

NAWTEC17-2343

ALTERNATIVE FINANCING FOR ENHANCED ENVIRONMENTAL PROTECTION: THE INTERSECTION OF WASTE-TO-ENERGY TECHNOLOGY AND SOLID WASTE FLOW CONTROL AUTHORITY

Scott M. DuBoff
Garvey Schubert Barer
Washington, D.C.

When local governments evaluate the environmental benefits and costs of alternatives for managing non-recyclable municipal solid waste, the relative costs of modern waste-to-energy (WTE) technology can be a significant stumbling block despite WTE technology's environmental benefits. Although the preceding point is an important economic reality that has constrained WTE development in the United States, fortunately there is a highly effective means – the use of municipal solid waste “flow control” (or “facility designation”) authority – to overcome WTE's perceived cost disadvantage.^[1] The relationship between flow control and WTE development, including significant encouragement for use of flow control as a result of the U.S. Supreme Court's recent decision in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786 (2007), is the focus of this paper, which will address the following topics:

Policy Basis for Flow Control – Absent government intervention, management of municipal solid waste will seek the lowest cost (i.e., short-term cost) and frequently less environmentally protective alternatives. Flow control can counter the tendency to choose alternatives with lower short-term costs and at the same time facilitate implementation of the environmentally-preferable waste management alternatives a local government selects, such as WTE technology and other aspects of “integrated waste management.”^[2]

Flow Control and the Courts – While the authority of a given local government to use flow control is grounded in state law, flow control also implicates

matters that arise under federal law, such as Commerce Clause issues, given the possibility that solid waste regulation in one state can affect commercial interests in solid waste management in another state. Although concerns regarding claims of impact on interstate commerce prompted a negative Supreme Court response to flow control in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), the Court's decision 13 years later in the *Oneida-Herkimer* case was in many ways just the opposite.

WTE's Correlation with Flow Control and Practical Guideposts – WTE development can be significantly advanced by the use of flow control. That conclusion is borne out by empirical data. The concluding portion of this paper addresses that topic as well as corollary issues, such as public-private collaboration for WTE development and other practical guideposts for implementing flow control ordinances.

A. The Economic and Public Policy Bases Underlying Flow Control

As the Supreme Court emphasized in the *Oneida-Herkimer* case, the core responsibilities of local government have long been recognized to include solid waste management. Acknowledgement of that local government responsibility is codified in the Resource Conservation and Recovery Act (RCRA), *see* 42 U.S.C. § 6901(a)(4) (“the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies”), as well as in the laws of essentially every state. Meeting that responsibility is not an easy task, however, and managing municipal solid waste in an

environmentally-protective and efficient manner is a complex responsibility that requires significant state and local government resources. The complexity of the task is compounded by the fact that the volume of municipal waste generated in the United States has increased by more than 50% since 1980, exceeding 254.1 million tons in 2007, *Municipal Solid Waste in the United States: 2007 Facts and Figures*, U.S. EPA (cited below as “2007 Facts and Figures”) (available at <http://www.epa.gov/osw/nonhaz/municipal/pubs/msw07-rpt.pdf>). The increasing national waste stream requires comprehensive planning by local government to address the broad range of public health, environmental and economic issues involved. For that reason, a principal RCRA objective is detailed state and local solid waste management planning, including emphasis on assuring capacity adequate to meet the affected communities’ “present and reasonably anticipated future needs.” 42 U.S.C. § 6941; *see also id.* §§ 6902(a)(1), 6942 and 6943. Such planning, which must consider the broad range of public health, environmental and economic issues involved, “present[s] . . . communities with serious financial, management, intergovernmental, and technical problems.” *See* 42 U.S.C. § 6901(a)(3).

Those factors (e.g., public health, the environment and economics) implicate a reality of solid waste management which may be referred to as “The Second Law of Garbage” – that is, in the absence of government intervention, management of municipal solid waste will generally default to the lowest cost (in terms of short-term costs) and frequently less environmentally sound alternatives. *See Facing America’s Trash: What Next For Municipal Solid Waste?* Office of Technology Assessment, 101st Cong., at 275 (Oct. 1989); *see also Agenda for Action* at 8 (describing the “First Law of Garbage” as “Everybody wants us to pick it up, and nobody wants us to put it down”). Not surprisingly, the environmentally advanced infrastructure that is necessary to counteract the “Second Law of Garbage” – of which WTE is a prime example – is often quite expensive and can present significant procurement challenges for local government. This is where flow control plays a particularly important role as a powerful antidote: by facilitating development of the infrastructure selected by the affected community as the best means to achieve its waste management goals, flow control reverses the dynamic in which short-term, less environmentally-sound waste management

alternatives had been encouraged. While the community’s choices may self-impose more short-term expense, the use of flow control is a highly cost effective and efficient means for the community to counteract the attraction of the lower short-term costs of environmentally less preferable alternatives.

