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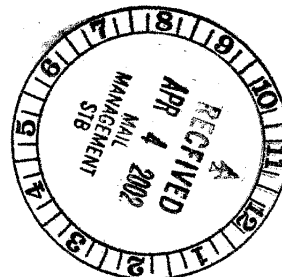
DID# 0101915002

April 3, 2002

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

FD-34192

ATT: Tim Cambridge



Via Federal Express

Re: HI TECH TRANS, LLC, CANADIAN PACIFIC RAILROAD,
CORP. - PETITION FOR A DECLARATORY ORDER - HUDSON
COUNTY, NEW JERSEY,

Dear Mr Cambridge:

Enclosed please find the eleven copies of the petition the original of which
was delivered yesterday with the check for the \$1,400 filing fee and the 3 1/2" diskette
containing the same in Microsoft Word 6.0 format.

The eleventh copy of the petition and a self addressed Federal Express
packet are enclosed as I would greatly appreciate receiving a dated copy of the
documents as filed with the Finance Docket Number.

Thank you for your attention to this matter and for your assistance in
correcting this error.

Very truly yours,

John F. McHugh

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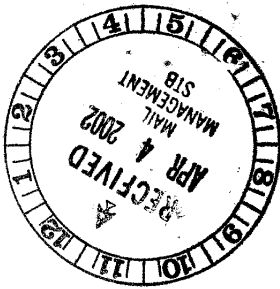
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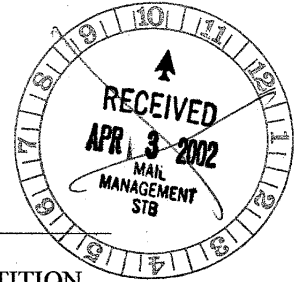
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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET

34192



HI TECH TRANS, LLC, CANADIAN PACIFIC RAILROAD, CORP. - PETITION
FOR A DECLARATORY ORDER - HUDSON COUNTY, NEW JERSEY,

205113

Petitioners, pursuant to 5 U.S.C. §554(e), seek a declaratory order that the Surface Transportation Board [STB] has exclusive jurisdiction over Petitioners' activities and those of its customers who seek to utilize rail services and nullifying the statutes and ordinances of New Jersey which render shipping by rail via the Petitioner's facilities unlawful on the ground that the use of Petitioner's facilities for the shipment of waste is not authorized pursuant to local law.

FACTS

Hi Tech Trans, LLC [Hi Tech] is a company organized under the laws of the State of New Jersey which operates a facility as a licensed agent of and on the property of the Canadian Pacific Railroad [CP] in Newark, N.J. Hi Tech is the local agent for the Canadian Pacific Railway which contracts for, gathers by truck and then loads construction and demolition debris and contaminated soils onto railway cars for transport in interstate commerce. Hi Tech issues bills of lading for such shipments as the agent of the Canadian Pacific Railway. Hi Tech contracts with the ultimate shipper of the cargos as well as with truckers licensed by the State of New Jersey to transport the cargos from the shipper's site (usually a construction site) to the rail loading facility where the cargos are transferred in bulk from the truck to a rail car. Neither Hi Tech nor CP store

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any waste materials upon the premises of the rail loading facility. Hi Tech inspects all waste moving through the Newark facility to insure that the materials are appropriate for such transport and fully comply with all federal regulations related to the safe handling of such materials. CP maintains all federal authority necessary for the transport of all grades of waste by rail. The Hi Tech-CP operation however, is limited to materials deemed non-hazardous pursuant to federal regulations and law.

Hudson County New Jersey has informed Hi Tech that it has designated the Hudson County Improvement Authority [HCIA] as its agent to implement and enforce its waste management régime. By a procurement process, that agency has selected a specific facility to receive all construction and demolition waste and contaminated soils originating in Hudson County (See: In the Matter of Certain Amendments to the Adopted and Approved Solid Waste Management Plan of the Hudson County Solid Waste Management District, Exhibit A). State laws impose fines on any transporter licensed by the State which delivers waste to a facility which, although licensed by the State, has not been designated by a State authorized district such as Hudson County to receive waste. The State laws also allow for the imposition of fines upon any transporter which delivers waste to a facility not authorized to receive waste (licensed) by the State. HCIA has informed Hi Tech that it believes that Hi Tech has accepted Hudson County generated waste. It has also notified Hi Tech that pursuant to the Hudson County Solid Waste Management Plan and/or under applicable New Jersey laws, Hi Tech is not authorized to accept Hudson County generated waste. . HCIA has also informed Hi-Tech that any person delivering waste to its Newark facility is similarly subject to fines and penalties as provided in New Jersey Revised Statutes 13:1E-9. The

HCIA has demanded that Hi-Tech provide it with information as to the identity of entities which have delivered waste to the Hi-Tech-CP facility, Exhibit B and has rejected arguments that the facilities, as rail facilities, do not require local authority to receive such cargos. Exhibit C.

The language of the Hudson County Solid Waste Management Plan at issue here reads as follows:

All waste types 10 and 25 not collected either by a municipality or through a contract with a municipality but, instead, is collected from non municipal generators pursuant to contracts between the generators and private solid waste collectors (up to 100,000 tons annually) are directed to the Union County Resource Recovery Facility located at 1499 Routes 1 and 9 North (Lots 8 and 9, Block 338) in the City of Rahway, Union County.

All waste types 10 and 25 collected either by a municipality or through a contract with a municipality (up to 300,000 tons annually) are directed to the SWT&R Transfer Station located at 442 Frelinghuysen Avenue (Lot 24, Block 3516) in Newark, Essex County for processing and transfer for transport by Hudson-JV to the Grand Central Landfill in Pen Argyle, Pennsylvania.

All waste types 13,23, and 27, and grits and screenings are directed to the HMDC 1-E North Area Landfill located at 100 Baler Boulevard (Lot 1, Blocks 175-183;185-189) in North Arlington, Bergen County and in Kearny, Hudson County (Lot 10, Block 149).

All solid waste facility operators and transporters registered with the Department and operating within the County and affected by the amendment contained herein shall operate in compliance with this amendment and all other approved provisions of the County Plan. Any facility operator or transporter who fails to comply with the provisions contained herein shall be deemed to be in violation of N.J.S.A. § 13:1E-1 et seq., in violation of N.J.S.A. 7:25-1 et seq., and in violation of their registration to operate a solid waste facility or a collection system issued thereunder by the Department and shall be subject to the provisions and penalties of N.J.S.A. § 13: 1E-9 and 12 and all other applicable laws.

