



ASSOCIATION OF
AMERICAN RAILROADS

Law Department

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June 22, 2011

Honorable Cynthia T. Brown
Chief, Section of Administration
Surface Transportation Board
395 E St., S.W.
Washington, DC 20423

Re: Ex Parte No. 684, Solid Waste Rail Transfer Facilities

Dear Ms. Brown:

Pursuant to the Board's Notice served March 24, 2011, attached please find the Reply Comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot
Counsel for the Association of
American Railroads

Attachment

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 684

SOLID WASTE RAIL TRANSFER FACILITIES

REPLY COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

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Introduction

In a Notice of Revised Interim Rules with Request for Comments (“Revised NPRM”) served March 24, 2011, the Surface Transportation Board (“Board”), based on the comments it received in response to its 2009 NPRM¹ in this proceeding, proposed changes to its interim rules with respect to the “review process for land-use exemption permits” under the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (“CRA”). Revised NPRM at 2. The Board’s Revised NPRM specifically requested that parties “should limit their comments regarding this NPRM to new issues raised by the revisions.” Revised NPRM at 3.

In its opening comments filed May 23, 2011, the AAR urged the Board to correct its newly proposed interpretation of 49 U.S.C. § 10910 in the Revised NPRM and remove any proposed requirements that would require an applicant to demonstrate that a state law “affecting the siting” of a SWRTF is “unreasonably burdensome” or “discriminates

¹ STB Ex Parte No. 684, *Solid Waste Rail Transfer Facilities* (served January 14, 2009) (“Notice of Proposed Rulemaking; Adoption of Interim Rules”) (“2009 NPRM”).

against rail carriers” if the state law can otherwise be characterized as falling within the “traditional police powers of the State.” AAR Opening Comments at 3-20. As explained in the AAR’s opening comments, the provisions of 49 U.S.C § 10910 *do not modify or limit in any respect the Board’s express authority to preempt state laws “affecting the siting” of a solid waste rail transfer facility (“SWRTF”) under the specific substantive and procedural requirements and criteria of 49 U.S.C. 10908 and 10909 of the CRA. Id.* at 3.

The AAR also urged the Board *not* to make its new statutory interpretation of 49 U.S.C. § 10910 (and new interim rules implementing such statutory interpretation) immediately effective on an interim basis as the Board proposed in the Revised NPRM. As noted by the AAR, the Board’s new interpretation of section 10910, and the new rules implementing that interpretation, should be stayed pending the outcome of the Board’s rulemaking to allow the Board to correct its clear error in statutory construction. The AAR also requested the Board to adopt other modifications to the Revised NPRM as proposed by the AAR.

Opening comments were also filed in this proceeding by the Atlantic County Utilities Authority (“ACUA”); the National Solid Wastes Management Association (“NSWMA”), Solid Waste Association of North America (“SWANA”), Construction Materials Recycling Association, the Energy Recovery Council, and the U.S. Council of Mayors (Joint Comments) (collectively “NSWMA”); the New Jersey Department of Environmental Protection (“NJDEP”) and the New Jersey Meadowlands Commission (“NJMC”); the Rhode Island Resource Recovery Corporation; the State of Connecticut Department of Environmental Protection (“CDEP”); and the Township of Bensalem,

Bucks County, Pennsylvania (“Township”). These parties collectively addressed various issues regarding the environmental review process set forth in the Revised NPRM. The parties also proposed that the Board, in order to “limit the burden on states in defending their laws”, impose as a pre-requisite that an applicant for a land-use-exemption permit first seek state or local approval under the challenged laws “affecting the siting” before such laws can be directly challenged before the Board in a land-use-exemption proceeding.

The AAR believes that the position of the commenters on the issues addressed by the AAR in its reply comments lack merit and, with respect to the “prior state or local approval” pre-requisite proposal, are contrary to the CRA and have been effectively rejected by the Board in the Revised NPRM.²

The AAR further notes that none of the commenters provides any analysis of the provisions of 49 U.S.C § 10910 in their comments other than to confirm the AAR’s observation that “virtually all state laws ‘affecting the siting’ of a SWRTF would likely fall within the scope of section 10910 [as interpreted by the Board in the Revised NPRM] because they would be presumably based on ‘environmental, public health and public safety’ concerns that traditionally fall within the state’s police power (albeit otherwise

² The AAR also wishes to modify the position in its opening comments that “question[ed] whether the timing proposed by the Board would work regarding the application/comment schedule.” AAR May 23, 2011 Opening Comments at 21. The AAR’s comment was based on a misunderstanding of the procedural schedule proposed by the Board for the environmental review process.

