

February 20, 2009

VIA E-FILE

Attention: STB Ex Parte No. 684

Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

To Whom It May Concern:

By decision dated January 14, 2009, the Surface Transportation Board (“Board”) issued a Notice of Proposed Rulemaking (“NPR”) containing proposed rules to implement the provisions of the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (“CRA”), and providing that the proposed rules were effective immediately as interim rules until the Board issued a final rule. The NPR indicated that comments could be submitted to the Board on the proposal until February 23, 2009, and that reply comments were due by March 23, 2009.

This letter constitutes the comments of the following parties on the NPR:

1. National Solid Wastes Management Association, a national trade association representing companies in North America that provide solid, hazardous and medical waste collection, recycling and disposal services. NSWMA’s members operate in all 50 states and the District of Columbia, and share a common mission to manage waste in a manner that is beneficial to the public, environmentally responsible, efficient, profitable, and ethical.
2. Integrated Waste Services Association, a national trade group representing 67 of the 87 waste-to-energy facilities in 25 states around the country that generate approximately 2700 megawatts of power from the disposal of more than 28 million tons of trash each year. IWSA members include 25 municipalities and more than a dozen private companies engaged in the waste-to-energy sector.
3. Construction Materials Recycling Association, a non-profit association that promotes the recycling and reuse of construction and demolition materials throughout North America.
4. The Solid Waste Association of North America, a national not-for-profit association representing solid waste professionals that are employed by local governments and

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private sector businesses that provide solid waste and recyclables collection, processing, transfer and disposal. Members of SWANA provide construction and demolition debris, collection, processing, transfer and disposal services throughout the United States. SWANA's mission is to advance the practice of environmentally and economically sound management of municipal solid waste in North America.

5. The U.S. Conference of Mayors, the official nonpartisan organization of cities with populations of 30,000 or more. There are 1,200 such cities in the country today and each city is represented in the Conference by its chief elected official, the mayor. The Conference promotes the development of effective national urban/suburban policy, strengthens federal-city relationships and ensures that federal policy meets urban needs.

At the outset, we want to state our appreciation of the opportunity to submit these comments to the Board to address concerns about the NPR and the proposed process for issuing land-use exemption permits to solid waste rail transfer facilities ("Facilities"). It is clear from a close read of the NPR that the Board and its staff gave careful thought and attention to the language in the CRA as it crafted the NPR, and we believe there are many positive features in the proposal. Our comments are limited to a few areas where we have concerns. However we would caution that we have significant concerns with the issues that we raise; we believe that the problems we discuss below are of tremendous gravity and we urge the Board to modify the proposal to address these issues in its final rule. We also urge the Board not to apply the NPR as an interim rule due to these deficiencies, and to instead quickly issue a revised rule that addresses these issues, as follows:

I. The Board Must Clarify The Criteria For Determining Which Laws Affect Siting.

As the Board has indicated in the NPR, "(t)he primary role of the Board under the [CRA] is to issue land-use exemption permits for solid waste rail transfer facilities that meet the CRA's standards." The CRA requires the Board to "publish procedures governing the submission and review of applications for solid waste rail transfer facility land-use exemptions." CRA, Sec. 604. "At a minimum, " such procedures "shall address ... the process for a State to petition 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; and ...the process for a solid waste transfer facility or a rail carrier that owns or operates such a facility to petition the Board for a land-use exemption."

As a land-use exemption permit is authorized under the CRA only when the Board finds that there is a "(s)tate or local law, regulation, order or other requirement affecting the siting of such facility," the first critical determination in the issuance of a land-use exemption permit is a decision on what laws "affect the siting" of the Facility. However, the Board has determined that it will not provide a definition of this term, and instead has structured its permitting process to provide the permit applicant with the opportunity to define the term for the Board (*See* NPR at

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7: “applicants will be required to identify those laws that they believe affect the siting of a particular solid waste rail transfer facility”. *See also* Proposed Rule at 49 C.F.R. § 1155.21).

