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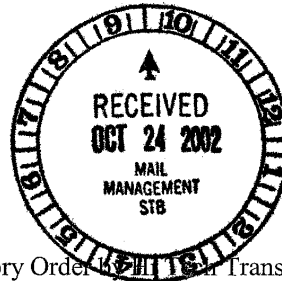
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October 23, 2002

VIA UPS OVERNIGHT

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Office of Proceedings

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Part of
Public Record

Re: Petition for a Declaratory Order, *Hi Tech Trans, LLC*
Finance Docket No. FD34192

Dear Mr. Williams:

This office represents respondents Essex County Utilities Authority ("ECUA") and Hudson County Improvement Authority ("HCIA") in the above-referenced matter. As the Board is aware, in August 2002, Hi Tech Trans, LLC ("Hi Tech") filed a lawsuit against the ECUA and HCIA in the United States District Court for the District of New Jersey, raising issues that overlap with, and in some instances are identical to, the issues raised in its petition for a declaratory order herein. In that lawsuit, Hi Tech has moved for a preliminary injunction to prohibit the enforcement of state and local solid waste laws and regulations in so far as they apply to Hi Tech's transfer station facility.

Under cover of letter dated October 17, 2002, Hi Tech's attorney, John McHugh, Esq., forwarded to the Board copies of reply papers Hi Tech has filed in support of its motion to the Court. While we are unaware of any Board rule requiring or underlying that transmission, we are herewith enclosing copies of the brief and certification our office recently filed on behalf of the ECUA and HCIA in the court case. Thus, the Board should now have copies of all the motion papers on file with the District Court.

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October 23, 2002

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If the Board has any questions or needs any further information, please let us know. Thank you.

Very truly yours,

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Attorneys for Respondents ECUA and HCIA

By: 
Benjamin Clarke

Enclosure

c: see attached service list

SERVICE LIST
PETITION FOR A DECLARATORY ORDER
BY HI-TECH TRANS, LLC
FINANCE DOCKET NO. FD 34192

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HI TECH TRANS, LLC,

Plaintiff,

v.

HUDSON COUNTY IMPROVEMENT
AUTHORITY, ESSEX COUNTY
UTILITIES AUTHORITY, et al.,

Defendants.

Civil Action No. 02-3781 (FSH)

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION AND
IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR A
PRELIMINARY INJUNCTION

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STATEMENT OF FACTS

A. Parties.

Plaintiff Hi Tech Trans, LLC, according to a "licensing agreement" it has submitted to the Court in highly redacted form (Certification of Ronald Klempner, Exh. B), is an entity "engaged in the transportation of Waste Products from various loading terminals to landfills and treatment facilities." Hi Tech provides the Court with no real description of the scope and history of its business, or of the identity of its principals, but its submissions indicate that it is basically a trucking business; thus, at page 9 of its brief, Hi Tech says: "HTT serves customers in Hudson and Essex Counties by truck." (Emphasis added.) Similarly, the "licensing agreement" that Hi Tech entered into with the Canadian Pacific Railway ("CPR") in November 2000 calls for "truck operations" to be conducted by Hi Tech "to efficiently transfer waste products from truck to rail." (Klempner Cert., Exh. B at 1.)

In the one brief description of its operations that Hi Tech does provide, it says:

Trucks of C&D are weighed in and then they dump their product into the hopper. The hopper's only function is to provide a direct transfer of the product from the truck into the rail car without any spillage. HTT controls dust with a water spray. Cargo is inspected only to assure conformity with our CPR license. After loading, the rail cars are moved by CPR directly or in interchange on a CPR bill of lading issued by Hi Tech from point of origin, i.e. the waste generator, to a landfill where the cargo is delivered to the Landfill Operator. Hi Tech is a common carrier and accepts waste from generators at the point of origin and from haulers at its facility. Some haulers solicit traffic for Hi Tech on a commission basis. Hi Tech transloads and ships and contracts for the receipt of cargos for its customers. Hi Tech does not own any of the materials it handles. [Klempner Cert., ¶15.]

Inscrutable as this description is in most respects and particulars, it makes this much reasonably clear: Hi Tech is engaged in trucking solid waste. Hi Tech does not itself ship waste by rail and does not have the legal status of a rail carrier.

In a rather self-defeating effort to portray Hi Tech as something that it is not -- a rail carrier -- Ronald Klempner, who describes himself as "a managing member of Hi Tech," states in his certification:

In June of 2000 HTT filed a petition with the STB [Surface Transportation Board] to be recognized as a rail carrier. CPR informed us that the petition was unnecessary as we would be working to place cargo on their trains and as CPR was a rail carrier, separate authority for HTT was unnecessary. That petition was withdrawn. [Klempner Cert., ¶4; emphasis added.]

Hi Tech's withdrawal of a petition "to be recognized as a rail carrier," on its own terms, suggests that Hi Tech is not a rail carrier, and a review of the STB's records confirms this intuition.

Documents on file with the STB show that, contrary to Mr. Klempner's assertion, Hi Tech did not actually seek to be "recognized as a rail carrier," which is a status one attains by obtaining a certificate from the STB pursuant to 49 U.S.C. §10901(c). Rather, it filed a "notice of exemption," seeking permission "to commence common carrier rail service from the Oak Island Yard in Newark, NJ, to points in New York and Ohio" without having to go through the formal certification process usually required to be recognized as a rail carrier. Certification of Benjamin Clarke ("Clarke Cert."), Exh. A(1). After another rail carrier (UTU) opposed the petition, Hi Tech withdrew it. Clarke Cert., Exh. A(4). In its own filings with the STB, Hi Tech described itself as a "noncarrier," and the STB, in its orders, used that

same description. Clarke Cert., Exhs. A(1), A(2) and A(4). Hi Tech vouchsafed that status by choosing to withdraw its petition, and its portrayal of itself as a rail carrier to this Court (see Plaintiff's Brief at 26; Complaint, ¶96) is thus wholly without substance.

Defendants Hudson County Improvement Authority ("HCIA") and Essex County Utilities Authority ("ECUA") are public agencies responsible for overseeing and implementing the Solid Waste Management Plans of Hudson County and Essex County, respectively (hereafter, the "County Plans"). See generally N.J. Stat. Ann. 13:1E-1 *et seq.* (New Jersey Solid Waste Management Act). Under Hudson County's Plan, all construction and demolition ("C&D") waste – also known as "Type 13" waste – is required to be taken to the Meadowlands landfill facility in North Arlington and Kearny for disposal. Klempner Cert., Exh. K, at 9-10. Under Essex County's solid waste Plan, all C&D waste generated within Essex County is required to be taken to a transfer station operated by Waste Management in Elizabeth, New Jersey, for ultimate disposal in a Pennsylvania landfill. Klempner Cert., Exh. F. In accordance with the provisions of New Jersey's Solid Waste Utility Control Act, N.J. Stat. Ann. 48:13A-1 *et seq.*, ECUA and HCIA also hold exclusive franchises on the solid waste generated within their respective counties. Clarke Cert., Exhs. F and G. As franchise holders, by law they have "the exclusive right to control and provide for the disposal of solid waste" generated within the County. N.J. Stat. Ann. 48:13A-5.

**B. Hi Tech's Solicitation of Deliveries and Acceptance of Waste
in Violation of the County Plans and Defendants' Franchises.**

In or around September 2001, Hi Tech began operating a solid waste transfer station in Newark, New Jersey. A "transfer station" is a facility to which solid waste that has been

collected in short-haul trucks is brought, dumped, temporarily stored, and then re-loaded for long-haul transport to a more distant disposal site. See N.J. Admin. Code 7:26-1.4. Hi Tech announced the opening of this facility by issuing a flier (Clarke Cert., Exh. B(1)) stating:

<i>HI TECH LLC</i>	\	<i>T. FIORE RECYCLING</i>
<i>TRANSPORTATION</i>	\	<i>CORP.</i>

*ANNOUNCES
THE OPENING OF A
SOLID WASTE TRANSFER STATION
LOCATED AT
OAK ISLAND, NEWARK, N.J.
ACCEPTING
CONSTRUCTION AND DEMOLITION
MATERIAL
WASTE ID 13C*

*FOR INFORMATION, PLEASE CALL:
(973) 589-3366*

ONLY VEHICLES REGISTERED WITH THE NJDEP AND
ACCOMPANIED BY A COMPLETED AND SIGNED WASTE
ORIGIN AND DISPOSAL FORM WILL BE ACCEPTED.

Looking for business, Hi Tech distributed this flier to waste haulers in the area. Hi Tech was well aware that recipients of the flier were subject to the County Plans, and sought

to overcome the natural reluctance haulers might have to violate those Plans by distributing a pre-signed form of indemnification agreement, stating:

If any State, Municipal or County regulatory authority ("Local Regulatory Agency(ies)") levies a fine against Customer or otherwise brings any action or enforcement proceedings against Customer as a result of the fact that Customer has transported by truck or any other appropriately licensed vehicle and/or delivered Construction/Demolition Debris or Bulky Waste (referred to in the manifest to which this indemnity is attached) to the Transload Facility on the grounds that the transload facility has not received a permit from the NJDEP or due the fact that the transloading facility has not been designated pursuant to any County Solid Waste Management Plan (both hereinafter referred to as "Enforcement Action(s)"), HTT shall indemnify, defend and hold harmless Customer from and against any claim, liability, cost and expense, including reasonably incurred attorneys fees, in connection with the defense, discharge or satisfaction of such Enforcement Action(s), provided that (i) Customer notifies HTT in writing within twenty four (24) hours of learning of any Enforcement Action; (ii) Customer shall not negotiate, discharge or settle the Enforcement Action(s); and (iii) HTT shall not be responsible for the cost and expenses of any counsel hired by Customer in connection with defending or responding to such Enforcement Action(s). [Clarke Cert., Exh. B(3).]

After the opening of Hi Tech's transfer station, HCIA and ECUA began receiving reports that haulers were delivering C&D waste generated within Hudson and Essex County to Hi Tech's facility instead of to the disposal sites designated in the County Plans. By letter dated October 16, 2001, HCIA formally advised Hi Tech that, under Hudson County's solid waste Plan, C&D waste generated within the County is required to be taken to the Meadowlands facility. Klempner Cert., Exh. C. By letter dated November 2, 2001, ECUA sent Hi Tech a similar notice, advising that all C&D waste generated within Essex County is required to be taken to Waste Management's transfer station in Elizabeth. Klempner

Cert., Exh. F. HCIA and ECUA both requested Hi Tech to make its records reflecting the origin and destination of received waste available for inspection. Hi Tech failed to respond to that request, and to date has steadfastly refused to make any of its records available for inspection.

On April 4, 2002, ECUA dispatched an inspector, Nicholas Maddaloni, to visit the facility and make a record of its operations. Clarke Cert., Exh. C. Hi Tech's yard manager, who identified himself as Brian, initially agreed to allow Mr. Maddaloni to inspect the facility. Brian's supervisor -- who, when asked his name, told Mr. Maddaloni that he "didn't have to know it" -- was somewhat more guarded. As recorded in the ensuing inspection report, when Mr. Maddaloni told the unidentified supervisor that he "was going to take some pictures where the trucks were unloading their waste," he replied, "The fuck you are." When Mr. Maddaloni repeated his request, the supervisor responded by telling him to go fuck himself. Denied the opportunity to take photographs, Mr. Maddaloni made a hand drawing of what he saw, which in essence was a succession of trucks dumping loads of solid waste into a pit in the ground. At intervals, a portable crane or "grapppler" then lifted the waste out of the pit and re-loaded it into open rail cars. Mr. Maddaloni also noted in his inspection report that Hi Tech was not using O&D (Origin and Destination) forms, as required by state regulation. See N.J. Admin. Code 7:26-2.13.

**C. Hi Tech's Institution of Declaratory Proceedings Before the
Surface Transportation Board.**

On April 2, 2002, Hi Tech filed a "Petition for a Declaratory Order" with the Surface Transportation Board ("STB"). Clarke Cert., Exh. D(1). In that petition (which should not

be confused with the petition for a "class exemption" that Hi Tech filed and then withdrew in July 2000, Clarke Cert., Exh. A(1)), Hi Tech asked the STB to declare that Hudson County's Solid Waste Management Plan was preempted by the Interstate Commerce Commission ("ICC") Termination Act, 49 U.S.C. §10101 et seq., insofar as the Plan required waste haulers carrying C&D waste generated within the County to take the waste to the Meadowlands landfill facility, rather than to Hi Tech's facility. Hi Tech named only the HCIA, and not ECUA, as a respondent, and initially listed Canadian Pacific as a co-petitioner. However, by notice dated May 2, 2002, Hi Tech amended its petition to remove CPR as a co-petitioner. Clarke Cert., Exh. D(2).

On June 6, 2002, the State of New Jersey, Department of Environmental Protection ("DEP") – which had intervened before the STB for the purpose of opposing Hi Tech's petition – filed a reply to Hi Tech's amended petition. Clarke Cert., Exh. D(3). In its reply, DEP asserted that Hi Tech was not a rail carrier and that its transfer station activities were not exempt from State regulation. Id. at 6-8. Thus, Hi Tech's suggestion that DEP has somehow okayed or signed off on its transfer station operations, Klempner Cert., ¶6, is flatly refuted by the record before the STB.

On June 18, 2002, Hi Tech moved to strike DEP's reply. Clarke Cert., Exh. D(5). DEP opposed that motion by letter dated June 27, 2002, and the motion is now pending before the STB. Clarke Cert., ¶5(e).

**D. Hi Tech's Commencement of Suit and
Application for a Preliminary Injunction.**

On August 7, 2002, Hi Tech filed this suit against the HCIA and ECUA. Hi Tech did not name DEP or any State official as a defendant, despite DEP's participation in the proceedings before the STB. Simultaneously, Hi Tech moved for a preliminary injunction prohibiting the HCIA and ECUA from "applying any state or local law relating to any designation of a recipient of Construction and Demolition Waste, also known as waste type 13, to Plaintiff or to plaintiff's customers." Order to Show Cause, at 2 (emphasis added). In its motion papers, Hi Tech is unable to point to any specific actions taken by HCIA and ECUA in recent months that lends urgency to its request for ad interim relief, but generally asserts that defendants are interfering with its business by advising haulers that they are required to comply with the County Plans.

For the reasons set forth hereafter, Hi Tech's arguments are without merit, and its request for a preliminary injunction should be denied. See Point I, infra. Beyond that, since Hi Tech has mis-advised private waste haulers that they are legally free to ignore State and local solid waste laws (provided that they deliver their loads to Hi Tech, see Clarke Cert., group Exh. B), and has thus encouraged haulers to violate the County Plans and the solid waste franchises held by HCIA and ECUA, a preliminary injunction should be entered against Hi Tech. See Point II, infra.

ARGUMENT

POINT I

PLAINTIFF HAS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS, IRREPARABLE HARM, OR A BALANCE OF EQUITIES IN ITS FAVOR.

In Advance Magazine Publishers, Inc. v. Vogue International, 123 F.Supp.2d 790, 794 (D.N.J. 2000), this Court stated, “An injunction is an extraordinary remedy which should only be granted in limited circumstances.” A party seeking a preliminary injunction bears the burden of satisfying each of four requirements, and of producing evidence showing (1) that it has a likelihood of success on the merits, (2) that it will suffer irreparable injury in the absence of injunctive relief, (3) that the nonmoving party will not suffer even greater harm if an injunction does issue, and (4) that the public interest will not be adversely affected. Id.; see also Council of Alternative Political Parties v. Hooks, 121 F.3d 876, 879 (3d Cir. 1997); EH Yacht, LLC v. Egg Harbor, LLC, 84 F.Supp.2d 556, 564 (D.N.J. 2000). Plaintiff fails to satisfy any of these requirements.

A. Plaintiff Lacks a Likelihood of Success on the Merits.

Plaintiff's complaint consists of three counts. In the first count, plaintiff alleges that it “is a rail carrier as that term is defined in” the ICC Termination Act, 49 U.S.C. §10102(5), and asserts that it and its prospective customers are therefore exempted from state solid waste laws and regulations by 49 U.S.C. §10501(b), which gives the STB exclusive jurisdiction over “transportation by rail carriers.” Complaint, ¶¶96-98. In the second count of its complaint, plaintiff alleges that the County Plans are unconstitutional under the

“dormant” Commerce Clause because they allegedly “mandate the utilization of local Transfer Stations” and “favor local facilities, at the expense of entities such as HTT which operate exclusively in interstate commerce.” Complaint, ¶¶111-12. In the third count of the Complaint, Hi Tech alleges that defendants have tortiously interfered with Hi Tech’s customer relations. Complaint, ¶¶116-123.

Defendants will address these claims in the order they are pled.

1. Plaintiff Is Not a Rail Carrier and Has No Federal Exemption From State and Local Laws Governing Solid Waste Haulers and Transfer Stations.

Plaintiff’s principal claim in this matter is that it is a “rail carrier” within the meaning of the ICC Termination Act, 49 U.S.C. §10102(5), and that, as such, its operation of a solid waste transfer station is exempt from state and local regulations. Complaint, ¶¶96-97. This federal exemption, plaintiff alleges, extends not only to its own activities, but also to any private waste haulers or generators desiring to bring waste to plaintiff’s facility. Complaint, ¶103. Contrary to these allegations, Hi Tech is a trucking business, not a rail carrier, and its alleged status as a rail carrier provides no federal license to other private haulers to violate state solid waste laws with impunity.

Regarding Hi Tech’s alleged status as a rail carrier, Hi Tech’s withdrawal, in July 2000, of its STB petition seeking permission to operate as a rail carrier is fatal to its position. In law as in life, actions speak louder than words, and Hi Tech’s withdrawal of its petition is the legal equivalent of an admission that it is not a rail carrier -- not that an inferred admission is needed, since Hi Tech expressly described itself as a “noncarrier” in its initial

pleading with the STB. Clarke Cert., Exh. A(1). Indeed, the STB never issued a certificate authorizing Hi Tech's activities, as would be required by 49 U.S.C. §10901(a)(4). Hi Tech's submissions to this Court likewise indicate that it is a trucking and transfer station enterprise that collects waste in its own trucks and also accepts waste from other truckers, some of whom apparently work on a "commission basis" to drum up additional business for Hi Tech. Klempner Cert., ¶15. Even under the most creative and expansive reading, this does not make Hi Tech a "rail carrier." Compare 49 U.S.C. §10102(5) ("rail carrier" means "a person providing common carrier railroad transportation for compensation"), with Plaintiff's Brief at 9 ("HTT serves customers in Hudson and Essex Counties by truck.")¹

At bottom, Hi Tech appears to contend that, since its trucking operations result, ultimately, in C&D waste being placed in rail cars, it is exempt from all state and local laws regarding the handling of solid waste, and so are its customers! Plaintiff has not cited, and cannot cite, any case that would support such a remarkable – and indeed revolutionary – expansion of federal authority over solid waste regulation. See AGG Enterprises v. Washington County, 281 F.3d 1324, 1328 (9th Cir.), cert. denied 2002 WL 1313046, 70 U.S.L.W. 3790 (Oct. 7, 2002), ("One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and

¹ Tellingly, even in the petition it filed with the STB in April 2002, Hi Tech made no claim to being a rail carrier. Rather, it claimed to be a "local agent for the Canadian Pacific Railway," and described its functions as "contract[ing] for, gather[ing] by truck, and then load[ing] construction and demolition debris and contaminated soils onto railway cars." Clarke Cert., Exh. D(1) (emphasis added). Only after the State and ECUA and HCIA sought dismissal of Hi Tech's petition did Hi Tech suddenly profess to have mutated into a rail carrier.

refuse”; rejecting preemption argument brought by a trash hauler under the Federal Aviation Administration Act).

Even if plaintiff were able to surmount the fact that it is not a rail carrier, it would face a dim prospect of success on its preemption claim. The starting point for any preemption analysis is that preemption of state or local laws is not to be lightly presumed. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996); Franklin Tower One, L.L.C. v. N.M., 157 N.J. 602, 615 (1999). The party claiming preemption bears the burden of supporting that claim by “clear and manifest evidence,” Pennsylvania Medical Society v. Marconis, 942 F.2d 842, 853 (3d Cir. 1991), and that burden is heaviest in “spheres traditionally occupied by the states.” Gurrieri v. William Zinsser & Co., 321 N.J.Super. 229, 233 (App. Div. 1999).

As Judge Cavanaugh recently noted in Johnson v. Guhl, 166 F.Supp.2d 42, 60 (D.N.J. 2001) (rejecting a preemption claim under the federal Medicaid statutes, even where Congress has acted to federalize a given field, such as the regulation of transportation by rail carriers), the “comprehensive nature of a federal regulatory scheme ... is not sufficient to support the conclusion that Congress intends to preempt all state regulation”:

To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Id. (quoting Hillsborough County v. Automated Med-Lab, Inc., 471 U.S. 707, 717 (1985)).

Plaintiff has not shown that the preemptive scope of the ICC Termination Act (“ICCTA”) extends so far as to allow solid waste haulers and transfer station operators to

ignore State and local solid waste laws. To the contrary, in Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001), the Eleventh Circuit recently held that the ICCTA did not allow a railroad or its lessee to ignore or violate local zoning laws. In rejecting the preemption argument, the Eleventh Circuit noted that the City was not "legislating in a field of historic federal dominance," but instead was "acting under the traditionally local police power of zoning and health and safety regulation." Id. at 1329. The court emphasized that, where a municipality acts "through the exercise of inherently local powers" to promote the health, safety and welfare of its community, "the respect for state sovereignty" weighs against preemption. Id.

Similarly, in People v. Conrail Corp., 613 N.E.2d 784 (Ill. App. Ct. 1993), the Illinois Court of Appeals addressed the question of whether the Interstate Commerce Act, formerly 49 U.S.C. §10101 et seq., preempted the Illinois Environmental Protection Act, which prohibited the siting of solid waste transfer stations within 1,000 feet of residences. The court answered this question in the negative, and held that the State retained authority to regulate solid waste transfer stations. The court noted, "No provision of the Commerce Act exclusively grants jurisdiction over the transportation of waste from inception to disposal." 613 N.E.2d at 182. The same is true of the ICCTA, which succeeded the Commerce Act, and which, as noted in Florida East Coast Railway, supra, preempts only state laws "with respect to *regulation* of rail transportation." 266 F.3d at 1331 (emphasis in original; quoting 49 U.S.C. § 10501(b)).

These cases are directly in line with numerous other decisions recognizing that railroad companies must comply with generally applicable, nondiscriminatory local fire,

health, safety and construction regulations that do not restrict the railroad from conducting its operations or unreasonably burden interstate commerce. See Oklahoma Corp. Comm'n v. Burlington Northern Santa Fe Ry. Co., 24 P.3d 365, 371-72 (Ok. Civ. App. 2000) (ICC Termination Act does not preempt local authority to require railroad to repair or replace fence along railroad right of way; primary purpose of ICC Termination Act was to preempt economic regulation of railroad, not state's right to ensure railroad maintains property in manner that is safe to public); In re Vermont Ry., 769 A.2d 648, 655 (Vt. 2001) (holding that states may regulate non-railroad activity occurring on or near railroad property; railroad's salt shed facility was not exempt from local zoning regulations); cf. Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corp., 163 N.J. 446, 460-61 (2000) (upholding railroad's preemption claim but noting that, under certain circumstances, municipal authorities may enforce local health and safety regulations, and that the railroad cannot deny local government access for inspection of facility to ensure compliance with those laws; also finding that railroad may be required to submit site plan of railroad maintenance facility construction project to Ridgefield Park); Flynn v. Burlington Northern Santa Fe Corp., 98 F.Supp.2d 1186 (E.D. Wash. 2000) (railroad directed to comply with local electric, building, fire and plumbing codes when building refueling facility).

If, as the above-cited cases make clear, railroads may be held to health, safety and welfare regulations of general applicability, then it follows, a fortiori, that a mere lessee or licensee of a railroad may be held to such regulations, and that the lessee's customers enjoy no special legal status at all. Florida East Coast Railway, supra. Under existing law, Hi Tech clearly has no federal immunity from state solid waste laws in conducting its trash hauling

and transfer station business, and its attempt to establish such an unprecedented immunity on behalf of itself and its prospective customers is a legally doomed exercise.

In another recent case that directly contradicts Hi Tech's position, the Ninth Circuit rejected a preemption argument raised by a trash hauler under the Federal Aviation Administration Act of 1994, 49 U.S.C. §14501(c) ("FAA Act"). In the course of its opinion, the court wrote:

Congress has recognized that waste hauling is a traditional state and local function subject to state regulation. See 42 U.S.C. §6901(a)(4) (stating that "the collection and disposal of solid waste should continue to be primarily the function of State, Regional and local agencies"). Our precedent has recognized the strong local governmental interest in regulating garbage collection. Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 398 (9th Cir. 1995). One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community. The historic responsibility of local governments to ensure safe and comprehensive garbage collection posts a strong caution against the possibility that Congress lightly would preempt local regulation in this field.

AGG Enterprises v. Washington County, 281 F.3d 1324, 1328 (9th Cir.), cert. denied, 2002 WL 1313046, 70 U.S.L.W. 3790 (Oct. 7, 2000). See also Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc., 110 Cal. Repr.2d 708, 91 Cal. App. 4th 678, 690, 695 (Ct. App. 2001) (finding that it would be "inconceivable" that Congress intended to preempt local solid waste regulations). Similarly, Hi Tech cannot show that Congress, by enacting the ICC Termination Act, intended to interfere with state and local regulation of solid waste truckers and transfer station operators.

2. The County Plans Do Not Violate the
Dormant Commerce Clause.

Hi Tech's second claim is that the County Plans are unconstitutional under the "dormant" Commerce Clause because, allegedly, they discriminate against interstate commerce. A simple review of the Third Circuit's decision in Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 112 F.3d 652 (3d Cir.), cert. denied 552 U.S. 996 (1997), will show that plaintiff has little if any chance of success on this claim.

In Atlantic Coast, several out-of-state waste processing facilities and businesses challenged the State's then-existing system of solid waste regulation as being violative of the Commerce Clause. At the time, New Jersey's regulatory scheme was bottomed on a policy of attaining "in-state sufficiency," i.e., of attaining the ability to dispose of all the State's waste within its own borders. The District Court (Hon. Joseph E. Irenas, U.S.D.J.) initially upheld the State's waste flow scheme and in-state sufficiency policy, but following the Supreme Court's decision in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) (invalidating a waste flow ordinance on Commerce Clause grounds), the Third Circuit concluded that the State's in-state sufficiency policy had to pass muster under "strict" Commerce Clause scrutiny. 48 F.3d 701, 717 (3d Cir. 1995). The State sought, over the next several years, to defend its in-state sufficiency policy under that exacting standard, but the court ultimately struck it down. 112 F.3d at 668-69. In so holding, the Third Circuit emphasized that the only constitutional flaw of the State's system was the embedded "in-state sufficiency" policy, and indicated that, once purged of that policy, the State's

overarching scheme of solid waste regulation would be unproblematic. Thus, the Court stated "if the process for selecting waste disposal facilities no longer discriminates against interstate commerce, neither will the regulatory provisions enforcing such a nondiscriminatory system." 112 F.3d at 668-69.

Following the Third Circuit's final decision in Atlantic Coast, the State took steps to remediate its solid waste regulations to ensure they were consistent with the court's mandate. DEP amended its regulations to repeal N.J. Admin. Code 7:26-6.5, its statewide "flow control" regulation, and to facilitate the procurement of waste transfer and disposal services in a nondiscriminatory manner. See generally UCUA v. BCUA, 995 F.Supp. 506, 514 (D.N.J. 1998). DEP made clear that Atlantic Coast did not relieve counties and local authorities of their obligations under state law to provide for the safe and efficient disposal of waste generated in their boundaries, and expressly advised them that they could lawfully incorporate waste flow strategies in their revised solid waste management plans so long as all disposal services were procured pursuant to a competitive and non-discriminatory bidding process. 29 N.J. Reg. 4170(a).

