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Vernon A. Williams, Secretary
Office of the Secretary
Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

**Re: Appeal of Hi-Tech Trans, LLC
Finance Docket No. 34192**

Dear Secretary Williams:

Enclosed for filing on behalf of respondents Hudson County Improvement Authority and Essex County Utilities Authority, please find an original and 11 copies of a reply to petitions to intervene in the above-referenced matter. If possible, I would request that the extra copy be date-stamped and returned so that our files may properly reflect the filing. Thank you.

Respectfully yours,

DeCotiis, FitzPatrick, Cole & Wisler, LLP
Attorneys for HCIA and ECUA

By: _____

Benjamin Clarke

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 34192
HI TECH TRANS, LLC – PETITION FOR DECLARATORY ORDER



ESSEX COUNTY UTILITIES AUTHORITY AND
HUDSON COUNTY IMPROVEMENT AUTHORITY'S
REPLY TO PETITIONS TO INTERVENE AND
COMMENTS OF NORFOLK SOUTHERN RAILWAY COMPANY,
DELAWARE AND HUDSON RAILWAY COMPANY, INC.
AND CANADIAN NATIONAL RAILWAY COMPANY

Respondents Essex County Utilities Authority ("ECUA") and Hudson County Improvement Authority ("HCIA") hereby submit the following reply to the petition to intervene and comments filed by Delaware and Hudson Railway Company, Inc. d/b/a Canadian Pacific Railroad ("CP"). At the outset, respondents ECUA and HCIA join in and rely on those arguments set forth by the New Jersey Department of Environmental Protection ("NJDEP") in reply to the various petitions to intervene filed in this case. Respondents ECUA and HCIA wish to add one point to the arguments raised by NJDEP, however.

Attached hereto as Exhibit A are a series of newspaper articles and a complaint filed by the New York Attorney General's Office against CP and several other parties, including an entity known as "Chem-Rail Logistics." Those documents reflect that, in or around August 2002, CP began shipping putrescible and non-putrescible solid waste for Chem-Rail from New Jersey to New York. The New York Attorney General's Office has advised us that the waste was loaded onto CP's rails at the Oak Island Yard, which is the same yard that serves as the base of operations for Hi Tech's solid waste transfer station. The Chem-Rail

operation resulted in more than 400 rail cars full of waste being left stranded for months at a rail yard located in Buffalo, New York. After the Attorney General filed suit to abate the public health hazard and nuisance created by the abandoned containers of solid waste, CP ultimately agreed to arrange for the disposal of the 40 million stranded pounds of garbage at a nearby landfill – very likely the same landfill to which Hi Tech sends much of its waste.

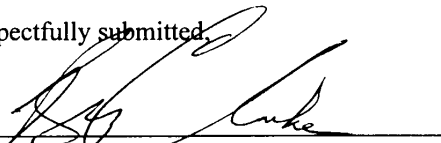
ECUA and HCIA respectfully call these documented events to the Board's attention because they demonstrate two things with utter clarity: (1) that the concerns expressed by the Board in its August 14 decision about the risk that unscrupulous third parties will seek to mis-use the federal rail laws as a haven for illegal or hazardous activities are real and well-founded; and (2) that CP, of all rail entities, should be well aware of the validity of those concerns, since it was recently required to redress the health hazard posed by its customer's activities.

From the available information, ECUA and HCIA have no reason to believe that Hi Tech was involved with the 400+ rail cars of abandoned waste, but the reported events serve as a stark reminder why state and local regulation of solid waste remains a matter of substantial public importance -- and one that the Board has rightly recognized falls outside its jurisdiction and expertise. The Board has no regulations governing the handling and storage of solid waste by non-rail entities such as Hi Tech, nor does the Board have the institutional resources needed to police their activities. The Board's August 14 decision draws an appropriate line between state regulation of solid waste facilities and transportation by rail carriers, and correctly concludes that Hi Tech's activities fall on the state-regulated side of the fence.

Accordingly, the Board should affirm the August 14 decision.

Respectfully submitted,

By:


Benjamin Clarke

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Dated: September 17, 2003

Attorneys for Essex County Utilities Authority and
Hudson County Improvement Authority

Exhibit A

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NYC-area trash rots for months in Buffalo rail yard

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USA: June 10, 2003

NEW YORK - Three hundred eighty-eight containers of garbage from the New York City area have been rotting in a Buffalo, New York, rail yard since December, reviving memories of New York City's infamous garbage barge of 1987, when six states rejected its trash because they feared it was toxic.

Referring to the garbage containers in Buffalo, Linda White, an assistant New York State attorney general, said, "At times they stink a lot."

