CAPE MAY COUNTY MUNICIPAL UTILITIES AUTHORITY,
Petitioner,

v.

PINELANDS COMMISSION,
Respondent.

Initial Decision: July 11, 1990
Final Agency Decision: July 13, 1990
Approved for Publication: July 24, 1990

SYNOPSIS

Petitioner applied for a waiver of strict compliance from the requirements of the Pinelands Comprehensive Management Plan in order to continue to operate its solid waste landfill until an alternative solid waste disposal program could be developed. Petitioner claimed there was compelling public need for a waiver pursuant to N.J.A.C. 7:50-4.66(a)2i. The executive director of the Pinelands Commission recommended that the application for a waiver be denied. The matter was transmitted to the Office of Administrative Law for a hearing.

Petitioner had previously obtained a waiver to develop its lined sanitary landfill while developing a resource recovery system. Under the terms of that waiver, the landfill was to be used only as a backup for the resource recovery system after August 8, 1990, the date when the Pinelands Protection Act required closure of all landfills in the Pinelands. Petitioner was not able to develop a resource recovery facility by that date nor had petitioner arranged to transport waste out of the county to another waste disposal facility. Therefore, petitioner requested a waiver in order to continue operating the existing landfill.

Petitioner argued that the waiver should be granted on the basis of compelling public need because there was no feasible alternative for disposal of solid waste after August 8, 1990. Respondent countered that feasible alternatives outside Cape May County existed, but had not been arranged. Therefore, the waiver was not required to meet public needs.

The administrative law judge assigned to the case concluded that petitioner failed to establish compelling public need for a waiver. Feasible alternatives did exist in other counties and out of State. The increased cost of those alternatives did not render them infeasible. The
additional cost would not be economically impractical when weighed against the public policy of protecting the Pinelands. Accordingly, the judge recommended denial of the waiver.

Upon review, this initial decision was modified by the Pinelands Commission. The Commission approved a waiver permitting the landfill to remain open until December 31, 1992, at which time it was to be permanently closed. Because petitioner had failed to arrange for an alternative method of disposing of solid waste and it would be impossible to make such arrangements before the end of 1992, there was a compelling public need for the waiver. However, the Commission said that no further extensions of time to operate the landfill would be permitted after 1992 and ordered petitioner to report to the Commission on a regular basis its progress in developing an alternative solid waste disposal plan.

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**Stephen E. Brower**, Deputy Attorney General, for respondent (Robert J. DelTufo, Attorney General of New Jersey, attorney)

**Jan M. Schlesinger**, Esq., for the Pinelands Preservation Alliance (Schlesinger, Mintz and Pilles, attorneys)

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**FIDLER, ALJ:**

**STATEMENT OF THE CASE**

This matter arises from the Executive Director’s recommendation that the Pinelands Commission deny the request of the Cape May County Municipal Utilities Authority (petitioner) for a waiver of strict compliance, pursuant to the Pinelands Protection Act (N.J.S.A. 13:18A-1 et seq.) and the Comprehensive Management Plan promulgated thereunder (N.J.A.C. 7:50-1.1 et seq.). Petitioner operates a solid waste landfill in the Pinelands Protection Area. It seeks permission to have the landfill continue to accept solid waste after August 8, 1990, until either an interim landfill or a resources recovery facility is developed. Thus, petitioner has applied for a waiver of strict compliance from the requirement of N.J.A.C. 7:50-6.75(a)5 (as modified by previously approved waivers) that use of the landfill be terminated on August 8, 1990. This is the issue:

Has the petitioner satisfied the requirements of N.J.A.C.
7:50-4.66(a)2i to establish a compelling public need for a waiver of strict compliance from the requirements of N.J.A.C. 7:50-6.75(a)5 that use of its landfill in the Pinelands Protection Area cease on August 8, 1990.

PROCEDURAL HISTORY

The Executive Director’s report on an application for a waiver of strict compliance and recommendation that the Pinelands Commission deny the requested waiver was issued on October 16, 1989. By letter dated October 31, 1989, the petitioner requested reconsideration by the full Pinelands Commission. On November 13, 1989, the Pinelands Commission transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

By letter to the Clerk of the Office of Administrative Law dated November 29, 1989, petitioner requested that the matter be scheduled for accelerated proceedings and disposition, pursuant to N.J.A.C. 1:1-9.4. By letter dated January 4, 1990, the Clerk advised all parties identified on the service list provided by the Pinelands Commission that the petitioner had applied for accelerated proceedings. Any objections to the request were to be filed in writing with the undersigned by January 16, 1990. No objections were received.

A prehearing conference was held on January 19, 1990. At that time, I determined that the Pinelands Commission concurred in the request for acceleration. Having found good cause for accelerating these proceedings, accelerated hearing dates were established pursuant to N.J.A.C. 1:1-9.4. Hearing sessions were thereafter conducted on February 22 and 23, and March 1, 7, 8, 21 and 22, 1990. At the joint request of the parties, further hearing sessions were then deferred for a time to permit extensive settlement negotiations. When it was determined that a settlement could not be reached, the remaining hearing sessions were conducted on June 11 and 12, 1990. The last posthearing submission was received on June 26, 1990, and the record closed on that date.

FINDINGS OF FACT

The facts material to resolution of this matter are essentially undisputed. Although the parties differ as to their significance, these facts may be stated with concision. Pursuant to the New Jersey Solid Waste Management Act of 1975, Cape May County was designated
as one of 22 solid waste districts within the State of New Jersey. As such, it has the responsibility of developing a solid waste management plan. The Cape May County Board of Chosen Freeholders assigned the task of developing the plan to the petitioner. The plan was adopted in December 1979.

