

Arkansas Association of Regional Solid Waste Management Districts

Walter G. Wright
wwright@mwlaw.com

Agenda

- Initial Creation of Arkansas Regional Solid Waste Districts/Boards
(Why?)
- Amendments/Changes
- Various Programs/Cases

1976-1989

- Some Arkansas solid waste authorities have been in place for years.
- The Federal Resource Conservation and Recovery Act ("RCRA") is enacted in 1976.
 - Placed the burden of solid waste managements on states (i.e., different from federal environmental baseline programs such as Clean Air Act, Clean Water Act, etc.).
 - Subtitle D of RCRA addressed non-hazardous solid waste.
 - Banned open dumping of solid waste and set minimum design standards for operation of municipal and industrial (non-hazardous) landfills.
- Arkansas Solid Waste Management Regulations (Arkansas Pollution Control and Ecology Rule 22) Implements the Arkansas Landfill (Classes 1,3, and 4) and other facilities (solid waste, [MRFs], etc.) permitting requirements.
- These Arkansas authorities did not address issues such as:
 - Recycling
 - Infrastructure
 - Needs assessment
 - Financing.
 - Solid waste capacity/needs.

Arkansas General Assembly Legislation - Act 870

- Public outcry concerning the potential receipt of out-of-state waste in Arkansas landfills (1987).
- Arkansas Legislative Committee Chaired by Representative Bynum Gibson (Dermott) formed by 1987 legislation to study issues such as:
 - Interstate movement of solid waste.
 - Arkansas Landfill capacity.
 - Stimulation of recycling.
- 77th Arkansas General Assembly enacted in Act 870 in 1989 to address issues such as:
 - Stimulation of recycling.
 - Despite substantial private recycling infrastructure (scrap facilities, etc.) need to expand both the volume and type of materials recycled.
 - So increase both demand and capacity.
 - Develop markets.
 - Encourage regional solid waste planning/facilities.
 - Consolidate solid waste infrastructure (larger/better funded facilities to meet stricter environmental requirements).
 - Conduct solid waste needs assessments.

Act 870

- What did 870 do?
 - Created 8 Regional Solid Waste Planning Districts and 8 Regional Solid Waste Planning Boards (now 19?).
 - Required each Board to evaluate the solid waste management needs of its district.
 - Established temporary moratorium on the expansion of out-of-state accepted at landfills within the state.
 - NOTE - Arkansas legislation based on the premise that most individual communities and counties would not have the resources to site, fund, and operate landfills – therefore moved to a “regional” system.

Act 870

- Powers of the Board
 - To collect data, study and initially evaluate the solid waste management needs of all localities within their Districts, as provided in section (5), and to publish their findings as a Regional Needs Assessment;
 - To evaluate on a continuous basis the solid waste needs of their Districts, and thereby update the Regional Needs Assessments at least biennially;
 - To formulate recommendations to all local governments within their Districts on solid waste management issues, and to formulate plans for providing adequate solid waste management;
 - To issue or deny Certificates of Need to any applicant for a solid waste disposal facility permit within their District;
 - To adopt such rules or regulations as necessary to assure public notice and participation in any findings or rulings of the Boards; and
 - To carry out all other powers and duties conferred by the Act.

Act 870

- Certificate of Need Criteria:

1. Whether the proposed facility is consistent with the District's regional planning strategy;
2. Whether the proposed facility conflicts with existing comprehensive land-use plans of any local governmental entities;
3. Whether the proposed facility disturbs an archeological site or an endangered species habitat;
4. Whether the facility would adversely affect the public use of any local, state, or federal facility, such as a park or wildlife management area;
5. Whether the proposed facility conflicts with the requirements of state or federal laws and regulations on the location of disposal facilities;

Act 870

6. Whether, if the proposed facility is located within the 100-year floodplain, it restricts the flow of the 100-year flood, reduces the temporary water storage capacity of the floodplain, or could result in washout of solid waste so as to pose a hazard to human health or the environment;
7. Whether the proposed facility is appropriately located given the District's needs and taking into consideration its road system;
8. Whether the proposed facility provides landfill disposal capacity needed within the District;
9. The history of the applicant's record with respect to violations of environmental laws and regulations;
10. The service area to be served by the proposed facility; and,
11. Whether the applicant followed the procedures for obtaining a CON in Subchapter 7.

