State of New Jersey
Commission of Investigation

SOLID WASTE MANAGEMENT

by the

BERGEN COUNTY UTILITIES AUTHORITY

DECEMBER 1992

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COMMISSION OF INVESTIGATION
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December, 1992

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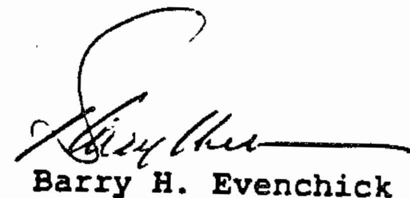
The State Commission of Investigation herewith formally submits, pursuant to N.J.S.A. 52:9M, a report and recommendations on its investigation into solid waste management by the Bergen County Utilities Authority.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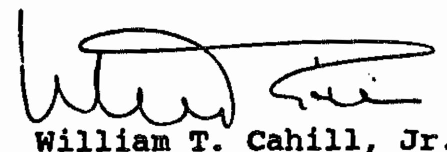
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INTRODUCTION

The State Commission of Investigation completed an extensive investigation of the solid waste management activities of the Bergen County Utilities Authority [BCUA] during the 1980s. Specifically, the Commission examined the processes that led to the BCUA's award of contracts for the transportation and out-of-state disposal of solid waste, for the equipment and labor to operate a temporary transfer station and for the construction of a permanent transfer station in North Arlington Boro, together with its acquisition of the transfer station site. The New Jersey State Senate, also concerned about the BCUA's activities, requested the Commission to undertake such an inquiry by Concurrent Resolution No. 116, enacted on December 1, 1988. When resources became available in the spring of 1989, the Commission assembled an investigative team.

The investigation was commenced amid allegations that the public emergency declared by the BCUA on November 30, 1987, which allowed the BCUA to bypass the competitive bid process and negotiate directly with prospective vendors, was contrived and that the award of the contracts was riddled with improprieties. Moreover, allegations of payoffs surfaced. At the center of the allegations was the issue of whether the BCUA performed its responsibilities competently and diligently. In examining these issues, the Commission necessarily explored the conduct of the various vendors in providing solid waste services to the BCUA. The ultimate question is whether the interests of the ratepayers of Bergen County were best served by the BCUA's management of the solid waste activities. The Commission concludes that they were not.

In reconstructing the events that preceded and surrounded the BCUA's actions, the Commission interviewed more than 100 individuals, heard testimony from 51 witnesses, reviewed several thousand documents and analyzed tens of thousands of financial records. The arduous task of scrutinizing past events was made all the more difficult by the deliberate evasiveness and faulty memory of an inordinate number of witnesses and by the finger-pointing of key individuals who refused to assume responsibility for actions. Frequently, it was the written words contained in documents, as opposed to the participants themselves, that gave substance to the events. Further, the Commission experienced repeated difficulty in obtaining documents. For example, the BCUA did not comply fully with the Commission's letter request for records in April 1989 and, as a result, the Commission was compelled to commence issuance of subpoenas in July 1989. In addition, the Commission was confronted with the uncooperativeness of the owners of a New Jersey corporation, Compaction Systems Corp., who reaped millions of dollars in profit from the BCUA project, but who moved money through related companies and maintained the books and records beyond the Commission's jurisdiction in the Bronx, New York. Many records were ultimately produced after the Commission obtained arrest warrants for the two owners, but most documents remained beyond the Commission's jurisdiction and were not voluntarily made available to enable the Commission to perform a complete trace of the monies generated by the BCUA project.

The Commission finds that the BCUA, faced with a final date of December 31, 1987, after which it could no longer dispose of its garbage in the Hackensack Meadowlands District, abandoned one initiative and neglected another project that would have presented reasonable, well-planned and far less costly solutions to its solid waste crisis. The emergency declared by the BCUA was avoidable.

In 1986, the BCUA engaged in negotiations with the Hackensack Meadowlands Development Commission for an interdistrict agreement that would have allowed Bergen County to continue disposing of its garbage in the Meadowlands beyond December 31, 1987 and until its resource recovery facility became operational. Inexplicably, at the end of 1986, the BCUA withdrew from the negotiations. No witness for the BCUA was willing or able to explain why. At the same time, however, the BCUA commenced preparation of requests for proposals to obtain a vendor to provide transportation and disposal at out-of-state landfills. The documents were ready for issuance in early 1987, but were never released. Again, no BCUA witness provided an explanation. By failing to bring to fruition either of these initiatives, the BCUA hurled itself toward the December 31, 1987 exit date and declared an emergency only one month before the date.

Following the emergency declaration, the BCUA crafted an extravagant solid waste program that needlessly cost the ratepayers of Bergen County millions upon millions of dollars. The BCUA rejected a simple, far less costly plan of constructing a transfer station facility and hiring a vendor to provide the equipment and labor to load, transport and dispose of the solid waste. Instead, the BCUA orchestrated an elaborate, convoluted two-phase plan. The *first stage,* or interim phase, consisted of seven months of handling the waste in loose form and involved the construction of a temporary slab, the hiring of a vendor (Compaction Systems Corp.) to provide equipment, the hiring of another vendor (Willets Point Contracting Corp.) to furnish the labor and the hiring of a vendor (Mitchell Environmental, Inc./Laidlaw Industries, Inc.) to transport and dispose of the garbage; but, because Mitchell was unable to handle the waste in loose form, Mitchell had to assign its responsibilities to two other vendors (Compaction and Willets). The *second stage* consisted of the costly acquisition of a site for the transfer station, the costly construction of an enclosed baler facility, whose primary intended purpose was for only three to five years, the purchase and installation of four balers, plus a conveyor system, the construction of a rail system, the purchase of forklifts, loaders and other equipment and the hiring of additional personnel. Furthermore, the BCUA found it necessary to engage six different engineering firms and six separate contractors for the construction of the transfer station in the second stage.

The program selected by the BCUA exceeded $225,000,000. This figure, which does not include the BCUA's own costs for overhead, employees and equipment, is comprised of the following components:

- $145,941,398 for transportation and disposal
- $4,543,194 for construction of the temporary transfer station
- $1,749,182 for the equipment contract for the temporary transfer station
- $3,461,405 for the labor contract for the temporary transfer station
- $2,770,629 for labor provided by Compaction without a contract
- $171,535 for equipment provided by Compaction without a contract
- $7,431,847 for the acquisition of the site for the permanent transfer station, *plus* $37,500 for the appraisal report
- $45,717,295 for the construction of the permanent transfer station/baler facility
- $2,965,105 for the baler system, including installation, *plus* $2,002,581 for ancillary equipment
- $7,771,296 for engineering firms.

During the interim phase, which began on March 1, 1988, the BCUA grossly overpaid for equipment rentals, paid for artificially inflated equipment rentals and paid for labor and equipment services without awarding contracts. These issues will be discussed at length in the report. In the construction of the permanent transfer station, the BCUA paid for change orders that proved so extensive as to alter the original contract terms and insure upwardly spiralling contract prices. The BCUA's mismanagement, lack of oversight and absence of planning cannot be explained or justified because of the emergency that it allowed to be created. Once declared, the emergency was continually invoked to justify a host of omissions and failures. In fact, a resolution of the BCUA on April 13, 1988 declared the November 30, 1987 emergency to be continuing until completion of the transfer station/baler facility. Once in the emergency mode, the BCUA repeatedly disregarded the requirements of the Local Public Contracts Law by obtaining services without authorizing resolutions or awarding contracts.

The selection of the transfer, transportation and disposal vendors was preceded by events and awarded under circumstances that raise serious questions as to whether the final selection of vendors was predetermined. However, the Commission emphasizes that it found no proof of payoffs in connection with the award of the contracts.

The Commissioners of the BCUA certainly had the duty and responsibility to know what their staff and consultants were doing and to direct them. Reliance upon the advice and assumed action of their staff and consultants does not relieve them of that duty and responsibility, but does underscore the impossible situation created by the appointment of part-time commissioners, however well-intentioned, who must deal with areas in which they lack expertise and, at times, an interest. As one BCUA Commissioner stated to the SCI, they were "spoon-fed" by the consultants and staff. Nevertheless, the BCUA Commissioners were responsible ultimately to set the policies and goals and to insure that they were carried out in a timely and effective manner. The consultants and staff cannot act without direction and authorization. This Commission finds that the BCUA Commissioners failed to exercise the proper oversight in directing the BCUA's solid waste management activities.

The failure of the Commissioners to act responsibly, however, pales in comparison to that of Vincent A. Caldarella, who served as their Chairman. *(See* **APPENDIX** for listing of BCUA Commissioners.) As evidenced in numerous documents and attested to by other witnesses, Caldarella assumed a prominent and active role in the BCUA's solid waste activities. Indeed, Caldarella himself confirmed in testimony that he gave "time and dedication to that job" of both Chairman and Executive Director and, from the beginning, was "[v]ery completely involved." When he was reappointed to the chairmanship on February 19, 1987, according to BCUA minutes, it was because "he was so completely involved in a lot of critical areas concerning landfilling and resource recovery." Further, he was characterized as the "major force behind BCUA's solid waste initiatives" in an article entitled "Out-of-State Disposal Starts Smoothly" in the BCUA *Communicator* (March 1988). Caldarella boasted to the Commission that at all times, "I honestly believed and still believe that I was doing things on behalf of the residents of Bergen County." Nevertheless, when confronted with documents and with questions seeking answers to why the BCUA failed to finalize certain initiatives or to explain steps that were undertaken, Caldarella was plagued by a poor memory, challenged the accuracy of documents that attributed to him courses of action and decision-making and repeatedly directed the Commission to other individuals. Caldarella, however, was not alone in this regard.

The Commission's scrutiny of the BCUA in the area of solid waste management is not the first of its kind for this agency or for the state legislature. In 1983, the Commission issued a report and recommendations on county and local sewerage and utility authorities. Many of the Commission's findings are apposite nearly 10 years later: "inadequate monitor-

ing of...funds," "widespread lack of oversight" of construction projects, "questionable practices in the appraisals and acquisitions" of sites, "shoddy management of facilities by authority members and employees," "incidents of conflicts of interest" and "political influence in the appointments of authority members and executives." A "principle finding" of the 1983 report and the ultimate finding now with respect to the BCUA is the "lack of accountability." The BCUA, as well as all county and local authorities, are virtually autonomous. In 1988, the New Jersey State Assembly Committee on County Government and Regional Authorities, citing the Commission's work in this area, conducted public hearings on the operation of authorities. In the course of the hearings, the Commission provided testimony and reiterated its recommendations. The hearings culminated in the proposal of reform legislation designed to make authorities more accountable, to improve their operation and to enhance their integrity. The Commission notes that its recommendations for a code of ethics and personal financial disclosures were incorporated in the Local Government Ethics Law. *N.J.S.A.* 40A:9-22.5; *N.J.S.A.* 40A:9-22.6.

The problems that both beset and were exhibited by the BCUA are not unique to this authority, but rather highlight the weaknesses inherent in authorities generally. Accordingly, the Commission's recommendations have state-wide application.

THE EMERGING SOLID WASTE CRISIS

In order to assess the BCUA's actions and inactions, one must understand the history of solid waste management in this state and the evolving statewide crisis and how they impacted upon Bergen County. A series of events and statewide policy changes in solid waste management directly affected Bergen County and thrust new responsibilities upon the BCUA.

After decades of uncontrolled, environmentally unsound dumping of garbage throughout the state, its landfills were reaching capacity or verging on collapse. At the same time, the environmental hazards from dumping, such as the formation of leachate, were being recognized and technologies were being developed to reduce and more safely dispose of solid waste. Gradually, state policies of recycling, incineration and properly designed and operated landfills began to replace the indiscriminate dumping of garbage that posed increasing threats to the state's environment and to its commercial and economic development and growth. As the state moved toward a goal of self-sufficiency in handling its garbage, it placed on each county the responsibility to formulate a solid waste management strategy within its borders. The Department of Environmental Protection [DEP], the forerunner to the present Department of Environmental Protection and Energy, served as the lightning rod in prodding and overseeing each county to achieve a long-range, ultimate solution to solid waste disposal, to formulate an interim plan until implementation of a final solution and to construct a contingency plan in the event of an immediate, unanticipated failure of the current disposal mechanism. Where necessary, DEP was prepared to intervene and, in fact, did so in certain counties that failed to undertake the necessary planning.

The northern counties, in particular, were rapidly running out of landfill space for a variety of reasons. While resorting to out-of-state disposal as a short-term remedy for these counties, the state regarded resource recovery facilities as the ultimate goal to achieve self-sufficiency. The state's vision of an incinerator in every county, however, recently succumbed to the concept of regional facilities. In Bergen County, for example, resource recovery planning has been abandoned and the bulk of its solid waste is transported to Essex County's facility.

Two events exercised a profound effect on the direction of solid waste management in this state, in general, and in the northern counties, in particular, and led to the BCUA's award of solid waste contracts in February 1988. These significant events were the creation of the Hackensack Meadowlands Development Commission in 1969 and the enactment of the Solid Waste Management Act in 1970.

In testimony before the Commission, Donald A. Deieso[1], former Assistant Commissioner of the DEP, described the genesis of New Jersey's solid waste crisis and the attempt by DEP to move the state to "properly designed and operated solid waste disposal facilities":

> *New Jersey had for years neglected to create new solid waste disposal facilities and, consequently, back in the late 1970s,*

---

[1]From 1980 through 1983, Deieso served with the U.S. Environmental Protection Agency, where he became Chief of the Superfund Program. In 1985, he joined the N.J. Department of Environmental Protection as Director of the Division of Environmental Quality under Commissioner Robert E. Hughey and in 1986, became Assistant Commissioner for Environmental Management and Control under Commissioner Richard T. Dewling. As Assistant Commissioner, Deieso was responsible for the Division of Solid Waste Management, the Division of Water Resources and the Division of Environmental Quality.

DEP acted correctly, in my judgment, to close many of the old dumps that existed in our state. New Jersey had over five or 600 dumps....

These dumps were, and continue to be today, one of the major environmental problems this state faces. They are, incidentally, the same dumps that have created the problems that Superfund is addressing. Many of these dumps received chemical waste in addition to the local, the local garbage and trash, so the legacy that these dumps continue to offer in our state is a most serious one.

Deieso continued:

... DEP acted, closed these dumps and encouraged the counties and local governments to create...properly designed and operated solid waste disposal facilities, whether -- whether incinerators or landfills....

That message went unheard from the mid-'70s to the early '80s and DEP, in its statutory responsibility to oversee the state's solid waste management activities, in the '80s...had taken firm action to assign responsibilities for counties' solid waste disposal solutions to the county.

That was echoed in an amendment to the Solid Waste Management Act whereby every county had the obligation to develop a plan, to submit the plan to DEP for approval and then to carry out the plan so that each county would handle its own solid waste; that is, it was then, and continues to be today, the obligation of the county and under state law.

In describing the role of DEP in solid waste management under the leadership of Commissioner Robert E. Hughey and his successor, Richard T. Dewling, Deieso emphasized the continuing theme that the counties had the responsibility for solid waste management. The only difference was that under Dewling's administration, DEP assumed more of a helpful role in finding solutions and was supportive "in all of the [counties'] political actions...to create new landfills or create incinerators." DEP also acted to insure that counties were aggressively seeking solutions. Deieso asserted that the state's objective was to achieve "a policy of self-sufficiency for each county and for our state by 1992."

HACKENSACK MEADOWLANDS DEVELOPMENT COMMISSION

Under its establishing legislation, the Hackensack Meadowlands Development Commission [HMDC] was to provide landfill capacity to only four counties: Essex, Passaic, Bergen and Hudson. Commencing in 1982, however, the HMDC set about to bring an end to all straight landfilling[2] within its district by the conclusion of 1987. As a result, the HMDC entered into consent and amended consent judgments with Essex and Passaic Counties and an interdistrict agreement with Bergen County for each county to cease all dumping of solid waste in the District as of July 31, December 1 and December 31, 1987, respectively. Only Bergen County declared an emergency and failed to meet its exit date. An agreement, formalized in May 1990, allowed Hudson County to landfill in a specified area until filled, at which time Hudson will have to send all of its solid waste out of state. (Hudson County has been sending a portion of its solid waste to out-of-state landfills.)

The HMDC's decision to end straight landfilling within its borders, despite its legislative require-

[2]Straight landfilling, which refers to the disposal of unprocessed, municipal solid waste, not including toxic or hazardous wastes, produces methane gas and leachate. The term is not used to refer to the residual or ash waste that results from the operation of a resource recovery facility. The HMDC never sought to get out of the solid waste business entirely, but expected to be host to the Bergen County and Hudson County resource recovery facilities and their associated landfills for residual ash, non-processible and bypass waste.

ment to provide disposal capacity, was the inevitable extension of its *raison d'etre* to reclaim and develop the vast acres of incalculable value known as the Hackensack Meadows. Full realization of HMDC's goals was inconsistent with the perpetual use of the Meadowlands as a dumping ground. It quickly became apparent that landfills were expanding at greater rates than initially projected and that many were nearing capacity. The 30,000 tons accepted in the district in 1970 more than doubled to 66,000 tons in 1985, when the district received 35% of all solid waste generated in New Jersey. Clearly, the ever-growing mountains of raw garbage not only threatened the integrity of the substantial industrial, business and residential development that had already taken place, but also jeopardized the continued development of the area. In addition, efforts to restore and preserve the environment were undermined. Furthermore, the HMDC's decision to close the district to solid waste landfilling in 1987 was consistent with the state's environmental policy to implement a program of resource recovery. The counties of Essex, Passaic and Bergen were expected to have such facilities in operation by their 1987 exit dates.

The inevitability of the HMDC's decision to end straight landfilling and its inexorable position on holding the counties to their exit dates are understood in light of its history and legislative mandate. The value of the marshlands in northeastern New Jersey was recognized as early as the 1810s and 1860s when proposals were made for the development of the region. Such efforts were thwarted by the infancy of engineering technology. Subsequent studies in 1896 and 1929 were not implemented because the inordinate expense of reclamation could not be justified by the land economics. Then, beginning in the late 1950s, groups to explore reclamation and development for the region were formed and studies were commissioned, all of which concluded that reclamation was feasible because engineering technology was capable of the task and the expense of reclamation was perceived to pale in comparison to the ultimate value of the reclaimed land. Momentum gained and the subject of reclamation and development of the Hackensack Meadowlands gained prominence with both the legislature and the governors from the late 1950s into the 1960s.

The immense value of the region, most of which remained undeveloped while a portion was utilized for warehousing, transportation and solid waste disposal, became increasingly acknowledged. The Hackensack Meadowlands constituted the only major land mass in the New York-New Jersey metropolitan area with access to a comprehensive network of rail, highway, airport and water transportation facilities serving regional, national and international markets. They, therefore, offered a unique opportunity to provide for the needed expansion to meet the burgeoning commercial, industrial and population growth from the densely concentrated urban centers. Within the eight northeastern counties of New Jersey, the population was expected to explode by 40% to 1.5 million persons by 1975 and to create 620,000 new jobs. The invaluable land reserve offered the opportunity of employment, housing, increased tax ratables and enhanced value to the Fund for the Support of Free Public Schools, pursuant to the New Jersey Constitution, Article VIII, Section IV. By 1969, as the great potential of the Meadowlands became self-evident, serious environmental problems caused by industrial and household wastes, dredge spoils and sewage were being identified.

By mid-1965, the only remaining obstacle to comprehensive reclamation and development of the Hackensack Meadowlands was the lack of a governmental vehicle to implement a uniform, coordinated program. So concluded the New Jersey Commission to Study Meadowland Development in its *Final Report*, which recommended a state-level authority to provide a cohesive and integrated approach instead of a leisurely, diffused and piecemeal effort by the 14 municipalities and two counties wherein the Meadowlands were located. The report admonished that

to permit the development of the meadowlands as it is now proceeding in an undefined and haphazard fashion would be to dissipate the potential of what has been called the most valuable piece of real estate on earth. Overstated as this description may be, the ultimate value of the meadows not only to New Jersey but to the whole Metropolitan Area is incalculable.

The transformation of the Hackensack Meadowlands from the region's garbage dump into an "area of booming development" was set in motion with the enactment of the Hackensack Meadowland Reclamation and Development Act in 1969. *N.J.S.A.* 13:17-1, *et seq.* Passage of the Act was vital to the state's qualification for $300 million in federal aid to assist in the reclamation. In acknowledging the approximate 21,000 acres in the lower Hackensack River basin as "a land resource of incalculable opportunity for new jobs, homes and recreational sites, which may be lost to the State through piecemeal reclamation and unplanned development" and recognizing "their strategic location in the heart of a vast metropolitan area with urgent needs for more space for industrial, commercial, residential, and public recreational and other uses," the Act provided the machinery, through the creation of the HMDC, for "the orderly, comprehensive development of these areas," with appropriate consideration to be given to "the ecological factors constituting the environment of the meadowlands and the need to preserve the delicate balance of nature...." *N.J.S.A.* 13:17-1. The Act recognized the region's "need [for] special protection from air and water pollution and [for] special arrangements for provision of facilities for disposal of solid waste." *N.J.S.A.* 13:17-6(i).

The powers entrusted to the HMDC were designed to transcend municipal and county boundaries and principles of home rule. No land within the Hackensack Meadowlands District that was owned by a particular county or its utilities authority was exempted from the HMDC's reach. Indeed, the HMDC was directed to prepare, adopt and implement a master plan "for the physical development of all lands lying within the district." *N.J.S.A.* 13:17-6(i) (emphasis supplied). The legislative intent to invest the HMDC with complete control over solid waste disposal within its boundaries was clear. *See Town of Kearney v. Jersey City Incinerator*, 140 *N.J. Super.* 279 (App. Div. 1976); *Atty. Gen. F.O.* 1979, No. 18. In this regard, it is noted that the HMDC was directed to guarantee solid waste disposal facilities for only that amount of solid waste being disposed of in the district as of January 13, 1969. *N.J.S.A.* 13:17-10(b). The disposal of more than this amount could be allowed only in its discretion. *N.J.S.A.* 13:17-10(e).

The HMDC's decision to end straight landfilling within its borders was supported by DEP. Former Assistant Commissioner Deieso testified:

With respect to solid waste planning, the HMDC had a plan and a mission that had been adopted and accepted. That plan had in it the solid waste management obligations of the HMDC for the future. That plan and what the HMDC thought of itself and its mission in solid waste was what we were -- we came to understand and what we then implemented. And with respect to the HMDC, if the HMDC said to us that there was no landfill capacity remaining or that their plan would have no further landfill capacity developed, then it was simply a matter of DEP adopting that notion as we began our planning and our thinking, so it was -- it was a close working relationship. It was really HMDC's decision and their planning as to what was and what wouldn't be within the HMDC district.

In light of the HMDC's history and mandate, the burst of development that ensued in the Meadowlands and the unanticipated mounting garbage that threatened the development, perpetual solid waste

disposal had to be eliminated at some point in order to realize the full potential of reclaiming and developing the Meadowlands. Definitive exit dates to cease landfilling were essential to the area's orderly development. Consequently, the HMDC set about to accomplish this result with the counties, including Bergen, through negotiations and economic inducements.

SOLID WASTE MANAGEMENT ACT

The Solid Waste Management Act, which provided for the coordination throughout the state of solid waste collection, disposal and utilization, designated the Hackensack Meadowlands District [HMD] and each of the 21 counties as a solid waste management district empowered to develop and implement a comprehensive solid waste management plan within its borders. *N.J.S.A.* 13:1E-1, *et seq.* It requires each solid waste management district, once every two years, to prepare and adopt revisions to its plan in order to insure constant updating of its solid waste strategy. Thus, the Act assigned full responsibility for solid waste management to each county and to the HMDC.

The Act portended severe consequences for the future of Bergen County's garbage dumping in the Meadowlands District. Significantly, by designating the HMD as a solid waste management district, the Act reaffirmed the HMDC's role in controlling the solid waste within its borders. In addition, according to HMDC's Director of Solid Waste and Engineering, Thomas R. Marturano, because the intent of the Act was to make each county self-sufficient and because reliance on the HMDC for disposal was clearly contrary to this intent, the HMDC concluded that the Act modified its own mandate to dispose of waste from certain municipalities.

DEP'S ROLE

In moving the state towards self-sufficiency in the disposal of solid waste, DEP recognized out-of-state disposal as a short-term solution for counties without available in-county landfill capacity and before completion of their long-range solution, resource recovery. In addition, DEP supported the HMDC's decision to end straight landfilling by the close of 1987. These policies, which DEP made well-known, served to define more sharply the BCUA's solid waste alternatives.

In testimony before the Commission, Michael F. DeBonis,[3] former Director of DEP's Division of Solid Waste Management, described the status of solid waste management in the state following enactment of the Solid Waste Management Act. He explained that the counties were formulating their solid waste management plans as required by the Act and that the DEP was in the process of certifying them. By 1980, a number of landfills throughout the state, especially in the northern counties, were either closing because they had reached their permitted capacity or were closed for environmental reasons. As a result, DEP was redirecting solid waste from counties with no remaining facilities to counties that still had operating landfills. The process of redirecting the waste flow continued through the early 1980s, but it became increasingly difficult as the existing landfills were reaching and exceeding capacity. At the same time, most of the southern counties were effectively moving toward self-sufficiency by selecting and preparing new in-county landfill sites. In contrast, the northern counties, where the strategy was to plan resource recovery facilities and only a few landfills, were very far behind in developing

[3] DeBonis, who joined the U.S. Environmental Protection Agency in July 1971, has been Assistant Director for Solid Waste Management in the Air and Waste Management Division, New York Region, since December 1988. In July 1980, he was dispatched to the N.J. Department of Environmental Protection pursuant to a federal program to provide assistance to the states. From June 1986 to December 1988, he served as the Director of the Division of Solid Waste Management and reported to Assistant Commissioner Deieso.

their facilities. As a result of this situation and the growing crisis in the northern counties, DEP made a policy decision in late 1985 that it could no longer redirect the waste or insure that the waste stream in the northern counties would be handled within the state. DeBonis explained DEP's decision not to redirect the waste from the northern counties to landfills in southern counties:

> *[T]o do that, it would have been to punish the counties that picked facility sites and developed facilities and rewarding those counties which, for whatever reasons, had not gotten their facilities on line, and that would have sent a terrible message to the next counties getting ready to develop a facility or construct a facility -- that, in fact, they would be constructing it for all the counties that didn't construct one. And so, that was unacceptable from a policy standpoint.*

In a bold move, that did not go unnoticed by the BCUA, DEP seized control of the solid waste planning in four northern counties that were in "urgent need of an interim solution to their solid waste management plans." In January 1986, DEP announced its policy to establish transfer station facilities in Union, Morris, Somerset and Passaic Counties for the transfer of solid waste to out-of-state facilities. DeBonis testified that the DEP undertook this initiative in 1986 and 1987 "because we no longer believed we had the capacity to handle all of New Jersey's waste in-state while we waited for these new [resource recovery] facilities to be developed." The decision to initiate a transfer station program had been made while Dewling was Deputy Commissioner under Commissioner Hughey and was implemented after Dewling became Commissioner. The program was regarded as a short-term, interim solution "for three years or five years at most" until the counties developed resource recovery facilities to dispose of the solid waste on a long-term basis. The DEP proceeded with the program for out-state-disposal despite its concerns about other states accepting New Jersey's garbage because of New Jersey's own experience in failing to close its borders to other states' solid waste[4] and the expectation that it would only be a short-term solution. To allay the concerns of other states and to emphasize the use of out-of-state landfills for the short term, DeBonis personally met with representatives of other states, including Pennsylvania and Kentucky, to explain New Jersey's policy.

DeBonis testified that although the transfer station program was decided upon as the specific solution for the four counties, it was viewed as a "general remedy" for the other northern counties as well. For example, Sussex County was also compelled to dispose of its waste out of state when the Hamm's Landfill closed, as was Warren County when the Highpoint Landfill closed. DeBonis testified that while "the northern counties in general had problems...the problems were particularly acute" in Bergen, Essex, Passaic and Hudson Counties "because of their population concentrations" and the absence of clear, long-term landfilling opportunities.

As the solid waste crisis was fomenting, the DEP actively took steps to force each county to formulate three types of solid waste plans: (1) a long-range disposal strategy; (2) a short-term, interim plan to be followed until implementation of the long-range plan, and (3) a contingency plan in the event of a sudden failure of the interim measure. According to Deieso, DEP required the counties to explain and document each type of plan.

For the northern counties, transfer stations and out-of-state disposal were increasingly chosen as the interim solution, pending construction of resource recovery facilities. DEP actively endorsed the program of transfer stations and out-of-state

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[4]In *City of Philadelphia v. New Jersey*, 98 *S.Ct.* 2531,437 *U.S.* 617, 57 *L.Ed. 2d* 475 (1978), the United States Supreme Court held invalid a New Jersey statute banning the disposal of out-of-state waste.

disposal and supported the HMDC's exit dates for Essex, Passaic and Bergen Counties. Documents confirm both DEP's support of HMDC's position to end all straight landfilling in 1987 and its own policy that counties, in formulating their long-range solid waste planning, could rely upon out-of-state disposal as a short-term solution. In the face of these clear positions, any assertion that the BCUA was oblivious to the clear direction advanced by the DEP is unconvincing. Moreover, each of the northern counties, including Bergen, kept abreast of the solid waste developments in neighboring counties.

Shortly after his appointment in the beginning of 1986, DEP Commissioner Dewling met with HMDC Executive Director Anthony Scardino, Jr., who briefed Dewling on the status of solid waste management in the HMD. In a follow-up letter dated February 25, 1986, Scardino reiterated the "solid waste crisis" in the Meadowlands and "the potential disaster which is scheduled for 1987." The letter contained a succinct statement on the need for both agencies to enforce the Essex, Passaic and Bergen agreements:

> *As signatories to the Bergen, Essex and Passaic agreements, it is both of our responsibilities to insure absolute compliance. The credibility of both entities is at stake. If the public perceives that neither the HMDC nor the NJDEP is willing to enforce its agreements, then no district will ever willingly enter into an agreement to accept another district's waste. Both of our agencies need to maintain a viable public credibility if we are to accomplish our goals.*

Dewling responded to Scardino in a letter dated June 2, 1986. He stated that the DEP "wholeheartedly agrees with the HMDC that the cutoff dates for the use of the HMDC disposal facilities as contained in the various ACO's/Consent Orders should be enforced by both our agencies." Dewling went on to note the DEP's intent to implement a transfer station initiative to dispose of Passaic County's waste outside of the HMD and the possibility that such an initiative could be expanded to include Bergen, Essex and Hudson Counties.

DeBonis expounded upon DEP's policy decision to support the HMDC's exit dates for Essex, Passaic and Bergen:

> *The Department had, in effect, reached the decision not to contest HMDC's decision that no further space would be available after the times that they had indicated, and so we, you know, consciously attempted not to suggest that, yes, maybe there is more space, not just for Bergen County, but for anybody.*
>
> *We had a meeting at one point, as I recall, between Commissioner Dewling and Commissioner [Leonard S.] Coleman [of the HMDC] when, in effect, the two departments agreed that the Meadowlands Commission wanted to hold counties to their deadlines and that the Department would not take a position of suggesting that there was more space in the Meadowlands. We pretty much accepted the Meadowlands Commission's representation as to the capacities there.*
>
> *Q. Do you recall when that meeting took place?*
> *A. Yes. I recall that that was late 1986 and the issue specifically was the fact that Mr. [Nicholas R.] Amato had just been elected County Executive and was new to Essex County and their particular solid waste situation and the Meadowlands Commission was very concerned over whether he would somehow appeal the existing consent agreement which had him -- his county leaving the Meadowlands the following August; and so we did have this meeting, again, between the two Commissioners, which I was present*

at, where they agreed, in effect, to work together and that the deadlines in the existing consent agreements would stand.

Let me continue on that. There was concern, I remember, expressed by Dr. Dewling at one point over holding Essex County to their deadlines in the consent agreement. There was concern that the Meadowlands Commissioners not respond to any sort of pressure from the jurisdictions or the elected officials in those jurisdictions to somehow find additional space in the Meadowlands, and Commissioner Dewling wanted to be sure that the Department of Environmental Protection, our department, in taking the position that we would enforce the deadlines in the established consent agreements, was not going to be undermined by the Meadowlands Commission all of a sudden finding additional space, and that was one of the reasons why he wanted to meet with Commissioner Coleman to insure that we would take consistent positions and that, in fact, the consent agreements had to be adhered to.

DEP's support of the cessation of landfilling in the Meadowlands District and of a transfer station/ out-of-state disposal program as a short-term solution was repeatedly expressed in correspondence. DEP Commissioner Dewling and HMDC Chairman Leonard S. Coleman, Jr., co-authored a letter dated February 23, 1987 to the County Executive of Essex County, which was facing an exit date of July 31, 1987. Although they recognized the "imminent solid waste disposal crisis which now faces Essex County," in light of the approaching exit date and the fact that the resource recovery facility was at least two to three years behind schedule, they admonished that continued disposal in the HMD was "simply not available." Dewling and Coleman stated: "[W]e would like to emphasize our position that contingency disposal options within the Meadowlands District will no longer exist beyond the next six months."

In an April 6, 1987 letter responding to Assemblyman Robert D. Franks' letter on behalf of Essex County for either an extension of the July 31, 1987 exit date or redirection of Essex County's solid waste to other in-state disposal facilities, Dewling flatly rejected both proposals. Specifically, with respect to developing a new landfill within the Meadowlands District, Dewling stated that such development would probably necessitate a U.S. Army Corps of Engineers wetlands permit, "which is completely beyond DEP control and a very time consuming process," and "would require state-of-the-art engineering and construction," which could not be accomplished prior to the exit date. Dewling also reiterated DEP's position that it would not penalize the southern counties by redirecting a northern county's waste "to the southern counties where landfill expansions and new facility development have already been accomplished." In concluding, Dewling opined that "the best solution to the solid waste disposal crisis facing Essex County is the use of transfer stations and the transport of the solid waste to out-of-state landfills until long-term, in-county disposal facilities are operational."

At Dewling's direction, Solid Waste Management Division Director DeBonis reviewed and responded to Essex County's draft contingency plan submission. By letter dated June 29, 1987 to County Executive Nicholas R. Amato, DeBonis recognized "the county's leadership in the development of the transfer station initiative," and expressed DEP's full support for it. In fact, DeBonis termed the transfer station program, with its out-of-state disposal, "the preferred interim response option." However, DeBonis iterated DEP's stated policy that out-of-state disposal was appropriate only as an interim, not a long-term, planning option and that an in-county facility must be developed as a long-term solution. Essex County was, in fact, developing a resource recovery facility for this purpose.

In a letter dated July 29, 1987 to the president of

the Board of Public Utilities, now known as the Board of Regulatory Commissioners, Commissioner Dewling recognized "the use of transfer stations and out-of-state disposal" as the "only viable alternative to fulfill our responsibility" and urged BPU's expeditious action on several matters affecting the programs of Union and Essex Counties.

DEP's positions on solid waste were highlighted in Deieso's speech on September 17, 1987 before the HMDC/DEP Conference on "Managing the Solid Waste Crisis in New Jersey." He spoke of "[a]chieving solid waste self-sufficiency" through a three-tier approach of "recycling, resource recovery, and ash landfilling." In noting an increasing reliance on out-of-state disposal as in-state landfill capacity was "dwindling," he emphasized that such reliance was only a short-term remedy and not a long-term solution.

BERGEN COUNTY

The foregoing events and policies greatly affected the solid waste activities of Bergen County and tested the competence of the BCUA. In responding to the dictates of the Solid Waste Management Act, Bergen County formulated a plan and carved out a role for the BCUA. The Board of Chosen Freeholders approved the Bergen County District Solid Waste Management Plan on October 1, 1980, and the plan, with modifications, was approved by DEP on October 31, 1980. On December 23, 1980, the Freeholders designated the BCUA[5] as the agency responsible to implement the county's plan and to oversee the county-operated solid waste disposal systems and facilities.

Bergen's Solid Waste Management Plan called for implementation of a resource recovery facility as the long-term solution to handle solid waste. In testimony before the Commission, General Counsel Stephen P. Sinisi referred to the resource recovery facility as "the main event or the centerpiece of Bergen's solid waste program." In directives issued by the DEP on January 13, 1982, DEP designated the BCUA as the agency responsible to implement the resource recovery facility, which initially was expected to be operational by January 1, 1985, and to accept and dispose of solid waste in the event that the facility was not completed prior to the closure of the Kingsland Park Sanitary Landfill and Extension. The BCUA, which selected American Ref-Fuel of Bergen County on December 15, 1984 to design, construct, maintain and operate the facility, exhibited diligence and aggressiveness in planning for the facility. Delays that occurred appear to have been occasioned by the vendor, by litigation concerning the site selection and by the permitting process of the U.S. Army Corps of Engineers. The same diligence and aggressive planning, however, were not exhibited by the BCUA in formulating an interim plan in anticipation of the December 31, 1987 exit date.

* * * *

Following the HMDC's decision to terminate straight landfilling within its borders, the HMDC and BCUA entered into negotiations and executed two interdistrict waste flow agreements: an agreement dated September 30, 1983 and an amended one dated May 25, 1984. Both agreements set December 31, 1987 as the final date for landfilling in the Meadowlands District. As noted by Deieso, they represented "a vital piece in the overall planning and the overall thinking of Bergen County." Significantly, the BCUA was an active negotiator in each agreement and, presumably, decided to sign each one because the benefits were deemed to outweigh any disadvantage in agreeing to the exit date.

The 1983 interdistrict agreement, which included the DEP and County of Bergen as parties, was the product of lengthy negotiation between the HMDC and BCUA and contained significant bene-

[5]The BCUA was created in 1977 as the successor to the Bergen County Sewer Authority, which was established in 1951.

fits to each agency. The BCUA sought the agreement, in part, because it needed additional landfill capacity in the HMD. Because of severe stability problems at the Kingsland Park Sanitary Landfill, the DEP did not allow any further vertical expansion and, in fact, filed a complaint in Superior Court concerning the diminishing capacity. (The litigation was rendered moot upon the signing of the interdistrict agreement.) An additional incentive for the BCUA to negotiate the agreement was the fact that the BCUA needed the HMDC's approval to site the resource recovery facility and associated landfills in the HMD. Moreover, the DEP constantly noted as a deficiency in Bergen County's Solid Waste Management Plan the absence of an interdistrict agreement between the BCUA and HMDC, as required by the Solid Waste Management Act for one district to dispose of garbage in another.

By the terms of the agreement, the HMDC agreed to provide solid waste disposal capacity to the BCUA until the county's resource recovery facility became operational, *but not later than December 31, 1987;* the HMDC agreed to designate the 30-acre Lagoon area contiguous to the Kingsland Park Sanitary Landfill as part of the site for the BCUA's interim landfilling (it was contemplated that the Lagoon would accept Bergen's waste until December 31, 1987); the DEP agreed to propose that Bergen County obtain from the Natural Resources Fund a $15 million interest-free loan for the development of its resource recovery facility; the BCUA was given the right to apply to the HMDC in the future for financial assistance for the resource recovery project, a right similar to that accorded Essex County in its agreement with the HMDC; the BCUA was given the right to apply to the HMDC for a change in the site of the resource recovery facility; the BCUA would be given a site location in the HMD for the disposal of resource recovery residuals and non-processibles; the BCUA agreed to assist the HMDC in obtaining from Bergen County a lease agreement for approximately 100 acres of county-owned marshland located east of the HMDC headquarters or to consider purchasing the acreage for the purpose of leasing it to the HMDC, and the BCUA and/or Bergen County agreed to improve the roadway in Lyndhurst leading to the landfill. Attached to the agreement and expressly adopted by each party was Schedule A, which set forth a time table for completion of the county's facility. December 31, 1987 appears on the schedule as the "[f]ixed" date to "Begin Full Scale Operation of BCUA Resource Recovery Facility."

Significantly, the exit date of December 31, 1987 appeared in two places in the interdistrict agreement. Paragraph 3 stipulated that the HMDC shall provide solid waste disposal capacity to the BCUA "until a resource recovery facility is operational,...but in no event shall the HMDC provide disposal capacity for County waste...beyond December 31, 1987, such limitation to apply whether or not the County resource recovery facility is completed and operational at that time." In equally clear language, paragraph 8, which addressed the study to be commissioned by the DEP to identify sites for the long-term disposal of ash and residue from resource recovery, stated that even if the site selected for Bergen County is located within the HMD, "such a determination shall in no way be construed to mean that the HMDC will provide disposal capacity in the Meadowlands District for the County's waste after December 31, 1987."

The BCUA was represented at the negotiations by General Counsel Sinisi, the chief negotiator, Executive Director John G. Costello and Director of Solid Waste Richard F. Killeen. Throughout the negotiations, Sinisi understood the HMDC's purpose in seeking an end to landfilling and the integral requirement of setting an exit date. He testified before the Commission:

> *[The HMDC] felt that it was absolutely necessary that districts like Bergen County commit to a sunset date for landfilling in the Meadowlands to insure that the other obligations that HMDC had -- and they were called other obligations -- by their statute*

could likewise be fulfilled, and I think HMDC had been heard to say that -- that continued solid waste activities would be incompatible with the other goals and mandates that they perceived and were under by virtue of their own statute. So, therefore, the date setting -- to get to the core question that you've asked -- was a function of knowing that this was an absolute condition of the HMDC to interdistrict understanding; that the Bergen County district, like Essex before it, would have to agree to cease and discontinue landfilling in the HMDC, and that was a generic -- it was told to the Bergen County Utilities Authority and its negotiators were telling us that this was a generic initiative by HMDC.

The BCUA also actively participated in the setting of the date itself. Sinisi testified:

> *I can tell you that on behalf of Bergen County we were looking obviously for the longest possible date after -- after, of course, it became clear that a date was absolutely necessary, if you understand the point. In other words, once the negotiations reached a point where a date had to be committed to in order to achieve an interdistrict understanding, then, yes, the dates were discussed and were negotiated.*
>
> *Now, we had, of course -- as lawyers for the Authority we had staff members of the Authority who were present, we had Authority engineers present to assist from the vantage point of the BCUA the scribing of that date and the setting of those dates in order to obviously size the phasing out of landfilling operations into a date that would be presumably compatible with the implementation of resource recovery development at the site.*

After consulting with Costello, Kileen and the BCUA's solid waste engineers, Sinisi was "satisfied" that the date of December 31, 1987 could be realistically met for the implementation of the resource recovery facility. The feasibility of the date was discussed by the BCUA Commissioners, whose discussions included whether a later date could be secured. However, according to Sinisi, "HMDC's position was adamant on the date." With the exit date firmly set, Sinisi was then questioned by Counsel Ileana N. Saros on whether the BCUA considered alternative courses if the date were not met:

> *Q. Did anyone raise the issue of what the BCUA would do if resource recovery were not on line come December 31, 1987?*
> *A. Not any individual, no. I do remember, though, that during the course of the discussions leading to this document, that was a question that had been asked.*
>
> *Q. How was it answered?*
> *A. I'd be speculating --*
>
> *COMMISSIONER W. HUNT DUMONT: Which party raised it? If you don't remember the individual, which party raised it?*
>
> *A. It would be BCUA.*
>
> *COMMISSIONER DUMONT: Okay.*
>
> *A. In its own internal review of the document and what it visits upon BCUA's obligations.*

Although General Counsel Sinisi was unable to recall any proposed interim measure if resource recovery were not completed or close to completion by the exit date, he did not believe that out-of-state disposal was raised as a possible solution or was even a "concept" at that time.

The BCUA executed the interdistrict agreement because it believed the agreement to be in its best interest. Referring to Bergen County's "primary objective" to develop resource recovery as the

"cornerstone of its solid waste management program," to the BCUA's position as "the lead agency" to develop the facility and to the BCUA Commissioners' "commitment" to resource recovery, General Counsel Sinisi stated:

> *[T]here are many things in this agreement that were important elements in the agreement for the orderly and planned progress of the solid waste management development for Bergen County and the major initiative it had underway, the resource recovery project.*

The BCUA approved the 1983 agreement by resolution at its October 20, 1983 regular meeting. The resolution identified two overriding reasons for the BCUA's approval of the agreement. After noting the "rapidly diminishing availability of landfill in Bergen County for the disposal of solid waste," the resolution referred to negotiations "commencing in May, 1983...to fashion permanent solutions to immediate problems, not the least of which is the establishment of interim landfill disposal capacity for Bergen County solid waste and the siting of a Resource Recovery Facility in Bergen County." The resolution also indicated that the BCUA was "amenable to offering the interdistrict agreement" to a court "for purposes of obtaining judicial approval" in order to "fix" and "finalize" the rights and obligations of each party. The document was not submitted to a court.

DeBonis, who represented the DEP during the negotiation of the agreement, opined that the BCUA signed the agreement because, "I presume, they felt it was as advantageous a program as they could get." He explained the reality of the situation that confronted the BCUA:

> *If they [BCUA] said, for example, "Our plan is to dump in the Meadowlands for 20 years," I think they could have expected that that would not have been approved by the state.*

DeBonis explained why such a position would have been in direct conflict with the HMDC's role as the planning agency for its district:

> *The understanding at the Department [of Environmental Protection] from the Attorney General's Office was that the Meadowlands Commission mandate to handle the waste from -- I guess it was the 131 municipalities that were dumping there in 1968 when the Commission was created -- was amended by the Solid Waste Disposal Act to require the Meadowlands to be a planning district, and, as I say, my understanding from the AG's office, back during the mid-80s when the Meadowlands Commission wanted to set dates and get rid of those counties' waste, was that the mandate in the HMDC legislation that established it only went so far as to provide for the amount of waste that was being generated by those counties or those municipalities in 1968 and that since they were generating more waste, they did not have this mandate for that additional waste to be handled in perpetuity. And that's how Essex County became the first county to sign one of these agreements to set a specific sunset date on their dumping privileges in the Meadowlands, and what they got in return for that sunset date would be the handling of all of their waste until the sunset date, as opposed to just that portion of their waste that they were generating in 1968.*
>
> . . .
>
> *COMMISSIONER KENNETH D. MERIN: In fact, the HMDC expressed some concern about the environmental problems that would emanate if dumping would be continued.*
>
> *A. Yes, that's true. The mandate for the Meadowlands to handle any reasonably large waste in perpetuity was a very, very difficult*

mandate for HMDC to comply with, especially as time went on. There's a physical limit to the amount of space they have there and to the extent that the waste was going to be handled, if it was going to be left on land in particular, then eventually the Meadowlands would just be one big landfill.

COMMISSIONER MERIN: The point that I was trying to make was that, clearly, the question of what to do with solid waste is a very big political issue because people don't want any type of facility in their own backyards. The Meadowlands, the HMDC has various responsibilities in addition to holding solid waste. They're interested in the environmental qualities of the area itself. They are buffeted by a variety of factors and indeed they're quite often at odds with the various counties because they don't want waste dumped there any more than any environmental groups do. Is that a fair statement of --

A. I think that is a fair statement of the mandates; that the Meadowlands Commission has to develop the area and zoning responsibilities and they have done a lot. The mandate to also handle all this solid waste was somewhat inconsistent or had cross-purposes with the developmental mandates.

DeBonis further testified that at the time that the September 1983 interdistrict agreement was executed, the BCUA anticipated, as did he, the completion of the county's resource recovery facility by the exit date. However, as time passed, "the less and less likely it was that the County was going to make that date." Not only was development of a solid waste facility time-consuming in and of itself, but in Bergen County's case, the process was rendered all the more protracted because a wetlands permit from the U.S. Army Corps of Engineers was required.

The 1983 interdistrict agreement was revised by an agreement dated May 25, 1984.[6] This agreement was also the product of lengthy negotiation and contained benefits to the BCUA. A resolution authorized at the May 17, 1984 regular meeting of the BCUA recited the history leading to the amendment of the interdistrict agreement. According to the resolution, during approximately February 1984, the DEP expressed concern to the HMDC about its dredging project at the Kingsland Lagoon, which was designated by the HMDC under the first interdistrict agreement; the HMDC notified the BCUA of this concern; "numerous meetings and conferences" by the HMDC, BCUA and DEP followed to review and establish the technological requirements necessary to qualify the Lagoon for the dredging project, and these conferences resulted in the recommendation "to amend the interdistrict waste flow agreement and adjust the primary obligations of the HMDC and the Authority" regarding the scope of work to be done and the attendant costs. The resolution stated that the original agreement would have required the BCUA to expend between $2.2 million and $3 million to construct an access road to the new landfill, whereas the proposed agreement required an expenditure of no more than $575,000 toward the improvement of Valley Brook Avenue, which the BCUA could then continue to use as the access road. Accordingly, the resolution approved execution of the amended agreement.

The revised agreement, in fact, eliminated the requirement that the BCUA improve Valley Brook Avenue and provided for the BCUA to reimburse the HMDC a certain amount toward the roadway's improvement. It also addressed additional matters regarding utilization of the Lagoon. Significantly, the language referring to the exit date was not altered. General Counsel Sinisi did not recall whether, during the negotiations, he or another BCUA repre-

[6]Then BCUA Chairman Robert Guido, now deceased, signed both agreements.

sentative sought to have the December 31, 1987 date reconsidered and did not recall being directed to do so by the BCUA Commissioners. Further, he did not recall any discussion of an alternative if resource recovery were not on line by the exit date. Sinisi believed that the BCUA considered the date and was confident that it could "achieve, if not complete, substantial compliance."

DEP Commissioner Hughey, who had never signed the original agreement, signed the revised interdistrict agreement *nunc pro tunc* in September 1985. According to documentation in the Commissioner's office, General Counsel Sinisi requested the signing "'nunc pro tunc' since its execution is critical to the funding of the Bergen County resource recovery project." Again, the agreement was criticial to resource recovery.

As early as possibly 1985, it became apparent to HMDC's Solid Waste Director Marturano, and in his opinion to the BCUA as well, that the resource recovery facility would not be operational by December 31, 1987. By mid-to-late 1986, it became "very clear" to DEP's DeBonis that Bergen's resource recovery facility would not be operational by the exit date. The BCUA's consulting engineer arrived at the same conclusion in 1986. Other BCUA witnesses, however, were unwilling to commit to any time period for this realization.

* * * *

In addition to having the exit date itself as a constant reminder of the necessity to formulate expeditiously an interim solution because resource recovery would not be completed as initially projected, the BCUA was also confronted with a precarious landfilling situation. Monitoring of landfill capacity and emergency expansions of the Kingsland Landfill and Extension appeared as early as June 1984.

Although the HMDC directed Bergen's garbage to the Lagoon because of dwindling capacity in the Kingsland Landfill, Peter Markens, former Deputy Attorney General assigned to the HMDC, testified "about how fast the lagoon was filling":

> *It was filling faster than we expected it to, and we all -- but we all knew that the landfill and lagoon combined only had so much life in it and that there was really nowhere else to go after that.*

As early as the latter part of 1985, there was concern by DEP, HMDC and BCUA about whether Bergen County would have sufficient landfill capacity to take it to the December 31, 1987 date. Efforts focused on expansion of the landfill area and constant monitoring of the landfill's stability to insure landfill capacity until the exit date. George Dakes of the BCUA's consulting engineering firm, Clinton Bogert Associates, referred in testimony to "continuing problems" from the beginning of 1987.

By mid-1987, the concern became heightened. According to a DEP internal briefing memorandum highlighting the significant issues for the week of May 4, 1987, the instability of the Kingsland Landfill and Lagoon area was noted. DeBonis testified:

> *That particular facility was getting rather full. It was rather high and there was a lot of concern about the stability of the side slopes. As you build the facility higher and higher you're concerned with subsidence occurring on the side slopes and waste collapsing....*

Slope inclinometers were placed in the side slopes to measure minute movements at different levels in order to indicate whether they might collapse. DEP's concern about the landfill's stability, according to DeBonis, was increased because there were "a number of sensitive structures in the area of Bergen County's landfill - there's railroad tracks, a gas pipeline and a number of critical facilities."

Thus, the increasing instability of the Kingsland Park Sanitary Landfill and Lagoon also reinforced the urgency with which the BCUA should have finalized an interim solution. Nevertheless, the BCUA ignored the exit date as well as the threat of closure or collapse of the Kingsland Landfill and failed to formulate and implement an interim strategy.

THE MAKING OF AN EMERGENCY

In scrutinizing Bergen County's trail to the declaration of emergency, it must be understood that the BCUA was faced with an exit date of December 31, 1987 by which to have its resource recovery facility operating or to have in place an interim disposal plan until the facility commenced operation. Therefore, what the BCUA knew and did are critical.

In this chapter, the Commission sets forth the numerous documents authored by the BCUA, HMDC and DEP that establish beyond any doubt that the BCUA not only was placed on repeated notice, but also acknowledged, that (1) it could no longer dispose of solid waste in the Meadowlands District after December 31, 1987; (2) the proposed resource recovery facility would not be operational by the exit date, and (3) the BCUA had to formulate an interim disposal plan for the solid waste until resource recovery became operational. In light of this knowledge, the issue focuses on the BCUA's actions and inactions.

Although the BCUA operated amid a flurry of activity, specific initiatives that would have produced a rational, well-planned and orderly solution well in advance of the exit date, and thereby averted an emergency and subsequent direct negotiations, were not brought to fruition. These initiatives included (1) negotiations to revise the interdistrict agreement with the HMDC to, in effect, cancel the exit date and allow continued straight landfilling for up to an additional two years, and (2) the preparation of requests for proposals to transport and dispose of the waste at out-of-state landfills. Both of these initiatives, which are developed herein, were commenced well before the exit date of December 31, 1987. As BCUA witnesses before the Commission were confronted with each initiative, they were unable to articulate reasons for the BCUA's failure to follow through. The Commission finds that the BCUA created its own emergency.

DEP DIRECTIVES TO BCUA

Throughout 1986 and 1987, while the BCUA was first negotiating with the HMDC and then pursuing out-of-state disposal, the DEP repeatedly emphasized to the BCUA the importance and urgency of formulating an interim solution for the anticipated gap between the December 31, 1987 exit date and the operation of the resource recovery facility. At the same time, DEP reiterated the need to site a residual landfill for the resource recovery facility. These constant admonitions to the BCUA make its inaction in finalizing an interim solution all the more egregious and inexplicable.

In a May 15, 1986 letter forwarding to the BCUA DEP's certification of the county's Solid Waste Management Plan amendment, DEP Commissioner Richard T. Dewling noted the BCUA's failure to designate landfills "to serve the county's needs after the current landfill reaches capacity and for residual waste disposal after the resource recovery facility becomes operational." He urged that the site be designated and the implementation process begun "expeditiously" in order "to prevent a disposal crisis." DEP's certification ordered the BCUA to designate by August 15, 1986 a site "to meet the county's disposal needs after December 1987." The BCUA's request for an extension of the August 15, 1986 date was granted by DEP in a letter dated August 19, 1986 by Director Michael F. DeBonis. Significantly, the letter reinforced the exit date:

...I must point out that the county's timing in making the site designation does not, in any manner, alter the provisions of the Revised Bergen County/HMDC/DEP Consent Agreement, especially the provision concerning the December 31, 1987, HMDC landfill ban.

The minutes of a closed session meeting of the BCUA on November 6, 1986 reflect that General Counsel Sinisi informed the Commissioners that the residual landfill site must be identified to the DEP within the week or, if not feasible, by their next regular meeting on November 26, 1986.

The BCUA filed a series of status reports to update the DEP on its solid waste management activities. Status Report No. 20, submitted by letter dated August 21, 1986, noted the "continuing negotiations" between the BCUA and HMDC regarding "interim landfilling to provide capacity for Bergen County waste until the Resource Recovery Facility is completed and operational, projected sometime in 1989." Thus, the BCUA clearly realized that there would be a gap requiring an interim solution for the handling of solid waste between the exit date and the operational date of the resource recovery facility.

In his September 11, 1986 letter responding to Status Report No. 20, Director DeBonis again focused on the lack of an interim solution:

As you know, we are particularly concerned with interim disposal capacity arrangements for Bergen County solid waste for the period after exhaustion of remaining capacity at the BCUA Landfill and before the proposed resource recovery facility is operational.

DEP's concern in this regard was expressed again in DeBonis' December 12, 1986 letter acknowledging receipt of Status Report No. 21:

...I must emphasize the Department's concern over the interim/residual disposal issue facing Bergen County. Expeditious action by all parties involved will be necessary to ensure the needed disposal capacity will be available in time.

When questioned about the repeated warnings to the BCUA, DeBonis stated:

[W]e took every opportunity we could to notify counties of deadlines approaching, and in this particular case, as we've already established that we're just over a year from December 31, 1987, so it was even more apparent that Bergen County will not have a resource recovery facility and they obviously have an interim problem and they also have a residual disposal problem from the incinerator. They apparently have not picked any site yet to handle their waste beyond December 31 of 1987; nor have they picked a site to handle the residual or the ash from that resource recovery facility.

The exit date was reinforced in an administrative consent order executed by the DEP and BCUA on October 24, 1986 and October 28, 1986, respectively, and concerning the BCUA's continued use of the Kingsland Landfill and Lagoon. One of the order's findings recited the HMDC's responsibility to provide Bergen County with disposal capacity until December 31, 1987. The order allowed the BCUA to continue landfilling under certain conditions, pending issuance of the required permit, by deferring any DEP enforcement action to cease operations for failure to have the permit. However, the order went on to state, "In no event shall this deferral extend beyond December 31, 1987."

In a February 23, 1987 letter noting a "critical period regarding availability of solid waste disposal capacity," DEP Commissioner Dewling directed each county to develop an emergency or contingency plan as an amendment to the Solid Waste Management Plan to provide for a strategy if a

landfill fails or capacity of a landfill proves inadequate. Copies of Dewling's letter to Bergen County Executive William D. McDowell were distributed to BCUA Chairman Vincent A. Caldarella, General Counsel Stephen P. Sinisi, Division of Solid Waste Director Richard F. Killeen and engineer George Dakes of Clinton Bogert Associations [CBA]. According to the letter, the county's plan was "to identify potential short-falls in disposal capacity and strategies to handle these disposal shortfalls over the next five years." An attachment to the letter set forth guidelines for the content of the contingency plan to be submitted. According thereto, the "policy response alternatives" to be addressed included "out-of-state transfer and disposal." The final category of the attachment, entitled "Inter-District Arrangement," stated:

> *It must be stressed that within the context of the contingency plan, the alternative of disposal in another New Jersey district is not considered viable unless an interdistrict agreement can realistically be developed by mutual inter-county efforts. The Department will not order solid waste redirection between counties to satisfy the needs of this contingency plan to the detriment of performing counties.*

Dewling's letter is significant in that it should have reinforced that the BCUA had to formulate short- and long-term disposal strategies, that it could not expect to dispose of its garbage in another county and that it properly looked to out-of-state disposal as a remedy.

