

Proceedings of Applied Geography Conferences
Vol. 18 (1995)
F. ANDREW SCHOOLMASTER (ED)

GARBAGE IN GARBAGE OUT -- SIMPLE UNLESS
IT'S SOLID WASTE

Olen Paul Matthews
University of New Mexico
Albuquerque, New Mexico 87131

Mary R. McNally
Montana State University -- Billings
Billings, Montana 59101

1. INTRODUCTION

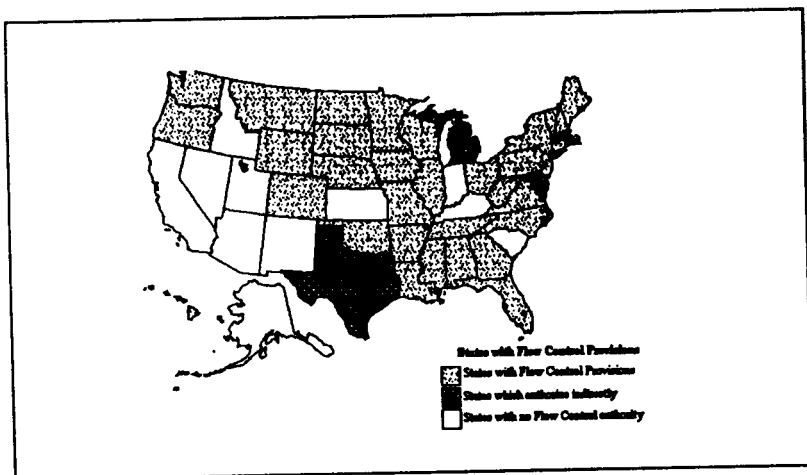
"Garbage in -- garbage out" is often used jokingly in reference to data analysis, but the movement of garbage in and out of states is not a jesting matter. Some people want it, and some people don't. The ability to control the movement of solid waste is complicated by the fact that the U.S. Constitution prohibits state and local laws that interfere with the free movement of goods (U.S. Constitution, Art. I. Sec. 8, cl.3). This paper examines those constitutional limitations, evaluates what is constitutionally possible, and looks at proposed federal statutes allowing states to pass laws that would otherwise be unconstitutional. The location of waste disposal facilities and the movement of solid wastes across state lines will be greatly influenced by these legal restraints.

Over 200 million tons of municipal solid waste are produced within the United States each year, making garbage disposal big business. (3) Disposal costs vary significantly from one region of the U.S. to another. Average costs for disposing of one ton of solid waste in a large northeastern facility are almost \$60 per ton while in the Southeast the cost is only \$25. Cost differentials like this allow solid wastes to be shipped long distances for disposal, often over the protests of those near the disposal sites. Out-of-state disposal is also encouraged by the closure of many local facilities. Closures have occurred in recent years because the Resource Conservation and Recovery Act (RCRA) eliminates those sites classified as "open dumps" (42 U.S.C. §§ 6910-6987). Because a limited number of sites are available for solid waste disposal and because the average cost for shipping one ton of waste 100 miles by rail is only four dollars, disposal of wastes out-of-state is frequently cheaper than in-state disposal. States where disposal is occurring have reacted by limiting waste imports, by charging higher rates, or by other means designed to inhibit imports. Unfortunately for the states trying to limit imports, the Supreme Court interprets the commerce clause of the constitution as creating a free market within the United States and finds unconstitutional state statutes that limit the free movement of goods. Solid waste is considered to be "goods" by the Supreme Court even if some states consider them "bads".

RCRA also encourages recycling and converting waste to energy. To accomplish these purposes, a guaranteed flow of solid waste is often required in order to finance the high costs associated with building and operating recycling and energy conversion facilities. In order to achieve the volume needed, local governments require mandatory participation

at designated facilities. These requirements are called "flow controls" and are directly or indirectly authorized in 39 states (Figure 1). Without flow controls, a sufficiently large supply of waste material may not be available to justify facility construction. Unfortunately flow controls also run contrary to the Supreme Court's free market ideas.

FIGURE 1
STATE FLOW CONTROL PROVISIONS



Within the last few years the Supreme Court has decided several commerce clause cases limiting a state's ability to restrict imports or use flow controls (5). The Court's interpretation of the commerce clause will be examined below.