The rotting trash is just another blow to hit the depressed city which manufacturers no longer prize for its Lake Erie location. Some 500 teachers may have to be laid off because of Buffalo's latest budget crunch, and the state is weighing seizing control of its finances.

White has sued the shipper, Chem-Rail, and Canadian Pacific Railway (CP.TO) to get the trash removed from a rail yard she described as an island in a business and residential district.

White said the trash containers were overloaded, so the trucks that carried them got stuck in the mud at the rail yard.

But Joseph Jacobi, an owner of Express Intermodal, which was unloading the containers, says the problem was that the shipper, Chem-Rail, ran out of money. "Chem-Rail didn't pay Canadian Pacific Railway, they didn't pay us, they didn't pay the truckers, they didn't pay the landfill. So we just stopped working."

Chem-Rail and Canadian Pacific officials were not immediately available.

Unlike 1987, when a barge hauling New York City's trash to a North Carolina landfill was homeless for months after the state declined to accept it, this time the city which produces 26,000 tons of trash a day is not on the hook.

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City officials have no records showing they did business with Chem-Rail, White said. And Jacobi said the trash did not come from New York City but from the area around it, possibly including Connecticut and New Jersey.

White wants the trash hauled away before the summer heat intensifies its odor but that could take years if left to the courts. "But you should know that there are people working on a solution," she added.

Jacobi agreed a clean-up plan was being worked out, adding: "It's really not as bad as it's being portrayed. The containers are sealed, there is no rodent problem. Sure, if you stood two feet away, there is an odor problem. They want it out of Buffalo."

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FOCUS: TRASH CONTROVERSY
Greed amid the garbage

On Buffalo's far East Side, seemingly abandoned rail cars hold more than 40 million pounds of New York City trash. Now a waste-disposal contractor who saw a chance to make a killing apparently can't afford to move them out.

By MICHAEL BEEBE
News Staff Reporter
6/15/2003

DENNIS C. ENSER/Buffalo News

The garbage train sits in a rail yard in the Clinton-Bailey neighborhood, where residents report swarms of fruit flies and green bottle flies, as well as rats.

Mary Taber, left, and Karen Ball are among the 1,500 neighbors of the garbage train on Buffalo's far East Side. They have been trying for months to get the containers of New York City garbage out of a rail yard.

Buffalo's garbage train, the 400 oceangoing containers stacked by twos in a far East Side rail yard, would stretch down the tracks for more than a mile if it were headed somewhere.
But this train has been bound for nowhere since February.

Each car is stuffed with 25 to 50 tons of solid waste and construction debris from New York City.

More than 40 million pounds of garbage - grapefruit rinds, disposable diapers and other aromatic throwaways that homeowners and apartment dwellers couldn't wait to get rid of - are rotting in the SK Rail Yard off Clinton Street.

A state environmental inspector could only get within a foot of the reeking cars in April before the overpowering stench drove her away.

It has been warming up since, and last week those who live in the Clinton-Bailey neighborhood reported swarms of fruit flies and green bottle flies had hatched. Neighbors saw the first rats last week.

The garbage is sitting there - in bright blue steel, tarped containers that make perfect composting bins - because a New York City waste transporter claims to have run out of money to continue sending them to Modern Landfill in Lewiston.

State and city officials, who brought court action last month to get rid of the rail cars and punish those responsible, say the garbage never should have been stored in Buffalo.

"It was a completely lawless operation," said Judith Enck, an environmental adviser to State Attorney General Eliot L. Spitzer.

How did those 400 containers - and the several thousand before them that were loaded onto tractor-trailers and sent over Buffalo city streets on their way to Niagara County - end up in a city neighborhood?

In a word, money.

Since New York City closed its massive Fresh Kills landfill two years ago, there are millions of dollars to be made by those willing to haul away the 36,000 tons of waste the city generates and ships out every day.

The city's Department of Sanitation spends nearly \$1 billion a year handling just one-third of that garbage, with private carting companies shipping the rest.

Landfills in Pennsylvania, Virginia and other states get most of the load hauled by a handful of the nation's largest waste companies.

But there are plenty of smaller outfits looking for a profit. Enter Robert B. Ferro's Chem-Rail Logistics, the company that shipped the garbage here over the Canadian Pacific Railroad.

Ferro, 60, a Long Island man with a home on Lake George, has a reverse Midas touch in the waste industry.

Court documents show he botched other waste operations in Pennsylvania and Virginia. And a civil racketeering lawsuit accused his workers of threatening to kill Philadelphia trucking company executives who complained about not getting paid for new trucks leased to Ferro.

"They did this out of greed," said Fillmore Council Member David A. Franczyk, whose district includes the rail yard, "and now they're drowning in their garbage."

