

# TESTIMONY of THOMAS MARTURANO

New Jersey Meadowlands Commission  
Director of Natural Resources and Solid Waste



*Presented to the*  
House Subcommittee on Railroads, Pipelines, and Hazardous Materials



**TESTIMONY OF THOMAS MARTURANO**

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First, I would like to thank the Committee for affording the New Jersey Meadowlands Commission an opportunity to address this critical issue. I am a professional engineer involved in the solid waste field my entire life. I have spent the past 23 years managing solid waste activities in one of the most ecologically sensitive areas in New Jersey. Some, including myself, have said that garbage is my life. I am proud to be one of the countless State employees that manages solid waste to ensure that it is handled in an environmentally secure manner.

The solid waste industry has morphed from the old days when almost every town had its own dump, to now, when large lined regional landfill or resource recovery facilities process our waste in an environmentally responsible manner. This evolution has taken place at the state or local level because ultimately, how much waste is generated per capita and where and how it is disposed of is a local decision. Recycling has profoundly impacted the per capita disposal rate and it has no federal counterpart. In fact, the only real federal regulation of most solid waste has to do with the large regional landfills, and nothing pertaining to the handling, processing, or transfer of the waste.

The fact is, most of the people in this room put their solid waste on the curb once or twice a week and it magically disappears. You do not give it a second thought because you know that some local government official

knows where it is going and has planned for its disposal in an environmentally safe manner. There is no danger of you being named as a potential responsible party. This system works well, it is efficient and everyone involved gets to sleep at night.

Approximately five years ago, this system started to unravel. In a two mile stretch of track, five separate open dumps began operating. When most people look at the photos of these rail solid waste facilities, they think that they are either 30 years old or that they are fake. It is inconceivable to most people in today's enlightened environmental atmosphere that anyone could think that dumping thousands of tons of waste material on the ground could be acceptable.

These open dumps were located in close proximity to warehouses, motels, industries, and sometimes residents that had relied on the presence of consistent regulations to protect their investment in their property. Zero consideration was given to the local infrastructure's ability to service these facilities. Yet, when some caught fire, local first responders were called. We tried to reason with the operators to no avail.

The NJMC and NJDEP were left with no choice but to try and regulate the facilities through litigation. It is only because we are a regional planning agency that we have been moderately successful. The communities where you will find these facilities do not have the resources to protect their residents in the courts. Ultimately, we were successful in getting structures

built so that at least the waste was being dumped within a building. Unfortunately, because the railroad still insisted that it was answerable to no one in the state, the structures were built without acknowledgement of the International Building Code. They did this even though they knew that there had been several fires in the open dumps. If there had been a major fire in one of the buildings, any of the firemen would know that the building code requires all buildings of that size to have sprinkler systems which protect the structure allowing first responders the time necessary to ensure that no one remained inside. No such protection existed, and there were no defined fire exits for the workers inside. This disaster-in-waiting could be avoided with a regulated facility.

I realize that in the greater scheme of things, before Congress, the handling of solid waste is relatively insignificant, and that is exactly the point. The proper regulation of solid waste cannot be done from afar. It is a daily, on-the-ground endeavor. For the welfare of the people immediately surrounding the facility and our environment, it has to be done.

Solid waste is not like coal, lumber, stone or sand. When these items show up at a rail transload facility, everyone knows exactly what is about to be off-loaded or dumped from the delivery trucks. The inspector of such a facility would see the same commodity being unloaded and loaded with numbing consistency. At a solid waste transload facility, not only is each day's material different,

but each load is different as well. Also, unlike the others, no one, not the hauler, facility operator nor the railroad knows what is about to be dumped on the tipping floor. In a regulated facility, provisions are made for loads which are smoldering or contain hazardous wastes. Likewise, an operations manual is prepared so that all employees know what to do and who to call in the event of a catastrophic load. I could go on and on about what I have witnessed being dumped from a garbage truck. Instead, suffice it to say that the reason I still do this after all these years is the beauty and challenge that comes from solid wastes, infinite variability. It is a game of cat and mouse that can be played out at any time a generator or hauler tries to knowingly or unknowingly slip something by the regulators, and it is our job to prevent it.

We are not opposed to the movement of solid waste by train. In fact, the NJMC has entertained proposals to move waste by barge, truck and rail. Furthermore, the NJMC was one of the first planning agencies to specifically create an intermodal zone as part of our Master Plan. We just want the facilities to be properly permitted and regulated on an on-going basis so as to not negatively impact the environment or adjacent properties. As I think you are beginning to realize, this really has nothing to do with the rights of railroads. Those rights are not being questioned. Rather, this is about the long history of how solid waste is handled in our country and whether we can afford to allow a new way of doing business in which nobody is watching.

Ultimately, the success of a private solid waste facility is determined by its economics. As you can imagine with five facilities within 2 miles of each other, the competition among them for waste is intense. Now, suppose that a load of demolition from an interior renovation shows up at a rail facility. From the outside, the load appears to be full of carpet, ceiling tiles and sheetrock. Once dumped, it becomes apparent that the center of the load is comprised of fluorescent light bulbs, which have now broken. What happens next? The operator is not equipped to segregate the waste and transport the waste by truck. Nor is there money available to cover the cost of transporting the bulbs to a hazardous waste facility. My guess is that since there is no enforcement risk or risk of losing the non-existent facility permit, the waste is loaded into the train car and no records exist that even indicate that the bulbs were there. Neither the rail company nor the receiving landfill will know that the waste they accept was more than just demolition waste. The only true loser in this scenario is the environment in several states. If the facility were regulated and permitted, this scenario is much less likely because it would be subject to fines and possible revocation of the operating license. The risk outweighs any short term financial gain. Not so with a facility that, in effect, regulates itself.

Finally, I would like to comment on the economics of a regulated versus non-regulated solid waste transfer facility. The railroads have said that their main

objection to being regulated at the local level is that the economic consequence of regulation will make the facility non-competitive. This conclusion is simply not supported by the facts. Within the two miles that separate the five facilities lies a fully-permitted solid waste transfer station, which also accepts construction and demolition waste and sends it to landfills in the West by truck. The only significant difference between this facility and a permitted rail facility is that in one case the waste travels to the western landfill by truck carrying 22 to 24 tons and in the other it travels in 100-ton rail cars. Both sides to this debate stipulate that it is more economical to ship waste by rail versus a truck. Therefore, assuming that the cost to build a fully permitted transfer station versus a fully permitted transload facility are equal, the transload will always be the cheaper alternative for delivering the waste to a landfill.

We are presented with a unique opportunity to resolve this problem before solid waste processors across the country decide to get off the fence and join the small but growing number in the Northeast who are trying to establish this new unregulated way of doing business. After all, why submit to the bother of following rules when you do not have to? Hopefully, this issue can be resolved with a legislative clarification whereby rail-site solid waste facilities will be permitted like all other facilities. Thus, other areas of the country would be prevented from having to suffer what we have.

Thank you very much.

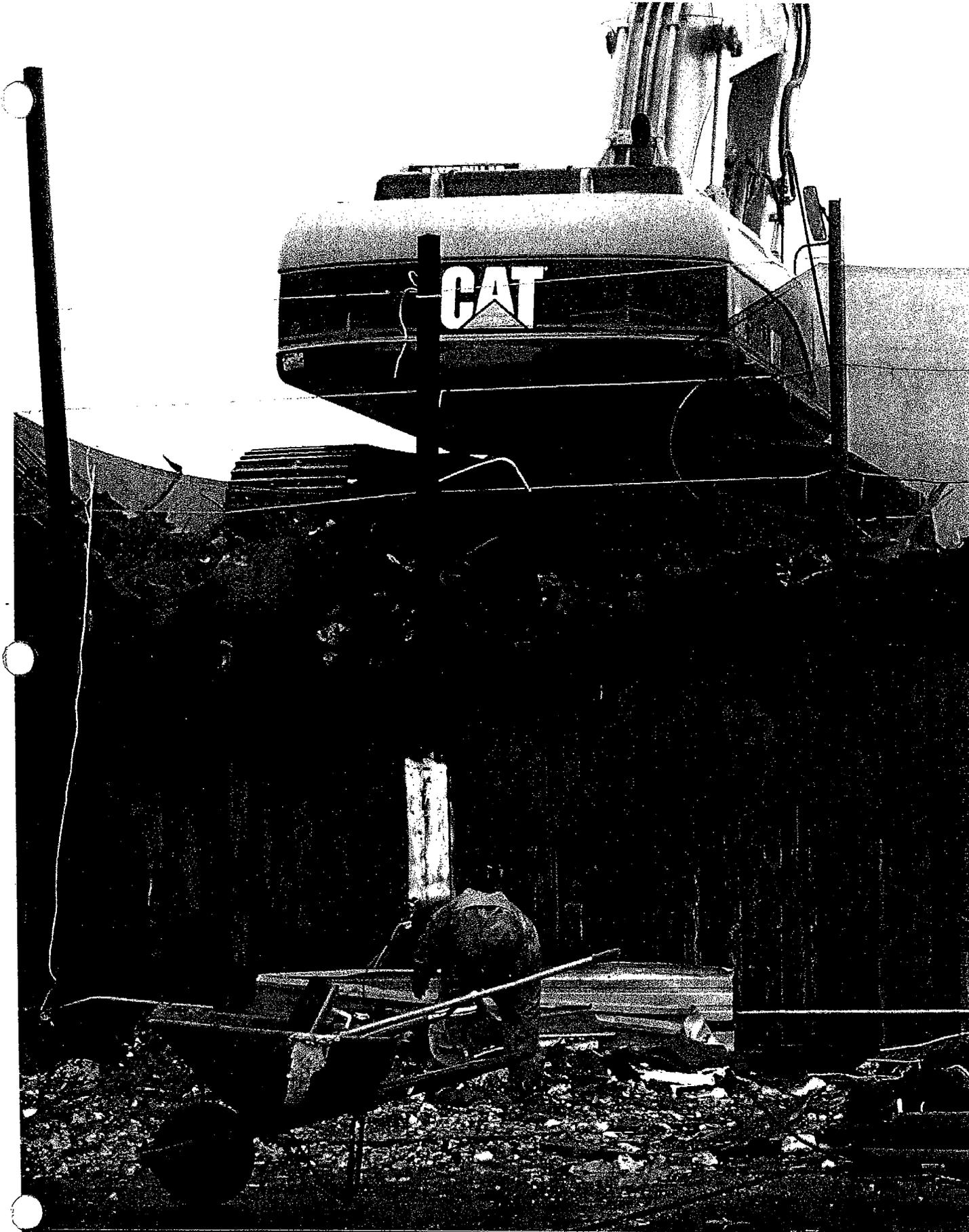
**APPENDIX ONE:**  
Survey of Under-regulated  
Solid Waste Processing Operations



