

*Via Certified Mail*

October 11, 2011

Kent County Board of Commissioners  
Board of Commissioners Office  
County Administration Building, 3rd Floor  
300 Monroe Avenue NW  
Grand Rapids, MI 49503-2206

***Re: Kent County Solid Waste Management Plan Amendment***

Dear Commissioners:

We are attorneys for Michigan Waste Industries Association (“MWIA”) with respect to the proposed amendment (the “Amendment”) to the Kent County Act 451 Solid Waste Management Plan, prepared pursuant to Part 115 of the Natural Resources and Environmental Protection Act (“Part 115”). This letter is to advise Kent County (the “County”) that it has failed to comply with requirements of Part 115 with respect to “formal action” on the Amendment. Specifically, the Amendment has not been approved by a majority vote of the Kent County Solid Waste Planning Committee (the “SWPC”) following the close of the public comment period. This critical step in the Part 115-mandated approval process provides an opportunity for the SWPC, in a public forum, to consider the issues raised during the public comment period, including:

- The scope and nature of the County’s proposed solid waste management ordinance;
- Whether the County intends to expand solid waste flow control under the proposed ordinance to include municipalities that have previously rejected such control;
- Whether the County intends to impose flow control on recyclable materials, as well as solid waste, under the proposed ordinance; and
- Other issues raised during the public comment period.

More importantly, before the Kent County Board of Commissioners (the “Board”) may take “formal action” on the Amendment, the SWPC ***must*** vote to approve the Amendment in light of those comments and the County’s response thereto. As explained below, the County’s failure to comply with this mandatory prerequisite to “formal action” renders any further action regarding the Amendment by the Board and the Kent County municipalities void and of no effect. Please be advised that MWIA intends to take all steps necessary to defend the integrity of

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Part 115's solid waste plan approval provisions and to ensure that the County fully complies with those provisions.

The County's designated planning agency, the Kent County Department of Public Works ("DPW"), set forth its rationale for subverting the SWPC's authority in Dennis Kmiecik's September 22, 2011 memo to Catherine Mueller (enclosed). The DPW asserts that the SWPC's post-comment period approval of the Amendment is merely a formality, which the DPW may ignore at its whim. The DPW, however, clearly misconstrues the requirements of the administrative rules promulgated under Part 115 (the "Part 115 Rules") concerning the SWPC's lynchpin role in "formal action" on the Amendment.

The DPW asserts that the SWPC's June 2<sup>nd</sup> vote, which authorized the release of the Amendment for public comment, is the only action required of that committee so long as the DPW does not subsequently modify the Amendment in response to public comments. The Part 115 Rules, however, expressly require that the SWPC take *two* separate and distinct actions. First, the SWPC must authorize the Amendment's release for public hearing. The SWPC reportedly took this action at its June 2<sup>nd</sup> meeting. Second, the SWPC must approve the Amendment by a majority vote of its members. This second action may only be taken *after the close of the public comment period*. The SWPC did *not* take this action at its September 22, 2011 meeting and, until the SWPC votes to approve the Amendment, no "formal action" may be taken on the Amendment.

Rule 707 of the Part 115 Rules (Mich. Admin. Code r. 299.4707, enclosed) states in its entirety:

Rule 707. (1) The designated planning agency shall follow the review procedures as established in section 27(a) to (e) of the act.

(2) The designated planning agency shall allow a period of not less than 3 months for the review and comments on the proposed plan. The exact time limit shall be specified in the work program. After the prescribed review and comment period, all of the comments from the reviewing agencies shall be submitted with the plan to the governmental unit that filed the notice of intent.

(3) The designated planning agency shall conduct a public hearing on the proposed county solid waste management plan before formal adoption by the county, the municipalities, or the state, as required in section 27(f) of the act. **Before the public hearing, the planning committee shall review the plan and shall authorize its release for public hearing.** After the public hearing, the designated planning agency shall prepare a transcript, a recording, or another

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complete record of the public hearing proceedings. The record may be copied at cost or may be inspected by the general public upon request.

