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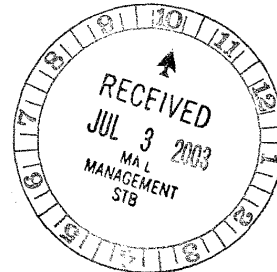
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July 2, 2003

VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006



Re: **Finance Docket No. 34192 (Sub-No. 1)**
Hi Tech Trans, LLC -- Petition for Declaratory Order --
Rail Transload Facility at Oak Island Yard, Newark, NJ

ENTERED
Office of Proceedings
JUL 03 2003
Part of
Public Record

Dear Secretary Williams:

As the Board is aware, the above-captioned proceeding involves an effort by the New Jersey Department of Environmental Protection ("DEP") to shut down a rail transloading facility at Oak Island Yard in Newark, New Jersey operated by Hi Tech Trans, LLC ("Hi Tech") as a licensee of the Delaware & Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway. DEP issued a cease and desist order on May 28, 2003 requiring closure of the facility within twenty days. In the order, DEP claimed that Hi Tech had violated New Jersey law by not obtaining a construction and operating permit and a certificate of convenience and necessity for the facility. Hi Tech filed a petition for declaratory order and a petition for emergency order and other relief with the Board on June 17, 2003, and filed a letter updating the Board on recent developments on June 27, 2003. DEP responded to the latter item by letter dated June 30, 2003.

On Monday, the DEP Commissioner issued an administrative order granting emergency relief and directing the agency to forbear from seeking enforcement of the cease and desist order against Hi Tech for a period of sixty (60) days. That order is attached hereto as Exhibit A. The order imposes a variety of interim conditions on the operation of the Oak Island Yard rail transload facility. Hi Tech disagrees with a number of those conditions, and believes that several are preempted by the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803, and the Board's exclusive jurisdiction under 49 U.S.C. § 10501(b). Nonetheless, the administrative order allows the Oak Island Yard transloading facility to remain open and in operation for a 60-day period while DEP conducts an administrative hearing on the matter.

Under these circumstances, immediate action on Hi Tech's pending petition for emergency order and other relief would not appear necessary. Hi Tech is not withdrawing that

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petition, however, since emergency action might still be required if the Board has not acted on Hi Tech's petition for declaratory order by the end of the 60-day period specified in the DEP administrative order. Emergency action also could be necessary given that the DEP Commissioner has expressly reserved the right to vacate the administrative order before expiration of the 60-day period. Exhibit A, Order at 2, 6.

With respect to Hi Tech's declaratory order request, it is obviously critically important that the Board rule on that matter within the 60-day window provided by the DEP administrative order (i.e., by August 29, 2003). Hi Tech is hopeful that the Board will be able to issue a declaratory order based on Hi Tech's initial June 17th petition and the reply to be filed by DEP (and by the Hudson County Improvement Authority and Essex County Utilities Authority ("the Counties")) next Monday. If the Board decides it is necessary to institute a declaratory order proceeding and seek further pleadings from the parties, Hi Tech requests that its initial petition for declaratory order be treated as its opening statement, with an expedited schedule adopted for filing of a reply by DEP and rebuttal by Hi Tech. In such a case, the Board should also consider adopting the approach taken in Borough of Riverdale -- Petition for Declaratory Order -- The New York, Susquehanna & Western Railway Corporation, Finance Docket No. 33466 (STB served September 10, 1999 and February 27, 2001), in which the Board indicated its preliminary views on certain preemption issues in an initial order and requested additional filings before issuing a final order.

We note that, with its June 30, 2003 letter to the Board arguing against expedited consideration of this matter, DEP has attached a June 20, 2003 order of the U.S. District Court for the District of New Jersey and has attempted to characterize the proceedings before that court and the U.S. Court of Appeals for the Third Circuit involving Hi Tech and DEP. It is important that the Board be fully informed of the present status and posture of those proceedings. As the Board knows, Hi Tech had initially filed suit in federal district court against the Counties with respect to the Counties' "flow control" regulations. See Hi Tech Trans, LLC -- Petition for Declaratory Order -- Hudson County, NJ, Finance Docket No. 34192 (STB served November 20, 2002) ("Hi Tech I") at 1, n.2. The Board's Hi Tech I decision found that those flow control rules were not preempted under ICCTA, that a challenge to those rules under the so-called dormant commerce clause "must be brought in an appropriate court," and that "[t]he only Hi Tech activity that might be considered integral to the rail transportation of C&D debris [and thus preempted under 49 U.S.C. § 10501(b)] would be the transfer of C&D debris from trucks to rail cars at the CP transload facility itself." Hi Tech I at 4-5 & n.8.

