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Interim Report of the Task Force to Study Market Power Issues Related to the Solid Waste Hauling and Disposal Industry

Maine State Legislature

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**STATE OF MAINE
119TH LEGISLATURE
SECOND REGULAR SESSION**

**Interim Report
of the
TASK FORCE TO STUDY MARKET POWER
ISSUES RELATED TO THE SOLID WASTE
HAULING AND DISPOSAL INDUSTRY**

December, 2000

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Sen. James D. Libby
Rep. John L. Martin
Rep. David L. Tobin**

EXECUTIVE SUMMARY

In response to concerns about recent mergers and consolidations in the solid waste industry, the Joint Standing Committee on Natural Resources recommended and the Legislature authorized formation of a Task Force to study horizontal and vertical market power in the solid waste industry in Maine.¹ The Task Force was composed of 5 members of the Joint Standing Committee on Natural Resources – Senators John Nutting and James Libby, and Representatives Robert Duplessie, John Martin and David Tobin. Senator Nutting and Representative Duplessie served as Task Force co-chairs.

The Task Force met 4 times during the interim and received background information on the solid waste industry in Maine, the impact of state and federal policies on the solid waste industry, and solid waste market experience in other states. It also heard testimony from participants and those affected by the solid waste industry in Maine – municipalities, operators of landfills and waste-to-energy facilities and representatives of integrated waste management companies.

Task Force members concluded that they needed more information and analysis to understand the state of the market in Maine, and to determine whether legislative action is needed to improve competition in the market. The Task Force contracted with an economics professor from the University of Maine to develop a work plan to guide data collection and analysis efforts in the second phase of the 2-year study.

The Task Force recommends that the law requiring 30-day notice to the Attorney General of acquisitions of solid waste businesses be continued and expanded. Current law requires notice only if the business to be acquired has more than 5 employees; that law is set to expire 90 days after adjournment of the 1st Regular Session of the 120th Legislature. To assist the Attorney General in reviewing potential acquisitions while the Task Force study continues, the Task Force recommends that the notice requirement apply to all acquisitions and be extended until 90 days after adjournment of the 2nd Regular Session of the 120th Legislature.

¹ The legislation creating the Task Force, 1999 Public Law, chapter 773, also required anyone seeking to acquire control of solid waste assets to notify the Attorney General at least 30 days before the acquisition, to enable that office to address any antitrust concerns.

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I. INTRODUCTION

A. Establishment and Charge to the Task Force

Solid waste hauling and disposal services are essential to the quality of life and environment in Maine. Recent mergers and acquisitions within the solid waste industry, both nationally and in Maine, have raised concerns among policy-makers and other public officials. They question whether the market for solid waste services is sufficiently competitive to provide municipalities and other purchasers of those services with reasonable price and choice among providers of these essential services.

In response to these concerns, the Joint Standing Committee on Natural Resources recommended and the Legislature authorized formation of a Task Force to study horizontal and vertical market power in the solid waste industry in Maine.¹ The Task Force was composed of 5 members of the Joint Standing Committee on Natural Resources – Senators John Nutting and James Libby, and Representatives Robert Duplessie, John Martin and David Tobin. Senator Nutting and Representative Duplessie served as Task Force co-chairs.

B. Meetings

The Task Force met 4 times during the interim – on August 28, October 18, November 17 and December 11, 2000. At its first meeting, the Task Force received background information on antitrust regulation and on the solid waste market from representatives of the Office of the Attorney General, a solid waste service provider and municipalities. At its second meeting, the Task Force reviewed information on ownership of solid waste disposal and hauling companies and facilities in the State. It also reviewed a pilot data collection project regarding concentration in the solid waste hauling market in Northern Aroostook County and received information on experiences in other states.

At its third meeting, the Task Force invited public comment and heard from local and regional public officials and from public and private waste disposal facility owners, managers and industry associations. Task Force members also talked with Professor Ralph Townsend, a consultant preparing a report for the Task Force. At its final meeting for the interim, the Task Force reviewed the paper submitted by Professor Townsend, setting forth a plan for further study, and put forth its recommendations from the first phase of the study to the 120th Legislature.

¹ The legislation creating the Task Force, 1999 Public Law, chapter 773, also required anyone seeking to acquire control of solid waste assets to notify the Attorney General at least 30 days before the acquisition, to enable that office to address any antitrust concerns.

II. BACKGROUND; OVERVIEW OF ISSUES

A. Market Power

In a competitive business market, firms are deterred from over-pricing their goods or services by the presence of competing firms which may offer a more reasonable price and take away their customers. A number of things can prevent a market from operating competitively, however, including market power.

Market power is said to occur when a firm has the ability to maintain prices above competitive levels for a significant period of time.² Market power can be obtained in several ways – some legal and some illegal. Government regulation granting exclusive franchises creates market power, e.g., in the electric utility industry. Conspiracy among market participants to keep prices high and anti-competitive behavior of a firm preventing new entrants may also result in market power. Market power can be obtained by acquiring and consolidating firms in the same business (e.g., the hauling business); this type of consolidation can create “horizontal market power.” Market power can also be obtained by acquiring firms at two or more levels of business (e.g., in the hauling and disposal levels); market power created through vertical integration is known as “vertical market power.”

