STB FINANCE DOCKET NO. 34429

THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION– PETITION FOR DECLARATORY ORDER

Decided July 15, 2004

The Board grants the petition for declaratory order filed by the New York City Economic Development Corporation, acting on behalf of the City of New York, and finds that: (1) the planned construction project at the end of the Travis Branch of the Staten Island Railroad involves excepted track under 49 U.S.C. 10906 that does not require the Board's approval under 49 U.S.C. 10901; and (2) federal law preempts otherwise applicable state and local laws with respect to this project.

BY THE BOARD:

By petition for declaratory order filed on October 29, 2003, the New York City Economic Development Corporation (NYCEDC or petitioner), acting on behalf of the City of New York (City), asked the Board to institute a declaratory order proceeding to address: (1) whether the construction project described in the petition involves the construction of spur or switching track that does not require the Board's authorization, or is instead a line of railroad requiring such authorization; and (2) whether federal law preempts a state agency's permitting or prior approval requirements with respect to this project. The request for declaratory order will be granted as discussed herein.

BACKGROUND

The proposed construction consists of the addition of 6,744 feet of track to, and the rehabilitation of, the end of the Travis Branch of the former Staten Island Railroad (SIRR). On December 10, 2003, the Board served and published in the *Federal Register* (68 Fed. Reg. 68968) a notice instituting a declaratory order proceeding and requesting comments on NYCEDC's petition. Comments were timely filed by the New York State Department of Environmental Conservation (NYSDEC), the New Jersey Department of Environmental Protection (NJDEP), U.S. Congressman Vito Fossella, Staten Island Borough President James P. Molinaro, Vanbro Corporation (Vanbro), Visy Paper, and William T. Fidurski. NYCEDC filed a reply to the comments on February 19, 2004.

The SIRR was abandoned in 1990 and 1991 and its lines were acquired by the States of New York and New Jersey. The lines continue to be identified as the SIRR and this decision will reference them as such. They stretch almost 13 miles, extending eastward from Cranford Junction, NJ, on the western end, across the New Jersey/New York state line at the Arthur Kill,

and terminating to the east at St. George, NY. The line also runs south about 3.5 miles from Arlington Yard; this segment is called the Travis Branch.

NYCEDC and the Port Authority of New York and New Jersey (Port Authority) are undertaking a project to revitalize and reactivate rail operations over these lines. The Port Authority is building a connecting track between the SIRR and the Chemical Coast Secondary Line, immediately to the west of the Arthur Kill, which the Board in a separate opinion found would not require Board authorization if certain criteria were met.[1] In addition, Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), and the Norfolk Southern Railway Company (NS) have obtained authority to provide service over the SIRR track between the new connector with the Chemical Coast Line and points on Staten Island.[2]

Petitioner states that the planned construction project consists of the addition of spur and/or switching track to the end of the Travis Branch. According to petitioner, the segment of the SIRR on which the new track will be built is owned by the City[3] and is managed by NYCEDC pursuant to a contract with the City. NYCEDC states that the new track is required for the pickup of trains from, and delivery to, a City Department of Sanitation transload facility (DSNY facility) being constructed on City-owned property at the Fresh Kills landfill site on Staten Island. The landfill has, for many years, served as the principal repository for New York City's solid waste. Capacity at the landfill has been exhausted, and the landfill was recently closed. The project will also entail replacing existing timber trestle bridges and timber and bituminous grade crossings, constructing a new wye connection and potential retaining walls, replacing and repairing tracks at Arlington Yard, and repairing and painting the Arthur Kill Lift Bridge.

NYCEDC indicates that rail service to and from the DSNY facility will be in unit trains approximately 4,700 feet long and will require that the trains be broken into sections. Petitioner says that the disassembly of empty railcar sections in an arriving unit train, and the assembly of full railcar sections into an outbound unit train, will occur in two areas of the right-of-way that will have a double-tracked rail layout: (1) south of the Visy Paper entrance road and extending across Victory Boulevard and the Consolidated Edison Co. property to the box culvert rail bridge; and (2) at the northern end of the Arthur Kill Power property.

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[1] *Port Authority of New York and New Jersey–Petition for Declaratory Order*, STB Finance Docket No. 34428 **(**STB served January 21, 2004).