The solid waste management plan, which was approved by the New Jersey Department of Environmental Protection, provided for the construction of an interim, secure sanitary landfill, for a source separation recycling program, and for the subsequent design and construction of a resource recovery facility (RRF). It was contemplated that the RRF would be a mass-burn incinerator. A site study conducted by the petitioner selected the present landfill site as the most environmentally sound and feasible location for the landfill, recycling facility and resources recovery facility. The site is located in a forest area of the Pinelands Protection Area, on a 324 acre parcel in Upper Township and Woodbine Borough in Cape May County.

Pursuant to the Pinelands Protection Act of 1980 (N.J.S.A. 13:18A-1 et seq.), the Pinelands Commission promulgated the Pinelands Comprehensive Management Plan (N.J.A.C. 7:50-1.1 et seq.). These regulations provide for the closure of all landfills in the Pinelands by August 8, 1990. N.J.A.C. 7:50-6.74(a) and N.J.A.C. 7:50-6.75(a)5. On July 6, 1981, the Pinelands Commission granted a non-site specific waiver of strict compliance to the petitioner to permit development of a lined sanitary landfill in Cape May County. This waiver noted that the Cape May County Solid Waste Management plan had identified a pressing need to construct a new environmentally secure landfill to accommodate all municipalities in Cape May County. The waiver further noted that the petitioner intended to operate the landfill for 20 to 25 years, and that it was not economically feasible for the petitioner to establish the landfill if it would have to be abandoned by August 8, 1990.

The July 6, 1981 waiver of strict compliance concluded that the petitioner had demonstrated that the proposed landfill would serve an essential health need in Cape May County, since the existing unlined landfills in the county represented a continuing actual and potential threat to the health of the residents of the Pinelands. Noting that the petitioner proposed to construct a resources recovery system at the landfill, the Pinelands Commission concluded that granting of the waiver of strict compliance from the August 8, 1990 termination date would not result in a substantial impairment of the Pinelands if the landfill would only be utilized for residuals from a resource
recovery operation and as a backup for that operation after August 8, 1990, assuming the petitioner would meet the requirements for establishment of a new landfill. Thus, the Pinelands Commission concluded that granting of the waiver was the minimum relief necessary to meet the compelling public need and that the waiver was consistent with the Pinelands Protection Act, the Federal Act (section 502 of the National Parks and Recreation Act of 1978, P.L. 95-625), and the Pinelands Comprehensive Management Plan.

The petitioner subsequently submitted an application to the Pinelands Commission to permit development of the landfill at its present location, and the Executive Director of the Commission issued his report on the application for public development on February 23, 1983. This staff report recommended that the landfill be approved with conditions. Among these were that after August 8, 1990, the landfill should only be used for the disposal of residuals and un-processable wastes from a resource recovery operation and as an emergency backup facility for such a facility. The report also recommended that the petitioner submit a schedule for development of the resource recovery facility and a composting facility. Updates of the schedule were to be submitted to the Commission every six months until the resource recovery facility and the composting facility were fully operational.

The Commission staff also recommended that the petitioner’s requested waiver of strict compliance from the requirement of N.J.A.C. 7:50-6.74(a), that the landfill not be located within 2,500 feet of an existing residence, be approved with conditions. One of those conditions was that the landfill only be utilized for residuals from a resource recovery operation and as a backup for the operation after August 8, 1990. It was determined that the condition was necessary to avoid the waiver resulting in a substantial impairment of the resources of the Pinelands. The petitioner did not seek reconsideration of the staff recommendation concerning development of the landfill or the waiver of strict compliance from the residence proximity regulation. On September 8, 1983, the Pinelands Commission voted to approve the waiver of strict compliance, and include among its conditions that the landfill should only be utilized for residuals from a resource recovery operation and as a backup facility for that operation after August 8, 1990.

In accordance with the solid waste management plan for Cape May County which was approved by the New Jersey Department of
Environmental Protection, the petitioner constructed a solid waste system, including the secure sanitary landfill and a transfer station, and operations commenced in the summer of 1984. The landfill is constructed with a primary and secondary liner system and each liner system has a leachate collection system which pumps leachate to holding tanks. Tanker trucks transport the leachate from the holding tanks to waste water treatment facilities. Testifying at the hearing, Department of Environmental Protection Acting Assistant Commissioner and Director of Solid Waste Management John Czapor offered his opinion that the petitioner's facility is a state-of-the-art landfill, fully in compliance with the Department's regulations and the provisions of the permits which it has granted. According to Mr. Czapor, the facility is well run and has existing capacity, and it could continue in operation, "absent Pinelands constraints."

In accordance with the Solid Waste Management Act and the Solid Waste Management Plan, the petitioner has developed an extensive recycling program in Cape May County to reduce the amount of solid waste which is sent directly into the landfill. In addition, tires are removed from the waste stream and used to construct artificial reefs off shore. Hazardous household waste is diverted from the landfill and disposed of elsewhere. The petitioner has diverted bulky, vegetative waste from the landfill and used it to create wildlife shelters at the landfill perimeter. Commingled, source separated recyclables are now handled at an intermediate processing facility which permits sale of recyclables to the secondary market. The petitioner is also constructing a bulky waste sorting and recycling facility which will allow removal from the waste stream of building materials and other bulky waste.

