

BEFORE THE SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 684

PROCEDURAL RULES RELATING TO SOLID WASTE RAIL TRANSFER FACILITIES

COMMENTS OF THE COMMONWEALTH OF MASSACHUSETTS

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION

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The Clean Railroads Act of 2008, Pub. L. No. 110-432 (“Clean Railroads Act” or “CRA”), amends 49 U.S.C. § 10501 to provide specifically that states have jurisdiction to regulate solid waste rail transfer facilities. See 49 U.S.C. §§ 10501(c)(2), 10908(a), 10908(b). The CRA limits the authority of the Surface Transportation Board (“Board”) with regard to these facilities to the issuance of land-use-exemption permits. Id. §§ 10908(b)(2)(B) and 10909(a). Pursuant to the CRA, the Board has established procedural rules for the submission and review of land-use-exemption permit applications and issued a Notice of Proposed Rulemaking on January 14, 2009. Id. § 10909(b). See Notice of Rulemaking Decision (“Rulemaking Notice”), STB Ex Parte No. 684 (served Jan. 14, 2009). The Board has solicited comments on both the proposed rules (“Proposed Rules”) and on its interpretation of the CRA.

The Commonwealth of Massachusetts by and through the Massachusetts Attorney General’s Office and the Massachusetts Department of Environmental Protection (“MassDEP”) submits comments on the Board’s interpretation of the CRA and the Proposed Rules.

I. THE BOARD’S INTERPRETATION OF THE CLEAN RAILROADS ACT

A. The Scope of the Phrase “Affecting the Siting” of a Solid Waste Rail Transfer Facility

The Clean Railroads Act specifically provides that solid waste rail transfer facilities are required to 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.” 49 U.S.C. § 10908(a). The Clean Railroads Act makes clear that a solid waste rail transfer facility is required to obtain all the necessary state permits, other than a siting permit, pursuant to 49 U.S.C. § 10908(a), that are applicable to solid waste management facilities. Id. §§ 10908(b), 10909(a). The solid waste rail transfer facility is not required to comply with state requirements “affecting the siting” of the facility if it obtains a land-use-exemption permit from the Board. See id.

While the Board recognizes that “[c]entral 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,’” it declines to specify what types of law would “affect the siting” of a solid waste rail transfer facility within the meaning of the CRA. Rulemaking Notice at 6-7. The Board suggests that some environmental laws may have an effect on the siting of a facility on a specific piece of property and therefore may fall within those laws and regulations from which a facility may seek a land-use exemption. Id. at 7 n.7. Expressing a wish to gain more experience applying the CRA before determining what specific types of land would fall within those “affecting siting,” the Board requires applicants and parties participating in land-use-exemption proceedings to identify those laws that they believe would affect the siting of a particular facility. Id. at 7.

Massachusetts believes that the phrase “affecting the siting” of a solid waste rail transfer facility refers to those laws and regulations primarily intended to regulate land use for planning

or zoning purposes, and not to those the primary purpose of which is to protect public health, safety and the environment. Massachusetts is concerned that the Board's proposed interpretation could have the effect of increasing uncertainty for state regulators and undermining environmental regulation, specifically when a site is unsuitable from an environmental point of view for use as a solid waste facility, thereby undermining the purpose of the CRA. Indeed, the CRA clearly specifies that solid waste rail transfer facilities are subject to the same state environmental laws and requirements as any other solid waste management facilities. See 49 U.S.C. § 10908(a). As an exception to the states' traditional jurisdiction over solid waste rail transfer facilities, the CRA carves out only a limited role for the Board. To interpret the phrase "affecting the siting" broadly to include environmental laws that may have an incidental effect on siting in particular cases would permit the exception to swallow the rule.

Many environmental laws and requirements that are part of the permitting process for the construction and operation of a solid waste management facility may be said to have some effect on the facility's siting. For example, in Massachusetts, after a facility has obtained site assignment or a siting permit pursuant to 310 Code Mass. Regs. §§ 16.00 to locate on a particular piece of property, the facility must apply for a facility permit that governs its construction and operation. These facility construction and operation permit regulations require MassDEP to consider the effect of the operation of the facility on sensitive receptors, such as an existing or potential public or private water supply, wetland resource areas, residential dwellings, bedded health care facilities, or children's pre-schools. See 310 Code Mass. Regs. §§ 19.038(1)(c), 19.038(2)(a)1 through 11, 13, 14, and 19.038(2)(b). The review enables the MassDEP to impose conditions in any construction and operation permit to ensure the protection of public health, safety and the environment. While the requirements may be said to have some effect on siting

(they necessarily relate to the site), their primary purpose is to protect the public health and safety and the environment and is not related to the traditional planning purposes of a land-use or zoning requirement. Therefore, Massachusetts would strongly urge the Board to clarify that the phrase “affecting the siting” of a solid waste rail transfer facility does not include environmental laws that have only incidental effects on siting.

