



## State of New Jersey

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

**CERTIFICATION  
OF THE APRIL 25, 2000  
AMENDMENT TO THE CAPE MAY 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 February 4, 1981, the Department of Environmental Protection (Department or DEP) approved, with modifications, the Cape May County District Solid Waste Management Plan (County Plan).

The Act requires that all district plans be based on and accompanied by a report detailing the existing waste disposal situation in the district, and a plan which includes the strategy to be followed by the district in meeting the solid waste management needs of the district for a ten-year planning period. The report must detail the current and projected waste generation for the district, inventory and appraise all facilities in the district, and analyze the waste collection and transportation systems which serve the district. The disposal strategy must include the maximum practicable use of resource recovery techniques. In addition to this strategy, the plan must designate sufficient available suitable sites for the disposal of the district's waste for a ten-year period.

The Act further provides that a district may review its County Plan at any time and, if found inadequate, a new County Plan must be adopted. The Cape May County Board of Chosen Freeholders (County Freeholders) completed such a review and on April 25, 2000, adopted an

amendment to its approved County Plan.

The amendment represents a further response by the County to the May 1, 1997 decision of the United States Court of Appeals for the Third Circuit which declared unconstitutional New Jersey's historic system of solid waste flow control. See Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 112 F. 3d 652 (3d Cir. May 1, 1997, cert. 1997), cert. denied, \_\_\_ U.S. \_\_\_, 118 S.Ct. 412, 139 L. Ed.2d 316 (1997) (Atlantic Coast). Specifically, each solid waste management district must reevaluate its solid waste disposal strategy in light of this recent court decision and, if necessary, initiate appropriate amendments thereto.

In general, the Department refers the County to the solid waste regulations at N.J.A.C. 7:26-1 et seq. to the extent they relate to specific procedural and substantive issues addressed in this and subsequent plan amendments. In addition, this certification is in no way intended by the DEP to represent a legal determination regarding the effect of the Atlantic Coast decision on any specific contract between public and/or private parties.

The April 25, 2000 amendment describes the County's revised disposal strategy, in response to the Atlantic Coast decision, which mandates that all non-recycled solid waste generated from within Cape May County which is not disposed of outside the State of New Jersey is to be disposed of at the Cape May County Municipal Utilities Authority's (CMCMUA) Landfill located in Woodbine Township as well as weighing requirements for transfer stations and materials recovery facilities and reaffirms the implementation of the Environmental Investment Charge (EIC).

The amendment was considered administratively complete for review by the Department on May 12, 2000 and copies were distributed to various administrative review agencies for review and comment, as required by law. The Department has reviewed this amendment, as well as the entire County Plan in light of the Atlantic Coast court ruling, and has determined that the amendment adopted by the County Freeholders on April 25, 2000 is approved in part and remanded in part as provided in N.J.S.A. 13:1E-24.

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

Pursuant to N.J.S.A. 13:1E-24a(1), I have studied and reviewed the April 25, 2000 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 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 April 25, 2000 amendment which are included in Section B.2. below.

In conjunction with the review of the amendment, the Department circulated copies to sixteen 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 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  
Pinelands Commission  
New Jersey Turnpike Authority  
New Jersey Advisory Council on Solid Waste Management  
Department of Agriculture  
Department of Health and Senior Services  
Department of Transportation  
Department of Community Affairs  
U.S. Environmental Protection Agency

**1. Agency Participation in the Review of the April 25, 2000 Amendment**

The following agencies did not object to the proposed amendment:

Division of Water Quality, DEP  
Division of Fish and Wildlife, DEP  
Division of Compliance and Enforcement, DEP  
Green Acres Program, DEP  
Department of Agriculture  
Department of Transportation  
New Jersey Turnpike Authority

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

Land Use Regulation Element, DEP  
Division of Parks and Forestry, DEP  
Division of Air Quality, DEP  
New Jersey Advisory Council on Solid Waste Management  
Department of Health and Senior Services  
Department of Community Affairs  
Pinelands Commission  
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 April 25, 2000 Amendment**

