THE 2006 AMENDMENTS TO THE LANDFILL FRANCHISE STATUTE, AND THE PENDING SOLID WASTE ACT OF 2007

July 2007

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I. Introduction.

In 2006, the General Assembly passed two bills relevant to solid waste disposal in North Carolina. Any company that seeks a permit to construct and operate a landfill from the N.C. Department of Environment and Natural Resources ("DENR") must first obtain a franchise for the operation from the county in which the landfill would be located. The General Assembly first made significant additions to what must be included in such a franchise, mandated the county board hold a public hearing on a franchise application, and gave counties the option of issuing a preliminary franchise. In Section II below, we outline those changes and address several issues that arise from the franchise statute as amended.

In response to proposals for construction of several large landfills that would receive significant amounts of out-of-state waste, the General Assembly also imposed a one-year moratorium on DENR's issuance of landfill permits, and commissioned several studies of various issues related to landfills. From those studies, legislation has emerged (the "Solid Waste Act of 2007") that, if adopted, would have wide-reaching consequences for both counties and private waste companies. In Section III below, we note key recommendations made by DENR that, if implemented, would have a very material impact on a county's franchising authority and leverage in franchise negotiations. In Section IV below, we note the key provisions in the Solid Waste Act of 2007, with an emphasis on the provisions of most importance to counties.

II. Senate Bill 1564 - Amending the Solid Waste Franchise Statute.

The provision requiring an applicant for a landfill permit to first obtain a franchise from the county in which the landfill would be located is contained in G.S. 130A-294. Through Senate Bill 1564 (copy attached under Exhibit 1), the General Assembly amended those provisions in several ways, which materially change how counties may issue a landfill franchise.

A. Clarification that a County Can Deny a Franchise Application.

Senate Bill 1564 first clarifies that a county is not obligated to grant a franchise application. See N.C. Gen. Stat. § 130A-294(b1)(2)(2006). This was less than clear before, and some waste companies had previously argued that a county could not outright deny such an application.

B. New Requirements in a Landfill Franchise.

Prior to enactment of Senate Bill 1564, a landfill franchise only had to contain: (1) a statement of the population to be served, including a description of the geographic area, (2) a description of the volume and characteristics of the waste stream, and (3) a projection of the useful life of the landfill. As a result, landfill franchises were typically very short (though a separate, more detailed "Host Agreement" or other contract was often negotiated and entered into when the franchise was issued). The waste company typically would not devote significant resources into engineering and designing a landfill until it was in the permitting process before DENR, after the franchise was obtained.

Senate Bill 1564 changed this by adding the following which now must be included in a franchise (in addition to the items listed above):

1. An explanation of how the franchise will be consistent with local government's solid waste management plan, including provisions for waste reduction, reuse, and recycling;

2. Procedures to be followed for governmental oversights and regulation of fees and rates to be charged for waste generated in the local government's jurisdiction; and

3. A "Facility Plan," to include:

    a. ***Exact boundaries*** of a proposed facility;

    b. A proposed schedule for development of the facility site in five-year operational phases;

    c. Boundaries of all waste disposal units;

    d. ***Final elevations*** and capacity of all waste disposal units;

    e. Amount of waste to be received per day in tons;

    f. Total waste disposal capacity of landfill in tons;

    g. Description of environmental controls;

    h. Description of any other waste management activities to be conducted at the facility;

    i. Location of soil borrow areas and leachate facilities; and

    j. Other facilities and infrastructure, including ingress and egress.

N.C. Gen. Stat. § 130A-294(b1)(2)(2006)(emphasis added).

Obviously, the most significant addition to the contents of a franchise is the requirement of a facility plan. Such a plan must contain "exact boundaries" and "final elevations" of all disposal units and other details that previously have not been generated until well into the permitting process before DENR, after the local franchise was obtained.

C. The New Option to Issue a "Preliminary Franchise."

A late change to Senate Bill 1564 was to give local governments the option of issuing a "preliminary franchise." Such a franchise must include all the requirements set forth above,

except the facility plan. In lieu of that plan, it must contain a general description of solid waste activities to be conducted on the site. N.C. Gen. Stat. § 130A-294(b1)(2a)(2006).

We understand this option was included at the behest of the waste companies who reasonably wanted some commitment from the local government before they expended the considerable sums involved in getting to the point where a facility plan could be prepared. They can obtain that through a preliminary franchise, which enables them to begin the permitting process before DENR. If this option is chosen, ultimately the franchise must be amended or supplemented to include the facility plan. We predict most if not all applications under the new law will be for a preliminary franchise.

