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July 31, 2003

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VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

Re: **Finance Docket No. 34192 (Sub-No. 1)**
Hi Tech Trans, LLC -- Petition for Declaratory Order --
Rail Transload Facility at Oak Island Yard, Newark, NJ

Dear Secretary Williams:

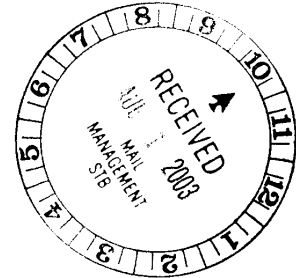
As the Board is aware, the above-captioned proceeding involves an effort by the New Jersey Department of Environmental Protection ("DEP") to shut down a rail transloading facility at Oak Island Yard in Newark, New Jersey operated by Hi Tech Trans, LLC ("Hi Tech") as a licensee of the Delaware & Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway. DEP issued a cease and desist order on May 28, 2003 requiring closure of the facility within twenty days. In the order, DEP claimed that Hi Tech had violated New Jersey law by not obtaining a construction and operating permit and a certificate of convenience and necessity for the facility. Hi Tech filed a petition for declaratory order and a petition for emergency order and other relief with the Board on June 17, 2003, and filed letters updating the Board on recent developments on June 27, 2003 and July 2, 2003.

While the Commissioner of the DEP has issued an order directing the agency to forbear for 60 days from seeking judicial enforcement of the cease and desist order, administrative proceedings have commenced in front of the Hon. Jeff S. Masin, the Acting Director and Chief Administrative Law Judge of the New Jersey Office of Administrative Law. The parties to that proceeding are Hi Tech; its president, David Stoller; the New Jersey Department of Law and Public Safety (acting on behalf of the DEP); and the Essex County Utilities Authority and Hudson County Improvement Authority ("the Counties").

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Mr. Vernon A. Williams

July 31, 2003

Page 2

Judge Masin has directed the parties to file briefs with respect to the issue of whether Hi Tech's transloading facility is within the exclusive jurisdiction of the Board and whether, as a result, the environmental permitting and licensing requirements under New Jersey law are preempted by the ICCTA, to the extent DEP is seeking to enforce those requirements against Hi Tech. Those issues, of course, overlap the issues which Hi Tech has asked the Board to decide in its petition for a declaratory order in this case. Judge Masin has also indicated that he will issue a decision with respect to those issues by August 15, 2003. See Exhibit A, attached hereto.

Enclosed with this letter are copies of the briefs filed with Judge Masin by DEP and the Counties (Exhibit B), as well as Hi Tech's reply brief (Exhibit C). As the Board will note, both DEP and the Counties have argued that Hi Tech's transloading facility is not within the Board's jurisdiction and that ICCTA preemption, therefore, does not apply to exempt that facility from the New Jersey environmental permitting and licensing requirements. More importantly, and perhaps more disturbingly, DEP and the Counties claim that the Board has already decided that Hi Tech's transloading facility is not within the Board's jurisdiction, citing the Board's decision in Hi Tech Trans, LLC -- Petition for Declaratory Order -- Hudson County, NJ, Finance Docket No. 34192 (STB served November 20, 2002) ("Hi Tech I"). Needless to say, in its decision in Hi Tech I, the Board did no such thing, something which the Board noted in the decision that it served in Hi Tech I on June 30, 2003.

In light of the imminence of a decision by Judge Masin on the issue of the Board's jurisdiction and in light of the claims made by DEP and the Counties (particularly regarding the "res judicata" effect of the Board's Hi Tech I order), we believe that it is imperative that the Board issue an order as soon as possible deciding whether it will grant Hi Tech's petition in this case and commence a declaratory order proceeding. The Board's order, moreover, should provide guidance to the parties just as the Board's initial order did in Borough of Riverdale -- Petition for Declaratory Order -- New York, Susquehanna & Western Railway Corp., Finance Docket No. 333466 (STB served September 10, 1999).

The issue of the Board's jurisdiction (and specifically, whether the Board has jurisdiction over Hi Tech's transloading facility) should be decided by the Board, and not by a state administrative law judge. An immediate decision by the Board will ensure that result and avoid the possibility of inconsistent decisions.

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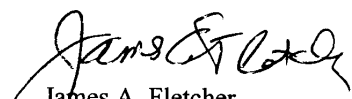
Mr. Vernon A. Williams

July 31, 2003

Page 3

Ten copies of this letter, with attachments, are enclosed for filing at the Board. One extra copy also is enclosed, and I would request that you date-stamp that copy to show receipt of this filing and return it to me in the provided envelope.

Very truly yours,



James A. Fletcher
Attorney for Hi Tech Trans, LLC

JAF:dg

Attachments

cc: Edward D. Greenberg, Esq. (via Federal Express)
Benjamin Clarke, Esq. (via Federal Express)
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July 11, 2003

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Re: N.J. Dept. of Environmental Protection v. Hi-Tech Trans, LLC and David Stoller,
Individually
OAL DKT. NO. ESW 05815-03
AGENCY DKT. NO. SWE PEA 0300001-U131

Dear Counsel:

This letter will confirm our discussions on July 7, 2003. Initially, counsel have all agreed that the issue in this case that needs to be decided is whether the DEP is preempted by Federal law from applying the provisions of 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 applicable regulations issued pursuant thereto, to the facility located at Bay Street, Oak Island Whale Yard, Newark, NJ. In addition, Mr. Indeck has advised that the Commissioner of DEP has agreed to consider argument with respect to the intervention which the Commissioner granted to the Essex County Utilities Authority and the Hudson County Improvement Authority in his letter order issued on June 26, 2003. As I advised, because the Commissioner has personally ruled upon the intervention issue, any further consideration of that matter at the administrative level must first be addressed to the Commissioner himself, as the Office of Administrative Law does not have jurisdiction to review what in essence is the final determination of the agency head on the narrow issue of intervention. However, if the Commissioner determines to transfer determination on the intervention application to the OAL, then that issue will be considered as well.

The parties have agreed that with respect to the Federal preemption issue there is no apparent need for a hearing nor are there any facts in dispute. Mr. Indeck will file his brief challenging application of the statutes by July 15, 2003, and Mr. Martin and Mr. Clark (subject

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EXHIBIT

A

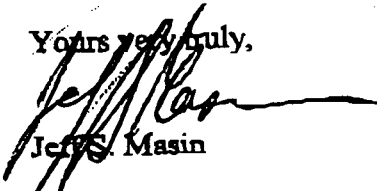
OAL DKT. NO. ESW 05815-03
July 11, 2003

to any change in the intervenor status) will file responses by July 22, 2003. Although we did not discuss it during the conference, I would allow Mr. Indeck until July 28, 2003, to file any reply. I will then take the matter under advisement and issue a decision as quickly as possible. I should note that my schedule is such that I intend to complete consideration of this case and issue a decision no later than August 15, 2003, and therefore request that you adhere with the briefing schedule that has been established. If for any reason it becomes apparent to you that that schedule cannot be kept, please notify me immediately as it might require that this matter be transferred to another judge.

As I noted should the Commissioner transfer consideration of the intervention issue to the OAL, I will be in touch with you by telephone to discuss how we will proceed to resolve that issue.

Thank you for your prompt cooperation in this matter.

Yours very truly,


Jerry S. Masin

mjm

c Joanne Restivo, Deputy Clerk

In the Matter of

HI TECH TRANS, LLC AND
DAVID STOLLER,

Administrative Order E.A.
ID#PEA0300001-U131.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: ESW 05815-03

**BRIEF OF INTERVENORS ESSEX COUNTY UTILITIES AUTHORITY
AND HUDSON COUNTY IMPROVEMENT AUTHORITY IN OPPOSITION
TO HI TECH'S AND DAVID STOLLER'S BRIEF ON PREEMPTION**

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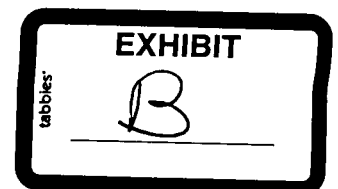


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY.....	2
STATEMENT OF FACTS.....	5
ARGUMENT.....	11
<u>POINT I</u>	
IT HAS ALREADY BEEN DECIDED, TWICE, THAT HI TECH'S OPERATIONS DO NOT FALL WITHIN THE PREEMPTIVE SCOPE OF THE ICCTA, AND HI TECH MAY NOT COLLATERALLY ATTACK THOSE DECISIONS IN THIS PROCEEDING	11
<u>POINT II</u>	
THE PREEMPTIVE SCOPE OF THE ICCTA DOES NOT EXTEND TO HI TECH'S OPERATION OF A SOLID WASTE TRANSFER STATION; THUS, HI TECH IS SUBJECT TO STATE AND LOCAL ENVIRONMENTAL LAWS GOVERNING SOLID WASTE FACILITIES.....	
A. Preemption of Historical Police Powers Is Not Favored	
B. Regulation of Solid Waste Matters Involve the Exercise of a Police Power Historically Reserved to the States	15
C. Hi Tech's Activities Are Not Protected By the Preemptive Provision of the ICCTA	19
D. Summary.....	26
CONCLUSION	27

TABLE OF AUTHORITIES

Federal Cases

<u>AGG Enterprises v. Washington County</u> , 281 F.3d 1324 (9th Cir. 2002).....	17, 23, 24
<u>Burlington Northern Santa Fe Corp. v. Anderson</u> , 959 F. Supp. 1288 (D. Mont. 1997).....	20
<u>CSX Transp., Inc. v. Georgia Public Service Comm'n</u> , 944 F. Supp. 1573 (N.D. Ga. 1996)	18, 20
<u>Florida East Coast Ry. Co. v. City of West Palm Beach</u> , 266 F.3d 1324	17, 21, 22
<u>Jones v. United States</u> , 529 U.S. 848 (2000).....	15
<u>Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson</u> , 48 F.3d 391 (9th Cir. 1995).....	17
<u>Loretto v. Teleprompter Manhattan CATV Corp.</u> , 458 U.S. 419 (1982).....	15
<u>Medtronic, Inc. v. Lohr</u> , 518 U.S. 470 (1996)	14, 15, 26
<u>New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.</u> , 514 U.S. 645 (1995).....	15
<u>Norfolk Southern Ry. v. City of Austell</u> , 1997 WL 1113647, *2 (N.D. Ga. 1997).....	19

Federal Administrative Agency Decisions

<u>Cities of Auburn, and Kent, WA - Petition for Declaratory Order - Burlington No. Railroad Co. - Stampede Pass Line</u> , STB Finance Docket No. 33200, 1997 WL 362017 (July 1, 1997).....	25, 26
<u>Hi Tech Trans, LLC -- Petition for Declaratory Order -- Hudson County, NJ</u> , STB Finance Docket No. 34192 (Nov. 19, 2002).....	
<u>Joray Trucking Corp. v. Common Carrier Application</u> , 99 M.C.C. 109 (1965).....	23

<u>King County, WA – Petition for Declaratory Order – Burlington No. Railroad Co. – Stampede Pass Line</u> , STB Finance Docket No. 33095, 1996 WL 545598 at *3 (I.C.C.) (Sept. 25, 1996)	24
<u>Riverdale Petition for Declaratory Order of the New York Susquehanna and Western Ry. Corp.</u> , 1999 WL 715272	20, 24

State Cases

<u>Bango v. Ward</u> , 12 N.J. 415 (1953)	13
<u>Borough of Princeton v. Board of Chosen Freeholders of the County of Mercer</u> , 169 N.J. 135 (2001)	16
<u>Enssilin v. Township of North Bergen</u> , 275 N.J. Super. 352 (App. Div. 1994)	12
<u>Ferger v. Local 483</u> , 94 N.J. Super. 554 (Ch. Div. 1967)	13
<u>Franklin Tower One, LLC v. N.M.</u> , 157 N.J. 602 (1999)	14, 15
<u>Gurrieri v. William Zinsser & Co. Inc.</u> , 321 N.J. Super. 229 (App. Div. 1999)	14
<u>In re Application of Saddle River</u> , 71 N.J. 14 (1976)	16
<u>In re Vermont Ry.</u> , 769 A.2d 648 (Vt. 2000)	24
<u>Mancuso v. Borough of North Arlington</u> , 203 N.J. Super. 427 (Law Div. 1985)	12, 13
<u>Monek v. Borough of South River</u> , 354 N.J. Super. 442 (App. Div. 2002)	11
<u>Oklahoma Corp. Comm'n v. Burlington Northern Santa Fe Ry. Co.</u> , 24 P.3d 368 (Ok. Civ. App. 2000)	24
<u>People v. Conrail Corp.</u> , 613 N.E.2d 784 (Ill. App. Ct. 1993)	18
<u>Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc.</u> , 91 Cal. App. 4th 678 (Ct. App. 2001)	17
<u>Township of Chester v. Panicucci</u> , 116 N.J. Super. 229 (App. Div. 1991)	15
<u>Velasquez v. Franz</u> , 123 N.J. 498 (1991)	11

<u>Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp.,</u> 163 <u>N.J.</u> 446 (2000)	20
<u>Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398 (1991)</u>	11, 12

Federal Statutes

28 <u>U.S.C.</u> § 2321	13
49 <u>U.S.C.</u> § 10501(b)	1
49 <u>U.S.C.</u> §10101	14, 18, 19
49 <u>U.S.C.</u> 14501(c)	17

State Statutes and Regulations

<u>N.J.S.A.</u> 13:1E-1.....	3
<u>N.J.S.A.</u> 13:1E-2.....	16
<u>N.J.S.A.</u> 13:1E-26.....	7
<u>N.J.S.A.</u> 13:1E-50.....	16
<u>N.J.S.A.</u> 13:1E-136.....	16
<u>N.J.S.A.</u> 48:13A-1	3
<u>N.J.S.A.</u> 48:13A-2	16
<u>N.J.A.C.</u> 7:26-2.4(b)(2).....	7, 9, 10
<u>N.J.A.C.</u> 7:26-2.8(f)	16
<u>N.J.A.C.</u> 7:26H-1.6(a)	16

Legislative History

H.R. Conf. Rep. No. 103-677.....	23
H.R. Rep. No. 104-311.....	18

Secondary Authority

New Jersey State Comm'n of Investigation, <u>Solid Waste Regulation</u> (April 1989).....	16
<u>Restatement (Second) of Judgments</u> , §27	12
<u>Restatement (Second) of Judgments</u> , §83	13

Having seen their preemption claim rejected by two other tribunals, respondents Hi Tech Trans, LLC and David Stoller (collectively, "Hi Tech"), evidently hope that the third time will prove to be a charm. Hi Tech's hopes should go unrewarded.

Hi Tech is the operator of a solid waste transfer station in Newark, New Jersey. It runs the facility for itself, for profit, and utilizes the services of Canadian Pacific Railroad ("CP") to ship the waste delivered to its facility. Reduced to its essence, Hi Tech's position is that, as a transfer station that uses rail services to dispose of waste, it is engaged in "transportation by a rail carrier" within the meaning of 49 U.S.C. § 10501(b), and is therefore exempt from state permitting laws and regulations that apply to all other types of solid waste transfer stations. Hi Tech cites no case endorsing its position, and common sense rejects it. Solid waste facilities with rail capacity are not categorically exempt from generally applicable environmental laws, and Hi Tech's staunch refusal to acknowledge that uncontroversial point of law does not immunize it from enforcement actions.

In an exercise of false bravado -- one designed to gloss over its inability to provide any valid precedent for its position -- Hi Tech baldly asserts, "There can be no serious debate that [the] type of rail transload facility operated by HTT [falls].. within the preemptive language of 49 U.S.C. section 10501 (b)(1)." (Hi Tech's Brief at 21). This would certainly come as news to the Surface Transportation Board ("STB"), which is the regulatory body charged with administering the federal statute on which Hi Tech relies. By decision dated November 19, 2002, the STB



emphatically rejected Hi Tech's preemption claim, and held that Hi-Tech's operations were "not integrally related to rail transportation services." See Certification of Benjamin Clarke, dated July 18, 2003, Exhibit D. It would also come as a shock to the Hon. Faith S. Hochberg, U.S.D.J., who has twice determined Hi Tech's preemption claim to be without merit. Clarke Cert., Exhs. F(1) and F(2).

