DEQ

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY
WASTE MANAGEMENT DIVISION

GENERAL GUIDANCE FOR PREPARATION OF
SOLID WASTE MANAGEMENT PLAN UPDATES
June 13, 1997

Introduction

The last update cycle of solid waste management plans began in September 1987. In order to carry out a comprehensive review of the program and allow for Legislative consideration of program revisions, the Director of the Department of Natural Resources, now the Department of Environmental Quality (DEQ), issued several delays to commencing the next round of solid waste management plan updates. These delays included an October 4, 1991 letter to counties delaying the updates for one year; a January 8, 1993 letter to counties delaying the updates an additional 18 months, to June 1994; a legislated delay to January 1995 implemented by 1994 PA 153 (Act 153); a June 17, 1994 letter to counties delaying the updates until June 1996; and a July 22, 1996 letter to counties indefinitely delaying the start of the update cycle.

Although these delays were intended to permit the consideration of comprehensive program changes, with the exception of Act 153, none of the many comprehensive proposals have been enacted into law. While changes to these requirements are always possible, this guidance reflects the requirements for preparation of solid waste management plan updates currently contained in Part 115, Solid Waste Management, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended (NREPA). As noted below, a detailed guidebook for use in preparing the new standard plan format will be provided along with the format. Also, please note that the Solid Waste Management Act, 1978 PA 641, as amended, was repealed and recodified into Part 115 of the NREPA. The terms Act 641 and 641 planning are no longer appropriate for use. You will note that neither of these terms is used in this guidance nor in the standard plan format.

Act 153 Changes

Act 153 made several important changes to the solid waste management planning program. Act 153 required the DEQ to prepare and provide to the counties a standard format for use in preparing and submitting solid waste management plans. A copy of the current format, along with a detailed guidebook on preparing the format, will be provided to each Designated Planning Agency (DPA) following submittal of the Notices of Intent. Updated plans are to be prepared on this format without modification to the format. Attachments may be used where indicated. The DEQ's review and approval of updated plans will be based on the submitted format. It is important that the format be followed and completed. Failure to submit a properly completed format may result in DEQ disapproval of locally prepared plans.

Act 153 also made several important changes to the solid waste disposal area siting process and related determinations of capacity. Act 153 reduced the long-range time period for plans to identify capacity from 20 years to 10 years. Act 153 also requires all county plans which do not demonstrate 10 years of capacity to contain an objective, criteria-based siting process to meet future siting needs. More detail on this requirement is provided in the discussion on siting.

Act 153 requires all county plans to contain a process to annually evaluate and certify each county's legally available solid waste disposal capacity, both in and out of county. If this annual capacity certification fails to demonstrate that a county has 66 months of available capacity, the

siting mechanism is required to be operative until such time as 66 months of capacity can be demonstrated. A county which fails to prepare an annual certification by law must be deemed to have less than the required 66 months of capacity. A plan update which does not contain this capacity certification process cannot be approved. Part 115 requires the annual capacity certification to be approved by a county's Board of Commissioners even if the county does not prepare the plan. The plan format package will also include the form on which the annual certification is to be prepared and submitted to the DEQ. A copy of this form is also included herein for your information and future use.

Interstate/Intercounty Waste Transport

Another area where significant changes have occurred since the last plan update cycle is the authority of county solid waste management plans to control the shipment of solid waste for disposal between counties, states, and countries. On June 2, 1992, the United States Supreme Court issued its opinion in the matter of Fort Gratiot Sanitary Landfill versus Michigan Department of Natural Resources, et al. In this decision, the Court found Michigan's provisions which permitted county solid waste management plans to restrict the importation of solid waste from out-of-state or the exportation of solid waste from the state to violate the Commerce Clause of the United States Constitution. Further decisions have clarified this situation.

Despite the efforts of many states, the United States Congress has not yet enacted legislation to mitigate the Fort Gratiot decision. Therefore, county solid waste management plans may not include language which seeks to restrict the import of solid waste from outside of Michigan nor the export of solid waste from Michigan. As the Commerce Clause also relates to commerce between countries, as well as states, county solid waste management plans may not restrict international movements of solid waste for disposal either. Until legal authority to regulate this issue exists, any plan which contains such language must be disapproved. Along with other issues, interstate waste import/export issues can be addressed within the context of separate local community/facility agreements where such agreements exist since such provisions are voluntary agreements rather than government-imposed restrictions.

