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OFFICE OF CHIEF COUNSEL  
CORPORATION FINANCE

1933 Act/3(a)(2)  
1934 Act/3(a)(12)  
1939 Act/304(a)(4)

June 18, 1987

PUBLIC AVAILABILITY DATE: 11-25-

William E. Morley, Esq.  
Chief Counsel  
Division of Corporation Finance  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

ACT	SECTION	RULE
1933	---	131
1933	3(a)(2)	---
1934	3(a)(12)	---
1934	3(b)	3b- 5
1939	304(a)(4)	---

Re: Capital Area Regional Solid Waste Authority, Harrisburg, Pennsylvania

Dear Mr. Morley:

This letter is submitted on behalf of our client, Prudential-Bache Capital Funding, a registered broker-dealer ("Prudential-Bache"), in connection with its proposed underwriting of the sale by the Capital Area Regional Solid Waste Authority, Harrisburg, Pennsylvania ("CARSWA" or "Issuer") of Taxable Revenue Bonds (the "Bonds") in an amount estimated to be between \$150 million and \$300 million, as more fully described below. Rhoads & Sinon, of Harrisburg, Pennsylvania, bond counsel to CARSWA, join in making this request on behalf of their client.

We hereby request, on behalf of our client and CARSWA, that the Staff of the Division of Corporation Finance confirm that no action will be recommended to the Securities and Exchange Commission (the "Commission") if the Bonds, including the interests afforded the holders thereof in the hereinafter described Bond Fund, (i) are sold without being registered under the Securities Act of 1933, as

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amended (the "1933 Act"), (ii) are treated as exempted securities under the Securities Exchange Act of 1934, as amended (the "1934 Act") and (iii) are sold without qualification of the indenture relating to the Bonds under the Trust Indenture Act of 1939, as amended (the "1939 Act"). In this connection, we are also requesting the advice of the Staff to the effect that the application of Rule 131 under the 1933 Act and Rule 3b-5 under the 1934 Act do not result in the creation of a "separate security" within the meaning of such Rules requiring registration under such Acts.

#### I. THE PROPOSED OFFERING

CARSWA is a public body corporate organized and existing under the Municipality Authorities Act of 1945, Act of May 2, 1945, §§ 301 et seq., 1945 Pa. Laws 382, Pa. Stat. Ann. tit. 53, §§ 301 et seq. (Purdon's 1967 and Supp. 1986), pursuant to appropriate joint action of the City of Harrisburg, located in Dauphin County, Pennsylvania, the Township of Hampden, located in Cumberland County, Pennsylvania and the Township of Susquehanna, located in Dauphin County, Pennsylvania (together the "Organizing Municipalities"). CARSWA was formed for the express purpose of planning, developing, owning and operating solid waste disposal projects (i.e., incinerator plants). CARSWA is an instrumentality of the Commonwealth of Pennsylvania exercising essential governmental powers, and has power to issue bonds to finance the planning, development, construction and operation of solid waste projects and facilities.

The City of Harrisburg, Pennsylvania has operated its municipal incinerator (the "Facility") since 1972. Because of the burdens of operating and maintaining the Facility and the technical and financial complexities associated with expanding the Facility or constructing a new solid waste disposal plant, the City of Harrisburg is contemplating transferring ownership and maintenance of the Facility to CARSWA. Accordingly, CARSWA has taken on the obligation of studying the feasibility of acquiring the existing Facility and thereafter expanding the Facility to meet the solid waste disposal needs of the Organizing Municipalities, as well as the surrounding townships and counties. In addition, CARSWA is empowered to develop other possible related projects under which the region's solid waste disposal needs may be met in an effective manner. Such projects may include, among other things, construction of landfills and

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transfer stations or other new facilities. CARSWA plans to conduct a feasibility study in order to properly assess the waste disposal needs of Harrisburg and the surrounding area, the potential acquisition and expansion of the existing municipal incinerator to service such needs, as well as alternative methods of dealing with such needs (the "Feasibility Study"). The Feasibility Study will entail analysis, from engineering and design, economic and legal perspectives, of the proposed Facility transfer as well as the additional and ancillary projects referred to above. Among the costs to be incurred in connection with the consideration of the Facility transfer will be the cost of an appraisal of the Facility and the report of a consulting engineer with respect to the Facility's current and contemplated "throughput" capabilities.

