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INTERSTATE TRANSPORTATION OF MUNICIPAL SOLID WASTE ACT OF 1995

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Mr. CHAFEE, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 534]

The Committee on Environment and Public Works reports S. 534, as amended, a bill to amend the Solid Waste Disposal Act, to provide authority for States to regulate the interstate transportation of municipal solid waste and to provide States and political subdivisions authority to flow control waste, and for other purposes, and recommends that the bill do pass.

GENERAL STATEMENT

GENERAL BACKGROUND

Interstate waste

Interstate transportation of municipal solid waste (MSW) is not a new phenomenon. In fact, for many cities, particularly those located near a State border, interstate transport over relatively short distances has occurred for decades.

Several factors, in addition to proximity, however, have contributed to the transport of waste—an article of commerce—across State lines. Primary among them is the economics of disposal. Tipping fees approaching $150 per ton in some metropolitan areas, with the national average between $30 and $50 per ton, have re-

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sulted in greater interest in interstate transport of waste. The economics are such that it can be less expensive to haul waste long distances with its resultant transportation costs and tipping fees than to dispose of it in waste management facilities closer to its point of generation.

In addition, there is a long-term trend toward larger, environmentally sound, regional disposal facilities that is affecting both interstate and intrastate transport of waste. In part, this has come about because of the imposition of more stringent State and Federal standards for the disposal of waste. As a result, older disposal facilities are increasingly being closed and new facilities are becoming more difficult to site.

Such consolidation of waste disposal is expected to continue with the implementation of new standards for municipal solid waste landfills promulgated by the Environmental Protection Agency under Subtitle D of the Resource Conservation and Recovery Act (RCRA). The new standards require landfill liners, leachate collection and treatment, groundwater and gas monitoring, corrective action, and closure and post closure care.

As a result of regionalization and the cost of waste disposal in some areas, there has been an increase in the transport of waste interstate. Since many States do not impose reporting requirements on waste exporters or waste management facilities, the quality of data on the levels of interstate waste transport vary greatly from State to State. According to a 1993 report from the National Solid Waste Management Association however:

> Interstate shipment of waste grew by 4 million tons, an increase of more than 25 percent, between 1990 and 1992. Currently, about 15 million tons of municipal waste is exported;
>
> 47 States, the District of Columbia, the Canadian provinces of Ontario and British Columbia, and Mexico exported some portion of their municipal solid waste for disposal in the contiguous United States in 1992;
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> 44 States import some MSW for disposal;
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> 4 States (New York, New Jersey, Illinois, and Missouri) and the Canadian province of Ontario export more than 1 million tons of MSW for disposal; and
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> an additional 13 States and the District of Columbia exported at least 100,000 tons of waste in 1992.

A recent memorandum compiled by the Congressional Research Service dated March 14, 1995, listed three States exporting more than 1 million tons of MSW in 1993 (New York, New Jersey and Illinois). On the import side, the document listed four States as having received more than 1 million tons of municipal solid waste in 1993 (Pennsylvania, Ohio, Virginia and Illinois). The Committee notes that while a majority of imported waste appears to be disposed of in privately owned landfills, in some States large quantities are transported to publicly owned facilities which, in many cases, have the authority to restrict out-of-State waste under the so called "market participation exemption to the dormant commerce clause" of the U.S. Constitution, (see Constitutional issues below).

Constitutional issues

Although generally a protected commodity under the Commerce Clause of the Constitution, waste imports have raised concerns for some receiving jurisdictions. The principal problem is that sudden shifts in the volume of waste imported to a State may make it difficult for the State to plan effectively for the management of its own waste. In addition, States that are net importers have argued that it is unfair for their citizens to experience the impacts of managing waste generated by entities outside their own jurisdiction.

To counteract the flow of interstate shipments, many states have attempted to restrict imports of waste through outright bans, differential fees, moratoria on facility construction, various planning and capacity assurance requirements or other mechanisms. Over 30 States have enacted laws that restrict or otherwise distinguish out-of-State wastes differently than wastes generated within State.

Many of these laws, however, have been subject to constitutional challenge, and the U.S. Supreme Court and other Federal Courts generally have upheld such challenges on the ground that laws restricting imports of waste violate the U.S. Constitution's Commerce Clause (article I, section 8, clause 3). The Commerce Clause provides that "Congress shall have Power . . . to regulate Commerce . . . among the several States." In addition to granting regulatory power to Congress, the Commerce Clause has long been understood to have a negative aspect, the so called "dormant commerce clause," that denies States the power to discriminate against or otherwise burden the interstate flow of articles of commerce. See, *H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525 (1949). Several Federal Circuit Courts have ruled on Commerce Clause challenges to import restrictions and flow control in the last three years. The litigation has also resulted in a number of Supreme Court decisions.

In one of the earliest legal decisions in the area of waste restrictions, *Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), the Supreme Court applied the "negative Commerce Clause" to invalidate a New Jersey law prohibiting the importation of municipal solid waste generated outside the State. "Whatever New Jersey's ultimately purpose," the Court said, "it may not be accompanied by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." Id. at 626.

Following the Supreme Court's decision in *Philadelphia* v. *New Jersey*, several States enacted laws imposing various restrictions on waste imports, apparently in the hope that burdens less onerous than outright prohibition might withstand constitutional challenge. These efforts took a number of forms including: the establishment of planning districts with authority to restrict waste from outside the district's jurisdiction, the imposition of differential fees for the disposal of in-State and out-of-State waste, waste capacity needs requirements, bans on the disposal of certain types of waste, and facility construction moratoria.

In response to these and other similar restrictions, the Supreme Court has recently issued three decisions invalidating various State attempts to discriminate against out-of-State waste. In *Oregon Waste Systems, Inc.* v. *Dep't of Environmental Quality*, 114 S. Ct.

1345 (1944), the Court invalidated an Oregon law imposing a surcharge on the disposal of waste generated outside the State. In *Chemical Waste Management, Inc.* v. *Hunt*, 112 S. Ct. 2009 (1993), the Court invalidated an Alabama law imposing a surcharge on the disposal of hazardous waste generated outside the State. And in *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 112 S. Ct. 2019 (1993), the Court invalidated a Michigan law allowing solid waste management districts to prohibit the disposal of waste from outside the district.

In light of these decisions, it appears that most, if not all, State laws restricting waste imports violate the Commerce Clause. The one major exception relates to waste disposal sites owned by States and localities. In *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976), the Supreme Court ruled that when State and local governments participate in the market, rather than merely regulate it, the dormant commerce clause does not apply. The associated benefits of the government owned facility may, according to the Court, be granted to the taxpayers who actually funded it. The so called "market participant exemption," however, is strictly limited to the market in which the State or local government is actually a participant.

Congressional legislation

As has been noted, Congress, through powers granted by the U.S. Constitution, may regulate interstate commerce and thus, "immunize" State actions, which otherwise would violate the Commerce Clause. See *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 472 U.S. 159, 174–75 (1985).

To this end, in the past few years, several Senate bills have been introduced and referred to the Environment and Public Works Committee that would provide authority to the States to restrict imports of waste in certain circumstances. Similar legislation has been introduced in the House of Representatives.

Since 1990, the Environment and Public Works Committee has held 3 hearings (June 18, 1990; July 18, 1991; and March 1, 1995) to review the issues posed by the interstate shipment of municipal solid waste. Over the past five years, the Committee has worked to develop a solution that would preserve the advantages of interstate commerce, while providing States some new authority to create a more orderly and predictable flow of waste imports and exports.

In the 102d Congress, the Committee reported S. 976, the Resource Conservation and Recovery Act Amendments of 1992, a bill that addressed a wide range of solid waste issues. Section 412 of the bill provided authority for Governors to restrict the disposal of out-of-State waste, but the legislation was not considered by the full Senate. The Senate subsequently approved separate legislation addressing interstate shipment of waste, S. 2877, the Interstate Transportation of Municipal Solid Waste Act of 1992, by a vote of 89–2, on July 23, 1992. No comparable legislation was approved by the House.

During the 103d Congress, the Committee unanimously reported S. 2345, the Interstate Transportation of Municipal Solid Waste Act of 1994 (Senate Report 103–322), to provide legal authority to

every State to restrict out-of-State MSW. S. 2345 was approved in the Senate by voice vote on September 30, 1994. The legislation would have allowed every Governor to freeze MSW exports at 1993 levels, and to ban future MSW imports to facilities not receiving such waste in 1993 if the affected local community did not want to receive out-of-state MSW. In addition, the bill included an "export state ratchet" to reduce the level of MSW exports from large exporting States and an "import State ratchet" to ensure that no single State received large amounts of MSW from another State.

On September 29, 1994, the House of Representatives approved its own interstate package, H.R. 4683, and after adding flow control language, a modified version of S. 2345 was approved by the House on October 7, 1994. The Senate received the bill, including both interstate waste and flow control provisions, on October 8, 1994, the last day of the Senate session. S. 2345, as approved by the House, was not considered on the Senate floor.

Thus far in the 104th Congress, several bills have been referred to the Environment Committee that would authorize State restrictions on imports of waste in certain circumstances, including S. 456 introduced by Senator Baucus, S. 589, introduced by Senator Coats and S. 542, introduced by Senator Conrad. Generally, these bills build on the provisions of S. 2877 and S. 2345.

On March 1, 1995, the Senate Environment and Public Works Committee's Superfund, Waste Control and Risk Assessment Subcommittee held a hearing on the issues of interstate waste and flow control.

In response to the testimony received at the hearing, Senator Robert Smith, Chairman of the Subcommittee and Senator John H. Chafee, Chairman of the Full Committee, introduced S. 534, a bill to amend the Solid Waste Disposal Act, to provide authority for States to regulate the interstate transportation of municipal solid waste and to provide States and political subdivisions authority to flow control waste. The bill, as amended, was ordered reported unanimously, by voice vote, from the Superfund Subcommittee on March 15, 1995. The Full Committee ordered the bill reported, as amended, on March 23, 1995, by a rollcall vote of 16 to 0.

Flow control

The term "flow control" refers to the legal authority of States and local governments to designate where municipal solid waste (MSW) must be taken for processing, treatment or disposal. As a waste management strategy, flow control requires waste to be delivered to specific facilities such as waste to energy plants (WTE), landfills, transfer stations, materials recovery facilities and composting operations.

Flow control has played a part in the domestic waste market for over twenty-five years. Thirty-five States, the District of Columbia, and the Virgin Islands authorize flow control directly. According to the Environmental Protection Agency's March 1995 "Report to Congress on Flow Control and Municipal Solid Waste," these States and territories "specifically allow local governments to use flow controls, to designate facilities where waste must be managed, and to require mandatory participation in municipal solid waste management services." Four additional States authorize flow control indi-

rectly through mechanisms such as local solid waste management plans (Michigan, Texas) and home rule authority (Maryland, Massachusetts); eleven States have no flow control authority (Alaska, Arizona, California, Idaho, Indiana—with the exception of Indianapolis—Kansas, Kentucky, Nevada, New Mexico, South Carolina and Utah).

The primary factor driving the imposition of flow control ordinances is economics. Over the past two decades, State and local governments have used flow control as a financing mechanism for the development of new municipal solid waste capacity. Such controls guarantee that a projected amount of waste will be received at designated waste facilities. Thus, a predictable revenue stream is generated for the retirement of capital debt and other expenses incurred by the waste management facility.

According to the Public Securities Association in testimony before the Committee, over $20 billion in municipal bonds have been issued to pay for the construction of solid waste facilities. In the overwhelming majority of cases, investors were assured that the projected amounts of waste would be delivered to the financed facility because flow control laws were in place.

This approach has ensured funding for capital intensive waste management facilities such as waste-to-energy plants. According to the EPA in its March 1995 report to Congress, of the 145 waste-to-energy facilities currently operating, 61 have waste guaranteed by flow control ordinances, representing close to 58% of the total 31 million tons of waste combusted in 1992. An additional 40 facilities received waste guaranteed by contracts, which may have been supported by some form of flow control, representing an additional 31% of the WTE market.

Flow control has also served as a trigger for recycling and for the diversion of specific wastes to certain facilities. In addition, it has been a tool for States and localities to plan for and fund solid waste management programs.

Governmentally directed flow control, however, is not the only mechanism available to achieve such purposes. In fact, the EPA's March 1995 report concluded that "flow control is not essential for developing MSW management capacity, or for achieving recycling goals."

The Committee has received testimony in support and opposition to flow control. Proponents of flow control have argued that flow control is an essential tool without which governments would find it more difficult, if not impossible, to fulfill their responsibilities to plan for the management of municipal solid waste. They have asserted that flow control ensures the financing of existing and planned municipal waste facilities, the delivery of garbage to environmentally sound facilities, and the generation of revenues for other aspects of local solid waste management, including recycling, household hazardous waste management and the cleanup of disposal sites.

Opponents of flow control, including small business, many environmental groups, and a number of firms in the waste management industry, have made a case that flow control has limited competition in the waste market, created inefficient local monopolies,

increased disposal costs, and interfered with the free flow of commerce.

Constitutional issues

Not unlike the interstate transport of municipal solid waste, flow control has emerged as a controversial legislative issue because of several recent Federal court decisions. Over the past five years, Federal courts have ruled that flow control laws in no fewer than four States violated the Commerce Clause of the U.S. Constitution. Again, the issue has been whether waste restrictions, and specifically flow control, undermined the dormant commerce clause that bars States and political subdivisions from placing undue burdens on interstate commerce.

The primary legal case that has brought the flow control debate to a head is *C&A Carbone, Inc.* v. *Town of Clarkstown, New York* 114 S. Ct. 1677 (1194), which the Supreme Court decided on May 16, 1994. By way of background, in the late 1980's, the State of New York ordered the Town of Clarkstown to close its landfill and replace it with a transfer station from which waste would be shipped to other facilities. The town contracted with a private contractor to build and operate the station. To finance the waste station's cost, the town guaranteed a minimum waste flow to the facility, for which the contractor could charge haulers a waste tipping fee which exceeded the disposal cost of unsorted solid waste on the private market. In order to meet the waste flow guarantee, the town adopted a flow control ordinance, requiring all nonhazardous solid waste within the town to be disposed at the transfer station.

After discovering that C&A Carbone, a waste company, was shipping nonrecyclables to out-of-State destinations, the town filed suit in State court, seeking an injunction requiring that the waste be shipped to the transfer station. Carbone responded by filing suit in United States District Court to enjoin the town's flow control ordinance. The United States District Court granted the injunction, *C&A Carbone, Inc.* v. *Clarkstown (SDNY) 1991.* Shortly thereafter, the New York court declared the flow control ordinance constitutional and granted summary judgment to the town of Clarkstown. The United States District Court then dissolved its injunction.

