

BEFORE THE SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 684

**PROPOSED RULEMAKING AND ADOPTION OF INTERIM RULES REGARDING SOLID WASTE
RAIL TRANSFER FACILITIES**

**COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

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By decision dated January 14, 2008, the Surface Transportation Board issued a Notice of Proposed Rulemaking (“Proposed Rulemaking”) containing proposed rules implementing the provisions of the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (“CRA”). The decision ordered the adoption of the proposed rules as interim rules and provided that comments to the proposed rules are due by February 23, 2009.

The following comments are submitted by New York State Department of Environmental Conservation (“NYSDEC”). NYSDEC is authorized by state law to regulate solid waste management facilities, including solid waste transfer stations, to ensure that such facilities are constructed, maintained, operated and closed in compliance with the New York State Environmental Conservation Law (“ECL”) and NYSDEC’s regulations and consistent with the protection of public health and the environment.

NYSDEC thanks the Board for this opportunity to provide comments on the Proposed Rulemaking regarding the land-use exemption authority granted to the Board by the CRA and its affect on solid waste rail transfer facilities covered by the CRA. As a regulatory agency, NYSDEC appreciates the Board’s efforts and attention to detail in drafting the Proposed Rulemaking. NYSDEC’s comments are limited in scope, but paramount to a clear understanding of the CRA, the Board’s authority and the Proposed Rulemaking. NYSDEC requests that the Board modify the Proposed Rulemaking to address these comments, reissue the modified rules as the interim rules and incorporate these comments in the final rules.

NYSDEC’s comments follow and are not necessarily outlined in order of importance.

I. **THE PROPOSED RULEMAKING NEEDS TO BE REVISED TO CLARIFY WHAT CONSTITUTES A SITING PERMIT AND WHICH LAWS AFFECT SITING**

The CRA amends 49 USC §§ 10501(c)(2) *et seq.* Section 10501(c)(2) provides in part that the Board does not have jurisdiction over a solid waste rail transfer facility except as provided under §§10908 and 10909. Section 10908(a) of the CRA provides that “[e]ach solid waste rail transfer facility shall be subject to and shall comply with all applicable Federal and State requirements, both substantive and procedural, including judicial and administrative orders and fines, respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, including laws governing solid waste, to the same extent as required for any similar solid waste management facility . . . that is not owned or operated by or on behalf of a rail carrier, except as provided in section 10909”, which limits the Board’s jurisdiction to the determination of land-use exemptions relating solely to siting requirements. Section 10908(b) requires solid waste rail transfer facilities operating as of October 16, 2008 to comply with Federal and State requirements pursuant to, and apply for all permits required by, Section 10908(a) except for siting permits. Section 10909 provides the authority, procedures and standards for reviewing land-use exemption permit applications.

A. Siting Permits

The Proposed Rulemaking does not define a “siting permit”. With a few minor exceptions, the definitions in Section 1155.2 of the Proposed Rulemaking are an exact restatement of the definitions found in the CRA and nothing more. NYSDEC does not issue “siting permits” for solid waste transfer facilities, but

many of the solid waste transfer facility permits issued by NYSDEC contain special conditions relating specifically to how a solid waste transfer facility may operate on a site. Such conditions can limit the amount of waste a facility is allowed to accept per day, limit the management of solid waste on the site by requiring all waste to be managed in an enclosed facility, and prohibit waste from being stockpiled or managed within an enumerated distance from the property line. Special permit conditions are utilized to mitigate potential adverse environmental impacts. Moreover, permits are required to be reviewed through the State Environmental Quality Review Act (ECL § 8-0101 *et. seq.*) and State Environmental Quality Review Regulations (6 NYCRR Part 617). It is that review process that addresses the need to mitigate potential adverse environmental impacts through special permit conditions. NYSDEC's solid waste management facilities regulations found at 6 NYCRR Part 360 ("Part 360") also require the mitigation of potential adverse environmental impacts for all facilities. None of these mitigation measures constitute a "siting" determination, but the permit conditions contain requirements or prohibitions to prevent potential adverse environmental impacts that may incidentally affect siting.

NYSDEC recommends that the Board define "siting permits" to exclude permit conditions that address where and how waste is managed on a site or limit how a site is utilized for the management of solid waste. Compliance with all of NYSDEC's solid waste regulations is paramount to ensuring protection of human health, safety and the environment. It is clear from the express language of the CRA that Congress intended that jurisdiction over solid waste rail transfer facilities should be left to the expertise of state and federal solid waste regulators.

B. Laws Affecting Siting

The CRA states that 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 by the land-use exemption permit issued pursuant to federal law. However, the Proposed Rulemaking fails to provide a determination of what types of laws could “affect siting” for the purposes of the CRA. Section 1155.2(d) defines “[s]tate laws, regulations, order, or other requirements affecting the siting of a facility” to include “requirements of a state or a political subdivision of a state, including a locality or municipality, affecting the siting of a facility.” The Board has utilized circular reasoning to define the term, resulting in a meaningless definition. Instead of addressing what constitutes a law affecting the siting of a facility, the Board has structured the Proposed Rulemaking so that the applicant for a land-use exemption permit will define which laws the applicant believes “affect the siting” of the applicant’s solid waste rail transfer facility. NYSDEC believes that this is an unreasonable approach and that allowing the regulated party to define the laws that the regulated party wants to be exempted from is an *ultra vires* delegation of the Board’s authority.

