

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34797

**NEW ENGLAND TRANSRAIL, LLC
D/B/A WILMINGTON & WOBURN TERMINAL RAILWAY
PETITION FOR EXEMPTION**

**REPLY COMMENTS OF
THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND THE NEW JERSEY MEADOWLANDS COMMISSION**

Pursuant to the decision of the Board served June 13, 2006, the New Jersey Department of Environmental Protection ("NJDEP") and the New Jersey Meadowlands Commission ("NJMC") are submitting their reply comments.

In their previous submissions in this proceeding filed January 27 and July 13, 2006, NJDEP and NJMC explained why the solid waste processing activities conducted at solid waste transfer stations that are located adjacent to rail lines do not constitute rail "transportation" as that term is defined at 49 U.S.C. §10102(9) and are accordingly neither subject to the Board's jurisdiction nor immune from federal, state or local environmental and safety regulation. In this reply, NJDEP and NJMC will address the separate comments submitted by the Association of American Railroads ("AAR") and the New York, Susquehanna and Western Railway Corporation ("NYS&W") that were filed July 13, 2006.

I. THE AAR APPROACH, SUPPORTED BY NYS&W, DOES NOT RESOLVE IMPORTANT ISSUES RELATING TO THE HANDLING OF SOLID WASTE SHIPMENTS

While a case-specific factual inquiry at times may be appropriate to determine whether a specific process is rail “transportation,” as the AAR suggests,¹ NJDEP and NJMC respectfully submit that under no circumstance would solid waste processing be integrally related to the movement of such solid waste by rail. Therefore, in no case would processing of solid waste be “transportation” as that term is defined at 49 U.S.C. §10102(9). AAR’s examples pertaining to the sampling or weighing of coal, testing for quality and moisture content of potatoes, blending petroleum coke and the inspection of automobiles (AAR Initial Comments at 4-5) arguably may be activities reasonably connected to rail transportation so as to fall within that definition. However, those activities have little in common with the processing activities contemplated by New England Transrail (“NET”) or practiced by the various parties seeking to avoid governmental oversight of their often hazardous operations.

The fact that ostensibly benign activities may take place at certain rail transload facilities is not a basis for the Board to conclude that it cannot or should not determine whether the processing of solid waste that has been described at length in the pending proceeding is jurisdictional rail “transportation” under the Interstate Commerce Commission Termination Act (“ICCTA”). Rather, the nature of solid waste processing activities is constant and does not require a case-specific analysis, as those activities will always be peripheral to rail transportation, and therefore, outside the scope of the

¹ In its Comments filed July 13, 2006, NYS&W also contends that “whether particular activities constitute ‘rail transportation’ subject to the STB’s exclusive jurisdiction . . . must be determined on the basis of the particular facts in each case.” See NYS&W Comments at 2-3. NYS&W also disputed -- to which NJDEP and NJMC respond *infra*, Point II -- certain statements that NJDEP and NJMC raised in their January 27, 2006 Comments.

preemption set forth at Section 10501(b). The processing of solid waste is not an activity that is integrally related to railroad transportation, and therefore, the fact-based inquiry, including whether environmental, health and safety laws are unduly burdensome, suggested by the AAR and NYS&W is unnecessary.

While the AAR appears reluctant to draw a line on the processing issue involving all commodities, several of its members that are directly involved in handling rail shipments of solid waste agreed that the type of activities proposed by NET ought not be considered traditional rail transportation subject to Section 10501(b). In comments submitted by CSX Transportation, Inc., Norfolk Southern Railway Company and Consolidated Rail Corporation at a Railroad Stakeholder's meeting in New Jersey, the carriers said:

In keeping with the general approach to preemption introduced above, we support granting a permit exemption solely to the transfer of shipments of solid waste between rail cars and other modes of transportation *without any tipping, sorting, compaction (except in connection with normal loading activities) or other processing*. Transfer activities are, in this form, considered to be traditional "transloading" operations. While we understand that others might draw the line to include a broader range of activities, we feel that this approach is better able to distinguish the exempt transfer of solid waste to and from rail cars from other waste management activities, without excluding the possibility that a broader range of activities also may be, in certain circumstances, preempted rail transportation activities.²

(Emphasis Supplied.)

² See Attachment 1, which was submitted to NJDEP when it was proposing to modify its environmental regulations in order to ease any undue burden on railroads and harmonize its regulations with the preemption provision of 49 U.S.C. §10501(b). This ultimately led to the promulgation of NJDEP's so-called Intermodal Regulations, codified at N.J.A.C. 7:26 – 2D.1 *et seq.*

NJDEP, NJMC and the large number of other state agencies and environmental organizations that have submitted comments in this proceeding are not seeking to inhibit the ability of legitimate railroads to engage in legitimate rail transportation. Rather, NJDEP and NJMC are urging the Board to clarify that solid waste processing activities – not the myriad of other activities wholly unrelated to solid waste transfer operations that AAR listed – are activities in the realm of solid waste handling, not rail transportation. Such activities by their nature present risks to the environment and the public health and safety and therefore, are validly subject to State and local regulation.

The issues raised by NET's proposed activities have nothing to do with the usual public concerns that at times may inhibit legitimate rail operations. Instead, they go to the heart of whether state and federal agencies can enforce the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, state solid waste management laws, and similar federal and state legislation essential to protect the public health and safety. The description of the processing that NET proposes to conduct makes manifestly obvious the fact that the processing activities have little or nothing to do with rail transportation. The only connection to rail transportation is that the waste product remaining after the processing will ultimately be transported out of the state by rail. In other words, NET's proposed activities are exactly the same as those provided at solid waste transfer stations all around the country. There is nothing so unique about this as to require that the Board desist from issuing clear guidance of its views of what is an extremely important topic with vast and potentially severe public health and safety consequences for local communities. Moreover, by issuing clear guidance, the Board

will help minimize the efforts made by solid waste profiteers to obfuscate the preemption issue in attempts to avoid necessary and valid oversight of their activities.

Subjecting the solid waste processing activities described by NET (and conducted at numerous other purported “rail transload” facilities) to the environmental and public health and safety regulations to which all other solid waste transfer stations must comply is not unduly burdensome to the operator; clearly, those facilities that are not somehow connected with railroads are able to comport their activities with the relevant regulations. This is not a matter of compelling railroads to bow to the inappropriate and burdensome “whims of local regulation and control”; it is a matter of ensuring that the well-catalogued abuses of the preemption provision of 49 U.S.C. §10501(b) do not continue and proliferate. Indeed, even the AAR recognizes and agrees that the misuse of the preemption provision in §10501(b) has led to numerous abuses by putative railroads. (*Id.* at 5-6.) Hence, against the background of this pending proceeding and the growing number of controversies (and litigation) pertaining to the handling of solid waste, there is ample reason for the Board to act now to resolve an immediate, compelling and important controversy and determine whether the processing of solid waste is a matter exclusively within the Board’s jurisdiction as argued by NET (and other parties, such as the NYS&W).

The AAR suggests that the Board can better address this issue in Ex Parte No. 659, *Public Participation in Class Exemption Proceedings*. In that proceeding, the Board is proposing to modify several class exemption regulations in response to the fact that a number of companies engaged in the solid waste business have misused the Board’s processes to become railroads (usually, in order to take advantage of the preemption

provision in §10501(b)). While the issues are sometimes related, Ex Parte 659 is nonetheless an inappropriate vehicle to examine the jurisdictional issues raised by the Board's order in this case served June 12, 2006, for a number of reasons.

First, in Ex Parte 659, the Board is proposing only to modify the time frames by which various Notices of Exemptions become effective. The only foreseeable outcome of that proceeding is that the public will have a bit more time to ascertain whether an applicant will be a bona fide railroad. While that is an important step to curb abuses, it will not even address the question of whether the processing of solid waste necessarily falls within the definition of rail "transportation".³

Second, as it is clear that Ex Parte 659 does not presently encompass the processing issue involved here, using that proceeding for this additional purpose would unnecessarily delay the resolution of a topic that has become increasingly important. In addition, the arguments concerning this issue have now been thoroughly raised by the various interests, so that there is no reason for the Board to start over, waste the resources that have already been expended and indefinitely postpone resolution of how the agency interprets the word "transportation" in this factual context.

Finally, Ex Parte 659 is only intended to address issues relating to the formation of new railroads. As such, that proceeding will not affect the activities of existing railroads such as NYS&W or JP Rail, both of whom have taken the position in numerous litigations pending in state and federal courts that all processing of solid waste conducted under the purported supervision of a railroad is preempted from all federal and state

³ Nor does Ex Parte No. 659 purport to revisit the so-called *Effingham* doctrine, by which the Board indicated that even exempt spur or industry yard tracks could constitute a line of railroad for a putative rail carrier if it was the entire system of that new entrant. See STB Docket No. 41986, *Effingham Railroad Company - Petition for Declaratory Order - Construction at Effingham, IL* (Decision served September 12, 1997 and September 18, 1998; not published).

regulation. While those arguments are fundamentally incorrect, they are raised repeatedly in attempts to forestall or at least delay essential state oversight over the environmentally damaging activities that are often conducted at their "transload" facilities.

Accordingly, while NJDEP and NJMC are mindful of AAR's concern that legitimate rail activities not be inappropriately regulated, determining that the processing of solid waste is not transportation within the meaning of section 10102(9) of ICCTA will not unduly or inappropriately burden those operations. On the other hand, it is critical for the industry, state and local governments, interested environmental groups and the courts that the Board act promptly to provide its view on this subject.

