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SERVICE DATE – LATE RELEASE JANUARY 14, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 684

SOLID WASTE RAIL TRANSFER FACILITIES

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking; Adoption of Interim Rules.

SUMMARY: The Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (Clean Railroads Act or CRA), enacted October 16, 2008, revises 49 U.S.C. 10501(c)(2) to remove from the jurisdiction of the Surface Transportation Board (Board or STB) the regulation of solid waste rail transfer facilities, except as provided for in that act. The Clean Railroads Act adds new sections to title 49 of the United States Code which limit the Board's authority with regard to solid waste rail transfer facilities to the issuance of land-use-exemption permits. Upon receiving a land-use-exemption permit, a solid waste rail transfer facility need not comply with state laws, regulations, orders, and other requirements affecting the siting of the facility, as those state laws, regulations, orders and requirements would be preempted under these circumstances. The Clean Railroads Act also requires that the Board issue procedures governing the submission and review of applications for land-use-exemption permits and related filings. The proposed rules, which we are issuing as interim rules, will be codified as Part 1155 of Title 49 of the Code of Federal Regulations, and are set forth in the Appendix. The Board is seeking comment on these rules and on our interpretation of the CRA, which is set forth below.

DATES: Comments on this proposal are due by February 23, 2009. Reply comments are due by March 23, 2009.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: STB Ex Parte No. 684, 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar at (202) 245-0395.
[Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: Section 10501(b) of the Interstate Commerce Act, 49 U.S.C. 10501(b), specifically provides that both “the jurisdiction of the Board over transportation by rail carriers” and the “remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies under Federal or State law.” Prior to enactment of the Clean Railroads Act, a solid waste rail transfer facility owned by a rail carrier, in general, came within the Board’s jurisdiction as part of transportation by rail carrier. Accordingly, any form of state or local permitting or preclearance (including zoning) that, by its nature, could have been used to deny a railroad its ability to construct and conduct activities involving rail transportation at a solid waste rail transfer facility was preempted, as were other state laws that had the effect of managing or governing rail transportation. See 49 U.S.C. 10501(b); N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); Green Mountain R.R. v. Vermont, 404 F.3d 638, 641-43 (2d Cir. 2005) (Green Mountain).

The purpose of the Clean Railroads Act is to establish that solid waste rail transfer facilities, as defined in section 10908(e)(1)(H), must now comply with all applicable federal and state requirements respecting pollution prevention and abatement, environmental protection and restoration, and protection of public health and safety, including laws governing solid waste, to the same extent as any similar solid waste management facility. The CRA gives the Board the power, if petitioned, to determine the placement of solid waste rail transfer facilities that are part of the national rail system through the issuance of land-use-exemption permits, which preempt state and local laws and regulations “affecting the siting” of such facilities. See 49 U.S.C. 10909(f). The CRA focuses on the Board’s jurisdiction and regulatory authority with regard to the siting of solid waste rail transfer facilities. It is not meant to affect a rail carrier’s transportation-related activities involving other commodities. See 49 U.S.C. 10908(d).

More specifically, section 602 of the Clean Railroads Act amends 49 U.S.C. 10501(c)(2)(B) to remove the Board’s jurisdiction over solid waste rail transfer facilities, except for the authority to preempt state and local laws and regulations through the issuance of land-use-exemption permits as set forth in sections 603-04 of that act, which are codified at 49 U.S.C. 10908-09. The Clean Railroads Act leaves all other regulation of solid waste rail transfer facilities to the states.

New section 10908, “Regulation of solid waste rail transfer facilities,” sets forth the general rule, in subsection (a), that a solid waste rail transfer facility must comply with federal and state laws regarding pollution, protection and restoration of the environment, and protection of public health and safety to the same extent that those laws would apply to any similar solid waste management facility that is not owned or operated by or on behalf of a rail carrier, except as provided in new section 10909, “Solid waste rail transfer facility land-use exemption authority.” Section 10908(b) sets forth transition rules for existing solid waste transfer facilities. An existing facility has 90 days to comply with all applicable federal and state requirements except for those requiring permits, see section 10908(b)(1), and 180 days to apply for all required federal and state non-siting permits, see section 10908(b)(2)(A). The facility can continue to operate during the pendency of the non-siting permitting process. See id. Existing facilities are not required to obtain state siting permits or a land-use-exemption permit from the Board. See section 10908(b)(2)(B). However, the governor of the state in which an existing facility is located may file a petition with the Board under section 10908(b)(2)(B) to require the

facility to apply for a federal land-use-exemption permit. The Board must accept a complete petition filed by the Governor or his or her designee.¹

New section 10909, “Solid waste rail transfer facility land-use exemption,” prescribes the land-use-exemption authority of the Board regarding solid waste rail transfer facilities. The Board’s interpretation of section 10909(a) is discussed below. The Board may only grant a land-use-exemption permit if it determines that the facility does not pose an unreasonable risk to public health, safety or the environment at that location, after weighing, *inter alia*, the facility’s potential benefits to and adverse impacts on public health and safety, the environment, interstate commerce, and the transportation of solid waste by rail. See section 10909(c). Congress also listed a number of factors for the Board to consider in a land-use-exemption proceeding. See section 10909(d). When the Board issues a land-use-exemption permit, all state laws, regulations, orders, or other requirements affecting the siting of the facility are preempted with respect to that facility. See section 10909(f). However, the Board may require compliance with some or all of those laws and regulations as a condition of its approval of an application for a land-use-exemption permit. Id.

The Clean Railroads Act also adds section 10910, “Effect on other statutes and authorities,” which preserves the state’s traditional police powers to require railroads to comply with environmental, public health, and public safety regulations so long as the regulations are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers.

Pursuant to new section 10909(b), the Board must “publish procedures governing the submission and review of applications for solid waste rail transfer facility land-use exemptions,” not later than 90 days after the Clean Railroads Act became law. 49 U.S.C. 10909(b).² The

¹ New section 10908 also includes a number of definitions, clarifies that the Clean Railroads Act does not affect railroad operations with respect to non-waste commodities, and also establishes that a railroad’s common carrier obligation does not apply to a solid waste rail transfer facility that does not have the required federal and state permits, including a land-use-exemption permit, if necessary. See sections 10908(c)-(e).

² Specifically, the Clean Railroads Act requires that the regulations, which we are proposing for adoption today, include the following:

- (1) The information that must be provided in the application for a land-use exemption that explains how the facility will not pose an unreasonable risk to public health, safety, or the environment, see proposed Rule 1155.22, “Contents of application.”
- (2) The information necessary to give notice to the public and give the public time to comment, including specific notice to the municipality where the facility is located, the state where it is located, and any Federal or State regional planning entity where it is located, see proposed Rules 1155.20, “Notice of intent to apply for land-use-exemption permit,” 1155.21, “Form of notice,” 1155.24, “Filings and service of application,” and 1155.25, “Participation in application proceedings.”

(continued . . .)

purposes of this decision are to propose procedures, which are contained in the Appendix and to adopt those procedures as the interim rules that will be followed until the completion of this proceeding. We recognize, however, that central to understanding these proposed procedures is an understanding of how we interpret the Clean Railroads Act itself. Therefore, we discuss the definitions of a solid waste rail transfer facility and a land-use-exemption permit; describe what the Clean Railroads Act requires of existing³ and proposed solid waste rail transfer facilities; discuss the role of the Board; and describe the effects of the CRA and a land-use-exemption permit. We invite public comments on the proposed procedural rules and any other aspect of our interpretation of the Clean Railroads Act.

THE BOARD’S INTERPRETATION OF THE CLEAN RAILROADS ACT

The Board recognizes that the intent of the Clean Railroads Act is to regulate solid waste rail transfer facilities at the federal and state levels in the same manner as non-railroad solid waste management facilities. The CRA preserves an important role for the Board by establishing a permitting process regarding siting. The following discussion is organized as follows: (1) what is a solid waste rail transfer facility; (2) what is a land-use-exemption permit; (3) what must existing and proposed solid waste rail transfer facilities do to comply with the Clean Railroads Act; (4) what is the Board’s role under the Clean Railroads Act; and (5) what are the effects of the Clean Railroads Act and a land-use-exemption permit.

