APPENDIX I-A
Flow Controls and Municipal Solid Waste

Summary of Public Comments

INTRODUCTION

Flow control of MSW, also referred to as designation, is a high priority issue for a wide spectrum of parties involv municipal solid waste management. In preparing the Report to Congress on municipal solid waste flow control, EPA active sought information from business, industry, government, and the public. EPA invited both written comments and participa in any of three public meetings in Arlington, Virginia (August 17, 1993); San Francisco, California (August 31, 1993); and Chicago, Illinois (September 15, 1993). Commenters included 74 State and local governments, 60 waste management com 29 recycling companies, two financial institutions, and 14 environmental groups and individuals for a total of 179 comment

These commenters submitted written materials at the meetings and also provided additional comments to the public docket. This report is strictly a summary of the various positions discussed in the written comments.[1] The summary does contain editorial comments, nor does it reflect EPA's position on any of the issues raised.

Much of the information provided in the written comments is anecdotal and lacks quantitative details. In addition, written comments did not always provide examples or explanation of opinions, especially on the topic of alternatives to flov controls. While many of the comments and perspectives are enlightening, they do not provide all of the necessary informat documentation for preparing the Report to Congress.

Table 1 provides a breakdown by respondent type (e.g., State and local government) that identifies the number of commenters, number of commenters who support or oppose flow

[1] Some commenters submitted more than one copy of their comments. Also, if the comments submitted contradict the information contained in the state matrix, the discrepancy will be identified in a footnote. An additional six comments were received and reviewed. Generally, no new issues were raised by the additional commenters.

TABLE 1

NUMBER OF COMMENTERS BY ISSUE AND NUMBER OF COMMENTERS IN FAVOR OF AND AGAINST FLOW CONTROL

Commenters	Total Number of Commenters	Number of Commenters For/Against Flow Controls	Total Number of Commenters That Discuss the Impacts of Flow Controls on:					
			Solid Waste Management and Capacity	Source Reduction and Recycling	Economics	Recyclable Materials	Human Health and the Environment	Alternatives to Flow Controls
State and Local Governments	74	66/5 1 had no opinion 2 did not comment	61	33-recycling 10-source reduction	54	36	17	13
Waste Management Industry	60	10/50	13	29	46	7	20	8
Recycling Industry	29	3/11 15 opposed flow control of recyclables only	7	17	18	17	8	8
Financial Institutions	2	1/0 1 had no opinion	2	1	2	1	0	1
Environmental Groups and Individuals	14	7/6 1 had no opinion	4	4	5	4	6	1
TOTAL	179	For - 87 Against - 72 No Opinion - 5 Oppose FC of recyclables- 15						

controls and the issue areas that received comment. This report organizes the information into six issue areas: (I) impacts control on solid waste management and capacity; (II) impacts of flow control on source reduction and recycling; (III) imp flow control on economics; (IV) impacts of flow control on recyclable material; (V) impacts of flow control on human hea the environment; and (VI) alternatives to flow controls. Within each issue area, the report is organized by respondent type. After the issue area sections, the summary provides a list of commenters that provided written materials to EPA.

I. IMPACTS OF FLOW CONTROLS ON SOLID WASTE MANAGEMENT AND CAPACITY

State and Local Governments

Sixty-one of the 74 state and local government commenters addressed the impact of flow control on solid waste management and capacity (i.e., 13 did not specifically comment on this issue). Of these 61 commenters, 59 support flow and two local governments oppose it in favor of free market approaches. The issues of effective and environmentally responsible solid waste management planning and capacity development are central to the flow control concerns of state an local governments. The 59 commenters supporting flow control include 10 state agencies and 49 local governments or loc government organizations involved in municipal solid waste management. These commenters urge EPA and Congress to explicitly grant flow control authority to state and local governments. Based on the written comments, it is unclear what Massachusetts' position is on flow control. Also, the submission from Ohio EPA does not state an opinion for or against fl control. Instead, it answers specific questions posed by the U.S. EPA in the July 12, 1993 Federal Register.

One municipality, Lancaster County, Pennsylvania, advocates improved flow control, not the elimination of it. It suggests that regulators identify and resolve the problems with existing systems and educate and train local government offi who will be planning and implementing municipal solid waste management in the future. Lancaster County also recommen that EPA establish the following:

- A national requirement for local governments to develop and implement a long-term plan for managing all municipal solid waste and recyclables generated within the community;
- Planning standards, materials definitions, and plan adoption procedures that incorporate public participatio
- Procedures allowing commercial and industrial generators of municipal solid waste to "opt out" of a local waste management system at the time of plan adoption if the generator can assure adequate disposition an meet recycling and waste management goals; and
- Indisputable authorization of local government flow control authority for municipal solid waste, including recyclables, as necessary, to implement their plans.

Responsibility/Right to Manage Waste. Eighteen state and local government commenters, including the Spokane Regional Solid Waste Management System in Washington State, view municipal solid waste management and plan as the "natural" responsibility of local governments. Five of the 18 commenters went even further by categorizing municip solid waste management as a public utility, similar to sewage disposal and electricity. Both the National Association of Cou (NACo) and the United States Conference of Mayors pointed out that the only difference between solid waste flow control sewage waste flow control is whether the waste moves by truck or by pipe. Two commenters noted that without flow co New Jersey would be unable to finance and develop the additional capacity needed to meet its goal of achieving self-suffici for solid waste management before the 21st Century. Flow control is needed for effective management, capacity planning, keep "foreign" waste out of the facilities. Since solid waste management is a government's inherent responsibility, derived its police powers, government should have the legal authority to exercise control over the flow of waste.

One commenter noted that when there are waste management problems (e.g., garbage is not collected), citizens automatically call the local government, regardless of whether the local government runs the collection services. Thus, citi view solid waste management as a public service. Two commenters added that the public interest should come before eco The Pennsylvania Department of Environmental Resources cited court cases from as early as 1905 that declare municipal governments responsible for managing their own wastes. Lackawanna County, Pennsylvania claimed that it is their "right t pursue viable, long-term land-use planning," which is not protected by the free market system, and it is their "right of self-determination of how we want to use our land, water, and resources."

Ensuring Economic Viability of Environmentally Preferred Facilities. One of the issues receiving the most attention is the use of flow control to finance solid waste management facilities. Nineteen commenters noted this ben flow control. Flow control provides the financial assurance that the investor communities and bond rating agencies require guaranteeing, over the life of the facility, contracts for a definite amount of solid waste and/or recyclables for which the fac will receive a specified revenue (tipping fee). Some local governments have "put or pay" contracts with solid waste manag facilities that require a definite amount of solid waste and/or recyclables to be delivered or the local government must pay f shortfall in waste or recyclables. Flow controls allow local governments to meet these contracts by requiring that solid wa recyclables be managed at specific facilities. Flow control also reduces the risk faced by the bondholders (i.e., more tonna equals more money, which increases the security of the bonds). Once the facility is constructed, flow control allows for it financial viability and continued operation. As two commenters explained, flow control guarantees sufficient revenues for t facility owners (either a private company or local government unit) to repay the debt incurred during initial start-up and to guarantee the long-term financial viability for the facility (usually 30-year bonds).

A related issue, noted by 17 commenters, is that flow control guarantees the flow of particular types of waste to th designated facilities. Flow control ensures that food and yard wastes go to the compost facility, mixed waste goes to a tra station to separate out the recyclables, and combustible waste goes to the incinerator. In this manner, facilities are guarante efficient operations, such as the incinerator receiving an ample amount of waste to maintain environmentally safe temperatu In addition, this guaranteed flow of waste allows facilities to predict their revenues and, as mentioned above, repay their de a fixed schedule. One commenter noted that if facilities, operating under a "put or pay contract," did experience shortfalls i waste received, tax dollars would be wasted since local governments would still need to pay the facilities to meet contractu obligations.

The Michigan Department of Natural Resources (DNR) and Clinton County, Michigan, both commented that voluntary agreements to ensure the flow of waste to a facility are not strong enough guarantees to build facilities. Only flo control can assure the controlled movement of waste and protect against competitors undermining rates and diverting wast streams. Likewise, Winnebago County, Wisconsin, noted that flow control is necessary to protect municipalities from competition so that they can properly manage and finance their facilities.

Ensuring Adequate Long-term Capacity. According to 14 commenters, flow control protects and ensures long-term capacity. Future capacity also is protected financially through guaranteed revenues which foster the continued, l term operation of a facility. These flow control assurances, for example, allow Delaware to guarantee capacity through the

2009. In Honolulu, flow control is used to ensure that waste is sent to the waste-to-energy facility, which is necessary to e landfill capacity and to keep the city from "being swamped with garbage." Long-term capacity also is guaranteed when flo control is used to minimize the amount of waste actually disposed by emphasizing source reduction and recycling. One commenter added that source reduction and resource recovery are not economically appealing to the waste management in therefore, flow control is needed to ensure that these environmentally beneficial management options, which ensure long-te capacity, are implemented.

Flow control can prohibit facilities from accepting waste generated outside of the designated planning area; this leg issue is currently a problem in Illinois. Federal and state courts are examining the legality of flow control prohibitions and restrictions on the movement of municipal solid waste. Legal decisions may affect the ability of flow controls to protect ar ensure capacity.

Solid Waste Management Planning. Seventeen government commenters stated that flow control allows for effective and environmentally responsible solid waste planning and management. State and local governments can plan for manage the appropriate type and number of facilities to handle the long-term generation of waste within a specified area. Additionally, effective planning also can predict and manage facility closure. Six commenters noted the benefit of being abl predict the quantity of solid waste over time. This predictability allows state and local governments to plan for and develop future capacity. The Solid Waste Association of North America (SWANA) indicated that Lancaster County, Pennsylvania, through its flow control ordinance, has assured capacity through the year 2015. Six commenters indicated that flow contr allows local governments to meet their goals, such as source reduction, recycling, and capacity goals. For example, New J has the goal of a 60 percent municipal solid waste stream recycling rate by 1995. New Jersey believes that this goal is attai only through effective flow control. Two commenters also indicated that flow control allows for the appropriate selection, planning, and management of the costs associated with a reliable solid waste management system.

Not only does flow control allow for the effective planning of solid waste management systems, it also provides fo implementation of solid waste management plans, as noted by 15 commenters. With flow control as the foundation, all asp of the plan, particularly an integrated solid waste management system, can be implemented. More specifically, four comm noted that flow control allows for the development of capacity needed to (1) make this integrated system a reality, (2) repla the capacity lost by closing landfills, and (3) meet recycling goals. As a result of planning and the use of flow control, little uncertainty about the amount of waste exists, and financial obstacles, if any, are minimal. The system can integrate source reduction initiatives, recyclables collection and processing, resource recovery, and landfilling (as the option of last resort) to manage waste in an efficient and environmentally protective manner. This type of system has been the goal of the Southea Public Service Authority of Virginia (SPSA) and, as SPSA indicated, it has been quite successful. The system will succeed because haulers will not have the option of diverting waste from the local materials recovery facility to a cheaper landfill. M states require development of integrated solid waste management plans. Local governments are fulfilling their legal responsi by implementing their plans and, therefore, should be empowered to use the necessary tools, such as flow control, to achie effective implementation.

Eight commenters focused on general waste management hierarchy issues related to flow control and solid waste management planning. Five commenters indicated that flow control allows local governments to decide the best and most protective methods to handle their waste, based upon the solid waste management hierarchy. Source reduction and recycli priority over incineration, and landfilling. The local governments can then plan for the necessary facilities to implement the chosen methods of management, and flow control guarantees that the waste will be sent to the proper facilities. For examp Florida, a county must meet a 30 percent recycling goal, have a commercial recycling program, and have some type of yar management program as a prerequisite to siting a waste-to-energy facility. Two commenters added that the result of flow will be less waste sent to landfills. The City of Springfield, Missouri expanded on this issue by stating that without flow control, law suits may arise over the "improper disposal of solid waste." An additional commenter, the Greater Lebanon Re Authority in Pennsylvania, discussed the concept of recycling landfills, or landfill mining. Through recycling, a 200-ton pe 15-acre landfill serving 100,000 people could operate for 100 years, based on several repetitive periods of use, recycling, ar reuse. This would limit the need for new landfill capacity.

Five commenters indicated that local governments also are obligated to provide and/or fund all supplementary wast management services, such as household hazardous waste collection, curbside recycling programs, composting programs, community education programs. Flow control is essential to keep local governments from going bankrupt trying to fulfill t obligations, in addition to covering the costs of meeting regulatory requirements, planning, and public participation in decisi making activities.

Three commenters argued that citizens are willing to pay more for integrated solid waste management systems tha technologically advanced and, thus, more protective of human health and the environment. As SWANA pointed out, in mar instances, the public has even voted in favor of paying higher tipping/user fees than they would for private landfilling in ord obtain the services provided by the integrated systems. Lancaster County, Pennsylvania adds that, in its experience, flow control authority is what allows the citizens to strive for and achieve the highest quality services and the maximum value fo investment. Finally, SWANA asserts that, without flow control, state and local governments cannot have the municipal soli waste management system of the future that the public is demanding.

Liability Issues. Six state and local government commenters addressed liability issues. As described by NACo, local governments are subject to "arranger liability," which is premised on the theory of actual or potential local government control of the solid waste stream, based on the police power authority and the government's right to monopolize waste disp if it so chooses. If a private owner/operator abandons a dump site or landfill, the local government may be liable for clean- closure, and post-closure care under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCL or Superfund), if they designated (or arranged) that waste be sent there. Further, NACo stated that these activities are extre expensive, and many local governments nationwide, such as Tacoma, Washington, are incurring significant debt to fund remediation activities. If local governments might incur these future liabilities, they should be granted flow control now to l up funds to cover future clean-up and closure activities. In addition, flow control is a positive mechanism for limiting a loc government's future liability since the local government would have the authority to direct municipal solid waste to the mos environmentally protective facilities. These commenters hold that if local governments cannot have flow control authority, should not be held accountable for how the waste is managed by the private sector.

Waste Import/Export. Four commenters addressed waste import and export issues. Michigan DNR noted that the control of imports and exports of waste across state boundaries is a key requirement in establishing and maintaining a comprehensive solid waste management system. This control has been threatened by the U.S. Supreme Court decision in l Gratiot. The Supreme Court held that a Michigan law restricting landfill operators from receiving waste generated outside county, unless it was approved in the integrated solid waste management plan, violates the Commerce Clause of the Constitution. Michigan DNR views this decision as jeopardizing the ability of counties to ensure long-term capacity, which could eventually lead to a nationwide disposal crisis. Clinton County, Michigan, referred to the Fort Gratiot decision as crippling the planning process. If waste generated in Michigan is taken out of state, waste from other states will be needed maintain a sufficient flow of waste to facilities in Michigan. NACo stated that Congress needs to declare that flow control, local government management of its own waste, is not unlawful interference or an unreasonable burden upon interstate co Finally, Minnesota remarked that a state cannot ensure the environmentally safe management of waste sent outside of its borders. Only if other states have equal or better standards and policies would waste exportation be a viable option.