"An awful stench"

So, too, are the neighbors surrounding the rail yard just west of the Niagara Food Terminal near Clinton Street and Bailey Avenue.

"It smells like my city garbage can when you open it," Karen Ball, who lives with her husband, Robert, on nearby Scoville Avenue, said of the times when the wind blows the wrong way. "It's an awful stench."

Ball remembers the day in August when the first big trucks rumbled down tiny Scoville from the rail yard.

"It started at 6 a.m. and went all day until 6 p.m.," she said. "I thought at first they were just moving some stuff from the railroad. But then I stopped one of the drivers, and she said they were moving New York City garbage off the trains."

That was only the start. Six days a week, all day long, the trucks headed down Scoville, and neighboring Baitz Avenue and Gilbert Street on their way

to the Thruway.

The pockets of residential streets surrounding the rail yard - it's known as Ghost Town, a name that stuck after Buffalo's rail industry faded - are home to about 1,500 people.

It's a working-class neighborhood with modest homes and small yards, where the average household income is about \$26,000 a year, according to the latest census figures.

"We definitely don't live high on the hog," said Mary Taber, a teacher's aide who still lives in the Scoville Avenue home where she was born. "We scrape by, from paycheck to paycheck."

But that doesn't mean they're any less protective of their homes or children, and the neighbors soon started gathering in their yards to talk about the continuing stream of garbage trucks passing by.

"I was home one Friday afternoon, waiting for a phone call," Taber said. "In one half-hour period, I counted 28 trucks going by. That's when I called Franczyk's office."

Soon Taber, the Balls and other neighbors formed the Clinton-Bailey Community Association, and Taber became its leader.

With Franczyk's office taking the lead, state transportation officials and state troopers started pulling over the garbage trucks coming from the rail yard, discovered most were overweight and started writing tickets.

But while the truck traffic from the rail yard slowed because of the stepped-up enforcement, the garbage trains kept coming from New York City. The backlog grew. Then some of the containers were taken off the tracks to free up the rail cars and put on the ground. The containers quickly sank into the soft earth.

In February, Modern Landfill finally stopped accepting the waste containers because Chem-Rail Logistics quit paying the bill.

As the 40-foot containers continued to stack up to the current count of 400, the state Department of Environmental Conservation cited Chem-Rail Logistics in February for violating state law.

Though the operation did not need permits as long as the containers were promptly put on trucks, DEC Regional Director Gerald Mikol said, storing the containers meant the rail yard had become a garbage transfer station.

And that's where the rail cars have sat since, some of them bulging at the sides from their putrid loads, while officials try to figure a way to get rid of them.

"It makes you wonder what these people were thinking," said Robert Sienkiewicz, Franczyk's aide who has worked on the problem. "That they could just come here, load up these trucks, drive them through residential neighborhoods and nobody would notice?"

Waste mismanagement

Buffalo is the latest failed attempt in the garbage business for Ferro, the waste executive who brought the garbage here. He once proposed a fleet of oceangoing garbage barges for the Hudson River.

The barges would anchor in Albany for a week at a time while loading 3,500 tons of upstate garbage, Ferro told state officials in a 1995 permit application for his Eagle Enterprises, then head down the Hudson to landfills in Virginia or Maryland.

Thwarted by the state, Ferro took his garbage barges to Philadelphia.

But only a few of the massive barges - each carrying 300 garbage-filled rail cars - left Philadelphia and sailed up the historic, plantation-lined James River to a landfill near Richmond.

The barges, Virginia environmental officials said, were leaking "garbage juice" into the James River. They fined the landfill \$6,000, and Virginia legislators banned garbage barges from the river. The ban was overturned by the courts, and state officials are writing more stringent regulations.

It wasn't Ferro's only problem.

Ferro, his wife, daughter and Eagle Enterprises were hit with a civil racketeering suit filed by a Philadelphia truck dealer who had agreed to lease Ferro 51 new tractor-trailers for a recycling operation.

After Ferro failed to pay the initial \$140,000 on the lease, the lawsuit charged, he gave the company a check that bounced. When trucking company officials complained, they said, Eagle employees threatened to kill them.

Eagle executives suggested their company was mob-connected, the lawsuit charged. The trucking company officials said Eagle executives told them, "You don't know who you're dealing with," "This isn't over yet" and "We're going to get you."

And Eagle's operations manager told the trucking company president he would "do harm" to his leasing manager and carry him out in "a body bag," the lawsuit alleged.

The racketeering suit by Freedom International Trucks died when Eagle Enterprises declared bankruptcy and liquidated its assets, leaving its creditors with little or nothing to collect.

