

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
BUREAU OF WASTE MANAGEMENT**

DOCUMENT NUMBER: 254-2212-504

TITLE: Guidelines for the Development and Implementation of
County Municipal Waste Management Plan Revisions

EFFECTIVE DATE: January 2, 2010

AUTHORITY: This document is established in accordance with the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, as amended, 35 P.S. § 6018.101 et seq.; the Municipal Waste Planning, Recycling and Waste Reduction Act, Act 101 of July 28, 1988, P.L. 556, No. 101, 53 P.S. § 4000.101 et seq (Act 101); and 25 Pa. Code Chapter 272.

POLICY: This technical guidance will be used by DEP regional staff in considering county municipal waste management plan revisions for approval.

PURPOSE: This technical guidance will provide DEP regional staff with updated information they can use to assist counties in the development of their plans, and to review the plans when they are submitted.

APPLICABILITY: This guidance will apply to DEP Regional Solid Waste Managers, Planning and Recycling Coordinators and Central Office staff.

DISCLAIMER: The technical guidance outlined in this document is intended to supplement existing regulatory requirements.

The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of the Department to give these rules that weight or deference. This document establishes the framework within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

PAGE LENGTH: 19 pages

LOCATION: Volume 6 Tab Number 25A

REVIEW OF COUNTY MUNICIPAL WASTE PLAN REVISIONS

I. HOW TO USE THIS DOCUMENT.

This Technical Guidance is designed to assist the Department in reviewing county municipal waste management plan revisions submitted by counties for approval. The Department's review of a county municipal waste management plan revision includes a determination on whether the plan is consistent with applicable law. See 25 Pa. Code § 272.244. This document explains requirements for county plans in the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §§ 4000.101—4000.1904 (Act 101) and subsequent legislation, as well as in relevant court decisions on the Commerce Clause of the United States Constitution. It is assumed the Regional Office's Coordinator will advise and assist a county in its efforts to develop a municipal waste management plan that is approvable under this guidance.

In the process of reviewing plans for approval, DEP staff must understand that each county may have issues that are different from other counties. The possibility of counties having differing circumstances has been contemplated in this document, with the result that several alternatives may be discussed in one topic, allowing the county to make choices. A county is not necessarily required to revise the entire content of its plan when submitting a plan revision to the Department; consequently, not all of this document will always be needed during the preparation or review process.

This document includes discussion of decisions issued by Pennsylvania and Federal Courts and analyses of their applicability to the county planning process. Regional Coordinators should inform any county contemplating a revision that this project should not be completed without the assistance of the county solicitor, or an attorney recommended by the solicitor.

II. REVIEW OF PLAN REVISIONS.

A. Introduction.

Since 1998, changes have been made to policies and regulations that govern the development and approval of county municipal waste management plans. Some of these changes were the result of changes in the waste industry and some were based on the results of litigation involving county plans. This guidance has been modified to reflect changes in law and policy that have occurred since the guidance was last revised in 1998.

All counties in Pennsylvania currently have in effect a municipal waste management plan developed and approved under Act 101. Originally, there were revisions made to several plans begun under the Solid Waste Management Act, 35 P.S. §§ 6018.101—6018.1003, and “grandfathered” under Section 501(b) of Act 101. Regardless of the manner in which the original plan was developed, all plans must be

revised and submitted to the Department: (i) at least three years before the remaining available permitted capacity is exhausted; (ii) at least three years before the expiration of the term of the county's approved plan; or (iii) when otherwise required by the Department. See 25 Pa. Code § 272.251. A county with an approved waste management plan may submit a revised plan to the Department at any other time, and the Department encourages counties to be proactive in their municipal waste management planning process. Like the original, the plan revision must be for a minimum of ten years.

As counties revise their plans, the Department will make decisions on approving or disapproving proposed revisions. The Department will disapprove plan revisions which are not consistent with legal requirements. In determining whether to approve a plan revision, the Department must determine that the plan is complete and accurate, and that applicable requirements related to the content of the plan have been satisfied. Section 502 of Act 101, and the Department's regulations in 25 Pa. Code §§ 272.221 to 272.233 describe the required content of county plans. The Department must also determine that the plan was developed in accordance with the procedural requirements set forth in § 503 of Act 101 and 25 Pa. Code Ch. 272, particularly the requirements for public participation. Counties should be certain the procedures they use to assure that disposal capacity is available to them are in compliance with Act 101, applicable county codes, and constitutional considerations.

Since Act 101 was enacted in 1988, there have been several pieces of legislation enacted that impact Act 101, primarily the recycling programs the act establishes. Some of the provisions that are contained in these acts will figure in the development of plan revisions as the county considers recycling issues. For reference, these Acts are:

* Act 190 of 1996, 35 P.S. §§ 6029.101 et seq. (Waste Tire Recycling Act); and 35 P.S. §§ 6029.201 et seq. (Small Business and Household Pollution Prevention Program Act) – Established the waste tire recycling program and provided funding and guidelines for Household Hazardous Waste.

* Act 57 of 1997, 71 P.S. § 510-37 – Requires actions that must be taken to avoid using 902 grant funding to compete with the private sector.

