



CENTRAL CONNECTICUT SOLID WASTE  
AUTHORITY

AND

CAPITOL REGION COUNCIL OF  
GOVERNMENTS

**2<sup>ND</sup> DRAFT MSA REVIEW**

September 10, 2010

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# CRRA REVISED TIER 1 MSA REVIEW

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## 1. INTRODUCTION

The Connecticut Resources Recovery Authority (CRRA) owns and operates a network of waste management facilities in the Mid-Connecticut region, consisting of transfer stations, a waste-to-RDF and WTE plant complex, and a Material Recovery Facility (MRF). The CRRA currently holds contracts with the 70 municipalities of the Mid-Connecticut region to provide waste and recycling transfer, processing and disposal services. These contracts are due to expire on or before 2012.

In April 2010, the CRRA provided a draft Management Services Agreement (MSA) for review by the 70 towns. This MSA was intended to summarize the terms and conditions that will govern the extension or renewal of the current contractual arrangements. At the request of the Capitol Region Council of Governments (CRCOG), MidAtlantic Solid Waste Consultants (MSW Consultants) reviewed the draft MSA from CRRA and provided written feedback about the terms, conditions, and implications of the draft MSA. This feedback was provided in a report dated May 14, 2010. CRCOG subsequently submitted this report to the CRRA. Many towns in the region independently reviewed and commented on the April draft MSA.

In July 2010, the CRRA provided a response to comments received on the first draft of the MSA, and provided a Revised Draft Tier 1 MSA. In the interim timeframe, the Central Connecticut Solid Waste Authority (CCSWA) has been formed and at least 18 towns have joined this new authority, which was formed for the express purpose to support the interests of its member communities in securing cost-effective, environmentally responsible transfer, disposal, and recyclables processing services. MSW Consultants has been retained by the CCSWA to review the response to those comments by the CRRA and provide written feedback as to whether or not the CRRA provided adequate responses to the concerns raised in the first round of comments. Note that the CRRA also issued a draft Tier 2 MSA in conjunction with the revised Draft Tier 1 MSA. The Draft Tier 2 MSA was not reviewed by MSW Consultants.

This effort is intended to help CCSWA, CRCOG and the 70 Mid-Conn towns establish an optimized strategy for negotiating with the CRRA, should such negotiations become necessary as part of the overall implementation of the long-term waste management strategy for some or all towns. It should be noted that MSW Consultants does not employ any attorneys and therefore cannot offer legal opinions. For this reason, it is recommended that CCSWA retain knowledgeable legal counsel to supplement the technical review provided herein.

The remainder of this report contains MSW Consultants' comments on the CRRA response.

## 2. EXECUTIVE SUMMARY

Despite adequately addressing certain of the comments on the first draft MSA, it is difficult to acknowledge any significant evolution of the 2<sup>nd</sup> draft Tier 1 MSA towards a satisfactory arrangement for Central Connecticut Towns. A dramatically simplified MSA that better serves the towns' needs and aligns contractual obligations with the regional waste market configuration would contain the following provisions:

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- 1) **Focus on Directly-Managed Wastes:** Towns should seek contractual commitments only for the portion of the waste stream that is controlled directly by each town. In layperson terms, this would require cities and towns that have public or contracted collection to deliver all of these directly-managed wastes; and towns with small convenience centers/transfer stations to have that waste delivered to CRRA. Residential wastes and commercial/institutional wastes collected by private haulers under direct relationship with waste generators should flow where the marketplace directs – and if CRRA can provide disposal and/or processing for a competitive price, then CRRA and individual private haulers should be left to enter into their own contracts. Flow control ordinances should not be necessary under this circumstance.
- 2) **Securing Performance Guarantees:** In the professional opinion of MSW Consultants, it is critical for the towns to obtain meaningful performance guarantees from any contracted disposal/processing service provider, including CRRA. The 2<sup>nd</sup> draft Tier 1 MSA contains numerous provisions that provide for termination of the contract for breach by CRRA. This remedy is meaningless in a geographic region that has, at the current time, no other large scale disposal/processing vendors offering a viable alternative to the CRRA. As an example of why such performance guarantees are critical, we reference the dynamics associated with the *New Hartford v. CRRA* court case and the challenges associated with the towns getting fairly compensated for damages from a “cost-based provider” that essentially passes through its costs – including liquidated damages assessed against its own poor performance – to the towns.
- 3) **Predictable Rates:** From their response, it appears that CRRA intends to continue its practice of setting disposal fees on an annual basis, subject to the outcome of each year’s budgeting process. While certainly all public authorities must undergo annual budgeting, it remains common practice for solid waste disposal providers to offer a starting disposal tip fee and a reasonably clear method to project annual changes to that starting disposal fee, in exchange for a commitment of a specified quantity of waste for a specified period of time. At a minimum, CRRA should inform all towns at the current time what it is projecting for its five year disposal fee projections assuming that CRRA continues to receive (a) all wastes as it does now, (b) 10% less waste than it does now, (c) and 20% less waste than it does now. It is difficult to believe that a solid waste disposal service provider with a 20 year operating history cannot offer such projections based on its knowledge of projected capital improvements and operating costs. This is especially true as CRRA has stated that, for the post-2012 period, they already have contractual minimum tonnage commitments from private haulers equal to approximately 65% of the waste needed to operate the facility at peak efficiency.

