

# Recent twists and turns in solid waste flow control

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## Carbone and flow control

In 1994, the U.S. Supreme Court issued a far-reaching and landmark legal opinion regarding solid waste flow control. In *C&A Carbone, Inc., et al., v. Town of Clarkstown, New York* (1994), the Court deemed a local flow control ordinance in New York unconstitutional because it violated the Commerce Clause of the U.S. Constitution by depriving competitors from outside the local market (including out-of-state competitors). The Town of Clarkstown had hired a private contractor to build a waste transfer facility and enacted an ordinance requiring that all solid waste generated within the Town be directed to the transfer facility (with tipping fees higher than the disposal costs of the private market). The Town had financed the transfer station and planned to be paid back from tipping fees generated there. The Supreme Court struck down the ordinance on the basis that solid waste was a commodity in commerce and that the Commerce Clause invalidates laws that discriminate against such commerce on the basis of its origin or its destination out-of-state. The Court found that flow control laws “deprive competitors, including out-of-state firms, of access to a local market.”<sup>1</sup> The impact of the Carbone decision was widespread.

At the time of the *Carbone* decision, most states and local solid waste agencies at that time had embarked on a three-decade-long planning process to ensure safe and effective solid waste disposal capacity for solid waste generated by its citizens. As such, a large number of new solid waste facilities needed to be constructed, while at the same time states and local communities had to grapple with the closure of more than 500 landfills with poor environmental records. Many of these landfills failed to meet increasingly stringent regulations, which were being imposed nationwide by the U.S. Environmental Protection Agency (EPA).

Further, during the late 1970s, many states adopted what has been termed the “state self-sufficiency policy” in which they refused to approve solid waste district plans from each county. The county plans proposed long-term out-of-state disposal arrangements, which the state believed to be unreliable. Instead, most states required in-district or in-state disposal as long-term solutions. As a consequence, local

agencies financed the construction of their solid waste facilities pursuant to their solid waste plans by issuing revenue bonds, which were assured by the guaranteed flow of waste to their publicly-owned facilities. Unfortunately, the legal uncertainty surrounding this state “self-sufficiency” policy and permissible government regulation of solid waste collection and disposal required changes to this state policy and development of a new waste flow control strategy.

As a consequence of *Carbone* and subsequent suits filed by haulers across the nation, local solid waste agencies across the country struggled to address this new legal landscape regarding solid waste flow control. Tipping fees in many locales fell literally overnight due to increased competition from out-of-state haulers. Those districts that contracted with private waste haulers modified their systems by re-bidding their waste contracts open to both in-state and out-of-state bidders. Some community-sponsored or supported facilities began charging market or below-market tipping fees to attract waste and subsidize the operating costs and debt service through use of other public funds (“Environmental Investment Charge”). Lawsuits were filed challenging the implementation of such charges.

Those communities that had expended public funds to construct solid waste facilities that relied on waste flow control faced a financial dilemma. For example, New Jersey was one state where this issue resulted in significant financial hardship on local solid waste agencies. This “stranded debt issue” ultimately required the State of New Jersey to step in and subsidize the debt payments of certain counties and forgive certain solid waste-related State loans in order to prevent default and potential difficulties for public agencies statewide that seek to raise capital. In 1998, New Jersey voters approved Ballot Question No. 3, which authorized the forgiveness of \$103 million in loans to seven counties and set aside \$50 million in bond money to help solid waste facilities avoid bankruptcy.

## The United Haulers Decision: A reversal of Carbone

In April 2007, the U.S. Supreme Court made a milestone decision regarding solid waste flow control in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. (2007). United Haulers sued the New York counties of Oneida and Herkimer claiming that county

<sup>1</sup> Carbone, at 386.

ordinances regulating the collection, processing, transfer and disposal of solid waste violated the Commerce Clause. The flow control regulations enacted by the two counties required all solid wastes and recyclables generated within Oneida and Herkimer Counties to be delivered to one of several waste processing facilities owned by the Oneida-Herkimer Solid Waste Management Authority. United Haulers had argued that these ordinances burden interstate commerce by requiring garbage delivery to an in-state facility, as this restriction unnecessarily prevents the use of facilities outside the counties and diminishes the interstate trade of waste and waste disposal services. United Haulers had submitted evidence that the flow control ordinances increased the cost of waste transport disposal from between \$37-55 per ton without flow control to \$86 per ton with flow control.

By a 6 to 3 decision, the Court ruled in favor of the two counties upholding solid waste flow ordinances that required waste haulers to deliver their trash to a publicly operated processing site. The justices disagreed with United Haulers, stating that the counties' flow control ordinances, "which treat in-state private business interests exactly the same as out-of-state ones, do not discriminate against interstate commerce." In stark contrast to the previous *Carbone* decision, a majority of the justices argued that this case was different because it dealt with a publicly-owned solid waste facility, which benefits the local "government's important responsibilities include protecting the health, safety, and welfare of its citizens."

The precise scope and impact of the Supreme Court's recent decision is unclear at the present time. Since the decision was announced, a few counties and municipalities have begun adopting solid waste flow ordinances. Notwithstanding, the scope of the public sector exceptions in the *United Haulers* case and their application to specific factual circumstances involving solid waste management are expected to be further litigated in the federal courts.

### Rail-Based Transfer Stations: A way around flow control?

In recent years, rail-based transfer stations have been sited in many areas to receive and transport municipal solid waste. These developers have received approval from the Surface Transportation Board (STB). Congress created the STB in 1995, in an effort to create uniformity and consistency in the regulation of rail transportation. The STB has exclusive jurisdiction over railroad operations, and with that, the power. The STB has proposed exempting rail-based solid waste transfer activities from state and local permits. They have ruled that certain waste transloading activities taking place on or near railroad rights-of-way constitute "transportation by rail carrier," and are therefore exempt from state laws governing solid waste management.

Solid waste and state agencies have argued against the STB preemption as applied to trackside solid waste facilities because it removes critical controls that ensure that these operations are conducted in a manner that will protect the environment and public health and safety in all communities where they are located. For these reasons, these groups support measures to end the STB's authority to exempt railroad-related solid waste facilities.

As part of the recent large Wall Street "bailout bill" enacted by Congress, legislation was passed to close this loophole that allowed solid waste facilities to operate unregulated along rail lines. Title VI of the Clean Railroads Act of 2008 essentially ends the regulation of the STB in this context.

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