

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

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

STATEMENT OF POSITION

Pursuant to the Board's March 29, 2007 Order in this proceeding, the New Jersey Department of Environmental Protection ("NJDEP") and New Jersey Meadowlands Commission ("NJMC") hereby respectfully submit their joint statement of position regarding the jurisdictional and related issues to be addressed at the oral argument scheduled in this proceeding for April 19, 2007. In addition, NJDEP and NJMC submit brief responses to the specific questions posed by the Board in its March 29, 2007 Order.

I. THE PROLIFERATION OF RAIL SOLID WASTE
PROCESSING FACILITIES IS A SERIOUS NATIONAL PROBLEM

Over the last several years, an increasing number of solid waste operators have located their facilities in industrial or rail switching yards, or along rail tracks, in order to attempt to avoid state environmental and health and safety regulation of their solid waste processing activities. Some of these solid waste operators have sought to use the Board's licensing exemption procedures to become a rail carrier – often through the use of the Notice of Exemption procedures – while others have partnered with existing railroads in order to characterize their solid waste activities as rail "transportation" subject to the Board's exclusive

jurisdiction.¹ Solid waste operators have undertaken such efforts to subject themselves to the exclusive jurisdiction of the Board for the sole purpose of claiming that their solid waste activities are protected by the preemption provisions of 49 U.S.C. § 10501(b) from any and all regulation or oversight by state agencies like NJDEP and NJMC.

New Jersey has attempted to deal with the proliferation of rail solid waste facilities by promulgating solid waste regulations that exempt railroads from permitting, licensing and other preclearance requirements otherwise applicable to solid waste facilities, but require compliance with the same substantive environmental and health and safety standards applicable to all solid waste facilities in New Jersey. These regulations – commonly referred to as the “Intermodal Regulations” or “2D Regulations” – were specifically designed to be consistent with the Board’s decisions regarding the scope of preemption under § 10501(b). Indeed, the Board’s staff has favorably referenced the 2D Regulations in statements before Congress as a reasonable approach to the problem of protecting public health and safety without unduly interfering with railroad operations.

Unfortunately, New Jersey’s attempts to enforce its 2D Regulations, and to ensure that adequate environmental controls and other safeguards are used at rail solid waste facilities, have been resisted at every turn. As the Board is no doubt aware, over the last five years NJDEP and NJMC have been embroiled in numerous lawsuits and legal proceedings before the Board and in the courts to defend their authority to regulate solid waste activities undertaken by or in conjunction with rail carriers subject to the Board’s jurisdiction. In these legal proceedings, rail solid waste processing facilities have consistently taken the position that (1) all solid waste processing and other activities at rail solid waste facilities are part of rail transportation subject to

¹ For ease of reference, we shall refer to these facilities as “rail solid waste facilities,” although it is often not clear whether the facilities are actually controlled and operated by the associated rail carrier or the solid waste operator that acts as the putative shipper.

the exclusive jurisdiction of the Board, and (2) § 10501(b) provides complete immunity from any and all state environmental and health and safety regulations applicable to solid waste activities.

Based upon their claims of immunity under § 10501(b) from any state regulation, solid waste operators and/or their railroad partners have constructed and operated facilities in New Jersey that lack even the most rudimentary environmental or health and safety controls. Most of these rail solid waste facilities are built on the cheap. As the photographs previously submitted by NJDEP and NJMC show, some of these facilities have even conducted solid waste processing in the open air with no systems or controls to prevent the release of contaminants into the air, ground water and nearby streams. Some of these facilities store solid waste open to the elements, some have made no effort to control disease vectors, and many have no fire suppression equipment or capacity. Some of these facilities have erected enclosures that do not meet uniform building, fire and safety codes. Further compounding the magnitude of the risk of environmental harm and threats to public health and safety, rail solid waste facilities are often located in populated areas and/or in environmentally-sensitive areas like wetlands, flood plains and coastal zones.