Upon a closer reading of the Board’s proposed procedural schedule in the context of the Board’s generally applicable (unless where superseded) environmental regulations at 49 C.F.R. Part 1105, appropriate Federal, state and local agencies and other interested parties are provided a full opportunity to participate in the scoping process and are typically provided a 45-day period to comment on the draft EIS prepared by the Board. 49 C.F.R. §§ 1105.10 (a) (2)-(4); Revised NPRM at 8. The AAR accordingly withdraws its suggestion regarding the Board’s proposed procedural schedule pertaining to the environmental review process. The AAR believes that the parties are afforded ample time and information upon which to comment upon the scope of the EIS and other potential environmental issues in land-use-exemption proceedings.

preempted by federal law).” AAR Opening Comments at 13.³ As such, the Board’s interpretation would render the specific criteria and weighing process established by Congress in 49 U.S.C. §§ 10909 (c) and (d) applicable to land-use-exemption proceedings superfluous because the governing issue in virtually all cases would be whether a state law “affecting the siting” of a SWRTF is “unreasonably burdensome” or “discriminates against rail carriers.” For the reasons detailed in the AAR’s opening comments, the Board’s construction is clearly erroneous and should be stayed pending completion of this proceeding so that the Board can correct it.

Discussion

- 1. The commenters’ proposals that the Board require an applicant to seek state or local approval under the challenged laws “affecting the siting” before such laws can be directly challenged before the Board in a land-use-exemption proceeding should be rejected as contrary to the CRA and as already considered and rejected by the Board in the Revised NPRM.**

NSWMA contends that requiring a state to “advocate for their own statutes, rules and regulations” and to “marshal complicated arguments concerning whether their laws fall under the traditional police powers and whether these laws unreasonably burden the interstate transportation of solid waste by railroad or discriminate against the railroad” imposes an unreasonable burden on states and municipalities. NSWMA Comments at 4. NSWMA further claims that “because the applicant creates the list of state, local and municipal laws... that the applicant believes affect the siting of the proposed facility (and is incentivized to maximize the list), the burden ... increases dramatically” *Id.* NSWMA

³ See comments of NJDEP at 2 (“NJDEP’s responsibility to regulate solid waste and enforce the solid waste laws in this State stems from the state’s traditional police powers to regulate for the public’s health and safety, and the State’s longstanding authority to regulate solid waste activities.”) There is little doubt that each state will make the same claim in virtually all land-use-exemption proceedings.

accordingly proposes “[t]hat in order to reduce the burden on states and municipalities...and the burden on the Board to make individual determinations for each of these laws, the Board should require as a prerequisite that an applicant seek state or local approval under the challenged laws...before they can be included on the list to be preempted ...unless it is demonstrably futile to do so.” *Id.*; see also Comments of CDOT at 1. The proposals of NSWMA and CDOT should be rejected by the Board as contrary to the CRA and as already effectively considered and rejected by the Board.⁴

As the Board expressly found in the Revised NPRM in rejecting NJDEP’s proposal that the state should be allowed to make its siting determination before the Board acts on an application for a land-use exemption permit by a rail carrier, “[t]his suggestion conflicts with the language of the statute, which explains that a rail carrier that owns or operates a facility may come before the Board prior to seeking a siting determination from the state. See 49 U.S.C. § 10909 (a) (1).” Revised NPRM at 10. As the Board clearly recognizes, it is without statutory authority under the CRA to require a rail carrier to first petition the state before it files a land-use-exemption application with the Board, and NSWMA’s proposal conflicts with the statutory scheme.

Similarly, any burdens imposed on states and municipalities in defending their laws “affecting the siting” of a SWRTF, and on the Board in deciding individual land-use exemption permit proceedings, is a direct consequence of the specific provisions of the CRA itself. The provisions of 49 U.S.C. §§ 10909 (c) and (d) specifically require a weighing process and set forth the criteria and factors that must be addressed by the applicant as well as any state or municipality (or other party) participating in a land-use-

⁴ For the reasons set forth in the AAR’s opening comments (at 3-20), under the proper statutory construction of 49 U.S.C. § 10910, there is no requirement that a party to a land-use exemption proceeding demonstrate that the state law “affecting the siting” falls within the state’s traditional police powers.