Substantial litigation has occurred since the Fort Gratiot decision regarding the application of that and other related rulings to county plan control over purely intrastate/intercounty movement of solid waste. While litigation on this matter continues, three court decisions currently control this matter. They are the June 16, 1995 decision of the Michigan Court of Appeals in Citizens for Logical Alternatives and Responsible Environment, Inc. and Michigan Department of Natural Resources versus Clare County Board of Commissioners and Waste Management, Inc.; the October 8, 1996 decision of the Michigan Court of Appeals in Montmorency/Oscoda County Joint Sanitary Landfill Committee versus County of Alpena et al.; and the July 29, 1996 decision of the United States District Court for the Western District of Michigan in Waste Management of Michigan versus Ingham County et al. In these decisions, the Courts ruled that neither the Fort Gratiot nor the later Carbone decisions affect the authority of solid waste management plans to control purely intrastate waste movements. The Courts concluded that such activity is not interstate commerce and, therefore, state law is not constrained by the Constitution's Commerce Clause and cases pertaining thereto. Simply put, this means that county solid waste management plans continue to restrict the disposal of solid waste generated in one Michigan county from disposal in another Michigan county unless such disposal is "explicitly authorized" in the approved solid waste management plans of both the generating and disposing counties. The plan format will provide specific locations for detailing the approved imports and exports for disposal of Michigan solid waste, as well as any condition, such as quantity limits or requisite agreements, which may be imposed on such authorized disposal. In-state disposal of Michigan generated solid waste is prohibited in a county other than the county of generation unless clearly authorized in this portion of the plan format.

In the past, there has been significant confusion over how this plan authorization process works. The statute is very clear. Within Michigan, waste from one county is absolutely prohibited from disposal in another county unless BOTH the generating and receiving county plans explicitly authorize it. This means language which clearly recognizes waste generated in County A is specifically authorized to be disposed of in County B. Authorizations must be in both plans to be valid. Execution of a separate agreement between two counties for a transfer which is not explicitly authorized in both plans is not permitted. Plans may not be altered by outside contracts, agreements or other understandings. Plans may only be altered through the legally defined plan amendment process.

Lastly, the county of origin of waste does not change by virtue of commingling with other source waste nor by interim management through disposal facilities such as processors or transfer stations. Disposal of waste at such facilities is also regulated disposal and must be plan authorized as well. However, the county of generation is the county where the waste first became discarded with the intent of being disposed. Therefore, taking it to a transfer station in another county does not change the county of generation of the waste. Final disposal of waste from that transfer station will occur in a landfill or incinerator somewhere. The county of origin for the wastes going to the landfill from the transfer station is not the county where the transfer station is located but, rather, the county where the waste was discarded first before it went to the transfer station.

Exempted Wastes

A number of amendments to Part 115 and its Administrative Rules have broadened the range of materials which are not considered solid waste and, therefore, not regulated by county solid waste management plans. Most of these exemptions pertain to waste materials which are managed under specified conditions. For example, scrap tires which are managed in compliance with Part 169, Scrap Tires, of the NREPA, are not solid waste. However, once they are no longer managed under Part 169 or are handled in noncompliance with Part 169, they become solid waste again. Many, but not all, solid wastes which are separated from the waste stream for recycling or reuse are not solid wastes so long as they meet certain management requirements. Many solid wastes burned as fuel in a combustion unit which is not a waste incinerator (such as a power plant or cement kiln) are not solid wastes, as well as many wastes managed under other statutory authorities.

Contamination site cleanup wastes managed on-site under an approved cleanup plan or managed off-site at property owned by the party responsible for the cleanup of the contaminated site under an approved cleanup plan are not solid waste plan regulated wastes. However, cleanup wastes which are removed from a contamination site and taken for disposal at a landfill, or in a manner other than described above, are solid waste plan regulated waste.

Contingency Planning

In the last plan update cycle, counties were advised to include provisions in their plans for contingency waste disposal in addition to the regular or primary disposal provisions plans are required to contain. Contingency disposal provisions were intended, as described in the 1987 planning guidance, to ensure that if primary disposal options ceased to be available, there was somewhere for the waste to go. Some parties have sought to reinterpret the contingency disposal concept to mean simply another plan-authorized disposal option which could be used at any time. Put another way, they suggest that contingency disposal options are just another primary disposal choice.

This interpretation was clearly not the DEQ's intent for this concept and this difference of interpretation has resulted in substantial controversy and litigation. While the term contingency is

not defined in Part 115 nor the Administrative Rules, the DEQ wishes to make as clear as possible in this guidance what we believe this concept means and does not mean in regard to county plan explicit authorizations for intercounty waste transfers.

