

*This is a copy of the August 18, 1999 Certification of the Admendment to the Essex County District Solid Waste Management Plan signed by Commissioner Robert C. Shinn Jr. on December 15, 1999.*

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**IN THE MATTER OF CERTAIN AMENDMENTS  
TO THE ADOPTED AND APPROVED SOLID  
WASTE MANAGEMENT PLAN OF THE  
ESSEX COUNTY SOLID WASTE  
MANAGEMENT DISTRICT.**

**CERTIFICATION  
OF THE AUGUST 18, 1999  
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 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 requires that all district plans be based on and accompanied by a report detailing the existing waste disposal situation in the district, and a plan which includes the strategy to be followed by the district in meeting the solid waste management needs of the district for a ten-year planning period. The report must detail the current and projected waste generation for the district, inventory and appraise all facilities in the district, and analyze the waste collection and transportation systems which serve the district. The disposal strategy must include the maximum practicable use of resource recovery techniques. In addition to this strategy, the plan must designate sufficient available suitable sites for the disposal of the district's waste for a ten-year period.

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 August 18, 1999, adopted an amendment to its approved County Plan.

The amendment represents the County's supplemental 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]. Specifically, each solid waste management district must reevaluate its solid waste disposal strategy in light of this recent court decision and, if necessary, initiate appropriate amendments thereto.

In general, the Department refers the County to the solid waste regulations at N.J.A.C. 7:26-1 et seq.

to the extent they relate to specific procedural and substantive issues addressed in this and subsequent amendments. In addition, this certification is in no way intended by the DEP to represent a legal determination regarding the effect of the Atlantic Coast decision on any specific contract between public and/or private parties.

The August 18, 1999 amendment proposes (1) a revised disposal strategy concerning processible solid waste generated from within Essex County in response to the Atlantic Coast decision and (2) the assessment and collection of an Environmental Investment Charge (EIC).

The amendment was received by the Department on August 31, 1999 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 August 18, 1999 is approved in part and modified in part as provided in N.J.S.A. 13:1E-24.

### **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 August 18, 1999 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 this plan amendment, as modified, is consistent with the Statewide Solid Waste Management Plan. In this regard, the County Freeholders are notified of the issues of concern relative to the 1999 Amendment which are included in Section B.2. below.

In conjunction with the review of the amendment, the Department circulated copies to fifteen administrative review agencies and solicited their review and comment. Pursuant to N.J.S.A. 13:1E-24a(2) and (3), these agencies included various bureaus, divisions, and agencies within the Department. All agencies contacted are as follows:

Division of Water Quality Management, DEP  
 Division of Parks and Forestry, DEP  
 Division of Fish, Game and Wildlife, DEP  
 Division of Compliance and Enforcement, DEP  
 Division of Solid and Hazardous Waste, DEP  
 Office of Air Quality Management, DEP  
 Green Acres Program, DEP  
 |Land Use Regulation Element, DEP  
 New Jersey Turnpike Authority  
 New Jersey Advisory Council on Solid Waste Management  
 Department of Agriculture  
 Department of Health and Senior Services  
 Department of Transportation  
 Department of Community Affairs|  
 U.S. Environmental Protection Agency

#### **1. Agency Participation in the Review of the August 18, 1999 Amendment**

The following agencies did not object to the proposed amendment:

Division of Water Quality, DEP  
Division of Compliance and Enforcement, DEP  
Green Acres Program, DEP  
Land Use Regulation Element, DEP  
Department of Agriculture  
Department of Transportation  
New Jersey Advisory Council on Solid Waste Management  
New Jersey Turnpike Authority

The following agencies did not respond to our requests for comment:

Division of Parks and Forestry, DEP  
Division of Fish, Game and Wildlife, DEP  
Office of Air Quality Management, DEP  
Department of Health  
Department of Community Affairs  
U.S. Environmental Protection Agency

The following agency provided substantive comments as shown in Section B. of the certification document:

Division of Solid and Hazardous Waste, DEP

## **2. Issues of Concern Regarding the August 18, 1999 Amendment**

### **Issue: Prior Disposal Strategy**

On August 19, 1998 the County Freeholders adopted an amendment ("1998 Amendment") which proposed that the Essex County Utilities Authority (ECUA) would re-establish regulatory flow control over both processible and nonprocessable solid waste following the nondiscriminatory procurement of transfer, transportation, and/or disposal services. Following the execution of a procurement process, the ECUA determined that the lowest responsible bidder for nonprocessable waste disposal services was Waste Management of New Jersey, Inc. Consequently, on July 9, 1998 the ECUA awarded a contract to Waste Management of New Jersey, Inc. (WMNJ) for the transfer, transportation, and/or disposal of all nonprocessable solid waste generated within Essex County at its facility located at 666 Front Street in Elizabeth, Union County.

