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January 27, 2006

## BY HAND DELIVERY

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Seventh Floor  
Washington, D.C. 20423



**Re: STB Finance Docket No. 34797  
New England Transrail, LLC – Petition for Exemption**

Dear Secretary Williams:

Enclosed please find an original and 10 copies of the Comments of the New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission, in the above referenced proceeding. Please date stamp and return one copy to our messenger for our records.

If you have any questions concerning this, please to not hesitate to contact me.

Very truly yours,

  
Edward D. Greenberg

Enclosure

cc: All Parties

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2/15/06

January 27, 2006

## **BY HAND DELIVERY**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Seventh Floor  
Washington, D.C. 20423



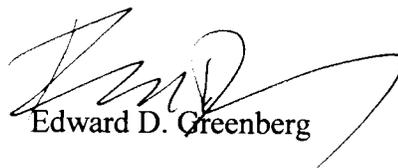
**Re: STB Finance Docket No. 34797  
New England Transrail, LLC – Petition for Exemption**

Dear Secretary Williams:

The State of New Jersey Department of Environmental Protection and the New Jersey Meadowlands Commission respectfully request to be added to the official service list compiled by the Board in the above-referenced proceeding.

If you have any questions concerning this, please to not hesitate to contact me.

Very truly yours,

  
Edward D. Greenberg

Enclosure

cc: All Parties

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

\_\_\_\_\_  
**FINANCE DOCKET NO. 34797**  
\_\_\_\_\_

**NEW ENGLAND TRANSRAIL, LLC  
D/B/A WILMINGTON & WOBURN TERMINAL RAILWAY  
PETITION FOR EXEMPTION**  
\_\_\_\_\_



**COMMENTS OF  
THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION  
AND THE NEW JERSEY MEADOWLANDS COMMISSION**

In accordance with the decision of the Board in this proceeding served December 20, 2005, the New Jersey Department of Environmental Protection (“NJDEP”) and the New Jersey Meadowlands Commission (“NJMC”) submit their comments in response to the Petition for Exemption filed in this matter by New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway (“NET”).

**I. STATEMENT OF INTEREST**

The NJDEP is an administrative agency of the State of New Jersey that is established and organized pursuant to N.J.S.A. 13:1D-1, *et seq.* As relevant here, the NJDEP is responsible for protecting the environment and the health and safety of New Jersey’s citizens and businesses. The NJMC is a New Jersey state agency situated “in, but not of,” the Department of Community Affairs, and is a political subdivision of state government exercising public and essential governmental functions. As is the case with NJDEP, NJMC is responsible for overseeing the public health and safety of citizens and businesses within the geographic area of New Jersey generally known as the Meadowlands District.

Both NJDEP and NJMC have, consistent with their statutory obligations, enacted regulations that govern the design, construction and operation of facilities engaged in the handling and disposal of, among other things, municipal solid waste (“MSW”) and construction and demolition waste (“CDW”). These regulations are promulgated pursuant to New Jersey's police powers and are designed to protect the health and safety of New Jersey's citizens. In that respect, the interests of NJDEP and NJMC are similar to and consistent with those of the Massachusetts Department of Environmental Protection (“MDEP”), which is also a party in this proceeding.

Over the last several years, an increasing number of solid waste operators have located their facilities in industrial or rail switching yards, or along railroad tracks, as a means of avoiding any and all state or local environmental regulations applicable to solid waste facilities. These operators have attempted to use the Board’s licensing exemption procedures and the preemption provisions of 49 U.S.C. § 10501(b) to claim a “regulatory gap” in which neither the Board nor federal and state environmental agencies would have any ability to enforce environmental and other health and safety regulations that are otherwise applicable to solid waste facilities.

A mounting number of these facilities have claimed that their activities are not subject to New Jersey state and local regulation due to preemption issues even though the operator is not a rail carrier,<sup>1</sup> while others have attempted to use the Board’s Notice of

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<sup>1</sup> STB Finance Docket No. 34192, *Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, New Jersey* (decision served August 14, 2003; not published) (“*Hi Tech II*”); Civil No. 05-2755, *J.P. Rail, Inc. v. New Jersey Pinelands Commission*, 404 F. Supp. 2d 636, 2005 WL 3529339 (D.NJ; decision issued December 22, 2005) (“*J.P. Rail*”). See also the attached Verified Statement of John Castner (“Castner Statement”) at ¶¶ 13-14 describing the alarming spread of solid waste transfer facilities in New Jersey.

Exemption procedure in 49 C.F.R. § 1150.31, to become rail carriers “under the radar.”<sup>2</sup> What they all seem to have in common is the desire to abuse the Board’s processes in order to convert strictly regulated solid waste activities into “rail” activities protected by preemption from any federal or state oversight. The result of these machinations has been a considerable and growing amount of litigation, legal uncertainty, and the brazen operation of patently dangerous rogue solid waste facilities that operate, at times, in open defiance of federal and state law.

While NET’s operation is not situated in the state of New Jersey, NJDEP and NJMC have a compelling interest to ensure, first, that there is a proper recognition of the distinction between solid waste facility operators masquerading as rail carriers and legitimate rail carrier transload operations and, second, that applicable public health and safety regulations are enforced. Otherwise, more and more unscrupulous companies will have a blueprint for circumventing oversight of their activities, resulting in the spread of unregulated facilities that threaten the health, safety and environment of countless communities. For examples of what happens when such facilities are freed to maximize their profits without state or local oversight, see the attached Castner Statement, at ¶ 17-24 and the photographs in his Exhibit B.

NJDEP and NJMC have carefully considered the supporting materials provided in NET’s Petition, including the information provided in the Verified Statements of Ms. M. Margret Hanley, LSP, and Mr. Stephen J. Graham. Similarly, NJDEP and NJMC have

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<sup>2</sup> We note that NET initially commenced its pursuit of rail carrier status that way. *See* Notice of Exemption filed by NET in Finance Docket No. 34365, on June 19, 2003. *See*, also, the Notice of Exemption filed in Finance Docket 34819, *Commercial Railroad Services, Inc. – Operation Exemption – Providence and Worcester Railroad Company*, where the recycling company that initially sought to be a rail carrier over approximately one thousand feet of tracks was doing so for the purpose of avoiding local licensing requirements. That applicant has since moved to withdraw its Notice of Exemption on January 19, 2006.

reviewed NET's commitment to comply with MDEP's substantive state health and safety regulations pertaining to the construction and operation of the proposed facility, as set forth in the verified statement of Mr. Robert W. Jones, III. These verified statements raise several preliminary points.

First, the Board should be aware that NJDEP has promulgated new regulations – after detailed consultation and exchanges of comments with rail carriers and members of the solid waste industry in New Jersey – by which legitimate rail carriers are relieved of preclearance requirements prior to their construction and operation of solid waste transload facilities.<sup>3</sup> Nonetheless, New Jersey's Intermodal Regulations do establish substantive health and safety requirements on such facilities that are similar to those applicable to all solid waste transfer facilities. As discussed below, New Jersey's Intermodal Regulations, and comparable regulations of other states that are intended to protect the public health and safety, are not preempted by Section 10501(b). (*See* Section III, *infra*.)

Second, while this is not an issue that directly affects New Jersey, NJDEP and NJMC note that NET contends that so-called “Waste Bans” provisions in the MDEP regulations “accomplish only economic objectives and not the protection of health and safety” and are therefore preempted. (NET Petition<sup>4</sup> at 15-16, Jones statement, ¶ 16) It is not clear what right NET has to unilaterally determine that those – or any state regulatory – requirements are necessarily preempted.

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<sup>3</sup> N.J.A.C. 7:26 – 2D.1 *et seq.* These are commonly referred to as the “Intermodal Regulations,” which were designed to relieve rail carriers of regulatory burdens that are preempted by Section 10501(b), while retaining essential public health and safety requirements relating to the storage, processing and handling of solid waste.

<sup>4</sup> For ease of reference, citations to NET's Petition hereafter will be referred to as “Argument.”

Third, NET alleges that it intends to comply with what it calls the "applicable" MDEP regulations (Argument at 15). This suggests, initially, that NET has assumed the responsibility for determining which state regulations are "applicable" and whether it will comply with them. This is patently self-serving and inappropriate; absent some finding by a tribunal with appropriate jurisdiction over the matter, companies subject to regulation may not unilaterally decide which laws are relevant. And, it seems clear that the overriding result that NET seeks by petitioning to become a rail carrier is to circumvent state regulation of its activities. Since any "rail operations" will be confined to a few hundred feet within its facility, there appears to be no operational or economic reason for NET to be a rail carrier and bear the attendant higher labor costs just to load rail cars. Rather, it appears that NET's primary, if not only, reason for seeking rail carrier status is so that NET can claim the right to unilaterally decide those MDEP regulations with which it will comply.<sup>5</sup> While it is clear that Section 10501(b) does not in fact convey that prerogative to NET or even *bona fide* rail carriers (*see* Section III, *infra*), New Jersey and other states are often being required to litigate each case involving a real or purported railroad in order to enforce their oversight responsibilities.

Fourth, NJDEP and NJMC are aware that the Board's Section of Environmental Analysis ("SEA") did a review of the demolition and construction activities originally proposed by NET in Finance Docket No. 34391. While SEA's Assessment will provide a

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<sup>5</sup> While NET's initial construction of "rail" facilities is subject to the Board's review, any further construction of facilities after it is deemed to be a rail carrier will be beyond the Board's review pursuant to § 10906 and *Effingham*; *see also* Finance Docket No. 34429, *The New York City Economic Development Corporation - Petition for Declaratory Order* (decision served July 15, 2005; not published) at 8. This has been a significant problem and has led to extremely expensive and protracted litigation in other cases involving railroads, where the carrier has claimed the unilateral right to decide which, if any, regulations are acceptable. *See, e.g.*, Civil Action No. 05-4010, *New York, Susquehanna and Western Railway Corporation v. Bradley M. Campbell, et al.* (D.N.J.)

thorough review of the site conditions and mitigation that will be required of NET due to its proposed construction activities, it does not address the steps or procedures NET will need to follow with respect to the operation of the facility itself.<sup>6</sup> That is an issue within the particular expertise of the state or local regulatory body that is charged with overseeing the health and safety of the local citizens. Indeed, at least with respect to the issue of air quality, SEA's Assessment states generally that NET should "comply with all applicable Federal, State, and local regulations regarding the control of fugitive dust." *Id.* at 5-2. Thus, there is an essential role for state and local authorities to maintain their oversight responsibilities where, as here, it is clear that the primary purpose of the proposed activities is to engage in the handling of solid waste.