(page 9 of Exhibit A)

The relevant provisions of N.J.S.A. § 13:1E-9 read as follows:

g. Any person who knowingly:

(1) Transports any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;

(2) Generates and causes or permits to be transported any hazardous waste to a facility or any other place which does not have authorization from the department to accept such waste;

(3) Disposes, treats, stores or transports hazardous waste without authorization from the department;

shall, upon conviction, be guilty of a crime of the third degree and, notwithstanding the provisions of N.J.S.2C:43-3, shall be subject to a fine of not more than \$50,000.00 for the first offense and not more than \$100,000.00 for the second and each subsequent offense and restitution, in addition to any other appropriate disposition authorized by subsection b. of N.J.S.2C:43-2.

The relevant provisions of N.J.S.A. §13:1E-12. read as follows:

Revocation or suspension of registration

The department, after hearing, may revoke or suspend the registration issued to any person engaged in the solid waste collection or solid waste disposal upon a finding that such person:

a. Has violated any provision of this act or any rule, regulation, or administrative order promulgated hereunder; or

b. Has violated any provision of any laws related to pollution of the waters, air or land surfaces of the State; or

c. Has refused or failed to comply with any lawful order of the department.

HCIA has demanded that Hi Tech provide the County with information as to the origins of all cargos it has handled. HCIA has informed Hi Tech that it will use that information to fine any Waste Hauler or Materials Handling Facility, including Hi-Tech, pursuant to the above cited State Laws, which has delivered or received Hudson County generated waste which facility is not authorized under the Certified Waste Management Plan of The Hudson County Waste Management District as amended on March 11, 1999 (hereinafter "The Plan"). Canadian Pacific Railroad and its agent, Hi Tech Trans, LLC are not licensed by the State of New Jersey to transport waste nor are they authorized to transport waste pursuant to the Plan.

The facility designated by the Plan for Construction and Demolition Waste and Contaminated Soils is a truck to truck facility. By selecting that facility, Hudson County has rendered rail either illegal or noncompetitive. The double handling and additional trucking necessitated by trans-shipping the type of waste handled by Hi Tech-CP from a truck to truck facility to a rail facility imposes a tremendous cost burden on the rail mode. Further, passage through the truck based transfer station serves no purpose. Such a process inherently favors truck contractors over rail carriers.

By excluding rail transport, the County has imposed a substantial burden on interstate commerce. No legitimate interest of the County is advanced by this ordinance which could not be fully protected by other available means. Through its governmental authority, Hudson County has attempted to regulate Petitioner's rail and intermodal operations and in doing so, it has invaded the exclusive jurisdiction of this Board.

THE JURISDICTION OF THE SURFACE TRANSPORTATION BOARD IS
EXCLUSIVE

Canadian Pacific Railroad is rail carrier as that term is defined in 49 USC §10102(5) to wit "a person providing common carrier railroad transportation for compensation". Canadian Pacific Railroad is registered to transport hazardous materials under the Hazardous Materials Transportation Act, 40 U.S.C. §5101 et seq. and is therefore fully authorized under federal law to provide the services rendered via Hi Tech's facilities. Hi Tech Trans is an entity engaged exclusively in handling freight in a continuous intermodal rail move in conjunction with Canadian Pacific.

Title 49 U.S.C. §10501(b) provides that the authority of the Surface Transportation Board over "(1) transportation by rail carriers and the remedies provided in this part with regard 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 discontinuation 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." Such jurisdiction must, of necessity, extend to an application of local law which is applied in such a way as to unduly interfere with interstate commerce.

The Surface Transportation Board has exclusive jurisdiction over any rail activity, including the activities of HI Tech Trans which "regardless of ownership" is engaged in services related to that movement, i.e., the "receipt, delivery, elevation," ... "transfer in transit", ... "handling" of property, 49 U.S.C. §10102 (9) (B).

HUDSON COUNTY'S FLOW CONTROL REGULATIONS ARE PREEMPTED TO
THE EXTENT THAT THEY RENDER SHIPPERS UTILIZING RAIL SERVICES
SUBJECT TO FINES

49 U.S.C. §11321(a) specifically proscribes any law which impedes the exclusive authority of the Surface Transportation Board. It states that "a rail carrier...is exempt from the antitrust laws and from all other laws, including state and municipal law, as necessary to let that rail carrier...hold, maintain and operate property...acquired through..." (a transaction approved or exempt from approval by the Surface Transportation Board) See: City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998). The exemption from state law contained in the §11321, is to be interpreted broadly, See; Ex Norfolk & Western Ry. V. American Train Dispatchers, Assn. 499 U.S. 117, 127-34. (1991) "The... language in §11321(a) exempting carriers from ...State and municipal law is clear broad and unqualified". See also, CSX Transportation v. Georgia Public Service Commission, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996). The congressional intent to preempt is express. Congress has made its intent to exempt rail operations from all State and Federal law other than the Interstate Commerce Commission Termination Act clear.

In addition to invading a field given by Congress exclusively to the Surface Transportation Board, Hudson County's regulations conflict directly with Federal law. Hudson County ordinances and regulations impose fines on truckers hired by Hi Tech to pick up cargos for intermodal shipment by rail, and on Hi Tech and CP for the receipt of cargos for rail shipment from Hudson County. The fines are imposed based upon the HCIA's assertion that Petitioners' rail intermodal services are not authorized by

the County or by the State of New Jersey. CP and Hi Tech Trans, its agent, however, are both authorized to accept waste for transport under federal law. No local governmental agency may, through the use of governmental authority, determine that an entity operating under authority of Federal Law, is unauthorized to do what such Federal law not only allows, but mandates, i.e. provide common carrier transportation services to the public on reasonable terms. Where, as here, Hudson County seeks to impose criminal sanctions for exercising a right to use federally authorized transportation services, the County's regulations conflict absolutely with federal law and are a nullity. Cipollone v. Liggett Group, Inc. 505 U.S. 504, 515 (1992), Teper v. Miller, 82 F. 3d 989, 993 (8th Cir. 1993).