exemption proceeding. The CRA also requires the Board to make a determination in individual cases whether the challenged law “affects the siting” of an existing or proposed SWRTF and to make the specific findings and determinations under the standards and criteria set forth in 49 U.S.C. §§ 10909 (c) and (d). As the Board noted in the Revised NPRM, “[w]hen an application is filed under the CRA, the Board must determine [on a case-by case basis] whether a law affects the siting of a facility.” Revised NPRM at 14. The Board also has a statutory duty to make the other findings and determinations required under 49 U.S.C. § 10909 of the CRA. Revised NPRM at 21; see also Revised NPRM at 22, n. 75 (“Congress specifically authorized the Board to make the findings required by the CRA in order to grant land-use-exemption permits”).

NSWMA also suggests as an “alternative” to its proposal, and in order to “narrow the issues” that “an applicant should be required to seek legal opinions from the state attorney general’s office and/or municipal town counsel with respect to these issues [i.e., which laws affect the siting of the facility and “questions concerning police powers and burdens on interstate transportation”] *during the application process....*” NSWMA Comments at 5 (emphasis added). NSWMA’s alternative proposal is also contrary to the CRA and should be rejected by the Board.

NSWMA’s proposal would similarly require a rail carrier to effectively apply for a legal determination by a state or municipality as a pre-requisite for filing an application for a land-use-exemption permit before the Board and is contrary to the provisions of 49 U.S.C. § 10909 (a) (1). Moreover, the “legal issues” to be submitted to the states or municipalities as a pre-requisite for filing an application under NSWMA’s “alternative” proposal are matters that the CRA expressly delegates to the Board for determination

(and not the state or municipality) in implementing the CRA (e.g., issues relating to whether the challenged law “affects the siting” or imposes “unreasonable burdens on interstate transportation”).

NSWMA also claims that its alternative proposal “would ensure that governmental authorities whose laws are the subject of challenge are provided clear notice and ability to participate in the proceedings.” NSWMA comments at 5. The AAR submits that rules proposed by the Board in the Revised NPRM already give clear notice to affected states and municipalities of the pendency of land-use exemption proceedings and provide such parties a full opportunity to make their views known during the course of the proceedings. See, e.g., Proposed 49 C.F.R. § 1155.20 (NOI provisions); Proposed 49 C.F.R. § 1155.22 (Application notice requirements); Proposed 49 C.F.R. § 1155.23 (Participation provisions).

2. **NJDOT’s proposal that the Board revise the language of Proposed 49 C.F.R. §1155.20 (c) to eliminate the language “if an environmental and/or historic report is required” should be rejected as contrary to the Board’s environmental regulations, including those set forth in the Revised NPRM.**

NJDOT proposes that the Board eliminate the language “if an environmental and/or historic report is required” from Proposed 49 C.F.R. §1155.20 (c) to make clear that an applicant must *always* submit an environmental and/or historic report at least 45 days before filing its application for a land-use-exemption permit. NJDOT comments at

3. NJDOT’s proposal should be rejected as contrary to the Board’s environmental regulations, including those set forth in the Revised NPRM.

First, the Board made clear in the Revised NPRM that the Board's "OEA has the authority to grant a waiver to reclassify the environmental review process from an EIS to a less stringent analysis, depending on the circumstances presented. See 49 C.F.R. § 1105.6 (d)." Revised NPRM at 8-9. Accordingly, there are circumstances where an EIS may not be required with respect to an application for a land-use-exemption permit in an individual case. Indeed, the Board's reclassification authority also extends to rail construction proposals that normally would require an EIS and there is no reason why the Board should be denied comparable flexibility to reclassify the environmental review process where circumstances warrant in individual land-use-exemption proceedings.⁵

Second, as the Board further notes, where a third-party contractor is hired by an applicant to assist OEA in preparing the environmental documentation in a land-use-exemption proceeding as encouraged by the Board (or where the Board itself hires a third-party contractor and charges the cost for the contractor to the applicant as provided in 49 U.S.C. § 10909 (h)), the environmental reporting requirements that would otherwise apply to the applicant are waived. Revised NPRM at 25; see also Proposed 49 C.F.R. § 1155.24 (c); 49 C.F.R. § 1105.10 (d). In such cases, the contractor works under OEA's direct supervision in preparing the environmental documentation and the need for applicants to file environmental and historic reports is superseded. Revised NPRM at 25.