* Act 68 of 1999 – Transferred funds from site specific post closure funds to the Environmental Stewardship Fund

* Act 90 of 2002, 27 Pa.C.S. §§ 6201 et seq. (Waste Transportation Safety Act) – Established the waste transportation safety program and requires waste transportation vehicles that transport municipal or residual waste to processing or disposal facilities to obtain authorization from the Department

* Act 175 of 2002 (amended §§ 103, 701, 706 and 905 of Act 101, and added § 1513 to Act 101) – New section 1513 requires that municipal recycling programs move toward financial sustainability, and that DEP assist them in this effort.

* Act 140 of 2006 (amending § 904 of Act 101) – Requires mandated curbside municipalities and other municipalities receiving more than \$10,000 in § 904 recycling performance grant funding to have in place specified recycling, compliance, and reporting programs.

B. Extent of Departmental Review.

There is no need for a county to revise all chapters of a plan if the proposed revisions will affect only some of the chapters. The revision must update all relevant and/or out-of-date information in the plan, including correcting parts of the plan that have been found to be in error or unrealistic during the period the plan has been in effect. Waste generation information and recycling progress typically need to be updated, and other plan elements should be reviewed for consistency with current circumstances. Newly available programs associated with recycling, such as resale or reuse of materials, should be examined. The Department will review the plan to the extent it has been revised.

C. Required Contents of a County Municipal Waste Management Plan.

Act 101 and the municipal waste regulations describe the required contents of county municipal waste management plans. Generally, county plans are to be concise; the Department does not expect extra chapters or lengthy passages containing general background information. In compiling its plan, the county should use the subheadings of § 502 in Act 101 to create numbered chapters of the plan in the following order:

1. Description of the waste. This means tons and contents of municipal waste that will be generated in the county, including waste from special events.
2. Description of facilities. An analysis of the facilities currently used by the county.
3. Estimated future capacity. An analysis of the potential county need for capacity.
4. Description of Recycling Program. Development of means to meet the 35% goal by 2003.
5. Selection and Justification of Municipal Waste Management Program. An analysis of the county's program, including facility selection and cost of disposal.
6. Location. The identification and locations of available facilities.
7. Implementing Entity Identification. Who will be responsible for implementing the plan on behalf of the county?

8. Public Function. Justification of and mechanisms to implement public ownership or public function in municipal waste processing or disposal, if proposed.

9. Copies of Ordinances and Resolutions.

10. Orderly Extension. An analysis of how the county's waste management system is coordinated with other county plans, ordinances and programs.

11. Methods of Disposal Other Than By Contracts.

12. Non-Interference. A discussion of how the county's plan will not interfere with existing facilities.

13. Public Participation. Advertisements, hearing minutes, SWAC meetings, notices, other public information documents.

14. Other Information. Any other information the Department may require.

The regulations in 25 Pa. Code §§ 272.221 to 272.233 provide further detail on required plan content.

D. Benefits of the Plan.

The county should develop its plan to withstand legal challenge. The planning process is not to be taken lightly or circumvented. In order to approve a plan and assist any county with appeals, the Department must be reasonably sure the county followed the law, applicable court decisions and the proper procedure for revising an Act 101 county plan. It is in the county's interest to state in its plan a list of benefits the county, its residents and its businesses derive from developing and implementing the revised plan. The description of benefits that accrue to the county because of the plan should be included in the introduction as a list, and the discussion of benefits should be placed into a separate, identified, paragraph. This list should be updated in all subsequent revisions. By way of example, some of the benefits already recognized by the courts include benefits to public health and safety, economic or financial benefits to residents or local government, decreasing the risk of liability from improper disposal of municipal waste, and the relevant purposes and goals of Act 101.

E. Recycling.

In 1997, the recycling goal in Pennsylvania increased to 35%. All plan revisions should contain a discussion of how the county intends to reach this goal if it has not already done so. There are several methods generally available for use in calculating recycling rates. For the sake of consistency, recycling rates used within the plan revision to show how the goal will be met should be calculated using the EPA Model which is included in the county's annual report documents. EPA amends this model periodically, and the Regional Coordinator should inform the counties when this happens.

Since 2002, the Department has reported the progress of recycling in Pennsylvania through an analysis of economic and environmental benefits rather than simple tonnage and percentage rate. This calculation can also be of use to counties. Each county should calculate the appropriate environmental benefits of the most recent year's recycling using the NERC, the EPA WARM, or the NRC calculator, and indicate these benefits as part of Chapter 4 in the plan.

All county plans must include an evaluation of the compatibility of recycling with other processing and disposal methods as part of the analysis of recycling required by Section 502(e) of Act 101. Each plan should be developed with a goal of creating an integrated municipal waste management system for the county based on the considerations of recycling, processing and disposal needs, and available capacity in the county.

F. Capacity Assurance.

An important purpose of a county municipal waste management plan is assuring that disposal capacity is available for waste generated within the county. The plan must show that there is capacity specifically available to the county for disposal of the waste generated within its boundaries for at least a ten-year period (not simply that capacity generally exists in Pennsylvania or surrounding states), and that the county has a right to use that specified capacity. (53 P.S. §§ 4000.502(c), (d); 53 P.S. § 4000.505(b)).