After DEP's issuance of the May 28, 2003 cease and desist order requiring closure of the Oak Island Yard transloading facility, Hi Tech sought injunctive and other relief against DEP in a separate proceeding at the federal district court. In a June 16, 2003 order (attached

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hereto as Exhibit B), the court declined to act on Eleventh Amendment immunity grounds. The court characterized the Board's language in Hi Tech I addressing the "integral" nature of transloading to "rail transportation" as "what can best be described as equivocal dicta," and criticized Hi Tech for not having sought further relief or clarification from the Board on the issue. Exhibit B at 1, n.1. On emergency appeal to the Third Circuit, a circuit judge referred Hi Tech's motion for stay pending appeal to a motions panel on an expedited basis, denied a stay in the meantime, and allowed the district court to enter an additional order on Hi Tech's amended complaint (which had been before the district court but not considered in that court's June 16, 2003 order). See Exhibit C, attached hereto. On June 20, 2003, the district court entered such an order, finding that Eleventh Amendment immunity did not apply but again declining to act on the basis of the so-called "Younger" and "Burford" theories of abstention. (The court's June 20th order is attached to DEP's June 30, 2003 letter filing at the Board). Hi Tech again took an emergency appeal of that decision to the Third Circuit, where the matter has been fully briefed and awaits decision. It thus is not accurate to say, as DEP does (DEP June 30th letter at 2) that the Third Circuit "has also ruled against Hi Tech twice."

Lastly, on June 30, 2003 the district court entered an order in the original "flow control" proceeding dismissing Hi Tech's claims there without prejudice on the basis that, since DEP had declared the Oak Island Yard rail transloading facility an illegal, unlicensed operation, Hi Tech has no standing to challenge the Counties' flow control regulations. See Exhibit D, attached hereto. This, of course, is a proverbial Catch-22 situation: while the Board noted in Hi Tech I (at 5, n.8) that Hi Tech must pursue its dormant commerce clause claim in court, the court has held that Hi Tech cannot pursue that claim in court because Hi Tech operates an illegal, unlicensed transloading facility, even though the Board indicated in Hi Tech I that state licensing requirements for such a rail transloading facility were likely preempted under ICCTA.

While complex and sometimes confusing, all of these federal court and state administrative actions reconfirm how important it is that the Board act expeditiously on Hi Tech's petition for declaratory order and determine the scope of exclusive federal jurisdiction over the Oak Island Yard rail transload facility. It would appear that none of these other actions can be fully or effectively resolved in the absence of Board action here.

Finally, we have attached as Exhibit E a letter from the Essex County Utilities Authority to Hi Tech's customers providing them with the May 28th DEP cease and desist order against the Oak Island Yard facility and advising the customers to "be guided accordingly." DEP claimed in its June 30th letter filing (at 3) that it has not "sent representatives out to inform Hi Tech's customers not to continue doing business with Hi Tech" -- although it did note with ominous overtones that "it should hardly come as a surprise" that "those customers may now be concerned about their own liability" If DEP has shown any forbearance in this respect, it

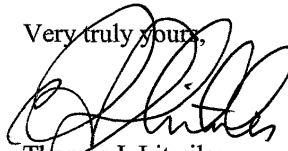
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obviously is not shared by the Counties. The point -- once again -- is that under current circumstances the passage of time can only work against the viability of the Oak Island Yard rail transload facility and the effective assertion of exclusive jurisdiction over that rail facility by the Board.

Ten copies of this letter, with attachments, are enclosed for filing at the Board. One extra copy also is enclosed, and I would request that you date-stamp that copy to show receipt of this filing and return it to me in the provided envelope.

Very truly yours,



Thomas J. Litwiler
Attorney for Hi Tech Trans, LLC

TJL:tl

Attachments

cc: Edward D. Greenberg, Esq. (via Federal Express)
Benjamin Clarke, Esq. (via Federal Express)
Parties of record



James E. McGreevey
Governor

State of New Jersey
Department of Environmental Protection

Bradley M. Campbell
Commissioner

(609) 292-2885

June 30, 2003

VIA FACSIMILE

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Counsel:

This is the matter of Hi Tech Trans, LLC and David Stoller, Administrative Order No. E.A. PEA-030001-U131, issued May 27, 2003. This letter decision addresses an application for emergency relief filed by Hi Tech Trans, LLC and David Stoller (collectively "Hi Tech") whereby the Administrative Order would be stayed pending resolution of the administrative case.

The procedural history of the matter is as follows. On May 28, 2003, the Office of Solid and Hazardous Waste Compliance and Enforcement in the Department of Environmental Protection (hereinafter the "Office") issued an Administrative Order citing High Tech for operating an unpermitted solid waste facility and engaging in the commercial disposal of solid waste without having obtained a Certificate of Public Convenience and Necessity. The Administrative Order directed Hi Tech to cease and desist operation of the illegal solid waste facility and operation of the uncertificated public utility within twenty calendar days of receipt of the Administrative Order. On June 17, 2003, High Tech requested an administrative hearing and sought a stay from me pending resolution of the

administrative case. On June 24, 2003 the Hudson County Improvement Authority and the Essex County Utilities Authority (hereinafter "Authorities") moved to intervene. On June 25, 2003 the Office filed its papers in response to the stay request.

