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Intergovernmental and Organizational Issues in Solid Waste Management

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Beginning in 1989, the General Assembly has enacted–and subsequently amended–numerous statutes that establish a comprehensive program for solid waste management. In essence, the management regime selected is that local governments, primarily counties, are responsible for the day-to-day collection and disposal of solid waste, but the counties' responsibilities are exercised under detailed state rules and with state oversight. The first part of this *Bulletin* examines the legal and organizational relations between counties and municipalities that this management regime entails. Specifically, it examines these relations in the context of planning, waste reduction, recycling, flow control, and trans-unit approval of landfills and other disposal facilities. The second part of the *Bulletin* examines cooperative arrangements for managing solid waste by two or more counties or municipalities or a combination of counties and municipalities.

I. Intergovernmental Issues

A. Planning for Solid Waste Management

One of the cornerstones of the 1989 legislation[1] is the requirement that each county submit a plan to the Department of Environment, Health, and Natural Resources (DEHNR) that demonstrates how solid waste generated in the county will be disposed of.[2] Each county must submit a plan, or an update of its plan, every two years. To obtain DEHNR approval, the plan must be consistent with the state's comprehensive solid waste management plan and describe how the county intends to meet the state's waste reduction goals.[3] If a county does not have an approved solid waste management plan in place, it faces one certain and two possible penalties: First, it is ineligible for grants from the Solid Waste Trust Fund;[4] second, DEHNR may withhold payment of any other DEHNR funds due the county and the municipalities therein[5] (which include loans and grants for water and wastewater facilities under the North Carolina Clean Water Revolving Loan and Grant Act of 1987);[6] and third, DEHNR may deny any permit application from the county and its municipalities for a landfill or incinerator.[7]

In preparing its plan, each county is to obtain the cooperation of the municipalities in the county. If a municipality operates the major waste disposal facility (landfill, incinerator, or other facility) in the county, that municipality—with the county's approval—may prepare the county plan.[8] If a municipality declines to participate in the preparation of the county plan, then it must prepare its own plan and submit it to DEHNR for approval.[9] There appears to be an assumption in the law that, having participated in the preparation of the plan, each municipality will do its part in implementing the plan. Subsequent sections of this *Bulletin* examine the question of what sort of leverage a county has to enforce the plan against a recalcitrant municipality.

1. 1989 N.C. Sess. Laws ch. 784.

2. N.C. GEN. STAT. § 130A-309.04(e) (Hereafter the General Statutes will be cited as G.S.). Although the Commission for Health Services has not yet adopted rules that give direction to counties regarding the preparation of solid waste management plans, guidance for plan preparation does appear in DIVISION OF SOLID WASTE MANAGEMENT, DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, *Local Government Guidance and Technical Assistance*, *in* III NORTH CAROLINA RECYCLING AND SOLID WASTE MANAGEMENT PLAN (Feb. 1992).

3. G.S. 130A-309.04(e) and -309.09A(b).

4. G.S. 130A-309.09C(g).

5. *Id.*

6. G.S. 159G.

7. G.S. 130A-294(a)(4).

8. G.S. 130A-309.04(e).

9. G.S. 130A-309.04(f).

B. Waste Reduction Goals and Recycling

One of the required elements of a county's solid waste management plan is that it demonstrate how the county will meet the state's waste reduction goals. These goals are, on a per capita basis, a reduction of the solid waste stream "primarily through source reduction, reuse, recycling, and composting" of 25 percent by June 30, 1993, and of 40 percent by June 30, 2001.[10] The baseline year against which the later years will be measured is July 1, 1991 through June 30, 1992, although under certain conditions a local government may use an earlier year.[11] Of the waste reduction techniques mentioned in the statute, the most important by far is recycling, and it is the technique given special emphasis in the law.

G.S. 130A-309.09B(a) requires each "designated local government" to initiate a recycling program by July 1, 1991. A designated local government is one that has a state permit to operate a solid waste management facility,[12] usually a sanitary landfill or incinerator. Since the great majority of these permits are held by counties, the legal responsibility for operating recycling programs in most cases falls to the counties. Counties and cities are exhorted to develop joint and cooperative recycling programs,[13] and in most instances the municipalities in a county will cooperate with the county in operating recycling programs designed to meet the state waste reduction goals. It is possible to hypothesize, however, that a municipality might take no action regarding a recycling program, might take inadequate action, or might take action that is inconsistent with the state waste reduction goals by contracting with a private disposal firm for the disposal of all waste, including recoverable materials. What measures are available to a county to encourage the municipality to operate an adequate program?

