BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NOS. 34986 & 34987

ASHLAND RAILROAD, INC. &
G. DAVID CRANE
NOTICES OF EXEMPTION

REQUEST FOR STAY
BY THE NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

The New Jersey Department of Environmental Protection ("NJDEP") respectfully requests that the Surface Transportation Board ("Board") stay the effectiveness of the Notices of Exemption ("Notices") filed by Ashland Railroad, Inc. ("Ashland") and G. David Crane ("Crane") on January 29, 2007 under the above referenced docket numbers pending the development of facts and details related herein. Further development of facts is necessary in order to determine whether Ashland and Crane are entitled to the exemptions set forth in 40 C.F.R. §§ 1150.31-34 and 1180.2 and therefore whether Ashland is entitled to lease and operate approximately 1.5 miles of railroad track in Freehold, New Jersey as a "rail carrier" as defined in 49 U.S.C. § 10102(5). These exemptions will become effective on February 28, 2007 unless stayed by the Board.

I. STATEMENT OF INTEREST

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. NJDEP is responsible for protecting the environment and the health and safety of New Jersey's citizens. N.J.S.A. 13:1D-9. Consistent

with these obligations, NJDEP has enacted regulations that govern the design, construction and operations of facilities that handle, dispose of and transfer solid waste, including municipal solid waste and construction and demolition debris. N.J.A.C. 7:26-2.1. One part of these regulations specifically applies to bona fide "rail carriers" that handle solid waste.[1] See N.J.A.C. 7:26-2D.1; Verified Statement of John Castner ("Castner Statement"), Ex. A ¶ 3. These regulations are designed to protect the public health and safety and were promulgated pursuant to New Jersey's police powers.[2] See also infra.

Over the past several years, NJDEP has been confronted with a growing number of solid waste operators who have – under the claim of engaging in "rail transportation[3]" – located or

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[1] Federal and state statutes both recognize the health and safety hazards posed by the unregulated handling of solid waste. See, 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"); 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").

[2] In a recent decision involving various solid waste facilities along The New York, Susquehanna & Western Railway tracks in North Bergen, New Jersey, the District Court of New Jersey concluded that the regulations found at N.J.A.C. 7:26-2D.1 et seq., are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 10101 et seq. NYS&W v. Jackson, No. 05-4010, slip op. at 37 (D.N.J. Feb. 21, 2007). The State is planning to appeal this decision based on numerous factual and legal errors contained therein.

[3] ICCTA defines "transportation" as "(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." 49 U.S.C. § 10102(9).

attempted to locate their solid waste facilities along or in close proximity to railroad tracks or switching yards in order to attempt to evade regulatory oversight by NJDEP and other state and local governing bodies. See Castner Statement, Ex. A ¶¶ 6, 9. These operators repeatedly claim exemption from the Board's licensing procedures as governed by 49 C.F.R. §§ 1150.31-45, and then assert that ICCTA preempts state regulation of their facilities by virtue of Section 10501(b).[4] The facilities in question frequently operate without proper controls to protect the public, health and safety and the environment, e.g., without proper controls for dust and other air pollutants, without proper leachate and wastewater management and by dumping massive amounts of waste in the open air. See Castner Statement, Ex. A ¶¶ 5, 7 and photographs at Exs. B-1, B-2. Accordingly, such facilities pose a potential threat to the health and safety of New Jersey's citizens. See also id. at ¶¶ 10-12.

Litigation over these solid waste facilities – in which NJDEP has frequently been involved – has resulted in findings that such facilities did not involve "transportation by rail carriers" and thus, that ICCTA was inapplicable. See, e.g., Hi Tech Trans. LLC v. NJDEP, 382 F.3d 295, 308 (3d Cir. 2004) (finding that at most, the solid waste facility involved transportation

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[4] This Section provides:

> (b) The jurisdiction of the Board over--
> (1) transportation by rail carriers, and the remedies provided in this part [49 USCS §§ 10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
> is exclusive. Except as otherwise provided in this part [49 USCS §§ 10101 et seq.], the remedies provided under this part [49 USCS §§ 10101 et seq.] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

to a rail carrier as opposed to by a carrier based on the lack of the railroad's involvement with and responsibility for the operations); J.P. Rail, Inc. v. New Jersey Pinelands Comm'n, 404 F.Supp. 2d 636, 653 (D.N.J. 2005) (Court issuing preliminary injunction prohibiting solid waste facility in New Jersey's Pinelands finding that "Congress's concern in passing ICCTA was the regulation of rail transportation. . . . [and] the proposed activities, including tipping, sorting and reloading onto rail cars, will not be performed by the railroad"); State of New Jersey v. J.P. Rail, No. C-41-06 (Sup. Ct. Ch. Div. filed June 22, 2006) (determining that waste "processing" activities, e.g., sorting and compacting of the waste, do not constitute "transportation by rail carrier" as such activities are not integrally related to rail transportation). See also excerpt from the Report of the Committee on Appropriations for The Departments of Transportation, Treasury, and Housing and Urban Development, The Judiciary, District of Columbia, and Independent Agencies Appropriations Bill, 2007 ("[T]he operation of solid waste facilities is not integral to transportation by rail. The Committee encourages the STB to clarify that these types of facilities are indeed subject to the same local, state, and federal laws and regulations as other solid waste facilities"). See Ex. B.

Similarly, the Board has previously been unwilling to condone rail carrier facilities that attempt to misuse ICCTA. See STB Finance Docket No. 34192, Hi Tech Trans, LLC–Petition for Declaratory Order–Newark, New Jersey 6, n12 (decision served August 14, 2003; not published) (Board stating that it would "not approve rail carrier authority that is a sham or intended solely to avoid local regulations"and rejecting claim for preemption because the Hi Tech facility was essentially a private facility dedicated to Hi Tech's use); June 30, 2005 letter from the Board to James J. Florio, then Chairman of the New Jersey Pinelands Commission

(stating,"a business could not locate close to a railroad, claim to be a rail facility, and be exempted from state and local laws that apply to the rest of the solid waste industry"), Ex. C.

Because, as noted above, ICCTA applies to "transportation *by rail carriers*[5]," see 49 U.S.C. § 10501(b), the Board's exemption process – which shortens the time period by which the Board can designate an entity as a bona fide "rail carrier" – is particularly attractive to entities trying to avoid necessary state and local health and safety regulation. Indeed, other entities involved with the handling of solid waste have sought "rail carrier" status by filing a Notice of Exemption with the Board and the Board has stayed the process because of incomplete information. See, e.g., STB Finance Docket No. 34797, New England Transrail, LLC D/B/A Wilmington & Woburn Terminal Railway–Petition for Exemption, (Decided December 20, 2005 and June 12, 2006) (extending time to comment on Notice of Exemption due to"public interest in petition" and later due to "questions ... about extent to which [waste processing] activities proposed by NET come within the Board's jurisdiction"). NJDEP's Comments opposing NET's Notice are attached hereto as Exhibit D. In addition, in a situation similar to the within matter, the Board stayed the effectiveness of an exemption proceeding based on NJDEP's request in order for the parties to submit additional and more specific information. See STB Finance Docket No. 34392, New Jersey Rail Carrier LLC–Acquisition and Operation Exemption–Former Columbia Terminal, Kearny, New Jersey, (Decision Served Aug. 13, 2003). There, the Board stated, "NJDEP has raised serious issues regarding the nature of the proposed operations and the

[5]"Rail carrier" under ICCTA is defined as, "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5).

potential impacts that could result from exemption."[6] Id.

In the STB Finance Docket 34281, LB Railco, Inc.–Lease and Operation Exemption–Providence and Worcester Company, the applicant, Railco, ultimately withdrew the Notice of Exemption it filed, due apparently in large part to environmental concerns attributable to its attempt to establish a solid waste rail/truck transloading facility within a town in Massachusetts and within fifty feet of a river. Prior to the withdrawal of the Notice of Exemption, however, the Board stayed its effectiveness, concluding that Railco's notice contained "insufficient information to enable the Board to determine the extent to which environmental review is required. Nor does the notice describe the track involved." Id. (Decision served Nov. 22, 2002.)

Based on NJDEP's extensive experience with solid waste entities that claim to be conducting transportation activities as a rail carrier under ICCTA and operate in violation of State law, see, e.g., Castner Statement ¶ 7, and because the facility is proposed in Freehold, New Jersey, NJDEP has a compelling interest to ensure that the applicant is a legitimate rail carrier engaged in rail transportation rather than a sham entity that handles solid waste. See NJDEP's Comments on NET's Notice, Ex. D.

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[6] The Board ultimately lifted the stay and granted the exemption based, in part, on the NJDEP's withdrawal of its objections after the applicant submitted sufficient information. See New Jersey Rail Carrier LLC–Acquisition and Operation Exemption–Former Columbia Terminal, Kearny, New Jersey (Decided Jan. 16, 2004).

