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RAILROAD-OWNED SOLID WASTE TRANSLOAD FACILITIES

(110–77)

HEARING

BEFORE THE

SUBCOMMITTEE ON

RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS

OF THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

OCTOBER 16, 2007

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CONTENTS

Page

Summary of Subject Matter vii

TESTIMONY

Buttrey, Hon W. Douglas, Vice Chairman, Surface Transportation Board 11
Chasey, Hon. Kathy, Mayor, Mullica Township, New Jersey 37
Foley, Hon. Brian X., Town Supervisor, Brookhaven, New York 37
Jones, III, Robert, Managing Principal, New England Transrail, LLC 55
Lautenberg, Hon. Frank, a United States Senator from the State of New Jersey 3
Marturano, Thomas, Director of Natural Resources and Solid Waste, New Jersey Meadowlands Commission 55
McMorrow, Hon. Barbara, Freeholder, Freehold, New Jersey 37
Mulvey, Hon. Francis P., Commissioner, Surface Transportation Board 11
Murphy, Hon. Patrick, a Representative in Congress from the State of Pennsylvania 3
Nottingham, Hon. Charles D. "Chip," Chairman, Surface Transportation Board 11
Pallone, Jr., Hon. Frank, a Representative in Congress from the State of New Jersey 3
Pizzo, Hon. Joseph W., City Solicitor, Township of Bensalem, Pennsylvania 37
Schmidt, Hon. Gregory, Mayor, Village of Croton-On-Hudson, New York 37
Skacel, Wolfgang, Assistant Commissioner, New Jersey Department of Environmental Protection 55

PREPARED STATEMENTS SUBMITTED BY MEMBERS OF CONGRESS

Bishop, Hon. Timothy H., of New York 68
Costello, Hon. Jerry F., of Illinois 69
Hinchey, Hon. Maurice D., of New York 71
Oberstar, Hon. James L., of Minnesota 75
Pallone, Jr., Hon. Frank, of New Jersey 77
Rahall, II, Hon. Nick J., of West Virginia 79
Smith, Hon. Christopher H., of New Jersey 110

PREPARED STATEMENTS SUBMITTED BY WITNESSES

Buttrey, Hon. W. Douglas 124
Chasey, Hon. Kathy 125
Foley, Hon. Brian X. 129
Jones, III, Robert W. 132
Marturano, Thomas 141
McMorrow, Hon. Barbara 176
Mulvey, Hon. Francis P. 179
Nottingham, Hon. Charles D. 197
Schmidt, Hon. Gregory J. 214
Skacel, Wolfgang 220

SUBMISSIONS FOR THE RECORD

Rahall, II, Hon. Nick J., a Representative in Congress from the State of West Virginia:
Eric Hsu, "3 Railroad Dump Stations Closed," *The Record,* April 28, 2007 81
New York Susquehanna and Western Railway Corporation v. Jackson, 500 F.3d 238 (3rd Cir. 2007). 82
Jones, III, Robert, Managing Principal, New England Transrail, LLC, additional statement 138

Page

Marturano, Thomas, Director of Natural Resources and Solid Waste, New Jersey Meadowlands Commission; Skacel, Wolfgang, Assistant Commissioner, New Jersey Department of Environmental Protection, response to question from Rep. Rahall 171
Marturano, Thomas, Director of Natural Resources and Solid Waste, New Jersey Meadowlands Commission, additional statement 174
Nottingham, Hon. Charles D. "Chip," Chairman, Surface Transportation Board, response to question from Rep. Hall 33
Nottingham, Hon. Charles D. "Chip," Chairman, Surface Transportation Board; Buttrey, Hon W. Douglas, Vice Chairman, Surface Transportation Board, responses to questions from the Subcommittee 211

ADDITIONS TO THE RECORD

Joseph DiGirolamo, Mayor, Township of Bensalem, Pennsylvania, written statement 252

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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October 12, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials

FROM: Subcommittee on Railroads, Pipelines, and Hazardous Materials Majority Staff

SUBJECT: Hearing on Railroad-Owned Solid Waste Transload Facilities

PURPOSE OF HEARING

The Subcommittee on Railroads, Pipelines, and Hazardous Materials is scheduled to meet on Tuesday, October 16, 2007, at 10:00 a.m., in 2167 Rayburn House Office Building to receive testimony on Railroad-Owned Solid Waste Transload Facilities. The purpose of the hearing is to examine the growing concern in the Northeast that some railroads are using federal preemption standards to shield themselves from important state and local environmental laws regarding the movements of municipal solid waste ("MSW").

BACKGROUND

The United States generated approximately 245.7 million tons of MSW in 2005, a substantial increase from the 88 million tons generated by Americans in 1960. The generation rate in 1960 was just 2.7 pounds per person per day; in 2005, that rate was about 4.5 pounds per person per day.

Over time, recycling rates have increased from 10 percent of MSW generated in 1980 to 16 percent in 1990, 29 percent in 2000, and 32 percent in 2005. Disposal of waste to a landfill has decreased from 89 percent of the amount generated in 1980 to 54 percent of MSW in 2005. In addition, the Environmental Protection Agency ("EPA") reports that the number of landfills in the United States is steadily decreasing – from 8,000 in 1988 to 1,654 in 2005 – although new landfills are generally larger than they were in the past. Geographically, the Southeast and West have the largest number of landfills. Thirty-five percent of landfills are located in the Southeast, 31 percent in the West, and 26 percent in the Midwest. Only 8 percent of landfills are located in the Northeast.

Due to lack of capacity and the challenges of constructing new landfill capacity, many Northeastern states are forced to export much of their MSW. For example, the nation's top two municipal waste exporters in 2005 were New York (with 7,198,648 tons of exported MSW) and New Jersey (5,772,838 tons of exported MSW).[1] Of the ten states that export the most MSW in the country, four are in the Northeast (New York, New Jersey, Maryland, and Massachusetts). Much of this MSW exportation is because of the challenges of creating new landfill capacity in Northeastern states and consolidation of the waste management industry.

Siting new landfills became increasingly challenging for Northeastern states beginning in the early 1990s. In 1984, Congress amended the Resource Conservation and Recovery Act ("RCRA"), which provides EPA with the authority to regulate the generation, transportation, treatment, storage, and disposal of waste, to increase environmental protections for new landfills (P.L. 94-580). The amendments required EPA to promulgate new regulations requiring new and existing landfills to improve safeguards against hazardous materials leakage and possible groundwater contamination. In addition, Northeastern states, with their high levels of urbanization and scarce land, possess very robust solid waste regulatory schemes that add further environmental protections to landfill siting.

While increased environmental protections and limited areas suitable for new facilities increased the costs associated with siting new landfill sites, states soon found that they had less ability to generate the revenue required to pay for new landfills. Prior to the 1990s, many states imposed flow control on waste generated in state to generate necessary revenue. Flow control is a local government requirement that waste within their jurisdiction be disposed of at local facilities. Often a local government would have funded the landfill or facility, and imposed a fee for its use. As a result, states could generate the revenue necessary to pay for new facilities by setting the flow control at an appropriate level.

However, in 1994, C&A Carbone, a private recycler, challenged the constitutionality of flow control after the Town of Clarkstown, New York, attempted to block Carbone's shipping of non-recyclable waste to a cheaper waste processing facility out of state. *See C&A Carbone, Inc. v. Town of Clarkstown, New York*, (511 U.S. 383 (1994)). According to the suit, Clarkstown had agreed to allow a private contractor to construct within town limits a solid waste transfer station to separate recyclable from non-recyclable items and to operate the facility for five years, at which time the town would buy it for one dollar. To finance the station's cost, the town guaranteed a minimum waste flow to the facility, for which the contractor could charge the hauler a tipping fee which exceeded the disposal cost of unsorted solid waste on the private market. While Carbone received solid waste at its own sorting facilities, the ordinance required them to bring non-recyclable residue to the transfer station, thus forbidding them to ship such waste themselves and requiring them to pay the tipping fee on trash that had already been sorted. Carbone brought suit after Clarkstown sought an injunction to prevent Carbone from shipping non-recyclables to out-of-state destinations without first sending it to the transfer station. In its decision, the Supreme Court sided with Carbone, concluding that Clarkstown's ordinance violated the "Dormant Commerce Clause", which prohibits a state from passing legislation that improperly burdens or discriminates against interstate commerce.

[1] McCarthy, James E. "Interstate Shipment of Municipal Solid Waste: 2007 Update," June 13, 2007, RL34043, Congressional Research Service.

This ruling was significant. Many Northeastern states had built facilities financed through revenue bonds issued by local counties or utility authorities, with repayment guaranteed by the revenue generated from flow control measures, representing billions of dollars of public debt. The Supreme Court decision meant New Jersey, New York, and other states had to shoulder this debt without the benefit of flow control revenue, hampering their ability to pay the debt incurred from upgrading existing facilities or constructing new facilities. As a result, exporting waste became increasingly attractive to many Northeastern states.

Consolidation of the waste management industry has also had an impact on the importing and exporting of waste. For example, in 2005, the three largest waste management firms (Waste Management, Allied Waste, and Republic Services) accounted for 66 percent of total revenues of the industry's 100 largest firms.[2] These large firms offer integrated waste services, from collection to transfer station to disposal site, in many locations. Often, they ship waste to their own disposal facilities, which may be located across a state border, rather than dispose of it at an in-state facility owned by a rival. The EPA notes that as small landfills continue to close, the trend toward regionalization, consolidation, and waste shipment across state lines is likely to continue.

THE GROWING CONCERN OVER RAILROADS AND WASTE DISPOSAL

Rail is an important transportation mode for the solid waste industry. There are many solid waste facilities throughout the country that ship waste by rail, using either direct transfer from an industrial side spur, or intermodal containers that travel by truck to rail yards. Typically, these shipments travel long distances, where rail is competitively priced in relation to trucking alternatives. As landfill space becomes more expensive, and as fuel costs increase, it is expected that solid waste shipments by rail will increase.

However, there is a growing concern in the Northeast that some railroads are using federal preemption standards to shield themselves from important state and local environmental laws. Instead of merely "transloading" waste by taking it from trucks and placing it on rail cars, some railroads in the Northeast are operating like transfer stations, putting waste on the ground, sorting it, bailing it, and processing it before it goes to the rail site. Solid waste companies that do this work are required to comply with state and local environmental laws while the railroads – which are doing the same work – claim that they are not subject to those laws because of federal preemption standards.

For example, in Massachusetts, new solid waste transfer stations must complete an extensive environmental impact review under the jurisdiction of the state secretary of environmental affairs, and then must obtain siting approval from both the state Department of Environmental Protection ("DEP") and the local board of health in the affected municipality. Facility developers then must obtain local zoning, wetlands, and site plan approvals before they can actually commence environmental permitting. After these requirements have been met, developers must obtain a solid waste construction permit and a companion operating permit from the Massachusetts DEP. This process customarily consumes two to four years, depending on site complexities.

In New Jersey, new solid waste transfer stations must complete a similarly stringent permitting process. In addition to obtaining state and local approvals similar to those required in

[2] "Waste Age 100" *Waste Age*, June 2007

Massachusetts, facility developers must complete a comprehensive background investigation of all companies and individuals involved in the project, obtain a certificate of public convenience and necessity, execute a contract with a state waste management district, be included in the district's waste disposal plan, complete and submit detailed environmental and health impact statements, and obtain approval of detailed engineering designs from the New Jersey Department of Environmental Protection ("DEP").

In contrast, railroad operations are preempted from certain state and local laws, and regulated exclusively by the Surface Transportation Board ("STB"). The railroad preemption of state and local laws expanded with enactment of the Interstate Commerce Commission Termination Act of 1995 ("ICCTA") (P.L. 104-88, 109 Stat. 803, December 29, 2005).

Prior to ICCTA, states were allowed to control the construction or removal of ancillary track such as "spur", "industrial", or "switching" track. Congress broadened the express Federal preemption under ICCTA, making the STB's jurisdiction "exclusive" for all rail transportation and rail facilities that are part of the national rail network, including ancillary track. Section 10501(b) of ICCTA expressly provides that "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or state law." The purpose of the Federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce.

In contrast to state environmental regulations, an existing railroad may build a support facility without any regulatory approvals. *See Borough of Riverdale--Petition for Declaratory Order*, STB Finance Docket No. 33,466 (STB served Sept. 9, 1999). For instance, if a railroad seeks to build and operate a traditional transload facility for use in receiving, storing, and transferring intermodal containers from trucks to rail, the railroad can simply build it. The STB has no permit application process, no site selection process, no environmental or health impact review, and no engineering design standards. The railroad does not need to apply for any state permits, as these permitting processes are preempted. Transload facilities, while subject to exclusive STB jurisdiction, are not regulated by the STB. *Flynn v. BNSF*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000).

The STB does recognize that the regulation of health and public safety has been traditionally viewed as part of the police powers reserved to the states by the U.S. Constitution. However, in practice, the STB has interpreted this reservation narrowly, indicating that while the standards contained in traditional safety requirements such as building codes apply, local permitting processes do not. Any permitting process is construed by the STB as a pre-clearance requirement, with the potential to obstruct a railroad's activity, so all such permitting is generally deemed to be preempted. *See CSX Transportation—Petition for Declaratory Order*, STB Finance Docket No. 34,662 (STB served May 3, 2005).

This disparity between the strict state and local regulatory oversight of solid waste facilities on the one hand and the minimalist STB oversight of ancillary rail operations on the other hand is the precise point of intersection between the rail and solid waste industries where so much tension and conflict have recently developed. In those states with the most aggressive solid waste regulatory structures, railroads are able to operate ancillary facilities with virtually no state or local regulatory role.

As a result, the STB's preemption powers continue to be challenged in court. The first significant judicial challenge was a frontal assault on the concept that the STB had exclusive jurisdiction over any land use or environmental regulation. In that case, *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999), the Burlington Northern Sante Fe Railway ("BNSF") sought STB approval to acquire a portion of the Stampede Pass rail line running through the Cascade Mountains in Washington State and proposed substantial track repairs as part of the acquisition. BNSF claimed that municipal permitting for the track repair was preempted by the ICCTA, and several municipal governments challenged this assertion, first before the STB, and then directly to the Ninth Circuit Court of Appeals following a decision by the STB that the project could proceed. *See Burlington Northern*, STB Finance Docket No. 32,974 (Oct. 25, 1996).

The City of Auburn argued that the STB could only preempt economic regulation of rail transportation and not any land use or environmental authorities, as those functions were reserved to the states in their exercise of traditional police powers. The Ninth Circuit, however, found that Congress intended a broad preemptive effect when it enacted the ICCTA, and that there was no evidence Congress intended to provide the states or municipalities any active role in imposing environmental or land use regulations on railroads.

A second critical case was *Hi Tech Trans, LLC v. State of New Jersey*, 382 F. 3d 295 (3d Cir. 2004), which challenged preemption for activities more remote from traditional rail functions. Hi Tech Trans, a solid waste processing company, entered into a license agreement with the Canadian Pacific Railroad ("CP") to develop and operate a bulk waste loading facility at a rail yard operated by CP. Hi Tech received waste shipments at the facility by truck, weighed and dumped them in a roofless dumping area, and loaded the waste into open-top rail cars using cranes and grapplers. The New Jersey DEP inspected the site and determined that Hi Tech was operating a transfer station without state permits, approvals, or a certificate of public convenience and necessity. In court, Hi Tech argued that the entirety of the DEP regulatory process was expressly preempted.

However, the court disagreed, finding that the connection between Hi Tech and CP was too tenuous to fall within the scope of the preemption. Hi Tech was not a rail carrier and, therefore, whatever activities it was conducting could not be protected by the STB preemption. The court held that the most cursory analysis of Hi Tech's operations reveals that "its facility does not involve 'transportation by rail carrier.' The most it involves is transportation '*to* rail carrier.'" In *Hi Tech*, the court found that "it is clear that Hi Tech simply uses CP's property to load [waste] into/onto CP's railcars. The mere fact that CP ultimately uses rail cars to transport the Hi Tech loads does not morph Hi Tech's activities into "transportation by rail carrier."'

In 2003, New England Transrail ("NET") filed an exemption petition with the STB "to commence the operation of common carrier rail service" for the express purpose of handling MSW and to construct a "bulk and container rail reload center. *See New England Transrail, Notice of Exemption*, STB Finance Docket No. 34365 (June 18, 2003). The company did not own or control any track, terminal, or rail cars at the time of the application, and indicated it was negotiating with the property owners and with the connecting railroad, which it hoped would provide actual rail service.

Opponents of the NET proposal included additional information into the public record to show that the actual proposal was to build and operate a large solid waste processing facility on an

existing Superfund site approximately 12 miles outside Boston, Massachusetts. The STB eventually dismissed the petition on the basis that the proponent had presented "inadequate, incomplete, and misleading information about its proposal." *See New England Transrail, LLC—Construction, Acquisition and Operation Exemption*, STB Finance Docket No. 34,391 (May 3, 2005). NET subsequently re-filed with the STB and on June 29, 2007, the STB issued a preliminary decision stating that the NET application met the STB's criteria to operate as a rail carrier subject to the STB's jurisdiction. Should this decision carry forward, local and state advocates contend that Transrail's MSW transloading activities would be largely preempted from important state and local environmental protections.

Addendum

On June 7, 2007, BNSF, Canadian National Railway, CP, CSX, Norfolk Southern, and Union Pacific ("Coalition") filed a petition with the STB to institute a rulemaking to amend the STB's regulations to increase the information required in a Notice of Exemption and to have the STB reexamine certain precedent related to proposals to initiate new rail service.

In the petition, the Coalition urged the STB to consider requiring more information in Notices of Exemption, such as whether the entity seeking authorization from the STB intends to provide facilities for the transportation or transloading of municipal solid waste or construction and demolition debris, and how the railroad facilities have been and will be operated. The Coalition contends that additional information would better enable the STB to determine if the filing entity is or will become a rail carrier intending to provide rail transportation or is a party whose primary objective is something else. The Coalition also argued that the STB should reconsider Board precedent insofar as it holds that track acquired by a new entrant rail carrier becomes a jurisdictional line of railroad even if it possesses characteristics that had made it a spur or siding.

The STB granted the petition requesting a rulemaking proceeding. Following further analysis of the suggestions made by the Coalition and those that have already commented, and assessment of other related issues, the STB intends to issue a Notice of Proposed Rulemaking.

WITNESSES

W. Douglas Buttrey
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Surface Transportation Board

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Mullica Township, New Jersey

Joseph DiGirolamo
Mayor
Township of Bensalem, Pennsylvania

Brian X. Foley
Town Supervisor
Brookhaven, New York

Robert Jones
Managing Principal
New England Transrail, LLC

Thomas Marturano
Director of Solid Waste and Natural Resources
New Jersey Meadowlands Commission

Barbara McMorrow
Freeholder
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Chairman
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Mayor
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Wolfgang Skacel
Assistant Commissioner
New Jersey Department of Environmental Protection

RAILROAD-OWNED SOLID WASTE TRANSLOAD FACILITIES

Tuesday, October 16, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:03 a.m., in Room 2167, Rayburn House Office Building, Hon. Corrine Brown [Chairwoman of the Subcommittee] Presiding.

Ms. BROWN. Will the Subcommittee on Railroads, Pipelines and Hazardous Materials come to order?

The Subcommittee is meeting today to hear testimony on railroads, on solid-waste transload facilities. I want to thank Mr. Murphy, who is here, and others—Mr. Frank Pallone, who, I am sure, is on his way—and many of the Northeastern Members have been closely monitoring this issue and requested today's hearing.

Americans are producing more waste than ever. In 1960, the United States generated 88 million tons of municipal solid waste. In 2005, the amount has grown to nearly 246 million tons, or 4.5 pounds per person per day.

As a result, it is harder than ever to get rid of our trash. There are many reasons for this. The consolidation of the waste-management industry, the challenge of constructing new landfills and the closing of older landfills are making it harder for States and municipalities to deal with the growing problem.

Rail is an important transportation mode for the solid-waste industry. Its importance is increasing as the distance to landfills from our cities and communities grows longer and fuel costs continue to rise.

However, there is a growing concern in the Northeast that some railroads are using Federal preemption standards to shield themselves from important State and local environmental laws and still are merely transloading waste by taking it from trucks and placing it on railcars. Some railroads in the Northeast are operating like transfer stations—putting waste on the ground, sorting it, bailing it and processing it before it goes to the rail sites.

Solid-waste companies that do this work are required to comply with State and local environmental laws, while the railroads, which are doing the same work, claim that they are not subject to these laws because of Federal preemption standards.

I believe that we should not interfere with interstate commerce, because we do not want a patchwork of State and local regulations.

But it is clear that someone needs to authorize the manpower to ensure that railroads operating waste-transfer stations are not posing a health or an environmental risk to the communities where they are operating.

I am looking forward to today's hearing and to the witnesses in learning how we can protect communities from harm without creating further problems in the disposing of municipal solid waste.

Before I yield to Mr. Shuster, I ask that the Members be given 14 days to revise and to extend their remarks and to permit the submission of additional statements and material by Members and witnesses.

Without objection, so ordered.

I ask unanimous consent that Mr. Rahall be allowed to participate in today's hearing and to sit and ask questions of the witnesses.

Without objection, so ordered.

With that, I will now yield to Mr. Shuster for his opening statement.

Mr. SHUSTER. Madam Chair, I would like to ask unanimous consent that Mr. LoBiondo, a Member of the Full Committee, be allowed to sit on the Subcommittee today and to ask questions and to give his opening statement.

Ms. BROWN. Without objection.

Mr. SHUSTER. Okay. Thank you.

Well, good morning. I would like to welcome you all to this Railroad Subcommittee hearing on railroad waste facilities.

This is the second hearing we have held on the subject since 2006, and there still seems to be a misunderstanding concerning the ICC Termination Act. That law gives the Surface Transportation Board exclusive jurisdiction over railroad facilities such as freight yards, side tracks and waste-transload facilities, but despite what some people say, the ICC Termination Act does not preempt all States and local laws.

First of all, the ICC Termination Act only applies to legitimate railroads and to legitimate rail carriers. If a company is not a legitimate railroad, case closed; there is no preemption. State and local laws still apply. Even if the operator is a legitimate railroad, most State and local laws still apply.

If you look at the case law, Federal preemption for railroad waste facilities is actually fairly limited. While communities are not allowed to have upfront permitting requirements, they can still enforce their local codes. Local codes for electrical, building, fire, plumbing, sanitation and rodent control still apply even if the site is run by a railroad. The only limitation is that local codes cannot discriminate against railroads or burden interstate commerce.

Unfortunately, some people have used phony preemption claims to evade legitimate local regulations. People have claimed to be railroads even when they do not own a single train. People have claimed to be exempt from local health and safety regulations, when that was never the intent of the Federal law. These people hire sharp lawyers, file endless legal proceedings, and make money every day until the courts finally shut them down.

When local communities are forced to spend millions litigating against shady companies running waste sites, something is wrong

with the system. I am interested to hear today what the STB has done to prevent such abuses from occurring and whether enough has been done to do that.

Thank you, Madam Chairman, for holding this hearing, and I yield back.

Ms. BROWN. Thank you.

I am pleased to welcome today Mr. Patrick Murphy from Philadelphia.

You have the floor, sir.

TESTIMONY OF HON. PATRICK MURPHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA; HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY; HON. FRANK LAUTENBERG, A UNITED STATES SENATOR FROM THE STATE OF NEW JERSEY

Mr. MURPHY. Madam Chairwoman and Ranking Member Shuster, thank you very much for the opportunity to speak to you today.

I also would like to thank the rest of the Subcommittee for giving me the opportunity to speak on an issue of great importance, not just to my district but to districts all over our country.

It is my privilege to introduce to you Bensalem Township's solicitor, Joe Pizzo.

Joe, if you could stand up.

We originally planned on having Mayor Joe DiGirolamo, the mayor of Bensalem in Bucks County, Pennsylvania, from my district, to testify today, but unfortunately, the mayor could not make the rescheduled hearing. We are disappointed that the mayor could not make it, but I am pleased that Mr. Pizzo is here to represent Mayor DiGirolamo and Bensalem Township.

Joe Pizzo is Bensalem's solicitor. No one knows the details of Bensalem's fight against the proposed waste-transfer station better than Joe. He has been a consistent and forceful advocate for the citizens of Bensalem. I want to take this opportunity to thank him for his efforts and to thank him for agreeing to come before this Committee on such short notice. He knows our community. He will give a critical local perspective on just how damaging these facilities can be. Joe will give the details of Bensalem's fight against a rail company that is attempting to build a trash facility in the township.

So I want to take this time to urge the passage of Congressman Frank Pallone's Clean Railroad Act. I am a cosponsor of his bill, which would exclude solid-waste disposal from the jurisdiction of the Surface Transportation Board. We are pushing for this so that State and local governments can protect their citizens and regulate solid-waste transfer stations built next to interstate freight rail lines.

This legislation is urgently needed for many reasons. I think that it is wrong that this legal loophole is allowing rail companies to run roughshod over State and local laws and the will of a community. These laws are there for a reason, and in Bensalem's case, the construction of this trash facility would destroy a year-long revitalization process for an economically depressed area.

Secondly, this is simply an issue of fairness. By refusing to close this loophole, we are putting waste-management companies that play by the rules at a severe disadvantage to a select few rail companies that do not care about the risks posed to local citizens by these facilities.

Lastly, Congress has a responsibility to stand up to the executive branch on this issue. When Congress created the Surface Transportation Board, it was never intended to allow decisions by the STB to be used to override the wishes of cities and towns across our country. Certainly, the STB was not to be used as a means of suppressing the health and the environmental regulations of State and local governments. Yet, this is exactly what is happening.

This is not a partisan issue. Mayor DiGirolamo is a Republican, and, as you know, I am a Democrat, but we are working together on this issue because it is what is right for our community.

With that, I would like to thank again the Chairwoman and the Ranking Member for giving me the opportunity to testify today. And I would be happy to answer any questions that you may have.

Ms. BROWN. Thank you.

Now, Representative Pallone from New Jersey is the person who has requested this hearing and who has been very persistent about making sure that we have this hearing today, so I will turn it over to Mr. Pallone.

Mr. PALLONE. Thank you.

First of all, I want to thank you, Chairwoman Brown and also Ranking Member Shuster, for having this hearing today. And I know that I did ask many times for the Chairwoman to conduct a hearing, and I appreciate the fact that we are having it. It is really an important issue for not only New Jersey and Pennsylvania but, I believe, throughout the country as the problem gets worse, which I think it, in fact, will.

As you know, Senator Lautenberg has introduced this bill in the Senate. I do believe that he will probably be here a little later to testify. But what we are seeing is that the problem that started in a few States now is just getting worse around the country.

The problem is that you have, not all, but some waste handlers and railroad companies that are trying to exploit this loophole in the Federal law in order to set up unregulated waste-transfer facilities. Imagine if you have, you know, a pile of this garbage that has absolutely no State regulation. I mean, that is basically what we are seeing.

Under the Interstate Commerce Commission Termination Act, the Surface Transportation Board, as you know, has exclusive jurisdiction over, ″transportation by rail carriers and the ability to grant Federal preemption over other laws at any level, whether it be local, State or Federal, that might impede such transportation.″ But I do not believe that it was the intention of Congress that such authority extend to these kinds of facilities. It was only for transportation by rail, not to the operation of facilities that are just sited next to rail operations or that have a business connection to a rail company. And I think that is the key. This was not the intention of Congress, but they have been exploiting it. They have been using this loophole to build or plan waste-transfer stations next to rail lines and to avoid any regulation.

In New Jersey, we have about 15 railroad waste-transfer facilities that have been proposed or that are now operating in the State, one of which handles hazardous waste. Now, some of these companies have gone before the STB to seek the Federal preemption of a host of environmental and public-health laws that apply to every other waste-transfer facility. So what you have is the ones that are next to the rail line being exempt from all of the State laws. The others that are competing with them, that are not there, are having to fulfill all of their obligations. So it is a total inequity, if you will.

Now, 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. And as I said, the word is spreading. These waste-transfer stations have sprung up or are being proposed, not only New Jersey, Massachusetts, Pennsylvania, and in New York. And in all of these instances, certain waste haulers are trying hard to avoid environmental regulations.

There is no other way to change this, as far as I know, other than for Congress to take action and to pass this bill. There is no indication that the STB, you know, through their own regulation, is going to change the situation. We do have to act.

I mentioned that Senator Lautenberg has the companion bill in the Senate. The bill simply amends the act to say that solid-waste management and processing are excluded from the jurisdiction of the STB, and then, of course, States would have the authority to regulate these waste-transfer stations just as they do any other in their State.

I am just summarizing, Madam Chairwoman. You have my full statement for the record, but I just wanted to sort of visualize—I wish I did have a visual here—visualize six stories of waste sitting next to a rail line in your own community, with no oversight from the State or local authorities. That is what we are facing right now if we do not pass this bill.

If I could, I want to mention that you have four witnesses today from New Jersey who are friends of mine. One is the freeholder in Monmouth County, Barbara McMorrow, who is from my own county. Another is the Mullica Township mayor, Kathy Chasey, who is also here. We have representatives from our State Department of Environmental Protection and from the New Jersey Meadowlands Commission. So I also appreciate not only bringing up the bill today but in letting these New Jersey witnesses testify.

Thank you.

Ms. BROWN. Thank you very much.

The Senator has just arrived, and I want to welcome Senator Frank Lautenberg from New Jersey.

Senator Lautenberg, thank you very much for traveling all the way from the other side of the chamber to be with us today. We are honored. And I will turn the statements over to you. The floor is yours, sir.

Senator LAUTENBERG. Thank you very much, Madam Chairman. It is nice to see you in that position.

I think it is fair to say that we are all concerned with this subject. Even though every State is not affected by it presently, there

is real interest in continuing this process in States that have not yet experienced it.

Now, I serve as Chairman of the Senate Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security of the Senate Commerce Committee. Now, my Subcommittee has sole jurisdiction over railroads. One issue of great importance to our Subcommittee involves the processing of solid waste in open piles on railroad property without regard for the effects it has on the surrounding communities.

Generally speaking, solid waste is an environmental hazard and must be handled properly. Under Federal guidelines issued by the EPA, States typically regulate the handling of solid waste, but there is a loophole in Federal law that says, if you are a railroad, you are exempt; these State environmental laws cannot apply.

Well, recently, railroads have been taking advantage of this loophole and operating unregulated solid-waste processing facilities on their property. There have been fires at these sites, reports of dust and debris blowing in the wind from them, terrible odors, and the potential pollution of our water resources by runoff from these piles of waste.

Now, despite opportunities for the courts and the Surface Transportation Board to resolve this obvious problem, the loophole is alive and well. And we have to pass legislation to close it and allow New Jersey and other States to protect the health of their residents through the effective regulation of solid-waste processing.

Now, I want to emphasize to the Committee that this is not just a New Jersey problem. Again, it is viewed with interest by many processing organizations, railroads. And solid-waste sites are being proposed all over the Northeastern United States, and I am certain that we will soon see more sites all over the country. Just picture it, a dump site out in the open; just throw your trash there and leave it behind.

That is why I introduced the Clean Railroads Act of 2007. And I am proud that my colleague from New Jersey, Congressman Frank Pallone, is the author of this legislation in the House. Now, our legislation would make it clear that solid-waste processing facilities, even if they happen to be located on or next to a rail line, are not given any special reprieve for meeting State environmental standards. Importantly, our bill would still preserve the uniform Federal regulation of railroad transportation that is so important to interstate commerce.

The bottom line is, however, that States should regulate solid-waste processing because they know what is best to protect the workers, the residents and the environment. The Clean Railroads Act of 2007 will assure this protection.

The Senate Commerce Committee has already reported out revised language from my bill as part of a larger package on railroad safety legislation. We are going to continue to work with interested parties to perfect that language reported out by the Committee. And I hope that this Subcommittee will take up and pass the Clean Railroads Act as quickly as possible, so that Congress can speak with a single voice and act to resolve this problem.

I thank you, Madam Chairman, for the opportunity to be here and to present our view.

Ms. BROWN. Thank you, Senator.

I yield to Mr. Oberstar, who is the full Chair of this Committee. Mr. Oberstar?

Mr. OBERSTAR. Thank you, Madam Chair, and thank you, Mr. Shuster, for holding this hearing and for the time that it takes to invest in setting up such a hearing.

I want to thank Mr. Pallone, our colleague; Mr. Murphy; and especially Senator Lautenberg. We have a very special friendship and a professional association and respect for one another. It goes back over 20-some years.

I recall, in this very Committee room, I was Chair of the Subcommittee on Investigations and Oversight, holding hearings on proposals to end the smoking on-board aircraft, and Senator Lautenberg just came into the Committee room. He just walked in and walked up and said, ″Can I testify?″ I said, ″Of course.″

Senator LAUTENBERG. I know better now.

Mr. OBERSTAR. Of course. He did not send a letter. He did not send staff or anything formal. He just said, ″I just feel so strongly about it.″

Our then-Committee Chairman, Mr. Howard from New Jersey, was astonished. He was a heavy smoker, and he had said, ″Well, if you pass this legislation limiting smoking or preventing smoking, then I cannot fly anymore. I have to drive or take a train.″ Senator Lautenberg just gave his straight, unabashed, unreserved testimony about the evils of smoking on-board airplanes, including a great respect for flight attendants.

I remember that testimony so well. It was from the heart, it was candid, it was forceful, it was fact-filled. A week or so later, we had an 11-hour markup in this Committee room, and we started at 10:30 that morning and went until nearly 11 o'clock or 10 o'clock that night, and lost by one vote. But then when the appropriations bill for transportation came to the House floor, it was Mr. Durbin who offered an amendment based on our hearings——

Senator LAUTENBERG. Right.

Mr. OBERSTAR. —and Senator Lautenberg's testimony. And it passed overwhelmingly on the House floor, as I knew it would. And since then, we have had clean airplane interiors.

Senator LAUTENBERG. Thanks very much.

If I may for a second, I did not realize—I was fairly new in the Senate at the time—I did not realize that running the risk of developing wrath from such a powerful Committee Chairman might come around and bite me. But the issue made its own way. And today, Mr. Oberstar, when I get on an airplane—and sometimes modesty prevents me from really shouting it outloud—I say, ″Well, you cannot smoke on airplanes because I wrote the law,″ and younger people will say, ″No, you never could smoke on airplanes.″

Mr. OBERSTAR. It has been that long.

Senator LAUTENBERG. So, anyway, we made sure of that. And I am delighted to be with here with my colleagues from the House.

Mr. OBERSTAR. Once again, you come to us with a valid cause and an earnest advocacy and based on health concerns. And we ought to move this legislation, and we will very much pursue and accept your recommendations.

Senator LAUTENBERG. Thank you very much.

Ms. BROWN. Mr. Shuster would like to make a comment.

Mr. SHUSTER. Thank you, Madam Chair.

I appreciate all of you being here today. This is an issue that was never intended under the law, but it has taken on its own life because of the litigation that continues to arise.

When it comes to waste, Pennsylvania is the number-one importer of trash. So, as we move down the road, that is something that I want to make sure that we are looking at, because, year in and year out, the State of Pennsylvania tries to fight this importation of trash from many other States, much of it coming from New Jersey.

It is something that we want to look at, but we have always—I am not a constitutional attorney or a lawyer, so I cannot sit up here and state with real authority on the interstate commerce clause. But that has been something that Pennsylvania has not been able to overcome, and hence, a lot of trash gets imported into Pennsylvania.

So it is something that I want to make sure that I am looking at closely, not only this issue on the transfer stations but, you know, where trash is coming and going and how we allow our States to have some say in this matter.

So I appreciate all three of you being here today. Thank you.

Ms. BROWN. Thank you all very much for your testimony.

Now Mr. Rahall has an opening statement.

Mr. Rahall?

Mr. RAHALL. Thank you, Madam Chair, for recognition and for holding today's hearing.

I believe this is probably the second time in less than a month that we have had the pleasure of receiving testimony from the upcoming panel, the board members of the STB. I believe it is also the second issue on which we have heard strong disagreement and debate from within the board, itself. And that is probably a good thing, as we air our grievances and bring on the debate.

Some, today, say there is a disagreement regarding what specific activities are covered by the Federal preemption clause. Some of our witnesses today would say that a waste-transload facility is not covered. However, the ICC Termination Act is very clear when it defines the preemption clause to cover dropping off cargo, loading it onto trains and the shipping of cargo.

