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October 24, 2005

VIA FEDERAL EXPRESS

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street NW
Washington, D.C. 20423

IN REPLY
PLEASE REFER TO THE ENCLOSED COPY

Case 2
Public Record



Re: National Solid Wastes Management Association, et al
Petition for Declaratory Order

FD-34776

Dear Secretary Williams:

Enclosed please find for filing an executed original and 11 copies of a Petition for Declaratory Order, three electronic copies of the Petition on compact discs, and a check in the amount of \$1,400.00 in payment of the filing fee. Please acknowledge receipt of these items by returning one date-stamped copy of the Petition in the enclosed self-addressed, stamped envelope.

As our Petition addresses an issue with significant national policy ramifications and is of great import to the provision of solid waste management services throughout the United States, we believe that a number of parties will wish to file comments or otherwise participate. Therefore, we respectfully ask that the Board open a formal proceeding in response to this Petition and expeditiously establish a procedural schedule.

Specifically, we suggest that the Board establish a procedural schedule as follows:

- 45 days from Petition Date: deadline for submittal of notices of intent to participate and comments on the Petition;
- 75 days from Petition Date: deadline for responses to comments;
- 100 days from Petition Date: final decision.

BEVERIDGE & DIAMOND_{PC}

The Honorable Vernon A. Williams
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We very much appreciate the Board's careful consideration of the Petition. If there are any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. Richmond", written over a horizontal line.

Stephen M. Richmond

SMR/maf
Enclosures

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



**PETITION OF
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
FOR DECLARATORY ORDER**

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Exhibits to this filing contain color images.

Dated: October 24, 2005

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. _____

PETITION OF
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
FOR DECLARATORY ORDER

Petitioners, National Solid Wastes Management Association (“NSWMA”), New Jersey State League of Municipalities, City of Newark, Village of Ridgefield Park, Hainesport Township, Burlington County, The United States Conference of Mayors, Solid Waste Association of North America, Integrated Waste Services Association, and Construction Materials Recycling Association, respectfully petition the Surface Transportation Board (the “Board”), pursuant to the Board’s authority under 5 U.S.C. § 554(e) and the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”), 49 U.S.C. § 721(b)(4), to enter a declaratory order to terminate a controversy or remove uncertainty and to prevent irreparable harm.

Petitioner NSWMA is a national trade association representing companies in North America that provide solid, hazardous, and medical waste collection, recycling and disposal services. NSWMA’s members operate in all 50 states and the District of Columbia and share a common mission to manage waste in a manner that is beneficial to the public, environmentally responsible, efficient, profitable, and ethical. NSWMA’s members include a number of companies with substantial existing solid waste operations in New Jersey, including operations serving geographic areas near the Site (as defined below). These operations are conducted pursuant to state and local law and permits. The creation and operation of rail-based solid waste

facilities claiming that state and local law are preempted by the ICCTA causes direct economic harm to these members and reputational harm to the solid waste industry.

Petitioner New Jersey State League of Municipalities (“NJLM”) is a voluntary association representing the interests of New Jersey municipalities. NJLM has been in existence since 1915 and currently its membership includes every one of the 566 municipalities in the State of New Jersey. The creation and operation of rail-based solid waste facilities claiming that state and local law are preempted by the ICCTA causes environmental and public health impacts to NJLM members and their communities, and directly harms their interest in regulating facilities that have the potential to cause environmental and public health impacts within their borders.

Petitioner City of Newark, New Jersey (“Newark”), a municipal corporation of the State of New Jersey, is the largest city in New Jersey. Newark is the transportation capital of the state and is the host community to a number of rail facilities. The creation and operation of rail-based solid waste facilities claiming that state and local law are preempted by the ICCTA may cause environmental and public health impacts to Newark residents, and directly harms its interest in regulating facilities that have the potential to cause environmental and public health impacts within its borders.

Petitioner Village of Ridgefield Park, New Jersey (“Ridgefield Park”) , is a municipality in Bergen County, New Jersey representing the interests of its citizens. Ridgefield Park is the host community to a rail facility operated by the New York, Susquehanna and Western Railway Corporation. The creation and operation of rail-based solid waste facilities claiming that state and local law are preempted by the ICCTA may cause environmental and public health impacts to Ridgefield Park residents, and directly harms its interest in regulating facilities that have the potential to cause environmental and public health impacts within its borders.

Petitioner Hainesport Township, New Jersey ("Hainesport"), is a municipality in Burlington County, New Jersey representing the interests of its citizens. The creation and operation of rail-based solid waste facilities claiming that state and local law are preempted by the ICCTA harms Hainesport's interest in regulating solid waste facilities that have the potential to cause environmental and public health impacts.

Petitioner Burlington County includes forty political subdivisions in the State of New Jersey and is the largest county in the state. Burlington County's Solid Waste Division plans for, implements, and operates facilities involved in the environmentally sound management of residential and commercial solid waste, the recycling and reuse of tires, construction material, and old appliances and the processing of sewage sludge into compost fertilizer. The creation and operation of rail-based solid waste facilities claiming that state and local law are preempted by the ICCTA causes direct economic harm to Burlington County, causes environmental and public health impacts to Burlington County and its political subdivisions, and directly harms their interest in regulating facilities that have the potential to cause environmental and public health impacts within their borders.

Petitioner The United States Conference of Mayors ("USCM") is the official nonpartisan organization of cities with populations of 30,000 or more. There are more than 1,100 such cities in the country today. Each city is represented in the USCM by its chief elected official -- the Mayor. The USCM promotes the development of effective national urban/suburban policy, strengthens federal-city relationships and ensures that federal policy meets urban needs. The creation and operation of rail-based solid waste facilities claiming that state and local law are preempted by the ICCTA causes direct economic harm to USCM members, environmental and public health impacts to USCM member communities, and directly harms the interest of USCM

members who regulate solid waste facilities that have the potential to cause environmental and public health impacts.

Petitioner Solid Waste Association of North America ("SWANA") is a not-for-profit professional association with a membership of over 7,500 professionals in the solid waste management industry. SWANA is involved in all aspects of municipal solid waste management and has an interest in this proceeding as the Association represents a broad cross-section of public and private sector individuals who provide services to numerous cities and communities across the country. SWANA's mission is to advance the practice of environmentally and economically sound management of municipal solid waste. SWANA is involved in educating and training its membership on sound solid waste management practices that are environmentally responsible, efficient and economically sound while protecting public health and safety. The creation and operation of rail-based solid waste facilities claiming that state and local law would be preempted by the ICCTA causes direct economic harm to SWANA's members, would be damaging to the reputation the solid waste industry, and could have adverse environmental and public health impacts to SWANA's members and their communities.

Petitioner Integrated Waste Services Association ("IWSA") is a national trade association representing 67 of the 89 waste-to-energy facilities in 27 states around the country, including five facilities located in New Jersey. These facilities generate approximately 2700 megawatts of power from the disposal of about 29 million tons of trash each year. IWSA member include 28 municipalities and a similar number of private companies. The operations of IWSA members are conducted pursuant to state and local law and permits. The creation and operation of rail-based solid waste facilities claiming that state and local law are preempted by the ICCTA causes direct economic harm to these members and reputational harm to the solid waste industry.

Petitioner Construction Materials Recycling Association (“CMRA”) is a national trade association that promotes the recycling and reuse of construction and demolition materials for members throughout North America, including five members who operate materials recycling businesses located in New Jersey. The operations of CMRA members are conducted pursuant to state and local law and permits. The creation and operation of rail-based solid waste facilities claiming that state and local law are preempted by the ICCTA causes direct economic harm to these members and their efforts to engage in recycling, and reputational harm to the solid waste industry.

I. INTRODUCTION

In recent years, there has been a surge in the establishment of solid waste processing facilities along rail lines. These facilities claim they are subject to the exclusive jurisdiction of the Board and are therefore entitled to federal preemption from most state and local laws. If these facilities could successfully claim federal preemption, they would in most cases be subject to no environmental controls, no design standards, no operational restrictions or oversight, and would need no approvals from the Board. By contrast, if they were not entitled to federal preemption, as is the case with thousands of transfer stations located throughout the United States, they would in most cases require years of intensive environmental permitting activities under state and local laws, and would be subject to stringent controls and operational oversight to ensure that they are protective of public health and the environment.

By this petition, Petitioners seek to preserve state and local government jurisdiction over the construction and operation of solid waste facilities, which is critically important for the protection of public health and the environment.

The Board's jurisdictional grant is being abused by operators attempting to gain an unfair competitive advantage over legitimate solid waste companies. These operators are wrongfully claiming federal preemption of state and local laws to avoid the high costs inherent in building and operating facilities that are protective of public health and the environment. This sham, if allowed to continue by the Board, will force a diminution in environmental protection for the processing and management of solid waste throughout the United States, with grave implications for public health and the environment.

To prevent this result, and to ensure that the solid waste industry remains protective of the public health and environment, Petitioners seek Board review of a representative facility located at 16th Street and Secaucus Road in North Bergen, New Jersey (the "Site"), nominally owned by the New York Susquehanna & Western Railway Corporation and operated by Rail Tech, LLC, and requests that the Board issue a Declaratory Order establishing a clear statement of statutory interpretation that the solid waste facility located at the Site, and any other similarly situated facility, is not within the exclusive jurisdiction of the Board; and that the application of New Jersey and local solid waste laws to this facility and the solid waste processing activities being conducted there, and any other similarly situated facility and activity, is not preempted by Section 102(a) of the ICCTA, 49 U.S.C. § 10501(b).

The importance of the Board's careful consideration of these issues to the public health and environment, to state and municipal governments, and to the solid waste industry, is difficult to overstate. It is critical that the Board send a clear message that it will not tolerate the exploitation of the ICCTA regulatory scheme.

As described below, the business of managing solid waste is heavily regulated by state and local laws, which have been enacted to protect the public health and environment. Solid

waste operators must all comply with these laws to maintain a fair and level economic playing field industry-wide, and to ensure the protection of public health and the environment.

