

Institutional and Implementation Options for
Solid Waste Management for the
Capital Region Solid Waste Management Partnership

Flow Control and Special Purpose Authority/Agency Legislation

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I. Background

- A. As part of the new planning process, need to explore various structural options for solid waste management in the Capital Region
- B. Currently, the Partnership operates as a loosely organized voluntary “consortium” of municipalities throughout the Capital Region
 - i. City of Albany acts as lead
 - ii. Has contracts with “member” municipalities authorizing disposal at landfill at set rates
 - iii. IMA with municipalities to have a waste-shed wide recycling coordinator
 - iv. Each municipality has its own solid waste management program and recycling ordinance.
- C. Purpose today is to provide an overview of two different options for the partnership to consider: Flow Control legislation, and requesting the State Legislature to create a special purpose Authority or Agency to take over solid waste management.

II. Flow Control

- A. History
 - i. Commerce Clause of the US Constitution reserves to Congress the right to regulate interstate commerce
 - ii. City of Philadelphia v. NJ – Supreme Court Decision in 1978. NJ banned out of state waste, and reserved its landfills for in-state waste only. City of Philadelphia challenged on commerce clause grounds
 - a. Supreme Court found that solid waste was an “article of commerce”
 - b. NJ law discriminated against out of state interests with no sacrifice by NJ interests
 - iii. Pre-1994, many municipalities would contract with private entities to manage solid waste for their residents, and in order to ensure that there was adequate revenue to support financing of these private facilities, would adopt local laws stating that all

non-hazardous waste generated within the municipality was required to be processed at designated facilities.

iv. C&A Carbone v. Town of Clarkstown – 1994 Supreme Court Decision.

- a. Supreme Court found that such ordinances discriminated against interstate commerce by excluding out-of-state processors from the local market.
- b. Health, safety and financial concerns can be addressed with nondiscriminatory alternatives.
- c. Concurrence questioned whether the result would be different if directed to a publicly owned, rather than private, facility.

B. 1994-2007 developments in New York

- i. Municipalities operating solid waste management and disposal facilities saw a marked decrease in revenues at their facilities, which for the most part, were constructed as a result of changes to the ECL which mandated closure of unlined landfills, and creation of solid waste management planning units. As a result, there were several years of chaos in the municipal solid waste management area.
- ii. Towns of Babylon and Smithtown – created residential and commercial waste districts taking control/ownership over all solid waste generated within the district, bid out for the right to collect solid waste within those districts, and required as a condition in the contract with the successful bidders that the waste be disposed of at designated facilities
 - a. Second Circuit found that in these cases, the Towns were acting as “market participants” instead of “market regulators”, and that the burdens on interstate commerce where the Towns act as market participants was incidental.
 - b. Key here was that the Towns had the ability to create Town-wide districts – due to quirks in state law, other Towns (mainly those not on Long Island), Cities and Villages have limits imposed through the Town Law, General City Law, and Village Law. All Counties have the power to create county-wide districts. Municipalities are constrained in that they only have the powers granted to them by the state Constitution and the state legislature.
- iii. Counties considered creating county-wide districts
 - a. Logistics of billing made this difficult
 - b. Politics also plays in here – many viewed as tax increase if charges appeared on tax rolls
- iv. Alternative mechanisms
 - a. Creation of franchises – problem is that franchises can only be granted for municipal property, such as streets, highways

and public places. No express power granted under state law to franchise solid waste collection.

- b. Undertaking collection of solid waste as a municipal function
 - 1. Extreme change in historic solid waste collection mechanisms.
- c. Conditions in permits for right to collect and/or dispose of solid waste within the municipalities
 - 1. Local Laws such as Bethlehem, require permit for right to collect within the Town, require haulers to account for waste
 - 2. Onondaga County – required all haulers to obtain a permit, and a condition of the permit was to use OCRRA’s facility. Tip fee at OCRRA facility covers not just cost of disposal, but all solid waste disposal and recycling activities throughout the County. Note, though, that OCRRA’s recycling numbers were achieved, in part, because Commissioner Jorling imposed a tonnage limit on the OCRRA’s resource recovery facility, which ensured that OCRRA implemented mechanisms to make sure that the only solid waste handled at the RRF was that which could not be recycled. This has resulted in a very high tip fee for users within the County.
 - 3. Oneida-Herkimer solution – two-county authority by act of the state legislature, both counties adopted ordinances essentially stating that once solid waste and recyclables were set out on the curb for disposal, they had to be delivered to a facility designated by the Legislature or by the Authority pursuant to contract with the County. The authority legislation authorized the Authority to collect, process and dispose of solid waste generated in the Counties, and authorized the Counties to impose appropriate and reasonable limitations on competition by adopting local laws requiring that all solid waste to be delivered to specified facilities. The Authority entered into contracts with the Counties which allowed for haulers to pick up trash from the curb, but the Authority would take over management from there, and agreed to purchase and develop facilities for management of solid waste (including recyclables). The authority collected tipping fees to cover its operating and maintenance costs for the facilities which exceeded disposal costs on the open market, but provided for recycling and other costs.