II. THERE IS INSUFFICIENT EVIDENCE SUPPORTING ASHLAND'S CLAIM THAT IT INTENDS TO OPERATE AS A BONA FIDE RAIL CARRIER

Through the shortened exemption process set forth in 49 C.F.R. §§ 1150.31-34, Ashland seeks to be designated a "rail carrier" by the Board. If so designated, the Board's jurisdiction and ICCTA's preemption provision, 49 U.S.C. § 10501(b), are implicated.[7] Ashland, however, fails to provide relevant necessary information to demonstrate that it is a bona fide rail carrier that will engage in rail transportation and not endeavoring to exploit the exemption process and primarily intending to engage in the solid waste industry.

The Notices here contain insufficient information to enable the Board to determine whether Ashland is in fact a rail carrier, as the term is defined in 49 U.S.C. § 10102(5), or whether it is a shipper in the solid waste disposal industry whose primary intent is to evade the State of New Jersey's environmental safety and health statutes and regulations. See, e.g., Castner Statement ¶ 4. Further, there is insufficient evidence to support Ashland's claim that environmental review is exempted pursuant to 40 C.F.R. § 1105.6. While exemption filings can be general in nature, the governing regulation still requires a "brief summary of the proposed transaction." 49 C.F.R. § 1150.33(e).

When the Interstate Commerce Commission ("ICC") originally promulgated the class exemption procedure, the agency contemplated that interested parties – including the various

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[7] Both the courts and the Board have recognized that ICCTA does not affect the State's duty and authority to exercise its traditional police powers to protect the public health and safety. See, e.g., Vill. of Ridgefield Park v. NYS&W, 163 N.J. 446, 460-61 (2000) ("[L]ocality may enforce its local fire, health, plumbing, safety and construction regulations to the extent they are applicable to the existing maintenance [rail carrier] facility"); Hi Tech Trans. LLC-Petition for Declaratory Order, STB Finance Docket No. 34192, n6 (Nov. 19, 2002) (ICCTA preemption "does not prevent state and local governments from imposing appropriate health and safety regulations and exercising their police powers").

States – would have sufficient information concerning an applicant's operations to determine whether a challenge was necessary. See Class Exemption–Acq. & Oper. of R. Lines under 49 U.S.C. § 10901, 1 ICC 2d 810 (1985). For example, in determining whether the class exemption procedure should include a specific comment period before becoming effective, the ICC concluded that this was not generally necessary since, "as a practical matter, State and local governments receive actual notice well before the proposal is filed." Id. at 816. Here, however, NJDEP received no prior notice of this proposal. Similarly, in response to suggestions that the ICC require detailed financial and operating data, the ICC concluded, again, that this was generally not necessary:

> [T]hose directly involved (including the State) are, in fact, well aware of the financial condition of the potential acquirer, expected traffic, volumes and commodities, as well as intended operation. [Id. at 817.]

Again, NJDEP has not been privy to such information. In fact, because NJDEP has not had access to critical information regarding this proposed facility, on February 13, 2007, NJDEP wrote to counsel for Ashland and Crane, asking for information in response to specific questions on the proposed facility. See Ex. E. To date, counsel has not responded. It is accordingly impossible to ascertain from the information supplied either in the Notices or otherwise the nature of the proposed facility and operations and whether Ashland is entitled to the exemptions at issue here.

Specifically, Ashland provided very little information on the proposed operations or its role and responsibilities with respect to such operations. Ashland merely indicated that it is "in the process of developing a transportation terminal transloading facility and operating freight common carrier service for shippers now located or who will locate" on approximately 1.5 miles

of track in Freehold (as Ashland terms such track, "The Line"). Ashland further states that it will "maintain and operate" The Line, provide switching and related rail services to facility tenants and "effect the interchange and delivery of inbound and the origination and interchange of outbound line-haul rail shipments."

However, there are no details concerning whether Ashland intends to: operate locomotives; own or lease rail cars; provide local or overhead rail operations; establish through rates and divisional arrangements with any other rail carriers; reach agreement with Conrail or other carriers; or otherwise actually operate as a railroad common carrier. It is even unclear whether the existing "rail facility" is in fact only an industrial park, or whether any rail service that would be provided is a private switching as opposed to a line haul rail service.

Notably, Ashland mentions "facility tenants" and "freight shipments" without providing any details whatsoever regarding the same such as type or volume of the shipments or nature and identity of the shippers. Based on NJDEP's experience with solid waste operators as explained above, see NJDEP's NET Comments, Ex. D, and Castner Statement ¶ 7, NJDEP is especially concerned about the absence of details with respect to the type of shipments Ashland will handle at the facility. This concern is heightened by the lack of information in the Notices indicating the owners or management of Ashland's experience in the rail transportation business.[8]

III. THERE IS EVIDENCE TO SUGGEST THAT ASHLAND INTENDS TO OPERATE A SOLID WASTE TRANSFER FACILITY

Evidence obtained up to now suggests that the proposed facility may indeed handle solid

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[8] Crane's Notice is similarly lacking any details. ("Crane has created a new company, the Ashland Railroad, Inc. (A New Jersey Corporation) which has filed a Notice of Exemption to operate trackage in the Township of Freehold, ... which will interchange with Consolidated Rail Corporation").

waste without complying with applicable health and safety regulations. First, Crane indicates that he is also the owner of Ashland Railway, Inc, a Class II carrier ("ARY"). Based on an April 2005 air pollution inspection, on June 30, 2005, the State of Ohio Environmental Protection Agency issued citations to the ARY, which was understood to be the operator of the construction and demolition debris transfer facility, for failing to adequately control dust and air emissions in violation of that state's air pollution rules. See Ex. F.

Further, according to the Notices, The Line is currently owned by Grems-Kirk Railway, LLC, which is also currently a non-carrier, and then will be leased to Ashland. By deed with respect to the property over which The Line will operate, Block 43, Lot 21, Ralph Clayton & Sons transferred the property to Grems-Kirk Railway, LLC on August 11, 2006 for the consideration of just $1.00. See Exhibit G. Grems-Kirk Railway was registered with the Secretary of State one day earlier on August 10, 2006. See Ex. H. Similar property exchanges preceded the attempted construction of the solid waste rail transfer facility by Magic Disposal and J.P. Rail in Mullica Township, New Jersey, and contributed to the Court's conclusion that the activities at that site would not constitute transportation by rail carrier. See J.P. Rail, Inc. v. New Jersey Pinelands Comm'n, 404 F.Supp. 2d at 653. Here, Ashland Railway's history in the solid waste industry, the manner of the property conveyance of The Line, and the timing of Grems-Kirk Railway's registration with the State further underscore the need for additional information before the Notices are allowed to become effective.

IV. CONCLUSION

NJDEP requests that the Board enter a stay of the effectiveness of the exemption in these dockets in order to require the applicants to provide additional and specific information with

respect to, e.g., the nature of the proposed operations, whether the proposed facility will operate as a solid waste rail/truck transload facility, the nature of the freight, the nature and volume of the shipments, the identity and nature of the shippers, the names of its management and their qualifications to provide rail transportation, and other information relevant to a determination of whether Ashland will be a "rail carrier" as that term is defined in Section 10102(5) of the Act. The lack of information submitted to date, combined with the background of the property in question and the entities involved warrants such a stay to avoid the construction of another noncompliant solid waste facility in the State of New Jersey.

Respectfully submitted,

STUART RABNER
ATTORNEY GENERAL
OF NEW JERSEY

By: _____
Kevin P. Auerbacher
Deputy Attorney General
609-292-6945
Attorney for
New Jersey Department
of Environmental Protection

Dated: February 21, 2007

EXHIBIT A

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.

Finance Dockets Nos. 34986 & 34987

Ashland Railroad, Inc. & G. David Crane Notices of Exemption

Verified Statement of John Castner in Support of the New Jersey Department of Environmental Protection's Stay Request

I, John Castner, hereby certify as follows:

1. I submit this verified statement in support of the New Jersey Department of Environmental Protection's ("NJDEP" or "Department") request for a stay of the effectiveness of the Notices of Exemption filed by Ashland Railroad, Inc. ("Ashland") and G. David Crane ("Crane"), seeking an exemption from 49 U.S.C. § 10901 to acquire through lease and operate approximately 1.5 miles of track in the Township of Freehold, County of Monmouth, State of New Jersey.
2. I am employed as the Director of the Division of County Environmental and Waste Enforcement within NJDEP. I am licensed as a professional engineer and as a professional planner, have a Bachelor of Science in Civil Engineering, and have worked for NJDEP 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 NJDEP's Division of Solid and Hazardous Waste and as Director of NJDEP'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 NJDEP to the New Jersey Legislature on solid waste matters. In March 2005, I assumed my current position as the Director of NJDEP's Division of County Environmental and Waste Enforcement, which oversees NJDEP's solid waste and hazardous waste compliance and enforcement efforts.

