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IMPACTS OF RAILROAD-OWNED WASTE FACILITIES

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HEARING

BEFORE THE

SUBCOMMITTEE ON

RAILROADS

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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IMPACTS OF RAILROAD-OWNED WASTE FACILITIES

Tuesday, May 23, 2006

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON RAILROADS, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, WASHINGTON, D.C.

The subcommittee met, pursuant to call, at 10:00 a.m., in Room 2167, Rayburn House Office Building, the Hon. Steven C. LaTourette [Chairman of the subcommittee] presiding.

Mr. LATOURETTE. The Subcommittee on Railroads will come to order this morning. Good morning, I want to welcome you all to this morning's hearing which is entitled the Impacts of Railroad-Owned Waste Facilities.

Under the ICC Termination Act of 1995, the United States Surface Transportation Board has exclusive jurisdiction over railroad facilities such as freight yards, truck to rail intermodal facilities, and auxiliary tracks. Thus, Federal law preempts State and local law regarding establishment and operation of such rail facilities. However, this preemption only applies when the entity in question is a rail carrier subject to STB jurisdiction. If the entity is not legally a rail carrier, then State and local law applies.

Now when you think of a rail carrier, you probably envision chugging locomotives, rumbling freight trains, and tracks stretching beyond the horizon. But what if a company only owns a few hundred feet of track, can it still legitimately claim to be a railroad? And what if that same company is engaged in the potentially noxious business such as waste disposal? Should the ownership of a short piece of railroad track equate to complete exemption from State and local oversight? In my mind, the answer is no. Congress established Federal preemption under the ICC Termination Act to ensure the free flow of interstate commerce, not as a loophole to allow sharp operators to escape legitimate local regulation.

At this morning's hearing, I am going to have some questions for Commissioner Buttrey about how we can assure that Federal preemption applies only to legitimate rail carriers. I am also looking forward to hearing about the limitations of preemption under the ICC Termination Act and the extent to which State and local laws may still be applicable.

I want to welcome our other witnesses this morning: Mr. William Haines, Jr., who is the Deputy Director of the Burlington County, New Jersey Board of Chosen Freeholders and Ms. Kathy Chasey, who is the Mayor of the Mullica—if I butcher that, I apologize, you will hear from me later—Township in New Jersey. I want to thank you for participating in this important Subcommittee hearing.

Before yielding to our guest Ranking Member Mr. Barrow of Georgia, I want to request unanimous consent to allow 30 days for members to revise and extend their remarks and to permit the submission of additional statements and materials by members and witnesses. Without objection, so ordered.

It is now my pleasure to yield to Mr. Barrow for his opening remarks.

Mr. BARROW. Thank you, Mr. Chairman, for holding this hearing. I want to welcome our guests and thank them for joining us today.

When Congress passed the Interstate Commerce Commission Termination Act in 1995, we gave the Surface Transportation Board exclusive jurisdiction over rail carrier transportation. The reason we did that was to create a seamless rail transportation network rather than to subject railroads to a patchwork of State and local regulations that might hinder interstate commerce. However, Congress did not intend for this law to enable railroads to shield themselves from State and local regulations when they are engaging in activities that have nothing to do with rail transportation.

There was a case in Florida where a building material supplier leased land from a short line railroad. West Palm Beach issued several notices of violations and cease and desist orders to the railroad and the supplier for operating a business without a license and for refusing to conform to the zoning ordinance. In response, both the railroad and the supplier filed a complaint with the District Court, seeking a judgment on whether the Interstate Commerce Commission Termination Act preempted West Palm Beach's local laws. Fortunately, in that case, the Court's decision was obvious. There was no preemption because the business had nothing to do with rail transportation. However, in other cases, the outcome may not be so obvious.

In my view, the line between what is preempted and what is not preempted is a little thin. So I would, in closing, just caution the Surface Transportation Board that, while we want to make sure that local communities don't unreasonably interfere with interstate commerce, we need to make sure that interstate commerce doesn't ignore the legitimate concerns of local communities.

Thank you, Mr. Chairman. I look forward to hearing from the witnesses and yield back the balance of my time.

Mr. LATOURETTE. I thank you, Mr. Barrow. I remarked to Mr. Barrow when he came in, he has only been on the Committee about a month, and he is already a Ranking Member. So, congratulations to you in your elevation.

There is a lot interest, obviously, in this subject matter in the States of New Jersey and New York, and this hearing comes about at the request of a number of members, in particular Mrs. Kelly, Mr. LoBiondo, Mr. Saxton, and our first panel as well.

I would now be happy to yield to Mrs. Kelly for any opening remarks that you choose to make.

Mrs. KELLY. First, let me thank you, Chairman LaTourette, for holding this hearing and spotlighting an issue that is begging for attention at the Federal level.

By manipulating the Interstate Commerce Commission Termination Act, waste hauling companies have been able to circumvent

local environmental safety and zoning regulations as well as State laws by claiming to operate as a rail carrier, due to their company operating near or on a small portion of a railway. The near placement of a company's facilities near a rail line should not permit a waste facility to evade State and local regulation, but that is exactly what is happening.

When I first brought this issue to your attention in my March 17th letter to you, I knew that this issue was not one that was exclusive to my New York-based District. If it is happening in Westchester and Orange Counties in New York, it is likely occurring in other places in the United States. It seems that this perspective is affirmed today as we see a wide range of municipalities represented here, both in person and in written testimony.

In two separate parts of my own Congressional District, local officials have had their safety and environmental regulations essentially bypassed by quasi-railroad operators. In Croton, New York, in Westchester County, a railway requested an exemption from the Surface Transportation Board to operate a waste transfer station on a railway in the village. Such an exemption would have permitted the company to operate without it having to adhere to State or local zoning and environmental laws. The site is owned by a company with a long history of environmental abuses.

In August of last year, I wrote the STB on behalf of Croton officials, asking them to deny the exemption which they ultimately and thankfully did. However, it appears that another company is trying to take a similar strategy, forcing the village into the same time consuming and costly process all over again. We can't allow this revolving door to continue to the detriment of our public health and safety.

In a separate part of my District, a new rail company plans to build a waste station that currently does not exist but which the local and State governments are powerless to prevent because of its planned proximity to railroad tracks. This scenario is equally disturbing because it suggests that a rail company could not only open a waste transfer station wherever it chooses but that it could also undermine waste facility operators that already have been good neighbors and have respected State and local regulation. This scenario opens up a Pandora's Box and removes any and all incentives for waste haulers to adhere to local regulation by simply locating their operations near train tracks or by building a couple hundred feet on their own.

While we don't want to return to the pre-Staggers era of over-regulation of the railroads, we simply can't accept the fact that waste facilities can pop up in our communities with little or no input from local and State officials.

I hope this hearing will produce a constructive dialogue that will lead us toward a solution that will provide State and local Governments with input into the process that currently shuts them out. The list of elected officials that are opposed to these two projects include State Senators and assemblymen, supervisors, mayors, councilmen, and board members, not to mention a vocal majority of the public at large. Despite all that opposition, the current process leaves local officials with no voice at all.

I have introduced legislation that would ensure that local and State environmental and safety regulations are adhered to by waste haulers and rail operators. As Middletown Mayor Marlinda Duncanson says in her statement, some of the affected towns have long cooperative relationships with rail companies, and it is undoubtedly in the best interest of those rail companies, the waste haulers, and the public at large that we work to ensure that the companies operating in our communities continue to be good neighbors.

So I ask unanimous consent that the statements of Croton Mayor Gregory Schmidt, Middletown Mayor Duncanson, and the testimony of Wawayanda Supervisor, John Razzano and Deputy Supervisor Dave Cole be submitted for record.

I look forward to the testimony of all of our witnesses, and I thank you once again, Chairman LaTourette. This is an important hearing. I appreciate your allowing me to be here.

Mr. LATOURETTE. Without objection, the gentlelady's request will be granted.

The Chair is advised that Mr. Boswell doesn't have any opening remarks.

Mr. LoBiondo?

Mr. LOBIONDO. Yes, Mr. Chairman, thank you very much for holding this hearing and responding to our serious concerns. We deeply appreciate it. I want to thank Mr. Saxton for joining with me on behalf of South Jersey and also Senator Menendez and Congressman Pallone for being here today, something that I believe has united the New Jersey delegation.

I am very pleased that we have Mayor Kathy Chasey of Mullica Township, who will be testifying in a little while, and Freeholder Bill Haines from Burlington Township. I have a port in Burlington Township. Mr. Saxton and I share the geographic jurisdiction. I am sure they will be able to give you some very compelling remarks.

Mayor Chasey and the residents of Mullica Township have been through a very agonizing period over the last year. In the spring of 2005, a local waste disposal company leased 20 acres of land adjacent to a short line owned and operated by a railroad company for the purpose of establishing a 24 hour a day waste transfer facility. Needless to say, the township was very, very concerned with the impact the facility would have on the quality of life for its residents. Concern turned to outrage very quickly after the township was informed that existing Federal law preempts any local or State laws, zoning ordinance, or environmental regulations.

Mullica Township joined with the State of New Jersey to fight the proposed facility in Federal Court. In December of 2005, the Court imposed an injunction barring the development of the facility until the Court can resolve whether the National Parks and Recreation Act of 1978 conflicts with the preemption standard and the Interstate Commerce Commission Act of 1995.

The National Parks and Recreation Act established the Pinelands National Reserve, 1.1 million acres of land, the development of which requires the approval of a joint Federal and State commission. Fortunately, Mullica Township falls nearly in the center of the Pinelands, and the conflicting Federal laws have granted the township a temporary stay of execution that we hope will be made

permanent. In the interim, I am working with all of my colleagues but especially Congressman Saxton of our delegation on legislation we have introduced to remove the Federal preemption of waste transfer facilities.

I understand the concerns our railroads have in reducing the scope of Federal preemption, but facilities that are not integral to the operation of a railroad, such as a waste transfer station, which threaten the environment and local quality of life should not be granted approval without the concurrence of the local residents.

I want to thank the Chairman again for holding this hearing, and I am looking forward to the testimony.

Mr. LATOURETTE. I thank you, Mr. LoBiondo.

On our first panel today, we are joined by a colleague and a former colleague. It is my pleasure to welcome for their testimony today, first, Senator Robert Menendez, a former member of this Committee, welcome back, and secondly, Representative Frank Pallone, both of New Jersey.

Senator, thank you for making time to come over and see us, and we look forward to hearing from you.

TESTIMONY OF THE HONORABLE SENATOR ROBERT MENENDEZ, A UNITED STATES SENATOR FROM THE STATE OF NEW JERSEY

Senator MENENDEZ. Thank you, Mr. Chairman, and thank you for the opportunity. I am glad to join with my colleagues here in a united effort which I think transcends New Jersey. You will hear a lot of New Jersey voices here today, but in fact this issue is far beyond the confines of New Jersey.

I appreciate your and the Ranking Member's focus on this, on an issue that has severely impacted our State in recent years and threatens to get a lot worse if action isn't taken by the Congress. And so, this hearing is incredibly important as we look at, I hope, closing a glaring loophole in Federal law that puts all of our States and Districts at risk, allows railroads to flout the critical Federal and State and local environmental protections that keep our rivers clean, our air clean, and our families healthy.

Now, my attention was first drawn to this when I had the privilege previously, as a member of this Committee and representing the 13th Congressional District in New Jersey, when a small railroad began operating a solid waste transfer facility in one of our communities for construction and demolition debris. Those sites were open to the air, polluting the surrounding neighborhoods with windblown debris. They had extremely poor storm water controls, if any at all, allowing rain to leach through the trash piles and into sensitive wetlands. The piles of trash at those sites could reach the height of a three-story building, and at least on one occasion, they caught fire.

It was inconceivable that these sites could actually be legal. Of course, they really weren't legal, at least not according to the State which fined the operator $2.5 million. The county and local planning boards were sent impassioned pleas asking for help. But the railroad claimed that because of the exclusive jurisdiction of the Surface Transportation Board over railroad activities, they were ex-

empt from all State and local regulations regarding the handling of solid waste.

Now, Mr. Chairman, I think all of us, when we look at Congress' intent when it passed the Interstate Commerce Commission Termination Act in 1995, it created the Surface Transportation Board and gave it broad authority over the rail transportation issues. I don't think that this was envisioned as being part of that focus. However, despite the preemption of local regulations, I think Congress' intent was very clear at the time ICCTA was passed, and in that respect, the Congress did not intend to preempt Federal environmental statutes such as the Clean Air and Clean Water Acts.

There are a series of cases that my statement has in it, Mr. Chairman, which I would ask consent to be included in the record in its full.

The reality is that the EPA has virtually no regulatory regime for solid waste facilities since that responsibility is supposed to be handled by the States. In this case, however, the States are being prevented from acting, leaving a regulatory hole that results in harm to the environment and the families living in close proximity to these waste transfer sites.

This is not a problem that is going away either. The New Jersey Department of Environmental Protection reports that no less than five new railroad-operated waste transfer sites opened just in the past year. While most of them are in one community, you will hear about others in different parts of the State as well.

Now, one of the challenges, and I know Congressman Pallone will probably speak to this, is that companies continue to exploit the loophole. One recycling company that wants to open a transfer facility in Monmouth County has voluntarily brought their proposal to the county's Solid Waste Transfer Council, but said, if the council denies the application, they would "pursue a preemption facility and form a union with a railroad, and under Federal law, all local authority and control would be lost." So, in essence, not only are there those who are directly flouting the very intention that we had, but there are those who are attempting to strong-arm local authorities, and that is clearly not what Congress had in mind when it passed the ICCTA.

It is obvious that voluntary actions will not be enough to protect the health and safety of New Jersey residents and workers in these facilities.

Finally, Mr. Chairman, it is my opinion that the operation of a solid waste transfer facility is in no way integral to the operation of a railroad. That question has not been settled by the Courts or the Surface Transportation Board, but it can be settled unambiguously by the Congress. Last July when I was still in the House, I joined members of both parties of our delegation including some on this Committee to introduce H.R. 3577 that would explicitly state that the Surface Transportation Board does not have exclusive preemption over the operation of solid waste transfer facilities and that these facilities would be subject to local zoning and environmental regulations.

I don't think we can stand idly by and allow railroads to exploit an unintended loophole in Federal law at the price of the health and well being of the constituents and our environment. So I com-

mend you, Mr. Chairman, for holding the hearing. I hope we will see action.

We are pursuing this on the Senate side. I know Senator Lautenberg has the exact legislation that I introduced in the House. We are aggressively pursuing it there, and I hope that together we can preserve the essence of the preemption for the railroads as it relates to all legitimate issues that are in the operation of a railroad. When they overreach and say that solid waste transfer stations are part of that legitimacy, I think that they are flouting the intention of the Congress. I appreciate your leadership in this regard.

Mr. LATOURETTE. Senator, without objection, your full statement will be inserted in the record, and I want to thank you for taking time from your duties on the other side of the Capitol to share your thoughts with us.

Congressman Pallone, thank you for coming, and we look forward to hearing from you.

TESTIMONY OF THE HONORABLE FRANK PALLONE, JR., A UNITED STATES REPRESENTATIVE FROM THE STATE OF NEW JERSEY

Mr. PALLONE. Thank you, Mr. Chairman, and also our Ranking Member Mr. Barrow, thank you also for holding this hearing and for allowing me to testify before you today.

I did want to particularly make mention of the comments that the Chairman made in his opening remarks where he said that preemption should apply only to legitimate rail carriers. I think that if legislation is passed that essentially implements what the Chairman said in that remark, we will be very happy.

I would point out, however, that if you listened to Senator Menendez' comments with regard to the Red Bank proposal which is in my District, I am sure you heard him say that one of the options of one of these private companies that is suggesting they can utilize this preemption is that they would essentially tell the local officials: Look, if you don't approve this, then we will get together with one of the rail carriers and have this operated under their auspices.

So when we talk about how we are going to sort out legitimate rail carriers and what they do, we have to be mindful of the fact that there are those unrelated to rail who will try to somehow come under the auspices of rail carriers, and we are going to figure out how to deal with those kinds of loopholes that different people will try to create. But I do appreciate your comments.

