

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, and
STATE OF NEW JERSEY,

Plaintiffs,

v.

WASTE MANAGEMENT, INC., and
ALLIED WASTE INDUSTRIES, INC.,

Defendants.

Case No.: 1:03CV01409

JUDGE: Gladys Kessler

DECK TYPE: ANTITRUST

DATE STAMP: July 22, 2003

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

Defendant Waste Management, Inc. ("Waste Management") and Defendant Allied Waste Industries, Inc. ("Allied") entered into stock and asset purchase agreements on January 29, 2003, pursuant to which Waste Management would acquire certain voting securities and waste-hauling and disposal assets of Allied in a number of areas throughout the United States. The United States and the State of New Jersey ("New Jersey") filed a civil antitrust Complaint on June 27, 2003, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially for waste collection and disposal services in several

markets in violation of Section 7 of the Clayton Act. This loss of competition would result in consumers paying higher prices and receiving fewer services for the collection and disposal of waste.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, Waste Management is required within 90 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as viable business operations, specified waste-hauling and disposal assets. The proposed Final Judgment also requires Defendants, within 90 days after approval by the New Jersey Department of Environmental Protection of Waste Management's request to acquire assets in New Jersey, to divest, as viable business operations, certain waste-hauling and disposal assets located in New Jersey and New York. Under the terms of the Hold Separate Stipulation and Order, Waste Management is required to take certain steps to ensure that the assets to be divested will be preserved and held separate from its other assets and businesses. In addition to the divestitures, the proposed Final Judgment also requires Waste Management to comply with certain conditions in its customer contracts in two identified areas.

The United States, New Jersey, and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Waste Management, with revenues in 2002 of approximately \$11.1 billion, is the nation's largest waste collection and disposal company, operating throughout the United States. Allied, with 2002 revenues of approximately \$5.5 billion, is the nation's second largest waste collection and disposal company. The proposed transaction, as initially agreed to by Defendants on January 29, 2003, would lessen competition substantially as a result of Waste Management's acquisition of the following: (1) hauling assets in Pitkin County, Colorado; (2) hauling assets in Garfield County, Colorado; (3) hauling assets in Augusta, Georgia; (4) hauling assets in Myrtle Beach, South Carolina; (5) hauling assets in Morris County, New Jersey; (6) hauling assets in Bergen and Passaic Counties, New Jersey; (7) voting securities and disposal assets serving Bergen and Passaic Counties, New Jersey; and (8) disposal assets in Tulsa, Oklahoma. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States and New Jersey on June 27, 2003.

B. The Competitive Effects of the Transaction

Municipal solid waste ("MSW") is solid, putrescible waste generated by households and commercial establishments. Waste collection firms, or haulers, contract to collect MSW from residential and commercial customers and transport the waste to private and public disposal facilities (e.g., transfer stations, incinerators, and landfills), which, for a fee, process and legally dispose of the waste. Small container commercial waste collection is one component of MSW collection,

which also includes residential and other waste collection. Allied and Waste Management compete in the collection of small container commercial waste and the disposal of MSW.

1. The Effects of the Transaction on Competition in Small Container Commercial Waste Collection Service

a. Small Container Commercial Waste Collection

Small container commercial waste collection service is the collection of MSW from commercial businesses such as office and apartment buildings and retail establishments (*e.g.*, stores and restaurants) for shipment to, and disposal at, an approved disposal facility. Because of the type and volume of waste generated by commercial accounts and the frequency of service required, haulers organize commercial accounts into special routes, and generally use specialized equipment to store, collect, and transport waste from these accounts to approved disposal sites. This equipment (*e.g.*, one- to ten- cubic-yard containers for waste storage, and front-end load vehicles commonly used for collection and transportation) is uniquely well suited for providing small container commercial waste collection service. Providers of other types of waste collection services (*e.g.*, residential and roll-off services) are not good substitutes for small container commercial waste collection firms. In their waste collection efforts, these firms use different waste storage equipment (*e.g.*, garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.*, rear-load, side-load, or roll-off trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect, or transport waste generated by commercial accounts, and hence, are rarely used on small container commercial waste collection routes. In the event of a small but significant and nontransitory increase in price for small container commercial waste collection services, customers would not switch to any other alternative. Thus, the Complaint alleges that the provision of small container commercial waste collection services constitutes a line of commerce, or relevant service,

for purposes of analyzing the effects of the transaction.

