

**CERTIFICATION
OF THE SEPTEMBER 9, 2009
AMENDMENT TO THE SUSSEX 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 June 1, 1981, the Department of Environmental Protection (Department or DEP) approved, with modifications, the Sussex 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 Sussex County Board of Chosen Freeholders (County Freeholders) completed such a review and on September 9, 2009 adopted an amendment to its approved County Plan.

The September 9, 2009 amendment proposes County Plan inclusion of the Sussex County Municipal Utilities Authority (SCMUA) Landfill, located at 34 Route 94 South in Lafayette Township, as the designated disposal facility for all solid waste types 10, 13, 13C, 23, 25, 27, 27A, and 27I generated within the County and the designation of the SCMUA as a County enforcement agent, as per a shared services agreement, in the realm of solid waste management.

The amendment was considered administratively complete for review by the Department on September 15, 2009 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 September 9, 2009 is approved, with modification, as provided in N.J.S.A. 13:1E-24.

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

Pursuant to N.J.S.A. 13:1E-24a(1), I have studied and reviewed the September 9, 2009 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 in part and inconsistent in part with the Statewide Solid Waste Management Plan. In this regard, the County Freeholders are notified of the elements relative to the September 9, 2009 amendment which are included below.

Elements of the September 9, 2009 Amendment

Element: Solid Waste Flow Control

The September 9, 2009 amendment proposes County Plan inclusion of the Sussex County Municipal Utilities Authority (SCMUA) Landfill, located at 34 Route 94 South in Lafayette Township, as the designated disposal facility for all solid waste types 10, 13, 13C, 23, 25, 27, 27A, and 27I generated within the County.

The proposed Solid Waste Management Plan Amendment is 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 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. As in Oneida Herkimer, the direction of waste to a facility run 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. The ordinances upheld in Oneida Herkimer are similar in their effect to the proposed amendment to the County Plan.

Element: Agreement By and Between the County, SCMUA, and Grinnell Recycling, Inc.

The Solid Waste Agreement entered into by SCMUA, Grinnell Recycling, Inc. (“GRI”) and Sussex County on or about July 13, 2005, (hereinafter “GRI Agreement”) provides that GRI may accept C & D material generated within Sussex County for recycling, so long as they return an equal amount of C & D residual to the SCMUA Landfill on a monthly basis. DEP previously approved this Agreement for inclusion in the County Plan on October 24, 2005. By its terms, the GRI Agreement is in effect until December 31, 2013 or until such time as the SCMUA Landfill ceases to accept solid waste. The adoption of the September 9, 2009 amendment to the County Plan will have no bearing on the continued validity of the GRI Agreement. The GRI Agreement will continue to run according to its terms, and consistent with its prior inclusion in the County Plan.

Element: Solid Waste Enforcement

The September 9, 2009 amendment to the County Plan also proposes County Plan inclusion of the designation of the SCMUA as a County enforcement agent, as per a shared services agreement, in the realm of solid waste management.

The proposed amendment to the County Plan includes the designation of the SCMUA as an enforcement agent for the Sussex County Department of Environmental and Public Health Services (SCDE&PHS), the County's lead agency in enforcing State solid waste regulations. The amendment would authorize the execution of a shared services agreement to be entered into by Sussex County, SCDE&PHS and SCMUA to conduct delegated inspection and enforcement activities. It is the Department's position that the "Scope of Activities" for a proposed shared services agreement should not extend to, "the disposal of solid waste", as currently provided for. SCMUA is subject to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and all applicable regulations and it would be an inherent conflict of interest for it to enforce the rules and regulations for disposal of solid waste that apply to its own facility.

