

BLI ORE THE SURFACE TRANSPORTATION BOARD

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STB Ex Parte No 684

PROCEDURAL RULES RELATING TO SOLID WASTE RAIL TRANSFER FACILITIES

REPLY COMMENTS OF THE COMMONWEALTH OF MASSACHUSETTS

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Michael W. Dingle
Senior Counsel
Department of Environmental Protection
Office of General Counsel
One Winter Street
Boston, MA 02108
(617) 292-5959

MARTHA COAKLEY
ATTORNEY GENERAL

Siu Lip Lam
Assistant Attorney General
Environmental Protection Division
Office of Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2418

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BEFORE THE SURFACE TRANSPORTATION BOARD

STB Ex Parte No 684

PROCEDURAL RULES RELATING TO SOLID WASTE RAIL TRANSFER FACILITIES

REPLY COMMENTS OF THE COMMONWEALTH OF MASSACHUSETTS

Pursuant to the Notice of Proposed Rulemaking that the Surface Transportation Board ("Board") issued on January 14, 2009 ("Notice of Rulemaking"), the Commonwealth of Massachusetts by and through the Massachusetts Attorney General's Office and the Massachusetts Department of Environmental Protection ("MassDEP") submits reply comments in response to comments submitted by the American Short Line and Regional Railroad Association ("ASLRRRA") and the Salem Rail Logistics, LLC ("SRL")

I. THE ASLRRRA'S INTERPRETATION OF THE SCOPE OF THE BOARD'S JURISDICTION UNDER THE CLEAN RAILROADS ACT IS CONTRARY TO THE LANGUAGE AND PURPOSE OF THE ACT AND SHOULD NOT BE ADOPTED.

In its comments, the ASLRRRA claims that prior to the Clean Railroads Act of 2008 ("CRA"), a solid waste facility seeking to come under the Board's jurisdiction for federal preemption protection from state regulation of its activities would have to show that the facility or activities constituted "transportation by rail carrier." The ASLRRRA then asserts that since the CRA defines a solid waste rail transfer facility as a facility that is "owned or operated by or on behalf of a rail carrier," this definition covers a broader group of facilities than those covered under "transportation by rail carrier." Thus, the ASLRRRA argues that the CRA brings within the Board's jurisdiction for purpose of the land-use-exemption permit and the resultant federal

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preemption of state laws affecting siting those facilities that would not have otherwise constituted transportation “by a rail carrier” under 49 U S C § 10501(a)(1) See Comment of the ASLRRA at 4-6, STB Ex Parte No 684 (Feb 23, 2009) (“ASLRRA Comments”) Because this interpretation is contrary to the express language and purpose of 49 U S C § 10501, as amended by the CRA, the Board should reject it

The ASLRRA is correct in that the Board’s general jurisdiction under 49 U S C § 10501(a)(1) is limited to “transportation by rail carrier” The CRA makes no change to this provision Rather, it amends 49 U S C § 10501(c) to further limit this jurisdictional scope with respect to facilities involving solid waste processing activities Section 10501(c) of 49 U S C as amended provides that “the Board does not have jurisdiction under this part over 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” 49 U S C § 10501(c)(2)(B) Under this section, the Board’s general jurisdiction over “transportation by rail carrier” does not extend to solid waste rail transfer facilities except in the review of land-use-exemption permits provided for under 49 U S C §§ 10908 and 10909 A provision limiting the Board’s jurisdiction over specific activities except under limited circumstances cannot confer jurisdiction over a broader group of activities than what the Board had prior to the provision’s enactment The language of 49 U S C § 10501 clearly does not support the ASLRRA’s position

