



ASSOCIATION OF  
AMERICAN RAILROADS

**Law Department**

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March 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 of Proposed Rulemaking, Adoption of Interim Rules served January 14, 2009, attached please find the Reply 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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REPLY COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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SURFACE TRANSPORTATION BOARD

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**Introduction**

Pursuant to the schedule established by the Board's Notice of Proposed Rulemaking; Adoption of Interim Rules ("NPR") served January 14, 2009, the Association of American Railroads ("AAR") and its members respectfully submit these Reply Comments in the above-captioned proceeding pertaining to the Board's interim rules implementing the provisions of the Clean Railroads Act of 2008 ("CRA") and the Board's interpretation of the CRA. As discussed below, the AAR believes that the Board's interim rules and CRA interpretation fully conform to the CRA's statutory directives and legislative intent and that the interim rules warrant only minor modification in response to issues raised by other parties. The AAR's response to issues raised by other parties is set forth below.

**Discussion**

1. The Only Way 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 As Proposed by the Board

Several parties take issue with the Board's refusal in the NPR (at 6) to determine in advance what types of state law may be found to "affect the siting" of a solid waste rail transfer facility (SWRTF) under the CRA. They suggest that, to eliminate uncertainty and avoid unnecessary controversy, the Board should provide clear guidance on the types of state law that the Board considers may "affect the siting" of a SWRTF.

The Board is eminently correct in its determination that it is impractical (indeed it is impossible) to attempt to define in advance all state laws or types of state laws that may be deemed to "affect the siting" of a SWRTF under the CRA. Such determination requires a practical application of the state law at issue in the context of a concrete factual setting.

First, the CRA itself employs the broad term "affecting the siting," which term requires practical application in a factual setting to be meaningful. Second, the term is nowhere limited in the CRA to state zoning, land-use or other general "siting" regulations as some commenters argue, and its limitations can only be determined by practical application in a specific case as the Board proposes. Moreover, as the Board correctly notes, the broad term "affecting the siting" was specifically used in the CRA as a practical means of achieving Congress' dual objectives of subjecting SWRTFs to state environmental and public health and safety laws to the same extent as similar non-rail solid waste facilities while leaving SWRTF *placement* decisions under the ultimate policy direction of the Board after taking into account state planning, environmental and other concerns enumerated in the statute. See 49 U.S.C. 10909. Thus, as properly found by the Board, the term "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 further illustrative, the CRA specifically provides, as an avenue of relief available to a SWRTF or to a rail carrier that has received an unsatisfactory result from a state agency affecting the siting of a SWRTF, that the Board may, on petition, issue a land-use exemption where the Board finds that a State law “affecting the siting” of such facility “unreasonably burdens the interstate transportation of solid waste by railroad, [or] discriminates against the railroad transportation of solid waste and a solid waste rail transfer facility....” 49 U.S.C. 10909 (a) (1).

In implementing this provision consistent with the CRA’s purpose to vest ultimate authority over SWRTF *placement* decisions with the Board, the term “affecting the siting” must be construed in the context of a specific factual setting relating to the state law at issue. Where a state “environmental regulation” or other state law provides the basis for a state decision effectively precluding or rendering impossible the placement or operation of a SWRTF at a proposed or existing site, and such law is found by the Board to unreasonably burden the interstate rail transportation of solid waste or to discriminate against the rail transportation of solid waste, there can be no valid grounds for contending that such law or its application is not a law “affecting the siting” of the SWRTF within the core meaning and scope of the CRA. Indeed, any contrary view would vitiate the CRA statutory scheme by effectively transferring SWRTF placement decisions to individual States and localities rather than vesting ultimate decision-making authority with respect to the placement of a SWRTF in the Board as the CRA specifically provides. Cf., New York Susquehanna and Western Railway Corp. v. Jackson, 500 F. 3d 238, 252

(3<sup>rd</sup> Cir. 2007) (“Susquehanna”) (burden imposed by state law, not regulatory labels, is determinative of impact); accord City of Auburn v. US, 154 F. 3d 1025,1031 (9<sup>th</sup> Cir. 1998). The same case-by-case, fact-intensive evaluation requirement, and potential availability of Board relief, would also apply to situations where a state “environmental regulation” or other law is unreasonably applied in a specific case as a pretext for denying a SWRTF siting application. Cf., Susquehanna, 500 F.3d at 254.

In short, the Board’s case-by-case approach to determining whether a state law “affects the siting” of a SWRTF is clearly necessary and appropriate. It is also (1) consistent with the CRA statutory language and intent and (2) avoids potentially serious unintended consequences and significant burdens on interstate rail transportation of solid waste that may arise from Board adoption of an impractical, extra-statutory limitation of the meaning of the term in the absence of a concrete factual setting.