Hudson County's policies discriminate against rail carriers both by requiring State permits to receive waste and by requiring all waste to move through the county designated truck to truck facility. The County's regulations do not seek to affect only waste generated by the County, but attempt to affect the conduct of private parties. Where a governmental authority seeks to affect the transportation mode choices of private trash generation or transportation interests, it is not acting as a market participant but as a transportation regulator, Huish Detergents, Inc. v. Warren County, Kentucky, 214 F.3d 707, 715, (6th Cir. 2000). Where, as here, a county ordinance or regulation directly conflicts with Federal Law, to wit by rendering federally mandated activity illegal, local law is preempted Free v. Bland, 369 U.S. 663, 666 (1962). The Board in reviewing this situation should not confine its consideration to the facts of the single matter before it but should consider the potential effect on the national transportation regulatory scheme of multiple similar local ordinances. If Hudson County may render

rail service illegal, absent concession to local regulation or otherwise, a multiplicity of such regulations would cripple the nation's rail system. The threat to the national interest requires nullification of local action whenever it effects interstate commerce, even where the purpose of the action is not overtly discriminatory particularly where a multiple of such local actions have the potential of a national effect. U & I Sanitation. V. City of Columbus, 205 F. 3d 1063, 1071 (8th. Cir. 2000).

In U&I Sanitation the 8th Circuit confronted precisely the type of flow control regulation which Hudson County seeks to impose. After reviewing, and finding wanting, all the City of Columbus' arguments, the Court, quoting C&A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 406 (1994) (O'Connor J. concurring) held the ordinances unconstitutional.

We conclude that the ordinance's effects upon interstate commerce are far from trivial. Assuming, as we must, that all cities such as Columbus enacted flow control ordinances like the one at issue here, the interstate market in recyclable materials extracted from solid waste could be substantially diminished or impaired, if not crippled. This is no academic problem for:

Over 20 States have enacted statutes authorizing local governments to adopt flow control laws. If the localities in these states impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, persuasive flow control would result in the type of balkanization the [Commerce] Clause is primarily intended to prevent.

Accordingly, Hudson County's regulations are void pursuant to 49 U.S.C. §11321(a).

THE COUNTY ORDINANCES AND REGULATIONS FAVOR TRUCK OVER RAIL
CARRIAGE AND THUS VIOLATE THE ENVIRONMENTAL MANDATES THE
BOARD IS CHARGED WITH ENFORCING

The County regulations are inconsistent with Federal environmental policy to the extent that they confine County generated waste to truck transport. Such transport generates 40% more emissions than would be generated by a rail haul. Congress made it clear in the National Environmental Policy Act, 42 U.S.C. §4331 et seq., that:

it is the continuing responsibility of the Federal Government to use all practicable means, [to] -

...
(2) assure for all Americans safe, healthful, productive and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

...

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

Id., 42 U.S.C. § 4331 (b). To achieve these goals, Congress "authorizes and directs . . . all agencies of the Federal Government" to consider:

(C) . . . (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action, ...

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332. Moreover, the Clean Air Act requires a federal program to favor environmentally sound proposals and disfavor those that adversely affect air quality:

Each department, agency, or instrumentality of the Federal Government having authority to conduct or support any program with air-quality related transportation consequences shall give priority in the exercise of such authority, ... to the implementation of those portions of plans prepared under this section to achieve and maintain the national primary ambient air quality standard.

42 U.S.C. §7506(d).

Rail haulage of waste, or of any product, is environmentally preferable to truck transport. To move the same tonnage by truck generates not only more emissions, it consumes valuable highway space, constitutes a growing safety problem and imposes a huge highway maintenance bill on the taxpayers. Thus, not only are the County's regulations preempted by the provisions of the §11321(a), they are arbitrary and in conflict with the principals which must govern any decision by the Surface Transportation Board in exercising its exclusive management of the nation's transportation system.

THE COUNTY'S ORDINANCES AND REGULATIONS NEITHER PROTECT A
LEGITIMATE LOCAL CONCERN NOR CONSTITUTE THE ONLY MEANS TO
PROTECT SUCH AN INTEREST WHICH IS AVAILABLE TO THE COUNTY

The County's designation of a single, in county facility through which all county waste of the type here in question must flow, is per se unlawful. C&A Carbone, Inc. v. Town of Clarkstown, New York, Supra 511 U.S. 392. The County is not a market participant in that it is providing no services other than administration of flow control. Huish Detergents, Inc. v. Warren County Ky., supra 214 F. 3d 715.

It would appear that the County's sole concern in establishing the waste management program is to impose fees on the movement of waste to finance its waste management staff and infrastructure. A purely financial local purpose is insufficient to

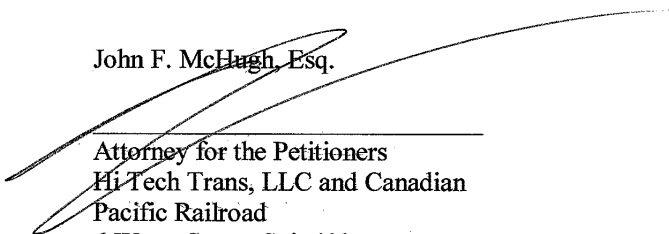
justify any burden on interstate commerce. U & I Sanitation v City of Columbus, supra 1070. The County cannot show that it has no alternative to the regulatory scheme it has established to finance its waste management scheme. It could, as New Jersey communities were invited to do by the Third Circuit Court in Atlantic Waste Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County, 112 F. 3d 652, 666 (3rd Cir. 1997) impose a tax or surcharge on all waste to pay the costs of its waste management infrastructure. Such a tax, evenly applied, would not discriminate against rail carriage or against interstate interests nor would such taxes or charges be an attempt to regulate rail carriers directly or indirectly, "The surcharge may be an annoyance, but it is an equal-opportunity annoyance." Maharg, Inc. v. Van Wert Solid Waste management District, 249 F. 3d 544, 553 (6th Cir. 2001).

CONCLUSION

Rail carriers are authorized to accept cargo for shipment from anyone seeking such services and the rail carrier must accept such proffered cargo for a reasonable fee. Hudson County New Jersey cannot forbid its residents from using rail services through the use of its governmental power to impose fines. Such power is specifically preempted by the provisions of §11321(a). The Surface Transportation

Board's jurisdiction over rail carriers is exclusive and that includes protecting the right of the public to access to rail carriers.

