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FLOW CONTROL AFTER UNITED HAULERS: PRACTICAL SUGGESTIONS FOR PUBLIC SYSTEMS

The question of whether a state or local government should have the power to regulate the destination of solid waste collected within its boundaries has prompted scores of lawsuits over the past twenty years. So-called "flow control" laws adopted by counties, cities and other municipal bodies generally direct that waste collected by private haulers from residences, businesses, and institutions be delivered to a facility selected by the municipality, in order to ensure both proper disposal and financial security for the designated facility. Laws which direct waste to privately held facilities have been, and remain, constitutionally suspect. Laws which direct waste to public facilities however, pursuant to the recent decision of the United States Supreme Court in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority et al.* 127 S.Ct. 1786 (2007), now appear relatively safe from constitutional challenge.

Flow Control as a Solid Waste Management Tool

Flow Control is a legislative tool for both financial and solid waste planning purposes. Flow control laws were commonly adopted in the 1970's and 1980's as public agencies began the process of replacing old solid waste infrastructure, prodded by passage of the Resource Conservation and Recovery Act, 42 U.S.C § 6901 et seq., in 1976. New solid waste facilities were expensive, often the most significant capital expenditures made by many governments. Flow control laws were relied upon by government to shore up contractual commitments to new privately developed technology, such as waste-to-energy, to replace unlined landfills as means of disposal. It allowed local governments to assure a steady and reliable flow of waste to a new facility, and by charging fees for the disposal of that waste, to finance the facility through fees and revenue bonds, and not through general obligations or property taxes. It also allowed government to finance and build a variety of smaller waste management projects, such as recycling facilities, transfer stations and compost facilities, designed to work with landfills and waste-to-energy facilities in a comprehensive system. Flow control provided the enforcement power to direct different wastes to specialized facilities in a larger planned approach known as integrated waste management.

The language of flow control laws generally speaks in terms of local authority to limit competition, and many states granted local government the express power to enact flow control in order to insulate the laws from challenge under anti-trust laws. However dormant Commerce Clause challenges to flow control laws became more frequent after *City of Philadelphia v. New Jersey* 437 U.S. 617 (1978), although that case, as well as *Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), and *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93 (1994) dealt with local laws that were designed to keep foreign waste out of local facilities, rather than keeping local waste at home.

In 1994 the Supreme Court decided *C&A Carbone v. Town of Clarkstown* 511 U.S. 383, 114 S.Ct. 1677, invalidating a flow control law enacted by Clarkstown N.Y. Clarkstown's law was prompted by the closure of its landfill, but the solution proposed by the town was designed to minimize the government's financial and administrative involvement. The town solicited private companies to build and operate a transfer station on town property that would haul & dispose of at least 120,000 tons of local waste per year at an agreed upon fee. The town would guarantee the tonnage or pay the difference in revenue, and reserved the right to buy the new facility back after five years. But while the private firm operated the facility, the town would not collect the fees or assume the shipping and disposal liabilities. These would be handled by the contractor. The town's main job would be to enforce the flow control law that directed all local waste to the facility. If it succeeded in that, the town would have no financial or other burdens to bear.

The *Carbone* Court found that the law violated the dormant Commerce Clause because it favored a single local facility over all other competitors. It prohibited out-of-state firms from competing for Clarkstown's waste, and therefore discriminated against interstate commerce. The Court viewed the town's purpose in enacting the law as a financial one, and held that revenue-raising was not sufficient to justify discrimination against interstate commerce.

However, the decision did not resolve all questions about flow control, and it did not provide state and local governments with any guidance on how to go about providing waste services. To the contrary, much confusion, and fear of fiscal disorder arose in some public systems. One inference that could be drawn from the decision was that municipalities should retire from the waste business, leaving these services to the private sector, which was, by 1994, undergoing a major transformation.