The Board needs to provide clear and consistent guidance on the characteristics of those requirements it believes will affect the siting of a solid waste rail transfer facility. The Board indicates in a footnote to the Proposed Rulemaking that siting laws “in general, may be read to refer to laws or regulations that traditionally are labeled as zoning or land-use laws.” Proposed Rulemaking, P. 7, fn 7. The Board also indicates, 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.” *Id.* NYSDEC believes it is critical 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 that NYSDEC applies to similarly situated solid waste facilities that are not located on rail lines. These are requirements for all solid waste management facilities, including solid waste transfer stations, and are not “particular to solid waste rail transfer facilities”. NYSDEC believes that to do otherwise is a contravention of the express terms, spirit and intent of the CRA.

In addition, there are a limited number of siting prohibitions contained in NYSDEC’s Part 360 regulations that apply to all solid waste management facilities. The regulations prohibit the siting of solid waste management facilities in certain agricultural lands, floodplains, and regulated wetlands and the siting of such facilities must not contribute to the taking of any endangered or threatened species or to the destruction or adverse modification of their critical habitat. These siting prohibitions are not “particular to solid waste rail transfer facilities”, but are intended to preserve and protect the environment and should be excluded from the Board’s determinations on land-use exemption applications.

Therefore, NYSDEC proposes that the Board define and clarify that laws “affecting the siting” of a solid waste rail transfer facility should only include those requirements that control the use of a particular parcel of land for a particular purpose, such as local zoning ordinances. Laws “affecting the siting” of a solid waste rail transfer facility should not include requirements that restrict the construction or operation of solid waste management facilities, including solid waste transfer facilities, in specific environmentally sensitive areas for reasons that are based upon environmental or public health concerns. This would include all general prohibitions as well as construction, operation and design requirements set forth in state solid waste regulations for solid waste management facilities and transfer stations to protect public health and the environment. In addition to the aforementioned siting prohibitions, this would include Part 360 solid waste regulations that

require transfer of solid waste within an enclosed structure (6 NYCRR Part 360-11.4(n)) due to the potential for environmental and public health impacts on sensitive receptors. Such regulations should not be construed as laws that affect the siting of a solid waste rail transfer facility. Furthermore, laws “affecting the siting” of a rail transfer facility should not include those regulations or requirements that impose permit obligations on facilities, such as a requirement to obtain a state solid waste permit for the operation of the facility.

As stated above, NYSDEC believes that all state solid waste regulatory provisions for operation and design of a rail transfer station, including siting prohibitions for environmental reasons, and the obligation for these facilities to obtain state solid waste permits for construction and operation, should not be considered “affecting the siting” of the facility for the purposes of a Board review petition in determining issuance of a land-use exemption. NYSDEC also believes the Board should modify the language contained in Part 1155, Subpart C, Section 1155.22(a)(12) to read as follows:

(12) Certification that the applicant has applied or will apply for the appropriate state permits not affecting siting, *including state solid waste management facility permits and all other state environmental permits.*

This modification will make it expressly clear that states are authorized to require solid waste permits for solid waste rail transfer facilities even though a land-use exemption permit may be issued by the Board. It will also reinforce the purpose of the CRA that “the 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” as stated by Senator Lautenberg on the floor of the Senate just prior to adoption of the CRA by the Senate.

II. THE BOARD MUST AMEND ITS ENVIRONMENTAL REVIEW PROCEDURES TO SPECIFICALLY ADDRESS SOLID WASTE RAIL TRANSFER FACILITIES

The Board proposes to conduct the appropriate environmental review for each land-use-exemption permit proceeding pursuant to the Council on Environmental Quality's regulations, 40 CFR §§ 1500-1508, and the Board's own environmental regulations, 49 CFR §1105. Since the CRA provides that the Board may only issue a land-use exemption if it determines that "the facility at the existing or proposed location does not pose an unreasonable risk to public health, safety, or the environment," 49 USC §10909(c)(1), NYSDEC also believes that environmental review is required for the Board to make such a determination.

However, the Board's current environmental regulations, 49 CFR §1105, which were issued prior to the enactment of the CRA, only focus on the effects of rail construction and operation. The Section 1105 regulations do not address impacts associated with solid waste management operations that occur at rail transfer facilities, nor do they address the specific risks and concerns that solid waste poses. As such, the current Section 1105 regulations are inadequate for gathering the information necessary to determine whether the handling of solid waste at a particular location poses unreasonable risks to public health, safety, or the environment.

