

State of New Jersey

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Robert C. Shinn, Jr. Commissioner

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

CERTIFICATION
OF THE DECEMBER 29, 1998
AMENDMENT TO THE PASSAIC 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 Passaic 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 In addition to this strategy, the plan must techniques. 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 Passaic County Board of Chosen Freeholders (County Freeholders) completed such a review and on December 29, 1998, 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 declared unconstitutional the Third Circuit which Jersey's historic system of solid waste flow control. 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 οf this recent court decision 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 December 29, 1998 amendment known as Amendment 6-1998 proposes (1) a revised County disposal strategy in response to the <u>Atlantic Coast</u> decision (2) the assessment and collection of an Environmental Investment Charge (EIC) and (3) the future role of the Passaic County Utilities Authority (PCUA).

The amendment was received by the Department on January 22, 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 December 29, 1998 is approved in part and remanded in part as provided in N.J.S.A. 13:1E-24.

B. <u>Findings and Conclusions with Respect to the Passaic County District Solid Waste Management Plan Amendment</u>

Pursuant to N.J.S.A. 13:1E-24a(1), I have studied and reviewed the December 29, 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 the approved portions of this plan amendment are consistent with the Statewide Solid Waste Management Plan. In this regard, the County Freeholders are notified of the issues of concern relative to the December 29, 1998 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, 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
Department of Transportation
Department of Community Affairs
U.S. Environmental Protection Agency

Agency Participation in the Review of the December 29, 1998 Amendment

The following agencies did not object to the proposed amendment:

Division of Parks and Forestry, DEP
Division of Compliance and Enforcement, DEP
Division of Water Quality, DEP
Land Use Regulation Element, DEP
Green Acres Program, DEP
New Jersey Turnpike Authority
Department of Agriculture
Department of Transportation

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

Division of Fish, Game and Wildlife, DEP
Office of Air Quality Management, DEP
New Jersey Advisory Council on Solid Waste Management
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 December 29, 1998 Amendment

Issue: Prior Solid Waste Disposal Strategies

On October 1, 1997, the County Freeholders adopted the initial

amendment in response to the <u>Atlantic Coast</u> decision. This amendment had three components:

- *Alliance Landfill License Agreement
- *Procurement of Solid Waste Transportation and Transfer Services
- *Recovering Environmental Investment Costs

On November 10, 1997 the Department certified the October 1, 1997 amendment. Specifically, the Department (1) Alliance Landfill License Agreement since the County adequately demonstrated that this contract was secured nondiscriminatory manner (2) approved with modification provision of transportation and transfer services for delivery of solid waste to the Alliance Landfill contingent upon receipt of documents awarding nondiscriminatorily bid contracts and remanded for further consideration and evaluation the proposed \$47.94 per ton EIC until such time as the procurement of all solid waste transportation and transfer services was completed with definitive costs ascertained.

On December 29, 1997 the County Freeholders adopted a subsequent amendment which proposed a revised disposal strategy in response to the Atlantic Coast decision. Specifically, since the County and the PCUA had not yet been able to procure all components of their solid waste system in a nondiscriminatory manner, on November 12, 1997 the PCUA declared an emergency and entered into a contract with American Ref-Fuel (operators of a resource recovery facility in Newark, Essex County) for a 90 day period to accept processible solid waste generated from within Passaic County. This contract also provided for an extension upon mutual agreement of both parties. Until alternative procurements were completed and contacts were awarded, the PCUA would be operating under a voluntary flow system.

Subsequent to the adoption of the December 29, 1997 amendment, newly elected County Freeholders assumed office on January 1, 1998 and began considering adoption of newly proposed amendments. As a result of these deliberations, on June 24, 1998 the Department received a letter from the County Freeholders requesting that the Department not approve the December 29, 1997 amendment which the County no longer supported. Therefore, in light of this letter, the Department issued a certification on June 25, 1998 remanding for readoption and recertification the December 29, 1997 amendment. The December 29, 1998 amendment is in response to this remand.

Issue: Revised Solid Waste Disposal Strategy

The disposal strategy contained with the December 29, 1998 amendment proposes the continued operation of a free market system within the County. This strategy represents a revision to

the market regulator approach initially contemplated upon completion of nondiscriminatory procurement (as described above). Within Section C. of the certification, the Department approves this free market disposal strategy.

