Making Lemonade from Lemons-
Lessons Learned in Reducing the Economic and Environmental Impact and Negotiating the Post-2005 Service Agreements
on behalf of the 23 NESWC Communities

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Abstract

The twenty-three communities that comprise the North East Solid Waste Committee have labored under what may well be the worst municipal solid waste service agreement in the country. In FY 2004, the disposal fee is $140 per ton. Over the past eighteen years, the communities have paid more for disposal, as much as two to three times what the neighboring communities have paid. The NESWC Board of Directors has, over the course of the past ten years, implemented a multifaceted program to reduce the environmental and economic burden associated with managing the municipal solid wastes generated in the 23 member communities. The program has included a series of innovative approaches to obtaining negotiating leverage and support from diverse stakeholders to reduce the cost and implementing innovative programs to help reduce the amount and toxicity of waste requiring disposal. What makes this particularly significant is that it was done on a regional basis, involved interaction with a broad, diverse group of stakeholders at the local, state and federal level and required the use of a wide array of change inducing tools, including arbitration and litigation, to achieve the results. Most recently, the communities and the vendor, Wheelabrator North Andover, completed negotiations regarding service post termination of the existing Service Agreement in September, 2005. This paper updates key lessons learned over the past decade.
Background

The North East Solid Waste Committee (NESWC) is a coalition of 23 Massachusetts communities -- with a total population of almost 500,000 residents -- formed in the 1980's to address solid waste disposal issues. These communities deliver the non-recycled portion of their waste stream to a 1500 TPD waste to energy facility owned and operated by Wheelabrator North Andover (formerly Massachusetts Refuse Tech, Inc.), an indirect subsidiary of Waste Management, Inc.

NESWC is comprised of:

<table>
<thead>
<tr>
<th>Acton</th>
<th>Manchester by the Sea</th>
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<tbody>
<tr>
<td>Andover</td>
<td>North Andover</td>
</tr>
<tr>
<td>Arlington</td>
<td>North Reading</td>
</tr>
<tr>
<td>Bedford</td>
<td>Peabody</td>
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<tr>
<td>Belmont</td>
<td>Tewksbury</td>
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<tr>
<td>Boxborough</td>
<td>Watertown</td>
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<tr>
<td>Burlington</td>
<td>Wenham</td>
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<tr>
<td>Carlisle</td>
<td>Westford</td>
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<tr>
<td>Dracut</td>
<td>West Newbury</td>
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<tr>
<td>Hamilton</td>
<td>Wilmington</td>
</tr>
<tr>
<td>Lexington</td>
<td>Winchester</td>
</tr>
<tr>
<td>Lincoln</td>
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</table>

Each of the 23 member communities has a representative on the Board of Directors, which oversees the administration of NESWC. The Board Chairman is Robert W. Moroney, P.E. of Manchester-by-the Sea. Wheelabrator Technologies, Inc., of Hampton, New Hampshire, owns and operates the North Andover facility. Wheelabrator is a subsidiary of Waste Management, one of the largest waste management companies in the world. The operating subsidiary for the North Andover facility is Wheelabrator North Andover, Inc. (WNA).

In the late 1970's, the Commonwealth of Massachusetts urged communities to develop regional municipal solid waste facilities. At the time, the Commonwealth indicated that it would soon close unlined landfills in the state and strongly encouraged waste to energy as the best alternative. The Commonwealth negotiated the terms of NESWC's construction and service agreement and advocated for its acceptance among the municipalities.

The basic provisions of the agreement negotiated in the early 1980's was that the communities would pay for the construction and operation of the Facility, with the operator receiving an operating fee, certain pass thru costs and a share of energy revenues. The communities are also obligated to deliver (or pay for) a guaranteed amount of tonnage per year (Guaranteed Annual Tonnage or GAT). In return, the communities receive 89.5 percent of the energy revenues, as well as revenues from non-NESWC tonnage processed at the Facility. In the early 80's, financial projections provided by the Commonwealth's consultants indicated that by now the communities would be getting paid for each ton of waste delivered.