On October 10, 1986, the Pinelands Commission voted to approve the petitioner's application to modify the previous approval of the landfill. The modification eliminated one of the originally approved four cells of the landfill and allowed an increase in the height of the other three cells. This did not change the overall capacity of the landfill. Among the conditions imposed with the modification approval was that the landfill only be used after August 8, 1990, for the disposal of residuals and unprocessable wastes from a resource recovery operation and as an emergency backup facility for such a facility. Again, the petitioner was to submit its current schedule for the development of the resource recovery facility and update the schedule to the Commission every six months until the resource re-
covery facility was fully operational. The petitioner did not request reconsideration of the Commission's approval. It is undisputed that the petitioner has not submitted all of the reports concerning the status of the resource recovery facility as required by the Commission's approvals.

On December 9, 1988, the Pinelands Commission approved the petitioner's application for construction of a 33,750 square foot intermediate processing facility for recyclables. As a condition of the approval, the Pinelands Commission required that no more than five percent of the material accepted at the intermediate processing facility should be disposed of at the landfill. Also, the Commission repeated the requirement that the landfill should only be used after August 8, 1990, for the disposal of residuals and unprocessable waste from a resource recovery operation and as an emergency backup landfill for such a facility. The petitioner did not request reconsideration of the Commission's approval.

Although the petitioner received its original waiver of strict compliance in 1981 and its landfill development approval in 1983, it will have neither an interim landfill nor a resource recovery facility developed by August 8, 1990. At the time of approval of the Solid Waste Management plan and the 1981 and 1983 waivers, it was contemplated that a mass-burn incinerator RRF would be utilized and the petitioner negotiated with Atlantic County and Cumberland County for a joint facility in 1985. When these counties could not agree, the petitioner began the complicated process to procure a vendor for the waste to energy facility at its landfill site. In early 1987, the petitioner received bids from vendors who were all proposing the use of mass-burn technology. The petitioner also completed its preliminary environmental health impact statement and submitted it to the Department of Environmental Protection for review. When the Cape May County Freeholders conducted public hearings concerning the mass-burn resource recovery facility, questions were raised regarding the safety of air emissions and the toxicity of ash residue from incineration. Even the Pinelands Commission raised questions as to the disposal of incinerator ash. The freeholders decided to delay their vote on designating the proposed site and technology for a resource recovery facility and they authorized an independent study to review the petitioner's plan to construct a 500 ton per day mass-burn resource recovery facility.

In September 1987, the Freeholders' independent consulting engineer reaffirmed the petitioner's recommendation and recommended
that the county proceed with the development of the facility. On September 17, 1987, the Freeholders conducted another public hearing and adopted an amendment to the Solid Waste Management Plan which authorized implementation of the 500 ton per day waste to energy facility. The Freeholders also directed the petitioner to concurrently evaluate "alternative technologies" to a mass-burn incinerator. In December 1987, the petitioner authorized a consultant's study of alternatives to straight mass-burning, including refuse derived fuels and pre-processing of solid waste prior to incineration. Also in December, the petitioner initiated negotiations with three remaining resource recovery vendors. On December 28, 1987, the petitioner received a copy of a letter sent from the Pinelands Commission to the Department of Environmental Protection which raised concerns regarding the water consumption, ash residue, and disposal of by-pass waste from a 500 ton per day incinerator.

In March of 1988, the petitioner requested the three resource recovery vendors to submit revised, updated proposals. On March 17, 1988, the Department of Environmental Protection approved the Solid Waste Management plan amendment for a 500 ton per day mass-burn resource recovery facility at the landfill site. The petitioner began evaluation of the proposals submitted by the resource recovery vendors in May 1988.

Significantly, representatives of the petitioner met with Pinelands Commission staff on August 18, 1988 to discuss the August 8, 1990 landfill closure deadline. The petitioner notified the respondent that it would be unable to construct and operate a resource recovery facility by the August 1990 deadline. The petitioner was advised by the respondent that no relief could be granted without a modification to its existing waiver of strict compliance. In order to obtain a determination from the respondent, it was necessary for the petitioner to immediately file a complete application for a waiver. The Commission staff also detailed the standards for a waiver, which would include eliminating all in-state, out-of-county alternatives and out-of-state alternatives for disposal of the solid waste.

It was not until March 1989 that the petitioner submitted a partial waiver application to the Commission. The application was then supplemented by additional submissions in April, July and September, 1989. As noted previously, the Commission staff report recommending denial of the waiver application was issued on October 16, 1989.

Prior to submitting the first component of its application for a waiver in March 1989, the petitioner initiated a site study for an
interim landfill. In November 1988, referenda in the Cape May County municipalities resulted in an overwhelming vote against mass-burn incineration. On March 11, 1989, the Cape May County Board of Chosen Freeholders asked the petitioner to research other options besides mass-burn incineration for short and long-term disposal of solid waste. These included the siting of a non-Pinelands landfill and out-of-county waste disposal. On March 31, 1989, the petitioner advised vendors of its decision to terminate the prior resource recovery procurement process and to initiate a new procurement process for resource recovery facilities which would be open to all technologies. A chronology regarding resource recovery procurement activities was admitted into evidence.

Requests for qualifications and requests for proposals have been received from vendors and three final vendors have been designated by the petitioner. Two propose composting as a resource recovery facility and one vendor proposes out-of-state incineration of Cape May County's municipal solid waste. The petitioner estimates that if a composting vendor is selected, a facility could be on line and operating by mid-1994.