Solid waste facility operators who team with short line railroads and claim protections under the ICCTA gain an unfair and unusually generous advantage over environmentally responsible operators because they avoid the high compliance costs and time consuming regulatory process inherent in building and operating a protective facility. The unfair use of the federal rail preemption by certain rail carriers and solid waste operators is nothing short of an attempt to create “regulation-free” zones of commerce for an industry that is otherwise subject to significant state and local regulation. This ploy threatens fair and open competition in the solid waste management industry nationwide, and jeopardizes public health and environmental protection by seeking to bypass the intricate network of state and local laws that have emerged in this industry. The result is unfair, unwarranted and improper, as it is clear that Congress did not intend to dramatically alter the solid waste management industry when it enacted the ICCTA.

This Petition presents two alternative legal propositions, as follows:

1. Solid waste operations at the Site, and at other similarly situated locations, are not integrally related to rail transportation and therefore are not subject to the exclusive jurisdiction of the Board; and
2. Solid waste operations at the Site, and at other similarly situated locations, do not constitute transportation by rail carrier and therefore are not subject to the exclusive jurisdiction of the Board.

II. THE FACTS

A. Regulation of Solid Waste in New Jersey.

The siting, design, permitting and operation of legitimate solid waste management facilities involves significant costs and investments of time. Site permitting alone can take several years. There is a particularly intricate environmental legal structure for these facilities in

New Jersey, a state which has a long history of governmental concern related to solid waste management. *See In the Matter of IMO Passaic County Utilities Authority*, 164 N.J. 270, 276-281 (1999); and *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 297 (3rd Cir. 2004).

The New Jersey Solid Waste Management Act was enacted to protect the health, safety and welfare of the people of New Jersey. N.J. Stat. Ann. § 13:1E-2(a). New Jersey's solid waste regulations were promulgated to implement this Act and establish a comprehensive regulatory regime for virtually every aspect of solid waste management. N.J.A.C. 7:26-1.1 *et seq.*

Under the New Jersey regulations, facilities for the "storage, collection, processing, transfer, transportation, separation, recycling, recovering, or disposal of solid waste" must be approved for inclusion in district solid waste management plans and must obtain solid waste facility ("SWF") permits from the New Jersey Department of Environmental Protection ("NJ DEP"). N.J.A.C. 7:26-2.4 and 7:26-2.8(e). An applicant for an SWF permit must submit a comprehensive permit application including, among other things, an environmental and health impact assessment containing an analysis of economic, environmental, and social parameters potentially affected by the proposed facility, engineering designs and reports describing the facility, and significant permitting fees to cover the cost of a detailed NJ DEP environmental review (for transfer stations, an initial permit fee of \$138,680 is required). N.J.A.C. 7:26-2.4(b); 7:26-2.9; 7:26-2.10; and 7:26-4.3. Once an SWF permit application is tentatively approved by NJ DEP, it is then subject to notice and public comment. N.J.S.A. 48:13A-6.

To ensure that operators are reliable, experienced, and otherwise competent, and do not have criminal records or associations, applicants must also submit extensive disclosure statements, and the state conducts a detailed background investigation to prevent those with improper or criminal backgrounds from owning or participating in solid waste management

operations. A company with criminal associations will not be authorized to conduct solid waste activities in New Jersey, reflecting the importance the state places on ensuring the adequacy of facilities that have the potential to cause adverse impacts to public health and the environment if improperly managed. N.J.A.C. 7:26-2.4(b)(2); 7:26-16.1.

The New Jersey solid waste regulations contain detailed operational requirements to protect against public health and environmental hazards. See N.J.A.C. 7:26-2.11. These requirements are substantially the same for rail carriers engaged in waste management activities. See N.J.A.C. 7:26-2d.1(d)(4)-(d)(10). (See also the discussion on pages 7 and 10 below about the challenge to these regulations pending in U.S. District Court.) Operators must also keep daily waste records and provide yearly updated registration statements and monitoring fees. N.J.A.C. 7:26-2.13, 7:26-2D.1(d)(27), 7:26-2.8, and 7:26-4.3.

NJ DEP and local solid waste management agencies are authorized by state law to conduct compliance inspections of solid waste facilities and to impose penalties of up to \$50,000 per day for noncompliance. N.J.A.C. 7:26-5.1. Facilities that operate in an environmentally unsound manner may be ordered to upgrade or close. N.J.A.C. 7:26-2.8(p).

B. The Facility.

The New York, Susquehanna and Western Railway Corporation (“NYS&W”) operates approximately 400 miles of track. In addition, NYS&W operates a side business marketing industrial development opportunities. The railroad’s website (www.nysm.com) advertises the following:

NYSW has industrial sites at many locations throughout our service territory. Whether you need an existing building or a vacant site, we can assist you in finding a suitable location. We work with local real estate companies, state and local agencies, and utilities to develop a package that will benefit your company.

If you need a rail-served site in our area, contact our Marketing & Sales Department to begin your search.

RailTech, LLC (“RailTech”), appears to have taken advantage of an industrial development opportunity as advertised.

In July 2002, RailTech entered into an exclusive license with NYS&W for use of the Site, which abuts NYS&W track in North Bergen, New Jersey, to conduct solid waste operations. A copy of the license between NYS&W and RailTech is attached as Exhibit A (the “License”). The License has a term of five years, with a five year renewal option.¹ Importantly, nothing in the License requires RailTech to transload shipments on request from NYS&W, and the only payments provided for under the License are *from* RailTech *to* NYS&W. Furthermore, the NYS&W website, which lists transfer and distribution facilities maintained by NYS&W in North Bergen, New Jersey, does not list the Site. Consequently, RailTech must be running its own business operations from the Site and must enjoy financial benefits outside of the confines of the License in order to maintain its business operations at the Site.

The Site is an undeveloped parcel of land, containing only a concrete pad, without even the most basic environmental protections or infrastructure, and RailTech uses the Site to operate an unpermitted solid waste transfer station. Attached as Exhibit B are photographs of the Site (the “Photographs”) depicting the highly objectionable Site operating conditions.

¹ Petitioners’ copy of the License was obtained from the New Jersey Meadowlands Commission, as an attachment to a letter which NYS&W had submitted to the New Jersey Department of Law. NYS&W recently provided seemingly conflicting information about the operation of the Site in pending litigation in U.S. District Court. NYS&W v. Campbell, et al., Docket No. 05-4010 (D.N.J.). In one portion of the filing, NYS&W asserted that the facility is operated by Hudson-National, LLC pursuant to an agreement dated June 2, 2005 (Certification of John B. Fenton, page 6); and in another portion of the filing NYS&W attached a letter to RailTech and referenced a transload agreement with RailTech, dated June 2, 2005 (Certification of John A. McKinney, Exhibit E). It appears that the License was in effect for a number of years, although it may not currently be in effect. Given this uncertainty, Petitioners have assumed for purposes of this submittal that the License is the operative agreement; however, if a newer agreement is confirmed Petitioners may request authorization to supplement this filing.

The licensing arrangement between NYS&W and RailTech attempts to paint RailTech's solid waste facility as a transload facility operated on behalf of NYS&W², but it is very clear from a simple review of the document that RailTech's arrangement is not to merely conduct transloading for a railroad.

- The Site is not a staging area for receipt of consigned goods for intermodal transfer to rail; instead, the License provides that RailTech may conduct any legal use of the Site agreed to by NYS&W, specifically including the management of wastes that are extracted from the materials brought to the Site for shipment (See License, at 2).
- The License does not provide that RailTech is paid by NYS&W to conduct transload operations for the railroad; instead, the License provides that RailTech must pay NYS&W for the privilege of operating on NYS&W property (See License, at 3).
- The License does not require RailTech to transload a single shipment of goods consigned to the railroad for transportation. That is, NYS&W does not appear to have the ability to require RailTech to transload any goods. Instead, RailTech is left on its own to make any business arrangements it may wish to deliver goods to NYS&W for shipment.
- The employees who conduct the loading of rail cars are not railroad employees and therefore do not appear to be entitled to the worker protections and employment securities guaranteed to railroad employees (See License, at 4).
- RailTech is specifically authorized to segregate, store, and remove from the Site an unlimited quantity and undefined types of incoming materials. (See License, at 2). This allows RailTech to use the Site for truck to truck shipments of waste materials, to manipulate and modify consigned shipments to extract valuable commodities such as recyclable materials, and to ship an unlimited quantity of materials from the Site by truck, with no clear shipping instructions.

These particulars describe not a transload facility, but a solid waste management facility that is intentionally located adjacent to a rail line to allow the operator to argue that it can evade state and local laws. Nothing in the License indicates that the railroad arranges for solid waste

² NYS&W asserts in its pending litigation in U.S. District Court in NYS&W v. Campbell, et al. that the Site is an NYS&W transload facility, that NYS&W separately contracts with the operator to perform loading operations at its facility, and that NYS&W directly charges its customers for loading. NYS&W does not, however, reveal that RailTech has an *exclusive* license for use of the Site, or that NYS&W does not appear to have a right to require RailTech to transload materials at the Site, or that the License does not call for NYS&W to pay RailTech for conducting transload operations.

deliveries to the site: RailTech arranges for deliveries by truck, deposits the solid wastes on the ground in large piles, segregates the received wastes, and processes the wastes. Its processing includes use of a tub grinder which creates marketable wood chips from waste wood, as well as densification. RailTech stores the wastes in piles in the open air, and ultimately loads some of the wastes onto rail cars for transport from the Site. See Photographs in Exhibit B (depicting 20- to 40-foot high piles of wastes, some already sorted and aggregated by type, a large red tub grinder, and plumes of dust arising from the movement of wastes from pile to pile). All of these activities take place in open air, directly beneath two sets of power lines, and within plain sight of the commercial area on Tonnelle Avenue in North Bergen, New Jersey, which includes a fast-food restaurant, a gas station, and a hotel.