A county may meet its capacity assurance requirements through the use of public facilities, or through agreements with private facilities. A county that meets its capacity assurance needs with a facility over which the county has direct control (county ownership) or indirect control (authority ownership or control) will generally need to demonstrate additional capacity when insufficient capacity remains available at the facility to provide for the waste generated in the county for the next 10 years. A county relying on private facilities will generally need additional capacity when the capacity assurance agreements provide for less than 10 years of capacity assurance.

Capacity assurance agreements must be facility-specific. Counties may not assure capacity by entering into an agreement which simply provides for alternative disposal in another of the company's sites if the chosen facility is unable to accept the waste, unless the alternative site has also been specifically chosen by the county in its facility selection process and is designated in the county plan. A county may ask a facility to demonstrate that the facility actually can provide the capacity to the county.

If a county determines that it is in need of additional disposal or processing capacity, the county must give public notice of this determination and solicit proposals and recommendations from the public regarding facilities and programs that may be used to provide the needed capacity. A copy of the notice should be provided to the Department, and the Department will publish a copy of the county's notice in the Pennsylvania Bulletin. See 53 P.S. §§ 4000.502(c), (d).

G. Selection of Waste Management Programs and Facilities.

Act 101 authorizes a county to use various types of programs and facilities to properly manage its municipal waste, and to promote waste reduction and recycling. A county may, for example, determine that it is in the public interest for municipal waste processing or disposal to be a public function; alternatively, a plan may rely on private businesses for the processing and disposal of county-generated waste; a plan may utilize landfills as disposal sites; or resource recovery facilities may be the primary disposal method; a plan may utilize flow control ordinances as part of its waste management system; or, a county may opt to allow its waste to be disposed at any permitted facility. (53 P.S. §§ 4000.303; 4000.502). The planning process involves some basic decisions regarding the type of waste management system the county intends to employ from among the available alternatives.

Many of these basic planning decisions were made at the time Act 101 plans were originally developed and adopted. However, plan revisions may involve some fundamental changes to a county's waste management system. For example, a county that is currently relying on several private landfill facilities for disposal of its municipal waste may decide that resource recovery facilities are more beneficial and should be utilized almost exclusively. A substantial change in recycling services may be contemplated, or a county without flow control may decide to adopt a plan and implementing ordinance which directs all county-generated municipal waste to a single public facility for processing.

Section 502(f) of Act 101 requires that a county use a "fair, open and competitive" process for selecting among alternative waste management programs or facilities. The county plan must provide the Department with "reasonable assurances" that the county has utilized a fair, open and competitive process for selecting among alternatives suggested to the county during its planning process. These Act 101 requirements apply to a county's basic planning decisions such as whether to use public or privately-owned facilities for processing or disposal of county-generated waste, or what kind of recycling programs and facilities will be implemented. A plan revision will be reviewed by the Department for consistency with Act 101's fair, open and competitive process requirement. Generally, when a county properly engages in the substantial plan revision process (see Section I below), the Department will consider the fair, open and competitive process requirement to have been satisfied.

H. Facility Designation Process, "Flow Control" Considerations, and Commerce Clause Analysis.

Act 101 expressly authorizes a county to require that all municipal waste generated within its boundaries be processed or disposed only at a specific facility (or facilities) designated in the county plan. (53 P.S. § 4000.303(e)). The Act 101 process for assuring capacity often involves designating a limited number of disposal facilities where municipal waste generated within the county may lawfully be disposed in accordance with the county plan and its implementing documents. Generally, a county

ordinance is used to implement a county's decision to require that municipal waste within the county be disposed only at a facility or facilities designated in the plan. Act 101 expressly authorizes a county to require by ordinance that all municipal waste generated within its jurisdiction shall be processed or disposed at a designated permitted facility.

The term "flow control" is often used to describe the situation where the county requires by law that waste generated within its boundaries be delivered only to facilities designated in the county plan. (Flow control is also generally used to describe a situation where an exclusive franchise for waste pickup is granted to a single waste hauler by a municipality.) An Act 101 plan will be considered a "flow control" plan even if a county designates more than one facility which may lawfully receive waste generated within the county. It is only when a county allows waste to be disposed or processed at *any* permitted facility that the plan will not be considered to include "flow control." A county which decides not to use "flow control" as part of its plan must still assure that it has adequate processing and disposal capacity for all county-generated municipal waste during the next ten years.

The county's process for selecting a facility or facilities for designation in the county plan will be reviewed by the Department for consistency with applicable law. This typically involves an analysis by the Department of the county's waste management system, and specifically the facility-designation process, to determine whether the system described in the plan revision would violate the Commerce Clause. The Supreme Court first recognized that the interstate hauling of waste was commerce for the purposes of Commerce Clause analysis in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The United States Constitution gives Congress the power to regulate commerce amongst the States. Courts have interpreted this delegation of authority to Congress to mean that States do not have the power to interfere with interstate commerce by engaging in economic protectionism. The Commerce Clause is applicable not only to regulation by States, but also to regulation by local governmental units like counties and municipalities.

