REPORT OF THE
JOINT SUBCOMMITTEE STUDYING

Flow Control and Resource Recovery Legislation

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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Report of the Joint Subcommittee Studying
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To
The Governor and the General Assembly of Virginia
Richmond, Virginia
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To: Honorable Charles S. Robb, Governor of Virginia
and
The General Assembly of Virginia

I. BACKGROUND OF THE STUDY

The origin of this study is traced to a legislative package which was before the 1984 General Assembly in companion sets of House and Senate bills. The package commonly has been referred to as "flow control" legislation although, as will be explained, flow control is only one of the issues involved. The overall purpose of the legislation was to empower localities to structure resource recovery operations as a means of disposing of the locality's refuse, garbage and trash.

House Bills 164 and 165 and Senate Bill 292 were enacted into law in 1984. House Bill 165 addressed the powers of local governments directly in resource recovery, while House Bill 164 was concerned with similar powers for water and sewer authorities. Senate Bill 292 more narrowly was directed to certain small districts of sanitary districts in certain counties. The Governor vetoed parallel bills, Senate Bills 90 and 91 and House Bill 693, because they were substantially the same as the three which were signed.

Each of the bills, as originally introduced in 1984, were general bills applying to all counties, cities and towns. As finally passed by the General Assembly and signed by the Governor, they in effect now apply to the City of Alexandria and Arlington County. During the course of the legislative history of the bills, however, several other localities did seek unsuccessfully to be included.

All of the bills were considered by a Committee of Conference at the 1984 Session. Each of them carried the following recommendations of the Conference Committee, pursuant to which this Joint Subcommittee was established:

We recommend that the Senate Committee on Local Government and the House Committee on Counties, Cities and Towns jointly study the issues raised in the debate of this bill regarding the implications for various communities around the state as well as the issue of the effects of similar legislation on property rights and competition, and to report to the General Assembly by December 15, 1984.

At its initial meeting, Senator J. Granger Macfarlane was elected Chairman and Delegate Franklin P. Hall Vice- Chairman. The Subcommittee worked extensively on this issue throughout the year and sought the advice of several legal and technical experts on the subject. In all, the Subcommittee held five meetings in Richmond (June 8, August 2, November 19, December 7, and December 17), a work session in Hampton (October 2), and a public hearing in Fairfax (October 18). We also inspected the resource recovery facility in Hampton.

A. Solid Waste Management And Resource Recovery

Two basic technologies are currently available in the resource recovery field. The more common is the "mass burn" approach which, as the name suggests, is the direct burning of trash and refuse to generate steam, which in turn can be used directly or converted to electrical energy. The second technology generally is known as RDF (Refuse-Derived Fuel) and involves the processing of the raw trash and refuse to produce a solid fuel which in turn can be burned. The Subcommittee did hear testimony concerning the relative merits of these technologies but

did not consider it a part of its responsibility to make recommendations on this point.

Resource recovery as an approach to trash and refuse management is increasingly attractive to many localities across the country. One reason for the appeal of resource recovery is the declining feasibility of the traditional landfill approach in many areas, either because landfill locations are not available or because federal and state regulatory restrictions make landfills too costly or otherwise impractical.

A second reason for the appeal of resource recovery is the seeming economic benefit to be derived. The 1978 Federal Public Utilities Regulatory Policies Act (PURPA) requires power companies to purchase the electricity produced by such facilities, and other customers may be found for the steam or other energy or fuels produced. It also is possible to separate and recover recyclable materials during the process. The mass burn technology does not dispose of all refuse, but even the residue apparently has some benefit as a settling agent in landfill operations. Testimony and documentation presented to the Subcommittee indicate that a successful operation is not automatic and that there may be a tendency by local governments to overestimate such benefits, but the attractiveness of the idea is easily understood. Even if a locality is realistic about the revenue which a facility will produce, it still may conclude that resource recovery will help offset the cost of refuse management.

B. Resource Recovery Facilities In Virginia

Three resource recovery facilities presently are in operation in Virginia. The largest of these is the Hampton facility, which has a contract with NASA for the steam produced by a mass burn plant. Smaller municipal mass burn operations are in Harrisonburg, where a city facility produces steam for sale to James Madison University, and in Salem, where a city facility produces steam for the Mohawk Rubber Company.

Other localities are moving in this direction, however. The Southeastern Public Service Authority (SEPSA), encompassing the eight cities and counties on the south side of Hampton Roads, has issued bonds for a two stage development, the first being a landfill in Southhampton County and the second stage being a recovery facility. The SEPSA project is an RDF facility, and the Authority has a contract with the United States Navy for the purchase of the fuel. The eight local governments, in turn, have signed contracts with the Authority for the delivery and disposal of refuse. The statutory authority for the project will be outlined later in this report.

Arlington and Alexandria, proceeding on the basis of the 1984 legislation, have sold bonds and entered into contracts for the construction and private operation of a mass burn facility. The facility initially will be publicly owned, although the two localities are seeking to sell it to a private equity owner after construction.

Finally, it is known that at least private concern, United Bio-Fuels, Inc., plans to construct a privately owned facility in the Petersburg area and is actively pursuing contracts for refuse disposal with local governments in that area.

Based on this activity, it is reasonable to expect that other Virginia localities, particularly in highly developed urban areas, as well as private entrepreneurs, will in the near future at least explore the feasibility of resource recovery. The Subcommittee understandably has had to deal most directly with the Arlington-Alexandria experience and the legal and financial structure of its proposed facility. In so doing, however, we believe that we have struggled with the major dimensions of resource recovery as they relate to the need for state policy in this regard.