The Complaint alleges that the provision of small container commercial waste collection service takes place in compact, highly localized geographic markets. It is expensive to ship waste long distances in either collection or disposal operations. To minimize transportation costs and maximize the scale, density, and efficiency of their waste collection operations, small container commercial waste collection firms concentrate their customers and collection routes in small areas. Firms with operations concentrated in a distant area cannot easily compete against firms whose routes and customers are locally based. Distance may significantly limit a remote firm's ability to provide commercial waste collection service as frequently or conveniently as that offered by local firms with nearby routes. Also, local commercial waste collection firms have significant cost advantages over other firms, and can profitably increase their charges to local commercial customers without losing significant sales to firms outside the area.

Applying this analysis, the Complaint alleges that the areas of Pitkin County, Colorado; Garfield County, Colorado; Augusta, Georgia; Myrtle Beach, South Carolina; Morris County, New Jersey; and Bergen and Passaic Counties, New Jersey constitute sections of the country, or relevant geographic markets, for the purpose of assessing the competitive effects of a combination of Allied and Waste Management in the provision of small container commercial waste collection services.

There are significant entry barriers into small container commercial waste collection. A new entrant into small container commercial waste collection services must achieve a minimum efficient scale and operating efficiencies comparable to those of existing firms in order to provide a significant competitive constraint on the prices charged by market incumbents. In order to obtain comparable operating efficiencies, a new firm must achieve route density similar to existing firms.

An efficient route usually handles 80 or more customers or containers each day. Because most customers have their waste collected once or twice a week, a new entrant must have several hundred customers in close proximity to construct an efficient route. However, the common use of price discrimination and long-term contracts by existing commercial waste collection firms can leave too few customers available to the entrant in a sufficiently confined geographic area to create an efficient route. The incumbent firm can selectively and temporarily charge an unbeatably low price to specified customers targeted by new entrants. Long-term contracts often run for three to five years and may automatically renew or contain large liquidated damage provisions for contract termination. Such terms make it more costly or difficult for a customer to switch to a new hauler and obtain lower prices for its collection service. Because of these factors a new entrant may find it difficult to compete by offering its services at pre-entry price levels comparable to the incumbent and may find an increase in the cost and time required to form an efficient route, thereby limiting a new entrant's ability to build an efficient route and reducing the likelihood that the entrant will ultimately be successful.

The need for route density, the use of long-term contracts with restrictive terms, and the ability of existing firms to price discriminate raise significant barriers to entry by new firms, which will likely be forced to compete at lower than pre-entry price levels. Such barriers in the market for small container commercial waste collection have allowed incumbent firms to raise prices successfully.

b. Anticompetitive Effects in Small Container Commercial Waste Collection Service Markets

(1) Pitkin County, Colorado

In Pitkin County, Colorado, Waste Management's acquisition of Allied's hauling assets would reduce from two to one the number of significant firms that compete in the collection of small container commercial waste. After the acquisition, Waste Management would control over 89 percent of total market revenues, which exceed \$1.8 million annually. There are no other significant small container commercial waste competitors in this market.

(2) Garfield County, Colorado

In Garfield County, Colorado, Waste Management's acquisition of Allied's hauling assets would reduce from two to one the number of significant firms that compete in the collection of small container commercial waste. After the acquisition, Waste Management would control over 93 percent of total market revenues, which approximate \$3.2 million annually. There are no other significant small container commercial waste competitors in this market.