Enforcement of RCRA inspired regulation through the 1980s and early 90s sharply reduced the number of active landfills in the U.S., while construction of new, mostly private facilities restored available capacity in large, regional landfills. Means of transporting waste greater distances was rapidly developed, and a model of vertical integration became a common business plan for private firms owning collection fleets, transfer stations and large regional landfills. These developments ushered in an era of merger and acquisition in the waste industry, and the number of independent haulers in the country began to fall as consolidation swept the industry.

Large, vertically integrated waste companies viewed flow control by local government as a threat to the business model. Under the banner of *Carbone*, flow control laws across the country were successfully challenged, and many more were repealed or left unenforced. Cases were sometimes brought by local haulers and private landfills, but as these suits became costly and prolonged, small plaintiffs were replaced by national firms, and by the industry trade association NSWMA.

Some municipalities, however, were not prepared to give up flow control. Public waste systems frequently relied upon revenue from tip fees paid on non-recyclable waste, and these fees also funded recycling, composting and other programs that could not generate revenues of their own. Loss of tip fee revenue put these programs in jeopardy. As a result, local governments began to defend flow control laws with arguments that attempted to distinguish their particular systems from *Carbone*, sometimes with significant success. From 1995 through 2001, federal circuit courts of appeals recognized at least three general exceptions to Carbone-based Commerce Clause challenges, sustaining local laws and waste systems.

In 1995, the Second Circuit sustained flow control schemes based upon public collection contracts with private haulers, and upheld the government's disposal decisions for the resulting waste as an exercise of market participation. *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272 (2d Cir. 1995) In 1997, the 8th Circuit upheld so-called "in-state flow control" where local waste could be directed to in-state facilities, so long as the door was left open for waste to travel out-of-state. *Ben Oehrleins and Sons and Daughter, Inc. v Hennepin County*, 115 F.3d 1372 (8th Cir. 1997) In 1995, the 3rd Circuit in *Harvey & Harvey Inc. v. County of Chester* 68 F.3d 788, joined by the 1st Circuit in 1999 in *Houlton Citizen's Coalition v. Town of Houlton* 175 F.3d 178, upheld flow control schemes which selected the designated facility through competitive bidding processes open to out of state participants. Despite these and other appellate decisions attempting to apply or distinguish *Carbone*, the Supreme Court declined to hear any case involving flow control until it granted certiorari in *United Haulers* in 2006.

The *United Haulers* Litigation

The litigation in *United Haulers* began in 1995, with a complaint that alleged simply that the flow control laws enacted by the municipal defendants were unconstitutional under *Carbone*. Oneida and Herkimer counties are located in central New York's Mohawk River valley, an area home to industry that grew up along the Erie Canal in the 19th century, as well as to agriculture throughout both counties and tourism in the Adirondack Park area of northern Herkimer. Solid waste disposal in the region was accomplished through the use of scores of small dump sites, many of which had been classified as inactive hazardous waste sites by 1986. All landfills in the region were slated for closure by the late 1980's, as none could meet new RCRA based regulations.

Following state mandates for re-organization, the counties adopted a regional waste strategy for the first time, and created a public authority charged with the planning,

financing, construction and operation of a modern integrated waste system. The core of Oneida-Herkimer's new system was to be source-separated recycling, and a new Materials Recovery Facility, together with transfer stations for non-recyclables were the first facilities constructed. The Authority began a 16 year process to site and build a new publicly owned and operated landfill, but in the meantime, it contracted with private landfills outside of the counties to haul away and dispose of waste that was not recycled.

Flow control, together with hauler licensing, was adopted to serve several purposes. It allowed the Authority to finance its programs on a revenue basis, as neither county government was financially able to assume responsibility for the debt associated with a new network of waste facilities, and both wished to insulate their property tax base from the costs associated with waste management. Flow control, in capturing all waste generated in the counties, also allowed the Authority to plan for new facilities, and to implement regulations directing recyclables to the MRF, green waste to a compost facility, and household hazardous wastes to a new facility designed to receive and recycle those materials. Haulers and generators in the area were charged a uniform tip fee on MSW, while recyclables were received for no charge. The object was to create economic incentives to maximize the amount of recyclables separated from other waste. As a result, the tip fee on non-recyclable waste was higher than rates in the newly emerging market for private transportation and disposal to out-of -region, and out-of-state landfills.