The purpose of the proposed Bond issuance is to finance the Feasibility Study. Any available funds remaining after the financing of the Feasibility Study will be used to finance certain other elements of the solid waste management system. It is anticipated that, upon completion of the Feasibility Study and with reference to its results, an additional offering of traditional tax-exempt bonds may be undertaken. The proceeds of such offering will fund the actual acquisition of the Facility or such other elements of a solid waste management system as may be deemed appropriate. It is anticipated that revenues derived from the Facility, including "tipping fees" for use and electricity and steam sales revenues, will be pledged to support payment of such bonds.

The Bonds will be limited obligations of CARSWA and will impose no general liability upon CARSWA for payment of the debt service thereon. Income on the Bonds will be subject to federal income taxation. Although financing plans have not been finalized, it is presently anticipated that the Bonds will have a ten year term with interest alone paid until maturity, and will not be redeemable by the Issuer prior to maturity.

The Bonds will be issued pursuant to the terms of a trust indenture (the "Trust Indenture") between CARSWA and a banking institution, as trustee (the "Trustee"). The proceeds from the sale of the Bonds will be primarily used for the following purposes: (1) to finance the Feasibility Study; (2) to deposit funds in a Bond Fund to be created under the Indenture (the "Bond Fund"), which will be immedi-

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ately invested in a guaranteed investment contract to be obtained from an insurance company or other financial institution; and (3) to provide monies for the issuance costs of the Bonds.

The financing structure of the Bonds is designed so that the funding costs for the Feasibility Study will be derived from the differential between the proceeds of the planned offering and the costs of the guaranteed investment contract. Payment of the debt service on the Bonds will be completely dependent upon payments to be received pursuant to the guaranteed investment contract. It is anticipated that, in order to purchase a guaranteed investment contract yielding funds adequate to service interest and principal payments on the Bonds, the great preponderance of the proceeds from the initial issuance of the Bonds will be invested in the Bond Fund for investment in the guaranteed investment contract.

At the present time, CARSWA intends to acquire or expand the Facility or develop other elements of a solid waste management system for the Organizing Municipalities and surrounding townships and counties as may be deemed appropriate. However, it is possible (either because of conclusions derived from the Feasibility Study or because of other developments) that the Facility will not be acquired or expanded or that a solid waste management system will not be developed. It is anticipated that, in any circumstances, the Bonds will nevertheless remain outstanding until their stated maturity.

## II. DISCUSSION

### A. 1933 Act Considerations and Rule 131.

Although the Bonds are securities under Section 2(1) of the 1933 Act, they are exempt from the registration provisions of Section 5 under Section 3(a)(2) of the 1933 Act, which exempts "any security issued or guaranteed by... any political subdivision of a State or territory, or by any public instrumentality of one or more States or territories..." As described above, CARSWA is a public instrumentality of the Commonwealth of Pennsylvania. Thus, the Bonds are exempt under Section 3(a)(2) from the registration provisions of Section 5 because they are securities issued by a public instrumentality of a State.

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Under Rule 131(a) of the 1933 Act, any part of an obligation issued by a governmental unit in Section 3(a)(2) that is "payable from payments to be made in respect of property or money which is or will be used, under a lease, sale or loan arrangement, by or for industrial or commercial enterprise," is deemed to constitute a "separate security" for purposes of Section 2(1) of the 1933 Act. Absent an exemption, such a separate security would require registration under the 1933 Act.\* Applying Rule 131(a) to CARSWA's proposed sale of the Bonds, the issue arises whether payments derived from the guaranteed investment contract in the Bond Fund could be interpreted as being made under a lease, sale or loan arrangement, by or for commercial or industrial enterprise.

In the contemplated transaction, payments made from the Bond Fund, funded by a guaranteed investment contract, clearly are not payments within the purview of the conditions set forth in Rule 131(a). Such payments are not in respect of a "lease, sale or loan arrangement, by or for an industrial or commercial enterprise". Hence the proposed obligation does not involve a separate security within the meaning of Rule 131(a). In the Release proposing Rule 131(a), Securities Act Release No. 4896, Fed. Sec. L. Rep. ¶77,525 (67-69 Trans. Bdr.) (February 1, 1968), the Commission indicated that Rule 131 is directed to financing plans with respect to the activities of a private company. *Id.* at p. 83,094. The proposed transaction in no way represents such a financing. Rather, the sale of the Bonds represents a financing by a state instrumentality for a public purpose, as described above, with the investment of proceeds in the Bond Fund serving as an effective means of furthering the public purpose. In a recent no-action letter, the Staff adopted a no-action position regarding the inapplicability of Rule 131 in circumstances in relevant part analogous to the proposed offering. In Cache County, Davis County, Salt Lake County, Utah County and Weber County (available January 16, 1987), the Staff accepted the view that a bond retirement fund consisting of guaranteed investment contracts

\* We do not address herein, nor do we request the views of the Staff, regarding whether the guaranteed investment contract would constitute an exempted security under Section 3(a)(8) of the 1933 Act or Rule 151 promulgated thereunder.

