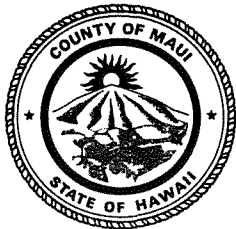


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MEMO TO: Elle Cochran, Chair
Infrastructure and Environmental Management Committee

FROM: Richelle M. Thomson *R. Thomson*
Deputy Corporation Counsel

DATE: September 8, 2014

SUBJECT: Polystyrene Disposable Food Service Containers (IEM-5)

This memorandum is response to your request of August 12, 2014, that the Department of Corporation Counsel comment on the County's legal authority to require providers of polystyrene disposable food service containers, as defined in the draft ordinance, Chapter 20.26, to:

1. Accept and manage the waste that is generated from the polystyrene containers;
or
2. Pay a fee to the County to offset the cost to dispose of these containers.

Short Answers:

1. Yes. Section 8.04.050(A), Maui County Code ("MCC"), authorizes unit charges per load or per ton for refuse delivered to the County's landfills.
2. Possibly. Pursuant to Section 8.04.050(B), MCC, refuse requiring special handling may be assessed an additional fee as set forth in the County's annual budget ordinance.

Discussion:

The short answer to Question No. 1 assumes that polystyrene waste (used food service containers) will continue to be part of the mixed residential and commercial municipal solid waste disposed of at the County's landfills and that "accept and manage" is accomplished by way of current disposal methods and payment of tipping fees by solid waste permit holders. If the question is whether the County can require businesses and/or consumers to segregate and dispose via non-County facilities or methods, or require that landfill staff inspect and turn away loads carrying such materials from the County's landfills, the question becomes more complex and is beyond the scope of this opinion.

As to Question No. 2, an affirmative answer depends on polystyrene food service containers being determined to require "special handling" such that the County incurs additional disposal costs and/or is required to handle the material differently than it does other types of municipal solid waste.

For background, "Special Wastes" are defined in Section 11-58.1-03, Hawaii Administrative Rules ("HAR") as: "solid waste which, because of its source or physical, chemical, or biological characteristics, require special consideration for its proper processing or disposal, or both. This term includes, but is not limited to, asbestos, used oil, lead acid batteries, municipal waste combustion ash, sewage sludge that is non-hazardous, medical wastes, tires, white goods, and derelict vehicles."

The County's Central Maui Landfill is required by its Solid Waste Management Permit to include a Special Waste Acceptance Program in the facility's Operational Plan. The types of special waste referenced in the permit include white goods, used oil, lead acid batteries, and tires. Under the definition of "Special Wastes" as defined by Section 11-58.1-03, HAR, polystyrene containers do not require special consideration for proper disposal and do not currently fall under the County's Special Waste Acceptance Program. Put simply, polystyrene is an acceptable type of municipal solid waste that can be landfilled under the County Solid Waste Management Permits. Consequently, it may be difficult to classify polystyrene containers as "Special Waste" and charge an additional fee for handling based on that classification.

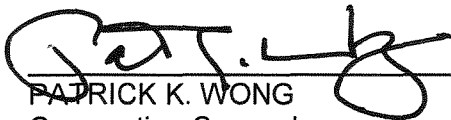
An Advance Disposal Fee ("ADF") imposes a duty on retailers to collect a set fee from consumers. ADF is a charge or fee levied against the distribution, purchase, or use of a product in order to discourage its use, as well as to recover the costs associated with either recycling or disposal of the product. There are costs to the business sector to implement and administer such programs, and costs to the municipality to administer and enforce the program. The fee charged should be commensurate with the costs of disposal. An example of an ADF is Hawaii's Glass ADF Program, administered by the State of Hawaii, Department of Health. The program regulates businesses in Hawaii that manufacture or import non-deposit beverage glass containers from outside Hawaii for sale or use within the State of Hawaii. The 1.5 cent advance disposal fee is used to pay for the operation of county glass container collection programs.

The County does not currently have an ADF ordinance. From a legal standpoint, there does not appear to be a basis preventing such an ordinance from being adopted. We would caution that the costs and benefits of such a program should be carefully studied prior to

implementation and that County's administration and enforcement of the program may be costly. Additionally, an analysis of which classes of products or components of the waste stream are most harmful to the environment or most costly for disposal should be considered.

A general comment on the proposed ordinance is regarding Section 20.26.040(C), which prohibits "food providers" from retail sales of polystyrene products used as disposable food containers. We recommend clarifying whether businesses that are not "food providers" (i.e., dry goods stores) or other businesses who are both food providers who also sell polystyrene food containers in bulk are prohibited from such retail sales.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel

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