In addition, Massachusetts is concerned that the lack of clarity could delay and impede the states’ application and enforcement of environmental laws in the non-siting permitting process relating to existing facilities. The Clean Railroads Act provides that facilities existing on October 16, 2008, the date of enactment of the CRA, are not required to possess any siting permit to continue to operate. 49 U.S.C. § 10908(b)(2)(B). The state may petition the Board to require the facility to obtain a land-use-exemption permit. Id. When the Board grants the state’s petition and requires the facility to apply for a land-use-exemption permit, the state may not enforce those laws or requirements affecting the siting of the facility. Id. § 10909(e). Because the Board requests that an applicant identify in its land-use-exemption permit application all those laws that it believes would affect siting, Massachusetts is concerned that the applicant could potentially identify all those state laws and regulations primarily aimed at protecting public health, safety, and the environment as laws affecting siting. In addition, the applicant may claim that its mere identification of laws affecting siting in the application would bar a state from applying and/or enforcing those provisions in the non-siting context. This could impede the state’s enforcement efforts and enable such a facility to continue to operate without the necessary permits and/or compliance with requirements that protect public health, safety, and the environment, until a resolution in the Board’s land-use-exemption proceedings. The Board’s clarification that the phrase “affecting the siting” does not include environmental laws could

prevent any potential for abuse of the land-use-exemption proceedings. The Board should further clarify that the mere identification of laws and requirements in a land-use-exemption permit application does not bar the state's enforcement of those provisions in a non-siting proceeding.

B. The Board's Authority to Issue Land-Use-Exemption Permits

Massachusetts agrees with the Board that the CRA applies only to solid waste rail transfer facilities, i.e. only solid waste rail transfer facilities may obtain a land-use-exemption permit from the Board. See Rulemaking Notice at 4. The CRA defines a "solid waste rail transfer facility" as "the portion of a facility owned or operated by or on behalf of a rail carrier . . . 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." 49 U.S.C. § 10908(e)(1)(H). Section 10909(a) sets forth the circumstances under which the Board may issue a land-use exemption:

(1) 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, or a rail carrier that owns or operates such a facility petitions the Board for such an exemption; or

(2) the Governor of a State in which a facility that is operating as of the date of enactment of the Clean Railroads Act of 2008 is located, or his or her designee, petitions the Board to initiate a permit proceeding for that particular facility.

49 U.S.C. § 10909(a). The Board interprets § 10909(a)(1) as providing two ways for a solid waste rail transfer facility to obtain a land-use-exemption permit. See Rulemaking Notice at 8-9. First, based on the last clause of § 10909(a)(1), the Board believes that "a rail carrier that owns or operates such a facility" may petition directly to the Board for such a permit. Id. at 8. See 49

U.S.C. § 10909(a)(1). Second, the Board believes that the first clause of § 10909(a)(1) “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.” Rulemaking Notice at 8, 10. Thus, after a solid waste rail transfer facility has first applied to the state agency for the necessary siting permit(s) and received an unsatisfactory result, it may petition the Board for a land-use-exemption permit. In this instance, the Board believes that as an initial matter, the facility must demonstrate to the Board that a state requirement affecting the siting of such facility unreasonably burdens the interstate rail transportation of solid waste or discriminates against the rail transportation of solid waste and the solid waste rail transfer facility. Id.

Massachusetts agrees generally with the Board’s interpretation of § 10909(a)(1). Further, since a solid waste rail transfer facility is defined as a facility owned or operated by or on behalf of a rail carrier, it is significant that the second clause of § 10909(a)(1) only provides to a *rail carrier* that *owns or operates* such a facility a direct route to petition the Board for a land-use-exemption permit and does not provide the same direct route to a non-railroad entity who operates such a facility *on behalf* of a rail carrier. 49 U.S.C. § 10909(a)(1) (emphasis added); see also § 10908(e)(1)(H). Thus, the first clause of § 10909(a)(1) provides the sole route to a land-use-exemption permit for non-railroad entities that operate such facilities on behalf of a rail carrier. While a rail carrier who owns or operates a facility may choose to apply directly to the Board pursuant to the second clause or apply to the Board after it fails to obtain a siting permit from the state pursuant to the first clause of § 10909(a)(1), a non-railroad entity which operates a facility on behalf of a rail carrier may only apply to the Board pursuant to the first clause of § 10909(a)(1) after it has failed to obtain a siting permit from the state. In addition, the non-