3. On October 6, 2003, NJDEP proposed regulatory standards for rail carriers, 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 genuinely operated by rail carriers would comply with standards necessary to protect public health and safety.
4. NJDEP requests a stay of the effectiveness of the exemption as contained in the Notices of Exemption filed by Ashland and Crane with the Surface Transportation Board ("Board") based on the insufficient information provided in these Notices. Such a stay is necessary in order to ensure that Ashland, under the ownership of Crane, is not given rail carrier 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 the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §§ 10101 et seq. The Notices filed by Ashland and Crane, which I have reviewed, provide insufficient information to understand the nature of the proposed "transloading" facility or Ashland's role at this facility. I have previously submitted a Verified Statement in support of NJDEP's Comments to New England Transrail's Notice of Exemption. See Attachment D to NJDEP's Stay Request.
5. Solid waste transfer stations are required, for example, 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 ICCTA have operated without adequate environmental controls.
6. NJDEP has had considerable experience with solid waste transfer stations recently attempting to cloak themselves as rail carrier transload facilities in order to gain the perceived benefit of operation under ICCTA.

7. Recently, fifteen waste transfer stations that allege to be rail related have proposed or begun operation in New Jersey. Many of these stations claim to be conducting "transportation" activities as a "rail carrier" under ICCTA, claim that ICCTA entirely preempts State environmental law and regulation, and conduct their operations in violation of even basic health and safety measures.
8. In at least a few instances, these sites are, or were proposed to be, located in or next to sensitive environmental regions such as the Pinelands National Reserve and New Jersey's coastal zone (for example, the proposed J.P. Rail, Inc. Facility in the Pinelands, and J.P. Rail, Inc.'s facility in Pleasantville, New Jersey along New Jersey's coastal zone). As the map attached as Exhibit C illustrates, railroad lines exist throughout the state of New Jersey, creating wide spread potential for exposures to sensitive environmental regions.
9. Since the Third Circuit Court of Appeal's decision in Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004) and this Board's earlier finding in STB Finance Docket No. 34192, Hi Tech Trans, LLC–Petition for Declaratory Order (August 14, 2003) (both cases in which Hi Tech was found not to be a rail carrier), several waste transfer facilities have attempted to structure their operations so that they appear to be "railroad" operations in an effort to evade New Jersey environmental and health and safety regulations. As the Third Circuit has stated, however, the mere fact that a rail carrier may ultimately transport solid waste to its end destination does not transform the entirety of the individual waste transfer stations' operations into transportation by rail carrier. See Hi Tech Trans, 382 F.3d at 309.
10. The proper 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 led 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 reoccurence of contaminated sites that have resulted from indiscriminate and uncontrolled waste disposal and handling practices. Among these is a federal law that bans disposal of

solid waste in "open dumps." See 42 U.S.C. §§ 6901 et seq. Such open dumps are without measures designed to control contaminants from entering the air, groundwater, and surface water, thereby posing dangers to public health and safety and the environment. See also N.J.A.C. 7:26-2.1.

11. 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. As the EPA report attached as Exhibit D notes, 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 groundwater. 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. This fire was so intense that it injured more than sixty 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 NJDEP's solid waste regulation. To prevent environmental impacts such as these and clarify a *bona fide* railroad's responsibility when it engages in solid waste, the NJDEP promulgated solid waste regulations applicable to rail carriers which are set forth at N.J.A.C. 7:26-2D.1 et seq.

12. NJDEP has 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 at open dumps that are now prohibited pursuant to federal and State law. Appended hereto as Exhibit B is a photograph from a purported rail facility in Newark, and one photograph from a purported rail 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, health and safety laws. Below is a description of each photograph:

a. Photograph B-I--This photograph illustrates an open air construction and demolition ("C&D") waste transfer station conducted at 91 Bay Avenue in Newark, New Jersey. NJDEP staff took this photograph 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 exempt from NJDEP's regulations. NJDEP observed that the conditions were even worse than depicted in the photograph when Hi Tech operated the facility.

b. Photograph B-2--This photograph illustrates an enclosed C&D waste transfer operation conducted at 95-105 Passaic Street in Passaic. NJDEP staff took this photograph 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 groundwater.

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

STATE OF NEW JERSEY)
COUNTY OF MERCER) ss.

SUBSCRIBED AND SWORN TO before me this 15th day of February, 2007,

Witness my hand and official seal.

Kathleen M. Szucsik
Notary Public
Kathleen M. Szucsik
Notary Public of New Jersey
My Commission Expires 02/27/2011

My commission expires: 2/27/2011

Exhibit A

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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 concered 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 bankrupcty this year.

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 Neward after the highway was damaged by a fire (NYT/John Sotomayor); diagram (NYT) (pg. B2)

B-1

16th Street, North Bergen - June 21, 2005

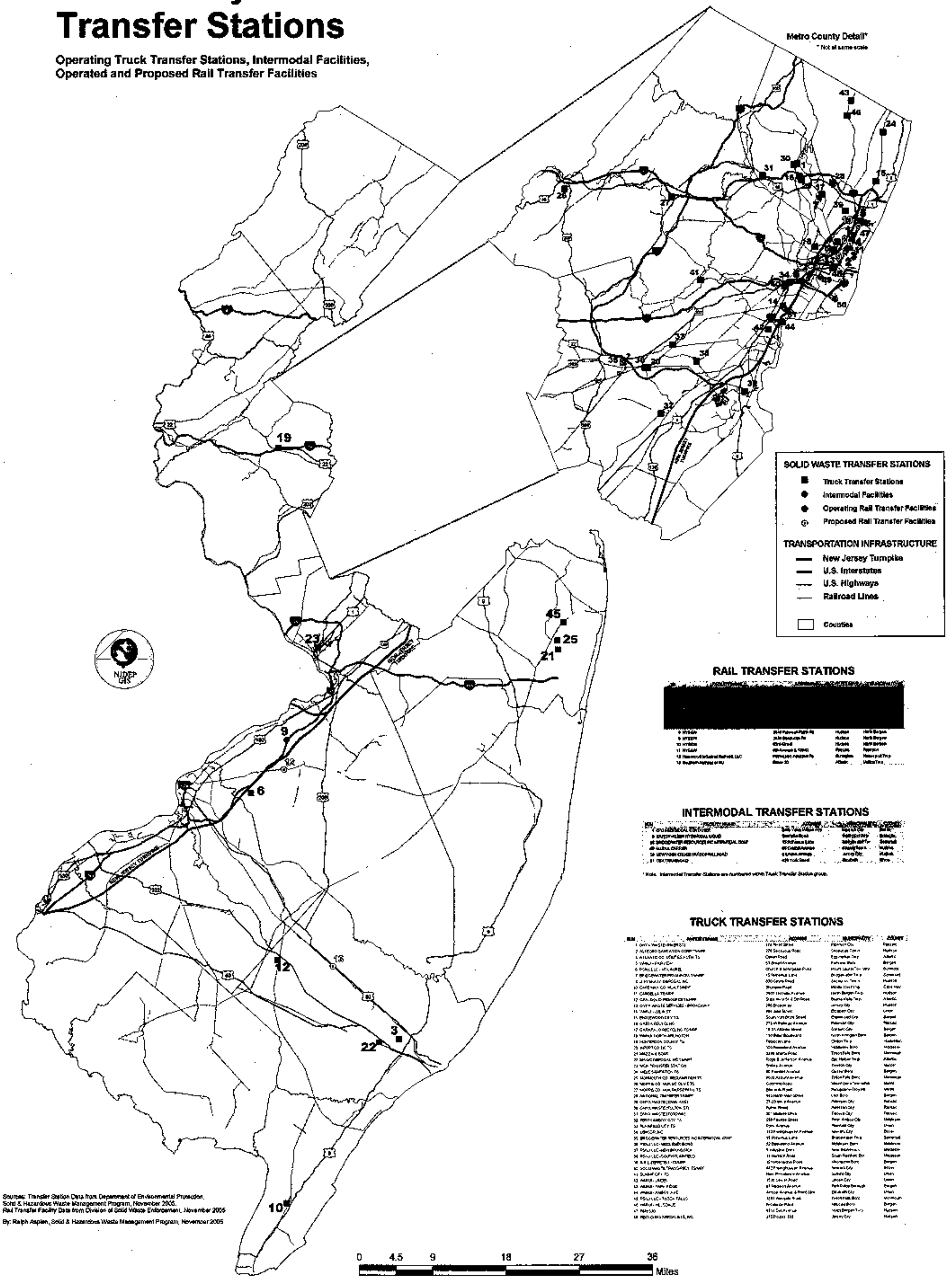
B-2

2200 Secaucus Road, North Bergen - June 15, 2005

Exhibit C

New Jersey Solid Waste Transfer Stations

Operating Truck Transfer Stations, Intermodal Facilities, Operated and Proposed Rail Transfer Facilities



RAIL TRANSFER STATIONS

INTERMODAL TRANSFER STATIONS

TRUCK TRANSFER STATIONS

Sources: Transfer Station Data from Department of Environmental Protection, Solid & Hazardous Waste Management Program, November 2005.
Rail Transfer Facility Data from Division of Solid Waste Enforcement, November 2005

By: Ralph Asplen, Solid & Hazardous Waste Management Program, November 2005

Exhibit D

CONSTRUCTION AND DEMOLITION WASTE LANDFILLS

Prepared for

U.S. Environmental Protection Agency
Office of Solid Waste

by

ICF Incorporated
Contract No. 68-W3-0008

February 1995

***** May 18, 1995 Draft Report *****

EXECUTIVE SUMMARY

The U.S. Environmental Protection Agency (EPA) is currently developing a rule addressing non-municipal facilities (industrial waste facilities, including construction and demolition waste landfills) that may receive hazardous wastes from conditionally exempt small quantity generators (CESQGs), or generators of less than 100 kilograms per month of hazardous waste. This report, prepared in support of EPA's rulemaking, presents information on construction and demolition (C&D) waste landfills, i.e., landfills that receive materials generated from the construction or destruction of structures such as buildings, roads, and bridges. C&D waste landfills are being examined because the Agency believes that the largest potential impact from this rulemaking will be on these facilities.