Act 870

• Moratorium in the Statute – AR “interdistrict” approach

- Until January 31, 1991, no existing landfill shall expand its service area outside of the District in which it is located.
- Existing landfills that currently serve areas outside of their respective Districts shall not increase the total amount of solid waste originating from outside their Districts by more than twenty percent (20%) of the total solid waste received at such facility (border cities issue).
- No new landfill shall be allowed to receive solid waste outside the boundaries of the District in which it is located until after January 31, 1991.
- No new applications for landfill permits seeking to dispose of solid waste originating outside of the district created hereunder, or that propose to dispose of solid waste originating from outside such district, shall be accepted or processed by the Commission or a regional solid waste planning board, unless such applications were pending before the Department of Pollution Control and Ecology as of March 1, 1989.

1991 – Act 319

• Findings of the Arkansas General Assembly After the Boards Were Formed

- Landfill life for the 63 existing solid waste landfills within the state to be approximately 4.3 years.
- This life expectancy was believed inadequate and a landfill capacity of at least 10 years should be developed for solid waste generated in Arkansas in order to provide sufficient protection for the public health, welfare and safety and to provide for the future development of the state.
- Result
 - Pursuant to these conclusions, the Arkansas legislature stated that it would extend the moratorium on importation until the later of:
 - July 1, 1992, or,
 - until the capacity of landfills in both the district and the state reaches a 10-year capacity.
 - The limitation prohibited existing landfills from extending their service area outside of their district,
 - however, existing landfills which serviced areas outside their districts as of March 31, 1989, could not increase the total disposal of solid waste originating outside their districts by more than twenty percent annually.

1991 – Act 752

- Amendments
 - Changed name of the Solid Waste Planning Districts to “Regional Solid Waste Management Districts”
 - Added the following to the Boards’ powers
 - Any applicant for a solid waste landfill permit, with the exception of permits for landfills when a private industry bears the expense of operating and maintaining the landfill solely for the disposal of waste generated by the industry or wastes of a similar kind or character, under the Arkansas Solid Waste Management Act, §8-6-201 et seq., with the exception of permits for landfills when a private industry bears the expense of operating and maintaining the landfill solely for the disposal of waste generated by the industry or wastes of a similar kind or character, must obtain a certificate of need from the board with jurisdiction over the proposed site prior to submitting the application to the Arkansas Department of Pollution Control and Ecology.
 - The Arkansas Department of Environmental Quality may deny any permit based upon the denial of a certificate of need by any regional board.
 - To petition the commission or director to issue, continue in effect, revoke, modify, or deny any permit for any element of a solid waste management system located within the district based on compliance or noncompliance with the solid waste management plan of the district;

1991 – Act 752

- Amendments Cont'd
 - Added 8-6-712 → Regulation of Solid Waste
 - A district which has an approved solid waste management plan may:
 - Require, by regulation or other legal means, that solid waste generated or collected within the boundaries of the district be delivered to a particular project for disposal, treatment, or other handling, provided however that nothing in this section shall be construed as impairing legal and proper contracts existing upon the effective date of this section under the Arkansas Constitution, or the notes or other evidences of indebtedness incurred pursuant to a revenue bond issued or reissued dependent upon a project involving a stated waste stream which is a contractual condition of said indebtedness;
 - Prohibit, by regulation or other legal means, the collection, disposal, treatment, or other handling of solid waste within the boundaries of the district, by persons other than the district or any persons designated by the district unless a district to district agreement is entered into when one solid waste district has no legally permitted landfill which can accept its solid waste;
 - Flow control? U.S. Supreme Court has disallowed in certain instances flow control to private facilities (*Carbone* case) but approved in publicly owned facilities (*United Haulers* case).
 - Note – These cases address waste. Is there an issue with recyclables (Fifth Amendment taking?)