In accordance with the Third Circuit's mandate and DEP's guidance, Hudson and Essex County both promptly revised their Solid Waste Management Plans to remove any discriminatory elements from them. Both counties undertook open and competitive procurements to provide for the disposal of their waste. Significantly, the procurements in both counties resulted in distinctly "interstate" disposal models. Under Hudson's revised plan, Type 10 waste (ordinary household waste) is delivered to a transfer station in Newark for transport and ultimate disposal in a Pennsylvania landfill; Type 13 waste (C&D waste),

as previously noted, is directed to the Meadowlands landfill facility. Klempner Cert., Exh. C. Under Essex's revised plan, Type 10 waste is directed for initial processing to the Essex County Resource Recovery Facility in Newark; after processing (i.e., burning), the residue is then shipped to a Pennsylvania landfill. Type 13 waste is directed to a transfer station in Elizabeth, owned by Waste Management, for transport and shipment to a Pennsylvania landfill.

To implement their revised plans, both counties had to obtain the approval of DEP, which scrutinized them for compliance with the Atlantic Coast mandate. Thus, Commissioner Shinn, in certifying Hudson's Plan, specifically noted, "The Department has reviewed the HCIA's nondiscriminatory procurement process to determine if it is consistent with the criteria established in the Atlantic Coast decision... [T]he HCIA has sufficiently demonstrated that it secured all disposal contracts in a nondiscriminatory manner..." Klempner Cert., Exh. K at 5-6. Given DEP's acute sensitivity, post-Atlantic Coast, to Commerce Clause issues, its approval of the County Plans, and its specific findings that the Plans do not discriminate against interstate commerce, demonstrate the lack of merit to plaintiff's Commerce Clause claim.

As it happens, one post-Atlantic Coast Commerce Clause challenge to Essex's Plan has already failed, in a case entitled ECUA v. Sisbarro Disposal SVC Co., Docket No. C-231-00 (Ch. Div. May 3, 2002). Clarke Cert., Exh. E. In that case, the Hon. R. Benjamin Cohen, J.S.C., found that ECUA and Essex County had acted in full compliance with the dictates of Atlantic Coast in promulgating a revised Plan. Significantly, the part of Essex's Plan that Judge Cohen was called upon to review in ECUA v. Sisbarro was the very same part that Hi

Tech challenges here -- the directive requiring all Type 13 waste generated in the County to be taken to Waste Management's transfer station for transport to a Pennsylvania landfill. A reading of Judge Cohen's decision upholding Essex County's revised Plan will show that Hi Tech has no likelihood of success on its Commerce Clause claim.²

**3. Plaintiff's Tortious Interference Claim is
Unsubstantiated and Flawed.**

Plaintiff's final claim is that defendants have "tortiously interfered" with its business relations. This claim rests entirely on the quicksand foundation of plaintiff's preemption and Commerce Clause claims. As a moment's thought makes clear, defendants cannot have acted wrongfully in advising haulers about the County Plans if those Plans are lawful. Since, as shown above, plaintiff is unlikely to succeed on its challenge to those Plans, it is likewise unlikely to succeed on its tortious interference claim -- particularly since that claim requires evidence of malice. See, e.g., Lamorte, Burns & Co. v. Walters, 167 N.J. 285, 306 (2001) ("To prove its claim, plaintiff must show ... defendants' malicious interference"). That evidence is so lacking here as to raise questions regarding the good faith basis for plaintiff's inclusion of the claim in its complaint.

The weakness of plaintiff's tortious interference claim is underscored by the fact that, even before the ECUA or HCIA took any measures to remind haulers about the dictates of the County Plans, Hi Tech had offered to indemnify the haulers for any penalties they might

²Underscoring the baselessness of plaintiff's attack on ECUA's procurement, Judge Cohen notes in his opinion that ECUA received four bids to provide Type 13 disposal services, each from an "interstate" vendor. Clarke Cert., Exh. E, Tr. at 44-45. One of the bidders, in fact, proposed to use rail transport to dispose of the waste. The bid was rejected because Waste Management's bid was lower, not because rail transport was unacceptable.

face for violating the County Plans. If this eye-catching offer failed to engender the groundswell of illicit business that Hi Tech was hoping for, then the most likely explanation is that haulers were savvy enough not to be taken in by Hi Tech's exaggerated claims of federal preemption and dubious promises of indemnification. Having itself advised haulers that they were likely to face legal difficulties and possible penalties if they brought waste to the facility in violation of existing wasteflow directives, Hi Tech can hardly be surprised if the response has been an appropriately cautious one.

B. Plaintiff Has Made No Showing of Irreparable Harm.

Like plaintiff's tortious interference claim, its claim of irreparable injury proceeds on the presumed validity of its preemption and Commerce Clause claims. Thus, plaintiff argues, "Where, as here, the actions complained of deny citizens rights guaranteed to them by the Constitution and Laws of the United States, irreparable harm is established." (Plaintiff's Brief at 23.) Leaving aside the weakness of plaintiff's claims (discussed above), this assertion is, on its own terms, erroneous, as plaintiff's citation of North Jersey Media Group, Inc. v. Ashcroft, 205 F.Supp.2d 288 (D.N.J.), stay granted 122 S.Ct.2655 (2002), makes clear. There, Judge Bissell addressed an alleged violation of the First Amendment and wrote, "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 205 F.Supp.2d at 304. Here, plaintiff does not allege any violation of its speech rights; rather, plaintiff is asserting commercial rights,

which can – if a violation is ultimately established – be compensated in the normal fashion, through an award of damages.³

With specific respect to alleged violations of the Commerce Clause, Judge Irenas has held, “[T]he violation of dormant Commerce Clause rights unaccompanied by other irreparable harm does not weigh heavily on the moving party’s side of the scale.” Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 893 F.Supp. 301, 309 (D.N.J. 1995) (emphasis added). Accord, Alliance of Automobile Manufacturers v. Hull, 137 F.Supp.2d 1165, 1173 (D. Az. 2001) (alleged violation of dormant Commerce Clause raised no presumption of irreparable injury; rejecting plaintiff’s arguments “placing violations of the Commerce Clause in the same category as the set of fundamental constitutional rights ordinarily afforded such protection, such as the Free Speech, Establishment and Due Process Clauses”); Starlight Sugar Inc. v. Soto, 909 F.Supp. 853, 861-62 (D.P.R. 1995) (violation of Commerce Clause does not automatically establish irreparable injury; “there is no ‘irreparable injury where only money is at stake and where plaintiff has a satisfactory remedy at law’”).

In this case, plaintiff has failed to establish that it is suffering any real or substantial injury, let alone an irreparable one. Plaintiff’s claims of lost profits raise monetary issues,

³Plaintiff’s reliance on Franklin Jefferson Ltd. v. City of Columbus, 2002 WL 1583528 (S.D. Ohio 2002), and Harris v. Gaddick, 593 F.Supp. 128 (M.D. Ala. 1984), is similarly misplaced, because both of those cases involved plaintiffs who had established a likelihood of success on constitutional claims that could not be redressed through an award of damages. Even less helpful to plaintiff is Medigan of Kentucky v. Public Service Commission of West Virginia, 787 F.Supp. 602 (S.D. W.Va. 1992), *aff’d* 985 F.2d 164 (4th Cir. 1993), in which the court issued a permanent injunction after a full hearing on the merits, and which did not involve preliminary relief at all.

which are capable of being redressed through an award of damages. See Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801-02 (3d Cir. 1989) (“We have never upheld an injunction where the claimed injury constituted a loss of money or loss capable of recoupment in a proper action at law.”) Accordingly, plaintiff has failed to make the required showing of irreparable harm.

**C. The Balance of Equities and Public Interest
Disfavor Issuance of a Preliminary Injunction.**

Finally, plaintiff has not shown and cannot show that the balance of equities favors issuance of a preliminary injunction. In New Jersey, solid waste has traditionally been, and remains, a heavily regulated area, strongly affected with the public interest. The cornerstone of the State's solid waste laws is the Solid Waste Management Act ("SWMA"), N.J. Stat. Ann. 13:1E-1 et seq., which imposes an obligation on each county in the State to develop a solid waste management plan providing for the safe and efficient disposal of solid waste generated within the county. See N.J. Stat. Ann. 13:1E-2 (collection, disposal and utilization of solid waste is a matter of “grave concern” in the State, “and is an activity thoroughly affected with the public interest”); see also In re Long-Term Out-of-State Waste Disposal Agreement, 237 N.J. Super. 516, 519-23 (App. Div. 1990), certif. denied 121 N.J. 647 (1990) (describing the statutory scheme of the SWMA).

Reinforcing the regulatory structure of the SWMA, the Solid Waste Utility Control Act, N.J. Stat. Ann. 48:13A-1 et seq., declares all waste facilities in the State to be public utilities. See In the Matter of Petition of Essex for Approval and Continuation of Interim Solid Waste Disposal Rates, 299 N.J. Super. 577, 592 (App. Div. 1997), certif. denied 151

N.J. 463 (1997), cert. denied 522 U.S. 1111 (1998) (holding transfer stations to fall "squarely within the definition of a public utility"); see also N.J. Stat. Ann. 48:13A-2 (legislative finding that "the disposal of solid waste is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest"). In accordance with this statutory scheme, HCIA and ECUA have both sought and obtained a franchise from the Board of Public Utilities giving them exclusive rights to control the stream of solid waste generated within their respective counties. Clarke Cert., Exhs. F and G.

The regulatory schemes of the SWMA and Solid Waste Utility Control Act evince the strong public interest in New Jersey in the regulation of solid waste. Hi Tech, by contrast, raises only a private commercial interest in asserting that it is entitled to operate its trucking and transfer station business without heed of or compliance with state laws and regulations. While plaintiff seeks to broaden that interest by contending that its prospective customers are also entitled to disregard state and local laws governing the handling of solid waste, this contention says more about the flaws in Hi Tech's legal analysis than it does about its equitable standing.

In this regard, it is well settled "that a franchise granted by the State in return for the performance of a public service, such as a public utility franchise, constitutes a property right," and that the "violation of an exclusive franchise entitles the franchise holder to an injunction." Morris County Transfer Station v. Frank's Sanitation Service, Inc., 260 N.J. Super. 570, 574-75 (App. Div. 1992). As the court there stated, "[I]rreparable injury is implicit in the violation of a utility's exclusive franchise ... Once the violation occurs, the character of the franchise as an exclusive property right is destroyed." Id. at 575. Here, it

is beyond dispute that HCIA and ECUA hold exclusive franchises on all solid waste generated within Hudson and Essex Counties. Clarke Cert., Exhs. F and G. It is also beyond dispute that Hi Tech has actively encouraged solid waste haulers to violate those franchises, and has gone so far as to offer to indemnify haulers for any penalties incurred by them for bringing waste to Hi Tech's facility in violation of the County Plans. Clarke Cert., Exh. B(3). Hi Tech's solicitation of conduct that is at present wholly unlawful should meet with a cold reception in a court of equity, see Connecticut General Life Ins. Co. v. Punia, 884 F.Supp. 148, 151 (D.N.J. 1995) ("Generally 'equity follows the law' and ordinarily equity will not divest legal rights"), especially since the profits that Hi Tech hopes to realize through such solicitations carry less equitable weight than the public interest with which HCIA's and ECUA's franchises are imbued. Frank's Sanitation, *supra*.

Since plaintiff has failed to demonstrate a likelihood of success on the merits; since it has failed to demonstrate that it is suffering or will suffer irreparable harm in the absence of immediate injunctive relief; and since ECUA's, HCIA's, and the public's interests all militate heavily against and outweigh plaintiff's asserted interests, plaintiff's motion for a preliminary injunction should be denied. Advance Magazine, *supra*.

POINT II

IN VIEW OF PLAINTIFF'S ACTIVE
INDUCEMENT OF WASTE HAULERS TO
VIOLATE THE COUNTY PLANS AND
DEFENDANTS' WASTE FRANCHISES,
PRELIMINARY INJUNCTIVE RELIEF SHOULD
BE GRANTED IN DEFENDANTS' FAVOR.

As previously noted, plaintiff raises two separate contentions with respect to the supposed preemptive scope of the ICCTA: first, plaintiff contends that it is authorized by federal law to operate a solid waste hauling and transfer station business without regard to State and local laws because it is a lessee or licensee of a railroad; second, plaintiff contends that, by some manner of transference, its prospective customers – i.e., other private waste haulers and waste generators – are likewise entitled to disregard state and local solid waste laws. Both of these contentions are legally erroneous, see Point I(A), supra, and the second lacks even the semblance of merit. Plaintiff does not cite, and cannot cite, any case holding that the ICCTA gives truckers and waste generators a federal right to ignore State and local solid waste laws. To the contrary, case law establishes that Congress has not ousted States and municipalities of their traditional police powers over the collection and handling of solid waste. Florida East Coast Railway, supra; AGG Enterprises, supra.

In normal circumstances, plaintiff's mere assertion of an unsound legal position would not warrant the issuance of a preliminary injunction, but the record makes clear that these are not normal circumstances. Here, plaintiff has propagated its misreading of the ICCTA to third parties, and has actively encouraged them to violate the County Plans on the basis of it. Indeed, plaintiff has gone so far as to offer to indemnify solid waste haulers for

any penalties that they might thereby incur. Clarke Cert., Exhs. B(3) and H. This remarkable offer establishes that plaintiff is well aware of the provisions of the County Plans, and knows that the Plans make delivery of waste originating in Hudson and Essex Counties to its facility unlawful. At best, plaintiff's solicitation of waste deliveries in knowing violation of the County Plans represents an overaggressive, imprudent exercise of self-help; at worst, it constitutes aiding and abetting.

The record before the Court establishes that HCIA and ECUA hold exclusive franchises on solid waste generated within Hudson County and Essex County. Clarke Cert., Exhs. F and G. It also establishes that plaintiff has promoted and is continuing to promote violation of those franchises. Clarke Cert., Exh. B(3). Injunctive relief is therefore warranted. Morris County Transfer Station v. Frank's Sanitation Service, Inc., supra, 26 N.J. Super. at 575 ("Irreparable injury is implicit in the violation of a utility's exclusive franchise"); see also, Virgin Islands Port Authority v. Virgin Islands Taxi Association, 979 F.Supp. 344 (D.V.I. 1997) (granting injunction to holder of exclusive franchise on airport taxicab services); N.J. Stat. Ann. 13:1E-9(d) (authorizing injunctive relief for violations of Solid Waste Management Plans).

Unlike plaintiff, defendants meet each of the requisites for preliminary injunctive relief. Since plaintiff is unlikely to prevail on its challenge to the County Plans, see Point I(A), defendants are likely to prevail on their counter-assertion that plaintiff has violated their franchises by falsely assuring the regulated community that it is free to disregard the Plans. Unlike plaintiff, which is suffering no irreparable harm, defendants are suffering irreparable harm as a matter of law. Frank's Sanitation, supra. And, finally, the public

interest clearly favors adherence to the State's solid waste laws, which serve the health, safety and welfare of the State's citizenry. See N.J. Stat. Ann. 13:1E-2(a) (legislative finding that the handling of solid waste in New Jersey is a "matter of grave public concern to all citizens ... and thoroughly affected with the public interest"); N.J. Stat. Ann. 48:13A-2 (same).

Plaintiff's commencement of an unmeritorious lawsuit gives it no license to solicit violations of New Jersey's solid waste laws by non-parties to the action, who have sought no judicial relief and who have no established or even asserted entitlement to ignore existing laws and regulations. Accordingly, during the pendency of this litigation, plaintiff should be prohibited from soliciting and accepting waste deliveries in violation of Hudson County's and Essex County's Plans and in violation of HCIA's and ECUA's franchises. Morris County Transfer Station v. Frank's Sanitation Service, supra.

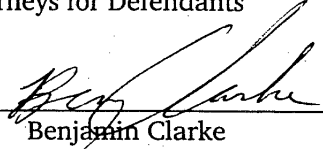
CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied, and defendants' cross-motion for a preliminary motion should be granted.

Respectfully yours,

DeCotiis, FitzPatrick, Gluck & Cole, LLP
Attorneys for Defendants

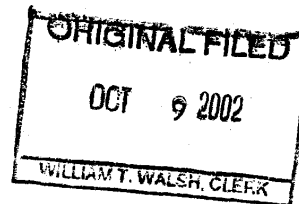
Dated: October 8, 2002

By: 

Benjamin Clarke

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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HI TECH TRANS, LLC,

Plaintiff,

v.

HUDSON COUNTY IMPROVEMENT
AUTHORITY, ESSEX COUNTY
UTILITIES AUTHORITY, et al.,

Defendants.

Civil Action No. 02-3781 (FSH)

CERTIFICATION

BENJAMIN CLARKE, of full age, hereby certifies:

1. I am a member of DeCotiis, FitzPatrick, Gluck & Cole, LLP, attorneys for defendants Hudson County Improvement Authority ("HCIA"), Essex County Utilities Authority ("ECUA"), Thomas Calvanico, and Mauro Tucci in the above-captioned matter. I submit this certification and the attached exhibits in opposition to plaintiff's motion for a preliminary injunction and in support of defendants' cross-motion for a preliminary injunction.

2. Attached hereto as group Exhibit A are four docket items from a proceeding commenced by plaintiff Hi Tech Trans, LLC ("Hi Tech" or "HTT"), before the federal Surface Transportation Board ("STB") in July 2000.

a) Exhibit A(1) is a document entitled "Exemption," filed by Hi Tech with the STB on June 30, 2000. In the "Exemption," Hi Tech claimed to be entitled to, and sought, an "exemption under 49 CFR 1150.31 to commence operations over approximately 641 miles of rail line from Oak Island Yard in Newark, NJ to points in Irwin, Buffalo and Niagara, NY, and Lowellville or Canton, OH." In the "Exemption," Hi Tech refers to itself as a "noncarrier."

b) Exhibit A(2) is a public notice issued by the STB soliciting comments on Hi Tech's petition. In the notice, the STB again refers to Hi Tech as a "noncarrier."

c) Exhibit A(3) is a document entitled, "Petition for Stay of Effective Date," filed by the United Transportation Union-New York State Legislative Board (UTU-NY) with the STB on July 6, 2002, in opposition to Hi Tech's claimed exemption. In its opposition, UTU-NY complained that Hi Tech's notice left "many unexplained features of the proposed operation" (Petition at 1), and asserted, "The use of the section 10901 non-carrier class exemption for a bogus operation such as proposed by HTT would extend the class exemption beyond that intended by the STB." (Petition at 3.)

d) Exhibit A(4) is a decision issued by the STB dated July 20, 2000, granting Hi Tech's request to withdraw its petition, along with a copy of Hi Tech's request.

3. Attached hereto as group Exhibit B are copies of materials that the ECUA received from a local solid waste hauler on October 3, 2001.

a) Exhibit B(1) is a copy of a flyer announcing the opening of a "solid waste transfer station located at Oak Island, Newark, N.J., accepting Construction and Demolition material." From the flyer, the transfer station appears to be a joint venture between Hi Tech and T. Fiore Recycling Corp. Compare Klempner Cert., Exh. G (stating, "Hi Tech Trans, LLC and T. Fiore Recycling have no relationship to one another other than as customer and service provider.")

b) Exhibit B(2) is a list of the types of solid waste that Hi Tech is willing to accept (including "non-contaminated dirt") and unwilling to accept (including "hazardous wastes" and "recyclables").

c) Exhibit B(3) is a pre-signed form of indemnification agreement that Hi Tech distributed to haulers, offering to indemnify haulers for any penalties that might be imposed on them by local authorities for delivering waste to its facility.

4. Attached hereto as Exhibit C is an inspection report prepared by Nicholas Maddaloni, an Essex County Health Department Inspector, dated April 4, 2002, after visiting Hi Tech's transfer station.

5. Attached hereto as group Exhibit D are docketed materials from a proceeding initiated by Hi Tech before the STB in April 2002.

a) Exhibit D(1) is a copy of a petition for a declaratory order filed by Hi Tech on April 2, 2002. In its petition, Hi Tech listed Canadian Pacific Railway ("CPR") as a co-petitioner. Hi Tech did not claim to be a rail carrier in the petition. Rather, it claimed to be an agent of CPR. The petition states that Hi Tech "contracts for, gathers by truck and

then loads construction and demolition debris and contaminated soils onto railway cars.”

Compare Exhibit B(2) (which suggests that Hi Tech only accepts “non-contaminated soil.”)

b) Exhibit D(2) is a copy of a certification and amended petition filed by Hi Tech with the STB on May 2, 2002. In his certification, Hi Tech’s counsel advised the STB that CPR had directed Hi Tech to remove CPR as a listed co-petitioner. In its amended petition, Hi Tech once again did not claim to be a rail carrier.

c) Exhibit D(3) is a copy of a reply filed by the State of New Jersey, Department of Environmental Protection (“DEP”), on June 6, 2002, to Hi Tech’s amended petition. In its reply, DEP contends that Hi Tech is not a rail carrier and that it is subject to state solid waste laws and regulations.

d) Exhibit D(4) is a copy of a reply filed by the HCIA and ECUA on June 6, 2002, to Hi Tech’s amended petition.

e) Exhibit D(5) is a copy of a motion filed by Hi Tech on June 18, 2002, seeking to strike DEP’s reply. In that motion, Hi Tech contended, for the first time, that it is a rail carrier. The motion has been fully briefed and is awaiting decision by the STB.

6. Attached hereto as Exhibit E is a copy of an unpublished decision rendered by the Hon. R. Benjamin Cohen, J.S.C., in a matter entitled ECUA v. Sisbarro Disposal Co., Docket No. C-231-00 (Ch. Div. May 3, 2002). In that decision, Judge Cohen rejected a claim that Essex County’s Solid Waste Management Plan was unconstitutional insofar as it directs all Type 13 generated in the county to Waste Management’s transfer station in Elizabeth, New Jersey.

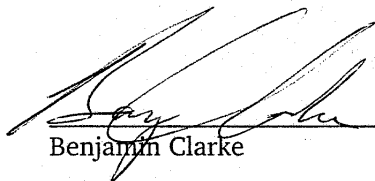
7. In the motion papers that Hi Tech has filed with the Court in this matter, Hi Tech asserts, "Hudson County does not possess any indicia of ownership o[r] own the C&D/Type 13 waste generated within Hudson County" (Plaintiff's Brief at 13), and that "Essex County does not possess any indicia of ownership of the C&D generated within Essex County." (Plaintiff's Brief at 17). In fact, HCIA and ECUA hold exclusive franchises on the waste generated within Hudson and Essex Counties. HCIA was granted its franchise by order of the Board of Public Utilities ("BPU") dated February 4, 1991, Docket No. SE90101129 (copy attached hereto as Exhibit F). Likewise, ECUA obtained an exclusive franchise from the BPU (then part of the DEPE) by order dated April 6, 1995 (copy attached hereto as Exhibit G).

8. Attached hereto as Exhibit H is a copy of a spread sheet summarizing observations made by health inspectors for the County of Essex on three recent occasions. The inspectors stationed themselves outside the entrance to Hi Tech's facility, and recorded the identities of haulers delivering waste to the facility. Many of the haulers delivering waste to Hi Tech are based and active in Essex County and Hudson County.

9. In preparation of defendants' opposition papers, in an effort to find out more about Hi Tech, I performed a "Google" search for "Hi Tech Trans, LLC." The search yielded no additional information about who Hi Tech is and what they do, but did yield one document that highlights the dearth of such information. The document, a copy of which is attached hereto as Exhibit I, is an email transmission sent out by an employee of the Erie Lackawanna railroad on July 11, 2000, after receiving notice of Hi Tech's petition seeking permission to conduct rail carrier operations from Newark, New Jersey to points in New

York and Ohio (Exhibit A). The email reads, in its entirety, "Anyone have ANY idea who these folks are and what this is all about in actuality????"

10. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false I am subject to punishment.



Benjamin Clarke

Dated: October 7, 2002

—

A1

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO.

33901

HI TECH TRANS, LLC, EXEMPTION FOR OPERATION AS A CLASS III
CARRIER OVER LINES OWNED BY THE CANADIAN PACIFIC RAILWAY
AND AFFILIATES AND CONNECTING CARRIERS.

EXEMPTION

a. Hi Tech Trans, LLC, a non carrier, has filed a notice of exemption pursuant to 49 CFR 1150.31 to commence the operation of common carrier rail service from Oak Island, Newark, Essex County, N.J. to Irwin, N.Y., Buffalo, N.Y., Niagara, N.Y., Lowellville, Ohio and or Canton, Ohio.

b. Hi Tech Trans, LLC is represented by:

John F. McHugh
McHugh & Barnes, P.C.
20 Exchange Place
New York, N.Y. 10005
212-483-0875
Fax: 212-483-0876

c. Hi Tech Trans, LLC anticipates that it will soon enter into a sub-lease agreement with the Canadian Pacific Railway, through its subsidiary the Delaware & Hudson Corp. for lands at Oak Island Yard in Newark, Essex County, N.J. to use to hold, shift, maintain and load rail cars owned by HTT and used in its waste products transportation service. The sub-lease will be for twenty years, renewable for additional

terms. HITT also anticipated finalizing a Transportation Agreement with Canadian Pacific for the transportation of its equipment over the lines of Canadian Pacific and its affiliates. The Agreement and Sub-Lease anticipate HITT interchanging not less than 500 cars per year and growing to 2500 cars in year six. All shipments are to be to HITT controlled locations at Buffalo, N.Y., Niagara Falls, N.Y., Irwin, N.Y., Canton, Ohio and or Lowellville, Ohio. HITT will own or otherwise control all cars in its service and will own and operate or otherwise control all terminals. Pursuant to the transportation agreement, loaded and empty HITT cars will be hauled on CP lines to HITT controlled terminals or to interchange points. The Transportation Agreement will anticipate single car, multiple car and full train movements with rates set accordingly from Newark, N.J. to HITT terminals. Subsidiary Agreements will be entered into for each particular destination terminal. All cars used will be owned or leased by HITT and will be subject to normal interchange rules. HITT will contract with such connecting carriers as may be required to reach HITT controlled terminals to wit, the Finger Lakes Railroad for Irwin, N.Y., the Norfolk Southern for Lowellville, Ohio, Canton Ohio and with CSX Corp. for Niagara, N.Y.. However, the initial sole connecting carrier will be Norfolk Southern at Buffalo N.Y. which will carry HITT cars between Buffalo and Lowellville, Ohio.

d. The name of the rail service operator will be Hi Tech Trans, LLC. The operation will be over lines owned by the Delaware & Hudson Railroad, Inc. and Norfolk Southern Corp.

e. HITT will be a common carrier, offering its services to shippers of

Construction and Demolition and other non-hazardous waste products moving in interstate commerce.

1. HHT is in the process of sub-leasing lands at Oak Island, Essex County, N.J. from the Delaware and Hudson Railroad, Inc. the address of which for the purposes of this transaction is Suite 300 Windsor Station, 910 Peel St. Montreal, Quebec, Canada H3C 3E4. HHT expects to finalize a Master Transportation agreement setting forth the general terms of carriage of HHT equipment over lines of the Canadian Pacific Railway and its affiliates. For the purposes of this part of the transaction the address of the line haul carrier is, Account Manager, Canadian Pacific Railway 1200 Jorie Boulevard, Oak Brook, IL 60523. The master transportation agreement as currently anticipated, will be supplemented by sub-agreements for each HHT destination. HHT will negotiate agreements with connecting carriers to reach HHT terminals which are not on the Canadian Pacific System.

2. HHT will receive waste at Oak Island Yard in Newark, Essex County, N.J. Waste will be received for transport either pursuant to contract or pursuant to published per ton rates. Waste will be loaded by HHT into its rail cars. Loaded cars will be assembled and interchanged with CP at Oak Island in single car or multiple car groups or as trains. CP will haul HHT cars or trains either directly to an HHT controlled discharge terminal or to an interchange point with a connecting carrier. At the discharge terminal HHT will unload the car and deliver the cargo to a local hauler as directed by the shipper. HHT will arrange for non-rail on carriage and disposal of such product as agent for the shipper if so requested.