II. NYS&W'S ASSERTIONS ARE INACCURATE AND MISLEADING

In its July 13 submission, NYS&W also took issue with the comments filed January 27, 2006 by NJDEP and NJMC pertaining to that railroad's activities involving the handling of solid waste. A reply to NYS&W's submission is necessary to present a clear record to the Board regarding the real and mounting problems raised by solid waste operators that engage in solid waste activities but append themselves to a rail carrier in an attempt to claim preemption under Section 10501(b) of the ICCTA. NYS&W's comments demonstrate why the Board's clear guidance on the issue of solid waste processing being peripheral, not integral, to rail transportation is necessary.

First, contrary to NYS&W's contention (Comments at 1-2) that the Intermodal Regulations are burdensome, those regulations set forth the minimal obligations to which a rail carrier that handles solid waste in New Jersey must abide precisely because solid waste is a unique commodity that raises specific public health and safety concerns. By

asserting that the regulations are unduly burdensome on their face – even though the regulations impose no pre-approval or permitting requirements upon rail carriers and require only that the facilities comply with basic operational standards necessary to protect the health and safety of the public as the State and local regulatory authorities are charged with doing – NYS&W is tacitly arguing that the ICCTA preempts *all* state and local regulation.⁴

This overly broad view espoused by NYS&W is precisely why solid waste operators have aligned themselves with certain rail carriers and created the problem facing many States and local communities today. *And* this contention flies in the face, *inter alia*, of Chairman Buttrey's testimony before the Railroads Subcommittee of the House Committee on Transportation and Infrastructure on May 23, 2006 concerning H.R. 4930 (Attachment 2, at p. 4). Among other things, the Chairman observed:

While a literal reading of Section 10501(b) would suggest that it preempts all other law, neither the Board nor the courts have interpreted the statute in that manner. Rather, where there are overlapping federal statutes, they are to be harmonized, with each statute given effect to the extent possible. This is true even for federal statutory schemes that are implemented in part by the states, such as the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act.

NYS&W also erroneously asserts that it is in voluntary "substantial" compliance with the Intermodal Regulations. While certain of the facilities being used for this

⁴ Although it is not necessary to reach that issue here, NJDEP and NJMC have explained, in the comments they initially filed on January 27, 2006 in this proceeding, why Section 10501(b) does not preempt state enforcement of the environmental and public health and safety laws, such as those mentioned by Chairman Buttrey. (See NJDEP/NJMC Comments filed January 27, 2006 at 15-26.) It is interesting that NYS&W has elected not to respond to that argument or to otherwise explain to the Board in its Comments why it believes that NJDEP's Intermodal Regulations are somehow preempted by Section 10501(b). Nor did it explain why CSX, Norfolk Southern or Conrail were wrong when those parties expressed their views that the proposed Intermodal Regulations were actually rather conservative. (Attachment 1 at 4-5).

purpose have finally been renovated or constructed to at least partially enclose incoming solid waste, fundamental problems persist at the facilities, including inadequate wastewater systems, ineffective air system controls and dust control systems, large piles of waste that do not move out in a timely manner, and no fire control/suppression measures or systems. (See Attachment 3, which is the Verified Statement of John Castner in Response to the Comments of NYS&W.)

One basic underlying concern of NJDEP and NJMC is the uncertainty that the facilities were constructed in accordance with the basic requirements of the Uniform Construction Code. *Id.* Similarly, due to NYS&W's refusal to comply with a Stipulation of Settlement that it voluntarily entered into with NJMC in 2001, the railroad was enjoined on July 21, 2006 from further construction activities at its 43rd Street solid waste transfer facility. The railroad was further required to comply with all requirements of that Stipulation of Settlement.⁵

Second, NYS&W points out, correctly, that three of the transload facilities challenged by NJDEP and NJMC in the pending litigation in the federal district court were closed prior to the end of 2005. Not surprisingly, NYS&W neglected to reveal that these closures took place only after: (1) NJDEP asserted its regulatory authority over the unsafe conditions posed by certain facilities (See Attachment 3 at 7), and (2) the stark photographs appended to Mr. Castner's January 27 Statement (showing enormous piles of solid waste stored and processed in open air dumps) were viewed by the Court at the

⁵ Attachment 4 is the order issued by Judge Olivieri in *New Jersey Meadowlands Commission v. The New York, Susquehanna and Western Railway Corporation*, Civil Action No. C-13606 (Sup.Ct.N.J.). As relevant here, the Stipulation of Settlement required NYS&W: first, to submit engineering and other design plans so that NJMC is able to determine whether any proposed solid waste transfer facility would comply with its regulations and, second, to comply with certain fire, health, plumbing, safety and construction requirements.

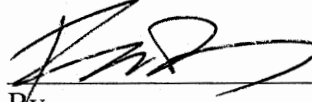
outset of the litigation in *New York, Susquehanna and Western Railway Corp. v. Jackson, et al.* (Civil Action No. 05-4010)(D.N.J.)⁶

In short, neither NYS&W nor any other railroad or solid waste entrepreneur can properly claim – or should be allowed to claim – to be the sole arbiter of the degree to which it will comply with essential and valid environmental and public health and safety regulations. Yet, by continuing to wave the banner of Section 10501(b), some railroads and other parties have misused that provision in efforts to maximize short-term profits while subjecting the public to serious environmental and other health and safety risks. Thus, it is not the NJDEP, NJMC and other environmental regulatory agencies that are threatening the type of railroad operations Congress had in mind when enacting the ICCTA. Instead, it is the activities of NYS&W and other similarly motivated parties that jeopardize the continued existence of the preemption provision through unwarranted and unsafe overreaching. By clearly placing a limit on the jurisdictional reach of the term “transportation” in this proceeding, the Board will go a long way toward restoring the equilibrium that should exist between legitimate preemption claims and essential state and local oversight of the solid waste industry.

Accordingly, NJDEP and NJMC again urge the Board to issue a clear statement that the processing of solid waste is not rail transportation within the meaning of Section 10102(9). Such Board action is necessary to end the enormously burdensome, wasteful and expensive litigation engendered by parties trying to cloak their activities with immunity from meaningful environmental or health and safety regulation.

⁶ In temporarily restraining the State from enforcing the Intermodal Regulations, the Court sought to maintain the status quo and stay the administrative proceedings; the Court made no comment or otherwise asserted any position regarding the validity of the NJDEP’s Intermodal Regulations. The Court has now established a briefing schedule for its decision on this legal issue with final briefs to be submitted by the parties on October 27, 2006.

Respectfully submitted,



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Dated: August 2, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of August, 2006, served a copy of the foregoing Supplemental Comments of The New Jersey Department of Environmental Protection and The New Jersey Meadowlands Commission on the following persons listed below via first-class mail, postage pre-paid:

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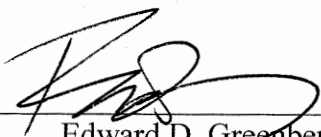
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Attachment 1

**COMMENTS OF CSX TRANSPORTATION, INC., NORFOLK SOUTHERN RAILWAY
COMPANY AND CONSOLIDATED RAIL CORPORATION ON NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION DRAFT REGULATIONS RE
RAILROAD SOLID WASTE TRANSFER ACTIVITIES**

Presented at:

Railroad Stakeholder's Meeting

March 12, 2003

The following comments address the draft regulations regarding the transfer of solid waste to and from rail carriers provided by the New Jersey Department of Environmental Protection (Department) to a stakeholder group consisting of railroad industry representatives. These comments are submitted on behalf of CSX Transportation, Inc. (CSX), Norfolk Southern Railway Company (NS) and Consolidated Rail Corporation (CONRAIL and collectively with CSX and NS, the Rail Companies).

At the outset, the Rail Companies applaud the Department for its efforts to address the unique issues raised by the application of New Jersey's solid waste regulations to rail transportation. As our comments reflect, the interstate commerce and uniquely federal aspects of rail regulation present difficult issues for state regulatory agencies seeking to find the proper balance between the exercise of state and federal authority. Integrating these considerations with New Jersey's state transportation policies which include promoting the increased use of rail service in lieu of trucks for the transportation of freight to alleviate highway congestion, creates further regulatory challenges. The Department's draft proposal evidences thoughtful consideration of these important issues.¹

The Rail Companies appreciate and thank the Department for the opportunity to provide input into the development of these regulations through the stakeholder process - both through discussion of the regulations at the March 12, 2003 railroad stakeholder meeting and through the submission of these written comments on the draft regulations. In keeping with the open nature of the exchange, the Rail Companies have approached the process as a candid and constructive exchange of views directed at working with the Department to improve the regulations and minimize the likelihood of future disputes; however, in order to foster this type of exchange at this preliminary stage of the regulatory process, we submit these comments with full reservation of our right to take the position that any particular state requirement is preempted by federal law in connection with any future proceedings.

Overview

The Rail Companies view this "fresh look" at state regulation of rail transportation of solid waste as being driven by two principal forces: (1) the growing body of federal preemption cases under the Interstate Commerce Commission Termination Act (ICCTA) and (2) the policies promoting freight transportation by rail in lieu of truck to reduce traffic congestion and improve transportation efficiency as reflected in Governor's McGreevey's recent Executive Order #43 (EO 43). The former reflects a strong Congressional intent to remove barriers to rail transportation and the latter reflects an acute concern that the state's highways are being increasingly congested by long and short haul truck traffic, the alleviation of which will promote quality of life, improve highway safety and result in environmental and energy benefits such as

¹ While this rulemaking addresses the preemptive effect of federal law on state solid waste facility permitting, construction and operational requirements, we believe that preemption applies equally to such issues as the solid waste licensing scheme (A-901), state hazardous waste permitting and fee assessment requirements, and state hazardous materials fees.

reduced air emissions and reduced fuel consumption. The following two sections briefly summarize how we perceive these two drivers as affecting the formulation of these regulations.