(3) Augusta, Georgia Area

Waste Management is acquiring the hauling assets of Allied in Augusta, Georgia. These assets serve small container commercial waste collection customers in Columbia, Richmond, McDuffie, Lincoln, and Warren Counties, Georgia. In the Augusta, Georgia area, the proposed acquisition would reduce from three to two the number of significant firms that compete in the collection of small container commercial waste. After the acquisition, Waste Management would control over 63 percent of total market revenues, which approximate \$7.5 million annually.

(4) Myrtle Beach, South Carolina Area

Waste Management is acquiring the hauling assets of Allied in Myrtle Beach, South

Carolina. These assets serve small container commercial waste collection customers in Georgetown and Horry Counties, South Carolina. In this area, the proposed acquisition would reduce from three to two the number of significant firms that compete in the collection of small container commercial waste. After the acquisition, Waste Management would control over 58 percent of total market revenues, which exceed \$7.4 million annually.

(5) *Morris County, New Jersey*

In Morris County, New Jersey, Waste Management's acquisition of Allied's hauling assets would reduce from four to three the number of significant firms that compete in the collection of small container commercial waste. After the acquisition, Waste Management would control over 41 percent of total market revenues, which exceed \$14 million annually.

(6) *Bergen and Passaic Counties, New Jersey*

Waste Management is acquiring the hauling assets of Allied that serve Bergen and Passaic Counties, New Jersey. In Bergen and Passaic Counties, New Jersey, the proposed acquisition would reduce from four to three the number of significant firms that compete in the collection of small container commercial waste. After the acquisition, Waste Management would control over 47 percent of total market revenues, which exceed \$38 million annually.

The Complaint alleges that a combination of Allied and Waste Management in these areas would remove a significant competitor in small container commercial waste collection services. In each of these markets, the resulting increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely will result in higher prices for the collection of small container commercial waste.

2. *The Effects of the Transaction on Competition in the Disposal of Municipal Solid Waste*

a. Municipal Solid Waste

A number of federal, state, and local safety, environmental, zoning, and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW. MSW can be disposed of lawfully in a transfer station, landfill, or incinerator permitted to accept MSW. Anyone who attempts to dispose of MSW in an unlawful manner risks severe civil and criminal penalties. In some areas, landfills are scarce because of significant population density and the limited availability of suitable land. Accordingly, most MSW generated in these areas is burned in an incinerator or brought to transfer stations where it is compacted and transported to a more distant permanent disposal site.

Because of the strict laws and regulations that govern the disposal of MSW, there are no good substitutes for MSW disposal. Firms that compete in the disposal of MSW can profitably increase their charges to haulers of MSW without losing significant sales to any other firms. Thus, for purposes of antitrust analysis, the disposal of MSW constitutes a line of commerce, or relevant service, for purposes of analyzing the transaction.

The disposal of MSW generally occurs in localized markets. The Complaint alleges that the Bergen and Passaic Counties, New Jersey disposal area (which includes Bergen and Passaic Counties and areas within 10 miles of these counties) constitutes a section of the country, or a relevant geographic market, for purposes of assessing the competitive effects of the transaction. Due to the high costs of transporting MSW and the substantial travel time to other disposal facilities based on distance, natural barriers, and congested roadways, virtually all of the MSW generated in Bergen and Passaic Counties, New Jersey is disposed of in transfer stations in the Bergen and Passaic Counties, New Jersey disposal area. Firms that compete in the disposal of MSW in the

Bergen and Passaic Counties, New Jersey disposal area can profitably increase their charges for MSW disposal without losing significant sales to more distant disposal sites.

The Complaint also alleges that the Tulsa and Muskogee, Oklahoma area (which includes Muskogee, Rogers, Tulsa, and Wagoner Counties, Oklahoma) constitutes a section of the country, or a relevant geographic market, for purposes of assessing the competitive effects of the transaction. Because of transportation costs and travel time to more distant facilities, virtually all of the MSW generated in the Tulsa and Muskogee, Oklahoma area is disposed of in landfills within roughly 25 miles of Tulsa or Muskogee, Oklahoma. Firms that compete in the disposal of MSW in the Tulsa and Muskogee, Oklahoma area can profitably increase their charges for MSW disposal without losing significant sales to more distant disposal sites.