NJDEP and NJMC are concerned about the precedent that may be established in the event NET is found to be a rail carrier. It is abundantly clear that many companies endeavoring to operate solid waste transfer stations under the guise of railroad transload facilities are not concerned about environmental issues or otherwise complying with state laws and regulations governing the construction and operation of such facilities. In New Jersey's experience, such facilities make minimal investment in anything that does not redound immediately to the bottom line and care little about the health and safety of the state's citizens or of its own workers. Unfortunately, once such a fly-by-night facility begins operations, otherwise responsible competitors face overwhelming economic pressure to cut corners or also seek to use the Board's processes given the "benefits" of federal preemption.

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<sup>6</sup> See Post Environmental Assessment served December 22, 2004.

## II. NET HAS NOT SHOWN THAT ITS ACTIVITIES ARE RAIL TRANSPORTATION

This case presents the second major proceeding in which a party in the solid waste industry has attempted to misuse the Board's processes for the sole purpose of attempting to evade legitimate state regulation over the serious environmental health and safety issues raised by their facilities. The Board recently rejected arguments made by Hi-Tech Trans, LLC that (1) motor carrier transportation inbound to a solid waste transfer facility served by railroad is either rail transportation or an activity integral to rail transportation, within the meaning of 49 U.S.C. § 10102(9),<sup>7</sup> and (2) that the activities of a solid waste transfer facility engaged in processing inbound solid waste for outbound movement by the serving rail carrier is, again, either rail transportation or an activity that is integral to rail transportation.<sup>8</sup> Regrettably, those decisions did not settle the matter, as opportunistic companies have attempted to restructure their operations so as to align themselves more closely with railroads so as to obfuscate the demarcation between the company engaged in the solid waste business and the serving rail carrier.<sup>9</sup>

Now the Board is presented with a variant on this familiar theme. On this occasion, NET has now sought to become recognized as a rail carrier and, on that basis, claims to be protected from bothersome state oversight. Notwithstanding the label used

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<sup>7</sup> STB Finance Docket No. 34192, *Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, New Jersey* (decision served November 20, 2002; not published) ("*Hi Tech I*")

<sup>8</sup> *Hi Tech II*.

<sup>9</sup> In one pending case, NJDEP and NJMC are challenging the activities of several solid waste transfer facility operators that have aligned themselves with the New York Susquehanna and Western Railroad. See *The New York, Susquehanna and Western Railway Corporation v. Bradley M. Campbell, et al.*, Civil Action No. 05-4010 (D.NJ). Similarly, in another action NJDEP and the New Jersey Pinelands Commission recently obtained a preliminary injunction against the activities of a company engaged in the solid waste business that had sought to align itself with J.P. Rail, Inc. doing business as the Southern Railroad of New Jersey. *J.P. Rail*.

to describe its activities, however, NET does not properly fall within the definition of rail carrier and is instead engaged primarily, if not solely, in the solid waste industry.

**A. NET Has Not Demonstrated That It Will Operate As A Rail Carrier**

NET has made an impressive showing of its intention to construct and operate solid waste transfer facilities and, perhaps, storage and loading facilities for the handling of aggregates and other bulk materials. Nonetheless, other than the fact that the facility is situated on railroad tracks and that freight will be tendered to a railroad once the facility is up and running, NET has provided neither evidence nor argument that it will operate as a rail carrier. For example, NET has provided no evidence as to whether it will: provide or operate rail equipment; be able to enter into interchange agreements with the Boston & Maine Railroad and/or the Massachusetts Bay Transportation Authority; hire engineers, trainmen, maintenance of way personnel or other railroad operating, clerical or management employees; share in railroad divisions; participate in interline settlements; provide locomotives or other rail equipment; actually move any rail cars; participate in the UMLER system; provide rail clerical and waybilling service; interface with the IT networks of rail carriers; or otherwise show an intention to provide *bona fide* common carrier rail service. Nor is there any indication that NET would be willing to let any other entity tender solid waste at its facility for movement by rail.<sup>10</sup>

Further, the background of NET's principals suggests that they do not have the necessary experience to provide rail common carrier service, even if they intended to do so. As noted in the Castner Statement (at ¶ 16), two of NET's principals – Messrs.

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<sup>10</sup> As such, its activities are substantially different than those described in Finance Docket No. 34145, *Bulkmatic Railroad Corporation – Acquisition and Operation Exemption – Bulkmatic Transport Co.* (decision served November 19, 2002; not published) at 5 (Bulkmatic had no financial interest in the goods it was transporting and was willing to provide service for other transloaders).

Ronald Klempner and Robert W. Jones – were also principals of Hi Tech and have a long history of activity in the solid waste industry. The only prior rail expertise these individuals appear to have is that they engaged in sham railroad operations previously and initiated extensive litigation as a delaying tactic to maximize the profits of their illicit solid waste transfer business.<sup>11</sup> While these individuals are clearly experienced in handling and profiting from solid waste, they have provided no indication as to their ability to actually run a railroad or otherwise interact with *bona fide* members of the rail industry.

Turning now to the proposed operations of NET, NJDEP and NJMC do not dispute the proposition that a rail carrier may operate within a relatively small area or that activities that were previously industrial switching can be converted into common carrier rail operations. The parties thus do not take issue with the Board's holding in *Effingham RR Co. – Pet. For Declaratory Order*, 2 S.T.B. 606 (1997), or in the various other cases cited by NET (*see* Argument at 17, n. 24).<sup>12</sup> On the other hand, there is no indication that NET intends to provide any service to the public other than its operations as, initially, a solid waste transfer facility and, perhaps later, for the temporary storage and transloading of other bulk materials for beyond movement by rail.

In his verified statement, Mr. Castner explains how CDW and MSW are typically handled. A company wishing to dispose of such waste products engages and pays

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<sup>11</sup> The Board's record in *Hi Tech I* and *Hi Tech II* recount just some of the litigation which was necessary to terminate the prior activities of Messrs. Klempner and Jones.

<sup>12</sup> However, two of the cases cited by NET were processed by the Notice of Exemption procedures set forth in 49 C.F.R. § 1150.31, so that there was no evidentiary record, other than the sparse Notice filing, of the nature of activities those applicants would be providing. *See* Finance Docket No. 33414, *Penn Jersey Rail Lines, Inc. – Acquisition and Operation Exemption – WMI Prop., Inc.* (decision served June 24, 1997; not published); Finance Docket No. 34328, *Pennsylvania Southwestern R.R., Inc. – Lease and Operation Exemption – J&L Special Steel, LLC* (decision served April 24, 2003; not published).

truckers to haul it either to a disposal facility, or as relevant here, to a transfer station. When the trucker arrives at the transfer station, it pays what are commonly referred to as "tipping fees" to the operator of the facility, who then processes the various shipments in order to sort, segregate, and otherwise manipulate the material so that it can be economically transported to whichever disposal site will accept that specific type of waste. The operator of the transload facility will then load rail cars and tender them for rail transportation to the ultimate disposal site, typically showing either itself or some broker as the shipper on the railroad bill of lading. While solid waste typically has a negative value, legal or equitable title for this consist is typically lodged in the person of the transfer station that tendered the cargo to the railroad for further movement to its ultimate destination. (Castner Statement at ¶ 7-8). NJDEP and NJMC assume that NET will act no differently, so that it would likely have some beneficial interest in the freight and primarily profit by its disposal, rather than by its loading and "hauling" services.

In sum, NET has presented no evidence to substantiate that its intended operations are anything but those of a shipper/solid waste transfer facility or that its petition is intended for any purpose other than to evade local regulations. The Board has previously made it clear that it would not countenance attempts to misuse the ICCTA or its procedures when it noted that it would "not approve rail carrier authority that is a sham or intended solely to avoid local regulations." *Hi Tech II*, at 6 n.12. The record evidence in this proceeding suggests that NET would not be a *bona fide* rail carrier and that its petition should be dismissed.

## **B. Processing of Solid Waste is Not Transportation**

Under the governing statute, the term "transportation" is defined to include a "facility" where services are provided related to the movement of property. 49 U.S.C. § 10102(9)(A), (B). The Board has construed this in numerous cases to hold that the activities in question must be integrally related to the railroad's ability to provide rail transportation service. Finance Docket No. 34662, *CSX Transportation, Inc. – Petition for Declaratory Order* (served March 14, 2005; not published); *CFNR Operating Co., Inc. v. City of American Canyon*, 282 F.2d. 1114, 1118-19 (N.D.Cal. 2003). In addition, in order to be subject to the Board's jurisdiction, the activities at the facility in question must be *bona fide* rail carrier transportation. 49 U.S.C. § 10105(b). *Hi Tech I* at 3, *Hi Tech II* at 6; *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d. 295, 308 (3<sup>rd</sup> Cir. 2004) ("*Hi Tech III*") and cases cited therein.

NET apparently intends to engage in a number of processing activities before it actually loads solid waste into railcars. In particular, NET plans to sort, segregate, recycle, shred and bale the solid waste before loading railcars. Yet, NET has provided no support for the proposition that the transloading of goods includes anything more than the physical act of transferring freight from a truck onto a railcar. Instead, it asserts that any handling or processing that does not affect a biological, thermal or chemical change to the molecular structure of the solid waste, is a part of the loading process. (Jones Statement, at ¶ 18). NET contends, accordingly, that its proposed operations are that of a classic transload facility that moves bulk or other materials on or off railcars, despite the significant processing activities it intends to undertake.

This argument fails for a number of reasons. First, NET provides no support whatsoever for its bald statement that some physical change in the molecular structure of

cargo is a prerequisite to finding that a non-rail service has been provided. We are aware of no precedent for this striking assertion. Even assuming this was relevant (which is not the case), by dumping various types of waste from multiple origins – some of which might include hazardous materials – into a pile, there will almost necessarily be a change in the physical structure of the waste. The dumping process will create dust from this debris which will migrate to other locations. Rain or water used for dust suppression will cause materials, often hazardous, to leach into the soil and ground water. Thus, almost of necessity the process will engender a qualitative change in the identity of the waste that has been brought into the facility (Castner Statement at 26), and the creation of environmental emissions endangering the health and safety of the public.