The U.S. Supreme Court, however, held that the Clarkstown ordinance violated the Commerce Clause. The Court held, on May 16, 1994, that:

> (1) The Ordinance regulated interstate commerce. Although its immediate effect was to direct transport of solid waste to a site within the local jurisdiction, its economic effects were clearly interstate in reach.
>
> (2) The ordinance discriminated against interstate commerce for it allowed only the favored operator to process waste within the town limits.
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> (3) The town did not lack other means to advance the local interest of preserving healthy and safety with respect to waste disposal. In addition, the ordinance's revenue generating purpose by itself was not a local interest that could justify discrimination against interstate commerce.

Delivering the opinion of the Court, Justice Kennedy wrote: "The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."

In a concurring opinion, Justice O'Connor once again affirmed Congressional authority to regulate interstate commerce, concluding that "it is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to that legislative judgement."

Thus, the supreme Court's ruling in the *Carbone* case has made it evidently clear that, absent Congressional action, the exercise of flow control by States and political subdivisions is unconstitutional.

Congressinal legislation

In response to local communities' concerns about protecting financial investments in solid waste management facilities and the desire to limit interference in the private waste market, the Environment and Public Works Committee has worked to craft a legislative solution with respect to flow control.

Several bills authorizing flow control were referred to the Committee in the 103rd Congress, including S. 2227, introduced by Senator Lautenberg and S. 1634, introduced by Senator Heflin. In addition, during the 103rd Congress, the Committee held a hearing on the issue of flow control (July 13, 1994).

As a general matter, the proposals to grant authority to States and political subdivisions to impose flow control authority have taken the following approaches:

Strict grandfather.—Under this approach, those States and political subdivisions that had enacted and implemented flow control ordinances by designating specific waste management facilities prior to the *Carbone* decision could continue to impose flow control until the debt incurred for construction of the facilities was retired or until the end of the useful life of the facilities.

Modified grandfather.—Under this approach, in addition to those entities covered by the strict Grandfather, those States and political subdivisions that had made a "substantial commitment" to the designation of waste management facilities prior to the *Carbone* decision could impose flow control.

System grandfather.—Under this approach, in addition to the entities covered by the strict and modified grandfathers, those States and political subdivisions that had put in place a waste management system predicated on flow control without necessarily designating specific facilities would be granted flow control authority.

Although the Environment and Public Works Committee did not report a flow control measure in the 103d Congress, flow control language was added by the House of Representatives to the House approved version of S. 2345, the Interstate Transportation of Municipal Solid Waste Act of 1994. S. 2345, as approved by the House, was not considered in the Senate.

Thus far in the 104th Congress, several bills have been referred to the Committee authorizing States and political subdivisions to

impose flow control, including S. 398, introduced by Senator Lautenberg and S. 485, introduced by Senator Hutchison.

On March 1, 1995, the Environment and Public Works Committee's Superfund, Waste Control and Risk Assessment Subcommittee held a hearing to receive testimony on the issue of flow control. In response to the testimony received, Senator Smith and Senator Chafee introduced S. 534.

Ground water monitoring

Title III of the reported bill reinstates the ground water monitoring exemption for small landfills in the municipal solid waste landfill criteria (MSWLFC). Section 4010(c) of RCRA directed EPA to revise the MSWLF criteria. One of the most significant issues raised during revision of the criteria was the impact on small community landfills.

As a result, the October 9, 1991 Final Rule for the MSWLFC included a ground water exemption for owners and operators of certain small landfills. To qualify for the exemption, the landfill had to accept less than twenty tons of waste per day, exhibit no evidence of ground water contamination and serve either a community that experiences an annual interruption of at least consecutive months of surface transportation that prevents access to a regional waste management facility, or has no practicable waste management alternative, and the landfill unit is located in an area that annually receives less than or equal to twenty-five inches of precipitation.

In January 1992, the Sierra Club and the Natural Resources Defense Council filed petitions with the U.S. Court of Appeals, District of Columbia Circuit for review of the Subtitle D criteria. The Court held that under RCRA section 4010(c), the only factor EPA could consider in determining whether facilities must monitor their ground water was whether such monitoring was "necessary to detect contamination" not whether such monitoring is "practicable."

Thus, the Court vacated the small landfill exemption as it pertained to ground water monitoring. The purpose of Title III of the reported bill is to reinstate the exemption.

The reported bill

The reported legislation includes three titles. Title I deals with interstate waste and is similar to the Senate approved version of S. 2345 from the 103rd Congress. Title II focuses on flow control, and Title III reinstates the ground water monitoring exemption for small landfills in the municipal solid waste landfill criteria.

Title I—Interstate waste

Title I provides legal authority to every State to restrict out-of-State municipal waste ("MSW"). In addition, the legislation provides the same authority with respect to out-of-country MSW, if it is consistent with U.S. international trade obligations under GATT or NAFTA.

Title I of the reported bill deals only with municipal solid waste, commonly known as garbage or trash. It purposely avoids imposing restrictions on the interstate transport of hazardous waste, industrial waste or construction and demolition debris. The reported bill

is intended to provide States with additional control over MSW imports without unduly limiting the flow of interstate commerce.

The legislation allows every Governor to freeze current MSW imports at 1993 levels, and to ban future MSW imports to facilities not receiving such waste in 1993, if the affected local community does not want to receive out-of-State MSW. In addition, the bill includes an "export State ratchet" to reduce the level of MSW exports from large exporting States and an "import State ratchet" to ensure that no single State receives excessive amounts of MSW from one particular State.

Specifically the bill provides the following new authority:

MSW import ban.—A Governor may, if requested by the affected local community (as designated by the Governor), ban out-of-State MSW at landfills or incinerators (including waste-to-energy facilities) that did not receive out-of-State MSW in 1993, or at those that received MSW in 1993 but are not in compliance with applicable Federal or State standards.

MSW import freeze.—A Governor may unilaterally freeze out-or-State MSW at 1993 levels at landfills and incinerators (including waste-to-energy facilities) that received MSW during 1993 and are in compliance with applicable Federal or State standards.

MSW export state ratchet.—A Governor may unilaterally ban out-of-State MSW from any State exporting more than 3.5 million tons of MSW in 1996, 3.0 million tons in 1997 and 1998, 2.5 million tons of MSW in 1999 and 2000, 1.5 million tons in 2001 and 2002, and 1 million tons of MSW in 2003 and every year thereafter.

MSW import state ratchet.—A Governor may unilaterally restrict out-of-State MSW, imported from any 1 State in excess of the following levels: in 1996, more than 1.4 million tons or 90% of the 1993 levels of such waste exported to such State, whichever is greater; in 1997, 1.3 million tons or 90% of the 1996 levels of such waste exported to such State, whichever is greater; in 1998, 1.2 million tons or 90% of the 1997 levels of such waste exported to such State, whichever is greater; in 1999, 1.1 million tons, or 90% of the 1998 levels of such waste exported to such State, whichever is greater; in 2000, 1 million tons; in 2001, 800,000 tons; and in 2002, and each year thereafter, 600,000 tons.

Cost recovery surcharge.—States that imposed a differential fee on the disposal of out-of-State MSW, on or before April 3, 1994, are allowed to impose a fee of no more than $1 per ton of MSW, as long as the differential fee is utilized to fund solid waste management programs administered by the State.

Miscellaneous.—The reported bill also allows any Governor to exercise authorities to ban or limit MSW imported from Canada (and other countries) if doing so is found by the President to be consistent with U.S. international trade obligations under GATT and NAFTA.

The legislation makes clear that nothing in the bill shall have any effect on State law relating to contracts on or State and local authorities to protect the public health and environment through laws, regulations and permits provided that such laws, regulations and permits do not discriminate between in-State and out-of-State waste, except as provided in this bill and consistent with the Supreme Court decisions in *Philadelphia* v. *New Jersey* and in *Fort*

Gratiot Sanitary Landfill Inc. v. *Michigan Department of Natural Resources.*

The reported bill explicitly prohibits a Governor from limiting or prohibiting MSW imports to landfills or incinerators (including waste-to-energy facilities) that have a host community agreement (as defined in the bill). Such agreements must specifically authorize (as defined in the bill) the receipt of out-of-State municipal solid waste. The language for such authorization may vary as long as it clearly and affirmatively states the approval or consent of the affected local government or State for the receipt of municipal solid waste from sources outside the receiving State. In addition, future host community agreements must meet new public disclosure requirements before execution.

The bill does, however, allow a governor to prevent receipt of out-of-State MSW, even under the terms of a host community agreement, if such imports would interfere with waste capacity that is permitted by State or federal law; identified in the State's solid waste management plan; and is legally committed for disposal of waste generated within the region.

Title II—Flow control

There has been a strong concern, in the wake of the *Carbone* decision that without prompt Congressional action on the authorization of flow control, local communities would be unable to meet debt service obligations related to prior issuance of revenue bonds for the construction of solid waste management facilities.

The reported bill addresses this issue. The intention of the reported bill is to provide States and political subdivisions with flow control authority in order to meet financial obligations and maintain credit worthiness. The title provides limited flow control authority under certain conditions to States and political subdivisions that embarked on financial investments that were, rightly or wrongly, predicated on the expectation or implementation of flow control. It does not reflect any position on the appropriateness of flow control as a policy option for solid waste management. In each instance in which flow control authority is granted, that grant is predicated on meeting debt obligations.

The reported bill does not provide flow control authority to States and political divisions for the purposes of directing waste to solid waste management facilities for which the capital cost of construction has been retired. Furthermore, any grant of authority provided in the reported bill expires no later than thirty years after date of enactment.

Title II of S. 534 includes three major provisions:

FLOW CONTROL AUTHORITY

General flow control authority.—The bill provides general flow control authority as follows: Each state and each political subdivision that prior to May 15, 1994: (1) imposed flow control pursuant to a law, ordinance, regulation or other legally binding provision; and (2) implemented flow control by designating particular waste management facilities or a public service authority for waste disposal would be authorized to conduct flow control activities until the later of the end of the contract between the State or political

subdivision and any other person regarding movement of the waste, completion of the schedule for payment of the capital costs of the waste facility or the end of the useful life of the original waste facility. The implementation of flow control requires that a State or political subdivision "designate" particular waste management facilities or a public service authority to which its waste is to be delivered. This "designation" must be performed prior to the substantial construction of the designated facilities (which can be through a public service authority) and can be satisfied by a State or political subdivision in one of two ways: (1) by passing a law, ordinance, regulation, or other legally binding agreement to direct its waste prior to substantial construction of the facility; or (2) by contractually committing to direct its waste prior to substantial construction of the facility, where the law, ordinance, regulation, or other legally binding agreement was approved after substantial construction is completed.

State related flow control.—In addition, any State or political subdivision that adopted and applied flow control regulations under State law, and applied those regulations to every political subdivision of the State, on or before January 1, 1984, may designate any waste facility in the State and continue to exercise flow control authority for the remaining useful life of the facility; or any political subdivision of a State may exercise flow control authority if, prior to May 15, 1994, the political subdivision was mandated by law to provide for the operation of solid waste facilities, is required to initiate a recyclable materials program, had implemented the authority through a law, ordinance, regulation contract, or other legally binding provision and had incurred significant financial expenditures to repay outstanding revenue bonds for the construction of solid waste management facilities to which the political subdivision's waste was designated.

Public service authority flow control.—Furthermore, any political subdivision that contracted with a public service authority for the disposal of municipal solid waste, prior to May 15, 1994, may exercise flow control until the expiration of the contract or the life of the bonds issued for the construction of the solid waste facilities to which the political subdivision's waste is transferred or disposed.

FLOW CONTROL COMMITMENT TO CONSTRUCTION

Any political subdivision that had a law, ordinance, regulation or other legally binding provision providing for flow control in effect prior to May 15, 1994, and had committed to the designation of a facility prior to that date, may exercise flow control under subsection (b) of the reported bill. Under this provision, commitment is demonstrated by one or more of the following (prior to May 5, 1994): completed construction permits; a signed contract to construct a facility; revenue bonds presented for sale; or the filing of permit applications for construction and operation of a facility.

FLOW CONTROL SUNSET

Under subsection (j) of this title, all authority to flow control would be repealed effective 30 years after the date of enactment.

Title III—Ground water monitoring

Title III reinstates the ground water monitoring exemption for small landfills in the municipal solid waste landfill criteria (MSWLFC).

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

Section 1 establishes the short title of the bill as the "Interstate Transportation of Municipal Solid Waste Act 1995".

Title I—Interstate Waste

SEC. 101. INTERSTATE TRANSPORTATION OF MUNICIPAL SOLID WASTE

Section 101 adds a new section to Subtitle D of the Resource Conservation and Recovery Act, authorizing states to restrict municipal solid waste imports in certain circumstances, as follows:

"SEC. 4011. INTERSTATE TRANSPORTATION OF MUNICIPAL SOLID WASTE"

Sec. 4011(a) Authority to restrict out-of-State municipal solid waste

Section 4011(a)(1)

Section 4011(a)(1) sets forth the basic authority for Governors to ban out-of-State imports of municipal solid waste for disposal at facilities that did not receive such waste in 1993. This authority may be exercised only if a formal request is received by the Governor from the affected local government.

The provision must be viewed in the context of existing law. The courts have consistently held under the Commerce Clause that, absent Congressional authorization, municipal solid waste disposal shipments among States are not subject to regulation or limitation by the importing States based solely on the fact that the waste is from another State. This provision of the reported bill provides Congressional authorization for the imposition of restrictions. It includes a grant of authority to Governors, under certain specified circumstances and pursuant to State law, to restrict the disposal of out-of-State municipal solid waste that would otherwise be constitutionally protected.

The grant of authority for Governors to restrict interstate transportation of municipal solid waste applies only to that waste intended for disposal in landfills or incinerators (including waste-to-energy facilities) in a State. Furthermore, the ultimate use of that authority expressly precludes interference with host community agreements. It is also intended to apply only to "municipal solid waste," which is a defined term.

The grant of authority is not intended to reflect a Congressional judgment as to the appropriateness of interstate transportation of municipal solid waste for disposal purposes. This is a decision to be made by Governors pursuant to State law, except in certain circumstances, only after a request from the affected local government and only if it would not interfere with the execution of a host community agreement.