railroad entity who operates a facility on behalf of a rail carrier must also demonstrate to the Board's satisfaction that the state or local requirement affecting the siting of such facility unreasonably burdens the rail transportation of solid waste or discriminates against the railroad transportation of solid waste and the facility. See id. § 10909(a)(1). The requirement of a different application procedure for a rail carrier and a non-rail carrier is further supported by 49 U.S.C. § 10909(b). That section authorizes the Board to establish procedural rules that would at minimum address "the process for a *solid waste rail transfer facility* or a *rail carrier that owns or operates* such a facility to petition the Board for a land-use exemption." Id. § 10909(b)(6) (emphasis added). The Proposed Rules, however, do not specify this distinction in the procedures. See 49 C.F.R. §§ 1155.20(2) and 1155.23. (See also Section II.C.2, infra, p. 11.) Massachusetts requests that the Board include in the final rules specific provisions to carry out the intent of the CRA.

C. The Standard of Review of Land-Use-Exemption Permit Applications

Massachusetts agrees that once a land-use-exemption permit application is before the Board, the Board may issue a permit if it finds that the facility does not pose an unreasonable risk to public health, safety, or the environment. Further, in issuing the permit, the Board must also make a finding that the state laws or requirements affecting the siting of the facility unreasonably burden the interstate transportation of solid waste by railroad or discriminate against the railroad transportation of solid waste and the solid waste rail transfer facility. Massachusetts believes that the requirement of making this finding is not limited to situations when the solid waste rail transfer facility has first applied to the state for a siting permit. (See Section I.B, supra, p. 5.) The Clean Railroad Act specifically requires that in reviewing a land-use-exemption permit application, the Board consider whether state laws affecting siting impose

“any unreasonable burdens . . . on the interstate transportation of solid waste by railroad, or . . . discriminat[e] against the railroad transportation of solid waste, a solid waste rail transfer facility, or a rail carrier that owns or operates such a facility.” See 49 U.S.C. § 10909(d)(6). The Clean Railroads Act further provides that “[n]othing in section 10908 or 10909 is intended to affect the traditional police powers of the State to require a rail carrier to comply with the 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.” Id. § 10910. Thus, because it is clear that a land-use-exemption permit may not be issued unless the Board makes such a finding, the Board should make such a requirement explicit in the final rules. (See Section II.C.7, infra, p. 15.)

D. The Environmental Review of Facilities Seeking a Land-Use-Exemption Permit

Massachusetts supports the Board’s proposal to conduct the appropriate level of environmental review for each land-use-exemption permit proceeding. Given that the CRA requires that in issuing a land-use-exemption permit, the Board make a determination on whether “the facility at the existing or proposed location . . . pose[s] an unreasonable risk to public health, safety, or the environment,” 49 U.S.C. § 10909(c)(1), Massachusetts agrees that the CRA contemplates that some level of environmental review is required in order for the Board to make such a determination.

The Board proposes to conduct the environmental review pursuant to its environmental regulations at 49 C.F.R. §§ 1105. However, those regulations address only rail construction and operation and their effects. They do not address the specific risks and concerns that solid waste poses and do not require the information necessary to determine whether the handling of solid waste at a particular location poses unreasonable risk to public health, safety, and the

environment. For example, 49 C.F.R. § 1105.6(c)(2) provides that no environmental documentation will normally be required for actions that do not trigger certain thresholds in the increase of rail traffic, carload activity, or truck traffic. Even when an environmental report is required, the applicant is not required to describe the anticipated effects on air unless those thresholds are reached. See 49 C.F.R. § 1105.7(e)(5). These regulations do not address dust, odor and other air impacts created by solid waste handling activities and potential emissions from the use of handling equipment. Moreover, while the regulations require a description of any inconsistencies the proposed actions would have with the applicable local and/or regional land use plans, they do not specifically require a description and discussion of the effects the solid waste handling activities would have on any sensitive receptors in the area, such as drinking water supplies (surface water, ground water wells and private wells), residences, and areas that a state has determined to be of critical environmental concern. See id. § 1105.7(e)(3). Thus, a solid waste rail transfer facility may escape the necessary environmental review entirely, or any review may be conducted based on insufficient information on the potential environmental impacts of the proposed activities. Therefore, the Board should propose environmental rules that specifically address solid waste rail transfer facilities.