On June 26, 2003 at 3 p.m., I faxed a letter order to all counsel granting the Authorities' motion for intervention and directing the Authorities and Hi Tech to file any further papers on the motion for a stay by 3 p.m. on Friday, June 27, 2003. The letter order further indicated that I intended to immediately review and rule on the papers.

Both the Authorities and Hi Tech requested extensions of time to provide their submissions. In addition, they objected that they had not been served with each other's papers. As a result, a telephone conference call was held with all counsel. Counsel was directed to immediately complete full service and were given an extension to 9 a.m., Monday, June 30, 2003 to file their papers relating to the stay request.

On June 27, the Authorities intervened in opposition to the stay request. On June 30, 2003 Hi Tech submitted reply papers giving its general agreement on most of the stay conditions proposed by the Office.

The Department must rule at this time. I note that while Hi Tech has requested additional time to brief the stay, it has not offered to withdraw its emergent motion to the federal courts seeking intervention if the Department fails to timely act on this stay request. I further note that the Department, under the scheduling order of the federal court, must file papers later today indicating to the federal court what action I have taken regarding the administrative stay request. In addition, apart from any court proceedings, this Department needs to take timely action on this emergent application. Moreover, the twenty-day grace period built into the Administrative Order of May 27th (during which time the Office indicated it would forebear from taking enforcement action) has expired and the Department must indicate its intention with respect to enforcement.

Therefore, I am issuing an order on emergency relief today and will entertain applications for modifications to, or relief from, that order on a schedule that takes into account the needs of all parties. There is no other practical way to issue a timely ruling and accommodate the requests for time of all the parties.

With regard to emergency relief, it must be noted that the charge against Hi Tech is serious-- operating without the necessary approvals from the Department. Illegal facilities have a significant effect not only on customers and nearby residents but and on other participants in the solid waste industry. Illegal facilities interfere with the statutory mandate of the Department and the counties to plan for and police solid waste operations within their jurisdictions. Because these facilities operate outside of the system, in important ways their existence jeopardizes the very integrity of the regulatory system. To grant emergency relief staying the Administrative Order here would risk sending a message to the public and industry that the Department does not take violations of this kind seriously or is not fully committed to enforcement follow through. Nothing could be further from the truth.

Nevertheless, the Department is mindful that there has not yet been a hearing on Hi Tech's administrative claim. Due process counsels that Hi Tech should have this opportunity before the Office enforces its cease and desist order.

Accordingly, while I am not staying the Administrative Order, I am hereby granting emergency relief whereby the Office of Solid and Hazardous Waste Compliance and Enforcement will forbear from seeking judicial enforcement of the Administrative Order for 60 days, on the conditions set forth in the attached order. I find the conditions imposed therein reasonable and appropriate. Operational requirements of this type are commonly included in solid waste facility permits of the type Hi Tech would have sought if it had complied with statute and regulation. It is crucial that the granting of emergency relief herein must not place Hi Tech in a position more advantageous than that of lawfully permitted facilities nor make them exempt from necessary environmental, health or safety requirements.

Finally, I note that there are certain other issues that have been raised by the parties that, because of the time constraints noted above, are not dealt with in this decision. Counsel is expressly invited to brief those issues when they avail themselves of the opportunity to seek relief from the Order. I note that these issues include, but are not limited to: intervention by the Authorities; confidentiality of Hi Tech's customer lists; scrap metal handling; and paving portions of the site.

By action under separate cover, I will expedite the administrative hearing request so that the administrative process will conclude within the 60-day period established in the order issued today.



Bradley M. Campbell
Commissioner



James E. McGreevey
Governor

State of New Jersey
Department of Environmental Protection

Bradley M. Campbell
Commissioner

IN THE MATTER OF:	:	ADMINISTRATIVE ORDER
HI TECH TRANS, LLC and	:	DEPARTMENT OF ENVIRONMENTAL
DAVID STOLLER,	:	PROTECTION
Individually, and in His Capacity as	:	
Capacity as Chairman and Chief	:	EMERGENCY RELIEF
Executive Officer of	:	
HI TECH TRANS, LLC.	:	EA ID # PEA030001-U131

The Department issued an administrative cease and desist Order on May 27, 2003 in the above-captioned matter ("the cease and desist Order"), which was served upon respondents Hi Tech Trans, LLC ("Hi Tech") and David Stoller (jointly referred to herein as "the respondents"), on May 28, 2003. On June 18, 2003 the respondents requested an administrative hearing and moved for an interim stay of that Order. On June 23, 2003, the respondents submitted an amended motion for interim stay. On June 25, the Department's Office of Solid Waste Compliance and Enforcement ("Office") submitted a letter setting forth its consent to the issuance of an interim stay of enforcement of the Order, but conditioned upon the imposition of certain conditions designed to protect the public health, safety and the environment during the interim stay period. On June 27, the Hudson County Improvement Authority and Essex County Utilities Authority ("Authorities") intervened in opposition to the stay request. On June 30, 2003 Hi Tech submitted reply papers giving its general agreement on most of the stay conditions proposed by the Office.