1. What Is a Solid Waste Rail Transfer Facility?

The Clean Railroads Act applies only to solid waste rail transfer facilities. See section 10908(d). A solid waste rail transfer facility is defined as including the portion of a

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(3) The Board’s review timeline, with the understanding that a final decision must be issued 90 days from the close of the record, see proposed Rule 1155.27, “Board determination under 49 U.S.C. 10909.”

(4) The Board’s expedited timelines for petitions to modify, amend, or revoke land-use exemptions, see proposed Rule 1155.25, “Participation in application proceedings.”

(5) The process for a State, under section 10908(b)(2)(B), to petition the Board to require an existing facility to apply for a land-use exemption, see proposed Subpart B.

(6) The process for a facility or rail carrier to petition the Board for a land-use exemption, see proposed Subpart C.

See 49 U.S.C. 10909(b). We have set forth proposed procedures in the Appendix, and invite comment on them from the public, recognizing that changes to the proposed rules may have an effect on the Board’s narrative interpretation set forth in this notice of proposed rulemaking, and vice versa.

³ A solid waste rail transfer facility in existence on October 16, 2008, is considered an existing facility.

facility: (1) that is owned or operated by or on behalf of a rail carrier; (2) where solid waste is treated as a commodity transported for a charge; (3) where the solid waste is collected, stored, separated, processed, treated, managed, disposed of, or transferred; and (4) to the extent that solid-waste activity is conducted outside of the original shipping container. See section 10908(e)(1)(H)(i).⁴ The CRA does not apply to any facility or portion of a facility that does not meet all of these factors. Whether a facility would fall within the state's or the Board's jurisdiction appears to depend upon which of those criteria the facility does not meet. For example, if a facility meets all other criteria but is not owned or operated by or on behalf of a rail carrier, then the Board has no jurisdiction. If, on the other hand, a facility meets all other criteria but the activity conducted at the facility is limited to transferring solid waste in the original shipping container, then the facility falls under the Board's general jurisdiction, not the Board's jurisdiction under the Clean Railroads Act.

The Clean Railroads Act excludes from the definition of solid waste rail transfer facility those facilities where the solid-waste activity is the direct transfer or transload of solid waste from a tank truck to a rail tank car. See 49 U.S.C. 10908(e)(1)(H)(ii)(II). The Clean Railroads Act also excludes from the definition the portion of a facility where the only activity is railroad transportation of solid waste after the waste has been loaded for shipment in or on a rail car, including interchanging rail cars of solid waste. See 49 U.S.C. 10908(e)(1)(H)(ii)(I). In such cases, assuming the facility, or portion thereof, meets the other necessary qualifications, it would be subject to the Board's general jurisdiction over rail transportation and entitled to preemption from most state and local laws, including siting laws, under section 10501(b). See Green Mountain, 404 F.3d at 641-43.

Due to Congress' intent to limit the definition of a solid waste rail transfer facility in this matter, we propose in Rule 1155.10, "Contents of petition," that when a state petitions the Board to require an existing facility to apply for a land-use exemption, the Governor or his or her designee must submit a good-faith certification that the subject facility meets the CRA's definition of a solid waste rail transfer facility.

A property could host different activities subject to varying levels of Board jurisdiction, or host activities not within the Board's jurisdiction at all. Because of this possibility, the Board is also proposing in Rule 1155.22, "Contents of application," that a solid waste rail transfer facility's application contain a technical drawing of the facility with specific demarcations detailing what activities will be occurring in what portions of the facility. We will also require that a facility detail in its application those areas of the property that it has set aside for future growth, so that the land-use-exemption permit may include those areas where expansion may occur, without the need for modifying or amending the original permit. These proposed requirements should help to clarify for states and the public at large the extent of a facility's activities and use of its land.

⁴ See section 10908(e) for definitions of "solid waste" and related terms.

2. What Is a Land-Use-Exemption Permit?

A land-use-exemption permit is the license that the Board will issue under the Clean Railroads Act to a qualifying solid waste rail transfer facility. To have federal preemption under the CRA, a new solid waste rail transfer facility must possess a land-use-exemption permit. Below we clarify two issues with regard to land-use-exemption permits to aid in understanding what a land-use-exemption permit is and what it does.

A. “Land-Use Exemption” and “Siting Permit”

The Clean Railroads Act uses two terms to describe the license that the Board may issue to a solid waste rail transfer facility. It uses the term “land-use exemption” when the carrier or facility involved seeks the license (*see, e.g.*, new section 10909(a)(1), (b)(6)), and the term “siting permit” when the Governor of the state initiates the Board proceeding with respect to an existing facility (*see* new section 10909(a)(2), (b)(5)). The two instances in which the phrase “siting permit” is used to describe action of the Board are in section 10909(b)(5) and (e). Reading those references in context, we believe that Congress intended “siting permit” to be synonymous with “land-use exemption.”⁵ For simplicity, we will use the single term “land-use-exemption permit” to refer to any license the Board may issue to a solid waste rail transfer facility.

B. The Scope of the Phrase “Affecting the Siting”

Central to an understanding of the extent of the Board’s authority under the Clean Railroads Act and the scope of a land-use-exemption permit is the interpretation of the phrase “affecting the siting.” Section 10909(f) preempts a solid waste rail transfer facility from

⁵ Section 10909(b)(5) references the process to be employed by the Board when a state petitions the Board “to require a solid waste transfer facility or a rail carrier that owns or operates such a facility to apply for a *siting permit*.” This language refers to the state petition process in section 10908(b)(2)(B), which does not use “siting permit” to describe what the Board issues. Instead, it explains that the state “may petition the Board to require the facility to apply for a *land-use exemption*.” That section further states that the “facility shall be required to have a Board-issued *land-use exemption*” to operate.

Section 10909(e) states that a solid waste rail transfer facility “shall submit a complete application for a *siting permit* to the Board pursuant to the procedures issued pursuant to subsection (b).” Section 10909(b) is titled “Land-Use Exemption Procedures” and requires the Board to issue procedures for submission and review of “land-use exemptions.” Section 10909(e) also states that a state may not enforce certain laws affecting the siting of an existing facility until “the Board has approved or denied a *permit* pursuant to subsection (c).” Section 10909(c)(1) sets out the Board’s standard of review, stating “the Board may only issue a *land-use exemption . . .*” in certain instances; while section 10909(c)(2) states “the Board may not grant a *land-use exemption . . .*” in other circumstances. Though section 10909(e) uses “siting permit,” neither of the other statutory sections referenced therein uses that phrase. Rather, each employs “land-use exemption.”

compliance with “all State laws, regulations, orders, or other requirements *affecting the siting*” of a facility if the solid waste rail transfer facility is granted a land-use-exemption permit by the Board.⁶

We believe that the term “affecting the siting” was purposefully chosen to provide facilities an opportunity to invoke the land-use-exemption-permit process regardless of the traditional characterization of a particular law.⁷ But we also recognize that Congress did not want to shield solid waste rail transfer facilities from complying with the same types of pollution, public health and safety, and environmental laws with which other similar solid waste management facilities must comply. Until the Board gains experience applying the Clean Railroads Act, we are not prepared to determine what types of laws could “affect siting” for purposes of the Clean Railroads Act. As discussed below, applicants will be required to identify those laws that they believe affect the siting of a particular solid waste rail transfer facility, as will any public participant in the proceeding.

3. What Actions Must Facilities Take to Comply with the Clean Railroads Act?

If a facility, or portion thereof, may be categorized as a solid waste rail transfer facility, it must comply with all federal and state laws⁸ regarding pollution, protection and restoration of the environment, and the protection of public health and safety, to the same extent as any similar solid waste management facility. See 49 U.S.C. 10908(a). Compliance with state and local laws that affect the siting of a facility will not be necessary if the Board issues a land-use-exemption permit. See 49 U.S.C. 10909(f). However, pursuant to that section, the Board may require compliance with such state laws, regulations, orders, or other requirements as a condition of a land-use-exemption permit. Section 10909(a) sets forth the circumstances in which an existing or proposed facility may obtain a Board-issued land-use-exemption permit.