The 3rd Court of Appeals recently stated in its decision of September 4th, 2007, that facilities engaging in the receipt, storage, handling and interchange of rail cargo fit within the plain text of the Termination Act's preemption clause.

I would ask, Madam Chair, that the 3rd Circuit'sdecision be made a part of the record. May that be made part of the record?

Ms. BROWN. Without objection.

Mr. RAHALL. One further item, Madam Chair.

There is also disagreement, of course, over how well a State like New Jersey or Massachusetts can protect their citizens through the exemption, given health and safety concerns.

Madam Chair, according to an article published on April 28, 2007, by New Jersey's The Record, three solid-waste transfer stations operated by New York, Susquehanna, and Western Railway Corporation were shut down because of a lack of adequate fire safe-

ty sprinklers. So it does show that these health and safety concerns are currently being considered. And I would ask that that article be made a part of the record as well.

Mr. RAHALL. If States do not have the authority to enforce their health and safety regulations, I would ask, under whose authority did New Jersey shut down these facilities that are referenced in the attached article?

I would also point out that restricting STB's jurisdiction on railroad-owned waste-transfer facilities could very well set off a dangerous precedent. If we allow one type of commodity to have the Federal exemption removed, where does it stop? Are there not similar concerns associated with other products, such as paint or pesticides?

Again, Madam Chair, thank you for allowing me to make these comments. And I ask that the two referenced articles be made a part of the record.

Ms. BROWN. Thank you, Mr. Rahall. Your statements and articles will be submitted to the record, without objection.

Now, Mr. LoBiondo from New Jersey.

Mr. LOBIONDO. Thank you, Madam Chair, very much for holding the hearing today and for the opportunity to make a brief statement.

I am very pleased that you have chosen to allow Mayor Kathy Chasey from Mullica Township, which is in my district, the 2nd Congressional District of New Jersey, to be testifying a little bit later on today.

Mayor Chasey and the residents of Mullica Township have been through a very agonizing period over the last few years. 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 concerned with the impact the facility would have on the environment and on the quality of life of its residents. Concern quickly turned to outrage after the township was informed that existing Federal law preempts any local or State laws on zoning ordinances or environmental regulations.

Mullica joined with the State of New Jersey to fight the proposed facility in Federal court. On December 5th, the court imposed an injunction, barring the development of the facility until the court could resolve whether the National Parks and Recreations Act of 1978 conflicted with the preemption standards in the Interstate Commerce Commission Act of 1995.

The National Parks and Recreation Act established the Pinelands National Reserve, 1.1 million acres of pine forest, the development of which requires the approval of a joint Federal and State commission. Fortunately, Mullica falls nearly in the center of the pinelands, and the conflicting Federal laws ultimately helped Mullica dodge the bullet. Unfortunately, other small towns in New Jersey and across the Northeast have not been so lucky. That is why it is critical for this Committee to move legislation to clarify the STB's preemption authority.

I want to thank Congressman Frank Pallone. I am thrilled to be working with him and other members of our delegation on the leg-

islation 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 the railroad and which pose a threat to our environment and quality of life, such as waste-transfer stations, should not be granted approval without the consent of local residents.

Madam Chair, once again, I thank you very much for the opportunity to be here and for Mayor Chasey to be here.

Ms. BROWN. Thank you.

Mr. John Hall?

Mr. HALL. Thank you, Madam Chair, for having this important hearing and for allowing my participation today, and also for inviting Mayor Gregory Schmidt of the Village of Croton-on-Hudson, in my district, who is on the third witness panel today.

Mayor Schmidt, would you stand up for a second? Thank you. We are looking forward to your testimony.

Dr. Schmidt is a chiropractor by trade and has served as mayor since 2005. Prior to that, he served as a village trustee for 3 years and has maintained an active relationship with civic groups like the Croton Chamber of Commerce and the Croton Rotary Club.

As he will show in a few moments, his participation in the civic life of a community that has wrestled with the issue before us today makes him well-suited to testify about the impact of legal loopholes that allow for the preemption of health and environmental standards governing municipal waste facilities.

As the testimony of the mayor and other witnesses will soon make clear, the legal framework that grants the STB exclusive jurisdiction over rail facilities has left a loophole large enough to drive a garbage truck through. Although procedures vary by State, the process for building a municipal waste facility is usually a lengthy one that ensures public interest is served by requiring local zoning and approval, as well as health and environmental certifications. In order to circumvent that process, some waste carriers and railroads have been collocating waste facilities with rail infrastructure to avail themselves of the sole jurisdiction afforded to the STB.

Congress gave the STB this jurisdiction in order to make sure that our Nation's critical railways would be able to effectively meet transportation needs, not to help waste companies and railroads dodge rules that were meant to protect the public.

The STB has never been intended to and is currently not equipped to evaluate the impacts of solid-waste storage and transfer on the public health and the surrounding environment. As a result, these facilities and the waste they contain end up in a legal no man's land, with little or no oversight.

Unfortunately, local ecosystems, groundwater supplies and air quality do not pay much attention to the regulatory ins and outs of rail law. Unregulated waste can present the same threat to local health regardless of whether they are connected to a rail line by a few hundred feet of track.

Often, these small communities, like Croton-on-Hudson, that host these sites have concerns about their impact but lack of financial resources or the legal recourse to protect the health of their

own citizens. That is why we need to make sure the regulations match the reality. That is why I am proud to be a cosponsor of Congressman Pallone's legislation. And today's effort is a strong step forward in that effort.

I thank the mayor for his testimony, and I thank the honorable Chairwoman for holding this hearing.

I yield back.

Ms. BROWN. Thank you.

I would ask that the first panel to come forward, please.

Good morning.

I am very pleased to introduce and welcome our witnesses this morning.

Our first witness is Chairman Charles Nottingham.

Mr. Nottingham, while you had recently testified for the first time before the Full Committee, this is your first time testifying before the Subcommittee. We are very pleased to have you here today.

Our second witness is the Vice Chair of the STB, W. Douglas Buttrey.

Mr. Buttrey, at our last hearing on this issue, you were the Chairperson, and I hope you will not be afraid to lend Mr. Nottingham direction on this issue where you feel it is appropriate.

Our final witness for the panel, who is a former person who worked with the Committee, is Mr. Mulvey.

We are always happy to see you, and we are happy that you are here today.

I ask that you limit your oral statements to 5 minutes. However, your entire written statements will appear in the record.

Mr. Chairman?

TESTIMONY OF HON. CHARLES D. ″CHIP″ NOTTINGHAM, CHAIRMAN, SURFACE TRANSPORTATION BOARD; HON W. DOUGLAS BUTTREY, VICE CHAIRMAN, SURFACE TRANSPORTATION BOARD; HON. FRANCIS P. MULVEY, COMMISSIONER, SURFACE TRANSPORTATION BOARD

Mr. NOTTINGHAM. Good morning, Chairwoman Brown and Members of the Subcommittee.

My name is Charles Nottingham, and I am Chairman of the Surface Transportation Board. I do appreciate the opportunity to appear before this Subcommittee today to address how the STB regulates rail-related solid-waste transload facilities.

From a personal perspective, I just want to note that I did grow up in northern New Jersey. I still spend a lot of time there and will be there later this week, and am very aware of the environmental sensitivities and concerns related to this issue and to others.

Turning to the specific issue at hand, the express Federal preemption contained in the STB's governing statute gives the STB exclusive jurisdiction over ″transportation by rail carriers.″ To qualify for preemption, two tests must be met: The operation must be rail transportation, and it must be conducted by a rail carrier.

Congress has defined the term ″transportation″ broadly to include all of the facilities used for and services related to the movement of property by rail, expressly including, the ″receipt, delivery,

transfer and transit, storage and handling of property." Thus, under our statute, transportation is not limited to the movement of a commodity while it is in a railcar, but includes activities such as loading and unloading material from railcars and temporary storage.

However, manufacturing and commercial activities that occur on property owned by a railroad that are not part of or are integral to the provision of rail service are not part of transportation. Therefore, these activities do not qualify for Federal preemption and are subject to the full panoply of State and local regulation.

Even where an activity is transportation and preemption applies, the Board has made clear that there are limits. The Board has never interpreted the statute to mean that it preempts all other law. Rather, where there are overlapping Federal statutes, they are to be harmonized with each statute given effect to the extent possible. Nor is all State and local regulation affecting rail carriers preempted. Rather, States retain certain police powers to protect public health and safety. These powers include requiring railroads to comply with local fire, electrical and building codes, to allow local government to inspect their facilities, and to share their plans with the community when they are undertaking an activity for which a nonrailroad entity would require a permit.

It is also important to keep in mind that preemption applies both to cases that require STB licensing authority and also to some that do not.

First, if a project involves building a new rail line into what would be a new service area for the railroad, it requires a license from the Board.

Second, if a project involves a new carrier seeking to acquire or operate an existing rail line, the new carrier must also obtain authority from the Board, usually in a summary class exemption process. The Board has become increasingly concerned recently that this process does not always provide enough information about a pending proposal to allow us to handle our regulatory responsibilities effectively and efficiently.

We recently initiated a rulemaking proceeding to consider whether to increase the information required from all of those seeking to use the class exemption procedures to acquire, lease or operate rail lines. In some cases, the Board has stayed or delayed the effectiveness of a notice invoking a class exemption to allow a more searching inquiry and to solicit further evidence.

For example, we recently held up the proposal of Ashland Railroad to lease and operate 1 1/2 miles of currently unused track in Freehold, New Jersey, and to develop a transload facility on that track because we needed to obtain additional information. After the railroad, Ashland, failed to adequately respond to specific questions about the nature of the proposed operations and the potential impacts to wetlands and water supply, the Board rejected Ashland's request for authority.

We hope that our rulemaking procedure will improve this process and lessen the need for stay requests. And we look forward to receiving comments from all of the witnesses before you today.

In the third and final category, there are those activities that, although part of rail transportation, may not be subject to STB li-

censing. These activities include making improvements to existing railroad operations, such as adding track or facilities at existing railroad locations, including transload facilities where materials are transferred between truck and rail, to better serve the needs of railroad service territory.

Because no Board license is required in these types of cases, there is no occasion for the STB to conduct a formal environmental review or to impose specific environmental conditions. However, Federal environmental laws continue to apply, and State and local police powers are not preempted. In addition, any interested party, community, State or local authority concerned may bring their concerns to the Board via a declaratory order request. Alternatively, they can go directly to court.

Just last week, the Board issued an order related to a project in Yaphank, New York, requiring the entity constructing facilities to immediately cease that activity and to either obtain Board authorization for the activity or a Board decision finding that the activity does not require our approval. We have also increased our inspection activity, where we send our staff directly to the facilities to find out what is going on on the ground.

Finally, some States have adopted regulations that accommodate Federal preemption but allow them to inspect and impose other requirements on rail-related waste facilities under the police powers they do retain. For example, New Jersey has regulations, known as the 2-D regulations, that shield the carrier from the need to comply with zoning and other preconstruction, environmental and land-use permits but impose a number of other requirements on rail-related solid-waste facilities that are meant not to impede the continued flow of interstate commerce.

The Board has never been asked to formally address the New Jersey regulations, and we are not currently a party to the litigation pending in the Federal courts regarding them. But I would say it would be consistent with everything the Board has said about the scope of preemption that States can apply their regulations to rail-related waste facilities so long as the regulations are not applied in a discriminatory manner and the regulations do not unreasonably interfere with a railroad's right to conduct its operations. Therefore, personally, I would not object to New Jersey implementing its 2-D regulations or to other States adopting or implementing similar regulations.

While the statutory and regulatory issues presented in these types of cases are quite complex, the public interest and policy considerations involved in these controversies require policymakers to balance several important and often conflicting policies. And in conclusion, I will just run through them very quickly.

It is such policy balancing as: How do we promote and expand the national rail network when local property owners, competing solid-waste facilities that are not located close to a railroad, and local and State governments seek to regulate rail operations? How can rail service help our country meet a growing demand for the transportation of material that some might view as controversial or a flat-out nuisance or worse? How can reasonable State, local and Federal health, safety and environmental safeguards for this type of rail transportation be implemented and imposed?

What protections should rail operators have, legitimate rail operators, if local, State and Federal regulation become unreasonable and tantamount to the flat-out zoning of the national rail network? I believe that last point deserves continued attention because there seems to be a presumption, which I hope we can get into in some of the Q&A, that there would never be a case where a community just did not want a rail operation regardless of what it is carrying. We do see those tensions everywhere.

I appreciate the opportunity to be here with you today and to address these questions. Please be assured the Board is focused very earnestly and diligently on these issues, and we will continue to do so. And I look forward to receiving any questions you might have.

Ms. BROWN. I ask unanimous consent that Mr. Tim Bishop be allowed to participate in today's hearing and to sit and ask questions of the witnesses. Without objection.

Mr. Buttrey?

Mr. BUTTREY. Good morning, Chairwoman Brown, Ranking Member Shuster and Members of the Subcommittee.

My name is Douglas Buttrey. I have had the privilege to serve as a member of the Surface Transportation Board since May 28, 2004. Currently, I am the Board's Vice Chairman. I appreciate the opportunity to appear before the Subcommittee today, as you conduct this hearing on the railroad's solid-waste transload facilities.

The Board's Chairman, Charles Nottingham, has submitted testimony which discusses key issues before the Board and which summarizes recent significant Board decisions and actions on this matter. The Chairman's testimony covers everything I would have said accurately and in detail. Rather than duplicating coverage of the same topics, I will instead associate myself and endorse the Chairman's formal filed testimony. And I stand ready to respond to any questions the Committee may wish to address to me.

Thank you very much.

Ms. BROWN. Mr. Mulvey?

Mr. MULVEY. Thank you. Good morning, Chairwoman Brown, Chairman Oberstar. Thank you, Member Shuster and other Members of the Committee. I want to thank you for this opportunity to speak on railroad-owned solid-waste transload facilities.

This agency was last called before this Subcommittee on this issue in May of 2006, when my colleague Doug Buttrey Chaired the Board. I want to commend Vice Chairman Buttrey for his testimony at that hearing. I would also like to take this opportunity, however, to update the Subcommittee on developments that have transpired at the Board in the 17 months since his testimony.

The Board has recently taken a more assertive stance toward cases involving waste, but I believe we need to do more to prevent them from becoming cases in the first place. In a more proactive manner, we need to exercise the full range of our powers to deal with the situations that confront us, and there may be a need for clarification of the railroad preemption law by the Congress.

In Attachment B to my testimony today, I have listed the various cases involving municipal solid waste or construction and demolition debris that have come before the Board in the past 17 months. The titles of these cases show that they come to the Board in many different guises and that entities and their representatives will go

to great lengths to obtain the Federal preemption of solid-waste-related rail projects.

A review of the Board's decisions confirms that we have become increasingly concerned about the tactics used in this bubble of cases and have become more cautious in permitting certain projects to move forward, as the Chairman has indicated. Indeed, just this last week, the Board initiated a proceeding to examine whether or not more information might be warranted up front in situations where an entity, seeking authorization from the Board, intends to provide facilities for the transportation or the transloading of municipal solid waste.

Next, as you are aware, the Board held an oral argument this past April in an important and controversial preemption case, known as the New England Transrail, which you will hear from later on in this hearing. It was highly unusual for the Board to hold such a hearing in a nonrate case. On July 10th of this year, the Board issued its decision on which of the NET's proposed waste-related activities would be preempted from local regulation if NET were to be authorized as a railroad. I issued a strong dissent describing my views and reasoning. Let me further elaborate on those views today.

First, let me take a moment to reassure you that I am and always have been an ardent supporter of Federal preemption. Congress and the courts have long recognized that there is a need to regulate railroad operations at the Federal level in order to avoid a patchwork quilt of State and local regulations that could impede an efficient flow of commerce. The Act, especially as amended by the Interstate Commerce Commission Termination Act of 1995, is one of the most pervasive and comprehensive of Federal regulatory schemes. The ability to preempt local laws is one of the prized benefits of receiving Board authority to build and run a railroad.

In the rail transportation arena, the purpose of Federal preemption is to protect the flow of interstate commerce. Commodities such as MSW, C&D debris and hazmats must move by rail because of their physical characteristics. But because preemption applies to our rail universe and only to, quote, ″transportation by rail carriers,″ end quote, and because the determination of what is ″transportation″ and who is a ″rail carrier″ is within the Board's jurisdiction, we should be exceedingly careful of how we exercise that discretion.

In considering the spectrum of MSW-related activities that an entity conducts, we have the discretion to determine at what point transportation and, thus, preemption begins. I regret that my colleagues and I disagreed about where this precise point was in New England Transrail, but I recognize that in any fact-bound determination, such as in that case, there may be disagreements. I dissented in the Transrail case not only on the facts of that particular case but also on policy grounds. Based on the inherent qualities of municipal solid waste, I believe its handling should not be accorded Federal preemption as integrally related to rail transportation.

MSW is an atypical commodity. A comprehensive scheme of State and local law exists to protect the environment and the health and safety of local populations in the vicinity of MSW handling and disposal facilities. There is a critical reason that the power to regulate

the handling of solid waste has been delegated by the EPA to the States, and that is because the States and localities are in the best position to protect the health and safety of their citizens and to understand the impacts of handling MSW in their areas.

Differing jurisdictions have different rules about what commodities should be kept out of the waste stream through recycling or through other special collections and through the disposal of yard waste and appliances. These same governments, then, are in the best position to determine how to handle the MSW that is generated in their areas and how to deal with noncompliant materials when the rules are not followed. And they often are not followed.

Unfortunately, while the Board typically harmonizes its interpretation and implementation of the IC Act with other Federal laws, there is no Federal law to be harmonized here precisely because the States have been delegated the authority and the responsibility to regulate in the area of MSW handling.

Finally, let me tell you what my New England Transrail dissent was not intended to do. My dissent focused narrowly on MSW. I did not object to the majority's findings with respect to C&D debris. The primary danger with that commodity is that it might contain asbestos, where the removal and disposal are governed by EPA and OSHA regulations. I also did not intend to disturb the delicate balance between local regulation and the enforcement of health and safety laws on the one hand and the Federal preemption of local laws on the other, except with regard to MSW.

In conclusion, I am troubled by the recent uptick in assertions by entrants into the MSW industry that they are rail carriers subject to the Board's jurisdiction. What concerns me is these firms' attempts to blend the nature of the operations to offer both rail carrier service as well as waste processing and to use their putative status as rail carriers to shield their waste-processing operations from the reach of State and local environmental laws. This tactic is manipulative and abusive of the Board's jurisdiction and powers, and it highlights a method of evading the law that I cannot support.

Either these entries are truly rail carriers providing transportation so their activities warrant Federal preemption, or they do not have rail carrier status and are subject to State and local regulations. They cannot have it both ways. If the Board's existing interpretation of the Act cannot stop this practice, then it is time for the Congress to step up and do so.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

Ms. BROWN. Thank you very much.

Mr. Oberstar, Chairman of the Full Committee.

Mr. OBERSTAR. Thank you, Madam Chair.

I regret having to intercede here, but I have to go to another Committee function, a Committee meeting on transit issues.

I think, Mr. Nottingham, you overstate the case, in worrying about Federal—when you include Federal along with State intervention on this particular issue about zoning, that the Federal Government is not going to do zoning, that the Federal Government agency is not going to intercede to do zoning. I think that is an overstatement. I understand the railroads' and the Board's long-

standing concern for Federal preemption, an issue that, in some respects, should be subject to reconsideration.

Without addressing the issue of State action or State authority to regulate in the public health interest, what would be your reaction to EPA's having primary jurisdiction over solid-waste disposal facilities on railroad properties, as they have had in all other circumstances?

Mr. NOTTINGHAM. Mr. Chairman, would you like me to take a crack at that? Thank you for the question.

First, if I could, I will just address your first point. With all due respect, I hope I did not say that there are any proposals currently pending that I have seen that——

Mr. OBERSTAR. You were not talking about current proposals, but you expressed a worry that Federal involvement and, certainly, State involvement could result in the zoning of rail activities. Without touching the State issue, I do not see how a Federal Government agency would be involved in zoning. I think that is an overstatement.

Mr. NOTTINGHAM. I do not know of any Federal agency that is proposing——

Mr. OBERSTAR. Address the other matter for me, please.

Mr. NOTTINGHAM. Yes, sir. And I would be happy to revisit later the zoning question, because it is very important.

We would be happy to partner—in fact, we do partner with the EPA currently in probably the biggest and most exhaustive record we have developed in the history of the Board on this issue, which is the New England Transrail case that we had an 11-hour hearing on. We actually put that project on hold until the EPA finishes a very exhaustive, remedial feasibility and investigative process that, the last time we checked, has no schedule per se. It may go for quite some time. In fact, that project is probably one of the most regulated projects in the world.

Mr. OBERSTAR. But, in the end, if the EPA comes to a conclusion the Board does not like, who has the prior authority?

Mr. NOTTINGHAM. We would defer to the EPA on their whole range of expertise, which, on that parcel, it is fairly fact-specific there. That happens to be an old Superfund site, so especially in a situation like that—and then we would, of course, expect that on transportation and interstate commerce matters the EPA would give us some deference. And in that spirit, I think we can continue to work well with them, and I——

Mr. OBERSTAR. Is that established by regulatory action by the Board?

Mr. NOTTINGHAM. Not that I am aware of. It is just something the statute anticipates. And the way we have always interpreted it is that all Federal laws and statutes and their implementing agencies have full jurisdiction in these matters.

Mr. OBERSTAR. Thank you.

Mr. Mulvey, what would be your reaction to having EPA preeminent authority in such matters?

Mr. MULVEY. Well, the EPA, theoretically, would. The EPA has purposefully delegated that authority to the States and localities, because they are the ones who have the expertise in this area. They are the ones who understand——

Mr. OBERSTAR. But the EPA delegates authority only where there is a State plan, only where there has been a prior approved plan by the EPA, not just delegating willy-nilly. And I do not think the Board has any sort of plan to accept the delegation of authority.

Mr. MULVEY. That is true. I was referring that the EPA generally relies upon State and local regulations to govern solid-waste facilities, but there are not any specific EPA regulations governing municipal solid waste. They expect the local governments to do it; they have the on-the-ground expertise. This is why I am so concerned that there is not this Federal law regarding these facilities to harmonize with. It is only the States' and local laws. And those are being preempted in some cases and, therefore, cannot be enforced.

Mr. OBERSTAR. Thank you, Madam Chairman.

Ms. BROWN. Thank you.

Mr. Shuster?

Mr. SHUSTER. Thank you very much, Madam Chair.

My concern about this law is that it is sort of a Trojan horse. All of a sudden, the Federal law takes, and there is no preemption, and communities will stop these transfer sites from being in their communities.

You know, I understand that it is not the best thing that you want in your community, a transfer site or a dump. But the reality is that we are all producers of garbage. Everybody in this room today is going to throw something in a trash can, every one of the 300 million people. So we have got to take the personal responsibility to say we are going to have to have a transfer station in a community. We are going to have to have sites where we bury the garbage underground.

As I said to the three members previously, Pennsylvania is the number-one importer of trash in the country. As of 2005, we have taken in 10 million tons of trash, more than any other State. And it is my view that, if Pennsylvanians create the trash, Pennsylvanians ought to deal with it. The same should be for New Jersey and all across this country.

So, again, I am concerned that this bill—and the Chairman, I think, just talked to you, Mr. Chairman, about zoning. It is my concern you used this law, this Federal law, and you will have the ability to use Federal law to create zoning and say, ″Okay, well, our community is not going to have this site.″

Could you talk a little bit more about the zoning you are talking about?

Mr. NOTTINGHAM. This has always been, really, at the core of this policy concern, which is, how much complete land use and zoning control should State and localities have over rail operations? Understandably, it is a very delicate issue. Nobody would prefer or choose to, most likely—I might be, you know, the exception. I choose to live two blocks from the main CSX line because I love railroading and I like to be near a station. But let's face it, most people would prefer not to live adjacent to a noisy, active rail line or facility, no matter what it is carrying, not to mention things that are far more hazardous than what we are talking about today, that

move through right—you know, in the not-too-distant past, right by this building, there was hazmat and chemicals and what have you.

To answer your question, this is at play right now in pending legislation. My understanding is this body has an amendment coming to the floor, perhaps this week, on the rail safety bill that has the words ″any Federal or State agency″ in it. It does not say ″Environmental Protection Agency.″ It is ″any″ agency, which, to me, means your local zoning board, your land use board. What you will see happen is folks will say, ″We just do not want you. We do not care how upstanding you are, how much due diligence you have done, how much security, how many protections you put in place. You are just not welcome here in our community.″

In the Senate, we have seen that language move with very specific amendments to actually specifically call that out and say ″not including zoning and land use.″ So it is playing out right before our eyes. We see one bill in the Senate, Senator Lautenberg's bill, to address that concern. It takes a very thoughtful approach, by the way. Then we have a bill racing to the floor of the House that actually says any agency at the State or local level can regulate. And I do not see how that does not play out to be a flat-out denial just for zoning or land-use reasons.

Mr. SHUSTER. Which is a concern of mine. Would you care to comment.

Mr. MULVEY. I agree. I don't believe that the purpose is to allow zoning in such a way that it precludes establishing a solid waste facility to transfer to a rail to move it out, and that is important. The laws need to be narrowly drawn to be very specific, as I think both the Lautenberg and the Pallone bill do.

Mr. SHUSTER. I think it is extremely important, because again I see all kinds of unintended consequences occurring, because again nobody wants to live near a landfill. The reality is we got to put the garbage somewhere and communities have to step up and take care of their own waste. I don't know that you mentioned this, but the notification for these permits. My understanding is before there was no notification and then in the last several months you have put that into effect, that there has to be notification given so that these people can't just go out there and just operate. Is that accurate and how is that working?

Mr. NOTTINGHAM. Sir, that is an active area. We are trying to sharpen our ability to regulate as we speak. We have announced a new rulemaking procedure where very much the focus of that is going to be to gather increased information. But in the meantime we are not waiting for that because rulemaking procedures, as we all know, can take time as we get the public comment and everything. We very much have within our current powers and we are much more proactively enforcing this than probably may have happened in the past demanding information. It is not enough for someone to say, hey, we are a rail carrier, trust us and stamp approved.

So repeatedly if you ask, and most of the controversies you will hear about from panels today, please ask the question, did the controversial transload facility ever open and did the STB play a positive role in preventing it from opening, I think you will hear over and over again, whether it be Freehold or Croton-on-Hudson or

other situations, actually the concerned controversial project never came into existence. So if something is working out there, but it would, of course, understandably drive local and State officials crazy, I understand it, is these folks can aggressively try to race forward and bluff everybody and say back off, we are railroad, you can't regulate it. Unfortunately, too many local governments and States back off and don't implement their police powers, and that is why I made sure in my testimony to talk about the very thoughtful New Jersey 2D regulations that I think specifically respect zoning and land use, but actually do provide thoughtful regulation. So this Board at least personally is not against healthy and robust amounts of State and local regulation.

Mr. SHUSTER. Just so I understand, notification has only been occurring in the last several months?

Mr. NOTTINGHAM. No. I think that might be unfair. And I will let my four colleagues who have a little more history address this. But I think it is fair to say we have much more aggressively questioned supposed railroads for more information, and very often they back off and retreat. It is interesting. They run for the hills, so to speak, and then they come back with the same attorneys a week later under a different name, which is what we have seen happen recently, and we again ask for all their information. So it is a real challenge.

Mr. SHUSTER. When you shine the light on the cockroaches, they run away.

Ms. BROWN. Thank you. I have a question. Mr. Nottingham, how many rail solid waste transloading facilities are currently operating that are preempted from State and local environmental regulations?

Mr. NOTTINGHAM. My understanding is we do not have that or keep that information at the Board. It is a question we get. We got that from the Wall Street Journal recently. It is a question we get very often. And we get most of our information on that, frankly, from trade associations that represent the waste business and through testimony we received at our long hearing on that one case up in New England. But my understanding is we do not have any detailed information or records on who out there—on any given day a rail facility today could stop carrying trash or start carrying trash and we might very well not know it.

Ms. BROWN. Mr. Mulvey, do you know the answer?

Mr. MULVEY. I don't know the answer to that either. We do know, however, there has been a real uptick in the number of applications before us to construct these facilities. And we do know also that the MSW has become a growing and increasingly important commodity for railroads to carry. It is concentrated in the Northeast, but I don't have the number of facilities that are preempted in front of me, no, sorry.

Ms. BROWN. Mr. Nottingham, the STB stated in the New England transrail decision that the Federal preemption does not entirely preempt States' police powers such as ensuring that the railroad comply with certain health and safety rules. Using the recent New England transrail decision as an example, how would State police powers apply for solid waste transloading facilities?

Mr. NOTTINGHAM. Thank you for that very important question. In my view those powers, let us face it, the police powers are some of the broadest powers we have in our country. What could be more powerful than the ability to go onto someone's property and protect public health and safety? It is the most fundamental, most powerful governmental power I can think of. It has been a mystery to me why more jurisdictions and States don't use it more aggressively. Some are learning. And I understand it is hard when you get sharp lawyers saying, hey, there are 19 reasons you can't touch our operation, and people think we are going to get sued and we are a small village or town. So I understand the challenge, but they are broad.

First of all, fire inspection and compliance, code compliance, electrical, some of the things you heard today. We had a witness who came to our hearing from I believe a State entity saying we can't even regulate for fire code. And that is just not the case. And so the powers are broad. When you hear about these mountains or these eight stories high of trash, to me that is a police power concern about piles of trash possibly blowing over, falling over, catching on fire, and those operations ought to be regulated.

Ms. BROWN. Do you think the police, is that fire or is that environmental? I am concerned that we don't have a composite to know how many applications, who is applying on a daily basis. Do you have the staff to deal with the inspections and to process the applications? How many people do you actually have working in this area?

Mr. NOTTINGHAM. Our staff is about 140 total. Of course they don't all work in this area. In the environmental area we probably have a small unit. I know we do. It is somewhere between six and 10 people, depending how broadly we expand. We bring in other people, too, so at any given time we can have 20 people working on related issues from applications that come in and inspections. We do conduct field inspections.

I am not here today asking for more staff, but I would be happy to have that conversation. We are not of course the front line police power investigator. That is and always should be the local government and supported and backed up by the State governments. We totally support that and think that should be, frankly, taken advantage of more often.

And police powers is a very old legal concept. It is not just about the police department. But anything that is a pressing public safety problem that is playing out that can hurt somebody, you can pretty much come up with a police power reason to go visit that location and check into it and regulate it.

Ms. BROWN. Would you like to respond, Mr. Mulvey?

Mr. MULVEY. The problem of course is that is why we are here today. It is not clear what powers the States actually have over these facilities which are preempted by ICCTA and the Interstate Commerce Act. So that is where I think we may need some clarification as to what the States and localities can do. Where does transportation begin and where do the police powers come into play in the public health and safety by controlling things like how high the trash can go and whether or not there are adequate provisions for the control of vermin and odors and the like.

Ms. BROWN. Mr. Buttrey, would you like to respond?

Mr. BUTTREY. Madam Chairwoman, I would agree with what the Chairman has said and what Mr. Mulvey has said. The Board is very vigilant in this area. We have assured Members of the Senate and Members of the House that we will continue that vigilance as time goes by. I can't speak for boards that will follow us. You will have to probably stay close to the situation when people follow us in these positions to make sure that they are enforcing the law. But I think Chairman Nottingham pointed out very eloquently that the police powers of the State, under the Constitution those powers are reserved for the States, and I would encourage localities around the country to be very vigilant about facilities that are proposed or that some may even try to go into operation without the proper approval, ours or anyone else's.

State Authorities are the people on the scene, on the ground in those locations, and unfortunately we are not. We don't have that kind of staff and resources to do that, and we certainly depend on them. But I can tell you and I can assure you after having dealt with this issue for some number of months now that the three people sitting before you right now are going to make sure that to the extent that we have the authority to do so the public health and safety is going to be protected.

Ms. BROWN. Do you have a concern that we don't know how many operators have applied?

Mr. BUTTREY. We don't have that database at the Board. That would be something that the local communities, the Association of Counties, the cities, the Association of Mayors, other national organizations may have the ability to monitor. State legislatures may have the database available to them. We do not. We certainly have the information on the applications that have been presented to the Board for approval by institutions or organizations that want to engage in this activity, which I think we all agree is going to have to take place somewhere. We certainly know that and we keep up with that.

We can certainly provide that for the record and would be happy to do so. But as far as having a database that tracks this sort of thing nationwide, we do not.

Mr. MULVEY. I provide an attachment, Attachment B to my testimony, which does have the pending and recently decided STB cases involving MSW, but these are only the more recent ones. The first case that I dissented on when I came to the Board was one involving MSW and one I was very familiar with. It was extending a rail line into the Staten Island Fresh Kills Landfill. What we decided was that it was not a line of railroad, that it was a spur track so we didn't regulate it. But then we turned around and we preempted the States of New Jersey and New York from regulating it. Now, this is a case where there were important wetlands in the area and because of our ruling nobody was protecting them. This has been a problem for quite some time now and it is one that is growing.

Ms. BROWN. Thank you. Mr. Hall.

Mr. HALL. Thank you, Madam Chair. No questions at this time. Thank you.

Ms. BROWN. Mr. LoBiondo.

Mr. LOBIONDO. Thank you. Just the one question for Chairman Nottingham. The STB has ruled that while State and local laws may be preempted, Federal laws, including environmental laws, must be harmonized, I think was the word that was used, with the ICC Termination Act. Can you tell me how the STB harmonizes overlapping Federal environmental laws and regulations?

Mr. NOTTINGHAM. Well, I think the thinking there is that each Federal agency that has an area of expertise or is charged by statute with implementing certain public policies. For example, the EPA in many cases, and the STB on the interstate commerce side, needs to have its governing statutes and regulations apply. And also the harmonizer worked with the sister Federal agency to make sure that hopefully all the public policy goals that Congress envision in the statutes can proceed. In other words, in most cases there is no reason why—in my mind, in every case there is no reason why a thoughtful, environmentally conscientious and safe rail facility can't advance and would advance the interstate commerce provisions of the act and, working with EPA, that EPA can do its job and protect the public from harm or health.

So we do—it is not as if—the reason I made that point is sometimes you will hear that the Interstate Commerce Termination Act or the STB trumps all law. At the Federal level, it does not whatsoever. We work with our sister agencies to harmonize those laws and give each its full effect while trying to work to advance each agency's objectives.

Mr. LOBIONDO. Thank you.

Ms. BROWN. Mr. Bishop.

Mr. BISHOP. Thank you. Madam Chair, thank you very much for allowing me to participate in this hearing. Mr. Nottingham, I have a question for you.

In your written testimony you indicate that the STB does not require a formal environmental review and does not impose specific environmental conditions. You also—I believe I heard you in response to Chairman Oberstar's questions arguing against the imposition of a local role with respect to environmental standards, and you are concerned about that becoming a zoning issue that the Federal Government has no role in.

We have a situation in my district. The town supervisor and the town affected is going to testify on the next panel. We had a rail company purporting to conduct—I mean, construct a spur. And they claimed a Federal exemption when they did not have one. And by the way, the STB has involved themselves in this case. And you have issued a ruling which is very helpful, and I thank you for that. But before the STB became involved they clear-cut 20 acres of property and began a sand mining operation. Now, they did so in their view under the cover of a Federal exemption, and that Federal exemption by current law does not include the imposition of environmental standards or environmental conditions.

If the Federal Government does not take that role and the local government is preempted from taking the role, how does a municipality, a local government, protect itself against the kind of unscrupulous behavior that we are clearly witnessing in our district on Long Island?

Mr. NOTTINGHAM. A lot of good questions there, Congressman. And we have been spending quality time, I can assure you, focused on your district in the very case and controversy you mentioned. And that will be with us I expect for a little while as we play out the legal process that we are currently in the midst of.

Our agency, as you mentioned, we have been proactive, responding in a matter of days as we learn the facts. I have to be careful because it is a pending case. I won't speak to the merits or demerits of the case. I will say that just in general, because you point out one example, it is in my view always unfortunate when a local government yields, no questions asked or with minimal questions, to a supposed railroad lawyer's statement that we have preemption, back off. Because in many cases we find out that is a bluff. What localities need to know is they can petition us for a declaratory order or they can go to court and get a declaratory order. They do not have to take some proposed railroad lawyer's word for it.