Four years after the counties adopted their flow control laws, and after the waste Authority had issued over $50 million in revenue bonds for construction of the first new waste facilities, the *Carbone* decision came down. One year later, in April 1995, an action was brought by six local haulers and an association requesting the federal district court to declare the flow control laws unconstitutional.

Modern jurisprudence under the so-called "dormant" aspect of the Commerce Clause will strike down state and local laws that discriminate or unduly burden the flow of interstate commerce. In very broadly stated terms, the Supreme Court has adopted two tests for the analysis of local laws under dormant Commerce Clause challenge. The first asks whether the laws intentionally discriminate against out-of-state interests in favor of local ones. If they do, they are considered "virtually per se" unconstitutional, and cannot be saved unless the municipality has no other alternative in order to serve a legitimate local purpose. *City of Philadelphia v. New Jersey* 437 U.S. 617 (1978). However, if the laws are found to be "even-handed" in their application to in-state and out-of-state interests, the second test asks whether they still may impose some incidental burden on interstate commerce, and if so, whether that burden out-weighs the benefits the laws provide to the public. This is the so-called "balancing test" of *Pike v. Bruce Church* 397 U.S. 137 (1970).

From a litigation standpoint, if a plaintiff can establish that the challenged laws discriminate against interstate commerce, the plaintiff virtually always wins. If the defendant can persuade the court to apply the *Pike* balance, the municipality has a good chance of winning. In *Carbone*, the Supreme Court found the Clarkstown laws to

discriminate against interstate commerce, while the dissent would have applied the *Pike* balance and found them constitutional.

In *United Haulers*, the plaintiffs immediately moved for summary judgment, which the Authority and the counties opposed, hoping to establish through discovery that the haulers were not treated differently from other haulers located in other states, and to build a record that established public benefits in recycling and overall waste planning that could not be achieved in other ways, and could be applied in their defense under either test. Discovery was stayed pending determination of the motion. The motion remained *subjudice* for the next five years.

In March 2000, the district court finally released its decision on the motion for summary judgment, ruling for the plaintiffs, declaring the laws unconstitutional and enjoining their enforcement. The Court found no distinction between Oneida-Herkimer's laws and Clarkstown's, and observed that it was a "foregone conclusion" that flow control laws were unconstitutional under *Carbone*. The Authority and the counties appealed.

By late 2000, when the appeal was argued before the Second Circuit Court of Appeals, it was clear from the decisions of several circuits that it was not a foregone conclusion that all flow control laws were unconstitutional. The counties and the Authority believed that their system could be upheld under two or three different theories. Because the region's waste had in fact been disposed of out-of-state for much of the past ten years, through competitive bids open to out-of-state competition, the 1st and 3rd circuit rules established in *Houlton and Harvey* seemed to operate in their favor. Because the geography of Oneida-Herkimer placed the counties over 200 miles from any state border, the 8th Circuit's "in-state" flow control exception to *Carbone* could theoretically be effective for the counties. But the primary argument advanced by the counties was that all private sector interests, both with and without the state, were treated exactly the same by the laws, the only beneficiary of the laws was the public system itself, and public systems were not comparable to private enterprise for Commerce Clause purposes.

In July 2001 the Court of Appeals reversed the District Court, ruled that the laws did not discriminate against interstate commerce, and remanded the case to the District Court for discovery and development of a record in order to apply the *Pike* balancing test. The core of the Second Circuit's ruling was the "public/private distinction." The Court held that flow control laws directing waste to public, as opposed to private waste facilities did not constitute discrimination against interstate commerce. In reaching this conclusion, the Court analyzed the differences between the majority and dissenting opinions in *Carbone*, finding that the majority and dissenting justices disagreed on *whether* the Clarkstown facility was public or private, and that the case did not address flow control to a public facility.