⁵ NSWMA contends that, under the revised NPRM, an applicant may make a written request to reclassify the environmental review requirements under Proposed 49 C.F.R. §§ 1155.24 (a) and 49 C.F.R. § 1105.6 (d) to avoid preparation of an EIS and that states and municipalities would be provided no notice of, or opportunity to object to, such request under the current rules. NSWMA Comments at 3. The AAR submits that, as the Board explained in the Revised NPRM, an applicant's request to reclassify the environmental review process would be treated as a petition for waiver of the otherwise applicable rules. Revised NPRM at 8; Proposed 49 C.F.R. § 1155.22 (d) (4). Under the Board's proposed rules, an applicant is required to serve notice of waiver requests on states, municipalities and other parties that are required to receive a copy of the NOI. Revised NPRM at 19; see also Proposed 49 C.F.R. § 1155.22 (d) (4).

3. The notice procedures provided under the Board's environmental regulations and the Revised NPRM are fully sufficient to ensure the participation of states and municipalities (and other interested parties) at the outset of the environmental review process applicable to land-use-exemption proceedings.

In their comments, several parties contend that “the Board should extend the broad notification requirements of the Notice of Intent and Application to the early stages of the EIS process in order to ensure public notice of, and participation in, these critical steps of the process.” Comments of NSWMA at 2-3; Comments of CDEP at 1; Comments of Township at 1. The predicate for the parties’ proposal is their perception (as explained by NSWMA) that, under the Board’s proposed rules, although the applicant must serve the Notice of Intent⁶ and Application on a broad range of parties including “[t]he municipality, the state, and any relevant federal or state regional planning entity in the jurisdiction of which the solid waste rail transfer facility is located or proposed to be located”⁷ and to provide for newspaper publication for three weeks in each county in which any part of the proposed or existing SWRTF is located,⁸ “[w]hen an EIS is required to be prepared, the Board is only obligated to provide a limited published notice in the Federal Register with a description of the proposed action and a request for comments on the scope of the EIS.” NSWMA Comments at 3.⁹

⁶The NOI must be filed at least 15 days, but not more than 30 days, prior to the filing of the application. Proposed 49 C.F.R. § 1155.20 (b) (1).

⁷Proposed 49 C.F.R. §§ 1155.20 (b) (1) and 1155. 22 (b).

⁸Proposed 49 C.F.R. §§ 1155.20 (a) (3) and (b) (2).

⁹NSWMA also asserts that “[w]hen projects require preparation of an EIS, project proponents must provide [OEA] with a written notice at least six months prior to filing an application to the Board pursuant to 49 C.F.R. § 1105.10 (a) (1).” NSWMA Comments at 3. The AAR submits that under the Board’s proposed rules in the Revised NPRM, the schedule for land-use-exemption permit proceedings commences with the applicant’s filing of the Environmental Report as specifically required under Proposed 49 C.F.R. § 1155.26. The Board’s rules also specifically require the applicant to file its NOI at least 15 days, but not more than 30 days, prior to its application. Proposed 49 C.F.R. § 1155.20 (b) (1). Under such circumstances, the

The AAR believes that such comments are based on a misapprehension of the Board's environmental review process applicable to land-use-exemption permit proceedings. In the view of the AAR, the environmental review process proposed by the Board in the Revised NPRM provides for specific notice at the outset of the environmental review process (and prior to the referenced Federal Register notice seeking public comment on the scope of the EIS) to affected states, municipalities and relevant federal or state regional planning entities and to require their consultation regarding the EIS scoping process. (In the event that the AAR's understanding of the Board's proposed notice procedures for the environmental review process is incorrect, however, the AAR would not object to the Board's clarification of the notice procedures to ensure that specific notice to the parties referenced in Proposed 49 C.F.R. § 1155.20 (a) (2) is provided.)

First, as a general matter, the AAR believes that in the vast majority of land-use-exemption permit proceedings (and perhaps in *all* such proceedings) it is highly likely that an applicant will use third - party contractors to assist OEA in preparing the appropriate environmental documentation as specifically encouraged by the Board or that the Board itself may hire a third-party contractor and charge the costs for the contractor to the applicant as provided in the CRA. See 49 U.S.C. § 10909 (h); see also Proposed 49 C.F.R. § 1155.24 (d); 49 C.F.R. § 1105.10 (d); Revised NPRM at 25. In such cases, the environmental reporting requirements that would otherwise apply to the applicant are waived and the contractor works under OEA's direct supervision in preparing the

"Prefiling Notice" provisions of 49 C.F.R. § 1105.10 (a) (1) are superseded and do not apply. See Proposed 49 C.F.R. § 1155.24 (d) ("The Board's procedures set forth in 49 C.F.R. § 1105.10 ... are controlling unless superseded by provisions in this Part.")

appropriate environmental documentation. Proposed 49 C.F.R. § 1155.24 (d); 49 C.F.R. § 1105.10 (d).