The petitioner's in-county interim landfill siting study identified five sites outside of the Pinelands Protection Area. Of these, two are in the Pinelands National Reserve. The three sites outside of the Pinelands National Reserve Area present difficulties because of inadequate elevation from ground water and the presence of fresh water wetlands. The two sites within the Pinelands National Reserve Area have significantly higher depth to ground water, but they are subject to wetlands development regulations under CAFRA and the Pinelands Commission has taken the position that these sites must be reviewed under a waiver of strict compliance standard. According to the petitioner, an interim landfill could be developed in the Pinelands National Reserve Area within two years and at one of the three sites outside the reserve area within a three-year period. These estimates are subject to the complex regulatory review process.

The petitioner also reviewed the possibility of out-of-county disposal of its solid waste. Bergen and Passaic counties could make their transfer stations available to handle Cape May County's waste. The waste would be transported from the transfer stations to landfills outside of New Jersey. The estimated cost of this disposal, including transportation, would exceed $150 per ton. Some capacity could also be made available at the Essex County resource recovery facility by the end of 1990. It is uncertain as to whether this capacity would
remain reliably available. The petitioner has also determined that out-of-state landfill space is available in the State of Pennsylvania. This availability is subject to Governor Casey's Executive Order limiting importation of waste into the Commonwealth of Pennsylvania. The petitioner estimates that the cost to transport and dispose of its solid waste in a Pennsylvania landfill would be $120 per ton.

The petitioner will not have a resource recovery facility in operation as of August 8, 1990. The most current amendment to the Solid Waste Management Plan provides that straight landfilling will cease on August 8, 1990. On the same date, the solid waste permit issued by the New Jersey Department of Environmental Protection will expire. Since January 1990, the petitioner has increased the tipping fee which it charges users of its landfill. This fee is intended to cover the additional cost which would be incurred to transport and landfill the county's waste out of state after August 8, 1990. However, the petitioner has as of yet not entered into any contracts for out-of-state landfill space or for the transportation of its solid waste. In essence, the petitioner does not know where Cape May County's solid waste will go as of August 8, 1990.

All of the preceding evidence is essentially undisputed and believable, and is thus FOUND AS FACT.

CONCLUSIONS OF LAW

N.J.S.A. 13:18A-10c authorized the Pinelands Commission to waive strict compliance with the Comprehensive Management plan or any element or standard of the plan, upon finding that such waiver is necessary to satisfy a compelling public need, that such waiver is consistent with the purposes and provisions of the Pinelands Protection Act and the Federal Act, and that such waiver would not result in substantial impairment of the resources of the Pinelands Area. To be granted a waiver of strict compliance from the August 8, 1990 closure date for landfills in the Pinelands Area, the petitioner must establish a compelling public need by meeting the requirements of N.J.A.C. 7:50-4.66(a)2i, as follows:

1. The proposed development will serve an essential health or safety need of the municipality or, in the case of an application serving more than one Pinelands municipality, the county in which the proposed development is located;
2. The public health and safety require the requested waiver;
3. The public benefits from the proposed use are of a character that override the importance of the protection of the Pinelands as established in the Pinelands Protection Act or the Federal Act;
4. The proposed use is required to serve existing needs of the residents of the Pinelands; and,
5. No feasible alternatives exist outside the Pinelands area to meet the established public need and no better alternatives exist within the Pinelands area.

N.J.A.C. 7:50-4.66(b) provides that an application for a waiver shall be approved only if it is determined that the following additional standards also are met:

1. The granting of the waiver will not be materially detrimental or injurious to other property or improvements in the area in which the subject property is located, increase the danger of fire, endanger public safety or result in substantial impairment of the resources of the Pinelands Area;
2. The waiver will not be inconsistent with the purposes, objectives or the general spirit and intent of the Pinelands Protection Act, the Federal Act or this plan; and,
3. The waiver is the minimum relief necessary ... to satisfy the compelling public need.

The petitioner argues that no feasible alternative exists for the disposal of Cape May County's solid waste and that the waiver of strict compliance must therefore issue. In regard to infeasibility, the report on the application for a waiver of strict compliance dated October 16, 1989, states:

To use an economic argument as the basis to demonstrate that an available alternative is infeasible, the applicant must clearly show that the burden to be absorbed is extraordinary, and near the limit where it cannot be reasonably absorbed. The applicant has failed to demonstrate anything that approaches either of the above.

The petitioner argues that feasibility should be construed in terms of being practical, as opposed to being "possible." The case of Turner Co. Div. of Olin Corp. v. Secretary of Labor, 561 F. 2d 82 (7th Cir.
1977) construed regulations of the Occupational Safety and Health Review Commission. The court identified the controversy between the parties to be whether the word feasible as used in the regulations should be interpreted to mean only "technically possible," or whether it includes a component of economic feasibility. The court adopted the following standard:

We conclude that the standard should be interpreted to require those engineering and administrative controls which are economically as well as technically feasible. Turner, at 85.

The petitioner relies upon evidence establishing the cost to transport and dispose of Cape County's solid waste out of state. This figure is estimated to be $120 per ton. If the transfer stations in Bergen or Passaic counties were utilized, the cost would be approximately $150 per ton. The petitioner argues that the extra cost to the citizens of Cape May County for out-of-state disposal because of an arbitrary date established by the Pinelands Commission is an exercise of infeasibility. The petitioner buttresses its argument by noting that it is the regulatory policy of the State of New Jersey to restrict out-of-state disposal of solid waste. In re Waste Disposal Agreement, 237 N.J. Super. 516 (App. Div. 1990). In that matter, the Appellate Division stated:

The uncertainty inherent in use of out-of-state facilities conflicts with the philosophy of the Solid Waste Management Act, which is that districts should be able to plan for and predict the availability of disposal capacity to meet their needs. In re Waste Disposal Agreement, at 523.