Issue: Revised Environmental Investment Charge

The County's decision to collect an EIC is to ensure revenues sufficient to recover stranded solid waste related debt in a manner that is directly related to the most accurate calculation of solid waste generated practicable. At present, outstanding solid waste debt incurred by the PCUA is amortized until 2008. proposed County Refinancing Plan requires the PCUA to refinance the existing debt to extend maturities to 2014. The refinancing of the outstanding debt will (1) achieve interest rates that are more favorable and (2) extend the maturity dates of the debt to reduce the amount of per ton EIC and minimize the impact of the annual EIC charges on the municipalities of the County. County anticipates that this refinancing will result in a reduction of the projected EIC from an average of \$32.37 per ton (for a 10-year pay-out) to \$24.43 per ton (for a 15-year pay-Municipalities will be offered the opportunity to select either the 10-year or the 15-year maturity schedule. Failure by a municipality to select either option will result in the 10-year term being implemented for that municipality. Within Section C. of the certification the Department approves the assessment of an EIC ranging from \$32.37 per ton (10-year pay-out) to \$24.43 per ton (15-year pay-out).

Issue: Collection of the EIC

The County's endorsement of a free market disposal strategy precludes the ability to collect the EIC at the point of The County rejected the allocation and collection of the EIC through the county tax structure recognizing that there is no correlation between solid waste generation and assessed property values. Consequently, the County has determined that the most fair and equitable allocation of the EIC requires that each municipality be charged its proportionate share of the outstanding debt based upon historic generation of solid waste. The calculation of the EIC will be based upon the generation of a total of 275,000 tons of solid waste during 1996 (the last complete calendar year for which accurate solid waste generation data is available). Of that amount, 224,000 tons of solid waste are attributable to municipal generators. The EIC will be directly assessed against the municipality for residential waste generation. The EIC will be billed no more frequently than The County does not mandate that a municipality collects the EIC by any specific means. Each municipality will be provided with an opt-out payment by which the municipality may pay its share of the total solid waste debt in a lump sum amount.

Any municipality which elects to opt-out will have no further obligations to pay the EIC. The EIC includes an administrative fee that may range from \$.50 per ton to \$1.00 per ton but in no event shall the administrative fee exceed \$1.00 per ton. administrative fee component of the EIC will be restricted to only those costs incurred by the PCUA necessary to collect the EIC from municipal and commercial generators. Within Section C. of the certification the Department approves the strategy for municipal EIC by direct assessment collecting the municipalities for residential waste generators based upon 1996 solid waste generation data. Also, the County is hereby directed to submit to the DEP on a semiannual basis for the duration of EIC collection a brief status report on the amount of EIC collected versus that projected. The County should contact the DEP's Division of Solid and Hazardous Waste to discuss the necessary components of this report.

Concerning the collection of the EIC from commercial generators, the 1996 base historic solid waste generation data may not accurately reflect the amount of solid waste generated by commercial establishments located within the County. Thus, the amendment notes, the EIC will be directly billed to commercial generators on the basis of solid waste generation data available during the billing year. However, the amendment fails indicate the specific mechanism for collecting this commercial solid waste generation data which will be the basis for billing the EIC to commercial generators. Absent this mechanism, the Department is constrained from certifying the strategy for collecting the EIC from commercial generators. Therefore, within Section C. of the certification, the Department remands this component of the amendment for reconsideration and readoption by the County. Within this subsequent plan amendment submission the County is directed to clarify the interrelationship of collecting the commercial and residential EIC's towards attaining equitable distribution for repayment of the stranded solid waste debt.

Issue: Litigation

The City of Paterson initiated litigation I/M/O City of Paterson et al., v. Board of Chosen Freeholders of Passaic County, et al., Law Division Docket No. L-PAS-176-98, on appeal, Appellate Division Docket Nos. A-3856-97T5 and A-4052-97T5. The City of Paterson also filed an appeal of the Department of Community Affairs' Local Finance Board December 16, 1997 approval of the imposition of an EIC <u>I/M/O Passaic County Utilities Authority</u> Petition Requesting Determination of Financial Difficulty and Application for Refinancing Approval, Appellate Division Docket No. A-2572-97T5. Additionally, on January 11, 1999 legal consul to the City of Paterson submitted a letter to the DEP which urged the Department to reject the December 29, 1998 amendment and, in particular, the proposal for collecting the EIC. In a decision

dated May 13, 1999, New Jersey Superior Court, Appellate Division, ruled that EIC's are a fee to cover debt service and not a tax. Further, the court found that service charges need not apply only to the provision of current service charges, but may also contain a provision as the financing and payment of expenses incurred by an authority to provide the service. Finally, the court concluded that the approval of an EIC by DCA's Local Finance Board was within that agency's broad powers to assure the financial stability of the PCUA and other authorities. Therefore, due to the recent court decision, the Department will not address the concerns of the City of Paterson within this certification document. As of this date, the Department is unaware of whether or not the City of Paterson will seek review of this court decision by the New Jersey Supreme Court. event that review is granted, the certification action of the Department is subject to the determination of the Supreme Court.