Although critics of flow control might attempt to minimize its policy function as merely a convenient financing mechanism, such characterizations are not correct. To the contrary, flow control is integrally related to important public policies for protection of the environment and public health. The Supreme Court expressly recognized this point in *Oneida-Herkimer*. *See* 127 S.Ct. at 1798 (“[F]low control ordinances are more than financing tools.”); *id.* at 1796 (“Here the flow control ordinances enable the Counties to pursue particular policies with respect to the handling and treatment of waste generated in the Counties, while allocating the costs of those policies on the citizens and businesses according to the volume of waste they generate.”).

Similarly, state laws authorizing flow control focus on the broader public benefits that flow control can facilitate. For example, in Wisconsin a prerequisite to a municipality’s use of flow control is a finding that flow control “is in the best public interest,” which in turn requires a determination that the use of designated waste management facilities will, among other things, conserve energy and natural resources, lessen demand for solid waste disposal facilities, and ensure that alternatives to flow control “have been compiled, analyzed and considered.” Wis. Stat. § 287.13. Under Minnesota’s comparable statute, use of flow control requires the affected local government to prepare a plan demonstrating that flow control “will better serve to protect public health and safety” and is necessary to achieve local waste management plans and policies. Minn. Stat. § 115A.84, subd. 2. Similarly, in Maine “municipalities are expressly authorized to enact ordinances that control solid waste . . . delivery to a specific facility, when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes.” Me. Rev. Stat. Ann. Title 38, § 1304-B.2.^[3]

A closely related point is the fact that the waste management functions performed by local governments which rely on flow control will typically comprise, in addition to processing or disposal of non-

recyclable waste, environmentally-essential services such as recycling, household hazardous waste programs, yard waste collection, related educational programs and comprehensive planning. As noted above, this is referred to as “integrated waste management,” which involves the complementary use of various waste management practices, including reuse of products, recycling of materials, waste-to-energy combustion and landfilling. *Agenda for Action* at 16. Because several of these services “generally do not lend themselves to generation of their own revenues,” *Report to Congress on Flow Controls and Municipal Solid Waste*, U.S. EPA, EPA 530-R-95-008, at ES-11 (Mar. 1995) (cited below as “*Report to Congress on Flow Control*”) (see also *id.* at III-80), the affected local governments charge a “system” fee which, although imposed only on disposal of non-recyclable waste, supports the full array of integrated waste management services provided.

The collaborative relationship between integrated waste management and flow control was addressed in a key expert report in the *Oneida-Herkimer* case:

[T]hese [integrated waste management] programs are supported by the system charge on non-recyclable waste and are not structured to generate fee revenue, but to encourage greater separation and delivery of material[for recycling.] . . . [C]harging tipping fees for non-recyclable waste that support all waste system components, and not charging fees for delivery of recyclables . . . [or yard waste and household hazardous waste collection, educational programs, etc.], provides greater incentives not only for complying with recycling laws, but also for reductions in the generation of waste.

See *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, No. CV-95-0516 (N.D.N.Y.), Expert Report of Robert N. Stavins, Jan. 10, 2003, ¶¶42, 49. Thus, in addition to supporting environmentally beneficial programs that cannot generate their own revenues, see *Report to Congress on Flow Control, supra*, flow control also provides financial incentives for waste reduction and recycling that are not possible through other means, such as tax subsidies. The reason for this is because a tax subsidy cannot provide the same difference in relative costs that results when the price for disposing of waste is increased to the level necessary to support all aspects

of integrated waste management. *Id.*, ¶60; *Oneida-Herkimer*, 127 S.Ct. at 1798 (noting that flow control “create[s] enhanced incentives for recycling and proper disposal of other kinds of waste.”). Put another way, the incentive for waste reduction which results from a system fee that prices waste disposal “above marginal cost . . . could not be sustained in a private market in the absence of . . . flow control.” *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, No. CV-95-0516 (N.D.N.Y.), Deposition of Robert N. Stavins, Feb. 13, 2003, Tr. 197. Finally, it bears emphasis that use of a system fee to support integrated waste management programs has a particularly strong correlation with WTE facilities. See *Report to Congress on Flow Control* at III-57 (“[T]he financial community has confirmed as common practice that tipping fees at many WTE facilities . . . recover the costs of other integrated waste management activities”).

B. The Legal Context – Flow Control and the Courts

Despite its ample policy justification, flow control has been the subject of considerable litigation. Although the path flow control has followed in the courts, particularly the federal courts, has not been without its ups and downs, the recent trend has clearly been positive. Although a full discussion would go beyond the scope of this paper, several points should be addressed here.

