

**CERTIFICATION
OF THE FEBRUARY 15, 2007
AMENDMENT TO THE UNION 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 or NJMC) develop comprehensive plans for waste management in their respective districts. On August 13, 1980, the Department of Environmental Protection (Department or DEP) approved the Union County District Solid Waste Management Plan (County Plan).

The Act further provides that a district may review its District Plan at any time and, if found inadequate, a new District Plan must be adopted. The Union County Board of Chosen Freeholders (County Freeholders) completed such a review and on February 15, 2007 adopted an amendment to its approved County Plan. The February 15, 2007 amendment proposes County Plan inclusion of:

- 1) the Canadian Pacific Railway (CP) Transload Facility, located on Block 5088, Lot 60 at 91 Bay Avenue in the City of Newark, Essex County, as the County's designated facility to which solid waste types 13, 13C, 23, and 27 are directed;
- 2) the contract by and between the Union County Utilities Authority (UCUA) and CP for solid waste disposal services of solid waste types 13, 13C, 23, and 27; and
- 3) the direction, via regulatory flow control, of solid waste types 13, 13C, 23, and 27 generated within Union County to the CP Transload Facility in the City of Newark, Essex County.

The amendment was considered administratively complete for review by the Department on April 25, 2008 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 15, 2007 is approved as provided in N.J.S.A. 13:1E-24.

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

Pursuant to N.J.S.A. 13:1E-24a(1), I have studied and reviewed the February 15, 2007 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 consistent with the Statewide Solid Waste Management Plan. In this regard, the County Freeholders are notified of the elements of the February 15, 2007 amendment, which are included below.

Elements of the February 15, 2007 Amendment

Element: County Plan Inclusion of Regulatory Flow Control Over Solid Waste Types 13, 13C, 23, and 27 to the CP Transload Facility

The February 15, 2007 amendment is proposing County Plan inclusion of:

- 1) the CP Transload Facility, located on Block 5088, Lot 60 at 91 Bay Avenue in the City of Newark, Essex County, as the County's designated facility to which solid waste types 13, 13C, 23, and 27 are directed;
- 2) the contract by and between the UCUA and CP for solid waste disposal services of solid waste types 13, 13C, 23, and 27; and
- 3) the direction, via regulatory flow control, of solid waste types 13, 13C, 23, and 27 generated within Union County to the CP Transload Facility in the City of Newark, Essex County.

On September 25, 2006, the UCUA issued bid specifications calling for receipt of bids on October 20, 2006 for the provision of disposal services for solid waste types 13, 13C, 23, and 27 generated within Union County. The request for bids was advertised locally in The Home News & Tribune, throughout New Jersey utilizing The Star Ledger, regionally in The Philadelphia Enquirer, and nationally in Waste News. Therefore, this procurement process was open to all bidders, regardless of geographical location. The UCUA received six bids. The County determined that Delaware and Hudson Railway Company, Inc. (DHRC) d/b/a Canadian Pacific Railway was the lowest complying and responsible bidder.

On May 25, 2007, New Jersey Superior Court Judge Honorable Marianne Espinosa ruled in *Waste Management of New Jersey v. Union County Utilities Authority*, Docket No. UNN-L-4449-06, that the UCUA was permanently enjoined from implementing the subject contract with DHRC. Among the reasons for the court's decision was the court's finding that the subject facility was not a rail facility subject to preemption under the Interstate Commerce Commission Termination Act, 49 U.S.C. 10101 *et seq.*, and therefore, the facility failed to meet the bid specifications because it lacked the requisite permits and approvals. DHRC appealed this final order.

The February 15, 2007 amendment to the County Plan was, as a result, certified as remanded, without prejudice, back to the County pending the outcome of the litigation.