2. As the Board Proposes, a Board Finding That a State Law “Unreasonably Burdens the Rail Transportation of Solid Waste” or “Discriminates Against the Rail Transportation of Solid Waste” Is Required As a Pre-Condition of Issuance of a Land-Use Exemption Only in Situations Where a Rail Carrier or SWRTF Petitions the Board for Relief After First Having Obtained an Unsatisfactory Decision by a State Agency

(a) Some parties take issue with the Board’s finding that 49 U.S.C. 10909(a) requires the Board to make a determination that a State law “unreasonably burdens the interstate transportation of solid waste by railroad, [or] discriminates against the railroad transportation of solid waste and a solid waste rail transfer facility....” as a pre-condition of issuing a land-use exemption only in those circumstances where a rail carrier or SWRTF petitions the Board after first applying to the State and obtaining an unsatisfactory result affecting the siting of a SWRTF. See NPR at 8-9. These parties claim that 49 U.S.C. 10909(a) requires such a finding as a pre-condition for Board

issuance of a land-use exemption in all proceedings. The Board's reading of the CRA is eminently correct.

As the Board properly found, the CRA provides two separate routes for a rail carrier or SWRTF to petition the Board for a land-use exemption: (1) under the last clause of 49 U.S.C. 10901 (a)(1) a rail carrier may directly apply to the Board for a land-use exemption for an existing or proposed SWRTF without first applying to the State for state permits affecting the siting of a SWRTF facility; and (2) under the first clause of 49 U.S.C. 10901(a)(1) a rail carrier or SWRTF may petition the Board for a land-use exemption after first applying to the State and obtaining an unsatisfactory result affecting the siting of a SWRTF. Under the specific language of the CRA, it is only under the first clause of 49 U.S.C. 10909 (a)(1) (i.e., an appeal from an unsatisfactory state result) that a Board finding that a state law affecting the siting "unreasonably burdens the rail transportation of solid waste" or "discriminates against the rail transportation of solid waste" is statutorily required. The statutory language speaks for itself.

Indeed, the Board's statutory analysis and interpretation of 49 U.S.C. 10901(a) as discussed above is specifically conceded by at least one nonrail party. (See Comments of the Commonwealth of Massachusetts at 6) The Commonwealth, however, instead argues that, although a Board finding of "unreasonably burdens" or "discriminates against the rail transportation of solid waste" is not required in all cases under 49 U.S.C. 10909(a) as the Board properly found, such finding is required by the Board in all situations where a rail carrier or SWRTF seeks a land use exemption from the Board under the general "considerations" for Board review enumerated in 49 U.S.C. 10909(d). This argument is also without merit.

Under 49 U.S.C. 10909 (d), the Board is required to “consider and give due weight” to various factors enumerated in that provision in its evaluation of an application for a land-use exemption. The factors include the land-use, zoning, and siting regulations or solid waste planning requirements of the state where the SWRTF is or will be located that are applicable to non-railroad solid waste transfer facilities or applicable to the property where the SWRTF is proposed to be located ((d) (1)-(2)); regional transportation planning requirements and solid waste disposal plans developed pursuant to State or Federal law ((d) (3)-(4)); any Federal and State environmental protection laws or regulations applicable to the site ((d)(5)); “*any unreasonable burdens imposed on the interstate transportation of solid waste by railroad, or the potential for discrimination against the railroad transportation of solid waste, a [SWRTF] or a rail carrier that owns or operates such a facility*” ((d)(6)) (emphasis added); and “any other relevant factors, as determined by the Board” ((d)(7)).

As is clear from the express language of 49 U.S.C. 10909(d), the Board is simply charged under the statute “to consider and give due weight” to each of the factors enumerated, not to make a specific determination or finding that any single one of them is controlling or even relevant in a specific case. This is particularly true with respect to the “any unreasonable burdens”/“potential for discrimination” considerations set forth in (d)(6), which simply require a Board evaluation of whether or not any unreasonable burdens would be imposed on the interstate rail transportation of solid waste or whether or not the potential for discrimination exists. Indeed, even the specific language of 49 U.S.C. 10909 (d)(6) does not require a consideration of whether actual discrimination exists, but only whether the *potential* for discrimination exists.