MSW Consultants continues to recommend that the newly formed Central Connecticut Solid Waste Authority generate its own technical specifications and contract terms to properly reflect the interests and service needs of its member towns, and to seek satisfactory disposal and processing from capable service providers including the CRRA, but on a level playing field.

### 3. REVIEW OF CRRA RESPONSES TO ORIGINAL COMMENTS

This section itemizes all of the original comments submitted by MSW Consultants on the first draft MSA. For each comment, we have paraphrased CRRA’s response, and added a recommendation that evaluates the adequacy of the response.

**Ownership of Waste:** Disposal agreements customarily address the transfer of waste ownership. It is recommended that the final MSA specify that the waste ownership transfers from the Municipality to the CRRA at the point where the CRRA takes possession of the waste at a CRRA-owned facility.

**CRRA Response:** *A new Section 205(d) has been added to the Revised Draft Tier 1 MSA to state that CRRA will take title to Acceptable Solid Waste and Acceptable Recyclables upon acceptance of these materials. CRRA also noted that the ownership of subscription waste generally resides with the private hauler, although some local governments retain ownership of subscription waste.*

**Recommendation:** *This appears to be an adequate response in the case of solid waste; and recyclables are addressed below.*

**Coverage of All Waste Types:** It is not clear if the MSA covers all waste types that are customarily generated in the municipal waste stream. Although certainly residential and commercial processible and non-processible wastes are included in the MSA, there is no clear mention of an outlet for electronic wastes, household hazardous wastes, scrap tires, large appliances, mattresses, and possibly other wastes that may be generated from time to time.

**CRRA Response:** *CRRA stated that the Connecticut Department of Environmental Protection (CTDEP) defines “bulky waste” as “landclearing debris and waste resulting directly from demolition activities other than clean fill”. By CTDEP permit, CRRA is prohibited from taking “bulky waste”. Appliances are “White Metals”, and “Nonprocessible Waste” is generally waste that is a safety or operational hazard to the Facility. The restrictions on White Metals and Nonprocessible Waste appear to be reasonable, but there is no procedure specified as to how the decision is made to take it on a “day-to-day basis”. On page 2-11 of CRRA’s Response to Comments, they list other waste services that are provided on a fee-for-service basis.*

**Recommendation:** *Include a section in the MSA listing these services, and, if possible, the fees for each one. At least, state that these fees will be negotiated between the CRRA and the municipality requesting the service. In addition, the Facility should either take Nonprocessible Waste whenever it is delivered or have a reasonable alternative to which the trucks can be directed.*

**Clear Pricing and Annual Escalation Formula for Transportation/Disposal:** Disposal agreements (including transfer and transportation) customarily specify a disposal price on a per-ton basis for the base year of the contract. Furthermore, disposal agreements customarily specify the basis for any annual price escalation. Such escalation is often tied to a published index (such as CPI) that can be readily tracked by both Parties.