⁶ The term “affecting the siting” also is used in section 10909(a)(1), “Authority,” which authorizes the Board to issue a land-use-exemption permit to a facility if, among other things, the Board “finds that a State, local, or municipal law, regulation, order, or other requirement *affecting the siting* of such facility” is either unreasonably burdensome to interstate commerce or discriminates against solid waste rail transfer facilities or rail carriers; and in section 10909(e), “Existing Facilities,” which bars a state from enforcing any “law, regulation, order, or other requirement *affecting the siting* of” an existing solid waste rail transfer facility during the pendency of a facility’s land-use-exemption permit application with the Board.

⁷ We understand that “siting” laws or regulations, in general, may be read to refer to laws or regulations that traditionally are labeled as zoning or land-use laws. We recognize, however, that there also may be a variety of other laws, such as environmental laws, that are particular to solid waste rail transfer facilities and, when applied to a solid waste rail transfer facility, may affect the siting of the facility on a specific piece of property.

⁸ We note that, under the CRA, the laws, regulations, ordinances, orders, and other requirements of a political subdivision of a state, such as a locality or municipality, are not applicable to solid waste rail transfer facilities unless the state has specifically delegated such power to the political subdivision. See 49 U.S.C. 10908(e)(3).

In general, any facility may come to the Board under section 10909(a)(1). Indeed, the last clause of the subparagraph—permitting “a rail carrier that owns or operates such a facility [to] petition[] the Board for such an exemption”—allows a rail carrier to petition the Board for a land-use-exemption permit without first receiving an unsatisfactory result from a state agency, regardless of the facility’s characterization as existing or proposed. The rail carrier would not need to make any showing to the Board of unreasonable burden or discrimination prior to applying for a land-use-exemption permit. Rather, the rail carrier could come in under Subpart C of our proposed rules to obtain a land-use-exemption permit.⁹

The first part of section 10909(a)(1) states, “the Board finds that a State, local, or municipal law, regulation, order, or other requirement affecting the siting of such facility unreasonably burdens the interstate transportation of solid waste by railroad, discriminates against the railroad transportation of solid waste and a solid waste rail transfer facility.” We believe that this clause contemplates a separate route for solid waste rail transfer facilities to come before the Board. It provides an opportunity to a facility that has first applied to the appropriate state agency for those state permits affecting the siting of a facility and that has received an unsatisfactory result to apply to the Board for a land-use-exemption permit. After receiving an unsatisfactory result from the state, a solid waste rail transfer facility could apply to the Board for a land-use-exemption permit. It must, however, make at least one of two showings with regard to the state’s action or the state law: (1) the state has placed an unreasonable burden on railroad transportation of solid waste, or (2) a state law discriminates against railroad transportation of solid waste and a solid waste rail transfer facility.

The Board, prior to considering whether the solid waste rail transfer facility is an unreasonable risk to the public health, safety, or the environment under 10909(c)(1), would have to make an initial determination about the unreasonableness or discriminatory nature of the state action or law in question. Such an initial determination would be a predicate to any Board consideration of whether to grant or deny the application for a land-use-exemption permit. Our proposed Rule 1155.23, “Additional requirements when filing after an unsatisfactory result from a state, local, or municipal authority affecting the siting of the facility,” provides additional requirements for a facility to satisfy were it to apply to the Board in this manner. We believe one of the purposes of section 10909(a)(1) is to provide a facility with an opportunity to seek a land-use-exemption permit after receiving an unsatisfactory result from the state if the facility believes that the state is unreasonably burdening the interstate transportation of solid waste by railroad or is discriminating against the railroad transportation of solid waste and a solid waste rail transfer facility.

It is important to note that a proposed facility might never come before the Board. If a proposed facility applies to the requisite state agency for all state permits affecting the siting and those permits are granted, the Board might never become involved in the process. Similarly, the Board would not become involved with state permits that do not affect the siting of the proposed

⁹ Subpart C contains the rules for applying for a land-use-exemption permit.

facility, because the Board's jurisdiction under the Clean Railroads Act only extends to land-use-exemption permits. Regardless of whether a proposed facility comes before the Board or not, we note that, in order to lawfully operate, a proposed solid waste rail transfer facility will need to comply with all state laws, as described in section 10908(a), that do not affect the siting of a facility.

As noted, existing solid waste rail transfer facilities have separate requirements they must meet under the Clean Railroads Act. To remain in operation, the CRA requires an existing facility to comply with all federal and state laws regarding pollution, protection and restoration of the environment, and the protection of public health and safety, except for permits, within 90 days, i.e., by January 14, 2009. See 49 U.S.C. 10908(b)(1). For those state laws requiring permits, an existing facility need not possess any state (non-siting) permit to remain in operation if it has, in good faith, submitted an application to the proper state agency (or agencies) for each permit within 180 days of enactment, i.e., by April 14, 2009. See 49 U.S.C. 10908(b)(2)(A)(i). After submitting a good-faith application, the existing facility may remain in operation until a final decision either approving or denying each one of those permits has been made.¹⁰ See 49 U.S.C. 10908(b)(2)(A)(ii).

If an existing facility already has a state siting permit, it need not take any further steps to remain in operation, aside from those described above regarding federal and state non-siting laws. See section 10908(b)(2)(B). If the existing facility does not have a state siting permit, it need not obtain any siting permits from the state or the Board to continue operations or to be considered in compliance with state land-use requirements, see 49 U.S.C. 10908(b)(2)(B), unless the state, acting through the governor or his/her designee, petitions the Board to require that the solid waste rail transfer facility apply for a land-use-exemption permit from the Board. Once the state, acting through the governor or his/her designee submits a perfected petition, then the solid waste rail transfer facility must file an application with the Board and obtain a land-use-exemption permit to continue to operate. See 49 U.S.C. 10909(a)(2), 10908(b)(2)(B). The contents of the petition that the state must file with the Board is set forth in proposed Rule 1155.10, "Contents of petition." This includes the identifying information for the facility and a certification by the state that the facility meets the definition of solid waste rail transfer facility set forth in the Clean Railroads Act.

When a state petitions the Board, proposed Rule 1155.12, "Participation in petition proceedings," allows 20 days for the subject facility to reply regarding the classification by the state of that facility as an existing facility under section 10908(b). If the state's classification is not challenged, or if the state prevails in showing that the facility is a solid waste rail transfer

¹⁰ For example, if an existing facility must receive state (non-siting) permits from five agencies, the existing facility may remain in operation until all five agencies have made their respective final decisions. If the state (non-siting) permits are all granted, the existing facility may continue to operate subject to the siting permit requirements discussed below. If any of those state (non-siting) permits are denied, the consequences set forth under the governing law(s) with regard to that permit would determine whether operations could continue.

facility, the Board will grant the petition, and the facility will be required to obtain a Board-issued land-use-exemption permit pursuant to section 10909 to continue to operate. See 49 U.S.C. 10908(b)(2)(B).

Upon the Board's acceptance of a state petition, the existing facility will be required to submit a complete application for a Board-issued land-use-exemption permit. See 49 U.S.C. 10909(e). The process for submitting an application and the information to be contained therein are set forth in Subpart C of the proposed rules. See 49 U.S.C. 10909(b). During the time that an existing facility's application is pending before the Board, the state would be preempted from enforcing any laws, regulations, orders, or other requirements affecting the siting of a facility. See 49 U.S.C. 10909(e). We read section 10909(e) in conjunction with section 10908(b)(2)(B) to allow an existing facility that is the subject of a state petition to continue its operations until a final decision on the land-use-exemption-permit petition is made by the Board. See 49 U.S.C. 10908(b)(2)(B), 10909(e).

4. What Is the Board's Role Under the Clean Railroads Act?

The primary role of the Board under the Clean Railroads Act is to issue land-use-exemption permits for solid waste rail transfer facilities that meet the CRA's standards. The Board may issue land-use-exemption permits only for solid waste rail transfer facilities that are or are proposed to be operated by or on behalf of a rail carrier. See 49 U.S.C. 10909(a). A petition for such a land-use-exemption permit could reach the Board in one of three ways: (1) a proposed facility has been denied its state application for a permit that affects the siting of a facility, or received an otherwise unsatisfactory result from the state, including inordinate delay, and that facility attempts to demonstrate, as noted above, that the state is placing an unreasonable burden on rail transportation of solid waste, or that the state is discriminating against railroad transportation of solid waste and the facility; (2) a rail carrier that owns or operates an existing facility or plans to own or operate a new facility petitions the Board for a land-use-exemption permit without first receiving an unsatisfactory result from the state; or (3) a state petitions the Board to require an existing facility to apply for a land-use-exemption permit. See 49 U.S.C. 10909(a).

