

**CERTIFICATION
OF THE FEBRUARY 25, 2010
AMENDMENT TO THE ESSEX COUNTY
DISTRICT SOLID WASTE MANAGEMENT PLAN**

BY ORDER OF THE COMMISSIONER:

A. Introduction

The New Jersey Solid Waste Management Act (N.J.S.A. 13:1E-1 et seq.) established a comprehensive system for the management of solid waste in New Jersey. The Act designated all twenty-one (21) of the state's counties, and the Hackensack Meadowlands District, as Solid Waste Management Districts, and mandated that the Boards of Chosen Freeholders and the Hackensack Meadowlands Development Commission (now known as the New Jersey Meadowlands Commission) develop comprehensive plans for waste management in their respective districts. On August 13, 1980, the Department of Environmental Protection (Department or DEP) approved, with modifications, the Essex County District Solid Waste Management Plan (County Plan).

The Act further provides that a district may review its County Plan at any time and, if found inadequate, a new County Plan must be adopted. The Essex County Board of Chosen Freeholders (County Freeholders) completed such a review and on February 24, 2010 adopted an amendment to its approved County Plan. Said amendment was approved by the Essex County Executive (County Executive) on February 25, 2010.

The February 25, 2010 amendment proposes County Plan inclusion of:

- The five-year extension of the Waste Disposal Agreement by and between the Essex County Utilities Authority (ECUA) and the Port Authority of New York & New Jersey (Port Authority) for the transfer, transportation, and disposal of municipal processible solid waste types 10, 23, 25, and 27 generated within the County and
- The direction of all municipal processible solid waste types 10, 23, 25, and 27 to the Essex County Resource Recovery Facility (ECRRF) in the City of Newark for the term of the above noted extension.

The amendment was considered administratively complete for review by the Department on April 5, 2010 and copies were distributed to various administrative review agencies for review and comment, as required by law. The Department has reviewed this amendment, and has determined that the amendment adopted by the County Freeholders on February 24, 2010 and approved by the Essex County Executive on February 25, 2010 is remanded, without prejudice.

B. Findings and Conclusions with Respect to the Essex County District Solid Waste Management Plan Amendment

Pursuant to N.J.S.A. 13:1E-24a(1), I have studied and reviewed the February 25, 2010 amendment to the County Plan according to the objectives, criteria, and standards developed in the Statewide Solid Waste Management Plan and I find and conclude that the amendment is neither consistent nor inconsistent with the Statewide Solid Waste Management Plan. In this regard, the County Freeholders are notified of the elements relative to the February 25, 2010 amendment which are included below.

Elements of the February 25, 2010 Amendment

Element: Facility History

On July 1, 1981, the Essex County Board of Chosen Freeholders adopted an amendment to the County Plan to include within it the designated site in the City of Newark for the ECRRF. This County Plan amendment was certified as approved by the Department on December 31, 1981.

On October 1, 2008, the ECUA submitted a request for administrative action to the Department proposing County Plan inclusion of, amongst other things, the ECRRF, located on Block 5000/5001, Lots 28, 30, 20, 29, 18, 32, 34, 36, 40, 50, 52, 35A, 60, 60A, 80, 80A, 90, and 92 at 183 Raymond Boulevard in the City of Newark. The October 1, 2008 request for administrative action to the County Plan proposed to include this facility in the County Plan for the acceptance of 985,500 tons per year of solid waste types 10, 23, and the processible portion of type 27 and identified the operating hours for the acceptance of solid waste as 24 hours per day, Monday through Saturday and for the processing of solid waste as 24 hours per day, Monday through Sunday. This request for administrative action was approved by the Department on October 15, 2008.