Empty rail equipment will be returned to Oak Island via a reverse route. This initial operation anticipates the movement of cars, blocks of cars or full trains over about 641 route miles of railway during the initial operations of HTT. All train movements, other than within terminals, will be based upon transportation agreements with other carriers. It is expected that agreements can be finalized by August 1, 2000 and that operations can commence before January 1, 2001. The operation may expand to serve terminals adjacent to this same line at Buffalo, N.Y., Niagara, N.Y. and on the Finger Lakes Railroad at Irwin, N.Y. and beyond this line to Lowellville and Canton, Ohio via Norfolk Southern.

3. The initial operation will be based at Oak Island Yard, Newark, N.J. (Lehigh Valley) MP 11.4 and will run to Wilkes-Barre, Pa. MP 176 thence via the Delaware and Hudson from MP 92.4 to Scranton MP 74 thence via D&H, (Lackawanna) MP 134 to Buffalo 403, thence interchanging with Norfolk Southern at (NKP) MP 523 to Ashtabula, Ohio, MP 395, thence on a branch from (New York Central) MP 0 to (PFF) MP 61, Lowellville, Ohio or such other equivalent route as HTT and the carriers shall determine in the future to afford the most efficient service.

4. Total initial miles operated of 641 for the initial operation and any variation will not materially change the operation or its market.

f. The projected route is depicted as follows:



g. Applicant certifies that its projected revenues will not exceed those which would qualify it as a Class III carrier.

8. This operation does not anticipate displacement of any railroad employees. Thus no labor protection is required.

9. As this transaction will be small, as all cargo handling will be done in rail yard in heavily industrialized areas or at rail facilities and as most cargo which HITT anticipates moving on HITT rail equipment will replace long haul truck movements with rail hauls, this transaction is not expected to have any significant adverse environmental impacts.

Dated, New York, N.Y.
June 2000

Respectfully Submitted

John F. McHugh
McHugh & Barnes, P.C.
20 Exchange Place
New York, N.Y. 10005
212-483-0875

VERIFICATION

John F. McHugh being an attorney duly admitted to practice in the State of New York in the District Courts of the Second and various other Circuits and before this Board, verifies under penalty of perjury that he is the duly appointed representative of Hi Tech Trans, LLC and has reviewed the information set forth in this Notice of Exemption and has compared it with the agreements he is negotiating and drafting on behalf of said applicant and knows that the information herein accurately describes the operation and financial results contemplated by applicant to the best of his knowledge and belief.

Dated, June 30, 2000

John F. McHugh.

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FINANCE DOCKET NO. 33901

**HI TECH TRANS, LLC, EXEMPTION FOR OPERATION AS A CLASS III
CARRIER OVER LINES OWNED BY THE CANADIAN PACIFIC RAILWAY
AND AFFILIATES AND CONNECTING CARRIERS.**

SURFACE TRANSPORTATION BOARD

NOTICE OF EXEMPTION

FINANCE DOCKET NO. _____

**HI TECH TRANS, LLC, EXEMPTION FOR OPERATION AS A CLASS III
CARRIER OVER LINES OWNED BY THE CANADIAN PACIFIC RAILWAY
AND AFFILIATES AND CONNECTING CARRIERS.**

Caption Summary

Hi Tech Trans, LLC has filed a notice of exemption, pursuant to 49 CFR 1150.31 to commence operations as a class III rail common carrier over lines owned and operated by the Canadian Pacific Railway and its affiliates and connecting carriers from a waste terminal to be built at Oak Island, Newark, Essex County N.J. (Lehigh Valley MP 11.T) to Buffalo, N.Y. and thence via the Norfolk Southern Corporation's lines from Buffalo, N.Y. to facilities owned by Hi Tech Trans, LLC Lowellville, Ohio (PLB MP 61), and other points, a total distance of about 641 miles but subject of variation depending on route and destination. Petitioner intends to finalize agreements by August 1, 2000 and to commence operations by January 1, 2001. Petitioner's representative is John E. McHugh.

of McHugh & Barnes, P.C., 20 Exchange Place, New York, N.Y. 10005, 212-483-0875.

No other class exemptions are being used by the petitioner.

Dated, New York, N.Y.
June 30, 2000

John F. McHugh
McHugh & Barnes, P.C.
20 Exchange Place
New York, N.Y. 10005
212-483-0875

A2

31148

SERVICE DATE - JULY 19, 2000

DO

FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 33901]

Hi-Tech Trans, LLC--Operation Exemption--Over Lines Owned By Canadian Pacific
Railway and Connecting Carriers

Hi-Tech Trans, LLC (HTT), a noncarrier, has filed a notice of exemption under 49 CFR 1150.31 to commence operations over approximately 641 miles of rail line from Oak Island Yard in Newark, NJ to points in Irwin, Buffalo and Niagara, NY, and Lowellville and or Canton, OH.¹ The specific route has not been established because HTT asserts that the route may be changed in the future to afford more efficient service. HTT certifies that its projected revenues will not exceed those that would qualify it as a Class III railroad.

HTT states that operations will not commence until it reaches lease or trackage rights agreements with other railroads. HTT further states that it expects that those agreements can be finalized by August 1, 2000 and that it can commence operations before January 1, 2001.

¹ HTT states that it expects to enter into sub-lease or trackage rights agreements with the Canadian Pacific Railway and its affiliates and will arrange connections with the Finger Lakes Railroad, Norfolk Southern Railway Company, and CSX Corporation.

If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.²

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33901, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, one copy of each pleading must be served on John F. McHugh, McHugh & Barnes, P.C., 20 Exchange Place, New York, NY 10005.

Board decisions and notices are available on our website at
“WWW.STB.DOT.GOV.”

Decided: July 13, 2000.

By the Board, Joseph H. Dettmar, Acting Director, Office of Proceedings.

Vernon A. Williams

Secretary

² On July 6, 2000, a petition for stay of the exemption filed by HTT was filed by Samuel J. Nasca, on behalf of the United Transportation Union - New York Legislative Board. The petition for stay was denied by the Board in Hi-Tech Trans, LLC--Operation Exemption--Over Lines Owned By Canadian Pacific Railway and Connecting Carriers, STB Finance Docket No. 33901 (STB served July 10, 2000).

A3

ENTERED
Office of the Secretary

JUL 17 2000

Part of
Public Record

ORIGINAL

Before the

SURFACE TRANSPORTATION BOARD

Finance Docket No. 33901

HI TECH TRANS, LLC--OPERATION EXEMPTION--
OVER LINES OWNED BY CANADIAN PACIFIC RAILWAY
AND CONNECTING CARRIERS

PETITION FOR STAY OF EFFECTIVE DATE^{*/}

GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington, DC 20036

July 6, 2000

Attorney for Samuel J. Nasca

^{*/} Expedited handling is requested inasmuch as the exemption otherwise becomes effective at 12:01 AM, Monday, July 10, 2000.

199194

RECEIVED
JUL 6 2000
U.S. DEPARTMENT OF
TRANSPORTATION

I

Before the
SURFACE TRANSPORTATION BOARD

Finance Docket No. 33901

HI TECH TRANS, LLC--OPERATION EXEMPTION--
OVER LINES OWNED BY CANADIAN PACIFIC RAILWAY
AND CONNECTING CARRIERS

PETITION FOR STAY OF EFFECTIVE DATE

1/

Protestant, Samuel J. Nasca, for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), petitions the Surface Transportation Board (STB) that it stay the operation of the Notice of Exemption, filed July 3, 2000, by Hi Tech Trans, LLC (HTT), pending hearing and disposition of a forthcoming petition to revoke application of the non-carrier class exemption to the instant transaction. Protestant intends to file such a petition to revoke.

Unless stayed, the exemption will become effective Monday, July 10, 2000.

Background

The HTT filing is most unusual and bizarre. There are many unexplained features of the proposed operation. It appears that HTT will confine its operations to loading/unloading in freight yards, and "All train movements...will be based upon transportation agreements with other carriers." Of course, this is HTT's initial statement, and it is not clear whether HTT will itself operate trains. Elsewhere in its filing HTT states the "line haul carrier" is Canadian Pacific Railway. See: Notice, pp. 3, 4.

1/ New York Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany, NY 12205.

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JUL 6 2000
STATION
TOLLETT

The HHT plan of operation is unclear and indefinite. The caption of the Notice states HHT will operate over lines owned by Canadian Pacific Railway; elsewhere, in the draft notice, HHT states it will operate as a common carrier over lines "owned and operated" by Canadian Pacific Railway (and affiliates) "and connecting carriers." HHT adds operation over Norfolk Southern Railway lines in its draft notice, yet elsewhere refers to Norfolk Southern as a connecting carrier. See: Notice, p. 2.

HHT plans an extensive operation, initially 641 miles, in New Jersey, New York, Pennsylvania, and Ohio.

HHT states it does not anticipate displacement of any railroad employees.

GROUND'S FOR STAY

1. Merits. Protestant has a high probability of success on the merits. It is doubtful that the transaction comes under the class exemption. It appears that the HHT operation will be in various yards and terminals, where transportation is excepted by 49 U.S.C. 10906, as an initial matter. No authority or exemption would be required for such transportation. Beyond the yards, it appears HHT is planning for operations to be by some sort of haulage by existing carriers.^{2/} But HHT must be a carrier before it can enter into haulage arrangements.^{3/} Under HHT's haulage theory, any shipper would become a carrier by filing a notice of exemption over some rail carrier's line and by establishing paper stations en route or at destination.

Of course, if the HHT notice were to become effective, HHT could perform train operations over the route, as there is nothing in its

2/ HHT employs the term "haul" or "hailed" throughout its Notice, e.g. pp. 2,3.

3/ Protestant maintains that where haulage is "joint use," rather than "trackage rights," the transaction would come under 49 U.S.C. 11323.

notice to bar such operations.

The use of the section 10901 non-carrier class exemption for a bogus operation such as proposed by HTT would extend the class exemption beyond that intended by the STB. It would create problems akin to carrier confusion with "operate" in contrast with "operate over." See: United Transp. Union v. Surface Transp. Bd., 175 F.3d 163, 167-69 (D.C. Cir. 1999).

The HTT proposal, as it presently stands, does not properly come within the section 10901 class exemption. The lack of HTT's present operating ability renders the transaction even more absurd than the ill-fated "Winona Bridge" proposal under the umbrella of Burlington Northern's right-of-way. Winter v. ICC, 851 F.2d 1056, 1064-65 (8th Cir. 1988); Burlington Northern R. Co. v. United Transp. Union, 962 F.2d 1266 (7th Cir. 1988).

2. Injury. Railroad employees stand to be injured by the HTT proposal. To the extent HTT operates its own trains outside the terminals, railroad employees clearly would be adversely affected. This would be injury to employees, irrespective of whether the STB could impose employee conditions, or whether such conditions would be precluded by statute.

There would be no injury to HTT if a stay is imposed. This is clear from its Notice, which does not propose commencement of initial operations until January 1, 20001. (Notice, p. 4).

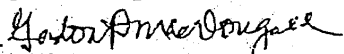
3. Public Interest. The public interest warrants a stay due to the incomplete and inadequate description of HTT's proposed operation--initial as well as final. Here, it appears that HTT is attempting to extend the non-carrier class exemption to haulage operations with an existing carrier, and where the non-carrier would not itself operate any line subject to STB jurisdiction. The situation

requires an investigation, and a stay pending final disposition.

CONCLUSION

The Board should stay the operation of the exemption pending hearing and disposition of protestant's forthcoming petition to revoke.

Respectfully submitted,


GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20035

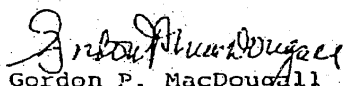
July 6, 2000

Attorney for Samuel J. Nasca

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing upon
counsel for HTT, John F. McHugh, Esq., by overnight express service
and by telefax.

Washington DC


Gordon P. MacDougall

A4

31181
SEC

SERVICE DATE - JULY 21, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33901

HI-TECH TRANS, LLC—OPERATION EXEMPTION—OVER LINES OWNED BY
CANADIAN PACIFIC RAILWAY AND CONNECTING CARRIERS

Decided: July 20, 2000

On July 3, 2000, Hi-Tech Trans, LLC (HTT) filed a notice of exemption under 49 CFR 1150.31 to commence operations over approximately 641 miles of rail line from Oak Island Yard in Newark, NJ, to points in Irwin, Buffalo and Niagara, NY, and Lowellville and or Canton, OH. Notice of the exemption was served and published in the Federal Register on July 19, 2000 (65 FR 44852-53).¹

By letter filed July 17, 2000, HTT requests that the notice of exemption be withdrawn. The request will be granted and the proceeding will be dismissed.

It is ordered:

1. The request to withdraw the notice of exemption is granted and the proceeding in STB Finance Docket No. 33901 is dismissed.
2. This decision is effective on its date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

¹ Footnote 2 of the notice issued by the Board erroneously indicated that a prior decision in this proceeding had been served on July 10, 2000. That decision was actually served on July 7, 2000.

McHUGH & BARNES, P.C.

20 Exchange Place
New York, N.Y. 10005
212-483-0875 212-721-2617
telefax 212-483-0876

John F. McHugh
Elisa Barnes
Monica Connell

Of Counsel
W. Patrick O'Keefe
201-529-1111

July 14, 2000

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

Re: Notice of Exemption, Hi Tech Trans. LLC
Finance Docket No. 33901

Dear Secretary Williams:

Our client, Hi Tech Trans. LLC, hereby withdraws the above referenced
Notice of Exemption.

Thank you for your attention to this matter.

Very truly yours

John F. McHugh

Cc: Gordon P. Mac Dougal
1025 Connecticut Avenue
NW Washington DC 20035

B1

HI TECH LLC } **T. FIORE RECYLING**
TRANSPORTATION } **CORP.**

**ANNOUNCES
THE OPENING OF A**

SOLID WASTE TRANSFER STATION

LOCATED AT

OAK ISLAND, NEWARK, N.J.

ACCEPTING

**CONSTRUCTION AND DEMOLITION
MATERIAL
WASTE ID 13C**

**FOR INFORMATION, PLEASE CALL:
(973) 589-3366**

**ONLY VEHICLES REGISTERED WITH THE NJDEP AND
ACCOMPANIED BY A COMPLETED AND SIGNED WASTE
ORIGIN AND DISPOSAL FORM WILL BE ACCEPTED.**

100/100

02/03/01 FAX 1732815328

10/03/01 WED 11:41 [TX/RX NO 7648]

B2

HI TECH TRANS LLC / CANADIAN PACIFIC RAILWAY
OAK ISLAND NJ TRANSLOADING FACILITY
ACCEPTED and EXCLUDED WASTES
September 2001

ACCEPTED

NJDEP Type 13C Construction and demolition waste:

"Waste building material and rubble resulting from construction, remodeling, repair, and demolition operations on houses, commercial buildings, pavements and other structures."

Including: treated and untreated wood scrap;
concrete, asphalt, bricks, blocks and other masonry;
plaster and wallboard;
roofing materials;
corrugated cardboard and miscellaneous paper;
ferrous and non-ferrous metal;
non-asbestos building insulation;
plastic scrap;
non-contaminated dirt;
carpets and padding;
glass (window and door); and
other miscellaneous materials.

EXCLUDED

NO other solid waste types such as:

- NO NJDEP Type 10 Waste (Municipal, household, commercial and institutional waste),
- NO NJDEP Type 13 Bulky waste
- NO NJDEP Type 27A asbestos or asbestos containing wastes

NO hazardous wastes or drums;

NO Recyclables, tires or batteries;

NO tree parts, tree stumps, brush or yard wastes.

B3

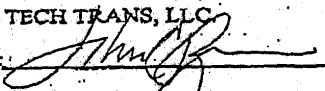
**91 Bay Avenue, Newark, NJ 07105**

(201) 692-0826; Fax (201) 287-0886; e-mail: ronkdem@erols.com

A determination has been made and HTT has represented to Customer that HTT's Transload Facility ("Transload Facility") is operating under the exclusive federal jurisdiction of the United States Surface Transportation Board. If any State, Municipal or County regulatory authority ("Local Regulatory Agency(ies)") levies a fine against Customer or otherwise brings any action or enforcement proceedings against Customer as a result of the fact that Customer has transported by truck or any other appropriately licensed vehicle and/or delivered Construction/Demolition Debris or Bulky Waste (referred to in the manifest to which this indemnity is attached) to the Transload Facility on the grounds that the transload facility has not received a permit from the NJDEP or due the fact that the transloading facility has not been designated pursuant to any County Solid Waste Management Plan (both hereinafter referred to as "Enforcement Action(s)"), HTT shall indemnify, defend and hold harmless Customer from and against any claim, liability, cost and expense, including reasonably incurred attorneys fees, in connection with the defense, discharge or satisfaction of such Enforcement Action(s), provided that: (i) Customer notifies HTT in writing within twenty four (24) hours of learning of any Enforcement Action; (ii) Customer shall not negotiate, discharge or settle the Enforcement Action(s); and (iii) HTT shall not be responsible for the cost and expenses of any counsel hired by Customer in connection with defending or responding to such Enforcement Action(s).

As to Manifest No: _____

HI TECH TRANS, LLC

by: 

Dated: _____

**HI TECH TRANS LLC
T. FIORE RECYCLING***Fiore
201-928-0183*

Exhibit C

CONTINUATION SHEET
(for Inspections, Surveys, Audits, etc.)

NAME (Individual, Facility, Establishment, etc.) HIGH TECH, 91 BAY AVE	DATE 4/4/02
MUNICIPALITY NEWARK - ESSEX	TEL. CODE & NO. LINKARTON

ITEM NO.	REMARKS
	THE AUTHOR OF THIS REPORT AND INSPECTOR FARMER ARRIVED ON-SITE @ APPROX 12:15 PM. OBSERVED SEVERAL ROLL-OFF SOLID WASTE VEHICLES IN STAGING AREA WAITING TO OFF-LOAD. 10-13 SOLID WASTE - CONSTRUCTION DEBRIS, WAS MET BY A PERSON WHO IDENTIFIED HIMSELF AS BRIAN YARD SUPERVISOR - I ASKED HIM WHAT THE ACTIVITY HIGH TECH WAS DOING AT THIS SITE. AND HE EXPLAINED TO US THAT; CHIRAL OWNS THE PROPERTY - BECAUSE THE PROPERTY IS FEDERAL, THE ACTIVITY AT THIS PROPERTY IS EXEMPT FROM STATE, COUNTY AND LOCAL REGULATION. THIS ALLOWS THEM TO ACCEPT C&D WASTE FROM HAULERS AND TRANSPORT IT OUT OF STATE. HE THEN ESCORTED US TO A OFFICE TRAILER WHERE WE WERE GREETED BY A PERSON WHO TOLD US WE NEEDED SAFETY EQUIPMENT IF WE WERE GOING TO TOUR THE SITE. THIS PERSON ALSO SAID THEY WOULD HAVE TO ESCORT US. AFTER ISSUING OUR SAFETY EQUIPMENT, MYSELF, INSPECTOR FARMER AND THIS PERSON GOT INTO THE COUNTY VEHICLE TO DRIVE TO WHERE THE TRUCKS WERE UNLOADING THEIR WASTE. DURING THIS TIME

SIGNATURE OF INDIVIDUAL COMPLETING FORM <i>[Signature]</i>	SIGNATURE OF OWNER OF FACILITY, ESTABLISHMENT, ETC., IF REQUIRED
MS-5 Revised 8/91 Essex County Health Dept	PAGE 1 OF 3 PAGES

CONTINUATION SHEET
(for Inspections, Surveys, Audits, etc.)

NAME (Individual, Facility, Establishment, etc.) Hight Tech, 91 Bay Ave		DATE 4/4/02
MUNICIPALITY NEWARK		TEL. CODE & NO.

ITEM NO.	REMARKS
	I ASKED THIS PERSON THEIR NAME AND HE SAID I DIDNT HAVE TO KNOW IT. THEN, I TOLD HIM I WAS GOING TO TAKE SOME PICTURE WHERE THE TRUCKS WERE UNLOADING THEIR WASTE AND HE REPLIED "THE FUCK YOU ARE". I REMINDED HIM THAT I WAS A INSPECTOR FOR THE DEPT OF HEALTH AND I MERELY WANTED TO MAKE SURE THAT HIGHT TECH'S OPERATION WAS NOT CREATING A PUBLIC HEALTH CONCERN - HE THEN TOLD ME "TO GO FUCK MYSELF". AT THIS TIME I TURNED THE TRUCK AROUND AND DROPPED THIS PERSON OFF AT THE OFFICE TRAILER. I ASKED TO SPEAK TO HIS SUPERIOR AND HE TOLD THAT HE WAS THE BOSS AND IF I HAD ANY OTHER QUESTIONS TO SPEAK WITH HIS ATTORNEY.

OBSERVATIONS OF SITE OPERATION

SEVERAL PULL-OFF TRUCKS WERE OBSERVED WEIGHING IN ON SCALE - TRUCKS THEN PROCEED TO STAGING AREA. TRUCKS THEN PROCEED UP DIRT RAMP TO OFF-LOAD WASTE.

SIGNATURE OF INDIVIDUAL COMPLETING FORM

[Signature]

SIGNATURE OF OWNER OF FACILITY, ESTABLISHMENT, ETC., IF REQUIRED

CONTINUATION SHEET
(for Inspections, Surveys, Audits, etc.)

NAME (Individual, Facility, Establishment, etc.)

MUNICIPALITY

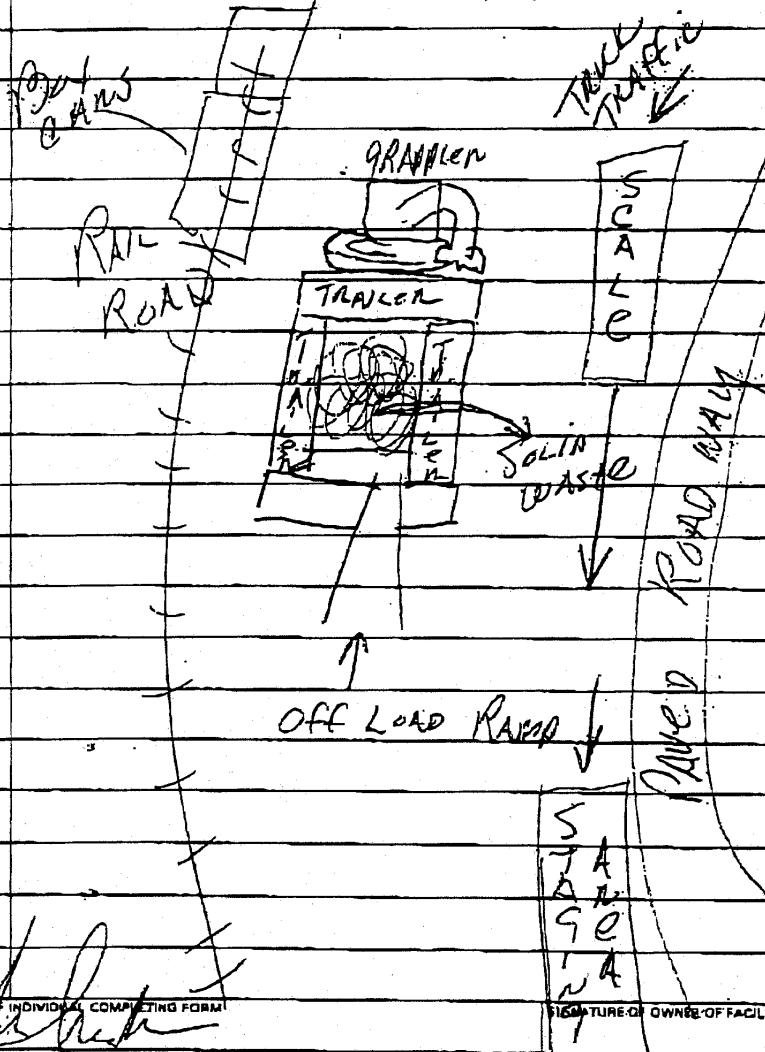
DATE _____

TEL., CODE or ID. NO.

ITEM
NO.

REMARKS

BILL OF LADONS ARE USED OLD FORMS NOT USED
WASTE IS TIPPED INTO PIT SURROUNDED
BY TRAILERS. WASTE IS THEN LOADED
INTO RAIL CARS BY GRAPPLER (SEE DIAGRAM)



SIGNATURE OF INDIVIDUAL COMPLETING FORM

SIGNATURE OF OWNER OF FACILITY, ESTABLISHMENT, ETC., IF REQUIRED

1-6
VIA 6/91

PAGE 3 OF 3 PAGES

• 2004.05.04

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CONTINUATION SHEET
(for Inspections, Surveys, Audits, etc.)

NAME (Individual, Society, Establishment, etc.)

MUNICIPALITY

DATE

TEL. CODE or ID NO.

ITEM NO.

REMARKS

High Tech
Newark
91 Bay Ave
Truck Watch

4/13/2002

9:00 AM start time

11:15 AM End Time

Tech
(High Point)

ITEM NO.	REMARKS	type	time
	CiUBA	Roll OFF	13
	T Fiore	18 Wheel Dump Truck	13
	ACE	Roll OFF	13
*	Daytona	Roll OFF	13
*	Daytona	Roll OFF	13
	Action	Roll OFF	13
*	Daytona	Roll OFF	13
	JUZEFYK	18 Wheel Dump Truck	13
	Action	Roll OFF	13
*	Daytona	Roll OFF	13

* other way in

SIGNATURE OF INDIVIDUAL COMPLETING FORM

SIGNATURE OF OWNER OF FACILITY, ESTABLISHMENT, ETC., IF REQUIRED

MS-5
Revised 5/91

PAGE 1 OF 1 PAGES



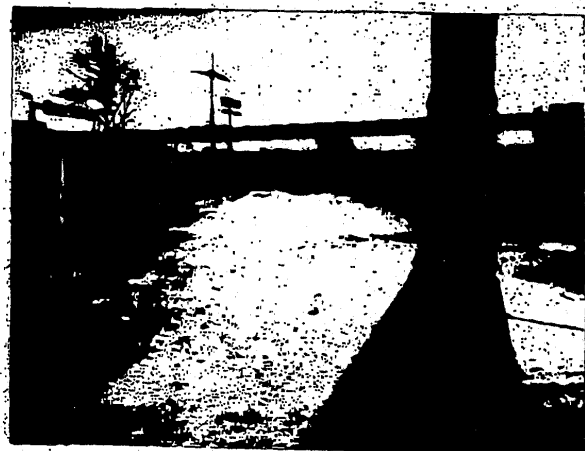
Vehicles @ High Tech



Vehicles @ High Tech



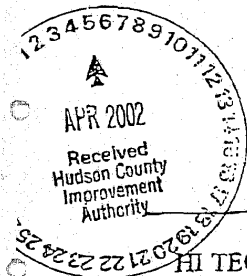
Vehicles @ High Tech



Vehicles @ High Tech

Exhibit D

D1



BEFORE THE

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET _____

HI TECH TRANS, LLC, CANADIAN PACIFIC RAILROAD, CORP. - PETITION
FOR A DECLARATORY ORDER - HUDSON COUNTY, NEW JERSEY,

Petitioners, pursuant to 5 U.S.C. § 554(e), seek a declaratory order that the Surface Transportation Board [STB] has exclusive jurisdiction over Petitioners' activities and those of its customers who seek to utilize rail services and nullifying the statutes and ordinances of New Jersey which render shipping by rail via the Petitioner's facilities unlawful on the ground that the use of Petitioner's facilities for the shipment of waste is not authorized pursuant to local law.