Section 4011(a)(2)

Section 4011(a)(2) deals with those facilities that received out-of-State waste in 1993. Landfills or incinerators (including waste-to-energy facilities) that did receive out-of-State MSW in 1993 are generally allowed to continue receiving out-of-State MSW in the future (these are referred to, although not defined as such in the bill, as "grandfathered" facilities). A Governor may, under paragraph (2), however—notwithstanding the absence of a request—limit the quantity of out-of-State MSW that such facilities received for disposal, to the amount received in 1993, unless such action would violate a host community agreement or permit authorizing the receipt of out-of-State waste.

Section 4011(a)(3)

Section 4011(a)(3)(A)

Under Section 4011(a)(3)(A), a Governor may, in the absence of a request, prohibit disposal of any municipal solid waste from States that exported more than specified amounts of such waste to facilities referred to in Paragraph (2) that are not covered by host community agreements or permits authorizing the receipt of out-of-State waste. The specified amounts are more than 3.5 million tons of MSW in 1996, declining over seven years to 1.0 million tons in calendar year 2003, and each year thereafter.

Section 4011(a)(3)(B)

Section 4011(a)(3)(B) authorizes a Governor to impose limits on the amount of municipal solid waste which any one State may export for disposal at landfills or incinerators (including waste-to-energy facilities) not covered by host community agreements which are located within the affected Governor's State. These limits begin at 1.4 million tons of MSW in 1996 or 90 percent of the 1993 levels exported to such State, whichever is greater, and gradually decline to 600,000 tons in 2002 and each year thereafter. A Governor from an importing State must notify the Governor of the exporting State or States and the Administrator of EPA twelve months prior to taking action if he or she intends to impose these limits. Furthermore, any restrictions imposed must be applied without discrimination at all facilities receiving out-of-State MSW.

The regimen established by this section is intended to rely on a municipal solid waste management structure that defers in most cases to the decisions and interests of State and local governments, upon which fall the bulk of responsibility associated with accepting or limiting disposal of out-of-State municipal solid waste.

The intent in establishing a class of grandfathered or exempt facilities, against which import bans may not be imposed except in narrow circumstances, is to protect arrangements and investments made in good faith reliance on the protections of the Commerce and Contracts Clauses of the U.S. Constitution. It also avoids the disruption that would otherwise ensue if the future of all interstate municipal waste shipments were rendered uncertain. Such a disruption must be avoided otherwise exporting States will be forced into questionable environmental decisions such as delaying the clo-

sure of substandard facilities in order to preserve in-State disposal capacity.

In implementing these authorities, the bill does not empower States to act in limiting imports of municipal solid waste so as to discriminate among States of origin or among recipient disposal sites. The language in Section 4011(a)(5) is designed to preclude such action. Where a Governor is authorized to freeze or otherwise limit municipal solid waste imports, such restrictions may not be imposed selectively.

Section 4011(a)(4)

Paragraph (4) preserves the provisions of host community agreements and permits. Under Section 4011(a)(4)(A), a Governor may not exercise the authority to prohibit or limit municipal solid waste imports if such action would be inconsistent with the terms of a host community agreement or a permit issued from the State. Section 4011(a)(4)(B) prohibits Governors from using authority provided by the bill to require that "grandfathered" facilities reduce the level of out-of-State MSW from any State to an annual quantity less than the amount received from such State at the "grandfathered" facility during 1993.

Section 4011(a)(5)

Paragraph (5) prohibits discrimination against specific facilities or exporting States. It provides that limitations imposed by the Governor at grandfathered facilities must be applicable throughout the State and not directly or indirectly discriminate against any particular landfill or incinerator (including a waste-to-energy facility). In addition, limits may not discriminate against shipments on the basis of State of origin, but rather must be applied equally to all States that exceed the limits imposed under paragraph (3).

Section 4011(a)(6)

Paragraph (6) provides for an annual report detailing waste imports. The States are charged with publishing the report based on information provided by owners or operators of importing landfills and incinerators. The report serves as the basis for a Governor's action to impose bans or restrictions on the importation of municipal solid waste.

Section 4011(a)(7)

Paragraph (7) sets forth procedural requirements for affected local governments that intend to enter a host community agreement or request that the Governor prohibit waste imports. Following notice and public comment, the affected local government must take formal action at a public meeting. It is expected that the procedures that local governments use for formal action on a host community agreement or request made to a Governor would be similar to the procedures that such governments use when taking action on similar or related activities.

Section 4011(a)(8)

Paragraph (8) includes a list of information that must be provided to the affected local government by an owner or operator of

a landfill or incinerator seeking a host community agreement. The provision provides that such information shall be made available to the public by the affected local government.

Section 4011(b) Exceptions to authority to prohibit out-of-State municipal solid waste

Section 4011(b)(1)

Section 4011(b)(1) identifies those facilities that are not subject to a Governor's authority to ban disposal of out-of-State municipal solid waste (i.e. grandfathered facilities). These are landfills and incinerators (including waste-to-energy facilities) that received out-of-State MSW in 1993, and in the case of landfills, are in compliance with all applicable Federal and State laws and regulations relating to facility design and operation, and in the case of incinerators (including waste-to-energy facilities), are in compliance with applicable requirements of Section 129 of the Clean Air Act and applicable State laws and regulations. A landfill or incinerator (including a waste-to-energy facility) that is not in compliance with such laws may lose its grandfathered status. Under the provisions of Section 4011(b)(2), however, a Governor who exercises the authority provided in subsection (a), to prohibit out-of-State MSW disposal at a facility not in compliance, must also prohibit the disposal of MSW generated within the State at such a facility.

Section 4011(c) Additional authority to limit out-of-State municipal solid waste

Section 4011(c)

Section 4011(c) outlines the only instance in which a Governor can override a host community agreement. The provision allows a Governor to prohibit the execution of a host community agreement with respect to a specified amount of capacity if the host community agreement would preclude the use of capacity that is: permitted by State or Federal law, identified under the State's solid waste management plan and committed to disposal of locally generated municipal solid waste. This authority may not be used to prevent a facility from committing excess capacity to out-of-State MSW.

Section 4011(d) Cost recovery surcharge

Section 4011(d)

Section 4011(d) provides grandfather authority for the imposition of cost recovery surcharges to any State that on or before April 3, 1994 imposed such surcharges on the processing or disposal of out-of-State municipal solid waste pursuant to a State law. The imposition of the surcharge is conditioned upon the State's ability to demonstrate that a differential cost arises from the processing of disposal of out-of-State waste, that such costs would otherwise have to be paid by the State and that the surcharge is compensatory and not discriminatory. A State may not assess a surcharge if the cost that the surcharge is intended to cover is otherwise recovered by another surcharge or tax assessed against solid waste. The State bears the burden of proof that the fee satisfies the above condi-

tions. In addition, this provision provides that the surcharge may not exceed $1 per ton of waste and that the surcharge shall be used to fund only those solid waste management programs for which the fee is collected.

This section provides authority in the most limited of situations, to States that: imposed such a fee, prior to April 13, 1994, and can demonstrate the need for such a charge. The $1 surcharge was regarded as the absolute maximum fee allowable.

Section 4011(e) Savings clause

Section 4011(e)

Section 4011(e) provides that nothing in the reported bill shall have any effect on State contract law. The provision is intended to clarify that the new Section 4011 does not convey any authority for Governors to interfere with current contractual arrangements between generators of waste and public or private entities for out-of-State municipal solid waste disposal.

Section 4011(d) is also intended to clarify that nothing in the new section shall affect State and local authority to protect public health and the environment through laws, regulations and permits, including authority to limit the total amount of municipal solid waste that landfill or incinerator (including a waste-to-energy facility) owners or operators within the jurisdiction of a State may accept during a prescribed period, provided that such limitations do not discriminate between in-State and out-of-State municipal solid waste except to the extent authorized by this section and consistent with the Supreme Court decisions in *Philadelphia* v. *New Jersey* and *Fort Gratiot Sanitary Landfill Inc.* v. *Michigan Department of Natural Resources.*

Section 4011(f) Definitions

Section 4011(f)

Section 4011(f) contains definitions for the terms "affected local government", "host community agreement", "out-of-State municipal solid waste", "municipal solid waste", "compliance", "specifically authorized", and "specifically authorizes".

In paragraph (1) the term "affected local government" is defined. For purposes of this section, affected local government is defined by the Governor and published within 90 days after enactment of this section as either, (A) a public body created by state law with responsibility to plan for municipal solid waste management provided that a majority of the members of such body are elected officials, or (B) the elected officials of a city town, township, borough, county, or parish exercising primary jurisdiction over municipal waste management or jurisdiction over the land. If the Governor fails to make a selection within 90 days after enactment of this section, the affected local government shall be the elected officials of a city, town, township, borough, county, or parish exercising primary jurisdiction over the land or the use of the land on which the facility is located or proposed to be located.

This definition is necessary for the purpose of taking action pursuant to subsection (a)(1) (primarily to request a ban on the disposal of out-of-State MSW in any landfill or incinerator that did

not receive out-of-State MSW in 1993) and for entering into a host community agreement as defined in this section. With respect to subsection (a)(1), a Governor may only prohibit out-of-State municipal solid waste if requested by the affected local government. With respect to a host community agreement, such agreement is between the owner or operator of the landfill or incinerator (including a waste-to-energy facility) and the affected local government. For both purposes, the term affected local government shall be designated by a Governor and shall be the same designation.

There is one important limitation to a Governor's authority to designate which public body shall serve as the affected local government. For purposes of any host community agreement entered into before the date of publication of a Governor's selection of the affected local government, the affected local government shall be any body described in clause (i) or (ii) or subparagraph (B) of this definition that is designated in an existing host community agreement. The purpose of this limitation is to prevent the reopening of an existing host community agreement if such agreement is between the owner or operator of a landfill or incinerator (including a waste-to-energy facility) and an affected local government that is different than the body designated by the Governor. It is expected, however, that any host community agreement entered into after the Governor publishes a notice designating the affected local government, will be an agreement between the owner or operator and the affected local government designated by the Governor.

In paragraph (2) the term "host community agreement" is defined. For purposes of this section a host community agreement means a written, legally binding document or documents executed by duly authorized officials of the affected local government that specifically authorizes (as defined in the bill) a landfill or incinerator to receive municipal solid waste generated out-of-State. Agreements that authorize differential fees for in-State and out-of-State waste are not considered host community agreements unless they also expressly authorize receipt of out-of-State waste.

This definition is necessary because Section 4011(a)(4)(A) prohibits a Governor from taking any action under this section if it would result in the violation of, or would otherwise be inconsistent with the terms of a host community agreement. Only those agreements in which the affected local government has expressly authorized the receipt of out-of-State waste are to be protected. Agreements that authorize differential fees for in-State and out-of-State waste, commonly referred to as fee agreements, would therefore not be protected unless they also expressly authorize the receipt of out-of-State waste.

There are however, examples of host community agreements that expressly authorize (see definitions of "specifically authorized" and "specifically authorizes") the receipt of waste from another State but do not use the term "out-of-State". Instead, they may include a reference to a fixed radius surrounding the landfill or incinerator or use terms such as "regardless of origin" or "outside the jurisdiction of the affected local government". The bill clearly intends to protect such agreements even though they do not use the term "out-of-State", provided that such alternative terms clearly and affirmatively state the approval or consent of the affected local gov-

ernment or State for the receipt of municipal solid waste from sources or locations outside the State.

In paragraph (3) the term "out-of-State municipal solid waste" is defined with respect to any State as, municipal solid waste generated outside the State. It also refers to municipal solid waste generated outside of the United States, provided that the President determines such definition is consistent with the North American Free Trade Agreement and the General Agreement on Tariffs and Trade.

In paragraph (4) the term "municipal solid waste" is defined for purposes of this section, as any refuse (or refuse derived fuel) generated by the general public from a residential, commercial, institutional or industrial source consisting of paper, wood, yard wastes, plastics, leather, rubber or other combustible or non combustible materials such as metal or glass. The definition also specifies a list of materials that is not municipal solid waste, including hazardous waste, contaminated soil and debris, solid waste that has been separated for recycling, industrial waste including construction and demolition debris, medical waste and material returned to a manufacturer for credit, evaluation or reuse.

In paragraph (5) the term "compliance" is defined as a pattern or practice of adhering to and satisfying standards and requirements promulgated by the Federal or State government for the purpose of preventing significant harm to human health and the environment. Actions undertaken in accordance with compliance schedules for remediation established by Federal or State enforcement actions shall be considered compliance for purposes of this section. The definition of compliance included in this section is only intended to be used in this section, and only for the purpose of determining if a landfill or incinerator (including a waste-to-energy facility) continues to meet the exceptions to the authority to prohibit the disposal of out-of-State municipal solid waste identified in Section 4011(b).

In paragraph (6) the terms "specifically authorized" and "specifically authorizes" are defined as references to explicit authorization, contained in a host community agreement or permit, to import waste from out-of-State. Such authorizations (as noted in the definition of ("host community agreement") may include a reference to a fixed radius surrounding the landfill or incinerator that includes an area outside the state or a reference to any place of origin, references to specific places outside the State, or use of such phrases as "regardless of origin" or "outside of State". The Committee intends that the language for such authorization may vary as long as it clearly and affirmatively states the approval or consent of the affected local government or State for receipt of municipal solid waste from sources outside the State.

Section 101(b) Table of contents amendment

Section 101(b)

Section 101(b) adds a new section 4011 to the RCRA table of contents.

Title II—Flow Control

SECTION 201. SHORT TITLE

Section 201 establishes the short title as the "Municipal Solid Waste Flow Control Act of 1995".

SECTION 202. STATE AND LOCAL GOVERNMENT CONTROL OF MUNICIPAL SOLID WASTE AND RECYCLABLE MATERIAL

Section 202 adds a new title to Subtitle D of the Resource Conservation and Recovery Act, providing authority for States and political subdivisions to exercise flow control authority, as follows:

"SECTION 4012. STATE AND LOCAL GOVERNMENT CONTROL OF MUNICIPAL SOLID WASTE AND RECYCLABLE MATERIAL"

Section 4012(a) Definitions

Section 4012(a)

Section 4012(a) contains definitions for the terms "designate", "designation", "flow control authority", "municipal solid waste", "public service authority", "recyclable material", and "waste management facility".

In paragraph (1) the terms "designate" and "designation" are defined as referring to an authorization by a State or political subdivision, and the act of a State or political subdivision in requiring or contractually committing, that all or any portion of the municipal solid waste or recyclable material that is generated within the boundaries of the State or political subdivision be delivered to a specific waste management facility or facilities for recyclable material or a public service authority identified by the State or political subdivision.