II. THE PROPOSED RULES

A. Subpart A – General

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.” As stated above, Massachusetts believes that the Board should at least clarify that laws affecting siting do not include environmental laws that have only incidental effects on siting. (See Section I.A, supra,

p. 1.) As the Board recognizes, this is critical to the understanding of the scope of any land-use-exemption permit and the preemptive effect of the permit. See 49 U.S.C. § 10909(f) and 49 C.F.R. §§ 1155.27(b)(5) and 1155.27(d).

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

The Proposed Rules at 49 C.F.R. § 1155.10 would require a state submitting a petition pursuant to 49 U.S.C. §10908(b)(2)(B) to have the matters contained in the petition attested to by a person having personal knowledge and to submit a good-faith certification that the facility at issue qualifies as a solid waste rail transfer facility within the meaning of 49 U.S.C.

§ 10908(e)(1)(H). See 49 C.F.R. § 1155.10, para. 1, and 1155.10(e). Massachusetts believes that the personal knowledge and the good-faith certification requirements are unnecessary because a state’s petition to the Board to require a facility to obtain a land-use-exemption permit itself represents to the Board pursuant to 49 C.F.R. § 1104.4 that the state believes that good ground exists for the petition.

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

1. *49 C.F.R. § 1155.20: Notice of intent to apply for a land-use-exemption permit; and 49 C.F.R. § 1155.22(c): Content of application concerning the submission of environmental reports.*

Section 1155.20(c) appears to require only a new solid waste rail transfer facility, not those in existence on October 16, 2008, to submit an environmental report containing the information required in 49 C.F.R. 1105.7. See 49 C.F.R. § 1155.20(c) (notice of intent requirement specifying that only an applicant for a new solid waste rail transfer facility needs to submit an environmental report), but see 49 C.F.R. § 1155.22(c) (requiring the content of a land-use-exemption permit application to include an environmental report and/or historic report

containing the information described in 49 C.F.R. 1105.7 and 1105.8). The Board does not explain why an existing facility would not be required to submit an environmental report. In fact, the CRA requires that the Board determine whether “the facility at the *existing* or *proposed* location . . . pose[s] an unreasonable risk to public health, safety, or the environment.” 49 U.S.C. § 10909(c)(1) (emphasis added). It is clear that the CRA contemplates that some level of environmental review is required for both an existing and a new facility in order for the Board to make such a determination. Thus, an environmental report should be required of all applicants for a land-use-exemption permit.

In addition, based on comments stated in Section I.D above, Massachusetts is also concerned that the environmental documentation required in 49 C.F.R. § 1105.7 is insufficient to enable the Board to determine whether the facility poses an unreasonable risk to public health, safety, or the environment. (See Section I.D, surpa, p. 8.) Massachusetts believes that the Board should require applicants to address the specific risks and concerns that solid waste handling activities pose. In addition, any final rules allowing an applicant to apply for a waiver from any portion of the environmental review rules should require notice to be given to interested parties and should give them an opportunity to respond to the waiver request. See 49 C.F.R. § 1105.7(g) (providing process to apply for a waiver from environmental review requirements without affording interested parties notice and an opportunity to be heard).

2. *49 C.F.R. §§ 1155.22: Contents of application concerning the status of a solid waste rail transfer facility; and 49 C.F.R. § 1155.21: Form of notice relating to when the commenters must put forth their entire case; 49 C.F.R. § 1155.23: Additional requirements when filing after unsatisfactory result from a state or local authority affecting the siting of the facility.*

The Proposed Rules only require the applicant to state whether it is a common rail carrier. See 49 C.F.R. § 1155.22(a)(2). Massachusetts believes that they should require an applicant to

provide information, with supporting documentation, demonstrating that the facility is in fact a solid waste rail transfer facility within the meaning of the CRA. The application should also include information on whether the facility is owned and/or operated by a rail carrier. If the facility is not owned and/or operated by a rail carrier, the applicant should provide detailed information on the entity that operates the facility on behalf of a rail carrier, the interest the rail carrier has in the facility, and the relationship between the operator and the rail carrier concerning the operation of the facility. Because the status of a facility may well be contested, and because the state and other interested parties often lack access to this information, the Board should consider establishing procedures to allow adequate inquiry into this issue and to give the commenters sufficient time to put forth their entire case. See 49 C.F.R. § 1155.24 (rules on participation in application proceedings do not provide for adequate inquiry into any disputes over the status of the facility); § 1155.21 (the Notice of Intent must inform interested parties that the comments in support or opposition of the application must contain the parties' *entire* case without permitting time to develop facts in support of their case).