[2] *CSX Transportation, Inc., Norfolk Southern Railway Company and Consolidated Rail Corporation–Modified Rail Certificate*, STB Finance Docket No. 34473 (STB served March 19, 2004) (*CSXT*).

[3] The City apparently acquired the segment from the states – a transaction, like the states' original acquisition of the lines from the SIRR, that lies outside the authority of this agency. *See Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions*, 363 I.C.C. 132 (1980) (*Common Carrier Status of States*), *aff'd, Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982); 49 *CFR* 1150.22.

POSITIONS OF THE PARTIES

Petitioner NYCEDC takes the position that the determination of whether a particular track segment is a "railroad line" (the construction of which requires Board authorization) or is instead a spur, industrial, team, switching, or side track (which is subject to the Board's jurisdiction but can be constructed without Board authorization) turns on the intended use of the track segment. *Nicholson v. ICC*, 711 F.2d 364, 368 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1056 (1984). According to NYCEDC, the intended use of the new track is for switching and for pickup and delivery to and from the DSNY facility. NYCEDC further claims that the new track is switching track according to the factors considered in *CNW–Aban. Exemp.–In McHenry County, IL*, 3 I.C.C.2d 366 (1987) (*McHenry*), *rev'd on other grounds sub nom. Illinois Commerce Comm'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989), because the track is not long, is stub-ended, will not invade the territory of another railroad or expand the involved market, and will initially serve only one shipper. There is a possibility that another shipper, Visy Paper, may build a lead into its plant from the new track, although the extent of use and volume of traffic are uncertain. NYCEDC Pet. for Declaratory Order at 9.

NYCEDC explains that NYSDEC is attempting to impose permitting and other requirements on it, including the implementation of the state environmental review process. NYCEDC's applications for permits for adding fill to tidal wetlands have been pending for 11 months and remain unresolved. NYCEDC notes that, even though 49 U.S.C. 10906 excepts the construction of the new track from the Board's licensing requirements, the Board's jurisdiction over the track and its construction prevents any agencies of the state or local governments from imposing regulations or requirements that would interfere with the project. Petitioner notes that the Board has exclusive and plenary jurisdiction over rail transportation to the extent that it involves "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," *citing* 49 U.S.C. 10501(b)(2) and *Friends of the Aquifer, et al.*, 5 S.T.B. 880 (2001) (*Friends of the Aquifer*). Petitioner maintains that the requirements that NYSDEC is seeking to impose here, based on state law, are preempted because they go beyond permissible "police power" regulation. Rather, they amount to impermissible permitting and environmental review requirements.

NYSDEC, in contrast, takes the position that significant potential impacts on sensitive environmental areas warrant an environmental assessment of this project. NYSDEC argues that the new track is a line of railroad subject to the Board's jurisdiction, rather than industrial, spur or switching track, because: (1) it will permit NYCEDC to extend its operations into new territory; (2) it is essential to the through movement of traffic; and (3) it is NYCEDC's only railroad operation. According to NYSDEC, the new line will allow petitioner to serve at least two shippers that currently lack access to rail service.

NJDEP comments that construction of the new track will significantly impact important and sensitive environmental resources and must be subjected

to proper environmental oversight at either the federal or state level. NJDEP argues that the new track cannot be considered a spur, because there are no existing railroads or railroad operations to which the new track could be considered a spur, inasmuch as the SIRR no longer exists as a railroad. Also, NJDEP argues that, because NYCEDC does not currently provide rail service to the Staten Island territory at issue, the new track must be considered an "extension into territory not already served by the carrier" under the principle of *Effingham Railroad Company–Petition for Declaratory Order–Construction at Effingham, IL*, 2 S.T.B. 606 (1997) (*Effingham*), *aff'd sub nom. United Transp. Union – Il. Legis. Bd. v. STB*, 183 F.3d 606 (7th Cir. 1999). Thus, NJDEP alleges, the new track is a line of railroad requiring Board authorization. NJDEP also argues that state environmental review of the construction of the new track is not preempted because the preemption in 49 U.S.C. 10501(b) applies only to rail carriers and NYCEDC is not a rail carrier.

Congressman Fossella, who represents the 13th District of New York, and Borough President Molinaro support NYCEDC's petition. They state that reactivation of the SIRR will promote much needed economic development for Staten Island, and will reduce regional truck traffic and its commensurate air pollutants. Congressman Fossella and Mr. Molinaro agree with NYCEDC's arguments that the planned track construction does not require Board approval and that NYCEDC should be allowed to proceed with this project without being subjected to regulation by state and local agencies.