II. ISSUES RAISED BY RESOURCE RECOVERY LEGISLATION

A. Introduction

While the 1984 legislative package usually is referred to as "flow control" legislation, three related but separate policy areas actually were covered in House Bills 164 and 165 and Senate

Bill 292. They were 1) mandatory flow control, 2) anti-trust protection for local governments, and 3) contracts with resource recovery facilities and the financial securities attendant to such contracts.

1. Mandatory flow control is the authority of a local government to require that all waste disposed of within its jurisdiction be disposed of at a particular place and to prevent the "export" of refuse to sites in other jurisdictions. Mandatory flow control was provided by House Bill 165 (Chapter 763, 1984 Acts, codified as § 15.1-28.01). It is a power granted to the local governing body itself. An authority created under the Virginia Water and Sewer Authorities Act is not authorized to impose flow control. Its contract with a local governing body for the disposal of trash, however, might require the local governing body to adopt a flow control ordinance.

2. Anti-trust protection to local governments in exercising collection and disposal powers was provided also in House Bill 165. The provision is a general one applicable to all local governments and is not limited to Arlington and Alexandria.

3. All three bills adopted in 1984 authorize certain contracts for the disposal of refuse. Authorities created under the Water and Sewer Authorities Act in Arlington and Alexandria were authorized to enter into contracts, including "put or pay" contracts for trash disposal, by House Bill 164 (Chapter 762, 1984 Acts, codified as § 15.1-1250.02). That bill also provided in detail the basis upon which the Authorities may fix and collect rates and charges and in general the financial means for the Authority to guarantee its ability to pay bonds or meet contract charges. Senate Bill 292 provided similar authority to certain sanitary districts in Arlington County, although it is not clear that this authority is actually being used in the facility structure which Arlington and Alexandria has created. House Bill 165 authorized the governing bodies of these two localities themselves to enter into contracts and to fix and collect charges, but did not detail the fiscal guarantees which exist.

In addition, activities such as those covered by the 1984 legislation potentially do touch upon state constitutional issues, particularly those of incurring debt and the prohibitions of the credit clause. A distinction should be kept in mind between the enabling legislation and the contracts which the localities negotiate and enter into under it. The 1984 legislation is permissive, it does not mandate all the details of a contract, and it does not specify a single financial and operations structure. The distinction is relevant in that tthe 1984 legislation itself may be constitutionally sound but local governments could create a violation in the contracts they negotiate, depending upon how they structure the financial arrangements and contractual obligations.

Also, while the Subcommittee developed an idea of the structure which Arlington and Alexandria propose, this structure is only one of several which would be possible under the 1984 legislation. The legislation, while specific in some areas, consequently is fairly broad in scope and was not tailored specifically to the structure which more recently has been described by the two localities. This openness of the legislation should be kept in mind if the legislation were to become generally available to all localities or if other individually named localities were added in the future.

B. Flow Control

Flow Control Precedents

Enactment of House Bill 165 in 1984 was not the first time the General Assembly authorized a locality to adopt flow control ordinances. Municipalities operating under the Uniform Charter Powers Act and any locality contracting for flow control with an Authority created under the State Water and Sewer Authorities Act already enjoyed mandatory flow control authority.

Section 15.1-879 is the relevant Uniform Charter Powers Act reference. Under it "A municipal corporation may provide and operate ... facilities ... for the disposal of garbage and other refuse ... (and) may prohibit the disposal of garbage and refuse in or at any place other than that provided for the purpose ... " However, many municipalities, including most larger cities, have not incorporated the Act into their charters. Unless they have specifically included flow control into their individual charters, they do not have such power.

Counties may acquire land or facilities for solid waste management (§ 15.1-282) and, under their general grant of power to secure and promote the health, safety, and welfare, may provide collection and disposal services (§ 15.1-510). Counties do not have mandatory flow control under any general grant of power, however.

Since 1979, any county, city or town has had mandatory flow control authority under § 15.1-1269 of the Water and Sewer Authorities Act. Any locality can enter into a contract with an Authority granting it the right to receive, use and dispose of all trash generated in the locality. In that case, the locality is authorized to exercise the powers contained in § 15.1-879 (flow control) to implement the terms of such a contract.

The 1984 legislation was more specific in its flow control language. It was also more specific in mandating at least certain exemptions for manufacturing and similar concerns.

Is Mandatory Flow Control Authority Necessary?

A predictable and dependable stream of trash to the facility is required in order to make most resource recovery projects economically feasible. In some instances the trash stream may be guaranteed by de facto control which the locality enjoys, whether it be through the public collection of most or all the trash, the absence of alternative disposal sites, or some other factor which gives the locality a natural monopoly. Some localities also have been able to structure a favorable financial operation, as has Hampton with its NASA steam customer, such that its economic edge directs the trash stream to it through marketplace decisions.

A policy issue arises when market forces or de facto natural factors do not guarantee the stream to the facility. In that situation, a locality may wish to protect its investment and ensure its ability to meet contractual obligations by imposing mandatory flow control or it may be urged to do so by bond counsel in order to obtain more favorable bond rates. Is this local interest sufficient to warrant a state policy which may limit competition and impose restrictions or prohibitions on the private sector?

Pro-Flow Control Position

Those who testified in favor of flow control authority generally started from the premise that responsibility for the disposal of waste in the final analysis rests with the public, or the local government. That responsibility first means that the local government must have the capacity to dispose of all or practically all the waste generated within the jurisdiction and it must plan now to be able to meet that demand in the future. Particularly is this long-term and capacity view important in the resource recovery approach to waste management.