In paragraph (2) the term "flow control authority" is defined as the authority to control and direct the movement of municipal solid waste or voluntarily relinquished recyclable material to a designated waste management facility or facility for recyclable material.

In paragraph (3) the term "municipal solid waste" is defined as solid waste generated by the general public or from a residential, commercial, institutional, or industrial source consisting of paper, wood, yard waste, plastics, leather, rubber and other combustible and non-combustible material such as metal and glass. The definition also specifies a list of materials that is not municipal solid waste, including hazardous waste, contaminated soil and debris, medical waste, industrial waste, recyclable material and sludge. This definition is necessary for the purpose of specifying what types of waste may be directed to designated solid waste management facilities. In any case, flow control authority granted by this bill applies only to the specific classes or categories of municipal solid waste to which flow control authority was applied by the State or political subdivision on or before May 15, 1995. With respect to States and political subdivisions that had made only a commitment to the designation of a solid waste management facility, such municipal solid waste for which the entity had committed would be eligible for flow control. In the event that there is a lack

of a clear identification of specific classes or categories of MSW, only MSW generated by households would qualify.

In Paragraph (4) the term "public service authority" is defined as (A) an authority or authorities created by State legislation to provide individually or in combination solid waste management services to political subdivisions or (B) an authority that was issued a certificate of incorporation by a State corporation commission established by a State constitution. This definition is included to address those unique instances where States and or political subdivisions designated or contracted with such entities, rather than specific waste management facilities, for the disposal of MSW.

In paragraph (5) the term "recyclable material" is defined as that material that has been separated from waste otherwise destined for disposal or has been managed separately from waste destined for disposal, for the purpose of recycling, reclamation, composting of organic material such as food and yard waste, or reuse other than for the purpose of incineration. The identification and definition of "recyclable material" are necessary so as to create a category for such material separate from "municipal solid waste" for the purposes of the imposition of flow control. Only that designated (or committed) and "voluntarily relinquished" recyclable material may be flow controlled.

In paragraph (6) the term "waste management facility" is defined as a facility that collects, separates, stores, transports, transfers, treats, processes, combusts, or disposes of municipal solid waste. This definition is necessary to delineate the types of facilities to which flow controlled MSW may be directed. Voluntarily relinquished recyclables may also be directed to facilities for recyclable material.

Section 4012(b) Authority

Section 4012(b)

Section 4012(b) sets forth the basic authority for States and political subdivisions to exercise flow control authority.

Section 4012(b)(1)

Section 4012(b)(1) provides that each State and each political subdivision that imposed flow control pursuant to a law, ordinance, regulation, or other legally binding provision prior to May 15, 1994, and which implemented flow control by the designation of particular waste management facilities or a public service authority prior to that date, would be authorized to conduct flow control activities. Designation of a particular waste management facility (or public service authority) must be performed prior to the substantial construction of the designated facilities and can be satisfied by a State or political subdivision in one of two ways: 1) by passing a law, ordinance, regulation, or other legally binding agreement to direct its waste prior to substantial construction of the facility; or 2) by contractually committing to direct its waste prior to substantial construction of the facility, where the law, ordinance, regulation, or other legally binding agreement was approved after substantial construction is completed.

The grant of flow control established by this section is intended to provide those States and political subdivisions that controlled the flow of waste prior to the *Carbone* decision, the ability to continue that practice in order to meet financial commitments with respect to the construction of solid waste management facilities.

Section 4012(b)(2)

Section 4012(b)(2) limits the material that States and political subdivisions may subject to flow control to the specific classes or categories of municipal solid waste to which flow control had been applied on or before May 15, 1994. With regard to facilities not yet operating under subsection (c), flow control would apply to the specific classes or categories of municipal solid waste to which the State or political subdivision had committed to the designation of a waste management facility.

The intent of this section is to limit the material subject to flow control to that specific material that was controlled prior to the *Carbone* decision. It is not the intention of the reported bill to allow States or political subdivisions to expand its flow control system.

Section 4012(b)(3)

Section 4012(b)(3) limits the application of flow control at facilities granted authority under subsection (c) in the event that classes or categories of waste were not specifically listed. Paragraph (3) provides that if there is no clear identification of the classes or categories of waste subject to flow control, then only municipal solid waste generated by households may be identified.

Section 4012(b)(4)

Section 4012(b)(4) establishes the duration of authority for the general grant of flow control authority provided in the bill. The authority shall be effective until the later of: the end of the life of the contract between the State or the political subdivision and any other person regarding the delivery of waste; the completion of the schedule for payment of the capital costs of the facility concerned; the end of the useful life of the original facility, as that life may be extended by significant modifications to meet environmental or safety requirements, routine repair that does not add to the capacity of the facility, expansion of the facility on land that is legally or equitably owned, or under option to purchase or lease by the owner or operator and covered by the operating permit for the facility as in effect on May 15, 1994.

The purpose of this section is to limit the time frame for which flow control is operating, relating the duration to: specific waste contracts at designated MSW facilities; the financing of designated facilities; or the useful life of designated facilities. This section is intended to take a specific facility based, as opposed to system based, approach to providing flow control authority.

Section 4012(b)(5)

Section 4012(b)(5) provides additional authority to impose flow control to those States with solid waste management systems predicated on statewide flow control. Under paragraph (5) any State or political subdivision that adopted and applied flow control

regulations under State law and applied those regulations to every political subdivision of the State, on or before January 1, 1984, may designate any waste management facility in the State that was designated prior to May 15, 1994 and continue to exercise flow control authority for the remaining useful life of the designated facility or facilities.

The purpose of this section is to recognize that some States may have implemented State-wide systems for flow control prior to the *Carbone* decision. Under this provision, a State or political subdivision, under certain conditions, may designate any MSW facility, at any time, in the State-wide system for waste disposal if that facility had been designated as part of the State-wide system prior to May 15, 1994. The thirty year flow control sunset provision for flow control, however, would still apply to such States.

Section 4012(c) Commitment to construction

Section 4012(c)

Section 4012(c) provides authority to political subdivisions of States to impose flow control if such subdivisions had committed to, though not yet designated, waste management facilities. Any political subdivision that had flow control in effect prior to May 15, 1994, and had committed to the designation of a facility prior to that date, would be authorized to conduct flow control activities. Under this provision, commitment is demonstrated by one or more of the following (prior to May 15, 1994): completed construction permits; a signed contract to construct a facility; revenue bonds presented for sale; or the filing of permit applications for construction and operation.

The grant of flow control provided in this section is included so as not to penalize those political subdivisions that had clearly intended to implement flow control but had not done so, in order to qualify under Section 4012(b), prior to the *Carbone* decision.

Section 4012(d) Constructed and operated

Section 4012(d)

In addition to the general flow control authority included in Section 4012(b), Section 4012(d) provides authority to political subdivisions that contracted with a public service authority or its operator prior to May 15, 1994, rather than with an individual designated waste management facility, to impose flow control. Under Section 4012(d)(1)(A)(i) any political subdivision that contracted (in order to support the issuance of revenue bonds for the construction of waste management facilities) with a public service authority or its operator for the disposal of municipal solid waste, prior to May 15, 1994, may exercise flow control in accordance with the general duration of authority provision included in Section 4012(b)(4). Under Section 4012(d)(1)(A)(ii) any political subdivision that contracted with a public service authority (which had revenue bonds outstanding for waste management facilities) prior to May 15, 1995, may exercise flow control until the expiration of the original contract or the life of the bonds issued for the construction of the solid waste management facilities to which the political subdivision's waste is transferred or disposed, whichever is earlier.

Section 4012(d) is intended to provide flow control authority to those political subdivisions that contracted, not with a specific waste management facility for MSW disposal, but with a public service authority or its operator. The grant of authority, as is the case with the general grant under Section 4012(b), is intended to protect the integrity of revenue bonds.

Section 4012(e) State-mandated disposal services

Section 4012(e)

Section 4012(e) authorizes political subdivisions of the State to exercise flow control authority if, prior to May 15, 1994, the political subdivision was mandated by law to provide for the operation of solid waste facilities, is required to initiate a recyclable materials program, had implemented the authority through a law, ordinance, regulation, contract, or other legally binding provision and had incurred significant financial expenditures to repay outstanding revenue bonds for the construction of solid waste management facilities to which the political subdivision's waste was designated.

Section 4012(e) is intended to provide a grant of flow control authority to political subdivisions that were mandated by State law to provide for the operation of solid waste facilities and implemented that mandate through flow control to designated facilities that may have been constructed prior to the political subdivision's actual facility designation, and thus would not qualify under Section 4012(a). The grant is predicated on the repayment of revenue bonds issued for the construction of the designated facilities and is intended to expire in accordance with 4012(b)(4).

Section 4012(f) Retained authority Section 4012(f)

Section 4012(f)

Section 4012(f) sets forth a procedure whereby, on the request of a generator of municipal solid waste, a State or political subdivision may authorize the diversion of flow controlled waste, if the purpose of the request is to provide a higher level of protection for human health and the environment or reduce future potential liability of the generator under Federal or State law.

Section 4012(f) establishes a discretionary system whereby generators of waste may petition for an opt out from the State or political subdivision flow control regimen. The purpose is to allow waste generators the opportunity to dispose the MSW at a facility with a higher level of health and environmental protections than the designated facility or protect itself from future liability under Federal or State law.

Section 4012(g) Limitations on revenue

Section 4012(g)

Section 4012(g) provides that all revenue derived from the exercise of flow control must be used for solid waste management services. The federal grant of authority to impose flow control, included in the reported bill, is directly related to States' and political subdivisions' financial commitments with respect to solid waste man-

agement. The provision is intended to prohibit revenues from being diverted to non-waste related purposes.

Section 4012(h) Reasonable regulation of commerce

Section 4012(h)

Section 4012(h) provides retroactive protection from challenge under the Commerce Clause for any law, ordinance, regulation or other legally binding provision or official act of a State or political subdivision as described in the bill that implements flow control authority in compliance with this section.

Section 4012(i) Effect on existing laws and contracts

Section 4012(i)

Section 4012(i) provides that nothing in the reported bill shall have any effect on any other law relating to the protection of human health and the environment or the management of municipal solid waste or recyclable. The provision is intended to ensure that nothing in the section will be construed to authorize any political subdivision of a State or exercise flow control authority granted by this section in a manner that is inconsistent with State law.

Section 4012(i) affirms that a State or political subdivision may not exercise flow control authority over recyclable materials unless the owner or generator of those materials voluntarily makes them available to the State or political subdivision. In addition, nothing in the section prohibits a generator or owner of recyclable material from selling that material or the purpose of transformation, or remanufacture into usable or marketable material.

Section 4012(j) Repeal

Section 4012(j)

Section 4012(j) provides that, notwithstanding any provision of the reported legislation, all flow control granted by this section shall terminate thirty years after date of enactment.

The reported bill was crafted to protect financial commitments made by States and political subdivisions in carrying out responsibilities for solid waste management. Primarily, the legislation was drafted to address the effect of the loss of flow control authority, in the wake of the *Carbone* decision, on the ability of local governments with bonds outstanding to continue to meet debt service obligations. It is the Committee's understanding that a thirty year time frame represents the longest issue period for solid waste securities. Therefore, the grant of authority is provided for not more than thirty years.

Section 203. Table of contents amendment

Section 203

Section 203 adds a new section 4012 to the RCRA table of contents: "Sec. 4012. State and Local government control of movement of municipal solid waste and recyclable material".

Title III—Ground water monitoring

Section 301 Ground water monitoring

Section 301

Section 301 reinstates the ground water monitoring exemption for small landfills in the municipal solid waste landfill criteria (MSWLFC).

HEARINGS

The Committee did not hold a hearing on the reported bill, however, the Subcommittee on Superfund, Waste Control and Risk Assessment held a hearing on interstate waste and flow control issues on March 1, 1995. In addition, the Committee held a hearing on flow control on July 13, 1994. The Committee also held hearings on the interstate transportation of municipal solid waste on June 18, 1991 and July 18, 1990.

MARKUPS

The Environment and Public Works Committee held one markup on S. 534 on March 23, 1995. The Superfund, Waste Control and Risk Assessment Subcommittee also held a markup on S. 534 on March 15, 1995.

ROLLCALL VOTES

Section 7(b) of rule XXVI of the Standing Rules of the Senate requires that any rollcall votes taken during the committee's consideration of the bill be noted in the report.

One rollcall vote was taken on the bill noted in this report. The Environment and Public Works Committee ordered the bill reported on March 23, 1995, by a rollcall vote of 16 to 0.

EVALUATION OF REGULATORY IMPACT

Section 11(b) of rule XXVI of the Standing Rules of the Senate requires publication in the report the committee's estimate of the regulatory impact made by the bill as reported. That estimate follows:

The bill establishes discretionary authority for States to impose restrictions on receipt of out-of-State municipal solid waste. In order to determine the levels of out-of-State waste disposed, owners or operators of some landfills or incinerators (including waste-to-energy facilities) are required to provide information (to the affected local government and to the Governor of the State in which the landfill or incinerator is located) specifying the amount and State of origin of out-of-State municipal solid waste such facilities received for disposal during the calendar year.

In addition, any owner or operator of a landfill or incinerator (including waste to energy facilities) seeking a host community agreement for the receipt of out-of-State MSW at a facility after the date of enactment of this bill is required to provide various information, including characteristics of the particular waste facility or proposed facility to receive out-of-State MSW, to the affected local government in which the landfill or incinerator is located or proposed to

be located. The bill will not affect the personal privacy of individuals.

COST OF LEGISLATION

Section 403 of the Congressional Budget and Impoundment Control Act requires that a statement of the cost of the reported bill, prepared by the Congressional Budget Office, be included in the report. Attached is an analysis of the cost of the legislation from the Congressional Budget Office.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, April 11, 1995.

Hon. JOHN H. CHAFEE,
Chairman, Committee on Environment and Public Works,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 534, the Interstate Transportation of Municipal Solid Waste Act of 1995.

Enactment of S. 534 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEILL.

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill Number: S. 534.

2. Bill title: The Interstate Transportation of Municipal Solid Waste Act of 1995.

3. Bill status: As ordered reported by the Senate Committee on Environment and Public Works on March 23, 1995.

4. Bill purpose: S. 534 would authorize states and local governments to control commerce in municipal solid waste (MSW) by allowing these governments to limit imports of waste from other states, and to designate where locally generated waste must be disposed. Title III would exempt certain MSW landfills from groundwater monitoring requirements.