1991 – Act 752

• Amendments Cont'd

- Added 8-6-714 → Rents, Fees and Charges
 - (a) A regional solid waste management board may fix, charge, and collect rents, fees, and charges for the disposal, treatment, or other handling of solid waste (“Waste Assessment Fee”)
 - No dollar limitation on amount in statute
 - May not be assessed on residents or businesses for which the board makes solid waste collection or disposal services available
 - May be assessed against the generator, transporter, or disposal facility for waste generated outside the district and brought into the district
 - (b) The board may levy a service fee on each residence or business for which the board makes solid waste collection or disposal services available (“Service Fee”)
 - Silent about whether these could be charged on districts that disposed of solid waste from an adjoining district

1991 – Act 752 (continued)

- To petition the commission or director to issue, continue in effect, revoke, modify, or deny any permit for any element of a solid waste management system located within the district based on compliance or noncompliance with the solid waste management plan of the district;
- To adopt an official seal and alter it at pleasure;
- To maintain an office at such places as it may determine;
- To sue and be sued in its own name and to plead and be impleaded;
- To make and execute contracts and other instruments necessary or convenient in the exercise of the powers and functions of the district, including but not limited to entering into contracts and agreements with private entities for provisions of services; and
- To enter into an agreement with another solid waste management district to allow one district to transfer solid waste to another district. (is only allowed if a solid waste district has no legally permitted landfill which can accept its solid waste).
- Requirement to provide residents an opportunity to recycle.

1992 – *In re Southeast Arkansas Landfill, Inc.*

Interstate Movement

- Southeast Arkansas Landfill, Inc., challenged the moratoriums in Act 870 and Act 319 that prevented solid waste originating outside the state from being transported into Arkansas.
- The federal Eighth Circuit Court of Appeals held that the moratoriums were discriminatory on their face and therefore a violation of the Commerce Clause.
- U.S. Supreme Court case in the 1970's involving New Jersey landfill space held waste is no different from products – has value as a commodity service and state cannot hoard it/discriminate.

1993 – Arkansas High Impact Solid Waste Management Facility Legislation (House Bill 1986)

- The Arkansas Environmental Equity Act of 1993 encourages “an equitable and efficient dispersal of solid waste management” to prevent “lower-income or minority communities” from becoming “involuntary hosts to a proliferation of high impact solid waste management facilities.”
- The Act creates a “rebuttable presumption” against siting a new high impact solid waste facility within a twelve-mile radius of another one.
- The presumption may be rebutted by showing a lack of sufficient sites, or by the community allowing it because of certain incentives listed as:
 - Increased employment opportunities;
 - Reasonable host fees not to exceed the prevailing state average;
 - Contributions by the high impact solid waste management facility to the community infrastructure, e.g. road maintenance, park development, and litter control;
 - Compensation to adjacent individual landowners for any assessed decrease in property values; or
 - Subsidization of community services.
- The definition of high impact solid waste management facility includes all commercial hazardous waste incinerators and commercial hazardous waste treatment, storage, or disposal facilities.

1993 Arkansas Solid Waste Siting Equity Legislation House Bill 1986

- 3(a) There shall be a rebuttable presumption against permitting the construction or operation of any high-impact solid waste management facility as defined in this act within twelve (12) miles of any existing high-impact solid waste management facility.
- 2(b) the term "high-impact solid waste management facility" shall not include the following:
 - i. Recycling or composting facilities;
 - ii. Waste tire management sites;
 - iii. Solid waste transfer stations;
 - iv. Solid waste landfills which have applications pending for either increased or new acreage or provisions for additional services or increased capacity;
 - v. A facility dedicated solely to the treatment, storage or disposal of solid or hazardous wastes generated by a private industry where the private industry bears the expense of operating and maintaining the facility solely for the disposal of waste generated by the industry or wastes of a similar kind or character or,...
- This presumption shall be honored by the Department of Pollution Control and Ecology, the regional or service area solid waste planning board with jurisdiction over the site, and any other governmental entity with permitting or zoning authority concerning any facility.