There are significant barriers to entry in MSW disposal. Obtaining a permit to construct a new disposal facility or expand an existing one is a costly and time-consuming process that typically takes many years to conclude. Local public opposition often increases the time and uncertainty of successfully permitting a facility. In the Bergen and Passaic Counties, New Jersey disposal area and the Tulsa and Muskogee, Oklahoma area, entry by a new MSW disposal facility would be costly and time-consuming, and unlikely to prevent market incumbents from significantly raising prices for the disposal of MSW following the acquisition.

b. Anticompetitive Effects in the Disposal of Municipal Solid Waste

(1) Bergen and Passaic Counties, New Jersey Disposal Area

The proposed acquisition would reduce from four to three the number of significant competitors for the disposal of MSW in the Bergen and Passaic Counties, New Jersey disposal area. Defendants Waste Management and Allied operate five of the nine transfer stations in this market

and collectively control over 55 percent of the available disposal capacity for Bergen and Passaic Counties. Annual revenue from disposal of waste in Bergen and Passaic Counties, New Jersey is over \$50 million.

(2) *Tulsa and Muskogee, Oklahoma Area*

In the Tulsa and Muskogee, Oklahoma area, the acquisition would reduce from three to two the number of significant firms competing to dispose of MSW. There are currently four owners of the six landfills that service the Tulsa and Muskogee, Oklahoma area. Two of the six landfills are expected to close in the near future, leaving four landfills owned by three companies to service haulers in the area. After the acquisition, Waste Management would own three of the four remaining landfills in this area.

The Complaint alleges that a combination of Waste Management and Allied in the Bergen and Passaic Counties, New Jersey disposal area and the Tulsa and Muskogee, Oklahoma area would remove a significant competitor in the market for the disposal of MSW. In each of these markets, the resulting increase in concentration, loss of competition, and absence of any reasonable prospect of significant new entry or expansion by market incumbents likely will result in higher prices for the disposal of MSW.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. *Small Container Commercial Waste Collection Service*

The divestiture and contract-revision requirements of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection services in the markets identified in the Complaint by establishing a new, independent,

and economically viable competitor in each of those markets and, in some areas, by also reducing the barriers to entry created by the contracts currently used by Waste Management. The proposed Final Judgment requires Waste Management, within 90 days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest, as a viable ongoing business or businesses, small container commercial waste collection assets (*e.g.*, routes, trucks, containers, and customer lists) in the areas of Pitkin County, Colorado; Garfield County, Colorado; Augusta, Georgia; and Myrtle Beach, South Carolina. On or before January 1, 2005, the proposed Final Judgment also requires Waste Management to alter the contracts it uses with its existing and new small container commercial waste customers in the areas of Myrtle Beach, South Carolina and Augusta, Georgia. The proposed Final Judgment further requires Defendants, within 90 days after approval by the New Jersey Department of Environmental Protection of Waste Management's request to acquire assets in New Jersey, to divest certain waste-hauling and disposal assets located in New Jersey and New York. The assets must be divested in such a way as to satisfy the United States that the operations can and will be operated by the purchaser or purchasers as a viable, ongoing business or businesses that can compete effectively in each relevant market. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

In the event that Defendants do not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that Waste Management will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the

price obtained and the speed with which the divestitures are accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court, United States, and New Jersey as appropriate, setting forth his or her efforts to accomplish the divestitures. At the end of six months, if the divestitures have not been accomplished, the trustee, United States, and New Jersey as appropriate, will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

1. Pitkin County, Colorado and Garfield County, Colorado

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection services in Pitkin County, Colorado and Garfield County, Colorado. Under the proposed Final Judgment, Waste Management is required to divest seven routes that serve small container commercial waste collection customers, among others, in Pitkin County, Colorado and Garfield County, Colorado to a new, independent, and economically viable competitor in these areas. These divestitures include all of Waste Management's existing small container commercial waste collection routes in the two counties. Many of Waste Management's small container commercial accounts in Pitkin County, Colorado and Garfield County, Colorado are not allocated, however, to a specific route, and their collective sale would not likely produce an efficient divestiture package. Accordingly, a majority of the routes that Waste Management must divest serve a mixture of small container commercial customers and residential customers. The package of routes to be divested produces annual revenues roughly equivalent to the \$2 million in annual revenues generated by all of Waste Management's small container commercial accounts in Pitkin County, Colorado and Garfield County, Colorado.