Cornelius Vanderbilt, President of Vanbro, an owner of property adjacent to the Travis Branch, agrees with NYCEDC that the construction project does not require Board approval and that NYCEDC should be allowed to proceed with the project without obtaining permits or other prior approval from state or local agencies. Mr. Vanderbilt states that, as a major distributor of aggregates and materials, Vanbro will be an important industrial user of the reactivated Travis Branch.

Helmut Konecsny, President of Visy Paper, another owner of property adjacent to the Travis Branch, also supports NYCEDC's petition. He states that rehabilitation of the SIRR is of vital importance to Visy Paper, which constructed a paper mill on Staten Island intending to reduce truck traffic by employing the railways and waterways. Mr. Konecsny maintains that completion of the SIRR rehabilitation is long overdue, and that Visy Paper must rely on trucks to move containers of its finished product to New Jersey rail yards at considerable extra cost until the SIRR project is completed.

William T. Fidurski[4] of Clark, NJ, states that reactivation of the SIRR is being driven by massive increases in the arrival of marine cargo generated by expansion plans of the Port Authority through the Comprehensive Port Improvement Plan. He also states that the expansion of Port Authority operations is enormous in scope and that these plans, in conjunction with

[4] On April 6, 2004, NYCEDC filed opposition to a motion by Mr. Fidurski for leave to file a March 22, 2004 pleading. NYCEDC asks that the motion be stricken as an impermissible reply to a reply. However, in the interest of compiling a complete record, Mr. Fidurski's motion will be granted.

NYCEDC's planned construction of new track, fail to take into account whether the existing infrastructure can handle dramatic increases in freight movement or to consider the environmental impacts of these actions. Mr. Fidurski is concerned that increased freight movements on Staten Island and in New Jersey will create an ever-increasing potential for conflicts with vehicular traffic at crossings at street level and with commuter rail along shared portions of line. He argues that an environmental impact statement is necessary to evaluate adequately the cumulative and indirect impacts of the massive expansion of port facilities and the extension of the SIRR.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. The issues presented here are: (1) whether petitioner's project involves the construction of spur or switching track (which does not require Board authorization) or the construction of a line of railroad (requiring such authorization); and (2) whether federal law preempts a state agency from requiring permits or other prior approval with respect to that construction. The Board is granting the request for a declaratory order in order to resolve these issues.

Spur Track vs. Line of Railroad.

The terms "spur, industrial, team, switching, or side tracks"(collectively, "spur" track) are not defined in the statute, nor does the legislative history of the Interstate Commerce Act reveal a clear Congressional intent regarding the meaning of these terms. *Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 726 (D.C. Cir. 1996) (*BLE*). Moreover, there is no single test for determining whether a particular track segment is a "line of railroad," or is instead simply a spur. Rather, the agency and the courts have adopted a case-by-case, fact-specific approach to make this determination. *McHenry*, 3 I.C.C.2d at 367.

In *Texas & Pacific Ry. v. Gulf, Colo. & S. F. Ry.*, 270 U.S. 266, 278 (1926) (*Texas & Pacific*), the United States Supreme Court found that track should be considered to be a line of railroad "where the proposed trackage extends into territory not theretofore served by the carrier, * * * particularly where it extends into territory already served by another carrier." Here, the construction of track to Fresh Kills will not extend the territory of the newly reactivated SIRR. Staten Island is a geographically distinct area–a small island historically served by only one freight railroad)the SIRR)–and so our focus is properly on the area as a whole, rather than on the Fresh Kills site. The SIRR has always had the capability to receive and haul solid waste from the greater New York City area. The market that NYCEDC proposes to serve is previously unexploited, but it is not new. The decision to locate the transload facility at Fresh Kills rather than at some other point on the SIRR may facilitate the service, but it is not a prerequisite to the service. Therefore,

given the particular facts of this case, the track to the transload facility–whether the facility is sited at Fresh Kills or elsewhere in the area served by the SIRR–does not require Board authority because it is ancillary to operations that might already be conducted on existing SIRR lines.