Background. To begin, as noted above and as recognized in RCRA, most aspects of solid waste regulation are matters of state and local government responsibility, see 42 U.S.C. § 6901(a)(4), which sometimes leads to the question of why there has been significant federal court involvement in flow control. The answer relates to the Commerce Clause of the U.S. Constitution (Article I, § 8, clause 3). While the Commerce Clause is phrased as a grant of power to Congress (“Congress shall have Power . . . [t]o regulate Commerce . . . among the several States”) without a specific reference to any state or local restraint, it has long been interpreted as an implicit restraint on state and local authority to regulate matters that affect interstate commerce. This implied or unstated aspect of the Commerce Clause is at times referred to as the “dormant Commerce Clause.” Although legal scholarship is not of one mind on the subject, as a practical matter it would seem that Congress’s authority over matters of interstate commerce can only

be meaningful if there is a complementary limit on the scope of state and local authority to regulate commerce. What this means in practice is that where the nature of the subject matter requires uniform national regulation, it is off limits to state and local regulation. Conversely, where the subject does not command uniform national standards, state and local regulation is permissible as long as it neither (i) discriminates against nor (ii) unduly burdens interstate commerce.

The question that necessarily follows is how flow control relates to these constitutional issues. The answer lies in the fact that flow control, by requiring the use of certain designated waste management facilities, necessarily restricts the use of other facilities. That restriction prompts opponents to argue that flow control discriminates against non-designated facilities, which in turn constitutes discrimination against interstate commerce (assuming that the non-designated facilities are located in another state). Having said that, it also bears emphasis that what constitutes discrimination is not always easy to determine, and results can vary from case to case based on narrow factual differences. This variability has prompted the Supreme Court to acknowledge that the purpose of the Commerce Clause “has been stated more easily than its object has been attained, . . . and the Court’s understanding of the dormant Commerce Clause has taken some turns.” *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995).

The *Carbone* Case. With that brief “primer” on the dormant Commerce Clause, let’s turn to the 1994 *Carbone* decision. As noted above, *Carbone* is the earlier of two far-reaching Supreme Court decisions in flow control cases (the second case, of course, is the Court’s decision in the *Oneida-Herkimer* case in 2007). *Carbone* involved a transfer station that served the Town of Clarkstown but was owned and operated by a private company, Clarkstown Recycling, Inc. Public funds were not used to pay for construction or operation of the transfer station. Instead, to assure repayment of Clarkstown Recycling’s investment in the facility and related operating expense, the town guaranteed delivery of a specified quantity of waste to the transfer station for a five-year period; at the conclusion of the five-year term the town would have the opportunity to purchase the transfer station for a nominal amount. To meet its waste guarantee, the town adopted a flow control ordinance requiring

delivery to the transfer station of all nonhazardous solid waste from within the town.

A very unusual aspect of the *Carbone* case was the fact that in addition to directing the flow of *locally* generated waste, the flow control ordinance at issue attempted to regulate disposal of waste from outside of Clarkstown that had simply been processed at a transfer station located within the town (such as the *Carbone* transfer station) and which would otherwise have been disposed at a distant location far from Clarkstown. The *Carbone* entities’ objection to the extraterritorial aspect of the Clarkstown flow control ordinance was understandable – the public policies that underlie flow control do not justify a municipality’s use of flow control to require local processing or disposal of another community’s waste where such waste is merely being transported through the municipality in route to a disposal site in another jurisdiction. That, however, was the precise effect of the flow control ordinance at issue in *Carbone*. Moreover, it was the extraterritorial reach of Clarkstown’s flow control ordinance – and *not* the use of flow control with regard to locally-originating waste – for which petitioners C. & A. *Carbone, et al.*, sought Supreme Court review in the *Carbone* case.^[4] Nevertheless, the Supreme Court invalidated Clarkstown’s flow control ordinance as it applied to both out-of-jurisdiction waste as well as locally originating waste. The Court’s majority opinion concluded that the Clarkstown ordinance discriminated against interstate commerce in violation of the “dormant” Commerce Clause. In addition, the majority opinion suggested that flow control “hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility.” 511 U.S. at 392. The Court also suggested that Clarkstown had nondiscriminatory alternatives available to it, such as subsidizing the transfer station through the general tax base. *Id.* at 393-94.^[5]

The consequences confronting communities in the wake of the *Carbone* decision included steep declines in waste deliveries and resulting bond downgrades, termination of recycling and other environmentally-essential programs, increased upward pressure on tipping fees as the unavoidable fixed cost burden of waste management infrastructure was shared by fewer users, and increased taxes to offset declines in tipping fees. See *Hearing on Flow Control Laws and Proposals to Regulate the Interstate Transportation of Municipal Solid Waste Before the Senate Comm. on*