43RD STREET, NORTH BERGEN ~ DECEMBER 10, 2004



43RD STREET, NORTH BERGEN - APRIL 18, 2005



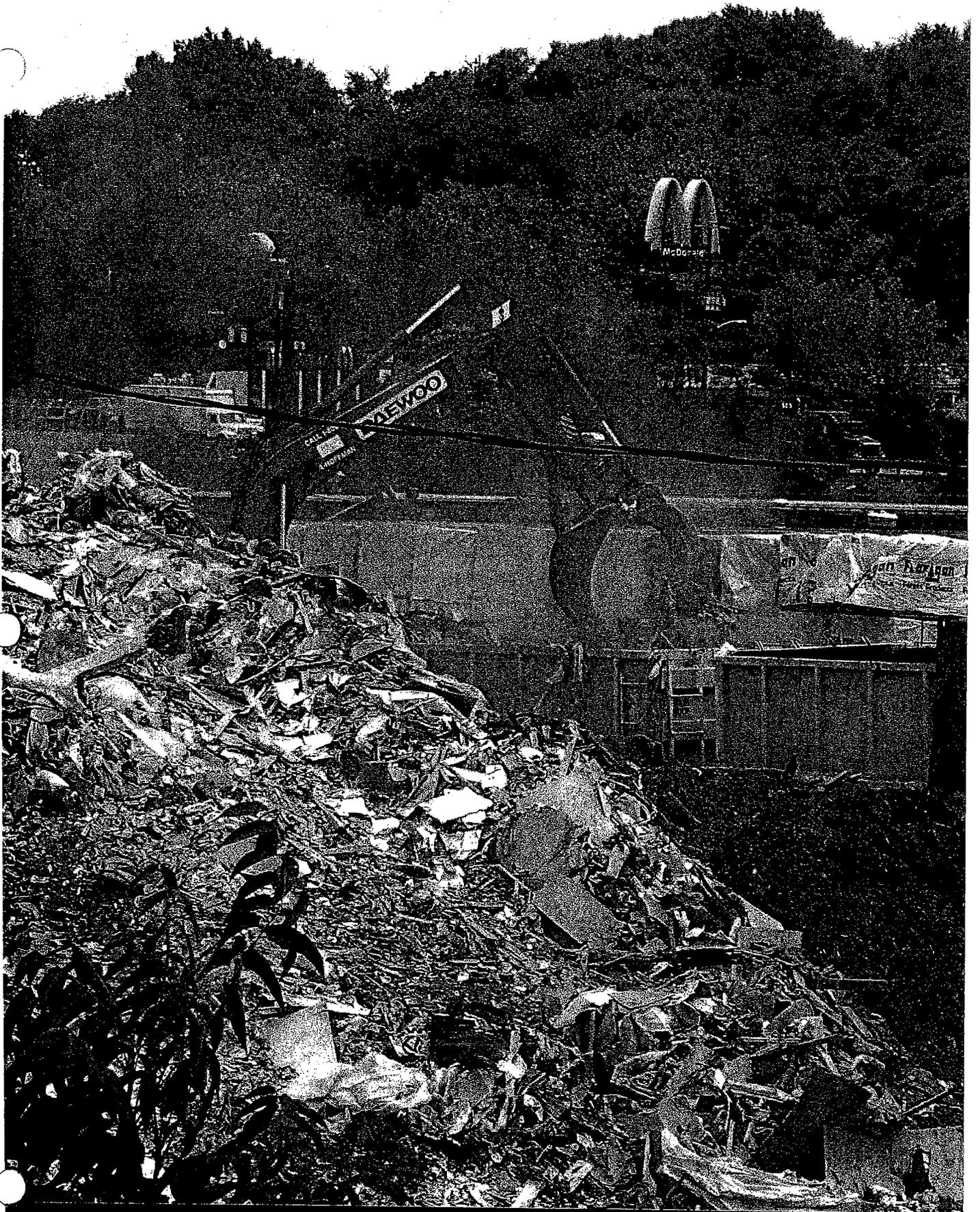
43RD STREET, NORTH BERGEN - OCTOBER 14, 2005



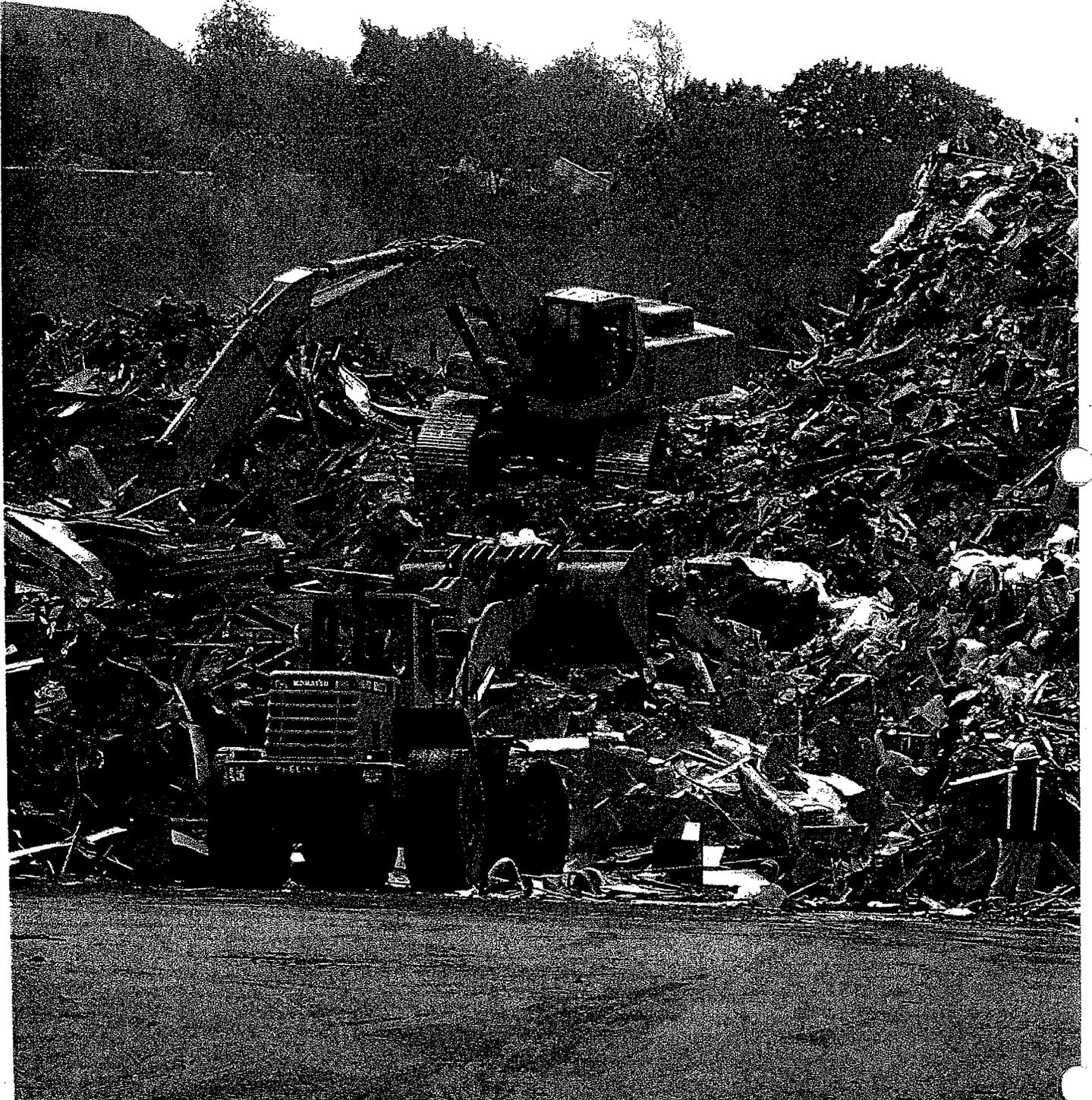
16TH STREET, NORTH BERGEN - DECEMBER 10, 2004



