

Draft Report

Solid Waste Acquisition

Chittenden Solid Waste District

January 26, 2005



Chittenden Solid Waste District

Table of Contents

SECTION 1 INTRODUCTION AND OVERVIEW

Introduction	1-1
Scope of Review	1-1
Purpose of Report	1-1
Waste Generation	1-2
Competing Facilities	1-3

SECTION 2 COLLECTION OF SOLID WASTE BY CSWD

Introduction	2-1
Examples Where Utilized	2-1
Benefits and Drawbacks	2-2
Comment	2-2
Legal Considerations	2-3

SECTION 3 CREATION OF COLLECTION DISTRICTS

Introduction	3-1
Examples Where Utilized	3-1
Benefits and Drawbacks	3-2
Legal Considerations	3-2

SECTION 4 EXECUTION OF LONG-TERM CONTRACTS WITH PRIVATE HAULERS

Introduction	4-1
Examples Where Utilized	4-1
Benefits and Drawbacks	4-1
Comment	4-2
Legal Considerations	4-3

SECTION 5 FRANCHISING COLLECTION ROUTES

Introduction	5-1
Examples Where Utilized	5-1
Benefits and Drawbacks	5-2
Legal Considerations	5-2

SECTION 6 LEGAL FLOW CONTROL

Introduction	6-1
Legislative Flow Control	6-1
Carbone and Its Application to Other Flow Control Regulations	6-2

The United Haulers Case	6-3
Application of the United Haulers Decision to Flow Control in CSWD	6-4
Timing of Legislative Action.....	6-6
Enforcement Issues	6-7
Future Judicial Activity on the Subject of Flow Control.....	6-8
SECTION 7 RELIANCE ON COMPETITIVE MARKET FORCES	
Introduction	7-1
Examples Where Utilized.....	7-1
Benefits and Drawbacks	7-2
Legal Consideration.....	7-2
SECTION 8 PRIVATIZING THE OPERATION OF THE LANDFILL	
Introduction	8-1
Examples Where Utilized.....	8-1
Benefits and Drawbacks	8-2
Legal Consideration.....	8-2
SECTION 9 IMPLEMENTING USER FEES FOR WASTE GENERATORS	
Introduction	9-1
Examples Where Utilized.....	9-1
Benefits and Drawbacks	9-2
Legal Considerations	9-2
Use of the Solid Waste Fee for Facility Construction	9-3
SECTION 10 ADVANCED SALE OF AIR SPACE	
Introduction	10-1
Examples Where Utilized.....	10-1
Benefits and Drawbacks	10-1
Legal Considerations	10-2
SECTION 11 SUMMARY	
Introduction	11-1

This report has been prepared for the use of the client for the specific purposes identified in the report. The conclusions, observations and recommendations contained herein attributed to R. W. Beck, Inc. (R. W. Beck) constitute the opinions of R. W. Beck. To the extent that statements, information and opinions provided by the client or others have been used in the preparation of this report, R. W. Beck has relied upon the same to be accurate, and for which no assurances are intended and no representations or warranties are made. R. W. Beck makes no certification and gives no assurances except as explicitly set forth in this report.

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Section 1

INTRODUCTION AND OVERVIEW

Introduction

Set forth in this report (the “Report”) are the results of a review undertaken by the consulting engineering firm of R. W. Beck, Inc. (“Beck”) and the legal firm of Germano & Cahill (“Cahill”) on behalf of the Chittenden Solid Waste District (“CSWD”). The Report presents an overview of different options which have been used by various public utilities to secure the delivery of solid waste to a solid waste management system. For each of the different options, the Report provides a description of: (1) what the option entails and how it is intended to function; (2) examples of where the option has been implemented; (3) the benefits and drawbacks of each option; and (4) legal considerations regarding the implementation of each option.

The implementation of any private landfill operation needs to be consistent with CSWD’s statutory authority and financial requirements.

Scope of Review

Beck is responsible for the preparation of the Report and all its contents with the exception of the review of legal considerations which was undertaken by Cahill. A review of legal matters is outside Beck’s area of expertise. Beck has included in the Report the discussion of legal considerations developed by Cahill in order to facilitate CSWD’s review of each option, but Beck assumes no responsibility or liability for the work performed by Cahill. Beck prepared the Report in accordance with the Professional Services Agreement dated October 24, 2004 between Beck and CSWD.

Purpose of Report

The Report was prepared as part of CSWD’s ongoing efforts to permit, finance, design, construct, and operate a sanitary landfill (the “Landfill”) to be located within Chittenden County which would meet the solid waste disposal requirements of the 18 municipal entities who are members of CSWD. The geographic area for which CSWD has responsibility is referred to herein as the “District”. The estimated population of Chittenden County is reported to be approximately 158,000 with a forecast to increase to 213,000 by 2025. The Landfill is being developed pursuant to CSWD’s Solid Waste Management Plan adopted on April 28, 2004 (the “SWMP”) and will serve as an integral part of CSWD’s solid waste management system (the “System”). CSWD had identified a proposed site for the Landfill and is currently evaluating technical options to be included as part of the final design of the Landfill.

As part of the overall development of the Landfill, and on a parallel path to reviewing various technical considerations, CSWD is reviewing various options which may be available related to securing a guaranteed annual quantity of solid waste to the System and the Landfill.

Securing a guaranteed quantity of solid waste is a very important consideration for CSWD for two reasons:

1. The amount of solid waste CSWD receives each year will be pivotal in the ongoing technical planning for the Landfill in the following areas:
 - a) Size of the footprint for the Landfill
 - b) Permitting considerations
 - c) Capital cost
 - d) Expected useful life
 - e) Annual operating expenses
2. In order to finance the Landfill, CSWD will need to demonstrate to prospective bond purchasers that CSWD has a future stream of revenues which will be available to repay the bonds. Because bond purchasers are relatively risk adverse, they are looking for the maximum amount of assurance that revenues will be available to repay the bonds during the period the bonds are outstanding. The less assurance that bondholders have, the higher the interest rate on the bonds and the greater the cost of debt service payments to CSWD. If the perception of risk is too high, CSWD may not even be able to issue bonds to pay for the capital cost of the Landfill.
3. To enable proper planning and implementation of other components of CSWD's comprehensive waste management system, including volume and toxicity reduction programs and to enable the optimal use of that system.

This Report is intended to identify options which have been used by other entities and to assist CSWD in reducing the number of options down to the two or three which best meet the goals and objectives of CSWD. The Report has been prepared to provide information and background on a wide array of options to CSWD as it proceeds with its considerations. It is not intended to provide a final recommendation of a preferred option because there are too many policy decisions which CSWD must address before it will be able to make a final selection among the options.

Waste Generation

CSWD is responsible for the proper disposal of municipal solid waste generated within the District. Presented in Table 1-1 is a summary of information compiled by CSWD regarding the amount of solid waste recycled and disposed in the last five years.

**Table 1-1
Historical Waste Generation ⁽¹⁾**

	1999	2000	2001	2002	2003
Recycled Material	38,338	36,938	37,143	37,092	36,152
Diverted Material ⁽²⁾	<u>18,487</u>	<u>20,953</u>	<u>18,312</u>	<u>23,850</u>	<u>24,140</u>
Subtotal	56,825	57,891	55,455	60,942	60,292
Solid Waste Landfilled	92,744	96,089	95,335	95,987	98,970
C&D Material	30,113	30,936	36,834	39,391	35,017

(1) Source: CSWD.

(2) Includes: backyard composting, wood, yard waste, food scraps, textiles.

The information in Table 1-1 indicates that if CSWD received all the solid waste requiring disposal, the Landfill would receive approximately 100,000 tons per year (“TPY”) of municipal solid waste and 35,000 TPY of construction and demolition (“C&D”) material.

Competing Facilities

The solid waste management facilities which could potentially compete with CSWD for solid waste deliveries include facilities both within and outside the District. Presented in Table 1-2 is a summary of the current and proposed competing facilities located within the District.

**Table 1-2
Competing Facilities in the District**

Name	Type of Facility	Ownership
A. Current		
1. All Cycle Waste Inc.	Transfer Station	Private
2. WSI Burlington Area	Transfer Station	Publicly Owned/Private Operated
B. Proposed		
1. All Seasons Excavating	C&D	Private
2. A. Marcilino and Company	C&D	Private
3. Myers Container	C&D	Private

Presented in Table 1-3 is a summary of information compiled by CSWD regarding competing facilities located outside the District. Such information has been included to assist readers of the Report to gain a better understanding of the marketplace in which CSWD will compete and the need to identify methods to secure solid waste.

**Table 1-3
Competing Facilities Outside the District ***

Owner	Location	Type	Distance in Miles	Annual Permitted Capacity (tons)	Actual Tonnage Acceptance	Capacity Available	Estimated Remaining Useful Life in Years	Base Gate Fee/Ton ⁽¹⁾
WSI of Vermont	Moretown, VT	Private landfill	27	125,000 ⁽²⁾	130,000 ⁽³⁾		6-7 ⁽²⁾	\$69.50
Casella	Morrisonville, NY	Private landfill	44	175,000	Use capacity annually	Negotiable?	Thru 2010 now, but working on more cells	Out of county \$68.75 MSW \$78.55 C&D
Casella	Coventry, VT	Private landfill	71	250,000	260,000 ⁽⁵⁾		23.2 ⁽⁴⁾	\$77.90
City of Lebanon	Lebanon, NH	Municipal landfill	86	Based on needs in service area	50,773 (inc. 30,000 from Casella)	Probably not available to non-local users	@2.3% annual growth 10-13 years	\$62
Wheelabrator	Hudson Falls, NY	Private WTE	102	152,500	Close to capacity	Might be able to accept 50+ tons per week	N/A	\$55-\$85
Wheelabrator	Claremont, NH	Private WTE	104	73,000	50,000 from NH/VT district and some from smaller contracts	17-18,000 TPY until 2007, perhaps more then	N/A	\$87

* Source: CSWD

(1) Excludes state franchise fee (\$6.00 per ton) and District solid waste management fee (\$17.61 per ton).