Use of Flow Control in Negotiations. Minnesota commented that flow control, or waste designation, can often be used as a leveraging tool to motivate voluntary delivery to designated facilities when negotiating contracts. In Minnesota, flow control is the tool of last resort. In order to adopt a flow control ordinance, a county or group of counties undergo a series of public hearings and state or regional approval. They must attempt to achieve flow control by voluntary delivery before an ordinance can be implemented. The City of Urbana, Illinois, echoed this benefit of using flow control as leveraging tool during solid waste management negotiations.

Private Sector Issues. Four commenters raised issues regarding the private sector and flow control. San Diego County, California, pointed out that private companies, when entering contracts, rely upon negotiating the type and volume waste to be sent to their facilities; in effect, a form of flow control. Similarly, granting flow control authority to local governments would allow them to compete with private firms and enter into comparable agreements. Private industry wou continue to play a significant role in solid waste management, as they do today in areas where local governments exercise f control.

Hennepin County, Minnesota, recalled that when it was deciding to finance an integrated solid waste management system and impose waste designation (i.e., mandated flow control), companies did not raise opposition. However, compan are now complaining because, as Hennepin County believes, they were not successful enough in selling their facilities and technologies when local governments were contracting for waste-to-energy facilities. Hennepin County asserts that EPA a Congress should not be persuaded by these companies who want the rules changed for their own financial benefit. Similar Greater Lebanon Refuse Authority (GLRA) asserted that many private companies develop business plans that include the receipt of waste from, or into, flow controlled areas and, therefore, planned for a greater volume of municipal solid waste t reasonable to expect under the state and municipal regulatory plans. For example, a company may decide to site a landfill 1 miles outside of a county that has flow control ordinances designating where the county's waste is sent. The company, ho may disregard this flow control authority and plan to obtain a portion of its waste from that county. GLRA asserts that this should not be allowed. The new facilities, not the old ones, are the chief flow control antagonists.

In addition, Clinton County, Michigan, believes that the private sector is too unpredictable to be a reliable manager waste. Citizens would be vulnerable to pricing monopolies, choices between vendors would be removed, and communities be unwilling recipients of waste from unknown origins. The local government would end up dealing with frustrated citizen experience lapses in service.

Arguments Against Flow Control. The Village of Westbury, New York, resists flow control and believes it to be inimical to their interests and to the general public interest for the following planning- and capacity-related reasons: (1) f control locks out capacity to those who need it; (2) burdens citizens with paying for any excess capacity; and (3) leads to unnecessary transport of waste.

Ventura County, California, also raised several arguments against flow control. The county believes that flow cont and the creation of service monopolies are not necessary to implement integrated solid waste management plans and ensure capacity. Through the exercise of police powers, local governments can solicit private sector proposals for materials collec and designated facilities; encourage the development of diverse merchant ventures; set service rates and standards; assess f finance local diversion programs; and provide regulatory incentives to service providers and manufacturers who offer syste enhancements. Ventura County further asserts that local government could still make financial guarantees if they choose to and operate all solid waste collection services.

Capacity objectives also can be met through smaller, more diversified facilities with multiple operators and process This more market driven system, in which government serves as a skillful buyer of privately financed and competitively pri services, provides greater flexibility, minimizes public sector risk, and catalyzes the development of innovative technologies markets. A waste management facility does not need to be large, monolithic, and expensive.

For example, in Ventura County, processing curbside program materials costs $65 per ton net of revenue at the loc materials recovery facility, but only $15 per ton net at smaller process lines operated by independent haulers at their service yards. Establishing small, strategically located green materials mulching and vermiculture operations in the County has allev the need for construction of a capital-intensive regional composting facility which would quadruple per ton processing cost all of these cases, cost-effective and market-sensitive capacity has been created in the absence of flow control. Even wher capital projects are essential to integrated solid waste management systems, these regional facilities, such as the waste-by-ra megafills of eastern Washington, Oregon, and the western deserts do develop with private capital and without flow guarant

Waste Management Industry

Six waste management industry commenters that support flow control, and six that oppose it, addressed solid was management and capacity. Another commenter, WMX Technologies, Inc., generally supports NSWMA's anti-flow contro arguments, but stated that they would not oppose legislation establishing flow control of residential recyclables as long as c conditions were included (e.g., the designation is made under a competitive process, facilities not limited to collecting from specific geographic areas, and prior investments and arrangements are protected).

Capacity Issues. One commenter indicated that flow controls guarantee that waste will flow through facilities developed under solid waste management plans, thus allowing for the development of increased capacity, and guaranteeing viability and efficient use. Two commenters, however, believe that flow control does not create increased capacity. One company commented that flow control actually may lead to reduced capacity by forcing privately-owned facilities out of business. The other company cited New Jersey as an example. New Jersey relies heavily on flow control, yet it has still fa to provide adequate disposal capacity for its own waste.

Planning Issues. One commenter, Ogden Martin Systems, stated that flow control is an essential solid waste management planning tool. Local governments need to determine the amount of waste within their jurisdictions, and the ex growth of that waste, so that they can estimate the amount of waste reduction possible with proposed recycling and compo programs. A second commenter, California Refuse Removal Council, echoed this belief, indicating that planned, ambitious recycling and waste reduction goals could not be achieved without flow control.

Recycling Industry

Four recycling industry commenters that support flow control, and two that oppose it, addressed issues related to solid waste management and capacity. Another recycling industry commenter, the California Resource Recovery Associati supports flow control for solid waste, but not for source separated recyclables.

Capacity Issues. The California Resource Recovery Association recognizes the value of flow control for financin materials recovery facilities and increasing the overall waste management capacity in a region. Flow control of source sepa recyclables, however, does not accomplish these ends. In fact, when exclusive franchises for recycling have been implem business generators reportedly have had to stop recycling some materials because the exclusive hauler chosen was unable t manage the amount of material and no other recyclers could service the account.

Planning Issues. Three commenters indicated that flow control allows local governments to achieve landfill diversion and recycling goals set forth in solid waste management plans and/or mandated by state laws. In reaching this en commenters noted that flow control allows for investment in landfill alternatives, such as incinerators and composting facili which would otherwise be impossible. Local governments may find that these alternative facilities will result in lower overa costs for municipal solid waste disposal. On the other hand, another commenter believes that facilities should be financed b their users and, if they are not viable without flow control, then they probably are unnecessary in the free market.

One recycling industry commenter stated that local governments cannot easily implement comprehensive, integrate waste management plans without flow control.

Financial Institutions

Planning Issues. Both Paine Webber and Standard & Poors commented on solid waste management and capacity Paine Webber supports flow control and believes that it is necessary for state and local governments to effectively plan cap and determine the amount of capital needed to implement the plans. While Standard & Poors took no position on flow cont stated that, "Without legal waste flow to limit competition, the result will be significantly lower rated bonds with higher cos which will make funding an integrated solid waste management system much more difficult."

Environmental Groups and Individuals

Capacity Issues. A University of Wisconsin research assistant stated that flow control is necessary to help provide more accurate predictions of quantities of solid waste in order to effectively plan for future capacity needs.

The Pennsylvania Chapter of the Sierra Club stated that standardized fees under flow control help to insure capacit and that many Pennsylvania counties use flow control as a necessary planning tool. In addition, Pennsylvania would benefi from using flow control to protect itself from the inundation of out-of-state waste.

Hierarchy Issues. The Californians Against Waste Foundation opposes put-or-pay contracts because they may run counter to the waste management hierarchy. Source reduction and recycling should be top priorities. If flow control recyclables is prohibited, local governments still should provide recycling services (e.g., collection) in competition with oth local recyclers. Local governments could adopt mandatory recycling ordinances that prohibit residential and commercial generators from disposing of certain garbage.

Supporting Other Waste Management Programs. The Ohio Chamber of Commerce raised the issue of communities using flow control to collect fees to pay for other waste management programs, such as household hazardou collection or recycling. Flow control allows for cross subsidies from one class of rate payer to another. The Chamber of Commerce opposed this use of flow control because industrial waste generators should not have to pay for programs in w they are not involved.

II. IMPACTS OF FLOW CONTROLS ON SOURCE REDUCTION AND RECYCLING

The commenters that directly addressed the impact of flow controls on source reduction and recycling could gener be divided into the following three categories:

- Encourages source reduction and recycling efforts;
- No effect on source reduction and recycling efforts; and
- Detrimental to source reduction and recycling efforts.

State and Local Governments

Encourages Source Reduction and Recycling Efforts. Of the ten state and local governments that addressed the issue of source reduction, six commenters noted that flow control either had been or was expected to be ben to the source reduction efforts in their states or counties. It specifically was noted that increased disposal fees tended to encourage source reduction. The more a generator has to pay per volume disposed, the greater the economic incentive the generator has to reduce the amount of solid waste generated. One commenter noted that flow controls are necessary to he states meet source reduction goals.

Of the 33 commenters from state and local government that addressed the issue of recycling, twenty-six stated tha flow control is either beneficial for or encourages recycling efforts. In the absence of flow control, low tipping fees could in less recycling overall. Most of the commenters noted that without flow control there would be no economic incentive to recycle because the cost to landfill is cheaper.

For example, according to the Minnesota Legislative Commission on Waste Management, mandatory flow control i Minnesota encourages source reduction and recycling because the cost of managing waste in a mixed waste facility ($156- ton) is higher than the cost of recycling ($100-156 per ton). Additionally, the commenter from the Maine Waste Managem Agency indicated that with incinerators that depend upon flow control, those who create the waste pay the true costs of w disposal. This provides a financial incentive for waste generators to reduce at the source and to recycle whenever possible order to avoid the costs of incineration. Specifically, in Maine, recycling increased from 16 to 30 percent from 1988 to 19 incineration fell from 45 to 37 percent; and landfilling fell from 9.5 to 4 percent. In this case, flow control had an extremel positive impact on recycling efforts.[2]

Thirteen of the commenters in favor of flow control observed that flow control was necessary for states and locali to meet their mandatory recycling goals. The National Association of Counties observed that many state laws mandate recy and diversion from landfill requirements. Local governments, not private industry, have the responsibility to meet these requirements. Virtually every option considered for recycling and diversion is more expensive than landfilling. Thus, flow

[2] These percentages do not add up to 100 percent, however, they are the numbers that appear in the comment.

controls are necessary for states to meet recycling and diversion goals, because without them haulers would simply choose cheapest option, landfilling.

Hennepin County, Minnesota will recycle and compost 50 percent of its waste in 1993; in 1992 only two percent o its waste was unprocessed and landfilled. This achievement is attributed to the successful use of flow controls. New Jers a mandatory recycling goal of 60 percent and flow controls are expected to help the state meet that goal.

Also, according to Union City, New Jersey, solid waste collectors and facilities are regulated as public utilities whereby rates are subject to regulation to avoid price gouging and to ensure reasonable rates. Since the government is resp for ensuring services, flow control positively impacts the delivery of solid waste recycling and disposal service by county implementing agencies. With the adoption of mandatory recycling goals (e.g., 60 percent by 1995), solid waste manageme districts have an obligation to provide a management strategy whereby at least 60 percent of their waste streams are returne the economic mainstream as raw materials. Thus, as a result of the recycling mandate, source reduction and recycling are encouraged in New Jersey.

The commenter from the City of Milwaukee noted that without flow control, recycling would suffer as a result of fluctuations in market conditions. Without flow control as the market varies, private haulers have to adjust the cost of processing to reflect these changes. Further, the vendors of recyclable processing and marketing services suffer because t unable to guarantee end users a reliable quantity and quality of product. While Milwaukee implied that with the implementat of flow controls, the market would fluctuates less, they did not address specifically how this situation would be made more effective under flow control.

No Effect on Source Reduction and Recycling Efforts. Three of the state and local government commenters noted that flow controls were not incompatible with nor an impediment to source reduction efforts. As one commenter noted, flow control has little impact on source reduction because companies have always taken their own sour reduction initiatives (e.g., in Delaware companies now fabricate 27 to 29 cans per pound of aluminum as compared to 20 t cans when cans were first introduced into the marketplace).

One commenter, from the Pennsylvania Department of Environmental Resources, noted that flow control would ha no significant impact on recycling efforts in the state since recycling is mandatory for most of the state. Currently, recycla are not subject to flow control.

Detrimental to Source Reduction and Recycling Efforts. One commenter found flow control to have negative impacts on source reduction efforts. The commenter from Ventura County observed that solid waste managemen obligations and source reduction are inherently in conflict. Flow controls that require collectors to maintain a steady strean waste to a facility can provide disincentives for source reduction.

Six commenters noted that flow control has some negative effects on recycling efforts. The commenter from the Minnesota Legislative Commission on Waste Management noted that flow controls may stultify recycling as a permanent w

management practice rather than allow it to develop into a materials marketing system. According to the commenters, the development of a materials marketing system is the only way recycling will become a permanent part of the production pro

Mayor Sheri Barnard, of Spokane, Washington, stated that under flow control, local governments contract primaril with large national corporations, making competition by small recycling firms nearly impossible. In some cases, when all v is designated to a specific incinerator, small recyclers are prevented from using their new recycling technologies. Therefor overall level of recycling is diminished.

The commenter from the Michigan Department of Natural Resources stated that flow controls might hurt recyclin efforts, unless revenues from the disposal facility could be used to support recovery facilities through an integrated waste management program. The commenter from the Greater Detroit Resource Recovery Authority observed that flow control ordinances could possibly result in a build up of recyclable materials, which might result in the unsanitary storage of recycla material or possibly even lead to illegal dumping.

Although three state and local government commenters noted some negative impacts of flow control, two of the si commenters were vehemently opposed to flow control. The comments of the Incorporated Villages of Westbury, Mineola New Hyde Park, New York, noted that with flow control recyclables become a burden, not an opportunity. This burden o because unnecessary transportation costs add to the management costs for recyclables.