Unfortunately, that did not materialize. In fact, rather than being paid to deliver waste to the Facility, the 23 NESWC communities are paying among the highest tipping fees in the country. Among the reasons for this are:

a) The Commonwealth failed to deliver on its promise to close less expensive unlined landfills for over a decade;

b) Projected revenues from electricity sales were much lower than predicted; and

c) The Service Agreement places the burden of "Changes in law and unforeseen circumstances" on the
communities and that resulted in substantial increases in costs.

The cost impact in the latter years is further impacted by the fact that the repayment of principal was backloaded under the terms of the indenture. Over the remaining eighteen months, the communities must pay over $70 million in principal payments, out of $200 million issued in 1983.

Nearly 500,000 residents live in the NESWC communities and these citizens now pay over twice the statewide average for trash disposal. That translates into an over $10 million per year surcharge for waste disposal services. The existing agreement has been the subject of significant attention over the past 18 years. It has been reviewed by the Commonwealth’s Attorney General and Inspector General and has also become a case study in contract negotiation and risk allocation at the Harvard Business School.

Preparation of the Strategic Plan

In the early 1990's, the NESWC Board realized that strategic and financial options needed to be developed and explored to mitigate the significant impact. They began the strategic planning program in 1993. Over the past decade, the Board has developed and implemented a multi-faceted program to reduce the environmental and economic burden associated with managing the municipal solid waste generated in the 23 member communities.

The implementation of the strategic plan by the NESWC Board of Directors required direct involvement of key project stakeholders, including citizens, all levels of municipal, state and federal government, the media and the private sector and the use of innovative approaches to reach consensus and foster change. The program included a series of novel approaches to obtaining negotiating leverage and support from diverse stakeholders to reduce the cost and implement innovative programs to help reduce the amount and toxicity of waste requiring disposal. What makes this particularly significant is that it was accomplished on a regional basis, involved significant interaction with a broad, diverse group of stakeholders at the local, state and federal level and required the use of a wide array of change inducing tools, including arbitration and litigation, to achieve the results.

The development and implementation of the strategic plan by the NESWC Board of Directors involved several key stakeholder groups, including citizens, all levels of municipal, state and federal government (executive, legislative and judicial), the media and the private sector. These included:

a) At the local level: the Board members; their fellow town/city officials, including elected and appointed officials, members of various Boards (including Health and Finance; citizens (via town meetings, citizen groups, etc.); the Facility owner/operator and the local media;

b) At the state level: State Senators and representatives, thru a NESWC legislative Caucus formed in 1997; regulators (Executive Office of Environmental Affairs, Department of Environmental Protection, Executive Office of Administration and Finance, the Massachusetts Technology Collaborative; the Attorney General, Inspector General; the judiciary; environmental groups, electric utilities and regional media outlets; and

c) At the Federal level: Members and staff of the Congressional delegation and
staff of the regulatory agencies (i.e. The Environmental Protection Agency and the Department of Energy.)

Implementation of the Strategic Plan

Fundamentally, the strategic plan effort focused on identifying opportunities to reduce costs; increase revenues; and obtain assistance from the Commonwealth, as well as the Federal government, while continuing to manage the municipal solid waste in an integrated, environmentally sound manner.

NESWC took the following steps to help meet its objectives:

a) Formed a Legislative Caucus with twenty state representatives and ten state senators to act as a focal point for addressing NESWC issues at the Legislature;

b) Formed various working Board subcommittees tailored to the specific issues at hand. These committees included a Legislative Committee, a Finance Committee, an Insurance Committee, a Retrofit Construction Committee, a Media Committee and a Strategic Planning Committee;

c) Developed and fostered good working relationships with various stakeholder groups, including environmental groups, citizen activists, and key regulatory, judicial and executive branch influentials;

d) Developed an active media outreach program to keep the press informed about ongoing developments; and

e) Assembled a support team of financial, legal and technical specialists to assist the Board.