Moreover, the service NET will provide is to sort and segregate waste coming from multiple origins, so that it can be dispatched ultimately to appropriate disposal sites. Once it has done so, and pulled out and independently sold any recyclable materials that can be recovered, NET will shred and bale the relevant shipments in order to reduce the rail freight cost to the lowest amount possible. And, it will maximize its profit from the disposal of the waste, not its transportation. This is substantially different from a legitimate transload operation, where a homogeneous type of freight (typically bulk) is moved from one shipper to one consignee, and the railroad's only obligation is to transport the freight and, perhaps, load or unload the car.

Indeed, due to its manipulation of the waste, NET's services are less related or integral to rail transportation than was the service provided by Rinker Materials Corporation in *Florida East Coast Ry. v. City of West Palm Beach*, 266 F.3d. 1324 (11<sup>th</sup> Cir. 2001) (Rinker simply received aggregates shipped by rail at its facility). Similarly,

NET's reliance upon Finance Docket No. 33466, *Borough of Riverdale – Petition for Declaratory Order – New York, Susquehanna and Western Railway Corporation* is of no help to its position since (1) no determination was ever made as to the nature of the corn syrup processing plant in issue; (2) the Board affirmatively found that a corn processing plant providing more than mere transloading services would not be subject to ICCTA jurisdiction even if located on rail property; and (3) in any event the nature of NET's activities goes far beyond simply facilitating the loading of a homogeneous shipment tendered by one shipper.

NET also argues that shredding and baling waste will increase the utilization of rail equipment. While this is true, it is also not relevant to the question of whether those waste processing activities are activities integral to rail transportation. Rail carriers hauling solid waste shipments are generally paid on a per car, rather than per ton, basis and thus are indifferent to the volume of waste that a shipper tenders for any given car. Indeed, from a strictly financial perspective, the carrier does better when a shipper has to use more cars. On the other hand, parties engaged in the disposal of solid waste maximize their profits by shipping as much waste as possible at the lowest possible cost. In that sense, their interests and efforts are distinct from those of the rail carriers.

The services NET proposes to provide here are no different than the services Messrs. Kempner and Jones provided when they ran Hi Tech. Similarly, they are no different than the operations that Judge Simandle recently found to be solid waste transfer, rather than rail transportation, in *J.P. Rail, supra*, 2005 WL 3529339 at Sheet 12. (The activities of such transfer stations involve "'transportation to rail carrier' rather than 'transportation by rail carrier'", quoting *Hi Tech III*). Simply stated, even assuming

arguendo NET is a rail carrier, the processing services it is proposing to conduct are neither rail transportation nor integral to rail.

That activities described by NET are not integrally related to rail transportation is evidenced by the fact that throughout the country such activities are conducted in ordinary solid waste transfer stations that have absolutely no connection with rail service. The fact that these activities may also take place on property owned or leased by a railroad does not magically transform these activities into services essential for rail transportation. *Cf. Native Vill. of Eklutna v. Alaska RR Corp.*, 87 P.3d 41, 57 (Alaska 2004) (finding the railroad's "own operation of a gravel quarry" to not be integrally related to rail operations); *Stowers v. Consol. Rail Corp.*, 985 F.2d 292, 297 (6th Cir. 1993) (in drawing the line between overland and maritime transportation, the court found that since the switchyard crew's duties were "the same as they would have been at any other railroad switchyard servicing another type of industry in which railroad cars are loaded and unloaded by another trade, employer, or business entity," the "overland transportation began and ended" with the crew's work).

To draw the line between rail "transportation" and non-transportation anywhere else other than the actual loading of the rail cars with waste would force the Board onto a slippery slope. There is no analytical justification for drawing the line to include some pre-loading predecessor activities but not others; any activity at any point in the pre-loading chain--from knocking the building down to gathering the C & D waste to driving it to the site-- would have an equal claim that it should fall under ICCTA. This could not have been what Congress intended when it enacted ICCTA. See *CFNR Operating Co.*, *supra*, 282 F. Supp. 2d at 1118-19 (rejecting plaintiffs' argument that because it "hauls

goods from its facility at the railroad terminal to the customer who ordered the goods, it completes the process of transporting goods by rail and so is subject only to ICCTA regulation,” or “any trucking company who picks up goods from a railroad terminal for delivery to a customer would be free from local regulation”); *Hi Tech I*, at 6 (“By Hi Tech’s reasoning, any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier.”); *Hi Tech III*, 382 F.3d at 309 (“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.”).

In short, only the actual loading of the waste onto the rail cars can be considered “integrally related” to rail transportation. All predecessor activities therefore fall outside of the scope of “rail transportation” and – regardless of who performs them – are subject to State environmental and public health and safety laws.<sup>13</sup>

### **III. NET'S ACTIVITIES ARE NOT PREEMPTED FROM PUBLIC HEALTH AND SAFETY OVERSIGHT BY THE STATE**

Even assuming for the sake of argument that the sundry activities at NET’s facility constitutes “transportation by a rail carrier,” the facility must still comply with state and local regulations, which in purpose and effect protect the public from the unregulated disposal and transfer of solid waste. New Jersey’s experience in attempting to enforce its

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<sup>13</sup> Parenthetically, NJDEP’s Intermodal Regulations do not preclude rail carrier solid waste transfer stations from engaging in the processing (*i.e.*, sorting, segregating, shredding, baling, recycling) of solid waste or otherwise require that such facilities obtain preclearance permits. N.J.A.C. 7:26-2D.1(d). That NJDEP has elected to proceed in this fashion does not mean that this processing function is either rail “transportation” or activities that are integral to rail transportation. To the contrary, only the actual transloading function falls within the definition of “transportation,” and NJDEP’s decision to lessen the regulatory burden on rail carriers when it promulgated the Intermodal Regulations was not required by Section 10501(b).

regulations with respect to solid waste facilities that are somehow connected with railroads has generally been met with substantial resistance and incessant litigation. In some cases, the carriers claim that the regulations are totally preempted from any regulatory oversight, while in others the carriers state that they will comply with any "applicable" regulations and then claim the right to unilaterally decide which regulations are applicable and the degree to which they will choose to comply. NJDEP and NJMC believe that this is a gross misunderstanding of the scope of Section 10501(b). Both the cases construing this section and the legislative history make it clear that Section 10501(b) must be read sufficiently narrowly so that any finding of preemption does not reach the State's exercise of its police powers to regulate the public health and safety.

The State is concerned with protecting the public and the environment from the dangers posed by the indiscriminate and unregulated disposal of solid waste. The Supreme Court has long recognized that a State's police power is "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people." *Manigault v. Springs*, 199 U.S. 473, 480 (1905). "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County v. Automated Med. Labs*, 471 U.S. 707, 719 (1985).

Both the Federal and State governments have recognized the health and safety hazards posed by the unmanaged disposal of solid waste. *E.g.*, 42 U.S.C. § 6901(b)(2) ("The Congress finds with respect to the environment and health, that . . . disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment"); 42 U.S.C. § 6901(b)(3) ("inadequate and environmentally unsound practices for the disposal or use of

solid waste have created greater amounts of air and water pollution and other problems for the environment and for health”); 42 U.S.C. § 6901(b)(4) (“open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land”); *see also* N.J.S.A. 13:1E-2a (“The Legislature finds that the collection, disposal and utilization of solid waste is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest”).

Moreover, solid waste management remains squarely within the state’s traditional police power. See 42 U.S.C. § 6901(a)(4) (recognizing that although federal guidance was required, the regulation of solid waste disposal “should continue to be primarily the function of State, regional and local agencies”); *Old Bridge Chems., Inc. v. New Jersey Dep’t of Env’tl. Prot.*, 965 F.2d 1287, 1292 (3d Cir. 1992) (“[A]lthough Congress recognized the need for federal regulation, it stated that ‘the collection and disposal of solid wastes should continue to be primarily the function of the State.’”); *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc.*, 48 F.3d 391, 398 (9th Cir. 1995) (“Congress has explicitly found that the field of solid waste collection is properly subject to state regulation.”); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1288 (2d Cir. 1995) (“In our multi-tiered federal system, local governments have historically borne primary responsibility for ensuring the safe and reliable disposal of waste generated within their borders – a role that Congress has expressly recognized.”).

State or local regulation of health and safety matters are presumed valid against a Supremacy Clause challenge, U.S. Const., Art. VI, cl. 2. *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 715 (1985). This presumption supports a narrow

interpretation of express preemptive language, an approach that, the Supreme Court explained, “is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). By claiming that any of MDEP's regulations are preempted, NET bears the considerable burden of overcoming this initial presumption that Congress did not intend to displace state law. *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997); *Penn. Med. Soc’y v. Marconis*, 942 F.2d 842, 847 (3d Cir. 1991) (“It is up to appellants to prove the presumption invalid, either by showing the area regulated is not in an area of traditional state regulation or by showing that Congress intended to displace this function.”). To meet its burden, NET must show that it was the “clear and manifest purpose of Congress” to preempt the State’s historic police power to regulate solid waste disposal for the health and safety of its citizens. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). The question here, then, is whether it was the “clear and manifest purpose of Congress” when enacting ICCTA to preempt State regulation of solid waste activities whenever a rail carrier was involved. NET cannot meet its burden of proving that the answer is anything other than a resounding: “No!”

A. **The express language of Section 10501(b) does not clearly and unequivocally show that Congress intended to supplant the State's authority to regulate solid waste activities.**

Congress' intent in enacting ICCTA can be discerned from both the statutory language and the legislative history and purpose of the statute. Neither supports a finding that Congress intended to broadly preempt all federal and state regulation simply because rail transportation was involved. Health and safety regulation is not an “exception” to the

preemption provision; rather, reading Section 10501(b) narrowly as required, the preemption provision does not even reach such regulation at all.

Section 10501(b) provides that “the remedies under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.” 49 U.S.C. § 10501(b). The necessary first step is to “identify the domain expressly preempted” by Section 10501(b). *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). Therefore, though on first blush the preemptive language appears expansive, the question must be what “remedies provided under Federal or State law” are preempted by “the remedies under this part with respect to regulation of rail transportation.” See 49 U.S.C. § 10501(b). In other words, do the ICCTA remedies preempt any and all “remedies provided under Federal or State law,” regardless of the type of regulation, or only those remedies with respect to the State economic regulation of rail transportation, see H.R. Rep. 104-311, at 83 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 794-95 (1995).