In New Jersey's experience, access to each rail solid waste facility is usually limited to a single solid waste operator, who generally constructs or finances the construction of the facility, controls who can use the facility, and often directly or indirectly oversees its operation. Consequently, there is considerable competitive pressure on non-rail solid waste operators to open their own "rail" facilities by seeking an exemption from the Board or by partnering with an existing railroad. The result is the construction of an ever-increasing number of substandard rail solid waste facilities and an ever-escalating threat to the environment and public health and safety. In the last several years, at least 15 rail solid waste facilities have commenced or sought

to commence operations in New Jersey alone. NJDEP and NJMC believe that the problem is not limited to the State of New Jersey, but extends to states across the nation.

The issues before the Board in this proceeding are of critical importance to the effective regulation of solid waste to protect the environment and the health and safety of the public. Regulation by state agencies like NJDEP and NJMC is the only existing and effective way to prevent very real and often irreversible environmental damage caused by these rogue facilities. Federal law does not comprehensively address the management of solid waste and is no substitute for the existing state regulatory schemes already in place. The Board has neither the resources nor the expertise to replace the comprehensive state regulation of solid waste, even if the Board had the statutory authority to do so. If enforcement of state solid waste management regulation is preempted or materially limited, the conditions and operations at rail solid waste facilities will quickly sink to the lowest common denominator, and the gains in responsible management of solid waste realized through state regulation during the last 40 years will inevitably be lost.

II. PRELOADING PROCESSING OF SOLID WASTE IS NOT TRANSPORTATION

NET apparently intends to engage in the same kinds of preloading processing of solid waste performed by most rail solid waste facilities. In particular, NET plans to sort, segregate, recycle, shred, bale or otherwise process solid waste prior to loading it into railcars for transportation to distant disposal sites. NET, like the rail solid waste facilities operating in New Jersey, contends that such preloading processing is “transportation” pursuant to the Interstate Commerce Commission Termination Act (“ICCTA”), and when performed by a rail carrier, is immune from state and local regulation pursuant to preemption under § 10501(b).

However, the processing of solid waste prior to loading it into rail cars is not “transportation” within the meaning of ICCTA. The Board has repeatedly held that only

activities integrally related to the provision of rail transportation can be considered “transportation” for the purposes of preemption under § 10501(b). See 49 U.S.C. § 10102(9)(A) and (B); *CSX Transportation, Inc. – Petition for Declaratory Order*, Finance Docket No. 34662, (served March 14, 2005); *Hi Tech Trans, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34192 (served August 14, 2003). While transloading commodities into railcars has generally been recognized as integral to transportation, preloading processing of solid waste is not integrally related to the provision of rail transportation services for several reasons.

First, the solid waste processing typically performed at rail solid waste facilities is not part of the loading process itself, nor is it required for the loading of railcars, nor does it need to be performed at the site where the rail cars will be loaded. Indeed, the processing of solid waste prior to loading can be, and traditionally has been, performed at solid waste transfer stations having no relationship to the railroad transloading facility or the transloading site. In fact, exactly the sort of processing at issue here is typically performed whether the solid waste is to be shipped by rail or some other mode of transportation.

Second, the preloading processing of solid waste at issue here is a function of, and generally performed by, the solid waste industry, not the rail transportation industry. As a preliminary matter, unlike most commodities shipped by rail, handling and processing of solid waste requires specialized knowledge and expertise unique to the solid waste industry. Moreover, solid waste is processed prior to shipment to a disposal site for reasons having nothing to do with transloading or rail transportation. Recycling of solid waste to recover materials of value is performed for economic reasons having nothing to do with rail transportation. Sorting solid waste to segregate materials that do not comply with requirements of the disposal site is also a solid waste function unrelated to the mode of transportation to be used to ship the waste to the

disposal site. Similarly, shredding or baling solid waste to increase density to achieve more efficient or less costly transportation is performed for the benefit of the shipper – not the railroad, which generally charges carload, as opposed to per ton, rates.

