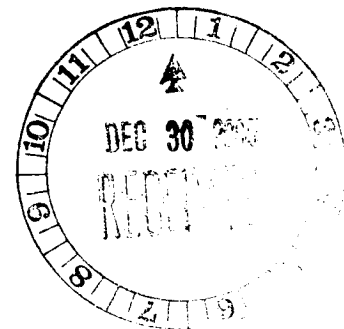


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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34776

**RESPONSE OF THE NEW YORK, SUSQUEHANNA, AND
WESTERN RAILWAY CORPORATION TO REPLY OF NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION**

**ENTERED
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DEC 30 2005

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Public Record**

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Dated: December 30, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34776

**RESPONSE OF THE NEW YORK, SUSQUEHANNA, AND
WESTERN RAILWAY CORPORATION TO REPLY OF NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION**

The New York, Susquehanna and Western Railway Corporation (“NYS&W”) respectfully submits this Response to the December 22, 2005 Reply of the National Solid Wastes Management Association (“NSWMA”). NSWMA and the other petitioners have asked the Board for a declaratory order finding that 49 U.S.C. § 10501(b) does not preempt state and local regulation of a NYS&W transload facility for construction and demolition material (“C&D material”) located at 16th Street, North Bergen Township, Hudson County, New Jersey (“16th Street Facility”) – a facility that is closed and has been dismantled. In its zeal to combat NYS&W’s arguments that a declaratory order proceeding is moot and inappropriate in light of ongoing district court litigation,¹ NSWMA has resorted to mischaracterizations of the facts and the law. NYS&W briefly responds to these mischaracterizations below.

I. NSWMA HAS MISCHARACTERIZED THE FACTS

NSWMA has mischaracterized the facts in several ways. First, NYS&W decided to close the 16th Street Facility before NSWMA filed its Petition, not as part of an effort to moot that Petition. NSWMA erroneously asserts – without a shred of evidence – that NYS&W closed the

¹ As NYS&W has previously advised the Board, the United States District Court for the District of New Jersey in *New York, Susquehanna and Western Railway Corp. v. Campbell* (Civil Action No. 05-4010 (KSH)) (“*NYS&W v. Campbell*”) is currently considering whether § 10501(b) preemption applies to the 16th Street Facility and four other NYS&W transload facilities in North Bergen, New Jersey. *See, e.g.*, NYS&W Reply at 5-8 (Nov. 14, 2005).

16th Facility in order to “manufacture mootness” and thereby evade this Board’s review. *See* Response of NSWMA to NYS&W’s Opp. to Pet. and Declaratory Order at 2 (Dec. 22, 2005) (“NSWMA Reply”). This accusation is not only false, it makes no sense, because NYS&W decided to close the 16th Street facility *before* it had any knowledge of NSWMA’s Petition. In a federal district court hearing held on October 24, 2005 – before NYS&W had been served with NSWMA’s Petition² – NYS&W informed the presiding judge in *NYS&W v. Campbell* that it had suspended operations at the 16th Street Facility, and further pledged that NYS&W would end all open-air C&D transloading in New Jersey by January 1, 2006. *See* Nov. 14, 2005 NYS&W Reply Ex. 1 at 46 (transcript of October 24 hearing). NYS&W’s mid-October decision to close the 16th Street Facility and all other open-air C&D transloading facilities in New Jersey could not have been motivated by a desire to render moot a declaratory order petition filed after NYS&W made that decision, and whose existence first became known to NYS&W on October 27, 2005.

NSWMA’s related allegation that NYS&W is “maneuver[ing] to prevent the Board from addressing the preemption issue” is also baseless. NSWMA Reply at 8. NYS&W initiated *NYS&W v. Campbell* in order to obtain a declaratory order and injunction predicated on the applicability of § 10501(b) preemption to five NYS&W transload facilities (including the former 16th Street Facility). Indeed, during proceedings in *NYS&W v. Campbell*, NYS&W suggested that the Court could refer the preemption question to the Board (a suggestion that the State of New Jersey opposed and the Court declined to follow). *See* Nov. 14 NYS&W Reply Ex. 1 at 53-54 (transcript of October 24 hearing).

² The certificate of service for NSWMA’s Petition indicates that a copy was mailed to NYS&W on October 25, 2005. NYS&W received the Petition on October 27, 2005.

