

Host Agreements 101

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Typically, a host community agreement is developed in conjunction with amendment to a solid waste area management plan by a community to include disposal capacity in a solid waste plan that is required for a solid waste landfill to operate within that community. It may also be required by local ordinance or regulation as a condition of operation of a solid waste disposal facility where appropriate findings are made to support the necessity for the host agreement.

By law, the Cabinet will not process an application for a new or substantially expanded municipal solid waste disposal facility absent that letter of consistency from the governing body. Additionally, a community retains the right to alter the solid waste plan at any time and can remove authorized capacity provided that the community has made arrangements for disposal of its municipal solid waste that satisfy the obligations of the solid waste management area under state law, although such changes in approved disposal capacity do not affect prior permit actions and the airspace approved under those permitting actions.

The other two factors that may convince a facility that it is desirable to engage in development of a meaningful host community agreement are local zoning/planning or other siting requirements as might exist and which might, as a condition of approval of a new or expanded facility, impose reasonably related requirements through a host community agreement; and local ordinances imposing fees on the management and disposal of waste. In the latter case, to avoid imposition of the maximum allowable fees (5-6.25 % of profits or .50/.625 cent/ton fee), some facilities will negotiate host agreements and provide other services or commitments to the host community.

¹ This background document was authored by the Kentucky Resources Council for use and consideration by governing bodies of solid waste management areas and counties in Kentucky. It is not intended as legal advice, but rather represents the opinions and concerns of the Council, which has assisted in development of numerous host community agreements across the Commonwealth.

In the years since 1991, when KRC acted as chief of the negotiation team on the bill that emerged as Senate Bill 2 from the 1991 Extraordinary Session of the General Assembly, KRC has been involved in assisting communities and community groups in developing host community agreements.

Considerations For Host Communities

KRC does not take a position on whether a County should host a new or continue to host an existing municipal solid waste disposal facility, since that is a decision for the residents of county speaking through their elected officials and the governing body of the solid waste management area. These observations and suggestions are offered based on KRC's belief that any host community, which will continue to bear the burdens associated with hosting a solid waste landfill, including the additional truck traffic, noise, odors, and other effects, as well as the potential costs and long-term environmental and economic liabilities associated with hosting a solid waste disposal facility for residential, industrial, commercial and institutional waste, should develop an agreement providing the reasonable assurances that a host community has a **right** to expect of a solid waste facility.

The adoption of a host agreement that plans for the long-term, as well as addressing short-term needs, is of critical importance to minimize environmental risks, to plan for closure and post-closure liabilities, and to assure that the contribution of the facility to the community is commensurate with the burdens borne by the community in hosting the landfill.

It must be remembered that the operation of a solid waste landfill is a privilege granted by the state only with the concurrence of the local solid waste governing body, and that but for the solid waste plan's inclusion of capacity for disposal of waste from in and out of the planning area, no municipal solid waste landfill may accept any municipal solid waste on a commercial basis. So too, it should be recognized that the process of land disposal of solid waste is one in which the financial benefits are realized to the operator at the front end, and the costs of long-term care and remediation are felt much later in the process, typically after closure of the facility. The host community has every right to insist on reasonable measures, above and beyond the minimum standards established under state regulation, to assure that the facility does not become a long-term financial and environmental sink for the community.

KRC believes that certain basics must be understood and kept in mind by any community proposing to enter into an agreement to host a solid waste management facility:

1. The design standards for construction of solid waste landfills do not assure that the waste, and waste constituents that are solubilized into "leachate," will

remain in place forever without migrating into the subsurface surrounding the landfill. Rather, given the limited useful life of the landfill liner (compacted clay with a plastic liner), and the leachate collection piping, it is, according to numerous studies and the conclusions reached by the US. Environmental Protection Agency, far more reasonable to assume that there is a limited "containment life" of the facility, after which time there will be leachate migration from the facility into the surrounding subsurface. The proximity to pathways through which the contaminant plume could travel to reach ground water, and the nature of the subsurface geology including the presence or absence of secondary media pathways (i.e. fractures or solution channels), as well as the amount of leachate production, will dictate the rate of transport of the leachate, but it is safe to assume that all landfills will ultimately leak.