In light of the express consent of the Office to forbear from enforcing the Order, I need not reach the issue of whether High Tech has set forth the necessary elements for an equitable stay. Therefore, after review of the papers, and for good cause shown, the Department has decided to grant emergency relief, but with conditions.

IT IS on this 30th day of Jan, 2003;

ORDERED that the Office of Solid Waste Compliance and Enforcement shall forbear from seeking judicial enforcement of the cease and desist order for a period of 60 days, or until further order of the Department vacating or amending this order for emergency relief, to enable High Tech to obtain appropriate administrative due process on an expedited basis pursuant to the Administrative Procedure Act, during which time High Tech shall comply with the following conditions:

1. Within each twenty-four (24) hour period High Tech shall clean each area where waste has been deposited or stored;
2. No waste shall be stored overnight;
3. The Hi Tech facility property surrounding the actual waste management area shall be maintained free of litter, debris, and accumulations of unprocessed waste, process residuals and effluents. Methods (such as fencing) of effectively controlling windblown papers and other lightweight materials shall be implemented;
4. Methods of effectively controlling dust shall be implemented in order to prevent migration offsite;
5. The operation shall not result in the migration of odors outside the confines of the Hi Tech facility or the emission of air contaminants in violation of N.J.A.C. 7:27-5.2(a);

6. An adequate water supply and adequate fire-fighting equipment shall be maintained to extinguish any and all types of fires. Fire-fighting procedures, including the telephone numbers of local fire, police, ambulance and hospital facilities, shall be posted in and around the Hi Tech facility at all times;
7. High Tech shall effectively control insects, other arthropods and rodents at the Hi Tech facility by means of a program in compliance with N.J.A.C. 7:30, and implemented by an applicator of pesticides, certified in accordance with the New Jersey Pesticide Control Code, N.J.A.C. 7:30;
8. The Hi Tech Trans facility shall, within 30 days of the date of this Order, operate certified scales for the reporting requirements of N.J.A.C. 7:26-2.13 for waste transported by trucks;
9. The queuing and staging of solid waste vehicles on any public roadway is prohibited;
10. The queuing and staging of solid waste vehicles shall be conducted so as to prevent traffic backups and related traffic hazards on access roads servicing the Hi Tech facility;
11. Facilities and all appurtenances, including vehicles while onsite, shall be positioned and buffered in such a manner that sound levels generated by the operation shall not exceed limits established pursuant to the Noise Control Regulations, N.J.A.C. 7:29;
12. High Tech shall not accept or in any manner handle hazardous waste as defined at N.J.S.A. 13:1E-38 or regulated medical waste, as defined at N.J.S.A. 13:1E-48.3. If the Hi Tech facility inadvertently accepts an unauthorized waste type, respondents shall

immediately report the event to the Department's Hotline at 1-877-WARNDEP, and place the waste in a secure area under the Hi Tech facility's control, located a safe distance from active waste areas, until the High Tech receives instruction from the Department as to the proper disposal of the waste.

13. Solid waste shall not remain at the Hi Tech facility for more than 24 hours.

14. Effective security procedures shall be implemented to control entry and exit at all times.

15. The Department's designated representatives and inspectors shall have the right to enter and inspect any building or any other portion of the respondents' facility, at any time. This right to enter and inspect includes, but is not limited to:

(1) Observing and sampling any materials on site;

(2) Photographing any portion of the Hi Tech facility, solid waste vehicles, containers, and container contents;

(3) Investigating an actual or suspected source of pollution of the environment;

(4) Ascertaining compliance or non-compliance with the statutes and regulations of the Department; and

(5) Reviewing and copying all records that are required to be maintained by federal or state law, which shall be made available on request to Department representatives and inspectors at all reasonable times for review and inspection.

16. Any release or discharge of any solid waste at the Hi Tech facility shall be immediately reported by High Tech or their designee to the DEP Emergency Response 24-hour Hot Line at 1-877-WARNDEP. The report shall specify the type of substance discharged and the estimated quantity, the nature of the discharge, the location of the

discharge, any action being taken or proposed to be taken in order to mitigate the discharge, and any other information concerning the incident the Department may request at the time of notification.

17. High Tech shall designate an on-site emergency coordinator who will be available during all hours of operation for the purpose of handling emergency situations such as, but not limited to, spills, discharges or releases of solid wastes at the Hi Tech facility.