1995 – Adoption of More Restrictive Standards

- Arkansas Legislative Amendments

- Added 8-6-724

- Regional solid waste management boards may adopt more restrictive standards for the location, design, construction, and maintenance of solid waste disposal sites and facilities than the state government or United States Government, provided such standards are based upon generally accepted scientific knowledge or engineering practices and are consistent with the purposes of this subchapter.

More Restrictive Standard Provisions: 1998 – *Four County (NW) Regional Solid Waste Management District Board v. Sunray Services, INC.*

- Sunray Services, INC., (“Sunray”) challenged 6 regulations imposed by Four County (NW) Regional Solid Waste Management District Board (“Four County”) as violating state law.
- The 6 regulations were as follows: double-composite liner systems, on-site inspector, wells inventory, accounting and video geophysical logs, surface geophysical studies, and dye-trace studies.
- The Arkansas Supreme Court held that the lower court used the wrong standard to evaluate the regulations.
- The Court held that because the regulations were “are based upon generally accepted scientific knowledge or engineering practices,” that Four County had the authority to impose them.

2007 – Amendments to Boards' Powers

- To enter into agreements with another solid waste management district to allow a district or any person within that district to transfer solid waste into another district.
- Notice of all authorizations are required to be submitted to the Arkansas Department of Environmental Quality within thirty (30) days and must be incorporated into the district needs assessment in its next regular update; and
- To authorize a disposal facility within a district to accept the receipt of solid waste from an adjoining district upon request by the generator of that solid waste, provided that the request specifies the disposal facility and the nature and estimated annual volume of solid waste to be received.
- Notice of all such authorizations must be submitted to the department within thirty (30) days and incorporated into the district needs assessment in its next regular update.

2007 – Amendments to Boards’ Powers

- The Regional Solid Waste Management Boards may
 - Employ an environmental officer who may:
 - Inspect all landfills;
 - Inspect other solid waste facilities;
 - Inspect waste haulers and other vehicles;
 - Ensure compliance with all district regulations;
 - Collect evidence of noncompliance and present the evidence to the prosecuting attorney; or
 - Issue citations for the violation of any district regulation.

2007 – Amendments to Boards’ Powers

- If a Regional Solid Waste Management Board employs an environmental officer under this subsection, then the environmental officer may complete the training course for law enforcement officers at the Arkansas Law Enforcement Training Academy.
- After satisfactory completion of the training course, the environmental officer shall be a law enforcement officer.
- After satisfactory completion of the training course, the environmental officer may:
 - Carry firearms;
 - Execute and serve a warrant or other processes issued under the authority of the district and related to violations of district regulations; and
 - Make arrests and issue citations for violations of district regulations regarding environmental protection.

2007 – Amendments to Boards' Powers Cont'd

- The Regional Solid Waste Management Boards shall adopt county purchasing procedures, as provided in § 14-22-101 et seq., as the approved purchasing procedures for the districts.
- Each Regional Solid Waste Management Board shall procure an annual financial audit of the district. Such audits shall be conducted following each board's fiscal year end. Regional solid waste management funds which are subject to audit in conjunction with a single audit performed consistent with Governmental Auditing and Reporting Standards are not required to have a separate audit.
 - Each district shall choose and employ accountants in good standing with the Arkansas State Board of Public Accountability to conduct these audits in accordance with Governmental Auditing and Reporting Standards issued by the Comptroller of the Currency of the United States.
 - The regional solid waste management district shall pay for such audits from their administrative moneys
 - Each audit report and accompanying comments and recommendations shall be reviewed by the appropriate regional solid waste management board.
 - Copies of each audit report of a regional solid waste management district shall be filed with the department and with the Division of Legislative Audit. In addition, one (1) copy of the audit report shall be kept for public inspection with the books and records of the district.
 - Failure to provide a full and complete audit report, as required by this subchapter, shall prohibit future distribution of revenue from funding programs that are administered by the department unless otherwise authorized by the director.
 - Federal appellate court has held that an Arkansas municipality may lawfully award an exclusive franchise with respect to certain services, including generally, solid waste management services.

2007 Arkansas Attorney General Opinion (2007-015)

- Act 752 “clearly envisions that district board will either completely take over waste management services or cooperate with cities and counties in providing waste management services.”
- “Act affords a district as much control over collections as it wishes to shoulder.”

