

US EPA ARCHIVE DOCUMENT

CHAPTER I INTRODUCTION

In September 1992, Congress directed the United States Environmental Protection Agency (EPA) to submit a Report to Congress on flow control as a means of municipal solid waste (MSW) management. The Report is to review States with and without flow control authority and describe the impact of flow control on:

- ◆ protection of human health and the environment; and
- ◆ development of State and local waste management capacity and the achievement of State and local goals for source reduction, reuse, and recycling.

Flow controls, as defined in this Report, are legal provisions that allow State and local governments to designate where MSW must be taken for processing, treatment, or disposal. Due to flow controls, designated management facilities have a local monopoly on MSW and/or recyclable materials.

Flow controls have become a heavily debated issue among State and local governments, the waste management industry, recyclers, and environmental groups. Financial institutions have been a part of the discussion because of the relationship between flow controls and financing of waste management facilities. These interested parties hold differing views on the environmental, planning, and economic benefits of flow controls. (Appendix I-A summarizes the positions of interested parties.) During the 1990s, several court decisions ruled against the use of flow controls. Notably, in May 1994, the United States Supreme Court in *C & A Carbone, Inc. v. Town of Clarkstown*¹ decided that the use of flow control can discriminate against interstate commerce and, therefore, can violate the commerce clause of the United States Constitution. (Appendix I-B summarizes the relevant litigation.) Legislation was introduced during the 103rd Congress to clarify the legal status of flow controls. A consensus bill was passed by the House of Representatives late in the session; the Senate did not act and the legislation died with this Congress. Similar legislation has been introduced in the 104th Congress.

A. RCRA AND FLOW CONTROLS

The Resource Conservation and Recovery Act (RCRA), as amended, is the primary federal statute governing solid waste management.² The principal objectives of RCRA are far-reaching and complementary:

- ◆ promote the protection of human health and the environment from potential adverse effects of improper solid waste management;
- ◆ conserve material and energy resources through source reduction and recycling;

¹ 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994).

² 42 U.S.C. §§ 6901 to 6992K.

- ◆ assist in the development of solid waste management plans;
- ◆ improve solid waste management practices; and
- ◆ promote the demonstration, construction, and application of solid waste management, resource recovery, and resource conservation systems which preserve and enhance the quality of air, water, and land resources.³

RCRA does not directly address the role of flow controls in accomplishing these objectives.

RCRA identifies State and local governments as the historic and appropriate leads for managing solid waste. The federal government's role primarily is to facilitate implementation of State and local solid waste management by developing national standards, providing technical assistance, and promoting a national research and development program. Subtitle D of RCRA directs States to prepare comprehensive solid waste management plans. Subtitle D places great emphasis on State, regional, and local planning and contains numerous provisions concerning the scope and content of State plans. Among the RCRA criteria for approval of State solid waste plans are the following minimum requirements:

- ◆ provision that no State or local government shall be prohibited from entering into long-term contracts for the supply of solid waste to resource recovery facilities or from entering into long-term contracts for the operation of such facilities; and
- ◆ provision for recycling and for the disposal of solid waste in a manner that is environmentally sound.⁴

State plans must provide for adequate recycling and disposal capacity and must address facility planning and development. RCRA is silent on the place of flow controls in State solid waste management plans.

Congress recognized in RCRA the importance of regional solutions and directed States to ". . . identif[y] the boundaries of each area . . . which, as a result of urban concentrations, geographic conditions, markets, and other factors, is appropriate for carrying out regional solid waste management."⁵ Congress further contemplated that the identification of regions with common solid waste management problems could encompass two or more States.⁶

Congress directed EPA to prepare guidelines to assist States in the development and implementation of solid waste management plans. EPA's *Guidelines for Development and Implementation of State Solid Waste*

³ 42 U.S.C. § 6902(a).

⁴ 42 U.S.C. § 6943(a) (4), (5), and (6).

⁵ 42 U.S.C. § 6946(a).

⁶ 42 U.S.C. § 6946(c).

Management Plans contain recommendations for complying with RCRA requirements.⁷ One recommendation is to assess "current and projected movement of solid and hazardous waste across State and local boundaries."⁸ The recommendations further specify that "[t]he State plan should provide for substate [local government or regional solid waste management district] cooperation and policies for free and unrestricted movement of solid and hazardous waste across State and local boundaries."⁹

B. FACTORS ENCOURAGING THE USE OF FLOW CONTROLS

Use of flow controls took hold in the late 1970s. State and local governments began using flow controls to support the development of new waste management facilities, particularly those requiring relatively large capital investments such as waste-to-energy (WTE) facilities and high-technology materials recovery facilities (MRFs). Flow controls were one mechanism State and local governments could use to help finance these costly facilities. To construct these facilities, local governments often issued revenue bonds, which were to be repaid out of the revenues (tipping fees) the facilities generated. Flow controls ensured receipt of enough waste or recyclable materials to generate sufficient revenue to pay facility debt service and other fixed costs.