The second responsibility of the local government is to provide waste disposal at the lowest cost in the long run to the public. (There seems to be no disagreement that initial tipping fees at resource recovery facilities will be higher than existing landfill tipping fees. Proponents of recovery facilities maintain, however, that revenues from energy recovered and the rising costs of future landfills will make resource recovery less costly over the long run). A local government might or might not be able to finance a project without flow control authority but flow control authority is a crucial factor in the economics of a project for various reasons. Some examples cited include the cost of borrowing, particularly for revenue bond financing, the ability to attract private capital or operators or to obtain favorable contracts with the same, and the amount of revenue form the sale of energy recovered by the facility. All of these factors eventually impact upon the fees and charges to the public for waste disposal, and flow control is essential in a favorable structuring and operation of a facility in favor of lower disposal costs to the public.

Anti-Flow Control Position

Those who opposed flow control emphasized cases of facilities now operating successfully without flow control to show that mandatory flow control is not necessary. If a resource recovery system can be made economical only by means of mandatory flow control, they argued, this may indicate that the facility is not needed or is not economically viable. (Opponents to mandatory flow control authority did not deal directly with the "government responsibility" argument to any great extent).

What Effect Does Flow Control Have On The Private Sector?

Mandatory flow control will preclude private disposal sites and facilities except those exempted in the legislation itself. The locality also could tailor its local ordinance to provide exceptions. A private firm seeking to start an experimental operation in Alexandria testified against the legislation during the 1984 Session but did not appear during the course of this study, nor did any other similar private facility entity.

The trash haulers and their state and national associations testified in opposition to mandatory flow control. Their argument was that flow control will force small haulers out of business by placing them in an economically unviable position vis a vis large national industry haulers. The basis for this contention was that: 1) national firms will be able to absorb tipping fee increases whereas the small haulers will not, gradually producing a hauler monopoly or cartel and forcing small haulers out of business; 2) haulers have contractual agreements which will lock them into fixed rates, meaning that they will have to absorb tipping fee increases.

The response by flow control proponents was that, with regard to the first point, the same rationale would apply to the existing market situation. That is, a large hauler could cut charges or absorb cost increases under existing landfill tipping rates to force out smaller haulers. The disposal location and method has little to do with larger hauler-small hauler competition.

Proponents response to the second argument was that several years will elapse before recovery facilities will be operational, allowing the time for contracts to expire and to be renegotiated. Further, contracts typically allow haulers to pass along tipping fee increases so that existing contracts are unlikely to actually lock in the charges by small haulers.

An initial argument by haulers also was that flow control would prevent them from seeking more competitive markets outside the jurisdiction. There has been no solid evidence that such an economically viable alternative actually exists in the Arlington-Alexandria case. Theoretically, the argument could apply if flow control were introduced in other parts of the state where such viable alternatives might be available.

As a final point, some communications from the hauler associations linked flow control authority with the potential for localities to limit and select those haulers who can operate in controlled service areas, thus putting haulers out of business or imposing onerous conditions on their operations. The power inferred in this connection is not a part of flow control per se. Flow control relates to the disposal of trash and not to its collection. This contention more properly falls under the regulatory policies with regard to collection and should be viewed in connection with the anti-trust provisions of the legislation.

C. Anti-Trust Protection And Anti-Competitive Effect

House Bill 165 in its final paragraph sought to grant to all local governments anti-trust protection in garbage, trash and refuse collection and disposal services by stating as state policy the authority of a locality to "limit or displace competition" and to exercise its powers "notwithstanding any anti-competitive effect." The United States Supreme Court's series of rulings that local governments do not automatically enjoy the anti-trust immunity which state governments hold and can be protected only by a clearly articulated and affirmatively expressed state action in this regard were reviewed for the Subcommittee by members of the Office of the Attorney General. The conclusion was that if a local government is to exercise flow control, create exclusive service districts, and so forth, such statutory authority is necessary. The extent to which the provisions of House Bill 165 are sufficient to constitute an authorization, however, is open to debate.

The language generally follows an approach suggested by some authors and experts who have commented on local anti-trust protection. The Subcommittee, however, had the benefit of a legal memorandum from the private firm of Cahill Gordon and Reindel, submitted by Assistant County Attorney James MecGettrick of Fairfax County, which argued that the House Bill 165 language alone is not sufficient and that anti-competitive actions must be expressly authorized and enumerated. The final paragraph reinforces the express powers granted other localities in

other legislation but is not sufficient alone. This interpretation for the most part was endorsed by the staff of the Office of the Attorney General. If, and this is the real policy issue, the state is willing to authorize localities to engage in anti-competitive activities such as flow control or exclusive service areas, the language here in question is a necessary but not determinative part of that authorization.

In this regard, attention is also called to the first paragraph of House Bill 165, amending § 15.1-28.1. This is an existing section applicable to all localities, and it has granted localities the authority to delineate service areas and to limit the number of persons engaged in service in the area. By implication, the "limitation" might be to one person but the section did not expressly so state. The 1984 legislation did add a specific provision allowing localities to designate exclusive service areas. Probably this amendment should be regarded as a clarification for anti-trust purposes.

D. Contracts

The 1984 legislation authorizes either the county or city itself or special authorities and districts of the county or city to contract with resource recovery facilities. Most of the testimony and the attention of the Subcommittee focused upon the provisions contained in House Bill 164 dealing with water and sewer authorities both because Arlington and Alexandria are structuring their contracts through authorities and because the contract provisions of House Bill 164 are much more detailed in the area of financing than are those of the more general House Bill 165 dealing with local governments themselves. (The provisions of Senate Bill 292, applying to certain sanitary districts, were similar to those of House Bill 164).