The record establishes that Hi Tech has been operating a major solid waste facility without a permit, and without regard to the health and safety standards that the permitting laws serve to promote. As the prior decisions of the STB and the United States District Court rejecting Hi Tech's preemption claim recognize decisions that Hi Tech astonishingly omits even to mention in its brief -- Hi Tech is not exempt from state regulations, and its illegal operation should be brought to a firm, and overdue, halt.

PROCEDURAL HISTORY

On May 28, 2003, the Commissioner of the State Department of Environmental Protection ("DEP" or "Department") issued the Administrative Order ("Order") that is the subject of this appeal, pursuant to his authority under the Solid Waste Management Act ("SWMA"), N.J.S.A. 13:1E-1 et seq., and the Solid Waste Utility Control Act ("SWUCA"), N.J.S.A. 48:13A-1 et seq. The Commissioner cited Hi Tech for operating a solid waste facility without permits required by law, and gave Hi Tech 20 days to discontinue its illegal operations.

Hi Tech initially responded to the Order by filing a suit against DEP in federal court. The matter was referred to the Hon. Faith S. Hochberg, U.S.D.J., who was already handling a related suit filed by Hi Tech against the Hudson County Improvement Authority and Essex County Utilities Authority ("County Authorities"). Judge Hochberg promptly dismissed the action against DEP on abstention grounds. Hi Tech's appeal of that order is presently pending before the Third Circuit.

With its federal suit dismissed, Hi Tech filed a belated request for an administrative hearing on the Order, and requested the Commissioner to stay the Order pending such a hearing. The County Authorities sought, and were granted leave, to intervene, and opposed the stay application. By letter order dated June 30, 2003, the Commissioner denied Hi Tech's request for a stay, but conditionally agreed to defer enforcement of the Order for sixty (60) days. Hi Tech, by the terms of the Commissioner's June 30 Order, was directed to file an affidavit of compliance as of July 10. To the County Authorities' knowledge, no such affidavit has been filed.

In the Office of Administrative Law, a conference call was held on July 8.

During that call, counsel for Hi Tech conceded that Hi Tech had one, and only one, contention to raise in defense of itself.¹ Specifically, Hi Tech contends that the State's laws requiring solid waste facilities to obtain environmental permits are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10101 et seq., insofar as they apply to Hi Tech's facility. The parties agreed that this issue was legal in nature, and could be resolved by way of summary disposition. An expedited briefing schedule was accordingly set. Hi Tech filed its brief on July 15, and this brief, and DEP's brief, follow.

¹ In its brief, however, Hi Tech raises an additional argument, challenging the authority of the Commissioner and the OAL to adjudicate its preemption claim. As discussed at length in the brief submitted by DEP, see DEP Brief, Points II and III, this argument has no merit. Intervenors ECUA and HCIA, therefore, rely on DEP's response to Hi Tech's claim. This was an issue raised in Hi Tech's application for emergent relief it recently filed with the Appellate Division, which the Appellate Division promptly denied by Order dated July 17.

STATEMENT OF FACTS

Hi Tech Trans, LLC, is a limited liability company formed in April 2000. The stated purpose of the company, according to its initial Operating Agreement (Clarke Cert., Exh. A), was to obtain approvals and permits to construct, develop and operate a facility to transfer solid waste. Id., Section 2.5. The Operating Agreement specifically noted that Hi Tech would need to obtain permits and approvals from NJDEP and ECUA before commencing its operations, or an exemption letter from the STB stating that Hi Tech was not subject to state and local laws, but rather was a "railroad" under the STB's jurisdiction. Id., Section 1.1(a). The agreement contemplated that Hi Tech would be involved in the transfer of various types of solid waste, including soil, sludge, residuals and/or intermodal containers of waste. Id., Section 1.1(i).

On November 6, 2000, Hi Tech entered into two agreements (an "Operational License Agreement" and a "Transportation Agreement") with the Delaware & Hudson Railroad d/b/a Canadian Pacific Railroad ("CP"). Clarke Cert., Exh. B. Under the License Agreement (Exh. B(1)), Hi Tech obtained the right to use CP's property for the purpose of transferring "waste products." "Waste products" were defined to include C&D waste, non-hazardous contaminated soils, containerized sludge and other solid waste. Id., Section 1. In the Transportation Agreement (Exh. B(2)), "waste products" expressly included municipal solid waste as well. Id., Section 1. Hi Tech did not obtain any transferable interest in CP's property (the "Oak Island Yard"), nor did it obtain any exclusive possession or enjoyment of the premises. Clarke Cert., Exh. B(1)

(License Agreement, Sections 4(c) and 6). Hi Tech was to be responsible for all construction, installation, maintenance and improvement of its facilities equipment; CP was not involved in the construction of the facility. Id., Sections 4(c), 5(b).

Perhaps most importantly, in entering into the Agreements, CP and Hi Tech did not intend to create, and did not create, any agency relationship between the parties. On that issue, the Transportation Agreement expressly stated,

The parties acknowledge and agree that nothing in this Agreement shall be construed as creating an employment or agency relationship between HTT and the Railroad. Neither party may hold out or represent to any third party that there exists an agency or employment relationship with the other nor may either party enter into any contract or agreement that may be binding upon the other. [Clarke Cert., Exh. B(2) (Transportation Agreement, Section 17, entitled "Independent Contractor").]

An attachment to the Transportation Agreement referred to Hi Tech "customer" of the Railroad -- an accurate description of Hi Tech's relationship with CP. Id., Schedule A.

Notably, the License Agreement between Hi Tech and CP stated that the transfer facility would commence operations when Hi Tech "obtains all necessary permits, approvals or exemptions to operate the Premises as a transfer facility." Clarke Cert., Exh. B(1) (License Agreement, Section 2). See also Section 4(e) ("Prior to commencement of any operations, HTT shall obtain all permits or exemptions of evidence of same necessary for the construction, use and operation of the facility"); Exh. B(2) (Transportation Agreement, Section 18) ("Prior to any transportation hereunder, [Hi Tech] shall obtain any and all necessary permits or

licenses for the transportation, transfer, delivery, treatment, unloading, storage or disposal of the Waste Products.”) Hi Tech also agreed to use the premises in “strict conformance with all applicable rules, regulations and ordinances of federal, state and municipal authorities.” Clarke Cert., Exh. B(1) (License Agreement, Section 13.) See, e.g., N.J.S.A. 13:1E-26 (requiring all solid waste facilities to receive DEP approval prior to commencing operations); N.J.A.C. 7:26-2.4(b)(2) (requiring all solid waste facilities to be included in a District Solid Waste Management Plan).

Despite this agreement, in September 2001, without having obtained any necessary permits, Hi Tech commenced operation of a solid waste transfer station at the Oak Island Yard. The County Authorities, upon learning of Hi Tech’s commencement of operations, duly advised waste haulers in their districts that Hi Tech’s facility was unlicensed, and that waste originating in their counties should not be taken there. In November 2001 – i.e., two months after opening – Hi Tech received an informal opinion from the Secretary of the STB that likewise advised Hi Tech that its customers had no exemption from applicable state solid waste laws. See Hi Tech Exhibit G. Hi Tech paid no heed at all to that opinion letter.²

On April 4, 2002, Hi Tech filed a formal petition with the STB, seeking a declaratory order that its transfer station operations fell within that body’s

² Prior to receiving the November 2001 informal opinion letter, Hi Tech had obtained three favorable informal opinion letters from the STB Secretary regarding its preemption theory. Hi Tech Exhibits E, F and G. To obtain those opinion letters, which have no legal force and were superseded by the STB’s formal decision on Hi Tech’s declaratory order petition (Clarke Cert., Exh. D), Hi Tech provided the Secretary with slanted, materially false information. Notably, Hi Tech has failed to include the informational letters in the record.

exclusive jurisdiction. Clarke Cert., Exh. C(1). The Department, joined by the County Authorities, opposed that petition, arguing that Hi Tech was not a rail carrier (as it was then claiming to be), and that its operations did not fall within the preemptive scope of the ICCTA. Clarke Cert., Exh. C(2). In July 2002, with its STB petition still pending, Hi Tech also instituted a federal action against the County Authorities, again asserting that state and local solid waste laws and regulations were preempted by federal law. Clarke Cert., Exh. E(1).

On November 19, 2002, the STB dismissed Hi Tech's petition, and issued an opinion that emphatically rejected the notion that Hi Tech's operations fell under the STB's exclusive jurisdiction. The STB wrote:

The particular activities at issue here are not integrally related to rail transportation services. To the contrary, the impact of HCIA's single, truck-to-truck facility designation for the processing of C&D debris is on truck shipments within the state, not on interstate rail shipments. Hi Tech's attempt to link these activities as one continuous intermodal rail movement must fail. As NJDEP points out, under Hi Tech's theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption clearly does not go that far; nor does the Board's jurisdiction. [Clarke Cert., Exh. D.]

Hi Tech, in a deliberate tactical choice, determined not to appeal the Board's decision. Instead, it chose to pursue its claims in the federal suit. Back before the District Court, the County Authorities contended that the Board's decision was dispositive of Hi Tech's preemption claim. Hi Tech, in response, conceded that the Board's decision disposed of its preemption claim as originally pled, but sought leave to amend its complaint to assert a re-framed preemption

claim. Clarke Cert., Exh. E(2). On review of Hi Tech's tendered pleading, by order dated April 11, 2003 the District Court determined that it was a legal futility, and denied Hi Tech's request for leave to amend its complaint. Clarke Cert., Exh. F(1). The District Court thereafter dismissed the remaining claims of Hi Tech's complaint, and stayed further proceedings on the County Authorities' counterclaims, pending the outcome of Hi Tech's administrative appeal of the Commissioner's Order. Clarke Cert., Exh. F(2).

Despite the rejection of its preemption argument by the STB and the District Court, Hi Tech has not changed its business practices and continues its unlicensed intake and handling of solid waste. Clarke Cert., Exh. G (Dep. Tr. of David Stoller). Hi Tech's operations continue without abatement to this day, on a massive scale. Clarke Cert., Exh. I (photographs). It conducts this business in plain sight, directly below an overpass of Route 1 in Newark – a location that can, and should, trigger painful memories of another illegal solid waste facility that operated in Newark under a highway overpass, Hub Recycling. On any given day, from the vantage of that bridge, one can watch the trucks roll into Hi Tech's open-air "facility," dump their loads of waste -- with a large effusion of dust -- and head back for a refill. One can also see tires, tree trunks, and abundant litter and detritus strewn around the site. Id.

As a review of the photographs of Hi Tech's "facility" will show, Hi Tech has no real safety standards or practices in place. Moreover, since the STB has no regulations regarding the handling of solid waste and has declined to exercise jurisdiction over Hi Tech's facility, Hi Tech yields to no governmental authority

regarding its solid waste operations. The lawlessness of Hi Tech's operation is a matter of particular concern because, contrary to Hi Tech's portrayal of itself as strictly a "C&D" facility, there are no restrictions on the types of solid waste Hi Tech will accept. At its inception, Hi Tech contemplated handling not only C&D waste, but also hazardous waste, putrescible municipal solid waste ("MSW"), sludge, soil and "other" solid waste. Clarke Cert., Exhs. A and B. Indeed, even before Hi Tech officially commenced its transfer station operations in September 2001, it brokered a substantial shipment of hazardous waste. Clarke Cert., Exh. H(1). Hi Tech's founder, Ronald Klempner, testified at his deposition that Hi Tech is still open for such business, should the opportunity present itself. Id., Exh. H(2).

Unless the solid waste laws and regulations that the Legislature and Department have implemented to govern the operation of solid waste facilities are of no genuine value -- as Hi Tech clearly believes -- then it is beyond doubt that Hi Tech poses a severe and imminent threat to the public health and safety. Hi Tech's appeal of the Commissioner's Order is wholly without merit, and should be denied.

ARGUMENT

POINT I

IT HAS ALREADY BEEN DECIDED, TWICE, THAT HI TECH'S OPERATIONS DO NOT FALL WITHIN THE PREEMPTIVE SCOPE OF THE ICCTA, AND HI TECH MAY NOT COLLATERALLY ATTACK THOSE DECISIONS IN THIS PROCEEDING.

Hi Tech's appeal of the Department's Order is an exercise in sheer legal futility. Hi Tech identifies only one issue, a pure issue of law, to be resolved: whether its operations are exempt, under federal law, from state solid waste regulations. It has raised that issue in two other fora, and lost both times. Thus, Hi Tech should be estopped from raising its preemption challenge, yet again, in connection with this administrative proceeding.

The doctrines of res judicata and collateral estoppel bar the "relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991) (res judicata); Monek v. Borough of South River, 354 N.J. Super. 442, 454 (App. Div. 2002) (collateral estoppel). These doctrines encompass two separate legal concepts: claim preclusion and issue preclusion. Watkins v. Resorts Int'l Hotel & Casino, 124 N.J. 398, 422 (1991). Claim preclusion operates to preclude matters actually determined in an earlier action, as well as "relevant matters that could have so been determined," arising "out of the same transaction or occurrence." Id. at 412-13. Issue preclusion applies "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

Id. at 423, quoting Restatement (Second) of Judgments, §27.

Whether viewed as a matter of claim preclusion or issue preclusion -- and, in this case, either label could fairly be applied -- the record makes clear that Hi Tech is barred from re-asserting its preemption argument in this forum. Hi Tech chose its forum, or rather fora, for pursuit of that claim/issue, first when it asked the STB to declare that its operations were exempt from state law, and again when it commenced a federal suit raising the same claim. The County Authorities and the DEP participated in the STB proceedings, and prevailed in it. Hi Tech was told by the STB, in no uncertain terms, that its operations were “not integrally related to rail transportation services,” and did not fall within the STB’s exclusive jurisdiction under federal law. Clarke Cert., Exh. D.³

Having had its preemption claim rejected by the administrative body it petitioned for relief, and having failed to appeal that decision, Hi Tech cannot seek the same relief here. See Enssilin v. Township of North Bergen, 275 N.J. Super. 352, 369 (App. Div. 1994), certif. den. 142 N.J. 446 (1995) (“It is now generally recognized that judicial determinations by administrative agencies are entitled to preclusive effect if rendered in proceedings which merit such deference”); Mancuso v. Borough of North Arlington, 203 N.J. Super. 427, 433 (Law Div. 1985) (res judicata and collateral estoppel barred complaint where issues had been decided in an earlier administrative proceeding); Restatement

³ It should be noted that the STB rejected Hi Tech’s preemption claim even while accepting, for purposes of its analysis, Hi Tech’s inaccurate descriptions of its operations and business relations with CP. Hi Tech lost on its preemption claim, in other words, even under assumed facts that greatly overstated its actual “rail” status.

(Second) of Judgments §83, Comment b (1982)(final agency decisions should be “accorded the same finality that is accorded the judgment of a court”).

The bar Hi Tech faces is reinforced in this instance by the District Court’s holding, in the federal lawsuit that Hi Tech commenced against the County Authorities, that the STB’s decision disposes of Hi Tech’s preemption claim. Clarke Cert, Exhs. F(1) and F(2). On that basis, Judge Hochberg dismissed Hi Tech’s preemption claim in the federal suit. See Ferger v. Local 483, 94 N.J. Super. 554, 563 (Ch. Div. 1967) (finding judgment of the federal court “must be regarded in this action as dispositive of the issues there tried between these parties”). While Hi Tech can, at the appropriate time, seek appellate review of Judge Hochberg’s ruling, it cannot offer any valid reason for the Department to ignore it, or act in contradiction of it.