Deieso testified as to the serious nature and intent of the letter:

> *[W]e considered it a very serious letter and the legislature considered it a very serious letter. These letters were also part of our presentations routinely to the state solid waste, both Senate and Assembly select committees on solid waste, and this became important. The idea of contingency planning, the idea of interim planning -- it wasn't taken lightly.*
>
> *Q. In the third paragraph, Commissioner Dewling writes, "Given the Statewide shortage in disposal capacity that may occur within the next five years," and so forth.*
>
> *Was that a serious statement? Was that realistic?*
> *A. I think very realistic and I'm going to add prophetic. As the time will go on, exactly this came to be.*

DeBonis also viewed the letter as "a very serious statement":

> *[O]ne of the problems we have in solid waste is getting local officials and the public to focus on the problem before it actually becomes a problem. No one seems to pay attention until their waste is not picked up in which case it's very often too late to resolve anything quickly; so, I mean, I don't find anything factually incorrect or misleading in there.*

However, when Caldarella, then Chairman, was questioned as to whether he regarded Dewling's letter seriously, he asserted:

> *I -- again, in my view, this was a generic letter put out with an initiative by the Commissioner. I said I wouldn't do this, but pardon my French, it's a CYA letter, sent to every county in the state, whereby they explain initiatives, and whereby they put in language like this.*
>
> *Did I believe it then? No. Do I believe it today? No. And why not? Because I believe, as I stated to you, that the HMDC is a figment of someone's imagination, and when they get serious about the role of the*

HMDC and what it should be doing, whether it's parkland, whether it's development or anything else, then I'll go along with it.

Q. Are you saying that you did not take this letter seriously when it was received?
A. I'm not saying that.

Q. Did you take it seriously?
A. Yes, I did.

According to a September 2, 1987 letter to the BCUA from DeBonis, the final permits for the resource recovery facility would be issued as soon as the Bergen County District Solid Waste Management Plan was amended to include the site for residual and bypass landfilling. The importance of finalizing the proposed plan amendment was emphasized in DeBonis' September 10, 1987 letter to BCUA's Solid Waste and Landfill Operations Director, Salvatore Crupi, in response to receiving the BCUA's Status Report No. 23:

> *The Department notes that the proposed amendment to the district plan, which would designate a residual disposal site for Bergen County, was the subject of a public hearing held on February 11, 1987, but has not been finalized and submitted to the Department. This designation, as you know, is critical toward moving ahead with long-term facility development. Therefore, action should be taken on the proposed site or some alternative as soon as possible.*

DeBonis' September 10, 1987 letter also criticized the BCUA for not yet submitting its contingency plan requested in Commissioner Dewling's letter of February 23, 1987:

> *In the absence of the county's response, the Department is unaware of the availability of disposal capacity for all of Bergen County as of January, 1988.*
>
> *I strongly recommend your immediate attention to this issue and would request written input from you concerning the county's disposal plans after January 1, 1988 as soon as possible.*

The serious impact of DeBonis' letter is reflected in the action taken by General Counsel Sinisi in forwarding DeBonis' letter to the BCUA Commissioners, under cover of his own letter dated September 17, 1987. Sinisi's letter emphasized the DEP's admonitions regarding the BCUA's failure to finalize a residual landfill designation, to submit the contingency plan required by Dewling's February 23, 1987 letter and to identify disposal plans commencing January 1, 1988. Sinisi concluded his letter by recommending that "this correspondence be immediately considered." Sinisi's letter was copied to Executive Director Killeen and copies were provided to CBA and Crupi. In testimony, Sinisi recalled a Commissioners' meeting in early September 1987 "when I specifically, and I believe very forcefully, recommended to my client that these concerns had to be addressed." The Commissioners responded "[p]ositively" and

> *in this period of time two things were done. We continued discussions on an intensified basis with the HMDC, and I believe that we authorized, sometime in September or close to it, the issuance of competitive bids or bid specifications on public advertisement.*

Of course, these "two things" had been commenced months before, but without conclusion.

ATTEMPTS TO REVISE THE BCUA/HMDC AMENDED INTERDISTRICT AGREEMENT

One of the most striking examples of the BCUA's knowledge of the impending December 31, 1987 exit date was its attempt to negotiate a Memorandum of Understanding [MOU] to supplant the amended interdistrict agreement and eliminate the

exit date. During the negotiations, which commenced in 1985, the BCUA was represented primarily by General Counsel Sinisi, with lesser participation by Chairman Caldarella and even less by Killeen, and the HMDC by Executive Director Anthony Scardino, Jr., Solid Waste Director Thomas R. Marturano and Deputy Attorney General Peter Markens. According to Marturano, Caldarella was knowledgeable of the issues and "knew what the big-picture question was." Drafts of the MOU, which were prepared and reviewed by Sinisi and Markens, appear as early as August 1986. Documents indicate that at least some of the drafts were presented to the BCUA Commissioners.

General Counsel Sinisi described the negotiation process with the HMDC as "a staff-driven initiative directed by our client [the BCUA]" and testified that significant changes in the drafts were communicated to the BCUA Commissioners "so that the client was aware of the evolution of the document." According to Sinisi, both he and the BCUA Commissioners undertook the negotiations with the HMDC in a serious vein:

> *I was asked to perform a service for my client, I assessed that service, I thought that service to be in the best interests of the Authority and we did have negotiations with the HMDC as we had in the past, and I believe as we put our mind set to the obstacles at arriving at this agreement as we had in the past, we might arrive at an agreement.*
>
> *My client has on -- to my knowledge always understood the consequences of the documents it was signing and would be presented with this document as it was and would be explained by not only myself but its other consultants the significance of this document.*

Marturano testified that negotiations between the BCUA and HMDC were prompted by the BCUA's need to site a resource recovery-related landfill. He explained that designation of the landfill site became a requirement of both the DEP and the U.S. Army Corps of Engineers, which was evaluating the wetlands permit for the resource recovery site in Ridgefield. In addition, the BCUA had issued bonds for the resource recovery facility and, to fulfill its contract with American Ref-Fuel of Bergen County, the BCUA had to designate the site. Therefore, the amended interdistrict agreement, which required the HMDC to provide a site, but did not designate one, had to be redrawn. Later, in 1986, when it became apparent that the resource recovery facility would not be operational by December 31, 1987, discussions focused on whether to allow the BCUA to use the same landfill space not only for the residuals and ash, but also as the interim site for straight landfilling until the facility was constructed. Marturano explained why the HMDC negotiators agreed to this proposal:

> *[O]ur thinking there was they would have an incentive then to build the plant as quickly as possible because they wouldn't want to use up the limited life that's in that landfill space with non-resource recovery-related products, the ash and the non-processibles. Since they needed that to get their other permits, they had to be sure that they would have enough space there to satisfy that seven-year requirement; so we really felt that that would be the -- a very, very good incentive for them to move very, very quickly on the resource recovery plant or as quickly as they could move on it, and it was okay by us because we weren't giving them more landfill space than we had originally intended to. It was still going to be the same acreage to be used for a landfill. It was just a difference in what was going to go on the site, and that was a function of their needs at the time more so than anything else. So, from our perspective, it wasn't a big leap to allow them to put the interim there, although like I say there was a question about whether that*

site could be acquired and permitted in time for them to use before the existing landfill ran out of space.

Additional factors in HMDC's willingness to accommodate the BCUA was the location of Bergen County land within the HMD and concern that the interdistrict agreement, if challenged in court, may not be upheld and that the HMDC would then be compelled to open a new landfill for the BCUA, a result which would jeopardize its agreements with Essex and Passaic Counties.

The space contemplated by the HMDC in 1986 were two contiguous areas: the LRFC site, a portion of which was wetlands and would have required a permit by the U.S. Army Corps of Engineers, and the Erie site, which had serious hazardous waste implications. Because this area was surrounded by water and a railroad track, it was a finite site that could not be expanded. Therefore, the BCUA would determine the extent to which it would be available to be used in connection with the resource recovery facility by controlling the amount of garbage it would receive.

The draft MOU appearing between April and August 1986 provided in paragraph 1 that the BCUA would be allowed to continue landfilling at the Kingsland Lagoon "for its permitted life." Thereafter, the BCUA would continue landfilling in the Meadowlands District, pursuant to paragraphs 2 and 3, under a concept of "space," rather than within fixed time parameters:

2. The parties will agree to a new "space" for landfilling, which "space" will be large enough to accommodate approximately two years of straight landfilling and seven years of residual landfilling. This "space" designation will include all parameters of the landfill including elevation. The BCUA will be allowed to use this "space" to the extent of the agreed upon parameters, notwithstanding any time limitations. Should the "space" not have the expected longevity, the HMDC will not be bound to find new landfill space for the BCUA. The BCUA therefore is bound by the limitation of the "space" and not time.

3. After the aforesaid "space" is exhausted, the BCUA must immediately dispose of residual, backup and straight landfilling in a landfill outside of the Meadowlands District for a period of ten years. The disposition of solid wastes after the ten year period expires shall be the subject of further negotiations between the HMDC and BCUA.

The draft placed the following responsibilities upon the BCUA: acquisition and preparation of the new "space," which was not yet identified; closure and post-closure responsibilities; all applications to the permitting agencies, including DEP and the U.S. Army Corps of Engineers; obtaining the necessary financial approvals from the Board of Public Utilities; all operating and capital expenses; compliance with all governmental requirements for landfills, and acquisition of all easements and rights-of-way for access to the site.

The requirement in paragraph 2 for the "space" to provide two years of straight landfilling, according to General Counsel Sinisi, reflected the BCUA's "concern" for "the life remaining for straight landfilling at the existing facilities" and its desire "to ensure that there would be capacity until resource recovery came on line." Sinisi acknowledged that it became apparent to the BCUA that the Kingsland Lagoon was quickly reaching capacity and would not be able to provide capacity to December 31, 1987. The seven-year requirement for residual capacity, explained Sinisi, was based on the BCUA's contract with its resource recovery vendor whereby the BCUA had to provide "up to seven years of ash residual capacity as a 'condition precedent' for the contract to be effective." The stipulation that when the "space" became exhausted, the BCUA had to find straight and residual landfill

capacity outside of the Meadowlands District, forced the BCUA to engage in long-term planning for its solid waste disposal needs. Sinisi testified:

> *What people were trying to do was to fulfill ten-year planning periods, quite frankly, and to focus on trying to achieve a ten-year solid waste planning program. That's what I think paragraph three meant....*

When asked what the BCUA would have done if the "space" became exhausted prior to resource recovery being operational, thereby confronting the requirement to be out of the HMD for a 10-year period, Sinisi reluctantly conceded that out-of-state disposal was the only realistic solution.

Under the draft MOU, the BCUA was obligated to perform every function necessary to make the site operational. The issue then becomes the length of time that it would have taken to accomplish such a result. If a new site could not be identified and fully prepared by December 31, 1987, as indicated by Marturano, then the BCUA would have had to go out of state for that period. General Counsel Sinisi was unable to provide a response on how long the preparation of a new landfill site would have taken and directed the Commission to the BCUA's engineers. He believed that he had discussed the issue with them, but could not recall the time-frame. Although he recalled representations by the HMDC chief engineer to a DEP official that a site could be "fast tracked" by both DEP and the U.S. Army Corps of Engineers, he could not recall how much time would be involved. Neither Sinisi nor anyone else from the BCUA, that he knew of, explored the issue with the Corps. Nevertheless, he believed that "research was undertaken" as to whether a fast track were possible with the Corps and, as a result, "there was some question as to whether a fast-track procedure could have been followed." Any expectation that the Corps of Engineers would expedite a project seems contrary to actual experience. The BCUA's own experience with the Corps on the resource recovery project proved that the process moves exceedingly slowly. Sinisi described it as "a very laborious, time-consuming process." Moreover, as Sinisi acknowledged, the Corps informed the HMDC and BCUA that it did not want to receive an application for a residual landfill while it was still considering the application for resource recovery.

The significance of the length of time necessary to open a new "space" lies in the fact that if the landfill were not operational by December 31, 1987, then the BCUA would have had to dispose of the solid waste out of state for some period of time. Sinisi did not recall any discussions at the BCUA about a course of action if a new "space" were not operational by December 31, 1987, but seemed to refer to the Requests for Qualifications (of the vendors) [RFQs] and Requests for Proposals [RFPs] for out-of-state disposal as the contemplated remedy:

> *I can only tell you that as we saw 1986 come to an end, the Authority had commissioned a team of consultants to prepare RFQs and RFPs to go out of state for ash residual capacity and interim capacity as it was defined as a resource recovery-related service.*
>
> *Q. Were the engineers commissioned to prepare those RFPs to go out of state because it was recognized there might be a gap between the December 31 date and preparing a new landfill?*
> *A. My recollection of it was, Miss Saros, that the primary purpose of that initiative, that procurement initiative, was to assess the availability at a cheaper rate for the ratepayers of Bergen County of available ash residual disposal capacity, but in undertaking that process the Authority also looked at and combined in that procurement the solicitation of shortfall capacity leading to resource recovery becoming operational as a resource recovery-related service as that term is defined under the McEnroe Act.*

Q. Mr. Sinisi, I'm not clear. I think I understand you're tying it to the ash residual. Why was landfilling, out-of-state landfilling, brought into it?
A. Interim as the segue to resource recovery facilities becoming operational.

Q. If that took longer than January 1, 1988?
A. That's correct.

The main obstacle between the BCUA and HMDC negotiators was the issue of the impoundment, the approximately 78-acre lagoon adjacent to HMDC's headquarters. The HMDC sought to have the land, which was necessary for the HMDC to obtain Green Acres funding for a wildlife sanctuary there, conveyed to it in fee or pursuant to a 25-year lease, at a consideration of $1. General Counsel Sinisi described the HMDC as "more than adamant" in demanding this provision. Difficulty arose because the impoundment was owned not by the BCUA, but by the county and, according to Sinisi, negotiations "stalled" when "members of the Board of Freeholders or maybe its administrator -- I've forgotten now" objected to the transfer at nominal value. Nevertheless, it is not clear, and no BCUA witness was able to explain adequately, why the County wanted to retain the acreage. Bergen County had purchased the impoundment for use as a landfill if necessary. Whether the area could ever be used for such a purpose was questionable. Markens testified:

> *As a practical matter, it's my understanding that neither the DEP, the Army Corps of Engineers, Federal Fish and Wildlife or the HMDC or anyone else for that matter would have ever permitted this property to be landfilled. It was -- it was a lake. It was a lagoon. It would have been impossible -- probably as a practical matter, but I'm not an engineer -- but I don't think anybody would have given the environmental approvals.*

Sinisi agreed that the area "could no longer be utilized for landfilling purposes due to wetlands laws, et cetera."

The next revision of the MOU was made on September 10, 1986. Paragraphs 2 and 3 regarding the "space" to be provided to the BCUA remained unaltered. The "impoundment" provision was modified to require that the impoundment be "acquired and conveyed by the BCUA to the HMDC either in fee or at a minimum 25-year lease."

The next draft appeared sometime prior to October 2, 1986. Paragraphs 2 and 3 remained intact, except that the "space" was now identified. In addition, the "impoundment" provision in paragraph 15 was further altered to require that the BCUA acquire and convey the impoundment or, in the alternative, that Bergen County do so "either in fee or at a minimum 25-year lease."

In an October 2, 1986 letter to DAG Markens concerning the most recent draft of the MOU, General Counsel Sinisi proposed, among other items, that the language in paragraph 15 requiring the BCUA to acquire and convey the impoundment be modified to require the BCUA to "use its best efforts to have the County of Bergen convey the impoundment to the HMDC by lease for a minimum of 25 years or in fee." Markens rejected this proposal in an unequivocal, immediate response to Sinisi in a brief letter dated October 7, 1986. The letter reads in full:

> *I have your letter of October 2, 1986, with regard to the captioned matter. Although I have not had the opportunity to thoroughly review same, due to the importance of this matter, I will give you my immediate thoughts.*
>
> *As you are fully aware, your paragraph 5 seeking to amend Memorandum paragraph 15 is totally unacceptable to the HMDC. BCUA's best efforts to have the impoundment conveyed to the HMDC is not good enough. The impoundment must be conveyed to the HMDC for this Memorandum of*

Understanding to be finalized. With regard to the other items, although I must look at them more closely, I do not believe there to be any major problem with your suggested changes.

Sinisi testified that he informed the Commissioners of the HMDC's unwavering position regarding the impoundment issue. The minutes of the October 16, 1986 closed meeting of the BCUA indicate that "Mr. Sinisi commented on the negotiations" and that "[a] major item still to be worked out is getting a lease of property desired by HMDC from the county." Sinisi testified that the BCUA used "our best efforts to meet with the county officials and to explain to the county officials why their transfer of this property would enhance and help to establish an interdistrict agreement for Bergen and the HMDC;" but he was unable to explain why the county officials, or who among them, would not agree to the conveyance or lease.

Throughout the negotiations, neither Sinisi nor Markens had the authority to commit his respective client to accepting the terms of the proposed MOU. Any approval of the document had to be voted upon by the Commissioners of the HMDC and those of the BCUA. Sinisi and Markens each acknowledged before the Commission that he made this position clear during negotiations. Markens testified:

> *It's very important to understand that this was being negotiated essentially by me and Mr. Marturano on our end and essentially by Mr. Sinisi on his end, but everyone knew that during the entire negotiations that we were nothing but negotiators and that these agreements had to be approved by both the Commission on the HMDC Commission as well as by BCUA and perhaps even by the Freeholder Board of Bergen County. We were not writing a binding agreement until two or three of those groups or parties agreed to it.*

Sinisi recalled that no negotiator for the HMDC represented that the Commissioners would excuse Bergen County from its exit date.

Furthermore, in the negotiations with the BCUA, the HMDC never suggested that the BCUA should not pursue alternative solutions. Markens stated:

> *I don't recall ever anyone saying to BCUA, "Don't bother pursuing alternative avenues," because there was always going to be a need for them to at some point to pursue alternate avenues no matter what agreement the HMDC came to them with.*

The firm position of the HMDC on the impoundment issue was again underscored in Markens' one-paragraph letter of November 26, 1986 to Sinisi following another revision of the MOU:

> *Enclosed please find the latest version of the Memorandum of Understanding. Part one is the clean copy, and part two is the copy that you and I marked up together over the telephone. I must hasten to again remind you that my clients are satisfied with the entire agreement save for paragraph 15. As I have advised many times there must by a conveyance of, or a fully enforceable promise to convey, the impoundment prior to the execution of the Memorandum of Understanding.*

In addition, paragraph 2 of the draft MOU attached to Markens' letter substituted, as Sinisi had proposed in his October 2, 1986 letter, the word "interim" for the word "straight" and defined "interim landfilling"

> *as the landfilling that will occur between the expiration of the Kingsland Landfill Extension and Lagoon and the beginning of operation of the Bergen County Resource Recovery Facility.*

Sinisi acknowledged that the BCUA would have experienced a "shortfall" in landfill capacity if, pursuant to paragraph 2, resource recovery were not on-line by the end of the two-year period of "interim landfilling." However, he dismissed as "speculative" what plan of action the BCUA would have pursued if such a "shortfall" were to occur. Again, the BCUA failed to recognize and plan for such an eventuality.

General Counsel Sinisi did not recall the proposed MOU being placed for a vote on the agenda of a meeting of the BCUA Commissioners at any time in 1986 or in 1987 prior to the vote late that year on the final MOU.

The Commission was not provided with, nor did it discover, any draft MOU from approximately the end of November 1986 through October 1987 or any document to indicate that negotiations between the BCUA and HMDC were continuing during this time period. For almost a year, there was a complete and inexplicable cessation in negotiations and revisions of the MOU. This issue was pursued with General Counsel Sinisi, with unsatisfactory results:

> *Q. Can you explain why the hiatus?*
> *A. Administratively, the Authority was gathering data, field data as to what was happening in other districts by way of possible out-of-state alternatives for the disposal of solid waste. Also, a new form of government had been elected in 1986, a County Executive form of government, and in the change of government the early issues that would be addressed was the state of the solid waste resource recovery program with the incoming County Executive.*
>
> *I believe that almost immediately after the election of the County Executive, a letter was written from the County Executive -- after he's sworn in, you know -- he's in office -- to the HMDC, Chairman Leonard Coleman I believe at the time, suggesting that it might be opportune to examine certain alternatives which could avoid the necessity of perhaps going out of state. I don't know if out of state was used, but I believe there was some entreaty for HMDC to explore with Bergen available capacity in the District and I'm--*
>
> *Q. Who authored that letter?*
> *A. I seem to remember a letter from the County Executive.*
>
> *Q. To Coleman?*
> *A. Well, it may have been to Executive Director Scardino.*
>
> *Q. Would you have that letter in your files?*
> *A. I don't know that I would. I will look for it. I may have seen it at the Authority. A copy may have been sent to the Authority or I may have been told about it, so I don't know that I have it in my files, but I'll look for it.*
>
> *Q. Approximately when was that letter sent?*
> *A. Early part of 1987.*
>
> *Q. Was there a response to the letter?*
> *A. If there was, I don't recall one.*
>
> *Q. Are you offering that as a reason why the MOU was not being worked upon after November 1986?*
> *A. I'm not offering anything. I'm responding to you as to why my client may not have moved forward in consummating an MOU even in this stage, okay? A, as far as I'm concerned, if this was the last MOU, a draft of an MOU, it still had some work to be done given the negotiating position of the BCUA. That's number one. You don't have to go any further than page 2 -- page 1, paragraph two for that, okay?*
>
> *Number two, the Authority had an obligation and discharged it in presenting to the*

government of Bergen County which it just reorganized under its new charter and presented to the Chief Executive -- County Executive, excuse me -- the outline of the plan and the status of the plan, and we received questions from Mr. McDowell on that basis or has the BCUA explored this with the HMDC? Was the BCUA aware that there may be potential capacity in the HMDC with respect to a site in a different area, Mr. McDowell having been the former Executive Director of the Hackensack Meadowlands Development Commission, having some knowledge of the evolution of the master plan and the solid waste activities of the Meadowlands Commission, so that was one of the earliest meetings that was held by HMDC officials -- BCUA officials and the County Executive.

No letter from County Executive McDowell to the HMDC was ever produced. Moreover, McDowell testified that he recalled only one occasion, a meeting at HMDC in May 1987, when he was asked to intervene on behalf of the BCUA. Nevertheless, even if there had been such a letter, it was allegedly sent early in 1987 and, therefore, does not explain the cessation of negotiations at the end of 1986. In addition, it is still unclear why the existence of any such letter should have interrupted the negotiations. Moreover, even if the letter had the significant impact of halting negotiations, then it is not clear why there was no follow-up to the letter. Questioning of Sinisi continued:

Q. Did you ever ask McDowell to contact the person to whom he wrote that letter in order to obtain a response?
A. Mr. McDowell had counsel.

Q. Do you know whether anyone at the BCUA asked Mr. McDowell to follow up on that letter?
A. I don't know.

Q. Did you follow up on his letter in any manner with HMDC?
A. No. I -- if I followed up at all it was by addressing my client's attention to the fact that what was represented by DEP to be a turn-around time of two weeks turned out to be several months.

Q. We're talking about the letter from McDowell to Coleman or Scardino.
A. Oh.

Q. Was there any follow-up that you know of to his letter?
A. Again, there may have been a response from Coleman to McDowell in writing. I just am not aware -- I have no recollection of it. [There was no such letter.]

Q. Do you know whether anyone undertook to follow up on McDowell's letter?
A. No.

When pressed as to any other reason to account for a delay of close to a year in resuming negotiations, General Counsel Sinisi initially referred to a meeting with DEP officials in February 1987 (the meeting will be discussed in another context later), but ended up by not being able to provide any explanation:

We came away from that meeting with the sense that HMDC in appreciation for a deferral of issuing RFPs or RFQs or not taking in proposals for RFPs and RFQs would undertake to do a due diligence investigation of what capacity, if any, could be made available to Bergen County in the Hackensack Meadowlands Development District, and we received that answer -- and again I may be off by two or three weeks, but I believe it was in mid-May.

Q. When you received what answer?
A. The answer that the DEP would not

undertake to site or direct a siting of capacity for Bergen County unless HMDC and BCUA came to an agreement among themselves.

Q. How --
A. And not intervene in that process.

Q. How was that answer communicated?
A. It was at a meeting. We -- Bill McDowell attended. I don't know if County Counsel attended. I was present with the Chairman of the Bergen County Utilities Authority with an engineer, I believe, of the Bergen County Utilities Authority. I believe one other person -- it may have been Dick Killeen, but I'm not sure.

Q. Who was present from DEP?
A. The DEP, Michael DeBonis came up alone, I believe.

Q. Between --
A. And present for HMDC were -- was a Commissioner of the HMDC. I don't remember his name, the Executive Director I believe was present, the Deputy Executive Director was present and I believe Mr. Marturano was present.

(At this time counsel and the witness confer.)

And Executive -- County Executive McDowell. Did I say that?

Q. Yes. Between the time of the meeting in McDowell's office at the beginning of 1987 and the meeting in mid-May did you ever contact any of the DEP officials to push them to give you an answer?
A. I don't recall making the call if -- I mean, I won't deny that I did but I just have no independent recollection of having made that call, Miss Saros.

Q. Did you document that meeting in any way, the one in early 1987?
A. I don't believe I did.

Q. Do you know whether anyone else with the BCUA contacted the DEP to provide an answer?
A. I think my answer is the same as it was in my office. I don't recall.

. . .

Q. Where did that meeting occur in May --
A. HMDC.

Q. When the DEP provided an answer at that time, how soon after that did negotiations between BCUA and HMDC resume on the MOU?
A. I don't know, Miss Saros, as I sit here without anything to refer to. I mean...

Q. Again, the Commission [SCI] has no draft until October, November 1987. Do you have any explanation for the several-month delay in resuming?
A. Well, delay is a word that troubles me because it makes it sound like it's being used in a negative sense.

BCUA was the recipient of some very disappointing information to say the least as a district-implementing agency to hear that one of the initiatives that it was waiting for and would hope would avoid a more expensive method of disposal for its residents was not entertained and, in fact, was entertained in short shrift and we -- I believe the BCUA's position was one didn't have to wait the several months one waited for the answer that actually was forthcoming in terms of talking about the time and the delay of getting things done.

We believed that in good faith we were going to get -- like we believed in good faith we

were going to get a reasonable consideration for the siting change back in June of '84 from the HMDC a -- a positive response because for all of the reasons that I think I expressed at the last meeting involving the earlier dedication and planning initiatives of Bergen County should not have gone by the boards, okay?

Q. After the mid-May meeting --
A. Yes.

Q. -- why were negotiations with HMDC not resumed --
A. Well --

Q. -- to pursue the MOU?
A. First of all, I can't -- I can't answer the question. I just can't answer the question. I don't -- I don't recall. I don't know why they weren't immediately resumed.

Q. Accepting that for now, why were negotiations discontinued for that time period?
A. I don't have an answer for that. I don't know. [Emphasis supplied]

No BCUA witness or document provided any insight into the reason why conveyance of the impoundment was not obtained or why negotiations ceased. However, materials provided by the HMDC did yield some insight. Throughout the SCI's investigation, facts were frequently presented not by key BCUA officials, but rather through documents and officials of other agencies. This was the situation to a large extent regarding the dealings between the BCUA and HMDC. Because the HMDC, unlike the BCUA, maintained clear, unedited tape recordings or official transcriptions by a court reporting service of all of its meetings, the SCI was able to examine events as they unfolded. The meetings of the HMD Commissioners establish that they were following the negotiations, that they were expecting the BCUA to act on the MOU as early as August 1986, at which time they were prepared to approve it, and that the BCUA's derelict conduct in abandoning the MOU and ceasing all negotiations left the HMD Commissioners completely perplexed and frustrated.

The tape recordings of the executive session meetings of the HMDC throughout 1986 reveal that, contrary to its public position, its Commissioners were in agreement to provide the BCUA with a new landfill site to carry it from December 31, 1987 until the resource recovery facility began operation. In fact, the HMD Commissioners were continually expecting to vote on the MOU. The recordings also provide insight on the impoundment issue.

At the August 6, 1986 executive session meeting of the HMDC, Marturano briefed the Commissioners on the status of the negotiations and proposed agreement with the BCUA:

We anticipated originally that we would have something for the Commissioners to look at at this meeting and hopefully even to vote on, but it didn't work out that way for the new Bergen County agreement. We are trying right now to negotiate with Bergen County and we think we pretty much have a deal hammered out for Interdistrict III [MOU]. We have an agreement right now with Bergen County.

Later in the meeting, Marturano raised the issue of the Freeholders' support of the agreement:

What we have been told by their people is that there is still a large contingent people in the Freeholders who this does not sit well with.

In an interview, Executive Director Scardino stated that any agreement with the BCUA had to include conveyance of the impoundment; however, the Freeholders wanted considerably more money for the conveyance. Furthermore, there remained with a number of the Freeholders a prevailing attitude that the Meadowlands had no value except to be

filled with garbage. BCUA witnesses were unable to detail any efforts to convince the Freeholders to agree to the conveyance.

At the September 24, 1986 executive session meeting of the HMDC, Marturano reported that approval of a final agreement by the BCUA was imminent:

> *We have been negotiating with BC now for the past -- at least a year or maybe more than that of trying to come up with some agreement with Bergen County for future disposal, and the intent of it was to come up with a plan that was fair to us, fair to BC and fair to the people of this district. Recognizing the fact that a good portion of this district is in Bergen County and...that Bergen County's bank of available land for landfilling also includes the land that is in this district...if they were to site a landfill in Bergen County and have it be in the district...that still is consistent with the Solid Waste Management Act. We have been negotiating with them and we are down to the wire on it. We have come up with a draft agreement which we hope to distribute to you, probably next week for your review. The reason it's on the agenda, we thought we might be under more of a time constraint but as it turns out, we will now have a little extra time. The intent is hopefully that we would pass it at the October meeting. The BCUA's parallel plan is that they intend to pass their end of it on the 16th, and I think our meeting is on the 22nd; so, it will be a public disclosure on the 16th, then ratifying and passing it from their perspective and then it would be up to us to approve or deny it.*

The impoundment issue appeared to be the primary obstacle. Markens reported to the Commissioners on October 22, 1986:

> *Two weeks, or sometime after we last all met, I got a letter from Steve Sinisi, with a host of proposed changes. I wrote back and said all your other changes look alright, but one change was that the BCUA would use best efforts to convey the impoundment. And I said, "Absolutely not. You know what our position is with regard to the impoundment. We gotta have it. We gotta have guarantees we are going to get it." That was the last report from him until -- I know Tony talked to him a couple of days ago, but I talked to him yesterday or the day before. He said that we are doing everything we can to get that impoundment, but that certainly nothing was going to happen before November 4th. He has also said that he needs to be in place no later than November 15th. So, I think between November 5th and November 15th things are going to happen.*

It is unclear what effect the upcoming election had on the Freeholders' willingness to make a decision with respect to the impoundment. In light of the fact that a county executive was going to be elected for the first time, Freeholders may have viewed their position as a "lame duck" situation and decided to postpone a decision on the impoundment until a county executive took office. This view was offered by Scardino. No BCUA official or representative acknowledged before the Commission that the November election had any impact on the impoundment issue, although Markens' presentation to the HMD Commissioners indicates that Sinisi did allude to it.

At the November 24, 1986 executive session meeting, it was again reported to the HMD Commissioners that approval of the agreement by the BCUA was imminent:

> *SCARDINO: The conversation I had with Steve Sinisi informally, he told me that BCUA -- I believe he said it was tonight or maybe tomorrow night, but it's imminent at any event -- that the Commission, the BCUA*

Commission will meet and supposedly ratify the agreement that has been worked out between ourselves and them. What that means effectively to you is that sometime between the time they ratify and the next meeting of this Commission, or even at the next meeting of this Commission, you will be asked, or will be recommended by us that you concur with that and then proceed from there.

MARKENS: I talked to Steve last week, Wednesday, and I said there is one thing still outstanding -- the impoundment. I talked to Steven and I said, "What is going on with this thing?" He said, "They've said O.K. Freeholders said O.K." How did they say O.K.? He said, "Well, they winked at us and stuff like that." I said, "Winks are not going to do it. I need a resolution." He said, "How about a letter?" I said, "No. I can't take a letter into court and enforce it. I want a resolution passed by the Freeholders, signed by the executive, that says Lake Galley is yours." O.K. And that's what he is trying to get. And I said, "Once you get that, the whole package falls into place." And he said he thinks he can get it. So, that is what we are waiting on.

After months of negotiations on an agreement and after repeated reports that approval by the BCUA was imminent, the HMD Commissioners learned at their December 22, 1986 executive session that the agreement was abandoned by the BCUA:

COLEMAN: You want to tell us where we stand with the BCUA thing.

SCARDINO: At the present time, the last thing I heard -- and this has not been substantiated -- is that the BCUA is looking for a residual and backup landfill outside of the District, possibly even outside of the state. This afternoon at three o'clock, I will be having a meeting with the attorney, Steve Sinisi, their chairman, Vincent Caldarella, and Dick Killeen, their solid waste manager, along with Tom Marturano and Peter Markens. They asked for the meeting and I'm anticipating that what they are going to tell us -- what I just told you -- that is, they're now negotiating and supposedly half a month away to make a determination as to where they are going to be sending their backup and their interim. Last week, they did designate the upland space in the North Arlington area as a residual landfill site which they obviously wanted to do expeditiously in light of the sensitivity of the contractual arrangements. Sensitivity only because of the time limit -- because of the agreements they have with American Ref-Fuel, they must designate a residual landfill by a certain date, otherwise it does something to this agreement.

Chairman Coleman's reaction was swift and firm:

Well, the other thing, too -- I don't know what the BCUA is doing with this thing. I mean, September or so we thought there was an agreement for next month. But I mean, I think we ought to make it clear to them as far as we're concerned we're going to enforce what agreements that we have.

The BCUA's unexpected abandonment of the MOU also strengthened DAG Markens' view on the enforceability of the HMDC/BCUA interdistrict agreement:

Six or seven months ago I was saying, "Well, District II [1984 amended interdistrict agreement] might have a little bit of trouble," because they could say that we've been negotiating with them and leading them down the garden path blah blah. And you might be able to make some sort of argument that we led them down the garden path and

now we yank the rug out of under them. But that changed. Now, it is just as easy for me to do that and say that they've been leading us down the garden path in regards to Interdistrict III [MOU]. And so my view as to the enforceability of Interdistrict II has strengthened.

Scardino recalled that he was "probably shocked" when he heard that the BCUA was abandoning the MOU, although he was not unhappy with the result because he wanted to obtain an end to all straight landfilling in the HMD. Scardino had no recollection of being advised by the BCUA why it did so. When asked if he pursued the matter with the BCUA, he responded that "it wasn't my job to get the BCUA to make an agreement with the HMDC;" it was "their job, their deadline."

In separate interviews, Chairman Coleman, Commissioner Eleanor Nissley and Executive Director Scardino each opined that the BCUA did not take the HMDC seriously enough and believed that the HMDC would ultimately retreat from its position and allow continued landfilling beyond the December 31, 1987 date. If their perceptions of the situation are accurate, then the BCUA gravely miscalculated.

From late November 1986, negotiations ceased and no further interest was expressed by the BCUA to negotiate an MOU; that is, not until May of 1987. (What occurred at that point will be discussed later in the report.) However, as Caldarella was being questioned on why initiatives in early 1987 for out-of-state disposal were not brought to fruition, he constantly referred to "the ongoing discussions and negotiations between the BCUA and HMDC" and asserted, "At this time, the HMDC draft agreement was the thing that we were hanging our hat on" - despite the fact that the BCUA quit the negotiations at the end of 1986!

Patently, had the BCUA succeeded in having the County convey the impoundment, it could have executed the MOU in 1986; had the BCUA executed the MOU, the December 31, 1987 exit date would have been eliminated; had the exit date been eliminated, it is speculative whether the new "space" could have been fully permitted and prepared by the exit date or whether out-of-state disposal would have been inevitable for some period of time, but even if inevitable, there would have been adequate time to implement an out-of-state strategy. Looked at somewhat differently, if conveyance of the impoundment was such a difficult, if not impossible accomplishment, then the BCUA should have known early in the negotiations that it could not reasonably rely upon execution of the MOU and, therefore, should have prepared immediately to pursue out-of-state disposal, the only realistic alternative. In either case, it is clear that no emergency would have had to be declared.

THE BCUA TURNS TO OUT-OF-STATE DISPOSAL

While abandoning negotiations with the HMDC for an MOU, the BCUA undertook to have the solid waste disposed of at out-of-state landfills for the interim period between December 31, 1987 and the date when the resource recovery facility would become operational. Caldarella conceded that if the HMDC did not lift the exit date, then out-of-state disposal was "the only viable solution." Despite the initially aggressive planning toward this objective, the BCUA failed to follow through. Again, no BCUA witness was able to provide clear reasons for this failure. The extensive planning undertaken by the BCUA toward out-of-state disposal is detailed in this section.

The minutes of the November 26, 1986 closed session meeting are highly significant in that they establish, beyond any doubt, the BCUA's interest in out-of-state disposal as an interim solution and detail the efforts of the BCUA, and of Chairman Caldarella in particular, in pursuing this solution. The minutes confirm Scardino's December 22, 1986

report to the HMD Commissioners. Because of their importance, the relevant portions of the minutes appear in full:

> *Under Resource Recovery initiatives, Chairman Caldarella reported that for the last 6 months, the Authority has discussed the need for an integrated approach to solid waste disposal, which includes a transfer station, recycling, etc. Transfer stations are an important component of resource recovery and must be operated properly. Recycling can be done in the transfer station, Resource Recovery Facility, and also would dramatically reduce the number of vehicles going to the Resource Recovery Facility.*
>
> *In so far [sic] as the siting of the landfill, the Authority must operate on a four-prong approach in solving problems:*
>
> *1. Residual and interim landfill within the district.*
>
> *2. Research out-of-county solutions.*
>
> *3. Research state of the arts technology for the handling of residuals.*
>
> *4. Out-of-state solution.*
>
> *Chairman Caldarella indicated that for the last 2 1/2 weeks, he has had discussions with contractors who have landfills in Pennsylvania, West Virginia, Ohio, Alabama and South Carolina. These contractors have offered the Authority interim and residual landfill capacity out of state. The price is high, but we must compare these against Authority costs to develop our own facilities. These costs may be upward of $65 to $75 per ton. The contractor approach in handling the solid waste would be to construct transfer stations in key locations throughout the county. He would operate these stations, and after recycling, compact the garbage which would then be made ready for rail or vehicle transport to the landfill site. One of the major concerns to the contractor is whether the EPA will define residual as a hazardous waste. If it is considered hazardous waste, the contractor would be required to expend large sums of money to make sure that the leakage would not find its way into the ground waters.*
>
> *Chairman Caldarella feels this is a viable method to dispose of the garbage in the interim until the Resource Recovery Facility is constructed and for the residuals when the plant is operational.*
>
> *A representative of the vendor will be attending a special work session meeting to answer any and all questions pertaining to the operations. They now have a site in existence in Pennsylvania and guarantees a standby capacity for the balance of contract in other states if problems such as shutdown or transfer station problems should occur. Some of the options for this contract would be interim landfill up to five year fixed price, ten to fifteen year commitment for residual, a ten year commitment is available with a cost of $96 per ton. This offer has credibility since it has already been bid on by one district in New Jersey and two or three other districts are moving forward to use this method of disposal. When handling the county's solid waste management endeavors, the local solution to locating sites is the best way to operate, but in the case of the Authority, due to the time limitations, the interim landfill would not be ready in time. In conjunction with this proposal for interim residual landfilling out of state, if the Authority was to enter an agreement by late December, the contractor would be ready for operation in October, 1987.*

In conjunction with reviewing this proposal, the Chairman asked for authorization to engage a financial advisor to analyze:

1. Vendor offer vs. an Authority built and operated interim and residual landfill.

2. Full contract interim and residual.

3. New contract, new vendor, public ownership of Resource Recovery Facility.

4. New contract, new vendor completed by privatization.

Sinisi recalled Caldarella's presentation in general and "recall[ed] the Authority making a determination in '86 to move forward some time after September or October of 1986 with a solicitation to go out of state and to draw the RFQ and RFPs for that purpose." Caldarella testified that "at this point in time, November 26, we are rapidly approaching a deadline [of December 31, 1987]." Despite Caldarella's clear efforts in exploring out-of-state disposal, he kept "draw[ing] an absolute blank" when questions were posed to him concerning the specifics of the minutes, including the vendor that was going to make a presentation. Caldarella had "no recall of this whole initiative." In fact, he stated, "that November 26th thing that I can't figure out." Not only did he deny that he engaged in such activities, but he claimed that the minutes, in this and other instances as well, were plainly wrong. Caldarella directed the Commission to listen to the tape of this meeting. However, the tape that was turned over to the Commission by the BCUA under subpoena as being the recording of this meeting was not only blank, but it was an unused tape. (The Commission submitted the tape to an electronics expert for examination.) Caldarella was the only BCUA witness to challenge the accuracy of minutes. Indeed, throughout his testimony, Caldarella jettisoned documents when they attributed actions to him or when he was unable to explain them.

The intent of the BCUA to achieve out-of-state disposal as the interim solution was cemented in its authorization to its consulting engineer to commence preparation of Request for Proposals.[7] A December 30, 1986 letter from Clinton Bogert Associates to Executive Director Costello, with a copy to General Counsel Sinisi, requested authorization to proceed with procurement documents "in accordance with discussions held at a meeting on December 30, 1986 at the Authority." The resolution authorizing CBA to proceed appeared in the minutes of a special meeting of the BCUA on December 30, 1986. Dakes, CBA's engineer assigned to the project, acknowledged in testimony before the SCI that at this point, it was understood by the Commissioners, and Dakes agreed, that out-of-state disposal was the only realistic solution for the interim period and that both the BCUA and CBA knew the importance of preparing the RFPs. Dakes testified that the BCUA wanted a vendor to provide transport and disposal services, but had not yet decided whether the vendor or the BCUA would handle the transfer, or loading, function and whether the BCUA would utilize existing transfer stations, construct its own or do both. Sinisi recalled that he "was told that there would be a program to initiate the preparation of out-of-state RFPs to solicit transport and disposal services and that a group will be engaged to do that."

Documents dated after the BCUA's directive to CBA indicate that CBA diligently pursued its assignment to prepare the RFPs. Dakes testified that Chairman Caldarella directed him to prepare the RFPs "as soon as possible" and to set a completion date, which Dakes met. In fact, as early as January 14, 1987, CBA, pursuant to BCUA direction, sent a letter to the *Wall Street Journal* for the placement of two Notices of Intent in the January 16 and 19, 1987 editions of the newspaper. By letter of the same date and, again, at BCUA direction, CBA cancelled the notices. No witness from the BCUA or CBA provided a reason for the cancellation.

[7]The BCUA regarded the services to be related to the resource recovery project and, as such, the services could be procured through requests for proposals, pursuant to the McEnroe Act, *N.J.S.A.* 13:1E-136, *et seq.*

During January and February 1987, a series of transmittals from George Dakes to Chairman Caldarella, with copies to General Counsel Sinisi, forwarded draft RFPs for the disposal of solid waste and for the design, construction and operation of the transfer and transport of solid waste, together with proposed mailing lists of solid waste haulers and landfill sites. According to Dakes, the extensive mailing list was composed from names obtained from environmental protection agencies in other states and from individuals, including Caldarella. (Caldarella denied that he contributed to the list.) The drafts were reviewed and discussed. Caldarella confirmed that the BCUA was proceeding on a fast track at the time. In contrast to the ultimate contract documents issued by the BCUA, the draft RFPs sought a contract for disposal and a separate contract for transfer and transport. Interestingly, in the January 16, 1986 draft, the provisions specified a minimum 10-year period commencing mid to late 1987, *viz.* the first three years for "interim landfilling," the last four to five years for disposal of bypass, nonprocessibles and ash residue from resource recovery, and years four and five for either type of disposal "depending on the actual completion date of the Resource Recovery Facility." In addition, the drafts anticipated the BCUA's landfill operation to cease "in mid to late 1987, but no later than December 31, 1987."

General Counsel Sinisi's Monthly Report to the BCUA for February 1987 confirmed his review of the draft RFPs. Sinisi testified that "the efforts...around December of '86 and January of '87 are heightening the awareness of the client [the BCUA] to the fact that this is becoming more emergent, on an emergency basis to move forward."

In an internal CBA memorandum dated January 14, 1987, Dakes wrote:

> *Please review and provide comments on RFP. Need today or Thursday - Chairman [Caldarella] has instructed that this be RFP and not competitive bids.*

The minutes of a closed meeting of the BCUA on January 15, 1987 refer to a "discussion" of out-of-state landfilling as an interim solution. During the discussion, the BCUA addressed issues of RFPs versus competitive bids and whether an emergency existed. The minutes reflect the aggressiveness with which the BCUA initially pursued out-of-state disposal:

> *[Q]uestions arose as to whether out-of-state capacity may be procured by competitive bid or RFPs. Mr. Sinisi indicated research was necessary on this subject. Chairman Caldarella wants to be able to negotiate for out-of-state interim landfill if it can be legally done, as the time frame for public bidding would take a substantial amount of time and the Authority is presently running out of capacity at the Kingsland Landfill. Authority financial and special counsels were asked to look into whether a state of emergency exists and under these circumstances, whether we can negotiate instead of going through bids. They will report back to the Commissioners as soon as they have researched this problem.*

No BCUA witness was able to recall why the issue of emergency was raised in light of the fact that the RFPs were almost completed. Neither Caldarella nor Sinisi recalled the issue of whether an emergency existed, except Caldarella placed responsibility for the issue on the attorneys and consultants. Sinisi testified that "special counsels" referred to Thomas S. Boyd, a member of the BCUA's Special Counsel's firm. Dakes did not recall what may have been reported to the Commissioners in this regard, but did state that the decision was made to proceed with RFPs in accordance with Sinisi's "opinion."

The diligence with which the BCUA pursued out-of-state disposal is also reflected in a document that set forth a meeting and work schedule for the preparation of documents and making of decisions. The schedule, which was outlined during discus-

sions held on January 21, 1987, was distributed to several individuals, including Chairman Caldarella, General Counsel Sinisi, Solid Waste Director Killeen, Special Counsel Boyd and CBA engineer Dakes. It evinces a fast-track approach to award the contracts. In testimony, Caldarella concurred. Dakes testified that the vigorous schedule was designed "to have an orderly implementation for a vendor to start to get underway." The following significant activities, with due dates, appear on the schedule:

> *February 7, 1987 CBA to distribute final RFP's [sic]*
>
> . . .
>
> *February 17, 1987 MEETING - 2:00 PM Bidder's Meeting - distribute RFP's [sic]*
>
> . . .
>
> *February 23, 1987 CBA to distribute final evaluation criteria to team*
>
> . . .
>
> *February 26, 1987 MEETING - 10:00 AM Team to finalize evaluation criteria*
>
> . . .
>
> *March 4, 1987 Disposal Capacity RFP's [sic] due from vendors*
>
> . . .
>
> *March 9-11, 1987 MEETING Team to begin negotiations with disposal vendors*
>
> . . .
>
> *March 13, 1987 Transfer and Transport RFP's [sic] due from vendors*
>
> . . .
>
> *March 20, 1987 NOTIFICATION - P.M. Team to notify successful, qualified transfer and transport vendors*
>
> . . .
>
> *March 23 - MEETING*
>
> *April 2, 1987 Team to negotiate with all vendors for best contracts*
>
> . . .
>
> *April 6, 1987 MEETING Recommendation to BCUA Commission*
>
> . . .
>
> *April 9, 1987 MEETING Commission awards*

Attached to the schedule was a form data sheet that was later distributed to interested vendors at the orientation meeting held on February 17, 1987.

Dakes did not know why the final RFPs were not distributed on February 7, 1987, but did state that it was not his conduct that caused the date to lapse; why the RFPs were not distributed to vendors on February 17, 1987, or why the entire schedule was not followed. Caldarella did not know why there was no adherence to the schedule or why the contract award date of April 9, 1987 was not met, but referred the Commission to the BCUA's engineers and attorneys. Sinisi also did not recall why the schedule was not met.

As evidenced in a January 27, 1987 document, the BCUA engaged a financial management firm, which prepared financial qualification criteria and business arrangement criteria for evaluation of vendors under the RFPs. The criteria were distributed to the BCUA working group. In addition, in a letter dated February 13, 1987, CBA requested cost

estimates from a consulting engineer for services to be rendered in assisting with the evaluation of proposers under the RFPs.

As it did with the draft RFPs, CBA continually transmitted to the BCUA revised Notices of Intent for Disposal and Notices of Intent for Transfer and Transport. The draft documents were forwarded as early as January 30, 1987 and as frequently as every few days to General Counsel Sinisi, with copies to Chairman Caldarella and Solid Waste Director Killeen. CBA finalized the notices and by letters dated February 10, 1987, sent them to the *Wall Street Journal* and the *New York Times*, as well as other publications in the country, for publication in the February 12 and 13, 1987 issues. The notices announced February 17, 1987 for an "orientation meeting and presentation." Significantly, the notice for disposal called for landfill capacity for "approximately 3 years of transitional disposal needs" until the resource recovery facility became operational, thereby demonstrating again the BCUA's knowledge that resource recovery would not occur for another three years.

On February 17, 1987, the orientation meeting for interested vendors was in fact conducted at the BCUA and was attended by representatives of more than 25 companies. The data sheets were distributed, completed by vendors and collected by the BCUA. Among the companies represented at the meeting were Laidlaw Industries, Waste Management and Crossridge, all of which ultimately entered negotiations with the BCUA. Although no RFPs were distributed at the meeting, Caldarella testified that it had been the intent to do so.

By letter dated February 19, 1987, Dakes wrote to the BCUA's financial consultant, John Eccleston, concerning the solid waste management transfer station development. Referring to a meeting the day before, Dakes submitted a preliminary estimate of development and construction costs for the proposed transfer station to be located on the so-called shale site in North Arlington (the Jay-Roc property later purchased by the BCUA as the site for the permanent transfer station). Thus, it appears that as early as February 1987, the BCUA contemplated a transfer station on the site where it was ultimately located. No BCUA witness was able to answer how the site was selected, who proposed it or exactly what was intended.

At the next closed session meeting of the BCUA on February 19, 1987, according to the minutes, "Chairman Caldarella expressed the need for additional Work Sessions in order to meet deadlines coming up." In addition, the minutes establish that the Commissioners were informed of the completion of the RFPs:

> *George Dakes of Clinton Bogert Associates reported that the RFP documents are ready to go out.*

In spite of the fact that the meeting with vendors was held and the fact that the RFPs were "ready to go out," the BCUA withheld issuance of the RFPs. Three days after the orientation meeting, on February 20, 1987, the BCUA disseminated the following Notice to Proposers:

> *Proposers are hereby notified that the requests for Proposals cannot be distributed at this time due to <u>technical</u> <u>delays</u>.*
>
> *It is anticipated that the requests for Proposals will be available shortly.*
>
> *Schedules for Proposals preparation will be adjusted accordingly. [Emphasis supplied]*

Surprisingly, even though this action represented a drastic departure from the aggressive course undertaken by the BCUA for out-of-state disposal, no BCUA witness identified the "technical delays" or explained why the RFPs were not issued; nor could anyone explain why the RFPs were not made "available shortly." Thomas J. Toscano, then a Commissioner for several years and now Deputy Executive

Director, had no recollection of any of the events surrounding the RFPs, even though he testified that as a Commissioner, he was "[r]esponsible to make policy decisions for the Authority." (Of approximately 148 responses, he did not "recall" or did not "know" approximately 111 times.) At first, Caldarella testified that he did not

> *know whether or not the counsel and the engineer or the procurement team came before the Board, or spoke to myself and the Executive Director at that time, and indicated a reason as to why they should be pulled back,*

but when he was pressed, he referred to the non-existent BCUA/HMDC negotiations and then to a meeting with DEP officials in attempts to explain why the RFPs were not issued.

Even after the decision was made not to issue the RFPs, CBA continued on course. By letter dated February 23, 1987 and in telephone conversations on February 28, 1987 and other dates, CBA communicated modified evaluation parameters to the consulting engineer chosen to assist CBA. In addition, as indicated in a transmittal memorandum dated March 19, 1987, CBA continued to work on draft criteria to evaluate the proposals to be submitted under the RFPs.

The BCUA's decision to dispose of solid waste at out-of-state landfills as an interim solution was also evidenced in the January-February 1987 edition of its own publication, *Communicator*. There, the BCUA proclaimed that it was "not without a strategy or solution to our short and long-term needs," *viz*. resource recovery being the long-term solution and with respect to the short-term one:

> *We will be looking at out-of-state disposal to avoid a crisis, but, only, hopefully, as an interim solution until the recovery facility becomes operational.*

Importantly, in the same article, the BCUA not only acknowledged the December 31, 1987 deadline for landfilling in the Meadowlands District:

> *Simply put, we're about to run out of landfill space. Sufficient capacity may be available until the end of this year, but certainly not beyond 1987....We have not been able to identify a site outside the meadowlands district. And the HMDC wants us out of the meadowlands at the end of the year.*

but also implicitly acknowledged that any reprieve which provided for continued landfilling in the Meadowlands beyond December 1987 would not obviate the need for some period of out-of-state disposal:

> *Even if space was available somewhere in the county or Meadowlands for a new landfill, obtaining the necessary permits would involve entanglement in a regulatory maze of time-consuming proportions with no guarantee of a successful outcome.*

In a March 10, 1987 letter to the BCUA, with copies to General Counsel Sinisi and Solid Waste Director Killeen, CBA engineer Dakes provided an update on the county's solid waste disposal needs. He recommended that the efforts toward procurement of transfer, transport and disposal services "should continue including completion of Requests for Proposals and evaluation criteria." The letter also informed the BCUA that arrangements for transport of solid waste to other county landfills "were not feasible." Interestingly, in a letter dated March 11, 1987 to Dakes, Sinisi inquired whether he correctly "assum[ed]" that the arrangements that proved unfeasible did not include the out-of-state transfer and transport program "which are currently being finalized." Dakes responded that his assumption was correct. The program, testified Dakes, remained viable at this time.

In drafts of the Contingency Plan prepared in response to DEP Commissioner Dewling's Febru-

ary 23, 1987 demand for one, the BCUA noted the interdistrict agreement obligating the HMDC to provide disposal capacity only through December 31, 1987; advised that it was "finalizing procurement documents," and reported that it had already held the "pre-proposal meeting of prospective proposers." The March 19, 1987 draft called for implementation of the transfer, transport and disposal services in December 1987. This date also appeared in the time table attached to the plan as the starting date for out-of-state transportation and disposal of solid waste, to be followed by disposal of the residue, bypass and non-processibles from resource recovery. BCUA witnesses claimed not to know why the December 1987 implementation date was not met. The March 30, 1987, April 9, 1987, April 16, 1987, and April 27, 1987 drafts all called for implementation in "about 12 months" following issuance of the procurement documents. The time table attached to each draft specified May 1987 for issuance of the RFPs and May 1988 for implementation. Dakes did not know why the RFPs were not issued in May 1987. Caldarella again alluded to the engineers and attorneys. Sinisi, who was not involved in the preparation of the documents, recalled nothing about the proposed May 1987 issuance.

On May 18, 1987, Chairman Caldarella, General Counsel Sinisi, CBA engineer Dakes and others attended an evening work session at the BCUA. According to Dakes' handwritten memorandum to his superiors,

> *...Chairman [Caldarella] said he wants RFP issued in a week or two.*
>
> *Nancy P[etrillo, Director of Resource Recovery] said she would have Tom Boyd review current draft of RFPs, and schedule meeting next week. She will advise.*

In a May 20, 1987 internal memorandum, Dakes recorded,

> *Chairman Caldarella has called meeting to be held at HMDC at 4PM today re: interim filling.*
>
> *GD [George Dakes] attendance requested.*
>
> *Others in attendance to be McDowell, Sinisi, Marturano, RFK [Richard F. Killeen], Malcolm Pirnie, etc.*

Dakes recalled that despite the BCUA's presentation at the meeting on potential landfill sites within the Meadowlands District, HMDC's position was that interim landfilling was not available and that it would not risk Essex and Passaic Counties returning to the District.

On May 20, 1987, two days after Caldarella's May 18, 1987 directive, CBA forwarded to the BCUA draft RFPs for a disposal contract and a transfer and transport contract. On June 4, 1987, draft RFPs were again forwarded by CBA by transmittal memorandum stating:

> *RFQ/RFP's [sic] are dated June 15, 1987, and incorporate comments made at the June 2, 1987 meeting.*

The documents were being prepared in an atmosphere of urgency, not only because of the approaching December 31, 1987 exit date, but also, according to Dakes, because of "continuing stability problems with the landfill such that we had to redirect waste frequently at various parts of the landfill, redirect operations."

The Requests for Qualifications/Requests for Proposals for disposal services and for transfer and transportation, together with a cover letter, were finalized by CBA, printed and dated June 15, 1987. Responses under each procurement were due on July 8 and July 15, 1987, respectively. A pre-proposal meeting at the BCUA was scheduled for June 24, 1987. The RFPs called for implementation beginning on December 1, 1987 until operation of the resource recovery facility in three to five years,

at which time the facility's ash residue, bypass and non-processibles would be disposed of at the landfill and the transfer station system would "serve as an essential staging area for resource recovery." The RFPs included the "Business Arrangements Questionnaire" previously drafted. The BCUA reserved the right to terminate the disposal contract after five years of residual landfilling and the transfer and transportation contract after three years, with options to renew for two years and then for two five-year periods. In its August 1987 Monthly Report, the BCUA's Department of Resource Recovery reported that on June 10, 1987, the draft RFP "was distributed to the Board during their regular Work Session" and that it "remains under Board review."

Although printed in final form, the June 15, 1987 RFQs/RFPs were not issued. Again, no BCUA witness, including Dakes who was "the point person," was able to explain why they were not. Caldarella provided a series of responses: he did not know, possibly the engineers and attorneys so dictated and "I honestly believed I had an extension in the HMDC." Sinisi testified that he had "no recollection of participating in this aspect [of setting dates]" and did not know why the RFPs were not issued.

As evidenced by a CBA transmittal memorandum dated June 24, 1987 from Dakes, technical criteria for the financial evaluation of each RFP were being reviewed and revised by CBA, the financial management consultant, Sinisi and others. The criteria entailed a point system for compliance with the RFPs. They were not utilized subsequently when the BCUA engaged in negotiations following the emergency declaration.