Once the matter is before the Board, the Board may issue a land-use-exemption permit if it finds the facility does not pose an unreasonable risk to public health, safety, or the environment. See 49 U.S.C. 10909(c)(1). To make this finding, the Board must weigh the facility's potential benefits to and adverse impacts on public health, public safety, the environment, interstate commerce, and transportation of solid waste by rail. See 49 U.S.C. 10909(c)(1). The Clean Railroads Act lists six factors the Board must consider in carrying out this balancing test, as follows:

- (1) the land-use, zoning, and siting regulations or solid waste planning requirements of the State or State subdivision in which the facility is or will be located that are applicable to solid waste transfer facilities, including those that are not owned or operated by or on behalf of a rail carrier;
- (2) the land-use, zoning, and siting regulations or solid waste planning requirements applicable to the property where the solid waste rail transfer facility is proposed to be located;

- (3) regional transportation planning requirements developed pursuant to Federal and State law;
- (4) regional solid waste disposal plans developed pursuant to State or Federal law;
- (5) any Federal and State environmental protection laws or regulations applicable to the site; and
- (6) any unreasonable burdens imposed on the interstate transportation of solid waste by railroad, or the potential for discrimination against the railroad transportation of solid waste, a solid waste rail transfer facility, or a rail carrier that owns or operates such a facility.

49 U.S.C. 10909(d)(1)-(6). The Board also can consider any other factors it deems relevant. See 49 U.S.C. 10909(d)(7).

To assist us in weighing all of these considerations, we propose to require, in Rule 1155.22, “Contents of application,” that the applicant organize its request in terms of (1) the Board’s standards for review of an application and (2) all of the factors the Board is required to consider under the CRA, including an explanation of how those factors relate to the subject facility. The applicant should also address any additional factors that it believes the Board should consider.

The Clean Railroads Act precludes the Board from issuing a land-use-exemption permit if the proposed facility, or any part of the facility, is to be located on land affiliated with the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Trails System, the National Wild and Scenic Rivers System, a National Reserve, or a National Monument. See 49 U.S.C. 10909(c)(2). Moreover, if the facility would be located on lands referenced in the Highlands Conservation Act for which a state has implemented a conservation management plan, the Board may issue a land-use-exemption permit for the proposed facility only if operation of the facility would be consistent with restrictions placed on those lands. See id. Because of these restrictions, the Board is proposing to require in Rule 1155.22, “Contents of application,” that an applicant state whether the proposed solid waste rail transfer facility or any portion thereof is located on any of these lands of national interest.¹¹ We also propose to require in Rule 1155.20, “Notice of intent to apply for a land-use-exemption permit,” that an applicant notify the managing agency of each land group noted above of the facility’s proposed location so that those entities may verify, if they so chose, that the facility is not located on such lands.

Though not specifically mentioned in the Clean Railroads Act, the Board recognizes that the issuance of a land-use-exemption permit is a major federal action under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq. The Board proposes to conduct the appropriate level of environmental review for each land-use-exemption-permit proceeding,

¹¹ While location on these lands of national interest is not a bar to the Board’s issuance of a land-use-exemption permit for an existing facility, it would still be a relevant factor under 49 U.S.C. 10909(d)(7).

pursuant to the Council on Environmental Quality's regulations, 40 CFR 1500-1508, and the Board's own environmental regulations, 49 CFR 1105. We also note that the Clean Railroads Act requires us to issue a final decision within 90 days of the close of the record, so that the time for issuance of a final decision will vary depending upon the type of environmental review conducted, if at all. See 49 U.S.C. 10909(b)(3).

The Clean Railroads Act also specifically authorizes the Board to set reasonable fees for permit applicants. See 49 U.S.C. 10909(h). Those fees may include the costs associated with retaining third-party consultants (which are not included in the filing fee). See id. We anticipate that the amount of Board resources that will be necessary for processing such applications, including legal and environmental analysis, will be similar to the amount of resources required in abandonment proceedings. Thus, we propose to mirror the filing fees charged in abandonment proceedings as follows: (1) an application for a land-use-exemption permit for a facility not in existence as of October 16, 2008, will require a filing fee of \$22,200 (the amount set for an abandonment application); and (2) an application for a land-use-exemption permit for a facility existing as of October 16, 2008, will require a filing fee of \$6,300 (the amount set for an abandonment petition for exemption). We propose to amend 49 CFR 1002.2(f), "Schedule of filing fees," to reflect the new fees.

The proposed fees set forth here reflect only an estimate of the amount of resources that the Board will use to process land-use-exemption-permit applications. We will update these fees periodically based on the cost study formula set forth at 49 CFR 1002.3(d) and other factors relevant to Board fee policy. See, e.g., Regulations Governing Fees for Services Performed in Connection with Licensing and Related Services—2008 Update, STB Ex Parte No. 542 (Sub-No. 15) (STB served June 18, 2008).

5. *What Are the Effects of a Board-Issued Land-Use-Exemption Permit and the Clean Railroads Act?*

The Clean Railroads Act only affects solid waste rail transfer facilities and not rail carriers' transportation-related activities regarding other, non-waste commodities. See 49 U.S.C. 10908(d). When the Board grants a land-use-exemption permit, a solid waste rail transfer facility is expressly preempted from complying with any and all State laws, regulations, orders, or other requirements affecting the siting of a facility except to the extent that the Board imposes as a condition of the exemption that the facility comply with particular state requirements. See 49 U.S.C. 10909(f). A solid waste rail transfer facility must comply, however, with all federal laws and with all other state laws regarding pollution, protection and restoration of the environment, and the protection of public safety.

We note that a land-use-exemption permit would not preempt a state's traditional police powers to require compliance with state and local environmental, public health, and public safety standards that are not unreasonably burdensome to interstate commerce and do not discriminate against rail carriers. See 49 U.S.C. 10910. Moreover, the Board may exempt a facility from compliance with state laws, regulations, orders, or other requirements affecting the siting of the facility only if it determines that a facility does not pose an unreasonable risk to public health, safety, or the environment.

If the Board denies a land-use-exemption permit application, the solid waste rail transfer facility would not come within the Board's preemptive jurisdiction and the state's laws, regulations, orders, or other requirements affecting the siting of a facility would govern that solid waste rail transfer facility. The facility would not be permitted to operate as a solid waste rail transfer facility at that location unless and until it obtained the necessary siting permits from the applicable state authority.

The Clean Railroads Act contemplates the possible need for changes to a Board-issued land-use-exemption permit. Under section 10909(b)(4), a Board-issued land-use-exemption permit is subject to petitions to modify, amend, or revoke, which must be considered by the Board in an expedited process. The Board is proposing procedures in Rule 1155.28, "Appellate Procedures." For petitions to modify, amend, or revoke a land-use-exemption permit, the proposed rules apply the Board's normal standard of review for a petition to reopen an administratively final Board action. See 49 CFR 1115.4. The petition must demonstrate material error, new evidence, or substantially changed circumstances that warrant the requisite action sought. A Board decision will be due within 90 days after the record is complete.

Finally, the Clean Railroads Act specifically provides that if a facility does not have the requisite state permits or a Board-issued land-use-exemption permit (if required), it is not a violation of the rail carrier's common-carrier obligation for the carrier to deny service to a customer seeking solid waste rail transfer service at that facility. See 49 U.S.C. 10908(c). We clarify here that, if a facility does have the requisite state permits and (if required) a Board-issued land-use-exemption permit, then the common-carrier obligation would apply.

Pursuant to 5 U.S.C. 605(b), the Board certifies that the proposed action will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The proposed rules set forth in the Appendix are adopted as interim rules.
2. Comments to the proposed rules are due by February 23, 2009, and reply comments are due by March 23, 2009.

3. This decision is effective on January 14, 2009.

Decided: January 14, 2009.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary

Appendix

Code of Federal Regulations Proposal

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend parts 1002 and 1011, and add part 1155 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1002.2 – FEES

1. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 552(a)(4)(A) and 553; 31 U.S.C. 9701; and 49 U.S.C. 721. Section 1002.1(g)(11) also issued under 5 U.S.C. 5514 and 31 U.S.C. 3717.

