



State of New Jersey

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Robert C. Shinn, Jr.
Commissioner

IN THE MATTER OF CERTAIN AMENDMENTS
TO THE ADOPTED AND APPROVED SOLID
WASTE MANAGEMENT PLAN OF THE
GLOUCESTER COUNTY SOLID WASTE
MANAGEMENT DISTRICT

CERTIFICATION
OF THE MARCH 17, 1999
AMENDMENT TO THE GLOUCESTER COUNTY
DISTRICT SOLID WASTE MANAGEMENT PLAN

BY ORDER OF THE COMMISSIONER:

A. Introduction

The New Jersey Solid Waste Management Act (N.J.S.A. 13:1E-1 et seq.) established a comprehensive system for the management of solid waste in New Jersey. The Act designated all twenty-one (21) of the state's counties, and the Hackensack Meadowlands District, as Solid Waste Management Districts, and mandated that the Boards of Chosen Freeholders and the Hackensack Meadowlands Development Commission develop comprehensive plans for waste management in their respective districts. On September 26, 1980, the Department of Environmental Protection (Department or DEP) approved, with modifications, the Gloucester County District Solid Waste Management Plan (County Plan).

The Act requires that all district plans be based on and accompanied by a report detailing the existing waste disposal situation in the district, and a plan which includes the strategy to be followed by the district in meeting the solid waste management needs of the district for a ten-year planning period. The report must detail the current and projected waste generation for the district, inventory and appraise all facilities in the district, and analyze the waste collection and transportation systems which serve the district. The disposal strategy must include the maximum practicable use of resource recovery techniques. In addition to this strategy, the plan must designate sufficient available suitable sites for the disposal of the district's waste for a ten-year period.

The Act further provides that a district may review its County Plan at any time and, if found inadequate, a new County Plan must be adopted. The Gloucester County Board of Chosen Freeholders (County Freeholders) completed such a review and on March 17, 1999, adopted an amendment to its approved County Plan.

The amendment represents the County's supplemental response to the May 1, 1997 decision of the United States Court of Appeals for the Third Circuit which declared unconstitutional New Jersey's historic system of solid waste flow control. [See Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County et al. 112 F.3d 652 3d Cir. 1997, cert. den. November 10, 1997]. Specifically, each solid waste management district must reevaluate its solid waste disposal strategy in light of this recent court decision and, if necessary, initiate appropriate amendments thereto.

In general, the Department refers the County to the solid waste regulations at N.J.A.C. 7:26-1 et seq. to the extent they relate to specific procedural and substantive issues addressed in this and subsequent amendments. In addition, this certification is in no way intended by the DEP to represent a legal determination regarding the effect of the Atlantic Coast decision on any specific contract between public and/or private parties.

The March 17, 1999 amendment proposes a strategy of implementing regulatory flow control based upon nondiscriminatorily procured solid waste disposal services.

The amendment was received by the Department on March 23, 1999 and copies were distributed to various administrative review agencies for review and comment, as required by law. The Department has reviewed this amendment and has determined that the amendment adopted by the County Freeholders on March 17, 1999 is approved as provided in N.J.S.A. 13:1E-24.

B. Findings and Conclusions with Respect to the Gloucester County District Solid Waste Management Plan Amendment

Pursuant to N.J.S.A. 13:1E-24a(1), I have studied and reviewed the March 17, 1999 amendment to the County Plan according to the objectives, criteria, and standards developed in the Statewide Solid Waste Management Plan and I find and conclude that the approved portions of this plan amendment are consistent with the Statewide Solid Waste Management Plan. In this regard, the County Freeholders are notified of the issues of concern relative to the March 17, 1999 amendment which are included in Section B.2. below.

In conjunction with the review of the amendment, the Department circulated copies to fifteen administrative review agencies and solicited their review and comment. Pursuant to N.J.S.A. 13:1E-24a(2) and (3), these agencies included various bureaus, divisions, and agencies within the Department. All agencies contacted are as follows:

Division of Water Quality Management, DEP
Division of Parks and Forestry, DEP
Division of Fish, Game and Wildlife, DEP
Division of Compliance and Enforcement, DEP
Division of Solid and Hazardous Waste, DEP
Office of Air Quality Management, DEP
Green Acres Program, DEP
Land Use Regulation Element, DEP
New Jersey Turnpike Authority
New Jersey Advisory Council on Solid Waste Management
Department of Agriculture
Department of Health
Department of Transportation
Department of Community Affairs
U.S. Environmental Protection Agency

1. Agency Participation in the Review of the March 17, 1999 Amendment

The following agencies did not object to the proposed amendment:

Division of Parks and Forestry, DEP
Division of Water Quality, DEP
Division of Compliance and Enforcement, DEP
Green Acres Program, DEP
Department of Agriculture
Department of Transportation
Department of Community Affairs

The following agencies did not respond to our requests for comment:

Division of Fish, Game and Wildlife, DEP
Office of Air Quality Management, DEP
Land Use Regulation Element, DEP
New Jersey Advisory Council on Solid Waste Management
New Jersey Turnpike Authority
Department of Health
U.S. Environmental Protection Agency

The following agency provided substantive comments as shown in Section B. of the certification document:

Division of Solid and Hazardous Waste, DEP

2. Issues of Concern Regarding the March 17, 1999 Amendment

Issue: Previously Adopted Atlantic Coast Amendment

On October 1, 1997, the County Freeholders adopted the initial amendment in response to the Atlantic Coast decision. This amendment proposed a market participant strategy providing for

voluntary delivery of Gloucester County generated solid waste to the Gloucester County Landfill. While the Department was reviewing this amendment, the County informed the DEP that it was in the process of adopting a subsequent amendment which would supersede the October 1, 1997 amendment. Upon receipt of this subsequent amendment (which was adopted on February 18, 1998), the Department ceased review of the October 1, 1997 amendment.

The February 18, 1998 amendment proposed that the Gloucester County Improvement Authority (GCIA) regulate the disposal of all solid waste generated within the County. The amendment noted that a procurement process for the disposal for all County generated waste would be undertaken by the GCIA on behalf of the County. However, since this procurement process was not yet completed at the time of adoption of the February 18, 1998 amendment, on March 24, 1998 the Department approved with modification this component of the amendment contingent upon receipt and approval by the DEP of a subsequent amendment or administrative action documenting the award of a nondiscriminatory bid contract to provide disposal services. The March 17, 1999 amendment describes, in detail, the nondiscriminatory procurement process.

Issue: Nondiscriminatory Procurement Process

On February 19, 1998, the GCIA authorized by resolution the advertisement of bids for solid waste disposal services pursuant to the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) and the advertisement for a Request For Qualifications (RFQ) pursuant to the McEnroe Act (N.J.S.A. 13:1E-136 et seq.). Specifically, these advertisements appeared on February 20, 1998 in (1) The Philadelphia Inquirer, a newspaper published in Philadelphia and circulated in Pennsylvania, New Jersey, and Delaware and (2) The Gloucester County Times, a newspaper published and circulated in the County, and on March 2, 1998 in Waste News, a nationwide solid waste journal. RFQ responses under the McEnroe Act were due on April 18, 1998 and bids for solid waste disposal services under the Local Public Contracts Law were due on April 28, 1998.

McEnroe Act Procurement

On April 18, 1998, the GCIA received qualifications from American Ref-Fuel Company of Delaware County (Pa.), L.P. (Ref-Fuel) and Wheelabrator Gloucester Company, L.P. (Wheelabrator). The qualifications submitted by Ref-Fuel identified the Delaware Valley Resource Recovery Facility located in Chester, Pennsylvania as the site of the disposal facility for resource recovery services and the Colebrookdale Landfill located in Earl Township, Berks County, Pennsylvania as the site of the disposal facility for ash residue. The qualifications submitted by Wheelabrator identified the resource recovery facility located in

Westville, Gloucester County as the site of the disposal facility for resource recovery services and the GCIA Landfill located in South Harrison Township as the site of the disposal facility for ash residue.

By resolution adopted May 15, 1998, the GCIA determined, after a review of the qualifications submitted by each vendor, that Ref-Fuel and Wheelabrator possessed the minimum qualifications necessary to provide the resource recovery services and designated both as Qualified Vendors in accordance with the McEnroe Act.

On May 18, 1998, the GCIA issued a Request for Proposals (RFP) for Resource Recovery Services to the Qualified Vendors. On June 5, 1998, the GCIA received proposals from each of the Qualified Vendors. By letter dated July 2, 1998, the GCIA requested Ref-Fuel to clarify information submitted in its proposal regarding whether its parent guarantor, Browning Ferris Industries, would unconditionally guaranty the obligations of Ref-Fuel as required by the terms of the RFP.

On July 6, 1998, the GCIA adopted a resolution that, based upon an evaluation report dated July 2, 1998, designated both Ref-Fuel and Wheelabrator as Preferred Proposers and authorized the commencement of negotiations with both vendors. This resolution also stipulated that the designation of Ref-Fuel as a Preferred Proposer was contingent upon Ref-Fuel producing prior to negotiations a satisfactory clarification to the guaranty issue. In the event such clarification was not satisfactory, the GCIA would automatically revoke the designation of Ref-Fuel as a Preferred Proposer.