The petitioner further argues that it has acted reasonably in seeking alternate technologies for resource recovery. Arguing that the landfill closure deadline is arbitrary, artificial, and without scientific or environmental basis, the petitioner states that it "paused on its journey to resource recovery to investigate alternative technologies," for reasons of public policy. Questions arose concerning the scientific reliability of mass-burn incineration and the inability to resolve those questions necessitated a loss of time in the resource recovery procurement process. Eventually, it became clear that petitioner would not be able to meet the August 8, 1990 landfill closure deadline. While applying to the Commission for a waiver of strict compliance, the petitioner has developed a procurement process for alternative remedies, all of which it argues are time consuming, laborious, and expensive to accomplish. The petitioner contends that it has taken the
correct path and has taken all alternative measures to mitigate the harshness of the "arbitrary and artificial" August 8, 1990 deadline.

In opposition to the petitioner's request for a waiver of strict compliance, the respondent contends that feasible alternatives exist outside the Pinelands Area to meet the established public need. It submits that the plain meaning of feasible for purposes of this matter is: capable of being accomplished. See, Black's Law Dictionary (5th edition 1979) at 549, and Random House College Dictionary (7th edition 1982) at 483. Development of a resource recovery facility or another interim landfill are existing feasible alternatives within Cape May County. A resource recovery facility is consistent with the existing Solid Waste Management Plan and is the basis for the waivers previously applied for and granted to the petitioner. Either a resource recovery facility or another interim landfill could have been developed and in operation prior to the August 8, 1990 deadline.

The respondent also argues that there are existing feasible alternatives for out-of-county but in-state disposal of Cape May County's solid waste. The petitioner could have accepted offers to transport its solid waste to either the Bergen County or the Passaic County transfer stations. The Warren County or the Essex County resource recovery facilities could accept the petitioner's solid waste. Existing feasible alternatives outside of New Jersey are also available. The petitioner has had the opportunity to enter into a contract to reserve out-of-state landfill space. Notwithstanding the public policy to seek in-state methods of solid waste disposal, a number of New Jersey counties presently ship solid waste out of state or have contracts to do so. Furthermore, the petitioner has been assessing its customers with an out-of-state surcharge since January 1, 1990. The petitioner has even received a bid for incineration of its solid waste which would provide for disposal of its ash in an out-of-state facility.

In light of the foregoing existing feasible alternatives, the respondent argues that the proposed waiver is not required to serve the existing needs of residents of the Pinelands. While these residents obviously must have their solid waste disposed of, landfilling of that solid waste in the Pinelands is not required. The respondent also argues that the public benefits from the proposed use do not override the protection of the Pinelands. In light of the special significance and protection accorded to the Pinelands by the State of New Jersey and the Federal Government, the long-standing deadline to end landfilling in the Pinelands should not now be overridden when feasible alternatives to such landfilling exist. Although the respondent concedes that
the waiver would serve an essential health and safety need of Cape May County, it asserts that the public health and safety needs do not require the waiver. While disposal of the county's solid waste is mandated, available in-county and out-of-county alternatives would serve the essential health and safety need of the county without risking the potential for degradation of Pinelands resources.

Having reviewed all of the evidence in this matter and having considered the arguments of the parties, I CONCLUDE that the petitioner has failed to satisfy the requirements of N.J.A.C. 7:50-4.66(a)2i to establish a compelling public need for a waiver of strict compliance. Feasible alternatives exist outside the Pinelands Area. The increased cost of out-of-state solid waste disposal is almost certainly an unappealing and unpopular alternative. However, the petitioner has not shown that the increase in cost is infeasible by its own standard for determining feasibility. The increased cost may be distasteful, but it has not been shown to be economically impractical when weighed against the long-standing public policy providing for protection of the Pinelands. In the absence of an operating resource recovery facility or alternative interim landfill, the extra cost of out-of-county or out-of-state disposal is a consequence which must be borne by the petitioner and its customers, because the importance of the protection of the Pinelands as established in the Pinelands Protection Act overrides the public benefit from continued landfilling in the Pinelands Area.

Accordingly, I CONCLUDE that the petitioner's request for a waiver of strict compliance from the requirement of N.J.A.C. 7:50-6.75(a)5 that use of its landfill in the Pinelands Protection Area cease on August 8, 1990, should be DENIED. It is so ORDERED.

This recommended decision may be adopted, modified or rejected by the PINELANDS COMMISSION which by law is empowered to make a final decision in this matter.