The fact that the City-owned DSNY facility at Fresh Kills happens to be located slightly more than a mile away from the end of the line — and not ancillary to a point in the middle of the line — does not, by itself, make this project a line extension. Rather, it is well settled that the agency must consider a variety of relevant factors in determining the spur vs. line of railroad issue. The agency and the courts look primarily at the use of a track (the "use test"), and at a track's physical characteristics, in making the determination of whether it should be categorized as a line of railroad, or a spur or switching track. *Battaglia Distributing Co., Inc. v. Burlington Northern Railroad Company*, 2 S.T.B. 323, 326-27 (1997). With respect to the use test, tracks that are found to come within the section 10906 exception are typically used for loading, unloading, storage, or switching operations that are incidental to the movement of trains. *See, e.g., Nicholson*, 711 F.2d at 367-68; *New Orleans Terminal Co. v. Spencer*, 366 F.2d 160 (5th Cir. 1966).

In this case, NYCEDC indicates that the track to be built at the end of the Travis Branch will be used for switching and shuttling railcars for pickup and delivery. Unit trains will be broken down to permit containers to be loaded onto flatcars, and then trains will be made up so they can be hauled away. The agency and courts have found that track that is used for the breaking up and reassembling of trains is switching track, and its construction does not require Board authorization. *See BLE*, 101 F.3d at 727. If Visy Paper becomes a shipper served over the planned line, the operations involved in serving it will be similar. Based on NYCEDC's description, the planned uses of this track place it in the category of excepted spur or switching track.

Finally, the physical characteristics of the planned track are consistent with the conclusion that it will be spur or switching track. There is no single criterion, but specific indicia that have been found relevant in making the determination of whether a track is a line of railroad, or is instead a spur, include: the length of the track, how many shippers will be served, whether it is stub-ended, whether it was built to invade another railroad's territory, whether the shipper is located at the end of the track (indicating that the sole purpose of the track is to reach that shipper's facility rather than a broader market), whether there is regularly scheduled service or not, who owns and maintains the track, etc. *See, e.g., ParkSierra Corp. — Lease & Operation Exemption — Southern Pacific Transp. Co.*, STB Finance Docket No. 34126, slip op. at 5 (STB served December 26, 2001) (*ParkSierra*); *Grand Trunk Western R.R. — Pet. for Declaratory Order — Spur, Industrial, Team, Switching or Side Tracks in Detroit, MI*, STB Finance Docket No. 33601, slip op. at 2 (STB served July 30, 1998); *Chicago SouthShore & South Bend Railroad — Petition for Declaratory Order — Status of Track at Hammond, IN*, STB Finance Docket No. 33522, slip op. at 6 (STB served December 17, 1998) (*SouthShore*). Applying these criteria to the track proposed for construction here also leads to the conclusion that the track will be spur or

switching track that falls within section 10906. This will be a stub-ended track, built predominantly for the purpose of serving one shipper located at the end of the track. The track's length will be moderate (under 1.3 miles), which is comparable to the length of some other tracks that have been found to be spur or switching tracks. *See, e.g.*, *ParkSierra* (1.7-mile-long spur track); *SouthShore* (1.8-mile-long spur track). The track will not invade the territory of another railroad, the shipper will own and maintain it, and service will be provided on an as-needed basis.

Because the proposed track meets the test to be considered a spur, the DSNY facility at Fresh Kills could have constructed a connection to the SIRR line at any time in the past, when rail service was available, without it being considered an "invasion of new territory" for the SIRR. Now that the facility's method of waste disposal is being changed and rail service is required, the connection to the SIRR is needed. The fact that the connection is being constructed now, at the same time as the reactivation of the SIRR, does not change the analysis.

NJDEP's arguments based on *Effingham* are inapposite. In *Effingham*, the Board found that construction of a stub-ended track that would be used exclusively for switching fell within its licensing authority, because "the larger purpose and effect of ERRC's proposal is to construct what will constitute ERRC's entire line of railroad to serve a new rail shipper," *Effingham*, 2 S.T.B. at 609 (1997). The facts here are significantly different because the planned new track will not comprise the entire operation of the modified certificate operators (NS, CSXT, and Conrail).

Preemption.