That, however, didn't stop Ferro's involvement in the garbage business. Chem-Rail Logistics was his next company.

Joseph Jacobi, a local developer and former contractor, said Ferro contacted him last year about getting involved in the SK Rail Yard operation, having learned of Jacobi from a former business associate in Kansas City.

Ferro, Jacobi said in an interview, told him he had leased the rail containers from a Pennsylvania company, signed contracts with Canadian Pacific to ship the waste and Modern Landfill in Lewiston to dispose of it, and had lined up the trucking companies.

What Ferro needed from him, Jacobi said, was a local operation at the rail

yard to take the containers off the trains, prepare shipping manifests and put the containers on the trucks.

"They had a real sweetheart deal with Canadian Pacific," Jacobi said. "They were charged a flat rate for so many cars, whether they were loaded or not."

Jacobi said Ferro told him he was being paid \$54 a ton to dispose of the waste - industry sources said Modern was charging about \$21 a ton - so it looked like a money-making operation.

Jacobi and Anthony Perrone, a contractor experienced with heavy equipment, formed Express Inter-Modal Service, paid \$42,000 to lease a heavy crane to offload the rail containers onto the trucks, hired some workers and went into business last summer.

"It did work," Jacobi said of the finances. "That was one of the reasons that I and some of the other vendors extended them so much credit. I still don't understand where it went wrong."

Jacobi said that Ferro came to Buffalo every other week or so with his wife, Sunny, and that Ferro's operations manager, Robert Votino - who held the same job with Ferro's Eagle Enterprises - was here weekly.

But when problems developed with the neighborhood over the trucks and the state over the container backup developing in the rail yard, Ferro and Votino were nowhere to be found.

It was Jacobi, who had only a small part of the operation, who was left to face the angry neighbors and regulatory officials.

"There were some problems with overweight trucks," Jacobi said. "It was one of the problems we were working out."

Heavier trucks to support the loads were on their way, Jacobi said, and he met with city officials to divert traffic from the neighborhood.

"It annoyed the residents to have them on residential streets," Jacobi said. "These were truck routes, but we were moving along on that. We were putting in a roadway to let the trucks exit on Bailey Avenue so they could get on the Thruway without going through the neighborhood."

Ferro stopped paying

But everything came to a halt, Jacobi said, when Ferro stopped paying Modern, and the landfill shut off further deliveries. Gary Smith, vice president of Modern, did not return telephone calls to comment.

"I said I'm not working anymore until I get paid," said Jacobi, who figures Ferro owes his company \$250,000.

"We were all such dummies," Jacobi said of his company and other local vendors. "We just kept extending them more credit."

Ferro did not respond to telephone calls made to two Chem-Rail offices. Calls made to his cell phone, and to his wife and daughter, also were not returned by Ferro. Calls to Votino were not returned.

But Ferro has not dropped out of sight.

In April, Ferro sent letters to Canadian Pacific Railroad, as well as the Pennsylvania company, Annexus Storage and Containers, that leased him the containers now filled with garbage.

"As you know," Ferro wrote in the letter to Canadian Pacific, "my company, Chem-Rail Logistics LLC, has encountered significant operational difficulties and disruptions. As you also know, we at Chem-Rail are committed to resolving such problems and resuming productive business."

Ferro accused the container company of interfering with his business. Calling its cleanup attempts illegal, he said Chem-Rail would take steps to block the efforts and warned the railroad not to interfere.

Action on lawsuits put off

David J. State, a lawyer representing the city, and Linda E. White, representing Spitzer, said last week that they are delaying further action on their lawsuits to allow Canadian Pacific and Annexus to work out arrangements to ship the waste from Buffalo.

The two companies are arranging to ship the waste in stages to landfills with rail facilities, Franczyk said. They told him they hope to begin removing the waste within a week to 10 days.

"They've been telling us that for months," Franczyk said, adding that he would believe it when he sees the first cars moving from the rail yard.

A Canadian Pacific spokesman confirmed the discussions and said the rail company hopes to have a resolution soon.

The negotiations are being kept under wraps because officials fear the notoriety of Buffalo's garbage train may cause landfills to shy away from accepting the waste.

"This material is hot," Jacobi said. "You stand next to it, it's not going to smell too bad. You empty one of those containers and expose the core, that stuff is going to reek."

Scott Weber, an engineering professor at the University at Buffalo and director of the Center for Hazardous Waste Management, said the smell will only increase as the garbage continues to putrefy.

"It would be like putting garbage in your trash can, keeping it out for weeks at a time, and then smelling it from time to time," Weber said. "It's going to get worse as it gets hotter."

