

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34914

**DESERTXPRESS ENTERPRISES, LLC – PETITION FOR DECLARATORY
ORDER**

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

In accordance with the decision of the Board in this proceeding served August 31, 2006, the New Jersey Department of Environmental Protection (“NJDEP”) and the New Jersey Meadowlands Commission (“NJMC”) submit their comments in response to the petition filed by DesertXpress Enterprises, LLC (“DesertXpress”) seeking a declaratory order relating to its proposed construction of a passenger rail system in Nevada (“Petition”).

I. STATEMENT OF INTEREST

The NJDEP is an administrative agency of the State of New Jersey that is established and organized pursuant to N.J.S.A. 13:1D-1, *et seq.* As relevant here, the NJDEP is responsible for protecting the environment and the health and safety of New Jersey’s citizens and businesses. The NJMC is a New Jersey state agency established and organized pursuant to N.J.S.A. 13:17-1 *et seq.*, situated “in, but not of,” the Department of Community Affairs, and is a political subdivision of state government exercising public and essential governmental functions. The NJMC is responsible for, among other duties, protecting the environmentally sensitive Hackensack Meadowlands and

overseeing the public health and safety of citizens and businesses within the geographic area of New Jersey generally known as the Meadowlands District.

At the outset, NJDEP and NJMC take no position concerning the project described by DesertXpress. Nonetheless, as the Board is aware, both NJDEP and NJMC (and the comparable agencies in various states) have been increasingly confronted with claims by various parties that the preemption provisions of 49 U.S.C. §10501(b) preclude all state and local environmental and public health and safety oversight concerning the activities of railroads and the entities tendering solid waste to those carriers. In view of its important role in interpreting the provisions of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. §10101 *et seq.*, NJDEP and NJMC believe it is essential that the Board continue to adhere to its practice of not issuing broad statements concerning the reach of section 10501(b) in a vacuum, and instead provide opinions that address specific facts that may be in controversy. Otherwise, and as discussed below, there is a possibility that the Board's statements may be taken out of context and used to obfuscate and impede the essential and legitimate oversight of environmental and public health and safety regulation by the various states.

II. THE PETITION HAS NOT SHOWN A NEED FOR USE OF THE DECLARATORY ORDER PROCESS

The Administrative Procedure Act authorizes agencies to issue declaratory orders when necessary to terminate a controversy or remove uncertainty. 5 U.S.C. §554(e).

And, when an administrative agency elects to initiate a declaratory order proceeding:

a necessary condition . . . is that it be employed only in situations *where the critical facts can be explicitly stated*, without possibility that subsequent events will alter them. This is necessary to avoid later litigation concerning the applicability of a declaratory ruling which an agency may

seek to disregard because, in its opinion, the facts to which it related have changed.

Attorney General's Manual on the Administrative Procedure Act, United States Department of Justice, pp. 59-60, 1947. (Emphasis added.)

The declaratory order process is thus not to be used in the abstract, but rather should be undertaken only when necessary to address the "critical facts" of a particular controversy. For example, in approving a decision of the Federal Communications Commission to refuse to issue a declaratory order concerning a licensee's proposal, the D.C. Circuit Court of Appeals concluded that the FCC's "disinclination to rule here is in accord with the Commission's longstanding policy of refusing to issue interpretive rulings or advisory rulings whenever the critical facts are not explicitly stated." *Yale Broadcasting Company v. Federal Communications Commission*, 478 F 2d. 594, 602 (D.C. Cir. 1973).

The Board and its predecessor, the Interstate Commerce Commission ("ICC"), have adhered to this principle and refused to institute declaratory order proceedings unless there was an actual controversy to resolve. In deciding to delegate to the Director of the Office of Proceedings the authority to institute declaratory order proceedings, the ICC advised that it was appropriate to initiate such proceedings where necessary to resolve an active controversy or where the petition seeking to initiate a proceeding was on referral from a court. *Delegation of Authority – Declaratory Order Proceedings*, 5 I.C.C. 2d. 675, 676 (1989). The ICC further explained that this discretion to institute a proceeding of this nature had not historically been exercised in situations where there had been no showing that it was necessary to terminate an act of controversy. *Id.* (Citations omitted.)

The Board has consistently declined to initiate declaratory order proceedings where the petitioner failed to show that an active controversy existed for which the Board's guidance was required. Recently, in F.D. No. 34776, *National Solid Wastes Management Association, et al. – Petition for Declaratory Order* (decision served March 8, 2006) the Board declined to institute a declaratory order proceeding concerning the scope of 49 U.S.C. §10501(b) preemption despite the fact that there was pending litigation in the courts involving the same issue. The Board concluded that since the court had not referred any issue to the Board, since the Board and the courts already have developed a considerable body of law addressing this same issue and since the petitioner had not raised unique matters requiring the Board's expertise at that juncture, the requested proceeding should not be instituted.