Environment and Public Works, 105th Cong. 77-980 (Mar. 18, 1997) (Testimony of Randy Johnson, Chair, Board of County Commissioners Hennepin County, Minnesota and President-Elect, National Association of Counties). *Carbone* also resulted in tax increases at the local and state levels; in one state alone, more than \$200,000,000 of tax revenue was diverted to fund local solid waste bond payment obligations that had previously been funded by flow control-based user fees. Brief of Amicus Curiae State of New Jersey at 2, *United Haulers Assoc., et al. v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (brief filed December 7, 2001), Supreme Court of the United States (No. 01-686) (“over \$200,000,000 has already been expended from the [New Jersey] State Treasury to prevent defaults on public debt obligations” due to the loss of flow control authority”).

Enter *Oneida-Herkimer* – Flow Control Reprised. The *Oneida-Herkimer* litigation had a long history, which began in 1995, not long after the Supreme Court decided the *Carbone* case. Proceeding at an unusually slow pace, the trial court (the United States District Court for the Northern District of New York) ruled about five years later and enjoined enforcement of the Oneida and Herkimer county flow control laws. The flow control laws at issue in *Oneida-Herkimer* differed in two significant ways from the *Carbone* case. First, unlike *Carbone*, the flow control laws of Oneida and Herkimer counties applied only to waste generated within the two counties. In addition, in contrast to the flow control law at issue in *Carbone*, which required use of a privately owned and operated transfer station, the flow control provisions at issue in *Oneida-Herkimer* required waste haulers to bring waste to a publicly owned waste management facility (which was privately operated when the *Oneida-Herkimer* litigation began and for several years thereafter). The district court attached no significance to those factual differences, however, and instead interpreted *Carbone* as categorically rejecting nearly all flow control laws. Oneida and Herkimer counties, together with the Oneida-Herkimer Solid Waste Management Authority, appealed the district court’s decision to the United States Court of Appeals for the Second Circuit.

In July 2001 the Second Circuit reversed the district court. *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 261 F.3d 245. The Second Circuit explained that Supreme Court precedent in cases where state and local laws are

challenged under the dormant Commerce Clause as discriminating against interstate commerce differentiates between laws that favor public, as opposed to private, facilities. *Id.* at 257 (“A municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to *publicly* owned facilities.”). The court distinguished the private facility at issue in *Carbone* on that basis, emphasizing that the “distinction is determinative.” *Id.* at 258. Although the Second Circuit’s 2001 decision resolved the key issue of discrimination, a remand to the district court was necessary to address the considerably narrower issue of whether the Oneida-Herkimer flow control ordinances, although they did not discriminate against interstate commerce, would nevertheless impose an “undue burden” on commerce.⁶¹ Following a lengthy remand to address the undue burden issue, the district court ruled in favor of Oneida and Herkimer counties, et al. Another appeal to the Second Circuit followed, and in February 2006 the appeals court ruled again for Oneida-Herkimer. 438 F.3d 150 (2d Cir. 2006). The waste industry requested Supreme Court review, and in September 2006, the Court agreed to hear the case.

On April 30, 2007, the Supreme Court decided *Oneida-Herkimer* with a six-justice majority upholding the Second Circuit’s judgments in favor of Oneida-Herkimer. 127 S.Ct. 1786. The Court ruled that the Oneida-Herkimer flow control ordinances neither discriminate against nor unduly burden interstate commerce. The Court’s decision validates the longstanding role of local government in solid waste management and echoes positions long advocated by local government in flow control litigation. An initial question addressed by the Court was whether its finding of discrimination and rejection of flow control in the *Carbone* case, which involved a privately-owned facility, controlled the outcome. The Court explained that the finding of discrimination in *Carbone* did not resolve the issues in *Oneida-Herkimer* because Supreme Court precedent in cases that involve private business interests, such as *Carbone*, does not apply to ordinances that favor local government. *Id.* at 1793-95.

The Court then turned to the merits of the case, ruling that the flow control ordinances at issue do not discriminate against interstate commerce. The Court’s principal theme in finding no discrimination was local government responsibility for solid waste management. As the Court explained, “[w]e should be particularly

hesitant to interfere with the Counties' efforts under the guise of the Commerce Clause because waste disposal is both typically and traditionally a local government function." *Id.* at 1796 (internal citation and quotation marks omitted); *see also id.* at 1795 ("But States and municipalities are not like private businesses – far from it. . . . [U]nlike private enterprise, government is vested with the responsibility of protecting the health, safety, and welfare of its citizens."). Another theme underlying the Court's finding of no discrimination was its finding that "[t]he most palpable harm imposed by the [flow control] ordinances – more expensive trash removal – is likely to fall upon the very people who voted for the laws," and "[t]here is no reason [for the courts] to step in and hand local businesses a victory they could not obtain through the political process." *Id.* at 1797.