(2) Information for Cell 2; WSI has proposed the construction of Cell 3 with 860,000 tons of total capacity and an increase in annual capacity from 125,000 TPY to 172,000 TPY. Estimated useful life assumes Cell 3 is permitted.

(3) Includes MSW, C&D, and Other.

(4) Includes proposed expansion for Phase IV. Currently permitted capacity is 2.4 years.

(5) Actual 2003 deliveries. Includes MSW, C&D and Other.

Section 2

COLLECTION OF SOLID WASTE BY CSWD

Introduction

One of the surest ways for CSWD to assure that solid waste generated in the District is delivered to the Landfill would be for CSWD to collect the solid waste itself. This would require CSWD to either: 1) purchase or lease a fleet of collection vehicles, hire drivers, and become an active participant in the collection of both residential and commercial solid waste; or 2) execute a contract with a private company to collect solid waste on behalf of CSWD.

Examples Where Utilized

A number of municipalities are currently involved in the collection of solid waste generated within their communities. Many of these communities which collect solid waste were also involved in issuing revenue bonds to pay for the capital cost of their solid waste management systems. Specific examples of public entities which collect solid waste are presented in Table 2-1 below.

Table 2-1
Examples of Public Entities That
Collect Municipal Solid Waste

Entity	Type of Waste	Solid Waste Management Facility Financed
City Members of Roanoke Valley Resource Recovery Authority, Virginia	Residential	Landfill and Transfer Station
City Members of Davis County Solid Waste Management District, Davis County, Utah	Residential	Waste-to-Energy Facility
Fairfax County, Virginia	Residential	Waste-to-Energy Facility
Washington, DC	Residential	Landfill and Transfer Station
City of Savannah, Georgia	Residential	Waste-to-Energy Facility
City Members of Southeastern Public Service Authority, Virginia	Residential	Solid Waste System

Benefits and Drawbacks

The two greatest potential benefits of CSWD becoming involved with the collection of solid waste involve: (1) the control of the waste it collects; and (2) the possible opportunity to offer lower cost collection services.

By actually collecting solid waste generated in the District, CSWD will have absolute control over where it is delivered for disposal. If it collects solid waste itself, CSWD should have no problems with any of the following: (1) co-mingled loads of solid waste which is generated both within and outside the District; (2) "leakage" of solid waste to alternative disposal facilities; (3) the desire some private haulers may have to internalize their collection and disposal operations; and (4) mixing loads of recyclable material with solid waste.

Secondly, by collecting solid waste itself, there is the potential for CSWD to be able to offer a lower cost collection option to its customers as a result of a combination of the following: (1) the ability to finance the capital cost of collection vehicles and other equipment with tax-exempt revenue bonds; (2) no need to operate the collection system at a profit as there are no shareholders or investors seeking a return on their equity investment; (3) no state or federal income taxes.

The potential drawbacks to CSWD associated with this collection option include the following:

1. It would place CSWD in a highly competitive business with which it has had no previous experience.
2. Depending upon whether CSWD contracts the business to a private company or assembles its own fleet of collection vehicles, it could require either a significant capital expenditure to purchase a fleet of collection vehicles or the execution of a long-term lease to lease the same vehicles.
3. It is likely to have a significant impact on the relationship between CSWD and private haulers who collect in the District. CSWD would be viewed as a competitor in the collection business and such perception could have an impact on future negotiations between CSWD and private haulers.
4. CSWD should expect to experience significant push back, on all fronts, from the private haulers who will view CSWD entering the collection business as a serious threat to the private haulers.

Comment

Beck has two large clients, both of whom are large solid waste authorities, which have considered getting into the collection business in an effort to help secure waste deliveries to their systems. In both instances, those authorities determined that the difficulties associated with this option outweighed the benefits and the authorities ultimately decided not to proceed. Nevertheless, the fact that the authorities were even considering this option provided them with significant leverage when they later

negotiated long-term disposal contracts with private haulers in the area who were very much opposed to the authorities becoming collection players in the market place.

Legal Considerations

The legal authority for the District to ensure the delivery of waste to a newly constructed landfill through the public collection of waste generated within the District (discussed in this Section 2), or through the use of haulers under contract to the District (Section 3) derives ultimately from the same source.

The Charter for CSWD, codified in 24 VSA Appendix, Chapter 405, sets forth in §405-5 certain enumerated powers, granted by the State of Vermont, to assist the District in providing “efficient, economical and environmentally sound management of the solid waste generated by its member municipalities...”. (§405-2) These enumerated powers are in addition to the other powers incident to a municipal corporation under the laws of the State of Vermont, consistent with the purpose of the District. CSWD, pursuant to its Charter §405-19, is authorized to exercise any of the powers capable of exercise by any of its member municipalities which are necessary or desirable to deal with solid waste problems of mutual concern.

The power to provide public waste collection services is granted to the towns and cities which are members of the District through 24 VSA § 2291 (12) and (13). 24 VSA §2291 (12) grants Vermont municipalities the power to regulate and prohibit the storage and dumping of solid waste, while 24 VSA §2291 (13) grants municipalities the power to both define and take action to abate or remove public nuisances, which can include accumulations of solid wastes. Under this authority, the member municipalities of CSWD could determine to provide for the collection and removal of waste generated at local properties. Because the member municipalities of the District could elect to provide public waste and recyclables collection service under 24 VSA §2291, CSWD could also provide this service, if it were deemed necessary or desirable for the management of solid waste, pursuant to CSWD charter §405-19.

The cost of providing collection service could be established in uniform units based upon waste volumes and frequency of service for different property classifications under the authority granted the District in §405-34(4) of the Charter. Such units could consist of fixed annual fees for collection and disposal of waste and recyclables generated at, for example, single family residences receiving one waste and one recyclables collection per week (or some other level of service), assuming an average annual quantity of waste generated by the households in the District. Other uniform units of cost could be established for commercial properties based upon container size and frequency of service, billed in dollars per cubic yard, times the number of pickups per month or other billing cycle.

Costs could be determined by the Board after review of (1) the elements of cost attributable to collection service, such as vehicles, labor, fuel, insurance, maintenance etc.; and (2) the elements attributable to disposal and recycling costs, including the established Tipping Fee, Waste Service Fee, and State Charge times the estimated

quantity of waste generated per unit. Costs could be modified annually based upon experience, and reviewed in the budget process of the District. Cost units could be charged directly to property owners or others receiving the benefits of the service by the District, or if administratively convenient, by the member municipalities.

Public collection is provided by many municipalities across the United States. As a method of flow control, direct public collection of solid waste, and the determination of the public agency to deliver waste to the facility of its choice, has never been challenged under the Commerce Clause of the Constitution. The U.S. Court of Appeals for the Second Circuit has endorsed the ability of local government to provide public collection services in cases challenging contractual arrangements, and has held that if a municipality provides collection service, it may choose its disposal method as a “market participant,” and as such, its choice is not subject to review under the Commerce Clause.

Section 3

CREATION OF COLLECTION DISTRICTS

Introduction

In an effort to regain a form of legal flow control over the disposal of solid waste, certain public entities have created “collection districts.” This option involves public entities providing collection services who employ private haulers who submit bids to obtain collection contracts for a specified period of time in a collection area designated by the public sector. The intent of creating a collection district is to establish the legal means by which a governmental entity can direct private haulers to deliver their solid waste to a disposal facility designated by that governmental entity.

Collection districts are characterized by the fact that the public entities which establish the districts are responsible for collecting revenues from residents and businesses and then paying the haulers. This results in a significant role for the collection district. This approach differs from franchise collection routes discussed in Section 5 of the Report. In franchise areas, the residents and businesses pay the haulers directly, thereby reducing the role played by the public entity, as well as the financial exposure to the public entity.

Examples Where Utilized

Collection districts have been established by several communities in Long Island, New York including Babylon, Huntington, and Smithtown. All three of these communities established collection districts in order to assure an adequate supply of solid waste associated with the financing of two waste-to-energy facilities located in Babylon and Huntington. The Huntington collection district consists of approximately 93 percent of the residential properties that lie within Huntington. The collection district is responsible for the collection of recyclable material and the disposal of waste and the collection district assesses the cost of such collection and disposal against real property located within the collection district. Huntington assesses all residential structures a unit amount which corresponds to the specific type of residence. For example, a single-family house is assessed one unit, a two-family house is assessed one and a half units, a three-family home is assessed two units, etc. The unit charges are applied to three cost components: collection costs, administrative costs, and disposal fees. The collection component is used to pay waste haulers who collect waste generated within the collection district. The disposal fee component provides funds to pay for the cost of disposal at the waste-to-energy facility.

The Town of Babylon established two separate collection districts. One collection district deals with the collection of residential waste generated within the Town of Babylon. The second collection district deals with the collection of commercial waste generated within the Town. One of the complications for the commercial collection district is that as the nature of a business situated at a particular location changes

(i.e., change from a restaurant to an office supply store), the quantity and type of waste may change. This may require changes in unit amounts charged and the types and number of collection containers used.