Mr. BISHOP. If I can just interrupt for a second. In the case in which we are discussing in my district, the activity began before the town was approached at all. And the activity, again, began under the cover of this presumed preemption. And so I guess my question is if the preemption, and I understand the reason for the preemption, but if it yields this kind of unintended consequence and yet the STB would take the position that we don't want to impose a local role with respect to rail facilities, there has to be some other governmental mechanism that would prevent this kind of outrageous behavior from taking place. Now, whether it is the EPA or some other governmental intervention, don't you agree that we have a situation that with all governmental agencies acting appropriately has yielded a result that is unacceptable? If that is the case under existing law, then we have to change existing law? Doesn't that just make sense?

Mr. NOTTINGHAM. I agree with you that the status quo, the way these controversies have played out and the way local governments and neighbors have had some of their rights trampled, is not acceptable. There are a number of ways we can get on top. We are doing everything we can at the Board. I think Congress is well within your rights to play a strong role in this field. I do urge caution. Look at all the consequences, because we are all concerned about increased truck traffic and we are all concerned about the possibility of legitimate—remember, for every one of these controversies there are probably 50 legitimate law abiding, environmentally conscientious railroad operators who handle some trash. It could be a little bit, it could be a fair amount, it could be in containers.

But getting back to your question, earlier you mentioned that the Board provides no formal environmental review nor conditions. That is absolutely not the case, and I do want to correct that. In a number of proceedings and fact scenarios we can provide enormous, and we do, conditions; NEPA review, denial. But there are certain cases where you have an existing railroad who tries to say I am just improving my facility and taking on a new line of business called trash where there is not that automatic STB. Someone has got to petition us or a complaint has got to be filed.

Mr. BISHOP. I am almost out of time, but doesn't your written testimony say that the STB is not required to conduct environmental review or impose environmental conditions? I think what I heard you say is that you may impose them, but you are not required to, is that correct?

Mr. NOTTINGHAM. I think my testimony references about three or four types of ways these cases and controversies come to us. In only one of those types do we not have a proactive, in advance, opportunity to look at the environmental issues and also put in conditions or denial. And that is when an existing railroad decides to take on trash for the first time and we don't know about it. So just there is a very minority, discrete area. In the vast majority of situations we have pretty broad authority.

Again, localities, in answer to your question about somebody—I am not going to speak about the controversy in your district that is pending with us—but if in another place in the country someone were to run roughshod over a State's land use and other laws under the guise, ill-gotten guise and erroneous guise that there is some kind of a preempted railroad, there should be enormous State and local repercussions that come down on that. I would expect there would be fines, penalties, license revocations at the State and local level, all the things that you do if an apartment building operator just starts knocking down apartment buildings without a permit or anything else.

Mr. BISHOP. I thank you for that.

Ms. BROWN. Mr. Bishop, you can finish.

Mr. BISHOP. Thank you, Madam Chair. Mr. Mulvey, you wanted to comment on that.

Mr. MULVEY. Well, we do have a Section on Environmental A nalysis, but it doesn't do the kind of inspections and the kinds of monitoring that a State environmental agency would do. What our group does is if they are constructing a new track or abandoning a track we make sure that that construction or abandonment is done in an environmentally sound manner. But we don't go in and actually inspect the way solid waste is handled and enforce State and local laws governing the processing and the handling of solid waste. Chairman Nottingham talked about a railroad taking on and building a track. Well, building a track, we would look at that, the way the track was built or the way the facility was built, to make sure it complied with effects on wetlands or whether an historical marker was moved. That is what our staff does. But our staff is not trained to monitor municipal solid waste activities as would be a State environmental agency.

Mr. BISHOP. Thank you, Madam Chair.

Ms. BROWN. Mr. Rahall.

Mr. RAHALL. Thank you, Madam Chair, and thank you, Board members, for being with us once again. My first question concerns the health and safety concerns. Are they not the same if the commodity was something other than solid waste, such as paint, cosmetics, LNG, ethanol, wine, gasoline, coal, nuclear materials, automobiles, et cetera, et cetera, et cetera?

Mr. NOTTINGHAM. I am concerned that while trash might be high on the nuisance scale of most citizens, things you don't want to live or spend quality time around, boy, that list can be long when you

really look at what goes on in our interstate rail system and you look at that we would depend on rail to move nuclear waste, to move hazardous waste, to move chemicals, pesticides, fertilizers. In the old days of course it was livestock, and a lot of early ICC cases are about, well, we can't live near the cow pen while the cows get loaded onto the railroad. There is some real concern that you will have bills every year, if not multiple bills peeling away at the importance of preemption in the Federal Interstate Commerce Act. In saying that, I do not suggest that State and local government shouldn't be given wide latitude to regulate in this area, but it has got to have a limit to it. And there should be some consideration of what rights a legitimate, honest railroad has if they become subject to unreasonable overregulation; i.e., you are not welcome in our community, go away, no matter how good you are.

In the pending bill you will see there is really no recognition that there ought to be a safety valve or a way for a legitimate railroad, clean railroad to actually protect its rights. And that is really where many of my concerns lie.

Mr. RAHALL. Any others?

Mr. MULVEY. Some of these, in fact, some of the ones you mentioned, like paint, for example, is in fact in the mix of the solid waste stream and in fact is one of the problems with some of the landfills and some of the storage. Paint has chemicals in it that can leach into the groundwater, et cetera, and cause problems. Others of the ones you mention are regulated by the Federal laws, like nuclear materials, et cetera. But there are a set of, unlike some of the other ones, like automobiles, for example, there are existing steps of State and local laws, especially State laws, aimed specifically at the solid waste stream. And it is one of those areas where, as I said before, the EPA has delegated the responsibility to the States to regulate.

So MSW is somewhat unique from the other ones. But I do share your concern that we need to be very, very careful that this is not taken too far and winds up applying to things it should not apply to and thereby interferes with interstate commerce.

Mr. NOTTINGHAM. Mr. Rahall, if I could just add one point that I think will be particularly of interest to you. I know where you come from, sir. I spent a lot of time with former Secretary Mineta when I was at Federal Highways helping improve your good highway network in your beautiful part of the world in West Virginia. This is not an academic discussion. We have battled communities in the U.S. Courts of Appeals in one large case related to the DM&E Railroad. The argument put forward was that the transportation of coal is such a, I'll paraphrase it, such a public problem that coal would move in commerce because we should get rid of coal as an energy source. That that new railroad—and we all want more rail competition, we spent quality time on that issue together in this room just a couple weeks ago—that that new railroad should be denied the right to enter the business because it was going to handle coal, because there was a supposed problem when our Nation's whole energy policy is premised that we are going to have a healthy amount of coal in play. And so thankfully we won that case, but it took years, it took thousands of man-hours, hun-

dreds of thousands of taxpayer dollars to win that case and it was back and forth.

And so that is just an example. This is not an academic discussion. You will have people thinking up any argument they can to just shut down a railroad. It will have competition implications, it will chase traffic onto the highways via trucks. And personally I am not one that enjoys sitting behind a trash truck on the interstate, as occasionally things unfortunately blow out, and I am pro transportation, I am pro truck transportation too, but given the choice I sure would rather see it loaded onto a railcar. I think right now only 10 percent, we are told by some of the trade associations, actually moves by rail.

Mr. RAHALL. How are these local health and safety concerns addressed now?

Mr. NOTTINGHAM. Well, it is somewhat—you have heard the word ″patchwork″ today earlier. It varies. Some of the jurisdictions you will hear from today deserve a lot of credit for being the most proactive. And they have given this a lot of thought. New Jersey in developing its, what I call the 2D regulations, which take into consideration that they are not going to zone out of existence just because something is unpopular in a community. But reasonable, in my personal view, regulations. Police powers. They can petition us. They can go to court. And in large measure the courts and the STB decisions have been very consistent. You won't see lots of disagreement—because we are just reading statute. And Commissioner Mulvey mentioned legitimate public policy concerns that he has. But we have to be a little careful as decision makers of cases to not overemphasize public policy when we are interpreting statute, because the plain words mean something. The words are in statute; handling, storage. These are all things that many communities would like to see regulated out of existence. They don't want trash handled or stored or in many cases even to move in any way through their community.

Mr. RAHALL. Yes?

Mr. BUTTREY. Congressman Rahall, the Chairwoman I think was out of the room when the gentleman from Long Island was asking one of his questions. And he had asked the question well, how do you stop these people, unscrupulous people from engaging in these activities that happen to be near a railroad. And if he had asked me the question I think I would have suggested to him that some local sheriffs deputies with 9mm firearms out there at the gate would probably solve that problem until the United States Supreme Court had ruled on it, and they would sit there until they did. That would be what would happen in a community if I was concerned about it. That is exactly what I would do to stop it until the Federal Court—they are raising a Federal issue. It will be solved at the Federal level. It will be solved in the Federal Courts, the District Courts, the Courts of Appeals, the United States Supreme Court. And until the United States Supreme Court told me to remove those security guards, those public security guards that is exactly where they would stay until it settled. That is sort of the way we handle those things where I come from.

Mr. MULVEY. There is also voluntary compliance. Most of the people who are involved in this, especially the existing railroads,

are good corporate citizens, and they work with communities and they try to solve the problem. There is this whole issue of this regulatory gap. And I recall when I was working for the Committee we had a problem in Minnesota with a railroad that had a property where they were storing containers and they were stacking these containers very high. And the children in the area were playing in these containers and the local governments could not do anything about it because regulating what went on on that property was the jurisdiction of the STB. And we don't really have any laws regarding, rules regarding what they can do on these yards in these areas. But finally the community, working with the railroad, solved the problem, the containers were taken down, the community was satisfied. But it did take some public pressure and it did take voluntary compliance and the railroad eventually coming out as a good corporate citizen. And that is what we have to rely upon in some of these cases.

Mr. RAHALL. Thank you, Madam Chair. May I have permission to submit additional questions for the record?

Ms. BROWN. Yes, sir, you may. You know this is a very sensitive area and it is a balance, trying to come up with the adequate balance. I guess I have a couple of more questions.

Can your staff, Mr. Chairman, conduct field inspections of solid waste transloading facilities? How frequently do they do that? And then any other members who would like to respond to that.

Mr. NOTTINGHAM. Yes, we can. Yes, we do. We have been doing that with increasing frequency in the last year or so. But I don't want to overstate that. We typically do it upon complaint, we hear about a problem. And then we also check first with the local and State governments to see, hey, is there a need for someone else to inspect, have you been there? We recently sent staff, for example, to I think it is a community in New Jersey called Hainesport where there have been a lot of complaints that the local papers had picked up. The internet is a great thing, so we can now do what we couldn't do 30 years ago probably which is quickly keep track of every local paper and put in some key words and hopefully keep up with some of the controversies, and we do do that. And when our staff got to the facility at question in Hainesport it turned out the State of New Jersey had been there frequently. There was not a problem. Unfortunately, there was a neighbor who didn't like living next door, and there is probably more to his perspective than I could ever offer today.

But we do do inspections. We can. We are happy to do more. And if need be, we will redeploy more staff to do more. And if we have to, we will of course come to the Congress to talk about resources, but resources are not blocking our ability to inspect at this time.

Ms. BROWN. Mr. Buttrey, I would have a concern that we want the police to go in and lock down the facility. What I would hope that we would have in place before that point, we would have an organized way to stop a person before they get to that point. I mean we should have a procedure in place that we could, a review process or working with the local communities. And even though we have the greatest respect for everyone here, you know, Mr. Nottingham, how much I respect you, but the point is that just like me I am here today, it is important that we have a law in place

that we can follow through a procedure. And of course I am a rail lover also. But the point—and I don't want this waste to be on trucks because that is even more dangerous to the community. So the question is what is the, I don't want to say balancing act, but what is the best way to do what we need to do and also protect the community?

I don't know whether or not you have seen the bill that is moving forward. And I would like to know how it will affect you. Because the key is that we have the law in place. Because we are interchangeable. We are here today, may be gone tomorrow.

Mr. NOTTINGHAM. Madam Chairman, thank you for the questions. First and foremost, I would urge anyone who cares about this area or practices in this area or local residents, states, local communities, take every advantage of the tools we currently have. Go to court and ask for an emergency injunction to stop a facility. Come to us, that would be my first piece of advice, and ask for an emergency declaratory order. We handle those. We turn them around quickly.

Mr. Bishop mentioned that case that was literally unfolding. Within days we were basically able to shut that facility down. And it will be shut down until we are convinced that it is actually a legitimate rail operation that deserves preemption. And so you've got the STB, you have got the court system already there, and of course you do have the full panoply of police powers.

But I understand. It is still a difficult situation because someone can wake up one day and find out that a business has bought a piece of rail line in their community and is talking about bringing in a trash transload facility. And it is not put up for referendum, there are processes that have to be followed. And it is understandably downright frustrating if you live in those areas. I do think some of the proposed—you mentioned the proposed legislation. Take a very good look at whether zoning and land use is spelled out and addressed in the pending bills and whether honest, clean railroads have an opportunity to be protected if there actually is an overreach. Those are the two missing things. The Senate bill actually does account for and recognize that they are not talking about zoning or giving zoning authority, which is a big improvement, I believe.

Ms. BROWN. Mr. Mulvey, do you want to respond to that?

Mr. MULVEY. I agree with the Chairman on this issue. We need to make sure that the bills are very specific and are narrowly tailored so that they don't take into account zoning, for example.

Ms. BROWN. Mr. Shuster.

Mr. SHUSTER. What is your general sense of the awareness level out there with State and local governments to the fact that you don't displace all Federal agencies in what you do? Do you generally feel, I am sure you haven't really measured it, but what is your general sense—Mr. Buttrey, you have been on the Board I think the longest. What is your sense of that?

Mr. BUTTREY. Mr. Shuster, I think the awareness level is probably dangerously low. It concerns me how low it is. In fact, as I go out around the country occasionally to speak to groups who want to know about the Board and how we operate, I find out that this whole area of regulation and law is a very esoteric area. And peo-

ple are unaware of the fact that they have this resource called the Surface Transportation Board to bring concerns to. We have a Consumer Advocacy Office that spends their days and probably some nights worrying about these concerns and dealing with these concerns that are brought to them.

The health and safety area is one that I think there happens to be, whether we like it or not, and we don't like it, there happens to be some bad actors in this area. There are bad actors all around of one kind or another, and this area is not immune from that. Which goes to what the Congressman from Long Island was talking about; that people who are unscrupulous, who are bad actors will go out and start these activities without getting the proper approvals or authority to do so. And unfortunately we don't find out about it, the STB doesn't find out about it until it shows up in a newspaper article or until somebody makes a phone call or until some local county attorney or city attorney or maybe even someone from the Attorney General's office of the State calls up and says what in the world is going on here, these people are telling us that you authorized these activities, is that true? And unfortunately, and I hate to admit this, but unfortunately we don't know about every single one of these activities that are going on because by definition if these people are bad actors they are not going to come and get the proper approvals.

Mr. SHUSTER. And sort of on the flip side of that, the general population isn't aware of these legal issues and wouldn't expect them in many cases?

Mr. BUTTREY. Right. And I don't want to give you the impression that I think all the people who are in this business are bad actors. They are obviously not. There are very reputable people in this business doing everything exactly right, but unfortunately that is not the case in every case.

Mr. SHUSTER. Again the flip side, somewhere in the court system they should be very aware of this, how frequently or how often are they coming to you and referring to you an expert legal opinion on what you guys do at the Board? Is that happening? Are the courts doing that? Or are they just winging it out there and interpreting things the wrong way?

Mr. Mulvey.

Mr. MULVEY. As I said, we have a number of cases before us. And the courts often do defer to the Board. We are thought to have the expert opinion and the expert backgrounds on these issues. There are a couple of cases now where the courts have had this before them and the Court of Appeals has remanded a case recently to the District Court for reconsideration. It is an active area right now. And I think, as I said before, it is growing. We haven't had that many cases, but as I pointed out in my testimony, there has been a growing number of them and people do contact us and ask us what our authority is. Douglas talked about going around the country talking about the Board and what the Board does. And I can second that, that very often we talk to people who have shippers, rail shippers and don't know what the Board actually does or knows that they have this group available to them for assistance if they have a problem with a railroad. It never ceases to amaze me that we have not been more successful in getting out the word

that you can come to the Board, you can get help from the Board, we can use our good offices to help shippers and others solve their problems.

Mr. SHUSTER. And you used the word ″often.″ Does that mean—it would seem to me common sense from a judge, and I got all these cases, many different, I would go to the experts. Is it happening a majority of the time? The courts coming to you?

Mr. MULVEY. I couldn't really judge whether it is a majority of the time. Maybe, Chip, do you have a better sense of that?

Mr. NOTTINGHAM. Just to give us sort of a quick overview how this looks as far as a litigation caseload perspective, we currently have three active cases with us now, actively with us now. One is right in Mr. Bishop's district. And the courts were probably tracking at any given time four, five, six or seven active cases or cases that are in some level of activity. One of the most prominent right now is the Third Circuit has sent back I believe to the Federal District Court a case involving the New York Susquehanna, looking at the New Jersey 2D regs that I spoke of. But we do—it is not unusual for a court to send parties back to us for a finding on what is transportation or commerce. But it doesn't happen every week.

Mr. SHUSTER. In those three prominent cases have they come to you and said give us your expert opinion?

Mr. NOTTINGHAM. Those I believe all came to us directly. In other words, people of course can bring, and we encourage, bring a petition for a declaratory order to us directly. But you have the courts there as well. And some people do either or both.

Mr. SHUSTER. Thank you very much. I yield back.

Ms. BROWN. Mr. Hall.

Mr. HALL. Thank you, Madam Chair. Mr. Nottingham, I just wanted to follow up on your comment to Mr. Bishop that the project in his district wouldn't go forward until the company had proven that they were actually a railroad business. And I am curious, I know it is something that is under consideration now and that you may not be able to comment directly on it, but what percentage of the time does the company eventually approve that they are a railroad business and eventually receive a permit for preemption?

Mr. NOTTINGHAM. In my limited, about 14-month tenure at the Board I believe that in the majority of cases and controversies we have actually—through asking questions, through pursuing our regulatory oversight, we have actually seen the proposed project not go forward, which is a long way of saying you don't see the controversial trash transload facility opening. How many have actually opened after going through our procedures? Let me get back to the record when I say——

Mr. HALL. My question is not whether they went forward, because unfortunately many of these businesses decide it is not profitable or they fold and go under, but how many receive the go-ahead from your agency?

Mr. NOTTINGHAM. If I could, let me get back to you on the record because I want to make sure we get that right. The cases are all different. Some people come in and say, oh, I am just building an exempt spur, but we find out that they are based in one State 1,000 miles away and they have never done business in this new

State and the whole spur exemption we presume has some meaning about building out your existing system, not five States over. So that is a very active area. But again I want to reiterate that nothing I have said today or will say today speaks to the merits or demerits of any pending case. Only because I don't want to recuse myself, although that would free up my schedule a lot.

[Information follows:]

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In response to your specific question, in the last year the Board has decided three cases involving common carrier licensing authority to operate a waste transload facility. In only one case was that authority granted: Northern and Bergen Railroad, L.L.C.—Acquisition Exemption—A Line of Railroad Owned by New York & Greenwood Lake Railway, STB Finance Docket No. 35020 (STB served June 25, 2007). The Board rejected the notices of exemption in the other two cases: Ashland Railroad, Inc.—Lease and Operation Exemption—Rail Line in Monmouth County, NJ, STB Finance Docket No. 34986 and G. David Crane—Continuance in Control Exemption—Ashland Railroad, Inc., STB Finance Docket No. 34987 (STB served Aug. 16, 2007); and J.P. Rail, Inc. d/b/a Southern Railroad Corporation of New Jersey—Lease and Operation Exemption—Alternative Energy Technologies SR, LLC, STB Finance Docket No. 35053 (STB served July 11, 2007). The Board acted on other cases involving waste transfer facilities, including determining the extent of the Board's jurisdiction and dismissing a case at the request of the party seeking an exemption to acquire and operate a rail line. However, because of the procedural posture of those cases, decisions were not made regarding whether or not to grant licensing authority.

Mr. HALL. Right. In the case of Croton-on-Hudson there is a company that had 32 miles of track 300 miles away from the village and nonetheless was supplying for a—entered into a sublease for this little spur in the town of Croton-on-Hudson and was claiming preemption. It turned out that they didn't go into business either, but it wasn't because the Transportation Surface Board made a decision to prevent that. It was just the way things worked out, I assume businesswise. But in the meanwhile it cost the village $1.2 million in legal fees.

Now, in the Hudson Valley, the 19th District of New York, one of the top issues that people are concerned about is property tax. And basically what this does is it forces a municipality to raise money in really the only way that they can raise it, which is by taxing their property owners to pay for legal fees. And in this case they are still facing the specter of another company coming in and trying to do the same thing and having another million dollars go out the door.

I don't see this as a case where the police or court options that you spoke of before helped because they lost their court case. I don't believe that it is practical to expect a small town police force to sit with firearms at the entrance to the property, nor do I think that that is how we should resolve these issues in our supposedly civilized society.

So the question really is isn't this a case in which there needs to be something other than harmonizing, which sounds to me like a softer version of mitigation. A transfer station, an incinerator of solid waste landfill in New York State has to go through an environmental quality review process that makes sure that the environment and the people are protected. And I don't hear from the existing law, the existing structure, that that exists.

Mr. NOTTINGHAM. Mr. Hall, please know that we were actively monitoring the controversy in Croton-on-Hudson and we stood ready to get involved as the facts and case presented itself. I am glad that it was able to be resolved in a way to the town's liking. And I do regret, I think anyone would, that so much money would have been a trigger in the court costs, and that is a real problem. I don't know if any of the pending bills would stop those kind of disputes from arising and the court costs, but that is a problem.

I will say, you raised property taxes as a concern, and I do think somewhere in here, and this Committee is probably the best Committee in the Congress to be able to keep an eye on the big picture, there are costs of course. There are costs of course that we all pay to handle our trash, and we all create it. We had a case, the New England Transrail case you will hear about later, where on the record a nonrail trash transload operator stated that it took 4-1/2 years to get a permit to go into business in Massachusetts. Now, there is a cost to that. And so we have got to find a balance here because we are going to be paying one way or another, whether it is increased truck traffic on the interstate wearing out our bridges, an issue of deep concern to this Committee, or whether it is increased cost to the consumer for handling trash. So just the idea of keeping all the costs and benefits before us is critical.

Mr. HALL. I would agree with that. In closing, I would just say that I am not opposed to trash being moved by rail. I don't think

anybody here is. But I do believe that there are some sites that—I mean the Bensalem testimony that we are going to hear in the next panel is one, for instance, where local concerns and local planning obviously run afoul of this particular site. I don't know what percentage of the time that happens.

But anyway, I thank the Chair for allowing me to ask some questions and yield back.

Ms. BROWN. Thank you very much, panel. And I know that you will get additional questions. And is there any closing remarks that you would like to make?

Mr. NOTTINGHAM. I would just say thank you, Madam Chair, for the time today and the thoughtful questions.

Just quickly, we have heard Bensalem mentioned and you will hear about the Bensalem case. That is a case where the Board actually denied the project and stopped it. And so we do always try to keep track. There are controversies and then there are typically Board, very often Board denials and strong action. Please know this Board is very concerned about this issue. We are not here to say don't do anything, or everything is fine, because that is not the case. But do please be careful. Look at all the costs and benefits of the pending bills. And we stand by. We have not been asked to provide any technical assistance on any of the bills. We stand ready to do that in a completely straightforward, professional way. And any time you ask we will provide that assistance.

Ms. BROWN. Thank you. And I guess I would like to know how the amendment that is moving forward will affect what you all do that is going to be attached to my railroad safety bill tomorrow. I mean it has been made in order, so I would like to know your opinions.

Mr. NOTTINGHAM. Because that is moving so quickly, tomorrow, I believe you said.

Ms. BROWN. It is not moving quick enough for me, but okay.

Mr. NOTTINGHAM. Right. That is why I mentioned that a couple of times today, because we may not have the luxury of sending you something in U.S. mail. Of course we will deliver anything to you that you need. But let me just say real quickly, look at the provisions. It is a very short bill. There is a bridge and then the longest section of the bill that references regulation by any local, I believe I am paraphrasing here, I have got it in my notebook over behind, but any local or State agency. And I read that as including land use and zoning. Bring it on. And the real likelihood that you will see controversial projects stopped, not because of environmental concerns, but of more "not in my backyard" concerns. And I know that is not what the good witnesses you will hear today, because these are some of the more thoughtful leaders on this issue, have on their mind.

I worry about the people that are not in the room today, the folks we have had to fight in the U.S. Court of Appeals who didn't want coal to move because they felt coal was a nuisance, and all of the other disputes that we will have. And please take a good look at the Senate compromise language that actually says we are not including zoning and land use here. That language is absent from the amendment, the Pallone amendment, that is pending.

Thank you.

Ms. BROWN. Yes, sir. Would you please get me your comments in writing. And Mr. Mulvey, do you want to?

Mr. MULVEY. I just want to thank you for having us here today. I agree with Chairman Nottingham. We need to be very, very careful. The Lautenberg bill does specifically mention zoning. I know that there have been changes in the Pallone bill which have been—we are not talking about not preempting transportation of solid waste, simply the handling of it. But I think looking at it carefully, making sure that we know what we are doing and we don't in any way impede the flow of commerce, which is not the purpose, it is to protect the public health and safety.

With respect to Mr. Hall's concern about what the STB has done in certain cases recently, at the back of my testimony there are the 2007 cases that we have that have now been decided. There are five of them listed there. And you will see in four cases the project did not go forward. And the one case that went forward was an acquisition of one railroad by another, and that was not what we were looking into doing.

Ms. BROWN. I want to thank you again. Mr. Shuster, do you have any final remarks? I want to thank you very much for your informative testimony today. And we will be working together as we move forward in this process. Thank you very much.

Panel III, will you please come forward?

I want to say good morning. It is still morning. We have about 5 more minutes. Good morning. I am happy to introduce our second panel today. Our first witness is the Mayor, Gregory Schmidt, from the village of Croton-on-Hudson from the State of New York, is that correct?

Mr. SCHMIDT. Madam Chair, yes, that is correct. I am Dr. Gregory Schmidt, and thank you for having me here today. I am the Mayor of the village of Croton-on-Hudson in the State of New York.

Ms. BROWN. Just one second. Let me finish introducing the other panelists and then we will get started.

Our second witness is Mr. Joseph Pizzo, who is the City Solicitor for Bensalem, Pennsylvania. And our third witness is Mayor Kathy Chasey, from Mullica Township in New Jersey. And our fourth witness is Brian Foley, the Town Supervisor of Brookhaven, New York. And our final witness is from Freehold, New Jersey, Mrs. Barbara McMorrow.

I would like to remind all of the witnesses that you have 5 minutes. However, your entire written statement will appear in the record. And if you would like to make any corrections in those pronunciations of those names, you are welcome. The second person, you can correct this. I have a different person.

Mr. PIZZO. Yes. It is Joseph Pizzo.

Ms. BROWN. Oh, that is right. Someone mentioned that the Mayor could not come.

Mr. PIZZO. That is correct.

Mr. SHUSTER. Madam Chair, I think that the staff is going to try to get a new name tag, so we don't screw it up.

Ms. BROWN. Okay. Thank you.

Mr. PIZZO. My name is only slightly less difficult than Mayor DiGirolamo's.

Ms. BROWN. Mr. Bishop is going to introduce Mr. Foley first.

TESTIMONY OF THE HON. GREGORY SCHMIDT, MAYOR, VILLAGE OF CROTON-ON-HUDSON, NEW YORK; THE HON. JOSEPH W. PIZZO, CITY SOLICITOR, TOWNSHIP OF BENSALEM, PENNSYLVANIA; THE HON. KATHY CHASEY, MAYOR, MULLICA TOWNSHIP, NEW JERSEY; THE HON. BRIAN X. FOLEY, TOWN SUPERVISOR, BROOKHAVEN, NEW YORK; AND THE HON. BARBARA McMORROW, FREEHOLDER, FREEHOLD, NEW JERSEY

Mr. BISHOP. Thank you very much, Madam Chair. And once again thank you for letting me participate in this hearing. It is my pleasure to welcome to Capitol Hill my friend and my partner and government supervisor, Brian Foley, of the town of Brookhaven, which is the largest town in the First District of New York. He has been an elected official on Long Island for a long time now. He has represented the Seventh Legislative District of Suffolk County since 1993.

In 2005, he was elected to be the Supervisor of the town of Brookhaven, and since that time he has undertaken a very ambitious and I would say very successful reform agenda to turn around a great many serious problems that have existed in the town of Brookhaven for a long, long time. He has been a leader on environmental issues and a leader in preserving wetlands and open space.

And it is with great pleasure that I welcome him here to Capitol Hill, and I look forward to his testimony.

Ms. BROWN. Now we will start with you, Mr. Mayor.

Mr. SCHMIDT. Hi. I am Dr. Gregory Schmidt. I am the Mayor of the village of Croton-on-Hudson in New York. We are a small suburb in the northern part above New York City. We are about 8,200 people, 4.5 square miles. And we find ourselves besieged with solid waste operators masquerading as railroads and abusing Federal law to prevent us from protecting the health and safety of our residents. We don't think that is what Congress had in mind when it created the STB.

You have my testimony, but I am going to give a little brief synopsis of what has been going on in our community. Our situation involves a 10-acre parcel of land that is owned by Greentree Realty, whose primary owner belongs to the estate of an associate of the Genovese organized crime family. This piece of property has been used over many years for various things. But about 10 years ago, 1,600 feet of rail track was installed in order to load processed waste onto railcars which would then be disposed of. Solid waste companies are trying to use this 1,600 feet of track to avoid State and local regulations, which are the privilege enjoyed by legitimate railroad companies. And again we don't think that is what Congress had in mind when it created the STB.

About in year 2000, Greentree leased to a company called Metro Enviro. It is a private company. They operated a C&D transfer station under special permit from the village. They had an appalling compliance record over that time. They exceeded waste limits, they falsified records, they accepted unacceptable material at the site, and they failed to train their personnel.

In 2003, the village ordered them to be shut down because of the violations of the special permit. In 2005, after 2-1/2 years of litigation at the cost of three-quarters of a million dollars, the State's

highest court finally upheld our decision and the facility closed. But then Greentree leased the property to NIR, Northeast Interchange Railway, which is not a railroad, just a waste handler. And they claimed that they were a railroad. And again 2-1/2 years of litigation between the village, Greentree and NIR.

And finally, a New York State Supreme Court judge ruled that they couldn't open up without first obtaining a special permit from the village, ruling that the village has the right to impose conditions necessary to prevent harm to the community and to the environment. NIR attempted to evade this by going to the STB and filing notice of exemption. The STB—we challenged this. The STB finally ruled that they wanted more information on this. And we expected to see that application from the STB. It never occurred.

Instead, what happened was NIR's attorney called us and told us there was a new entity on the block, BSOR, Buffalo Southern Railroad. They had subleased the property and claimed that all village authority was exempted by the ICCTA, Interstate Commerce Transportation Act, and they were filing a temporary restraining order against us in Federal Court. We had never heard of Buffalo Southern, and we found out that they were a rail company 300 miles away in Buffalo. And we were stymied when that Federal Court granted a primary injunction.

So there is confusion out there in the courts as to what is supposed to happen with this. BSOR, Buffalo Southern, threatened massive operations of solid waste and other materials under the cover of being a railroad. The village would have no regulations over this, no enforcement whatsoever. But for business reasons that we don't understand, BSR disappeared from the scene. But the village fears are far from over. In negotiating with the owner to purchase the property, Greentree, the owner, keeps telling us that other railroads are in the wings ready to come in and take over this operation.

I just want to say that the village, the County of Westchester and the State of New York have worked tirelessly for decades to remove the influence of organized crime from the waste industry, and we have been successful. This has resulted in a waste industry that is regulated on many different levels by local, county and State government. Allowing railroads or railroads masquerading as transfer stations to perform the handling of waste would completely undermine the gains we have made.

Madam Chairman, our little village has spent $1.2 million defending ourselves in court from these solid waste operators who are disguised as railroads claiming Federal immunity from our control. We don't think that is what Congress had in mind when it created the STB, and we call upon Congress to correct that. Thank you.

Ms. BROWN. Thank you.

Mr. Pizzo?

Mr. PIZZO. Yes, good morning, Congresswoman and Ranking Member. My name, again, is Joseph Pizzo. I am the township solicitor for the Township of Bensalem, a community of some 60,000 people, located in southeast Pennsylvania. We are located along the Delaware River, north of Philadelphia.

I am here on behalf of our mayor, Joseph DiGirolamo. He thanks you for the opportunity to address the Committee, and he apolo-

gizes that he could not be here today when the hearing was rescheduled because of the passing of Congresswoman Davis, for whom we express our condolences to you all. His schedule would not allow him to be here today.

His testimony, I believe, summarizes an issue that our township has been battling for several years now and goes back over many, many years of planning for our Delaware River Waterfront.

What we have been confronted with for the past several years is the possible establishment of a construction demolition transfer facility along our Delaware River Waterfront in violation of numerous State, county and township regulations. We are a typical suburban community, but because of our unique location along the Delaware River, we have a rich history, dating back to the early days of our country. Names like Wharton, Biddle, Drexel and Bickley all lived along our riverfront, and their mansions still exist there today. Washington's troops camped along our Delaware Riverfront, and there are monuments to those brave soldiers there today.

Because of our location on the Delaware River, during the 19th century and the first half of the 20th century, industry located there; it thrived there. But in the latter half of the 20th century, almost all of that industry moved out. It is virtually gone now, and that area of our riverfront lays fallow. But because of our location on the Delaware River, a renaissance is under way. Years of planning have led to a rebirth in this area, one that will give our river back to the people of Bensalem.

As the mayor's written testimony sets out at length, there have been years of study involving our riverfront at the county level, at the township level and at the State level. And we have an opportunity today that might not come again for decades, if not centuries. Our leaders have tried to do it right. We sought input from businesses, from residents, from civic organizations. Committees were formed, they met, they put together plans, they put together proposals, one of which I have here, for the Bucks County Waterfront Revitalization Plan. Objectives were set out; means and methods to achieve those objectives were set out. And they are all contained in this plan and in our township open space plan and in our township comprehensive plan.

Once this roadmap was made, the township went about doing what it said it was going to do. We created new zoning districts for our riverfront. Land was rezoned and acquired. $7 million was invested in the cleanup of contaminated sites along our Delaware River that used to house industry, chemical plants and the like.

Today, there is a plan on board to revitalize 40 acres of our riverfront. It would house 500 units of housing. It would house shops. It would house restaurants. It would have a marina. It is the linchpin of the redevelopment of the four miles of riverfront that we have.

But let me tell you what is immediately going to be across the street from that site: the trash transfer station.

It is projected, using their numbers that they submitted to the township, that up to 2,000 tons of construction and demolition debris a day would be traveling to that site, 7 days a week, 12 hours a day, from 6:00 a.m. to 6:00 p.m. How would it get there? By

truck. Twenty six trucks per hour would be coming to that site, each carrying up to 10 tons of construction and demolition debris. The loading of that debris, once it is dumped at that site off of those trucks, would occur for 16 1/2 hours a day, from 4:00 a.m. in the morning until 8:30 in the evening.

By the way, if there are not enough railcars available or the dump that they intend to take it to cannot accommodate them, they are going to carry some of that waste back out of there by truck, up to 200 tons per day.

That is what is going to be across the street from our river, less than 1,000 feet from it.

These trucks have only one way in and one way out of this facility, a two-lane road, one way in each direction, called ″State Road,″ a small State road that in no way can handle this kind of traffic.

This facility has been turned down by the township. It has been turned down by our State Department of Environmental Protection for siting reasons, for siting reasons for a trash facility. It does not comply with our local zoning. It does not comply with our local land use. It does not comply with our vision for our township. It does not comply with State siting regulations. It does not fit at all. It just does not fit.

It has been the subject of litigation at the zoning hearing board level, at our county common pleas court level, at our commonwealth appellate court level, and at our State Environmental Hearing Board. It runs completely contrary to everything that we have planned for this part of our township.