To accord Section 10501(b) as total preemption of all state regulation in this area would be to create a regulatory gap where Congress intended none. *Cf. Inland Steel Co. v. EPA*, 901 F.2d 1419, 1424 (7th Cir. 1990) (distinguishing between discharge and disposal in interpreting RCRA’s exemption provision “not because the dictionary requires” it, but “because a failure to make the distinction would create a senseless regulatory gap”). As discussed, *infra*, the purpose of the ICCTA preemption provision was to reduce the economic regulation of rail transportation. The purpose was not to create a regulatory hole--a hole through which rail carriers may indiscriminately dump not only C&D debris, but also sludge and putrescible waste. *Cf. Inland Steel Co. v. EPA*,

901 F.2d 1419, 1423 (7th Cir. 1990) (The purpose of RCRA's exemption is "to avoid duplicative regulation, not to create a regulatory hole through which billions of gallons of hazardous wastes can be pumped into the earth without any controls provided they are pumped deeply enough to endanger neither navigable waters nor the supply of drinking water"). Congress recognized in ICCTA that it was important "to operate transportation facilities and equipment without detriment to the public health and safety." 49 U.S.C. § 10101(8). However, nowhere in ICCTA-- aside from a minor provision regarding "safe and adequate car service," 49 U.S.C. § 11121(a)(1)--is regulation for the public health and safety provided for. The only logical conclusion to be drawn from this apparent inconsistency is that Congress intended to leave regulation of public health and safety where it has always been--in the province of the State.

According to the plain language of Section 10501(b), the ICCTA "remedies" preempt the remedies under both Federal and State law. 49 U.S.C. § 10501(b). A broad interpretation of the scope of Section 10501(b), then, would require this court to find that ICCTA repealed all other federal statutes by implication, including the Federal Railroad Safety Act, the Clean Air Act, the Clean Water Act, and RCRA. Not only are implied repeals not favored, *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141-42 (2001), such a holding would create an untenable regulatory gap in the most fundamental matters of public health and safety. To argue, then that the language of Section 10501(b) has precluded all state regulation over the operations of a "rail carrier" would interject an "interpretive conundrum" that cannot withstand scrutiny. As the Eighth Circuit noted, the argument that "Congress in ICCTA occupied the field of economic and facilities regulation of railroads . . . is deceptively simple, for it ignores

relevant federal statutes that were enacted before ICCTA, that are administered by one or more agencies other than the ICC or the STB, and that Congress left intact in enacting ICCTA.” *Iowa, Chicago & R.R. Corp. v. Wash. Cty.*, 384 F.3d 557 (8th Cir. 2004).

In *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 521 (6th Cir. 2001), the district court broadly held that ICCTA preempted Ohio’s track clearance regulation “because its express preemption clause applied to state regulations impacting rail construction or rail safety.” On appeal, plaintiff argued and the Sixth Circuit agreed that such a broad interpretation impermissibly “repeals by implication the current federal and state rail safety regulatory system developed under FRSA,” a concern, the Sixth Circuit noted, “shared by the United States and the STB.” *Id.*

Similarly, *Iowa, Chicago & R.R. Corp.*, *supra*, 384 F.3d at 561, concerned state administrative proceedings that Iowa commenced in response to the county’s petition that the railroad be ordered to replace four bridges at its own expense. The Eighth Circuit found that “Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular.” The court continued: “ICCTA did not address these problems. Its silence cannot reflect the requisite ‘clear and manifest purpose of Congress’ to preempt traditional state regulation of public roads and bridges that Congress has encouraged in numerous other statutes.” *Id.* The court therefore rejected the railroad’s broad preemption argument. *Id.* See also *Allende v. Soo Line R.R. Co.*, 2004 U.S. Dist. LEXIS 26918, at \*38 (D. Minn. 2004) (finding no preemption because, although ICCTA refers to safety, “contains an explicit preemption provision for those remedies covered by the

Act, 49 U.S.C. § 10501(b)(2), and includes an explicit enforcement provision for certain types of claims, 49 U.S.C. § 11704(a) and (b), “none of plaintiff’s claims are covered by the remedial or enforcement mechanisms provided by the Act”).

A closer look at those state laws that have been found to be preempted reveals that they areas directly regulated by the Board, *see, e.g., Cedarapids, Inc. v. Chicago, Cent. & Pacific R.R. Co.*, 265 F. Supp. 2d 1005, 1013 (N.D. Iowa 2003) (track abandonment); *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 499 (S.D. Miss. 2001) (switch yard operation); *City of Auburn v. United States Gov’t*, 154 F.3d 1025, 1029-30 (9th Cir. 1998) (rail line reopening); *CSX Transp., Inc. v. Ga. Publ. Serv. Comm’n*, 944 F. Supp. 1573, 1581-82 (N.D. Ga. 1996) (railroad agency closings); or that, in the court’s view, constituted economic regulation of rail transportation, *see, e.g., South Dakota v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 932, 934-35 (D.S.D. 2003) (finding that the State’s claims for punitive damages and tortious interference would “allow almost unlimited state ‘regulation’” and were therefore preempted by ICCTA, but the State’s contract claims would be allowed since ICCTA does not set forth any criteria for the enforcement of contracts); *Sunflour R.R., Inc. v. Paulson*, 670 N.W.2d 518, 523 (S.D. 2003) (section 10501(b) “does not foreclose every conceivable state claim,” but rather only those that attempt “to impose economic regulation on rail transportation”).

If Section 10501(b) is given its broadest possible preemptive effect, the practical result would be to tie the hands of the State and local authorities, simply because a railroad is involved. *See In re Vt. Ry.*, 769 A.2d 648, 654-55 (2000) (agreeing that “mere ownership of a business enterprise by a railroad does not exempt that enterprise from all

state or local regulation” and upholding permit conditions that “merely address traffic issues and concerns with environmental contamination, matters properly within the province of municipalities by virtue of the state’s delegation of its traditional police powers”). Given such potentially expansive language, the terms “with respect to” and “regulation” must be read in terms of the purpose and legislative history of the ICCTA statute. See *N.Y. State Conference of Blue Cross & Blue Shield Plans*, *supra*, 514 U.S. at 655-56 (recognizing that “[t]he governing text of ERISA is clearly expansive” and going “beyond the unhelpful text” and looking to the statutory objectives to determine the scope of the preemption provision). To do otherwise would be to “read the presumption against preemption out of the law whenever Congress speaks to the matter with generality.” *Id.*; see also *Bates v. Dow Agrosciences LLC*, 544 U.S., 125 S. Ct. 1788, 1806 (2005) (the court has “a duty to accept the reading that disfavors preemption”).

**B. The legislative history and statutory purpose of ICCTA require a narrow interpretation of Section 10501(b).**

Given that preemption turns on Congress’ intent, the Board may look to the objectives of and history behind the ICCTA statute to discern the intended scope of Section 10501(b) before making any findings as to the MDEP or other state regulatory provisions in this area. *Accord Blue Cross & Blue Shield Plans*, *supra*, 514 U.S. at 655-56. As the Supreme Court explained, “that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers” is a familiar rule. *Calif. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284 (1987). Indeed, the Court has declined to read a statute’s words literally where such an interpretation would defy sense by separating the statute from its intended purpose. See, e.g., *Lewis v. United States*, 523 U.S. 155, 161-62 (1998) (concluding that Congress did

not intend that the words “any enactment” in the federal Assimilative Crimes Act “carry an absolutely literal meaning,” because a literal reading “would leave federal criminal enclave law subject to gaps of the very kind the Act was designed to fill”); *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543-44 (1940) (explaining that although words “sufficient in and of themselves to determine the purpose of the legislation” should be given their plain meaning, “[w]hen that meaning has led to absurd or futile results,” or simply an unreasonable one at odds with the policy of the legislation as a whole, the court should look “beyond the words to the purpose of the act”). *Cf. Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1090 n.45 (D.C. Cir. 1996) (noting that if the text of the Clean Air Act “really created a legislative gap, in the sense of leaving a large class of pollution sources unregulated by any jurisdiction, that might suggest that Congress did not intend a literal interpretation”). “When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’” *Am. Trucking Ass’ns*, *supra*, 310 U.S. at 543-44 (internal citations omitted).

Here, Congress acted to ensure that the remedies provided in Part A of the ICCTA preempt – or trump – all other remedies that had previously been provided by the Interstate Commerce Act (“ICA”). In other words, the new federal ICCTA remedies superceded the old federal ICA remedies, and the states may not attempt to re-regulate those areas that ICCTA had just de-regulated. *Baker v. IBP, Inc.*, 357 F.3d 685, 688 (7th Cir. 2004). Similarly, states may not regulate in areas where ICCTA has occupied the field. See *Englehard Corp. v. Springfield Terminal Ry. Co.*, 193 F. Supp. 2d 385 (D. Mass. 2002) (recognizing the limits to ICCTA preemption and concluding that “Congress

has occupied the field of car mileage allowances so completely as to preempt any potentially parallel state-law remedy”).

Both the statutory purpose of ICCTA and its legislative history support this interpretation. First, the Committee Report summarized ICCTA as a bill to “eliminate[s] obsolete rail provisions,” “substantially deregulate[]” the rail industry, and abolish the Interstate Commerce Commission. H.R. Rep. 104-311, at 82 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 793-94 (1995).

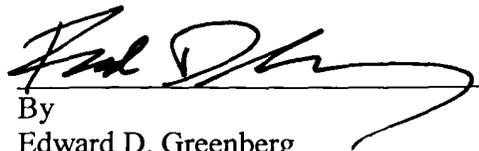
Second, the pre-ICCTA statute authorized State regulation of intrastate transportation by rail carrier. 49 U.S.C. §§ 10501(c) and (d); 11501(b) (1988). The House Report on the ICCTA bill explicitly repealed this authority, declaring that under ICCTA there would be “direct preemption of State economic regulation of rail transportation.” H.R. Rep. 104-311, at 83 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 795 (1995). The House Report explained:

As used in this section, ‘State or Federal law’ is intended to encompass all statutory, common law, and administrative remedies addressing ...rail-related subject matter...The bill is intended to standardize all economic regulation (and deregulation) of rail transportation under Federal law, without the optional delegation of administrative authority to State agencies to enforce Federal standards, as provided in the relevant provisions of the Staggers Rail Act.

