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LANDFILLS

MUNICIPAL LANDFILL ISSUES AND RESOLUTIONS

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INTRODUCTION

Stop! Our town has enough issues without talking about future landfill problems. The School Committee has a proposed FY 2009 budget that we can not meet. The police and fire contract negotiations are not going well. With the economy, we have a declining commercial base. Taxpayers are already complaining about sticker shock when they open their assessment disclosure notices. Getting the landfill permitted was a major community battle. So. . . the last thing we want to be talking about right now is what problems could be lurking at the landfill.

Indeed, the presence of a landfill in or near a municipality can raise a number of legal issues. Concerns range from groundwater pollution to odor. Usually, an immediate concern of a municipality relates to the benefits and corresponding financial burden. Will the municipality gain some type of financial benefit from the landfill? Another concern is often logistical. Will the municipality be able to address the numerous issues that may arise during the initial construction, expansion, and capping/closing at the landfill? A third concern is often the long term impact of the landfill. Will the landfill be safe 30 years from now? Have the long-term costs been addressed? This paper will address in overview these areas.

LANDFILL CONTRACTS CAN BE A SOURCE OF SIGNIFICANT REVENUE IF CONTRACTUAL AND ENVIRONMENTAL PROTECTIONS ARE IN PLACE

Landfill financial opportunities arise from a number of factors. For example, does the municipality own a landfill that a private entity is operating? If so, the municipality as an owner is most likely receiving a payment of some type from the operations. Alternatively, does the municipality own the land upon which a landfill is operated by a private entity? Again, some form of payment and "free" pick-up program may be in place. Or perhaps, is the municipality simply the "host" of a fully private landfill? Even under this circumstance the municipality may be receiving financial benefit in the form of a host payment.

Each of these examples (and there could be many more) illustrate an opportunity for the municipality to gain financially from a landfill. These "revenue opportunities" (for lack of a better phrase) are well known to municipalities. However, the critical question is whether that municipality is receiving the maximum potential benefit or indeed whether it is even receiving what it has been promised.[1] For those communities with landfill agreements,

[1] In one case, the municipality in which we served as counsel was able to obtain a substantial recovery of over $11,000,000 because of a disagreement over the characterization of certain of the "waste" at a landfill. In another matter, a settlement was reached with the operator which provided cash payments and services of over $6,000,000 for the municipality.

there may be significant monies that are not being collected, and will not be collected, without a thorough understanding of the contractual rights between the parties.

From siting to closure (and post-closure) care, the landfill contractual documents should be periodically examined. Who has the responsibility when new pollutants are discovered? Who bears the responsibility when regulations are changed? This is a continuing area of concern. Often times a landfill contract is negotiated and then set aside. Rarely is it scrutinized 5, 10 or 15 years after it is signed, unless there is a specific problem that comes to light. In the absence of that scrutiny, a municipality may seriously underestimate its rights.

Here is an example. A contract between a waste company and a municipality included a contract term requiring payment for "all waste disposed of at the landfill". In the late 1980's and early 1990's, various regulatory changes concerning landfills allowed landfill operators to make some operational changes. A primary change involved the use of "cover".

Traditionally, cover was clean soil that a landfill operator was obligated to place over the active face of the landfill on a daily basis to control and reduce the amount of birds, rodents, the omission of odors and the like. A minimum of six inches of cover may be required for this purpose. The amount of cover that needed to be purchased by a landfill operator to comply with this requirement was significant and constituted a large cost item for a landfill. The operator contended that the municipal contract did not directly address cover. This was understandable since cover did not generate any revenue, but instead, was a significant cost item for a landfill.

After execution of the municipality's contract, the state environmental regulatory body, the Department of Environmental Protection ("DEP") changed some of its regulations concerning cover. The most important change was that DEP regulations began to allow materials other than "clean" soil to be used as cover. Some of the materials which the DEP allowed to be used as cover included contaminated soil, auto shredder residue (ground up automobile parts), construction and demolition materials (ground into "fines"), ground up glass, etc. It would not be unusual for the types of waste the DEP allowed the landfill operator to use as cover to have been previously classified, both by the parties and DEP, as "waste."

This regulatory change saved the landfill operator millions of dollars in avoided expenses and also created a new source of operator revenue. Instead of paying for the material, the landfill operator was paid by customers to take the cover. Some might say the operator went into the "cover" business.

