *See id.* at 17.

242. *See id.*

243. *See* Township of Galloway v. Atl. County Mun. Util. Auth (N.J. Super. Ct. filed June 23, 1998) (No. ATL-C-90-98E) (transcript of preliminary determination of July 24, 1998).

244. *See* Township of Galloway v. Atl. County Mun. Util. Auth (N.J. Super. Ct. filed June 23, 1998), (No. ATL-C-90-98E) (transcript of final determination of Sept. 4, 1998).

245. *See* Municipal and County Utilities Authority Law, N.J. STAT. ANN. § 40:14B-1 - 69 (West 1994).

cilities.²⁴⁶ Assessment of an EIC, however, which is not based on any current use of a solid waste system, exceeds the power of a municipal utilities authority, absent a specific grant of authority by the New Jersey State Legislature.

It is useful to compare the sections of the MCUAL respecting sewer service fees (40:14B-22) to the section regarding solid waste service fees (40:14B-22.1).²⁴⁷ While the two sections are similar, they are not identical and the difference is material to the issue of whether a municipal utility authority may assess an EIC. Under Section 40:14B-22.1, a municipal utility providing solid waste services may "charge and collect rents, rates, fees or other charges . . . for the use or services of the solid waste system. Such solid waste service charges may be charged to and collected from any municipality or any person contracting for such use or services."²⁴⁸ It is apparent from the language that fees are the only charges that can be assessed for the use or services of the solid waste system.

Alternatively, the New Jersey Legislature has granted the utilities authorities providing sewer services the authority to collect separate charges to assist the agency with the recovery of debt service costs.²⁴⁹ The statute allows the collection of a connection charge, which may reflect an amount representing debt service on the capital required to build the sewerage facilities.²⁵⁰ By specific grant of power, the Legislature has allowed a sewerage authority to assess charges for a purpose unrelated to the use of the sewer system. This language does not appear in the statute in connection with solid waste services.²⁵¹ By including separate language in the part of the statute addressing sewer charges, the Legislature acknowledged that a specific grant of authority is necessary to collect a particular type of revenue.

Prior to the Appellate Division's decision in the *City of Paterson* case,²⁵² there were no reported decisions construing a municipal utilities authority's powers under Section 40:14B-22.1 of the MCUAL respecting solid waste services. The Appellate Division analyzed several decisions related to the power of municipal utili-

246. *Id.* at § 40:14B-22.1.

247. Compare *id.* at § 40:14B-22 with *id.* at § 40:14B-22.1.

248. *Id.* at § 40:14B-22.1.

249. See *id.* at § 40:14B-22.

250. See *id.*

251. See Municipal and County Utilities Authority Law, N.J. STAT. ANN. at § 40:14B-22.1.

252. 57 N.J. 107 (1970).

ties authorities to charge fees for water and sewer services. However, in some cases, the court failed to fully consider the difference between sewer utilities and solid waste utilities. For example, in *Airwick Industries, Inc. v. Carlstadt Sewerage Authority*,²⁵³ the court held that, with respect to operation and maintenance costs of a sewer system, only the current users should be charged.²⁵⁴ On the other hand, all properties, where sewer service was available, were required to absorb the debt cost of constructing the facilities.²⁵⁵ The court held that even if the property was not actually connected to the system, the property could receive the benefit of enhanced property value due to the availability of sewer service.²⁵⁶ However, the court made clear that even with respect to debt costs, the statute does not authorize an immediate charge against a non-user of the system.²⁵⁷ The statute requires the application of the debt charge as a connection fee to be assessed when the property is actually connected to the sewer system.²⁵⁸

Application of the *Airwick* rationale to solid waste is problematic because the availability of county solid waste disposal services to municipalities is not analogous to the availability of a sewerage system. Most notably, the absence of county solid waste treatment and disposal services does not result in the unavailability of those services to generators. There is a thriving and competitive private solid waste industry in New Jersey that does not exist in the wastewater arena. Therefore, the fact that solid waste disposal is available through the county does not increase the value of property in the county to any extent because those services could easily be provided by private entities. Since the EIC is a charge specifically to recover debt service, under *Airwick* these charges could only be assessed when there has been some corresponding enhancement to the value of property in the county. However, even if the *Airwick* rationale implicitly permits the imposition of solid waste service charges to recover debt, there is no precedent for the imposition of a debt service charge on non-users of an authority's disposal system. *Airwick* made clear that a municipal utility authority had no power to impose a charge until a person connected to the sewerage system.²⁵⁹

253. See *id.* at 119 (citing New Jersey Statute § 40:14A-8(b)).

254. See *id.* at 120.

255. See *id.*

256. See *id.* at 121.

257. See *id.*

258. See 57 N.J. at 122.

259. 162 N.J. Super. 466 (1978).