Hi Tech had an opportunity to appeal the STB’s decision to a federal circuit court, see 28 U.S.C. § 2321 (appeals of STB orders “shall be brought in the court of appeals”), and it deliberately chose not to do so. See Mancuso, supra, 203 N.J. Super. at 433-34 (trial judge refused to rule on the correctness of administrative law judge’s interpretation; plaintiff’s remedy was to file a timely appeal with the Appellate Division). This is not the appropriate forum, or an available forum, for Hi Tech to seek review of this settled legal issue. Cf. Bango v. Ward, 12 N.J. 415, 420 (1953) (Justice Brennan noting that “The public interest in putting an end to litigation, which underlies the principle of res judicata, as well as the interest of parties require that the loser in such case shall be denied a second chance to litigate the matters determined by the final judgment”).

POINT II

THE PREEMPTIVE SCOPE OF THE ICCTA DOES NOT EXTEND TO HI TECH'S OPERATION OF A SOLID WASTE TRANSFER STATION; THUS, HI TECH IS SUBJECT TO STATE AND LOCAL ENVIRONMENTAL LAWS GOVERNING SOLID WASTE FACILITIES.

As already noted, Hi Tech's sole basis for challenging the Order is the assertion that its business operation is exempt from state regulation under the ICCTA. Hi Tech, however, does not cite (and cannot cite) any case, statute or regulation that extends the preemptive scope of the ICCTA to non-rail entities like itself, nor does it cite authority that would provide to transfer stations a federal exemption from state solid waste laws. Thus, if Hi Tech is to be heard on its preemption claim yet again, the outcome should be the same: it should be rejected.

A. Preemption of Historical Police Powers Is Not Favored.

It is well recognized that preemption of state or local laws is not to be lightly presumed. Franklin Tower One, LLC v. N.M., 157 N.J. 602, 615 (1999). Courts exercise great restraint where spheres traditionally occupied by the states are subject to a preemption challenge. Gurrieri v. William Zinsser & Co. Inc., 321 N.J. Super. 229, 233 (App. Div. 1999). The presumption against preemption is even stronger where a police power is subject to challenge. Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) ("States traditionally have had great latitude under the police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."); New York State Conference of Blue Cross &

Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995)(exercise by local authority of historic police power is not to be superseded by federal statutes unless that was the clear and manifest purpose of Congress); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982)(preemption not appropriate where states traditionally have broad power to regulate); see also Township of Chester v. Panicucci, 116 N.J. Super. 229, 237 (App. Div. 1991)(federal preemption of local police powers must be explicit). Principles of federalism, including the recognition that “the States are independent sovereigns in our federal system,” Medtronic, supra, 518 U.S. at 485, dictate that in the absence of a clear intent to supercede the historic police powers of the States, Congress cannot “be deemed to have significantly changed the federal-state balance,” Jones v. United States, 529 U.S. 848, 860 (2000)(Stevens, J., concurring) (citing U.S. v. Bass, 404 U.S. 336, 349 (1971)).

The party claiming preemption bears the heavy burden of supporting that claim by “clear and manifest evidence.” Franklin Tower, supra, 157 N.J. at 615; see also New York Blue Cross, supra, 514 U.S. at 654. The starting point for any preemption analysis, therefore, is that Congress does not generally intend to supplant state law. Franklin Tower, supra, 157 N.J. at 615.

B. Regulation of Solid Waste Matters Involve the Exercise of a Police Power Historically Reserved to the States.

In this case, Hi Tech challenges the application of solid waste regulations that were enacted to address a number of this State’s concerns with the solid waste industry. Those problems, which have been well documented over the

years, include a drastic increase in this State's generation of solid waste, the vanishing of in-state landfill space to handle the State's waste disposal needs, inefficient and fragmented licensing requirements for the industry, and the heavy infiltration of organized crime within the industry. See generally In re Application of Saddle River, 71 N.J. 14, 21-22 (1976); N.J.S.A. 13:1E-136 (noting State's landfill capacity is limited, and that there is a need to develop alternative methods to dispose of waste); N.J.S.A. 13:1E-50 (finding need to strictly regulate disposal of hazardous waste because it tends to be disposed of improperly and illegally); New Jersey State Comm'n of Investigation, Solid Waste Regulation (April 1989)(documenting and evaluating need for solid waste reform in New Jersey during period of 1969-1989).

To remedy these problems, the Legislature enacted the SWMA and SWUCA to ensure greater governmental oversight in the solid waste industry. Borough of Princeton v. Board of Chosen Freeholders of the County of Mercer, 169 N.J. 135, 141 (2001). Thus, in this State, the collection, disposal and utilization of solid waste is a matter of "grave concern," and the enforcement of the State's solid waste laws and regulations is "in the public interest and for a public purpose." N.J.S.A. 48:13A-2 (SWUCA policy statement); see also N.J.S.A. 13:1E-2 (SWMA policy statement). The State ensures that solid waste is handled in a safe and efficient manner through strict enforcement of the permitting laws for solid waste facilities. See N.J.A.C. 7:26-2.8(f); N.J.A.C. 7:26H-1.6(a).

While New Jersey, with its small landmass and high population density, has a special interest in the safe handling and disposal of solid waste, it is not

unique in that regard. Courts in other jurisdictions have also recognized the need to maintain local governmental oversight in the solid waste industry. Recently, the Ninth Circuit underscored this point in rejecting a preemption argument raised by a trash hauler under the Federal Aviation Administration Act of 1994, 49 U.S.C. §14501(c) ("FAA Act"). The Ninth Circuit 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)
See also Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc., 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 light of this State's strong public policy to ensure the safe handling and disposal of solid waste and the express recognition by Congress that solid waste matters are traditionally reserved to the State for regulation, the ICCTA should

not be interpreted so to usurp the State's solid waste facility permitting laws, thereby affording Hi Tech an exemption from state regulation. See, e.g., Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1328-29 (finding ICCTA does not preempt local government regulations where those regulations do not encroach upon a field of historic federal dominance, and instead involve an exercise of inherent local powers). Like the statute at issue in AGG Enterprises and Pleasant Hill, there is no language within the ICCTA or in its legislative history to suggest that Congress intended to take away any police powers reserved to the States by the Constitution. H.R. Rep. No. 104-311, at 95-96, reprinted in 1995 U.S.C.C.A.N. at 807-08 (finding that traditional police powers retained by States would not be preempted by ICCTA). Hi Tech, therefore, has not show, and cannot show, that in bestowing the STB with exclusive jurisdiction over "transportation by rail carriers," 49 U.S.C. §10501(b), Congress intended to prevent States from exercising their historic dominance over solid waste regulation.

If the ICCTA is interpreted to exempt Hi Tech from the State's solid waste regulations, then Hi Tech's handling of solid waste would not be subject to any governmental oversight since the STB has not adopted any standards or rules to address the safe handling of solid waste. Against that void, it is "inconceivable" that Congress would have intended to oust States of their authority to regulate solid waste matters. Cf. CSX Transp., Inc. v. Georgia Public Service Comm'n, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996)(noting that under the ICCTA, States have the authority to regulate railroads "in the absence of federal regulation"). Taking

Hi Tech's argument to its logical conclusion, any business operation located on railroad property could then assert that it is not subject to any state regulation.

To find that the ICCTA preempts state solid waste regulations would also be contrary to established case law under the ICCTA's predecessor statute. In People v. Conrail Corp., 613 N.E.2d 784, 793 (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. (which was the predecessor to the ICCTA), preempted the Illinois Environmental Protection Act's prohibition of 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. Id. at 794. In particular, the court noted, "No provision of the Commerce Act exclusively grants jurisdiction over the transportation of waste from inception to disposal." Ibid.

C. Hi Tech's Activities Are Not Protected By the Preemptive Provision of the ICCTA.

Due to the absence of any legal authority to support its conclusion that Congress intended to preempt the States' solid waste regulations when enacting the ICCTA, Hi Tech argues in favor of an expansive reading of the preemption provision of the ICCTA, which states:

Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. 49 U.S.C. §10501(b)(emphasis added).

Hi Tech's preemption argument under the ICCTA is dependent, therefore, on showing that its operation of a solid waste facility falls within the meaning of "regulation of rail transportation."

On a threshold matter, Hi Tech has not provided any cases where the preemptive scope of §10501(b) has been applied to non-rail entities like itself. Instead, Hi Tech only relies on cases where the ICCTA has preempted the application of state laws to railroad activities. See Hi Tech's Brief at 15-19 (discussing Norfolk Southern Ry. v. City of Austell, 1997 WL 1113647, *2 (N.D. Ga. 1997); CSX Transportation, Inc. v. Georgia Public Service Comm'n, 944 F. Supp. 1573 (N.D. Ga. 1996); Burlington Northern Santa Fe Corp. v. Anderson, 959 F. Supp. 1288 (D. Mont. 1997); Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp., 163 N.J. 446 (2000); Riverdale Petition for Declaratory Order of the New York Susquehanna and Western Ry. Corp., 1999 WL 715272). Hi Tech's reliance on those cases is misplaced because each party in those cases advancing the preemption argument was recognized as a common carrier involved in the interstate transport by rail, and thus are "rail carriers" under the ICCTA. Hi Tech, on the other hand, is not entitled to "rail carrier" status under the ICCTA.⁴ See 42 U.S.C. §10102(5)(defining "rail carrier" to mean "a person providing common carrier transportation for compensation").

In light of the absence of legal authority on point to support its argument, Hi Tech argues that because the definition of "transportation" under the ICCTA is

⁴ Ironically, Hi Tech attempted to obtain "rail carrier" status, filing a notice of exemption with the STB in July 2001. Hi Tech, however, withdrew its request soon after its filing.

defined in broad terms, then its contractual relationship with CP brings it within the definition's meaning. The ICCCTA defines transportation as

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property[.] [49 U.S.C. 10102(9).]

However, the pertinent definitional sections of the ICCTA, such as "transportation," have never been interpreted to apply to the activities of non-rail entities that have contractual relationships with railroads. Indeed, a private business operator who entered into a contractual business relationship with a railroad raised a similar argument under the ICCTA, which the Eleventh Circuit rejected in Florida East Coast. In that case, the operator of an aggregate distribution company entered into a lease and trackage agreement with a railroad (the company was one of the railroad's largest customers) to conduct its business operation on the railroad's land. Florida East Coast, supra, 266 F.3d at 1326-27. This lease arrangement provided an easier way for the lessee to conduct its business operation because its product would be shipped via rail directly to the lessee's facility, to then be unloaded at the railroad site for distribution. Id. at 1327. The lessee, however, did not obtain the necessary local approvals prior to commencing its operations, and as a result, the City of West Palm Beach issued a

cease and desist order and notice of violations against the railroad and lessee. Ibid. The railroad and the lessee challenged the City's actions, claiming that the ICCTA exempted the lessee's business operation from local regulation.

The court in Florida East Coast stressed that the focus of a preemption analysis under the ICCTA is whether the application of local regulation constitutes "regulation of rail transportation." To determine what type of activities would fall within the meaning of that phrase, the court compared the language used by Congress in the ICCTA with language used by Congress in other federal statutes to preempt state laws, and the court concluded that, by enacting the ICCTA, Congress intended

to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or govern[ing]' rail transportation, [citation omitted] while permitting the continued application of laws having a more remote or incidental effect on rail transportation. [Id. at 1331.]

A simple review of the SWMA and SWUCA confirm that they do not attempt to "manage" or "govern" rail transportation. Instead, they are general applicable environmental laws that apply to any solid waste facilities operating in the State.

Like the lessee in Florida East Coast, Hi Tech argues in favor of a broad interpretation of the defined terms of the ICCTA to suggest that Congress intended to expand the scope of §10501(b) to customers of railroads that build facilities on railroad land to conduct their private business operations. See Hi Tech's Brief at 20. That argument should be rejected for reasons similar to those identified by the Eleventh Circuit in Florida East Coast.

Reviewing the history of the terminology used by Congress to express the preemptive reach of the ICCTA – “regulation of rail transportation” -- the court in Florida East Coast found that Congress’ purpose for defining the operative term “transportation” broadly was to bring within its reach those activities that would benefit the general public, as opposed to the interests of individual private entities. Id. at 1336. The court concluded that because the lessee’s use of the railroad’s property served “no public function,” but rather was a contractual arrangement between the railroad and the lessee that facilitated the operation of a private business enterprise, the ICCTA did not apply to the lessee’s business operation. Ibid.

To interpret the definition of transportation or the jurisdictional section of the ICCTA to cover Hi Tech’s operation of an unpermitted solid waste facility would not serve any public purpose. In fact, it would be in the best interest of the public and the environment for Hi Tech to comply with the State’s solid waste laws. Hi Tech, like the lessee in Florida East Coast, is a customer of a railroad, engaged in a for-profit business enterprise that is located on railroad property. Thus, it would be contrary to the legislative intent of the ICCTA to extend its preemptive scope to Hi Tech’s unlicensed solid waste facility.

The Ninth Circuit’s reasoning in the AGG Enterprises case provides additional support for concluding that Hi Tech’s operation falls outside the preemptive provision of the ICCTA. Like the statute at issue in the AGG Enterprises, the term “property” is contained within the definition of transportation under the ICCTA, and is undefined. In AGG Enterprises, the court

of analyzing the preemption language contained in the FAA Act. AGG Enterprises, supra, 281 F.3d at 1329. A review of the legislative history of federal statutes revealed that under ICC case law, garbage and refuse are not considered property. Ibid. (citing H.R. Conf. Rep. No. 103-677, at 85 (1994)); see also Joray Trucking Corp. v. Common Carrier Application, 99 M.C.C. 109 (1965)(finding that C&D waste does not constitute “property” under the Interstate Commerce Act). In light of that legislative history, and the understanding that solid waste matters are generally handled at the local level, the Ninth Circuit held that

[a]bsent a clear and manifest purpose, if not an explicit instruction, from Congress, we decline to divest states and local governments of [the regulation of solid waste collection matters], crucial to health and safety. To the contrary, Congress’ intent *not* to preempt the area of solid waste collection is unambiguous. [AGG Enterprises, supra, 281 F.3d at 1329.]

Similarly, the use of the term “property” by Congress in the ICCTA demonstrates that the Act does not encompass the transportation of waste. This conclusion is further supported by the general legislative history of the ICCTA. By including preemptive language in the ICCTA, Congress intended only to remove “direct economic regulation by the States” on activities of the surface transportation industry, “as opposed to the incidental effects that inhere in the exercise of traditionally local police powers.” Florida East Coast, supra, 266 F.3d at 1337; see also In re Vermont Ry., 769 A.2d 648, 651-52 (Vt. 2000)(discussing legislative history of ICCTA, and finding Act did not preempt local zoning

regulation of the railroad's salt shed facility); Oklahoma Corp. Comm'n v. Burlington Northern Santa Fe Ry. Co., 24 P.3d 368 (Ok. Civ. App. 2000)(discussing legislative history of the ICCTA, and finding state could exercise its authority to direct railroad to repair or replace fence located along right of way). Thus, the limitations of the preemptive scope of the ICCTA have been recognized in court decisions and decisions issued by the STB. Ibid.; see also King County, WA – Petition for Declaratory Order – Burlington No. Railroad Co. – Stampede Pass Line, STB Finance Docket No. 33095, 1996 WL 545598 at *3 (I.C.C.) (Sept. 25, 1996)(STB noting that “[t]he ICCTA does not usurp the right of state and local entities to impose appropriate public health and safety regulation on interstate railroads.”)

For instance, in Borough of Riverdale - Petition for Declaratory Order - The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466, 1999 WL 715272 (Sept. 9, 1999), the STB discussed how §10501(b) only applies to railroad activities that are integrally related to the provision of interstate rail service. Specifically, in the Riverdale case, where the railroad proposed to construct a truck terminal and corn processing plant in a residential zone, the STB stated that if the railroad's facility

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. at *7.]

Cf. Florida East Coast Ry., supra, 266 F. 3d at 1328 (finding that ICCTA does not preempt the application of local regulations to a facility located on railroad property).

In Cities of Auburn, and Kent, WA – Petition for Declaratory Order – Burlington No. Railroad Co. – Stampede Pass Line, STB Finance Docket No. 33200, 1997 WL 362017 (July 1, 1997), the STB also drew a distinction between railroad activities that are exempt from state regulation and those that are not; the later includes solid waste regulations:

[T]here are areas with respect to railroad activity that are reasonably within the local authority's 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 *6 (emphasis added).]