We thought we had them on the run until this June. All of a sudden, the landscape changed, and all of our plans, if you will pardon the pun, were about to be derailed. A company called JP Rail, doing business as Southern Railroad Company of New Jersey, filed a verified Notice of Exemption with the Surface Transportation Board. We did not know what it was, but we knew it did not sound good, and we were right. In a nutshell, we were told that Southern Railroad was going to do an end-run around years and years of planning and numerous, numerous State, local and county regulations. We were told they could establish this facility, that all they had to say was, ″We are a railroad, and we want to do it.″ If they could convince the STB of those two things, they could do it free and clear of any of our local land-use or zoning plans. If STB agreed, they would be allowed to locate and operate this facility, and we would be powerless to stop them or to even regulate any aspect of their regulation.

I have heard talk today about health and safety police powers. Please, they are important, but it is of little solace to the people of our community if we have to tell them that, as to those 26 trash trucks an hour coming by your front doors into this facility, we cannot stop that, but rest assured, they are going to comply—they are going to have enough sprinklers in that building when they are dumping that trash in that building. Police powers are important, but the siting regulations, the land-use regulations are equally as important.

As to the discussion about getting trucks off the street, again, these trucks are going to be coming to our facility from the five-county Philadelphia area, again, according to the hauler, using all

of the interstate highways to get to our little corner of the world to then put it on railcars.

Ms. BROWN. Excuse me. Your time is up. We are going to have a question-and-answer period where you will be able to elaborate longer.

Mr. PIZZO. Thank you.

Ms. BROWN. Did you want to make a closing statement?

Mr. PIZZO. If I could——

Ms. BROWN. Yes, sir.

Mr. PIZZO. —and I appreciate the opportunity.

The fate of our community is, to some extent, in the hands of this austere body. Years of planning, years of thought, millions of dollars of investment, thousands of hours of planning and caring will have been spent for nothing if this facility can just, willy-nilly, on a moment's notice, come in and undo everything that we have done.

On behalf of the citizens who I represent and the community I am proud to call home, thank you for your consideration of our plight.

Ms. BROWN. Thank you.

Mr. PIZZO. Thank you.

Ms. BROWN. Ms. Chasey?

Ms. CHASEY. Thank you very much.

I wish to thank Chairwoman Corrine Brown and the Subcommittee for allowing this hearing in order to document the need for a legislative fix to eliminate the 11-year loophole in the ICCTA regulations that allow the operations of unregulated solid-waste facilities.

Mullica Township is 56 square miles, and we are located in the heart of the 1.1 million acres of the Pinelands National Preserve. There are 2,200 existing homes with 6,000 residents. We have no public sewer or water, thus are relying fully on personal wells and septic systems. Our tax ratables are compromised of 98 percent residential and 2 percent 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.

As a member of the Atlantic County Solid Waste Advisory Committee, I am familiar with the procedure that the owner of a solid-waste company must follow in order to start up or to expand their operation, including the involvement of the State 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 there exists Federally exempted 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—no applications, no public involvement, no limits in regard to the num-

ber of trucks, tonnage or materials, including possible hazardous waste. These are 7-days-a-week, 365-days-a-year operations with the ability to run 24 hours a day without the obligations to the districts they reside in and without the normal and accepted permitting process it would afford their neighbors.

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

In Mullica's case, the railroad company was to lease the property for $1 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 4 1/2 years, to build up over $1 million in unpaid 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 was find $199,000. According to DEP documents, he has frequently failed to comply with the conditions of his solid-waste permit. The DEP finally denied his permit renewal application, terminated his existing permit and revoked his authority to operate his solid-waste facility in 2005, but he retains his hauling license. This is the same individual who is 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 from any other towns up to that point. We were very lucky. Because we are 100 percent Pinelands, we had the full weight of the Pinelands Commission and the State's Attorney General's Office to deal with the legal strategy, along with our town solicitor and the Atlantic County legal staff. The fight took a great emotional toll on me, on our governing body and on the residents of our town, who, of course, had to bear the financial impact of this battle. I was personally named in the lawsuit the railroad company filed in Federal court regarding intergovernmental plans and the mayor's efforts to frustrate and to block the project.

Our town has a successful story for this individual property. The railroad withdrew their complaint this year on March 26, 2007, and the judge signed a consent order permanently banning the construction of a solid-waste facility on this site. I made a promise that I would continue to do what I could to protect other towns from going through the horrors of these unregulated sites.

Those of us seeking relief in the form of regulation, where these exempted operations are concerned, are not NIMBYs. We are not saying, ″We do not 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. This is not about the railroad or the trucking industry. It is about a normally much-regulated industry and what happens when those regulations are not enforced consistently.

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 under State and local control. 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 laws. Although there have been a few encouraging court rulings regarding this exemption recently, they are expensive to achieve, site-specific and always open to appeal. The number of towns that are grappling with this problem are growing daily, and the protests of their residents are becoming louder.

I am convinced that the only solution is a legislative one. We need clear and concise rules to implement, not a constantly changing interpretation of what is unreasonable interference and what is not. Please give us the tools we need to ensure the health and safety of our constituents and the ability to regulate solid-waste operations uniformly on a State and local level.

Thank you.

Ms. BROWN. Mr. Foley?

Mr. FOLEY. Thank you. Good afternoon, Chairwoman Brown, Ranking Member Shuster and honorable Members of the Committee. My name is Brian Foley. I am the elected supervisor of the Town of Brookhaven in our State of New York.

Brookhaven is a town with approximately 484,000 residents located in Central Long Island. In my capacity as supervisor, I am on the front lines of land-use regulation and enforcement. Land-use, zoning and environmental controls are critical tools of preserving the local environment and the quality of life for the taxpayers of our town.

I appreciate the Committee's allowing me to speak on the important topic of railroad preemption and its effect on local municipalities. The purpose of my testimony today is to speak in favor of the legislation that has been proposed to close the loophole that has been used to try and avoid State and local controls for the siting of waste facilities at railyards. I will supply the Committee will local newspaper accounts that describe in detail what has come to pass in the Town of Brookhaven.

The area in question is a 28-acre site within the township. And in July of 2007, prior to the owner of the property invoking the shield of railroad preemption, this was an undeveloped, 28-acre parcel of land. Now, 18 acres of this site have been clearcut, and newspaper accounts indicate that over 42,000 cubic feet of sand were mined without any environmental review under the National Environmental Policy Act or New York's State Environmental Quality Review Act.

That is correct, ladies and gentlemen. There was no level of government, be it Federal, State or local, that had given any environmental approval for this work. The owners represented that they were exempt from local regulations and subject solely to the exclusive jurisdiction of the Federal Surface Transportation Board. And because of the uncertainty that currently exists in this area of Federal law, those representations were initially deemed to be credible. Yet, it was recently learned that they had never submitted their actions to the jurisdiction of the Surface Transportation Board. These same owners and individuals, therefore, have not filed the appropriate procedures to qualify for Federal preemption.

However, the current climate of uncertainty has emboldened scrupulous operators and has led to the situation that the Town of Brookhaven now confronts. This uncertainty about the scope of

Federal presumption has allowed alleged railroad operators to claim that Federal statute preempts all State and local laws that might apply to the construction rail facilities, no matter how attenuated they are from actual railroad operations.

On Long Island, the ″railroad″ has traditionally meant our commuter railroad. We never envisioned that a company that adjoins a railroad and constructs a few hundred feet of railroad track could change itself into a waste-disposal facility that was free from all Federal, State and local environmental review and permitting requirements.

These materials from a waste-disposal facility contain contaminants that can be harmful to the environment and to the public health. For that reason, State and local governments have adopted comprehensive regulations that govern the way waste can be processed, and they often impose ongoing monitoring requirements to ensure that the waste-disposal process does not cause harm to our environment or to the public's health.

Solid waste has traditionally been in the domain of State and local governments. While Congress has adopted a legal framework for regulating solid waste, the Federal Government has never assumed a large role in this area, and as a result, there are very few Federal regulations that deal with solid-waste transfer stations. Regulation in this area, rather, has been left to State and local governments, which have very ably filled this regulatory gap.

For example, in the Town of Brookhaven, we have regulations that govern, among other things, the zoning and site plans for waste-transfer facilities in an attempt to ensure that they are sited in the appropriate places and that adequate mitigation measures are taken.

Our role is also complemented by the New York State Department of Environmental Conservation Chapter 360 regulations that review the environmental impacts of the operation of a transfer station. In the case of waste facilities that invoke railroad preemption, they claim to be governed by the Surface Transportation Board, a Federal agency that does not have any type of permit application or site selection process. Additionally, this board does not have the ability to conduct a meaningful environmental or health impact review or to ensure compliance with engineering or design standards. As I understand it, this board's staff is limited to no more than 150 employees by appropriation, and only a small number of these employees are responsible for conducting environmental reviews nationwide.

So what has resulted? What has resulted is a regulatory gap that I do not believe was ever really intended, a gap that creates a situation where no level of government is policing the activities of these facilities that, by their very nature, pose significant risks to our environment. Given these risks, immediate and decisive actions are warranted by Congress.

So, in conclusion, given the scarce resources of the Federal Government in this area and given the limited reach of Federal laws involving waste-transfer facilities, there must be a role for State and local governments in the area of regulating waste-transfer facilities. In almost all of the cases that I have seen or heard, including the situation that has evolved in my town, the rail activities

are merely secondary, or incidental, to the primary business, which is the processing and the storage of solid waste.

For that reason, I would respectfully urge you to adopt an amendment, the Interstate Commerce Commission Termination Act, to provide that rail facilities that process solid waste are not entitled to Federal preemption.

Thank you.

Ms. MCMORROW. Madam Chairwoman and Members of the Subcommittee, thank you for the opportunity to speak on behalf of the residents of Monmouth County, New Jersey. I am Barbara McMorrow, an elected county freeholder.

This spring, Ashland Railroad Company in Monmouth County applied to the Surface Transportation Board for an exemption to operate a solid-waste transfer station on previously abandoned railroad tracks adjacent to a stream and just a stone's throw from farms and homes. That stream, which parallels the train tracks, is a tributary of the Manasquan River, part of the watershed that comprises the drinking water for thousands of people. I was shocked to learn that a loophole in the law exists to allow railroad companies to operate solid-waste transfer stations without any regulation by State or local government.

I joined Congressman Pallone, DEP Commissioner Lisa Jackson and State Senator Ellen Karcher in April to protest the application to operate this unregulated solid-waste transfer station and offered my support as a county elected official in this fight to protect our residents and our environment.

I have closely followed the application filed by Ashland Railroad Company, learning as much as I could from our county solid-waste expert, Larry Zaayenga, and a great local citizen advocacy group, the Sludge Busters. We were together at a meeting in August when we learned that the Surface Transportation Board had dismissed the application of the Ashland Railroad Company to operate a solid-waste transfer station in Freehold Township.

This temporary respite does not mean that our fight is over, because the Surface Transportation Board rejected without prejudice the application of Ashland Railroad. That means that Ashland Railroad can reapply using the lessons learned from their rejected application, can gain an exemption and can operate an unregulated solid-waste transfer station.

Unlike our State law that requires the counties to include any solid-waste facility in its county solid-waste plan before any application is accepted by the New Jersey DEP, there is nothing in the law that would require the Surface Transportation Board to even notify the township or the county if Ashland Railroad resubmits an application. That means if any of us blink who are advocates for the people and the environment in Monmouth County, the opportunity to oppose this plan is missed.

For your information, a regulated solid-waste station does exist without any problems just across the road from the proposed Ashland site.

It appears that the Surface Transportation Board does not have the interest of our residents foremost. In July, the Surface Transportation Board ruled that railroads that load, unload, handle and store solid waste do not have to be regulated by State or local agen-

cies. I believe that all solid waste must be regulated at the State and local levels, regardless of its proximity to railroad tracks.

New Jersey has suffered greatly from this loophole. We have had solid-waste piles next to railroad tracks that have polluted the air, ground and water. These unregulated piles have grown so high that they have caused power blackouts. They emit arsenic and mercury, two dangerous chemicals that are otherwise strictly regulated under the law. These stations operate in open air with no building, so the chemicals and particulates are airborne, wreaking more havoc on residents and on the environment.

Furthermore, property values surrounding an unregulated solid-waste transfer station plummet, while hundreds of trucks that will travel to and from these unregulated waste stations will cause additional pollution, hazards to the citizenry and damage to roads.

New Jersey law requires all solid-waste transfer stations to be in closed buildings. If hazardous waste is detected, the buildings have to utilize negative airflow to protect the environment and citizens. Additionally, New Jersey law only allows solid waste to be at a transfer station for a maximum of 24 hours. Unregulated solid-waste transfer stations, ones that are granted an exemption under the loophole in the law, can leave solid waste as long as they choose, allowing significant damage to the environment.

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. I believe that 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 that have a business connection to a rail company. We cannot allow hazardous waste to be unregulated due to a loophole in Federal law.

How many Members of this Subcommittee would want to wake up one morning and find that they are living near an unregulated solid-waste transfer station? That could happen because of the loophole in this law. This is why I am before you today, to urge the passage of the Clean Railroads Act of 2007 and to preserve the integrity of the environment for our future generations.

Thank you for allowing me this opportunity to address this Committee.

Ms. BROWN. Thank you all for your testimony.

Mr. Shuster?

Mr. SHUSTER. Thank you, Madam Chair.

I think I said this earlier, I said it frequently, that I am not an attorney. But the attorneys tell me we need to make real certain that—most of you or, I think, all of you may have something pending before the STB or before the courts. Just be aware of the Pillsbury Doctrine, which I did not know about before today.

The Pillsbury Doctrine says to subject an administrator to a search and an examination as to how and why you reached a decision in a case still pending before him and to criticize him for reaching the wrong decision sacrifices the appearance of impartiality.

So be very careful, I think, of what you say, and I am going to be very careful of what I ask. I would not want to jeopardize anybody's case.

I guess just a general question to all of you is—and I guess Mr. Pizzo is the only one whom I would guess would not want that transfer station there.

Because you have a development going on. So for you guys, it is not a question of, ″We want it to be regulated and properly administered.″ Yours is, ″It screws up our whole economic development plan and causes serious problems to the development.″ Is that correct?

Mr. PIZZO. That is absolutely correct. As some of the other members of the panel have said, this is not about the railroads. In our community in particular, we have had the Northeast Corridor, the range from Philadelphia to New York, since 1839. There are four or five sets of tracks that run right smack dab through the heart of our town. They have been there for 150 to 175 years. We have a good relationship with the railroads. Cornwall Heights station was in our community. We fought to keep an Amtrak stop there. We have one of the largest parking rights in the regions.

This is not animus between the townships and the railroads. This is, we have a plan. We have laid out, as the law requires us to do, a zoning plan for the township, a comprehensive plan for the township. We have gone the extra step for this region, which, again, has laid barren and fallow and underused for all of these years. We said, this is what we are going to do to fix it and to clean up the contamination and to give it back to our people.

Then literally in the middle of the night, something gets filed with the STB, and years of planning are all for naught, because these guys can operate a trash-transfer station there because they are affiliated with or purport to be a railroad, period.

Mr. SHUSTER. Would any of the others like to comment?

Would you allow it, Mr. Schmidt, in your case, if they were operating properly or——

Mr. SCHMIDT. My community is also one of those communities that we have had a C&D transfer station in our community.

Mr. SHUSTER. I am sorry. You have?

Mr. SCHMIDT. We had one. We shut it down. I was elected because I fought to get that place closed down, and the reason why we are trying to get that closed down and end it is—let me paint you a picture of our community.

We are Croton, and we are on the Hudson River. The Hudson River is a heritage river. Our entire western boundary is the Metro North train line that runs along the riverfront from New York City to Albany. Within those three miles of riverfront, we have a Superfund site that is an old county landfill that was operating for probably 40-plus years that is a Superfund site. It was Band-Aided; they put a cap over it to keep the rain from running through it, but it leaches out into the Hudson River all the time.

We have Metro North, the railroad. They also have a railyard there. That is where they service a lot of their equipment. We already have that relationship with the railroad, in the sense that we know that they do certain operations out there that we have no control over, okay? They run diesel engines all night long because

they have to keep them running in the wintertime. It is noisy in our community because of that. You can smell the diesel fumes throughout our community. We asked them politely if they can shut those things down whenever they can. They do the best they can to shut those down.

They are in the process of a major capital improvement out there. They are rebuilding their entire facility out there. As a courtesy, they came to us and talked to us about what was going on out there. I understand we have no control of zoning rules and regulations, as to what they are doing out there.

We also have a CSX switching yard along that riverfront. We already have commodities coming through our communities. Municipal solid waste in sealed cars that routinely come there are parked there for days before they are taken out.

Completing the picture on our river and just up the road is Indian Point, a nuclear power plant, and I am sure you have heard controversy about that. Then just a little bit beyond that is Charles Point, the county incinerator.

My little community, again, is 4.5 square miles. I feel like we have done our share. We have had these facilities in our backyard. That is not the only reason we want this shut down, but it is a part of the reason. I was elected to really protect my residents, and quality of life is what it is all about.

We have a waste-transfer facility that operates in an adjacent community. It operates within the law and all that kind of stuff. The one that we had in our community operated by special permit. Even with those rules and regulations, even with their making millions of dollars a year, they still violated the permit because they accepted material that they were not supposed to accept at that facility.

And anyone who thinks that C&D is an innocuous material has never looked in a dumpster that has come from a construction site. You have no idea what is in there, but we do know there is asbestos in there, because any building that is torn down that was built before the 1950s has asbestos in it. It has lead in it. There is possible mercury in it. Tires get in there. Refrigerators get in there. Compressors get in there, car parts, whatever. This has to be regulated.

Mr. SHUSTER. My time has expired, so I would just like to—all you can give me is a ″yes″ or ″no,″ because the Chairwoman is going to move on.

This is ″yes″ or ″no.″ If they operate according to the laws of the State, are you willing to leave them there, ″yes″ or ″no″?

Ms. CHASEY. If they operate as a regular solid-waste facility? Yes, I believe that is all we are asking for.

Mr. SHUSTER. I am sure Mr. Bishop is going to ask you a question that you will be able to expound on, but just for me, ″yes″ or ″no.″ If they operate properly, you do not want them there, ″yes″ or ″no″?

Mr. FOLEY. It is really not a ″yes″ or ″no″ answer. They have to abide by all appropriate local, county and State regulations.

Mr. SHUSTER. Right.

Mr. FOLEY. If they so do and if their siting in the appropriate location passes muster with all of the local regulations, as well as the

State regulations, and if they go through that process—that is what we are saying. Go through the process, and if it passes muster through that process, they can then be sited at the appropriate place.

Mr. SHUSTER. All right.

Ms. MCMORROW. At the location which I referred the Ashland Railroad Company, no, absolutely not. Other ones would have to be decided on a case-by-case basis if they were regulated.

Mr. SHUSTER. Thank you very much.

Ms. BROWN. Mr. Bishop?

Mr. BISHOP. Thank you very much, Madam Chair.

Supervisor Foley, I have a question for you. But first, let me thank you, on behalf of the constituents we both represent, for how quickly and how forcefully you have responded to the situation that exists in Yaphank.

My question is this: Under normal circumstances, if a project were taking place in the Town of Brookhaven that was going to encompass some 18 to 20 acres—and pick the project: a subdivision, a senior citizens' facility—what kinds of environmental and site plan reviews would that project be subjected to?

Mr. FOLEY. Thank you for the question, Congressman. I would also like to thank you for quickly interceding on our behalf with the Surface Transportation Board.

Certainly, in our township, we spoke earlier about our time in office and that we are ones to try to encourage businesses to move into our town and the like, by virtue of the fact that we have almost half-a-million people. There are a number of, let's say, solid-waste issues and so forth. We are not saying no to railroads, nor are we saying no to these facilities. What we are saying is they have to go through the process.

To answer your question more directly, if there is any large subdivision proposal for something in the neighborhood of 28 to 30 acres, it goes through a whole regulatory review process. There is not an automatic ″no″ to it, nor is there an automatic ″yes″ to it. It is reviewed at staff level, both in the Planning Department as well as in our Building Department. It is reviewed by our Law Department, as well. Once it goes through that review process, it requires any kinds of variances. Then it would come before our Zoning Board of Appeals. Or, if, in fact, there is a change of zone that needs to be accomplished or at least attempted, then it comes before the town board. The town board has the power of reserve solely to itself for change of zones.

So there is an involved process that one would undertake in order for, let's say, a 28- to 30-acre piece of land to be used, whether for business purposes or for residential purposes. There is a lot of oversight, a lot of review. I would not say that it is cumbersome. I think it is important, because, as was mentioned earlier, it is part and parcel of our responsibilities locally to ensure the quality of life for those particular communities.

So I think that gives you a bit of an overview of some of the processes that would take place in our township and of the different departments that would review it. It does not mention the fact that the county health department would also be involved with this.

But even with all of that said and given where we live, there are many businesses and residential proposals that still come our way. The regulations are there not necessarily to say ″no″ but more to have, let's say, transparency brought to the process and that, through transparency, there can be accountability, which is completely missing from the current situation as it relates to these Federal preemption laws.

Mr. BISHOP. I do not want to put words in your mouth, but what I hear you saying is, if there were a local role, that that local role would be undertaken in good faith with the recognition of the responsibilities that townships have for the disposal of their waste.

Mr. Nottingham, in his testimony, he was saying that his fear was that, if there were a local role, we would be engaged in NIMBYism, and the local role would simply be an opportunity for the local government to say ″no.″ You are saying that is not the case.

Mr. FOLEY. That is definitely not the case. As a matter of fact, there is closer scrutiny of our zoning codes and the like when there are regulations regarding waste-transfer facilities. We realize that, you know, given the size of our township and given that we live on an island, that these are realities. But what we are saying is go through the process, go through the State process, go through the local process. If, in fact, a municipality would say ″no″ when regulations say otherwise, then we would be brought to court.

I would like to, at some point, get to the point about this rather cavalier attitude of some, saying local governments can go to court to challenge these railroads.You know, with a municipality of my size, which is larger than any upstate city, we have the financial wherewithal to take these companies to court, but small municipalities in this country do not. And it is a rather intimidating situation of David versus Goliath.

To answer your question directly, it is not an immediate ″no.″ It goes through the regulatory process. If it passes muster through that process, then the answer will be ″yes.″ If it does not pass muster through that regulatory process, which is very transparent and open for all to see and to scrutinize, then the answer would be ″no.″

Mr. BISHOP. Okay. Thank you very much.

Thank you, Madam Chair.

Ms. BROWN. Thank you.

Mr. LoBiondo?

Mr. LOBIONDO. Thank you.

I just have one question for Mayor Chasey: What did it cost Mullica for this?

Ms. CHASEY. Mullica spent over $100,000. But that would have been close to $1 million if we did not have the State Attorney General's Office, legal counsel from the Pinelands Commission—and who else was involved?

Mr. LOBIONDO. What is your population again?

Ms. CHASEY. Our population is 6,000 people.

Mr. LOBIONDO. Pretty small.

Thank you.

Ms. BROWN. Mayor Schmidt, who currently handles the solid waste coming out of your village? Do you have a preference for the transportation mode of train or trucks?

Mr. SCHMIDT. The facility in our community was a C&D transfer station. You are asking about our waste that is generated in our community——

Ms. BROWN. Yes, sir.

Mr. SCHMIDT. —and how that is handled?

Ms. BROWN. Yes.

Mr. SCHMIDT. Throughout the entire County of Westchester, which we are a part of, all of our municipal solid waste is trucked to the county facility up at Charles Point, which is the county incinerator. That is where all municipal solid waste generated in the county is taken to. Some C&D also goes up there.

Our issue, really, is with the C&D transfer station that existed within our community that a railroad is trying to come in and take over and to operate under the guise of being a railroad. That is what our issue is with the C&D transfer facility. Again, yes, all of the material is being trucked into this facility. It travels through our village streets to get to this facility, and then it is hauled out by railcars. That is how it was operating before.

Ms. BROWN. In your testimony, you stated that the Buffalo Southern Railroad cancelled its lease before it could begin the operation of hauling solid waste out of your village due to the problems faced by previous rail carriers attempting to start operation in the village.

Why do you think that the interests are still there to try to use this facility?

Mr. SCHMIDT. This is a very lucrative business, and that is one of my compelling arguments in here, that the county did an incredible job of getting the waste industry on a level playing field to make sure that everybody was playing at the same level so that it was a competitive market. If you allow somebody to come in under the guise of operating as a railroad to operate a facility with no local rules and regulations and not having them follow all of those steps to get there, they are going to undermine all of the other legitimate operators out there. That, I believe, is the most compelling reason for making sure that they have to play on the same field as everybody else.

As far as I am concerned, the collection, sorting, processing of waste is a local, county and State responsibility. Once it is determined that that remaining waste is to be disposed of, at that point, it could be loaded on railcars and shipped out. Up until that point, it is a local responsibility. We have the ability to watch that. The county has the ability to watch that, and the State has the ability to watch that. The Federal Government does not have the ability to be there and to watch that.

That is why we shut down the facility that was operating there. We gave them every opportunity. We gave them extension after extension when their permit expired. They kept violating and violating.

It is a very lucrative business, and that is why they want to be in this business. It is worth millions. And the wrong people are using this loophole, and those are the people who use loopholes, the wrong people, to get in there. That is why we need to close this.

Ms. BROWN. Mr. Pizzo, did your area attempt to block the verification Notice of Exemption by the Southern Railroad Com-

pany of New Jersey that allowed them to develop the transloading facilities? What was the outcome of the effort?

Mr. PIZZO. We were preparing to file with the STB when the STB, as the Chairman indicated during his testimony, of its own accord, rejected the petition for various deficiencies. They were rejected by the STB without prejudice to refile.

So, much like in the case of one of the other panelists, we are essentially holding our breath, waiting for the day when that application is cleaned up, the T's are crossed and the I's are dotted, and it is refiled with the STB.

Ms. BROWN. Has the Southern Railroad Company of New Jersey attempted to work with the community in addressing your concerns? What has been the outcome of these efforts?

Mr. PIZZO. I am glad you asked that question, particularly because, in response to Mr. Shuster's question, I did not want it to sound as though our township was taking a ″not in our backyard″ position.

We have miles and miles of rail track in our township. We have an ample amount of heavily, industrially zoned property. If this sort of use came to one of those sites that were zoned for it, it would certainly be treated just like any other properly zoned and appropriately sited use.

In this case, this land is not zoned for industry. It does not meet our township's siting requirements. It does not meet State siting requirements because of its proximity to a school.

We had been dealing for 2 years with a company called HJH. They had come into the township as a trash operator, wanting to site a C&D facility there, and they were told, ″It does not fit. This is not the site for it. It is not zoned for it. The land use does not work.″ Our State Department of Environmental Protection said the same thing: ″under State siting regulations for a trash facility, this does not work at this location. You are going to have to fix it. You are going to have to move it, because you cannot put it there.″

They then went out, and our understanding is, based on the documents that were filed with the STB, they have made some arrangement between HJH and Southern Rail for Southern Rail, I guess, to buy the property and lease it back to the trash hauler—or there is some other arrangement—and thereby doing the end run around us. Two years of land-use planning, zoning and all of the legal requirements were met. And when they kept hitting a roadblock each way along the way because it did not work at that site, they then went, found a rail carrier and said, ″Hey, let's do it this way. It is quick, it is fast, it is easy, and we are going to be in.″

Ms. BROWN. But did you all try to block it?

Mr. PIZZO. Again——

Ms. BROWN. You did not know about it?

Mr. PIZZO. This was filed in June by a company we had never heard of. We had never heard of Southern Rail.

Ms. BROWN. I am trying to find the procedure here. Did you get a notice that this was going on?

Mr. PIZZO. No.

Ms. BROWN. No notice to the community. So you were in no position to block it, because you did not know anything about it.

Mr. PIZZO. We, fortunately, were notified by people here in Washington, D.C. They came to us and said, ″By the way, do you know that this was filed for a piece of property in your township?″ we otherwise had no idea. Many of us had no idea what the Surface Transportation Board was or what it did or how it functioned, because, in our little corner of the world, it really never came into play. The railroads and the township got along fine.

Ms. BROWN. Okay. So you did not try to block it. I am trying to find——

Mr. PIZZO. No. We were preparing to. We were given notice that it was filed back in June. We were calling in the troops. We were ready to throw everything but the kitchen sink at it. The STB turned around and rejected the application——

Ms. BROWN. Okay.

Mr. PIZZO. —because, on its face, it did not comply, I guess, with STB standards.

Ms. BROWN. So, in this case, the system worked?

Mr. PIZZO. The system worked, but my understanding, Congresswoman—and it is only my understanding—is that they were bounced on technicalities, that their paperwork did not meet all of the requirements. It did not have the mile markers for the train tracks. It did not have a site map showing, you know, in different distances what was where. But they were not told, ″Oh, no, you cannot go there because you are not a rail carrier.″ They were told, ″Cross your T's, dot your I's and refile it.″ That is what they were told.

So the system worked in that what they gave the STB was not what it should have been, but it does not stop them from cleaning up the paperwork, refiling it and going through that process. Believe me, you know, we have the horses ready to roll if something gets refiled again.

Ms. BROWN. Okay. They have just called for a vote, and so this is really, kind of, the end of this panel. I want to thank you all.

Would anyone like to make brief closing remarks? We have four votes, and then we have the last panel.

Yes, ma'am?

Ms. CHASEY. Can I just say something really quickly?

When the STB was asked how many of these facilities exist, they will never have a count of how many of these facilities exist, because if there is an existing siting and an operating train, they do not have to make an application to the STB in order to put a solid-waste facility in there. The STB has no say in it. They can just set up and operate. You know, I think they have to get an exemption.

Mr. FOLEY. Well, just on that note, too, I think what is also required is, if I might say, just as we asked for, let us say, improved intergovernmental interaction between ourselves and State government, I think, in this particular case, when there are cases that come before the STB, they should certainly notify local communities, number one, local governments.

Number two, in the cases just mentioned by Ms. Chasey where there is, in fact, no notification to the Surface Transportation Board, there has to be some methodology that is developed through this legislation that would bring greater light to this area of Federal law and also greater light as to who and what the Surface

Transportation Board is. I mean, you have a panel of folks here who, historically, because we are from the Northeast, have some of the oldest railroads in the country, and many of us are very pro-railroad. But I think what gets our dander up is when these loopholes are exploited that can potentially impact the health and welfare of our residents.

So there has to be a way to try and bring not only more transparency to the process but to also develop a protocol, if you will, where the Surface Transportation Board has a more active role in working with localities about these things, not so much for us to automatically say no, but to make us aware of it. And then we can use our good auspices, along with the State government's and the Federal Government's, to see what is in the best interest of all concerned.

At this point, I have been involved in politics and in government for over 25 years. The first time I ever heard of the Surface Transportation Board was no more than several months ago. You know, given the amount of railroads that we have in the Northeast and given, particularly in our case, that we would like to see more railroads because of the limited highways that we have on our island, I think this is now an opportunity for the Committee, if I may say so, along with the relevant Federal agencies, to step things up so there is greater interaction and so that we can see more use of the rail but in ways that are not injurious to local communities.

Ms. BROWN. Yes, ma'am?

Ms. MCMORROW. Yes, I would just like to say that I do not believe any of us is against railroads. In fact, I know that, in my county, we are very pro-railroad. We have a large commuting segment of our community that goes to New York every single day and uses our railroads. We also spend millions of dollars in our county for farmland preservation and open space.

What I am most concerned about, as I mentioned before, is the notification process while we are working to hopefully, I beseech you, close this loophole. While we are waiting for that to happen, it is very important that somehow notification to local, county and State governments be put in place, so that, while we are all holding our breath on some of these reapplications, we at least will have the opportunity to once again speak up and be counted. If, in my case, the Ashland Railroad Company goes forward again, I would be able to once again rally the troops to stop it.

Ms. BROWN. We have to stand adjourned. We have only about 7 minutes to vote.

We do not have any more questions. So, if you have additional comments, I am going to let you put them in the record.

We have about 25 minutes in which we will be voting, and then we will come back with the panel in about 30 minutes, at about 1:30 or 1:45. So I am going to dismiss this panel, and we will let the third panel come up when we come back.

But if you have any additional comments, you can submit them into the record. We really appreciate your testimony, and we definitely will take it into consideration.

Thank you very much.

[Recess.]

Ms. BROWN. I am pleased to welcome the fourth panel, because another Committee is supposed to have this room at 2:00, so we are going to see how it proceeds. But the first witness for this panel is Mr. Robert Jones, Managing Principal of New England Transrail. Our second witness is Mr. Thomas Marturano, Director of Natural Resources and Solid Waste of the New Jersey Meadowlands Commission. And our third witness is Mr. Wolfgang Skacel, Assistant Commissioner for the New Jersey Department of Environmental Protection.

TESTIMONY OF ROBERT JONES, MANAGING PRINCIPAL, NEW ENGLAND TRANSRAIL, LLC; THOMAS MARTURANO, DIRECTOR OF NATURAL RESOURCES AND SOLID WASTE, NEW JERSEY MEADOWLANDS COMMISSION; AND WOLFGANG SKACEL, ASSISTANT COMMISSIONER, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Ms. BROWN. Thank you and welcome. Let me remind you to please limit your oral testimony to 5 minutes; however, your entire written statement will appear in the record. I now recognize Mr. Jones for your testimony. Mr. Jones.

Mr. JONES. Thank you Madam Chair, Ranking Member Shuster, Members of the Subcommittee. My name is Rob Jones. I am managing member of New England Transrail, a company headquartered in Clifton, New Jersey. And I am very pleased to have the opportunity to testify at today's hearing. Thank you for inviting me to appear.

Perhaps the biggest contribution I can make to the Subcommittee's examination today of the issue of railroad-owned solid waste transloading facilities is to explain our project and the effort that we have made to address the legal and practical issues that have come up. The benefit of that analysis may be especially useful if the Committee considers taking up legislation in this area.

Transrail petitioned the Surface Transportation Board for authority to acquire and rehabilitate existing track, construct new track, and to operate as a rail carrier in Wilmington, Massachusetts. We also propose to build a state-of-the-art multicommodity transloading facility and to use the current best management practices for the operation of that facility. Attached to my testimony is a rendering of our proposal.

Our railroad operation will transport a variety of commodities, including sand, gravel, plastic resins, plastic pellets, liquids, rock salt, aggregates, wood chips, coal fly ash, soda ash, liquified natural gas, corn sweeteners, vegetable oil, biofuels, coal, lumber, construction stone, sheet metal, cosmetic products and municipal solid waste, and construction and demolition debris. We will transport that rail traffic for about one mile, literally the last mile, and then interchange it with connecting carriers that will continue moving the commodity to its final destination.

The concept of our proposed facility being what some refer to as ″the last mile″ is significant. As the Members of this Committee know very well, the last mile is a frequent missing element in transportation infrastructure. In our case the area where we propose to operate near Wilmington is underserved by rail providers, and we hope to provide the missing link.

In recent years shortline railroads have found opportunities to provide quick, responsive customer service, often in underserved markets, providing transportation services that have largely been neglected by the larger Class I railroads. One of these markets is in the last-mile transportation of bulk; i.e., non-containerized solid waste. These facilities provide services to unload, sort, store and reload that commodity onto rail cars which are sent away from local communities on the interstate rail network. Handling and transporting trash by rail keeps it off the already congested streets and highways and provides a safer, more efficient way of getting the commodity to its final destination.

The practice of receiving, unloading, sorting, storing and reloading is no different than the activities that railroads have been engaging in for more than a century under the jurisdiction of the ICC and later the Surface Transportation Board. The Federal Courts, and indeed the board itself, have repeatedly affirmed this position. Here it is the same process with simply a different commodity, nothing more.

Under current law, the exclusive jurisdiction of the STB has limits; however, as the STB and the Federal courts have made clear, State and local health and safety laws are not and have never been preempted. In fact, the only State and local laws that are clearly preempted are economic regulations and State or local siting preclearance or permitting requirements that could be used to deny a railroad's ability to conduct its operations.

In addition, Federal environmental laws must be harmonized with the jurisdiction of the board. That is the law as it stands today.

It is very unfortunate that a few operators of transloading facilities have argued an overbroad interpretation of existing law to preclude enforcement of local health and safety requirements. That mistaken premise has taken on a life of its own and has ultimately led, I believe, to this hearing.

Changing Federal law is not the answer to cleaning up the problems at a few transloading facilities, for one very simple reason. The power to clean up those facilities already exists at the State and local level.