By letter dated July 8, 1998, Ref-Fuel stated that BFI would provide a corporate support agreement to contribute equity capital to Ref-Fuel provided the GCIA meets certain tonnage delivery obligations. However, the RFP expressly stated that proposers were required to submit a Guarantor Acknowledgment evidencing the Guarantor's agreement to unconditionally guarantee the obligations of the proposer as set forth in the Guaranty Agreement contained within the RFP. Therefore, on July 30, 1998, counsel for the GCIA notified Ref-Fuel by letter that its proposal did not comply with the terms of the RFP and the GCIA had determined to reject Ref-Fuel's proposal. Subsequent negotiations between the GCIA and Wheelabrator culminated in the execution of an agreement for the Provision of Resource Recovery Services dated January 1, 1999 (Agreement). The obligations of Wheelabrator under this Agreement are unconditionally guaranteed by Waste Management, Inc. under a Guaranty Agreement dated January 1, 1999.

Local Public Contracts Law Procurement

On April 28, 1998, the GCIA received a bid proposal from American Ref-Fuel Company of Delaware County. By resolution adopted June 18, 1998, in accordance with the Local Public Contracts Law and with the consent of Ref-Fuel, the GCIA extended the deadline to award or reject the Ref-Fuel bid by 45 days beyond the original 60-day deadline. On August 10, 1998, the GCIA requested Ref-Fuel's consent of an additional deadline extension. By letter dated August 10, 1998, Ref-Fuel declined to provide any extension and stated that its proposal was no longer effective. Accordingly, the Local Public Contracts Law procurement was ended. The GCIA commemorated this conclusion by resolution adopted August 20, 1998.

Final Determination

The Department has reviewed the GCIA's procurement of solid waste disposal services under the McEnroe Act to determine if it was nondiscriminatory. The amendment seeks to waste flow four waste types: acceptable waste, bypass waste, nonprocessable waste, and ash residue. The GCIA advertised for proposed vendors in a national trade journal as well as in local publications and proposals were received from in-state and out-of-state vendors. This solicitation process is consistent with the criteria set forth in the Atlantic Coast decision and, therefore, services procured in this manner may be considered nondiscriminatory. The GCIA had the opportunity to negotiate with two different vendors for provision of solid waste disposal services. As noted in the Order Conditionally Approving Agreement for Solid Waste Disposal Services, Docket No. CT299002 of even date herewith, the GCIA had before it two proposals for resource recovery services. These proposals provided a choice between a proposer who would provide the guaranty required by the GCIA in the form it wanted and one who would not, with no large difference in the cost for disposal between the two proposals. The requirement that in-state and out-of-state providers of service have equal opportunity to bid on contracts for solid waste disposal services does not also require the GCIA or any other contracting unit to reject a business proposal that is favorable to it because that favorable proposal comes from the in-state bidder. The opportunity to fully participate was available equally to all.

A problem arises in the specific waste types which were advertised for procurement. The McEnroe procurement process only solicited services for resource recovery and ash disposal. The procurement of the resource recovery services approved herewith allows the County to direct those waste types acceptable for incineration (i.e., waste comprising nonrecycled portions of type 10 municipal waste, portions of type 13 bulky waste, type 23 vegetative waste, and the nonanimal portion of type 25 animal and

food processing waste) to the Wheelabrator Resource Recovery Facility. With respect to the disposal of ash residue, as noted above, the Wheelabrator bid identified the GCIA Landfill as the site for residual waste. To be able to control the flow of ash residue, Wheelabrator should have identified within their proposal a disposal site over which it has ownership/contractual relations. The designation of the GCIA Landfill does not satisfy this criterion. Therefore, the County may not direct ash residue to the GCIA Landfill.

Additionally, the McEnroe process did not solicit bids for the disposal of bypass and nonprocessable waste. However, bypass waste is defined as acceptable waste delivered to the Wheelabrator Resource Recovery Facility which because of unavailability of the facility is directed to the GCIA Landfill. Since the GCIA is hereby allowed to direct acceptable waste to the Wheelabrator facility, and bypass waste is a component of acceptable waste, by extension the GCIA should be allowed to direct all bypass waste to the GCIA Landfill subject to terms specified in the Wheelabrator Agreement. Finally, since nonprocessable waste was not the subject of any nondiscriminatory procurement process, the County may not direct nonprocessable waste to the GCIA Landfill.