H.R. Rep. 104-311, at 95 (1995), reprinted in 1995 U.S.C.C.A.N. 793, 807 (1995). See also *Wheeling & Lake Erie Ry. Co. v. Penn. Pub. Util. Comm’n*, 778 A.2d 785, 792 (Pa. Commw. Ct. 2001) (finding that Congress’ intent in Section 10501(b) was “to preempt only the states’ previous authority to economically regulate the rail transportation within their borders with respect to such matters as the operation, rates, rules, routes, services, tracks, facilities and equipment”).

to the Board's jurisdiction, the provisions of ICCTA or otherwise preempted by federal law from state oversight and regulation.

Respectfully Submitted,



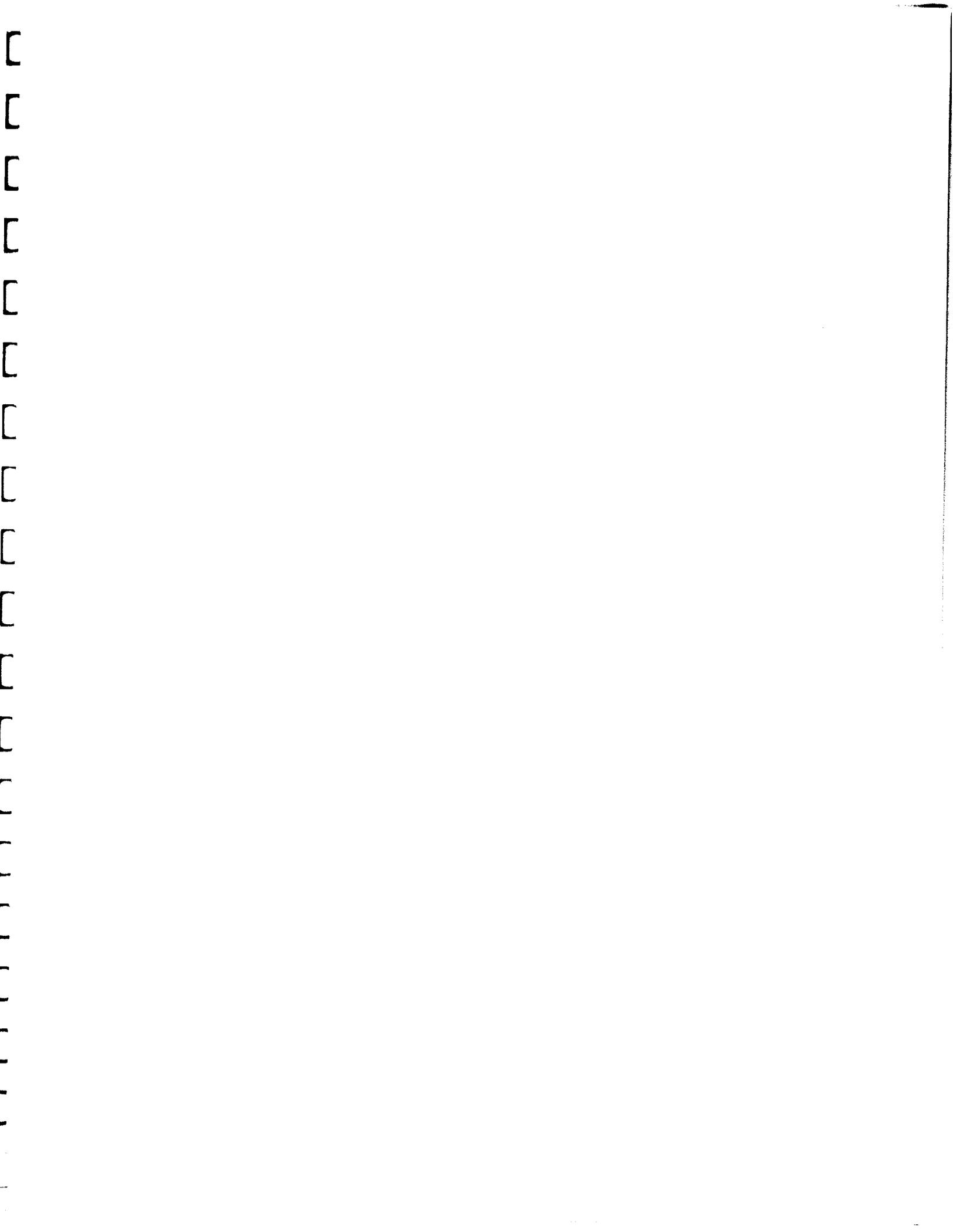
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Department of Environmental Protection  
and New Jersey Meadowlands  
Commission

Dated: January 27, 2006



**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.**

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**Finance Docket No. 34797**

**New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway - Petition  
For An Exemption From 49 U.S.C. § 10901 To Acquire, Construct And Operate As A Rail  
Carrier On Tracks and Land In Wilmington and Woburn Massachusetts**

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**Verified Statement of John Castner in Opposition of New England Transrail, LLC's  
Petition For An Exemption From 49 U.S.C. § 10901**

I, John Castner, hereby certify as follows:

1. I submit this verified statement in support of the New Jersey Department of Environmental Protection's (hereinafter "the department" or "DEP") opposition to New England Transrail's (hereinafter "NET") resubmitted petition for an exemption from 49 U.S.C. § 10901 to acquire, construct and operate as a rail carrier on tracks and land in Wilmington and Woburn Massachusetts.
2. I am employed as the Director of the Division of County Environmental and Waste Enforcement within the DEP. I am licensed as a professional engineer and as a professional planner, have a Bachelor of Science in Civil Engineering, and have worked for DEP since 1976. Since 1976, I have served in a variety of staff and (primarily) supervisory capacities relating to solid and hazardous waste enforcement and permitting, including solid waste facility permitting. Solid waste facilities include landfills, incinerators, material recovery facilities, and waste transfer stations. My supervisory responsibilities have included being a Supervising Environmental Specialist in the Engineering Bureau, which regulates solid waste transfer station permitting; the Chief of the Bureau of Landfill Closure; and the Chief Engineer of two bureaus which regulated, respectively, solid waste transfer stations, compost facilities and landfills. From 1996 through October 2004, I served as the Executive Assistant to the Director of DEP's Division of Solid and Hazardous Waste and as Director of DEP's Division of Solid & Hazardous Waste. In those capacities, I supervised solid waste facility permitting as well as New Jersey's solid waste planning program. I also briefly served during this time as a liaison for DEP to the New Jersey Legislature on

solid waste matters. In March 2005, I assumed my current position as the Director of DEP's Division of County Environmental and Waste Enforcement, which oversees DEP's solid waste and hazardous waste compliance and enforcement efforts.

3. In response to requests by several purported rail carriers proposing operations in New Jersey and claiming exemption from DEP's solid waste transfer station permitting requirements under the New Jersey Solid Waste Management Act, N.J.S.A 13:1E-1 et seq., by virtue of the pre-emption provision of the Interstate Commerce Commission Termination Act, 49 U.S.C. §10101 et seq. (hereinafter "ICCTA"), the DEP proposed regulatory standards for rail carriers. DEP proposed these regulatory standards, found at N.J.A.C. 7:26-2D.1, on October 6, 2003, 35 N.J.R. 4405(a), and adopted them on November 15, 2004, 36 N.J.R. 5098(b). These regulations were crafted specifically so that rail carriers would not be subject to solid waste permitting or pre-clearance requirements, unlike non-rail carrier solid waste transfer facilities. The purpose of the regulations was to ensure that solid waste facilities operated by rail carriers would comply with standards necessary to protect public health and safety.
4. The department opposes NET's petition because some of the activities NET proposes are not legitimate rail transportation. NET's proposed waste transfer station operations should not be given rail status so as to avoid regulation under State environmental laws and local regulation, including the regulations applicable to non-rail facilities that handle solid waste, N.J.A.C. 7:26-2.1 et seq., through the preemption provision of ICCTA. In its resubmitted petition, NET, in

addition to the normal tipping and loading activities of a rail carrier transload facility, proposes to “grind [or shred] ‘loose’ construction and demolition debris (“C&D”) before loading it and bale some loose municipal solid waste (“MSW”) before loading it.” In addition, NET proposes segregating non-conforming waste such as metal, wood or other materials from the received waste materials. NET contends that these processing activities are part of its transloading of these materials from trucks into rail cars and are thus, “integral to NET’s rail transportation services and ... ‘part of rail transportation’.”

5. The DEP strongly disagrees with NET’s position that these processing activities are part of or integral to rail transportation. These processing activities are instead typical of the activities that take place at a solid waste transfer station and are subject to state oversight that is essential to protect the health and safety of citizens.
6. Based on my substantial experience regulating solid waste transfer stations it is my opinion that NET’s proposed processing activities involve essentially the same practices that are employed by solid waste transfer station operations in New Jersey. Further, NET does not offer an explanation as to the nature of the rail operations it will provide or an explanation why their proposed activities are in any way different from any other waste transfer station.
7. Waste transfer operations typically include the following distinct activities: persons wishing to dispose of waste engage a truck to haul it from the waste generation site; waste materials are delivered by a truck to a solid waste transfer facility; the truck enters the facility, is weighed, and the required paperwork is

filed with facility personnel; if all paperwork is in order, the truck enters a building where the waste is tipped onto a concrete floor; after inspection, the waste is often processed (e.g., compacted, crushed/shredded, or baled) to meet waste composition and handling requirements of the subsequent transporter(s) and/or the destination facility; often, recyclable materials are pulled out; and lastly, loading equipment is then used to transfer the waste into a transport vehicle, whether it be a transfer trailer, container, or rail car for transportation to a solid waste disposal facility.

8. Activities such as shredding C&D waste, baling MSW, sorting, segregating and recycling have traditionally been provided by solid waste transfer stations. These processing services provide added value for the waste generators. Accordingly, by conducting these proposed processing activities, NET will be providing a business function separate and distinct from rail transportation - namely, the function typically provided by solid waste transfer stations - and being paid for a value added service.
9. Solid waste transfer stations are required to have environmental controls for dust and other air pollutants, leachate and wastewater management, and other controls to protect health and safety. As depicted in the pictures contained in Appendix B and discussed herein, many of the waste transfer stations that allege they are operating as a rail carrier and attempt to invoke the ICCTA do not have adequate environmental controls.
10. According to NET, the segregated material, in the form of unacceptable and/or recyclable material, will be transported to an appropriate receiving facility

following its removal from the waste. However, NET's petition does not disclose the ultimate fate of the segregated material or whether NET is providing the removal service and receiving a benefit from the recycling and/or any revenues that may be derived. Based upon the background and experience of NET's owners, discussed below, it seems likely that NET is providing these functions as well.