Obviously, today's hearing highlights what has become a very troubling issue throughout my home State of New Jersey, but as some of the other members, like Mrs. Kelly, have mentioned, this is a threat nationwide, I think, to our environment and to public health. As you know, certain waste handlers and railroad companies have tried to exploit this loophole in Federal law in order to set up unregulated waste transfer facilities.

Under the Interstate Commerce Commission Termination Act of 1995, the Surface Transportation Board has exclusive jurisdiction over transportation by rail carriers and the ability to grant Federal preemption over other laws at any level—local, State or Federal—that might impede such transportation. This makes sense, and it

was obviously Congress' intention in passing the ICCTA to ensure that the STB would enforce compliance with the Commerce clause.

And I agree that local and State Governments should not have the ability to unduly impede interstate rail operation, but Congress intended such authority to extend only to transportation by rail, not to the operation of facilities that are merely sited next to rail operations or have a business connection to a rail company. Unfortunately, certain companies have exploited uncertainty regarding Congressional intent to build or plan waste transfer stations next to rail lines and avoid any regulation, giving them a competitive advantage.

In New Jersey, there are approximately nine railroad transfer facilities operating under supposedly Federal preemption, one of which actually handles hazardous waste, and some of these companies have gone before the STB to seek Federal preemption of a host of environmental and public health laws that apply in every other waste transfer facility. Even without applying for specific exemptions from the STB, companies have held up the threat of Federal preemption as a way of getting local and State Governments to back down on proposed regulations.

Now, word is spreading. This is getting worse, Mr. Chairman, in my State. In my home District, Senator Menendez mentioned a company called Red Bank Recycling is preparing to take advantage of the possibility of preemption and move forward with a proposal to build railroad sitings as well as facilities for transferring construction debris and separating recyclable materials.

Officials from the borough of Red Bank, the County Solid Waste Advisory Council, and the State have all weighed in with my office, expressing grave concerns about this proposal. The Red Bank proposal and others throughout the State have shown that certain waste haulers are trying hard to avoid environmental regulations and to site facilities in environmentally sensitive locations. One facility in Mullica Township—the Mayor is here—was stopped by a court order before it could begin operations but would have been located in the midst of the Pinelands region.

Unregulated waste transfer stations are not merely small operations that exist to move containerized waste from trucks to rail, and that is why I brought this poster which is to my right. As you can see from the poster, these facilities are large, they are dirty, and often in the midst of heavily populated areas. The one picture here in the poster is in North Bergen, New Jersey, and as you can see clearly, it is right across the street from a McDonald's and other retail locations. This facility performs much of the same work that you would expect to see at any large waste transfer station with the exception that this particular station does not have to comply with the State's rigorous solid waste regulations.

Mr. Chairman, I don't come before you to ask that Congress do anything to interfere with the legitimate interstate movement of freight rail. You mentioned that yourself, Mr. Chairman. In fact, the freight rail industry itself does not see Federal preemption of environmental laws as critical to their commerce. In a recent filing with the STB, the Association of American Railroads noted that potential Federal loopholes under the ICCTA are being abused by

parties whose objective is something other than providing rail service. So they agree with us.

I simply want to ensure that these new waste facilities sited near rail lines comply with the same regulations as every other facility of this type, and that is why I introduced the bill H.R. 4821, legislation that was originally championed by our two State Senators. It simply amends the law to say that solid waste management and processing are excluded from the jurisdiction of the STB. This will do nothing to impede interstate freight rail service but will ensure that solid waste facilities next to rail lines fall under the same regulations as every other waste facility.

Again, I hope that we can pass legislation like this, and I appreciate your comments and the Committee's attention. Thank you.

Mr. LATOURETTE. Congressman Pallone, thank you very much for coming and sharing your thoughts with us as well. Unless somebody has a question for the Congressman, you go with our thanks. Thank you very much.

At this time, it is my pleasure to call up our next panel. We are joined by the Honorable W. Douglas Buttrey, who is the Chairman of the Surface Transportation Board, and he will be accompanied this morning by Evelyn Kitay, who is the Associate General Counsel of the Surface Transportation Board.

Chairman Buttrey, thank you very much for coming to share your thoughts with us this morning. Your entire statement will be made part of the record, and we look forward to hearing from you. Thank you for coming, sir.

TESTIMONY OF THE HONORABLE W. DOUGLAS BUTTREY, CHAIRMAN, SURFACE TRANSPORTATION BOARD, ACCOMPANIED BY: EVELYN KITAY, ASSOCIATE GENERAL COUNSEL, SURFACE TRANSPORTATION BOARD; WILLIAM S. HAINES, JR., DEPUTY DIRECTOR, BURLINGTON COUNTY BOARD OF CHOSEN FREEHOLDERS; TESTIMONY OF KATHY CHASEY, MAYOR, MULLICA TOWNSHIP, NEW JERSEY

Mr. BUTTREY. Thank you, Mr. Chairman, and good morning. My name is Douglas Buttrey. 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, and I appreciate the fact that you are going to enter my entire testimony—this will be a summary—in the record.

The express Federal preemption contained in the Board's governing statute of 49 U.S.C. 10501(b) gives the Board exclusive jurisdiction over transportation by rail carriers. Congress has defined the term, transportation, broadly to include all of the related facilities and activities that are a 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 preemption is broad, there are limits. While a literal reading of the statute 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 stat-

ute 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 rates or service or the construction operation and abandonment of rail lines.

Otherwise, whether 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 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, an environmental review under NEPA, the Board addresses both the transportation-related issues and any environmental issues that are raised.

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 preemption is being wrongly claimed to shield activities which do not qualify. 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. It is worth noting that the Board and the Courts have never reached different conclusions regarding the availability of 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.

Given the strength and breadth of the preemption, the potential for misuse is a definite concern. 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 to the Courts.

The inquiry into whether and to what extent 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.

In conclusion, it is important to reiterate that both the Board and the Courts have interpreted the preemption statute 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, is still being fleshed out by the Board and the Courts in individual cases. However, it is clear that not all activities are entitled to preemption simply because the activities take place at a facility 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 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 I will be happy to answer any questions that you may have.

Mr. LATOURETTE. Chairman Buttrey, thank you very much for coming here today and thank you also for your very concise statement. I think from the earlier panel with Senator Menendez and Congressman Pallone, and I know we are going to hear from some of our other colleagues, and in the opening statements of Mrs. Kelly and Mr. LoBiondo, you get what the problem is as far as these folks are concerned.

I just want to talk to you a little bit about the avenues. You said several avenues of recourse. If a community determines that they want to challenge some activity of one of these folks that are claiming preemption, it is my understanding that if they go to Court, the Court may but doesn't have to refer or ask the STB for a declaratory or an expert opinion. Is it your experience and is it the Board's experience that this is being done on a consistent basis so that we have a consistent body of case law?

I think I heard you say that there has never been a disagreement between what the STB has ruled and what the Courts have ruled. Does that continue to be the case?

Mr. BUTTREY. That continues to be the case, Mr. Chairman.

Mr. LATOURETTE. You pointed to Section 10501(b) and indicated that does not displace all other Federal and State law. The question that I think I have is in that instance, do you think that the communities that are currently having these difficulties are aware of the distinction between preemption for economic regulation on the one hand and the fact that they retain jurisdiction, for instance, with police powers on the other? If not, what, if anything, is the STB doing to increase the awareness of these communities to that fact?

Mr. BUTTREY. Mr. Chairman, I think there is considerable confusion around the Country about what these rules are and are not. I heard this morning from the Senator's and the former Congressman's testimony that would indicate that is still the case. So I think this confusion is there. I am not sure exactly what the Board could do. I think these hearings that you are having today will illu-

minate this issue to a great extent and bring it to the fore, which I think is important.

I heard both the Senator and the former Congressman talk about the fact that statements have been made to local communities about the fact that if they couldn't get their facility one way, they would try to get it another by using the railroad preemption. I think there is some misrepresentation there. I can't help but believe that it is intentional misrepresentation, and people have been misled about what the law is and is not. The line of Board precedent on this is very consistent. The line of Court decisions affirming those precedents is very consistent.

The Congress, I think, put preemption in place for a very good reason, and I think they expect the Board and I think they expect the Courts, in relating to what the Board decisions are, to build on the foundation that they have laid with this preemption issue in the statute.

I would have to say I think we have done a fairly good job of building on the foundation that the Congress made for us to the extent that people have said or groups or interests have said that we have done a good job. At least the Courts have agreed with us so far, and I would hope that in the future, when we make decisions in this area, that they would be sound decisions in keeping with the statute and the intention of the preemption law and that we would continue to have the affirmation of the Courts as we go forward.

Mr. LATOURETTE. Let me ask you just a procedural question. If a community were to file a claim relative to the facilities preemption, does the Board conduct a live hearing or do you do everything based upon written pleadings and briefs?

Mr. BUTTREY. Generally, they are based on, they are obviously based on written pleadings in that we function very much like a special Court for railroads and shippers over at the STB. Generally speaking, the record is brought forth from a complaining party, whoever that party may be, and the decision is rendered based on a written evidentiary record. We normally do not have oral arguments or hearings on these issues. They are usually done by written pleadings.

And I would add this, too, that these matters are given expedited treatment. They are acted on quickly. As long as I am there, Mr. Chairman, they will continue to be acted on quickly.

Mr. LATOURETTE. I appreciate that very much.

My last question is, and you correctly point out that the statute indicates that in order to be subject to one of these preemptions, it has to be a rail carrier providing rail transportation. Does the Board ever take into consideration whether or not the party involved, the company involved is paying, for instance, into the railroad retirement system? Do you ever confer with the Railroad Retirement Board to determine whether or not we actually have a railroad here or we have something else?

Mr. BUTTREY. I am not aware of that. I may refer to Ms. Kitay here to see if she could clarify that, but I am not aware of any case, maybe she is, where that has been the case. That would not, to me anyway, initially anyway just on first blush, sound like something that we would do, but Evelyn may know of another case.

Ms. KITAY. I don't think we have ever looked into the railroad retirement situation, but there is Board and Court precedent looking very carefully at whether the entity that holds itself out as a rail carrier really is a rail carrier, and we have found that somebody just having the name, railroad, is not enough, for example.

Mr. LATOURETTE. As we approach sort of the 10 year anniversary of this thing, you have heard what the issue is. You know what it is, the concerns among our members today. Is there any suggestion as to a tweak of the statute that we need to do that would clear this up a little bit so that we don't have the confusion that you talk about?

Mr. BUTTREY. Mr. Chairman, when this issue came up, I think for the very first time to my knowledge anyway was last year, we didn't take a position on the legislation last year. We have not taken a formal position this year about any amendments to the law. What I would say is I think the gist of my testimony today and both the verbal testimony and the written testimony would indicate that the system we have in place now seems to be working pretty well. That is not to say, however, that there aren't people out there, interests out there in the Country who are very eager to take advantage of what they perceive to be a loophole in the law.

I will tell you this: We take our environmental responsibilities at the Board very seriously, and as I said before, as long as I am there, we will continue to do that, and I can assure you of that.

Mr. LATOURETTE. I thank you. I thank you very much.

Mr. Barrow?

Mr. BARROW. Thank you very much, Mr. Chairman.

At the outset as a housekeeping matter, I believe that any statements or remarks of Congresswoman Corrine Brown might have been covered by the unanimous consent.

Mr. LATOURETTE. It was, but we will make double sure.

Mr. BARROW. Good, and I also want to ask unanimous consent that we allow Congressman Maurice Hinchey and the statement of the National Solid Waste Management Association to be added to the record of these proceedings as well.

Mr. LATOURETTE. Without objection.

Mr. BARROW. Thank you, sir.

Mr. Chairman, just at the outset, I want to clarify something that the Chairman asked you a minute ago about this. He asked a question about procedure, and I want to make sure we are at a point of agreement because you said earlier that the findings and the conclusions of the Courts are in remarkable agreement with the findings and conclusions of the Board on the matter of the substantive scope of preemption in this area.

But I also heard him ask a slightly different question that gets at the procedural morass that folks can find themselves in. I heard him to ask whether or not the Courts consistently refer these matters to the Board, or whether or not the Courts sometimes decide these issues for themselves or sometimes refer these issues to the Board. As a matter of practice, do the Courts consistently refer these matters to the Board, or do they sometimes decide these matters themselves?

Mr. BUTTREY. My experience, and I would stand corrected by my counsel here, but my recollection of all the case law on the matter

that I have reviewed, and I have tried to diligently review it all, the Courts have occasionally sought the Board's review of this issue and sometimes they do not. Sometimes they simply look at the case law and look at the Board's precedents and rule themselves without coming to the Board.

But we have a procedure at the Board called a declaratory order that is a procedure that is very useful in this particular type of case where the party, aggrieved party or interested party, could file for a declaratory order similar to an application for declaratory judgment in a regular Court.

Mr. BARROW. Well, that is a concern of mine that I have because if the Court refers the matter to you or if the party initiates the matter with you, your practice and procedure becomes the practice and procedure that folks are stuck with.

You said that these proceedings were expedited. If you say they are conducted normally, in fact in every instance you describe, on a written record which has to be prepared and produced, that requires time. It isn't as quick, for example, as a TRO in a Federal Court. If the Federal Court has some question about preemption and then refer it to you, they are stuck with a process that doesn't allow you to go in front of a Court in five days or to get a TRO. You are stuck with the proceedings.

So how expedited is that actually? How quickly? What is the fastest turnaround time someone has in getting a declaratory judgment, if you will, from you, that something is not preempted from the time it is first initiated with you, either by a Court referring it to you or by someone taking it to you in the first instance?

Mr. BARROW. I would have to refer to my counsel on that because she is our chief litigator in these matters and would have a better answer for that time frame involved.

Mr. BARROW. Does anybody know what the quickest turnaround time has been?

Ms. KITAY. In the Croton-on-Hudson case, we issued a stay very quickly. I can't remember how many days it was, but I don't think that that has been a problem really, although it could be a potential problem. I think that in several other instances, including the Pinelands case if I am not mistaken, the Court issued a stay very quickly.

Mr. BARROW. Was the stay given effect?

Ms. KITAY. Yes.

Mr. BARROW. Was there a right of appeal from someone? What right of appeal do they have if someone issues a stay, the stay before the Board?

Ms. KITAY. Well, if there is a stay before the Board, I believe that on the Croton-on-Hudson case it was a temporary stay pending further pleadings, and then we issued a subsequent decision disallowing use of the expedited class exemption procedure in that case. I think the first decision was issued in August, and the second decision in November.

Mr. BARROW. Has there been any instance in your knowledge, your recollection, in which someone has asked for a stay, and a stay wasn't in effect throughout the entire time that the party was asking for the stay?

Ms. KITAY. I am not aware of any situation like that.

Mr. BARROW. If the Board issues a declaratory judgment in favor of the parties opposing the operation of the facility, can that be appealed, and if so, to whom?

Ms. KITAY. Yes, you go to the Courts of Appeal to appeal those.

Mr. BARROW. Right, and what happens with the stay then? It is up to the Court. Then you have two bodies deciding whether or not there will be a stay. You have the Board level, and then that can be challenged. The separate unit, the case within a case, the lawsuit with a lawsuit that develops, though, is whether or not the stay remains in effect while someone is arguing about the scope of preemption.

Ms. KITAY. Well, the only case that we have ever stayed or been asked to stay is the Croton-on-Hudson case. So we haven't had that much experience, but I don't think these cases have languished for years. I think, in fact, there has been recourse either at the Board or in the Courts in every instance.

Mr. BARROW. Well, Mr. Chairman, I don't want to trespass on the other members' time, but I will ask one last question.

If there is remarkable agreement between the Board and the Courts with respect to the specific subject matter of waste transfer facilities not be covered by the scope of preemption, why would anyone object to making that clear and putting it in legislation that will expedite this process and send a clear signal to the operators they are not going to get away with this, to augment what you are finding through the case by case common law approach, both at the administrative level and the Courts, with specific legislation that says what everybody agrees on? Should there be a problem with that?