2. THE COMMERCE CLAUSE

At independence the United States was governed by the Articles of Confederation which gave most regulatory power to the individual states. With a weak central government each state tried to gain economic advantage for its citizens through the use of tariff barriers. The resulting economic turbulence was a major reason for calling the constitutional convention in 1787. The commerce clause of the U.S. Constitution was designed to correct this problem by creating free trade between the states. Although free trade seems a desirable national goal, states often have difficulty in separating the national goal from their desire to help or protect their own citizens. Taxing goods from out of state at higher rates, regulating out of state goods in a discriminatory way, and banning imports or exports all run contrary to the commerce clause. Solid waste regulations frequently have commerce clause problems. In recent years a series of cases related to solid waste have made it to the Supreme Court effectively constraining a state's power to control the movement of garbage. Generally, two types of cases have reached the Supreme Court — those trying to limit imports and those compelling a specific disposal site be used. Import limitations will be examined first.

Prior to 1978, New Jersey had a statute prohibiting the importation of waste products originating outside the state. Such absolute bans on the import or export of goods are considered economic protectionism and must pass strict constitutional tests to overcome the Court's bias against them. Philadelphia challenged the validity of the import ban as

unconstitutional under the commerce clause. New Jersey had two arguments justifying the ban. First, they maintained that garbage was not an article of commerce, because it could not be sold and in fact had a negative value because of disposal costs. Secondly, New Jersey argued the prohibition was needed to protect the public's health and the environment similar in some ways to the quarantine laws courts had upheld in the past. The Supreme Court rejected both arguments. (7) The Court viewed New Jersey's remaining landfill space as the valuable resource being protected by the ban, not the solid waste. Without doubt the landfill space had value, and those from outside the state were prohibited from using it. This ban clearly violated free market principles and could only be upheld if a local purpose related to health or safety outweighed the harm caused to other states, and if no nondiscriminatory alternatives existed. New Jersey's arguments failed to meet these two tests.

State wide bans are almost always unconstitutional, but other statutes may be less comprehensive and still have a discriminatory impact on the free movement of goods. The Supreme Court has dealt with several cases of this nature in the past few years. Michigan had a statutory provision that allowed counties to ban solid waste generated in another county, state, or country. A county's solid waste plan could explicitly allow imports, but the matter was discretionary. Although St. Clair County's plan did not allow imports, a local landfill operator applied for permission to receive out-of state wastes. When permission was denied, the landfill owner filed suit, and the case eventually reached the U.S. Supreme Court. (4) Even though out-of-state wastes were treated the same as in-state wastes, the statute was unconstitutional. The Court held the commerce clause strictures could not be avoided by allowing a subdivision of the state to curtail the movement of articles of commerce when a state itself would be prohibited from doing so. If the provision was allowed to stand, all the counties in the state could ban imports which would in fact create a state wide ban. Michigan argued that the ban could be justified as a comprehensive health and safety regulation, but the court rejected this saying the real justification was economic protectionism. The Court found that Michigan's attempt to protect their limited landfill capacity was unambiguous discrimination against interstate commerce.

In another case, Alabama allowed out-of-state hazardous wastes to be imported but charged an additional fee for their disposal. The operator of a hazardous waste disposal facility within Alabama brought suit against the state. The trial court declared this was a violation of the commerce clause, because the only basis for the fee was the origin of the wastes—outside the state rather than within it. On appeal the Alabama Supreme Court reversed the decision holding the fee advanced a legitimate local purpose (protection against environmental risks) and no nondiscriminatory alternatives existed. The U.S. Supreme Court disagreed. (2) Although the Court recognized Alabama's concern about the volume of waste entering the facility, several nondiscriminatory alternatives were suggested. The alternatives include adding an additional fee to all hazardous wastes disposed of within the state regardless of their point of origin, adding a per mile tax on all vehicles transporting waste within the state, or capping the total tonnage from any source allowed at the site. In addressing the potential for environmental risks, the Court noted that the risk did not vary with the point of origin of the hazardous waste and found no justification for discriminating against out-of-state hazardous wastes. If out-of-state wastes were different in some way from in-state wastes, then a fee differential might be justifiable.