Taber, the neighborhood leader, isn't holding her breath waiting for a quick cleanup. But with warmer weather coming, holding her breath around 20,000 tons of rotting garbage might not be such a bad idea.

"It's supposed to get into the 80s (soon)," she said. "I'm afraid this stuff is still going to be sitting here all this summer."

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

THE STATE OF NEW YORK and ERIN M. CROTTY
as COMMISSIONER of the NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Plaintiffs,

AMENDED
VERIFIED COMPLAINT

-against-

CHEM-RAIL LOGISTICS, LLC, EXPRESS INTERMODAL
SERVICE LLC, and CANADIAN PACIFIC RAILROAD,

Defendants.

Plaintiffs the State of New York and Erin M. Crotty as Commissioner of the New York State Department of Environmental Conservation (together, the "State"), by Eliot Spitzer, Attorney General of the State of New York, for their complaint against defendants allege as follows:

Preliminary Statement

1. The State brings this action to enjoin defendants creation and maintenance of a public nuisance caused by defendants' bringing thousands of tons of household garbage and other waste to the SK Yard, a rail yard located approximately between Route 62 (Bailey Avenue), New Babcock Street, William Street and Manitoba Street in the City of Buffalo, New York (the "Site"), and illegally storing it there, causing excessive odors, flies and other pests in the area surrounding the Site. In addition to creating a nuisance, defendants' actions violate 6 NYCRR § 211, promulgated pursuant to Environmental Conservation Law ("ECL") § 19-0301 (governing air pollution) and ECL § 27 -0707, 6 NYCRR § 360-1.7(a)(1) and 6 NYCRR § 360-11.1 (all governing solid waste management).

2. A number of local residents have experienced adverse physical effects associated with

exposure to the noxious fumes and odors emanating from defendants' activities, including headache, nausea, gagging, eye irritation, coughing, sneezing, and loss of appetite. These residents have had to curtail and/or interrupt their daily activities, remain indoors, close windows, and remain indoors to minimize their exposure to the noxious fumes and odors.

3. Under state common law and the state ECL, the State seeks injunctive relief requiring defendants to remediate the conditions causing the public nuisance at the Site including removal of all waste on the Site whether in containers, on the ground, or in existence in any form at the Site. The State also seeks an order permanently enjoining defendants from operating the Site as a public nuisance and civil penalties for the statutory violations described herein.

Jurisdiction and Venue

4. This Court has jurisdiction pursuant to ECL §§ 71-2103 and 71-2107, and the common law.

5. Venue is proper in Erie County pursuant to CPLR §503(a) and (c) because the Site is located in that county.

Parties

6. Plaintiff, the State of New York, is a body politic and sovereign entity which brings this action on behalf of itself and, as parens patriae, on behalf of all residents and citizens of the State, particularly those residents and citizens residing in the area of the Site.

7. Plaintiff Erin M. Crotty is Commissioner of the New York State Department of Environmental Conservation ("DEC"), an agency of the State of New York charged with protecting the environment and natural resources of the State pursuant to the ECL.

8. Defendant Chem-Rail Logistics, LLC ("Chem-Rail") is, upon information and belief, a

limited liability company organized under the laws of the State of New York, with a principal place of business located at 330 West 38th Street, New York, New York 10018-2999.

9. Defendant Express InterModal Service LLC ("InterModal") is, upon information and belief, a limited liability company organized under the laws of the State of New York, with a principal place of business located at 1 Manitoba Street in the City of Buffalo, New York 14206-2928.

10. Defendant Canadian Pacific Railway Company ("Canadian Pacific"), a Canadian business entity, is, upon information and belief, a corporation authorized to do business in the State of New York, with a principal place of business located at 401 9 Avenue SW, Suite 500, Calgary, Alberta T2P 3C5, Canada.

Statutory and Regulatory Framework

A. ECL Article 19

11. ECL Articles 3 (General Powers) and 19 (Air Pollution) authorize the DEC to regulate, among other things, stationary sources of air pollution within the State.

12. Pursuant to ECL § 19-0301(1), the DEC has promulgated air pollution control regulations at, inter alia, 6 NYCRR § 211.2, which provides that:

no person shall cause or allow emissions of air contaminants to the outdoor atmosphere of such quantity, characteristic or duration which are injurious to human, plant or animal life or to property, or which unreasonably interfere with the comfortable enjoyment of life or property. Notwithstanding the existence of specific air quality standards or emission limits, this prohibition applies, but is not limited to, any particulate, fume, gas, mist, odor, smoke, vapor, pollen, toxic or deleterious emission, either alone or in combination with others.