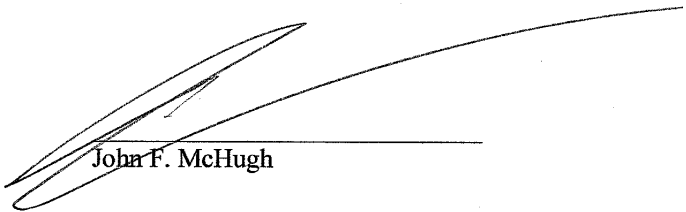
Dated, New York, N.Y.
April 2, 2002


John F. McHugh, Esq.

Attorney for the Petitioners
Hi Tech Trans, LLC and Canadian
Pacific Railroad
6 Water Street, Suit 402
New York, N.Y. 10005
212-483-0875

Verification

John F. McHugh, an attorney duly admitted to practice before this Board verifies under penalty of perjury that I is the attorney for the petitioners herein and based upon the information made available to me by my clients this petition correctly sets forth the material facts.



John F. McHugh

CERTIFICATE OF SERVICE

Sylvia Cruz certifies under penalty of perjury that she is over eighteen years of age, not a party to this matter and is the office manager of the office of John F. McHugh, Esq. at 6 Water Street, New York, N.Y. 10004. On this second day of April, 2002 she served a true copy of this Petition for a Declaratory Order pursuant to 5 U.S.C. 554(e) on the Hudson County Improvement Authority by regular mail addressed to the Authority at 574 Summit Avenue, 5th Floor, Jersey City, N.J. 07306.

Dated, New York, N.Y.
April 2, 2002

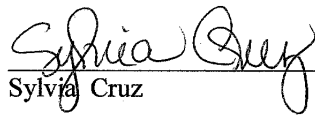

Sylvia Cruz

Exhibit A

Office of the Commissioner
P.O. Box 402
Trenton, NJ 08625-0402
Tel. # 609-292-2885
Fax. # 609-292-7695

IN THE MATTER OF CERTAIN AMENDMENTS
TO THE ADOPTED AND APPROVED SOLID
WASTE MANAGEMENT PLAN OF THE
HUDSON COUNTY SOLID WASTE
MANAGEMENT DISTRICT

CERTIFICATION
OF THE MARCH 11, 1999
AMENDMENT TO THE HUDSON COUNTY
DISTRICT SOLID WASTE MANAGEMENT PLAN

BY ORDER OF THE COMMISSIONER:

A. Introduction

The New Jersey Solid Waste Management Act (N.J.S.A. 13:1E-1 et seq.) established a comprehensive system for the management of solid waste in New Jersey. The Act designated all twenty-one (21) of the state's counties, and the Hackensack Meadowlands District, as Solid Waste Management Districts, and mandated that the Boards of Chosen Freeholders and the Hackensack Meadowlands Development Commission develop comprehensive plans for waste management in their respective districts. On January 27, 1982, the Department of Environmental Protection (Department or DEP) approved, with modifications, the Hudson County District Solid Waste Management Plan (County Plan).

The Act requires that all district plans be based on and accompanied by a report detailing the existing waste disposal situation in the district, and a plan which includes the strategy to be followed by the district in meeting the solid waste management needs of the district for a ten-year planning period. The report must detail the current and projected waste generation for the district, inventory and appraise all facilities in the district, and analyze the waste collection and transportation systems which serve the district. The disposal strategy must include the maximum practicable use of resource recovery techniques. In addition to this strategy, the plan must designate sufficient available suitable sites for the disposal of the district's waste for a ten-year period.

The Act further provides that a district may review its County Plan at any time and, if found inadequate, a new County Plan must be adopted. The Hudson County Board of Chosen Freeholders (County Freeholders) completed such a review and on March 11, 1999, adopted an amendment to its approved County Plan.

The amendment represents the County's supplemental response to the May 1, 1997 decision of the United States Court of Appeals for the Third Circuit which declared unconstitutional New Jersey's historic system of solid waste flow control. [See Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County et al. 112 F.3d 652 3d Cir. 1997, cert. den. November 10, 1997]. Specifically, each solid waste management district must reevaluate its solid waste disposal strategy in light of this recent court decision and, if necessary, initiate appropriate amendments thereto.

In general, the Department refers the County to the solid waste regulations at N.J.A.C. 7:26-1 et seq. to the extent they relate to specific procedural and substantive issues addressed in this and subsequent amendments. In addition, this certification is in no way intended by the DEP to represent a legal determination regarding the effect of the Atlantic Coast decision on any specific contract between public and/or private parties.

The amendment includes within the County Plan specified waste flows to the following solid waste disposal facilities based upon the completion of nondiscriminatorily bid contracts:

- *Waste types 13, 23, and 27, asbestos, and grits and screenings to the Hackensack Meadowlands Development Commission (HMDC) J-E Landfill;
- *Up to 100,000 tons annually of waste types 10 and 25 to the Union County Resource Recovery Facility (UCRRF); and
- *Up to 300,000 tons annually of waste types 10 and 25 as well as incinerator ash to the Grand Central Landfill in Pennsylvania.

The amendment was received by the Department on March 24, 1999 and copies were distributed to various administrative review agencies for review and comment, as required by law. The DEP has reviewed this amendment and has determined that the amendment adopted by the County Freeholders on March 11, 1999 is approved as provided in N.J.S.A. 13:1E-24.

B. Findings and Conclusions with Respect to the Hudson County District Solid Waste Management Plan Amendment

Pursuant to N.J.S.A. 13:1E-24a(1), I have studied and reviewed the March 11, 1999 amendment to the County Plan according to the objectives, criteria, and standards developed in the Statewide Solid Waste Management Plan and I find and conclude that this plan amendment is consistent with the Statewide Solid Waste Management Plan. In this regard, the County Freeholders are notified of the issues of concern relative to the March 11, 1999 amendment which are included in Section B.2. below.