**CRRA Response:** *“CRRA has provided this same net-cost-of-service pricing structure for four projects for more than 20 years. To CRRA’s knowledge, all public entities that operate waste-to-energy facilities use a net-cost-of-service pricing structure.” CRRA also notes that the draft MSA requires that by January 31<sup>st</sup> CRRA must adopt the budget and set the fee for the following fiscal year. Currently this is required by the end of February. CRRA also states that they make no profit on their services and that State law requires them to return surpluses to their customers.*

**Recommendation:** *It appears that CRRA continues to intend that its disposal fees will be set on an annual basis, subject to the outcome of each year’s budgeting process. While certainly all public authorities must undergo annual budgeting, it remains common practice for solid waste disposal providers to offer a starting disposal tip fee and a reasonably clear path to project annual changes to that starting disposal fee, in exchange for a commitment of a specified quantity of waste for a specified period of time. CRRA should, at a minimum, inform all towns at the current time what it is projecting for its five year disposal fee projections assuming that CRRA continues to receive (a) all wastes as it does now, (b) 10% less waste than it does now,*

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*(c) and 20% less waste than it does now. It is difficult to believe that a solid waste disposal service provider with a 20 year operating history cannot offer such projections based on its knowledge of projected capital improvements and operating costs.*

**Clear Pricing and Revenue Share for Recyclables Processing:** Recyclables processing agreements customarily delineate the processing charge on a per ton basis. This processing charge should have a clearly defined basis for annual changes (same as disposal pricing). Further, recyclables processing agreements customarily have clearly defined procedures for determining the market value of the recyclables delivered, and specify exactly how revenues will be shared between the processor and the Municipality.

**CRRA Response:** *CRRA apologized for the omission of its intent to continue the practice of not charging municipalities for acceptable recyclables. CRRA changed Section 302(b) to establish the charge of \$0.00 per ton for acceptable recyclables. CRRA also added a new Section 305 formalizing the method of distributing the net proceeds from commodity sales to the municipalities.*

**Recommendation:** *This clarifies the expectation for the cost of tipping recyclables, but does not adequately inform the towns about the processing costs nor does it adequately describe a revenue sharing mechanism.*

**Performance Bond:** Most municipalities will benefit from reasonably strong financial assurance and/or some form of performance guarantee. Performance bonds are a commonly used strategy for waste disposal and processing contracts. Legal counsel should be consulted to determine whether a performance bond can/should be required of the CRRA.

**CRRA Response:** *CRRA said that a public agency does not provide performance bonds for service they provide.*

**Recommendation:** *CCSWA would reasonably expect to obtain a performance bond from any private sector service provider supplying these services. CCSWA should seek legal opinion on whether a public agency can be compelled to provide such a performance guarantee, and seek to obtain a similarly binding performance guarantee from CRRA.*

**Liquidated Damages in Favor of Municipality:** Any Municipality that enters into a long term agreement with a waste disposal and/or recyclables processing provider should reasonably expect their delivered wastes and recyclables to be handled according to contractually specified service levels. Failure of the disposal/processing provider to do so materially impacts the operations and/or costs for the Municipality. Municipalities should consider including liquidated damages to offset the costs of failure to provide contractually specified service levels.

**CRRA Response:** *CRRA notes that public agencies do not usually pay liquidated damages. Also, "Liquidated Damages" for municipalities in Section 403 has been changed to "Delivery Payment".*

**Recommendation:** *CCSWA would expect to obtain reasonable performance guarantees from any private sector service provider supplying these services. CCSWA should seek legal opinion on whether a public agency can be compelled to enter into a contract that includes such a performance guarantee, and seek to obtain a similarly binding performance guarantee from CRRA. .*

**No Reciprocal Indemnification:** Legal counsel should be consulted to craft appropriate reciprocal indemnification.

**CRRA Response:** *"There is a legal issue concerning the authority of CRRA to provide a general indemnity. However, CRRA has added a new subsection (b) to Section 702 in the Revised Draft Tier 1 MSA to include reciprocal indemnification with the proviso 'to the extent permitted by law'."*

**Recommendation:** CCSWA should obtain legal counsel on this new provision, but it appears to be an adequate response.

**Clearly Stated Insurance Coverage:** Municipalities customarily require a slate of insurance coverage, with details of the specific coverage levels and other requirements included in the contract. It is standard convention for disposal/processing providers to be contractually bound to specific insurance levels.

**CRRA Response:** CRRA listed the type of insurance they carry but not the amounts,

**Recommendation:** Include a section in the MSA listing the minimum amounts of the insurance that will be carried by CRRA during the life of the MSA. It is not unusual for a public agency to be required to carry a certain level of pollution liability insurance that covers their facility and the governments who deliver waste to that facility.