Second, the record is clear that the 16th Street Facility has been permanently closed. As a result of a miscommunication, some limited operations were performed at the 16th Street Facility during the last week of October and the first week of November. In response, and to avoid any further confusion, NYS&W promptly wrote a letter to its shipper at the 16th Street facility, which expressly terminated the parties' contract and allowed the shipper and loader access to the closed facility only to the extent necessary to remove equipment and material from the former facility. See N. Fenno Letter (Nov. 4, 2005) (Exhibit 2 to Nov. 14 Reply). By November 9, the facility was permanently shut down. By December 12, the structures at the former 16th Street Facility had been dismantled and removed. See Ex. A (photograph introduced into evidence at December 12, 2005 hearing in *NYS&W v. Campbell*). In short, the public record amply demonstrates that NSWMA's insinuation that the 16th Street Facility may still be open is wrong.³

Third, NSWMA's accusation that NYS&W is engaging in "a cat-and-mouse game" of "quickly clos[ing]" facilities in order to "move[them] elsewhere" is false and irresponsible. See NSWMA Reply at 4. As review of NYS&W's filings in this proceeding alone (to which the NSWMA Reply purports to respond) make clear, NYS&W will have permanently terminated *all* open-air transloading of C&D materials by tomorrow, December 31, 2005. See, e.g., NYS&W Reply in Opposition to Petition at 7-9 (Nov. 14, 2005); NYS&W Response to NJDEP Reply at 3 (Nov. 23, 2005); NYS&W Reply to Comments at 3, n.1, 5, n.2 (Dec. 23, 2005). Far from opening new open-air facilities, over the last several months NYS&W has been engaged in an

³ NSWMA's reliance on the NJDEP's fleeting assertion that NJDEP had "been made aware" that operations resumed at 16th Street after October 24, 2005 is irrelevant. See NSWMA Reply at 3 (citing NJDEP Reply at 4, n.4). NJDEP does not presently contend that the former 16th Street Facility is in operation. Further, NJDEP has never claimed that facility operated after November 9, 2005, nor has it contested the fact that the former 16th Street Facility has been demolished.

orderly process of transition to covered facilities. *Id.* The other C&D transload facilities that NYS&W is operating are not “similar” to the open air facility formerly operated at 16th Street; on the contrary, they are within covered buildings that address state and local governments’ concerns about the potential environmental or public health impact of truck-to-rail C&D transloading.⁴

II. NSWMA MISUNDERSTANDS AND MISAPPLIES THE LAW

NSWMA’s Reply misstates the law in three ways: (1) by suggesting that a declaratory order proceeding does not require the Board to consider a specific, live factual context; (2) by arguing that the “voluntary cessation” and “capable of repetition yet evading review” exceptions to mootness apply here; and (3) by claiming that the Board’s precedents support the institution of a declaratory order proceeding even though the *NYS&W v. Campbell* district court has declined to refer the § 10501(b) preemption issue to the Board.

First, NSWMA’s suggestion that the Board issue a legal ruling despite the lack of a predicate factual dispute or record fundamentally misunderstands the nature and purpose of a declaratory order proceeding. Logically, the issuance of a declaratory order untethered to facts makes no sense. The entire purpose of a declaratory order proceeding is to resolve a controversy with respect to a specific real-world situation, not to issue an abstract pronouncement.⁵ Without

⁴ NSWMA incorrectly asserts that NYS&W’s November 14 submission to the Board “fail[ed] to mention” the fact that it operated other transload facilities that handled C&D materials, and implies that NYS&W was trying to conceal that fact from the Board. NSWMA Reply at 4. This is flatly wrong – NYS&W expressly and repeatedly informed the Board that it operated other facilities that transloaded construction and demolition material (“C&D”). *See, e.g.*, Nov. 14 NYS&W Reply at 6 (noting that NJDEP attempted to impose its regulations “at the 16th Street Facility and at four other truck-rail transload facilities operated by NYS&W”); *id.* at 7 (discussing plans to close 16th Street “and NYS&W’s other open-air transload facilities”); *id.* at 8 (discussing NYS&W’s “other open-air transload facilities in New Jersey”).

⁵ The Board may, of course, issue regulations of general applicability through notice-and-comment rulemaking proceedings where appropriate. The present Petition, however, seeks a declaratory order, not the institution of a rulemaking proceeding.

a concrete factual basis, a declaratory order is not only inappropriate, it would be meaningless and would not resolve anything.