Issue: Future Role of the PCUA

The December 29, 1998 amendment addresses the future role of the PCUA which is the County Plan designated implementation agency. Specifically, "The County will continue to evaluate the PCUA's effectiveness as the implementing agency for the [County] Plan. The issuance of the Refinancing Plan and the assessment and collection of the EIC will be the primary remaining function of the PCUA." Further, "Accordingly, the [Freeholder] Board is compelled to impose strict constraints on any actions of the PCUA which would have the effect of increasing the current financial exposure of the taxpayers of the County to new obligations which may be incurred by the PCUA, absent such constraints." These constraints would prevent the PCUA from:

*The submission of any application to the Local Finance Board which contemplates the PCUA proceeding with any financing or refinancing plan;

*The issuance of any additional notes or bonds of the PCUA;

*The solicitation or execution of any solid waste collection, transportation, transfer, or disposal contracts;

*The employment of any employee in addition to the total number of employees on the PCUA payroll as of October 1, 1998; and *The execution of any contract to engage any professional or consulting service in addition to those engaged for such purposes as of October 1, 1998.

The primary concerns of the County Freeholders relative to the continued operation of the PCUA are financial in nature. The DEP notes that the PCUA's operations and its budget are subject to strict regulatory oversight by the Local Finance Board. Specifically, the PCUA's budget projecting its anticipated revenues and expenses must be approved by the Local Finance Board pursuant to the Local Authorities Fiscal Control Law (N.J.S.A.

40A:5A-1 et seq.). Further, the court decision of May 13, 1999 upheld the Local Finance Board's broad powers to assure the financial stability of the PCUA. Consequently, the issue of addressing constraints identified within the December 29, 1998 amendment is more appropriately addressed by the Local Finance Board. Therefore, within Section C. of the certification, this component of the amendment is remanded to the County for reconsideration and submission to the Local Finance Board for their review.

Finally, pursuant to <u>N.J.S.A.</u> 13:1E-21b.(1), each solid waste management district is required to maintain a plan implementation agency. Should the County Freeholders choose to modify or limit the functions of the PCUA, they must ensure that an alternative unit of county government is designated to implement the County Plan. The designation of such agency must be accomplished through adoption of an amendment.

C. <u>Certification of the Passaic County District Solid Waste</u> <u>Management Plan Amendment</u>

In accordance with <u>N.J.S.A.</u> 13:1E-1 <u>et seq.</u>, specifically <u>N.J.S.A.</u> 13:1E-21, which establishes specific requirements regarding the contents of the district solid waste management plans, I have reviewed the December 29, 1998 amendment to the approved County Plan and certify to the County Freeholders that the December 29, 1998 amendment is approved in part and remanded in part as further specified below.

The County Plan inclusion of the revised solid waste disposal strategy encompassing a free market system is approved.

The County Plan inclusion of the assessment of a revised Environmental Investment Charge ranging from \$32.37 per ton (for a 10-year pay-out) to \$24.43 per ton (for a 15-year pay-out) is approved.

The County Plan inclusion of the strategy for collecting the municipal EIC by direct assessment against municipalities for residential waste generators based upon 1996 solid waste generation data is approved. However, the County Plan inclusion of the strategy for collecting the EIC from commercial waste generators is remanded for reconsideration and readoption by the County. As noted within Section B., this commercial EIC collection strategy entails direct billing to commercial generators on the basis of solid waste generation data available during the billing year. However, the amendment fails to indicate the specific mechanism for collecting this commercial solid waste generation data which will be the basis for billing the EIC to commercial generators. Absent this mechanism, the Department is constrained from certifying the strategy for

collecting the EIC from commercial generators.

The County Plan inclusion of the imposition of constraints upon the actions of the PCUA is remanded for reconsideration and submission to the Department of Community Affairs' Local Finance Board for their review. As noted within Section B., the issue of addressing the constraints identified within the amendment is more appropriately addressed by the Local Finance Board.

D. Other Provisions Affecting the Plan Amendment

1. <u>Contracts</u>

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 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. <u>Certification to Proceed with Implementation of the Plan</u> <u>Amendment</u>

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 portions of the amendment 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 portions of the amendment 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. <u>Certification of Approval and Remand of the Amendment by the Commissioner of the Department of Environmental Protection</u>

In accordance with the requirements of N.J.S.A. 13:1E-1 et seq., I hereby approve in part and remand in part the amendment, as outlined in Section C. of this certification, to the Passaic County District Solid Waste Management Plan which was adopted by the Passaic County Board of Chosen Freeholders on December 29, 1998.

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

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