SALEM COUNTY IMPROVEMENT AUTHORITY

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Resolution # 2014-41

RESOLUTION
April 10, 2014

Of The Salem County Improvement Authority
In The County Of Salem, State Of New Jersey

AUTHORIZING THE SALEM COUNTY IMPROVEMENT AUTHORITY TO ENTER INTO AN ALTERNATIVE FUNDS ESCROW AGREEMENT FOR CLOSURE and POST-CLOSURE ACTIVITIES AND EXPENSES

WHEREAS, the Salem County Improvement Authority (SCIA) has designated and accumulated alternate funds for Closure and Post-Closure activities and expenses; and

WHEREAS, pursuant to N.J.A.C.7:26-2A.9(f)2, the Closure and Post-Closure Financial Plan shall include an estimate which details the cost of each provision of the Closure and Post-Closure Care Plan and a projection of funds that will be available from the escrow account; and where the total funds projected for the Closure and Post-Closure Care Plan exceed the amount of funds projected in the escrow account, the owner or operator must identify specific alternative funds which are to be dedicated to ensure payment of all costs identified in the Closure and Post-Closure Care Plan; and

WHEREAS, the New Jersey Department of Environmental Protection [hereinafter “DEP”] has directed that alternate funds must be placed into a dedicated account that specifically limits its accessibility to closure and post-closure activities and requires approval of the DEP for withdrawals from the alternate funds account; and

WHEREAS, the DEP, in consultation with the New Jersey Attorney General’s Office has recommended that placing the alternate funds into an escrow account governed by the DEP’s Alternative Funds Standard Escrow Agreement would simplify and streamline requests for release of funds from DEP; protect the escrow agent and/or the Authority from claims of misfeasance or malfeasance in investing or other handling of the funds, assuming they comply with the investment and other requirements of the alternative funds standard escrow agreement; help ensure that there will be sufficient monies in the escrow account and the statutory fund to properly close the landfill; ensure, to the greatest extent possible, that the funds in the account will not be available to any creditor of the Authority; and make the funds a non-asset of the Authority, except for its right to receive monies left in the fund after closure and post-closure have been fully accomplished as determined by DEP; and

WHEREAS the SCIA has reviewed the DEP’s Alternative Funds Standard Escrow Agreement and consulted with counsel regarding the propriety of entering into the Agreement; and
WHEREAS, the SCIA agrees that an approved escrow account must be established; and

WHEREAS, the SCIA agrees to the terms of the DEP’s Alternative Funds Standard Escrow Agreement;

NOW THEREFORE BE IT RESOLVED by the SCIA that

1. The SCIA shall negotiate the Alternative Funds Standard Escrow Agreement attached to this resolution with an accredited financial institution, execute the agreement and submit it to the DEP for approval; and

2. The SCIA shall comply with the terms of the Agreement if approved by the DEP.

ATTEST:

Lew Schneider, Secretary

Robert E. Widdifield, Chairman

April 10, 2014
Date

CERTIFICATION

I hereby certify the above to be a true copy of a resolution adopted by the Salem County Improvement Authority Board at their regular meeting held April 10, 2014.

Lew Schneider, Secretary
Debbie,

Pursuant to N.J.A.C.7:26-2A.9(f)2-“The Closure and Post-closure Financial Plan shall include an estimate which details the cost of each provision of the Closure and Post-Closure Care Plan and a projection of funds that will be available from the escrow account. Where the total funds projected for the Closure and Post-Closure Care Plan exceed the amount of funds projected in the escrow account, the owner or operator must identify specific alternative funds which are to be dedicated to ensure payment of all costs identified in the Closure and Post-closure Care Plan.

Here is the opinion DAG's office rendered for another county.