The Board's legal authority to issue declaratory orders also embodies the common sense requirement of an actual, specific factual context or controversy. The Board is empowered to issue a declaratory order to "terminate a controversy or resolve uncertainty" 5 U.S.C. § 554(e); *see* 49 U.S.C. § 721. Here, Petitioner cannot seriously dispute that there is no live factual controversy regarding the former 16th Street Facility. Nor is there any uncertainty regarding the scope of ICCTA preemption with respect to activities at the former 16th Street Facility – there is no longer a transload facility or any activity at that location that might be subject to state or local environmental regulation. Because the former 16th Street Facility (which the Petition refers to in the singular, as "the Site" or "the Facility") is the only facility about which the Petition makes factual allegations, there is no fact-based uncertainty or factual controversy specified in the Petition that could support a declaratory order.

Second, NSWMA claims that a declaratory order proceeding would not be moot because of the "voluntary cessation" and "capable of repetition yet evading review" exceptions to mootness. *See* NSWMA Reply at 2-4. But NSWMA ignores the absence of essential elements of each of these narrow exceptions, neither of which can apply where the facility that is the basis of the Petition no longer exists. Initially, neither the "voluntary cessation" exception nor the "capable of repetition yet evading review" exception can revive an action that "became moot before the action commenced," as the instant Petition seeks to do. *Renne v. Geary*, 501 U.S. 312, 319 (1991); *see supra* at 1-2. Moreover, the "voluntary cessation" exception to mootness only applies when the party who ceased the specific activity at issue conceivably could resume it in the future. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envir. Servs., Inc.*, 528 U.S. 167, 189

(2000) (case is moot regardless of voluntary cessation when it is “absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur”). Here, the former 16th Street Facility has been shut down and dismantled – there is no likelihood that the conduct NSWMA complains about will recur at this site. Nor is it accurate for NSWMA to claim that NYS&W is “free to return to [its] old ways,” NSWMA Reply at 2, when NYS&W has pledged repeatedly to the District Court – and repeated that pledge in this proceeding – that it will cease all open-air C&D transloading by December 31, 2005. *See, e.g.* NYS&W Reply to Comments at 3, n.1, & 2 (Dec. 23, 2005).

Similarly, the “capable of repetition, yet evading review” exception does not apply here. That exception only pertains to activities whose very nature makes ordinary review impossible, *i.e.* where “the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration.” *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Because bulk material (including C&D) transloading is often conducted at the same facilities for years, it is not an activity that is inherently “too short to be fully litigated.” Thus, neither of the narrow exceptions to mootness that NSWMA relies on are relevant in this case, where the transload facility about which NSWMA complains no longer exists.

Third, NSWMA asserts that a declaratory order proceeding should go forward in spite of the pendency of the District Court action (filed months before the NSWMA Petition), and claims that such an overlapping proceeding would be consistent with the Board’s precedents. *See* NSWMA Reply at 5 (relying on Finance Docket No. 34662, *CSX Transp., Inc. – Petition for Declaratory Order* (Mar. 14, 2005) and Finance Docket No. 33971, *Joint Pet. for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA* (Apr. 30, 2001)). NSWMA ignores the critical distinction between the present case and the cases it cites: in both *Town of Ayer* and *CSX*

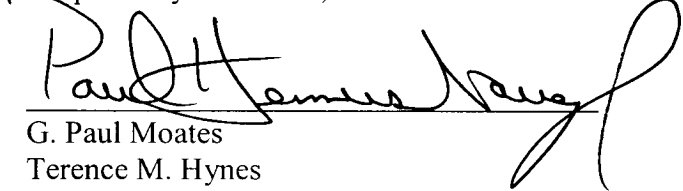
Transportation, the district court specifically expressed interest in obtaining the Board's views. Indeed, the District Court in *Town of Ayer* referred the ICCTA preemption issue to the Board. See *Town of Ayer, MA*, STB Finance Docket No. 33971 at 2. And the declaratory order in *CSX Transportation* was issued *after* the District Court indicated that it was interested in the Board's decision and that it looked forward to reviewing it. See Ex. B (Feb. 25, 2005 letter to Board in *CSX Transportation – Petition for Declaratory Order*).