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from one or more insurance companies, public utilities or similar triple A institutions would not constitute a "lease, sale or loan arrangement" deemed to be a separate security by Rule 131(a). That letter involved a transaction under which certain Utah counties proposed to issue zero coupon bonds, over half the proceeds of which were to be used to fund the bond retirement fund, with the remaining proceeds to be invested primarily in venture capital investments in new and developing non-public companies. See also Dunes Community Development District (available March 2, 1987). It is respectfully submitted that, in view of the clear public purpose and related circumstances of the proposed CARSWA financing, as well as the analysis of Rule 131 accepted in the recent Cache County no-action letter, the payments in respect of the guaranteed investment contract to be utilized in the CARSWA financing are not with respect to "a lease, sale, or loan arrangement, by or for industrial or commercial enterprise" within the parameters of Rule 131.

We believe that the grounds for the inapplicability of Rule 131 and any related registration requirements are most correctly premised on the above analysis. However, it should also be noted that a secondary ground for exemption from registration can be found in the actual language of subsection (b)(2) of Rule 131. Rule 131(b)(2) provides that an obligation is not a "separate security" for purposes of Rule 131(a) if it "relates to a public project or facility owned and operated by or on behalf of and under the control of a governmental unit" specified in Section 3(a)(2). Thus, even if the contemplated transaction could be interpreted to involve a "lease, sale or loan arrangement, by or for industrial or commercial enterprise," the exception provided by Rule 131(b)(2) should be applicable. As indicated above, the purpose of the proposed initial Bond financing, and the related investment in the guaranteed investment contract, is to make available funds which will be used to finance the Feasibility Study and related initial work for a publicly owned and operated solid waste disposal facility or facilities, as well as possibly to contribute financing for certain other elements of the facilities. In Dunes Community Development District, the Staff recently took a no-action position under Rule 131(b)(2) where there was a substantial degree of public ownership and control over a project. The governmental purpose and ownership of the waste disposal project contemplated by CARSWA is even more apparent than in Dunes and the no-action letters cited therein. Thus, the guaranteed investment contract contem-



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plated by the proposed CARSWA financing comes within the specific exemptive language of Rule 131(b)(2), since such obligation is an integral part of the effectuation of a financing which relates to a project with clear public purpose and ownership.\*\*

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\*\* In this regard, it is relevant to note the language contained in the Commission's Securities Act Release No. 4921 (and recited again in Securities Act Release No. 5055) to the effect that

"[Rule 131] does not have the effect of requiring registration of revenue bonds issued by a state, a political subdivision, a municipality or a public instrumentality to finance a revenue producing public project operated by such issuer, such as toll roads, municipal water systems, transportation facilities and systems or municipal recreational facilities, or revenue bonds which are to be funded by payments under a lease, sale or loan arrangement if the user of the facility or property is a state or a political subdivision or public instrumentality of a state or a municipality which is the lessee or obligor. New paragraph (b) of the rule is designed to remove all doubt as to the effect of the rule. In this connection, concern was expressed in many comments that the rule would have the effect of requiring registration of bonds issued to finance construction of airports, wharves, recreational and sporting facilities and convention facilities. Paragraph (b) would clearly make the rule inapplicable to the financing of such facilities that are owned by a municipality and operated by it or a public instrumentality."

Securities Act Release No. 4921, Fed. Sec. L. Rep. (CCH) ¶ 77,592 ['67-'69 Trans. Bdr.] (August 28, 1968).

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B. 1934 Act Considerations and Rule 3b-5.

Although the Bonds are securities as defined in Section 3(a)(10) of the 1934 Act, they are "exempted securities" within the meaning of Section 3(a)(12) of the 1934 Act. "Exempted securities" include "municipal securities," as defined in Section 3(a)(29) of the 1934 Act. Section 3(a)(29) of the 1934 Act defines "municipal security" as

securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof,....