There are several ways to respond to unfair market power, including suing a company under antitrust law and enacting legislation to change or control the structure of the market or to provide incentives for greater competition. The Task Force received information regarding agency enforcement of antitrust laws and possible policy initiatives, but focused most of its resources in this first phase of its study on understanding the structure and concerns in the solid waste market in Maine, before proceeding to discuss whether market conditions warrant legislative action and, if so, what action is advisable.

B. Antitrust Law and the Limits on Market Power

Federal and State laws regulate business transactions and practices to prevent anti-competitive behavior, and authorize government agencies to intervene when proposed mergers or business practices threaten healthy business competition.

1. Federal laws

The Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) share authority under federal law for regulating unfair or anti-competitive business practices. The Clayton Act prohibits price discrimination and corporate mergers “where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce.”³ The FTC and DOJ jointly enforce this law.

² FTC/DOJ Guidelines

³ 15 USC §18

The Sherman Antitrust Act provides civil as well as criminal penalties for persons who monopolize or attempt to monopolize any part of the trade among the states, or who enters into contracts, combinations or conspiracies in restraint of trade.⁴ The Sherman Act is enforced by the Department of Justice, as well as by private actions in which injured parties may recover treble damages and attorney fees.

Finally, the Federal Trade Commission Act prohibits unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce.⁵

2. State laws

Maine laws parallel the federal Sherman, Clayton and Federal Trade Commission Acts.

Title 10, sections 1101 and 1102 prohibit a person from entering into contracts, combinations or conspiracies in restraint of trade and from monopolizing or attempting to monopolize trade or commerce of this State. Violation of these laws is a Class C crime. As an alternative to seeking criminal penalties, the Attorney General may seek to impose a \$100,000 civil penalty for each course of conduct that violates the law. The Attorney General may also sue to enjoin violations, and any person injured by violations may sue to recover treble damages and attorney fees.

Title 10, section 1102-A prohibits a person from acquiring a firm where in any line of commerce the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly. This law is also enforced by the Attorney General, but no criminal penalties are provided. The Attorney General may sue to enjoin the acquisition and any person injured by the acquisition may sue for treble-damages and attorney fees.

The Maine Unfair Trade Practices Act, Title 5, chapter 10 (§§205-A to 214) declares unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. The Attorney General may sue to enjoin acts believed to violate this Act. Also, any person injured by violations may sue to recover restitution and other equitable relief.

3. Analyzing market power

One method of analyzing market power is the method used by state and federal regulators to determine whether to challenge mergers on the grounds that they will substantially lessen competition or tend to create a monopoly. The results of following these merger guidelines in analyzing data about the Maine

⁴ 15 USC §§1

⁵ 15 USC §45

market can give the Task Force guidance in evaluating the competitiveness of the current market, and can help anticipate potential problems if more acquisitions occur.

a. Horizontal market power

The federal guidelines for analyzing horizontal market power call for defining the market area, collecting data on who is operating there and what percent of the market they hold, and calculating an index called the Herfindahl-Hirschman Index. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. When a large number of firms operate in a market and no single firm has a significant share of the market, the HHI is relatively small. HHI increases as the number of firms decreases or the disparity in size between firms increases.

To take extreme examples, if 100 firms each have 1% of the market, the HHI is 100. (the sum of 100 squared 1's). If 2 firms each have 50%, the HHI is 5000 ($50^2 + 50^2$). If one firm has 90% of the market and 2 others each have 5%, the HHI is 8150 ($90^2 + 5^2 + 5^2$). Federal guidelines classify a market with an HHI between 1000 and 1800 as “moderately concentrated,” and those with an HHI in excess of 1800 as “highly concentrated.”

The calculation of the HHI is only the first step in determining whether to challenge a merger as anti-competitive. The FTC and DOJ also look at: whether the merger raises concerns about potential adverse competitive effects, given the level of concentration and other features of the market; whether entry of new competitors is likely and whether that entry would occur in a timely manner and in sufficient magnitude to deter anti-competitive behavior; whether efficiency gains from the merger would benefit the market; and whether one of the merging companies would have failed and exited the market if the merger had not occurred.

b. Vertical market power

Vertical market power is more difficult to analyze, since there is no numerical calculation that can provide a threshold for concern. Among the concerns raised by vertical integration are the following:

- Entering a market by means of a vertical merger may eliminate a potential competitor; if existing firms believe that a firm will enter its market as a competitor, they may keep prices reasonable to deter a potential competitor. In addition, entry by merging with an existing company denies the market of an actual competitor.