The first two situations—no action and inadequate action—will be examined first. Two statutory provisions are directly relevant here. The first one, G.S. 130A-309.09B(e), provides that if a municipality does not participate in a recycling program with the county, the county may require it to report on recycling efforts undertaken in the municipality so that the county can determine whether the state's waste reduction goals are being achieved. This statute does not state that this is the only measure available to the county, nor does it say what the county is to do if it determines from the information provided that the municipality is not meeting the waste reduction goals. The second relevant statute, G.S. 130A-309.09C(d), provides:

> Nothing in this Part [Part 2A of Chapter 130A] or in any special or local act or in any rule adopted by any agency shall be construed to limit the authority of a municipality to regulate the disposal of solid waste located within its boundaries or generated within its boundaries so long as a facility for any such disposal has been approved by the Department. . . .

Thus whatever actions the county takes to encourage adequate recycling by the municipality, it must not exercise any authority under Part 2A of Chapter 130A that could be seen as limiting the municipality's authority to regulate solid waste disposal. For example, the county could not direct a municipality to join a county-operated recycling program. What *may* the county do?

First, the county may exclude a recalcitrant municipality from its solid waste management plan, either from the initial plan or from the two-year update. Exclusion from the county plan places the burden on the municipality either to submit an acceptable plan to DEHNR or risk the penalties discussed in section A, above.[14] It seems unlikely that many municipalities will wish to assume this burden.

Second, because solid waste collected from a municipality without a recycling program will contain a higher percentage of recoverable materials than solid waste from those with recycling programs, the county may charge higher tipping fees for disposing of that waste at its landfill or incinerator.[15] Such a variable fee schedule will require the county to have in place some sort of inspection procedure so that it can back up the higher charges with a showing that the municipality's waste does in fact contain a higher percentage of recoverable materials. Any county disposal fees charged to municipalities must also comply with G.S. 153A-292.[16]

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10. G.S. 130A-309.04(c).

11. *See* G.S. 130A-309.04(c2).

12. G.S. 130A-290(a)(5).

13. G.S. 130A-309.09B(a) provides: "Counties and municipalities are encouraged to form cooperative arrangements for implementing recycling programs." G.S. 130A-309.09B(b) provides: "To the maximum extent practicable, units of local government should participate in the preparation and implementation of joint recycling and solid waste management programs, whether through joint agencies established pursuant to G.S. 153A-421, G.S. 160A-462 or any other means provided by law." And G.S. 130A-309.09B(e) provides: "A county or counties and the municipalities within the county's or counties' boundaries may jointly develop a recycling program, provided that the county and each municipality must enter into a written agreement to jointly develop a recycling program." The emphasis on joint and cooperative programs could hardly be stronger.

14. G.S. 130A-309.04(f).

15. G.S. 130A-309.08(d) authorizes counties operating solid waste management facilities to charge disposal fees that vary according to "the amount, characteristics, and form of recyclable materials present in the solid waste," and G.S. 130A-309.09A(a) specifically authorizes a county to charge a higher disposal fee to a municipality than is charged to other users if that higher charge is based on differences in recoverable materials.

16. These requirements are reviewed in detail in William A. Campbell, *Legal Issues in the Financing of Solid Waste Disposal Facilities*, LOCAL GOVERNMENT LAW BULLETIN NO. 46 (Institute of Government, Oct. 1992).

Third, under the authority granted by G.S. 153A-292(a) to regulate the kinds of waste disposed of at a county facility, the county could prohibit the disposal at its facility of waste containing some defined, unacceptable percentage of recoverable materials. This action, too, would require the county to initiate an inspection procedure.

The third situation posed above, that of a municipality that contracts for disposal with a private firm that requires no recycling, raises the fundamental question under the state's management scheme of what authority a county with a management plan has to require private firms to comply with the plan. This issue is of increasing importance as more and more counties and municipalities turn to large, privately owned, regional landfills for waste disposal. Four such landfills are currently operating in the state and two more are planned.[17] The county's enforcement tools in this situation are weak to nonexistent.