18. Only solid waste vehicles properly registered, pursuant to N.J.A.C. 7:26-3, with the Division of Solid and Hazardous Waste, unless exempt from the registration requirement pursuant to N.J.A.C. 7:26-3.3, and displaying the appropriate registration number and solid waste decal shall be admitted for loading and unloading of any solid waste at the Hi Tech facility. Hi-Tech shall comply with all requirements of applicable District Solid Waste Management Plans unless an order to the contrary is issued by the Department or a court of competent jurisdiction.

19. The Hi Tech facility shall not receive, store, handle, process or transfer waste types other than ID # 13 and ID # 13C, as defined pursuant to N.J.A.C. 7:26-2.13(g).

20. High Tech shall provide a means of removing mud, solid waste or other debris from the tires of all vehicles. Vehicle tires shall be cleaned prior to the vehicle's departure from the Hi Tech facility's boundaries.

21. The Hi Tech facility shall, within no later than 30 days of the date of this Order, install and properly maintain a system that collects, stores, and properly disposes of wastewater generated during normal operations, including wash-out and cleaning of equipment, trucks and floors, in compliance with the applicable rules regarding wastewater and storm water management at N.J.A.C. 7:14A;

22. On all onsite roadways and storage areas subject to vehicle loading and unloading, Hi Tech shall, no later than 30 days from the date of this Order, undertake reasonable measures to reduce dust and prevent pollutants from seeping into the soils. The measures taken need not be by concrete or asphalt paving, unless subsequently ordered to the contrary.

23. Failure to operate in compliance with the requirements of this agreement shall be subject to all applicable penalties pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and N.J.A.C. 7:26-5, and shall be cause for reconsideration and possible vacation or amendment of this Order.

24. High Tech shall comply with the following record keeping and reporting requirements:

i. The Hi Tech facility shall maintain a daily record of wastes received. The record shall include the information specified in N.J.A.C. 7:26-2.13(a);

ii. The daily record shall be maintained, shall be kept, and shall be available for inspection in accordance with N.J.A.C. 7:26-2.13(b);

iii. The Hi Tech facility shall verify, retain, and make available for inspection a waste origin/disposal (O and D) form for each load of solid waste received in accordance with N.J.A.C. 7:26-2.13(c).

iv. High Tech shall submit monthly summaries of wastes received to the Division of Solid and Hazardous Waste, Bureau of Recycling and Planning, on forms provided by the Department (or duplicates of same), no later than 20 days after the last day of each month. The monthly summaries shall include the information specified at N.J.A.C. 7:26-2.13(e).

High Tech is ordered to file with the Department an affidavit within 10 days of the date of this Order attesting to their compliance with all of the conditions set forth above except those in paragraphs 8, 21, 22, 23 and 24. High Tech shall be required to file with the Department an affidavit within 35 days of the date of this Order attesting to compliance with all of the conditions set forth in paragraphs 8, 21, and 22.

By issuing this order for emergency relief, the Department is not in any way recognizing Hi Tech as a facility lawfully authorized to handle, receive, process, collect or dispose of, solid waste. Specifically, nothing in this Order shall preclude the Department or any of its lawful agents, including but not limited to those under the County Environmental Health Act, from prosecuting any solid waste hauler or transporter for failure to dispose of solid waste at a lawfully authorized solid waste facility.

Nothing within this Order shall be interpreted as implying that the interim conditions set forth herein are an effective substitute for, or are in any way as protective of the public health, safety and the environment as, the lawful permitting and licensure processes under the Solid Waste Management Act and the Solid Waste Utility Control Act. Nor shall this Order in any way preclude the Department from imposing more stringent standards upon respondents as the public health, safety and welfare require.

Dated:

June 30 2003



Bradley M. Campbell
Commissioner

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 17, 2003

#E-49-E

No. 03-2773

HI TECH TRANS, LLC, et al., Appellants

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION

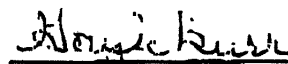
(N.J.-Newark Civil No. 03-cv-02751)

Present: ALITO, Circuit Judge.

- 1) Emergency Motion by Appellants, Hi Tech Trans, LLC, et al., for stay of enforcement pending appeal and for expedited appeal.

Appellants' brief and appendix to be filed and hand-served by June 20, 2003; and Appellee's brief to be filed and and-served by June 25, 2003.

- 2) Response by Appellee, State of New Jersey, Department of Environmental Protection, in opposition to emergency motion for stay of enforcement pending appeal.
- 3) Document entitled "Declaration of Ronald S. Feehan" which the Court may wish to construe as an exhibit in support of response in opposition by Appellee.



Gayle Burr 267-299-4921
Case Manager

Response due by 11:00 a.m. on 6/17/03.