13. Pursuant to ECL § 71-2103, any person who violates any provision of ECL Article 19 or any code, rule or regulation promulgated pursuant thereto shall be liable, in the case of a first

violation, for a penalty not less than two hundred fifty dollars nor more than ten thousand dollars for said violation and an additional penalty not to exceed ten thousand dollars for each day during which such violation continues. In the case of a second or any further violation, the liability shall be for a penalty not to exceed fifteen thousand dollars for said violation and an additional penalty not to exceed fifteen thousand dollars for each day during which such violation occurs. These penalties are recoverable in an action brought by the Attorney General. ECL § 71-2103(2).

14. In addition, the Attorney General, upon the request of the Commissioner of DEC, may bring an action for an injunction against any person violating a provision of ECL Article 19 or any rule or regulation promulgated pursuant thereto. ECL § 71-2107.

B. ECL Article 27 and 6 NYCRR Part 360

15. Article 27 (solid waste) of the ECL authorizes the DEC to regulate the handling and disposal of solid waste.

16. Pursuant to ECL § 27-0703(2), the DEC is empowered to promulgate regulations to prevent or reduce air, water and noise pollution including noxious odors, unsightly conditions caused by the uncontrolled release of litter, infestations of vermin, and "other conditions inimical to the public health safety and welfare."

17. Pursuant to ECL § 27-0703(2), the DEC has promulgated solid waste regulations at, inter alia, 6 NYCRR Part 360.

18. 6 NYCRR § 360-1.7(a)(1), entitled "Permit requirements, exemptions and variances," provides in pertinent part:

(1) Except as provided for in subdivisions (b) and (c) of this section, section 360-1.13 of this Subpart or otherwise provided for in the applicable subpart pertaining to the type of solid waste management facility in question, no person shall:

(i) construct or operate a solid waste management facility, or any phase of it, except in accordance with a valid permit issued pursuant to this Part

19. Any person who violates any of the provisions of, or fails to perform any duty imposed by, title 3 or title 7 of Article 27 or any rule or regulation promulgated pursuant thereto, shall be liable for a civil penalty not to exceed five thousand dollars for each such violation and an additional penalty of no more than one thousand dollars for each day during which such violation continues, and may be enjoined from continuing such violation. ECL § 71- 2703(a). In addition, ECL § 71-2703(b) provides for additional penalties if, as a result of such violation, solid waste is released into the environment.

20. Pursuant to 6 NYCRR § 360-1.2(b)(113), "operator" or "facility operator" means:

the person responsible for the overall operation of a solid waste management facility or a part of a facility with the authority and knowledge to make and implement decisions, or whose actions or failure to act may result in noncompliance with the requirements of this Part or the department-approved operating conditions at the facility or on the property on which the facility is located.

21. NYCRR § 360-1.2(b) provides

(125) Putrescible means the tendency of organic matter to decompose with the formation of malodorous byproducts. For the purpose of this Part, wood is not considered to be putrescible.(126) Putrescible waste means solid waste that contains organic matter capable of being decomposed by microorganisms and of such a character and proportion as to be capable of attracting or providing food for disease vectors.

Facts

A. General Background

22. On information and belief, the Site is leased by defendant Canadian Pacific from Norfolk Southern Railway, a Virginia corporation authorized to do business in the State of New York.

23. On information and belief, defendants began operating at the Site in about August 2002, transporting construction and demolition debris, household garbage, and other putrescible waste material (the "Waste") to the site. The Waste is transported in containers from New Jersey to Buffalo via rail car, purportedly using the Site to stage these containers prior to delivery of the containers by truck to a landfill in Niagara County. However, instead of moving these containers promptly off the Site, defendants have stored or abandoned them there.

24. The DEC estimates that there are about 400 containers on the Site, some still on rail cars, and others stored on the ground.

25. On information and belief, each of these containers is filled with 50,000 to 100,000 pounds of waste.

26. On information and belief, the railroad cars used for transporting the Waste and on which Waste is currently being stored are owned by Canadian Pacific.

27. On information and belief, defendants are operators of the Site and are jointly or separately responsible for operation of the Site or a part of it and have authority to make decisions affecting the compliance of such operations with environmental laws.

28. Residential properties and businesses are located adjacent to and across Manitoba Street from the Site and, in general, surround the Site.

29. On information and belief, many of the containers filled with the Waste are overweight and cannot be transported on local streets. Thus, further handling of the Waste on the Site may be necessary, potentially causing further odors and other pollution.

30. In addition, there have been numerous traffic violations associated with truck traffic from the Site.

31. The containers are not adequately covered as the tarps used to cover them are inadequately

secured. Some containers lack any cover and waste is visible on the ground of the Site.