Mr. BUTTREY. Representative Barrow, I would answer your question by saying this. The preemption language in the statute is very broad and covers a lot of different kinds of activities. I think that we just have to be very cautious about whatever we do to make sure that the preemption, the basic foundation of preemption is not eroded to the extent—

Mr. BARROW. I quite agree.

Mr. BUTTREY.—that it could be chipped away piece by piece until finally you have a situation where the Courts are saying, we really don't know what is going on here anymore.

Mr. BARROW. Well, right now, it is a fact-specific process that requires some sort of adjudication, some sort of common law process in which the party has to fight it out and spend the resources to do it on a subject matter where we are all in agreement. This is an area that we might not want to recache the formula in coming up with a general proposition that covers all cases that generates a new level of uncertainty around its perimeter.

But if we can all agree that solid waste transfer facilities operated by folks who aren't railroads on their property should not be covered, why not just put that in there?

Mr. BUTTREY. If that is what the Congress chooses to do, that is what the Congress chooses to do.

Mr. BARROW. It is an administrative problem.

Mr. BUTTREY. We would abide by the law whatever the law is. We are going to follow the statute.

Mr. BARROW. Thank you.

Mrs. KELLY. If the gentleman would yield?

Mr. BARROW. Yes, ma'am. I don't have any time to yield, but I will be happy to.

Mrs. KELLY. With regard to the Croton decision which was in my District, the problem is not the decision itself. The problem is that, once a decision is rendered, then the company will sell to another company and the local entities then have to go through the process again. It becomes a chain reaction.

Mr. LATOURETTE. Well, I thank the gentleman, unless you have an observation to make on that.

Mr. BARROW. No, thank you.

Mr. LATOURETTE. It is my pleasure now to yield five minutes to Mrs. Kelly.

Mrs. KELLY. Thank you. I appreciate your yielding to me.

The problem is exactly as I described it. In the Croton decision, the local entity, Croton-on-Hudson had tried repeatedly through the Courts in every way possible to stop a very messy situation. We finally got the decision, and it was rendered very quickly, much to our astonishment and grateful astonishment I might say.

That decision, though, caused the company—it was Northeast Interchange Railway, LLC—the Northeast Interchange Railway went for sale. Another entity then will step in, buy it, and then the local people have to go through the process again and the Board has to go through the process again. Somewhere we need to change. We need to break that chain.

I yield back the balance of my time.

Mr. LATOURETTE. Does the gentlelady want to ask any questions?

Mrs. KELLY. I would be delighted to ask a question about that to Chairman Buttrey about that particular case. That was a class exemption. It was a standing administrative suspension of an active STB regulation. It allowed a very truncated and short notice process for a person claiming rail carrier status to do whatever they wanted to do. In this Northeast Interchange Railway case, the STB decided to withdraw the class exemption status of the transaction and require a full-blown normal application but only after the local communities took up the burden of challenging the original class exemption.

So my question is basically this: Has the STB considered cutting back the scope of these class exemptions in order to allow a better look for the first time around of the proposed railroad action? And second, isn't it true that Association of American Railroads just recently filed a petition with the STB to reduce the scope of these class exemptions?

Mr. BUTTREY. Representative Kelly, you have touched on a hot point for me. Since coming to the Board about two years ago, there are some due process issues that I think need to be addressed, and this is one of them. I think your case awakened, if you will, an interest in both Board members, both myself and Vice Chairman Mulvey, as a due process issue that needs to be addressed.

We have instituted or we are in the process now of instituting a rulemaking proceeding to change that process, so the people in the local communities have more of an opportunity, if you will, to be aware of what is going on before it might be, but it is really not

too late necessarily because they would always have recourse to the Courts or the Board to reverse a class exemption. But our effort is to make the process more transparent, if you will, so that parties would have notice of these things longer so they could have time to respond before these things go into effect.

That is an ongoing process that we are involved in right now which goes to the very heart of your question. What are we doing to make sure these things don't go into effect before it is so-called too late because it is not really too late, but it is always hard to undo something after it is already done than it is prevent it from happening in the first place. So that is what we are trying to do.

Mrs. KELLY. Chairman Buttrey, would it help you if we were able to put some legislative fix in there? Would that be helpful?

Mr. BUTTREY. We are actually doing it at the regulatory level through the rulemaking process. It doesn't even require legislation. It is difficult to get legislation passed from time to time, depending on what it is, and we intend to deal with this through the rulemaking procedure under the Administrative Procedure Act.

Mrs. KELLY. I assume you are working with our Chairman.

Mr. BUTTREY. Yes.

Mrs. KELLY. Thank you very much. I yield back. Thank you, Mr. Chairman, for letting me participate.

Mr. LATOURETTE. I thank the gentlelady.

Mr. Cummings?

Mr. CUMMINGS. Thank you very much, Mr. Chairman.

Tell me something. How do these things get established? In other words, do they have to come to you at all before they can just set these things up wherever they get ready to?

Mr. BUTTREY. Generally speaking, we would not get involved in it unless a complaint was filed with us about some activity where a claim was being made that they were operating under the creation of the Act. A complaint would be filed either by a local community or by an individual. It can be filed by anybody. It can be filed by a neighbor to this facility.

To use the example that was here just a few minutes ago, the manager of a McDonald's, the McDonald's Corporation, if he is upset about it, he can file with the Board for a declaratory order, saying: Is this activity preempted or not? We would have to rule on that.

Mr. CUMMINGS. So when the issue comes to you a little bit earlier you were talking about the stages. Is the issue normally whether this is a rail operation? Is that usually what it is all about? Do you follow me?

In other words, it sounds like that is what the issue would almost have to come down to be. Is that normally the issue?

Mr. BUTTREY. There is a threshold question that needs to be answered. That is: Is this rail transportation by a rail carrier? Is this activity part of rail transportation, or is it not?

Mr. CUMMINGS. When these facilities are established and they are not getting any authority from the Federal Government, then I guess it is a natural conclusion, a reasonable conclusion that they are getting it from State and local.

Mr. BUTTREY. That would be the conclusion because the State are administering the Clean Water Act, the Solid Waste Disposal Act, and the Clean Air Act.

Mr. CUMMINGS. Then after they establish these things and they are exempt, the problem is the State doesn't have too much authority, is that right?

Mr. BUTTREY. Well, if the issue is presented to us and we rule that they are not preempted, then the State would be able to shut them virtually, I would think, immediately.

Mr. CUMMINGS. That is what I meant to say.

Mr. BUTTREY. Right, right.

Mr. CUMMINGS. Do you inspect these facilities for any reason?

Mr. BUTTREY. I am sorry. I didn't catch that.

Mr. CUMMINGS. Do you inspect them?

Mr. BUTTREY. No, we do not inspect them. We do not have any inspection personnel. We do not have any inspection authority. We would make a determination of whether it is preempted or not based on a written record that is before us, very much like a Court would do.

Mr. CUMMINGS. That is about it? I mean that is about basically what you do?

Mr. BUTTREY. That is correct.

Ms. KITAY. Can I just say something?

Mr. CUMMINGS. I would love to hear it.

Ms. KITAY. If the proceeding requires a license from the Board, in other words, if it is a rail, if it is part of a proposal to construct new line or possibly to acquire and operate new line, then they need a license from the Board. If the facility is part of that proposal, it would be considered. In any case like that, the Board would look at both the transportation aspects and the environmental aspects and generally would conduct an environmental review under the National Environmental Policy Act. As part of that review, any communities could come in or any interested parties concerned about the facility could come in, and the Board would address those issues as part of its environmental review. Then the Board typically would impose conditions on any grant of authority. That is true for cases that require a license.

In cases that do not require a license, then we do exactly what Chairman Buttrey said. We get involved either if requested by a Court to address preemption issues or if somebody files a request for a declaratory order at the Board. Then we look at whether this is actually rail transportation by a rail carrier. But even if it constitutes rail transportation by a rail carrier and qualifies for preemption, the Board and the Courts have made it clear that Federal environmental laws continue to apply and that some State and local regulation also continue to apply as part of police powers that the States retain. So there is not total preemption, regardless of the circumstances.

Mr. CUMMINGS. And are those companies, many of them, I guess they are saying to the State: You don't have but so much authority over me. Is that usually the issue?

Ms. KITAY. That is sometimes the issue. Now, New Jersey, for example, has passed regulations, I believe, that accommodate ICCTA and do not incorporate zoning and permitting but do retain a lot

of other regulation that continues to apply to solid waste facilities in that State. If there are disputes about what is or is not preemptive, that is where the declaratory order or the availability of going to Court for relief applies.

Mr. CUMMINGS. Last question: When we have a situation where like New Jersey, what they have done, is that something that would be or have you found that is helpful to the New Jersey communities as something that perhaps other States need to be doing?

Ms. KITAY. To pass regulations?

Mr. CUMMINGS. Yes, yes, the ones New Jersey has done.

Ms. KITAY. I am surprised that other States haven't passed regulations, but nobody has ever come in, and we don't have any kind of a record. I don't know.

Mr. CUMMINGS. I understand. Thank you, Mr. Chairman.

Mr. LATOURETTE. I thank the gentleman.

Mr. LoBiondo?

Mr. LOBIONDO. Thank you. Thank you, Mr. Chairman.

Chairman Buttrey, what if the railroad leases the waste facility, waste transfer facility from an entity that is not a railroad, would that arrangement meet the definition of rail carrier and qualify the facility for preemption?

Mr. BUTTREY. Well, as I said before, each one of these situations is different in terms of the facts. We would have to look at the facts of each case to see what was really going on here, and it would certainly depend on the complainant, whoever that complainant would be to make that case to us.

But the statement that we have made all along here this morning is that if someone believes that they are going to be able to escape an environmental review on facilities like this, I think they are going to be really surprised.

There have been significant misrepresentations made, it appears to me, based on what I have heard this morning with some of these companies about what their rights are and are not. I think when those representations have been made, if they have been accepted on face value by local communities, I think they need to go back and take a look at that and review those because they may be, potentially at least, allowing something to take place that should not take place.

Mr. LOBIONDO. I thank you. Can I just end with a brief comment, echoing the comments of my colleague from New York, Mrs. Kelly, about the fear that if one company goes ahead and is denied, then somebody else just follows up in their tracks. In the case of in my District, and I think it is probably the same in Mr. Saxton's District, these small communities have very limited resources. To be able to go through a list over and over again of people who are just going to step up and cost the taxpayers money to fight the same fight over again is a wrong road to go down.

Chairman Buttrey, I thank you very much.

Mr. LATOURETTE. I thank the gentleman very much. We are attempting to solve our audio difficulties.

Ms. Johnson, do you have any questions?

There being no other questions, I want to thank you very much, Chairman, for coming and sharing your thoughts with us today. It is obvious that you get the concern. I have to say the Chair is im-

pressed by your stated willingness to work through these cases in an expeditious manner, and we look forward to hearing from you again. So you go with our thanks. Thank you very much.

Mr. BUTTREY. Thank you.

Mr. LATOURETTE. I think maybe when we shut off that one microphone, that was the offending microphone. So maybe we can skip that for the remainder.

Our next panel we are lucky to have. I would like to call them up. We have Mr. William S. Haines, Jr., who is the Deputy Director of the Burlington County Board of Chosen Freeholders. He is going to be accompanied by our colleague, the Honorable Jim Saxton this morning. Also I think we have referenced already Ms. Kathy Chasey, who is the Mayor of Mullica Township in New Jersey, and she is not accompanied at the moment but I think will be introduced by our colleague, Congressman LoBiondo.

First, Congressman Saxton, thank you very much for coming and thank you for your interest and asking the Subcommittee to have this hearing. We will yield to you to introduce your constituent and any other comments you want to make. Thank you for being here.

Mr. SAXTON. Thank you very much, Mr. Chairman and Ranking Member Barrow. I am here primarily to introduce my great friend, Burlington County Deputy Director of the Board of Chosen Freeholders, which incidentally are called different things in different States, but the Board of Chosen Freeholders in Burlington County, of course, is the legislative group and administrative group, for that matter, that runs the matters in Burlington County.

Before I actually introduce him, let me just say that I have some written testimony which I would like to submit for the record.

Mr. LATOURETTE. Without objection.

Mr. SAXTON. Let me just briefly say a couple of things.

It was mentioned a little while ago that New York and New Jersey are here to demonstrate significant interest in this subject, and there is very good reason for that. As you probably know, New Jersey is the most densely populous State in the Country, and the area that Mrs. Kelly and her Republican and Democrat colleagues who represent the greater New York area have is an even more densely populated region than New Jersey. As a result of that, our region produces tons and tons and hundreds of thousands of tons of solid waste a day, and in a very short order, those hundreds of thousands of tons turn into mountains of solid waste.

Over the years, this has been a huge problem for us contrasted to the disposal of solid waste in a State like Wyoming where our good friend, Barbara Cubin, hails from, where her entire state has a population of something under 500,000, which is 250,000 less than my District. And so, we have a unique situation in which I would make the case that a one size fits all preemption policy is really wrong-headed for the Country.

Because of that, the State of New Jersey—and I am sure the State of New York as well, particularly the City of New York which has such problems in this area—the State of New Jersey in the late 1970s passed a law called the Solid Waste Management Act for the Sate of New Jersey. I say this to frame the situation so that my friend Bill Haines' comments and testimony will be put into this context.

In 1977 or 1978, I can't remember which, I was in the State Legislature, and we passed the Act, and we recognized that not only did New Jersey have a unique situation but each county had a unique situation. Some counties were more densely populated than others. Other counties had good ways of managing solid waste in place already. So the Solid Waste Management Act passed during the 1970s gave each county the responsibility and the duty to put in place a system to take care of their solid waste.

In the case of Burlington County, we invested in our county $200 million to put that system in place, and in order to recoup a return on that investment, we now have to process solid waste. We do it in many wastes. Some of it is landfilled. Some of it is recycled. The methane gas from that which is landfilled is used to heat hot houses, to grow vegetables.

We have a good system. Aside from the fear of the environmental damage that would come from an unregulated solid waste facility carried out under the preemption law by the railroads, the citizens of our county could be put to a great disadvantage if we don't have the solid waste to process through our $200 million investment. This becomes a very real problem for a number of reasons for communities in the northeastern region that we represent.

With that, I would like to turn for more specific discussion of this situation to my friend, Freeholder Bill Haines, who is the Deputy Director of the Burlington County Board of Chosen Freeholders. Bill presides over the county's Resource Conservation Department set up under the State Act and has been the key in crafting our solid waste management plans for more than a decade. He has been instrumental in creating and implementing the hugely successful Resource Recovery Complex in Burlington County, the $200 million investment. Overseeing the Division of Solid Waste Management has given Freeholder Haines firsthand knowledge of the Federal preemption problem that we face today in Burlington County.

Mr. LATOURETTE. Congressman Saxton, I want to thank you very much not only for your interest but your excellent remarks, and thank you for bringing Mr. Haines to us. Just before we hear from Mr. Haines, I am glad you brought up this Freeholder business. I got a letter from Congressman Frelinghuysen, and he said that Freeholder Smith wanted me to do something, and I didn't know what the hell he was talking about. So I am glad you brought that to light.

Mr. Haines, thank you very much for being with us, and we look forward to hearing from you.

Mr. HAINES. Thank you, Mr. Chairman and members of the Committee for providing me the opportunity for me to provide this comment this morning. Thank you, Congressman Saxton, for inviting me to here today and for putting the situation in Burlington County into context.

I appear before you today on behalf of the entire Burlington County Board of Chosen Freeholders in support of H.R. 4930 sponsored by Congressman Saxton. We are a five-member board which is charged with the administration of county government, and all Freeholders are elected at large. Burlington County is geographically the largest county in New Jersey with a population of

450,000, and we are renowned for our pine barrens and our other open spaces, but it is a situation within the population center of our county that I wish to address.