NYS&W has represented to government agencies that RailTech's solid waste operations are actually those of the railroad. By letter dated June 17, 2003, attached as Exhibit C, NYS&W notified the NJ DEP that "NYS&W has recently begun operating a rail loading facility" at the Site and that "NYS&W has contracted with RailTech, LLC...to handle certain of the transloading operations on NYS&W's behalf." Given the language of the License, which provides a grant to RailTech of "an exclusive license and access" to the Site, and the contract terms under which NYS&W appears to have no authority to require RailTech to transload any particular shipments, it is difficult to understand how NYS&W could construe the operation as its own.

Also of interest in the NYS&W statement to the NJ DEP is the representation that "(t)here will be no storage of waste at the NYS&W facility". The Photographs in Exhibit B suggest the actual conditions are quite different.

Increasingly, solid waste is managed in a "hub and spoke" system: local collections are transported by truck to transfer stations, where the wastes are segregated for processing and

storage, densified, stored, and ultimately loaded for transport to disposal or recycling facilities. The Site is being operated as a solid waste transfer station.

Solid wastes are expensive to manage. Waste generators pay for the safe management and disposal of their wastes, typically in fees assessed on a per ton (or cubic yard) basis reflecting the direct relationship between the weight or volume of the wastes, the costs to manage them, and a profit margin. At the time solid wastes leave the possession of these generators, the wastes generally have a negative economic value - a fee has already typically been paid, on a per ton (or cubic yard) basis, reflecting the cost to safely transport and dispose of the wastes, and anyone receiving them would need to get paid a competitive rate to manage them.

Solid waste processors who receive and process solid wastes are in the value creation chain. These processors are generally paid for disposal, but take affirmative steps to alter the waste streams they receive in order to reduce solid waste disposal costs.

Solid waste processors create economic value by sorting, aggregating, baling, grinding, crushing, shredding, and otherwise transforming the wastes they receive. These activities are occurring at the Site. Facility activities include removing wastes from the disposal stream that can be recycled at either a profit or a cost that is lower than the cost of disposal, segregating wastes that can be disposed of at lower cost from those that must be disposed of at higher cost, aggregating wastes to obtain the benefits of bulk pricing, and densifying wastes to reduce disposal costs. These are not activities that are conducted for the benefit of transportation by rail. Instead, these are customary activities in the solid waste industry regardless of the method of waste shipment.

On July 26, 2005, NJ DEP issued an administrative order and notice of penalty assessment to NYS&W, relating to the operation of several solid waste facilities in New Jersey,

including the Site. The order alleged noncompliance with NJ DEP solid waste regulations relating to rail facilities. NYS&W subsequently filed a complaint in the U.S. District Court for the District of New Jersey seeking, among other things, a declaration that the state regulations cited in the order are preempted by the ICCTA. The District Court issued an order with temporary restraints on August 16, 2005, and that matter is currently pending before the Court. Petitioners file this request independent of that pending case, but raises the case to the Board's attention as it involves a preemption question arising concurrently at the Site.

III. DISCUSSION

A. Solid Waste Operations at the Site Do Not Constitute Rail Transportation and Are Not Integrally Related to the Provision of Rail Service.

The Board's exclusive jurisdiction extends to "transportation by rail carrier". 49 U.S.C. § 10501(a). Under the ICCTA, "transportation" is defined to include a facility "related to the movement of...property...by rail," as well as "services related to that movement," including receipt, transfer in transit, storage, handling, and interchange of property. 49 U.S.C. § 10102(9)(A) and (B); see also *Ili Tech Trans, LLC*, Petition for Declaratory Order, STB Finance Docket No. 34192 (STB served Aug. 14, 2003).

The Board has consistently determined that its exclusive jurisdiction over "transportation by rail carrier" is limited to facilities or services that are "integrally related" to the provision of interstate rail service, or to a rail carrier's ability to provide transportation services. See e.g., *CSX Transportation, Inc.*, Petition for Declaratory Order, STB Finance Docket No. 34662 (STB served March 14, 2005) (determination that preemption does not extend to operations that are not part of the national rail network); and *Borough of Riverdale*, Petition for Declaratory Order, STB

Finance Docket No. 33466 (STB served Sept. 9, 1999) (determination that manufacturing activities and activities not integrally related to the provision of interstate rail service are not subject to Board jurisdiction or federal preemption). This limitation on Board jurisdiction has also been acknowledged by the federal courts. See, e.g., Florida East Coast Rwy. v. City of West Palm Beach, 110 F.Supp.2d 1367, 1378-1379 (S.D.Fl. 2000), *aff'd* by 266 F.3d 1324 (11th Cir. 2001), (applying *Borough of Riverdale* to determine that a distribution operation was not entitled to federal preemption); CFNR Operating Co., Inc. v. City of American Canyon, 282 F.Supp.2d 1114, 1118-19 (N.D.Cal. 2003) (stating that preemption does not reach activities not “integrally related” to rail service, such as hauling goods from a railroad).

In *Borough of Riverdale*, the Board determined manufacturing activities and facilities that are part of a business function separate from rail transport, such as facilities processing a commodity prior to transport, do not fall within the Board’s exclusive jurisdiction, while intermodal facilities at which the commodity and final products created from the processing of the commodity were merely consigned for transport do fall within the Board’s exclusive jurisdiction.

Similarly, in *Hti Tech Trans, LLC*, the Board determined its exclusive jurisdiction does not include the spectrum of activities that occur *before* solid waste is delivered to a rail carrier for transportation. In particular, where a railroad contractor hired ostensibly to transload construction and demolition (“C&D”) debris argued that state and local prohibitions against trucking solid waste to a facility near a rail line were preempted, the Board disagreed, ruling that the contractor’s “attempt to link [solid waste trucking and transload] activities as one continuous intermodal rail movement must fail” and that the only activity that might be integrally related to

rail transportation would be the actual transfer of C&D debris from truck to railcar at the intermodal facility. See also *Hi Tech Trans, LLC*.

Petitioners do not dispute that legitimate transload activity constitutes “transportation” subject to the Board’s exclusive jurisdiction. After all, there can be no “movement of property by rail” unless goods can be loaded onto and off of railcars. However, Petitioners strongly dispute the attempt at this Site to expand the meaning of “transload” - and thus, distort the statutory definition of “transportation” - to include activities preceding the actual transload of goods that *change* the nature of such goods in a manner that is wholly unrelated to and unnecessary for rail transportation. These activities cannot legitimately be construed to be integrally related to rail transportation.

As described above, RailTech’s activities at the Site far exceed mere transload operations on behalf of a railroad, in the same way that the processing of a commodity or the management of C&D debris constitutes more than just transloading.. RailTech runs a business that receives wastes from numerous local collection points for aggregation, processing, transformation and storage. RailTech receives wastes, separates the different waste types, processes portions of the wastes into marketable materials, compacts the sorted wastes, stores these materials in piles in the open air, and ultimately loads the materials onto rail cars for transport from the Site. Presumably, some materials and wastes are also shipped from the Site by truck.

RailTech’s activities are a distinct business separate from the business of rail transportation. This same business is operated by dozens of competitors in New Jersey and thousands of transfer stations around the nation, without any claim that those facilities are “integral to rail transportation”. RailTech is a small hub in the large national solid waste management network. Its aggregation, separation, processing and storage functions

fundamentally change the value of received wastes, and this solid waste management activity occurs prior to transloading onto railcars.

Petitioners recognize the Board has previously opined that state law governing many “ancillary” rail facilities may be preempted even if the Board does not have authority to directly regulate such facilities. See *Borough of Riverdale*. This reasoning, however, does not apply to the solid waste processing facilities that Petitioners are describing herein. Even though the Board might never have occasion or authority to regulate these facilities, it can have no exclusive jurisdiction because the facilities are not ancillary *rail* facilities, but instead are solid waste processing facilities. Were the Board to apply its ancillary rail facilities reasoning to solid waste processing facilities, it would preempt the comprehensive state and local environmental reviews applicable to such facilities, and dramatically and adversely alter the public health and environmental impacts of these facilities.

The Board’s exclusive jurisdiction certainly cannot attach to the mere conduct of a solid waste management business adjacent to a rail line, and it certainly cannot apply to the processing of a material to change its value from a waste to a marketable commodity. Such a result would be inconsistent with the ICCTA’s grant of exclusive jurisdiction to the Board. Were the Board to allow others to read its exclusive jurisdictional grant as broadly as NYS&W and RailTech would wish, the entire national rail network would become a giant regulation-free zone of commerce for operators to exploit, and manufacturing and processing businesses would operate in this zone free from state and local regulation.

Were RailTech to cease its solid waste management activities and conduct only legitimate transload activities, NYS&W’s ability to move property by rail would not be at all diminished. Correspondingly, were this Board to issue the requested declaratory order, RailTech

would not be barred from fulfilling its other business objective of processing solid wastes, as those operations can, and do, flourish without physical proximity to rail transportation. There are countless solid waste transfer stations that operate in compliance with all state and local laws and have direct rail access. Such sites, operated as legitimate solid waste management facilities, are subject to the same rules as their competitors and are protective of the public health and environment.

NYS&W and RailTech's attempt to represent these two separate industries and activities as integrally related was born not out of necessity but out of an interest in exploiting one legal infrastructure at the expense of another. Quite simply, virtually all of RailTech's operations at the Site are dominated by traditional solid waste management activities, which far exceed those of a legitimate transload facility and are not otherwise integrally related to rail transportation. Thus, the business activities at the Site are not subject to the Board's exclusive jurisdiction over rail transportation.

B. Solid Waste Operations at the Site are Not Provided By a Rail Carrier, and Therefore Are Not Within the Exclusive Jurisdiction of the Board.