To obtain clarification from the County on the disposal of those waste types which were not subject to nondiscriminatory procurement, the Department contacted counsel to the GCIA. By letter to the DEP dated May 5, 1999, GCIA counsel indicated that all nonprocessable waste and ash residue shall be delivered to a licensed solid waste disposal facility (and shall not be subject to flow control). Consequently, within Section C. of this certification, the Department only approves the direction of all processible waste to the Wheelabrator Resource Recovery Facility and all bypass waste to the GCIA Landfill.

Issue: Materials Recovery Operations

With reimposition of flow control within certain counties, the Department has expressed concern to the affected counties that such flow control provides for materials recovery. In response, the March 17, 1999 amendment states that "Any material[s] recovery facility located within or outside the County that recycles solid waste generated within the County shall deliver any residual acceptable waste and nonprocessable waste after such recycling to the County for disposal in accordance with this 1999 plan amendment." Therefore, since this policy adequately provides for materials recovery, the Department hereby approves the materials recovery policy proposed by the County. However, since only flow control for acceptable waste is approved within Section C. of this certification, only acceptable waste resulting from materials recovery operations may be directed to the

Wheelabrator Resource Recovery Facility.

Issue: Enforcement

The amendment proposes that the GCIA and the County will exercise jurisdiction to undertake enforcement actions to assure compliance with the above noted disposal strategy. The amendment also notes that the County Health Department is authorized under the auspices of the County Environmental Health Act (CEHA and N.J.S.A. 26:3A2-1) to enforce the waste flow system. Since the County Health Department is the only authorized enforcement agency, within Section C. of the certification, this agency is approved as the designated agency to enforce the provisions of the March 17, 1999 amendment.

Issue: Method of Financing Solid Waste Management

The GCIA has outstanding about \$27.7 million of County Guaranteed Solid Waste Revenue Bonds (Bonds) relating to the acquisition and construction of the GCIA Landfill. The Bonds are secured by revenue derived from the GCIA Landfill. Also, the County has annual debt service on the Bonds of \$2.7 million. The GCIA expects to finance the annual debt service payments on the Bonds through revenues generated by the GCIA Landfill. The March 17, 1999 amendment notes that upon certification of the amendment, the GCIA anticipates commencing flow control requiring the delivery of all acceptable waste to the Wheelabrator Resource Recovery Facility and all residual waste, bypass waste, and nonprocessable waste to the GCIA Landfill. Based upon historic tonnage data existing prior to the Atlantic Coast decision of November 1997, the GCIA projects that revenues generated from the disposal of residual waste, bypass waste, and nonprocessable waste will be about \$4 million. The GCIA also expects to generate additional revenue from contracts for the disposal of nonprocessable waste and residual waste generated from outside the County. Collectively, the GCIA anticipates that revenues from these contracts and the Wheelabrator Agreement will total about \$5.4 million per year. As noted above, the DEP is only approving flow control for acceptable waste and bypass waste with the disposal of ash residue and nonprocessable waste not subject to flow control. Therefore, within Section C. of this certification, the Department approves the method of financing solid waste management although the delivery of ash residue and nonprocessable waste to the GCIA Landfill will be via individual contracts and not flow control.

C. Certification of the Gloucester County District Solid Waste Management Plan Amendment

In accordance with N.J.S.A. 13:1E-1 et seq., specifically N.J.S.A. 13:1E-21, which establishes specific requirements

regarding the contents of the district solid waste management plans, I have reviewed the March 17, 1999 amendment to the approved County Plan and certify to the County Freeholders that the March 17, 1999 amendment is approved as further specified below.

The County Plan inclusion of the GCIA's nondiscriminatory process to secure disposal services is approved for certain waste types. Specifically, since the County has adequately demonstrated that it secured a disposal contract with Wheelabrator Gloucester Company, L.P. in a nondiscriminatory manner, the GCIA may commence the delivery of all acceptable waste to the Wheelabrator Resource Recovery Facility located in West Deptford Township, Gloucester County, and all bypass waste to the GCIA Landfill located in South Harrison Township, Gloucester County. However, since a nondiscriminatory procurement process was not completed for ash residue and nonprocessable waste, these waste types are not subject to flow control and may be delivered to any licensed solid waste disposal facility.

The County Plan inclusion of the designation of the County Health Department to directly exercise enforcement actions to assure compliance with the March 17, 1999 amendment is approved.

The County Plan inclusion of the method of financing solid waste management is approved. However, as noted within Section B., although the DEP is approving this method of financing, the delivery of ash residue and nonprocessable waste to the GCIA Landfill will be via individual contracts and not flow control.