Over the past several months, an entity known as Hainesport Industrial Railroad, LLC has been seeking to operate a waste transfer facility within an industrial park located in the municipality of Hainesport Township. It has been a matter of discussion, debate, and even negotiation between the railroad owner and local officials as to the operating parameters as well as to the types of waste which would be trucked into the industrial park, loaded onto railcars and shipped across the county to locations beyond New Jersey.

This proposal has been a source of public outcry, particularly from residents whose homes border the industrial park. At the same time, we are advised that local officials in other municipalities through which the railcars pass are girding for a fight and are intent on protecting the health, safety, and welfare of their residents as well.

However, hanging over all discussion, all debate, and all negotiation is the phrase, Federal preemption. It is the rail owners trump card where, as the Committee is aware, Federal law presently exempts rail carriers from State or local permitting requirements related to the processing and transporting of solid waste. Hainesport Industrial Railroad received its verified notice of exemption from the Federal Surface Transportation Board on May 10th, 2005.

From our position as county officials and from the viewpoint of elected officials in our local communities, this type of exemption and the Federal preemption that flows from it flies in the face of what we have come to regard as home rule. It guts local governments' abilities to fulfill their obligations to protect the health, safety, and welfare of their residents. The siting of any type of waste facility should not be taken lightly. The very nuisance and health issues related to odors, dust, traffic, and noise invites scrutiny and demand that State regulations, county requirements, and local ordinances be followed.

Our position is that no aspect of what we know as the regular solid waste, zoning, and other recognized permitted processes should be waived. Mr. Chairman, as a result of recent experiences involving another waste facility, I cannot underscore enough the importance of these permitting processes.

Presently, the Freeholder Board is engaged in a two-year legal and administrative battle in concert with the State of New Jersey to shut down another waste operation in our county. This composting operation was granted a State permit, yet obnoxious odors and other environmental complaints have resulted in dozens of violations and hundreds of thousands of dollars in fines.

Ironically, unlike the Hainesport facility, this other operation is located in a rural community, but the odor complaints have come in on a regular basis from residents across the northern part of the county. The State is methodically following legal procedures for lifting the permit and closing this facility while the residents continue to suffer.

I only mention this because, again, it underscores the importance of waste facilities meeting every standard of law that protects the public, including the right of State and local governments to impose

their statutes and ordinances. This example also points out that even when appropriate permitting processes are followed, facilities can go bad, and addressing the problems are not simple.

While the actual siting of any commercial operation falls largely on local government in New Jersey, when it comes to waste facilities, the county is also engaged. Under State law, all proposed waste facilities and even proposed changes in operation and types of waste accepted must be reviewed at the county level. This review culminates in a public hearing before a Solid Waste Advisory Committee.

This advisory board hears testimony from the public and all interested parties, weighs those comments and the evidence provided, and makes a recommendation to the state as to whether the proposed facility or change of operation should be granted. The advisory committee was originally created under State law with an eye toward ensuring that counties have jurisdiction over their own solid waste plans. It was the State's sanctioning of the very home rule that we seek to protect today. Because of existing Federal law, not even this county advisory board is afforded the opportunity to review the situation in Hainesport.

All of this considered, this brings me back to the proposal of the Hainesport Industrial Railroad. I would be less than candid if I did not represent to you that the primary operative for the Hainesport Industrial Railroad is a respected businessman. He has made representations that his waste facility will comply with State environmental law.

But the bottom line is that late last week, Hainesport Township officials found themselves in a situation, because of the Federal preemption, that they were under pressure to make a deal. They had no hammer, no ordinance, no regulation to match against Hainesport Industrial Railroad. Facing what it foresaw as a difficult legal battle, Hainesport Township entered into an agreement with the railroad purportedly limiting its operation to construction and demolition waste. How well that agreement will stand the test of time is already an item of public debate, and the specter of the facility handling regular solid waste, garbage, at some time in the future, or hazardous or medical waste or other types of waste still generates grave concern.

I know that Burlington County is not alone, that other jurisdictions have faced similar dilemmas. It is a legitimate problem that H.R. 4930 addresses, and w are grateful to Congressman Saxton for introducing the legislation. Thank you very much.

Mr. LATOURETTE. I thank you very much, Mr. Haines.

The floor has just notified us that we have a series of votes, but I think before we break to vote, I want to introduce, take a minute to let Congressman LoBiondo introduce Mayor Chasey who is here from Mullica Township. Mayor, we would like to hear your five-minute testimony after Congressman LoBiondo introduces you to us.

Mr. LOBIONDO. Thank you, Mr. Chairman.

I am very pleased that Mayor Chasey has taken the trip to be with us today. Mullica is a small township experiencing the same situation that Burlington County did. The mayor has been living through a horror story on this. Mayor, thank you for being here.

Mr. LATOURETTE. Thank you very much, Congressman LoBiondo. Mayor, if you would turn on the switch on your microphone, we are anxious to hear from you. Thank you for coming.

Ms. CHASEY. I wish to thank Chairman LaTourette and this Subcommittee for allowing this hearing to examine the extent and scope of the abuse by companies using the loophole in the Federal law to operate unregulated waste facilities.

I am here today to share some of the personal experience that we faced in Mullica Township when we discovered there was a plan to construct one of these exempt waste sites. We have, running through our town, 10 miles of east-west railroad track with a LICA siding but no train stop. The track is owned by New Jersey transit, a passenger line with a company by the name of JP Rail that leases the trackage rights through there. This company was planning on building 1,000 feet of track on the property, but because there is an existing siding at this site, the railroad did not have to apply to the STB to expand their operation.

Being a member of the Atlantic County Solid Waste Advisory Committee, I am familiar with the procedure the owner of a solid waste company must follow in order to start up or expand their operation including the involvement of a DEP, the local towns, and the County Freeholder Board. In Mullica's case, the starting point and added layer of the Pinelands regulation would be an integral part of the procedure. When we were first made aware of the transrail transfer station proposal, I felt safe in my knowledge of the procedures in place.

It was only then did I find out that there exists federally-exempt solid waste operations whose only criteria that need to be met is that they are located next to or near a set of railroad tracks, an operation that is proposing to move hundreds of tons of trash a day and night that does not have to apply to any entity for anything, no applications, no public involvement, no limits in regards to the number of trucks, tonnage, or materials including possibly hazardous waste. These are seven days a week, 356 days a year operations running 24 hours a day without the obligations to the Districts they reside in that the normal and accepted permitting process would afford their neighbors.

As I learned about these sites and the laws that govern them, I quickly realized that this is not a local issue but a national one. If it could happen in my town, it can and does occur anywhere.

The proposed site in Mullica is a 30-acre parcel in a residential zone. It is less than a quarter of a mile from our 800-student K through eighth grade. There are 500 homes within a half of a mile of the site with dozens of homes directly surrounding it, that being the most condensed area of our town. There are also five residential facilities within a half-mile that house approximately 75 handicapped occupants, many of whom walk or wheelchair throughout the area.

In Mullica's case, the railroad company was to lease the property for a dollar per year from the owner. The owner, not so ironically, is a notorious South Jersey waste hauler. This waste hauler has managed over the past four and a half years to build up over a million dollars in unpaid penalties and fines assessed by the DEP, the county health department, and the neighboring town where his

trash business was operating. He pled guilty to two counts of illegal dumping in Mullica and has a $184,000 outstanding balance on a $199,000 fine.

According to DEP documents, he has frequently failed to comply with the conditions of his solid waste permit. The DEP finally denied his permit upon renewal application, terminated his existing permit and revoked his authority to operate his solid waste facility in 2005. This, however, will not take away his ability to run a rail-related solid waste operation. This is the same individual that the railroad company contracted to run their businesses in Mullica under two newly formed companies called Elwood Brokerage and Elwood Transloading, LLC.

Mullica's journey through the process of fighting our proposed transrail transfer station was different than any other towns up to that point. We were very lucky. Because we are 100 percent Pinelands, we have the full weight of the Commission along with the State's Attorney General's Office to deal with the legal strategy.

Federal Judge Simandle's December 23rd, 2005, decision to keep the injunction that the Pinelands filed for in position until such a time the railroad decides to continue the lawsuit to operate or drop the development of our site has saved us untold misery. Although we are more fortunate than our non-Pinelands neighbors, our relief will never be more than temporary as long as the exemption stands in the law.

Our fortune to date has not come without great emotional drain on myself, our governing body, and the residents of our town who, of course, had to bear our portion of the financial impact of this battle. I was personally named as a witness in the railroads lawsuit concerning intergovernmental plans and my efforts to frustrate and block their project.

The town is seeking relief in the form of regulation where these exempted operations are concerned are not NIMBYS. We are not saying we don't want you in our town, so go to the next one. There are laws in place now that prevent that from happening with regulated sites.

With respect to solid waste, we are asking that the laws be distributed fairly and without prejudice, that the solid waste industry as a whole be required to operate in an environmentally responsible manner. When it comes to a private industry that operates on a national level, there is only one practical solution. Anyone receiving and transporting solid waste needs to be regulated under the same set of rules. The number of States and towns that are grappling with this issue are growing daily, and the time to act is now.

Mr. LATOURETTE. Mayor, thank you very much for your testimony.

As I indicated, there is a series of votes on the floor, and so we will recess to accommodate those votes. There is at least two. We hope to be back here within 15 or 20 minutes, and at that time, we will ask the panel questions. Subject to the votes on the floor, the Committee stands in recess.

[Recess.]

Mr. LATOURETTE. We are going to call the Subcommittee back to order. I apologize for the length of time we have been gone, but hopefully we won't be interrupted again.

Again, Mr. Haines and Mayor, I want to thank you for your testimony.

Mr. Haines, I want to start with you. I asked Mr. Saxton, I said, Hainesport isn't named for your family, is it?

Mr. HAINES. Well, actually, we have been there forever and never had ambition enough to move on. So, yes, it is family.

Mr. LATOURETTE. There you go, okay. I know you were in the room when Chairman Buttrey testified. The way that I understood his testimony is that there may be some confusion between what we thought we were doing with Federal preemption when it came to economic issues, and I thought I understood him to say that the ICC Termination Act doesn't preempt State and local environmental rules and regulations.

I would ask you two things. Have you ever heard that before, and secondly, is that something that your legal counsel agrees with at this moment in time?

Mr. HAINES. First, no, that isn't something I had heard before. Our counsel, our County Solicitor and other legal advice we solicited has advised us that while we may pursue and have pursued this, in fact, we probably wouldn't prevail.

Mr. LATOURETTE. Have you pursued it? Have you gone to the STB on the Hainesport facility?

Mr. HAINES. Yes, we have. Our county solicitor contacted the STB to express our concerns.

Mr. LATOURETTE. Can you just describe for us—the record is pretty clear—what type of waste is going to be shipped from the Hainesport facility?

Mr. HAINES. Right now, and the agreement was just reached with Hainesport Township at the end of last week, Thursday I believe, and right now they are talking about construction and demolition, C and D waste, which would be the least noxious. I am sure that the town felt that this was the best that they could do, but my understanding is the agreement does not guarantee in perpetuity that other types of waste would not be used in that facility. So, if perhaps, the railroad were flipped to someone else, they could change the type of waste they could handle including garbage.

Mr. LATOURETTE. Sure. Have there been any studies done to demonstrate how many trucks it is going to add to the community in terms of going in and out of the facility? Do you have any traffic estimates?

Mr. HAINES. No, I haven't seen any of those figures.

Mr. LATOURETTE. Thank you.

Mayor, I thought I heard you say that the tracks are owned by the New Jersey Transit in your situation, and they are leased by New Jersey for a dollar a year?

Ms. CHASEY. No, the railroad is owned by New Jersey Transit. JP Rail leased the trackage rights from New Jersey Transit from Atlantic City to Winslow. The property, the 20-acre property involved, is owned by this trash hauler who was leasing the property to JP Rail for a dollar per year.

Mr. LATOURETTE. So is the rail waste facility going to be operated by the railroad itself, or is it be subcontracted?

Ms. CHASEY. It is being subcontracted, and my understanding is the STB rules state that it can be run by the railroad or an agent

thereof which allows them to hire subcontractors to run the operations.

Mr. LATOURETTE. My question is similar to the one that I just asked Mr. Haines. I know you were in the room when Chairman Buttrey testified.

Ms. CHASEY. Yes.

Mr. LATOURETTE. Is that the first time that you have heard that local environmental regulations still apply, and does your legal counsel tell you something else?

Ms. CHASEY. Yes, that is the first time I have heard that. I actually have a letter from Chairman Nober when he was there that said that, indeed, environmental rules can apply as long as they never interfere with the Interstate Commerce Act.

Mr. LATOURETTE. Right.

Ms. CHASEY. That will always supercede.

Mr. LATOURETTE. Then I think you mentioned in your case that there was currently an injunction in place?

Ms. CHASEY. Yes.

Mr. LATOURETTE. What is the exact status of the case at this point?

Ms. CHASEY. Until either the Pinelands pursues the case, which they will not, or the railroad company pursues the case, the injunction does stay in place.

Mr. LATOURETTE. Thank you very much. I thank both of you.

Ms. CHASEY. Thank you.

Mr. LATOURETTE. Mr. Barrow?

Mr. BARROW. Thank you, Mr. Chairman.

Mr. Saxton, thank you for participating in this and bringing this issue before us.

I just want to discuss briefly with you Chairman Buttrey's concerns that we have a good general proposition in the segment of preemption we have in the statute. We don't want to be carving out all kinds of exceptions because, sooner or later, the general proposition won't be worth very much. You understand, don't you, that you have a great big old wall that has been built up. If someone starts gnawing a little hole in the wall, if a rat starts gnawing a hole in the wall, and you have a little place where some vermin can get through, don't you think it makes good sense to put a cat at that hole rather than tear the whole wall down and try to build another wall? I think you can get a cat at every hole, don't you?

Mr. SAXTON. I think that is a great analogy. In this case, nobody at this table wants to interfere with interstate commerce, but everybody at this table understands what the New Jersey law is and the expense and effort and sometimes real heartburn that goes with administering the State law.

From my point of view, and I guess I could say from our point of view, there are two issues here where we need some cats to watch. One set of issues has to do with environmental concerns and health concerns, and the other set of issues has to do with maintaining the facilities which have been very expensive and painful, politically painful in some cases and personally painful in others, to put in place.

Mr. BARROW. It seems to me that what we have is a situation where right now the hole has been gnawed. The argument has

been thought up. The argument has been raised. Right now, folks get to decide whether or not they want to go through the hole, and they don't know what they will find on the other side. Maybe they will find a friendly Court. Maybe they will find a friendly Board. Maybe they will find a hostile Court that will refer the matter to a Board that is equally hostile, that drags things out. Then you have a sham transaction. But you don't know what is on the other side of the hole.

It seems to me if you can put something on the other side of hole, you know you are going to do a little better than what you have right now. Right now, it is a game that the other side gets to play, and a war of attrition is something the big guys are naturally going to do a whole lot better at winning than the little guys, it seems to me.

Mr. Haines, I want to follow up on a question that Chairman LaTourette asked you. He asked you whether or not you had taken your case to the Surface Transportation Board, and you said, yes. What was the outcome? How did it come out?

Mr. HAINES. They have been certified that they are a rail operation, and they are eligible.

Mr. BARROW. It sounds to me like they ruled against you.

Mr. HAINES. Yes.

[The information received follows:]

> But we did not actually file a formal legal action challenging the STB's findings on Hainsport Industrial Railroad per se. However, Burlington County was a joint petitioner, along with the National Solid Wastes Management Association, that challenged the STB's federal preemption provided to another facility in North Jesrsey. We felt a decision against that preemption would have impacted the Hainsport case as well. However, the North Jersey facility closed permanently prior to the STB's consideration of the matter, and the STB therefore found the matter moot and denied our request for a declaratory order.

Mr. BARROW. Are you satisfied with the outcome in that case?

Mr. HAINES. No. We are considering pursuing it in Court at this time, although it is a little cloudy now whether we want to, considering the fact that Hainesport Township has reached an agreement the railroad.