Some issues common to all three bills which concerned the Subcommittee included:

1. Should "put or pay" contracts be authorized? Local governments and authorities are authorized to contract for a specific capacity at the facility (reserving the use of a given number of tons of disposal capability) and to pay a certain amount per ton for that number of tons of disposal capacity, whether or not it is actually used. This is usually referred to as a "put or pay" contract. A concern was the lack of risk to the owner/operator which this entails. As in the case of flow control, examples can be cited of successful operations where put or pay contracts have not been included, but the testimony has been that they are a common requirement in resource recovery ventures.

2. Should local governments and authorities be allowed to agree contractually to make up revenue from energy sales which is lost because the full amount of trash was not delivered? The 1984 legislation authorizes this contractual provision. The rationale is that revenue from the sale of energy is a part of the owner/operator's calculation in arriving at a disposal price and he should be protected against a loss which resulted from the failure of the other party to meet contractual agreements.

3. What cost increases should the operator be allowed to pass along to the locality? The payment for disposal which the local government or authority initially agrees to pay the operator of a facility may be adjusted for factors "beyond the control" of the operator.

A number of other issues focused upon the fees and charges which water and sewer authorities are authorized by House Bill 164 to levy to meet contractual obligations. The Subcommittee raised the following questions or possible requirements:

4. Should an authority be empowered to levy fees and charges on property owners who do not dispose of refuse through the system? House Bill 164 grants them this authority. Water and sewer authorities may now charge a connection fee, frontage fee, and monthly nonuser fee to persons who choose to use their own domestic water or sewage disposal systems. However, the nonuser fee is limited to the proportionate share of debt retirement on the authority's bonds and does not apply to the proportion of a user's bill which would represent operating costs. (§ 15.1-1261).

5. Should the authority be able to base its charge or fee on the assessed value of property? House Bill 164 provides this as one basis for determining fees and charges. Fees and charges by

water and sewer authorities for their other services may be based either on actual use or some indicators of use. (See § 15.1-1260).

6. Should there be a lien on property for the charges and fees imposed by the authority? Water and sewer authorities now enjoy a lien for other services (see § 15.1-1263) and no new precedent would be created.

In summary, water and sewer authorities may now impose fees and charges for services. It is possible for someone not to use the service but to be required to pay a portion of the user fee proportionate to debt retirement. The fees or charges may be based either on actual use or on one of several indicators of potential use. There is a lien on the property for the amount of fees and charges. The unusual provisions in the 1984 resource recovery legislation thus are 1) the use of assessed value as a possible base for fees and charges in general and 2) the lack of any distinction between users and nonusers in the amount of fees and charges. In the proper combination, the same rate applied to users and nonusers on the basis of assessed property value, it would be accurate to describe this as a taxing power.

7. Who sets the rates, fees and charges? The rates are set by the water and sewer authority under House Bill 164. House Bill 164, however, would allow the entity with whom the authority has contracted to legally compel the authority to fix, charge, and collect rates, fees and charges in accordance with such contract. Together with other funds available to the authority, they must be sufficient to meet all contract obligations and to provide a margin of safety for such payment. House Bill 164 does require that rates be set in accordance with the fourth paragraph of § 15.1-1260, which is a requirement for a public hearing. The first paragraph of § 15.1-1260 provides that rates are to be subject to the jurisdiction of the State Corporation Commission. However, House Bill 164 says that the power to establish such fees shall not be subject to the jurisdiction of any commission, authority or other unit of government.

8. Who controls the water and sewer authority? The authority is independent of the local governing body. The Code itself does not specify a method for selecting the board of the authority, allowing the manner of selection and the terms to be provided in the ordinance of the local government creating the authority. "One or more members of the governing body" may be appointed to the board of the authority.

9. Should there be a referendum to approve proposed contracts of this kind? The law permits but does not require the governing body to call for a referendum before an authority is created. Ten percent of the voters can require a referendum on the ordinance creating an authority. Otherwise, there are no statutory requirements for referenda on the actions or decisions of the board in setting rates and the like.

10. Should the law specify what should be done with any "profit" from the project or should this be left to the authority board? "Profit" refers to the possibility that revenues from the project might exceed the amount required to meet the various contractual obligations. Arlington-Alexandria have indicated that a separate enterprise account will be maintained and that any such "profit" would be used in connection with the project but has not specified any one mandatory use. Possibilities mentioned by the Subcommittee or to the Subcommittee include a retrospecitive rebate or refund to users or prospective use by lowering charges and tipping fees to future users.

E. State Constitutional Issues: Debt Provisions And Credit Clause

The issues which most likely could arise under the 1984 legislation are:

1. Can a local government enter into long term contracts of the sort associated with resource recovery systems without taking steps to conform with the requirements of the debt provisions of Article VII, Section 10 of the Constitution of Virginia?

2. Can a local government provide the guarantees and securities usually required by private owners and operators of resource recovery facilities without violating the prohibition against pledging the credit of the local government in violation of Article X, Section 10 of the

Constitution of Virginia?

In addition to exceptions noted in Article VII, Section 10, there are at least three methods by which a local government may avoid the requirement that a debt count against the debt limit, in the case of municipalities, or that incurring the debt be approved by a referendum in the case of counties. One is the use of revenue bonds whereby the debt is retired from funds produced by the undertaking. The second is the use of special authorities, whose obligations do not count against the locality so long as the local government does not pledge itself in support of the debt. The local government can make voluntary contributions to the authority. The third is the use of a service contract, which is permissable if the locality is committed to pay only as service is rendered.