Moreover, a review of the purpose and the legislative history of the CRA shows that the CRA does not expand the Board’s jurisdiction to cover anything other than transportation by rail carrier As the Board correctly pointed out, the purpose of the CRA is to establish that solid waste rail transfer facilities must comply with all federal and state public health, safety, and

environmental laws to the same extent as all solid waste management facilities. Notice of Rulemaking at 2, 4. During the floor debate on amendments to the proposed bill, no one disputed that solid waste facilities should be regulated to protect public health, safety and the environment. See 153 Cong Rec H11,690-92 (daily ed Oct. 17, 2007), 154 Cong Rec. S10,286 (daily ed Oct 1, 2008). The concern raised about earlier amendments of the bill focused on whether they might interfere with the Board's existing general jurisdiction over transportation by rail carrier. See 153 Cong Rec H11,692 (Letter from Commissioner Mulvey of the Board expressing support for an amendment to 49 U S C § 10501, but expressing concern that an earlier version of the bill might be "interpreted too broadly to enable State and local governments to frustrate the zoning of legitimate solid waste transload facilities"). Thus, the issue before Congress was not whether the Board should have jurisdiction over solid waste facilities that might not otherwise constitute "transportation by rail carrier" but whether the bill would unnecessarily interfere with Board's general jurisdiction over "transportation by rail carrier." Nothing in the legislative history suggests that the definition of a solid waste rail transfer facility or any portion of the CRA was meant to expand the Board's general jurisdiction over "transportation by rail carrier."

The ASLRRA grasps at straws in relying on a comment letter purportedly written by the Board on or about February 7, 2008, to the Senate Staff (a copy of which is not attached to ASLRRA Comments) and a press release from Senator Lautenberg's office concerning the enactment of the CRA. ASLRRA Comments at 5. A section of the February 7, 2008, comment letter ASLRRA quotes appears to express concern about the use of the Board's limited resources to review a petition for a land-use-exemption permit for an existing facility that may not be

controversial or the siting of which the state may not oppose. The use of the terms "rail-related facilities" and "facilities that allow waste to move by rail" in that quoted section is hardly a discussion or a proposal to expand the Board's general jurisdiction. Nothing in the quoted language discusses the definition of a "solid waste rail transfer facility." Id. The ASLRRRA's quoting of a phrase from Senator Lautenberg's press release is completely out of context and outright misleading. The press release states "States are granted the permanent right to enforce their public health and safety and environmental laws at facilities that handle solid waste regardless if they are located on a railroad." See Press Release, 1st bullet para., attached to ASLRRRA Comments. This is a far-cry from ASLRRRA's assertion that "Senator Lautenberg's description in his Press Release of the type of facilities covered by this legislation is *'if they are located on a railroad'*" See ASLRRRA Comments at 5 (emphasis in original). Because the ASLRRRA's interpretation of the CRA is contrary to the express language and purpose of the CRA, it should not be adopted.

II. THE BOARD SHOULD NOT ADOPT SRL'S COMMENTS THAT WOULD REQUIRE THE BOARD TO DEVIATE FROM THE CRA REQUIREMENTS.

The SRL makes three comments that would require the Board to deviate from the CRA and therefore, they should not be adopted. First, SRL suggests that the Board should extend the deadline for existing facilities to submit applications to the appropriate state agencies to obtain non-siting permits. See SRL Comments at 2, No. 2, STB Ex Parte No. 684 (Feb. 23, 2009). The deadline is established by the CRA, and the Board may not waive or extend it. See 49 U.S.C. § 10908(b)(2).

Second, the SRL requests that the Proposed Rules at 49 C.F.R. § 1155.27(b)(2) and (3) address the situation where an existing facility is located on lands that were designated as a

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National Park or National Wildlife Refuge (see 49 U S C § 10909(c)(2)), after the facility had begun operations. The SRL also suggests that the Board create an exception for existing facilities from the requirements at 49 C F R § 1155.27(b)(2) and (3) and 49 U S C § 10909(c)(2). SRL Comments at 2, No. 4. The Board should reject this suggestion because 49 U S C § 10909(c)(2) and 49 C F R § 1155.27(b)(2) and (3) apply to facilities not in existence on October 16, 2008, the effective date of the CRA. The Board appropriately requires facilities existing as of October 16, 2008, to submit in their petitions for a land-use-exemption permit information on whether they are located in any of the lands listed at 49 U S C § 10909(c)(2). Notice of Rulemaking at 11 n 11 and at 21, 23. See 49 C F R §§1155.21 and 1155.22(14). This information will aid the Board in determining whether a land-use-exemption permit should be issued. See Notice of Rulemaking at 11 n 11. The Board should reject any suggestion that the existing facilities should not be required to submit such information.