Similarly, in F.D. No. 34020, *Fletcher Granite Company, LLC – Petition for Declaratory Order* (decision served June 29, 2001), the Board was presented with another request that it opine upon the reach and scope of federal preemption under section §10501(b). In that instance, Fletcher Granite's petition was occasioned through concern that its rail rehabilitation project and the resumption of rail service "could be delayed or defeated if state and local officials try to regulate the matter" and cited the "alleged hostility by the local community" and local officials to the project. (*Id.* at 2.) The Board nevertheless concluded that a declaratory order proceeding was not warranted "... as there is not now, and may never be, a controversy that needs to be terminated." (*Id.*)

Those cases are in sharp contrast with the cases cited by DesertXpress in support of its petition. As is abundantly clear in the Board's decision in *Joint Petition for*

Declaratory Order – Boston & Maine Corp. & Town of Ayer, MA, 5 S.T.B. 500, 506-07 (2001)¹, that proceeding was referred to the Board by a federal district court; moreover, the Town of Ayer and various municipal entities had repeatedly sought to impose substantial and discriminatory impediments to the construction of a rail facility. As such, the Board's determination to initiate the requested declaratory order proceeding concerning the meaning of section 10501(b) in that controversy satisfied both of the prerequisites for initiating such proceedings. First, there was a specific factual controversy whose resolution would benefit from the issuance of an appropriate declaratory order. And, the matter was on referral from a federal court. Neither of those factors are present here.

In each declaratory order case cited by DesertXpress, either one or both of the prerequisites for initiating a declaratory order proceeding were present. In *King County, WA – Petition for Delcaratory Order – Burlington Northern Railroad Co. – Stampede Pass Line*, 1 S.T.B. 731 (1996) ("*Stampede Pass I*"), the county incorrectly believed it had the authority to require the railroad to obtain its approval prior to reactivating and operating a line of railroad, and sought a declaratory order from the Board concerning its proper role. Similarly, in *Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line*, 2 S.T.B. 330 (1997), *aff'd sub nom. City of Auburn v. United States*, 154 F. 3d. 1025 (9th Cir. 1998) ("*Stampede Pass II*"), the Board initiated the declaratory order proceeding to resolve new claims about the scope of section 10501(b) raised by new petitioners that had not originally been advanced in *Stampede Pass I*.

¹ *Pet. for reconsideration denied*, 5 S.T.B. 1041(2001), *aff'd Boston & Maine Corp. v. Town of Ayer*, 206 F. Supp. 2d. 128 (D. Mass. 2002), *rev'd on unrelated issue*, 330 F. 3d. 12 (1st Cir. 2003).

In F.D. No. 34376, *City of Creede, Co-Petition for Declaratory Order* (decision served June 22, 2004), the Board initiated the requested declaratory order proceeding in order to answer three questions involving federal preemption that had been referred to it by the U.S. District Court for the District of Colorado. In *Borough of Riverdale – Petition for Declaratory Order – The New York, Susquehanna and Western Railway Corporation*, 4 S.T.B. 380 (1999), there was ongoing litigation between the borough and the railroad, and the Board provided guidance to the parties and the court in an attempt to help resolve an actual controversy involving the scope of 49 U.S.C. §10501(b). Finally, in *North San Diego County Transit Development Board – Petition for Declaratory Order*, 6 S.T.B. 331 (2002), the issuance of a declaratory order proceeding again related to an action pending in federal district court concerning the ability of the municipality to impose environmental or permit regulations upon the construction of a rail passing track.

Here, however, the petitioner has not even attempted to make a showing that there is a pending or related court proceeding, or even that there is any actual dispute with state and/or local governmental bodies in California and Nevada pertaining to their roles in the construction project which DesertXpress wishes to undertake. Instead, the petitioner has stated only that “a question has arisen” concerning whether state or local government agencies can require compliance with various “state and/or local environmental land use, and other discretionary permitting requirements.” (Petition at 5). Continuing, DesertXpress opines that a Board decision concerning the proper role of the state and/or local governmental bodies in California and Nevada would remove some unspecified “uncertainty” and thereby ensure that its construction project would not be unduly burdened or delayed. (*Id.* at 5-6.) Yet, there is no indication that those state and/or local

entities are seeking to exercise powers that may be in conflict with or preempted by section 10501(b). As the petitioner has made no showing, or even alleged, that there is a controversy as to this subject, it has not provided a cogent reason for the Board to go forward at this time.²