Third, the responsibility to tender cargo in a condition suitable for transportation by rail is that of the shipper, not the rail carrier. Railroads, as recipients of the cargo tendered by shippers, are responsible only for transporting the cargo tendered. Shippers are responsible for whatever processing, packaging, crating or other preparatory measures are required to tender the cargo in a condition suitable for transport. Shippers of solid waste are also responsible for ensuring that the waste meets the requirements of the disposal sites to which they choose to ship.

Fourth, although processing solid waste before it is loaded may in some manner facilitate the shipment of the solid waste, it does not follow that preloading processing of solid waste is integrally related to rail transportation. Any of the activities in the preloading chain of predecessor activities – from the knocking down of buildings, to the collection of C&D waste, to the trucking of the solid waste to a solid waste facility, to the processing of the waste – can be said to facilitate its later transportation by rail. As the Board itself has recognized, if any of these activities fall within the exclusive jurisdiction of the Board on the grounds that they facilitate rail transportation, there is no analytical justification for excluding the others from the purview of ICCTA. *See, e.g., Hi Tech Trans, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34192 (served November 20, 2002), at 6 (“By Hi Tech’s reasoning, any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier.”) The only clear-cut and principled distinction between transportation and non-transportation activities in connection with the shipment of solid waste is to draw the line at transloading.

III. STATE REGULATION OF SOLID WASTE PROCESSING IS NOT PREEMPTED BY ICCTA

The jurisdictional issue on which the Board is primarily focused in this proceeding – whether processing of solid waste prior to loading it into railcars is “transportation” as defined in ICCTA – is not dispositive with respect to the scope of preemption under § 10501(b) as applied to state regulation of solid waste. New Jersey and other states regulate solid waste pursuant to the exercise of their police powers to protect public health and safety. The Supreme Court has long recognized that a State’s police power is “an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people” which is reserved to the states under the Constitution. *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

Congress has made clear that regulation of solid waste falls squarely within the States’ traditional police powers and is primarily the responsibility of state and local governments. *See, e.g.*, 42 U.S.C. § 6901(a)(4) (recognizing that although federal guidance was required, the regulation of solid waste disposal “should continue to be primarily the function of State, regional and local agencies.”); *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 398 (9th Cir. 1995)(“Congress has explicitly found that the field of solid waste collection is properly subject to state regulation.”); *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1288 (2d Cir. 1995)(“In our multi-tiered federal system, local governments have historically borne primary responsibility for ensuring the safe and reliable disposal of waste generated within its borders – a role Congress has expressly recognized.”).

State regulation of health and safety matters pursuant to police powers reserved under the Constitution is presumed valid against a challenge under the Supremacy Clause. *See Hillsborough County v. Automated Med. Labs*, 471 U.S. 707, 715 (1985). The presumption in

favor of the exercise of state police powers supports a narrow interpretation of express preemptive language, an approach that the Supreme Court has held is “consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Accordingly, the States’ historic police power to regulate solid waste in furtherance of the public health and safety cannot be preempted unless it can be shown that it was the “clear and manifest purpose of Congress” to do so in enacting ICCTA. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). NJDEP and NJMC submit that nothing in the language of ICCTA or its legislative history supports the preemption of state regulation of solid waste.

The Board has repeatedly recognized that § 10501(b) of ICCTA does not preempt enforcement of health and safety regulations promulgated pursuant to state police powers so long as the regulations (a) do not require permits or preclearance of railroad activity, (b) are nondiscriminatory and (c) do not unduly burden or unreasonably interfere with rail transportation. *See, e.g., CSX Transportation, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662 (served March 14, 2005); *Borough of Riverdale – Petition for Declaratory Order*, STB Finance Docket No. 33466 (served September 10, 1999 and February 27, 2001). New Jersey’s Intermodal Regulations are clearly valid under this analysis. The Intermodal Regulations do not require that rail solid waste facilities obtain permits, licenses or preclearance before construction or operation. Moreover, the Intermodal Regulations apply to rail solid waste facilities the same substantive health and safety requirements applicable to non-rail facilities, and thus are not discriminatory. Finally, New Jersey’s Intermodal Regulations do not unreasonably burden or interfere with rail transportation. Indeed, enforcement of the Intermodal Regulations does not foreclose or unduly restrict a railroad’s ability to operate a solid

waste facility. The Intermodal Regulations simply require railroads to operate such facilities in a responsible manner consistent with the public health and safety.

