

**ONE PERSON'S TRASH IS ANOTHER PERSON'S ETHANOL:
AN ENVIRONMENTAL STIMULUS PACKAGE**

A COUNTY SOLID WASTE DISTRICT'S JOURNEY FROM RFP TO WTE

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BACKGROUND

Indiana passed House Bill 1240 in 1990 as its attempt to address the growing concern regarding solid waste management. The bill established a procedure for creating solid waste Districts within an individual county or, where a willingness to cooperate along with geography and politics permitted, Districts comprised of more than one county. Under the bill, each District was responsible for developing its own 20-year plan for solid waste management.

Part of the powers of the Indiana Department of Environmental Management (IDEM) under Indiana statute are to maintain oversight and ultimate statutory control over permitting and other solid waste activities, including some District action. House Bill 1240 provided for expansive local input and control over other aspects of solid waste management. The statute itself delineates a vast array of permissible activities for Districts, and includes commerce clause-like language as a basis to allow a District to do whatever is "necessary and proper" to effectuate its 20-year plan for solid waste management. However, the statute restricts District control in the areas of eminent domain and flow control, although the issue of local flow control authority has been recently revisited and recognized under the April 30, 2007 United States Supreme Court decision in *United Haulers Association, Inc., et. al. v. Oneida-Herkimer Solid Waste Management Authority, et. al.*

Much like Chicago, Lake County is the "second county" of Indiana, behind the capitol county of Marion. Lake County has a population of 480,000 and is located in the northwest corner of Indiana near Chicago. There is heavy industry in operation within the county borders. The county consists of 19 separate and politically divergent municipalities which traditionally place a high value on maintaining their independence.

In recognition of the unique nature of Lake County and its political subdivisions, the membership of the Lake County Solid Waste Management District currently stands at 27. The membership includes mayors, town council members and county representatives. Pursuant to its statutory charge, the District developed and implemented an IDEM approved 20-year plan. Its plan included education and recycling programs, special collection programs including household hazardous waste, white goods and tire collection programs, e-waste and drop-off recycling centers. It also included grants to municipalities for curbside recycling. To close the

recycling loop, the District attracts and supports businesses which use recyclable materials to manufacture other useable products.

Finally, in recognition of the state's direction to address and be responsible for the generation and ultimate disposal of solid waste, and in further recognition of the cost savings and other benefits of collective purchasing agreements, the District Board, on behalf of and pursuant to interlocal agreements with the municipalities in Lake County, requested proposals for the taking of the solid waste generated and collected in Lake County, Indiana either by providing capacity at a final disposal facility or by another type of facility. Upon receipt of responses to that request for proposals, the District engaged in the review of those proposals, and entered into negotiations with all proposers. The result was an executed agreement with Powers Energy One of Indiana, LLC for the construction and operation of a waste to ethanol facility in Lake County, Indiana. This presentation will focus on the Darwinian evolution of that journey.

ROLES OF THE STATE AND COUNTY SOLID WASTE DISTRICT **COUNTY SOLID WASTE DISTRICT**

Prior to 2003, the District had gone through a long and arduous process to site a landfill in Lake County, Indiana. Ultimately, the District Board determined that there was no need to construct a new municipal landfill in Lake County, Indiana, based on the existence of operating landfills within a reasonable distance of the county. However, the District still recognized the need to effectively and efficiently manage solid waste in Lake County.

In 2003, the District held a meeting to discuss comprehensive and long range approaches to solid waste issues in the District's office, attended by numerous representatives of the solid waste industry. At that meeting, the number one recommendation to come from the solid waste industry was to seek a unified commitment from all of the municipalities of Lake County regarding their solid waste disposal, in order for the solid waste companies to propose, and the municipalities to ultimately incur, the lowest possible cost for solid waste management services. As a result of that recommendation by the solid waste industry, the District began that process.

That collaborative approach was also recommended by a "Good Government Study" conducted in Lake County, which study involved a review of nearly all of the county-wide offices/entities. The Study

recognized and specifically stated that the District “is well positioned to act as a central negotiator on behalf of the various jurisdictions in the County, and that there is potentially large cost savings to those municipalities”. The Report listed this as a High Priority, and provided a time frame of implementation of 12 to 18 months. The Report also strongly recommended that all jurisdictions in the County sign an interlocal agreement concerning a united approach to solid waste disposal and that the District, as agent for such municipalities, negotiate tipping fees.