The plans are required to identify and authorize all disposal of solid waste between counties within Michigan. The plans are required to identify disposal capacity to meet the requirements of Part 115. This disposal capacity is considered primary capacity; i.e., the capacity which will be used on a routine, daily, or regular basis to meet a county's disposal needs. Plans may establish any number of primary disposal options no matter how redundant. Contingency disposal capacity is intended only to be used when no primary capacity is available to meet a county's needs and failure to use the contingency disposal options would result in the waste having no place to go for disposal. Contingency disposal might also be properly characterized as emergency or backup disposal. It is not intended to be used on a long-term, routine, or daily basis to meet a county's normal disposal needs. Capacity used for this purpose must be designated as primary capacity and properly authorized by all applicable county plans. Contingency needs are triggered by the actual unavailability of primary capacity, not by economic, business, or convenience considerations. A better price for disposal does not invoke a contingency need. The closure of primary disposal capacity, such that it is not available for managing wastes, is an event which would trigger a contingency need, unless other adequate primary capacity is still available.

In preparing their plans, counties are encouraged to plan for sufficient primary and contingency capacity to ensure that legal options for managing the county's wastes will most likely always be available in sufficient supply to handle all the waste. This can best be accomplished through reliance on multiple disposal options and development of a truly integrated waste management program which provides multiple approaches to handling wastes. Such a program would include waste reduction and recovery programs to reduce the waste stream in need of disposal, as well as recognition of sufficient final disposal options to meet more than the county's quantified waste stream. This will also place waste generators in a better position to negotiate prices and services for management of a county's wastes. Approval of county plans will be based on demonstration of required disposal capacity, however, rather than adequate contingency capacity. The annual capacity certification process will ensure that sufficient, primary disposal capacity should always be available.

Facility Siting and Host Agreements

Part 115 and the Administrative Rules require that all county solid waste management plans must identify solid waste disposal capacity for both a five-year and a ten-year period from the date of DEQ approval of the plan. A plan which does not identify five years of capacity at specific sites cannot be approved. If a plan does not identify ten years of capacity, the plan is required to contain a mechanism that will ensure necessary capacity can be sited. While this mechanism can be used at any time by a county, the law requires that it be operational whenever a county's annual capacity certification fails to demonstrate 66 months of legally available disposal capacity or when the annual county capacity certification is not submitted when required.

The siting mechanism requirements are limited and strict. As with the last round of plan updates, the DEQ will strictly enforce the requirement for siting mechanisms to comply with the legal standards. These standards require the siting mechanism to rely on clearly stated, objective criteria to determine the consistency of a proposed disposal area with the plan. The determination of consistency must be able to be determined by any party from a narrow comparison of the proposal against the criteria as described in the plan. Judgments made on subjective requirements or through processes not contained within the siting process in the plan are not permitted. For example, a siting process which calls for a review of a proposal by a county planning commission

for general acceptability with the county master plan is not approvable. If there are specific, definable master plan requirements appropriate to the proposal, they must be included in the criteria, and the approvability standard for those criteria must be clearly stated. That is, some vague reference to acceptability is not permissible. The standard must be clear and measurable, such as a given distance from some type of land use, restriction to particular types of zoning area classifications, etc. However, the restrictions also cannot be so restrictive as to effectively preclude siting of necessary capacity. For instance, restriction to one type of zoning area which does not exist in sufficient amount in a county to allow a reasonable opportunity to find a suitable site is not acceptable. Criteria which, when evaluated in the aggregate, have the same effect, will not be approved.

Siting criteria may not include matters which are in the direct regulatory control of the DEQ. For instance, counties may not determine consistency based on facility hydrogeology or engineering/design requirements which are within the DEQ's permitting authority. Likewise, plans may not impose financial assurance requirements on facilities since this area is also defined by statute and regulated by the state.

Many communities pursue development of host agreements or contracts with disposal area developers as part of their siting processes. While DEQ encourages the development of host agreements as a valuable means to address local issues, the mandated siting process cannot include a host agreement process as a required part of the consistency review. However, a siting process which allows consistency to be established by execution of a host agreement is acceptable as long as the option to site through the criteria-based mechanism absent a host agreement exists. Further, host agreements must not address issues subject to DEQ's direct regulatory authority as discussed above and may not contain provisions which are contrary to law.