For example, 49 CFR § 1105.7 contains thresholds that are designed to address rail operations, but not solid waste management operations. Moreover, the applicant is not required to describe the anticipated effects on air unless certain thresholds in the increase of rail traffic, rail yard activity, or truck traffic are triggered. 49 CFR §1105.7(e)(5). These regulations also do not address many impacts created by solid waste management operations such as dust, odors, and vectors, or the emissions and other air impacts created by solid waste

handling equipment and activities. Other issues that are not considered in the Board's existing regulations include: stormwater management, state wetlands, endangered or threatened species and areas designated as critical habitat under state law, wildlife management areas, natural areas, or agricultural lands. In light of the Board's new jurisdiction and new permitting responsibility over solid waste rail transfer facilities, NYSDEC believes the Board should reexamine its existing environmental review regulations and propose environmental rules that specifically address solid waste rail transfer facilities.

III. CONTENTS OF PETITION

The provisions of Subpart B, Section 1155.10 govern a petition to require a facility in existence on October 16, 2008 to apply for a land-use exemption permit. The petition is made by the Governor of a state, or that Governor's designee. Section 1555.10(d) requires that a state provide the name of the rail carrier that owns or operates the solid waste rail transfer facility. The requirement for a state to determine whether or not a solid waste rail transfer facility is owned or operated by or on behalf of a rail carrier is overly burdensome. It is wholly within the Board's jurisdiction to make that determination as evidenced by numerous declaratory rulings issued by the Board. A state petition will result in a hybrid proceeding in which the Board will be required to determine whether the facility is owned or operated by or on behalf of a rail carrier before it can reach the issue of whether to require the facility to apply for a land-use exemption permit. NYSDEC knows from experience that it is not always clear who is a recognized rail carrier, nor is it easy to determine whether or not an entity is operating on behalf of a rail carrier. The best that states may be able to do is to base the petitions upon information and belief. NYSDEC believes that the requirements of Section 1155.10 should reflect these facts and allow the petition and good-faith certification, discussed below, to be submitted upon information and

belief, or in the alternative, the Board should remove the requirements of Section 1150.10 (d) and (e) from the Proposed Rulemaking.

Furthermore, the Board requires that a petition filed by a state must certify that the facility qualifies as a solid waste rail transfer facility both as of the filing date of the petition and on October 16, 2008, the CRA enactment date. This requirement creates an unnecessary procedural burden on the state filing the petition. The CRA refers to a solid waste rail transfer facility operating on the date of enactment of the CRA. This demonstration should be sufficient for the Board to determine that a facility subject to a state petition was in existence on the date of enactment. NYSDEC believes that the Board's imposition of an additional requirement beyond what is required by the CRA is unwarranted in this instance.

IV. OTHER COMMENTS

A. Proposed Rulemaking Section 1155.21 Form of Notice

NYSDEC believes the Notice of Intent to petition for a land-use exemption permit should include language identifying the rail carrier and demonstrating how the facility is owned or operated by or on behalf of that rail carrier. The Notice should have subheadings for topics such as "Description of Applicant"; "Reasons for Proposed Permit Application"; "Certification Regarding Certain Lands"; and "Comments by Interested Parties and Availability of Information".

B. Proposed Rulemaking Section 1155.22 Contents of Application

NYSDEC believes the contents of an application for a land-use exemption permit should also include the following information or requirements:

- the owner and operator of the facility;
- the relationship of the owner and operator to the rail carrier;
- a demonstration that the facility is a solid waste rail transfer facility as defined by the CRA; and
- that any future expansions must be expressly approved and permitted by the State prior to expansion of the solid waste rail transfer facility.

C. Proposed Rulemaking Section 1155.24(d)(2) Filings and Service of Application

Proposed Section 1155.24(d)(2) allows an applicant to file a petition to seek a waiver of specific regulations of Subpart C - Procedures Governing Applications for a Land-Use Exemption Permit. The section does not, however, provide for notice to the state or other interested parties or an opportunity for those parties to be heard. NYSDEC believes that the Board should make this procedure as transparent as possible by providing the states and interested parties with notice and the opportunity to be heard. If the petition for waiver was required to be submitted with the Notice of Intent to Apply for a Land-Use Permit and subject to the same service requirement, notice and an opportunity to be heard may be readily effectuated. NYSDEC also believes that grounds for granting a waiver should be enumerated in the regulations.

D. Proposed Rulemaking Section 1155.26 Transfer and Termination of a Land-Use Exemption Permit

NYSDEC is concerned that states will not receive notice of a transfer of a land-use exemption permit. Most NYSDEC solid waste management facility permits have a term of five to ten years and are only transferable upon written approval of NYSDEC and a demonstration that the prospective transferee will be capable of complying with applicable laws and regulations, permit conditions, and other requirements to which the prospective transferor is subject. The state should be notified of a pending transfer, and the transferor and transferee must facilitate the transfer of the permit in advance. NYSDEC believes the Board should require the transferor and transferee to notify the state within 120 days of the transfer to facilitate the state's permitting process.

V. CONCLUSION

NYSDEC requests that the Board modify the Proposed Rulemaking to address the comments and issues raised herein, reissue the modified rules as the interim rules and incorporate these comments in the final rules.

Respectfully submitted by,

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