Also influencing use of flow controls were State goals and mandates for increased recycling or diversion of specific wastes (e.g., yard trimmings) from landfills. Flow control was one mechanism used by local governments to generate needed revenues and to direct waste in responding to these goals and mandates.

Some State and local government officials indicated during the public meetings that, as State laws spurred local governments to expand waste management services, flow control was a useful mechanism to raise funds for local integrated solid waste management (ISWM) systems including programs such as source reduction, curbside recycling, household hazardous waste collection, education and outreach, and, in limited instances, Superfund cleanups. These services typically do not lend themselves to collection of revenues as do other components (e.g., tipping fees from landfills) of ISWM systems. Flow controls have been used to support these other waste management programs through the revenues generated by tipping fees, which can be set at rates higher than prevailing market prices.

In some cases, flow control may facilitate local government planning. Local governments may find flow control to be an expeditious tool to plan for solid waste capacity necessary to manage an area's solid waste.

The most common reason for adopting flow control is to assure the financial viability of waste management facilities by providing a reliable, long-term supply of waste. This assurance can be instrumental in securing capital to finance the construction of a facility.

⁷ 40 CFR § 256.41.

⁸ 40 CFR § 256.41(a)(3).

⁹ 40 CFR § 256.42(h).

C. INTERESTED PARTIES' POSITIONS ON KEY FLOW CONTROL ISSUES

EPA held three public meetings¹⁰ during August and September 1993 to provide interested parties with opportunities to present information and their views on flow controls.¹¹ In addition to asking for comments on the three flow control issues raised by Congress (i.e., impact of flow controls on human health and environment, waste management capacity, and source reduction and recycling), the Agency asked for input on the following issues:

- ◆ What materials are/should be covered by flow control laws?
- ◆ How can local governments implement integrated solid waste management plans without flow controls?
- ◆ What alternatives to flow controls exist that achieve the same public policy goals?

Over 100 people commented during the public meetings. In total, 179 commenters submitted written materials to the RCRA docket. The commenters included representatives from State and local governments (74), the waste management industry (60), the recycling industry (29), financial institutions (2), and environmental groups and individuals (14). See Appendix I-A for a synopsis of the public comments. The information provided was anecdotal; comments offered no empirical data on the key issues the Agency was to address on flow control.

D. ORGANIZATION OF REPORT

The remainder of this Report to Congress is organized as follows:

- ◆ **Chapter II** provides a comparative review of State flow control authorities across all 50 States, the District of Columbia, and the Virgin Islands, including the materials covered by existing flow controls. Chapter II also discusses EPA's finding on the human health and environmental need for flow controls in light of existing federal and State laws.
- ◆ **Chapter III** analyzes composting, recycling, waste-to-energy, and land disposal markets to assess the impact of flow controls on ensuring adequate waste management capacity and promoting State and local goals for source reduction, reuse, and recycling. Chapter III also summarizes organizational and financial alternatives for supporting integrated waste management programs, including financing the capital costs of facilities and funding the operating expenses of MSW programs.

¹⁰ EPA held public meetings in Arlington, Virginia; San Francisco, California; and Chicago, Illinois.

¹¹ Comments from the public hearings distinguished legal flow controls from "economic" flow controls. Economic flow controls occur when a State or local government subsidizes a designated solid waste management facility. The subsidy reduces the tipping fee (i.e., service charge) to a level competitive with other management options in the area, thereby ensuring a steady supply of waste. Similar to legal flow controls, economic flow controls result in the delivery of waste and/or materials to specific waste management facilities.

- ◆ **Appendix I** includes a summary of public comments received by EPA on flow controls, analyzes the litigation over flow controls, and provides synopses of key legal decisions on flow controls.
- ◆ **Appendix II** summarizes State flow control authorities, recycling goals, and planning responsibilities for all 50 States, the District of Columbia, and the Virgin Islands. The Appendix also presents 4 case studies that examine solid waste management in municipalities where flow controls are or are not used.
- ◆ **Appendix III** consists of supporting technical analyses for the market analysis component (Chapter III) of this Report.

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