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December 23, 2005

By Hand

The Honorable Vernon A. Williams
Secretary
U.S. Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423



Re: NSWMA et al Petition for Declaratory Order, STB Docket No. 34776

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter are the original and ten copies of The Reply of The New York, Susquehanna, And Western Railway Corporation to Comments on the Petition for Declaratory Order, and an electronic copy of that document.

Please file this document in STB Docket No. 34776, file-stamp the additional copies and return them to our messenger for service and for our files. If you have any questions regarding this filing, please contact one of the undersigned.

Thank you for your assistance in this matter.

Very truly yours,

G. Paul Moates

Paul A. Hemmersbaugh

cc: Counsel of record

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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 34776

**REPLY OF THE NEW YORK, SUSQUEHANNA, AND
WESTERN RAILWAY CORPORATION TO COMMENTS ON
THE PETITION FOR DECLARATORY ORDER**

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Dated: December 23, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34776

**REPLY OF THE NEW YORK, SUSQUEHANNA, AND
WESTERN RAILWAY CORPORATION TO COMMENTS ON
THE PETITION FOR DECLARATORY ORDER**

The New York, Susquehanna and Western Railway Corporation ("NYS&W") respectfully submits this Reply to comments submitted to the Board concerning the National Solid Waste Management Association's ("NSWMA") Petition for Declaratory Order. While several short comments were submitted in support of NSWMA's Petition, none of them provides any legal ground for instituting a declaratory order proceeding. Moreover, none of them even addresses the two compelling reasons the Board should not institute a declaratory order proceeding at this time: first, because the Petition is moot; and second, because the United States District Court in *The New York, Susquehanna and Western Railway Corp. v. Campbell*, Civ. Act. No. 05-4010 (D.N.J.) ("*NYS&W v. Campbell*") is currently considering the issues raised in the Petition and has declined to refer them to the Board. *See* Reply of NYS&W in Opp. to Petition of NSWMA for Declaratory Order (Nov. 14, 2005) ("Nov. 14 NYS&W Reply") at 8-11; *see also* Reply of the New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission to the Petition of NSWMA for a Declaratory Order at 1, 6 (Nov. 16, 2005) ("NJDEP Reply") (agreeing that Board should not initiate declaratory order proceedings at this time). Moreover, the commenters' unsupported speculation about C&D transload facilities in general bears no relation to the actual condition and operation of the facilities operated by NYS&W. The Petition for a Declaratory Order should be denied and dismissed.

The comments submitted in support of the Petition for Declaratory Order are most notable for what they omit. None of the commenters addresses the fact that the transload facility that is the subject of the Petition (hereafter, the “16th Street Facility”) has been closed. And, none address the appropriateness of a declaratory order proceeding that would consider the precise issues that are currently pending before the District Court in *NYS&W v. Campbell* – where the District Court has access to a factual record far greater than that provided by Petitioner and where the Court has not requested the Board’s input. Attesting to the power of these two arguments, the New Jersey Department of Environmental Protection (“NJDEP”) and New Jersey Meadowlands Commission – parties to *NYS&W v. Campbell* and the entities whose regulations NSWMA believes should be enforced against NYS&W – agree that the Board should “not initiate such a proceeding at this time.” See NJDEP Reply at 1, 6.

First, any declaratory order proceeding would be moot because the 16th Street Facility is closed. The Board issues declaratory orders in order to terminate a controversy or to remove uncertainty. See 5 U.S.C. § 554(e); 49 U.S.C. § 721. There is no live controversy or uncertainty to resolve here, however. NYS&W closed and dismantled the 16th Street Facility in early November, and it does not intend to reopen the facility.¹ Therefore the Petition is moot, and the Board should dismiss it in accordance with its past practice. See Nov. 14 NYS&W Reply at 8-9 (citing cases).

Second, the Board should not institute a declaratory order proceeding before the conclusion of federal court litigation in *NYS&W v. Campbell*. As discussed in NYS&W’s November 14 Reply, the District Court is considering the precise issue raised by NSWMA here –

¹ Moreover, NYS&W has represented to the New Jersey District Court that, as of December 31, 2005, it will no longer operate open-air transload facilities that handle bulk construction and demolition material (“C&D material”) in New Jersey. Based in part on that representation, the Court has enjoined NJDEP from enforcing its regulations against NYS&W.

whether ICCTA preempts certain regulations that NJDEP is attempting to impose on the 16th Street Facility and on certain other NYS&W transload facilities in North Bergen. *See* Nov. 14 NYS&W Reply at 5-8. The parties have conducted substantial factual discovery in that action, including production of a significant volume of documents, and thirteen depositions. The District Court has been presented with dozens of exhibits and declarations, and it conducted a hearing on December 12 and 13, 2005, at which it heard testimony on the ownership and operation of NYS&W's transload facilities and other relevant issues. The District Court has adjourned the hearing until March 8, 2006, when it will hear additional evidence and arguments from the parties.