FACTS

Hi Tech Trans, LLC [Hi Tech] is a company organized under the laws of the State of New Jersey which operates a facility as a licensed agent of and on the property of the Canadian Pacific Railroad [CP] in Newark, N.J. Hi Tech is the local agent for the Canadian Pacific Railway which contracts for, gathers by truck and then loads construction and demolition debris and contaminated soils onto railway cars for transport in interstate commerce. Hi Tech issues bills of lading for such shipments as the agent of the Canadian Pacific Railway. Hi Tech contracts with the ultimate shipper of the cargos as well as with truckers licensed by the State of New Jersey to transport the cargos from the shipper's site (usually a construction site) to the rail loading facility where the cargos are transferred in bulk from the truck to a rail car. Neither Hi Tech nor CP store

any waste materials upon the premises of the rail loading facility. Hi Tech inspects all waste moving through the Newark facility to insure that the materials are appropriate for such transport and fully comply with all federal regulations related to the safe handling of such materials. CP maintains all federal authority necessary for the transport of all grades of waste by rail. The Hi Tech-CP operation however, is limited to materials deemed non-hazardous pursuant to federal regulations and law.

Hudson County New Jersey has informed Hi Tech that it has designated the Hudson County Improvement Authority [HCIA] as its agent to implement and enforce its waste management régime. By a procurement process, that agency has selected a specific facility to receive all construction and demolition waste and contaminated soils originating in Hudson County (See: In the Matter of Certain Amendments to the Adopted and Approved Solid Waste Management Plan of the Hudson County Solid Waste Management District, Exhibit A). State laws impose fines on any transporter licensed by the State which delivers waste to a facility which, although licensed by the State, has not been designated by a State authorized district such as Hudson County to receive waste. The State laws also allow for the imposition of fines upon any transporter which delivers waste to a facility not authorized to receive waste (licensed) by the State. HCIA has informed Hi Tech that it believes that Hi Tech has accepted Hudson County generated waste. It has also notified Hi Tech that pursuant to the Hudson County Solid Waste Management Plan and/or under applicable New Jersey laws, Hi Tech is not authorized to accept Hudson County generated waste. . HCIA has also informed Hi-Tech that any person delivering waste to its Newark facility is similarly subject to fines and penalties as provided in New Jersey Revised Statutes 13:1E-9. The

HCIA has demanded that Hi-Tech provide it with information as to the identity of entities which have delivered waste to the Hi-Tech-CP facility, Exhibit B and has rejected arguments that the facilities, as rail facilities, do not require local authority to receive such cargos. Exhibit C.

The language of the Hudson County Solid Waste Management Plan at issue here reads as follows:

All waste types 10 and 25 not collected either by a municipality or through a contract with a municipality but, instead, is collected from non municipal generators pursuant to contracts between the generators and private solid waste collectors (up to 100,000 tons annually) are directed to the Union County Resource Recovery Facility located at 1499 Routes 1 and 9 North (Lots 8 and 9, Block 338) in the City of Rahway, Union County.

All waste types 10 and 25 collected either by a municipality or through a contract with a municipality (up to 300,000 tons annually) are directed to the SWT&R Transfer Station located at 442 Frelinghuysen Avenue (Lot 24, Block 3516) in Newark, Essex County for processing and transfer for transport by Hudson-JV to the Grand Central Landfill in Pen Argyle, Pennsylvania.

All waste types 13,23, and 27, and grits and screenings are directed to the HMDC 1-E North Area Landfill located at 100 Baler Boulevard (Lot 1, Blocks 175-183;185-189) in North Arlington, Bergen County and in Kearny, Hudson County (Lot 10, Block 149).

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.S.A. 7:25-1 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.

(page 9 of Exhibit A)

The relevant provisions of N.J.S.A. § 13:1E-9 read as follows:

g. Any person who knowingly:

(1) Transports any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;

(2) Generates and causes or permits to be transported any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;

(3) Disposes, treats, stores or transports hazardous waste without authorization from the department;

shall, upon conviction, be guilty of a crime of the third degree and, notwithstanding the provisions of N.J.S.2C:43-3, shall be subject to a fine of not more than \$50,000.00 for the first offense and not more than \$100,000.00 for the second and each subsequent offense and restitution, in addition to any other appropriate disposition authorized by subsection b. of N.J.S.2C:43-2.

The relevant provisions of N.J.S.A. §13:1E-12. read as follows:

Revocation or suspension of registration

The department, after hearing, may revoke or suspend the registration issued to any person engaged in the solid waste collection or solid waste disposal upon a finding that such person:

a. Has violated any provision of this act or any rule, regulation, or administrative order promulgated hereunder; or

b. Has violated any provision of any laws related to pollution of the waters, air or land surfaces of the State; or

c. Has refused or failed to comply with any lawful order of the department.

HCIA has demanded that Hi Tech provide the County with information as to the origins of all cargos it has handled. HCIA has informed Hi Tech that it will use that information to fine any Waste Hauler or Materials Handling Facility, including Hi-Tech, pursuant to the above cited State Laws, which has delivered or received Hudson County generated waste which facility is not authorized under the Certified Waste Management Plan of The Hudson County Waste Management District as amended on March 11, 1999 (hereinafter "The Plan"). Canadian Pacific Railroad and its agent, Hi Tech Trans, LLC are not licensed by the State of New Jersey to transport waste nor are they authorized to transport waste pursuant to the Plan.

The facility designated by the Plan for Construction and Demolition Waste and Contaminated Soils is a truck to truck facility. By selecting that facility, Hudson County has rendered rail either illegal or noncompetitive. The double handling and additional trucking necessitated by trans-shipping the type of waste handled by Hi Tech-CP from a truck to truck facility to a rail facility imposes a tremendous cost burden on the rail mode. Further, passage through the truck based transfer station serves no purpose. Such a process inherently favors truck contractors over rail carriers.

By excluding rail transport, the County has imposed a substantial burden on interstate commerce. No legitimate interest of the County is advanced by this ordinance which could not be fully protected by other available means. Through its governmental authority, Hudson County has attempted to regulate Petitioner's rail and intermodal operations and in doing so, it has invaded the exclusive jurisdiction of this Board.

THE JURISDICTION OF THE SURFACE TRANSPORTATION BOARD IS
EXCLUSIVE

Canadian Pacific Railroad is rail carrier as that term is defined in 49 USC §10102(5) to wit "a person providing common carrier railroad transportation for compensation". Canadian Pacific Railroad is registered to transport hazardous materials under the Hazardous Materials Transportation Act, 40 U.S.C. §5101 et seq. and is therefore fully authorized under federal law to provide the services rendered via Hi Tech's facilities. Hi Tech Trans is an entity engaged exclusively in handling freight in a continuous intermodal rail move in conjunction with Canadian Pacific.

Title 49 U.S.C. §10501(b) provides that the authority of the Surface Transportation Board over "(1) transportation by rail carriers and the remedies provided in this part with regard to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers' and (2) the construction, acquisition, operation, abandonment, or discontinuation of spur, industrial, team, switching, or side tracks or facilities, even if the tracks are located or intended to be located entirely in one state, is exclusive." Such jurisdiction must, of necessity, extend to an application of local law which is applied in such a way as to unduly interfere with interstate commerce.

The Surface Transportation Board has exclusive jurisdiction over any rail activity, including the activities of HI Tech Trans which "regardless of ownership" is engaged in services related to that movement, i.e., the "receipt, delivery, elevation," ... "transfer in transit", ... "handling" of property, 49 U.S.C. §10102 (9) (B).

HUDSON COUNTY'S FLOW CONTROL REGULATIONS ARE PREEMPTED TO
THE EXTENT THAT THEY RENDER SHIPPERS UTILIZING RAIL SERVICES
SUBJECT TO FINES

49 U.S.C. §11321(a) specifically proscribes any law which impedes the exclusive authority of the Surface Transportation Board. It states that "a rail carrier...is exempt from the antitrust laws and from all other laws, including state and municipal law, as necessary to let that rail carrier...hold, maintain and operate property...acquired through..." (a transaction approved or exempt from approval by the Surface Transportation Board) See: City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998). The exemption from state law contained in the §11321, is to be interpreted broadly, See; Ex Norfolk & Western Ry. V. American Train Dispatchers, Assn. 499 U.S. 117, 127-34. (1991) "The... language in §11321(a) exempting carriers from ...State and municipal law is clear broad and unqualified". See also, CSX Transportation v. Georgia Public Service Commission, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996). The congressional intent to preempt is express. Congress has made its intent to exempt rail operations from all State and Federal law other than the Interstate Commerce Commission Termination Act clear.

In addition to invading a field given by Congress exclusively to the Surface Transportation Board, Hudson County's regulations conflict directly with Federal law. Hudson County ordinances and regulations impose fines on truckers hired by Hi Tech to pick up cargos for intermodal shipment by rail, and on Hi Tech and CP for the receipt of cargos for rail shipment from Hudson County. The fines are imposed based upon the HCIA's assertion that Petitioners' rail intermodal services are not authorized by

the County or by the State of New Jersey. CP and Hi Tech Trans, its agent, however, are both authorized to accept waste for transport under federal law. No local governmental agency may, through the use of governmental authority, determine that an entity operating under authority of Federal Law, is unauthorized to do what such Federal law not only allows, but mandates, i.e. provide common carrier transportation services to the public on reasonable terms. Where, as here, Hudson County seeks to impose criminal sanctions for exercising a right to use federally authorized transportation services, the County's regulations conflict absolutely with federal law and are a nullity. Cipollone v. Liggett Group, Inc. 505 U.S. 504, 515 (1992), Teper v. Miller, 82 F. 3d 989, 993 (8th Cir. 1993).

Hudson County's policies discriminate against rail carriers both by requiring State permits to receive waste and by requiring all waste to move through the county designated truck to truck facility. The County's regulations do not seek to affect only waste generated by the County, but attempt to affect the conduct of private parties. Where a governmental authority seeks to affect the transportation mode choices of private trash generation or transportation interests, it is not acting as a market participant but as a transportation regulator, Huish Detergents, Inc. v. Warren County, Kentucky, 214 F.3d 707, 715, (6th Cir. 2000). Where, as here, a county ordinance or regulation directly conflicts with Federal Law, to wit by rendering federally mandated activity illegal, local law is preempted Free v. Bland, 369 U.S. 663, 666 (1962). The Board in reviewing this situation should not confine its consideration to the facts of the single matter before it but should consider the potential effect on the national transportation regulatory scheme of multiple similar local ordinances. If Hudson County may render

rail service illegal, absent concession to local regulation or otherwise, a multiplicity of such regulations would cripple the nation's rail system. The threat to the national interest requires nullification of local action whenever it effects interstate commerce, even where the purpose of the action is not overtly discriminatory particularly where a multiple of such local actions have the potential of a national effect. U & I Sanitation. V. City of Columbus, 205 F. 3d 1063, 1071 (8th. Cir. 2000).

In U&I Sanitation the 8th Circuit confronted precisely the type of flow control regulation which Hudson County seeks to impose. After reviewing, and finding wanting, all the City of Columbus' arguments, the Court, quoting C&A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 406 (1994) (O'Connor J. concurring) held the ordinances unconstitutional.

We conclude that the ordinance's effects upon interstate commerce are far from trivial. Assuming, as we must, that all cities such as Columbus' enacted flow control ordinances like the one at issue here, the interstate market in recyclable materials extracted from solid waste could be substantially diminished or impaired, if not crippled. This is no academic problem for:

Over 20 States have enacted statutes authorizing local governments to adopt flow control laws. If the localities in these states impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, persuasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent.

Accordingly, Hudson County's regulations are void pursuant to 49 U.S.C. §11321(a).

THE COUNTY ORDINANCES AND REGULATIONS FAVOR TRUCK OVER RAIL
CARRIAGE AND THUS VIOLATE THE ENVIRONMENTAL MANDATES THE
BOARD IS CHARGED WITH ENFORCING

The County regulations are inconsistent with Federal environmental policy to the extent that they confine County generated waste to truck transport. Such transport generates 40% more emissions than would be generated by a rail haul. Congress made it clear in the National Environmental Policy Act, 42 U.S.C. §4331 et seq., that:

it is the continuing responsibility of the Federal Government to use all practicable means, [to] -

(2) assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

Id., 42 U.S.C. § 4331 (b). To achieve these goals, Congress "authorizes and directs . . . all agencies of the Federal Government" to consider:

(C) . . . (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action, ...

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332. Moreover, the Clean Air Act requires a federal program to favor environmentally sound proposals and disfavor those that adversely affect air quality:

Each department, agency, or instrumentality of the Federal Government having authority to conduct or support any program with air-quality related transportation consequences shall give priority in the exercise of such authority, ... to the implementation of those portions of plans prepared under this section to achieve and maintain the national primary ambient air quality standard.

42 U.S.C. §7506(d).

Rail haulage of waste, or of any product, is environmentally preferable to truck transport. To move the same tonnage by truck generates not only more emissions, it consumes valuable highway space, constitutes a growing safety problem and imposes a huge highway maintenance bill on the taxpayers. Thus, not only are the County's regulations preempted by the provisions of the §11321(a), they are arbitrary and in conflict with the principals which must govern any decision by the Surface Transportation Board in exercising its exclusive management of the nation's transportation system.

THE COUNTY'S ORDINANCES AND REGULATIONS NEITHER PROTECT A
LEGITIMATE LOCAL CONCERN NOR CONSTITUTE THE ONLY MEANS TO
PROTECT SUCH AN INTEREST WHICH IS AVAILABLE TO THE COUNTY

The County's designation of a single, in county facility through which all county waste of the type here in question must flow, is per se unlawful. C&A Carbone, Inc. v. Town of Clarkstown, New York, Supra 511 U.S. 392. The County is not a market participant in that it is providing no services other than administration of flow control. Huish Detergents, Inc. v. Warren County Ky., supra 214 F. 3d 715.

It would appear that the County's sole concern in establishing the waste management program is to impose fees on the movement of waste to finance its waste management staff and infrastructure. A purely financial local purpose is insufficient to

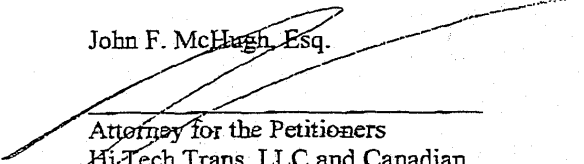
justify any burden on interstate commerce. U & I Sanitation v City of Columbus, *supra* 1070. The County cannot show that it has no alternative to the regulatory scheme it has established to finance its waste management scheme. It could, as New Jersey communities were invited to do by the Third Circuit Court in Atlantic Waste Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 112 F. 3d 652, 666 (3rd Cir. 1997) impose a tax or surcharge on all waste to pay the costs of its waste management infrastructure. Such a tax, evenly applied, would not discriminate against rail carriage or against interstate interests nor would such taxes or charges be an attempt to regulate rail carriers directly or indirectly, "The surcharge may be an annoyance, but it is an equal-opportunity annoyance." Maharg, Inc. v. Van Wert Solid Waste management District, 249 F. 3d 544, 553 (6th Cir. 2000).

CONCLUSION

Rail carriers are authorized to accept cargo for shipment from anyone seeking such services and the rail carrier must accept such proffered cargo for a reasonable fee. Hudson County New Jersey cannot forbid its residents from using rail services through the use of its governmental power to impose fines. Such power is specifically preempted by the provisions of §11321(a). The Surface Transportation

Board's jurisdiction over rail carriers is exclusive and that includes protecting the right of the public to access to rail carriers.

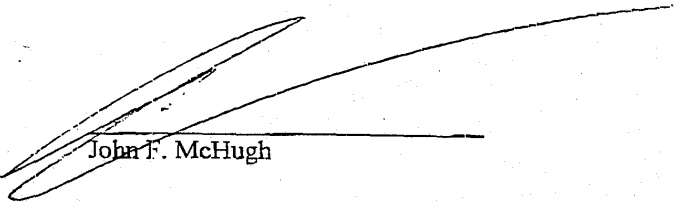
Dated, New York, N.Y.
April 2, 2002


John F. McHugh Esq.

Attorney for the Petitioners
Hi-Tech Trans, LLC and Canadian
Pacific Railroad
6 Water Street, Suit 402
New York, N.Y. 10005
212-483-0875

Verification

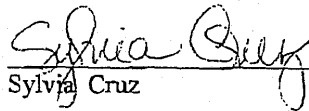
John F. McHugh, an attorney duly admitted to practice before this Board verifies under penalty of perjury that I is the attorney for the petitioners herein and based upon the information made available to me by my clients this petition correctly sets forth the material facts.


John F. McHugh

CERTIFICATE OF SERVICE

Sylvia Cruz certifies under penalty of perjury that she is over eighteen years of age, not a party to this matter and is the office manager of the office of John F. McHugh, Esq. at 6 Water Street, New York, N.Y. 10004. On this second day of April, 2002 she served a true copy of this Petition for a Declaratory Order pursuant to 5 U.S.C. 554(e) on the Hudson County Improvement Authority by regular mail addressed to the Authority at 574 Summit Avenue, 5th Floor, Jersey City, N.J. 07306.

Dated, New York, N.Y.
April 2, 2002


Sylvia Cruz

D2

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 34192

HI TECH TRANS, LLC, CANADIAN PACIFIC RAILROAD- PETITION FOR A
DECLARATORY ORDER - HUDSON COUNTY, NEW JERSEY,

CERTIFICATION IN SUPPORT OF AN APPLICATION PURSUANT TO 49 CFR
1104.11 FOR LEAVE TO AMEND THE PETITION

John F. McHugh an attorney duly admitted to practice before this Board
certifies under penalty of perjury as follows:

1. Hi Tech Trans, LLC filed this Petition for a Declaratory Order on April 4, 2002. The respondents, Hudson County and the State of New Jersey Department of Environmental Protection, have asked that their time to file responding papers be extended until May 6 and Hi Tech has agreed to that extension, subject to the Board's approval.
2. Though a copy of the Petition was provided to an employee of the Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway ("CPR") before it was filed, the Petition did not receive pre-filing review from CPR's legal staff or any officer of CPR. A mis-communication between the representatives of CPR and Hi Tech then resulted in this petition being filed with CPR as a named party. Because there has not been adequate time for CPR to review the Petition, CPR has asked to be removed from this Petition as a party.
3. On information and belief neither the State of New Jersey nor Hudson County have applied to the Secretary of Transportation for a waiver of preemption under

the Hazardous Materials Transportation Act nor has such an exemption from preemption been granted. If the State and County have failed to exercise their rights under 49 U.S.C. §5125(e), any effort by New Jersey to regulate the interstate transportation of construction and demolition waste and to impose a burden in so doing is preempted by the provisions of that Act. Clearly, any legitimate local concern should have been addressed in such an application. Rather than raise this additional issue in a reply, Hi Tech deemed it in the interests of a full and fair airing of the issues to amend to add that fact and the provisions of that act to this Petition.

4. The annexed amended Petition removes CPR as a party and adds reference to the provisions of the Hazardous Materials Transportation Act as an additional reason for preemption of the subject County Ordinances.

Wherefore the Petitioner respectfully requests that its motion for leave to file the attached amended petition be granted and that the petition be deemed filed as of the date the order granting the motion.

Dated, New York, N.Y.
May 2, 2002

Respectfully Submitted

John F. McHugh, Esq. attorney for
Hi Tech Trans, LLC
6 Water Street, Suite 401
New York, N.Y. 10004
212-483-0875

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 34192

HI TECH TRANS, LLC, - PETITION FOR A DECLARATORY ORDER - HUDSON
COUNTY, NEW JERSEY,

Petitioner seeks a declaratory order that the Surface Transportation Board has exclusive jurisdiction over Petitioner's activities and those of its customers who seek to utilize rail services and nullifying the statutes and ordinances of New Jersey which render shipping waste by rail unlawful.

FACTS

Petitioner Hi Tech Trans, LLC is a company organized under the laws of the State of New Jersey which operates a facility on property of Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway ("CPR") in Newark, N.J. Hi Tech contracts for cargos to be shipped by rail, gathers those cargos by truck and then loads those cargos, all construction and demolition debris and contaminated soils, onto railway cars for transport in interstate commerce. Cars move on CPR rail line, and on the lines of connecting carriers, including the Norfolk Southern Railroad Company, Inc. and the CSX Transportation Corp. Hi Tech contracts with the ultimate shipper of the cargos and contracts with truckers, licensed by the State of New Jersey to transport the cargos from the shipper's site, usually a construction site, to the rail loading facility where the cargos are transferred in bulk from the truck to the rail car. Hi Tech inspects all waste moving through the Newark facility to insure that all materials are appropriate for such

transport and fully comply with all federal regulations related to the safe handling of such materials. No materials are held on the site other than in rail cars and then never for more than the time between arrival loading directly from a truck and departure in regularly scheduled trains. The Hi Tech operation is limited to materials deemed non hazardous pursuant to the Hazardous Materials Transportation Act.

Hudson County New Jersey has informed Hi Tech that it has designated the Hudson County Improvement Authority [HCIA] as its agent for the management of waste. By a selection process, that agency has selected a specific facility to receive all Construction and Demolition waste and contaminated soils originating in Hudson County (See: In the Matter of Certain Amendments to the Adopted and Approved Solid Waste Management Plan of the Hudson County Solid Waste Management District, Exhibit A). State laws impose fines on any transporter licensed by the State which delivers waste to a facility which, although licensed by the State, has not been designated by a State authorized district, such as Hudson County, to receive waste. The State also imposes fines on any transporter which delivers waste to a facility not authorized to receive waste (licensed) by the State. HCIA has informed Hi Tech that it believes that Hi Tech has accepted cargos, originating in Hudson County. It has also informed Hi Tech that it is not authorized to accept waste by Hudson County or under applicable New Jersey laws. It has informed Hi-Tech that any person delivering waste to Hi-Tech Trans is in violation of law and subject to fines and penalties as provided in New Jersey Revised Statutes 13:1E-9. It has demanded that Hi-Tech provide Hudson County with information as to the identity of entities who have delivered waste to the Hi-Tech facility, Exhibit B and

has rejected arguments that the facilities, as rail facilities, do not require local authority to receive such cargos. Exhibit C.

The language of the State Certified County Flow Control Plan at issue here reads as follows:

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.S.A. 7:25-1 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.

(Page 9 of Exhibit A)

The relevant provisions of N.J.S.A. § 13:1E-9 read as follows:

g. Any person who knowingly:

- (1) Transports any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;
- (2) Generates and causes or permits to be transported any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;
- (3) Disposes, treats, stores or transports hazardous waste without authorization from the department;

shall, upon conviction, be guilty of a crime of the third degree and, notwithstanding the provisions of N.J.S.2C:43-3, shall be subject to a fine of not more than \$50,000.00 for the first offense and not more than \$100,000.00 for the second and each subsequent offense and restitution, in addition to any other appropriate disposition authorized by subsection b. of N.J.S.2C:43-2.

The relevant provisions of N.J.R.S. §13:1E-12. read as follows:

Revocation or suspension of registration

The department, after hearing, may revoke or suspend the registration issued to any person engaged in the solid waste collection or solid waste disposal upon a finding that such person:

- a. Has violated any provision of this act or any rule, regulation, or administrative order promulgated hereunder; or
- b. Has violated any provision of any laws related to pollution of the waters, air or land surfaces of the State; or
- c. Has refused or failed to comply with any lawful order of the department.

HCIA has demanded that Hi Tech provide the County with information as to the origins of all cargos it has handled. HCIA has informed Hi Tech that it will use that information to fine any Waste Hauler or Materials Handling Facility, including Hi-Tech, pursuant to the above cited State Laws, which has delivered or received Hudson County waste which facility is not authorized under the Certified Waste Management Plan of The Hudson County Waster Management District as amended on March 11, 1999 (hereinafter "The Plan"). Hi Tech Trans, LLC is not licensed by the State of New Jersey to carry waste nor is it authorized to carry waste pursuant to The Plan.

The facility designated by The Plan for Construction and Demolition Waste and Contaminated Soils is a truck to truck facility. By selecting that facility, Hudson County has rendered rail either illegal or noncompetitive. Transshipping the type of waste handled by Hi Tech from a truck to truck facility to a rail facility imposes a tremendous cost burden on the rail mode. Further, passage through the truck based

transfer station serves no purpose. Such a process favors truck contractors over rail carriers.

By excluding rail transport, the County has imposed a burden on interstate commerce. No Legitimate interest of the County is advanced by this ordinance which could not be fully protected by other means available to the County. Hudson County seeks to use its governmental power to regulate Petitioner's rail and intermodal operations and in attempting to do so, Hudson County seeks to invade the exclusive jurisdiction of this Board.

THE JURISDICTION OF THE SURFACE TRANSPORTATION BOARD IS EXCLUSIVE

CPR, as well as connecting carriers used by Hi Tech, are rail carriers as that term is defined in 49 USC §10102(5), to wit "a person providing common carrier railroad transportation for compensation". Hi Tech Trans is an entity engaged exclusively in handling freight in a continuous intermodal rail move.

Title 49 U.S.C. §10501(b) provides that the authority of the Surface Transportation Board over "(1) transportation by rail carriers and the remedies provided in this part with regard to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers' and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks or facilities, even if the tracks are located or intended to be located entirely in one state, is exclusive." Such jurisdiction must, of necessity, extend to an application of local law which is applied in such a way as to unduly interfere with interstate commerce.

The Surface Transportation Board has exclusive jurisdiction over any rail activity including the activities of Hi Tech Trans which "regardless of ownership" is engaged in services related to that movement, i.e., the "receipt, delivery, elevation," ... "transfer in transit", ... "handling" of property, 49 U.S.C. §10102 (9) (B).

HUDSON COUNTY'S FLOW CONTROL REGULATIONS ARE PREEMPTED TO
THE EXTENT THAT THEY RENDER SHIPPERS UTILIZING RAIL SERVICES
SUBJECT TO FINES

49 U.S.C. §11321(a) specifically proscribes any law which impedes the exclusive authority of the Surface Transportation Board. It states that "a rail carrier...is exempt from the antitrust laws and from all other law, including state and municipal law, as necessary to let that rail carrier...hold, maintain and operate property...acquired through..." (a transaction approved or exempt from approval by the Surface Transportation Board) See: City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998). The exemption from state law contained in the §11321, is to be interpreted broadly, See; Ex Norfolk & Western Ry. V. American Train Dispatchers, Assn. 499 U.S. 117, 127-34. (1991) "The... language in §11321(a) exempting carriers from ...State and municipal law is clear broad and unqualified". See also, CSX Transportation v. Georgia Public Service Commission, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996). The congressional intent to preempt is express. Congress has made its intent to exempt rail operations from all State and Federal law other than the Interstate Commerce Commission Termination Act clear.

In addition to invading a field given by Congress exclusively to the Surface Transportation Board, Hudson County's regulations conflict directly with Federal

law. Hudson County ordinances and regulations impose fines on truckers hired by Hi Tech to pick up cargos for intermodal shipment by rail and on Hi Tech and rail carriers for the receipt of cargos for rail shipment from Hudson County as Petitioners' rail intermodal services are not authorized by that County or by the State of New Jersey. Hi Tech Trans and the rail carriers over whose lines its cargo moves, are all allowed under federal law to accept waste for transport. No local governmental agency may, through the use of governmental authority, determine that an entity operating under authority of Federal Law, is unauthorized to do what such Federal law not only allows but mandates, i.e. provide common carrier transportation services to the public on reasonable terms. Where, as here, Hudson County seeks to impose criminal sanctions for exercising a right to use federally authorized transportation services, the County's regulations conflict absolutely with Federal Law and are a nullity. Cipollone v. Liggett Group, Inc. 505 U.S. 504, 515 (1992), Teper v. Miller, 82 F. 3d 989, 993 (8th Cir. 1993).