However, at the time of adoption of the 1998 Amendment, the ECUA had not completed the nondiscriminatory procurement process for processible solid waste disposal services. Two alternative disposal strategies were presented, both premised upon regulatory flow control. The 1998 Amendment acknowledged that the proposed strategy for the disposal of processible solid waste depended on the outcome of a pending judicial action on the validity of existing disposal contracts. On September 11, 1998 the Court granted partial summary judgment to the ECUA/County. In this ruling, the ECUA's Motion for Summary Judgment was adjourned pending implementation of the proposed strategy for processible waste detailed below. In its December 2, 1998 certification of the 1998 Amendment, the DEP approved the nondiscriminatory procurement process for nonprocessable waste executed by the County, and the subsequent direction of all waste types 13 and 13C, the nonrecycled portion of type 23, the nonprocessable portion of type 27, and bypass waste generated from within Essex County to the WMNJ transfer station/material recovery facility. Also, the DEP

approved with modification both alternative disposal strategies for processible waste contingent upon the receipt and approval by the DEP of a subsequent administrative action specifying which disposal strategy would be implemented. The August 18, 1999 amendment proposes a revised disposal strategy for processible solid waste based on a competitive, market-based system which negates the two initial alternatives proposed in the 1998 Amendment.

### **Issue: Revised Disposal Strategy**

The August 18, 1999 amendment proposes the implementation of a new solid waste system for the estimated 625,000 tons of solid waste generated within Essex County. The revised system has three components which include:

- \* re-establishment of regulatory flow control to the WMNJ facility in Elizabeth for waste types 13, 23, and 27 which comprises approximately 125,000 tons per year or 20% of County waste (this component was previously approved by the DEP within its December 2, 1998 certification);
- \* voluntary contracts providing for the disposal of processible waste at the Essex County Resource Recovery Facility (ECRRF) for a 10 year period comprising an estimated 350,000 tons per year or 56% of County waste; and
- \* establishment and collection of an EIC for all type 10 waste generated within Essex County that will not be disposed at the ECRRF pursuant to voluntary contracts comprising an estimated 150,000 tons per year or 24% of the County's waste.

Concerning the disposal of processible solid waste, the ECUA proposes to restructure its existing contractual relationship with the Port Authority of New York and New Jersey. Specifically, pursuant to a waste disposal agreement with the Port Authority, the ECUA shall offer to execute voluntary contracts with each of the County's twenty-one municipalities (and the County with respect to County related facilities) and all commercial transporters servicing Essex County customers for the disposal at the ECRRF of processible solid waste generated within the County. The ECUA intends to offer similar contracts to transfer stations, public entities located outside the geographic boundaries of the County, and/or commercial transporters. The contracts with municipalities that presently provide waste collection services (either through municipal collection or through collection contracts with a private transporter) will require the municipality to deliver (or cause to be delivered by a private transporter pursuant to a contract with the municipality) all processible waste collected by or on behalf of a municipality to the ECRRF and will impose minimum delivery guarantees based upon the average number of tons per year of municipal waste, excluding recyclables, that the municipality has delivered to the ECRRF from 1994 to 1996, inclusive. The contracts with commercial transporters servicing the Essex county customers will also include minimum delivery guarantees and will permit the delivery of processible waste to the ECRRF. Within Section C. of this certification, the County's strategy of offering voluntary contracts to municipalities and commercial transporters servicing Essex County customers for disposal of processible solid waste at the ECRRF is approved.