The next six years were taken up with discovery and the submission of expert reports, followed by cross motions for summary judgment. By this time the record established that the alleged injury to interstate commerce consisted only of a diminution

of the general private commerce in waste, caused by the operation of a local public monopoly. Plaintiffs had not alleged or proven any injury to a particular out-of-state entity, and it was conceded that all private actors were treated alike. At the same time, the counties submitted evidence of significant public benefits, not only in financing the public system, but in fulfilling the local solid waste management plan, in promoting recycling, and in the administration of all regulations governing waste. The summary judgment motions produced a Report and Recommendation in favor of the counties from the Magistrate Judge, and a decision from the District Court accepting the Report and Recommendation and dismissing the complaint.

A second appeal to the Second Circuit followed in 2005. The Court of Appeals affirmed, assuming that even if a general reduction in commerce could be viewed as a burden on interstate commerce under *Pike*, that impact was outweighed by the benefits provided by the laws.

The Supreme Court granted plaintiffs' petition for certiorari in September 2006. The Court had not heard any case related to flow control since the *Carbone* decision 12 years earlier. In 2006 however, a clear conflict among the circuits emerged with a decision by the 6th Circuit in *NSWMA v Davies County Kentucky* 434 F.3d 898 (2006) where the court expressly disagreed with the 2d Circuit's 2001 decision over the public/private distinction.

The Supreme Court's Decision

In April 2007, the Supreme Court, in an opinion written by chief Justice Roberts, joined by Justices Breyer, Souter, and Ginsberg, with separate concurrences by Justices Scalia and Thomas, affirmed the Second Circuit and recognized the public/private distinction. Justice Robert's opinion is unequivocal in resolving several long-running arguments over the role of local government in waste management.

First, laws favoring public facilities are clearly distinguished from those favoring private facilities for constitutional purposes. They are not "similarly situated" for purposes of comparative analysis, and they are entitled to greater deference.

> *[I]t does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism. As our local processing cases demonstrate, when a law favors in-state business over out-of-state competition, rigorous scrutiny is appropriate because the law is often the product of "simple economic protectionism."* [citationsomitted] *Laws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism.*

United Haulers 127 S.Ct. at 1795.

Reinforcing this theme, the Court observed that waste management is a "core function of local government in the United States" and that Congress recognized the

"vital role" played by local government in the federal scheme established by RCRA 42 U.S.C. § 6901(a)(4). 127 S.Ct. at 1796.

Second, courts should not interfere with legislative determinations about the services government should and should not provide.

> *The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition. . . It is not the office of the Commerce Clause to control the decision of the voters on whether government or the private sector should provide waste management services.*

127 S.Ct. at 1796

Third, flow control laws favoring public facilities do not discriminate against interstate commerce:

> *We hold 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" for purposes of the dormant Commerce Clause.*

127 S.Ct at 1797

Fourth, the *Pike* balance is the appropriate test, and in this regard, the Court did not recognize the petitioners' assertion that the removal of Oneida-Herkimer waste from the national marketplace was a cognizable burden on interstate commerce:

> *We find it unnecessary to decide whether the ordinances impose any incidental burden on interstate commerce because any arguable burden does not exceed the public benefits of the ordinances.*

127 S.Ct at 1797

Fifth, the Court identified three distinct benefits provided by flow control that are cognizable under *Pike*: i) revenue generation, which the court found not sufficient to justify a discriminatory law, but fully capable of off-setting an incidental burden; ii) health and safety benefits obtained through incentives for increased recycling and proper disposal of waste; and iii) enhanced ability to administer and enforce existing recycling laws and other waste regulations. 127 S.Ct. at 1798.