Title I of the bill would amend the Solid Waste Disposal Act to authorize states, under certain conditions, to refuse to accept shipments of MSW generated in other states ("imports"). The bill would bar any states from exporting the greater of 1.4 million tons or 90 percent of the 1995 tonnage of MSW to any single state in 1996. This limit would gradually decline to 0.6 million tons of MSW in 2002 and thereafter. The bill also would allow states to ban imports to MSW from states that fail to comply with total MSW export limits set by the bill. The total MSW export limit for each state would be 3.5 million tons for 1996, and would decrease to 1.0 million tons in 2003 and thereafter. States could not ban imports of MSW if the ban resulted in a violation of an agreement between an exporting state and a community choosing to receive out-of-state waste.

Title II would amend the Solid Waste Disposal Act to authorize states and qualified political subdivisions to control the flow of MSW and recyclable materials within state or subdivision boundaries. Such authority is known as flow control. Specifically, the bill would allow each state (or qualified subdivision) to direct, regulate, or prohibit the transportation, management, and disposal of MSW and recyclable materials generated within the boundaries of the state or subdivision at facilities in operation as of May 15, 1994.

Title III would, under certain conditions, exempt landfills that dispose of less than 20 tons of MSW daily from current law requirements to monitor ground water in the vicinity of the facility for evidence of contamination.

5. Estimated cost to the Federal Government: This bill would have little impact on the federal budget. Under Title I, the Environmental Protection Agency (EPA) would have to collect and publish information on interstate shipments of MSW. Based on information from EPA, CBO estimates that this effort would cost about $0.5 million annually, as shown below. Under current law, EPA does not devote any resources to monitoring or reporting on shipments of MSW.

[By fiscal year, in millions of dollars]

	1996	1997	1998	1999	2000
Estimated authorization of appropriations	0.5	0.5	0.5	0.5	0.6
Estimated outlays	0.4	0.5	0.5	0.5	0.5

The costs of this bill fall within budget function 300.

6. Pay-as-you-go considerations: None.

7. Estimated cost to State and local governments:

SUMMARY

Title I of S. 534 would allow state and local governments to restrict commerce in MSW disposal, and we expect that these restrictions would increase the cost of waste disposal services provided by local governments. CBO estimates that, as a result, waste disposal costs would increase by at least $10 million annually for several years, largely for communities in the state of New York.

The flow control restrictions that states could impose under Title II are already authorized by 35 states, but recent court decisions have ruled that such flow control laws are invalid. Title II would benefit local governments that have imposed flow control restrictions by allowing them to maintain their income from waste disposal.

Title III would exempt operators of some small landfills from current requirements to monitor groundwater quality. Based on information from EPA, CBO estimates that enacting this title would lower future operating costs of certain public and private MSW landfills in Alaska and parts of the western United States by $7 million to $26 million annually.

It is likely that any increases in local government disposal costs incurred as a result of enactment of S. 534 would be recovered by higher waste disposal fees. Likewise, any savings in disposal costs would likely benefit consumers in the form of lower fees in the future. Hence, the net impact on the budgets of state and local gov-

ernments nationwide—after changes in waste disposal fees—may be very small. Additional details for the different types of potential effects on the budgets of state and local governments are provided below.

MSW IMPORTS

The major impact of Title I of this bill would be on public and private entities responsible for disposing of MSW, particularly in New York, the state that currently disposes of the most MSW in other states. Waste management officials in New York predict that enactment of this bill would increase the cost of waste disposal for the citizens of that state by an average of about $10 million annually for the next several years. Officials expect that this legislation would require the state's MSW haulers to dispose of more waste within the state, at a higher cost, and to ship some MSW currently sent to Pennsylvania to other, more distant, states. Enacting this bill could increase MSW disposal costs for other states, depending on the actions of those states currently importing MSW.

A 1992 study by the National Solid Waste Management Association estimates that between 16 million and 20 million tons of MSW crossed state lines for disposal in landfills or incinerators. A 1992 survey by the Congressional Research Service (CRS) reached similar conclusions. CRS estimated that more than 15 million tons of MSW crossed state lines for disposal, amounting to about 5 percent of the total amount of MSW disposed of annually.

Most states import and export some MSW, but only a few states are significant net importers or exporters. In 1992, New York, New Jersey, Missouri, and Washington accounted for over half of all MSW exports, while Pennsylvania, Illinois, Ohio, and Indiana accounted for over half of all MSW imports. New York exports about 3.8 million tons of MSW to other states, approximately a quarter of the MSW it generates. It accounts for about 20 percent of all MSW exported, and is the only state currently above the maximum limit of 3.5 million tons of exported MSW that would be established by this bill.

Enacting S. 534 would give states the authority to ban imports of MSW under certain conditions, but CBO cannot predict which states might choose to do so. Nonetheless, any interference in the interstate movement of MSW is likely to result in higher waste disposal costs for some public and private waste disposal services, assuming that MSW haulers are currently balancing fees paid to in-state landfills against out-of-state fees and transportation costs. In addition, states that currently export MSW might incur additional costs for sighting, permitting, and monitoring new in-state waste disposal facilities if exports of MSW were banned. Alternatively, if some states ban MSW imports as a result of enactment of this bill, communities that currently export waste across state lines may attempt to enter into agreements with out-of-state disposal facilities to accept waste imports on mutually agreeable terms. It is likely that such agreements for MSW disposal would be more expensive than current disposal costs.

Recent data on the average cost of MSW disposal in each state, compiled from the *Solid Waste Digest*, illustrate the magnitude of the added costs that states exporting waste may face. The average

disposal fee per ton of MSW is $94 in New Jersey and $82 in New York. In contrast, the average fee is $56 in Pennsylvania and $30 in Ohio. Sighting, operating, and properly closing new landfills to handle waste that is now exported would also be expensive. In 1991, EPA estimated that disposal fees for new landfills could range as high as $150 per ton. In 1992, EPA investigated the costs of "locality fees", which some exporting communities might have to pay as part of agreements with importing communities if this bill is enacted, and found examples of communities paying premiums of $1 to $7 per ton of MSW to have their waste accepted by others. In addition, EPA found that other forms of incentive payments made to site new waste facilities included payments into contingency funds for potential future damage, installing deep-drilled drinking water wells for nearby residents, guaranteeing property values, and building local community centers.

If public or private haulers of MSW incur increased costs as a result of this bill, it is likely that most or all of such an increase would be passed on to the general population in the form of higher waste disposal fees. Based on information from the larger MSW-exporting states and from a private waste management firm, CBO estimates it is unlikely that enactment of this bill would have a significant impact on the cost of waste disposal services in states other than New York.

FLOW CONTROL

The EPA's recent report, *Flow Controls and Municipal Solid Waste,* estimates that 35 states authorize localities to impose some form of flow control over MSW. The use of flow control laws is especially important to the MSW incineration facilities that burn garbage to generate electricity (known as waste-to-energy facilities). Such facilities typically have high capital costs (an average of about $135 million for facilities under construction) and depend on waste disposal fees to cover their financing and operational costs. Many of these waste-to-energy facilities rely on flow control laws and contracts to ensure a firm source of revenue.

Recent federal court decisions (particularly Carbone v. Clarkstown decided on May 16, 1994) have made it clear that state and local flow control laws violate the commerce clause of the U.S. Constitution. Local governments currently have about $12 billion in outstanding debt that has been incurred to finance waste-to-energy facilities. The court's invalidation of flow control laws has brought into question the future viability of some waste-to-energy facilities, because in many parts of the country there are often cheaper alternative methods of MSW disposal. For example, EPA compared waste disposal fees at waste-to-energy facilities with the costs to dispose of waste in landfills and found the landfill costs about 19 percent cheaper in New Jersey, 13 percent cheaper in New York, 9 percent cheaper in Connecticut, and about equal in Massachusetts. EPA estimates that less than 10 percent of the nation's MSW is disposed of in facilities dependent upon flow control laws.

As a result of the Carbone decision, some localities are likely to lose income from waste disposal fees charged for use of waste-to-energy facilities. Enactment of Title II would prevent this loss by

allowing local governments to impose flow control laws for facilities in operation on May 15, 1994. Over time, this provision may lead to higher public and private MSW disposal costs than would otherwise be expected. The increases in disposal costs would be passed on to the businesses and citizens that ultimately pay for waste disposal.

GROUND WATER MONITORING AT MSW LANDFILLS

On October 7, 1991, EPA published a final rule concerning the location, construction, and operation of MSW landfills. This rule provided an exemption from ground water monitoring requirements to small landfills in remote parts of Alaska and arid parts of the West. This exemption was overturned by a court decision on May 7, 1993. Title III of S. 534 would reinstate the original exemption for certain MSW landfills that handle less than 20 tons of MSW daily. Without this exemption, these small landfills will be required to begin compliance with EPA's ground water monitoring rules for landfills starting in October 1995. The agency estimates that drilling wells and testing ground water will cost these small landfill owners $7 million to $26 million annually. (CBO has no information on the division of these costs between public and private landfill owners).

It is possible, however, that the potential costs estimated by EPA would not be incurred. Under current law, EPA is preparing a draft regulation to provide alternative methods of ground water monitoring for certain small landfills. The agency expects these alternatives to substantially reduce compliance costs. Whether or not this alternative rule will be finalized before the October 9, 1995, compliance deadline for the current rule is uncertain. If the alternative rule is adopted, the provisions of S. 534 may not significantly affect the costs incurred by operators of small landfills to monitor ground water quality.

8. Estimate comparison: None.

9. Previous CBO estimate: None.

10. Estimate prepared by: Kim Cawley.

11. Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

ADDITIONAL VIEWS OF SENATOR MAX BAUCUS

We have been working on interstate waste legislation for six years. We have explored options in an effort to find a solution that both importing and exporting states can live with. In the Senate, we have held hearings, debated the issues and passed interstate waste bills in each of the last three Congresses. It is time to finish the job.

Each year, the United States produces more than 200 million tons of municipal waste. Seven percent of this garbage, one ton in 14, is sent to a landfall or an incinerator in another State. Nearly every State is a seller or buyer in the municipal waste market; forty-seven States export some garbage, and 44 States import some garbage.

Much of this interstate movement of garbage makes sense, especially for border towns. In Montana, for example, two towns have made arrangements to share landfills with western North Dakota towns. And some trash from Wyoming areas of Yellowstone Park is disposed in Montana. These arrangements save money for the communities involved. And the establishment of shared regional landfills can be a policy that makes sense.

But it only makes sense when the communities involved agree to it. Nobody should have to take garbage that they don't want from another community. But many communities are being forced to do so, and many more communities, especially in thinly populated states are being targeted as potential sites for mega-landfills designed for large amounts of out-of-State garbage.

Not too long ago, the people of Miles City, Montana, a town of 8,500 people, were almost forced to take trash from Minneapolis. The garbage would have arrived in mile long open-roofed trains, carrying as much trash in one trip as all of the people in Miles City throw out in an entire year. So far the people of Montana have been able to stop these imports. But every time waste companies have challenged State laws restricting out-of-State waste, the State laws have been overturned. So without Congressional action neither the people of Montana or any other State can stop waste imports.

Because of the importance of this issue, I am pleased that the committee has moved so quickly. The legislation that we reported will take us one step closer to protecting Montana and other rural areas from being filled up with unwanted trash from other States. It will give ordinary people the right to say no to importing trash. And with the amendment that I offered and was accepted in committee it will give importing communities the information they need to make an informed decision about whether or not they want to accept out-of-State waste. Specifically, my amendment will require those companies who want to import garbage to tell the pub-

lic more about their past practices including whether they've violated State and federal laws in the past.

Although I voted to support the bill from committee, I have reservations about some of the provisions and reserve my right to seek changes to the bill when it is considered by the full Senate. In particular, I am concerned that the bill would allow waste to be imported until the community gets wise to it and finally says no. I believe we ought to take a more aggressive approach. Waste from big cities should not be allowed to come into our communities until the people have agreed to accept it. We ought to empower our States and communities so they can decide up-front and for themselves whether they want out-of-State waste. If they want imports, they can enter into a host community agreement. If they don't they should be able to stop the waste before it is imported.

Ultimately we must pass a bill that will become law. Without Congressional action, neither States nor communities will have the authority they need to restrict waste imports. We must give them that authority, and we must do so in a rational way that does not disrupt beneficial existing arrangements between importing and exporting communities or create incentives for illegal disposal.

To that end I encourage my colleagues to resist extreme positions, tempting as they may be, because extreme positions will not survive. And a bill that's a dead letter will not help anyone. We need legislation that will be acceptable to the Senate, the House of Representatives and the President. We came very close last year and I hope and expect that we will enact interstate waste legislation that will become law this year.

MAX BAUCUS.

ADDITIONAL VIEWS OF SENATORS FRANK R. LAUTENBERG, BOB GRAHAM, AND BARBARA BOXER

INTRODUCTION

These additional views focus on the inconsistent way the issue of Municipal Solid Waste (MSW) is handled in this bill. On the one hand, Title I gives Governors the power to restrict wastes from out-of-state; on the other hand, Title II takes away from Governors power they currently have to control their in-state wastes.

Title I—Allows Governors to restrict interstate flow of wastes

In *New Jersey* v. *Philadelphia*, the Supreme Court ruled that waste was a commodity. As such, states could not prevent, or discriminate against, the movement of interstate waste without a valid purpose.

Title I of the Committee bill reverses *New Jersey* v. *Philadelphia*, and allows states' to effectively control interstate waste flow. Under Title I governors may:

Freeze current MSW imports at 1993 levels.

Prohibit new MSW imports unless the receiving community desires them.

Require large MSW exporting states to reduce future exports.

Limit MSW imports from any single state.

Place a tax on out of state MSW.

The rationale for empowering states is based on two assumptions. First, states have the responsibility to solve their own waste problems. Second, unanticipated and uncontrolled MSW imports may disrupt carefully laid state plans to handle their own trash.

Title II—Prevents Attempts to Control Intrastate Waste Flow

In *C&A Carbone* v. *Town of Clarkstown*, the Supreme Court ruled that intrastate flow control violated the Commerce clause. The Court saw *Carbone* as an extension of its ruling in *New Jersey* v. *Philadelphia*, stating, "We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers to discriminate against an article of commerce by reason of its origin or destination out of State."

While the Committee, in Title I, rejected the Court's conclusion regarding control of interstate waste, it embraced it in Title II when the issue was intrastate control of waste. Title I gives states new powers to control MSW flow between states; Title II withdraws from states the power they had used to address MSW flow within their own borders. Title I limits out-of-state disposal options; but flow control, which would allow states to become self-sufficient and end the necessity for out of state disposal, is restricted in Title II.