**Sec. 104** – The “Procedures” exhibit was missing from the draft MSA. These Procedures are referenced regularly and should be reviewed when available. The MSA cannot be executed without a full review of these Procedures.

CRRA provided the “Procedures” exhibit with this revised draft MSA. MSW Consultants has reviewed the “Procedures” and has the following comments:

**2.2 Submission of Permit Applications (b):** Permittees (including municipalities) must agree to fully cooperate in any matter affecting the orderly operation of the Facilities and to comply fully with the “Procedures”. They must also agree that if they fail to do so, they can be fined or have their disposal privileges suspended or revoked.

**Comment:** There is no provision for warnings prior to fines or suspension or revocation of disposal privileges. There should be provision for reasonable notification and warnings to municipalities before penalties are imposed.

**3.2 Indemnification:** There is no reciprocal identification.

**Comment:** The Municipality should require reciprocal indemnification, similar to the new subsection (b) in Section 702 of the revised MSA, which includes reciprocal indemnification “to the extent permitted by law”.

**Sec. 201(a)** – The MSA indicates that only Acceptable Solid Waste and Acceptable Recyclables will be accepted under this agreement. The definition of Acceptable Solid Waste includes Nonprocessable Waste, which are generated by all municipalities; however, Nonprocessable Wastes are required to be separated (by the municipality or the hauler) prior to delivery to CRRA. This appears to mean that bulky wastes will be accepted by the CRRA, but this should be explicitly defined. Further, Acceptable Recyclables are defined in the Procedures, which are not provided and so it is not clear what Acceptable Recyclables are.

**CRRA Response:** CRRA stated that the CTDEP defines “bulky waste” as “landclearing debris and waste resulting directly from demolition activities other than clean fill”. The Facility is not allowed by CTDEP permit to accept this material. Nonprocessable Waste is included in the definition of Acceptable Waste, and is, therefore, accepted at the Facility. Nonprocessable Waste is waste that is a safety or operational hazard if processed, and for this reason, it must be delivered separately. This is standard operating procedure. However, deciding on a day-to-day basis how much Non-Processible Waste to take is a disservice to the municipalities.

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**Recommendation:** *The Facility should either take Nonprocessable Waste whenever it is delivered or have a reasonable alternative to which the trucks can be directed.*

**Sec. 201(b)** – The MSA gives the CRRA authority to dispose of wastes in any Alternate Facility. At a minimum, the definitions of Waste Facility and Alternate Facility should be tightened to require properly permitted facilities that are in compliance with all state and federal regulations. It is recommended that the Municipality require that CRRA provided a list of Alternate Facilities and associated disposal service terms and prices.

**CRRA Response:** *CRRA has added a provision to this section that requires CRRA to verify permit status of any alternative disposal facility, which they state is their current practice. They have also changed the definition of “Waste Facility” in Exhibit A to any “properly permitted” facility. CRRA stated that any facility “to which waste will be shipped” is added to CRRA’s pollution legal liability insurance.*

**Recommendation:** *As this list will change from time to time, including in the MSA the website where the list can be found would be a reasonable alternative to including the list in the MSA.*

**Sec. 202(d)** – This section appears to make the Municipality responsible for paying disposal fees even for wastes collected and delivered by private haulers who are not under contract to the Municipality. Such an arrangement might be feasible if a strong flow control ordinance is in place. In practice, however, imposing a disposal fee on the Municipality for wastes delivered by a private party outside that Municipality’s direct control increases the likelihood of inaccurate charges being imposed (see Section 5 of this report for a discussion of flow control).

**CRRA Response:** *CRRA has changed Section 501 to clarify that municipalities are not responsible for payment of disposal fees billed to waste haulers. A reference to Section 501 has been added to Section 202(d).*

**Recommendation:** *This appears to be an adequate response.*

**Sec 202(e)** – The MSA puts the onus of separating Nonprocessable Wastes on the Municipality and/or their hauler. For public collection providers and contracted collection, this should be achievable. For subscription collection that is flow controlled by ordinance, there may be no mechanism for the Municipality to enforce this requirement.