2. *Myrtle Beach, South Carolina Area and Augusta, Georgia Area*

In the Myrtle Beach, South Carolina and Augusta, Georgia areas, the United States determined that competition would be best maintained by requiring a combination of divestiture and contract relief. The divestiture relief in the Myrtle Beach, South Carolina and Augusta, Georgia areas requires Waste Management to divest all but one of Allied's small container commercial waste collection routes in each area. The divestitures of these routes to a new, independent, and economically viable competitor will help to eliminate the anticompetitive effects of the acquisition in small container commercial waste collection in the Myrtle Beach, South Carolina and Augusta, Georgia areas by creating a competitor capable of restoring competition that otherwise would have been lost.

Because these divestitures alone will not fully eliminate the anticompetitive effects of the acquisition in each area, they are augmented by decree provisions that obligate Waste Management to alter all of its contracts with its small container commercial waste customers. The new contracts are less restrictive in duration, renewal terms, and the liquidated damages imposed on a customer who wishes to switch its service to a new hauler. Contract relief is significant because it lowers entry barriers and effectively enables smaller competitors to grow and new competitors to enter. This contract relief will make it easier for customers to consider competitive alternatives, easier for existing small haulers to compete and expand in the future, and more difficult for incumbent haulers to price discriminate successfully. The contract provisions also make it easier for new haulers to enter a market, and raise the prospect that the markets will become less concentrated and more competitive than they were pre-acquisition by enabling smaller firms to compete for customers under contract with incumbent hauling firms.

Waste Management's implementation of the contract relief specified in the proposed Final

Judgment should permit the purchaser of the divested assets, and other competitors, to maintain efficient routes and gain customers more easily if Waste Management seeks to raise prices in these markets. The combined route divestitures and contract relief sought in the Myrtle Beach, South Carolina area and Augusta, Georgia area, will ensure that consumers of small container commercial waste collection services will continue to receive the benefits of competition.

3. *Morris County, New Jersey and Bergen and Passaic Counties, New Jersey*

The proposed Final Judgment requires partial divestitures of the Allied small container commercial waste collection assets being acquired by Waste Management in Morris County, New Jersey and in Bergen and Passaic Counties, New Jersey. The proposed acquisition raised competitive concerns in these areas based upon the significant post-acquisition market concentration and Waste Management's post-acquisition market share. The United States, however, determined that partial divestitures of Allied's small container commercial waste collection routes would be acceptable in each area in light of the other, albeit less substantial, third-party competitors located therein. In addition, the post-acquisition market concentrations identified in Morris County, New Jersey and Bergen and Passaic Counties, New Jersey were lower than those found in other areas addressed in the proposed Final Judgment. These divestitures will ensure that consumers of small container commercial waste collection services in Morris County, New Jersey and Bergen and Passaic Counties, New Jersey will continue to receive the benefits of competition – lower prices and better service.

B. *Disposal of Municipal Solid Waste in the Bergen and Passaic Counties, New Jersey Disposal Area and the Tulsa and Muskogee, Oklahoma Area*