The DAGs do not believe that the DFA is properly "dedicated" by the Resolution; because, although the Resolution states what the DFA will be used for, it does not establish the DFA in such a fashion as to be off limits to other uses should the Authority or its creditors seek to use it for other purposes. The legal opinion is that the proper way to dedicate the DFA is through utilization of some recognized legal means of dedication, such as putting the fund in an irrevocable trust or, more simply, in an escrow account with limitations on use of the funds similar to those governed by the DEP escrow agreement, including provisions to the effect that the funds may only be used for closure and post-closure activities and requiring approval of DEP for withdrawals from the DFA.

The legal opinion notes that establishing the DFA with an Alternative Funds Standard Escrow Agreement would simplify and streamline requests for release of funds from DEP; protect the escrow agent and/or the Authority from claims of misfeasance or malfeasance in investing or other handling of the funds, assuming they comply with the investment and other requirements of the alternative funds standard escrow agreement; help ensure that there will be sufficient monies in the DFA and the statutory fund to properly close the landfill; ensure, to the greatest extent possible, that the funds in the account will not be available to any creditor of the Authority; and making the DFA a non-asset of the Authority, except for its right to receive monies left in the fund after closure and post-closure have been fully accomplished as determined by DEP.

I have attached an Alternative Funds Standard Escrow Agreement (AFSEA) form. If the board is planning on establishing an Alternative Escrow Account, please make two copies of the form, have a representative of the financial institution of choice and a representative of SCIA sign all three forms and then mail all three forms to me at the address below. Once the DEP approves the AFSEA, Anthony Fontana will sign all three forms and one of the signed copies will be mailed to the financial institution of choice, one of the signed copies will be mailed to SCIA and one of the signed copies will be kept on file at the DEP.

Debbie, feel free to contact me if you have any more questions.

Mary

Mary Herald
New Jersey Department of Environmental Protection
Mail Code 401-02C
Division of Solid and Hazardous Waste/Escrow Section
111 East State Street, 2nd Floor West
P.O. Box 420
Trenton, New Jersey 08625-0420
Pursuant to the Sanitary Landfill Facility Closure and Contingency Fund Act, N.J.S.A. 13:1E-100 et seq. (hereinafter "Act"), and regulations promulgated thereunder, N.J.A.C. 7:26-1.4, 2A.9 (hereinafter "Regulations"), and Order of the Department dated __________, in Docket No. __________, OAL Docket No. __________, a copy of which is attached hereto and made a part thereof, this Escrow Agreement is made on this _____ day of _______ 20__

between

(Owner/Operator Name) ______________________________________
hereinafter called "Depositor",
and

(Accredited Financial Institution Name) ______________________________________
hereinafter called "Escrow Agent"

(1) **Escrow Account/Purpose**

The sole purpose of the escrow account shall be to insure that funds are set aside and kept available for environmental improvements, closure and post-closure care of the above-designated sanitary landfill facility in accordance with applicable Board of Public Utilities (BPU) Solid Waste Orders, Department of Environmental Protection (DEP) approved Closure Plan (Closure and Post-Closure Care Plan and Closure and Post-Closure Financial Plan) under the terms of the Act and Regulations.

(2) **Approval of the Escrow Agreement**

This Agreement shall be of no force and effect unless approved in writing by the DEP, which approval may be withdrawn at any time by DEP, within its sole discretion. This Agreement may only be amended by a written agreement approved in writing by DEP which the Department may, from time to time, require in its discretion, or as otherwise set forth herein.

(3) **Separation of Funds**

The Depositor and the Escrow Agent agree that the escrow account shall be a separate account apart from all other accounts.
(4) **Escrow Deposits**