Element: County Plan Inclusion of Regulatory Flow Control Over Solid Waste Types 10, 23, 25, and 27

In response to the May 1, 1997 decision of the United States Court of Appeals for the Third Circuit which declared unconstitutional New Jersey's historic system of solid waste flow control [See Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County et al. 112 F . 3d 652 (3d Cir. 1997, cert. den., November 10, 1997)], Essex County has employed a bifurcated system of solid waste disposal for processible (waste types 10, 23, 25, and the processible portion of waste type 27) waste.

Firstly, the ECUA entered into an agreement (Waste Disposal Agreement) with the Port Authority for the disposal of processible waste generated within the County at the ECRRF in the City of Newark. As a result of the terms of the Waste Disposal Agreement, which expired on January 31, 2010, regarding guaranteed delivery of specific quantities of processible waste, the ECUA entered into voluntary contracts with each of the County's municipalities to provide for the disposal of processible waste at the ECRRF.

Secondly, on June 20, 2001, the County Board of Chosen Freeholders adopted an amendment to the County Plan which proposed County Plan inclusion of regulatory flow control over the portion of processible waste generated at commercial establishments within the County not delivered to the ECRRF pursuant to a voluntary contract. This waste is referred to throughout this certification as the "non-contract waste". The June 20, 2001 amendment to the County Plan, directed the subject waste to the Waste Management of New Jersey, Inc. (WMNJI) Transfer Station/Material Recovery Facility (TS/MRF), located at 864 Julia Street in the City of Elizabeth, Union County, based on a non-discriminatory procurement process. This amendment to the County Plan was certified as approved by the Department on December 22, 2001.

This strategy of waste flow over non-contract waste was reaffirmed in December 5, 2007 and December 22, 2009 amendments to the County Plan, which again directed said waste to the WMNJI TS/MRF located on Julia Street in the City of Elizabeth based on non-discriminatory procured contracts by and between the ECUA and WMNJI. These amendments to the County Plan were certified as approved by the Department on May 14, 2008 and May 19, 2010 respectively.

Element: Solid Waste Flow Control

The February 25, 2010 amendment proposes County Plan inclusion of:

- The five-year extension of the Waste Disposal Agreement by and between the ECUA and the Port Authority for the transfer, transportation, and disposal of municipal processible solid waste types 10, 23, 25, and 27 generated within the County and
- The direction of all municipal processible solid waste types 10, 23, 25, and 27 to the ECRRF in the City of Newark for the term of the above noted extension.

The proposed waste flow direction may be appropriate under the recent U.S. Supreme Court decision in United Haulers Association v. Oneida Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007). In Oneida Herkimer, a group of solid waste haulers challenged county flow control ordinances under the Commerce Clause of the U.S. Constitution; the challenged ordinances directed waste to a facility run by a public authority. In its decision, the Court stated that the direction of solid waste to a facility owned by a public authority places only an incidental burden on interstate commerce that is outweighed by its public purpose and is thus permissible under the Commerce Clause; however, a clear environmental benefit of the waste flow direction was noted as a critical reason for the Court's finding.

The February 25, 2010 amendment to the County Plan fails to demonstrate that the direction of all municipal processible solid waste types 10, 23, 25, and 27 to the ECRRF provides a clear public benefit to the generators of solid waste within the County as compared to going out to bid and awarding a disposal contract to the lowest bidder.

Although the Department is committed to the premise of solid waste flow control in New Jersey and Essex County, that flow must be legally defensible. Thus, in order for the DEP to approve solid waste flow control within Essex County based on Oneida Herkimer (as opposed to a non-discriminatory bid process), the County must supply it with additional information as to how the above noted extension of the Waste Disposal Agreement and solid waste flow direction comport with the subject U.S. Supreme Court decision. It must also be noted that the Department has no objections to the concept of the extension of the above noted Waste Disposal Agreement, but inasmuch as the extension of said Agreement and the direction of all municipal processible waste types to the ECRRF are inexorably linked, the Department must remand both elements of the February 25, 2010 amendment to the County Plan.

The information requested of the County in the preceding paragraph may be submitted to the Department as an administrative action, pursuant to N.J.A.C. 7:26-6.11 et seq.