If the reasonable exercise of state police power to regulate solid waste activities is completely preempted by ICCTA, the result will be a regulatory gap that Congress could not have intended. Because the Board's authority to regulate the construction and day-to-day operation of rail solid waste facilities appears to be limited by the provisions of 49 U.S.C. § 10906, railroads would be completely immune from *any* oversight of their solid waste activities if the states are barred from regulating rail solid waste facilities. While in certain circumstances it might be possible for the Board to condition the grant of operating authority to new carriers based upon compliance with some set of environmental or health and safety requirements, such a policy would not appear to affect the ability of existing railroads to construct or operate non-compliant solid waste facilities. NJDEP and NJMC are not aware that any existing railroad has sought Board approval in order to operate a rail solid waste facility. In fact, NYS&W has opened and operated seven solid waste facilities in New Jersey to date – some of which have been open-air facilities with no environmental controls whatsoever – without ever seeking the Board's approval. As demonstrated by the NYS&W facilities in New Jersey, the effect of preempting the comprehensive state regulation of solid waste management would almost certainly lead to a return to uncontrolled open-air operations resulting in gross injury to the environment and public health and safety.

Moreover, even if the Board had the clear statutory authority to regulate rail solid waste facilities, it does not appear to have the resources or the expertise to effectively regulate, inspect and monitor on a day-to-day basis hundreds, if not thousands, of solid waste facilities located across the nation. Similarly, it is not at all clear whether the Board has the injunctive authority or

the procedural tools necessary to adequately protect the public from unsafe conditions or operations capable of causing immediate and irreversible damage to the environment. Given the legal and practical uncertainties involved, any effort by the Board to attempt to replace the existing and proven system of comprehensive state regulation of solid waste with a system of federal regulation administered by the Board, would be an enormous undertaking likely doomed to failure.

IV. NJDEP AND NJMC RESPONSES TO THE QUESTIONS POSED BY THE BOARD

- A. *Is it premature to issue a preliminary decision given the pending appeal in the NYS&W litigation and the ongoing Environmental Protection Agency remedial investigation and feasibility study under the Superfund laws on the property on which NET proposes to operate the business at issue in this matter?*

There is no reason for the Board to delay reaching a decision in this proceeding because of the NYS&W litigation or the EPA investigation. The NYS&W decision, which is on appeal, applies only to five specific facilities served by NYS&W, some of which are no longer operating. Moreover, the Board's position on the issue raised in the Board's June 13, 2006 Order – whether the preloading processing of solid waste is “transportation” for the purposes of ICCTA – has considerable importance and application beyond the proposed NET facility. For the same reason, the EPA remedial investigation and feasibility study, which has not yet been commenced, will not address the question whether solid waste processing is transportation, and should not cause the Board to delay addressing this important issue.

- B. *What federal statutes and regulations are applicable to facilities where C&D and MSW are handled and to what extent is their administration delegated to the states?*

Solid waste regulation has always been and continues to be primarily a State function arising out of the State's police powers, and is clearly a field of traditional state regulation. See e.g., 42 U.S.C. § 6901(a)(4) (recognizing that “the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies . . .”). As a result, solid waste activities are almost entirely regulated by, and subject to, state law. While certain aspects of federal environmental law may be implicated in solid waste activities, federal environmental law was not designed or intended to address the specific requirements necessary for the regulation solid waste activities, much less to replace longstanding state regulation in this area. Accordingly, reliance solely on federal law to regulate the activities of rail solid waste facilities would not be adequate to protect the environment and the health and safety of the public.