Pursuant to the support and agreement of the municipalities to develop and implement an interlocal collective purchasing agreement for the disposal/processing of the municipal solid waste stream being generated and collected in the Lake County municipalities, the District issued a request for proposals for solid waste disposal at a final disposal facility or by another type of facility which would meet the municipalities’ and the County’s waste disposal needs in an environmentally sound manner and at a reasonable economic cost.

In this case, the District had to demonstrate political sensitivity to the wide variety of interests of its constituents to meet its goals of addressing the needs of its citizens, bettering the quality of life in the community, and insuring the economic and environmental health, safety and general welfare of its citizens.

REVIEW PROCESS

The District issued a Request for Proposals (RFP) for the proposed facility in the spring of 2007. The RFP issued by the District needed to be expansive enough to not only solicit responses from the existing landfills outside of the county, but to solicit other proposals which could involve progressive and emerging technologies relative to the processing and disposal of municipal solid waste, which facility may or may not be constructed within Lake County. Since the statute under which the District proceeded provided for subsequent negotiation of an agreement after receipt and review of proposals, an agreement containing more detailed contractual terms relating to the specific responses were expected to be reached during those negotiations. Therefore, the RFP initially sought to restrict potential facilities to those which passed all applicable permitting requirements. Other relevant factors identified in the RFP included the potential economic impact of the site in terms of fees to municipalities for the disposal of waste and to the District; net cost and net revenues; compatibility

with existing District environmental programs and policies; type and location of the facility; technical evaluation of the facility design; net energy efficiency; environmental protection; overall system reliability; and the financial condition of the proposer. Last, but not least, the RFP allowed for the submission of such other information and factors by a proposer which were specific to each proposal but were not otherwise addressed in the RFP.

There were three proposals received by the District in June of 2007: two from proposed waste to ethanol facilities (Powers Energy One of Indiana, LLC, hereinafter Powers, and Agresti, LLC) providing for the processing/disposal of the waste; and one from a municipal solid waste landfill operated by Allied Waste Industries, Inc./Republic providing landfill capacity.

After initial presentations by all proposers, negotiations with all three proposers began in January, 2008. Consistent with Indiana statute, the goal was that the negotiations would result in a preliminary contract, which would then be subject to a public hearing, ultimately resulting in the development of a final contract. In our role as negotiators of the preliminary contract on behalf of the District, our charge was to reach acceptable terms within a reasonable timeframe. Our goal was to obtain agreement for the best possible terms and then present the preliminary contract and comments to the Board for its review, comment and action.

As previously stated, before this RFP process began, the District was previously involved in the siting, construction and operation of a landfill in Lake County. The District made the siting of the landfill an integral part of that Request for Proposals. Unfortunately, problems had occurred in the transition from the RFP/siting process to the negotiation process. After selecting the proposer with the most appropriate site and beginning negotiations only with that proposer, the proposer changed from an attitude of "whatever you want" to the position "whatever I am required to do". This resulted in a transition from the initially proposed state of the art facility to a stripped down "state of the regulations" facility. The envisioned multi-purpose facility became a “garden-variety” landfill with other potential uses designated as determined to be "economically feasible at the operator's discretion". As a result, this led to some heated discussions and to a preliminary contract significantly different from that envisioned by some District members. As a result of that experience, the District’s focus in this case was on review and consideration of all of the

proposals, without a determination of a site, and the District would conduct negotiations with all proposers. The siting issue would remain an issue to be addressed in this negotiation, where applicable.

Concurrent with that negotiation, technical and financial evaluations of all three proposers were conducted by the District. In the District's interactive review of these proposers, technical review was provided by J Spear Associates from Wisconsin and Dr. Nathan Mosier, an engineering professor from Purdue University. The financial review was provided by Crowe Chizek and Company. Legal services were provided both by Clifford Duggan, in-house counsel for the District, and lawyers from Barnes & Thornburg LLP.

