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March 16, 2009

VIA E-FILE

Attention: STB Ex Parte No. 684

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

To Whom It May Concern:

By decision dated January 14, 2009, the Surface Transportation Board (“Board”) 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 was published in the Federal Register on January 27, 2009, 74 *Fed. Reg.* 4714 (January 27, 2009), and indicated that comments should be submitted to the Board on the proposal until February 23, 2009, with reply comments submitted by March 23, 2009.

By letter dated February 20, 2009, National Solid Wastes Management Association, Integrated Waste Services Association, Construction Materials Recycling Association, Solid Waste Association of North America, and The U.S. Conference of Mayors submitted joint comments on the NPR to the Board. Having considered the comments filed by other interested parties, this letter constitutes the reply comments of the signatories to our initial comment letter.

As would be expected from the controversy that surrounded the siting of solid waste rail facilities prior to the enactment of the CRA, there was broad interest in the NPR and a number of interested parties submitted comments to the Board on the CRA. This letter responds to just a few of those comments which, we believe, either dramatically misrepresent current law or propose changes to the proposed rules which are in our opinion wholly untenable.

1. ASLRRRA Comments.

First, in the comments submitted by the American Short Line and Regional Railroad Association (“ASLRRRA”), the Board is asked to adopt an interpretation of the CRA that would significantly expand the Board’s jurisdictional grant in the Interstate Commerce Commission Termination Act, 49 U.S.C. 10501(a) and (b) (“ICCTA”). ASLRRRA uses a very selective

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reading of the legislative history of the CRA to argue that the adoption of a land-use exemption permitting process for solid waste rail transfer facilities dramatically expands the jurisdiction of the Board. ASLRRRA argues that the CRA authorizes the siting and operation of solid waste rail transfer facilities under a broader jurisdictional scope than the Board has heretofore been authorized to employ, giving the Board the authority to waive siting requirements for a broad category of facilities that previously were not within the scope of its jurisdiction under ICCTA.

Under ASLRRRA's reading of the CRA, the Board's new land-use exemption authority applies to any portion of a facility that processes, treats, or disposes of solid waste, so long as the facility is owned or operated by or on behalf of a rail carrier. While the land-use exemption permitting authority may certainly be a new permitting requirement for the Board, ASLRRRA seeks to impermissibly expand the scope of the Board's preemption authority by divorcing the Board's land-use exemption authority from its traditional jurisdictional authority over transportation by rail carrier.

ASLRRRA argues that the Board has jurisdiction to grant land-use exemptions for waste facilities regardless of any connection that the facility may have to transportation by rail carrier. This would place the Board in the position of having the authority to void the application of state and local environmental laws on proposals to site solid waste landfills, waste processing facilities, sludge composting facilities and other sometimes extremely controversial projects, so long as some portion of the facility is owned or operated on behalf of a rail carrier. As we have seen from the past activities of some short-line railroads that have come before the Board in recent years, rail carriers can seek to engage in activities that are not within the scope of the Board's authority over transportation activities, while claiming to be acting as rail carriers subject to the Board's authority.¹ Now ASLRRRA argues that these non-transportation activities which were previously outside of the Board's authority will now be within the scope of the Board's authority because of the CRA. This is an absurd result and has no support in the CRA.

A plain reading of the CRA, and the manner in which it amends the ICCTA, establishes that the ASLRRRA interpretation of the CRA is without merit. The Board's authority over rail carriers extends to transportation by rail carrier and not to non-transportation activities that happen to be conducted by or on behalf of rail carriers. The ICCTA establishes a limited grant of exclusive jurisdiction to the Board and the essential nexus is that there must be transportation by rail carrier.

Section 10501(a) provides the Board's grant of jurisdiction:

¹ We believe this is precisely the concern that led Board Commissioner Mulvey to warn about those companies that "use their putative status as rail carriers to shield their waste processing operations from the reach of state and local environmental laws. This tactic is manipulative and abusive of the Board's jurisdiction and powers, and it highlights a method of evading the law that I cannot support." New England Transrail- Construction, Acquisition and Operation Exemption, STB Finance Docket No 34797 (STB served July 10, 2007)(dissent, at p. 20).

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Sec. 10501. General jurisdiction

(a)(1) Subject to this chapter, **the Board has jurisdiction over transportation by rail carrier** that is--

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

[Emphasis supplied.]

Section 10501(b) then provides the grant of exclusive jurisdiction, which is derivative of the general jurisdictional grant in Section 10501(a):

(b) **The jurisdiction of the Board over--**

(1) **transportation by rail carriers**, and the remedies provided in this part with respect to rates, classifications, rules

(including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) **the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities**, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

[Emphasis supplied.]