Ruling that the Oneida and Herkimer county flow control laws do not discriminate against interstate commerce, the Court turned to the question of "undue burden." The Court concluded that any arguable burden that flow control places on commerce does not exceed the public benefits provided. The Court focused on "integrated waste management," which it described as the Counties' "integrated package of waste disposal services," explaining as follows:

[T]he ordinances are more than financing tools. They increase recycling in at least two ways, conferring significant health and environmental benefits upon the citizens of the Counties. First, they create enhanced incentives for recycling and proper disposal of other kinds of waste. Solid waste disposal is expensive in Oneida-Herkimer, but the Counties accept recyclables and many forms of hazardous waste for free, effectively encouraging their citizens to sort their own trash. Second, by requiring all waste to be deposited at Authority facilities, the Counties have markedly increased their ability to enforce recycling laws. If the haulers could take waste to any disposal site, achieving an equal level of enforcement would be much more costly, if not impossible. For these reasons, any arguable burden the ordinances impose on interstate commerce does not exceed their public benefits.

127 S.Ct. at 1798.

C. WTE's Correlation with Flow Control – Emerging Issues and Practical Guideposts

The important reprise *Oneida-Herkimer* provides for the use of flow control has significant implications for development of waste-to-energy facilities. This is borne out by the record.

WTE's Strong Correlation with Flow Control.

First, it bears emphasis that *Oneida-Herkimer* sets the stage for a significant and beneficial shift in the public policy and economic context for solid waste management and substantially enhances the ability of local governments to implement proactive integrated waste management programs of which waste-to-energy is a key component. By removing obstacles to the use of flow control, the financial and public policy drawbacks, as well as uncertainty and complexity, of other alternatives (e.g., tax subsidies – "economic flow control", intrastate-only flow control, etc.) are far less relevant.¹⁷ Moreover, while federal government policy continues to evolve, the U.S. Environmental Protection Agency (EPA) has long recognized the importance of waste combustion with energy recovery as a key component in the hierarchy of waste management alternatives, *see Agenda for Action* at 16; 54 Fed. Reg. 52209, 52245 (December 20, 1989) ("The EPA believes it is preferable to burn the combustible materials in [a municipal waste combustor] [rather] than to landfill them."), a position that EPA recently restated. *See 2007 Facts and Figures* at 11 ("EPA's integrated waste management hierarchy includes the following four components, listed in order of preference: [s]ource reduction . . . [r]ecycling . . . [c]ombustion with energy recovery [and] [d]isposal through landfilling."); *Agenda for Action* at 16 (same).

Given that context, the significant role that flow control has played in WTE facility development bears emphasis. This point is addressed in EPA's *Report to Congress on Flow Control*, which shows that 58% of WTE throughput was supported by flow control with another 31% supported through similar types of contractual arrangements. *Report to Congress on Flow Control* at III-52. As EPA explains, for the WTE market segment, "existing market conditions reflect a high use of flow controls and other mechanisms to guarantee waste flows particularly for larger capacity facilities." *Id.* at III-55. EPA further explains this point as follows:

Data indicate that WTEs supported by flow controls are more likely to have greater

throughput than WTEs not supported by flow controls. The association between capital costs of WTE facilities and use of flow controls is similarly strong. WTEs supported by flow controls generally have higher mean and median capital costs, regardless of facility type (mass burn, RDF, or modular). Facilities supported by neither flow controls nor contracts generally have lower capital costs. Because of the large capital costs, financing is important; the better the terms, the lower the resulting net operating costs, due to reduced debt service costs.

Id. at III-54 (internal citations omitted) *see also id.* at III-55 and III-56 (high debt service costs are a principal reason why “many WTE facilities rely on flow controls or long-term contracts: to guarantee enough waste to spread their fixed costs of debt service and lower their net costs per ton.”).