The two waste to ethanol facilities involved different processes. The Powers Energy One facility involved a material recovery facility on the front end which removed recyclables and material not otherwise able to be processed; the remaining municipal solid waste then would go through a gasification process, followed by a biological conversion process, resulting in the production of ethanol. The process itself was developed by Dr. Gaddy, a professor at the University of Arkansas, and was operational at a pilot plant off campus in Fayetteville, Arkansas, which was capable of processing 1 ½ tons per day. The Agresti facility proposed construction of several gravity pressure vessels to be installed two thousand feet into the ground, into which solid waste would be placed. Through a combination of chemical and thermal treatment, along with pressure, the ethanol would be extracted.

There were numerous public meetings of the District's Board from June, 2007 through November, 2008, during which various presentations and reviews occurred. There was the opportunity for public input at each of the Board meetings, and such input was received and considered. Reports prepared by and/or conclusions reached by the consultants were provided to the District Board, public and press. These reports included findings regarding the technical, economic and environmental reliability of all three proposals, and any problems associated therewith. Part of the conclusions included a finding that, regarding the two waste to ethanol proposals, the Powers process was the closest to being a commercially viable process.

Based upon all of the meetings, reports, input and review, as well as the negotiations with all three proposers, a preliminary agreement between Powers and the District was reached and made available for public review and comment in August of 2008. A

public hearing was held at the District Board meeting on November 20, 2008. The final agreement was adopted after that hearing and after further discussion by the District Board. This award and agreement was based in part on the following factors:

1. The amount of waste ultimately going to landfills would be reduced significantly, perhaps as much as 80% to 90%, with the diverted material being recycled.
2. The cost to the municipalities for the processing and disposal of the municipal solid waste would be reduced from approximately \$45/ton (with yearly increases) at a landfill, as proposed in this selection and negotiation process, to a fixed solid waste disposal charge of \$17.25/ton for the first 1,450 tons/day and \$15.25 for each amount thereafter/day at the waste to ethanol facility, with no yearly increase for 20 years: a savings of over two-thirds the cost for landfilling.
3. The municipality in which the facility will be located, currently undetermined, would additionally receive 3 cents/gallon for each gallon of ethanol produced.
4. The Agreement provides for guaranteed and fixed solid waste disposal charges for all municipal solid waste originating within Lake County for a period of not less than fifteen (15) years.
5. The ethanol being produced, approximately 90 gallons per ton of waste, would help reduce our country's dependence on foreign oil.
6. The Agreement provides economic benefits to the District and provides it with the means to implement its Solid Waste Management Plan and fulfill its statutory responsibilities by the payment of Two Dollars and Fifty Cents (\$2.50) for each ton of solid waste delivered to the Site.
7. The Agreement provides economic benefits to the District and provides it with the means to implement its Solid Waste

Management Plan and fulfill its statutory responsibilities by the payment of one-half of the Carbon Credits that might be obtained from the operation of the facility.

8. The Agreement provides for the permitting, design, construction, operation, and maintenance of a state-of-the-art solid waste facility at no net cost to the District.
9. The cost for construction of the waste to ethanol facility is approximately \$200 million, privately funded and insured, with no tax abatement. Such a facility would not only provide construction jobs, at prevailing wage, but would provide increased employment once the facility began operation, all with a preference to local companies, businesses and citizens.
10. The operation of the facility involves proven technology, employing a gasification system and a biological conversion, all of which must comply with all federal and state permit requirements.
11. The operation of the facility will result in the reduction of greenhouse gases compared to those gases currently being generated at landfills.
12. The waste management service described herein is not currently available in the District.
13. The waste management service described herein is not currently available in the District at a reasonable cost.
14. The provision of this waste management service described herein under this Agreement will benefit the public health, welfare and safety of the residents of the District.
15. No facility shall be located in any city, town or unincorporated area without the consent of the local elected officials of that city, town or unincorporated area.

The proposed terms of the agreement were found by the District Board to be in the best interest of the citizens and municipalities of Lake County.

