

APPENDIX F

SOLID WASTE FLOW CONTROL

What is Flow Control?

Flow control is a legal provision that allows governments to designate the places where municipal solid waste and recyclables are taken for processing, treatment, or disposal. Governments engage in flow control for *environmental* reasons (to direct waste or recyclables to legally permitted facilities) and for *economic* reasons (to direct waste or recyclables to facilities that collect fees or earn profits through which the government gains a benefit). A common avenue to implement flow control is through passage and enforcement of a *flow control ordinance*.

What is a Flow Control Ordinance?

A flow control ordinance mandates that waste generated within a certain area be sent to a specific facility for handling. By maximizing the amount of waste entering a facility, the local government or operator could spread costs over a larger base, thereby minimizing per ton costs. These ordinances proved especially helpful in communities which needed to collect tipping fees on a maximum of waste to repay bond debt.

Does Pierce County Flow Control?

Technically, no. Chapter 8.30 of the Pierce County Code requires that waste bound for disposal be handled at designated facilities. These facilities include solid waste landfills, transfer stations, some recycling centers, woodwaste processing facilities, composting facilities, and inert waste landfills.

Location is not a bar to designation. Pierce County's waste designation policies do not discriminate against in-county or out-of-state facilities.

Service level ordinances affecting single-family and multi-family residential recycling indicate a policy preference for processing recyclable materials within the County.

Pierce County has no ordinance or designation policy affecting non-residential or commercial recyclables.¹

Why Do We Have These Rules?

The 1989 Solid Waste Plan recommended waste designation to assist financing of *publicly-owned* facilities developed as part of an integrated waste management system.

As a *control* mechanism, the ordinance has proven unnecessary. Rather, designation serves as a method for tracking and publicizing which facilities handle which types of waste.²

Isn't Flow Control Illegal?

No. The United States Supreme Court, in 1994, invalidated a *Flow Control Ordinance* of Clarkstown, NY. The Town had

¹Court cases and Congressional action have invalidated flow control of commercial recyclables.

²An ordinance has not been necessary to compel waste to the disposal system in Pierce County. As of 1998, there are no other facilities in the regional marketplace willing or able to accept Pierce County waste at a lower cost to the consumer. Also, waste generated within the County system is collected by haulers affiliated with LRI or a hauler under contract with a city or town which has entered into an Interlocal Agreement with the County.

guaranteed a minimum waste flow to a private transfer station that a contractor agreed to build in the Town. To make good on its promises, the Town passed an ordinance to compel waste haulers to deliver all waste to the private transfer station. When a local hauler refused to comply with the ordinance and delivered waste to a lower cost facility outside Clarkstown, the Town sued. This case eventually reached the Supreme Court: *C & A Carbone Inc. v. Town of Clarkstown NY*.

The Supreme Court found that the Town's ordinance violated the Commerce Clause of the United States Constitution.³ The Court, however, did not invalidate all forms of flow control. Courts have upheld cases in which municipalities direct flow through contracts for collection services and where the local government is viewed as a "market participant" purchasing disposal services.

This ruling has severely impacted those communities which relied on flow control of waste to generate revenue to repay bonds or meet minimum waste guarantees with processing and disposal firms.

Subsequent federal court decisions have refined the *Carbone* decision by holding that flow control is not an undue burden on interstate commerce where the municipality is actually performing the solid waste collection with its own employees or via contract. Washington law gives Tacoma, as well as other cities and towns, clear authority to engage in solid waste collection; to exclude other providers of solid waste collection service from collecting municipal solid waste within municipal boundaries; and to determine where the waste that has been collected will be disposed (*Article 7, Section*

7 of the Washington Constitution and RCW 35.67.020.)

More recent decisions of the U.S. Court of Appeals for the Second Circuit support the authority of a municipality to require use of a particular disposal facility through its involvement in solid waste collection. In one case, *SSC Corp v. Town of Smithtown* (66F.2d 502, (1995)), the court confirmed that a town has authority to include in a contract for solid waste collection by a private company a provision requiring such a company to deliver such solid waste to a facility specified by the town. This contractual designation of a disposal site did not violate the Commerce Clause because in contracting for solid waste collection service the town acted as a market participant rather than a market regulator. In *USA Recycling v. Town of Babylon* (66 F.2d 1272 (1995), a town's decision to provide municipal collection, funded by taxes, through a single contractor constituted market regulation and therefore was subject to the limitations of the dormant Commerce Clause. Nevertheless, there was no Commerce Clause violation because the town's action did not discriminate against interstate commerce; rather the town had eliminated the market entirely.

Relevancy to the Solid Waste Plan

The Plan recognizes that Federal and State Law and the Pierce County Development Regulations establish minimum standards for the siting of solid waste facilities. These regulatory instruments work to ensure that wastes flow only to legally permitted facilities.

Design factors which are necessary to comply with those regulations have made all solid waste facilities -- from a rural drop box to recycling centers to a large landfill -- more expensive. Without a flow control ordinance to compel waste into the system, financing

³The Court ruled that the Ordinance had the effect of discriminating against in-state and out-of-state businesses.

new facilities is more risky, although not impossible.

The Plan update identifies four things Pierce County has done to reduce risk and maintain control over the waste system:

- provide the least expensive disposal system so that markets dictate flow;
- design facilities to reduce system costs and/or increase the value of recyclables;
- rely upon the private sector to provide processing capacity for recyclables;
- enter into voluntary agreements with waste haulers, other municipalities and large waste generators.

By taking these steps, pulling together the unincorporated County and 19 cities and towns, Pierce County has used “economies of scale” and “market clout” to:

- provide local residents and businesses the lowest per ton rates for the long-haul of waste in Western Washington;
- fund waste reduction and recycling education and public outreach programs;
- develop a nationally recognized yardwaste composting system;
- fulfill the County’s long-term legal and environmental liabilities at closed waste disposal sites; and
- fund household hazardous waste collection, education, and outreach programs.

As explained in the Plan, this on-going

partnership is more important than allaying fears brought on by the changing nature of flow control. While other counties in Washington State have been in Olympia lobbying for *new taxing and funding authorities* to finance waste management systems, Pierce County continues to rely on a share of the tipping fee that has not increased since 1991, despite declining tonnage, increased population, and inflation.

Pierce County Solid Waste Division, 8/98