Mr. BARROW. That leads me to another question, but Mayor, I want to ask you a couple follow-up questions. Do you see a pattern emerging here? Do you see something evolving? What is the pattern you see at work here?

Ms. CHASEY. Oh, the pattern I see is that these things are starting to crop up all over the place, and they are going to continue to do so.

Mr. BARROW. In your particular case, was there any kind of ongoing working arrangement between the rail operator and the waste hauler? Did they have anything going on before this?

Ms. CHASEY. Not before this, not before the railroad contracted for the waste hauler to run the operation.

Mr. BARROW. Now the railroad has a vested interested in the hauler being able to do what is clearly preempted, what we all agree should be preempted. But the Courts have decided, whenever they have reached the question, it ought to be preempted and until the case we just talked about, are in remarkable unanimity with the Board it is something not covered. It seems to me you have a situation now where the railroads, who clearly don't have a vested

interest in the underlying operation, now have an interest in the deal.

Ms. CHASEY. Yes.

Mr. BARROW. That pays them money.

Ms. CHASEY. Absolutely.

Mr. BARROW. My grandmother taught me a long time ago that it is very, very difficult to persuade anybody that there is anything wrong until somebody puts a dollar in their pocket, and that is not casting aspersions on anybody. That is just the way things are. Is that a problem as you see it?

Ms. CHASEY. Absolutely. In the Court case, Mr. Fiorello, who was the attorney for the railroad, said to Judge Simandle: But Judge, you don't understand how much money there is to be made here. That is actually in the court transcript.

Mr. BARROW. That puts me in mind of the story of the lawyer who was on the other side of a case once. The judge called him up to the stand and said: Did you try to settle this case? The lawyer of one side said: We have offered $5,000 to settle this case. The judge said: Oh, we can't settle for that. We have to do better than that.

Well, listen, as a former county commissioner and former city councilman, I know exactly what you are up against in terms of dealing with a regulatory agency that claims exclusive right to deal with the problem, but they have so many other things to do, even if they give it their best effort, they can't take care of your case as quickly as you can and as quickly as you need it to be taken care of. I also know that your arms are too short to box with railroad and Federal regulatory agencies that just ain't jumping as fast as you need them to jump. So just know, us local government folks, we need to stick together.

Ms. CHASEY. Yes.

Mr. BARROW. Thank you very much.

Ms. CHASEY. Thank you.

Mr. LATOURETTE. Thank you, Mr. Barrow.

Mr. LoBiondo?

Mr. LOBIONDO. Thank you again, Mr. Chairman.

For the Mayor, a couple questions, could you explain the normal process a similar facility that would not qualify for the Surface Transportation Board preemptions would have to follow if they were to begin construction in Mullica Township? Can you also comment whether that process would involve review by the Pinelands Commission?

Ms. CHASEY. Absolutely, that would be the first place they have to go. Nobody begins construction on anything in a Pinelands town unless they get a certificate of filing from the Pinelands Commission. That is the first entity they need to go to.

Mr. LOBIONDO. If this exemption were not granted, what would a facility have to go through if they came to you? If they have to come to you, what would they have to do to build this transfer station?

Ms. CHASEY. Well, besides the Pinelands, if they could get approval from the Pinelands, a regulated entity, they would also have to be put in the county plan, the Atlantic County plan. It would have to be not necessarily approved but kind of okayed by the local

municipality before it goes to SWAC. And then it goes from SWAC—

Mr. LOBIONDO. SWAC is the Solid Waste Advisory Committee?

Ms. CHASEY. The Solid Waste Advisory Committee in Atlantic County. Then it goes to the County Freeholder board, and it has to be approved by the DEP. It has to be a licensed and approved waste hauler.

Mr. LOBIONDO. Has this issue generated much interest in the township?

Ms. CHASEY. Oh, very much interest.

Mr. LOBIONDO. And is it pretty evenly weighed out, or how would you categorize it?

Ms. CHASEY. Overwhelming against the transfer station. There might be a few people that are in the business that wouldn't mind seeing this happen there, but they have never come out publicly and said so. They have only said privately.

Mr. LOBIONDO. To date, has the township had to expend any monies fighting this?

Ms. CHASEY. Yes, last year, we had to do an emergency appropriation because we had not budgeted the money for $50,000. In Mullica, that means two cents. We only had to spend $50,000 last year because the State Attorney General's Office took on the case because of the Pinelands Commission. Again, we were very lucky here. We would have spent 10 times that much.

We hired an environmental attorney; we hired an attorney very familiar with the railroads, here from Washington, a Mr. Edward Greenberg; and our own solicitor, the time that he put into it.

Mr. LOBIONDO. Do you feel that there is real potential that this project could move forward if the Court finds that the regulations that govern development in the Pinelands can be preempted?

Ms. CHASEY. Yes.

Mr. LOBIONDO. Mr. Chairman, if I could, I want to thank the Mayor and Deputy Director Haines for being here, and again, Mr. Saxton.

What you talked about a minute ago and what Mr. Barrow talked about, I think really get to the heart of the problem of what the intention really was to allow a railroad to enter into an agreement with an agent. I think what we have created here is a loophole that several locomotives can drive through, and I don't think that is right. Thank you.

Mr. LATOURETTE. Thank you, Mr. LoBiondo, and I want to thank you for bringing the Mayor here. I want to thank Congressman Saxton for bringing Mr. Haines. I also want to thank Congressman Pallone and Senator Menendez for testifying, and I want to thank Mrs. Kelly also for bringing this attention.

Just from the Chair's perspective, I am not opposed to garbage being hauled on trains. I think, as a matter of fact, places like Cape Cod haul most of their waste out, and they don't want the garbage trucks on the road, and so they take most of their waste out on trains. But, at least from the Chair's perspective, when the ICC Termination Act, railroads that were really railroads would have an exemption, and railroads that aren't railroads should still be subject to State and local laws, especially when it comes to permitting waste facilities.

Again, I thought this was a good hearing. I want to thank you for bringing it to our attention. I want to thank both of you for traveling here from New Jersey. I now know what a Freeholder is, and I appreciate that.

This hearing is adjourned, and you go with our thanks.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned.]

STATEMENT OF
THE HONORABLE JOHN BARROW
SUBCOMMITTEE ON RAILROADS
HEARING ON
"IMPACTS OF RAILROAD-OWNED WASTE DISPOSAL FACILITIES"
MAY 23, 2006

Thank you, Mr. Chairman, for holding this hearing. I want to welcome all of our distinguished guests, and thank them for joining us today.

When Congress passed the Interstate Commerce Commission Termination Act in 1995, we gave the Surface Transportation Board exclusive jurisdiction over rail carrier transportation. The reason we did that was to create a seamless rail transportation network, rather than subject railroads to a patchwork of state and local regulations that might hinder interstate commerce.

We did not, however, intend for this law to enable railroads to shield themselves from state and local regulations when they are engaging in activities that have nothing to do with rail transportation.

There was a case in Florida where a building material supplier leased land from a short line railroad. West Palm Beach issued several notices of violations and Cease and Desist Orders to the railroad and the supplier for operating a business without a

license and refusing to conform to the zoning ordinance. In response, both the railroad and the supplier filed a complaint with the district court seeking a judgment on whether the Interstate Commerce Commission Termination Act preempted West Palm Beach's local laws.

Fortunately, in this case, the court's decision was obvious: There was no preemption because the business had nothing to do with rail transportation. In other circumstances, however, the decision may not be as obvious. In my view, the line between what is preempted and what is not preempted is quite thin so I would – in closing – just caution the STB: While we strive to ensure that local communities don't unreasonably interfere with interstate commerce, we need to make sure that interstate commerce doesn't ignore the legitimate concerns of local communities.

Thank you, Mr. Chairman. I look forward to hearing from the witnesses, and I yield back the balance of my time.

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.

Attachment

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)

Chasey

Written Document Submitted to The Honorable Steve LaTourette, Chairman
US House Subcommittee on Railroads
2453 Rayburn House Office Building
Washington, DC 20515

I wish to thank Chairman La Tourette and this subcommittee for allowing this hearing to examine the extent of the abuse by companies using the loophole in the federal law to operate unregulated waste facilities. I am here today to convey the personal experience that we faced in my town when we discovered there was a plan to construct one of these exempt waste sites. I am here not only as an elected official representing my constituents but also as a resident whose town was subjected to something unknown to anyone there at that point and time. The following facts are important because they give you a visual look into the geographical make-up of my town. Mullica Township is 56 square miles, and we are situated in Atlantic County in South Jersey. We are also located in the heart of the 1.1 million acres of the Pinelands National Preserve. All of our zoning and land use is dictated by the Pinelands Comprehensive Management Plan known as the CMP. There are 2,200 existing homes with 6,000 residents. We have no public sewer or water thus relying fully on personal wells and septic systems. Our tax ratables are comprised of 98% residential and 2% commercial. Although we have 10 miles of state highway Route 30 running through Mullica we have no industrial parks, shopping centers, banks or even a strip mall. We also have running through our town 10 miles of east-west railroad track with a LICA siding but no train stop. The track is owned by New Jersey Transit, a passenger line with a company by the name of JP rail that leases the trackage rights through there.

Being on the Atlantic County Solid Waste Advisory Committee I am familiar with the procedure the owner of a solid waste company must follow in order to start up or expand their operation including the involvement of the DEP, the local town and the County Freeholder Board. In Mullica's case the starting point and added layer of the Pinelands

would be an integral part of the procedure. When we were first made aware of the transrail transfer station proposal I felt safe in my knowledge of the procedures in place. Imagine my shock in finding out that there exists federally-exempted solid waste operations whose only criteria that needs to be met is that they are located next to or near a set of railroad tracks. Can you imagine me trying to explain to a resident who had to make an application to our Zoning Board for a variance to a side yard setback to install a handicap ramp for his son because of local zoning laws that an operation that is proposing to move hundreds of tons of household trash day and night less than a half of a mile from his home did not have to apply to any entity for anything. No applications, no public involvement, no limits in regards to the number of trucks, tonnage or materials including possibly hazardous waste. These are 7 day a week 365 day a year operations running 24 hours a day without the obligations to the districts they reside in that the normal and accepted permitting process would afford their neighbors. As I learned about these sites and the laws that govern them I quickly realized that this is not a local issue but a national one, if it could happen in my town it can and does occur anywhere.

The proposed site in Mullica is a 20-acre parcel in a residential zone located on a four lane divided highway. Because of the medium there is no way to access the property heading west and there are no u-turns for 10 miles, only small local roads to turn around on. It is less than a quarter of a mile from our 800 student local K thru eighth grade school. There are 500 homes within a half-mile of the site, with dozens of homes directly surrounding it, that being the most condensed area of our town. There are also five residential facilities within a half- mile with approximately 75 handicapped occupants many of who walk or wheelchair throughout the area.

In Mullica's case the railroad company was to lease the property for $1.00 per year from the owner. The owner, not so ironically, is a notorious South Jersey waste hauler. This waste hauler has managed over the past four and a half years to build up over a million dollars in unpaid fines assessed by the DEP, the County Health Department and the neighboring town where his trash business was operating. He plead guilty to two counts of illegal dumping in Mullica has a $184,000.00 outstanding balance on a

$199,000.00 fine. According to DEP documents he has frequently failed to comply with the conditions of his solid waste permit and conditions. The DEP finally denied his permit renewal application, terminated his existing permit and revoked his authority to operate his solid waste facility in 2005. This is the same individual that was to operate the Mullica transrail facility under two newly formed companies called Elwood Brokerage and Elwood Transloading LLC.

Mullica's journey through the process of fighting our proposed transrail transfer station was different than any other towns up to that point, we were very lucky. Because we are 100% Pinelands we had the full weight of the Commission along with the States Attorney Generals office to deal with the legal strategy along with our town solicitor and Atlantic County attorneys. We had Congressman Lobiondo and State Senator Bill Gormley along with our State Assemblymen and County officials. Federal Judge Simandles December 23rd. 2005 decision to keep the injunction that the Pinelands filed for in place until such a time the railroad decides to pursue the lawsuit to operate or drop the development of our site has saved us untold grief. Although we are more fortunate than our non-pineland neighbors our relief will never be more than temporary as long as the exemption stands in the law.

Our fortune to date has not come without a great emotional toll on myself, our governing body and the residents of our town who of course had to bear the financial impact of this battle. I was personally named as a witness in the railroads lawsuit concerning intergovernmental plans and my efforts to frustrate and block the project.

The towns seeking relief in the form of regulation where these exempted operations are concerned are not NIMBYS. We are not saying we don't want you in our town so go to the next one, there are laws in place now that prevent that from happening with regulated sites. With respect to solid waste we are asking that laws be distributed fairly and without prejudice, that the solid waste industry as a whole be required to operate in an environmentally responsible manner. When it comes to a private industry that operates on a national level there is only one practical solution, anyone receiving and transporting

solid waste needs to be regulated under the same set of rules. The number of states and towns that are grappling with this issue are growing daily; the time to act is now.

Respectfully Submitted by
Mayor Kathy Chasey
Mullica Township
Atlantic County
New Jersey

May 10, 2006

The Honorable Steve LaTourette, Chairman
US House Subcommittee on Railroads
2453 Rayburn House Office Building
Washington, DC 20515

Dear Chairman LaTourette:

Recently my community was faced with the possibility of a rail waste transfer station, an entity unknown to South Jersey until that time. With this threat upon us it was very disappointing to learn about the Federal laws existing that allow such operations to be built and operate outside of any existing environmental constraints, not to mention State, County or local zoning laws. Thanks to this site being located in the pristine Elwood Corridor which is in the Pinelands National Reserve created by the 1978 Federal "National Parks and Recreation Act," the Pinelands, represented by the New Jersey State Attorney Generals Office has so far been able to halt the establishment of this threat. Had Mullica Township not been located in the Pinelands there is no doubt we would be home to one of these federally exempt and unregulated trash operations today.

Thanks to the concerted efforts of the Pinelands Commission, the States Attorney Generals Office and State, County and Local Officials the Commission was able to usurp their Federally granted authority and protect this part of the federally designated 1.1 million acres of environmentally sensitive land. I consider Mullica Township very fortunate to have had all that support, our neighbors outside of the Pinelands are however not so lucky. When it comes to the regulation of any industry that has the potential for environmentally adverse effects the Federal government has taken a pro-active approach, it should be no different in the case of rail waste transfer stations. This is not an argument that would affect the railroads ability to transport solid waste but one for the necessity of regulating the waste industry fairly and consistently regardless of the mode of transportation. That is why Mullica Township's Governing Body strongly supports H.R. 4870, which establishes rules for Surface Transportation Board approval, but most specifically requires that a rail carrier comply with all applicable State and local zoning laws.

It is becoming more frequent that waste companies are posing as rail carriers so that they can violate State and local laws, thus ignoring the environmental concerns of the area and the safety and welfare of the community. The waste hauler involved in Mullica's case has approximately $500,000.00 in outstanding DEP and County Health department fines and

has lost their license to operate at their former site. Therefore, we implore the Subcommittee on Railroads to quickly approve and recommend H.R. 4870 for further action and commend Congresswoman Kelly for her commitment in not only protecting our local laws but the foresight to see what can happen if we continue to ignore this growing problem.

Lastly please note that these concerns are certainly not isolated and we strongly believe it is quickly becoming a growing problem throughout the United States. It is an issue that cannot wait until it hits crisis proportions and it's effects become irreversible. Thank you for conducting a hearing and your consideration in this most vital issue.

TOWNSHIP OF MULLICA
RESOLUTION # 62-2006

SUPPORTING HOUSE OF REPRESENTATIVE BILL 4870 ESTABLISHING RULES FOR SURFACE TRANSPORTATION BOARD APPROVAL

WHEREAS, local governments are responsible for the proper management of Municipal Solid Waste that provides for the safety and welfare of the citizens; and,

WHEREAS, the Interstate Commerce Commission Termination Act of 1995 (ICCTA) created the surface Transportation Board to oversee rail transactions and operations; and

WHEREAS, due to the ICCTA waste companies are claiming Federal preemption thus ignoring local and State requirements for development;

WHEREAS, House of Representative Bill #4870 has been introduced to establish certain rules for Surface Transportation Board approval of waste management company applications to become rail carriers; and

WHEREAS, HR 4870 directs the Surface Transportation Board to require a company that becomes rail carrier to haul was to comply with all applicable State and local zoning laws.