- Vertical mergers also can create barriers to entry, e.g., where the degree of vertical integration is so extensive that potential entrants must enter both levels of the market to succeed, entry to one of the markets is difficult, and the difficulty of entering that market affects its performance.
- Vertical integration can allow a company to evade the impact of rate regulation, e.g., by purchasing a supplier, raising prices and passing them through to rate payers, as allowed under the regulatory scheme.

C. Legislative Responses to Market Power

Policymakers have responded to the existence of monopolies in the utilities industries, most often by passing laws to regulate rates charged by the monopoly companies. Telephone, natural gas, and electricity are among the services that are now or were once subject to rate regulation. Another less common response has been enactment of laws requiring divestiture of certain assets. Electric utility restructuring is an example, under which Maine law required the separation of electricity generation firms from electricity distribution firms.

Laws relating specifically to the solid waste industry seem less common than those relating to electricity, telephone and other utilities. The Task Force asked Attorney General Offices in all 50 states for information on the solid waste markets in their states and any legal or policy response that has occurred. Few states responded; most of those who did respond said that they have dealt with issues through antitrust litigation. Two states – Alaska and West Virginia – regulate rates for waste hauling, disposal or both in the same way they regulate rates for electricity and other utilities.

Other possible legislative responses to solid waste market problems could include restrictions on consolidation, equal access requirements at disposal facilities, limits on behavior such as prohibition of “evergreen contracts”⁶ and changes in state law to increase competition, such as lifting the ban on development of commercial disposal sites. Any review of these possible options would occur only if the Task Force finds that the solid waste market in Maine is not functioning properly.

D. The Structure of the Solid Waste Industry in Maine

The solid waste industry is a multi-faceted and inter-related one, involving special waste landfills, incinerators, compost facilities, municipal landfills, tire processors and transporters who haul waste from households and businesses to disposal facilities or transfer stations and from transfer stations to disposal facilities.

⁶ Evergreen contracts are private trash-hauling contracts that renew automatically and that contain difficult or costly options for terminating the contract.

1. Solid waste haulers

Solid waste may be brought to a disposal site or transfer station from households and commercial sites by (a) residents themselves; (b) municipal employees; (c) private haulers under contract with the municipality or business; (d) private haulers under contract with the individual resident or business; or (e) a combination of residents and haulers hired by them.

Data collected from municipalities by the State Planning Office show the following distribution of methods of solid waste hauling in 1999.

Methods of Municipal Waste Hauling -- 1999

Method of Municipal Waste Delivery	Number of Municipalities	Percent of State Population	Percent of State Total Tons of Waste Disposed
Municipal employee pick-up	16	14%	14%
Municipal contract with private hauler	116	29%	29%
Residents and Private Haulers Take to Transfer Station	160	26%	33%
Residents Take to Transfer Station	171	18%	16%
Pay-per-Bag Fee	64	12%	8%

The Task Force received some information indicating that, at least in some parts of the State, the number of haulers in the market has decreased. Some municipalities that contract with private haulers say that fewer haulers are bidding on their contracts. Regional Waste Systems of South Portland provided information to the Task Force indicating that the number of haulers bringing waste to the RWS incinerator has decreased, and the concentration of waste hauled by the largest companies has increased. According to RWS, the top three companies delivered 65% of the waste brought to RWS in 1994, with only one company exceeding 25%. In 2000, the top three companies delivered 97% of the waste and each of the three exceeded 25%. The next highest percent of waste was 1.94%.

CHANGE IN WASTE HAULERS DELIVERING TO THE RWS INCINERATOR, 1994 vs. 2000

FISCAL YEAR 1994			FISCAL YEAR 2000	
Company	Percent of Waste Delivery to RWS		Company	Percent of Waste Delivery to RWS
Astro	12.05		---	---
BFI	3.16		--- **	--- **
Carey	4.84		Carey	.65
Casella	0		Casella	29.10
Coadco	0		--- **	--- **
Enviropac	9.72		--- **	--- **
Harris	6.01		---	---
Herrick	2.04		Herrick	1.94
McCormick	.80		McCormick	.51
Pine Tree Waste	0		--- **	--- **
Waste Management	36.54		Waste Management	39.80
Troiano Waste	16.13		Troiano Waste	28.01
Yarmouth Rubbish	8.71		--- **	--- **
			** -- Hauler Purchased by Casella	

At least some of the decrease in haulers is caused by consolidation. Information submitted at the request of the Task Force indicates that the 2 largest firms in the state – Casella and WMI – have purchased at least 20 haulers statewide in the past 4 years. This information does not present a complete picture of the hauling industry in Maine, which is somewhat difficult to create because there is no single centralized source of information on the industry.

2. Solid waste disposal facilities

At one time, municipal landfills were the primary method of disposing of solid waste. In 1999, there were only 8 licensed and operating municipal landfills, and they accepted approximately 10% of municipal solid waste generated in the State. The remainder of the waste is disposed of in waste-to-energy incinerators and commercial landfills.

a. Incinerators

Maine has 4 major waste-to-energy incinerators: The Maine Energy Recovery Company facility in Biddeford; Regional Waste Systems incinerator in South Portland; the Mid-Maine Waste Action Corporation incinerator in Auburn and the Penobscot Energy Recovery Corporation facility in Orrington.