16TH STREET, NORTH BERGEN - JANUARY 26, 2005



16TH STREET, NORTH BERGEN - JUNE 21, 2005



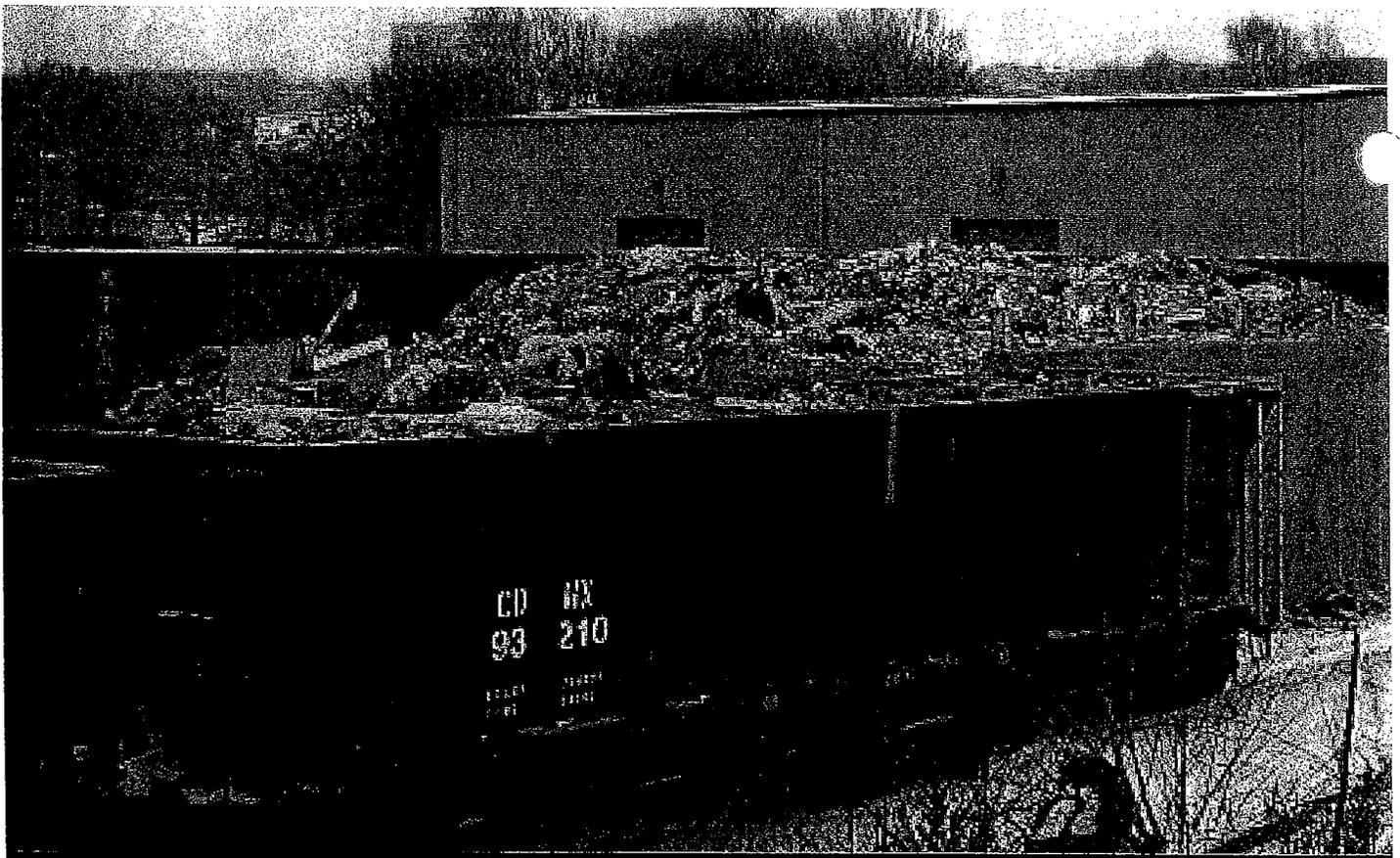
2200 SECAUCUS ROAD, NORTH BERGEN - JUNE 1, 2005



2200 SECAUCUS ROAD, NORTH BERGEN - JUNE 15, 2005



2200 SECAUCUS ROAD, NORTH BERGEN - OCTOBER 14, 2005



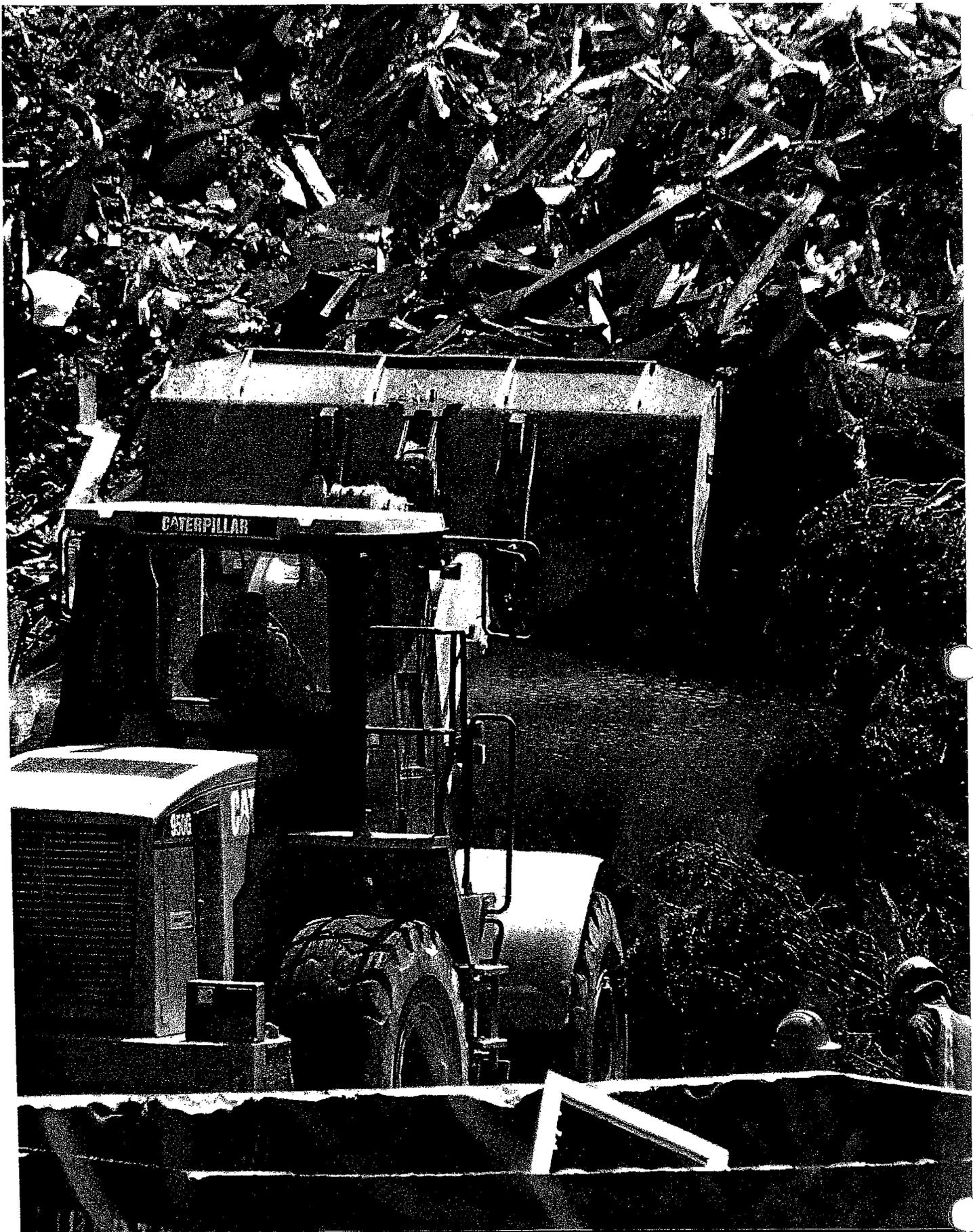
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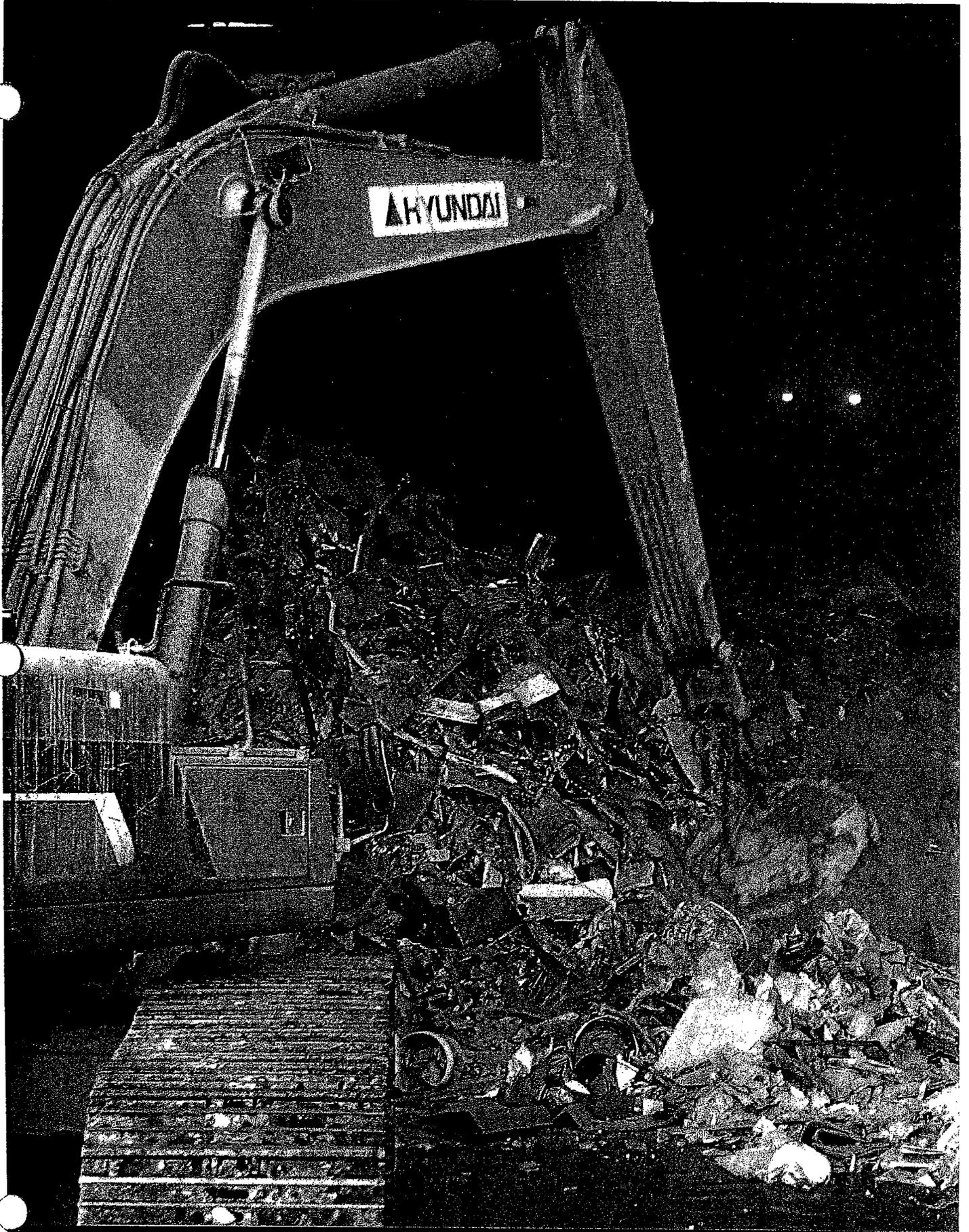
94TH STREET, NORTH BERGEN - JULY 11, 2005