A plan which allows county-generated waste to be disposed at *any* permitted facility, whether in-state or out-of state, treats all private businesses the same and thus generally does not raise Commerce Clause issues. If the county has a flow control plan, (i.e. the plan has a designation process which limits the number of facilities designated in the plan as authorized processing or disposal sites and directs that all county-generated waste must be processed or disposed only at the facilities designated in the plan), the Commerce Clause is implicated. Limiting the number of facilities at which county-generated waste may lawfully be processed or disposed raises a question whether the regulation by the county (in the form of its county plan and/or county ordinance) has discriminated in favor of in-state businesses.

It is important to recognize that a county may, consistent with the Commerce Clause, decide to designate a single facility as the only designated facility in the county plan where county-generated waste may lawfully be processed or disposed.¹ The county

¹ Similarly, courts have upheld local government ordinances which grant an exclusive franchise to a waste hauler for pickup of waste generated within the jurisdiction of the local government. *See, e.g., Houlton*

may enact an ordinance compelling the disposal of all county-generated waste at the single designated facility selected by the county in its facility-selection process (see 53 P.S. § 4000.303(e)), and this ordinance may be upheld as consistent with the Commerce Clause. Over the past several decades, various types of waste flow-control systems have been challenged as a violation of the Commerce Clause, and there are numerous federal court opinions on this question. However, a recent U.S. Supreme Court case, *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1786 (2007), has significantly changed the framework for analyzing whether a waste management system violates the Commerce Clause. Based on this Supreme Court decision, there are now two basic types of flow control systems that may be used in Pennsylvania consistent with the Commerce Clause. The applicable criteria for satisfying Commerce Clause considerations will depend upon the system being utilized.

(1) *Selecting a Single Public Facility as the Only Designated Site in the County Plan*

The first type of flow control system is one in which the county selects a single, in-state, public facility for designation in the plan as the only site which may lawfully receive county-generated waste for processing or disposal. In the *Oneida-Herkimer* case, the U.S. Supreme Court upheld a solid waste flow control ordinance that compels private haulers to deliver all municipal waste generated within a county to a single public processing facility. The Court distinguished its earlier ruling in *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994) on the basis of a public/private distinction. The Court in *Oneida-Herkimer* concluded that a flow control ordinance which directs all county-generated waste to a single, public, facility (in this case a waste processing facility owned and operated by a joint solid waste authority) does not discriminate against interstate commerce.² Balancing the benefits of the flow control ordinance against the incidental

Citizens' Coalition v. Town of Houlton, 175 F.3d 178 (1st Cir. 1999); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995); *Douglas Disposal Inc. v. Wee Haul, LLC*, 170 P.3d 508 (Nev. 2007).

² In the *Oneida-Herkimer* case, two New York counties had established a joint Solid Waste Authority under state law to manage all solid waste generated within the counties. The Authority developed and operated a facility for processing solid waste and recyclables. Under the system, private haulers pick up citizens' trash from the curb, and county flow control ordinances require all solid waste generated within the counties to be delivered to the Authority's facility for processing and ultimate disposal. The Authority charges tipping fees higher than the open market, but uses the revenue to cover the costs of a comprehensive waste management system. In addition to landfill transportation and disposal, the fees enable the Authority to provide robust recycling service, composting, household hazardous waste disposal, and other services. The Authority accepts recyclables and many forms of hazardous waste for free, thus encouraging separation of these items from the waste stream and increasing the counties' ability to enforce recycling laws.

A group of trash haulers challenged the flow control ordinances alleging that the ordinances discriminated against interstate commerce and consequently violated the Constitution's Commerce Clause. The court noted: "Disposing of trash has been a traditional government activity for years, and laws that favor government in such areas—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause." The Court found compelling reasons for treating the county ordinances differently from laws favoring particular private businesses over their competitors. The Court recognized that State and local governments that provide public goods and services on their own, unlike private businesses, are vested with the responsibility

burden on interstate commerce, the Court decided that the public benefits of the flow control system far outweighed any burden that may have been imposed on interstate commerce, and the Court upheld the county's flow control system. This recent ruling by the U.S. Supreme Court changes the nature of the Department's Commerce-Clause analysis for Act 101 county plans. If a county has selected a single public facility as the only site where county-generated waste may be lawfully processed or disposed, the Department will analyze that situation using the *Oneida-Herkimer* case as its guide.³

The Department will take into account several important factors of the *Oneida-Herkimer* case when analyzing a county plan which designates a single public facility for processing or disposal. In *Oneida-Herkimer*, the county ordinances benefit a public facility while treating all private companies exactly the same. No special exception was provided for a particular in-state private business. Certain benefits resulting from the Oneida-Herkimer system were specifically noted by the Court. The system enabled the counties to finance an integrated package of waste-disposal services for their residents, including robust recycling service, composting, household hazardous waste disposal, and other services. The system increased recycling, which confers significant health and environmental benefits, and increased the ability to enforce county recycling and waste disposal laws.

The Court also emphasized that the residents of Oneida and Herkimer counties had expressed a preference for their system of a public facility with above-market tipping fees, where the money from the higher fees is then used to finance a comprehensive waste management system. Consequently, a county that seeks to revise its plan to implement flow control to a single public facility will be required to use the substantial revision process set forth in 25 Pa. Code § 272.252 because of the public participation elements in that process. The Department will examine the benefits provided to the county and its residents by a flow control plan that designates only a single public facility for disposal of county-generated waste to assure that the benefits of the system outweigh any incidental burden on interstate commerce.

of protecting the health, safety, and welfare of their citizens, and laws favoring such States and their subdivisions may be directed toward any number of legitimate goals unrelated to economic protectionism. Applying a balancing test, the Court upheld the county ordinances.