B. Notice of Violation for Operating in Violation of ECL Articles 27 and 19

32. On or about February 5, 2003, the DEC sent a Notice of Violation ("NOV") to Chem-Rail regarding violations of New York State Solid Waste and Air Pollution Laws, Articles 27 and 19 of the ECL and applicable regulations, and specifically citing 6 NYCRR Parts 360 and 211 et seq. The NOV requires Chem-Rail to, among other things, remove all containers stored on the ground by February 14, 2003, adequately cover all containers on the Site, and submit a management plan by February 28, 2003.

33. Chem-Rail has not complied with the requirements of the NOV.

C. Off-Site Effects of Defendants' Operations

34. Since defendants began operating at the Site in about August 2002, the State has received hundreds of complaints from local residents regarding noxious fumes and odors, vectors (such as insects) and waste blowing from the Site, as well as complaints of noise, dust and hazards from truck traffic associated with transfer of the Waste from the Site to the waste disposal facility in Niagara County.

35. Based on these complaints, the DEC has conducted numerous inspections of the Site that confirmed the substance of the citizens' complaints.

36. On information and belief, citizens residing in the vicinity of the Site have experienced headache, nausea, gagging, eye irritation, coughing, sneezing, and loss of appetite because of the noxious fumes and odors emanating from the Site, and some have sought medical treatment for their symptoms.

37. Residents near the Site are also concerned that their children are at risk from increased truck traffic associated with transferring the Waste from the Site to a permanent disposal facility.

38. Defendants have allowed and continue to allow emissions of air contaminants from the Site of a quantity, characteristic or duration that unreasonably interferes with the comfortable

enjoyment of life or property. Homes and yards are adversely affected. On information and belief, at times, residents stay inside their homes with the windows closed or even leave their homes and go to another location because the odors are so noxious and irritating. Outdoor recreational activities must be limited and people in the affected area are deprived of the use and enjoyment of their homes and property.

**FIRST CAUSE OF ACTION:
PUBLIC NUISANCE**

39. Defendants' activities at the Site, including the transport, collection and storage of the Waste, have caused and/or contributed to the creation and maintenance of a public nuisance, in that odors, pests and other pollution emanating from the Waste stored or transferred at the Site interfere with, and cause damage to the public in the exercise of rights common to all, and injure the property, comfort, health, safety, and environment of a substantial number of persons.

40. Defendants' acts and omissions at the Site resulting in the odors pests and other pollution emanating from the Site, and litter on and blowing from the Site adversely affect the residential and business areas around the Site and cause and/or contribute to the creation and maintenance of the public nuisance.

41. Defendants have failed to abate the public nuisance despite having actual knowledge of the conditions creating said nuisance.

42. Plaintiffs have no adequate remedy at law for the public nuisance created and maintained by defendants.

**SECOND CAUSE OF ACTION:
VIOLATION OF ECL ARTICLE 19 AND 6 NYCRR PART 211**

43. Defendants are "persons" within the meaning of ECL § 19-0107(1) and 6 NYCRR §

200.1(bk).

44. Defendants' activities have caused or allowed and continue to cause or allow emissions of air contaminants to the outdoor atmosphere of a quantity, characteristic or duration injurious to human, plant or animal life or to property, or unreasonably interfering with the comfortable enjoyment of life or property, in violation of 6 NYCRR § 211.2.

**THIRD CAUSE OF ACTION:
VIOLATIONS OF ECL ARTICLE 27 AND 6 NYCRR PART 360**

45. Defendants are "owners" and/or "operators" within the meaning of Title 7 of Article 27 of the ECL.

46. Defendants have operated and continue to operate the Site as an unpermitted solid waste transfer station in violation of ECL § 27 - 0707, 6 NYCRR § 360-1.7(a)(1) and 6 NYCRR § 360-11.1.

47. Defendants' acts and omissions constitute violations of 6 NYCRR § 360-1.7 (a)(1) and § 360-11.1.

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against defendants as follows:

A. As relief for the First Cause of Action:

1. Holding defendants liable for creation and maintenance of a public nuisance caused by their activities at the Site; and

2. Granting injunctive relief :

(i) enjoining defendants from bringing, causing, or allowing any additional waste material on the Site;

(ii) enjoining defendants to remove all waste, including the Waste in containers from the Site and remove all containers from the Site, whether empty or full, pursuant to a schedule set by the Court;

(iii) enjoining defendants to remove the Waste, including any waste material on the ground at the Site; and

(iv) enjoining defendants from operating the Site as a public nuisance.