Congress has delegated significant responsibilities to the States under various federal environmental statutes implicated in solid waste disposal activities, including but not limited to the Clean Air Act, 42 U.S.C. §§ 7401 et seq. For example, the federal Environmental Protection Agency granted New Jersey final authority to administer and enforce the State's hazardous waste program in lieu of the federal program, 67 Fed. Reg. 76,995 (Dec. 16, 2002), and approved the State's municipal solid waste landfill permit program, 60 Fed. Reg. 62,439 (Dec. 6, 1995). See 42 U.S.C. §§ 6926 and 6947.

- C. *Could the Board address the state environmental concerns associated with NET's proposal by conditioning any Board authorization of NET's proposal on NET permitting state officials to periodically inspect the facility? If so, could the Board provide for the suspension or revocation of NET's authorization on the recommendation of state officials based on an unsatisfactory inspection, provided that NET has some due process recourse to the Board?*

The Board appears to have the authority to impose reasonable conditions on the grant of operating authorization to a rail carrier consistent with the public interest. However, granting conditional authorization subject to suspension is not a practicable resolution to the problem of non-compliant solid waste processing facilities. As a preliminary matter, granting conditional authority to NET and other applicants for new operating authority would not affect solid waste facilities operated by or in conjunction with either existing railroads or new railroads that later announce their intention to handle solid waste. Indeed, such a policy would likely shift the focus of solid waste operators from seeking new rail operating authorizations to partnering with existing railroads that would not need to seek the Board's approval. Moreover, as the NYS&W facilities in New Jersey demonstrate, the participation of an existing railroad is no guarantee that solid waste facilities will meet even minimal standards required to protect the environment and the health and safety of the public.

A policy of granting conditional operating authority subject to inspections by state officials raises difficult questions about the legal standards the Board would apply to the rail solid waste facilities. If state regulations are not preempted, then there is no need for Board involvement in the inspection and enforcement process. However, if state regulations are preempted, then it is not at all clear what standards the Board could apply, whether the Board would be required to formally promulgate its own solid waste regulations, or whether the Board has the statutory authority to do so in light of Section 10906.

In addition, the procedures required to implement a policy of granting conditional authority would be unworkable from a number of perspectives. State inspections of what could be hundreds of such solid waste facilities would inevitably generate a large number of referrals to the Board by state officials. If state officials are powerless to compel compliance by injunction and/or the imposition of significant penalties, many of these referrals will require expedited resolution to address immediate and irreparable harm to the environment or public health and safety. Moreover, these disputes will almost always involve factual issues requiring some sort of evidentiary hearing. The Board does not appear to have the procedural or statutory authority to provide injunctive or other

provisional relief, nor does it have the resources or the solid waste expertise to adequately adjudicate such disputes. The inevitable delay may result in irreversible damage to the environment or public health and safety if an operation is allowed to proceed while the litigation is pending before the Board.

- D. *If the C&D and MSW activities proposed by NET are determined not to be part of rail transportation, what impact would such a decision have on this proposal and on the transloading of other commodities by railroads?*

The determination that processing of C&D and MSW are not “transportation” would not affect the transloading of other commodities by railroads.

- E. *In determining whether a facility is a rail transloading facility, must the activities that take place there be solely transportation activities?*

Although a rail transloading facility may include both transportation activities and non-transportation activities, only the transportation activities are subject to the preemption provisions of ICCTA.

- F. *In determining whether NET’s proposed activities would be part of rail transportation, would it be enough that an activity facilitates transportation, or must that activity be essential to the transportation?*

In order to be considered part of “transportation” for the purposes of ICCTA, an activity must be integrally related to rail transportation. To broaden the definition of transportation to include activities that merely “facilitate” rail transportation would include almost any activity performed on commodities that are later shipped by rail. The Board has already rejected that proposition in the *Hi Tech* proceedings.