BACKGROUND

The 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act (RCRA) required EPA to revise the existing standards and guidelines governing the management of household hazardous wastes and hazardous wastes from small quantity generators. EPA responded in 1991 by revising the existing criteria for solid waste disposal facilities and practices (40 CFR Part 257). In 1991 EPA issued revised criteria in 40 CFR Part 258 for municipal solid waste landfills (MSWLFs) that receive household hazardous wastes and CESQG wastes. EPA did not establish revised criteria for non-municipal facilities and subsequently was sued by the Sierra Club. A consent agreement was reached in January 1994, and EPA is now fulfilling the remainder of the HSWA mandate by regulating non-municipal facilities that may receive CESQG wastes. The final rule must be signed by the EPA Administrator by May 15, 1995. The rule will require facilities receiving CESQG wastes to have adequate ground-water monitoring, corrective action requirements, and location restrictions.

COMPOSITION OF C&D WASTE

Information on the composition of C&D waste is presented below. Most of this information was compiled from the literature by the National Association of Demolition Contractors (NADC); a small number of other readily available sources were used as well. These source documents provide only snapshots of the C&D waste stream in specific locations and at specific points (e.g., generation) rather than providing a complete cradle-to-grave picture of C&D wastes nationwide, or of the portion landfilled.

C&D waste is generated from the construction, renovation, repair, and demolition of structures such as residential and commercial buildings, roads, and bridges. The composition of C&D waste varies for these different activities and structures. Overall, C&D waste is composed mainly of wood products, asphalt, drywall, and masonry; other components often present in significant quantities include metals, plastics, earth, shingles, insulation, and paper and cardboard.

C&D debris also contains wastes that may be hazardous. The source documents identify a number of wastes that are referred to using such terms as "hazardous," "excluded," "unacceptable," "problem," "potentially toxic," or "illegal." It is not necessarily true that all of these wastes meet the definition of "hazardous" under Subtitle C of RCRA, but they provide an indication of the types of hazardous wastes that may be present in the C&D waste stream. They can be divided into four categories:

- Excess materials used in construction, and their containers. *Examples: adhesives and adhesive containers, leftover paint and paint containers, excess roofing cement and roofing cement cans;*
- Waste oils, grease, and fluids. *Examples: machinery lubricants, brake fluid, form oil, engine oil;*
- Other discrete items. *Examples: batteries, fluorescent bulbs, appliances;* and
- Inseparable constituents of bulk items. *Examples: formaldehyde present in carpet, treated or coated wood.*

Some of these components are excluded from C&D landfills by state regulations.

C&D LANDFILL LEACHATE QUALITY

Construction and demolition landfill leachate sampling data were collected from states and from the general literature by NADC. Leachate sampling data for 305 parameters sampled for at one or more of 21 C&D landfills were compiled into a database.

Of the 305 parameters sampled for, 93 were detected at least once. The highest detected concentrations of these parameters were compared to regulatory or health-based "benchmarks," or concern levels, identified for each parameter. Safe Drinking Water Act Maximum Contaminant Levels (MCLs) or Secondary Maximum Contaminant Levels (SMCLs) were used as the benchmarks if available. Otherwise, health-based benchmarks for a leachate ingestion scenario were identified; these were either reference doses (RfDs) for non-carcinogens, or 10^{-6} risk-specific doses (RSDs) for carcinogens. Benchmarks were unavailable for many parameters because they have not been studied sufficiently.

Of the 93 parameters detected in C&D landfill leachate, 24 had at least one measured value above the regulatory or health-based benchmark.[1] For each of the parameters exceeding benchmarks (except pH), the median leachate concentration was calculated and compared to its benchmark. The median value was first calculated among the samples taken at each landfill, and then across all landfills at which the parameter was detected. Due to anomalies and inconsistencies among the sampling equipment used at different times and at different landfills, non-detects were not considered in determining median values; i.e., the non-detects were discarded before calculating both individual landfill concentration medians and medians across landfills. Thus, the median leachate concentrations represent the median among the detected values, rather than the median among all values. The median concentration among all values would in most cases have been lower than those calculated here.

Based on (1) the number of landfills at which the benchmark was exceeded and (2) a comparison between the median detected concentration and the benchmark, seven constituents emerge as being potentially problematic. They are listed in the table below. Also shown are the number of landfills at which the constituent was sampled, the

C&D LANDFILL LEACHATE - POTENTIALLY PROBLEMATIC CONSTITUENTS

Constituent	No. Landfills Sampled	No. Landfills Detected	No. Landfills > Benchmark	Ratio of Median to Benchmark
1,2-Dichloroethane	9	3	3	4
Methylene chloride	9	4	3	3
Cadmium	19	14	12	2
Iron	20	20	19	37
Lead	18	15	13	4
Manganese	14	14	13	59
Total dissolved solids	18	17	15	4

[1]In the case of pH, the "exceedances" were actually pH values below the regulatory range.

number of landfills at which the constituent was detected, the number of landfills at which the constituent was detected above its benchmark, and the ratio of the median detected concentration to the benchmark.

For three of the seven parameters listed in the table (iron, manganese, and TDS), the benchmarks are secondary MCLs (SMCLs), which are set to protect water supplies for aesthetic reasons (e.g., taste) rather than for health-based reasons. None of the remaining four parameters exceeds its benchmark by a factor of 10 or more, indicating that concentrations in ground water where monitoring wells or drinking water wells may be located are likely to fall below the health-based benchmarks.

Conclusions regarding C&D landfill leachate quality must be viewed with an understanding of the data limitations. The most important limitation is that the 21 landfills represented in this report comprise just over one percent of the approximately 1,800 C&D landfills in the United States. Thus, the representativeness of the sample is questionable. Other limitations are discussed in the body of the report.

STATE REGULATIONS

State statutes and regulations for C&D landfills were summarized, and similarities and differences between current state requirements for C&D landfills and federal requirements for MSWLFs were evaluated. The following summarizes the key findings:

- **All states regulate off-site C&D landfills to some extent.** Thirteen states require off-site C&D landfills to meet state MSWLF requirements (in many states, these requirements are not as stringent as the federal MSWLF requirements found in 40 CFR Part 258), while the remaining 37 have developed separate regulations that are specific to off-site C&D landfills.[2]

- **Only seven states exempt on-site C&D landfills from regulatory requirements.** Of the remaining 43 states, 11 require on-site C&D landfills to meet state sanitary landfill requirements (in many states, these requirements are not as stringent as 40 CFR Part 258), 8 have developed separate regulations applicable to only on-site landfills, and the remaining 24 have extended the regulations for off-site landfills to on-site landfills.

- **Sixteen states mandate location restrictions, ground-water monitoring, and corrective action for off-site C&D landfills.** These requirements, however, vary in stringency relative to 40 CFR Part 258. For example, **only two states have location restrictions, ground-water monitoring, and corrective action requirements for off-site C&D landfills that are at least as stringent as 40 CFR Part 258.**

- **The most common 40 CFR Part 258 location restrictions that states apply to C&D landfills relate to: airports and bird hazards, wetlands, and floodplains.** Several states have moved beyond federal requirements and prohibit the siting of on-site (eight states) and off-site (nine states) C&D landfills in floodplains. Fewer states have adopted the 40 CFR Part 258 requirements regarding faults, seismic zones, and unstable areas.

- **A majority of states impose additional location restrictions on C&D landfills.** The most common additional restrictions are: near ground and surface waters, and near endangered species habitats.

- **Twenty-nine states (nearly 60 percent) require off-site C&D landfills to monitor ground water.** Of these 29 states, 5 have requirements substantially similar to 40 CFR Part 258, while 24

[2]Ohio expects to have specific C&D management requirements effective by the end of 1995.

have requirements that are less stringent.[3] **The remaining 21 states do not require ground-water monitoring requirements.** Of these 21, however, 12 "may" require ground-water monitoring if the regulatory authority deems it necessary.

- **Twenty-four states (nearly 50 percent) require on-site C&D landfills to monitor ground water.** Of these 24, only 4 have requirements substantially similar to 40 CFR Part 258, while 20 have requirements that are less stringent. **The remaining 26 states do not require ground-water monitoring.** Of these 26, 9 states "may" require ground-water monitoring if the regulatory authority deems it necessary.