In this example, the Court ruled that the landfill operator remained obligated under the contract to compensate the municipality for waste, whether or not used as cover. This definitional debate over a contract that was over 10 years old triggered substantial payments to a municipality that well needed the revenue. Other issues may also emerge, such as when the landfill's owner and/or operator have gone out of business. Identifying sources of funding for these concerns can be an issue, notwithstanding the requirements concerning closure of a landfill, including the 30 year post-closure obligations of the owner or operator and the related financial assurance requirements. *See* 40 C.F.R. §258.61 and §258.72 (implementing the requirements of the Resource and Recovery Act, known as "RCRA").

HOST COMMUNITY AGREEMENTS CAN BE A MAJOR BENEFIT TO A MUNICIPALITY

According to the U.S. Environmental Protection Agency, the number of landfills has declined, but the average size has increased. *See*, *Municipal Solid Waste Generation, Recycling, and Disposal in the United States: Facts and Figures for 2006* (EPA–530-F-07-030, November 2007). The complexity of landfill design has similarly increased. Matters must be considered from water control to leachate management. Agreements involving landfills and municipalities can vary greatly. For the municipality, the primary financial concern is maximizing the return in whatever form that return takes. It is not uncommon for the compensation and volunteered impact payment to a community to involve a wide range of benefits, including: cash, free or reduced cost waste disposal, reimbursements for a variety of expenses, local improvements, etc. One study found that approximately 48% of its sample of communities throughout the country with landfills have host community agreements. *See*, Robin R. Jenkins et al, *Host Community Compensation and Municipal Solid Waste Landfills* 17 (EPA NCEE Working Paper No. 02-04, 2002), at p. 17. That same study noted that the benefits were far from uniform. *Id*. at p. 4.

The municipality should discuss its needs in advance of negotiating the host community agreement and create its "wish list" with the use of an engineering firm skilled in solid waste issues. The formation of a citizens advisory committee may help to address concerns and streamline the creation of the wish list. The host community agreement negotiations will be influenced depending on such matters as the size of the facility, its location, permitting issues, community support or opposition, waste streams, etc. It is important that attorneys for the municipality be involved early in this process. This will help to create a realistic wish list given the factors mentioned above and address other issues which may arise such as the legality of the compensation arrangement and open meeting law issues.

Some potential benefits that might be considered for the wish list include:

1. cash payments;
2. future upward adjustment of payments based upon an index (i.e. consumer price index);
3. payments designed to defray any municipal costs in addressing landfill problems in the future (i.e. additional safety training for fire departments);
4. pick-up and disposal of all municipal solid waste;
5. pick-up of recyclables;
6. upgrades to streets;
7. landscaping, sound or visual barriers;
8. household hazardous waste collection;
9. favorable renewal terms;
10. attorney fees in negotiating the agreement;
11. engineering fees.

The wish list can go on and on. Some of the items may be quite important, but not always costly. For example, one community added to its wish list the requirement that the entrance to the landfill be made more appealing with screening landscaping. This type of contractual term may not be particularly controversial and may be really appreciated by the municipality.

Certain terms that may be included in the host community agreement merit discussion. One of the most basic terms—who are the parties to the agreement—can be more complicated than it first appears. Waste companies sometimes operate with multiple subsidiaries, often times with very similar sounding names. By way of example, "Waste, Inc." may be a separate company from "Waste Co." Likewise, "Waste, Inc., a Delaware Corp." may be separate from "Waste, Inc., a California Corp."[2] You will want to be sure that the entity contracting with the municipality is a viable entity with significant assets. If the entity needs to be a separate subsidiary, you will probably want to get a guarantee from the parent company or consider other financial assurance. Do not assume that because the name sounds like the national waste company you are familiar with that it is that entity. You don't want to be surprised when you have to enforce an agreement and learn that the entity in the contract has limited assets (perhaps only the landfill itself).

Similarly, if there is a right for an assignment of the contract, it should be narrowly drawn. It is not uncommon for entities to merge or be purchased. You will want to address what happens if there is such an event. Does the landfill operator need to get the permission of the municipality to assign the contract? *See e.g., Davis v. Browning-Ferris, Inc.*, 1998 U.S. Dist. LEXIS 20134 (Pa. 1998). If there are financial assurances of performance, the new entity will need to meet those obligations.

[2] The writers by offering these examples in no manner make reference to any waste company. Any perceived reference is accidental as this is for example purposes only.