11. Several disposal options exist and are utilized for solid waste from transfer stations. Waste may be disposed of at a landfill, incinerator or other type of solid waste facility in-state or out of state. Each type of ultimate disposal facility is likely to have different waste composition and handling requirements. Often these disposal sites have strict requirements as to the type of materials they may receive. The sorting and segregating of such materials by the solid waste transfer facility is therefore an activity critical to allowing transfer facilities to tender the waste to these disposal sites.
12. The DEP's position, as expressed above, is in part based on its substantial experience with the regulation of solid waste facilities and the solid waste industry in general. To adequately and completely explain the DEP's position it is necessary to describe in detail the recent history of solid waste transfer stations attempting to cloak themselves as rail carrier transload facilities in order to gain the perceived benefit of operation under the ICCTA.
13. Recently, fifteen waste transfer stations that allege to be rail related have begun or proposed operation in New Jersey. A few of these operations abide by New Jersey's Solid Waste regulations and are operated in a manner that protects the

public and the environment. The majority, however, claim to be conducting transportation activities as a rail carrier under the ICCTA, claim State environmental law and regulation is entirely preempted, and conduct their operations in violation of even the basic health and safety measures governing the operation of rail carrier facilities, mandated by New Jersey in N.J.A.C. 7:26-2D.1 et seq.

14. In at least three (3) instances these sites are, or were proposed to be, located next to sensitive environmental regions such as the Meadowlands and the Pinelands (two New York Susquehanna & Western (NYS&W) facilities located at 16<sup>th</sup> Street, and 83<sup>rd</sup> Street in North Bergen, and the proposed J.P. Rail facility in Mullica Township). Based on the historical locations of rail sidings, the potential for exposures to sensitive environmental regions is wide spread.
15. Since the Third Circuit Court of Appeal's decision in Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308 (3<sup>rd</sup> Cir. 2004) and this Board's earlier finding in STB Finance Docket No. 34192 (Sub-No. 1), Hi Tech Trans, LLC – Petition for Declaratory Order (August 14, 2003) (finding that Hi Tech was not a rail carrier), several waste transfer facilities intending to evade New Jersey environmental and health and safety regulations have attempted to structure their operations so that they appear to be the “agents” of a railroad. Essentially, these facilities claim to have an agency relationship with a rail carrier for the purpose of providing loading services. However, this agency relationship is often suspect, and the control and associated profit from the operations conducted at these waste transfer stations remain unchanged. Hence, the claim that the facilities are “rail carrier”

facilities is false. The waste transfer stations simply use railroad property (or lease the property to the railroad), usually pursuant to a license agreement, and load C&D and other waste onto the rail carrier's railcars. DEP believes that the mere fact that a rail carrier may ultimately transport the C&D waste to its end destination does not transform the entirety of the individual waste transfer stations' operations – including, the essential processing, sorting and segregating of materials – into transportation by rail.

16. Importantly, some of the same people involved in the operation of the Hi Tech facility discussed above are now involved with the NET facility. In particular, Mr. Ronald Klempler and Robert W. Jones were principals of Hi Tech during the period that Hi Tech was deemed not to be a rail carrier by the Board and the Third Circuit. Mr. Klempler and Mr. Jones equally share ownership of NET, LLC along with two other individuals. As they did with their New Jersey facility, Mr. Jones and Mr. Klempler now assert that their Massachusetts operation is a rail carrier and thus, exempt from Massachusetts solid waste regulation.
17. Notably, some of the facilities discussed above in paragraph 13 have been operated much like the “open dumps” that New Jersey regulatory officials were charged with closing or upgrading over twenty five years ago by the United States Congress. New Jersey ultimately addressed the open dump problem only after much time and effort.
18. The collection, transportation, handling and disposal of solid waste are a matter of substantial concern with respect to public health, safety and protection of air, land, and water resources. Historical mismanagement of waste has lead to

countless contaminated sites, many of which have required cleanup with public funds under the federal superfund and state level cleanup programs. A myriad of Federal and State laws have been passed to prevent the recurrence of contaminated sites that have resulted from indiscriminate and uncontrolled waste disposal and handling practices. Among the first of these was a federal law that bans disposal of solid waste in "open dumps." These open dumps are land disposal facilities that do not have measures in place to prevent contaminants contained in the waste material from entering the surrounding air, groundwater and surface water, thereby posing dangers to public health safety and the environment.

19. Uncontrolled dumping of waste on the ground outdoors (even as a temporary measure during transloading operations) poses a significant threat to ground water and surface water resources similar to that of an open dump. C&D waste often contains particles of asbestos, lead and other hazardous pollutants. For instance, rain water percolating through the waste piles will dissolve harmful constituents in the waste and eventually seep into the ground, potentially contaminating ground water. In addition, such operations can pose other health risks due to the offsite migration of airborne contaminants, or the threat of fire or explosion. Such an event happened sixteen years ago when a New Jersey recycling facility (the HUB Recycling Facility) caught fire and caused massive damage. See New York Times article entitled, "Fire in Unlicensed Dump Closed Highway," dated August 8, 1989, appended hereto as Exhibit A for a description of the event. This fire was so intense that it injured more than 60 firefighters, buckled an elevated

section of Route 78, and closed a major interstate artery for 10 days. Complete service on the 10-lane roadway was not restored for four months. In the end, it cost more than \$14 million to repair the highway and to clean up the more than 100,000 tons of waste piled up to 25 feet high on the outer edge of Newark, not far from the Newark airport. As particularly relevant here, the HUB Recycling facility also claimed it was exempt from DEP's solid waste regulation, just as NET claims its proposed facility should be exempted from certain Massachusetts regulations. To prevent environmental impacts such as these and clarify a *bona fide* railroad's responsibility when it engages in the processing of solid waste, the DEP promulgated solid waste regulations applicable to rail carriers which are set forth at N.J.A.C. 7:26-2D.

20. The New Jersey waste transfer stations discussed above in paragraph 13 present many dangers to both the public and environment. The most significant of these dangers are discussed below in paragraphs 21 to 25. Many of these operations have been conducted outdoors and without the benefit of any environmental protection against air pollution, water pollution, fire control or attraction to birds and other vectors.
21. The DEP and the New Jersey Meadowlands Commission (hereinafter "NJMC") have photographed and/or videotaped waste transfer station operations in New Jersey consisting of outdoor operations and massive piles of solid waste that release clouds of dust that migrate offsite and leachate that enters surface water, groundwater, and wetland natural resource areas. The observed conditions are much like the conditions which had been seen at open dumps that are now

prohibited pursuant to federal and State law. Appended hereto as Exhibit B are three photographs from three such facilities operated alongside the NYS&W tracks in North Bergen, one photograph from a Canadian Pacific Railway facility in Newark, and one photograph from a New York and Greenwood Lake Railway facility in Passaic. These facilities are examples of what can happen when solid waste transfer stations operate without State regulation and ignore the State's environmental and health and safety laws. Below is a description of each photograph:

- Photograph B-1 – This photograph illustrates an open air C&D waste transfer operation conducted on property owned by NYS&W at 16<sup>th</sup> street in North Bergen. The photograph was taken by NJMC Staff on June 21, 2005. The foreground area illustrates a large mound of crushed C&D waste with a grapple working to fill rail cars. The waste is exposed to the air and rainfall. Dust from the loading operation is clearly evident and no controls are in place to prevent release and exposure of this dust, and any contaminants within it, to the surrounding environment and nearby citizens.
- Photograph B-2 - This photograph illustrates an open air C&D waste transfer operation conducted on property owned by NYS&W at Secaucus Road in North Bergen. The photograph was taken by NJMC Staff on June 15, 2005. A mountain of waste is visible that is being processed by a loader and grapple. A limited attempt at dust control is evident in the lower right corner of the photograph where a stream of water is being sprayed on a small portion of the waste pile. No other environmental controls are in place. Waste is clearly

exposed to the environment with no provisions to collect air contaminants or leachate releases that can migrate to surface and ground water.

- Photograph B-3 - This photograph illustrates an open air C&D waste transfer operation conducted on property owned by NYS&W at 43<sup>rd</sup> street in North Bergen. The photo was taken by NJMC Staff on December 10, 2004. The photograph depicts the waste tipping area filled and overflowing with C&D waste. In the foreground of the photograph ponded rainwater can be seen in contact with the waste material. No environmental controls are in place. Waste is clearly exposed to the environment with no provisions to collect air contaminants or leachate releases that can migrate to surface and ground water.
- Photograph B-4 – This photograph illustrates an open air C&D waste transfer operation purportedly conducted by the Canadian Pacific Railway at 91 Bay Avenue in Newark. The photograph was taken by DEP Staff on August 5, 2005. The photograph shows the significant amount of dust generated during loading of C&D waste. This dust, and any contaminants contained within it, is directly impacting the surrounding environment and nearby citizens, and may pose a traffic hazard to motorists traveling on the adjoining highway. It is worth noting that this is the facility that Hi Tech was operating when it claimed to be a railroad, and otherwise preempted from the DEP's regulation during the extensive litigation discussed above in paragraph 15. Although the photograph demonstrates that this facility remains a threat to the public's Health and Safety and the environment, the conditions were worse when Hi

Tech operated the facility.

- Photograph B-5 - This photograph illustrates an enclosed C&D waste transfer operation conducted by the New York and Greenwood Lake Railway at 95 - 105 Passaic Street in Passaic. The photograph was taken by DEP Staff on January 19, 2006. The photograph shows the facility has allowed the transfer building to reach maximum capacity, resulting in waste being offloaded outside of the building. This waste is clearly exposed to the environment with no provisions to collect air contaminants or leachate releases that can migrate to surface and ground water.
22. Stormwater samples collected on October 25, 2005, immediately following a rain event at three waste transfer stations operated alongside the NYS&W tracks in New Jersey (16<sup>th</sup> Street, 43<sup>rd</sup> Street, and 94<sup>th</sup> Street), contained elevated levels of arsenic, copper, lead and mercury, demonstrating that leachate from the waste at these unregulated facilities can affect the quality of New Jersey's water and land resources.
  23. Waste has also been allowed to remain onsite at these facilities for extended periods of time thereby exacerbating the effects of leachate and air emissions to the surrounding environment. See Exhibit B appended hereto for examples of such facilities including the facilities located alongside the NYS&W tracks in North Bergen, the Canadian Pacific Railway facility in Newark, and the New York and Greenwood Lake Railway facility in Passaic.
  24. At one site in New Jersey, operated alongside the NYS&W tracks in North Bergen, the outdoor waste transfer operation was in close proximity to overhead

high tension power utilities. On at least one occasion, heavy equipment used in the operation contacted live electrical wires causing a fire and local power outage.