- G. *May a determination be based on the type of commodity involved? To what extent, if any, does it matter that the proposed facility would handle multiple commodities?*

The nature of the activities performed at the facility, and whether they are integrally related to the provision of rail transportation, is the primary consideration. However, the nature of the commodity and the extent to which it is otherwise regulated are clearly relevant to determining the scope of preemption if the activities at issue are deemed to be integrally related to rail transportation.

- H. *Should C&D and MSW be considered differently from all other commodities and, if so, on what basis?*

If solid waste processing is deemed to be “transportation,” then C&D and MSW should be treated differently from other commodities with respect to the scope of preemption because of (1) the risks they create to the environment and public health and safety and (2) the fact that regulation of solid waste traditionally has been left by Congress to the states pursuant to their inherent police powers.

- I. *What is the source of the materials other than C&D and MSW that NET proposes to transport? Where are those shipments destined? Would those commodities be segregated from C&D and MSW? How would they be segregated, loaded and unloaded?*

NJDEP and NJMC cannot comment on the particular details of NET's proposed operations. NJDEP and NJMC note, however, that their experience suggests that "rail" facilities like the one proposed by NET usually indicate plans to handle non-solid waste commodities, when the reality is that the great majority – if not all – of the materials actually handled tends to be C&D and MSW.

- J. *Would NET's proposed activities at the transload facility with respect to C&D and MSW add value to the materials, facilitate the disposal of the materials in a landfill or otherwise, or serve any purpose other than facilitating rail transport? If so, should that have an impact on our determination here?*

Based on their experiences with rail solid waste facilities in New Jersey, NJDEP and NJMC understand that preloading processing of solid waste is performed primarily for the purposes of recycling materials of value, to comply with requirements of solid waste disposal sites and to increase the shipping density of the waste regardless of the mode of transportation to be used. The fact that solid waste is processed for reasons having little or nothing to do with rail transportation is clearly relevant to whether the activity is integrally related to rail transportation. In fact, the preloading solid waste processing performed at rail solid waste facilities is identical to the processing performed at non-rail facilities on solid waste shipped by other modes.

- K. *To what extent would NET's proposed handling of C&D and MSW be directed towards ensuring that the material would meet the requirements of the landfill, or other receiver, to which it would be transported?*

NJDEP and NJMC note that ensuring that solid waste meets the requirements of the disposal site is traditionally the responsibility of the solid waste management industry, which has the requisite expertise required and is subject to the oversight by state regulatory officials, as Congress intended.

- L. *Does NET anticipate earning revenue as a result of any recycling activities, e.g., NET's proposed activities of inspection, sorting and reclaiming of reusable materials from the C&D and MSW at this facility?*

NJDEP and NJMC have no information regarding this question.

- M. *What is the background of each of the principals of NET? What is the extent of their prior and current involvement in (a) the railroad industry; (b) the trucking industry; (c) the MSW and C&D industries; and (d) environmental compliance issues? How was the NET project conceived?*

While NJDEP and NJMC encourage the Board to pursue additional background information from applicants like NET, they stress that the Board's exemption process as

applied to the solid waste industry is insufficient to protect public safety. New Jersey's experience regulating solid waste collection, transport and disposal reveals the ability of organized crime to infiltrate this industry, resulting in murder, extortion, arson, and price fixing. New Jersey addressed this threat through a program called A-901, which requires a detailed background investigation of principals of solid waste entities, and allows NJDEP to exclude such entities from the industry if they are found to have organized crime connections, disqualifying felony convictions, or a poor environmental compliance history. Several other jurisdictions, including Vermont, Ohio, New York City, and Westchester County in New York have adopted similar programs. This background investigation is much more extensive than the review provided in connection with the Board's Notice of Exemption procedure, but is necessary to protect public safety from the dangers inherent in the improper handling of solid waste. If rail solid waste operations are found to fall under the Board's exclusive jurisdiction and to be immune from state regulations, important safeguards like the A-901 program will be removed and rail facilities may act as magnets for persons with organized crime or other criminal backgrounds, or repeat major environmental offenders.

Respectfully submitted,



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