The effect of the land-use exemption permit is to exempt a Facility from specific state or local laws, regulations, orders or other requirements (“Laws”). Offering parties that would otherwise be subject to Laws the opportunity to identify which requirements they should be exempt from is, in our view, not a reasonable approach unless the Board provides clear and consistent guidance on the characteristics of those requirements that it believes will affect the siting of a Facility, and the nature and extent of any exemption that may be available. Furthermore, by offering the opportunity to permit applicants to select laws for exemption instead of providing clear guidance for the entire interested public, the Board would be creating an enormously inefficient process, requiring all parties who might be adversely affected by a land-use exemption permitting decision to continuously and closely monitor the Board docket for filings that might contain permit applications, and to then be prepared to embark on an expensive and time consuming engagement in those proceedings to protect their interest in the fair application of the law.

We understand that the Board has indicated in a footnote to the NPR that siting laws “in general, may be read to refer to laws or regulations that traditionally are labeled as zoning or land-use laws.” However, the Board also indicated in this same footnote 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.” NPR, Fn. 7, at 7.

It is critical to the effective administration of the CRA that the Board administer the land-use exemption permit in a manner that provides the same level of environmental regulation to solid waste rail transfer facilities as is applied to similarly situated solid waste facilities that are not located on rail lines. Senator Lautenberg, lead author of the CRA provisions, stated on the floor of the Senate just prior to adoption of the relevant provisions of the CRA by the Senate that “(t)his legislation ensures that solid waste rail transfer facilities must fully comply with the substantive and procedural requirements in State and Federal environmental and public health and safety laws, including all permitting requirements”, and “this bill ensures that solid waste rail transfer facilities ... obtain the State permits that any other similar solid waste management facility is required to obtain and comply in full with State law”. 154 Cong. Rec. S-10286 (daily ed. Oct. 1, 2008) (statement of Sen. Lautenberg).

The Board has indicated its understanding of the central purpose of the CRA provisions: “we 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.” NPR, at 7. However, by declining to provide clear guidance on which laws may affect siting of a Facility, the Board has created significant uncertainty about the reach and impact of the permitting

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process, and has established an unwieldy, inefficient and costly process for the many parties who have an interest in this issue.

The frequent attempts to operate solid waste facilities along rail lines under the preemption provisions in the Interstate Commerce Commission Termination Act prior to the adoption of the CRA resulted in the expenditure of significant resources by parties on all sides of the issue, and by the Board itself. As Chairman Nottingham testified before the House Committee on Transportation and Infrastructure's Subcommittee on Railroads, Pipelines and Hazardous Materials, "(o)ne of the most difficult issues facing the Board this year is how to improve the Board's ability to ensure effective regulation of rail operations involving solid waste...". Testimony of C. Nottingham, Oct. 9, 2007. Many petitions were filed before the Board and there were frequent challenges to those petitions, both before the Board and in federal and state courts. In some of these matters, there were as many as thirty parties providing substantive comments to the Board, and in some instances hundreds of interested individuals and groups submitted letters of concern. See, e.g., *New England Transrail, LLC - Construction, Acquisition and Operation Exemption*, STB Finance Docket No. 34797; *Ashland Railroad, Inc. - Lease and Operation Exemption*, STB Finance Docket No. 34987; *Buffalo Southern Railroad, Inc. - Acquisition and Operation Exemption*, STB Finance Docket No. 34903; *Town of Babylon and Pinelawn Cemetery - Petition for Declaratory Order*, STB Finance Docket No. 35057; *J.P. Rail, Inc. - Lease and Operation Exemption*, STB Finance Docket No. 35090; *J.P. Rail v. New Jersey Pinelands Commission*, 404 F. Supp. 2d 636 (D. N.J., 2005); *Buffalo S. R.R. v. Vill. of Croton-On-Hudson*, 434 F. Supp. 2d 241 (S.D.N.Y., 2006); *NYS&W v. Jackson*, Civ. Act. No. 05-4010 (D. N.J., 2007); *Coastal Distribution. LLC v. Town of Babylon*, 216 Fed. Appx. 97 (2d Cir. 2007); *NYS&W v. Jackson*, 500 F.3d 238 (3d Cir. 2007). See also Attachment B, Testimony of F. Mulvey, House Committee on Transportation and Infrastructure, Subcommittee on Railroads, Pipelines and Hazardous Materials, October 11, 2007.