WASTE INDUSTRY

The waste industry did not publicly criticize or challenge the selection process, but in fact responded to the request for proposals and participated fully in the process. By engaging the private sector in this process, the free market issue is addressed. However, the reality is that solid waste generation, collection and disposal have a significant impact on the health, safety and welfare of the community. By creating a public-private partnership regarding solid waste management, there is recognition of the government's responsibility to provide for and protect the health, safety and general welfare of its citizens, as reaffirmed by the United States Supreme Court in the United Haulers decision referred to hereinabove.

LOCATION OF THE FACILITY

Environmental regulation is frequently the source of angry attacks because of the necessity of imposing certain limitations of the use of property. However, there are few things that cause a business or property owner's blood to boil more than "heavy handed" government. Condemnation is perhaps the absolute height of the exercise of government control. However loathsome it may be to some, condemnation is a necessary "evil" routinely exercised to further the "common good" in the areas of transportation and public utilities. Waste related matters are closely analogous to these types of issues.

Many property owners have no interest in solid waste issues. Members of the community only know that the government somehow deals with disposal of their trash, and are of the view that "if it's not broke, don't fix it". In an echo of the views of those within the waste industry, the general feeling is that current regulations and market forces should drive the construction of final disposal facilities and management of solid waste. This view changes of course, and perhaps should be modified to include the caveat 'so long as it doesn't affect me and is not in my back yard'. Unfortunately, this creates a reactive situation, derailing the proactive approach. Such a response results in the creation of situations which by their very nature limit the opportunity for careful review and consideration of proposals or the exploration of the wide variety of alternatives.

By separating the siting issue in the District's RFP review process, the District was provided the ability

to carefully review and consider the proposals received, including the alternative technologies proposed, without such limitation. By reserving the responsibility for siting and permitting with the proposer, the free market of “willing buyer/willing seller” was allowed to operate. While the siting of any business or industry is not without its conflicts, by including in the terms of the agreement the need for municipal support in the community in which the facility would ultimately be sited, the agreement did provide for additional local input and control as to location of the facility.

Since the execution of the agreement in November of 2008, Powers had performed an exhaustive search for an appropriate site for the facility, and had engaged various communities in discussions regarding that siting. Ultimately, a parcel of property partially in and partially outside of the Town of Schneider in Lake County was selected. The Town of Schneider held several public meetings to provide information regarding the facility and allow public input before that selection took place. There was overwhelming support both from the citizens and the Town officials. The Town has recently annexed, through friendly annexation, that portion of the parcel previously outside of its boundaries. The zoning is currently appropriate for development of the site for the construction and operation of the facility.

Clearly, much work remains. The next step in the process is to complete and submit a permit application as a solid waste processing facility with the Indiana Department of Environmental Management, followed by such other permit applications with the applicable regulatory agencies. The permit review process is anticipated to be started in February, 2010. The goal remains to complete all permit reviews and begin construction in 2010, and to begin operations eighteen months thereafter.

WHAT DOES THE FUTURE HOLD?

As more and more landfills reach capacity and close, local and state governments will be faced with the challenge of finding the best approach to protect the health, safety and general welfare of its citizens as it pertains to solid waste management. Increasing the difficulty of this situation is the present consolidation in the waste industry, leaving fewer private entities providing service and limiting alternatives for communities. The situation has become very similar to that of regulated utilities, in that a limited few are left providing a necessary and valuable service. This situation may well result in a shift in the treatment of solid waste, including implementation of public

utility-type review and approval of rates through state utility regulatory agencies. A limited number of states currently have such a statute.

Indiana currently requires that before a solid waste district provides or contract for solid waste service, it must hold a public hearing to determine if there is already a service provider, and if so, can the district provide it more economically. Such scrutiny may be become an accepted requirement of the solid waste industry in foreseeable future. As disposal rates continue to increase, available options for solid waste management will continue to be developed and must be considered. Certainly, public entities and private citizens are sure to be more and more interested in having a say in the process. Public-private partnerships such as the District’s waste to ethanol agreement described herein provide a way in which all interested parties can be engaged and their issues addressed. If those concerns are not adequately met, the ultimate result may be a shift from allowing the market to dictate the terms of solid waste handling to the universal regulation of solid waste management in the manner of any other necessary utility.