

Daniel R. Deutsch, Esq.  
ddeutsch@dwbboston.com

February 23, 2009

**Attention: STB Ex Parte No. 684**

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

**Re: Comments of Wilmington, Massachusetts on Proposed Land-Use  
Exemption Rules**

To Whom It May Concern:

By decision dated January 14, 2009, the Surface Transportation Board (“Board” or “STB”) 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 Town of Wilmington, Massachusetts (“Wilmington”). Wilmington has been an active party in an STB proceeding brought by the proponent of a rail-based solid waste facility proposed to be sited on an unresolved Superfund site in Wilmington. See *New England Transrail, LLC – Construction Acquisition and Operation Exemption*, STB Finance Docket No. 34797. The preemption issues that arose and were debated in that NET proceeding contributed to the development of the CRA.

The complex and controversial issues bearing on federal preemption which the Board sought to address in the NET proceeding highlight the need for clear and consistent guidance in new regulations for the issuance of land-use exemptions under the CRA. Wilmington recognizes the Board’s efforts to identify and adjudicate the multiple preemption concerns raised by Wilmington, the National Solid Wastes Management Association (“NSWMA”), Senator Lautenberg, various established rail carriers, and others in that proceeding, as well as the attention which the Board so far has given to the development of the NPR. Nonetheless, Wilmington is concerned that the Board’s regulations as currently proposed do not reflect the mandate of the CRA in important respects and would not be conducive to consistent, reliable and

Surface Transportation Board  
February 23, 2009  
Page 2

fair decision-making. Wilmington therefore urges the Board to suspend the effect of the proposed rules as interim rules.

Wilmington joins in the comments of the NSWMA and offers the following additional brief comments.

1. **The Board Should Not Engage In Ad Hoc Definition of the Scope of the Exemption Process.**

Wilmington shares NSWMA's concern that rules must not leave it to each exemption petitioner to identify what laws "affect the siting" of a facility and thereby to define the requirements from which the petitioner is entitled to petition for exemption. The exemption scheme must be administered so that the same level of environmental regulation applies to rail-based solid waste facilities and other such facilities. Allowing successive individual petitioners to determine what laws are subject to exemption would undermine that equal treatment mandate of the CRA. In addition, ad hoc classification would give rise to a patchwork of inconsistent rulings on the very scope of the regulatory scheme. The availability of an exemption must not depend on the circumstances, creativity or zeal of individual petitioners seeking exemption, but instead must be established by objective criteria. As NSWMA points out, such established criteria will promote certainty and permit exemption petitions to be adjudicated in a way that is more efficient and less controversial. Wilmington concurs in the guidelines proposed by NSWMA.

2. **Environmental Review Procedures Need To Comport With NEPA.**

Likewise, compliance with the CRA mandate – and adherence to the STB's own rule-making preamble - requires that the Board's environmental review procedures applicable to exemption petitions be compliant with NEPA. Although it is not fundamentally an environmental agency, STB now is obligated to engage in environmental review on a par with federal standards that are not specific to rail operations. CRA's ultimate criterion for land-use exemption is that a facility not pose an unreasonable risk to public health, safety or the environment at its location or proposed location, and this is to be determined by examining the impacts of a rail-based solid waste facility with the same "hard look" to which non-rail facilities are subject under NEPA.

A land-use exemption amounts to a waiver from legal requirements whose strict application would be discriminatory and unduly burden interstate commerce. Yet, even then, to be exempted, the facility must not present an unreasonable safety or environmental risk. STB's review procedures therefore need to be exacting enough to permit the Board to meaningfully

Surface Transportation Board  
February 23, 2009  
Page 3

evaluate whether a facility's design and operating procedures will ensure compliance with the objectives of the state or local laws from which exemption is sought. As drafted, the rules do not accomplish this.

Subpart C of the proposed rules (49 CFR 1155.20) establishes the procedures for a land-use-exemption petition. Section 1155.20(c) requires submission of an environmental report and refers to 49 CFR 1105.7 for the specific information requirements; however, 49 CFR 1105.7 is relatively non-specific when compared with information requirements for permitting of solid waste facilities under most state regulatory programs. For example, it does not make direct reference to evaluating the requirements of state and federal regulations that would govern siting of solid waste transfer facilities, does not require identification of areas governed by ground water protection zones, and requires assessment of potential air impacts only if increases in activity from 20 to 100 percent are expected. This section of the proposed regulation does not require compliance with 49 CFR 1105.9, which calls upon applicants to evaluate and certify compliance with provisions of state coastal zone management plans.

