

This is a copy of the August 19, 1998 Certification of the Admendment to the Essex County District Solid Waste Management Plan signed by Commissioner Robert C. Shinn Jr. on December 2, 1998.

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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 19, 1998
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 19, 1998, adopted an amendment to its approved County Plan.

The amendment represents the County's initial 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

plan 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 19, 1998 amendment describes the County's disposal strategies concerning processible and nonprocessible waste generated from within Essex County in response to the Atlantic Coast decision.

The amendment was received by the Department on September 2, 1998, and copies were distributed to various administrative review agencies for review and comment, as required by law. The Department has reviewed this amendment on an expedited basis and has determined that the amendment adopted by the County Freeholders on August 19, 1998 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 19, 1998 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 August 19, 1998 amendment which are included in Section B.2. below.

In conjunction with the review of the amendment, the Department circulated copies to fifteen federal and state 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 Parks and Forestry, DEP
- Division of Fish, Game and Wildlife, DEP
- Division of Compliance and Enforcement, DEP
- Division of Solid and Hazardous Waste, DEP
- Division of Water Quality, 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
- Department of Transportation
- Department of Community Affairs
- U.S. Environmental Protection Agency

1. Agency Participation in the Review of the August 19, 1998 Amendment

The following agencies did not object to the proposed amendment:

Division of Compliance and Enforcement, DEP
 Division of Parks and Forestry, DEP
 Division of Water Quality, DEP
 Office of Air Quality Management, DEP
 New Jersey Turnpike Authority
 Department of Agriculture
 Department of Transportation
 Department of Community Affairs

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

Green Acres Program, DEP
 Division of Fish, Game and Wildlife, DEP
 Land Use Regulation Element, DEP
 Department of Health
 U.S. Environmental Protection Agency

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

Division of Solid and Hazardous Waste, DEP
 New Jersey Advisory Council on Solid Waste Management

2. Issues of Concern Regarding the August 19, 1998 Amendment

Issue: Prior Disposal Strategy

Prior to the November 10, 1997 denial of Certiorari in the Atlantic Coast case, all processible waste generated from within the County was directed to the Essex County Resource Recovery Facility (RRF) for disposal pursuant to the County Service Contract with the Port Authority of New York and New Jersey; all ash produced at the RRF was delivered to an out-of-state landfill for disposal pursuant to the Ash Disposal Contract with GROWS-Wills; and all nonprocessible waste and bypass waste was directed to the Solid Waste Transfer & Recycling, Inc. Transfer Station located in Newark in accordance with the Interdistrict and Intradistrict Solid Waste Flow Regulations (N.J.A.C. 7:26-6 et seq.). After the November 10, 1997 denial, disposal of waste generated within Essex County has been pursuant to the free market.

Issue: Nonprocessible Waste

The August 19, 1998 amendment proposes that the Essex County Utilities Authority (ECUA) will re-establish regulatory flow control over both processible and nonprocessible solid waste following the nondiscriminatory procurement of transfer, transportation, and/or disposal services. To this end, the ECUA advertised for bids on November 3, 1997 and March 23, 1998. On each occasion the bids were advertised throughout the State of New Jersey utilizing The Bergen Record and The Star Ledger, regionally through The Philadelphia Inquirer, and nationally through Waste News. In compliance with the Atlantic Coast case, the procurement process on both occasions was open to all bidders regardless of geographic location.

In response to the request for bids, the ECUA received proposals on December 2, 1997 and May 1,

1998, respectively. All bids received on December 2, 1997 were rejected as a result of the failure of the ECUA to take action with respect to such bids within the 60 day period specified under the Local Public Contracts Law (N.J.S.A. 40A:11-24 et seq.). Such nonaction was due to unresolved matters concerning continuing litigation (Declaratory Judgment Action) as further described below. While none of the bids received on May 1, 1998 for processible waste complied with the revised bid specifications issued on March 23, 1998, Waste Management of New Jersey, Inc. was determined to be the lowest responsible bid for nonprocessible waste in response to the March 23, 1998 request for bids. Therefore, on July 9, 1998 the ECUA awarded a contract to Waste Management of New Jersey, Inc. for the transfer, transportation, and/or disposal of all nonprocessible solid waste generated from within Essex County.