On the other hand, it should also be emphasized that although EPA’s *Report to Congress on Flow Control* shows a strong correlation between WTE development and the use of flow control, the report was published in March 1995, which was barely nine months after the *Carbone* decision, and based on data gathered in 1992-94 prior to the hard punch *Carbone* landed on flow control. While the slow pace of WTE development in the years following *Carbone* was in all likelihood the result of several factors, the constraint *Carbone* placed on local governments was quite significant and continued for nearly 13 years.^[8] Moreover, although *Oneida-Herkimer* limited *Carbone* to its facts and did not overrule the earlier decision, in the lead-up to the Supreme Court’s decision in *Oneida-Herkimer* it was by no means clear that the Court would agree with the Second Circuit’s interpretation limiting *Carbone* to cases involving privately owned waste management facilities. In that regard, a number of other federal courts had interpreted *Carbone* in the same manner as the district court in *Oneida-Herkimer* – as a broad prohibition on flow control that did not vary based on public versus private ownership. *See Nat’l Solid Wastes Mgmt Ass’n v. Daviess County*, 434 F.3d 898 (6th Cir. 2006); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 798 (3d Cir. 1995); *National Solid Wastes Mgmt. Ass’n v. Pine Belt Solid Waste Mgmt. Auth.*, 261 F. Supp.2d 644 (S.D. Miss. 2003), *rev’d in part, dismissed in part*, 389 F.3d 491 (5th Cir. 2004); *see also Municipal Solid Waste Flow Control Upheld in the Oneida-Herkimer Case – Will*

the Supreme Court Agree? S. DuBoff, *Municipal Lawyer*, Nov./Dec. 2001 at 13 (“Given the wide variety of financial arrangements used for development of public-purpose facilities, the differences between public and private ownership can often be blurred. Thus, whether *Carbone* intended the public versus private distinction that underlies *Oneida-Herkimer*, or whether the Supreme Court would adopt that distinction in a new case, remains to be seen.”). Put another way, even though *Oneida-Herkimer* did not overrule *Carbone*, *Oneida-Herkimer* represents a significant change in the status quo and legal landscape for the use of flow control, with considerable future benefit for integrated waste management and expanded development of WTE capacity.

Emerging Issues and Practical Guideposts.

While the stage is set for increased use of flow control to facilitate WTE development, several guideposts should be noted going forward.

Cross-Subsidies. At a conference sponsored by *Waste News* in February 2008, several speakers representing the private waste collection industry suggested that as a result of *Oneida-Herkimer*, local governments will use flow control to cross-subsidize other local government services which are unrelated to solid waste management. The Supreme Court’s dormant Commerce Clause jurisprudence suggests that an undue burden on interstate commerce can result where a state or local government diverts user fee revenue derived from one service to support unrelated government services or activities. To avoid that fate a user fee must reflect a fair approximation of the payer’s use of the facility or service for which the fee is imposed. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972).

Lawsuits claiming that government-imposed user fees constitute a cross-subsidy that unduly burdens commerce have generally been rejected by the courts. One of the reasons for the plaintiffs’ lack of success in such suits is because user fees are often imposed by general purpose governments, and absolute precision in allocating common costs (e.g., office space, other administrative overhead, etc.) between different governmental functions is often difficult (if not impossible). Such allocation issues are less likely to arise with a stand-alone special purpose authority, however, and a court is likely to conclude – in the case of both general purpose governments and special

purpose authorities – that a user fee is an undue burden under the Commerce Clause where there is a significant disparity between the level of the fee and the costs of the service (or services) the fee supports. See *Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 566 F.Supp. 2d 81 (D. Conn. 2008) (invalidating fee imposed on ferry passengers where record showed that a significant portion of the fee revenue – about 45% – supported expenditures that were unrelated to passenger ferry service). In short, cases like *Bridgeport and Port Jefferson Steamboat Co.* are relevant to local governments that use flow control and counsel against using tipping fee revenue to support governmental services that are unrelated to solid waste management.^[9]

Contract Clause Claims. Where a local government initiates use of flow control or resumes a prior use, an adversely affected waste company may attempt to raise a claim under the “Contract Clause” of the U.S. Constitution. See U.S. Const. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”). Such claims would focus, for example, on disposal agreements that predate initiation of flow control (a pending flow control suit involving such claims is *Escambia County, Florida v. Allied Waste*, Case No. 3:08-cv-88 (N.D. Florida)). Although an extended discussion is unnecessary here, Contract Clause claims are based on evidence showing (i) an ongoing contractual relationship (ii) that is diminished by a change in the law and (iii) the resulting impact is substantial. As explained in *Houlton Citizens’ Coalition v. Town of Houlton*, 175 F.3d 178, 191 (1st Cir. 1999), a flow control case that rejected a waste hauler’s Contract Clause claim, “even a state law that creates a substantial impairment does not transgress the Contract Clause as long as it is appropriate for, and necessary to, the accomplishment of a legitimate public purpose.”