The BCUA was aware, and apparently was in possession of the papers, of the suit instituted by the City of Newark against the HMDC, DEP and BPU to invalidate the Essex County/HMDC consent agreement and allow Essex to continue dumping in the HMD. Sinisi testified that he "personally watched [the Essex County situation] with keen interest because of what I perceived to be its possible ramifications to Bergen County." The suit and its unsuccessful outcome for Essex County constituted an ominous portent for Bergen County as it approached its own exit date. Sinisi added:

> *[I]t became abundantly clear to me that as a result of that litigation, the likelihood in gaining a rescission of the drop dead date on an immediate basis was potentially in jeopardy.*
>
> *Q. As the result of informing the BCUA of that, was any decision made to forthwith issue those RFPs?*
> *A. The decision was made to forthwith contact the HMDC to attempt to pursue negotiations with them toward trying to perfect an in-district solution, as well as some of the other features in the original draft MOUs which had been under consideration in 1986.*
>
> *Also, not only --*
>
> *MR. FREDERICK B. LACEY: The question was, was there a decision made to issue the RFPs as a result of this advice that you gave? I believe that was the question.*
>
> *THE WITNESS: No, not to issue RFPs, no.*
>
> *Q. Was there any discussion on whether or not to issue RFPs?*
> *A. There were, I believe, discussions about which method of procurement now would be most advantageous to utilize to ensure that the Authority would find itself the recipient of competitive proposals, i.e., whether a competitive bidding process should now be utilized as distinguished from an RFQ, RFP, McEnroe review agency procurement process. And I'm just not so sure date wise where that discussion fits in, but it's memorialized.*

Nevertheless, the BCUA did not issue the RFPs.

On September 15, 1987, a meeting was held in the office of General Counsel Sinisi and included Sinisi, Chairman Caldarella, Special Counsel Boyd, CBA engineer Dakes and Landfill Director Crupi. Dakes characterized the meeting as a turning point. His notes of the meeting reflect discussion of a declaration of emergency:

> *SPS [Steven P. Sinisi] - Tom [Boyd] to auth. emergency disp[osal] services*
>
> *commence December 31*
>
> *KPSL may/may not stabil[sic]*
>
> *SPS wants to call emergency*
>
> *A bid - garbage fairy - all services Cert[ificate] of Publ[ic] Convenience*
> *min[imum] 1 yr. w/options 1-2 yrs.*
>
> . . .
>
> *SPS - Tom Marturano...*
> *can slab be put on Jay Roc? and then use site for resids.[residual waste]*
> *-Tom has no problem w/scenario*
>
> . . .
>
> *Is performance bond needed? - SPS - BCUA would want*
>
> *Tom M[arturano] - top of KPSL*

After reviewing his notes, Dakes testified that "Sinisi made a comment that Thursday we would authorize bids...under Contract 87-43;" that "Sinisi changed his mind and then advised that we should be going out with spec[ifications];" that he (Dakes) did not recall why the RFPs were to be converted to bid specifications or what the discussion was concerning an emergency; that the contract would be for a minimum one-year term with options for additional terms in the event that the BCUA was successful in obtaining interim landfilling in the HMD; that HMDC's Marturano did not object to the proposal of placing "a slab of concrete for a quick transfer station to be put on Jay Roc, which was the residual landfill site," and that Marturano suggested siting the transfer station on top of the existing landfill to avoid a lengthy permitting process. Sinisi denied that he advocated declaring an emergency, but testified that he only identified it as one option: "What I advocated was the necessity for considering an immediate procurement pursuant to competitive bids."

Thus, it appears that decisions were made to issue bid documents pursuant to a scenario that included construction of a transfer station on top of the Kingsland Park Sanitary Landfill, which would require HMDC approval. According to the minutes of the September 17, 1987 regular meeting of the BCUA, a motion was entertained and carried to convert the draft RFQs/RFPs to competitive bid specifications and to advertise for bids "for the transfer and/or transportation and disposal of solid waste...commencing January 1, 1988." No BCUA witness knew the reason for the conversion or why the decision came after months of preparing the RFPs. However, Dakes recalled that it was based upon the advice of counsel and Caldarella again pointed to the engineer and attorney. Sinisi explained that the RFP process would be too time-consuming at that point. The bid package was prepared and issued in a matter of weeks, in contrast to the months during which the RFPs were continually reviewed and revised.

When Caldarella was asked if at any time he directed that the RFPs not be issued, he responded, "At this point in time, I just don't recall." When Sinisi stated that "it was always BCUA's decision" whether or not to issue the RFPs at particular points in time, Counsel Saros queried:

> *Q. Mr. Sinisi, if you cannot answer the questions as to why the RFPs were not issued at various points in time during 1987, can you direct us to anyone who --*
> *A. Who could?*
>
> *Q. -- who would be able to answer those*

questions?

COMMISSIONER WILLIAM T. CAHILL, JR.: Can you direct her to anyone and can he tell her why the RFPs weren't issued?

MR. LACEY: Answer her now, yes.

A. Perhaps Tom Boyd and CBA.

Q. Anyone at the BCUA as opposed to consultants, outside counsel?
A. You mean as opposed to Vincent Caldarella?

Q. Is he one of the individuals that you would refer us to?
A. Yes.

Q. Anyone else at the BCUA?
A. Not offhand that I can think of.

No witness accepted responsibility for directing that the RFPs not issue.

Commissioner Cahill pressed several times with Sinisi the issue of why bids were not issued until October, but was not given direct responses. Cahill attempted a fifth time to obtain an answer, albeit without success:

COMMISSIONER CAHILL: I think my question originally was, if we both agree that this thing could have been done in the spring, why wasn't it done in the spring?

THE WITNESS: I think the sincere answer that I can tell you is that it was because the BCUA genuinely believed that earlier in the spring, in fact, sometime after February, and within two or three or four weeks thereafter, we were going to be told that there was going to be an in-state solution worked out or in-district solution worked out, and if you trigger that mechanism to start the bidding process, it was not clear that, you know, if it went beyond the 60 days, what could happen in terms of losing, potentially, an effective bid.

COMMISSIONER CAHILL: So you're saying that the BCUA waited because they thought the problem was going to get resolved somewhere else?

THE WITNESS: I'm saying to you --

COMMISSIONER CAHILL: That's the way I interpret that remark.

THE WITNESS: Well, let me clarify that interpretation. BCUA put all of its oars in the water. It had an RFP process going as early as '86. I'd like to state it a little bit more affirmatively.

COMMISSIONER CAHILL: I understand. It didn't do anything more than that.

THE WITNESS: No, it didn't because one of the other prongs that the BCUA was pursuing was the in-state solution through negotiation with the HMDC and the DEP. And that's real. Because we're talking about mega-million dollars in savings to the ratepayers to invest the time to pursue that alternative.

COMMISSIONER CAHILL: And counsel, I understand that, I've been listening how you're pursuing this and I remember all the meetings with DEP.

But again, when you get to the spring of '87, if I were the Chairman of that Authority, I'd like to think I would have said to myself, I'm in the spring of '87, we've got to get a reasonable approach, we've got to make a decision, a drop dead date, so to speak, and it can't be October or November of '87, it's

got to be April or May 1st.

And again, with my limited knowledge of this whole field, I just don't understand why that didn't happen in the spring of '87, even assuming you were pursuing other tracks. Assuming you were doing all of this, I understand that. And it was the prudent thing to do. I understand that. I don't know why the chairman and/or the members of the committee let this thing wait until October and November of '87. That was just too late, and it's beyond me how they could have done that.

It is noted that the fee paid by the BCUA to CBA during 1987, when CBA was vigorously preparing and finalizing the RFPs and RFQs, constituted a wasted expenditure. CBA was unable to provide the Commission with the exact fee paid by the BCUA for this service because it failed to maintain separate billing records for each BCUA project. The BCUA paid CBA $240,849 under a contract number that included work on the RFPs/RFQs, as well as other projects.

THE ALLEGED DEP DIRECTIVE

Several BCUA witnesses attempted to explain the BCUA's failure to issue RFPs for out-of-state disposal in February 1987 and for several months thereafter by referring to a directive given by DEP officials at a meeting that was held in February 1987 in the county administrative offices and that included County Executive McDowell, DEP officials and BCUA officials. However, the BCUA witnesses were not consistent in recalling who attended the meeting or even what the directive was. Essentially, the BCUA witnesses stated that at the meeting, the BCUA informed the DEP of its intent to issue RFPs for out-of-state disposal and the DEP, in turn, directed, requested or suggested that the BCUA postpone and refrain from doing so to allow the DEP an opportunity to convince the HMDC to lift the December 31, 1987 exit date. The BCUA's version of the meeting was not substantiated byMcDowell or the DEP officials who attended the meeting. Further, it is not clear why the DEP's assistance was needed in this regard when the BCUA had been in negotiations with the HMDC and it was the BCUA that brought an abrupt halt to the negotiations. Moreover, according to Sinisi, the issue of the impoundment - the only obstacle to an MOU between the BCUA and HMDC - was not even raised with the DEP officials.

The Commission established through documentation that a meeting was in fact held in the County Executive's offices on February 20, 1987 and that McDowell, DEP Assistant Commissioner Deieso, DEP Solid Waste Director DeBonis, BCUA Chairman Caldarella and BCUA General Counsel Sinisi were present. Conflict exists as to the presence of others. However, the recollection of Caldarella and Nancy (Petrillo) Macedo that DEP Commissioner Dewling was present is factually incorrect - the Commission ascertained that Dewling was out of the state at the time of the meeting.

Based upon the differing accounts of the meeting offered by the BCUA witnesses, the apparent coaching of George Dakes regarding the meeting, the conflicting accounts given by Richard F. Killeen, the firm recollections of McDowell and the DEP officials and the assertion of Caldarella and Macedo, then Executive Assistant, that Dewling was present, the Commission concludes that the DEP officials did not make the statements attributed to them. Because of the significance of the BCUA's averment regarding the alleged DEP directive, the testimony of the witnesses in this regard is set forth:

-Vincent A. Caldarella-

Caldarella stated that in the beginning of 1987, "we prepared an RFP strictly for having people inform the DEP that we were going to go out of state with 4,000 tons and to try to get them to assist us in our initiatives to stay in the HMDC." Of course,

Caldarella's statements are not credible in light of the fact that the BCUA abandoned the negotiations with the HMDC at the end of 1986. Nevertheless, it was in this context that Caldarella raised, and the Commission heard for the first time, the alleged DEP directive. By Counsel Saros:

> *Q. Is it your contention that the direction or authorization to CBA to commence procurement documents for RFPs, the writing of the two Notices of Intent, the forwarding of those Notices of Intent to the Wall Street Journal for publication were all pursuant to a scheme by the BCUA --*
> *A. No.*
>
> *Q. -- to force the DEP to get the HMDC to grant an extension?*
> *A. No, counselor, not a scheme. It was -- it was done because it was something we had to think about.*
>
> *The hope was that someone would schedule a meeting and that we would gain assistance in staying in the Meadowlands, and that did happen because I guess, right around this time, there was a County Executive in the County of Bergen who received a call from Commissioner Dewling, and Commissioner Dewling said it was quite important that he come up to visit with him in Bergen County and that he would like him to have -- well, myself and I guess Sinisi and Nancy Petrillo and Dakes and whoever else was there with the County Executive, and <u>Mr. Dewling came up</u> with himself, Dr. Deieso, Mike DeBonis and I think somebody else -- maybe Joe Wiley -- and we had a meeting in the County Executive's office where they asked him to bear with them, not go out on the RFP because the state was getting mounting pressure from the State of Pennsylvania because of the amounts -- as I said, and if Bergen went out with 4,000 tons on the street, that it would create a problem.*
>
> *[Emphasis supplied ; Dewling was out of state. See previous page of this report.]*
>
> *Q. Were you present at that meeting?*
> *A. Yeah. Sorry. Yes.*
>
> *Q. When did that occur?*
> *A. I don't know.*
>
> *Q. When in connection with the authorization to CBA to commence procurement documents and the drafting of the two Notices of Intent?*
> *A. Counselor, I'm sure someone has a record. My mind just cannot give it to you. I can give you the background. I can give you the whole scenario, but I just can't give you the date. I'm sorry.*
>
> *Q. Are you offering that as the reason why the Notices of Intent were cancelled in the Wall Street Journal?*
> *A. I don't know that that ties in or, you know, whatever. I just don't know that.*
>
> *Q. Did that meeting come before or after?*
> *A. I just don't know.*
>
> *Q. Why were the Notices of Intent cancelled on January 14, 1987.*
> *A. It might well be that Commissioner Dewling had contacted Mr. McDowell and that they had set up a meeting. I'm just not sure.*
>
> . . .
>
> *Q. How was the DEP advised that BCUA was in the process of preparing procurement documents to go out of state?*
>
> *(Pause.)*
>
> *A. I am sure that the HMDC might have said something to them and I also think that we informed them that, you know, unless -- at*

least come down to Trenton and meet with these people, you know, and I'm sure that we mentioned that unless, you know, we got some assistance that we'd have to go out on, you know, procurement for out-of-state hauling.

Toscano, then a Commissioner, testified that he did not recall being told by Caldarella or anyone else about DEP's alleged representations.

Caldarella testified that DEP also made the same statements at a meeting in Trenton, but was unable to recall when that meeting occurred:

> *I can recall a meeting in Trenton which was like a briefing session or an update session on where we were at critical mass and where we were at this point.*
>
> *I don't recall who said what, and I just know that it was a position of the DEP that for the BCUA to go out at that point in time for a procurement for 4,000 tons would be detrimental to the position of the state as far as the out-of-state markets were concerned.*
>
> *Q. Was there an actual instruction or directive by a DEP official to you not to go out of state?*
> *A. I don't know*
>
> . . .
>
> *Q. Did they direct you or ask you or what?*
> *A. I told you: They all came into McDowell's office. We had a meeting. They made a plea for us not to go out on the RFP, to give them time to work this out with the HMDC and that they were going to work together with us.*
>
> *Q. And at the meeting in Trenton, were you directed not to go out of state or was it in the form of a plea again?*
> *A. I think it was -- I think it was the same spirit of trying to work together. You know, don't -- don't do that yet. Let us continue to try.*
>
> *Q. If that plea had the effect of bringing a stop or slowdown to your fast track of issuing RFPs for out-of-state disposal, would that have been reflected in any letter or in any of the minutes of the BCUA?*
> *A. If it is, I -- you know, I don't know. I don't have them.*
>
> . . .
>
> *Q. If it's your testimony that the DEP asked BCUA to cooperate and not proceed with out-of-state disposal plans, did the BCUA accommodate that plea?*
> *A. Yeah. They held off for awhile.*
>
> *Q. When did they resume and when they resumed, was it because DEP gave them the go-ahead?*
> *A. No. We had the meeting at McDowell's office. We have had the meeting at McDowell's office. At that point in time we said, "Well, let's give them a month and see what they can come up with."*
>
> *A month went by, we were in communication with, you know, Mr. Dewling's staff and, you know, they were in touch with Mr. McDowell's representatives and together both agencies were still trying to work out the real scenario which was the HMDC.*
>
> *Q. Which never materialized?*
> *A. No, it did not.*

There is no corroboration of communications between DEP and McDowell's office.

-Nancy (Petrillo) Macedo-

Macedo testified that she attended the February

20, 1987 meeting. She asserted that both DEP Commissioner Dewling and Assistant Commissioner Deieso were present and that the BCUA was represented by Chairman Caldarella, General Counsel Sinisi and her. She did not recall if Killeen had attended. She testified clearly and concisely as to what occurred:

> *Mr. Caldarella stated to the representatives of DEP that we were prepared and had been working on a request for proposals for out-of-state dumping; that the options that were available to the BCUA did not look as though they were really feasible other than an out-of-state solution because of where the other counties were going and their ability to work with the HMDC to stay in the District; that we felt that we would have to, as an agency, be prepared to go out-of-state and put the RFP "on the street" as he called it, to which the Assistant Commissioner was very -- Deieso was very adamant in stating that the state did not want Bergen County to issue an RFP to go out of state. They were concerned as the state agency that if they, Bergen County, did go out of state for landfilling, that 50% of the state's garbage would then be transported, disposed of outside of New Jersey; that it was his belief that with the DEP's assistance, the BCUA could reach and work with HMDC and reach some kind of understanding and that, "Please do not put the RFP on the street, allow the DEP time to work with them and with HMDC to see if an interim solution could be reached."*
>
> *Q. As a result of that meeting, what did the BCUA do?*
> *A. The BCUA did not issue their request for proposals.*

Macedo stated that both the DEP Commissioner, who was not present, and Assistant Commissioner "expressed" concern about the BCUA sending the garbage out of state. As a result of the meeting, she continued,

> *We were told, me specifically by Mr. Caldarella, to not issue the RFP at that time; that they were going to start -- to initiate and commence their negotiations with HMDC. It was at that point that I really stopped being involved in the overall process. Once the RFP was prepared and put on the shelf, that was basically the end of my involvement.*

Macedo also testified that "just after the meeting," she and the other BCUA attendees discussed how the HMDC might react:

> *The conversation...was the fact that if HMDC were to agree to move into negotiations, it would have to be a push coming from the state level. It was not something that the BCUA could achieve on their own, that there had to be a desire at the state level that Bergen County stay within the District if it was to be achieved.*

Apparently, Macedo was unaware of the months of negotiations between the BCUA and HMDC that the BCUA inexplicably terminated in late 1986. Perhaps she was misinformed by others. In any case, her recitation does not comport with the facts.

-Richard F. Killeen-

Killeen, then BCUA's Deputy Executive Director, injected the meeting with DEP in response to a question as to whether the approaching December 31, 1987 exit date was prominent in his mind:

> *[S]ome people in the DEP had told us when we wanted to go out with RFP and an RFQ, "Don't put it out, we'll see if we can't work to get some capacity from the HMDC."*
>
> *Q. When did that occur?*
> *A. Maybe February '87.*

. . .

Q. Mr. Killeen, you just stated that officials with DEP told you or others at the BCUA not to issue the RFPs.
A. Hold off on issuing it.

Q. Who told you that?
A. That was at the February '87 meeting.

Q. Where was that meeting held?
A. In the County Executive's office.

Q. Who was present at that meeting?
A. I know I was there, Mr. Caldarella was there, County Executive was there and the only reason I'd be reluctant to mention from the DEP is because it's a little vague as to who was there. I know Mike DeBonis was there.

Q. To the best of your recollection, who else from the DEP was there?
A. Possibly Mr. Deieso.

Q. Anyone else?
A. Mr. Dewling.

Q. Anyone else?
A. That's about all I remember.

Q. What was said that prompted the DEP officials to say "don't issue the RFPs"?
A. We had with us at the time drafts of an RFQ and we showed them that RFQ and we said, "We want to go out and we want to start on this." And the feeling was, and I can't give you the exact words, "Well, we'll see what we can do, we'll work with you, we'll help out on that problem."

Q. What was the purpose of that meeting?
A. I honestly forget what the purpose of the meeting was.

Q. Do you know what prompted you and the others from the BCUA to bring RFPs along with you?
A. Well, that might have had something to do with it, but I really forget what -- we were attending so many meetings, I really forget what -- it might have been something else that triggered the meeting and then in a discussion in the meeting this came out.

Q. Which official from the DEP directed that the RFPs not be issued?
A. I wouldn't say, because I'm not clear.

Q. What reason was given as to why they should not be issued?
A. To my knowledge, there was none. No reason.

Q. Didn't you and the other members of the BCUA ask for an explanation?
A. If they were going to work with us to help alleviate this problem, that would be what we would be interested in.

Q. Alleviate what problem?
A. The date for the closure of the landfills.

Although Killeen regarded DEP's directive as significant, he could not recall that any follow-up was done. In addition, the Commission notes the testimony of Costello, then Executive Director, that he was never apprised of the DEP directive by anyone, including Killeen who reported to him.

Killeen's sudden recollection of DEP officials directing that the RFPs not be issued was startling to the Commission because only one month earlier, in an interview by SCI Special Agent Raymond H. Schellhammer, Killeen was asked about the alleged DEP directive and unequivocally stated that DEP never made any such suggestion, request or directive. Killeen was questioned about the conflict:

Q. Mr. Killeen, did someone coach you to say that here today?
A. No.

Q. Do you recall being interviewed by Mr. Schellhammer on September 9th of this year?
A. Yes.

Q. And at that time Mr. Schellhammer asked you if you were ever present at a meeting with DEP officials where DEP directed that the RFPs not issue and you told him you were never at such a meeting.
A. No, no. I don't even recall Mr. Schellhammer asking that, because we just sat in the backyard, he gave me the subpoena and I was in a beach chair and I offered him a chair and we went over my service, but --

Q. Do you recall that he also asked you questions about the events at the BCUA?
A. Very, very, very few questions.

Q. He asked you specifically whether anyone at DEP directed that the RFPs not issue and you said, "No one ever said that."
A. I wouldn't -- this is some kind of a conflict, because I don't recall him asking very many questions.

COMMISSIONER DUMONT: The question is, sir, do you recall that specific question?

THE WITNESS: No, I don't recall him ever asking me that question.

COMMISSIONER DUMONT: Do you deny that he asked you that question?

THE WITNESS: I would have to deny it.

COMMISSIONER DUMONT: In other words, I'm asking you something firmer than whether you recall it or not. Do you deny that he asked you that question when you were interviewed in -- on that particular occasion?

THE WITNESS: See, I'm at a disadvantage because I don't know what context he might have said something, but all this was, and I want to be very specific about it, was that we sat in my backyard, he asked me where I worked, my birth date, I asked him if -- could this be scheduled in the morning. He said he'd see if he could schedule it instead of the afternoon, but as far as a lot of questions, I don't recall him asking a lot of questions.

COMMISSIONER DUMONT: Whether there were a lot of questions or just a few questions, I just want to know whether you recall that specific question that counsel put to you?

THE WITNESS: I don't recall that specific question. If I recalled that question and gave that answer, then I wouldn't change it now.

-George Dakes-

During his first appearance before the Commission, Dakes referred twice to the DEP not wanting the BCUA to send the garbage out of state, but it was during his second appearance that he provided elaboration. The first reference occurred during questioning about his January 8, 1987 letter to the BCUA regarding emergency planning for disposal. He testified as to possible landfill options in another county and Pennsylvania. In this context, when asked if DEP were not opposing landfilling in other counties, Dakes stated that he "was led to believe that the DEP did not want the Authority to go out of state with their garbage" because doing so "would have just meant a big burden to other states and the DEP was afraid that the Authority would have the whole system collapse." He recalled being told of "meetings or a meeting" in the spring of 1987 when

Commissioner Dewling was present, the BCUA exhibited the RFPs and the BCUA "[m]aybe...were asked not to pursue it."

Dakes next appeared before the Commission in November 1990. Soon after the questioning commenced, and although he could not provide reasons why the RFPs were not issued at specific points in time, Dakes referred to the DEP meeting in the context of attempting to explain why the RFPs were not being issued in accordance with the May 1987 framework contained in the March and April drafts of the interim/contingency plan requested by Commissioner Dewling. However, when Dakes referred to the DEP meeting this time, he did so in greater detail because "[i]t was told to me in more detail, I guess, than the last time I testified":

> *Based on meetings which the Authority had with DEP, it was told to us that DEP was nervous about another county going out of state with their garbage because at that time several counties had already started taking their garbage out or were about to, so I think at that time, with BCUA's solid waste flow being so high, the DEP was afraid that it would have closed down that possibility and made it extremely difficult for everybody else to continue to go out of state with their solid waste.*
>
> . . .
>
> *Well, I recall being told about a meeting that was held with Mr. Caldarella, Mr. Sinisi and many others and Commissioner Dewling of DEP during which BCUA presented Mr. Dewling with the -- one of the draft documents that it had prepared, and the DEP was told that the Authority was ready to go out of state or ready to go out with this procurement, and it's my understanding that the DEP didn't want us to go out of state at that time and they felt they -- and again it's been told to me that DEP thought that something could be worked out for landfilling to continue for Bergen County.*

When Dakes later recounted what had occurred, he again described the DEP as being "nervous" about the BCUA sending its garbage out of state.

In light of the appearance that Dakes was coached prior to his second appearance, he was questioned at length about what he knew and when. Dakes' responses were shaky, conflicting and, at times, incoherent. Dakes began by stating that in 1986 he "was aware of meetings with HMDC. I would assume that I was aware of meetings also with DEP on the same lines" and that "DEP, it's my recollection, preferred that we didn't go out of state." By Counsel Saros:

> *Q. And someone at the BCUA told you specifically that DEP preferred that the BCUA not go out of state?*
> *A. I believe so.*
>
> *Q. You believe so? Did that or did that not happen?*
> *A. You said specifically did they tell me. I don't recall any specific date. I don't recall one person telling me that another person at DEP saying we should -- we shouldn't be going out. I remember this -- the general -- I can't think of a word -- trend. I'll say trend.*
>
> *Q. Did someone tell you specifically, "DEP does not want the BCUA to go out of state"?*
>
> *COMMISSIONER DUMONT: Do you mean at the time that this was going on?*
>
> *Q. Back in early 1987 when you had the RFPs ready.*
> *A. I don't recall any specifics about that at that time. I -- I have recollection later on in 1987. I know your questioning, though, was about earlier in the year.*

After Counsel Saros retraced the events involving

authorization to CBA to prepare RFPs, the completion of the RFPs, publication of Notices of Intent and the conducting of an orientation meeting with vendors, the following question was posed:

> *Q. At that time, when you had the RFPs ready to go out, did someone tell you the DEP did not want the BCUA to go out of state?*
> *A. I don't recall specifically. I don't recall -- I recall it just as a general -- as a general recollection.*
>
> *Q. What is the general recollection?*
> *A. Well, that -- that the RFPs as you say were done in at least draft form, sometimes final form, and were to be withdrawn or not go out and that it would be for a -- it would be because DEP and BCUA felt they could work something else out.*
>
> *Q. Were you told by someone that DEP and BCUA could work something out?*
> *A. I don't recall specifically.*
>
> *Q. What were you told specifically on whether BCUA should go out of state?*
> *A. What?*
>
> *Q. What were you told in the beginning of 1987 on the issue of whether or not BCUA should take the garbage out of state?*
> *A. By BCUA you mean?*
>
> *Q. Yes --*
> *A. That we should proceed with the procurement documents; that that was the -- that was the prudent planning at the time.*
>
> *Q. And what were you told about whether or not DEP wanted the BCUA to go out of state?*
> *A. As we were beginning that work you mean?*
>
> *Q. As you were preparing the RFPs in the beginning of 1987.*
> *A. I don't recall if I ever asked -- if I was ever told about -- as we were preparing the documents in January of that year we were ever told anything about DEP or HMDC.*
>
> *Q. Were you told anything about what DEP wanted with respect to out-of-state disposal at the time the Notices of Intent went out in mid-February?*
> *A. I don't recall. It's four years ago. I really don't recall.*
>
> *Q. The orientation meeting was held with interested vendors on February 17. Three days later the BCUA issued the notice saying because of technical delays we cannot issue the RFPs at this time.*
>
> *The last time you testified you did not know what those technical delays were and why the RFPs were not issued.*
>
> *What is your recollection now as to why they were not issued?*
>
> *A. I have no better recollection now.*

Dakes did not "recall" when in 1987 he was told that the DEP did not want the BCUA to go out of state. He then testified that "later in '87, when the contract documents under 87-43 -- well, around that time -- DEP was still uncomfortable about us going out of state." He continued:

> *As I said before, I -- it was my recollection that something was said at the time by DEP being nervous.*
>
> *Q. When was that told to you?*
> *A. I don't recall.*
>
> *Q. But you recall that that did not occur in February of 1987 when the RFPs were first*

held back?
A. Do I recall that it did not happen? I'm sorry.

Q. You stated you did not recall when you were first told that the DEP was nervous about the BCUA going out of state. Did that occur at the time of or some time after the February cancellation of the RFPs?
A. I believe it happened after.

Q. How long after?
A. I don't recall.

Q. In June, documents were prepared for out-of-state disposal. Did it occur before or after that event?
A. I don't recall.

. . .

Q. Did someone represent that to you before or after the contract documents were issued in October 1987?
A. Possibly.

Q. Exactly what was told to you about the DEP?
A. I don't recall, but at that time when the contract documents were issued there was very little time left through the end of the year -- through the December 31 deadline to stop landfilling.

In a final attempt to ascertain exactly what Dakes was told in 1987, the following ensued:

Q. Were you told that the DEP was concerned about the BCUA going out of state or that the DEP firmly did not want the BCUA to go out of state?
A. I don't recall how it was told to me.

Q. Were you told specifics or were you...
A. I wasn't told any specifics. I wasn't told of individuals of BCUA meeting with anybody -- individuals meeting with DEP.

Q. You were not told of any meeting. Is that correct?
A. That's correct.

Q. How was it framed to you as to what DEP was instructing the BCUA to do?
A. How what? DEP was instructing? I'm sorry.

Q. You were told about a meeting between DEP and BCUA. In what context was it told to you that DEP was concerned about the BCUA going out of state?
A. I don't recall.

Q. Do you recall what you were told?
A. I can't recall.

Q. You can't recall at all what was represented to you?
A. I can't recall any specific discussions. I can't recall anything that was told to me about what DEP said. I can't recall any discussions --

Q. Would it be accurate to say that nothing was told to you about any representation from DEP?
A. No, that's not accurate either. I recall some -- there was a general -- there was something general back then, but I don't recall any specifics back then.

Q. What was the general?
A. Again, as I said before, that the DEP was nervous about the additional solid waste from Bergen County going out of state.

Dakes testified that between his first and second appearance before the Commission, Caldarella and Killeen spoke to him about the meeting, although neither of them cited the DEP meeting as the reason for not issuing the RFPs month after month. Dakes

was then questioned about his conversation with each individual.

Dakes recalled several conversations with Caldarella between his two appearances (Caldarella had already testified):

> *Q. Did you speak with him after you testified?*
> *A. Yes.*
>
> *Q. About the investigation?*
> *A. Not about my testimony, no.*
>
> *Q. About your interviews or aspects of the investigation?*
> *A. In a general broad sense, yes.*
>
> *Q. What did you talk to Mr. Caldarella about with respect to this investigation? What did you say and what did he say?*
> *A. We discussed very briefly what my feeling was on the -- the interest in the emergency that had been called and the reasons for it.*
>
> *Q. And what did Mr. Caldarella say about the reasons for the emergency?*
> *A. In -- in giving you my response I'm trying to remember if he mentioned anything to do with meetings with DEP or HMDC.*
>
> *(Pause)*
>
> *A. I believe he did.*
>
> *Q. What did he say?*
> *A. I believe he told me about the meeting about -- at -- with DEP that we discussed before.*
>
> *Q. What did he tell you about that meeting?*
> *A. That the meeting was with Commissioner Dewling and others and that the draft document that had been prepared at the time was presented to DEP to indicate to them that we were ready to go out of state or at least to go forward with the procurement to go out of state with the solid waste, and it was at that meeting, as Mr. Caldarella told me, that it was decided that -- that DEP decided they would prefer it if BCUA didn't go out at that time.*
>
> *Q. And Mr. Caldarella gave you that as the reason for what?*
> *A. For withholding the document and thus not going ahead with the procurement.*
>
> *Q. Did he tell you when that meeting occurred?*
> *A. I think -- I think it was -- I think he said or -- I don't recall if he actually said it, but I believe it was February.*
>
> *Q. Did he tell you that?*
> *A. I don't recall. I think he did.*
>
> *. . .*
>
> *COMMISSIONER DUMONT: Let me just interrupt you there.*
>
> *Was he -- if he wasn't the first one to tell you after your testimony, did someone tell you about this meeting after your testimony?*
>
> *THE WITNESS: Yes, but I don't recall who was the first one to tell me about it.*
>
> *COMMISSIONER DUMONT: Okay. But was that the first time that you heard about this meeting? In other words, after you testified in May?*
>
> *THE WITNESS: In such detail, yes, it's the first time I heard and -- yes -- no. I'll answer the question directly, yes, it was the first time I heard about that meeting.*
>
> *COMMISSIONER DUMONT: Now, back in '87 you were generally aware of the*

DEP's nervousness about BCUA going out of state, correct?

THE WITNESS: Yes.

COMMISSIONER DUMONT: But you were not aware back in 1987 about a specific meeting between the BCUA and DEP?

THE WITNESS: Yes, that's correct.

COMMISSIONER DUMONT: So that the first time you learned of a meeting with regard to this supposed nervousness by the DEP was after you testified in May of this year, correct?

THE WITNESS: Yes.

COMMISSIONER DUMONT: And you're not sure now who told you about the meeting for the first time. Is that right?

THE WITNESS: Yes.

COMMISSIONER DUMONT: But you did give us a group of individuals which, according to my notes, were Messrs. Sinisi [Dakes later withdrew Sinisi's name], Killeen, Caldarella and Boyd [Dakes later stated that he "probably" spoke with Boyd about the DEP meeting, but did not recall when or who raised the topic; Boyd had no recollection] as the four individuals that you spoke with about your testimony this year. Is that correct?

THE WITNESS: Yes, Commissioner.

...

COMMISSIONER DUMONT:...It would have been then one of the four individuals that you've identified who first informed you about a meeting which took place between the DEP and the BCUA in which this --

THE WITNESS: Yes.

COMMISSIONER DUMONT: -- nervousness by DEP was expressed, correct?

THE WITNESS: Yes.

COMMISSIONER DUMONT: But you do not recall which one of the four?

THE WITNESS: No, but I'd like to go along with my recollection that I think I recall that when Mr. Caldarella told me about the meeting it was -- it was revealing in that he was the first one who I believe was actually present at that meeting to tell me about that and so I -- I felt that, well, here was somebody who actually was at that meeting who was finally telling me about the meeting that had gone on.

I do have that recollection, so if he wasn't the first one, he was -- I think he was the first one who was actually there. I really don't know who else was there.

Dakes also testified that Arthur Bergman, then CBA's in-house counsel, was present when Caldarella spoke of the DEP meeting:

> *...[T]he one time that Mr. Caldarella and I met, Arthur Bergman was with me. I think that we were -- I think Mr. Caldarella may have told that story at that time.*
>
> *Q. How many times did Mr. Caldarella tell that story to you?*
> *A. That story -- not story -- recounted what happened at the meeting is what I meant to say.*
>
> *Q. How many times did he tell you about it?*
> *A. I think only once.*

Dakes also engaged in several conversations with Killeen, who contacted Dakes prior to his own appearance before the Commission because "he [Killeen] really wanted to give some intelligent answers...[and] in my assisting him with his recollection, it assisted him with his recollection of that meeting":

> *COMMISSIONER DUMONT: Well, who first raised the topic of that meeting, did you or did he, in your discussions prior to his appearance?*
>
> *THE WITNESS: I think he did.*
>
> *COMMISSIONER DUMONT: And why did he raise it with you? Did he say?*
>
> *THE WITNESS: It just -- in the discussion -- the part of the discussion I had with him about how DEP again was nervous about us going out of state with solid waste and how HMDC wouldn't give us the disposal capacity in there and it was during that time.*
>
> *COMMISSIONER DUMONT: Well, did you say that to him or did he say that to you?*
>
> *THE WITNESS: I said that to him and then he mentioned the meeting to me.*
>
> *COMMISSIONER DUMONT: And he mentioned on his own that there was a meeting in which this was expressed, what you just said?*
>
> *THE WITNESS: As I said, I'm pretty sure he did.*
>
> *COMMISSIONER DUMONT: Was this after you had spoken to Mr. Caldarella about the meeting?*
>
> *THE WITNESS: I believe, yes.*
>
> *COMMISSIONER DUMONT: So that you already had Mr. Caldarella's version of what took place when you spoke with Mr. Killeen?*
>
> *THE WITNESS: Yes.*

Dakes testified that Killeen informed him that he, Caldarella and Dewling attended the meeting. Killeen did not recall any such conversations with Dakes.

-Stephen P. Sinisi-

General Counsel Sinisi believed that "the Authority asked for the meeting" with DEP. He recalled that County Executive McDowell was present, that the BCUA was represented by him (Sinisi), Chairman Caldarella and possibly Killeen and Macedo and that representing the DEP were Deieso and DeBonis, although he stated during a later session that Commissioner Dewling was also present. His recollection of what was uttered by the DEP officials was not as strong as that of the other BCUA witnesses. According to Sinisi, the meeting

> *had been sought for the purposes of, A, acquainting the highest-level officials at the DEP with the status of BCUA's resource recovery project and its concerns regarding interim disposal strategies remaining available to BCUA, and as a result of the meeting held with representatives of the DEP and the BCUA, a decision was ultimately made to deliberate on the out-of-state procurement initiative that had been in progress by way of RFQ/RFP formulation based on DEP <u>indicating</u> that it would appreciate the time to undertake a study and to see if they could assist the BCUA in working out concerns for in-district disposal with the HMDC. [Emphasis supplied]*

Thus, initially, Sinisi referred to the meeting in attempting to explain why the RFPs were not issued in February 1987. However, when he was later

pressed as to why negotiations on the MOU had lapsed for almost a year, he again made reference to the meeting with DEP. This time, Sinisi's description of DEP's action was further diluted:

> *We came away from that meeting with the sense that DEP, in appreciation for a deferral of issuing RFPs or RFQs or not taking in proposals for RFPs and RFQs, would undertake to do a due diligence investigation of what capacity, if any, could be made available to Bergen County in the Hackensack Meadowlands Development District, and we received that answer -- and again I may be off by two or three weeks, but I believe it was in mid-May. [Emphasis supplied]*

Ultimately, Sinisi withdrew it as the reason for the BCUA's abandoning the negotiations with the HMDC.

At a subsequent session, Commissioner Cahill probed the issue:

> *COUNSEL SAROS: Was the impetus for not releasing the RFPs from DEP or from BCUA officials?*
>
> *A. I can't answer.*
>
> *Q. Did the idea stem from --*
>
> *MR. LACEY: I think he's given you a general idea of what went on at that meeting and I don't know how he can describe in terms of what went on as impetus.*
>
> *MS. SAROS: This is a very important issue.*
>
> *COMMISSIONER CAHILL: Mr. Sinisi, let me see if I can get to the bottom of it. Do you recall anybody from the DEP saying they should not be issued?*
>
> *THE WITNESS: As direct as that, no, sir. I do, however --*
>
> *COMMISSIONER CAHILL: I think the reason Counsel is probably trying to follow up in this area is you seem to hesitate, which I understand, you're thinking about the question, and then you answer it by saying "as direct as that, no," which kind of leaves the thought that maybe there was an indirect suggestion.*
>
> *THE WITNESS: Concerns were being expressed, sincere open concerns.*
>
> . . .
>
> *COMMISSIONER CAHILL: When you say to me, "directly, no," is there some indirect suggestion from the DEP?*
>
> *THE WITNESS: Obviously, DEP, I felt, would be relieved or express relief when the notion that the RFPs would not be issued immediately was forthcoming from the BCUA based upon BCUA hearing that it was going to receive a review by the DEP of a situation that was critical to its short-term solid waste management strategy, which was interim capacity in the Meadowlands District. [Emphasis supplied]*
>
> *I think both sides expressed a sigh of relief. And I did not chronicle, I did not take notes as to who said what to whom about that issue. But obviously, on the basis of that discussion, the BCUA did not issue RFPs and on the basis of that discussion, the DEP hierarchy indicated, you know, strongly indicated that they would leave it, and within a matter of a few weeks is my recollection of the time period, would be back to the BCUA on whether they could identify ways to resolve concerns expressed by BCUA to stay in the District.*

COMMISSIONER CAHILL: Just a follow-up question. You indicated that DEP seemed to have a sense of relief about the RFPs not being issued.

Can you tell me who expressed that sense of relief, and how it was verbalized? I mean, what was said and by whom was it said that left you with the feeling that there was a sense of relief on the part of the DEP that these RFPs were not going to be issued, if you recall?

THE WITNESS: I don't recall, and I don't recall because if there is some significance to who said what to whom about whether RFPs would be withdrawn or not, at that time, both parties at the table, I don't think, wanted to show that in one way or another. The discussion was very abrupt on those points.

I would suspect that from the DEP's position, you know, they wanted to get to the heart of the matter, which is the pledge of the cooperation, without having to create a directive to the BCUA or indeed whether they could create a directive to the BCUA on the issue of withholding RFPs.

They may have even said they're not here to tell us what to do with that in terms of how the RFP should be issued.

That was not really their role. The only time it came up was in the context of what the RFP meant in terms of additional waste going out of state to the overall statewide Solid Waste Management Plan.

COMMISSIONER CAHILL: Mr. Lacey, Mr. Sinisi, I think what counsel is just trying to get to the bottom of is very simple: Did the DEP recommend the RFPs not be issued and if so, who at the DEP did? And if they didn't, just say so, or did it come from the BCUA or did it come from the Meadowlands Authority? All they're trying to do is find an answer to that.

According to Sinisi, the DEP "would get back to us within two weeks or so." When asked if there were discussions at the BCUA about whether or not to issue the RFPs because the DEP did not yet "get back" to the BCUA, Sinisi stated, "I have no recollection of a specific conversation of that nature." The BCUA did nothing to follow up.

Sinisi did not commit himself to alleging that the DEP dictated or requested or directed that RFPs not be issued. On the basis of Sinisi's testimony, it appears that the BCUA inferred a great deal. It is not clear, then, why the BCUA neglected and abandoned initiatives on such a flimsy basis.

* * * *

-William D. McDowell-

McDowell, who was one of the first commissioners of the HMDC and later its Executive Director for seven years, recalled the meeting. His office week-at-a-glance calendar lists for February 20, 1987 at 2:00 p.m., "DEP re: Status of solid waste, Don Deieso, Assistant Commissioner, Mike DeBonis, Joseph Wiley." (Wiley arrived late for the meeting, but joined Deieso and DeBonis at the subsequent meeting at the HMDC.) McDowell's recollection of the meeting did not support the BCUA witnesses' contentions:

> *Q. At this meeting or at any time, did Deieso, DeBonis or Wiley instruct, direct, suggest or request the BCUA not to go out of state with the garbage?*
> *A. I -- I don't recall that ever happening and I don't know how they could have, anyway.*
>
> *Q. Can you explain that?*
> *A. I don't know what the alternatives were*

as we got to this point.

Q. Did anyone from DEP ever, in your presence, tell the BCUA not to issue the RFPs for out-of-state disposal?
A. I don't -- I don't recall ever being at such a meeting.

Q. In your presence, at any time, did any DEP official tell the BCUA that the DEP would assist the BCUA in obtaining an extension of the December 31 date from the HMDC?
A. I honestly don't recall ever hearing that.

Q. At any time in your presence, did an official or representative of the BCUA ever request a DEP official to assist them in obtaining an extension of the December 31 date?
A. Not to my knowledge.

In addition, regarding the assertion that RFPs for out-of-state disposal were placed on the table at the meeting, McDowell did not "recall that ever happening in my presence."

* * * *

-DEP Officials-

The former DEP officials were consistent and unequivocal in their recollections denying the BCUA witness' various versions of the meeting. Furthermore, in the opinion of then Deputy Attorney General Markens, it would not have made sense for DEP to direct or suggest that the BCUA postpone issuing the RFPs because DEP "really wanted Bergen County to move forward in resolving their solid waste problem."

Deieso recalled the meeting with McDowell on February 20, 1987. In a January 30, 1987 letter to McDowell to confirm the February 20 meeting at 2:00 p.m., Deieso wrote,

We expect to discuss the status of the Bergen County resource recovery project, landfilling of residuals and interim disposal of the County's waste pending completion of the Ridgefield [resource recovery] facility.

According to Deieso, the meeting followed these topics, with "the emphasis on the resource recovery plant."

Deieso was then questioned about what occurred at the February 20 meeting, with a focus on out-of-state disposal:

Q. At any time during that meeting, did any of the BCUA officials show you a copy of the RFPs that were drafted for the BCUA for out-of-state disposal?
A. No.

Q. Did you ever see any such RFPs?
A. I never saw the RFPs. I heard about the RFPs at a subsequent meeting some time later.

Q. During the February 20, 1987 meeting, did any BCUA official or representative inform you that the BCUA was considering out-of-state disposal?
A. At any meeting or --

Q. During that February 20th meeting?
A. Oh, yes, absolutely.

Q. What was your response?
A. As we did for every other county, its action plan rested with the county to develop and that among other options we expected them to take a look at, to decide what was best for the county and propose back to us that this was their course of action and with respect to out-of-state, it was one of perhaps several options that they had that they could study and adopt.

Q. During the February 20 meeting, did you instruct, direct, suggest or imply in any fashion that the BCUA should not consider out-of-state disposal at that time and that the DEP would assist the BCUA in working with the HMDC for an extension?
A. Absolutely not. We would not have. It would have been -- it would have been inconsistent with a whole series of other actions we had taken in other counties, and, frankly, at the time, there were just one or two other real options before them. There was little else they could do with their trash.

Bergen County had just one other landfill site, I think, that they were investigating and that was in Mahwah or up-county as they -- as they like to say. So, frankly, there wasn't a lot that we could see that was real other than out-of-state. So, no, we would not have -- we would not have said, "Do not look at out-of-state."

Q. Or hold off temporarily?
A. Or hold off in any other way.

Again, I'll state the principle that I've shared with you, and that is, the relationship between Bergen County, the HMDC was a -- was a contentious one, but if there was going to be any decision at all, it properly rested between the HMDC and Bergen County. DEP would have had no -- no role to play.

Q. Did you ever offer such role?
A. No. I -- I can -- there were times when -- as I shared with you -- the strain between the HMDC and Bergen County went back many years and it was -- it was a difficult, difficult working relationship between those two agencies and both -- from a personal view I would not have -- never have gotten in the middle of that hornet's nest and, secondly, from a policy view there was -- it would just be inappropriate for the Department to have anything to do with the relationship with Bergen County and the HMDC.

Q. At any time other than that February 20 meeting, did you make such a direction or suggestion to the BCUA not to go out of state?
A. No. We would -- we would not have. I know that the plans submitted by the County, the plans that we reviewed would have reflected that if that were the case -- and I'm still left -- I'm still left with the difficult issue. We would not have created a division in counties. We could not have. It would have been poor thinking, poor planning and would have been very -- most consequential for us on all fronts.

Out-of-state was encouraged by us for Essex, Union and Passaic. Out-of-state was certainly a real viable option for Bergen County.

Interestingly, Deieso related an attempt by Chairman Caldarella, after the bid specifications were issued in October 1987, to make the DEP responsible for the BCUA's decision not to go out of state:

> *Q. At any time did Mr. Caldarella or Mr. Sinisi offer to you that the BCUA would not go out-of-state?*
> *A. Not on -- not on February 20.*
>
> *Q. At any time?*
> *A. At a later meeting, and it was an offhanded remark -- and again I'd characterize the spirit as almost humorous in the event that they said, "Well, we'll do you a favor, DEP, and we won't go out of state, but we'll hold up our plans to go out of state while we look at some other solutions," and again the law and our position, the way we behaved was always the same and I think right to the point.*

It was the County's responsibility to plan. If they chose not to go out of state, then it must -- must have meant that there was another option that they were pursuing and it was not an option that they shared with us or that was evident, so out of state -- if they chose not to go out of state, that was their -- that was their decision, but they had to have some other solution. It had to be something in their pocket.

Q. Who made that remark from the BCUA?
A. As I recall, it was Vincent Caldarella.

Q. Where was it made?
A. It was in my conference room some weeks or months after -- after that. I remember it in the context of a discussion, and the discussion was the results of either bid documents or quote documents that Bergen County had requested of those who would carry their waste out of state, and why the -- why it stays with me is that one of the proposers had proposed to Bergen County that its waste could be shipped to Panama, and Steve Sinisi at the time said, "We're going to -- if we send that to you, you'll look on it favorably," and I remember at the time saying we absolutely would not....

. . .

And at the time, I remember Caldarella saying to us, "Well, then, we'll -- maybe we'll hold back on this out-of-state proposal. We'll do you a favor, DEP. You're facing enough embarrassment now with Essex County and Passaic County, Union County," and all of the political spillover we were receiving on that, and a number of us laughed and said, "Well, you're doing us no favor. Maybe you're doing yourself a favor," but it was an extremely light moment. It wasn't -- certainly not a policy-setting one, nothing that would be ratified by us, nor has it been included in any document that we or the County had produced.

Q. What other DEP official was present?
A. Mike DeBonis and as I recall Joe Wiley.

In his testimony, DeBonis also volunteered the same incident of Caldarella offering not to send the garbage out of state "as a favor to the Department":

> *You know, going back to an earlier answer, I do recall that Vincent Caldarella in one or at least two meetings that we had with him around those times....that Mr. Caldarella would promise Assistant Commissioner Deieso and I that he wouldn't look to go out of state until he heard from us next, until he met with us next, and it was kind of a running joke between Assistant Commissioner Deieso and I. We would say, "Why did he promise that when he's got all these problems and we didn't ask him not to go out of state?" But we always seemed to be explaining to him what a critical situation the County was in and his parting words always seemed to be, "But I won't do anything until I see you next time," and this--the impression that we had with each other was again, "Why is he doing this? He doesn't seem to be doing us a favor, so why is he saying it?"*

In fact, DeBonis recalled that he and Deieso met with Caldarella no "more than about perhaps three times that year and he said it at least twice, if not three times...and...I believe one of the times was at that meeting [in McDowell's office]."

When Deieso was pressed as to whether he ever offered the assistance of the DEP to the BCUA in obtaining an extension of the December 31, 1987 exit date, he asserted:

> *No. We -- and we would not have done so. One of the -- one of the basic tenets of how we worked with the HMDC is that it was their land, it was their policies, it was their landfill space. It would have been inappropriate for us to have done so and, more*

> *importantly, just from a policy view we had just, at considerable expense to the residents of Essex County, Union County and Passaic, pushed transfer station initiatives through, so that those counties could honor the exit dates from the HMDC.*
>
> *It was important that Bergen exit on the compliance date as well. It would have been an inconsistent position for state government to have taken, but notwithstanding the inconsistency, DEP would not have encouraged, nor would we have discouraged. That would have been a matter left strictly between the Bergen County authorities and the HMDC.*

As to whether McDowell ever contacted Deieso in an effort to have DEP persuade the HMDC to extend the December 31, 1987 date, Deieso responded, "Never." McDowell confirmed this.

When questioned if he had a conversation with HMDC Chairman Coleman on whether the BCUA should be granted an extension of the December 31, 1987 date, Deieso testified:

> *[I]f such a discussion were had, it would certainly have been to the -- in reverse. It would have been a strong encouragement that they hold firm in their deadline so that Bergen would not be treated any differently than the other counties who had already had the hardship of the higher rates associated with out-of-state transfer.*

Deieso's scheduling documents indicate that a meeting with the HMDC was scheduled for 4:00 p.m. following the one with McDowell. DeBonis and Wiley accompanied Deieso to the offices of the HMDC, which was represented by Scardino and Marturano. DeBonis testified that the HMDC meeting was unrelated to the prior meeting at McDowell's office and "was simply a matter of trying to accomplish several matters in the northern part of the state at the same time." According to Deieso, among the matters discussed was the "admitted failure of the Kingsland Landfill," which DEP believed to be "over-loaded" and which "was taking a lot of our time."

DeBonis also represented the DEP at the meeting on February 20, 1987. According to DeBonis, the meeting was intended to introduce the newly-elected County Executive to the DEP and to provide him with an overview of the solid waste situation in Bergen County. He did not expect that the BCUA was going to make a presentation on what it perceived to be potential landfill capacity in the HMD in an attempt to convince the DEP that the district could handle Bergen's waste. DeBonis recalled that BCUA representatives emphasized that the HMDC was allowing Hudson County to dispose of its garbage at a landfill site located within Bergen County. DEP's response to this point was that the site was located "within the Meadowlands District territory, regardless of which county it was in." According to DeBonis, "we weren't terribly concerned over that particular distinction." Another issue that DeBonis recalled the BCUA raising was the problem associated with access to the resource recovery site.

DeBonis testified that at no time during the meeting did any BCUA representative place on the table RFP documents for out-of-state disposal of solid waste or state that the BCUA was preparing to issue RFPs or enter negotiations or award contracts for out-of-state disposal. Further, neither he nor Deieso suggested, recommended or directed that the BCUA not go out of state with its solid waste or that RFPs for out-of-state disposal not be issued at that time. In fact, DeBonis could conceive of no reason why the DEP might want the BCUA to postpone issuance of the RFPs. In addition, neither he nor Deieso made any statement to the effect that the DEP would provide assistance to the BCUA in trying to persuade the HMDC to extend the December 31, 1987 date. On the contrary, as DeBonis testified,

The Department had, in effect, reached the decision not to contest HMDC's decision that no further space would be available after the times that they had indicated. And so we, you know, consciously attempted not to suggest that, yes, maybe there is more space not just for Bergen County but for anybody.

We had had a meeting at one point, as I recall, between Commissioner Dewling and Commissioner Coleman, when, in effect, the two departments agreed that the Meadowlands Commission wanted to hold counties to their deadlines and that the Department would not take a position of suggesting that there was more space in the Meadowlands. We pretty much accepted the Meadowlands Commission's representation as to the capacities there.

Q. Do you recall when that meeting took place?
A. Yes. I recall that that was late 1986 and the issue specifically was the fact that Mr. Amato had just been elected County Executive and was new to Essex County and their particular solid waste situation and the Meadowlands Commission was very concerned over whether he would somehow appeal the existing consent agreement which had him -- his county leaving the Meadowlands the following August, and so we did have this meeting, again between the two Commissioners which I was present at, where they agreed, in effect, to work together and that the deadlines in the existing consent agreements would stand.

Let me continue on that. There was concern I remember expressed by Dr. Dewling at one point over holding Essex County to their deadlines in the consent agreement. There was concern that the Meadowlands Commissioners not respond to any sort of pressure from the jurisdictions or the elected officials in those jurisdictions to somehow find additional space in the Meadowlands, and Commissioner Dewling wanted to be sure that the Department of Environmental Protection, our department, in taking the position that we would enforce the deadlines in the established consent agreements was not going to be undermined by the Meadowlands Commission all of a sudden finding additional space, and that was one of the reasons why he wanted to meet with Commissioner Coleman to insure that we would take consistent positions and that, in fact, the consent agreements had to be adhered to.

Any averment that the DEP was responsible for the BCUA postponing the issuance of the RFPs is further weakened by the fact that the BCUA failed to document the representation in any written communication with the DEP, especially in light of the voluminous correspondence that did exist between the two agencies. Deieso "characterize[d] it [BCUA's correspondence to DEP] as the most voluminous and most detailed" of all the counties. Furthermore, the alleged representation appeared nowhere in minutes of BCUA meetings. In addition, Assemblyman John E. Rooney, who was also a BCUA Commissioner at the time, told the SCI that he was a "close friend" of Commissioner Dewling; that such a representation by DEP would have been contrary to what he was told by Dewling, and that if he had been advised as a BCUA Commissioner of the alleged DEP representation, he would have reacted to the information.

Deieso also refuted the contention of several BCUA witnesses that the DEP opposed the BCUA disposing of the garbage out of state because it was too much tonnage:

> *We were encouraging -- in fact, to be more accurate, we sponsored out-of-state initiatives for Essex, for Passaic and for Union*

County. Those initiatives we offered the counties to adopt, counties in some instances embraced and in one or two others they did not, and we actually carried those initiatives forward. We felt that proper because the state's capacity was diminishing and we needed -- we needed to create a solution and so we thoroughly supported it, endorsed it. In fact, in at least one or even in two of the counties' cases, they actually took the action necessary to create the out-of-state disposal options.

Q. Was that policy affected at all by the fact that Bergen County had many more tons of garbage than might be shipped out of state than some of the other counties you named that looked to out-of-state disposal?
A. Well, let me challenge just the first point. I'm not sure that Bergen has many times more. If it was larger than perhaps any single county, that may be true, but an amalgam, Passaic certainly will rival Bergen. Passaic, Union and Essex will far exceed the Bergen County amount, so I'm a bit rusty on my percentages and details, but I think the basic principles are still sound that Bergen was not this tremendous land mass of garbage that dwarfed the others. Quite the contrary. Of the three, they certainly exceeded the amount that Bergen produced and they were successfully going out of state.

Q. Let me restate the question: Was there any concern about having Bergen County go out of state because the amount of garbage represented by Bergen might be the straw that broke the camel's back in terms of other states allowing the garbage into those states?
A. There was no -- there was no concern on our part that having Bergen go out of state would have been -- would have been something that would have caused us to change our out-of-state policy, no. Hardly that.

We were -- if I'm -- if I could remember, we were probably shipping 45 percent out of state. Bergen would have represented another ten percent more, so it was not going to change the complexion of the solid waste picture that profoundly; but more correctly, I think what we waited and expected to hear from Bergen was how they were going to address their interim problem.

DeBonis also recalled no apprehension within the DEP about Bergen County sending its garbage out of state:

> *Well, I don't recall anyone taking a position that Bergen should not take their waste out of state. The combined waste from the other four counties we were already sending out of state was substantial. I don't recall the exact tonnage figures, but certainly Morris and Passaic were on the order of 12 to 1400 tons per day each and Essex was working on their own -- they were over 2,000. Passaic, Morris I said were about 12-1400 tons each. Union is probably closer to probably 1500 tons and Somerset would have been a little bit less, but collectively those four counties represent probably close to twice what Bergen County generated.*

In fact, as previously noted, the guidelines to Dewling's February 23, 1987 letter to each county to formulate contingency plans included "out-of-state transfer and disposal" as one of the "policy response alternatives." Deieso elaborated:

> *I need to underscore the fact that out-of-state disposal was something that was a main issue at every meeting we had with County Executives and with their county solid waste planners. It was a well-understood, common issue among the solid waste professionals of the state. To imply that it was a surprise or no one was doing it -- if I can again set the backdrop for you -- this*

issue was receiving front page, Star Ledger and regional papers in the state coverage as mayors of Essex County revolted because of the high cost associated with out-of-state transfer. Passaic mayors were rebelling at the high costs. Then, now deceased, Mayor Frank Graves, Mayor of Paterson, had strong reservations about where the transfer stations were located in the City of Paterson serving all of Passaic.

These were issues that were receiving a tremendous amount of attention. The thought that we were shipping this much out of state, the thought that out-of-state transfer stations were -- were a rather common solution to our problems was well-known, so if -- if you would like me to underscore and I need to underscore for you that it was in this document, it was in every document, it was on our agenda for every solid waste meeting, every speech we gave in the state, every policy-setting discussion from the Governor down -- all included the out-of-state solution as a way to get us by.

It was also part of our thinking and hope that the counties saddled with the very high costs with out-of-state disposal would take even more aggressive action to meet their long-term solutions; so a county faced with $120 a ton would move aggressively, quickly to find a new landfill and to site a new incinerator so that they could reduce those costs to one-half when those new solutions came on -- came on board.