If the Authority's tip fee was insufficient to cover the costs, the Counties agreed to make up the difference.

- C. 2007 – The Oneida/Herkimer challenge and Supreme Court decision
 - i. United Haulers Association challenged the Oneida/Herkimer solution as an impermissible burden on interstate commerce, arguing that since they could take their waste to out-of-authority (and out-of-state) facilities at a much lower tip fee, the system was unconstitutional.
 - ii. The Supreme Court found (550 U.S. 330) that because of the history associated with the system (closing unlined landfills) the benefits to the residents and the Counties (the tip fee covered recycling costs, *inter alia*), that Congress, through the Resource Conservation and Recovery Act explicitly stated that management of solid waste was primarily an issue of local concern, and most importantly, the fact that the designated facilities were publicly owned and all private actors were treated alike, there was no unconstitutional burden on interstate commerce.

III. Special Authority/Agency legislation

- A. Limits to municipal powers in the absence of special legislation
 - i. As noted above, the powers of municipalities are limited to those granted to them by the State Constitution and state legislation.
 - ii. Each level of municipal government is granted different powers.
 - iii. Sherman anti-trust considerations come into play
 - a. Municipalities may not exercise monopoly power in the absence of specific state legislation
 - b. Oneida-Herkimer Solid Waste Management Authority was granted an exemption from the Sherman anti-trust provisions through its legislation specifically authorizing the Counties to adopt local laws imposing reason limits on competition.
- B. Creation of an Authority or Agency
 - i. Requires an act of the State Legislature
 - ii. Requires a municipal home rule message from each municipality within the boundary of the authority
 - iii. Requires each municipality to agree to power sharing
 - a. Politically charged issue, which has defeated authority legislation in the past
 - iv. Would grant to the Authority the responsibility for managing all solid waste within the municipal boundaries of the specific authority
 - v. Typically grants powers to municipalities within the authority that are not otherwise authorized by the State Constitution or other acts of the state legislature (such as the municipal home

rule law, County Law, General City Law, Second Class Cities Law, Town Law or Village Law)

- vi. Facilitates the kind of “flow control” legislation upheld by the Supreme Court, but only if the Authority owns all of the facilities encompassed within the authority.
- vii. Dissolution not allowed if there are bonds outstanding.
- viii. Multi-municipality authorities – municipalities cannot unilaterally withdraw, as it requires an act of the state legislature.

IV. How such an Authority would work for the Capital District

A. Individual municipalities

- i. Because the partnership does not encompass an entire county, but rather individual municipalities across multiple counties, it would still be up to each municipality to adopt the kinds of local laws blessed by the Supreme Court in Oneida Herkimer.
- ii. Each municipality may be required to sell their facilities to the Authority, and cede local control of solid waste management within its municipal boundaries to the Authority
- iii. Static Authority – adding or subtracting individual municipalities would require additional state legislation
- iv. In one case, the Multi-Town Solid Waste Management Authority the legislation required that upon dissolution each municipality would be required to bear its share of the costs/debt outstanding (Public Authorities Law § 2040-c(5)).

B. Benefits of an Authority

- i. Provides a legislatively-blessed mechanism for municipalities to exert more control over the management of solid waste within its boundaries
- ii. Concomitantly, if municipalities adopt the appropriate legislation, and cede control to the authority, could result in increased funding for recycling and other environmentally beneficial options for solid waste management, not burdened by local politics
- iii. At least arguably, would relieve municipalities of the burden of having recycling coordinators and removing that line item from tax burdens of its municipal residents.

C. Disadvantages of an Authority

- i. Cedes local control of solid waste management to another layer of government
- ii. Potentially increases costs through this additional layer
- iii. Municipalities subject to shortfalls in Authority budget
- iv. Financing of facilities is complex and more costly because cannot finance facilities through general obligation bonds – to be credit-worthy, probably would need to do facility revenue bonds with the municipalities agreeing to guarantee any shortfall.