Federal Pre-emption of Rail Transportation

With respect to federal preemption, the seeds of the Department's current rulemaking were planted in the 1995 passage of ICCTA which granted exclusive jurisdiction over transportation by rail carriers to the newly created federal Surface Transportation Board (STB).²

There followed a series of STB and court cases concluding that, when it comes to railroad regulation, state permitting requirements which set up legal processes that could frustrate or defeat railroad operations by giving a state or local entity the right to deny a carrier the right to conduct operations, impinge upon federal regulation of interstate commerce and are pre-empted. *See, e.g., North San Diego County Transit Development Board*, STB Finance Docket No. 34111 (August 19, 2002) (hereinafter "NSDCTDB"); *Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corporation*, 163, N.J. 446, 750 A.2d 57 (2000). These and other cases also indicate that state and local regulation of railroads is permissible to secure substantive compliance with state and local general police powers over health and safety provided that it does not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burden interstate commerce and provided further that the regulations are enforced in a non-discriminatory manner. *See Borough of Riverdale*, STB Finance Docket No. 33466 (Sept. 10, 1999); *NSDCTDB, supra*.

In developing its draft regulations, the Department has recognized the preemptive thrust of ICCTA as interpreted by the STB and the courts and provided for a broad permit exemption applicable to rail carriers engaged in solid waste transfer activities, though imposing a fairly

² ICCTA provides, in pertinent part as follows (49 U.S.C. §10501(b)(1) and (2)):

The jurisdiction of the [STB] 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 added]

ICCTA defines "transportation" to include (49 U.S.C. §10102(9)):

- (A) a locomotive car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
- (B) services related to that movement . . .

extensive set of operating requirements on rail carriers.³ While we agree with the conceptual underpinnings of the permit exemption, we would strike the balance somewhat differently by more narrowly defining the scope of the activities exempted to include those activities that are more clearly related to rail transportation, and at the same time applying a less extensive regulatory regime to rail transportation operations. The latter is justified by minimizing the types of activities that are in need of environmental controls, thereby reducing the environmental risk to be addressed and applying preemption principles to the narrowed scope of activities.

Transferring freight to and from rail and other modes of transportation is, and for many years has been, an important aspect of transportation by rail carrier, so much so that the term "transloading" has been coined to connote the activity.⁴ In the process, railroads have developed various transloading techniques that take account of the distinctive operational characteristics of transloading facilities and are equally applicable whether the material being transferred is a commodity or waste. These techniques can be readily carried out under a regulatory regime that (1) recognizes a permit exemption of appropriate scope with due regard for the applicable environmental imperatives which the Department is charged to oversee and (2) facilitates realization of the full range of public benefits of rail transport and avoids creating disincentives to rail usage.

State Transportation Policy - Rail Advantages

With respect to state transportation policy considerations, one of the principal premises supporting EO 43 is the importance of improving the transportation system so as to reduce congestion, enhance safety, and improve the quality of life. To this and other ends, among the six implementation directives issued to the New Jersey Department of Transportation (NJDOT) and other state transportation agencies in paragraph 5 of the order is the implementation of a "statewide rail plan designed to increase the efficiency of freight movement and thereby reduce the number of trucks on our highways". Under paragraph 7 of the Order, these same agencies are directed to expedite projects that "improv[e] rail freight services". As an initial step, the Department and NJDOT have recently announced an interdepartmental initiative to implement the Order by cutting through red tape within the Department and NJDOT in order to get critical transportation projects moving.⁵

The rail waste transfer rulemaking offers an excellent opportunity to advance these state transportation objectives. The contemplated changes to the Department's solid waste regulatory program, as modified in the manner suggested herein, will foster the use of rail transport of waste materials in lieu of trucks and thereby realize the significant advantages that rail offers as

³ When we refer to the "permit exemption", we include the proposed solid waste facility permit exemption for transfer stations and material recovery facilities as well as the exemption for "approval" of intermodal container facilities (ICFs) under N.J.A.C. 7:26-3.6.

⁴ In the STB's decision in *Hi Tech Trans*, STB Finance Docket No. 34192 (November 19, 2002), the STB recognized that the key to its decision rested on whether a particular activity constituted "transportation by rail carrier" and acknowledged that it, the Interstate Commerce Commission and the courts have recognized that transloading, including the transfer of waste from truck to rail at a rail transload facility, may be considered important to rail transportation.

⁵ See *McGreevey Administration Takes Action on "Fix it First"*, News Release, February 25, 2003. Although the press release focuses on bridge improvement projects, the concept has broad applicability to projects targeted by EO 43.

compared to trucks. For example, the increased use of railroads instead of trucks to transport solid waste will reduce highway traffic congestion and, because air emissions generated by trains are far less than those generated by trucks, the shift from truck to rail will result in improved air quality. The public would also derive significant non-environmental benefits from encouraging the transport of waste by rail rather than by highway, as rail transportation is historically safer than highway transportation and the reduction in truck trips will reduce wear and tear on the state's highway system and increase highway safety for the motoring public.

The following comments are directed at achieving these goals. They are organized in two general categories - first, those comments which are principally directed to issues involving preemption as applied to state pre-clearance or permitting requirements (also including district solid waste plan inclusion requirements) and second, those comments that are principally directed to preemption as applied to issues affecting environmental requirements that apply to railroad operations.⁶

Preemption of Pre-clearance Requirements

General

In keeping with the general approach to preemption introduced above, we support granting a permit exemption solely to the transfer of shipments of solid waste between rail cars and other modes of transportation without any tipping, sorting, compaction (except in connection with normal loading activities) or other processing.⁷ Transfer activities are, in this form, considered to be traditional "transloading" operations. While we understand that others might draw the line to include a broader range of activities, we feel that this approach is better able to distinguish the exempt transfer of solid waste to and from rail cars from other waste management activities, without excluding the possibility that a broader range of activities also may be, in certain circumstances, preempted rail transportation activities.⁸ The drawing of a more conservative line between exempt and non-exempt activities will limit the areas open to dispute, facilitate railroad operations and promote the use of rail as a meaningful alternative to truck transportation of freight in accordance with state transportation policy.

⁶ While the regulations and consequently our comments are directed at solid waste facility permits, preemption applies equally to the recycling facility approvals required under Chapter 2:26A. The regulations, when proposed by the Department, should address and provide an appropriate exemption for those facilities as well.

⁷ If the transloading facility is operated by a rail carrier (including through a contractual or agency relationship with a third party), the rail carrier and its agent or contractor should be exempt from state preclearance requirements on the basis of federal preemption for the reasons set forth above. This would address the typical circumstances surrounding NS's operations. If a transloading facility is operated by a corporate affiliate of a rail carrier, which is frequently the case with CSXT's operations, we see no reason why it should not also be exempt as a matter of the state transportation policies underlying EO 43. For business reasons, railroads handle their transloading operations differently, and to treat them differently for this reason would elevate form over substance and force a costly restructuring which would itself unreasonably burden interstate commerce. To the extent that the following comments applicable to rail carriers, their contractors and agents are expressly grounded in federal preemption, they should be read as applying equally to the rail carrier affiliate operation for the foregoing reasons.

⁸ For example, certain activities undertaken by a rail carrier incidental to transloading may be preempted even if the facility or operations failed to meet the narrowed requirements suggested herein. Nothing the Rail Companies are suggesting herein should be interpreted as precluding the assertion of ICCTA preemption in that or any other appropriate circumstance.

Utilizing this approach, the following types of solid waste transfer operations would fall under the permit exemption for rail carriers:⁹

- Transfer of solid waste from truck to railcar using mobile (or stationary) equipment that picks up the waste from the truck and places it directly into the railcar. This transfer operation would not involve the interim placement of waste on the ground. It may involve some limited compaction as the material is placed in the railcar, however that type of activity should not be considered to exceed the scope of the permit exemption.
- Transfer of liquid solid waste through piping or other direct connection (e.g., hose) from tank truck to tank car.
- Movement of waste material from truck to railcar via aboveground conveyer system.
- Tipping of truckloads directly into railcars.
- Transfer of sealed containers containing solid waste from truck trailer to rail flatcar (as discussed below, because this activity involves no waste handling whatsoever, but instead is simply the transloading of sealed containers, different considerations apply to whether and the extent to which any solid waste regulation is appropriate).

As these activities all involve the direct loading of a train from a truck (or vice versa) either in an enclosed environment or without placing the waste on the ground, they unquestionably fall within the scope of activities covered by federal preemption as well as being vital to the promotion of rail transport from a policy standpoint. In addition, the environmental risks associated with these activities are limited. In light of the foregoing, we are proposing the inclusion of more limited operational requirements in the operational portion of our comments.

Specific Preemption/Permit Exemption Issues

In addition to the general approach set forth above, we note the following specific issues with regard to preemption:

N.J.A.C. 7:26-2D(b) - Transfer of solid waste in sealed containers (hereinafter sometimes referred to as intermodal container or "IC" transfer) is part of the uninterrupted transportation of waste materials in interstate commerce, the permitting (or other approval) of which should be fully exempted. Because no waste handling activities take place, no operational requirements are necessary or appropriate under the state's police power.

A broad exemption for IC transfer activities is also justified because what little environmental risk may exist can be addressed by regulations applicable to non-rail solid

⁹ These examples deal with movement from truck to train; however they are equally applicable to movements in the other direction or involving other modes of transportation.

waste transporters and processors without encumbering railroad transportation. Under the draft regulations, a processor that fills and transports sealed intermodal containers before delivery to an exempt facility is subject to regulation pursuant to the Solid Waste Management Act. Therefore, by regulating that processor and transporter, the State is able to regulate the physical condition of sealed solid waste containers in order to minimize the likelihood that solid waste could spill, leak or otherwise be released. Additionally, by requiring that the containers be sealed, the risk of odor, dust, disease vectors or other concerns that form the basis for the draft operating regulations regarding IC transfer activities (N.J.A.C. 7:26-2D(b)) can be fully addressed.