The strategic initiatives implemented can be separated into two areas:

a) Reducing the costs associated with the ongoing operation and retrofitting of the 1500 TPD regional waste to energy facility; and

b) Putting in place post-2005 contracts that dramatically change the risk allocation between the communities and the private owner/operator of the waste to energy facility, while cutting the communities cost by over 50%.

The Retrofit

The Clean Air Act Amendments of 1990 and the Commonwealth’s Municipal Combustor Regulations imposed more stringent emission requirements on waste to energy facilities. At the North Andover Facility, complying with these limits required the installation of new bag houses, spray dryers, Nox control, carbon injection and auxiliary natural gas burners, among other items. The new equipment was installed and operational prior to the compliance deadline of December, 2000 and has resulted in significant reductions in emissions.

In October, 1997, WNA submitted a change in law notice firm price proposal of $43.5 Million to NESWC. NESWC took issue with many aspects of the proposed design and, per the Service Agreement, submitted the disagreement to an independent third party (ITP) process. The ITP determined that the allowed capital cost for the Retrofit was $35.5 million.

NESWC also took issue with how much of the $35.5 million the communities should be responsible for. This issue was the subject of litigation, which was resolved as
part of a broader settlement between NESWC and WNA. Pursuant to the Settlement Agreement entered into in the spring of 1999, NESWC's share of the retrofit capital cost was set at $17 million.

Other Measures

In addition to the Retrofit, over the past decade the NESWC Board has implemented several other measures that have reduced the costs to the communities and have resulted in increased recycling and the first in the state permanent regional household hazardous products facility. These measures include:

a) Refinanced the 1985 project debt in 1993, saving over $30 million in interest costs on a net present value basis;

b) Renegotiated an electricity supply agreement that increased revenues by $14 million;

c) Received over $2 million in funds from the Commonwealth to support recycling efforts, as part of the Recycling Assistance Program, a pilot program for the statewide Recycling Incentive Program;

d) Added to the electricity deregulation legislation that created a “renewables” fund that brought $16.6 million to the NESWC communities;

e) Working with the Legislature and administration, obtained $3 million in the FY 99 Capital Supplemental budget to help reduce the cost burden of the project; and

f) Increased recycling from 18 to 30+ percent.

In addition to minimizing the financial impact of this project, NESWC has also sought ways to improve its integrated waste management practices and reduce its environmental impact. The communities have participated in innovative pilot programs to improve recycling rates and have increased their overall recycling rates from 18 percent to the mid thirties, despite having to also meet GAT.

NESWC and its member communities have also developed innovative ways for handling difficult to manage household hazardous products. In 1998, through the efforts of the Town of Lexington and the support of DEP, the Minuteman Regional Household Hazardous Products Facility was opened. This permanent regional facility, the first of its kind in the state, operates during the spring, summer and fall. It has resulted in the diversion of over 160,000 gallons of HHP to proper disposal.

Negotiating the Post- 2005 Contracts

The negotiation process to put in place successor disposal agreements began in 2000, with the NESWC Board making conscious decisions about the nature of the services they would require post termination of the existing agreement. One of the first decisions the Board made was that the communities would rely upon the private sector to provide disposal services post September, 2005. There was little appetite among the member communities to act as the host for another regional waste management facility. Doing so would have required that the planning and siting process begin several years before the facility would need to be available, given the long lead time associated with siting such facilities in the Commonwealth.
The Board also realized that they needed to get the decision process moving sooner rather than later to allow member municipalities sufficient time to review any regional proposal (s) that NESWC as a group negotiated. This needed to be completed with enough lead time left so that it would not jeopardize each community’s ability to go forward with their own solution in a timely manner in the event that they elected to not participate in the negotiated arrangement. To that end, the Strategic Planning Committee (SPC) was reactivated in the spring of 2002, with seven members representing ~40% of the NESWC tonnage.