Hudson County's policies discriminate against rail carriers both by requiring State permits to receive waste and by requiring all waste to move through the county designated truck to truck facility. The county's regulations do not seek to affect only county owned waste but attempt to affect the conduct of private parties. Where a governmental authority seeks to affect the transportation mode choices of private trash interests it is not acting as a market participant but as a transportation regulator, Huish Detergents, Inc. v. Warren County, Kentucky, 214 F.3d 707, 715, (6th Cir. 2000). Where, as here, a county ordinance or regulation directly conflicts with Federal Law, to wit by rendering federally mandated activity illegal, local law is preempted Free v. Bland, 369 U.S. 663, 666 (1962). The Board in reviewing this situation should not confine its

consideration to the facts of the single matter before it but should consider the potential effect on the national transportation regulatory scheme of multiple similar local ordinances. If Hudson County may render rail service illegal, absent concession to local regulation or otherwise, a multiplicity of such regulations would cripple the nation's rail system. The threat to the national interest requires nullification of local action whenever it affects interstate commerce even where the purpose of the action is not overtly discriminatory particularly where a multiple of such local actions have the potential of a national effect. U & I Sanitation. V. City of Columbus, 205 F. 3d 1063, 1071 (8th. Cir. 2000). Indeed in U&I Sanitation the 8th Circuit confronted precisely the type of flow control regulation which Hudson County seeks to impose. After reviewing, and finding wanting, all the City of Columbus's arguments, the Court held the ordinances unconstitutional for the following additional reason:

We conclude that the ordinance's effects upon interstate commerce are far from trivial. Assuming, as we must, that all cities such as Columbus enacted flow control ordinances like the one at issue here, the interstate market in recyclable materials extracted from solid waste could be substantially diminished or impaired, if not crippled. This is no academic problem for:

Over 20 States have enacted statutes authorizing local governments to adopt flow control laws. If the localities in these states impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, persuasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent.

Citing C&A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 406 (1994) (O'Connor J. concurring)

The County's regulations are void pursuant to 49 U.S.C. §11321(a).

The laws and ordinances here in question are also preempted as the determination of which materials are hazardous, and thus require special handling, is

covered by The Hazardous Materials Transportation Act 49 U.S.C. §5125. That act and that act alone determines which materials may be subject to scrutiny. Construction and demolition waste is not designated as hazardous by the regulations promulgated under that act. The HMTRA specifically preempts State laws and regulations to the extent that they differ substantively from federal regulations and in particular where they expand the designation of hazardous materials beyond those included in the Federal regulations. The act states in relevant part:

(b) Substantive differences.--(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(emphasis added). Subsection (e) of this section provides:

Waiver of preemption.--A State, political subdivision of a State, or Indian tribe may apply to the Secretary for a waiver of preemption of a requirement the State, political subdivision, or tribe acknowledges is preempted by subsection (a), (b)(1), or (c) of this section. Under a procedure the Secretary prescribes by regulation, the Secretary may waive preemption on deciding the requirement--

(1) provides the public at least as much protection as do requirements of this chapter and regulations prescribed under this chapter; and

(2) is not an unreasonable burden on commerce.

(emphasis added)

"A major purpose of the HMTA was the development of a uniform national scheme of regulation regarding the transportation of hazardous materials" Chlorine Inst. V.

California Highway Patrol, 29 F. 3d 495,496 (9th Cir. 1994) quoting Southern Pacific Transportation v. Public Service Comm'n of Nev., 909 F.2d, 352,353(9th Cir 1990). Here, the state regulations are inconsistent with federal regulation in that they deem Construction and Demolition materials to be hazardous and requiring a State license and County designation to transport. These laws impose substantial regulations on the transportation of such materials not found in HMTA regulations. The State regulations are therefore an obstacle to the intent of the Federal scheme which also requires preemption, Chlorine Inst. Supra 26 F.3d at 498.

Finally, states may not impose a burden on interstate commerce unless no other avenue is open to protect a legitimate state interest. The Congressional scheme, in the Hazardous Materials Transportation Act gives local interests the right to seek to substitute local regulations upon an application to be made to the Secretary of Transportation where local conditions mandate a waiver of preemption 49 U.S.C. §5125(e) . No such application is in issue here.

The ordinances of Hudson County are thus, preempted by Federal Law.

THE COUNTY ORDINANCES AND REGULATIONS FAVOR TRUCK OVER RAIL
CARRIAGE AND THUS VIOLATE THE ENVIRONMENTAL MANDATES THE
BOARD IS CHARGED WITH ENFORCING

The County regulations are inconsistent with Federal environmental policy to the extent that they confine County generated waste to truck transport. Such transport generates 40% more emissions than would be generated by a rail haul. Congress made it clear in the National Environmental Policy Act, 42 U.S.C. §4331 et seq., that:

it is the continuing responsibility of the Federal Government to use all practicable means, [to] -

...

(2) assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

...

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

Id., 42 U.S.C. § 4331 (b). To achieve these goals, Congress "authorizes and directs . . . all agencies of the Federal Government" to consider:

(C) . . . (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action, ...

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332. Moreover, the Clean Air Act requires a federal program to favor environmentally sound proposals and disfavor those that adversely affect air quality:

Each department, agency, or instrumentality of the Federal Government having authority to conduct or support any program with air-quality related transportation consequences shall give priority in the exercise of such authority, ... to the implementation of those portions of plans prepared under this section to achieve and maintain the national primary ambient air quality standard.

42 U.S.C. §7506(d).

Rail haulage of waste, or of any product, is environmentally preferable to truck transport. To move the same tonnage by truck generates not only more emissions, it consumes valuable highway space, constitutes a growing safety problem and imposes a huge highway maintenance bill on the taxpayers. Thus, not only are the County's

regulations preempted by the provisions of the §11321(a), they are arbitrary and in conflict with the principals which must govern any decision by the Surface Transportation Board in exercising its exclusive management of the nation's transportation system.

THE COUNTY'S ORDINANCES AND REGULATIONS NEITHER PROTECT A
LEGITIMATE LOCAL CONCERN NOR CONSTITUTE THE ONLY MEANS TO
PROTECT SUCH AN INTEREST WHICH IS AVAILABLE TO THE COUNTY

The County's designation of a single in county facility through which all county waste of the type here in question must flow, is per se unlawful C&A Carbone, Inc. v. Town of Clarkstown, New York, Supra 511 U.S. 392. The County is not a market participant in that it is providing no services other than administration of flow control. Huish Detergents, Inc. v. Warren County Ky. 214 F. 3d 707, 715 (6th Cir 2000).

It would appear that the County's sole concern in establishing the waste management program is to impose fees on the movement of waste to finance its waste management staff and infrastructure. A purely financial local purpose is insufficient to justify any burden on interstate commerce. U & I Sanitation v City of Columbus, supra 1070. The County can not show that it has no alternative to the regulatory scheme it has established to finance its waste management scheme. It could, as New Jersey communities were invited to do by the Third Circuit Court in Atlantic Waste Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 112 F. 3d 652, 666 (3rd Cir. 1997) impose a tax or surcharge on all waste to pay the costs of its waste management infrastructure. Such a tax, evenly applied, would not discriminate against rail carriage or against interstate interests nor would such taxes or charges be an attempt

to regulate rail carriers directly or indirectly, "The surcharge may be an annoyance, but it is an equal-opportunity annoyance." Maharg, Inc. v. Van Wert Solid Waste management District, 249 F. 3d 544, 553 (6th Cir. 2001).

CONCLUSION

Rail carriers are authorized to accept cargo for shipment from anyone seeking such services and the rail carrier must accept such proffered cargo for a reasonable fee. Hudson County New Jersey can not forbid its residents from using rail services through the use of its governmental power to impose fines. Such power is specifically preempted by the provisions of §11321(a). The Surface Transportation Boards jurisdiction over rail carriers is exclusive and that includes protecting the right of the public to access to rail carriers.

Dated, New York, N.Y.
May 1, 2002

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CERTIFICATION OF SERVICE

John F. McHugh being an attorney duly admitted to practice before the Board certifies under penalty of perjury that he dispatched a copy of the certification in support of the motion to amend and the proposed amended petition by Federal Express overnight regular service to:

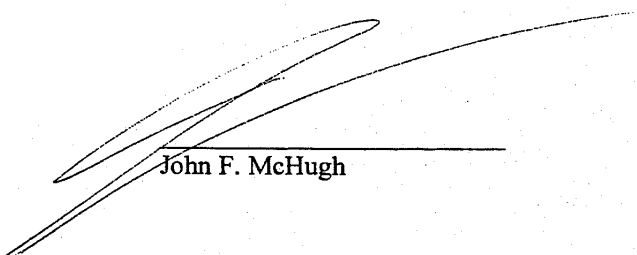
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this 2nd day of May, 2000.

New York, N.Y.



John F. McHugh

D3

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34192

HI TECH TRANS, LLC - PETITION FOR DECLARATORY ORDER

**STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,
REPLY TO AMENDED PETITION FOR DECLARATORY ORDER**

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JERSEY, DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

Dated: June 6, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34192

HI TECH TRANS, LLC –PETITION FOR DECLARATORY ORDER

**STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,
REPLY TO AMENDED PETITION FOR DECLARATORY ORDER**

The State of New Jersey, Department of Environmental Protection ("NJDEP"), hereby submits this Reply to the Amended Petition for Declaratory Order filed May 3, 2002 by Hi Tech Trans, LLC ("Hi Tech"). The Surface Transportation Board ("STB" or "Board") should deny Hi Tech's request for a declaratory order proceeding because the Eleventh Amendment precludes the STB from issuing the relief requested by Hi Tech. In addition, the STB does not have jurisdiction over the alleged solid waste collection and disposal activities of Hi Tech. Even if the proceeding were not barred by the Eleventh Amendment and the Board had jurisdiction over Hi Tech's activities, Hi Tech has failed to establish that the State of New Jersey statutes and regulations that it seeks to nullify would be preempted by the ICC Termination Act of 1995 ("ICCTA").

PROCEDURAL BACKGROUND

On April 4, 2002, Hi Tech filed a Petition for Declaratory Order ("Original Petition") asserting that the Board has exclusive jurisdiction over Hi Tech and that such exclusive jurisdiction nullifies the State of New Jersey's statutes and regulations governing solid waste management with respect to Hi Tech's activities. On May 3, 2002, Hi Tech filed an Amended Petition for Declaratory Order ("Amended Petition") in order to remove Canadian Pacific Railway Company ("CP") as a party to the petition at CP's request and to include an argument

under the Hazardous Materials Transportation Act. See John F. McHugh Certification in Support of Application for Leave to Amend Petition at 1-2. In addition, the Amended Petition contains various other modifications from the Original Petition. See, e.g., Hi Tech Amended Petition for Declaratory Order ("HTT Pet.") at 1 (deleting reference to Hi Tech as the "licensed agent" of CP); HTT Pet. at 3 (quoting different language from Hudson County Flow Control Plan). On May 6, 2002, NJDEP informed the Board that it would file a Reply to the Amended Petition by May 23, 2002 in accordance with 49 C.F.R. § 1104.13(a). By decision served May 17, 2002, the Board extended the due date for Replies to June 6, 2002.

ARGUMENT

Hi Tech seeks a declaratory order that the STB has "exclusive jurisdiction over [Hi Tech's] activities and those of its customers" and that such exclusive jurisdiction nullifies the State of New Jersey's solid waste management statutes and regulations with respect to Hi Tech's activities. HTT Pet. at 1. NJDEP respectfully submits that the Board should deny Hi Tech's petition for a declaratory order proceeding for several reasons. First, the Eleventh Amendment to the Constitution precludes the Board from issuing the relief requested by Hi Tech. Second, the Board does not have jurisdiction over the alleged solid waste collection and disposal activities of Hi Tech. Third, Hi Tech has failed to establish that the State of New Jersey's statutes and regulations governing solid waste management would be preempted by ICCTA even if the Board had jurisdiction over Hi Tech's claims. In the alternative, should the Board decide to institute a declaratory order proceeding, it should limit that proceeding to issues (if any) that fall within the Board's primary jurisdiction under ICCTA and should provide NJDEP and other parties with a sufficient opportunity to develop the factual record.

I. The Board Lacks Subject Matter Jurisdiction Over Hi Tech's Petition Pursuant To The Eleventh Amendment To The Constitution

The Board should deny Hi Tech's petition because the Board is barred by the Eleventh Amendment from ordering the relief requested by Hi Tech.¹ Although the text of the Eleventh Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, the Supreme Court has consistently reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996). The Eleventh Amendment does not exist solely in order to "preven[t] federal court judgments that must be paid out of a State's treasury." Id. at 58. It also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." Id. (emphasis added).

The Supreme Court recently decided that the same principles also serve to avoid subjecting a State to the coercive process of federal administrative agencies at the instance of private parties. Federal Maritime Commission v. South Carolina State Ports Authority, No. 01-46, 535 U.S. ___, slip. op. at 14-16 (May 28, 2002). The Court held that the preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. Id. at 14. The Court stated:

Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency. The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court. In

¹ The Eleventh Amendment provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of Any Foreign State."

both instances, a State is required to defend itself in an adversarial proceeding against a private party before an impartial federal officer.

Federal Maritime Commission, 535 U.S. at __, slip. op at 15.

Although theoretically the State of New Jersey is not required to subject itself to the jurisdiction of this Board in the instant matter, it is faced with the Hobson's choice of either doing so, or watching silently as Hi Tech seeks an order nullifying New Jersey's solid waste management laws and regulations, a carefully crafted legislative scheme to protect the health and safety of New Jersey's citizens and the integrity of its environment. The Supreme Court discussed this same situation in the Federal Maritime Commission opinion:

A State seeking to contest the merits of a complaint filed against it by a private party must defend itself in front of the FMC or substantially compromise its ability to defend itself at all. For example, . . . if a party fails to appear before the FMC, it may not then argue the merits of its position in an appeal of the Commission's determination filed under 28 U. S. C. §2342(3)(B)(iv). . . . Should a party choose to ignore an order issued by the FMC, the Commission may impose monetary penalties for each day of noncompliance. See 46 U. S. C. App. §1712(a) (1994 ed., Supp. V). The Commission may then request that the Attorney General of the United States seek to recover the amount assessed by the Commission in federal district court, see §1712(e) (1994 ed.), and a State's sovereign immunity would not extend to that action, as it is one brought by the United States. Furthermore, once the FMC issues an order assessing a civil penalty, a sanctioned party may not later contest the merits of that order in an enforcement action brought by the Attorney General in federal district court. . . . Thus, any party, including a State, charged in a complaint by a private party with violating the Shipping Act is faced with the following options: appear before the Commission in a bid to persuade the FMC of the strength of its position or stand defenseless once enforcement of the Commission's nonreparation order or assessment of civil penalties is sought in federal district court. To conclude that this choice does not coerce a State to participate in an FMC adjudication would be to blind ourselves to reality.

Federal Maritime Commission, 535 U.S. ___, slip. op. at 17-18
(emphasis added).

Finally, the Supreme Court has determined that even where there is a “constitutional necessity of uniformity” in a federal regulatory scheme such as in maritime commerce, a federal administrative agency is still barred from adjudicating a dispute between a private party and a State. Id. at 22-23. That is because the Federal Government retains ample means of assuring that States comply with federal law. Id. at 23. In the instant case, the Board remains free to investigate alleged violations of ICCTA, either upon its own initiative or upon information supplied by a private party, and to institute its own administrative proceeding against a state. Additionally, the Attorney General may bring suit in a district court of the United States to enjoin conduct in violation of ICCTA. For these reasons, even if the Board were to reject the instant petition, private parties such as Hi Tech remain perfectly free to complain to the Board about unlawful state activity, and the Board remains free to take subsequent legal action. The only step the Board may not take, consistent with the Supreme Court’s sovereign immunity jurisprudence, is to adjudicate a dispute between a private party such as Hi Tech and a non-consenting State such as New Jersey.

II. The Board Should Deny Hi Tech’s Petition For A Declaratory Order Proceeding Because The Board Does Not Have Jurisdiction Over Hi Tech’s Alleged Activities

In its Amended Petition, Hi Tech asserts that it contracts for the shipment of construction and demolition debris and contaminated soils, contracts with truckers to gather such materials from construction sites and then arranges for the transfer of such materials in bulk from trucks to railway cars at a facility located in Newark, New Jersey. HTT Pet. at 1. Hi Tech asserts that it inspects all waste moving through its Newark facility to insure that such materials are “appropriate” for transport and that such materials comply with unspecified federal regulations

relating to the safe handling of such materials. HTT Pet. at 2. Hi Tech asserts that its operation is limited to materials deemed "non-hazardous" under the Hazardous Materials Transportation Act. HTT Pet. at 2.

A. Hi Tech Is Not A Rail Carrier And Does Not Provide Common Carrier Rail Service Within The Board's Jurisdiction

Hi Tech is not a rail carrier and does not provide rail service. Its customers (the shippers and/or receivers of construction and demolition debris and contaminated soils) are not rail carriers and do not provide rail service. Therefore, Hi Tech's assertion that the STB has "exclusive jurisdiction over its activities and those of its customers" (HTT Pet. at 1) is erroneous. See 49 U.S.C. § 10501(b) (STB jurisdiction extends to "transportation by rail carriers"). Since the Board does not have jurisdiction over Hi Tech's activities and those of its customers, the basic premise of Hi Tech's preemption argument fails. On this basis alone, the Board should reject Hi Tech's petition for a declaratory order proceeding.

B. Hi Tech Overstates The Scope Of The Board's Jurisdiction In Order To Bootstrap Its Activities Within The Scope Of Federal Preemption

In its Amended Petition, Hi Tech vastly overstates the scope of the STB's jurisdiction. Contrary to Hi Tech's assertion, the STB does not have "exclusive management of the nation's transportation system." HTT Pet. at 12. The STB regulates "transportation by rail carriers" and the remedies that it provides with respect to the rates, classifications, rules, practices, routes, services and facilities of such carriers are exclusive. See 49 U.S.C. § 10501(b). The STB does not, however, regulate the activities of Hi Tech in arranging for truckers to gather such debris from construction sites and to transport that debris to a truck-rail transfer facility. The STB's jurisdiction does not extend to the activities of the construction companies that generate such construction/demolition debris or the activities of the truckers that haul that debris from

state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation. For example, under Hi Tech's theory, shippers, truckers and freight forwarders would be exempt from state and local health and safety regulations applicable to a product as long as that product was scheduled at some point in the distribution chain to be shipped by rail. The Board should not give credence to Hi Tech's attempt to bootstrap on federal preemption of "transportation by rail carriers" in order to protect activities (such as solid waste collection and disposal) that historically have been subject to state and local regulation. See, e.g., AGG Enterprises v. Washington County, 281 F.3d 1324, 1328 (9th Cir. 2002) ("One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety and aesthetic well-being of the community").

III. Hi Tech Has Failed To Establish That The New Jersey Statutes And Regulations Are Preempted By The ICC Termination Act

Even assuming the Board has jurisdiction over Hi Tech's claims, the Board should deny Hi Tech's request for a declaratory order proceeding because Hi Tech has failed to establish that the State of New Jersey statutes and regulations at issue would be preempted. In support of its preemption argument, Hi Tech asserts that the State of New Jersey's solid waste management statutes and regulations (i) are preempted by 49 U.S.C. § 11321(a) (HTT Pet. at 6-8); (ii) are preempted by the Hazardous Materials Transportation Act (HTT Pet. at 8-10); (iii) violate the STB's mandate under the National Environmental Policy Act (HTT Pet. at 10-12); and (iv) are per se unlawful under the Commerce Clause of the Constitution (HTT Pet. at 12-13). As explained further below, each of these arguments is misplaced and fails to justify the institution of a proceeding by the Board to consider the declaratory relief sought by Hi Tech.

A. Section 11321 Does Not Preempt New Jersey Statutes and Regulations

Hi Tech asserts that the State of New Jersey's solid waste management statutes and regulations are expressly preempted by 49 U.S.C. § 11321(a). HTT Pet. at 6. Section 11321(a) preempts rail carriers from state and municipal law to the extent necessary to allow such rail carriers to carry out merger, consolidation and control transactions subject to STB jurisdiction under 49 U.S.C. Chapter 113. This provision is not applicable here because Hi Tech, a non-carrier, has not engaged in any merger, consolidation or control transaction under Chapter 113. Therefore, Hi Tech's express preemption and field preemption arguments based on Section 11321(a) are irrelevant.

B. STB's Alleged Mandate Under NEPA Is Not Violated By State of New Jersey's Statutes and Regulations

Hi Tech also argues that the New Jersey solid waste management statutes and regulations violate National Environmental Policy Act ("NEPA") mandates that the Board is charged with enforcing (HTT Pet. at 10-12). However, NEPA requirements are not applicable here because Hi Tech is not a rail carrier within the Board's jurisdiction. Even if Hi Tech were a rail carrier subject to Board jurisdiction, NEPA requirements would not be applicable because the Board is not being asked to consider a "major Federal action" by Hi Tech or any other entity. See Friends of the Aquifer, et al. - Declaratory Order, Finance Docket No. 33966 (STB served Aug. 15, 2001)(NEPA environmental review provisions not applicable where Board lacks licensing authority over proposed construction project by rail carrier). Therefore, Hi Tech's NEPA argument is irrelevant.

C. The Board Does Not Have Primary Jurisdiction Over The HMTA and Commerce Clause Arguments Raised By Hi Tech

In support of its declaratory order petition, Hi Tech asserts that the New Jersey solid waste management statutes and regulations are preempted by the Hazardous Materials Transportation Act ("HMTA") and are per se unlawful under the Commerce Clause of the Constitution. These arguments should not be considered in determining whether the Board should institute a declaratory order proceeding. These arguments are beyond the purview of the Board's jurisdiction and provide further support for NJDEP's view that a declaratory order proceeding should not be initiated.

1. United States Department of Transportation Has Primary Jurisdiction Over HMTA Preemption Claim

Hi Tech asserts that the New Jersey solid waste management statutes and regulations are preempted by the Hazardous Materials Transportation Act ("HMTA"). DOT has primary jurisdiction over HMTA preemption issues and is the administrative agency responsible for implementing and enforcing the federal hazardous material transportation regulatory scheme. See 49 C.F.R. §§ 106-180 (DOT regulations promulgated under authority of HMTA); State of New York By Its Department of Environmental Conservation v. United States Department of Transportation, 37 F.Supp.2d 152 (N.D.N.Y. 1999). Therefore, NJDEP respectfully submits that the STB is not the proper forum to consider such arguments.³

2. The STB Lacks Jurisdiction To Consider Hi Tech's Commerce Clause Argument

Hi Tech asserts that the solid waste management statutes and regulations are per se unlawful under the Commerce Clause of the Constitution. HTT Pet. at 7-8. First, as a matter of

³ In addition, the relevance of the HMTA preemption argument is unclear because Hi Tech asserts that it does not handle hazardous waste. HTT Pet. at 2.

procedure, the Board's predecessor agency, the Interstate Commerce Commission ("ICC"), determined that the judicial system should resolve questions relating to the constitutionality of state laws and regulations under the Commerce Clause. National Limousine Association – Petition for Declaratory Order, MC-C-30186 (ICC decided March 20, 1992)(finding that ICC had no general jurisdiction to consider whether state or local regulations impose an undue burden on interstate commerce in violation of the Commerce Clause). More fundamentally, the Supreme Court has determined that Congress cannot abrogate a State's Eleventh Amendment immunity from private suit:

Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72-73 (1996).

Although the Seminole Tribe opinion refers only to the "judicial power" being restricted, as discussed in Section I above, the Supreme Court's recent decision in Federal Maritime Commission makes clear that the same constitutional restriction applies to federal administrative agencies such as the STB.

IV. Alternatively, If The Board Decides To Institute A Declaratory Order Proceeding, The Proceeding Should Be Limited To ICCTA Issues (If Any) Raised By The Amended Petition In Accordance With The Procedural Schedule Set Forth Below

In the event that the Board decides to institute a declaratory order proceeding, that proceeding should be limited to issues (if any) raised by Hi Tech that fall within the Board's primary jurisdiction under the ICCTA.

If the Board initiates such a proceeding, NJDEP respectfully requests that the Board adopt a procedural schedule that will allow NJDEP and other parties an opportunity to develop the factual record. NJDEP anticipates that, if the Board initiates such a proceeding, it will need to engage in discovery in order to obtain further information about Hi Tech's alleged activities. Therefore, NJDEP proposes the following procedural schedule in the event that the Board initiates a declaratory order proceeding:

Close of Discovery Period – 90 days after service of Board decision on whether to institute declaratory order proceeding

Hi Tech Opening Statement – 30 days after close of discovery period

Respondents' Opening Statement(s) – 45 days after receipt of Hi Tech Opening Statement

Hi Tech Rebuttal Statement – 20 days after receipt of Respondents' Opening Statement(s)

CONCLUSION

For the foregoing reasons, NJDEP respectfully requests that the Board deny Hi Tech's petition for a declaratory order proceeding. To the extent that the Board elects to institute a declaratory order proceeding, NJDEP respectfully requests that the Board limit such proceeding to issues (if any) that fall within the STB's primary jurisdiction under ICCTA and further requests that the Board adopt the proposed procedural schedule set forth above.

Respectfully submitted,

By: 

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Dated: June 6, 2002

**SPECIAL COUNSEL TO STATE OF NEW
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ENVIRONMENTAL PROTECTION**

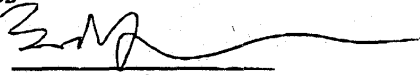
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing State of New Jersey, Department of
Environmental Protection, Reply to Amended Petition for Declaratory Order was served
this 6th day of June, 2002 via facsimile and overnight mail upon:

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Edward J. Fishman

D4

BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET 34192

HI-TECH TRANS, LLC - PETITION FOR DECLARATORY ORDER -
HUDSON COUNTY, NEW JERSEY

REPLY ON BEHALF OF HUDSON COUNTY IMPROVEMENT
AUTHORITY AND ESSEX COUNTY UTILITIES AUTHORITY
TO AMENDED PETITION FOR DECLARATORY ORDER

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Attorneys for Hudson County Improvement Authority and
Essex County Utilities Authority

Dated: June 5, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET 34192

HI-TECH TRANS, LLC - PETITION FOR DECLARATORY ORDER -
HUDSON COUNTY, NEW JERSEY

REPLY ON BEHALF OF RESPONDENTS HUDSON COUNTY
IMPROVEMENT AUTHORITY AND ESSEX COUNTY
UTILITIES AUTHORITY TO AMENDED PETITION

Pursuant to 49 C.F.R. §§1104.13 and 1111.5, respondents Hudson County Improvement Authority and Essex County Utilities Authority hereby submit the following reply to the Amended Petition for a Declaratory Order filed on behalf of Hi-Tech Trans LLC ("Hi-Tech") in the above-captioned matter, and respectfully request the Surface Transportation Board ("STB" or "Board") to deny Hi-Tech's request for a declaratory order proceeding.

INTRODUCTION

Respondents Hudson County Improvement Authority ("HCIA") and Essex County Utilities Authority ("ECUA") are public agencies responsible under the laws of New Jersey for implementing the solid waste management plans of the County of Hudson and the County of Essex, respectively. See N.J. Stat. Ann. 13:1E-21(b)(1). HCIA and ECUA are in receipt of an amended petition for a declaratory order filed by Hi-Tech Trans, LLC, effective May 17, 2002. One of the principal amendments made by Hi-Tech to its original petition was to remove Canadian Pacific Railway as a co-petitioner.

For the reasons set forth hereafter, respondents respectfully submit that the Board lacks jurisdiction over the subject matter of Hi-Tech's petition.

STATEMENT OF FACTS

Hi-Tech alleges in its amended petition that it is a "company organized under the laws of the State of New Jersey which operates a facility on property of Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway ('CPR') in Newark, N.J."

(Amended Petition at 1.) More specifically, Hi-Tech alleges that it

contracts for cargos to be shipped by rail, gathers those cargos by truck and then loads those cargos, all construction and demolition debris and contaminated soils, onto railway cars for transport in interstate commerce. [Id.; emphasis added.]

In common parlance, Hi-Tech operates a solid waste transfer station on property that it allegedly leases from CPR, and allegedly uses CPR's rail line to transport solid waste that is dumped and temporarily stored at the site to out-of-state landfills. That is the entire sum and substance of the relationship between Hi-Tech and CPR.

Based on that alleged relationship with CPR, Hi-Tech petitions the Board for an order declaring that it has "exclusive jurisdiction over [Hi-Tech's] activities and those of its customers." (Amended Petition at 1.) Hi-Tech does not identify the "customers" on whose behalf it purports to act, but they are presumably persons or entities with "construction and demolition debris and contaminated soils" needing disposal. They might include (for example) general contractors performing construction work, corporations undertaking construction projects, or independent truckers and haulers engaged in the transport and

disposal of solid waste. Hi-Tech makes no allegation that it has legal authority or license to represent or speak for any of its customers before the Board.