DEP's position to endorse and even promote out-of-state disposal as a short-term solution (as applied to Bergen County, too) makes all the more ludicrous Caldarella's statement that the preparation of the RFPs was designed to "let the word get out to DEP that Bergen County is considering sending 4,000 tons a day out of state and see whether or not they would be willing to help us stay in the [Meadowlands] District." Caldarella also testified that he used the same ploy with the HMDC by saying, "'Hey, guys, unless you do something, we'll have to go out of state and you know what that's going to mean to the state,' knowing or hoping -- I knew that they would call the DEP and say, 'Hey, you better watch those guys. There may be 4,000 tons going out on the street.'" If Caldarella actually employed such tactics with the DEP and HMDC, he not only deluded himself, but also steered the BCUA in the wrong direction.

Based upon full consideration of all facts pertaining to the February 20, 1987 meeting, the Commission finds that the DEP did not direct, suggest, request or act in any fashion to cause the BCUA reasonably to conclude that the RFPs should not be issued.

BCUA AND HMDC EXECUTE THE MOU

After abandoning the negotiations with the HMDC at the end of 1986 and after pursuing an out-of-state disposal plan for months without any overture to the HMDC to resume negotiations, the BCUA contacted the HMDC in May of 1987. Once again, the void created by BCUA witnesses - this time, as to when and why negotiations were resurrected - was filled by other witnesses and by documentation.

HMDC Executive Director Scardino reported at the May 27, 1987 executive session meeting that he had just received a "panic call" from Chairman Caldarella seeking a meeting. Scardino recalled in an interview that Caldarella attempted to convince him "why we need to work together." When Scardino pointed out that the BCUA had "wasted time," Caldarella offered no explanations. Any expectation by the BCUA that it could return to the favored position it had enjoyed the prior year proved wrong.

According to the transcript of the May 27, 1987 HMDC meeting, Scardino briefed the Commissioners as follows:

[A] bit of history here is something happened about 8 or 9 months ago, if you recall, it was about that time when we reported to you that there was some meaningful, at least in terms of dialogue, activity between ourselves and the Bergen County Utilities Authority. And at that time, BCUA had indicated strongly that they were moving toward transfer stations. That they were moving possibly toward a vendor taking the garbage somewhere out of state, probably Pennsylvania. Things then got quiet. And between then and now, and during that time both Tommy [Marturano] and I and others on occasion would say to the BCUA, and particularly to the Chairman, Vincent Caldarella, "We should get together. Time is getting pretty close and we don't see any movement." And what we were getting back as a response was that "we are getting the plans together, everything is going to be okay. We have got the cooperation of higher sources," whatever they were, and so forth and so on. So, we said, "Okay. If that's what you feel, but we are just cautious." Last Monday, I get a call from Chairman Caldarella - "We need a meeting immediately. Right away. Tony, can you get it together?" I said, "Sure. As we always do, right away. Wednesday early enough?" "Yes."

The meeting was held and Marturano concisely articulated the result of the meeting to the Commissioners:

The end result of that meeting was that there probably isn't going to be any continued dumping for Bergen County in the District either [in addition to Passaic County]. They are going out with an RFP now for transfer stations for shipment to out of state. That appears to be the way they are going to go.

In elaborating upon the meeting, Scardino emphasized what by then had become all too evident, that is, that Bergen County had not engaged in thoughtful, constructive planning to address the solid waste situation:

By Wednesday, we learned that the County Executive was going to be joining us at the meeting as well, and that Mike DeBonis from DEP would be at the meeting, and the meeting was held. We were asked point blank what we were asked three years ago, "Can you continue Bergen County in the Meadowlands?"

And, just to capsulize the whole thing and not bore you with details, the essence was, we turned around and made this point, and in the presence of the County Executive, which was good, was that "you are asking the HMDC, who has done its planning and done it properly in respect to all of the counties - we know what we are going to be doing between now and sometime in '88 in order to accommodate all of the counties in '88, Hudson County particularly, - and in effect, what you are asking us to do is to now alter those plans to accommodate Bergen County at more than the eleventh hours. This is unfair and will not obviously be done." Point One.

Point Two was that then they started to put on some pressure on DEP and Mike DeBonis, and that they [DEP] stood firm and they said to Bergen County, "If you think the Meadowlands is not going to accommodate you, that you are going to get your garbage sent to another county, maybe in the south to another county who has in effect met its mandate in requirements under the Solid Waste Management Act, because Bergen County didn't do its job," - and in effect this is what he is saying - "we are going to now allow you to dump at a place, you are mistaken. They have done their job."

McDowell also recalled this meeting and testified that it was the only occasion that "the BCUA types" requested him to intervene on their behalf.

Scardino further informed the Commissioners that during the meeting, County Executive McDowell inquired whether straight landfilling could be accommodated in the Meadowlands. He continued:

> *[W]e made the point clear and we said, "But you know, Mr. Executive" - and we said this respectfully, but it is the truth - "We said, you know, your choice is Bergen County, not the Meadowlands. We are willing to concede, and the Commission has always been on record, that because there are 10 communities in the Meadowlands District that we have always felt a sense of obligation. But, the mandate under the Solid Waste Management Act to Bergen County is that they must find a place somewhere in Bergen County."*
>
> *Under the question of somewhere other than the Meadowlands, no one ever responded, that is, from their side. They wanted to try to keep it here in the Meadowlands.*
>
> *So, the final outcome, as I said, was that Bill McDowell said, "It appears as though we are getting nowhere. We have learned a lot today, but that's about the essence of it."*
>
> *And, Vincent Caldarella and his people, he left with, at least my feeling was, that he said, and Tommy you can clarify this, he said, "It looks like we are going to have to go out and find a solution to this problem," but apparently getting the message that it was a solution other than dumping in the Meadowlands, other than the place that we had mutually agreed to some time ago.*

Scardino then pointed out that even if the BCUA obtained the deal from the HMDC that it could have had the previous year, the BCUA still would have had to dispose of garbage out of state for some period of time:

> *[E]ven if we move back to that site that we had agreed with Bergen County as the interim site, if they had done this 9 months ago when we agreed to it, they would have been that much further along with what they had to do before with the Army Corps, because they have to go before the Corps.*
>
> *If they start today, there is no way that they are going to get in there by the deadline.*

When the issue was posed to Sinisi, he initially replied that it was "beyond the scope of my expertise" and referred the Commission to the engineer, but eventually conceded that

> *it was my client's understanding, based on all of the sources that it was evaluating, that it would have to, practically speaking, go out of state for a period of time.*

Clearly, the BCUA was confronted with out-of-state disposal regardless of whether it received an extension from the HMDC. Nevertheless, it still took the BCUA months to act. Moreover, in terms of long-range financial planning, the amount of any savings in preparing a new landfill as opposed to disposing of the waste out of state may have been negligible:

> *SCARDINO: One final point on the subject, because some people have raised it and Tom, clarify this also, that if you open up a new landfill, based on my understanding of the numbers involved, it would cost almost as much as it would if you sent the garbage, based on the cost, of sending the garbage out of state. There is a difference, but it is really not as big a difference as some people would like you to believe.*

Marturano testified that had the BCUA utilized the

Erie site, the rates would have risen dramatically because of the costs for land acquisition and hazardous waste cleanup.

Scardino then identified the BCUA's prevailing problem of laxity:

> *They have, in effect, lost all of their time and now are coming back to us to say, "Save the day again." And, I don't know of any way that this Commission, or we, can do that. If we could, we would. I'm sure. But, we can't. Is that in effect -*
>
> *MARTURANO: We could not do it without jeopardizing other commitments.*
>
> *SCARDINO: It would blow the whole thing to smithereens.*

The BCUA's initiative to implement a transfer station operation continued, although, once again, it was not achieved. At the HMDC's June 24, 1987 executive session meeting, DAG Markens reported:

> *Bergen County is about to go out with its request for transfer stations. I think they said the first week of July.*

No RFPs were issued.

The next communication from the BCUA with the HMDC was made a few months later, as reported by Scardino at the September 23, 1987 executive session meeting. Significantly, what the BCUA was seeking was not a return to the previously negotiated, but unexecuted agreement, but rather HMDC's approval to use the top of the existing landfill as a transfer station site. What is also made very clear is that the HMDC would not now take any action toward Bergen that would jeopardize its arrangements with Essex and Passaic Counties:

> *SCARDINO: Within the last three weeks, BCUA has been communicating with us. As you know, there is no sense in rehashing old news. A year or so ago we did have the makings of an agreement. We were waiting for BCUA's action on that agreement. It never materialized and each month we keep reporting here that there is nothing new, nothing new. Now, suddenly BCUA is aware of the fact that they are going to be out of the District on December 31st and they are asking for --*
>
> *The BCUA is seeking our consideration on an extension. I mean, that's as bluntly as we can put it. They are looking for an extension beyond December of this year in the District and the very fact that we are talking to them, and we remind them of this constantly or consistently, and that is that unlike Essex and Passaic County, at least with Bergen County we have consistently had the door open where we are trying to deal with all of the options, whatever proposals, suggestions they have, regardless of how ridiculous some of them may be, until possibly we find one that we can all cooperate and live with.*
>
> *The bottom line is, what we keep reminding Vincent Caldarella, the Chairman, is that whatever action this Commission takes, I can assure you that they will not take an action where there is even a hint that it will impact on the agreements we have already concluded with Essex and Passaic County. Because then, as you know, the whole thing opens up again to a very ugly situation. Tom, why don't you pick up from here and tell us what they are proposing.*
>
> *MARTURANO: You have to clarify. When you said extension after December 31st, what they are proposing is not an extension of dumping, I think that's a key distinction.*
>
> *SCARDINO: Tom, you may be right, but you remember last week we met with them*

and they were looking, A for an extension predicated on some deal, some scheme where they would ship the garbage out of the country, and this week they came in with one that says they want to just utilize, possibly utilize the landfill as a transfer station. I would like this clarified. They are still dealing with both. Have they eliminated the first option?

MARTURANO: Once they go to the RFP, they eliminated the first option. The current proposal on the table is not to extend dumping in the District beyond December 31, 1987, but to potentially use the existing Kingsland Landfill, the top of it, as a transfer station possibly in conjunction with transfer stations, other transfer stations, throughout Bergen County, or possibly not.

The vendors will have the opportunity to either use existing transfer stations, build new ones or just use the existing Kingsland Landfill; so it is not an extension of dumping rights, which is a key policy statement that we wanted to continue to make - tell everyone, stop dumping when they were supposed to.

On the other hand, the trucks are used to coming down here. If they are going to have to go out of state for a short period of time, it may make sense to use the top of the existing landfill. There is still some impact on the District, traffic-wise, although no additional dumping that would occur. Anything that was dumped would be taken that same day.

That's their proposal. What they wanted from us yesterday on the phone - we spent quite a bit of time on the phone - "We are going to go with this RFP on Monday. If somebody calls the Commission on Tuesday, that you people don't torpedo us by saying that we will forget our position - no way, not even a transfer station in the District." That, in effect, would pull the rug out from underneath their out-of-state initiative, which, I think if Bergen County goes out of state on December 31st, we have legally accomplished something in terms of the overall District. So, I don't think we want to sabotage that.

The issue for the HMDC, then, became one of whether to allow the BCUA to continue to use the Meadowlands in some form - not for continued straight landfilling beyond December 31, 1987, but as a transfer station site. As reflected in the HMDC minutes, it was important for the BCUA to offer this site, in addition to the possibility of using existing facilities in the county, in its bid specifications for out-of-state disposal. Otherwise, it was feared that the existing facilities would band together to control the bid price and, thereby, eliminate competition. However, if the HMDC was going to allow the BCUA to continue to utilize the HMD for some purpose, then it was going to insist on the same items that had been under negotiation:

MARKENS: We were on the phone for an hour or so, Steve [Sinisi], Tony [Scardino] and I. And one of the things I was concerned about was they are still talking about the memorandum of understanding, what Steve referred to as all the trinkets coming to HMDC. I decided to use his word.

One thing you recall, that agreement allowed them to dump after December 31st in the District, as Tom said, on the combination, and then they would be out of the District for 10 years.

He says he is now going to move forward with RFP and all these other things. I said, "All right. But, you are buying more time in the District, even if you are carting it out. And I still want all those trinkets. But, I also want one more thing and that is, I want

credit added onto your 10 year period, which doesn't start for another 10 or 11 years. I want, for whatever period of time that you are going to be transfer stationing, that that period of time is added onto the 10 years out of the District."

Of course, I have to add that he isn't speaking yet with the full direction of his client. I mean, he is just negotiating, I guess. He didn't see a problem with that, adding that time period onto the time period. So, I mention that to you.

But, I should mention, all the other trinkets I think are still intact and we have got a few other ideas to add to our list.

The BCUA's interest in achieving a transfer station operation and seeking HMDC approval to site the pad on top of the existing landfill, together with a brief extension of the exit date, is reflected in the BCUA's issuance of bid documents in early October 1987 and Chairman Caldarella's October 13, 1987 letter to HMDC Chairman Coleman. According to Sinisi, he and Boyd "participated...in its [the letter's] preparation."

In the two and one-half page letter that appears to contain several contradictions, Caldarella stated that "the BCUA seeks your consent and agreement to amend IDW II [the 1984 revised interdistrict agreement] to extend Bergen County's ability to utilize all available capacity at our Kingsland Park Sanitary Landfill...." This request is unclear in light of the fact that the landfill already was being pushed to new diameters in order to utilize all available capacity in the face of mounting stability problems. In fact, Caldarella's letter acknowledged that "the lagoon, has unfortunately not yielded the capacity expected." Caldarella recited some of the delays encountered in the resource recovery project, but reaffirmed the BCUA's commitment to the project as "the cornerstone for the long term disposal strategy of the BCUA." With this background, Caldarella then turned to "the need to address the gap between activation of our Resource Recovery Project and the closure date of Kingsland Landfill contemplated by IDW II." Caldarella briefly mentioned and then rejected the idea of finding landfill capacity in the county "to fill the gap." He also recognized that possible sites within the HMD, discussed in terms of a proposed Interdistrict Waste Agreement III, would trigger a state and federal environmental permitting process that "in our experience can take up to three years." After rejecting such sites "to meet our immediate needs," he stated that the BCUA was "prepared to consider" these options in light of a "possible availability of an expedited master permit process to obtain necessary [federal] permits." Nevertheless, Caldarella recognized that even an expedited permit process would not make a site available by January 1, 1988. Therefore, Caldarella proposed a two-phase strategy as "the most feasible and the only realistic and practical short term remedy to avoid a disposal crisis...on January 1, 1988": (1) an extension of the December 31, 1987 deadline to April 1988 or until the Kingsland Landfill "is fully utilized to permitted levels," and (2) use of DEP Emergency Transfer Station Rules to permit a transfer facility on top of the Kingsland Landfill. Noting the recent issuance of a bid package "to secure phase two of our strategy," Caldarella stated that phase one was contingent on a brief extension of the exit date. Thus, the BCUA, having issued bid documents for out-of-state disposal, was clearly on the path for a transfer station program.

During a closed session of a BCUA special meeting on November 4, 1987, General Counsel Sinisi briefed the Commissioners on Caldarella's recent letter to HMDC Chairman Coleman and the expectation of landfilling until the end of February, possibly the end of March. According to the minutes, he reviewed the provisions insisted upon by the HMDC and recited the following three benefits to the BCUA:

1. HMDC will recognize whatever capacity

BCUA can squeeze out of the landfill rather than curtailing landfill operations on a date certain. A reasonable case scenario will provide space up to February 15-28, 1988 with the possibility of going to March 25. A letter has been sent to Commissioner Coleman requesting this accommodation.

2. HMDC will designate approximately 110 acres at LRFC and Erie for both <u>*interim*</u> *and residual landfilling. [Emphasis supplied]*

3. HMDC will grant tacit permission to use the top of the landfill for a transfer station.

Apparently, the BCUA was still looking for "interim" landfilling, although it was not mentioned in Caldarella's letter. However, even if agreed to by the HMDC, the garbage would have had to be sent out of state for a period of time.

During the closed session of the November 24, 1987 meeting, according to Dakes' November 30, 1987 internal CBA memomrandum, Sinisi and Caldarella reported that they were negotiating with the HMDC

regarding last minute changes to the agreement, including a change in the available capacity to BCUA from utilizing all available capacity at the Kingsland Park Sanitary Landfill down to utilizing capacity only through February 29, 1988.

The political climate in which the BCUA was seeking to resume negotiations with the HMDC changed dramatically from the prior year. In an interview, Coleman alluded to changed circumstances and stated that the BCUA could not expect the same deal a year later. In 1987, counties were actually being held to their exit dates. When Essex County learned of the possibility that the BCUA might obtain an extension of the December 31, 1987 exit date, it reacted strongly. In identical letters dated November 13, 1987 to DEP Commissioner Dewling and Bergen County Executive McDowell, Acting Essex County Counsel H. Curtis Meanor stated that Essex County met its obligation to cease landfilling in the Meadowlands, commented on Bergen's obligation to cease landfilling there and threatened to seek rate averaging if Bergen succeeded. The letter reads in full:

It appears that Bergen County may attempt to retain use of the Hackensack Meadowlands Development Corporation beyond December 31, 1987 when it is contractually committed to cease dumping its solid wastes at that site.

The County of Essex obeyed its legal requirements to cease use of that landfill after July 31, 1987 at a significant increase in the cost per ton of waste disposal.

Bergen County has known for long that it was required to depart from the Hackensack Meadowlands Development site by the end of this year. If Bergen is permitted to stay it will be rewarded for failure to meet its obligations and will be permitted to take advantage of self-created crisis.

Should Bergen be permitted to remain at Hackensack Meadowlands Corporation into 1988, Essex County will seek rate averaging, so that the per ton cost for waste generated in each County is the same. Any other result would reward Bergen for not meeting its obligations, and punish Essex for compliance.

We have every expectation that Passaic County would join Essex County in any such effort.

Sinisi testified that the letter "was obviously a concern to the entire Authority initiative with the HMDC to stay in the District, to retain an interim

capacity in the District."

Ultimately, Bergen County agreed to conveyance of the impoundment. Scardino informed the Commissioners at the November 25, 1987 executive session meeting that County Executive McDowell

> *agreed that the impoundment should be in the hands of the HMDC, because Bergen County has absolutely no use for it and it falls in line with our objectives concerning open space wetlands and the preservation and enhancement thereof.*
>
> *And, he also suggested that in addition to the 78 acre impoundment, that we might consider taking over an additional 100 acres that extends from the impoundment eastward over to the Hackensack River. [This area was not subsequently conveyed.]*

According to BCUA witnesses, there persisted a hope, if not an expectation, that the HMDC would agree to a straight landfilling provision. Caldarella testified:

> *...I'm telling you, I swear that up until the day that Commissioner Coleman called me to the HMDC and told me the deal ain't no more, I ... I would have sworn on a stack of Bibles that I had that deal.*

Some HMDC staffers continued to be in favor of granting straight landfilling to the BCUA. Sinisi found their support "assuring," but knew that it was the commissioners of both agencies who would have to approve the provision.

The decision of the HMD Commissioners was delivered to the BCUA on November 30, 1987, "at about four or five o'clock that afternoon," when Sinisi was notified by telephone that they did not approve paragraph 2 of the MOU. Paragraph 2 provided not only for interim landfilling, but also landfilling for the resource recovery ash and residue. Sinisi testified that he

> *warned the HMDC that their actions could have a detrimental effect on the progress of the resource recovery project, if Paragraph 2 was unacceptable for some other reason --*
>
> *Q. That's with respect to the residual site?*
> *A. Yes, because what I don't think was ever understood by the HMDC was that in Paragraph 2, more than just interim landfilling capacity was provided for. There was non-proccessible landfill capacity and ash residual capacity provided for, three elements of solid waste disposal and in Paragraph 2, always was.*
>
> *Q. And that was critical for resource recovery development?*
> *A. Absolutely critical. It was a backbone, in my opinion, of our ability to move forward on the variety of fronts we were obliged to move forward on to implement resource recovery for Bergen County.*
>
> *It was a contract provision in the service agreement with American Ref-Fuel of Bergen County, our vendor. We had provision in the service agreement that made it a condition precedent for BCUA to provide residual landfill capacity for up to seven years.*

On the following morning of December 1, 1987, Sinisi sought "the opportunity...to address with Commissioner Coleman and the other Commissioners the opportunity to see if what we had worked on so diligently for so long could be salvaged in some way." Sinisi and Caldarella met that day with Chairman Coleman at the HMDC and expressed the BCUA's concerns regarding the resource recovery project. Coleman advised them

that the HMDC would designate a site for the resource recovery-related landfill, but would not allow the site to be used for straight landfilling. The BCUA accepted the proposal even without the interim landfilling provision because it gave the BCUA two critical things: a site in the Meadowlands District for the residue and ash and the two-month extension which, Sinisi stated, was a "minimally acceptable period of time...to get to our out-of-state option."

Following the meeting with Chairman Coleman, Caldarella called an emergency meeting for the evening of December 1, 1987 to discuss the proposed MOU with the HMDC. In closed session, according to the preliminary minutes,

> *Chairman Caldarella explained to the commissioners that a breakthrough occurred this morning leading to further discussions with the HMDC over the "memo of understanding" which defines each party's responsibility in a new interdistrict waste flow agreement. He noted that each commissioner was called to gain approval for the chairman and general counsel to meet with the HMDC to negotiate further.*

After reviewing the minutes, Caldarella testified, "I guess I got a little more out of the HMDC." According to the minutes, General Counsel Sinisi then recited the proposed provisions, including BCUA's use of the LRFC and Erie sites for residual landfilling, location of a transfer station on top of the landfill, elimination of interim landfilling and continued landfilling until February 29, 1988 or "when permitted capacity expires, whichever occurs first." All BCUA Commissioners voted to approve the MOU.

In Scardino's opinion, the rationale for the HMDC's agreement to extend the December 31, 1987 deadline by two months was the fact that Bergen County land was situated within the HMD. This "interim" period was long enough for the BCUA to construct a transfer station, whether the pad was going to be placed on top of the existing landfill or elsewhere.

The BCUA's decision ultimately to accept the MOU, even without the provision granting straight landfilling, appears to have been predicated upon the fact that the MOU did contain a provision for a residuals site, identification of which was critical under the BCUA's contract with American Ref-Fuel of Bergen County and for the bonds issued for the resource recovery facility. Without the designation and approval of the site, the bonds issued for the facility would have been placed in jeopardy. Sinisi testified that the elimination of paragraph 2 in the MOU, as it pertained to the residuals site, "jeopardiz[ed] in a major way" and "substantially impaired the Bergen County resource recovery program" and "would have had a major impact on the bond issue." Another factor involved in the BCUA's decision to approve the MOU was the two-month extension granted by the HMDC for further landfilling. As Caldarella commented, "We just could not put together the plan that we envisioned on top of the landfill in any manner, shape or form without some sort of an extension."

If it was speculative at the end of 1986 whether a disposal site for straight landfilling could have been made operational by the exit date, it was definite that no such site could be readied between October and December 1987. It bears emphasis that even if the HMDC approved the MOU with a straight landfilling provision, the BCUA *still* would have had to implement an out-of-state/transfer station program for some period of time. Sinisi acknowledged this certainty. What the BCUA feebly attempted to accomplish in October 1987 by issuing bid specifications on a renewable one-year basis, it could have done from the beginning of 1987 and avoided the emergency declaration.

BCUA ISSUES PUBLIC BIDS

Less than three months before the exit date of December 31, 1987 and after rejecting the RFPs that had been developed, the BCUA issued and reissued bid specifications. No proposals were received on the first bid and two unresponsive bids were submitted on the rebid. Whether the bid documents were designed for this result or whether the result was the product of inexperience and ineptness cannot be determined. The facts, however, compel the conclusion that the specifications were not realistic enough to create competition. The comment of George Dakes, who was primarily responsible for drafting the specifications, is revealing: "I hadn't prepared anything like this before."

On October 8, 1987, the BCUA issued contract documents for Contract 87-43, entitled "Development of Emergency Solid Waste Transfer, Transport and Disposal Services for BCUA." The bids were due on October 29, 1987, with a scheduled starting date of January 1, 1988, absent any extension by the HMDC. The BCUA offered two bid options, which, according to Boyd, were designed to provide "a very flexible bid document":

(1) "The provision of transfer station capacity," transportation and disposal, or

(2) "Using a transfer site(s) provided and operated by the BCUA," transportation and disposal.

The term of the contract was four years, "with optional termination at the end of each one-year period at BCUA's discretion." The BCUA reserved "the right to reject all bids" and to select the one "most advantageous to the public." The waste flow was estimated at 3,750 tons per day, as it had been in the RFPs, but with no minimum tonnage guarantees. The contract documents required "[d]ocumentation of previous experience in the operation of transfer, transport and disposal services sufficient to assure the BCUA of the Contractor's capacity to complete all duties...." In addition, they required a bid bond of a New Jersey surety company, in the amount of the lesser of $20,000 or 10% of the contract price, to indemnify the BCUA for losses from the vendor's failure to properly execute the contract. The successful bidder had to deliver an executed, $15 million performance bond. Bidders and any partners in a joint venture also had to provide extensive corporate, financial and personal histories and information, as well as information on relevant experience. The contract documents were modified by two addenda issued to prospective bidders on October 22, 1987.

On October 29, 1987, the BCUA held a special meeting to receive the bids on Contract 87-43. Not one bid was submitted to the BCUA, although a number of vendors sent letters expressing interest and criticizing the specifications. The bid package was flawed. It contained a number of specifications which made it, if not impossible, at least very difficult for a competent vendor to submit a bid. This conclusion was echoed by every vendor, whether a major waste management company or a local, small company, interviewed by the Commission. The BCUA's cautious and self-protective approach was at the expense of promoting competition. The Commission questions the BCUA's judgment in issuing such demanding specifications.

One specification invariably criticized by vendors was the BCUA's right to terminate the contract after each one-year period. The October 27, 1987 letter by Browning-Ferris Industries, the country's second largest solid waste management firm, was typical of vendors' reaction to this requirement:

> *The capitalization required to initiate a project of this magnitude is too great to provide for an acceptable return on equity in one short year.*

Even the DEP was critical of this specification. Dakes' notes of an October 27, 1987 meeting wherein

the BCUA showed the bid documents to the DEP indicated that an official noted "a problem with a fleet purchase of 400 trucks with a one-year cancellation clause." The BCUA's strategy, however, was unaffected.

The decision to offer a three-year contract, which could be cancelled after each one-year period was grounded in the BCUA's unrealistic expectation that it would obtain interim landfilling from the HMDC. Boyd testified:

> I*n early September or late August, I was called to a meeting in Mr. Sinisi's office. Present were Mr. Sinisi, myself, Mr. Caldarella, Mr. Sal Crupi, who was the Director of Solid Waste for the Authority, Mr. Dakes and I believe Mr. Art Bergman, who's counsel to Clinton Bogert, and the subject was, you know, it's getting so late in the year that even if the HMDC -- if we conclude this agreement with the HMDC, we're not going to be able to -- unless the DEP gives us an extension on Kingsland -- continue to dump solid waste in the district for the short term. The view was that with the commitment -- and basically the understanding that the HMDC was going to provide interim landfill capacity -- that we needed to find a way to shoot a gap of a year or two between the time we got assigned new capacity and the time we could get it permitted and actually come back to the District.*
>
> *Q. It would take up to two years to get --*
> *A. Oh, yeah. The permitting process? Yes.*
>
> *Q. And to prepare the landfill?*
> *A. Oh, yes. And so -- I mean, I'm -- my view was, you know, that -- to be on the safe side we should go out for three. I think I indicated to you that we had a debate in that meeting over the -- over both the parameters of the procurement as well as the time that we needed to secure adequate disposal and transport.*
>
> *Mr. Sinisi's view was that it would be imprudent for us to go out longer than one year when we knew that we were going to get waste in the District and that any local landfill capacity would have to be cheaper than transporting out of state and therefore it would be a waste of Authority resources to go out for any longer than we had to go and so -- and basically I then agreed with him. I mean, it was an internal debate amongst staff....*

Dakes stated:

> *I think the Authority still believed they could landfill back in the Meadowlands someplace and maybe only go out for one year with this potentially very expensive out-of-state disposal contract. We believed the contractors were out there that could do it on a one-year basis or a five-year basis.*

Sinisi also referred to, as "a factor," the approval by HMDC of an interim landfilling site which could be prepared and made operational within a year's time.

A second specification invariably denounced by vendors, both large and small, was the provision requiring a $15 million performance bond which was typically termed too costly. Additional criticisms of Contract 87-43 were noted in Dakes' November 3, 1987 internal CBA memorandum:

> *That contractors had insufficient time to prepare bids, [According to Boyd, "there was concern about the time period, but we were trying to get the bid done."]....*

> *That a bid could not [be] prepared without a proper waste flow guarantee.*
>
> *That not enough specificity was given on the use of the Kingsland Park Sanitary Landfill Transfer Station Site....*
>
> *That the compensation for any site changes made was too vague.*

Dakes' memorandum also noted that a discussion of these concerns resulted in "the only change to be made under the resolicitation is that a letter of credit may be accepted as a substitute for a performance bond."

According to the same November 3, 1987 memorandum, meetings were held on October 30 and 31, 1987 to discuss the BCUA's alternatives following the receipt of no bids. The declaration of an emergency, which would allow the BCUA immediately to enter into negotiations with vendors, was discussed and favored by Chairman Caldarella, Crupi, Killeen and Dakes. Sinisi took the position that he would consider such an action. Crupi and Killeen were going to contact "several transport companies to obtain information." During the second day of meetings, Sinisi and Crupi instructed Dakes to have CBA "proceed immediately with the design layout of transfer station to be built at the top of the Kingsland Park Sanitary Landfill." Dakes did so. In addition, Dakes' memorandum contained the following:

> *Finally, as a result of the October 31 meeting, it was noted in strong terms by Steve Sinisi that CBA should be ready with several people to make phone calls to interested parties for landfill capacity and transfer capabilities, should negotiations proceed.*

In handwriting by this sentence, Dakes wrote,

> *discussed manpower requirements with JHS but would not act on seting [sic] priorities. Told him we should meet to discuss priority with others involved. [Because manpower requirements were neglected, the BCUA was later embroiled in a very expensive contract for labor.]*

At a special meeting on November 4, 1987, the BCUA passed a resolution to readvertise for the solicitation of competitive bids by reissuing Contract 87-43, with addenda. The resolution stated the BCUA's intention to retain the option to cancel the contract on a yearly anniversary basis in order to have "maximum flexibility...to seek alternative solutions which may result in less costly disposal options." In addition, it noted that a $15 million performance bond or letter of credit would be required from the successful bidder to secure "maximum assurance of contract performance." According to Sinisi, a letter of credit was permitted to make it easier for vendors to bid. Under the rebid of the contract, the bids were due on November 24, 1987.

At a special meeting of the BCUA on November 24, 1987, the BCUA received two bids. The bid from Joseph A. Paolino and Sons was rejected immediately because it lacked a bid bond. The inordinately high risk placed on the vendor by the BCUA is reflected in Paolino's high price of $148 and its inability to produce a $15 million performance bond. The second bid, from International Energy Resources, Inc., which proposed to utilize landfills in Panama and Costa Rica, failed to provide a variety of required documentation and was ultimately rejected. In addition to the two bids, the BCUA received 12 letters from interested vendors who were not submitting bids.

At the November 30, 1987 special meeting, all BCUA Commissioners voted to adopt a resolution rejecting the two bids and declaring an emergency in the following language:

> *[H]aving solicited bids for Contract 87-43*

on two occasions and having failed to receive responsive bids on either occasion, there now exists in the Bergen County Solid Waste Management District a state of emergency with regard to the transfer, transport and disposal of solid waste for the Bergen County Solid Waste Management District....

The resolution then authorized the Chairman to chair and appoint members to a Procurement Committee to negotiate for the transfer, transportation and disposal of solid waste. Toscano, a Commissioner at the time, claimed that he was unable to recall the basis for the emergency or whether he voted for it.

* * * *

The issue is not whether on November 30, 1987 the circumstances warranted the declaration of an emergency, but whether the BCUA undertook a course that inevitably left no alternative except to declare an emergency. In light of the facts outlined above, the Commission concludes that the BCUA propelled itself toward an emergency. The emergency was created by the BCUA's inaction (1) in failing to execute the MOU in 1986 or to implement a transfer station and out-of-state disposal program in a timely fashion, and (2) by the capping of that inaction with two failed public bids that followed issuance of incompetently drawn bid specifications. By declaring an emergency, the BCUA was able to proceed directly to negotiations for the solid waste contracts. As a result, the BCUA awarded contracts in the frantic and hurried atmosphere of an emergency and completed the process to the detriment of the ratepayers in whose interest the BCUA was supposed to act.

SELECTION OF A VENDOR TO TRANSPORT AND DISPOSE OF THE GARBAGE

Declaration of an emergency triggered a negotiation process that culminated in a solid waste program lasting approximately four years. With the conclusion that the emergency declaration was inevitable, the overriding question is whether the emergency was solely the product of the BCUA's incompetence or whether it was orchestrated by a few individuals in order to steer the award of the transportation and disposal contract through direct negotiations. The BCUA assembled a team of professionals who engaged in intensive negotiations with a number of vendors and, therefore, cannot be accused of declaring an emergency and then immediately steering the contract to a vendor. Although a number of factors during the negotiation and selection process raise suspicions, the Commission's investigation yielded no proof that individuals conspired in the award of the contract or that there were payoffs in connection with the award.

THE NEGOTIATIONS

By letter dated December 7, 1987 and addressed "TO ALL INTERESTED PARTIES," the BCUA thanked the vendors "for your interest in Contract 87-43...to procure transfer, transport and disposal services" and advised them of the declaration of emergency because of the lack of a responsive bid and of its intent to enter negotiations for these services. The vendors were invited to complete a data sheet and "provide information necessary to undertake negotiations towards procurement of transport and disposal services for solid waste," to commence no later than March 1, 1988. The letter, which was signed by Chairman Caldarella, announced a meeting on December 11, 1987 for prospective vendors and directed any questions to Dakes. The notice appeared in publications and was mailed to approximately 500 individuals and firms in the solid waste business.

DEP officials expressed their preference in a vendor to the BCUA. According to Dakes' notes of a December 16, 1987 meeting that included Deieso and Wiley for DEP and Caldarella, Sinisi, Boyd, Bergman and Dakes for the BCUA, DEP "wants" a national company to handle the "entire process" because of its fleet of trucks, rolling stock and guaranteed landfill capacity. In the margin of his notes, Dakes wrote Browning-Ferris Industries and Waste Management.

What the BCUA was looking for in terms of tonnage and length of contract changed dramatically from the 3,750 tons and one-year renewable term previously specified. In stark contrast to both the RFPs and the two sets of bid specifications, the data sheet for transport/disposal inquired whether the vendor had "currently permitted capacity for a minimum of 2,000 tons per day for a period of at least three years, with one year options for years 4 and 5." It is not known why the 3,750 ton figure, which, according to Dakes, had been derived from calculations of the tonnage being received at the BCUA landfill, was reduced to 2,000 tons per day. What is clear, though, is that the 3,750 ton figure was artificially high because of the out-of-county and out-of-state garbage being disposed of at the landfill. The 2,000 ton figure was closer to the amount of Bergen County-generated waste being dumped. In addition, it may be that the 2,000 ton figure was used to insure that the contract would be split between two vendors, although BCUA witnesses testified that the issue of a split contract was not decided until the actual selection.

The BCUA conducted a meeting for interested

vendors on December 11, 1987. Approximately 25 persons attended. Among those who signed the attendance sheet were Timothy Salopek, Charles "Pete" Hunkele and Domenick Pucillo, all on behalf of Laidlaw Waste Systems and Mitchell Environmental, Inc.; Thomas and Peter Tully for Willets Point Contracting Corp.; Steven W. Fass for Crossridge, Inc., and Kenneth Rogers for Compaction Systems Corp. The BCUA announced that the DEP approved the Kingsland Park Sanitary Landfill as a transfer station site and that it intended to award that evening a contract for construction of a concrete pad on top of the landfill. According to one vendor present, it was represented that solid waste would be transferred at this location to open top trucks unless a better proposal were made.

The BCUA negotiating team was headed by Boyd and included Dakes, Gerald G. Gardner and Bergman from CBA and Gary W. Higgins from John J. Eccleston & Company. According to Gardner, Caldarella "was there virtually all the time....it's fair to say that every time he came in the room he knew what we were doing." In fact, Gardner recalled that when the negotiating team reached an impasse or confronted a question, Boyd spoke to Caldarella in his office. Gardner testified:

> *I remember him [Boyd] returning on many occasions disagreeing with what he got as a final answer, saying, "I don't know why he's [Caldarella's] doing this, this doesn't make sense," and we'd all say, "Right, it doesn't make any sense, but we have to do it anyway." And I don't remember any specific instance, but I remember it was that tone came back.*
>
> *Q. Did the team, and Mr. Boyd in particular, view Caldarella's decision as the final one?*
> *A. Sure, oh yes, had to. That's who we worked for.*

Boyd testified on the role of Caldarella and the participation of the Commissioners:

> *I would go to him [Caldarella] on policy issues ["once a day"]. We would -- generally-speaking, the procurement would proceed for a few days, we'd have an emergency meeting of the Authority, we'd give them a brief on where we were, we would bring up directional issues in terms of the kinds of policy things that were -- that were important --*
>
> *Q. Was that with Commissioners?*
> *A. Yes, with the whole Commission, and -- the policy things I'm talking about are things like -- that would come up as a result of a vendor's presentation.*

A December 18, 1987 internal CBA memorandum by Dakes also demonstrated the involvement of Chairman Caldarella:

> *In accordance with assignment from Chairman Caldarella, data sheets from companies responding to 12/7/87 request for information on transport/disposal of solid waste have been reviewed. Caldarella advised that limited number of companies appear to satisfy Authority conditions of general price, capacity, capability/qualifications.*
>
> *Attached schedule lists meetings/negotiations to be held. Intention is to short list by 12/23/87.*

The BCUA's December 7, 1987 Notice to Proposers evoked responses from a number of companies, including Waste Management, Browning-Ferris Industries, Crossridge, Mitchell and Willets. A BCUA document indicated preliminary discussions with the following companies on December 21, 22 and 23, 1987:

> *Laidlaw/Mitchell Environmental*

BFI

Crossridge, Inc./Accent Investments

Empire Landfill

American Resource Recovery System

Virotech, Inc.

Kelly Ward/International Recycling Systems

J. Paolino & Sons

Waste Management

Ty Associates.

The original group of 22 vendors was reduced to 11 and ultimately short-listed to five, according to Boyd. It is unclear who reviewed all of the proposals and how the list of vendors was compiled, although Boyd advised that the negotiating team decided which vendors to call in. No BCUA witness was able to explain why Willets was not included. Neither Dakes nor Gardner had any recollection of even seeing the correspondence and documentation submitted by Willets. According to Gardner, all submitted proposals and correspondence from vendors were filed by vendor in a box that was kept in the conference room at the BCUA. At some point, the box disappeared and then "remnants of it showed up in his [Caldarella's] office." Gardner referred to the box "all the time and I'd go in there and stuff that I knew was in there wasn't in there and I really don't know what happened to any of it."

When negotiations commenced and as they unfolded, according to members of the BCUA negotiating team, there was no decision on whether the garbage would be equally divided between two different vendors or whether rail haul was or was not preferable to transportation by truck. From Dakes' notes, it appears that the decision to utilize balers was made on or about December 30, 1987 and that it was anticipated that there would be a loose waste operation for a 60-day period until delivery of the balers. Further, the intent, as understood by the team members, supported by the Commissioners and expressed to vendors, was that the BCUA would operate the transfer station. Boyd testified that "we were given assurances by the operational people [Salvatore Crupi, Director of Solid Waste, and James Bocchino, Assistant Director] that they [BCUA employees working the landfill] could handle it" and that they had the equipment. He continued:

> *On December 1st, probably the decision wasn't made, but what we were looking at was the utilization of the BCUA employees and the equipment and then the discussions were as to the adequacy of the employees and the equipment and we were given assurances by, you know, Jim Bocchino and the other people in solid waste that they had plenty of equipment and they had plenty of employees and they could handle it with no problem.*
>
> *Q. Did Crupi give you those assurances also?*
> *A. Well, Crupi gave the assurances and I'm trying to remember whether he gave them personally. My recollection is he was sick and maybe in Florida during the month of December, but I talked to him on the phone, I know, and I also talked to Bocchino, who was his assistant, about those issues and -- because, clearly, as you could see in the bid documents which led up to this, the effort was made to assess what I call the make or buy decision; whether or not it was cheaper to utilize the employees of the Authority to provide the service or to go outside and -- you know, and, in essence, fire all the employees in solid waste and go to an outside vendor and let them provide a turn-key service, so this was something that was being constantly evaluated through the procurement, and the decision that we made in terms*

> *of the approach for the emergency was to seek transport and disposal service only; that we basically could provide the labor on a much cheaper basis than could be provided by outside vendors. [Emphasis supplied]*

Gardner testified:

> *The intent all along was the Authority was going to operate the facility. We were going to build a temporary transfer station for the Authority to operate. What it actually looked like wasn't clear. The decision -- I think we were -- we were in the middle of that decision process moving it from the top of the landfill down to its present location, but the Authority was going to operate it and I, in fact, remember many, many conversations where I was -- strange, I never thought of it -- but many conversations where I brought up the fact that the Authority was going to try to operate a facility that it had no idea how to operate and it didn't seem to bother anybody at the time. "We have to do that because the union's here, we have a lot of people that are on union jobs. We have to do something. They're going to have to move garbage."*

In addition, BCUA's expressed intent during the negotiations was to construct a concrete pad on top of the Kingsland Park Sanitary Landfill for use as a transfer station. The concept was for the garbage to be pushed into trucks located on a lower slab, with the tops of the trucks level with the tipping floor. Eventually, balers would be placed on the slab. The plan collapsed on or about January 1, 1988 when the piles, intended to support the pad on top of an unstable landfill, could not be driven into the mountain of garbage. The BCUA then formulated a two-phase plan consisting of an interim period and the remaining period. The interim period would entail construction of a temporary transfer station and disposal of the solid waste in loose form for a period of three months, to be followed by use of a permanent transfer station and the baling of the waste. The interim period, in fact, lasted seven months and the transfer station/baling facility was located on property referred to as the Jay-Roc site.

Despite the testimony of BCUA witnesses attributing the change in location of the transfer station to the inability to drive piles into the landfill, the BCUA was clearly considering the Jay-Roc property prior to the piles incident. An internal CBA memorandum dated December 9, 1987 - well before the piles incident - stated:

> *Discussion held on a confidential basis with Chairman Caldarella regarding changing the transfer station site....[to] west of the railroad tracks in North Arlington, known as Jay-Roc property on Block 174.*

In addition, Dakes' notes of the negotiations with Waste Management on December 30, 1987 reveal "Discussed Jay-Roc" and those with Mitchell and Laidlaw on the same date contain "Review of Jay-Roc...Jay-Roc for baling waste W/KPSL for loose only." Dakes could not recall why the Jay-Roc property was being discussed at a point in time when the BCUA's intention was to construct the pad on top of the landfill and before the piles failed. In the opinion of some CBA engineers, there was not sufficient effort to drive the piles into the landfill.

Even after vendors were short-listed, only three of the companies were ever under serious consideration - Mitchell/Laidlaw, Waste Management and Crossridge. The Commission has concerns about the elimination of viable vendors prior to the short-listing. These vendors will be discussed later in this section.

-Crossridge In Negotiation-

Crossridge proposed to transport the waste by rail to its landfill in Wintersville, Ohio. The concept of rail haul was new to the industry and skepticism

abounded, although Chairman Caldarella remained "a strong proponent of rail," according to Dakes, and, as Boyd related, became "enamored with rail." According to Macedo, Caldarella had spoken of rail to her as early as December 1986. Caldarella testified on how he learned about rail haul: "[Y]ou know, you read and you look at things, you hear about things in the industry," but denied learning of it from Joseph N. Scugoza, the owner of Crossridge ("Oh, no, no, no."). (*See* footnote 8.) Dakes admitted to having "trepidation" about rail haul because "it was totally new." Boyd "focused" on rail haul as a result of Crossridge's letter and was persuaded because the Crossridge Landfill was a new, state-of-the-art landfill and Conrail was part of the negotiations. Conrail explained to the team that garbage was a commodity like any other that it was experienced in moving. According to Boyd, Conrail "lent credibility to the rail proposal."

Crossridge, a subchapter "S" corporation, was incorporated in Ohio on March 9, 1983 and acquired by Scugoza in early 1987. Crossridge entered the BCUA negotiations represented by Christopher Yonclas, the president since February 1987. Scugoza did not become an officer until February 1988, when he was listed as treasurer.

Yonclas, who was always in communication with Scugoza, kept abreast of the BCUA's efforts toward an out-of-state disposal program. He attended the February 17, 1987 orientation meeting at the BCUA, but had no recollection of it or the cancellation notice that followed. Scugoza also had no recollection. Thereafter, Yonclas' diaries, which contained contemporaneous notations of his activities, indicate that he was expecting issuance of the RFPs in June 1987. According to his diary, "Bergen County deal out this Wednesday, 6-2-87." Yonclas testified that the notation was based upon his telephone conversation with Scugoza, who was unable to recall anything. For June 4, 1987, Yonclas wrote:

> <u>*Bergen County Utility Authority*</u>*-f[ollow] u[p] to RFP on intermedate [<u>sic</u>] Haul of M[unicipal] S[olid] W[aste] referred to Clinton Borgret [sic] - Geo Dakes 201-944-1676 - not ready - call late next week*

According to his diary, Yonclas again contacted Dakes on June 11, 1987 and recorded:

> *RFP not available again. Still considering many options. Should have something within two to three weeks.*

No witness was able to tell the Commission how Yonclas and Scugoza learned of the possible issuance of the RFPs in June 1987. Scugoza maintained throughout his appearances that he was not in contact with Chairman Caldarella during this time.

Inexplicably, Scugoza commenced significant preparations in anticipation of the BCUA issuing bid specifications, but supposedly without actually knowing that a bid package would be issued. On September 26, 1987, Yonclas wrote in his diary, "Two-page white paper on what Bergen County should do for the interim haul of its waste." Yonclas testified that Scugoza directed him "to conceptualize what Bergen County would do with respect to an interim haul." He did not know why Scugoza asked him to do so and did not know what Scugoza did with the document that he produced. For September 30, 1987, Yonclas wrote:

> *Joe [Scugoza] wants ASAP disposal site for contracts for 2,000 tons a day. Option on property for possible use as transfer station in County. Steve Fass confirms that County's expected to push panic button after this Friday's meeting with the DEP and BCUA proposals are known to have been prepared with very short response date allowed.*

According to Yonclas, Scugoza was "anticipating that Bergen County must be coming out for a bid and he -- he's guessing that that's what their requirement should be, 2,000 tons a day." Scugoza directed

Yonclas to look for additional landfill capacity to meet the 2,000-ton figure, which was in fact the figure in the bid specifications. Yonclas found it in Harmon, Alabama. Yonclas also testified that Scugoza, believing that a proposal would have to include a transfer site, as was required by Essex County, directed a search for a site. As a result, Yonclas investigated railroad properties in Bergen County and was brought into contact with both New York, Susquehanna & Western Railway Corporation and Conrail.

By letter dated December 15, 1987 to Chairman Caldarella, Yonclas presented the BCUA with three options for rail transport, together with a fee schedule. A second letter, also dated December 15, 1987, signed by Yonclas and directed to Chairman Caldarella, provided a data sheet on the Crossridge Landfill in Wintersville, Ohio, as the primary disposal site and one on Harmon's Sanitary Landfill in Pell City, Alabama, as the backup site. The Harmon landfill was available to receive up to 4,000 tons a day and the capacity of the Crossridge Landfill was estimated at 1,764,400 cubic yards, with a planned extension increasing it to 13,000,000 cubic yards. The data sheet for the Crossridge Landfill set forth the current receiving rate for baled waste, based on one ton per cubic yard, as 940 tons per day, pending an action scheduled for February 1, 1988 on an application to increase the rate to 5,200 cubic yards and/or tons.

According to Dakes' notes, Crossridge was represented at the December 21, 1987 negotiation session by Yonclas and Fass. Scugoza's name was not listed. Also present was a representative of the New York, Susquehanna & Western Railway Corporation and James F. Byrd regarding the backup landfill in Harmon, Alabama. Crossridge had entered the negotiations with both railway companies, but finalized its proposal utilizing Conrail.

At the December 31, 1987 session with Crossridge, Dakes' notes indicate that the company was represented by Yonclas and Fass. Again, there is no indication that Scugoza was present. The notes also indicate discussion of an interim phase involving a 60-day period of loose waste followed by baling.

Crossridge's proposal was dependent upon the baling of the waste. In fact, *before* negotiations between the BCUA and Crossridge even commenced, Crossridge was exploring the use of balers for the BCUA project. Yonclas was in contact with Mosley Machinery Company, Inc., Waco, Texas. A December 14, 1987 letter from Mosley's Manager of Business Development to Yonclas was "in reference to the balers for the proposed Bergen County Transfer Station in northern New Jersey" and provided a delivery schedule and price list for three balers. The letter projected delivery and installation of one baler by the end of January 1988 and the second and third balers by March 15, 1988.

The financial picture of Crossridge presented to the BCUA negotiating team is startling in light of the fact that the Commissioners ultimately selected Crossridge to handle half of the county's solid waste. Crossridge's financial position hardly should have generated confidence in awarding a multimillion dollar contract to it. Included in Crossridge's submission was the company's financial statements as of September 30, 1987, compiled by a Steubenville, Ohio, public accounting firm. The firm's accompanying letter stated that the information contained in the statements

> *is the representation of management. We have not audited or reviewed the accompanying financial statements and, accordingly, do not express an opinion or any other form of assurance on them.*
>
> *Management has elected to omit substantially all of the disclosures required by generally accepted accounting principles. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's*

financial position, results of operations, and changes in financial position.

Because the figures in the financial statements were not substantiated by the accounting firm, they provided no indication of the company's financial solvency or worth.

In addition, the firm prepared a financial statement on Crossridge, "a development stage S corporation," as of December 31, 1987. In the accompanying letter dated January 20, 1988, it stated that all information contained in the statement "is the representation of the management of Crossridge, Inc.":

> *A review consists principally of inquiries of Company personnel and analytical procedures applied to financial data. It is substantially less in scope than an examination in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.*

Any reliance upon these documents by the BCUA was highly inappropriate. However, Boyd explained that because of Crossridge's lower price, "[i]t was worthwhile to take a little risk on one vendor to save a little money."

Dakes was questioned on why Crossridge was short-listed:

> *Well, at the time it appeared that Crossridge had the landfill space, had the Ohio and the Alabama landfill space and based on the preliminary check that we did or at least the extent of the check that we did, it appeared they could be short-listed. I mean, they had landfill space, they had -- they appeared -- from what I recall I think they had the financial capabilities.*
>
> *Q. As proven by what?*
>
> *A. I don't remember.*

An issue arose over the ownership of Crossridge. In preliminary meetings, Yonclas presented himself as president and there is a question whether he also presented, or allowed it to be inferred, that he was the owner. Dakes testified, "During negotiations, there were two different owners of Crossridge" - "Yonclas initially [c]laimed that he was the owner/ president, and then it became Joe Scugoza who was the owner of Crossridge." No documentation indicates Scugoza's presence at a meeting until after the January 12, 1988 award of the contract to Crossridge. Scugoza's name appears on a sign-in sheet to a February 3, 1988 meeting and in Dakes' notes of a February 17, 1988 meeting. Boyd, who testified that Scugoza's name "[a]bsolutely [did] not" come up prior to January 1, 1988, related how he learned of Scugoza's involvement. According to Boyd, shortly after the piles failed, he, Caldarella and Dakes met Yonclas at the site to talk about "where to put the baler and logistics...and...look at Jay-Roc." Yonclas introduced Boyd to Scugoza as "an investor in Crossridge," although he did not indicate that he was the only investor. Boyd testified that Caldarella disclosed to him, "on the walk around the landfill and the Jay-Roc site, that he had known Joe Scugoza since, you know, like grammar school." Boyd recognized Scugoza's name in the context of "problem areas in the solid waste industry,"[8] but remarked that Crossridge did have a DEP license to engage in the solid waste business in New Jersey. (In fact, the license was held by Scugoza's company, Haulaway, Inc., which had been "grandfathered in." Crossridge never applied for or held such a license. In addition, at the time of the BCUA's negotiations,

[8]Scugoza and his company, Haulaway, Inc., pled guilty in 1983 to unlawful conspiracy in restraint of commercial-industrial collection in nine northern New Jersey counties. *State v. New Jersey Trade Waste Association, et al.*

Scugoza and his companies, including Haulaway, were under investigation by both federal and state grand juries and by state regulatory agencies concerning their solid waste activities. In 1991, the state barred Scugoza from engaging in any solid waste activity or from holding an interest in any solid waste business.) Yonclas testified that he learned from Scugoza that he had known Caldarella "for over 20 years." Yonclas' diary indicates that on December 22,1987, he drove to the BCUA landfill. He testified that Scugoza, Caldarella and Boyd were present and believed that it was made clear to Caldarella that Scugoza owned Crossridge. Yonclas stated that he never told Boyd or Dakes that Scugoza was the owner.

Caldarella, who admitted to the Commission that he knew Scugoza in his youth, testified that he did not know initially that Scugoza owned Crossridge, but understood from Scugoza that he was "a consultant." By Counsel Saros:

> *Q. At the time that you received the letter before you [December 15, 1987 letter from Crossridge], did you know that Joe Scugoza owned Crossridge?*
> *A. No, because at the time that I saw him around the site or wherever I saw him, he indicated to me -- well, it says it here -- that Yonclas was the head of this company, and I guess it was Crossridge, and that he was just acting as a consultant; that Yonclas was a friend of his.*
>
> *Q. When did that occur?*
> *A. Oh -- well, it was prior to the time that -- prior to the time that we started on the top of the landfill because I know he made comments to the effect that he just disagreed with the engineering that was being proposed for the top of the landfill. He didn't think it was viable.*

Scugoza denied that he attempted to conceal his ownership of Crossridge, but was unable to recall definitively whether he attended any meetings at the BCUA in December 1987. In addition, although Caldarella and Scugoza had known each other in childhood, each testified that he did not contact the other prior to or during the RFP, bidding and post-emergency negotiation processes. Caldarella denied that he gave Crossridge special consideration, that he steered the contract to it or that he had any private conversation with Scugoza about the contract. However, Caldarella failed at the outset to notify the negotiating team or the Commissioners that he knew Scugoza.

-Waste Management In Negotiation-

The offers made by Waste Management during negotiations, as compared to how its proposal was portrayed to the Commissioners, presents a puzzling picture. In evaluating the discrepancies, which are set forth herein, it is significant that Waste Management's proposals were documented in letters to the BCUA. Furthermore, the negative attitude of CBA's lead engineer on the negotiating team toward Waste Management cannot be ignored.

Waste Management of North America, a subsidiary of Waste Management, Inc., the largest solid waste management company in the country, provided a response and completed data sheet by letter dated December 15, 1987. The letter noted Waste Management's contract with the HMDC to operate its baling facility, which was handling 1,750 tons per day, and its construction and operation of Newark's Avenue A Transfer Station, which was processing approximately 1,500 tons per day. In addition, Waste Management noted its operation on a national level of 23 transfer stations which processed 3,340,000 tons annually and operated 110 approved and permitted landfills, more than 15 of which were in states adjacent to New Jersey.

Negotiations with Waste Management were held on December 22, 1987, December 29, 1987 and January 11, 1988. Waste Management was repre-

sented by Joseph Graziano, a vice-president whose responsibilities included the sale of "air space" to outside contractors and the arrangement of disposal capacity for Waste Management-owned collection companies; Jane G. (LaPorte) Witheridge, then staff engineer for the Northeast Region, and Theodore A. Schwartz, outside counsel.

At the December 22, 1987 session, Witheridge and Graziano pointed out a number of technical and operational weaknesses in the proposed size and location of the transfer station pad on top of an existing landfill and in the proposal to push the solid waste from the pad into open-top trailers located at points under the pad. (The BCUA's proposal was criticized by other vendors as well, including Laidlaw and Crossridge, but perhaps not as forcefully.) Copies of the engineering plans were requested, but none were made available. In an interview, Witheridge commented that she found it difficult to engage the BCUA's engineer in a discussion about the proposed pad and operation. She opined that CBA had designed a facility that could not be justified and called the placing of a transfer station pad on top of a recently operating landfill "nuts." (Every vendor and engineer interviewed by the Commission in this regard agreed that CBA's proposal was not viable.) Although Witheridge stated that she attempted not to challenge Dakes, she did ask many questions which Dakes did not answer. Witheridge and Graziano agreed that she, in effect, "took him [Dakes] on" and that her approach may have been perceived as "pushy."

Members of the BCUA negotiating team represented to the Commission that Dakes became antagonistic toward Waste Management. Boyd stated that "Dakes wasn't that thrilled with them" and confirmed that Witheridge "told us that it [construction of the transfer station on top of the landfill] would never work, that it was ill-designed." He added that CBA "took some offense to this and there ensued a little bit of an engineering debate...so that kind of set the tone of the meeting off again." According to Gardner, Waste Management's criticism of the location of the pad on top of the landfill "caused a little bit of internal turmoil at Clinton Bogert Associates;" however, "It was evaluated, but it was decided that that was the design and we were sticking with it." Gardner continued:

> *...George Dakes didn't like Waste Management. He felt they were arrogant and he had a very negative -- he had a very negative opinion of anything that they brought in....*
>
> *He just didn't like the people he was dealing with. The dealings I had with them were nothing but professional.*
>
> . . .
>
> *We [CBA] had sized the temporary station on top of the landfill to become a permanent station. George Dakes, I think, worked on that design or that planning portion. These people said it was too small, inadequate, whatever that point was. George took it personally, maybe which may be part of the reason that he didn't like them.*

Dakes revealed his bias against Waste Management when questioned about Laidlaw making demands similar to those advanced by Waste Management concerning its wanting the entire contract and wanting to load and use its own personnel:

> *Q. Why did you react to Waste Management's requirements as -- you characterize Waste Management representatives as being "arrogant" and Laidlaw/Mitchell seem to be making similar demands --*
> *A. No, they weren't making similar demands.*
>
> *Q. Why didn't you characterize them as being "arrogant" --*
> *A. Waste Management was making other demands. They were -- they were characterizing the design of the transfer station as*

inadequate. They couldn't possibly operate the -- with all that garbage on top of the landfill with the design that was provided.

