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**Current Issues for County Officials:**

**Implications of the Solid Waste Flow Control Statute and  
a New Day for Issuer Liability**

*SCAC Annual Conference*

**August 5, 2013**

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## Flow Control: What is it?

- Flow control is a legal mechanism whereby an entity is given the power to determine where solid waste should go, typically when exercising its legal responsibility for dealing with solid waste created in its jurisdiction.
- The theory is that the power to direct the flow of waste will ensure that it goes to an appropriate landfill and that waste may be directed in sufficient quantity to justify capital investment and safe operation.



## Flow Control: History

- The disposal of garbage is, and has historically been, a local issue. Improper disposal can lead to all manner of bad outcomes, from groundwater contamination, to disease, to litter.
- In the 1970's, Congress passed the Resource Conservation and Recovery Act to address contiguous environmental problems created by harmful disposal methods, inadequate landfill capacity, and substandard facilities. Congress also formally expressed its intent that waste management should be addressed at the state and local level. EPA regulations followed.



## Flow Control: History

- To comply with the EPA regulations, States passed a number of laws and regulations.
- As with many environmental laws and regulations, the new requirements impose substantial costs on the process of collecting and disposing of waste.
- To ensure sufficient waste is available to create economies of scale and provide revenues to invest in helpful technologies, many state management plans include provisions allowing local governments to designate specific sites as the only lawful place where solid waste could be disposed.



## Flow Control: Implementation

- In South Carolina, the General Assembly enacted the “South Carolina Solid Waste Policy and Management Act of 1991” (“SWPMA”). This required counties to enter the solid waste business, even if the actual operations were franchised or otherwise delegated.
- Section 44-96-80(j) provides that “[t]he governing body of a county has the responsibility and authority to provide for the operation of solid waste management facilities to meet the needs of all incorporated or unincorporated areas of the county. . .”



## Flow Control: Implementation

- Legislative Findings:
  - The legislative findings supporting the enactment of SWPMA recited that 80% of waste generated in the State was landfilled, that landfill capacity was quickly running out, that the costs of solid waste management would rise sharply in response, and that improper solid waste management posed a threat to the public health.



## Flow Control: Implementation

- The act requires “local governments to adequately plan for and provide efficient, environmentally acceptable solid waste management and services.” Section 44-96-20.
- The act also provides that “[t]he governing body of a county is authorized to enact such ordinances as may be necessary to carry out its responsibilities under this chapter. . .” Section 44-96-80(k).



## Flow Control: Implementation

- The General Assembly “sought to handle the practical problems associated with solid waste management by ensuring adequate landfill capacity to meet the state's future disposal needs and provide for the efficient and economical disposal of waste in the state.” *Sandlands C&D, LLC v. County of Horry*, 716 S.E.2d 280 (S.C. 2011).
- The SWPMA mandates the formation of a state solid waste management plan by DHEC and requires counties to prepare individual solid waste management plans or participate in regional solid waste management plans.



## Flow Control: Challenged and Upheld

- Horry County adopted a flow control ordinance that governed the disposal location of all solid waste generated in Horry County. That ordinance was challenged in federal court, and during that case a question was certified to the South Carolina Supreme Court asking whether the flow control ordinance was preempted by SWPMA.
- The South Carolina Supreme Court upheld the ordinance as a valid exercise of the County's police powers pursuant to Section 4-9-25 and did not find preemption. Stated another way, the Supreme Court said that enacting a flow control ordinance is part of the Home Rule powers of counties.



## Flow Control: In Practice

- Counties are not required to displace private haulers in their regulating the flow of all solid waste in their boundaries; it is simply an option.
- However, the ability to regulate all waste serves two significant ends:
  - It allows for leverage over the affairs of private waste haulers and landfills by the elected body which is closest to the people.
  - It provides a mechanism to ensure sufficient waste flows to a site to support investment.



## Flow Control: Legislation

- There have been several proposed legislative amendments to SWPMA in recent years that affect the ability of counties to enact flow control ordinances.
- The most recent challenge goes by the name of “The Business Freedom to Choose Act,” H. 3290. This amendment leaves in place all of the responsibility to address and provide for solid waste management, but removes the ability of a county to direct the flow of solid waste.



## Flow Control: Legislation

Specifically, H. 3290 provides that “[t]o the extent that a county ordinance requires disposal of waste at one or more designated solid waste management facilities or requires recovered materials to be processed or recycled at one or more designated facilities, the ordinance is void.” Proposed amendment to Section 44-55-1210.



