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ALTERNATIVE FINANCING FOR ENHANCED ENVIRONMENTAL PROTECTION: THE INTERSECTION OF WASTE-TO-ENERGY TECHNOLOGY AND SOLID WASTE FLOW CONTROL AUTHORITY

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When local governments evaluate the environmental benefits and costs of alternatives for managing non-recyclable municipal solid waste, the relative costs of modern waste-to-energy (WTE) technology can be a significant stumbling block despite WTE technology's environmental benefits. Although the preceding point is an important economic reality that has constrained WTE development in the United States, fortunately there is a highly effective means – the use of municipal solid waste “flow control” (or “facility designation”) authority – to overcome WTE's perceived cost disadvantage.^[1] The relationship between flow control and WTE development, including significant encouragement for use of flow control as a result of the U.S. Supreme Court's recent decision in *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 127 S.Ct. 1786 (2007), is the focus of this paper, which will address the following topics:

Policy Basis for Flow Control – Absent government intervention, management of municipal solid waste will seek the lowest cost (i.e., short-term cost) and frequently less environmentally protective alternatives. Flow control can counter the tendency to choose alternatives with lower short-term costs and at the same time facilitate implementation of the environmentally-preferable waste management alternatives a local government selects, such as WTE technology and other aspects of “integrated waste management.”^[2]

Flow Control and the Courts – While the authority of a given local government to use flow control is grounded in state law, flow control also implicates

matters that arise under federal law, such as Commerce Clause issues, given the possibility that solid waste regulation in one state can affect commercial interests in solid waste management in another state. Although concerns regarding claims of impact on interstate commerce prompted a negative Supreme Court response to flow control in *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), the Court's decision 13 years later in the *Oneida-Herkimer* case was in many ways just the opposite.

WTE's Correlation with Flow Control and Practical Guideposts – WTE development can be significantly advanced by the use of flow control. That conclusion is borne out by empirical data. The concluding portion of this paper addresses that topic as well as corollary issues, such as public-private collaboration for WTE development and other practical guideposts for implementing flow control ordinances.

A. The Economic and Public Policy Bases Underlying Flow Control

As the Supreme Court emphasized in the *Oneida-Herkimer* case, the core responsibilities of local government have long been recognized to include solid waste management. Acknowledgement of that local government responsibility is codified in the Resource Conservation and Recovery Act (RCRA), *see* 42 U.S.C. § 6901(a)(4) (“the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies”), as well as in the laws of essentially every state. Meeting that responsibility is not an easy task, however, and managing municipal solid waste in an