Finally, the Chief Justice closed with a harsh assessment of the arguments advanced by the petitioners, and a caution to other courts tempted to make social policy:

> *There is a common thread to these arguments: They are invitations to rigorously scrutinize economic legislation passed under the auspices of the police power. There was a time when this Court presumed to make such binding judgments for*

> *society, under the guise of interpreting the Due Process Clause.* See *Lochner v. New York,* 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905). *We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause.*

127 S.Ct at 1798.

The Future of Flow Control

It can be said that flow control is back in the municipal tool box for financing and organizing municipal waste services. It may not be appropriate for everyone, but it could be very useful for communities that have struggled to maintain recycling and other programs for lack of consistent budgetary support, or who face new challenges in upgrading or replacing existing infrastructure. The balance of this paper will discuss some considerations that communities considering flow control should bear in mind.

First, *United Haulers* did not overrule *Carbone.* Flow control to facilities owned by private firms is still suspect, and may well be found to violate the dormant Commerce Clause. However, cases such as *Ben Oerhleins, Harvey & Harvey,* and *Houlton* also remain good law, and systems favoring private facilities while allowing an "open door" for out-of-state disposal, or systems that select that private facility in an open competition may continue to rely on those decisions.

Nevertheless, reliance on the public/private distinction recognized in *United Haulers* may prove to have a broader application for public waste systems. It is perhaps too early to tell how the lower courts will interpret *United Haulers*, but it is important to note that the plaintiff in the *Daviess* case, after remand to the 6th circuit, elected to drop any further challenge to the Daviess County's flow control law. The private sector is digesting the import of *United Haulers* and it is not clear whether, and under what circumstances, private challenges to new flow control laws might be renewed.

United Haulers effect on the "vertical integration" business model common to most national waste companies is not necessarily catastrophic. Most communities that find flow control attractive will not be siting and building new landfill or other expensive disposal capacity. A more common use of flow control would be to direct local waste to public transfer stations, and then use the interstate disposal market to secure longer term, higher volume, lower cost contracts with private landfills, while using enhanced revenues to fund recycling and other programs. In these situations, national firms may lose the opportunity to profit from their own retail transfer operations, but this would be partially off-set by the opportunity to secure larger municipal contracts for transport and landfill operations.

For smaller haulers who do not also own landfills and transfer stations, flow control may be seen as a positive development. When flow control brings a uniform

series of disposal fees to a local collection market, it tends to level the playing field between large and small firms. Competition for collection accounts focuses more on service and less on overall price. In the Oneida-Herkimer region, over 35 commercial hauling companies, both large and small, are licensed to operate, and consumers have a wide choice of options in waste hauling. This situation can be contrasted with communities in New York's Hudson Valley, where no more than three or four firms offer service, following repeal of flow control and the merger or acquisition of most small haulers in the 1990's. In Oneida-Herkimer, ten local haulers filed an amicus brief with the Supreme Court, supporting the Authority's and the counties' position.

In adopting new flow control legislation, it is simple enough to say that a municipality that duplicates the Oneida-Herkimer system should be safe from constitutional challenge. Still, no two municipal systems are exactly alike, and every community will have its own unique series of concerns and potential problems in implementing a flow control law to support its waste system. Framed as questions, some suggestions are offered below.

Is a simple need to generate more revenue a sufficient "public benefit" to outweigh incidental burdens on interstate commerce?

The *United Haulers* Court held that it is, at least when measured against the incidental burdens raised by the plaintiffs in Oneida-Herkimer. In a sense, the Court granted the respondents more than they asked for on this point, because Oneida-Herkimer had argued that its revenue needs were inextricably linked to its overall waste program, which was defined by a comprehensive solid waste management plan. The counties' plan was adopted after a series of public hearings and approved by the state of New York, and it expressly described the role of flow control in achieving its goals. While the Roberts opinion referenced the planning provisions of RCRA in recognizing local government's "vital role" in waste management, it did not make planning a pre-requisite for flow control. While a municipality might adopt flow control for the stated purpose of simply raising new revenue, it would seem more prudent to place the flow control law in the context of the community's long-range plans and goals for waste management.

Should a facility (or system) which benefits from a flow control directive be wholly public, or can private contractors be used in some capacity?

