

Rockland County's Adoption of Flow Control Measures

Introduction

"Flow control" is a general term that refers to the ability of municipalities and their agencies to mandate — through laws and regulations — that all locally-generated solid waste be delivered to designated solid waste management facilities. Until the United States Supreme Court's recent decision in *United Haulers Association, Inc. et al v. Oneida-Herkimer Solid Waste Management Authority, et al.* (127 S.Ct. 1786 [2007]), the prevailing view was that all flow control measures were unconstitutional because they imposed an impermissible burden on interstate commerce. That view had been endorsed by the Supreme Court in *C&A Carbone, Inc. v. Town of Clarkstown* (511 U.S. 383 [1994]). In *United Haulers*, the Supreme Court held that it is in fact legally permissible for a local government to require that solid waste generated within the jurisdiction of a municipality be processed at a designated publicly-owned solid waste management facility.

In light of the *United Haulers* decision, the Rockland County Solid Waste Management Authority (the "Authority") led the effort for Rockland County's (the "County") adoption of its own flow control measures. To provide a better understanding behind the adoption of the flow control measures, this article summarizes flow control's recent legal history, its benefits to the public, and the Authority's efforts to enact the flow control measures.

Flow Control – Brief Legal History

Pursuant to the Commerce Clause of the United States Constitution, Congress has the power to regulate commerce among the several states. To ensure that the states do not impinge on the duties of Congress with respect to regulation of commerce, the judiciary created the "dormant" Commerce Clause, which invalidates laws that result in "differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter." (*Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 [1994]). Such discriminatory laws, typically "motivated by simple economic protectionism[,] are subject to a virtually per se rule of invalidity." (*Oregon Waste Systems*). As explained by the United States Supreme Court in *HP Hood & Sons, Inc. v. Dumond* (336 U.S. 525 [1949]), the dormant Commerce Clause seeks to ensure that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them." Given their perceived effect on the interstate marketplace, flow control measures — as had been in effect in the 1980s and early 1990s — were targeted for, among other things, dormant Commerce Clause challenges.

In the most notable dormant Commerce Clause challenge to flow control measures prior to the *United Haulers* decision, the United States Supreme Court held in *C&A Carbone, Inc. v. Town of Clarkstown* that flow control laws were unconstitutional because such laws imposed an

impermissible burden on interstate commerce. In *Carbone*, the Town of Clarkstown, New York, engaged a private contractor to build and operate a solid waste transfer station. To alleviate the cost of building the facility, the Town of Clarkstown and the contractor agreed that the contractor would own and operate the facility for five years. During that period the contractor could charge the haulers who delivered the waste to the facility a fee, commonly known as a tipping fee, and would be entitled to the revenue generated by those fees. To ensure the contractor recouped the cost of building the facility, the Town passed a flow control law that required all non-hazardous solid waste generated within the Town to be delivered to the transfer station for five years.

The Clarkstown flow control law prohibited haulers of solid waste from obtaining processing services from any vendor other than the local contractor selected by the town. Haulers could not deliver waste to out-of-state facilities even if such facilities had lower tipping fees. The Clarkstown flow control law therefore conferred an exclusive economic benefit on a local contractor by "depriv[ing] out-of-state businesses of access to a local market." (*Carbone*, 511 U.S. at 389). Based on these facts, the United States Supreme Court determined that the Clarkstown flow control law was invalid on the ground that "state and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." (*Carbone*, 511 U.S. at 394).

Because the 1994 *Carbone* decision was interpreted as supporting the proposition that all flow control measures were inherently unconstitutional, it effectively eliminated flow control measures for municipalities throughout the United States. Indeed, for the subsequent seven years following *Carbone*, municipalities steadfastly avoided enactment or enforcement of direct flow control measures. In 2001, however, the sweeping interpretation of *Carbone* was challenged. And, in 2007, it was ultimately refuted by the United States Supreme Court's decision in *United Haulers Association, Inc. et al v. Oneida-Herkimer Solid Waste Management Authority*.

In *United Haulers*, the counties of Oneida and Herkimer, New York each enacted flow control ordinances that authorized the counties to direct solid waste generated within the counties to designated solid waste management facilities. Unlike the town of Clarkstown in *Carbone*, however, Oneida and Herkimer counties only designated facilities that were owned by the Oneida-Herkimer Solid Waste Authority, which is a state-created public benefit corporation. As acknowledged by the Court, this was the "only salient difference" between the laws enacted by Oneida and Herkimer Counties and the flow control laws that were invalidated in *Carbone*. In the Court's estimation, however, this sole difference was "constitutionally significant." The Court held that because the Oneida-Herkimer flow control laws excluded all private entities to the benefit of a system of publicly-owned facilities, the laws did not result in differential treatment of in-state and out-of-state businesses because all private companies were treated in the same manner. *United Haulers*, therefore, supports the proposition that flow control measures that direct solid waste to publicly-owned solid waste management facilities do not violate the dormant Commerce Clause, and are constitutional notwithstanding the United States Supreme Court's decision in *Carbone*.