Ventura County observed that flow control eliminates competition over the supply of wastes and ignores the effect the recyclable market dynamics on planning, program development, and service delivery. Specifically, Ventura County not that flow controls inhibit the development of a recyclables market. Long-term commitments to facilities both decrease the government's ability to respond effectively to changes in the commodities marketplace and provide a disincentive to develop utilize innovative and more cost effective waste management alternatives. Moreover, costs increase due to a lack of compe and lower service choices and quality lead to customer disenfranchisement. Flow controls also restrict a manufacturer's a recyclables, thus limiting essential market development.

Waste Management Industry

Encourages Source Reduction and Recycling Efforts. Four commenters observed that flow control can provide benefits for recycling efforts. Two commenters noted that flow controls allow local governments the ability to ma recycling and meet recycling goals. With flow controls, localities can require that collectors recycle materials that cannot b recycled economically. Another commenter added that flow controls help to develop new markets for recyclable goods be of the increased predictability of quantity and quality of recyclable material. Another commenter stated that because of the financial security provided by flow control, major investments are made in new facilities that use recycled raw materials. Therefore, increased recycling is a benefit of flow control.

No Effect on Source Reduction and Recycling Efforts. Four commenters stated the position that flow control neither ensures nor encourages recycling. Two commenters in particular noted that the only way to ensure recycli strengthen the market for recycled materials.

Detrimental to Source Reduction and Recycling Efforts. Most of the commenters did not address the issue of source reduction directly. A few commenters did note that flow control did not encourage waste reduction.

Of the 29 commenters from the waste management industry that addressed the issue of recycling, 21 stated that fl control would be detrimental to the recycling industry and recycling efforts. Some of the reasons cited for disapproving of controls include:

- The creation of a monopolistic environment that inhibits innovation in the recycling marketplace;
- Protection of hauling practices that allow wastes to be mixed, thus degrading the resources; and
- An increase in the fixed costs for recyclers.

Frank Perrotti & Sons, Inc of Woodbridge, Connecticut stated that when municipalities fall short of meeting their p or pay obligations, they have an incentive to reduce recycling to meet their other obligations. The commenter noted further the more effective a municipality is at meeting its recycling goals, the less likely it is to meet its put or pay obligations under solid waste contract with a Resource Recovery Authority.

The commenter from Waste Stream, Inc. (WSI), located in New York, used their firm as evidence of the fact that control thwarts the efforts of successful recycling firms. In WSI's case, the St. Lawrence Solid Waste Disposal Authority planned to build a waste-to-energy facility, but worried more about having enough waste volume to guarantee adequate cas for financing the facility than about the development of an effective recycling program.

SEMASS, which is a waste-to-energy facility located in Massachusetts, represented a different perspective.[3] They stated that if flow controls were implemented in the SEMASS service area, and waste were directed to a landfill rather than SEMASS facility, many potentially recyclable materials would be landfilled, and society would lose the recovery value of th materials.

Recycling Industry

Encourages Source Reduction and Recycling Efforts. Two commenters noted that flow control might be beneficial for recycling efforts. National Recovery Technologies, Inc. observed that flow controls could encourage recycli waste stream is directed toward facilities that process mixed solid waste. Flow control also might encourage recycling if s the tipping fees collected at public facilities could be used to pay for recycling and composting programs including curbside

[3] Some states including Rhode Island classify waste-to-energy facilities as recycling facilities.

drop off programs. Marin Resource Recovery and Recycling Association (California), observed that flow controls will enh recycling opportunities and the ability of individuals to participate in local recycling programs, however, they never provide any examples.

Detrimental to Source Reduction and Recycling Efforts. Of the 17 commenters from the recycling industry that addressed the issue of recycling, 15 stated that flow control would have negative effects on recycling efforts, particularly on the future of the recycling industry. Ten commenters noted that the monopolistic nature of flow control wo be detrimental to the recycling industry and efforts for future expansion. As one commenter from the Chicago Paperboard Commission stated that even the threat of flow controls reduces the incentive to invest in the recycling industry. The most opposition to flow control is that without free markets for recyclables, recycling firms would be unable to do business bec the restricted access to raw materials. Recyclers also oppose flow control because they are concerned that the lack of competition will reduce innovations in the recycling industry. Another obstacle flow control imposes on the recycling indu noted by six commenters, was the potential degradation of resources that results from hauling of mixed wastes. The qualit recyclable materials may be decreased by mixed waste processing.

Financial Institutions

Encourages Source Reduction and Recycling Efforts. Paine Webber was the only financial institution that addressed the impacts that flow control would have on recycling. They commented that flow control might enhance a foster recycling programs by improving the ability of local governments to fund materials recovery facilities.

Environmental Groups and Individuals

Encourages Source Reduction and Recycling Efforts. One commenter from the Institute for Environmental Studies at the University of Wisconsin stated that flow control is necessary to help Wisconsin meet its recyc goals.

The Pennsylvania Sierra Club observed that if states are permitted to exclude waste generated out-of-state through use of flow controls, each state will have more incentive to effectively promote recycling and source reduction within their Governments need to be able develop integrated solid waste management plans that incorporate recycling. Flow control pro a tool that will permit state and local governments to meet their responsibility to implement such plans.

Bio-Engineering Fuels, an alternative energy company located in Washington, observed another way in which flow control has positive effects on recycling efforts:

- Without flow controls, recycling and source reduction will suffer because it is cheaper to landfill everythir Many private companies do not want the expense or the hassle of reducing their use of landfills to manage their solid waste.

Detrimental to Recycling Efforts. The Californians Against Waste Foundation noted that flow control has the following negative effects on the recycling industry:

- Flow controls limit the amount of material ultimately diverted. An exclusive franchise on recyclable mater could prevent a recycler from collecting material that a franchise hauler does not collect.
- Flow controls limit the quality of the material that is collected and marketed. The exclusive hauler may off only mixed waste processing or minimal source separation.
- Flow controls reduce the incentive for a company to reduce costs via source reduction or recycling. An exclusive franchise that controls both solid waste and recyclables may offer a flat rate for services. In thi case, a company must pay the same amount to have both its solid waste and recyclables removed regardle of the volume of waste to be recycled. This situation might be remedied by the introduction of a tiered fe structure to encourage the hierarchy of source reduction, recycling, and then disposal. With such a fee structure, the franchisee might charge the company less money to remove recyclable material.
- Generators want to have the flexibility to choose the recycling company with which they do business, especially when the generator is a chain with outlets in different states. Flow control may hinder the development of company-wide recycling programs for generators in this position if different outlets of the company must operate under different flow control restrictions.

III. IMPACTS OF FLOW CONTROLS ON ECONOMICS

State and Local Governments

Increased Disposal Costs. One of the main points stressed by state and local governments was that the goals of government and private industry differ in providing waste management services. Private industry seeks profit, while gover seeks the safest, most cost effective method for managing waste and protecting human health and the environment, withou producing a profit. Governments reach their goals by developing comprehensive waste management plans, which often incorporate recycling and composting programs as well as construction plans for state-of-the-art, environmentally sound, disposal facilities. Realizing that their plans are expensive to implement, 22 governments defended increased costs stating t the higher goals of long-term waste minimization and increased protection of public health and the environment supersede a short-term negative impacts of increased costs.

Fifteen commenters claimed that flow controls are necessary to acquire waste for facilities and guarantee revenue finance them. Four government commenters specifically stated that current solid waste management systems would suffe greatly if flow control authority were removed. Existing facilities would not receive adequate quantities of waste and, thus, not repay their debts. State and local governments that have already invested large amounts of money and capital in facilitie dependent on flow control, financially would be devastated. The Concord Regional Solid Waste/Resource Recovery Cooperative, formed by 36 municipalities in New Hampshire to manage the financing, construction, and operation of waste energy facilities, fears that the municipalities will not be able to meet their 20 year put-or-pay commitment to deliver solid v without flow control. A put-or-pay commitment means that a municipality must deliver a specified amount of solid waste a must pay its vendor (e.g., the Cooperative) its fee, whether or not the solid waste is delivered to the facility. Haulers will c to take the waste to cheaper facilities, such as far-off landfills, for disposal. The League of California Cities advocates that size does not fit all," and that current flow control flexibility must be retained.

Five state and local governments stated that flow control does not create inefficiency. They said instead that flow control will ensure that the least expensive and least risky method of financing facilities is implemented. One commenter tc the argument a step further implying that the current approach to waste management, without flow controls, is inefficient.

Market Inefficiencies. Sixteen commenters countered the argument that flow control inevitably results in a monopoly stating that with flow control, competition is still an integral part of the waste management process. Vendors m compete to win bids when local governments contract with the private sector to provide waste management services.

Five commenters remarked that flow control establishes a fair and level playing field by stabilizing solid waste management prices and disposal/tipping fees. As the City of Tampa, Florida, stated, "In order to keep the price manageable entity must be able to balance the total fiscal and waste stream picture." Delaware levies uniform fees on commercial and residential generators of waste such that all residents share the total cost of solid waste management, which is treated as a p utility. As experienced by Marion County, Oregon, flow control ensures that waste is sent to the local waste-to-energy fac so that the county can meet its contractual obligations. Failure to meet this commitment would cause increased garbage ra

"The control was, and still is, necessary to keep rates stable." Finally, two commenters noted the economies of scale gaine aggregating waste for collection and processing on a regional or state basis.

The Town of Wallingford, Connecticut, commented that there is no evidence to indicate that there are either more less inefficiencies in flow control municipalities than in other communities. They stated that, "Connecticut, which allows fl control by statute, is one of the most successful states in the U.S. in its construction and utilization of waste-to-energy plar and MRFs."

Waste Management Industry

Increased Disposal Costs. The majority of waste management industry commenters (35 of 46) specifically stated that flow controls foster the monopolistic control of solid waste by local governments and inevitably lead to increase cost without concurrent increases in benefits. The commenters generally stated that when laws restrict or abolish competi the natural market forces that keep prices from unnecessarily rising disappear.

Many waste management commenters provided examples of situations where disposal costs in counties with flow controls exceeded disposal costs in neighboring free market counties. A solid waste collector in Mercer County, New Jers name was not provided), where flow controls presently exist, described such a situation. The commenter stated that under controls in Mercer County, trash haulers must pay $117.81 per ton to dispose of municipal solid waste and $136.36 per ton dispose of construction debris at a transfer station owned by the county. All trash from the transfer station is then delivere privately owned and competitively operated landfill in Pennsylvania where the fee for dumping is only $55 per ton for either municipal solid waste or construction debris. The result is that haulers in Pennsylvania pay $55 while haulers in Mercer Co pay $117.81 or $136.36 for disposing the same amount of trash that will eventually go to the same place.

The Waste Material Trucking Company Inc., located in Southington, Connecticut, provided another example of increased disposal costs due to monopoly control. Residents and haulers in Southington, once accustomed to free trash dis at the now closed Southington landfill, currently must deliver their waste to the nearby Bristol waste-to-energy facility. Tip fees have increased since the time the Bristol facility opened from $37.50 in January of 1988 to $55 in July of 1993. Rates increase every year, and they now more than double the disposal fees charged in nearby Massachusetts towns that operate free market conditions. The Waste Material Trucking Company is outraged because it cannot take advantage of lower cost options, though they are available.

Some comments made by the waste management industry dealt with taxation issues. Five firms implied distrust of governments in their use of revenues resulting from flow control. These firms stated that government officials use flow co to create hidden taxes that sometimes support projects unrelated to waste management. In addition, three commenters note ironically, as governments attempt to raise more revenues with flow control, excessive costs are actually driving private fir of business, leading to an overall decline in tax revenues.

Market Inefficiencies. Over half of the waste management industry commenters (27 of 46) specifically stated that flow control leads to inefficiency. Commenters addressed the inefficiencies experienced both by government owned o government subsidized firms in general, and the inefficiencies experienced by private firms as a result of flow control.

Because government owned businesses do not fear competition and loss of revenue, they do not have incentives tc costs and improve efficiency. Flow control effectively shields government owned waste management facilities from free n forces by guaranteeing waste and revenue. Consequently, prices increase and efficiency suffers. In support of this argum one commenter (Container Corporation of Carolina, Inc.) pointed to a Virginia study comparing public and private trash collection services in the Virginia suburbs of Washington, D.C. The study determined that in general, public facilities were more expensive and far less efficient than private ones (e.g., municipal departments used smaller trucks and therefore, had make more trips to dump sites, they also used larger pick-up crews but served fewer homes per shift, and public employee were absent a greater percentage of time).

Not only were commenters displeased by the inefficiencies of government owned facilities, they also were unhapp about the inefficiencies forced upon private firms by flow control. Private firms described situations in which they were fc to haul waste long distances to comply with flow control laws when more conveniently located disposal sites were availabl Being forced to dispose of waste in inconvenient, distant locations often resulted in backtracking of waste, longer hours fo haulers, and higher costs due to extra fuel use. Other, less obvious consequences included increased air pollution, greater probability of accidents due to more hours on the road, and more wear and tear on roads and highways.

York Waste Disposal Inc. provided an example of the inefficiencies private firms must endure as a result of flow controls that prohibit waste export. York cites a specific example involving the Township of Derry in Dauphin County, Pennsylvania whose waste, prior to flow control laws, was hauled to the waste-to-energy facility in York county as out-of- county waste. Because the hauling distance was only five miles, waste disposal was being handled efficiently. However, f control laws forced Derry to transport its waste to the Dauphin Meadows Landfill, 35 miles away. The additional hauling distance requires more diesel fuel, more wear and tear on trucks, and causes more air pollution. Additionally, York stresse absolutely nothing is gained from choosing one disposal site over another because they are both environmentally safe (doub lined landfill versus incinerator).

With flow controls, private firms also complained that they had to choose facilities with unfavorable credit terms a operating hours. These are often serious considerations for smaller companies, which do not have the financial flexibility o larger firms.

Four representatives of the waste management industry commented that flow control is a form of economic protectionism. They believed that shielding facilities, whether or not they are government-owned and operated, is often detrimental to the economy, unproductive, and inefficient. Commenters believe that flow control should not be allowed to facilities operating by guaranteeing waste, when those facilities would not otherwise survive under free market conditions. company questions why government-owned facilities need economic protection to survive, when privately-owned facilities operate successfully without any form of revenue guarantee.

One commenter stated that large government construction projects, such as those resulting from flow control, are unnecessarily costly and highly inefficient. Local governments often waste tax money on poorly planned projects. Project more likely to succeed if handled by the private sector, which is driven by the free market.

Disincentive to Investment. Another complaint made by nineteen waste management industry representatives was that incentives to invest are often curtailed by the prospect of flow control. If companies believe their revenue stream be removed by government-owned facilities that are supported by flow control, they are unlikely to invest millions of dollar new and potentially risky ventures.