This past history of controversy confirms how important it is that the Board adopt procedures for implementation of the CRA that contain clear guidance on the crucial issue of what constitutes a requirement "affecting the siting" of a Facility. We propose that the Board clarify the following when it issues the final rule on the NPR:

(i) Review of Laws to determine whether they "affect the siting" of a Facility will be guided by the fundamental precept that Congress intended for solid waste rail transfer facilities to obtain the State permits that any other similar solid waste management facility is required to obtain and to comply in full with State law.

(ii) Laws "affecting the siting" of a Facility are those requirements that control the use of a particular parcel of land for a particular purpose. Such laws are typically found in local zoning ordinances which regulate the use of land, and not the design of structures or equipment, or the emissions of pollutants. Examples of such Laws that "affect siting" would be a designation of land for exclusively single family residential use, or a prohibition of the construction or

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operation of particular types of facilities in a specific geographic area for reasons that are based upon land use planning principles rather than environmental or public health concerns.

(iii) Laws “affecting the siting” of a Facility will not include those requirements that restrict the construction or operation of particular types of facilities in specific geographic areas for reasons that are not related to land use generally but instead are based upon environmental or public health concerns. For example, a setback requirement that prohibits the management of solid waste in close proximity to a private water supply¹ or near a school or playground² would not be construed as a Law that affects the siting of a Facility. Similarly, a restriction that prohibits the operation of an open air waste transfer facility due to the potential for particulate matter (i.e., air quality) impacts on sensitive receptors would not be construed as a Law that affects the siting of a Facility.³

(iv) Laws “affecting the siting” of a Facility will also not include those requirements that impose environmental or public health impact assessment obligations on proposed facilities that have the potential to cause environmental or public health impacts. For example, a requirement to complete an environmental assessment or impact review prior to constructing a solid waste management facility would not be construed as a Law that “affects the siting” of a Facility.⁴

(v) Laws “affecting the siting” of a Facility will also not include those requirements that impose permit obligations on facilities that address the discharge or potential discharge of pollutants to environmental or public health receptors in the area of the facility. For example, a requirement to obtain a solid waste construction and operation permit, or a wastewater discharge permit, or an air pollution control permit, would not be construed as a Law that affects the siting of a Facility.⁵

(vi) Where some portion of a Law is determined to “affect the siting” of a Facility, the Board will endeavor to include in the land-use exemption permit only the narrowest portion of the law which is determined by the Board to qualify for inclusion, and the remainder of the Law, to the fullest extent consistent with the purposes of the CRA, will remain applicable to the Facility.

¹ See, e.g., Massachusetts solid waste permitting requirements applicable to all waste handling facilities at 310 CMR 19.038(b)(2).

² See, e.g., Pennsylvania solid waste permitting requirements applicable to all transfer stations at 25 Pa. Code § 279.202(a)(6).

³ See, e.g., New York solid waste requirements applicable to all transfer stations at 6 NYCRR 360-11.4(n).

⁴ See, e.g., New Jersey requirements for environmental and health impact statements at NJAC 7:26-2.9, and for environmental assessments in Executive Order No. 215 of 1989. See also 301 CMR 11.00, implementing the Massachusetts Environmental Policy Act, and 6 NYCRR Part 617, implementing the New York State Environmental Quality Review process.

⁵ See, e.g., 310 CMR 19.030 and 19.038; 6 NYCRR 360-1.7; NJAC 7:26-2; 25 Pa. Code § 279.201.