Major Waste to Energy Incinerators in Maine

Incinerator and Location	Capacity	Owner
Regional Waste Systems (South Portland)	Daily: 550 tons Annual: 170,000 tons	RWS, Inc., a quasi-municipal corporation formed by 21 municipalities
Mid-Maine Waste Action Corporation (Auburn)	Daily: 200 tons Annual: 70,000 tons	MMWAC, a quasi-municipal corporation formed by interlocal agreement among 12 municipalities
Penobscot Energy Recovery Corporation (Orrington)	Daily: 1100 tons Annual: 270,000 tons	General Partners are Casella Waste Systems ⁷ Inc. and Energy National, Inc (ENI) of Minnesota. Limited partners include Casella, ENI and the Charter Municipalities
Maine Energy Recovery Company (Biddeford)	Daily: 1000 tons Annual: 250,000 tons	General Partners are Casella Waste Systems, Inc. and Energy National, Inc. (ENI)

Incinerators do not operate in isolation. Material delivered to the incinerator that does not burn efficiently is separated from the waste and sent to a landfill. This material is known as front-end-processing-residue or FEPR. Ash resulting from incineration must also be landfilled. Incinerators rely on

⁷ Casella is part owner of the PERC plant through its subsidiary, PERC Management Recovery Company, Limited Partnership (PMC).

revenue from selling electricity as well as on tipping fees to maintain their economic viability.

b. Landfills

There are 2 privately-owned landfills in the State – the Crossroads facility in Norridgewock and the Sawyer facility in Hampden. The Sawyer facility is currently accepting mostly special waste, such as incinerator ash. The Norridgewock facility accepts both municipal solid waste and special waste (incinerator ash and front-end processing residue).

State law currently prohibits new commercial facilities, although expansion of existing facilities may still be possible. Instead of allowing new commercial facilities, state law provides for development and operation of state-owned facilities. The State currently has licenses from the Department of Environmental Protection and from the Land Use Regulation Commission to construct and operate a waste disposal site in central Maine near Lincoln (T2R8, known as the Carpenter Ridge site). State law requires the State Planning Office to submit to the Legislature a plan for developing and operating that facility when 4 years or less of disposal capacity remains in the State for municipal or special waste.⁸

There are 8 large municipal landfills in Maine – in Bath, Brunswick, Augusta, Presque Isle, Fort Fairfield, West Forks, Lewiston and Greenville – and several other small landfills. There are 2 publicly owned landfills that are licensed to accept special waste. These are used primarily for incinerator ash – the RWS landfill accepts waste from its own incinerator; the Lewiston landfill accepts MMWAC's ash.

E. Task Force Data Collection Efforts

The first step in evaluating horizontal concentration is to define the relevant service and a market area in which firms compete to provide that service and then determine which firms compete there and what percent of the market they hold. How do you define a market area for solid waste hauling? Is it a 50-mile radius around a landfill or other disposal site? What if waste is collected from towns farther than 50 miles away, deposited in transfer stations at the outer ring of those markets, and brought to the disposal facility from the transfer stations? In an attempt to begin defining the appropriate market area for analyzing solid waste hauling services, Task Force staff conducted a pilot project collecting information from disposal facilities on which haulers dispose of waste there.

⁸ 38 MRSA §2156-A, subsection 2

1. Pilot project to analyze horizontal concentration in Northern Aroostook

State Planning Office staff asked the Tri-Community Landfill (TCL) to provide data on what haulers bring waste to the landfill, and in what quantities. TCL was chosen because of the size and the relative isolation of the facility, which simplifies data collection. The results of the study are included in Appendix D. They indicate the difficulty in defining the relevant market area, and the dramatically different results obtained by different definitions.

If the market is viewed as including the town of Houlton, the Herfindahl-Hirschman index is 2039, a concentrated market. Without including Houlton in the market area, the HHI is 924, a reasonably unconcentrated market. However, that analysis leaves Houlton as its own market, with an HHI of 10,000, since the City of Houlton awarded its residential waste disposal contract to a single hauler.

This pilot project demonstrated the importance of defining the market appropriately, and led the Task Force staff to conclude that more data and analysis of the market was needed before conclusions about the horizontal concentration of the market can be drawn.

2. Plans for further data collection

On the basis of the pilot project, staff concluded that data collection from disposal sites should continue, but that analysis of the data will require continued effort to define the market area. That further work may involve consultation with local officials, solid waste businesses and antitrust experts.

F. Testimony to the Task Force and Emerging Concerns

In addition to collecting data, the Task Force sought testimony on concerns and observations from participants in the solid waste market.

Regional Waste Systems

Charles Foshay, General Manager for Regional Waste Systems, described the difficult financial position in which RWS operates, largely because of changes in state and federal solid waste policy and federal court decisions. RWS is a quasi-municipal corporation formed in 1974 by interlocal agreement among 21 municipalities. It was formed to provide a facility to meet the state mandate that municipalities provide for the disposal of solid waste generated within their borders. RWS operated a landfill for the first 15 years after it was formed.