Hi Tech, in its brief, mentions the existence of DEP "draft regulations" in an effort to suggest that the State has recognized the ICCTA would apply to exempt its operation of a solid waste facility from the State's solid waste laws. Hi Tech's argument, however, is unpersuasive for many reasons. First, those draft

regulations were never officially published, and do not have the effect of law. They were merely proposed for comment. Second, even if the regulations were in force and effect, Hi Tech would not receive the benefit of the exemption set forth therein because it is not recognized as a rail carrier under the law. See discussion supra note 3.

D. Summary.

Given the strong State public policy regarding the collection, transfer and disposal of solid waste, preemption should not apply in this case. See generally Medtronic, Inc., supra; New York Blue Cross, supra. Additionally, Hi Tech cannot cite any authority to suggest the ICCTA preemption provision was intended to apply to non-rail entities like itself. Indeed, Hi Tech's tortured interpretation of the ICCTA has not been adopted by any prior court or STB decision, and its preemption argument has already been rejected by the STB and the federal courts. Thus, the State's solid waste laws and regulations should be applied to Hi Tech and its operations.

CONCLUSION

For the foregoing reasons, Hi Tech's appeal of the Administrative Order should be denied.

Respectfully submitted,

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STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, OFFICE OF SOLID
WASTE COMPLIANCE AND
ENFORCEMENT,

Petitioner,

v.

HI TECH TRANS, LLC,
and DAVID STOLLER,

Respondents.

Administrative Action

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY, DEPARTMENT OF
ENVIRONMENTAL PROTECTION, OFFICE OF SOLID WASTE COMPLIANCE AND
ENFORCEMENT

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TABLE OF CONTENTS

	<u>Page Nos.</u>
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	3
A. State Administrative Proceedings	3
B. Surface Transportation Board Litigation	5
C. Hi Tech Trans, LLC v. Hudson County Improvement Authority et al, No. 02-3781 (D.N.J.)	6
D. Hi Tech Trans, LLC v. New Jersey Department of Environmental Protection (No. 03-2751) (D.N.J.)	8
E. Third Circuit Litigation	10
THE REGULATORY SCHEME	12
COUNTERSTATEMENT OF FACTS	16

ARGUMENT

POINT I

HI TECH'S ACTIVITIES ARE NOT WITHIN THE SCOPE OF FEDERAL PREEMPTION.	21
--	----

POINT II

THE OFFICE OF ADMINISTRATIVE LAW IS THE APPROPRIATE FORUM TO HEAR AND DETERMINE RESPONDENTS' CHALLENGE TO THE DEP'S ADMINISTRATIVE ORDER PURSUANT TO THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES, ESPECIALLY BECAUSE RESPONDENTS HAVE FAILED TO SET FORTH A FACIAL CHALLENGE TO ANY STATE STATUTE OR REGULATION, BUT HAVE MERELY ALLEGED AS A DEFENSE THAT THE SOLID WASTE MANAGEMENT ACT AND SOLID WASTE UTILITY CONTROL ACT ARE UNCONSTITUTIONAL AS APPLIED TO RESPONDENTS' SOLID WASTE TRANSFER FACILITY.	39
--	----

POINT III

RESPONDENTS' ARGUMENT THAT BOTH THE OAL AND THE COMMISSIONER ARE SOMEHOW DISQUALIFIED TO CONSIDER THIS MATTER IS BASELESS.	44
CONCLUSION	48

TABLE OF AUTHORITIES

CASES CITED

<u>Abbott v. Burke</u> , 100 N.J. 269 (1985)	39, 45
<u>AGG Enterprises v. Washington County</u> , 281 F.3d 1324 (9th Cir. 2002)	36, 37
<u>Ahto v. Weaver</u> , 39 N.J. 418 (1963)	43
<u>Auburn & Kent, WA - - Pet. For Declar. Order - - Stampede Pass Line</u> , 2 S.T.B. 330 (1997), 1997 WL 11352	31
<u>Board of Education of the Upper Freehold Regional School District v. State Health Benefits Commission</u> , 314 N.J. Super. 486 (App. Div. 1998)	44, 46
<u>Borough of Riverdale - Petition for Declaratory Order</u> , (STB Finance Docket No. 33466) 1999 WL 715272 (STB served September 10, 1999)	30, 37
<u>Brunetti v. New Milford</u> , 68 N.J. 576 (1975)	39, 40
<u>Burford v. Sun Oil Co.</u> , 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943)	8
<u>In re Carberry</u> , 114 N.J. 574 (1989)	45, 47
<u>City of Atlantic City v. Laezza</u> , 80 N.J. 255 (1979)	40
<u>Desilets v. Clearview Regional Bd. of Educ.</u> , 137 N.J. 585 (1994)	41

<u>Donadio v. Cunningham</u> , 58 <u>N.J.</u> 309 (1971)	43
<u>Exxon Corp. v. Governor of Maryland</u> , 437 <u>U.S.</u> 117, 132, 98 <u>S.Ct.</u> 2207, 57 <u>L.Ed.2d</u> 91 (1978), <u>reh'g denied</u> , 439 <u>U.S.</u> 884, 99 <u>S.Ct.</u> 232, 58 <u>L.Ed.2d</u> 200 (1978)	36
<u>Federal Compress & Warehouse Co. v. McLean</u> , 291 <u>U.S.</u> 17, 54 <u>S.Ct.</u> 267, 78 <u>L.Ed.</u> 622 (1934)	36
<u>Fletcher Granite Company, LLC -</u> - <u>Petition for Declaratory Order</u> , (STB Finance Docket No. 34020) 2001 WL 729418 at *2 (STB served June 29, 2001)	31, 37
<u>Florida East Coast Railway Company v.</u> <u>City of West Palm Beach</u> , 266 <u>F.3d</u> 1324 (11th Cir. 2001)	36
<u>Hi Tech Trans, LLC-Petition for Declaratory Order</u> (STB Finance Docket No. 34192) 2002 WL 31595417 at *1 (STB served November 20, 2002)	5, 6, 30
<u>Hi Tech Trans, LLC-Operation Exemption -Over Lines</u> <u>Owned by Canadian Pacific Railway and Connecting Carriers</u> , (STB Finance Docket No. 33901) 2000 WL 1010603 (STB Served July 21, 2000)	24
<u>Joint Petition for Declaratory Order - - Boston</u> <u>and Maine Corporation and Town of Ayer, MA</u> , ("Town of Ayers") (STB Finance Docket No. 33971) 2001 WL 458685 at *8 (STB served May 1, 2001)	30, 31, 37
<u>In re Kallen</u> , 92 <u>N.J.</u> 14 (1983)	47
<u>Napier v. Atlantic Coast Line</u> , 272 <u>U.S.</u> 605, 47 <u>S.Ct.</u> 207, 209 71 <u>L.Ed.</u> 432 (1926)	35

<u>North San Diego County Transit Development Board - - Petition for Declaratory Order</u> STB Finance Docket No. 3411) 2002 WL 7924265 (STB served August 21, 2002)	31
<u>Paterson Redevelopment Agency v. Schulman,</u> 78 <u>N.J.</u> 378, 387 (1979), <u>cert. denied</u> , 444 <u>U.S.</u> 900, 100 <u>S.Ct.</u> 210, 62 <u>L.Ed.2d</u> 136 (1979)	39, 40
<u>Penn Dairies v. Milk Control Commission,</u> 318 <u>U.S.</u> 261, 63 <u>S.Ct.</u> 617, 87 <u>L.Ed.</u> 748 (1943)	36
<u>Roadway Express Inc. v. Kingsley</u>	40
<u>In re Solid Waste Customer Lists,</u> 106 <u>N.J.</u> 508, A.2d 386 (1987)	45
<u>Townsend v. Yeomans,</u> 301 <u>U.S.</u> 441, 57 <u>S.Ct.</u> 842, 81 <u>L.Ed.</u> 1210 (1937)	36
<u>In re Uniform Admin. Procedural Rules,</u> <u>supra</u> , 90 <u>N.J.</u>	45
<u>United States v. Salerno,</u> 481 <u>U.S.</u> 739, 107 <u>S.Ct.</u> 2095, 95 <u>L.Ed.2d</u> 697 (1987)	42
<u>Wilde v. Wilde,</u> 341 <u>N.J. Super.</u> 381, (App. Div. 2001)	42
<u>Withrow v. Larkin,</u> 421 <u>U.S.</u> 35, 95 <u>S.Ct.</u> 1456, 43 <u>L.Ed.2d</u> 712 (1975)	44, 47
<u>Younger v. Harris</u> 401 <u>U.S.</u> 37,	8

STATUTES CITED

<u>N.J.S.A.</u> 13:1 E-1 <u>et seq</u>	3
<u>N.J.S.A.</u> 13:1E-1 to -207	12

<u>N.J.S.A.</u> 13:1E-2(a)	12
<u>N.J.S.A.</u> 13:1E-2(b) (6)	12
<u>N.J.S.A.</u> 13:1E-4(a)	12
<u>N.J.S.A.</u> 13:1E-9(b)	12
<u>N.J.S.A.</u> 13:1E-9(e)	14
<u>N.J.S.A.</u> 48:13A-1 <u>et seq</u>	3
<u>N.J.S.A.</u> 48:13A-6	14
<u>N.J.S.A.</u> 48:13A-12(b)	14
<u>N.J.S.A.</u> 52:14F-8	46
42 <u>U.S.C.A.</u> § 6901(a) (4)	37
49 <u>U.S.C.</u> § 10102(5)	7, 23, 34
49 <u>U.S.C.</u> § 10501(b)	<u>passim</u>

REGULATIONS CITED

<u>N.J.A.C.</u> 7:26-1.1 <u>et seq.</u>	12
<u>N.J.A.C.</u> 7:26-1.4	12, 13
<u>N.J.A.C.</u> 7:26-1.6(c)	13
<u>N.J.A.C.</u> 7:26-2.8(f)	13, 19, 20
<u>N.J.A.C.</u> 7:26-2.10	33
<u>N.J.A.C.</u> 7:26-2.13(g)	16
<u>N.J.A.C.</u> 7:26-2.13(g) (1) (iii)	13, 16
<u>N.J.A.C.</u> 7:26-2.13(g) (iv)	16

<u>N.J.A.C.</u> 7:26-2.13(h)	13
<u>N.J.A.C.</u> 7:26-2B.5	33
<u>N.J.A.C.</u> 7:26-2B.9	33
<u>N.J.A.C.</u> 7:26-16 and 16A	13
<u>N.J.A.C.</u> 7:26-16.2	13
<u>N.J.A.C.</u> 7:26-5.4(g)(2)	14
<u>N.J.A.C.</u> 7:26H-1.6(a)	19, 20
<u>N.J.A.C.</u> 7:26H-1.8	14
<u>N.J.A.C.</u> 7:26H-1.8(a)(1)	14
<u>N.J.A.C.</u> 7:26H-1.8(a)(2)	14
49 <u>C.F.R.</u> §1150.32	23

RULES CITED

<u>R.</u> 2:2-3(a)(2)	40
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PRELIMINARY STATEMENT

This is the latest in a series of proceedings commenced by respondents Hi Tech Trans, LLC ("Hi Tech"), and David Stoller, its chief executive, in their dogged effort to evade compliance with all environmental health and safety laws of the State of New Jersey. Hi Tech is in the business, *inter alia*, of facilitating the disposal of construction and demolition ("C&D") solid waste, and operates a transfer station at which the C&D waste is dumped and then loaded in railcars for shipment out of the State of New Jersey. In their brief, respondents argue nothing less than that the State of New Jersey, Department of Environmental Protection, should be prohibited from enforcing as against Hi Tech any of the environmental permitting and licensure regulations promulgated by the State for the protection of the health, safety and welfare of its citizens.

Respondents are aware that New Jersey, pursuant to its inherent police power, requires an operator of a transfer station to obtain a certificate of public convenience and necessity and a solid waste facility permit, in order to minimize the risk of injury to the environment and the health and safety of the public. Nevertheless, Hi Tech has made no attempt to comply with those requirements or to otherwise ensure that its operations are consistent with the environmental regulations applicable to the

operation of all other transfer stations in New Jersey. Instead, Hi Tech has expended considerable resources in prosecuting actions before the United States District Court, the United States Surface Transportation Board ("STB"), the United States Court of Appeals for the Third Circuit, and now the State of New Jersey, Office of Administrative Law, in an effort to avoid all state regulation of Hi Tech's activities.

PROCEDURAL HISTORY

A. State Administrative Proceedings

On May 28, 2003, DEP served an Administrative Order In the Matter of Hi Tech Trans, LLC and David Stoller (Matter EA ID# PEA030001-U131). (Rb, Exh. I).¹ Alleging, *inter alia*, that Hi Tech was receiving construction and demolition waste in a facility that was neither licensed nor in compliance with the engineering and environmental specifications required for such sites, and that it was charging fees from solid waste haulers for depositing waste at the facility without having a required tariff on file, the Administrative Order charges Hi Tech and David Stoller, its President and Chief Executive Officer, with violations of the New Jersey Solid Waste Management Act, N.J.S.A. 13:1 E-1 et seq., the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq. and the regulations promulgated thereunder. Under the terms of the Order, Hi Tech and Mr. Stoller were directed to cease and desist from these activities within 20 calendar days of receipt (i.e., before June 17, 2003.)

Respondents were entitled to request a hearing, as long as the hearing was requested prior to the June 17 compliance date. (Id. at 8,9.) The order went on to recite the potential penalties that

¹ References to Respondents' July 15, 2003 brief shall be made by the abbreviation "Rb."

could be imposed in the event Hi Tech and/or Mr. Stoller were found to have violated the cited statutes. Rather than immediately seek a hearing or even a stay from DEP, Hi Tech sought emergency relief from the federal District Court and the United States Court of Appeals for the Third Circuit, which efforts were denied by the courts as described below. Ultimately, on June 18, 2003, Hi Tech and Mr. Stoller did file a request with DEP for a hearing and stay. In that pleading, Hi Tech specifically contended that the allegations set forth in the Administrative Order are fatally defective because its facility is allegedly not subject to "NJDEP's solid waste facility regulations."

On June 30, 2003, the Hon. Bradley M. Campbell, Commissioner of Environmental Protection, issued a decision in which he denied Hi Tech's request for a stay, but nevertheless granted emergency relief directing DEP's Office of Solid and Hazardous Waste Compliance and Enforcement to "forbear from seeking judicial enforcement of the Administrative Order for 60-days" as long as Hi Tech complied with a series of enumerated conditions set forth in the decision.²

² In his cover letter to the parties, Commissioner Campbell noted that the charges against Hi Tech were "serious" and that unlawful solid waste facilities adversely affect local residents, customers and other participants in the solid waste industry and that they "interfere with the statutory mandate of the Department and the counties to plan for and police solid waste operations within their jurisdictions." (Id. June 30, 2003 letter at 2.)

Thereafter, the Administrative Order was transmitted to the Office of Administrative Law (OAL) with a request that respondents be granted an expedited hearing. The matter was assigned to the Hon. Jeff S. Masin, Chief Administrative Law Judge. By letter dated July 11, 2003, Judge Masin confirmed that all counsel had agreed the issue to be decided in this case is "whether the DEP is preempted by Federal law from applying the provisions of" the applicable state solid waste statutes and regulations. Further, the parties agreed that "with respect to the Federal preemption issue there is no apparent need for a hearing nor are there any facts in dispute." Thus, Respondents agreed to file their motion challenging the application of the statutes by July 15, 2003, with responding papers due July 22, 2003.

In addition to the instant administrative proceeding, respondents have initiated litigation directly challenging the DEP's Cease and Desist Order in several federal forums as described more fully below.

B. Surface Transportation Board Litigation

On April 4, 2002, Hi Tech filed a petition for declaratory order seeking a finding that the Surface Transportation Board ("STB") has exclusive jurisdiction over Hi Tech's activities and those of its customers. Hi Tech Trans, LLC-Petition for Declaratory Order (STB Finance Docket No. 34192) 2002 WL 31595417

at *1 (STB served November 20, 2002). Hobbs Cert., Exh. A.³ On November 20, 2002, the STB issued its ruling, denying Hi Tech's petition in its entirety, stating:

Hi Tech's attempt to link these activities as one continuous intermodal rail movement must fail. As NJDEP points out, under Hi Tech's theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption clearly does not go that far; nor does the Board's jurisdiction. (Id. at *2).