³ The recent opinion by the U.S. Court of Appeals for the Third Circuit in *Lebanon Farms Disposal, Inc. v. County of Lebanon*, 538 F.3d 241 (3d Cir. 2008) provides further support for this approach. The Lebanon County ordinance requires all county-generated municipal waste to be disposed at a landfill owned and operated by the Greater Lebanon Refuse Authority, i.e. a public facility, unless a hauler receives prior written approval from the GLRA to dispose of such waste at another facility. A hauler operating in the county challenged the ordinance as a violation of the Commerce Clause. The Third Circuit applied the analytical framework of the *Oneida-Herkimer* decision: "This case seems indistinguishable from *United Haulers* in all material ways for the purpose of the facial discrimination analysis [T]he flow control ordinances in this case clearly benefit a public facility, the GLRA." *Lebanon Farms Disposal, Inc.*, 538 F.3d at 250 n.18. The Third Circuit recognized that the decision in *Oneida-Herkimer* overruled the Third Circuit case of *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), "to the extent [*Harvey*] supports the application of strict scrutiny to publicly operated waste disposal sites like the GLRA site." *Id.* at 249.

(a) *Flow Control to a Public Facility Owned by Another County*

In the *Oneida-Herkimer* case, two counties formed a joint solid waste authority which owned and operated a processing facility; each county then required that all county-generated waste be disposed at that facility. The critical distinction by the Court for Commerce Clause purposes was made between a public facility and a private business. The Court did not require that the county which flow controlled its waste to a public facility also be the county which owns and operates the public facility to which the waste is being directed. A subsequent Supreme Court case addressing a Commerce Clause challenge has reinforced the broad public/private distinction drawn by the Court. See *Dep't of Revenue v. Davis*, 128 S. Ct. 1801 (2008). The Department will accept for review a county plan revision in which a county selects a single public facility as the only designated facility in the county plan where county-generated waste may lawfully be processed or disposed, even though the county does not own or operate the designated public facility. In other words, county A flow controls its waste to a single facility owned and operated by county B or county B's solid waste authority. In this situation, the Department will closely examine the benefits that planning county A will receive from the public facility owned by county B as a result of directing the county A waste to the single public facility. These benefits should be clearly stated in the county plan, and any implementing documents related to the provision of such benefits, such as an intermunicipal agreement, must be submitted.

(b) *Flow Control to a Publicly-Owned Facility Operated by Private Business*

Courts have not addressed a situation where a county requires that its waste be processed or disposed at a facility which is owned by a local government but is operated to some extent by a private business. In other words, the county owner has contracted with a private business for operation of at least some aspects of the county-owned facility. The Department will examine a county plan which designates a single publicly-owned (but privately-operated) facility where county waste may be lawfully processed or disposed to determine whether the plan benefits a public facility while treating all private processing or disposal companies equally with respect to the business of disposing county-generated waste. The Department will consider whether the county is engaging in economic protectionism through laws that favor in-state business over out-of-state competitors.

A county that has contracted for operation of a processing or disposal facility that it owns is providing the public service of waste disposal for its citizens. Unlike private businesses, local governments that provide public goods and services are vested with the responsibility of protecting the health, safety, and welfare of their citizens. The Supreme Court has recognized that laws favoring such local governments may be directed toward any number of legitimate goals unrelated to economic protectionism. Plans with this type of flow control system will be examined to assure consistency with the parameters outlined by the Supreme Court in the *Oneida-Herkimer* decision.

(2) *Selecting a Single In-State Private Facility as the Only Designated Site in the County Plan or Selecting a Limited Number of In-State Private and Public Facilities as Designated Sites in the Plan*

The second type of flow control system is one in which the county either selects a single in-state private facility for designation in the plan as the only facility at which county-generated waste may be lawfully processed or disposed, or the county selects a limited number of in-state private facilities for designation in the plan. The Department will analyze this type of plan using the case of *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *cert. denied*, 516 U.S. 1173 (1996) as its guide.⁴ In the *Harvey* case, the court focused on the county's process for designating processing or disposal sites in the county plan, rather than on the effect of an ordinance once a provider or providers had been chosen. The court determined that the fact that all the designated sites in the county plan happen to be in-state does not, in and of itself, establish that the county's flow control plan discriminates against interstate commerce. The court concluded that a local authority could choose a single in-state provider—without impermissibly discriminating against interstate commerce—so long as the selection process was open and competitive and offered truly equal opportunities to in-state and out-of-state businesses. To determine whether the flow control scheme actually discriminates against interstate commerce, three factors should be closely examined: (1) the designation process itself; (2) the duration of the designation; and (3) the likelihood of an amendment to add alternative sites to the plan as designated sites for processing or disposal of county-generated waste. When reviewing a county plan that designates a limited number of in-state private facilities where county waste may be processed or disposed, the Department will examine the three factors identified in the *Harvey* case.