The Depositor agrees to make monthly deposits into the alternative funds escrow account as required by the Department of Environmental Protection. The deposits shall be consistent with BPU and/or DEP Orders and with the facility's DEP approved Closure and Post-Closure Plan and, if necessary, according to each two-year plan update thereafter. The Depositor agrees to make no deposits into the escrow account except such funds as are so required. The Escrow Agent shall not be responsible for determining the amount to be deposited into the escrow account. The Depositor agrees to deposit with the Escrow Agent the funds described in N.J.S.A. 13:IE-109 for the sanitary landfill facility described above, an amount equal to ___________ per cubic yard or ___________ per ton of all solid waste accepted for disposal at said landfill on and after the date of the rates authorized by said Order are implemented. Said deposits shall be made on a weekly basis out of daily cash (checks and currency) receipts received in payment of said rates for the previous week. The Escrow Agent agrees to hold said funds in escrow in an interest bearing account pursuant to the Act, the Regulations and the terms and conditions of this Agreement. The funds so deposited shall be deemed trust funds and shall be held and utilized to pay for environmental improvements, closure and post-closure maintenance costs of the facility in accordance with the Engineering Design Approval issued by the Department and considered in the above docket and or the DEP approved Closure Plan (Closure and Post-Closure Care Plan and Closure and Post-Closure Financial Plan) under the terms of the Act and Regulations.

(5) **Investment of Escrow Account Funds**

In all cases, the escrow account shall be invested and maintained so as to maximize yield and minimize risk. In the event this Agreement contains Investment Guidelines attached hereto, the escrow account shall also be invested and maintained in a manner fully consistent with such Guidelines. These Investment Guidelines may vary from time to time be revised or modified by DEP, in its discretion, as circumstances regarding the environmental improvements, closure and post-closure care of the above sanitary landfill facility and/or prevailing financial market and economic conditions may change. Any such revisions or modifications by DEP to the Investment Guidelines shall be immediately incorporated into the terms of this Agreement upon receipt by the parties hereto, and thereafter the investment and maintenance of the escrow account shall be fully consistent with such revised or modified Investment Guidelines. Liquidity shall be maintained as directed by the Department. ("Liquidity" shall mean the availability of funds for drawdowns consistent with a landfill's BPU and/or DEP approved Closure Plan, or, if there is no DEP approved Closure Plan, consistent with the Department's closure strategy for the landfill facility.)

(6) **Availability of Escrow Funds**

Subject to paragraph 5, the funds in the escrow account shall be kept readily available for withdrawal, in a manner approved by DEP, should emergency or other circumstances necessitate, in the sole judgment of DEP, partial or total closure or post-closure care of the facility before the time originally contemplated. DEP may, at its discretion, determine that there is a need for environmental improvements, closure or post-closure care expenditures and may, at any time, require the Depositor to withdraw funds from the escrow account to meet such expenses. In the event of such a determination, DEP will give written approval for a withdrawal of funds pursuant to paragraph 11 of this Agreement.

(7) **Interest and Other Income**

The Depositor and the Escrow Agent agree that all interest and other income earned as a result of investment of funds in the escrow account shall be deposited as earned into the escrow account, to be applied toward the cost of environmental improvements, closure, post-closure care and DEP-approved fees charged by the Escrow Agent for administering the account. Such interest and other income shall be subject to the same restrictions applicable to the principal of the escrow account as set forth in the Act, the Regulations and this Agreement.

(8) **Direction of Investments**

The Depositor shall have no right to direct the investment of the escrow account funds. Investments shall be directed by the Escrow Agent, subject to the provisions of the Act, the Regulations and the determination of DEP, as set forth in this Agreement.

(9) **Account as Non-Asset**

All funds deposited in the escrow account shall not be considered an asset of the Depositor and shall not be available to any creditor of the Depositor in the event of the bankruptcy, reorganization, insolvency or receivership of the landfill or the Depositor, or for any other reason. Depositor and the Escrow Agent agree that funds deposited in the escrow account are for the sole benefit of the purposes established in paragraphs 1 and 14 of this Agreement and may be withdrawn only pursuant to the express provisions of this Agreement. Funds will only be available for use by the owner/operator, or by a court-appointed receiver or other legal representative of the owner/operator, for closure and post-closure care activities, upon written approval of the DEP.
(10) **Monthly Statement-Financial Institution**

The Escrow Agent hereby agrees to submit monthly statements of the escrow account to the DEP. The statements shall report on all transactions charged and credited to the escrow account and shall include an itemization of all accrued interest and all opening and closing balances of principal and income.