In the late 1980's, however, RWS switched to incineration. This change was precipitated by diminishing landfill capacity and a number of federal and state actions that made it economically feasible for groups of municipalities to finance costly incinerators. State bonds were issued to encourage building of incinerators

as alternatives to less environment-friendly landfilling. Federal energy policy encouraged waste-to-energy plants as a way to reduce reliance on foreign oil. State laws allowed municipalities to pass “flow control” ordinances, directing the waste generated within their borders to the incinerator, to ensure that the incinerator had sufficient revenue from tipping fees and from electricity sales to pay off the bonds.

But in 1994, the U.S. Supreme Court struck down flow control ordinances as unconstitutional burdens on interstate commerce.⁹ Municipalities could no longer require haulers to bring all waste from the municipality to the RWS incinerator. Municipalities can require haulers they contract with to bring municipal waste to the facility. But commercial waste, which makes up about half of RWS’s revenue, is collected under contract with businesses, not the municipality. Those haulers can, and do, take the waste where the tipping fee is lowest. RWS has attempted to retain this business by keeping commercial rates low, and requiring municipalities to make up the difference.

A second factor leading to higher costs for RWS municipalities is electric utility restructuring, which has led CMP and other power companies to buy out or renegotiate their power purchase contracts. RWS settled with CMP for a lump sum, and will sell its electricity in the future to a Texas company. But the revenue from that contract is less than RWS was receiving from the CMP contract. Tipping fees would have to increase to make up the difference, a shortfall of about \$5 million per year. Divided over the 190,000 tons of waste delivered to RWS per year, that amounts to \$26.32 per ton. But because RWS must keep the commercial fees competitive, the burden of making up the shortfall may fall disproportionately on the member municipalities, either through higher tipping fees or higher assessments.

Large haulers can take waste anywhere and exacerbate the financial problem at RWS. RWS doesn’t fault them for those decisions – they are in business to make money and choosing the lowest-cost service makes business sense. But those low costs are coming at the expense of municipalities that acted responsibly to meet their state mandated roles. Instead, Mr. Foshay asked the Task Force to recommend an equalization subsidy to correct the inequitable results of a decade of policy changes statewide for solid waste management.

Tri-Community Landfill

TCL is a quasi-municipal corporation formed in 1977 by interlocal agreement between Caribou, Fort Fairfield and Limestone. In 1989, TCL was forced to decide whether to close its landfill or to spend a large sum of money to build a landfill that complied with new environmental regulations. After agreement from 35 municipalities to enter into 7-year contracts for disposal of waste, TCL began construction of a landfill in 1996 and opened it in 1997. They issued \$3.8 million

⁹ C. & A. Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994)

of bonds for 25 years, relying on delivery of 24,000 tons per year. Houlton was one of the 35 municipalities that had agreed to deliver waste to TCL. However, the contract with TCL was a contract with Houlton's hauler, not the municipality itself. That hauler has been purchased by Casella, and the contract with the hauler expires at the end of 2001. Casella has begun talks with TCL about where it will dispose of its waste after the current contract expires. TCL is concerned that the Casella hauler will be offered a lower tipping fee at the PERC facility than is offered at TCL, and that the revenue from that waste will be lost to TCL. The communities that finance TCL feel at a competitive disadvantage with the Casella-owned facilities, and feel that they relied on the support of regional towns in undertaking the financing.

City of Waterville

Waterville's Director of Public Works, Greg Brown, explained to the Task Force the difficulty his city is having with meeting its obligation to deliver a certain amount of tonnage it is required to deliver to the PERC facility, its guaranteed annual tonnage, or "GAT." Despite continual reductions in its GAT, Waterville will likely not meet its quota this year, resulting in monetary penalties. Brown is not sure how the tonnage could fall so far below expectations. He suspects that waste is being delivered to MERC by haulers that have been recently purchased by Casella. Casella has recently built a transfer station in the area, and Brown believes that the waste is being transported to MERC from that facility. He has asked for data on where the waste from the transfer station is going, but he has not received answers.

PERC Municipal Review Committee

The PERC Municipal Review Committee (MRC) is an organization formed by the 130 PERC Charter Municipalities. Greg Louder, Executive Director of the MRC, described the concerns of the Charter Municipalities.

The Charter Municipalities have several interests in the PERC facility. Their long-term contracts with the facility (through the year 2018) obligate them to deliver a guaranteed tonnage to the facility, at a tipping fee determined through a formula set forth in the contract. They are also part owners of the facility, being entitled to one-third of the profits of the PERC incinerator. They can also purchase additional shares of the company with "performance credits" that they earn through their interactions with the facility. To protect these interests, the MRC is entitled to monthly and annual operation and performance reports, which enable them to review the company's financial operating information and to monitor expenses, tipping fee adjustments and changes in cost due to law changes.