Hempstead, New York and Montgomery County, Maryland have also established a collection and disposal district as part of the financing of their waste-to-energy facilities.

Benefits and Drawbacks

The principal benefit of creating a collection district, as discussed above, is that private haulers would be required to contract with CSWD in order to collect solid waste generated in the District, and CSWD would be able to direct where that solid waste must be disposed. CSWD will want to give consideration to whether the collection district will address both the residential and commercial waste streams. There are no technical or legal reasons that CSWD could not create collection districts which deal with residential and commercial waste. The creation of a collection district is a form of economic flow control which would be an effective means of controlling that portion of the waste stream generated in the collection district and subject to being collected.

One major drawback with this option for CSWD is that this would represent the development and implementation of a significant additional program which CSWD would have to administer and enforce. It will involve CSWD procuring private haulers to perform the collection services, receiving payments from residents and businesses to cover the costs of the program, and pay haulers for collection services.

Legal Considerations

The establishment of “collection districts” is an option practiced widely in New York, among other states, and refers to collection service provided by local government, employing private contractors who bid to secure contracts in designated areas, or “districts,” for a specified term. The term “district” in this sense is a more limited concept than the Solid Waste Districts authorized by the State of Vermont in Act 78 of 1987. In Vermont, legal authority for the employment of private haulers to provide collection services under contract with the District derives from the same sources which authorize the District to collect waste grant the power to collect waste, as described in Section 2. The only difference is that private haulers would be employed in designated “bid areas” and their obligations would be defined in contracts which would govern quality and quantity of service, and include direction as to where waste and recyclables should be delivered for disposal. The authority of the District to let contracts for these services is contained in the Charter, §405 (4). Unit costs for different classifications of properties could be established in the same fashion as if the District were directly providing the service, except that collection related costs would be based upon the contract with the hauler, determined through the competitive bidding process. The District would still assess local properties for the cost of the service and pay the contract hauler from the revenues collected from waste generators.

As a method of flow control, “district” arrangements in which a public agency provides collection service through contracts with private haulers have been upheld by the U.S. Court of Appeals for the Second Circuit. In *U.S.A. Recycling v. Town of Babylon* 66 F3d 1272 (2d Cir. 1995) the Court upheld both the creation of the district collection structure as non-discriminatory with respect to interstate commerce, and the operation of the flow control provisions of the district contract as market participation. Subsequent cases, including *SSC Corp v. Town of Smithtown* 66 F.3d 502 (2d Cir 1995) and *Sal Tinerello & Sons v. Town of Stonington* 141 F.3d 46 (2d Cir. 1998) reaffirmed municipal power to establish public collection via private contractors without violation of the Commerce Clause.

Section 4

EXECUTION OF LONG-TERM CONTRACTS WITH PRIVATE HAULERS

Introduction

One of the more traditional approaches to securing a solid waste stream would be to execute long-term contracts with the private haulers who collect solid waste generated within the District. CSWD reports that at the present time, there are seven large haulers who collect 92 percent of the solid waste generated in the District, one of which is the CSWD Drop-off Center Program. Therefore, CSWD could reasonably expect to be able to control approximately 92 percent of the waste stream by negotiating long-term solid waste contracts with those six private haulers.

Examples Where Utilized

The vast majority of the 80 solid waste management facilities, for which Beck has prepared an independent engineer's report as part of the financing of the facilities, have included long-term solid waste disposal contracts between the owner of the facility and private haulers. The amount of solid waste covered by such contracts has ranged from a relatively small percentage of the total waste received to almost 100 percent. This use of long-term contracts has been relied upon in all parts of the country for a variety of solid waste management facilities including transfer stations, landfills, and waste-to-energy facilities. The number of applicable examples is too long to list. It is safe to say that this is the most common approach used by public sector entities when market conditions (i.e., the level of competitive tipping fees) allow.

Benefits and Drawbacks

The benefit to CSWD of executing long-term contracts is that CSWD clearly can demonstrate to prospective bond purchasers that it has long-term contracts in place with private haulers which provide for the delivery of a specified quantity of solid waste at a stated tipping fee. The existence of such contracts assures bond purchasers that there will be a specific revenue stream in place for the term of the contract. This helps reduce the perception of risk and should help result in a lower interest rate on the bonds.

A second benefit is that these contracts should be relatively easy for CSWD to administer after they have been negotiated and executed. CSWD will issue a monthly invoice to the private haulers and can reasonably expect to receive a monthly check to pay for the disposal services which CSWD will provide at the Landfill.

EXECUTION OF LONG-TERM CONTRACTS WITH PRIVATE HAULERS

A third benefit is that it should make the operation of the Landfill more efficient as the operators can expect to receive a quantifiable amount of solid waste each month. This should result in a decrease in dramatic swings in the amount of waste delivered to the Landfill. CSWD could be subject to swings in waste deliveries it was receiving solid waste on a spot market basis.

There are several drawbacks which CSWD will want to consider as part of its evaluation.

The first drawback deals with the fact that, while these are “long-term” contracts, there is a likelihood that the term of some of the contracts may run for five years or less and CSWD may issue revenue bonds with a 20 year maturity. In the past, many private haulers, but not all, have been reluctant to commit themselves to a disposal option for more than five years in case there is a significant change in market conditions in the future which would put that hauler at a competitive disadvantage. Contracts often include provisions for a five-year initial term with options for renewal. Therefore, CSWD may find itself having to renegotiate the private contracts several times during the term of the bonds.

A second drawback involves the fact that CSWD may issue bonds with annual service payments based on the level of annual revenues that can be supported by the tipping fees in the current contracts. In the event there is a change in the market place during the initial term of the disposal agreements, during subsequent renewals CSWD could find itself in a situation where the tipping fees under the second set of contracts are lower than what CSWD had anticipated when the bonds were first issued.

A third potential drawback is that if there is a major change in the market place, private haulers may not honor their contract or will contest the contract in a court of law.

CSWD will also need to consider whether it will have a standard tipping fee which it will offer in all contracts or if it plans to offer different tipping fees based on any of the following: volume of waste, term of the contract, or other considerations. Some haulers may request some form of “most favored nation” provision whereby they will not be required to pay a higher tipping fee than any other private hauler with a similar contract.

Comment

In spite of the drawbacks discussed herein, none of them are considered insurmountable and this option should offer a significant level of assurance to prospective bondholders. One of the major benefits of this option is that it has the potential to address both the residential and commercial waste streams. Certain of the other options are aimed more at the residential waste stream.

Legal Considerations

CSWD has the power to contract with local haulers for delivery of waste to District facilities over a period of years pursuant to CSWD Charter §405-5(4). Long term contracts have the advantage of securing the delivery of that hauler's waste for the term of the contract, and because the hauler's obligation is contractual, the obligation is immune from constitutional challenge under the Commerce Clause. Such a system can provide reliable waste flows without the risk of litigation, while allowing competition to continue among haulers for accounts in the District service area. However, this method depends upon the ability of CSWD to secure contracts with all local haulers on uniform terms to maintain fair competition. A portion of this complication may be able to be alleviated through the pricing structure of the contracts and the gate fee. In the event that one or more haulers decline to enter into contracts, they can complicate the arrangements made with other haulers if market conditions allow them to offer more attractive terms to customers.

Section 5

FRANCHISING COLLECTION ROUTES

Introduction

Franchising collection routes would represent a somewhat similar approach to the collection districts discussed in Section 3 in that a public sector entity would identify where private haulers can collect solid waste. The two options differ in who is responsible for billing the residents and businesses. Under a franchise arrangement, the private haulers would bill their customers directly. Under this option, CSWD would grant a private hauler the exclusive right to collect solid waste within a specified geographic area. The CSWD would procure the services of and grant the franchise to a private hauler based on CSWD's evaluation of the proposals it receives. What is important for the discussions of this Report is that as part of the granting of the franchise, CSWD would identify where the collected solid waste must be disposed. A franchise area would differ from a collection district in that under the franchised collection routes, the private hauler would both directly bill residents and business for collection services and collect payment. Under the collection district discussed herein, CSWD would be responsible for billing residential and business customers for the services provided by the private hauler.

In some instances, solid waste collection in franchised areas is made mandatory in order to allow for efficiency of collection vehicles, provide incentive for private haulers, and reduce the number of vehicles on the street. Under this option, CSWD would want to evaluate the impact on its drop-off centers as part of considering whether to make collection mandatory.

Examples Where Utilized

Public entities have used franchise routes to help assure the financing of various solid waste management facilities. Examples where franchise systems have been established to support a specific solid waste management facility, include the following:

Public Entity	Type of Waste	Solid Waste Management Facility Financed
Lee County, Florida	Residential	Waste-to-Energy
New Britain, Connecticut	Residential	Waste-to-Energy
Onondaga County, New York	Residential and Recyclables	Waste-to-Energy
Arlington County, Virginia	Residential	Waste-to-Energy

Benefits and Drawbacks

One of the benefits of a franchise system is that CSWD could direct the private hauler, to whom it grants a franchise, to deliver the solid waste to the Landfill as part of the franchise agreement. This could help secure a significant portion of the waste stream subject to the franchising of collection routes.

There is also a potential environmental benefit of utilizing a franchise approach because it would result in just one collection vehicle traveling on the roads in a collection area, rather than having multiple collection vehicles traveling in the same street. This reduction in the number of collection vehicles should help reduce emissions from the collection vehicles.

A third benefit is that it should result in lower cost of collection as private haulers can be much more efficient if they collect solid waste from every house or business on a street rather than every fifth or tenth house or business. This increased efficiency should result in cost savings for haulers which in turn should be reflected in the bids CSWD would receive when it procures collection services.