(11) **Withdrawal or Disbursement of Funds**

The Depositor and the Escrow Agent agree that withdrawals or disbursements from the escrow account will not be made or permitted without the written approval or directive of the DEP. Written approval will be given only upon submission and approval of a written request identifying the specific provisions of the DPU Solid Waste Order and/or DEP approved Closure Plan of the sanitary landfill facility for which funding is sought. Written directive may be issued to the Escrow Agent by DEP upon a written request or in the absence of a written request upon a determination by DEP, in its discretion, that there is a need for environmental improvements, closure or post-closure care expenditures. Upon the issuance and delivery to the Escrow Agent of such written approval or directive by DEP, the Escrow Agent shall immediately disburse the funds called for by said approval or directive, for use solely for the purposes and in the manner specified in said written approval or directive. The Utility shall simultaneously file or cause to be so filed with said Department and said Escrow Agent for review, a certification by a licensed New Jersey Professional Engineer, bearing his/her professional seal, certifying that the costs referred to in the certification are reasonable in light of current construction costs for similar work and that the improvements referred to therein are in place and have been performed in a good and workman-like manner and in accordance with said Engineering Design Approval referred to in paragraph 1. Each certification shall be supported by invoices for the materials, supplies, labor, equipment and related costs referred to therein, and copies of which shall be attached to the certifications. Where a certification is for or includes in-house expenses, it shall be supported by statements detailing the costs including, but not limited to labor charges, equipment utilization, supplies and fuel. All certifications and the costs and expenses shall be subject to accountability and audit by the Department at any time. The Utility shall submit two certified submissions to: Mail Code 401-02C NJDEP, Solid and Hazardous Waste Management Program, Financial Management, Unit P.O. Box 420, 401 East State Street, Trenton, New Jersey, 08625-0420. One copy of the certification and all related materials shall be provided to the Escrow Agent.

(12) **Compensation of Escrow Agent**

Notwithstanding the terms of paragraph 11 of this Agreement, the Escrow Agent shall be entitled to take reasonable compensation for its services in administering the escrow account to be established under this Agreement. Such compensation may be deducted by the Escrow Agent directly from the escrow account from time to time, but in no event more frequently than once a month, unless more frequent deductions are approved in writing by DEP. All such deductions shall be fully documented and shown as a debit to the escrow account by the Escrow Agent under the monthly statements to be submitted to DEP, pursuant to paragraph 10 of this Agreement. In all cases, the amount or rate of such compensation shall be reasonable, shall not exceed the amount or rate of compensation customarily charged by the Escrow Agent for like services, and shall be subject to the written approval of DEP. For purposes of this Agreement, and unless and until written approval to modify such compensation is given by DEP, the amount or rate of compensation to be charged by the Escrow Agent hereunder shall be as follows (detailed):

(13) **Liability of the Escrow Agent** *(Optional)*

The Depositor agrees to indemnify and hold the Escrow Agent harmless from and against all liabilities, fees, costs and expenses incurred by the Escrow Agent, with respect to the performance of its duties hereunder, unless said liabilities, fees, costs or expenses shall arise from the Escrow Agent's failure to perform its duties hereunder with reasonable cost and care.

(14) **Use of Funds After Closure and Post-Closure**

After the DEP determines that environmental improvements, closure and post-closure activities for the sanitary landfill facility designated above have been completed, any funds remaining in the escrow account, including accumulated interest and other income from investment of funds in the escrow account, shall be returned to the depositor as specified by the State.
(15) **Termination**