**CRRA Response:** *Section 202(e) has been moved to Section 203(c) changing the provision to clarify the municipalities’ responsibility: “(and shall direct each Waste Hauler that the Municipality has the ability to so direct, to separate)”.*

**Recommendation:** *This appears to be an adequate response.*

**Sec. 202(f)** – This clause allows CRRA to change the Designated Facility with no price impact on the Municipality as long as the new Designated Facility is part of the CRRA’s Central CT system. This introduces significant potential for unforeseen costs to be imposed on the Municipality. The Municipality should be protected against the cost increase from *any* change to the Designated Facility. Further, the method for calculating the price increase should not be limited to a per-mile charge, as the cost impact may not have a linear relationship to mileage (this is especially important for any Municipality with public collection).

**CRRA Response:** *CRRA has moved Section 202(f) to a new Section 206. The provision has been modified to say that CRRA will pay any additional delivery costs if CRRA changes the Designated Facility for the convenience of CRRA, and will provide a reasonable amount of advance notice before making the change. The only time a municipality might have to pay additional delivery costs would be if a Force*

*Majeure event caused CRRA to have to divert waste to an alternate facility. In that case, the municipality could choose to make its own disposal arrangements.*

**Recommendation:** *This appears to be an adequate response. However, it will be important to further define “additional delivery costs” to include the incremental capital and operating costs that could be borne by a municipality that must, as a consequence of the longer drive time and associated reduction in productive time spent collecting on route, add one or more routes in order to complete daily collection requirements.*

**Sec. 203(a)(ii)** – Should change the second sentence by replacing the word “authority” to “approval” and add “mutually agreed upon” in front of the word “methods.”

**CRRA Response:** *As CRRA will take ownership of the waste after determining that the waste is acceptable under the Procedures and the Tier 1 MSA, CRRA will retain final authority.*

**Recommendation:** *As this is identical language to the current MSAs, the municipalities should determine whether or not it is problematic to agree to this language.*

**Sec. 204:** All verbiage in this section suggests that CRRA may act unilaterally in making any final decision (e.g., whose “hearing officer” is it?). Consider defining the requirements more clearly, or else allow for impartial determination. Also, if this section allows CRRA to hold a Municipality responsible for Solid Waste delivered by private contractor under open subscription, then it is an unreasonable burden on the Municipality.

**CRRA Response:** *As CRRA will take ownership of the waste after determining that the waste is acceptable under the Procedures and the Tier 1 MSA, CRRA will retain final authority.*

**Recommendation:** *As this is identical language to the current MSAs, the municipalities should determine whether or not it is problematic to agree to this language.*

**Sec. 205(a)** – References the Procedures, but does not provide a copy of the Procedures. The Procedures should be reviewed when available.

**CRRA Response:** *CRRA acknowledged that they neglected to include the web site where the Procedures can be viewed. The document “Mid-Connecticut Project Permitting, Disposal and Billing Procedures” has been added as Exhibit B.*

**Recommendation:** *This response is adequate.*

**Sec 206** – Municipalities should demand that CRRA prepare a viable emergency response plan and submit such plan as a condition of the contract. Private sector and other public sector disposal and processing providers are routinely required to have such plans to assure minimal disruption of their operations in case of an emergency or disaster.

**CRRA Response:** *CRRA has, as a precondition of its CTDEP permit, emergency response plans for all of its facilities. CRRA is willing to share them with the municipalities. CRRA also carries “a substantial amount of business-interruption and extra-expense insurance”.*

**Recommendation:** *That CRRA reference in the MSA the website where the emergency response plan can be viewed, as well as including the business-interruption and extra-expense insurance in the listing of all insurance CRRA carries.*

**Article III** – This entire article should be replaced with a base year disposal price per ton of waste with annual index-based cost escalation. For recyclables processing, this article should be replaced with an annual processing cost per ton including annual index-based cost escalation; plus an index-based method for calculating and distributing a share of material revenues back to the delivering

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Municipality. As written now, this article is utterly complex, completely at odds with standard waste industry disposal/processing pricing conventions, and insufficient to enable Municipality to reasonably plan for the cost of waste disposal and recyclables processing.

**CRRA Response:** “CRRA has provided this same net-cost-of-service pricing structure for four projects for more than 20 years. To CRRA’s knowledge, all public entities that operate waste-to-energy facilities use a net-cost-of-service pricing structure.” CRRA also notes that the draft MSA requires that by January 31<sup>st</sup> CRRA must adopt the budget and set the fee for the following fiscal year. Currently this is required by the end of February. CRRA also states that they make no profit on their services and that State law requires them to return surpluses to their customers.