Energy Answers Corporation (EAC), stated that, contrary to arguments claiming that flow control reduces financia risks by guaranteeing waste and revenue, flow control does not guarantee financial success, and lenders and bondholders c flow control because it creates uncertainty when planning and developing a project. For example, if social or economic cha occur, such as shifting populations, then facilities will have no mechanism to adjust their disposal options if they are limited specific geographic area.

EAC asserts that flow control is not necessary to support a facility. EAC is responsible for the development of SEMASS, a three hundred million dollar resource recovery facility in Massachusetts. Although SEMASS is one of the nati largest waste-to-energy facilities in the country, EAC has never required flow control for any aspect of its development or operation. All of EAC's projects are privately financed and rely on long-term negotiated contracts. The SEMASS Partnersl owned by EAC, is an example of a successfully operating facility that never utilized flow controls. In order to secure finan SEMASS was required by its lenders to secure 1,000 tons of waste under long term contract. They were able to do this successfully by negotiating with 32 cities and towns and by demonstrating that they would provide the most cost effective disposal option.

Supporters of Flow Control. Ten of the 60 waste management industry commenters supported flow control. Two stated that flow control did not result in monopoly control and instead, provided a balanced playing field for all waste management companies. With flow controls, smaller firms could compete evenly with larger firms; without flow controls, firms, especially those with their own management facilities, could undercut prices and capture most of the waste market. Martin Systems, Inc. commented that flow controls in northern Virginia actually caused competition to flourish and pointec that over 800 individual trash collection and disposal contractors compete for business within Arlington County, Fairfax Co and the City of Alexandria. Four of the companies argue that flow control is necessary to guarantee waste to facilities, whi turn guarantees that the facility owners (either local governments or private firms) will pay off their debts. Minnesota Res Recovery Association added that haulers would simply choose cheaper alternatives.

Recycling Industry

Increased Disposal Costs. Ten recycling industry commenters either explicitly stated or implied that flow controls create monopolies and cause price escalation. These commenters agree that the free market is responsible for kee

prices at reasonable levels and that flow controls interfere with the free market system causing all the benefits associated w competitive markets to disappear (e.g., system upgrades, improved quality of service, market development, and low prices)

One recycler also believes that flow control is a tool used to disguise new taxes. However, as stated by another commenter, increased costs resulting from flow control can drive private recycling firms out of business and therefore red revenues.

Market Inefficiencies. Six of the recycling industry commenters feel that flow controls would result in either inefficient collection of recyclable goods or inefficient waste disposal in general. Four commenters also stated that flow co would retard the development of the recycling market by blocking local businesses with the potential to use recycled feedst from obtaining the material from monopoly collectors.

Disincentive to Investment. Two recyclers addressed the effects of flow control on incentives to invest. They stated that flow controls that regulate recycling will prevent further private investment in recycling efforts. Often, existing controls compete with private sector recycling investments and crush any incentive to invest in the recycling industry. In addition, the municipal operations taking control of recycling efforts have less incentive to invest in state-of-the-art facilities an effort to increase efficiency, because they are protected from the forces of the free market.

Financial Institutions

Market Inefficiencies. Only two financial institutions commented, Paine Webber, Inc. and Standard & Poor's Corporation. Paine Webber stated that competition still exists with flow control since haulers must competitively bid to hau waste for municipalities. Standard & Poors also commented on the market effects of flow control stating that flow control limit competition. In general, Standard & Poors is neutral on the flow control issue, stating both that, "flow control is not necessary for a solid waste issue to receive a high rating" and yet "if municipal solid waste facilities are to be financed with tipping fees, legal waste flow is needed to have strong investment grade ratings and the lowest possible borrowing costs to municipality."

Environmental Groups and Individuals

Increased Disposal Costs. Three commenters opposing flow control stated that it creates monopolies and results in higher costs to consumers. They said that when a monopoly replaces the free market system, prices increase an consumer suffers.

A University of Wisconsin research assistant supporting flow controls, stated that if large regional landfills are allo to underbid the services provided by county-wide or municipal disposal systems, the government-owned facilities will not b able to compete. Consumers will choose the cheaper option in a free market system. Flow control ensures that consumers pay the higher disposal costs necessary for an environmentally safe facility.

The Pennsylvania Chapter of the Sierra Club agreed stating that flow control is needed to help cover the costs of existing solid waste disposal facilities.

Incentives to Investment. One commenter also stated that flow control is necessary to convince investors to buy the bonds that finance facilities. Without revenue guarantees, the ability to plan and finance new, state-of-the-art facilit would be greatly reduced.

IV. IMPACTS OF FLOW CONTROLS ON RECYCLABLE MATERIALS

Comments concerning recyclables and flow controls could be divided into the following three categories:

- No exclusion of recyclables;
- Limited exclusion of recyclables; and
- Complete exclusion of recyclables.

Addressing the exclusion of certain materials from flow controls, most of the comments from the recycling indust raised the issue of discarded versus non-discarded materials. The position of these commenters on the use of flow control manage materials depended on whether flow controls could regulate all materials or only materials discarded (e.g., placed a curb or delivered to a recycling facility).

Some of the commenters included in the "Complete Exclusion" category did not provide a definition of recyclables differentiate between clean and mixed recyclables in their comments. As more information concerning this distinction was acquired, it appears that most commenters believe that source separated recyclables should be excluded from flow control.

State and Local Governments

Of the 74 commenters from state and local government, 36 commenters directly addressed the issue of materials covered by flow control ordinances. The central issue raised in most of the comments was defining recyclables and detern who has the right to regulate them.

No Exclusion of Recyclables. Fourteen commenters noted that the government had the authority and/or the need to control the flow of all municipal solid waste, including recyclables.

Two commenters justified the authority of municipalities to implement flow control over recyclables by explaining it enables them to meet state recycling goals. The commenter representing the League of California Cities observed that wi the authority to control the flow of recyclables, cities will not be able to meet the ambitious diversion mandates established California law and by 1995 will be subject to fines of $10,000 per day. Further, if recyclables are exempted, many contrac be void and exclusive franchisees will be unable to meet their obligations. Local governments also will experience similar revenue/tonnage problems.

Regional Waste Services, Inc. (RWS is an organization representing 21 municipalities in Maine) expanded on this l adding that all household, commercial, industrial, municipal, and institutional solid waste, including the recyclable compone the waste stream in Maine, is the property of RWS. As a result of this ownership, RWS has the right to subject all discard

and unused materials regardless of their material value to flow controls.[4] RWS stated that recyclables need to be included t each municipality in Maine meet its mandatory recycling goals. Each municipality in Maine is under a statutory mandate to recycle 50 percent by January 1, 1994. If a municipality fails to make reasonable progress towards this goal, it will be ass $1.50 per ton on its tipping fee. Since the responsibility to meet these recycling goals ultimately falls on the municipalities, i likely that the encouragement of voluntary recycling by generators will result in the imposition of penalties against the municipalities.[5]

In September 1992, New York City approved a Solid Waste Management Plan consisting of ambitious source reduction, recycling, landfilling, and incineration programs. As part of the plan, New York City will consider promulgating control pursuant to New York City Administrative code §16-201 et seq., that will facilitate the recycling and composting of categories of residential, institutional and commercial solid waste. Since the Department of Sanitation only collects waste f residential and certain institutional generators, flow control may need to be employed to direct certain categories of recyclab and/or compostable solid waste currently collected by the private sector to specialized handling facilities in order to meet planning goals.

Limited Exclusion of Recyclables. Ten commenters stated that while recyclables were different from the rest of the municipal solid waste stream, it was important to be selective in excluding recyclables from flow control. Most importantly, there was considerable concern that "recyclables" and "recycling" be clearly, universally, and equitably defined Some commenters described the recyclable materials excluded from flow controls in their own state. These exclusions are implemented in two ways: some states list specific materials to be excluded from flow controls and other states list the mat actually subject to flow controls.

According to the Maine Waste Management Agency, Maine flow controls cover residential, commercial, and indus waste, as well as recyclables that are abandoned or discarded by the owner. In Maine, commercial businesses with their disposal facilities are an additional exception.[6]

According to the Minnesota Legislative Commission on Waste Management, municipal solid waste flow control or waste designation in the state is based on a waste management hierarchy (source reduction, recycling, waste-to-energy, landfilling). This approach allows designation only for wastes that would otherwise be managed in a less environmentally s manner. The state will not authorize the use of flow controls for waste that is being managed at a facility using a method t

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[4] According to state regulations, municipalities may designate certain materials as recyclables and exempt them from flow control.

[5] The municipality may have trouble tracking the voluntary quantities recycled and thus may not be able to demonstrate that they have met their recycling goal.

[6] This differs slightly from the language in the state regulations, which states that municipalities may require delivery of solid waste to a designated facility. Under the regulations, municipalities may designate certain materials as recyclables and exempt them from flow control.

occupies the same or higher place on the state's waste management hierarchy (e.g., flow controls could not be applied to M currently being managed at a waste-to-energy facility in order to send the waste to a landfill). Waste designation may not b applied to source separated recyclables. Also exempt from designation is waste processed at a resource recovery facility in operation at the time a designation ordinance goes into effect. Anyone can apply for exclusion from designation, and it mus granted if it would not financially impair the facility. Designation encourages source reduction, recycling, and waste manag facilities at the higher end of the hierarchy and discourages the use of landfills.

While the Michigan Solid Waste Management Act does not authorize flow control, it does regulate the entire solid waste stream except for hazardous and liquid wastes. According to the Michigan Department of Natural Resources, Michi also exempts certain recyclable materials from the Solid Waste Management Act, "if they are separated and actually being recycled." In Prince Georges County, Maryland, the local government has the authority to direct all solid waste, but exemp construction demolition debris, commercial recyclables (i.e., white paper and corrugated cardboard), old cars, sludge, and

According to Lycoming County, Pennsylvania, flow control is authorized for curbside separated recyclables and delivered recyclables for all commercial, industrial, household, or institutional recyclables (i.e., flow control is authorized fo discarded materials). Lycoming does exempt charities, private industry, and residential drop-off or buy-back centers from controls. The Solid Waste Authority of Central Ohio, excludes secondary materials recovered from a materials recovery fa as long as they are destined for market and not another disposal facility.

The Florida Department of Environmental Protection states that recovered materials, (defined as those with known recycling potential that have been diverted from the solid waste stream for sale, use, or reuse) are exempt from municipal so waste flow control if the materials are used within one year, they do not cause pollution, and they are not hazardous or deri from hazardous wastes. While local governments have the right to exclusive collection of recovered material from residen they cannot restrict the flow of commercial source-separated recovered material.

Union City, New Jersey explains that flow control should govern all residential, commercial, and industrial solid wa including recyclable material, unless they are separated at the point of generation (e.g., source separated). This is necessar because only a public entity will resist market forces and recycle material instead of opting for the cheaper landfilling.

Illinois authorizes flow controls for the management of all municipal solid waste including recyclables. However, Illinois considers that each planning jurisdiction should have the authority to decide what materials to include for flow contr their municipal solid waste management plans.

Champaign, Illinois considers that municipalities need to control the entire residential waste stream in order to achie economies of scale and to assure adequate volumes to finance programs and facilities. To achieve this, Champaign sugges all residential waste (including recyclables), all commercial solid waste (excluding source-separated recyclables), all industr waste (excluding source-separated recyclables), and all landscape waste should be covered by flow control.

The commenter from the Resource Recovery Project in Wallingford, Connecticut, which represents 5 counties, explained that the authority to control the flow of municipal solid waste and residential recyclables is essential to enable stat finance waste-to-energy plants, landfills, and materials recovery facilities. Many Connecticut municipalities have guarantee waste and/or recyclable streams to enable the financing of such facilities. At the same time, the commenter also noted that seems logical to treat recyclables as separate once they have been segregated.[7]

Complete Exclusion of Recyclables. Twelve state and local governments hold that recyclable material should be excluded from flow controls. Most of these twelve noted that flow control should be applicable only to municipal solid waste, which should be defined to exclude recyclables.

Waste Management Industry

No Exclusion of Recyclables. One commenter from the waste management industry stated that recyclables were no different than any other material in the solid waste stream. In their opinion, no basis exists for excluding some materials flow controls while including others.

Limited Exclusion of Recyclables. Of the seven waste management industry commenters on this issue, three noted that certain types of recyclable material should be exempt from flow controls. Specifically, one commenter stated th only materials to be sold or donated materials can safely be exempted from municipal solid waste flow control. Two other commenters from WMX Technologies and Mid-American Waste Systems, Inc. stated that while they were not opposed to flow control of residential recyclables, commercial recyclables should not be subject to flow control. According to WMX, government should not assume the responsibility or burden of managing commercial and industrial wastes except to the ext that regulations are necessary to protect human health and the environment. Commercial recycling has a long history of be successful and there is no need for it to be disrupted or limited by government.

Complete Exclusion of Recyclables. Three waste management industry commenters stated that it was inappropriate for government to subject recyclables or materials of any value to flow control. These three commenters acc that local governments need to control municipal solid waste (one commenter defined municipal solid waste as residential v and another commenter referred to municipal solid waste as any materials that have been discarded).

Recycling Industry

Among the 17 commenters from the recycling industry that addressed the issue of materials covered, the main issu was the need to clearly define the extent to which recyclables should be subject to flow controls. One commenter stated th clarifying the materials covered by flow control ordinances is essential.

[7] Under current regulations, municipalities in Connecticut may designate where solid waste and specified residential recyclables may be managed.

No Exclusion of Recyclables. One commenter observed that even if a material is potentially recyclable, it is still a solid waste and inherently could present many of the same potential risks to public health and safety as any other solid wa and therefore should be treated no differently. It is the availability of markets that determines a material's recyclability.

Limited Exclusion of Recyclables. Seven commenters stated that flow control of recyclables is only appropriate when the materials have not been separated from the waste stream or when materials have been discarded throu actions such as placing the materials on the curbside. One commenter elaborated on the need to categorize recyclables into least two types based on their management pathways. The first type entails removal of recyclable materials from discarded waste. Since this is a regulated solid waste activity, recyclables following this path may be subject to flow controls. The s pathway, however, involves source separated materials that have never been part of the solid waste stream. This second category is not waste management but resource management. Flow controls are not appropriate here. Recovered material not solid waste and not subject to flow control.

The commenter from the Free-Flow Packaging Corporation (FFP) also noted that the ability to collect source-sepa recyclable material directly from the generator is essential to maintaining the high quality raw material for their polystyrene needs. Specifically, FFP collects polystyrene directly from its generators (e.g., Apple Computer, Sony, Saturn Motor Company), so that it is clean, dry, and free of all contamination. This source of usable raw material would not be available flow controls included recovered materials in the definition of solid waste. It is not feasible for FFP to purchase polystyren from a municipal transfer station because if the polystyrene is collected by a garbage hauler, it is commingled with other pl cans, and covered with dust.