As noted above, the Board has exclusive jurisdiction over "transportation by rail carrier". 49 U.S.C. § 10510(b). A "rail carrier" is defined as a "person providing common carrier railroad transportation for compensation", and "transportation" is defined to include "facilit(ies)...related to the movement of...property...by rail, regardless of ownership or an agreement concerning use". 49 U.S.C. §§ 10102(5) and (9)(A). Thus, in order for the Board's exclusive jurisdiction to apply in the instant case, it would be necessary for the activities at the Site to be (i) construed as a facility related to the movement of property by rail, and (ii) conducted by a common carrier railroad for compensation.

There have been two cases decided in the federal Court of Appeals on facts similar to those that exist at the Site and that provide guidance on whether facility operations constitute “transportation by rail carrier”. In both instances, the Court has determined that similar operations do not fall constitute transportation by rail carrier and are therefore not subject to the Board’s exclusive jurisdiction.

In the first case, *Florida East Coast*, an aggregate distribution company entered into a lease with Florida East Coast Railway (“FEC”) providing access to FEC’s track and then used the property to store aggregate and load it onto rail cars for transport by FEC. The Court noted that the ICCTA ignores ownership and agreements with respect to a facility, but imposes no such limitation on “services related to [the movement of property]”, and that the Court therefore may consider ownership and agreement arrangements when evaluating the provision of services under the ICCTA. 266 F.3d at 1332. The Court then proceeded to review the activities of the aggregate company in relation to the involvement of FEC, and on facts much like our own, concluded that the aggregate company received, stored, handled and interchanged property. *Id.* at 1333.

In its analysis of the facts of that case, the *Florida East Coast* Court found the aggregate distribution company’s use of the railroad’s property

“serve[d] no public function and provide[d] no valuable service to FEC; rather the arrangement...merely facilitate[d the company’s] operation of a private distribution facility on FEC-owned premises. Furthermore, record evidence...indicates that [the company’s] operation served a purely private function. As stated by the district court, “[the company] effectively ran a [company] operation on FEC property.” [citation omitted].” *Id.* at 1336.

The Court concluded the aggregate company’s activities did not constitute transportation by rail carrier. *Id.*

In the second case, *Hi Tech*, a private company entered into a license agreement with Canadian Pacific Railroad (“CPR”) providing a right to develop and operation a bulk waste

loading facility at a New Jersey rail yard. The license stated the premises would be used “only for the transfer of Waste Products from truck to railcars operated by CPR.” 382 F.3d at 299. The company, which was not a railroad, arranged for trucks to provide wastes to the facility, the wastes were processed and managed at the facility, and then loaded into rail cars for transport off site. The NJ DEP determined the facility was a transfer station and was subject to solid waste facility permitting under state regulations, and issued an Order requiring cessation of solid waste activities, and the company appealed.

The *Hi Tech* Court found that the company was not a rail carrier and that “the most cursory analysis of Hi Tech’s operations reveals that its facility does not involve ‘transportation by rail carrier.’ *The most it involves is transportation ‘to rail carrier.’*” *Id.* at 308 (emphasis partly supplied). The Court noted that while the license agreement in use was not a contractual determination of the company’s status as a railroad carrier, it did reflect the nature of the company’s activities and its relationship with the railroad. *Id.* at 308, n.19. Of most importance to the Court was language in the license that “essentially eliminates CPR’s involvement in, and responsibility for, the operation of Hi Tech’s facility.” *Id.* at 308. Following an analysis of the facts, the Court held:

“it is clear that Hi Tech simply uses CPR’s property to load [waste] debris into/onto CPR’s railcars. The mere fact that the CPR ultimately uses rail cars to transport the...debris Hi Tech loads does not morph Hi Tech’s activities into ‘transportation by rail carrier.’ Indeed, if Hi Tech’s reasoning is accepted, any nonrail carrier’s operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier.” *Id.* at 309. The *Florida East Coast* and *Hi Tech* cases present facts and analysis directly applicable to the Site, to the solid waste activities at the Site, and to many similarly situated locations. The Site operator has run a solid waste management business under license to a railroad. The terms of the business arrangement allow the operator nearly complete control over whether and how shipments arrive at or depart from the Site. The railroad owner of the Site does not market the use of the Site, and the License does not provide any mechanism for the railroad to arrange for shipments or transloading at the

Site. The License contains an extraordinarily broad indemnity under which the operator assumes responsibilities for all liabilities arising from the use or occupation of the Site.

As in *Florida East Coast*, these arrangements “merely facilitate” a private company’s operation of a non-rail related business on railroad-owned property. Similarly, as in *Ili Tech*, a private company has simply used a railroad’s property to load wastes into/onto railcars. The mere fact that the NYS&W ultimately uses rail cars to transport the wastes that a private operator has loaded does not morph RailTech’s activities into ‘transportation by rail carrier.’

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Board issue a Declaratory Order confirming (i) that the solid waste facility located at the Site, and any similarly situated facility, is not within the exclusive jurisdiction of the Board because the solid waste management and processing operations conducted at the Site are not integrally related to the provision of rail transportation, and (ii) that state and local solid waste laws are therefore not preempted by the ICCTA, 49 U.S.C. § 10501(b), as they apply to the solid waste activities at the Site and at similarly situated locations.

In the alternative, Petitioners respectfully request that the Board issue a Declaratory Order confirming that (i) the contracted operation of the Site, or of any similarly situated location, to a company that engages in solid waste management activity does not constitute transportation by rail carrier, and (ii) state and local solid waste laws are therefore not preempted by Section 102(a) of the ICCTA, 49 U.S.C. § 10501(b) at the Site.

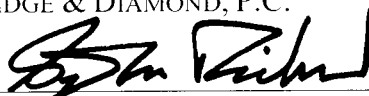
DATED: Wellesley, Massachusetts
October 24, 2005

Respectfully submitted,

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

By its Attorneys,

BEVERIDGE & DIAMOND, P.C.

By: 

Stephen M. Richmond, Esq.

Tina Y. Wu, Esq.

Beveridge & Diamond, P.C.

45 William Street, Suite 120

Wellesley, Massachusetts 02481-4004

(781) 416-5700

David Biderman, Esq., General Counsel

NATIONAL SOLID WASTES

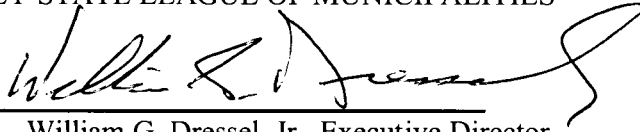
MANAGEMENT ASSOCIATION

4301 Connecticut Avenue, Suite 300

Washington, D.C. 20008

[Signatures Continued on Next Page]

NEW JERSEY STATE LEAGUE OF MUNICIPALITIES

By: 
William G. Dressel, Jr., Executive Director
407 West State Street
Trenton, NJ 08618

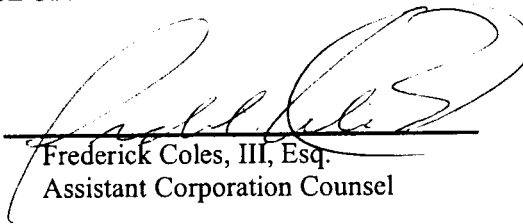
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CITY OF NEWARK, NEW JERSEY

By its Attorneys,

JOANNE Y. WATSON, ESQ.
CORPORATION COUNSEL

By:



Frederick Coles, III, Esq.
Assistant Corporation Counsel

[Signatures Continued on Next Page]

VILLAGE OF RIDGEFIELD PARK

By its attorneys,

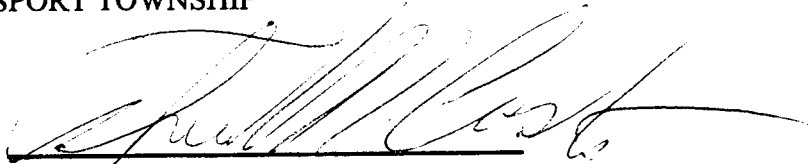
DURKIN & BOGGIA

By: William P. Betesh
Martin T. Durkin, Esq.
71 Mount Vernon Street
Ridgefield Park, NJ 07660

[Signatures Continued on Next Page]

HAINESPORT TOWNSHIP

By:

A handwritten signature in black ink, appearing to read 'Theodore M. Costa', written over a horizontal line.

Theodore M. Costa

Solicitor

Hainesport Township

Hainesport Township Municipal Complex

One Hainesport Centre

Hainesport, NJ 08036

[Signatures Continued on Next Page]

BURLINGTON COUNTY, NEW JERSEY

By: Augustus M. Mosca
Augustus M. Mosca
County Administrator

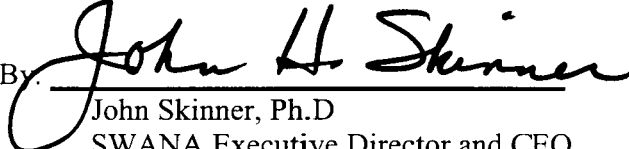
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THE UNITED STATES CONFERENCE OF MAYORS

By: Tom Cochran
Tom Cochran
Executive Director
1620 Eye Street, N.W.
Washington, D.C. 20006

[Signatures Continued on Next Page]

SOLID WASTE ASSOCIATION OF NORTH AMERICA

By 
John Skinner, Ph.D
SWANA Executive Director and CEO
P.O. Box 7219
Silver Spring, MD 20907-7219

[Signatures Continued on Next Page]

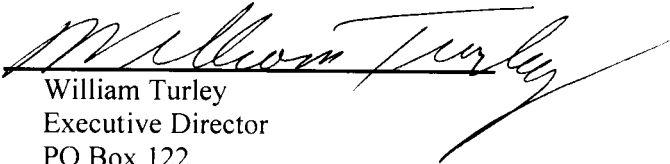
INTEGRATED WASTE SERVICES ASSOCIATION

By: 

Ted Michaels
President
1331 H Street, N.W.
Washington, D.C. 20005

[Signatures Continued on Next Page]

CONSTRUCTION MATERIALS RECYCLING ASSOCIATION

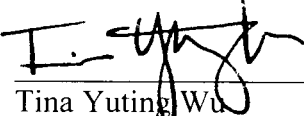
By: 
William Turley
Executive Director
PO Box 122
Eola, IL 60519

CERTIFICATE OF SERVICE

I hereby certify that I have on this ^{25th}~~24th~~ day of October, 2005, served copies of the foregoing upon the following by first class mail, in accordance with the rules of practice of the Surface Transportation Board:

New York, Susquehanna & Western Railway Corporation
1 Railroad Avenue
Cooperstown, NY 13326-1110
Attn: Nathan Fenno, Esq., General Counsel

RailTech, LLC
1034 Hudson Avenue
Ridgefield, NJ 07657
and
85 Dey Street
Jersey City, NJ 07306-6202



Tina Yuting Wu

Exhibit List

Exhibit A	License
Exhibit B	Verification and Photographs
Exhibit C	NYS&W Letter to NJ DEP, dated June 17, 2003

EXHIBIT A

OPERATING LICENSE

THIS LICENSE made as of this 25 day of July, 2002, by and between RAILTECH, LLC, 185 Dey Street, Jersey City, New Jersey 07306, (hereinafter referred to as "Operator") and THE NEW YORK, SUSQUEHANNA AND WESTERN RAILWAY CORPORATION, 1 Railroad Avenue, Cooperstown, New York 13326 (hereinafter referred to as "NYS&W").