On June 17, 2003, Hi Tech filed a new petition for declaratory order with the STB. Through this new petition, Hi Tech apparently seeks to have the STB reconsider its prior decision and now hold that respondents' activities are immune from any state or county environmental regulation due to the preemption provision in 49 U.S.C. §10501(b).

C. Hi Tech Trans, LLC v. Hudson County Improvement Authority et al, No. 02-3781 (D.N.J.)

Prior to the DEP's issuance of the Administrative Order, Hi Tech filed a complaint in the U.S. District Court for the District of New Jersey seeking to enjoin enforcement of the Hudson County Improvement Authority ("HCIA") and Essex County Utilities Authority ("ECUA") waste flow control regulations, which generally regulate the method for handling and disposing of waste originating within

³ References to the July 22, 2003 Certification of Rebecca Hobbs shall be made by the abbreviation "Hobbs Cert."

the counties of New Jersey. Among the arguments raised by Hi Tech was that its activities, and those of the trucking companies which bring the waste to its facility, are preempted by 49 U.S.C. § 10501(b). In addition to contesting the preemption argument, HCIA and ECUA counterclaimed, seeking to enjoin further operations of Hi Tech pending its compliance with the applicable state and local environmental statutes and regulations and to recover damages pertaining to its past activities.

While this proceeding is still pending, in an order dated April 1, 2003, Judge Hochberg reiterated her prior finding that Hi Tech's challenge to the New Jersey waste flow control laws were not preempted by § 10501(b) and that Hi Tech was collaterally estopped, due to its failure to appeal the STB's Decision, from amending its complaint in an attempt to restate a different preemption argument. Hobbs Cert., Exh. B. And on June 30, 2003, Judge Hochberg issued a further decision dismissing all of Hi Tech's remaining claims, noting that Hi Tech had withdrawn its claim that it had the status of a rail carrier, as defined in 49 U.S.C. § 10102(5), and that Hi Tech's activities were therefore not preempted by § 10501(b) from state and local law enforcement. (Hobbs Cert., Exh. C, at 1-2 and n.2.)⁴

⁴While their claims for damages are still pending, the court did not grant the HCIA and ECUA requests to enjoin Hi Tech's activities, ruling that this issue was moot since DEP had

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D. Hi Tech Trans, LLC v. New Jersey Department of
Environmental Protection (No. 03-2751) (D.N.J.)

As noted above, rather than seeking a stay of the State's Administrative Order or exercising their rights to a hearing before DEP, respondents initially filed a complaint in the federal District Court requesting that the court enjoin enforcement of the cease and desist order. Due to its close relationship to the issues raised in the HCIA case, No. 02-3781, supra, this matter was also assigned to Judge Hochberg. Noting that Hi Tech had not availed itself of its right to request an administrative hearing or stay from DEP, and finding that the complaint was barred pursuant to the provisions of the Eleventh Amendment, the court denied Hi Tech's motion for a preliminary injunction in a decision dated June 16, 2003. (Hobbs Cert., Exh. D)

In that order, the court observed that Hi Tech might be able to cure the Eleventh Amendment defect by amending its complaint to name a DEP official, but, if it did so, the court would consider abstaining pursuant to the abstention doctrine enunciated by the Supreme Court in Younger v. Harris 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) and Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). Shortly thereafter, Hi Tech

issued an Administrative Order requiring Hi Tech to cease and desist its unlawful activities. (Id. at 2-3, n.3 and 6.)

renewed its request to enjoin DEP from enforcing the order and amended its complaint in order to add two officials of DEP as defendants in the matter.⁵ In an order issued June 20, 2003, the court again declined to enjoin enforcement of New Jersey's state environmental laws and regulations, this time due to considerations of federalism and comity. Judge Hochberg found that abstention was warranted because:

- (1) There is a state administrative proceeding currently pending which is judicial in nature
- (2) New Jersey has a high significant state interest in the regulation of its solid waste facilities and
- (3) the DEP and the appellate courts of New Jersey provide an adequate opportunity for Hi Tech to raise all of its federal claims.

(Hobbs Cert., Exh. E at 3, n.5; citations omitted).

Judge Hochberg added that any exercise of the court's jurisdiction in this instance might well be disruptive of New Jersey's efforts to deal with matters of substantial public concern. In Judge Hochberg's words:

New Jersey's environmental regulations are clearly comprehensive and serve to ameliorate the important policy problems of public health, welfare and safety relating to the storage and disposition of solid waste . . .

⁵Accordingly, the title of that litigation has now been amended to Hi Tech Trans, LLC et al. v. Bradley M. Campbell, Commissioner of the State of New Jersey, Department of Environmental Protection, et al.

Plainly stated, if solid waste facilities can immunize themselves from state environmental licensing regulations through the opportunism of locating themselves near a railroad and using rail transportation, the comprehensive regulatory scheme established to protect the environment and public health safety may well be seriously eroded [T]his Court's intervention into the state's comprehensive regulatory scheme of solid waste facilities would undermine state efforts to adopt a coherent and complete policy with respect to an area of such grave public concern.

Id. at 4, n.6

The court accordingly denied Hi Tech's request to enjoin the administrative proceeding initiated by DEP since this would "seriously undermine New Jersey efforts to establish and maintain a coherent and uniform regulatory policy." Hi Tech was instead advised of its right to seek any review or emergent relief it might deem appropriate through the state's administrative and judicial forums.⁶

E. Third Circuit Litigation

Immediately after Judge Hochberg issued her June 16, 2003 order denying Hi Tech's request to enjoin DEP's Administrative Order, Hi Tech appealed to the United States Court of Appeals for the Third Circuit and sought an emergency stay pending appeal.

⁶ The court noted, in addition, that any claimed emergency on Hi Tech's part was "of Hi Tech's own making" in that the dispute has been pending for over a year, during which time Hi Tech neither sought reconsideration nor judicial relief from the STB's refusal to grant the relief Hi Tech sought in F.D. 34192. (Id.)

That action was originally docketed as Hi Tech Trans, LLC v. State of New Jersey Department of Environmental Protection, No. 03-2773. In an order issued June 18, 2003, that court denied Hi Tech's Emergency Motion for a Stay pending appeal, but set an expedited briefing schedule. (Hobbs Cert., Exhibit F). Hi Tech's appeal of the District Court's refusal to enjoin the administrative proceeding has been fully briefed and is now pending the decision of the Third Circuit.⁷

⁷ Technically, Hi Tech lodged separate appeals of both the June 16 and June 20 orders of Judge Hochberg with the 3rd Circuit. In motions filed on June 26, 2003, Hi Tech sought to consolidate both appeals and amend the caption of the appellate proceedings as Hi Tech Trans, LLC et al. v. Bradley M. Campbell, Commissioner of the State of New Jersey, Department of Environmental Protection, et al.

THE REGULATORY SCHEME

The State of New Jersey has established a comprehensive statutory scheme for regulating solid waste management:

The Legislature finds that the collection, disposal and utilization of solid waste is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest; that the health, safety and welfare of the people of this State require efficient and reasonable solid waste collection and disposal service or efficient utilization of such waste.

[N.J.S.A. 13:1E-2(a)]

The collection, transportation, transfer, processing and disposal of solid waste is regulated by the Solid Waste Management Act, N.J.S.A. 13:1E-1 to -207, and the corresponding regulations at N.J.A.C. 7:26-1.1 et seq. The Solid Waste Management Act grants the Department the authority to regulate all solid waste facilities and register all persons engaged in the collection or disposal of solid waste. N.J.S.A. 13:1E-2(b)(6); N.J.S.A. 13:1E-4(a). The Department can impose liability on any "person" who has violated the Solid Waste Management Act or the solid waste regulations. N.J.S.A. 13:1E-9(b). A "person" is defined by regulation to include individuals, corporations and corporate officials. N.J.A.C. 7:26-1.4.

"Solid waste" is defined broadly by regulation to include waste material that is deposited on any land "so that such material or any constituent thereof may enter the environment or be emitted

into the air or discharged into ground or surface waters." N.J.A.C. 7:26-1.6(c). N.J.A.C. 7:26-2.13(g)(1)(iii). A "solid waste facility" is defined to include any site or building used for the "storage, collection, processing, transfer, transportation, separation, recycling, recovering or disposal" of solid waste material. N.J.A.C. 7:26-1.4. N.J.A.C. 7:26-1.4 defines "transfer station" as "a solid waste facility at which solid waste is transferred from one solid waste vehicle to another solid waste vehicle, including a rail car, for transportation to an off-site solid waste facility, or a solid waste facility at which ID 72 liquid waste (as defined at N.J.A.C. 7:26-2.13(h)) is received, stored, treated or transferred, except that a "transfer station" shall not include any solid waste facility at which only site-generated solid waste is received for onsite transfer and processing or disposal utilizing facility-owned or operated equipment and vehicles operated therefor."

N.J.A.C. 7:26-1.4 defines "Solid waste facility permit" or "SWF permit" as "a certificate of approved registration and engineering design approval for a nonhazardous solid waste facility. For the purposes of N.J.A.C. 7:26-16 and 16A, a solid waste facility permit shall mean a license as that term is defined at N.J.A.C. 7:26-16.2." N.J.A.C. 7:26-2.8(f) states "No person shall begin construction or operation of a solid waste facility

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without obtaining a SWF Permit unless exempt pursuant to N.J.A.C. 7:26-1.1, 1.7 or 1.8." Pursuant to N.J.A.C. 7:26-5.4(g)(2), the minimum mandatory penalty for operating a solid waste facility without a permit is \$5,000. Pursuant to N.J.S.A. 13:1E-9(e), each day a violation continues is a separate and distinct offense.

N.J.S.A. 48:13A-6 provides in pertinent part that:

No person shall engage, or be permitted to engage, in the business of solid waste collection or solid waste disposal until found ...to be qualified by experience, training or education to engage in such business, is able to furnish proof of financial responsibility, and unless that person holds a certificate of public convenience and necessity...

N.J.A.C. 7:26H-1.8 sets forth the standards for obtaining a certificate. An applicant must disclose the names and addresses of all persons who have either financially or operationally a legal or beneficial interest in the applicant's business. N.J.A.C. 7:26H-1.8(a)(1). The applicant must give appropriate information as to his skill, experience or education and as to his financial responsibility. N.J.A.C. 7:26H-1.8(a)(2). N.J.S.A. 48:13A-12(b) provides that any person who shall engage in the solid waste disposal business without having been issued a certificate of public convenience and necessity shall be liable for a penalty of not more than \$10,000.00 for a first offense, not more than \$25,000.00 for a second offense and not more than \$50,000.00 for a

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third and every subsequent offense. Each day during which the violation continues constitutes an additional, separate and distinct offense. Ibid.

COUNTERSTATEMENT OF FACTS

On April 16, 2003, investigators from the State of New Jersey, Department of Environmental Protection, conducted a site visit to the Hi Tech facility at Oak Island Rail Yard in Newark, Essex County, New Jersey. (Feehan Cert., ¶12).⁸ Investigators observed solid waste origin/disposal ("O&D") forms⁹ and weigh tickets taken in and generated for solid waste loads accepted on April 16, 2003. (Id., ¶14). All dumping records were observed to be computerized and paper records were observed to be kept for dumped loads. Ibid. All loads were classified on the O&D forms as either ID # 13 or ID # 13C. Ibid.

Hi Tech's records indicate that prior to the DEP's investigators' arrival at Hi Tech's site at approximately 7:48 a.m. on April 16, 2003, Hi Tech had already accepted approximately 12 roll-off vehicles delivering solid waste to the facility for transfer. (Id., ¶15).

⁸ References to the July 18, 2003 Certification of Ronald S. Feehan shall be made by the abbreviation "Feehan Cert."

⁹ Solid waste facilities are required to maintain waste origin/disposal records for each load of waste received by waste type ID number. N.J.A.C. 7:26-2.13(g). "Type 13" is "Bulky waste: Large items of waste material, such as appliances and furniture." N.J.A.C. 7:26-2.13(g)(iii). "Type 13C" is "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." N.J.A.C. 7:26-2.13(g)(iv).

Prior to the arrival of Hi Tech's general manager, Joseph Levy, on the morning of April 16, 2003, the investigators observed 4 loaded gondola rail cars bearing the markings GFSX 4308, GFSX 4444, GFSX 4442, and GFSX 4335. (Id., ¶6). These gondolas were observed to contain bulky waste materials such as plaster, lathe, treated wood (painted), plastic bags, cardboard, drywall, sheet metal etc. Ibid. Photographs were taken of the Hi Tech site by the investigators. (Id., ¶7).

The investigators met with General Manager Joseph Levy upon his arrival and requested that he accompany them to observe the actual tipping operation and to answer questions regarding the operation. (Id., ¶8).

On April 16, 2003, inbound roll off trucks transporting C&D (construction & demolition wastes) (ID #13C) and bulky wastes (ID #13) were observed to enter the facility and proceed to the inbound scale. (Id., ¶9). After exiting the inbound scale, vehicles were observed to proceed to the "east box"¹⁰ to dump their loads of solid

¹⁰ The "east box" refers to a roofless dumping area with approximately 12' high metal sides observed to be active during this inspection. The "west box" is a dumping area which was not active during the inspection, although NJDEP investigators observed and photographed several cubic yards of demolition waste present in the west box. Both dumping areas are similarly constructed with an earthen/C&D ramp on which the grappler operates to load the deposited waste into adjacent gondola rail cars. Likewise each dumping area has a 1" steel plate bottom area onto which waste is deposited. A steel frame ramp with wooden slats was observed

waste which were then loaded by a grapple crane into a waiting open top rail car. (Id., ¶9). Loads were visually inspected prior to dumping, and the grapppler operator was afforded full view of what was coming out of the roll off container as it dumped. Ibid. Truck traffic was directed by Hi Tech employees at the ramp locations. Ibid.

After dumping and exiting the "east box" area, vehicles crossed the railroad tracks and proceeded to weigh out at the outbound scale. (Id., ¶11). At the outbound scale, drivers were observed to hand in O&D forms and sign off on scale tickets prior to exiting the site. Ibid. Site conditions during loading of gondolas and dumping of roll off containers were observed to be dusty. (Id., ¶12). A water truck was observed parked under an overpass but was not in use. Ibid.

Investigators observed the unloading/loading operation for several minutes, observing many roll-off containers from various commercial and non-commercial solid waste haulers dump their loads into the east box and then have the grapppler load that waste into a rail car. (Id., ¶13).

constructed at each dumping area to accommodate roll off trucks. A lower dumping area (at ground level) was observed at each dumping area to accommodate larger transfer trailers and the overflow traffic of roll off vehicles.

Thus, during the approximately one half-hour that the DEP investigators observed the Hi Tech tipping operation, there were approximately 15 loads of ID # 13 or ID # 13C solid waste tipped for transfer at the facility. (Id., ¶14). The volume accepted during this time was approximately 375 cubic yards of solid waste. Ibid.

The Department of Environmental Protection determined, based upon the investigation, that the activities conducted by Hi Tech were the operation of a solid waste facility, more specifically a transfer station. As discussed above, solid waste activities and facilities are regulated through solid waste facility permits and approved engineering designs issued by the Department. On May 27, 2003, the Department issued an Administrative Order determining that because the facility does not possess a solid waste facility permit, registration, or approved engineering design, Hi Tech was an illegal solid waste facility operating in violation of N.J.A.C. 7:26-2.8(f). The Administrative Order further determined that because Hi Tech was engaging in the business of solid waste disposal without a Certificate of Public Convenience and Necessity, it was also operating in violation of N.J.A.C. 7:26H-1.6(a), failure to obtain a Certificate of Public Convenience and Necessity prior to engaging in the business of commercial solid waste disposal.