Another concern in the crafting of a plan's siting process is the procedural steps for completion of the process. The law requires that siting mechanisms ensure a specified outcome. The DEQ will not approve a siting process which does not contain detailed, specific process steps; designations of bodies responsible for those steps; and reasonable time frames to ensure completion of local review in a timely fashion.

Capacity Certifications

Act 153 added a new requirement for counties to annually prepare and submit to the DEQ an analysis and certification of solid waste disposal capacity validly available to the county. This certification is required to be prepared and approved by the County Board of Commissioners by June 30 of each year and submitted to the DEQ for approval. Failure to submit the annual certification is equivalent to a finding of less than the minimum 66 months of available disposal capacity and will result in the mandatory siting mechanism contained in the county plan being activated. The law requires approval of this certification each year by the County Board of Commissioners even if the county did not prepare the solid waste plan. A submittal format prepared by the DEQ is included with this guidance and will also be included with the standard plan format for use in fulfilling this requirement. Additional materials may be submitted with the certification form, if appropriate.

Preemption of Local Ordinance Authorities

Although the subject of considerable discussion, no changes have been made to this section of the law. Section 11538(8) of Part 115 of the NREPA and several court cases which have occurred regarding this section make clear that no local ordinance, rule, policy, etc. which regulates the location, development, or operation of a solid waste disposal area may be enforced unless it is part of the approved county solid waste management plan. The plan format contains

a section where such ordinances or other authorities which are intended to be enforced by the county or any of its municipalities, may be included. Sufficient information needs to be provided in that Section to make clear what the regulatory nature and limits of these ordinances, etc., will be. The DEQ will not approve vague or general references to broad regulatory authorities. Application of local regulatory authority must be clearly and specifically defined and must not conflict with state regulatory authorities.

Local Enforcement Agency/Mechanism

County plans are required to identify county/local entities which will be responsible for enforcement of the plan and the mechanisms by which enforcement will be conducted. These mechanisms can include local ordinances (within the limits specified above), reliance on state law authorities, contracts, etc. It is clear that the Legislature intended county plans to be locally enforced. While the DEQ retains its enforcement authority, no plan is approvable unless identification of local enforcement authorities and mechanisms is included and specific acceptance by those local authorities of that responsibility is included in the plan.

Regional/Multi-County Planning

While the planning process is designed on a county-specific basis, the DEQ recognizes that some issues may be better addressed on a multi-county or regional basis. The law provides for such plans to be prepared, and the DEQ wishes to encourage reliance on such approaches. In order to prepare a multi-county plan, each county must execute a notice of intent form and should indicate its intent to participate with other designated counties. All those counties should make sure they designate the same DPA. In addition, a single solid waste management planning committee should be appointed and a single plan prepared for all the counties as if they are one. The plan format has been designed to allow this approach. The planning committee may not vary from the statute's required composition. Appointments should be agreed to by all participating county boards, but committees may not be expanded, nor membership makeup changed from the statutory requirements.

The complicated part of multi-county planning is the plan approval process. The law still requires each county and its municipalities to approve its own plan. Therefore, after approval of the plan by the planning committee, each county board and each county's respective municipalities should act on the plan as if it was prepared by that county. The DPA can submit the plan to the DEQ for approval on a county-by-county basis as local approval is obtained or wait until all units in the regional area have acted and submit it for approval at one time for all counties involved.

Waste Reduction/Recycling/Composting Considerations

Section 11539 of Part 115 of the NREPA requires all county plans to include an evaluation of local recycling, composting, and waste reduction opportunities, and to include initiatives to increase reliance on these tools toward meeting the goals of Michigan's Solid Waste Policy adopted in 1988. While this is not a new requirement, the DEQ intends to increase its emphasis in local planning efforts in this area. This is of greater importance given the capacity certification process which allows counties to count waste reduction and recycling activities in determining disposal capacity needs. In addition, since the last plan update, the ban on landfilling and incineration of yard waste has gone into effect, increasing the need for development of local yard waste composting programs.

The DEQ's vision of this issue is actually much broader than just waste recycling. We want to encourage development of local programs to promote waste reduction and pollution prevention activities, as well as waste reuse, recycling, composting, and other non-disposal waste alternatives, and related local education efforts. While the approval standard for this plan requirement is not defined in the law, the DEQ intends to encourage local planning efforts to address these issues in greater detail than was done in previous plans.

Planning Grants

There is no funding appropriated for county solid waste management planning grants. The DEQ will be unable to provide any financial assistance to counties, municipalities, or regional planning agencies for plan preparation. No planning grant work programs will be required.