### **Issue: Prior Disposal Strategy**

On October 2, 1997, the County adopted an amendment which represented its initial response to the Atlantic Coast decision. This amendment, among other things, required that all solid waste generated within Cape May County be weighed at one of two designated weigh stations for the collection of an EIC prior to disposal. Also, the County adopted a policy to solicit for disposal at the CMCMUA Landfill solid waste generated from outside of Cape May County. The Department, in its certification of November 10, 1997, approved with modification these components of the amendment. Specifically, pursuant to N.J.A.C. 7:26-6.10(b)2., the in-district weighing was restricted to a 6 month period and required the submission of a subsequent plan amendment identifying a long-term strategy for the collection of outstanding debt that examines reasonable available alternatives. Following the submission of this amendment, the County would be allowed to continue to collect any charges through mandatory in-district weighing pending the Department's review of the alternative method of collection.

On April 28, 1998, the County adopted a subsequent amendment which represented a response to the Department's November 10, 1997 certification of the October 2, 1997 County Plan amendment. This amendment examined reasonable alternatives for the collection of outstanding debt and adopted a strategy which required that all solid waste generated within Cape May County but not disposed of at the CMCMUA landfill or transfer station be transported to one of six identified out-of-district facilities for weighing and recordkeeping prior to disposal for billing and collection of the EIC by the CMCMUA. On October 5, 1998, the Department approved the strategy contained in the April 28, 1998 amendment.

As a supplemental response to the Atlantic Coast decision, Cape May County adopted the April 25, 2000 amendment which proposes that all non-recycled solid waste generated within Cape May County and which is not transported to a permitted out-of-State facility for disposal, shall be directed to the CMCMUA landfill for disposal, reaffirms the collection of the EIC and mandates additional weighing and reporting requirements for transfer stations and materials recovery facilities. Also, the April 25, 2000 amendment proposes to delete from the County Plan the policy which allows for the solicitation of solid waste generated from outside of Cape May County for disposal at the CMCMUA Landfill.

### **Issue: Revised Disposal Strategy**

In the Atlantic Coast case, the United States Court of Appeals for the Third Circuit enjoined the enforcement of New Jersey's flow control regulations noting that "...the State of New Jersey cannot protect the local waste disposal market, and thereby exclude out-of-state competitors, in

order to use inflated revenues to finance substantial debts of its waste management districts.” However, the court noted that “...a law that directs waste to a particular facility will not necessarily violate the dormant Commerce Clause as long as out-of-state operators are given an even chance to compete for the opportunity to dispose of the state or district’s waste.” Further, the Court held that “...[a]lthough the state of New Jersey may no longer preclude the designation of out-of-state waste disposal facilities or operators, the state and the county authorities remain free to regulate the flow of waste within New Jersey as long as the state’s laws and regulations treat in-state and out-of-state facilities equally.” Subsequently, the Appellate Division of the Superior Court of New Jersey upheld the enforcement of waste flow restrictions as they affected the in-state flow of waste. See, IMO Allegations of Violations of Law by A. Fiore & Sons, Inc., 305 N.J. Super. 192, (App. Div. 1997). The Atlantic Coast and Fiore decisions represent the existing legal precedents regarding restrictions on the intra-state flow of waste in New Jersey. Written comments from both the private and public sectors regarding the April 25, 2000 plan amendment object to the in-state direction of waste as intruding upon the protections of the dormant Commerce Clause of the United States Constitution. As discussed in greater detail below, this certification remands for further consideration the collection of an EIC by the CMCMUA, and also remands the attendant weighing and reporting requirements envisioned by the previous amendments as well as this amendment. Moreover, haulers transporting solid waste generated in Cape May County are able to use transfer stations and materials recovery facilities located in New Jersey. As a consequence, there appears to be no barrier to access by out-of-state entities to the solid waste market in Cape May County, nor any negative effect on the movement of recyclable materials into interstate commerce.

**Issue: Solicitation of Out-of-County Waste**

In its April 25, 2000 plan amendment, Cape May has deleted the prior strategy regarding the solicitation of out-of-county solid waste for disposal at the CMCMUA Landfill. Prior to the amendment, the Cape May County Plan had described circumstances under which Cape May would solicit out-of-county solid waste. The April 25, 2000 plan amendment eliminates solicitation by the CMCMUA of out-of-county waste, but does not prohibit the disposal of out-of-county waste, which would be unconstitutional. See, Fort Gratiot Sanitary Landfill, Inc., v. Dep’t of Natural Resources, 504 U.S. 353, 359, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992).