In conjunction with the review of the amendment, the Department

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circulated copies to sixteen administrative review agencies and solicited their review and comment. Pursuant to N.J.S.A. 13:1E-24a(2) and (3), these agencies included various bureaus, divisions, and agencies within the Department. All agencies contacted are as follows:

Division of Water Quality Management, DEP
Division of Parks and Forestry, DEP
Division of Fish, Game and Wildlife, DEP
Division of Compliance and Enforcement, DEP
Division of Solid and Hazardous Waste, DEP
Office of Air Quality Management, DEP
Green Acres Program, DEP
Land Use Regulation Element, DEP
New Jersey Turnpike Authority
New Jersey Advisory Council on Solid Waste Management
Department of Agriculture
Department of Health
Department of Transportation
Department of Community Affairs
U.S. Environmental Protection Agency
Hackensack Meadowlands Development Commission

1. Agency Participation in the Review of the March 11, 1999 Amendment

The following agencies did not object to the proposed amendment:

Division of Water Quality Management, DEP
Division of Compliance and Enforcement, DEP
Green Acres Program, DEP
Department of Agriculture
Department of Transportation
Department of Community Affairs

The following agencies did not respond to our requests for comment:

Office of Air Quality Management, DEP
Division of Parks and Forestry, DEP
Division of Fish, Game and Wildlife, DEP
Land Use Regulation Element, DEP
New Jersey Advisory Council on Solid Waste Management
New Jersey Turnpike Authority
Department of Health
U.S. Environmental Protection Agency

The following agencies provided substantive comments as shown in Section B. of the certification document:

Division of Solid and Hazardous Waste, DEP
Hackensack Meadowlands Development Commission

2. Issues of Concern Regarding the March 11, 1999 Amendment

Issue: Previously Adopted Atlantic Coast Amendment

On November 13, 1997, the County Freeholders adopted an amendment proposing its initial response to the Atlantic Coast decision. Within its December 30, 1997 certification of the amendment, the DEP approved the concept of regulatory flow control based upon a nondiscriminatory procurement strategy, a disposal contract with Empire Landfill (now Alliance Landfill and known as the 1990 Landfill Agreement), a transportation services agreement with Hudson J-V, and an enforcement strategy. The Department remanded for further consideration and evaluation the imposition of an environmental investment charge, and approved with modification a transfer station services agreement with Solid Waste Transfer and Recycling, Inc. (SWT&R) in Newark, contingent upon receipt by the DEP of documents awarding a nondiscriminatory bid contract. In a subsequent certification dated May 27, 1998, the Department approved the nondiscriminatory procured contract with SWT&R of Newark, Essex County, as presented in an amendment adopted on February 11, 1998.

Issue: American Ref-Fuel Litigation

An appeal of the Department's December 30, 1997 certification was filed by American Ref-Fuel company of Essex County in the matter entitled Hudson County District Solid Waste Management Plan, Superior Court, Appellate Division, Docket No. A-3290-97T, challenging that portion of the November 13, 1997 plan amendment that relied on the 1990 Landfill Agreement with Empire Landfill on the grounds that the 1990 Landfill Agreement should have been publicly bid in accordance with the Local Public Contracts Law.

Additionally, American Ref-Fuel initiated subsequent litigation in the Superior Court of New Jersey, Hudson County, in the matter entitled American Ref-Fuel Company of Essex County v. Hudson County Improvement Authority, Empire Sanitary Landfill, Inc. d/b/a Alliance landfill and U.S. Systems Corp., Docket No. HUD-L-1764-98, in which the Law Division entered an Order on March 25, 1998, invalidating the 1990 Landfill Agreement, as well as a subsequent amendment thereto known as the 1998 Amendment Agreement, but stayed the Order pending conclusion of appeals. The Hudson County Improvement Authority (HCIA) and Empire filed appeals in the Superior Court, Appellate Division, bearing Docket Numbers A-005080-97T3 and A-005011-97T3, respectively.

Issue: Nondiscriminatory Procurement Process

In response to the noted litigation, the HCIA initiated a procurement process, pursuant to the Local Public Contracts Law (N.J.S.A. 40A:11-1 et seq.) seeking contingent solid waste

disposal services to ensure the continued, uninterrupted provision of solid waste disposal services to in-county generators. The contingent disposal services contract, for a term of five (5) years unless terminated earlier in accordance with the terms thereof, commences on the date of execution, but the services do not commence until thirty (30) days after the issuance of a Notice to Proceed by the HCIA that may be issued at any time during the term of the contract. The issuance of a Notice to Proceed is contingent upon a final determination of the American Ref-Fuel litigation affirming the decision of the Law Division, Hudson County, invalidating the Landfill Agreement as violative of the Local Public Contracts Law and thereby causing the HCIA to be unable to utilize the Empire Landfill under the Landfill Agreement.

On September 22, 1998, HCIA issued bid specifications calling for receipt of bids on October 27, 1998 for the provision of contingent solid waste disposal services for processible waste types 10 and 25 (under Alternate A), and for nonprocessable waste types 13, 23 and 27, and grits and screenings (under Alternate B). The request for both bids was advertised locally in The Jersey Journal, throughout New Jersey through The Star Ledger, and nationally through The New York Times, and Waste News. Therefore, this procurement process was open to all bidders, regardless of geographical location.

On October 27, 1998, HCIA awarded a contract to Ogden Martin Systems of Union, Inc. for disposal of 100,000 tons annually of processible waste at the UCRRF in Rahway, Union County as the lowest responsible bidder under Alternate A. Also on October 27, 1998, the HCIA awarded a contract to HMDC for disposal of all nonprocessable waste at the HMDC's 1-E North Area Landfill in North Arlington, Bergen County as the lowest responsible bidder under Alternate B.

On November 4, 1998, HCIA issued bid specifications calling for receipt of bids on November 30, 1998 for disposal services to cover the balance of up to 300,000 tons annually of processible waste generated within the County not delivered to the UCRRF. This request for bids was advertised in The Jersey Journal and The Star Ledger, and copies of the bid specifications were provided to all firms, including out-of-state facilities, that received the September 22, 1998 bid specifications. On December 17, 1998, the HCIA awarded a contract to Waste Management of Pennsylvania, Inc. as the lowest responsible bidder for disposal of up to 300,000 tons annually of processible waste at the Grand Central Landfill, located in Pen Argyle, Pennsylvania.

