



Waste-To-Energy Public/Private Partnership Legal Issues



2nd Annual
Waste Conversion Congress West Coast

November 28-29 2012, Renaissance Hotel, Long Beach, California



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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.



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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.



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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 Public Facilities 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



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