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II. The Board Must Apply the Same Review to All Land-Use Exemption Permits.

The CRA states in Section 10909(a) that the Board may issue a land-use exemption permit for a Facility if “the Board finds that a ... law ... affecting siting ... unreasonably burdens the interstate transportation of solid waste by railroad, discriminates against the rail transportation of solid waste and a solid waste facility, or a rail carrier that owns or operates such a facility petitions the Board for such an exemption.” The CRA states in Section 10909(c) that such a land-use exemption permit may be issued only if the Board “determines that the facility at the existing or proposed location does not pose an unreasonable risk to public health, safety, or the environment.”⁶

These two sections form the statutory basis for review of all potential land-use exemptions. In all cases where it issues an exemption, the Board must find first that the state or local laws under consideration both create an unreasonable burden and discriminate against rail transportation, and second that the Facility at the proposed or existing location does not pose an unreasonable risk in the absence of the application of the state or local requirement.

The Board’s proposed rules implementing this review, however, do not require the complete review for each potential exemption permit. Instead, 49 C.F.R. § 1155.27 skips the first step in this analysis and states only that the Board will consider whether the Facility does not pose an unreasonable risk. The Board should amend section 1155.27 to add the first part of the two-part review test.

III. The Board Must Amend its Environmental Review Procedures.

The National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”) has “twin aims. First, it places upon [a federal] agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 97 (1983). To accomplish these aims, NEPA requires federal agencies to prepare an environmental assessment prior to taking major federal actions significantly affecting the quality of the environment. 42 U.S.C. 4332(2)(C). As stated in the NPR, “the Board recognizes that the issuance of a land-use-exemption permit is a major federal action under the National Environmental Policy Act”. NPR at 11.

NEPA also requires agencies to develop rules implementing its statutory mandate. Among other things, an agency must develop procedures that include “[s]pecific criteria for and identification of those typical classes of action: (i) which normally do require environmental impact statements; (ii) which normally do not require either an environmental impact statement

⁶ Section 10909(c) contains other review requirements that are not necessary to address here.

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or an environmental assessment; [and] (iii) which normally require environmental assessments but not necessarily environmental impact statements.” 40 C.F.R. § 1507.3(b)(2).

Consistent with its obligations under NEPA and 40 C.F.R. Part 1507, the Board has promulgated rules and procedures governing the conduct of environmental reviews. *See* 49 C.F.R. § 1105. In particular, Section 1105.6 lays out the manner in which the Board will conduct its environmental review of proposed projects and specifically lists actions for which no environmental documentation will be prepared, 49 C.F.R. § 1105.6(c), and actions for which an environmental assessment will be prepared, 49 C.F.R. § 1105.6(b). All other actions require impact statements. 49 C.F.R. § 1105.6(a). The Board’s proposed rule to implement the CRA provides that for new Facilities, an environmental report is required containing the information described at 49 C.F.R. § 1105.7. *See* Proposed Rules, Section 1155.20(c).

The Board’s environmental review regulations were developed prior to the enactment of the CRA, which vests in the Board new review authority over certain solid waste projects. Specifically, the Board is now authorized to issue a new type of permit, referred to variously as a “siting permit”, or a “land-use exemption permit” for a newly defined classification of facility, a solid waste rail transfer station. While the Board’s existing rules contain specific environmental review criteria for actions under Board jurisdiction, these criteria were developed prior to the enactment of the CRA, and such criteria simply do not contemplate or capture the environmental impacts that may be associated with solid waste rail transfer stations.

For example, the proposed rules provide that an environmental report must be prepared for new Facilities pursuant to 49 C.F.R. § 1105.7. However, Section 1105.7 contains thresholds that are unequivocally designed to address rail operations but not solid waste management operations. For example, this section contains the following thresholds:

(4) Energy. ...

(iv) If the proposed action will cause diversions from rail to motor carriage of more than: (A) 1,000 rail carloads a year; or (B) An average of 50 rail carloads per mile per year for any part of the affected line, quantify the resulting net change in energy consumption and show the data and methodology used to arrive at the figure given.