Six of these seven commenters that are in favor of limited exclusions noted that flow controls should not interfere the property rights of the generator. One commenter also noted that the right of commercial businesses to contract directly scrap metal dealers for the collection of materials separated prior to disposal must be protected.

Complete Exclusion of Recyclables. Nine of the commenters from the recycling industry stated that recyclables should be excluded from the materials covered by flow controls because (1) recyclables are a commodity; and personal property rights of the owner need to be protected. Generators should have the right to dispose of materials as they choose.

Financial Institutions

One commenter addressed the issue of what materials ought to be covered by flow controls. Paine Webber's posit that bondholder security is greatest when the commitment of flow includes 100 percent of all waste generated in a region. However, Paine Webber has successfully financed projects where local community recycling efforts have been exempted. feel that the role of recyclables in the waste stream needs to be further evaluated.

Environmental Groups and Individuals

No Exclusion of Recyclables. Two commenters stated that recyclables should not be exempt from flow control ordinances. The Pennsylvania Sierra Club noted that all materials should be covered by flow control including commercial, residential, and industrial solid waste as well as curbside separated recyclables and commercially generated recyclables.

One commenter observed that in California "recyclables" are legally a part of the solid waste stream. Consequently local governments have legal justification for their authority to regulate "recyclables."[8]

Limited Exclusion of Recyclables. Of the four individual and environmental group commenters that addressed the issue of materials covered by flow controls, two commenters noted that certain exclusions were necessary.

The Californians Against Waste Foundation (environmental group) stated that flow control should be limited to mix solid wastes. Source separated recyclable materials which have been separated by the generator for the purposes of reuse, recycling, or composting should not be defined as solid waste, nor should they be subject to the flow control authority of l government. The definition of solid waste should not depend upon the value of the material. Generators should be able to recycle their materials with the recycler of their choice whether it is on a donate, sale, or fee for service basis.

The American Automobile Manufacturers Association noted that flow control must include certain exclusions. Sol wastes transported for the purpose of recycling to a facility owned or operated by the generator should be excluded. Recyc materials separated from municipal waste should be excluded as well. The definition of municipal solid waste also should e industrial process waste, or other solid wastes resulting from industrial activity that are unlike general refuse and trash, incl construction, demolition, and any renovation debris; used oil; scrap metal; machinery and equipment; and any solid waste identified or listed as a hazardous waste under section 3001 of RCRA, or any solid waste containing polychlorinated biphen (PCBs) that is regulated under the Toxic Substances Control Act.

[8] California Public Resources Code protects the right of persons to sell, donate, or otherwise dispose of recyclables.

V. IMPACTS OF FLOW CONTROLS ON HUMAN HEALTH AND THE ENVIRONMENT

State and Local Governments

Seventeen state and local governments commenters addressed the impacts of flow controls on human health and tl environment. All of the 17 commenters favor the use of flow controls. The general opinion of 14 state and local governm that improperly handled waste can present serious environmental and human health problems that do not arise in the handlir most other commodities. State and local governments seem most concerned that without flow controls, economics would haulers to bring waste to the cheapest disposal facilities regardless of their level of environmental protection. In addition, incentives would remain for environmentally unsound facilities to continue operating indefinitely without upgrading. Since substandard and minimally standard facilities contaminate ground water, impose health risks to citizens and cost tremendou amounts of money to clean up and upgrade, it is wise to implement flow controls to steer waste away from unsound and o environmentally hazardous facilities.

According to one government commenter, repeal of waste flow control would benefit those entities that have mad least effort in pursuing and implementing balanced and environmentally correct solid waste solutions. In contrast, flow co rewards those striving to meet environmental objectives.

The City of Tacoma, Washington believes that flow controls can play an important role in funding the clean up of Superfund sites. In Tacoma, solid waste rates approximately doubled between 1989 and 1993 in order to pay for debt serv the revenue bonds used to fund remediation activities at a Tacoma Superfund site. Without flow control, funding the remec activities would have been extremely difficult and complete remediation would not have been accomplished as rapidly as it

Six state and local governments feel that limitations of the use of flow control impinge on government's rights. Th believe that if local governments are ultimately responsible for the waste in their jurisdiction, they should be allowed to deci how and where that waste is disposed. If flow control is the most suitable method for ensuring that waste is disposed in tl safest way possible, municipalities should be allowed to implement it.

Two commenters stated that illegal dumping occurs in the absence of flow control and that flow control would pr the authority to reduce backyard dumping.

Waste Management Industry

Twenty representatives of the waste management industry addressed the impact of flow controls on human health the environment. Seventeen opposed flow control, while three supported it.

Ten commenters believe that flow control is unnecessary as a means of protecting human health and the environm They stated that RCRA's Subtitle D Rule for municipal landfills, once implemented, would provide adequate protection and therefore, environmental protection is not a valid justification for flow controls. One commenter suggested that stricter

enforcement of existing rules and regulations governing waste disposal sites would achieve greater environmental protectio without loss of competition.

Two commenters, a solid waste collector in Mercer County, New Jersey, where flow controls presently exist, and National Solid Wastes Management Association (NSWMA), oppose flow control stating that it leads to illegal dumping. Si residents are not willing to pay more to have their trash removed, they find other means of disposal such as backyard buryi dumping. This illegal dumping damages soils and contaminates ground water. According to NSWMA, illegal dumping alre occurs in some localities such as Saint Lawrence County, New York, where flow controls currently are in place.

Another concern, voiced by two commenters, the National Solid Wastes Management Association (NSWMA) and United States Pollution Control Inc., is that flow control actually will channel waste to environmentally unsound disposal sit or possibly even to known Superfund sites. According to NSWMA, flow controls forced Rhode Island Solid Waste Management Corporation to haul waste to a known Superfund site. The commenters fear that all residents and organizatio that used the environmentally unsound facility will be responsible for cleanup costs through increased rates.

Four commenters maintained that flow control does not protect human health and the environment. One comment York Disposal Services, stated that flow control can actually damage the environment when it forces private haulers to car waste long distances, increasing fuel use and air pollution. York feels that if flow control is potentially harmful to the environment, it is not a reasonable solution to the waste problem.

Finally, three proponents of flow control expressed concern that without flow control laws, local governments car properly manage waste disposal and ensure human health and environmental safety. If local governments are to be held responsible for waste within their jurisdictions, they must be armed with all available tools to prevent the mismanagement o waste.

Recycling Industry

Eight recyclers commented on the impacts of flow control on human health and the environment. All eight either stated explicitly or implied that flow control does not provide benefits to human health and the environment. Two of the ei commenters specifically oppose flow control of recyclables, which in their view have no hazardous effects on health or sa The California Resource Recovery Association cited a study of over 600 recycling facilities by the California Integrated Wa Management Board (CAIWMB) entitled, "Effects to Human Health and the Environment of Recycling Facilities and the Mar in Which These Facilities are Regulated." The analysis showed that the environmental impacts of processing source separa materials are minimal, so they could be excluded from flow controls without great risk to the public.

One recycler stated that flow controls cause problems with illegal dumping. When fees increase, people try to avo them by dumping waste illegally. Another recycler claimed that in the past, flow controls have directed waste to sites kno be environmentally unsound.

Environmental Groups and Individuals

The six environmental groups and individuals commenting on the impact of flow controls on human health and the environment oppose the use of flow control. Two feel that flow control impinges on the generators' right to choose the m environmentally protective waste management facility. In effect, the waste generator loses control of the management of h her waste but retains liability for any mismanagement. According to the American Automobile Manufacturers Association (AAMA), "If a waste generator were limited by a flow control statute or regulation to manage waste at certain facilities, an these facilities subsequently became Superfund sites, the generator should be relieved of CERCLA liability with respect to response costs at these facilities. In such a case, it would be Congress, EPA, or the local government and not the generato actually `arranged for disposal' of the material."

Another commenter described a case in New York where flow control forced waste to be disposed in an environmentally inferior facility. This commenter stated that, "[d]espite the presence of a state of the art waste-to-energy p in the neighboring Town of Hempstead, the Town of North Hempstead invoked its flow control authority to direct all commercial, industrial, and residential solid waste generated within its boundaries to an unpermitted Town transfer facility out-of-state export."

Finally, one commenter, the Californians Against Waste Foundation, stated that preliminary evidence shows that th majority of problems occur with facilities that process mixed solid waste. Hence, recycling facilities should not be penalize with flow controls when they are not causing environmental problems. The Californians Against Waste Foundation sugges that the degree of regulation should be proportional to the degree of environmental impact.

VI. ALTERNATIVES TO FLOW CONTROLS

State and Local Governments

Most of the 13 state and local governments that suggested alternatives either stated explicitly or implied that waste management policy goals could not be achieved without flow control. Consequently, governments suggested alternatives cautiously, often warning that they were not completely feasible.

Contracts or Franchising Agreements. The most popular alternative (suggested by 7 commenters) was government contracts with the private sector to guarantee adequate flow of waste to planned facilities. Though effective in short run, one commenter stated that contracts do not provide any means of financing future capacity or for funding landfi closure and remediation. Another commenter pointed out that contracts are really a form of flow control since they restric competition and limit opportunities for small rubbish haulers.

Three commenters suggested that if legislative authority exists, local governments could establish franchises. Witl franchises, instead of entering into contracts, municipalities could give a limited number of haulers franchise agreements or right to enter into private contracts in a specified district.[9] The United States Conference of Mayors stated that both contra and franchise agreements are "less flexible" and "more cumbersome" than flow controls and may involve higher costs to consumers. The United States Conference of Mayors also stated that these alternatives disrupt competition more than flow controls do because they limit the destination of waste as well as the opportunity to haul it.

Taxation. Two commenters suggested increasing local or state property taxes. However, according to the Pennsylvania Department of Environmental Resources, most entities do not have the enabling authority. In addition, increa taxation is politically difficult to implement.

Alternative Bonds. The United States Conference of Mayors suggested replacing revenue bonds with general obligation bonds which rely on the taxing authority of the local government to provide financing.

Fee Systems. Four commenters considered the possibility of levying a fee on residences, businesses, and apartments to pay for growth and expansion of solid waste management facilities. This fee would subsidize facilities. Acc to the commenters, one problem with this approach is that it does not encourage the internalization of the true costs of was disposal. Hence, generators lack incentives to reduce waste.

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[9] A franchise is the right or license granted to a person to market a company's services within a particular territory. Franchises are often awarded through a competitive bidding process. Franchises could limit the number of waste management or recycling companies within a jurisdiction. As part of this franchise agreement, a company may sign a contract requiring that municipal solid waste or recyclables be collected and delivered to specific management facilities.

Another possibility (suggested by Minnesota) is to create landfill surcharges for future closure/post-closure care ar possible remediation costs. This approach forces greater internalization of the true costs of landfilling and reduces some of differences in tipping fees between landfills and other waste management facilities.

One commenter stated that local governments could establish license fees for waste haulers, charging them for the licenses to operate such that the fees would cover the basic costs of operating a waste management facility. Operators the could charge minimal tipping fees.

Increased Government Involvement. Five commenters suggested complete government ownership and operation of all elements of the waste disposal industry. This approach would ensure both the financial viability of facilities effective waste management; however, it would remove the free market from the system altogether and would be extremel complicated and expensive to implement. Another difficulty mentioned by the commenters is that government displacemen private waste companies might cause undesired disruption of the flow of commerce.

Another suggested alternative was to force landfills to upgrade and set aside funds for cleanup, closure, and post-closure care.[10] This alternative would be similar to the landfill surcharge suggestion. Again, landfills would be forced to internalize the true costs of waste disposal and would have to increase fees. As a result, state-of-the-art facilities with high fees would be better able to compete.

Waste Management Industry

Contracts or Franchising Agreements. Five of the 8 waste management industry firms commenting on alternatives to flow control suggested that municipalities contract with disposal services to ensure waste flow. Through contracts, government-owned facilities still would have guaranteed waste flow without the monopolistic environment creat flow controls. Another firm suggested franchising waste collection using a competitive bidding process.

Taxation. One firm suggested raising taxes to finance facilities.

Alternative Bonds. The following bond alternatives were suggested by a waste management company:

- General obligation bonds;
- Pollution control revenue bonds;
- Leveraged leasing; and
- Industrial bonds.

Unfortunately, no discussion accompanied the suggested alternatives.

[10] This alternative already is required under RCRA's Subtitle D.

Increased Government Involvement. The National Solid Wastes Management Association (NSWMA) advocated the establishment of increased partnerships between the government and private waste service firms.

Recycling Industry

Seven of the 8 recycling firms commenting on alternatives to flow control either stated that competition was the b option or mentioned that free market options in general should be explored in greater depth. The following alternatives wer offered:

Contracts or Franchising Agreements. Four commenters suggested the use of contracts or franchising agreements as competitive alternatives to flow control.

One commenter suggested establishing government and recycler alliances. Through the alliances, recyclables are e separated from municipal solid waste or reclaimed after collection but before disposal. The alliances allow recyclers to acc recyclable material while still appeasing the health and safety concerns of local governments.

Taxation. Individual recycling companies stated that taxes could provide an alternative to flow controls. State or local governments could levy permit taxes on all vehicles transporting waste and/or finance new facilities through the creati new taxes.

Fee Systems. Two commenters suggested establishing system fees to create recycling incentives.

Increased Government Involvement. The California Resource Recovery Association (CRRA) suggested each of the following alternatives:

- Promote the expertise and investment of existing recyclers to provide reuse, recycling and composting services to generators;
- Build smaller MRFs that encourage (or at least allow) independent recyclers to continue recycling. Instead building facilities that handle all recyclables, CRRA proposed designing facilities that target only the recyclables that the private sector cannot handle;
- Finance MRFs with flow control of solid waste only (i.e., not including source separated materials);
- Have state or local governments establish a license and reporting system for independent recyclers;
- Ban recyclable or compostable materials from landfills (as San Diego is doing with a mandatory recycling ordinance). This ban would achieve the same objectives of flow control of recyclable materials; and
- Require generators who do not meet recycling goals to develop comprehensive waste reduction plans.

Financial Institutions

Standard and Poors was the only financial institution to comment on alternatives.

Taxation. Standard and Poors raised the possibility of using ad valorem taxes (property taxes) to fund projects.