Hi-Tech's petition thus raises two separate issues: 1) whether the Board has exclusive jurisdiction over Hi-Tech's solid waste transfer station facility, and 2) whether the Board has exclusive jurisdiction over the activities of Hi-Tech's customers. The clear legal answer to both questions is no. Hi-Tech has mis-invoked the jurisdiction of the Board, and seeks to draw the Board into a field -- solid waste regulation -- that is well outside the Board's legal and historic province. Accordingly, Hi-Tech's petition should be dismissed.

ARGUMENT

POINT I

THE BOARD HAS NO JURISDICTION OVER HI-TECH'S UNIDENTIFIED CUSTOMERS AND HI-TECH HAS NO STANDING TO SEEK RELIEF ON THEIR BEHALF.

Hi-Tech asserts that the Board has exclusive jurisdiction over the activities of its customers because the customers allegedly "seek to utilize rail services" to dispose of solid waste. (Amended Petition at 1.) As is clear on a moment's reflection, this bare assertion does not suffice to give the Board jurisdiction over the waste disposal activities of Hi-Tech's customers -- activities that are subject to comprehensive regulation under state law. See generally, N.J. Stat. Ann. 13:1E-1 et seq. (Solid Waste Management Act). While the ICC Termination Act provides for federal preemption of state laws relating to transportation by rail carriers, see 49 U.S.C. §10501, the preemptive scope of the Act has never been construed to extend to, e.g., trucks engaged in the transport of solid waste over the

highways and roads of a State or locality, or to the generators of such solid waste. To state the notion is to reject it.

Hi-Tech does not cite and cannot cite any case, statute or regulation that gives waste generators or haulers a portable, fissionable federal exemption from state solid waste laws. The Board is surely familiar enough with the limits of its own powers to recognize that Hi-Tech's assertion of such a remarkable federal immunity lacks any foundation in law. In King County, WA, STB Finance Docket No. 32974, 1996 WL 545598 at *4 (I.C.C.) (Sept. 25, 1996), for instance, the Board noted, "The ICCTA does not usurp the right of state and local entities to impose public health and safety regulation on interstate railroads." Much less, then, does it preempt state and local laws regulating the handling of solid waste by non-rail entities. See Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1336-37 (11th Cir. 2001) (lessee of a rail carrier engaged in an aggregate distribution business was not exempt from local regulation under ICC Termination Act because it was not in the railroad business but rather in the business of distributing its own product).

Hi-Tech's attempt to assert federal preemption on behalf of its customers should also be rejected for lack of standing. Hi-Tech's customers are independent actors, and have not appointed Hi-Tech to serve as their legal spokesperson or representative. Given the outlandishness of the position that Hi-Tech espouses on behalf of its unidentified customers, it seems unlikely that they would adopt that position as their own; certainly, CPR's insistence that it be removed from the petition supports that negative inference. See, e.g., Powers v. Ohio, 499 U.S. 400, 410 (1991) (under basic requirements of standing, a "litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the

legal rights or interests of third parties"); cf. Singleton v. Wulff, 428 U.S. 106, 113 (1976) (the prohibition against third-party standing is based on the principle that courts should not adjudicate third-party rights unnecessarily, and third-parties will typically be the best proponents of their own rights).

For both of these reasons, lack of jurisdiction and lack of standing, Hi-Tech's petition should be dismissed insofar as it purports to seek a declaratory order on behalf of Hi-Tech's customers.

POINT II

HI-TECH IS NOT A RAIL CARRIER, AND THE PRIVATE OPERATION OF A SOLID WASTE TRANSFER STATION DOES NOT CONSTITUTE "TRANSPORTATION BY A RAIL CARRIER."

The ICC Termination Act grants the Board exclusive jurisdiction over "transportation by rail carriers and their practices, routes, services, and facilities of such carriers." 49 U.S.C. §10501(b). Here, Hi-Tech does not contend, and cannot in good faith contend, that it is a "rail carrier," which is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. §10102(5). Consequently, under a plain language reading of the Act, the Board does not have "exclusive jurisdiction" over Hi-Tech's activities.

Hi-Tech's assertion that the Board has exclusive jurisdiction over its operation of a solid waste transfer station also runs contrary to established case law. In People v. Conrail Corp., 613 N.E.2d 784 (Ill. App. Ct. 1993), the Illinois Court of Appeals addressed the question of whether the Interstate Commerce Act, formerly 49 U.S.C. §10101 et seq., preempted the Illinois Environmental Protection Act, which prohibited the siting of solid

waste transfer stations within 1,000 feet of residences. The court answered this question in the negative, and held that the State retained authority to regulate solid waste transfer stations. The court noted, "No provision of the Commerce Act exclusively grants jurisdiction over the transportation of waste from inception to disposal." 613 N.E.2d at 182. See also Florida East Coast Ry. Co., supra, 266 F.3d at 1336-39 (discussing history and purpose of ICC Termination Act, and concluding that it does not preempt state and local laws that have "incidental effects" on rail operations).

More generally and recently, the Board has recognized in its own decisions that the preemptive scope of §10501 is limited to railroad activities that are "integrally related to providing transportation services." Borough of Riverdale - Petition for Declaratory Order, STB Finance Docket No. 33466 (Sept. 9, 1999), at 9. In Riverdale, where a railroad proposed to construct a truck terminal and corn processing plant in a residential zone, the STB stated that, if the proposed project

is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. [STB] jurisdiction, like that of the former ICC, is limited to those facilities that are part of a railroad's ability to provide transportation services[.] [Id.]

Similarly, in Cities of Auburn and Kent, WA - Petition for Declaratory Order - Burlington Northern Railroad Company - Stampede Pass Line, STB Finance Docket No. 33200 (July 1, 1997), the Board noted:

[T]here are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution. For example, even in cases where we approve a construction or abandonment project, a local law prohibiting a

railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, [] a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden on, or interfere with, interstate commerce. Therefore, such requirements are not preempted. [*Id.* at p. 9-10 (emphasis added).]

See also In re Vermont Ry., 769 A.2d 648, 651-52 (Vt. 2001) (discussing legislative history of ICC Termination Act, and finding that the Act did not preempt local regulation of railroad's salt shed facility); Oklahoma Corp. Comm'n v. Burlington Northern Santa Fe Ry. Co., 24 P.3d 365 (Ok. Civ. App. 2000) (discussing legislative history of the ICC Termination Act, and finding no preemption of state's right to ensure safety of its citizens by directing railroad to repair or replace fence located along right of way).

As the above cases show, the regulation of solid waste has never been viewed to fall within the jurisdiction of the ICC or STB, and solid waste transfer stations have never been viewed to enjoy a federal exemption from state and local laws. In this regard, the Ninth Circuit recently rejected a preemption argument raised by a trash hauler under the Federal Aviation Administration Act ("FAAA") of 1994, 49 U.S.C. §14501(c), and stated:

Congress has recognized that waste hauling is a traditional state and local function subject to state regulation. See 42 U.S.C. §6901(a)(4) (stating that "the collection and disposal of solid waste should continue to be primarily the function of State, Regional and local agencies"). Our precedent has recognized the strong local governmental interest in regulating garbage

collection. Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 398 (9th Cir. 1995). One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community. The historic responsibility of local governments to ensure safe and comprehensive garbage collection posts a strong caution against the possibility that Congress lightly would preempt local regulation in this field.

AGG Enterprises v. Washington County, 281 F.3d 1324, 1328 (9th Cir. 2002).

In AGG, the Court held that solid waste did not constitute "property" within the meaning of the FAAA. No reason exists to construe "property" differently under the ICC Termination Act. See 49 U.S.C. §10102(a) ("transportation" includes services related to the movement of "passengers and property.") See also Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc., 110 Cal. Repr.2d 708, 91 Cal. App. 4th 678, 690, 695 (Ct. App. 2001) (finding that it would be "inconceivable" that Congress intended to preempt local solid waste regulations; rejecting preemption defense asserted by haulers in violation of local regulations).

In New Jersey, with its high population density and small land mass, the collection, handling and disposal of solid waste are matters of "grave concern," and are "thoroughly affected with the public interest." See N.J. Stat. Ann. 13:1E-2 (describing solid waste matters as a local health, safety and welfare concern). In light of that strong public policy, the ICC Termination Act should not be interpreted to oust local bodies of their authority to adopt and enforce laws and regulations regarding the handling of solid waste. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (discussing the general presumption

against preemption of local police powers; that presumption, the Court noted, is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety"); see also New York Blue Cross v. Travelers Ins., 514 U.S. 645, 654 (1995) (exercise by local authority of historic police power is not to be "superseded by the Federal Act unless that was the clear and manifest purpose of Congress"). While it is conceivable that on some future occasion, the Board may have a reason or need to address the interaction between New Jersey's Solid Waste Management Act and the ICC Termination Act, Hi-Tech's apparent desire to operate a solid waste transfer station in disregard of state environmental laws and regulations provides no valid basis for the Board to address that issue now.

Hi-Tech's attempted invocation of 49 U.S.C. § 11321(a), and the National Environmental Policy Act, 42 U.S.C. § 4331 et seq., and the Clean Air Act, 42 U.S.C. § 7506(d), see Amended Petition at 6 and 10-11, merely highlights the misdirected nature of its arguments. Section 11321, by its express terms, applies to rail carriers; Hi-Tech is not a rail carrier, but a private operator of a solid waste transfer station. With respect to NEPA and the Clean Air Act, the Board has no special expertise regarding the applicability of those Acts to the operation of private solid waste transfer stations. Thus, it would be a most improvident exercise of the Board's discretion to open a proceeding at Hi-Tech's request to address an asserted (and, in truth, non-existent) conflict between those Acts and New Jersey's solid waste laws. If Hi-Tech believes such a conflict exists, it should be directed to proceed in a court of proper jurisdiction, and not in this administrative forum. See, Intercity Transportation Co. v. United States, 737 F.2d 103,109 (D.C. Cir. 1984)(affirming ICC

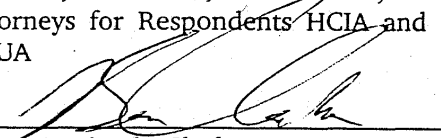
decision not to issue declaratory order where the agency reasonably concluded that initiation of a proceeding would represent "an imprudent and inefficient allocation of agency resources").

CONCLUSION

For the foregoing reasons, Hi-Tech's request for initiation of a declaratory order proceeding should be denied, and its petition should be dismissed.

Respectfully submitted,

DeCotiis, FitzPatrick, Gluck & Cole, LLP
Attorneys for Respondents HCIA and
ECUA

By: 

Benjamin Clarke

Dated: June 5, 2002

D5

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 34192

HI TECH TRANS, LLC, - PETITION FOR A DECLARATORY ORDER - HUDSON
COUNTY, NEW JERSEY,

PETITIONER'S MOTION TO STRIKE THE REPLY OF THE STATE OF NEW
JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Petitioner seeks a declaratory order that the Surface Transportation Board has exclusive jurisdiction over Petitioner's activities and those of its customers who seek to utilize rail services and nullifying the administrative actions of Hudson County, New Jersey which render shipping waste by rail unlawful. The State of New Jersey Department of Environmental Conservation has intervened in this matter seeking to assert a bar to this proceeding under the Eleventh Amendment of the United States Constitution.

Petition seeks only prospective relief and does not seek to impose any fine or penalty on the State of New Jersey or any agency thereof, nor does it seek to nullify any law of that State but only a county's program which seeks to regulate and thus, forbid rail service to customers in that county. Indeed, this petition seeks only a declaratory order that the County's administrative actions which require designation by the county for a facility to receive waste, can not be applied to the operations of the Petitioner. Therefore, neither the petitioner nor its customers can be held subject to a penalty for violation of an administrative action which is void.

AUTHORITY OF THE SURFACE TRANSPORTATION BOARD

The State seeks to rely upon the recent ruling of the Supreme Court in Federal maritime Commission v South Carolina State Ports Authority, No. 01-46,535 ___ U.S. ___ (May 28, 2002) in arguing that this Board does not have jurisdiction over this matter as it involves the actions of its agent, Hudson County. The South Carolina case was an action seeking affirmative relief which could have resulted in the imposition of penalties against that State. States have long been held not to be subject to such suits.

HI Tech seeks only prospective declaratory relief. It seeks a determination by this Board that a administrative procedures which would require HI Tech to obtain county and state authority to handle waste shipped by county residents is a nullity. All regulation of the carriage of cargo by rail is preempted by federal law. Where, as here, an order is sought simply declaring a county action invalid due to its conflict with federal law, there is no violation of the Eleventh Amendment where a party seeks to enjoin enforcement of such a law. The Supreme Court restated that principal of law in Verizon Maryland, Inc. v. Public Service Commission of Maryland etc. ___ U.S. ___ Nos. 01-1531, 00-1711, 122 S. Ct. 1753, 1760 (May 20, 2002). The Verizon court held that where, as here, an agent of the State, seeks to enforce an act of the state which is unconstitutional, the Federal Courts and thus, Federal Agencies assigned by Congress the task of hearing such matters as to particular subjects of federal concern, have jurisdiction to do so. Enjoining the enforcement of such laws, i.e. prospective relief, does not offend the Eleventh Amendment.

The Verizon Court deems that principal to have been established in Ex Parte: Edward T. Young, 209 U.S. 123, 155 (1907). That case is similar in many respects to the matter before the Board. It involved the imposition of fines and penalties by the state on a railroad and its employees if the railway failed to revise its freight and passenger rates as dictated by the state. That court found that where, as here, an agent of the State is seeking to enforce an unconstitutional state law, a suit enjoining that agent is not a suit against the State. Here the suit is against Hudson County which is seeking to enforce its own administrative rules which it is, at best, allowed but not required to enact under State law. A federal agency seeking to declare such enforcement to be preempted does not offend the Eleventh Amendment.

Therefore, the State's argument in attempting to deny the Surface Transportation Board jurisdiction to decide whether the administrative regulations of Hudson County are preempted is simply contrary to long established precedent and should be stricken.

THE STATE'S ATTEMPT TO ASSERT THAT HI TECH TRANS IS NOT A RAIL
CARRIER SHOULD BE STRICKEN

The Delaware and Hudson Railroad obtained its operating rights into Newark N.J. pursuant to the creation of Conrail, a transaction approved by the Interstate Commerce Commission. Pursuant to 49 U.S.C. § 11321(a) the Delaware and Hudson, is a rail carrier and is a "person participating in that approved or exempted transaction..." and "...is exempt from the anti trust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the

transaction, hold, maintain and operate property and exercise control of the franchisees acquired through the transaction.” It its reply the Delaware and Hudson has made it clear that it has chosen to “operate property and exercise control of the franchise” utilizing the services of Hi Tech for the purpose of obtaining and loading Construction and Demolition waste onto its trains on the Delaware and Hudson’s property.

Petitioner Hi Tech is a licensee of CPR. Pursuant to agreements between Hi Tech and CPR, High Tech obtains construction and demolition debris (C&D), transfers it from truck to rail at CPR’s transload facility, and then ships the C&D in interstate commerce on CPR’s lines. Hi Tech is an integral component of CPR’s movement of this particular type of freight by rail. Many producers of C&D cannot access rail transportation without the use of trucks. Furthermore CPR relies heavily upon Hi Tech to perform duties that are essential to the successful marketing of its rail services in the highly specialized area of C&D transportation”

Submission of Delaware and Hudson Railway Company , June 5, 2002, Page 1.

It is respectfully submitted that Hi Tech engaged in traditional rail transloading or multi modal operation and is not a transfer station. Hi Tech is used by CPR to obtain and load cargos for shipment on that railway. HI Tech is “regardless of ownership” engaged in services related to that movement, i.e., the “receipt, delivery, elevation,” ...”transfer in transit”, “handling” of property, 49 U.S.C. §10102 (9) (B). Hi Tech is a rail carrier as that term is defined in the Act and therefore the portion of the State’s reply seeking to assert the opposite should be stricken.

THE STATE'S ASSERTION THAT C&D WASTE IS NOT PROEPRTY SHOULD BE
STRICKEN

The Interstate Commerce Commission determined that materials being moved in long distance interstate commerce, as opposed to short haul local truck operations, are property and are covered by the Act. In Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application, 131 MCC 578, 580 (1979) the Commission held that waste moving in long distance commerce was property within the meaning of the act as property means ownership and not just value. Thus, the State seeks to put forth a proposition long rejected by the Interstate Commerce Commission that lack of value is determinative. More recent cases relied upon by the State involve the Federal Aviation Commission Authorization Act which is not in issue here. Unlike the FACA there is no legislative history under the ICC Termination Act to evidence any intent by Congress to exempt any commodity from the exclusive grant of jurisdiction contained in 49 U.S.C. §10501(b) and the specific exemption from the effect of any other law, including State law, contained in 49 U.S.C. §11321(a). Unlike the legislative history relied on by courts interpreting the FACA "(t)he... language in §11321(a) exempting carriers from ...State and municipal law is clear broad and unqualified". See also, CSX Transportation v. Georgia Public

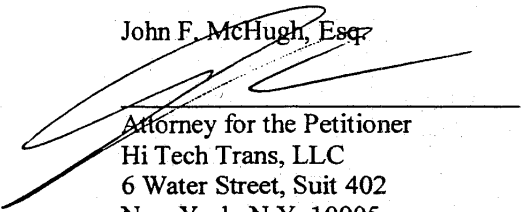
Service Commission, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996).

CONCLUSION

For the reasons stated above the reply of the State of New Jersey should be stricken.

Dated, New York, N.Y.
June 18, 2002

John F. McHugh, Esq.



Attorney for the Petitioner
Hi Tech Trans, LLC
6 Water Street, Suit 402
New York, N.Y. 10005
212-483-0875

CERTIFICATION OF SERVICE

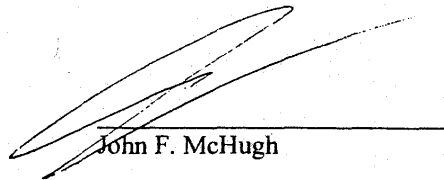
John F. McHugh certifies that on June 18, 2002 I served a copy of this motion to strike the reply of the State of New Jersey Department of Environmental Protection by Federal Express on:

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150 South Fifth Street
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Dated, New York, N.Y.
June 17, 2002



John F. McHugh

ECUA, et al v SISBARRO DISPOSAL SVC CO, et al -- May 3, 2002

SHEET 1

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY
CHANCERY DIVISION, EQUITY PART
DOCKET NO. C-231-00
APP. DIV. NO. _____

ESSEX COUNTY UTILITIES	)	
AUTHORITY, et al.,	)	
	)	
Plaintiff,	)	TRANSCRIPT
	)	of
vs.	)	MOTION
	)	
SISBARRO DISPOSAL	)	
SVC COMPANY, et al.,	)	
	)	
Defendant.	)	

Place: Wilentz Justice Complex
212 Washington Street
Newark, New Jersey 07102

Date: May 3, 2002

BEFORE:

HONORABLE R. BENJAMIN COHEN, P.J.S.C.

TRANSCRIPT ORDERED BY:

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Gluck, and Cole, Glenpointe Centre West, 500 Frank
W. Burr Boulevard, Teaneck, New Jersey 07666)

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APPEARANCES:

BENJAMIN CLARKE, ESQ. (De Cotiis, Fitzpatrick,
Gluck, and Cole)
Attorney for the Plaintiffs

MARC J. FRIEDMAN, ESQ. (Rich and Friedman)
Attorney for the Defendant, East Coast Sanitation

JEFFREY M. POLLOCK, ESQ. (Sills, Cummis, Radin,
Tischman, Epstein, and Gross)
Attorney for the Defendant, SWTR

I N D E X

MOTION TO DISMISS THE COMPLAINT

Page

ARGUMENT:

By Mr. Friedman

5, 32

By Mr. Pollock

13, 33

By Mr. Clarke

22

COURT DECISION

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ECUA, et al v SISBARRO DISPOSAL SVC CO, et al -- May 3, 2002

SHEET 20

Argument - Pollock

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1 MR. POLLOCK: Am I incorrect? There's only
2 two.
3 MR. CLARKE: Yeah. Yeah. Respectfully, you
4 are. Yeah.
5 THE COURT: I mean, four -- four entities
6 somehow put in bids. I must assume --
7 MR. POLLOCK: Okay.
8 THE COURT: -- they all -- and -- and I don't
9 think any of them were seeking to --
10 MR. POLLOCK: Fine.
11 THE COURT: -- use the same transfer station.
12 MR. POLLOCK: I apologize, Your Honor. One
13 last concept, Your Honor, which -- let me throw out
14 which may kind of wrap this all together. In my
15 analysis, I would respectfully submit this case is DEAN
16 MILK all over again and, you know, in DEAN MILK,
17 Madison County said you've got to have it processed
18 here. That's the way you've got to do it. No.
19 Illinois, you're not good enough to do this. The
20 Supreme Court rejected that and said no. You have to
21 have some rational basis for saying that that is so.
22 You have to have some interest that you really would
23 bona fide need to protect.
24 Having hammered -- with all due respect --
25 politely and professionally Mr. Wisler for two days at

Argument - Pollock/Decision

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1 deposition about the face and head and said, hey, give
2 me something. What have you got? The clear answer was
3 nothing but money. That's the only interest I can
4 identify. He clearly said that was not his sole
5 interest, but I agree with Mr. Friedman. We asked him
6 do you have anything else. Everything else failed.
7 Thank you, Your Honor.
8 THE COURT: All right. Thank you. Thank
9 you, counsel. Well, I've listened to the arguments pro
10 and con and I've, of course, reviewed the papers that
11 you've submitted on these applications.
12 In this matter, the plaintiffs, Essex County
13 Utility Authority and the Essex County Department of
14 Health instituted this action in July, 2000, seeking
15 injunctive relief against the various defendants for
16 alleged violations of Essex County's solid waste
17 management plan.
18 Some of the defendants contended that the
19 county fla-- plan was unconstitutional in that it
20 impermissibly infringes on inter-state commerce in
21 violation of the dormant commerce clause.
22 The Court in this matter bifurcated the
23 issues involved in the case and directed the parties
24 initially to take discovery on the constitutional
25 issue.

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1 One defendant, East Coast Sanitation, has now
2 submitted a brief in support of its position to dismiss
3 the complaint asserting that the plan was
4 unconstitutional and defendants, SWTR and Louis T.
5 Roselle (phonetic), Incorporated, have joined the
6 arguments raised by East Coast Sanitation.

7 The Solid Waste Management Act, N.J.S.A.
8 13:1(e)-1 et seq., hereinafter SWMA, requires that each
9 solid waste management district include in its solid
10 waste management plan suitable sites to treat and
11 dispose of solid waste generated within the district.

12 The Solid Waste Utilities Control Act, SWUCA,
13 N.J.S.A. 48:13(a)-1 et seq., declares all waste
14 facilities in the State to be public utilities.

15 Under the County Environmental Health Act,
16 CEHA, N.J.S.A. 2 -- 26-3(a)2-21 (sic), county health
17 agencies are charged with the responsibility of
18 monitoring and enforcing county plans. Pursuant to the
19 CEHA, each county must seek and obtain approval for its
20 waste management plan from the State Department of
21 Environmental Protection.

22 Clearly, then the handling of waste materials
23 remains in New Jersey, a matter of public interest, and
24 is subject to close regulatory supervision at the both
25 the State and local levels. From the 1970s until the

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1 late 1990s, the State's policy and goal in this area
2 was to obtain self-sufficiency; that is, to develop the
3 capacity to dispose of all waste generated in the State
4 without relying on out-of-state disposal options.

5 The Third Circuit's opinion in -- in the
6 ATLANTIC COAST DEMOLITION AND RECYCLING, INCORPORATED
7 VS. BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY
8 case, 112 F.3d 652 (3d Cir. 1997), which I will call
9 ATLANTIC COAST II, invalidated the State's then
10 existing waste flow control system, declaring that the
11 State's express policy goal of attaining self-
12 sufficient -- self-sufficiency to be violative of the
13 commerce clause of the U.S. Constitution.

14 In response, this State, amongst other
15 things, repealed New Jersey Administrative Code 7:26-
16 6.5, the statewide flow control regulation, and advised
17 the individual counties to revise their solid waste
18 management plans in accordance with the ATLANTIC COAST
19 II decision. Therefore, the counties promulgating
20 waste flow strategies would need to provide for a
21 competitive and non-discriminatory bidding process for
22 the procurement of disposal services. Essex County,
23 accordingly, adopted three separate plan amendments,
24 one of which related to the disposal of non-processable
25 waste which is at issue here.

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1 After ATLANTIC COAST II, the counties options
2 were to deregulate the disposal of this type of waste,
3 as some counties did, or to reinstate a flow control
4 system through a non-discriminatory bidding process, as
5 other counties have done. Essex County adopted for the
6 latter, viewing waste flow control as preferable to
7 deregulation for economic, health, and safety reasons,
8 as well as compliance with State regulation.

9 As to health and safety, the county indicated
10 that it determined that by maintaining control of waste
11 disposal it could ensure that all waste went to
12 properly licensed facilities, and could minimize impact
13 on residential neighborhoods, and local roads that
14 might otherwise arise.

15 As to economics, the county indicated that
16 reinstatement of flow control afforded the county an
17 equitable way of distributing debt service costs that
18 were incurred in the development of the county's waste
19 system which would otherwise have to be defrayed
20 through increased taxes or other means.

21 For all of these reasons, the county decided
22 against deregulation and decided that instead to
23 conduct an open, competitive procurement for a new
24 contract for transportation, transfer, and disposal of
25 non-processable waste. As a practical matter, the only

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1 disposal option for non-processable waste generated in
2 Essex County was and is shipment to an out-of-state
3 landfill since there is no available landfill space
4 left in this State.

5 Off the record, please.

6 (Tape off. Tape on)

7 THE COURT: We're back on the record. Given
8 that the real world constrains -- that real world
9 constraint -- I should say -- the county must rely on
10 transfer stations to dispose of the waste because
11 collection trucks picking up waste in Essex County
12 cannot economically or viably make the trip to out-of-
13 state landfills.

14 Essex -- the Essex County Utility Authority's
15 bid specifications were prepared after consultation
16 with the solidwaste directors in each of the
17 municipalities within Essex County in consideration of
18 a sanitation truck traffic study commissioned by the
19 City of Newark. The specifications required bidders to
20 designate a transfer station facility located within 15
21 miles of the Essex County resource recovery facility
22 which the solid waste is the solid waste epicenter, if
23 you will, of Essex County. The 15 mile radius included
24 numerous transfer stations within its sweep, including
25 facilities in the State of New York.