In the most recent Supreme Court decision on import restrictions, Oregon had a statute imposing a \$2.25 per ton surcharge on solid waste originating in other states. (6) The fee for waste generated within Oregon was \$0.85 per ton. Oregon tried to justify the difference in disposal fees as being compensatory in nature, reflecting the true cost of disposal. According to the state, the higher fee was proportional to the services rendered

with the lower fee reflecting an uncompensated subsidy from other sources. In analyzing the case the Court acknowledged it had allowed the use of "compensatory taxes" as a means of achieving a legitimate local purpose for which there were no nondiscriminatory alternatives. But in order to use this doctrine, the intrastate tax burden for which the state is attempting to compensate must be identified, and the tax on interstate commerce must be roughly equivalent. In addition, the interstate and intrastate events being taxed have to be substantially equivalent. The Supreme Court held Oregon's statute failed those tests. The statute was typified as economic protectionism which would give a state's citizens a preferred right of access to the natural resources within the state. As such, the statute was unconstitutional. As these cases suggest statutes which discriminate are virtually per se invalid. Although the Court's decisions on import restrictions seem consistent, less has been done with "flow controls."

Flow controls allow state and local governments to designate the site for processing, treating, and disposing of solid wastes. Flow controls began in the late 1970s in response to RCRA. RCRA encouraged the development of new waste management facilities such as those designed to convert waste to energy or those designed as high-technology materials recovery facilities. In addition, states began to set recycling goals and divert specific wastes such as yard trimmings from landfills. In order to finance these high cost projects, a revenue stream was needed that was sufficient to pay the debt and fixed costs. Flow controls were designed to allow financing in order to achieve these goals. In 1994, the Supreme Court ruled on the validity of one flow control ordinance and found it unconstitutional. (1)

The town of Clarkstown, New York closed its landfill site in 1989 and built a solid waste transfer station designed to receive bulk solid waste and separate recyclable from nonrecyclable materials. The facility cost \$1.4 million to construct and was to be operated by a private contractor for five years after which it would become city property. During the first five years, the town guaranteed a minimum volume of waste at a fixed tipping fee of \$81 per ton. If insufficient volume occurred, the town promised to make up the deficit. Because the guaranteed tipping fee exceeded the disposal cost on the private market, the town passed a flow control ordinance requiring all nonhazardous solid waste be deposited at the transfer station. Noncompliance was subject to small fines and short terms in jail. A recycling company in the town received solid waste from within and from outside the state, separated the recyclable material, and then was required to ship the remaining nonrecyclable wastes to the town's transfer station. The tipping fee they paid on the nonrecyclable materials was the same fixed rate everyone else paid, but this material had already been sorted. In order to avoid this high fee the recycling center shipped waste by truck to cheaper disposal facilities in Indiana, Illinois, West Virginia, and Florida. Although they were caught in this illegal activity, the company claimed the ordinance was invalid under the commerce clause. The case eventually reached the U.S. Supreme Court. (1)

Although the ordinance appeared evenhanded in treating in-state and out-of-state interests the same, the Court found requiring all solid waste be transported to a single site had negative interstate economic effects. Because the recycling center was required to dispose of nonrecyclable materials at the transfer station, disposal costs of waste material from sources outside the state were driven up. The article of commerce being protected was the service of processing and disposing of wastes, and the flow control ordinance discriminated because only the designated operator could process wastes within the town. The reason for the rule against discrimination was to prohibit state and local laws whose object was economic protectionism. This ordinance squelched competition by creating a monopoly. According to the Court, such discrimination can only be allowed in those instances where there is no other means of advancing a legitimate local interest. Nondiscriminatory means exist for the environmental concerns advanced by the city, and

the Court found the real reason for the flow controls was as a financing measure. Revenue generation is not a local interest which can justify discrimination against interstate commerce.

The cases on flow controls and import limitations have gotten considerable congressional attention in the past few years. Even though both have been found unconstitutional, Congress has the power to authorize state statutes and local ordinances that would otherwise violate the commerce clause. At present, federal legislation is being proposed which would grant this authority.