It appears that Arlington and Alexandria will proceed essentially under the special authority approach. The legislation itself, however, would have permitted contracts directly between the local government and the private owner and operator.

The Supreme Court of Virginia has been reasonably lenient in applying the terms of the credit clause. The court will examine the underlying purpose of the commitment. When the underlying purpose is to benefit the public or carry out a governmental function, the credit clause generally will not be held to have been violated. The fact that a private party may benefit from the activity does not constitute a violation.

In both the debt and credit clause cases, the courts will examine each case separately. As noted, the contracts negotiated in a particular instance are not necessarily spelled out completely in the 1984 enabling legislation. For that reason, constitutional questions concerning resource recovery activities in Virginia are likely to focus upon the individual contracts and structure of a particular project rather than upon the 1984 legislation.

III. FINDINGS AND RECOMMENDATIONS

The Subcommittee has been sympathetic to the need of Virginia localities to have the necessary tools to manage the collection and disposal of trash and refuse. We understand the attraction which resource recovery holds in this regard, particularly in more developed urban areas where the feasibility of landfill operations is in question, and consider it an exciting technology ourselves. We also can appreciate that even smaller localities might be drawn to consider recovery technologies by the potential revenue which seemingly can be derived or by the opportunity to "privatize" what has been a governmental responsibility by contracting with private recovery facilities for disposal. The Subcommittee takes the position that state policy should make it possible for local governments to pursue these avenues when they legitimately offer the best solution to a locality's refuse disposal needs.

The Subcommittee is concerned, however, that localities move in this direction only after clearly determining that resource recovery is the most appropriate technology for the particular locality. Resource recovery has much to offer, but the initial costs are high and there is no automatic "pot of gold" at the end of each refuse rainbow. Since it was not within the scope of our responsibility to investigate the statewide feasibility of resource recovery, the Subcommittee will do no more than note this word of caution. A locality should undertake a realistic examination before committing to the resource recovery approach, and a number of state agencies as well as private consultants and firms are available to assist in this evaluation. We recommend that any locality contemplating a program as a first step consult the Energy Division of the Department of Emergency Services' publication, Energy Recovery From Municipal Solid Waste: A Feasibility Guide for Local Governments in Virginia.

More to the scope of our study, the Subcommittee frankly was concerned about the possible "overreach" of the 1984 legislation in attempting to grant the powers necessary to establish a resource recovery program. We have been uncomfortable with, and struggled with, the justification for a number of the powers which might be exercised under the 1984 legislation. Part II indicated some of our concerns, but it might be well to reiterate at this point they include: 1) the impact upon private haulers and private refuse disposal and resource recovery enterprises; 2) the long-term and rather open-ended contractual commitments which might be made which would commit the citizens of a locality to pay whatever may be demanded under

the contracts, and without their having any voice in or recourse against the price which could be demanded of them; 3) the possible overprotection of investors and of private owners/operators with whom a locality contracts for recovery services, resulting in the locality and ultimately its citizens bearing all the risk of the venture. The Subcommittee was struck throughout its investigation by the fact that the reason for various provisions in the proposed financial and operational structure of projects we examined appeared largely to be that they were required by bond counsel or private companies who would be involved in construction, ownership, or operation of a facility.

In the final analysis, however, the Subcommittee was unable to determine how to completely safeguard by statute a locality in one case against so overcommitting it and its citizens while at the same time retaining statutory authority for a locality to exercise powers and make commitments which might legitimately be necessary in another case. Our deliberations led gradually to the conclusion that prudent use of permissive authority such as that granted in the 1984 legislation rests to a significant extent on the relationship between the public officials of a locality and the citizens they serve. The local governing body and the citizens who are served by and will pay for recovery facilities at some point must determine where to draw the line at trading favorable contractual terms for lower bond rates.

The Subcommittee therefore recommends that referendum approval be required before a locality may enter into resource recovery contracts. The Virginia tradition has been to allow elected local representatives to make local decisions rather than requiring a local referendum in most policy areas. Resource recovery projects involve commitments of such magnitude, both in the length of contracts and in the financial costs which local citizens may have to underwrite, however, that we believe that the approval of the contracts by those citizens is appropriate in this case.

The specific recommendations of the Subcommittee now are presented and proposed legislation where required is appended.

1. The 1984 legislation should not be given general application to all localities; the inclusion of any other local government should be judged on a case by case basis as the need arises.

Other localities may conclude that landfill disposal will not meet future waste disposal needs and look to resource recovery as a solution. If these localities propose to operate under the type of authority granted by the 1984 legislation, major commitments on the part of the locality and its citizens are involved in order to attract private facility owners or operators. Consideration of each locality's case on an individual basis is desirable to ensure that the financial and operational structure which that locality proposes is appropriate. For that reason, we recommend that the 1984 legislation not be made automatically applicable to all localities. The authority could be extended to localities on an individual basis.

It should be noted that the urban Tidewater localities moved towards large-scale resource operations prior to 1984 through the Hampton-NASA facility and the Southeastern Public Service Authority agreement with the United States Navy. Both are cases where localities were able to enter the resource recovery field because of contracts with the United States government which to a considerable extent underwrite the projects. In no way should the subcommittee recommendations concerning the 1984 legislation be interpreted to impose additional present or future obligations or requirements on these projects.

