

**Date:** April 25, 2013

**From:** Andrew Booker, Ohio EPA

**To:** Flow Control Discussion Participants

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During the last flow control meeting, it was suggested that it might be helpful for Ohio EPA to provide participants with our thoughts on flow control in order to help frame the discussion during the final meeting(s). I have drafted the following document for that purpose. Some of the information below is simple background information and is well-known by all participants. The final section of the document contains Ohio EPA's current thinking on flow-control based on our historic position on the issue, our experience with flow control over the recent past, and the discussion that has taken place with participants over the last few weeks.

## **Ohio EPA Perspective on Flow Control**

### **Background**

When Ohio EPA began the Ohio Solid Waste Management Review project, we stated that we would be looking comprehensively at the entire system of waste management in Ohio, including difficult issues that have the potential to be controversial. Flow control is without question one of these issues. Ohio's solid waste management districts were granted the ability to exercise flow control with the passage of H.B. 592 in 1988. In fact, the exercise of flow control was the "default" condition created by H.B. 592. Since that time, the statute has been changed to make flow control a discretionary action by SWMDs.

At this time, some type of flow control is exercised by approximately 21 SWMDs. Of these, about 8 exercise what could be termed "fee designation" flow control, whereby they designate multiple facilities, but require each facility to enter into a contract for the collection and remittance of a fee to the SWMD as a condition of being designated. Under this approach, the focus is not on dictating where waste can go, but rather assuring that wherever it goes a fee is paid. (Three additional SWMDs have some type of less common fee collection mechanism that utilizes designation.)

About 10 SWMDs exercise what could be termed "traditional flow control", whereby they require waste to go to one or a small number of solid waste facilities. Typically, this approach is used when a SWMD (or county) owns a solid waste facility and traditionally has been utilized in order to secure and pay off public debt. However, the exercise of flow control is not exclusively used at publicly-owned facilities, and it is not necessary to have debt in order to exercise it.

Flow control is controversial because the private waste industry objects to the restriction on the flow of waste. Often, they would rather deliver waste to a facility that they own as opposed to delivering it to the publicly-owned facility. The controversy over flow control is in no way unique to Ohio, as flow control is exercised in numerous states and jurisdictions throughout the country, and it has been

litigated repeatedly in Ohio as well as in other jurisdictions. Cases involving low flow control have also been heard on more than one occasion before the U.S. Supreme Court.

### **Participation in the Flow Control Discussions**

Ohio EPA greatly appreciates the participation and input that has been provided by both the private waste industry and the SWMDs on this issue. We believe that the discussion has been very beneficial to understanding the issue from all perspectives and generating ideas for future direction. We also hope that it has been a productive and healthy dialogue between the interested parties, independent of the legislative review project.

### **Ohio EPA's Perspective on Flow Control**

The first item was stated at the outset of the meetings but is worth repeating here.

- Ohio EPA will not put forward any legislative proposal that would result in stranded public debt.

Based on the discussion at the meetings, there appears to be wide consensus (although not necessarily unanimous support) for the following.

- The ability of SWMDs to exercise “fee designation” flow control should not be restricted, as it is more of a fee collection exercise than one of flow control. This practice should be clarified and simplified in statute, and possibly refined in some manner, but the general approach makes sense as a practice and generally evens the playing field for Ohio solid waste facilities. It is essentially an extension of the SWMD’s ability to levy and collect generation fees. The focus on this issue from this point forward should be on clarification and refinement, not on the general concept.

Regarding traditional flow control, Ohio EPA’s current thinking on the issue, based on our historic position, our experience with flow control in the recent past, and the discussion that has taken place with participants over the last few weeks, is as follows.