Q. As it turned out, that wasn't used anyway--
A. That's irrelevant.

Q. -- at the top.
A. That's irrelevant. The fact that Waste Management was saying that whatever was going to be provided to them was inadequate, because they -- it was a stance that they were taking.

Q. And you didn't regard their opinion or their comments in that regard as being concrete or professional?
A. Nor valid; nor were they valid or professional.

Q. What about their other demands about using their own personnel?
A. Waste Management?

Q. Wanting to be in control, not wanting to split thecontract. Neither didMitchell/Laidlaw.
A. Well, again, they were negotiating points.

Q. Why the attitude toward Waste Management that they were "arrogant" and yet you don't have that attitude toward Mitchell/Laidlaw who seem to be making very big demands?
A. I don't know. Maybe it was more than that.

Dakes freely admitted that Mitchell/Laidlaw "was my personal preference."

During the December 22, 1987 meeting, Waste Management also proposed to dispose of the waste at sites that it owned in Pennsylvania, but made it clear that if for any reason these sites were rendered unavailable, it would transport the waste to its other disposal sites at no additional cost to the BCUA. In addition, Waste Management was prepared to handle the full 3,750 tons or only 2,000 tons per day.

Waste Management expressed to the negotiating team its preference to provide its own labor and equipment to load the waste into the trucks. In addition, the company also stated its preference to handle the waste in loose, not baled form. Waste Management explained that loose waste would be less expensive to transport and dispose of because Waste Management had a dedicated fleet of trucks that would transport the loose waste a short distance to its disposal sites in Pennsylvania. In addition, in Waste Management's view, baled waste posed safety, health and operational problems. For example, there was no method to insure that prohibited waste was not commingled in the bales and additional equipment and manpower were required to remove the bales from the trucks, open them, compact the waste and move the waste to the landfill. It is noted that although the BCUA had issued bid specifications requiring a dedicated fleet of trucks, this requirement was eliminated during the negotiation process. No BCUA witness was able to explain the reason.

In addition to its own preference to handle loose waste, Waste Management explained that the BCUA's total costs in having the waste in loose form would be considerably less. Schwartz elaborated in testimony before the Commission:

> *[G]oing to Grows Landfill, for instance, in Pennsylvania, which is 65 miles, our opinion was that going with the loose-type material was more economically advantageous to the County because you don't have to build a big baling plant, buy all the balers, and maintain them and so on and so forth. If you drop that cost out of your overall solid waste disposal operation as a county and then you look at the proposals, you might have a more economical approach to han-*

dling the waste.

A lot of the other counties did just dispose of refuse by open-top trailers. I don't know of any other ones that did baling, to be honest with you.

The BCUA was not persuaded.

In a letter dated December 28, 1987 and hand-delivered to Caldarella, Dakes and Boyd, Graziano confirmed the discussion of the December 22, 1987 negotiating session. The letter confirmed that during the session, the BCUA explored services for disposal only and for loading, transportation and disposal. Dakes' own notes of the session refer to both discussions with prices. The letter, as well as Dakes' notes, make clear that Waste Management offered to dispose of the solid waste at three of its sites in Pennsylvania, all within 100 miles of the proposed transfer station. As reflected in his letter, Graziano was apparently under the impression that there was "a possible misunderstanding at the meeting as it relates to transportation" and sought to clarify Waste Management's position to control the loading of the trailers. The letter explained that this position

was made solely in the interest of cost effectiveness. The efficiencies of loading will determine the number of trailers and tractors required to transport the approximate 2,000 tons per day. I believe that we both share the same objective -- that is, to provide processing, loading, transportation, and disposal at the lowest possible cost per ton. While the BCUA will make the final determination, we can only succeed if we can demonstrate that WMI can provide efficient, reliable, and dependable service to Bergen County at a competitive cost per ton in total. We are prepared to offer all of our engineering, technical, and other support staff to accomplish that objective.

Waste Management's position that it did not seek full and complete control of the entire transfer station operation is borne out by Dakes' notes on the negotiation sessions with Waste Management. Regarding the December 22, 1987 session, Dakes wrote "WMI to load" in two places. Other functions on the transfer station pad would be the responsibility of BCUA employees.

According to Schwartz's January 15, 1988 letter, which was written to Chairman Caldarella after the BCUA selected Mitchell/Laidlaw and Crossridge and was regarded by Boyd as "self-serving" and "misrepresent[ing]" the events, it was at the December 29, 1987 [December 30 in Dakes' notes] meeting that the BCUA announced a revised plan, namely, services to handle loose waste for approximately 60 days and baled waste for approximately three years thereafter. According to the letter, "This was the first time that Waste Management had [been] advised that the Authority might be considering baling as an alternative to direct transfer to open-top trailers." Dakes' notes confirmed that Waste Management presented a baling proposal at this meeting and that the proposal provided for Waste Management to load, using its own balers and forklifts. In testimony, Boyd confirmed that Waste Management was "not going to provide all of the labor," but only the loaders, the operators for the loaders and the supervision of the immediate transfer floor. At the meeting's conclusion, the negotiating team requested Waste Management to respond to three proposals by January 6, 1988 and scheduled another meeting for that date.

Waste Management's responses were contained in a letter dated and delivered to Chairman Caldarella, with copies to Boyd and Dakes, on January 6, 1988. In the letter, Graziano stated that it was a follow-up to the December 29, 1987 meeting wherein Waste Management "agreed to develop estimated cost projections under alternative methods for the processing, transportation, and disposal of solid waste," based upon a waste flow of about 2,000 tons per day. It is obvious from the letter that Graziano

continued under the impression that the transfer station would be located on top of the existing landfill, even though the BCUA's plan had changed by this time. According to the letter, each of the three alternatives had been discussed at the meeting. The first proposal was for "loading, transporting and disposal through the use of open top transfer trailers." The cost of $93 per ton included not only the loading of the solid waste into the trucks, but also the following services:

A. WMI will take operational responsibility at the point of the constructed transfer facility on top of the existing landfill.

B. WMI will assume responsibility for traffic control and unloading of the vehicles.

C. WMI will supply all equipment and manpower required to process, load, transport and dispose of the solid waste.

D. WMI will reserve sufficient disposal capacity at their facilities to guarantee disposal for the full term of the contract period.

E. WMI will construct a tarping shed in the immediate area for tarping of all trailers prior to exiting the landfill site.

F. WMI will supply an employee and management center (modular trailers) at the site.

G. WMI will construct a stoned area on site for all mobile equipment and completely enclose same with a cyclone fence. [The BCUA paid $135,060 for fencing.]

The second proposal involved the use of balers to be purchased and operated by the BCUA and included the following services:

A. WMI will supply all equipment and manpower required to load, transport and dispose of the solid waste.

B. WMI will reserve sufficient disposal capacity at their facilities to guarantee disposal for the full term of the contract period.

C. WMI will construct a tarping shed in the immediate area for tarping of all trailers prior to exiting the landfill site.

D. WMI will supply an employee and management (modular trailers) at the site.

E. WMI will construct a stoned area on site for all mobile equipment and completely enclose same with a cyclone fence.

The cost for these services was stated to be $85 per ton, but Gardner's handwriting on the letter indicated, "appears this could be lowered." When asked to comment on this proposal, Gardner stated,

> *[A]lternative two is the alternative that we wanted. They were going to use our personnel, supply all the equipment, manpower, reserve the capacity.*
>
> *Q. What was wrong with that proposal, then, if they were going to utilize BCUA personnel which is --*
> *A. That's really the problem.*
>
> *Q. -- what you wanted?*
> *A. That's really the problem. I don't even know why -- this wasn't included on the spreadsheet?*
>
> *Q. No.*
> *A. I don't know where it went.*

The third proposal entailed, at a cost of $102 per ton, the purchase and operation of the balers by Waste Management and the following services:

A. WMI will take total operational responsibility at the point of the constructed transfer facility on top of the existing landfill.

B . WMI will assume responsibility for traffic control and unloading of the vehicles.

C. WMI will supply all equipment and manpower required to bale, load, transport and dispose of the solid waste.

D. WMI will reserve sufficient disposal capacity at their facilities to guarantee disposal for the full term of the contract period.

E . WMI will construct a tarping shed in the immediate area for tarping of all trailers prior to exiting the landfill site.

F. WMI will supply an employee and management center (modular trailers) at the site.

The scheduled January 6, 1988 meeting did not take place (Boyd was in Texas to meet with Mosley Equipment, Inc., which subsequently sold the balers to the BCUA), but was postponed several times. According to Schwartz's January 19, 1988 letter to the BCUA,

> *On January 5, 1988, the day prior to the scheduled meeting date, I was advised by a representative of the negotiating team that the meeting had been canceled due to certain technical problems that had arisen relative to the transfer station project. I was advised that the meeting would be rescheduled for January 8, 1988 and that we should present our proposals at that time. During that conversation, I reiterated that WMNA still had not received the engineering plans for the transfer station.*
>
> *On January 7, 1988, I attempted to confirm the meeting scheduled for the next day. I was advised that Mr. Boyd was out of town and was not expected to return until that evening. I was asked to check again with the Authority and was subsequently advised that the meeting was canceled because Mr. Boyd was not expected back due to weather conditions. When I inquired as to the date the meeting would be rescheduled, I was requested to check with the Authority on Monday, January 11, 1988. On the morning of January 11, 1988, I telephoned the Authority to inquire when the meeting would be held. I was advised that the meeting would be held at 3 p.m. on that date.*

It was at the January 11, 1988 meeting, according to Schwartz's letter, that Waste Management first learned that the BCUA abandoned the idea of placing the transfer station pad on top of the landfill and planned to locate a transfer station elsewhere and construct a baler facility. Waste Management was informed that there would be an interim period of 60 to 90 days when the waste would be loose, followed by the permanent phase when the waste would be baled. Waste Management estimated the price for the interim period at $95 to $100 a ton, which included numerous services in addition to transport and disposal. The negotiating team directed Waste Management to re-evaluate its proposal and provide by telephone on January 12, 1988 proposals for the interim 90-day period and the following period of approximately three years.

On January 12, 1988, according to Schwartz's letter, Waste Management communicated to the BCUA prices of $95 to $100 a ton for *loading*, transportation and disposal during the interim period and $82 a ton for the *loading*, transportation and disposal during the baling period. Each price included additional services, such as construction of a tarping shed, a management center, a fenced enclosure of the facility and installation of temporary scales, all of which the BCUA ultimately paid for separately.

On the issue of transport by rail, Schwartz's letter noted that at the January 11, 1988 meeting, Waste Management noticed that the projected location for the baler facility contained a rail siding and offered to present a rail proposal and implement a

rail-hauling system if it afforded a savings. However, the negotiating team did not request such a proposal. Waste Management's surprise then in learning that the BCUA directed a contract for rail haul is reflected in Schwartz's statement, "We cannot conceive how such a proposal could have been under consideration by the Authority if the rail-hauling alternative was not a basis upon which Waste Management was invited to submit a proposal."

There are several significant points of conflict between the positions advanced by Waste Management, as reflected in its correspondence and articulated to the Commission, and the interpretation of those positions by members of the BCUA negotiating team. One point of conflict concerns the providing of equipment and labor. Although the BCUA insisted on providing the labor and equipment for the operation of the transfer station, Waste Management argued to use its own equipment and operators to load the waste into the trucks. According to Waste Management representatives, when some members of the BCUA negotiating team expressed concern about use of BCUA employees, they responded that the employees could perform the numerous other functions involved in operating the transfer station and receiving the waste. However, this position was not articulated to the BCUA Commissioners.

Dakes was questioned about Waste Management's preference to handle the loading of the trucks (in the context of the December 22 meeting):

> *Q. Why was there an objection to Waste Management's providing the equipment and the personnel to do the loading?*
> *A. Well, higher -- it would have been an implied higher price and loss of control by BCUA over its own operations.*
>
> *Q. But one of the proposals sought was for the vendor to handle the transfer, so why now was there an objection to it?*
> *A. You're saying the proposals at that time --*
>
> *Q. Yes.*
> *A. -- to handle transfer? I don't -- I don't know that we were asking for transfer by the vendors. Is that what we were doing at the time?*
>
> *Q. One of the options was to provide transfer, transportation and disposal --*
> *A. But options where?*
>
> *Q. In the bid specs.*
> *A. Well, that was in October.*
>
> *Q. Yes. And now suddenly the BCUA's uncomfortable with a vendor wanting to handle the transfer?*
> *A. I guess somewhere we changed -- somewhere the policy changed where we wanted BCUA employees to handle the transfer.*
>
> *Q. Why and who changed the policy?*
> *A. I don't recall that that was the case and I don't recall if that was a change.*
>
> *Q. Can you elaborate more fully on why BCUA representatives objected to having a vendor handle the transfer?*
> *A. I don't recall that we objected at this meeting that we're looking at here. I'm trying to recall when we wanted transfer and when we didn't want transfer, and I don't remember. It evidently was the case on December 22 we didn't -- we were not seeking for transfer services from the vendors.*
>
> . . .
>
> *Q. Did the BCUA engage in any kind of cost comparison between what Waste Management was offering in terms of the transfer and what it would cost the BCUA to provide that service itself?*

A. Probably not at that time.

A second point of departure between Waste Management and the BCUA was with respect to a split contract. Waste Management representatives insisted both during the interview and appearance before the Commission that they did not reject a split contract and advised the BCUA that Waste Management would take a portion of the waste along with another vendor. In fact, Waste Management's letter of January 6, 1988 stated that it would accept a contract with 2,000 tons per day. Boyd, however, recalled that Waste Management wanted a split contract only after it did not receive the award.

A third area of difference concerned the value of the additional services offered by Waste Management. Graziano stated in the interview that he had informed the BCUA negotiating team that the value of the additional services, including the labor and equipment, was $10 a ton. Yet, the BCUA Commissioners were told by members of the negotiating team that the services were worth only between $1 and $3 a ton.

The final point of contention related to the type of guarantee to be given. According to Waste Management's representatives, the issue of a guarantee was never raised. Schwartz stated that if the BCUA insisted upon a parent corporate guarantee, he would have taken the request to top management and was confident that such a guarantee would have been approved in order to obtain the contract. In fact, parent guarantees had been authorized for Waste Management's projects in Philadelphia, Pennsylvania and Mercer County, New Jersey. Nevertheless, the BCUA Commissioners were advised by the negotiating team that Waste Management refused to provide a parent guarantee.

In the opinion of the Waste Management representatives, there were "absolutely" no "deal breakers" - Waste Management was prepared to meet any new requirement erected by the negotiating team. Graziano commented during testimony that the BCUA kept "changing the game." In the opinion of Boyd, who expressed that he favored Waste Management by a small margin, Waste Management projected a "cooperation problem" and had a reputation in the industry of being "tough to get along with."

-Mitchell/Laidlaw In Negotiation-

Without its arrangement to represent Laidlaw's landfill capacity in an area that encompassed Bergen County, Mitchell would not have been in a position to compete for the BCUA contract. The marriage of Laidlaw to Mitchell was cemented in the Waste Disposal Agreement dated April 23, 1987. By the terms of the agreement, Mitchell became Laidlaw's exclusive agent for the transportation of solid waste to its Valley View Landfill in Sulphur, Kentucky, from within a specified "Territory," which included certain northern New Jersey counties and certain southern New York counties. The agreement, which was to operate from July 1, 1987 through June 30, 1990, with the option of Mitchell to extend it an additional two years, was executed by Chester Pucillo, President of Mitchell, and by Donald E. Koogler, Vice-President of both Valley View Waste Systems, Inc. and Laidlaw Waste Systems, Inc. Under the agreement, Mitchell was initially to deliver to Valley View Landfill a maximum rate of 3,000 tons per day.

According to Chester Pucillo, his brother and partner, Domenick, contacted Laidlaw's office in Ohio in January or February 1987. According to Dick van Wyck, Laidlaw's corporate counsel, Mitchell approached Timothy Salopek, Regional Landfill Manager at the Laidlaw Waste Systems office in Columbus, Ohio, to inquire into available landfill capacity. Subsequent meetings resulted in the Waste Disposal Agreement. As a result of the BCUA contract with Mitchell/Laidlaw, a supplementary agreement was executed on February 16, 1988 to reflect the BCUA contract and to join Laidlaw Industries, Inc., the U.S. parent, as a party to the Waste Disposal Agreement.

The Commission explored the issue of whether the Mitchell partners knew of the BCUA's interest in out-of-state disposal while negotiating the Waste Disposal Agreement. According to the principals of Mitchell, they did not know that the BCUA was interested in out-of-state disposal when they contracted with Laidlaw. Without such knowledge, they were able to deny that the Laidlaw contract was obtained in order to place Mitchell in a position to be awarded the BCUA contract. By denying this objective, they were able to disclaim that there was a deal.

At the time of Mitchell's incorporation in New Jersey in January 1987, it had no business or any assets to speak of and its stated purpose was to engage in solid waste activities. Only three of its five partners had any experience in the area of solid waste and that was only as to garbage collection. Each partner was searching for business opportunities from the outset and was generally aware of, and keeping abreast of, potential opportunities in the northern counties which were running out of landfills and being forced to go out of state with the garbage. For example, Chester Pucillo was "looking for opportunities, formulating ideas to get business" and testified that "the rumor...it was always suspected that, as I said earlier, a couple of these northern New Jersey counties would go out to RFP."

Nevertheless, despite the stated objective to find business for the fledgling company, each partner - Chester Pucillo, Domenick Pucillo, Charles "Pete" Hunkele, Toby Soprano (Pucillos' brother-in-law) and Benjamin Scalovino[9] - testified that he had no knowledge of the BCUA's interest in out-of-state disposal in early 1987 and continued to have no knowledge of it until after the BCUA issued the bid package, when Mitchell was apprised of the fact by its consultant.

The partners' lack of awareness is surprising in light of the fact that the BCUA published Notices of Intent in February 1987 and mailed them to companies and landfill operators throughout the state and country. The BCUA's interest in out-of-state disposal was, as Dakes commented, "public information." In addition, at the time, Hunkele was a member of the Morris County Solid Waste Advisory Committee, which kept abreast of solid waste developments in other counties and participated with other advisory committees on a regional and statewide basis. Further, the Pucillos and Hunkele were owners and operators of garbage collection companies. Moreover, Martin R. Sternberg, an owner of Compaction Systems Corp., which had a business arrangement with Mitchell beginning in April 1987 in relation to the Oyster Bay, Long Island, Transfer Station, and at the end of 1987 in pursuing the BCUA project, also alleged that he did not know of the February 1987 events, even though he, too, was in the solid waste business. By Counsel Saros:

> *Q. If a particular municipality intended to award a garbage contract, how easily would that information become known throughout the industry?*
> *A. I think you hear it from everybody. It just becomes street knowledge. A truck goes into the landfill in Edgeboro -- the first time I found out Edgeboro was going to close, the truck driver told me. I told him he was nuts. It turned out I was nuts. He was right.*
>
> *Q. And because you've been in this business for a number of decades and have developed certainly an expertise in the area, do you feel that you have fairly well kept your finger on the pulse of what's been going on in the solid waste industry in terms of potential contracts, what municipalities might be looking at to award contracts*
> *A. If you're in a business, I presume you stay aware of what is happening even unconsciously. You just hear things all the time.*

The Mitchell partners' claimed ignorance of the

[9]The Pucillos' brother, Lawrence, later became a partner.

BCUA's plans for out-of-state disposal is also mystifying when evaluated in light of the Waste Disposal Agreement itself. According to them, the agreement with Laidlaw was sought, negotiated and executed without any firm idea of where they would obtain the solid waste to dispose of in Laidlaw's landfill. However, according to Koogler, who was involved in the process, Laidlaw would not have entered into the contract to make Mitchell its exclusive agent without a representation of substantial anticipated solid waste:

> *Well, I mean, the material would have -- as Salopek was talking to Mitchell, Mitchell would have had to have some source or -- you know, where is all this volume going to come from. Certainly, I don't think it would have come from their operations because I don't think that they had enough volume, based on what Tim had said, so I think they had to have some idea where the -- the volume of trash was going to come from. So they would have had to have known, I think, that it had to be Bergen County. You see what I'm saying?*
>
> *It would be difficult for Mitchell and Tim to be having conversations without Mitchell and Tim having some idea where the volume's going to come from.*
>
> *Q. So then a company -- Mitchell -- would not have approached Laidlaw without having a specific volume in mind from a particular source?*
> *A. Well, I don't know how they could because they would have nothing to talk about. I mean, if you look at it from Laidlaw's standpoint or Salopek having the conversations, why would -- why would Salopek waste his time talking to him unless there was some assurance where this volume's going to come from and what quantities of volume you're even talking about or it would really be a wasted conversation.*
>
> *Q. Would Mitchell have had to talk about something concrete or just in the abstract? You're saying concrete?*
> *A. Oh, I'm sure at first they would be very, very vague, and the reason why they would probably want to take and do that is to be able to not reveal where it might come from. That -- but at some point Bergen County had to be named. They would have been.*
>
> . . .
>
> *A. It would have been senseless to enter into an agreement if you have -- if you don't have a good idea that they have volume that they're going to take and be sending to you all the time. Why go through the motions of drawing up an agreement?*
>
> . . .
>
> *What I can say is that somewhere along the line, something would have had to have been said where the volume was going to come from to get up to that tons per day [3,000]. I mean -- or else we would have never gone through the conversations with them.*
>
> *Q. Or had a contract with them?*
> *A. Or had a contract with them, because why draw up a contract if you're -- if we're not sure where they're going to take and be able to get this volume and we're not going to take and begin to beef up on the landfill site because our cost -- because certainly we had an increase in cost and equipment and people. We're not going to take and do it.*
>
> *Q. Would it be equally true that you wouldn't do that -- that you wouldn't give a company an exclusivity clause unless they told you that they expected waste?*
> *A. Sure.*

In addition to Koogler's testimony, another fact that places strong doubt on the claim of the Mitchell partners is that Salopek knew of the BCUA's interest in out-of-state disposal in February 1987 during his conversations and negotiations with Mitchell for the Waste Disposal Agreement. Salopek testified that the February 17, 1987 Notices of Intent, which the BCUA had mailed to Laidlaw's Ohio office, "look[ed] familiar" and that he "recommended ["probably [to] my vice-president, Don Koogler"] that we should look into it as a waste company for disposal at our disposal sites," specifically the ones in Sulphur, Kentucky, and Adrian, Michigan. Because Salopek was unable to attend the February 17, 1987 meeting at the BCUA, he requested William J. Holbrook, the owner of WHI, Inc., a Pennsylvania consulting firm, to attend. Holbrook, in turn, had his vice-president, Richard E. Valiga, attend the meeting. Valiga signed in as representing "WHI/ Laidlaw." Salopek testified that following WHI's attendance at the meeting,

> *There was a constant issue of when would the Bergen bid ever come out. I mean in-house, within Laidlaw, through WHI, just within the industry, you know, at different times you would hear that it's going -- the bid specs are coming out, they are -- it was, you know, kind of confusing most of the time, and everybody just sat back and waited.*

Salopek, who stated that he was contacted by Mitchell in January or February 1987, was the primary negotiator for Laidlaw. Although he knew in February 1987 about the BCUA's intent to dispose of its garbage out of state, despite his discussions with Mitchell specifically "about a service area for Mitchell to market for Laidlaw, you know, or to try to find waste streams [source of solid waste] for the North Jersey area," and even though

> *there were a lot of discussions back and forth about the BCUA and I don't remember exactly when or how, but again, throughout the industry, everyone knew that Bergen was looking for a long-term disposal site,*

Salopek did not "remember any specific mention" to Mitchell in early 1987 that Bergen County was interested in out-of-state disposal or that he had someone attend the February 17, 1987 meeting at the BCUA.

Casting additional doubt on Salopek's testimony in this regard is the fact that Mitchell paid Salopek $.50 per ton of baled waste from the BCUA project, for a total of $582,779. Salopek testified that in the summer or fall of 1987, prior to his attendance with Mitchell at meetings at the BCUA in December 1987, he contemplated resigning from Laidlaw to establish his own consulting business. He announced his resignation on January 4, 1988 with an effective date of January 15, 1988. Salopek formed two consulting firms in 1988, and in the fall Mitchell became a client. Salopek located disposal sites for Mitchell for Bergen County's loose waste and for "industrial waste," and when the sites were used for disposal, Mitchell paid Salopek on a price-per-ton basis.

Mitchell paid the $.50 per ton of all baled waste to Salopek's company, Waste Placement Professionals. Salopek gave the following explanation for the $.50 per ton fee:

> *This particular exhibit that you've shown me was based on 50 cents per ton of baled waste that we did not place anywhere, but we were looking for sites to put it into once the Laidlaw agreement and the Mitchell/Laidlaw agreement ultimately expired with Bergen. So we were paid a fee to find disposal sites far into the future, three to five years into the future.*
>
> . . .
>
> *...If Mitchell was not successful in getting an extension [of the BCUA contract], we were going to assist Mitchell in providing dis-*

posal, to rebid the contract if they were unsuccessful in rebidding it, or in the extension, do you follow me?

Q. If Mitchell didn't get an extension?
A. If Mitchell did not get an extension, we were going to try to supply them with -- or that's what they asked us to do, was go out and look for sites, Indian reservations, South Carolina, the other projects we were working on.

Q. To replace the Laidlaw site?
A. Right, because the Laidlaw site at that time only had the capacity to accept 3,000 tons per day for three years and then Laidlaw's landfill would have been filled to capacity. So Mitchell's fear was when it came time to rebid again, that the capacity wouldn't be there and they wouldn't be able to rebid, so we negotiated disposal agreements, or actually permanent landfills to rebid with Mitchell.

The reason I got paid the 50 cents in an up-front kind of a fashion was my fear in the whole thing was I'd go out and make these commitments, risk all my capital and money, negotiate all these deals and then Mitchell would not get extended, obviously, nor would they bid the proposal with my disposal sites, which ultimately did happen.

. . .

Q. What was the rationale for having your consulting fees, which was to find disposal sites in the future, based on baled tonnage at the BCUA?
A. It was my rationale. I initially talked to them on an hourly fee plus expenses, and for some reason, they weren't really interested in hourly fee plus covering all my expenses.

And then my fear of that, if I was able to go out and find sites to be acquired, one, they wouldn't come up with the money to acquire them, which did happen. The next would be, if we -- I was able, through my good reputation, to get a company like Mid-American, Westinghouse, to bid it with a company like Mitchell, that Mitchell would do something that would make the thing fall apart, which did happen, and then I would end up getting paid nothing and all my expenses, all my time, all my efforts over a two-year period would have been wasted, so I only asked for a dollar per ton and was unable to get it.

So we agreed on 50 cents per ton, plus we agreed that I would spend however much time I needed to help them with their open-top and their special waste streams, whatever I can do to permit, to get approval in the landfills for an additional number, whatever I could make but still made it competitive for them.

Salopek's explanation of why he received $.50 per ton of baled waste from the Bergen County transfer station is difficult to grasp. It is not industry practice to be paid to locate landfill capacity that may or may not be utilized in the distant future. Efforts to locate "air space" under such conditions are paid for on a fee and/or expense basis. A commission tied to a per ton basis is paid only if the deal is consummated and the landfill is actually made part of the deal and utilized. The Commission found the arrangement described by Salopek to be unique to him and Mitchell. The arrangement raises questions of whether Salopek, who was instrumental in directing the April 23, 1987 Solid Waste Agreement between Mitchell and Laidlaw, was rewarded for doing so or for insuring the execution of the agreement on Mitchell's representation that it anticipated receiving the BCUA contract. (Again, Mitchell could not have competed for or obtained the BCUA contract but for its landfill arrangement with Laidlaw.) The $.50 per ton payments to Salopek also raise a question of whether Salopek

violated his fiduciary relationship with Laidlaw. Salopek denied that he received any payments for his efforts in concluding the Waste Disposal Agreement as a means to secure the BCUA contract.

Salopek's credibility is further damaged by discrepancies with respect to his relationship with Holbrook, the owner of WHI, the company requested by Salopek to represent Laidlaw at the February 17, 1987 pre-proposal meeting at the BCUA. Salopek introduced Holbrook to Mitchell in 1987. (Although Holbrook directed his vice-president to attend the February 17 meeting and recalled the event, he also denied speaking with Mitchell's principals about the BCUA's interest in out-of-state disposal.) Holbrook produced records establishing that WHI's 1988 cash disbursement journal contained total payments to Salopek of $28,878 which amount was confirmed by the Commission's examination of negotiated checks issued to and endorsed by Salopek; however, the IRS 1099 form for miscellaneous income issued by WHI to Salopek for 1988 indicates that only $12,878 was paid. Initially, Holbrook was unable to explain the discrepancy, but when he was confronted again with the issue, months later, he stated that, at Salopek's direction, the difference appeared on a 1099 form issued to Salopek's partner, Michael A. Julian. Salopek's attorney provided the same explanation. (The Commission will refer this matter to the IRS.) In addition, both Salopek and Holbrook explained that because Salopek had introduced Holbrook to Mitchell, Salopek was entitled to a "royalty" for all waste handled by Holbrook for Mitchell in connection with any project. Holbrook produced documents indicating "royalty" payments of $3 per ton of loose waste transported and disposed of by WHI for Mitchell during the interim period. However, Holbrook produced records showing payment of only $8,878 to Salopek, even though the tonnage handled by WHI called for considerably more money to be paid, and no payments for the BCUA's "special waste" handled by WHI for Mitchell. Clearly, the financial arrangement between Holbrook and Salopek is suspicious and was not disclosed fully in WHI's records. Moreover, the financial arrangement resulting from Salopek's introduction of Holbrook to Mitchell while Salopek was employed by Laidlaw also raises questions concerning possible breach of Salopek's fiduciary duty to Laidlaw.

* * * *

Mitchell responded to the bid package in a letter dated October 28, 1987 and signed by Vice-President Hunkele. The letter linked Mitchell to Laidlaw Industries and Compaction Systems Corp.:

> *Mitchell Environmental is a solid waste management company...affiliated with Laidlaw Industries....*
>
> *Mitchell, with its partner, Compaction Systems Corp., is presently hauling and disposing of waste from Long Island....in Laidlaw Landfills for a total cost of less than $60 per ton....*
>
> *Mitchell and Compaction in association with Laidlaw Industries are experienced and prepared to offer Bergen County a complete refuse transfer capability....*

In litigation instituted by Willets against Mitchell in federal court, Chester Pucillo admitted to having conversations with Sternberg about joint participation in the project at the time of the first bid, but testified that he would "not categorize them [Compaction] as a partner, not in '87," contrary to the letter.

Hunkele sent a second, almost identical letter, dated November 23, 1987, to the BCUA. Again, the letter repeated that Mitchell "is affiliated with Laidlaw Industries," that "Mitchell, with its partner, Compaction Systems Corp., is presently hauling and disposing of waste from [Oyster Bay,] Long Island, New York," and that "Mitchell and Compaction in association with Laidlaw Industries are experienced and prepared to offer Bergen County a

complete transfer capability."

In response to the BCUA's December 7, 1987 Notice to Proposers, Mitchell sent a December 14, 1987 letter that appeared on Laidlaw's letterhead and was co-signed by Hunkele and by Salopek, without any copies to Salopek's superior, an omission that surprised Koogler. The letter, referring to Mitchell and Laidlaw, stated that "we are the most qualified firms available to perform" and requested consideration of "our financial resources and the qualifications of our personnel." Specifically, the letter boasted of Mitchell's "proven track record over the past nine months as it related to transportation."

According to the handwritten notes of Gardner of the December 30, 1987 meeting with Laidlaw and Mitchell, Laidlaw offered its "best price" of $78 per ton of baled waste, plus $21 a ton if Laidlaw purchased the balers and supplied the workforce, and $95 per ton for the unbaled portion, estimated by Laidlaw to be 10%. The discussion included a 60-day minimum phase-in period of a baling operation, with a price schedule of $115 per ton of loose waste if Laidlaw personnel loaded or $105 per ton if the BCUA loaded.

Dakes' notes for the December 30, 1987 session with Mitchell and Laidlaw also reveal discussion of a "short-term 60-day loose" period at $115 per ton with Laidlaw loading and $105 per ton with the BCUA loading. Dakes did not recall why Laidlaw's offer to conduct the loading was not later accepted. (Such an arrangement would have been far more economical for the BCUA.) The notes also contain that Laidlaw "Wants entire contract - no split." Ultimately, Laidlaw yielded on the issues of a split contract and handling the loading operation. Dakes did not recall how that came about.

Dakes' notes indicate that at the January 6, 1988 session, issues of a "split contract" and "60-90 days - single vendor" were raised. Dakes was unable to elaborate. Van Wyck noted for this session that a "2 phase approach (re interim open-top phase vs long-haul baled)" was developed and a "price tendered." (Waste Management was not informed of the bifurcated interim and baled periods until the day before the Commissioners' meeting to select the vendors.)

There is evidence that the BCUA negotiating team engaged in extensive discussion with Mitchell regarding the interim period prior to the Commissioners' January 12, 1988 selection of Mitchell/Laidlaw. Mitchell's attorney provided the BCUA with an outline of the terms for the interim, loose waste period, as well as for the long term, under letter dated January 11, 1988. Although the BCUA received this letter, it is not clear whether the receipt occurred on January 11. The outline included the requirement that the BCUA load the trash into trucks and the recommended equipment to be provided by the BCUA. In stark contrast to the approach taken with Mitchell/Laidlaw, no discussion about the interim period was held with Waste Management prior to the January 12, 1988 selection.

On January 12, 1988, at 2:30 p.m., *prior to* the BCUA's selection of Mitchell/Laidlaw, Mitchell's attorney faxed to the BCUA a letter concerning the interim period in terms assuming the award of the contract:

> *The interim 90-day arrangement will be handled by Mitchell Environmental, Inc. which intends to engage the services of Compaction Systems Corporation in connection with the work to be done during that period. The long-term portion will be handled jointly by Mitchell Environmental, Inc. and Laidlaw Waste Systems, Inc.*

Also attached to this letter was an outline of the proposal for the interim and long-term periods, which outline differed from the one that accompanied the January 11 letter. The January 11 outline referred to a 60-day interim period and listed prices of $105 a ton for the first 2,000 tons and $125 a ton

for the "next, up to 750 tons." In contrast, the outline attached to the January 12 letter referred to a 90-day interim period, noted that any extension of the "90-day period is feasible, but is subject to separate negotiation as to minimum period, price and other items," and gave a single price of $105/ton.

* * * *

The Commission finds that a comparison of Mitchell's correspondence to the BCUA with the letters sent to the BCUA by Willets, together with the behind-the-scenes role of Compaction, reveals significant insight into the companies' relationships. Mitchell and Willets were on parallel courses in responding to the BCUA's bid specifications and to the December 7, 1987 Notice to Proposers. Willets, which was never invited by the BCUA to negotiate, became crucial to Mitchell's ability to effectuate the deal. No BCUA witness was able to recall why the company was not requested to negotiate. It may be that Willets was deliberately excluded so as not to interfere with Mitchell.

Before reviewing the activities of the three companies in late 1987, brief mention of their common history is appropriate. The meeting of Mitchell, Compaction and Willets occurred in relation to the Oyster Bay, Long Island, Transfer Station. Willets had been awarded the contract for the construction and operation of the transfer station and the transportation and out-of-state disposal of the solid waste. The contract, which had an annual value of approximately $40 million, lasted from February 1986 through August 1988. According to Thomas Tully, who supervised his family's operation of the Oyster Bay project, Mitchell was hired by Willets' subcontractor to haul a small portion of the solid waste and dispose of it at Valley View Landfill under Mitchell's agreement with Laidlaw. Mitchell was engaged for a few months in the spring of 1987 until it was fired by Willets because the subcontractor had misrepresented its financial arrangement with Mitchell. Two or three weeks after Mitchell's firing, Tully was approached by Sternberg, whom he did not know. Sternberg proposed that Willets hire Compaction, which in turn would utilize Mitchell in arranging for trucks to transport the garbage to Laidlaw's Kentucky landfill. Tully hired Compaction because of Mitchell's contract with Laidlaw for "air space." Sternberg provided Tully with the necessary documentation. Tully understood that "Mitchell was doing the trucking and that Compaction was only brokering." Willets always paid Compaction and Compaction paid Mitchell.

Curiously, Mitchell and Willets each sent a letter dated November 23, 1987 to the BCUA. Each letter expressed an interest in the contract and each referred to Compaction and Laidlaw, with only Willets referring to Mitchell and not *vice versa,* but in a different configuration. In the Willets' letter, President Kenneth Tully cited Willets' transfer, transportation and disposal contract with the Township of Oyster Bay and noted that Mitchell and Compaction were its subcontractors. Tully offered the BCUA the same arrangement, with Mitchell and Compaction performing as Willets' subcontractors. Tully enclosed with his letter a November 19, 1987 letter by Salopek to Mitchell "confirming the availabilities of the landfills to handle the county's waste flow." The letter was obtained from Sternberg.

The BCUA's December 7, 1987 Notice to Proposers evoked responses from Mitchell and Willets. Again, letters from both companies coincidently bore the same date of December 14, 1987. Like its November 24, 1987 letter, Willets' December 14 letter presumed a business arrangement with Willets as the primary contractor and Mitchell and Compaction as subcontractors and with utilization of Laidlaw's landfills. The Willets' letter announced that the company "inconjunction *[sic]* with Mitchell Environmental and Compaction Systems would like this letter to serve as our response to your request for data" and expressed Willets' intent "to enter the proposed negotiation jointly with the firms of Mitchell Environmental, Compaction Systems and Omni Technical," Willets' subcontractor at Oyster Bay. Attached to the letter was extensive documentation

corroborating Willets' claim of access to equipment necessary to perform the contract. Significantly, there was also attached to the letter a number of documents related to Laidlaw's landfill capacity: the amended permit granted to Valley View Landfill, Inc. by Kentucky's Department of Natural Resources; the Solid Waste Disposal Area License issued to Laidlaw Waste Systems, Inc. for its Adrian, Michigan, landfill by Michigan's Department of Natural Resources; an October 28, 1985 letter from the Michigan Department of Natural Resources concerning a notice of violation issued to Laidlaw Waste Systems concerning its landfill in Adrian; Salopek's April 9, 1987 letter to Mitchell referring to the availability of its landfills in Sulphur, Kentucky, and Adrian, Michigan, and Salopek's November 19, 1987 letter to Mitchell regarding the availability of these two landfills "with regards to the Bergen County Contract #87-43." Also included in Willets' December 14, 1987 submission to the BCUA was a December 9, 1987 letter from Edward Ehrbar, Inc. to Thomas Tully concerning the "availability of loading equipment for Bergen County, New Jersey, interests," *viz.* four Dresser 560 B Payloaders and one Dresser 560 A Payloader.

Although Willets was unaware of Mitchell's correspondence to the BCUA, Sternberg was not. Furthermore, Chester Pucillo testified in the Willets/Mitchell federal litigation that Sternberg brought Willets into their discussions "around the time of...the advertisement for the second bids" and told him that Willets had sent a letter to the BCUA. Kenneth Tully[10] and his sons, Peter and Thomas, testified to one set of facts and portrayed Sternberg as orchestrating a different set of facts. According to Peter Tully, after Willets obtained the BCUA bid package and before it sent the October 28, 1987 letter to the BCUA, Sternberg was "in the office constantly during that period of time" and

> *was always around, you know. He came -- around the office a lot, you know, looking for his check for [the Oyster Bay project] you know, to be paid or whatever and he was hanging around a lot and I remember him saying, you know, "We could do something together in Bergen."*

Peter Tully recalled that "Marty [Sternberg] would come over and say, you know, 'Let's try this. We got the landfill capacity. You're in Oyster Bay. You got the experience.' And all that kind of stuff." Kenneth Tully also recalled that "Sternberg was at the office constantly because he was doing work out in Oyster Bay" and that "Sternberg is the one who expressed the interest in bidding with us" and including Mitchell. He continued:

> *I explained to Mr. Sternberg that as far as we were concerned, it didn't look to us like the job was even going to go ahead because of the way they had the specs written and the onerous nature of it and I got the impression from Mr. Sternberg that those things were going to change and that they were going to go ahead and they were going to change the specifications.*

As Willets responded by letter to the bid package, according to Kenneth Tully, "our intent was to possibly use the Compaction/Mitchell situation and send the waste out to Laidlaw's landfill." Tully explained that Willets would use Mitchell's contract for the Laidlaw site, although it had its own contacts for other sites as well, but that it did not need Compaction "for any particular reason - they were just with Mitchell for lack of a better explanation." He asserted that Sternberg "very definitely knew" that Willets was including Compaction's and Mitchell's names in its November 28, 1988 letter. Tully, who stated that "Sternberg was very anxious for us to get involved in the project in any way possible," spoke of a "verbal understanding" with Sternberg, that Compaction and Mitchell would be Willets' subcontractors, an arrangement similar to what had

[10]Kenneth Tully is president and stockholder of Willets. Statements attributed to him in this report are derived from his testimony on June 15, 1991 in *Willets Point Contracting Corp. v. Mitchell Environmental, Inc.*, in the U.S. District Court, Eastern District of New York.

occurred on the Oyster Bay project.

Thomas Tully testified that he discussed with Sternberg that the BCUA's bid specifications were "too onerous" to submit a bid, but that Willets would be sending a letter:

> *I told him that we would like to use you guys [Compaction and Mitchell] as, you know, one of our subcontractors on the job if we were able to get it and he said that was great.*

Tully advised Sternberg that Compaction and Mitchell would be named in Willets' letter and Sternberg "said that was no problem." He also informed Sternberg that Willets would like to use Laidlaw's landfills pursuant to Mitchell's agreement and Sternberg responded that it was a "great idea." Tully recalled that he "probably" showed Willets' November 23, 1987 letter to Sternberg.

According to Peter and Thomas Tully, at no time did Sternberg inform either of them that Mitchell was sending any letters to the BCUA or that he (Sternberg) was pursuing the BCUA project with another company.

Willets was never contacted by the BCUA and invited to make a presentation, despite its letters expressing an interest, its submittal of the data sheet and supporting documentation and Peter Tully's follow-up telephone calls to the BCUA. Peter Tully continued to discuss the project with Sternberg "into December" and then, suddenly and unexpectedly, it was

> *in late December or early January where it became clear that the BCUA was not going to negotiate with us and that they had short-listed [certain companies].*

In early January, when Sternberg advised Peter Tully that Mitchell was in negotiations with the BCUA, "the discussions turned to us being a partner with Mitchell and Compaction and that Mitchell/Laidlaw would be the lead." Tully stated that because "[w]e are usually the prime, so it was -- it was not taken too kindly, but we accepted it as the best way to get a part of this project."

Sternberg denied that he engaged in the conversations described by the Tullys and denied that he knew what Willets was doing in pursuing the BCUA project. The Commission finds that Sternberg's testimony in this regard, as well as others, is not credible in light of a number of factors: Sternberg, who resides in New York, refused to appear voluntarily before the Commission when requested to do so because he was beyond the reach of the Commission's subpoena power (After extensive efforts to ascertain when Sternberg might enter New Jersey, the Commission succeeded in serving a subpoena upon him with the cooperation of the State Racing Commission.); following the early service of a subpoena *duces tecum* upon Sternberg's partner, Benny R. Villani, one of the attorneys initially representing Compaction attempted to mislead the Commission by questioning the Commission's reference to Villani as the president/owner of Compaction; Sternberg and Villani refused to comply fully with the Commission's subpoenas *duces tecum;* as a result of their noncompliance, the Commission was compelled to obtain an arrest warrant for Villani and later an arrest warrant for Sternberg and it was only under the threat of execution of the warrants that the records were produced to the Commission; in appearances before the Commission, Sternberg was uncooperative, unresponsive and sarcastic and frequently professed not to understand the question (In one three-hour session, Sternberg stated "I don't presently recall" 170 times, which does not include numerous responses of "I don't know" and "I don't recall."), and Sternberg and Villani directed their New York accountants, over whom the Commission does not have jurisdiction, not to cooperate with the Commission or provide an interview. In stark contrast, Willets' principals and attorney, although they too were not subject to the Commission's jurisdiction, provided full co-

operation in furnishing requested documents, giving interviews and testimony and allowing employees to be interviewed. The Commission also takes into account the credible and forthright testimony of both Peter and Thomas Tully and their genuine reaction of surprise, if not shock, as well as that of their attorney, to a number of documents, including Mitchell's letters to the BCUA and agreements with Compaction, that were apparently concealed from them.

-Other Vendors In Negotiation-

-1-

The BCUA's treatment of Browning-Ferris Industries [BFI] raises questions. George Paturalski, Market Development Manager for the Atlantic Region since 1986, was following closely the developments in Bergen County and kept meticulous and contemporaneous notes of his contacts with the BCUA. He received the Notices of Intent for out-of-state disposal and attended the February 17, 1987 meeting at the BCUA. His notes of the meeting indicate that two RFPs would be issued within two weeks, responses would be due by March 6, 1987 and contracts awarded on April 6, 1987. Paturalski testified that he was very interested in the BCUA's proposals. When he received the February 20, 1987 notice that the RFPs were not being issued because of "technical delays," he telephoned the BCUA numerous times to ascertain when the RFPs would be forthcoming. His notes indicate that on April 2, 1987, he spoke with Petrillo, who stated that the BCUA was "a lot behind schedule" and that she would notify BFI's Marketing Coordinator of the anticipated time frame, which was never done.

Paturalski reviewed the bid specifications in October 1987 and discussed them with senior management. The decision was made not to submit a bid, although Paturalski did provide the BCUA with a letter expressing an interest in the project. Following issuance of the rebid, Paturalski's notes again indicate that he made numerous attempts to contact the BCUA. On December 3, 1987, unaware that an emergency had been declared, Paturalski contacted the BCUA and spoke with Chairman Caldarella to express BFI's interest in negotiating a deal and to schedule a meeting, to which Caldarella did not agree.

Paturalski received the December 11, 1987 Notice to Interested Parties and responded to the BCUA with a completed data sheet. He testified that he was still "[k]eenly interested." BFI was invited to discuss the project on December 11 and 21, 1987. On December 11, 1987, Paturalski and BFI's Vice-President of Market Development met with the BCUA. Paturalski recorded the meeting, which lasted 30 minutes, in detailed notes. His notes indicate, among other things, that the BCUA advised that it had already met with two bidders, who "seem to be farthest along;" that Dakes described the transfer station slab that would be located on top of the landfill; that the BCUA "indicated that the vendor could include equipment as part of the proposal" and that the BCUA exhibited a "'make us an offer' attitude."

Paturalski's notes indicate that on December 14, 1987, he spoke by telephone with Acting Executive Director Killeen as a follow-up to the December 11 meeting. Killeen informed him that the BCUA was not going to meet with anyone and was going to make a "prequalification cut" of four or five vendors. In addition, BFI had to submit any materials by December 15, 1987. Paturalski's notes also indicate that "trucking is important." He explained:

> *[H]e was saying to me is that BFI's multitude of disposal sites wasn't as important as we thought it was; that the trucking was a very critical component, and since everyone in the world could, and I'm paraphrasing obviously, could provide disposal, that key to them was someone who could reliably provide transportation.*

BFI submitted a proposal dated December 15, 1987 and continued to be very interested in the project.

At the December 21, 1987 meeting, BFI proposed services that included design consultation on the transfer facility, loading of the garbage into the transport vehicles, transportation, disposal sites from BFI's then 90 landfills and a performance bond. BFI tendered a price of $135 to $150 per ton, but indicated it was "very flexible" and negotiable and requested "a more definitive scope of work." Paturalski opined to the Commission that the BCUA was "somewhat receptive," although it did charge that BFI's price was "about twice the price of everyone else." Paturalski's December 23, 1987 letter, written as a follow-up to the meeting, stated that "BFI's proposal is to operate the transfer station" and recited the terms of the proposal, including that BFI would provide all balers, wheelloaders, forklifts and other necessary equipment and the personnel to operate the equipment. BCUA employees could operate the scalehouse and their assumption of other tasks was negotiable. Paturalski repeated the price range of $135 to $150 per ton.

Following his December 23, 1987 correspondence, Paturalski repeatedly telephoned the BCUA to ascertain whether BFI was short-listed and on January 6, 1988, finally spoke with Boyd, who advised that it was not. After receiving a rejection letter dated January 11, 1988, Paturalski again made repeated attempts to telephone the BCUA to discuss the matter. He eventually was referred to Dakes, who advised on February 5, 1988 that negotiations were proceeding with two vendors, Laidlaw and Crossridge.

It is significant that the BCUA not only informed BFI that the vendor could supply the equipment, but also did not direct that any of the services be eliminated in order to make the price comparable to the prices tendered by other vendors. The BCUA did not represent that it was interested only in transportation and disposal and did not engage in any negotiation of the price or contract terms. The testimony of BCUA witnesses that BFI was eliminated because it did not appear to be interested in the contract and its price was too high ignored what really occurred. It may be that BFI was deliberately eliminated from the competition.

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The New York, Susquehanna & Western Railway Corporation submitted its own proposal for rail haul to the BCUA, but it was not considered. At the same time, Susquehanna had discussions with Crossridge to form a joint venture. Susquehanna's proposal to the BCUA entailed use of the Crossridge Landfill as the disposal site. According to Yonclas, Susquehanna and Crossridge were also discussing a joint venture with Crossridge utilizing the rail company as a transporter. Crossridge was proceeding with Conrail and contemplated using both companies, although Susquehanna's rate was considerably lower then Conrail's. When questioned as to why Crossridge later appeared to favor Conrail over Susquehanna, Yonclas noted that the BCUA and Susquehanna "were at odds over the access from the Turnpike for their [Resource Recovery] burn plant, so there may have been some hostility between BCUA and the railroad." Fass testified to witnessing an exchange of strident words between Caldarella and Susquehanna's Vice-President Robert Kurdock at the December 11, 1987 meeting at the BCUA. Yonclas elaborated:

> *[B]ased on the way Bob Kurdock explained the blow-up that he had with Vinny Caldarella and that -- claimed by the BCUA -- that the railroad had caused significant harm by not allowing the access through their property to the burn plant and created a great animosity between the railroad and BCUA, so my own personal opinion is you don't bury the hatchet on some prima donnas -- you know, the two of them were very prima donna-oriented so I thought there would never be a compromise between the two. That's my own personal opinion.*

Fass recorded the following in his diary when Kurdock telephoned him on December 17, 1987:

> *Bob said he was told Caldarella taken to task for not giving Susquehanna proposal fair consideration due to previous conflicts with Caldarella.*

Susquehanna submitted a letter-proposal dated October 29, 1987. Gardner never saw the letter and was unaware of a rail haul proposal other than Crossridge's. Apparently, Boyd also did not see the letter.

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The BCUA did not rule out the possibility of utilizing existing transfer stations. In fact, meetings were held on December 28 and 29, 1987 with those owners and/or operators of stations permitted in the county's Solid Waste Management Plan, including Sal-Car Transfer Systems, Inc., United Carting Company, Inc., National Transfer, Inc., DiBella Sanitation, Inc., Vincent M. Ippolito, Inc., and Joe DiRese & Sons, Inc. An internal CBA memorandum dated December 30, 1987, which reviewed the issues concerning use of these stations, conservatively estimated their ability to handle 1,500 tons per day as of March 1, 1988 and 3,000 tons per day within six months with proper upgrading of their facilities. However, according to BCUA witnesses, the BCUA ultimately rejected proposals by the existing transfer stations because of the high prices.

THE SELECTION

On December 28, 1987, CBA provided the BCUA with a background and status report on the procurement process. The report articulated four guidelines with which the negotiating team was charged:

> *1. "Certainty of disposal capacity" obtained through landfills in more than one state and proof of back-up disposal sites;*
>
> *2. Negotiation of the "lowest feasible price;"*
>
> *3. "Sufficient transport capacity," and*
>
> *4. Proof of "the necessary financial stability and/or performance guarantees" by <u>each</u> vendor. [Emphasis supplied]*

The report then recounted the events following the unsuccessful bidding process: existing transfer station owners and/or operators were contacted to supplement possibly the BCUA's proposed transfer station on top of the landfill; these transfer stations offered prices ranging from $117 to $121.50 a ton; contact was also made with the approximately 22 vendors (excluding Willets) who had expressed an interest during the bidding process to complete a data sheet, and interviews were conducted with those vendors who responded with completed data sheets.

The report referred to an "attached spread sheet" containing "significant data on all of the interested vendors at this point." The document turned over to the Commission did not have the spread sheet attached to it, and the BCUA never provided one. The report concluded with the negotiating team's request of the BCUA Commissioners to review the "attached data sheet" and "create a short list for further negotiations" in order to finalize a contract "on or slightly after January 1, 1988." In addition, the team sought guidance on the following policy issues to direct the negotiations:

> *1. Does the BCUA desire a single vendor for the entire 3750 tons or would it be preferable to seek multiple vendors?*
>
> *2. Should the Authority consider the construction of balers at either the Kingsland Landfill site or another suitable site for the purpose of phasing in a baled waste operation at the earliest possible time? There are*

certain economics and efficiencies gained by this.

3. What transport options should be considered? Is trucking the only feasible operation or should rail operations be considered at this time by the negotiators?

4. What bench mark for financial stability will be required by the Commissioners? For example, is Waste Management, although at a higher price than other vendors, so secure that lower prices by other vendors can be safely ignored?

According to BCUA witnesses, no guidance was given.

The BCUA Commissioners selected Mitchell/Laidlaw and Crossridge to transport and dispose of the solid waste at a meeting on January 12, 1988. Their private, unrecorded discussion and selection was preceded by a tape recorded presentation by members of the negotiating team. The fact that the presentation was tape recorded offered the Commission the unique opportunity to hear how the presentation was conducted. A comparison of the team's representations of the vendors' proposals with the proposals themselves reveals startling conflicts. Unfortunately, the decision was made to turn off the recorder when the team members were excused and the Commissioners began their discussion. (Caldarella testified, "I'm positive on that meeting I insisted that a recording be going." If this segment of the meeting was recorded, the tape was withheld from the Commission.) As a result, no glimpse into the actual selection was afforded.

Each Commissioner was provided with a briefing book that had been prepared that day by Gardner from pieces of information supplied by other team members. The background section of the briefing book updated, and was very similar to, the "Background and Status Report" submitted to the BCUA on December 28, 1987. According to the document, a presentation was made to the Commissioners on December 30, 1987, at which time the vendors were short-listed. (No tape recording or minutes of the meeting were provided to the Commission.) The background section concluded with a request to the Commissioners to review the enclosed "data sheet to select a vendor or vendors for further direct negotiations on a contract to be executed as of March 1, 1988." The document requested guidance on the following issues:

1) Does the BCUA desire a single vendor for the entire amount of baleable waste or would it be preferable to seek multiple vendors?

2) What transport options should be considered? Is trucking the only feasible operation or should rail operations be considered at this time by the negotiators?

3) What bench mark for financial stability will be required by the Commissioners? For example, is Waste Management, although at a higher price than other vendors, so secure that lower prices by other vendors can be safely ignored?

Omitted from these issues was the question of whether the use of balers should be considered.

The next section of the document, entitled "Venture Descriptions and Proposals," contained a brief description of the companies under consideration and listed them in the following order:

Mitchell Environmental Corporation/ Laidlaw Industries, Inc.

Crossridge, Inc.

Joseph S. Paolino & Sons, Inc.

Envirotech [sic; Virotech] Systems, Inc.

Waste Management, Inc.

Solid Waste Transfer, Inc. [this company's proposal was for the transportation and recycling of demolition waste]

Transfer Station Consortium.

Certain statements contained in the descriptions are noteworthy. The one on Mitchell/Laidlaw incorrectly referred to Mitchell as "a local Bergen County company in the waste business in NJ." Not only was Mitchell not a "local" company, but it had no operating history in the state. Gardner recalled that with respect to the information contained in the briefing book on Mitchell, "Most everything we got about Mitchell that I remember -- what came from those fellas. They were there. They told us." In fact, Gardner testified that Mitchell partners "were there every day. You always saw them. Either they were talking to us or they were talking to Vinnie [Caldarella] or they were there for some reason a lot of times." In addition, the narration noted that the baled waste would be transported "via a fleet of nondedicated trucks procured via multicarrier contracts." Crossridge's description properly stated that the company was "a new venture that does not have an operating history" and that Conrail "also does not have an operating history of carrying waste by rail." The description of Waste Management included its proposed use of "a dedicated trucking fleet owned by Waste Management to their landfill sites in the Northeast," primarily in Pennsylvania, and the inclusion in the price of "certain labor and equipment which they propose to own and control, in order to control the loading of their trucks."

The section describing the vendors was followed by a grid sheet that set forth the apposite data on each vendor for comparison purposes. Significantly, Laidlaw's name appeared on the grid without Mitchell's name. As a result, Mitchell escaped appearing under the categories of "Insurance Coverage," "Most Recent Financial Statements Submitted" and "Net Worth." Under "Vehicles Currently Committed," Laidlaw was listed to have "200 Non Dedicated [*sic*] (Multi-Carrier Contracts)." (It was Mitchell that obtained the contracts at some point, but not in that number.) The grid also contained for Laidlaw a price of $105 for the interim, loose period. No such interim price appeared for Waste Management, although a price for "Loose" waste did appear on the grid and in the description portion was referred to as the price for the interim period. The grid disclosed that Waste Management's price of approximately $100 per ton for the loose waste included not only transportation and disposal, but also the loading of the trucks and that its price of $82 for baled waste included, in addition to transportation and disposal, "fork lifts and manpower for loading vehicles, construction of tarping shed and related manpower to operate shed, pave mobile equipment and staging area and construct an employee and management center."

Section 3 of the briefing book, "Financial Stability," contained Dunn and Bradstreet reports on the vendors and a "Financial Ratio Analysis" chart. For Crossridge, the chart noted "NOT AVAILABLE." Laidlaw's name appeared on the chart, but Mitchell's did not. The Dunn and Bradstreet report for Laidlaw indicated a net worth estimated at more than $140 million and for Waste Management a net worth exceeding $1.5 billion. The section contained a sheet stating that no Dunn and Bradstreet data was available for Crossridge, as well as for three other vendors, but a similar sheet did not appear on Mitchell.

The Tape

The tape of the Commissioners' meeting to select a vendor is revealing of several issues: how a split contract was decided upon; how Crossridge and Laidlaw were chosen, and how Waste Management was eliminated. The tape also exposes the roles of Chairman Caldarella and Commissioner Toscano. Although the tape discloses an active participation by Toscano, he denied in testimony before the Commission that he assumed such a role.