The designation process should not, either purposely or in effect, favor in-state private businesses. The designation process should be open to both in-state and out-of-state facilities. A county can help assure that its designation process is considered open and competitive by publishing its solicitation materials in national trade publications. Whether a national or regional dissemination of solicitation materials is used, the point is to assure that all those facilities who may have an interest in competing for inclusion in the county plan are given an opportunity to do so. A properly conducted selection process should give in-state and out-of-state facilities an equal chance to compete for the county's waste processing or disposal. The criteria should not favor in-state or out-of-state facilities, either overtly or otherwise. Act 101 does not require a county to utilize a request for proposal or bidding process to select a facility, nor does it require the county to select the alternative with the lowest cost. 25 Pa. Code § 272.227(c)(2). Regardless of whether a county solicits processing or disposal capacity in the form of a request for proposals, a precursor to a request for proposals, or another type of solicitation process, the criteria stated in the solicitation documents must be fair to every potential respondent.

⁴ See *Lebanon Farms Disposal, Inc.* 538 F.3d at 250 n.19 (“Harvey’s application has now been overruled to the extent it suggests the application of strict scrutiny to nondiscriminatory regulations benefitting public waste disposal sites.”).

The duration of the designation of a particular facility in the plan will also be examined when a plan revision is submitted. The court in *Harvey* noted that excessively long periods of exclusive service rights under the designation can raise suspicion that an in-state facility is being favored over out-of-state businesses. The Department generally considers a ten-year contract as an acceptable duration. Counties reaching the end of a ten-year contract with a designated facility should strongly consider undertaking a solicitation process open to in-state and out-of-state facilities rather than simply extending the existing contract. A plan revision which attempts to assure capacity through the extension of existing ten-year capacity assurance agreements with a private facility or facilities will generally not be approved unless a designation process is undertaken which allows for equal competition from out-of-state facilities.

The process for designating a facility in the plan will be examined with respect to the likelihood of additional facilities being added to the list of designated sites in the plan. The process by which a facility may be added to the list of designated sites should provide a real possibility for the designation of additional, potentially out-of-state sites to the plan. The process for adding designated sites should treat all applicants equally. A process for adding designated facilities which imposes unequal administrative burdens on out-of-state facilities compared with in-state sites will raise concerns that the Commerce Clause could be violated.

I. Procedure for Developing Plan Revisions: Substantial or Non-Substantial Revisions.

Section 272.252(a) requires that a county provide written notice to the Department when plan revision development begins. The notice must include a description of the proposed plan revisions the county intends to undertake. After receiving the notice, the Department must decide within 30 days whether the proposed plan revisions are substantial or non-substantial. The type of revision to the plan, substantial or non-substantial, entails the specific process which the county must use to complete the revision. Whether a plan revision is considered substantial or non-substantial depends on the types of changes to the plan rather than the amount of revising that must be accomplished. Many, if not most, revisions are considered non-substantial, and the revision may be accomplished by the county using the non-substantial revision process described in 25 Pa. Code § 272.252.

There may be situations in which the county chooses to use the substantial revision process, even though the plan revision may be considered as non-substantial by the Department. The county is not prohibited from using the substantial plan revision process, which involves significantly more public participation, for a “non-substantial” revision. (25 Pa. Code § 272.252(f)).

The regulations specify certain types of plan revisions which are considered to be substantial, and therefore the county must follow the procedures for developing a substantial plan revision. Otherwise, the Department has discretion to determine whether a proposed plan revision is substantial. A substantial revision process must always be

used when the county proposes to eliminate a recycling program that was included in the current plan and is operating in the county. (25 Pa. Code § 272.252(e)(1)). This action would probably reduce the amount of recycling in the county, and is a very serious consideration. Similarly, if the county decides to manage a waste stream that has not previously been under its control, the Department will require that a substantial revision process be used pursuant to § 272.252(e)(2).

The Department will require a county revising its plan to adopt a flow control system which directs county-generated waste to a single public facility to engage in the procedures for a substantial plan revision. The public participation provided for in the substantial revision process will help to insulate any flow control system being implemented from a Commerce Clause challenge. In a situation where the county has or intends to establish an authority to be responsible for implementing the plan, managing the county's waste management system, managing the recycling program, or any combination of these, the plan must be revised to reflect this change and a substantial revision must be submitted. The same applies to the transfer of waste or recycling responsibilities and personnel from county government to an authority or vice versa. Simply changing a recycling program from drop off to curbside, or changing the collection method or materials, would not require a substantial revision.

(1) *Elements of the Substantial Revision Process (25 Pa. Code § 272.252)*

The following are the elements of the substantial revision process:

(i) County provides a written notice to the Department that it intends to revise the plan and what will be revised. This notice must also include a description of how the county intends to assure capacity for the next ten years. The notice will be submitted to the Department within three years of when the revised plan is due.

(ii) Within 30 days after receipt of the notice, the Department will notify the county in writing if it determines that the revision is substantial.

(iii) Prior to preparing substantial plan revisions for submission to the Department, the county must either form an advisory committee to participate in the development of the plan or if previously formed, notify its existing advisory committee of its intent to revise the plan. The advisory committee shall review the plan revision during its preparation, make suggestions and propose any changes the committee believes are appropriate. (53 P.S. § 4000.503(a); 25 Pa. Code § 272.202(a)). It is important to actively consult with the advisory committee during preparation of plan revisions to assure a full, fair and open discussion of alternative methods of municipal waste processing or disposal, as required by § 502(f) of Act 101 and 25 Pa. Code § 272.201. The county should be certain to include a representative from each of the required categories of stakeholders identified in § 503(a) of Act 101.