- **Twenty-two states have corrective action requirements for off-site C&D landfills.** These states either require the permit applicant to submit a corrective action plan with the permit application, or require the facility owner/operator to submit a plan after a release to ground water is detected.

- **Sixteen states have corrective action requirements for on-site C&D landfills.** Again, these states either require the permit applicant to submit a corrective action plan with the permit application, or require the facility owner/operator to submit a plan after a release to ground water is detected.

- **States also have mandated permit, design and operating, post-closure, and financial assurance requirements for both on-site and off-site C&D landfills.** The most common of these is permitting requirements. Respectively, 45 and 38 states require off-site and on-site C&D landfills to obtain a permit.[4] Thirty-four states require some post-closure time period for off-site landfills (11 require at least 30 years and 23 require less than 30 years). Additionally, 33 states require off-site C&D landfills to obtain financial assurance for closure, while 32 require it for post-closure care.

- **Twenty-four states prohibit <u>all</u> hazardous wastes from disposal at off-site C&D landfills.** In addition, three and four states require that only inert waste and C&D waste be disposed, respectively. Fourteen states do not specifically prohibit disposal of all hazardous wastes at off-site C&D landfills. In general, the regulations for these states note that only waste specified in permit may be accepted, or only "regulated" or "controlled" hazardous waste is prohibited. Finally, five states do not specifically identify any restrictions on waste disposal at off-site C&D landfills.

---

[3]Ohio currently does not have ground-water monitoring, but monitoring is expected to be part of C&D management regulations that should be finalized by the end of 1995.

[4]Ohio requires a permit for C&D landfills.

TABLE 2-1
COMPONENTS OF C&D WASTE

ASPHALT paving shingles	**PAINT** **paint containers and waste** **paint products**	**WALL COVERINGS** **drywall (gypsum)** plaster
EARTH dirt sand, foundry soil	**PAPER PRODUCTS** cardboard fiberboard, paperboard paper	**WOOD** cabinets composites millends pallets, shipping skids, and crating lumber particle board plywood siding trees: limbs, brush, stumps, and tops veneer
ELECTRICAL fixtures wiring	**PETROLEUM PRODUCTS** **brake fluid** **form oil** **fuel tanks** **oil filters** **petroleum distillates** **waste oils and greases**	**WOOD CONTAMINANTS** **adhesives and resins** **laminates** **paintings and coatings** **preservatives** **stains/varnishes** **other chemical additives**
INSULATION **asbestos** building extruded polystyrene (rigid) **fiberglass (bat)** roofing	**PLASTICS** buckets pipe (PVC) polyethylene sheets styrofoam sheeting or bags laminate	**MISCELLANEOUS** **adhesives and adhesive cansaerosol** cans **air conditioning units** **appliances ("white goods")** **batteries** **carpeting**
MASONRY AND RUBBLE bricks cinder blocks concrete mortar, excess porcelain rock stone tile	**ROOF MATERIALS** **asbestos shingles** roofing, built up **roofing cement cans** roofing shingles roofing tar tar paper	**caulk (tubes)** ceiling tiles **driveway sealants (buckets)** **epoxy containers** **fiberglass** fines fireproofing products (overspray) floor tiles **furniture** **garbage**
METAL aluminum (cans, ducts, siding) brass fixtures, plumbing flashing gutters **mercury from electrical switches** iron **lead** nails pipe (steel, copper) sheet metal steel (structural, banding, decking, rerod) studs, metal wire (e.g., copper)	**VINYL** siding flooring doors windows	glass **lacquer thinners** leather **light bulbs, fluorescent and HID** light bulbs, other linoleum organic material packaging, foam **pesticide containers** rubber **sealers and sealer tubes** sheathing silicon containers **solvent containers and waste** street sweepings textiles **thermostat switches** **tires** **transformers** water treatment plant lime sludge

Source: Summarized from NADC, 1994a and 1994b; Hanrahan, 1994; and Lambert and Domizio, 1993.

EXHIBIT B

109TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
109–495

DEPARTMENTS OF TRANSPORTATION, TREASURY, AND HOUSING AND URBAN DEVELOPMENT, THE JUDICIARY, DISTRICT OF COLUMBIA, AND INDEPENDENT AGENCIES APPROPRIATIONS BILL, 2007

JUNE 9, 2006.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KNOLLENBERG, from the Committee on Appropriations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 5576]

The Committee on Appropriations submits the following report in explanation of the accompanying bill making appropriations for the Departments of Transportation, Treasury, and Housing and Urban Development, the Judiciary, District of Columbia, and independent agencies for the fiscal year ending September 30, 2007.

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Operating Plan and Reprogramming Procedures

The Committee continues to have a particular interest in being informed of reprogrammings which, although they may not change either the total amount available in an account or any of the purposes for which the appropriation is legally available, represent a significant departure from budget plans presented to the Committee in an agency's budget justifications and supporting documents, the basis of this appropriations Act.

Consequently, the Committee directs the departments, agencies, boards, commissions, corporations and offices funded at or in excess of $100,000,000 in this bill, to consult with the Committee prior to each change from the approved budget levels in excess of $500,000 between programs, activities, object classifications or elements unless otherwise provided for in the Committee report accompanying this bill. For agencies, boards, commissions, corporations and offices funded at less than $100,000,000 in this bill, the reprogramming threshold shall be $250,000 between programs, activities, initiatives object classifications or elements unless otherwise provided for in the Committee report accompanying this bill. Additionally, the Committee expects to be promptly notified of all reprogramming actions which involve less than the above-mentioned

tracking of the collections and provide the Board with more flexibility in spending its appropriated funds.

STB case report.—The Committee is aware of frustration over rail service and freight rail charges among rail customers, including electric utilities, rural electric cooperatives, paper companies, agricultural industries and local units of government. The Committee recognizes that the four major railroads now control more than 94% of the industry's revenues and 90% of the rail track and that there are fewer options for shippers that rely on the nation's major railroads for service. The Committee directs the STB to issue a report to the House and Senate Committees on Appropriations by February 1, 2007, that shows the number of complaints that have been filed related to high rail charges and poor service since January 2005, the STB's determinations in these cases, and the status and timing of decisions in any pending cases.

Union Pacific/Southern Pacific merger.—On December 12, 1997, the Board granted a joint request of Union Pacific Railroad Company and the City of Wichita and Sedgwick County, KS (Wichita/Sedgwick) to toll the 18-month mitigation study pending in Finance Docket No. 32760. The decision indicated that at such time as the parties reach agreement or discontinue negotiations, the Board would take appropriate action.

By petition filed June 26, 1998, Wichita/Sedgwick and UP/SP indicated that they had entered into an agreement, and jointly petitioned the Board to impose the agreement as a condition of the Board's approval of the UP/SP merger. By decision dated July 8, 1998, the Board agreed and imposed the agreement as a condition to the UP/SP merger. The terms of the negotiated agreement remain in effect. If UP/SP or any of its divisions or subsidiaries materially changes or is unable to achieve the assumptions on which the Board based its final environmental mitigation measures, then the Board should reopen Finance Docket 32760 if requested by interested parties, and prescribe additional mitigation properly reflecting these changes if shown to be appropriate.

Waste transfer and sorting facilities.—The Committee recognizes that a growing number of certain waste haulers and rail companies have sought to exploit a potential loophole in the Interstate Commerce Commission Termination Act in order to construct and operate unregulated waste transfer and sorting facilities on railroad properties. The developers of these types of facilities are claiming that ICCTA grants federal preemption from local, state and certain federal regulations that protect the public interest with respect to solid waste. The Committee disagrees with this interpretation of ICCTA preemption since the operation of solid waste facilities is not integral to transportation by rail. The Committee encourages the STB to clarify that these types of facilities are indeed subject to the same local, state, and federal laws and regulations as other solid waste facilities.

GENERAL PROVISIONS—DEPARTMENT OF TRANSPORTATION

Section 180. The Committee continues the provision allowing the Department of Transportation to use funds for aircraft; motor vehicles; liability insurance; uniforms; or allowances, as authorized by law.

EXHIBIT C

JUL 13 2005

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

June 30, 2005

The Honorable James J. Florio
Chairman
The Pinelands Commission
PO Box 7
New Lisbon, New Jersey 08064

Dear Chairman Florio:

This responds to your letter dated May 25, 2005, urging the Board to stop construction of a waste transfer facility being proposed in Mullica Township, New Jersey, until a development application is filed with the New Jersey Pinelands Commission and that Commission determines that the project complies with the Pinelands Comprehensive Management Plan.

From press reports, I know that two court cases have been filed in the United States District Court for the District of New Jersey regarding this project– one by the proponent of the project, arguing that it qualifies for the preemption from most state and local laws provided by 49 U.S.C. 10501(b), and one by the State of New Jersey, seeking to block construction of the facility until the approvals the State believes are necessary are obtained. Indeed, the court evidently has issued a consent order, agreed to by the parties, that halts construction of the proposed facility pending the final outcome of the pending court litigation. Nevertheless, I will briefly explain how the section 10501(b) preemption works.