In these and other ways, the reasoning behind the Committee bill is, at best, inconsistent.

BACKGROUND ON FLOW CONTROL

To respond to widespread open dumping of trash, which caused contamination to ground water supplies, Congress passed the Resource Conservation and Recovery Act in 1976 to standardize and improve solid waste disposal methods and practices. Under Subtitle D of RCRA, state and local governments developed comprehensive waste management plans meeting minimum standards set by EPA. Further, the law required that these state solid waste management plans mandate that all solid waste be utilized for recycling and resource recovery, disposed in sanitary landfills meeting EPA criteria, or otherwise be disposed of in an environmentally sound manner.

Although the law created national standards, imposed through the solid waste management plans, Congress recognized that solid waste was a problem traditionally managed at the local level. Under that philosophy of local control, Subtitle D gave state and local governments flexibility to determine the best way to meet the national standards.

In response to the federal mandate that waste be disposed in an environmentally sound manner, many local governments constructed modern, state-of-the-art recycling systems, waste-to-energy facilities, and sanitary landfills. Integrated waste management systems were implemented to promote recycling, consumer education and proper management and disposal of household hazardous waste.

While necessary and desirable, these facilities were also expensive. Because the Federal government does not share the cost of municipal solid waste management programs at the state or local level, states and local governments adopted various means to finance municipal solid waste management services and facilities. The general approach taken by state and local government was to issue revenue bonds, secured by long-term contractual promises which rely on a steady, dependable, and consistent quantity of waste for disposal in new facilities. To ensure guaranteed quantities of waste, cities and towns enacted laws requiring that trash generated within their borders be disposed in these recently financed facilities. These flow control laws were consistent with Congress' instructions in Subtitle D that state and local governments endeavor to secure long-term contracts for supplying resource recovery facilities and other environmentally responsible waste disposal facilities. [Subtitle D sec. 4003(a)(5)]

Until the *Carbone* decision, the flow control laws represented nothing more than a legitimate exercise of local governments' historic police power over the management and disposal of trash generated by their citizens.

The country's system of solid waste management fostered by the RCRA Subtitle D requirements has been successful. State and local flow control laws, ordinances, regulations and contracts ensure that solid waste is properly managed and disposed. Disposal of solid waste in unlined landfills, contaminating water and air, is now the exception. Flow control has been a useful mechanism to raise funds

for local, integrated solid waste management systems including: source reduction, curbside recycling, composting, household hazardous waste collection and education programs—all desirable activities but not activities which typically generate enough revenue to be self-supporting. The linchpin holding the system together is the ability of state and local governments to control the flow of solid waste to designated environmentally superior facilities. In many states, these programs are important parts of a comprehensive plan that would be threatened without the revenue raising ability of flow control.

The May, 1994 decision in *Carbone* invalidated the historic right of local and state governments to manage solid waste, overturning almost 20 years of sound solid waste management policy and jeopardizing the solid waste management systems of the over 40 states who rely on flow control authority to manage their solid waste. Without flow control laws to ensure a steady and dependable supply of municipal solid waste to designated facilities, the ability of governments across the country to properly manage the solid waste generated by their citizens, is threatened.

SCOPE OF THE PROBLEM

The *Carbone* decision has the capacity of not only upsetting the systems states and localities have established to handle their trash, it also has the power to drive facilities and communities to financial ruin. Over $20 billion in debt is financed through flow control associated contracts; indeed the amount is probably larger because certain localities have entered into contracts that do not fit the regular definition of bonded indebtedness. Flow control, which guarantees a steady stream of waste to these facilities, is critical to their financial viability. If *Carbone* is affirmed even in part—as is the case in the Committee bill—the very basis of the bonds which have been issued and the debts which have been incurred is threatened. That is why so many states are urging the Congress to restore the present structure that the Supreme Court unexpectedly ended on May 15, 1994 in the *Carbone* decision.

Beyond the financial issue, there is also a philosophic one. Organizations representing local elected officials, including many represented by the National Governors Association and the National Association of Counties, believe that trash is a local or state responsibility and that the federal government should authorize states to exercise flow control authority without limit. In terms of the national debate about what level of government should provide what kind of service, they believe that the federal government has a limited role at most.

DRAFTING A NARROW BILL FOR FLOW CONTROL

The markup of the Committee bill showed how difficult it is to meet the sponsor's goal of ending flow control except where it is now exercised. The principle behind the limitation is clear, but efforts to implement it created problems. States have developed a variety of unique and creative ways to use flow control to solve their waste problems. As a result, there are non-uniform statutes, ordinances and contracts that follow no general model. When the Committee's principle of a limited extension of flow control authority

was imposed on this plethora of local situations, chaos was created. Many of these non-uniform problems are either left unfixed by the committee reported bill or were fixed for reasons which are not immediately obvious.

For instance, section 4012(d) was added at Subcommittee because the basic bill as introduced, did not cover the established flow control system in Virginia. Likewise section 4012(b)(5) was added at subcommittee because of the different situations in New Jersey which are only partially fixed by the reported bill. Amendments at full Committee were needed to cover other instances. Section 4012(e) was written to cover the flow control system in Florida, and section 4012(d), among other provisions, partially modified the Virginia amendment to cover Connecticut. Senator Boxer of California entered into a colloquy with the Chairman to ease the concerns of that state.

It is worth noting that all states mentioned are represented on the Environment and Public Works Committee. At the close of the markup, the Chairman made clear that additional amendments for North Carolina, also represented on the Committee, and Maine would be added before the floor.

The expectation that other states would also require their own fix is inevitable. Indeed, at least nine states have made it clear that they need additional help. If we continue to follow this path, the final legislation will be unwieldy and an example of unnecessary federal intrusion into what is generally understood to be a local problem.

These are facilities that were planned at the level but are now jeopardized by a federal Congress that is unwilling to allow states to exercise control of policies within their own borders. This is not the federal government stepping in to protect civil rights or educational equity; this is Congress objecting to the financial structure for trash disposal! If "devolution" or invocations of the Tenth Amendment have any meaning, surely they mean that we ought not take existing powers out of the hands of state and local government. But that is what this bill does: It removes the historic power to exercise flow control from arsenal of state and local government.

The primary justification for this intrusion in local affairs is the claim that continued flow control discriminates against private sector firms who could, if allowed, dispose of MSW at lower costs. There are, however, two arguments which minimize the power of this argument.

First, those who make this case assume that the private sector will be everywhere where waste streams exist. This is simply not the case. Where the economics for waste management services are not attractive, there is no private sector interest and the task is left to State and local government agencies. That theory is borne out in fact. There are a number of cases where economic factors mean that private interests will not provide alternatives to government mandated flow control. Consider, for example, the case of Florida where a high water table requires incineration. Or New Jersey where limited available land discourages private sector options. Yet, even here, flow control does allow for some private sector involvement. Under many flow control agreements, private vendors do operate the facilities and haul the trash. But in most of

those cases, governmental entities have contracted with these vendors to supply a certain specified volume of waste. To be able to live up to those contracts, these governmental bodies have used flow control. It will be interesting to watch as the private companies, many of whom are leading the fight against the continuation of flow control, turn around and sue those governments for not living up to their contracts.

Second, it is possible that in some cases, if flow control were eliminated, private interests could enter the market and offer disposal at lower rates by providing disposal sites at out-of-state locations. But that possibility may be closed when Title I of this legislation limits the availability of out-of-state disposal of MSW. And in other cases, lower cost disposal may prevent other goals—like recycling—from being achieved. The point is that private sector interest is not the only factor that ought to be considered here: the needs of our society for long-term solutions to waste problems also deserves some attention.

OPTIONS

There are two preferred alternatives to address the court decision in *Carbone:*

1. Return the authorities to the states to handle their trash any way they desire. Such a delegation was invited by the concurring opinion of Justice O'Connor and is consistent with the principle of delegating authority to the level of government most appropriate for making rules about this issue. This is consistent with the logic in Title I. Trying to craft a narrow bill runs into the problems of the lack of uniformity that exists. Wouldn't a more blanket authority be more workable, reasonable and logical?

2. Craft a more generic fix such as that introduced by Representatives Smith and Oxley in the House, H.R. 1025 or S. 398 introduced in the Senate by Senators Lautenberg, Cohen, Dodd, Graham, Heflin, and Snowe. These bills are based on the bipartisan compromise legislation of 1994—which was supported by waste companies, public sector interests, transportation companies and recycling interests—and strike an appropriate balance between public and private sector concerns.

S. 398 and H.R. 1025:

Strike a fair balance and utilize a narrow grandfather.—These bills protect only those communities that have already relied on flow control authority, have made specifically defined commitments or were in the process of completing a flow control system but were arbitrarily cut off from completion as a result of *Carbone.* The compromise legislation's narrow grandfather is the minimum necessary to allow these flow-controlling and 'in process' communities to continue to rely on flow control authority to finance modifications in existing facilities or construct new ones to meet current needs or new environmental requirements. Other than these grandfathered jurisdictions, all other jurisdictions are barred from using flow control in the future, both for commercial and residential waste.

Preserve competition and is pro-small business.—No new facilities in flow controlled grandfathered communities are allowed unless the communities meets a strict competition standards and needs tests. It should be noted the most flow control facilities were built

or operated by private businesses that won competitive bids. Ending flow control, as the Committee bill attempts to do, will allow bidders who lost another bite at the apple.

Pro-environment and pro-recycling.—Without the revenue bond financing available because of flow control, money-losing recycling and composting facilities could not be built without local tax increases or reliance on general obligation bonds.

Are pro-consumer.—Waste disposal costs in flow controlled systems are stable. In addition, those costs are comparable to non-flow controlled systems or, in many instances, are significantly lower.

The third alternative is to continue amendments for those communities whose structure falls through the present cracks in S. 543.

WHAT HAPPENS WITHOUT FLOW CONTROL?

Without flow control, what is now a decreasing waste problem will again become a garbage crisis. Without flow control, communities will again give their garbage to low cost haulers with only a hope the waste will end up in a certified RCRA facilities.

Evidence of this is depicted on page 1 of the Washington Post, April 12, 1995. Because trash haulers are not adequately using the local facility, tipping fees are down and the city's recycling program is being curtailed. To avoid the $28 surcharge for recycling included in the tipping fee, haulers are taking the garbage to Virginia or Southern Pennsylvania. Without flow control, the recycling in the District is the first casualty of *Carbone.* Because of *Carbone,* the District will be less self-sufficient in handling its trash and there will be an increase in the interstate flow of MSW.

THE REPORTED BILL

Because of the jeopardy many states are in on account of the *Carbone* decision, it is necessary that the Congress address this issue soon. Therefore, the signers of these additional views supported passage at the Full Committee and will offer amendments to improve the bill on the floor.

FRANK R. LAUTENBERG.
BOB GRAHAM.
BARBARA BOXER.

CHANGES IN EXISTING LAW

In compliance with section 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows: Existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman:

AN ACT To provide technical and financial assistance for the development of management plans and facilities for the recovery of energy and other resources from discarded materials and for the safe disposal of discarded materials, and to regulate the management of hazardous waste

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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TITLE II—SOLID WASTE DISPOSAL

SUBTITLE A—GENERAL PROVISIONS

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CONTENTS

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Subtitle D—State or Regional Solid Waste Plans

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"Sec. 4011. Interstate transportation of municipal solid waste.
Sec. 4012. State and local government control of movement of municipal solid waste and recyclable material.".

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SUBTITLE D—STATE OR REGIONAL SOLID WASTE PLANS

OBJECTIVES OF SUBTITLE

SEC. 4001. * * *

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ADEQUACY OF CERTAIN GUIDELINES AND CRITERIA

SEC. 4010. (a) STUDY.—The Administrator shall conduct a study of the extent of which the guidelines and criteria under this Act (other than guidelines and criteria for facilities to which subtitle C applies) which are applicable to solid waste management and disposal facilities, including, but not limited to landfills and surface impoundments, are adequate to protect human health and the environment from ground water contamination. Such study shall include a detailed assessment of the degree to which the criteria

under section 1008(a) and the criteria under section 4004 regarding monitoring, prevention of contamination, and remedial action are adequate to protect ground water and shall also include recommendation with respect to any additional enforcement authorities which the Administrator, in consultation with the Attorney General, deems necessary for such purpose.

(b) REPORT.—Not later than thirty-six months after the date of enactment of the Hazardous and Solid Waste Amendments of 1984, the Administrator shall submit a report to the Congress setting forth the results of the study required under this section, together with any recommendations made by the Administrator on the basis of such study.

(c) REVISIONS OF GUIDELINES AND [CRITERIA.—Not later] *CRITERIA.—*

(1) IN GENERAL.—Not later than March 31, 1988, the Administrator shall promulgate revisions of the criteria promulgated under paragraph (1) of section 4004(a) and under section 1008(a)(3) for facilities that may receive hazardous household wastes or hazardous wastes from small quantity generators under section 3001(d). The criteria shall be those necessary to protect human health and the environment and may take into account the practicable capability of such facilities. At a minimum such revisions for facilities potentially receiving such wastes should require ground water monitoring as necessary to detect contamination, establish criteria for the acceptable location of new or existing facilities, and provide for corrective action as appropriate.

(2) ADDITIONAL REVISIONS.—Subject to paragraph (2), the requirements of the criteria described in paragraph (1) relating to ground water monitoring shall not apply to an owner or operator of a new municipal solid waste landfill unit, an existing municipal solid waste landfill unit, or a lateral expansion of a municipal solid waste landfill unit, that disposes of less than 20 tons of municipal solid waste daily, based on an annual average, if—

"(A) there is no evidence of ground water contamination from the municipal solid waste landfill unit or expansion; and

"(B) the municipal solid waste landfill unit or expansion serves—

"(i) a community that experiences an annual interruption of at least 3 consecutive months of surface transportation that prevents access to a regional waste management facility; or

"(ii) a community that has no practicable waste management alternative and the landfill unit is located in an area that annually receives less than or equal to 25 inches of precipitation.

"(3) PROTECTION OF GROUND WATER RESOURCES.—

"(A) MONITORING REQUIREMENT.—A State may require ground water monitoring of a solid waste landfill unit that would otherwise be exempt under paragraph (2) if necessary to protect ground water resources and ensure compli-

ance with a State ground water protection plan, where applicable.

"(B) METHODS.—If a State requires ground water monitoring of a solid waste landfill unit under subparagraph (A), the State may allow the use of a method other than the use of ground water monitoring wells to detect a release of contamination from the unit.

"(C) CORRECTIVE ACTION.—If a State finds a release from a solid waste landfill unit, the State shall require corrective action as appropriate.