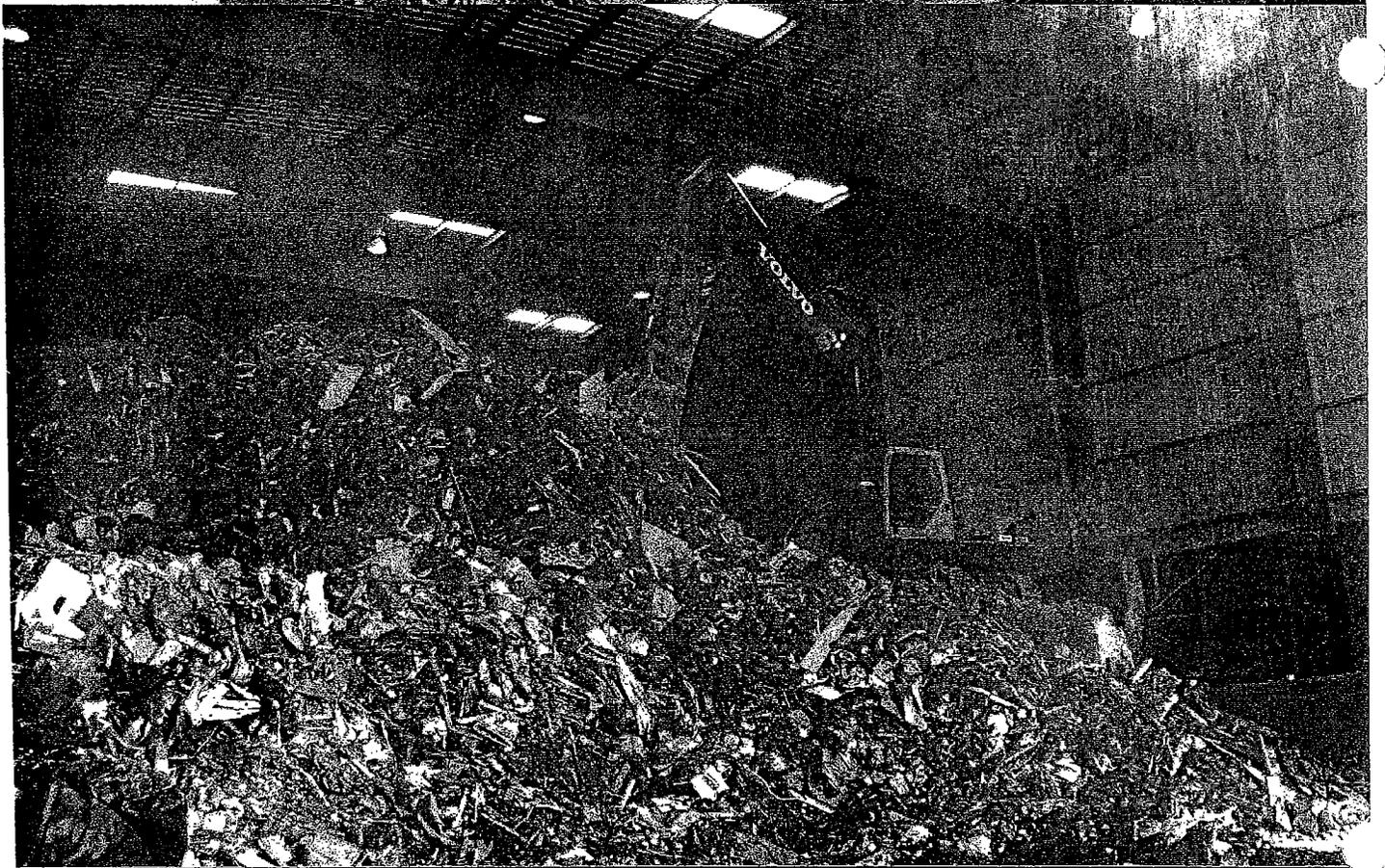
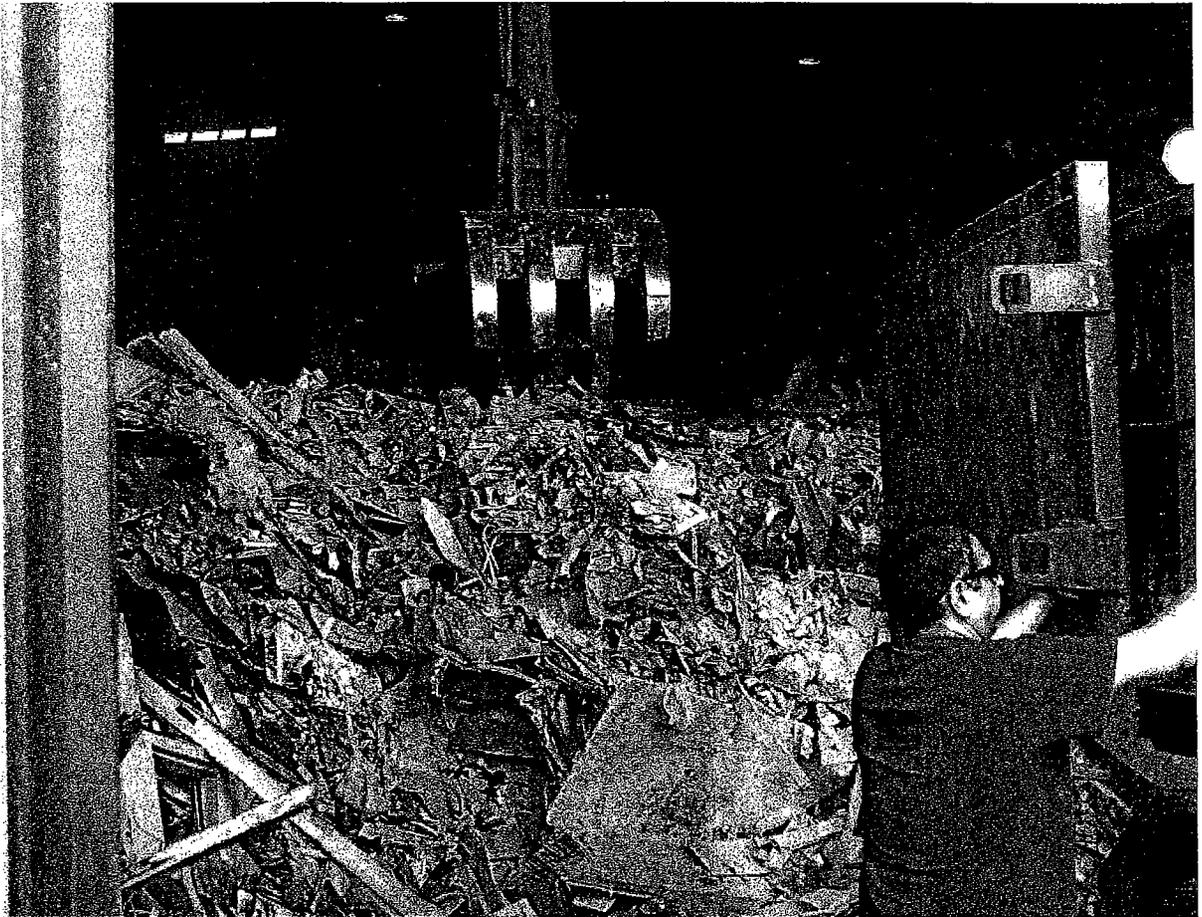
94TH STREET, NORTH BERGEN - NOVEMBER 11, 2005



94TH STREET, NORTH BERGEN - NOVEMBER 11, 2005



94TH STREET, NORTH BERGEN - JANUARY 23, 2007



83RD STREET, NORTH BERGEN - FEBRUARY 21, 2006

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83RD STREET, NORTH BERGEN - OCTOBER 2, 2007

# APPENDIX TWO:

## Survey of News Coverage

### Court opens door to waste transfer oversight

September 5, 2007 - *The Record* - By SCOTT FALLON

A federal appeals panel may have opened the door Tuesday for greater state environmental and safety regulation over North Bergen rail stations where large amounts of waste are transferred from truck to train.