Since the ECUA has sufficiently demonstrated that the procurement of transfer, transportation, and/or disposal services for nonprocessible waste is consistent with the criteria set forth in the Atlantic Coast decision, the DEP approves within Section C. of this certification the nondiscriminatory procurement process for nonprocessible waste. Therefore, the ECUA may direct all nonprocessible solid waste (Types 13 and 13C, the nonrecycled portion of Type 23, the nonprocessible portion of Type 27, and bypass waste) generated from within Essex County to the Waste Management of New Jersey, Inc. Transfer Station/Materials Recovery Facility located at 666 Front Street (Block 4, Lot 1452) in Elizabeth, Union County effective immediately. Finally, the County is hereby advised that in addition to review by the DEP pursuant to the planning authority of N.J.S.A. 13:1E-24, the Department is obligated to review the contract with Waste Management of New Jersey, Inc. pursuant to its authority under N.J.S.A. 48:13A-7. Such review will be the subject of a separate DEP action.

Issue: Processible Waste

As noted above, none of the bids received on May 1, 1998 for processible waste complied with the revised bid specifications issued on March 23, 1998. Consequently, at the time of adoption of the August 19, 1998 amendment, the ECUA had not completed the nondiscriminatory procurement process for processible waste. However, the amendment acknowledges that the final disposition relative to disposal of processible waste will depend upon the outcome of a Declaratory Judgment Action filed by the County and the ECUA seeking a determination of the legal status of existing processing and disposal contracts. Therefore, the various processible waste disposal strategies contained within the amendment, designated "Alternative 1" and "Alternative 2" as more fully described below, are intended to address the following respective events: (a) the County and the ECUA prevail in the Declaratory Judgment Action and the County Service Contract and the Ash Disposal Contract are declared invalid in light of the Atlantic Coast case, or (b) the County and the ECUA are unsuccessful in the Declaratory Judgment Action and the County Service and Ash Disposal Contracts are declared valid. Both alternatives are premised upon regulatory flow control.

Alternative 1

Alternative 1 assumes that the County and the ECUA are no longer legally bound by the County Service and Ash Disposal Contracts. The County's solid waste disposal strategy for processible waste will then be premised upon the re-establishment of regulatory flow control pursuant to nondiscriminatory procurement and redesignation of solid waste facility(ies) in accordance with Atlantic Coast.

Alternative 2

Alternative 2 assumes that the County Service and Ash Disposal Contracts are deemed valid. The County's solid waste disposal strategy for processible waste will then be premised upon a continuance of regulatory flow control directing all processible solid waste generated from within Essex County to the Essex County Resource Recovery Facility (the County's designated disposal site) for processing and disposal under the terms and conditions contained within the County Service and Ash Disposal Contracts. Regulatory flow control could be re-established under this alternative without the completion of a nondiscriminatory procurement process because a court would have decided that the original procurement process for the County Service and Ash Disposal Contracts was sufficient or was entered into during a time when the Department's self-sufficiency policy was not yet in place.

Issue: Declaratory Judgment Action

As noted above, the August 19, 1998 amendment presents two scenarios (Alternatives 1 and 2) relative to the disposal of processible waste dependent upon the outcome of a Declaratory Judgment Action filed by the County and the ECUA seeking a determination of the legal status of existing processing and disposal contracts. On September 14, 1998, while the DEP was reviewing the August 19, 1998 amendment, Judge Weiss of the New Jersey Superior Court ruled in IMO County of Essex and ECUA v. Port Authority of New York and New Jersey, et al., Ch. Div., Essex County, Docket No., ESX-L-8197-97. Specifically, Judge Weiss declared that the County Service and Ash Disposal Contracts are invalid in light of the Atlantic Coast case. Therefore, Alternative 2 as described within the August 19, 1998 amendment may now be moot. However, this September 14, 1998 decision may be subject to appeal. Consequently, within Section C. of this certification, the Department approves with modification both Alternatives 1 and 2. Specifically, Alternative 1 is approved with modification contingent upon receipt and approval by the DEP of a subsequent amendment or administrative action which documents awarding a nondiscriminatory bid contract(s) to provide transfer, transportation, and/or disposal services. (The distinction between the adoption of an amendment or the issuance of an administrative action is that if the selected facility is already included within the County Plan as a designated transfer or disposal facility, an administrative action will suffice. Otherwise, the complete plan amendment adoption process must be completed.) Alternative 2 is approved with modification contingent upon the receipt and approval by the DEP of a subsequent administrative action specifying that said disposal strategy is the one to be implemented. This latter strategy would only become effective if a court of competent jurisdiction overturns or substantially modifies by final decision the September 14, 1998 ruling of Judge Weiss.