2. Repeal the flow control authority granted in the 1984 legislation.

Arlington and Alexandria, however, have already adopted flow control ordinances pursuant to the authority granted them to do so by the 1984 legislation. We recommend that these ordinances be specifically exempted from repeal of flow control. The flow control authority granted to any county or municipality which contracts with an authority created under the Water and Sewer Authorities Act will not be affected. Eight Tidewater localities have made contractual commitments with the Southeastern Public Service Authority under § 15.1-1269, and we therefore recommend that the Water and Sewer Authorities Act be left unchanged.

3. Place the anti-trust paragraph of § 15.1-28.01, unamended, in a separate Code section.

The paragraph applies to all local governments in their garbage and trash collection and disposal and should stand separately from the specific 1984 Resource Recovery package. The testimony of the Attorney General's staff was that the paragraph, showing legislative intent, is a correlate of specific grants of power in the waste collection and removal area found elsewhere in the Code. It thus completes the anti-trust package not only with the 1984 legislation but with other powers not necessarily related to resource recovery granted generally to localities in earlier legislation.

4. Require a referendum before the local government or authority can enter into a put or pay contract.

As explained earlier, we believe the future commitments which may be required of the citizens makes this area one in which approval of the voters is appropriate.

5. Add a paragraph in § 15.1-28.01 which provides for a referendum on a put or pay contract in a county if the contract is deemed to constitute a debt under Article VII, Section 10 of the Constitution of Virginia.

Incurring a debt by a county, with certain enumerated exceptions, requires referendum approval. The Constitution of Virginia (Article VII, Section 10) requires that provision for the referendum must be made in the same general law which authorizes the county to incur the debt. House Bill 165 failed to do so, and this recommendation will cure that oversight. The recommendation is made to cover two possible situations.

a. While not the case in Arlington-Alexandria, a locality which in the future is added to those eligible to proceed under this legislation might actually wish to contract debt directly in connection with the project.

b. Special authorities and service contracts are devices for avoiding the constitutionally prescribed debt provisions, and the 1984 legislation also contains a disclaimer to the effect that contracting a debt is not intended. Neither the special authority or service contract doctrine nor the disclaimer will have any effect, however, if a court rules that the county actually has agreed to contract a debt. The recommended amendment will put in place an authorization for the referendum which would be required if a judicial decision or official legal opinion so held.

6. Amend § 15.1-1250.02 to delete assessed value of property as a basis for allocating rates, fees and charges in connection with resource recovery operations.

Despite the Subcommittee's concern with some of the contract provisions in this section, most of them are generally consistent with or find precedent in the existing powers of water and sewer authorities. The same is not true of the authorization to base charges on assessed property value and we recommend that this provision be deleted. It in effect now gives an authority the power to tax.

7. Establish a separate enterprise account for resource recovery activities.

The intent is not to prevent the transfer of funds to or from the account. Rather, the fund should be established for accounting and auditing purposes so that the costs or profitability of the project can be determined.

8. Exempt the project initiated by Arlington and Alexandria from most of the changes recommended.

These two localities have adopted flow control ordinances, signed various contracts, and issued bonds for the construction of a facility based on the 1984 authorizing legislation. Since the financing of the project has moved so far along on the basis of the 1984 provisions, it is possible that imposing the additional requirements at this point might cloud the contracts and bond issue or force the two localities to reopen the process. The provisions will be in place, however, for any localities included in the statutes in future years.

Respectfully submitted,

J. Granger Macfarlane, Chairman
Franklin P. Hall, Vice Chairman
Peter K. Babalas
Robert E. Russell
C. Richard Cranwell
William S. Moore, Jr.
Arthur R. Giesen
John Watkins

SENATE BILL NO. 656

AMENDMENT IN THE NATURE OF A SUBSTITUTE

A BILL to amend and reenact § 15.1-28.01 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 15.1-28.02, the amended and added sections relating respectively to regulation of garbage and refuse pickup and disposal services by local governments generally and by certain counties and cities and to the exercise of such powers notwithstanding any anticompetitive effect.

Be it enacted by the General Assembly of Virginia:

1. That § 15.1-28.01 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 15.1-28.02 as follows:

§ 15.1-28.01. Regulation of garbage and refuse pickup and disposal services; contracting for such services in certain counties and cities.–The governing bodies of counties that have adopted the county manager plan of government and a city contiguous thereto having a 1980 population of more than 100,000, singularly or jointly, ~~2~~ *two* or all of such counties and cities ~~, may adopt ordinances requiring the delivery of all or any portion of the garbage, trash and refuse generated or disposed of within such counties and cities to waste disposal facilities located therein or to waste disposal facilities located outside of such counties and cities if the counties and cities have contracted for capacity at or service from such facilities.~~

~~Such counties and cities may provide in such ordinance that it is unlawful for any person to dispose of his garbage, trash and refuse in or at any other place. No such ordinance making it unlawful to dispose of garbage, trash and refuse in any other place shall apply to the occupants of single-family residences or family farms disposing of their own garbage, trash or refuse if such occupants have paid the fees, rates and charges of other single-family residences and family farms in the same service area.~~

~~Such ordinance shall not apply to garbage, trash and refuse generated, purchased or utilized by an entity engaged in the business of manufacturing, mining, processing, refining or conversion except for an entity engaged in the production of energy or refuse-derived fuels for sale to a person other than any entity controlling, controlled by or under the same control as the manufacturer, miner, processor, refiner or converter. Nor shall such ordinance apply to (i) recyclable materials, which are those materials that have been source-separated by any person or materials that have been separated from garbage, trash and refuse by any person for utilization in both cases as a raw material to be manufactured into a new product other than fuel or energy, (ii) construction debris to be disposed of in a landfill or (iii) waste oil. Such ordinances may provide penalties, fines and other punishment for violations.~~