This Agreement may be terminated by either party on 90 days written notice to DEP, and to the other party to this Agreement, which notice shall state the reasons for such termination, and the provisions of this Agreement shall remain in full force and effect until the expiration of said 90 days notice. In the case of termination by the Depositor, such termination shall be ineffective in the absence of prior written consent by the DEP on such terms as the Department, in its discretion, may require. In the event of termination where funds remain in the escrow account, the Depositor shall submit a new escrow agreement to DEP for review and approval as set forth in paragraph 2, within 60 days from the notice of termination. Upon such approval, DEP will give the Escrow Agent hereunder written approval to transfer the funds in the escrow account, with accumulated interest and other income from investment of the funds in the escrow account, to the new Escrow Agent under the new escrow agreement, and the Escrow Agent shall immediately transfer all such funds to the new Escrow Agent upon receipt of such written approval. No such transfer shall be made without such written approval by DEP. Such transfer of funds must be through an inter-financial institution transaction and shall not be transferred through the Depositor. Nothing herein shall limit the right of DEP to withdraw its approval of this Agreement at any time, in its discretion, as set forth in paragraph 2 herein.

(16) **Notice and Instruction**

All notices and instructions related to this Agreement shall be in writing and, except monthly bank statements to DEP under paragraph 10, shall be made by certified or registered mail, return receipt requested. All notices and instructions sent to the parties hereunder shall be sent to the addresses of the parties set forth at the beginning of this Agreement. For purposes of this Agreement, and until notification of a change of address is supplied by DEP to the parties hereunder, all notices to NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION shall be addressed to Mail Code 401-02C NJDEP-SHWMP, Financial Management Unit P. O. Box 420, 401 East State Street, Trenton, New Jersey 08625-0420.

In Witness whereof, the parties to this Escrow Agreement have executed same on this __________ day of __________, 20 ___.

(Owner/Operator Name) ____________________________ (Accredited Financial Institution Name) ____________________________ (Attest) ____________________________

By ____________________________ By ____________________________ By ____________________________

Signature ____________________________ Signature ____________________________ Signature ____________________________

Print or Type Name ____________________________ Print or Type Name ____________________________ Print or Type Name ____________________________

Title ____________________________ Title ____________________________ Title ____________________________

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APPROVED BY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
SOLID AND HAZARDOUS WASTE MANAGEMENT PROGRAM

By ____________________________
Anthony Fontana, Chief Bureau of Transfer Stations and Recycling Facilities

Date ____________________________
PORTFOLIO OBJECTIVES

Maximize Return, Minimize Risk

GUIDELINES

The Escrow Agent shall use all reasonable efforts to invest in funds at the highest available rates of interest, consistent with the timing of the escrow fund withdrawal requirements, in the following:

A. Obligations issued or guaranteed by an instrumentality or agency of the United States of America, whether now existing or hereafter organized;

B. Obligations issued or guaranteed by any State of the United States or the District of Columbia.

C. Repurchase agreements (including repurchase agreements of the Escrow Agent) fully secured by obligations of the kind specified in (A) or (B) above, as well as in money market funds and in common funds of the Escrow Agent invested in obligations specified in (A) and (B) above;

and

D. Interest bearing deposits in any bank or trust company (which may include the escrow agent) which has combined capital surplus and retained earnings of at least $50,000,000. Any interest payable on said funds shall become part of the escrow account balance.

E. Maximum maturity of individual securities limited to 10 years.

F. The average maturity should be between 3 and 5 years in accordance with the needs specified in the closure/post-closure financial plan.

G. For all county, municipal, and local governments, please refer to N.J.S.A. 40A:5-15.1, which provides specific guidance for the allowable investment of public funds.

To facilitate these investments the facility shall provide the Escrow Agent and the Chief, Bureau of Transfer Stations and Recycling Facilities, with a schedule of anticipated escrow account withdrawals consistent with the DEP approved closure/post-closure financial plan. The parties understand that said schedule shall be solely for the guidance of the Escrow Agent for investment purposes and shall not be considered as a firm escrow withdrawal schedule. All notices shall be addressed to Mail code 401-02C NJDEP, Environmental Management, Solid and Hazardous Waste Management Program, 401 East State Street, 2nd Floor West, P. O. Box 420, Trenton, New Jersey 08625-0420.