Moreover, unlike the standards for review set forth in 49 U.S.C. 10909(c), which require specific determinations by the Board (including “that the facility at the existing or proposed location does not impose an unreasonable risk to public health, safety, or the environment...”), the considerations set forth in 49 U.S.C. 10909 (d) are simply factors for the Board to “consider and weigh” in light of all the relevant facts. In short, there is no requirement in 49 U.S.C. 10909(d) that the Board make a determination that a state law affecting the siting of a SWRTF “unreasonably burdens” or “discriminates” against the rail transportation of solid waste as a pre-condition of issuing a land-use exemption.

(b) Various parties further contend, as ancillary to their argument under 49 U.S.C. 10909 (a), that the statutory language of that section only allows “a rail carrier that owns or operates” a SWRTF to directly petition the Board for a land-use exemption under the last clause of that section. Under their reading of the CRA, a SWRTF may only file a petition with the Board under 49 U.S.C. 10909: (1) after receiving an unsatisfactory result after filing a state application or (2) in response to a petition from a Governor of a State to the Board pursuant to 49 U.S.C. 10909(a) (2) that the Board initiate a land-use-exemption permit proceeding for an existing SWRTF. They accordingly request that the Board modify its interim rules in Subpart C (1155.20 et seq.) to reflect this distinction.

The AAR submits that, although the language of the last clause of 49 U.S.C. 10909(a) provides a basis for the commenters’ contention, other provisions of the CRA (at 49 U.S.C 10909 (b) (6)) broadly allow either a SWRTF or a rail carrier that owns or operates such a facility to petition the Board for a land-use exemption without restriction. Moreover, because the CRA defines a SWRTF as “the portion of a facility owned or operated by or on behalf of a rail carrier” (49 U.S.C. 10908 (e) (H)), a SWRTF must

necessarily be acting “on behalf of a rail carrier” in filing a petition with the Board. And because a SWRTF petition would be subject to the same public notice, comment, procedures and information requirements that would be applicable to a rail carrier as provided under the CRA and the Board’s interim regulations, there is no potential for abuse of the land-use exemption process if the SWRTF were treated identically to the carrier under the permit process. There is thus no overriding statutory or practical reason why a SWRTF should not be able to file a petition with the Board for a land-use exemption under the same circumstances as the rail carrier that owns the facility as broadly provided for in 49 U.S.C. 10909 (b) (6) and under the Board’s interim regulations.

3. The Board Should Clarify That Its Environmental Review of a Land-Use Exemption Petition under Its Environmental Regulations Will Take Into Account Relevant Factors and Thresholds Specifically Applicable to SWRTFs

(a) Various parties take issue with the Board’s requirement in the interim rule (at 49 CFR 1155.20 (c)) that an applicant “must ...submit an Environmental Report containing the information described at 49 CFR 1105.7....” The parties contend that the Board’s existing environmental regulations under 49 CFR 1105.7 deal generally with traditional railroad operations and that the environmental criteria set forth are not specifically relevant to potential environmental issues arising from SWRTFs. They accordingly propose that the Board revise its environmental regulations to address this deficiency. The AAR agrees that the environmental review issue raised by the parties is relevant and should be addressed by the Board, but believes that the issue can be readily and satisfactorily resolved in the instant rulemaking without requiring revision of the Board’s environmental regulations.

Under the Board's existing environmental regulations, it "may require applicants to submit additional information regarding the environmental or energy effects of the proposed action." 49 C.F.R.1105.7(f). This same requirement is set forth in Interim Rule 49 CFR 1155.22(d).

The interim regulations specifically require that an applicant for a land-use exemption file with the Board: (1) a summary of why a land-use-exemption permit is sought (49 CFR 1155.22 (3)) and (2) "Copies of the specific state, local, or municipal laws, regulations, orders or other requirements affecting siting of [the SWRTF] from which the applicant requests entire or partial exemption that would otherwise apply, any publicly available material providing the criteria in the application of the regulations, and a description of any action that the state, local or municipal authority has taken affecting the siting of the facility (49 CFR 1155.22(8). The interim rules further require that "[t]he application containing the information set forth at 49 CFR 1155.22 will include applicant's entire case for the granting of the of the land-use-exemption permit (case in chief)." 49 CFR 1155.21.

The AAR submits that the interim rules in their current form largely address the environmental concerns raised by the parties by specifically requiring an applicant to provide environmental information specifically pertaining to the existing or proposed SWRFT for which it is seeking a land-use exemption, including the environmental criteria otherwise applicable under the particular State law(s) at issue "affecting the siting" of the SWRFT, in order to "make its case in chief." (In cases where an applicant is petitioning the Board after an unsatisfactory result, this information would likely have been already submitted to the state.)