Any host agreement should contain a clear description of the tons per day allowed to be disposed at the landfill. Is it a specific tonnage per day, a specific tonnage per year, an average weekly tonnage, etc. Does the tonnage include or exclude "cover"? As described above, the handling of cover can be an important, and sometimes overlooked, aspect of the contract. This year in Pennsylvania there was litigation over whether certain types of material qualified as cover, which was important because of a statute requiring certain payments in that state. *See Seneca Landfill, Inc. v. Department of Environmental Protection*, 948 A.2d 916 (Pa. 2008).

Think about how the municipality will enforce the agreement. For example, if the host community agreement provides for "$2.00 per ton of waste disposed at the landfill", how will your client be sure it is getting paid the appropriate amount? Perhaps it is appropriate to ensure electronic withdrawals and provide penalties for late payments or accountings. Still, it bodes well for the business relationship to present a balanced contract with grace periods.

SUGGESTED HOST COMMUNITY AGREEMENT COMPONENTS TO MONITOR PERFORMANCE

1. monthly reports in electronic form from the landfill operator;
2. the municipality's specific right to audit the books and records;
3. the specific right of the municipality through its accountant and/or engineer to inspect the computer records at the landfill on reasonable notice throughout the contract;
4. an annual report that describes the tonnage and the remaining airspace and estimated tonnage remaining through the life of the landfill (this may also be good for future planning for the municipality);
5. the specific right to be on the landfill property to monitor the trucks coming into the gate and the right to observe weighing operations.

KEY PROVISIONS TO NEGOTIATE IN HOST COMMUNITY AGREEMENTS

There are some terms in a host community agreement that can be a challenge during the negotiations. For example, under what circumstances can payments to the municipality be suspended? The landfill operator may want to halt all payments if the permits to the landfill are suspended in some manner, thus halting the landfill's operation. If the permit suspension is caused by the actions of the landfill owner, however, it may not be appropriate to allow the payment

suspension. Likewise, if the cost of doing business at the landfill becomes uneconomical for the landfill operator, the municipality may still require full payment. Likewise, the force majeure term, if there is one, needs to be narrowly drawn for the same reasons.

Another provision that can be controversial is who should bear the burden of future regulatory changes. This may be identified in the host community agreement as follows:

> "Any increase in cost to the landfill operator in complying with any future change in federal and state laws applicable to the landfill shall be borne by the landfill operator."

The cost of future regulatory changes can be significant. This is an especially important provision to address since host community agreements may be for long periods of time. It may be several years before a regulatory change occurs and that change may cause the cost of the landfill operation to increase significantly. Also, it would not be unusual for both parties to admit that the regulatory change was not anticipated at the time the contract was executed. This may lead to a dispute as to who should bear the risk of the unanticipated event occurring. The municipality will not want that cost to fall to it.

Likewise, on a related front, the issue of indemnification can be controversial. The municipality will want to negotiate for as much indemnification as possible, whereas, the landfill operator will most likely want to limit indemnification. This can be especially difficult if the municipality previously operated the landfill and now a private landfill operator is taking it over. At a minimum, the municipality will want to obtain indemnification for any of the landfill operator's actions during its operations period. Unfortunately, differentiating an environmental problem based upon time periods may be difficult. Therefore, the best course for the municipality is to negotiate as much protection as possible.

There are numerous other important considerations, including insurance, amendments, test data, termination, etc. Any host community agreement should address a multitude of issues in order to adequately protect the municipality. Each of these provisions will need to be negotiated depending on the relative bargaining strengths of the parties and the ultimate desire to enter into the agreement.

IMPROVING THE CONSTRUCTION PROJECT

Whether it is during initial construction, an expansion, or a closing/capping, there are several time periods when a municipality is involved with landfill construction. *See e.g., American Empire Surplus Lines Insurance*

Co. v. Wightman Environmental, Inc., 2000 U.S. Dist. LEXIS 1046 (W.D. Mich. 2000). If the landfill is owned or operated by the municipality, then you should expect the same type of legal issues to arise as if it were any other construction project. The municipality will be concerned with dust, traffic and safety issues. Regulatory compliance often addresses ground water protection and the potential for pollution. Building a landfill can be compared to building any other structure—it can leak, it can become unstable, it can go over budget, it can be delayed, it can be poorly designed—in short, it can become a problem. During construction, you could compare the landfill quality control process to a three-legged stool. The stool would consist of a base (the landfill), supported by three legs: (1) the owner/operator and its engineer and/or designer, (2) the contractor and its sub-contractors, and (3) the regulatory body. *See e.g., Webster County Solid Waste Authority v. Brackenrich & Associates, Inc.*, 217 W. Va. 304 (2005). Each leg of the stool needs to be appropriately addressed.