B. As relief for the Second and Third Causes of Action:

1. Holding defendants liable for operating and maintaining the Site in violation of the ECL and applicable regulations, including 6 NYCRR § 211.2, ECL § 27 - 0707, 6 NYCRR § 360-1.7(a)(1) and 6 NYCRR § 360-11.1;

2. Permanently enjoining Defendants from operating the Site in violation of the ECL and applicable regulations; and

3. Assessing penalties in an amount to be determined by the Court.

D. Such other and further relief as the Court deems just and proper.

Dated : May 28, 2003

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STATEMENT BY ATTORNEY GENERAL SPITZER ON THE SUCCESSFUL RESOLUTION OF STRANDED GARBAGE TRAIN IN BUFFALO

I am pleased to announce today that a creative negotiating process has produced a plan that will rid Buffalo of millions of pounds of trash stranded for many months in a local rail yard.

Under this agreement, the trash in 400 large containers stacked on railroad cars at the SK Rail Yard since last December will be transported away by train beginning tomorrow and disposed of at a licensed out-of-state landfill.

No one will be more pleased by this development than the residents of the Clinton-Bailey neighborhood who have had to live with a foul and unpleasant illegal landfill in their backyards for far too long.

My office first filed a lawsuit on May 29 against Chem-Rail Logistics, Express Intermodal Services and Canadian Pacific Railroad in an effort to resolve this issue. I am pleased that the work of my office helped drive this matter to a successful conclusion.

However, this resolution would never have been achieved without the dedicated work of many, including neighborhood activists, Buffalo Mayor Anthony Masiello, the state Department of Environmental Conservation, Congressman Jack Quinn, Buffalo City Council Member David Franczyk, Erie County Legislator Mark Schroeder and others too numerous to mention. The settlement could not have occurred without the cooperation of the railroad companies involved, Delaware and Hudson Railway Company, Inc., Canadian Pacific Railway, and CSX Transportation.

I want to extend my particular thanks to Supreme Court Judge Patrick NeMoyer who kept the parties at the negotiating table and helped facilitate the agreement.

Today's resolution ends a regrettable chapter for the Clinton-Bailey community. But it also demonstrates that successful results can be forged from

bad situations when those involved deal with each other in good faith.

Buffalo free of trash train

By Jim Johnson

BUFFALO, N.Y. — About 500 rail containers full of trash have been removed from Buffalo after a judge brokered a deal for their disposal to a landfill several states away.

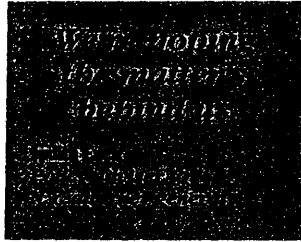
The stranded trash made news as it lingered for months in a rail yard near a residential neighborhood with no place to go.

Canadian Pacific Railway Co. was instrumental in the trash removal, said Judith Enck, a policy adviser to New York State Attorney General Eliot Spitzer.

"Our priority was getting it out of the neighborhood, especially in the hot weather," Enck said.

Some of the railcars had to be reloaded for their trip, which was reported in the Buffalo media, to the Lee County landfill near Bishopville, S.C.

"Many of the cars were significantly overloaded [originally],"



she said.

A total of four shipments were made between Buffalo and the landfill to rid the community of the waste.

"We're hoping the matter's behind us and it won't happen again," Enck said.

The whole stinky mess began when an arrangement to ship the New York City area trash via rail to a western New York landfill fell apart late last year after months of operation.

Railcars, each containing

about 25 to 50 tons of waste, became stranded in a rail yard that was used to transfer the containers from rail to truck due to a variety of problems.

Some trucks were cited for being overweight, others became stuck in the mud, and then there was an alleged transfer permit problems. The New York State Department of Environmental Conservation eventually stepped in to shut down the site.

Spitzer's office later sued three companies involved in the project in an effort to move the trash. An Erie County Supreme Court then brokered a deal.

Some working close to resolve the problem had been hesitant to talk, apparently because of a gag order Supreme Court Judge Patrick NeMoyer placed on them as they worked to find a solution to the well-publicized issue.

Canadian Pacific, which leases the yard from Norfolk Southern Corp., was named in the complaint and stepped up to help facilitate the transfer, Enck said.

Chem-Rail Logistics LLC originally arranged to ship the trash to Buffalo and a company called Express Inter-Modal Service was transferring the containers from rail to truck before the operation stopped late last year.

About 12,000 tons of waste was removed from Buffalo, said Canadian Pacific spokesman Paul Thurston.

The "resolution ends a regrettable chapter for the Clinton-Bailey community. But it also demonstrates that successful results can be forged from bad situations when those involved deal with each other in good faith," Spitzer said when the plan to move the waste was finalized. ■

Contact Waste News senior reporter Jim Johnson at (330) 865-6171 or jjohnson@crain.com