D. Changes Regarding a Public Hearing.

Prior to enactment of Senate Bill 1564, the county board was charged with holding a public hearing on the franchise application only if "sufficient public interest" existed. Senate Bill 1564 requires that the county board hold a public hearing prior to the issuance of a franchise, regardless of the level of public interest. N.C. Gen. Stat. § 130A-294(b1)(3)(2006). A notice of hearing must be given 30 days in advance, include a summary of the information to be included in the franchise, and specify the procedure to be followed at the hearing. Additionally, the applicant must provide a copy of the franchise application, that includes all information required to be included in the franchise, to the public library closest to the proposed landfill site (presumably before the hearing). Id.

As a practical matter then, at least a good summary of all information that will go in the franchise must be provided by the applicant in the franchise application, which can then be used in the notice of public hearing.

E. Issues Arising from Senate Bill 1564.

Q: Can a preliminary franchise be issued before an actual location of landfill is selected?

A: Yes. Technically, the actual site does not have to be identified at the preliminary franchise stage.

Q: If a county issues a preliminary franchise, does it have to do it by ordinance?

A: Yes. G.S. 153A-46 provides that no ordinance granting any franchise may be finally adopted until it has passed at two regular meetings of the commissioners, and no such grant may be made except by ordinance. The new preliminary franchise is not exempt from this requirement.

Q: If a county issues a preliminary franchise, when should it hold the required public hearing?

A: At least before the second reading on issuing the preliminary franchise, and preferably before the first reading. The public hearing could precede a reading at the same meeting. The idea is the hearing should be held before there is a binding vote (i.e., a reading).

Q: If a county issues a preliminary franchise by ordinance, does it have to hold another public hearing and issue a "final" franchise by ordinance once the facility plan is submitted? In other words, does a county board have to go through the process twice?

A: The amended statute does not address this. The conservative approach would dictate the county board hold another public hearing, and make the franchise "final" by ordinance, once the facility plan is submitted. The facility plan will represent a significant new body of information compared to what was presented for a preliminary franchise. The intent behind Senate Bill 1564 was to give the public notice and opportunity to be heard, so

caution dictates giving the public the chance to comment on the facility plan. Similarly, the applicant should make the facility plan available at the nearest library.

Q: What should be the term of a preliminary franchise?

A: Counties can issue landfill franchises for up to 30 years. See N.C. Gen. Stat. § 153A-136(a)(3)(2007). A county would be ill-advised, however, to issue a long-term preliminary franchise, particularly if it agrees not to grant any other landfill franchises during the term of the preliminary franchise. See id. (franchises for landfills issued by counties can be exclusive). One option would be to make the term of the preliminary franchise the same period of time by which the waste company must present a site for the landfill to the county board for approval (e.g., two years). The county could commit in the preliminary franchise that, upon its approval of a proposed site for the landfill and a facility plan, it will: (i) make the franchise "final" by ordinance, and (ii) extend the term of the franchise for an agreed upon, long-term period.

III. The 2006 Moratorium Bill, and Resulting Recommendations.

Also during the 2006 session, the General Assembly passed Senate Bill 353, imposing a moratorium on DENR's issuance of landfill permits for one year, running through August 1, 2007 (the "Moratorium Bill"). This was inspired by a number of proposed large, regional landfills that would have accepted large quantities of out-of-state waste. In the Moratorium Bill, the General Assembly directed its Environmental Review Commission ("ERC"), with DENR's assistance, to study and report on various issues, including local government approval of landfills, the design of landfills, statewide tipping fees, and regulatory oversight of landfills. Through this bill, the General Assembly also formed a Joint Select Committee on Environmental Justice that was directed to study and report on issues related to the siting of landfills.

The ERC's study showed that the total tonnage and the rate of waste generation in North Carolina are increasing, and that the state has historically been a solid waste exporter. 1.2 million tons of solid waste were exported from North Carolina during the period 2004-05.

After reviewing solid waste fees and landfill regulations in 16 nearby states, DENR issued a memo entitled, "Improving Oversight of Landfill Construction and Operation in North Carolina." (Copy attached as Exhibit 2). One of DENR's most pertinent recommendations would, if adopted, have a profound impact on a county's ability to negotiate favorable franchise terms. DENR recommended that :

> ***A local government's authority to issue a landfill franchise should be limited to franchising the capacity required to meet waste disposal needs within the county where the landfill is to be located. Landfill permits proposed for service areas extending beyond the county in which the landfill will be located should be considered by the State with input from local governments within the proposed service area.*** State franchise decisions should consider factors such as the need for additional waste disposal capacity; consistency with North Carolina's solid waste management plan; the applicant's ability to ensure compliance with state law affecting solid waste disposal (including bans on disposal of certain types of waste in landfills); and the impact of landfill operation on resources of regional and statewide significance.