**Recommendation:** It appears that CRRA continues to intend that its disposal fees will be set on an annual basis, subject to the outcome of each year’s budgeting process. While certainly all public authorities must undergo annual budgeting, it remains common practice for solid waste disposal providers to offer a starting disposal tip fee and a reasonably clear path to project annual changes to that starting disposal fee, in exchange for a commitment of a specified quantity of waste for a specified period of time. CRRA should, at a minimum, inform all towns at the current time what it is projecting for its five year disposal fee projections assuming that CRRA continues to receive (a) all wastes as it does now, (b) 10% less waste than it does now, (c) and 20% less waste than it does now. It is difficult to believe that a solid waste disposal service provider with a 20 year operating history cannot offer such projections based on its knowledge of projected capital improvements and operating costs.

**Sec. 302(e)** – Without specific maximum dollar amounts, it is not possible to evaluate the reasonableness of this section. Further, given the extensive lead time that would be needed by any Municipality to secure alternate disposal and/or processing capacity, allowing termination as a remedy is meaningless. Essentially, once a Municipality signs this agreement, they are going to be stuck with the charges for the duration of the Base Term.

**CRRA Response:** “The final version of the Tier 1 MSA will have dollar amounts specified for the upset prices (i.e., the price at which, if exceeded, the municipality can terminate the MSA) in Section 302(e).”

**Recommendation:** Ultimately, the lack of viable alternative disposal options for individual municipalities renders the termination for breach remedy to be toothless. In the absence of some form of performance bond or other insurance, contracted municipalities will have no protection against annual disposal fees exceeding the contract ceiling price.

**Sec. 303(a)** – The 180 day delay for repayment of surplus is excessive. How about 30 days after completion of pertinent financial audits?

**CRRA Response:** Section 303(a) has been modified to require that if there are surpluses they will be distributed within 30 days after the Board of Directors certifies the financial audit and declares a surplus.

**Recommendation:** This appears to be an adequate response.

**Article IV** – The MSA contains **severe** penalties against any Municipality that fails to enforce the CRRA’s definition of flow control. Given the difficulty in establishing and enforcing flow control for wastes collected under subscription between a generator and a private hauler, this entire section should give pause to any Municipality that does not provide public or contracted collection, and/or does not offer a convenience center for waste disposal.

**CRRA Response:** Article IV applies only to a municipality with a Tier 1 agreement who has consciously decided to not enforce its flow control ordinance. Since Tier 1 does not include upper or lower limits on waste, it is unclear how Section 403 would be applied.

**Recommendation:** See the specific Section comments below.

**Sec. 403** – This section defines a narrow range for required, non-penalized waste deliveries. For example, waste volumes during the economic downturn fluctuated by more than 10 percent in many areas of the country. Given the strength of the penalties, either the range needs to be increased or the penalties need to be reduced.

**CRRA Response:** In Section 403, “Liquidated Damages” for municipalities who do not enforce flow control has been changed to “Delivery Payment”. It appears that the municipality would become a Tier 2 municipality. Since Tier 1 does not include upper or lower limits on waste, it is unclear how Section 403 would be applied.

**Recommendation:** Provide that if a municipality refuses to take the steps in Section 401 to enforce flow control, the contract is terminated and the municipality automatically becomes a Tier 2 MSA.

**Sec. 601** – In addition to the right to inspect the books, Municipalities should specify the reports they want/need to manage their waste stream and require these reports to be provided by the CRRA on a regular schedule.

**CRRA Response:** As an “open and transparent” organization, CRRA does and will continue to provide any reports a municipality requests. They currently provide monthly and cumulative reports of the amount of waste and recycling delivered from each municipality, including which haulers “collected waste in the municipality, the amount collected and the amount and entity billed for the waste.” CRRA also stated that they welcome any suggestions from municipalities to improve the reports.

**Recommendation:** The municipalities should provide CRRA with a list of reports they wish to receive and what should be included in each report. These should be listed in the final MSA.

**Sec. 602** – Any Municipality that has its own scale should be allowed to reconcile the weight of its shipped wastes against the CRRA received quantities and to jointly investigate and correct discrepancies.

**CRRA Response:** The scales used by CRRA are calibrated and certified annually by the Connecticut Department of Consumer Protection (“DCP”). CRRA has changed Section 602 to provide a method for municipalities to challenge the accuracy of the scales.