A fourth benefit is that this option will not require as much effort to administer on the part of CSWD, as compared to administering a collection district. This is due to the fact that under a franchise collection system, CSWD will not be issuing bills to and collecting payments from households and businesses, as that responsibility will rest with the private haulers.

One of the drawbacks that CSWD should consider is that there will be more to administer under this option, but, as discussed above, not as much as would be required by establishing a collection district. The contracts will have to be re-bid and let on a periodic basis, dependent upon the term that CSWD grants for franchise routes.

There could also be some initial challenges for CSWD to address in determining what will constitute a franchise area. Such franchise area must be large enough for a private hauler to experience improved efficiency in collections, but not so large as to represent the development of a monopoly for that hauler.

Similarly, CSWD would want to consider whether or not to adopt some type of policy which would assure a continuation of competition among haulers. If CSWD continually awarded franchises on the basis of the lowest bid, and the lowest bid was always the same company, it could reduce the level of competition among haulers working in the District.

Legal Considerations

Municipalities are authorized to grant local franchises to private haulers for waste collection services within a defined area pursuant to 24 VSA §2202a(a), and the District is authorized to exercise this power under Charter §405-19. The use of franchises, like district collection contracts, can provide stable waste flows for a period of years. Under an “exclusive” franchise arrangement, a single hauler would

have the right to collect waste in a given area, but the hauler would operate under the terms of a franchise agreement with the District. The franchise agreement would govern quality and quantity of service, as well as designate the place of disposal of waste and recyclables. A “non-exclusive” franchise would authorize a limited number of haulers to operate within the District, under a similar franchise agreement, but would not give exclusive collection rights in any particular area.

Non-exclusive franchises would be similar to licenses issued by the District, except that greater controls over service, and higher minimal levels of qualification might be incorporated into the franchise agreements.

Exclusive franchises are similar to the “district” arrangements described in Section 3, in that one hauler is responsible for a particular area and greater efficiency and economies of scale may be expected in the provision of service. The difference is that a franchisee has the right to bill the customer directly, and the District would not be involved in collecting assessments from customers.

The franchise can be granted subject to conditions which require the franchisee to deliver the waste collected under the franchise to CSWD facilities, and to pay CSWD tipping fees. The franchises can be awarded through competitive bidding based upon proposed rates to classes of customers, which can be controlled thereafter by the franchising authority.

As a method of flow control, franchise arrangements have not yet been reviewed by the U.S. Court of Appeals for the Second Circuit. However, because franchises are essentially a government controlled privilege to engage in the collection business, other decisions may be directly analogous. “Exclusive” franchises, granting one firm the right to collect in a defined area, with an obligation to deliver waste to designated publicly owned facilities, are similar to “district” contract arrangements discussed in Section 3, and may be sustained under the ruling in *USA Recycling v. Town of Babylon*. “Non-exclusive” franchises are similar to licenses issued by governmental authority. Provisions in these franchise agreements directing the delivery of waste by the franchisees may be viewed as analogous to the licenses granted to haulers subject to flow control conditions, as was the case in *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Management Authority* 261 F.3d 245 (2d Cir. 2001), discussed in Section 6. There may be constitutional limits to the length of the franchise term, so that out-of-state firms are not permanently precluded from seeking and receiving franchises under the local system. In other circuits, where exclusive rights to collect or receive waste subject to flow control have been distributed through competitive bidding, terms of up to seven years have been sustained. (*Harvey & Harvey v. County of Chester* 68 F.3d 788 (3d Cir. 1995) *Houlton Citizens Coalition v. Town of Houlton* 175 F.3d 178 (1st Cir. 1999)). However, as long as out-of-state firms are allowed to bid on an equal footing with local firms, and as long as the franchises come up for renewal or re-award within reasonable periods, these arrangements are likely to withstand scrutiny.

Section 6

LEGAL FLOW CONTROL

Introduction

The following discussion on legal flow control has been prepared by Cahill.

Legislative Flow Control

The term “flow control” refers to the exercise of legislative power to direct the delivery of waste generated within the jurisdiction of a municipality to a specific facility. Flow control is a waste management tool that can provide a variety of environmental, administrative and economic benefits to public agencies. It can be beneficial to the administration of an integrated system, in which a number of different processing or disposal facilities are provided to handle different components of the waste stream, by legislating the delivery of each component to the proper facility. Flow control is frequently coupled with requirements to pay tipping fees on waste delivered under the authority of the flow control law, and can be employed to secure both waste flows and revenues to the system, for the benefit of the public entity and its bondholders. The economic components of flow control – mandatory delivery of waste and payment of system charges – have engendered numerous legal challenges by affected parties, usually haulers or landfill operators who are denied the ability to select other, lower cost alternatives for disposal.

The Chittenden Solid Waste District has long recognized the potential benefits of flow control, which was widely used by many municipalities across the United States prior to 1994. The District’s 1991 Analysis of Alternative Systems, which formed the foundation for the District’s present integrated waste management system, presumed that flow control would be available to assist the District in organizing, administering, and financing the system. In 1994 however, the United States Supreme Court ruled that a flow control ordinance adopted by Clarkstown, New York violated the Commerce Clause of the U.S. Constitution in *C & A Carbone, Inc. v. Town of Clarkstown*. Since 1994, the District has not adopted or enforced any flow control legislation, although it has continued to monitor developments in the courts. (Solid Waste Management Plan, §§1.4, 2.3 and 3.2.5).

The Supreme Court has not revisited the subject of flow control in the ten years which have elapsed since the Carbone decision, but many other courts have examined flow control laws adopted in other jurisdictions, recognizing certain circumstances in which flow control laws do not violate the Constitution. The United States Court of Appeals for the Second Circuit, with jurisdiction in Vermont, Connecticut and New York, has reviewed several different flow control schemes adopted by local governments, and has come to recognize certain circumstances which distinguish some flow control laws from the situation presented in Carbone. The most recent of these decisions, *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Management Authority* (261 F.3d 245

2d Cir. 2001) describes flow control legislation adopted by a public agency similar to CSWD in purpose, policy and organization. The *United Haulers* decision recognized a constitutionally significant distinction between flow control laws which direct waste to public facilities from those which direct waste to private facilities, holding that laws which benefit public facilities do not discriminate against interstate commerce. As a public agency, CSWD could potentially rely upon the *United Haulers* ruling to adopt flow control legislation in support of its integrated system.

Carbone and Its Application to Other Flow Control Regulations

The *Carbone* case reviewed a law adopted by Clarkstown, New York that required all waste generated in the town to be delivered to a transfer station built and operated by a private firm on land owned by the town. The town had an option to buy the transfer station after five years, but until that option was exercised, the law directed all haulers and residents to use the designated facility, and to pay the fee charged by the operator. The town guaranteed the operator that a certain minimum tonnage would be delivered, or the town would make up the difference in revenue.

The Supreme Court applied a traditional two-part test to determine if the law violated the Commerce Clause. The test first asks if the law patently discriminates against interstate commerce, by placing burdens on economic interests located out-of-state while favoring similarly situated interests located within the state. If the law fails this first test it is “virtually per se” unconstitutional. If the law does not discriminate against interstate commerce, but regulates even-handedly, the second part of the test asks whether the law nevertheless places incidental burdens on interstate commerce that substantially outweigh the public benefits of the law. The burdens are balanced against the benefits of the law, but the burdens must be substantially greater than the benefits if the law is to be struck down. Under this two-part analysis, laws which are found to discriminate against commerce are almost always found unconstitutional, while those which regulate even-handedly usually upheld, unless the burdens are heavy and the benefits are insubstantial.

In *Carbone*, the Supreme Court found that the Clarkstown law discriminated against interstate commerce because it favored the local transfer station operator and denied other “waste processors” located in other states access to the local waste services market. The Court also found that the law was applied to waste which originated in New Jersey and was destined for disposal in Pennsylvania, but was subject to the law while passing through Clarkstown. The law had the effect of increasing the cost of waste disposal to residents of New Jersey, and had an extra-territorial effect prohibited by the Constitution. The Court did not reach the question of whether there might be benefits to the public which could be balanced against lesser, incidental effects, although the Court viewed the legislation as “at bottom, a financing measure.” Following *Carbone*, many flow control laws in many states were subsequently struck down by other courts.

Nevertheless, over the following seven years, certain types of flow control laws were distinguished from the circumstances presented in *Carbone* and upheld by the courts. In the Third and First Circuits (Pennsylvania and Maine), flow control schemes were

upheld because they selected designated facilities by open competitive bidding, in which out-of-state bidders were not disfavored. *Harvey & Harvey v. County of Chester* 68 F.3d 788 (3d Cir. 1995) *Houlton Citizens Coalition v. Town of Houlton* 175 F.3d 178 (1st Cir. 1999) In the 8th Circuit (Minnesota and Iowa) so-called “in-state flow control” was upheld, because the laws at issue did not prohibit waste from leaving the state, but only applied to waste “destined for disposal” within the state. (*Ben Oehrleins & Sons v. Hennepin County* 115 F.3d 1372 (8th Cir. 1997)) In the Second Circuit, “contractual flow control” was upheld where municipalities hired contractors to collect waste, and then directed them to deliver it to specific facilities. (*U.S.A. Recycling v. Town of Babylon* 66 F3d 1272 (2d Cir. 1995)). In *United Haulers*, the Second Circuit addressed the differences between laws which favor public facilities from those which favor private facilities, in a ruling which may have broad applicability in Vermont, Connecticut and New York. The Court concluded that *Carbone* did not preclude legislatures from enacting flow control to benefit public, as opposed to private, waste enterprises.