The Department has reviewed the HCIA's nondiscriminatory procurement process to determine if it is consistent with the criteria established in the Atlantic Coast decision. Since the

Page 6 of 10

HCIA has sufficiently demonstrated that it secured all disposal contracts in a nondiscriminatory manner, within Section C. of the certification the Department approves the following waste flows:

*All waste types 10 and 25 generated from within Hudson County not collected either by a municipality or through a contract with a municipality but, instead, is collected from nonmunicipal generators pursuant to contracts between the generators and private solid waste collectors (e.g., all commercially generated solid waste) up to 100,000 tons annually are directed to the UCRRF. The 100,000 amount has been determined by review of historical data collection which reveals this to be the amount of waste types 10 and 25 commercially collected on an annual basis.

*All waste types 10 and 25 generated from within Hudson County collected either by a municipality or through a contract with a municipality up to 300,000 tons annually are directed to the SWT&R Transfer Station for processing and transfer for transport by Hudson-JV to the Grand Central Landfill.

*All waste types 13, 23, and 27, and grits and screenings generated from within Hudson County are directed to the HMDC 1-E North Area Landfill.

*All waste type 27I (incinerator ash) generated from within Hudson County is directed to the Grand Central Landfill.

Issue: Materials Recovery Operations

In its May 27, 1998 certification, in response to prior directives of the DEP to address materials recovery, the Department approved the HCIA's interim policy of addressing materials recovery. Specifically, that all transporters of type 13C waste generated from within the County and all transporters serving commercial premises within the County have the option of delivering such waste to a DEP approved materials recovery facility provided that the residue therefrom is delivered to the SWT&R Transfer Station.

The March 11, 1999 amendment further clarifies the HCIA's materials recovery policy. Namely, that generators and/or transporters of waste types 10 and 25 that are not municipally collected or collected pursuant to municipal contract shall have the option to deliver such waste to a DEP approved materials recovery facility provided, however, that (1) such generator and/or transporter shall immediately notify the HCIA of the name and location of the materials recovery facility to which such commercially generated waste is delivered and (2) all residue therefrom is delivered to the Union County Resource Recovery Facility. In the case of waste types 13, 23, and 27, the option to deliver such waste to a DEP approved materials recovery facility is also available provided, however, that (1) such generator and/or transporter shall immediately notify the HCIA of

the name and location of the materials recovery facility to which such waste is delivered and (2) all residue therefrom shall be delivered to the HMDC 1-E North Area Landfill. However, the Department is concerned that this materials recovery option is not available to municipally collected waste types 10 and 25 which are directed to the SWT&R Transfer Station prior to out-of-state disposal. Regardless of the collection option chosen (e.g., commercial or municipal) and notwithstanding the mandatory source separation requirements in place, commercial and institutional generators may request a source separation exemption from the host municipality (pursuant to N.J.S.A. 13:1E-99.16d.). While the HCIA is not aware of any such exemptions being granted, if such exemptions are issued, the materials recovery option must be available to such commercial and institutional generators. Therefore, the County is hereby directed to provide for the materials recovery option for municipally collected commercial or institutional waste as an administrative action (pursuant to N.J.S.A. 7:26-6.11(b)6.) if any municipal source separation exemptions are granted.

Issue: Litigation Resolution

The HCIA, Empire Sanitary Landfill, Inc. and U.S. Systems Corp. have recently entered into a Settlement Agreement, providing for the withdrawal of appeals in the American Ref-Fuel litigation pending before the Superior Court of New Jersey, Appellate Division, and for the termination of the parties' respective obligations under the 1990 Landfill Agreement and the subsequent 1998 Amendment Agreement. The settlement includes the cancellation of any obligation that the HCIA may have had under the 1990 Landfill Agreement to pay an estimated \$110 million for any unused capacity. Accordingly, disposal services for all in-county generated solid waste shall be provided by Ogden Martin, HMDC and Waste Management pursuant to the terms in the awarded respective contracts.

Issue: HMDC Comments

As an administrative review agency, the HMDC was submitted a copy of the March 11, 1999 amendment for review. In a letter dated April 1, 1999, the HMDC submitted extensive comments to the DEP relative to the acceptance of grits and screenings and asbestos at the HMDC 1-E Landfill. Relative to grits and screenings, the HMDC is concerned with grits and screenings physically generated outside the boundaries of Hudson County being included within the regulated Hudson County waste stream which the HMDC is obligated to accept. This concern is valid since the March 11, 1999 amendment only directs grits and screenings generated from within Hudson County to the HMDC 1-E North Area Landfill. The origin of generation of grits and screenings is the site location of the sewage treatment plant or appurtenances. Therefore, grits and

screenings generated by a sewage treatment plant or appurtenances located within Hudson County may be directed to the HMDC Landfill. However, if the plant or appurtenances are located outside of Hudson County, grits and screenings may not be directed to the HMDC Landfill pursuant to the March 11, 1999 amendment. Concerning the acceptance of asbestos at the HMDC 1-E Landfill, the HMDC states asbestos materials "...were specifically exempted from the bid documents and our contract with the HCIA. We strenuously oppose the post-bid inclusion of this material into the regulated waste stream." The DEP concurs with the HMDC that the HCIA did not specifically identify waste type 27A (asbestos) within its nondiscriminatory procurement documents. Therefore, since the HCIA did not conduct a nondiscriminatory procurement process for the disposal of asbestos, within Section C. of this certification the Department is constrained from approving asbestos within those waste types subject to flow control in Hudson County.

Certification of the Hudson County District Solid Waste Management Plan Amendment

In accordance with N.J.S.A. 13:1E-1 et seq., specifically N.J.S.A. 13:1E-21, which establishes specific requirements regarding the contents of the district solid waste management plans, I have reviewed the March 11, 1999 amendment to the approved County Plan and certify to the County Freeholders that the March 11, 1999 amendment is approved as further specified below.

The County Plan inclusion of the HCIA's nondiscriminatory procurement process to secure disposal services is approved. Specifically, since the HCIA has adequately demonstrated that it secured all disposal contracts in a nondiscriminatory manner, the HCIA may commence the delivery of all Hudson County generated waste as follows:

*All waste types 10 and 25 not collected either by a municipality or through a contract with a municipality but, instead, is collected from nonmunicipal generators pursuant to contracts between the generators and private solid waste collectors (up to 100,000 tons annually) are directed to the Union County Resource Recovery Facility located at 1499 Routes 1 and 9 North (Lots 8 and 9, Block 338) in the City of Rahway, Union County.