**Recommendation:** This appears to be an adequate response.

**Sec. 603** – The MSA should explicitly allow both the Authorized Representative of the Municipality “and/or his/her designee(s).” Alternatively, the definition of Authorized Representative of Municipality could be changed to specify any individual or individuals designated by the Municipality.

**CRRA Response:** “CRRA has changed Section 603 in the Revised Draft Tier 1 MSA to include the suggested language except CRRA has required that “designees” be designated in writing to CRRA.”

**Recommendation:** This appears to be an adequate response.

**Sec. 604** – Municipalities should require precisely stated minimum insurance coverage levels (CGL, workers’ comp, auto, bodily injury, etc.) which should be stated in the MSA; provision of a certificate indicating such insurance; requirement for notice of change/termination; approval of insurance carrier. It is standard convention for disposal/processing providers to be contractually bound to specific minimum insurance levels.

**CRRA Response:** CRRA listed the insurance they carry, which appears to be reasonable.

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**Recommendation:** *Include a section in the MSA listing the types and minimum amounts of the insurance that will be carried by CRRA during the life of the MSA. It is not unusual for a public agency to be required to carry a certain level of pollution liability insurance that covers their facility and the governments who deliver waste to that facility.*

**Sec. 702** – The Municipality should require reciprocal indemnification. Further, the Municipality’s indemnification of CRRA should exclude negligence, error, willful breach or bad faith. Legal counsel should be consulted to develop appropriate indemnification language.

**CRRA Response:** *“There is a legal issue concerning the authority of CRRA to provide a general indemnity. However, CRRA has added a new subsection (b) to Section 702 in the Revised Draft Tier 1 MSA to include reciprocal indemnification with the proviso ‘to the extent permitted by law’.”*

**Recommendation:** *This appears to be an adequate response.*

**Sec. 704** – The MSA contains paragraphs of details about when and under what conditions the Municipality will be penalized for a variety of conditions. This one-paragraph section absolves CRRA of any of its liability so long as it “acts promptly to remedy.” At a minimum, the degree of penalization should at least be made more equal among the Parties for failure to perform by either Party. However, the entire concept of penalties in favor of CRRA as the service provider should be struck and any penalties should be in place to assure that the service provider performs, not that the waste generator delivers waste.

**CRRA Response:** *Because CRRA is providing a service on behalf of those municipalities using the system, any action against the agreement by a municipality can increase the costs to the other municipalities using the system. Therefore, CRRA feels it is correct to penalize municipalities whose actions increase the costs of disposal and that it is unacceptable to not have these penalties.*

**Recommendation:** *This dynamic further highlights the need for municipalities to explore whether there are other meaningful performance guarantees that can be integrated into the contract. Legal assistance should be sought.*

**Sec. 705 and 706** – Legal expertise should be sought to determine if it is acceptable to have a contract require municipal taxation.

**CRRA Response:** *“It is legally acceptable to have a contract require municipal taxation.”*

**Recommendation:** *The municipalities should seek legal advice on this issue from its legal staff.*

**Sec. 707** – Municipality should not be required to pay for disputed portion of invoices (as a compromise, Municipality could agree to pay half of disputed amount – can’t get much fairer than that).

**CRRA Response:** *Section 707 has been modified to provide that if a municipality’s dispute is upheld, CRRA will refund the disputed amount with “interest calculated at the then current rate of the Connecticut Short Term Investment Fund (“STIF”), which is administered by the State Treasurer.”*

**Recommendation:** *This appears to be an adequate response.*

**Sec. 715** – Legal expertise should be sought to determine if a contract can specifically allow non-compliance with a law just because it is being contested.

**CRRA Response:** *This section is not allowing non-compliance with a law, but is recognizing the right of the parties to the agreement to contest provisions of the law.*

**Recommendation:** *The municipalities should seek legal advice on this issue from its legal staff.*

**Sec. 716** – Municipalities may want to consider inserting certain terms that would be triggered under certain types of re-organization of CRRA.

**CRRA Response:** *CRRA assumed the comment referred to an action of the legislature that would reorganize CRRA, and stated that would be more appropriately addressed in the legislation, if any.*

**Recommendation:** *This appears to be an adequate response.*

**Definitions:** The Definitions intermittently contain actual definitions, or else refer to another paragraph elsewhere in the MSA. This makes them very difficult to read. Include the actual definitions for all terms in the definition section.