The tape recording indicates that Boyd opened the presentation to the Commissioners. Although he referred to prior briefings of the Commissioners, the Commission found no document detailing the sessions. After articulating the "ground rules" requirement of a 90-day "interim open truck hauling" followed by "baled hauling," Boyd noted that four vendors offered transportation by truck and one by rail, but added that Waste Management, Virotech and Laidlaw would explore rail if the BCUA so desired and pass on any savings. Boyd explained that the vendors were compared as to price, "stability of the entity," ownership of landfill capacity, availability of landfill capacity in different states and transport capacity. He recited the basic package desired by the BCUA, namely a price for transportation and disposal only, with the BCUA operating the transfer station, including the loading of the trucks and the operation of balers. He then reviewed variations in some of the proposals offered.

Boyd spoke of a separate contract for the construction debris and recyclable waste. He explained that because it would account for approximately 20% of the waste stream, the "real" waste stream would be reduced to about 2,500 tons. Boyd then made the significant point that removal of the demolition and recyclable waste would, *de facto,* accomplish a division of the waste stream and, consequently, not necessitate a split contract:

> *It may or may not be cost-effective and practical to divide if we have a 2,600 ton waste stream left. It may not be cost-effective to try to divide that into two 1,300 ton lots or to divide it into any other way. It might be best if we look toward one of the vendors left on the list to provide the entire 2,600 tons. And that's something that I think we should discuss as we go along.*

Gary W. Higgins of Eccleston guided the Commissioners through the briefing book. He indicated that the spread sheet comparing the vendors was an updated version of one that they had previously received. He reviewed the two-tier proposal of each vendor: a price for the 90-day interim period of loose waste and a price for the subsequent baling operation. Crossridge alone could not offer a proposal for the interim period. Higgins informed the Commissioners that the spread sheet contained an interim price by Waste Management of approximately $100, but that Boyd confirmed earlier in the day that the $100 was firm. Higgins failed to recite the additional services included in the interim price, but did review the extra services for the baled price:

> *[T]heir baled price includes forklifts and manpower for loading the vehicles, construction of the tarping shed and related manpower to operate such shed. They've offered to pave the mobile equipment and staging area and also construct an employee and management center.*

Asserting that these additional services in the price make a comparison uneven, Higgins gave a value to these services - a ridiculously low value:

> *It's estimated that, obviously, this is worth anywhere from <u>one to three dollars</u>, this additional cost. So to really make it comparative, you would have to back that off of the 82 and bring them down to 80 or 79 or wherever that may be. [Emphasis supplied]*

Moreover, when Higgins reviewed the "Comparative Cost Analysis" chart, he allocated $2 per ton to the additional services for the baled price and stated that "it converts to an additional $6 or $7 million" over the three-year contract. Again, Higgins failed to make any adjustment to the price for the interim period. Because of such a ludicrous adjustment, plus the failure to make any adjustment for the interim price, Waste Management was ranked the fourth lowest price, after Virotech, Crossridge and Laidlaw. According to Waste Management Vice-President Graziano, the loading feature was worth $4 and the additional services $6, for a total of $10 per ton.

Despite Higgins' clear participation as evidenced by the tape and the testimony of Boyd and Dakes that it was Higgins' responsibility as the financial advisor on the team to obtain and review the necessary financial data from the vendors, Higgins, in an interview, disclaimed any active participation and did not recall the low-figure allocation to Waste Management's additional services, let alone how the figure was calculated. He stated that it was not his duty to obtain the data and that he did not evaluate any data, but only calculated vendors' costs based on information provided by team members. Higgins asserted that he "didn't do anything personally." According to Boyd, it was Higgins and Gardner who provided the figure of $1 to $3 a ton. Gardner was also questioned about how the figure was computed:

> *Q. How did you arrive at that figure?*
> *A. I just gave that number? I didn't give any backup for it at the time?*
>
> *Q. You did not.*
> *A. I have no idea. I really don't. I don't know where that came from.*
>
> *Q. How did you calculate one to three dollars a ton?*
> *A. It must have come -- someone must have given it to us.*
>
> *Q. Who?*
> *A. That's a question I don't know.*
>
> *Q. Prior to that meeting or during?*
> *A. No, it had to be prior. I was prepared.*
>
> . . .
>
> *Q. If you gave that figure to the Commissioners, and someone gave you that figure, with whom did you discuss it?*
> *A. It probably didn't seem so significant at the time as it does now, as significant at the time as it does now. It doesn't -- we didn't know -- I can tell you this, we didn't know how much it was going to cost to load -- we hadn't figured that out yet.*
>
> *Q. Then how did you arrive at --*
> *A. I know that. I know that.*
>
> *Q. -- one to three dollars a ton?*
> *A. If somebody told me a number, I may have just said maybe they're right, and I just repeated it, but I can't imagine who would have told me.*
>
> *Q. You testified that someone gave you that figure. Can you recall if someone gave that to you at the time of this meeting or immediately prior to this meeting?*
> *A. It must have been immediately prior. We were prepared. I knew what I was going to say before I got there.*

Boyd reviewed the negotiation process as it related to the existing transfer stations. He stated that their proposals ranged in price from $117 to $121 per ton and opined that they "priced themselves above the market in the beginning." Boyd also stated that they never identified the landfills that they would use. In further negotiations, a consortium of transfer stations offered a price of $98 per ton, but failed to identify the trucks to be used or the landfills, although they did identify the states where the landfills were located.

The Commissioners were advised that only Laidlaw and Waste Management offered to provide an indemnity. Boyd stated that Laidlaw offered a limited indemnity "backed by a self-insurance pool for claims." The indemnity was stated to be "much more limited in nature than that offered by Waste Management," "but also Waste Management's is more limited than it looks like." Boyd explained:

The Waste Management indemnity is an indemnity, at least in the Essex contract,[11] we have not directly negotiated with them, but it is an indemnity of the subsidiary, a New Jersey Subsidiary of Waste Management, not a parent indemnity.

. . .

Basically, I'm telling you that, you know, if what you sought from Waste Management in the contract negotiations was a parent indemnity, I would be prepared to go after that with them because, well, but we are using the Essex County contract as an example of what they will find acceptable, to give you an idea.

Later, Boyd reiterated, "My sense is, since I've seen the Essex County contract, is that they are offering a subsidiary guarantee."

It is not known what weight was given by the Commissioners to the indemnity issue. What is clear, however, is that the indemnity issue was inaccurately portrayed as it pertained to Waste Management. Boyd admitted, in essence, that he had not discussed a "parent indemnity" with Waste Management, but rather relied upon the Essex County contract, a contract with which no one from the BCUA was involved. Therefore, the Essex contract provided no legitimate basis for comparison or "example of what they [Waste Management] will find acceptable." In testimony, Boyd stated that he did not discuss the "type of guarantee" with Waste Management "because they weren't awarded the contract" and added, "Had they been awarded the contract, I would have insisted on a Waste Management corporate guarantee." But the Commissioners were not so apprised.

In response to one Commissioner's question regarding the data sheet indicating "209 dedicated vehicles" by Laidlaw, Boyd stated:

Laidlaw has a contract with Mitchell Environmental Systems, which is a trucking company. And Mitchell has provided us with a list of drivers and trucks at which they have access on a contract basis.

Only Waste Management proffered a dedicated fleet of trucks.

Boyd alerted the Commissioners to the "serious issues as it relates to the financial viability of the various organizations." Higgins provided the net worth figures for each company, where financial data existed, and noted that "Crossridge - is really nothing going on in that particular corporation. It's a newly formed corporation." Continuing on the issue of "financial viability" and whether there was any risk with a subsidiary of Waste Management, Boyd stated:

The key is, though, is whether Waste Management is willing to take a corporation into bankruptcy in order to avoid responsibilities for a contract with Bergen County. And I think, you know, I think it would be folly to suggest that they would really take a dive on, you know, I think Laidlaw and Waste Management have a long-term interest in the solid waste business and that a contract of this size, for them to renege on it would be a detriment to their business outlook that they probably could not live with.

Boyd explained the risk in selecting a "thinly capitalized" vendor and stated that "a bond of some sort" was required in the range of $8 million to $15 million:

[11]The negotiating team was in possession of the contract between Waste Management of New Jersey, Inc. and Essex County for the transfer, transportation and disposal of solid waste.

Basically, what that bond will buy you is the ability to go out and procure for 60 days, on the spot market, the money to pick up the trash while you negotiate with another vendor.

Boyd focused upon whether or not to split the contract between two vendors:

One of the things we talked about, one of the things we talked about and one of the reasons that initially we discussed, perhaps, splitting the contract between two vendors is that if we were going to go with a thinly capitalized one on one side and a strong one on the other side, if one or the other disappears, you have someone to catch your garbage.

My sense is, based upon the waste stream analysis that we've done, is that it would not be, if we separate the waste stream, we take construction waste and get a bargain price on it, then the remaining waste stream around 2,500 tons could be devoted to a vendor whom we have confidence in - a single vendor. On the other hand, if it's a vendor that is thinly capitalized, then I would not recommend giving the entire contract to them, but rather splitting it.

After commenting on Virotech, the vendor with the lowest price, but which was "thinly capitalized," Boyd turned to the "next level of prices," that is, "78 to 83. Five bucks a ton. That's the band." (In actuality, Waste Management's price was $82 a ton.) Boyd continued, with Toscano expressing a preference for Laidlaw:

BOYD: When you're looking at that band of price, then I go for security. All right?

TOSCANO: It looks to me like Laidlaw is the most secure.

BOYD: Well, it's Laidlaw or Waste Management.

In emphasizing the need to examine closely the risk associated with a thinly capitalized vendor if, for example, it lacked sufficient liability insurance and chose to seek Chapter 11 status, Boyd stated, "The more substantial capital you have in the organization, the less likely it is that you are going to face a vendor default due to either a lack of capital or a threat on their capital that they cannot manage."

Boyd repeatedly urged (but the Commissioners ultimately rejected) the path of security, given the volatile nature of the solid waste industry because of a growing need for out-of-state landfills throughout the Northeast, escalating landfill costs and the closing of landfills. He stated:

And so the issue is - do you lock in your landfill? Do you have certainty that these people know what they are doing? Do you have comfort that in case something unforeseen happens - an accident, a landfill blows up, the things that can happen in the garbage industry - that there is enough financial security behind the corporation to stay with you in the bad times? And that to me is the four corners of the decision.

Boyd concluded this portion of the presentation by commenting upon the range of financial security with the vendors:

On one side you get a real low price with a higher risk of default. On another side you get a higher price with a lower risk of default. And there's a range in between, you know. They're clearly ranked on the terms of financial security --you got to say Waste Management, Laidlaw, Paolino, Crossridge, Virotech. That's about the way they're ranked.

Boyd later returned the discussion to the issue of

financial security:

> *In terms of the issues of the price and security differential, you know, you'd have Virotech on one end that's less secure that is by far your lowest price. On the other end you really have Waste Management and Laidlaw that are really the same price in essence -Waste Management throwing in equipment, operators and various other objects that the Authority does not have to purchase or buy, which makes the price about 78 bucks a ton.*

Following the presentation and some discussion about financial security, preference shifted toward Laidlaw and Crossridge and away from Waste Management:

> *TOSCANO: I think in the beginning that we talked about possibly going with two vendors, and I myself have not ruled that out and the rail option is very, looks very good to me even though they can't get in right away but a little later on, and you have a backup in both directions. If your trucks aren't working too well, the rail can be doing it.*
>
> *CALDARELLA: I think that we have to seriously look at both kinds of options.*
>
> *ARTHUR BERGMAN: There are two points - let me suggest them both. As far as multi-vendors, if one of the multi-vendors is Waste Management, they told us flat out they want to control the transfer operation. They want to control the loading of the truck and so they -- we can't accommodate Waste Management and another firm. [Waste Management's preference to control the loading had no bearing on whether there could be two vendors. Waste Management sought to control the loading only of its own trucks.]*
>
> *TOSCANO: Laidlaw said they would work with somebody else.*
>
> *BERGMAN: That is correct. They said if they only get half a load instead, only a half load, they could accommodate us.*
>
> *TOSCANO: Looking at our location we have an excellent rail site.*
>
> *BERGMAN: Just a second. Let me speak to that a minute. The way I look at it, I think rail is a very viable option and something we should really look at seriously. The proposal we have from Crossridge -- and I give you my evaluation -- what Crossridge brings to the table is a landfill that they are opening in Ohio with a rail siding right in it. It's wonderful and good but they have never been in the business before and I don't know how good that is. Waste Management, the big player that we've spoken to on that - and I remember specifically, but I don't remember Laidlaw saying yea or nay - they would look at rail. Waste Management said, "We'd be delighted to work with you to a rail option if it happens to be cheaper to go to rail than to truck all this stuff out. Whatever percentage can effectively be hauled by rail not only will we look at it and implement it, you can sit there with us and we'll bring in Conrail. Whatever the savings are over trucks, we'll pass that back to the Authority." And so, when I look at that as an option, I wouldn't preclude that as an option even though you're going to a single vendor.*
>
> *HIGGINS: You can't do a change order in the contract?*
>
> *VOICE: Yes.*
>
> *HIGGINS: To reduce the price of the transfer cost?*
>
> *BOYD: That's specifically what we talked about.*

HIGGINS: Waste Management, they say they have a plan right now for a rail and bale facility, but they couldn't commit to it in this contract because it's just not available at this moment.

GARDNER: In New Jersey? They don't know how long it's going to be?

SINISI: Is there any other vendor that could (inaudible).

BOYD: Laidlaw. Laidlaw indicated that they would put us on rail. However, they were less specific.

TEAGUE: How do we do that? How do we do that? What do we do, go for one year without it?

BOYD: No. No. You have a three-year contract and you have a change order and another price.

TOSCANO: We could have a three year contract (inaudible).

BOYD: Sure, sure you could.

SINISI: One of the vendors said that they could not do that.

BOYD: Well, if you're going to split the contract at the site, and making an assumption here which is that we're under any contract scenario, we're going to give the demo waste to another vendor, and Waste Management would accept that. But they would not accept two vendors at the balers, splitting the loads. So, if you're going to split, then Waste Management is out.

TOSCANO: I still would feel comfortable with two firms that could handle all the waste and go one way or the other.

BERGMAN: Anybody who starts up can't get on to the rail site until the balers are up and running and the rail facilities are ready.

TOSCANO: Exactly. But that's only a few months down the road.

BERGMAN: I understand that, but any one of the two biggest ones can probably be up and running as quick as anybody else, because the key is Conrail. Whoever is going to get awarded, if we tell them we want you to go to that rail option for a portion of your waste, they are going to bring in Conrail in anyhow.

TOSCANO: I think you have to remember one thing, we've never had garbage moved by rail before. Unless it's a small amount, and you're talking about a lot of tonnage here (inaudible).

BOYD: Very substantial risk and a concern of ours that we brought up with our meetings, and we brought it up with our meetings with Conrail, is that freight in this County has a tendency to stay at rail yards, that it gets lost on occasion, so that the concern would be if a large number of rail cars with Bergen County waste sat on a siding for thirty days.

CALDARELLA: Oh, they'd find it before then.

BOYD: Yeah, it changes. One of the issues that came up -- this was --

TEAGUE: But wouldn't that be the responsibility of the hauler?

BOYD: Right. It would be the responsibility of the hauler, but if I'm talking about political concern, if it comes back, and it's

kind of like the barge to no where --

CALDARELLA: Needless to say that the Bergen County facility would be ready for rail by June 1, or don't you feel uncomfortable that they are prepared to begin negotiations now and give straight details as to the rail operation?

BOYD: What I'm telling you is they have indicated a willingness to go to rail with us if it's cost-effective. They have not indicated that if it's going to cost them more they are going to move on it.

TOSCANO: But we do have someone that says that they will do it by rail?

BOYD: Right.

CALDARELLA: How in depth did they go into the rail scenario with us?

BOYD: We simply discussed rail. We did not go in depth with the vendors. They indicated that the transport mode -- very frankly, for the big companies I'm talking about at this point, they are indifferent with the transport mode. If one transport mode is cheaper than another, they are happy to use it. And they, you know, I mean Waste Management, I would suggest, if you want to get a contract with Conrail, you know, could probably get a contract as fast or faster than Crossridge. I mean, ah, I don't see that as the issue, alright?

CALDARELLA: We were driving on the Turnpike yesterday going to Trenton and we passed a garbage truck which was delivering massive amounts of garbage through the New Jersey Turnpike and every day I see more and more counties going out of state.

BOYD: You see it more and more.

CALDARELLA: And everyday I am more concerned about crap just going all over the place.

BOYD: Let's not forget that's loose. Let's remember that our trucks are going to be in that herd for 90 days. After 90 days, they are not going to be in that herd because they are not going to be loose. The baled waste is containable. That's one thing when we went on our due diligence of a baler and looked at it, alright, that stuff is not flying all over the place. That stuff is crunched down into a tight little mass and it makes it a more containable waste stream. I mean, the reason we initially went to balers is the material cost associated with it, you know, that you would save money, but it also reduces your spillage and risk of your flying garbage syndrome.

BROPHY: Yea, but, I don't know. I -- I somehow -- how many balers -- how many cars would line up to take care of tonnage -- 2000 tons a day?

BOYD AND OTHER VOICES: 40 or 50 daily back and forth.

BERGMAN: That's assuming the entire waste removal, right?

VOICES: (Inaudible)

TOSCANO: Looking at the numbers with Laidlaw and Crossridge, if you took an average of those two numbers, would you have a considerably lower price?

BERGMAN: But one thing I have to tell you about Crossridge's price -- again my evaluation -- I think the price for rail haul is a little bit higher than it ought to be. I think the reason for that is, it's a start-up organization, they're just opening up a brand new,

beautiful landfill in Ohio and you may be paying for that in your price. I really think the rail cost differential should be greater than that. Again, that is just my professional opinion. I think if we went to the other big boys and got them to hook up with a rail source it might even be lower than 72.

TOSCANO: What we are saying here, we have a firm price from everybody at this point in time. If we did go into contract with Laidlaw or Waste Management, would you then have to negotiate another price later on?

VOICE: Yeah.

TOSCANO: We don't know what that would be based on, there.

BOYD: No, we wouldn't negotiate. No. No. No. No.

VOICES: (Inaudible)

BOYD: We wouldn't negotiate the price on rail. We would go in with them to rail and they would pass through to us directly a transportation savings. We wouldn't split the difference with them, alright? They'd give us all of the savings -- whatever they were. So, if it turns out that rail, that we could negotiate a hauling contract, let's say as a component of an $80 contract right now, 40 of it is transportation, alright? And we go to rail and we get transportation for $30, the whole $10 would come back.

PETRILLO: Don't you have a chance of them making a windfall if they can put the deal together by rail?

BOYD: And, if in fact our assumption about price is correct, alright, cause it's cheaper.

CALDARELLA: If we went to Conrail or whatever railroad we want, we presented the scenario of the future site that we envision someday in the future, correct? If they told us they could have a start-up date of June 1, we could then sign them up to begin rail, if it was cheaper, and Waste Management would just go along with it.

TEAGUE: How can we do that?

PETRILLO: We can't (inaudible).

TOSCANO: Laidlaw will just go along with it?

BOYD: Laidlaw or Waste Management, whoever the vendor is. We go in with the vendor and we would talk.

VOICE: (Inaudible)

BOYD: Yeah, right.

TOSCANO: Supposing later on down the road we negotiated with them to go rail and they said that they don't want to go rail, then you're stuck with what you've got.

BOYD: I guess we can impose that in the contract if we are insisting on going to rail at some point. You know, the issues you have to look at is why go to rail if it's more expensive?

TOSCANO: At that time, how are we going to evaluate it?

BOYD: It's only worth it if it's cheaper.

VOICES: (Inaudible)

BERGMAN: Bonus. It's a bonus.

TOSCANO: How are we going to evaluate

it (inaudible).

BERGMAN: You got to the western part of Pennsylvania, anything beyond that would be a rail bonus.

BOYD: That's our assumption. Alright, that is our assumption. That would have to be validated by a negotiation with Conrail at a price where it, in fact, would be borne out. If it's cheaper, it's cheaper.

BERGMAN: If it is not, we don't take it.

TOSCANO: How do we evaluate a true differential in transportation costs?

PETRILLO: You're at the table with them.

HIGGINS: If it is a dollar cheaper, it is our benefit.

Several significant points emerge from the foregoing dialogue. First, there is a clear push toward Crossridge and Laidlaw by Toscano and Caldarella, who ignored representations that Waste Management would provide rail if it proved cost-effective. Second, as a result of the insistence on a split contract, Waste Management was effectively eliminated because, as Bergman and even Boyd mistakenly advised the Commissioners, Waste Management would not work with another vendor.

Killeen raised an issue, apparently valid to him, that further weakened Waste Management's standing:

> *Mr. Chairman, let me just bring up one thing, and I'm not, I just have to bring it up. We have 40 employees in the landfill, uh, some consideration will have to be given to them.*

The implication was that the BCUA's employees had to be insured a role in the transfer station operation. Because Waste Management was portrayed, albeit mistakenly, as wanting to handle the entire operation to the complete exclusion of the BCUA, another ground was thus articulated for rejecting Waste Management.

At this point, the tape went blank and when voices appeared again, the topic had changed. Later, when the dialogue again turned to the issue of rail, Toscano again was its proponent:

> *BOYD: We have to build, to repair the siding and also prepare the transfer station, which means a different loading platform and all that for rail which will be a change order which will be* <u>*additional costs.*</u> *[Emphasis supplied]*
>
> *TOSCANO: I understand that. But, what happens if the one vendor with the trucks gets their trucks stuck in a blizzard down in Pennsylvania some place or Ohio?*
>
> *BERGMAN: It depends on who you are dealing with, too. Because if it's, wait, Waste Management has a dedicated fleet. They own, lets say, 170 trucks or transporter trucks, they go and they come back empty. Laidlaw's systems is they have contract trucks dead ending here and going back out one way, so they have maybe 600 trucks of which they dispatch all in one direction. Theoretically, (inaudible) a lot of --*
>
> *TOSCANO: They have to come back here anyway.*
>
> *BERGMAN: Oh, no. It's not the same truck coming back.*
>
> *GARDNER: It is a different truck every time.*
>
> *BERGMAN: They may have 2000 trucks of which (inaudible).*

TOSCANO: But your numbers don't change.

When Toscano was questioned before the Commission on why he favored awarding half the contract to Crossridge when the company had no operating history or financial background, facts brought out in the briefing book, he stated, "I may not have been aware of it. I don't recall the whole situation."

Further discussion on rail resulted in the recognition that every vendor would go to rail if, in fact, it proved to be cost- effective. Commissioner Frank C. Longo opined that "it's going to cost more to ship it by rail" and Commissioner Eugene J. Brophy agreed. Boyd testified that he explained to the Commissioners that "railroads typically have severe scheduling problems, trains get laid over in yards for periods of time, ...so I felt that that was a risk and brought that risk out."

Toscano also persisted in supporting a split contract:

> *I don't know, maybe I'm batting my head against the wall. Am I the only one that wants to go with two people?*
>
> *HIGGINS: Including the demo guy or two guys?*
>
> *TOSCANO: No, no, without the demo guy.*

Arguments against having two vendors were then advanced:

> *HIGGINS: You get into a position where your waste flow may be only 25 to 28 hundred after the demo and a lot of these guys are at 2000 at the minimum.*
>
> *BOYD: If you look at the minimum tonnage.*
>
> *HIGGINS: You get into a problem where you split it, it's 12 to 1500 apiece.*
>
> *BOYD: There are Crossridge and Virotech which will go down to a 100 or 500 apiece. The rest of the vendors and United Carting will go to 400. But the rest of the vendors basically are around 2000 for --*
>
> *VOICES: (Inaudible; BOYD: I want to be heard on this.)*
>
> *BOYD: The concern that we have on splitting it, based upon a waste stream which, you have to remember, the recommendation of splitting was at the point at which we were talking about the whole 3750, O.K.? Our view on the split is that by separating out the construction waste stream, which we have identified during the procurement process as a low cost disposal item -- alright? -- by splitting that off, that we have split the contract and that to further split it, you're, we are going to be about 2500 tons per vendor here. Alright?*
>
> *CALDARELLA: You're assuming your waste stream is 3750 and I'm telling you, I honestly believe that the numbers you have right now, pal, that you're going to go over 3750 and be closer to 4500.*
>
> *BOYD: Well --*
>
> *CALDARELLA: You're the cheapest guy in the State of New Jersey. You're going to be the cheapest in New York and you're going to have a waste stream that balloons and balloons and balloons.*

The issue of how much tonnage could be expected is highly significant. The position that the tonnage would be 3,750 tons or more per day was critical in justifying a split contract. Boyd's argument that removal of the construction debris would substantially reduce the daily tonnage was rejected by Caldarella. Caldarella's insistence that the transfer station operation would receive great amounts of

tonnage and the Commissioners' apparent acceptance of his representation are remarkable in light of prior statements to the contrary. According to the tape recording of a May 6, 1986 work session of the BCUA, there was a discussion about the debate between the BCUA and American Ref-Fuel of Bergen County concerning the BCUA's ability to produce 2,200 tons of solid waste per day as projected under their contract for the resource recovery facility. Sinisi advised the Commissioners:

> *[Y]our waste stream is, in fact, a composite of New York State waste. It is from the City or upstate. You're getting it now. There is infiltration of waste from out of state. That's why your waste figures are where they are.*

Even Caldarella acknowledged, "We're getting [New York City Mayor] Koch's garbage." CBA's projection of 3,750 tons per day on the basis that that was the tonnage being disposed of at the Kingsland Landfill was clearly erroneous in light of the widespread knowledge that, because of the very low tipping fee, garbage from other New Jersey counties and from New York was dumped there.

Following a brief discussion on whether the contract would guarantee a minimum of solid waste, to which Sinisi stated that the vendors were informed that the contract would not be "put or pay," Caldarella and Toscano again argued in favor of a split contract with Laidlaw and Crossridge as the vendors:

> *BOYD: We have to say the contract is for something. What's the contract going to be for? A percentage of the waste stream?*
>
> *CALDARELLA: Yeah.*
>
> *TOSCANO: If we went in with two vendors, then when the second vendor went on line with rail, if we did go to rail, you're guaranteed then 50/50.*
>
> *CALDARELLA: No, no. I see no reason why you can't divide it three ways. I see no reason why you can't take care of the construction debris.*
>
> *HAYES: Who's taking construction debris out?*
>
> *CALDARELLA: And then dividing the waste stream as between two modes. If one doesn't work, the other does - rail and truck. And I think it covers every base possible.*
>
> *BERGMAN: The question is, do you want to have one guy doing truck and rail or do you want to have two guys doing truck and rail?*
>
> *CALDARELLA: I am very uncomfortable with that one person being responsible for my destiny.*
>
> *BOYD: I get comfortable with Laidlaw and Waste Management. I don't get comfortable with the other vendors having total control of my destiny. I mean those two companies, I think, are going to be around.*
>
> *TOSCANO: Supposing you took one of those two companies and the Crossridge, the rail option, O.K.? If something went wrong with Crossridge, they could turn around and take the whole ball of wax.*
>
> *SINISI: Unless the other company could not take --*
>
> *PETRILLO: You don't have Waste Management with a Crossridge because Waste Management won't go with it.*
>
> *TOSCANO: O.K., Laidlaw.*
>
> *BOYD: Laidlaw?*

TOSCANO: Laidlaw can take the whole thing over.

CALDARELLA: Laidlaw will take all the loose until the time you're prepared to go to rail.

BOYD: That is what they said. They said $105 a ton --

CALDARELLA: You can give all the loose to Laidlaw from now until the time your rail is ready and operable, if it ever is, and they'll take good care of it. Then split it, if in the final negotiations they're convinced that rail is an operative. You cover every base.

BOYD: We have to see if it is cost-effective.

TEAGUE: Oh yes, if it isn't, it isn't.

CALDARELLA: Well, it's cost-effective right now. It's $6 a ton differential.

BOYD: Excuse me?

VOICES: (Inaudible)

GARDNER: Between Laidlaw and Waste--

BERGMAN: No, Crossridge.

TOSCANO: Everything we do around here we get criticized for, not doing it on time, or not having backup. And I feel that we need some backup here.

BERGMAN: The only real question you ask and the question I ask is whether -- before -- if you want to go truck and rail or do you want to go to two or one vendor -- by -- by using the Crossridge proposal, what you're buying, that you may or not need is the Crossridge Landfill. What I am saying to you is, and suggesting is, that either one of the two that you may award to do the truck, their using the rail to their own facility may be cheaper than Crossridge into their facility. We don't know the answer to that.

BOYD: (Inaudible)

CALDARELLA: What did Conrail say when they discussed the fact that in a lot of rail options, what you do is go from rail to a place in between, to another place, and they said that what they had at Crossridge was that Crossridge has a rail siding on site.

BERGMAN: I don't know that either Laidlaw or Waste Management don't own that either. They can't do it cheaper because we have never asked the question. What I am saying is --

BOYD: No. No. Wait a minute, let me clarify that. Waste Management represented that they have landfills with rail siding, alright? That is not the problem. The problem with Waste Management and the start-up on rail is that they do not have a rail siding at this end. Alright? And they have not developed with us, as Crossridge has, a rail siding proposal. They have indicated that they would be willing to work with us to do that, if that's what we want, and it is cost- effective, alright? If they can't get the numbers on transport though, we have Crossridge at 72. Crossridge also is only offering us two landfills, one in Alabama and one in Ohio. O.K.? Laidlaw and Waste Management are offering us together an aggregate of about 300 landfills across the country.

SINISI: Between Laidlaw and Waste Management.

HAYES: Listen, could anyone who isn't a

Commissioner leave us.

At this point, everyone who was not a Commissioner left the room. The following ensued:

> *HAYES: The Chairman's made a suggestion. Anybody here got trouble with it?*
>
> *BROPHY: With what?*
>
> *CALDARELLA: Splitting it three ways.*
>
> *BROPHY: Will they work together?*
>
> *TEAGUE: It's a three-way split anyway because you can send the construction debris --*
>
> *TOSCANO: We're going to have a two-way split no matter what.*

The discussion then proceeded in very low, inaudible voices. Caldarella's voice is the next discernible one. He again argued for a split contract with truck and rail because of anticipated high volumes of garbage. Contrary to the strong role exhibited with the Commissioners, Caldarella stated before the SCI, "I don't know that I took a position on -- well, one way or the other on whether it should have been a single vendor as opposed to multiple vendors. I could have." In addition, although the SCI has not established the existence of any track record for rail haul at that time, Caldarella represented to the Commissioners that it was being done:

> *CALDARELLA: The construction material -- be honest -- right -- right -- you hear people talk around the state that New York is going to be going up to $90 a ton or $89. We're getting New York waste. Essex County is $102. Passaic is $106. Union is $121. Our stuff -- you're talking about security around here and everything else. We're talking, we're going to be doing better and better. Everybody is going to be coming to Bergen County and I want you to remember that the record (inaudible) 4000 -- 4500 right now -- on some days they get close to 5000 tons a day. And all I am saying is that I don't want to deal, I'm afraid of one guy controlling the destiny and if I can split it even more and have rail and truck and the other thing, I think we're covering our ass all the way around.*
>
> *TEAGUE: But what are you afraid of --*
>
> *HAYES: Cost-effective. We're not sure. It's too risky. It's a new thing. It's never been done before and I think -*
>
> *CALDARELLA: (Inaudible)*
>
> *TOSCANO: What's the point of this. Wait, where's it being done?*
>
> *CALDARELLA: (Inaudible)*
>
> *TOSCANO: Rail is being done?*
>
> *CALDARELLA: Sure.*
>
> *HAYES: I think that what Vinnie's saying is that rail presents itself as cost-effective.*
>
> *CALDARELLA: Rail is being done in this state. Rail is -- the Passaic deal. The problem with the Passaic deal is they're trying to get in rail. Everybody is trying to get on rail because they know (inaudible). This guy [Crossridge] made a heck of a proposal. I happen to be (inaudible) on it. I know we want to have a direct line, because the thing you don't want is to rail it to a transfer station, unload it, put it on a truck and then take it the last 50 miles. (Inaudible) These people have one from here right in the landfill.*
>
> *VOICE: I know that.*

CALDARELLA: When I hear a guy like that say, from Conrail --

LONGO: He's just pushing his idea. You've got to remember that, too.

CALDARELLA: He's [Crossridge is] pushing Conrail.

TOSCANO: Yeah, right.

HAYES: But he's got to have some substance to his scenario.

TOSCANO: I don't think they went through the expenses of getting them to the railroad right away, build the rail sidings right into the landfill and built with -- without being thinking, uh, uh --

HAYES: They see that as future income. If there was a (inaudible) represent what people don't want.

LONGO: (Inaudible)

CALDARELLA: Of course.

HAYES: Of course.

Caldarella then minimized the action to be taken that evening, while still arguing forcefully in favor of Crossridge and Laidlaw:

> *CALDARELLA: (Inaudible) and the other thing is, I think all we are doing tonight, to the best of my knowledge, is authorizing this team to negotiate a trial agreement, a contract. Now, the first step is --*
>
> *HAYES: But we're getting some indication of how we did.*
>
> *CALDARELLA: (Inaudible) would like us to go, but that is not the point I am saying. I think, at least, I frankly want a letter of credit posted of, either divided two ways or three ways, $7 million each, so that we have enough money to run for a month or a month and a half on their letter of credit without getting into trouble.*
>
> *TOSCANO: I think we get bonding -- isn't that bonding here?*
>
> *CALDARELLA: Yeah. So you're covered there. Any kind of [inaudible] you get -- say you pick Laidlaw. Laidlaw said they'll take the loose up until the time for 90 days or 120 days, whatever it is.*
>
> *TOSCANO: Three months.*
>
> *CALDARELLA: They take it all. In the meantime, they are negotiating with Conrail to see if Conrail will do it. Not saying they will come down in price, maybe they will, maybe they won't. But at 72 your still $6 cheaper. If they conclude that Conrail can't, knock them out of the way, bring somebody else in. Let us go out right now with a full option that includes truck, rail and a --*
>
> *TEAGUE: It has to be --*
>
> *RINKO: Who is going to negotiate with the train people. In other words, you are saying that, O.K., Laidlaw is (inaudible) three months.*
>
> *CALDARELLA: They're going to negotiate. Laidlaw's going to take everything until the time that that facility is ready. O.K. So we award Crossridge, Laidlaw and Jerry's client.*
>
> *TOSCANO: You mean the recycling company?*

CALDARELLA: I think it's National Transfer, O.K.

TEAGUE: Where are they?

TOSCANO: That could mean that 1000 tons of construction debris is going to be recycled.

HAYES: Michael, are you saying that -- say rail doesn't work out. Are you unhappy with --

TOSCANO: Construction debris is going to fall off completely.

TEAGUE: Yeah, alright, I can understand that.

RINKO: No. I think Laidlaw can handle one deal in one shot. My problem is, how do you convince Laidlaw that he's going to get enough garbage to haul after three months?

HAYES: He'll take 2,000 tons.

RINKO: But will we have 2,000 tons?

CALDARELLA: And we're not going to guarantee him anything.

RINKO: I know that we're not guaranteeing anything.

CALDARELLA: And the other thing in talking to, uh, I spoke with Nick Amato earlier and what they want to do is the same thing we're talking about doing, truck and rail, because they're not satisfied with the return, ya know. With more and more trucks getting into the system, you are going to have more and more problem with trucks going out and everything else. Another problem that we have that is a very serious problem is whatever transfer station we use, the minute those trucks are going over the top, down (inaudible) when Waste Management (inaudible). We don't have the greatest location in the world until we get to the other side.

RINKO: Well, the point is that trucks is still a tried and proven way of moving garbage. Granted, you have your problems with it. Uh, I have no problem if you want to give rail a try. I have nothing against rail, obviously, but my concern is that I want to be sure that it works.

When Teague suggested that they select Laidlaw and that Laidlaw could explore rail transport, Toscano advanced the argument in favor of a split contract with an exclusively rail hauler as one of the vendors:

> *TEAGUE: Why couldn't we go with Laidlaw tonight and then have our team negotiate with the contract? It's exactly what we were talking before that at a certain point that they should then look into the, using rail.*
>
> *TOSCANO: Rose, that's the problem.*
>
> *VOICE: (Inaudible)*
>
> *TOSCANO: The thing Vinnie and I brought up was placing our destiny in one vendor. One vendor scares me because we won't have a backup and I would feel far more confident with two people.*
>
> *TEAGUE: What happens if Laidlaw does fall apart, and Conrail -- how are they going to service us here? Are they going to have trucks and all that other stuff?*
>
> *TOSCANO: No. Laidlaw is not going to fall apart.*

RINKO: They are not going to expire today.

TEAGUE: I don't feel they are. That's why I'm not as anxious.

TOSCANO: You just have to make it. In 90 days you're going to have a real operation going up there, a baled rail operation. Now you're going to have trucks, baled trucks and baled rail. Now, if one of these guys fall apart on us, either one of those two companies could handle all the garbage.

TEAGUE: Now, if we go with rail, we go with the rail people, who trucks into the rail?

TOSCANO: No, then we bale right there.

RINKO: What are you going to have? You're going to have a portion go rail and a portion is to stay with Laidlaw.

TEAGUE: You mean they are going to dump right at the rail?

VOICES: (Inaudible)

LONGO: It is going to be chaos.

TOSCANO: What is that --

VOICES (including CALDARELLA): (Inaudible; very soft)

LONGO: How would you make that split?

RINKO: After 90 days would we say, O.K., Crossridge you are going to handle 1500 tons a day or a thousand tons a day ?

TOSCANO: Or a certain percent --

CALDARELLA: One thing that I have in my mind is that we could say, uh, Laidlaw, you take the one transfer station (inaudible; too soft) I still --

Every vendor that the Commission questioned about the feasibility of having two different vendors operating on the transfer station pad at the same time and of trying to divide equally the solid waste between them concurred that such an arrangement is neither effective nor practical.

At this point on the tape, no voices are heard for a short while. When voices resume, there is discussion of whether any vendor site had been visited and the issue of guaranteed waste. This side of the tape then comes to an end. There is no record of what transpired from this point until the other side commences, after the attorneys returned to the room. The tape then abruptly ends after the following brief colloquy:

> *HAYES: Gentlemen, when we go out there tonight, the scenario we are discussing here is a land, a rail and a demo.*
>
> *CALDARELLA: What this comes down to (inaudible) demo.*
>
> *BOYD: I see. He wants, he wants to get another bidder in on the demo.*
>
> *TEAGUE: Oh, is that what you wanted, another bidder?*
>
> *BOYD: There are bidders here that if they can't get the big contract, they are willing to do demo at a lower price.*
>
> *CALDARELLA: All right, well, that's no problem. If we gotta do demo, everybody else pulled that out, of course. But, we want to do Laidlaw for 90 days and if possible (blank)*
>
> *BEEP (THE TAPE GOES BLANK.)*

If the BCUA Commissioners actually took a

vote, it did not appear anywhere on the tape. As set forth in the resolution adopted by the Commissioners that evening, they chose Mitchell/Laidlaw and Crossridge, the companies vigorously advanced by Chairman Caldarella and Commissioner Toscano. Caldarella testified before the Commission that he opposed Waste Management because "they wanted the whole contract, A; B, that they would not guarantee rail -- they would think about it." Toscano did not "recall" why Laidlaw was selected and could not explain why Waste Management was rejected. In the BCUA's selection of the vendors, the Commission is not unmindful of the deference typically exhibited by a body to its chairman and to a senior member like Toscano, who was serving his fifth year as a Commissioner, had been Chairman in 1985 and headed the Engineering and Construction Committee in 1987.

The resolution authorized the Chairman "to negotiate and execute agreement(s) with" Mitchell/Laidlaw at $78 a ton of baled waste and with Crossridge at $72 per ton of baled waste. The resolution also directed that Mitchell/Laidlaw "shall provide solid waste hauling and disposal services in open top trucks" at $105 a ton from approximately March 1, 1988 until approximately 90 days thereafter when the permanent transfer station would become operational.

The resolution explicitly excluded from the foregoing contracts all "construction debris and recyclable bulky wastes, which shall be negotiated by separate agreement with a recycling facility." Because the regulations governing the disposal of demolition waste are less stringent than those for municipal solid waste, the cost is considerably less. Therefore, it was to the BCUA's advantage to award a separate contract for the demolition waste. Such was the understanding and intent of the negotiating team. However, the BCUA never negotiated and awarded a separate contract for construction debris and demolition waste. Without any contract or resolution, the BCUA allowed Mitchell to haul and dispose of the construction debris at a price of $105 during both the interim and remaining periods.

The February 1988 edition of the BCUA *Communicator* announced the out-of-state disposal of solid waste beginning on March 1, 1988. The article omitted any mention of Mitchell in reciting the selection of the two companies - Laidlaw Waste Systems, Inc. and Crossridge, Inc. - to transport and dispose of the waste. In addition, it stated that Laidlaw "offered to truck loose waste out-of-state for the first 90 days at $105 per ton," when in fact it was Mitchell who would be handling the trucking. The article further noted that in connection with the baler operation beginning on June 1, 1988, the BCUA was purchasing four balers at about $500,000 each, ostensibly because "baled waste [was] costing less than loose waste."

* * * *

Several questions are raised by the BCUA's selection of both Crossridge and Mitchell/Laidlaw. The Commissioners chose Crossridge to transport and dispose of half of the county's solid waste despite the untested mode of rail haul for garbage. Moreover, as Boyd testified, Yonclas and Fass "were concept people" - "we ran through a number of different concepts for the transfer station on how to put things together and most of them never ended up being fleshed out; you know, there wasn't any substance to them." In addition, Crossridge had no operating history and its personnel had no experience in landfilling. According to Yonclas, he had not been involved in the operation of a landfill before the Crossridge Landfill began receiving some garbage in May 1988; Fass has never been so involved, and, at the end of 1987 and beginning of 1988, the Crossridge Landfill manager had no prior experience in operating a landfill, but had been involved in earth moving and general construction. Nevertheless, the BCUA Commissioners evidently were not affected by the absence of operational experience in deciding to award a multi-million dollar contract to Crossridge; nor were they apparently concerned by Crossridge's lack of financial

history, by the company's financial dependence upon its sole owner, as revealed in the company's financial statements, and by the $8 to $10 million dollar performance bond that would be provided on Scugoza's personal guarantee. Furthermore, the seemingly low price of $72 per ton offered by Crossridge is misleading. In order to implement a rail haul system, the BCUA incurred substantial, additional costs in leasing a portion of the Harrison Industrial Track from New Jersey Transit and financing the rehabilitation of the East Leg of the Kingsland Wye Track. The BCUA paid $355,079 for the improvement of the Kingsland Wye Track.

With respect to Mitchell/Laidlaw, as evidenced in the briefing book, on the tape and from the testimony of BCUA witnesses, the BCUA ignored questions of Mitchell's experience and financial background and stability and relied solely upon Laidlaw's financial history and worth. Typical in this regard was Dakes' admission that Mitchell "might not have been required to submit the same financial information because the Authority was relying on Laidlaw to provide the guarantee." Caldarella discerned no point to "bifurcating" "the package." Consequently, the BCUA waived its own requirement, previously contained in the RFPs and, according to Dakes, applied to other vendors in the post-emergency negotiation process, that each vendor in a joint venture or partnership submit all requested information and documentation.

Although Laidlaw's financial strength is indisputable, the BCUA was hiring Mitchell, not Laidlaw, to be present and perform the day-to-day transportation operation. Laidlaw was the monolith in Canada whose American landfills were going to be used. Mitchell had no experience in the operation of a transfer station and transported solid waste as a subcontractor during a brief stint at the Oyster Bay Transfer Station. Not only did Domenick Pucillo admit to the Commission that Mitchell "didn't have much of a track record," but Mitchell's own consultant, Kenneth J. Rogers, testified before the Commission as to the principals' lack of experience:

> *Mitchell didn't know anything about this business at that time. These were all just local garbage men who do collections. They had no transfer station experience.*

Therefore, even if the BCUA were satisfied that it would have the deep pockets of Laidlaw to draw from if Mitchell defaulted, the realistic threat was that garbage was going to pile up until a new operation could be mobilized. Boyd opined that the BCUA, with Laidlaw's money, could have arranged for a new vendor to step in and "could work out something for a short-term failure" with existing transfer stations until the new vendor could "really take the job over." No one explored the mechanics of how Laidlaw, a Canadian-based company with subsidiaries throughout the United States, but none involved in solid waste in New Jersey or on the east coast, would step in and direct the actual hauling of the garbage if Mitchell defaulted. Dakes was confronted with this issue:

> *Q. As a practical matter, it was Mitchell who was to operate that transfer station and arrange for the transportation to Laidlaw sites. Laidlaw was not to be involved in that. You were relying on Mitchell to perform. Why, then, did you not require the same guarantees from Mitchell that you were requiring from everyone else?*
> *A. Well, as I said before, I don't recall about the financial guarantees, but it's my recollection that we relied more on Laidlaw.*
>
> *Q. As a practical matter, did you really want to see the BCUA have to call Laidlaw if Mitchell couldn't perform and have Laidlaw come in when Laidlaw wasn't already operating in the state or anywhere in the vicinity in neighboring states and would have to rely on Laidlaw to last minute put together an operation and carry on the business if Mitchell failed?*
> *A. No, we wouldn't have wanted that.*

Q. But yet you were relying on a company for whom you did not require track record proof or financial proof of stability?
A. Again, the financial proof was for Eccelston's people to find out.

Gardner was also questioned:

Q. Did you inquire or explore, in the eventuality that Laidlaw had to stand in the place of Mitchell, on a practical basis, how Laidlaw would accomplish that, especially in light of the fact that no Laidlaw company was performing in the area of solid waste in New Jersey or in any neighboring state?
A. Right, we didn't investigate that. I didn't.

Q. Did anyone even raise the issue?
A. I don't remember that ever being raised. Laidlaw was well-known, large, well-liked, as opposed to some of the other big firms, and I don't remember the issue ever coming up.

Commissioner Merin pursued this area with Gardner:

MR. MERIN: I guess the question that I want to come back to is--

THE WITNESS: Right.

MR. MERIN: -- it seems like a fairly major void.

THE WITNESS: Right. Now it does. You're right.

MR. MERIN: And if you look at the pattern of events, it seems somewhat curious that you did not receive correspondence from people that might have had a role to play in this effort --

THE WITNESS: Right.

MR. MERIN: -- that Mitchell/Laidlaw did not submit certain documentation or was not asked certain questions that the other potential bidders were asked at one point or another. There are certain documents that are missing or not available, those documents that were in the office of Mr. Caldarella, and again what we're trying to figure out is what happened there. It could be that you had a momentary lapse there and --

THE WITNESS: Right.

MR. MERIN: -- it could be that other people on that team were responsible for doing it?

THE WITNESS: That's right.

MR. MERIN: Or if one wanted to look at it that way it could be that there were some -- I hate to use this word but -- sinister forces at work that were creating the impression in your mind and the minds of other people that everything was okay. Don't worry about it for some ulterior motive.

What we're trying to do is dissect this thing, trying to figure out why things happened or why things didn't happen, why questions weren't asked when they should have been asked, and we're trying to get a handle, so I guess what I ask you is to try to think a little bit either now or after you leave here and try to reconstruct those events and see if you can come up with some reason why that void occurred.

THE WITNESS: One thing I could point out, we worked from ten o'clock in the morning until midnight a lot, a lot, and sometimes beyond midnight under circumstances that were somewhat hurried at best because we had a deadline.

It could be that things were just overlooked

because it was easier. It was expedient. We were getting toward an end and maybe nobody meant to overlook them, but it happened.

MR. MERIN: But then the question would be why was it overlooked for Mitchell as opposed to being overlooked for someone else?

THE WITNESS: Whether someone was actually orchestrating that --

MR. MERIN: Several times during the testimony today you said that someone said, "It's okay. Don't worry about it. It's taken care of."

THE WITNESS: Right, yeah.

. . .

MR. MERIN: Earlier in your testimony today you made mention of some other people -- I don't quite frankly -- right now I can't recall the names as to who you said said that.

I ask you to reflect on that, and I'd ask you to think about it and let us know again either now or at some point in the future --

THE WITNESS: Sure.

MR. MERIN: -- if you think that there were people or was a person who was trying to push the thing in a certain direction.

Gardner related that on January 12, 1988, prior to the selection of the vendors, he observed Caldarella having a "very private, personal conversation" with "the people that were present from Mitchell." Caldarella then "just came back with, like there was a finality to it, 'Okay, looks like these guys can handle it if it comes to that.'" Gardner assumed from Caldarella's actions and statements that "he was asking [them], 'Look, guys, I'm going to stick my neck out here. If it doesn't work out it's my responsibility. Are you guys sure you can do this?'" There is no indication that Caldarella acted in a similar manner with any of the other vendors.

DUE DILIGENCE INQUIRY

Following the BCUA's selection of Mitchell/Laidlaw and Crossridge as the vendors to transport and dispose of the solid waste, the BCUA embarked on a due diligence inquiry of each vendor. The due diligence on Laidlaw was successfully completed. The BCUA was interested only in Laidlaw's landfill capacity and financial capability and not in Mitchell's background or financial worth. The due diligence search of Crossridge yielded grave problems which ultimately lead to Crossridge's withdrawal, thereby paving the way for Mitchell/Laidlaw to obtain 100% of the solid waste. The Commissioners, who were driven in their January 12, 1988 meeting to select two vendors, were very quickly left with only one.

The BCUA, which had received from the Ohio EPA documents concerning Crossridge's permits on January 29, 1988, conducted several meetings with Crossridge. Conrail also participated in the sessions. On February 3, 1988, the BCUA negotiating team met with Crossridge which, according to the sign-in sheet, was represented by Scugoza, Yonclas, Fass and John J. Pribish, Esq. The minutes of the meeting indicate that Chairman Caldarella announced that its purpose was for both sides to resolve outstanding questions concerning, in part, the permitted capacity of the Ohio and Alabama landfills. The minutes also reflect the BCUA's concern with Scugoza's ownership of the company:

> *Mr. Boyd questioned the ability of Crossridge to function if the sole financial supporter, Mr. Scugoza, was no longer available to head the company. Mr. Pribish assured Mr. Boyd that Mr. Scugoza's legal problems are being addressed and should not be a prob-*

lem, allowing him to properly operate the company. Mr. Boyd asked if there was a legal mechanism in place to assign the Crossridge stock held by Mr. Scugoza to someone else if Mr. Scugoza is not available. Mr. Pribish stated that he will respond to this question at the February 4th meeting.

. . .

Mr. Boyd and Mr. Pribish also agreed that all calls to the BCUA concerning Mr. Scugoza's legal problems will be referred to Mr. Pribish.

Crossridge produced for the BCUA a January 26, 1988 letter by John A. Rocco Co., Inc., stating that if Crossridge executed a contract with the BCUA, it would provide a performance bond in an amount not to exceed $8 million to $10 million in favor of the BCUA and transportation liability insurance in the amount of $5 million.

As the due diligence inquiry progressed, problems began to surface with respect to the capacity and current operating ability of both the Ohio and Alabama landfills. The negotiating team concluded that Crossridge made misrepresentations not only as to the Ohio and Alabama landfills, but also with respect to the ownership of the company. CBA's in-house counsel composed a draft memorandum, dated February 23, 1988, outlining the misrepresentations. The memorandum noted that during the January 12, 1988 presentation to BCUA Commissioners, no question was raised as to the ownership of Crossridge or the extent of its landfilling permit in Ohio. Clearly, had such minimum inquiry been made by the BCUA negotiating team or the Commissioners, a different result would have been likely.

The difficulties encountered in Crossridge's due diligence inquiry also prompted BCUA's Special Counsel for the Emergency Procurement Procedure to submit a detailed report, dated March 2, 1988, on its dealings with Crossridge. In raising the question of whether negotiations with the vendor should continue, the report recited the factual history, which is summarized as follows:

- The data sheet submitted by Crossridge (and reviewed by the SCI) contained the following statement on the capacity of its Ohio landfill:

  At baled density of one ton per cubic yard, the current receiving rate for baled waste at the Crossridge, Inc. facility is 940 tons per day. An application to increase the daily gate rate to 5,200 cubic yards and/or tons is currently pending with final office action/approval scheduled for February 1, 1988. [Emphasis supplied]

  In addition, Crossridge identified as its backup landfill the Harmon Sanitary Landfill in Pell City, Alabama, with "a daily rate of up to 4,000 tons per day until April 30, 1992."

- After the Commissioners selected Crossridge on January 12, 1988, the emergency procurement team met with Crossridge on January 14, 1988 to commence its due diligence inquiry. At the January 14 meeting, the team "learned for the first time that Crossridge was not owned by Chris Yoncales [*sic*] and other investors as had been earlier represented, but was an Ohio Corporation, the shares of which were 100% owned or controlled by Joseph Scugoza." (It is clear from testimony that Scugoza directed Yonclas and Fass in their dealings with the BCUA). Yonclas explained that he was a full-time employee and served as president with no shareholdings. Crossridge also disclosed that the current gate rate at the Ohio landfill was 940 cubic yards per day, but that it would be increased to 5,200 cubic yards per day under a permit to be issued by January 27, 1988.

• Because of the disclosure that Scugoza owned Crossridge and knowledge that the Board of Public Utilities filed an order to show cause against Scugoza and one of his companies, the team "requested that Crossridge counsel supply information regarding Mr. Scugoza's eligibility to participate in this project." Crossridge's attorney responded in a letter, dated January 19, 1988, addressing the issues raised by the BPU Order to Show Cause, the execution of search warrants on Scugoza's home and one of his companies on May 5, 1987 and the convening of a federal grand jury in September 1987. No indictments had yet resulted from these latter two events. Scugoza was able to prove to the team's satisfaction that he was currently licensed to engage in solid waste transportation in New Jersey. In the same letter, the attorney stated the permitted capacity of the Ohio landfill to be 940 tons per day. When the team questioned the daily capacity after reviewing the Ohio permit, which stated a capacity of 940 cubic yards per day, the attorney replaced the January 19 letter with another letter of the same date changing the "940 tons" to "940 cubic yards." The substituted letter also stated that the application to increase the capacity was for 5,200 cubic yards, and not tons as previously represented. Crossridge was confident that the gate rate would be increased to 5,200 cubic yards and argued that the BCUA should rely upon this projected capacity.

• At the February 3, 1988 meeting, the team addressed conflicts in the representations of landfill capacity between the January 19 letter from Crossridge's counsel and information obtained by the team from the Ohio EPA. The meeting (as confirmed by BCUA minutes) established that Crossridge's permitted capacity was 940 cubic yards, which translated into approximately 750 tons of baled capacity per day. There also remained a "serious question" whether the Ohio landfill could accept baled waste. Although the team learned from the Ohio EPA that baled waste was not allowed because of the possible inclusion of toxic or hazardous waste in the bales, Crossridge represented that it could eventually obtain approval for baled waste, which was being accepted at other Ohio landfills.

• At the February 3, 1988 meeting, the team also learned that even if the Ohio EPA issued the permit to increase the gate rate, a 30-day public comment period would follow to allow a challenge to any provision of the permit before the Ohio Environmental Review Board. Consequently, the possibility existed for modification or reversal of the permit. As a result of the uncertainty in Crossridge's ability to increase the gate rate, the team directed its attention to Crossridge's backup landfill in Alabama.

• Fass represented at the February 3, 1988 meeting (as confirmed by BCUA minutes) that the Harmon Landfill was currently accepting solid waste, that it received a renewal of its operating permit in May 1987 and that there were no daily volume restrictions. A letter by Harmon Landfill's counsel, which was provided to the BCUA by Crossridge's attorney on February 4, 1988, stated that the landfill "has been permitted and operated continuously since 1971." Contrary to these representations, the team subsequently learned from the Alabama Department of Environmental Management that the Harmon Landfill had not been continuously operating and that operations had ceased in the spring of 1987. In addition, it was learned that the landfill had a permit for only 75 to 80 tons per day for local waste and that a new operational plan would have to be filed to increase the capacity. At the February 17, 1988 meeting (as confirmed by Dakes'

notes), Crossridge's representatives, Scugoza, Yonclas and its attorney, conceded that Harmon was not an operating landfill and that it should not be relied upon as a backup.

• On February 12, 1988, the Ohio EPA denied Crossridge's application for an increased gate rate. The denial included the statement that there was no permission to landfill baled waste, as set forth in the November 1984 permit. As a result, any bales would have to be opened, spread and compacted on site, thereby effectively reducing the gate rate to 280 tons per day. Crossridge was unsuccessful in its attempt to have the decision reconsidered and filed in federal court for injunctive relief. The team was advised on February 25, 1988 that the Restraining Order to allow Crossridge to operate at the increased capacity was denied.

The due diligence inquiry established that when Crossridge submitted the data sheet, when it was selected as a vendor for the contract and when it underwent the due diligence inquiry, it did not have the required minimum of 2,000 tons per day of permitted capacity for three years, with one year options for years four or five, in either Ohio or Alabama. Crossridge engaged in a series of misrepresentations. Based upon the findings and conclusions of the team, as set forth in the Special Counsel's report, the BCUA officially notified Crossridge, by letter dated March 3, 1988, that if it did not withdraw its proposal, the BCUA would rescind its selection of Crossridge as a vendor. Crossridge had been notified of this likelihood on February 25, 1988. Crossridge withdrew by letter dated March 3, 1988.

As a result of Crossridge's withdrawal and pursuant to the right-of-first-refusal provision in the BCUA's contract with Mitchell/Laidlaw, the BCUA offered to Mitchell/Laidlaw the right and option to transport and dispose of the remainder of the solid waste at Crossridge's price of $72 per ton. The BCUA resolution accepting Crossridge's letter of withdrawal and offering to Mitchell/Laidlaw the option on the remainder was authorized at a special meeting on March 3, 1988. By letter dated March 29, 1988, Executive Director Caldarella notified Mitchell and Laidlaw of the existence of one of the conditions precedent to an exercise of its right-of-first-refusal option. (On February 18, 1988, Caldarella became Executive Director, Toscano acceded to the chairmanship and Killeen became Deputy Executive Director.) Mitchell and Laidlaw exercised the option by counter-signing the letter and, thus, contracted to transport and dispose of the other 50% of the baled solid waste at $72 per ton. The averaging of this figure with the contract figure of $78 per ton resulted in a final price of $75 per ton.

Following Crossridge's withdrawal, the BCUA's interest in rail haul nevertheless continued. The BCUA directed Mitchell to explore rail haul and Mitchell pursued implementation of rail haul with Conrail. Although tried on an experimental basis, rail haul was not implemented because it did not prove to be cost-effective.