Third, the SRL suggests that the Board limit the non-siting state laws with which the solid waste rail transfer facilities must comply to those that are "reasonable." SRI Comments at 2, No. 6. This suggestion is contrary to the express language and the purpose of the CRA, which is to ensure that solid waste rail transfer facilities are subject to all federal and state laws (except those laws affect siting which are preempted by a land-use-exemption permit) to the same extent as any other solid waste management facilities. See 49 U S C §§ 10908(a), 10908(b)(1) and (2). The Board has no authority to deviate from the CRA.

III. CONCLUSION

Because the comments of the ASLRRRA and SRL are contrary to the express language and purpose of the CRA, the Board should not adopt them.

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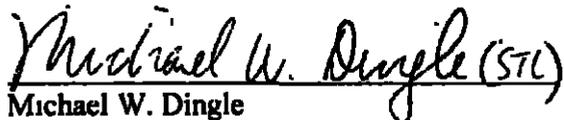
Respectfully submitted by,

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

MARTHA COAKLEY
ATTORNEY GENERAL

By its attorney,

By her attorney,



Michael W. Dingle
Senior Counsel
Department of Environmental Protection
Office of General Counsel
One Winter Street
Boston, MA 02108
(617) 292-5959



Siu Tip Lam
Assistant Attorney General,
Environmental Protection Division
Office of Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2418

Dated: March 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2009, I served the foregoing Reply Comments of the Commonwealth of Massachusetts on the Procedural Rules Relating to Solid Waste Rail Transfer Facilities by causing a copy thereof to be delivered via first class mail, postage prepaid, to:

Kevin P Auerbacher
New Jersey Department of Environmental
Protection
25 Market Street
P O Box 093
Trenton, NJ 08625

Keith T. Borman
American Short Line and Regional Railroad
Association
50 F Street, NW, Suite 7020
Washington, DC 20001-1564

Michael S. Caruso
New York State Department of Environmental
Conservation
625 Broadway, 14th Floor
Albany, NY 12233-1500

Daniel R. Deutsch
Deutsch Williams Brooks Derensis & Holland,
P C.
One Design Center Plaza, Suite 600
Boston, MA 02210

William G Dressel, Jr
New Jersey State League
222 West State Street
Trenton, NJ 08608

Honorable Raymond A. Kershaw
One Municipal Plaza
Freehold, NJ 07728

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Janine King
Village of Croton-On-Hudson New York
One Van Wyck Street
Croton-On-Hudson, NY 10520-2501

Dominic Maruca
Veolia Environmental Services
1 Center Court, Suite C
Totowa, NJ 07512

Gary S Rosensweig
700 Alexander Park, Suite 102
Princeton, NJ 08540

Louis P Warchot
Association of American Railroad
50 F Street, NW, Suite 12041
Washington, DC 20001

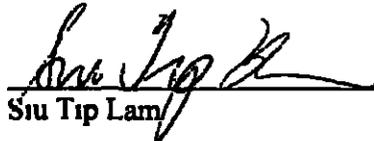
Donna Thomas
138 Mt Laurel Road
Hainesport, NJ 08036

Kenneth P Kolson
Association of American Railroads
50 F Street N W
Washington, DC 20001

Stephen M Richmond
Beveridge & Diamond, P.C.
45 William Street, Suite 120
Wellesley, MA 02481

Suzanne M. Sullivan
60 Lawrence Street
Wilmington, MA 01887

Michael V. Wolak
New York State Association for Solid Waste
Management
P O Box 13461
Albany, NY 12212


Siu Tip Lam