In raising this objection NJDEP and NJMC are not intending to interfere with or hinder the project envisioned by DesertXpress. Rather, NJDEP and NJMC are concerned about the potential ramifications of a broad decision issued by the Board, in which there is no actual controversy to resolve, there are no specific questions to answer, and there are no factual issues against which a Board decision will be viewed. On the other hand, NJDEP and NJMC are concerned that an advisory opinion issued by the Board in the abstract, that does not address specific controversies or factual disputes, runs the risk of being misconstrued or misrepresented by parties that are often anxious to push the envelope as to the scope of federal preemption.

As the Board is well aware, NJDEP and NJMC are embroiled in a regrettably extensive number of litigations involving efforts by parties to avoid the legitimate and essential governmental oversight by waving the flag of preemption with a disturbingly and incorrect broad brush. As just one example, NJDEP and NJMC have appended, as Attachment 2, an example of the almost inevitable result when railroads, or parties pretending to be railroads, claim to be protected from any oversight of their activities. A

² As the Board stated in the *Fletcher Granite* decision:

It would be premature for the Board to institute a declaratory order proceeding at this point, as there is not now, and may never be, a controversy that needs to be terminated.

(Decision, at 2.)

decision issued without any factual context runs the risk of being misconstrued and misused in a manner that neither Congress nor the Board intended.

Accordingly, NJDEP and NJMC believe that the Board should not initiate the requested proceeding unless and until there is an actual controversy whose resolution can be facilitated by having the benefit of the Board's focused views on specific legal issues.

III. A DECLARATORY ORDER IS UNNECESSARY

Aside from the fact that the petitioner has not alleged that there is a pending controversy, it similarly has failed to demonstrate that there is any uncertainty concerning the role to be played by state and local governmental bodies with respect to the construction and operation of rail lines. Indeed, DesertXpress correctly cites the seminal *Stampede Pass I* and *Stampede Pass II* cases for the principle that the Board has exclusive jurisdiction over rail construction projects under 49 U.S.C. §10901 and that "any state or local statute that requires a railroad to obtain state or local approval before construction . . . of a line would appear, on its face, to conflict with the ICCTA and [therefore] is preempted." Petition at 7, citing *Stampede Pass I*, 1 S.T.B. at 734-35. Similarly, in subsequent pages, the Petition recites the Board's explanations about the scope of preemption that arose in a series of other controversies (Petition at 9-12). It accordingly is not clear what further guidance DesertXpress is seeking.

Of particular concern to NJDEP and NJMC is the fact that Petitioner's statement of the scope of preemption unfortunately omits mentioning either the limitations of that doctrine or the legitimate role that federal, state and local governmental bodies have with respect to the construction and operation of railroads and of facilities that are integrally related to transportation by railroad. This is a significant shortcoming, as some parties

argue that section 10501(b) must be read literally, and that the provision necessarily and absolutely preempts *all Federal or State* law, and that the Board's pronouncements concerning police powers reserved to the states are meaningless "dicta". This reading of the statute, while clearly inappropriate and inconsistent with Congressional intent, is actually being advanced by a railroad in federal court.³

Petitioner has similarly failed to mention that the Board and courts have repeatedly indicated that state and local regulation of railroad activities "is appropriate where it does not interfere with interstate rail operations, and localities retain certain police powers to protect the public health and safety." *Fletcher Granite*, at 5; *Riverdale*, 4 S.T.B. at 386. Similarly, the Board has repeatedly recognized that state and local agencies have a role in implementing various environmental statutes. *Ayer* at 9. Hence, that a permit for new railroad construction may not be required does not mean that state and local governmental bodies are precluded from exercising their oversight responsibilities to protect the environment and public health and safety.

The Board correctly concluded, in *Riverdale* (4 S.T.B. at 389), that it could not properly provide guidance in a vacuum concerning the interplay between the preemption provision in section 10501(b) and the legitimate oversight responsibilities of state and local governmental entities. And, as Petitioner has not raised any novel issues, there is no

³ In *The New York Susquehanna and Western Railway Corporation v. Lisa Jackson, et al.*, Civil Action No. 05-4010 (D.N.J.), The New York Susquehanna and Western Railway Corporation ("NYS&W") filed a brief, as recently as September 29, 2006, stating:

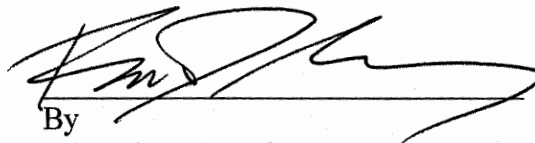
ICCTA's express preemption clause has no limiting language and provides for no exceptions: the STB's jurisdiction "with respect to regulation of rail transportation" is "exclusive and preempt[s] the remedies provided under federal or state law." 49 U.S.C. §10501(b) (Supplemental Memorandum of Plaintiff The New York Susquehanna and Western Railway Corporation and Third-Party Defendants Susquehanna Bulk Systems, Inc., at 21, 27-28.) (See Attachment B.)

need or reason for the Board to go beyond the general principles on this subject that it has already articulated.