To ensure that the parties' concerns are fully addressed, however, the Board, may wish to clarify in its interim rule (49 CFR 1155.20) that: (1) the applicant must provide in its Environmental Report the relevant environmental information otherwise required to be submitted under the state law "affecting the siting" of the SWRTF for which a land-use exemption is sought, and (2) that the Board will consider such information and State and Federal environmental criteria applicable to the existing or proposed SWRTF in conducting its environmental analysis.

(b) Various parties also take issue with interim rule 49 CFR 1155.20 because it provides that an applicant must submit an Environmental and Historic Report only for SWRTFs that were not in existence on October 16, 2008. They contend that because the Board may only issue a land-use exemption under 49 U.S.C. 10909(c) 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," an existing facility should also be required to file an Environmental Report. The AAR concurs in this statutory analysis and proposal.

(c) Various parties contend that the interim rules should be modified to include information pertaining to the Coastal Zone Management Act requirements in the Environmental Report as currently required under the Board's environmental regulations (49 CFR 1105.9). The AAR concurs in this proposal.

#### 4. Miscellaneous Issues

(a) A party proposes that the Board's interim rules be modified to require that an applicant first seek a state ruling regarding the siting of an existing or proposed SWRTF

as a prerequisite for filing an application to the Board for a land-use exemption. This proposal should be rejected as contrary to the statutory scheme. Indeed, specific provisions of the CRA permit a “rail carrier that owns or operates [a SWRTF]” to petition the Board directly for a land-use exemption without first resorting to state proceedings “affecting the siting” of an existing or proposed SWRTF (49 U.S.C. 10909(a)). Other provisions of the CRA also specifically provide that a SWRTF in existence on October 16, 2008 need not seek a state siting permit, and vests the Board with direct authority to issue a land use exemption to such existing facility should the Governor of a State petition the Board to require the facility to file for a permit. 49 U.S.C. 10908 (b) (2).

(b) A party suggests that the Board should conduct a public hearing regarding all SWRTF petitions for a land-use exemption. The AAR believes this proposal unnecessary and a potential waste of the Board’s and the parties’ resources. The CRA does not require a public hearing, and the Board’s procedural rules provide sufficient guidance to the Board whether a specific proceeding warrants a public hearing in lieu of the modified procedure generally used. See 49 CFR 1112.1 et seq.

(c) Several parties contend that the Board should not permit an applicant an unconditional right to undertake “reasonable future expansion [of a SWRTF] that the applicant requests to be included in the land-use-exemption permit” as provided in interim rule 49 CFR 1155.22(17) because the environmental effects of the future expansion cannot be determined at time of application. The AAR submits that if a party seeks to have a land-use-exemption permit apply to “reasonable future expansion” as specified in its application and provides sufficient environmental information to support such a request in its application, the applicant should not have to submit another

application for such future expansion. The AAR would not have a concern if expansion rights were conditioned on a reasonable time limit for exercise.

(d) Several parties contend that the provisions for waiver of specific procedural regulations in the interim rules (49 CFR 1155.24(d) (2)) should include a requirement for public notice and that the grounds for waiver should be specified. The AAR does not oppose a public notice requirement, but believes that the grounds for waiver should not be required to be specified because an applicant's reasons for requesting a waiver of a specific procedural requirement is largely fact-dependent or otherwise based on exigent circumstances that cannot be anticipated in advance.

(e) A party notes that the "railroad transportation of solid waste after the solid waste is loaded for shipment on or in a rail car" is exempted from the definition of the term SWRTF under the CRA (49 U.S.C 10908(e) (1) (H)), but claims the provision is "vague." It requests the Board to clarify that in order to be exempt, the loading must occur "offsite." This proposal should be rejected as contrary to the CRA's specific provisions. 49 U.S.C. 10908(e) (1) (H)(ii) specifically provides that the term "SWRTF" does not include "*the portion of a facility to the extent that activities taking place at such portion are comprised solely of the railroad transportation of solid waste after the solid waste is loaded for shipment on or in a rail car*" (emphasis added). The CRA thus explicitly provides for on-site loading of solid waste at a SWRTF. Indeed, any reading of the CRA that would preclude on-site loading would be inconsistent with the plain reading of the statute.

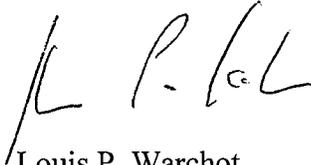
(f) A party contends that an applicant for a land-use exemption permit should be required to provide information regarding its competence to own or manage a SWRTF.

This information is not required by the CRA and is not relevant to the SWRTF siting issues to be determined by the Board.

**Conclusion**

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

Respectfully submitted,



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