N.J.A.C. 7:26-2.1(c)1 - The basic permit exemption for rail waste transfer activities set forth in this section applies to a "rail carrier as defined in 49 U.S.C. §10102". Although this is also an area where there might be room for disagreement, we are prepared to support this "scope" as long as it is understood that the transfer operations are almost always performed through contractors, agents and affiliates and the permit exemption includes these parties within its scope. If not, the exemption will not achieve the salutary policy objectives described above without a major and extremely costly restructuring of the way that railroads do business which would unreasonably burden their transportation operations. Therefore, for purposes of clarity, we propose that the wording of the exemption provide that the exemption apply to a "rail carrier as defined in 49 U.S.C. §10102, its agents, contractors and affiliates."

This section also provides that although rail transloading operations are exempt from permitting requirements applicable to the transfer of solid waste to or from rail cars, they are not exempt from regulation pursuant to the Solid Waste Management Act and shall be subject to the provisions of N.J.A.C. 7:26-2D. Because obtaining a permit is a requirement of the Solid Waste Management Act, this regulation is internally inconsistent. It should be modified to reflect that the rail transloading operations are subject to only those requirements of the Solid Waste Management Act which are within the scope of the state's police powers as set forth in subchapter 2D.

N.J.A.C. 7:26-2.1(c)1; 7:26-2D(b); 7:26-2D(c)1 - As presently drafted it is unclear whether the permit exemption applies only to transfer activities at a facility owned by the same rail carrier that is engaged in the transloading activities.¹⁰ If it was the Department's intent to limit the exemption to transfers by the rail carrier in the rail carrier's own facility, we do not see the basis for the requirement. If the rail carrier's activity (loading or unloading a railcar) is preempted, it should not be necessary that the activity take place on the property of the rail carrier.¹¹ Of equal importance, in practice, transloading may take place on property owned by an entity other than the rail carrier. Therefore

¹⁰See, e.g., N.J.A.C. 7:26-2D(b) which specifies requirements applicable to "a rail carrier that engages in transportation [sic] of solid waste at a facility owned by such rail carrier"; 7:26-2D(c)1 which stipulates that "the rail carrier facility shall be operated in accordance with the following ..." without providing a definition of "rail carrier facility"; contrast 7:26-2.1(c)1, which contains the basic exemption for rail carriers that transfer waste to or from rail cars, but makes no mention that the activity must take place in the rail carrier's facility and 7:26-2D(c)2 which applies to "every facility owned or operated" by the rail carrier.

¹¹There is no ICCTA requirement that the depot, yard or ground be owned or operated by the rail carrier. 49 U.S.C. § 10102(b).

conformance with the Department's approach would necessitate a costly and inefficient restructuring of ownership relationships throughout the industry. We propose that any requirement that the rail facility be owned by the rail carrier be eliminated.

N.J.A.C. 7:26-2.1(c)2 - The draft regulations specify that the exemption does not apply to a solid waste transporter transporting waste to a rail carrier and that such a transporter remains subject to district plan solid waste flow control provisions. We do not oppose that approach for present purposes; however, it should be made clear that the exempted transload facility should not have to be included in the district solid waste management plan of the county in which the facility is located as a precondition to facility operations. Like state permitting requirements, this requirement imposes a pre-clearance requirement on the operation of the facility that is preempted by federal law.¹²

N.J.A.C. 7:26-2D(c)2 - Rail carriers should not be put in the role of monitoring delivery of waste to substantiate compliance with the waste flow system. The waste transfer activities that are addressed under these regulations, particularly as narrowed by our proposed changes, are part of the transportation process itself and N.J.A.C. 7:26-2D(c)2 recognizes this ("the rail carrier shall comply . . . at each and every facility owned or operated by it . . . which is engaged in transportation of solid waste . . ."). Nowhere else in the solid waste management system is a transporter obligated in the midst of waste transportation to police flow control or otherwise monitor the waste flow system by recordkeeping and reporting requirements. This is legitimately a function of landfills, waste transfer stations, etc. where waste transportation reaches an endpoint. In contrast, imposition of this policing obligation on transportation by rail carrier is an undue interference with the rail transportation process that is not required in other transportation contexts and is preempted. Elimination of this requirement will also advance state transportation policy by eliminating unnecessary recordkeeping and reporting, thereby improving the efficiency and attractiveness of rail transport.

N.J.A.C. 7:26D(b)2.i; 7:26D(c)1.xxiv - Several sections in the draft regulations deem facilities at which waste is stored in excess of permissible time periods as "unpermitted solid waste facilities". In addition, the preamble to the draft regulations states that the Department reserves the right to revoke an exemption "if an exempted rail carrier does not comply with the applicable solid waste regulations or district flow control requirements." These statements are inconsistent with the notion that the state is preempted from imposing permitting requirements. In light of the fundamental nature of preemption, the state is without authority to take enforcement action on the grounds that a facility is "unpermitted" or to revoke an exemption where it is preempted from requiring a permit in the first instance. This does not mean that the state does not have other options to redress violations of regulatory requirements that are within the scope of its police powers - only that it may not enforce on the grounds that a facility is not permitted or revoke a permit exemption for a permit which it had no authority to require in the first instance.

¹² We reserve any objection to the overall waste flow control scheme as violative of the Commerce Clause.

Operational Regulations

As indicated above, although pre-clearance approval requirements are preempted, the STB and court cases recognize a legitimate role for limited, reasonable state police power regulation of transloading operations for the purpose of securing substantial compliance with its regulations. With respect to the subject matter of the Department's jurisdiction, those requirements should be limited to matters that are reasonably related to the protection of public health and the environment. To that end, requirements such as notice as to facility location and operations, fire safety, wastewater control, spill reporting and similar requirements are appropriate subjects of Department regulations as applied to transloading operations. Other requirements that are not directly related to waste transloading (as distinguished from other types of transloading operations) are viewed as preempted interference with railroad operations, e.g., noise control (which is subject to federal requirements), recordkeeping and reporting, off-site highway queuing controls and other matters addressed below.

In the following sections, we present comments on specific operational requirements premised on preemption as well as due consideration for state transportation policy objectives taking into account the narrowed scope of the permit exemption that is advocated above.

7:26-2D(a), (b) - As discussed above, an IC transfer operation should be fully exempt from the permitting and operational requirements of the Solid Waste Management Act, as discussed above. The Rail Companies can provide notice as to facility locations and a general description of facility operations, as these requirements do not appear to unreasonably burden the movement of sealed containers in commerce.

7:26-2D(c) - The Rail Companies acknowledge that, unlike IC transfer, the transloading of uncontainerized waste may give rise to environmental and health concerns and regulation of this activity may be permissible pursuant to the State's police power to the extent such regulations are narrowly and reasonably tailored to avoid impermissible interference with rail transportation.

7:26-2D(c)(1)(i) - The requirement to conduct transloading activities within the confines of an enclosed building that complies with all requirements of the Uniform Construction Code exceeds the scope of the Department's legitimate police power concerns in view of the narrower permit exemption concept advocated by the Rail Companies. In this context, transloaded materials have only minimal contact with the environment as they are moved from one container to another, without contacting the ground and without remaining for any significant period of time outside of a container. Additionally, due to the nature of the equipment involved in transloading operations, it would be extremely costly and logistically challenging to build an enclosed building large and versatile enough to accommodate trucks, rail cars, cranes, backhoes, front-end loaders or other similar heavy equipment, conveyor systems or such other systems as may be used to transload these materials. The limited environmental concerns raised by transloading operations can be readily addressed in a far less costly manner, e.g., through compliance with applicable air pollution control requirements for fugitive dust control and stormwater and wastewater management requirements as may be appropriate and reasonable pursuant to the state's police powers. This approach would address

environmental risks consistent with federal pre-emption and state transportation policy aimed at removing (or avoiding) impediments to rail transportation.

7:26-2D(c)(1)(ii) - In view of the narrower exemption for transloading operations proposed by the Rail Companies, the requirement to have a concrete "tipping" floor is not appropriate, as waste would not be put on the ground as part of transloading activities covered by the proposed exemption. Nevertheless, to the extent that wastewater could spill or drip from waste as it is transloaded, a regulatory requirement to utilize an impermeable ground surface in the area where transloading activities take place to ensure proper containment and channeling of wastewater and constructed to withstand heavy vehicle usage may be permissible. Such a floor should not be termed a "tipping floor," as tipping activities would not fall within the permit exemption as we propose.

7:26-2D(c)(1)(iii) - Because normal transloading operations may generate wastewater, e.g., in connection with washout and cleaning of equipment and containers, the requirement to utilize a system to collect, store and properly dispose of wastewater, may be permissible under the State's police power.

7:26-2D(c)(1)(iv) - Transloading activities covered by the permit exemption will not involve the deposition or storage of uncontainerized solid waste. Therefore, a requirement to clean the area where waste has been deposited or stored is unnecessary.

7:26-2D(c)(1)(v) - With the exception of fully sealed intermodal containers, it is not expected that normal facility transloading operations would require the storage of waste overnight. Moreover, in the unlikely event that waste that is not in sealed containers would remain at the facility overnight; it would only be stored in the source or destination container, and not on the ground. Nevertheless, the Rail Companies recognize the potential for odors from the source and destination containers and acknowledge the potential need to control such odors for certain wastes. Therefore, the requirement to effectively treat waste to be stored overnight to prevent odors associated with putrefaction may be a permissible operational requirement under the State's police power.