The 3rd Circuit Court of Appeals said each regulation proposed by New Jersey should be examined to see if it violates federal laws that exempt railroads from a great deal of local and state oversight.

At issue are five North Bergen loading facilities owned by the New York Susquehanna and Western Railway Corp. where state officials say debris was piled as high as 2 1/2 stories at one point.

State officials argued the sites posed health, environmental and fire risks to neighbors, and wastewater samples collected at three facilities showed excess levels of lead, arsenic, mercury and copper.

The case will be sent back to U.S. District Judge Katherine S. Hayden, who ruled in February that the state Department of Environmental Protection and the Meadowlands Commission were unable to impose their regulations on the loading facilities.

The appellate panel said Hayden's ruling was too broad.

Still, the panel said the state regulations may still be found to be in violation of federal law.

"It may turn out that most of the regulations are preempted, but it would be premature to invalidate those that might survive on a more developed record," the panel wrote.

The panel found that the state's continuous fine of \$2,000 a day was not unreasonable.

The panel said Hayden was right in saying that the state could not dictate how the facility is operated if it caused a significant delay. But the panel said Hayden did not show how the state's demands were unreasonable in this case.

A spokesman for the Meadowlands Commission said the agency was pleased with the ruling.

"It is important that consistent rules for managing solid waste remain intact and that residents are not harmed by an uneven observance of protections of health, safety, and our environment," said Christopher Gale.

Nathan Fermo, the railway's president, said he hoped Hayden would be able to resolve the case when she examines it again.

New Jersey's campaign against the stations has been fought on many fronts including legislation sponsored by Democratic Sens. Frank Lautenberg and Bob Menendez that would subject the railway to state and local regulations.

Other efforts have failed. In July, the federal Surface Transportation Board ruled 2-1 that local environmental regulations cannot preempt federal rules that cover railways.

### Shut down State closes three waste transfer sites

May 6, 2007 - *North Bergen Reporter* - By Jim Haque

If you're keeping score in the ongoing battle between the government and the operators of railroad solid waste transfer stations in North Bergen, score one for the side of the government.

Last week, the New Jersey State Department of Community Affairs closed three solid waste transfer stations in the township, citing a lack of fire sprinklers as the reason for the immediate closures.

The stations are on 83rd Street, 49rd Street and 32nd Street and Paterson Plank Road.

The action is just the latest of a series of battles between legislators and the New York Susquehanna & Western Railroad Corp., which owns and operates the rail line that has leased its property to the waste-handling companies.

The solid waste has been collected at different construction sites throughout northern New Jersey, then brought to North Bergen, where it is then placed in rail cars to be shipped to sites outside of the state.

However, there is no real timeline as to how long the solid waste remains in the North Bergen receptacles, thus the cause for the concern. Also, the waste is not tested for any contaminants or toxins and remains until it is able to be shipped via the railroad.

The NYS&W has maintained all along that it doesn't have to abide to any local or state regulations, because it is protected by a federal law, written in the 1880s, that encouraged transportation via rail to enhance business.

### Federal law used to stymie legislators

Legislators, including Gov. Jon Corzine and U.S. Senators Robert Menendez and Frank Lautenberg, have all gone on record to say the federal law is outdated and does not protect the citizens who reside near the waste transfer stations from dangerous pollutants and air quality levels.

The officials, legislators and environmental advocates all agree that allowing the waste to pile up poses serious environmental and health

hazards to the neighboring areas and should be subjected to some sort of state regulations.

In the past, both the local Superior Court and state Supreme Court have said that the standing federal railroad protection laws prevail. Those rulings have not only allowed the waste stations to continue to do business in North Bergen, but they led to additional stations being built and operated.

But now, the state DCA has stepped in with their newest findings and shut down the three existing stations in North Bergen citing fire safety standards.

"It's not safe for the occupants of the building," said Bill Connolly, the state director of the Division of Codes and Standards, a subdivision of the state DCA. "It's not safe for the firefighters who might be called to fight a fire at the building, and it's not safe for the community."

Thomas O'Neil, a spokesman for the NYS&W, maintains that shutting down the waste transfer stations will only cause further problems to the area. Without the use of the railway, the collected construction debris is now being removed via trucks.

While the trucks were removing the debris last week, there was significant dust that was visible to the naked eye.

"Construction debris isn't going to magically go away," O'Neil said. "What this means for the region is just that instead of moving waste by train in the most environmentally friendly way, it will just be trucks traversing the highways in the area."

### **Will appeal new shutdown**

Two years ago, then acting Gov. Richard Codey tried to fine the NYS&W a record \$2.5 million for the numerous health and environmental infractions. He ordered the railroad to comply with regulations stipulated by the state Department of Environmental Protection.

In turn, the NYS&W sued the state DEP, saying that the proposed fine levied by the state would put the railroad out of business and again used the 120-year-old federal railroad law as leverage in the suit.

Last February, a federal judge ruled in favor of the NYS&W, dismissing the \$2.5 million fine and ruling that the federal law takes precedence over the state environmental regulations.

Regarding the most recent shutdown, O'Neil said that the NYS&W has already filed an appeal in federal court, asking for an injunction on the closings.

### **Not just a local issue**

North Bergen Mayor Nicholas Sacco, who is also the state senator in the 32nd District, applauded the efforts of the state DCA.

"I think that it's great that the state Department of Community Affairs took the jurisdiction in this matter," Sacco said. "It's very important for North Bergen. We couldn't accomplish anything alone, but I think we were able to shed some light on the problem. When the state realized

that it was a problem statewide, not just in North Bergen, the state DCA got involved. I'm grateful that they took the lead."

Sacco said that the township of North Bergen couldn't fight the battle against the waste transfer stations alone.

"It would have become a financial burden for us in terms of a legal battle," Sacco said. "I know that the state DCA has now shed some light on this problem nationally and it's a very legit problem. Maybe Congress will now address it, knowing that the law that protects this operation belongs in the 19th Century and is not appropriate now."

Sacco was asked if there could be a happy medium reached between the railroads and the government.

"There could be, if these operations are controlled properly," Sacco said. "But they would have to be entirely enclosed and show no danger whatsoever to the residents."

## **N.J. asks feds for stricter regulation of trackside sites**

*April 20, 2007, The Record - By H. R. JACKSON*

New Jersey officials urged the federal Surface Transportation Board on Thursday to make trash facilities owned by railroads meet the same environmental health and safety rules as other trash facilities.

But a lawyer for the railroad that owns several sites in North Bergen that were fined \$2.5 million for violations in 2005 contended that New Jersey is out to get his client and urged the federal regulators not to cede control over the issue.

"The state of New Jersey had an agenda... and their agenda was to shut these facilities down," said G. Paul Motes, lawyer for the New York, Susquehanna & Western Railway Corp.

NYS&W owns five North Bergen facilities where construction waste and contaminated soil from polluted sites are transferred from trucks onto railcars for shipment to out-of-state landfills.

The company convinced a U.S. District Court judge in February that federal laws designed to protect interstate commerce from not-in-my-back-yard local laws make railroads exempt from state solid waste regulations, and the fine was overturned.

The state has appealed, arguing the federal exemption applies to transportation activities, not trash processing.

"No one to my mind has ever said why a railroad can't comply with basic health and safety rules," said David K. Mouroe, a Washington lawyer who is serving as special railroad counsel to New Jersey. "Is there a transportation reason they don't have to do that?"

The issue is playing out in other places around the country and within New Jersey, where environmentalists have also complained about trash facilities on railroad property in Saddle Brook and Paterson.

Sen. Frank Lautenberg, D-N.J., heads the Senate subcommittee that

regulates surface transportation and opened the hearing by urging the federal board to take action.

"Unregulated waste facilities, whether on a rail line or not, are bad for our communities," Lautenberg said as aides showed poster-size photos of piles of debris at NYS&W sites.

Thursday's daylong hearing by the transportation board delved into New Jersey's complaints as well as a proposal for a transfer station in Massachusetts.

Motes urged the board not to take any action before New Jersey's appeal is decided and complained that the photos Lautenberg had shown were out of date. He said there are no more piles of waste at its facilities.