Let me offer a few suggestions that might benefit this Committee as it considers how to assist State and local authorities.

First, the STB may need stronger oversight of transloading facility compliance with State and local rules and regulations. We believe the STB fully understands the problem and is already committed to that goal.

Second, local enforcement authorities need to have a better understanding of their rights, of their legal rights to enforce health and safety laws.

Finally, operators of these facilities need to recognize their responsibility to be good corporate citizens and to work with State and local authorities to reach reasonable accommodations.

In closing, I would like to remind the Committee of the importance of preemption in the context of rail transportation. Members of this Committee have been strong supporters of preemption, because undoubtedly you recognize that the Federal Government relies on that principle to prevent patchwork regulation by the State

and local authorities over rail transportation because it is essential to interstate commerce. Carving out a single commodity from the jurisdiction of the board is the first step towards such patchwork regulation.

This Committee has not chosen to do that before and it is not appropriate now. If this Committee were to alter the board's jurisdiction, it will effectively prohibit companies like ours from constructing and operating transloading facilities capable of handling solid waste and many other products in the last mile of the interstate rail network.

Thank you for the opportunity to appear before you today. I will be pleased to answer any questions.

Ms. BROWN. Mr. Marturano.

Mr. MARTURANO. First of all, I thank the Committee for affording the New Jersey Meadowslands Commission an opportunity to address this critical issue.

I am a professional engineer. I have been involved in the solid waste field my entire life. The solid waste industry is more from the old days when almost every town had its own dump, to now when large lined regional landfills or resource recovery plants process our waste in an environmentally responsible manner. This evolution has taken place at the State or local level because ultimately how much waste is generated per capita and where and how it is disposed of is a local decisions.

Ms. BROWN. Excuse me; will you pull your mike a little closer?

Mr. MARTURANO. Recycling has profoundly impacted the per capita disposal rate and it has no Federal counterpart. In fact, the only real Federal regulation of most solid waste has to do with the large regional landfills and nothing pertaining to the handling processing or the transferring of the waste.

The fact is most people in this room put their solid waste on the curb twice a week and it magically disappears. You don't give it a second thought because you know that some local government official knows where it is going and has planned for its disposal in an environmentally safe manner. There is no danger of you being named as a potentially responsible party. This system works well. It is efficient and everyone involved gets to sleep at night.

Approximately 5 years ago this system started to unravel. In a two-mile stretch of track, five separate open dumps started to begin operating in my district. When most people look at the photos of these rail solid waste facilities, they think they are either 30 years old or that they are fake. It is inconceivable to most people today that, in today's enlightened environmental atmosphere, that anyone could think that dumping thousands of tons of waste on the ground could be acceptable. These open dumps were located in close proximity to warehouses, hotels, industries and sometimes residents that relied on the presence of consistent regulations to protect their investment in their property. Zero consideration was given to the local infrastructure ability to service these facilities. Yet when some caught fire, local first responders were called. We tried to reason with the operators, but to no avail.

The NJMC and the DEP were left with no choice but to try and regulate the facility through litigation. It is only because of our regional planning agency that we have been moderately successful.

The communities where you find these facilities do not have the resources to protect their residents in the court. Ultimately, we were successful in getting structures built so at least the waste was being dumped within a building. Unfortunately, because the railroad still insisted that they were answerable to no one in the State the structures were built without acknowledgment of the international building code. They did this even though they knew there had been several fires in the open dumps and there had been a major fire in one of the buildings—if there had been a major fire in one of the buildings any of the firemen would know that the building code requires all buildings of that size to have sprinkler systems which protect the structure, allowing first responders the time necessary to ensure that no one remained inside. No such protection existed and there were no defined fire engines for the workers inside.

This disaster in waiting could have been avoided with a regulated facility. I realize that in the greater scheme of things before Congress, the handling of solid waste is relatively insignificant, and that is exactly the point. The proper regulation of solid waste cannot be done from afar. It is a daily on-the-ground endeavor. For the welfare of the people immediately surrounding the facility and for our environment it has to be done.

Solid waste is not like coal, lumber, stone or sand. When these items show up at a rail transload facility, everyone knows exactly what is going to be off-loaded or dumped from those delivery trucks. The inspector of such a facility would see the same commodity being loaded, and loaded with numbing consistency. At a solid waste transloading facility not only is each day's material different, each load is different as well. Also unlike the other ones, no one—not the hauler, not the facility operator nor the railroad—knows what is about to be dumped out the back of that onto the tipping floor.

In a regulated facility provisions are made for loads which are smoldering or contain hazardous waste. Likewise, an operational manual is prepared so that all employees know what to do and who to call in the event of a catastrophic load.

I could go on and on what I have witnessed being dumped from a garbage truck. Instead, suffice it to say the reason I still do this after all these years is the beauty and challenge that comes from solid waste's infinite variability. It is a game of cat and mouse that can be played out at any time a generator or hauler tries to knowingly or unknowingly slip something by the regulators, and it is our job to prevent it.

We are not opposed to the movement of solid waste by train. In fact the NJMC has undertaken proposals to move waste by barge, truck, and rail. Furthermore, the NJMC was one of the first planning agencies to specifically create an intermodal zone as part of our master plan. We just want the facilities to be properly permitted and regulated on an ongoing basis so as not to majorly impact the adjacent properties.

As I think you are beginning to realize, this really has nothing to do with the rights of railroads. Those rights are not being questioned. Rather, it is about the long history of how solid waste is

handled in our country and whether we can afford a new way of doing business in which nobody is watching.

Ultimately, the success of a private solid waste facility is determined by its economics. As you can imagine with five facilities located within two miles of each other, the competition among them for waste is intense.

Now, suppose that a load of demolition from an interior renovation shows up at a new facility. From the outside the load appears to be carpet, ceiling tile, sheetrock. Once dumped, it becomes apparent that the center load is comprised of the fluorescent light bulbs which were taken down as part of the renovation.

What happens now? The operator is not equipped to segregate the waste and transport that waste by truck, nor is there money available to cover the cost of transporting the bulbs to a hazardous waste facility. My guess is that since there is no enforcement risk or risk of losing the nonexisting facility permit, the waste is loaded into the train car and no records exist that even indicate the bulbs were there. Neither the rail company nor the receiving landfill will know that the waste they accepted was more than just demolition waste. The only true loser in this scenario is the environment and several States.

If the facility were regulated and permitted, the scenario is much less likely to recur because they would be subject to fines and possible revocation of the operating license. The risk outweighs the short-term financial gain. Not so in a facility that, in effect, regulates itself.

Finally, I would like to comment on the economics of regulated versus nonregulated solid waste transfer facilities. The railroads have said that their main objective to being regulated at the local level is the economic consequence of regulation will make the facility noncompetitive. This conclusion is simply not supported by the facts.

Within the same two miles that we have the five separate dumps, we have a fully licensed transfer facility that transports waste by truck. The only significant difference from this facility and the permitted rail facility is, in one case, the waste travels from the western landfill by truck carrying 22 to 24 tons, and the other travels in 100-ton rail cars. Both sides of this debate stipulate that it more economical to ship waste by rail versus a truck. Therefore, assuming the cost to build a fully permitted transfer station versus a fully permitted transrail facility are equal, the transrail will always be the cheaper alternative to delivering the waste to a landfill.

We are presented with the unique opportunity to resolve this problem before solid waste processors across the country decide to get off the fence and join the small but growing number in the Northeast who are trying to establish this new unregulated way of doing business. After all, why submit to the bother of following rules when you don't have to?

Hopefully this issue can be resolved with the legislative clarification. Thank you.

Ms. BROWN. Mr. Skacel.

Mr. SKACEL. Thank you, Chairwoman Brown and Members of the Committee, for inviting New Jersey to testify on rail-affiliated

solid waste transfer facilities. In our efforts to ensure safe operation of these facilities I would also like to thank Congressman Pallone for his leadership by bringing attention to the severe environmental and public health impacts of railroad-owned solid waste transload facilities.

My name is Wolfgang Skacel and I am the Assistant Commissioner for Compliance and Enforcement at the New Jersey Department of Environmental Protection. New Jersey supports the movement of solid waste by rail, which reduces traffic congestion, fuel consumption, and air emissions from diesel trucks. But these environmental benefits must and can be had without the current harmful impacts of an unbridled industry that threatens to return us to an era of open waste dumps.

New Jersey has the highest number of Superfund sites in the Nation and is still recovering from a legacy of indiscriminate dumping of waste and the influence of criminal elements in the waste business. Consistent with Congress' proclamation in RCRA, the Resource Conservation and Recovery Act, that solid waste management is primarily the responsibilities of the State, New Jersey implements and enforces a strong solid waste management program. Our goals have been to prevent the routine creation of new contaminated sites, to ensure the use of environmental controls at waste operations, and to exclude entities with organized crime connections, disqualifying felony convictions or poor environmental compliance histories from the industry.

I just need to note for a minute that you heard earlier testimony about some of the entities that have been showing up at various sites. Well, we deal with the same entities. And when we knock them out of the business it is amazing how they show up as railroad sites. Our progress has been threatened by waste operators and railroads abusing the preemption provision of ICCTA, the Interstate Commerce Commission Termination Act, by claiming they are exempt from all State and local law, including vital public health and environmental regulations.

State health safety and environmental laws, however, are often the only safeguards against harmful pollution to our water, air, and land resources caused by the mismanagement of solid waste.

Railroads are taking us a step backwards in environmental protection. Waste is not innocuous. Construction and demo debris, for example, can contain any number of hazardous, toxic, or even radioactive materials such as copper and arsenic and building lumber, mercury in light bulbs, lead paint, pesticides, PCBs and sealants and adhesives, asbestos in insulation, roofing and siding materials.

Think of the myriad of environmental and quality-of-life impacts that the unregulated handling of such waste can cause in a neighborhood of your constituents. The STB simply does not have the expertise, staff or regulatory tools available to properly regulate the waste industry or to address the many serious consequences of mismanaging solid waste.

I have 150 people in the Department of Environmental Protection that are devoted to dealing with solid waste. You have 150 people in the Surface Transportation Board to deal with all of the Surface Transportation Board's issues. You are not able to do the

job with that kind of staffing. More importantly, the Surface Transportation Board has no regulatory authority over the ancillary facilities once the railroad is established.

You asked a question earlier from the Chairman of the STB how many rail facilities are there. In New Jersey there were four that were shut down. There are currently 12 that are operating and there are eight more that are proposed. A lion's share of these facilities are right here in New Jersey.

Leaving the recognized rail carriers to their own devices has proven to be dangerous because as railroads argue, they are free to operate open waste dumps. And they have. As shown in the photographs we have prepared, a handful of waste facilities actually dumped, sorted, processed and transferred garbage out in the open air. The open-air operations and even operations enclosed by walls and a roof have allowed clouds of contaminated dust to blow off site, pump leachate into adjoining wetlands, short-circuited transmission lines, caused fire and a roof collapse, and allowed contaminated storm water runoff to seep into the ground and reach ground surface waters of New Jersey.

To protect against these problems, New Jersey adopted regulations that set forth basic measures to protect against hazardous dust from polluting our air, toxic metals and chemicals from contaminating drinking water supplies, wetlands and other important natural resources from being wantonly destroyed, rats and other vermin from being attracted, and increased risk of fire from endangering our citizens, nearby businesses, and community assets.

All waste transfer in New Jersey must meet these same standards and more. Yet under the broad claims of preemption, railroads have resisted even these minimum operating standards. Those are commonly referred to as the 2D standards, broadly challenging the State's authority to enforce State solid waste in any State law. But solid waste management has always been and continues to be the State's responsibility.

What we now ask is for your help in recognizing this primary responsibility of the States and affirming the State's authority to regulate solid waste activities and to address the problems attendant with waste management.

I thank the Committee for its continued interest in this effort on this pressing issue, and request that the Committee continue to keep the testimony open so that we can submit additional testimony at a later date. I am also happy to answer any questions you may have. Thank you.

Ms. BROWN. Thank you.

Mr. Shuster.

Mr. SHUSTER. Thank you. Mr. Skacel, is that right?

Mr. SKACEL. Skacel.

Mr. SHUSTER. Skacel, thank you.

The permitting process in New Jersey, you described it a little bit. Can you talk a little bit what actually has to be filed and the cost to somebody filing that?

Mr. SKACEL. It is essentially a two-phase process. The first phase begins with a county plan inclusion. And the second phase is to actually file a permit application, have it reviewed and approved. The approximate cost, I do not know what the cost for a county plan

inclusion is. I guess it would vary by county. Approximate application, depending on the nature of the facility and the size of the facility, assuming the largest facility for solid waste, you are probably talking in the neighborhood of $100,000 permit application fee.

Mr. SHUSTER. And does the New Jersey Department of Environmental Protection have a stated policy on the hauling of waste? Would you rather see more of it go towards trains moving it, or trucks, or no preference? How do you view that?

Mr. SKACEL. We are certainly in favor of moving waste by rail. The issue is not moving the waste by rail. The issue is the nature and the way these facilities are operated in New Jersey. The issue isn't the railroad. The issue is really the operators that set themselves up, that align themselves as railroad facilities. The railroads just don't seem to be able to have any sort of control over their operations.

Mr. SHUSTER. Did you want to say something, Mr. Marturano?

Mr. MARTURANO. The only thing I would say is one of the ways you qualify for preemption is if you are an actual rail facility. We heard that from the STB. Obviously, those five facilities within two miles of each other, they are not all rail facilities, they were never rail facilities. Each one was operated by an individual hauler under the guise of being a rail facility. They were never rail facilities, they should never have qualified for even a hint of preemption. What company of any kind would put five distinct facilities within two miles of each other if you really and truly owned all five of them? It was a charade from the beginning, it is still a charade that goes on today.

Mr. SHUSTER. Has the STB involved itself in those five facilities that you know of?

Mr. MARTURANO. Not that I am aware of, no.

Mr. SHUSTER. Do you believe—earlier we heard members of the STB talk about notification. Do you believe that would help solve a lot of the problems, if people had put notice in the STB that they were going to do this and sort of shed light on their operation?

Mr. MARTURANO. No, I don't believe it would matter one bit. Because all five of these facilities popped up when the STB's powers were in effect. The NYS&W Railroad felt it didn't need to notify the STB or anyone that they were starting these transload operations, even though as you see from these pictures it was literally dumping garbage on the ground, because it was no different than had it been lumber. It could have been a lumberyard, so therefore they don't need to go to STB to open a new lumber yard. We don't need to go to STB to dump 5,000 yards of waste on the ground and start putting it into gondolas.

It is just not apples and apples. Garbage is never a commodity, it was never a commodity. Those other things that the rail hauled, those are commodities. People worry about losing them. Look at the pictures of these cars as they go in the rail cars. They are heaped above the water line of the cars. They are heaped that way because if you follow the rail lines you will find the waste falling off these cars. They refuse to tarp them because, as you move, you lose some of it. And when you get to the other end, you pay less to dispose of it because you lost some of it along the way.

I can take you to rail lines right now in New Jersey that have debris littering the sides of those rail lines from people—and not all operators are the same—overzealous operators who top these things with the hope that the vibration will send some of the waste over the side. They gain economically by thwarting the environmental issue.

And that is what has been at the crux of this from the very beginning. It is a way around doing what you should do. There are perfectly legitimate rail operators out there that handle the waste legitimately and in an environmentally conscious way. That is what we should be encouraging, not this.

Mr. SHUSTER. Mr. Jones, I understand that you filed an appeal with the United States First Circuit Court. Someone is shaking their head; is that accurate?

Mr. JONES. That is not us.

Mr. SHUSTER. Okay. It must be a different company. Are you a railroad?

Mr. JONES. We have an application, a petition pending before the Surface Transportation Board right now to become a railroad in Wilmington, Massachusetts.

Mr. SHUSTER. What will you have to do going through that process to become a railroad? Do you own locomotives?

Mr. JONES. We do not. As soon as we are provided with the authority to operate, we will procure locomotives and rail cars and other machinery that would be required.

Mr. SHUSTER. So presently, no locomotives?

Mr. JONES. That is a massive investment to make without having the operating authority.

Mr. SHUSTER. Are you actually operating now as a rail transfer station?

Mr. JONES. No. I have in the past been involved in those kinds of developments. Most notably there is one in Newark, New Jersey that is up and operating right now. It is owned by Canadian Pacific.

Mr. SHUSTER. Canadian Pacific is operating that?

Mr. JONES. They are indeed. They use a contract operator.

Mr. SHUSTER. How does that facility operate in Newark, New Jersey, Mr. Marturano?

Mr. MARTURANO. Well, again, this goes back to that issue: Is a contract operator who used to be a hauler, is that the same as a railroad operating the facility? That is the question that somebody has got to answer, because that is the scam that is being done. You hire people—and that was our case in North Bergen. They are all haulers, some of them which have been debarred from operating in some states. They are all haulers. They got in, they started operating again. That is not a rail operator. Just because you sign a piece of paper, you hire an old hauler, now he is suddenly a railroad employee. That is ridiculous. But that is the scam that has been perpetrated here is that you hire these people and then all of a sudden they became a railroad. And they are covered under the same umbrella that the legitimate rails like Canadian Pacific and all the real legitimate ones. They should be protected. No one doubts that.

But don't give an umbrella to somebody who has a fleet of trucks that he picks up garbage; was a railroad that doesn't own any piece of railroad equipment in his life, and all of a sudden he is a railroad, because you signed a piece of paper saying they will now act as my agent. No, that is ridiculous.

Mr. SHUSTER. Thank you. I see my time has expired.

Ms. BROWN. Mr. Jones, in your testimony you stated that local health and safety laws are not and have never been preempted. Yet, today I have heard a number of examples where railroads are clearly violating State and local health and safety laws without repercussions. Can you better explain what laws you are referring to and why they are not enforced through previous examples?

Mr. JONES. Yes ma'am. We believe that there has been an overbroad interpretation by some of these folks that are calling themselves railroads to get around having to comply with local and State regulations. It is spelled out very clearly in the law that if it is health- and safety-related, the railroads have to comply just like anybody else does.

That trash mountain that showed up at the facilities Mr. Marturano just described, the States are fully empowered to go out there and shut that down on day one. As a matter of fact, that kind of operation should never have come into existence in the first place. And they only came into existence because they have used the notice of exemption proceeding.

Whereas the Surface Transportation Board and all of the localities that govern these types of facilities, or the localities in which they intend to exist, they don't find out about it until after the fact.

Ms. BROWN. Mr. Jones, I think you have a picture that you want to put up.

Mr. JONES. Yes ma'am I have several. I mentioned——

Ms. BROWN. Mr. Shuster, if you take a look at this, I think this is the site in New Jersey. Will you all take a look at this. Where is this picture here; where is that?

Mr. JONES. That picture is of New York and Susquehanna rail yard in North Bergen, New Jersey. That is the infamous trash mountain that Mr. Lautenberg spoke about this morning. As you can see, it is on open ground, it is open air, it is exposed to the potential for fires. You got power lines running across the top of it. That is something that should have never come into existence.

Ms. BROWN. Now, what kind of permit does this have?

Mr. JONES. I believe they did that with a notice of exemption, being an existing railroad. Unlike someone like us, we could never create anything like that, because we would be a new build railroad, and we had to apply under a different proceeding, the petition proceeding, which was accompanied by an environmental review, an up-front environmental review. So there was no potential for us to sneak through in the dark of night. Everybody knew what we were doing on day one.

Ms. BROWN. Mr. Skacel, would you like to respond?

Mr. SKACEL. Just to clarify, there was no notice of exemption. This is an existing railroad. New York Susquehanna and Western operated this. They simply decided we are going to set up this operation. There was no requirement for notice or anything else to the Surface Transportation Board. And I think the one point that I

consistently hear almost as a common theme throughout all this testimony is we talk about health and safety. There is another factor here that we are not covering, and I heard it in Congressman Shuster's opening remarks as well. We talked about fire code, electrical code, building code, plumbing code. What about the environment? Where is the code that protects the environment? And throughout this entire process there is no reference to the environment. And that is what this issue has been about all along.

Mr. Jones points to the Canadian Pacific facility in Newark. If we were to see a picture of that facility, you would see that that facility doesn't have air pollution controls. It has what they refer to as a misting system where the theory is, if you create enough mist, the particles become so heavy that everything will fall to the ground. If you are lucky it falls within the facility. Most of the time it is a wind tunnel effect. It blows right out of that facility and onto the ground and into the environment.

Again, there are insufficient controls. And why are there insufficient controls? Because the Surface Transportation Board is not requiring it, and we are unable to require anything further.

Ms. BROWN. We have about 5 more minutes before we have to get out of this room. I think I did have one thing.

Mr. JONES. We can't get our computer equipment to work properly here. There we go. But we do have a rendering of what we are building in the state of Massachusetts. It is nothing like these mountains of trash that you have seen. It is not an open-air facility, as was described this morning by Mr. Lautenberg and Mr. Pallone. We have storm water controls so there won't be any leachate running through mountains of waste. All of our roads are paved. There won't be any mud in the streets. All of our storm water detention basins are lined. We have odor control in our building, dust control, local dust control. We have dust collection, as well as a droplet system. We will also be using odor neutralizers. And we are just properly sited. We are 1,300 feet away from the nearest sensitive receptor, with commercial and industrial activities between us and them. So we are a much different facility.

Ms. BROWN. I understand. Are you following the EPA best practices as far as you develop this facility?

Mr. JONES. I believe that we are. Moreover, when problems arise in other jurisdictions, we pay attention; we do a little bit of research. We looked at the—in the Susquehanna case, the Attorney General's complaint. He outlined very clearly what some of the adverse impacts were that were associated with the facilities in New Jersey. And we designed all of them right out of it. And because there was an up-front environmental review, the public had an opportunity to comment on our submissions. So we had to respond to that comment.

Ms. BROWN. Let me just say that one of the things, you know, it seems like you follow like maybe a different procedure and you all are complying. But basically it is like a ″trust me.″ It is not that we have guidelines in order. And in listening to the—I don't know whether or not they have the—they couldn't even tell me today how many plants were out there. That concerns me. In what community?

Mr. JONES. We can get out of the ″trust me″ with one simple change to the process: Make everybody do what Transrail had to do. Eliminate the notice of exemption proceeding. Make everybody that is handling this type of cargo do a petition; file a petition which involves much more extensive information, including an environmental review, an up-front environmental review, along with a filing of convenience and public necessity.

Ms. BROWN. What about the continuous monitoring? You are going to have the last word. What about the continuing monitoring? Because with the 100-plus, they are responsible for the entire country. And they only have about six or seven people, period, that work in this area.

Mr. JONES. Well, I only know that because we are filing an environmental review—because we are doing that and nobody else is, none of the facilities in New Jersey certainly did—that will allow the Surface Transportation Board to condition—condition, place conditions on any approval that is granted to us. And in doing so, as they so eloquently put on page 17 of their jurisdictional decision on July 10th, that they could use that, create conditions that would force us to have to comply with all of the regulations or some of the regulations, certainly those that are applicable to rail transloading facilities that may be common to rail transloading in the State of Massachusetts. It is a normal sold waste regulation. So they would have, the State of Massachusetts would have the ability to monitor. We don't have any opposition to that. We would welcome it.

Ms. BROWN. Now you have the last word.

Mr. MARTURANO. In the question to this—and this is a great pictorial of what the site plan looked like—but the fact is if a railroad that owns that line wanted to open up one of these open dumps a mile from Mr. Jones' facility, it can. And it doesn't have to spend all this money that Mr. Jones is spending doing it the right way. They don't have to spend that, because there is no regulatory force to make them spend it. They could open that up.

And we have talked about economic competition. There will be economic competition. There will be someone who is trying to do it the right way, as I believe Mr. Jones is. Someone can open that facility tomorrow, dump on the ground, and take his customers away the next day.

Ms. BROWN. Is that correct, Mr. Jones? That is a yes-or-no question, Mr. Jones.

Mr. JONES. I believe so.

Ms. BROWN. Mr. Skacel, do you have any final comments?

Mr. SKACEL. Just that don't lose track of the fact that it is more than just the exemption process that needs to be followed here. It is the follow-through.

Even once you go through all of this process—and I agree the presentation looks really great—but it is the day-to-day operations, the follow-up that needs to happen, and currently the way it occurs there is none. The Surface Transportation doesn't do it, we have attempted to do it at every juncture in this whole process, and we have spent millions of dollars trying to get to this point. We are unsuccessful to date in having the ability to control these types of sites.

Ms. BROWN. Thank you. And in closing, let me just say that the record will remain open for 2 weeks, 14 days, so that you can add any additional information that you want to share with us.

And I want to say that someone that is an owner stopped me in the hall and said that he would like to submit information for the record. So I think the record is open to take testimony from anyone that wants to make a point on what we are discussing. So I just want you to know that.

And I want to thank you very much for your testimony, and sorry that we didn't have as much time, but obviously we are going to have some follow-up and lots of discussion. It is a concern. And this process is moving forward. We are going to have a bill on the floor that has some elements here, that will be up tomorrow. And then the Senate has some information in theirs, and we will go to conference. And so we will be working through the process.

And thank you very much for your testimony. Thank you very much.

[Whereupon, at 2:30 p.m., the Subcommittee was adjourned.]

Congressman Tim Bishop (NY-01)
Statement for the Record
Subcommittee on Railroads, Pipelines, and Hazardous Materials
Committee on Transportation and Infrastructure
October 16, 2007

Madame Chairwoman, thank you for allowing me the opportunity to join you and my colleagues on the Railroads Subcommittee at this important hearing regarding railroad transload facilities. Unfortunately, constituents in my district on eastern Long Island have recently become intimately familiar with a grey area in federal law that allows rail operators, or companies masquerading as rail operators, to bypass state and local regulation.

In September of this year, a constituent notified my office about a construction project in Yaphank, New York, near the Long Island Expressway and the Long Island Railroad. The companies behind this project cleared nearly twenty acres of trees and vegetation, and mined hundreds of tons of valuable sand in an effort to create a rail transload facility.

When asked to prove their authority to construct such a facility, the rail company behind the project argued that although they had not filed a notice of exemption specifically for the Yaphank project they were already recognized by the Surface Transportation Board (STB) as a rail carrier, and were completely within their federal preemption rights under common carrier authority.

Federal exemptions, granted by the Surface Transportation Board, under the Department of Transportation, are legal tools that railroads use to take care of routine, non-controversial matters such as changing operators on a rail line. Unfortunately, some companies have gone outside the intent of Congress and used this general provision to build rail spurs without federal environmental review and state and local regulation.

And while in the end this particular project was shut down by the STB, my concerns with the process of federal exemption – and more importantly its abuse – have brought me here today to better understand this grey area in federal law, and the efforts of the Surface Transportation Board to minimize its exploitation.

I look forward to hearing testimony from today's panelists and thank them for their participation. I also would like to again thank Chairwoman Brown for allowing me to sit in on today's hearing. Thank you.

I yield back the remainder of my time.

Statement by Congressman Jerry F. Costello
Committee on Transportation and Infrastructure
Subcommittee on Railroads
Hearing on Railroad-Owned Solid Waste Transload Facilities
October 16, 2007

Thank you, Madame Chairwoman. I am pleased to be here today as we discuss railroad-owned solid waste transload facilities. I would like to welcome today's witnesses.

Municipal solid waste (MSW) is a rapidly growing market for the rail industry in general, with a sharp increase in the amount of solid waste produced in the world and the increasing need for transportation of mass amounts of MSW from all areas make it a viable market.

There is some concern that railroads are using federal preemption standards to shield themselves from important state and local environmental laws. I am interested in hearing from our witnesses from the Surface Transportation Board to see how they are governing this issue and what further steps they can take to more closely oversee railroad activities. I am also interested in hearing from the states in terms of their permitting and regulation process and how they are working with the railroad industry to further improve transporting waste in an environmentally friendly way.

Again, thank you Madame Chairwoman for calling today's hearing.

MAURICE D. HINCHEY
22ND DISTRICT, NEW YORK

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October 22, 2007

The Honorable Corrine Brown
Chairwoman
Transportation and Infrastructure
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Pipelines and Hazardous Materials
H2-589 Ford House Office Building
Washington, D.C. 20515

The Honorable Bud Shuster
Ranking Member
Transportation and Infrastructure
Subcommittee on Railroads,
Pipelines and Hazardous Materials
H2-592 Ford House Office Building
Washington, D.C. 20151

Dear Chairwoman Brown and Ranking Member Shuster:

Please accept my attached comments for the record when you compile your hearing record from the "Railroad-Owned Solid Waste Transload Facility" hearing in mid-October.

I appreciate the opportunity to make you aware of my views and I thank you for holding this important hearing.

Best regards.

Sincerely,

Maurice Hinchey

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Comments to the House Committee on Transportation & Infrastructure Subcommittee on Railroads, Pipelines and Hazardous Materials

"Railroad-Owned Solid Waste Transload Facilities"

Submitted by Representative Maurice D. Hinchey (NY-22)
October 22, 2007

Chairman Oberstar, Chairwoman Brown, Ranking Members Mica, Shuster and distinguished members of the Subcommittee on Railroads, Pipelines and Hazardous Materials, I appreciate the opportunity to submit these comments on the impact of railroad-owned waste facilities, an issue that has drawn my attention in the past year due to a situation in my Congressional District. Based upon 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 last 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 its 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 ultimately led to the company indefinitely postponing any further action.

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 its newly acquired rail lines.

All solid waste facility operators in the State of New York are strictly regulated and are required to seek certain state permits and local site plan approvals by the host municipalities, as New York has strong state and local environmental review regulations. 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. This company 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 was clear that this company's primary business purpose was handling solid waste. However, since it purchased a rail line, Chartwell claimed that it was 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 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.

In a subsequent meeting with the heads of the federal Surface Transportation Board several weeks later, 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 appreciated 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, I have cosponsored Congressman Pallone's legislation, H.R. 1248, the Clean Railroads Act of 2007, 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 respectfully ask you to consider this legislative effort to correct and clarify the type of situation that I have described, which I believe will occur with increasing frequency until the intent of Congress is clarified. Clearly, Congress has a strong interest in maintaining federal preemptions for railroads themselves, but also needs to protect the interests of our local communities by excluding solid waste transfer facilities from this preemption.

Thank you for your consideration of my comments.

STATEMENT OF
THE HONORABLE JAMES L. OBERSTAR
SUBCOMMITTEE ON RAILROADS, PIPELINES, AND HAZARDOUS MATERIALS
HEARING ON
"RAILROAD-OWNED SOLID WASTE TRANSLOAD FACILITIES"
OCTOBER 11, 2007

Rail is an important transportation mode for the solid waste industry. As landfill space becomes more expensive and fuel costs increase, it is expected that rail's importance will only increase for the industry. However, there is growing concern that some in the solid waste industry are using the railroads' federal preemption standard as a means to circumvent important state and local environmental health and safety protections, which would permit them to undercut their competitors.

In 2003, for example, New England Transrail (NET) filed a preemption petition with the Surface Transportation Board "to commence the operation of common carrier rail service" and to construct a "bulk and container rail reload center" even though it did not own or control any track, terminal, or rail cars at the time of the application. Opponents of the NET application were able to show that NET wasn't interested in running a railroad, but rather building and operating a large solid waste processing facility on an existing Superfund site approximately 12 miles outside Boston, Massachusetts. Although the Surface Transportation Board (STB or Board) dismissed NET's original petition, the Board seemed to do a complete reversal when it decided this past June that NET's waste processing operations were integrally related to rail transportation, thereby shielding NET from having to comply with important state and local environmental protections.

This is not what Congress had in mind when it passed the Interstate Commerce Commission Act of 1995, which provided the Surface Transportation Board with exclusive jurisdiction over rail

transportation and certain rail-related facilities. Although the law stated that "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or state law," it was never intended to shield railroads, like New England Transrail, from state and local laws, as some now claim. The purpose of the Federal preemption standard is to prevent a patchwork of state and local regulation from unreasonably interfering with interstate commerce. Environmental laws governing the processing of waste do not interfere with the flow of commerce.

Hauling waste creates a potential hazard for the communities through which it travels. The U.S. Environmental Protection Agency does not have a substantive regulatory program for solid waste processing. It is therefore up to state and local governments to ensure that their citizens are in no way harmed by these operations.

I firmly believe that the STB's recent decision could set a precedent that will mean the long-term erosion of state and locally-established environmental health and safety regulations, and I am not alone. A number of Members of Congress are planning to appear today before the Subcommittee, including Congressman Pallone who had originally brought this issue to my attention and requested this hearing. Mr. Pallone recently introduced H.R. 1248, the Clean Railroads Act, which would exclude solid waste disposal from the jurisdiction of the Surface Transportation Board. I am grateful for Mr. Pallone's leadership on this issue, and I look forward to working with him and others as we consider this important legislation.

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Statement of Rep. Frank Pallone
Subcommittee on Railroads, Pipelines, and Hazardous Materials

Railroad-Owned Solid Waste Transload Facilities
October 16, 2007

I would first like to thank Chairwoman Brown and Ranking Member Shuster for conducting this important hearing.

Unregulated waste transfer stations are a major issue throughout New Jersey and a looming threat to our environment and to public health.

Certain waste handlers and railroad companies have tried to exploit a supposed 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 (STB) 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.

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 this loophole to build or plan waste transfer stations next to rail lines and avoid any regulation.

In New Jersey, approximately fifteen railroad waste transfer facilities have been proposed or are now operating in the state -- one of which handles hazardous waste.

Some of these companies have gone before the STB to seek federal preemption of a host of environmental and public health laws that apply to 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.

Apparently, word is spreading. Unregulated waste transfer stations have sprung up or are being proposed in Massachusetts, Pennsylvania, and New York. In all of these instances certain waste haulers are trying hard to avoid environmental regulation.

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This is unacceptable and I believe Congress must ensure that any proposed waste facilities sited near rail lines comply with the same regulations as every other facility of that type. This is critical to protecting public health and the environment throughout the country.

That is why I recently introduced H.R.1248, the Clean Railroads Act of 2007. Senator Frank Lautenberg introduced a companion bill in the Senate.

This simple bill amends the Interstate Commerce Commission Termination Act to say that solid waste management and processing are excluded from the jurisdiction of the STB.

Companies should no longer be allowed to use this loophole to get around state and local regulations. My legislation will give States the authority to regulate these waste transfer stations, so that we can protect both the environment and the health of area residents.

We must ensure that solid waste facilities follow the rules and do not pollute pristine open space, and do all that we can to protect our environment from unregulated facilities.

Imagine if you can, six stories of waste sitting next to a rail line in your own community with no oversight from the State or local authorities. It's a possibility that's all too real today, but can be remedied with the passage of the Clean Railroad Act.

At this time I would like to recognize some of the people who have been fighting this issue at the ground level in New Jersey

- Monmouth County Freeholder Barbara McMorrow
- Mullica Township Mayor Kathy Chasey
- Mr. Wolfgang Skacel the Assistant Commissioner at the New Jersey Department of Environmental Protection
- And finally Mr. Thomas Marturano from the New Jersey Meadowlands Commission.

Again, thank you Chairwoman Brown and Ranking Member Shuster. I apologize for having to leave before hearing from the witnesses but I have an important markup in another committee.

Remarks of U.S. Rep. Nick Rahall
Hearing on Railroad Owned Solid Waste Transfer Facilities
Subcommittee on Railroads, Pipelines, and Hazardous Materials
2167 Rayburn House Office Building
October 16, 2007

Thank you, Mr. Chairman for recognition and for holding today's hearing on solid waste transfer stations.

Mr. Chairman, if I have counted this correctly, this is the second time in less than a month that we have had the pleasure of receiving testimony from the Board members of the Surface Transportation Board.

It is also the second issue on which we have heard strong disagreement and debate from within the Board itself. I have a strong belief in debate, in airing grievances. The political philosopher JS Mills' "market place of ideas" established the free exchange of ideas as a powerful tool in furthering consensus where none exists.

Some today say there is disagreement regarding what specific activities are covered by the federal preemption clause. Some of our witnesses today would say that a waste transload facility is not covered. However, the ICC Termination Act is very clear when it defines the preemption clause to cover dropping off cargo, loading it onto trains, and the shipping of cargo.

The Third Circuit Court of Appeals recently stated in its decision of September 4, 2007, facilities engaging in the receipt, storage, handling, and interchange of rail cargo fit within the plain text of the Termination Act's preemption clause. Mr. Chairman, as the Third Circuits decision is a thorough and well written decision, I would also ask that it be included for the official record.