(iv) The county provides a notice to the municipalities within the county when development of the revision begins.

(v) As development of the plan revision progresses, the county provides progress reports to the municipalities within the county.

(vi) When the plan revision is complete, the county publishes a notice in a newspaper of general circulation in the county, in the form of a display ad, twice in two consecutive weeks, containing:

- a. A description of the proposed plan, the facilities the county intends to use for disposal and the recycling programs;
- b. The location of copies for review;
- c. The opportunity for persons to comment within 90 days and the procedure for submitting comments; and
- d. The date, time and place of at least one public hearing to be held during the 90-day comment period.

(vii) At the same time that the newspaper notice is published, the county submits copies to:

- a. The Department;
- b. Municipalities within the county;
- c. The county or regional planning agencies; and
- d. The county Health Department.

(viii) A notice accompanying the copies will indicate that the county will receive comments for 90 days from the date of the newspaper notice. Specific reasons for the comments should be provided.

(ix) After the comment period ends, the county, (usually the advisory committee), makes appropriate revisions and prepares a written response to the comment document.

(x) The advisory committee submits the plan revision and the response to comment document to the County Commissioners for adoption.

(xi) The commissioners adopt the plan within 60 days after the public comment period.

(xii) The commissioners send the adopted plan to the municipalities within the county within 10 days after it is adopted.

(xiii) In the process of ratification, each municipality within the county has 90 days to act on the plan. If a municipality does not act, it will be assumed to have ratified. The municipality submits a copy of its resolution of ratification to the county.

(xiv) If a municipality within the county acts to decline to ratify the plan, that municipality must pass a resolution containing a concise statement of its objections and forward a copy of that resolution to the county and the advisory committee. A conditional approval is considered a disapproval.

(xv) When more than one-half of the municipalities, representing more than one-half of the population in the county ratify the plan, the county submits a copy of the plan to the Department within ten days of ratification for approval.

(xvi) If the plan is not ratified, the county must then follow the requirements of 25 Pa. Code § 272.243 (pertaining to failure to ratify plan) of the Municipal Waste Regulations.

(2) *Elements of Non-Substantial Revision Process*

(i) The county provides a written notice to the Department that it intends to revise the plan and indicates what portions of the plan will be revised. This notice must also include a description of how the county intends to assure capacity for the next ten years.

(ii) Within 30 days after receipt of the notice, the Department will notify the county if it determines that the revision is substantial.

(iii) The county forms an advisory committee to participate in the development of the plan or if previously formed, notifies its existing advisory committee of its intent to revise the plan.

(iv) The county provides a notice to the municipalities within the county when development of the revision begins.

(v) As development of the plan revision progresses, the county provides progress reports to the municipalities within the county.

(vi) At least 30 days before submitting a non-substantial plan revision to the Department, the county submits a copy to the advisory committee and each municipality within the county. After the end of the 30 days, the county submits the non-substantial revision to the Department for approval.

J. Joint Planning.

It is important to recognize that Act 101 expressly provides for joint planning by several counties. Section 303(b) of Act 101 states that: “Any two or more counties may adopt and implement a single municipal waste management plan for the municipal waste generated within the combined area of the counties.” (53 P.S. § 4000.303(b).). Each county involved in the joint planning process should adhere to the required elements of the applicable plan revision process (substantial or nonsubstantial). When several counties are engaged in the § 303(b) joint planning process to revise their individual plans to newly adopt and implement a single municipal waste management plan, the Department will generally require the substantial plan revision process to be used for such a change. Where several counties are engaged in joint planning pursuant to § 303(b) of Act 101, a regional advisory committee may be used for the plan revision process, provided that the regional committee includes representatives for each of the required classes identified in § 503(a) of Act 101 from all of the joint planning counties. The joint planning counties may combine the advisory committees from each planning county to form a single regional committee to increase administrative efficiency and assure proper stakeholder representation.

III. PLAN IMPLEMENTATION.

A. Description of Implementation Methods.

Every plan revision should include a description of how the county intends to implement its plan. This should include, but not be limited to:

- (i) A description of the ordinances to be adopted by each municipality within the county and by the county;
- (ii) A description of the contracts that the county intends to use to implement disposal, recycling, collection or other programs within the county, and whether they are municipal or county contracts;
- (iii) Identification of the person or agency that will be responsible for monitoring the implementation of the plan and making recommendations on any action to be taken to the Commissioners. This may be the implementing entity described in Chapter 7 of the plan, but must include the duties of this entity; and
- (iv) A general description of what the county intends to do to prevent interference with the plan, or what actions the county intends to take in the event that there is interference.

B. Interference With County Plans.

Interference with county plans includes, but is not limited to:

(i) The transportation of waste to facilities that are not designated in the generating county's municipal waste management plan.

(ii) The improper management of recyclables that would affect a county's achievement of its recycling goals. Every county has a recycling goal, and disposing of recyclables prevents the county from achieving its goals.