He also said the sites serve a purpose, since landfill space is scarce and it would be far worse for the transportation system for trucks carrying the waste to drive hundreds of miles to landfills as far away as Ohio and Quebec.

He also said that railcars filled with waste account for about 40 percent of NYS&W's traffic.

The board chairman, Charles "Kip" Nottingham, said no immediate action was likely but the issue would be a "high priority."

He and other board members were sympathetic to complaints that a company should not be able to simply buy an old railroad siding and call itself a railroad to evade local regulations.

The federal agency also has limited staff, leading two board members to ask witnesses about the possibility of empowering states to enforce rules, with any disputes settled by the board.

Much of the hearing focused on the differences between "transloading" materials from trucks to railcars, which most witnesses conceded would be exempt from regulation, and trash "processing" that might not be.

## Require review of waste stations

*March 10, 2007 - Asbury Park Press - Editorial*

Waste transfer stations like the one proposed for Freehold Township should be subject to state and local review to ensure they don't pose an environmental threat. Unfortunately, that's not the case today if the station is operated by a railroad. Our federal and state representatives should press for legislation to require community review of any solid waste storage facility.

The drumbeat against the proposed station — to be built along a rail line on Route 33 by an Ohio railroad that will lease the property — has already begun and should get louder. The Monmouth County Board of Freeholders is considering a resolution opposing the facility. State Sen. Ellen Karcher, D-Monmouth, said the station "would adversely affect the health and well-being of local residents." Karcher should take the lead in Trenton to guarantee public input whenever waste transfer facilities are proposed.

Railroads escape state permitting requirements for waste stations

because of a loophole in federal law. Rep. Frank Pallone Jr., along with Sens. Robert Menendez and Frank Lautenberg, all D-N.J., have introduced legislation to close that loophole and prevent railroads from storing waste without regulation. They need to step up their efforts to get the legislation passed.

The state Department of Environmental Protection has requested information about how the railroad would operate the facility and what materials would be handled. It's absurd it should even have to ask.

Karcher said Thursday that these sites "have a known track record for increasing air, water and ground pollution." Transparency in the application process would place the burden on the railroad to demonstrate that its operations — drawing truckloads of solid waste — would not cause any environmental harm in Freehold Township or the region.

With precious little landfill space, New Jersey's solid waste has to go somewhere. Rail transportation may be a good way to get it there. It does keep long-haul trucks off the road. But the pickup point has to be in the right place. This site, in the heart of a populated area already coping with traffic problems, doesn't appear to measure up.

## N.J. loses power to regulate railway trash

*February 26, 2007 - The Record - Editorial*

A railway that has created garbage heaps in Hudson County reaching 2½ stories high is free to operate with no oversight by any authorities in New Jersey. Not the city of North Bergen where the trash mountains are located, not the county, not the state — no one affected by the dumps has the power to regulate them under a far-reaching federal court order last week.

Literally, that's rubbish.

The New York Susquehanna & Western Railway Corp. has created a string of garbage piles along a two-mile stretch of rail line in North Bergen. The railway uses the sites as transfer stations for some of the hundreds of thousands of tons of construction and demolition debris that it ships each year to out-of-state landfills.

The trash poses a health, environmental and fire danger to neighbors. Its location also risks contaminants leaching into the ecologically sensitive Meadowlands. Elevated levels of lead, arsenic, mercury and copper have been found in wastewater at three trash sites.

New Jersey has rightfully tried to regulate these trash mountains for the protection of citizens and the environment. But a federal judge ruled Wednesday the state has no such authority. The railway is exempt from state oversight under federal laws that give railroads special powers, the judge ruled.

The state plans to appeal, as it should. New Jersey, like all states, has a fundamental need to regulate waste within its borders. Fighting for court recognition of that right is worth the legal costs this battle entails.

There is, however, a less expensive and more direct way to end this crisis. Congress or another federal authority needs to clarify that the special

rights granted to railroads don't extend to the waste-transfer business.

Sen. Frank Lautenberg introduced a bill two years ago to affirm states' rights to regulate the environmental and health impacts of solid-waste transfer operations by railroads. His office says he plans to reintroduce that measure soon. But they say the quicker way would be to win an order to the same effect by the federal Surface Transportation Board. The senator is lobbying the board. Good. The senator should continue to make this a priority.

NYS&W says state regulation is unnecessary. It points to improvements it has made since this controversy broke in 2005. The railway has for example built structures around the trash heaps that may reduce the risks of air pollution from flying debris.

But the railway made improvements under state pressure. Now that the court has ruled the state is powerless, what incentive does NYS&W have to invest in such protections?

Railways balk at the notion of states overseeing trash-transfer operations. They worry about the loss of their federal protections. No one is trying to undo the interstate commerce rights of rail.

New Jersey doesn't want to regulate railroads. It wants to regulate trash. If courts won't recognize this fundamental right of states, another branch of the federal government must step in.

## Official: transfer stations 'unsafe'

December 14, 2005, *The Record*, By PETER J. SAMBSON

NEWARK — A state official testified Tuesday that the enclosed waste-transfer stations the New York Susquehanna & Western Railway Corp. is building in North Bergen failed to comply with basic building code and environmental safeguards.

The so-called "transload" facilities, which have not received zoning and planning approvals, lack sprinkler systems, restrooms and such basic emergency equipment as eye washes in the event a worker is exposed to dust, said Thomas R. Marturano, director of solid waste and natural resources for the New Jersey Meadowlands Commission.

"It's unconscionable to be inside these buildings in such unsafe conditions," Marturano testified during the second day of a hearing before U.S. District Judge Katherine S. Hayden.

The judge continued the hearing until March but directed the railroad to work with the state to address concerns about the transfer facilities, where tons of construction and demolition debris and contaminated soils are delivered by truck to be loaded onto rail cars for out-of-state disposal.

Hit with a \$2.5 million fine for violating 2004 regulations governing the design, construction and operation of rail transload facilities, NYS&W sued the state Department of Environmental Protection and the Meadowlands Commission in August, contending the DEP regulations are preempted by federal law.

The judge temporarily blocked the state from enforcing the regulations

and collecting the fines. She allowed the railroad and its loading contractors to continue operating the transfer sites as NYS&W moved to replace four "open air" dumps with enclosed facilities that are supposed to control dust, pests, odors and wastewater runoff.

But Marturano said the new facilities are fraught with problems.

In addition to failing to comply with building and safety codes, he said, the scales to weigh trucks were not located properly and could lead to dangerous backups along a street that crosses the tracks.

"Traffic is a huge issue," he said, noting there's been no assessment of the effects of hundreds of daily truck trips on local roads.

Marturano said the sites were being operated by solid waste haulers who didn't want to spend the time or money to create legitimate transfer stations.

He also asserted that the railroad's recently instituted "flow control" measures, intended to prevent dangerous mountains of construction and demolition debris from accumulating at transfer sites, have led to illegal dumping in the district.

Truckers, who find the gates closed early, often dump their loads in deserted parts of the Meadowlands, he said.

Hayden has been pushing the parties to settle. She noted that any decision she made would likely be appealed by the losing party, take years to resolve and not serve the people of New Jersey now.

Finding that the railroad, which operates 400 miles of track in New Jersey, New York and Pennsylvania, has made progress in improving its facilities, she directed it to continue the dialogue with the state and identify which state regulations it intends to obey and which it won't.

She said she also would entertain a request by the state to have the rail line post a bond to cover its potential fines and asked both sides to suggest a fair amount. The judge also said she wants to see a traffic study done.

Paul Moates, a NYS&W attorney, said the rail line expects to finish the facilities and be in substantial compliance by the time the parties return to court in March.

## Derailing a disaster

July 18, 2005, *The Record*, Editorial

CONSIDER it the last straw. In recent years, North Jersey communities have had to put up with all sorts of headaches from railroads — from foul fumes of long-idling freight trains to the mounds of trash at rail yards. But in recent weeks, the situation escalated from exasperating to untenable.

Police and health officials found more than 280 tons of a potentially deadly chemical at a rail facility owned by the New York Susquehanna & Western Railway in North Bergen. By the time state police, fire marshals and environmental officials inspected the rail yard last week, most of the material — a flammable chemical known as phosphorus

pentasulfide had been transported elsewhere. But the officials were furious nonetheless. And for good reason.

One unlocked boxcar of phosphorus pentasulfide was still on site, in apparent violation of state fire codes. This chemical is serious stuff. It becomes explosive and produces poisonous gases when exposed to water, yet no one was notified of its presence in the rail yard. What's more, officials expressed concern about inadequate security and poor safety preparedness at the site - located near residential areas.

No wonder acting Governor Codey was angry: "The companies that want to develop unregulated [rail] sites that endanger our health should hear this message loud and clear: Clean up these sites or get out of New Jersey."

The NYS&W insists that it is fully complying with all federal hazardous materials transportation requirements, and that containers at the site are secured as required by federal law.

If that's the case, why could anyone easily enter the rail yard last week and walk right up to the containers of dangerous chemicals without being stopped? In an age when protecting against terrorism is of paramount concern, this is unacceptable.

U.S. Sens. Jon Corzine and Frank Lautenberg are working on legislation that would close the loopholes in federal laws that severely curtail reasonable state and local oversight of railroad property.

In the meantime, the railroad says it will address any legitimate concerns that state officials have about the dangerous chemicals.

That's good news. Starting when?