3. FEDERAL LEGISLATION

During the last legislative session, Congress worked on legislation which would allow some import restrictions and limited flow controls. Although a compromise measure passed the House last year, questions in the Senate about flow controls caused its failure on the last day of the session. In the current Congress, attempts are once again being made to pass legislation. Agreement seems to have been reached on the basic need to permit some form of import limitations and to allow states to finance projects based on flow controls. Although many details have yet to be worked out, the basic framework seems to be in place.

The Senate is proposing new legislation to be called the Interstate Transportation of Municipal Solid Waste Act of 1995 (S.534). Several proposals have been introduced in the House which are similar but may broaden a state's authority more than the Senate version (H.R. 4779, H.R. 1085, H.R. 342). The discussion here will be based on the Senate version, since it is the most likely compromise between competing bills. The bill would allow a state governor, at the request of a local government, to prohibit the disposal of out-of-state solid waste in a landfill or incinerator. But an exception exists for those sites which were receiving out-of-state solid waste shipments during 1993. For those sites, the governor of a state has the power to freeze shipments at the 1993 level. Reductions in the frozen volumes can occur under specified circumstances. Existing contractual arrangements are protected, however, as are new "host community agreements." The statute will allow new agreements to be made with communities who want them, but notice must be given to a variety of parties and hearings must be held. In summary, those sites which have never received solid wastes from outside the state can ban them by making a request to the governor. For those sites already receiving wastes from outside the state, the governor can freeze the quantity imported. For states which are heavy exporters, specified quotas which decline annually have to be reached or the importing states are allowed to ban even the volume shipped in 1993. The statute shifts power to local governments and state governors and encourages exporting states to reduce their export volume.

The second part of the statute addresses flow controls. A major concern is that the Supreme Court decision overturning flow controls placed many communities in a position where they now face a bond rating problem. The current bill is very limited in nature and is designed to take care of the problems created by the Court's decision. A state may use flow controls if they did so on May 15, 1994, but only for those facilities that were already in existence or for which a commitment for construction had been made. Thus states, who have relied on the financial benefits of flow control provisions in developing waste disposal facilities, would be allowed to keep their financing mechanisms in place. Several Senators feel this statute should not be broadened because to do so would stifle cost reducing competition. Thus the bill does not authorize new facilities to use flow controls or authorize them in states where they were not previously used.

4. DISCUSSION

The proposed legislation on import restrictions shifts the decision making power from the waste exporter to the local government. This shift would not have been allowed under the Supreme Court's interpretation of the commerce clause. The Court has suggested several ways to limit out-of-state wastes including even handed fees on all wastes, per mile taxes on transporting wastes, and a cap on the quantity allowed at a specific site. But, in all three examples in-state wastes and out-of-state wastes must be treated equally. Only the cap on the quantity allowed at a specific site could actually be used to stop out-of-state wastes, and this would have the effect of stopping in-state wastes as well. Although the constitutional limits on the movement of goods is very stringent, Congress has the power to authorize such state limitations. Under the proposed legislation the "host community agreements" will give local communities the power to decide if they want to receive out-of-state garbage in the future or not. In addition, those states which are exporters must meet quotas for total volume exported or face the possibility of having bans imposed. The debate in Congress is centered on whether the proposed legislation gives enough power to local governments or whether the potential limitations on the movement of solid waste are an unacceptable interference with free trade.

The flow control legislation is much more limited in its infringement on the free movement of goods. Basically those cities which used such mechanisms in financing disposal facilities would be allowed to continue to do so. No expansion on current use is contemplated, and cities will have to use other methods of financing in the future. The main debate in passing the legislation centers on assuring that all states currently using flow controls are included. Because many different schemes are used, a broad definition of what is included is needed.

The issues surrounding the interstate disposition of solid wastes are complex and frequently reflect contradictory objectives. For example, the impetus behind flow controls, to support the development of improved waste management and recycling facilities, can be considered a desirable social goal. Its implications, specifically the effect of impeding the free flow of "goods" and development of a more competitive market for garbage disposal, are less desirable. Garbage - particularly someone else's - will only become a "good" if a community stands to profit somehow from such a transaction. The proposed legislation allows for this incentive, whereas the existing system simply shifts costs. Allowing exporters to externalize their costs by shipping wastes out-of-state may meet the commerce clause objectives of free trade, but local communities need the power to choose whether to accept the wastes or not.

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