7:26-2D(c)(1)(vi) - Maintaining the facility property surrounding the actual waste management area free of litter, debris, and accumulations of waste and effluents may be a reasonable requirement (depending upon the nature of that regulation and the enforcement mechanisms used by the Department); however, because there will be no processing under the permit exemption, unprocessed waste and process residuals will not be accumulated and should therefore not be referenced in these regulations.

7:26-2D(c)(1)(vii) - In view of the narrowed permit exemption proposed by the Rail Companies, controlling the migration of dust offsite should be sufficient to protect against any foreseeable harms and therefore satisfy any police power concerns that may arise. Existing dust control requirements applicable to transfer stations under the Solid Waste Management Act require only the prevention of offsite migration of dust. To the extent the requirements applicable to rail transloading facilities with respect to dust

control go beyond what is required at non-rail facilities, those requirements discriminate against the former and are therefore preempted.

7:26-2D(c)(1)(viii) - In light of the narrowed permit exemption proposed here, the narrowed scope of permissible activities and the proposed elimination of the enclosed building requirement, compliance with N.J.A.C. 27:5.2(a) should be sufficient to protect against any foreseeable air pollution harms and therefore satisfy any police power concerns that may arise from odor or other air pollution issues.

7:26-2D(c)(1)(ix) - The Rail Companies acknowledge that the maintaining an adequate water supply and fire-fighting equipment to extinguish any and all types of fires and to keep fire-fighting procedures, including telephone numbers of local fire, police, ambulance and hospital facilities posted within the facility may be permissible police power regulations that will not unduly interfere with rail transportation.

7:26-2D(c)(1)(x) - The Rail Companies acknowledge that the controlling insect, other arthropods and rodents at the facility, depending upon the nature of waste handled, may be a permissible police power regulation that will not unduly interfere with rail transportation.

7:26-2D(c)(1)(xi) - The operation of computerized scales for the reporting requirements of N.J.A.C. 7:26-2.13 does not appear to be reasonably related to the protection of public health and the environment and has the potential to substantially interfere with rail transportation. The operation of computerized scales is intended to monitor compliance with the waste flow management system. As such it uniquely and unnecessarily imposes this obligation in the midst of waste transportation (see discussion re N.J.A.C. 7:26-2D(c)2 at p. 7 above) and discriminates against rail carriers as opposed to other types of transporters do not have similar obligations. Therefore, the requirement to operate computerized scales does not appear to be a legitimate exercise of the State's police power in this present context.

7:26-2D(c)(1)(xii) - Any health or environmental concerns addressed by the obligation to ensure that the facility's onsite roadways and storage areas have a concrete or asphalt paving in those areas subject to vehicle loading and unloading are adequately addressed by 7:26-2D(c)(1)(ii), (iii) and (vii). The additional requirements under this regulation would also require costly improvements at rail yards (without concomitant benefits) thereby increasing the cost of and raising the burdens to rail transportation, and are preempted.

7:26-2D(c)(1)(xiii) - The prohibition against queuing and staging of solid waste vehicles on a public roadway does not appear to implicate any significant environmental concerns related to rail transloading activities and would impose an impermissible and unrelated (to transloading) administrative burden on such activities by requiring the policing of off-site activities of shippers delivering waste for rail transport. Further, a rail carrier's common carrier obligations would preclude it from turning away these vehicles. To the extent a valid police power concern may exist, that concern should be addressed in a less burdensome manner, e.g., by imposing a prohibition against queuing and staging on a

public roadway on the solid waste vehicles themselves, rather than on the rail transloading facility.

7:26-2D(c)(1)(xiv) - Traffic flow issues internal to the transloading facility are no different for waste-containing vehicles than for non-waste containing vehicles. Imposition of substantial regulatory burdens would, in either event, impermissibly interfere with interstate commerce.

7:26-2D(c)(1)(xv) - New Jersey's noise control regulations are preempted with respect to the activities of a rail carrier. Rail noise at a waste transloading facility will not differ to any significant degree from such noise attendant to typical railroad operations at other yards and transloading and intermodal operations throughout the country.

7:26-2D(c)(1)(xvi) - It does not appear that the requirement to admit only registered solid waste vehicles displaying a registration number and solid waste decal implicates any environmental concerns with respect to the operation of a transloading facility. This requirement may be appropriate where wastes are being handled, e.g., at a landfill or transfer station; however, transloading does not involve such waste handling activity and by its nature would be unreasonably burdened by this requirement. In addition, limitations on access to rail transportation are inconsistent with common carrier obligations. To the extent a valid police power concern may exist, it should be clarified that the facility may rely on solid waste decals and registration numbers that appear, on their face, to be valid. The facility should not be required to verify these indicators.

7:26-2D(c)(1)(xvii) - The justification for designating a separate, secure area for transloading from exempt vehicles or vehicles in need of manual unloading is not present at a transloading operation which does not engage in tipping, sorting, compaction and other processing.

7:26-2D(c)(1)(xviii) - The meaning of this provision is unclear. As written, the provision appears to require that, to the extent that a rail carrier elects to accept asbestos containing waste material, it "may" establish a separate secure area for drop-off and/or transfer of such waste, but must ensure that the container used for drop-off and/or transfer is fully enclosed (i.e. sealed) and located on an impermeable surface and that only facility personnel or a licensed commercial asbestos removal contractor load such waste into the container used for drop-off and/or transfer. Did the Department intend to require compliance with these requirements in all instances where a rail carrier chooses to accept asbestos waste for transportation? Pending clarification, the Rail Companies reserve the right to comment on this regulation.

7:26-2D(c)(1)(xix) - The Rail Companies reserve comment on this proposed regulation.

7:26-2D(c)(1)(xx)(1) - The Rail Companies do not anticipate storing ID72 waste at transloading facilities. Nevertheless, the Rail Companies request further clarification of what constitutes "storage" and what constitutes a "container," as rail transloading operations should not be precluded from allowing, if necessary, trucks or rail cars to remain on-site at a transloading facility until transloading is completed with respect to

that truck or car. While these trucks and rail cars should be considered acceptable containers for the purposes of limited "storage" until transloading is complete under this regulation, they should not be deemed "containers" such that secondary containment requirements apply pursuant to 7:26-2D(c)(1)(xx)(3).

7:26-2D(c)(1)(xx)(2) - The Rail Companies do not anticipate ID72 waste will be stored at transloading facilities. Nevertheless, when trucks or rail cars remain on site at a transloading facility until transloading is complete and to the extent that this constitutes storage, the Rail Companies acknowledge that such tank trucks or cars should be in good condition and not leaking.

7:26-2D(c)(1)(xx)(3) - The Rail Companies do not anticipate ID72 waste will be stored at transloading facilities. Due to the nature of transloading (i.e., transferring waste directly from the incoming tank truck to the outgoing tank car or vice versa via a hose or other direct conveyance, without intermediate storage or containment), the only storage containers that would arguably be used at a transloading facility are the source and destination tank truck or car. Due to the mobile nature of these vehicles, it would not be possible to "equip" them with a secondary containment system. Moreover, they are already designed to hold waste in transport without leakage in the ordinary course.

7:26-2D(c)(1)(xx)(4) - The Rail Companies request a clarification of this requirement. First, it is unclear whether the transloading facility may rely upon waste analyses for a representative sample of the waste obtained from the originator or transporter of the waste, rather than obtain their own analyses. Second it is unclear whether analyses must be obtained with each shipment or from each source or for each type of ID72 waste, regardless of the number of shipments or identity of the source. The facility should be entitled to rely upon the shipper's analysis and representative sampling and analysis should suffice. In addition, rail carriers are required to accept the lading tendered to them as described by a shipper bill of lading.

7:26-2D(c)(1)(xx)(5) - The taking of precautions when handling incompatible wastes or mixtures of incompatible wastes to prevent violent reactions, fire, explosion, toxic mists, fumes, gases, etc., and prevent damage to equipment or the facility and threats to human health and the environment may be appropriate police power regulations. However, any requirement to document the same would be preempted by ICCTA.

7:26-2D(c)(1)(xx)(6) - Stopping any detected releases of ID72 waste and cleaning up and properly managing the released waste and repairing or replacing leaking containers or tanks prior to returning them to service may be appropriate police power regulations.

7:26-2D(c)(1)(xxi) - While the Rail Companies acknowledge that these amendments are intended only to allow rail transloading facilities to accept solid waste that is neither hazardous nor regulated medical waste. They nevertheless reserve the right to apply for and obtain hazardous waste or regulated medical waste permits and/or to challenge the necessity of obtaining such permits on the basis of preemption.

7:26-2D(c)(1)(xxii) - While the Rail Companies acknowledge that reasonable time limits may be applied to the storage of non-putrescible solid waste and putrescible waste, respectively, a facility in violation of those requirements cannot be deemed an "unpermitted solid waste facility" and subjected to all penalties for such unpermitted activity if the facility is not obligated, pursuant to the exemption provided in these draft proposed regulations and the doctrine of preemption, to obtain a permit in the first instance.

7:26-2D(c)(1)(xxiii) - While the Rail Companies fail to see any direct environmental implication of maintaining security procedures to control entry to and exit from the facility at all times, they recognize the State's concern and anticipate that such security measures would be implemented in any event.