2. It is further more prudent than not to assume that the leachate will contain chemical constituents whose ability to cause human health or environmental problems will exceed the containment life of the facility. Almost one-half of the sites now listed on the federal Superfund list are former solid waste landfills, and others are formerly licensed hazardous waste landfills who have now closed and become burdens on the companies who formerly operated them and on the public.
3. The time at which the facility may become a problem due to leachate breakthroughs is some 20 - 30 years hence in a facility that is otherwise without design and construction flaws. That 20-30 year period is near or past the time during which the state releases the operator of his post-closure responsibility, and there is no financial obligation under the state solid waste regulations on the facility to post a bond in advance to assure that the owner and any parent corporation will stand liable, with assets, to conduct whatever corrective action may be required in the event of containment failure.
4. The universe of wastes we call hazardous wastes are a small fraction of a larger universe of wastes which may pose a threat to public health and the environment but which, for various policy or political reasons, have been treated as other-than-hazardous by regulation. Problem wastes for solid waste landfills, which may pose particular concerns due to properties of the waste, include:
 - So-called "special wastes," including utility fly and bottom ash and scrubber sludge, which typically contain some 17 metals in concentrations that often exceed drinking water standards; as well as sewage sludge and oil drilling wastes, which may also contain high metals concentrations;
 - Infective medical waste from establishments over which the Cabinet for Human Resources has not exercised jurisdiction, including pathology labs and doctors' offices, local health department clinics, home health care providers, nursing homes (other than acute care), and dentists offices. While the rate of instances of injury is not reported as high, there is

an increased risk to workers at landfills of needlestick injuries, and incidents such as the hepatitis outbreak in Meade County reflect the problem of migration of infective agents through ground water pathways;

- Industrial solid waste, which is the process waste from numerous industries and may contain up to 1 ppm less of a hazardous constituent that if present at 1 ppm more would make the waste a hazardous waste.² Industrial solid wastes often include contaminated soils and sludges, from which metals and a wide array of organic compounds (chlorinated and not) are present and capable of migrating into ground water;
- Superfund clean-up soils and Underground Petroleum Tank clean-up soils. Because PCBs are not regulated under RCRA as "hazardous wastes" but are instead regulated under the Toxic Substances Control Act (TSCA), soil contaminated at 49 ppm is a solid waste, and at 50 ppm is regulated under TSCA and is subject to rigorous disposal requirements. EPA created a loophole for Underground Tank contaminated soils, which allows soils contaminated with otherwise-hazardous levels of benzene to be disposed as solid wastes, notwithstanding the fact that if the soil were contaminated with benzene from a source other than a leaking petroleum storage tank, the soils **would** be regulated as a hazardous waste and would have to comply with the hazardous waste regulations.
- Household hazardous wastes, which contain a wide variety of solvents and other compounds that are hazardous but are not regulated as such because of the consumer use. While this fraction of the solid waste stream only comprises some .7 of 1% of solid waste, it is of concern, because many of the constituents are particularly damaging to the containment system;
- Limited quantity hazardous wastes, which are those wastes with levels of contaminants exceeding hazardous concentrations but which are generated in less than the regulatory threshold per month (approximately 1/2 of a 55-gallon drum).

These problem wastes, when present in the waste stream, present both a heightened potential for failure of containment, and a heightened level of public health and environmental risk from any resulting contamination.

Potential Components of Host Agreements

With this background stated, listed below are some provisions that KRC believes any host community agreement should consider including:

- Daily maximum and yearly limitations on the disposal amounts at the facility through the period of the host agreement, covering all types of non-hazardous

² A waste can become hazardous because it leaches certain compounds at 100 times the drinking water standard. At 99 times higher than the drinking water standard, the waste is still considered a solid waste.