Where a third party contractor assists OEA in preparing the appropriate environmental documentation, the Board's policy directives and OEA's oversight role are intended to ensure that OEA and the contractor engage in a broad consultation at an early stage of the environmental review process (including the scoping process) with "Federal, state and local agencies, Native American Tribes, members of the public, and other interested parties." See STB Ex Parte No. 585, *Policy Statement On Use Of Third Party Contracting in Preparation Of Environmental Documentation* (served March 19, 2001) ("*STB Policy Statement*"), slip op. at 9. In land-use-exemption proceedings, such consultation would necessarily include the relevant federal, state and municipal parties and agencies listed in Proposed 49 C.F.R. § 1155.20 9a). As noted by the Board, "[OEA] and the contractor typically conduct public outreach at the early stages of the environmental analysis, to promote notice of the proposal and to obtain input on potential environmental impacts and issues associated with the project." *Id.*¹⁰ As the Board itself concluded, there is thus "extensive public outreach to ensure public awareness of the proposals before the agency and participation in the process" [*id.* at 11) where a third-party contractor is used to assist OEA in preparing the appropriate environmental documentation, and clearly no need for additional notice procedures.

Second, there appears no need for further notice procedures in those cases where the applicant itself prepares and submits its Environmental Report at least 45 days prior to its application as required under Proposed 49 C.F.R. § 1155.24 (b). As noted in the

¹⁰ "One of the first tasks [OEA] directs a third-party contractor to undertake is the preparation of consultation letters to appropriate federal, state and local agencies." *Id.* at 10.

Revised NPRM, the Board “will continue to require applicants to comply with the environmental reporting requirements in 49 C.F.R. § 1105.7 to the extent applicable.” Revised NPRM at 25. Under 49 C.F.R. § 1105.7, an applicant that is required to prepare an Environmental Report under the provisions of that section “must certify that it has sent copies of the Environmental Report to the [federal, state and municipal] agencies listed in paragraph (b) [49 C.F.R. §1105.7 (b) (which include “any other agencies that have been consulted in preparing the report”)] and that it has consulted with all appropriate agencies in preparing the report.” 49 C.F.R. §1105.7 (c). The Board’s decision adopting its environmental regulations also require an applicant to engage in an “advance consultation process” with the relevant agencies in preparing its Environmental Report and to provide the responses of the agencies they have contacted. See Implementation of Environmental Laws, 7 ICC 2d 807, 824 (1991).

Such notice and consultation requirements would appear applicable to land-use-exemption proceedings and would necessarily embrace the “[t]he municipality, the state, and any relevant federal or state regional planning entity in the jurisdiction of which the solid waste rail transfer facility is located or proposed to be located” as referenced in Proposed 49 C.F.R. §§ 1155.20 (b) (1) and 1155. 22 (b). As such, the Board’s proposed rules appear fully adequate to provide direct notice of the environmental review process to such parties at the earliest stage of the process and no additional notice requirements are necessary.

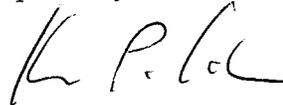
Conclusion

The Board should correct its proposed interpretation of 49 U.S.C. § 10910 in the Revised NPRM and remove any proposed requirements that would require an applicant

to demonstrate that a state law “affecting the siting” of a SWRTF is “unreasonably burdensome” or “discriminates against rail carriers” if the state law can otherwise be characterized as falling within the “traditional police powers of the State.” The Board should also *not* make its new statutory interpretation of 49 U.S.C. § 10910 (and new interim rules implementing such statutory interpretation) immediately effective on an interim basis as the Board proposed in the Revised NPRM. The Board’s new interpretation of section 10910, and the new rules implementing that interpretation, should be stayed pending the outcome of the Board’s rulemaking to allow the Board to correct its clear error in statutory construction.

The Board should also adopt the other modifications to the Revised NPRM as proposed by the AAR.

Respectfully Submitted,



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