ORDER

The foregoing motion for a stay pending appeal is denied without prejudice to the presentation of the motion to a motions panel, to which the matter is being referred on an expedited basis. This referral is not intended in any way to deprive the District Court of jurisdiction to entertain a renewal by the appellant of its motion based on its amended complaint.

The District Court's order of June 16, 2003 is based on the ground that the sole defendant named in the original complaint, the New Jersey Department of Environmental Protection, is protected from suit in federal court without its consent under the Eleventh Amendment. The appellant does not dispute the District Court's Eleventh Amendment analysis but argues in effect that the District Court should have ruled with reference to the amended complaint, which the appellant contends was filed prior to the District Court's decision. The appellee argues that this amended complaint has not been properly served. In the event that the District Court does not rule on a renewed motion prior to the decision of the motions panel, the motions panel will have to consider whether the ruling before it should be considered as relating to the original or amended complaint.

The appellant's motion for an expedited briefing schedule is also referred to the motions panel.

By the Court,



Circuit Judge

Dated: JUN 17 2003

nmh/cc: SLI, ESS
JMM, ESS

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

HI TECH TRANS, LLC,

Plaintiff,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Defendant.

Civil No. 03-2751 (FSH)
Hon. Faith S. Hochberg, U.S.D.J.

ORDER

Date: June 16, 2003

HOCHBERG, District Judge:

This matter having come before the Court upon Plaintiff, Hi Tech Trans's Emergent Order to Show Cause with Temporary Restraints;

and the Court noting at the outset that the exigent circumstances of this action have come about entirely through Plaintiff's own actions and inactions;¹

¹ The instant Order to Show Cause was submitted to the Court by mail some 10 days after the DEP made its ruling, rather than having been filed in any manner seeking true emergent relief. The Court held a prompt hearing on the request nonetheless. At the hearing, Plaintiff represented that sometime last year it petitioned to the Surface Transportation Board ("STB") for a decision regarding whether activity at the Hi Tech facility is part of intermodal rail transportation. The STB, in its November 19, 2003 decision, determined that transportation of construction and demolition ("c&d") debris by truck to the Hi Tech facility is not an integral part of rail transportation. In what can best be described as equivocal dicta, the STB further stated "the only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be transfer of C&D debris from trucks to rail cars at the Canadian Pacific Railway transload facility itself." Surface Transportation Board Decision, Finance Docket No. 34192 at p. 4. Plaintiff never sought any further relief or clarification of this statement by the STB in the 7 months after the ruling. Rather, it chose to do nothing until such time as the DEP ordered it to shut down with full knowledge that it was facing this likelihood.

and it appearing that Plaintiff seeks to enjoin the enforcement of the DEP's Administrative Order of May 27, 2003, in which it determined that Plaintiff is operating an "illegal solid waste facility" because it has failed to obtain the necessary permits for such a facility and ordered that Plaintiff cease and desist operation of such illegal facility within 20 days of receipt of the Administrative Order;²

and it appearing that the Court has reviewed the many submissions of the parties and heard oral argument presented on June 11, 2003;

and the Court finding that, under the Eleventh Amendment, a plaintiff other than the United States or a state may not sue a state in federal court without the latter state's consent unless Congress abrogates the state's Eleventh Amendment immunity pursuant to a constitutional provision granting Congress that power. See Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996);

and the Court further finding that the United States Supreme Court's decisions in Ex parte Young, 209 U.S. 123 (1908) and Verizon Maryland Inc., v. Public Service Commission of Maryland, 535 U.S. 635, 645 (2002), cited by Plaintiff, do not control here, as those cases involved suits against state commissioners in their official capacities;

² Plaintiff presents the novel argument that, as a licensee of CP, it is an integral part of rail transportation and is not subject to state and local permitting rules because this particular area has been preempted by the ICCTA, and that therefore, the DEP does not have the authority to make it obtain permits or shut it down. (Interestingly, it concedes that in all other areas related to health and safety, this area has not been preempted and that therefore, the DEP can regulate it.)

In this case Plaintiff asks this Court to make a determination that its solid waste facility is an integral part of rail transportation. Yet, in a related action also before this Court, Hi Tech Trans v. HCIA, et al., 02-3781, Plaintiff contends that this Court does not have the authority to make this determination because the STB has the exclusive authority to do so. See June 10, 2003 letter of John McHugh, counsel for Plaintiff in 02-3781.

and the Court noting that Plaintiff was put on notice at the hearing on June 11, 2003 that one possible way to cure the 11th Amendment defect would be to amend its Complaint to name a DEP official;

and the Court noting that if, and when, Hi Tech files an action against an individual acting in his/her official capacity, this Court will promptly address the Burford and Younger abstention doctrines as they relate to the issues in this case;

and the Court noting that Plaintiff has not availed itself of its right to request an administrative hearing from the DEP, nor a stay from the DEP, nor any of the other relief accorded by the New Jersey Superior Court despite ample notice of the availability of those remedies since the DEP's May 27, 2003 ruling;

IT IS on this 16th day of June 2003,

ORDERED that Plaintiff's Complaint is barred by the U.S. Const. 11 Am. and is therefore **DISMISSED**; and it is further

ORDERED that Plaintiff's Motion for a Preliminary Injunction is accordingly **DENIED**.³


HON. FAITH S. HOCHBERG
UNITED STATES DISTRICT JUDGE

³ Because of this Court's ruling that the entire action is barred by the 11th Amendment, it is unnecessary to address the parties' arguments for and against injunctive relief on the merits.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HI TECH TRANS, LLC,

Plaintiff,

v.