"solid" wastes, and including special wastes and industrial solid wastes. State law exempts "special wastes" from local planning, and the cabinet refuses to acknowledge that Senate Bill 2 (1991) covers industrial solid wastes, so that these controls **must** be gained through negotiation in the host agreement.

The Council believes that the host agreement should include overall caps on the **total** tonnage/cubic yardage of **all** waste to be disposed of at the facility, including not only residential and commercial solid waste, but also industrial and institutional solid wastes and special wastes.

The Cabinet has taken the position that municipal solid waste, for purposes of the local solid waste plan, includes only residential and commercial solid waste, based on the definition found at KRS 224.01-010(31)(a)4. While the clearly better reading of KRS 224.40-315 (the section requiring a determination of consistency of a solid waste landfill permit application with the local plan) defines "municipal solid waste disposal facility" to include not merely residential and commercial but also industrial solid wastes, the Cabinet will not respect an effort by a local community so set a restriction in the local solid waste management plan on the industrial solid wastes disposed of at a landfill. There is, however, nothing in the state law that prevents the landfill operator and community from agreeing to an overall cap on all waste disposal, and it is very appropriate that such matters be addressed and controlled through the agreement.

Placing an overall cap on all waste disposal is important, in order that community efforts to reduce waste disposal do not result in filling of the landfill with more industrial wastes. Industrial solid wastes range in relative risk, from inert material to borderline hazardous wastes (i.e. just below hazardous thresholds, but in many cases above safe exposure levels). It would be ironic indeed for the community to involve itself in extensive recycling and waste diversion efforts only to have that conserved airspace devoted to disposal of greater volumes of industrial solid wastes and special wastes.

- Controls on acceptance of problem wastes, including segregation of the wastes for disposal, testing of industrial solid and limited quantity hazardous waste streams, with a prohibition on acceptance of benzene-contaminated soils at levels in excess of hazardous thresholds, and a prohibition on acceptance for disposal of other problem wastes, such as NORM³ and TENORM⁴

³ Naturally occurring radioactive material.

⁴ Technologically enhanced radioactive material. After the illegal dumping in the Estill County landfill of radioactive sludges generated from oil and gas fracking wastewater recycling in Ohio and West Virginia, the Cabinet for Health and Family Services and the Energy and Environment Cabinet have developed regulations limiting the upper-bound levels of radioactivity of oil and gas wastes generated in Kentucky that can be disposed

radioactive wastes and untreated infectious waste. Current state law does not regulate the disposal of infectious wastes from commercial and non-commercial home health care (including sharps, dialysis equipment, etc.), or from physician's offices, medical or pathological laboratories and clinics, and dentist offices.

- Limitations on service area are important to allow for identification of problem waste generators and assure that facility does not serve more than the negotiated and defined region.
- A list of industrial and commercial waste generators should be provided, and prior notice should be given to the governing body of the solid waste management area when new industrial or commercial waste generators propose to use the facility, to allow for independent tracking and verification of suitability of waste for disposal at the site;
- Any controls on transportation route deemed necessary by the community, as well as limitations on hours of operation. The Cabinet has made clear that it will *not* enforce hours of operation limits, and if this is a concern it should be spelled out in the agreement.
- Agreement concerning the use of the land after closure of the site;
- Prior notice and approval by the host community should be required for any transfers of ownership or control of the facility. Host agreements can provide for prior notice to and approval by the county of any transfer of the facility to another entity or change in ownership or "key personnel" as defined in KRS Chapter 224. The transfer should be effective only where the transferee receives approval from the Cabinet, but also agrees to abide by all of the terms and conditions of the host agreement, posts replacement insurance and any other financial instruments required by the host agreement, and also demonstrates the financial, managerial and technical capability to manage the facility in accordance with law and the host agreement.
- Provision should be made for development of a funded post-closure liability fund that will provide assurance of performance of remediation that might be required during the post-closure period. While state law requires that financial assurance be provided for the post-closure monitoring, there is no fund providing financial assurance for performance of corrective action in the event of releases from the facility in the post-closure period. To assure that there will exist a fund to assure that the corrective action obligations do not fall to the

of in landfills. Nothing in that law or regulations overrides limits or prohibitions on acceptance of NORM or TENORM wastes that are included in a host agreement.

county, as co-disposer of the waste, or to the state general fund, the Council recommends establishment of a funded post-closure corrective action assurance program.