WHEREAS, NYS&W is actively engaged in the interstate transportation of freight in interstate commerce and has facilities available at North Bergen, New Jersey for the purpose of loading, receiving, unloading and transferring to or from railcar loads of bulk commodities; and

WHEREAS, NYS&W wishes to engage an experienced facility operator (i) to develop, manage and operate the loading of non-hazardous construction and demolition debris and/or other non-hazardous soils materials ("Bulk Materials") at North Bergen, New Jersey and (ii) for the solicitation of Bulk Materials for carriage for the benefit of NYS&W, as its agent acting on its behalf, and

WHEREAS, Operator has the capacity to perform loading of Bulk Materials to railcars, and desires to perform said service at NYS&W's facilities for shippers whose rail cars are routed from North Bergen, NJ to locations outside of New Jersey.

NOW, THEREFORE, in consideration of the aforementioned and the mutual covenants and Licenses set forth hereafter, the parties agree as follows:

1. TERMINAL PREMISES AND FACILITIES:

1.1 NYS&W hereby grants Operator an exclusive license and access during the term of this License to use the terminal area and facilities described in the attached map (Exhibit "A") at North Bergen, New Jersey, together with the improvements described thereon (hereinafter the "Facility") for Operator to perform transportation and Bulk Materials loading operations and for no other purpose.

1.2 Notwithstanding the foregoing, NYS&W hereby reserves unto itself and its licensees the right and easement to construct, use, operate, maintain, repair and renew any rail tracks, pipe, conduit or tunnel, and any electric, communication or signal transmission lines, together with poles and guys therefore, and any other facilities of like character, as may now exist on, under or over the Facility, it being agreed that this License is subject and subordinate to any and all such rights, easements and uses; provided, however, that NYS&W shall use its best efforts to assure that the exercise of any such reserved right(s) and/or easement(s) by it, and/or its licensees, shall be conducted in a manner so as not to interfere with the operations of Operator consistent with the rights granted herein. Operator shall occupy and use the Facility in a careful, safe and orderly manner so as not to

interfere in any way with the maintenance or operation of the business of NYS&W, or of its licensees, or with any structures or facilities appurtenant to the business of NYS&W or of its licensees.

1.3 NYS&W reserves the right, upon no less than sixty (60) days notice to Operator, to adjust the layout and location of the Facility within NYS&W's adjacent property so long as such adjustment and relocation do not adversely affect Operator's operations and, to the extent any cost(s) are incurred in connection with any such adjustment and/or relocation, such costs shall be born by NYS&W.

2. LIMITATIONS ON USE:

2.1 The use of the NYS&W facility at North Bergen, NJ by Operator shall be limited to activities related to loading of Bulk Materials to railcar which (i) move in rail cars pursuant to tariffs published by or freight rates and routing agreed to by NYS&W, and (ii) any other legal purpose agreed to in writing by NYS&W.

2.2 Operator may not use the Facility for any commercial trucking business other than as directly related to loading of Bulk Materials to railcars.

2.3 Operator may not store motor trucks or trailers at the Facility, may not fuel road licensed vehicles at the Facility (except for fuel required for Operator's off road handling equipment), and may not store Bulk Materials at the Facility (except for (i) Bulk Materials already loaded into railcars and awaiting transport by NYS&W and/or (ii) containers utilized to collect materials not conforming to Bulk Materials standards which are extracted from the materials flow, which containers shall be removed from the Facility by Operator on a _____ basis).

3. UTILITIES:

Operator shall pay for all heat, water, electricity and other utility services required for its use. In the event that such utilities are used in common with others on a common meter, Operator and NYS&W shall agree upon a fair and equitable proration of such utility costs.

NYS&W shall pay for all other utility services.

4. TERM / FEE:

4.1 The initial term of this License shall for a period of five (5) years beginning with its execution date. Unless terminated as provided herein, this License shall automatically renew for up to three (3) renewal terms of five (5) years each.

4.2 No less than ninety (90) days prior to the expiration of the initial or any renewal term of this License, Operator may give notice of its intention to terminate this License.

4.3 Operator shall pay to NYS&W in full consideration and satisfaction for the license granted herein the sum of \$10.00 per annum.

4.4 Notwithstanding any other provision of this License, NYS&W may terminate this License on not less than ninety (90) days written notice to Operator in the event that, during the prior calendar year, fewer than five hundred (500) revenue producing railcars of Bulk Materials were loaded by Operator at the Facility.

5. OPERATIONS:

5.1 Operator will provide all equipment and tools necessary to accomplish the function of transfer of Bulk Materials from trucks to railcars, and shall provide for or arrange for the transportation of such materials to the consignee.

5.2 Operator will provide personnel sufficient to accomplish the functions of transfer and all associated administrative functions.

5.3 Operator will maintain records and receipts for railcars it loads identifying the following:

- i. car number;
- ii. shipper;
- iii. any other records required to be maintained by federal, state or local agencies relating to such carriage.

5.4 Transfer charges for cars of Bulk Materials received by Operator shall be reasonably determined by Operator. Operator shall retain all charges collected for such transfers.

5.5 Operator, its officers, employees and invitees, while in proximity to rail tracks, shall follow, observe and be governed by railroad safety rules as applicable. NYS&W shall cooperate in Operator's training programs in regard to railroad safety rules.

6. CARE OF PREMISES - ALTERATIONS:

6.1 Operator shall exercise good care in its use of the Facility and, at the end of the term of this License shall deliver up the Facility free of any damages caused by Operator, normal wear and tear excepted.

6.2 ~~Except for initial modifications as described in Exhibit 6.2 attached hereto and made a part hereof,~~ Operator shall not make any alterations, additions or improvements on or to the Facility without the prior written consent of NYS&W, and all alterations, additions or improvements which may be made by either NYS&W or Operator upon the Facility, unless herein otherwise provided, and except the personal property of Operator, shall be property of NYS&W and shall remain upon and

be surrendered with the Facility as part thereof at expiration or other termination of this License.

6.3 NYS&W and Operator shall each monitor the condition of the Facility and the state of operations for the purpose of determining the need at any time for the addition of new equipment and improvements, repair or replacement of existing equipment and improvements or the alteration of the Facility. NYS&W shall have ultimate responsibility for determining whether repair or replacement of NYS&W provided equipment is required. Operator shall have ultimate responsibility for determining whether repair or replacement of Operator provided equipment is required. Each of NYS&W and Operator shall have responsibility for the repair or replacement of its own equipment, except to the extent provided in Section 9 of this License.

7. LIENS AND CHARGES:

7.1 The creation or imposition of any lien or charge upon the Facility through acts or omissions of Operator, its agents, contractors or sub-contractors, shall be deemed a default under the provisions of this License.

7.2 In the event any such lien or charge shall not be paid or bonded by Operator within fifteen (15) days after the lien or charge accrues, NYS&W shall have the right to pay such lien or charge and Operator shall repay the cost to NYS&W, as additional rent hereunder, with interest at ten percent (10%) per annum from the date of payment by NYS&W, promptly upon rendition of bill therefore. Nothing in this paragraph or in any other paragraph of this License shall be construed as authority to Operator to create any lien on NYS&W's interest in the Facility.

8. RESPONSIBILITY OF OPERATOR TO ITS EMPLOYEES:

Operator, in the performance of any and all work by Operator under the terms of this License or otherwise, upon or adjacent to the Facility, will furnish all labor and supervisory forces of every kind and Operator shall employ, pay from Operator's own funds and have the right to discharge all persons engaged in the performance of such work, and all such persons shall be and remain the employees of Operator exclusively and subject to Operator's exclusive supervision, direction and control.

9. INDEMNIFICATION:

9.1 Operator will be responsible for and will indemnify, save harmless and defend NYS&W against and from any and all claims and suits for, and any and all liability, loss or expense arising from or incidental to or in connection with, damage to or loss of property of NYS&W, Operator, or of agents, servants or employees of either, or of any other person, and against and from any and all claims and suits for, and any and all liability, loss or expense arising from or incidental to or in connection with, injury to or death of persons, including agents, servants, or employees of NYS&W or of Operator, or any other person (including Operator, if a natural person), which said damage, loss injury or death shall arise in any manner, directly or indirectly, out of or incidental to

or in connection with, any act or omission relating to the use or occupation of the Facility, or exercise of this License by Operator or any motor carrier performing services related to this License, including any appurtenant sidewalks or driveways, except to the extent caused by the negligence of NYS&W or other entities allowed to use the Facility by NYS&W.

In the event that NYS&W allows other entities to use the Facility, in accordance with the terms and conditions of this License, it shall require such entities to enter into a similar indemnification agreement which shall require such other licensees to indemnify Operator for any claims or damages caused by such other licensee. Operator's indemnification hereunder shall not extend to the use or occupation of the Facility, or exercise of a license, by another licensee of NYS&W.