In the present case, however, the District Court did not act on NYS&W's suggestion that it might refer the § 10501(b) preemption issue to the Board. Indeed, such a referral was expressly opposed by NJDEP, which also opposes NSWMA's request that the Board institute a declaratory order proceeding. When a district court "has made clear its desire to resolve the issues raised without referring the matter to the Board" – as the New Jersey District Court has here – the Board's consistent practice has been to refuse to exercise its jurisdiction to institute a declaratory order proceeding. See Finance Docket No. 34052, *Green Mountain R.R. Corp. – Petition for Declaratory Order* (May 28, 2002). NSWMA's assertion that issues in this case may have "national significance" – even if accurate, which is far from clear – is of no moment to the application of this principle. The purported "significance" of an issue does not warrant abandonment of the rule described in *Green Mountain*, which is designed to promote comity and to avoid inconsistent outcomes in cases where a District Court has chosen to resolve a Section 10501(b) preemption question itself. Moreover, the Board may wish to address similar preemption questions should they arise in a future declaratory order proceeding, but it should do so only in the context of a live, concrete, ongoing controversy and an adequate factual record – not in the abstract as Petitioner requests – to determine whether (or how) Section 10501(b) preemption applies.

CONCLUSION

For the foregoing reasons and the reasons detailed in its submissions of November 14, 2005, November 23, 2005, and December 23, 2005, 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 30, 2005