## Flow Control: Legislation

- You may hear that there were protections in the amendment for entities with outstanding bonds or contracts dependent on either the existence of or power to enact a flow control ordinance. This is what they were talking about:

However, nothing in the Business Freedom to Choose Act shall be construed to impair in any respect the existing contractual obligations of any county, municipality, or other political subdivision, including a joint agency consisting of five or more counties formed prior to the effective date of the Business Freedom to Choose Act pursuant to Section 6-16-10, et seq., as amended, arising from, or incurred in connection with, any bonds, notes, or other evidences of indebtedness issued by the entity prior to the effective date of the Business Freedom to Choose Act, which are secured by, or payable from a solid waste user fee, or any amounts payable under a solid waste service agreement entered into by a member county with a joint agency as specifically described in this section. Proposed Section 44-55-1215

- Language only applies to contractual obligations arising from bond documents.
- The conflict between the “is void” language and the “shall be construed” language is essentially irreconcilable.



# Flow Control

- Why does this matter?
  - Home Rule devolved the primary, everyday functions of government to the representatives closest to their constituents.
  - The ability to enact a flow control ordinance is central to ensuring a framework to protect the health, safety, and welfare in your communities.



# Flow Control

- Who does this affect?

Berkeley County Ordinance 53-4(c):

“The county shall collect the solid waste deposited in the receptacles on a periodic basis so as to avoid the creation of any condition that may be hazardous to the health and welfare of the public and so that the receptacles do not become unsightly thereby distracting from the aesthetic appearance of the county. **Once collected, the solid waste shall be disposed of at the county sanitary landfill.**”

Spartanburg County Ordinance Sec. 66-3. - Collector's license; landfill to be used.

“(b) **All collectors licensed under subsection (a) of this section must dispose of all refuse collected or transported at the county sanitary landfill.** Licensed collectors are not permitted to use the roadside containers for the disposal of refuse collected or transported in the operation of their business.”

Horry County Ordinance No. 02- 09

2.1.1

“**The County hereby designates the disposal facilities operated by the SWA and/or public owned facilities designated by the SWA for the acceptance or disposal of acceptable waste. The dumping or depositing by any person at any place other than at the designated facilities of any acceptable waste generated within the County is prohibited.**”



# Flow Control

- Who does this affect?

Florence County Ordinance 13-1 Green Boxes

(6) “The above-mentioned items **are to be transported to the county landfill's collection station, or placed in the "40-yard, roll-off boxes" designated mini-stations.**”

Lexington County Ordinance 54-39(2)

“All solid waste including normal household refuse, garbage, and/or rubbish **shall be disposed of at a county sanitary landfill, convenience station or transfer station.**”

Dorchester County Ordinance 34-71

“The annual solid waste recycling and disposal user fee relates only to the receipt and disposition by the county of solid waste. **It is the duty of every owner of real property within the county to cause all solid waste generated on such real property to be disposed of in a manner consistent with any regulations fixed by other ordinances of the county.** For that purpose, the solid waste recycling and disposal system is being made available to every owner of real property within the county.”



# Flow Control

- Who does this affect?

## Jasper County Ordinance 24-30

**“Hickory Hill Landfill and Recycling Center is the approved solid waste disposal facility for the county.”**

## Jasper County Ordinance 24-31(a)

“Effective the date of the acceptance of this article, commercial waste will be charged to the hauler at the rate designated by the rate schedule. (See section 24-32) The contract agreement between the county and Hickory Hill LFRC requires that **all commercial waste generated in the county must be delivered to Hickory Hill Landfill and Recycling Center**, except commercial, construction and demolition debris and commercial yard waste.”

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## Oconee County Ordinance 28-73

(b) *Licenses.*

(3) **“Any collector of solid waste may dump only at designated, authorized sanitary landfills approved by the county or the state department of health and environmental control.”**



# Flow Control

- Who does this affect?

Richland County Ordinance 12-22

**“All refuse collected by county forces or collectors under contract with the county shall be disposed of and/or delivered to such places and used for such purposes as may be ordered by the county.”**

Charleston County 10-21(g)

**“All collectors should dispose of all solid waste collected in such manner and at such locations as are approved by the county health department.”**

Charleston County 10-24



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## Issuer Liability

- SEC Rule 10b-5, promulgated under Section 10(b) of the Securities Exchange Act of 1934, as amended, provides that it is unlawful for any person, directly or indirectly:
  1. to employ any device, scheme, or artifice to defraud,
  2. to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
  3. to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.



# Issuer Liability

- What are we talking about?
  - Whether there is substantial likelihood that the inclusion or omission of a fact would significantly alter the “total mix” of information about a security in the view of the reasonable investor.