G.S. 130A-309.09D, the only statute explicitly dealing with privately owned facilities, provides:

> (a) The owner or operator of a privately owned municipal solid waste management facility shall operate the facility in a manner which is consistent with the State solid waste management plan and with the solid waste management plans that have been adopted by those units of local government served by the facility and approved by the Department.

One can contend under this statute that a private landfill that accepts unduly large amounts of recoverable materials from a municipality with an inadequate recycling program is not operating in a manner consistent with the state and county management plans.

What, however, can the county do about it? It can exclude the municipality from its plan, with the result that the municipality must prepare its own acceptable plan or suffer the penalties discussed above. This may be a sufficient threat to some municipalities. But to those that consider their solid waste disposal needs are being satisfactorily met by a favorable long-term contract with a private firm, it may not be. The county appears to have no sanctions available to use against the operator of the private landfill to discourage it from accepting recoverable materials. Even more serious, the state appears to have no sanctions available to use against the operator of the landfill—such as permit revocation—to coerce it into refusing to accept materials for disposal that are recyclable. Thus although the statute calls for private landfills to operate consistently with the state and county plans, it fails to provide enforcement sanctions that may be used against private facilities that—either directly or indirectly—cause a failure to meet the state's waste reduction goals.

17. The four existing regional landfills are in Cabarrus, Forsyth, Bertie, and Sampson counties; two more are planned for Montgomery and Anson counties. Stuart Leavenworth, *Garbage Glut Spawns Huge Landfills*, NEWS & OBSERVER (Raleigh) Nov. 21, 1993, at 1A and 12A.

C. Flow Control

Another Institute of Government publication, Special Series Number 12, presents an extensive analysis of flow control regulations and the legal challenges that have been mounted against them; readers who wish to pursue the subject should consult that publication.[18] This section of the *Bulletin* summarizes the status of flow control in North Carolina.

Flow control is a regulatory technique whereby a unit of local government requires that all solid waste generated in the unit be transferred to or disposed of at a particular solid waste management facility. The North Carolina statutes contain ample legal authority for a local government to adopt a flow control ordinance.[19] Before a county may adopt a flow control ordinance, DEHNR must designate the county as a geographic area for the management of solid waste.[20] Before a municipality in the county can be included in the county's flow-control ordinance, the municipality must join in the request for designation as a geographic area for management. Thus a municipality cannot be subjected to a county's flow-control ordinance without its consent. As a practical matter, a county contemplating the substantial investment that must be made in a new landfill or incinerator should obtain DEHNR designation that includes the municipalities before making any firm commitments for the new facility, so that countywide flow control can be imposed, if necessary.

Although the North Carolina statutes authorize the adoption of flow-control ordinances, their constitutionality is currently in doubt. In June of 1992, the United States District Court for the Western District of North Carolina, in Charlotte, held that Mecklenburg County's flow-control ordinance was unconstitutional because it violated the commerce clause of the United States Constitution.[21] Three other recent federal cases have held the same way.[22] These courts have found, in essence, that by directing the disposal of solid waste to a particular facility, flow-control ordinances discriminate against

18. ANNE KIM, LEGAL CHALLENGES TO SOLID-WASTE FLOW-CONTROL ORDINANCES (Institute of Government, Special Series No. 12, Dec. 1993).

19. G.S. 130A-294(5a) and (5b).

20. *Id.*

21. Container Corp. of Carolina v. Mecklenburg County, 92cv-154-MU (W.D.N.C. June 19, 1992).

22. Devito Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991); Waste Systems Corp. v. Martin County, 985 F.2d 1381 (8th Cir. 1993); and Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority, 814 F. Supp. 1566 (M.D. Ala. 1993).

the interstate commerce in such waste. Other courts, however, have reviewed the constitutionality of flow-control ordinances and found nothing impermissible.[23] One of the cases upholding the legality of a flow-control ordinance, *Town of Clarkstown v. C&A Carbone, Inc.*,[24] is of special interest because the United States Supreme Court has agreed to review it; a decision is expected in 1994.

D. Trans-Unit Approval of Sanitary Landfill Sites

G.S. 130A-294(a)(4)a provides that DEHNR may not issue a permit for a sanitary landfill unless the governing board of the city or county where the landfill is to be located gives its approval. Moreover, a permit for an existing landfill cannot be renewed or substantially amended without the approval of the host city or county. A "substantial amendment" is defined as[25]

1. an increase of 10 percent or more
   (a) in the population of the geographic area to be served by the landfill,
   (b) in the geographic area served by the landfill, or
   (c) in the quantity of waste disposed of in the landfill; or
2. a change in the categories of waste to be disposed of in the landfill; or
3. any other change the Commission for Health Services or DEHNR determines to be substantial.

