FLOW CONTROL
ISSUES IN SOLID WASTE MANAGEMENT

A NCRA Policy Committee White Paper

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This issue paper on flow control intends to provide information to NCRA members, public policy makers, and interested parties in an effort to present concerns from all sides of a controversial issue. This paper does not attempt to establish an official North Carolina Recycling Association position on flow control nor does it necessarily reflect the view of the Association.

What is Flow Control?

The term flow control can mean many things. In the context of solid waste management, flow control refers to the authority of a unit of local government to direct when, where, and how solid waste is to be managed.

Brief History

Until fairly recently, solid waste management received little attention from citizens or government. In fact, not until 1976 did Congress become actively involved in an area that had previously been regarded as a local concern. With the passage of the Resource Conservation and Recovery Act (RCRA) in 1976, Congress took a more active role in solid and hazardous waste management. RCRA had three main objectives; (1) hazardous waste management, (2) solid waste management, and (3) procurement of products and resources from recovered materials. The impetus for RCRA came from municipalities, environmental groups, and industry. These groups had two main concerns; (1) an increasing shortage of disposal capacity and (2) protection of public health and the environment.

The Environmental Protection Agency was given the responsibility to develop standards and implement regulations regarding waste disposal. The states could develop their own plans regarding hazardous and solid waste management but would be subject to EPA approval. It is in this context that states began to develop comprehensive waste management legislation. In turn, local governments were directed to develop and implement long range waste management plans that encouraged alternatives to landfilling of wastes.

Current Legal Aspects
Flow control regulations became popular in the late 70's and early 80's, when communities developing waste-to-energy projects needed to guarantee a sufficient waste stream to the facility to efficiently operate and finance the project. Early challenges to flow control were centered around federal antitrust law with the federal courts usually upholding a community's authority to control the flow of solid waste.

Recently more and more local and state governments have begun to look to flow control as a means to properly manage their wastes, not just for waste-to-energy projects, but also to direct waste and sometimes even recyclables to other waste management facilities, such as material recovery facilities (MRF's), composting projects, and landfills. With the increased use of flow control came increased court challenges by private waste management companies. This time, however, the challenges were brought under the Commerce Clause of the U.S. Constitution.

These challenges have been successful in cases where flow control regulations have restricted interstate commerce. This has occurred when a local government attempted to direct all waste within its borders to specific facilities but has been challenged by a local hauler who prefers to haul waste to facilities out-of-state or by an out-of-state landfill operator whose waste stream has been impacted by the flow control ordinance. The private waste management companies have successfully challenged flow control at the federal district, appellate levels, and in the U.S. Supreme Court.

Local governments will continue to be prevented from using flow control when interstate commerce is an issue unless the U.S. Congress takes action to specifically authorize state and local governments to regulate the flow of solid waste. Several bills have been introduced during the current session of Congress to authorize flow control but quick approval is not anticipated.

State Law

At the state level North Carolina G.S. 130A-294(a)(5b) provides that the North Carolina Department of Environment, Health, and Natural Resources (NCDEHNR) may, at the request of a unit of local government, "designate a geographic area within which the collection, transportation, storage and disposal of all solid waste generated within such area shall be accomplished in accordance with the solid waste management plan", and may also authorize the unit of local government "to require by ordinance, that all solid waste generated within the designated geographic area that is placed in the waste stream for disposal be collected, transported, stored and disposed of at a permitted solid waste management facility or facilities serving such area."
There are specific requirements that a unit of local government must meet to the satisfaction of NCDEHNR before the state grants the authority to enact flow control. The main requirement is a solid waste management plan approved by the State.

While flow control ordinances may not be legal when inter-state commerce is restricted, there has been no challenge in North Carolina regarding restrictions on intra-state commerce. Therefore, flow control ordinances may still be useful to local governments to restrict the flow of waste within the state (i.e. between counties).