**FINAL DECISION BY THE PINELANDS COMMISSION:**

WHEREAS, the Pinelands Commission has reviewed an extensive record compiled during nine days of hearing, and the Initial Decision rendered by Administrative Law Judge Joseph F. Fidler; and

WHEREAS, the applicant is seeking a Waiver of Strict Compliance to permit the continuation of disposal of municipal solid waste in its landfill beyond the date provided in a previous Waiver of Strict Compliance, and the Comprehensive Management Plan adopted by
the Commission pursuant to the Pinelands Protection Act (N.J.S.A. 13:18A-1 et seq.) and the National Parks and Recreation Act of 1978 (P.L. 95-625); and

WHEREAS, the landfill and associated facilities are located on a 324 acre parcel in Upper Township and Woodbine Borough, and the landfill itself, is located in a Forest Area in Upper Township; and

WHEREAS, N.J.A.C. 7:50-6.75(a)5 precludes the disposal of solid waste in the Pinelands after August 8, 1990; and

WHEREAS, the applicant previously received a Waiver of Strict Compliance from the provisions of N.J.A.C. 7:50-6.75(a)5 pursuant to the provisions of the Comprehensive Management Plan which Waiver of Strict Compliance took effect on August 10, 1981; and

WHEREAS, in the application for that Waiver of Strict Compliance the applicant represented that the landfill was necessary for the disposal of municipal waste until August 8, 1990 at which time a resource recovery facility (mass burn incinerator) would be on line and the landfill would be used for "inert ash" residuals, unprocessable waste and as an emergency back-up; and

WHEREAS, the Waiver approval limited the use of the landfill to the disposal of residuals from said resource recovery facility, unprocessable waste, and as an emergency back-up to such facility after August 8, 1990, and these limitations were imposed to ensure that the granting of a Waiver would not result in a substantial impairment to the resources of the Pinelands; and

WHEREAS, on March 4, 1983 the Pinelands Commission approved the development of the landfill on the subject parcel and among the conditions imposed by that approval were the following:

1. After August 8, 1990, the landfill shall only be used for the disposal of residuals and unprocessable wastes from a resource recovery operation and as an emergency back-up facility for such a facility.

2. Within 60 days of this approval the applicant shall submit a schedule for the development of the resource recovery facility and the composting facility. Said schedule shall include the dates by which various aspects of the development of the resource recovery and composting facilities will be completed. It shall also include an estimate of the total cost of the facilities and a statement of the sources of funding for the property. For each funding source, the applicant shall state whether the proposed funding has been approved or obtained. An update of said schedule shall be submitted to the Commission every 6 months until the resource recovery facility and the composting facility are each fully operational.
WHEREAS, those conditions were contained in the Executive Director's recommendation that the Waiver be approved and the applicant neither requested reconsideration of the that recommendation nor appealed the Commission's final decision; and

WHEREAS, the Cape May County Solid Waste Management Plan indicated at that time that the landfill was an interim facility until the aforementioned resource recovery facility was developed; and

WHEREAS, the development of the landfill required a Waiver of Strict Compliance from the requirement contained in N.J.A.C. 7:50-6.74(a)7 that the landfill not be located within 2,500 feet of an existing residence; and

WHEREAS, the Executive Director's recommendation that the Waiver be approved repeated comparable conditions to those cited above in order that the granting of the Waiver would not result in a substantial impairment to the resources of the Pinelands, and the applicant did not request reconsideration of that recommendation; and

WHEREAS, residents within 2,500 feet of the landfill requested reconsideration of the Executive Director's recommendation, and the testimony at the hearing reitered that the landfill would only be used for residuals and as an emergency back-up for the aforementioned resource recovery facility; and

WHEREAS, after reviewing the record of the hearing and an initial decision, the Commission approved the Waiver of Strict Compliance with conditions in September, 1983 including the condition that, "After August 8, 1990 the landfill shall only be utilized for residuals from a resource recovery operation and as a back-up facility for that operation;" and

WHEREAS, in 1986 the applicant submitted an application to modify its prior approval to eliminate one of the originally approved cells (1D) and to increase the height of other cells resulting in no change in the overall capacity of the landfill; and

WHEREAS, based on the recommendation of the Executive Director of the Commission approved the modification with conditions including:

1. After August 8, 1990, the landfill shall only be used for the disposal of residuals and unprocessable wastes from a resource recovery operation and as an emergency back-up facility for such a facility.

2. Within 60 days of this approval the applicant shall submit its current schedule for the development of the resource recovery facility. Said schedule shall include the dates by which various
aspects of the development of the resource recovery facility will be completed. It shall also include an estimate of the total cost of the facility and a statement of the sources of funding for the property. For each funding source, the applicant shall state whether the proposed funding has been approved or obtained. An update of said schedule shall be submitted to the Commission every 6 months until the resource recovery facility is fully operational.

WHEREAS, the applicant neither requested reconsideration of the Executive Director’s recommendation containing these conditions nor appealed the Commission’s final action of approval; and

WHEREAS, in 1988, the applicant applied to develop an intermediate processing facility for recyclables on a portion of the landfill parcel, and this application was approved with conditions by the Commission on December 9, 1988 including the following; and

1. No more than 5% of the material accepted at the facility shall be disposed of at the landfill located on the parcel. After August 8, 1990, the landfill shall only be used for the disposal of residuals and unprocessable waste from a resource recovery operation and as an emergency back-up landfill for such a facility.

WHEREAS, the applicant did not request reconsideration of the Executive Director’s recommendation containing this condition, and did not appeal the Commission’s final action in the matter; and

WHEREAS, the applicant applied to develop a bulky waste sorting facility on the subject parcel and that application was approved by the Commission on May 4, 1990 with conditions including the following:

1. After August 8, 1990, the landfill shall only be used for the disposal of residuals and unprocessable wastes from a resources recovery facility and as an emergency back-up for such a facility unless a new Waiver of Strict Compliance is approved that modifies this requirement. For purposes of this condition neither the intermediate processing facility nor this bulky waste sorting facility constitute a resource recovery facility.