25. On the few occasions when these facilities have agreed to build an enclosed structure for the processing function (as specifically required by N.J.A.C. 7:26-2D.1(d)), the plans made available to the State are commonly inadequate with respect to critical infrastructure such as fire safety, air pollution controls, wastewater management, stormwater management, and numerous aspects of the International Construction Code.
26. Additionally, NET claims in its petition that it is not a solid waste facility, because it is not engaged in an activity to produce something “different for further use or for resale.” NET’s proposed activities may not induce a biological, thermal or chemical change to the molecular structure of the waste it processes, but the sorting, segregating, shredding, and baling activities certainly change the character of the waste material tendered to NET and ultimately delivered to disposal sites. Nonetheless, this point is immaterial to the definition of a solid waste facility.

VERIFICATION

John Castner, having first been duly sworn according to law, deposes and states that he has read the foregoing Verified Statement, is familiar with the contents thereof, and that the same are true and correct to the best of his knowledge, understanding and belief.

*John Castner*  
\_\_\_\_\_  
John Castner

STATE OF NEW JERSEY )  
COUNTY OF MERCER )

ss.

SUBSCRIBED AND SWORN TO before me this 26 day of January, 2006.

Witness my hand and official seal.

*Kathleen M. Barrett*  
\_\_\_\_\_  
Notary Public

My commission expires: Feb. 27, 2006

Kathleen M. Barrett  
Notary Public of New Jersey  
My Commission Expires Feb. 27, 2006

# **Exhibit A**

37 of 39 DOCUMENTS

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August 8, 1989, Tuesday, Late Edition - Final

**SECTION:** Section A; Page 1, Column 1; Metropolitan Desk

**LENGTH:** 1220 words

**HEADLINE:** Fire in Unlicensed Newark Dump Closes Highway

**BYLINE:** By ANTHONY DePALMA, Special to The New York Times

**DATELINE:** NEWARK, Aug. 7

**BODY:**

A section of Interstate 78 buckled today from the heat of a fire burning in an unlicensed garbage dump below it, and officials said the busy highway would be closed for at least a month.

The highway, 12 lanes wide where the fire softened the concrete and dropped the road several inches in places, is an important east-west link to the New Jersey Turnpike and Newark International Airport for more than 90,000 commuters and truckers daily.

The source of the fire was a mound of trash 25 feet tall and hundreds of yards long at Hub Recycling Inc., a company that state and local officials have been trying to close for two years and that had been cited for Fire Code violations.

**Sagging by Morning**

Newark fire officials had warned that the tons of scrap wood, plastics and paper beneath Interstate 78 and a parallel highway, Route 22, was a tinderbox. But Hub persuaded judges to allow it to stay open.

At 1:19 A.M. today, the first of 16 fire units was dispatched to the fire. By the morning rush hour, the 100-yard section of elevated superhighway had started to sag, and traffic was diverted to other highways and local roads, causing extensive backups.

In addition to frustrating thousands of commuters heading for work in northern New Jersey and New York City, the partly melted bridge disrupted the flow of goods west from the airport, the Port Newark-Port Elizabeth complex and the turnpike.

State and local officials met with Gov. Thomas H. Kean on the roadway just before 2 P.M. After walking on the road and talking with state engineers, Mr. Kean said it could be anywhere from one to several months before the road could be reopened, depending on whether its supporting steel girders had been damaged.

"This is the most serious traffic emergency in my memory," he said. "It could not have occurred at a worse place."

The heat of the fire, which burned through the day, was intense enough to damage extensively the 21-year-old structure. By late afternoon, engineers were still not able to approach the supports to check them.

From atop the road, the damage was obvious. A three-lane section of the westbound concrete roadbed, about 100 by 100 feet, had dipped eight inches. A similar section across a low divider appeared to have sagged in the center.

The eastbound lanes were too engulfed in smoke to see. Officials said they had also been affected.

Crisscross of Major Roads

Mr. Kean said the state environmental officials who had been monitoring the smoke since early morning had found no toxic emissions, although it was not determined what was burning in the mountain of refuse within a few feet of the highway girders.

The part of the highway closed to traffic is near the border with Elizabeth, an industrial neighborhood of the city not far from the airport. The superhighway is 12 lanes wide. The six eastbound lanes are slightly lower than the six westbound lanes.

Several important roads crisscross the area, including Routes 22, 21, 1, 9 and the turnpike.

Throughout the day smoke seeped through expansion joints. The concrete was warm to the touch, and asphalt patches turned soft enough to push a pen through.

An assistant transportation commissioner, Charles T. Edson, said it did not appear there was a danger that the section could collapse, "but it obviously can't hold traffic." Mr. Edson said the time needed for repairs would depend on the extent of the damage.

#### 'We Don't Know'

"It could be in good shape underneath," he said. "We don't know."

If just the 10 inches of concrete failed because of the extreme heat, Mr. Edson said, it could be removed and replaced in a month or so. But if the huge girders have twisted or bent, he added, replacements would have to be manufactured, meaning that reopening the roadway might take as long as a year.

Nearly all the fire equipment of Newark was at the scene, leaving the rest of the city undermanned. Fire Chief Alexander McGrory said the fire threatened to spread under a raised section of Route 22 about 100 yards south and he ordered the digging of a trench that could be filled with water to keep the fire away from Route 22.

Early this morning, a dispatcher for the fire department said firefighters were still pouring water on the smoldering fire, but that Route 22 was not threatened.

At 11 o'clock, Chief McGrory and other city officials went to the dump, which they cited for Fire Code violations in July 1987. Chief McGrory was concerned that the fire would travel deeper into the 25-foot pile of rubbish. One of the three owners of the company, Richard Bassi, said the material would not continue to burn.

#### 'Fort Hub - Under Siege'

"I could take a match and throw it in the pile and nothing would happen," Mr. Bassi said. Later he said there had been no other fires at the site. "Somebody set that," he said.

Officials said they did not know how the fire, which the arson squad is investigating, had started. Officials expressed frustration, because they had tried to shut Hub. The state contends it is an illegal and unsafe dump. But the owners have successfully argued in court that they are recyclers.

At an entrance to the site, a large sign reads, "Fort Hub - Under Siege."

The Board of Public Utilities, which regulates waste handlers, has sought in court several times since 1987 to have Hub declared an illegal dump that accepts household trash and construction debris, storing it on land beneath the highways and next to Conrail tracks.

#### Dumping and Shredding

Two of the three owners, Mr. Bassi of Morris Township and Michael Harvan of Wayne, were convicted in April of operating an illegal dump in North Bergen, where they accepted construction debris from New York City. They were sentenced to 14 years and 9 years in prison, respectively.

Last year, a judge in Superior Court rejected the state's argument that the operation here was a dump. While the case was being appealed, Judge Paul B. Thompson of Superior Court heard another suit, and he essentially agreed in May that Hub was operating an illegal dump, but allowed it to remain in operation so recyclable materials could be sold to pay claims against Hub when it declared bankruptcy this year.

The New York Times, August 8, 1989

Officials said that a truck was seen dumping trash this morning and that workers continued moving wastes, even as firefighters worked.

State lawyers are said to be planning to return to court to ask that Hub be prevented from accepting more waste and be forced to bear some of the cost of cleaning up the site. Mr. Kean expressed frustration because of the delays and said he was considering a move to declare a state of emergency on the site and send in a special cleanup team.

That is the action the state took in 1980, when a warehouse in Elizabeth filled with toxic chemicals exploded. Mr. Kean is expected to make a decision on the declaration Wednesday.

The president of the Board of Public Utilities, Christine T. Whitman, said that with the rising cost of legally disposing of garbage, there were four or five other illegal dumps in northern New Jersey that were thinly disguised recycling centers, though none was as blatant as Hub.

"We don't have the manpower to police all of them," Mrs. Whitman said. "But if we don't get a handle on the problem, it will get out of hand."

**GRAPHIC:** Map of N.J. showing the site of the fire (NYT) (pg. A1); photo of traffic being routed off of Interstate 78 in Newark after the highway was damaged by a fire (NYT/John Sotomayor); diagram (NYT) (pg. B2)