(5) Air.

(i) If the proposed action will result in either: (A) An increase in rail traffic of at least 100 percent (measured in gross ton miles annually) or an increase of at least eight trains a day on any segment of rail line affected by the proposal, or (B) An increase in rail yard activity of at least 100 percent (measured by carload activity), or (C) An average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on any affected road segment, quantify the

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anticipated effect on air emissions. ...

(ii) If the proposed action affects a class I or nonattainment area under the Clean Air Act, and will result in either: (A) An increase in rail traffic of at least 50 percent (measured in gross ton miles annually) or an increase of at least three trains a day on any segment of rail line, (B) An increase in rail yard activity of at least 20 percent (measured by carload activity), or (C) An average increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on a given road segment, then state whether any expected increased emissions are within the parameters established by the State Implementation Plan. ...

(iii) If transportation of ozone depleting materials (such as nitrogen oxide and freon) is contemplated, identify: the materials and quantity; the frequency of service; safety practices (including any speed restrictions); the applicant's safety record (to the extent available) on derailments, accidents and spills; contingency plans to deal with accidental spills; and the likelihood of an accidental release of ozone depleting materials in the event of a collision or derailment.

49 C.F.R. § 1105.7(e) (4) and (5). These existing environmental review thresholds are focused exclusively on rail-related environmental impacts and completely ignore the potential environmental impacts of concern for solid waste management activities at solid waste rail transfer facilities.

If new solid waste rail transfer facility projects proceed under the existing environmental review criteria, many would escape meaningful environmental review under 49 C.F.R. § 1105.7 notwithstanding the existence of potentially significant impacts. As one example, if the projected increase in rail or truck traffic for a new Facility were below the thresholds established in Section 1105.7(e)(5)(i), the environmental review contemplated by the Board's proposed rules would exclude air impacts from the Facility, regardless of whether facility operations were anticipated to have significant air emissions. Similarly, while the Board's existing rules contain a review threshold for the transport of ozone depleting substances, there is no threshold to evaluate potential impacts from myriad other substances that may be handled at a solid waste facility and are of potentially greater concern if mismanaged. Due to these gaps in the use of the existing environmental review procedures when applied to the Board's new permitting authority, the issuance of a land-use exemption permit under the Board's existing environmental review rules would likely run afoul of NEPA and its implementing regulations.

All federal agencies must adopt procedures that ensure decisions are made in accordance with the policies and purposes of NEPA. 40 C.F.R. § 1505.1. This includes designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them. *Id.* As the Board's current environmental review procedures do not consider the potential for significant

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effects from the Board's new permitting responsibility under the CRA, the current rules will not comply with NEPA if they are used to guide environmental reviews for Facilities.

First, the Board would be forced to evaluate solid waste transfer facility projects under existing environmental review criteria that were not designed for the types of facilities and potential impacts that the CRA now requires the Board to address. In our view, any attempt to provide such an explanation would likely constitute impermissible, post-hoc decision-making. *See, e.g., California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002) (stating that post-hoc examination of data to support a pre-determined conclusion is impermissible because "[t]his would frustrate the fundamental purpose of NEPA, which is to ensure that federal agencies take a 'hard look' at the environmental consequences of their actions, early enough so that it can serve as an important contribution to the decision making process").

Second, should the Board proceed by applying existing environmental review criteria to solid waste facilities, a court will likely find that the Board impermissibly failed to consider adequately the unique characteristics of these new projects, and therefore, failed to properly assess their significance. *See, e.g., Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (stating that the "threshold question in a NEPA case is whether a proposed project will 'significantly affect' the environment, thereby triggering the requirement for an [impact statement].")