D. Other Provisions Affecting the Plan Amendment

1. Contracts

Any contract renewal or new contract for solid waste collection or disposal which is inconsistent with this amendment to the County Plan and which was executed prior to the approval of this amendment and subsequent to the effective date of the Solid Waste Management Act (July 29, 1977), and which shall further be for a term in excess of one year, shall immediately be renegotiated in order to bring same into conformance with the terms and provisions herein set forth. Any solid waste collection operation or disposal facility registered by the Department and operating pursuant to a contract as herein described, shall be deemed to be in violation of this amendment and of the County Plan if such renegotiation is not completed within ninety (90) days of the effective date of this amendment provided, however, that any such registrant may, upon application to the Department, and for good cause shown, obtain an extension of time to complete such renegotiation.

2. Compliance

All solid waste facility operators and transporters registered with the Department and operating within the County and affected by the amendment contained herein shall operate in compliance with this amendment and all other approved provisions of the County Plan. Any facility operator or transporter who fails to comply with the provisions contained herein shall be deemed to be in violation of N.J.S.A. 13:1E-1 et seq., in violation of N.J.A.C. 7:26-1 et seq., and in violation of their registration to operate a solid waste facility or a collection system issued thereunder by the Department and shall be subject to the provisions and penalties of N.J.S.A. 13:1E-9 and 12 and all other applicable laws.

3. Types of Solid Wastes Covered by the District Solid Waste Management Plan

The provisions of the County Plan shall apply to all solid wastes defined in N.J.S.A. 13:1E-3 and N.J.A.C. 7:26-2.13 including waste types 10, 13, 23, 25, and 27 and all applicable subcategories and shall not apply to liquid and hazardous wastes. All nonhazardous materials separated at the point of generation for sale or reuse are subject to regulation in accordance with N.J.A.C. 7:26A-1 et seq.

4. Certification to Proceed with the Implementation of the Plan Amendment

This document shall serve as the certification of the Commissioner of the Department to the County Freeholders and pursuant to N.J.S.A. 13:1E-24c. and f., the County shall proceed with the implementation of the approved amendment certified herein.

5. Definitions

For the purpose of this amendment and unless the context clearly requires a different meaning, the definitions of terms shall be the same as those found at N.J.S.A. 13:1E-3 and -99.12, N.J.A.C. 7:26-1.4, -2.13, and N.J.A.C. 7:26A-1.3.

6. Effective Date of the Amendment

The approved amendment to the County Plan contained herein shall take effect immediately.

7. Reservation of Authority

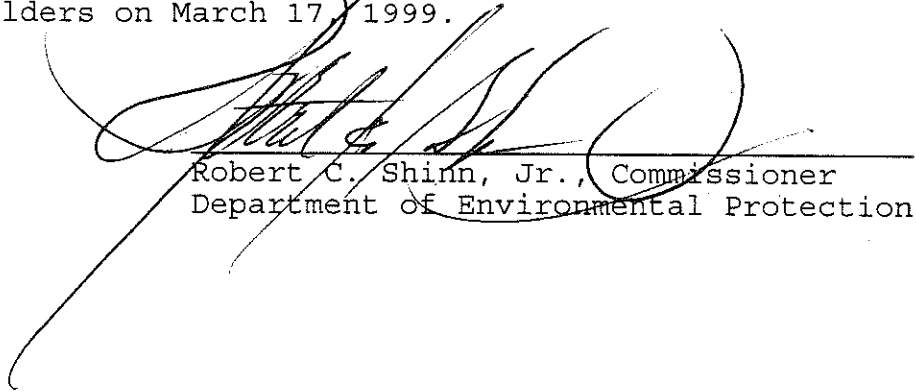
Nothing contained herein shall be construed as a limitation on any other action taken by the Department pursuant to its

authority under the law. The County Plan, including any amendment made thereto, shall conform with the Statewide Solid Waste Management Plan, with appendices, which includes the Department's planning guidelines, rules, regulations, orders of the Department, and also includes the compilation of individual district plans and amendments as they are approved.

E. Certification of Approval of the Amendment by the Commissioner of the Department of Environmental Protection

In accordance with the requirements of N.J.S.A. 13:1E-1 et seq., I hereby approve the amendment, as outlined in Section C. of this certification, to the Gloucester County District Solid Waste Management Plan which was adopted by the Gloucester County Board of Chosen Freeholders on March 17, 1999.

6/4/99
Date


Robert C. Shinn, Jr., Commissioner
Department of Environmental Protection