In addition, the Department's Division of County Environmental & Waste Enforcement (CEWE) commented as part of their review of the September 9, 2009 County Plan amendment that before the SCMUA can actually participate in the County Environmental Health Act (CEHA) Program of Sussex County, the County must, "first submit a revised CEHA solid waste work program that delineates responsibilities for solid waste inspections, investigations and enforcement between the lead agency, Sussex Co[unty] Health Dep[artmen]t, and the [SC]MUA". CEWE goes on to note that this work plan must describe how the lead agency will ensure that the relevant work is properly supervised and coordinated with the Department; how enforcement will be handled and overseen; and describe the qualifications and capabilities of SCMUA Staff who will do this work. Lastly, CEWE notes that approval of this component of the September 9, 2009 amendment to the County Plan shall not be construed to guarantee the Department's ultimate approval of the SCMUA in the Sussex County CEHA Program.

Element: Non-compliance of the SCMUA Landfill with Title V Requirements

The federal Clean Air Act mandates that every major source operate in compliance with a permit issued by the State under an approved Title V program. 42 U.S.C. Sec. 7661. Under the Clean Air Act, each State was called on to develop and submit to the EPA an operating permit program intended to meet the requirements of Title V of the Clean Air Act. Id. The EPA fully approved all provisions of the State's Title V program rules. N.J.A.C. 7:27-22, effective November 30, 2001, at 40 C.F.R. Part 70, App. A. Title V permits are subject to EPA review and are federally enforceable.

Under the Department's operating permit regulations, a facility needs an operating permit if it emits or has the potential to emit more than 100 tons per year of any air contaminant, except CO₂. An "air contaminant" is defined as: "any substance, other than water or distillates of air, present in the atmosphere as solid particles, liquid particles, vapors or gases." N.J.A.C. 7:27-22.1. Methane is defined as "a colorless, odorless, flammable gas." N.J.A.C. 7:27-21.1. Moreover, methane is a greenhouse gas as defined in the Global Warming Response Act. N.J.S.A. 26:2C-30; N.J.A.C. 7:27-8.1. Therefore, methane is an air contaminant for purposes of determining whether a facility requires an operating permit pursuant to Subchapter 22.

On March 6, 2006, the Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment ("AONOCAPA") to the SCMUA, for, among other things, operating a landfill without a valid operating permit. The SCMUA's submissions to DEP indicate that it has potential annual methane emissions of 9,804 tons per year; pursuant to N.J.A.C. 7:27-22.2(a)(2), facilities that have the potential to emit 100 tons per year of methane are subject to the requirements of Subchapter 22.

According to Air Permitting Staff, every landfill of similar size in the State of New Jersey is permitted under Subchapter 22 as a major operating source. The March 2006 AONOCAPA and other pending violations are currently being heard before a Judge in the Office of Administrative Law. In recent discussions, counsel for SCMUA, Mr. Thomas Hoff Prol of Scarinci & Hollenbeck, has stated in writing that SCMUA intends to submit a permit application under Subchapter 22 no later than February 26, 2010; however, SCMUA has not committed to entering into an administrative consent order, as is the typical practice in litigation of this nature.

It is the Department's expectation that SCMUA will come into compliance with the Air Pollution Control Act and enter into an administrative consent order acceptable to the Department no later than February 26, 2010, consistent with the representation made by SCMUA's counsel.

C. Certification of the Sussex 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 September 9, 2009 amendment to the approved County Plan and certify to the County Freeholders that the September 9, 2009 amendment is approved, with modification, as further specified below.

The County Plan inclusion of the SCMUA Landfill as the designated disposal facility for all solid waste types 10, 13, 13C, 23, 25, 27, 27A, and 27I generated within the County is approved.

The County Plan inclusion of the designation of the SCMUA as a County enforcement agent, as per a shared services agreement, in the realm of solid waste management is approved, except that the phrase, "and the disposal of solid waste" is eliminated from the September 9, 2009 amendment to the County Plan due to reasons identified in Section B. of this certification.

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. 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.

4. 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.

5. Effective Date of Amendment

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

effect immediately.

6. 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, with modification, the amendment, as outlined in Section C. of this certification, to the Sussex County District Solid Waste Management Plan, which was adopted by the Sussex County Board of Chosen Freeholders on September 9, 2009.

January 15, 2010

Date

Mark N. Mauriello, Acting Commissioner
Department of Environmental Protection