There is also disagreement about how well a State like New Jersey or Massachusetts can protect their citizens through the exemption given for health and safety concerns. Mr. Chairman, according to an article published on April 28, 2007, by New Jersey's The Record, three solid waste transfer stations operated by New York, Susquehanna and Western Railway Corporation were shut down because of a lack of adequate fire safety sprinklers.

Mr. Chairman I would ask to include this article for the record. I also would ask, if states do not have the authority to enforce their health and safety regulations, under who's authority did New Jersey shut these facilities down?

I would also like to point out that restricting STB's jurisdiction on railroad owned waste transfer facilities could very well set a dangerous precedent. If we allow one type of commodity to have the federal preemption removed, where does it stop? Are there not similar concerns that associated with other products such as paint or pesticides?

So again, thank you again Mr. Chairman, and I ask that my statement be included as a part of the official record.

The Record

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3 railroad dump stations closed

Saturday, April 28, 2007

By ERIC HSU
STAFF WRITER

NORTH BERGEN -- State inspectors shut down three controversial railroad dumping stations Friday, saying the buildings where solid waste is transferred from trucks to rail cars are missing required fire-safety sprinklers.

The inspectors issued building code violations to transfer sites located on Westside Avenue at 94th, 83rd and 58th streets. The orders require the buildings, which are owned by the New York, Susquehanna & Western Railway Corp. to be immediately closed and emptied until sprinklers are installed.

"When they properly complete them, then they can use them," said William Connolly, director of the Division of Codes and Standards for the state Department of Community Affairs.

Thomas O'Neil, a spokesman for the railroad, said the company has agreed to stop operations. But by late Friday, O'Neil said rail company lawyers had already filed an appeal with a state administrative law judge to overturn the orders.

The shutdowns are the latest skirmish in a long battle between the railroads and state officials about whether the stations must comply with local environmental and health regulations or just comply with federal laws.

In February, a federal judge ruled that the transfer stations were exempt from state laws, a decision the state has appealed.

Sean Darcy, a spokesman for the Department of Community Affairs, said the latest closures were undertaken in part because of recent hearings on the preemption issue by the federal Surface Transportation Board. At the hearings, called last week, Darcy said board Chairman Charles Nottingham indicated there were clear precedents that rail companies are not exempt from police and fire safety requirements.

The 94th and 83rd street sites handle construction and demolition debris. The 58th Street site is a larger facility that also handles radioactive and contaminated waste. The NYS&W facilities, which shipped more than 450,000 tons of debris in 2004, typically employ about 10 people each, and are origin sites for waste that will be shipped to landfills in the Midwest, O'Neil said.

O'Neil said the rail companies have followed all code requirements and suggested the shutdown could even increase the risks of transporting waste.

"Construction debris isn't going to magically go away," O'Neil said. "What this means for the region is just that instead of moving waste by train in the most environmentally friendly way, it will just be in trucks traversing the highways in Bergen County."

Connolly said the inspectors are within their rights to enforce minimum safety standards.

"There are federal preemptive laws that [the railroads] don't have to get a permit, but they do have to comply with health and safety laws. The violation is they built these buildings and occupied them with lots of code violations."

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1675

NEW YORK SUSQUEHANNA AND WESTERN
RAILWAY CORPORATION,

Plaintiff/Fourth Party Defendant

v.

LISA P. JACKSON, in her official capacity as
Commissioner of the New Jersey Department of
Environmental Protection;
NEW JERSEY MEADOWLANDS COMMISSION;
ROBERT R. CEBERIO, in his official capacity as Executive
Director of the New Jersey Meadowlands
Commission; JAMES ANZEVINO, in his official capacity as
a Commissioner of the Meadowlands Commission;
MICHAEL J. GONNELLI, in his official capacity as a
Commissioner of the New Jersey Meadowlands Commission;
LEONARD R. KAISER, in his official capacity as a
Commissioner of the New Jersey Meadowlands Commission;
MIA M. MACRI, in her capacity as a Commissioner of the
New Jersey Meadowlands Commission;
ELEANORE NISSLEY, in her official capacity as
a Commissioner of the New Jersey Meadowlands

Commission; CHARLES A. RICHMAN, in his official capacity as a Commissioner of the New Jersey Meadowlands Commission; ARLENE WALTHER, in her official capacity as a Commissioner of the New Jersey Meadowlands Commission,

Appellants
Defendants/Counterclaimants/
Third Party Plaintiffs

v.

CARDELLA TRUCKING CO., INC.; CROSSROADS RECYCLING, INC.; HUDSON-NATIONAL, LLC; MHF LOGISTICAL SOLUTIONS, INC.; MILLENIUM RESOURCE RECOVERY, LTD.; ONTRACK LOADING COMPANY, INC.; PRECISE CONSTRUCTION CONTRACTING, INC.; RAIL-TECH, LLC.; SCOTT EXCAVATING, LLC; SLANE RAIL TRANSPORT, LLC; SUSQUEHANNA BULK SYSTEMS; X-PRESS RAIL TRANSFER, LLC d/b/a 94th Street Rail Transfer, LLC,

Third Party Defendants

v.

SLANE RAIL TRANSPORT, INC.,

Fourth Party Plaintiff

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 05-cv-04010)
District Judge: Honorable Katharine S. Hayden

Argued July 10, 2007

Before: AMBRO and HARDIMAN, Circuit Judges,
SHAPIRO,* District Judge

(Opinion filed September 4, 2007)

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*Honorable Norma L. Shapiro, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

AMBRO, Circuit Judge

Shipping solid waste to Midwestern landfills has become big business—particularly in places like New Jersey where capacity at in-state landfills is scarce. Railroads are prime beneficiaries of the increased demand for the means of shipping waste across the country. Many railroads accommodate this demand by building facilities within their rights-of-way for the storage and loading of waste, which often is brought to the loading facility by truck. As one might imagine, transferring solid waste from truck to rail car is not the cleanest of businesses, and so the State of New Jersey has tried to regulate it. Railroading, however, is historically the subject of federal regulation, so any state regulation affecting it raises the question of preemption. Because we conclude that the District Court's factfinding does not support its conclusion that all of the State's environmental regulations at issue are preempted here, we remand for consideration of each regulation individually.

I. Facts and Procedural History

In business since the mid-19th century, the New York Susquehanna and Western Railway Corporation ("Susquehanna") operates 400 track-miles in New York, New Jersey, and Pennsylvania. This dispute centers on activities at five of its New Jersey solid waste transloading facilities.[1]

Four of the facilities at issue dealt primarily or exclusively in solid waste generated at construction and demolition sites ("C&D waste"). Susquehanna built these facilities itself and either leased or owned the land. At each facility, Susquehanna sold most of its shipping capacity to a primary customer. These primary customers, known as "shippers," acted as middlemen between the generators of waste and the railroad. For a fee, they took title to C&D waste from the operators of the sites that generated it and hauled it by truck to Susquehanna's C&D transloading facilities. They then paid

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[1] "Transloading" is a term of art in the bulk transportation industry. It means "[t]ransferring bulk shipments from the vehicle/container of one mode to that of another at a terminal interchange point." U.S. Dep't of Transp., Fed. Highway Admin., Freight Prof'l Dev. Prog., Freight Glossary, available at http://ops.fhwa.dot.gov/freight/FPD/glossary/index.htm. In the context of this case, it refers to transferring solid waste from trucks (which carried it from its point of origin) to Susquehanna rail cars (for carriage to landfills).

Susquehanna to load the waste onto rail cars and ship it to out-of-state landfills (which they paid to take final title to the waste). Because the shippers' value added was their ability to move waste efficiently from C&D sites to landfills, they used guaranteed-capacity contracts with Susquehanna to ensure that they could do so. Rather than operating the transloading facilities itself, Susquehanna hired a loading company to unload the trucks bringing in the waste, oversee its storage, and load it onto rail cars.

The fifth facility dealt only in contaminated soil, which was stored in sealed containers and emptied directly into sealed rail cars. The loading agent at that facility was a Susquehanna subsidiary, and the shipper had an exclusive contract with Susquehanna. Because the facility catered to only one customer, that customer controlled access to the facility.

At least initially, the transloading facilities were a mess.[2] Nearby residents complained that their houses and yards were covered in dust and grime, the noise was excessive, and the wastewater and stormwater runoffs were dirty. Of equal (if not

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[2] Susquehanna notes that the facilities are now much cleaner than they were when they opened. Given the question presented (to what extent the State may regulate the facilities under federal railroad law), we believe that Susquehanna's voluntary efforts to clean up the facilities, while perhaps laudable, are not relevant to our disposition of the case.

more) concern to state officials was that the facilities posed, in the officials' judgment, potentially deadly fire hazards. The pollution and its perceived danger caused a public outcry, and New Jersey officials responded by promulgating a series of health, safety, and environmental rules that have come to be known as the "2D regulations". *See* N.J.A.C. § 7:26-2D.1.

For transloading facilities that deal only in containerized solid waste, the 2D regulations require that:

- the rail carrier provide the State with a narrative from an officer of the rail carrier describing the facility operations and certifying that containers will not be opened and that employees, the public or the environment will not be exposed to solid waste except as allowed in accordance with state law;

- nonputrescible [not decaying] solid waste not remain at the rail facility for more than 10 days, putrescible [decaying] solid waste for not more than 72 hours, and non-hazardous liquid waste in sealed containers not more than 180 days;

- solid waste received, stored or transferred at the rail facility be contained in sealed

containers that do not leak any liquids or solid materials and are not opened for any purpose at the facility, except that a container holding liquid waste may be opened briefly for the purpose of sampling the liquid provided the container is immediately resealed;

- the operation not result in the migration of odors outside the confines of the rail carrier's property;

- all solid waste containers staged or stored at the facility be secured at all times in a manner that prevents unauthorized access to the containers and their contents;

- an adequate water supply and adequate fire-fighting equipment be maintained or be readily available to extinguish any and all types of fires;

- solid waste vehicles not be queued or staged on any public roadway;

- the queuing and staging of solid waste vehicles be conducted so as to prevent traffic backups and related traffic hazards

on access roads servicing the facility;

- facilities and all appurtenances, other than those owned or operated by rail carriers, including vehicles while on-site, be positioned and buffered in such a manner that sound levels generated by the operation not exceed limits established pursuant to noise control rules;

- only solid waste vehicles properly registered and displaying the appropriate registration number and solid waste decal be admitted at the facility;

- the State's designated representatives and inspectors be admitted to inspect any building, or any other portion of the rail facility, at any time;

- any release or discharge of any solid waste that would harm human health and the environment at the facility be immediately reported by the facility operator or its designee to the State;

- an on-site emergency coordinator be designated who will be available during all

hours of operation for the purpose of handling emergency situations, such as, but not limited to, spills, discharges or releases of solid wastes at the facility; and

- the facility maintain daily records of waste and submit quarterly reports within 20 days of the end of each calendar quarter summarizing waste receipts.

See generally N.J.A.C. § 7:26-2D.1(c).[3]

For facilities that deal in waste that is not confined to sealed containers, the regulations provide that:

- all facility processing, tipping,[4] sorting, loading, storage and compaction of materials (that is, solid waste and mixtures of solid waste and recyclable materials)

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[3] Because much of the language in the regulations is technical and unnecessary for our purposes, we have paraphrased them rather than quoting them directly.

[4] "Tipping" refers to the process of unloading waste from a truck into a storage facility. The "tipping floor" is the place where the waste is placed after it is unloaded from a truck and before it is loaded onto a rail car. *Cf. LaFleur v. Whitman*, 300 F.3d 256, 259–60 (2d Cir. 2002).

occur within the confines of an enclosed building that complies with all requirements of the Uniform Construction Code;

- the facility have concrete or equivalent tipping floors or ramps to ensure proper containment and channeling of wastewater to sanitary sewer connections or holding tanks and be constructed to withstand heavy vehicle usage, in compliance with applicable rules regarding the discharge of wastewater and the use of holding tanks;

- the facility have a system that collects, stores, and properly disposes of wastewater generated during normal operations, including wash-out and cleaning of equipment, trucks, and floors, in compliance with the applicable rules regarding wastewater and stormwater management;

- the operator clean each area where waste has been deposited or stored within each 24-hour period;

- no waste be stored overnight without

effective treatment to prevent odors associated with putrefaction;

- the facility property surrounding the actual waste management area be maintained free of litter, debris, and accumulations of unprocessed waste, process residuals, and effluents, and methods (such as fencing) of effectively controlling windblown papers and other lightweight materials be implemented;

- methods of effectively controlling dust be implemented in order to prevent migration outside the enclosed building and off-site;

- the operation not result in the migration of odors outside the confines of the enclosed building;

- an adequate water supply and adequate fire-fighting equipment be maintained or be readily available to extinguish any and all types of fires;

- the operator effectively control insects, other arthropods and rodents at the facility by means of a program implemented by an

applicator of pesticides, certified in accordance with the New Jersey Pesticide Control Code;

- the facility operate certified scales for the reporting requirements for waste transported by trucks;

- facilities' on-site roadways and storage areas have concrete or asphalt paving in those areas subject to vehicle loading and unloading activities;

- the facility not queue or stage solid waste vehicles on any public roadway;

- the queuing and staging of solid waste vehicles be conducted so as to prevent traffic backups and related traffic hazards on access roads servicing the facility;

- the facility and all appurtenances be positioned and buffered in such a manner that sound levels generated by the operation shall not exceed limits established pursuant to applicable noise control rules;

- only solid waste vehicles properly registered and displaying the appropriate registration number and solid waste decal be admitted for loading or unloading of any solid waste at the facility;

- the facility designate a secure area under the facility's control, located at a safe distance from the tipping area, where solid waste may be unloaded from those solid waste vehicles that are either exempt from state registration requirements or which must be manually unloaded;

- the facility not accept or in any manner handle hazardous waste or regulated medical waste as defined by state law, except in compliance with all applicable requirements for such activities;

- nonputrescible solid waste not remain at the rail facility for more than 10 days, liquid solid waste not more than 180 days in sealed containers, and putrescible solid waste not more than 72 hours;

- effective security procedures be implemented to control entry to the rail

facility, and exit from it, at all times;

- the State's designated representatives and inspectors be admitted to inspect any building or other portion of a rail facility at any time;

- any release or discharge of any solid waste at the rail facility be immediately reported by the facility operator or its designee to the State;

- an on-site emergency coordinator be designated who will be available during all hours of operation for the purpose of handling emergency situations such as, but not limited to, spills, discharges, or releases of solid wastes at the facility;

- the rail carrier maintain daily records of wastes received, a waste origin/disposal form for each load of solid waste received, and submit to the State monthly summaries of wastes received no later than 20 days after the last day of each month.

See generally N.J.A.C. § 7:26-2D.1(d).

Susquehanna asserted from the outset that it did not need to comply with the 2D regulations because they were preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b). After negotiations between Susquehanna and the State failed, the State, alleging multiple violations of the regulations at each site that continued for 250 days, assessed a civil penalty against Susquehanna of $2.5 million—$2,000 per day per site. Specifically, the State alleged that one or more of the sites:

- did not store waste in a fully enclosed building complying with the Uniform Construction Code (all sites);
- did not properly channel wastewater from the tipping floor into sewer system connections (all sites);
- did not properly collect, store, and dispose of wastewater generated through normal facility operations (all sites);
- did not properly control dust migration (all sites);
- failed to operate certified scales for purposes of reporting waste transported by trucks (all sites);

- spilled hazardous waste onto tracks and adjoining areas rather than keeping it contained (one site);

- failed to clean waste storage areas every 24 hours (four sites);

- failed to keep property surrounding waste management areas free of litter and debris (four sites);

- did not properly control odor emissions (four sites);

- did not properly control insects and rodents (four sites);

- failed to pave roadways and areas where waste was loaded or unloaded (two sites);

- allowed particulates to be released into the atmosphere causing air pollution (one site);

- allowed nonputrescible waste to remain on-site for more than 10 days (one site), and

- failed adequately to control access to the facility (one site).

App. at Aa217–28.

In response to the civil penalty, Susquehanna sued the State in the federal District Court for the District of New Jersey, asking the Court to declare that all of the 2D regulations were preempted by federal law and to enjoin New Jersey from enforcing the penalty. After the parties took limited discovery, the District Court held a hearing in December 2005 to assess the then-current conditions of the facilities and the issue of federal preemption. Two days into the hearing, after Susquehanna had called all of its witnesses but the State had only begun examining its first, the Court discontinued the hearing to attend to other matters. Over the next eight months, the parties tried to settle the dispute. In August 2006, they gave up. The Court asked for a final round of briefing and proposed to rule on preemption without concluding the hearing. Neither party objected, and the Court held that the Termination Act preempted all of the 2D regulations. The State appeals.[5]

Because the District Court heard live testimony and resolved disputed factual issues on that basis, we treat this case

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[5] The District Court had jurisdiction under 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291.

as though it comes to us after a bench trial.[6] Thus we review the Court's factual findings for clear error and its conclusions of law *de novo*. *Frederick L. v. Dep't of Pub. Welfare of Pa.*, 422 F.3d 151, 154 (3d Cir. 2005).

II. Whether Susquehanna's Activities Are Covered by the Termination Act's Preemption Clause

In relevant part, the Termination Act provides that "[t]he jurisdiction of the [Surface Transportation] Board over transportation by rail carrier . . . is exclusive. . . . [T]he remedies provided under this part with respect to the regulation of rail transportation are exclusive and preempt the remedies provided under Federal and State law." 49 U.S.C. § 10501(b) (internal paragraph divisions omitted). The Act defines "transportation"

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[6] In the usual case, to rule for one side on legitimately disputed, material factual issues without taking the adverse side's evidence would not be "according to Hoyle." (Moreover, the Federal Rules of Civil Procedure only allow judgment after partial findings against a party that has been fully heard on the relevant issue. *See* Fed. R. Civ. P. 52(c).) But because the State had notice of the Court's intention to rule without additional testimony and did not object or otherwise raise the issue until now, any defect is waived. *Brenner v. Local 514, United Bhd. of Carpenters & Joiners*, 927 F.2d 1283 (3d Cir.1991) ("It is well established that failure to raise an issue in the district court constitutes waiver of the argument.").

as

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property[.]

49 U.S.C. § 10102(9). It defines "rail carrier," in relevant part, as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5).

The first question to which we turn is whether the activities at issue are "transportation by rail carrier," and thus subject to the Termination Act. We begin with whether Susquehanna engages in "transportation" activities, and follow up with whether it acts as a "rail carrier."

A. Whether Susquehanna's Activities are "Transportation"

It is undisputed that operations of the facilities include dropping off cargo, loading it onto Susquehanna trains, and shipping it. Thus the facilities engage in the receipt, storage, handling, and interchange of rail cargo, which the Termination Act explicitly defines as "transportation." *See* 49 U.S.C. § 10102(9)(B). These operations fit within the plain text of the Termination Act preemption clause.

The State, however, argues that the operations must be "integrally" or "closely" related to providing rail service to qualify as "transportation" under the Surface Transportation Board's prevailing interpretation of the Act.[7] But the State's position seems based on a misreading of the Board's caselaw. It is true that the Board wrote in *Borough of Riverdale*, 4 S.T.B. 380 (1999) (declaratory order), that "facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption." *Id.* at 387. But consider the entire paragraph:

> Finally, it should be noted that manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject

[7] Though both sides rely on Board decisions, neither has argued that we owe it deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984). Because we believe the Board's interpretation of the Act's preemption clause is correct in all respects pertinent to this case, we need not decide whether formal deference is required.

case as true, it deals with "transloading." Hence, whatever the legal effect of the Board's adverb "integrally" (which we suspect is minimal or none), transloading qualifies as transportation.

In addition, the Court of Appeals for the Second Circuit has held that transloading activities fall within the Termination Act's definition of "transportation." *See Green Mountain R.R. Corp. v. Vt.* (*Green Mountain 2d Cir.*), 404 F.3d 638, 642 (2d Cir. 2005) ("Certainly, the plain language [of the Termination Act] grants the [Surface] Transportation Board wide authority over the transloading and storage facilities undertaken by Green Mountain."). Thus we hold that transloading operations are "transportation" under the Termination Act.

The State claims, however, that the District Court erred in not recognizing that Susquehanna engages in waste sorting and processing as well as transloading at its facilities. Sorting and processing, it argues, are not "transportation" because they do not have the requisite nexus to the movement of property by rail. Rather, those activities can be done anywhere and need not have anything to do with the loading or shipment of solid waste. *Amicus curiae* National Solid Wastes Management Association, a trade association of solid waste collectors and processors, agrees. It explains that separating recyclables from other C&D waste is part of its members' function as waste processors. Nat'l Solid Waste Mgmt. Ass'n Br. at 12–14. According to the Association, the food chain works as follows: people with waste

pay a shipper to take title to it. The shipper then delivers the waste to a processor who, for a fee, separates out valuable materials, such as scrap metal, wood, and appliances. The shipper sells the valuables to recycling plants. It also engages a railroad to take the remaining waste to a landfill, and it pays the landfill to take title to the waste. Shippers make money by getting more for the waste—from the initial owner and from recycling plants—than they pay for processing, transport, and ultimate disposal. Here, according to the Association, we have a railroad acting as transport company, transloader, *and* processor. By charging a low combined transloading/sorting fee (Susquehanna's expert refers to the transloading process as a "loss leader"), the railroad increases demand for its real service, which is hauling waste to landfills. But here's the rub: waste processing is a heavily regulated industry. According to the Association, the railroad gains a competitive advantage if it can shield its processing activities from regulation by characterizing them as "transportation by a rail carrier" and thus preempting burdensome state regulations. *Id.*

The District Court characterized the sorting activities at the facilities as the *de minimis* removal of items that did not comply with the shipper and landfill's disposal contract. It further found that because sorting and loading took place at the same time, they were actually one process, the dominant character of which was loading. App. at Aa38 (D. Ct. Op.). The Court likened it to a loader removing a Toyota Camry from a shipment it knew was supposed to be Ford Explorers. *Id.*

Determining how to review the Court's characterization is difficult because the line between fact and law here is blurry. On one hand, Susquehanna's expert plausibly characterized the removal of some items as an incidental and normal part of the loading process, *id.* (quoting App. at Aa1390–91 (Test. of William Rinnicke)), and the District Court, as factfinder, was entitled to credit that testimony. *See T.R. v. Kingwood Twp. Bd. of Educ.*, 205 F.3d 572, 577 (3d Cir. 2000). Moreover, the Association's characterization of this kind of sorting as "waste processing" with value independent of the transloading process, while perhaps persuasive, is not in the record. On the other hand, even accepting the facts underlying Susquehanna's characterization as true, we must apply those facts to the Termination Act's definition of "transportation" to decide whether they fit. *See Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207, 213 (3d Cir. 1993) (noting that "whether the facts meet [a] statutory standard is an issue of law" (citations omitted)).

Given all of the record evidence, we conclude that whether the District Court's characterization of the sorting process was correct is immaterial. The 2D regulations do not specifically regulate the sorting/processing aspect (to whatever extent there is one) of Susquehanna's facilities, nor does the civil penalty order have anything specifically to do with sorting or processing as opposed to storage and loading. Thus the question of whether a state could specifically regulate the sorting process (apart from the loading process) is not before us.

The regulations and penalty assessment here broadly regulate storage and transloading, irrespective whether the rail carrier also processes waste. Since both storage and transloading fall within the definition of "transportation," we need not consider whether the incidental processing activities do as well.

B. Whether the Transloading Activities Are Undertaken "by a Rail Carrier"

The State argues that Susquehanna is not acting as a "rail carrier" when it ships waste from the transloading facilities for two reasons: (1) Susquehanna does not operate the transloading facilities itself, and (2) it grants virtually all of its hauling capacity at each facility to one shipper.

1. Susquehanna's Control over the Transloading Process

Our *Hi Tech* decision dealt with whether transloading activities were performed "by a rail carrier." *Hi Tech Trans, LLC v. N.J.*, 382 F.3d 295, 308–10 (3d Cir. 2004). In that case, we noted that Hi Tech, the transloader, operated the transloading facility under a license agreement with CPR, the rail carrier and owner of the land. *Id.* at 308. Hi Tech constructed and maintained the facility. *Id.* Moreover, the license agreement established that Hi Tech was not CPR's agent, and CPR disclaimed any liability from Hi Tech's operations. *Id.* CPR did not charge shippers a fee for using the Hi Tech transloading

facility (presumably, the shippers paid Hi Tech for the service). *Id.*

This case is different because (1) the rail carrier owned (or leased) the land and built the transloading facilities, (2) shippers pay the rail carrier to load their freight, and (3) the rail carrier does not disclaim liability for the loading process. The Board noted that the *Hi Tech* situation was "substantially different from a situation in which a rail carrier builds and owns a truck-to-rail transloading facility, and holds it out to the public as its own facility, but chooses to have a contract operator," which, presumably, would qualify as transportation by rail carrier. *Hi Tech Trans, LLC (Hi Tech STB)*, 2003 WL 21952136, at *5 n.13 (denying request for a declaratory order). Relying on this language, the District Court concluded that our case is just what the Board describes: a rail carrier (Susquehanna) building, owning, and advertising its own transloading facilities, which it uses a contract agent to operate.

While the District Court's conclusion that this case is distinguishable from *Hi Tech* is correct, a footnote from our *Hi Tech* decision complicates the issue. We wrote that "[w]e do not . . . suggest that a party can contractually determine its status as a railroad carrier for regulatory purposes." 382 F.3d at 308 n.19. This is a perplexing statement because the contract before us obviously plays some role in determining the "nature of [the loader's] . . . relationship to [the railroad]." *Id.* That is, after all, why it exists—to define the parties' relationship. Our point in

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DEAN, NEW JERSEY DELEGATION

Statement of the Honorable Christopher H. Smith
Committee on Transportation and Infrastructure
Subcommittee on Railroads, Pipelines, and Hazardous Materials
October 16, 2007

Chairwoman Brown and Members of the Subcommittee, thank you for the opportunity to testify before the Subcommittee today.

The issue of federal preemption for railroad owned solid-waste facilities is one that has been front and center in the state of New Jersey for several years—and especially in my district—in the last several months. As you know, the Interstate Commerce Commission Termination Act, which President Clinton signed into law in 1995, (PL 104-88) created a federal preemption—now a loophole—for railroaders who become waste transloaders allowing them to ignore state and local environmental regulations established to protect the people.

Consider the case of Grems-Kirk Railway—which for the price of $1—purchased an inactive railspur in my district in Freehold, NJ. Grems-Kirk then set about to lease the property to Ashland Railroad who petitioned the Surface Transportation Board (STB) to establish a transloading facility. The federal preemption established in PL 104-88 means the new facility can side-step State environmental laws despite the fact that a potential *WASTE*-transloading facility will operate within the State's borders.

The proposed site for the Freehold facility is right next to hundreds of homes and a wetlands area. The very location, coupled with the dangerous waste that could be transported, poses staggering hazards to the health, safety, and well-being of my constituents. This is especially important in light of the fact that the wetlands feed directly into the Manasquan Reservoir. This reservoir is the source of potable water for hundreds of thousands of people in the Monmouth County area.

The potential health risks to the community are real and evident. Yet, the federal exemption denies the State environmental agency the ability to properly do its job—which is to ensure the protection of the community and the environment.

Thankfully, the application for the facility in Freehold mobilized a ground-swell of dedicated, informed local opposition. Larry Zaayenga of the Monmouth County Solid Waste Advisory Council uncovered the application and took the lead providing technical, environmental information. Anne Marie Howley of the local citizens group known as the "Sludgebusters" worked hard at educating neighbors and local leaders. After literally thousands

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of letters, numerous meetings and petitions, the application to establish an unregulated waste transloading facility in Freehold, NJ was denied. Denied, but not necessarily because of environmental concerns.

The public outcry in Freehold brought additional federal scrutiny and a closer look by the STB. But the STB's unanimous decision against the Freehold transfer facility was predicated not on environmental expertise but rather on the fact that the company demonstrated either an unwillingness or inability to answer questions as part of the application process.

In Freehold we dodged a bullet—basically, we won on a technicality. Still, a much large crisis looms for communities around the country. Congress must move now to protect them.

These waste stations present a clear and present danger to the public health of the nearby community. Furthermore, these sites have been known to pose a series of health, environmental and fire risks resulting from high levels of lead, arsenic, mercury, copper and other potentially hazardous materials. The danger could not be more real.

We are not saying we are opposed to allowing waste transfer facilities along rail lines. We are opposed, however, to establishing such facilities without significant local input and environmental protections. Preemption voids numerous meaningful State health and safety environmental laws, including those enacted in my State. The general public has every reason to believe they are protected by these laws. Our federal guidelines should reinforce local health and environmental protections, not take them away.

I am pleased that the STB has most recently announced they will consider increasing oversight of those that seek to operate rail facilities under the Board's jurisdiction that are exempt from local and State laws. However, when the STB has had the opportunity to grant full environmental oversight to State agencies such as in the New England Transrail Case, they did not. Further, companies that have been fined or penalized by State government for violation of certain environment protections seemingly do not have to pay up for their abuse. Courts have shown reluctance to give States environmental jurisdiction because of federal preemption. In one case in North Bergen, New Jersey, the New Jersey Department of Environmental Protection fined a company $2.5 million for violation only to have this year a Federal judge nullify that important State enforcement.

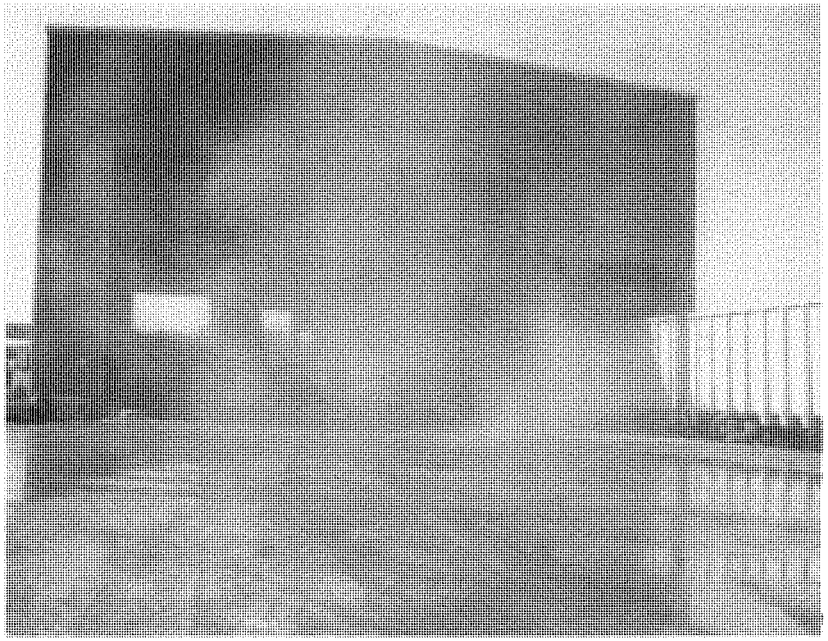
Earlier this year, I offered an amendment to the Transportation, Housing and Urban Development fiscal year 2008 appropriations bill. My amendment would have stripped the Surface Transportation Board of the authority to regulate these facilities, thus turning control—and environmental oversight—back to the States. As you may know, House rules all but require that these types of changes be made on authorizing bills. I was pleased then that during the debate Rep. Jim Oberstar, Chairman of the authorizing committee, the Transportation Committee, spoke and offered his support for closing the exemption loophole. With these assurances in mind, I appreciate the decision of this subcommittee to hold this hearing and I look forward to working with you to close this loophole.

Thank you.

Cardella, 43rd Street, North Bergen, N.

- Uncontrolle open air du
- Note total lack of environmer controls

Canadian Pacific Railroad Site, Newark, NJ



- Former Hi-Tech operation
- Note lack of air and stormwat controls

Cardella, 83rd Street, North Bergen, N.

- **Stormwate retention p**
- **Notes lack liner and further controls. Contamina are simply allowed to overflow al track.**

New York & Greenwood Lake Railway, Paterson, NJ

- **Facility temporaril shut down to fire**
- **Note top of cars**
- **Building d not have sprinkler system**

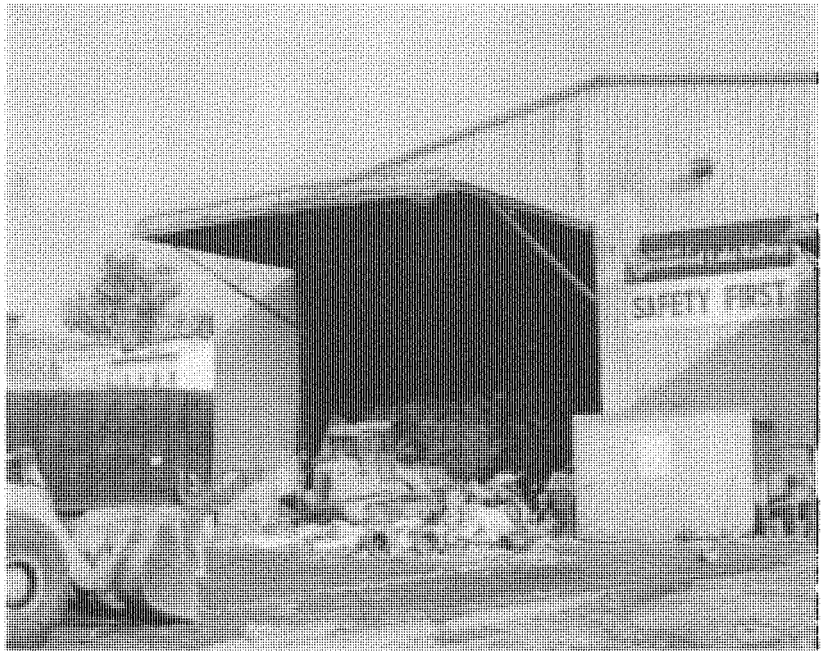
New York & Greenwood Lake Railway, Paterson, NJ

- Front view of the building after fire

New York & Greenwood Lake Railway, Paterson, NJ

- Front view of the building after fire

New York & Greenwood Lake Railway, Paterson, NJ



- **Photo taken on 9/26/07**
- **Dumping outside of building**
- **Poor Condition of Roadway**
- **Lack of Stormwater Control**

New York & Greenwood Lake Railway, Paterson, NJ

- **Photo taken on 9/26/07**
- **Dumping outside of building**
- **Poor Condition of Roadway**
- **Lack of Stormwater Control**

Hainesport Industrial Rail Facility, Hainesport, NJ

- Over loaded rail car

JP Rail, Pleasantville, NJ

- Partially enclosed structure
- No air pollution controls

Cardella, 83rd Street, North Bergen, N.

- **Photo taken on 3/27/07**
- **Volume of waste received at site exceeds capacity to manage**
- **Building lacks air and wastewater pollution controls**

New York & Greenwood Lake Railway, Paterson, NJ

- Front view of the building after fire

Testimony of W. Douglas Buttrey
Vice Chairman of the Surface Transportation Board
395 E Street, SW; Washington, D.C. 20423; (202) 245-0220

Before the
Subcommittee on Railroads, Pipelines, and Hazardous Materials
Of the
House Committee on Transportation and Infrastructure
Hearing on Railroad-Owned Solid Waste Transload Facilities
10:00 A.M., October 16, 2007; 2167 Rayburn H.O.B.

Good morning Chairwoman Brown, Ranking Member Shuster, and Members of the Subcommittee.

My name is Douglas Buttrey. I have had the privilege to serve as a Member of the Surface Transportation Board since May 28, 2004, and currently I am the Board's Vice Chairman.

I appreciate the opportunity to appear before the Subcommittee today as you conduct this hearing on railroad-owned solid waste transload facilities. The Board's Chairman, Charles Nottingham, has submitted testimony which discusses key issues before the Board and summarizes recent significant Board decisions and actions. The Chairman's testimony covers everything that I would have said, accurately and in detail. Rather than duplicating coverage of the same topics, I will instead associate myself with and endorse the Chairman's formal, filed testimony.

I stand ready to respond to any questions the Committee may wish to address to me.