WHEREAS, the applicant’s Executive Director sent a letter expressing concerns with this condition prior to Commission action on this matter, but expressly did not request reconsideration of the staff recommendation containing such condition; and

WHEREAS, the Commission considered the aforementioned let-
ter and included in the Resolution approving the facility the following findings:

WHEREAS, the Commission specifically adopts the finding in the staff report that the bulky waste facility does not constitute the resource recovery facility contemplated by the prior approvals granted by the Pinelands Commission to the Cape May County Municipal Utilities Authority; and

WHEREAS, this finding does not preclude either this facility or the previously approved intermediate processing facility from being considered a component of an overall resource recovery program; and

WHEREAS, neither of those facilities, either alone or considered together, are the resource recovery facility that the applicant represented would be developed in its prior applications to the Pinelands Commission concerning the landfill which was approved by the Pinelands Commission; and

WHEREAS, the applicant did not appeal the Commission’s approval of the bulky waste sorting facility; and

WHEREAS, the applicant has violated conditions of the prior approvals granted by the Pinelands Commission and the provisions of the Comprehensive Management Plan including:

1. Failure to submit the required reports on the status of the resource recovery facility;
2. Commencing resource extraction operations on the parcel prior to receiving approval of the Pinelands Commission;
3. Conducting resource extraction operations within 300 feet of fresh water wetlands;
4. Commencing construction of the bulky waste sorting facility prior to receiving approval from the Pinelands Commission;
5. Establishing stockpile areas for recyclables prior to receiving approval from the Pinelands Commission;
6. Developing a ditch for stormwater runoff without receiving approval from the Pinelands Commission; and
7. The applicant awarded the contract for the development of Cell 1C without the prior approval of Pinelands Commission.

WHEREAS, the applicant has failed to have a resource recovery facility operational by August 8, 1990 after nine years from the approval of the original Waiver of Strict Compliance; and

WHEREAS, based on the record of the hearing, the Cape May County Board of Chosen Freeholders considered an amendment to the County’s Solid Waste Management Plan to site a mass burn
facility in March, 1987 and deferred action on the matter pending further study; and

WHEREAS, the applicant had received bids for the development of a mass burn resource recovery facility at this time; and

WHEREAS, in September, 1987 the Board of Freeholders approved the aforementioned amendment to the County's Solid Waste Management Plan and the amendment was subsequently certified by the Department of Environmental Protection; and

WHEREAS, the applicant requested amended bids from the original bidders and received same, but chose not to award a contract to any bidders; and

WHEREAS, the hearing testimony record is devoid of any finding that none of the bidders were qualified or that the bids failed to meet the applicant's requirements; and

WHEREAS, the hearing record indicates that the mass burn resource recovery facility could have been developed by August 8, 1990 if a contract had been awarded at this time; and

WHEREAS, the applicant did not initiate or complete an application for a Waiver of Strict Compliance until after it was too late to develop an alternative facility in Cape May County if the Waiver was not approved despite being urged by the Commission's staff to submit an application immediately in August, 1988; and

WHEREAS, several New Jersey counties and cities are currently disposing of solid waste outside of New Jersey and the cost for these counties is similar to that which would be incurred by Cape May County, and Cape May County has failed to demonstrate that any unique factors such as income distinguish it from such counties and cities; and

WHEREAS, all other counties within the Pinelands have made arrangements for the disposal of solid waste outside of the Pinelands by August 8, 1990 including most recently, Atlantic County, which will dispose of its solid waste out-of-state for a 10 year period; and

WHEREAS, the existence of this contract indicates there are no legal impediments in either New Jersey or Pennsylvania to the disposal of solid waste from Cape May County in Pennsylvania; and

WHEREAS, based on the foregoing it is feasible for Cape May County to dispose of its waste in a similar fashion; and

WHEREAS, the applicant failed to negotiate with Essex County to use its incinerator although it was informed that capacity is available; and

WHEREAS, the applicant has now received three bids for the
disposal of solid waste; two of which are for composting facilities which will require landfilling of unprocessed waste not suitable for composting, and one bid for incinerator disposal in Pennsylvania in 1991; and

WHEREAS, the record is clear that the assumptions by the applicant and the Commission which led to the original approval of a Waiver of Strict Compliance are no longer valid, and that the landfill will not be utilized for "inert" ash residue from a mass burn resource recovery facility; and

WHEREAS, as the record indicates, increased knowledge during the period of 1981 to 1990 has raised issues regarding the content of ash residuals from mass burn facilities and their hazardous and toxic nature, and such ash is definitely not "inert;" and

WHEREAS, the conditions of the prior approvals and the provisions of the Comprehensive Management Plan preclude acceptance of hazardous or toxic waste at the landfill; and

WHEREAS, none of the alternatives being pursued by Cape May County reflect the intent of the original Waiver of Strict Compliance; and

WHEREAS, continued operation of the landfill as provided by the original waiver no longer will provide assurance that substantial impairment to the resources of the Pinelands will be avoided; and

WHEREAS, the Commission finds, based on the record, that Cape May County can construct an alternate landfill outside of the Pinelands National Reserve within the next two and one half years; and

WHEREAS, the Commission finds, based upon the review of the record of the hearing, that permanent closure of the landfill is required to forestall the substantial impairment to the resources of the Pinelands that would occur if the landfill is used as presently anticipated; and

WHEREAS, the Commission after reviewing the record, is of the opinion that the facts demonstrate that there are no feasible alternatives existing outside of the Pinelands Area for a period now until December 31, 1992, and therefore, there is a compelling public need to grant this extension under the terms and conditions contained herein; and

WHEREAS, the Commission finds that a limited extension of use of the landfill will provide the County a reasonable period to institute an alternative which will enable the County to dispose of its solid waste outside of the Pinelands National Reserve, and ensure the
permanent closure of the landfill so that the resources of the Pinelands will not be so impaired; and

WHEREAS, the approval of a modification to the 1981 Waiver of Strict Compliance will better protect the resources of the Pinelands in a manner consistent with the Pinelands Protection Act and the National Parks and Recreation Act; and

WHEREAS, in light of the above the Commission finds that the approval of a modification of the Waiver of Strict Compliance will better reflect the statutory and regulatory requirement that the Waiver be consistent with the purposes, objectives or general spirit and intent of the Pinelands Protection Act, Federal Act or the Comprehensive Management Plan than the original Waiver does.