The United Haulers Case

The Oneida-Herkimer Solid Waste Authority, located in New York’s Mohawk Valley, including the cities of Utica and Rome, is similar to the Chittenden Solid Waste District in several respects. It is a public agency created by state law for the specific purpose of managing solid waste in two constituent counties. It is responsible for drafting and implementing a solid waste management plan, based upon a hierarchy of method: reduce, reuse, recycle and recover energy before employing land disposal. It has the power to build and operate waste management facilities, and to issue debt to finance their construction. It provides a variety of solid waste services to its residents, similar to the range of services offered by CSWD. It has recently permitted and issued bonds for a new public landfill. The Authority’s primary source of revenue is a tipping fee charged to users of its facilities. In the event that the Authority cannot meet its obligations through revenues derived from tipping fees, its constituent counties are bound to make up the difference in order to keep the Authority solvent.

Unlike CSWD, the Oneida-Herkimer Authority operates its own MSW transfer stations, and is directly responsible for procuring long-haul transportation and disposal service at landfills outside of its service area. It does not have the power to assess a Solid Waste Fee on waste passing through private transfer stations in its service area. Consequently, the Authority incorporates all costs for recycling, household hazardous waste, composting, waste education and other programs into a system charge which is levied on the non-recyclable fraction of the waste stream. The Authority’s system charge, which includes an amount earmarked for non-revenue generating programs corresponding to those funded by the CSWD Solid Waste Fee, is higher than the tipping fees generally charged by local transfer stations that would simply transport and dispose of MSW, without providing other services. In 1990, the counties of Oneida and Herkimer each adopted flow control laws to mandate that all waste generated in the counties be delivered to the Authority’s various facilities, including the transfer stations. The laws allow the Authority to receive sufficient waste and

revenue to continue to provide a range of services, without petitioning the counties for subsidies due to revenue shortfalls.

Shortly after the *Carbone* decision was rendered, a group of local haulers brought an action challenging the Oneida-Herkimer flow control laws, alleging that the laws were unconstitutional under *Carbone* because they improperly favored the local Authority, while burdening all private sector waste processors, including those located in other states. The lower court ruled in favor of the haulers in March 2000, but the Second Circuit Court of Appeals reversed in 2001, recognizing an important distinction between public and private waste systems. The Court held that “Flow control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause.”

The Court’s ruling that flow control ordinances like Oneida-Herkimer’s do not discriminate against interstate commerce does not mean that such ordinances may not impose incidental burdens on interstate commerce. The Court of Appeals remanded the *United Haulers* case to the District Court to determine whether such burdens are present, and if so, whether they substantially outweigh the public benefits provided by the laws. In the District Court, the case was assigned to a magistrate judge for a report and recommendation. In March 2004, the Magistrate reported that no incidental burdens were placed on interstate commerce by the laws, and recommended dismissal of the action. The Magistrate’s report is currently under review by the District Court judge, and no final decision has been entered. In the event that the District Court affirms the substance of the Magistrate’s decision, it is likely that the plaintiffs will appeal to the Second Circuit once again. If the Second Circuit does not reverse or modify its own 2001 decision, it is likely that the plaintiffs will petition the Supreme Court for review. A petition to the Supreme Court in 2001 was denied, but this does not deprive the Court of the opportunity to review all aspects of the case should it choose to do so.

Application of the United Haulers Decision to Flow Control in CSWD

The 2001 decision of the Second Circuit Court of Appeals in *United Haulers* is the governing law in the State of Vermont with respect to Commerce Clause challenges to local flow control legislation. Consequently, a local law crafted to direct local waste to publicly owned CSWD facilities, which is equally applicable to all private sector interests, whether those interests are located in Vermont or other states, would not be considered to facially discriminate against interstate commerce. However, such a local law, like the ordinance at issue in *United Haulers*, or indeed any regulation of economic activity, would still be subject to review for the presence of incidental burdens on commerce. If such burdens could be identified, they would be balanced against the public benefits provided by the law.

Should CSWD consider the adoption of a flow control law to direct locally generated waste to the District’s new public landfill, the potential benefits of the law should be

considered and articulated in the law as its public purpose. Several classes of benefits could be identified.

First, flow control could aid in the implementation of the District's solid waste management plan. CSWD system relies upon several different facilities to manage different components of the waste stream, including a variety of recyclables, yards wastes, household hazardous wastes, bio-solids and construction and demolition debris, in addition to MSW. Moreover, current CSWD regulation bans the disposal of certain materials, such as motor oil, appliances, batteries, paint and hazardous waste in any landfill, regardless of ownership. Flow control could bring all waste generated within CSWD service area under the direct supervision and inspection of CSWD personnel. Supervision could both enhance CSWD enforcement of source separation and health and safety regulations, and improve CSWD's ability to gather information on the waste stream for future planning purposes.

Second, flow control directing local waste to a new CSWD landfill could reduce the potential exposure of CSWD residents and businesses to environmental liabilities arising from their use of out-of-area landfills, particularly if those landfills are also used by third parties. Generators of waste deposited in a landfill which is later found to have leaked or discharged a hazardous waste to the environment can be subject to liability for clean-up costs under the Comprehensive Environmental Response Compensation and Liability Act. (CERCLA 42 USCA §9601 et seq.). Because liability under CERCLA is strict, joint and several, a single large generator can be held liable for all environmental clean-up costs. Flow control directing local waste to a CSWD landfill would place the long term, post-disposal management of that waste under direct CSWD control, and would eliminate risks of commingling local wastes with waste from other sources. Moreover, CSWD can construct its own landfill to higher environmental standards than those applicable to other facilities.

Third, flow control directing local waste to a CSWD landfill could reduce costs incurred by local residents and business for waste disposal. If a CSWD landfill can be constructed and operated for a cost which allows a tipping fee that is lower than other currently available disposal options, CSWD residents should save disposal costs immediately. Because a CSWD landfill will be sited locally, transportation costs and environmental burdens arising from long haul transportation can be avoided. Finally, use of a local facility dedicated solely to the disposal of CSWD waste can stabilize disposal costs over the long term. Continued reliance upon out-of-area landfills carries the potential for cost increases which arise from volatility in the interstate waste market. Flow control can help to insulate local residents from cost increases due to rising fuel, insurance, equipment or other transportation costs, or from future scarcity of landfill capacity, or from new legislation adopted by Congress or other states.

With these benefits in mind, the District should consider the potential for the imposition of any incidental burdens on interstate commerce due to the enforcement of a flow control law. The Second Circuit has defined the "incidental burden" relevant for Commerce Clause purposes as "a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Nat'l Elec. Mfrs., v. Sorrel* 272 F.3d 104, 109 (2d Cir. 2001). Laws which burden

in-state interests and out-of-state interests equally do not produce the “incidental burdens” that require balancing with local benefits. If no such burdens can be shown, there is no Commerce Clause claim.

Within the CSWD, the parties likely to be adversely affected by a new flow control law include the operators of private transfer stations who ship waste to private landfills, the owners of those landfills, and the haulers who patronize those transfer stations. Flow control would eliminate the use of both private transfer stations and private landfills by CSWD generators. Haulers within the CSWD would be compelled to deliver to the CSWD landfill, but this would only produce an injury to the haulers if the cost of using the public landfill is higher than the cost of using private alternatives. If not, haulers and their customers would benefit from the use of the public facility.

Even if the tipping fee at a new public landfill were to be higher than fees at local transfer stations, the disparity in price enforced by the law would not rise to the level of a constitutional violation unless it could be shown that the application of the law was qualitatively or quantitatively different for transfer stations, landfills and haulers located outside of Vermont than those located within Vermont. If all private transfer stations and landfills are deprived of the same opportunity to receive local waste, and all local haulers pay the same rate, it is unlikely that an incidental burden could be established. In enforcing the law, CSWD would have to take care that no favoritism is shown to local, as opposed to out-of-state companies.

If an affected party could demonstrate some disparate impact on out-of-state interests and an incidental burden on interstate commerce, that incidental burden would have to substantially outweigh the local benefits of the law to result in a constitutional violation. In construing the value of local benefits, CSWD’s own assessment of the law’s purposes and benefits will be given judicial deference, as courts generally will not substitute their judgment for that of a local legislative body, unless the legislative judgment is irrational. In that balance, the value of a flow control law that aids in the implementation of the solid waste management plan, enhances environmental security, and lowers local costs will be afforded considerable weight.

Timing of Legislative Action

The District may adopt flow control legislation at any time. At the time of adoption, the District may specify a date on which the law will become effective, and the effective date may be coordinated with the date on which a new landfill comes into service. Alternately, the district may defer adoption of a flow control ordinance until after the landfill is placed in service and it is determined that other methods of securing waste flows are ineffective.

Two advantages may be gained by adopting the law in advance of the opening of the landfill. First, there may be a fiscal advantage in issuing bonds for construction of the landfill if the rating agencies recognize the new flow control law as providing greater security to bondholders. If so, this may result in a better rating for the bonds, and lower costs for the District. Second, in the event that the law is challenged in court, an action might be brought before the law takes effect, thereby reducing the potential for damages. There is no means to assure that legal challenges will be brought at any

particular time, but a resolution of disputes over the law prior to its effective date can be advantageous to both sides.