As described above, the Bonds are obligations of CARSWA, an instrumentality of the Commonwealth of Pennsylvania. Thus, the Bonds are "municipal securities" under Section 3(a)(29) and therefore are "exempted securities" under Section 3(a)(12). The Staff in prior no-action letters has agreed that revenue bonds payable otherwise than from the general revenues of municipal issuers, as is the case in the proposed transaction, are municipal securities for purposes of Section 3(a)(29). See, e.g., Kidder, Peabody & Co. Incorporated (available July 17, 1984); Cache County.

In a variety of circumstances involving a complex array of municipal obligations, the Commission has consistently taken the view that taxable obligations issued by a municipality are "municipal securities", and thus direct obligations, for purposes of Section 3(a)(29) where, as in the case of CARSWA's proposed Bond issuance, payment of principal of and interest on such obligations derives from a source other than the public entity issuing the bonds. For example, in Kidder, Peabody, supra, the Commission agreed that obligations were municipal securities under Section 3(a)(29) where the obligations were payable solely from the proceeds of certificates of deposit placed in trust by a bank. More recently, in Cache County, supra, the Commission accepted the view that obligations were municipal securities under Section 3(a)(29) where payment on the bonds derived from a fund consisting of either obligations issued by an agency of the United States or guaranteed investment contracts issued by an insurance company, public utility or similar "Triple A" rated institution.



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Further support for our position that the Bonds are municipal securities for purposes of Section 3(a)(29) can be found in the legislative history underlying this provision. In enacting Section 3(a)(29), Congress did not intend that this provision only cover municipal obligations where payment on the bonds would derive from the municipality itself. Rather, Congress intended for Section 3(a)(29) to "embrace a multifaceted, complex array of state and local debt." S. Rep. No. 94, 75th Cong., 1st Sess., reprinted in 1975 U.S. Code Cong. & Admin. News 179, 216. Congress stated that:

Unlike corporate securities, which are relatively homogenous within major categories..., municipal bonds constitute a highly individualized type of securities. In addition to differences in investment quality..., bonds vary according to the nature of the debt. For example, such securities may be general obligations of the issuer, backed by the "full faith and credit" of the issuing government to the extent of its powers of taxation; or they may be revenue bonds, payment of which is secured only by funds generated by use of the facility financed by the proceeds of the bond issue. In addition, municipal securities include special assessment and industrial revenue bonds.

Id.

Rule 3b-5 of the 1934 Act is the companion to Rule 131 in the 1933 Act and contains provisions substantially identical to Rule 131. We submit, for the reasons stated above with respect to Rule 131, that CARSWA's proposed sale of the Bonds does not involve a "separate security" under Rule 3b-5 that would require registration under the 1934 Act.

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C. 1939 Act Considerations.

Section 304(a)(4)(A) of the 1939 Act states that the Act does not apply to

any security exempted from the provisions of the Securities Act of 1933, as heretofore amended, by paragraph (2), (3), (4), (5), (6), (7), (8) or (11) of subsection 3(a) thereof....

As discussed above, the Bonds are exempt from the registration provisions under Section 5 of the 1933 Act under Section 3(a)(2) of the 1933 Act. Thus, the Bonds are exempt from the provisions of the 1939 Act under Section 304(a)(4)(A) of the 1939 Act. Furthermore, for the reasons stated above, the Bond Fund and the guaranteed investment contract are also exempt from the registration provisions of the 1933 Act under Section 3(a)(2) of the 1933 Act because they do not constitute "separate securities" under Rule 131(a). Thus, the Bond Fund and the guaranteed investment contract also are exempt from the 1939 Act under Section 304(a)(4)(A) of the 1939 Act.

III. CONCLUSION

Based upon the foregoing, we respectfully request the advice of the Staff to the effect that (a) it will not recommend any action to the Commission if (i) the Bonds are offered and sold without registration under the 1933 Act, (ii) the Bonds are treated as exempted securities under the 1934 Act, and (iii) the Bonds are sold without qualifying the Indenture relating to the Bonds under the 1939 Act; and (b) no "separate security" is created under the foregoing facts within the meaning of Rule 131 under the 1933 Act or Rule 3b-5 under the 1934 Act that would require registration under such Acts, in reliance upon the opinion of our firm that such registration and qualification are not required and that such treatment is appropriate. Rhoads & Sinon, bond counsel to CARSWA, concur in the views and opinions set forth herein.

In accordance with the procedures outlined in Securities Act Release No. 6269 (December 5, 1980), we enclose seven extra copies of this letter for the convenience of the Staff.