7:26-2D(c)(1)(xxiv) - This obligation to allow the Department access to the facility is overly broad. Initially, it purports to encompass the entire transloading facility and not just those areas where waste transloading operations take place. Waste transloading will likely take place within a larger facility dedicated to commodity transloading. The Department, in the performance of its duties under these regulations, does not have jurisdiction over non-waste transloading operations. Their inspection should be limited to areas where waste transloading takes place. Additionally, access should be limited to "reasonable times," rather than "any time" and should also provide that the Department's representative shall be escorted by a facility employee. The Rail Companies are concerned about the Department representative's safety within the rail yard. The Rail Companies do not, at this time, contest the Department's right to perform the tasks provided in subparts (1) through (4). With respect to subpart (5), the Rail Companies request clarification of what records, specifically, the Department would request to review and inspect, as certain records that federal or State law may require rail carriers to maintain would have no bearing on environmental issues at the facility within the Department's jurisdiction.

7:26-2D(c)(1)(xxv) - Reporting of a release or discharge of a solid waste at the rail facility appears to be reasonably related to a valid police power concern and therefore this may be a permissible regulation.

7:26-2D(c)(1)(xxvi) - The Rail Companies acknowledge that an on-site emergency coordinator should be designated who will be available during all hours of operation for the purpose of handling emergency situations, such as spills, discharges or releases of solid waste.

7:26-2D(c)(1)(xxvii) - Notwithstanding the language of this provision and the State's right to compel compliance with appropriate operational requirements pursuant to its police power, the Rail Companies reserve the right to raise preemption of any purportedly applicable requirement as a defense to any action for penalties pursuant to the Solid Waste Management Act.

7:26-2D(c)(2)(i) - (iv) - Generally, recordkeeping requirements are preempted. Rail carriers are obligated to accept lading (including solid waste shipments) based on bills of

loading furnished to the carrier by the shipper, but the Department is able to inspect such records and related waybills to the extent they are maintained under STB requirements. The Department cannot impose additional special recordkeeping and reporting requirements on the rail carriers.

7:26-3.6(a)(1) - The Rail Companies agree that pre-approval of transfer operations involving sealed containers should be exempted, but contend that this exemption also extends to the operational regulations for this type of facility set forth at N.J.A.C. 7:26-2D as discussed in regard to N.J.A.C. 7:26-2D(b) on page 6. With respect to specific operating requirements, the Rail Companies incorporate by reference all comments set forth above concerning the corresponding provisions of N.J.A.C. 7:26-2D which apply to the transfer of waste in unsealed containers to or from rail cars.

7:26-3.6(a)(2) - The Rail Companies specifically reserve the right to challenge any purported obligation to obtain a permit to handle hazardous waste or regulated medical waste on the grounds of preemption.

Attachment 2

Testimony of W. Douglas Buttrey
Chairman of the Surface Transportation Board
House Committee on Transportation and Infrastructure
Subcommittee on Railroads
Hearing on Impacts of Railroad-Owned Waste Facilities
10 a.m. May 23, 2006

Good morning Mr. Chairman. My name is Douglas Buttrey, and I am the Chairman of the Surface Transportation Board. I appreciate the opportunity to testify before you today about federal preemption for rail-related facilities. I would first like to provide the Subcommittee with an overview of the Board's role, and the role of state and local authorities with regard to such facilities. Next, I will discuss the state of the law on this complex issue which is still being fleshed out by the Board and the courts in individual cases that arise. Finally, because there has been a lot of concern lately about the potential for misuse of federal preemption in cases involving facilities on rail lines, I will outline how interested parties can raise concerns before the Board and in the courts regarding individual proposals that arise. I will not focus today on the individual cases that have addressed federal preemption for rail-related facilities, but I have included as part of my written testimony a summary of the relevant case law.

1. The Scope of the Federal Preemption

As all of you are aware, the Surface Transportation Board was created in the ICC Termination Act of 1995 (ICCTA). The express federal preemption contained in the Board's governing statute at 49 U.S.C. 10501(b) gives the Board exclusive jurisdiction over "transportation by rail carriers." Congress has defined the term "transportation" broadly, at 49 U.S.C. 10102(9), to include all of the related facilities and activities that are part of rail transportation. The purpose of preemption is to prevent a patchwork of

otherwise well intentioned local regulation from interfering with the operation of the rail network to serve interstate commerce.

Both the Board and the courts have made clear, however, that, although the scope of the section 10501(b) preemption is broad, there are limits. While a literal reading of section 10501(b) would suggest that it preempts all other law, neither the Board nor the courts have interpreted the statute in that manner. Rather, where there are overlapping federal statutes, they are to be harmonized, with each statute given effect to the extent possible. This is true even for federal statutory schemes that are implemented in part by the states, such as the Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act.

When states or localities are acting on their own, certain types of actions are categorically preempted, regardless of the context or basis of the action. This includes any form of permitting or preclearance requirement—such as building, zoning, and environmental and land use permitting—which could be used to deny or defeat a railroad's ability to conduct its rail operations or to proceed with activities that the Board has authorized. Also, states or localities cannot regulate matters directly regulated by the Board, such as railroad rates or service or the construction, operation, and abandonment of rail lines.

Otherwise, whether the preemption applies depends on whether the particular action would have the effect of preventing or unreasonably interfering with rail transportation. Types of state and local measures that have been found to be permissible, even in cases that qualify for the federal preemption, include requirements that railroads share their plans with the community when they are undertaking an activity for which a

non-railroad entity would require a permit, or that railroads comply with local electrical, fire, and plumbing codes.

In cases involving facilities that require a license from the Board and an environmental review under the National Environmental Policy Act (NEPA), the Board addresses both the transportation-related issues and any environmental issues that are raised. The environmental review is managed by the Board's Section of Environmental Analysis.

Even where no license is needed from the Board, there are several avenues of recourse for interested parties, communities, or state and local authorities concerned that the section 10501(b) preemption is being wrongly claimed to shield activities that do not rightly qualify for the federal preemption. Any interested party can ask the Board to issue a declaratory order addressing whether particular operations constitute "rail transportation" conducted by a "rail carrier." Alternatively, parties are free to go directly to court to have that issue resolved. Some courts have chosen to refer that issue to the Board; others have decided the matter themselves. It is worth noting, however, that the Board and court cases on the boundaries of the section 10501(b) preemption have been remarkably consistent, and that the Board and the courts have never reached a different conclusion regarding the availability of the preemption for particular activities and operations.

Finally, in some cases, environmental and safety concerns have been successfully resolved through consensual means, by the railroad and the community working together to address their respective interests.

2. Relevant Precedent on Facilities

Given the strength and breadth of the section 10501(b) preemption, the potential for misuse is a definite concern. Thus, both the Board and the courts have made clear that an entity is not entitled to federal preemption to the extent it is engaged in activities other than rail transportation. In some cases, solid waste and other businesses have located close to a railroad and claimed to be a rail facility exempted from state and local laws that would otherwise apply, but have been found by the Board or a court not to be entitled to the federal preemption because the operation did not actually constitute "rail transportation" by a "rail carrier." In other cases, activities and operations at facilities have been found to qualify for the federal preemption, as part of the transportation conducted by a rail carrier.

Cases involving solid waste transfer, storage and /or processing facilities proposed to be located along rail lines are especially controversial and often raise concerns that the operations could cause environmental harm. In every case, however, interested parties, communities, and state and local authorities concerned about a proposal have recourse to the Board or the courts.

Rail carriers need approval to construct a new rail line under 49 U.S.C. 10901. During the Board's licensing proceedings, parties concerned that all or part of the project is not entitled to preemption have the opportunity to present their views to the Board for consideration in the proceeding. In rail construction cases, the Board also routinely conducts a detailed NEPA review, allowing all interested parties the opportunity to raise any environmental concerns. The Board then takes the entire environmental record into account in deciding whether to grant the license. The Board can, and often does, impose

appropriate environmental conditions to address the environmental concerns that are raised. Thus, the Board's existing process has proven to be sufficient to allow the agency to address any issues related to proposed solid waste or other facilities along the line.

If the project involves the acquisition and operation of an existing rail line, or the acquisition of a rail carrier by another carrier or carrier-affiliate, authority from the Board also is required, and NEPA is applicable. Normally, however, a proposal to change the owner or the operator of a line will not have any significant effects on the environment. Therefore, the Board does not always conduct a case-specific environmental analysis. But where there is a potential for significant impacts, and that is brought to the Board's attention, the Board may decide to undertake a full environmental review.

Finally, some activities at facilities on or along rail lines may qualify for the preemption in section 10501(b) but not require Board approval and review, so that there is no occasion for the Board to conduct an environmental review. For example, under the statute, carriers may make improvements and add new facilities (including a solid waste facility) to an existing line without seeking Board approval. Even in these types of cases, however, parties concerned that section 10501(b) is being used to shield activities that do not qualify for the federal preemption under section 10501(b) can ask the Board to issue a declaratory order, or a stay, or go directly to court to address the status of the facility.

The inquiry into whether and to what extent the preemption applies in a particular situation is naturally a fact-bound question. There have been only a few cases that have come before the Board involving solid waste facilities. The Board and the courts will continue to explore where the boundary may lie between traditional solid waste activities

and what is properly considered to be part of "rail transportation," and what kinds of state and local actions are federally preempted, in the individual cases that arise.

CONCLUSION

In conclusion, it is important to reiterate that, although both the Board and the courts have interpreted section 10501(b) preemption broadly, there are limits on the preemption, which is harmonized with other federal laws. The question of what constitutes "transportation by rail," according to the statute and precedent addressing the rights of railroads and of state and local authorities under section 10501(b), is still being fleshed out by the Board and the courts in the individual cases that arise. However, it is clear that not all activities are entitled to preemption simply because the activities take place at a facility located on rail-owned property. Of course, cases involving preemption for railroad facilities are likely to remain controversial. But even in cases that do not require review and approval by the Board, parties concerned that the section 10501(b) preemption is being misused in a case involving a facility have ways to raise their concerns at the Board or in the courts.

I appreciate the opportunity to discuss these issues with you today, and would be happy to answer any questions you may have.