"(4) REMOTE ALASKA NATIVE VILLAGES.—Upon certification by the Governor of the State of Alaska that application of the requirements of the criteria described in paragraph (1) to a solid waste landfill unit of a Native village (as defined in section 3 of the Alaska Native Claims Settlement Act (16 U.S.C. 1602)) would be infeasible, would not be cost-effective, or is otherwise inappropriate because of the remote location of the unit, the unit shall be exempt from those requirements.".

"(b) REINSTATEMENT OF REGULATORY EXEMPTION.—It is the intent of section 4010(c)(2) of the Solid Waste Disposal Act, as added by subsection (a), to immediately reinstate subpart E of part 258 of title 40, Code of Federal Regulations, as added by the final rule published at 56 Fed. Reg. 50798 on October 9, 1991.

INTERSTATE TRANSPORTATION OF MUNICIPAL SOLID WASTE

SEC. 4011. (a) AUTHORITY TO RESTRICT OUT-OF-STATE MUNICIPAL SOLID WASTE.—(1) Except as provided in paragraph (4), immediately upon the date of enactment of this section if requested in writing by an affected local government, a Governor may prohibit the disposal of out-of-State municipal solid waste in any landfill or incinerator that is not covered by the exceptions provided in subsection (b) and that is subject to the jurisdiction of the Governor and the affected local government.

(2) Except as provided in paragraph (4), immediately upon the date of publication of the list required in paragraph (6)(D) and notwithstanding the absence of a request in writing by the affected local government, a Governor, in accordance with paragraph (5), may limit the quantity of out-of-State municipal solid waste received for disposal at each landfill or incinerator covered by the exceptions provided in subsection (b) that is subject to the jurisdiction of the Governor, to an annual amount equal to or greater than the quantity of out-of-State municipal solid waste received for disposal at such landfill or incinerator during calendar year 1993.

(3)(A) Except as provided in paragraph (4), immediately upon the date of publication of the list required in paragraph (6)(E), and notwithstanding the absence of a request in writing by the affected local government, a Governor, in accordance with paragraph (5), may prohibit or limit the amount of out-of-State municipal solid waste disposed of at any landfill or incinerator covered by the exceptions in subsection (b) that is subject to the jurisdiction of the Governor, generated in any State that is determined by the Administrator under paragraph (6)(E) as having exported, to landfills or incinerators not covered by host community agreements or permits authorizing receipt of out-of-State municipal solid waste, more than—

(i) 3,500,000 tons of municipal solid waste in calendar year 1996;

(ii) 3,000,000 tons of municipal solid waste in each of calendar years 1997 and 1998;

(iii) 2,500,000 tons of municipal solid waste in each of calendar years 1999 and 2000;

(iv) 1,500,000 tons of municipal solid waste in each of calendar years 2001 and 2002; and

(v) 1,000,000 tons of municipal solid waste in calendar year 2003 and each year thereafter.

(B)(i) No State may export to landfills or incinerators in any 1 State that are not covered by host community agreements more than the following amounts of municipal solid waste:

(I) In calendar year 1996, the greater of 1,400,000 tons or 90 percent of the amount exported to the State in calendar year 1993.

(II) In calendar year 1997, the greater of 1,300,000 tons or 90 percent of the amount exported to the State in calendar year 1996.

(III) In calendar year 1998, the greater of 1,200,000 tons or 90 percent of the amount exported to the State in calendar year 1997.

(IV) In calendar year 1999, the greater of 1,100,000 tons or 90 percent of the amount exported to the State in calendar year 1998.

(V) In calendar year 2000, 1,000,000 tons.

(VI) In calendar year 2001, 800,000 tons.

(VII) In calendar year 2002 or any calendar year thereafter, 600,000 tons.

(ii) The Governor of an importing State may take action to restrict levels of imports to reflect the appropriate level of out-of-State municipal solid waste imports if—

(I) The Governor of the importing State has notified the Governor of the exporting State and the Administrator, 12 months prior to taking any such action, of the importing State's intention to impose the requirements of this section;

(II) the Governor of the importing State has notified the Governor of the exporting State and the Administrator of the violation by the exporting State of this section at least 90 days prior to taking any such action; and

(III) the restrictions imposed by the Governor of the importing State are uniform at all facilities.

(C) The authority provided by subparagraphs (A) and (B) shall apply for as long as a State exceeds the permissible levels as determined by the Administrator under paragraph (6)(E).

(4)(A) A Governor may not exercise the authority granted under this section if such action would result in the violation of, or would otherwise be inconsistent with, the terms of a host community agreement or a permit issued from the State to receive out-of-State municipal solid waste.

(B) Except as provided in paragraph (3), a Governor may not exercise the authority granted under this section in a manner that would require any owner or operator of a landfill or incinerator covered by the exceptions provided in subsection (b) to reduce the

amount of out-of-State municipal solid waste received from any State for disposal at such landfill or incinerator to an annual quantity less than the amount received from such State for disposal at such landfill or incinerator during calendar year 1993.

(5) Any limitation imposed by a Governor under paragraph (2) or (3)—

(A) shall be applicable throughout the State;

(B) shall not directly or indirectly discriminate against any particular landfill or incinerator within the State; and

(C) shall not directly or indirectly discriminate against any shipments of out-of-State municipal solid waste on the basis of place or origin and all such limitations shall be applied to all States in violation of paragraph (3).

(6) ANNUAL STATE REPORT.—

(A) IN GENERAL.—Within 90 days after enactment of this section and on April 1 of each year thereafter the owner or operator of each landfill or incinerator receiving out-of-State municipal solid waste shall submit to the affected local government and to the Governor of the State in which the landfill or incinerator is located, information specifying the amount and State of origin of out-of-State municipal solid waste received for disposal during the preceding calendar year. Within 120 days after enactment of this section and on July 1 of each year thereafter each State shall publish and make available to the Administrator, the Governor of the State of origin and the public, a report containing information on the amount of out-of-State municipal solid waste received for disposal in the State during the preceding calendar year.

(B) CONTENTS.—Each submission referred to in this section shall be such as would result in criminal penalties in case of false or misleading information. Such information shall include the amount of waste received, the State of origin, the identity of the generator, the date of the shipment, and the type of out-of-State municipal solid waste.

(C) LIST.—The Administrator shall publish a list of States that the Administrator has determined have exported out-of-State in any of the following calendar years an amount of municipal solid waste in excess of—

(i) 3,500,000 tons in 1996;

(ii) 3,000,000 tons in 1997;

(iii) 3,000,000 tons in 1998;

(iv) 2,500,000 tons in 1999;

(v) 2,500,000 tons in 2000;

(vi) 1,500,000 tons in 2001;

(vii) 1,500,000 tons in 2002;

(viii) 1,000,000 tons in 2003; and

(ix) 1,000,000 tons in each calendar year after 2003.

The list for any calendar year shall be published by June 1 of the following calendar year.

(D) SAVINGS PROVISION.—Nothing in this subsection shall be construed to preempt any State requirement that requires more frequent reporting of information.

(7) Any affected local government that intends to submit a request under paragraph (1) or take formal action to enter into a host com-

munity agreement after the date of enactment of this subsection shall, prior to taking such action—

(A) notify the Governor, contiguous local governments, and any contiguous Indian tribes;

(B) publish notice of the action in a newspaper of general circulation at least 30 days before taking such action;

(C) provide an opportunity for public comment; and

(D) following notice and comment, take formal action on any proposed request or action at a public meeting.

(8) Any owner or operator seeking a host community agreement after the date of enactment of this subsection shall provide to the affected local government the following information, which shall be made available to the public from the affected local government:

(A) A brief description of the planned facility, including a description of the facility size, ultimate waste capacity, and anticipated monthly and yearly waste quantities to be handled.

(B) A map of the facility site that indicates the location of the facility in relation to the local road system and topographical and hydrological features and any buffer zones and facility units to be acquired by the owner or operator of the facility.

(C) A description of the existing environmental conditions at the site, and any violations of applicable laws or regulations.

(D) A description of environmental controls to be utilized at the facility.

(E) A description of the site access controls to be employed, and roadway improvements to be made, by the owner or operator, and an estimate of the timing and extent of increased truck traffic.

(F) A list of all required Federal, State, and local permits.

(G) Any information that is required by State or Federal law to be provided with respect to any violations of environmental laws (including regulations) by the owner and operator, the disposition of enforcement proceedings taken with respect to the violations, and corrective measures taken as a result of the proceedings.

(H) Any information that is required by State or Federal law to be provided with respect to compliance by the owner or operator with the State solid waste management plan.

(b) EXCEPTIONS TO AUTHORITY TO PROHIBIT OUT-OF-STATE MUNICIPAL SOLID WASTE.—(1) The authority to prohibit the disposal of out-of-State municipal solid waste provided under subsection (a)(1) shall not apply to landfills and incinerators in operation on the date of enactment of this section that—

(A) received during calendar year 1993 documented shipments of out-of-State municipal solid waste; and

(B)(i) in the case of landfills, are in compliance with all applicable Federal and State laws and regulations relating to operation, design and location standards, leachate collection, ground water monitoring, and financial assurance for closure and post-closure and corrective action; or

(ii) in the case of incinerators, are in compliance with the applicable requirements of section 129 of the Clean Air Act (42 U.S.C. 7429) and applicable State laws and regulations relating to facility design and operations.

(2) A Governor may not prohibit the disposal of out-of-State municipal solid waste pursuant to subsection (a)(1) at facilities described in this subsection that are not in compliance with applicable Federal and State laws and regulations unless disposal of municipal solid waste generated within the State at such facilities is also prohibited.

(c) ADDITIONAL AUTHORITY TO LIMIT OUT-OF-STATE MUNICIPAL SOLID WASTE.—(1) In any case in which an affected local government is considering entering into, or has entered into, a host community agreement and the disposal or incineration of out-of-State municipal solid waste under such agreement would preclude the use of municipal solid waste management capacity described in paragraph (2), the Governor of the State in which the affected local government is located may prohibit the execution of such host community agreement with respect to that capacity.

(2) The municipal solid waste management capacity referred to in paragraph (1) is that capacity—

(A) that is permitted under Federal or State law;

(B) that is identified under the State plan; and

(C) for which a legally binding commitment between the owner or operator and another party has been made for its use for disposal or incineration of municipal solid waste generated within the region (identified under section 4006(a)) in which the local government is located.

(d) COST RECOVERY SURCHARGE.—

(1) AUTHORITY.—A State described in paragraph (2) may adopt a law and impose and collect a cost recovery charge on the processing or disposal of out-of-State municipal solid waste in the State in accordance with this subsection.

(2) APPLICABILITY.—The authority to impose a cost recovery surcharge under this subsection applies to any State that on or before April 3, 1994, imposed and collected a special fee on the processing or disposal of out-of-State municipal solid waste pursuant to a State law.

(3) LIMITATION.—No such State may impose or collect a cost recovery surcharge from a facility on any out-of-State municipal solid waste that is being received at the facility under 1 or more contracts entered into after April 3, 1994, and before the date of enactment of this section.

(4) AMOUNT OF SURCHARGE.—The amount of the cost recovery surcharge may be no greater than the amount necessary to recover those costs determined in conformance with paragraph (6) and in no event may exceed $1.00 per ton of waste.

(5) USE OF SURCHARGE COLLECTED.—All cost recovery surcharges collected by a State covered by this subsection shall be used to fund those solid waste management programs administered by the State or its political subdivision that incur costs for which the surcharge is collected.

(6) CONDITIONS.—(A) Subject to subparagraphs (B) and (C), a State covered by this subsection may impose and collect a cost recovery surcharge on the processing or disposal within the State of out-of-State municipal solid waste if—

(i) the State demonstrates a cost to the State arising from the processing or disposal within the State of a volume of municipal solid waste from a source outside the State;

(ii) the surcharge is based on those costs to the State demonstrated under clause (i) that, if not paid for through the surcharge, would otherwise have to be paid or subsidized by the State; and

(iii) the surcharge is compensatory and is not discriminatory.

(B) In no event shall a cost recovery surcharge be imposed by a State to the extent that the cost for which recovery is sought is otherwise paid, recovered, or offset by any other fee or tax assessed against or voluntarily paid to the State or its political subdivision in connection with the generation, transportation, treatment, processing, or disposal of solid waste.

(C) The grant of a subsidy by a State with respect to entities disposing of waste generated within the State does not constitute discrimination for purposes of subparagraph (A)(iii).

(7) DEFINITIONS.—As used in this subsection:

(A) The term 'costs' means the costs incurred by the State for the implementation of its laws governing the processing or disposal of municipal solid waste, limited to the issuance of new permits and renewal of or modification of permits, inspection and compliance monitoring, enforcement, and cost associated with technical assistance, data management, and collection of fees.

(B) The term 'processing' means any activity to reduce the volume of solid waste or alter its chemical, biological or physical state, through processes such as thermal treatment, bailing, composting, crushing, shredding, separation, or compaction.

(e) SAVINGS CLAUSE.—Nothing in this section shall be interpreted or construed—

(1) to have any effect on State law relating to contracts; or

(2) to affect the authority of any State or local government to protect public health and the environment through laws, regulations, and permits, including the authority to limit the total amount of municipal solid waste that landfill or incinerator owners or operators within the jurisdiction of a State may accept during a prescribed period, provided that such limitations do not discriminate between in-State and out-of-State municipal solid waste, except to the extent authorized by this section.

(f) DEFINITIONS.—As used in this section:

(1)(A) The term 'affected local government', used with respect to a landfill or incinerator, means—

(i) the public body created by State law with responsibility to plan for municipal solid waste management, a majority of the members of which are elected officials, for the area in which the facility is located or proposed to be located; or

(ii) the elected officials of the city, town, township, borough, county, or parish exercising primary responsibility over municipal solid waste management or the use of land

in the jurisdiction in which the facility is located or is proposed to be located.

(B)(i) Within 90 days after the date of enactment of this section, a Governor may designate and publish notice of which entity listed in clause (i) or (ii) of subparagraph (A) shall serve as the affected local government for actions taken under this section and after publication of such notice.

(ii) If a Governor fails to make and publish notice of such a designation, the affected local government shall be the elected officials of the city, town, township, borough, county, parish, or other public body created pursuant to State law with primary jurisdiction over the land or the use of land on which the facility is located or is proposed to be located.

(C) For purposes of host community agreements entered into before the date of publication of the notice, the term means either a public body described in subparagraph (A)(i) or the elected officials of any of the public bodies described in subparagraph (A)(ii).

(2) HOST COMMUNITY AGREEMENT.—The term "host community agreement" means a written, legally binding document or documents executed by duly authorized officials of the affected local government that specifically authorizes a landfill or incinerator to receive municipal solid waste generated out of State, but does not include any agreement to pay host community fees for receipt of waste unless additional express authorization to receive out-of-State waste is also included.

(3) The term "out-of-State municipal solid waste" means, with respect to any State, municipal solid waste generated outside of the State. To the extent that the President determines it is consistent with the North American Free Trade Agreement and the General Agreement on Tariffs and Trade, the term shall include municipal solid waste generated outside of the United States.

(4) The term "municipal solid waste" means refuse (and refuse-derived fuel) generated by the general public or from a residential, commercial, institutional, or industrial source (or any combination thereof), consisting of paper, wood, yard wastes, plastics, leather, rubber, or other combustible or noncombustible materials such as metal or glass (or any combination thereof). The term "municipal solid waste" does not include—

(A) any solid waste identified or listed as a hazardous waste under section 3001;

(B) any solid waste, including contaminated soil and debris, resulting from a response action taken under section 104 or 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604 or 9606) or a corrective action taken under this Act;

(C) any metal, pipe, glass, plastic, paper, textile, or other material that has been separated or diverted from municipal solid waste (as other-wise defined in this paragraph) and has been transported into a State for the purpose of recycling or reclamation;

(D) any solid waste that is—

(i) generated by an industrial facility; and

(ii) transported for the purpose of treatment, storage, or disposal to a facility that is owned or operated by the generator of the waste, or is located on property owned by the generator of the waste, or is located on property owned by a company with which the generator is affiliated;

(E) any solid waste generated incident to the provision of service in interstate, intrastate, foreign, or overseas air transportation;

(F) any industrial waste that is not identical to municipal solid waste (as otherwise defined in this paragraph) with respect to the physical and chemical state of the industrial waste, and composition, including construction and demolition debris;

(G) any medical waste that is segregated from or not mixed with municipal solid waste (as otherwise defined in this paragraph); or

(H) any material or product returned from a dispenser or distributor to the manufacturer for credit, evaluation, or possible reuse.

(5) The term "compliance" means a pattern or practice of adhering to and satisfying standards and requirements promulgated by the Federal or a State government for the purpose of preventing significant harm to human health and the environment. Actions undertaken in accordance with compliance schedules for remediation established by Federal or State enforcement authorities shall be considered compliance for purposes of this section.

(6) The terms "specifically authorized" and "specifically authorizes" refer to an explicit authorization, contained in a host community agreement or permit, to import waste from outside the State. Such authorization may include a reference to a fixed radius surrounding the landfill or incinerator that includes an area outside the State or a reference to any place of origin, reference to specific places outside the State, or use of such phrases as "regardless of origin" or "outside the State." The language for such authorization may vary as long as it clearly and affirmatively states the approval or consent of the affected local government or State for receipt of municipal solid waste from sources outside the State.

STATE AND LOCAL GOVERNMENT CONTROL OF MOVEMENT OF MUNICIPAL SOLID WASTE AND RECYCLABLE MATERIAL

SEC. 4012. (a) DEFINITIONS.—In this section:

(1) DESIGNATE; DESIGNATION.—The terms "designate" and "designation" refer to an authorization by a State or political subdivision, and the act of a State or political subdivision in requiring or contractually committing, that all or any portion of the municipal solid waste or recyclable material that is generated within the boundaries of the State or political subdivision be delivered to waste management facilities or facilities for recyclable material or a public service authority identified by the State or political subdivision.

(2) FLOW CONTROL AUTHORITY.—The term "flow control authority" means the authority to control the movement of municipal solid waste or voluntarily relinquished recyclable material and direct such solid waste or voluntarily relinquished recyclable material to a designated waste management facility or facility for recyclable material.

(3) MUNICIPAL SOLID WASTE.—The term "municipal solid waste" means—

(A) solid waste generated by the general public or from a residential commercial, institutional, or industrial source, consisting of paper, wood, yard waste, plastics, leather, rubber, and other combustible material and noncombustible material such as metal and glass, including residue remaining after recyclable material has been separated from waste destined for disposal, and including waste material removed from a septic tank, septage pit, or cesspool (other than from portable toilets); but

(B) does not include—

(i) waste identified or listed as a hazardous waste under section 3001 of this Act or waste regulated under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.);

(ii) waste, including contaminated soil and debris, resulting from a response action taken under section 104 or 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604, 9606) or any corrective action taken under this Act;

(iii) medical waste listed in section 11002;

(iv) industrial waste generated by manufacturing or industrial process, including waste generated during scrap processing and scrap recycling;

(v) recyclable material; or

(vi) sludge.

(4) PUBLIC SERVICE AUTHORITY.—The term "public service authority" means—

(A) an authority or authorities created pursuant to State legislation to provide individually or in combination solid waste management services to political subdivisions; or

(B) an authority that was issued a certificate of incorporation by a State corporation commission established by a State constitution.

(5) Recyclable material.—The term "recyclable material" means material that has been separated from waste otherwise destined for disposal (at the source of the waste or at a processing facility) or has been managed separately from waste destined for disposal, for the purpose of recycling, reclamation, composting of organic material such as food and yard waste, or reuse (other than for the purpose of incineration).

(6) Waste management facility.—The term "waste management facility" means a facility that collects, separates, stores, transports, transfers, treats, processes, combusts, or disposes of municipal solid waste.

(b) AUTHORITY.—

(1) IN GENERAL.—Each State and each political subdivision of a State may exercise flow control authority for municipal solid waste and for recyclable material voluntarily relinquished by the owner or generator of the material that is generated within its jurisdiction by directing the municipal solid waste or recyclable material to a waste management facility or facility for recyclable material, if such flow control authority—

(A) is imposed pursuant to a law, ordinance, regulation, or other legally binding provision of the State or political subdivision in effect on May 15, 1994; and

(B) has been implemented by designating before May 15, 1994, the particular waste management facilities or public service authority to which the municipal solid waste or recyclable material is to be delivered, the substantial construction of which facilities was performed after the effective date of that law, ordinance, regulation, or other legally binding provision and which facilities were in operation as of May 15, 1994.

(2) LIMITATION.—The authority of this section extends only to the specific classes or categories of municipal solid waste to which flow control authority requiring a movement to a waste management facility was actually applied on or before May 15, 1994 (or, in the case of a State or political subdivision that qualifies under subsection (c), to the specific classes or categories of municipal solid waste for which the State or political subdivision prior to May 15, 1994, had committed to the designation of a waste management facility).

(3) LACK OF CLEAR IDENTIFICATION.—With regard to facilities granted flow control authority under subsection (c), if the specific classes or categories of municipal solid waste are not clearly identified, the authority of this section shall apply only to municipal solid waste generated by households.

(4) DURATION OF AUTHORITY.—With respect to each designated waste management facility, the authority of this section shall be effective until the later of—

(A) the end of the remaining life of a contract between the State or political subdivision and any other person regarding the movement or delivery of municipal solid waste or voluntarily relinquished recyclable material to be a designated facility (as in effect May 15, 1994);

(B) completion of the schedule for payment of the capital costs of the facility concerned (as in effect May 15, 1994); or

(C) the end of the remaining useful life of the original facility, as that remaining life may be extended by—

(i) retrofitting of equipment or the making of other significant modifications to meet applicable environmental requirements or safety requirements;

(ii) routine repair or scheduled replacement of equipment or components that does not add to the capacity of a waste management facility; or

(iii) expansion of the facility on land that is—

(I) legally or equitably owned, or under option to purchase or lease, by the owner or operator of the facility; and

(II) covered by the permit for the facility (as in effect May 15, 1994).

(5) ADDITIONAL AUTHORITY.—Notwithstanding anything to the contrary in this section, but subject to subsection (j), a State or political subdivision of a State that, on or before January 1, 1984, adopted regulations under State law that required or directed the transportation, management, or disposal of solid waste from residential, commercial, institutional, or industrial sources (as defined under State law) to specifically identified waste management facilities and applied those regulations to every political subdivision of the State may—

(A) designate any waste management facility in the State that—

(i) was designated prior to May 15, 1994, and meets the requirements of subsection (c); or

(ii) meets the requirements of paragraph (1); and

(B) continue to exercise flow control authority for the remaining useful life of that facility over all classes and categories of solid waste that were subject to flow control on May 15, 1994.

(c) COMMITMENT TO CONSTRUCTION.—

(1) IN GENERAL.—Notwithstanding subsection (b)(1) (A) and (B), any political subdivision of a State may exercise flow control authority under subsection (b), if—

(A) the law, ordinance, regulation, or other legally binding provision specifically provides for flow control authority for municipal solid waste generated within its boundaries and was in effect prior to May 15, 1994; and

(B) prior to May 15, 1994, the political subdivision committed to the designation of a waste management facility to which municipal solid waste is to be transported or at which municipal solid waste is to be disposed of under that law, ordinance, regulation, plan, or legally binding provision.

(2) FACTORS DEMONSTRATING COMMITMENT.—A commitment to the designation of a waste management facility is demonstrated by 1 or more of the following factors:

(A) CONSTRUCTION PERMITS.—All permits required for the substantial construction of the facility were obtained prior to May 15, 1994.

(B) CONTRACTS.—All contracts for the substantial construction of the facility were in effect prior to May 15, 1994.

(C) REVENUE BONDS.—Prior to May 15, 1994, revenue bonds were presented for sale to specifically provide revenue for the construction of the facility.

(D) CONSTRUCTION AND OPERATING PERMITS.—The State or political subdivision submitted to the appropriate regulatory agency or agencies, on or before May 15, 1994, substantially complete permit applications for the construction and operation of the facility.

(d) CONSTRUCTED AND OPERATED.—

(1) IN GENERAL.—A political subdivision of a State may exercise flow control authority for municipal solid waste and for recyclable material voluntarily relinquished by the owner or generator of the material that is generated within its jurisdiction if—

(A) prior to May 15, 1994, the political subdivision—

(i) contracted with a public service authority or with its operator to deliver or cause to be delivered to the public service authority substantially all of the disposable municipal solid waste that is generated or collected by or is within or under the control of the political subdivision, in order to support revenue bonds issued by and in the name of the public service authority for waste management facilities; or

(ii) entered into contracts with a public service authority to deliver or cause to be delivered to the public service authority substantially all of the disposable municipal solid waste that is generated or collected by or within the control of the political subdivision, which imposed flow control pursuant to a law, ordinance, regulation, or other legally binding provision and where outstanding revenue bonds were issued in the name of public service authorities for waste management facilities; and

(B) prior to May 15, 1994, the public service authority—

(i) issued the revenue bonds for the construction of municipal solid waste facilities to which the political subdivision's municipal solid waste is transferred or disposed; and

(ii) commenced operation of the facilities.

(2) DURATION OF AUTHORITY.—Authority under this subsection may be exercised by a political subdivision under paragraph (1)(A)(ii) only until the expiration of the contract or the life of the bond, whichever is earlier.

(e) STATE-MANDATED DISPOSAL SERVICES.—A political subdivision of a State may exercise flow control authority for municipal solid waste and for recyclable material voluntary relinquished by the owner or generator of the material that is generated within its jurisdiction if, prior to May 15, 1994, the political subdivision—

(1) was mandated by State law to provide for the operation of solid waste facilities to serve the disposal needs of all incorporated and unincorporated areas of the county;

(2) is currently required to initiate a recyclable materials recycling program in order to meet a municipal solid waste reduction goal of at least 30 percent;

(3) has been authorized by State statute to exercise flow control authority and had implemented the authority through a law, ordinance, regulation, contract, or other legally binding provision; and

(4) had incurred significant financial expenditures to comply with the mandates under State law and to repay outstanding revenue bonds that were issued for the construction of solid waste management facilities to which the political subdivision's waste was designated.

(f) RETAINED AUTHORITY.—

(1) REQUEST.—On the request of a generator of municipal solid waste affected by this section, a State or political subdivision may authorize the diversion of all or a portion of the solid waste generated by the generator making the request to an alternative solid waste treatment or disposal facility, if the purpose of the request is to provide a higher level of protection for human health and the environment or reduce potential future liability of the generator under Federal or State law for the management of such waste, unless the State or political subdivision determines that the facility to which the municipal solid waste is proposed to be diverted does not provide a higher level of protection for human health and the environment or does not reduce the potential future liability of the generator under Federal or State law for the management of such waste.

(2) CONTENTS.—A request under paragraph (1) shall include information on the environmental suitability of the proposed alternative treatment or disposal facility and method, compared to that of the designated facility and method.

(g) LIMITATIONS ON REVENUE.—A State or political subdivision may exercise flow control authority under subsection (b), (c), or (d) only if the State or political subdivision certifies that the use of any of its revenues derived from the exercise of that authority will be used for solid waste management services.

(h) REASONABLE REGULATION OF COMMERCE.—A law, ordinance, regulation, or other legal binding provision or official act of a State or political subdivision, as described in subsection (b), (c), or (d), that implements flow control authority in compliance with this section shall be considered to be a reasonable regulation of commerce retroactive to its date of enactment or effective date and shall not be considered to be an undue burden on or otherwise considered as impairing, restraining, or discriminating against interstate commerce.

(i) EFFECT ON EXISTING LAWS AND CONTRACTS.—

(1) ENVIRONMENTAL LAWS.—Nothing in this section shall be construed to have any effect on any other law relating to the protection of human health and the environment or the management of municipal solid waste or recyclable material.

(2) STATE LAW.—Nothing in this section shall be construed to authorize a political subdivision of a State to exercise the flow control authority granted by this section in a manner that is inconsistent with State law.

(3) OWNERSHIP OF RECYCLABLE MATERIAL.—Nothing in this section—

(A) authorizes a State or political subdivision of a State to require a generator or owner of recyclable material to transfer recyclable material to the State or political subdivision; or

(B) prohibits a generator or owner of recyclable material from selling, purchasing, accepting, conveying, or transporting recyclable material for the purpose of transformation or remanufacture into usable or marketable material, unless the generator or owner voluntarily made the recyclable material available to the State or political sub-

division and relinquished any right to, or ownership of, the recyclable material.

(j) REPEAL.—(1) Notwithstanding any provision of this title, authority to flow control by directing municipal solid waste or recyclable materials to a waste management facility shall terminate on the date that is 30 years after the date of enactment of this Act.

(2) This section and the item relating to this section in the table of contents for subtitle D of the Solid Waste Disposal Act are repealed effective as of the date that is 30 years after the date of enactment of this Act.

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