Third, environmental evaluations conducted under the existing Board rules will not satisfy the evaluation requirements of NEPA. The NEPA regulations require that each Federal agency shall determine whether a proposal will require an environmental impact statement, or will require an environmental assessment, or can be categorically excluded. 40 C.F.R. § 1501.4. An environmental impact statement is required if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor. *See Center for Biological Diversity v. NHTSA*, 2007 U.S. App. LEXIS 26555 (9th Cir. 2007). "If an agency decides not to prepare an EIS, it must supply a 'convincing statement of reasons' to explain why a project's impacts are insignificant. The statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Id.*, at 122, citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 Fed. 3d 1208, 1212 (9th Cir. 1998). Under the Board's current rules, substantial potential impacts from new Facilities will not be evaluated and therefore proper environmental impact analysis will not occur.

Finally, should a court find that the Board has violated NEPA by failing to review and revise its implementing procedures, this would jeopardize any land-use exemption permits issued by the Board and the court could issue an injunction preventing any further land-use exemption permitting until the regulatory deficiencies are corrected. *See, e.g., Montana Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032 (D. Mont. 2006) (ordering continued suspension of oil and gas leases and shutdown of oil and gas pipeline until the agency cured deficiencies in its NEPA compliance process).

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We recommend that the Board take the opportunity now to reexamine its existing environmental review regulations in light of the new jurisdiction and new permitting responsibility conferred on the Board by the CRA. In deference to Senator Lautenberg's statement that the CRA "ensures that solid waste rail transfer facilities ... obtain the State permits that any other similar solid waste management facility is required to obtain and comply in full with State law" (154 Cong. Rec. S10286), there are a number of examples of state environmental review thresholds that the Board could adopt that capture the potential environmental impacts from solid waste facilities and to which similarly situated solid waste facilities are already subject. For example, the Massachusetts Environmental Policy Act, M.G.L. c. 30, §§ 61-62, and its implementing rules at 301 C.M.R. Part 11, provides for a "mandatory environmental impact study for new capacity or expansion of 150 or more tons per day for storage, treatment, processing, disposal of solid waste" and "environmental assessment and discretionary environmental impact study for a transfer station or for any facility storing, treating or processing 50 or more tons per day of solid waste or disposing of any quantity of solid waste."

IV. Existing Facilities Should Not Be Provided The Opportunity To Evade Review.

The Board has proposed at Section 1155.10 that a petition related to an existing Facility filed by the Governor of a State must certify that the subject facility qualifies as a solid waste rail transfer facility both as of the filing date of the petition and on October 16, 2008, the date of enactment of the CRA.

A requirement that a State must certify as to the Facility's qualification on both the petition date and the CRA enactment date creates an unnecessary procedural and practical burden on this process. Under the proposed language, it will be possible for an existing facility to engage in sporadic operations and thereby potentially evade review by the Board. By requiring a State to certify as to operation as a Facility on the date of the petition, a requirement that does not exist in the CRA and is therefore proposed solely at the Board's discretion, the Board creates an impediment to the exercise of petition rights by the states.

The sole requirement in the CRA is that the facility exist on the date of enactment of the CRA. It should therefore be sufficient for the Board to determine that a facility subject to a state petition was in existence on the date of enactment. To ensure that there is an actual controversy, it might be appropriate for the Board to also seek information that the facility has operated for at least one day since the date of enactment, but there is no reason to require that the facility be in operation on the date the petition is filed.

Thank you for the opportunity to submit these comments. As noted above, we believe that the NPR contains a number of worthy components, but we have significant concern about the issues discussed above and we urge the Board to make changes to the proposed rules

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consistent with our suggestions. We look forward to the opportunity to work with the Board and other stakeholders to ensure that the Board develops a fair and effective process for administering the provisions of the Clean Railroads Act of 2008.

Very truly yours,



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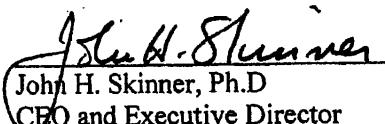
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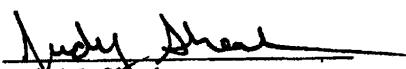
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