EXHIBIT A

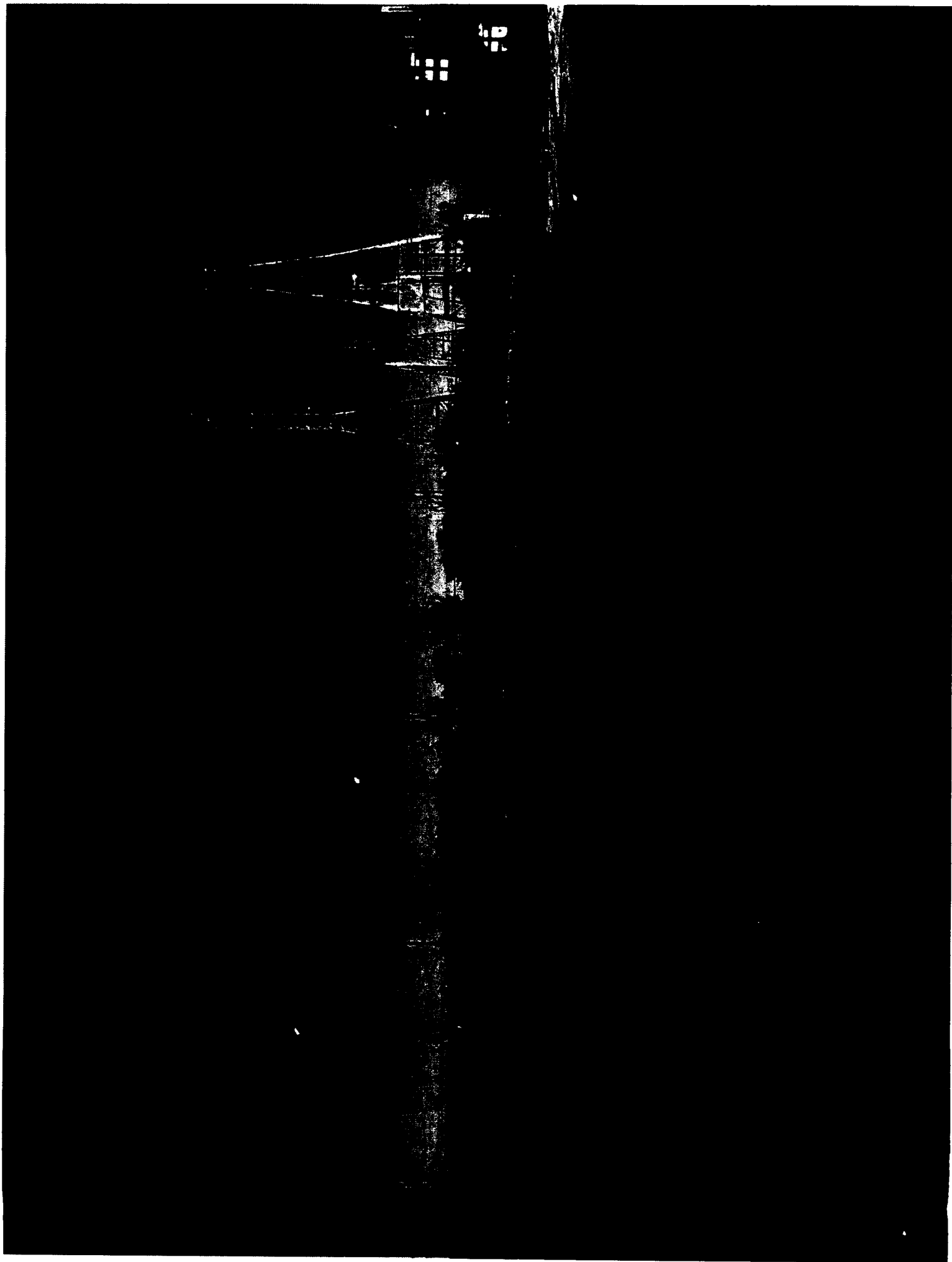


EXHIBIT B

213408

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February 25, 2005

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ENTERED
Office of Proceedings

FEB 25 2005

Part of
Public Record



Re: CSX Transportation, Inc. -- Petition for Declaratory Order, Finance
Docket No. 34662

Dear Ms. Hanson:

On behalf of our client, CSX Transportation, Inc. ("CSXT"), Petitioner in the above-referenced proceeding, we wish to inform the Board of a development that might bear on the Board's consideration of CSXT's Petition for Declaratory Order. Specifically, there was a hearing yesterday afternoon before the Honorable Emmet G. Sullivan in the United States District Court for the District of Columbia in CSX Transportation, Inc. v. Williams et al., Civ. No. 1:05-cv-338, an action in which CSXT seeks to have the Court enjoin enforcement of the same District of Columbia ordinance that is the subject of the Petition for Declaratory Order in Finance Docket No. 34662 on several grounds, including on the ground that the ordinance is preempted by the Interstate Commerce Commission Termination Act of 1995.

During the course of the hearing, the District committed that it would not seek to enforce the ordinance before April 11, 2005. The Court then set March 8, 2005, as the date for the filing of dispositive motions and March 23, 2005, as the date for the hearing on CSXT's Motion for a Preliminary Injunction. (Previously, when the case was assigned to Judge Huvelle, a hearing date of March 9, 2005 had been established.)

Also during the course of the hearing, there was some discussion of the pendency of the Declaratory Order proceeding before the Board, and Judge Sullivan inquired as to when the Board was likely to rule on the matter. When he was informed that CSXT had requested expedited handling of the Petition but that we were not in a position to know when the Board

Ellen D. Hanson
February 25, 2005
Page 2

might issue its ruling, Judge Sullivan indicated that the Court is interested in the Board's decision and that the Court looks forward to reviewing it when it has been issued. (In these circumstances, of course, the District's citation to Green Mountain Railroad Corporation – Petition for Declaratory Order, Fin. Docket No 34052 (May 24, 2002), as supporting the District's suggestion that the Board should not consider CSXT's Petition is wholly unavailing.)

Copies of this letter are being served upon all Parties of Record to Fin. Docket No. 34662.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Paul Moates", with a long horizontal line extending to the right.

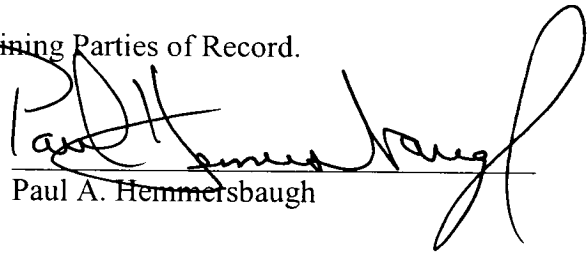
G. Paul Moates

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of December 2005, I served the foregoing Response of The New York, Susquehanna, And Western Railway Corporation to Reply of National Solid Wastes Management Association by causing a copy thereof to be delivered by overnight courier to:

Stephen M. Richmond, Esq.
Tina Y. Wu, Esq.
Beveridge & Diamond, P.C.
45 William Street, Suite 120
Wellesley, Massachusetts 02481-4004

and by first class mail, postage prepaid, to the remaining Parties of Record.



Paul A. Hemmersbaugh