ASLRRA ignores that the CRA does not amend either of these foundational sections. Instead, the CRA amends Section 10501(c), a section that does not expand in any way the jurisdictional grant or the exclusive jurisdiction of the Board, but instead provides a **limitation** on the authorities granted to the Board in Sections 10501(a) and (b):

(c)(2) ... (T)he Board does **not have jurisdiction** under this part over (A) mass transportation provided by a local governmental authority; or (B) a solid waste rail transfer facility as defined in section 10908 of this title, except as provided under sections 10908 and 10909 of this title.

[Emphasis supplied.]

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Consequently, ASLRRA's argument that the CRA expands the jurisdiction of the Board to confer state and local law preemption on facilities that it did not previously have jurisdiction over is simply unsupported by a plain reading of the statute.

Under traditional administrative law principles, federal courts will use a two step review process to determine if an agency has correctly interpreted federal law. *See Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step requires a simple determination of whether the statutory language is clear, a consideration of "whether Congress has directly spoken to the precise question at issue." *Id.*, at 842. Here, the structure of the statute is crystal clear and the amendments adopted by Congress did not change that structure. ASLRRA's argument would therefore fail at step one of the *Chevron* analysis.

We do happen to agree with ASLRRA's statement that "Congress did not design nor intend the CRA to discourage the use of rail to transport waste." However ASLRRA's legal argument is not for a reasonable application of the CRA land-use exemption process but instead for an unsupported expansion of the Board's authority to confer land-use exemptions. ASLRRA appears to be afraid of the application of state environmental laws to facilities that Congress has just recognized as needing state and local environmental regulation. The ASLRRA argument is untenable and must be rejected by the Board.

2. Salem Rail Logistics, LLC Comments.

Several of the comments submitted by Salem Rail Logistics, LLC ("SRL") would, if adopted, create an unfair advantage for solid waste rail facilities by creating a land-use exemption process that favored the applicant at the expense of disadvantaging interested parties and state and local governments who have a legitimate interest in land-use exemption applications. Given the recent history of abuse of the ICCTA process by some solid waste rail facility operators, the Board should not adopt the SRL comments and should instead ensure that the land-use exemption process is fair and unbiased. Comment numbers assigned below coincide with the numbers identified in the SRL comment letter.

Comment No. 2. SRL suggests that the Board should extend the deadline for existing facilities to submit applications for exemptions. This date is established by the CRA and cannot be waived or extended by the Board.

Comment No. 4. SRL argues that existing solid waste rail transfer facilities should be entitled to a special exception from restrictions on operating inside a national park or national wildlife refuge if they are currently so located. The CRA confers no such special exception if there are federal prohibitions that exist on such operations. If there are state prohibitions, the provisions of Section 10908(a) and (b) apply and we do not believe that the Board's rules need address this matter further.

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Comment No. 5. SRL argues that the Board should use its own staff rather than third party consultants to minimize expenses incurred in land-use exemption applications. Presumably, SRL here argues for no-cost environmental and historic reviews conducted by Board staff under the National Environmental Policy Act and the National Historic Preservation Act. This would be inconsistent with Federal law, which requires agencies to attempt to recoup through fees their costs in providing services to individuals on specific projects. The purpose of the CRA is not to provide cheap environmental reviews to applicants seeking to avoid the application of environmental law. The CRA states that each solid waste rail facility “shall be subject to and shall comply with all applicable Federal and State requirements... 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 similarly situated solid waste facility...”. CRA at Section 603. This request to provide free environmental reviews should be rejected.

Comment No. 6: SRL suggests that the Board limit the non-siting state environmental laws that solid waste rail transfer facilities must comply with to those that are “reasonable.” This request is entirely inconsistent with the CRA and subverts the stated purpose of the CRA, as quoted above, to ensure that solid waste rail facilities shall be subject to the same environmental laws to the same extent as required for any similarly situated solid waste facility. The Board has no authority to impose a reasonableness requirement in this manner.

Comment No. 8: SRL requests that the Board extend the application due date for existing facilities from 120 days to 180 days. This is simply an attempt to extend the grandfathering protection offered in the CRA for an additional two months. The associations that are submitting this reply comment have memberships with vast experience in the submittal of applications for environmental and land-use permitting and in light of this experience it is not conceivable to us that the preparation of a land-use exemption application envisioned by the Board would take greater than 120 days. In fact, a 60 to 90 day application deadline would be entirely reasonable and consistent with the concept of ensuring that facilities enjoying a temporary grandfathering from the provisions of the CRA would expeditiously be subject to the environmental review required by the statute.

MAR-18-2009 08:47 FROM:

BEVERIDGE & DIAMOND*

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Thank you for the opportunity to provide these reply comments.

Very truly yours,



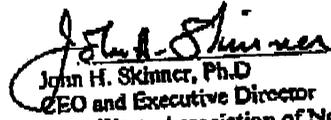
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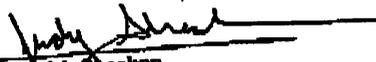
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