2. Amend § 1002.2 by adding paragraphs (f)(16),(17), and (18) to read as follows:

§ 1002.2 Filing fees.

* * * * *

(f) * * *

(16) An application for a land-use-exemption permit for a facility existing as of October 16, 2008 under 49 U.S.C. 109096,300.

(17) An application for a land-use-exemption permit for a facility not existing as of October 16, 2008 under 49 U.S.C. 1090922,200.

(18)-(20) [Reserved]

PART 1011 - BOARD ORGANIZATION; DELEGATIONS OF AUTHORITY

3. The authority citation for part 1002 continues to read as follows:

Authority: 5 U.S.C. 553; 31 U.S.C. 9701; 49 U.S.C. 701, 721, 11123, 11124, 11144, 14122, and 15722.

4. Amend § 1011.7 by adding paragraph (b)(17) to read as follows:

§ 1011.7 Delegation of authority by the Board to specific offices of the Board.

* * * * *

(b) * * *

(17) In land-use-exemption-permit application proceedings, whether to grant petitions for waiver of specific regulations listed in subpart C of 49 CFR 1155.

PART 1155—SOLID WASTE RAIL TRANSFER FACILITIES

Subpart A—General

Sec.

- 1155.1 Purpose and scope.
1155.2 Definitions.

Subpart B—Procedures Governing Petitions to Require a Facility in Existence on October 16, 2008, to Apply for a Land-Use-Exemption Permit

- 1155.10 Contents of petition.
1155.11 Filing and service of petition.
1155.12 Participation in petition procedures.
1155.13 Board determination with respect to a Governor’s petition.

Subpart C—Procedures Governing Applications for a Land-Use-Exemption Permit and Petitions for Modifications, Amendments, or Revocations

- 1155.20 Notice of intent to apply for a land-use-exemption permit.
1155.21 Form of notice.
1155.22 Contents of application.
1155.23 Additional requirements when filing after an unsatisfactory result from a state, local, or municipal authority affecting the siting of the facility.
1155.24 Filings and service of application.
1155.25 Participation in application proceedings.
1155.26 Transfer and termination of the land-use-exemption permit.
1155.27 Board determinations under 49 U.S.C. 10909.
1155.28 Appellate procedures.

Authority: 49 U.S.C. 10908, 49 U.S.C. 10909, 49 U.S.C. 10910.

PART 1155—SOLID WASTE RAIL TRANSFER FACILITIES

5. Adds part 1155 to read as follows:

Subpart A—General

1155.1 Purpose and scope.

49 U.S.C. 10501(c)(2)(B) excludes solid waste rail transfer facilities from the Board’s jurisdiction except as provided under 49 U.S.C. 10908 and 10909. Sections 10908 and 10909 provide the Board authority to issue land-use-exemption permits for solid waste rail transfer facilities when certain conditions are met. 49 CFR 1155 contains regulations concerning land-use-exemption permits and the Board’s standard for review.

1155.2 Definitions.

(a) Unless otherwise provided in the text of these regulations, the following definitions apply in this part:

(1) *Commercial and retail waste* means material discarded by stores, offices, restaurants, warehouses, nonmanufacturing activities at industrial facilities, and other similar establishments or facilities.

(2) *Construction and demolition debris* means waste building materials, packaging, and rubble resulting from construction, remodeling, repair, and demolition operations on pavements, houses, commercial buildings, and other structures.

(3) *Household waste* means material discarded by residential dwellings, hotels, motels, and other similar permanent or temporary housing establishments or facilities.

(4) *Industrial waste* means the solid waste generated by manufacturing and industrial and research and development processes and operations, including contaminated soil, nonhazardous oil spill cleanup waste and dry nonhazardous pesticides and chemical waste, but does not include hazardous waste regulated under subtitle C of the Solid Waste Disposal Act (42 U.S.C. 6921 et seq.), mining or oil and gas waste.

(5) *Institutional waste* means material discarded by schools, nonmedical waste discarded by hospitals, material discarded by nonmanufacturing activities at prisons and government facilities, and material discarded by other similar establishments or facilities.

(6) *Municipal solid waste* means household waste; commercial and retail waste; and institutional waste.

(7) With the exception of waste generated by a rail carrier during track, track structure, or right-of-way construction, maintenance, or repair (including railroad ties and line-side poles) or waste generated as a result of a railroad accident, incident, or derailment, the term *solid waste* means construction and demolition debris; municipal solid waste; household waste; commercial and retail waste; institutional waste; sludge; industrial waste; and other solid waste, as determined appropriate by the Board.

(8) *Solid waste rail transfer facility*—

(i) means the portion of a facility owned or operated by or on behalf of a rail carrier (as defined in 49 USC 10102) where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, when the activity takes place outside of original shipping containers; but

(ii) does not include—

(A) the portion of a facility to the extent that activities taking place at such portion are comprised solely of the railroad transportation of solid waste after the solid waste is loaded for shipment on or in a rail car, including railroad transportation for the purpose of interchanging railroad cars containing solid waste shipments; or

(B) a facility where solid waste is transferred or transloaded solely from a tank truck directly to a rail tank car.

(9) *Sludge* means any solid, semi-solid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant.

(b) Exceptions. Notwithstanding section (a), the terms *household waste*, *commercial and retail waste*, and *institutional waste* do not include yard waste and refuse-derived fuel; used oil; wood pallets; clean wood; medical or infectious waste; or motor vehicles (including motor vehicle parts or vehicle fluff).

(c) “*Land-use-exemption permit*” means the authorization issued by the Board pursuant to the authority of 49 U.S.C. 10909(a) and includes the term “siting permit” in 49 U.S.C. 10909(e).

(d) “*State laws, regulations, orders, or other requirements affecting the siting of a facility,*” as used in 49 U.S.C. 10909(f) and 49 CFR 1155.27(d), include the requirements of a state or a political subdivision of a state, including a locality or municipality, affecting the siting of a facility.

(e) “*State requirements*” as used in 49 U.S.C. 10908 does not include the laws, regulations, ordinances, orders, or other requirements of a political subdivision of a state, including a locality or municipality, unless a state expressly delegates such authority to such political subdivision.

Subpart B—Procedures Governing Petitions to Require a Facility in Existence on October 16, 2008, to Apply for a Land-Use-Exemption Permit

1155.10 Contents of petition.

A petition to require a solid waste rail transfer facility in existence on October 16, 2008, to apply for a land-use-exemption permit, submitted by the Governor of the state or that Governor’s designee, shall contain the following information and shall be attested to by a person having personal knowledge of the matters contained therein:

- (a) The Governor’s name.
- (b) The state’s name and the name of any agency filing on behalf of the Governor.
- (c) The full address of the solid waste rail transfer facility, or, if not available, the city, state, and United States Postal Service ZIP code.
- (d) The name of the rail carrier that owns or operates the facility.
- (e) A good-faith certification that the facility qualifies as a solid waste rail transfer facility pursuant to the definition in 49 U.S.C. 10908(e)(1)(H) and 49 CFR 1155.2 both as of the filing date of the petition and on October 16, 2008.
- (f) Relief sought (that the rail carrier that owns or operates the facility be required to apply for a land-use-exemption permit).
- (g) Name, title, and address of representative of petitioner to whom correspondence should be sent.

1155.11 Filing and service of petition.

(a) When the petition is filed with the Board, the petitioner shall serve, by first class mail, a copy of the petition on the rail carrier that owns or operates the solid waste rail transfer facility and on the facility if the address is different than the rail carrier’s address. A copy of the certificate of service shall be filed with the Board at the same time.

(b) Upon the filing of a petition, the Board will review the petition and determine whether it conforms to all applicable regulations. If the petition is substantially incomplete or its filing otherwise defective, the Board will reject the petition for stated reasons by order (which order will be administratively final) within 15 days from the date of filing of the petition.

1155.12 Participation in petition proceedings.

(a) An interested person may file a reply to the petition challenging the Governor's classification of the facility as a solid waste rail transfer facility and may offer evidence to support its contention. The petitioner will have an opportunity to file a rebuttal.

(b) Filing and service of replies.

(1) Any reply shall be filed with the Board (the Secretary, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423) within 20 days of the filing with the Board of a petition to require a solid waste rail transfer facility in existence on October 16, 2008, to apply for a land-use-exemption permit.