Enforcement Issues

Even if a new flow control law is capable of surviving constitutional scrutiny, other considerations warrant attention. Not all opponents of such a law will be prepared to bring a challenge in court. Some may simply ignore the law, and test the ability of the District to effectively enforce it. In Madison County, New York a new flow control law was adopted in 2002, after the *United Haulers* decision was published. After adoption, no constitutional challenge was filed, and the majority of local haulers complied. However, some haulers refused to comply, and continued to collect local waste and take it out of the jurisdiction for disposal.

The County's efforts to enforce were hindered by a lack of trained personnel, the need to draft new accusatory instruments and supporting affidavits for compliance officers, a lack of presumptions in the law, and an adjudicatory forum that was not fully prepared to hear and decide cases under the new law. As a result, a few companies were able to defy the County and evade prosecution for several months. The evasion resulted in some lost waste and revenue, but also presented a threat to continued compliance by other haulers. Ultimately the defects in training and flaws in the text of the statute were corrected before the County lost the cooperation of the majority of its haulers. However, Madison's experience highlights the need for a municipality to thoroughly prepare to enforce the law as soon as it becomes effective. Some preliminary steps can be taken in conjunction with the adoption of a flow control law to ensure that it is equitably enforced as soon as it becomes effective.

Flow control laws differ from other types of waste legislation because they require that waste be delivered to a particular place. In order to prove a violation of the law, it is necessary to prove a negative – that waste was not delivered where it should have gone. This raises questions of proof that defense counsel can exploit, unless rebuttable presumptions are written into the law to relieve enforcement personnel of the obligation to observe collections and follow vehicles to unauthorized places of disposal. These should include rebuttable presumptions that a person distributing containers in the District is engaged in the business of waste collection; that the observations of a compliance officer that a container was full of waste one day and empty the next justifies a conclusion that the waste was in fact collected by the owner of the container; and that unlawful disposal occurred if there is no record of delivery of the waste within a reasonable time after collection occurred.

An enforcement mechanism should be prepared to be effective with the effective date of the law. Compliance personnel should be generally familiar with the routes, customers and services offered by haulers in the region. Pre-printed summonses and accusatory instruments should be prepared in advance, and compliance personnel should be prepared to add specific factual accusations in the event of a violation. If the law prohibits practices such as commingling recyclables with other MSW, or contemplates violations by generators as well as haulers, documents specific to these violations should be available to the officer. The accusatory documents should in all

cases be clear, and drafted in a manner sufficient to meet all notice and due process challenges.

Compliance personnel should have direct and reliable communication with the scalehouses of the District. Record keeping practices at District facilities should identify individual trucks, weights, times, and record the signatures of drivers. Scalehouse personnel should be familiar with supporting affidavits needed to establish when individual vehicles did, or did not arrive with loads at the facility. Both compliance officers and scalehouse personnel should be prepared to appear to testify at contested hearings at reasonable times.

An appropriate forum should be designated to hear violations. Administrative tribunals can be more effective than local civil or criminal courts in enforcing flow control, because civil and criminal court judges often have large and varied dockets, and have little time to become familiar with the nuances of hauler misbehavior. Administrative judges, hearing officers or boards are often better able to determine the significance of offenses, and to select the appropriate penalty in a given case. In any forum chosen, particularly if loss of a hauler's license is a potential result, offenders should be afforded due process, including the right to counsel and the right to cross-examine witnesses.

Enforcement philosophy should recognize that compliance with the objectives of the law is paramount, and that abuse of the process to generate new revenue through fines and penalties can be construed against a municipality in a constitutional challenge. It is better to be prepared to enforce the law thoroughly and effectively at its inception, than to be unprepared to bring cases until non-compliance is widespread. Experience in jurisdictions which have adopted flow control in recent years demonstrates that haulers can accept the idea of flow control if it is fairly applied, and no competitor appears to be able to evade prosecution.

Future Judicial Activity on the Subject of Flow Control

The District should be mindful that the evolution of Commerce Clause jurisprudence from *Carbone* through *United Haulers* is not yet complete. The *United Haulers* case itself is still pending with respect to the issue of incidental impacts, although the 2001 decision of the Court of Appeals is the law of this circuit unless reversed or modified by the Supreme Court. The public/private distinction articulated in *United Haulers* is significant because it establishes a relatively simple rule for both courts and local legislatures: flow control in favor of public facilities is likely to be constitutional, but flow control in favor of private business is likely to be unconstitutional.

Municipalities in several other states have taken notice of the *United Haulers* analysis and adopted flow control in favor of their own public facilities. These actions have drawn challenges from the private waste industry and the results are still unknown. A federal District Court in Florida has upheld a local flow control law under the *United Haulers* rationale. A federal District Court in Kentucky has rejected the public/private distinction and struck another law down. The U.S. Courts of Appeals for the Fifth Circuit (Mississippi, Louisiana, Texas) and the Sixth Circuit (Kentucky, Ohio, and

Tennessee) each have cases pending before them which raise the public/private distinction of *United Haulers* and call upon them to accept or reject it.

It is conceivable that if one or more of these Circuit Courts of Appeals may rule in a way which conflicts with the Second Circuit's interpretation of the Commerce Clause and the *Carbone* case. If so, the Supreme Court may be called upon to revisit *Carbone* and resolve the conflict. This may not be a bad thing, if indeed the appellate courts fail to reach a consensus on the subject of flow control. There is however, no assurance that the Supreme Court will rule in one way or in another if it returns to the field of solid waste regulation after more than ten years. On the other hand, the Supreme Court may decline to hear such a case, as it has declined all such cases since 1994.

If the District is concerned over the eventual outcome of the continuing judicial struggle over flow control, it could defer adoption of a law, or once adopted, defer the enforcement of the law until judicial uncertainties approach some resolution.

Section 7

RELIANCE ON COMPETITIVE MARKET FORCES

Introduction

CSWD could attempt to establish a competitive tipping fee which would be set at a level that would attract solid waste deliveries to the Landfill because it was the most financially attractive option available to private haulers. Under this option, CSWD would undertake a review of competitive tipping fees in the current market. This review would include consideration of the following:

1. Information on posted gate rates. Beck has found that gate rates are not usually a reliable source of data in determining a true market-based tipping fee.
2. Information on recently executed long-term disposal contracts for solid waste collected in or around the District. Beck has found that this is often the best indicator if such information can be obtained.
3. An analysis which considers: (a) the tipping fee being paid at alternative disposal facilities; (b) the cost of operating a transfer station; and (c) the cost of transporting solid waste from the transfer station to the alternative disposal facilities – this represents a “text book” approach and is based on a series of engineering and planning assumptions which are not always able to take into account cost savings a private operator may be able to experience by operating in a manner other than that prescribed in the text book.

It should be noted that it is extremely difficult to obtain reliable information on competitive tipping fees based on surveys and telephone inquiries because private operators consider such information to be highly confidential and proprietary.

After completing this review of competitive tipping fees, CSWD would develop an estimate of what tipping fee should attract waste to the Landfill. CSWD would then have to determine whether that level of tipping fee, if charged for all the solid waste available, will result in sufficient revenues to meet all the projected financial obligations of CSWD including paying operating and maintenance expenses and making debt service payment on the bonds.

Examples Where Utilized

This particular approach, often referred to as a “merchant plant” approach, is seldom used by itself for the financing of solid waste facilities because there is too much uncertainty and risk regarding the future revenue stream to support the issuance of revenue bonds. It has been used by solid waste authorities and public sector entities in tandem with other means of obtaining operating revenues.

Montgomery County, Maryland charges a market-based tipping fee for waste delivered to its solid waste management system and then charges a systems benefits

charge to all households in the County to make-up the difference between the total revenue requirement and the revenues received from tipping fees.

The Southeastern Public Service Authority of Virginia negotiates short-term, market-based contracts with private haulers for commercial waste and then adjusts the tipping fees it charges for solid waste delivered by the municipal members.

What is important in both of these examples is that there is an additional funding mechanism in place which backstops the market-based tipping fee.

Benefits and Drawbacks

One of the major benefits of relying on market-based tipping fees is its relative simplicity to administer after CSWD has determined what the appropriate tipping fees should be. It largely involves CSWD monitoring waste deliveries to the Landfill. If deliveries to the Landfill start to decrease, it may be that the tipping fee established by CSWD is too high. Similarly, if solid waste deliveries to the Landfill significantly increase, perhaps driven by solid waste generated outside the District, the tipping fee may be too low. CSWD may have to periodically adjust the tipping fee.

A second advantage is that if CSWD sets the rates at the right level, solid waste will come to the Landfill.

There are, however, major drawbacks with this option, the biggest and most important of which is the amount of financial risk involved and the fact that by itself, this option would not allow CSWD to issue revenue bonds to pay for the capital costs of the Landfill.

Similarly, just as there is financial risk to prospective bond purchasers, there is similar risk to CSWD itself. First, there is the uncertainty of how much solid waste may be delivered year to year. Secondly, there is no assurance that CSWD will have adequate funds to meet its financial obligations unless there is some other funding mechanism in place.

Legal Consideration

This alternative requires no legal action on the part of CSWD, and would rely upon competitive tipping fees at the District landfill to attract local waste. If the Solid Waste Fee continues to act as a surcharge on disposal, and is reliably collected at both the CSWD landfill and certified scales handling waste destined for other facilities, the cost of ancillary programs can be supported without raising landfill rates beyond a competitive level.

CSWD may reduce the landfill fee by subsidizing the cost of operating through charging user fees. See Section 9 for additional discussion of this option.