Oneida-Herkimer's transfer stations employed private contractors to haul and dispose of MSW to private landfills for much of the period from 1992 through 2006. At the same time, private entities purchased recyclables from the Authority's facilities. These contractors were selected through competitive bidding, open to bidders from out-of-state. They were not authorized to accept fees from the general public, or conduct business unrelated to the municipal work they had been hired to do. They could be fired and replaced, and they had no ownership interest in the facilities where they worked. It seems likely that a court would consider a facility to be public, despite the use of private contracting service, where ownership is public, the fees collected go to the public

treasury, access to the facility is controlled by government, and the activities of the private entity are controlled by contract with the government.

Can flow control be used to direct waste to a facility that is owned partly by government, and partly by a private entity?

This is the "50-50 question" raised by Justice Roberts at oral argument in *United Haulers*. It was not answered in the opinion of the Chief Justice. It bears on the situation where a municipality wishes to employ an expensive technology, perhaps under patent owned by a private firm, but wishes the private firm to share in some of the risk of building and operating it. Waste-to-energy is an example. Many current waste to-energy contracts involve capital investment by both the government and the private operator of the facility. The contracts often provide that at the end of the agreement, either the government or the private operator will succeed to full ownership, or that one side or the other must buy their former partner out.

In *United Haulers* the answer to the fifty-fifty question, from the respondents' side, was "maybe, but it does not apply here." This does not provide much guidance for municipalities where the question does apply, but some contractual and business arrangements could be structured to help persuade a court that the facility is indeed "public" for purposes of Commerce Clause evaluation. Two precedents have addressed this question, both from the Second Circuit in 1995. In *USA Recycling v. Town of Babylon* 66 F.3d 1272 (2d Cir. 1995), and *SSC Corp. v. Town of Smithtown* 66 F.3d 502 (2d Cir. 1995), decided by the same panel on the same day, the Court found the Babylon facility to be public, and the Smithtown facility to be private, because language in their respective service agreements said so. Both facilities were built and operated by Ogden Martin (now Covanta Energy), but the Smithtown agreement contained a statement saying, essentially "the facility is owned by Ogden, and the towns are customers only." The distinction was relevant because the court upheld, on market participation grounds, flow control provisions in Babylon's contract with the firm collecting waste in a special commercial district, while striking Smithtown's flow control ordinance directing independent private haulers to its facility. The court also upheld Smithtown's contract provisions for its residential collection districts, allowing the town to continue to direct its contract haulers to the Ogden facility.

The *United Haulers* opinion does not rely upon the market participation doctrine, but *Babylon* and *Smithtown* suggest that the terms of the agreement made between the government and its private partner will influence how a court views the public or private nature of the designated facility. It could not hurt, therefore, to provide in the agreement an unequivocal statement that the facility is publicly owned, even if privately operated. Provision might be made for private ownership of the equipment placed in the facility by the private investor, or other contract or leasing provisions in order to protect the private investment.

More generally, public/private partnership arrangements should reserve to government the more important elements of control, especially control over the revenues

received by the facility, and the power to grant or deny access to the facility by haulers and other providers of waste. Care should be taken in authorizing the private partner to operate the facility as a merchant plant for any excess capacity that may exist. A court may be more inclined to consider a facility private if the operator exerts more control over how the facility conducts its business than the putative government owner.

Can a municipality employing flow control within its borders also market excess capacity in its facilities to generators and haulers located out of its jurisdiction?

This question was not addressed in *United Haulers*. The Oneida-Herkimer Authority was prohibited by law from importing waste from other jurisdictions, although it could accept recyclables from elsewhere. In any event, it did not do so, and the counties' laws had no impact on haulers or generators outside of the counties' borders. Other communities are not so restricted however, and may wish to consider enforcing flow control to provide basic support for the local solid waste program, and at the same time, to market capacity in the public landfill, waste-to-energy facility, or even transfer station, to other communities.