Section 1155.20(c) provides for waiver of the report requirements if the petitioner hires a third-party consultant to work under the direction of the STB's Section of Environmental Analysis (SEA) to "prepare any environmental documentation that might be warranted." It is not clear who will determine whether and what type of documentation might be warranted, and criteria for such a determination are not specified although presumably they would be the criteria in 49 CFR 1105.7. Qualification criteria for third-party consultants also are not specified. This is significant, inasmuch as Congress has subjected the land-use exemption process to NEPA requirements.

More fundamentally, Section 1155.20(c) states that a consultant working under SEA direction will prepare a draft of appropriate environmental documentation, "...an Environmental Impact Statement or a more limited Environmental Assessment." This provision contradicts the STB's acknowledgment that the issuance of a land-use-exemption permit is a "major federal project under the National Environmental Policy Act," such that it should require completion of the more thorough Environmental Impact Statement. This subpart also does not reference the Council on Environmental Quality regulations, which were cited in the STB's preamble.

Section 1155.22 identifies the application information requirements. Those requirements are incomplete relative to the application requirements for solid waste facilities under other federal and state programs. For example, required applicant information under the proposed STB rules is limited to the "exact name of the applicant" and "whether the applicant is a common carrier by railroad..." Again, state laws are instructive. Massachusetts regulations require "applicant identification which shall include such information and documentation as the Department deems necessary to fully identify all persons having a legal or financial interest in, or operational responsibility for the site or facility; those persons' legal status; their prior ownership

Surface Transportation Board  
February 23, 2009  
Page 4

or operating history of solid waste facilities and other relevant information which identifies the applicant and the applicant's competency to own and/or operate a facility" (310 CMR 19.030(3)(b)). Consideration of information concerning the applicant's financial stake, experience, and competence is essential, at least in the case of a proposed facility not yet in operation, in order to permit a review that adequately addresses the CRA requirement that exempted operation of the proposed facility not pose an unreasonable risk to human health, safety or environment. An extract of the application requirements from the Massachusetts solid waste regulations is attached for reference.

Section 1155.22(a)(15) of the proposed rules requires a detailed description of operations and activities at the facility. This requirement is very general and should be made substantially more specific. *See*, for example, the attached extract from Massachusetts regulations under paragraph 19.030(3)(c). Similarly, Sections 1155.22(a)(16) and (17) require a "detailed map" and "detailed drawing," but then limit their sizes to 8 x 10.5 inches. Figures of this size often are too small to meaningfully illustrate the information required to be shown. The information requirements should be augmented to include additional information that is relevant and a higher level of specificity (*see* attached 19.030(3)(c)(1), for example). The sizes and number of drawings should be dictated by the nature and amount of information to be shown.

Section 1155.22(b) only broadly requires a statement describing the reasons that the Board should grant a land-use-exemption permit. In order to provide useful guidance to applicants, and solicit meaningful data for review, the section should be revised to require at least specific identification of:

- the regulation(s) for which an exemption is being sought;
- a description of the hardship imposed by the regulation(s) from which exemption is sought; and
- a description of the facility design and operating procedures that will ensure compliance with the objective of the regulation(s) from which exemption is sought.

*See*, for example, 19.080(2) of the attached extract from the Massachusetts solid waste regulations. Similar standards should be set in Section 1155.24(d)(2), which governs requests for waivers from provisions of Subpart C of the proposed STB rules.

Finally, Section 1155.25 establishes provisions for public comment on land-use exemption petitions. This section should be revised to require a public hearing, as is required for virtually all environmental permits issued by state and federal regulatory agencies.