### **Issue: Assessing the Environmental Investment Charge**

The ECUA has incurred debt in developing the Essex County solid waste system, and will continue to incur certain costs in maintaining a system to adequately manage all the waste generated within the County. The August 18, 1999 amendment proposes that the ECUA will assess and collect an EIC in an amount sufficient to pay off this existing debt and for certain operating expenses, including administrative and enforcement expenses, to ensure the proper monitoring, weighing, and delivery of Essex County generated solid waste. The EIC will be assessed on a per ton basis to generators who

choose not to deliver solid waste to the ECRRF on a voluntary basis.

The ECUA recently refinanced its outstanding debt and issued new bonds in excess of \$75 million. Additionally, the ECUA has reached a settlement with the Port Authority on all claims related to the County Service Contract (which directed all processible waste generated from within Essex County to the ECRRF), provided that the ECUA contracts to deliver 350,000 tons per year of solid waste to the ECRRF for a 10 year period. The Port Authority's settlement amount is composed of three principal elements:

- \*cash payment of \$15 million
- \*annual payments of \$500,000 beginning in 2008 and continuing for 10 years, and
- \*.50% added to the tipping fee escalator factor.

Settlement charges are proposed to be funded by the ECUA from solid waste system revenues and from proceeds from the collection of the EIC. In order to fund other settlement related costs, the ECUA intends to issue not more than \$36.5 million of bonds. All solid waste system costs are allocated pro-rata among the 3 system components shown above on pages 4 and 5 since debt and administrative costs are being recovered from service charges collected under flow controlled nonprocessable waste delivered to the WMNJ facility and the voluntary delivery of processible waste to the ECRRF. The EIC has been calculated as a fixed amount equal to the dollars required under the solid waste system's life (23 years) divided by the total EIC tons in the system, or 150,000 tons per year, as follows:

Debt Service	\$11.38 per ton
Settlement Charges	\$ .68 per ton
Enforcement	\$ 3.08 per ton
ECUA Administration	<u>\$ 1.37 per ton</u>
Total EIC	\$16.52 per ton

Finally, the 1999 Amendment proposes that in response to interest rate movements or other unexpected costs, an increase in the amount of the EIC of up to 10%, or up to \$18.17 per ton, may be made in the future through the administrative action approval process.

The ECUA has proposed an EIC which would remain at a constant level for the 23 year term of the bonds although the actual amount of debt service to be paid escalates upwards and levels off. This collection strategy has the net effect of overcollecting of debt service in the first few years of the EIC and undercollection in the last few years. A levelized EIC is comparable to the levelized fuel adjustment clauses utilized by gas utilities and which are a "widely used and judicially accepted" method of estimating average costs over a specific period of time and allow for "subsequent periodic adjustments to reflect actual costs when ascertained." Application of Rockland Electric, 231 N.J. Super. 478, 484 (App. Div.), certif. denied, 117 N.J. (1989). See also, In re Jersey Central Power & Light Co. Petition, 85 N.J. 520, 524 (1981). In cases involving fuel adjustment clauses, the Board of Public Utilities (BPU) considers it prudent to periodically require true-ups from the utility to review the performance and the status of the charges. Similarly, in this case, the DEP considers it prudent to require the same of the ECUA with respect to the proposed EIC, particularly in view of its 23 year duration. Accordingly, the DEP will require annual true-ups from the ECUA to review the status of the collection of the EIC, and consequently, identify changes that should be made to the amount of EIC being assessed. The Department finds that the levelized EIC, in combination with a true-up

provision, will have a benefit to the public as well as to the ECUA. The ECUA will be able to predict its charges and to pay its debt service and the public will benefit from lowered costs due to reduced filings before the Department. Therefore, within Section C. of this certification, the DEP approves with modification the assessment of the \$16.52 per ton EIC contingent upon the ECUA conducting true-ups on an annual basis. If, after completion of any annual true-up, the ECUA determines that an increase of 4% or more in the amount of the EIC being assessed is required, then such modified EIC must be submitted to the Department via administrative action (pursuant to N.J.A.C. 7:26-6.11(b)10.) for review and approval. The 4% threshold is consistent with BPU practice and supersedes the "up to 10%" proposal contained within the August 18, 1999 amendment.