Increased Government Involvement. They also suggested special assessments, which may accomplish the same effect as legal flow controls. A system can levy an assessment on all residents and businesses and charge no or low fees at the waste management facility, creating the equivalent of an economic monopoly without waste flow laws. The assessment would provide credit strength and allow local governments to obtain financing for waste management facilities.

Environmental Groups and Individuals

Increased Government Involvement. One reason for flow controls is to meet state recycling goals. However, instead of establishing flow controls, one commenter suggested that governments begin mandatory recycling pro which, with better record keeping and monitoring requirements, would obtain the same results.

LIST OF COMMENTERS

STATE AND LOCAL GOVERNMENT COMMENTERS

State Governments

Connecticut Department of Environmental Protection, Hartford, Connecticut

Delaware Solid Waste Authority, N.C. Vasuki, Chief Executive Officer, Dover, Delaware

Florida Department of Environmental Protection, William Hinkley, Chief, Bureau of Solid and Hazardous Waste, Tallahassee Florida

Illinois Environmental Protection Agency, Mary Gade, Director, Springfield, Illinois

Maine Waste Management Agency, Sherry Huber, Executive Director, Augusta, Maine

Massachusetts Office of the State Auditor, Division of Local Mandates, Joseph DeNucci, Auditor, Boston, Massachusetts

Michigan Department of Natural Resources, Jim Sygo, Chief, Waste Management Division, Lansing, Michigan

Minnesota Legislative Commission on Waste Management, MN Office of Waste Management, MN Pollution Control Agenc and MN Attorney General

Nebraska Department of Environmental Quality, Joe Francis, Assistant Director, Lincoln, Nebraska

New Jersey Department of Environmental Protection and Energy, Office of Recycling and Planning, Gary Sondermeyer, Assistant Director

Ohio Environmental Protection Agency, Kate Bartter, Deputy Director for Policy and Legislation, Columbus, Ohio

Pennsylvania Department of Environmental Resources , Arthur Davis, Secretary

Local Governments and Organizations Representing Local Governments

American Public Works Association, Ray Reurket, Director, Federal Programs, Washington, D.C.

Association of Minnesota Counties, Barbara Johnson, Attorney (represents 86 of the 87 counties in Minnesota)

Board of Hennepin County Commissioners, Minnesota, Randy Johnson, Commissioner

Bristol Resource Recovery Facility Operating Committee and Tunxis Recycling Operating Committee, Jonathan Bilmes, Connecticut

Cape May County Municipal Utilities Authority, New Jersey

City and County of Honolulu, Hawaii, Department of Public Works, Robert Young

City of New York Department of Sanitation, Jane Levine, Deputy Commissioner for Legal Affairs

City of Springfield, Missouri, Jim O'Neal, Councilman

City of Sunnyvale, California, Mark Bowers, Solid Waste Program Manager

City of Tampa, Florida, Sandra Freedman

City of Urbana, Illinois, Tod Satterthwaite, Mayor

City of Houston, Texas, Department of Solid Waste Management, Everett Bass, Director

City of Milwaukee, Wisconsin, Department of Public Works, Steven Brachman, Resource Recovery Manager,

City of Tacoma, Washington, Department of Public Works, Phillip Ringrose, Public Works Division Manager

Clay-Owen-Vigo Solid Waste Management District, Indiana, Donna Klewer, Director

Clinton County, Michigan, Department of Waste Management, Ann Mason

Concord Regional Solid Waste/Resource Recovery Cooperative, New Hampshire, James Presher, Director, (represents 27 municipalities)

Connecticut Conference of Municipalities, New Haven, Connecticut

County of Lehigh Department of Planning and Development, Office of Solid Waste Management, Allentown, Pennsylvania, Stamm, Solid Waste Coordinator

County of San Diego, California, Scott Peters, Deputy County Counsel

County of Ventura, California, Solid Waste Management Department, Kay Martin, Director

Delaware County Council, Media, Pennsylvania

Greater Detroit Resource Recovery Authority (represents 21 municipalities)

Greater Lebanon Refuse Authority, Lebanon County, Pennsylvania, Michael Pavelek II, Executive Director

Joint Comments on behalf of City of Indianapolis, Indiana; Davis County Solid Waste Management and Energy Recovery Special Service District; Delaware County Solid Waste Authority; Eastern Renssalaer County Solid Waste Management Authority; Greater Detroit Resource Recovery Authority; Marion County, Oregon; Minnesota Resource Recovery Associati National Institute of Municipal Law Officers; Onondaga County Resource Recovery Agency; Resource Authority in Sumne County, Tennessee; Solid Waste Authority of Central Ohio; Town of North Hempstead, New York; Wisconsin County Soli Waste Management Association; and York County Solid Waste and Refuse Authority

King County Solid Waste Division, Department of Public Works, Seattle, Washington, Rodney Hansen, Manager

Lackawanna County Solid Waste Management Authority, Pennsylvania

La Crosse County, Wisconsin, Brian Tippetts, Solid Waste Manager

Lancaster County Solid Waste Management Authority, Pennsylvania, Herbert Flosdorf, Executive Director

Latah County, Idaho, Board of Latah County Commissioners

Law Firm of DeCotiis & Pinto for 7 of the 22 solid waste management districts in New Jersey, Hackensack, New Jersey

Law Firm of Fulbright & Jaworski for the Incorporated Villages of Westbury, Mineola, and New Hyde

Park, New York; The New York State Conference of Mayors and Municipal Officials; and American Ref-Fuel Company of Hempstead, New York

Law Firm of McManimon & Scotland for the Mercer County Improvement Authority, New Jersey Law Firm of Michael D Diederich, Jr. for the County of Rockland Department of Solid Waste Management

Law Firm of Tock and Miller, LTD. for the Intergovernmental Organization in Champaign County, Illinois

League of California Cities, Yvonne Hunter, Legislative Representative, Sacramento, California (represents 468 incorporatec cities in California)

Lycoming County Planning Commission and Lycoming County Solid Waste Department, Pennsylvania, Jerry Walls, Execut Director

Marion County, Oregon, Department of Solid Waste Management, James Sears, Director, Salem, Oregon

Medina County Sanitary Engineering Department, Ohio, K.W. Hutz, County Sanitary Engineer

Metro Dade Solid Waste Management, Miami Florida, Paul Mauriello, Solid Waste Management Planner

Monmouth County Planning Board, New Jersey, Lawrence Zaayenga, Solid Waste Coordinator

National Association of Counties, Washington, D.C.

Newark, New Jersey, Sharpe James, Mayor

Northeast Indiana Solid Waste Management District, Brian Miller, Executive Director

Organization of Solid Waste Districts of Ohio, Michael D. Long, Executive Director of the Solid Waste Authority of Centra Ohio (Mr. Long's comments represent the opinion of the Organization of Solid Waste Districts of Ohio which is comprised of Ohio's 48 solid waste management districts.)

Pollution Control Financing Authority of Warren County, Oxford, New Jersey, Bart Cahart, Executive Director

Prince Georges County, Maryland, Dept of Environmental Resources, Eugene Lauer, Director

Regional Waste Services, Inc., Portland, Maine, Gary Lorfano, Chairman of the Board of Directors (Regional Waste Servic represents 21 municipalities)

Solid Waste Association of North America, John Abernethy, Vice President, (also Public Works Director, Sacramento Cou California) Mr. Abernathy's comments represent SWANA's opinions regarding the flow control issue.

Solid Waste Association of North America, Durwood Curling, International Secretary (also Executive Director of Southeas Public Service Authority of Virginia) Mr. Curling's comments represent SWANA's opinion on the flow control issue.

Solid Waste Association of North America, Curt Kemppainen, President (also Public Works Director, Kent county, Grand Rapids, Michigan) Mr. Kemppainens' comments represent SWANA's opinions regarding the flow control issue.

Solid Waste Association of North America's "Response to Questions Raised by the USEPA for Their Flow Control Public Meetings"

Solid Waste Authority of Central Ohio, Jack Foulk, President of the Franklin County, Ohio Board of Commissioners and Chairman of the Solid Waste Authority of Central Ohio Finance Committee. Mr. Foulk's comments represent the Solid Wa Authority of Ohio's opinions regarding the flow control issue.

Minnesota Solid Waste Management Coordinating Board, Paul McCarron, County Commissioner (represents the 7 counties surround and include Minneapolis and St. Paul)

Southeastern Public Service Authority of Virginia, John Hadfield, Deputy Executive Director (represents 8 communities)

Spokane, Washington, Sheri S. Barnard, Mayor (on behalf of herself and other concerned citizens)

Spokane Regional Solid Waste Management System, Washington, Phil Williams, Executive Director

Town of Hamden, Connecticut, Mayor Lillian D. Clayman

Town of Wallingford, Connecticut, Philip Hamelm, Jr., Resource Recovery Project Coordinator (represents 5 counties)

Union County Utilities Authority, Linden, New Jersey, Jeffrey Callahan, Executive Director

United States Conference of Mayors, Washington, D.C., J. Thomas Cochran, Executive Director

Winnebago County Solid Waste Management Board, Wisconsin, Leonard Leverence, Director of Solid Waste

WASTE MANAGEMENT INDUSTRY COMMENTERS

Alliance Environmental Services, Inc., Milwaukee, Wisconsin

Allied Waste Industries, Inc., Apache Junction, Arizona

Arena Trucking Co., Inc., Rice, Virginia

Attwoods Inc., Coconut Grove, Florida

Browning-Ferris Industries, Inc., Houston, Texas

C&R Sanitation Co., Inc. Collection & Recycling, Newington, Connecticut

California Refuse Removal Council, Sacramento, California

California Waste Removal Systems, Lodi, California

CDT Landfill Corporation, Joliet, Illinois

Cedar Disposal Inc., Menomonee Falls, Wisconsin

Chambers Development Co., Inc., County of Anson, North Carolina

Commercial Disposal Co., Inc., West Springfield, Massachusetts

Council of Trade Waste Association, Inc., Flushing, New York

CSX Transportation, Jacksonville, Florida

Daneco, Inc., Minneapolis, Minnesota

E&K General Hauling Inc. (President), Sheboygan, Wisconsin

E&K General Hauling Inc. (Vice President), Sheboygan, Wisconsin

Energy Answers Corporation, Albany, New York

Expert Disposal Service, Inc., Hartland, Wisconsin

Frank Perrotti & Sons, Inc., Woodbridge, Connecticut

Grand Central Sanitation, Pen Argyl, Pennsylvania

Handy Dump Waste Diverting Technologies, Inc., Roanoke, Virginia

Hechimovich Sanitary Landfill, Inc., Horicon, Wisconsin

Knutson Services, Inc., Rosemount, Minnesota

Laidlaw Waste Systems, Inc., Burlington, Ontario

McCaughey Standard, Inc., Pawtucket, Rhode Island

McGuire, Woods, Battle, & Boothe REP: Container Corporation of Carolina, Inc., Fort Mill, South Carolina

Mid-American Waste Systems, Inc., Canal Winchester, Ohio

Minnesota Resource Recovery Association, Trudy Gasteazoro, Executive Director, St. Paul, Minnesota (represents waste-t energy facilities serving 29 counties and 2 cities. Other members of the Association include Dakota county, Northern State Power Company, United Power Association, Quadrant Company and Richards Asphalt

Multi Material Management & Marketing, Oakland, California

National Serv-All, Inc., Ft. Wayne, Indiana

National Solid Wastes Management Association, Washington, D.C. (represents 2500 member companies in the U.S. and Ca

Norcal Waste Systems, Inc., California

Ogden Martin Systems, Inc., Arlington, Virginia

Paine's Inc. Recycling and Rubbish Removal, Simsbury, Connecticut

PASCO (Palo Alto Sanitation Co.), Palo Alto, California

Richmond Sanitary Service, Richmond, California

Ritters Sanitary Service Inc., Lyon County, Minnesota

Rumpke Waste Systems, Cincinnati, Ohio

Santek Environmental, Inc., Cleveland, Tennessee

Sawyer Environmental, Hampden, Maine

Semass Partnership, Rochester, Massachusetts

South Coast Refuse Corp., Irvine, California

Superior Environmental Services (President), West Allis, Wisconsin

Superior Environmental Services (Chief Executive Officer), West Allis, Wisconsin

Testimony of a Solid Waste Collector in Mercer County, New Jersey

United States Pollution Control, Inc.

Upper Valley Disposal Service, St. Helena, California

Valley Sanitation Co., Inc. (Vice President), Fort Atkinson, Wisconsin

Valley Sanitation Co., Inc. (General Manager, Leonard Cerrentano), Fort Atkinson, Wisconsin

Valley Sanitation Co., Inc. (President), Fort Atkinson, Wisconsin

Valley Sanitation Co., Inc. (General Manager, Deborah Vaughn), Fort Atkinson, Wisconsin

Virginia Waste Industries Association, Richmond, Virginia

Vogel Disposal Services, Mars, Pennsylvania

Waste Material Trucking Company, Inc., Southington, Connecticut

Waste Industries, Inc., Raleigh, North Carolina

Waste Systems Corporation, Minnesota

Waste-Stream Inc., Potsdam, New York

WMX Technologies, Inc., Oak Brook, Illinois

York Waste Disposal, Inc., York, Pennsylvania

RECYCLING INDUSTRY COMMENTERS

American Forest & Paper Association, Washington, D.C.

Automated Material Handling, Kensington, Connecticut

C.F. Justice, Hesperia, California

California Wastepaper Dealers Association, Baldwin Park, California

California Resource Recovery Association, Loomis, California

Chicago Paperboard Corporation, Chicago, Illinois

E. L. Harvey & Sons, Westboro, Massachusetts

Free-Flow Packaging Corporation, Redwood City, California

Independent Recycler's Association, Oakland, California

Institute of Scrap Recycling Industries: Chicago Chapter, Chicago, Illinois

Institute of Scrap Recycling Industries, Inc., Washington, D.C.