The following testimony respectfully submitted to Chairwoman
Corrine Brown

Submitted by Mayor Kathy Chasey
1320 Weekstown Road
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Written Document Submitted to the Honorable Corrine Brown, Chair US House Subcommittee on Railroads, Pipelines and Hazardous Materials

I wish to thank Chairwoman Corrine Brown and this subcommittee for allowing this hearing to support a Legislative fix to eliminate the 11-year loophole in the ICCTA regulations that allow the operations of unregulated solid 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 most people at that time in 2003. 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 and 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.

As 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 the State 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 procedure in place. Imagine my shock in finding out 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 picture me trying to explain to a resident who had to make an application to the Zoning Board for a variance for 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 that a half 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 possible 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 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 and was fined $199,000.00. According to DEP documents, he has frequently failed to comply with the conditions of his solid waste permit. The DEP finally denied his permit renewal application, terminated his exiting permit and revoked his authority to operate his solid waste facility in 2005, but he retains his hauling license. This same individual 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 from any other towns up to that point, we were very lucky. Because we are 100% Pinelands, we had the full weight of the Commission and the States Attorney Generals office to deal with the legal strategy along with our town solicitor and the Atlantic County legal staff. The fight took 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 in the lawsuit the railroad company filed in federal court regarding intergovernmental plans and "the Mayor's efforts to frustrate and block the project". Unlike any other town that has faced this issue, Mullica's story has a successful conclusion. U.S. District Court Judge Simandle granted a temporary injunction against construction of the waste facility in December of 2005, which was never appealed. The railroad withdrew their complaint this year and on March 26, 2007 the Judge signed a consent order permanently banning construction of a solid waste facility on this site. As an extra protection, Mullica Township and Atlantic County purchased an easement on this property running the length of the tracks 30 feet in.

I made a promise that I would continue to do what I could to protect other towns from going through the horrors of these unregulated sites. The towns seeking relief in the form of regulation where these exempted operations are concerned are not NIMBYS. We are not saying we do not 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. This is not about the railroad or the trucking industry; it is about a normally much regulated industry and what happens when those regulations are not enforced consistently. 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 under state and local control. 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 laws. Although there have been a few encouraging court rulings regarding this regulation recently they are local and always open to appeal. The number of towns that are grappling with this issue are growing daily and the outcry of their residents is becoming louder. I am convinced that the only solution is a legislative one. Give us the tools we need to insure the health and safety of our constituents, the ability to regulate solid waste operations equally on a State and local level.

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

Written Testimony of Brian X. Foley, Supervisor of the Town of Brookhaven, New York

Before the Subcommittee on Railroad, Pipelines, and Hazardous Materials Committee on Transportation and Infrastructure United States House of Representatives

October 11, 2007

Chairwoman Brown, Ranking Member Shuster, honorable members of the Committee, my name is Brian Foley and I am the elected Supervisor of the Town of Brookhaven, New York. Brookhaven is a town with approximately 480,000 people located in central Long Island. In my capacity as Supervisor I am on the front lines of land use regulation and enforcement. Land use, zoning and environmental controls are critical tools in preserving the local environment and quality of life of the taxpayers of my town.

I appreciate the committee allowing me to speak on the important topic of railroad preemption and its effect on local municipalities. As I will describe shortly, the current loophole in law has allowed a land owner in our town to wreak environmental havoc under the alleged shield of railroad preemption. I have been advised that in many other localities local land use and environmental controls are being compromised by unscrupulous operators who illegitimately use the shroud of railroad preemption to open and operate waste transfer facilities.

The purpose of my testimony is to speak in favor of the legislation that has been proposed to close the loophole that has been used to try and avoid state and local controls for siting of waste facilities at rail yards.

I will supply the committee with local newspaper accounts that describe in detail what has come to pass in the Town of Brookhaven but as the saying goes, "a picture is worth a thousand words." I have with me enlarged aerial photographs of the 28-acre site in the Town of Brookhaven. As you can see from this photo, in July, 2007, prior to the owner of the property invoking the shield of railroad preemption, this was a pristine 28-acre parcel of land. Now 18 acres of this site have been clear-cut and newspaper accounts indicate that over 1,000 cubic yards of sand were mined without any environmental review under the National Environmental Policy Act or New York's State Environmental Quality Review Act.

That is correct, no level of government, federal, state or local have given any environmental approval for this work.

The owners of this property undertook this large-scale construction project, clear-cutting 18 acres of trees and mining thousands of cubic yards of sand based on their representations to the state and local government that they qualified for federal preemption because they were a railroad facility. They represented that they were exempt from local regulations and subject to the exclusive jurisdiction of the federal Surface Transportation Bureau ("STB"). Because of the uncertainty that currently exists in this area of the law, those representations were initially deemed to be credible. Yet, it was recently learned that they had never submitted their actions to the jurisdiction of the STB. Further a September 25, 2007 decision of the STB warned the owner not to commence rail construction activities at the site without STB approval. As a result of my Town's inquiry and the articles in Newsday, on October 4, 2007 the STB issued a letter to the rail carrier now involved directing then to stop all activities at the site and explain their conduct to the STB. More recently, we have received correspondence from representatives of the owner that leads us to believe that they intend to use this property as a solid waste transfer facility.

Since I anticipate that Brookhaven may be engaged in some sort of litigation or adversarial proceeding with the owners and operators of this property, I want to emphasize our position that these individuals have not followed the appropriate procedures to qualify for federal preemption and for that the owners and operators of this property will be held responsible for their crimes against the environment.
However, the current climate of uncertainty that exists in this area has emboldened unscrupulous operators in this area and led to the situation that the Town of Brookhaven now confronts. This uncertainty about the scope of federal preemption has allowed alleged railroad operators to claim that federal statute preempts all state and local laws that might apply to the construction of rail facilities, no matter how attenuated they are from actual railroad operations.

On Long Island, the railroad has traditionally meant our commuter railroad, the Long Island Railroad that brings Brookhaven residents into New York City for employment. We never envisioned that a company that adjoins a railroad and constructs a few hundred feet of railroad track could morph itself into a waste disposal facility that was free from all federal, state and local environmental review and permitting requirements.
Before I describe the role of these levels of government, we should be clear about what is at stake here and the significance of waste processing facilities. These facilities process garbage: usually either municipal solid waste or construction and demolition debris. These materials contain contaminants that can be harmful to the environment. For that reason, state and local governments have adopted comprehensive regulations that govern the way waste can be processed and often impose ongoing monitoring requirements to ensure that the waste disposal process does not cause harm to our environment.

Solid waste has traditionally been in the domain of state and local government. While Congress has adopted a legal framework for regulating solid waste, the federal government has never assumed a large role in this area and as a result there a very few

federal regulations that deal with solid waste transfer stations. Regulation in this area has been left to state and local governments, which have ably filled this regulatory gap.

For example, in the Town of Brookhaven, we have regulations that govern, among other things, the zoning and site plans for waste transfer facilities and attempt to ensure that they are sited in appropriate places and adequate mitigation measures are taken. Our role is complemented by the role of New York State and its so-called 360 regulations that review the environmental impacts of the operations of a transfer station.

In the case of waste facilities that invoke railroad preemption, they claim to be governed by the STB, a federal agency that does not have any type of permit application or site selection process. Additionally, the STB does not have the ability to conduct meaningful environmental or health impact review or to ensure compliance with engineering or design standards. As I understand it, the STB's staff is limited to no more that 150 employees by appropriation and only a small number of those employees are responsible for conducting environmental reviews.

What has resulted is a regulatory gap that I don't believe was ever really intended. A gap that creates a situation where no level of government is policing the activities of facilities that by their very nature pose significant risks to our environment. Given the risks to the environment posed by this regulatory gap, immediate and decisive actions is needed by Congress.

CONCLUSION

Given the scarce resources of the federal government in this area and the limited reach of federal laws involving waste transfer facilities, there must be a role for state and local government in the area of regulating waste transfer facilities.

The mere fact that owners and operators in these situations claim to be rail related facilities, or in some cases allegedly operate as short line railroads, should not establish that they are rail carriers or that they are integrally related to rail operations so as to invoke federal preemption. In almost all of the cases I have seen or heard of, including the situation that has evolved in my town, the rail activity is merely secondary or incidental to the primary business, which is the processing and storage of solid waste.

For that reason, I would respectfully urge you to adopt an amendment to the Interstate Commerce Commission Termination Act to provide that rail facilities that process solid waste are not entitled to federal preemption.

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Testimony of Robert W. Jones, III
New England Transrail, LLC

Hearing on "Railroad-Owned Solid Waste Transload Facilities"

House Transportation and Infrastructure Committee
Subcommittee on Railroads, Pipelines and Hazardous Materials

October 11, 2007

Chairman Brown, Ranking Member Shuster, Members of the Subcommittee, my name is Rob Jones. I am a managing member of New England Transrail, LLC, and I am very pleased to have the opportunity to testify at today's hearing. Thank you for inviting me to appear.

New England Transrail is a company headquartered in Clifton, New Jersey. We have proposed to build a state-of-the-art multi-commodity transloading facility, and to use the current best management practices for the operation of that facility. We also petitioned the Surface Transportation Board ("STB") for authority to acquire and rehabilitate existing track, construct new track, and to operate as a rail carrier in Wilmington, Mass.

We are well aware of the problems that have arisen at some solid waste transloading facilities, specifically those located not too far from my own home in New Jersey. We have tried to learn from those experiences and we have focused a great deal of time and resources on figuring out how to design and operate the NET facility in a way that minimizes those problems.

We have also followed the efforts of some in Congress to draw attention to those problems through legislation, and we appreciate the good intentions behind that work.

Perhaps the biggest contribution I can make to the Subcommittee's examination today of the issue of railroad-owned solid waste transloading facilities is to explain the effort we have made to address the legal and practical issues. The benefit of that analysis may be especially useful if the Committee considers taking up legislation in this area.

First however, for those Members who may be unfamiliar with the concept of "transloading," it may be helpful if I describe what transloading is, and very clearly and simply describe what we propose to do at the New England Transrail site.

What Is Transloading?

A transloading facility is one that transfers any of a variety of commodities – including solid waste – from one mode of transportation (i.e., a rail car) to another (i.e., a truck), or vice versa. True rail transloading facilities are beneficial to the environment and for commerce because they alleviate highway congestion and air pollution from large trucks, and allow a wide variety of commodities to be transported by rail in a safer and more fuel-efficient manner. Historically, the STB, and before that the Interstate Commerce Commission, has had exclusive jurisdiction over the construction and operation of transloading facilities operated by railroads, because these facilities are integral to the freight rail transportation network of the United States and are essential to interstate commerce.

Activities of New England Transrail, LLC

The concept of the proposed New England Transrail facility is what some refer to as the "last mile" connection to mainline rail transportation. As the members of this Committee know very well, the "last mile" is a frequent missing element for port infrastructure, highways, and sometimes even public transit. In our case, the area where we propose to operate near Wilmington is underserved by rail providers, and we hope to provide the missing link.

Our railroad operation will transport a variety of commodities, including sand, gravel, plastic resins, plastic pellets, liquids, rock salt, aggregates, woodchips, coal fly ash, soda ash, liquefied natural gas, corn sweeteners, vegetable oil, biofuels, coal, lumber, construction stone, sheet metal, structural steel, and cosmetic products. We will transport that rail traffic for about one mile – literally the "last mile" – then interchange it with connecting carriers that will continue moving the commodity to its final destination. Attached is a rendering of our proposed facility.

A portion of our proposed facility would be dedicated to the handling of municipal solid waste ("MSW") and construction and demolition debris ("C&D"). These are the commodities that the Committee is chiefly concerned about today. These are also the commodities that are most likely to lead to local health and safety concerns if the railroad and local enforcement officials do not work cooperatively to prevent such problems from arising. Undoubtedly, problems such as loose debris floating through the neighborhood or objectionable odors not properly contained to the facility are the kinds of problems that have led to today's hearing. However, the point I would like to make today is that nothing in the existing law prevents state and local authorities from addressing those problems, and others like them already.

The Legal and Practical Issues

The legislative efforts that have led to this hearing proceed from a mistaken premise about the existing law – the idea that the Board's exclusive jurisdiction prevents state and local regulatory authorities from enforcing state and local health and safety laws, creating a "regulatory gap." I am not a lawyer, but even to my untrained eye, there is no question that that is a mistaken interpretation of the existing law.

As you know, 49 U.S.C. Section 10501(b) gives the STB exclusive jurisdiction over "transportation by rail carriers" and the definition of "transportation" includes a "warehouse . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property" in interstate commerce. 49 U.S.C. Section 10102(9)(A). The definition also includes "services related to th[e] movement" of property, "including receipt, delivery, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange." That statute is not some recent aberration in the law. It was enacted about 100 years ago as part of the Hepburn Act. The statute has been the subject of numerous cases in the federal courts, including the U.S. Supreme Court, and there is no inconsistency in the decisions. If you read those cases, the law is very clear, and has been clear for a very long time. In the past, Congress has rejected attempts to repeal it or carve out exceptions.

As the STB and the federal courts have made clear, the STB's exclusive jurisdiction has limits. Specifically, state and local health and safety laws are not, and have never been, preempted. In addition, federal environmental laws must be harmonized with the jurisdiction of the Board. In fact, the only state and local laws that are clearly preempted are economic regulations and state or local siting, preclearance, or permitting requirements, that could be used to deny a railroad's ability to conduct its operations.

These principles are well-settled, have remained largely unchanged for over a century. They were recently confirmed by the STB in an Order issued in our proceeding (Finance Docket No. 34797). They were also confirmed by a recent decision of the U.S. Court of Appeals for the Third Circuit, in New York Susquehanna and Western Ry. Corp. v. Jackson, No. 07-1675 (3rd Cir. Sept. 4, 2007), in which the federal appeals court concluded that New Jersey's state health and safety regulations are not categorically preempted by the STB's jurisdiction.

In sum, the STB and the federal courts have repeatedly held that states retain their police powers to enforce state and local health and safety regulations, as long as those regulations do not unreasonably burden rail transportation in interstate commerce.

For example, if a local health inspector came by the facility to investigate neighborhood complaints about debris and loose trash blowing into the yards of nearby homes, that investigation and any subsequent remedial order is not preempted. If the city environmental authorities find that the facility has allowed motor oil to spill into nearby waterways, the ability to order corrective action is not preempted. If a state inspector found that a facility had no fire suppression equipment on site, state regulators have the ability to enforce state law.

The concerns expressed in the communities where these problems have appeared are legitimate. It is very unfortunate that a few operators of transloading facilities have argued an overbroad interpretation of existing law to preclude enforcement of local health and safety requirements. That interpretation is clearly incorrect, and has already been corrected by the courts.

The Federal government relies on the principle of preemption to prevent patchwork regulation by states and local authorities over activities – like rail transportation – that affect

interstate commerce. As I previously stated, the STB has "exclusive" jurisdiction over transportation by rail carriers, including related facilities and activities that are part of rail transportation. There is long-standing precedent holding that the Board's exclusive jurisdiction covers transloading operations, including facilities for transloading solid waste.

Enacting legislation to change the STB's jurisdiction for one specific commodity would overrule an unbroken line of more than 100 years of decisions by the Interstate Commerce Commission, the STB, and the Federal courts, including the U.S. Supreme Court. If Congress singles out one commodity for special treatment, it would open the door to similar legislation allowing complete local control over rail transportation of other commodities.

In the past, Members of Congress, and Members of this Committee, have been strong supporters in a bipartisan manner of federal preemption and the STB's exclusive jurisdiction over rail transportation of all commodities (for example, hazardous materials and nuclear waste). For example, in 2005 both Chairman Brown and Congressman LaTourette placed written comments in the STB docket in a case involving the District of Columbia's hazardous materials transportation ban. In that situation, the District singled out one type of commodity – certain hazardous materials transported by rail – and passed a law ordering that they be prohibited from entering the city. The views of Chairman Brown and Congressman LaTourette were ultimately affirmed by the U.S. Court of Appeals for the District of Columbia Circuit, which held that the local law was preempted. If hazardous materials cannot be singled out as a commodity for local control, why should non-hazardous solid waste be any different?

I make no excuse for the deplorable conditions at the other sites that have prompted today's hearing, and I want to make clear that our proposed facility has been designed from the ground up to address all of those potential problems in advance. And if problems do arise, we have pledged to work cooperatively with state and local authorities to correct them.

How can legitimate health, safety, and environmental issues be resolved? First, in addition to the full range of local health and safety regulations, solid waste transloading facilities are subject to federal environmental laws. In addition, when a new railroad project is proposed, the STB has the power to require the project to undergo a complete environmental review at the Federal level before it grants operational authority for that project. The STB's environmental review is comprehensive and provides multiple opportunities for state and local comment. The STB has the power to issue an order requiring the applicant to agree to mitigation conditions that will address any environmental concerns relating to the site or the operations of the facility. Those mitigation conditions can be enforced by local regulatory authorities. The STB also can condition its order on concurrence by the Environmental Protection Agency ("EPA") that the operation of the facility on the site poses no environmental danger.

Without a doubt, there have been some recent examples of inadequate facility management, inadequate environmental and safety stewardship, and just being a bad neighbor. Ultimately, however, we do not believe that changing federal law is the answer to cleaning up the problems at a few transloading facilities for one very simple reason. The power to clean up those facilities already exists at the state and local level. The reason it exists is because although the STB has preemption authority over *some* state rules and regulations, federal law *does not*

preempt state and local rules and regulations pertaining to the health and safety of the community.

It is not a deficiency of federal law that a solid waste transloading facility has not properly installed fire extinguishers and safety gear. It is not a deficiency of federal law that a facility has ignored local rules about free-floating debris, or state regulations prohibiting odors above a certain level. The way to fix these problems is not to overrule a long, unbroken line of legal decisions, including decisions of the U.S. Supreme Court, but to enforce existing law.

The first step to addressing these problems could be through stronger STB oversight of transloading facility compliance with state and local rules and regulations. We believe the STB fully understands the problem and is already committed to that goal. Second, local enforcement authorities need to have a better understanding of their legal rights to enforce health and safety laws. Finally, operators of these facilities need to recognize their responsibility to be good corporate citizens and to work with state and local authorities to reach reasonable accommodations. For example, in our case, we have publicly and formally notified Massachusetts authorities that we would comply with almost all of their regulations.

Conclusion

I would like to conclude my testimony by stressing the environmental benefits and efficiencies of solid waste transloading operations. The American Association of Railroads ("AAR") has said that "a single intermodal train can take up to 280 trucks (equivalent to more than 1,100 cars) off our highways. Trains carrying other types of freight can take up to 500 trucks off our highways."[1] Transportation by rail has emissions benefits as well. AAR has also cited estimates by the EPA that "for every ton mile, a typical truck emits roughly three times more nitrogen oxides and particulates than a locomotive."[2]

Those benefits will be fully realized when smaller railroad operations, like NET's, are able to construct and operate transloading facilities to handle that commodity in the "last mile" of the interstate rail network. The pending legislation will effectively prohibit companies like ours from doing that.

Again, thank you for the opportunity to appear before you today. I would be pleased to answer any questions you may have.

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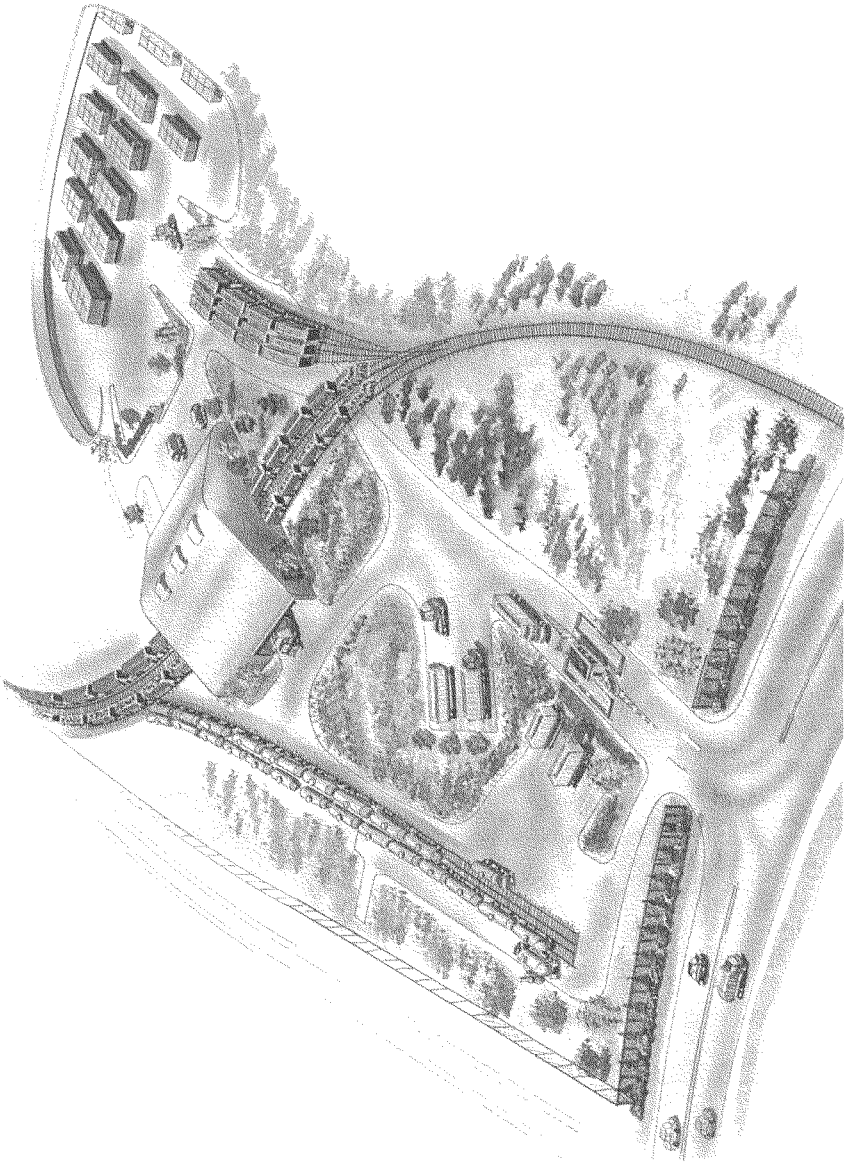
[1] American Association of Railroads, Railroads: Building a Cleaner Environment, June 2007 available at http://www.aar.org/getFile.asp?File_id=364
[2] Id.



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October 29, 2007

The Honorable Corrine Brown
Chairman
House Transportation and Infrastructure Subcommittee on
Railroads, Pipelines and Hazardous Materials
589 Ford House Office Building
Washington, DC 20515-6261

Dear Chairman Brown,

It was an honor and a privilege to be invited to share my views with you, Ranking Member Bill Shuster, and the members of the Subcommittee on the issue of railroad-owned solid waste transloading facilities. Thank you for inviting me to appear at the October 16 hearing, and for the opportunity to submit additional facts and comments into the official hearing record.

It is important that the Subcommittee understand that the proposed New England Transrail ("NET") facility in Wilmington, Massachusetts is not being designed as a facility primarily intended to transport municipal solid waste ("MSW"). NET's business plan contemplates handling a wide variety of commodities as a common carrier, of which waste will be just one. We want our business to be flexible enough to accommodate a fluctuation in demand for commodities, and it is therefore possible that the majority of our traffic will not be solid waste-related. Yet, the currently pending legislation that has been proposed on the issue of solid waste transloading facilities would impair our ability to open and operate our business.

We recognize that there are some Members who are very concerned that the Surface Transportation Board ("STB") has not demonstrated enough oversight over railroad-owned solid waste transloading facilities. That has certainly not been our experience, as our docket indicates. The docketed history of our proceeding should reassure those members in two ways: that the STB's current review standards are rigorous and the environmental reviews required pursuant to NEPA, as administered by the STB, are an effective means of exposing and handling all State and local health and safety concerns. Further, the STB has made it clear that if operating authority is ever granted in our proceeding, that such authority would be conditioned on NET's ongoing compliance with appropriate oversight, such as environmental monitoring, inspections, or other conditions.

As chairman Nottingham indicated in his October 16 testimony, there are three ways in which issues involving the handling of solid waste at facilities proposed to be located along new or existing rail lines come before the Board: (1) proposals to build a new line into a new service area; (2) proposals that involve a new carrier or a small Class III carrier seeking to acquire and operate an existing line; and (3) proposals to construct facilities ancillary to already-authorized rail lines. Number three (3), involving ancillary track and facilities, is the only of these that is not subject to the Board's licensing authority and is the method that has led to the problems that your Subcommittee heard about in the October 16 hearing. If all proposals were required to undergo one of the first two application processes, as NET is, each of the applicants would be subject to significant scrutiny by the Board.

NET's proposal is very different from the type of proposal over which the Board lacks full licensing authority. In our proceeding, the Board must ultimately determine that NET is a rail common carrier. Some of the facts that the Board has considered are that: (1) NET will transport multiple commodities; (2) NET will deliver services to multiple customers – indeed the entire shipping public; and (3) NET is not affiliated with any upstream or downstream waste hauling or waste disposal company. These facts all differentiate NET from the solid waste operators in New Jersey, Pennsylvania, and New York, and it is that category of operator that was the subject of the many objections voiced by the witnesses on Panel Two during the Subcommittee's hearing.[1]

NET's application process has been underway for almost three years and has included scores of filings and evidentiary exhibits, site visits by STB staff and a 12-hour public hearing in front of all staff and Board members in which over three dozen public participants weighed in with their views.

The Board's environmental review of the NET project is being conducted by an independent consulting/engineering firm with strong expertise in both environmental and rail transportation matters. While the firm works under the guidance and strict control of the STB (which monitors all communications between NET and the firm), the costs and expenses of the firm's work is paid for by NET—a cost that will exceed several hundred thousand dollars.

The NEPA review process has involved interviewing Federal, State and local officials regarding the project, taking into account laws, rules and regulations at all levels of government. STB staff has conducted site visits and public meetings regarding the proposal. The STB's consultants also have conducted numerous site visits and interviewed our engineers as well as State engineers and officials. Both the STB staff and its consultants have reviewed all impacts of the project on the surrounding community. After coming up with initial findings and conditions, the STB will then invite the Massachusetts Department of Environmental Protection to review its findings and recommend supplemental conditions for the STB to set forth in its report regarding compliance with health and safety requirements. NET must agree to accept and follow such mitigating conditions as may be imposed by the STB, on an ongoing basis, if it wishes to operate its facility.

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[1] It should be emphasized that in *all* of the municipalities represented on Panel Two, the proposed solid waste transfer facility *was unsuccessful* in obtaining operational authority from the STB. If anything, the testimony of those panel members demonstrates that the current system can work, and is presently working well.

Finally, as you know, there is pending legislation that proposes that rail transloading facilities should be allowed to handle only pre-containerized waste, and obtaining state or local approval will be required for the facility to handle non-containerized waste. I believe this restriction would be detrimental to the environment and will unduly burden rail transportation. The Subcommittee may wish to consider the following observations about enacting such a requirement:

- First, waste containerization is outdated and is being rapidly supplanted by the baling of waste to adequately mitigate potential adverse environmental impacts and to efficiently transport waste on the interstate rail network.
- Second, transporting waste solely in containers requires double handling of containers from the truck-to-container transfer station to the rail yard. Because many of these truck-to-container transfer stations were originally sited in low income and minority neighborhoods, those communities will be hardest hit be the additional truck traffic associated with double handling.
- Third, containers are heavy and can carry only 2/3 the load that can be carried in a gondola car of similar length. More - and heavier - trucks will be required to transport the containerized waste.
- Fourth, because of their height on a railcar, containers require higher clearances, which will prohibit their use on many rail routes in the Northeast.
- Fifth, the use of containers is less efficient, from a rail transportation perspective, because containers do not lend themselves to easy 'backhauls' of other materials and container cars must be returned empty, placing strains on rolling stock equipment shortages and making railroads less competitive against long-haul trucks that extensively use backhauls.

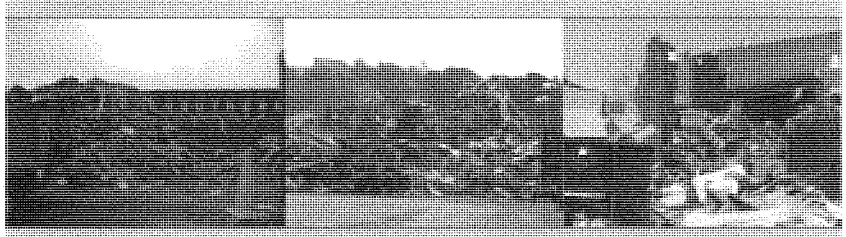
Once again, thank you for inviting me to testify and for including this statement as part of the record.

Sincerely,

Robert W. Jones

TESTIMONY of THOMAS MARTURANO

New Jersey Meadowlands Commission
Director of Natural Resources and Solid Waste



Presented to the:
House Subcommittee on Railroads, Pipelines, and Hazardous Materials

TESTIMONY OF THOMAS MARTURANO

New Jersey Meadowlands Commission
Director of Natural Resources and Solid Waste

Testimony Presented October 11, 2007

First, I would like to thank the Committee for affording the New Jersey Meadowlands Commission an opportunity to address this critical issue. I am a professional engineer involved in the solid waste field my entire life. I have spent the past 20 years managing solid waste activities in one of the most ecologically sensitive areas in New Jersey. Some, including myself, have said that garbage is my life. I am proud to be one of the countless State employees that manages solid waste to ensure that it is handled in an environmentally secure manner.

The solid waste industry has morphed from the old days when almost every town had its own dump, to now, when large based regional landfill or resource recovery facilities process our waste in an environmentally responsible manner. This evolution has taken place at the state or local level because ultimately, how much waste is generated per capita and where and how it is disposed of is a local decision. Recycling has profoundly impacted the per capita disposal rate and it has no federal counterpart. In fact, the only real federal regulation of most solid waste has to do with the large regional landfills, and nothing pertaining to the handling, processing, or transfer of the waste.

The fact is, most of the people in this room pull their solid waste on the curb once or twice a week and it magically disappears. You do not give it a second thought because you know that some local government official knows where it is going and has planned for its disposal in an environmentally safe manner. There is no danger of you being named as a potential responsible party. This system works well, it is efficient and everyone involved gets to sleep at night.

Approximately five years ago, this system started to unravel. In a two mile stretch of track, five separate open dumps began operating. When most people look at the photos of these rail solid waste facilities, they think that they are either 50 years old or that they are fake. It is the very trouble to most people in today's enlightened environmental atmosphere that anyone could think that dumping thousands of tons of waste material on the ground could be acceptable.

These open dumps were located in close proximity to warehouses, motels, industries, and suburban residents that had relied on the presence of consistent regulations to protect their investment in their property. Zero consideration was given to the local infrastructure's ability to service these facilities. Yet, when some caught fire, local first responders were called. We tried to reason with the operators to no avail.

The NJMC and NJDEP were left with no choice but to try and regulate the facilities through litigation. It is only because we are a regional planning agency that we have been moderately successful. The communities where you will find these facilities do not have the resources to protect their residents in the courts. Ultimately, we were successful in getting structures

back so that at least the waste was being dumped within a building. Unfortunately, because the railroad still insisted that it was irreversible to go one in the state, the structures were built without acknowledgement of the International Building Code. They did this even though they knew that there had been several fires in the open dumps. If there had been a major fire in one of the buildings, any of the firemen would know that the building code requires all buildings of that size to have sprinkler systems which protect the structure allowing first responders the time necessary to ensure that no one remained inside. No such protection existed, and there were no defined fire exits for the workers inside. This disaster in waiting could be avoided with a regulated facility.

I realize that in the greater scheme of things before Congress, the handling of solid waste is relatively insignificant, and that is exactly the point. The proper regulation of solid waste cannot be done from afar. It is a daily, on-the-ground endeavor. For the welfare of the people immediately surrounding the facility and our environment, it has to be done.

Solid waste is not like coal, lumber, stone or sand. When these items show up at a rail terminal facility, everyone knows exactly what is about to be off-loaded or dumped from the delivery trucks. The inspector of such a facility would see the same commodity being unloaded and loaded with remarkably consistency. At a solid waste transload facility, not only is each day's material different, but each load is different as well. Also, unlike the others, no one, not the hauler, facility operator nor the railroad knows what is about to be dumped on the tipping floor. In a regulated facility, provisions are made for loads which are unidentifiable or contain hazardous wastes. Likewise, all operations manual is prepared so that all employees know what to do and who to call in the event of a unacceptable load. I could go on and on about what I have witnessed being dumped from a garbage truck. Suffice it to say that the reason I will do this after all these years is the beauty and challenge that comes from solid waste: infinite variability. It is a game of cat and mouse that can be played out at any time a generator or hauler tries to knowingly or unknowingly, circumvention by the regulators, and it is our job to prevent it.

We are not opposed to the movement of solid waste by train. In fact, the NJMC has even raised proposals to move waste by barge, truck and rail. Furthermore, the NJMC was one of the first planning agencies to specifically create an intermodal zone as part of our Master Plan. We just want the facilities to be properly permitted and regulated in an on-going basis so as to not negatively impact the environment or adjacent properties. As I think you are beginning to realize, this really has nothing to do with the rights of railroads. Those rights are not being questioned. Rather this is about the long history of how solid waste is handled in our country and whether we can afford to allow a new way of doing business in which nobody is watching.

Ultimately, the success of a private solid waste facility is determined by its economics. As you can imagine with five facilities within a miles of each other, the competition among them for waste is intense. Now, suppose that a load of demolition from an interior renovation shows up at a rail facility. From the outside, the load appears to be full of carpet, ceiling tiles and sheetrock. Once dumped, it becomes apparent that the center of the load is composed of fluorescent light bulbs, which have now broken. What happens next? The operator is not equipped to segregate the waste and transport the waste by truck. Nor is there money available to cover the cost of transporting the bulbs to a hazardous waste facility. My guess is that since there is no enforcement risk or risk of losing the non-exclusive facility permit, the waste is loaded into the train car and no records exist that even indicate that the bulbs were there. Neither the rail company nor the receiving landfill will know that the waste they accept was more than just demolition waste. The only loser in this scenario is the environment in several states. If the facility were regulated and permitted, this scenario is much less likely because it would be subject to fines and possible revocation of the operating license. The risk outweighs any short term financial gain. Not so with a facility that, in effect, regulates itself.

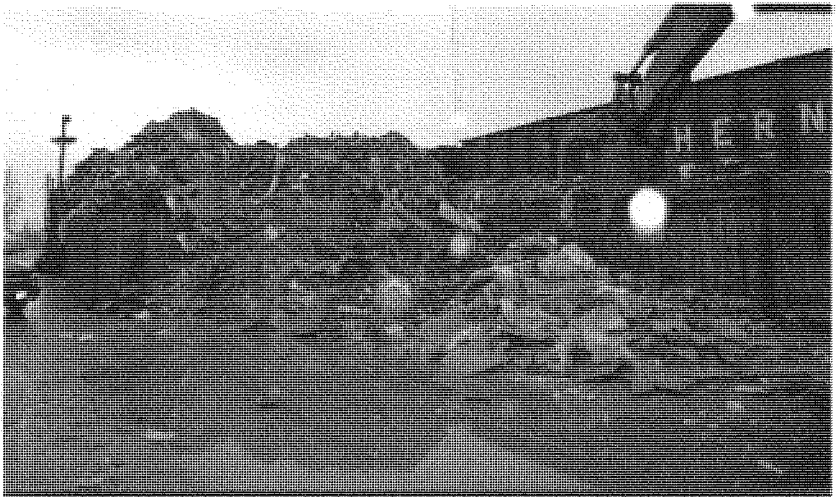
Finally, I would like to comment on the circumstances of a regulated versus non-regulated solid waste transfer facility. The railroads have said that their main objection to being regulated at the local level is that the economic consequences of regulation will make the facility non-competitive. This conclusion is simply not supported by the facts. Within the two miles that separate the five facilities lies a fully permitted solid waste transfer station, which also accepts construction and demolition waste and sends it to landfills in the West by truck. The only significant difference between this facility and a permitted rail facility is that in one case the waste travels to the western landfill by truck carrying 20 to 22 tons and in the other it travels in 100-ton rail cars. Both sides in this debate stipulate that it is more economical to ship waste by rail versus a truck. Therefore, assuming that the cost to build a fully permitted transfer station versus a fully permitted transload facility are equal, the transload will always be the cheaper alternative for delivering the waste to a landfill.