9.2 Operator will be responsible for and will indemnify, save harmless and defend NYS&W against and from any and all claims and suits for, and any and all liability, loss or expense arising from or incidental to or in connection with, damage to or loss of any Bulk Materials (i) for materials brought to the Facility by railcar, from and after the date and time such railcar is placed by NYS&W; and (ii) for materials brought to the facility for transport out by railcar, from and after the date and time such railcar is released to NYS&W.

10. INSURANCE:

Operator shall provide and maintain in effect during the term and any continued term hereof, a policy of public liability insurance including contractual liability covering liability assumed by the Operator under the provisions of the foregoing section 9 of this License. Said insurance shall be in limits of not less than \$3,000,000.00 combined single limit, and shall be issued by companies and in form reasonably acceptable to NYS&W.

Operator shall furnish to NYS&W certificates of all required insurance policies upon request of NYS&W. All such policies shall be endorsed to provide not less than thirty (30) days' notice to NYS&W of any cancellation thereof and of any material change in coverage.

The providing of said insurance coverages shall not be deemed a limitation on the liability of Operator as provided in this License, but shall be additional security therefore.

At the beginning of each renewal term of this Agreement, NYS&W may require an increase in the limits of insurance required herewith to reflect the changes in the consumer price index, if any, since the last such increase.

11. ASSIGNING, UNDERLETTING:

Operator shall not assign or transfer this License, in whole or in part, or sublet the Facility or any part thereof, without the written consent thereto by NYS&W. Any assignment or transfer of this License shall not affect any obligations of Operator hereunder arising prior to such assignment or transfer. Any such assignment or transfer of this License shall not be effective until delivery to NYS&W of a written assumption of Operator's obligations under this License signed by the assignee/transferee in form reasonably acceptable to NYS&W.

The rights, duties, and obligations of the respective parties hereto under this License shall carry to and be binding upon the parties' successors and assigns, respectively.

12. ORDINANCES:

Operator, at its sole cost and expense, shall comply with and obey all legally applicable laws, ordinances, rules, regulations and requirements of all Federal, State, Municipal, County, Town, Village or other governmental authorities, and the various departments thereof, now existing or hereafter created, so far as the same may affect its use of the Facility or the neighboring streets, roadways, sidewalks, alleys, areas or yards, and Operator's improvements, if any.

NYS&W, at its sole cost and expense, shall construct and maintain the Facility in compliance with all legally applicable ordinances, rules, regulations and requirements of all Federal, State, Municipal, County, Town, Village or other governmental authorities, and the various departments thereof, now existing or hereafter created.

13. ENVIRONMENTAL REGULATIONS:

13.1 Operator covenants that it will not release, dispose, cause to dispose, or aid and abet in the release or disposal of any hazardous or explosive chemical, impurity, waste, or other substance on or near the Facility. In the event that any court, duly constituted public authority, municipality or agency enters an order or judgment against NYS&W, Operator, its customers, employees or visitors, for any such release or disposal resulting out of such release or disposal by Operator, Operator shall indemnify and hold NYS&W harmless for all expenses associated with compliance with said judgment to include, but not be limited to, any required clean-up and/or restoration cost of the site to a safe condition. Further, Operator agrees to pay and discharge all reasonable costs, attorneys' fees or other costs of litigation that NYS&W may incur in enforcing or defending compliance with the foregoing.

13.2 Operator agrees to fully cooperate with NYS&W, at Operator's own expense, at all times both during and at the termination of this License, in regard to any applicable environmental regulations relating to Operator's use of the Facility in accordance with the terms and conditions of this License. Without limiting the foregoing, Operator will, in a timely manner, prepare and execute such informational and/or disclosure forms required by a cessation of Operator's operations, termination of this License, or sale of the premises (the "Transaction") as may be required by any

governmental agency as a condition for any Transaction.

13.3 Operator shall not be responsible for any such release which (i) predates this License or (ii) is caused by NYS&W, or another licensee, agent, contractor or invitee of NYS&W.

13.4 NYS&W shall conduct all of its operations in compliance with all legally applicable environmental statutes, ordinances, rules, regulations and requirements of all Federal, State, Municipal, County, Town, Village or other governmental authorities, and the various departments thereof, now existing or hereafter created.

14. DEFAULT:

Default is defined as the failure to discharge any of the covenants herein. If either party to this License fails to correct default hereunder within thirty (30) days after written notice to do so, or, if such default cannot with best efforts be cured within thirty (30) days then as soon thereafter as possible, the party serving such notice may unilaterally terminate this License forthwith. Waiver of any default shall not be construed as a waiver of either a subsequent or continuing default.

The actions and remedies provided in this License in case of default shall not be deemed exclusive but shall be in addition to all other actions and remedies at law or in equity in case of any such default; and no action or remedy taken or omitted by NYS&W or by Operator in case of default shall be deemed a waiver of such default and waiver of a particular default shall not be deemed a waiver of any other default or a waiver of the same default again occurring, nor shall any failure on the part of NYS&W or by Operator to compel a fulfillment of any one or more of the covenants, terms and conditions herein contained be held to be a waiver of its right to enforce the same at any time thereafter during the term, or any continued term, of this License.

15. REMOVAL:

Upon the expiration of the term or any continued term hereof and upon any other termination of this License, Operator, at Operator's sole cost and expense, shall remove from the Facility any materials, buildings and structures brought to the Facility by Operator, except additions and alterations made with the consent of NYS&W and which consent included the provision that same would not be removed, and all waste, rubbish and debris brought to the Facility by Operator, and repair any damage it has caused to the Facility, reasonable wear and tear excepted. All such work of removal and restoration shall be completed on or before the expiration or other termination, of this License.

Should Operator fail, neglect or refuse to so remove such property and make the aforesaid restoration then, and in such event, NYS&W shall have the following rights, which are hereby expressly given it: (i) to remove such property and to make the aforesaid restoration, all at the expense of Operator, which expense Operator hereby expressly agrees to pay promptly upon demand; (ii) to sell any of such property and retain the proceeds of such sale and to deliver such property to

the purchaser, or any interest therein of Operator, without any liability whatsoever to Operator, or to any other person or corporation; or, if NYS&W so elects (iii) in lieu of such sale or removal of any of such property, NYS&W may retain and use the same, or any interest therein of Operator, or of any person or corporation claiming through or under Operator, without any liability whatsoever to Operator, or to any other person or corporation.

16. SEVERABILITY:

The provisions of this License are severable and it is the intention of the parties hereto that if this License cannot take effect in its entirety because of the final judgment of any court of competent jurisdiction holding invalid any part or parts thereof, the remaining provisions of this License shall be given full force and effect as completely as if the part or parts held invalid had not been included therein.

17. FORCE MAJEURE:

In the event that either Operator or NYS&W is unable to perform as stated in this License due to or as a result of one or more of the following causes: acts of God, including but not limited to floods, storms, earthquakes, hurricanes, tornadoes, or other severe weather or climatic conditions; act of public enemy, war, blockade, insurrection, riot, vandalism or sabotage; fire, accident, wreck, derailment, washout, or explosion; strike, lockout or labor dispute; embargoes or AAR service orders; or governmental laws, orders or regulations, this License shall be suspended only insofar as said performance is affected by the described cause and only for the duration of such cause.

18. EMINENT DOMAIN:

NYS&W and Operator herein expressly acknowledge that the property will be utilized by Operator exclusively as an interstate public rail yard facility. In the event eminent domain proceedings are successfully undertaken and completed against any portion of such property which, in the sole and final reasonable determination of NYS&W, leave the remainder, together with any contiguous substitute facilities made available by NYS&W, usable by Operator for purposes of an intermodal rail facility, then this License will not terminate. The effect of such condemnation will be to terminate the License as to the portion of the property condemned, and leave the License in effect as to the remainder of the property and any contiguous substitute facilities made available by NYS&W. In the event the entire property is taken and NYS&W is unable to provide a mutually acceptable alternative site, this License shall terminate on the date title shall be acquired. It is agreed that Operator's interest, if any, in improvements and personal property, shall be severed from the NYS&W's interest in such proceeding.

19. ABANDONMENT OF PREMISES:

If Operator shall vacate or abandon the Facility, this License may be forfeited at NYS&W's option and declared null and void. Upon such abandonment and after five (5) days written notice to

Operator, NYS&W, its agent or attorney, shall have the right without further notice to re-enter upon said Facility and remove all property therefrom without being deemed guilty of any manner of trespass or other tort or violation of law, and without prejudice to any remedy provided by law for the breach of said License. It is understood and agreed by the parties that for purposes of this License, the term "abandonment" shall be construed to mean failure by Operator to use the Facility for loading operations for a period of thirty (30) consecutive days, absent the occurrence of any condition(s) or event(s) which might excuse such failure in accordance with the terms and conditions hereof.

20. THIRD-PARTY MODIFICATION:

In the event that the Surface Transportation Board ("STB") or any other governmental authority having jurisdiction shall issue or adopt (or issue or publish notice of its intention of any such issuance of adoption) any law, order, rule or regulation, the effect of which shall be to modify, amend, cancel or terminate any or all of this License, either party shall promptly deliver to the other a full and complete copy thereof. Provided, however, that neither party shall seek such action by the STB or other government authority. If any provision of this License shall be found to be illegal or unenforceable, the remaining provisions shall not be affected thereby and shall continue in full force and effect.

21. NOTICE:

Any notice required or permitted to be given under the terms, conditions and provisions of this License shall be in writing and considered as having been given upon the mailing thereof by certified mail, return receipt requested, to the office address of the other party set forth above, or to such other address as such party may from time to time specify in writing. Each such notice shall be effective on the date actually received, as indicated on the receipt therefor.

22. APPLICABLE LAW:

This License shall be governed and construed in accordance with the laws of the State of New Jersey.