- Establishment of a facility post-closure fund or maintenance of a liability and casualty insurance policy to pay for third-party damages associated with landfill contamination, and environmental liability insurance for environmental contamination, must be maintained through the life of the facility and through the closure and post-closure periods.
- A host community fee. The current tax of 5%/6.25% represents the maximum that can be imposed under that statutory authority but does not affect the ability of a community to negotiate a higher fee based on waste volume or other factors.
- Landfill oversight. State law provides for hiring of a local representative that is trained in landfill oversight, and the host agreement can and should specify the authority to monitor facility operations and to conduct sampling at the expense of the facility.
- A pledge to provide compensation for any adjacent landowners for the diminution in value associated with proximity to the landfill in the event that they cannot sell the property for full value because of proximity to the landfill.
- The county should not waive rights to comment or oppose any permits based on technical deficiencies. Some host agreements contain a provision wherein the host community waives the right to oppose the landfill permitting on technical grounds. KRC believe it is improper for a community to agree in a contract to support *carte blanche* the siting and permitting of a landfill, since the community has a responsibility to protect the public welfare. The right to review and comment on, and challenge if appropriate, any permitting action, is advisable.
- Water supply replacement. If there are groundwater users in the area of the proposed facility, water quality and quantity surveys should be required for groundwater wells within a fixed radius of the facility, and background samples should be drawn, with wells within a 1/2 mile radius should be sampled on a periodic basis to allow for prompt detection of contaminants migration. Water supply replacement without cost to the homeowner or user should be included as an obligation of the company in the event that it causes a decline in water quality or quantity to that homeowner or user.
- Collection and disposal. Many host agreements contain provisions that guarantee low- or no-cost collection and disposal of waste generated within

the county. It is important to cap the fee in a manner that caps the entire fee to be paid, so that the company does not discount merely the disposal component and then add in all assessments, taxes, fees and other surcharges.

- Extension of closure obligation and monitoring for old landfill areas and extending maintenance of cap and leachate system for the closed landfill. For many of the former “residential” landfills, the cap maintenance and groundwater monitoring obligations terminated after a shorter period of time than for the new generation of landfills. Groundwater contamination potential is heightened when leachate systems cease to be maintained and when the liner ages and cap is not maintained. Host agreements can and should address extending the liability and maintenance obligations for any part of the closed landfill until final closure and post-closure obligations are met for the last cell.
- Host agreements should include a reservation of capacity, which is a reservation of sufficient airspace under permit to handle the anticipated annual waste generated by the county for the period of the plan and permit. In the event that the airspace is otherwise used, the agreement should provide that the facility will transport the county waste to another landfill at no additional cost to the county.
- The agreement can require development of a waste recycling program, provision of free capacity for illegal dump wastes, tire recycling days, household hazardous waste collection days - all of these county-specific measures should be considered.
- Providing timely copies of all reports provided to the state, to the county, and filing a copy for public review at the local library, is appropriate.
- Agreements should provide for a mechanism for dispute resolution, by arbitration, mediation, or other means.
- The agreement should contain a clause under which the landfill indemnifies the community from any claims made against the community for its’ disposal of waste at the landfill or any other claims relating to the design, construction, use, operation or closure of the facility.
- The term of the host agreement is typically consistent with the term of the solid waste plan, so that it is renegotiated at the time that the county again determines the capacity of waste to be approved in the solid waste plan. In no event can the term of the Host Agreement exceed 20 years, nor should more than 20 years of capacity be approved in order to assure that agreement and plan meet constitutional constraints on the granting of a franchise or privilege.