The Department expects facilities that manage municipal waste and those who transport municipal waste to act in a manner consistent with Act 101, the Department's municipal waste regulations in 25 Pa. Code Ch. 271-285, and all approved county plans. The Department regularly reviews the data from the quarterly fee reports to ascertain if facilities are accepting waste from counties whose plans do not designate the facility as a site where county-generated waste may be processed or disposed. A facility that accepts waste from a county that has not designated that facility may be in violation of the county plan, the municipal waste regulations, and/or Act 101. (53 P.S. § 4000.1701; 25 Pa. Code § 273.201). The facility may be subject to penalties under applicable law.

Transporters of municipal waste who deliver waste to facilities that are not designated in a county plan may be violating the municipal waste regulations and Act 101, which require compliance and non-interference with county plans. Counties are expected to enforce the provisions of the county plan and its implementing documents. Any enforcement actions taken by counties against those who have violated the county plan or implementing documents may establish facts that form the basis for the Department to determine a violation of Act 101 and the municipal waste regulations has occurred. The Department may take actions, including notice of violations followed by orders, civil penalties, and/or suspension or revocation of permits or authorizations. Any enforcement actions taken by the Department will be reviewed by the Department when evaluating the compliance history of a transporter, processing facility or disposal facility. Violations and enforcement actions may lead to the suspension or revocation of permits or Act 90 waste transportation authorizations.

C. Licensing and Fees.

(1) County Licensing Systems for Haulers

A county that licenses haulers who operate within its borders, or counties that have developed fees which must be paid to the disposal facilities and returned to the county, must reconsider the inclusion of such programs in their plan when they revise the plan. Recent court decisions have limited the ability of a county to implement licensing

and administrative fee programs as they have in the past.⁵ These elements may be revised or eliminated when the plan is next revised.

Under Act 90 of 2002, 27 Pa.C.S. §§ 6201 et seq. (the Waste Transportation Safety Act), the Commonwealth began a program of authorization and registration of trucks over 17,000 pounds gross vehicular weight involved in the transportation of municipal waste. Plan revisions that contain county licensing for waste hauler trucks of greater than 17,000 pounds operating within the county have been restricted by recent Court rulings, and such revisions cannot be accepted for review or approved as part of a county plan revision.

The scope of Act 90's waste transporter safety program does not extend to trucks with an actual gross weight of 17,000 pounds or less. The courts have not addressed the question of whether a county or municipality may license smaller waste hauler trucks that fall outside the scope of Act 90. If a county plan revision submitted to the Department for review and approval contains a licensing system exclusively for waste hauler trucks outside the scope of Act 90, the region should consult with central office and regional counsel before making a decision on whether to approve the plan.

Although the licensing of trucks is subject to the interpretation of court decisions, such decision does not apply to the licensing of waste containers. A recent court decision has upheld a local government's system for licensing waste containers.⁶ Plans containing proposed programs involving licensing and/or registration of waste containers thus may be approved as consistent with applicable law.

(2) *Administrative Fees Imposed by County Ordinance*

Several recent Commonwealth Court decisions have determined that imposing county administrative fees on the disposal of county-generated waste is preempted by Act 101.⁷ Counties had been using such fees to meet the operation and maintenance costs of implementing their recycling programs. Under Act 101, county plans must include descriptions of recycling programs, including sources of funding for those programs. Thus, many of the counties included these fees in their plans. Under current law, the Department will not approve county plan revisions that impose administrative fees as a funding source for county recycling programs without the express agreement of the entity paying the fees. For example, the Department will not approve county plan revisions that

⁵ See *IESI PA Bethlehem Landfill Corporation v. County of Lehigh*, 887 A.2d 1289 (Pa. Cmwlth. 2005); *Pennsylvania Independent Waste Haulers Association v. County of Northumberland*, 885 A.2d 1106 (Pa. Cmwlth. 2005).

⁶ See *Pennsylvania Independent Waste Haulers Association v. Township of Lower Merion*, 872 A.2d 224 (Pa. Cmwlth. 2005).

⁷ See *IESI PA Bethlehem Landfill Corporation v. County of Lehigh*, 887 A.2d 1289 (Pa. Cmwlth. 2005); *Pennsylvania Independent Waste Haulers Association v. County of Northumberland*, 885 A.2d 1106 (Pa. Cmwlth. 2005).

include an ordinance imposing the fee or utilization of selection criteria that requires payment of fees.

The Commonwealth Court has not specifically prohibited counties from obtaining funds through a contract that has been negotiated between the county and the entity paying the fee. Therefore, the Department may approve county plans that identify administrative fees as a funding source for county recycling programs if the obligation to pay the fee is the result of a negotiated contract between the county and waste collector/transporter or county and disposal facility, whichever entity is paying the fee. However, the Department does not intend to provide counties with guidance on procurement procedures or draft contract provisions. If a contract that contains provisions for payment of an administrative fee is submitted by a county as a document to implement its approved plan in accordance with § 513 of Act 101, (35 P.S. §4000.513), the Department will accept the document to determine compliance with §513. The Department will not approve or disapprove any terms of a submitted contract. Counties should not construe its submission of a contract in accordance with § 513 and the Department's acceptance of the contract as an indication that the contract terms are compliant with applicable federal, state or local law or regulation.