The Administrative Order further determined that David Stoller, as Chairman and Chief Executive Officer of Hi Tech has actual responsibility for the operation of this illegal solid waste facility and was and is in a position to be able to prevent the occurrence of the violations set forth above but has failed to do so. As such, the Administrative Order states that David Stoller is in violation of N.J.A.C. 7:26-2.8(f), failure to obtain a SWF permit prior to constructing or operating a solid waste facility; and N.J.A.C. 7:26H-1.6(a), failure to obtain a Certificate of Public Convenience and Necessity prior to engaging in the business of commercial solid waste disposal. The Administrative Order did not assess any penalty against Hi Tech or David Stoller, but ordered them to cease solid waste operations within twenty days.

ARGUMENT

POINT I

HI TECH'S ACTIVITIES ARE NOT WITHIN THE SCOPE OF FEDERAL PREEMPTION.

Hi Tech does not claim that the NJDEP regulations at issue here are unreasonable, discriminatory or unfair. Nor does Hi Tech allege that it is somehow incapable of complying with New Jersey law. Rather, Hi Tech simply does not want to comply with any of the state environmental regulations applicable to all other solid waste facilities operating in New Jersey. This dispute is not about onerous state or local regulations that are in reality a pretext to interfere with legitimate railroad operations or to prevent a rail carrier from locating a rail facility at some reasonable location. The simple truth of the matter is that Hi Tech was established with the specific intent of circumventing the environmental statutes and regulations applicable to other solid waste facilities, including solid waste flow control regulations. Hi Tech apparently believes that it has found a foolproof way to completely insulate itself from any and all state regulation of its solid waste disposal business by attempting to structure its business arrangements and operations in such a way as to bring itself within the preemption provision of 49 U.S.C. §10501(b).

Perhaps even more significantly, Hi Tech--and this proceeding--is being closely watched by the solid waste industry. If Hi Tech is able to use preemption under 49 U.S.C. §10501(b) to circumvent state environmental regulation, the rest of the solid waste industry will routinely attempt to follow Hi Tech's road. The practical result would be the collapse of the carefully drawn system of state environmental regulation of solid waste, and the absence of any meaningful oversight of the collection and disposal of solid waste.

There are several problems with Hi Tech's plan. First, the federal preemption provision set forth in 49 U.S.C. §10501(b) does not apply to Hi Tech. Federal preemption of state law under §10501(b) applies only to railroad activities that are integrally related to a railroad's ability to provide rail transportation services. However, the STB has already determined that Hi Tech's activities are not within its exclusive jurisdiction, and Hi Tech, having previously claimed to be the local agent for Canadian Pacific Railway ("CPR"), has more recently conceded the obvious; namely, that it is not a railroad. Nor can Hi Tech come within the terms of §10501(b) by claiming it is closely associated with a railroad, does business with a railroad, operates on railroad property or is involved in intermodal shipments over a railroad.

Contrary to Hi Tech's suggestions, section 10501(b) is not a federal license to pollute or otherwise ignore the laws of state and local governments. Federal preemption of state and local regulation over a railroad is limited to circumstances where state or local authorities attempt to use regulation as a means of foreclosing or restricting a railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce. Accordingly, §10501(b) would not prohibit New Jersey from exercising its police power to impose nondiscriminatory environmental regulations to protect public health and safety - - even if Hi Tech was a railroad. As a matter of fact, real railroads, unlike Hi Tech, do not seek to misuse federal preemption as a means of escaping reasonable state regulation. To the contrary, real railroads routinely comply with applicable state and local regulation without protest.

Hi Tech contends that all of its activities are preempted, due to §10501(b), because its operations take place at CPR's Oak Island rail yard. This argument has no merit. First, Hi Tech is not a rail carrier, as that term is defined in the statute (49 U.S.C. §10102(5)), for the obvious reason that it does not provide common carrier railroad transportation. Indeed, while Hi Tech did once file a notice of exemption under 49 C.F.R. §1150.32 to acquire

operating rights on 640 miles of track belonging to the Canadian Pacific Railway, it voluntarily withdrew that notice.¹¹

Second, Hi Tech is not a railroad. Hi Tech is simply a shipper. It is paid by various parties to receive, consolidate and dispose of solid waste originating from various locations both within and outside of New Jersey. And, it then tenders that waste as a shipper to CPR for transportation to disposal sites outside the state.

Hi Tech's true function is demonstrated by materials attached to its brief. For example, in the Operational License Agreement between Hi Tech and CPR, dated November 6, 2000, (Rb, Exh. C), Hi Tech is to pay a use and access fee to operate on CPR's premises (on a non-exclusive basis) at the Oak Island rail yard. (See ¶¶ 1, 3 & 6). However, in order to persuade CPR to allow Hi Tech to operate its facility at the Oak Island rail yard, Hi Tech was required to tender a minimum number of cars per year, or what the agreement refers to as an "Annual Car Load Guarantee," at rates as set forth in Transportation Agreement No. STB-CPRS 136814 (the "Transportation Agreement"). (Hobbs Cert., Exh. G). All of this is intended to generate an Annual Car Load Guarantee Fee, which Hi Tech is to pay "so long as CPR has system capacity to handle the

¹¹ Hi Tech Trans, LLC-Operation Exemption -Over Lines Owned by Canadian Pacific Railway and Connecting Carriers, (STB Finance Docket No. 33901) 2000 WL 1010603 (STB Served July 21, 2000).

traffic and is providing the services as contemplated pursuant to the Transportation Agreement." (Rb., Exh. C, ¶¶ 1, 3 & 6). In other words, Hi Tech pays CPR, a fact which is inconsistent with agency or even subcontractor status. Also, Hi Tech is restricted to use the facilities solely for handling and tendering shipments of solid waste to CPR and any construction, installation, maintenance and improvement of the facilities it is using are to be exclusively at its "sole expense." (Id. at ¶ 4.) Again, despite the fact Hi Tech is located at CPR's rail yard, Hi Tech's activities are not part of CPR's rail services.

Hi Tech's operation of this facility on CPR property and payment of annual shipment guarantees demonstrates clearly that it is a shipper and that its operations are pursuant to its primary business of solid waste disposal. Indeed, Hi Tech's president and chief executive officer, David C. Stoller, boasts that his company "has become the largest customer (in terms of revenue produced)" of CPR. (Hobbs Cert., Exh. H, Verified Statement of David Stoller at 3).¹² Similarly, Mr. Lawrance of CPR, describes Hi Tech as "the

¹² Parenthetically, by citing Mr. Stoller's statement, Petitioner does not mean to convey the impression that it agrees with its contents, as that is not the case. For example, while Mr. Stoller recites the now familiar mantra that DEP agreed, until the last 30 days, that its activities were preempted from its oversight, that is obviously not accurate. DEP intervened in the STB litigation on April 23, 2002, and has consistently argued that Hi Tech required a license from the DEP in order to construct and operate the solid waste transfer station and that its activities are not preempted by § 10501(b).

largest shipper served by [CPR] at the Oak Island yard." (Hobbs Cert., Exh. I, Verified Statement of Steven Lawrence at 3).

Moreover, the Operational License Agreement also demonstrates that both CPR and Hi Tech fully understood and expected, when the document was executed, that Hi Tech would need to apply for an appropriate license from DEP. In that regard, the agreement specifically obligates Hi Tech to obtain all required permits or exemptions, and recognizes DEP as the prospective licensing authority. (Rb, Exh. C at ¶4(e).)¹³ Accordingly, any attempt by Hi Tech to imply that CPR intended to bring Hi Tech within the scope of the preemption protection enjoyed by CPR as a rail carrier is belied by the specific terms of the Operational Agreement.

That CPR regards Hi Tech as a shipper rather than as an integral component of its rail transportation services is also evidenced by the terms of the Transportation Agreement between these parties. (Hobbs Cert., Exh. G). The provisions of the contract demonstrate that: CPR, not Hi Tech, has exclusive control

¹³ This article of the Agreement provides:

Prior to commencement of any operations, HTT shall obtain all permits or exemptions or evidence of same necessary for the construction, use and operation of the facility....Any costs incurred by CPR in the processes (sic) of obtaining any leases..., permits or operating authority for HTT will be paid by HTT....HTT will not be responsible for any legal fees incurred by CPR in reviewing submissions made by HTT or costs incurred by CPR in obtaining permits, authority or exemptions in the name of CPR including costs incurred by CPR in connection with meetings with the New Jersey Department of Environmental Protection by Public Affairs Consultants.

over the performance of CPR's "transportation services" (§ 4); Hi Tech is subject to demurrage, not per diem, in the event CPR is required to supply cars (§ 9); Hi Tech "has selected the destination and disposal site" for its shipments and actually "certifies that [CPR] has not participated in, nor taken any active interest in, the site selection for the storage or disposal" of the waste it tenders (§ 14); Hi Tech - - not CPR - - has the necessary contract with the destination disposal sites (Id.); and that Hi Tech is not an agent of CPR (§ 17).¹⁴ Again, Hi Tech is only a shipper that happens to be functioning, in part, on property essentially leased from a railroad.

Hi Tech argues that its solid waste disposal activities are subject to the exclusive jurisdiction of the STB and that any state regulation is preempted by federal law. None of the precedent Hi Tech cites supports its expansive, self-serving view of the nature of the preemption provision. Indeed, any shipper of toxic, hazardous materials could avoid local and state regulation of its storage facilities by the simple artifice of placing them alongside rail tracks--effective environmental regulation would be virtually

¹⁴ Parenthetically, consistent with the provisions of the Operational License Agreement, CPR and Hi Tech recited the importance for Hi Tech to obtain the necessary environmental permits from DEP (and HCIA and ECUA) by making this an acknowledged contingency that might impair the parties' ability to enter into the Transportation Agreement. Id. at § 31.

impossible. For example, many, if not most, chemical shippers have sidetrack arrangements with railroads, whereby their loading and unloading facilities are situated adjacent to or on land that is leased to or from railroads. These shippers typically have transportation agreements with their serving railroad containing minimum shipment guarantees. Yet, under Hi Tech's rationale, all state or local permitting of the construction and operation of those facilities would be preempted solely because the product is being loaded into or unloaded from rail cars. Happily, for the environment and the citizens of this State, that is not the law.

Hi Tech contends here that even if it is not a rail carrier itself, its activities are preempted as integrally related to intermodal transportation that includes shipment by rail. Hi Tech has not cited, however, to any authority supporting its position. Instead, Hi Tech has attempted to parse the phrase "transportation by rail carrier" by separating "transportation" from "rail carrier." Hi Tech seems to argue that because its facilities and operations arguably come within the technical definition of "transportation" under § 10102(6)(C) and are related to intermodal transportation involving rail service, any regulation of Hi Tech's activities is tantamount to regulation of "transportation by rail carrier."

The problem with Hi Tech's strained construction of the phrase "transportation by rail carrier" is that it would result in the preemption of essentially all 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 so long as the products they handled would at some point in the distribution chain be shipped by rail.¹⁵ Obviously, Congress never intended such a result when it enacted 49 U.S.C. § 10501(b), and neither the STB nor the courts have ever suggested that preemption under § 10501(b) extends beyond rail carriers engaged in rail transportation. In fact, Hi Tech's argument that its activities are preempted because it participates in intermodal shipments that include rail transportation was previously rejected by the STB:

Hi Tech's attempt to link these activities as one continuous intermodal rail movement must fail. As DEP points out, under Hi Tech's theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption clearly does not go that far; nor does the Board's jurisdiction.

¹⁵ To the extent Hi Tech seeks to support preemption of its activities on the grounds that DEP regulation of Hi Tech indirectly impacts CPR, that contention also fails. Anyone manufacturing, shipping, storing, loading or delivering goods or commodities eventually destined for transportation by rail would be able to claim immunity from state and local regulation if that were the test.

[Hi Tech Trans, LLC-Petition for Declaratory Order (STB Finance Docket No. 34192) 2002 WL 31595417 at *3 (STB served November 20, 2002). Hobbs Cert., Exh. A.]

In any event, Hi Tech materially overstates the preemptive effect of the STB's exclusive jurisdiction over "transportation by rail carriers" and the application of preemption under 49 U.S.C. § 10501(b). The STB has made clear that § 10501(b) does not prevent state or local governments from exercising their traditional police powers in a nondiscriminatory fashion to protect public health and safety. See, e.g., Borough of Riverdale - Petition for Declaratory Order, (STB Finance Docket No. 33466) 1999 WL 715272 (STB served September 10, 1999). Federal preemption of state or local regulation over a rail carrier is limited to situations where such regulations frustrate or defeat railroad operations:

[W]hile state and local government entities such as the Borough retain certain police powers and may apply non-discriminatory regulation to protect health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce.

[Id. at *8.]

Indeed, in every instance in which this topic has come up, the STB has made it clear that §10501(b) was intended to preempt state and local regulation that would "deny the carrier the right to construct facilities or conduct operations." See, e.g., Joint Petition for Declaratory Order - - Boston and Maine Corporation and

Town of Ayer, MA, ("Town of Ayers") (STB Finance Docket No. 33971) 2001 WL 458685 at *8 (STB served May 1, 2001). Similarly, the STB has added the important caveat that § 10501 is not intended to interfere with the non-discriminatory exercise of state police powers that are essential for the protection of public health and safety or to otherwise preclude the important role states play in enforcing Federal environmental statutes. (Id., at *9; Auburn & Kent, WA - - Pet. For Declar. Order - - Stampede Pass Line, 2 S.T.B. 330, 337-39 (1997), 1997 WL 11352.

Consequently, the STB has elected to entertain and grant petitions for declaratory orders only where the state or local community attempted to use regulation as a means to prohibit or impede legitimate rail operations as a "not in my backyard" or "NIMBY" response to change. See, e.g., Town of Ayers, supra; North San Diego County Transit Development Board - - Petition for Declaratory Order STB Finance Docket No. 3411) 2002 WL 7924265 (STB served August 21, 2002). At the same time, however, the STB has elected not to intervene where the state or local community is not attempting to frustrate and delay rail operations, but is instead concerned with true environmental issues. Fletcher Granite Company, LLC - - Petition for Declaratory Order, (STB Finance Docket No. 34020) 2001 WL 729418 at *2 (STB served June 29, 2001).

Thus, even if, arguendo, Hi Tech could somehow be found to be

within the exclusive jurisdiction of the STB, § 10501(b) would not prohibit New Jersey from exercising its police power to enforce DEP environmental regulations in a nondiscriminatory manner. The environmental regulations at issue in this case have neither the purpose nor effect of prohibiting Hi Tech from operating a transfer station. DEP regulations do require, however, that Hi Tech meet the same requirements applicable to all other transfer stations operating in New Jersey. Hi Tech has not even alleged, much less demonstrated, that it is incapable of complying with DEP regulations; Hi Tech simply would prefer to avoid the regulatory obligations and responsibilities shouldered by all of its competitors.

Perhaps more to the point, DEP is not seeking to deny CPR or any other railroad the right to construct rail related facilities, conduct rail operations or even obtain occupancy permits. Nor is DEP seeking to deny Hi Tech the ability to tender its traffic to CPR or any other railroad. To the contrary, the Hi Tech facility is located in the middle of a rail yard and DEP does not suggest that the challenged operations should not be conducted from this location. Nor does anyone seek to constrain in any way CPR's ability to move solid waste via rail in general or to do so specifically from a facility located at its Oak Island rail yard.

Instead, it is Hi Tech which has sought, for inexplicable reasons, to wage a seemingly unending legal battle in its attempt to avoid compliance with any state or local environmental health and safety regulations. Under DEP's solid waste regulations, which are applicable to all solid waste transfer stations, permits are issued to prospective operators after specific construction and operating requirements are reviewed and vetted by agency staff. N.J.A.C. 7:26-2.10. In each instance, this specific review is necessary to ensure that the facility has an appropriate containment system to minimize migration of liquids, dust, noxious or toxic odors from the confines of the facility or unnecessary infestation from rodents and other pests. N.J.A.C. 7:26-2B.5. In addition, the facility's operating practices are reviewed to prevent, again, unacceptable environmental damage that could otherwise be minimized through relevant and, frequently, collaboratively established operating guidelines. N.J.A.C. 7:26-2B.9.