**B-1**



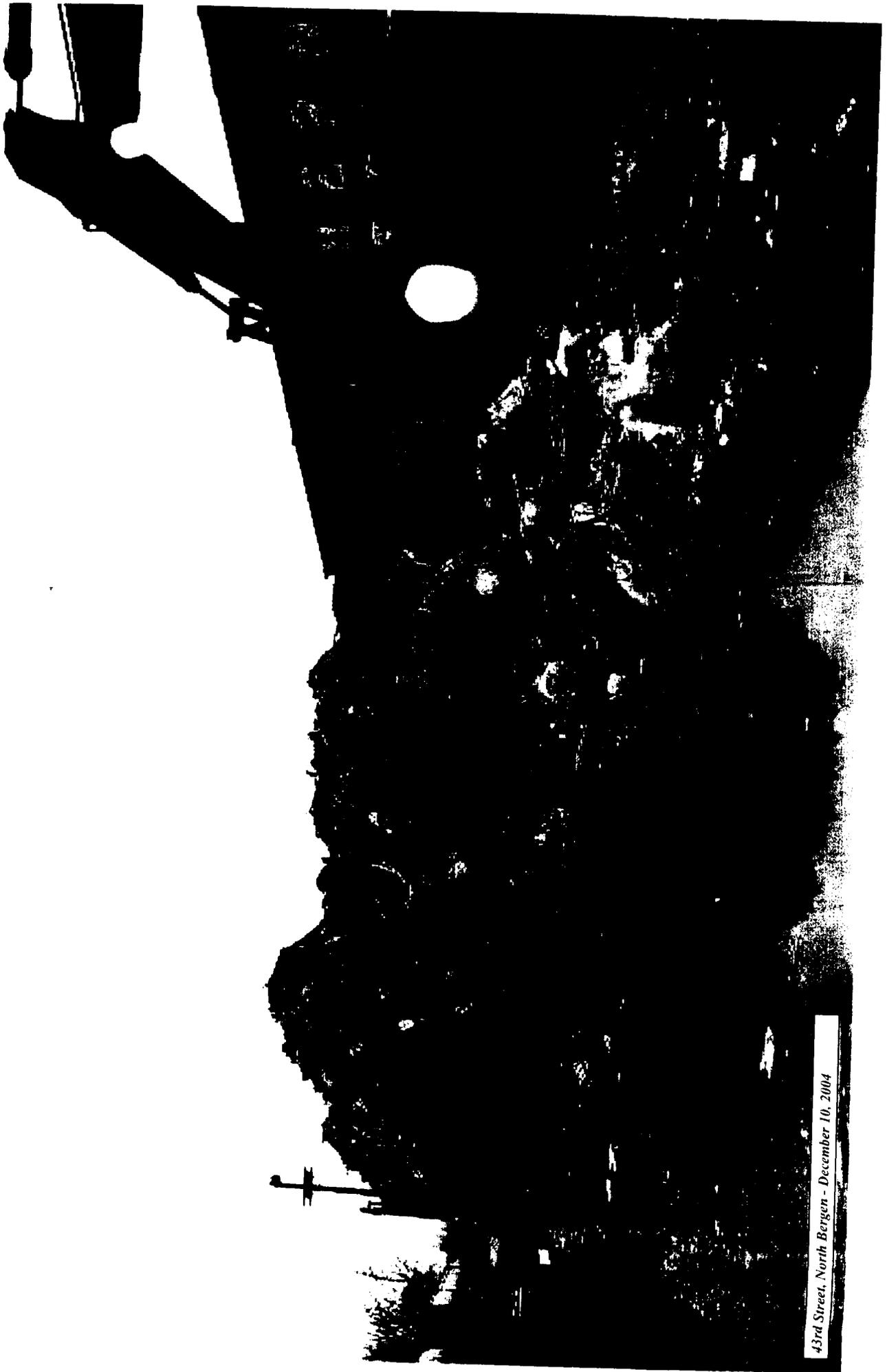
16th Street, North Bergen - June 21, 2005

**B-2**



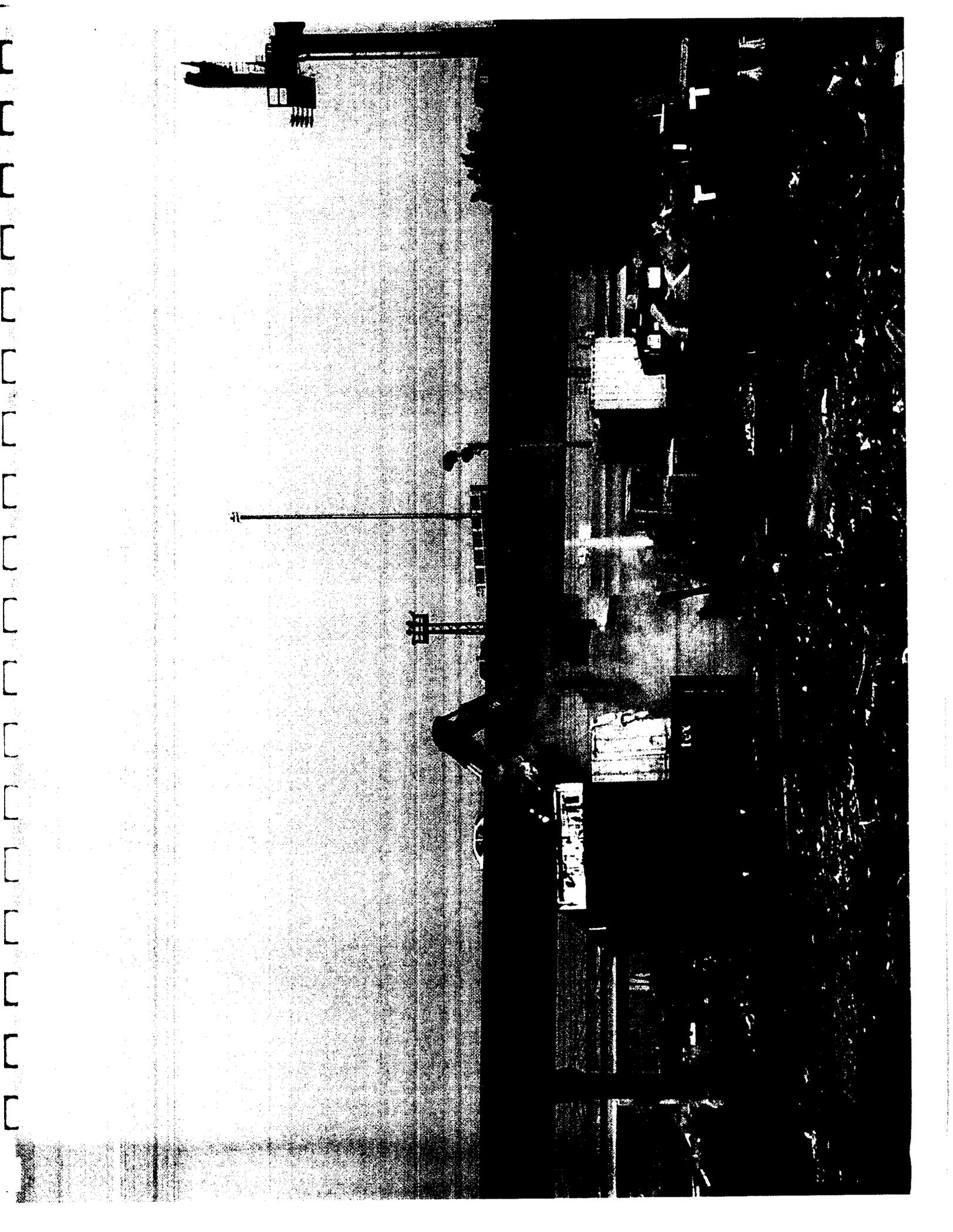
2200 Secaucus Road, North Bergen - June 15, 2005

**B-3**

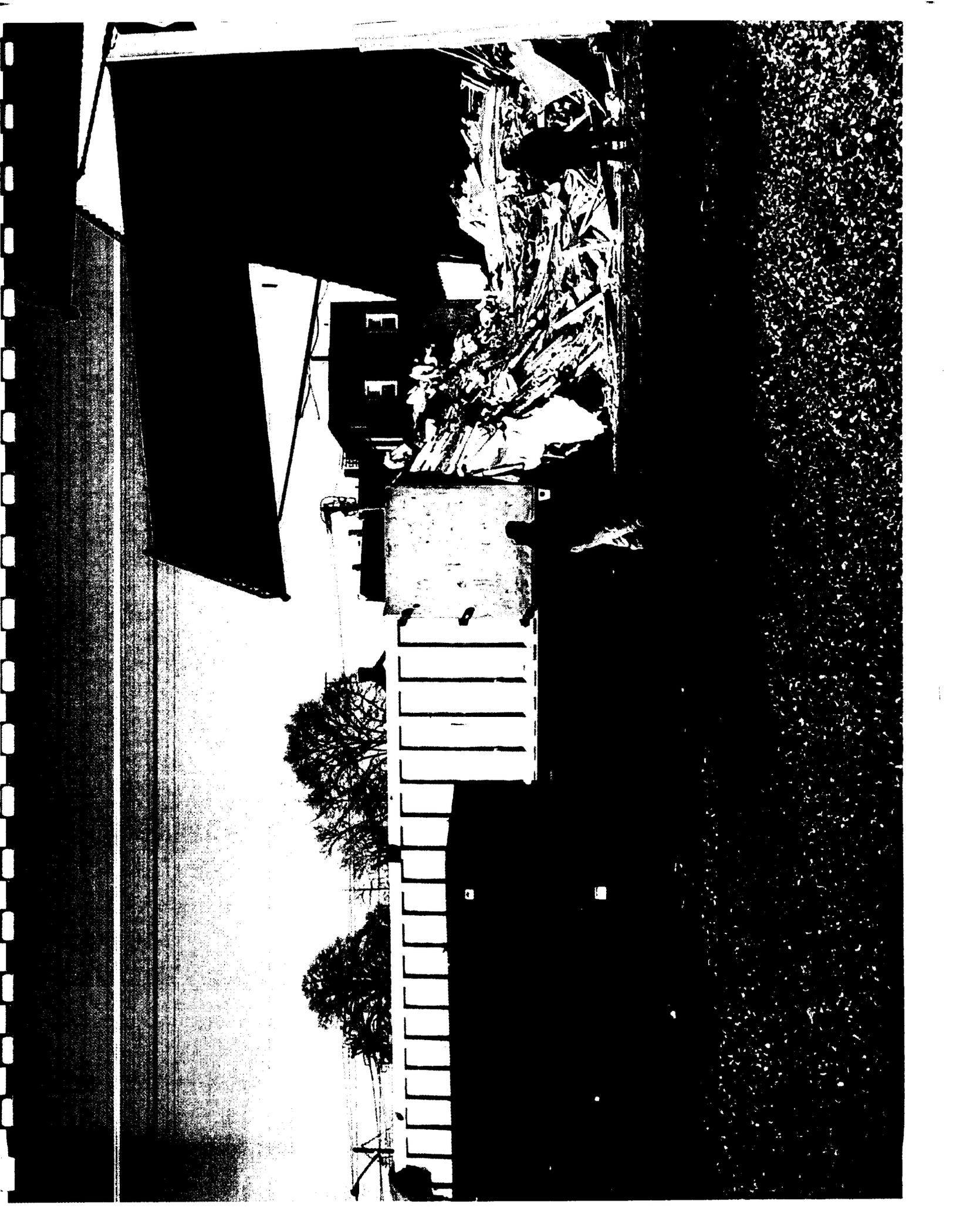


43rd Street, North Bergen - December 10, 2004

**B-4**



**B-5**





**CERTIFICATE OF SERVICE**

I hereby certify that I have this 27<sup>th</sup> day of January, 2006, served a copy of the foregoing Comments of The New Jersey Department of Environmental Protection and The New Jersey Meadowlands Commission on the following persons listed below via first-class mail, postage pre-paid:

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