(2) A copy of the reply shall be served on petitioner or its representative at the time of filing with the Board. Each filing shall contain a certificate of service.

(3) Any rebuttal to a reply shall be filed and served by petitioner no later than 30 days after the filing of the petition.

1155.13 Board determination with respect to a Governor's petition.

(a) The following schedule shall govern the process for Board consideration of and decisions regarding a petition to require a solid waste rail transfer facility in existence on October 16, 2008, to apply for a land-use-exemption permit, from the time the petition is filed until the time of the Board's decision on the merits:

Day 0--Petition filed.

Day 20--Due date for reply.

Day 30--Due date for response to reply.

(b) The Board shall accept the Governor's complete petition on a finding that the facility qualifies as a solid waste rail transfer facility pursuant to the definition in 49 U.S.C. 10908(e)(1)(H) and 49 CFR 1155.2 both on the filing date of the petition and on October 16, 2008. In the decision accepting the Governor's petition, the Board shall require that the rail carrier that owns or operates the facility file a land-use-exemption-permit application within 120 days of the service date of the decision.

Subpart C—Procedures Governing Applications for a Land-Use-Exemption Permit**1155.20 Notice of intent to apply for a land-use-exemption permit.**

(a) Filing and publication requirements. An applicant (i.e., a solid waste rail transfer facility, or the rail carrier that owns or operates the facility) shall give Notice of Intent to file a land-use-exemption permit application by complying with the following procedures:

(1) Filing. Applicant must serve its Notice of Intent on the Board in the format prescribed in 49 CFR 1155.21. The Notice of Intent shall be filed in accordance with the time requirements of paragraph (b) of this section.

(2) Service. Applicant must serve, by first-class mail (unless otherwise specified), its Notice of Intent upon:

(i) The Governor of the state where the facility is located;

(ii) The state agency/ies and/or municipal agency/ies that would have permitting or review authority over the solid waste rail transfer facility absent 49 U.S.C. 10908 and 10909, these regulations, and federal preemption under 49 U.S.C. 10501(b); and

(iii) The appropriate managing government agencies responsible for the groups of land listed in 49 U.S.C. 10909(c)(2).

(3) Newspaper publication. Applicant must publish its Notice of Intent at least once during each of 3 consecutive weeks in a newspaper of general circulation in each county in which any part of the proposed or existing facility is located.

(b) Time limits.

(1) The Notice of Intent must be served on the parties discussed above at least 15 days, but not more than 30 days, prior to the filing of the land-use-exemption permit application;

(2) The three required newspaper Notices must be published within the 30-day period prior to the filing of the application; and

(3) The Notice of Intent must be filed with the Board either concurrently with service on the required parties or when the Notice is first published (whichever occurs first).

(c) Environmental and Historic Reports. Applicant for a solid waste rail transfer facility, other than those in existence on October 16, 2008, must also submit an Environmental Report containing the information described at 49 CFR 1105.7 at least 20 days prior to filing an application. Applicants shall concurrently file an historic report containing the information at 49 CFR 1105.8 if that regulation is applicable. The environmental and historic reporting requirements that would otherwise apply are waived, however, if the applicant hires a third-party consultant, the Board's Section of Environmental Analysis (SEA) approves the scope of the consultant's work, and the consultant works under SEA's supervision to prepare any environmental documentation that might be warranted. In such a case, the consultant acts on behalf of the Board, working under SEA's direction to collect the needed environmental information and compile it into a draft of the appropriate environmental documentation (an Environmental Impact Statement or a more limited Environmental Assessment). See 49 CFR 1105.10(d).

1155.21 Form of notice.

The Notice of Intent to petition for a land-use-exemption permit shall be in the following form:

STB Finance Docket No. ____ (Sub-No. ____)

Notice of Intent to petition for a land-use-exemption permit for a solid waste rail transfer facility.

(Name of Applicant) gives notice that on or about (insert date application will be filed with the Board) it intends to file with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423, an application for a land-use-exemption permit for a solid waste rail transfer facility as defined in 49 U.S.C. 10908(e)(1)(H) and 49 CFR 1155.2. The solid waste rail transfer facility is located at (full address, or, if not available, provide city, state, and United States Postal Service ZIP code). The solid waste rail transfer facility is located on a line of railroad known as _____ at milepost _____ between (station name) at milepost _____ and (station name) at milepost _____.

The reason(s) for the proposed permit application is (are) _____ (explain briefly and clearly the activities undertaken, or proposed to be undertaken, by the applicant at the solid waste rail transfer facility. Also describe the specific state and local laws, regulations, orders or other requirements affecting siting from which the applicant requests entire or partial exemption that would otherwise apply and any action that the state, local, or municipal authority has taken affecting the siting of the facility.)

(Include this paragraph for facilities not in existence on October 16, 2008). Applicant certifies that, based on information in its possession, the facility is not proposed to be located on land within any unit of or land affiliated with the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Trails System, the National Wild and Scenic Rivers System, a National Reserve, or a National Monument. Applicant further certifies that the facility is not proposed to be located on lands referenced in The Highlands Conservation Act, Public Law No. 108-421, for which a state has implemented a conservation management plan (or, The facility is consistent with the restrictions implemented by (state) under The Highlands Conservation Act, Public Law No. 108-421, placed at its proposed location). Any relevant documentation in the railroad's possession on these issues will be made available promptly to those requesting it.

(For facilities already in existence on October 16, 2008, address the extent to which the facility is or is not located in any of these types of lands, and to the extent that it is so located address any relevant criteria, and so certify.)

The application containing the information set forth at 49 CFR 1155.22 will include the applicant's entire case for the granting of the land-use-exemption permit (case in chief). Any interested person, after the application is filed on (insert date), may file with the Surface Transportation Board written comments concerning the application within 45 days after the application is filed.

Comments should contain that party's entire case in support or opposition including the following, as appropriate:

- (1) Name, address, and organizational affiliation.
- (2) A statement describing commenter's interest in the proceeding, including information concerning the organization or public interest the commenter represents.
- (3) Specific reasons why commenter supports or opposes the application, taking into account the standards for the Board's review and consideration provided in 49 U.S.C. 10909(c), (d) and these regulations.
- (4) If the applicant files under 49 CFR 1155.23, specific reasons why commenter supports or opposes the Board's accepting the application.
- (5) Any rebuttal of material submitted by applicant.

Written comments will be considered by the Board in determining what disposition to make of the application. Parties seeking information concerning the filing of comments should refer to 49 CFR 1155.25.

Written comments should indicate the proceeding designation STB Finance Docket No. ____ (Sub-No. ____) and must be filed with the Secretary, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423, no later than (insert the date 45 days after the date applicant intends to file its application). A copy of each written comment shall be served upon the representative of the applicant (insert name, address, and phone number). Except as otherwise set forth in 49 CFR 1155, each document filed with the Board must be served on all parties to the land-use-exemption-permit proceeding. 49 CFR 1104.12(a).

Persons seeking further information concerning land-use-exemption-permit procedures may contact the Surface Transportation Board or refer to 49 U.S.C. 10908, 10909, and the full land-use-exemption-permit regulations at 49 CFR 1155.

A copy of the application will be available for public inspection on or after (insert date the land-use-exemption-permit application is to be filed with Board). The applicant shall furnish a copy of the application to any interested person proposing to file a comment, upon request.

Questions concerning potential environmental issues may be directed to the Board's Section of Environmental Analysis. Where the preparation of environmental documentation under the National Environmental Policy Act is warranted, a Draft Environmental Impact Statement (EIS) (or more limited Environmental Assessment (EA), if appropriate) prepared by the Section of Environmental Analysis will be issued for public review and comment and served upon all parties of record and upon any agencies or other persons who commented during its preparation. The comments received will be addressed in the Final EIS or Post EA. The Board will take into account the results of the environmental review and any final recommended environmental mitigation in deciding what action to take on the application.