On the other hand, to do otherwise raises the possibility that parties in future or even existing controversies unrelated to *DesertXpress* will mischaracterize broad interpretative statements in an attempt to mislead governmental bodies and/or courts concerning the reach and scope of §10501(b). NJDEP and NJMC have been compelled to litigate an alarming and growing number of cases in which putative railroads and solid waste operators have attempted to avoid essential environmental and public health and safety oversight. The concern about any misuse of the Board's guidance is substantially alleviated when that guidance is provided in a specific factual context. Only in that way would the Board – and parties relying upon the Board's statements – be in a position to know whether any specific governmental activity falls within or without the preemption provision of section 10501(b)(1).

Accordingly, NJDEP and NJMC request that the Board not initiate the requested declaratory order proceeding or otherwise enunciate any general principles concerning the proper scope of federal preemption under section 10501(b) on this record. In the event the Board does intend to issue a declaratory order in response the Petition, NJDEP and NJMC urge that the Board carefully circumscribe any decision so as not to cast doubt on the authority or responsibility of state and local governmental bodies relating to the activities of railroads.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Ed Greenberg', written over a horizontal line.

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Dated: October 16, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this 16 day of October, 2006, served a copy of the foregoing 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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ATTACHMENT A



16th Street, North Bergen - June 21, 2005

ATTACHMENT B

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE NEW YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION,

Plaintiff,

v.

LISA JACKSON, in her official capacity
as Commissioner of the New Jersey
Department of Environmental Protection,
NEW JERSEY MEADOWLANDS
COMMISSION, et al.,

Defendants/Counterclaimants/
Third Party Plaintiffs,

v.

MHF LOGISTICAL SOLUTIONS, INC.,
SLANE RAIL TRANSPORT, LLC,
PRECISE CONSTRUCTION
CONTRACTING, INC., RAIL-TECH, LLC,
HUDSON-NATIONAL, LLC, CARDELLA
TRUCKING CO., INC., ON TRACK
LOADING COMPANY, INC.
MILLENMUM RESOURCE RECOVERY,
LTD., X-PRESS RAIL TRANSFER, LLC
d/b/a 94th STREET RAIL TRANSFER,
LLC, SCOTT EXCAVATING, LLC,
CROSSROADS RECYCLING, INC. and
SUSQUEHANNA BULK SYSTEMS, INC.,

Third Party Defendants,

Civil Action No. 05-4010 (KSH)

**SUPPLEMENTAL MEMORANDUM OF
PLAINTIFF THE NEW YORK,
SUSQUEHANNA AND WESTERN
RAILWAY CORPORATION AND
THIRD-PARTY DEFENDANT
SUSQUEHANNA BULK SYSTEMS, INC.**

V.

SLANE RAIL TRANSPORT, LLC,

Fourth-Party Plaintiff,

V.

NEW YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION,

Fourth-Party Defendant.

II. THE 2D REGULATIONS REGULATE RAIL TRANSPORTATION AND ARE PREEMPTED.

Because NYS&W's transloading facilities and operations are plainly "transportation by a rail carrier," New Jersey's 2D Regulations – which purport to regulate that rail transportation – are preempted. The 2D Regulations impose a complex regulatory scheme that reaches the very core of rail transportation – construction and operation of NYS&W's transportation facilities. Indeed, many of the 2D Regulations mirror other state and local regulations that courts and the STB have held preempted. The State's rigid interpretation and inflexible application of the 2D Regulations in the present case substantially interferes with rail transportation, and therefore the 2D Regulations as applied to NYS&W's transload facilities are preempted. The conclusion that the 2D Regulations, as applied, unduly interfere with and impede rail transportation is reinforced by the disproportionately large fines the State has already imposed (and threatens to impose in the future) for NYS&W's alleged violations of the 2D Regulations, fines the State imposed to "harass the hell" out of NYS&W and its rail transportation operations.