Although NYS&W suggested to the District Court that it could refer the ICCTA preemption issue to the Board, the District Court elected not to do so, choosing instead to proceed without a referral. *See* Nov. 14 NYS&W Reply at 8, 10. In prior cases, the Board has declined to exercise its jurisdiction to institute a declaratory order proceeding where a court "has made clear its desire to resolve the issues raised without referring the matter to the Board." *See* Finance Docket No. 34052, *Green Mountain R.R. – Petition for Declaratory Order* (May 28, 2002). The Board should adhere to this practice here, particularly because the District Court has been presented with a considerably more extensive factual record than that NSWMA has given the Board. *See* Nov. 14 NYS&W Reply at 10-11. The conclusory allegations of NSWMA and its supporting commenters simply do not give the Board an adequate foundation to make the fact-specific determinations necessary to assess whether ICCTA preemption applies.

Because the Petition is moot, and because a declaratory proceeding is inappropriate in light of *NYS&W v. Campbell*, the broad-brush, conclusory assertions of the commenters are

irrelevant.² Neither the generalized concerns of local governments about ICCTA preemption, nor speculation about hypothetical risks – untethered to actual facts and conditions at an operating transload facility – is sufficient to create a concrete, real world controversy that is an essential predicate for any declaratory order proceeding. Institution of a declaratory proceeding in this matter would upset the Board's precedent and prudent, settled practice of not considering moot issues and not opining on issues being considered by a court without that court's request to do so.

In short, supported only by speculation and imagination, the commenters ask the Board to convene a declaratory order proceeding, seeking the creation of an exemption from ICCTA's exclusive jurisdiction to allow unlimited local regulation of certain rail transloading facilities and activities. Given the very clear text of ICCTA's preemption provisions, the Board should proceed very cautiously, and convene a proceeding to evaluate such a request – if at all – only in the context of a real, present controversy that would allow careful fact-specific analysis. Without such an actual controversy, the requested declaratory order proceeding would be an abstract exercise. Any order issued from such a proceeding would provide neither clarity nor meaningful guidance for real world situations. Commenters' desires and speculation notwithstanding, a declaratory order proceeding is simply not appropriate here, because the Petition does not satisfy the indispensable threshold requirement of demonstrating the existence of a real, live, concrete

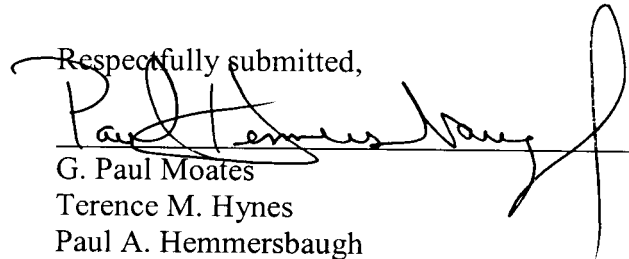
² None of the commenters offers any specific facts or factual allegations about the current state of operations at any NYS&W transload facility. In fact, NYS&W has made significant changes to its C&D transload operations over the last several months that eliminate potential environmental harm. As of January 1, 2006, (approximately one week from this filing), all of NYS&W's transloading operations for bulk C&D material will be conducted within covered buildings that surround and contain the C&D material and rail car loading operations. And, NYS&W will not to operate open-air C&D transload facilities in New Jersey in the future.

controversy. A declaratory order proceeding to consider a closed and dismantled NYS&W facility would be inappropriate, unwise, and unnecessary.

CONCLUSION

For the foregoing reasons and the reasons detailed in its November 14, 2005 Reply and its November 23rd Reply, NYS&W respectfully requests that the Board deny NSWMA's Petition for Declaratory Order.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul A. Hemmersbaugh", is written over a horizontal line.

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Dated: December 23, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of December 2005, I served the foregoing Reply of The New York, Susquehanna, And Western Railway Corporation by causing a copy thereof to be delivered by overnight courier to:

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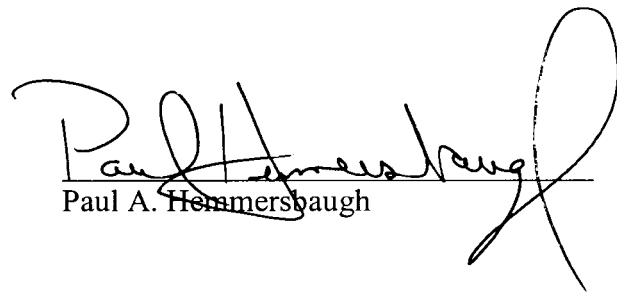
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