Based on the comments in Section I.B above, Massachusetts believes that the Board should also establish specific procedural rules applicable to an entity that is not a rail carrier and only operates a solid waste rail transfer facility on behalf of one. The Proposed Rule at 49 C.F.R. § 1155.23 is generally applicable to a rail carrier that both owns or operates a solid waste rail transfer facility and has applied first to the state for a siting permit, but it does not require a non-railroad entity operating a facility on behalf of a rail carrier to apply first to the state for a siting permit. The Board should make clear that a non-railroad operator of a facility may apply to the Board for a land-use-exemption permit only after it has applied to the state for a siting permit but failed to obtain one.

In addition, the Proposed Rules should be amended to make clear at what point a solid waste rail transfer facility may petition the Board for a land-use-exemption permit after it has submitted a siting permit application to the state. The Proposed Rule at 49 C.F.R. § 1155.23(a) permits a facility to petition the Board when the applicant has received “an unsatisfactory result, such as inordinate delay” from the state. See also Rulemaking Notice at 8. It is unclear as to what kind of showing an applicant must make in demonstrating that it has received an “unsatisfactory result” and what constitutes an “inordinate delay.” Massachusetts is concerned that the lack of a clear standard will permit the facility to cut short the proceeding before the state based on a mere claim in its application that the facility has received an “unsatisfactory result” or “inordinate delay” from the state. That may undermine the state’s authority and ability to review fully any siting permit application.

3. *49 C.F.R. § 1155.22(a)(17): Contents of application concerning future expansion.*

Section 1155.22(a)(17) requires the application to contain a description of any plans for reasonable future expansions. The Board states that such information would provide a basis for it to issue a land-use-exemption permit to include those areas where expansion may occur without the need for modifying or amending the original permit. Rulemaking Notice at 5. While Massachusetts supports the requirement that the application fully describe all proposed activities and any plans for future expansions, it believes that the Board should not include in any land-use-exemption permit those areas where the expansion may occur without imposing limitations that prohibit future expansions when the conditions at the site no longer support such expansions and other limitations, such as a time limit on the permit, to ensure the protection of public health, safety and the environment.

4. *49 C.F.R. § 1155.24(2): Filings and service of application concerning the request for waivers.*

Section 1155.24(2) provides that an applicant may seek a waiver of specific regulations listed in subpart C by filing a petition for a waiver with the Board. However, the rules do not require notice to be given to the state and other interested parties, and they do not provide the grounds on which Board may issue the waiver. The Board should require notice, permit the state and interested parties an opportunity to respond to any waiver requests, and provide the specific grounds on which the Board may issue the waiver.

5. *49 C.F.R. § 1155.25(b): Participation in application proceedings concerning the filing requirements.*

Section 1155.25(b) requires that an original and ten copies of the written comments on an application and rebuttals to the comments be filed with the Board. Massachusetts requests that the Board clarify that the filing may be done electronically pursuant to 49 C.F.R. § 1104.1(e).

6. *49 C.F.R. § 1155.26: Transfer and termination of a land-use-exemption permit.*

Section 1155.26(a) permits the transfer of a land-use-exemption permit 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.” Massachusetts believes that prior to any transfer, the current permit holder and the acquiring rail carrier should provide notice to the state and other interest parties. In addition, the acquiring rail carrier should also submit a certification with supporting documentation to the Board that the solid waste rail transfer facility will be operated by or on behalf of the acquiring rail carrier. The acquiring rail carrier should also include in the certification that it will comply with all the conditions contained in the land-use-exemption permit.

7. 49 C.F.R. § 1155.27(b): *Standard of review.*

Section 1155.27(b) sets forth the standard of review of an application for a land-use-exemption permit. It states that “[t]he 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.” 49 C.F.R. § 1155.27(b)(1). As stated in Section I.C above, in addition to making a finding of a lack of unreasonable risk, the Board must also make a finding that the state laws affecting the siting of the facility unreasonably burden interstate rail transportation of solid waste or discriminate against rail transportation of solid waste and the facility. (See Section I.C, *supra*, p. 7.)

III. CONCLUSION

Massachusetts urges the Board to modify the Proposed Rules in light of the foregoing comments to clarify the scope of the land-use exemption proceeding to ensure that solid waste rail transfer facilities would not be able to use that proceeding to escape state regulation and to ensure that the facilities obtain the environmental review necessary for a land-use exemption.

Respectfully submitted by,

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