Institute of Scrap Recycling Industries: Southwestern Chapter, California

IVEX Packaging Corporation, Lincolnshire, Illinois

Jefferson Smurfit Corporation, St. Louis, Missouri

Marin Recycling and Resource Recovery Association, San Rafael, California

National Recovery Technologies, Inc., Nashville, Tennessee

Northern California Recycling Association, Berkeley, California

Omni Recycling Paper Recycling Coalition, Westbury, New York

Recycling Products of Rockland, New York

Recycling Products of Rockland and C & A Carbone, New York

Sonoco Product Company, Hartsville, South Carolina, for Paper Recycling Coalition (a group of 11 companies that operate paper mills which exclusively use recovered paper as raw material)

Southeastern Paper Manufacturing Company, Dublin, Georgia, for the Recycling Paper Coalition (PRC)

The Pick Up Artists, Culver City, California

The Business Recyclers Educational Assistance Link, Loomis, California (a technical council of the California Resource Re Association formed to specifically address generator's issues regarding source reduction, resource recovery and recycling)

Tidewater Fibre Corporation, Chesapeake, Virginia

Urban Ore, Inc., Richmond, California

Waste Recovery Systems, Inc., Newport Beach, California and Franklin, Tennessee

Weyerhauser Company, Tacoma, Washington

Winzinger Incorporated, Hainesport, New Jersey

FINANCIAL INSTITUTION COMMENTERS

Paine Webber, Inc., New York, New York

Standard & Poor's Corporation, New York, New York

ENVIRONMENTAL GROUPS AND INDEPENDENT COMMENTERS

American Automobile Manufacturers Association, Detroit, Michigan

Bio-Fuels Engineering Corp., Kalama, Washington

Californians Against Waste Foundation, Sacramento, California

Charlotte Zieve, PhD., Institute for Environmental Studies, Madison, Wisconsin

Citizens Coordinating For Clean Water, Lebanon, Pennsylvania

Dirk Plessner, Esq., Eastman & Smith, Toledo, Ohio

John Pugliaresi, Waste Resource Technologies, California

John McCabe, Independent Waste Management Consultant, Palo Alto, California

Lawrence R. Schillinger Environmental Consultants, Albany, New York

Ohio Chamber of Commerce, Columbus, Ohio

Pennsylvania Chapter of the Sierra Club, Harrisburg, Pennsylvania

Rufus C. Young, Jr. of Burke, Williams & Sorensen, Los Angeles, California (this attorney and his firm have represented California municipalities on solid waste management issues; however, the comments submitted were not on behalf of any s municipality.)

Tammie Wallace, Fort Myers, Florida

W. Dexter Bellamy, PhD, Fort Myers, Florida

APPENDIX I-B

Legal Decisions Concerning Municipal Solid Waste Flow Controls

This appendix describes recent litigation over flow controls and provides synopses of several important court decis related to flow control. The discussion of each decision highlights the legal issues raised, describes the laws/ordinances challenged, and summarizes the case and decision reached. This appendix concludes with a summary matrix describing th control mechanism, materials covered by the flow controls, facilities affected, issues raised, decision, and rationale in eac

LITIGATION OVER FLOW CONTROLS

Although many jurisdictions have used flow controls and related mechanisms for a number of years, legal challeng continue to occur. Flow control laws have been challenged primarily on the following 3 issues:

(1) **Antitrust** claims concerning the creation of monopolies,

(2) **Takings** claims concerning the unlawful taking of private property for public use, without just compensation, and,

(3) **Commerce Clause** claims regarding discrimination against interstate commerce.

This section summarizes recent litigation over flow controls.

ANTITRUST CLAIMS

From the late 1970s till the mid-1980s, a major challenge to flow controls was on antitrust grounds. Haulers claim that requiring waste to be disposed at a municipally-designated facility violated federal antitrust laws because the local government acted in a monopolistic fashion. The leading case on this issue is *Hybud Equipment Corp. v. City of Akron*.[11] The United States Court of Appeals for the Sixth Circuit reviewed an Akron ordinance that required all collected MSW, including recyclables, to be delivered to a city-operated WTE facility. The ordinance also barred haulers from remo recyclables at transfer stations and delivering the remaining solid waste to other management facilities. Trash haulers challe the city ordinance as a violation of the Sherman Antitrust Act.[12] The Court held that the federal antitrust laws were not applicable because the City was acting to implement a State policy designed to substitute competition with monopoly public service. Since the mid-1980s, antitrust challenges have not been successful, because federal appellate courts consistently h

[11] 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

[12] The haulers also made claims that the ordinance violated the Commerce Clause and was a taking of property without just compensation.

determined that flow control laws comply with antitrust requirements where States have authorized local governments to b involved in solid waste management.[13]

TAKINGS CLAIMS

Opponents of flow controls also have made claims based on the Takings Clause of the Fifth Amendment to the Un States Constitution: "nor shall private property be taken for public use, without just compensation." With regard to the taki issue, the court in the *Hybud* case held that control of sanitation was a proper exercise of police power, similar to fire and police protection.[14] Therefore, this exercise of police power did not legally result in a taking requiring compensation even if city in fact appropriated some valuable materials, because the control of MSW was such a significant public function.

In 1994, a takings claim was made in a case involving the authority of a city to control the flow of recyclable mate In this California case, a recycler claimed that the exclusive franchise for solid waste handling services was invalid and cau taking when applied to recyclable materials that had not been discarded as waste.[15] Although the California Integrated Wast Management Act of 1989 (AB 939) authorizes cities to grant exclusive franchises for the provision of solid waste handling services, the California Supreme Court decided that, because recyclable materials have some economic value, they are not s waste as defined by AB 939. The Court concluded that owners of undiscarded recyclable materials cannot be required to t these materials to the holder of an exclusive franchise. The Court, however, did not explicitly state that such an involuntary transfer would be a taking. The Court noted that once recyclable materials were discarded, they were subject to the exclus franchise. For example, if an owner puts recyclable material at the curb, the owner discards or abandons the property and thereby renders it waste that is subject to the exclusive franchise.

COMMERCE CLAUSE CLAIMS

As State and local governments successfully defeated antitrust challenges to their authority to direct the flow of M other challenges arose, based on the Commerce Clause of the United States Constitution. The United States Supreme Cour decided in *City of Philadelphia v. New Jersey* that solid waste should be considered an article of commerce, and its

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[13] The general purpose clauses of State solid waste management statutes provide sufficient authorization for anticompetitive activities by local governments. This authorization also may be inferred (e.g., planning requirements that encourage local governments to join together to provide management facilities for solid waste). *Central Iowa Refuse System v. Des Moines Metro Solid Waste Agency*, 715 F.2d 419, 426-27 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985).

[14] *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

[15] *Waste Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc.*, 28 Cal. Rptr.2d 461, 869 P.2d 440 (1994). The city ordinance authorized an exclusive franchise for all solid waste and recyclable materials between the City of Rancho Mirage and Waste Management of the Desert.

interstate movement is therefore protected by the Constitution from undue interference by the States.[16] This decision allow parties to challenge flow controls on the grounds that mandating waste management at designated facilities discriminates ag interstate commerce (e.g., out-of-State landfills could not compete to obtain in-State waste).

The applicability of the Commerce Clause to flow control laws depends upon the facts of each particular situation. During the early to mid-1980s, courts often upheld flow controls against challenges that those laws discriminated against interstate commerce. In many of these cases, the courts decided that the flow controls did not discriminate because the la legitimately served the public interest (e.g., assuring proper disposal of MSW, reducing truck traffic) and applied evenly to State and out-of-State waste. In addition, flow controls did not result in sufficient economic injury to out-of-State interest

More recent court decisions, on the other hand, have found that flow control laws do discriminate against interstat commerce. In May 1994, the United States Supreme Court decided in *C & A Carbone, Inc. v. Town of Clarkstown*[18] that a flow control ordinance unfairly gave a designated waste management facility a competitive advantage ov out-of-state facilities.[19] The Court also determined that the town did not lack other means to achieve its waste management goals. The Court mentioned, for example, that the town can address health and safety concerns by enacting more stringen environmental protection standards. To raise revenue, the town could increase taxes or issue municipal bonds. The Court concluded that ensuring the financial viability of a publicly-owned facility was not a sufficiently compelling State interest justifying interference with interstate commerce.

[16] 437 U.S. 617 (1978).

[17] *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988); *Harvey & Harvey, Inc. v. Delaware Solid Waste Authority*, 600 F.Supp. 1369 (D.Del. 1985).

[18] 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994).

[19] The Clarkstown ordinance required that all solid waste originating in the town, as well as out-of-town waste processed in the town, be processed at the town's designated solid waste transfer facility. Haulers could not deliver waste directly to cheaper out-of-state waste management facilities.

SUMMARY OF COURT CASES

UNITED STATES SUPREME COURT DECISIONS

Case: C&A Carbone, Inc. v. Town of Clarkstown

Court: U.S. Supreme Court
114 S.Ct. 1677, 128 L.Ed.2d 399 (1994)

Issue Raised: Commerce Clause

Law/Ordinance Challenged: A Clarkstown flow control ordinance required that all solid waste originating in the town, as well as out-of-town waste processed in the town, be processed at the town's designated solid waste transfer facility. This ordinance did not cover recyclable materials.

Summary of Case: C&A Carbone, a waste hauler, operated a recycling center. While the flow control ordinance allowed recyclers, such as Carbone, to continue receiving solid wastes, it required that non-recyclable residues be brought to the designated transfer station. The tipping fee at the transfer station exceeded the disposal cost of solid waste on the private market. Carbone separated recyclable materials from solid waste and sent non-recyclable residues out-of-state rather than to the transfer station. Clarkstown filed a lawsuit in State court seeking an injunction requiring that Carbone send its waste to the transfer station. Carbone responded by suing in federal court, claiming that the local law violated the Commerce Clause, because it prohibited the shipment of solid waste to out-of-state facilities.

Decision: Overturned flow control ordinance.

The Supreme Court overturned Clarkstown's flow control ordinance on the basis that it both regulates and discriminates against interstate commerce. The Court held that the ordinance deprives out-of-state businesses access to local markets because only the favored local operator can process waste in the town.

The Court determined that the town does not lack other means to achieve its goals; for example, the town can address health and safety concerns by enacting more stringent standards, or, to raise revenue, the town could increase taxes or issue municipal bonds.

Case: City of Philadelphia v. New Jersey
437 U.S. 617 (1978)

Issue Raised: Commerce Clause

Law/Ordinance Challenged: New Jersey law banned disposal of out-of-state waste at all in-state landfills.

Summary of Case: Philadelphia challenged New Jersey's authority to ban the disposal of out-of-state waste at in-state landfills as a violation of the interstate Commerce Clause.

Decision: Overturned law.

Supreme Court held that solid waste is an article of interstate commerce and its interstate movement is constitutionally protected from interference by the States.

Supreme Court held that legislative intent to conserve in-state capacity and to protect the environment is not a sufficient reason to discriminate against out-of-state waste.

Therefore, the New Jeresy law violated the Commerce Clause as an economic protectionist measure.

Case: Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources
504 U.S. ____,[a] 112 S.Ct. 2019 (1992)

Issue Raised: Commerce Clause

Law/Ordinance Challenged: Michigan law required private landfill operators to limit their business to accepting wastes only from the county in which the landfill is located unless a county's State-approved solid waste management plan authorized otherwise.

Summary of Case: The county solid waste planning committee denied a landfill operator's petition to accept out-of-state waste at its landfill. The landfill operator claimed that the Michigan MSW import restrictions violated the Commerce Clause because they discriminated against the free flow of goods and services across state lines.

Decision: Overturned law.

Although the law applied evenly to all out-of-county (both in-state and out-of-state) waste, the Supreme Court held that the law discriminated against interstate commerce. In order to render its law constitutional, Michigan had the burden of proving that the law furthered health and safety concerns and that these concerns could not be served by nondiscriminatory alternatives.

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[a] Page cite not available as of November 1994.

UNITED STATES COURT OF APPEALS' DECISIONS

Case: Hybud Equipment Corp v. City of Akron
654 F.2d 1187 (6th Cir. 1981), vacated and remanded on other grounds, 455 U.S. 931 (1982), remand, 742 F.2d 949 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985)

Issue Raised: Antitrust, Commerce Clause, and taking of property.

Law/Ordinance Challenged: Akron ordinance directed that all collected MSW, including recyclables, be delivered to a city-operated waste-to-energy facility. The ordinance also barred haulers from removing recyclable at transfer stations and delivering the remaining solid waste to other management facilities.

Summary of Case: Trash haulers challenged the city ordinance as a violation of the Sherman Antitrust Act, the Commerce Clause, and a taking of property without just compensation.

Decision: Upheld flow control ordinance.

The court held that the federal antitrust laws were not applicable, because the city was acting t implement a State policy designed to substitute competition with monopoly public service.

The court also found that the ordinance primarily burdened residents of Akron, and any impact on interstate commerce was incidental. Therefore, no violation of the Commerce Clause occurred.

With regard to the "taking" issue, the court held that control of sanitation was a proper exercise of police power, similar to fire and police protection. The exercise of the police power does nc result in a taking even if the city appropriates some valuable materials, because the control of MSW is such a significant public function.

Case: J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection
857 F.2d 913 (3d Cir. 1988)

Issue Raised: Commerce Clause

Law/Ordinance Challenged: State flow control regulation required that all waste originating within a county be transported t a county transfer station to be processed before disposal outside the State.

Summary of Case: J. Filiberto Sanitation, Inc. wanted to transport waste directly to an out-of-state landfill without stopping at the designated transfer station. Filiberto argued that the cost of disposal at out-of-state landfills was approximately half the cost of the tipping fee charged by the county transfer station. Filiberto claimed that the State regulation was unconstitutional because it discriminated against interstate commerce.

Decision: Upheld flow control regulation.

The U.S. Court of Appeals held that the State regulation did not discriminate against interstate commerce because the regulation applied evenly to in-state and out-of-state waste, and did not result in sufficient economic injury to out-of-state interests. In addition, the court concluded that the regulation legitimately served the public interest (e.g., assuring proper disposal of trash, reducing truck traffic).

UNITED STATES DISTRICT COURTS' DECISIONS

Case: Harvey & Harvey, Inc. v. Delaware Solid Waste Authority
600 F.Supp. 1369 (D. Del. 1985)

Issue Raised: Commerce Clause

Law/Ordinance Challenged: Delaware Solid Waste Authority flow control ordinance required that all solid waste within the State, whether it originated in-state or out-of-state, must be transported and managed at Delaware Solid Waste Authority-operated facilities.

Summary of Case: Harvey & Harvey, Inc. transported commercial and industrial solid waste to disposal sites located both inside and outside of Delaware. To take advantage of lower tipping fees, the company disposed out-of-state 95 percent of the solid waste collected at its transfer station. Harvey & Harvey challenged the ordinance under the Commerce Clause and claimed that it discriminated against interstate commerce.

Decision: Upheld flow control ordinance.

The court held that since the regulations apply equally to all generators and transporters of solid waste, both in-state and out-of-state, the requirements did not significantly discriminate against

out-of-state economic interests. The regulations also served the legitimate State interest of protecting human health and the environment.