THE CONTRACTS FOR TRANSFER, TRANSPORTATION AND DISPOSAL

In February 1988, the BCUA entered into three contracts for the transfer, transportation and disposal of solid waste. The contract for transportation and disposal for the period March 1, 1988 to February 28, 1991 was awarded to Mitchell/Laidlaw. Under a separate agreement, which was provided to the BCUA, Mitchell assigned all of its responsibilities under the contract for the interim period of loose, unbaled waste to Compaction Systems Corp. (a New Jersey corporation)[12] and Willets Point Contracting Corp. (a New York corporation). For the operation of the transfer station during the interim period, the BCUA awarded a contract for equipment to Compaction and a contract for labor to Willets.

THE TRANSPORTATION AND DISPOSAL CONTRACT

The Solid Waste Agreement executed by the BCUA, Mitchell and Laidlaw Industries, Inc. (a Delaware corporation) was dated February 16, 1988. The agreement was for the transportation and disposal of certain solid waste.[13] It specified the landfill sites for the interim period and for the balance of the contract. The contract contained a right-of-first-refusal provision granting Mitchell/Laidlaw the "sole right and option...to provide transport and disposal services ...at...$72.00 per ton" if "the BCUA does not contract with, or intends to terminate its contract(s) with other Contractor(s)." The agreement was signed by Chairman Caldarella, Chester Pucillo for Mitchell and David Sutherland-Yost for Laidlaw.

The BCUA's agreement with Mitchell/Laidlaw provided for a fee schedule of $105 per ton of unbaled waste, $82 per ton of baled waste in the interim period and $78 per ton of baled waste during the remaining period. By not specifying the time period for application of the $105 per ton charge, the contract applied the $105 figure to unbaled waste in both the interim and remaining periods.

Attached to the agreement was a Guaranty, executed on February 16, 1988, to the BCUA by Laidlaw Industries, Inc. for the performance of Mitchell under the contract. The guarantee was not a guarantee of the parent corporation, Laidlaw Transportation, Ltd. Apparently, a guarantee by the parent corporation, an issue used to weaken Waste Management's position before the Commissioners, as set forth in the prior chapter, was no longer important. The agreement also required that by February 24, 1988, the BCUA provide Laidlaw with an irrevocable letter of credit, a form of which was attached to the agreement, in the amount of $13,932,254.

As early as July 5, 1988, Mitchell sought, with Caldarella's support, to lock in years four and five of the contract. By letter dated July 5, 1988, Mitchell's attorney proposed to the BCUA that the contract be continued for years four and five at prices to be fixed by a formula, but within an annual range of $95 to $101 per ton. Mitchell's offer was in effect until August 15, 1988. On July 13, 1988, Executive Director Caldarella provided copies of the letter to, and sought responses from, General Counsel, the Legal Committee, Special Counsel, CBA and Crupi. Having received no response from anyone, Caldarella followed up in an August 9, 1988 memorandum indicating that further communication was received from Mitchell's attorney reiterating that the proposal would be in effect only until August 15,

[12] There are numerous "Compaction" companies incorporated in New Jersey, New York and Connecticut.

[13] The solid waste was essentially municipal solid waste, exclusive of toxic or hazardous waste and construction and demolition waste.

1988. Mitchell's proposal was withdrawn without response by the BCUA. On December 14, 1988, Executive Director Caldarella authored a memorandum concerning years four and five to General Counsel, Chairman Toscano and others. After noting that the resource recovery facility would not be operational prior to 1993, Caldarella recommended "to the Commissioners that we take appropriate steps to contractually lock in waste transportation and disposal rates for the period from March 1991 through February 1993." He "strongly and urgently request[ed] that the BCUA attempt to negotiate" a reduced rate or accept the $105/ ton rate. He sought authorization for him "to commence negotiations with representatives of Mitchell/Laidlaw." None was given. Ultimately, the contract was not extended and the BCUA publicly bid the project and awarded the contract to Chambers Waste Systems of New Jersey, Inc.

THE TRIPARTITE ARRANGEMENT: MITCHELL, COMPACTION AND WILLETS

Mitchell, which could not transport solid waste in loose form, was incapable of performing under the contract during the interim period. Therefore, Willets was essential to Mitchell's fulfillment of the contract during the interim period. Willets was needed for its financial resources and for its expertise in hauling and operating a transfer station. It possessed the necessary landfill and trucking contracts, owned the trailers to handle loose waste and was able to provide the $1 million letter of credit demanded by Laidlaw before it agreed to give the BCUA a guarantee of Mitchell's performance. Compaction also had experience in hauling, but its participation appears to have been more a matter of being involved in the orchestration of the deal than as a result of being necessary to the implementation. It is also apparent that, despite statements to the contrary, Willets was not treated as a one-third equal partner by Mitchell and Compaction.

The interaction and interrelationship of these three companies is revealing. Pursuant to subpoena, Compaction produced a transportation and disposal agreement, dated January 11, 1988, between it and Mitchell. The agreement obligated Mitchell to "exercise all reasonable efforts to make available," and Compaction to transport and dispose of, up to 2,750 tons of solid waste per day. Significantly, the agreement was dated one day *prior* to the Commissioners' selection of Mitchell/Laidlaw and was to operate from March 2, 1988 until June 2, 1988, which was the interim period projected by the BCUA. No witness was able to explain why the agreement was made prior to the selection of Mitchell/Laidlaw. Although the agreement explicitly superseded "any prior or collateral agreements or arrangements, whether verbal or written," in appearances before the Commission, none of the Mitchell principals or Compaction owner Sternberg admitted to any other agreement or arrangement. The copy of the January 11, 1988 agreement provided by Compaction bore only Sternberg's signature as Vice-President of Compaction and no signature on behalf of Mitchell. When questioned, the Mitchell principals and Sternberg each testified under oath that the agreement was not signed by Mitchell and, therefore, was never executed. Subsequent to their testimony, Commission staff discovered a *fully executed* copy of the agreement in documents produced by the BCUA Special Counsel under subpoena. This copy was signed by Chester Pucillo as President of Mitchell and indicated that it was sent by telecopier by Mitchell's attorney to the BCUA on January 29, 1988 at 4:57 p.m.

Mitchell, Compaction and Willets entered into a number of agreements, all dated February 5, 1988, in contemplation of Mitchell executing the contract with the BCUA. All three companies executed the Transportation and Disposal Agreement, termed "tripartite agreement" and signed by Chester Pucillo, Sternberg and Kenneth Tully. The agreement assigned to Compaction and Willets all the obligations and responsibilities of Mitchell under the BCUA contract with respect to the transportation and disposal of the loose, unbaled solid waste during the

interim period of 90 days. This agreement was stated to replace the January 11, 1988 agreement between Mitchell and Compaction.

The tripartite agreement directed that all payments received by Mitchell, Compaction or Willets from Laidlaw or the BCUA in connection with the interim period were to be deposited into an account established solely for use during the interim period. Payments to be deposited into this account, therefore, included the $95 of the $105 a ton to be paid by the BCUA to Mitchell/Laidlaw for the loose waste (Laidlaw retained $10 per ton), the monies to be paid by the BCUA to Willets under their labor contract and the monies to be paid by the BCUA to Compaction under their equipment contract. Disbursements under the account included all expenses incurred by the companies in connection with the interim period, including legal and professional fees and expenses incurred by Mitchell in relation to the negotiation of the tripartite agreement, the BCUA contract and any related Laidlaw agreements. The tripartite agreement also provided for the equal division of the net profits among the three principal companies. Further, each company assumed liability for one-third of any payment that might be made under a letter of credit issued for Laidlaw's benefit by a New Jersey bank, naming Mitchell as account party.

Interestingly, in Mitchell's Application for a Certificate of Public Convenience and Necessity for Solid Waste Collection, filed on June 21, 1988 with the Board of Public Utilities and verified by President Chester Pucillo, Mitchell concealed its financial arrangement with Compaction and Willets by failing to disclose the tripartite agreement. Pucillo answered "no" to the following question:

> *Has the applicant agreed to permit any person to receive, or agreed to pay to any employee or other person (by way of rent, salary or otherwise), all or any portion or percentage of the gross or net profits or income derived from the business to be conducted under the certificate applied for? If so, give complete details.*

Compaction and Willets each signed an agreement with Mitchell regarding the tripartite agreement. The circumstances surrounding the agreements establish the different treatment of each company by Mitchell. Both agreements acknowledged the tripartite agreement, pursuant to which Compaction and Willets "agreed to provide all such services on behalf of Mitchell" during the interim period. The one with Willets also recognized that Willets "entered into further agreements with third parties...in order to enable it to fulfill its obligations" under the tripartite agreement. Both agreements then recited that because Compaction and Willets were each "unwilling" to enter into their respective agreements unless Mitchell executed the instant agreement, "in order to induce" each company "to execute" the agreement, Mitchell agreed to pay each company a dollar figure per ton of baled waste transported and disposed of by Mitchell during the remaining period after the interim period. Mitchell agreed to pay Compaction $5 per ton, but only $1 per ton to Willets. The agreement with Compaction, unlike the one with Willets, contained handwriting that the remaining period included "any renewals or extensions thereof" and was initialled by Chester Pucillo and Sternberg. In addition, Mitchell's agreement with Willets was witnessed by Compaction. Sternberg signed the following paragraph to the Mitchell/Willets agreement:

> *Compaction Systems Corporation is executing this agreement to acknowledge disclosure to it of the terms and conditions contained above.*

In contrast, the Mitchell/Compaction agreement was not witnessed by Willets; nor did Willets ever receive a copy of it. According to Kenneth Tully, he discussed the $1 per ton arrangement with Sternberg and operated under the belief that Compaction would receive the same amount as Willets. Peter Tully testified that he was told by Sternberg, "'Yeah,

yeah, I have the same deal,' - - something like that." Sternberg denied that he had any such discussions with Willets. The Commission finds the testimony of the Tullys to be credible and rejects Sternberg's testimony.

The final agreement executed by Mitchell, Compaction and Willets in connection with the BCUA contract was for the purpose of "set[ting] forth their understanding concerning the transportation and disposal of Open-Top Material after the expiration of the Initial Period or any extension thereof (the 'Remaining Period')." Signed by Chester Pucillo and agreed to and accepted by Kenneth Tully for Willets and Sternberg for Compaction, the agreement provided that during the remaining period, Willets was to provide a minimum of 20 85-yard trailers for transportation of open-top material and Compaction and Mitchell were to furnish the tractors to pull these trailers. All payments made by the BCUA in relation to the transportation and disposal of open-top material during the remaining period were to be placed by Mitchell into a separate account from which expenses and fees were to be paid, with any net profits divided in the ratio of 45% to Mitchell, 45% to Compaction and 10% to Willets.

In actuality, Mitchell paid Compaction $5 per ton, but paid Willets only half of the $1 per ton on the basis that Mitchell originally expected only half of tbe solid waste. Mitchell was unable to explain why the same theory was not applied to Compaction. (Willets subsequently filed suit against Mitchell in federal court on this and other issues.) In addition, during the remaining period, Compaction was paid its 45%, but Willets, which was excluded from the remaining period (Thomas Tully testified that "we were cut out all of a sudden."), did not receive the 10%.

The BCUA was provided with a copy of the tripartite agreement and was well aware of Mitchell's dependence and reliance upon other vendors for the transportation and disposal of the solid waste during the interim period. Despite this knowledge, in a letter to the DEP, dated February 16, 1988, concerning the issuance of a temporary registration certificate to Mitchell for the interim period, Chairman Caldarella stated:

> *Mitchell was selected because of its ability to handle immediately the large volume of solid waste generated in Bergen County. Mitchell demonstrated that it has the capability of transporting and disposing of all of the loose waste in the short-term....*

THE LABOR AND EQUIPMENT CONTRACTS

The BCUA abandoned its previously firm position that *it* would supply all equipment and manpower and executed two agreements, dated February 8, 1988, for the operation of the temporary transfer station: an equipment contract with Compaction and a labor contract with Willets. The equipment and labor contracts for the interim period, which lasted from March 1, 1988 through September 30, 1988,[14] cost the BCUA $5,210,587 or an additional $11.05 per ton of solid waste. Instead of contracting with Laidlaw to handle the loading operation, which it had proposed to do during negotiations at a slightly lower price of $10 per ton, the BCUA chose to assign the responsibilities to two companies that Mitchell brought in. As a result, the BCUA had to deal with three separate companies and paid inordinate sums of money that inured to the benefit of Mitchell, Compaction and Willets. Moreover, it must be borne in mind that Waste Management had offered to perform the same services provided by the three companies during the interim period for $100 a ton, $16.05 less than what the BCUA paid to Mitchell/Laidlaw, Compaction and Willets - a savings of $7,562,312. (With the additional services included in Waste Management's price, even greater savings would have been obtained.)

[14]Compaction continued to provide equipment under its contract until October 31, 1988, although the contract was not extended.

Caldarella testified that when the BCUA realized there would be an interim period, "I just don't think we had the ability to mobilize something that quickly, in all honesty, to get it done." His remark, of course, does not explain why the BCUA engaged in no planning of the equipment and manpower needs when it intended to locate the pad on top of the landfill and immediately after this plan disintegrated. According to Boyd, when the plan was to construct the pad on top of the landfill, Director of Solid Waste Salvatore Crupi and Assistant Director James Bocchino advised that they could handle the equipment and labor needs. "Bocchino was adamant for a long period of time that his guys could handle it and didn't need anybody." Even after the piles failed and the plan was altered, Boyd asked Bocchino "if that changed anything and he said, 'No, we're fine.'"

During the entire time that Boyd was involved in the negotiations and applying for a DEP performance permit, first, for the transfer station on top of the landfill and then for the temporary pad at the base of the landfill, the BCUA Division of Solid Waste did nothing to prepare for and mobilize the equipment and labor for the transfer station operation. In fact, Crupi denied that he was instructed to prepare to shift from a landfill operation to a transfer station operation; but then, he repeatedly denied responsibility and knowledge throughout his testimony. Crupi, who has been Director of Special Projects since 1989, claimed that during his entire employment at the BCUA, "[A]ll I do is all the work...I have nothing to do with policy" and that he took *no* part in *any* discussions on *any* topic. Bocchino's statements during an interview that he was never told the "specifics" is lame in light of the fact that equipment and labor were his area of expertise. It was his duty to obtain the "specifics." Further, how could he opine that his department could handle the needs if, as he alleged, he did not know what the needs were? Later, according to Boyd, both Crupi (after he returned from an absence due to illness) and Bocchino "panicked." Boyd stated that Crupi "hit the panic button and Jimmy Bocchino just panicked. He said, 'I -- you know, I don't have enough people. I can't do this. There's no way I can do this,' and I said, ...'Great, Jimmy. This is a wonderful time to tell me.'"

Boyd testified that based upon "assurances" from the engineering firms, first CBA and later Yurasek Associates, Inc. and LEA Group, Inc., that in "90 days tops we would be at a full-scale baling operation," the BCUA regarded the equipment and labor needs for the temporary facility "as a short-term expense." The BCUA's judgment in projecting a 90-day interim period is highly questionable, especially in light of the fact that the BCUA changed engineers for the permanent transfer station and hired three different firms rather than only one. Gardner testified:

> *Q. When did it become clear that the initial period would have to be extended?*
> *A. I don't think anybody believed it would be ready in 90 days, especially since they were changing engineers.*
>
> *Q. As early as when?*
> *A. January 12th. I don't think anybody really believed that. No one said it out loud. We had internal discussions [at CBA].*

Under their respective agreements, Compaction was to furnish the equipment and Willets the labor "necessary to complete the loading operation of Open-Top Material during the Initial Phase of the Bergen Agreement." Each agreement stated that the two vendors would "be responsible for completion" of the loading operation and contained a provision for any extension "by the mutual written consent of the parties." The BCUA entered into no other agreements with either Compaction or Willets.

The equipment specified in the Compaction agreement was one Caterpillar D-8 dozer at $11,000/month plus overtime, one trash loader 973 at $10,000/month plus overtime and five trash loader 988 or 560 at $16,000/month plus overtime. A minimum

three-month rental period was required. The BCUA was obligated to provide "all fuel, oil, supplies and any other items needed to provide for the regular operation maintenance of the Equipment." The BCUA was also responsible for the transportation of the equipment to and from the transfer station site.

The labor agreement required Willets to provide operators of loaders and dozers, as well as laborers responsible for tarping and other duties.

In deciding to award the contracts to Compaction and Willets, the BCUA disregarded the research and recommendations of CBA and relinquished all responsibility to the vendors. When the BCUA focused upon the equipment needs for the temporary transfer station, Gardner, a civil engineer and former municipal engineer who has been with CBA for approximately 21 years, was assigned the task of locating and obtaining prices for the equipment. He prepared a spread sheet that demonstrated that the BCUA could purchase the equipment and recover the cost within the projected 90 days of operation of the temporary pad. In another CBA document concerning equipment alternatives, Gardner recommended the leasing of major equipment and the purchase of equipment that could be used in the permanent facility, as well as pieces not available for leasing. Gardner was questioned about this recommendation:

> *Q. What happened to that idea?*
> *A. That was nixed.*
>
> *Q. By whom?*
> *A. This is already a watered down version of buying equipment and then selling it at the end of the temporary period and saving money.*
>
> *This is already a watered down version of that, because they are asking -- I'm telling them here to lease some of the equipment, and originally I had suggested they not lease any of it. Who actually changed it this far? I don't know.*
>
> *Q. Are you saying that the original document that you prepared --*
> *A. No, I'm just saying that by the time I had gotten to prepare this original document, the original idea of buying the equipment was already modified.*
>
> *Q. Who objected to that idea?*
> *A. Most of the people from Mitchell....[I] would talk to Domenick [Pucillo] and the people from Mitchell because we all assumed, and I think everybody in the group assumed, that they had experience in operating a transfer station, where we really didn't.*
>
> *So when it came down to picking the equipment, I said, "Well, what do you really need?"*

Despite Gardner's findings and recommendations, the decision-making process regarding the equipment for the temporary transfer station appears to have been greatly influenced, if not directed, by Mitchell. Chester Pucillo testified in the federal litigation between Willets and Mitchell, "We sort of had a feeling that they [BCUA] wouldn't be able to produce bucket loader type equipment." Gardner recalled Mitchell urging that it should furnish the equipment and Domenick Pucillo, specifically, arguing against the BCUA's purchase of equipment because it could not be used at the permanent transfer station and because the BCUA would have to hire someone to handle the maintenance and repairs. Boyd recalled that "Mitchell brought in proposals from" Compaction and Willets; Mitchell "brought us these vendors." In fact, it was Mitchell's attorney who provided the BCUA with drafts of the BCUA's contracts with Compaction and Willets, which companies had not even reviewed them.

Domenick Pucillo did not acknowledge that he directed the BCUA, but portrayed himself as only responding to the BCUA's requests. He testified that he provided an equipment list when the BCUA asked him what the equipment needs would be:

> *Then they asked us, "Well, can you get what you need to make this happen?" And that's where Compaction came in. Compaction had a long-term relationship with Ehrbar Equipment....*
>
> . . .
>
> *We asked them [Compaction] their input, you know, "We need some machines. Do you know where to get them?" They said they had them.*

Sternberg also testified that Compaction provided the equipment because it "had the rapport and the trust of" Edward Ehrbar, Inc. and "had done business with them for some 20 years." Sternberg's testimony in this regard, as it was in other instances, was not accurate. According to Ehrbar's president, Ehrbar sold Sternberg and Villani a piece of equipment "sometime before" and one "sometime after" it leased the payloaders in connection with the BCUA temporary transfer station. In contrast, Ehrbar's president had known the Tully family of Willets since 1947 and Ehrbar had been doing business with Willets since Willets was formed and as recently as the Oyster Bay project. In fact, documentation confirms that Willets made the initial inquiries regarding rental of payloaders for the BCUA project. Later, when Sternberg asked Willets to participate in the trucking and disposal during the interim period, Sternberg spoke to Thomas Tully about providing payloaders. Tully, who contacted Ehrbar because he "knew they had some equipment coming off of Long Island," testified that "[o]riginally," Willets was to provide the equipment. Then, unexpectedly, Sternberg "wanted it to be the both of us." Peter Tully also testified that in discussions with Compaction and Mitchell, Willets was "always designated as the equipment source," but because of insurance problems with having the two companies named on the policy, Sternberg "said he wanted to do it." Sternberg told Peter Tully that the BCUA "needed to have two separate contracts."

Again, Sternberg was cast in the role of directing events. In fact, at no time was Willets allowed to enter the negotiations with the BCUA. Thomas Tully testified that when Sternberg invited him to attend the January 19, 1988 operational review meeting at the BCUA to provide input from his Oyster Bay operation, Sternberg instructed him to sign in as representing Compaction (the sign-in sheet confirms this) and that Sternberg omitted any mention of Willets when he introduced Tully. Clearly, Sternberg was manipulating events; yet, he testified that he did not know why the BCUA needed Compaction and Willets to provide the labor and equipment. Unless Compaction thrust itself into a position to provide services directly to the BCUA, it would not have been able to play an equal role in the tripartite arrangement and it would not have been able to reap great profits on the equipment rental.

Gardner acknowledged that the BCUA could have rented the equipment directly and not through Compaction as the middleman:

> *I pointed that out to them, that there was no reason to do that.*
>
> *Q. To whom did you suggest that?*
> *A. The group, the Chairman, the people from Mitchell, anybody that was involved in it.*
>
> *Q. What was the response?*
> *A. Again, I'm one out of 10 there at that time. They wanted to go with somebody who could get the job done and put the responsibility on somebody else.*
>
> *Q. How about the cost?*
> *A. Did not enter the picture, and it was very*

clearly not the cost-effective solution.

Caldarella placed responsibility for the decisions to have vendors provide the equipment and labor squarely with the negotiating team.

After the BCUA decided to hire an outside vendor to supply the equipment, Domenick Pucillo directed Gardner to Sternberg. Gardner testified:

> *Q. What did Marty Sternberg tell you?*
> *A. Well, he gave me rates.*
>
> *Q. For equipment?*
> *A. Yes.*
>
> *Q. Did he indicate what his company was?*
> *A. No, and I didn't really question him. It was somebody who supplied equipment, and we found those people around, other people.*
>
> *Q. How did Domenick [Pucillo] present to you what Compaction was?*
> *A. Just somebody that they worked with that supplied equipment, but right away, it became apparent it was more than somebody that worked for -- they were old friends, they knew each other from, you know, from yesterday.*
>
> *Q. Did Sternberg tell you whether the equipment he was proposing was owned by his company or leased by his company?*
> *A. No, he didn't. He just said he would supply it. And that was something that kind of surprised me in the end when it showed up on the site. It was so old, it was like its useful life was gone, and right away, it broke down. Piece of equipment broke down the first day. It was old.*
>
> *And then that's really when I came back to the Authority. I said, "This is ridiculous," and I ran out some more spread sheets; I analyzed their bills at the end of a month. The Chairman asked me to do that, directed me, "Show me how much we're spending here."*
>
> *Q. On equipment?*
> *A. Yes, and it was phenomenal.*
>
> *Q. What was his response?*
> *A. Just took it. I didn't pursue it any further.*
>
> . . .
>
> *Q. How did Tom Boyd react?*
> *A. He was also upset. He was surprised that it was so high.... "These are the facts, give them to Vinnie, see what he does."*
>
> *Q. But as far as you know, once the information was provided to Caldarella, nothing further was done?*
> *A. No, but I think I did it again the next month.*
>
> *Q. And what happened?*
> *A. Without being asked, I did two months, and it was worse than it was the first month, and I turned it over to him again, and I don't know that anything happened after that.*

Gardner was questioned why the BCUA contracted with Compaction and Willets, rather than with Mitchell, the primary vendor :

> *Q. Can you explain why it entered into those contracts as opposed to having a contract with Mitchell and letting Mitchell arrange for equipment and labor?*
> *A. That came up. I even suggested that, I think, or someone, I don't know if I did, someone suggested that Mitchell should be contracting with them. For some reason, they didn't want to.*
>
> *Q. Who didn't want to?*
> *A. I think Mitchell didn't want to.*

Q. Why not?
A. They just said, "We don't want to be responsible, it's not our responsibility. We want to use these guys, they're fair, the price is good and get their equipment." They didn't ever -- I can't think of a good reason that they ever gave, and I don't think we ever pursued it. The Authority was happy doing it that way.

Boyd was also under the impression that Mitchell wanted the contracts to go to Compaction and Willets. Thomas Tully testified that Sternberg told him that it was the BCUA that wanted separate companies to provide the equipment and labor. Chester Pucillo claimed not to know why Mitchell was not awarded the services, although he wanted Mitchell to, or why the contracts were awarded to the other companies. Caldarella once again was unable to provide insight and did not know why the BCUA did not contract directly with Mitchell: "You got me. You know, I assume there's some legal reason or whatever." It bears emphasis that Laidlaw had offered to provide the services on a cost-per-ton basis.

Mitchell was not in a financial position to provide the labor because it would have had to advance the payroll for the labor until the BCUA made payment. Therefore, Mitchell needed Willets, which had the financial capability as well as the union contacts. Sternberg was also at the center of this arrangement. Chester Pucillo testified that he recommended Willets to provide the labor only when the BCUA "asked us if there was a company that we knew of that they could use for payroll. So we told them, 'Here's a company, Willets, if you want to use them....'" According to Thomas Tully, Sternberg announced to him that Willets would provide the labor. At no time did the BCUA seek to meet with Willets on the issue.

Gardner was also questioned about any efforts to deal directly with a union:

Q. Did you ever contact a union to see what it would cost the Authority to contract directly with the union for the labor?
A. Never.

Q. Why not?
A. That issue was never brought up. Again, they wanted to get the garbage out of there, and these people knew how to do it, we thought.

According to Caldarella, there was no question but that a vendor would have to supply the labor for such "a very inordinate process." It was a question, however, when he was rejecting Waste Management.

Following commencement of the interim transfer station operation, Gardner continued to analyze its cost to the BCUA. He provided Executive Director Caldarella with a report on the analysis of the first three weeks of invoices submitted by Willets for labor. According to the report's forwarding letter of March 22, 1988, the analysis was requested by the BCUA. The report found that the total labor cost was "at least 15% higher than anticipated" and "at least 25% higher than originally proposed." Although offering several explanations for the unexpected increases, the report made the following recommendations:

We recommend that the operating procedure be reviewed by a joint team from the Authority, the Engineer and Mitchell Environmental. Attention should be directed not only to the duties of each of the operating entities, but the way in which those duties are carried out.

As pad operators, the Authority should assume the lead in directing the day-to-day operations, including use of manpower.

Gardner pointed to an error in one invoice submitted, but noted that he was unable to check the invoices "in detail since backup material is not

available." Gardner also made specific findings as to overtime:

> *Q. If you will turn to page 4, in the first paragraph, you write that about 15 percent of the loading, about 20 percent of the labor time is overtime. How can it be overtime?*
> *A. Well, they were letting people stay there beyond their -- and this was one of the points we made, that they were letting people stay beyond their shift. Why was never clear. People should have been showing up for the second shift early and it would have been the other way around, but it wasn't working out that way. The guys that were already doing the work were staying there working .*

Gardner also prepared a spread sheet entitled "Labor Analysis." He testified about his findings:

> *It's an invoice analysis. This is one Vinnie [Caldarella] had asked me to calculate, the actual costs that we were incurring based on invoices.*
>
> *Q. What was your opinion on the costs?*
> *A. They were ridiculous. We were paying a lot of money. We were just getting started.*
>
> *Q. Did you communicate that to Caldarella?*
> *A. Sure.*
>
> *Q. What was his response?*
> *A. Well, I don't know that he had one. I just made it clear to him.*

At Boyd's request, Gardner reviewed the operating costs of the temporary transfer station from March 1 through March 19, 1988 and provided his findings in a memorandum dated March 28, 1988. Based upon the costs of the contract labor, equipment rentals and associated BCUA costs, which were not all-inclusive and excluded, for example, pad construction, equipment repair and fuel costs, Gardner estimated "the total actual overhead cost" to be between $16 and $18 per ton, *over and above the well-publicized rate of $105 per ton.* No action was taken as a result of Gardner's memorandum.

Gardner did not recall the exact cost of constructing the tarping facility for the temporary pad, but only that "it was expensive." He testified to an additional, unnecessary expense when the tarping facility was not completed in time for the ribbon-cutting ceremony for the temporary facility. The incident serves as yet one more example of the BCUA's callous disregard for the ratepayers' wallet. Gardner testified:

> *The permanent temporary tarping was not going to be ready on opening day....We had arranged a little ribbon-cutting. The Commissioners were going to take a bus down to the landfill, take a look at the transfer station. We were going to explain it, give everybody a hard hat, whatever. There was no tarping station, it was still under construction.*
>
> *So the Chairman went wild..."You got to have something down there."...*
>
> *I scrambled around, found someone to supply temporary -- what amounted to a temporary tarping facility, and I personally went down there with another employee and assembled it, so -- they made me climb up on the racks and put the thing together.*
>
> *We never even drove a truck through it. The whole thing was for show. It cost relatively small money compared to the rest of this, but it was a waste of money. Ended up it was there for a day, took it down and they took it away....*

At a meeting held on March 30, 1988, changes regarding the equipment and labor were discussed. Boyd testified that "during the early period, the entire cost of the operation became a problem be-

cause" of the rented equipment and labor and testified that "the estimates for the magnitude of the problem and the ability to deal with the problem were wrong." Based upon the proposed modifications, Gardner wrote Boyd a memorandum, dated April 3, 1988, wherein he re-estimated the expenses under the Compaction and Willets contracts. The new, lower figure was based upon the elimination of certain labor positions and elimination of both the D-8 dozer and the 976 track loader. (The dozer and track loader, which had been recommended by Compaction and supplied by a Compaction-related company, proved to be too large to turn around on the pad.)

Despite numerous documented analyses by CBA illustrating that the Compaction and Willets arrangements were not cost-effective and despite requests from the BCUA for such analyses, no significant changes were instituted. As Gardner testified, "[W]hen you work for the Authority, you just do what they ask and let them decide what to do." It appears that the BCUA's concern to move the garbage overshadowed any concern about cost. Gardner continued:

> *[B]y the time we got down to the Willets and Compaction prices, the price issue was so out of control that I don't think anybody ever looked back.*
>
> *Q. Was that expressed to Chairman Caldarella?*
> *A. Yes, I told -- well, I don't know in those words, but I told him, this is very expensive.*
>
> *Q. What was his response?*
> *A. He was concerned about getting the garbage moved.*

Similarly, Boyd testified that the equipment contract "probably" should have been modified upon each extension, "but we were so desperate to get them to stay that we didn't negotiate every three months for a new deal." Thus, the picture painted is one of a utilities authority unable to control, if not in fact contributing to, its runaway costs.

It is not clear why the BCUA, in dealing initially with Mitchell for the equipment and labor, did not link the services to a fee per ton of solid waste handled, rather than basing the services on hours, a far more costly approach. The additional equipment and labor services offered by Waste Management and by Laidlaw were tied to the tonnage.

Another factor that affected the BCUA's inability to eliminate or reduce the contracted labor was the incompetence of its Solid Waste Division. Boyd testified that Crupi and Bocchino "kept saying that they could take over all the jobs," but when actually confronted with their people having to perform the jobs, Crupi again "hit the panic button and he wouldn't let us pull people out." Boyd related a meeting of "hours and hours of negotiation where we went down job by job to eliminate people and...Mr. Crupi participated" - he would agree to the elimination and then "back off what he just agreed to -- none of the jobs were eliminated."

The Payloaders

The rental of the loaders by Compaction to the BCUA exemplifies the dereliction of the BCUA to exercise proper and reasonable judgement and to act in the interest of the ratepayers. Gardner testified to his reaction to the amount of money billed by Compaction for the payloaders:

> *All I was concerned with was how much they [BCUA] could have saved by buying from the beginning, because the bill went way over the purchase price before the 90 days was up.*

Under its equipment contract, Compaction rented to the BCUA five Dresser International Model 560B payloaders. Compaction, which is *not* an equipment dealer, did not own the payloaders, but rather leased

them from Edward Ehrbar, Inc., a heavy equipment distributor formed in 1903 and operating in the southern New York area and the 13 northern New Jersey counties. Compaction's equipment lease agreements with Ehrbar were dated February 26, 1988 and signed by co-owner Villani. They contained options to purchase the equipment at market value, plus taxes and less 86% of the paid rentals, and a provision, violated by Compaction, prohibiting any subletting of the payloaders. At no time did the BCUA inquire into the ownership of the payloaders or the type of company that Compaction was. The BCUA never came into possession of Compaction's lease agreements.

The extent to which Compaction may be accused of gouging the BCUA and the ratepayers of Bergen County in connection with the rental of the payloaders is the extent to which the BCUA allowed Compaction to do so. The inordinate profit realized by Compaction at the expense of the ratepayers is seen at several different levels. First, a comparison of the rental price charged to the BCUA by Compaction with the rental price paid by Compaction to Ehrbar shows the great profit realized by Compaction and demonstrates the ineptness, if not incompetence, of the BCUA in striking the deal. For each payloader, Compaction paid Ehrbar *$10,000* per *200*-hour month, with an overtime rate of *$40* per hour; Compaction then charged the BCUA *$16,000* per *176*-hour month, with an overtime rate of *$85* per hour. Compaction's rental charges to the BCUA simply do not bear out Sternberg's incredulous testimony that he applied "an industry standard." In addition to the rental charges, the BCUA also paid for shipment, fuel, maintenance and repairs.

On the bare rental of the machines, even taking into account the fact that Ehrbar did not furnish tires and Compaction did, as well as an insurance coverage factor in favor of Compaction, Compaction realized a profit of approximately 46%. On the overtime rate, Compaction enjoyed a profit of 112%, or $339,093 of the $640,509 charged to the BCUA. (Matthew Ahern, branch manager of Ehrbar, estimated Ehrbar's profit on base rental and overtime to be between 16% and 22%.) For base rental with overtime, the BCUA paid Compaction a total of $1,200,509, while Compaction paid Ehrbar only $599,024. If the BCUA had rented directly from Ehrbar under the same arrangement, it would have realized a savings of $601,485. Even if the BCUA had decided to purchase rather than lease the payloaders, it would have saved $347,509 and would have realized further savings upon resale. Further, if the BCUA had leased the payloaders with the same option to purchase that Compaction had obtained, then it would have been the BCUA, and not Compaction, Mitchell and Willets, reaping the benefits from the subsequent purchase. All of these savings would have been *substantially greater* because the BCUA continued to rent the same payloaders until February 1989.

The substantial increase in the bare rental price charged by Compaction for the payloaders, with the corresponding excessive profit, is not accounted for by the fact that Compaction supplied the payloaders with tires. After Compaction rented the payloaders from Ehrbar without tires, Willets then arranged for the purchase of heavy duty, Michelin Mine D-2 tires for the payloaders from a tire supply company, which also mounted the tires. Each of the 20 tires for the five payloaders cost $3,624, plus tax and installation, for a total of $79,608.60, which was paid from the Mitchell/Compaction/Willets tripartite account. Thomas Tully testified that it was less expensive for them to buy and install the tires than to rent the payloaders with tires.

Matthew Ahern stated that if Ehrbar had purchased the tires from the same vendor at a price of approximately $16,000 per machine, then it would have added $2,000 to the bare rental rate of $10,000, for a final rate of $12,000. When Compaction's rental rate to the BCUA of $16,000 is compared to this figure, even taking into account the fact that Compaction obtained insurance coverage, Compaction would have realized a profit of 48.6% on the rental to the BCUA of each payloader. Indeed, this

profit margin is conservative in light of the fact that the tires were owned by the tripartite group and not Ehrbar and had a useful life (one year to 18 months), beyond the seven-month interim period. Moreover, the Mitchell/Compaction/Willets tripartite group easily recouped the cost of the 20 tires within the time frame of the interim period.

As serious as the foregoing comparison of rental figures is in demonstrating how much the BCUA could have saved by renting the payloaders directly from Ehrbar rather than through Compaction, the situation is made even more egregious by the fact that the discounts received by Compaction on the rentals and repairs, when it exercised its options to purchase the payloaders, were not passed on to the BCUA. Of the $599,024 in rentals paid by Compaction to Ehrbar, 86% or $509,170 was credited by Ehrbar toward the purchase of the payloaders. Ehrbar submitted to Compaction 34 invoices for the repairs of the machines, for a total of $155,398.03. This amount was reimbursed in full to Compaction by the BCUA by check dated October 19, 1988, but was not paid in full by Compaction to Ehrbar. As a result of Compaction exercising the options to purchase on September 30, 1988, Ehrbar allowed Compaction a 50% discount on the repairs. Therefore, Compaction paid Ehrbar only $77,743.50 of the $155,398.03 received from the BCUA. Significantly, the five invoices that Compaction submitted to the BCUA to cover the 34 Ehrbar invoices were dated October 12, 1988, close to two weeks after Compaction learned of the 50%discount.

The BCUA's lack of oversight is also evidenced by its failure to monitor the overtime charged on the rental of the payloaders. The Commission analyzed the invoices submitted by Compaction to the BCUA and by Ehrbar to Compaction. The Ehrbar invoices were based upon the engine meter readings. After making appropriate adjustments for threshold overtime hours between the *176*-hour monthly rate charged to the BCUA by Compaction and the *200*-hour monthly rate charged to Compaction by Ehrbar, the Commission established that Compaction overcharged the BCUA by 281 overtime hours. This overcharge cost the BCUA $23,911.

The financial analysis conducted by the Commission also revealed billing errors. For example, Compaction invoice number 00030, dated July 19, 1989, in the amount $7,050, was paid twice by the BCUA: by check dated September 15, 1989 and by check dated October 23, 1989. As inexcusable as the BCUA's error was in making payment twice, so was Compaction's greed in accepting the double payment.

The overriding and persistent question that remains is why the BCUA chose to rent equipment through a middleman rather than use any of its numerous personnel and consultants to research the issue and negotiate directly with an equipment dealer. Apparently, whatever Compaction offered was accepted at face value. A simple check with the annual edition of Equipment Rental Rates & Specifications, compiled by the Associated Equipment Distributors, would have revealed substantially lower average monthly rental rates for payloaders. Compaction certainly could not be relied upon to protect the county's pocketbook. This situation highlights the ease with which a vendor may take advantage of a utilities authority that is not motivated to perform its duties in a responsible manner. Rather than conducting its own inquiry and challenging Compaction's terms for the payloaders, the BCUA surrended all responsibility to the vendor.

Furthermore, it is noteworthy that the BCUA was not inexperienced in dealing with equipment dealers and with the purchase and rental of equipment. Minutes of BCUA meetings are replete with solicitations and awards of contracts for equipment rental and purchase. In fact, Ehrbar, 40% of whose business is with state and municipal agencies, appeared as a bidder on several BCUA contracts.

* * * *

Fraud by the vendor in the rental of the payload-

ers is demonstrated by the presence and operation of both a transmission meter and an engine meter on each payloader. A transmission meter, which monitors the transmission fluid pressure, records the time that the machine is actually moving, whether forward or backward or if the boom and bucket are in use, whereas the engine meter, which monitors the engine oil pressure, records the time that the machine engine is turned on, regardless of whether or not the machine or boom and bucket are in motion. Therefore, the engine meter logs the total hours that the engine is turned on, that is, both idling hours and movement hours, while the transmission meter logs only the movement hours.

Ehrbar installed the transmission and engine meters at the request of Sternberg, who professed ignorance before the Commission on how the meters work. Once the payloaders were delivered to the BCUA temporary transfer station, a mechanic with Ehrbar was assigned to the BCUA site and visited the site on a daily basis Monday through Friday, except for a few brief periods. Each day, he recorded the transmission and engine meter readings in a book for each payloader. The five books were turned over to the Commission. Significantly, the mechanic stated that in his 15 years of experience, this was the only time that he ever installed transmission meters or observed them in use. Engine meters, however, are standard for billing purposes. The mechanic estimated that the transmission hours should constitute approximately two-thirds of the engine hours. Both Jeremiah Ahern, Ehrbar's President and stockholder, and Matthew Ahern estimated the transmission hours at 75% of the engine hours. The extra 15 minutes every hour on the engine meter includes gear shifting and idling time such as waiting for another truck to move. Matthew Ahern opined that the meters are "quite accurate."

The billing invoices submitted by Ehrbar to Compaction were based upon Ehrbar's reading of the engine meters on the 29th of each month, as set forth in their leases. Utilizing these invoices and Ehrbar's service reports which contained the transmission meter readings, Commission staff compared the engine hours with the transmission hours for each month of operation from March through September 1988. The Commission's findings establish that the payloaders were left standing with the engines running. The figures show that for each month, the engine hours were at least double the transmission hours. The greatest discrepancy was in June, when engine hours were more than four times the transmission hours (2,121 engine hours versus 486 transmission hours) and the least discrepancy occurred in April, when engine hours were still more than twice the transmission hours (2,147 engine hours versus 936 transmission hours). In reaction to the Commission's findings, Jeremiah Ahern stated, "It tells me that the machines were sitting with the engines running and not loading garbage."

The Commission also compared the transmission hours with the operator hours and the findings confirm that the machines were not being operated for extended periods. According to Thomas Tully, the transmission and operator hours should be "relatively close." For each month, the operator hours were at least three times the transmission hours. The greatest discrepancy occurred in June, when operator hours were five times greater than the transmission hours (2,762 versus 486) and the least discrepancy in August, when operator hours were three times more (2,292 versus 936).

The issue is why Compaction had transmission meters installed. In all of Willets' experience, Thomas Tully related, transmission meters have not been used. Jeremiah Ahern, who joined Ehrbar in 1947, testified that an engine meter on payloaders was standard to determine hours of usage and for servicing purposes (for instance, to know when to change the oil) and that the only time that transmission meters were ever requested was for the payloaders at the BCUA temporary transfer station. Matthew Ahern's testimony was the same. Each was questioned as to why a company might want the extra meter installed. Matthew Ahern offered his

"very good assumption":

> *[I]n the negotiations of the rate there is, of course, always discussion about the machines' application and usage, shifts, single, double, triple, what have you. There may very well have been some discussion that the machines are not going to be working a rigorous 24-hour a day shift and possibly to monitor it, it might have been the suggestion of the customer, "If you want to cross-check it, install an additional hour meter because there might be a lot more than typical idle time."*

Jeremiah Ahern agreed that this was "a very possible scenario," but did not recall whether such a scenario entered the negotiations with Compaction.

Obviously, Compaction wanted the transmission meters installed for a purpose. In light of Ehrbar's January 1, 1988 internal memorandum indicating that Ehrbar quoted Thomas Tully an overtime rate of $54.55, Tully's own recollection that the figure was $57 and Tully's statement that a $40-overtime rate is "cheap," it is reasonable to conclude that Compaction may have been able to obtain a better overtime rate, as well as a better bare rental rate, with the argument that the machines would not be utilized a great deal. In any event, it is safe to assume that Compaction requested the transmission meters to obtain a benefit or advantage. Once again, the BCUA failed to protect the ratepayers.

* * * *

It soon became evident to the BCUA that the temporary period would have to be extended. In fact, the interim period was twice extended. Recognizing this fact, Gardner examined the payloader rental situation and, in an April 8, 1988 memorandum to Boyd and Crupi, made a significant recommendation for the BCUA to save substantial money in this regard. However, his memorandum and recommendation were ignored.

In the memorandum, Gardner related that he contacted an equipment supplier who would be able to lease to the BCUA five new 560 wheel loaders by the conclusion of the date of the Compaction contract. The equipment was offered at $12,000 per machine per month for seven months, with no overtime charges, for a total of $84,000 per machine or $420,000 for the five machines. Gardner compared this figure to a projected cost of about $120,000 per machine or $600,000 for the five machines under the three-month Compaction contract, based upon current overtime usage of the equipment. Gardner estimated a savings of approximately $36,000 per machine, or $180,000 for the five machines. Gardner's memorandum concluded with the suggestion that

> *a special meeting be called immediately to discuss this matter as the availability of the machines is limited and if the Authority decides to proceed with this we must act accordingly.*

Gardner was questioned about his April 8, 1988 memorandum:

> *Q. Is it correct to say that you came up with a more cost-effective approach than extending the Compaction contract?*
> *A. Yes, sure.*
>
> *Q. Did you make that recommendation?*
> *A. Yes.*
>
> *Q. To anyone other than Boyd and Crupi?*
> *A. I don't know that I did. If we were still -- a memo like this would indicate to me we were having a meeting, otherwise I would have sent a letter, so there were probably other people present, but I don't remember who they were.*
>
> *Q. What came of your recommendations?*

A. They didn't want to do it.

Q. Why not?
A. They were satisfied with what was happening.

Q. Even at the cost?
A. Well, cost wasn't an issue. The garbage was being moved.

Q. For whom was cost not an issue?
A. For most of the people that were involved with the project on the Authority's side.

. . .

A. That, I can't -- I don't remember specifics. But we all operated under the impression that whatever it cost, we had to move the garbage.

Q. Going through these documents, especially your memos, you seem to be constantly hammering the BCUA with how expensive --
A. I suggested to them --

Q. -- the operation was and how the Authority could cut its costs significantly.
A. Yes.

Q. Why did your constant announcements fall on deaf ears?
A. We -- as a professional working for someone like the Authority, all you can do is recommend, you can't make them change, and that's all we were doing was recommending.

Q. Was no one, outside of CBA, in favor of cutting costs?
A. It just never came up. Every time I brought it up was when it came up.

Q. In the final paragraph, you call for a special meeting. Was one held?
A. No. I remember this.

Not only was no meeting held, but the BCUA chose to extend its agreement with Compaction. If Gardner's recommendation had been followed and the equipment rented for the seven-month period from June through December 1988, the BCUA would have paid only $84,000 per machine, or $420,000 for the five machines. Instead, the BCUA continued to rent the same payloaders and paid $194,198 per machine, or $970,990 for the five machines in bare rental and overtime, for the same seven-month period. Thus, the BCUA ignored a savings of $550,990. The BCUA's lack of judgment was compounded when it continued to pay the rental rates until February 1989, the delivery date of the new payloaders that the BCUA had purchased for the permanent transfer station.

THE PURCHASE OF PAYLOADERS FOR TRANSFER STATION/BALER FACILITY

The lease agreements between Ehrbar and Compaction for the five payloaders ended as of September 30, 1988, the conclusion of the interim period. Compaction exercised the options to purchase all five of the payloaders leased by Compaction from Ehrbar. Of the five, Compaction simultaneously sold one payloader back to Ehrbar at a higher price and the remaining four were divided equally among Compaction, Mitchell and Willets, with each company acquiring one payloader and a one-third interest in the fourth payloader. Although Ehrbar's invoices to Compaction were dated September 30, 1988, the invoices issued by Compaction to Mitchell and Willets were dated September 7, 1988. Each company's share was $121,861.37. Mitchell and Willets paid Compaction by checks dated October 6, 1988.

Information on the ownership of the four payloaders was furnished to Ehrbar. A handwritten note to Matthew Ahern identified, by serial number,

the payloader owned by Compaction, Mitchell and Willets and by their joint ownership. Despite this configuration, the note instructed that during the rental period with the BCUA, Compaction was to receive "all invoices for the 'ownership' repairs...regardless of ownership, as that is whom are [*sic*] agreement is with."

Payloaders were also necessary for the operation of the permanent transfer station. On August 29, 1988, the BCUA issued the bid documents for Contract 88-41, "Phase IV - Equipment" for the proposed transfer station/baler facility. The bids were due on September 7, 1988. In addition to five front end loaders, the BCUA sought to purchase five fork lift trucks and four yard horse tractors. The BCUA received several bids, including one by Ehrbar to provide five Dresser 555 payloaders. The bids were reviewed by the BCUA's project engineer, LEA Group, Inc., of Boston, Massachusetts, which concluded that the bids were nonresponsive because they failed to meet the delivery schedule set forth in the specifications. At a special meeting on September 19, 1988, the BCUA rejected all bids and directed that Contract 88-41 be re-bid.

On September 23, 1988, the bid was reissued. In contrast to the original bid, the specifications under the second bid required the vendor to furnish rental equipment beginning on October 17, 1988 until delivery of the new equipment. The bid documents stated that availability of equipment for rental constituted "a material factor to be considered." Bids were due on October 3, 1988. Although the minutes to the September 2, 1988 operation review meeting noted that "Domenick Pucillo can provide additional payloaders until the permanent equipment will be delivered," Mitchell was not asked to provide them. It is not known why the offer was not accepted, especially in light of the fact that the tripartite group owned the payloaders that were on the pad.

On the rebid, the BCUA received three bids for front end loaders. Ehrbar again submitted a bid to sell five front end loaders and included the rental of five front end loaders, with tires, at $4,200 each per week, or $21,000 for the five pieces per week. Ehrbar's was the highest bid at $1,387,615.

In a letter dated October 12, 1988, LEA Group, Inc. reported on the bids received on October 12, 1988. With respect to the front end loaders, LEA reported that the low bid of $1,071,960 by Foley Machinery Co. did not include rental equipment and did not meet the delivery schedule and, therefore, recommended acceptance of the next lowest bid submitted by Bernardi, Inc. Pursuant to LEA's recommendation and at its October 12, 1988 meeting, the BCUA rejected Foley. The contract was then awarded to Bernardi, Inc. at $1,162,125. However, the award was rescinded by resolution dated October 20, 1988 because Bernardi, Inc. was unable to deliver the interim rental equipment by October 17, 1988. The contract was then awarded to Ehrbar and was executed on October 27, 1988.

Only Ehrbar was able to provide rental payloaders to the BCUA within the specified time frame and it was able to do so because the payloaders that it provided were already on site. The only difference was that four of them were no longer owned by Ehrbar because Compaction exercised the options to purchase. The change in bid specifications requiring the furnishing of rental equipment proved to be tailor-made for Ehrbar. By changing the bid specifications to require rental machines, the BCUA prevented competitive bidding and insured that the same group of vendors would continue to benefit. Under the contract, the BCUA paid Ehrbar $4,200 a week for each payloader. Ehrbar, in turn, paid Compaction $4,000 per week.

BCUA OBTAINS SERVICES WITHOUT ISSUING CONTRACTS

In violation of the Local Public Contracts Law, *N.J.S.A.* 40A:11-1, *et seq.*, the BCUA obtained and paid for services without publicly advertising for

the services or, assuming the stretched umbrella of the emergency declaration, without a contract and without even a resolution.

At the loose solid waste rate of $105 per ton, the BCUA paid Laidlaw and Mitchell to transport and dispose of the construction and demolition debris, even though the transportation and disposal contract clearly stated, "In no event shall Acceptable waste include...Demolition Waste or Construction Debris." (During the remaining period, Mitchell retained the full $105 per ton.) In addition, the BCUA paid $3,683,964.46 directly to Mitchell for the transportation and disposal of hospital and "special" waste, which was also specifically excluded from the transportation and disposal contract. In both instances, the BCUA disregarded the statutory requirements of either publicly advertising for bids and bidding for the services or, at the very least, awarding contracts pursuant to resolutions describing the emergency.

Also without contract or resolution, the BCUA paid Compaction $2,770,629 for labor and $171,535 for equipment rental not specified in its equipment contract. The BCUA had only one contract with Compaction, the February 16, 1988 agreement for certain enumerated equipment. Yet, the BCUA paid Compaction for laborers and operators and other types of equipment that included jockey trucks, forklifts and Bob Cats. No BCUA witness before the Commission, including Caldarella, Killeen, Crupi and Bocchino, all of whom approved payments, was able to explain the authority for the services and payments or how the situation evolved. Even the BCUA's General Counsel stated, "I can provide you with no authority, no."

Caldarella was questioned about an invoice and corresponding check, dated December 21, 1988, for $498,412.06 for the period November 10, 1988 to November 30, 1988. The payment included $413,906.68 for labor, $60,999.47 for equipment rental and $23,505.91 for maintenance and field service on the equipment. The supporting invoice was approved and signed by Executive Director Caldarella for the BCUA and by Domenick Pucillo as secretary/treasurer of Compaction, even though Pucillo did not hold any position with Compaction. Caldarella again accepted no responsibility and waived a pointing finger in several directions. By Counsel Saros:

> *Q. The only contract that Compaction had with the BCUA was to provide equipment.*
>
> *Under what authority did Compaction provide these laborers and under what authority did the BCUA make payment to Compaction for these laborers?*
>
> *A. Again, counselor, I'm not the one that negotiated -- I negotiated but I did not draw the legal documents or the contracts, and I really don't understand that.*
>
> *When my consultants tell me that Compaction is doing this or Compaction is doing that and I see a check for Compaction, I, you know -- I just sign the check or do whatever I'm doing.*
>
> *The issue of Compaction in the manner that you're talking about saying that they didn't have a contract or they did have a contract or whatever was never brought to my attention. It was not something that was discussed at Authority meetings and was not an issue at the Authority. Whatever they were doing, they were doing.*
>
> *Q. Whenever you approved vouchers submitted by Mitchell or Compaction or Willets, did you ever take any steps to determine whether those services were, in fact, provided?*
> *A. Well, sure I did. I would ask -- you know, my assurance is that a Mr. Killeen or a Mr. Battaglia or whoever else would sign them had gone through these.*

I think there were also times when Mr. Dakes and Mr. Boyd or -- there used to be somebody else -- maybe somebody from the accounting firm would also look at them.

Counsel Saros probed Caldarella on the procedure that resulted in payments for services without a contract:

> *Q. What was the procedure when you were Executive Director for payment of vouchers once the vendor submitted the voucher? What was the review process, who signed, who approved?*
> *A. Well, it depended on the department --*
>
> *Q. Solid Waste Division.*
> *A. Solid Waste Division. You know, we would get them and review them. A lot of times Mr. Boyd or Mr. Dakes or somebody from the -- I think Mr. Killeen would call them in and ask them to look at this or that.*
>
> *Q. Did you always have to approve the vouchers? Was that the practice?*
> *A. Me?*
>
> *Q. Yes, as Executive Director.*
> *A. I'm not sure, but I think Mr. Killeen approved vouchers. I'm not sure.*
>
> *Q. Did you change the procedure at all with respect to payment of vouchers after you assumed the position of Executive Director?*
> *A. I don't -- it would not surprise me, but I do not recall.*

Killeen denied that he simply rubber stamped vouchers, but could offer no explanation why he approved payments when there was no contract. Toscano, then Chairman, testified to the Commissioners reviewing and approving lists of payments to vendors and stated, "I have to assume that the -- that the bills that are submitted for payment are accurate and have been signed by our staff." Crupi testified, "I don't make the bills. I don't pay the bills....I don't get to see any of that." Moreover, no BCUA witness was able to confirm that any attempt was made to verify the information contained in the supporting documentation to vouchers.

The Commission also finds that the BCUA failed to renew the Compaction and Willets contracts. Although the interim period was extended twice, the BCUA produced only one agreement purportedly extending the Compaction contract and no agreement extending the contract with Willets. The second agreement with Compaction, dated June 2, 1988, was signed by Chairman Toscano (although he testified before the Commission that he had never heard of Compaction) and Compaction's Vice-President Sternberg. However, the agreement was identical to the original February 5, 1988 agreement, except that February was crossed out and the date of June 2 written. Therefore, it contained the dates of the original term and not the dates of the extension. Furthermore, it set forth the original rental equipment without any change, even though there were changes to the equipment.

THE FLOW OF MONIES

BCUA witnesses admitted that they did not explore the profit margin contained in each vendor's price, but focused on the range of competitive prices. According to Gardner, the issue was never even raised by the negotiating team. The BCUA exhibited no effort to conserve the ratepayers' finances. One can hardly have expected the profit-driven vendors to do so. As Mitchell's consultant callously stated, "In my mind there is no unreasonable profit;" "As far as I'm concerned, there is no utility's view," and "What our profit would be in doing that I don't think is a concern -- should be a concern to anybody." But it should have been a concern to the BCUA, the guardian of the ratepayers' finances.

During the three-year period from March 1,

1988 to February 28, 1991, the BCUA paid approximately $154,000,000 to Mitchell, Laidlaw, Compaction and Willets. Under the transportation and disposal contract, the BCUA paid $142,257,434 to Laidlaw, which retained its share of $28,487,176 and forwarded the balance of $113,770,258 to Mitchell. From March 1 to December 3, 1988, Laidlaw received $10 of the $105 per ton of loose waste. (Laidlaw demanded the $10 per ton arrangement before it would agree to guarantee Mitchell's performance during the interim period, a performance that was delegated to two other vendors. In essence, then, the BCUA was paying $10 a ton for Mitchell's inexperience and lack of capitalization.) Thereafter, Mitchell received the entire amount for the loose waste during the remaining period. Approximately $59,233,141 was deposited into the tripartite account, which was maintained by Mitchell for the benefit of Mitchell, Compaction and Willets and included payments from the BCUA for the transportation and disposal of the loose waste and the services to operate the temporary transfer station. This amount consisted of $47,388,965 forwarded by Laidlaw to Mitchell from BCUA payments and direct payments by the BCUA of $3,683,964 to Mitchell, $4,691,346 to Compaction and $3,461,405 to Willets. The profit distribution to Mitchell, Compaction and Willets from the tripartite account appears to have been $2,992,159.67 to each company. Even though Willets' participation in the project ceased at the conclusion of the interim period on September 30, 1988, the tripartite account remained active. On September 20, 1989, there was an additional profit distribution to Mitchell and Compaction of $135,000 each and a $30,000 payment to a law firm trust account. In March 1991, a final profit distribution was made to Compaction by checks in the amounts of $42,856.40 and $15,545.61.

With respect to the revenues from the baled operation, Mitchell paid identifiable commissions of $5,378,712 to Compaction, $537,901 to Willets and $582,779 to Salopek's company.

In identifying net profits to Mitchell, Compaction and Willets from the BCUA project, the amounts are understated. They do not reflect perks to Mitchell and Compaction, such as leased vehicles for Mitchell's principals, rent payments to affiliated companies, expense reimbursements and salary paid to a spouse. The net profit figures also do not reflect amounts paid as expenses to related companies, thereby resulting in profits to the same principals. For instance, $8,586,861 was paid to Bulk Transfer, a trucking company set up by Mitchell to transport loose waste during the interim period, and $173,193 to another related company. Compaction also subcontracted work to affiliated companies. For example, approximately $1,400,000 was paid to B.V. Rubbish Removal Co., resulting in increased profits to owners Sternberg and Villani.