Pursuant to the terms of the Service Agreement, the NESWC communities were obligated to negotiate in good faith with Wheelabrator before pursuing alternatives. The Service Agreement also provided WNA with a right of first refusal in the event that any community chose an alternative arrangement, which was balanced somewhat by a favored nations clause that in turn required that if WNA agreed to a form of contract for processing municipal solid waste, that WNA would be required to offer such contract to the NESWC Communities.

Given the long and painful history of NESWC, with the communities being subjected to higher and higher disposal costs as a result of the risk allocation under the original Service Agreement, the Board and the SPC established early on that the new agreement would be dramatically different from the existing Service Agreement. The SPC was only interested in an agreement that appropriately placed risks back on the private sector. With that as background, the SPC was authorized to negotiate with Wheelabrator on behalf of the Board regarding post September, 2005.

The SPC, along with staff and legal support, met with representatives from Wheelabrator over a several month period hammering out the details of the new agreement to govern disposal services post termination (September, 2005). The parties were able to successfully bridge the sometimes-significant differences and overcome the historical oftentimes adversarial relationship to forge a series of proposals that the SPC was prepared to bring back to the Board. The outcome of that process was a package of three alternatives, which differed only in the term and level of tip fee. Table 1 details the three options brought back to the NESWC Board in the spring of 2003.
Table 1
Pricing for Disposal Services post September, 2005
for NESWC member communities

<table>
<thead>
<tr>
<th>Term</th>
<th>Option A</th>
<th>Option B</th>
<th>Option C</th>
</tr>
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<tbody>
<tr>
<td></td>
<td>Nine months</td>
<td>Two years, nine</td>
<td>Four years, nine</td>
</tr>
<tr>
<td></td>
<td>9/26/05-6/30/06</td>
<td>months 9/26/05-</td>
<td>months 9/26/05-</td>
</tr>
<tr>
<td></td>
<td>$/ton</td>
<td>6/30/08</td>
<td>6/30/10</td>
</tr>
<tr>
<td>Total Service Fee $/ton</td>
<td>$64</td>
<td>$64</td>
<td>$64</td>
</tr>
<tr>
<td>9/26/05-6/30/06</td>
<td>Na</td>
<td>$69</td>
<td>$68</td>
</tr>
<tr>
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<tr>
<td>7/1/09-6/30/10</td>
<td>Na</td>
<td></td>
<td>$73</td>
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</table>

1) All other terms and conditions are identical.
2) Risk allocation under the new agreement is dramatically different. The communities' tip fee, unlike the existing agreement, is not subject to adjustment due to variations in electricity price, amount and/or pricing of other waste delivered to the Facility, among other things. In addition, the definition of and consequences of uncontrollable circumstances/change in law are much more limited. Furthermore, under the new agreement, there is no Guaranteed Annual Tonnage commitment. Finally, under the new agreement, there is no NESWC.

The proposed terms sheet included conditions precedent requiring that, by June 30, 2003, at least 50% of the tonnage had to be committed under Option C and at least 75% combined under Options B and C. Over spring and early summer, 2003, all of the NESWC member communities participated in the decision and approval process. The municipal approval process varied by community. It included various stakeholder outreach meetings, meetings with legal counsel, finance committees and various Boards, as well as several town meetings. By June 30, 2003, 22 of 23 communities elected to enter into one of three alternative agreements. Twenty of twenty-three chose the 2010 agreement, one chose the three year deal with the intent to enter into the five year deal upon town meeting approval in the fall, while one chose the 2006 agreement.

Conclusion

The NESWC Board of Directors, with the assistance of many stakeholders, has over the past decade put in place a successful program that helped to dramatically reduce the economic and environmental impact associated with this long-term regional project. Over the past three years, they have successfully put in place a bridge to the future that will see their disposal costs cut by over half and that will provide for an economically sound disposal option through 2010 for over 95% of the residents.