The MRC is concerned that tipping fees have increased dramatically since they first entered into contracts with PERC – from \$12 in 1988, to \$32 in 1991 and a

net of \$45 in 2000. One of the MRC's chief concerns is the cost of disposing of ash and other residuals from the incinerator. This cost is passed through to the Charter Municipalities in their tipping fees, and the MRC is concerned with the potential conflict of interest created by the fact that the PERC plant contracts with the Sawyer facility for ash disposal. Casella owns the Sawyer facility and has an interest in the PERC facility,¹⁰ through one of its subsidiaries. In addition, the municipalities are concerned about the loss of choice in hauling contractors.

Representatives of Casella Waste Industries, Inc.

Don Meagher, Licensing and Compliance Manager, Eastern Region of Casella Waste Industries Inc. was asked to address the Task Force at its background meeting in August. Mr. Meagher pointed out that, in the past 20 years, the solid waste industry has changed from a largely unregulated, local service provided by the town dump to a highly-sophisticated, interrelated, regulated and expensive solid waste management system. These changes have resulted from public demand for more environment-friendly solid waste disposal and for a system that steers waste to recycling and incineration in preference to landfilling. Companies in such an industry benefit from combining the capital and risk-intensive disposal segment of the market with recycling, hauling and transfer stations. Integration provides for the greatest efficiency and economies of scale. The hauling industry in a rural state like Maine is composed of long, low-density routes. Consolidation of routes allows servicing with denser routes and more customers, without increases in the number of trucks or employees. Consolidation is balanced because there are low barriers to entry into the market. It is not unreasonably expensive to start a hauling business, and haulers can operate on a stand-alone basis without having to own disposal assets. Also, municipalities have an option of having their own employees haul the waste to transfer stations or the disposal facility.

Jim Hiltner, Vice-President of Casella, also addressed the Task Force. Mr. Hiltner responded to comments made to the Task Force at its second meeting. Mr. Hiltner commented on the criteria for evaluating market concentration, saying that the calculation of an HHI index is just one step in analyzing horizontal concentration. The U.S. DOJ also analyzes (a) whether changes in the market indicate that the current market share of a particular firm overstates or understates its future competitive significance; (b) the ability of competing firms to enter the market, i.e., whether barriers to entry are high or low; and (c) the efficiencies likely to result from a proposed merger, which would make the merger beneficial for consumers by providing low prices, improved quality, enhanced services or new products.

¹⁰ Casella has an interest in PERC through one of its subsidiaries; the subsidiary is one of 2 general partners in PERC and is also a limited partner in PERC. A subsidiary of the other general partner (ENI) manages operations of the PERC plant.

In response to the pilot data collection project, Mr. Hiltner said that it demonstrates that there is a competitive market for hauling in Aroostook County, and that municipal contracting decisions play a large part in waste hauling competition.

With regard to the Tri-Community Landfill, Mr. Hiltner says that Casella has been working to find a mutually-beneficial arrangement for waste disposal services in Houlton. In response to concerns that Casella would entice Houlton waste to the PERC incinerator and away from the TCL by offering inappropriately low tipping fees, Mr. Hiltner explained that the agreement between PERC and its charter municipalities would prevent that from happening. The agreement prohibits the PERC incinerator from offering to non-Charter municipalities a lower tipping fee than is charged to the Charter Municipalities, unless the Municipal Review Committee consents. Therefore, the vertical integration of ownership of the PERC incinerator and the hauler does not create undue market power.

Casella Waste Systems also provided written information at the request of the Task Force, including a list of the communities that have directly contracted with Casella for waste hauling services; a description of the businesses acquired by Casella in Maine; and a description, from the company's perspective, of the legislative and regulatory factors that affect its business activities. In its written response, Casella noted that the dramatic price increases at PERC occurred years before Casella acquired an ownership interest in the plant. In addition, they noted that there is no conflict of interest in disposal of PERC ash at the Sawyer landfill because the pricing and term of ash disposal are determined by a contract entered into years before Casella acquired either the Sawyer landfill or an ownership interest in PERC.

G. Plans for Further Study

The Task Force hired a consultant to prepare a work plan for further study of the solid waste market, and particularly to focus on a plan to study vertical integration. Dr. Ralph Townsend, Professor of Economics and Chair of the Economics Department at the University of Maine, is the consultant to the Task Force. Professor Townsend met with the Task Force and with Task Force staff to clarify issues and concerns. He delivered a paper to the Task Force laying out 29 tasks to be performed during the interim and in the next phase of the study beginning in the summer of 2001.

The work plan calls for preparation of the following background materials before the Task Force reconvenes following the 1st Regular Session of the 120th Legislature:

- A thorough review of state and federal laws and court cases affecting the solid waste industry;

- A review of consolidation and integration on the national level;
- Tonnage and cost data from municipalities and disposal sites over the past 10 years;
- More thorough information from other states on how they have responded to consolidation and integration in the solid waste market; and
- A summary of state policy objectives relating to solid waste.

