

FLOW CONTROL UPDATE 2013

NEW YORK STATE ASSOCIATION FOR SOLID WASTE
MANAGEMENT

High Peaks Resort

Lake Placid, N.Y.

September 30, 2013

Michael J. Cahill

Germano & Cahill, PC

Holbrook N.Y.

mjc@germanocahill.com

FOUR CASES in 2013

- C&A CARBONE v. ROCKLAND CTY, NY
 - Motions Pending
- NSWMA V. CITY OF DALLAS, TX
 - Settled
- SANDLANDS C&D V. COUNTY OF HORRY, SC
 - On appeal to 4th Circuit
- JWJ INDUSTRIES v. COUNTY OF OSWEGO, NY
 - Affirmed by 2d Circuit

OLD ISSUES ON FLOW CONTROL

- Carbone Says Flow Control To A Private Facility Discriminates Against Interstate Commerce
- United Haulers Says Flow Control To A Public Facility Does Not Discriminate Against Interstate Commerce
- United Haulers Says Revenue And Other Benefits Of Flow Control To Public Facilities Outweigh Incidental Burdens On Interstate Commerce

NEW ISSUES ON FLOW CONTROL

- What's A "Public Facility"?
- When Can A Flow Control Law Impermissibly Interfere With A Pre-existing Contract?
- Does A State Permit Confer Any Protected Rights To Waste Or Revenue?
- When Are Definitions Of "Solid Waste" And "Recyclables" Too Vague To Be Enforced?

C&A CARBONE v. ROCKLAND CTY, NY

SDNY 08-cv-6459

- Challenge To Flow Control Law Directing Waste To Publicly Owned, But Privately Operated Facilities
- Will Construe *United Haulers* Language Describing Oneida-Herkimer's "Clearly Public" Facility
- Also Questions Flow Control of Commercial Recyclables
- Motions For Summary Judgment Sub-Judice

NSWMA V. CITY OF DALLAS

2012 WL 4893016

Oct. 16, 2012

- Challenge To Flow Control Law By Holders Of City Franchises
- Court Found Violation Of The Contract Clause
- Law Not Entitled To Deference Because It Changed Terms Of City's Own Contract
- Only Purpose To Raise Revenue
- Case Settled – Limited Application Elsewhere

SANDLANDS C&D v. COUNTY OF HORRY, SC

Unreported. Docket # 09-cv-1363 (DCSC)

Docket # 13-1134 Court of Appeals 4th Cir. (pending)

- Out-of -County Landfill Challenged Flow Control Law On Commerce Clause, Contract Clause, Takings, And Other Grounds.
- On Appeal, Issues Limited to Commerce Clause Claims.
- Purpose of Law Alleged to be Revenue Generation Only, Therefore Discriminates Against Interstate Commerce and Violates *Pike*

JWJ INDUSTRIES V. OSWEGO CTY. NY

2012 WL 5830708, Nov. 16, 2012

- Challenge By Local Transfer Station To Flow Control Law As On Vagueness, Equal Protection, Due Process And Unconstitutional Taking Grounds.
- Vagueness Challenge -That C&D Debris Was Recyclable Material - Dismissed
- Equal Protection Claim – That Source-Separation Not Distinguishable from Post-Collection Separation at Transfer Station – Dismissed
- Takings, Due Process Claims Dismissed For Failure To Pursue State Remedies.
- Affirmed by 2d Circuit, September 4, 2013. 2013 WL 4733977 (Summary Order).

Predictions

- Carbone v Rockland – County To Win First Round. Operation of Public System with Contractors Should Not Change Status. Appeal Likely.
- NSWMA v Dallas Contract Clause Ruling To Be Limited In Application.
- Horry County Likely to Be Affirmed.
- Takings, Vagueness Claims Not Likely To Be Pursued by Flow Control Challengers in Future.