Section 8

PRIVATIZING THE OPERATION OF THE LANDFILL

Introduction

CSWD could consider privatizing the operation of the Landfill to a major private hauler who, as part of that hauler's requirements, would assume the responsibility for obtaining the required solid waste. Under this option, CSWD would retain ownership of the Landfill and the Landfill's permits but turn over the operation of the Landfill to a private operator and charge that operator with securing the necessary waste supply. In order for this approach to work, it may be financially advantageous for CSWD to allow the private operator to accept solid waste at the Landfill that is generated outside the District.

The implementation of any private landfill operation needs to be consistent with CSWD's statutory authority and financial requirements.

Examples Where Utilized

Several counties in the State of New York have recently renegotiated long-term operating agreements with private companies pursuant to which the private companies have assumed responsibility for the operation of the publicly-owned landfills. The New York counties have done this for a variety of reasons including the following: (1) it may provide access to a larger solid waste management company with greater operating capabilities; (2) the private company will make necessary capital improvements, such as additional cell construction; (3) the private company will assume responsibility for all facets of the operation of the landfill including billing haulers and collecting payments; (4) the private company may be able to offer innovative operating procedures or landfill designs in order to maximize the useful life of the landfill; (5) the private company will assume responsibility for obtaining and maintaining permits; (6) the private company will arrange for waste delivery; and (7) the private company will make lease payments of tens of millions of dollars to the county over the 20-year term of the lease. However, the provisions of most leases also allow the private company to use the county-owned landfill for the delivery of solid waste generated outside the counties. In effect, the counties are selling a portion of the air space in their landfills to a private company.

In 2002, Monroe County, New York executed a long-term lease with Waste Management Inc. for the operation of the Mill Seat Landfill. In 2003, Ontario County, New York executed a long-term lease with Casella Waste Industries for the operation of the Ontario County Landfill. Chemung County, New York issued a request for proposal on December 13, 2004 seeking proposals from private companies to execute a long-term contract for the operation of the Chemung County Landfill.

Benefits and Drawbacks

The potential benefits to CSWD of privatizing the operation of its landfill are the same as those discussed above:

1. Hire an experienced operator with greater resources and potential for some economies of scale.
2. Private company makes the required capital improvements associated with new cell development.
3. Many administrative responsibilities shifted from CSWD to the private operator.
4. Private operator assumes responsibilities for obtaining a sufficient waste supply up to the permit limits.
5. If CSWD is willing to accept solid waste generated outside the District, it could result in significant lease payments to CSWD.

One major drawback to this option as it relates to significant lease payments is the potential that this could involve a private operator being allowed to accept waste which is generated outside the District. Without the ability to accept waste from other sources, the economics of such an approach may not work for the private company because that private operator may not receive that solid waste collected by other private haulers operating within the District. Therefore, in order to obtain a sufficient supply of solid waste, it would be necessary to find other source of solid waste.

A second significant drawback is that if CSWD allows waste generated outside the District to be disposed at the Landfill, the useful life of the Landfill could be reduced dependent upon the level of waste deliveries. This could be addressed by established an annual limit which is tied to the permit conditions.

A possible drawback, although some may consider it a benefit, is that CSWD will give up a significant amount of control over the operation of the Landfill. This may even include allowing the private operation to have the ability to set the tipping fees which are charged, dependent upon how the transaction is structured.

Legal Consideration

The legal authority of CSWD to engage a private sector operator for a District facility is granted by the Charter, §405-4 and §405-6. This option presumes that private operation of the landfill can provide lower management costs, which can in turn be passed through to consumers. These lower costs can be presumed to aid CSWD's position in a competitive market, and attract reliable quantities of waste, as discussed in Section 7, above.

From a constitutional perspective, a Commerce Clause challenge can be avoided if the private operator is engaged solely to manage the landfill for a fee appropriate to that purpose. The District should retain the right to fix and collect all tipping fees at the landfill, and the operator should not be given any rights to privately market or sell

PRIVATIZING THE OPERATION OF THE LANDFILL

any public capacity on a merchant basis. If the operator were to have such powers, a claim could be made that other flow control methods used to supplement his operation, such as legislative flow control or public subsidies for construction, would place the operator in the position of a private beneficiary of the regulatory scheme, similar to the private operator of the transfer station in Clarkstown.

Section 9

IMPLEMENTING USER FEES FOR WASTE GENERATORS

Introduction

CSWD could implement a program of various user fees which are charged to waste generators. Such a program is intended to result in “economic flow control,” not unlike what would be involved in the creation of collection districts. CSWD would identify its cost to provide solid waste disposal services for different types of waste including, but not limited to, the following:

1. Municipal solid waste
2. Construction and demolition material
3. Tires
4. White goods (i.e., household appliances)
5. Yard waste
6. Commercial waste
7. Household hazardous waste
8. Recyclable materials

By charging sufficient user fees to generators and collecting a sufficient level of revenues, CSWD could potentially put itself in the position where it would not have to charge tipping fees at the Landfill or could charge a significantly lower tipping fee. This would make the Landfill the lowest cost disposal option available to private haulers, in effect resulting in economic flow control as haulers would have no economic incentive to utilize any other disposal facility.

Examples Where Utilized

CSWD currently utilizes a type of user fee in the form of its Solid Waste Management Fee. This fee is a per ton fee charged to the hauler for each ton of waste generated in the District for disposal.

Many communities have adopted pay-as-you-throw (“PAYT”) user fee systems for residential waste either through the sale of stickers that are placed on trash bags when they are placed out for collection, the sale of specially colored trash bags, or by charging a monthly fee for collection and disposal service based on the amount of waste generated (usually based on the size and number of waste containers used by the customers). The user fees can be set at a level which is sufficient to pay for both collection and disposal. User fees have also been established by public entities for the

other types of waste identified above. Such user fees are often charged at the point of disposal.

Benefits and Drawbacks

A major benefit of implementing a system of user fees for waste generators is that, as discussed above, it has the potential to result in economic flow control where private haulers would have no incentive to go to other facilities if no tipping fee (or a very low tipping fee) was being charged for waste delivered to the Landfill.

A second benefit of users fees is that those individuals and businesses generating the waste pay for the cost of service associated with dealing with that particular component of the waste stream. A well-designed system can allocate different users fees for different types of waste.

A third benefit is that PAYT programs often encourage increased levels of recycling by the general public. When citizens are paying for stickers and trash bags, they are often more motivated to increase the amount of material they recycle because recycled material often has no charges.

The biggest potential drawback with this option is that it would require CSWD to become much more involved in the collection aspect of solid waste management. This in turn would result in a much greater level of effort in administering the program as CSWD may have to sell stickers or trash bags or provide different sized and numbers of container for residential waste dependent upon the amount of solid waste each household generates. Additional programs would have to be created for commercial waste and other types of solid waste. It will also require that CSWD pay private haulers for the collection services they provide and CSWD will have to determine how it will monitor such collection services. It would result in a significant expansion of CSWD's role in the collection of waste in the District.

Legal Considerations

The legal authority for the District to assess user fees, as uniform units of cost, is granted by the Charter §405-34(d). Billing to individual users could be charged directly to property owners or others receiving the benefits of the service by the District, or if administratively convenient, by the member municipalities.

As a method of flow control, the direct assessment of user fees to waste generators, as opposed to haulers, has not been challenged under the Commerce Clause of the Constitution in the Second Circuit. However, such an assessment might not be considered to be regulation of interstate commerce, and hence not subject to review under the Commerce Clause, pursuant to *U.S.A. Recycling v Town of Babylon*. The assessment would not be directed to, or paid by, any hauler, landfill, or private transfer station operator, and would not interfere with the operations of such parties, who might not have the standing requisite to bring a Commerce Clause challenge. It is likely that the courts would view the direct assessment of user fees to waste generators

as merely a means of charging local property owners for the benefits of services provide by local government, and not as regulation interstate commerce.

Use of the Solid Waste Fee for Facility Construction

The CSWD Solid Waste Management Fee is assessed on all solid waste generated within the District, subject to exemptions for certain types of waste identified by the Board. (Solid Waste Management Ordinance Article VIII.) The District's authority to impose the Fee is granted by the Charter, §405-34(d), which does not limit the use of revenues raised by the Fee. Consequently the District's revenues, pursuant to its Charter, may be used for valid District purposes, defined in §405-2 as "providing for the efficient, economical and environmentally sound management of solid waste generated by member municipalities and their residents."

The Commerce Clause of the U.S. Constitution subjects most areas of interstate and intrastate commerce to potential judicial review, including the use of fees and charges on the sale of goods, and the provision of services for particular purposes. The salient case concerning the use of revenues raised from sales or use taxes for special local projects is *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186 (1994), in which the U.S. Supreme Court struck down a Massachusetts statute which imposed a tax on all milk sold in the state in order to fund a program designed to aid Massachusetts milk producers. The Court found that the tax effectively discriminated against out-of-state dairy farmers by devoting the proceeds of their taxes to their in-state competitors.

The question arises as to whether a private sector landfill operator could draw a valid parallel between the tax-and-spend arrangement reviewed in *West Lynn Creamery* and the use of the Solid Waste Management Fee to help finance the District's new public landfill. An allegation might be made that i) the fund balances now available to the District have come from assessments on solid waste which has heretofore been disposed in private landfills in the interstate waste market, and ii) the use of those funds to construct a competing local facility violates the Commerce Clause in the same way that Massachusetts' milk subsidy to local farmers improperly burdened out-of-state milk producers. We believe that such an analogy is flawed for several reasons.