ICCTA's express preemption clause has no limiting language and provides for no exceptions: the STB's jurisdiction "with respect to regulation of rail transportation" is "exclusive and preempt[s] the remedies provided under Federal or State law." 49 U.S.C. § 10501(b). The STB has sometimes advocated a more limited reading of the statute, however, suggesting that ICCTA only preempts state and local regulations that would prevent or unreasonably interfere with railroad operations. *See Town of Ayer*, STB Fin. Docket No. 33971 (May 1, 2001), available at 2001 WL 458685 at *4-5; cf. *Boston and Maine Corp. v. Town of Ayer*, 330 F.3d 12, 16 (1st Cir. 2003) (STB's ICCTA preemption analysis in *Town of Ayer* was "finely crafted"). Under the STB's analysis, preempted state and local regulations break down into two categories. First, ICCTA preempts all regulations that give the state or local body the

Transload Facilities, unless and until the State, in its sole and unfettered discretion, deemed it permissible to conduct those operations. Such intrusive and heavy-handed government interference with rail transportation operations is unquestionably state regulation of “transportation by a rail carrier,” which is unequivocally preempted by ICCTA.

III. THE 2D REGULATIONS ARE NOT EXEMPTED FROM ICCTA PREEMPTION AS AN EXERCISE OF “POLICE POWER.”

Relying upon dicta from a handful of decisions, the State has asserted that the 2D Regulations are an appropriate exercise of “police powers” that are not subject to ICCTA preemption. This argument is wrong for a number of reasons. In the first place, ICCTA’s broad express preemption provision does not contain any “police powers” exception. Indeed, ICCTA specifically *removed* such language from the previous version of the statute. Before 1995, the Interstate Commerce Act expressly provided that the Act “does not affect the power of the State, in exercising its police power, to require reasonable intrastate transportation by carriers.” 49 U.S.C. § 10501(c) (1995). When it passed ICCTA, Congress deleted this language, thereby eliminating any vestige of States’ limited “police power” jurisdiction over rail transportation. As the Ninth Circuit explained in rejecting a similar claim that state police powers were not preempted by ICCTA, “it is not the nature of the state regulation, but the language and congressional intent of the specific federal statute” that determines whether state laws are preempted. *City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998).

Lacking any support for its argument in the language of the statute, the State previously resorted to snippets of legislative history to prop up its claim to a “police power” exception. But legislative history may only be used as a guide to resolving *ambiguities* in a statute, not a basis to change a statute’s plain language. *See, e.g., Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254 (“When the words of a statute are unambiguous . . . judicial inquiry is complete.”);

United States v. Bowers, 432 F.3d 518, 522 (3d Cir. 2005) (“foray[s] into legislative history [are] unnecessary . . . [if] the plain meaning of the statute is clear.”); *Sabree ex rel. Sabree v. Richman*, 367 F.3d 180, 190 (3d Cir. 2004) (“Where, as here, the plain meaning of the text is evident, we need not look further to determine congressional intent.”).²²

Here, ICCTA’s “clear and broad” express preemption clause leaves no room for doubt about Congress’s intent to preempt “all state efforts to regulate rail transportation.” *Marshfield*, 160 F. Supp. 2d at 1013. As two Courts of Appeal have concluded, “the plain language of the statute itself, and in particular its preemption provision, is so certain and unambiguous as to preclude any need to look beyond that language for congressional intent.” *Friberg v. Kansas City So. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001); see *City of Auburn*, 154 F.3d at 1029-30 (legislative history of ICCTA irrelevant because preemption clause is unambiguous). What the State is asking the Court to do is to engage in judicial legislation by inserting an exception into a statute whose unambiguous language allows no such exception. The State’s disagreement with Congress’s policy decision to preempt State regulation of rail transportation simply is not sufficient to rewrite a federal statute.

Even if the legislative history were considered, it does not provide sufficient evidence to override the clear language of the statute, which provides no exception for state police power regulation. Indeed, the most compelling legislative history on this point is Congress’s decision

²² The State previously argued that the Court should presume that Congress did not intend to preempt exercises of state police power. But this presumption only applies to *implied* preemption (as opposed to express preemption). See *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996). Where Congress has provided a clear statement preempting state laws, it should be applied. See *Aloha Airlines, Inc. v. Director of Taxation, Hawaii*, 464 U.S. 7, 12 (1983); *Auburn*, 154 F.3d at 1031 (state police power preempted by ICCTA). Indeed, in traditionally federal fields like this one, an opposite presumption applies: “the case for preemption is particularly strong where, as here, ‘the State regulates in an area where there has been a history