**Issue: Validity of EICs**

A June 22, 2000 ruling by the Supreme Court of the State of New Jersey in a case concerning the validity of the imposition of an EIC has relevance to certain portions of the April 25, 2000 amendment. Specifically, IMO Passaic County Utilities Authority Petition Requesting Determination of Financial Difficulty and Application for Refinancing Approval by the City of Paterson, 164 N.J. 270 (2000) the court held that the EIC imposed by the Passaic County Utilities Authority is not statutorily authorized. The effective date of the judgment was stayed for ninety days to provide an opportunity for State legislative intervention, and has been extended by the court for an additional sixty days. The Department notes that, as to the users of the CMCMUA Landfill, the Cape May EIC represents costs related to debt service and

enforcement in the operation of the CMCMUA Landfill. As such, these costs are permissible to recoup from users of the CMCMUA Landfill.

Without the enactment of state legislation authorizing EIC's within this extended stay period granted by the court decision, the Cape May County EIC becomes legally void. Further, without the authorization to collect the EIC, the various weighing and reporting requirements imposed by Cape May County on waste disposed out-of-state becomes unnecessary. For purposes of solid waste planning, waste generation data may be obtained from data which the Department requires solid waste facilities and transporters, in certain circumstances, to maintain and from Waste Origin and Disposal Forms. Therefore, Section C. of this certification remands for further consideration the Cape May County EIC and associated weighing and reporting requirements.

**Issue: Comprehensive Solid Waste Planning**

Steven Wymbs, Executive Director of the Cumberland County Improvement Authority, submitted written objections to the April 25, 2000 plan amendment as inconsistent with the Cumberland County District Plan and the Solid Waste Management Act. Although the actions undertaken by the CMCMUA prohibit Cape May generated solid waste from being disposed of in Cumberland County, this does not produce an inconsistency with the Cumberland County District Plan which calls for a free market acceptance of all legally available waste. The CMCMUA action of imposing intrastate flow control merely eliminates Cape May County generated waste from the pool available for Cumberland County to solicit waste to its disposal facility.

**C. Certification of the Cape May County District Solid Waste Management Plan Amendment**

In accordance with N.J.S.A. 13:1E-1 et seq., specifically N.J.S.A. 13:1E-21, which establishes specific requirements regarding the contents of the district solid waste management plans, I have reviewed the April 25, 2000 amendment to the approved County Plan and certify to the County Freeholders that the April 25, 2000 amendment is approved in part and remanded in part as further specified below.

The County Plan inclusion of the revised disposal strategy which mandates that all non-recycled solid waste generated within Cape May County and which is not transported out-of-state for disposal shall be disposed of at the CMCMUA Landfill located in Woodbine Township, Cape May County is approved. As an alternative to disposal at the CMCMUA Landfill, a solid waste hauler/transporter may transport non-recycled Cape May County generated solid waste to any permitted out-of-state solid waste disposal facility authorized to accept such waste and may utilize in-state transfer stations and materials recovery facilities prior to disposal.

Regarding the reaffirmation of the implementation of the EIC, in light of the provisions of the June 22, 2000 New Jersey Supreme Court decision on the legality of EIC's, the portion of the April 25, 2000 County Plan amendment pertaining to EIC implementation is remanded to the county for further consideration. As noted within Section B., the EIC represents costs related to

debt service and enforcement in the operation of the CMCMUA Landfill and is, therefore, chargeable to users. Following the expiration of the extended stay of the June 22, 2000 decision, the Cape May County EIC and the associated weighing and reporting requirements become legally void without New Jersey legislative intervention.