Under 49 U.S.C. 10501(b)(2), as broadened by the ICCTA,[5] the Board has exclusive jurisdiction over rail transportation, including "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," even though Board approval is not required by such activities. Section 10501(b) further provides that both "the jurisdiction of the Board over transportation by rail carriers" and "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law." *See City of Auburn v. STB*, 154 F.3d 1025, 1029-31 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999); *Friends of the Aquifer*, slip op. at 4; *Borough of Riverdale–Petition for Declaratory Order–The New York Susquehanna and Western Railway Corporation*, 4 S.T.B. 380, 384-85 (1999).

In this proceeding, the Board has exclusive jurisdiction over the planned new track, and state and local regulation is preempted, because the new track will be operated by rail carriers (NS, CSXT, and Conrail) as part of the interstate rail network. The fact that the track owner, petitioner NYCEDC, is not itself a rail carrier is not relevant. And the fact that the new track is

[5] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 807 (1995).

outside the Board's licensing authority does not change this outcome. The section 10501(b) preemption applies even in cases – such as the construction of switching and spur track, as involved here – where the Board lacks licensing authority and therefore does not conduct its own environmental review. *Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA*, 5 S.T.B. 500, 507 & n.24 (2001), and cases cited therein.[6]

Although the Board's jurisdiction precludes state environmental review, and the finding that this track is spur and switching track means that the Board will not perform a formal environmental review in this proceeding, the record indicates that petitioner is making serious efforts to address potential environmental ramifications of this project. NYCEDC states that it has proposed and is undertaking voluntary mitigation measures to protect the environment.[7] Moreover, petitioner states that it has been working with federal and state agencies, specifically, NYCEDC avers that it has sought approvals from the U.S. Army Corps of Engineers, the United States Coast Guard, and the New York State Department of State regarding the rehabilitation of the Travis Branch and the construction of the new track. Petitioner also indicates, in response to Mr. Fidurski's concerns about the cumulative and indirect impacts of all area projects relating to reactivation of the SIRR that, in October 2003, a number of agencies[8] jointly issued a Draft Scoping Document for the Comprehensive Port Improvement Plan Environmental Impact Statement. According to petitioner, the concerns of Mr. Fidurski and other interested parties can be addressed in the context of that broad ongoing study.

[6] Opponents have raised other arguments. NYSDEC argues that the City and NYCEDC are acting *ultra vires* by seeking exemption from the environmental laws of their own state. But, as discussed, the track to be constructed is properly subject to federal not state or local law as a consequence of preemption. Additionally, NYSDEC contends that the "public trust" doctrine limits the scope of statutory preemption here by allowing states to fill any void created by section 10906 to protect land subject to the public trust. However, NYSDEC fails to demonstrate the applicability of that doctrine to these circumstances and, even if it had, such a doctrine would undoubtedly be trumped by federal preemption. NYSDEC and NJDEP also argue that petitioner is subject to state environmental regulation and obligated to comply therewith because it voluntarily sought and obtained a permit from NYSDEC for the proposed construction. Petitioner responds that the issued permit does not cover the proposed new track. More importantly, however, the Board encourages voluntary cooperation with state and local agencies where possible, and petitioner's willingness to cooperate with NYSDEC should not and will not be held against it.

[7] According to petitioner, the wye connection will impact 1.1 acres of low quality wetlands, the replacement of three trestle bridges will impact a total of approximately 1,500 square feet of wetlands, and the industrial spur/switching track will impact 1.7 acres of wetlands. Petitioner states that it has met with NYSDEC numerous times to discuss mitigation for the tidal wetland impacts from the project. NYSDEC has suggested that petitioner, together with the Port, work to reprofile and/or dredge portions of Bridge Creek to improve existing hydrology and tidal flow and potentially implement shoreline stabilization efforts along the creek at selected locations. These efforts would allow for the improvement of 25 or more acres of existing wetlands located within a NYSDEC State Preserve, the Wilpon Property. According to petitioner, it and the Port are amenable to NYSDEC's proposal and investigative work is underway to determine the work scope for the mitigation plan.

[8] The U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the Federal Highway Administration, Empire State Development Corporation, New Jersey Department of Transportation, the City, and the Port Authority.

Finally, NYCEDC's project is subject to federal environmental laws, such as the Clean Air Act, the Clean Water Act, etc.[9]

In sum, the Board finds that the construction project described in NYCEDC's petition does not require agency authorization pursuant to 49 U.S.C. 10906; and that federal preemption applies pursuant to 49 U.S.C. 10501(b).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

VICE CHAIRMAN MULVEY, dissenting:

I dissent from the Board's decision in this case. I find that the proposed track would be a line of railroad, the construction of which should be subject to the Board's construction licensing authority and environmental review procedures.