1. *Bergen and Passaic Counties, New Jersey Disposal Area*

Waste Management's proposed acquisition of two Allied transfer station disposal facilities

in Bergen County, New Jersey raised significant concerns about the availability of sufficient disposal capacity for haulers of MSW generated in Bergen and Passaic Counties, New Jersey. To remedy the anticompetitive effects of the proposed acquisition, the proposed Final Judgment requires Waste Management to divest the Garofalo Transfer Station in Garfield, New Jersey and the Chestnut Ridge Solid Waste Transfer Station in Chestnut Ridge, New York. In addition to the divestitures, the proposed Final Judgment requires that Waste Management sell throughput disposal rights to a third party at the New Jersey Meadowlands Commission's HMDC Transfer Station for the remainder of Waste Management's current lease, and if the lease is renewed, for the duration of the period in which Waste Management has contractual rights to operate the facility, not to exceed the termination date of the proposed Final Judgment. Collectively, the throughput disposal rights and divestitures provide haulers of MSW generated in Bergen and Passaic Counties, New Jersey with a range of options providing at least 1,200 tons per day of uncommitted MSW disposal capacity. In the event that Waste Management is unable to divest the Chestnut Ridge Solid Waste Transfer Station by the date specified in the proposed Final Judgment, it will, in the alternative, divest one of three Bergen County, New Jersey transfer stations. The divestiture and throughput disposal provisions of the proposed Final Judgment will fully eliminate the anticompetitive effects of the acquisition for MSW disposal services in the Bergen and Passaic Counties, New Jersey disposal area.

The proposed Final Judgment requires that all divested assets be acquired by a new, independent, and economically viable competitor. The proposed relief will thereby ensure that users of disposal services in these areas will continue to receive the benefits of competition.

2. *Tulsa and Muskogee, Oklahoma Area*

Defendants agreed to exclude from the transaction the proposed sale of all waste-hauling and disposal assets in the Tulsa and Muskogee, Oklahoma area in light of concerns expressed by the United States regarding the increased concentration in MSW disposal that would occur. The proposed Final Judgment requires Waste Management to provide written notice to the United States at least 30 days in advance of its acquisition of any landfill located within 25 miles of the city of Tulsa, Oklahoma or the city of Muskogee, Oklahoma. If Waste Management again proposes to acquire the Porter Landfill originally scheduled to be purchased in this transaction, the notice required from Waste Management shall also include the additional information specified in the proposed Final Judgment. The proposed Final Judgment thus maintains the pre-acquisition structure of MSW disposal competition in the Tulsa and Muskogee, Oklahoma area, and thereby ensures that users of disposal services in the area will continue to receive the benefits of competition

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act (15 U.S.C. § 16(a)), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the Defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States, New Jersey, and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial

on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Waste Management's acquisition of certain Allied voting securities and assets. The United States is satisfied, however, that the divestiture of assets and the contract relief described in the proposed Final Judgment will preserve competition for small container commercial waste collection services and MSW disposal in the relevant markets identified by the United States.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider:

- (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
- (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the United States Court of Appeals for the D.C. Circuit held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm

third parties. *See United States v. Microsoft*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).¹ Rather,

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-Am. Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Case law requires that

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether

¹ *See also United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6535, 6538.

the settlement is "*within the reaches of the public interest* ." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted)²

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first

² *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.* at 1459-60.

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 22, 2003

Respectfully submitted,

/s/

Michael K. Hammaker
DC Bar No. 233684
U.S. Department of Justice
Antitrust Division, Litigation II Section
1401 H Street, NW, Suite 3000
Washington, DC 20530
(202) 307-0938

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon Waste Management, Inc., Allied Waste Industries, Inc., and the State of New Jersey by placing a copy of this Competitive Impact Statement in the U.S. mail, first class and postage prepaid, directed to each of the above-named parties at the addresses given below, this 22nd day of July, 2003.

Counsel for Defendant Waste Management, Inc.

James R. Weiss
Preston Gates Ellis & Rouvelas Meeds LLP
1735 New York Avenue, NW, Suite 500
Washington, DC 20006
(202) 628-1700

Counsel for Defendant Allied Waste Industries, Inc.

Tom D. Smith
Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001-2113
(202) 879-3971

Counsel for Plaintiff State of New Jersey

/s/

Michael K. Hammaker
DC Bar No. 233684
U.S. Department of Justice
Antitrust Division, Litigation II Section
1401 H Street, NW, Suite 3000
Washington, DC 20530
(202) 307-0938