## Inspectors swarm over site of toxic chemicals

July 17, 2005 - The Record - By PETER J. SAMPSON

**NORTH BERGEN** - State police, fire marshals and environmental investigators, on orders from acting Governor Codey on Thursday, inspected a rail yard in the Meadowlands where thousands of pounds of a potentially deadly chemical were transshipped earlier this week.

The inspection team found 43 empty containers that had been used to transport phosphorus pentasulfide, a flammable chemical used in the production of lubricants and insecticides. They also found a quantity of chlorine in a locked boxcar, but railroad workers were unable to produce a manifest showing how long it had been there, North Bergen officials said.

A state police spokesman said he could not immediately disclose the results of the inspection at the West Side Avenue facility, owned by the New York Susquehanna & Western Railway Corp.

Police and health officials discovered more than 80 containers of phosphorus pentasulfide after responding to a report of a possible spill last week. Although there was no leak, officials expressed alarm about the lack of notification, inadequate security and poor safety preparedness at the site, noting that the chemical becomes explosive

and produces poisonous gases when exposed to water.

Codey vowed Thursday to take action to safeguard the community.

"This morning, I directed the Department of Community Affairs, the Department of Environmental Protection and New Jersey State Police to work with appropriate agencies and make sure these chemicals are dealt with properly," Codey said in a statement.

"This is only the latest incident in an ongoing problem of unregulated transfer stations that are being developed all across New Jersey."

The acting governor also directed the New Jersey Meadowlands Commission to retain special counsel, with national expertise in these laws, to help determine what further steps New Jersey can take to protect its residents in these communities.

"The companies that want to develop unregulated sites that endanger our health should hear this message loud and clear: Clean up these sites and obey our laws, or get out of New Jersey."

Lawyers for the New York Susquehanna & Western, in a letter to the Meadowlands Commission on Thursday, denied putting the public at risk.

"The railroad fully complies with all applicable federal DOT hazardous materials transportation requirements," attorney Dennis M. Toff wrote. "Any containers containing product that are not immediately picked up at the railroad's West Side Avenue facility are secured as required by federal law."

Toff said the 80 containers observed earlier by officials were in fact empty and awaiting return. He said they were "nitrogen-purged" and posed no risk.

Toff also said that Bulldog Lines, a Carlstadt trucking firm, was only delivering the chemical to Linden and does not occupy space at the site.

The railroad and Bulldog were issued a cease-and-desist order by the Meadowlands Commission on Wednesday for operating at the site without approvals or permits and in violation of regulations governing the storage of explosive, flammable and toxic materials. The agency demanded the immediate removal of flammable materials from the property.

"Rather than prematurely running into court, we request that the commission meet us to review this situation," Toff said in response to the agency's threat to seek an injunction. "Our client is prepared to address any legitimate concerns the commission or any other agency may have regarding these materials."

In June, Codey directed the attorney general to file an action in U.S. District Court in Camden on behalf of the Pinelands Commission against the companies and individuals planning to build an unregulated solid-waste station in the Pinelands National Reserve in Mullica Township.

U.S. Sens. Jon Corzine and Frank Lautenberg, meanwhile, are drafting legislation to close loopholes in federal laws that limit the reach of local

authorities on railroad property.

Jeff Tittel, executive director of the New Jersey chapter of the Sierra Club, said such legislation is badly needed to protect the public.

"It's mind-boggling that such dangerous chemicals can be stored on a railroad siding near a residential area," Tittel said. "If there had been an accident, he said, it could have been catastrophic. You've got to wonder if we're just flirting with disaster."

## HUDSON HAS CHEM INSECURITY ISSUES

July 13, 2005, *The Jersey Journal* By JARRI FLRENSHAW

**NORTH BERGEN** — Describing it as a potential "environmental catastrophe," local and county authorities are investigating security measures at a township rail yard, which acts as a storage yard for as much as 28,000 pounds of explosive chemicals.

The inquiry — and the outrage — stems from when emergency personnel apparently stumbled upon the chemical last week while responding to a complaint of a foul smell at the CSX Railroad property on West Side Avenue.

The good news was the smell proved to be inconsequential.

The bad news was officials discovered little or no security at the yard, a storage center along the New York, Susquehanna & Western Railway.

More than 40 containers of phosphorus pentasulfide, a flammable, explosive chemical, are stored at the site, according to police reports.

"We observed no security personnel, restriction or point of contact," read a memo from the North Bergen Health Department. A police officer wrote in his report, "There was absolutely no security in the yard."

Yesterday, a photographer from *The Jersey Journal* was able to walk through the yard's open gate and freely inspect the aluminum containers. Eventually, two employees asked him what he was doing, but then returned to work.

John Demjanick, a hazardous materials responder and coordinator with the Hudson Regional Health Commission, visited the site and said he is concerned about the length of time the chemicals remain on the property.

The chemicals are supposed to be moved from the rail car right on to a truck, Demjanick said yesterday. "If that happens, then everything is OK. But if it stays there, then there becomes a problem."

A CSX Railroad spokesman said the site is patrolled daily by New York, Susquehanna & Western Railway Police, though usually at night, after workers on the site go home.

## The rules for railroads

June 03, 2005, *The Star Ledger* Editorial

Congress long ago decided that the federal government alone should

regulate railroads, and with good reason. Uniform national standards ensure that local officials cannot helter-skelter zone train lines out of existence, derailing the free flow of commerce along the way.

That grand goal is little consolation to those who happen to live in tiny Elwood, a hamlet in Mullica Township in Atlantic County, home to an old, little-used train line. The Southern Railroad of New Jersey wants to build a transfer station there on a former junkyard site.

Trucks would bring tons of construction debris, and perhaps other waste, to the station, and trains would carry it off to Ohio landfills. The railroad says federal rail jurisdiction means state permits, local ordinances and the like don't apply.

But they do, at least enough to ensure that the health and safety of local residents aren't compromised. Federal pre-emption of local rules doesn't give railroads a complete pass on construction codes or other local rules that directly affect public safety and health.

Just which local mandates fit within those categories is a matter of growing debate. Railroads and local authorities usually disagree. And Elwood is just the latest example of a clash that is popping up across the country. Here in New Jersey, there are at least four railroad-operated transfer stations in the Meadowlands and plans for more.

All that has prompted acting Gov. Richard Codey, local officials and Sens. Frank Lautenberg and Jon Corzine to talk of changing the federal law. As appealing as the idea might seem, it's hard to see why that wouldn't create the very problem that Congress tried to prevent, the shutdown of railroads on local or political whim. And Congress isn't going to change the law anyway.

That doesn't mean the residents of Elwood or anyplace else have to suffer without recourse. The state should use its health and safety powers as aggressively as possible to keep the railroad facilities operating as good corporate citizens, not rogue train barons. That includes asking the Surface Transportation Board, the federal agency responsible for rail regulation, to officially spank railroads that balk at reasonable controls.

The board is no pushover. It slaps down towns and states that use sham environmental or other claims as a pretext to get around Washington's limits on local authority. But the board also says railroads should be cooperative and communities should be pragmatic.

That means railroads should abide by reasonable environmental and other regulations, including rules limiting the number of trucks and their operating hours. Residents such as those in Elwood can't be inundated with convoys of noisy trucks hauling construction debris to the tracks at 5 a.m.

Federal jurisdiction may not give the state Department of Environmental Protection or local officials nearly as much power over railroads as they would like. But it still leaves them enough to guard the legitimate interests of New Jersey residents.

They should not be afraid to do so. National commerce is important. But so is local quality of life.

## APPENDIX THREE:

### Summary of the New Jersey Meadowlands Commission Position

Solid waste management has historically been the jurisdiction of state and local government. This is particularly true with regard to environmental oversight and police powers dealing with public health and safety. Though the federal government has some role with regard to solid waste management, it has delegated oversight of solid waste transfer facilities to states and localities.

Recently certain solid waste operators have emerged in a new form in New Jersey, Massachusetts, Rhode Island and New York establishing a new and novel claim that their operations fall under federal jurisdiction due to their proximity to or utilization of railway infrastructure, which in large part is governed by the federal Surface Transportation Board (STB) and therefore preempted from state and local solid waste management regulation. The STB has not, to date, claimed total jurisdiction over solid waste management issues, nor can it under federal statute that grants to the STB no regulatory authority over ancillary facilities. Accordingly, the STB has not taken over – nor does it have the resources to do so even if within the STB's authority – the responsibilities of states and local government with regard to ensuring public and environmental health and safety from solid waste operations.

The processors' claims of sweeping preemption, if upheld, would place their waste operations in a regulatory blind spot, again, due to the lack of jurisdiction, regulatory authority, and resources associated at the federal level. Past incidents have shown the potential for abuse if this lack of oversight were allowed to become institutionalized.

Instances are highlighted by cases of outstanding litigation in the Northeast where a construction boom is generating large amounts of waste in a region with tight environmental controls. If unchecked, the opportunity to conduct solid waste business without proper, if any, oversight – in effect outside the law – could easily draw these practices beyond the regional context they appear to occupy now.

Through the Resource Conservation and Recovery Act of 1976, Congress and the judiciary have repeatedly recognized local and state government's role in solid waste management. In a U.S. Supreme Court decision issued in April 2007 that upheld local control of solid waste processing, Chief Justice John Roberts reaffirmed that "waste disposal is both typically and traditionally a local government function." Furthermore, Chief Justice Roberts wrote that "Congress itself has recognized local government's vital role in waste management," and he quotes the Resource Conservation and Recovery Act, which states that "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies."