The effect of this statute is to give a county or municipality that contains a potential site for a landfill to be owned or operated by another unit of government a veto over establishment of the landfill. This veto authority applies only to permits for sanitary landfills, not to permits for demolition landfills, incinerators, transfer stations, or other solid waste management facilities.

The constitutional infirmities of this statute as applied to private applicants for landfill permits have been reviewed elsewhere.[26] It is also possible, however, that the statute is unconstitutional as applied to local government applicants for landfill permits because it violates the due process clause of the Fourteenth Amendment to the United States Constitution. A land-use regulation, to withstand a due process challenge, must bear a rational relation to the public health, safety, morals, or general welfare, and it must not be arbitrary. In a case involving a West Virginia statute that authorized the director of the state's Department of Natural Resources to deny an application for a landfill permit because issuance of the permit would be "significantly adverse to the public sentiment of the area where the solid waste facility is or will be located," the United States Court of Appeals for the Fourth Circuit held the statute unconstitutional as bearing no significant relation to the promotion of the general welfare and therefore an arbitrary exercise of the police power.[27] The court said that the statute was an invitation to administrative decision making by "mob rule." Given the absence of any standards in G.S. 130A-294(a)4a, it appears in substance to be indistinguishable from the West Virginia statute declared unconstitutional.[28]

The above comments regarding the likely unconstitutionality of the basic statute apply as well to the 1993 amendment that defines a substantial amendment to a landfill permit as "any other change to the application for a permit or to the permit for a sanitary landfill that the Commission or the Department determines to be substantial."[29] There are no standards to guide the commission or department in making a determination of substantiality.

In 1981, several counties obtained local acts from the General Assembly that prohibited another unit of local government from acquiring real property in the county for any purpose without the permission of the board of county commissioners. Counties with these acts could use the granted authority to stop another governmental unit from acquiring property for a landfill or other solid waste management facility. These acts are a direct exercise by the General Assembly of its power to regulate local government and are constitutional. The counties that obtained veto authority by local act are Bladen,[30] Brunswick and Pender,[31] Columbus,[32] Sampson,[33] and Caswell, Franklin, Granville, Person, Vance, and Warren.[34]

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23. *See* Harvey & Harvey, Inc. v. Delaware Solid Waste Authority, 500 F. Supp. 1369 (D. Del. 1985) and J. Filiberto Sanitation, Inc. v. Dept. of Envtl. Protection, 857 F.2d 913 (3rd Cir. 1988).

24. 587 N.Y.S.2d 681 (N.Y. App. Div. 1992), *cert. granted*, 61 U.S.L.W. 3621 (May 24, 1993) No. 92-1402.

25. G.S. 130A-294(b1)(1).

26. *See* William A. Campbell, *Solid Waste Management: Local Government Exclusionary Policies*, 55 POPULAR GOVERNMENT 44, 45 (Institute of Government, Spring 1990).

27. Geo-Tech Reclamation Industries, Inc. v. Hamrick, 886 F.2d 662 (4th Cir. 1989).

28. Notwithstanding the Eleventh Amendment to the U.S. Constitution, suit may be brought in federal court to challenge the constitutionality of the action of a state official (in this case, the secretary of DEHNR) under a state statute. *See ex parte* Young, 209 U.S. 123 (1908) and Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).

29. G.S. 130A-294(b1)(1)b.

30. 1981 N.C. Sess. Laws ch. 134.

31. 1981 N.C. Sess. Laws ch. 283.

32. 1981 N.C. Sess. Laws ch. 270.

33. 1981 N.C. Sess. Laws ch. 459.

34. 1981 N.C. Sess. Laws ch. 941.

II. Cooperative Arrangements

Two statutory procedures are available to counties and municipalities that wish to enter into cooperative arrangements for managing solid waste: an interlocal agreement pursuant to Article 20, G.S. Chapter 160A; and a regional solid waste management authority pursuant to Article 22, G.S. Chapter 153A.[35]

A. Interlocal Agreement

An interlocal agreement is a flexible device by which two or more units of local government may jointly provide for one or more services for solid waste management. By way of examples, two municipalities could jointly operate a composting facility; a municipality could contract with the county for all collection, recycling, and disposal of solid waste; or two counties could jointly operate a landfill. The cooperating units may establish a joint agency—separate from any of the contracting units—to perform the services,[36] or the services may be undertaken without forming a joint agency.