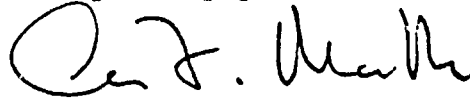
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CARSWA expects shortly to offer and sell the Bonds. Accordingly, we respectfully request a response to this request as soon as practicable, and, if possible, a response within 30 days of your receipt of this letter.

If you have any comments or questions relating to this request, or if you anticipate formulating a response not consistent with our interpretation, please feel free to contact either the undersigned at (212) 715-8080 or James A. Lapenn, Esq. of this office at (212) 715-8023. Please also feel free to contact Robert H. Long, Jr., Esq., or Charles J. Ferry, Esq., of Rhoads & Sinon at (717) 233-5731.

Very truly yours,



Cameron F. MacRae III, P.C.

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June 18, 1987

William E. Morley, Esq.  
Chief Counsel  
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Washington, D.C. 20549

Re: Confidentiality for No-Action Request Filed  
June 18, 1987 for the Capital Area Regional  
Solid Waste Authority, Harrisburg, Pennsylvania

Dear Mr. Morley:

Pursuant to 17 C.F.R. § 200.81(b)(1986), we are submitting this letter on behalf of our client, Prudential-Bache Capital Funding ("Prudential-Bache"), to request that the Staff of the Securities and Exchange Commission ("Commission") grant confidential treatment until 90 days after the expiration of 30 days from the date of the Staff's response to the no-action letter submitted on June 18, 1987 by this firm on behalf of our client relating to the Capital Area Regional Solid Waste Authority, Harrisburg, Pennsylvania ("CARSWA"), proposed bond financing. Rhoads & Sinon, of Harrisburg, Pennsylvania, bond counsel to CARSWA, join in making this request on behalf of their clients.

As more fully described in our no-action request, the proposed bond financing by CARSWA, which involves the investment of a portion of the proceeds from the sale of the

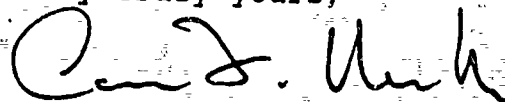
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bonds in a guaranteed investment contract, is a relatively unique concept developed by Prudential-Bache. The disclosure of CARSWA's no-action request and the Staff's response thereto without granting confidential treatment for 90 days after the expiration of 30 days from the Staff's response could jeopardize the highly proprietary nature of the concept and could detrimentally affect the success of the CARSWA's proposed offering. Therefore, we are of the view that confidential treatment should be accorded to the no-action request.

If you have any comments or questions relating to this request, please feel free to contact either the undersigned at (212) 715-8080 or James A. Lapenn, Esq. of this office at (212) 715-8023. Please also feel free to contact Charles J. Ferry, Esq. of Rhoads & Sinon at (717) 233-5731.

Very truly yours,



Cameron F. MacRae III, P.C.

July 29, 1987

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RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF CORPORATION FINANCE

Re: Capital Area Regional Solid Waste Authority, Harrisburg, Pennsylvania  
Incoming letter dated June 18, 1987

Based on the facts presented, this Division will not recommend enforcement action to the Commission if the Capital Area Regional Solid Waste Authority, in reliance on your opinion that the exemptions afforded by Section 3(a)(2) of the Securities Act of 1933 (the "1933 Act"), Section 3(a)(12) of the Securities Exchange Act of 1934 (the "1934 Act") and Section 304(a)(4) of the Trust Indenture Act of 1939 (the "1939 Act") are available, offers and sells the Bonds (including the interests of the holders thereof in the Bond Fund) as described in your letter without registering the Bonds under the 1933 Act or the 1934 Act or qualification under the 1939 Act. It is also our view that payments from the Bond Fund would not be made in respect of property or money which is or will be used, under a lease, sale or loan agreement, by or for industrial or commercial enterprises, and would thus not be deemed separate securities under Rule 131(a) under the 1933 Act and Rule 3b-5 under the 1934 Act.

Because these positions are based on the representations made to the Division in your letter, it should be noted that different facts or conditions might require another conclusion. Moreover, this letter only expresses the Division's position on enforcement action and does not purport to express legal conclusions on the questions presented.

With regard to your request for confidential treatment for an additional 90 days pursuant to 17 CFR 200.81, please be advised that your request has been granted for that period.

Sincerely,

*Sara Hanks*

Sara Hanks  
Attorney-Fellow