As the law requires, if a county declines to prepare its plan update, the DEQ will offer the municipalities in the county that opportunity. If a majority of the municipalities do not wish to prepare the plan, the DEQ will offer that opportunity to the regional planning agency. The law requires that if none of these entities accept responsibility for plan preparation, the DEQ must prepare the plan and that plan shall be final.

Given the lack of available grant funding, the DEQ anticipates that it may become responsible for preparing a large number of plan updates. Due to resource limitations, the DEQ will not be able to prepare plans that are custom designed for each county or community. We expect the DEQ prepared plans to be fairly standardized in their content. Additionally, because the DEQ cannot impose nor fund local waste recycling or other programs on our own, the DEQ-prepared plans will not be able to address the waste reduction/recycling components of the plans which, as stated previously, we believe need greater emphasis.

Plan Preparation Process

The following is a simplified outline of the process steps for preparation of the solid waste management plan updates once responsibility for plan preparation is accepted by a county or municipalities in the county:

- Board of Commissioners (or municipalities) appoints Solid Waste Management Planning Committee (SWMPC) and names DPA

- The SWMPC with staff support from DPA holds meetings (subject to Open Meetings Act, 1976 PA 267, as amended, requirements) and prepares draft plan

- The SWMPC approves release of draft plan for public review and comment

- The SWMPC/DPA issues public notice and holds 90-day comment period and public hearing on draft plan

- After considering public comment, the SWMPC revises and recommends plan for approval by the Board of Commissioners (or municipalities) within 30 days of end of 90-day public comment period

- The Board of Commissioners (or municipalities) approves plan as presented or sends back to the SWMPC with objections

- The SWMPC (if plan returned to them) acts on the Board of Commissioner's concerns and sends plan back to the Board of Commissioners (or municipalities) within 30 days

- The Board of Commissioners (or municipalities) approves the SWMPC plan or adopts its own version of plan

- Plan goes to all municipalities for approval by governing bodies

- Plan receives approval of at least 67 percent of municipalities - is locally-approved and submitted to the DEQ for approval

- Plan fails to receive 67 percent municipality approval - the DEQ prepares plan for county.

Plan Submittal Due Date

The last plan update cycle requested submittal of locally-approved plans to the DEQ within 18 months of the Notice of Intent letter being sent out. Very few locally-approved plans were submitted in this time frame. Also, because some plans were not prepared by counties, the additional Notice of Intent processes pushed plan submittal dates for those counties several months further. The standard plan format should enable locally-prepared plans to be completed in quicker fashion than was the case the last time, as less original drafting is needed. The DEQ believes that plan preparation and approval should be able to be completed within 18 months of commencing the process. Therefore, the DEQ would like locally-approved plans to be submitted by December 1, 1998, or sooner where possible.

Plan Submittal to DEQ

After the local plan approval process is completed, or a plan is locally-disapproved, the plan is subject to review and approval by the DEQ (or DEQ preparation in the case of a locally-disapproved plan). The DPA, on behalf of the county (or municipalities if municipally prepared), should submit the plan by letter to the DEQ, requesting DEQ review and approval. Along with the plan update as locally-approved, with no changes, the DPA should include documentation of all required approval actions, including disapprovals, by the planning committee, the county board, and the municipalities. In addition, copies of required public notices and documentation that the public hearing was held should be included.

Although actual plan approvals are done by the Director of the DEQ, submittal packages should not be sent to the Director. Submit plan approval packages to :

Solid Waste Management Unit
Solid Waste Program Section
Waste Management Division
Department of Environmental Quality
P.O. Box 30241
Lansing, Michigan 48909

The DEQ consideration of action on each plan will be noticed in the DEQ Calendar, which is published every two weeks and is available without charge. To be put on the mailing list to receive the Calendar, please write to:

DEQ Calendar
Department of Environmental Quality
P.O. Box 30473
Lansing, Michigan 48909-7973

The Calendar is also available on the Internet at *http://www.michigan.gov/deq* .

Staff in the Waste Management Division, Solid Waste Management Unit, are available to assist in the development and review of county solid waste management plans. Anyone with questions about either the plan preparation process or plan content issues should contact their designated staff planning contact or Ms. Rhonda Oyer Zimmerman, Chief, Solid Waste Management Unit, at the address indicated above, by phone at 517-373-4750, or by e-mail at oyerr@michigan.gov.