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1 In November of 1997 and March of 1998, the
 2 Essex County Utilities Authority advertised for bids on
 3 a contract for transportation, transfer, and disposal
 4 services for non-processable waste generated within the
 5 county. The bids were locally, regionally, and
 6 nationally advertised through such entities as the
 7 Bergen Record, the Star Ledger, the Philadelphia
 8 Inquirer, and a national trade magazine called Waste
 9 News.
 10 The bid specifications required bidders to
 11 designate disposal facilities and transfer stations
 12 within 15 road miles of the Essex County resource
 13 recovery facility, and the transfer station, as counsel
 14 know, is a facility with a designated receiving area
 15 where waste collection vehicles discharge their loads
 16 so that it can be consolidated with waste from other
 17 vehicles, compacted and loaded onto larger vehicles --
 18 be they transfer trailers, or rail cars, or barges, and
 19 inter-modal containers -- for more economical shipment
 20 to distant landfills or composting facilities.
 21 The county received four bids. The four
 22 bidders were Waste Management, a multi-national
 23 corporation; next a joint venture between defendant,
 24 SWTR, a local transfer station operation, and USA
 25 Waste, owner of an out-of-state landfill; third, a

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1 joint venture between Penn-Pack (phonetic), a local
 2 transfer station operator, and a company called Epic
 3 (phonetic), a transporter; and fourth, BFI Transfer
 4 Systems, a national waste conglomerate.
 5 The lowest responsible bidder was deemed to
 6 be Waste Management of New Jersey -- WMI hereafter --
 7 Waste Management of New Jersey, Incorporated. As I
 8 said, a multi-national corporation. WMI proposed to
 9 utilize a cell phone transfer station in Elizabeth and
 10 for ultimate disposal, a cell phone landfill in Bucks
 11 County, Pennsylvania.
 12 On June 22, 1998, the county adopted a
 13 resolution formally awarding the contract to WMI and on
 14 August 18th -- or 19th, 1998, the county adopted
 15 Ordinance No. 98-0021, amending the county plan to
 16 direct all non-processable waste to the WMI transfer
 17 station facility in Elizabeth. The State Department of
 18 Environmental Protection, the DEP, approved the
 19 county's amendment in December, 1998, finding that the
 20 bid procurement process was non-discriminatory.
 21 None of the parties bidding objected to the
 22 bid specifications, to the bidding process, or to the
 23 award of the contract to WMI back in 1998, and none
 24 raised any constitutional challenges to the county's
 25 revised plans in 1998 -- 1998 or thereafter, until the

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1 plaintiffs instituted this suit, and in response,
2 several of the defendants raised these constitutional
3 concerns.

4 A number of solid waste transporters, after
5 the implementation of the regulations, failed to comply
6 with the revised plan. Those transporters, I -- I
7 note, disposed of waste -- or sought to dispose of any
8 waste not in out-of-state facilities but rather in
9 other in-state facilities. In particular, defendant,
10 East Coast, was cited for transporting Essex County
11 waste to a transfer station operator by the Bergen
12 County Utilities Authority.

13 As a result, the Essex County Utilities
14 Authority instituted the present lawsuit to enforce the
15 county's revised plan. Defendants responded by
16 claiming, amongst other things, that the revised plan
17 is unconstitutional and seek to have the complaint
18 dismissed on that basis, as well as others.

19 The defendants here argue that the ordinance
20 in question favors local business by its very design
21 and as such is per se invalid under the United States
22 Supreme Court analysis in the C&A CARBONE,
23 INCORPORATED, ET AL. VS. TOWN OF CLARKSTOWN, a New York
24 case, 511 U.S. 383, a 1994 decision. Defendants assert
25 that the ordinance cannot withstand the standard

1 enunciated by the CARBONE court for analysis of waste
2 flow regulation. Quoting from that decision:

3 "Discrimination against interstate commerce
4 in favor of local business or investment is per se
5 invalid; save in a narrow class of cases in which the
6 municipality can demonstrate under vigorous scrutiny
7 that it has no other means to advance a legitimate
8 local interest."

9 The Essex County solid waste management plan
10 provides in pertinent part as follows:

11 The following facility is hereby included in
12 the county plan as the county's designated solid waste
13 facility to which all in-county generated, non-
14 processable waste, as defined, is hereby directed for
15 processing and transferring for transport onto long
16 haul vehicles for disposal out of state; Waste
17 Management of New Jersey.

18 The defendants deposed Mr. Eric Wisler,
19 Esquire, to determine the county's justification for
20 reestablishing waste flow control in the wake of the
21 ATLANTIC COAST II decision of the Third Circuit.
22 Defendants assert that Mr. Wisler's analysis of the
23 case law governing waste flow as academic and that the
24 county's proposed justifications are lacking in
25 specific factual basis, studies, or tests.

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1 The defendants argue that the justifications
2 were generalized references to the county's police
3 interest, environmental interest, and economic
4 interest. Defendants argue further that there had been
5 no identifiable health violations, no liabilities
6 imposed on the county, and no violations of State rules
7 and regulations that the county could refer to as its
8 basis for returning to waste flow control after
9 ATLANTIC COAST II.

10 The police power to which Mr. Wisler referred
11 was to assure that solid waste was handled properly so
12 as to alleviate potential health impacts, ensure that
13 the waste was taken to licensed facilities that comply
14 with State regulations, and to ensure that the right
15 kind of material goes over the kind of roads and
16 highways that are particularly permi-- permitted under
17 the law to handle that kind of material, according to
18 Mr. Wisler's deposition.

19 The defendants make much of the fact that Mr.
20 Wisler candidly admitted that there was an economic
21 interest of the county in deciding to return to waste
22 flow management. The county could potentially have
23 lost a source of revenue if Waste Management had not
24 been awarded the contract. Mr. Wisler stated, however,
25 that although this was a concern, it was not of

1 paramount importance to Essex County in its final
2 determination. The defendants assert, however, that
3 the county's sole reason -- or sole cognizable reason
4 for instituting the waste flow ordinance was revenue
5 based.

6 Perhaps the most compelling argument that the
7 defendants make is that the bid specifications
8 themselves, according to the defendants, preclude any
9 real participation by out-of-state bidders and that
10 alone discriminates against interstate commerce. The
11 bid specifications, of course, require the bidder to
12 designate a facility that was within 15 road miles of
13 the Essex County resource recovery facility. In
14 addition, the specifications required the facility to
15 be able to process 2,000 tons of waste per week. The
16 defendants argue that it is unknown whether any
17 facility in New York would have been able to process
18 that amount of refuse and that the 15 mile geographic
19 limitation precluded not only out-of-waste facilities
20 -- out-of-state facilities, but also various stations
21 in Bergen, Morris, and Union County.

22 The plaintiff responds by arguing that under
23 the legal standards that have been developed since the
24 CARBONE case was decided by the Supreme Court in 1994,
25 the county's plan is subject to ordinary scrutiny and

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1 not the strict or heightened scrutiny test that the
2 def-- defendants urge and argue. According to the
3 plaintiff, the alleged discriminatory impact on
4 interstate commerce here is an incidental effect of a
5 legitimate non-projectionist exercise of governmental
6 powers and, therefore, argue the plaintiffs, the plan
7 passes muster under the balancing test enunciated in
8 PIKE VS. BRUCE CHURCH, 397 U.S. 137 (1970), whereby a
9 state regulation will be upheld unless the burden
10 imposed on commerce is clearly excessive in relation to
11 the punitive, local benefits.

12 Plaintiffs recognize that this court is not
13 bound by the lower federal courts rulings governing the
14 analysis of similar waste flow control regulations.
15 However, plaintiffs argue that the Court should adhere
16 to the persuasive Third Circuit precedents set forth in
17 ATLANTIC COAST II and the HARVEY AND HARVEY decisions.
18 The Third Circuit's decisions have also, of course,
19 been followed by those decisions in the First and
20 Second Circuits which clearly announce that CARBONE did
21 not create a per se rule subjecting all flow control
22 ordinances to strict scrutiny. HARVEY AND HARVEY was
23 at 68 F.3d 788. The HOLTON CITIZENS COALITION VS. TOWN
24 OF HOLTON, 175 F.3d 178 (1st Cir. 1999).

25 The plaintiff argues that in the wake of

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1 CARBONE the aforementioned Circuit Court decisions
2 demonstrate that judicial consensus. That waste flow
3 control ordinances are to be subjected to normal
4 scrutiny so long as the process used to select the site
5 is fair, open, and competitive, and does not exclude or
6 disfavor qualified out-of-state businesses. As stated
7 by ATLANTIC COAST in its opinion:

8 If the process for selecting waste disposal
9 facilities no longer discriminates against interstate
10 commerce, neither will the regulatory provisions
11 enforcing such a non-discriminatory system. Although
12 the State of New Jersey may no longer preclude the
13 designation of out-of-state waste disposal facilities
14 or operators, the State and the county authorities
15 remain free to regulate the flow of waste within New
16 Jersey, so long as the State's laws and regulations
17 treat in-state and out-of-state facilities equally.
18 Citing the HARVEY decision, also of the Third Circuit.

19 Plaintiffs contend that the bidding process
20 here satisfies the requisite pike balancing test that
21 they urge and the Essex County Utilities Authority
22 received four bids in response to its invitation. Two
23 of which were from national or multi-national waste
24 management corporations, BFI and Waste Management, and
25 two of which were from local ent-- entities joint

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1 venturing with other companies. The successful bidder,
2 Waste Management, a large multi-national company as
3 I've indicated, owns its own landfill in Pennsylvania,
4 in Tullytown, as well as a local transfer station.
5 Accordingly, plaintiffs argue it represents a model
6 interstate vendor.

7 The central issue here for the Court to
8 decide in this motion to dismiss is whether the Essex
9 County waste flow ordinance, which requires all in-
10 county generated non-processable waste to be hauled to
11 waste -- Waste Management of New Jersey, Incorporated
12 facility, located in Elizabeth, violates the commerce
13 clause of the United States Constitution. The commerce
14 clause, of course, grants congress the power to
15 regulate commerce amongst the several states. Article
16 I, Paragraph 8, Clause 3 of the United States
17 Constitution.

18 Our Supreme Court has long recognized that
19 this clause also limits the powers of the states to
20 erect barriers against interstate commerce. Actions
21 are within the domain of the commerce clause, if they
22 burden interstate commerce or impede its free flow.
23 The commerce clause has a so-called dormant aspect
24 which limits State authority to regulate areas where
25 congress has not affirmatively acted to either

1 authorize or forbid the challenged State activity.
2 Here, it is undisputed. Congress has neither
3 prohibited nor authorized flow control ordinances such
4 as those at issue here and, therefore, this court must
5 consider whether the ordinance in question here
6 violates the dormant commerce clause.

7 The analysis of the ordinance in this case
8 necessarily begins with an inquiry into its burden or
9 impediment on the free flow of commerce. Specifically,
10 the service provided by waste haulers. The ordinance
11 in question which I mentioned before -- just to
12 reiterate -- provides that as set forth in Section 4
13 above, the county and Essex County Utilities Authority
14 shall direct all in-county generated, non-processable
15 waste, which is defined as type 13 in non-processable
16 portion of type 27 and bypass waste to Waste Management
17 of New Jersey, Incorporated, Amber (phonetic) Avenue,
18 Front Street facility, located at 666 Front Street,
19 Elizabeth, New Jersey, for processing, transfer, for
20 transport by long haul vehicles for disposal out-of-
21 state.

22 The burden of demonstrating a discriminatory
23 purpose or effect on out-of-state commerce rests with
24 the party challenging the constitutionality of the
25 ordinance; here, the defendants. A number of things

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1 can demonstrate that the designation process
 2 impermissibly favored in-state interests -- or bidders.
 3 A seemingly mutual bid specification with an entirely
 4 legitimate purpose, such as a specified proximity
 5 requirement, may have the effect of giving in-state
 6 interests an advantage, according to HARVEY VS. HARVEY.
 7 However, the Third Circuit has held
 8 government defendants can rebut a putative showing of
 9 discrimination by presenting evidence demonstrating
 10 that the designation process was open, fair, and
 11 competitive. Such evidence might include bid
 12 solicitation, selection criteria, evaluation of
 13 bidders, et alia, but such evidence alone may be
 14 insufficient to prove the flow control schemes
 15 neutrality. The government defendants in these cases
 16 might also present additional evidence such as
 17 statistical evidence or expert testimony demonstrating
 18 that different aspects of the designation process are
 19 as neutral to out-of-state interests in practice as
 20 they appear on their face.
 21 If the ordinance in question does not
 22 discriminate against interstate commerce in either its
 23 purpose or effect, it is subject to a balancing test.
 24 Whereby, the statute will be upheld unless the burden
 25 imposed on such commerce is clearly excessive in

1 relation to the putative local benefits. That's, of
 2 course, the pike standard.
 3 Defendant movants herein urge this court to
 4 -- initially, to disregard the line of cases that
 5 followed in the wake of CARBONE and fashion a rule
 6 designating the waste flow control ordinance as per se
 7 invalid under a strict scrutiny analysis and, of
 8 course, as -- the plaintiff concedes in -- our Supreme
 9 Court of -- of the State of New Jersey in DEWEY VS.
 10 R.J. REYNOLDS TOBACCO COMPANY (phonetic), 121 N.J. 68
 11 (1990), observed that the lower federal courts and
 12 state courts occupy the same position in the national
 13 judicial structure. The Supreme Court of New Jersey
 14 reiterated its position that decisions of a lower
 15 federal court are no more binding on a state court than
 16 they are on a federal court not beneath it in a
 17 judicial hierarchy.
 18 Despite that assertion by the New Jersey
 19 Supreme Court, our Supreme Court acknowledged that
 20 state courts should recognize judicial com-- comity,
 21 noting that judicial comity helps ensure uniformity and
 22 helps discourage forum shopping. Judicial comity is
 23 appropriate here and this court chooses to follow the
 24 well reasoned analysis of waste flow control ordinances
 25 conducted by the Third Circuit and the other circuits

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1 I've mentioned. I take note of the case cited in oral
2 argument, the Appellate Division decision, which
3 counsel for the plaintiff asserts is binding upon me in
4 addition.

5 As plaintiff notes, the Third Circuit, in
6 addition to the First and Second Circuits, have
7 examined the holding in CARBONE and have concluded that
8 CARBONE does not mandate that all flow control
9 regulations must pass muster under the stricter,
10 heightened scrutiny standard. What is required is that
11 the bidding process by which the State or county
12 government procur-- procured a contract is open, and
13 fair, and does not exclude or disfavor out-of-state
14 businesses.

15 In HARVEY AND HARVEY, the Third Circuit
16 reviewed waste flow schemes similar to the one at issue
17 here. In determining that the designation process for
18 waste disposal which did not afford out-of-state
19 business equal opportunity to compete suggested
20 violations of the dormant commerce clause, the Court
21 stated the following:

22 To determine whether these flow control
23 schemes actually discriminate against interstate
24 commerce, triggering the strict scrutiny analysis, the
25 Court must closely examine for signs that the out-of-

1 state bidders do not in practice enjoy equal access to
2 the local market. The following factors (1) the
3 designation process, (2) the duration of the
4 designation, and (3) the likelihood of an amendment to
5 add alternative sites must be considered. The HARVEY
6 court remanded that case for consideration of the waste
7 flow scheme there, pursuant to the principles
8 enunciated in ATLANTIC COAST II.

9 The designation process here is as follows:

10 After the ATLANTIC COAST II decision in 1997,
11 Essex County determined, for reasons I set forth
12 earlier, that reinstatement of the flow control was
13 preferable to accomplish its goals in protecting the
14 health, safety, and safety of its citizenry by amongst
15 other things, minimizing impacts on residential
16 neighborhoods and local roads that might otherwise
17 arise to a deregulation.

18 Therefore, the county decided to conduct what
19 it believed to be an open bid for the procurement of a
20 contract for the transportation, transfer, and disposal
21 of non-processable waste. The county, as I indicated
22 earlier, advertised the bid process locally,
23 regionally, and nationally, and at that time and
24 thereaf-- and thereafter, up until -- in response to
25 this litigation, none of the bidders and none of the

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1 defendants in this case made any challenge to the
2 selection criteria, to evaluation of the bidders, and
3 even -- even so in this case, the -- the main challenge
4 is the requirement of the transfer station being
5 located within 15 road miles of the Essex County
6 resource recovery facility.

7 Given the constraint realized by the fact
8 that there simply is no landfill space available in the
9 State of New Jersey any longer, the county must rely
10 upon a transfer station to dispose of this type of
11 waste or simply deregulate. The alternative is not
12 economically sound, according to the county, nor is it
13 safe. Therefore, imbedded in the bid specifications is
14 the requirement that the successful bidder designate a
15 transfer station within 15 miles of the Essex County
16 resource recovery facility.

17 The only aspect of the competitive process
18 utilized by the Essex County Utilities Authority to
19 select a non-processable waste contractor that raises
20 even a colorable constitutional concern in this court's
21 opinion is the specification requiring all bidders to
22 include, as a part of their bid, a transfer station
23 facility located within 15 road miles of the county
24 resource recovery facility.

25 However, the need for a transfer station of

1 reasonable proximity to the county is not something
2 that the Essex County Utilities Authority created out
3 of whole cloth to favor local businesses. Delivery to
4 a nearby transfer station is unavoids-- an unavoidable
5 step in the disposal of non-processable waste here in
6 Essex County because, as I've noted several times,
7 there is no landfill space of sufficient proximity as
8 to be reachable by short haul garbage trucks.

9 Indeed, defendants here do not seek to take
10 non-processable waste directly to out-of-state
11 landfills. By their actions rather, they have sought
12 in the past to take it to other non-designated in-state
13 transfer stations for eventual disposal out-of-state.

14 I note with interest the argument of counsel
15 for the plaintiff here that there is a distinction
16 between saying the transfer station must be located
17 locally, and the entity that operates it must be a
18 local entity, and I think that's an important
19 distinction for purposes of the discussion we're having
20 here. There is no requirement in the bid
21 specifications that an out-of-state facility can't
22 compete on a level playing field -- to use the
23 vernacular. It's simply a fact of life that any
24 transfer for -- a station has to be located locally and
25 the decisions are replete, I might add, with statements

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1 that that alone does not make a -- a flow control
 2 system violative of the dormant commerce clause.
 3 Since use of a nearby transfer station is a
 4 practical necessity for non-processable waste generated
 5 in Essex County, the Essex County Utilities Authority
 6 can hardly be said to have acted with protectionist
 7 motives in including that requirement as a part of its
 8 bid specification. Moreover, plaintiffs drafted it --
 9 the specifications to ensure that out-of-state vendors
 10 would not be excluded from bidding on the contract.
 11 The radial distance specified by the plaintiffs in the
 12 bid package permitted out-of-state transfer facilities
 13 to bid on the contract according to the record before
 14 me.
 15 The record fails to reveal any bias against
 16 out-of-state interests on Essex County's part here in
 17 conducting its procurement for the solid waste
 18 services. The Utilities Authority did not require
 19 bidders to be based in New Jersey or to have a
 20 principal place of business near Essex County. It
 21 required only that they have, or secure, or team up
 22 with an entity that had a transfer station facility of
 23 sufficient proximity to the county to make the bid
 24 sensible from a planning standpoint.
 25 The Court finds that the designation here is

Decision

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1 a reasonable one. Based on the evidence in the record,
 2 the transfer stations have to be located within a
 3 reasonable proximity of the source of the waste.
 4 In this action, the county received four
 5 bids. All of which were in -- of an interstate
 6 character. The successful bidder, WMI, is a multi-
 7 national corporation itself. It happens to own a
 8 transfer station in Elizabeth, New Jersey, and that is
 9 where all the non-processable waste currently is
 10 required to be delivered. As previously noted, none of
 11 the -- the participants in the bidding process,
 12 including defendant, SWT&R, protested the bid
 13 specifications, the decision to award the contract
 14 which occurred four plus years ago.
 15 By resolution adopted June 22nd, 1998, the
 16 Essex County Utilities Authority awarded the contract
 17 to WMI for the provision of transfer, transportation,
 18 and disposal services, having determined that WMI's bid
 19 represented the lowest, all in cost of services, that
 20 the WMI bid complied with the technical, financial, and
 21 other requirements of the bid specifications, and the
 22 WMI bid did not contain any material deficiencies.
 23 Therefore, the Utilities Authority considered WMI a
 24 responsible bidder pursuant to the local public
 25 contracts law, N.J.S.A. 40A:11-1 et seq.

ELITE TRANSCRIPTS, INC.

28 Catherine Street, Bloomingdale, NJ 07403
 (973) 283-0196 (973) 492-2927-FAX

Decision

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1 The Department of Environmental Protection of
2 the State of New Jersey subsequently approved the
3 county's plan, finding that the procurement process and
4 the specifications issued by the Essex County Utilities
5 Authority were non-discriminatory.

6 Pursuant to the terms of the agreement, the
7 combined services agreement governs the rights and
8 obligations of the parties for a term of five years
9 unless earlier terminated in accordance with its terms
10 and the Court does not find this to be an unduly,
11 lengthy term.

12 The Court does find that the bidding process
13 here employed by the plaintiff entities was fair, and
14 open, and did not either in its purpose or effect
15 discriminate against out-of-state businesses.

16 Therefore, for the reasons I've set forth, I
17 conclude that the ordinance in question here is subject
18 to the balancing test under which the movant must prove
19 that the burden placed on interstate commerce is
20 clearly excessive in relation to the punitive local
21 benefits under the PIKE decision. The punitive local
22 benefits to the county and its -- in employing such a
23 designation, amongst other things, includes the
24 assurance that solid waste is properly handled in light
25 of the potential health impacts if it were taken to a

Decision

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1 facility not properly licensed to receive the waste.

2 In addition to its police power
3 considerations, the county has cited both environmental
4 and economic concerns as further justification for the
5 waste flow control. These are legitimate concerns and
6 the movants have not demonstrated that any incidental
7 burdens on interstate commerce are clearly excessive in
8 relation to the local benefits.

9 Therefore, East Coast's motion to dismiss the
10 complaint on the ground that the plaintiffs' waste flow
11 plan is unconstitutional must be denied and I'm signing
12 an order to that effect. I will provide a copy of same
13 to counsel and, of course, that will trigger the
14 beginning of phase II of this litigation.

15 And what I'm going to suggest, counsel, is
16 that I would like to circulate a -- one of my form case
17 management orders since I understand that there will be
18 a new round of discovery that must be undertaken, and
19 if the -- the many parties -- although I -- there are
20 fewer parties now than, of course, when we began the
21 case. Some -- some have settled out. If you can agree
22 upon a time table for discovery and if it meets my
23 standard of being reasonably expeditious under the
24 circumstances, I'll allow you to take a shot at doing
25 that, but I want a -- a short window of opportunity to

ELITE TRANSCRIPTS, INC.

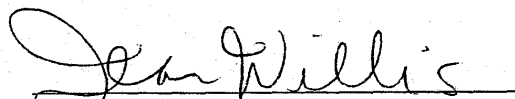
28 Catherine Street, Bloomington, NJ 07403

(973) 283-0196 (973) 492-2927-FAX

1 do that.
2 Failing the ability to agree or if you take
3 too long, I'm going to promptly schedule a case
4 management conference with all the remaining parties in
5 the case and set a schedule for discovery.
6 Off the record.
7 (Proceedings concluded)

CERTIFICATION

I, JEAN WILLIS, the assigned transcriber, do hereby
certify that the foregoing transcript of proceedings in
the County of Essex, General Equity Part, on May 3,
2002, Tape No. 1, Index No. 0009 to 5475, is prepared
in full compliance with the current transcript format
for judicial proceedings and is a true and accurate
compressed transcript of the proceedings as recorded to
the best of my knowledge and ability.



Jean Willis AD/T#523 June 14, 2002
ELITE TRANSCRIPTS, INC.
BLOOMINGDALE, NEW JERSEY 07403

ELITE TRANSCRIPTS, INC.

28 Catherine Street, Bloomingdale, NJ 07403
(973) 283-0196 (973) 492-2927-FAX

Exhibit F



STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
TWO GATEWAY CENTER
NEWARK, N.J. 07102

AGENDA DATE: 1/2/91

AGENDA DATE: 1/25/91

AGENDA DATE: 1/31/91

SOLID WASTE

IN THE MATTER OF THE PETITION OF THE)
HUDSON COUNTY IMPROVEMENT AUTHORITY)
FOR (1) A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY; (2) A)
FRANCHISE; (3) ISSUANCE OF A JOINT)
WASTE FLOW REDIRECTION ORDER;)
(4) APPROVAL OF AN INITIAL TARIFF;)
(5) APPROVAL OF A LANDFILL LICENSE)
AGREEMENT; AND (6) APPROVAL OF A)
TRANSPORTATION AGREEMENT)

DECISION AND ORDER
APPROVING STIPULATION,
AWARDING FRANCHISE AND
GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND
NECESSITY

BPU Docket No. SE90101129

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes the Board of Public Utilities (the "Board") decisions rendered on January 2, 1991, January 25, 1991 and January 31, 1991. Petitioner, The Hudson County Improvement Authority (the "HCIA"), a public body corporate and politic of the State of New Jersey, having its principal place of business at 601 Pavonia Avenue, Jersey City, New Jersey, filed a verified petition on October 4, 1990 with the Board seeking (1) a Certificate of Public Convenience and Necessity to engage in solid waste disposal, (2) a franchise applicable to solid waste types 10, 13, 23, 25 and 27 generated within the geographic boundaries of the County of Hudson (the "County"), New Jersey, (3) approval of an initial tariff, (4) issuance of a joint waste flow redirection order, (5) approval of a landfill license agreement, and (6) approval of a transportation agreement. The relief requested in the verified petition with respect to the issuance of a franchise and a joint waste flow redirection order wholly superceded a petition filed on October 7, 1988, and amended thereto, filed on March 8, 1989 on behalf of the HCIA.

The County is a Solid Waste Management District established pursuant to the provisions of the Solid Waste Management Act (the "Act"), N.J.S.A. 13:1E-1 et seq. Pursuant to the Act, the County is responsible for the development and implementation of a comprehensive Solid Waste Management Plan (the "Plan"). The Plan was adopted by ordinance of the Board of Chosen Freeholders of the County on April 26, 1979, and approved

by the New Jersey Department of Environmental Protection (The "DEP").

On November 18, 1985, in accordance with the provisions of the Act, the Board of Chosen Freeholders of the County adopted an ordinance designating the HCIA as the sole entity responsible for implementing the Plan.

At the time of the HCIA's filing on October 7, 1988, municipal solid waste generated within the County was collected and delivered for disposal at the solid waste facilities owned by the Hackensack Meadowlands Development Commission (the "HMDC"). In planning the County's solid waste system, the HCIA anticipated that interim disposal capacity would be available at such HMDC facilities until the commencement of commercial operation of the planned resource recovery facility, which is presently projected by the HCIA to occur during calendar year 1994.

By Order for Termination of Landfill Operations dated December 22, 1989 (the "Order for Termination"), the DEP and the Board ordered the phased orderly closure of the HMDC 1-E landfill no later than December 31, 1990. The County appealed the Order for Termination, and the litigation was subsequently resolved by execution of a settlement agreement, dated June 14, 1990, by the County, the HCIA, the HMDC, the DEP and the Board (the "Settlement Agreement"). Pursuant to the terms of the Settlement Agreement, the HMDC will continue to accept for disposal solid waste generated within the County up to the capacity determined by the DEP. Also, pursuant to the terms of the Settlement Agreement, the HCIA has developed a short-term disposal strategy to provide for the disposal of solid waste generated within the County at the HMDC 1-E landfill up to the capacity of that landfill, and at landfills located out-of-state, until commercial operation of the planned resource recovery facility.

In order to implement the short-term disposal strategy, and pursuant to the Settlement Agreement, the HCIA and the HMDC have executed an interdistrict agreement which provides for, among other things, the processing and disposal of solid waste generated within the County (the "Interdistrict Agreement"). The Interdistrict Agreement also provides for the use of the HMDC Baler Facility as the transfer station for certain types of solid waste that will be processed and transported to out-of-state landfills for disposal.

The County transmitted to the DEP a proposed amendment to the County Plan, dated September 7, 1990, that included the short-term disposal strategy selected by the HCIA. On January 14, 1991, the County transmitted to the DEP a second proposed amendment to the County Plan to incorporate the Interdistrict Agreement into the County Plan, which Interdistrict Agreement was referenced in and essentially implements the details of the September 7, 1990 Plan Amendment as they relate to the day-to-day business relationships between the HCIA and the HMDC. On January

24, 1991, the DEP approved the September 7, 1990 amendment to the County Plan. The DEP is currently reviewing the second amendment to the County Plan.

Motions to intervene were filed with the Board by United Carting Company, Inc. on January 11, 1991, and by Allegro Sanitation Corp., Anchor Carting Corp., Five Brothers Carting Co., Inc., Hoboken Recycling Corp. and V. Ponte and Sons, Inc. on January 9, 1991 (collectively referred to as "Intervenors"). Thereafter, responses to the motions were filed as well as replies to the responses. At its January 25, 1991 meeting, the Board granted the Intervenors' motions to intervene. The Department of the Public Advocate, Division of Rate Counsel ("Rate Counsel") is also a party to this proceeding.