The hearing committee should note that there are rail-side waste processing operators that do not claim to be exempt from local and state environmental, health and safety regulations and have been fully able to comply with local and state requirements. The committee should also be aware that several rail-side waste transfer facilities that operate, at least in part, according to local and state guidelines began to do so only after legal challenges were mounted against them.

Finally we must also note that railways are an important part of the process of transporting waste in the United States and practicality would seem to dictate that railways should continue to do so. The form of transportation is not the issue. What is the issue is the potential generation of a new exception never intended by Congress to generally accepted and long held standards meant to protect the public and their environmental resources.

# Description of Outstanding Cases

What follows is an outline of some of the pending cases that illustrate problems inherent in the contention that the laws governing solid waste should be breached to create a new and unprecedented exception for facilities associated with railways. It is by no means an exhaustive survey, but rather a reference to pertinent examples.

There are several instances of rail-side solid waste transfer stations in New Jersey that have eschewed local oversight with adverse consequences to the public and the environment. The situation has improved at some facilities, but only after legal action was taken. In cases in New Jersey and elsewhere, judges have recognized the traditional oversight held by local and state agencies over solid waste transfer operations.

## Township of North Bergen

- Five solid waste processing facilities situated along the New York Susquehanna & Western Railroad (NYS&W) emerged in the past five years in the form of large piles of debris placed directly on the ground and stored in place for considerable periods of time and without any significant environmental controls of any kind.

- Piles of construction and demolition debris as high as two stories had accumulated in the open-air facilities. Certain operations were closed and others put in place enclosed structures in which to store the debris. Enclosed structures that were eventually put in their place through the force of litigation were found packed beyond capacity with debris and constructed without regard for the International Building Code and without necessary fire suppression systems. Nearby wetlands were also found to have been filled illegally. The operations created serious fire safety and air and water quality hazards.

- The solid waste processing facilities argued that because of their proximity to or location on NYS&W

property they were preempted from any local or state guidelines governing solid waste operations.

- The railroad has continued to litigate in support of that position. In the meantime conditions have improved without assurance of continued improvement to the necessary standards or appropriate observance of established standards.

## Litigation:

- The New Jersey Department of Environmental Protection (NJDEP) fined NYS&W \$2.5 million as a result of numerous and continuous violations of state environmental regulations at five open-air waste facilities which went unmitigated for more than six months. The railroad requested injunctive relief from the fines based on broad claims of preemption.

- A U.S. District Court permanently enjoined the NJDEP from enforcing its regulations and assessing any civil penalty as to the five facilities at issue.

- A U.S. Third Circuit Court of Appeals decision released on September 4th struck down that ruling.

- The ruling stated that the U.S. District Court decision was overly broad and that only those state regulations that discriminate against and unreasonably interfere with rail carriage are invalid.

- The case has been remanded to the U.S. District Court.

## City of Passaic

- A rail-side waste processing facility has sought federal exemption from local and state oversight.

- Fires have broken out four times in the past four years. It is located in an urban, predominantly Hispanic and Polish residential neighborhood.

- Waste is processed in a structure located across the street from restaurants and dwelling units.

- Once waste is loaded, it is then transferred across a busy intersection while a single individual controls traffic.

- The rail cars are then assembled adjacent to a riverside playground and schoolyard.

## City of Paterson

- NYS&W informed the City in 2003 that it planned to build a "transload facility" adjoining residential backyards, but never submitted a full application to the Planning Board.
- In correspondence between the city and railroad planning officials repeatedly asked for more details about the structure.
- The railroad offered to appear before the Planning Board, but would not pay the fees required of applicants before the Board.
- The railroad filed a successful complaint to bar the city from interfering with construction. The company expected 12 to 15 trucks a day would use the facility.
- In May 2006 a 70-car freight train approaching a rail-side waste processing facility situated in a densely-populated residential neighborhood derailed, destroying two commercial buildings and forcing the evacuation of 75 families.

## Township of Freehold

- In August the federal Surface Transportation Board rejected an Ohio railroad's proposal to build a waste-transfer station in the township. The Board denied the plan because the railroad failed to answer specific questions about the proposed facility and could not rebut arguments made by opposing parties.
- The move followed strong bi-partisan opposition to the project. Local and state officials feared that the materials the station would likely handle, and runoff from those materials, would pollute the air and water.

## City of Pleasantville

- A judge rejected Southern Railroad's claim that a waste transfer station located within two feet of coastal wetlands was exempt from state regulations. The judge ruled that the federal law governing railroad facilities does not supersede state regulation of solid waste activities.

## Township of Mullica Hill

- Magic Disposal planned to build a rail-side waste transfer station that it claimed would be exempt from state oversight in the federally-protected Pinelands National Preserve.
- A District Court judge found it likely that the facility would not be preempted from state regulations.

## Township of Hainesport

- After claiming federal preemption and resisting state and local efforts to execute proper oversight, a solid waste processor using an adjacent rail line has agreed to abide by state environmental rules, giving the Township construction official the power to make regular inspections of the railroad with written notice and make snap inspections in the event of emergencies.
- The Township is paid 50 cents per ton for waste processed at the facility.
- The facility has reportedly agreed not to process municipal solid waste.
- The facility retains the right to claim federal exemption. A clause in the contract also allows the company to opt out of the deal if the Township or a third party files suit contesting the right of the railroad to engage in solid waste processing.

# APPENDIX FOUR:

## Description of the New Jersey Meadowlands Commission

The New Jersey Meadowlands Commission (NJMC) is the state zoning and planning authority for the 30.4 square-mile Meadowland District, a region of marshes, industrial areas and residential zones five miles from Manhattan. In creating the agency in 1968, the New Jersey Legislature assigned the NJMC – in addition to its land use role – jurisdiction over the District's solid waste management plan and the responsibility of providing solid waste disposal sites. The agency provides an increasingly broad array of services to the 14 District municipalities as well as carrying out an aggressive environmental agenda. Currently the NJMC is implementing several broad and innovative initiatives which are summarized below.

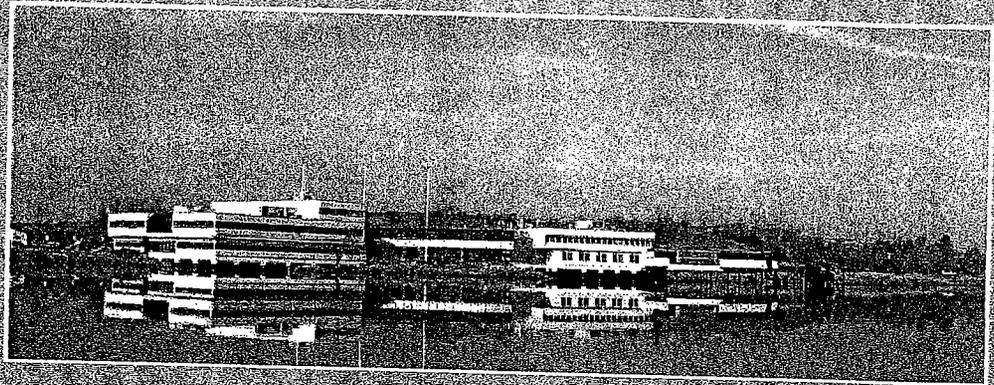
### Environmental Policy

The Meadowlands Master Plan and its requisite regulations, approved in January 2004, call for the preservation of the entire 8,400-acre Meadowlands urban wetlands ecosystem. This is one of the largest urban wetland systems in the United States.

Environmental projects underway include \$10 million for a series of massive marsh restorations and the establishment of a network of passive recreation assets.

Restoration of the 600-acre Richard P. Kane Natural Area and the creation of an adjoining public marina and park will receive \$3 million. An additional \$800,000 is targeted toward general trail system development in the District. Finally, a \$340,000 fund is set aside for basic environmental research.

The Meadowlands District hosts a remarkable bird population of 260 different species including 35 listed as endangered and threatened in New Jersey.



### Renewable Energy

The NJMC announced in June the advancement of a 700-kilowatt solar array that will satisfy half of the energy requirements of the NJMC campus. Next, the NJMC will work to facilitate the installation of solar energy on municipal and school-owned properties in the Meadowlands District. This year the NJMC will release its Renewable Energy Master Plan. The plan will facilitate the installation of at least 20 megawatts of renewable energy by 2020.

### Flood Management

As part of its new drive to assist municipalities and businesses in the District, the NJMC pursues flood control strategies following the Hackensack Meadowlands Floodplain Management Plan of 2005. The plan brings agency resources to the aid of localities suffering from chronic flooding and was developed together with state and federal agencies, municipalities and property owners.

### Municipal Support

Since 2003 the NJMC has established a highly developed system of support services for Meadowlands municipalities. This includes annual direct assistance to help communities purchase much-needed equipment that would otherwise require a hike in taxes. The NJMC's award-winning Meadowlands Environment Center is quickly expanding its educational offerings to Meadowlands school districts. Another example of the agency's unique expertise is the expansive Geographic Information System (GIS) outreach program which has produced digital mapping systems for each of the 14 municipalities in the District.



**New Jersey Meadowlands Commission**

One DeKorte Park Plaza • Lyndhurst, NJ • 07071 • 201-460-1700 • [www.njmeadowlands.gov](http://www.njmeadowlands.gov)