The provisions of any interlocal agreement will of course vary depending on the kinds of services undertaken and the number of units of government involved. G.S. 160A-464, however, directs that in any interlocal government the following matters be addressed:[37]

1. Purpose of the agreement
2. Duration of the agreement
3. Nature of joint agency, if established
4. Manner of appointing personnel
5. Method of financing
6. Formula for ownership of real property
7. Methods for amending the agreement
8. Methods for terminating the agreement

B. Regional Solid Waste Management Authority

A regional solid waste management authority is a legal entity separate from the local governments that create it, and it may perform any of the tasks related to solid waste management that a city or county is authorized to perform.[38] It is apparent from the statutes that a regional authority is intended to be an organization that comprehensively manages and disposes of solid waste for the member governments.[39]

To create a regional authority, the units of local government that are to become the authority's members adopt identical resolutions.[40] These resolutions become the charter, or basic operating framework, for the authority. The charter must contain the following elements:[41]

1. Name of the authority
2. Powers and duties of the authority
3. Number of delegates to represent the member units and their compensation
4. Method of determining each unit's financial support of the authority
5. Method of amending the charter and dissolving the authority and liquidating its assets and liabilities

After an authority is established, nonmember units of local government may join it by adopting a resolution identical to the charter and being admitted by a unanimous vote of the members.[42] If the authority has no outstanding indebtedness, a member unit may withdraw from the authority at the end of the current fiscal year by giving at least six months' notice to the other members.[43] In these circumstances, the authority is not dissolved if at least two members remain.[44] If the authority has outstanding indebtedness, no member may withdraw unilaterally, and the dissolution procedures contained in the charter must be followed.

A regional authority's business affairs are managed by a board of delegates appointed by the member units.[45] Thus the charter provision establishing the number of delegates from each unit is quite important. No particular formula is prescribed by statute, so the members could agree that each unit will have the same number of delegates, could agree that the number will be based on the population of each unit, or could establish some other formula for determining the number of delegates.

A regional authority may not levy taxes, but it does have available numerous other sources of financial support. The charter must state "the method of determining the financial support that will be given to the authority by each member unit . . . ,"[46] and in the early years of an authority's existence these contributions will be an important source of

35. *See* G.S. 153A-278 and 160A-192(b).

36. G.S. 160A-462 and -463.

37. See also the list of issues that should be considered in drafting an interlocal agreement in David M. Lawrence and Warren Jake Wicker, *Interlocal Cooperation and City-County Consolidation, in* COUNTY GOVERNMENT IN NORTH CAROLINA 56, 58 (Institute of Government: A. Fleming Bell, II, ed., 3d ed. 1989).

38. G.S. 153A-427(a)(16) and (18).

39. *See especially* G.S. 153A-422.

40. G.S. 153A-421(c).

41. G.S. 153A-424.

42. G.S. 153A-423(a).

43. G.S. 153A-426.

44. *Id.*

45. G.S. 153A-423(a) and -425.

46. G.S. 153A-424(a)(4). G.S. 153A-432 authorizes member governments and other local governments to lend money to an authority, and G.S. 153A-428(b) provides that operation of an authority serves a public purpose and that the state and units of local government may appropriate funds for its support and operation.

support. An authority may also accept grants from government agencies and private sources;[47] issue revenue bonds;[48] and collect fees and charges to meet operating costs, debt service, and capital reserve requirements.[49]

As noted above, a regional authority has all of the powers of a city or county to manage solid waste generated in the member units. Among the powers expressly granted an authority are those to plan, construct, and operate systems and facilities for the management and disposal of solid waste,[50] to locate solid waste facilities as it sees fit,[51] to acquire property located within any member unit by eminent domain,[52] and to require that all waste generated within the authority's service area be disposed of or recycled at designated facilities (flow control).[53]

47. G.S. 153A-427(a)(1).
48. G.S. 153A-427(a)(13).
49. G.S. 153A-427(a)(20).
50. G.S. 153A-427(a)(16).
51. G.S. 153A-427(a)(17).
52. G.S. 153A-427(a)(23).
53. G.S. 153A-427(a)(24).

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