



State of New Jersey

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Governor

Department of Environmental Protection

Robert C. Shinn, Jr.
Commissioner

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November 21, 1997

Mr. Richard S. Dovey, President
Atlantic County Utilities Authority
6700 Delilah Road
Egg Harbor Township, New Jersey 08234-5623

Dear Mr. Dovey:

On October 23, 1997 the Department of Environmental Protection's Division of Solid and Hazardous Waste received the October 20, 1997 Atlantic County Utilities Authority's (ACUA) request for administrative action pursuant to the provisions of N.J.A.C. 7:26-6.11(b)9. The October 20, 1997 request for administrative action represents the ACUA's 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. Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County et al. 112 F.3d 652 (3rd Cir. 1997), cert. den., November 10, 1997. As a result of that decision, each solid waste disposal district must reevaluate its strategy and, if necessary, initiate appropriate amendments thereto.

The October 20, 1997 ACUA request for an administrative action pursuant to N.J.A.C. 7:26-6.11(b)9 petitions the Department to reaffirm without modification the solid waste disposal system that has been in effect in Atlantic County for a number of years. That system includes:

*The June 8, 1990 ACUA contract with Waste Management of Pennsylvania for out-of-state landfill disposal;

*The direction of type 13 waste to the ACUA landfill located within Atlantic County;

*The site selection of the transfer station at the ACUA Environmental Park in Egg Harbor Township, Atlantic County;

*The operations of the ACUA transfer station; and

*The transportation of the solid waste to the out-of-state landfill facility.

Pursuant to the provisions of N.J.A.C. 7:26-6.11(f), the October 20, 1997 ACUA request for administrative action is remanded for further consideration and evaluation by the County. While ACUA has sufficiently demonstrated that portions of its system are consistent with the criteria set forth in the decision in Atlantic Coast, specifically the out-of-state disposal arrangement for waste types other than type 13, the selection of the transfer station site, and the award of the contract for the transportation of waste to the out-of-state facility, other portions do not meet those criteria. Accordingly, the remaining portions must be modified and thus, pursuant to N.J.A.C. 7:26-6.10 and -6.11., cannot be reviewed as an administrative action. These provisions must be further acted upon by the County according to the requirements for a solid waste management plan amendment pursuant to the provisions of N.J.A.C. 7:26-6.10.

The portions of Atlantic County's system that must be reevaluated are: (1) the portion of its plan that directs type 13 waste to the in-county ACUA landfill and (2) the portion of its plan that would direct waste to the transfer station operated by ACUA.

With respect to the direction of type 13 waste to the ACUA in-county landfill, the County asserts that this requirement survives the Third Circuit decision in Atlantic Coast because it resulted from the negotiation process undertaken after the out-of-state disposal contract for the remainder of the waste stream was awarded to Waste Management of Pennsylvania. However, no subsequent procurement was undertaken after negotiations led to the omission of this waste stream from the Waste Management contract. The County has not sufficiently demonstrated that the process leading to the direction of this waste was non-discriminatory as defined in the recent Federal decisions or how the non-discriminatory procurement of the Waste Management contract would logically extend to this requirement and permit the continuation of the type 13 flow directive. Reprocurement, use of a user charge or environmental investment cost approach or conversion to a market participant strategy should be assessed in light of the directive in the Third Circuit decision in Atlantic Coast.

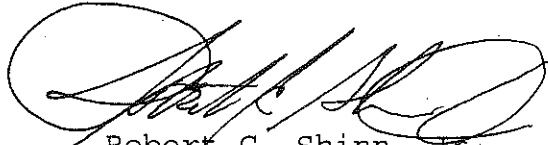
With respect to the non-discriminatory bidding process for the operation of the ACUA transfer station, the administrative action submitted proposes to allow the county to continue to serve as a market participant operating the transfer station while at the same time serving as a market regulator and mandating the flow of waste to that transfer station under penalty of law. While ACUA may continue to operate its

transfer station at market rates or may reprocore for transfer station services in a non-discriminatory manner and subsequently mandate flow, it may not regulate and participate in the market simultaneously. The County should reassess its preferred course and resubmit a plan amendment accordingly.

With respect to a subsequent plan amendment, the Department refers the County generally to the solid waste regulations at N.J.A.C. 7:26-1 et. seq. and specifically to the recent amendments to regulations, 29 N.J.R. 4170, to the extent they relate to specific procedural and substantive issues to be addressed in subsequent submissions. In addition, this administrative action is in no way intended by the Department to represent a legal determination regarding the effect of the Atlantic Coast decision on any specific contract between public and/or private parties.

Should you have any questions in this regard, please contact Gary Sondermeyer, Director, Division of Solid and Hazardous Waste, at (609) 984-6880.

Sincerely,



Robert C. Shinn, Jr.
Commissioner