NOW, THEREFORE BE IT RESOLVED that the Initial Decision of the Administrative Law Judge is hereby modified as set forth herein and the application for a Waiver of Strict Compliance by the Cape May County Municipal Utilities Authority (Application No. 81-0837.10, OAL DKT NO EPC 8660-89, Block 40, lots 2, 4, 5, p/o 7, 10, 11, and 12; Block 223, lot 5; Block 247, lots 1-3, and Block 248, lots 5-7, 9 and 9.01 Upper Township, Block 123, lots 1-3; Block 124, lot 1; Block 128.02, lots 1-3; Block 128, lots 1, 3, and 4; Block 121, lot 1; Block 122, lots 1 and 2; Block 129, lot 1; Block 131.02, lots 1-29 and Block 137.02; lots 1-9 Woodbine Borough) to Modify the Waiver of Strict Compliance approved by the Pinelands Commission in 1981 is hereby approved to enable the landfill to remain open from August 8, 1990 until December 31, 1992 at which time the landfill shall be permanently closed to all forms of solid waste subject to the following conditions:

1. Under no circumstances shall the permanent closure date of December 31, 1992 be extended;

2. Within 120 days of this approval the applicant shall provide documentation to the Pinelands Commission that the Cape May County Solid Waste Management Plan either contains the following provisions or that an amendment containing the following provisions has been submitted to DEP for its approval:
   a. The existing CMCMUA landfill in Upper Township shall be permanently closed as of December 31, 1992;
   b. No existing landfill within the Pinelands National Reserve shall be permitted to be reopened or to expand except for the expansion of the CMCMUA landfill in Upper Township as provided by this Waiver of Strict Compliance;
c. No new landfill shall be sited or constructed in the Pinelands Area or the Pinelands National Reserve;

3. By December 31, 1990 the CMCMUA shall submit to the Pinelands Commission documentation describing alternatives available to the CMCMUA for the disposal of solid waste and any residuals from any resource recovery (including, but not limited to, an incinerator, composting, recycling center, material recovery facility) or out of county disposal in a manner which precludes the use of any landfill in the Pinelands Area or in the Pinelands National Reserve beyond the use of its landfill in Upper Township until December 31, 1992 as herein permitted;

4. By July 1, 1991 the CMCMUA shall submit to the staff of the Pinelands Commission documentation including Solid Waste Management Plan amendments, regarding the solid waste disposal alternative(s) selected. Such alternative(s) shall preclude the landfilling of any solid waste or any residuals from any resource recovery facility within the Pinelands Area or the Pinelands National Reserve. A schedule which demonstrates that the selected alternative(s) will be in place on or prior to January 1, 1993 shall also be provided;

5. By June 30, 1992 the CMCMUA shall submit closure plans to the Commission for approval for its existing landfill in Upper Township and shall provide in said plans that all closure activities shall be completed by December 31, 1993;

6. By September 15, 1990 and every three months thereafter the CMCMUA shall submit to the staff of the Pinelands Commission a memorandum describing the Authority’s progress in meeting conditions 2, 3, 4, and 5 above;

7. Failure to meet any date required by Conditions 2, 3, 4, 5 and 6 above shall cause the landfill to cease operating and to be permanently closed within 90 days of notice of such failure to comply with the condition from the Executive Director of the Pinelands Commission;

8. No hazardous, toxic, chemical, petroleum (including oil spill pollutants), septic, nuclear waste or liquid or dewatered sludge shall be disposed of in the landfill;

9. Only waste from Pinelands municipalities or from counties with at least 50% of their land within the Pinelands shall be accepted at the landfill;

10. No leachate shall be disposed of in the Pinelands. No leachate shall be permanently stored at the site;

11. All cells shall be capped with an impervious material by December 31, 1993;

12. Landscaping shall adhere to the requirements of the Comprehensive Management Plan;
13. All development shall be located at least 300 feet from any wetlands on the site; and

14. The development of Cell 1C is hereby authorized except as modified herein. The development of Cell 1C shall adhere to the plan, consisting of 16 sheets, prepared by Hart Engineers, Inc. and dated as follows:
sheets E1 and E16 dated July 28, 1989 and last revised August 11, 1989,
sheets E2, E4-7, E11 and E13-15 dated July 28, 1989, and last revised March 5, 1990,

The applicant may reduce the size of Cell 1C provided that it stays within the footprint shown on the above referenced plans. Any disturbed areas not necessary for landfilling beyond December 31, 1992 shall be revegetated with native Pinelands plant materials. A landscaping plan shall be submitted for approval at such time as closure plans are submitted for landfill.

You must check the New Jersey Citation Tracker in the companion looseleaf volume to determine the history of this case in the New Jersey courts.