It is important to note that although courts generally defer to the enacting government’s judgment regarding the need for regulatory measures that affect contractual rights, that is, the “legitimate public purpose” to which the *Houlton Citizens’ Coalition* case refers, such deference is much less likely where the affected government uses its regulatory power to modify its own contractual obligations. See *id.* at 191. In short, where a local government intends to initiate or resume use of flow control, it is important to be mindful of the interplay between flow control and related contractual obligations of the enacting

jurisdiction as well as the regulated entities’ contractual obligations with third parties.

Public Ownership and Private Operation. In two post-*Oneida-Herkimer* cases, plaintiffs representing private waste hauling and disposal interests have claimed that the Supreme Court’s decision only applies where a publicly-owned waste management facility is also operated by government employees.^[10] That contention is unsound.

In considering this point it should be noted that the record in *Oneida-Herkimer* shows that at least one of the *Oneida-Herkimer* authority’s publicly owned facilities – a transfer station – had been privately operated during the litigation (it later changed to public operation). That point was repeated throughout the waste hauler-petitioners’ briefs to the Supreme Court. For example, the waste haulers’ November 2006 opening brief explained as follows:

Under the Second Circuit’s decision, the validity of flow control turns entirely on the identity of the record title owner of the preferred facility. . . . If legal title to a facility is in the name of a private entity, a law requiring that waste be delivered to that facility is subject to the Court’s virtually *per se* rule of invalidity. If legal title to a facility is in the name of a public entity – *even if constructed and operated by a private entity* – the very same law would be evaluated under the more deferential *Pike* test.

No. 05-1345, Brief of Petitioners, *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, November 2006 at 25 (citing *Pike v. Bruce Church*, see n.6, *supra*). The waste hauler-petitioners’ recognition of the private operation aspects of the *Oneida-Herkimer* waste management system was repeated a number of times in their briefs to the Supreme Court. Thus, after noting that “there is no practical difference between the [Oneida-Herkimer] facilities and the facility involved in *Carbone*,” the waste haulers’ December 2006 reply brief explained that “[s]imilarly here, the designated transfer stations were constructed by *and are operated by a private company under contracts with the Authority.*” See No. 05-1345, Reply Brief of Petitioners, *United Haulers Assoc., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, December 2006 at 3.

At least equally important, this same point was recognized in the Second Circuit's decisions in *Oneida-Herkimer*, which the Supreme Court upheld in all respects. Thus, after noting that "Waste Management continues to operate the transfer station on behalf of [Oneida and Herkimer] Counties," 261 F.3d at 250, the Second Circuit explained that "the district court [which the Second Circuit reversed] erred in its Commerce Clause analysis by failing to recognize the *distinction between private and public ownership* of the favored facility" because "a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities." *Id.* at 257.

As a concluding point on this subtopic, it should be emphasized that nothing in the Supreme Court's opinion in *Oneida-Herkimer* suggests that a waste management facility which is publicly owned and licensed in the name of the public entity owner – and operated for the benefit of the same public entity and the community it serves – somehow loses its public status simply because the owner contracts with a private entity for operation of the facility.^[11] As the Court emphasized, "[i]t 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. It is at least equally true that the Commerce Clause does not dictate the extent to which a voter-selected public system for solid waste management can use private entities to assist in the public system's operation.

Local Government Consortia and Use of Flow Control. Finally, at times local governments will use flow control to direct waste to a facility owned by a separate local government entity. Such arrangements reflect the important benefits, including economies of scale, where local governments form multi-jurisdictional consortia or compacts to address responsibilities they share in common, such as solid waste management. EPA has long encouraged such intergovernmental solutions. See *The Solid Waste Dilemma: An Agenda for Action; Availability of a Draft Report and Announcement of Public Hearings*, 53 Fed. Reg. 36883, 36885 (September 22, 1988) (EPA "desires that local and State governments assume responsibility for the wastes generated within their jurisdictions," and important means for achieving that objective are "sub-state or multi-state regional solid

wastes management solutions, which EPA also encourages."). The *Oneida-Herkimer* case is an example: New York law authorized Oneida and Herkimer counties to exercise flow control by designating specific facilities for management of their respective communities' waste, and for that purpose the two counties designated facilities owned by a third entity, the Oneida-Herkimer Solid Waste Management Authority.

Conclusion

In sum, flow control reflects a commendable cost-internalizing policy by which local governments assume responsibility for management of the solid waste their citizens generate. Flow control neutralizes financial obstacles that can discourage WTE development and otherwise serves a very important role in facilitating WTE development and expansion.