First, the Solid Waste Management Fee is not charged to any private landfills, whether in Vermont or elsewhere. The Fee is charged to waste generated within the District, and ultimately falls upon waste generators within the District. To the extent that it is collected from local haulers at local private transfer stations with scales licensed by the District, these haulers and facilities pass the charge through to the generators of the waste. Consequently, while a new public landfill might be seen to be in competition with private landfills in other states, there is no basis to claim that private landfills have paid any fee which might be used to subsidize their competitors.

Second, the tax raised in Massachusetts was ultimately used to subsidize the private dairy industry in that state. The use of District fund balances, in contrast, will be used to construct a public waste facility. The U.S. Court of Appeals for the Second Circuit has recognized a constitutionally significant difference between regulations which benefit public facilities and those which benefit private interests for Commerce clause

IMPLEMENTING USER FEES FOR WASTE GENERATORS

purposes in *United Haulers Assoc. v. Oneida-Herkimer Solid Waste Management Authority*, 261 F.3d 245 (2d Cir. 2001). Because the District's landfill will be publicly owned, it is not likely that the courts will find discrimination against interstate commerce if the District uses the Fee to build the landfill.

Third, the fact that the application of fund balances to facility construction will lower the debt service to be paid by the District, and thereby lower the future tipping fees to be charged at the landfill, is not a constitutional defect. The Supreme Court, in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994), specifically referred to the use of general taxes and municipal bonds as an appropriate means to subsidize the cost of a public waste facility. The Vermont Supreme Court has held, in *Northwest Vermont Solid Waste Management District v Central Vermont Solid Waste Management District* 61 A.2d 816 (Vt. 1992) that Solid Waste Management Fees, such as those charged by the CSWD, are equivalent to taxes pursuant to delegation by the Vermont legislature. The landfill moreover, will be available to all persons who generate waste within the District, who may include persons who reside on other states.

Finally, the continued assessment of the Solid Waste Management Fee after the new landfill is opened should not present any new constitutional issues, for the reasons above. Any fund balance which may be generated in the future from the assessment of the Fee should be available for any lawful purpose of the District, including accelerated repayment of debt, or the development and operation of new programs consistent with the "efficient, economical and environmentally sound management of solid waste generated by member municipalities and their residents."

Section 10

ADVANCED SALE OF AIR SPACE

Introduction

CSWD is evaluating an option where it would pre-sell a portion of the air space in the Landfill to private haulers for the anticipated useful life of the Landfill. For example, if a private hauler believed that hauler would be delivering 10,000 TPY of waste to the Landfill, and if the useful life of the Landfill is assumed to be 20 years, CSWD would sell that hauler enough air space to accommodate the disposal of 200,000 tons of waste. Payment for the air space would be included as part of the financing of the Landfill. It is likely that provision would have to be included to allow the hauler to operate within some reasonable band width on an annual basis (for example, between 8,000 to 12,000 TPY for the hauler delivering 10,000 TPY), but with a firm maximum that could not be exceeded over the life of the agreement.

An alternative to this particular option would involve the sale of a portion of the equity in the Landfill. For example, a hauler may determine that, based on his current and projected waste collection, he requires 20,000 TPY. If, for the purpose of this discussion, we assume the Landfill has an annual permitted capacity of 100,000 TPY, the private hauler would make an initial payment equal to 20 percent of the capital cost of the Landfill. There would also be a provision that the hauler would pay CSWD a tipping fee for actual waste deliveries sufficient to pay for: (1) 20 percent of the actual operating and maintenance expenses in a given year; plus (2) capital cost of future cell development. This would represent a “public/private partnership” in the truest sense of the word.

Examples Where Utilized

Beck is not familiar with other public entities who have used this approach, but that does not mean that it has not been implemented in some part of the Country.

Benefits and Drawbacks

If CSWD could either pre-sell a significant portion of the air space of the Landfill, or sell equity shares in the Landfill to private haulers, there would be some major advantages:

1. Any private hauler who had made the financial investment described above would have every financial incentive to use the quantity of the airspace which had already been paid for. This would be an effective way to assure the delivery of whatever quantity of waste was subject to this option.

2. If CSWD receives either type of upfront payment from private haulers, it will reduce the amount of debt CSWD will need to issue to pay for the capital cost of the Landfill.
3. Having the private haulers in a financial partnership with CSWD has the potential for both parties to work together to address future issues.

One potential drawback to this option is that private haulers may not be willing to make a long-term financial commitment to deliver 100 percent of their waste due to a concern that the market may change in the future and the private hauler will not be able to utilize all of the pre-purchased space. If less than 100 percent of the waste was committed, CSWD would have to make alternative arrangements for the delivery of the balance.

Legal Considerations

The legal authority for the District to make agreements for the advance sale of air space or capacity at a new landfill is granted by the Charter §405-2, which authorizes the District to “purchase, sell, lease, own, convey, mortgage, improve, and use real and personal property to construct develop and maintain solid waste management facilities....” Airspace or future capacity at a new landfill would be considered to be real or personal property under this section, and would thus be subject to sale by the District, under terms to be approved by the District Board.

The sale of airspace by the District would probably be exempt from scrutiny under the Commerce Clause, as an act of market participation pursuant to *USA Recycling v. Town of Babylon*, *SSC Corp v. Town of Smithtown*, and other cases. However, it would be prudent for the District to conduct any such sale through a competitive procurement, open equally to in-state and out-of-state bidders.

Section 11 SUMMARY

Introduction

As Sections 2 through 10 indicate, there are different benefits and drawbacks for each of the nine options discussed in this Report. In order to assist CSWD in its evaluation, Beck has prepared a comparative summary which addresses the major items of consideration by CSWD. The results of that summary are presented in Table 11-1.

**Table 11-1
Summary of Options**

Option	Financing Ability	Administration Level of Effort by CSWD	Capital Cost by CSWD	Potential Risk to CSWD	Type of Waste Secured	Need to Collect Property Taxes	Legal Considerations
1) Collection of Solid Waste by CSWD	Allows for financing depending on amount of waste CSWD is able to collect	Significant amount of additional work for CSWD as it will have to bill customers for collection services.	Significant capital investment to purchase collection vehicles unless CSWD contracts out to private haulers.	CSWD has to compete with private haulers	Can secure both residential and commercial waste.	No need to collect taxes if CSWD bills customers for services.	Authorized with participation and cooperation of member municipalities]
2) Creation of Collection Districts	Allows for financing if collection districts address commercial waste stream.	Significant additional work for CSWD to administer and enforce as it will have to bill customers and pay haulers.	No additional capital investment.	Low risk if properly implemented and administered.	Allows for collection of residential waste.	Requires assessing residents based on quantity of waste.	Authorized with participation and cooperation of member municipalities
3) Execution of Long-Term Contracts with Private Haulers	Allows for financing if contracts cover a significant amount of total waste stream.	Relatively low administrative efforts.	No additional capital investment.	Future risk of changes in marketplace - can be addressed by length of contracts.	Can cover all types of waste.	No need to collect property taxes.	Authorized by District Charter

**Table 11-1
Summary of Options**

Option	Financing Ability	Administration Level of Effort by CSWD	Capital Cost by CSWD	Potential Risk to CSWD	Type of Waste Secured	Need to Collect Property Taxes	Legal Considerations
4) Franchise Collection Routes	Allows for financing if commercial waste stream is addressed.	Relatively low administrative efforts if CSWD has haulers perform billing function.	No additional capital investment.	Low risk.	Allows for collection of residential waste.	No need to collect property taxes. CSWD requires haulers to do billing.	Authorized by 24 VSA §2202a(a)
5) Legal Flow Control	Allows for financing based on entire waste stream	Will require potentially high level of enforcement and legal resources in early stages.	No additional capital investment]	Low risk if current constitutional precedent is sustained. However, law is not yet settled.	Entire waste stream, or as designated by District.	No need to collect property taxes.	Currently authorized by Second Circuit Court of Appeals subject to incidental impact test., but also subject to review by US Supreme Court .
6) Reliance on Competitive Market Forces	Will not allow for issuance of revenue bonds unless "back-stopped" by some other provision.	Should require constant monitoring of market-based tipping fees and adjustments required.	No additional capital investment.	Could result in significant risk to CSWD with regard to revenues and quantity of waste.	No waste is secured.	No need to apply property taxes unless property taxes are used as a "back-stop" to guarantee payment on bonds.	Authorized by District Charter

**Table 11-1
Summary of Options**

Option	Financing Ability	Administration Level of Effort by CSWD	Capital Cost by CSWD	Potential Risk to CSWD	Type of Waste Secured	Need to Collect Property Taxes	Legal Considerations
7) Privatizing Operation of Landfill	Would allow for financing depending on provision of lease agreement and credit worthiness of the private company.	Relatively low administration if a long-term lease is executed which includes requirement for vendor to provide solid waste.	No additional capital investment.	Low risk with right contract terms and credit worthy vendor.	Will cover both residential and commercial.	No need for property taxes.	Authorized by District Charter
8) User Fees for Generation	Would allow for financing if commercial waste stream is properly addressed.	Could require significant amount of administrative effort if program includes PAYT. Will require multiple types of generator fees for different types of waste.	CSWD would have to determine who pays for trash and recycling containers provided to waste generators.	Low risk of waste not being delivered.	Will cover residential waste.	Depends on how CSWD will collect generator fees.	Authorized by District Charter
9) Advanced Sale of Air Space	Enhances ability to issue bonds.	Relatively low administrative effort by CSWD.	No additional capital cost.	Low risk if sufficient capacity can be pre-sold.	Can cover all types of waste.	No need for property taxes.	Authorized by District Charter