**Recyclable Materials**

There is considerable concern among both the public and private sectors regarding the ability of local governments to control the flow of recyclables. On one hand, some local government officials wish to control recyclables because of mandates to meet waste reduction goals and the revenue potential of these materials. On the other hand, the recycling industry fears that flow control of recyclables could be taken to a level where the intermediate processors are essentially prohibited from receiving recyclable materials. Under current North Carolina law, flow control of recyclables is restricted. The statute authorizing flow control does not allow local ordinances to prohibit the source separation of materials from solid waste prior to collection of such solid waste for disposal, or prohibit collectors of solid waste from recycling materials or limit access to such materials as an incident to collection of such solid waste.

**Perspectives**

One's perspective on flow control depends on its impact. The public sector typically favors flow control while the private sector is generally opposed to it. In addition, the recycling industry fears flow control could have a negative impact.

**The Public Sector**

In 1989, the North Carolina General Assembly enacted legislation which rewrote the Solid Waste Management laws codified in Chapter 130A. This legislation required local governments to develop and implement solid waste management plans designed to meet state recycling goals. This legislation was further amended in 1991 to require that county solid waste plans be designed to achieve at least a twenty-five (25) percent reduction in waste disposal (on a per capita basis) through source reduction, reuse, recycling, and composting by June 30, 1993 and a forty (40) percent reduction by June 30, 2001. In part, the purpose of this legislation was to "protect the public health, safety, and welfare; enhance the environment for the people of this State; and recover resources which have the potential for further
There is no demonstrated correlation between flow control and increased environmental protection or increased rates of recycling. Safe management and disposal of solid waste is best achieved through strict evenly enforced standards, not through flow control. In fact, environmental concerns may not be fully addressed if flow control measures direct waste to sub-standard facilities.

In general, the private sector views flow control as a political solution to an economic problem. The result of flow control is higher costs.

**Alternatives To Flow Control**

In addition to regulatory flow control, local governments have other alternatives to control the flow of waste within their jurisdictions. These alternatives could be used separately or in combination with regulatory flow control. Other methods include: (1) public collection system, (2) economic initiatives, and (3) contractual agreements.

**Public Collections System**

Counties and municipalities have the statutory authority to provide solid waste collection services. Under present law, the cost of collecting and disposing of solid waste could be financed through ad valorem taxes, collection fees, availability fees, or some combination of such revenues.

This system could take several years to fully implement. Municipalities and commercial waste generators frequently enter into multi-year contracts for waste management services. Funding for such a system could be through property taxes, availability fees, and collection fees.

The drawback to this system is that costs would not be equitably distributed. Heavy generators may not be required to pay full costs for services and small generators could pay disproportionately more. Also, financial incentives to reduce waste could be diminished.

**Economic Flow Control**

Since many local governments finance recycling, waste reduction education, and other environmental programs through tipping fees, a system to balance costs could be employed. One option would be to remove non-revenue generating programs from the tipping fee structure. The costs for these programs could be made up through taxes or other types of fees.

Another option would be to impose the costs of non-revenue generating programs on all waste generated within the jurisdiction regardless of who collects and transports it. The effect would be to level the field for both public and private concerns and provide funding so that non-revenue
programs could continue no matter how many transfer stations are built or how much waste is exported.

The first option would lower disposal costs but incentives to reduce waste generation would be diminished. The second option levels the playing field, provides funding for programs, and maintains incentives for waste reduction.

**Contractual Flow Control**

Another method to control the flow of waste is through contracts with waste generators, haulers, and other local governments. Long term contracts for the delivery of waste may assure a predictable flow of waste. Recent court challenges however have questioned whether or not local governments can designate disposal locations for waste collected under contract with the private sector. Even inter-local agreements between local governments have been challenged on the grounds that they may restrict interstate commerce.

**Summary**

Both the public and private sectors pose valid arguments concerning flow control of solid waste. On one hand, local governments cannot be reasonably expected to develop and implement long range integrated waste management plans without some tools to do so. Communities that have acted in good faith in developing long term solutions and making capital investment should not be abandoned. On the other hand, private enterprise should not be excluded from the process. The entrepreneurial spirit should be encouraged especially in regards to recyclables. Competition keeps everyone sharp and fosters innovation creating new market opportunities and lowering service costs.