Case: Stephen P. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corporation 770 F. Supp. 775 (D.R.I. 1991), aff'd, 947 F.2d 1004 (1st Cir. 1991)

Issue Raised: Commerce Clause

Law/Ordinance Challenged: State flow control regulation directed that all solid waste generated or collected in Rhode Island must be managed at in-state facilities.

Summary of Case: Prior to the enactment of the regulation, DeVito transported solid waste generated or collected i Rhode Island to waste management facilities in Maine and Massachusetts, because the tipping fees charged by out-of-state facilities were lower than the fees charged by the Rhode Island facility. Stephen P. DeVito, Jr. Trucking, Inc. sought injunctive relief, claiming that the regulation was an unreasonable interference with interstate commerce.

Decision: Overturned flow control regulation.

The U.S. District Court held that the regulation resulted in a positive advantage to in-state economic interests at the expense of interstate commerce. Revenues at in-state facilities were increased, because commercially-generated waste could not be transported out-of-state.

The court also decided that Rhode Island failed to demonstrate the compelling need for the flow control regulation or that less burdensome alternatives did not exist. The court concluded that health and safety could be achieved by inspections and that a financially viable waste management system could be achieved by local taxation.

Case: Waste Systems Corp. v. County of Martin, et al
784 F. Supp. 641 (D. Minn. 1992), aff'd, 985 F.2d 1381 (8th Cir. 1993)

Issue Raised: Commerce Clause

Law/Ordinance Challenged: A flow control ordinance enacted by Martin and Faribault counties in Minnesota required all locally generated wastes to be disposed at a publicly-owned and operated composting facility.

Summary of Case: Waste Systems Corp. operated a landfill in Iowa that had been receiving about two-thirds of the MSW generated in the bi-county area. Waste Systems argued that the ordinance was a violatio of the Commerce Clause and also violated their civil rights (e.g., protection against discrimination by the government).

Decision: Overturned flow control ordinance.

The U.S. District Court ruled that ensuring the financial viability of a publicly-owned waste handling facility was not a sufficiently compelling State interest to justify interference with interstate commerce. The court noted that less discriminatory means existed to maintain the financial viability of the project, such as community taxes to lower the price of disposal and attract waste on an economic rather than compulsory basis.

The court concluded that the flow controls resulted in giving the publicly-owned facility a "competitive advantage" over out-of-state facilities.

Case: Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority
814 F.Supp. 1566 (M.D. Ala. 1993)

Issue Raised: Commerce Clause

Law/Ordinance Challenged: Municipal flow control ordinances restricted the disposal of solid waste in a four-county area to a regional publicly-owned disposal facility.

Summary of Case: Approximately 36 local governments created a regional solid waste management authority and enacted flow control ordinances to assist the Southeast Alabama Solid Waste Disposal Authority (Authority) in financing a regional landfill and several transfer stations.

Waste management companies that collect, haul, and dispose of solid waste argued that the ordinances violated the Commerce Clause.

The cities and the Authority defended the ordinance and the regional operations as market participation (where the Authority operates as a commercial business), arguing that government conduct is exempted from Commerce Clause scrutiny where it is similar to private sector trading or business activity.

Decision: Overturned flow control ordinances.

The United States District Court found that the ordinances clearly discriminated against interstate commerce and did not result in market participation; rather, the ordinances resulted in market regulation. The ordinances restricted the ability of private companies to compete with the regional publicly-owned disposal facility.

The court concluded that the ordinances represented a significant barrier to the free flow of wastes through interstate commerce and decided that the Authority had failed to substantiate any interest besides local economic protectionism.

Though the purpose of the ordinances was to ensure an adequate flow of waste to the facility, the Authority failed to demonstrate that the ordinances were the least restrictive alternatives. The court suggested several alternatives to ensure the economic viability of the facility, including charging competitive rates and financing the facility through bank loans, property taxes, private investors, or utility bill assessments. The court also cited the Authority's failure to justify the ordinance based on health and safety concerns.

STATE COURT DECISIONS

Case: Waste Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc.

Court: California Supreme Court
28 Cal. Rptr. 2d 461; 869 P.2d 440 (1994)

Issue Raised: Taking of Private Property

Law/Ordinance Challenged: A city ordinance authorized an exclusive franchise between the City of Rancho Mirage and Waste Management of the Desert, Inc. to provide handling and disposal services for all residential and commercial solid waste and recyclables.

Summary of Case: The City of Rancho Mirage awarded an exclusive franchise to Waste Management for all solid waste and recyclables services and asserted that all recyclable materials in the City were covere under this agreement. Waste Management and the City took legal action to stop a competing recycler, Palm Spring Recycling Center, from collecting recyclable materials from commercial clients. The California Supreme Court considered whether the State authorized cities to prohibi owners of recyclable materials from selling these materials to someone other than the exclusive franchisee.

Decision: Overturned ordinance.

The California Supreme Court held the exclusive franchise between the City and Waste Management invalid and unenforceable when applied to recyclable materials that have not been discarded by the generator as waste.

The California Integrated Waste Management Act of 1989 (AB 939) allows cities to grant exclusive rights (e.g., franchisees to private haulers) for the provision of solid waste handling services. The Court found that because recyclable materials have some economic value, they a not solid waste as defined by the Act. The Court concluded that owners of undiscarded recyclable material cannot be required to transfer these materials to the holder of an exclusive franchise.

Once materials are "discarded", however, they are subject to the exclusive franchise.

LEGAL DECISIONS CONCERNING MUNICIPAL SOLID WASTE FLOW CONTROLS

NAME OF CASE	FLOW CONTROL MECHANISM	SCOPE OF MATERIALS COVERED[1]	TYPES OF FACILITIES	ISSUES RAISED			DECISION		RATIONALE FOR DECISION
				ANTITRUST[2]	COMMERCE CLAUSE[3]	TAKING[4]	FLOW CONTROL OVER-TURNED	FLOW CONTROL UPHELD	
U.S. SUPREME COURT DECISIONS									
C&A Carbone, Inc., et al. v. Town of Clarkstown 114 S.Ct. 1677, 128 L.Ed.2d 299 (1994)	Local ordinance	MSW, excluding recyclables	Transfer Station		✓		✓		A local ordinance that required delivery of out-of-state waste to designated facility at an additional cost discriminates against out-of-state businesses.
City of Philadelphia v. New Jersey 437 U.S. 617 (1978)	State statute	MSW sent to landfills	Landfills		✓		✓		Solid waste is an article of interstate commerce; and state law that bans disposal of out-of-state MSW into in-state landfills violates the Commerce Clause because it discriminates against the import of out-of-state waste without a legitimate local concern.
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources 504 U.S.___, 112 S.Ct. 2019 (1992)	State statute	MSW	Landfill		✓		✓		Requirement that a person not accept solid waste that is generated outside the county where the facility is located violates the Commerce Clause because nondiscriminatory alternatives existed.

LEGAL DECISIONS CONCERNING MUNICIPAL SOLID WASTE FLOW CONTROLS

NAME OF CASE	FLOW CONTROL MECHANISM	SCOPE OF MATERIALS COVERED[1]	TYPES OF FACILITIES	ISSUES RAISED			DECISION		RATIONALE FOR DECISION
				ANTITRUST[2]	COMMERCE CLAUSE[3]	TAKING[4]	FLOW CONTROL OVER-TURNED	FLOW CONTROL UPHELD	
FEDERAL COURT OF APPEALS DECISIONS									
Hybud Equipment Corp. v. City of Akron 654 F.2d 1187 (6th Cir. 1981), vacated and remanded on other grounds, 455 U.S. 931 (1982), on remand, 742 F.2d 949 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985)	City ordinance	MSW, including recyclables	Waste-to-energy plants	✓	✓	✓		✓	City ordinance that monopolized solid waste collection and disposal and required private disposal firms to transport all waste to a city-sponsored facility does not interfere with interstate commerce, violate federal antitrust laws, or constitute a taking.
J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection 857 F.2d 913 (3d Cir. 1988)	State regulation	MSW	Transfer station		✓			✓	State regulation that required that all waste, whether originating in-state or out-of-state, be processed at an in-county transfer station does not discriminate against interstate commerce.
FEDERAL DISTRICT COURT DECISIONS									

LEGAL DECISIONS CONCERNING MUNICIPAL SOLID WASTE FLOW CONTROLS

NAME OF CASE	FLOW CONTROL MECHANISM	SCOPE OF MATERIALS COVERED[1]	TYPES OF FACILITIES	ISSUES RAISED			DECISION		RATIONALE FOR DECISION
				ANTITRUST[2]	COMMERCE CLAUSE[3]	TAKING[4]	FLOW CONTROL OVER-TURNED	FLOW CONTROL UPHELD	
Harvey & Harvey, Inc. v. Delaware Solid Waste Authority 600 F. Supp. 1369 (D.Del. 1985)	Authority ordinance	MSW	State-operated landfills, recycling centers, and waste-to-energy facilities		✓			✓	Flow control ordinance that required all MSW to be managed at state-operated facilities does not violate the Commerce Clause because it treats all interests, both in-state and out-of-state, equally.
Stephen P. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp. 770 F.Supp. 775 (D.R.I. 1991), aff'd, 947 F.2d 1004 (1st Cir. 1991)	State regulation	MSW	Landfill and proposed waste-to-energy facility		✓		✓		State regulation that directed all solid waste to be managed at state-operated facilities discriminates against interstate commerce because the state failed to demonstrate a compelling need or the absence of less burdensome alternatives.
Waste Systems Corp. v. County of Martin, et al 784 F.Supp. 641 (D.Minn. 1992), aff'd, 985 F.2d 1381 (8th Cir. 1993)	Bi-county ordinance	MSW	MSW Composting facility		✓		✓		Bi-county ordinance that directed all MSW to be managed at a public composting facility discriminates against interstate commerce because the ordinance's primary interest is in ensuring the financial viability of a publicly-owned management facility.

LEGAL DECISIONS CONCERNING MUNICIPAL SOLID WASTE FLOW CONTROLS

NAME OF CASE	FLOW CONTROL MECHANISM	SCOPE OF MATERIALS COVERED[1]	TYPES OF FACILITIES	ISSUES RAISED			DECISION		RATIONALE FOR DECISION
				ANTITRUST[2]	COMMERCE CLAUSE[3]	TAKING[4]	FLOW CONTROL OVER-TURNED	FLOW CONTROL UPHELD	
Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority 814 F. Supp. 1566 (M.D. Ala. 1993)	Municipal ordinances	MSW	Landfill and transfer stations		✓		✓		Municipal ordinances that directed all waste to publicly-owned facilities result in economic protectionism and violate the Commerce Clause.
STATE COURT DECISIONS									
Waste Management of the Desert, Inc. v Palm Springs Recycling Center, Inc.* 28 Cal.Rptr. 2d 461; 869 P.2d 440 (1994)	City ordinance	MSW, including residential and commercial recyclables	Landfills and recycling centers			✓	✓		City ordinance that restricted access to the collection and removal of recyclable materials is void, because these materials are not considered a solid waste under State law until they have been discarded by their owners.

1. MSW refers to municipal solid waste and does not necessarily include recyclables unless specifically noted.
2. Antitrust refers to the Sherman Antitrust Act which restricts monopolies.
3. The Commerce Clause is the provision of the United States Constitution which gives Congress the exclusive power to regulate interstate commerce.
4. A taking is an unlawful taking of property in violation of a person's due process rights.

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APPENDIX II-A

Summary Matrix of State Flow Control Authorities

This Appendix contains a summary matrix of flow control authorities for all 50 States, the District of Columbia, an the Virgin Islands. The purpose of this matrix is to provide Congress with a comparative review of States with and withou control authorities. The matrix demonstrates that State flow control laws vary in the degree of authority and discretion giv local governments. Flow controls also differ in the types of wastes or recyclable materials covered.

The matrix is divided by State or territory into the following major sections:

- **State recycling goals** list the source reduction and recycling goals established by State legislatures.[20]
- **Responsibility for MSW Planning** provides the statutory and/or regulatory title and citation along with the governmental entity responsible for solid waste management planning.
- **Specific Delegation of Flow Controls** identifies those States or territories that explicitly authorize flow controls by statute or regulation. A footnote explains the flow control authority in those States that do not authorize flow control directly but have established other mechanisms such as home rule authority, the power to award franchises, or the local solid waste management planning process.
- **Scope of Materials Covered by Flow Controls** lists the types of wastes or recyclable materials that may be flow controlled.
- **Comments** discuss the State solid waste management planning or flow control authorities in further detail.

[20] Information on source reduction and recycling goals obtained from Robert Steuteville, "The State of Garbage in America: Part II," *BioCycle*, May 1994, pp. 30-36. The Steuteville survey includes States where the goals were established by statute as well as States where the source reduction and recycling goals were established by other means, such as executive orders by State governors.

HOW FLOW CONTROLS ARE IMPLEMENTED

State and local governments use flow controls to require that wastes and/or recyclable materials be delivered to designated facilities such as WTE facilities, MRFs, landfills, composting facilities, and transfer stations. State statutes expli may require that municipal solid waste be sent to a designated facility or may authorize award of contracts or franchises th mandate delivery to a specific facility.

State flow control laws vary in the degree of authority and discretion given to local governments to control the flo MSW within their political jurisdictions. For example, the States of Rhode Island and Delaware (and not their local governments) have the authority to develop flow controls. Most other States that allow flow controls authorize local governments and regional solid waste management districts to implement flow controls.

Local governments in some States also must address administrative requirements prior to implementing flow contr Mississippi and Tennessee require a solid waste management authority to demonstrate the necessity of implementing manda flow controls (e.g., after considering the use of existing facilities and examining other alternatives). Other administrative hu include holding public hearings prior to establishing flow controls (e.g., Colorado, Minnesota), attempting to develop a contractual agreement with haulers as an alternative to using flow controls, and requiring each municipality that wants to implement flow controls to seek specific State legislative authorization.

Flow control laws may cover a wide range of solid wastes and materials, such as:

- Commercial and residential waste;
- Mixed waste;
- Recyclables in mixed waste;
- Curbside and drop-off center commingled recyclables; and
- Source separated recyclables.

Twenty-three (23) States (and the District of Columbia) that authorize flow controls limit the recyclable materials or MSW may be controlled. For example, Mississippi, Montana, and New Jersey do not authorize flow controls for source separate recyclable materials.

METHODOLOGY

To collect information on State flow control authorities, EPA reviewed information from the following sources:

- State statutes and regulations;
- Public comments and materials submitted to the RCRA docket;
- Discussions and citations from court decisions and legal briefs; and
- Contacts with knowledgeable sources.

Federal, State, and local government personnel familiar with the flow control issue corroborated the information obtained b
statutory and regulatory reviews.