Hi Tech commenced operations without complying with DEP regulations, and has consistently refused to comply with any of the applicable state statutes or regulations. The result? Completely aside from its long running violation of the carefully crafted waste flow control regulations, which are a great concern to the State of New Jersey, HCIA and ECUA, Hi Tech has been operating the

facility with no regard to its obligations under the New Jersey environmental health and safety laws.

Hi Tech also suggests that DEP itself has determined that § 10501(b) preempts its existing regulations. (Rb9). Hi Tech's contentions in this regard are both disingenuous and inaccurate. While DEP is considering amending its regulations to lessen the modest burden they currently impose on railroads, by eliminating the need to actually obtain a physical permit in order to construct and operate a solid waste transfer station, that is only in draft form. The existing regulations remain in place and the proposal may never be implemented. Moreover, eliminating the need for a railroad to obtain a permit would not obviate the numerous construction and operational requirements that DEP requires of all such enterprises.¹⁶

In its effort to avoid oversight, Hi Tech has raised the ante for all of the stakeholders, including the DEP, other state

¹⁶ The draft regulations, set forth at Rb, Exh. H, detail, *inter alia*, the need for rail carriers to ensure that all activities of this nature are conducted in an enclosed structure (rather than in the open air, as Hi Tech currently operates), the requirement that the operator describe the facilities and certify that the facility will not be opened so as to expose the employees, public or environment to such wastes, that containers are sealed at all times, that there will not be a migration of odors or other contaminants, etc. But, the salient point here is that while the draft regulations are only that and may never be promulgated, and while Hi Tech would not be covered by the draft since the proposed exemption would in any event only be applicable to rail carriers as defined by 49 U.S.C. § 10102(5) that provide common carrier rail transportation, Hi Tech has elected to comply with no regulations at all.

environmental agencies, local and county authorities and the STB itself. If Hi Tech is able to use the preemption provision in § 10501(b) to evade all environmental oversight by DEP, it will plainly not be the last waste facility that will follow that path. If all state environmental regulation can be easily evaded by simply locating solid waste facilities next to a railroad, who will regulate and oversee those activities? The STB has not proposed regulations to review the design, engineering, and construction of solid waste transfer stations situated alongside railroads. And, while Hi Tech purports currently to be handling only what it claims to be relatively benign construction and demolition waste, what is to stop Hi Tech - - and other such facilities - - from handling extremely toxic or hazardous commodities if state oversight is preempted as Hi Tech suggests? Just to pose the question demonstrates how dangerous the situation could become.

It is precisely to prevent the result sought by parties such as Hi Tech that there is strong presumption against preemption. As Justice Brandeis, writing for the Court, said in Napier v. Atlantic Coast Line, 272 U.S. 605, 611, 47 S.Ct. 207, 209 71 L.Ed. 432 (1926), "The intention of Congress to exclude States from exerting their police power must be clearly manifested." And the Supreme Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, has resolved

close cases in favor of a continuing power on the part of the States to legislate in their customary fields and thus has permitted state regulations to mesh with federal controls. See Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622 (1934); Townsend v. Yeomans, 301 U.S. 441, 454, 57 S.Ct. 842, 848, 81 L.Ed. 1210 (1937); Penn Dairies v. Milk Control Commission, 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748 (1943). Indeed, "[p]reemption analysis begins with the 'presumption that Congress does not intend to supplant state law.'" AGG Enterprises v. Washington County, 281 F.3d 1324, 1327 (9th Cir. 2002). Where federal and state or local enactments overlap in their effects on non-governmental activities, the proper judicial approach is to reconcile the operation of both statutory schemes rather than hold one completely ineffectual. See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), reh'g denied, 439 U.S. 884, 99 S.Ct. 232, 58 L.Ed.2d 200 (1978). In Florida East Coast Railway Company v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001), the court noted the presumption against preemption recognized by the U.S. Supreme Court, id. at 1327-28, and emphasized that the Senate Report on the final form of the bill that became the ICCTA stated that the exclusivity in the legislation "is limited to remedies with respect to rail regulation - not State and Federal law generally ...

because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation," id. at 1338, thus identifying a clear limit on the use of the exemption provided in the ICCTA.

For these reasons, credence should not be given to Hi Tech's strained attempt to construe federal preemption of "transportation by rail carriers" in order to shield highly regulated activities such as solid waste collection and disposal that historically have been subject to state and local regulation. See, e.g., AGG Enterprises, supra, 281 F.3d at 1328 ("[o]ne 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"). Indeed, Congress has explicitly found that the field of solid waste collection and disposal is properly subject to state regulation. See, 42 U.S.C.A. § 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").

To repeat a point that Petitioner totally ignores, the STB has made it plain in numerous cases,¹⁷ including its November 2002 Decision, (Hobbs Cert., Exh. A), that the preemption in § 10501(b)

¹⁷ See, e.g. Borough of Riverdale, supra; Town of Ayer, supra; Fletcher Granite Company, supra.

does not foreclose state and local governmental agencies from exercising their police powers in a non-discriminatory fashion to protect health and safety as long as this does not foreclose or restrict a railroad's ability to conduct its operations or unreasonably burden interstate commerce. Interstate commerce is not being burdened by DEP's actions. Hi Tech would have the DEP nullify New Jersey's right, obligation and responsibility to protect its citizens' health and safety, based on its unsupported and erroneous assertion that it is somehow immune from such oversight. The DEP should not - - indeed cannot - - provide this relief to Hi Tech.

POINT II

THE OFFICE OF ADMINISTRATIVE LAW IS THE APPROPRIATE FORUM TO HEAR AND DETERMINE RESPONDENTS' CHALLENGE TO THE DEP'S ADMINISTRATIVE ORDER PURSUANT TO THE DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES, ESPECIALLY BECAUSE RESPONDENTS HAVE FAILED TO SET FORTH A FACIAL CHALLENGE TO ANY STATE STATUTE OR REGULATION, BUT HAVE MERELY ALLEGED AS A DEFENSE THAT THE SOLID WASTE MANAGEMENT ACT AND SOLID WASTE UTILITY CONTROL ACT ARE UNCONSTITUTIONAL AS APPLIED TO RESPONDENTS' SOLID WASTE TRANSFER FACILITY.

Respondents are not entitled to judicial remedies since available and adequate administrative remedies before the Department of Environmental Protection have not been exhausted. Ordinarily in this State, a party must exhaust any available administrative remedy before resorting to the courts. Abbott v. Burke, 100 N.J. 269, 296 (1985). The exhaustion doctrine is applied to direct litigants to pursue the less expensive, informal, and more expeditious administrative remedy before pursuing any court remedies. See, id. It is also designed to prevent premature judicial interference in the agency process. Paterson Redevelopment Agency v. Schulman, 78 N.J. 378, 387 (1979), cert. denied, 444 U.S. 900, 100 S.Ct. 210, 62 L.Ed.2d 136 (1979). In Brunetti v. New Milford, 68 N.J. 576 (1975), the Supreme Court stated:

This Court has recognized that the exhaustion of remedies requirement is a rule of practice designed to allow administrative bodies to perform their statutory functions in an orderly manner without preliminary

interference from the courts. . . . Therefore, while it is neither a jurisdictional nor an absolute requirement, there is nonetheless a strong presumption favoring the requirement of exhaustion of remedies.

[Id. at 588]

Indeed, the Supreme Court has by rule required exhaustion of administrative remedies before one can appeal agency action to the Appellate Division. R. 2:2-3(a)(2).

Our courts require exhaustion for a number of reasons. First, the body possessing expertise in the area should preliminarily focus on the parties' complaints. Paterson Redevelopment Agency, 78 N.J. at 387. Also, the parties may be satisfied by the administrative resolution and thus obviate any necessity for judicial review. City of Atlantic City v. Laezza, 80 N.J. 255, 265 (1979). This reluctance to adjudicate unnecessarily is particularly compelling in constitutional cases where decisions have greater gravity and permanence. Paterson Redevelopment Agency, 78 N.J. at 387. Exhaustion is particularly important where, as in the instant matter, the agency's interpretations of relevant statutes are desirable. Ibid.

The mere presence of constitutional implications does not abrogate exhaustion. Ibid. Similarly, alleging a constitutional issue does not alone relieve a party of the exhaustion requirement. Brunetti, supra, 68 N.J. at 590. That is because "[a]dministrative

agencies are clearly empowered to determine issues within their jurisdiction even though the resolution of those issues implicates constitutional claims." Desilets v. Clearview Regional Bd. of Educ., 137 N.J. 585, 595 (1994). For example, in deciding whether school policy regarding a student newspaper violated a student's constitutional rights, the Supreme Court indicated that future First Amendment claims should be initially reviewed and resolved by the Commissioner of Education. Id. at 597.

In Roadway Express Inc. v. Kingsley, a Delaware corporation operating as a common carrier in New Jersey "sought a declaratory judgment that the [New Jersey corporate business tax] statute [was] unconstitutional as applied," because its operations were exempt as an interstate carrier. 37 N.J. 136, 137-38 (1962). Rather than filing an appeal with the Division of Taxation, the plaintiff sought relief in the Law Division. Id. In upholding the trial court's decision to dismiss the complaint for failure to exhaust its administrative remedies, the court noted that there was no claim the statute was unconstitutional on its face. Id. at 139-140. When an "as applied" attack is made, careful examination of the nature of the statute, facts and legal determinations rests with the administrative agency charged with enforcing the regulatory scheme. Id. Just as the plaintiff in Roadway Express, did not challenge the statute on its face, or the authority of the

state agency to implement a franchise tax, Respondents here do not argue that the relevant environmental statutes are unconstitutional as to all solid waste facilities or even all transfer stations. The crux of this dispute hinges on a claim by respondents that the specific nature of their solid waste transfer facility should exempt it from application of the state statutes and regulations governing all other solid waste transfer facilities within the State of New Jersey. Respondents have not even attempted to set forth a facial challenge to the statutes and regulations they are charged with violating. "[T]o succeed on a facial challenge [to the constitutionality of a statute], a party 'must establish that no set of circumstances exists under which the Act would be valid.'" Wilde v. Wilde, 341 N.J. Super. 381, 395 (App. Div. 2001), quoting, United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 95 L.Ed.2d 697 (1987). Respondents have not met this burden, because they have not even argued, much less demonstrated, that the New Jersey statutes and regulations they are charged with violating are invalid as applied to all solid waste transfer facilities. Indeed, the point heading of Point I of respondents' brief states the issue as preemption of the New Jersey statutes and regulations "as applied" to Hi Tech. Clearly the issue and relief sought are limited to an "as applied" challenge

only, and not the facial constitutionality of the statutes or regulations themselves.

Requiring respondents to exhaust their administrative remedies in the instant case would further the established judicial principle that "a court should not reach and determine a constitutional issue unless it is absolutely imperative in the disposition of the litigation." Donadio v. Cunningham, 58 N.J. 309, 325-26 (1971); accord, Ahto v. Weaver, 39 N.J. 418, 428 (1963). Aside from the jurisdictional issues discussed above, abrogation of exhaustion would be bad policy in the instant case because allowing the respondents to obtain a judicial remedy without first having petitioned the Department for relief would reduce the Department's effectiveness by encouraging others to circumvent the Department, and would render its regulatory efforts more complicated and more expensive.

For all of the foregoing reasons, respondents have shown no basis for abrogating the requirement of exhaustion of administrative remedies.

POINT III

RESPONDENTS' ARGUMENT THAT BOTH THE OAL AND THE COMMISSIONER ARE SOMEHOW DISQUALIFIED TO CONSIDER THIS MATTER IS BASELESS.

The multiple roles of administrative agencies, including their functions as investigators, prosecutors, and adjudicators, has long been recognized by the courts, and this characteristic has not been found to preclude the procedural due process requirements of a fair tribunal and trial. Withrow v. Larkin, 421 U.S. 35, 47-55, 95 S.Ct. 1456, 1464-1468, 43 L.Ed.2d 712 (1975). To be sure, the DEP decides cases concerning its governing statutes, as well as the regulations it has proposed and adopted on a regular basis. These functions are the very essence of a regulatory agency scheme. Respondents cite no authority for the proposition that an administrative agency is barred from adjudicating claims that its statutes are being enforced improperly. To the contrary, "it is characteristic of the administrative process for agencies to adjudicate disputes in which they have taken a position on the merits." Board of Education of the Upper Freehold Regional School District v. State Health Benefits Commission, 314 N.J. Super. 486, 491 (App. Div. 1998).

The New Jersey Supreme Court has stated:

The right to decide contested cases is an integral part of the administrative process. Administrative agencies carry out their

regulatory responsibilities not only through rulemaking, In re Uniform Admin. Procedural Rules, supra, 90 N.J. at 91-93, 447 A.2d 151, or informal administrative action, In re Solid Waste Customer Lists, 106 N.J. 508, 518-19, 524 A.2d 386 (1987), but also through adjudication of contested cases. "Thus, the agency's decisional authority over contested cases is directly and integrally related to its regulatory function." In re Uniform Admin. Procedural Rules, supra, 90 N.J. at 93-94, 447 A.2d 151.

[In re Carberry, 114 N.J. 574, 585-596 (1989)]

Furthermore, one of the main goals intended by the creation of the OAL was the promotion of due process. Abbott v. Burke, 100 N.J. 269, 302 (1985). Respondents' brief states that the "Court [in Abbott] held the matter should be transferred from the Commissioner and State Board because they were defendants to the action, and it would have been an abuse of discretion for the Commissioner not to transfer the case." (Rb26). What Respondents fail to point out is that the Court transferred the case to the OAL for an initial decision, to be returned to the Commissioner for a Final Decision. Abbot v. Burke, 100 N.J. 269, 303 (1985), appeal after remand, 119 N.J. 287. In other words, the impartiality provided by the OAL in creating an initial record and decision was adequate reason for the Court to decide that petitioners would be accorded sufficient due process.

Similarly, in Board of Education of Upper Freehold, the State Health Benefits Commission issued a letter to the Board demanding payment for premiums. 314 N.J. Super. at 490. When the Board refused to pay, the Commission declared the matter a contested case and transferred it to the OAL, to be returned to the Commission for a final decision. Id. at 491. Though the Board argued that fundamental fairness precluded the Commission from adjudicating the claim, the court rejected its position as "antithetical to the structural context of the modern American state." Id. at 492. In reaching its decision, the court took special note of the role of the Office of Administrative Law, as having been created to bring objectivity and impartial fact-finding to the decision-making process. Id. At 492.

In this case the DEP has scrupulously observed the Respondents' due process rights. In recognition of Respondents' right to a hearing, Commissioner Campbell granted Respondents' request for a stay of enforcement and directed a hearing held and the case decided within 60 days. Further, Commissioner Campbell preserved the role of the OAL as an impartial, initial decision-maker by transferring the case to it for an initial decision, notwithstanding the expedited schedule demanded by petitioners.¹⁸

¹⁸ It is unclear why Respondents begin Point III of their brief with a citation to N.J.S.A. 52:14F-8. This section of the statutes governing the Office of Administrative Law stands for

Respondents' have failed to demonstrate that the Commissioner of the DEP should be disqualified from hearing this matter merely because he is fulfilling his role as administrative agency head, which of necessity combines elements as an adjudicator, investigator, rulemaker and informal actor. See e.g., Withrow, 421 U.S. at 53; In Re Carberry, 114 N.J. 574, 585-596 (1989).

Finally, respondents' argument that merely being named as a defendant in a federal lawsuit initiated by respondents disqualifies the Commissioner from hearing this matter is nothing less than absurd--especially given the fact that respondents' suit was dismissed in its entirety within two weeks of its being filed. If that were indeed the standard for disqualification, any party could disqualify any administrative agency, federal or state, merely by filing a complaint against the agency head.

For the reasons stated above, respondents have not shown that the DEP and OAL should be disqualified from hearing this matter.

the proposition that "[a]n agency head has the exclusive right to decide contested cases in administrative hearings." In re Kallen, 92 N.J. 14, 20 (1983). Specifically, Commissioner Campbell could have retained and heard the matter himself.