***(4) The designated planning agency shall revise the plan, if necessary, in response to public hearing comments and shall then submit the plan to the planning committee.***

***(5) After approval by the majority of the planning committee and within 30 days of closing of the public comment period, the plan shall be submitted for formal action to either the county board of commissioners or to the municipalities who voted in favor of preparing the plan. (Emphasis added.)***

Under the plain language of the above-quoted rule, the SWPC's *authorization to release* the Amendment for public comment under Subsection (3), and its *approval of the Amendment* under Subsection (5), are clearly two separate and distinct actions. The requirements to perform these actions appear within two different subsections of Rule 707, and the actions themselves take place at two different times. Under Subsection (3), the SWPC's vote to *authorize the release* of the Amendment naturally takes place "[b]efore the public hearing." Under Subsection (5), the SWPC's vote to *approve the Amendment* cannot be held until after the DPW submits the Amendment to the SWPC *following the close of the public comment period* when the SWPC can consider the Amendment in light of the comments received. Thus, the SWPC's authorization to release the Amendment for public comment is ***not*** an approval for purposes of "formal action" on the Amendment. Otherwise, the public comment period, and the SWPC's oversight role with respect to the DPW's response to those comments, would be rendered meaningless.<sup>1</sup>

The DPW's memo concluded that, "***[s]ince there were no substantive changes***" to the Amendment, the Department of Public Works was not required to submit the Amendment to the SWPC for approval. This conclusion is contrary to the plain language of Rule 707 and would usurp the SWPC's oversight of the DPW's actions. Subsection (4) of Rule 707 requires that the "***designated planning agency shall revise the plan, if necessary, in response to public hearing comments and shall then submit the plan to the planning committee.***" The DPW must take two actions under this subsection. First, the DPW must make necessary revisions to the Amendment in response to public hearing comments. Second, the DPW must submit the Amendment to the SWPC. Only the first obligation is qualified by the phrase "*if necessary.*" Thus, the DPW need not revise the Amendment if no revision is necessary. ***In every case,***

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<sup>1</sup> To the extent the County argues that the SWPC intended for its June 2<sup>nd</sup> vote to also be an approval of the Amendment for purposes of "formal action," then the SWPC, itself, would have violated its regulatory obligation to approve the plan *following* the public comment period and in light of the comments received. Any such pre-comment period approval by the SWPC would also be void and of no effect.

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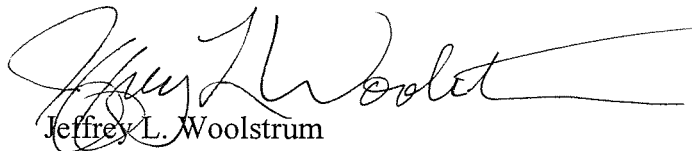
however, even where the DPW determines that no revision is necessary, ***the DPW must submit the Amendment to the SWPC for approval.*** There is no exception to this obligation and the fact that the DPW made “no substantive changes” to the Amendment does not relieve the DPW of its duty to comply.

Finally, Rule 708(1) of the Part 115 Rules (Mich. Admin. Code r. 299.4708(1), enclosed) expressly states that “formal action [on the Amendment] has been fulfilled when ***the plan is approved by the planning committee and then approved by the county board of commissioners.*** Conversely, “formal action” has ***not*** been fulfilled if either the SWPC or the Board fails to approve the Amendment. Thus, the SWPC’s approval is a prerequisite to “formal action.” Moreover, the SWPC’s approval must take place *before* approval by the Board. Because the SWPC has not approved the Amendment by a majority vote of its members, any attempt by the Board to take “formal action” on the Amendment is null and void.

In summary, the County’s actions with respect to the Amendment violate Part 115. MWIA urges the County to immediately comply with Part 115 by directing the DPW to submit the Amendment to the SWPC for consideration of the Amendment in light of the public comments received, and for a vote to either approve or disapprove the Amendment.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP



Jeffrey L. Woolstrum

Enclosures

c: Kent County Public Works Board  
Mr. Douglas Wood (Kent County)  
Ms. Catherine Muller (Kent County)  
Ms. Liane Shekter-Smith (MDEQ)  
Ms. Tonia Olson (MWIA President)

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# Memo

**Date:** September 28, 2011

**To:** Catherine Mueller, Chairperson

**From:** Dennis Kmiecik, Division Director Solid Waste

**CC:** Solid Waste Plan Committee Members

**Re: September 22, 2011 Solid Waste Planning Committee meeting**

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At the Thursday, September 22, 2011 Solid Waste Planning Committee meeting member Mr. Tom Mahoney, Republic Waste Services made an inquiry regarding the approval process. Specifically, Mr. Mahoney wanted to know if the plan amendment needed to be sent back to the Committee following receipt of any verbal or written public comments.