Similarly, in *Ivan v. Marlboro Township Municipal Utilities Authority*,²⁶⁰ the court held that those entities that do not use a utility system are in no way obligated to pay for operations, maintenance, or debt service, regardless of the benefits to their property resulting from the construction of the municipal system. In *Ivan*, the plaintiff used private wells on his property for potable water, but was billed by the municipal authority for a connection charge and an annual minimum water use charge.²⁶¹ When plaintiff sued to restrain the utility from imposing the charge, the utility argued that the MCUAL permitted the charge because plaintiff's property benefited from the existence of the water utility. The court found that even though plaintiff's property benefited from the availability of the water system, only actual users were required to pay the utility fees.²⁶² The court noted that users who come into the system late may be required to pay an increased tie-in charge to offset charges imposed on the first users of the system who paid for operating and maintenance costs as well as debt service, but not until they actually become users of the system.²⁶³

In a contrary decision, *Wanaque Borough Sewerage Authority v. West Milford*,²⁶⁴ the court held the town of West Milford partially responsible for the payment of debt service charges incurred during the planning phases of a regional sewerage authority. However, the case can be distinguished from the situation faced by municipalities that are being assessed EICs because West Milford had utilized the information obtained during the planning phase of the regional sewerage authority to develop its own treatment system.²⁶⁵ If the municipalities that are being assessed EICs used the planning information of the municipal utilities authorities to develop their own solid waste treatment and disposal facilities, then they should pay part of the debt incurred to develop the information. Since a thriving private solid waste collection and disposal industry exists in New Jersey, it is unlikely that municipalities will construct their own facilities. Instead, most are likely to contract with private haulers who will transport solid

260. See *id.* at 467.

261. See *id.*

262. See *id.* at 468.

263. 144 N.J. 564 (1996).

264. See *id.* at 576.

265. GUIDANCE DOCUMENT, *supra* note 26.

waste to their own transfer stations and landfills for final disposal.

The argument was raised that the NJDEP *Guidance Document In Response to the May 1, 1997 Court Decision on Solid Waste Flow Control*,²⁶⁶ which presumes the legality of assessing EICs²⁶⁷ somehow offers legal support for EICs.²⁶⁸ The NJDEP's authority with respect to economic issues under the SWMA is limited to ensuring that district plans for financing solid waste management are consistent with the goals of the Act.²⁶⁹ Section 13:1E-2(b)(6) states that district plans must include "a method or methods of financing solid waste management in the solid waste management district."²⁷⁰ The NJDEP cannot expand its role in economic issues beyond that which was expressly granted by the statute. Recognizing that its guidance document is not the final word on post-waste flow issues, the NJDEP states:

It must be stressed that solid waste management policy will continue to evolve over the weeks and months ahead as we collectively develop revised county plans into a comprehensive statewide mosaic. At this stage, it is not possible to predict the final outcome of each issue. Therefore, not all questions raised by the affected community and reflected in this document have complete answers at this time²⁷¹

This statement begs for a legislative solution to the economic crisis facing New Jersey's solid waste authorities. Solid waste

266. *Id.* at 11-12. The language regarding EICs is as follows:

Question: What is the legal authority to impose an EIC? Answer: The legal authority to impose an EIC derives from each authority's enabling statutes. See N.J.S.A. 40:14B-1 *et seq.* (Mun. and County Util. Auth. Law); N.J.S.A. 40:37A-1 *et seq.* (County Improvement Auth. Law). In addition, the Local Finance Board has broad authority to order the imposition of fees and/or charges necessary for local government entities in financial difficulty to assure satisfaction of outstanding obligations (N.J.S.A. 40A:5A-18 & 19); and the DEP has broad authority over solid waste utility rates to ensure adequate and proper service, N.J.S.A. 48:13A-1 *et seq.*

Id.

267. See Brief and Appendix for Respondent, Passaic County Utilities Authority at 15, *City of Paterson v. Passaic County Bd. of Chosen Freeholders* (N.J. Super. Ct. App. Div. 1998) (Nos. A-2572-97T5, A-3856-97T5 and A-4052-97T5).