See Exhibit 2, DENR Memo, p. 2 (emphasis added).

Also, a $2.00 state wide tipping fee or surcharge on all solid waste was recommended, which would be assessed against local governments as well as private waste companies. The purpose of such fees would primarily be to clean up unlined abandoned or orphaned landfills.

Other important recommendations made by the ERC and DENR included: (1) increasing the financial qualification requirements and environmental compliance review requirements for prospective landfill owners and expanding their liability; and (2) technical changes regarding landfill design, such as the use of double liners for new or lateral expansions and the use of

composite liners for new or lateral expansion of currently-permitted construction/demolition ("C&D") landfills.

IV. The Pending Solid Waste Act of 2007.

Many but not all of the proposals from DENR and the ERC were rolled into the Solid Waste Act of 2007, Senate Bill 1492, and now the Proposed Committee Substitute Bill, S1492-CSRTxf-6 [v.24] (copy attached as Exhibit 3).

A. Provisions Regarding Landfill Franchises and Approval of Landfills.

DENR's recommendation to transfer the authority to franchise landfills with service areas greater than a single county was not incorporated into the Solid Waste Act of 2007. In its current form, the Solid Waste Act of 2007 would not change the requirement that an applicant for a landfill permit must first obtain a franchise for the operation from the county in which the landfill would be located, regardless of the size of the proposed landfill.

In an earlier version, however, the Solid Waste Act of 2007 called for creation of a new State-level "Commission on Multi-Jurisdictional Solid Waste Management Facilities" (the "Commission"), comprised of the Secretary of DENR, the Secretary of Health and Human Services, and the Secretary of Commerce. This Commission would, per this earlier version of the bill, wield broad authority to approve or disapprove of any landfill with a multi-county service area after the franchise is obtained from the county, and before DENR reviewed the permit application. See Proposed N.C. Gen. Stat. § 130A-295.7 (copy attached as Exhibit 4). This entire provision has been removed from the bill, and the subject of how to approve of multi-county landfills has been referred to a study commission.

Since the creation of such a commission may again be included in the bill or subsequent bills after the study, it is worth briefly noting the powers it might be accorded. Under the bill's

prior language, this Commission would only approve of an application for a multi-county landfill if it determined that:

1. the proposed facility would be consistent with the solid waste management policy and plan set forth in the statutes;

2. the local government's solid waste management plan was consistent with the State plan;

3. adequate procedures are legally established for governmental oversight and regulation of the fees and rates to be charged by the facility;

4. the cumulative impact of the facility would not have a disproportionate adverse impact on minorities or low-income communities; and

5. the franchise was properly granted.

Under these broad terms, such a Commission would yield substantial discretion to "veto" any multi-county landfill, regardless of whether the technical requirements for a landfill can be met. Further, this "veto" could occur after a county has invested substantial legal and technical resources into negotiating the terms of a franchise. Such approval would be required of most if not all privately-operated landfills, since most such landfills in the future are likely to service a greater area than a single county.

B. Provisions of the Solid Waste Act of 2007, in its Current Form, of Particular Interest to Local Governments.

1. Establish a solid waste disposal fee of $2.50 per ton on waste to be imposed on the disposal of municipal solid waste in landfills in the State and on the transfer of municipal solid waste for disposal outside the State. The funds collected from the tax would be used for the following purposes:

   a. To fund the Inactive Hazardous Sites Cleanup Fund for assessment and remediation of pre-1983 landfills;

   b. To fund the Solid Waste Management Trust Fund for grants to State agencies and units of local government to initiate or enhance local recycling programs;

   c. To fund the Litter Prevention Account for programs to reduce litter in the State.

2. Clarify the circumstances under which a unit of local government may collect a solid waste availability fee.

   To the extent that the services provided by the county disposal facility differ from the services provided at the disposal facility provided by a private contractor, the county may charge an availability fee to cover the costs of the additional services provided by the county disposal facility.

3. Authorize certain units of local governments to hire landfill liaisons.

   This section of the bill would allow counties and cities with jurisdiction over a landfill that has a service area that extends 100 miles or more in any direction from the landfill to employ a local government landfill liaison. A local government landfill liaison may enter the landfill facility at reasonable times and inspect landfill operation to:

   i. Ensure that the facility meets all local requirements.

   ii. Identify and notify DENR of suspected violations of applicable federal or State laws, regulations, or rules.

   iii. Identify and notify DENR of potentially hazardous conditions at the facility.