On January 25, 1991, the Petitioner, Board Staff and Rate Counsel executed a stipulation, which provides for, among other things, interim rate relief. A public hearing concerning the HCIA's petition was held on December 5, 1990 at the Harrison Town Hall in the Town of Harrison, New Jersey. Public notice of the hearing was provided to all customers of the HCIA, to solid waste collectors providing service in the County, and to municipalities located in the County. A second public hearing was held on January 24, 1991 concerning the HMDC's petition for an increase in rates, BPU Docket No. SE90111329, including its impact on the HCIA's proposed rates which were the subject of the December 5, 1990 public hearing. Public notice of the hearing was provided to all customers of the HCIA and the HMDC, to solid waste collectors providing service in the County and to municipalities in the County.

The Board has reviewed the stipulation, as well as the verified petition, responses to data requests propounded by Board Staff, the position papers filed with the Board by Intervenors concerning this matter, as well as the comments provided by interested persons at the December 5, 1990 and January 24, 1991 public hearings. On the basis of this review, as discussed at three different Board agenda meetings, the Board has reached the determinations set forth below. The Board considered the HCIA's request for a franchise and a Certificate of Public Convenience and Necessity at its January 2, 1991 agenda meeting, considered the HCIA's and the HMDC's requests for interim rates and the HCIA's request for approval of certain contracts at its agenda meeting of January 25, 1991, and approved an interim tariff regarding treatment of "mixed loads" at its agenda meeting of January 31, 1991.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

As part of the verified petition filed with the Board, the HCIA submitted the Board's Form M&R5C pursuant to N.J.S.A. 48:13A-6, and also presented information about the HCIA through numerous inquiries by the Board's Staff. In view of this information, the Board FINDS that the petitioner is qualified by

experience, training and education to engage in the solid waste disposal business and HEREBY GRANTS to the HCIA in accordance with N.J.S.A. 48:13A-6, a Certificate of Public Convenience and Necessity to engage in the business of solid waste disposal. At its January 2, 1991 agenda meeting, the Board directed that approval of the HCIA's Certificate of Public Convenience and Necessity was contingent upon approval by the DEP of the September 7, 1990 amendment to the County Plan. As noted above, on January 24, 1991, the September 7, 1990 amendment to the County Plan was approved by the DEP and therefore, the Certificate of Public Convenience and Necessity granted herein is effective as of the date of this Order.

HCIA'S FRANCHISE

Pursuant to the provisions of N.J.S.A. 48:13A-5, when the Board finds that it is in the public interest, the Board is empowered to award a franchise to any person engaged in solid waste disposal at rates and charges published in tariffs or contracts accepted or to be accepted by the Board, provided that the proposed franchise conforms to the solid waste management plan, as approved by the DEP, of the solid waste management district in which service is to be performed, and provided that the franchise is of sufficient area and duration to meet the estimated technical and economic needs of the disposal facility.

The County Plan, as adopted and amended, provides for both the short-term and long-term solid waste management and disposal needs of the County. The short-term needs will be met pursuant to the September 7, 1990 County Plan Amendment, which provides for the disposal of certain solid waste types at the HMDC 1-E landfill, and the processing of other solid waste types through the HMDC Baler Facility to be disposed of at out-of-state landfills. The HCIA's short-term disposal policy is designed to conserve the diminishing space at the HMDC 1-E landfill.

The Board concludes that the HCIA meets the requirements for a solid waste disposal franchise pursuant to N.J.S.A. 48:13A-5. As the HCIA is a public body responsible for implementation of the County's Plan, the award of a solid waste disposal franchise to the HCIA furthers the public interest by helping to preserve valuable landfill space and by assisting the County in gaining control over solid waste flows generated in the County.¹ In addition, the HCIA will be engaged in solid waste

¹ The HMDC 1-E landfill is the last operational disposal facility and the only facility currently available for the receipt of Hudson County solid waste in the Hackensack Meadowlands District. HMDC 1-E landfill's operation is restricted by virtue of the December 22, 1989 landfill closure order and the June 14, 1990 Settlement Agreement. Unless all non-type 10 Hudson County solid waste, except as otherwise specified in the HCIA's tariffs, is diverted from the HMDC 1-E

disposal as of February 4, 1991, with rates and charges published in its tariff on file with the Board. The awarding a franchise to the HCIA also conforms to the County plan as approved by the DEP on January 24, 1991, and meets the estimated technical and economic needs of the disposal facility to be used by the HCIA. Finally, the franchise provides financial stability to the HCIA and will assist it in developing its solid waste system.

Accordingly, the Board HEREBY AWARDS the HCIA a franchise for the disposal of solid waste types 10, 13, 23, 25 and 27 generated within the County, effective as of the effective date of the HCIA's tariffs. The franchise is effective until such time as there is a substantial change in the County's disposal system, such substantial change to include, but not be limited to, a decision to proceed with construction of a resource recovery facility, the execution of an interdistrict agreement with another county or the development of a system of waste distribution centers.

INITIAL TARIFF

The HCIA has proposed an initial tariff to implement the County's short-term disposal strategy, and to provide for the delivery of solid waste types 10, 13, 23, 25 and 27 generated within the County to the HMDC Baler Facility for processing and disposal pursuant to the terms of the Interdistrict Agreement. The HCIA and the HMDC have also, pursuant to the September 7, 1990 Plan Amendment and the Interdistrict Agreement, established charges, reflected in their respective tariffs, related to the various undertakings by each with respect to the processing of solid waste at the HMDC Baler Facility for disposal at the HMDC 1-E Landfill and at landfills located outside the State of New Jersey.

For convenience, the HCIA and the HMDC have determined that the fees otherwise payable to the HMDC for the performance of its responsibilities under its tariff and the Interdistrict Agreement (such fees are referred to as the "HMDC Components") are to be incorporated into the applicable HCIA solid waste disposal tariff rates, as modified from time-to-time and approved by the Board. The HCIA and the HMDC have also determined that the HMDC will act as billing agent on behalf of the HCIA and will charge and collect the applicable HCIA tariff rates. Pursuant to the terms of the Interdistrict Agreement, the HMDC and the HCIA have executed a Deposit, Transfer and Escrow Agreement which generally provides that all payments made by solid waste disposal customers under the HCIA's tariff shall be collected by the HMDC on behalf of the HCIA and the HMDC and deposited in a joint account, and thereafter transferred to the HCIA and the HMDC in

(Footnote cont'd.)

landfill, it will reach its safe permitted capacity and will be closed to all Hudson County solid waste in approximately two years.

accordance with each party's respective component of the collected funds.

The stipulation executed by the HCIA, Board Staff and Rate Counsel contains a revenue requirement that was agreed to on an interim basis by Board Staff and the HCIA. Rate Counsel objected to the HCIA including in the revenue requirement expenses related to recycling. The stipulation also contains, based upon the agreed revenue requirement and the HCIA's tonnage projections, solid waste disposal rates for waste types 10, 13, 23, 25 and 27. Notwithstanding Rate Counsel's position regarding recycling expenses, the parties agreed to accept the disposal rates on the condition that in the event revenues collected during the consecutive twelve-month period after the effective date of the tariff exceed the HCIA's stipulated revenue requirement, exclusive of taxes, surcharges, and revenues deposited with the HMDC, such excess revenues which are not required to meet the HCIA's variable costs, as specified in the stipulation, will be deposited in a separate HCIA escrow account pending a final decision by the Board in this matter. The HCIA has also agreed to provide the Board and Rate Counsel with financial reports as may be specified by the Board. The stipulation further provides that the parties agreed to deposit in an escrow account, any revenues collected which pertain to the HCIA's amortization expense, as specified in the stipulation.

After reviewing the provisions of the stipulation, the Board FINDS that there is a need to implement the County Plan at the earliest possible time in order to preserve valuable landfill space. Given this need, the Board is persuaded that interim relief is necessary pending a final decision by the Board on the HCIA's requested rates. Therefore, pursuant to N.J.S.A. 48:2-21.1, the Board HEREBY APPROVES the stipulation and incorporates the terms thereof into this Order as if fully set forth at length herein. The rates set forth in the stipulation are interim and subject to refund with interest.

The Board rejects the position of Rate Counsel with respect to recycling expenses. The Board has previously stated its position on the issue of including recycling expenses in solid waste disposal rates and adheres to its position in that matter. See In the Matter of the Petition of The Mercer County Improvement Authority for Approval of an Increase in Rates, Order Adopting in Part and Modifying in Part Initial Decision, BPU Dockets SR88070850, et al., OAL Dockets PUC5775-88, et al. (October 19, 1990). Recycling activities are an integral part of the HCIA's solid waste disposal operations and are in the short and long-term interest of Hudson County and its citizens; such costs should be included in the interim rates approved herein.

Except as otherwise provided in the Deposit, Transfer and Escrow Agreement between the HCIA and the HMDC, the HMDC and the HCIA shall hold each other harmless against any claim to collected funds, as defined in the Deposit, Transfer and Escrow

Agreement, including claims for refunds, with respect to the other party's respective component of the collected funds. In the event the HMDC does not upon a lawful request refund its component of collected funds, the HCIA shall have no liability to a solid waste disposal customer for any funds which have been deposited with the HMDC from the Joint Escrow Account pursuant to paragraph 2 of the Deposit, Transfer and Escrow Agreement. Similarly, in the event the HCIA does not upon a lawful request refund its component of collected funds, the HMDC shall have no liability to a solid waste disposal customer for any funds which have been deposited with the HCIA from the Joint Escrow Account pursuant to paragraph 2 of the Deposit, Transfer and Escrow Agreement. The HMDC and the HCIA are directed to provide any reasonable customer refunds on a timely basis as provided for in the Deposit, Transfer and Escrow Agreement.

The HCIA has also filed a proposed policy for acceptance of disposal of mixed Hudson and non-Hudson County waste. Based upon discussions with the Board Staff, the HMDC, and Intervenor, the HCIA has proposed to adopt an alternative interim policy concerning mixed waste pending further proceedings at the Board. Pursuant to the HCIA's alternative interim policy, the HCIA will in the short-term and commencing upon the effective date of its tariff, continue to accept mixed Hudson and non-Hudson County solid waste in accordance with the procedures presently employed by the HMDC. The HCIA intends to update this policy and thereafter file any revised policy with the Board for approval. There will be further consideration of this issue by the Board approximately 30 days from the date of this Order.

LANDFILL LICENSE AGREEMENT AND TRANSPORTATION AGREEMENT

Pursuant to an agreement by and between the HCIA, Empire Sanitary Landfill, Inc. ("Empire Landfill" or "Empire") and U.S. Systems Corp., the HCIA has acquired an undivided interest in real property, consisting of the acquisition of a non-exclusive, irrevocable license to utilize landfill capacity at the Empire Landfill located in Taylor, Pennsylvania (the "License Agreement"). Under the terms of the License Agreement, the HCIA may deliver and Empire is obligated to accept waste types 10, 13, 23, 25 and 27 for disposal according to applicable laws.

The HCIA has also executed a transportation agreement with John B. Pucillo & Sons ("Pucillo") (the "Transportation Agreement") for the transportation and delivery to Empire of all solid waste types 13, 23 and 25 and at the sole option of the HCIA, waste types 10 and 27 delivered to the HMDC Baler Facility or to any HCIA designated transfer station.

In the stipulation, the parties agreed that the terms and conditions of the License Agreement and Transportation Agreement are reasonable and prudent and should be approved by the Board on a permanent basis throughout the term of each

respective agreement, such approval being necessary for the implementation of the HCIA's solid waste disposal system. The HCIA also agreed in the stipulation to make a good faith effort to dispose of solid waste pursuant to the terms and conditions of the License Agreement. The HCIA also agreed to file with the Board on an annual basis a report which states the total cumulative tons of solid waste that were disposed of at the Empire Landfill during the preceding year and the amount of additional capacity available to the HCIA pursuant to terms of the License Agreement. Finally, the HCIA agreed to use reasonable efforts during the term of the License Agreement to mitigate any obligation to make any deficiency payments to Empire upon the termination of the License Agreement.

The Landfill License Agreement provides for capacity for up to a ten-year period. However, it is the State's policy, as evidenced in DEP's approval of Hudson County's September 7, 1990 amendment to the County plan, that primary reliance on out-of-state disposal should be only short term in nature. Consistent with that policy, the Board recognizes that this contract represents the primary disposal facility for a short-term period. The contract provides sufficient flexibility for the HCIA to develop alternative in-state disposal resources without economic penalty, including the ability to transfer or sell its landfill rights. The Board has the ongoing responsibility to review the reasonableness of the HCIA's efforts in this regard, as well as the rate implications which result therefrom.

The HCIA has not entered into any arrangements for backup landfill capacity, in the event Empire Landfill is unable to accept waste for any reason. However, the HCIA indicates that the Empire License Agreement provides that Empire bears the entire responsibility for finding alternative disposal facilities and will insulate the HCIA entirely from the economic effect of such an event. Moreover, at least in the short term, the HMDC landfill provides backup capacity as well. Based on these factors, the Board concludes that the Empire License Agreement provides sufficient ratepayer protection.

With respect to the Transportation Agreement with Pucillo, its terms provide sufficient operational assurances and economic protection to the HCIA. The HCIA maintains an ongoing obligation to assure the adequacy of service provided by Pucillo and, moreover, Pucillo is subject to the ongoing jurisdiction of the Board.

Based on the above, the Board HEREBY APPROVES as reasonable and prudent the License Agreement and the Transportation Agreement and ORDERS the HCIA to file with the Board on an annual basis a report which states the total cumulative tons of solid waste that were disposed of at the Empire landfill during the preceding year and the amount of additional capacity available to the HCIA pursuant to the terms

of the License Agreement. The Board FURTHER ORDERS that the HCIA use reasonable efforts to mitigate any obligation to make up any deficiency payment to Empire, in accordance with the terms of the Landfill License Agreement, upon termination of the License Agreement.

The Board has reviewed the proposed tariff submitted by the HCIA and FINDS the tariff to be consistent with the terms of the stipulation and acceptable in regard to enforceability and technical requirements. Therefore, the Board HEREBY ACCEPTS the tariff as submitted.

The Board directs staff to implement expedited interim rate proceedings for collectors consistent with this Order, and authorizes staff to review filed tariffs for expedited relief administratively.

DATED: February 4, 1991

BOARD OF PUBLIC UTILITIES
BY:

Scott A. Weiner
SCOTT A. WEINER
PRESIDENT

George H. Barbour
GEORGE H. BARBOUR
COMMISSIONER

ATTEST:

Chrys Wilson
CHRYL WILSON
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utility Commissioners.

Exhibit G



State of New Jersey

Christine Todd Whitman
Governor

Department of Environmental Protection

Robert C. Shinn, Jr.
Commissioner

IN THE MATTER OF THE PETITION OF THE
ESSEX COUNTY UTILITIES AUTHORITY
FOR AN AWARD OF A FRANCHISE FOR
SOLID WASTE DISPOSAL IN ESSEX COUNTY

ORDER

SERVICE LIST ATTACHED

On January 31, 1995, the Essex County Utilities Authority (ECUA), a body corporate and public created pursuant to N.J.S.A. 40:14B-1 et seq., petitioned the Department of Environmental Protection (Department or DEP) for an updated solid waste disposal franchise pursuant to N.J.S.A. 48:13A-5. The County of Essex is the holder of orders granting a franchise issued by the Board of Public Utilities (Board or BPU)* on July 22, 1983 in Docket No. 827-650 and on October 27, 1987 in Docket Nos. SE87070552 and SE87070566.

The County of Essex has been designated as a solid waste management district pursuant to the provisions of the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. In accordance with the Solid Waste Management Act, the County is responsible for the development and implementation of a comprehensive solid waste management plan (County Plan) for the Essex County solid waste management district. The County Plan was approved by the Department with modifications on August 13, 1980 and has been amended from time to time, subject to review and approval by the Department. By resolution of the Essex County Board of Chosen Freeholders dated August 4, 1993, the ECUA was designated as the implementing agency for the County Plan.

* Pursuant to Reorganization Plan 002-1991, effective August 19, 1991, all authority and responsibility for the economic regulation of solid waste has been transferred from the BPU to the Department. Therefore, any reference hereinafter to the BPU denotes authority vested in the Department.

With the granting of a franchise to Essex County pursuant to N.J.S.A. 48:13A-5, the Board conferred upon Essex County the right to control and provide for the disposal of solid waste generated within Essex County. At the time the franchise was granted the solid waste disposal system for Essex County was planned to comprise a resource recovery facility and three transfer stations.

Significant changes to the system have occurred since the award of a franchise in 1987. The resource recovery facility in Newark has been operational since 1990 and accepts all solid waste types 10, 23, and processible type 27 generated within the County. One of the planned transfer stations (proposed for East Orange) was never developed, another (operated by Waste Management of New Jersey, Inc. in Newark) has ceased commercial operation, while the existing Solid Waste Transfer & Recycling transfer station located in Newark accepts all solid waste types 13, 25, and nonprocessable type 27 generated within the County prior to out-of-state disposal. Further, in a plan amendment adopted on August 4, 1993 and certified by the Department on December 10, 1993, Essex County designated the ECUA as the County's solid waste implementation agency in substitution for the County's Division of Solid Waste Management. Essex County, therefore, seeks an updated franchise to reflect the changes that have occurred since 1987 to the County's solid waste disposal system.

The Department has reviewed ECUA's request for a revised franchise and has determined, for the reasons outlined below, that the grant of a franchise to ECUA would be in the public interest. The ECUA therefore seeks a franchise of sufficient area and scope to assure the necessary and adequate flow of solid waste into current or future intradistrict and interdistrict solid waste facilities designated as the district disposal facility in accordance with the County Plan, and any duly adopted and approved amendments thereto, in order to attract and retain the necessary investors to finance the purchase and/or construction of solid waste facilities as may be necessary to achieve in-state self-sufficiency in solid waste disposal.

The Department's authority to grant a solid waste franchise is set forth at N.J.S.A. 48:13A-5 which provides as follows:

- a. The Board of Public Utilities may, by order in writing, when it finds that the public interest requires, award a franchise to any person or persons engaged in solid waste disposal at rates and charges published in tariffs or contracts accepted or to be accepted for filing by the BPU; provided, however, that the proposed franchise for solid waste disposal conforms to the district solid waste management plan of the solid waste management district or districts in which such service is to be located, as such plan shall have been approved by the DEP.

b. Franchises awarded pursuant to this section shall be of sufficient area and duration to support the estimated technical and economic needs of the disposal facility which is to serve the district or districts.

c. For the purpose of this section, franchise shall mean the exclusive right to control and provide for the disposal of solid waste, except for recyclable material whenever markets for those materials are available, within a district or districts as awarded by the BPU.

The ECUA has demonstrated its role in solid waste disposal for the proposed franchise area in fulfillment of N.J.S.A. 48:13A-5 by the following:

1. Essex County has an established district solid waste management plan which has been amended from time to time to reflect changes to the waste disposal system for the district;

2. The ECUA has been designated as the implementing agency for the County Plan and has served as that implementing agency since 1993;

3. The Department has granted to the ECUA on April 6, 1995 a Certificate of Public Convenience and Necessity for Solid Waste Collection and/or Disposal heretofore awarded to Essex County;

4. The Essex County Department of Health has been delegated responsibility to implement the County solid waste management plan in accordance with the County Environmental Health Act (CEHA), N.J.S.A. 26:3A2-33, giving it enforcement authority over the waste flow within Essex County consistent with the Department's rules and regulations, and has served as the CEHA agency for solid waste since December 1993.

5. The Department has approved on April 6, 1995 the agreement of assignment between the ECUA and Essex County which transfers all solid waste management responsibilities including the County contracts with the Essex County resource recovery facility and the Solid Waste Transfer & Recycling, Inc. transfer station.

The Department, having reviewed the application of the ECUA for a solid waste franchise pursuant to N.J.S.A. 48:13A-5, hereby grants such a solid waste franchise to the ECUA, subject to the following terms:

A. The franchise shall vest immediately with the ECUA. The franchise shall grant the ECUA the exclusive right and responsibility to control and provide for the disposal of all solid waste types 10, 13, 23, 25, and 27 generated within the Essex County Solid Waste Management District, subject to applicable law and regulation, except for recyclable materials whenever markets

for those materials are available.

B. All solid waste generated within the Essex County Solid Waste Management District shall be required to be delivered to the designated disposal facilities as identified in the County Plan, subject to applicable law and regulation, as long as such facilities comprise a part of the solid waste disposal system for Essex County, and thereafter to such additional or substitute facilities as may be developed by the ECUA or the County from time to time, to the extent that such facilities or contracts conform to the County Plan, as approved by the Department.

C. All contracts for the operation of the solid waste facilities, or the provision of solid waste services or disposal, shall be filed with the Department no later than thirty (30) days prior to their effective dates. The Department expressly reserves the right to review and approve, reject, or modify any contracts in accordance with its authority as provided by the Solid Waste Management Act and the Solid Waste Utility Control Act.

D. The franchise granted herein shall remain in effect until such time as the ECUA is no longer designated as the implementing agency responsible for the disposal of solid waste in accordance with the County Plan, or unless the Department shall revoke this franchise, at which time the franchise shall become null and void unless otherwise extended by DEP.

The Department affirms its continuing right and duty to ensure that any franchise awarded remains consistent with the requirements of N.J.S.A. 48:13A-5. Nothing contained in this Order shall be construed or is intended to limit the authority of the Department under law, including but not limited to N.J.S.A. 13:1E-1 et seq., N.J.S.A. 48:13A-1 et seq., and the regulations promulgated thereunder. In addition, this franchise award does not relieve the ECUA of its responsibilities concerning the disposal of solid waste within the franchise area as provided by the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., and regulations promulgated thereunder.

Dated: 4/6/95

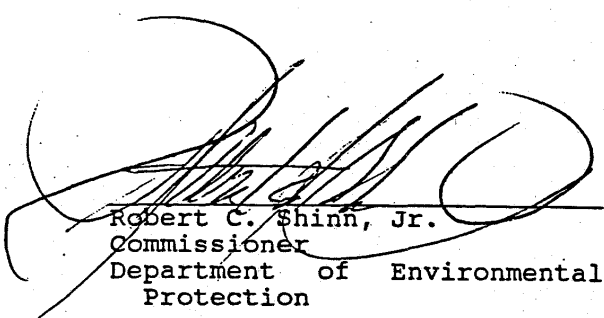

Robert C. Shinn, Jr.
Commissioner
Department of Environmental
Protection

Exhibit H

LOCATION :
HITECH

DATE :
9/26/02

Time	Hauler Name	NJDEP #	Plate #	Type
9:45 AM	Liberty	00968	AG58JA	RL Compactor
9:48 AM	East Coast	51276	X311YP	Roll Off
9:51 AM	Cipollini	13541	X22570	Roll Off
9:55 AM	Cooper	09116	X64N55	Roll Off
10:05 AM	Mack	49662	X9558F	Roll Off
10:10 AM	East Coast		X4151U	Roll Off
10:30 AM	Avanti	05961	AV591U	Roll Off
10:40 AM	Gulluzzo Bros	40114	AE4995	Roll Off
10:43 AM	Daytona		X9929J	Roll Off
10:55 AM	Jovin Demo	00897	AJ139C	RL Compactor
11:06 AM	Cipollini	04233	X2218C	Roll Off
11:07 AM	Interstate		AG377B	Roll Off
11:08 AM	Daytona	09219	X5890J	RL Compactor
11:12 AM	Mack	49695	XJ5391	Roll Off
11:16 AM	Manzo	05631	NY13396	Roll Off
11:20 AM	Avanti	05952	AD692H	Roll Off
11:21 AM	Standard Waste	09136	AF341R	Roll Off
11:33 AM	Daytona	09216	X7369N	Roll Off
11:38 AM	Cardella	09361	T65J4K	Tractor 18 Wheeler
11:40 AM	Galaxy		A357CF	Roll Off
11:45 AM	Gulluzzo	40115	X45875	Roll Off
11:47 AM	Midco	09795	X322286	Roll Off
11:49 AM	Cooper	09116	X64N55	Roll Off
11:49 AM	Small rack & body truck		X6589R	Rack Body
11:57 AM	ABDI	11149	AF7749	Roll Off
12:13 AM	Action		AC3110	Roll Off
12:30 AM	IWS		NY131TR	Tractor 18 Wheeler
12:35 AM	IWS			Roll Off
12:35 AM	Standard Waste		AC944C	Roll Off

LOCATION :
HITECH

DATE : 9 - 27
- 2002

Time	Hauler Name	NJDEP #	Plate #	Type
10:33 AM	Guliano	05291	AG569A	Roll Off
10:35 AM	Galuzzo	09085	AF499S	Roll Off
10:44 AM	Galuzzo	40060	X45875	Roll Off
10:45 AM	Avanti	05967	X8629G	Roll Off
10:47 AM	Carfil		X8482G	Roll Off
10:50 AM	Yannuzzi	07943	AE181G	Roll Off
10:55 AM	Finne Bedford	53655	04940022	Tractor 18 Wheeler Maine
10:54 AM	Demo Jr	05449	87366	Roll Off NY Pl
11:00 AM	Cooper	09116	X64N55	Roll Off
11:03 AM	ABDI	11195	AF7749	Roll Off
11:05 AM	Surprat		A1664	Tractor 18 Wheeler
11:19 AM	East Coast	09046	X499U	Roll Off
11:25 AM	Avanti	05961	AV5919	Roll Off
11:28 AM	Yannuzzi	04962	AF728	Roll Off
11:39 AM	Cipollini	04233	X2286C	Roll Off
11:40 AM	Avanti	05960	AD962V	Roll Off

LOCATION :
HITECH

DATE : 9 - 30
- 2002

Time	Hauler Name	NJDEP #	Plate #	Type
10:30 AM	Guliano	00495	X8761F	Roll Off
10:58 AM	Liberty	00982	AG583J	RL Compactor
11:00 AM	No Name	none	13127TR	Tractor 18 Wheeler NY Pl
11:05 AM	No Name	none	AE474G	Tractor 18 Wheeler
11:09 AM	Action	03155	AE113D	Roll Off
11:11 AM	Daytona	09217	X299J	Roll Off
11:12 AM	Standard	12611	AG6142	Roll Off
11:13 AM	Liberty	00968	AG58AJ	RL Compactor
11:25 AM	Cooper	09116	X64N55	Roll Off
11:28 AM	Town of Jefferson	none	MG38515	Dump Truck
11:39 AM	Avanti	05952	AD227X	Roll Off
11:40 AM	Manzo	05600	5440PA	Roll Off NY Pl
11:55 AM	R J Cuba	00936	X62Y29	Roll Off

Exhibit I

[[Date Prev](#)][[Date Next](#)] [[Chronological](#)] [[Thread](#)] [[Top](#)]

(erielack) High Tech Trains wants to serve NY:STB (fwd)

- Subject: (erielack) High Tech Trains wants to serve NY:STB (fwd)
 - From: Will <"alcoman_@_net.bluemoon.net">
 - Date: Tue, 11 Jul 2000 22:09:30 -0400 (EDT)
-

Anyone have ANY idea who these folks are and what this is all about in actuality????

Will Semanchuk-Enser Technical Support & Co-Network Administrator
The Blue Moon Internet Corp. - www.bluemoon.net "alcoman_@_bluemoon.net"

The Railfan Network	- www.Railfan.net
MoonMud	- telnet mud.bluemoon.net 4000
ZUHnet Buffalo, NY IRC Server	- irc.bluemoon.net 6667
Homepage	- alcoman.Railfan.net

- ----- Forwarded message -----
Date: Tue, 11 Jul 2000 22:03:26 EDT
From: "erail7_@_aol.com"
Reply-To: "nstier_@_egroups.com"
To: "NSTier_@_egroups.com"
Subject: [NSTier] High Tech Trains wants to serve NY:STB

31154 SERVICE DATE - LATE RELEASE JULY 7, 2000

CO

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33901