Issue: Administrative Review Agency Comment

On September 14, 1998, the New Jersey Advisory Council on Solid Waste Management submitted two substantive comments relative to the amendment. The first comment was that it was premature to review Alternatives 1 and 2 prior to the Declaratory Judgment Action. In response, this comment was submitted the date Judge Weiss of the New Jersey Superior Court ruled in IMO County of Essex and ECUA v. Port Authority of New York and New Jersey, et al. and, consequently, the commenter was not yet aware of this court decision. With this ruling, it is now incumbent upon the ECUA to move forward with implementation of Alternative 1 which, of course, may be subject to additional review by the courts should the Port Authority of New York and New Jersey ultimately prevail in its pending motion for leave to appeal or in a subsequent appeal. The second comment is that for nonprocessible waste, the ECUA will now be using a facility which is primarily a materials recovery facility while the previously designated facility was a transfer station. While it is correct that the Waste Management facility in Elizabeth is primarily a materials recovery facility, it does have transfer station capabilities and utilizing this facility will provide an opportunity to increase the County's

recycling rates.

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 19, 1998 amendment to the approved County Plan and certify to the County Freeholders that the August 19, 1998 amendment is approved in part and modified in part as further specified below.

Nonprocessable Waste

The County Plan inclusion of the nondiscriminatory procurement process to solicit bids for the provision of transfer, transportation, and/or disposal services for nonprocessable waste is approved. Specifically, since the County has adequately demonstrated that it secured a contract with the Waste Management of New Jersey, Inc. Transfer Station/Materials Recovery Facility located at 666 Front Street (Block 4, Lot 1452) in Elizabeth, Union County in a nondiscriminatory manner, this facility is hereby approved for County Plan inclusion and the ECUA may direct all its nonprocessable solid waste (Types 13 and 13C, the nonrecycled portion of Type 23, the nonprocessable portion of Type 27, and bypass waste) to the facility effective immediately.

Processible Waste

The County Plan inclusion of the disposal strategy (both Alternatives 1 and 2) for processible solid waste is approved with modification. Specifically, Alternative 1, a disposal strategy premised upon the re-establishment of regulatory flow control pursuant to nondiscriminatory procurement and redesignation of solid waste facility(ies), is approved with modification contingent upon the receipt and approval by the DEP of a subsequent amendment or administrative action which documents awarding a nondiscriminatory bid contract(s) to provide transfer, transportation, and/or disposal services. (If the selected facility is already included within the County Plan as a designated transfer or disposal facility, an administrative action will suffice; otherwise, the plan amendment adoption process must be completed.) Alternative 2, a disposal strategy premised upon a continuance of regulatory flow control directing all processible solid waste generated from within the County to the Essex County Resource Recovery Facility for disposal pursuant to the terms and conditions contained within the County Service and Ash Disposal Contracts, is approved with modification contingent upon the receipt and approval by the DEP of a subsequent administrative action specifying that said disposal strategy is the one to be implemented. This latter strategy would only become effective if a court of competent jurisdiction overturns or substantially modifies by final decision the September 14, 1998 ruling of Judge Weiss of the New Jersey Superior Court in IMO County of Essex and ECUA v. Port Authority of New York and New Jersey, et al.

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 in part and modification in part 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 Plan

The provisions of the District 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 waste. All nonhazardous materials separated at the point of generation for sale or reuse are subject to regulation pursuant to N.J.A.C. 7:26A-1 et seq.

4. Certification to Proceed with 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 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 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 August 19, 1998 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 19, 1998.

12/02/98
Date

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