Spur vs. Line Determination: I do not agree with the Board's finding that the proposed track would be a spur, and thus excepted from our construction licensing authority and attendant environmental review. Using the agency's and courts' case-by-case, fact-specific approach to determining the status of rail track, I have reviewed the record with a focus on the proposed use and purpose of the track and its physical characteristics.

While the evidence could lead to the conclusion that the line is a spur, as the majority finds, I believe that the larger purpose and effect of the proposed track is to extend the reach of CSXT, NS, and Conrail into new territory.[10] Despite NYCEDC's claims that the track will be used for the assembling of trains, the very purpose of the track is to connect a shipper not currently served by rail with the interstate rail network. But for the construction of the track, there would be no need for the modified certificate issued in *CSXT* to reactivate the Travis Branch. As NJDEP argues, there are no existing operations on the Travis Branch for which the track could be considered a spur. That the track would be integral – rather than incidental – to operations over the Travis Branch and the reactivated SIRR lines persuades me that this would be a line of railroad.

I find that other factors also weigh in favor of a determination that the proposed track would be a line of railroad. The weight of rail to be used, 115-pound rail, is a weight often used on lines of railroad and indeed is stronger

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[9] Not all state and local regulations that affect railroads are preempted. For example, communities can enforce their local codes for electrical, building, fire and plumbing unless the codes are applied in a discriminatory manner, unreasonably restrict the railroad from conducting its operations, or unreasonably burden interstate commerce. *Friends of the Aquifer*, 5 S.T.B. at 884-85 (2001).

[10] *See Texas & Pac. Ry. v. Gulf, Colorado & S. F. Ry.*, 270 U.S. 266, 278 (1926); *Brotherhood of Locomotive Eng'rs v. United States*, 101 F.3d 718, 728 (D.C. Cir. 1996).

than the 100-pound rail on the Travis Branch when it was abandoned.[11] The volume and regularity of traffic moving out of the DSNY facility, four unit trains per week, would be significant. However, I recognize that factors such as the possibility that other shippers might be served over the track and the proposed track's 1.3 mile length can support either a spur or line determination.

Where, as here, the facts do not clearly dictate one determination or the other, and in light of my environmental concerns discussed below, I would have preferred that the Board err on the side of asserting jurisdiction to license the construction. Then, we would have undertaken the appropriate environmental review, as the state and local governments are preempted from doing so.

Environmental Concerns: The parties have raised a number of unresolved concerns regarding the potential environmental impacts of the construction. NYS Department of Environmental Conservation alleges impacts on wetlands, but does not address what it believes NYCEDC is not, but should be, doing to mitigate any adverse effect of its proposed construction. NYCEDC, in turn, has not explained whether it believes it will satisfy all of the concerns of NYS Department of Environmental Conservation through the measures it has voluntarily undertaken.

Considering the environmental sensitivity and history of the Staten Island area, it would have been prudent for the Board to conduct an environmental review of the proposed construction to answer these and other questions. Such a review would have developed a full record on the environmental impacts of this project, as well as the cumulative impacts of the related projects presented to the Board in recent months. Because of the state and local environmental review of the non-rail aspects of, and the overwhelming support for, the DSNY project, such a review by the Board could have been conducted in a short time frame that would not have unduly delayed the proposed construction. Under the majority's decision, no environmental review of the proposed track construction will be conducted because local authorities are preempted from doing so.

I recognize that the gap in environmental oversight results from the overlay of 49 U.S.C. 10501(b) and 10906: reservation of spur track to the Board's exclusive jurisdiction while simultaneously excepting it from the Board's licensing authority. I believe that this gap, and its real-world impacts, are an unfortunate result of the ICC Termination Act that Congress may want to reconsider in light of the potentially serious consequences of a determination that particular track is a spur.

It is ordered:

1. The petition for declaratory order is granted.
2. This proceeding is discontinued.

[11] *See Staten Island Railway Corp. Letter to Consolidated Edison Company of NY, Inc.*, filed in ICC Docket No. AB-263 (Sub-No. 2X), February 12, 1990, at Exh. A.

3. This decision is effective 30 days from the date of service.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey dissented with a separate expression.