As you know, the federal preemption provision is intended to promote a national rail system by making most state and local laws inapplicable to "rail carriers" providing "transportation" as those terms are defined in the Interstate Commerce Act. However, the Board is mindful of the development of waste transfer facilities along railroads and the assertion by the owners of these facilities that they are entitled to the rail preemption provided in section 10501(b). Both the Board and the courts examine the cases that come before them very carefully to ensure that only those entitled to the preemption benefit from it. A non-railroad or even a railroad when engaged in activity that is not transportation is not entitled to federal preemption. Thus, a business could not locate close to a railroad, claim to be a rail facility, and be exempted from state and local laws that apply to the rest of the solid waste industry.

Moreover, both the Board and the courts have made it clear that, although the scope of section 10501(b) preemption is broad, there are limits. Where there are overlapping federal statutes – such as the Federal Railroad Safety Act, the Hazardous Materials Transportation Act, the Clean Air Act, and the Clean Water Act – those acts are harmonized with the Interstate Commerce Act to the extent possible so long as the end result is not to unreasonably interfere with the flow of interstate commerce. And even some state and local safety laws – like fire codes – still apply as long as they do not unreasonably interfere with interstate commerce.

I hope that this information is useful to you. Please do not hesitate to contact me again if we can be of assistance in the future.

Sincerely,

Roger Nober
Chairman

EXHIBIT D

GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRSKY, P.C.

ATTORNEYS AT LAW
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GEORGE F. GALLAND (1910-1985)

WRITER'S DIRECT E-MAIL ADDRESS
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WRITER'S DIRECT DIAL NUMBER
202-342-5277

January 27, 2006

JAN 27 2006
RECEIVED

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

GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRSKY, P.C.

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215676

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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JAN 27 2006
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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

NEW ENGLAND TRANSRAIL, LLC
D/B/A WILIMINTON & 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,[1] while others have attempted to use the Board's Notice of

[1] 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."[2] 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

[2] 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.[3] 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[4] 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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[3] 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.

[4] 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.[5] 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

[5] 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 lead 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.[6] 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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[6] *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),[7] 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.[8] 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.[9]

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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[7] 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*")

[8] *Hi Tech II.*

[9] 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.[10]

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.

[10] 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.[11] 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).[12] 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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[11] 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.

[12] 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 (3rd 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 (11th 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.[13]

III. NET'S ACTIVITIES ARE NOT PREEMPTED FROM PUBLIC HEALTH AND SAFETY OVERISGHT BYTHE 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

[13] 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 Envtl. 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. <u>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.</u>

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. <u>The legislative history and statutory purpose of ICCTA require a narrow interpretation of Section 10501(b).</u>

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:

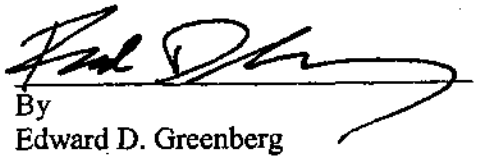
> As used in this section, 'State or Federal law' is intended to encompass all statutory, common law, and administrative remedies addressing ...rail-related subject matter....The bill is intended to standardize all economic regulation (and deregulation) of rail transportation under Federal law, without 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").

Third, the House Conference Report explained that since as early as 1980, it had

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

Respectfully Submitted,



By
Edward D. Greenberg
David K. Monroe

GALLAND, KHARASCH, GREENBERG,
FELLMAN & SWIRSKY, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007

Telephone: 202-342-5277
Facsimile: 202-342-2311

Special Counsel for the State of New Jersey
Department of Environmental Protection
and New Jersey Meadlowlands
Commission

Dated: January 27, 2006

EXHIBIT E

JON S. CORZINE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 093
TRENTON, NJ 08625-0093

STUART RABNER
Attorney General

ROBERT J. GILSON
Director

February 13, 2007

John K. Fiorilla, Esquire
Capehart & Scatchard, P.A.
Laurel Corporate Center
8000 Midlantic Drive, Suite 300
Mount Laurel, New Jersey 08054

Re: STB Finance Dockets 34986 and 34987, Ashland Railroad, Inc. and G. David Crane–Verified Notices of Exemption
Freehold, New Jersey

Dear Mr. Fiorilla:

We are in receipt of the Notices of Exemption that you filed with the Surface Transportation Board ("STB") with respect to the above referenced Finance Docket Numbers. On behalf of the Attorney General of the State of New Jersey, the New Jersey Department of Environmental Protection ("NJDEP"), and other state agencies that may be affected by these applications, we have reviewed these submissions to the STB. Based on our review, we are seeking information regarding the specific nature and operations of the proposed "transportation terminal transloading facility" in Freehold, New Jersey that is the subject of the above referenced Notices.

Initially, please provide any operating, transportation or other agreements between and/or among Ashland, G. David Crane ("Crane"), and any "shippers now located or who will locate on 'The Line.'" This request includes any other documents relating to any relationship with shippers for this proposed facility. In addition, please provide answers to the following questions:

1. Will any waste materials–solid or hazardous–be handled in any manner or at any time at the proposed facility? Describe precisely what kind of materials will be handled at the proposed facility.

2. Does Ashland or Crane have a contract with any shipper to haul solid and/or hazardous waste? If there is no contract, has any shipper been provided with a rate quote or tariff rate?

3. Who are the shippers or proposed shippers for this facility? How and by whom have these shippers been solicited with respect to this facility?

4. What is the proposed volume of shipments and does any shipper have any minimum volume shipment obligations?

5. Who is supplying rail cars that will be used for moving the shipments? What type of rail cars?

6. To where will the shipments go from the proposed facility, including the ultimate destination?

7. From what source(s) is the shipment originating?

8. Has there been any communication with NJDEP or any other New Jersey agency concerning the proposed facility? Do Ashland and/or Crane intend to communicate with such agencies and/or seek approval for the proposed facility?

9. Do Ashland and/or Crane intend to comply with New Jersey regulations for the proposed facility? Who will be responsible for obtaining any environmental permits?

10. Will Ashland and/or Crane issue the bills of lading for the shipments?

11. Have Ashland and/or Crane made any arrangements with trucking companies that will be bringing the shipments into the facility? Which trucking companies? Has NJDEP permitted these trucking companies or will these companies be permitted? Will these trucking companies issue bills of lading? Have Ashland and/Crane entered into any agreements with such trucking companies or will they?

12. Will any of the shippers act as an agent or contractor for Ashland and/or Crane?

13. Will any of the shippers reimburse Ashland and/or Crane for any costs associated with the proposed facility?

Thank you in advance for your cooperation in providing the information that is necessary to understand the nature of the proposed operations here. I am available to discuss these items further.

Sincerely yours,

STUART RABNER
ATTORNEY GENERAL OF NEW JERSEY

By: Ruth E. Carter
Ruth E. Carter
Deputy Attorney General

EXHIBIT F

OhioEPA
State of Ohio Environmental Protection Agency

Northwest District Office

347 North Dunbridge Road
Bowling Green, OH 43402-9398

TELE: (419) 352-8461 FAX: (419) 352-8468
www.epa.state.oh.us

Bob Taft, Governor
Bruce Johnson, Lieutenant Governor
Joseph P. Koncelik, Director

June 30, 2005

CERTIFIED MAIL

Mr. Don Cleland
Ashland Railway
P.O. Box 1528
Mansfield, Ohio 44901

Re: Outstanding Notice of Violation
Air Permit Requirement for Waste Transfer Station
Richland County

Dear Mr. Cleland:

This letter shall serve as follow-up to the air pollution inspection conducted April 19, 2005, by the Ohio Environmental Protection Agency (OEPA), Northwest District Office (NWDO), Division of Air Pollution Control (DAPC) at the railcar construction and demolition debris (CDD) transfer site located off North Main Street in Mansfield, Ohio. As a result of our phone conversation on June 28, 2005, NWDO understands, for the time being, Ashland Railway is the operator of the transfer site. At the time of the inspection, NWDO was informed JR Wolph Company was the party responsible for the transfer site. A brief history of our dealings with the transfer site follows.

In July 2003, NWDO and the transfer site operator at the time, Allied Waste, met to discuss the CDD transfer operation, facility roadways and Ohio's air pollution rules. Allied Waste submitted emission calculations which demonstrated the CDD transfer operation and the facility's roads each had potential emissions which were less than 10 pounds per day and were, therefore, exempt from permitting requirements as specified in, Ohio Administrative Code (OAC) 3745-15-05. To be eligible for this exemption, a deminimis source can never exceed this emissions level.

Since that time, NWDO has learned CDD transfer operations have changed. The material being unloaded has been ground up to allow more CDD per railcar, which creates considerably more dust than we were originally led to believe. During the inspection of this facility, NWDO conducted a visible emission observation of the railcar unloading operation. The NWDO recorded visible emissions in excess of 20% opacity, as a 3 minute average, an emission restriction contained in Ohio Administrative Code (OAC) 3745-17-07(B). Based on our visible emission readings and the amount of dust being generated from unloading railcars and loading trucks, the NWDO does not believe the transfer operation is a "De Minimis" activity.

