









# Waste-To-Energy Public/Private Partnership Legal Issues



2<sup>nd</sup> Annual
Waste Conversion Congress West Coast

TOP RANKED
CHAMBERS
USA
2011

Stoel Rives LLP

RANKED IN CHAMBERS GLOBAL 2011

Stoel Rives LLP

Stoel Rives is pleased to announce that it has received a nomination for the prestigious 

USA Awards for Excellence in 
Energy Projects: Power including

Renewables, as well as national rankings for its 
Renewables and Alternative Energy practice from Chambers USA and Chambers Global.

Chambers and Partners annual rankings are a result of extensive independent research conducted among in-house counsel, corporate executives and leading attorneys.





Stoel Rives is pleased to announce that for the second year in a row it has received a *National First-Tier* ranking for its

Energy Law practice, an honor achieved by only a select number of law firms in the country.

The annual *U.S. News & World Report Best Lawyers* "*Best Law Firms*" rankings are based on a comprehensive survey of clients, attorneys and marketing professionals.

For the 2011-2012 rankings, the survey generated nearly 27,000 responses, including a response from every Fortune 100 company.











#### Kevin D. Johnson



Partner
Minneapolis, Minnesota
612-373-8803
kdjohnson@stoel.com



# Role of Municipalities in Solid Waste Management

- Cities, Counties, Special Purpose Districts/Authorities
- Owner/Operator
- Supplier
- Financing Assistance
- Off-Taker



## **Facility Owner/Operator**

- Transfer Stations
- Waste-to-Electricity or Steam
- Mass Burn
- Refuse Derived Fuel
- Organics Management
- Landfills
- Public Employees
- Contract Operations



### Supplier

- Public Collection
- Public Employees
- Hauler Contracts for Collection
- Hauler Delivery Contracts
- Subsidized Tipping Fees
- Waste "Flow Control"



#### Carbone Case

- Carbone: 1994 U.S. Supreme Court Decision
- Privately-Owned and Operated Transfer Station
- Flow Control (Designation) Ordinance was Per Se Violation of Dormant Commerce Clause; No Pike Balancing Test Necessary
- Prevented Flow of Solid Waste to Out-of-State Disposal Facilities; Interstate Impacts



#### Oneida – Herkimer Case

- 2007 U.S. Supreme Court Decision; 6-3 That Flow Control to <u>Public Facilities</u> is Not *Per Se* Violation of Dormant Commerce Clause
- Chief Justice Roberts: "Constitutionally Significant" Difference Between Publicly-Owned and Privately-Owned Facilities



#### Oneida – Herkimer Case

- Pike Balancing Test Outcome: "Any Arguable Burden Does Not Exceed the Public Benefit"
- Favorable Criteria:
  - Finances Integrated Program of Waste Management Services
  - Increases Recycling and Proper Household Hazardous Waste Management
- Key Issue is Public Ownership and Public Operation;
   Potential Future Cases



#### City of Dallas Flow Control Case

- Dallas Ordinance Adopted 9-6 on September 28, 2011
- Simple Ordinance Amendment Providing Fine of \$2,000 for Disposing of any Waste (except Recyclables) at Non-City Facilities
- Two Waste Management Landfills and One Republic Landfill Just Outside of Dallas
- Higher Tip Fees at City Facilities?



#### City of Dallas Flow Control Case

- Contracts Clause, not Commerce Clause, is Basis of Challenge
- Violated Contractual Rights of Hauler Franchisees
- Real Intent was to Generate Revenue



#### City of Dallas Flow Control Case

- Holding: Violation of Contracts Clause; Impaired Right Granted to Haulers in City Franchise Agreements (2007) to Take Waste to Facility of Their Choice
- City Could Have Potentially Overcome Through Valid Public Purposes, but Failed



### Flow Control Implementation

- State/Local Authority
- Commerce Clause
- Contracts Clause



# Market Participation for Waste Collection

- Smithtown and Babylon Cases (2nd Circuit 1995);
   U.S. Supreme Court Declined to Hear
- Government Regulatory Act to Assume Responsibility for Collection, Subject to Commerce Clause
- Government Then Becomes Market Participant and Contracts for Collection Service or Performs with Public Employees; Exempt from Commerce Clause
- Government Designates Facilities in Contract
- Court: Importance of Government Managing Its Liability



### **Financing**

- Tax Exempt Bonding Options
- Service Charges
- Property Based
- Hauler Collected



## Hauler-Collected Service Charge

- Shifts Some or All of Service Charge From Property Assessment to Collection Via Hauler Invoice
- Better Allocation of Service Charge Based on Amount of Waste Generated
- Upheld by Minnesota Supreme Court in WLSSD Case (1997)
- A "Model" for All Minnesota Communities



#### Off-Taker

- Purchaser of Fuel or Electricity
- Municipal Utilities
- Vehicle Fleets

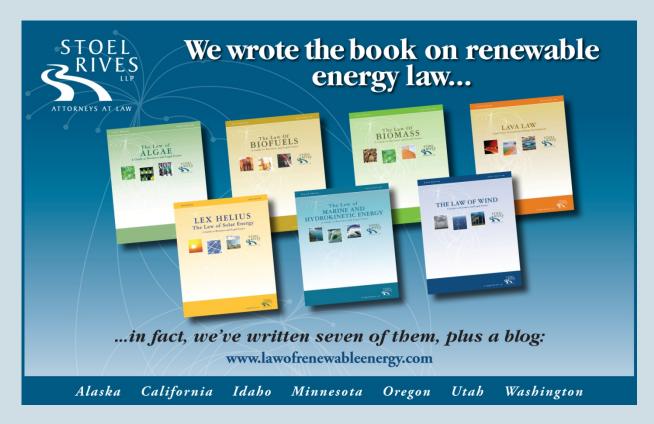


#### **Summary**

- Cities, Counties and Special Purpose
   Authorities/Districts Play a Key Role in MSW
   Collection and Management and are
   Important to Future of Renewable Energy
   Development
- Project Developers Have a Variety of Options to Pursue in Contracting or Partnering with Local Governments



# To order any of these books please contact Carlene Richardson at cvrichardson@stoel.com



To join the Stoel Rives Renewable Energy mailing list and ensure direct delivery of future alerts, go to www.stoel.com/subscribe.