CONCLUSION

For all the foregoing reasons, a decision should issue upholding the Administrative Order at issue in this proceeding.

Respectfully submitted,

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By: James H. Martin
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DATED: 7-22-03

OFFICE OF ADMINISTRATIVE LAW

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

vs.

HI TECH TRANS, LLC AND DAVID
STOLLER,

OAL Docket No. DSW 05815-03
Agency Docket No. SWE PEA
0300001-U131

REPLY BRIEF ON BEHALF OF HI TECH TRANS, LLC AND DAVID STOLLER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
PRELIMINARY STATEMENT	3
<u>LEGAL ARGUMENT</u>	
POINT I:	
THE ICCTA EXPLICITLY GOVERNS THE CONDUCT THAT THE NJDEP ADMINISTRATIVE ORDER IS PREMISED UPON	4
POINT II:	
NEITHER THE STB NOR THE FEDERAL DISTRICT COURT REACHED THE ISSUES BEFORE THIS COURT	6
POINT III:	
HTT HAS NEVER ARGUED THAT IT IS NOT SUBJECT TO ALL STATE ENVIRONMENTAL POLICE POWERS	9
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<u>AGG Enterprises v. Washington County</u> , 281 F.3d 1324 (9 th Cir. 2002)	12, 13
<u>Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.</u> , 450 U.S. 311, 318 (1981)	13
<u>Florida East Coast Railway Co. v. City of West Palm Beach</u> , 266 F.3d 1324 (11 th Cir. 2001)	12, 14
<u>In Village of Ridgefield Park v. New York Susquehanna & Western Railway Corporation</u> , 163 N.J. 446 (2000)	11
<u>Riverdale Petition for Declaratory Order the New York Susquehanna and Western Railway Corporation</u> , 1999 WL 715272	10, 11, 12

Statutes

49 U.S.C. § 10102(6)	5
49 U.S.C. § 10102(9)(A) and (B)	4
49 U.S.C.A. § 10501(b)(1) and (2)	4

Other Authorities

H.R. Conf. Rep. No. 103-677, at 82 (1994)	13
---	----

Regulations

Federal Aviation Administration Authorizing Act of 1994 ..	13
--	----

PRELIMINARY STATEMENT

Both of the briefs in opposition are conspicuous by omission. For a case that revolves around the application of federal statutory language, it is inconceivable that the New Jersey Department of Environmental Protection ("NJDEP") could supply forty-eight (48) pages of argument without once quoting the Interstate Commerce Commission Termination Act. ("ICCTA") The governing language at the very crux of this case is nowhere to be found in its brief.

Equally astonishing is the legal shell game that both the NJDEP and intervenors Essex County Utilities Authority ("ECUA") and Hudson County Improvement Authority ("HCIA") play with the Surface Transportation Board ("STB") rulings in this matter. Both briefs in opposition attempt to persuade this Court that the STB has somehow ruled on the issue raised by this appeal on behalf of Hi Tech Trans, LLC and David Stoller (collectively referred to herein as "HTT"). That argument could not be further from the truth. Both opposition briefs contain intentionally misleading "snippets" from the prior STB decision, editing the quote to begin immediately after language which makes it obvious that the STB's decision had nothing to do with the issue

herein. The rest of the ruling which both parties have purposefully concealed from this tribunal starts:

To the contrary, the impact of HCIA's single, truck-to-truck facility designation for the processing of C&D debris is on truck shipments within the state, not on interstate rail shipments.

The decision also notes at footnote seven (7), quoting a prior informal Board opinion of November 15, 2001:

The reach of the section 10501(b) preemption hinges on what can reasonably be considered to be part of "transportation by rail carriers" under the statutory definition . . . Based on the information you have provided, it would seem that the movement of trucks operated by [C&D debris] haulers over public roads en route to the Facility is sufficiently separate from the rail activity at the Facility that it falls outside the definition. Therefore, the section 10501(b) preemption would not appear to apply to the truck movements.

(See Exhibit "A" to Certification of Rebecca Hobbs for NJDEP.)

As more fully set forth below, the STB ruling that is being held up as somehow determinative of the issues in this proceeding (so much so that ECUA and HCIA premise an entire brief point dedicated to a *res judicata* argument upon the supposition) specifically noted that there was no preemption on the facts before the Board because the activity at issue was truck-to-truck processing of construction and demolition ("C&D") debris on truck shipments within the state, not on interstate rail

shipments. To remove any doubt, on June 30, 2003 the STB issued a clarification that its prior Order dealt solely with truck-to-truck shipments on intrastate roadways, and in no way resolved HTT's status as a preempted facility. The STB ruled that it will now undertake to resolve that issue. The STB stated in its most recent decision:

The question of whether Hi Tech is a rail carrier has not come before the Board, and the Board has made no determination on that issue, which in any event would have no bearing on the status of the truck traffic.

Thus, there is no *res judicata* or preclusive effect from the prior STB decision.

Finally, at no time has HTT ever argued that it is not subject to the traditional police powers of state agencies. It is merely the permitting and licensing requirements contained in the challenged statutes and regulations that are preempted. In sum, a careful reading of the ICCTA and the decisions of the STB and the state and federal courts confirms that HTT is most certainly required to comply with environmental regulations regarding the continued operation of its transload rail facility, however, its operation as a railway transloading facility renders the permitting and licensing requirements of the state regulations preempted. Thus, this Court should rule that the administrative order at issue is null and void.

LEGAL ARGUMENT

POINT I

THE ICCTA EXPLICITLY GOVERNS THE CONDUCT THAT THE NJDEP ADMINISTRATIVE ORDER IS PREMISED UPON

In order to refocus the argument before this Court, it is useful to note the language of the ICCTA. It is with good reason that both of HTT's adversaries avoid the actual and relevant language of the statute at issue. The "General Jurisdiction" provision of the ICCTA provides:

The jurisdiction of the [STB] over
(1) transportation by rail carriers . . . and facilities . . . and
(2) the construction . . . and operation . . . of . . . facilities . . . is exclusive.

Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C.A. § 10501(b)(1) and (2).

The ICCTA defines "transportation" as:

(a) a . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of . . . property, . . . by rail, regardless of ownership or any agreement concerning use; and

(b) services related to that movement.

49 U.S.C. § 10102(9)(A) and (B).

The ICCTA defines "railroad" as:

(a) . . . intermodal equipment used . . . in connection with a railroad; . . .

(c) a . . . terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

49 U.S.C. § 10102(6).]

It is undisputed that HTT operates a truck-to-rail transload facility on the property of Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway ("CP"). It is equally undisputed that the debris is "property" that is taken from the trucks and placed on rail cars and then transported in interstate commerce across CP's rail lines. Thus, application of the ICCTA definitions to the facts before this tribunal confirms that HTT operates a railroad and supplies railroad transportation, thereby implicating the exclusive jurisdiction of the STB.

POINT II

NEITHER THE STB NOR THE FEDERAL DISTRICT COURT REACHED THE ISSUES BEFORE THIS COURT

As noted briefly above, and despite all arguments to the contrary, the STB never considered the issues before this Court. Purposefully omitted from either of the opposition briefs, was any reference to the most recent Order of the STB, which stated as a matter of clarification that the issue before the STB at the time of its November 20, 2002 decision was "limited to a determination that the Board's jurisdiction, and preemption under section 10501(b), would not reach movements of construction and demolition debris haulers on public roads en route to the CP transload facility." (See June 30, 2003 attached as Exhibit "A" to the certification of Andrew L. Indeck, submitted herewith). The question of whether Hi Tech is a rail carrier and/or whether its facility is subject to federal preemption was never before the STB, and the STB has never made any determination on that issue. The sole consideration was the exercise of jurisdiction by the STB over truck-to-truck processing of C&D debris on truck shipments within the state, not on interstate rail shipments. At bar, this Court is confronted with wholly

different facts, i.e. transfer of C&D debris from trucks to rail cars at the transload facility itself.

In fact, the November 20, 2002 STB Order specifically acknowledged that a different factual scenario might very well present a different outcome. The Board stated: "The only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be the transfer of C&D debris from trucks to rail cars at the CP transload facility itself." That is precisely the activity under review by this Court in the matter at bar.

In addition to intentionally deceiving this court with distorted synopsis of the STB decisions (and indeed not even advising this court of the most recent STB decision of which they have had possession for several weeks), the opposition also mislead this Court with regard to the decisions rendered by the United States District Court, District of New Jersey, Hon. Faith S. Hochberg. The only decision rendered by Judge Hochberg with respect to the preemption claim of Hi Tech was again in the context of truck-to-truck processing of C&D debris on truck shipments within the state, not on interstate rail shipments, the same conduct considered by the STB in its November 20, 2002 Order. Judge Hochberg's two subsequent decisions never reached HTT's claims of preemption arising from the loading

of the rail cars. The first was issued on June 16, 2003 and improperly dismissed HTT's Complaint on Eleventh Amendment grounds, thus never reaching the preemption argument. (See Exhibit "D" to Certification of Rebecca Hobbs for NJDEP.) The second was issued on June 20, 2003 and dismissed HTT's Complaint after application of the *Younger* and *Burford* abstention doctrines, thus again never reaching the merits of HTT's preemption argument. (See Exhibit "E" to Certification of Rebecca Hobbs for NJDEP.) As the foregoing has made clear, no authority anywhere has ever rendered a ruling with regard to HTT's preemption claims arising from truck-to-rail processing of C&D debris on interstate rail shipments. Thus, there is no *res judicata* or preclusive effect of any prior decisions on this proceeding.

POINT III

HTT HAS NEVER ARGUED THAT IT IS NOT SUBJECT TO ALL STATE ENVIRONMENTAL POLICE POWERS

The opposition consistently misstates HTT's argument for the purpose of inflaming this Court. HTT has never contended it is exempt from all state environmental regulations. From the outset, HTT has contended only that the permitting and licensing requirements, which stand as an impediment to the business operations of a railroad carrier, are preempted. HTT has always conceded that it is still subject to the general police powers of the State for environmental clean up. Even Judge Hochberg noted in her June 16, 2003 decision that HTT "concedes that in all other areas related to health and safety, this area has not been preempted and that therefore, the DEP can regulate it." (See Exhibit "D" to Certification of Rebecca Hobbs for NJDEP at p.2, fn.2.) Nonetheless, ECUA and HCIA refuse to recognize the distinction, stating "Solid waste facilities with rail capacity are not categorically exempt from generally applicable environmental laws, and Hi Tech's staunch refusal to acknowledge that uncontroversial point of law does not immunize it from enforcement actions." ECUA/HCIA Opposition Brief at p.1.

Similarly, the NJDEP argues the cataclysmic end to all state environmental regulation as a result of a finding in HTT's favor.

If Hi Tech is able to use preemption under 49 U.S.C. §10501(b) to circumvent state environmental regulation, the rest of the solid waste industry will routinely attempt to follow Hi Tech's road. The practical result would be the collapse of the carefully drawn system of state environmental regulation of solid waste, and the absence of any meaningful oversight of the collection and disposal of solid waste.

NJDEP Opposition Brief at p. 22.

These are classic strawman arguments, setting up a mistaken premise, only to give the appearance of a superior argument to defeat it. HTT has never argued anything other than the preemption of the licensing and permitting requirements that the NJDEP seeks to impose on HTT's rail facility operations.

HTT does so with the precedential authority of the STB and New Jersey Supreme Court. In Riverdale Petition for Declaratory Order the New York Susquehanna and Western Railway Corporation, 1999 WL 715272 the STB preliminarily interpreted the preemptive effect of the ICCTA. The STB stated that the ICCTA preempts all municipal zoning regulations as applied to railroads.

Zoning regulations that the Borough would impose clearly could be used to defeat NYSW's maintenance and upgrading activities, thus

interfering with the efficiency of railroad operations that are part of interstate commerce...[T]his is the type of interference that Congress sought to avoid in enacting section 10501(b).

Id. at *7.

Regarding public health and safety matters, the STB observed:

. . . state . . . laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce. That means that, while state and local government entities such as the Borough retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce.

With regard to the kinds of inspection that are permissible on property owned or used by interstate railroads . . . pre-clearance permitting requirements plainly are preempted. Id. at *6.

HTT is arguing nothing more than what the STB has already found: permitting requirements are preempted, but policing is not. Even the New Jersey Supreme Court has accepted the reasoning of the STB and that argued by HTT.

In Village of Ridgefield Park v. New York Susquehanna & Western Railway Corporation, 163 N.J. 446 (2000), the Supreme Court of New Jersey was faced with similar facts as

the case at bar. The Village sought a determination that the defendant railroad needed to obtain municipal permits, to permit municipal inspections, to cease the maintenance of a public nuisance, and to cease operations at the maintenance facility until the municipal requirements were met. The Village alleged that the railroad was in violation of local zoning ordinances and that the railroad had breached an implied contract to construct an engine house designed to minimize noise and air pollution. Relying heavily upon the STB's decision in Borough of Riverdale, supra, the Supreme Court of New Jersey held that the Village may not require permits of the railroad.

Both briefs in opposition take the tack that Congress never intended to usurp all of the State's policing role of garbage collection and hauling (a premise HTT does not disagree with). In so doing, both cite AGG Enterprises v. Washington County, 281 F.3d 1324 (9th Cir. 2002) and Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001). A closer look at both cases shows that they are inapposite to the issues presented in HTT's application herein.

In AGG, the Court was faced with a motor carrier hauling mixed solid waste. The motor carrier claimed it did not need an exclusive permit to haul the waste because

such a regulation was preempted by the Federal Aviation Administration Authorizing Act of 1994 ("FAAAA"). The motor carrier brought suit for injunctive relief. After setting forth the process of preemption analysis generally, the Court examined the intent of Congress. A major distinguishing factor with the claim of HTT, the Court in AGG ruled that "the purpose of the FAAAA preemption clause was to 'level the playing field between air carriers on the one hand and motor carriers on the other with respect to intrastate economic trucking regulation'" Id. at 1329 *citing* H.R. Conf. Rep. No. 103-677, at 82 (1994). Thus, as a starting premise, HTT is in a very different legal realm since railway regulation is a notoriously interstate matter, hence State and local regulation has long been preempted to a significant extent. See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981) (historically, the Interstate Commerce Act was recognized as "among the most pervasive and comprehensive of federal regulatory schemes"). Also contrary to HTT's position, the motor carrier in AGG was alleging it had no obligations to the State authorities, a claim HTT does not make. The AGG Court thus went on to find that the motor carrier was not exempt from all types of State authority.

In Florida East, the Court was confronted with an asphalt aggregate supplier looking to take advantage of a railroad's status to avoid regulation. The aggregate supplier was using the property, albeit owned by the railroad, almost solely for its own personal profit. As noted in the opposition, the Court determined that Congress intended

to displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or govern[ing]' rail transportation, [citation omitted] while permitting the continued application of laws having a more remote or incidental effect on rail transportation.

Id. at 1331.

It can hardly be said that the State regulations at issue herein do not have the effect of governing rail transportation. The permitting and licensing requirements imposed by these regulations effectively shut down HTT and thus CP's operations that depend so heavily on the services provided by HTT. Unlike the aggregate supplier in Florida East, HTT is a licensee of CP, performing those functions for CP in CP's shoes. Even the opposition do not go so far as to argue that CP is subject to the permitting and licensing requirements sought to be imposed upon HTT. Thus, where HTT is merely performing a service as a licensee of CP, HTT is entitled to the same preemptive

scope as CP. It bears repeating, that HTT does NOT contend it is immune from all police powers of the State environmental oversight authorities. HTT respectfully suggests that the permitting and licensing regulations that have the affect of preventing HTT, a rail carrier, from operating its business are preempted, thus rendering the administrative order null and void.

CONCLUSION

Hi Tech Trans, LLC respectfully requests that this tribunal rule the administrative order at issue to be null and void. In the alternative, it is respectfully requested that this tribunal declare that it is without jurisdiction to resolve the present matter.

Respectfully Submitted,

ANDREW L. INDECK