1155.22 Contents of application.

Applications for land-use-exemption permits shall contain the following information, including supporting documentation:

- (a) General.
 - (1) Exact name of applicant.
 - (2) Whether applicant is a common carrier by railroad subject to 49 U.S.C. Subtitle IV, chapter 105.
 - (3) Summary of why a land-use-exemption permit is being sought.
 - (4) The full address of the solid waste rail transfer facility, or, if not available, the city, state, and United States Postal Service ZIP code.
 - (5) The line of railroad serving the facility, the milepost location of the facility, and the milepost and names of the stations that the facility is located between.
 - (6) Name, title, and address of representative of applicant to whom comments should be sent.
 - (7) Citation to all state, local, or municipal laws, regulations, orders, or other requirements affecting the siting of the solid waste rail transfer facility.
 - (8) Copies of the specific state, local, or municipal laws, regulations, orders, or other requirements affecting the siting of the solid waste rail transfer facility from which the applicant requests entire or partial exemption that would otherwise apply, any publicly available material providing the criteria in the application of the regulations, and a description of any action that the state, local, or municipal authority has taken affecting the siting of the facility.
 - (9) Certification that the laws, regulations, orders or other requirements from which the applicant requests exemption are not based on Federal laws, regulations, orders, or other requirements.
 - (10) Certification that the facility complies with all state, local, or municipal laws, regulations, orders, or other requirements affecting the siting of the facility except those for which it seeks exemption.
 - (11) Citation to the regulations listed in 49 CFR 1155.27(c)(1)-(5).
 - (12) Certification that the applicant has applied or will apply for the appropriate state permits not affecting siting.
 - (13) For facilities not in existence as of October 16, 2008, certification that the facility is not proposed to be located on land within any unit of or land affiliated with the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Trails System, the National Wild and Scenic Rivers System, a National Reserve, or a National Monument. For facilities in existence as of October 16, 2008, state whether the facility is located in any of these types of lands.

(14) For facilities not in existence as of October 16, 2008, certification that the facility is not proposed to be located on lands referenced in The Highlands Conservation Act, Public Law No. 108-421, for which a state has implemented a conservation management plan, or, that the facility is consistent with the restrictions implemented by the applicable state under The Highlands Conservation Act, Public Law No. 108-421, placed on its proposed location. For facilities in existence as of October 16, 2008, state whether the facility is located in any of these lands, and, if so, address whether the facility is consistent with the restrictions placed on the location by the applicable state under that law.

(15) A detailed description of the operations and activities that will occur/are occurring at the facility.

(16) Detailed map showing the subject facility on a sheet not larger than 8x10 1/2 inches, drawn to scale, and with the scale shown thereon. The map must show, in clear relief, the exact location of the facility on the rail line and its relation to other rail lines in the area, highways, water routes, population centers and any geographic features that should be considered in determining whether the facility would pose an unreasonable risk to public health, safety, or the environment, pursuant to 49 U.S.C. 10909(c)(1).

(17) Detailed drawing of the subject facility on a sheet not larger than 8x10 1/2 inches, drawn to scale, and with the scale shown thereon. The drawing must show, in clear relief, the exact boundaries of the facility, structures at the facility, the location and type of the operations taking place at the facility, the proposed traffic configuration for the solid waste entering and leaving the facility, reasonable future expansion that the applicant requests to be included in the land-use-exemption permit, any geographic features that should be considered in determining whether the facility would pose an unreasonable risk to public health, safety, or the environment, pursuant to 49 U.S.C. 10909(c)(1), and any other information that the applicant would like to show.

(b) A statement that sets forth in detail the reasons why the Board should grant a land-use-exemption permit to the applicant. The applicant shall organize its request in terms of the standards for the Board's review and consideration provided in 49 U.S.C. 10909(c), (d) and these regulations.

(c) Environmental impact. The applicant shall certify that it has submitted an environmental and/or historical report containing the information in 49 CFR 1105.7 and 1105.8, if one is required, to allow the Board's Section of Environmental Analysis to determine whether preparation of environmental documentation is warranted, and, if so, whether a full Environmental Impact Statement or a more limited Environmental Assessment should be prepared.

(d) Additional information. The applicant shall submit such additional information to support its application as the Board may require.

(e) Draft Federal Register Notice. The applicant shall submit a draft notice of its application to be published by the Board. In addition to the regular number of copies that must be filed with the Board, the applicant must submit a copy of the draft notice as data contained on a computer diskette compatible with the Board's current word processing capabilities. The Board will publish the notice in the Federal Register within 20 days of the application's filing with the Board. The draft notice shall be in the form set forth below:

STB Finance Docket No. ____ (Sub-No. ____)

Notice of Application for a land-use-exemption permit for a solid waste rail transfer facility

On (insert date application was filed with the Board) (name of applicant) filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423, an application for a land-use-exemption permit for a solid waste rail transfer facility. The solid waste rail transfer station is located at (full address, or, if not available, provide city, state, and United States Postal Service ZIP code). The solid waste rail transfer facility is located on a line of railroad known as _____ at milepost _____ between (station name) at milepost _____ and (station name) at milepost _____. The application explains why applicant believes its request for a land-use-exemption permit should be granted.

(Include this paragraph for facilities not in existence on October 16, 2008). The facility is not proposed to be located on land within any unit of or land affiliated with the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Trails System, the National Wild and Scenic Rivers System, a National Reserve, or a National Monument. The facility is not proposed to be located on lands referenced in The Highlands Conservation Act, Public Law No. 108-421, for which a state has implemented a conservation management plan (or, The facility is consistent with the restrictions implemented by (state) under The Highlands Conservation Act, Public Law No. 108-421, placed on its proposed location). Any relevant documentation in the railroad's possession will be made available promptly to those requesting it.

(For facilities already in existence on October 16, 2008, address the extent to which the facility is or is not located in any of these types of lands, and to the extent that it is so located address any relevant criteria, and so certify.)

Any interested person may file with the Surface Transportation Board written comments concerning the application within 45 days of the filing of the application. Persons seeking information concerning the filing of comments should refer to 49 CFR 1155.25.

Written comments should indicate the proceeding designation STB Finance Docket No. _____ (Sub-No. _____) and must be filed with the Secretary, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423, no later than (insert the date 45 days after the date applicant intends to file its application). A copy of each written comment shall be served upon the representative of the applicant (insert name, address, and phone number). Except as otherwise set forth in 49 CFR 1155, each document filed with the Board must be served on all parties to the land-use-exemption permit proceeding. 49 CFR 1104.12(a).

Persons seeking further information concerning land-use-exemption-permit procedures may contact the Surface Transportation Board or refer to 49 U.S.C. 10908, 10909, and the full land-use-exemption-permit regulations at 49 CFR 1155.

A copy of the application is available for public inspection. The applicant shall furnish a copy of the application to any interested person proposing to file a comment, upon request.

Questions concerning potential environmental issues may be directed to the Board's Section of Environmental Analysis. Where the preparation of environmental documentation under the National Environmental Policy Act is warranted, a Draft Environmental Impact Statement (EIS) (or more limited Environmental Assessment (EA), if appropriate) prepared by the Section of Environmental Analysis will be issued for public review and comment and served upon all parties of record and upon any agencies or other persons who commented during its preparation. The comments received will be addressed in the Final EIS or Post EA. The Board will take into account the results of the environmental review and any final recommended environmental mitigation in deciding what action to take on the application.

(f) Verification. The original application shall be executed and verified in the form set forth below by an officer of the applicant having knowledge of the facts and matters relied upon.

Verification

State of _____ ss.

County of _____

_____ (Name of affiant) makes oath and says that (s)he is the _____ (title of affiant) of the _____ (name of applicant) applicant herein; that (s)he has been authorized by the applicant (or as appropriate, a court) to verify and file with the Surface Transportation Board the foregoing application in STB Finance Docket No. __ (Sub-No. __); that (s)he has carefully examined all of the statements in the application as well as the exhibits attached thereto and made a part thereof; that (s)he has knowledge of the facts and matters relied upon in the application; and that all representations set forth therein are true and correct to the best of his/her knowledge, information, and belief.

(Signature)

Subscribed and sworn to before me _____ in and for the State and County above named, this ___ day of ___, 20__.

My commission expires

1155.23 Additional requirements when filing after an unsatisfactory result from a State, local, or municipal authority affecting the siting of the facility.

(a) When an applicant has previously sought permission from the applicable state, local, or municipal authority and received an unsatisfactory result, such as inordinate delay, affecting the siting of the facility, the applicant may petition the Board to accept an application for a land-use-exemption permit. The applicant shall address in its petition why applicant believes it can make the showing required in 49 CFR 1155.23(b). The petition shall be filed simultaneously with the land-use-exemption permit application.