At a minimum, the CDD transfer operation is subject to OAC 3745-17-08 Restriction of Emission of Fugitive Dust. This fugitive dust regulation identifies specific areas of the state as "Appendix A Areas." An Appendix A Area is an area in which facilities must control sources of fugitive dust. In Richland County, the City of Mansfield is identified as an Appendix A Area and the CDD transfer operation is defined as a fugitive dust source. The OAC states that "No person shall cause or permit any fugitive dust source to be operated, etc., without taking or installing reasonably available control measures (RACM) to prevent fugitive dust from becoming airborne."

Richland County Noble Rd LF Correspondence.

In addition to OAC 3745-17-08, the transfer operation is also subject to OAC rule 3745-31-05 which requires Best Available Technology (BAT) be employed on new emission units.

The NWDO believes that the transfer operation is currently being operated in violation of the requirements of OAC rule 3745-17-08 and that it was either never "De Minimis," which means it required a permit and would have needed to employ BAT at installation, or has since been modified without obtaining a PTI and installing BAT. Either way, violations of OAC rules 3745-31-02 and 3745-31-05 and 3745-35-02 have occurred.

After minimal review of this operation and more detailed review of similar operations in the State of Ohio, the Ohio EPA has determined that BAT may require enclosure of the transfer operation and use of a wet suppression system in conjunction with a baghouse to control particulate emissions. Ohio EPA and NWDO have observed a facility with an enclosure and a temporary wet suppression system. However, the use of water as the sole means to control fugitive dust from the transfer operation was not found to be adequate.

Finally, the NWDO received a complaint June 24, 2005. The complainant identified dust from the transfer operation had covered automobiles and was on the company's finished manufactured product. The complainant indicated their employee's had complained of eye and skin infections, which they attribute to the dust being released from the transfer station as well as "sewage" odors. The complainant indicated they had been reporting the problems for some time to the facility directly but things had not improved.

In order to resolve the above violations and address the complaint Ashland Railway will need to submit a compliance plan and schedule which includes the following milestone dates.

		Milestone Dates
a.	Submit Permit to Install application	_____
b.	Award contract(s) for emission control systems or process modifications; or, issue orders for the purchase of component parts to accomplish emission control or process modifications by	_____
c.	Initiate on-site construction or installation of emission control equipment or process change by	_____
e.	Achieve final compliance by	_____

Please submit this schedule by July 31, 2005.

Please be advised that the submission of information to respond to this letter does not constitute waiver of Ohio EPA's authority to seek civil penalties pursuant to ORC section 3704.06.

The Ohio EPA will make a decision on whether to pursue or decline to pursue such penalties regarding this matter at a later date. If you have any questions or concerns, please call me at (419) 373-3130.

Sincerely,

Chad M. Delbecq
Division of Air Pollution Control

CMD/llr

pc: Don Waltermeyer, DAPC/NWDO
Lisa Holscher, U.S. EPA
E. Jay Murphy, DSIWM/NWDO
[redacted]
Tom Kalman, DAPC/CO
Chad Delbecq, DAPC/NWDO
DAPC-NWDO File

EXHIBIT G

5

SEP 07 2006

COUNTY OF MONMOUTH
CONSIDERATION
RTF Exempt add'l RTF
DATE 9/11/06 BY NJ

DEED

120234

This Deed is made on August 11, 2006

BETWEEN **RALPH CLAYTON & SONS, a New Jersey partnership**

whose address is 1355 Campus Parkway, Wall, New Jersey

referred to as the Grantor

AND **GREMS-KIRK RAILWAY, L.L.C., a New Jersey limited liability company**

whose post office address is 1355 Campus Parkway, Wall, New Jersey

referred to as the Grantee.

the words "Grantor" and "Grantee" shall mean all Grantors and all Grantees listed above.

NOT CERTIFIED COPY

1. **Transfer of Ownership.** The Grantor grants and conveys (transfers ownership of) the property described below to the Grantee. This transfer is made for the sum of $1.00 One Dollars and No Cents

The Grantor acknowledges receipt of this money.

2. **Tax Map References.** (N.J.S.A. 46:15-2.1) Municipality of Freehold
Block No. 43 Lot No. 21 Account No.
No property tax identification number is available on the date of this deed.

3. **Property.** The property consists of the land and all the buildings and structures on the Town of Freehold, County of Monmouth and State of New Jersey. The legal description is attached hereto as Schedule A.

BEING the same premises conveyed to the Grantor herein by Deed from Jocama Construction Corporation, dated May 19, 1994 and recorded in the Monmouth County Clerk's office on May 27, 1994 in Deed Book 5314, Page 853.

M CLAIRE FRENCH,CTY CLK
MONMOUTH COUNTY,NJ
INSTRUMENT NUMBER
2006134902
RECORDED ON
Sep 11, 2006
12:59:40 PM
BOOK:DR-8595
PAGE:2315
Total Pages: 5

COUNTY RECORDING $80.00
FEES
TOTAL $80.00

Prepared by:

ROSS D. GERTNER, ESQ.

ORIGINAL DOCUMENT POOR QUALITY

SCHEDULE "A"

ALL that certain lot, tract or parcel of land and premises situate, lying and being in the Township of Freehold, County of Monmouth and State of New Jersey, more particularly described as follows:

DESIGNATED as Lot 21, Block 43 on a plan of survey made by Donald H. Stires Associates, Professional Engineers and Surveyors, dated November 10, 1976, and bounded and described according to said plan as follows:

BEGINNING at a point marked by an iron pipe in the Northeasterly right-of-way line of the Freehold Branch of railroad formerly of the Penndel Company (formerly Freehold-Jamesburg Agricultural Railroad), said point being in the Northerly right-of-way line of New Jersey State Highway Route No. 33 (66 feet wide), said right-of-way defined by lands of New Jersey Department of Transportation, and running thence the following ten courses and distances:

1. along said railroad right-of-way, North 38 degrees 02 minutes 00 seconds West, a distance of 267.47 feet to an iron pin, said point being the Southerly corner of lands of the former Freehold and Jamesburg Agricultural Railroad Company; thence

2. along said lands of the former Freehold & Jamesburg Agricultural Railroad Company, North 18 degrees 11 minutes 30 seconds East, a distance of 685.48 feet to an iron pin; thence

3. still along said lands of the Railroad Company, North 30 degrees 46 minutes 30 seconds East, a distance of 264.97 feet to an iron pin, said point being in the Southerly line of lands now or formerly of Brockway Glass Company; thence

4. along said Brockway Glass Company lands, South 74 degrees 52 minutes 00 seconds East, a distance of 1,710.72 feet to an iron pin; thence

5. still along said Brockway Glass Company lands, South 11 degrees 09 minutes 00 seconds West, passing over an iron pin 4.00 feet from the terminus of this course, a distance of 1,151.92 feet to a point in the aforementioned Northerly right-of-way line of Route 33; thence along said Route 33 the following 5 courses and distances:

6. North 77 degrees 43 minutes 00 seconds West, a distance of 105.61 feet to a point of curvature; thence

7. on a curve to the right in a Westerly direction having a radius of 1,877.08 feet, a distance along the arc of 92.28 feet to a point of tangency, the chord of said curve bears, North 76 degrees 18 minutes 30 seconds West, a distance of 92.27 feet; thence

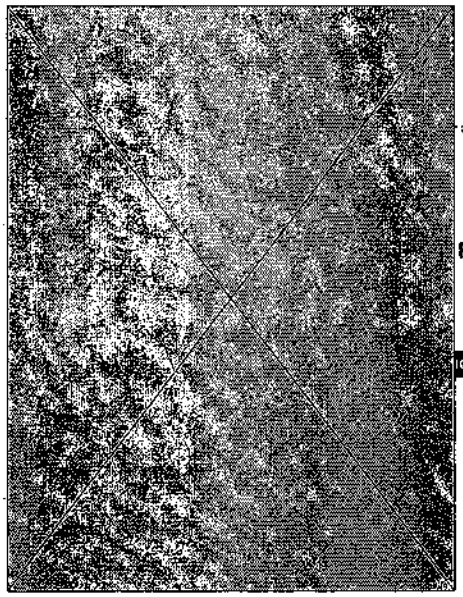
8. North 74 degrees 54 minutes 00 seconds West, a distance of 746.38 feet to a point; thence

9. North 65 degrees 35 minutes 13 seconds West, a distance of 202.34 feet to an iron pin; thence

10. North 72 degrees 16 minutes 04 seconds West, a distance of 545.42 feet to the point and place of BEGINNING.

ALSO known as Lot 21 in Block 43 on the Township of Freehold Tax Map.