When the Task Force reconvenes, Professor Townsend suggests that it:

- Gather information on the impact of concentration in the disposal market on the ability to enter the hauling market;
- Describe and assess vertical mergers in the State;
- Assess the relationship between public and private disposal facilities, and between in-state and out-of-state facilities; and
- Assess cost data, including profitability and cost justifications for mergers.

Finally, Professor Townsend set forth possible policy options for the Task Force to consider if it concludes that changes in the market are merited. Those options include: allowing construction of commercial disposal facilities or accelerating development of state facilities to increase competition in disposal; altering the municipal responsibility to provide for disposal; restricting further consolidation or requiring divestiture of existing assets; and regulating hauling or disposal rates.

III. FINDINGS and RECOMMENDATIONS

Findings

State antitrust laws allow the Attorney General to intervene when a planned merger between 2 or more companies threatens to substantially reduce competition in a given market. It is essential that the Attorney General receive notice before a merger occurs, to provide the greatest opportunity for analysis and public protection. The law requiring a company to give 30 days notice to the Attorney General before acquiring a solid waste company is set to expire 90 days after adjournment of the 1st Regular Session of the 120th Legislature, approximately mid-September of 2001. That law also requires notice only if the business to be acquired has more than 5 employees. The Task Force finds that continued notice of all acquisitions is necessary, to give the Task Force time to complete its work without concern that further consolidation and integration will occur without review by the Attorney General. Also, since numerous acquisitions of small hauling companies can have a significant impact on competition, the notice requirement should be extended to all companies, regardless of the number of employees.

Recommendation

The Task Force recommends that the Maine statutes be amended to change the repeal date on the notification law to 90 days after the adjournment of the 2nd Regular Session of the 120th Legislature. It also recommends that the notice requirement be extended to all acquisitions, regardless of the number of employees.

Findings

The Task Force finds that the work of understanding and assessing markets is a highly technical issue, requiring background in economic principles and expertise in market analysis. The Task Force needs resources to hire a person with such specialized skills to assist it in analyzing data that is being collected during the legislative session. Funds are needed to hire a consultant to enable the Task Force to finish its work during the next legislative interim.

Recommendation

The Task Force recommends that a sufficient amount of funds be provided to it to hire an economics and market analysis expert to assess market data collected by the Task Force and that the Task Force be authorized to retain such an expert for the duration of its study. Funding sources, including dedicated revenue relating to solid waste matters, must be pursued.

APPENDICES

- A. Authorizing Legislation (1999 Public Law, chapter 773) (not included)
- B. Letters from Casella Waste Systems and Waste Management, Inc. responding to questions from the Task Force (not included)
- C. Solid Waste Market Experience in Other States
- D. Pilot Data Collection Project: Calculation of the Herfindahl-Hirschman Index for the Market for Solid Waste Hauling to the Tri-Community Landfill
- E. Recommended Legislation

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SOLID WASTE MARKET EXPERIENCE IN OTHER STATES

STATE	General Observations about Trends in the Market	Evidence of Market Problems	Studies; Proposed legislation; Litigation; Other solutions
ALASKA	There is increasing concentration in the industry. Waste Mgt. has acquired most of the certified refuse utilities serving the urban areas of the state; it now has 95% of customers in the State. Alaska regulates this industry as a public utility. Certified refuse utilities are exempt from state antitrust laws.		Corporations and individuals furnishing collection and disposal services are public utilities and their rates are regulated by the Regulatory Commission of Alaska.
COLORADO	Has seen trend toward horizontal concentration and vertical integration There are 2 major haulers in the Denver metro area: BFI and Waste Mgt.	Market power reveals itself through “evergreen clauses”	No studies; no proposed legislation
CONN.	There is a general trend toward increased concentration and vertical integration		Attorney General’s office is currently investigating levels of concentration, but there is no conclusion yet. Attorney General’s office has proposed that trash haulers be registered
IOWA	Haulers are being bought out or going out of business (some because of	Most landfills are municipally-owned and municipalities provide hauling or contract	No studies, but vertical integration is a concern and will be discussed at the

	inability to compete with services and lower prices of vertically integrated companies)	out; commercial business is done by private haulers, which often are vertically integrated. Trash may be hauled to facilities they own out of state (and some is brought into Iowa from other states (MN.))	next upper Midwest summit meeting in November. They have initiated discussions with neighboring states and are watching Penn., New York, Virginia and Illinois
KENTUCKY	There is a trend toward consolidation in hauling and vertical integration, esp. in the metro counties	Industry is exercising market power with increasing rates and service cutbacks, esp. with regard to specialty markets	
MISSOURI	Mo. has concerns about vertical integration; they have a dominant hauler in the Kansas City area with 60% of market; another company with 30% may be up for sale soon.		They are currently analyzing a merger case affecting Kansas City
NO. DAKOTA	National mergers have resulted in significant concentration of private landfill ownership; following acquisition of landfills, the companies are aggressively acquiring haulers. This is a problem particularly in the rural areas, since the cities have municipal trash pick-up.		No studies or legislative proposals known Atty. General office has very limited resources and does not get involved unless there is a merger; the Health Department, which licenses landfills, brought the most recent merger concerns to the AG's attention. Attorney General did become involved in a merger a couple of years ago; company agreed to conditions, including a 7-year freeze on rates (for landfills?), with only cost-of-living increases allowed.