(b) Standard for review. The Board will not consider a land-use-exemption-permit application regarding laws, regulations, or other requirements upon which the applicant has received an unsatisfactory result from a state, local, or municipal authority, unless the Board finds that the laws, regulations, or other requirements affect the siting of the facility, on their face or as applied, either (1) unreasonably burden the interstate transportation of solid waste by railroad, or (2) discriminate against the railroad transportation of solid waste and a solid waste rail transfer facility.

1155.24 Filings and service of application.

(a) The applicant shall tender with its application an affidavit attesting to its compliance with the notice requirements of 49 CFR 1155.20. The affidavit shall include the dates of service, posting, and newspaper publication of the Notice of Intent.

(b) When the application is filed with the Board, the applicant shall serve, by first-class mail, a copy on the Governor of the state where the facility is located, and the state, local, and/or municipal agency/ies that would have permitting or review authority of the solid waste rail transfer facility if there were no federal preemption. A copy of the certificate of service shall be filed with the Board at the same time.

(c) The applicant shall promptly furnish by first class mail a copy of the application to any interested person proposing to file a written comment upon request. A copy of the certificate of service shall be filed with the Board at the same time.

(d)(1) Upon the filing of a land-use-exemption-permit application, the Board will review the application and determine whether it conforms to all applicable regulations. If the application is substantially incomplete or its filing otherwise defective, the Board shall reject the application for stated reasons by order (which order will be administratively final) within 20 days from the date of filing of the application. If the Board does not reject the application, notice of the filing of the application shall be published in the Federal Register by the Board, through the Director of the Office of Proceedings, within 20 days of the filing of the application.

(2) An applicant may seek waiver of specific regulations listed in subpart C of this part by filing a petition for waiver with the Board. A decision by the Director of the Office of Proceedings granting or denying a waiver petition will be issued within 30 days of the date the petition is filed. Appeals from the Director's decision will be decided by the entire Board. If waiver is not obtained prior to the filing of the application, the application may be subject to rejection.

1155.25 Participation in application proceedings.

(a) Public participation.

(1) Comments. Interested persons may become parties to a land-use-exemption-permit proceeding by filing written comments with the Board within 45 days of the filing of the application. Comments should contain the following information, as appropriate:

(i) Name, address, and organizational affiliation.

(ii) A statement describing commenter's interest in the proceeding, including information concerning any organization or public interest it represents; and

(iii) Specific reasons why commenter supports or opposes the application, taking into account the standards for the Board's review and consideration set forth in 49 U.S.C. 10909(c), (d) and these regulations.

(iv) If the applicant files under 49 CFR 1155.23, specific reasons why the commenter supports or opposes the Board considering the application.

(v) Any rebuttal to the evidence and argument submitted by applicant.

(vi) Any state, local, or municipal law, regulation, order, or other requirement affecting the siting of the facility not included in the application and any argument concerning its bearing on the merits of the application in terms of the standards for the Board's review and consideration set forth in 49 U.S.C. 10909(c), (d) and these regulations.

(b) Filing and service of written comments, along with evidence and argument, and rebuttals.

(1) Written comments shall be filed with the Board (addressed to the Secretary, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423) within 45 days of the filing with the Board of a land-use-exemption permit application. An original and 10 copies of each written comment shall be filed with the Board. A copy of each written comment shall be served on applicant or its representative at the time of filing with the Board. Each filing shall contain a certificate of service.

(2) Rebuttals to written comments shall be filed and served by applicants no later than 60 days after the filing of the application. An original and 10 copies of such replies shall be filed with the Board.

1155.26 Transfer and termination of a land-use-exemption permit.

(a) A land-use-exemption permit will be transferred to an acquiring rail carrier without the need for a new application for a land-use-exemption permit if the rail line associated with the solid waste rail transfer facility is transferred to another rail carrier or to an entity formed to become a rail carrier pursuant to authority granted by the Board under 49 U.S.C. 10901, 10902, or 11323. When seeking Board authority under 49 U.S.C. 10901, 10902, or 11323, the applicant(s) should specifically advise the Board of the intended transfer.

(b) When a carrier plans to cease using a facility as a solid waste rail transfer facility, or when a facility is transferred to any party in any manner other than that described in 49 CFR 1155.26(a), the entity that received the land-use-exemption permit must notify the Board in writing no later than 60 days prior to the proposed cessation or transfer. Upon receipt of that notice, the Board will publish notice in the Federal Register that the land-use-exemption permit will be terminated on the 60th day unless otherwise ordered by the Board.

1155.27 Board determinations under 49 U.S.C. 10909.

(a) The following schedule shall govern the process for Board consideration and decisions in land-use-exemption permit application proceedings from the time the application is filed until the time of the Board's decision on the merits:

Day 0--Application filed, including applicant's case in chief.

Day 20--Due date for Notice of Application to be published in the Federal Register.

Day 45--Due date for comments.

Day 60--Due date for applicant's rebuttal.

A decision on the merits will be due 90 days after a full record is developed, including the appropriate environmental review, if any.

(b) Standard for review.

(1) The Board will issue a land-use-exemption permit only if it determines that the facility at the existing or proposed location would not pose an unreasonable risk to public health, safety, or the environment. In deciding whether a solid waste rail transfer facility that is or proposed to be constructed or operated by or on behalf of a rail carrier poses an unreasonable risk to public health, safety, or the environment, the Board shall weigh the particular facility's potential benefits to and the adverse impacts on public health, public safety, the environment, interstate commerce, and transportation of solid waste by rail.

(2) The Board will not grant a land-use-exemption permit for a solid waste rail transfer facility proposed to be located on land within any unit of or land affiliated with the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Trails System, the National Wild and Scenic Rivers System, a National Reserve, or a National Monument.

(3) The Board will not grant a land-use-exemption permit for a solid waste rail transfer facility proposed to be located on land within any unit of or land affiliated with lands referenced in The Highlands Conservation Act, Public Law No. 108-421, for which a state has implemented a conservation management plan, if operation of the facility would be inconsistent with restrictions placed on such land.

(4) A land-use-exemption permit will not exempt a state requirement that a rail carrier comply with an environmental, public health, or public safety standard that falls under the

traditional police powers of the state unless the requirement is unreasonably burdensome to interstate commerce or discriminates against rail carriers.

(5) A land-use-exemption permit will only exempt state, local, or municipal laws, regulations, orders, or other requirements affecting the siting of the solid waste rail transfer facility.

(c) Considerations. The Board will consider and give due weight to the following, as applicable:

(1) the land-use, zoning, and siting regulations or solid waste planning requirements of the state or state subdivision in which the facility is or will be located that are applicable to solid waste transfer facilities, including those that are not owned or operated by or on behalf of a rail carrier;

(2) the land-use, zoning, and siting regulations or solid waste planning requirements applicable to the property where the solid waste rail transfer facility is proposed to be located;

(3) regional transportation planning requirements developed pursuant to Federal and state law;

(4) regional solid waste disposal plans developed pursuant to Federal or state law;

(5) any Federal and state environmental protection laws or regulations applicable to the site;

(6) any unreasonable burdens imposed on the interstate transportation of solid waste by railroad, or the potential for discrimination against the railroad transportation of solid waste, a solid waste rail transfer facility, or a rail carrier that owns or operates such a facility; and

(7) any other relevant factors, as determined by the Board.

(d) If the Board grants a land-use-exemption permit to a solid waste rail transfer facility, all state laws, regulations, orders, or other requirements affecting the siting of a facility are preempted with regard to that facility. A Board issued land-use-exemption permit may require compliance with such state laws, regulations, orders, or other requirements.

1155.28 Appellate procedures.

General rule. Petitions to modify, amend, or revoke land-use-exemption permits shall be decided in accordance with the Board's normal standard of review for petitions to reopen administratively final Board actions at 49 CFR 1115.4. The petition must demonstrate material error, new evidence, or substantially changed circumstances that warrant the requested action, and is subject to these additional conditions:

(a) An entity that petitions for a modification or amendment requesting an expansion of federal preemption or the facility's operations or physical size is subject to the notice and application requirements in this subpart C. The language of the notifications shall be modified to note that the petition is for a modification or amendment.

(b) The Board will approve or deny petitions to modify, amend, or revoke a land-use-exemption permit within 90 days after the full record for the petition is developed.