- H.B. 592 gave SWMDs responsibilities related to comprehensive solid waste planning and management in Ohio, and did so in a way that vested them with a significant amount of autonomy regarding how best to achieve those purposes. The vesting of responsibility in SWMDs continues to have value to Ohio. Waste management is often an “out of sight, out of mind” issue, and often involves a large number of diverse entities involved in the process. As such, there has historically been no entity that is responsible for a long-term, comprehensive focus on waste management issues. While the role and responsibilities of SWMDs will likely be altered in some manner as part of Ohio EPA’s overall legislative proposal, they will continue to serve as an integral part of the overall solid waste system, will continue to have responsibilities for the long term planning and management of the solid waste stream, and will continue to have a significant amount of autonomy regarding how to achieve their objectives<sup>i</sup>. As such, Ohio

EPA supports the concept that flow control can sometimes be an appropriate exercise of SWMD authority to further several purposes<sup>ii</sup>, including:

- The payment of public debt;
- The consolidation of waste in a manner that is economically beneficial to the communities generating the waste;
- The provision of waste management services to areas that are traditionally underserved, and;
- The achievement of certain other solid waste management objectives.

Accordingly, Ohio EPA is not advocating for the elimination of flow control in Ohio. However, we do think that the system can be improved to reduce the potential for negative impacts from the exercise of this authority.

- SWMDs that choose to exercise flow control should do so very judiciously, in a very well thought-out and purposeful manner, being cognizant of the fact that the exercise of this authority can potentially have a negative economic impact on the private waste industry. It should never be entered into lightly, and other possible approaches should be explored thoroughly prior to exercising this authority.
- SWMDs that choose to exercise flow control should have a clearly articulated objective for doing so and a clear plan for paying off debt (if debt exists). If a SWMD exercises flow control, it should be clear and easy for any waste hauler or business to understand the flow control requirements.
- The private waste industry has the potential to be directly impacted by flow control decisions, and as such has a legitimate right for direct input into the decision-making process regarding flow control.
- Flow control should continue to be exercised in a manner that is open, transparent, and encourages input from all types of interested parties.
- SWMDs that choose to exercise this authority should explicitly identify and analyze the impact of their decisions on existing privately-owned facilities. This is particularly true for any new or expanded use of flow control
- The exercise of flow control should not be a static decision. A SWMD that exercises flow control should regularly assess whether it continues to be the best approach to achieve their objectives, taking into consideration changes to the waste industry, technology, availability of service providers, etc.

- Over time, there is every expectation that the private waste industry in Ohio will continue to grow and expand the services offered. In addition, we anticipate that the trend away from small landfills servicing a limited area towards larger regional facilities will continue as it has for the last decade. As a result, the exercise of traditional flow control by SWMDs should become less and less necessary.
- The existence of a diverse, competitive, innovative private sector waste industry is good for Ohio, and good for SWMDs. Ohio EPA, SWMDs, and the private sector waste industry should continue to engage in an open dialogue on ways in which we can all work together to achieve common objectives.

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<sup>i</sup> Ohio EPA has stated publicly that in the long-run it should be the objective of SWMDs to “put themselves out of business” by the promotion of environmentally beneficial waste management practices that are institutionalized and self-funded. Ohio EPA’s vision for waste management in Ohio is one in which individuals, businesses, governments, and other institutions are implementing best waste management practices as a normal course of behavior, in a way that they do not need the technical or financial support of SWMDs or Ohio EPA. As such, Ohio EPA is also striving to put itself “out of business” when it comes to solid waste planning and related waste management activities. Ohio also recognizes that in order to achieve this objective, the private sector waste industry will need to play a critical role in providing a wide variety of waste management services throughout Ohio.

<sup>ii</sup> The special role of local (or regional) governments in the management of solid waste and the exercise of flow control to do so has been recognized by the U.S. Supreme Court. In the 2007 opinion issued by the Court in UNITED HAULERS ASSOCIATION, INC., ET AL., PETITIONERS v. ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY ET AL., the Court stated “. . . States and municipalities are not private businesses—far from it. Unlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens.” Further, the Court recognized “The Counties’ ordinances [implementing flow control] are exercises of the police power in an effort to address waste disposal, a typical and traditional concern of local government.” Finally, the opinion stated “Congress itself has recognized local government’s vital role in waste management, making clear that ‘collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.’ Resource Conservation and Recovery Act of 1976, 90 Stat. 2797, 42 U. S. C. §6901(a)(4).”