Mitchell's tax returns reveal just how significant the BCUA contract was to Mitchell and its principals. In 1987, prior to the award of the contract, Mitchell's net profits and salaries to principals constituted a mere $107,549. This figure soared to $6,497,534 in 1988, skyrocketed to $7,950,474 in 1989 and dropped somewhat to $4,443,031 in 1990. Mitchell's reported net worth of approximately $25,000 in 1987 ballooned to approximately $2,900,000 in 1988. The remark of a Mitchell principal that the BCUA contract delivered to them "the American dream" was certainly no understatement. The following chart graphically demonstrates the significance of the BUCA project to Mitchell in the first year of the contract's operation:

	1987	*1988*
NET PROFITS	**$107,549**	**$6,497,534**
NET WORTH (APPROXIMATE)	**$ 25,000**	**$2,900,000**

Willets, a million-dollar company unlike Mitchell or Compaction, provided the Commission with computer printouts indicating gross profits of $6,808,669 from the temporary transfer station operation. This figure has not been reduced by

Willets' overhead and operating costs attributable to the BCUA project.

The financial records of Sternberg's and Villani's companies are also enlightening. They establish that the BCUA project constituted approximately 46% of the 1988 revenues of seven of Sternberg's and Villani's subchapter "S" corporations and approximately 91% of Sternberg's and Villani's 1988 income. In addition, the Compaction company handling the Bergen project reported on its New Jersey corporate tax returns a net profit of $28,636 in 1988 and a loss of $33,108 in 1989, despite the fact that its two owners split $3,406,636 in 1988 and $2,788,464 in 1989. The meager net profit reported in 1988 and the loss taken in 1989 were the result of deductions for expenses that are highly questionable. The BCUA project also yielded Sternberg and Villani a financial benefit apart from the salary and profit distributions that they received. The Compaction company that handled the Bergen account belonged to a group of Sternberg-Villani affiliated, multi-state subchapter "S" corporations that frequently had money and assets passed among them on an "as needed" basis. The loan and exchange transactions among these companies involved approximately $830,000 of funds obtained from the BCUA project from March 1988 through October 1990. The records of these companies are replete with inconsistencies and an absence of accountability in the manner that monies were funneled in and out of the companies. In addition, the records of the Compaction-Bergen account contain expense items that lack documentation and appear to be improper. One such expense is $161,500 purportedly for "tonnage." This figure raises very serious questions.

Initial intelligence information in the investigation indicated that there was a payoff of $2.50 per ton. This figure coincidentally appears in the workpapers of Compaction's New York accountants for the BCUA project as follows:

> *CSC Bergen*
> *additional accruals*
> *12/31/88*
>
> *Per discussion with client an additional accrual is necessary for amts due Mitchell environmental [sic]*
> *64,600 tons X $2.50/tons = $161,500*

Sternberg was questioned about the $2.50 per ton accrual for monies owing to Mitchell. By Counsel Saros:

> *Q. Mr. Sternberg, Berenson, Berenson and Adler prepared the income tax returns for all of your companies for tax year 1988. Is that correct?*
> *A. Yes.*
>
> *Q. During December 1988, did you direct anyone at Berenson to show an additional accrual for amounts owing to Mitchell Environmental based on 2.50 per ton of solid waste?*
> *A. I don't understand the question.*
>
> *Q. At the end of 1988, did you have a conversation with anyone at Berenson telling them that Mitchell was owed an additional $2.50 per ton of solid waste, total amount being $161,500, and that that should be reflected?*
> *A. I don't recall.*
>
> *Q. Do you know whether Mr. Villani did?*
> *A. I wouldn't know.*
>
> *Q. I'm going to show you the workpapers of your accountant for year-end 12-31-88 for Compaction Systems Corp., the New Jersey corporation. It's Exhibit Number 288, and I'm going to direct your attention to a certain page.*

At the top it is written "CSC Bergen, additional accruals 12-31-88," and on that page is printed "Per discussion with client an additional accrual is necessary for amounts due Mitchell Environmental, 64,600 tons times $2.50 per ton equals $161,500," and ask you to look at that.

When Sternberg was unable to explain the notation, he was requested to research the issue prior to his next appearance. At his subsequent appearance, the issue was revisited, but with the same unsatisfactory result:

Q. One of the questions pending from the last session was with respect to the accountant's workpapers, and we will show you the particular page now that indicated the accountant was given the instruction to pay Mitchell 2.50 a ton for a total of $161,500 approximately. The exhibit is Number 288. You were to ascertain for us what that was in connection with.
A. The accountant asked me what I thought we may pay Mitchell from the Oyster Bay project, and I told him -- he wanted to know in dollars, and I told him that the numbers could be 150, 160, 170,000 if things went well, and that was the discussion, and he wrote whatever he wrote here.

Q. How was the figure 2.50 a ton arrived at?
A. I don't know.

Q. How was that related to the instruction you gave him?

MR. STEVEN GERBER: I don't know that the witness has testified he gave an instruction.

BY MS. SAROS:

Q. Who gave the instruction to the accountants? I thought you said that you spoke to the accountant about that.
A. He asked me what I thought we may pay the Mitchells from the Oyster Bay project, and I said I really didn't know. He said, "Well, take, you know, an educated guess." And I said, "Could be 150, 60, 70, 170,000, I don't know." And he said, "Okay," and that was it.

Q. How many tons were involved?
A. I don't know.

Q. What were you basing your figure on that you gave him?
A. What I expected profits to be. [But the Oyster Bay project concluded the prior August and profits should have already been known.]

Q. When did that conversation occur?
A. I don't recall.

Q. Did it occur in 1987 or 1988?
A. I don't recall.

Q. With which accountant did you have that conversation?
A. Bruce Lumish.

Q. How did you, for the purposes of today testifying, how did you recall that event?
A. I spoke to Bruce Lumish.

Q. About the documentation in that accountant's workpapers?
A. Yes.

Q. Is he the one who told you about the conversation you had with him?

MR. GERBER: I don't understand the form of the question. Can you rephrase it?

BY MS. SAROS:

Q. Did the accountant tell you the conversa

tion you had with him that resulted in the notation in the workpapers?
A. He -- I asked him what all that scribble was, and he said, "Well, you told me that's what you thought, you know, we may -- that we may pay them, the number between a number and a number. And I just sort of worked it out myself, and that's the way I came up with that."

Q. Did he explain to you how the 2.50 a ton was arrived at?
A. No.

Q. Mr. Sternberg, if it, in fact, relates to the Oyster Bay project, why is the notation appearing on a page with a heading "CSC Bergen," which indicates the Bergen account?
A. I have no idea.

Q. Did you have that particular conversation with the accountant?
A. No.

Q. Mr. Sternberg, would you, in order to assist the Commission get to the truth in this matter, would you agree to have your --
A. Are you implying that I'm not telling the truth?

MR. GERBER: Just a minute. Just a minute.

BY MS. SAROS:

Q. -- would you agree to have your accountant talk with us?

MR. GERBER: We'll take that under advisement.

Sternberg refused to allow the New York accountant to be interviewed on this issue. When the Commission directly contacted Robert K. Berenson, one of the partners of the New York City accounting firm, in early 1991 to request an interview in his office, he declined on instruction of the clients. When notified in December 1992 that their names would appear in this report, both Berenson and Lumish, through an attorney, indicated a willingness to now testify before the Commission. (The attorney also stated that the initial denial of the Commission's request for an interview was "for ethical reasons.") The Commission finds that Sternberg and Villani obstructed the investigation.

The 1988 New Jersey corporate tax return for Compaction-Bergen includes a year-end expense accrual for "tonnage" in the amount of $161,500. Even if it were true that this money was owed to Mitchell for work performed on the Oyster Bay project in New York State, the reduction of reportable income from Compaction-Bergen, a New Jersey corporation, for an expense allegedly incurred by Compaction Systems Corp., the New York corporation, and relating to a New project is improper and has income tax fraud implications. Further, the records of the New York Compaction involved in the Oyster Bay project contain no evidence of this expense. Although Compaction deducted this accrued expense on its 1988 New Jersey tax return, the actual payment of the $161,500 had not been made as of October 1990. In 1989, the company's New Jersey corporate tax return included a year-end accrued expense of $170,000, which was undocumented except for the accountant's notation "add'l job expenses per client." This expense was also unpaid as of October 1990. In the accountant's workpapers, these sums are noted as "reaccruals," contrary to standard accounting practices. The questionable expenses identified by the Commission will be referred to the New Jersey Division of Taxation and the IRS.

Sternberg's assertion that the $161,500 figure was based upon $2.50 per ton of Oyster Bay waste is further challenged because the figure is nowhere located in Mitchell's records. Thus, the conclusion that the money was not owing to Mitchell is further buttressed.

* * * *

It cannot be overstated that the BCUA contracts and tripartite financial arrangements resulted in great, indeed inordinate, profits for the vendors. Extensive examination of financial documents by the Commission's accountants has disclosed that massive amounts of money were moved around the Sternberg-Villani companies in several states and that significant sums were withdrawn from accounts located outside of New Jersey and beyond the reach of the Commission. Therefore, the monies were untraceable. As a result, if there were in fact bribes or kickbacks related to the award of the contracts, there was ample untraceable money for the payoffs.

THE TRANSFER STATION/BALER FACILITY

The BCUA's imprudent expenditure of public funds for the transfer, transportation and disposal of solid waste turned into an avalanche of spending when the BCUA constructed the temporary transfer station, purchased the site for the transfer station/ baler facility and constructed the facility. If the BCUA had engaged in proper planning, thereby obviating the necessity of declaring an emergency, there would have been sufficient time to design and construct one suitable transfer station and no need for a temporary facility. The $4,543,194 cost for the interim transfer station was completely avoidable and was due solely to the BCUA's prior inaction. The BCUA's failure to act also resulted in its paying an exorbitant price to acquire the site for the transfer station/baler facility, substantially higher costs for its construction and $5,500,000 in construction delay costs to subsidize the transportation and disposal operation. Finally, it cannot be ignored that the enormous 160,000 square foot facility that the BCUA constructed with a useful life of 20 to 25 years is presently used to handle a mere 350 to 400 tons of solid waste per day and negligible quantities of recyclables, residual ash and non-processible waste.

ACQUISITION OF THE SITE

The BCUA paid to Jay-Roc Realty, owned by Charles S. Rocco, $6,500,000 for the property where the transfer station/baler facility was constructed and $250,000 for an option to purchase a parcel intended to be used as the staging area for the facility. The settlement occurred on May 27, 1988. (Subsequently, the BCUA refused to exercise the option, an action which is being litigated, and purchased another site for considerably less money.) The BCUA's purchase price was $1,000,000 more than the value of the parcels contained in the appraisal report commissioned by the BCUA. The BCUA's acquisition of the Jay-Roc property, at an inflated price, together with its excessive payment of $37,500 for an inferior and inaccurate appraisal report, exemplifies the BCUA's waste of public funds.

The BCUA selected Management Associates, Inc. [MAI], an appraisal company in Glen Rock, New Jersey, to perform an appraisal for solid waste management purposes on 32 lots in eight blocks in North Arlington, including the tracts owned by Jay-Roc Realty. An agreement was authorized by BCUA resolution dated October 1, 1987 and was executed on November 24, 1987. MAI's owner and president, James L. Kirby, testified that Caldarella initially contacted him to do other work for the BCUA "because he had heard that we do good work...and he wanted to meet me" and that Caldarella "was the one that would contact us and advise us that they were interested in having us bid or hand in a proposal to the Authority." Nevertheless, Kirby claimed not to recall who notified him of the opportunity to perform the appraisal in question. At the time of MAI's selection, neither MAI nor Kirby appeared on the approved appraiser lists compiled by the New Jersey Turnpike Authority, the Department of Transportation and the Department of Environmental Protection, Green Acres Program.

Under Kirby's letter dated November 30, 1987, MAI submitted to the BCUA the "Market Value Appraisal of Proposed Solid Waste Management Site, County of Bergen, Borough of North Arlington as of October 1, 1987." MAI then retrieved the report and submitted a revised report with the identical cover letter. Both reports listed the total acreage at 197.253 acres. The first report listed the

market value for each parcel of land and contained a total market value of $27,912,521, "SAY $27,913,000." [Emphasis supplied] It made *no* mention of shale being on any of the Jay-Roc parcels. In contrast, the revised report contained a total market value of $30,169,721, "Plus Estimated Recovery of Shale on Jay-Roc Parcels" of $1,000,000, for a total of $31,169,721, "SAY $31,170,000." [Emphasis supplied] The substituted report increased the value of each of the Jay-Roc parcels and *only* the Jay-Roc parcels. Specifically, it increased the value of the Jay-Roc properties that the BCUA subsequently purchased by $849,200, plus $1,000,000 for the presence of shale, and the one lot that was the subject of an option by $2,200,000.

Pursuant to a subpoena for *all* appraisal reports, together with any drafts, Kirby produced only the second, revised report and not the first one. In testimony before the Commission, Kirby claimed that he was unable to recall that the original report was withdrawn and a revised one substituted. He could not recall why the report was revised, why only the Jay-Roc parcels ultimately purchased by the BCUA were increased in value or why these increased figures appeared only in the revised report and *not* in the supporting work papers. His response when questioned about the increased value for the Jay-Roc properties - "I don't think that's significant at all." - is startling. Kirby was also questioned as to whether he was instructed to increase the values. By Counsel Saros:

> *Q. Did anyone connected with the BCUA instruct you to increase any of the market value of the properties contained in the report?*
> *A. Increase it, you mean after we gave them the report?*
>
> *Q. Either after you apprised someone from the BCUA of the values or after you submitted the report, did anyone tell you to increase the values?*
> *A. Not that I know of or not that I can recall.*
> *Q. Wouldn't you recall if someone gave --*
> *A. Yeah, right.*

In addition, the revised appraisal report was devoid of any information regarding the shale and of any factual data or analysis to support the $1,000,000 valuation. The MAI work papers and former employees assigned to the BCUA project corroborated that no effort was made to examine, quantify or value the shale. When Kirby was questioned about the inclusion in the second report of $1,000,000 for shale on the Jay-Roc properties, he could offer no explanation for how the $1,000,000 estimate for the shale was calculated or why it was included in the report:

> *...Okay. There was an item in here which was estimated recovery of shale on Jay-Roc parcels, that's a million dollars.*
>
> *Now, we were advised of that, but I don't recall who said it.*
>
> *Q. What were you advised?*
> *A. That there was shale rock on the property, which we were aware of, and that the recovery of the cost of buying the land would be approximately a million dollars for the shale rock.*
>
> *In other words, if you pulled the shale rock out, you would be able to pull it out, sell it and make a profit of at least a million dollars.*
>
> *Q. Did anybody tell you to put that one million dollar figure in?*
> *A. Nobody told us to put it in, they advised us.*
>
> *Q. Because of the existence of the shale?*
> *A. Because the shale was there and they thought this was the estimated recovery. And I can't tell you who told me because I don't remember, but I remember that we*

were advised of it, that the shale was on the property and that the value -- I don't know whether they told us what the value was or -- I know we weren't told to put it in the report, though. I know that for a fact, because I wouldn't tell me what they tell me to do. [sic] I would do the report, put the item in there, and it's for anybody that wants to accept it or not accept it to do that.

Kirby denied that he paid anyone a portion of his fee from the BCUA or any other consideration for preparing the appraisal report as he did. Even if true, his inability or refusal to explain and justify why there was a substituted report, why the Jay-Roc properties were arbitrarily and incorrectly increased in value and why $1,000,000 for shale was included in the second report raises serious questions, at the very least, about Kirby's qualifications and standard of ethics. In addition, Kirby included with the appraisal report a statement of his "Qualifications," which the Commission ascertained is replete with inaccuracies concerning claimed professional memberships and positions. Furthermore, on July 17, 1992, following a hearing, Kirby was found to have violated the Code of Ethics and Standards of Professional Conduct of the International Association of Assessing Officers. The decision to expel him from membership was based upon eight violations, including Kirby's preparation of the BCUA appraisal report "containing a value estimate for property...which he knew, or should have known, was excessively high." As a result, the Commission is referring Kirby's conduct in this matter to the State Board of Real Estate Appraisers and to the Division of Building and Construction, Department of the Treasury, for consideration of debarment, suspension or disqualification from being awarded a state contract, as well as to the New Jersey Turnpike Authority, the Department of Transportation and the Department of Environmental Protection and Energy, Green Acres Program, for possible exclusion from their lists of approved real estate appraisers.

In addition to the foregoing facts, which cast great doubt on the accuracy of the MAI appraisal report, the Commission finds additional grounds to challenge the validity of the report, as well as the BCUA's reliance upon it. The Commission submitted MAI's substituted appraisal report, together with its proposal and contract, to the Right of Way Division, Department of Transportation [DOT], for evaluation. DOT's analysis and findings are contained in a report which is appended hereto. Its conclusions with respect to the quality of the MAI report and the BCUA's management of public funds are devastating:

Based on this division's review of the Management Associates report and the independent appraisal analysis as well as the study of the potential for shale recovery, it is concluded that the appraised value for the entire 197.25 acre site at $31,170,000 and the evaluation of the 23.1 acre Jay-Roc property at $5,126,700 (plus some or all of the $1,000,000 estimate for shale) were both grossly overstated.

The Management Associates report contains so many inaccuracies and is so lacking in meaningful analysis that it was not an appropriate basis for purchase negotiations and could only be useful as a "ball park" number for early budget or feasibility purposes.

The actual purchase of the Jay-Roc property for $6,500,000 by the Bergen County Utilities Authority was above even this estimate and thus, because it is not supported by other data, represents an unsupported expenditure of public funds.

Specifically, DOT concluded that MAI's appraisal report, required by its contract to be a "full narrative appraisal report," did not meet the requirements of such a report and did not "meet the terms of the contract." DOT also found that the appraisal report

is inadequate for use in an actual purchase transaction and does not provide the necessary support for the expenditure of public funds. It does not contain even the detail and depth of analysis needed to meet the less stringent requirements for corporate expenditures or mortgage lending. [Emphasis supplied]

Finally, DOT determined that MAI's fee of $37,500 was "excessive" and that a fee of $10,000 to $15,000 was appropriate.

DOT's findings are highly significant with respect to the six lots in two blocks actually purchased by the BCUA, that is, Lots 1 and 2 in Block 154 and Lots 1, 2, 3 and 4 in Block 174. MAI appraised these 23.1 acres at $5,126,700, *plus* $1,000,000 for shale, although it failed to "identify the specific location or quantity of the supposed shale deposit." In stark contrast, DOT's appraisals valued the six lots, as of October 1, 1987, at $2,951,800, "with the possibility of shale recovery found to be economically infeasible." [Emphasis supplied] DOT identified "four key weaknesses" in MAI's conclusions of valuation:

(1) the failure to cover the competitive market area in the comparable sales research,

(2) the inaccuracies in the market data reported and the lack of comparability in the sales used,

(3) the lack of meaningful analysis of the individual characteristics of the subject lots as compared to the sales, especially the access circumstances, and

(4) the valuation of the potential for shale recovery on the Jay-Roc parcels.

Charles S. Rocco made it very clear before the Commission that he vigorously and aggressively argued with the BCUA for more money for his parcels and that the shale was worth $1,000,000. The BCUA, in fact, paid Rocco $1,000,000 more than its own appraisal report estimated for the land. The BCUA produced no document or resolution pursuant to subpoena to explain its decision to offer Rocco even more money than its own, clearly inflated appraisal report dictated. Because the BCUA operated in the atmosphere of a self-created emergency and, therefore, was pressed to obtain land for the transfer station/baler facility site as expeditiously as possible without risk of a protracted condemnation proceeding, the BCUA paid an exorbitant amount for the land. The value of the Jay-Roc property to the BCUA also lay in the fact that it had an existing rail spur to support rail transportation of the garbage, an expensive system that the BCUA blindly pursued without being assured that it would be economical. Therefore, it is not unreasonable to conclude that the BCUA directed both the increase in the values assigned to the Jay-Roc tracts and the inclusion of $1,000,000 for shale in an attempt to justify the outrageous cost.

CONSTRUCTION OF THE FACILITY

Because the BCUA was operating in a crisis atmosphere, which was exacerbated when it had to abandon the plan to locate the transfer station on top of the existing landfill, the BCUA did not have time to determine exactly what it needed for a transfer station/baler facility and, therefore, was unable to provide the engineers with the required specificity to design properly the project. Consequently, a costly scatter gun approach was used in the award of contracts for the construction; the construction was controlled by repeated, almost daily, change orders rather than following a fully designed set of plans; labor costs were charged at substantially higher rates because of the fast-track approach, and additional costs were triggered because the construction was forced to accommodate commencement of the garbage operation. In addition, the BCUA con-

cocted an engineering configuration for the project that was not conducive to a coordinated formulation and implementation of the engineering services. The BCUA selected three firms to comprise an engineering team, rather than reposing full responsibility in one firm, and later hired yet another firm to complete the final stage of the project. Moreover, the BCUA's judgment in demanding a facility of immense size that could accommodate five balers is highly questionable in light of: (1) its anticipated use as a baler facility for only three to five years, and (2) clear evidence that the landfill had been receiving considerable amounts of solid waste from areas outside of the county and state - waste that would not be delivered to the facility. Even without the diversion of Bergen County's waste stream that occurred, there would have been a substantial reduction for economic reasons.

It appears that the reason that CBA, the BCUA's consulting engineer since inception, was not awarded the engineering contract for the construction of the transfer station/baler facility was because CBA's engineering plan to site the facility atop the existing landfill proved to be a disaster and embarrassment for the BCUA. The severe reaction from both county government and Republican party officials demanded that a new firm be hired. Yurasek Associates, Upper Saddle River, New Jersey, was delivered to the BCUA by county and party officials to provide the engineering services. (*See* **ADDITIONAL FINDINGS**.) However, the BCUA chose not to place Yurasek Associates in charge of the project, but to form a triumvirate of Yurasek Associates, LEA Group, Inc. of Boston, Massachusetts, and Goldberg Zoino Associates of Upper Newton Falls, Massachusetts, as the "engineering team." The BCUA entered into one contract, dated July 13, 1988, with these firms for surveying and engineering services in connection with the planning, design and construction implementation of the facility and residual ash landfill. The Commission notes that the BCUA directed the engineers to commence work in January, but waited approximately six months to execute the contract.

The BCUA's lack of judgment in failing to select one engineering firm to handle the project and allowing that firm to subcontract any necessary portions is glaring. The format selected by the BCUA did not facilitate a smooth, coordinated effort. It served no purpose except to steer work to favored firms for personal reasons. Nevertheless, even under the format designed by the BCUA and although Yurasek Associates was designated in the contract and underlying January 21, 1988 resolution as the "project coordinator" and also as the "lead consultant" in the contract, the BCUA failed to give the firm the necessary support. According to the firm's owner and president, William Yurasek, and as confirmed by other witnesses, the BCUA was not wholehearted in its reception of his firm and did not provide the backing that he needed. Interestingly, CBA was represented at the weekly project meetings, even though it held no responsibilities, and was hired to complete the final phase of the project.

From an objective standpoint, the BCUA's hiring of LEA Group and Goldberg Zoino Associates is mystifying, except that it appears that Caldarella was responsible for their inclusion because of prior business and personal relationships with the firms' members. The BCUA's action demonstrated very poor judgment. The services offered by LEA Group were not unique and could have been provided by a local or New Jersey firm that, unlike LEA, would have been familiar with the state's permitting processes and would not have caused the BCUA to incur additional costs for travelling (airfare and car rental) and living expenses (lodging, meals and telephone). The same holds true for Goldberg Zoino Associates, which was hired specifically for the residual ash landfill, although very little was actually required of this firm.

Yurasek Associates subcontracted work to three other engineering firms, two of which provided very specialized services. Although the services provided by Yurasek Associates and the cement work subcontracted by it could have been provided by one firm, the Commission finds that this arrange-

ment did not result in extra costs to the BCUA because Yurasek Associates did not charge any fee in addition to that of the subconsultant.

In addition to the numerous smaller contracts awarded for the construction of the facility, the BCUA awarded the primary contracts to Drill Construction Co., Inc., West Orange, New Jersey, and J. Fletcher Creamer & Sons, Inc., Hackensack, New Jersey. Although it is impossible to calculate an exact savings to the BCUA if the project did not have to be fast tracked and if the BCUA had issued bid specifications that were all-inclusive, thereby reducing the high number of contracts, there is no doubt that substantial savings would have been realized. It bears emphasis that the BCUA's fast-track approach and failure to know what it wanted at the project's commencement made it inevitable that contractors would have to seek an inordinate number of change orders and to charge premium time and overtime. Drill Construction and J. Fletcher Creamer & Sons were just two of the contractors that were compelled to file change orders.

Drill Construction was awarded three contracts following its proposals of $2,565,745 to provide and assemble the prefabricated metal buildings, $683,719 to insulate the buildings for noise abatement and $7,155,000 to provide all interior work for the buildings, including plumbing, electricity, rest rooms, showers, kitchen facilities, office facilities, walls, flooring and painting. However, the BCUA ultimately paid Drill Construction in excess of $11,819,498, an increase of 13.6 % above the original bids. This significant increase of $1,415,034 is accounted for by the more than 150 approved changes that altered the initial specifications and the approximately $300,000 that was paid for overtime, premium time and labor costs associated solely with fast tracking a facility where operations have also begun.

J. Fletcher Creamer & Sons bid $1,238,000 for the excavation and embankment contract, $9,868,000 for the foundation contract and $2,689,000 for the final modications contract, for a total of $13,795,000. The BCUA awarded the contracts to Creamer and paid the company a total of $17,521,413, an increase of 27%. Creamer's contracts were modified by more than 75 approved changes. The amount paid to Creamer included $371,911 for overtime and premium time and $725,000 as a bonus for expediting completion, even though it was clear at the outset that the project had to be fast-tracked.

After the Commission initiated its investigation, the BCUA hired a Philadelphia, Pennsylvania, engineering firm to evaluate the engineering and construction work performed in connection with the facility. The BCUA paid $21,200 for a report which was formulated and submitted prior to the completion of the facility, reflects the conclusions primarily of one engineer who was interviewed and draws conclusions based on parameters that are clearly over-extended. The BCUA never released the report to the public. The Commission questions the BCUA's wisdom and expenditure.

ADDITIONAL FINDINGS

Historically, the tentacles of the prevailing political party have reached into authorities. Patronage positions at authorities are not uncommon and at some authorities have been the rule. The New Jersey Turnpike Authority and the Parkway Authority have traditionally been the subject of patronage positions. The BCUA, during the time of the Commission's investigation, was a patronage mill. In addition, it has been common practice for BCUA officials to collect political contributions from their employees. Furthermore, the Chairman of the Bergen County Republican Party at the time of the investigation, John F. Inganamort, exercised influence over the BCUA, although he denied that he did so. For example, Thomas J. Toscano recalled two or three meetings with the party chairman and other Republican BCUA Commissioners at the Palisadium Restaurant, Fort Lee, New Jersey, to provide "an update of what was going on at the BCUA." Vernon R. Cox, then an alternate Commissioner and currently the Chairman, testified that he attended a meeting at the Palisadium when the party chairman announced that he (Cox) and Caldarella would be joining the BCUA and that Caldarella would be their next chairman. William Yurasek related that he was summoned to the party chairman's home, where he was advised that "new blood" was needed at the BCUA following CBA's ill-fated attempt to site the transfer station atop the landfill and that he should contact Caldarella to provide engineering services for the transfer station. Yurasek then contacted Caldarella and his firm was hired. Inganamort, acknowledging that he asked Yurasek to his home, stated that he told him that "there's trouble down there [at the BCUA]" because of the failure of CBA's plan, "asked him if he could be helpful" and "asked" him to contact Caldarella. Inganamort denied speaking with Caldarella or any of the Commissioners about hiring Yurasek's firm.

* * * *

The BCUA's failure to maintain full accounts of its meetings, to record every meeting once tape recording was instituted and to maintain proper security of the tapes indicates not only ineptness and negligence, but perhaps an intent to destroy and conceal evidence. The Commission issued a subpoena to the BCUA for all tapes of all meetings. (Caldarella testified that tape recordings were "[s]upposed to be" made of all BCUA meetings.) Director of Security Albert L. Adcock, who produced the tapes, testified that Executive Director Caldarella had turned over the tapes to him at the end of 1988 or beginning of 1989 when he (Adcock) was assigned to the BCUA from the Bergen County Police Department.

Of the 20 tapes produced for 1986, 10 were blank and, of these, five were new, unused tapes. For 1987, the critical year of the BCUA's solid waste activities, only three tapes were produced and of these, two were blank, unused tapes. No BCUA witness could explain these findings. The Commission also determined that several of the tapes contained erasures. In addition, only one tape was furnished of the January 12, 1988 meeting when the BCUA selected Mitchell/Laidlaw and Crossridge. However, a January 4, 1989 internal memorandum by Executive Director Caldarella directed that the *four* tapes of this meeting be transcribed and the Commission obtained a transcription of a second tape from a court reporting service. There is also evidence that a tape existed of at least one other meeting, but was not produced. Further, there are a number of tapes for meetings for which no printed minutes were provided. Moreover, although issuance of agendas apparently preceded each meeting of the BCUA, no more than three were turned over

to the Commission pursuant to subpoena.

* * * *

Soon after Caldarella stepped down as Executive Director in February 1989, he was contacted by Domenick Pucillo and within a short period of time, was offered a position with Mitchell. In August 1989 (October, according to Caldarella), Caldarella, who served at the BCUA's helm and steered the Commissioners, with Toscano's assistance, to award the contracts to Mitchell/Laidlaw and Crossridge, became a vice-president of Mitchell at an annual salary of $160,000, plus a vehicle and other benefits. As of July 18, 1990, testified Chester Pucillo, Caldarella "brought a number of projects to the table," but none materialized. At the very least, Caldarella's employment by Mitchell gave rise to an appearance of impropriety. A revolving door in government service does little to promote the public's confidence in its officials.

* * * *

During 1988, following the BCUA's award of the transportation and disposal contract to Mitchell/Laidlaw, Mitchell contributed $26,500 to the Bergen County Republican Party. Of this amount, $21,500 was designated for the party's fund-raising event, a boat ride, which none of the Mitchell principals attended. Chester Pucillo denied that he was requested or coerced to make any contribution. Nevertheless, even if Pucillo viewed the contributions as "good business practice," the appearance is one of impropriety.

RECOMMENDATIONS

Although there has been improvement in the structure, composition and conduct of authorities since the Commission first issued its report in this area in 1983, there continues to be a need for rigid requirements to establish accountability, to promote the open and honest operation of authorities and to safeguard the public's interest. In addition to the problems highlighted by this investigation, accounts of authority improprieties and mismanagement periodically surface throughout the state. Accordingly, the Commission proposes renewed efforts to examine authorities and urges immediate review and implementation of the following recommendations:

• The appointment of competent and intelligent commissioners who are willing to devote their time and attention to the authority's business will insure the integrity of the authority and its effective operation. As crucial as these qualities are for the commissioners, they are imperative for the chairperson. A capable body of commissioners will hire qualified staff and consultants, set reasonable and necessary policies, engage in proper oversight of the authority's activities and insure the implementation of policies and decisions. However, the appointment of able and devoted commissioners cannot be legislated. Rather, the public must depend upon the conscientiousness of the governing body. It can ill afford to have the position of commissioner succumb to political patronage, which all too often guides the appointment process. The Commission has previously noted the need to improve the membership composition of authorities in both its 1983 report and its 1988 statement to the Assembly County Government and Regional Authorities Committee. The Commission reiterates its recommendation that the membership include an accredited engineer and at least one other member who is (1) a lawyer with an acknowledged professional background in governmental, corporate or bond law, or (2) a fully qualified representative of the financial community, or (3) an individual with proven academic credentials and experience in business administration. Once appointed, commissioners must act in the interest of the public and must not be governed or influenced by political considerations.

• One of the recommendations contained in the Commission's 1983 report on authorities, and still vital to promote the integrity of all authorities, is the requirement that no political party possess a majority of more than one vote on an authority.

• The lack of accountability of authorities has been the subject of public hearings, reports and proposed remedial legislation, most of which has not been enacted. Nevertheless, despite efforts to bring some of their actions under closer examination, authorities continue to operate virtually free of public scrutiny and accountability. The Commission believes that one measure necessary to control the conduct of authorities is the establishment of veto power over their minutes by a two-third or three-quarter majority of the board of chosen freeholders, or by the chief executive officer where a county charter form of government exists, with possible override by a two-third or three-quarter majority of the freeholders, and by the chief executive officer of a municipality. Consideration should be given to exempting areas that were integral to the very reasons for creating certain authorities, such as the power of utilities and sewerage authorities to issue bonds.

• The Commission's investigation underscores the need for regulations prohibiting employment of officials of authorities, following their retirement or

resignation, by the authorities' vendors and consultants. Laws requiring the passage of specific time periods before certain officials can be employed in related industries exist throughout government. An authority's officials, key management personnel and consultants should similarly be barred from accepting employment with, or acquiring any direct or indirect interest in, the authority's vendors. The employment of officials and key management personnel by the authorities' consultants should also be prohibited.

• Authorities must adhere scrupulously to the dictates of the Open Public Meetings Act. *N.J.S.A.* 10:4-6, *et seq.* First, members of an authority must be zealous in not crossing the fine line between conducting partisan caucus meetings and excluding the public or a portion of the members from a meeting. Second, the authority must not only record minutes of *all* meetings, but must also maintain minutes that accurately reflect all subjects under consideration. The best procedure is to utilize a stenographic service to avoid the problems displayed by the BCUA in attempting to record its meetings. Not only were there missing tapes and erasures on tapes, but it was obvious on a number of tapes that voices were deliberately lowered to prevent recording. The requirement of *N.J.S.A.* 10:4-14 that a public body maintain "reasonably comprehensible minutes of all its meetings" is overly broad and lends itself to widespread interpretation. This provision must be made more specific.

• Contracts awarded by authorities must contain a provision whereby all officers, employees and agents of the vendor, whether located in state or out of state, consent to accepting service of subpoenas issued by the state or any of its subdivisions for the production of books and records and for providing sworn testimony. This recommendation was contained in the Commission's 1988 report on the Green Acres Acquisition of Union Lake.

• The position of commissioner, albeit part-time, requires full participation in deciding policy issues and directing activities. Members of utilities authorities presently serve terms of five years, pursuant to *N.J.S.A.* 40:14B-5. This lengthy term of office, which is frequently renewed repeatedly, is not conducive to insuring a responsive public body and avoiding abuses. The Commission believes that the terms of commissioners of all county and municipal authorities should be no more than three years in order to better enable the appointing authority to assess their conduct and to assign individuals who will assume an active and responsible role. A shorter term will reduce the tendency of many commissioners to become indolent in a comfortable position. In addition, no commissioner should serve more than two consecutive terms.

• Although not uncommon, it has not been the practice for authorities to obtain names of real estate appraisers from lists of approved appraisers compiled by the New Jersey Turnpike Authority, the Department of Transportation or the Department of Environmental Protection, Green Acres Program. The Commission recommends that the state, through the Department of the Treasury, maintain a master list from which other agencies may draw to compile their own lists. All authorities should be required to utilize only those appraisers included on the master list.

•The employees of an authority should not constitute a reliable funding mechanism for political parties. However subtle the approach by an authority official to sell fund-raising tickets or solicit political contributions, the clear implication is that purchasing the ticket or making the contribution is necessary to retain the position, receive a promotion or not be hassled on the job. There should be a ban on such fund-raising activities at all authorities. In addition, the ban should be extended to include the authority's vendors and consultants.

• The subject investigation highlights once again the recurring obstacle faced by the Commission in attempting to conduct a full and complete investigation when persons or documents lie beyond its

jurisdiction in other states. New Jersey's civil practice rules allow for depositions to be taken outside this state when "an action" has commenced or is pending. *R*.4:11-5. However, the Commission is unable to avail itself of this rule because an SCI investigation does not constitute an action. *See R*.4:2-2. Therefore, in order to enable the Commission to pursue its investigation to records and witnesses located without the state, it is strongly urged that *R*.4:11-5 be amended to incorporate the following provision contained in the "Uniform Interstate and International Procedure Act" on the taking of depositions:

> When no action is pending, a court of this state may authorize a deposition to be taken outside this state of any person regarding any matter that may be cognizable in any court of this state. The court may prescribe the manner in which and the terms upon which the deposition shall be taken. [Sec. 3.01(c) (13 U.L.A. 487)]

• The Commission's investigation disclosed a number of matters that warrant referral to appropriate government agencies for review and appropriate action: (1) the financial records of Compaction Systems Corp. will be forwarded to the Division of Taxation and the IRS for a determination on the accuracy of income and expenses reported; (2) the Commission will also provide pertinent information on Compaction and its owners to the Attorney General's Office with respect to the qualifications of Benny R. Villani and Martin R. Sternberg to be licensed to participate in the solid waste industry in New Jersey and for consideration of possible criminal charges in connection with the rental of equipment; (3) information on the conduct of Management Associates, Inc. and its owner, James L. Kirby, will be forwarded to the Department of the Treasury, Division of Building and Construction, for consideration of inclusion in the "Report of Suspensions, Debarments, and Disqualifications of Firms and Individuals," as well as to the New Jersey Turnpike Authority, the Department of Transportation and the Department of Environmental Protection and Energy, Green Acres Program, for consideration of exclusion from their lists of approved real estate appraisers; (4) the income and expense reporting practices of Timothy Salopek, William J. Holbrook and Michael A. Julian will be referred to the IRS, and (5) referral will be made to the Division of Taxation regarding questionable deductions by Mitchell Environmental, Inc. for substantial salary payments to a non-participating partner. In addition, the Commission urges the BCUA to avail itself of the investigation's analysis and findings in order to consider whether to institute suit to recover monies paid to Compaction in connection with the rental of equipment.

* * * *

This investigation was conducted under the direction of Counsel Ileana N. Saros, who was assisted by Special Agent Raymond H. Schellhammer, Investigative Accountants Arthur A. Cimino and Jeanne M. Jackson and now retired Chief Investigative Accountant Julius M. Cayson. Some assistance was also provided by now retired Special Agent Anthony J. Quaranta.

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COMMISSIONERS OF THE BERGEN COUNTY UTILITIES AUTHORITY

February 1986 to February 1987

Vincent A. Caldarella, Chairman
Eugene J. Brophy, Vice-Chairman
Gennaro (Jim) Anzevino
Martin J. Hayes
Frank C. Longo
Michael P. Rinko
John E. Rooney
Rose Teague
Thomas J. Toscano

Alternates
Vernon R. Cox
Barbara S. Hall

February 1987 to February 1988

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Eugene J. Brophy, Vice-Chairman
Gennaro (Jim) Anzevino
Vernon R. Cox (appointed 11/16/87 following Anzevino's death)
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Frank C. Longo
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Alternates
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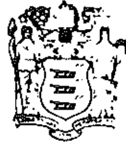

IN REPLY PLEASE REFER TO

State of New Jersey
DEPARTMENT OF TRANSPORTATION

THOMAS M. DOWNS
COMMISSIONER

1035 PARKWAY AVENUE
CN 600
TRENTON, NEW JERSEY 08625

November 27, 1991

James J. Morley, Executive Director
State of New Jersey
Commission of Investigation
28 West State Street
CN045
Trenton, New Jersey 08625

Dear Mr. Morley:

At your request this division has reviewed the Management Associates, Inc. proposal for appraisal services, the contract with the Bergen County Utilities Authority, and the October 1, 1987 land valuation report submitted in conjunction with the proposed solid waste management facility.

The proposal submitted to the Bergen County Utilities Authority by Management Associates, Inc., and the resulting contract for performance of the appraisal, clearly spell out that Management Associates would prepare a "full narrative appraisal report" for a fee of $37,500 plus expenses.

The report, as submitted, does not fulfill the requirements of a full narrative appraisal report nor does it meet the terms of the contract.

The detailed review of the Management Associates report revealed a number of weaknesses in the evaluation process and in the supporting documentation. In more general terms, the overall review of this report indicates that it would be appropriate as an early estimate for budget and feasibility purposes but is inadequate for use in an actual purchase transaction and does not provide the necessary support for the expenditure of public funds. It does not contain even the detail and depth of analysis needed to meet the less stringent requirements for corporate expenditures or mortgage lending.

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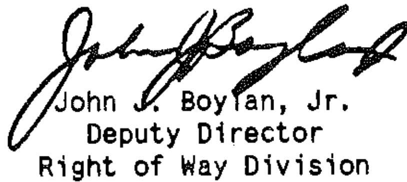
The fee for these services, which might be justified for 32 separate, individualized reports, is excessive for a single report covering that number of lots with only a minimum of individualized differences in size, topography and location. Market research and individual analysis and comparisons to the subject are the most time consuming, and thus the most expensive elements of the appraisal process. With the scope of work limited to research of sales in North Arlington and with no requirement for individualized analysis for the 32 separate lots, a fee in the range of $10,000 to $15,000 would have been more appropriate.

Very truly yours,



John J. Boylan, Jr.
Deputy Director
Right of Way Division

NEW JERSEY DEPARTMENT OF TRANSPORTATION
RIGHT OF WAY DIVISION

REVIEW OF MANAGEMENT ASSOCIATES,INC. APPRAISAL REPORT
Relating to purchase of site in North Arlington
by the Bergen County Utilities Authority

This division has completed a review and analysis of the October 1, 1987 appraisal prepared by Management Associates for the Bergen County Utilities Authority covering the site of the solid waste management facility in North Arlington.

This appraisal covers some 197.25 acres in 32 lots and 8 different blocks in North Arlington. The report indicates a final value of $31,170,000 including a $1,000,000 amount for shale recovery on several of the tracts.

Particular attention was given in the review to the six lots in two blocks that were actually purchased or taken by the Utilities Authority. The appraisal of these lots totaled $5,126,700 for the 23.1 acres, plus $1,000,000 for shale. The Management Associates report did not identify the specific location or quantity of the supposed shale deposit. Other data supplied by the State Commission of Investigation indicates that the shale was on block 174. In addition to the review of this appraisal, the division also prepared independent appraisals for these lots. These appraisals indicate a total value of the six lots, as of October 1, 1987, of $2,951,800, with the possibility of shale recovery found to be economically infeasible.

Land valuation reports are prepared for a variety of purposes in relation to a proposed or approved project. In the early planning stages, a feasibility estimate is done to determine the economic feasibility of the project. Such a report would be based on raw data with no need for a detailed analysis of either the market data or the characteristics of the subject property since a high degree of accuracy is unnecessary. The desired result is only an approximation of the cost so that it can be determined whether or not the benefits of the project are worth the cost. It can also be used to compare various alternative solutions to the problem being addressed.

Once a particular alternative has been chosen, a second evaluation of the land may be made. The function of this estimate is to establish a budget and set funding levels. A higher degree of accuracy is needed at this level and some minimum level of individual analysis of market data and of the characteristics of the subject property are essential; but they would still be in general terms rather than specific, individual comparisons.

When the decision has been made to proceed with the purchase of the land a formal appraisal is needed. An appraisal is defined by the American Institute of Real Estate Appraisers as a formal written document containing: (1) an estimate of value as of a certain date, (2) the purpose of the appraisal, (3) any qualifying conditions, (4) an adequate description of the property and the neighborhood, (5) factual data on the subject property and on pertinent market activities together with an analysis of that factual data, (6) a certification and signature of the appraiser, and (7) other descriptive materials such as photographs and maps or charts.

The market data used in an appraisal must be verified as to accuracy and completeness and must be subjected to a detailed individual analysis and direct comparison to the individual characteristics of the subject properties.

The proposal submitted to the Bergen County Utilities Authority by Management Associates, Inc., and the resulting contract for performance of the appraisal, clearly spell out that Management Associates would prepare a full narrative appraisal report. The report, as submitted, does not fulfill the requirements of a full narrative appraisal report.

The detailed review of the Management Associates report revealed a number of weaknesses in the evaluation process and in the supporting documentation. In more general terms, the overall review of this report indicates that it would be appropriate as an early estimate for budget and feasibility purposes but is inadequate for use in an actual purchase transaction and does not provide the necessary support for the expenditure of public funds. It does not contain even the detail and depth of analysis needed to meet the less stringent requirements for corporate expenditures or mortgage lending.

The four key weaknesses are: (1) the failure to cover the competitive market area in the comparable sales research, (2) the inaccuracies in the market data reported and the lack of comparability in the sales used, (3) the lack of meaningful analysis of the individual characteristics of the subject lots as compared to the sales, especially the access circumstances, and (4) the valuation of the potential for shale recovery on the Jay-Roc parcels. Each of these four areas will be discussed in turn.

I. COMPETITIVE MARKET AREA

The comparable sales selection by the appraiser was limited to North Arlington. The market for residential properties may be limited to a single municipality since the type and quality of municipal services, schools, etc. are key factors in the purchase decision. For industrial properties, however, the competitive market area is much broader. The factors of concern to industrial buyers are the availability of workers, the location of customers, the transportation systems, and the general economic climate. These factors are not

restricted by municipal boundaries and may, in fact, dictate a competitive market area spanning several towns, several counties, or several states.

The appraiser must investigate the entire competitive market area in his search for comparable sales. This is especially true when the local area is small and nearly fully developed since, as is the case in North Arlington, there may be few, if any, sites available which could be used for the same purposes as the property being appraised. The main requirement in comparable sales research is to be certain to investigate all areas which would be considered by the typical prospective purchaser as an alternative to the purchase of the subject site. While it is recognized that the Bergen County Utilities Authority would be restricted to sites within Bergen County, the market value of these sites would be based on the actions of the typical purchaser of similar sites in the general market who would not be subject to such restrictions.

In the instance of the subject property, the competitive market does, in fact, include at least seven municipalities in three counties, Bergen, Hudson, and Essex. The comparable sales research conducted for the Department of Transportation appraisals prepared on this property developed a total of 86 sales in these areas which were potential indicators of the market value. After review and analysis of all of these comparable sales, the Appraisers for D.O.T. selected the three most comparable sales for each of the properties appraised based on the individual characteristics of each property.

Management Associates, by limiting the selection to those sales in North Arlington, has omitted consideration of the most comparable sales, namely those which would be suitable and large enough to use for the same purposes as the subject properties. An omission of such pertinent data makes the value conclusion unsupported, unreliable and unsuitable for use as a basis for the purchase of property or the expenditure of public funds.

II. QUALITY AND ACCURACY OF MARKET DATA

In estimating the land value, Management Associates used only four consummated sales plus one option agreement and one contract of sale. There are significant weaknesses in each of these six indicators.

Sale 1 is listed as having a consideration of $23,900 for 0.1316 acres or $181,611 per acre. The reported consideration and size are both inaccurate, resulting in an incorrect unit value calculation. The actual deed indicates a consideration of $95,000 and an area of 0.26 acres which would indicate a unit value of $356,000 per acre.

This sale is zoned industrial but the entire area around the property is developed residentially. The high potential for residential use and the very small size make it unacceptable for use as a comparable sale.

Small lots, as long as they are large enough to be used, will almost always sell at a higher unit price than larger sites. Similarly, individual lots suitable for residential uses, such as this sale, command a much higher price than an individual industrial site. Prospective purchasers for a major industrial use would not even look at such small tract and certainly would not consider one in a residential area where they could face problems in developing the site.

Sale 2 is also very small, 0.056 acres, (2349 square feet) and because of its narrow shape it has no utility except as an add on to an adjacent lot. This motivational factor makes it unreliable as a comparable sale.

Prices for property sales such as this are always influenced by the purchaser's need for the property. If it is essential to him the price would be high even though the seller had little use for it. If it were not really needed, the price would be low since the seller would have no leverage in negotiating the sale price.

Sale 3 is reported as reflecting $130,000 per acre. However, a reading of the deed shows that this sale also included lot 19 which was not considered by Management Associates. Inclusion of the area for lot 19 reduces the unit value to $99,305 per acre. Management Associates also reports the zoning as Office Research, while a review of the local zoning map shows it to be Two-Family Residential and thus not comparable to the subject since residentially zoned properties cannot be used for the industrial purposes that the typical purchaser of the subject property would desire. It may be used as a general indicator of value levels in the municipality but would require adjustments for zoning.

Sale 4 appears to be mostly land within the mean high water line which would prevent development. The low potential for use makes this a poor sale for comparison to anything but the two lots described as wet which comprise 15 acres of the 197 acre subject tract.

The Option Agreement, if consummated at or near the date of value, would have some measure of validity as a value indicator. However, this option, for whatever reason, was not exercised and thus it has no credibility as market data. In general, options are used as an inexpensive way to prevent the sale of a property to someone else while the prospective purchaser looks into the suitability or feasibility of a project. The price stated in the option is binding only on the seller, the buyer can allow the option to expire and then negotiate a better price. For this reason, options are never good indicators of value unless they are exercised and then the actual contract or deed would be available as a basis for comparison of the price and terms.

In this case there is also the complexity of the terms of the option to consider. If it had been exercised the analysis would have to include adjustments for the various contingencies since the seller was taking all the risks in regard to development approvals, etc., and would have been entitled to something above market value for these risks.

The Contract of Sale was later closed; however, the property in question was zoned for residential use and 20 two-family dwellings were planned for the site. The terrain and location of this sale are far superior to the subject and the residential zoning on a site this size is a premium commodity in a fully developed community such as North Arlington.

Based on zoning alone this contract should not be used as a value indicator for the subject property since the industrial uses anticipated by the typical purchaser for the subject property could not be placed on a residential site. Further, the very substantial adjustments to the unit price which would be required in a comparison to the subject make it an unreliable indicator of value.

III. ANALYSIS OF MARKET DATA

In order to reach an appropriate conclusion of the value of a property, it is essential to identify the various characteristics of the subject property both in terms of the beneficial aspects and of those which would make the property less desirable. These characteristics include zoning and permitted uses, easements or other encumbrances, physical topography such as wetlands, slopes, and other restraints on development of the property, ease of access, and size and shape.

Similar information must be gathered on any comparable sale to be used so that a specific and detailed comparison may be made of the relative value of the subject tract. Percentage or dollar amount adjustments are made to the comparable sales price, on a unit price (per acre, per square foot, etc.) basis, for each difference between the comparable sale and the subject property. These adjustments account for the specific differences between each sale and each specific property being appraised and would therefore result in an individual and perhaps different value indication for each property.

The Ninth Edition of the Appraisal of Real Estate published by the American Institute of Real Estate Appraisers notes on Page 149, that "before undertaking any analysis the appraiser must organize the data gathered in the investigation. The Market Data grid, on which the analysis and adjustments are displayed, separates the data into the identified characteristics of the subject and the sales so that meaningful comparisons can be made. The adjustments are displayed on the grid to provide an overall picture of the various components and their interrelationships before a final unit value is selected."

The Management Associates report is lacking much of the detailed information concerning the comparable sales and has very little in the way of comparison to the subject. The Management Associates report failed to include the Market Data grid or any other display of the comparative attributes of the comparable sales and the subject property. In fact, the report does not even distinguish between many of the individual characteristics of the 32 lots being appraised. It contains only 3 different values, based on a single variation between all the lots.

There is no indication of any analysis or adjustment for the fact that the public road frontage on a number of the subject lots is well above the grade of the property and impractical or extraordinarily expensive to develop and use. These and some of the other lots are accessible only through other lands via easements or unrecorded rights of way. Accessibility is an essential ingredient of any industrial development. Difficulties with physical access and restricted access, such as via easements or rights of way, present legal problems for development, limit the potential for multiple uses, and also generate higher development costs. These negative factors generally result in a lower per acre value.

None of the sales are analyzed specifically; nor is there any indication of the value of any of the subject lots in comparison to any of the sales. Even though contemporary appraisal standards and all recognized appraisal organizations require such specific analysis and comparison, the report only provides a generalized statement of the values for the three classes of land identified. There is no basis provided to show how or why these three specific value conclusions were reached.

The lots on block 174 owned by Jay-Roc were not included in those identified as prime site by Management Associates, but they are valued on page 32 of the report, without explanation, at $220,000 per acre, which is higher than the prime lots which were evaluated at $197,000 per acre.

In fact, page 30 of the report and the appraiser's work papers conclude a value of $176,000 per acre for lots on block 174, while the final valuations on page 32 actually use $220,000 per acre for these same lots with no explanation provided for this discrepancy.

As of the October 1, 1987 date of appraisal, there were several structures in existence on lot 1, block 154. Management Associates did not give any consideration to the cost which would be incurred by any purchaser for demolition of these structures which would have to be done in order to use the site for its intended purpose. Subsequent to the appraisal date the buildings were actually demolished. In fact, Management Associates included a substantial value for these useless structures as an addition to the land value. This is contrary to the workings of the marketplace where purchasers would discount the market value by the cost of demolition so that their final total cost would be in line with the cost of competing sites.

The Department of Transportation appraisals began with a data-bank of some 86 comparable sales. Through investigation and site inspection, the number of sales actually used and included in the reports was limited to those considered to have the highest degree of comparability. Two sales along Washington Ave. in Carlstadt were considered to be the top of the line in location, terrain, and accessibility. These sales, without adjustment for any differences, reflected a price range of $211,700 per acre to $225,100. This is considered to be the top of the market for prime sites. None of the subject sites fit that description.

With the top of the market for prime sites in the $225,000 per acre range, Management Associates' evaluation of the far inferior Jay-Roc tracts at $220,000 per acre is clearly unsupported and outside the range of reasonableness. The lack of detailed analysis of the comparable sales and lack of any meaningful comparison to the subject property makes all of the value conclusions unreliable and renders the report useless for its intended purpose.

IV. VALUATION OF SHALE DEPOSITS

Management Associates included an unexplained lump sum of $1,000,000 for shale indicated in the report as being on the Jay-Roc parcels and indicated in other documents as being only in block 174. The report contains no information on the supposed shale deposits and makes no mention of it in the narrative description of the property. There is also no factual data or analysis which would support this $1,000,000 valuation conclusion.

In order to determine the value of the "in place" material, it must first be determined if it is economically feasible to remove it at all. The intrinsic value of the land commands a certain income and the mining operation must be able to satisfy that demand in order to be economically feasible.

Land is no different than any other investment, it commands an income. Bank deposits earn interest, stocks earn dividends, and land earns rents. In the investment market of late 1987, land investments were earning about 12%. This is higher than bank deposits because of the risks involved and the difficulty in converting land to cash.

At a land value of $220,000 per acre as reported by Management Associates, to provide a 12% return any use must be able to produce an annual income of at least $26,400 per acre just to support the land value. The $1,000,000 value reported by Management Associates for the shale equates to an additional $50,000 per acre for the 20 acre Jay-Roc tract and a total land value of $270,000 per acre requiring an income flow of $32,400 per year to earn 12% per year. At $125,000 to $130,000 per acre, as shown in the D.O.T. appraisals, the income flow still must be $15,000 to $15,600 for a 12% return.

Additional data supplied by the State Commission of Investigation contains a 1980 letter indicating the availability of some 500,000 to 600,000 cubic yards of fill material, but does not specifically identify the distribution of these shale deposits among the various tracts. Other reports in the file indicate that this is far from select fill and is moisture sensitive and would require special treatment in order to be used. Moisture sensitive soils must be placed only on dry ground and only in dry weather. They must be covered with other, less sensitive, materials before any rain or they will deteriorate and become unsuitable as fill. These factors make the use of moisture sensitive materials more costly and less desirable and thus lower the potential sale price of the material.

From the division's research, it is indicated that the price of good fill material was about $4.50 per ton "on the truck" and that expenses for mining and loading range from $2.90 to $3.90 per ton. While these figures are from 1988 contracts, they would not vary substantially from the late 1987 figures. Profit margins for the mining business run about 15% to 20% on sales or $.68 to $.90 per ton leaving a maximum of $.92 per ton, for the landowner. It was also found that most successful ventures can extract and sell less than 100,000 tons per year.

It was also noted that royalties paid to property owners in 1988 for the privilege of extracting the materials ran from $.10 to $.50 per ton depending on the quality of the materials. The materials indicated to be on the subject property are of less than prime quality and thus would tend to be at the lowest end of this range. Terms of royalty agreements vary, but most provide adequate time for removal at 50,000 tons per year or less. Many have an indefinite term, lasting until all the materials have been removed.

If one were to take the "best case" circumstance with the material being classed as "select fill" and saleable at $4.50 per ton, with expenses at only $2.90 per ton, and omit consideration of any profit for the entrepreneur operating the business, the maximum income flow would be only $1.60 per ton. At a maximum rate of sales, this would produce an income of $160,000 per year. Based on a total area of approximately 20 acres this works out to about $8,000 per acre per year or far below the minimum $15,000 per acre required for feasibility.

If even a minimal profit is allowed for the operation of the business, the anticipated land rent shrinks to $68,000 or about $3,400 per acre.

Alternately, using the royalty analysis, 100,000 tons per year at a royalty of even $.50 per ton produces an income of only $50,000 per year for the 20 acres or only $2,500 per acre per year. Again, this is far below the income required for the land value alone.

Given even these highly favorable circumstances, shale mining would only support a land value in the range of $21,000 to $66,000 per acre including the value of the shale. This, incidentally, is above the $5,000 to $15,000 per acre found to be prevalent in existing mining operations around the state.

It is important to note that extraction of the material on an accelerated schedule is also impractical. Material that is not sold becomes a liability. Exposed shale weathers and degrades in a relatively short time and becomes unsalable. Quarry operators pace their mining operations to match sales. Even high-quality material such as stone is difficult to dispose of or store if it cannot be sold. Disposal of excess rock and fill has cost the state and other project developers millions of dollars in those instances where the quantity removed exceeded the need for fill and was excess to the market demand at the time.

This analysis clearly shows that, even under the most favorable circumstances, the presence of mineable shale on this property does not add to the basic land value at the $125,000 to $130,000 per acre value in the D.O.T. reports and could not even come close to being worthwhile at the $220,000 per acre used by Management Associates.

CONCLUSIONS

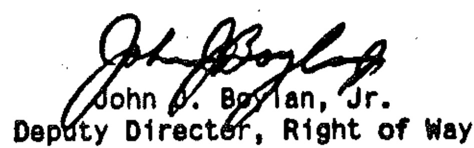
Based on this division's review of the Management Associates report and the independent appraisal analysis as well as the study of the potential for shale recovery, it is concluded that the appraised value for the entire 197.25 acre site at $31,170,000 and the evaluation of the 23.1 acre Jay-Roc property at $5,126,700 (plus some or all of the $1,000,000 estimate for shale) were both grossly overstated.

The Management Associates report contains so many inaccuracies and is so lacking in meaningful analysis that it was not an appropriate basis for purchase negotiations and could only be useful as a ""ball park"" number for early budget or feasibility purposes.

The actual purchase of the Jay-Roc property for $6,500,000 by the Bergen County Utilities Authority was above even this estimate and thus, because it is not supported by other data, represents an unsupported expenditure of public funds.

Attached as a supplement to this report is a copy of each of the appraisals prepared by this division.

NEW JERSEY DEPARTMENT OF TRANSPORTATION
RIGHT OF WAY DIVISION



John J. Boylan, Jr.
Deputy Director, Right of Way

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