Surface Transportation Board  
February 23, 2009  
Page 5

3. **The Rules Should Define Exempt Activities In A Way That Prevents Unreasonable Risks to Human Health, Safety and the Environment.**

Even as it requires the Board to assess unreasonable risks, the CRA exempts certain waste categories and activities from compliance with state law and from the exemption petition process. These activities include direct transfers of liquid waste from tank trucks to rail tank cars. *See* CRA Sec. 10908(e)(1)(H)(ii)(II). That activity poses inherent risks associated with potential spillage. To fulfill the mandate of the CRA, the Board's regulations should define such a transfer in a way that requires at least minimal protective measures, such as the establishment of appropriate berms or other devices to contain any possible spillage that may occur during a transfer. Likewise exempt is rail transportation of solid waste after it has been loaded for shipment by rail. *See* CRA Sec. 10908(e)(1)(H)(ii)(I). Given the vagueness of that provision, and the CRA's overarching mandate to address public safety and environmental concerns in the context of solid waste operations, the Board's regulations should make clear that the loading for shipment that precedes such exempt transportation of solid waste is loading that occurs off-site.

Wilmington appreciates the opportunity to comment on the proposed regulations. We believe that substantial progress is being made toward the establishment of a coherent and fair structure for adjudicating claims of preemption in the context of rail-based solid waste facilities. However, for the reasons expressed above, we urge the Board to make the crucial changes identified by Wilmington and by NSWMA to the proposed CRA regulations.

Very truly yours,

**DEUTSCH WILLIAMS BROOKS  
DERENSIS & HOLLAND, P.C.**

By: 

Daniel R. Deutsch

**EXTRACTS FROM SOLID WASTE REGULATIONS  
COMMONWEALTH OF MASSACHUSETTS**

**19.030: Application for a Solid Waste Management Facility Permit**

(1) General. Any person intending to construct, operate or maintain a solid waste management facility shall file an application for a permit. Applications shall consist, at minimum, of the plans, descriptions, reports and other information required in 310 CMR 19.030(3).

(2) Facility Specific Plans. In addition to the plan requirements set forth in 310 CMR 19.030(3), the applicant for a new facility shall submit such additional or alternative information as required in other Parts of 310 CMR 19.000 governing the permitting of specific types of solid waste management facilities.

(3) Application. An application for a permit shall include:

- (a) a completed application on a form as may be provided by the Department;
- (b) applicant identification which shall include such information and documentation as the Department deems necessary to fully identify all persons having a legal or financial interest in, or operational responsibility for the site or facility; those persons' legal status; their prior ownership or operating history of solid waste facilities and other relevant information which identifies the applicant and the applicant's competency to own and/or operate a facility;
- (c) a solid waste management facility plan (Plan) for the particular type of solid waste management facility including such maps, data, information and documents as required in the facility specific regulations. The Plan shall, at a minimum, be comprised of the following components:

- 1. a site plan which shall include such maps, diagrams, reports and other information the Department deems necessary to accurately locate the proposed site and facility, identify its geographical characteristics, identify the zoning of the site, and evaluate the potential impact of the construction and operation of the proposed facility on surrounding land uses, traffic flow, surface water bodies, wetlands, water supplies, and flood zones;
- 2. a waste ban plan as required at 310 CMR 19.017(5);
- 3. a facility design plan which shall provide such diagrams, reports, studies and other information as the Department deems necessary to evaluate the feasibility and potential impacts of the facility on public health, safety and the environment. The facility design plan shall address all aspects of the facility design and shall include:
  - a. a detailed description of the type and size of the proposed facility;
  - b. the nature and amount of refuse to be handled on a daily and weekly basis;
  - c. a detailed description of the design of the facility, including recycling and composting components, site improvements and all systems and other appurtenances thereto necessary to comply with:
    - i. the operation and maintenance requirements;