On appeal, the Appellate Division vacated the court's permanent injunction that barred the UCUA from awarding the waste disposal contract to DHRC. *Waste Mgmt. of New Jersey, Inc. v. Union County Utils. Auth.*, 399 N.J. Super. 508 (App. Div. 2008). The Court's action was based on its determination that the record did not support a preliminary injunction. *Id.* at 519, 521. In so finding, the Court did not reach the issue of "whether or to what extent federal preemption precludes state regulation of DHRC's activities." *Id.* at 528. The Court remanded for consideration of whether to impose an interlocutory injunction, finding that "plaintiff failed to demonstrate a reasonable probability of success but that the circumstances as presently understood do not necessarily militate against the entry of an interlocutory injunction." *Id.* at 538-39. The Court did not foreclose the trial court from deferring to DEP under the principles of primary jurisdiction, and specifically noted that the trial court might determine that an injunction is not required because DEP would ultimately review DHRC's need for a permit and any final agency action would be subject to review.

On remand, after a conference call with the parties and by Order dated April 30, 2008, Superior Court Judge William Wertheimer stayed the proceedings pending DEP's statutory review of the County Plan amendment. DEP was accorded the full statutory period from the time of UCUA's resubmission of the County Plan amendment. DEP was further ordered to advise all parties upon completion of the agency's review.

Element: Facility Operations

On September 12, 2008, CP, CP's alleged agent TLA-Newark, LLC (TLA), and the Department entered into an Administrative Consent Order (ACO) resolving the parties' disputes regarding, among other things, the subject facility's operation in non-compliance with the Department's regulations at N.J.A.C. 7:26-2D.1 (2D Regulations), as well as the rail carrier status of the subject facility. The ACO sets forth a timetable for TLA to become the operator of the subject facility, and towards that end, to submit the necessary applications to obtain a Solid Waste Facility (SWF) Permit from the Department under the Solid Waste Management Act. Once a SWF Permit is obtained, TLA and CP agree that the subject facility will be subject to the full panoply of State law as a solid waste facility and TLA agrees to operate the subject facility in accordance with the SWF Permit and law. While the Permit application process is pending, CP has agreed to comply with the provisions of N.J.A.C. 7:26-2D.1 and N.J.A.C. 7:27-5.2(a), in accordance with the terms of the ACO. CP has further agreed to operate in accordance with the 2D Regulations if CP resumes operation at any time due to, for example, TLA's failure to receive the necessary Permit(s) and/or approval(s).

C. Certification of the Union 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 15, 2007 amendment to the approved County Plan and certify to the

County Freeholders that the February 15, 2007 amendment is approved as further specified below.

The February 15, 2007 amendment is proposing County Plan inclusion of:

- 1) the CP Transload Facility, located on Block 5088, Lot 60 at 91 Bay Avenue in the City of Newark, Essex County, as the County's designated facility to which solid waste types 13, 13C, 23, and 27 are directed;
- 2) the contract by and between the UCUA and CP for solid waste disposal services of solid waste types 13, 13C, 23, and 27; and
- 3) the direction, via regulatory flow control, of solid waste types 13, 13C, 23, and 27 generated within Union County to the CP Transload Facility in the City of Newark, Essex County, is approved.

This certification shall not be construed as an expression of the DEP's intent to issue a SWF Permit for any proposed facility or operation. The issuance of operating permits pursuant to the Solid Waste Management Act is limited to those applicants found by the DEP and the Attorney General of the State of New Jersey to be deserving of licensing under the provisions of N.J.S.A. 13:1E-126.

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. More particularly, to the extent that it operates as a rail carrier facility, certification of this Plan Amendment is conditioned upon the facility coming into, and maintaining compliance with, the provisions of N.J.A.C. 7:26-2D, in accordance with the timelines of the ACO for such compliance.

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 approve the amendment as outlined in Section C. of this certification, to the Union County District Solid Waste Management Plan which was adopted by the Union County Board of Chosen Freeholders on February 15, 2007.

September 18, 2008

Date

Lisa P. Jackson, Commissioner
Department of Environmental Protection