HUDSON COUNTY IMPROVEMENT
AUTHORITY, et al.,

Defendants.

Civil No. 02-3781 (FSH)
Hon. Faith S. Hochberg, U.S.D.J.

ORDER

Date: June 30, 2003

HOCHBERG, District Judge:

This matter comes before the Court on an Order to Show Cause entered June 4, 2003, why Plaintiff's Complaint should not be dismissed for lack of standing or of a justiciable case or controversy;¹

and the Court having reviewed the submissions of the parties and heard oral argument presented on June 11, 2003,

and for good cause having been shown,

and the Court finding that Plaintiff previously withdrew its Preemption Claim contained in Count 1;²

¹ On May 30, 2003, Defendants HCLIA and HCUA submitted its reply brief in support of their motion for summary judgment to the Court. At that time, Defendants notified the Court that the New Jersey Department of Environmental Protection entered an Administrative Order on May 28, 2003, directing HI Tech to discontinue "its illegal operation of a solid waste facility." In response, the Court issued the Order to Show Cause.

² Plaintiff claimed in Count 1 of its Complaint that it has the status of a rail carrier as defined in 49 U.S.C. § 10102(5), under the exclusive jurisdiction and control of the Surface

and the Court finding that Plaintiff's claim set forth in Count 2 does not present a justiciable case or controversy at this time and is therefore dismissed without prejudice;³

Transportation Board and is accordingly, "exempt from the application of any state or local law." Hi Tech sought a declaratory order of the Surface Transportation Board ("STB") that they have exclusive jurisdiction over Hi Tech's activities. However, on November 19, 2002, the STB denied the request for a declaratory judgment, finding that "movement of trucks carrying [construction and demolition] debris over New Jersey roads to reach the [Canadian Pacific Railway] transload facility that Hi Tech operates is not part of 'transportation by rail carrier' as defined in section 10501(a)" and therefore 10501(b) presumption does not apply. Hi Tech Transportation Board Decision, STB Finance Docket No. 34192. Hi Tech did not appeal this adverse ruling. Accordingly, Hi Tech informed the Court during a conference call earlier this year that Count 1 would be withdrawn. This was reconfirmed during the hearing on the instant Order to Show Cause.

³ Defendants claim that Plaintiff's Complaint should be dismissed because they lack standing to pursue their Complaint that the counties' order directing waste flow violates the Commerce Clause (as to approximately 30% of the Type 13 waste received by Hi Tech) in light of the DEP's Administrative Order shutting Hi Tech's facility down completely. While the Court agrees that Plaintiff's action should be dismissed without prejudice, the Court finds that the reason for dismissal is more properly characterized as a mootness issue. See Regin v. Bensalem Township, 616 F.2d 680, 684 (3d Cir.1980) ("Inasmuch as mootness would divest us of jurisdiction to consider this appeal, we are obligated to address this issue as a threshold matter"). The United States Supreme Court has acknowledged "mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980) (quoting Monaghan, Constitutional Adjudication: The Who and When, 82 YALE L.J. 1363, 1384 (1973)). Because the DEP has determined that Plaintiff is operating an illegal solid waste facility, Plaintiff's claim that Defendants' County Plans violate the Commerce Clause is now moot. No order in this case can have anything other than an advisory effect unless and until Hi Tech obtains resolution of the DEP shut-down order. In other words, its Commerce Clause claim does not present a redressable grievance at this time. Therefore, this Court lacks jurisdiction over this claim, as well as Plaintiff's § 1983 claims based on the same set of facts, and Plaintiff's Complaint is thus dismissed without prejudice.

and the Court further finding that Count 3, asserted under 42 U.S.C. § 1983 yet premised on the same grounds as Count 1 and Count 2 and presents no different issue, and it will correspondingly be dismissed without prejudice at this time;⁴

and the Court finding that Hi Tech's motion for a preliminary injunction will be denied;⁵

and the Court further finding that HCLIA and ECUA's motion for a preliminary injunction will be denied as moot at this time;⁶

⁴ On May 21, 2003, the Court dismissed Count 3, the tortious interference claim, and the claims against the individual defendants, Thomas P. Calvanico and Mauro G. Tucci. Therefore, with this dismissal of Plaintiff's claims contained in Counts 2 and 4, Plaintiff's remaining counts of the Complaint are dismissed without prejudice.