268. See N.J. STAT. ANN. § 13:1E-2(b)(6) (West 1994).

269. *Id.*

270. GUIDANCE DOCUMENT, *supra* note 26, at 1.

271. See N.J. STAT. ANN. § 13:1E-2(a) (West 1994) (emphasizing state-wide planning and coordination).

management has long been regarded by the Legislature as an environmental problem that warrants state-wide planning.²⁷² It would be consistent with the state-wide solid waste planning approach for the Legislature to develop means by which the municipal utilities authorities could solve their debt crises in a manner that is equitable and generally applicable across the state.

Critics of EICs argue that they are unfair, because the tax burden is not distributed evenly throughout the tax base.²⁷³ Wealthier towns that can afford tax increases are spared under the EIC system because they produced less trash historically than more densely populated and poorer cities.²⁷⁴ The State should make funds available to help municipal utilities authorities and counties pay for their outstanding bond debt.²⁷⁵

It is possible that the Legislature will choose not to pass legislation authorizing EICs. In 1998, legislation was introduced that would instead impose a tax on solid waste transporters and use the funds to reduce the debt on solid waste treatment and disposal facilities.²⁷⁶ This and similar proposals were rejected by the Legislature,²⁷⁷ but innovative solutions beyond EICs are possible.

There is also reason to expect that market forces may provide the answer for at least some of the New Jersey solid waste utilities authorities. New York City is required to close the Fresh Kills landfill on Staten Island by the end of 2001.²⁷⁸ One proposal to find an alternative site for New York solid waste involves transporting garbage from Queens and Manhattan to the solid waste transfer station operated by Bergen County Utilities Authority (BCUA).²⁷⁹ The transfer station has a daily capacity of 5,000 tons, but currently processes only 1,400 to 1,500 tons per day.²⁸⁰ BCUA has proposed assessing an EIC of \$25.58 per ton to pay off its outstanding debt of \$109 million dollars,²⁸¹ but accepting New York

272. See Michael Casey, *Court Hits Towns With PCUA Bill of \$78M: Paterson Would Owe the Most - \$20M*, THE RECORD (Northern New Jersey) May 14, 1999, available in 1999 WL 7100738.

273. See *id.*

274. See Rooney, *supra* note 23.

275. See Hugh R. Morley, *Schuber Warns Towns of Crisis Over Trash Debt*, THE RECORD, (Northern New Jersey) Feb. 11, 1999, at A-24.

276. See *id.*

277. See Douglas Martin, *New York Moves on Plan to Ship Trash Out of City*, N.Y. TIMES, Jan. 21, 1999, at B5.

278. See *id.*

279. See *id.*

280. See Morley, *supra* note 275.

281. See Martin, *supra* note 277.

City garbage could offset this amount considerably, providing the transfer station could be operated at closer to its full capacity. The Governor of New Jersey has reacted to this proposal negatively, citing traffic and other environmental concerns.²⁸² Instead of finding reasons not to accept New York City garbage, the State should take the lead in directing New York City trash into underutilized New Jersey facilities, thereby reducing the debt that will need to be paid for by EICs or other means.

The City of Paterson filed a challenge to the ruling of the Appellate Division on May 19, 1999.²⁸³ The Supreme Court of New Jersey will have an opportunity to review the lower court's decision and provide a different interpretation of applicable statutory and decisional law. Despite the dire warnings of the debt-ridden authorities, the court should not succumb to the urge to provide a quick-fix in the form of an EIC.

V. Conclusion

The New Jersey Legislature is clearly aware of the situation faced by the utilities authorities, but has elected not to pass legislation authorizing the assessment of EICs, such as Assembly Bill No. 50.²⁸⁴ Rather than waiting for legislative authorization to assess an EIC, many authorities, including the PCUA and the ACUA, implemented EICs immediately. Regardless of the method chosen by the Legislature to resolve the current crisis, the ubiquity of the problem throughout the state requires a state-wide solution. While the Legislature is crafting this long-term solution, the counties are grasping at EICs to manage their debt crises. Despite the urgency of the situation and the desire of the counties to solve their immediate financial problems, an illegal and unfair solution such as EICs should not be tolerated.

282. See Casey, *supra* note 272.

283. A. 50, 207th Legis. Sess. 1 (N.J. 1996).

284. See *id.*