The municipality may primarily deal with the landfill through its engineer. Since a municipality may not be knowledgeable in landfill issues, an engineer's role with a landfill on a municipality's behalf may be fairly extensive. One expert has described the thinking process and the difficulties engineers may encounter in their work. "Geotechnical engineering can be viewed as a process that consists of five stages: Investigation, Analysis, Prediction, Observation and Evaluation. Each stage of the G.E. Process requires the application of critical thinking skills." See, W. Allen Marr, Ph.D., P.E., *Geotechnical Engineering and Judgment in the Information Age* (2006). Dr. Marr continues, "Judgment is critical thinking. Judgment is reasoning. Judgment is arriving at a conclusion from masses of conflicting, contradictory, erroneous, irrelevant information." *Id*.

The scope of responsibility of the engineer needs to be clear. The municipality and the engineer will probably have a comprehensive contract describing their respective roles. A detailed description of the appropriate contract terms is outside the scope of this presentation; however, there are some suggestions that may be helpful.

First, communication is key. The engineer or an experienced member of the engineer's firm should be on-site during the construction and in regular contact with both the contractor and the regulatory body. Continual communication is one of the best means to avoid a problem in the first place. If the project faces delays and the municipality has not made provisions for alternative trash disposal, a real crisis may occur. A construction problem at a landfill can trigger significant damage to a municipality through delays, time spent identifying the problem, redesign or deconstruction of portions already built over the problem, additional construction to fix the problem, numerous sessions with regulators to address the problem, loss of use of the landfill for municipal waste, potential loss of any host fee, etc. Money spent on daily monitoring and communication is well spent. A related problem exists when the engineer's

design does not adequately address the landfill needs (e.g., when a component is omitted which would otherwise be necessary to meet regulatory requirements).

Second, record keeping is critical. If a problem develops, the potential for litigation will be directly influenced by the quality of the records kept. It is particularly important to know whether your client is appropriately documenting necessary items including inspections, acceptances of various phases and the creation of "as-builts". For example, is it clear who has the responsibility to prepare and keep all quality control and quality assurance documents for the regulators? Are some of those responsibilities left with the engineer and part with the contractor? If so, trouble may follow.

Third, resolving all disputes needs to be done as soon as possible. Letting open issues simmer simply makes it more difficult to ultimately resolve them, including the determination of various change orders. Getting the parties together as soon as possible to address problems may be difficult, but necessary.

WHAT ABOUT THE LONG TERM IMPACT OF THE LANDFILL?

What will happen 30 years from now? At least the EPA has noted with regard to landfill technology as of 1988, that landfills are anticipated to leak. *See*, *Federal Register*, Vol. 53, No. 168, Proposed Rules (August 30, 1988). Is the landfill safe?[3] Will the liner system maintain its integrity? Will the leachate collection system operate effectively? Will the high density polyethylene liners diminish leakage?

It is not easy to answer these questions. In part the questions are more readily addressed to the engineers and regulators. One regulator has stated that:

> "Innovative technologies may well be the future. We should consider performance based standards for these innovative technologies." David Ellis, Chief, Solid Waste Management Section, Southeast Region, Department of Environmental Protection, Massachusetts.

There are some things a municipality can do today to help with these questions. The municipality should negotiate the best contractual protection possible. This may entail host community agreements, agreements with engineers, agreements with contractors, and insurance contracts. The insurance may be expensive, may only cover off site issues, and may only apply as to new pollutants with historic pollution being excluded.[4]

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[3] In 2007, the U.S. Environmental Protection Agency announced the communities of Vega Baja and Florida, Puerto Rico would close existing landfills and make the landfills safer in the interim prior to closure. The landfills were closed because of ground water concerns. Lawsuits were also recently commenced because of groundwater pollution issues in Campbell County, Virginia.

[4] These are examples only. Each policy of insurance would need to be individually evaluated.

Also, the landfill operator will most likely conduct various testing in and around the landfill. By regulation or contract, these reports may need to be provided to the municipality. Reviewing and evaluating these environmental reports can assist in early identification of problems. This may not answer the above questions, but it is a step in the right direction.

Finally, by recognizing that a landfill requires special attention when dealing with its numerous legal issues, you will have taken a real step toward solving those future problems. Landfill evaluations cannot simply wait for the "right" time, as there is never really a right time.