REFERENCES

^[1] As the term implies, "flow control" is a mechanism that allows local governments to implement their choices for managing locally-generated municipal solid waste in an environmentally sound and fiscally responsible manner. A local government will "control the flow" of such waste by selecting a specific facility (or set of facilities) for processing, disposal, etc., of local waste. To effectuate its choice of facilities, the local government adopts an ordinance or regulation which "designates" the facilities and requires their use by waste haulers. Such regulatory measures are often referred to as "regulatory flow control" and are distinguished from non-regulatory (or "economic flow control") measures such as tax subsidization of waste management services. Generally speaking, "regulatory" and "economic" flow control have the same result – each causes waste to be delivered (due to either a legal requirement or an advantageous price) to the intended facility.

^[2] "Integrated waste management" refers to the complementary use of several waste management alternatives "to safely and effectively handle the municipal solid waste stream with the least adverse impact on human health and the environment." *The Solid Waste Dilemma: An Agenda for Action*, U.S. Environmental Protection Agency, EPA/530-SW-8-019, at 16 (Feb. 1989) (cited below as "Agenda for Action").

^[3] See also 53 Pa. Cons. Stat. § 4000.502(f) (as a prerequisite to use of flow control in Pennsylvania, a county's solid waste management plan must "[e]xplain in detail the reason for selecting such facility," "provide reasonable assurances that the county utilized a fair, open and

competitive process for selecting such facilities or programs from among alternatives which were suggested to the county,” and “[e]valuate [for the affected facility] the environmental, energy, life cycle cost, [and] the costs of transportation . . . as well as the [costs of] alternatives.”

^[4]No. 92-1402, Petitioners’ Reply Brief, *C&A Carbone, Inc., et al. v. Town of Clarkstown*, September 29, 1993 at 1 (“[T]he trash in this case comes from outside the regulating jurisdiction; it is *not* trash generated by local residents. . . . Thus, the local disposal of local trash simply is not at issue.”) (emphasis in original) (emphasis is added throughout this paper except where otherwise noted).

^[5]As noted above, the overreaching nature of Clarkstown’s flow control law was the apparent reason for the Supreme Court’s decision to hear Carbone’s appeal. This brings to mind Justice Oliver Wendell Holmes’ admonition that “hard cases make bad law.” See *N. Secs. Co. v. United States*, 193 U.S. 197, 400-01 (1906) (Holmes, J., dissenting).

^[6]In addition to overcoming claims that state and local laws and regulations discriminate against interstate commerce, such as the claims in *Carbone* and *Oneida-Herkimer*, state and local laws challenged under the dormant Commerce Clause must also pass muster under the two-part test of *Pike v. Bruce Church*, 397 U.S. 137 (1970): (i) whether the state or local requirement poses an “undue” – as opposed to merely “incidental” – burden on interstate commerce relative to the burden it imposes on intrastate commerce; and (ii) whether the resulting burden, if any, on interstate commerce is justified based on the local benefits provided. In comparison to the rigid “per se discrimination” standard underlying *Carbone*, the “undue burden” standard is more pragmatic and flexible; it considers a range of factors and is likely to be more advantageous for the proponent of a state or local regulatory measure challenged under the dormant Commerce Clause.

^[7]For example, public policy generally disfavors tax subsidization of solid waste management services, which is the typical form of “economic flow control.” See *Variable Rates In Solid Waste: Handbook For Solid Waste Officials*, U.S. EPA, EPA/530-SW-90-084A, Vol. I–Exec. Summ. 2 (Sept. 1990) (discouraging use of local taxes, such as property taxes, to support solid waste management services because it fails to give “residents *any* incentive to reduce their waste” (emphasis in original)). Similarly, although the courts have ruled that “intrastate-only” flow control does not discriminate against interstate commerce, that alternative (which mandates use of designated facilities insofar as a hauler elects to dispose of waste within the state of origin, but applies no restrictions if the hauler elects out-of-state disposal) is not helpful where the enacting jurisdiction is

within economic transportation distance of out-of-state disposal facilities.

^[8]The Integrated Waste Services Association website shows only three WTE facilities with post-*Carbone* start-up dates (excluding Eielson Air Force Base in Alaska), each of which was in 1995, shortly after the *Carbone* decision. See http://www.wte.org/docs/IWSA_2007_Directory.xls.

^[9]Although discussion would be beyond the scope of this paper, it should also be noted that the laws of many (if not all) states require user fees to reasonably reflect the costs of the specific services for which the fees are imposed.

^[10]*C&A Carbone, Inc., et al. v. County of Rockland, et al.*, No. 7:08-cv-06459 (S.D. N.Y.); *Penn. Waste Inds. Assoc., et al. v. Delaware County Solid Waste Auth., et al.*, No. 2:08-cv-01170-LP (E.D. Pa.).

^[11]Other important factors in this regard include the identity of the permit holder for the facility, assignment of responsibility for collecting tipping fees, and the affected local government’s role in oversight concerning operation of the facility in question.