**CRRA Response:** *CRRA will consider putting the complete definitions in Exhibit A, “Definitions” instead of referring to another section in the MSA. CRRA did not commit to do so, as they are concerned that much of the contract terms are spelled out in Exhibit A of the draft Tier 1 MSA.*

**Recommendation:** *The municipalities should insist that CRRA put complete definitions of all the terms in Exhibit A. It does appear that some of the definitions, as they are in Exhibit A currently, are too detailed.*

One of the central issues implicit in the MSA is that of flow controlling wastes to the CRRA Designated Facilities. Essentially, this implies that each Municipality will pass an ordinance that requires all waste collected within the Municipality border to be delivered to the CRRA Designated Facility. Flow controlling is clearly and accurately perceived by the CRRA as a means to maximize the flow of wastes to their system, which in turn spreads the CRRA fixed costs over a larger number of units and makes their resulting per-ton costs more attractive. Through its Tier 1 and Tier 2 pricing, the MSA does offer to pass on some of the benefits of the improved economies of scale to Municipalities that commit to maximizing their waste deliveries (although, curiously, CRRA also wants to penalize those very same municipalities if they maximize their waste deliveries *too much*).

While flow controlling is simple conceptually, in practice there are challenges. One such challenge involves private haulers that collect wastes (residential or commercial) on a subscription basis. For the sake of collection efficiency, these haulers may route their trucks across municipal borders, mixing wastes from one or more Municipality. Yet, when a truck containing a mixed load is delivered to the CRRA, it must have some basis for reporting the origin of wastes for the purpose of accounting for waste contributions in a manner consistent with the MSA. While it is conceivable that some private haulers will diligently document the origin of their wastes, in practice it seems likely that accounting for wastes by Municipality of origin will not be accurate. Given the level of penalties in the MSA for failure to meet Annual Quantities or exceeding the Upper Limit, the inherent inaccuracy of this system seems problematic.

The second challenge to this requirement is that it imposes indirect relationships in the open market. In doing so, inefficiencies (and costs) almost certainly increase. For Municipalities that do not provide public or contracted collection, the MSA will create a need for strong enforcement of the flow control ordinance by the Municipality, given the strength of the proposed penalties for failure to flow control effectively.

In a market-based system, the subscription haulers should become the direct customers of the CRRA, not the non-participating Municipality. These private haulers will either (a) attempt to negotiate an economically viable disposal/processing solution with CRRA, (b) accept CRRA’s spot price, or (c) find alternative long term disposal/processing options outside of CRRA. Municipalities that are not engaged in the direct provision of collection and/or convenience center services should not be held accountable for the interactions of its constituents who opt to use a private hauler under

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no direct (i.e., contractual) control of the Municipality. Perhaps one means of revising the terms of Tier 1 pricing is to strike the requirement for full flow control, and instead establish the Tier 1 price for all waste that is currently directly controlled by the Municipality, whether through regulated collection or through operation of a transfer station.

**CRRA Response:** *Only Tier 1 municipalities will be required to have and to enforce flow control ordinances. Only Tier 2 municipalities will have minimum tonnage commitments and caps. CRRA expects that municipalities with only subscription service will chose to sign Tier 2 MSAs.*

*Waste haulers are currently required by State law and CT DEP regulation to accurately report the origin of waste. CRRA acknowledges that haulers do not always report origins of waste correctly, and stated that they will investigate ways to decrease inaccurate origin assignments and to accommodate reporting of mixed loads. CRRA also stated that they will continue to enforce the correct reporting and assignment of waste origin.*

*“CRRA acknowledges that a flow-control requirement does impose indirect relationships in the open market. It was precisely because of the indirect relationships imposed by flow control that the United States Supreme Court authorized the use of flow control for publicly-owned facilities.”*

**Recommendation:** *The municipalities should seek legal expertise on flow control. It is the technical understanding of MSW Consultants that the US Supreme Court Decision on United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority (Case No. 05-1345, released April 30, 2007) [<http://www.supremecourt.gov/opinions/06pdf/05-1345.pdf>] allows local governments explicitly to direct waste to publically owned and operated solid waste facilities. As the CRRA Facility is publically owned and privately operated, a situation that has not been explicitly tested in the courts, there appears to be a question as to whether or not the Oneida-Herkimer decision would cover this Facility. If this understanding is correct, there may be legal risk to a municipality enacting flow control for waste going to the CRRA Facility.*