SECTION 10501(b) PREEMPTION

1. Section 10501(b)

- Gives Board exclusive jurisdiction over “*transportation by rail carriers*” and expressly preempts any state law remedies with respect to rail transportation; ICA defines “transportation” broadly to include all of the related facilities and activities that are part of rail transportation (section 10102(9))
- Purpose of section 10501(b) is to prevent patchwork of local regulation from unreasonably interfering with interstate commerce

2. Reach of the Section 10501(b) Preemption

- Statute not limited to “economic” regulation (City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998))
- While most state and local laws are preempted, overlapping federal statutes (including environmental statutes) are to be harmonized, with each statute given effect to the extent possible (Tyrrell v. Norfolk Southern Ry., 248 F.3d 517 (6th Cir. 2001) (there is no “positive repugnancy” between the Interstate Commerce Act and the Federal Railway Safety Act); Friends of the Aquifer et al., STB Finance Docket No. 33396 (STB served Aug. 15, 2001) (Congress did not intend to preempt federal environmental laws such as the Clean Air Act and the Clean Water Act, even when those statutory schemes are implemented in part by the states))
- Two types of state and local actions are categorically preempted:
 - (1) any form of state and local preclearance or permitting that, by its nature, could be used to deny or defeat the railroad’s ability to conduct its operations (City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998) (environmental and land use permitting categorically preempted); Green Mountain R.R. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005) (preconstruction permitting of transload facility necessarily preempted by section 10501(b)) and
 - (2) state or local regulation of matters directly regulated by the Board (CSXT Transportation, Inc.-Pet. For Decl. Order, STB Finance Docket No. 34662 (STB served March 14, 2005), reconsideration denied (STB served May 3, 2005), petitions for judicial review pending, District of Columbia v. STB, No. 05-1220 et al. (D.C. Cir. filed June 22, 2005) (any state or local attempt to determine how a railroad’s traffic should be routed is

preempted); Friberg v. Kansas City S. Ry., 267 F.3d 439 (5th Cir. 2001) (state statute imposing limitations on a railroad expressly preempted); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp.2d 1009 (W.D. Wis. 2000) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted))

- **Otherwise, preemption analysis requires a factual assessment of whether that action would have the effect of preventing or unreasonably interfering with railroad transportation** (Dakota, Minn. & E.R.R. v. State of South Dakota, 236 F. Supp.2d 989 (D. S.D. 2002), aff'd on other grounds, 362 F.3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad's eminent domain power that would have the effect of state "regulation" of railroads))
- **Notwithstanding section 10501(b), it is permissible to apply state and local requirements such as building, fire, and electrical codes to railroad facilities so long as they are not applied in a discriminatory manner; however, need to seek building permit is preempted** (Flynn v. Burlington N. Santa Fe. Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000); Village of Ridgefield Park v. New York, Susquehanna & W. Ry., 750 A.2d 57 (N.J. 2000); Borough of Riverdale — Pet. for Decl. Order — The New York Susquehanna & Western Ry., STB Finance Docket No. 33466 (STB served Sept. 10, 1999, and Feb. 27, 2001)).
- **Railroads are encouraged to work with localities to reach reasonable accommodations** (Township of Woodbridge v. Consolidated Rail Corp., STB Docket No. 42053 (STB served Dec. 1, 2003) (carrier cannot invoke section 10501(b) preemption to avoid obligations under an agreement it had entered into voluntarily, where enforcement of the agreement would not unreasonably interfere with interstate commerce))

3. Who Interprets Section 10501(b)?

- **Board in cases that require a license & environmental review**
- **Either the Board in a declaratory order or a court (either with or without referral to the Board) in other cases**
- **When class exemption was invoked to lease and operate 1,600 feet of track for use in transferring construction and demolition waste between truck and rail, the Board stayed the proceeding to obtain additional information** (Northeast Interchange Ry., LLC-Lease & Oper. Exem.-Line in Croton-on-Hudson, NY, STB Finance Docket No. 34734 et al. (STB served August 5, 2005))

- Board has discretion to decide whether to institute an declaratory order proceeding and denied request that it do so to address solid waste operations on property owned by the New York, Susquehanna and Western Ry. in North Bergen, NJ, and other similarly situated solid waste operations, because the North Bergen facility is permanently closed, petitioners failed to point to an alternative site that would warrant continuing with the proceeding, and the railroad and the New Jersey Department of Environmental Protection are involved in ongoing court litigation related to the facility (National Solid Wastes Management Association, Et AL.-Petition for Declaratory Order, STB Finance Docket No. 34776 (STB served March 10, 2006))

4. Case Law on Facilities

- Preemption applies to proposals to build or acquire ancillary facilities that assist a railroad in providing its existing service, even though the Board lacks licensing authority over the projects
 - i. Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983)
 - ii. Borough of Riverdale — Pet. for Decl. Order — The New York Susquehanna & Western Ry., STB Finance Docket No. 33466 (STB served Sept. 10, 1999, and Feb. 27, 2001)
 - iii. Flynn v. Burlington N. Santa Fe. Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000)
 - iv. Friends of the Aquifer et al., STB Finance Docket No. 33396 (STB served Aug. 15, 2001)
- No preemption where the operation does not constitute transportation by a rail carrier
 - i. High Tech Trans. LLV v. New Jersey, 382 F.3d 295 (3d Cir. 2004); High Tech Trans. LLC- Pet. For Decl. Order- Hudson County NJ, STB Finance Docket No. 34192 (STB served Nov. 20, 2002) (both agreeing with New Jersey Dept. of Environ. Protection that there is no preemption for truck transportation of construction and demolition waste en route to transloading facility, even though a railroad ultimately uses rail cars to transport the debris)
 - ii. Grafton and Upton R.R. v. Town of Milford, Civ. No. 03-40291 (D. Mass. Feb. 14, 2006); Town of Milford, MA- Pet. For Decl. Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004) (no preemption for planned steel fabrication facilities that are not part of "transportation")
 - iii. Florida East Coast Ry. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001) (no preemption for aggregate

distribution plant because the plant, although located on railroad property, was not railroad-owned or operated and thus was not part of rail transportation)

- **Activities That Do Qualify for Federal Preemption as Transportation Conducted by a Rail Carrier**

- i. Green Mountain R.R. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005) (preemption for cement transloading facility in Vermont)
- ii. Joint Pet. For Decl. Order- Boston & Maine Corp. v. Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001), aff'd, Boston & Maine Corp. v. Town of Ayer, 206 F.Supp.2d 128 (D. Mass. 2002), rev'd solely on attys fee issue, 330 F.3d 12 (1st Cir. 2003) (preemption for automobile loading facility in Massachusetts)
- iii. Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 WL 1113647 (N.D. Ga. 1997) (local zoning and land use permitting regulation for railroad facility preempted)
- iv. Canadian National Ry. v. City of Rockwood, No. 04-40323, 2005 WL 1349077 (E.D. Mich. 2005) (county zoning laws and permitting and preclearance requirements preempted for a railroad's transload facility in Michigan)

Attachment 3

**BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, D.C.**

Finance Docket No. 34797

**New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway - Petition
For An Exemption From 49 U.S.C. § 10901 To Acquire, Construct And Operate As A Rail
Carrier On Tracks and Land In Wilmington and Woburn Massachusetts**

**Verified Statement of John Castner in Response to the Comments of the New York,
Susquehanna, and Western Railway Corporation**

I, John Castner, hereby certify as follows:

1. I submit this verified statement in response to the comments of the New York, Susquehanna, and Western Railway Corporation (hereinafter "NYS&W") submitted to the Surface Transportation Board (hereinafter the "STB") on July 13, 2006, and in support of the New Jersey Department of Environmental Protection's (hereinafter the "department" or "DEP") opposition to New England Transrail's (hereinafter "NET") resubmitted petition for an exemption from 49 U.S.C. § 10901 to acquire, construct and operate as a rail carrier on tracks and land in Wilmington and Woburn Massachusetts.
2. I am employed as the Director of the Division of County Environmental and Waste Enforcement within the DEP. I am licensed as a professional engineer and as a professional planner, have a Bachelor of Science in Civil Engineering, and have worked for DEP since 1976. Since 1976, I have served in a variety of staff and (primarily) supervisory capacities relating to solid and hazardous waste enforcement and permitting, including solid waste facility permitting. Solid waste facilities include landfills, incinerators, material recovery facilities, and waste transfer stations. My supervisory responsibilities have included being a Supervising Environmental Specialist in the Engineering Bureau, which regulates solid waste transfer station permitting; the Chief of the Bureau of Landfill Closure; and the Chief Engineer of two bureaus which regulated, respectively, solid waste transfer stations, compost facilities and landfills. From 1996 through October 2004, I served as the Executive Assistant to the Director of DEP's Division of Solid and Hazardous Waste and as Director of DEP's Division of

Solid & Hazardous Waste. In those capacities, I supervised New Jersey's solid waste planning and facility permitting programs. I also briefly served during this time as a liaison for DEP to the New Jersey Legislature on solid waste matters. In March 2005, I assumed my current position as the Director of DEP's Division of County Environmental and Waste Enforcement, which oversees DEP's solid waste and hazardous waste compliance and enforcement efforts.