*All waste types 10 and 25 collected either by a municipality or through a contract with a municipality (up to 300,000 tons annually) are directed to the SWT&R Transfer Station located at 442 Frelinghuysen Avenue (Lot 24, Block 3516) in Newark, Essex County for processing and transfer for transport by Hudson-JV to the Grand Central Landfill in Pen Argyle, Pennsylvania.

*All waste types 13, 23, and 27, and grits and screenings are

directed to the HMDC 1-E North Area Landfill located at 100 Baler Boulevard (Lot 1, Blocks 175-183; 185-189) in North Arlington, Bergen County and in Kearny, Hudson County (Lot 10, Block 149).

*All waste type 27I (incinerator ash) is directed to the Waste Management of Pennsylvania, Inc. Grand Central Landfill located on Pen Argyle Road, in Pen Argyle, Plainfield Township, Northampton County, Pennsylvania.

D. Other Provisions Affecting the Plan Amendment

1. Contracts

Any contract renewal or new contract for solid waste collection or disposal which is inconsistent with this amendment to the County Plan and which was executed prior to the approval of this amendment and subsequent to the effective date of the Solid Waste Management Act (July 29, 1977), and which shall further be for a term in excess of one year, shall immediately be renegotiated in order to bring same into conformance with the terms and provisions herein set forth. Any solid waste collection operation or disposal facility registered by the Department and operating pursuant to a contract as herein described, shall be deemed to be in violation of this amendment and of the County Plan if such renegotiation is not completed within ninety (90) days of the effective date of this amendment provided, however, that any such registrant may, upon application to the Department, and for good cause shown, obtain an extension of time to complete such renegotiation.

2. Compliance

All solid waste facility operators and transporters registered with the Department and operating within the County and affected by the amendment contained herein shall operate in compliance with this amendment and all other approved provisions of the County Plan. Any facility operator or transporter who fails to comply with the provisions contained herein shall be deemed to be in violation of N.J.S.A. 13:1E-1 et seq., in violation of N.J.A.C. 7:26-1 et seq., and in violation of their registration to operate a solid waste facility or a collection system issued thereunder by the Department and shall be subject to the provisions and penalties of N.J.S.A. 13:1E-9 and 12 and all other applicable laws.

3. Types of Solid Wastes Covered by the District Solid Waste Management Plan

The provisions of the County Plan shall apply to all solid wastes defined in N.J.S.A. 13:1E-3 and N.J.A.C. 7:26-2.13 including waste types 10, 13, 23, 25, and 27 and all applicable subcategories and

shall not apply to liquid and hazardous wastes. All nonhazardous materials separated at the point of generation for sale or reuse are subject to regulation in accordance with N.J.A.C. 7:26A-1 et seq.

4. Certification to Proceed with Implementation of Amendment

This document shall serve as the certification of the Commissioner of the Department to the County Freeholders and pursuant to N.J.S.A. 13:1E-24c. and f., the County shall proceed with the implementation of the approved amendment certified herein.

5. Definitions

For the purpose of this amendment and unless the context clearly requires a different meaning, the definitions of terms shall be the same as those found at N.J.S.A. 13:1E-3 and -99.12, N.J.A.C. 7:26-1.4, -2.13, and N.J.A.C. 7:26A-1.3.

6. Effective Date of the Amendment

The amendment to the County Plan contained herein shall take effect immediately.

7. Reservation of Authority

Nothing contained herein shall be construed as a limitation on any other action taken by the Department pursuant to its authority under the law. The County Plan, including any amendment made thereto, shall conform with the Statewide Solid Waste Management Plan, with appendices, which includes the Department's planning guidelines, rules, regulations, orders of the Department, and also includes the compilation of individual district plans and amendments as they are approved.

E. Certification of Approval of the Amendment by the Commissioner of the Department of Environmental Protection

In accordance with the requirements of N.J.S.A. 13:1E-1 et seq., I hereby approve the amendment, as outlined in Section C. of this certification, to the Hudson County District Solid Waste Management Plan which was adopted by the Hudson County Board of Chosen Freeholders on March 11, 1999.

Date

Robert C. Shinn, Jr., Commissioner
Department of Environmental Protection

Exhibit B

Oct 16 01:09:38p

SENT BY: MCHUGH & BARNES, PC;

212 483 0876

; OCT-16-01 4:15PM;

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p. 5



Commissioners

John L. Shinnick, Chairman
Martin A. Budnick, Vice Chairman
James E. Byrnes, Treasurer
John J. Duffy, Secretary
Thomas E. Donnelly
Frank M. Vaccaro, Esq.

Executive Director

Thomas P. Calvanico, Esq.

October 16, 2001

General Counsel

Robert L. Barry, Esq.

Hi Tech LLC/T. Fiore Recycling
91 Bay Street
Oak Island, Newark, N.J.

To Whom It May Concern:

This letter shall serve to introduce Michael Novembre and David Ruiz, Special Enforcement Officers of the Hudson County Improvement Authority.

Pursuant to the June 8, 1999 Certification of the New Jersey Department of Environmental Protection ("DEP"), all Hudson County generated solid waste types 10, 13 (including 13C), 23, 25 & 27 (excluding asbestos and asbestos containing materials) ARE subject to regulatory waste flow and are to be delivered to the Hudson County Improvement Authority's designated facilities as follows:

- 1) All waste types 10 and 25 generated from within Hudson County collected either by a municipality or through a contract with a municipality are directed to the SWT&R Transfer Station in Newark, New Jersey for processing and transfer for transport by Hudson-JV to the Grand Central Landfill.
- 2) All waste type 10 and 25 generated from within Hudson County not collected either by a municipality or through a contract with a municipality but, instead, is collected from nonmunicipal generators pursuant to contracts between the generators and private solid waste collectors (e.g., all commercially generated solid waste) are directed to the Union County Resource Recovery Facility (UCRRF) in Rahway, New Jersey.
- 3) All waste types 13, 23, and 27, and grits and screening generated from within Hudson County are directed to the HMDC 1-E North Area Landfill in North Arlington, New Jersey.

Oct 16 01:09:41p

SENT BY: MCHUGH & BARNES, PC;

212 483 0876

; OCT-16-01 4:16PM;

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0003/003

p. 6

- 4) All waste type 271 (incinerator ash) generated from within Hudson County is directed to the Grand Central Landfill.