In light of the *United Haulers* decision, municipalities are once again free to explore flow control options. At the very least, the decision makes clear that flow control measures that direct solid waste to publicly-owned and operated solid waste management facilities will pass constitutional muster. The decision also appears to support the constitutionality of flow control measures that direct solid waste to publicly-owned, but privately-operated solid waste management facilities. Indeed, the decision arguably broadly stands for the proposition that laws that enable public entities to fulfill their public duties are constitutional — at least with respect to the dormant Commerce Clause. Accordingly, municipalities across the country are developing and implementing flow control measures in accordance with *United Haulers* to improve their solid waste management systems.

Benefits of Flow Control Measures

Aside from ensuring the financial viability of municipal solid waste management systems, flow control measures provide municipalities with greater control and oversight of the solid waste generated within their jurisdictions. Flow control measures therefore allow municipalities to better protect the health, safety, and welfare of their citizens. Indeed, by thoroughly regulating collection and disposal of solid waste through flow control measures, municipalities can ensure that solid waste is handled, and ultimately disposed of, in a safe and environmentally-sound manner. Flow control measures also serve to protect natural resources by allowing municipalities to designate disposal sites in specific areas that must meet certain environmental standards. Such measures additionally provide municipalities with sufficient revenue to pursue alternative technological solid waste disposal methods that would be otherwise unattractive to private entities due to their prohibitive costs.

Of the many laudable goals that may be achieved through the adoption and enforcement of flow control measures, an increased rate of recycling is perhaps the most significant, given current environmental concerns. By allowing municipalities to control and inspect all the solid waste generated within their jurisdictions, flow control measures permit municipalities to implement recycling programs that would otherwise be unmanageable. For example, flow control measures increase the rate of recycling by (1) creating incentives for citizens to recycle (flow control measures are often drafted to exempt from tipping fee requirements disposal of recyclable materials, thus encouraging citizens to separate their recyclables from their solid waste) and (2) allowing municipalities to better enforce their recycling laws by requiring all solid waste to be delivered to designated publicly-owned solid waste management facilities. Flow control measures and their resulting increased rate of recycling allow municipalities to better conserve their resources and protect the local environment.

The Authority's Successful Efforts to Adopt Flow Control Measures

Because of the numerous potential public benefits associated with flow control measures, and in light of their recently-confirmed constitutionality, the Authority set out to have flow control measures adopted in the County in accordance with the parameters set forth in *United*

Haulers. Spearheaded by Authority Chairman Christopher P. St. Lawrence, a task force consisting of members of the Authority, the New York State Department of Environmental Protection, the Rockland County Business Association, the Rockland County Legislature, the Rockland County Department of Health, and the County Executive's office explored the issues associated with adopting such measures. The task force carefully examined the County's solid waste management plan and compared it with the Oneida and Herkimer County solid waste management plans that were the subject of the *United Haulers* decision. The task force additionally reviewed the County's present and future solid waste management needs, and balanced those needs with the concerns of residents and private industries located within the County. After much deliberation and analysis, the task force recommended the adoption of County-wide flow control measures. As introduced by Hon. Ilan Schoenberger, Hon. VJ Pradhan, Hon. William L. Darden, Hon. Michael M. Grant, Hon. Patrick J. Moroney, Hon. Harriett D. Cornell, Hon. Connie L. Coker, Hon. Philip Soskin, Hon. Douglas Jobson, and Hon. John A. Murphy, the Rockland County Legislature enacted a local law on May 20, 2008 to add a County-wide flow control law to the Laws of Rockland County for implementation by the Authority.

The adopted law directs solid waste generated within the County to publicly-owned solid waste management facilities. With the concerns of both commercial entities and residents in mind, the task force drafted the flow control measures to allow for certain exemptions for landscapers and certain qualifying recycling programs. The flow control measures therefore aim to achieve a careful balance between the legitimate needs of the local private solid waste management industry and the important health, safety and environmental needs of the community. With the adoption of the County-wide flow control law, the Authority is well-positioned to ensure the safe and environmentally-sound future of the County's solid waste management system.

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