3. As stated in my prior verified statement submitted to the STB on January 27, 2006, the DEP proposed regulatory standards for rail carriers that transfer solid waste. DEP proposed these regulatory standards, found at N.J.A.C. 7:26-2D.1 (the "2D regulations"), on October 6, 2003, 35 N.J.R. 4405(a), and adopted them on November 15, 2004, 36 N.J.R. 5098(b). The 2D regulations were crafted specifically so that rail carriers would not be subject to solid waste permitting and pre-clearance requirements, unlike non-rail carrier solid waste transfer facilities under the New Jersey Solid Waste Management Act, N.J.S.A 13:1E-1 et seq. The purpose of the 2D regulations is to ensure that solid waste facilities operated by rail carriers comply with the basic standards necessary to protect public health and safety.
4. Prior to adoption of the 2D regulations, and continuing today, solid waste transfer stations in New Jersey attempted to cloak themselves as rail carrier transload facilities, claimed broad preemption of their activities by the Interstate Commerce Commission Termination Act, 49 U.S.C. §10101 et seq. (hereinafter "ICCTA"), and thereby shunned their responsibilities to comport their operations with state environmental and public health and safety regulation. In doing so these transfer

stations operated in violation of basic health and safety measures. Many of these operations were conducted outdoors and without the benefit of any environmental controls against air pollution, water pollution, fire control or attraction to birds and other vectors.

5. Construction and demolition (hereinafter "C & D") waste and the constituents contained therein pose significant threats to ground water and surface water resources, and to the local public health and safety. C&D waste often contains particles of asbestos, metals including lead, and other hazardous pollutants. Such dangerous constituents can migrate off-site via airborne dust which settles on the ground and is later contacted and dissolved by rainwater, or wastewater leachate from the on-site waste piles. This off-site migration can lead to the eventual seepage of these harmful constituents into the ground water and or surface waters.
6. In my January 27, 2006 verified statement I referenced several examples of New Jersey solid waste facilities operated by railroads claiming ICCTA preemption. Three of these facilities were operated by NYS&W alongside its tracks located at 16th Street, Secaucus Road and 43rd Street in North Bergen, New Jersey. These three waste transfer stations consisted of outdoor operations and massive piles of solid waste that released clouds of dust that migrated offsite and leachate that entered surface water, groundwater, and wetland natural resource areas. I referenced these NYS&W facilities as examples of what occurred in New Jersey when solid waste transfer stations operated without any regard for the State's environmental and health and safety laws.

7. In its July 13, 2006 comments NYS&W states that it has now permanently closed these three facilities. However, NYS&W fails to mention that it only closed these facilities after the DEP, on July 26, 2005, issued to it an Administrative Order and Notice of Civil Administrative Penalty Assessment assessing civil penalties because the three facilities, as well as two others, did not comply with the 2D Regulations.
8. Also, in its July 13, 2006 comments, NYS&W incorrectly contends that “it currently transloads C&D materials only at enclosed facilities that substantially comply with the requirements of the Intermodal [2D] Regulations.” Fundamental issues of public health and safety remain at these facilities. Furthermore, simply enclosing the tipping floor/tipping area does not adequately mitigate the risks associated with C & D waste, *e.g.*, the potential releases of dust and leachate laden with hazardous substances. Rather, the facilities must install and effectively maintain appropriate environmental, *e.g.*, air pollution, dust, wastewater and stormwater, control measures and systems to adequately protect the public and environment from exposure to such contaminants.
9. There are currently five facilities purportedly operated by NYS&W. Four of these facilities are in North Bergen, located at 3440 Patterson Plank Road (3700 Westside Avenue); 83rd Street; 94th Street; and 5800 Westside Avenue. The fifth is located at 4th Avenue and 13th Street in the City of Paterson. Inspections of the facilities located at 3440 Patterson Plank Road, 83rd Street, 94th Street, and 4th Avenue and 13th Street have continued to show significant problems that risk the environment, the public health, and the public safety and substantial non-

compliance with the minimal standards of the 2D Regulations. These problems include: inadequate wastewater systems, *e.g.*, ineffective drains for the proper collection of wastewater leachate; ineffective air system controls and dust control systems resulting in dust emissions that could contain various hazardous constituents, *e.g.*, asbestos and metals; and large waste piles, *e.g.*, piles 50 feet long, 15-20 feet wide, and 15-20 feet high, and 450-500 tons of waste, that remained on the tipping floor for several days.

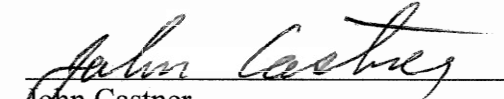
10. The facility located at 5800 Westside Avenue in North Bergen receives waste classified as hazardous under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 et seq., and/or toxic under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601 et seq. Waste delivered to this facility has included creosote, lead, chrome and polychlorinated biphenyls ("PCBs"). The mishandling of such materials can cause significant harm to the environment and nearby community. Waste loading activities at this facility are conducted in a partially enclosed building, allowing dust to be emitted into the outside atmosphere and off-site. Specifically, during unloading only the tail gate of the unloading truck is contained within the building. The waste, as it is unloaded, passes through a chute where it is sprayed with water in an attempt to suppress any dust. However, wind passes through the building and blows dust out of building from both the rail car area and the truck unloading area. Moreover, this water spraying system is unreliable, in part because it freezes during the winter
11. In addition to the issues noted in Paragraphs 9 and 10, none of the five facilities have adequate fire control/suppression measures/systems in place and therefore,

substantially deviate from the requirements of the Uniform Construction Code (“UCC”). The lack of adequate fire control presents an extremely dangerous situation for the local community, a risk that is heightened due to the large waste piles that have remained on-site for days without removal. The facilities, moreover, may further deviate from the basic UCC requirements; however, because the facilities were constructed without oversight by the DEP, the Meadowlands Commission or the local regulating agencies, the extent to which the facilities fail to meet the UCC requirements is unknown, such that whether the facilities are even safe for human occupancy is unknown.

12. In sum, at each of the mentioned facilities, significant environmental and public health and safety issues remain that NYS&W, claiming broad ICCTA preemption, refuses to address. However, the 2D requirements, far from being unduly burdensome, are the minimum requirements for the safe operation of waste transfer stations operating in New Jersey.

VERIFICATION

John Castner, having first been duly sworn according to law, deposes and states that he has read the foregoing Verified Statement, is familiar with the contents thereof, and that the same are true and correct to the best of his knowledge, understanding and belief.

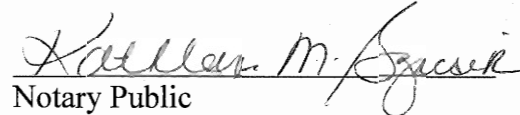

John Castner

STATE OF NEW JERSEY)
COUNTY OF MERCER)

ss.

SUBSCRIBED AND SWORN TO before me this 28th day of July, 2006.

Witness my hand and official seal.


Notary Public

My commission expires: 2/27/2011

Kathleen M. Szucsik
Notary Public of New Jersey
My Commission Expires 02/27/2011

Attachment 4

ZULIMA V. FARBER
ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street
PO Box 093
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Attorney for Plaintiff

Kevin P. Auerbacher
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(609) 292-6945



SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - HUDSON COUNTY
DOCKET NO. C-13606

NEW JERSEY MEADOWLANDS
COMMISSION,

Plaintiff,

v.

THE NEW YORK SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION,

Defendant.

Civil Action

ORDER TO SHOW CAUSE WITH
TEMPORARY RESTRAINTS

This matter having been opened to the Court by Zulima V. Farber, Attorney General of New Jersey, by Kevin P. Auerbacher and Christine Piatek, Deputy Attorneys General appearing as attorneys for plaintiff New Jersey Meadowlands Commission ("NJMC") and notice having been given to defendant The New York, Susquehanna and Western Railway Corporation ("the Defendant"), and the Court having considered the Verified Complaint, supporting certifications and supporting brief, and good cause being shown;

IT IS on this 21ST day of

July, 2006;

ORDERED that the Defendant show cause before the Superior Court of New Jersey, Chancery Division, Hudson County, before the Hon. Thomas P. Olivieri, J.S.C., at the William J. Brennan, Jr. Courthouse, 583 Newark Ave., Jersey City, New Jersey, on the 22nd day of August, 2006, at 1:30 o'clock, or as soon thereafter as counsel may be heard, why an Order should not be entered:

1. Enjoining the Defendant from commencing construction at the 43rd Street facility until such time as Defendant complies with the terms of the Stipulation of Settlement and final agency order; and

2. Ordering the Defendant to provide sufficient information, as required by NJMC, to allow NJMC to ascertain Defendant's compliance with fire, health, plumbing, safety, construction and NJMC regulations, as required by the Stipulation of Settlement, as outlined in the verified complaint; and

3. Ordering the Defendant to comply with all fire, health, plumbing, safety and construction regulations, as required by the Stipulation of Settlement; and

4. Ordering the Defendant to pay NJMC all costs and fees associated with the filing of this action.

IT IS FURTHER ORDERED that pending the return date of this order to show cause, the Defendant is temporarily restrained from any further construction activity at the site including pile driving; and marking the 43rd Street New Transcon Facility

*Reel 481 Sub 1, 1/20/06
Bayer*

IT IS FURTHER ORDERED that within 3 days of this date, the Plaintiff's attorney shall serve the Defendant with true and correct copies of this Order to Show Cause, Verified Complaint, supporting certifications and supporting brief by personal service; and

IT IS FURTHER ORDERED that the Defendant shall file its responsive certification and brief, if any, and shall serve copies of the same upon plaintiff's attorney, or her designee, at least 3 days before the return date of this Order to Show Cause, and in default thereof, this matter may proceed ex parte; and

IT IS FURTHER ORDERED that plaintiff shall ^{file its} ~~have~~ _____ days ~~from receiving the Defendant's responsive certification and brief to file its reply, if any~~ by August 21, 2000 at 9 AM.

Opposed

Hon. Thomas P. Olivieri, J.S.C. P.J. Ch.

IT IS further
The Court has determined that
the Stipulation of Settlement and Agreement
dated March 1, 2001 require the Defendant
A provide documents and plans for review of
plaintiff before construction commences.