Franchise/Zone Collection System

- The statutes do not expressly authorize a governing board to create a franchise zone collection system – however, there is no express prohibition of such action.

2011 – Amendment to Rents, Fees, and Charges

- Amendments

- Limited amount for the Waste Management Fee board could charge to no more than \$2.00 per ton of solid waste
- Solid waste generated in 1 district and broach into another to dispose → can assess Waste Management Fee
 - Either in the district in which waste generated OR district in which its transported, stored, management, disposed of
 - Both cannot assess the fee
 - How districts can determine how fee is assessed, by interlocal agreement, how to assess/administer the fee, divide fees, if they can't reach an agreement, divide fees equally

Acts 749/748

- Create a five person “State Marketing Board for Recyclables” (749).
- 30% Tax Credit to facilities that invest in “waste reduction, reuse or recycling equipment” designed to separate, process, modify, convert or treat solid waste so that the resulting product may be used as raw material for productive use (748).
- Tax credit has been utilized by a number of new and existing Arkansas facilities to enable their use of solid waste for resource recovery (i.e., production of a useful product/or as a raw material).

Regional Board/District Rules

- Implements their various statutorily provided authorities.

2019 –Benton County Solid Waste Management District v. Waste Management of Arkansas, INC.

Fees

- Waste Management of Arkansas, Inc., brought action against Benton County Solid Waste Management District (“Benton County”) seeking declaratory judgment that fee changes adopted by Benton County exceeded its statutory authority.
- Benton County and the Boston Mountain Regional Solid Waste Management District (“Boston”) originally had an interlocal agreement setting the waste management fee between both districts.
- The agreement expired and Benton County tried to enforce their fee unilaterally against Boston.
- The court held that Benton County did not have this authority.
- Further, Benton County attempted to enforce a service fee against waste haulers.
- The statute only allows this fee to be assessed on residences and business for which the district makes solid waste disposal or collection services available.

*2019 – Boston Mountain Regional Solid Waste Management District
v. Benton County Solid Waste Management District*

- Two Districts (Boston County and Benton County) had an agreement between the two determining which county would get fees and how much the fees would be.
- The agreement expired in 2016, and the counties were unable to agree on the amount to be charged.
- The Circuit Court determined that the statutory provision, requiring the fee to be split evenly between the districts if they are unable to come to an agreement, would cause one county to be “unjustly enriched.”
- On appeal, the Court of Appeals reversed the Circuit Court, holding that there was no basis to apply the doctrine of unjust enrichment, and the lower court should have enforced the statutory provision.

2020 – Amendments to Boards’ Powers

- Amendments
 - Arkansas Legislative Audit shall annually select on a random basis one-third (1/3) of the total number of districts for a review of selected policies, procedures, and transactions.
 - The review under subdivision (d)(6)(A) of this section shall include without limitation a determination of compliance with applicable criteria.
 - A report of the reviews under subdivision (d)(6)(A) of this section shall be compiled and presented to:
 - The Legislative Joint Auditing Committee; and
 - The Division.

Arkansas Department of Energy and Environment – Division of Environmental Quality Role?

- Arkansas Solid Waste Management Act Enforcement.
- Arkansas Pollution Control and Ecology Rule 22 (Solid Waste Management Rules) Implementation/Enforcement.
 - Host Community Agreements.
 - Host Community Approval of Site Selection.
 - Landfill permitting.
 - Composting/MRF/Transfer Facility Permitting.
 - Station Permitting.
 - State development of a comprehensive solid waste management plan every 10 years (Act 1376 of 2001).
 - Establish minimum requirements for new plans by Arkansas 18 Regional Solid Waste Boards.
 - **Certification of Arkansas Recycling Tax Credit (Arkansas Pollution Control & Ecology Rule 16).**

Continuing/Future Challenges

- Siting new facilities.
- Lithium batteries.
- Solar panels.
- Tires.
- Funding.
- Landfill closure/post-closure.
- Emissions.
- PFAS (passive liability/CERCLA exemption?).
- Servicing/Incorporating Rural Areas.