23. ENTIRE AGREEMENT; AMENDMENTS:

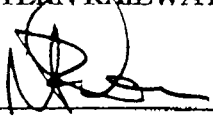
This Agreement contains the entire agreement of the parties relating to the Operator's transloading of Bulk Materials between railcars and motor carrier at NYS&W's facilities at North

Bergen, New Jersey. Any purported amendment hereto shall not be effective unless it shall be set forth in writing and executed by both parties.

IN WITNESS WHEREOF, and intending to be legally bound, the parties hereto have caused this License to be executed by their duly authorized respective representatives on the day and year first above written.

WITNESS:

THE NEW YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION

By: 

Title: Vice President

WITNESS:

RAILTECH, LLC

By:  F. L. O. R. H.

Title: Pres. E.V.P.

EXHIBIT B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. _____

PETITION OF
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
FOR DECLARATORY ORDER

Verification Statement of Thomas R. Marturano

1. I, Thomas R. Marturano, P.E., P.P. am the Director of Solid Waste and Natural Resources at the New Jersey Meadowlands Commission ("NJMC").
2. Inspectors working under my supervision are authorized by the NJMC to conduct inspections of solid waste facilities located in areas subject to the jurisdiction of the NJMC, including the Town of North Bergen, Hudson County, New Jersey. Inspectors are authorized take photographs of such facilities to document facility conditions.
3. The attached photographs were taken by NJMC inspectors working under my supervision during inspections of the solid waste facility located at 16th Street and Secaucus Road in the Town of North Bergen, Hudson County, New Jersey, and are a true and accurate representation of that facility as of the dates indicated to the right of each photograph.

I, Thomas R. Marturano, verify under penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Further, I certify that I am qualified and authorized to make this verification statement.

Signed on this 23 day of September 2005.


Thomas R. Marturano, P.E., P.P.



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12/10/2004



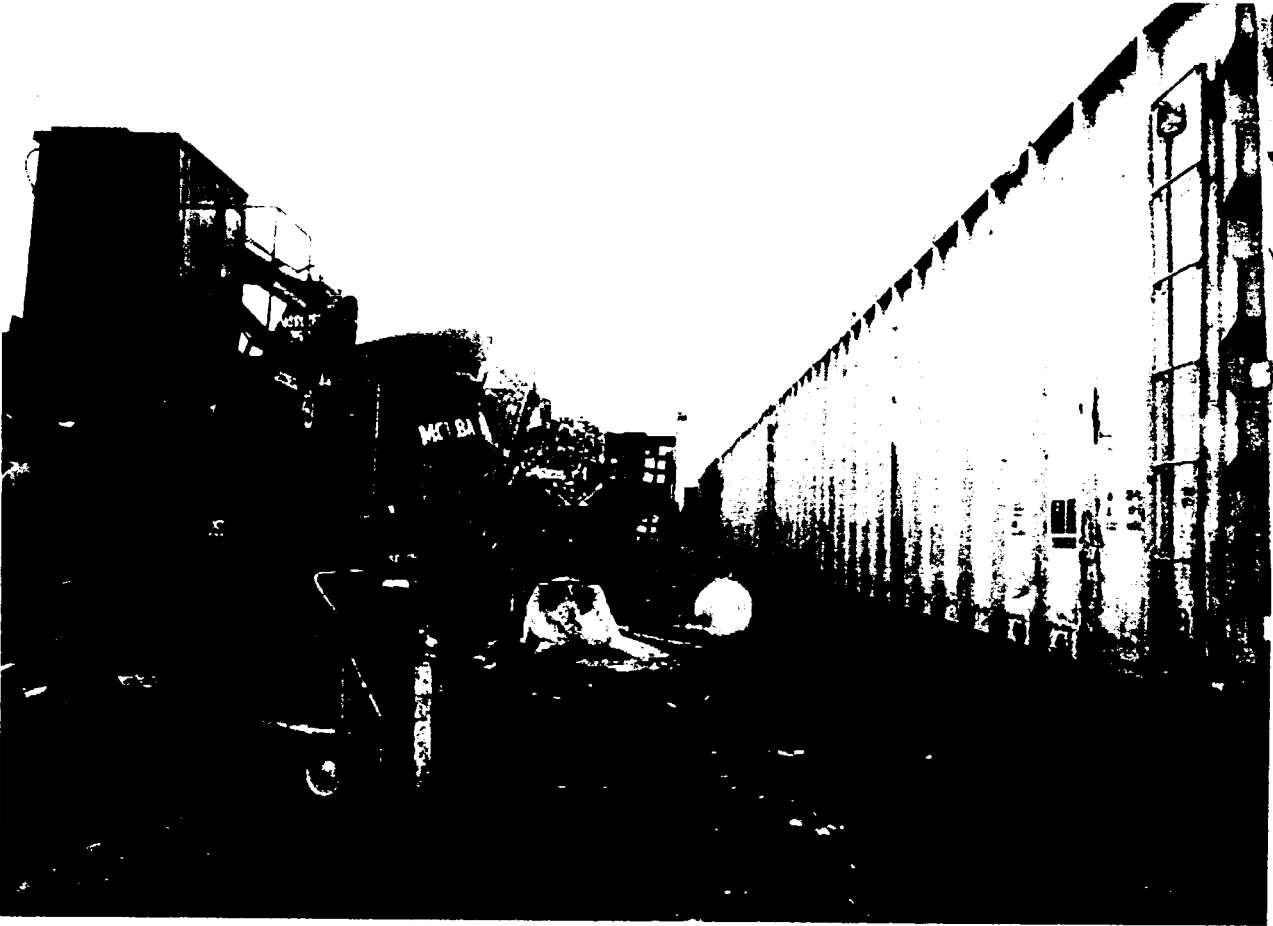
PC100002.JPG
12/10/2004



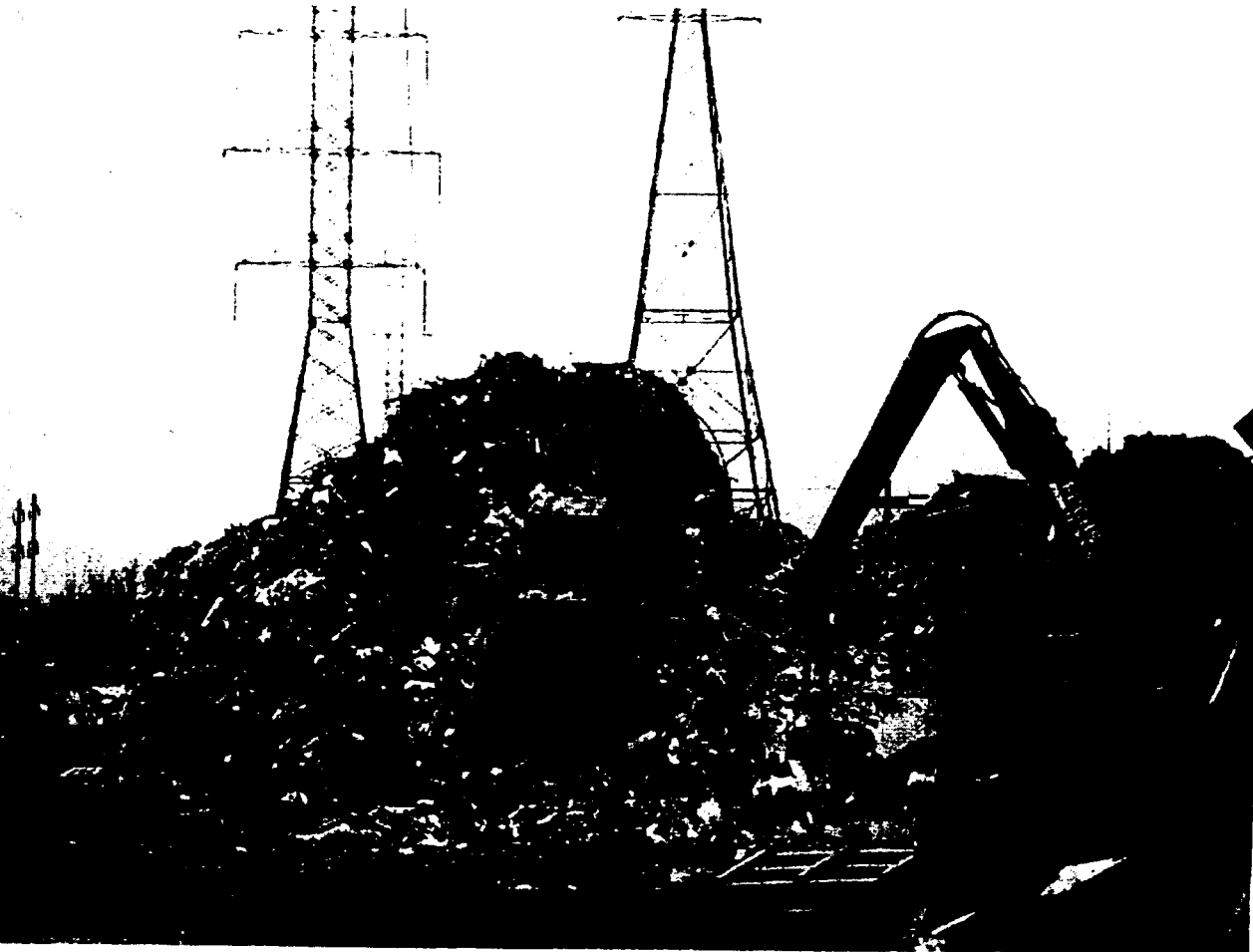
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PC100004.JPG
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PC100005.JPG
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PC100006.JPG
12/10/2004