The Designated Planning Agency (DPA) which is the Kent County Department of Public Works is responsible for conducting the public hearing and reviewing any public comments that it may have received. Part 115 Administrative Rules for plan adoption (Rule 299.4707) states that the designated planning agency "...shall allow a period of not less than 3 months for review and comments on the proposed plan." The DPA also conducts a public hearing before the proposed solid waste management plan is formally adopted by the County, municipalities and the State. Before the public hearing, the Planning Committee "shall review the plan and shall authorize its release for public hearing." The Kent County Solid Waste Plan Committee authorized the release of the proposed plan amendment at their June 2, 2011 meeting. The public hearing on the proposed plan amendment was noticed and held on August 30, 2011. After the public hearing, the DPA may revise the substance of the plan, if it deems necessary. In this instance the DPA did not revise the substance of the plan based on public comments. Typographical errors were corrected, placing some existing information in a second location within the document and changing page numbers to reflect the original plan page numbers were done as requested by the MDEQ. Since there were no substantive changes, the plan was not sent back to the Solid Waste Plan Committee.

The designated planning agency sent the proposed amendment to the Kent County Board of Commissioners which was approved without objections on September 22, 2011. If the draft plan amendment had not been approved by the Board of Commissioners, the Plan Committee would have had 30 days to revise the plan and return it to the Board of Commissioners for approval. This step was not necessary.

The purpose of the September 22, 2011 meeting was solely to approve the June 2, 2011 minutes and to share the public comments with the committee.

## Part 115 Rules Excerpt

### **R 299.4707 Plan adoption; update procedures.**

Rule 707. (1) The designated planning agency shall follow the review procedures as established in section 27(a) to (e) of the act.

(2) The designated planning agency shall allow a period of not less than 3 months for the review and comments on the proposed plan. The exact time limit shall be specified in the work program. After the prescribed review and comment period, all of the comments from the reviewing agencies shall be submitted with the plan to the governmental unit that filed the notice of intent.

(3) The designated planning agency shall conduct a public hearing on the proposed county solid waste management plan before formal adoption by the county, the municipalities, or the state, as required in section 27(f) of the act. Before the public hearing, the planning committee shall review the plan and shall authorize its release for public hearing. After the public hearing, the designated planning agency shall prepare a transcript, a recording, or another complete record of the public hearing proceedings. The record may be copied at cost or may be inspected by the general public upon request.

(4) The designated planning agency shall revise the plan, if necessary, in response to public hearing comments and shall then submit the plan to the planning committee.

(5) After approval by the majority of the planning committee and within 30 days of closing of the public comment period, the plan shall be submitted for formal action to either the county board of commissioners or to the municipalities who voted in favor of preparing the plan.

**R 299.4708 Formal action.**

Rule 708. (1) If the county files a notice of intent under section 25(3) of the act to prepare a solid waste management plan, then formal action has been fulfilled when the plan is approved by the planning committee and then approved by the county board of commissioners.

(2) If the municipalities within a county file a notice of intent under section 25(4) of the act to prepare a solid waste management plan, then formal action has been fulfilled when the plan is approved by the planning committee and then is approved by a majority of those municipalities who voted in favor of filing a notice of intent to prepare a solid waste management plan.

(3) If the plan is disapproved under subrule (1) or (2) of this rule, the plan shall be returned to the planning committee along with the statement of the objections to the plan. The planning committee shall have 30 days to review the objections and return the plan to the county board of commissioners or to the majority of municipalities along with its recommendations. The county board of commissioners or a majority of municipalities who voted in favor of preparing the plan shall approve the plan, either as submitted or with changes and the reasons for the changes, and then shall submit the plan to all municipalities within the county.

(4) Before the plan may be submitted to the director for his or her approval, not less than 67% of the municipalities in the county shall approve the plan.

(5) A plan that is prepared by the regional solid waste management planning agency under section 25(5) of the act shall be approved as follows:

(a) Within 30 days of closing of the public comment period, the regional solid waste planning agency shall submit the plan, together with any modifications and public comments and responses from the public hearing, to the county board of commissioners for their formal action.

(b) After the county board of commissioners has taken formal action, the plan shall be submitted to the governing bodies of all municipalities within the county for their approval.

(c) Not less than 67% of the municipalities shall approve the plan before submittal to the director for his or her approval.