PENN.	<p>There s a trend toward consolidation and vertical integration in hauling and disposal.</p> <p>Small and independent landfills have been targeted for acquisition by large companies that serve large East Coast cities</p>		Penn. Attorney General has investigated many proposed mergers for horizontal and vertical issues; they have worked with the U.S. Justice Department on many of the cases, which are of multi-state interest
SOUTH DAKOTA	Have no specific data, but there is anecdotal evidence of increased concentration		
UTAH	There is increased concentration; significant vertical integration and expansion of waste companies into related fields	There is not widespread evidence of anticompetitive practices or misuse of market power	<p>No studies or legislation</p> <p>Attorney General's Office reviewed the impact of proposed merger of BFI and Allied Waste and has concerns in one area of the state; They approved the merger with several conditions.</p>
WEST VA.	Following national trend toward consolidation and vertical integration	<p>Industry is highly regulated – rates are controlled by Public Service Commission</p> <p>There have been problems in the commercial hauling market (where the PSC does not regulate rates) – with evergreen clauses and use of landfill ownership to engage in below-cost pricing of hauling services</p>	Public Service Commission licenses and sets rates for landfills, waste transport and residential refuse collection. PSC has authority to regulate commercial hauling rates, but does not currently do so.

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Herfindahl-Hirschmann Index

Solid Waste Hauled to the Tri-Community Landfill (Fort Fairfield) (Including Houlton Tonnage)

Hauler	Market Share	HHI
Adams	7	49
Bob's	<1	
Boyd's	41	1681
Bouchard	3	9
Brooker	1	
City Sanitation	5	25
Crown of Maine	8	64
Deschaine	2	4
Gary's Sanitation	1	1
Gil's Sanitation	1	1
Landeen	2	4
Maple Grove	5	25
McNeal's	10	100
Saucier	6	36
Searles	2	4
Star City	<1	
Residential	6	36
TOTAL HHI		2039

**Solid Waste Hauled to the Tri-Community Landfill (Fort Fairfield)
(Excluding Houlton Tonnage)**

Hauler	Market Share	HHI
Adams	10	100
Bob's	<1	
Boyd's	9	81
Bouchard	5	25
Brooker	1	1
City Sanitation	8	64
Crown of Maine	12	144
Deschaine	4	16
Gary's Sanitation	1	1
Gil's Sanitation	1	1
Landeen	4	16
Maple Grove	8	64
McNeal's	16	256
Saucier	9	81
Searles	3	9
Star City	1	1
Residential	8	64
TOTAL HHI		924

Houlton Tonnage Only

Hauler	Market Share	HHI
Boyd's	100	10000

DRAFT LEGISLATION

An Act to Extend and Amend the Requirement for Giving Prior Notice of Acquisitions of Solid Waste Businesses

EMERGENCY PREAMBLE (?)

Sec. 1. 38 MRSA §2111 is amended to read:

§ 2111. Acquisition of solid waste and residue hauling assets

1. Prohibition. A person may not acquire, directly or indirectly, controlling stock or substantial assets that include those used in solid waste or residue hauling from a business engaged in and of which more than 1/2 of the revenue is derived from solid waste or residue hauling in the State without prior notice as required under subsection 2.

For the purposes of this subsection, "solid waste or residue hauling" means the collection, transportation or delivery of solid waste or residue to a transfer facility or station, incinerator or disposal site from residential or commercial generators and customers and includes hand pickup, containerized pickup and roll-off services.

2. Notice. The person acquiring controlling stock or substantial assets under subsection 1 shall provide notice of this acquisition to the Department of the Attorney General at least 30 days prior to the date of acquisition. That period may be shortened with the consent of the Attorney General.

~~3. Exception. Notwithstanding subsection 1, this section does not apply if the business from which controlling stock or substantial assets are being acquired employs 5 or fewer individuals.~~

4. Confidentiality. Information received by the Department of the Attorney General as a result of the notice requirement under subsection 2 is confidential.

5. Penalty. A person that violates this section is subject to a civil penalty not to exceed \$10,000, payable to the State. The penalty is recoverable in a civil action. The violation constitutes a prima facie violation of Title 5, section 207.

6. Repeal. This section is repealed 90 days after adjournment of the ~~First~~ Second Regular Session of the 120th Legislature.

SUMMARY

This bill amends the law requiring a person to give notice to the Office of the Attorney General at least 30 days before acquiring a solid waste or residue hauling

business in the state. It removes the 5-employee threshold for application of the notice requirement and extends the repeal date of the requirement to 90 days after adjournment of the Second Regular Session of the 120th Legislature.

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