NOW, THEREFORE, BE IT RESOLVED, that the Governing Body of the Township of Mullica, County of Atlantic, State of New Jersey strongly supports the passage of House of Representative Bill 4870 and urges the Committee on Transportation and Infrastructure and the House Subcommittee on Rail to adopt.

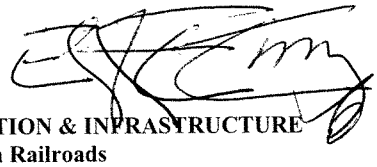
BE IT FURTHER RESOLVED, that copies of this Resolution are forwarded to Congresswoman Sue Kelly, Congressman LoBiondo, Chairman House Subcommittee on Railroads Steven LaTourette, Senate Committee on Transportation and Infrastructure, Assemblyman Blee, Assemblyman Whelen, County Executive Dennis Levinson, Atlantic County Board of Freeholders and Atlantic County Municipalities.

Adopted: May 9, 2006

_____
KATHY CHASEY
MAYOR

ATTEST:

_____
KIMBERLY JOHNSON
TOWNSHIP CLERK



COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE
Subcommittee on Railroads

"Waste Transfer Rail Facilities"

May 23, 2006
10:00 a.m.
Room 2167, Rayburn House Office Building

Opening Statement of Congressman Elijah E. Cummings

Mr. Chairman:

I thank you for calling this hearing to enable us to examine the issues – particularly the regulatory issues – that surround the operation of waste transfer facilities by railroads.

The specific question before us today is whether railroads are right in their assertion that they can create and operate waste transfer facilities on land they own

without seeking or obtaining state and local permits that would otherwise apply to waste transfer facilities.

More broadly, the issue before us is whether all activities and business ventures developed by a railroad count as "rail carrier facilities" that are exempt from all regulation but that of the federal government – even when these facilities are in no way part of the operation by rail carriers of trains on tracks and they are otherwise subject to substantial regulation by all levels of government.

The ICC Termination Act of 1995 gives to the Surface Transportation Board (STB) the exclusive authority to regulate rail carrier facilities. As a result, railroads

seek the authority of the Surface Transportation Board before creating waste facilities – but they do not generally seek any state or local permits that would otherwise apply to waste transfer facilities.

However, the STB has no particular expertise in the management of waste transfer facilities and it is unclear if they are conducting regular oversight of the operation of these facilities to ensure that they comply with all applicable environmental regulations.

In some cases, railroads are now accused of failing to prevent discharges from these facilities that violate the Clean Water Act or other environmental regulations.

Because states are often tasked with overseeing much of industry's compliance with federal environmental regulations, the absence of any meaningful state oversight over railroad waste transfer facilities is likely contributing to any non-compliance that may be occurring.

Mr. Chairman, railroad waste transfer facilities must not be allowed to use the federal preemption of railroad regulation to avoid complying with applicable environmental regulations pertaining to any waste facilities they operate.

Not only is compliance with these regulations essential for the preservation of natural resources, but facilities

that currently presume they do not need to comply with such regulations are frequently able to undercut the prices charged by facilities that are in compliance – giving them an unfair competitive advantage.

I look forward to hearing from today's witnesses such basic information as how many waste transfer facilities have been created by railroads, what condition they are in, and whether steps should be taken either to strengthen the ability of the STB to oversee the environmental compliance of these facilities or to allow states to oversee their compliance.

Thank you and I yield back.

TESTIMONY
OF
WILLIAM S. HAINES, JR.
Deputy Freeholder Director of Burlington County, NJ
BEFORE THE
RAILROADS SUBCOMMITTEE
OF THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
ON THE MATTER OF THE
"IMPACTS OF RAILROAD-OWNED WASTE FACILITIES"
Tuesday, May 23, 2006

Thank you, Chairman LaTourette, and Members of the Committee, for providing me the opportunity to provide comment this morning.

I appear before you today on behalf of the Burlington County Board of Chosen Freeholders, in support of H.R. 4930, sponsored by Congressman Saxton.

For the record, the Burlington County Board of Freeholders is a five-member board charged with the administration of County government. All freeholders are elected at large.

Burlington County is geographically the largest County in New Jersey, with a population of 450,000. We are renowned for our Pine Barrens and other vast open spaces. But it is a situation within the population center of our County that I wish to address.

Over the past several months an entity known as Hainesport Industrial Railroad LLC has been seeking to operate a waste transfer facility within an industrial park located in the municipality of Hainesport Township.

It has been a matter of discussion, debate and even negotiation between the railroad owner and local officials as to the operating parameters, as well as to the types of waste which would be trucked into the industrial park, loaded on to rail cars, and shipped across the County to locations beyond New Jersey.

This proposal has been the source of public outcry, particular from residents whose homes border the industrial park. At the same time, we are advised that local officials in other municipalities – through which the rail cars will pass – are girding for a fight, and are intent on protecting the health, safety and welfare of their residents as well.

However, hanging over all discussion, all debate, and all negotiations, is the phrase "federal preemption." It is the railroad owner's trump card.

Or, as the committee is aware, federal law presently exempts rail carriers from State or local permitting requirements related to the processing and transporting of solid waste.

Hainesport Industrial Railroad received its Verified Notice of Exemption from the federal Surface Transportation Board on May 10, 2005.

From our position as County officials, and from the viewpoint of the elected officials in our local communities, this type of exemption, and the federal preemption that flows from it, flies in the face of what we come to regard as home rule. It guts local governments' ability to fulfill their obligations to protect the health, safety and welfare of their residents.

The siting of any type of waste facility should not be taken lightly. The very nuisance and health issues related to odors, dust, traffic, and noise invite scrutiny, and demand that State regulations, County requirements, and local ordinances be followed.

Our position is that no aspect of what we know as the regular Solid Waste, Zoning and other recognized permitting processes should be waived.

Mr. Chairman, as a result of recent experiences involving another waste facility, I can not underscore enough the importance of these permitting processes.

Presently, the freeholder board is engaged in a two-year legal and administrative battle in concert with the State of New Jersey to shut down another waste operation in our County. This composting operation was granted State permit. Yet obnoxious odors and other environmental complaints have resulted in dozens of violations and hundreds of thousands of dollars in fines.

Ironically, unlike the Hainesport facility, this other operation is located in a rural community. But the odor complaints have come on a regular basis from residents far and wide. The State is methodically following legal procedures for lifting the permit and closing this facility while the residents continue to suffer.

I only mention this because again, it underscores the importance of proposed waste facilities passing the "smell test," not to mention every other aspect of law that protects the public, including the right of State and local government to impose its statutes and ordinances.

This example also points out that – even when the appropriate permitting processes are followed -- facilities can go bad, and addressing the problems are not simple.

While the actual siting of any commercial operation falls largely on local government in New Jersey, when it comes to waste facilities, the County is also engaged.

Under State law, all proposed waste facilities, or even proposed changes in operation and types of waste accepted, must be reviewed at the County level. This review culminates in a public hearing before a Solid Waste Advisory Committee.

This advisory board hears testimony from the public and all interested parties, weighs those comments and the evidence provided, and makes a recommendation to the State as to whether the proposed facility or change of operation should be granted.

The advisory committee was originally created under State law with an eye toward ensuring that Counties have jurisdiction over their own solid waste plans. That is, it was the State's sanctioning of the very home rule that we seek to protect today.

Because of existing federal law, not even this County advisory board is afforded the opportunity to review the situation in Hainesport.

All of this considered, that brings me back to the proposal by Hainesport Industrial Railroad. I would be less than candid if I did not represent to you that the primary operative for Hainesport Industrial Railroad is a respected businessman. He has made representations that his waste facility will comply with State environmental law. That notwithstanding, businesses exist to make a profit.

The bottom line is that late last week Hainesport Township officials found themselves in a situation where – because of the federal preemption – they were under pressure to make a "deal." They had no hammer, no ordinance, no regulation, to put up against Hainesport Industrial Railroad.

Facing what it foresaw as a difficult legal battle, Hainesport Township entered into an agreement with the railroad purportedly limiting its operation to construction and demolition waste.

How well that agreement will stand the test of time is already an item of public debate. And the specter of the facility handling regular solid waste – garbage – at some time in the future, or hazardous or medical waste or other types of waste, still generates grave concern.

I know that Burlington County is not alone, that other jurisdictions have faced similar dilemmas. It is a legitimate problem that H.R. 4930 addresses, and we are grateful to Congressman Saxton for introducing the legislation.

Once again, I ask for the committee's favorable consideration. And I will endeavor to answer any questions you may have.

Thank you very much.

Statement of Senator Robert Menendez
Before the House Railroads Subcommittee
Hearing on Railroad-Owned Waste Facilities
May 23, 2005

Mr. Chairman, Madame Ranking Member, thank you very much for holding this hearing on an issue that has severely impacted New Jersey in recent years, and which threatens to get a lot worse if action isn't taken by Congress. This hearing is a critically important first step in closing a glaring loophole in federal law that puts all of our states and districts at risk, and allows railroads to brazenly flout the critical federal, state, and local environmental protections that keep our rivers clean, our air clear, and our families healthy.

My attention was first drawn to this when I was representing the New Jersey 13th Congressional District, and a small railroad began operating a solid waste transfer facility for construction and demolition debris in North Bergen. Those sites were open to the air, polluting the surrounding neighborhoods with wind-blown debris, and had extremely poor stormwater controls, if any at all, allowing rain to leach through the trash piles and into sensitive wetlands. The piles of trash at those sites could reach the height of a 3-story building, and on at least one occasion they caught on fire. It was inconceivable that these sites could actually be legal.

Of course, they really weren't legal. At least, not legal according to the State, which fined the operator of these sites $2.5 million, or the county and local planning boards, which sent me impassioned pleas asking for help. But the railroad claimed that because of the exclusive jurisdiction of the Surface Transportation Board over railroad activities, they are exempt from all State and local regulations regarding the handling of solid waste.

When Congress passed the Interstate Commerce Commission Termination Act (ICCTA) in 1995, it created the Surface Transportation Board and gave it broad authority over rail transportation issues. The jurisdiction of the Surface Transportation Board was deemed to be "exclusive" over activities that are integral to rail operations. The intent of this was to allow railroads, which cross state lines, to avoid having to deal with a patchwork of state economic regulations that might hinder interstate commerce. Subsequently, the courts have ruled that this exclusive jurisdiction of the Surface Transportation Board preempts state and local regulations when it comes to permitting requirements. Hence, railroads are exempt from having to comply with local land use plans when, for example, they decide to lay additional track, although they are still required to comply with federal environmental statutes such as the National Environmental Protection Act (NEPA).

However, despite the preemption of local regulations, Congressional intent was very clear at the time ICCTA was passed. The conference report states that the Board's exclusive jurisdiction does not generally preempt state and federal law. The only restriction is that States do not attempt to economically regulate the railroads. The Surface Transportation Board concluded in 1999, in their decision in the dispute between the Borough of Riverdale and the New York Susquehanna and Western Railroad, that "Congress did not intend to preempt federal environmental statues such as the Clean Air Act and the Clean Water Act." The U.S. District Court for the District of Vermont affirmed that statement in the case of Green Mountain Railroad

Corporation v. State of Vermont. Unfortunately, the EPA has virtually no regulatory regime for solid waste facilities, since that responsibility is supposed to be handled by the states. In this case, however, the states are prevented from acting, leaving a regulatory hole that results in harm to the environment, and to the families living in close proximity to these waste transfer sites.

This is not a problem that is going away, either. The New Jersey Department of Environmental Protection reports that no less than five new railroad-operated waste transfer sites opening in the past year. And while most of them are in North Bergen, they are also starting to appear in South Jersey, in places like Pleasantville and Hainesport. Some of these sites are being operated in compliance with the state regulations, but some are not, and those are costing the state millions of dollars in time and effort through drawn-out court cases. And companies continue to exploit the preemption loophole. One recycling company that wants to open a transfer facility in Monmouth County has voluntarily brought their proposal to the county's solid waste advisory council, but has said that if the council denies the application, they'd "pursue a preemption facility and form a union with a railroad and, under federal law, all local authority and control would be lost." Attempts to strong-arm local authorities is clearly not what Congress had in mind when it passed ICCTA, and it is obvious that voluntary actions will not be enough to protect the health and safety of New Jersey residents and the workers at these facilities.

It is my opinion that the operation of a solid waste transfer facility is in no way integral to the operation of a railroad. This question has not been settled by the courts or the Surface Transportation Board, but it can be settled unambiguously by Congress. Last July, I was joined by members of both parties of the New Jersey delegation, including some on this committee, to introduce legislation (H.R. 3577) that would explicitly state that the Surface Transportation Board does not have exclusive preemption over the operation of solid waste transfer facilities, and that these facilities would be subject to local zoning and environmental regulations. We can not stand idly by while some unscrupulous railroads exploit an unintended loophole in federal law when the price is the health and well-being of our constituents and our environment.

I commend you for your leadership in holding this hearing, which is an important first step towards solving this problem, and I thank you for allowing me the opportunity to provide these remarks.

Submitted for Record

INTRODUCTORY REMARKS
OF
CONGRESSMAN JIM SAXTON (NJ-3)
BEFORE THE
RAILROADS SUBCOMMITTEE
OF THE HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
ON THE MATTER OF THE
"IMPACTS OF RAILROAD-OWNED WASTE FACILITIES"
Tuesday, May 23, 2006

Thank you, Chairman LaTourette, and Members of the Committee, for providing the opportunity for us to discuss this important matter.

The federal Interstate Commerce Commission Termination Act of 1995 has created a major problem for several New Jersey communities with regard to the regulation and disposal of solid waste. Solid waste issues in New Jersey are successfully managed by a comprehensive framework of laws established under the state's Solid Waste Management Act. These laws serve to provide the State, as well as each county, with the ability to devise a management plan tailored to deal with each individual county's solid waste needs. Counties devise a plan, submit it to the New Jersey Department of Environmental Protection for approval, and after approval, the counties administer the plan.

Burlington County worked with the New Jersey Department of Environmental Protection (NJDEP) to develop plan to meet the county's unique needs. Included was a $200 million dollar Resource Recovery Complex where the county could safely dispose of solid waste using state of the art techniques, and in accordance with state and local regulations. In addition to the Complex, significant other investments were made providing other supporting infistructure.

Each and every time a new facility is proposed or modified, the county and State are involved on all levels, except when a railroad is involved. In those instances, federal pre-emption prohibits any local involvement in what is commonly referred to as solid waste transfer stations. These are facilities which use railroads to transport waste materials from one location to another.

I represent Hainesport, a township in the process of dealing with a proposed solid waste transfer station. Hainesport Township, Burlington County and the New Jersey Department of Environmental Protection all want the proposed facility to be subject to state and local regulations. But, as it stands, the owners of the proposed facility are in fact exempt by federal law from abiding by these regulations due to a pre-emption in federal law.

Despite having a long-standing history of proven successes with our local solid waste laws, this pre-emption is being used as a tool to circumvent these laws.

That is why I have introduced H.R. 4930, a bill to amend the Interstate Commerce Commission Termination Act of 1995 to ensure that solid waste transfer stations are not exempted from state and local permitting requirements relating to the processing, sorting or transporting of solid waste.

I would like to take this time to now introduce Mr. William Haines, Deputy Director of the Burlington County Board of Chosen Freeholders. Freeholder Haines

presides over the county's Resource Conservation Department, and has been key in crafting the county's solid waste management plans for more than a decade, as well as being instrumental in creating and implementing the hugely successful Resource Recovery Complex in Burlington County. Overseeing the Division of Solid Waste Management has given Freeholder Haines first- hand knowledge of the negative impacts of this federal pre-emption.

Thank you, Mr. Chairman LaTourette, for holding this hearing.

Charles M. Norkis, Executive Director

George W. Betts, Chairman
John J. Pantalone, Vice Chairman
William G. Burns, Jr.
Patricia A. Callinan
William J. McMahon, Jr.
Beatrice Payne
Thomas M. Phelan

Cape May County Municipal Utilities Authority
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Telephone 609-465-9026 • Telefax 609-465-9025
www.cmcmua.com • email admin@cmcmua.com

May 22, 2006

Via E-mail & Regular Mail

The Honorable Steven LaTourette, Chairman
U. S. House of Representatives
Subcommittee on Railroads
589 FHOB
Washington, DC 20515

Re: May 23, 2006 Hearing on Impacts of Railroad-Owned Waste Facilities

Dear Chairman LaTourette and Members of the House Subcommittee on Railroads:

Enclosed please find the comments of the Cape May County Municipal Utilities Authority regarding solid waste rail transfer facilities which are operating exempt from state and local regulations.

The Cape May County Municipal Utilities Authority appreciates the opportunity to comment on this important issue and requests the Subcommittee's consideration of our concerns and recommendations regarding the protection of public health and the environment.

Very truly yours,

CAPE MAY COUNTY
MUNICIPAL UTILITIES AUTHORITY

Charles M. Norkis

Charles M. Norkis, P.E.
Executive Director

CMN:dml
Enclosure
cc: Congressman Frank A. LoBiondo
Senator Frank R. Lautenberg
Senator Robert Menendez

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MAY 23, 2006 HEARING
OF THE
U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON RAILROADS

COMMENTS OF THE
CAPE MAY COUNTY
MUNICIPAL UTILITIES AUTHORITY
ON THE IMPACT OF RAILROAD-OWNED WASTE FACILITIES

INTRODUCTION

In accordance with New Jersey statutes, the County of Cape May has developed and implemented a comprehensive Solid Waste Management Plan (SWMP) with the goal of ensuring the availability of a reliable and environmentally responsible method of disposal for solid waste generated within the County. The strategy set forth in the Cape May County SWMP not only provides for the proper long-term disposal of the County's solid waste but also emphasizes and, in fact, provides financial support for, various local and County-wide recycling initiatives. As the designated implementing agency for the Cape May County SWMP, the Cape May County Municipal Utilities Authority (CMCMUA) desires to ensure that all solid waste generated within Cape May County is handled, processed and disposed of in an environmentally secure manner that is consistent with the provisions of the State-approved Cape May County SWMP. Given the unique and highly sensitive environmental areas that exist within Cape May County, including salt and fresh water wetlands and federally protected Pinelands areas, the CMCMUA seeks to ensure that all solid waste handled, processed and/or disposed of in Cape May County will not pose a threat to the health and safety of the public or to the environment.

COMMENTS

Several companies are currently operating, or are proposing to operate, solid waste facilities along railroad tracks in New Jersey and other states. If not properly managed, solid waste rail transfer facilities that receive and process materials clearly pose a threat to public health, as well as, the environment. The operators of these facilities should not be able to continue to claim exemption from important State regulations and permitting requirements that typically apply to the construction and operation of solid waste facilities, simply because rail transport is involved.

As we all know, Federal law provides that the Surface Transportation Board (STB) has exclusive jurisdiction over transportation by rail carriers, and over the construction, acquisition and operation of rail transportation facilities. Although it is well established that the exclusive jurisdiction of the STB extends to traditional rail facilities that are **integrally related** to the provision of rail transportation, a number of railroad companies have represented that virtually any facility they construct, operate and/or sublease, are within the "exclusive jurisdiction" of the STB when they are located adjacent to a rail line. This interpretation is not supported by either existing case law or prior STB opinions. As a result, there is a need for the STB to now address this matter by providing appropriate guidance.

The CMCMUA understands the background and appreciates the exclusive jurisdiction of the Surface Transportation Board over legitimate rail facilities and rail functions. Furthermore, the CMCMUA does not contest the STB's exclusive jurisdiction over true intermodal facilities which simply serve to transfer containers of waste (or any other material) from truck to rail when such containers have been filled and sealed prior to delivery to a rail siding. However, true solid waste facilities, such as those which have been proposed or are operating in our neighboring County of Atlantic, are not intermodal facilities. Functionally, these are clearly solid waste facilities that are involved in the management of solid waste. Therefore, oversight of these facilities does not, and should not, fall within the exclusive jurisdiction of the STB.

Recent attempts to construct and operate solid waste rail facilities in southern New Jersey have required action by the court system to protect the public health and environment. In the case of Mullica Township, the State of New Jersey had to obtain an injunction halting any further development of a private sector solid waste transfer facility located adjacent to a rail line in the Pinelands National Reserve. In December 2005, the U.S. District Court recognized the jurisdiction of the Pinelands Commission over the proposed facility and required that Pinelands Commission approval of the proposed solid waste facility be obtained before construction could proceed. Most importantly, the Court also found that the proposed facility would likely cause irreparable harm to the critical and valuable resources of the Pinelands, since there were no regulatory controls.

Within two weeks of the U.S. District Court Order halting the Mullica Township project, the same group of companies began construction of a similar facility in nearby Pleasantville, New Jersey. Not only did these companies continue to disregard the responsibility and authority of the State of New Jersey to protect the environment and public health; they proceeded to construct the solid waste facility after the City of Pleasantville rejected their development proposal. Since this rail transfer facility in Pleasantville was constructed in a coastal zone directly adjacent to a coastal salt marsh, these companies also ignored the requirements of the New Jersey Coastal Area Facility Review Act (CAFRA), which was adopted by the State of New Jersey under the federal Coastal Zone Management Act and approved by the U.S. Secretary of Commerce. The goal of these CAFRA requirements is to preserve, protect and enhance the resources of the Nation's coastal zone. In order to protect the environment and public health, the State of New Jersey filed suit in federal court in April 2006 to halt any further construction and discontinue the operation of this unauthorized solid waste facility located adjacent to a rail line in Pleasantville.

The STB has not established any environmental controls over solid waste facilities located adjacent to a rail line. However, rail transfer stations that receive and process non-containerized solid and/or hazardous waste primarily participate in the handling of waste materials and therefore should be subject to oversight and careful environmental controls. In the State of New Jersey, for example, regulations require that proposed solid waste facilities be incorporated into the district solid waste management plan to ensure compliance with local recycling and waste management strategies and goals. Proposed facilities must also receive a solid waste facility permit from the New Jersey Department of Environmental Protection prior to initiating facility construction. This State level permit review process ensures that facilities are designed and constructed to comply with preestablished environmental and engineering standards and ensures that local health and safety considerations, such as, air pollution, water pollution, noise and traffic, are properly addressed. In the absence of adequate environmental controls such as these, rail facilities can create risks to public health and the environment. The STB must address this issue in a responsible manner by balancing the need to adequately protect the public health and environment with the need to ensure that operations that are truly **integral** to the activity of rail

transportation are not impeded by unnecessary State and local requirements. Regulations regarding the proper handling of waste materials are certainly necessary.

Exclusive STB jurisdiction over solid waste rail transfer stations effectively strips these facilities of any meaningful environmental regulation, oversight or control, and presents a serious risk to public health and the environment. Unless the STB is prepared to assume and actively engage in the role of environmental regulator for such facilities, the STB should recognize that protection of public health and the environment related to the construction and operation of solid waste facilities is best provided at the State and/or local level.

RECOMMENDED ACTION

The CMCMUA urges the STB to issue a direct and clear ruling that prevents solid waste rail transfer station operators from abusing the exclusive preemption provided to the STB under the Interstate Commerce Commission Termination Act (the "Act"). The operators of solid waste rail transfer facilities abuse the statutory objective of the exclusive jurisdiction granted to the STB under the Act when they claim to be performing services that are integral and directly related to rail transportation when they are, in fact, actually performing the task of handling solid/hazardous waste, oftentimes in a manner inconsistent with State requirements and the interests of the public. If the STB fails to issue a direct and clear ruling to stop such activity, the CMCMUA strongly recommends that the Act be amended by the U.S. Congress to clearly provide regulatory jurisdiction over these solid waste rail transfer facilities to state and local regulatory agencies.

Respectfully submitted by the

CAPE MAY COUNTY
MUNICIPAL UTILITIES AUTHORITY

Charles M. Norkis

Charles M. Norkis, P.E.
Executive Director

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MASSRECYCLE The Massachusetts Recycling Coalition

FAX: 440-352-3622; PAGE: 1 OF 1

TESTIMONY: MAY 23, 2006 RAILROAD SUBCOMMITTEE HEARING

June 20, 2006

The Hon. Steve LaTourette, Chairman
Railroad Subcomittee, Committee on Transportation & Infrastructure
2453 Rayburn House Office Building
Washington, DC 20515

RECEIVED DC

Dear Rep. LaTourette,

I am writing on behalf of the Board of MassRecycle, a coalition of Massachusetts municipalities, institutions, businesses and citizens dedicated to increased recycling and source reduction, to support House Resolution 3577 and its companion, Senate bill 1607. Please accept this letter as testimony to the May 23 Hearing on the Impacts of Railroad-owned Waste Facilities.

These bills would amend section 10501 of title 49 of the United States Code to exclude solid waste management facilities and the processing of solid waste from the jurisdiction of the Surface Transportation Board. The legislation would close a loophole that has allowed waste/rail companies to locate adjacent to rail operations that are exempt from state and local environmental laws, and thereby avoid regulation.

Waste companies involved in the storage, separation and management of mounds of waste and recyclable materials (regardless of whether waste is transported by truck or by rail) should be subject to state and local environmental regulations. With passage of this legislation, rail facilities that also handle solid waste would have to follow the same rules as other facilities involved in this business. We feel that this change is needed to protect the health and safety of local residents and the environment in Massachusetts and all other states where waste companies are seeking exemptions from local regulations through the Surface Transportation Board. We encourage you to move HR 3577 forward.

Sincerely,

Lisa Hayden

Lisa Hayden
Legislative Analyst

Cc: W. Douglas Buttrey, Chairman, Surface Transportation Board

198 Tremont Street, Box #143 • Boston, MA 02116 • 617.338.0244 •
www.massrecycle.org

Submitted for Record

NJLM New Jersey State League of Municipalities

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William G. Dressel, Jr EXECUTIVE DIRECTOR | Michael J. Darcy, CAE ASSISTANT EXECUTIVE DIRECTOR | Michael F. Cerra SENIOR LEGISLATIVE ANALYST | Jon R. Moran SENIOR LEGISLATIVE ANALYST | Helen Yeldell SENIOR LEGISLATIVE ANALYST

May 11, 2006

The Honorable Steve LaTourette, Chairman
US House Subcommittee on Railroads
2453 Rayburn House Office Building
Washington, DC 20515

Re: HR Bill #4870

Dear Chairman LaTourette:

It is becoming more frequent that waste companies are posing as rail carriers so that they can violate State and local laws, thus ignoring the environmental concerns of the area and the safety and welfare of the community. This is fast becoming a threat to residents across New Jersey as well as around the country.

House of Representative Bill #4870 has been introduced to establish certain rules for Surface Transportation Board approval of waste management company applications to become rail carriers and directs the Surface Transportation Board to require a company that becomes a rail carrier to haul waste to comply with all applicable State and local zoning laws. This legislation would go a long way toward resolving this growing and emergent issue.

Therefore, we implore the Subcommittee on Railroads to quickly approve and recommend H.R. 4870 for further action and commend Congresswoman Kelly for her commitment in not only protecting our local laws but in having the foresight to see what can happen if we continue to ignore this growing problem.

Lastly, please note that these concerns are certainly not limited to New Jersey and we strongly believe it is quickly becoming a growing problem throughout the United States. It is an issue that cannot wait until it hits crisis proportions and its effects become irreversible. Thank you for conducting a hearing and for your consideration in this most vital issue.

Very truly yours,

William G. Dressel, Jr.
Executive Director

WGD/dk:sc

c: Hon. Kathy Chasey, Mayor of Mullica
Member of the New Jersey Congressional Delegation

Testimony

Before the

Committee on Transportation & Infrastructure

Subcommittee on Railroads

U.S. House of Representatives

The Problem of Unregulated Waste Management Facilities on Rail Property

By Bruce J. Parker President

President and CEO

National Solid Wastes Management Association

May 23, 2006

Mr. Chairman, the National Solid Wastes Management Association (NSWMA) appreciates the opportunity to present its concerns about unregulated solid waste management facilities operating on property owned or controlled by railroads. These facilities, which are spreading like weeds throughout the Northeast United States, present an imminent threat to public health and the environment through the unregulated processing of waste materials. These operations are a throwback to the past and should be eliminated immediately.

NSWMA is a trade association representing for-profit companies in North America that provide solid, hazardous and medical waste collection, recycling and disposal services, and companies that provide professional and consulting services to the waste services industry. NSWMA's members operate in all 50 states and the District of Columbia and consist of large publicly-traded companies and both small and large privately-owned companies, all of which share NSWMA's mission to promote the management of waste in a manner that is environmentally responsible, efficient, profitable and ethical, while benefiting the public and protecting employees.

Let me start by stating very clearly that NSWMA and its members are not opposed to transport of solid waste by rail. Indeed, many of our members utilize rail services to move solid waste from collection and consolidation stations to sites where it is recycled, burned to produce electricity, or disposed in landfills throughout the country. Nor are we opposed to the operation of solid waste management facilities on property owned or controlled by railroads.

So what then, is our concern? Simply put, it is that if a solid waste management facility is to be operated on rail property, then it must be regulated just like any other such facility, and that is not the case at the present time. An uncertainty in Federal law is allowing the owners and operators of those facilities to claim that their facilities are subject to the exclusive jurisdiction of the Surface Transportation Board (STB) and, therefore, are exempt from state and local solid waste permits and regulations designed to protect public health, safety, and the environment. The STB does not have any regulatory program for these facilities, and so they escape state and local regulations that apply to all other facilities.

What is the Cause of the Problem?

To understand the problem, it is helpful to understand the evolving nature of solid waste management practices. Increasingly, waste and recyclable materials are brought by the trucks that collect them to sites where they are consolidated, sorted, sometimes processed, and loaded in tractor trailers or containers for shipment to recycling, waste-to-energy, or landfill sites. In some cases, the materials are delivered to rail sites where they are dumped directly into rail cars or, if already containerized, loaded onto the rail car bed. These activities at a rail site are known as "transloading" and we have no objection to this activity. The handling at the rail site is the same as those involving boxes of frozen chicken, widgets or other products shipped from the source and simply loaded onto the rail car. The sites where the waste is sorted, recyclables separated, and materials shredded, baled and otherwise processed before going to the rail site, or are dumped onto the ground and then picked up and loaded into a container, are considered "solid

waste management facilities" that are subject to state and local regulation if they are located anywhere except on rail property.

There has been a recent surge in the construction and operation of these unregulated solid waste management facilities along rail lines in the Northeast. These facilities are being developed by or in connection with short line railroads, under a claim that they are subject to the exclusive jurisdiction of the Surface Transportation Board ("STB"), and are therefore exempt from state and local law, and, also exempt from actual regulation by the STB on the basis that they are rail related facilities for which the STB has no regulatory program because of the current uncertainty in Federal law.

This phenomenon is fueled by several converging events:

1. The U.S. Environmental Protection Agency does not have any substantive regulatory program for these solid waste management facilities, leaving the regulation of this industry nearly exclusively to the individual states.

2. In the populous Northeast, the solid waste industry is very heavily regulated by state and local governments, and these regulatory programs impose high costs and long permitting processes for those wishing to construct and operate solid waste management facilities. It is not unusual for the environmental permitting of a new solid waste facility to take 3 - 4 years, if not longer.

3. Congress has granted the STB exclusive jurisdiction over the rail industry and its transportation related functions, thereby preempting many of the regulatory programs administered by state and local governments.

4. Limited disposal options due to stringent state and local regulations have created significant interest in the siting of new solid waste management facilities.

What's the Law on this Issue?

The rail based solid waste facility developers are basing their claim of state and local law preemption on the language in 49 U.S.C. §10501(a) of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). *See* Pub. L. No. 104-88, 109 Stat. 803. ICCTA established the STB to replace the Interstate Commerce Commission and provided that the STB would have exclusive jurisdiction over "transportation by rail carrier." ICCTA defines transportation to include rail facilities, and the STB has consistently determined that its exclusive jurisdiction extends to facilities that are "integrally related" to the provision of rail service. *See CSX Transportation, Inc.,* Petition for Declaratory Order, STB Finance Docket No. 34662 (STB served March 14, 2005); *Borough of Riverdale*, Petition for Declaratory Order, STB Finance Docket No. 33466 (STB served Sept. 9, 1999).

Those seeking to bypass state and local solid waste laws have tried two different routes under ICCTA. First, some facility developers have attempted to contract with short line railroads to operate solid waste facilities in rail yards owned by the railroads, claiming that these facilities are rail transload facilities and that state and local law is preempted. Generally, these attempts have been rebuffed by the courts, which have determined that the facilities cannot be rail

facilities because they are not actually operated by railroads. *See Hi Tech Trans v. State of New Jersey*, 382 F.3d 295, 308 (3d Cir. 2004); *Florida East Coast Railway v. City of West Palm Beach*, 266 F.3d 1336 (11th Cir. 2001); *J.P. Rail, Inc. v. New Jersey Pinelands Commission*, Order and Preliminary Injunction, Civ. No. 05-2755, Dec. 22, 2005 (D.N.J.).

The second strategy to bypass state and local law has been more problematic. Facility developers have attempted to establish themselves as short line railroads for the sole purpose of operating a solid waste management facility, or existing short line railroads have attempted to themselves enter the solid waste business by setting up solid waste management facilities. These cases have proved very difficult for the STB and the courts to address, due to the difficulty in defining what constitutes rail related facilities.

Under ICCTA and existing STB rules, short line railroads can be established as virtual railroads, with no actual ownership of track, railroad cars or locomotives. The STB maintains a concise manual on its web site describing how to set up a short line. *See* So You Want to Start a Small Railroad, March 1997, at www.stb.dot.gov/stb/elibrary/epubs.html. For these developers, a notice of exemption is filed with the STB and, if approved, the railroad is sanctioned to begin operation.

The STB has determined that even though it has exclusive jurisdiction over rail related facilities, it does not have any direct regulatory role over these facilities under ICCTA. See *Borough of Riverdale* at 5. As a result, once a railroad is established, it can build rail related facilities such as locomotive repair buildings and transload facilities with no STB oversight at all, and no state or local permits. Consequently, unscrupulous operators have attempted to set up solid waste management facilities along rail tracks without any regulatory oversight at all, claiming that these are rail related facilities.

To date, proceedings before the STB and litigation in the federal courts have not resolved the problem. While the STB has had several opportunities to issue definitive guidance, it has instead limited its review to a case-by-case analysis of facts and has resolved a number of cases on procedural or other non-substantive grounds, instead of defining a clear position on this issue.

In *Hi Tech Trans, LLC, Petition for Declaratory Order*, STB Finance Docket No. 34192, (STB served November 20, 2002), and again in *Hi Tech Trans, LLC, Petition for Declaratory Order*, STB Finance Docket No. 34192 (Sub-No.1), (STB served August 14, 2003), the STB had the opportunity to explain its position on solid waste processing but instead chose to limit its decisions to the transportation of materials to a rail yard and the status of the rail yard operator. In *Northeast Interchange Railway, LLC, Lease and Operation Exemption,* STB Finance Docket No. 34734 (STB served November 18, 2005), the STB had an opportunity to explain its position but deferred on procedural grounds. In *National Solid Wastes Management Association, et al, Petition for Declaratory Order*, STB Finance Docket 34776 (STB served March 8, 2006), the STB again had the issue directly framed for a decision, but chose to dismiss the matter on procedural grounds. In the latter case, the STB dismissed the matter because the short line railroad operating the facility shut down the site a week after the petition was filed, notwithstanding that a similar facility shut down evaluated by the 11th Circuit Court of Appeals was allowed to proceed to a substantive decision on an ICCTA jurisdictional challenge because

the case was capable of repetition and evaded review. *See Florida East Coast Railway v. City of West Palm Beach*, 266 F.3d 1336 (11th Cir. 2001).

The federal courts have also ruled on a few cases directly relating to solid waste facility processing, and several cases are currently pending. In *Hi Tech Trans v. State of New Jersey*, 382 F.3d 295, 308 (3d Cir. 2004), the Court of Appeals determined that a solid waste company operating at a rail yard did not qualify as a railroad. In *J.P. Rail, Inc. v. New Jersey Pinelands Commission*, Order and Preliminary Injunction, Civ. No. 05-2755, Dec. 22, 2005 (D.N.J.), the District Court issued a preliminary injunction preventing a short line railroad from constructing a solid waste facility without state or local permits on the grounds that the facility would cause irreparable harm and that, as in the *Hi Tech Trans* case, the facility likely involved transportation to a rail carrier rather than transportation by a rail carrier. In *New York, Susquehanna and Western Railway v. New Jersey DEP*, Civ. No. 05-4010 (D.N.J.), litigation is continuing on these issues.

Who Cares and Why?

The threats posed by unregulated waste management facilities operating on property owned or controlled by railroads are so great that two broad and diverse coalitions of public and private sector entities have been formed, led by NSWMA, to oppose this abuse of purported STB jurisdiction and put a stop to these rogue operations. They represent municipalities, counties, private solid waste and recycling companies, public officials and trade associations challenging rail-based solid waste management facilities in existence or under consideration in New Jersey and Massachusetts.

In New Jersey, the coalition includes, in addition to NSWMA, the New Jersey State League of Municipalities, U.S. Conference of Mayors, City of Newark, Burlington County, Hainesport Township, Village of Ridgefield Park, Solid Waste Association of North America (SWANA), Integrated Waste Services Association (IWSA), and Construction Materials Recycling Association (CMRA). The New Jersey coalition has been supported in filings with the STB by diverse officials and organizations, including Senator (then Congressman) Menendez, New York State Department of Environmental Conservation, Connecticut Department of Environmental Protection, New York City Department of Sanitation, Des Moines (Iowa) Metro Waste Authority, Boston Mountain (Arkansas) Solid Waste District, Onondaga County (NY) Resource Recovery Agency, Camden County (NJ) Pollution Control Financing Authority, Hudson County (NJ) Improvement Authority, and others.

In Massachusetts, the coalition includes, in addition to NSWMA, the Massachusetts Municipal Association, SWANA, IWSA, CMRA, and New Bedford Waste Services, LLC. The Massachusetts coalition has been supported in filings with the STB by diverse officials and organizations, including Senators Kennedy and Kerry, Congressmen Markey and Tierney, Representative Miceli (MA), the Commonwealth of Massachusetts through its Attorney General and its Department of Environmental Protection, the New Jersey Department of Environmental Protection, New Jersey Meadowlands Commission, Mercer County (NJ) Improvement Authority, Town of Wilmington (Massachusetts), Woburn Business Association, and others.

We have joined together because these rogue operations are abusing the STB's exclusive jurisdiction in an attempt to avoid all state and local permitting and regulatory oversight. These facilities can be set up very quickly, even overnight, with virtually no environmental safeguards, and they operate under truly shocking conditions. Facilities have been observed and documented operating with mountains of trash underneath high tension wires, in at least one case leading to a dangerous fire, with outdoor storage of wastes in close proximity to human receptors, emitting plumes of dust, causing odors, and either without or using insufficient stormwater and groundwater controls. The facilities ignore state and local regulations, they are dangerous to their communities and they are giving the reputable solid waste industry a bad name. In addition, they gain an unfair economic advantage over legitimate solid waste companies who operate in compliance with regulations.

Mr. Chairman, responsible management of solid waste requires safeguards to protect public health and the environment. Let's not go back to the era of strewing garbage around the land without any concern for the spread of disease. Once again, these unregulated facilities are a throwback to the past that should be eliminated immediately.

Conclusion and Request for Action

The mere fact that these companies claim to be rail related facilities, or in some cases operate as short line railroads, does not establish that their solid waste management activities constitute either transportation by rail carrier or that they are "integrally related" to rail operations as required by ICCTA in order for the exclusive jurisdiction provisions to apply. In the case of new solid waste management facilities, the rail activity is merely incidental to the primary intended business, which is to process, store, and handle solid waste. That the wastes are ultimately loaded onto rail cars does not mean the facilities are engaged in transportation activities.

In most cases, the rail facility operators are claiming that they are simply transload facilities that will conduct processing activities solely to promote the efficient transfer and loading of cargo, and to protect rail cars. However, this claim defies common sense. Consider, for example, a similar argument that might be made by a facility that sought to slaughter, render, process, and freeze chickens on rail property that would then be loaded on to rail cars for shipment to wholesale and retail outlets. Clearly, the chicken processing facility would not be rail transport and it would not be "integrally related" to rail operations. Surely Congress would not want to allow such activities to escape state and local regulations simply because they were conducted on rail property. I would hope that you would view these solid waste management activities similarly and agree with us that the demands for exemption are equally preposterous. The ownership of land on which an activity is conducted should have no relevance.

We need action now! Rail based solid waste management facilities are harming the communities in which they are operating, and are creating an unfair and anticompetitive environment for legitimate solid waste management companies.

The turmoil that has been created by multiple cases in multiple jurisdictions and the lack of a definitive decision by STB have done nothing to provide a solution to this problem. We offer two possible alternative solutions that would bring additional certainty:

1. Amend ICCTA to provide that the rail facilities entitled to claim preemption from state and local law do not include solid waste management facilities. This proposal is currently pending in Congress as H.R. 3577 and S. 1607 and we support this amendment as a solution to the problem; or,

2. Failing that or in the interim, urge STB to issue a binding determination that solid waste management facilities will not be considered rail facilities, and that any facilities engaged in sorting, grinding, aggregating, baling, separating and/or storing wastes will fall outside of the STB's exclusive jurisdiction and will therefore be subject to full regulation by states and municipalities. This determination would be helpful, although it would be subject to appeal to a U.S. Circuit Court of Appeals, which would delay its effect. A court decision would aid in providing clarity, but would only be binding in the circuit in which the court has jurisdiction.

Thank you for the opportunity to provide this testimony.

no show - submitted for record

Comments to the House Committee on Transportation & Infrastructure Subcommittee on Railroads

"Local Impact of Railroad-Owned Waste Facilities"

Submitted by Representative Maurice D. Hinchey (NY-22)
May 23, 2006

Chairman LaTourette and distinguished members of the Subcommittee on Railroads, I appreciate the opportunity to submit these comments on the local impacts of railroad-owned waste facilities, an issue that has drawn my attention in recent months due to a situation in the congressional district I represent. Based on my recent experience with this issue, I am requesting your consideration and assistance in preventing solid waste transfer station operators from improperly using federal preemptions for railroads and related facilities to construct waste facilities that do not comply with existing state and local regulations and reviews for such facilities.

I represent a large part of New York State's Hudson River Valley, including the City of Middletown, located in the County of Orange. The City of Middletown's elected officials contacted me earlier this year regarding the possible construction of a railroad-owned waste facility in Middletown using federal railroad facility preemptions based on the Interstate Commerce Commission Termination Act (ICCTA) of 1995.

In February 2006, an investment company named Chartwell International, Inc. purchased a controlling interest in a local rail company, the Middletown and New Jersey Railroad, which owns rail lines in Middletown. Chartwell's Chief Financial Officer indicated at that time to the local Middletown newspaper that Chartwell intended to construct and operate a solid waste transfer station on their property adjoining the rail lines in the City of Middletown. Further, the CFO stated his belief that as a "rail company," Chartwell would be exempt from any local and state environmental or site reviews, based on the Interstate Commerce Commission Termination Act (ICCTA) of 1995. This pronouncement commenced a firestorm of outrage from local residents and elected officials, and to date, there is no clear direction on the company's next actions.

According to the January 6, 2006 Securities and Exchange Commission filing from Chartwell International, the company's business plan was focused on solid waste management. The SEC filing noted that Chartwell "is seeking to integrate rail transportation, including construction and service maintenance of rail containers, waste disposal, disposal site management, and the logistics of vertically integrating each aspect of waste collection, transportation and disposal." Chartwell was clearly specializing in the solid waste industry rather than more diversified rail transport on their newly acquired rail lines.

All solid waste facilities in the State of New York are strictly regulated by the state and are required to seek certain local site plan approvals by the host municipalities, since New York has very strong local home rule regulations and guarantees. By purchasing a rail line and adjacent properties to the rail lines, Chartwell was obviously trying to circumvent the laws and regulations with which solid waste facilities must comply. They attempted to do so by using, or in this case, misusing, federal railroad preemptions over local and state reviews for "rail facilities." In this case, it is clear that this company's primary business purpose was handling solid waste. However, since they purchased a rail line, they claimed that they were exempt from the local and state laws that protect our communities from the many possible problems with such facilities. These include protections from various environmental, health, nuisance, and safety problems.

On March 1, 2006, I wrote to Chairman W. Douglas Buttrey and Vice Chairman Francis P. Mulvey of the Surface Transportation Board detailing the situation in my congressional district and asking for their assistance in the matter. I noted my strong belief that Chartwell's statement regarding the solid waste transfer station indicated a gross misreading and misinterpretation of the ICCTA provisions, and highlighted that Congress did not provide an unlimited and open-ended loophole through the ICCTA that allows any type of facility to avoid state and local reviews by simply locating their facilities on or near railroad property.

I stressed to the Surface Transportation Board in this letter that the federal rail preemption is reserved solely for facilities directly related to the functioning of rail transportation, and defining a solid waste transfer station as such is disingenuous and incorrect. Solid waste facilities have nothing to do with the basic functioning of rail transportation and therefore should be subject to all appropriate state and local environmental reviews.

Section 10501 of the ICCTA indicates that the Surface Transportation Board (STB) has jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities..." In this section of the law, Congress intended to give the STB jurisdiction over only facilities that are integral or necessary to the operation of the railroads themselves. Solid waste transfer stations were never meant to be included under the interpretation of rail facilities. However, as evidenced by recent events in my congressional district and other areas of the country, certain waste transfer station operators now seem to be twisting the intention of this law to circumvent local and state environmental reviews for their projects.

Several weeks later, in a subsequent meeting with the heads of the federal Surface Transportation Board, I presented this situation in greater detail. The Chairman and Vice Chairman indicated to me that they were investigating the matter and noted that they were receptive to the arguments that I presented on behalf of the City of Middletown. During the meeting, the STB officials mentioned that they believed the Board would develop a rule to clarify what kind of activity is allowed and said they would take into account the primary activity at a particular railroad site. While I certainly appreciate this consideration from the Surface Transportation Board, I also feel that the Congress has a

responsibility to clarify the ICCTA of 1995 so that the issue of railroad-owned waste facilities is resolved expeditiously and clearly.

To that end, on February 28, 2006, I cosponsored legislation, H.R. 4821--the Solid Waste Environmental Regulation Clarification Affecting Railroads Act of 2006, which would amend and clarify provisions in the ICCTA. This legislation would explicitly prevent solid waste transfer stations, such as the one proposed by Chartwell International, from being included under ICCTA provisions that exempt facilities directly related to the operation of rail transportation from local and state reviews. I have proposed this legislation along with Representatives Pallone, LoBiondo, Saxton, Andrews and Payne, who I understand have shared similar experiences with railroad-owned waste facilities in their districts.

I respectfully ask you to consider this legislative effort. To the extent that there may be any ambiguity as to the legality of such proposals under current law, which I believe there is not, I hope you will use this opportunity to clarify the intent of Congress. Clearly, Congress has a strong interest in maintaining federal preemptions for railroads, but also needs to protect the interests of local communities by excluding solid waste transfer facilities from this preemption.

Thank you for your consideration of my comments.

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