The answer may lie in federal and state laws governing fair trade, and not with the Commerce Clause. A local flow control law that is enforced within jurisdictional limits may not directly injure persons in other states, but a municipality's business practices in marketing its waste capacity elsewhere may cause problems. For example, it is not hard to envision a court finding a legal remedy to prohibit a municipality from using local flow control to balance its solid waste budget, and then offering additional capacity in its landfill to other persons in other waste markets at cut-rate prices designed to injure competitors in those markets. For Commerce Clause purposes, a municipality marketing excess capacity would be a market participant where it does business beyond its flow control jurisdiction, but it would also be bound by commercial law applicable to all competitors in the waste business in outside markets. Care should be taken in setting prices for out-of-jurisdiction waste, particularly where prices for foreign waste are lower than the prevailing market prices in those areas.

How does a municipality enforce flow control legislation?

Flow control presents some unique enforcement issues because the violation of the law arises when waste does not arrive at the designated facility. Enforcement is a question of finding out when waste was collected and where it went, if it did not go to the facility designated to receive it. A municipality will usually discover something is going on when tonnages drop to lower than expected levels, but this does not necessarily identify the culprit who is taking waste from the system, or exactly how much was taken away. The easy explanation from a suspected violator is that the waste was not generated in the first place.

These problems can be addressed in several ways. An enforcement staff will be necessary to track tonnages delivered and investigate instances where haulers fail to

arrive when expected, or when delivery patterns change abruptly. Trucks using the facility should be identified by number, and their delivery frequency should be tracked. Field investigators can observe trucks on their routes and follow them when they finish the route and travel to another facility to dump their loads. Reliance on field personnel can be lessened if the law contains rebuttable presumptions. For example the law may provide that it is a rebuttable presumption that placement of a commercial container at a stop is evidence that the owner of the container is providing service to that stop. It may also provide that emptying a container, coupled with proof of a failure to deliver waste to the designated facility within a 24 hour period is presumptive evidence that the waste was delivered to a non-designated facility.

The venue for prosecution is also important. Enforcement in local criminal or civil courts can be difficult, as flow control matters will join an already lengthy judicial calendar, and the court may not be familiar with the waste business or the significance of the case. A better alternative may be to establish an administrative hearing process, where the hearing officer is familiar with both the law and the waste system, and can expedite adjudications. Here due process concerns must be met, and an appellate procedure should be identified.

Enforcement of flow control laws against local haulers can turn into a game of cat and mouse when the hauler feels the rewards of breaking the law are sufficient to risk the penalties coming with detection and conviction. For this reason, it is often effective for the municipality to require haulers to be licensed in order to do business in the jurisdiction, and to require compliance with flow control as a condition of the license. This will allow the municipality to revoke the hauler's license as the ultimate penalty for non-compliance. Licensing also allows a municipality to require disclosure of relevant information kept by haulers for both enforcement and planning purposes, such as numbers of containers, vehicles, customers, tonnages, and other statistics.

The most effective enforcement measure is cooperation from the hauling industry. Municipalities should bring haulers into the process that creates the law, and they should be consulted on the level of fines, penalties, and license provisions. The industry should be afforded time to re-schedule their routes, and if necessary revise their rate schedules in advance of the effective date of the law. The most important concern to a hauler is the knowledge that the law will be enforced against all competitors as well as himself. In general, the large waste companies will comply with the law, or sue to overturn it. Small haulers may attempt to evade the law, especially in the early period after adoption. Consistent enforcement is the best answer, and for that reason, municipalities should be fully prepared to investigate and enforce as soon as the law is effective.

Conclusion

Twenty years ago, state and local governments, together with the private sector, undertook a major reform of the way solid waste is managed in the United States. Old, environmentally unsound facilities were closed, and replaced by new technologies in incineration, new designs in landfill construction, and new practices in recycling and

composting. Many of these changes were aided by flow control. With the *Carbone* decision in 1994, public construction of new facilities slowed, while reorganization of the private sector, and the construction of a national market in waste grew rapidly. Today, many municipal waste facilities built in the 1980's are reaching the end of their life cycles, and decisions will need to be made for the next generation of facilities. In this sense, the *United Haulers* decision is timely, as it restores to municipal planners an old but useful tool to construct the waste systems of the future.