Rail Tech 37 .JPG
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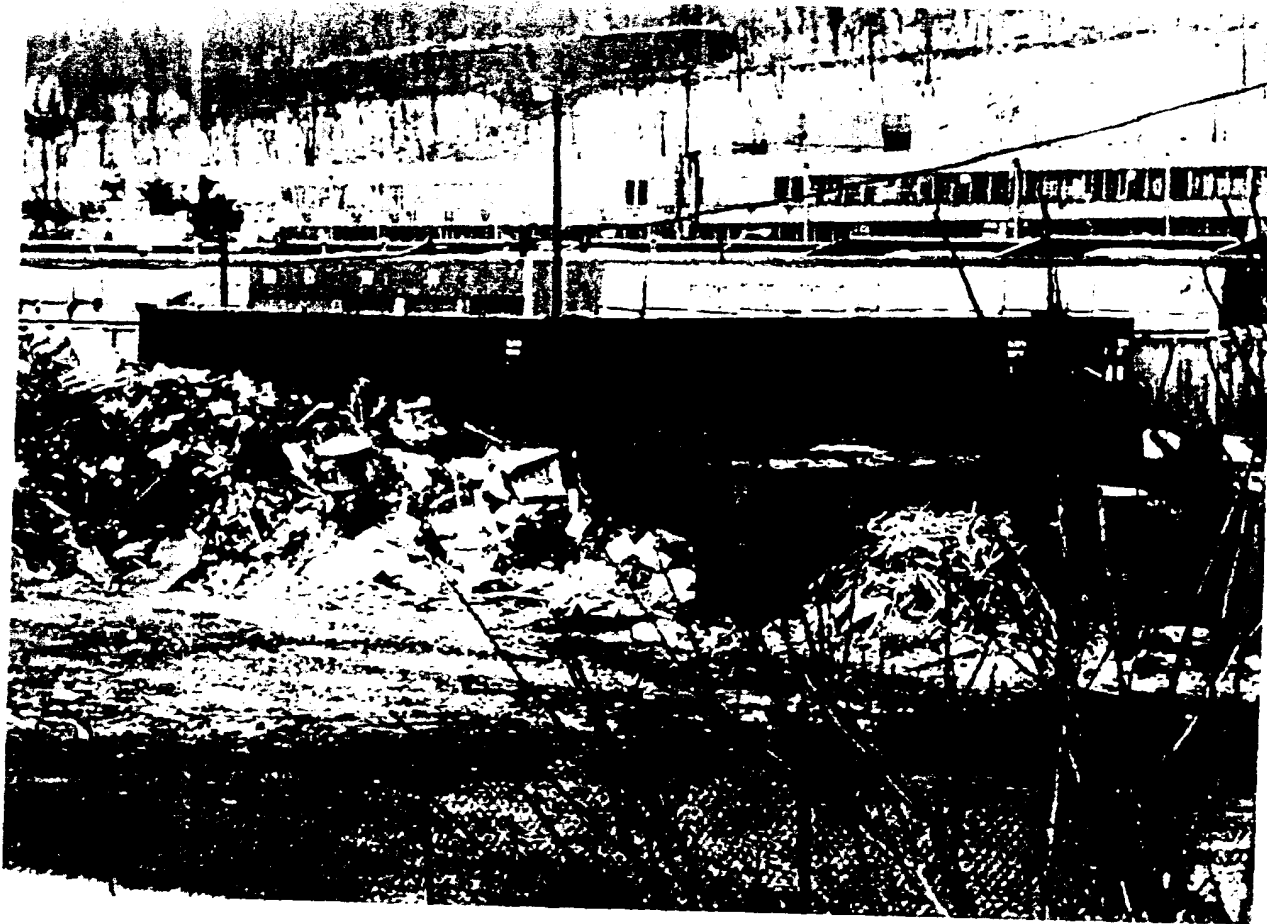
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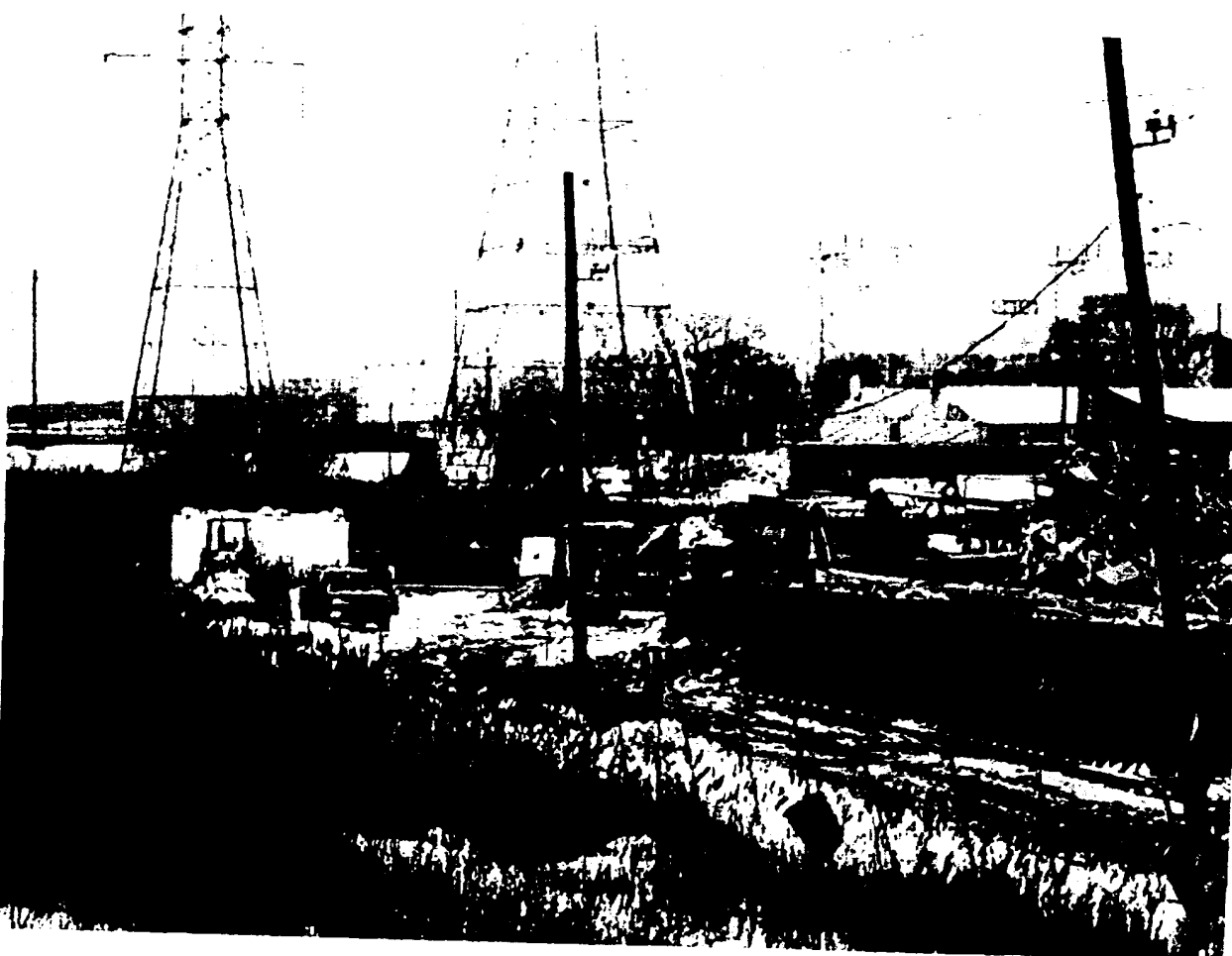
Rail Tech 39 .JPG
1/26/2005



Rail Tech 40 .JPG
1/26/2005



Rail Tech 41 .JPG
1/26/2005



Rail Tech 42 .JPG
1/26/2005

EXHIBIT C

The New York, Susquehanna and Western Railway Corporation

1 Railroad Avenue
Cooperstown, NY 13326
607-547-2555
Fax: 607-547-9834
www.nysw.com

June 17, 2003



via Federal Express

John Castner, P.E., P.P., Director
Division of Solid & Hazardous Waste
State of New Jersey Dept. of Environmental Protection
401 East State St., P.O. Box 414
Trenton, NJ 08625-0414

RE: Rail Loading Facility
Secaucus Road, North Bergen, NJ

Dear Mr. Castner:

NYS&W has recently begun operating a rail loading facility on NYS&W's transload facility at Secaucus Road and 16th Street, North Bergen, New Jersey for the transloading of construction and demolition debris from truck to rail car. NYS&W has contracted with RailTech LLC, 185 Dey Street, Jersey City, NJ 07306 ("RailTech"), to handle certain of the transloading operations on NYS&W's behalf. The transloading operations consist solely of the following:

Construction and Demolition Debris (Type 13C). Construction and demolition debris (type 13C) will be transported to the site by truck with access via 16th Street. The waste is placed in a concrete loading platform and is then loaded into a gondola railcar by a grapple machine.

The following operational rules apply to all of these transloading operations:

- A. There will be no storage of waste at the NYS&W facility;
- B. All waste flow regulations will be complied with;
- C. The record keeping requirements of NJAC 7:26-3.6(h) will be complied with; and
- D. The operational requirements of NJAC 7:26-3.6(a) and (g) will be complied with.

As has been acknowledged by NJDEP, the Department's authority to regulate a rail facility used for transloading of materials to railcars is limited by the preemption of such regulation under the Interstate Commerce Commission Termination Act of 1995. NYS&W is aware of and supports the Department's efforts to propose new regulations to define the Department's role in addressing valid safety concerns at such facilities. While that process moves forward, the needs of transportation must be met. NYS&W, with the assistance of RAILTECH, has endeavored to

design this transload facility and the operating rules in such a manner as to satisfy the Department's health, safety and environmental concerns. We are also aware of the Department's recent enforcement actions relating to certain other facilities served by other railroads, and wish to clarify our desire to work with the Department to provide for the safe, efficient, and environmentally beneficial transportation of these solid wastes. We look forward to responding to any questions or requests for information you may have.

Respectfully,



Nathan R. Fenno
Vice President-Law

cc.: Mr. Tom Bryne, NJDEP
James Martin, DAG
Dennis Toft, Esq.
Kenneth Hollenbeck, Esq.