   (counties typically negotiate for this authority before issuing a landfill franchise.)

4. Allows local governments to be reimbursed the costs of voluntarily undertaking the assessment and remediation of pre-1983 (un-lined) landfills. DENR shall provide reimbursement if DENR finds all of the following:

   a. The unit of local government undertakes assessment and remediation under a plan approved by DENR.

   b. The unit of local government provides a certified accounting of costs incurred for assessment and remediation.

   c. Each contract for assessment and remediation complies with the requirements of the solid waste statutes.

   d. Remedial action is limited to measures necessary to abate the imminent hazard.

C. Other Provisions of Interest the Solid Waste Act of 2007.

1. Requires all C&D landfills to have a single flexible membrane linerand requires combustion products landfills to have a double flexible membrane liner. [1] In addition:

    a. All applicants must conduct an Environmental Impact Study.

    b. All landfills must have a buffer of 200 feet between any stream or wetland, except in certain circumstances.

    c. No landfill can be constructed within any 100 year floodplain or on land previously designated a 100 year floodplain except by variance.

    d. No landfill can be constructed within a wetland.

    e. No permit can be issued for a landfill that authorizes: (i) a capacity of more than 55 million cubic yards of waste; (ii) disposal area of more than 350 acres; and (iii) a height more than 250 feet.

    f. No landfill can be constructed within 5 miles of a National Wildlife Refuge.

    g. No landfill can be constructed within 2 miles of a state park or within 1 mile of state game lands.

2. Clarifies the circumstances under which an application for a solid waste management permit may be denied by DENR. Under this section, DENR must deny an application for a permit for a solid waste management facility if they find that:

    a. Construction or operation of the proposed facility would be inconsistent with or violate rules adopted by the Commission.

    b. Construction or operation of the proposed facility would result in a violation of water quality standards adopted by the Environmental Management Commission pursuant to G.S. 143-214.1 for waters, as defined in G.S. 143-213.

    c. Construction or operation of the proposed facility would result in significant damage to ecological systems, natural resources, cultural sites, recreation areas, or historic sites of more than local

[1] The most recent version of the bill removed a requirement that all municipal solid waste landfills contain two flexible membrane liners.

significance. These areas include but are not limited to, national or State parks or forests; wilderness areas; historic sites; recreation areas, segments of the natural and scenic rivers system; wildlife refugees, preserves and management areas, areas that provide habitat for threatened or endangered species; primary nursery areas and critical fisheries habitat designated by the Marine Fisheries Commission; and Outstanding Resource Waters designated by the Environmental Management Commission;

d. Construction or operation of the proposed facility would limit or threaten access to or use of public trust waters;

e. The proposed facility would be located in a natural hazard area, including a floodplain or an area subject to excessive seismic activity, such as that the facility will present a risk to public health or safety;

f. There is a practicable alternative that would accomplish the purposes of the proposed facility with less adverse impact on public resources, considering engineering requirements and economic costs;

g. The cumulative impacts of the proposed facility and other facilities in the area of the proposed facility would violate the criteria set forth in (b) through (f).

h. Construction or operation of the proposed facility would be inconsistent with the State solid waste management policy and goals as set out in G.S. 130A-309.04 and with the State solid waste management plan developed as provided in G.S 130A-309.07.

i. The cumulative impact of the proposed facility, when considered in relation to other similar impacts of facilities located or proposed in the community, would have a disproportionate adverse impact on a minority or low-income community protected by Title VI of the federal Civil Rights Act of 1964.

3. Clarifies that a parent, subsidiary, or other affiliate of the applicant or parent, including any business entity or joint venturer with a direct or indirect interest in the applicant is subject to financial responsibility and environmental compliance review.

4. Amends financial responsibility requirements for applicants and permit holders for solid waste management facilities.

5. Provides that solid waste management permits are not transferable.

6. Increases the penalties that may be imposed for solid waste violations.

The amount that may be assessed for a penalty involving non-hazardous waste would be increased from $5,000 per day to $15,000 per day. The amount that may be assessed for a penalty involving hazardous waste would be increased from $25,000 per day to $32,500 per day.

7. Clarifies and expand the scope of environmental compliance review requirements.

8. Requires that permit applicants for certain solid waste facilities conduct environmental impact studies and traffic studies of the impacts of the proposed facility.

9. Establishes fees applicable to permits for solid waste management facilities to support the solid waste management program.

V. Conclusion

County representatives will want to continue to monitor the Solid Waste Act of 2007, particularly regarding any new State commission that will have authority to approve or disapprove of multi-county landfills.