#### **Issue: Collecting the Environmental Investment Charge**

The ECUA has determined that the most effective method to impose and collect the EIC is to assess the EIC based upon actual tonnages of Essex County generated solid waste delivered to solid waste facilities as determined from daily records that are required to be maintained by solid waste facilities and made available for inspection in accordance with N.J.A.C. 7:26-2.13(a). The County/ECUA will utilize such records for the billing and collection of the EIC from the companies collecting such processible waste from those generators who have not executed voluntary contracts for the use of the ECRRF.

Pursuant to N.J.A.C. 7:26-2.13(b), this daily record shall be available for inspection by representatives of the Department or county lead agency certified by the DEP pursuant to N.J.S.A. 26:3A-2 (County Environmental Health Act or CEHA) for any county from which solid waste is received. The Essex County Health Department is the certified CEHA agency for Essex County. Therefore, the Essex County Department of Health or its lawful designee is authorized to conduct facility records inspections.

The 1999 Amendment lacks specifics on how the County will compile the tonnage data and collect the EIC. To obtain this information, counsel to the County was contacted. Counsel provided the following clarification. "The County intends to (i) identify those solid waste facilities accepting Essex County solid waste as determined from monthly summary reports required to be provided to DEP by the solid waste facilities; (ii) inspect and copy on a regular basis the daily records of those identified facilities; and (iii) bill on a monthly basis every transporter identified in the daily records as disposing of Essex County solid waste at such facilities in an amount equal to the number of tons so disposed (as determined from the daily records) times Essex County's authorized EIC." Provided with this clarification, within Section C. of the certification the Department approves this method for collection of the EIC.

#### **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 district solid waste management plans, I have reviewed the August 18, 1999 amendment to the approved County Plan and certify to the County Freeholders that the August 18, 1999 amendment is approved in part and modified in part as further specified below.

The County Plan inclusion of the revised solid waste disposal strategy for processible waste encompassing a free market system for delivering waste to the ECRRF pursuant to voluntary contracts is approved.

The County Plan inclusion of the assessment of a \$16.52 per ton EIC for all processible solid waste not delivered to the ECRRF pursuant to voluntary contracts is approved with modification. Specifically, as noted within Section B., due to the long-term duration of the EIC, the DEP is requiring the ECUA to conduct true-ups on an annual basis. If, after completion of any annual true-up, the ECUA determines that an increase of 4% or more in the amount of EIC being assessed is required, then such modified EIC must be submitted to the DEP via administrative action for review and approval.

The County Plan inclusion of the strategy for collecting the EIC based upon actual tonnages of solid waste to be determined from daily records maintained by facilities accepting Essex County generated waste is approved.

#### **D. Other Provisions Affecting the Plan Amendment**

##### **1. Contracts**

Any contract renewal or new contract for solid waste collection or disposal which is inconsistent with this amendment to the County Plan and which was executed prior to the approval of this amendment and subsequent to the effective date of the Solid Waste Management Act (July 29, 1977), and which shall further be for a term in excess of one year, shall immediately be renegotiated in order to bring same into conformance with the terms and provisions herein set forth. Any solid waste collection operation or disposal facility registered by the Department and operating pursuant to a contract as herein described, shall be deemed to be in violation of this amendment and of the County Plan if such renegotiation is not completed within ninety (90) days of the effective date of this amendment provided, however, that any such registrant may, upon application to the Department, and for good cause shown, obtain an extension of time to complete such renegotiation.

##### **2. 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.

##### **3. Types of Solid Wastes Covered by the District Solid Waste Management Plan**

The provisions of the County Plan shall apply to all solid wastes defined in N.J.S.A. 13:1E-3 and N.J.A.C. 7:26-2.13 including waste types 10, 13, 23, 25, and 27 and all applicable subcategories and shall not apply to liquid and hazardous wastes. All nonhazardous materials separated at the point of generation for sale or reuse are subject to regulation in accordance with N.J.A.C. 7:26A-1 et seq.

##### **4. Certification to Proceed with the Implementation of the Plan 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 shall proceed with the

implementation of the approved amendment, as modified, certified herein.

**5. 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.

**6. Effective Date of the Amendment**

The approved amendment, as modified, to the County Plan contained herein shall take effect immediately.

**7. 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 and Modification 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 approve in part and modify in part the amendment, 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 August 18, 1999.

12/15/1999  
Date

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Robert C. Shinn, Jr., Commissioner  
Department of Environmental Protection