Regarding the reaffirmation of the previously approved out-of-district weighing and reporting requirements and the newly proposed weighing requirements for Cape May County generated solid waste prior to out-of-state disposal at transfer stations and materials recovery facilities as contained in the April 25, 2000 amendment, in light of the June 22, 2000 New Jersey Supreme Court decision on the legality of the EIC's, which comprised the basis for these weighing and reporting requirements, this portion of the April 25, 2000 County Plan amendment is remanded for further consideration. Following the expiration of the extended stay of the June 22, 2000 decision, the requirements for weighing and reporting Cape May County generated solid waste prior to out-of-state disposal become legally void without New Jersey legislative intervention.

The County Plan deletion of the strategy contained in the October 2, 1997 amendment to solicit out-of-county generated solid waste for disposal at the CMCMUA Landfill is approved.

#### **D. Other Provisions Affecting the Plan Amendment**

##### **1. Contracts**

Any contract renewal or new contract for solid waste collection or disposal which is inconsistent with this amendment to the County Plan and which was executed prior to the approval of this amendment and subsequent to the effective date of the Solid Waste Management Act (July 29, 1977), and which shall further be for a term in excess of one year, shall immediately be renegotiated in order to bring same into conformance with the terms and provisions herein set forth. Any solid waste collection operation or disposal facility registered by the Department and operating pursuant to a contract as herein described, shall be deemed to be in violation of this amendment and of the County Plan if such renegotiation is not completed within ninety (90) days of the effective date of this amendment provided, however, that any such registrant may, upon application to the Department, and for good cause shown, obtain an extension of time to complete such renegotiation.

##### **2. Compliance**

All solid waste facility operators and transporters registered with the Department and operating within the County and affected by the amendment contained herein shall operate in compliance with this amendment and all other approved provisions of the County Plan. Any facility operator or transporter who fails to comply with the provisions contained herein shall be deemed to be in violation of N.J.S.A. 13:1E-1 et seq., in violation of N.J.A.C. 7:26-1 et seq., and in violation of their registration to operate a solid waste facility or a collection system issued thereunder by the Department and shall be subject to the provisions and penalties of N.J.S.A. 13:1E-9 and 12 and all other applicable laws.

**3. Types of Solid Wastes Covered by the County 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. Certification to Proceed with Implementation of Amendment**

This document shall serve as the certification of the Commissioner of the Department to the County Freeholders and pursuant to N.J.S.A. 13:1E-24c. and f., the County Freeholders shall proceed with the implementation of the approved components of the amendment certified herein.

**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 Amendment**

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

**7. Reservation of Authority**

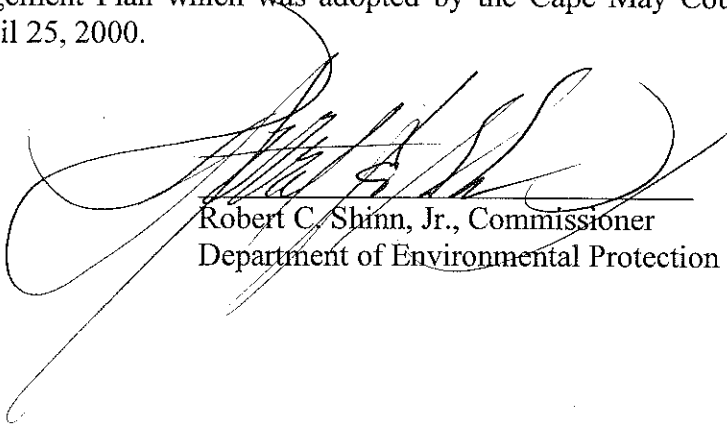
Nothing contained herein shall be construed as a limitation on any other action taken by the Department pursuant to its authority under the law. The County Plan, including any amendment made thereto, shall conform with the Statewide Solid Waste Management Plan, with appendices, which includes the Department's planning guidelines, rules, regulations, orders of the Department, and also includes the compilation of individual district plans and amendments as they are approved



E. Certification of Approval and Remand of the Amendment by the Commissioner of the Department of Environmental Protection

In accordance with the requirements of N.J.S.A. 13:1E-1 et seq., I hereby approve in part and remand in part the amendment, as outlined in Section C. of this certification, to the Cape May County District Solid Waste Management Plan which was adopted by the Cape May County Board of Chosen Freeholders on April 25, 2000.

10/4/00  
Date

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