~~Such counties and cities~~ are authorized to contract with any person, whether profit or nonprofit, for garbage and refuse pickup and disposal services in their respective jurisdictions and to enter into contracts relating to waste disposal facilities which recover energy or materials from garbage, trash and refuse. Such contracts may make provision for among other things (i) the purchase by the counties and cities of all or a portion of the disposal capacity of a waste disposal facility located within or without the counties and cities for their present or future waste disposal requirements, (ii) the operation of such facility by the counties and cities, (iii) the delivery by or on behalf of the contracting counties and cities of specified quantities of garbage, trash and refuse, whether or not such counties and cities collect such garbage, trash and refuse, and the making of payments in respect of such quantities of garbage, trash and refuse, whether or not such garbage, trash and refuse are delivered, including payments in respect of revenues lost if garbage, trash and refuse are not delivered, (iv) adjustments to payments made by the counties and cities in respect of inflation, changes in energy prices or residue disposal costs, taxes imposed upon the facility owner or operator, or other events beyond the control of the facility operator or owners, (v) the fixing and collection of fees, rates or charges for use of the disposal facility and for any product or service resulting from operation of the facility, and (vi) such other provision as is necessary for the safe and effective

construction, maintenance or operation of such facility, whether or not such provision displaces competition in any market. Any such contract shall not be deemed to be a debt or gift of the counties and cities within the meaning of any law, charter provision or debt limitation. Nothing in the foregoing powers granted such counties and cities shall include the authority to pledge the full faith and credit of such local governments in violation of Article X, § 10, Constitution of Virginia.

Before such county or city shall finally enter into such contract, it shall petition and require the circuit court of the county or city to order a referendum on the question of whether or not the county or city should be authorized to enter into the contract. The referendum shall be held and conducted and the results thereof ascertained and certified in accordance with § 24.1-165 of this Code. The county or city shall cause to be published once a week for the two weeks preceding the referendum, in a newspaper having general circulation in the county or city, a detailed summary of the provisions of the proposed contract. The county or city shall be deemed to be authorized finally to enter into the contract only if a majority of those voting on the question at the referendum so authorize.

In the event that the contract into which any such county proposes to enter involves or is deemed by a court of competent jurisdiction to involve the incurring of a debt within the meaning of Section 10 (b) of Article VII of the Constitution of Virginia, the county, in conformity with the requirements of that section, shall petition the circuit court of the county to order that the referendum in the county be on the question of contracting such debt. The referendum on the debt shall satisfy all referendum requirements of this section unless the question of contracting the debt is severable from the remaining terms of the contract, in which case the court shall order that both the question of contracting the debt and of entering into the contract be placed on the ballot.

A separate enterprise account shall be established to account for operations relating to any services in which any such county or city may engage or for which it may contract pursuant to this section. This provision shall not be deemed to require the physical segregation of funds or to prevent the transfer of funds to or from such account.

~~It has been and is continuing to be the policy of the Commonwealth of Virginia to authorize each county, city or town to displace or limit competition in the area of garbage, trash or refuse collection services and garbage, trash or refuse disposal services to provide for the health and safety of its citizens, to control disease, to prevent blight and other environmental degradation, to promote the generation of energy and the recovery of useful resources from garbage, trash and refuse, to protect limited natural resources for the benefit of its citizens, to limit noxious odors and unsightly garbage, trash and refuse and decay and to promote the general health and welfare by providing for adequate garbage, trash and refuse collection services and garbage, trash and refuse disposal services. Accordingly, the governing bodies of the counties, cities and towns of this Commonwealth are directed and authorized to exercise all powers regarding garbage, trash and refuse collection and garbage, trash and refuse disposal notwithstanding any anti-competitive effect.~~

§ 15.1-28.02. Exercise of garbage, trash and refuse collection and disposal powers; anticompetitive effect.–It has been and is continuing to be the policy of the Commonwealth of Virginia to authorize each county, city or town to displace or limit competition in the area of garbage, trash or refuse collection services and garbage, trash or refuse disposal services to provide for the health and safety of its citizens, to control disease, to prevent blight and other environmental degradation, to promote the generation of energy and the recovery of useful resources from garbage, trash and refuse, to protect limited natural resources for the benefit of its citizens, to limit noxious odors and unsightly garbage, trash and refuse and decay and to promote the general health and welfare by providing for adequate garbage, trash and refuse collection services and garbage, trash and refuse disposal services. Accordingly, the governing bodies of the counties, cities and towns of this Commonwealth are directed and authorized to exercise all powers regarding garbage, trash and refuse collection and garbage, trash and refuse disposal notwithstanding any anticompetitive effect.

2. The provisions of this act which amend § 15.1-28.01 shall not apply, except as to the requirement of an enterprise account, to any such county or city which prior to January 1, 1985, shall have adopted ordinances, entered into contracts, or issued bonds pursuant to the provisions

of that section in effect at the time such action was taken. Such ordinances, contracts, and bonds, including the refunding of any such bonds, shall be governed by the provisions of Chapter 763 of the 1984 Acts of Assembly.

SENATE BILL NO. 657

AMENDMENT IN THE NATURE OF A SUBSTITUTE

A BILL to amend and reenact § 15.1-1250.02 of the Code of Virginia, relating to powers of water and sewer authorities in certain counties and cities.