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- ii. the closure and post-closure requirements; and
- iii. permit approval criteria;
- d. provision to minimize the impacts of site and facility construction; and
- e. other design provisions the Department deems necessary on a site or facility specific basis to ensure proper design;
- 4. an operation and maintenance plan which shall provide such diagrams, reports, studies, and other information as the Department deems necessary to evaluate the ability of the proposed operation and maintenance procedures to ensure good solid waste management practices and to protect public health and safety and the environment. The operation and maintenance plan shall include:
  - a. a detailed description of the proposed waste handling methods and techniques, and sequence of operations for the facility;
  - b. a description of the procedures to be employed to comply with the operation and maintenance requirements for the specific type of facility and the permit approval criteria;
  - c. a detailed description of the environmental monitoring and sampling protocols and procedures and inspection and maintenance of the environmental monitoring systems;
  - d. a tracking and reporting system by which the Department can verify compliance with recycling requirements and with bans on acceptance of certain types of solid waste or recyclable materials which have been imposed pursuant to 310 CMR 19.017 and are in effect at the time the permit is granted;
  - e. a compliance and inspection plan to ensure operation of the facility is in compliance with the permit and all applicable regulations; and
  - f. other operation and maintenance provisions that the Department deems necessary on a site or facility specific basis to ensure proper operation and maintenance;
- 5. a closure and post-closure plan which shall provide such diagrams, reports, studies and other information as the Department deems necessary to describe and evaluate the procedures the applicant proposes to use to close the facility and maintain and care for the site during the post-closure period in a manner that minimizes the impacts to public health and safety and the environment. A closure and post-closure plan shall include:
  - a. a description of the activities, and the sequence of activities necessary to close the facility;
  - b. a description of measures to be utilized to comply with the closure and post-closure requirements set forth in 310 CMR 19.045 and other applicable sections of 310 CMR 19.000 ;
  - c. a description of proposed subsequent use of the site and/or facility, if any; and
  - d. other provisions that the Department deems necessary on a site or facility specific basis to ensure proper closure of the facility.
- (d) a public health report, if any, as submitted by the Department of Public Health pursuant to the Site Assignment Regulations, 310 CMR 16.17;

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- (e) sufficient documentation that the proposed facility will be located within the boundaries of a valid site assignment;
- (f) sufficient documentation that:
  - 1. the MEPA process does not apply;
  - 2. the MEPA process does apply and the Secretary has determined that an Environmental Impact Report is required; or
  - 3. the MEPA process has already been completed and the Secretary has issued a certificate or a determination that no EIR is required.

**19.080: Variances**

(1) General. The Department recognizes that the literal application of 310 CMR 19.000 to all persons and activities may impose significant hardships in individual situations, frustrate the underlying legislative and regulatory purposes, or adversely affect the public interest. Therefore, in the exercise of the Department's discretion and upon a proper and timely demonstration, a variance from the application of specific provisions of 310 CMR 19.000, other than those that embody statutory requirements, may be available in an individual case to a person whose activities are governed by them.

(2) Required Demonstration. A variance request shall include, at a minimum, the following information demonstrating, to the Department's satisfaction, that:

- (a) compliance with the provision would, on the basis of conditions unique to the applicant's particular situation, impose unreasonable economic, technological or safety burdens on the applicant or the public;
- (b) substitute measures will provide the same or greater degree of protection to public health, safety and the environment as the application of the regulation(s) from which a variance is requested; and
- (c) the desired relief may be granted without substantial detriment to the public interest and without nullifying or substantially derogating from the intent of 310 CMR 19.000.

(3) Reasonable or Necessary. Where circumstances are appropriate, the Department may request the applicant to establish, in addition to the criteria listed in 310 CMR 19.080(2), either or both of the following:

- (a) that no reasonable conditions or alternatives exist that would allow the project to proceed without the requested variance; and/or
- (b) the variance is necessary to accommodate an overriding community, regional, state, or national public interest.

(4) Request for Variance. A request for a variance may be made only by or on behalf of a person whose activities are governed by 310 CMR 19.000 and who seeks relief from their application prior to taking any action subject to and in conflict with them and does so in a timely manner. The request shall be made in writing and must contain, at a minimum, the information necessary to establish the showing required by 310 CMR 19.080(2) and, where required by 310 CMR 19.080(3), in the form prescribed in 310 CMR 19.080(4)(a) through (d):

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- (a) specific reference, by citation to Code of Massachusetts Regulations, to each regulatory provision from which relief is sought;
- (b) an analysis and evaluation, prepared by a qualified professional, of all known technically accepted alternative methods of pursuing the activity in compliance with 310 CMR 19.000 including a detailed explanation as to each such alternative of the factual circumstances that render it unreasonable within the meaning of 310 CMR 19.080(1);
- (c) a detailed description, prepared by a qualified professional, of the substitute measures intended to provide the same or greater degree of protection to the public health, safety and the environment as the application of the regulation(s) from which a variance is requested would provide, accompanied by an opinion, including the basis on which that opinion was formed, that the substitute measures will in fact perform their intended function; and
- (d) evidence that an overriding public interest is associated with the project which justifies a variance from the regulation(s) if required by the Department pursuant to 310 CMR 19.080(3)(b).