In addition, pursuant to an Interlocal Services Agreement with the Hudson Regional Health Commission ("HRHC"), the HCIA's Enforcement Division acts as enforcement agent and conducts investigations for purposes of monitoring compliance and enforcing the Solid Waste Management Act pursuant to N.J.S.A. 26:3A2-25. In such capacity, the HCIA has the power to issue summonses to, or to institute actions in Superior Court against, any person who diverts solid waste to facilities in violation of the regulatory waste flow directive.

Please be advised that it has come to the attention of this Authority that Hudson County generated waste types as above listed have been delivered to your facility for processing and/or disposal. Accordingly, and pursuant to the requirements of N.J.A.C. 7:26-2.13(b), this letter requests your compliance with N.J.A.C. 7:26-2.13(b) and make your daily records immediately available to this Authority's representative.

At this time this Authority is requesting the daily records and O&D forms, for the period covering August 1, 2001 to present.

Your attention and cooperation to this matter is appreciated.

Very truly yours,



THOMAS P. CALVANICO, ESQ.
Executive Director

TPC/er

Exhibit C

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 MARIA M SMYTH

Also Admitted to NY
 Also Admitted to PA

January 29, 2002

via telecopier and regular mail

John F. McHugh, Esq.
 McHugh & Barnes
 20 Exchange Place
 New York, New York 10005-3201

**Re: Hi-Tech Transportation, LLC
 Solid Waste Transfer Station**

Dear Mr. McHugh:

This office serves as Special Counsel to the Hudson County Improvement Authority. Your letter of October 17, 2001 has been referred to me for review and response. Kindly accept my apology for the inordinate delay in forwarding this reply.

Having reviewed your correspondence, the various letters from the Secretary of the United States Surface Transportation Board, and the federal statutes and case law referenced therein, I must respectfully disagree with the conclusion that the operation by Hi-Tech Transportation, LLC, of a transfer station in the Oak Island Rail Yard in Newark and the delivery of Type 13C, construction and demolition material, by solid waste haulers are exempt under federal law from regulation by the HCIA.

It is the position of the HCIA that it lawfully may exercise waste flow control over solid waste types 10, 13 (including 13C), 23, 25, and 27 generated within Hudson County,

**LAW OFFICES
DECOTHS, FITZPATRICK,
GLUCK & COLE, LLP**

John F. McHugh, Esq.
January 29, 2002
Page 2

having procured solid waste disposal services in a manner that did not discriminate against interstate commerce. In obtaining solid waste transfer station, transportation and landfill services for the disposal of Hudson County solid waste, the HCIA has acted consistent with the Commerce Clause and in accordance with the applicable decisions of the federal courts, including Atlantic Coast Demolition Co., Inc. v. Atlantic County Board of Chosen Freeholders, et al., 112 F.3d 653 (3rd Cir. 1997). Consequently, the HCIA maintains an absolute ownership interest in these Hudson County solid waste types.

In your correspondence, the Federal District Court of Oregon decision in AGG Enterprises, Inc. v. Washington County, 2000 WL 361892 (D. Ct. 2001) was cited as dispositive of the issue of waste flow control where interstate commerce is involved. However, my reading of the opinion reveals that, contrary to the situation extant in Hudson County, the circumstances involved local licensure requirements and not a restriction on the disposal of solid waste collected from a particular area. In response to the plaintiff's reliance on U&I Sanitation, 205 F.3d 1063, (8th Cir. 2000), the court specifically stated in section 10 of its opinion that the ordinances of Washington County and the City of Beaverton were not flow control ordinances

There is no dispute that the court addressed the issue of preemption in rendering its decision and found the ordinances were preempted by the Federal Aviation Administration Authorization Act of 1994. However, in declaring an ownership interest in the solid waste types listed above that are generated in Hudson County, the HCIA is by no means attempting to regulate the rates, classifications, rules, practices, routes, services, and facilities of a rail carrier reserved to the jurisdiction of the Surface Transportation Board under the Interstate Commerce Commission Termination Act. The informal opinion expressed by the Secretary of the Surface Transportation Board in a letter of May 3, 2000 to Mr. Klempner of Hi-Tech that "local zoning and permitting requirements" are preempted by the ICC Termination Act is certainly less than definitive when it is read following the Secretary's acknowledgment that Mr. Klempner was not specific as to the "exact nature" of local regulation. As an aside, it is difficult to assess the applicability of the various letters from the Surface Transportation Board without the corresponding letters from your client requesting informal opinions and describing the activities of the facility at Oak Island.

As a result of national procurements of solid waste disposal services that fully took into consideration the interstate commerce concerns of solid waste companies located outside the boundaries of New Jersey, the HCIA is not acting as a market regulator in directing Hudson County solid waste to its contractors for disposal; rather, it is acting as a participant in the solid waste disposal market. In fact, the provision of solid waste disposal

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January 29, 2002
Page 3

services by the HCIA constitutes interstate commerce since Hudson County solid waste is shipped via long-haul trailer to landfill facilities in Pennsylvania. Furthermore, the HCIA's consequent ownership of Hudson County-generated waste entitles it exercise control over this waste from the point of generation to ensure its proper disposal and the health, safety and welfare of the citizens of Hudson County.

The actions of the HCIA are intended to enforce its ownership interest in this waste, starting at the moment of collection. The delivery to and receipt of this waste at transfer station sites contravene the waste flow control ordinances enacted in accordance with Atlantic Coast and approved by the New Jersey Department of Environmental Protection.

Consistent with the decisions of the federal courts and State law, the HCIA hereby demands that Hi-Tech make available for inspection by HCIA representatives all daily records and origination and destination forms for waste generated in Hudson County. In the event such documentation is not produced for inspection by the HCIA within ten (10) days from the date of this letter, it is the HCIA's intention to take all measures necessary to compel delivery of such Hudson County waste to its contract facilities and prevent its unlawful diversion to facilities not included in the Hudson County District Solid Waste Management Plan.

I concur that it may be beneficial for representatives of the HCIA and Hi-Tech to meet for purposes of discussing our disparate positions. Should you still wish to meet, kindly contact me at your earliest convenience to make the necessary arrangements.

Very truly yours,
DeCotiis, FitzPatrick, Gluck & Cole, LLP

By: Kevin A. Conti
Kevin A. Conti

KAC/mo

cc: T. Calvanico, Executive Director
R. Barry, General Counsel
J. Williams, Esq.