⁵ The Third Circuit has repeatedly held that injunctive relief "is an extraordinary remedy which should be granted only in limited circumstances." See, e.g., Frank's GMC Truck Center, Inc. v. General Motors Corp., 847 F.2d 100, 102 (3d Cir. 1988). In order for this extraordinary remedy to obtain, a movant must demonstrate: (1) a reasonable probability of success on the merits; (2) that irreparable injury will result if the requested relief is denied; (3) that the hardships balance in favor of the moving party; and (4) the public interest would be advanced by the requested relief. Here, Plaintiff's injunction application fails on the first prong - likelihood of success on the merits - and therefore, the Court need not address any of the other prongs.

⁶ Defendants fail to meet the third prong of the test set forth above - irreparable injury. In order to meet its burden of showing irreparable injury, the moving party "must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial. The preliminary injunction must be the only way of protecting the plaintiff from harm." Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989). Insofar as Hi Tech has been shut down by the DEP's Administrative Order, the Counties are not irreparably harmed at this time.

If the Hi Tech facility is reopened, HCLIA and ECUA may reapply on 24 hours notice for interim restraints that would prohibit Hi Tech from accepting any type 13 waste originating in either Hudson or Essex Counties. Had the DEP not shut Hi Tech down completely, this Court would have been inclined to grant interim restraints on Count 2 of Defendants' counterclaim, i.e., that Defendants have shown a likelihood of success on the merits (through the full development of facts set forth in the parties' respective motions for summary judgment) that Hi Tech violated the Solid Waste Utilities Control Act and HCLIA and ECUA's franchises because the irreparable harm to Defendants and the public's interest significantly outweighed the 30% diminution to Hi Tech's business by not being able to accept type 13 waste from these counties.

and the Court further determining that in fairness to Plaintiff and to promote judicial economy, HCIA and ECUA's Counterclaims should be stayed while such proceedings as may affect the future justiciability of Plaintiff's Commerce Clause claim proceed further;⁷

IT IS on this ____ th day of June, 2003,

ORDERED that Count 1 of Hi Tech's Complaint, previously withdrawn by Plaintiff's counsel, is now **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that Counts 2 and 4 of Hi Tech's Complaint, the Commerce Clause and corollary § 1983 claim are **DISMISSED WITHOUT PREJUDICE** as moot; and it is further

ORDERED that Hi Tech's motion for a preliminary injunction is **DENIED**; and it is further

ORDERED that HCIA and ECUA's counterclaim and third party claims are **STAYED** for a 90-day period to permit the New Jersey State Department of Environmental Protection proceedings and such other proceedings that bear upon the standing issue in this case to proceed; and it is further

ORDERED that HCIA and ECUA's motion for a preliminary injunction is **DENIED WITHOUT PREJUDICE** as moot at this time; and it is further

⁷ Defendants clearly have standing to bring their counterclaims and third party claims at this time. However, in the interest of judicial economy, the Court will stay Defendants' counterclaims for a period of 90 days. At that time, the Court will take another look at this matter to determine whether Plaintiff's Complaint remains moot. Both parties shall submit a Status Report to the Court on September 30, 2003, which shall address the issues germane to mootness. Defendants seek restraints upon Plaintiff's dissipation of assets during the pendency of the stay, contending that Plaintiff's illegal operations have diverted hundreds of thousands of dollars of revenues belonging to Essex and Hudson Counties. It is ordered that Defendants shall be entitled to take discovery of Hi Tech and its principals during the 90-day period of the stay, including, but not limited to banking and other financial records to determine whether Hi Tech's corporate entity has been used inappropriately by its principals to render the corporate entity undercapitalized and unable to satisfy a money judgment. Defendants may seek documents and depositions upon 10 days' notice. Any discovery disputes shall be brought forthwith to Magistrate Judge Shwartz.

ORDERED that HCLIA and ECUA are relieved of Magistrate Judge Hedges's "for attorney's eyes only" Protective Order so that they may proceed with any enforcement actions necessary to enforce county and state laws in state court.



HON. FAITH S. HOCHBERG
UNITED STATES DISTRICT JUDGE



THE ESSEX COUNTY UTILITIES AUTHORITY

165 Pacific Avenue, 6th Floor, Paterson, New Jersey 07004
Tel. 973-887-4280 Fax. 973-887-4981



Commissioners

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Jerome M. St. John
Chairman

Elmer J. Kautzman, Jr.
Acting Executive Director

June 25, 2003

FROM: The Essex County Utilities Authority
TO: All Solid Waste Haulers

Enclosed please find a copy of an administrative order issued by the New Jersey Department of Environmental Protection against Hi-Tech Trans, LLC.

Please be guided accordingly.

RECEIVED
JUN 30 2003
BY: