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Interstate Waste Transport: Legislative Issues

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Summary

This report discusses ten issues raised by proposed legislation to allow controls on interstate commerce in solid waste. Such legislation has been considered in every Congress since 1990. Renewed interest has been generated by developments in Michigan, which has seen a sharp increase in waste imports from Canada as Toronto has closed local landfills. New York City's closure of its last remaining landfill in March 2001 also generated concern in several states that now receive its waste. Issues discussed in the report include whether to presumptively ban new waste shipments, whether to grant authority to states or to local governments, what types of facilities and what types of waste to include in a bill's authority, how to address out-of-country waste, grandfather provisions, freeze and ratchet authority, fees on out-of-state waste, indirect measures controlling waste imports, whether to include flow control authority, and the desirability of preconditions versus an unconditional grant of authority. This report will be updated as developments warrant.

Background

Interstate shipment of solid waste — an issue symbolized more than a decade ago by the New York garbage barge that could find no state willing to accept its cargo — has again reached the front pages of the nation's newspapers. More recently, as New York City has phased out its last local landfill and contracted for future disposal of its waste, the recipients, including New Jersey, Pennsylvania, and Virginia, have objected, starting a rhetorical battle that pits the right of states to protect their environment against the interstate commerce clause of the Constitution.

The issue is not confined to the Eastern seaboard. In Michigan, concerns have arisen over imports of Canadian waste, as Toronto closed its largest landfill. Elsewhere, in the South, Midwest, and West, enormous landfills with millions of tons of capacity have been constructed as the waste industry consolidates its operations and increasingly seeks business in more distant areas.

Waste management has traditionally been considered a local matter, but the federal government, specifically the Congress, has a potential role to play in resolving these controversies for a simple reason: waste and the provision of waste management services are considered articles of commerce under court interpretations of the interstate commerce clause, Article I, Section 8, clause 3 of the Constitution. State and local governments wishing to place restrictions on interstate shipment of solid waste (that they do not place on waste generated within the state) may do so only if authorized by the Congress.[1]

Until now, the Congress has not granted such authorization, and the courts have repeatedly struck down state restrictions. Whether the 108th Congress will authorize such restrictions remains to be seen; some have suggested, however, that the increased publicity surrounding interstate waste shipment and changes in the congressional landscape as a result of recent retirements could lead the 108th Congress to act where previous Congresses have not.

Numerous models exist for what such legislation might contain. In both the 103rd and 104th Congress, the Senate adopted bills to give Governors authority to prohibit new shipments of waste to specific facilities if requested by the affected local government. The bills would also have allowed a freeze on imports at the level reached in a designated previous year, and would have provided some relief to importing states by allowing them to gradually ratchet down imports in future years. In the 103rd Congress, the House passed legislation that gave authority to restrict future waste shipments to local governments, rather than the state. None of these bills was enacted, however, in part because of differences in the bills' structures on which the two chambers did not agree.

The remainder of this report discusses key differences in the bills considered to date and a few issues that most of the legislation introduced in earlier Congresses did not address. Ten issues are discussed.

Issues

1. Should there be a presumptive ban on new waste shipments? A basic difference between House and Senate bills on interstate waste in many previous Congresses has concerned the structure of the authority they would grant. In past Senate bills, generally, states would have been allowed to prohibit new waste shipments if the Governor acted to impose such a prohibition. In most House bills, on the other hand, there has been what is called a "presumptive ban": new shipments would be prohibited unless a local government acted to allow them.

Whether enacted legislation contains a presumptive ban could affect the political pressures felt by state and local governments. In most cases, it is easier to defend the status quo than to bring about action to change it. By establishing a presumptive ban, an

[1] In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and subsequent cases, the Supreme Court has made clear that its interpretation of the interstate commerce clause is not meant to interfere with a state's right to protect its environment. Rather, the court found that this goal cannot be achieved by discriminating against out-of-state waste. Restrictions on waste disposal that apply equally to waste generated within and outside the state are likely to be held constitutional.

interstate waste bill would make prohibition the status quo, placing the onus and focusing attention on those who wish to import waste. Such legislation might be more likely to result in future restrictions on waste imports than would a bill that presumed to allow continued shipments, requiring action by the Governor or local government to stop them.

2. State or local primacy? A second structural difference in interstate waste bills concerns the role of state and local governments. In bills that have passed the Senate, Governors have had the authority to restrict new waste shipments. Local governments could request the Governor to restrict imports, but could not take action themselves. In bills considered by the House, on the other hand, local governments would have played the central role, deciding whether or not to allow new interstate waste shipments at local facilities.

The latter approach places the decision-making authority closer to the location of potential impacts, generally considered a desirable factor. At the same time, depending on how one defines "affected local government," it may exclude from the decision-making process nearby jurisdictions that could be affected by truck traffic, air emissions, surface water and ground water pollution, etc., but which are not the jurisdiction in which the facility is actually located.

Placing authority at the state level means that the decision is not made by those most directly affected by potential impacts. On the other hand, the state as a whole may wish to make its decision in the context of broader policy considerations of less interest to the most directly affected local government. The state may be both an importer and exporter of waste, for example, and therefore may wish to encourage others to keep their facilities open to its exports. It is likely to have other reasons to foster cooperation with neighboring states, and may view waste imports as a way to strengthen its hand in negotiating approaches to regional issues.

In recent years, many local communities have negotiated what are called "host community agreements" with landfill owners and operators. Under such agreements, the host community typically receives a fee for each ton of waste disposed at the facility. In such cases, the host community may wish to see waste imports continue unrestricted, while the state government, perhaps responding to the concerns of nearby communities that do not benefit, may favor restrictions.

3. Just landfills, or other facilities as well? Interstate waste legislation has generally been written to allow restrictions at landfills or, in some cases, at disposal facilities — a category that could include incinerators. Absent from both of these categories are transfer stations. Transfer stations are facilities that receive waste from collection trucks, compact it, bale it, and load it on long haul trucks for disposal elsewhere. In multi-state metropolitan areas (notably, the Connecticut and New Jersey portions of the New York City area), in Washington, D.C. (whose transfer stations receive substantial amounts of waste from Maryland), and potentially in such areas as Philadelphia, Chicago, St. Louis, and Kansas City, there may be concerns about out-of-state waste being shipped to transfer stations. None of the bills introduced in previous Congresses addressed this issue.

Transfer stations are not regulated by U.S. EPA, and they are subject to varying degrees of state and local regulation. Lack of regulation is believed to motivate interstate

shipment to transfer stations in some cases. There is also an "environmental justice" component to this issue, with some alleging that the facilities are disproportionately located in poorer, often minority areas.

4. What types of waste would be subject to restrictions? Most interstate waste bills have been written to apply to municipal solid waste (MSW). MSW is not a term currently defined in the Solid Waste Disposal Act, however, so the types of waste covered are those specified in the definition given this term (or such other term that may be used) by a bill's drafters. The definitions used vary from bill to bill; in many cases, however, they do not include construction and demolition waste, medical waste, nonhazardous industrial waste, and other wastes that are shipped across state lines for disposal, in many cases at the same facilities that accept MSW.

The amount of such waste, while generally less than the amount of MSW, can be substantial. In general, the states don't track other waste imports as comprehensively as they do MSW. The data that are available, however, suggest that substantial amounts of such waste cross state lines for disposal. For example, Pennsylvania, the nation's leading waste importer, received 9,764,147 tons of MSW in 2000. It also imported nearly 2.5 million tons of other nonhazardous waste (industrial waste, construction and demolition (C&D) waste, ash, and sludge). Virginia, which ranked second in imports, reported non-MSW imports on the order of 15% of its MSW imports in 2000. Other states, notably Maryland and Utah, receive little MSW, but do import large amounts of other waste.

5. How should out-of-country waste be addressed? A question that arises often in the discussion of interstate waste legislation is whether foreign waste (from Canada, Mexico, or elsewhere) would be affected by such legislation, or whether it is protected by the North American Free Trade Agreement (NAFTA) or other international agreements. The answer to this question is that if foreign waste is included in the definition of out-of-state waste, it can be subjected to the same restrictions that states are allowed to impose on waste from other states. NAFTA and other international trade agreements require only that products (and waste) from Canada and Mexico not be disadvantaged because of their foreign origin. In general, most interstate waste legislation would apply to Canadian and Mexican waste, because such waste is included in the definition of out-of-state waste.

6. What should be grandfathered? Almost all of the interstate waste bills that Congress has considered have provided sweeping grandfather provisions, exempting from restrictions the amount of waste shipped to out-of-state facilities in a given year (1993 in many recent bills), and exempting facilities that have negotiated host community agreements with affected local governments.

There are no hard data on the effects of such grandfather provisions, but they are likely to be significant. According to industry or state sources, all of the large landfills importing waste to Virginia have host community agreements as do most of those in Pennsylvania. Exempting such facilities from the authority provided by interstate waste legislation would mean that Virginia and Pennsylvania might receive little or no new authority to restrict waste imports. In fact, imports might continue to rise, unless the host community agreements have placed limits on the amount of out-of-state waste a facility can receive.

On the other hand, the degree to which this exemption would function might depend on how the term "host community agreement" is defined. In some bills, a host community agreement would be required to "specifically authorize" the receipt of MSW generated out of state to be eligible for the exemption. It is not clear whether all or most such agreements do so.

Most bills also exempt from controls amounts of waste not covered by host community agreements that were imported at facilities in a specified year prior to enactment. In the 104th through 107th Congresses, this year was generally specified as 1993: thus, if Facility A imported 100,000 tons of MSW from out of state in 1993, it could continue to import that amount annually under this exemption.

Waste imports have fluctuated substantially over the years, particularly when observed from the perspective of individual facilities. Thus, the choice of year is significant. Overall, waste imports have grown each year since CRS and waste industry sources began tracking data in 1990[2]; the choice of an earlier year grandfathers a smaller amount of waste, therefore, than would the choice of a more recent year. Further, if a bill requires that the amount of imports "be in such documented form as will result in criminal penalties under State law in case of false or misleading information," as some bills would do, the scope of the grandfather is likely to be further restricted.

7. Should grandfathered shipments be "frozen" or "ratcheted" down? If the grandfather provisions of most interstate waste legislation would prohibit the largest importing states from restricting imports, the bills could provide other mechanisms of relief to such states. A common method in recent bills has been the provision of "freeze" or "ratchet" authority, which would allow major importing states to prevent further increases or to gradually reduce total imports. Such authority has been structured several different ways. In many cases, it would not restrict imports at facilities covered by host community agreements, leaving a major exception to any presumed import ceiling. In other cases, the authority has been structured to set limits at the state level; this raises the question of how a state-wide quota would be distributed among a state's facilities.

8. Should importing states be allowed to charge fees on out-of-state waste? While most proposed authority over interstate shipment of waste has focused on authority to block shipments or impose tonnage limits, the imposition of fees offers another means of affecting the level of imports. This method, when applied discriminatorily to out-of-state waste, has also been prohibited by court interpretations of the commerce clause, but like the other measures discussed in this report, it could be authorized by Congress. Whether to allow discriminatory fees on out-of-state waste and whether to limit or impose conditions on such fees are questions Congress might consider.

9. Should the Congress authorize the use of indirect measures to limit imports? As states have searched for tools to constitutionally limit imports of waste, many states have developed indirect approaches — most of which have also been overturned when challenged. Such approaches include granting local governments

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[2] For information on the amount of waste imports by state, see CRS Report RL31651, *Interstate Shipment of Municipal Solid Waste: 2002 Update.*

authority to limit landfill capacity, the imposition of a needs assessment demonstrating the need for new capacity before new or expanded facilities can be approved, or the application of stringent requirements (e.g., the separation of recyclables) before waste can be accepted for disposal. Whether Congress wishes to confer commerce clause immunity for such measures is another potential issue in the interstate waste debate.

10. Should interstate waste legislation also address flow control? Whether state and local governments can designate where privately collected waste *must* be disposed (through what are called "flow control" laws) has also been the subject of court challenges. In *C & A Carbone* v. *Clarkstown*,[3] the Supreme Court held that flow control also violates the interstate commerce clause.

Many see the flow control and interstate waste issues as intertwined. In its efforts to provide adequate in-state disposal capacity, for example, New Jersey erected one of the most comprehensive flow control requirements in the nation. The state was divided into 21 waste districts, each of which was given authority over waste generated within its boundaries and was required to provide disposal capacity. When flow control was overturned, much of this waste fled the state for less expensive disposal facilities elsewhere. Local governments and waste authorities in New Jersey were left to scramble for new sources of revenue to pay for facilities that were now larger than needed to address the remaining waste stream.

To allow waste importing states to prevent incoming shipments without at the same time providing relief to waste exporters is viewed as unfair by many of these local governments. If flow control is authorized, however, a large number of subsidiary questions arise, including whether all the former flow control arrangements would simply be reinstated, whether new facilities or programs would be eligible to use such authority, and whether the authority should expire at some date.

Conclusion

In lieu of addressing the issues discussed above, Congress could simply authorize state or local governments to impose restrictions on interstate commerce in waste, without setting preconditions on the use of such authority. Nothing in the Constitution requires preconditions. To forego them would greatly simplify the task of drafting legislation and would allow the states to use the tools they see as appropriate, whether numerical limits, fees, planning requirements, capacity limitations, waste management requirements, or no measures at all.

On the other hand, to give states or localities a "blank check" might establish irresistible pressures to act, perhaps resulting in the imposition of extreme measures that would cause harm to neighboring states and result in the balkanization of what is increasingly a regional system of waste management facilities.

It is Congress's need to balance such competing interests that has made the enactment of legislation so difficult. Whether the conditions now exist to overcome these difficulties remains to be seen.

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[3] 511 U.S. 383 (1994).

Author Information

James E. McCarthy
Specialist in Environmental Policy

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