NOT CERTIFIED COPY



GIT/REP-3
(6-05)

State of New Jersey
RESIDENCY CERTIFICATION/EXEMPTION
(C.55, P.L. 2004)

ictions, Page 2)

NC1545 - Affidavit of Consideration
RTF-1 (Rev. 4/2004) P3/05

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STATE OF NEW JERSEY

AFFIDAVIT OF CONSIDERATION FOR USE BY SELLER

[Chapter 49, P.L. 1968; as amended by through Chapter 66, P.L. 2004]
To be recorded with deed pursuant to Chapter 49, P.L. 1968 as amended by Chapter 206, P.L. 1981 (N.J.S.A. 46:15-5 et seq.)
BEFORE COMPLETING THIS AFFIDAVIT, PLEASE READ THE INSTRUCTIONS ON THE REVERSE SIDE OF THIS FORM.

STATE OF NEW JERSEY
COUNTY OF Monmouth } SS.

FOR RECORDER'S USE ONLY
Consideration $ _____
RTF paid by seller $ Exempt *
Date 9/11/06 By NJ

* The symbol "O" to indicate that fee is exclusively for county use.

(1) PARTY OR LEGAL REPRESENTATIVE (See Instructions #3, 4 and 5 attached)
Deponent, William R. Clayton, Member (Name), being duly sworn according to law upon his/her oath deposes and says that he/she is the Grantor (Name of Grantor, Grantee, Legal Representative, Corporate Officer, Officer of Title Co., Lending Institution, etc.) in a deed dated Aug. 11, 2006 transferring real property identified as Block No. 43 Lot No. 21 located at Freehold Township, Monmouth County, NJ (Street Address, City/Lending County) and annexed hereto.

(2) CONSIDERATION (See Instruction #6)
Deponent states that, with respect to deed hereto annexed, the actual amount of money and the monetary value of any other thing of value constituting the entire compensation paid or to be paid for the transfer of title to the lands, tenements or other realty, including the remaining amount of any prior mortgage to which the transfer is subject or which is to be assumed and agreed to be paid by the grantee and any other lien or encumbrance thereon not paid, satisfied or removed in connection with the transfer of title is $ _____

(3) FULL EXEMPTION FROM FEE
Deponent states that this deed transaction is fully exempt from the Realty Transfer Fee imposed by c. 49, P.L. 1968, as amended through c. 66, P.L. 2004 for the following reason(s). Explain in detail. (See Instruction #7.) Mere reference to exemption symbol is not sufficient. (a) for consideration of less than $100

(4) PARTIAL EXEMPTION FROM FEE
NOTE: All boxes below apply to grantor(s) only. ALL BOXES IN APPROPRIATE CATEGORY MUST BE CHECKED. Failure to do so will void claim for partial exemption. (See Instructions #8 and #9.)

Deponent claims that this deed transaction is exempt from the State portion of the Basic fee imposed by c. 176, P.L. 1975; c. 118, P.L. 2004; and c. 66, P.L. 2004 for the following reason(s): _____

A. SENIOR CITIZEN (See Instruction #8)
- ☐ Grantor(s) 62 years of age or over.*
- ☐ One- or two-family residential premises.
- ☐ Resident of the State of New Jersey.
- ☐ Owned and occupied by grantor(s) at time of sale.
- ☐ Owners as joint tenants must all qualify.

B. BLIND (See Instruction #8)
- ☐ Grantor(s) legally blind.*
- ☐ One- or two-family residential premises.
- ☐ Owned and occupied by grantor(s) at time of sale.
- ☐ Owners as joint tenants must all qualify.
- ☐ Resident of the State of New Jersey.

DISABLED (See Instruction #8)
- ☐ Grantor(s) permanently and totally disabled.*
- ☐ Receiving disability payments.*
- ☐ Not gainfully employed.*
- ☐ One- or two-family residential premises.
- ☐ Owned and occupied by grantor(s) at time of sale.
- ☐ Owners as joint tenants must all qualify.
- ☐ Resident of the State of New Jersey.

* IN THE CASE OF HUSBAND AND WIFE, ONLY ONE GRANTOR NEED QUALIFY IF OWNED AS TENANTS BY THE ENTIRETY

C. LOW AND MODERATE INCOME HOUSING (See Instruction #8)
- ☐ Affordable according to HUD standards.
- ☐ Meets income requirements of region.
- ☐ Reserved for occupancy.
- ☐ Subject to resale controls.

(5) NEW CONSTRUCTION (See Instruction #9) – Affidavit must be executed by Grantor
- ☐ Entirely new improvement.
- ☐ Not previously used for any purpose.
- ☐ Not previously occupied.
- ☐ "NEW CONSTRUCTION" printed clearly at the top of the first page of the deed.

Deponent makes this Affidavit to induce the County Clerk or Register of Deeds to record the deed and accept the fee submitted herewith in accordance with the provisions of c. 49, P.L. 1968, as amended through c. 66, P.L. 2004.

Subscribed and sworn to before me this 11th day of August, 2006

Claire Sabatini
Notary Public
CLAIRE M. SABATINI
A Notary Public of New Jersey
My Commission Expires Feb. 6, 2009

Signature of Deponent
1855 Campus Parkway
Wall, NJ 07719
Address of Deponent

William R. Clayton
Name of Grantor
William R. Clayton, Member
Address of Grantor at Time of Sale
Ross D. Gertner, Esq.
Bathgate, Wegener & Wolf
Name/Company of Settlement Officer

FOR OFFICIAL USE ONLY
Instrument Number _____ County _____
Deed Number _____ Book _____ Page _____
Deed Dated _____ Date Recorded _____

This form is prescribed by the Director, Division of Taxation in the Department of the Treasury, as required by law, and may not be altered or amended without the approval of the Director.

CERTIFIED COPY

The Street address of the Property is:

Promises by Grantor. The Grantor promises that the Grantor has done no act to encumber the property. This promise is called a "covenant as to grantor's acts" (N.J.S.A. 46:4-6). This promise means that the Grantor has not allowed anyone else to obtain any legal rights which affect the property (such as by making a mortgage or allowing a judgment to be entered against the Grantor).

Signatures. The Grantor signs this Deed as of the date at the top of the first page.

NOT CERTIFIED COPY

Witnessed by:

RALPH CLAYTON & SONS, a New Jersey partnership

By: CONCRETE I, LLC and CONCRETE II, LLC, New Jersey Limited liability companies (Partners)

By: WILLIAM R. CLAYTON, Member

STATE OF NEW JERSEY, COUNTY OF Ocean SS:

I CERTIFY that on Aug. 11 ___, 2006, William R. Clayton, Member, Grantor, personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this Deed;
(b) signed, sealed and delivered this Deed as his or her act and deed; and
(c) made this Deed for $1.00

as the full and actual consideration paid or to be paid for the transfer of title. (Such consideration is defined in N.J.S.A. 46:15-5.)

Claire Sabatini

CLAIRE M. SABATINI
A Notary Public of New Jersey
My Commission Expires Feb. 8, 2008

RECORD AND RETURN TO:
ROSS D. GERTNER, ESQ.
Bathgate, Wegener & Wolf
One Airport Road
Lakewood, NJ 08701

HELP

Get Image

Instrument Details

Type	DEED
Inst. Number	2006134902
Date	09/11/2006
Book/Page	OR-8593/2315
GRANTOR	RALPH CLAYTON & SONS
GRANTEE	GREMS-KIRK RAILWAY LLC
Block/Lot	43/21
Township	FREEHOLD TWP

Related Documents by Block and Lot

	Inst. Num	Document
View	2006134902*	Deed

* Instrument Index in search results.

EXHIBIT H

USER: OPS$EXTLPS DIVISION OF COMMERCIAL RECORDING 02-01-2007
FORM:CRPIN_I CORPORATION FILING - INQUIRY 04:41

CORP NUM: 0600276689 GREMS-KIRK RAILWAY, L.L.C.
STATUS: ACT INCORP DATE: 08/10/2006 EFFECT DATE: 08/10/2006
TYPE: LLC STATUTE: 42:2B PURPOSE: GENERAL A/R MONTH: 8
REGISTERED AGENT: AGENT NUMBER: 633889
NAME: ROSS D GERTNER
AGENT MAILING ADDRESS: SERVICE OF PROCESS ADDRESS (OPTIONAL):
ONE AIRPORT RD

LAKEWOOD NJ ,08701-0000 , -
VALID DELIVERABLE
INCORPORATOR NAME AND ADDRESS:
NAME:
ADDRESS 1:
ADDRESS 2: INCORP STATE: NJ
CITY,ST,ZIP: , -
FOLDER NUMBER: REEL NUMBER: STOCK:
DCR SUS BGN DTE: TAX SUS BGN DTE:
SUS END DTE: SUS END DTE: # OF PAGES: 0
WOULD YOU LIKE TO SEE MORE DETAILS ON THIS CORP? :

Count: *0 <Replace>

CERTIFICATE OF SERVICE

I certify that I have this day, February 21, 2007, served copies of the Request for Stay in this proceeding (FD Nos. 34986 & 34987) by the New Jersey Department of Environmental Protection upon John K. Fiorilla, Esq., attorney for applicant, Ashland Railroad, Inc., via electronic mail at jfiorilla@capehart.com.

Michele D. McGahey

Michele D. McGahey