Element: Disposal of Solid Waste Type 25

During the review phase of the planning process, the Department's Bureau of Recycling and Planning (Bureau) submitted comments regarding the proposed direction of all municipal processible solid waste types to the ECRRF. The Bureau's comments noted that the ECRRF is not currently permitted to accept solid waste type 25. ID 25 waste is defined as animal and food processing wastes at N.J.A.C. 7:26-2.13(g). Therefore, solid waste type 25 generated within Essex County will remain free market (allowed to be taken to any disposal facility authorized to accept such waste) until the County proposes County Plan inclusion of a waste flow direction to a disposal facility which is permitted to accept such waste is proposed by the County and approved by the Department. Any such County Plan inclusion would have to be accomplished as a plan amendment, pursuant to N.J.A.C. 7:26-6.10.

C. Certification of the Essex County District Solid Waste Management Plan Amendment

In accordance with N.J.S.A. 13:1E-1 et seq., specifically N.J.S.A. 13:1E-21, which establishes specific requirements regarding the contents of the county solid waste management plans, I have reviewed the February 25, 2010 amendment to the approved County Plan and certify to the County Freeholders that the February 25, 2010 amendment is remanded, without prejudice, as further specified below.

The February 25, 2010 amendment proposing County Plan inclusion of:

- The five-year extension of the Waste Disposal Agreement by and between the ECUA and the Port Authority for the transfer, transportation, and disposal of municipal processible solid waste types 10, 23, 25, and 27 generated within the County and
- The direction of all municipal processible solid waste types 10, 23, 25, and 27 to the ECRRF in the City of Newark for the term of the above noted extension is remanded, without prejudice.

D. Other Provisions Affecting the Plan Amendment

1. Compliance

All solid waste facility operators and transporters registered with the Department and operating within the County and affected by the amendment contained herein shall operate in compliance with this amendment and all other approved provisions of the County Plan. Any facility operator or transporter who fails to comply with the provisions contained herein shall be deemed to be in violation of N.J.S.A. 13:1E-1 et seq., in violation of N.J.A.C. 7:26-1 et seq., and in violation of their registration to operate a solid waste facility or a collection system issued thereunder by the Department and shall be subject to the provisions and penalties of N.J.S.A. 13:1E-9 and 12 and all other applicable laws.

2. Certification to Proceed with Implementation of Amendment

This document shall serve as the certification of the Commissioner of the Department to the County Freeholders and pursuant to N.J.S.A. 13:1E-24c. and f., the County Freeholders shall proceed with the implementation of the approved components of the amendment certified herein.

3. Definitions

For the purpose of this amendment and unless the context clearly requires a different meaning, the definitions of terms shall be the same as those found at N.J.S.A. 13:1E-3 and -99.12, N.J.A.C. 7:26-1.4, -2.13, and N.J.A.C. 7:26A-1.3.

4. Effective Date of Amendment

The approved components of the amendment to the County Plan contained herein shall take effect immediately.

5. Reservation of Authority

Nothing contained herein shall be construed as a limitation on any other action taken by the Department pursuant to its authority under the law. The County Plan, including any amendment made thereto, shall conform with the Statewide Solid Waste Management Plan, with appendices, which includes the Department's planning guidelines, rules, regulations, orders of the Department, and also includes the compilation of individual district plans and amendments as they are approved.

E. Certification of Approval of the Amendment by the Commissioner of the Department of Environmental Protection

In accordance with the requirements of N.J.S.A. 13:1E-1 et seq., I hereby remand the amendment, without prejudice, as outlined in Section C. of this certification, to the Essex County District Solid Waste Management Plan which was adopted by the Essex County Board of Chosen Freeholders on February 24, 2010 and approved by the Essex County Executive on February 25, 2010.

August 26, 2010

Date

Bob Martin, Commissioner
Department of Environmental Protection