Be it enacted by the General Assembly of Virginia:

1. That § 15.1-1250.02 of the Code of Virginia is amended and reenacted as follows:

§ 15.1-1250.02. Powers of authority in certain counties and cities.–An authority or authorities created pursuant to the provisions of this chapter by counties that have adopted the county manager plan of government and a city contiguous thereto having a 1980 population of more than 100,000, singularly or jointly, ~~2~~ *two* or all of such counties and cities may enter into contracts relating to the furnishing of services and facilities for garbage and refuse collection and disposal and conversion of same to energy (system) with any person or partnership or corporation (entity). The contract shall not have a term in excess of thirty years from the date on which service is first provided. It may make provisions for:

1. The use by the authority of all or a portion of the disposal capacity of such system for the authority's present or future requirements,

2. The delivery by or for the account of the authority of specified quantities of garbage and refuse, whether or not the authority collects such garbage and refuse,

3. The making of payments in respect of such quantities of garbage and refuse, whether or not the garbage and refuse are delivered, including payments in respect of revenues lost if such garbage and refuse are not delivered,

4. Adjustments to payments to be made by the authority in respect of inflation, changes in energy prices or residue disposal costs, taxes imposed upon the system or other events beyond the control of the entity or in respect of the actual costs of maintaining, repairing or operating the system, including debt service or capital lease payments, capital costs or other financing charges relating to the system, and

5. The collection by the entity of fees, rates or charges from persons using disposal capacity for which the authority has contracted.

Before any such authority shall finally enter into such contract, it shall petition and require the circuit court of each county or city which is partially or entirely within the proposed system service area to order a referendum on the question of whether or not the authority should be authorized to enter into the contract. The referendum shall be held and conducted and the results thereof ascertained and certified in accordance with § 24.1-165 of this Code. All registered voters who reside within the system service area shall be eligible to vote in the referendum. The authority shall cause to be published once a week for the two weeks prior to the referendum, in a newspaper having general circulation in each of the counties and cities contained partially or entirely within the system service area, a detailed summary of the provisions of the proposed contract. The authority shall be authorized finally to enter into the contract only if a majority of those voting on the question at the referendum in each of the affected counties or cities so approve.

The authority may fix, charge and collect fees, rates and charges for services furnished or made available by the entity operating the system to provide sufficient funds at all times during the term of the contract, together with other funds available to the authority for such purposes, to pay all amounts due from time to time under such contract and to provide a margin of safety for such payment. The authority may covenant with the entity to establish and maintain fees, rates and charges at such levels during the term of the contract for such purposes.

Such fees, rates and charges shall not apply to garbage and refuse generated, purchased or utilized by any enterprise located in the service area and engaged in the business of manufacturing, mining, processing, refining or conversion, which is not disposed at or through such system.

The rates, fees and charges may be imposed upon the owners, tenants or occupants of each occupied lot or parcel of land which the authority determines (with the concurrence at the time of such determination of the local government in which such parcel is located) is in the service area, or portion thereof, of the system for which the authority has contracted, whether or not garbage and refuse generated from such parcel are actually delivered to such system.

The rates, fees and charges shall be fixed in accordance with the procedures set forth in the fourth paragraph of § 15.1-1260. Such rates, fees and charges may be allocated among the owners, tenants or occupants of each lot or parcel of land which the authority determines is in the service area, or portion thereof, of the system for which the authority has contracted. Such allocation may be based upon:

1. Waste generation estimates, the average number of persons residing, working in or otherwise connected with such premises, the type and character of such premises or upon any combination of the foregoing factors, or

2. The amount of garbage and refuse delivered to such system, or

3. ~~The assessed value of such parcels, or~~

~~4.~~ A combination of the foregoing.

There shall be a lien on real estate for the amount of such fees, rates and charges as provided in § 15.1-1263. The authority is empowered by resolution or other lawful action to enforce the payment of the lien by means of the actions described in § 15.1-1262.

The power to establish such fees, rates and charges shall be in addition to any other powers granted hereunder and such fees, rates and charges shall not be subject to the jurisdiction of any commission, authority or other unit of government. The entity contracting with the authority, except to the extent rights herein given may be restricted by the contract, either at law or in equity, by suit, mandamus or other proceedings, may protect and enforce any and all rights granted under such contract and may force and compel the performance of all duties required by this chapter or by such contract to be performed by the authority or by any officer thereof, including without limitation the fixing, charging and collecting of rates, fees and charges in accordance with this chapter and such contract.

Such contract, with the irrevocable consent of the entity, may be made directly with the trustee for indebtedness issued to finance such system and provide for payment directly to such trustee. The authority may pledge fees, rates and charges made in respect of the contract with the entity and such pledge shall be valid and binding from the time when it is made. Fees, rates and charges so pledged and thereafter received by the authority shall immediately be subject to the lien of such pledge without any physical delivery or further act and the lien of such pledge shall be valid and binding against all parties having claims of any kind, in tort, contract or otherwise irrespective of whether such parties have notice thereof. Neither the contract nor any assignment thereof need be filed or recorded except in the records of the authority.

The requirements and restrictions of § 15.1-1250.01 shall not apply to any contract of the authority with respect to the system if the entity for such system will not collect garbage and refuse from the generators of the same, and there are no such facilities located in the area served by the authority.

A separate enterprise account shall be established to account for operations relating to any services in which any such authority may engage or for which it may contract pursuant to this section. This provision shall not be deemed to require the physical segregation of funds or to prevent the transfer of funds to or from such account.

2. The provisions of this act which amend § 15.1-1250.02 shall not apply, except as to the requirement of an enterprise account, to any such authority which prior to January 1, 1985, shall have entered into contracts or issued bonds pursuant to the provisions of this section in effect at the time such action was taken. Such contracts and bonds, including the refunding of any such bonds, shall be governed by the provisions of Chapter 762 of the 1984 Acts of Assembly.