# Issuer Liability

- When is this relevant?
  - Primary Market Disclosure – official statements, transaction documents.
  - Secondary Market Disclosure – continuing disclosure, and other statements “calculated to reach the market.”



## Issuer Liability

- What Disclosure is Calculated to Reach the Market?
  - It seems fairly intuitive that Official Statements and EMMA filings pursuant to Continuing Disclosure Undertakings are calculated to reach the market and need to be accurate.
  - However, “[m]unicipal issuers have an obligation to make sure that information that is released to the public that is reasonably expected to reach investors and trading markets, even if not specifically published for that purpose, does not violate the antifraud provisions.” SEC Release 69515, May 6, 2013.



## Issuer Liability

- The SEC has taken the position that in the absence of EMMA filings, “investors may be more likely to rely upon statements from public officials.”
- In this case, public officials’ statements become “the principal source of significant, current information about the issuer of the security and thus could reasonably be expected to influence investors and the secondary market.”
- Full and complete public disclosure on EMMA reduces the likelihood that public statements will alter the total mix of information.



## Issuer Liability

- Moreover, the SEC has increasingly focused on individuals:
  - “Although cities and municipal issuers are distinct legal entities, in fact they act through individuals . . . And they meet their primary and continuing disclosure obligations under state and federal law through the conduct of public officials. So when we find material misstatements or omissions by public officials in connection with municipal securities, we can, should, and will take action to hold the appropriate public officials accountable.” – SEC Commissioner Daniel Gallagher on May 10, 2013.



## Issuer Liability

- There has been a spurt of SEC activity in 2013; many of the actions by the SEC focus on individuals and nontraditional forms of disclosure:
  - Nontraditional Media
    - Harrisburg, PA – Public Statements
    - South Miami, FL – Unrelated Documents
  - Personal Financial Liability
    - San Diego, CA – Understatement of Pension Liability
    - Victorville, CA – Inflation of Property Values
    - Miami, FL – Pattern of Misbehavior



## Issuer Liability - Harrisburg, PA

- Harrisburg failed to file its audit or other continuing disclosure in connection with its disclosure agreements. This created an information vacuum during a time the city was experiencing financial distress.
- In the absence of such documents, the SEC found that budgets and even State of the City addresses amounted to disclosure under the securities laws.
- Problematically, these documents and speeches omitted payments for certain bond issues and misstated the city's credit rating.



## Issuer Liability - Harrisburg, PA

- The SEC report, filed May 6, 2013, establishes that documents unrelated to a bond issue, but reasonably expected to reach investors can result in fraud liability.
- “Public officials should be mindful that their public statements, whether written or oral, may affect the total mix of information available to investors, and should understand that these public statements, if they are materially misleading or omit material information, can lead to potential liability under the antifraud provisions of the federal securities laws.” SEC Release 69516, May 6, 2013.



## Issuer Liability - South Miami, FL

- South Miami falsely certified that it was complying with loan agreements to ensure two sets of pool bonds issued by a conduit issuer in 2002 and 2006 would be tax-exempt.
- The City represented that the proceeds were being used for proper purposes when in reality it loaned the bond proceeds and leased the project to a private developer in return for parking revenues, jeopardizing the tax exempt status.
- The documents at issue were certifications to the conduit issuer, not statements designed to reach investors.



## Issuer Liability - San Diego, CA

- The SEC alleged that the San Diego City Manager, Auditor & Comptroller, Deputy Finance City Manager, and the City Treasurer fraudulently failed to inform municipal investors about the severe under-funding of its pension obligations.
- “Municipal officials have a personal obligation to ensure that investors are provided with complete and accurate information about the issuer’s financial condition.” – SEC Regional Director Rosalind Tyson
- The City officials consented to the entry of a consent order that permanently enjoined them from future violations of the Securities Act with three having to pay a penalty of \$25,000 and the fourth paying a fine of \$5,000.



## Issuer Liability - Victorville, CA

- Victorville
  - Airport TIF Bonds.
  - Inflated the valuation of hangars (\$65m v. \$27.7m) in the issuance of TIF bonds to allow for a larger issue size.
  - Put on notice by assessor that values were suspect.
  - SEC is seeking financial penalties against the City of Victorville, the former director of economic development, the airport authority, and the underwriters.
  - The SEC is also seeking an injunction to prohibit [further violations of the Securities Act].



## Issuer Liability - Miami, FL

- It is alleged, that Miami, acting through its budget director, made several inter-fund transfers of restricted monies as a means of masking a general fund deficit and securing better bond ratings.
- This mirrored conduct in 2003 that was the subject of an existing cease and desist order.
- The SEC is suing the City and its former budget director for monetary damages.



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