



ASSOCIATION OF  
AMERICAN RAILROADS

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Senior Vice President-Law  
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February 23, 2009

Honorable Anne K. Quinlan  
Acting Secretary  
Surface Transportation Board  
395 E St., S.W.  
Washington, DC 20423

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

Dear Secretary Quinlan:

Pursuant to the Board's Notice served January 14, 2009, attached please find the Comments of the Association of American Railroads (AAR) for filing in the above proceeding.

Respectfully submitted,

Louis P. Warchot  
Attorney for the Association of  
American Railroads

Attachment

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB EX Parte No. 684

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SOLID WASTE RAIL TRANSFER FACILITIES

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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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February 23, 2009

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SURFACE TRANSPORTATION BOARD

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**Introduction**

In a Notice of Proposed Rulemaking; Adoption of Interim Rules (“NPR”) served January 14, 2009, the Surface Transportation Board requested comment on its interim rules implementing the provisions of the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (“CRA”) and the Board’s interpretation of the CRA.

The CRA, enacted October 16, 2008, revised 49 U.S.C. 10501 (c) to remove from the Board’s jurisdiction the regulation of solid waste rail transfer facilities, except as provided for in the Act. The exception, as codified in new sections 49 U.S.C. 10908-10910, provides the Board with the authority to issue land-use-exemption permits for the siting of such facilities. Upon receiving a land-use-exemption permit issued by the Board, a solid waste rail transfer facility need not comply with state laws and other requirements affecting the siting of the facility, as those state laws and requirements would be preempted.<sup>1</sup> The CRA also required the Board to implement procedures governing the

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<sup>1</sup> The Board, however, may require compliance with some or all provisions of state law affecting siting as a condition of approval of a land use exemption permit. 49 U.S.C. 10909 (f). New section 49 U.S.C. 10910 (“Effect on other statutes and authorities”) also clarifies that other than with respect to state laws and requirements affecting siting, nothing in 49 U.S.C 10908-09 is intended to affect the state’s traditional

submission and review of applications for land-use-exemption permits which procedures are set forth in the Board's interim regulations.

The Association of American Railroads ("AAR"), on behalf of its member railroads, hereby submits these comments in response to the NPR. As noted below, the AAR fully supports the Board's interim rules and interpretation of the CRA as set forth in the NPR. The AAR's comments are accordingly limited in scope and propose a minor modification to the Board's interim rules.

## **Discussion**

### **Overview**

Prior to enactment of the CRA, a solid waste rail transfer facility owned or operated by or on behalf of a rail carrier generally came within the Board's jurisdiction as part of transportation by a rail carrier. Accordingly, as noted by the Board (NPR at 2), "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....[citations omitted]" The intent of the CRA 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." NPR at 4. At the same time, however, the CRA also seeks to protect the free and efficient flow of rail interstate commerce from state regulation or interference by providing the Board with authority, if petitioned, "to determine the placement of solid waste rail transfer facilities that are part of the national rail system

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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.

through the issuance of land-use-exemption permits, which preempt state and local laws and regulations ‘affecting the siting’ of such facilities.” NPR at 2.

The AAR supports the environmental, health and safety goals underlying the CRA as applicable to solid waste rail transfer facilities. The AAR also strongly supports the goals underlying the specific provisions of the Act providing the Board with authority to preempt state zoning, land use or other laws affecting the siting of these facilities through the land-use-exemption permit process. The AAR and individual rail carriers actively participated in the CRA legislative process with the dual aims of protecting the free and efficient flow of rail interstate commerce while recognizing the state’s traditional police powers regarding environmental and public health and safety interests, and the AAR views the CRA as attaining those objectives.

#### **Specific AAR Comments**

The AAR supports the Board’s interim rules and interpretation of the CRA as straightforward and adhering closely to the CRA’s specific statutory requirements and underlying intent, and as fully adequate to achieve the CRA’s objectives. The procedural schedule set forth in the interim rules also appears appropriate.

The AAR’s comments in response to the NPR are confined to two issues addressed below.

1. The AAR wishes to emphasize its agreement with the Board that the term “affecting the siting” as used in the CRA 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.” NPR at 7. As the Board correctly noted, although state “siting” laws, in general, may traditionally be labeled as zoning or land-use laws,

other state laws may also affect the siting of a particular solid waste rail transfer facility on a specific piece of property and may fall within the scope and purpose of the CRA. Id. The AAR also concurs with the Board that the best approach to determine whether a particular state law falls within the CRA's "affecting the siting" provision is to consider the issue on a case-by-case basis in the context of a concrete factual setting. Id.

2. The AAR also wishes to propose a minor modification to a provision in the interim rules to make it more workable. The AAR's proposed modification is noted below.

Proposed Rule 1155.22 (Contents of Application)

1155.22 (17)- The proposed rule requires a "Detailed drawing of the subject facility on a sheet not larger than 8 x 10 ½ inches."

The AAR submits that the sheet size specified is likely far too small to show with clear definition the specific details required by the proposed rule (e.g., exact boundaries of the facility, all structures at the facility, location and type of operations taking place, proposed traffic configuration for the solid waste entering and leaving the facility, reasonable future expansion that the applicant requests to be included in the facility, and geographic features that should be considered in determining whether the facility would pose an unreasonable risk to health, safety or the environment). The Board should accordingly allow an applicant to submit either a larger detailed drawing or clarify that an applicant may use additional 8 x 10 ½ inch sheets to show more specific details of a drawing.

**Conclusion**

The AAR fully supports the Board's interim rules and interpretation of the CRA as set forth in the NPR. Accordingly, the Board should adopt the interim rules with the minor modification proposed above by the AAR.

Respectfully submitted,



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