We are presented with a unique opportunity to resolve this problem before solid waste processors across the country decide to get off the fence and join the small but growing number on the Northeast who are trying to establish this new unregulated way of doing business. After all, why subject to the bother of following rules when you do not have to? Hopefully, this issue can be resolved with a legislative clarification whereby rail site solid waste facilities will be permitted like all other facilities. Thus, other areas of the country would be prevented from having to suffer what we have.

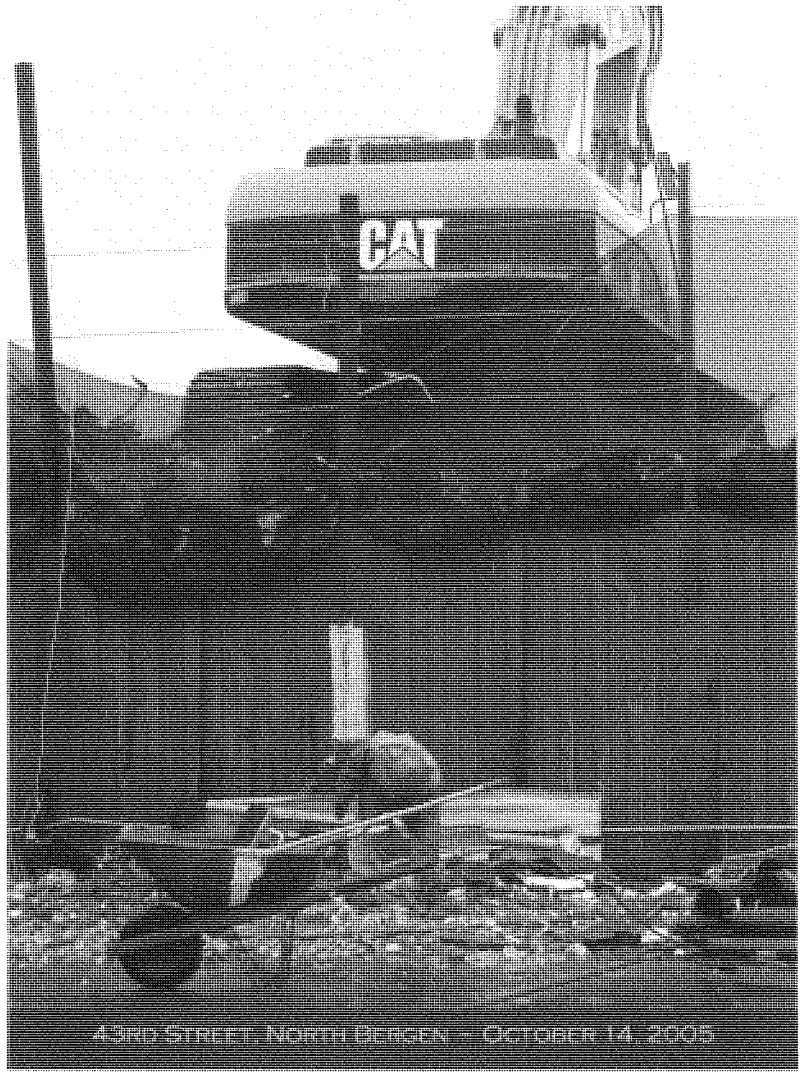
Thank you very much.

APPENDIX ONE:

Survey of Under-regulated Solid Waste Processing Operations


43RD STREET, NORTH BERGEN – DECEMBER 10, 2004

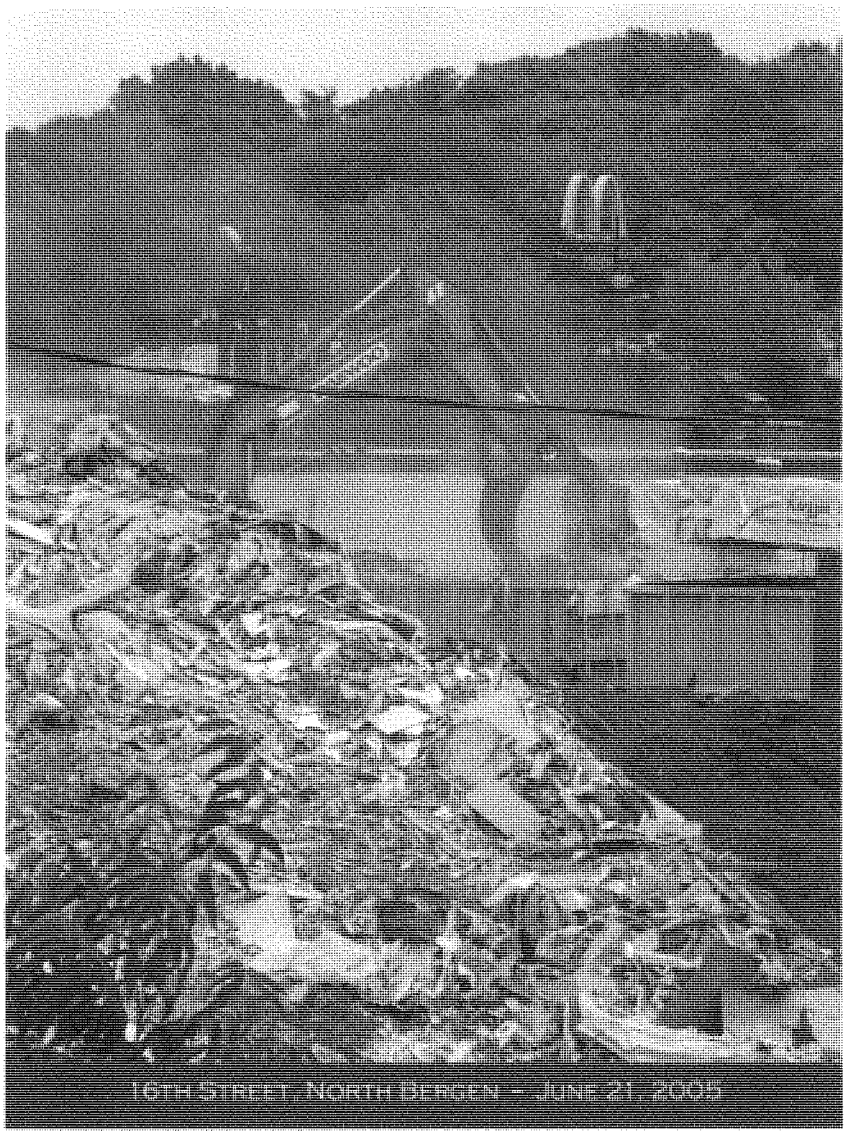
43RD STREET, NORTH BERGEN – APRIL 18, 2005



43RD STREET, NORTH BERGEN – OCTOBER 14, 2005

16th Street, North Bergen – December 10, 2004

16th Street, North Bergen – January 26, 2005



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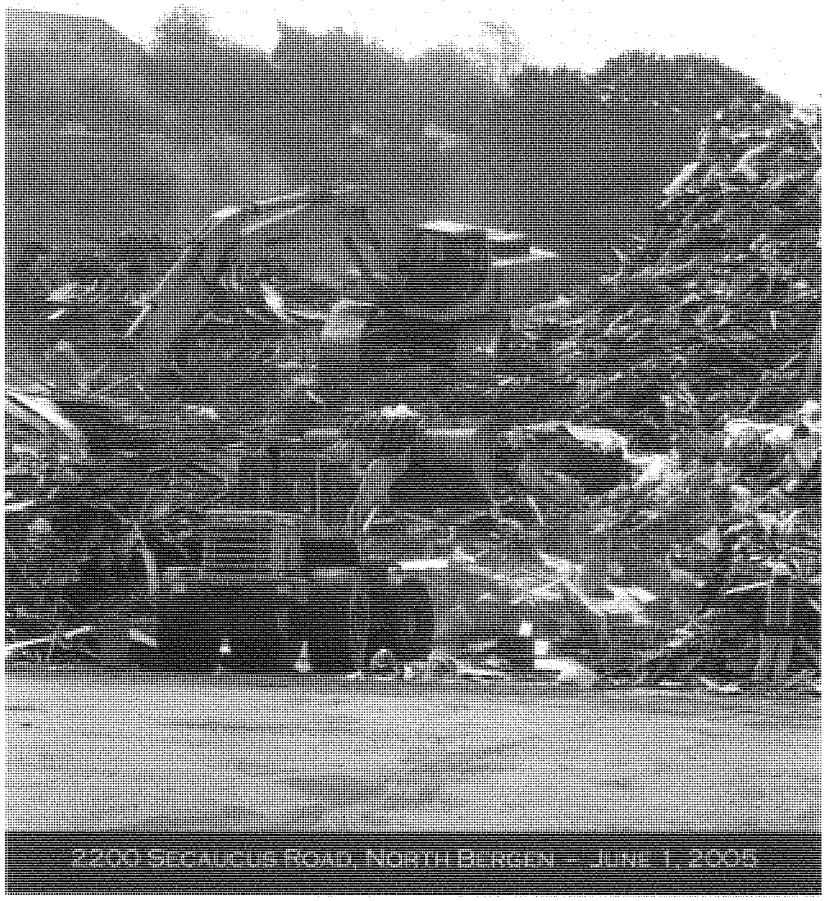

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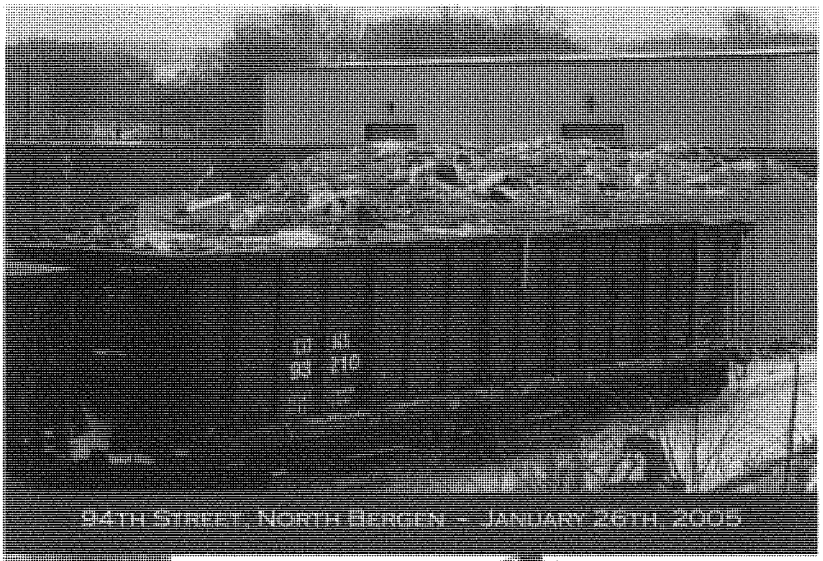
2300 Secaucus Road, North Bergen – June 15, 2005
2300 Secaucus Road, North Bergen – October 14, 2005



94th Street, North Bergen – January 26th, 2005

94th Street, North Bergen – July 11, 2005

94th Street, North Bergen – November 11, 2005

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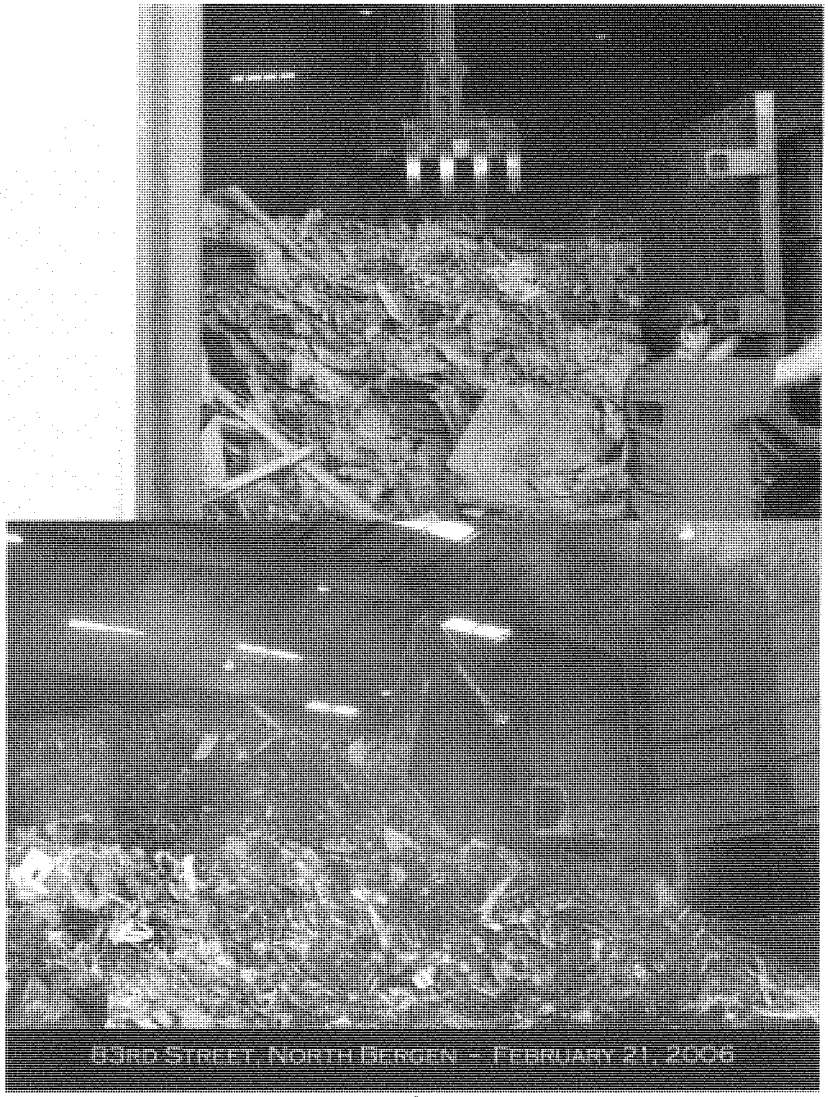

83rd Street, North Bergen – February 21, 2006

BAIRD STREET, NORTH BERGEN – OCTOBER 2, 2007

APPENDIX TWO.

Sampling of News Coverage

Court opens door to waste transfer oversight

September 3, 2007 | The Record | By [illegible]

A federal appeals panel may have opened the door Tuesday for greater state environmental and safety regulation over North Bergen and others where large amounts of waste are transferred from truck to train.

The 3rd Circuit Court of Appeals said such regulation proposed by New Jersey should be examined to see if it violates federal laws that exempt railroads from a great deal of local and state oversight.

At issue are five North Bergen loading facilities owned by the New York Susquehanna and Western Railroad Corp. where state officials say debris was piled as high as 25 feet in one case.

State officials argued the sites posed health, environmental and fire risks to neighbors, and noxious samples collected at three facilities showed excess levels of lead, arsenic, mercury and copper.

The case will be sent back to U.S. District Judge Katharine S. Hayden, who ruled in February that the state Department of Environmental Protection and the Meadowlands Commission were unable to impose their regulations on the loading facilities.

The appellate panel said Hayden's ruling was mistaken.

Still, the panel said the state regulations may still be found to be in violation of federal law.

"It may turn out that some of the regulations are preempted, but it would be premature to conclude that ... that might not be a more developed record," the panel wrote.

The panel found that the state's continuous fine of $2,000 a day was not unreasonable.

The panel said Hayden was right in saying that the state could not dictate how the facility is operated if it caused a significant delay. But the panel said Hayden did not show how the state's demands were unreasonable in this case.

A spokesman for the Meadowlands Commission said the agency was pleased with the ruling.

"It is important that consistent rules for managing solid waste remain intact and that residents are not harmed by an uneven observance of protections of health, safety and our environment," said Christopher Dale.

Nathan Fenno, the railroad's president, said he hoped Hayden would be able to resolve the case when she continued it again.

New Jersey's campaign against the stations has been fought on many fronts, including legislation sponsored by Democratic Reps. Frank Lautenberg and Bob Menendez that would subject the railroad to state and local regulation.

Other efforts have failed. In July, the federal Surface Transportation Board ruled 3-1 that local environmental regulations cannot preempt federal rules that govern railways.

Silent shown

State closes three waste transfer sites

[illegible] | Staff Writer | Bergen Dispatch | [illegible]

If you're keeping score in the ongoing battle between the government and the operators of railroad solid waste transfer stations in North Bergen, some run for the ends of the government.

Last week, the New Jersey State Department of Community Affairs closed three solid waste transfer stations in the township, citing a lack of the operators as the reason for the immediate closures.

The stations are on Bird Street, April Street and Jared Street and Paterson Plank Road.

The action is just the latest in a series of battles between landowners and the New York Susquehanna & Western Railroad Corp., which owns and operates the rail line that has leased its property to the waste handling companies.

The solid waste has been collected at different construction sites throughout northern New Jersey, then brought to North Bergen, where it is then placed in rail cars to be shipped to sites outside of the state.

However, there is no real treatment or storage involved in the solid waste transfer in the North Bergen companies, thus the cause for the concern. Also, the waste is not limited to any contaminants or toxins and could be built it is able to be shipped via the railroad.

The NYS&W has maintained all along that it doesn't have to abide by any local or state regulations, because it is protected by a federal law, enforced by the STB, that supersedes transportation rules and ordinances by railroads.

Federal laws cannot be superseded by legislation

Legislators, including Gov. Jon Corzine and U.S. Senators Robert Menendez and Frank Lautenberg, have all gone on record to say the federal law is outdated and does not protect the citizens who reside near the waste transfer stations from dangerous pollutants and air quality issues.

The officials, legislators and environmental advocates all agree that allowing the waste to pile up poses serious environmental and health

hazards to the neighboring areas and should be subjected to some sort of state regulations.

In the past, both the local Superior Court and state Supreme Court have said that the existing federal railroad preemption laws prevent these things from not only allowing the state officials to continue to do business in North Bergen, but they let to additional chemicals being built and operated.

For now, the state DCA has stopped in with their newest findings and shut down the three existing chemicals in North Bergen citing the safety standards.

"It's not safe for the occupants of the building," said Bill Connolly, the state director of the Division of Jobs and Standards, a subdivision of the state DCA. "It's not safe for the firefighters who might be called to fight a fire at the building, and it's not safe for the community."

Thomas O'Neil, a spokesman for the NYSBW, maintains that shutting down the seven transfer stations will only cause further problems in the area. Without the use of the railway, the railroad contends the trucks now being used will include:

While the trucks were removing the chemicals last week, there was significantly less traffic on the railroad yard.

"Our trains have, but I guess we unexpectedly got away," O'Neil said. "What this means for the region is just that instead of moving goods by rails in the most environmentally friendly way, it will just be trucks traversing the highways in the area."

Will appeal case, officials say

Two years ago, then-acting City Manager Cody asked to have the NYSBW a permit fee, either for the numerous health and environmental infractions. He ordered the railroad to comply with regulations regulated by the state Department of Environmental Protection.

In turn, the NYSBW sued the state DEP, saying that the proposed fees levied by the state would put the railroad out of business and again used the case prior said federal railroad law as leverage in the case.

Last February, a federal judge ruled in favor of the NYSBW, dismissing the fees earlier levied and ruling that the federal law takes precedence over the state environmental regulations.

Regarding the most recent shutdown, O'Neil said that the NYSBW will already filed an appeal to federal court, asking for an injunction on the shutdown.

Shut down a local favorite

North Bergen Mayor Nicholas Sacco, who is also the state senator in the grand District, applauded the efforts of the state DCA.

"I think that it's great that the state Department of Community Affairs took the jurisdiction in this matter," Sacco said. "It's very important for North Bergen. We couldn't accomplish anything alone, but I think we were able to shed some light on the problem. When the state realized that it was a problem nationwide, not just in North Bergen, the state DCA got involved. I'm grateful that they took the lead."

Sacco said that the township of North Bergen couldn't fight the battle against the multi-billion dollars alone.

"It would have become a financial burden for us in terms of a legal battle," Sacco said. "I know that the state DCA has brought more light on the problem nationally and it's a very large problem. Maybe Congress will now address it, knowing that the law that prevents the operation belongs in the 19th Century and is not appropriate now."

Sacco was asked if there could be a happy medium reached between the railroads and the government.

"There could be, if these operations are controlled properly," Sacco said. "But then would have to be entirely enclosed and there would be more enclosures in the residents.

N.J. seeks funds for stricter regulations of hazardous waters

Associated Press · The Bergen Sun · Feb 17, 1991 · 3 min read

New Jersey officials urged the federal Surface Transportation Board on Thursday to make small facilities created by railroads meet the same environmental, health and safety rules as other truck facilities.

Pat Lawson for the railroad that owns several sites in North Bergen that were fined $2.5 million for violations, argued that New Jersey is not legal but there and urged the federal regulators not to make matters worse for the state.

"The state of New Jersey has an agenda ... and this agenda was to make these facilities shut," said G. Paul Bhatia, lawyer for the New York, Susquehanna & Western Railway Corp.

NYSBW runs five North Bergen facilities where construction waste and contaminated soil from polluted sites are transferred from trucks onto railroad cars for shipment to out-of-state landfills.

The company convinced a U.S. District Court judge in February that federal laws designed to promote interstate commerce from rail to truck yard, land, have made railroads exempt from state solid waste regulations, and the case continued.

The state has appealed, urging the federal commission applies to transportation activities, not truck processing.

"No one in my state has ever said why a railroad can't comply with basic health and safety rules," said David A. Weaver, a Washington lawyer who is serving as special railroad counsel to New Jersey. "Is there a transportation reason they don't have to do that?"

The issue is playing out in other places around the country, and within New Jersey, where environmentalists have also complained about truck facilities on railroad property in Kearny, Secaucus and Paterson.

Sen. Frank Lautenberg, D-N.J., heads the Senate subcommittee that

regulate surface transportation and opened the hearing by urging the federal board to take action.

"Transportation waste facilities, whether on a rail line or not, are bad for our communities," Lautenberg said in video showed points out dozens of piles of debris at NYSWA sites.

Thursday's hearing, hosted by the transportation board visited into New Jersey's compliance as well as a proposed for a transfer station in Massachusetts.

Moses urged the board not to take any action before New Jersey's appeal is decided and complained that the process Lautenberg had shown were not of their, he said there are no more piles of waste at the facilities.

He also said the sites serve a purpose, since landfill space is scarce and it would be far worse for the transportation system for trucks carrying the waste to drive hundreds of miles to landfills in far away as Ohio and Quebec.

He also said that carbon filed with waste amount for about 40 percent of NYSWA's traffic.

The board chairman, Charles "Big" Montgomery, said no recreation action was taken, but the issue would be a "hot potato."

He and other board members were sympathetic to complaints that a company should not be able to simply buy an old railroad siding and will transfer railroads outside local regulations.

The federal agency also has limited staff, leaving two board members to talk witnesses about the possibility of empowering states to enforce rules, with any disputes settled by the board.

Much of the hearing focused on the differences between "transloading" materials from trucks to railcars, which most witnesses conceded would be exempt from regulation, and truly "processing" that might not be.

Bergalore review of waste stations

Mitchell Ho, Staff Writer, Bergen Record Tribune

Many regular stations like the one proposed for Fredrick Township should be subject to state and local review to ensure they don't pose an environmental threat. Unfortunately, that's not the case today if the station is approved by a railroad. Our federal and state representatives should press for legislation to require community review of any solid waste storage facility.

The standard against the proposed station — to be built along a rail line on Route 23 in an Ohio railroad that will lease the property — has already begun and should get harder. The Monmouth County Board of Freeholders is considering a resolution opposing the facility. State Sen. Ellen Karcher, D-Monmouth, said the station "would adversely affect the health and well-being of local residents." Karcher should take the lead in Trenton to guarantee public input whenever waste transfer facilities are proposed.

Railroads escape state permitting requirements for waste stations because of a loophole in federal law. Rep. Frank Pallone Jr., along with Sens. Robert Menendez and Frank Lautenberg, all D-N.J., have introduced legislation to close that loophole and prevent railroads from moving waste without regulation. They need to step up their efforts to get the legislation passed.

The state Department of Environmental Protection has requested information about how the railroad would operate the facility and what materials would be handled. It's a request it should have to ask.

Karcher said Thursday that Ohio also "have a broken track record for increasing air, water and ground pollution." Throughout the application process, would place the burden on the railroad to demonstrate that its operations — throwing truckloads of solid waste — would not cause any environmental harm in Freehold Township or the region.

With precious little landfill space, New Jersey's solid waste has to go somewhere. Rail transportation may be a good way to get it there. It does keep long-haul trucks off the road. But the siting need has to be the right place. The site, in the heart of a population area already coping with traffic problems, doesn't appear to measure up.

N.J. lawsuit prevent his regulate railway transfer

Anthony Ho, Staff Writer, The Record Tribune

A railway that has created garbage heaps in Hudson County, resulting, a/k/a stations high or low to operate with no oversight by any authorities in New Jersey. Not the city of North Bergen where the trash mountains are located, not the county, not the state — no one affected by the dumps has the power to regulate them under a lawsuit reaching federal court order last week.

Literally, that's rubbish.

The New York Susquehanna & Western Railway Corp. has created a string of garbage piles along a freeside stretch of rail line in North Bergen. The railway uses the sites as transfer stations for some of the hundreds of thousands of tons of construction and demolition debris that is shipped each year to out-of-state landfills.

The trash poses health, environmental and fire danger to residents, the location sites rubble mountains leaching into the ecologically sensitive Meadowlands. Elevated levels of lead, arsenic, mercury and copper have been found in water wells of those trash sites.

New Jersey has rightfully tried to regulate these trash mountains for the protection of citizens and the environment. But a federal judge ruled Wednesday the state has no such authority. The railway is exempt from state oversight under federal laws that give railroads special powers, the judge ruled.

The state plans to appeal, as it should. New Jersey, like all states, has a fundamental need to regulate waste within its borders. Fighting for court recognition of that right is worth the legal costs this battle entails.

There is, however, a less expensive and more direct way around the claim. Congress or another federal authority needs to clarify that the special

rights granted to railroads don't extend to the waste transfer business.

Sen. Frank Lautenberg introduced a bill two years ago to affirm state rights to regulate the environmental and health impacts of solid waste transfer operations by railroads. The office says he plans to reintroduce the measure soon. But they say the option only would be in reserve in order to the state effort by the Surface Transportation Board. The senator is backing the board, they said. The senator should continue to make this a priority.

NJDEP operates regulation to environment. It points to improvements it has made since the controversy began in 2005. The railway has for example built structures around the trash heaps that may reduce the risks of air pollution from flying debris.

But the railway made improvements under state pressure. Now that the court has ruled for state's protection, what incentive does NJDEP have to compel such protections?

Lawyers, both of the owners of waste companies, took broader exceptions. They worry about the fate of their federal protections. No one is trying to make the transfer stations regard rail.

Now, some doubt I want to regulate railroads. It wants to regulate trash. It wants and recognize the longstanding right of states, and not breach of the federal government more stay in.

Officials: transfer stations 'unsuitable'

[illegible]

NEWARK — A state official testified Tuesday that the proposed waste transfer stations in the New York Susquehanna & Western Railway City in building in North Bergen failed to comply with basic building, safety and environmental requirements.

The unpaved "transload" facilities, which have not received zoning and planning approvals, lack sprinkler systems, restrooms and such basic emergency equipment as eye washes in the event a worker is exposed to dust, said Thomas R. Marturano, director of solid waste and natural resources for the New Jersey Meadowlands Commission.

"It's unconscionable to be inside these buildings in such unsafe conditions," Marturano testified during the second day of a hearing before U.S. District Judge Katherine S. Hayden.

The judge continued the hearing until March but directed the railroad to work with the state to address concerns about the transfer facilities, where tons of construction and demolition debris and containerized solid are delivered by truck to be loaded onto rail cars for out-of-state disposal.

Hit with a $25 million fine for violating state regulations governing the design, construction and operation of rail transload facilities, NJDEP and the state Department of Environmental Protection and the Meadowlands Commission in August, preceding the DEP regulations are preempted by federal law.

The judge temporarily blocked the state from enforcing the regulations and ordering the fines. She allowed the railroad and its hauling contractors to continue operating the transfer stations. NJDEP moved to enforce four "open air" dumps with unclosed facilities that are exposed to overall dust, paper, debris and wastewater runoff.

But Marturano said the new facilities are fraught with problems.

In addition to failing to comply with building and safety codes, he said, the scales to weigh trucks were not located properly and would lead to dangerous backups along streets the owners the trucks.

"Traffic is a huge issue," he said, adding there's been no assessment of the effects of hundreds of daily truck trips on local roads.

Marturano said the sites were being operated by solid waste haulers who didn't have to apply for licenses or meet the more rigorous transfer station.

He also asserted that the railroad's security, including "dust control" measures, intended to prevent dangerous accumulations of combustible dust, which have accompanied of transfer sites, have led to illegal dumping in the facilities.

Thomas, who said the sites closed only when dump their loads, in deserted parts of the Meadowlands, he said.

Hayden has been pushing the parties to settle. She noted that any decision she made would likely be appealed by the losing party, take years to resolve and not serve the people of New Jersey now.

Finding that the railroad, which operates any sides of tracks in New Jersey, New York and Pennsylvania, has made progress in improving its facilities, she directed it to continue the dialogue with the state and identify which state regulations it intends to obey and which it won't.

She said the state might initiate a request by the state to have the rail line post a bond to cover its potential fines and asked both sides to support a bid amount. The judge also said she wants to see a traffic study done.

Paul Mosley, a NJDEP attorney, said the rail line reports to track the facilities and be substantial compliance by the time the parties return to court in March.

Derailing a disaster

[illegible] The Hunterdon Democrat

CONSTITUTION has been down in recent years. North Jersey communities have had to put up with all sorts of hazardous from railroads — from bad throes of toxic chlorine freight trains to the records of trash at rail yards. But in recent weeks, the disaster avoided from emergency to remarkable.

Police and health officials based more than who been of a potentially deadly chemical in a rail facility owned by the New York Susquehanna & Western Railway in North Bergen. By the time state police, fire marshals and environmental officials responded the rail yard last week, most of the material — a flammable chemical known as phosphorus

political life, but have transported elsewhere. But the officials were Tuesday unscathed. And for good reason.

One railroad boxcar of phosphorous pentasulfide was still on site, in apparent violation of state law, under. The chemical, a savage stuff it burns on contact and produces poisonous gases when exposed to water, yet no one was resident of its presence in the rail yard. Which, mind, officials expressed concern about making sure security and good safety preparedness at the site – located near residential areas.

No wonder acting Governor Corley was angry. "The companies that want to develop unregulated [sic] sites that endanger our health should hear this message loud and clear: Clean up these sites or get out of New Jersey."

The NJDEP states that it is fully complying with all federal hazardous materials transportation requirements, and that containers at the site are secured as required by federal law.

If that is the case, why could anyone easily enter the rail yard last week and walk right up to the containers of dangerous chemicals without being stopped? In an age when protesting against terrorism is of paramount concern, this is unacceptable.

U.S. Sens. Joe Corzine and Frank Lautenberg are working on legislation that would close the loophole in federal laws that currently exempt corporate sites and local oversight of railroad property.

In the meantime, the railroad agrees with addressing legitimate concerns that state officials have about the dangerous chemicals.

That's good news. Starting when?

Inspectors swarm over site of toxic chemicals

Jolly Jackson / The Herald-Sun PHOTO / CONTRIBUTED

NORTH BERGEN – State police, fire marshals and environmental investigators, on orders from acting Governor Corley, on Thursday inspected a railyard in the Meadowlands where hundreds of pounds of a potentially deadly chemical were mysteriously left earlier this week.

The inspection team found 33 empty containers that had been used to transport phosphorus pentasulfide, a flammable chemical used in the production of fertilizers and insecticides. They also found a quantity of chlorine in a locked boxcar, but railroad workers were unable to produce a manifest showing how long it had been there, North Bergen officials said.

A state police spokesman said he could not immediately disclose the results of the inspection at the Bear Tree Avenue facility, owned by the New York Susquehanna & Western Railway Corp.

Police and health officials discovered more than 60 containers of phosphorus pentasulfide after responding to a report of a possible spill last week. Although there was no leak, officials expressed alarm about the lack of notification, inadequate security and poor safety preparedness at the site, noting that the chemical becomes explosive and produces poisonous gases when exposed to water.

Corley vowed Thursday to take action to safeguard the community.

"This morning, I directed the Department of Community Affairs, the Department of Environmental Protection and New Jersey State Police to work with appropriate agencies and make sure these chemicals are dealt with properly," Corley said in a statement.

"This is only the latest incident in an ongoing problem of unregulated transfer stations that are being developed all across New Jersey."

The acting governor also directed the New Jersey Meadowlands Commission to remain vigilant and staff "with national expertise in these laws, to help determine what further steps New Jersey can take to protect its residents in these communities."

"The companies that want to develop unregulated sites that endanger our health should hear this message loud and clear: Clean up these sites and obey our laws, or get out of New Jersey."

Lawyers for the New York Susquehanna & Western, in a letter to the Meadowlands Commission on Thursday, denied putting the public at risk.

"The railroad fully complies with all applicable federal DOT hazardous materials transportation requirements," attorney Dennis M. Toft wrote. "Any containers containing product that are not immediately packed up at the railroad's West Side Avenue facility are secured as required by federal law."

Toft said the 60 containers observed earlier by officials were in fact empty and awaiting return. He said they were "nitrogen-purged" and posed no risk.

Toft also said that Bulkship Lines, a Garfield trucking firm, was only delivering the chemicals to Linden and does not occupy space at the site.

The railroad and building were issued a cease-and-desist order by the Meadowlands Commission on Wednesday for operating at the site without approvals or permits and in violation of regulations governing the storage of explosive, flammable and toxic materials. The agency demanded the immediate removal of flammable materials from the property.

"Rather than prematurely running into court, we request that the commission meet us to resolve this situation," Toft said in response to the agency's threat to seek an injunction. "We stand ready to address any legitimate concerns the commission or any other agency may have regarding these materials."

In June, Corley directed the attorney general to file an action in U.S. District Court in Camden on behalf of the Meadowlands Commission against the companies and individuals planning to build an unregulated solid-waste station in the Pinelands National Reserve in Mullica Township.

U.S. Sens. Joe Corzine and Frank Lautenberg, meanwhile, are drafting legislation to close loopholes in federal laws that limit the reach of local

authorities on railroad property.

Jeff Tittel, executive director of the New Jersey chapter of the Sierra Club, said such legislation is badly needed to protect the public.

"It's mind-boggling that such dangerous chemicals can be stored on a railroad siding near a residential area," Tittel said. "If there had been an accident, people would have been endangered." Tittel urged lawmakers "to wake up and bring this disaster."

HUDSON HAS CHEM INSECURITY ISSUES

Jersey Journal – The Jersey Journal – By JANET SCHOFIELD

NORTH HUDSON — Describing it as a potential "environmental catastrophe," local and county authorities are investigating security measures at a township rail yard, which acts as a storage yard for as much as 25,000 pounds of explosive chemicals.

The county, and the village, alerted by an urban emergency preparedness specialist stumbled upon the chemical bad news while responding to a complaint of a bad smell at the CSX Railroad property on West Side Avenue.

The good news was the smell proved to be inconsequential.

The bad news was officials discovered little or no security at the yard, a storage center along the New York, Susquehanna & Western Railroad.

More than 400 containers of phosphorus pentasulfide, a flammable, explosive chemical, are stored at the site, according to police reports.

"We observed no security personnel, no fencing, no guard of any kind," said a memo from the North Bergen Health Department, a police officer wrote in his report. "There was absolutely no security at the yard."

Yesterday, a photographer from The Jersey Journal was able to walk through the yard's open gate and freely inspect the chemical containers. Eventually, two employees stared him down as he was doing had been warned to march.

Gary Deshkevich, a hazardous materials responder and coordinator with the Hudson Regional Health Commission, stated the site was said to be unsecured about the height of time the chemicals remain on the property.

"The chemicals are supposed to be moved from the rail car right on to a truck," Deshkevich said yesterday. "If that happens, then everything is OK. But if it stays there, then there becomes a problem."

A CSX Railroad spokesman said the site is patrolled daily by New York Susquehanna & Western Railway Police, though usually at night, after workers on the site go home.

The rules for railroads

Jersey Journal – The Jersey Journal – Editorial

Congress long ago decided that the federal government alone should regulate railroads, and with good reason. Railroads cross local jurisdictions that local officials cannot police—whether some train loses out or continues, disrupting the free flow of commerce along the way.

That good goal is little consolation to those who happen to live in Bay Ridge, a district in Mullica Township in Atlantic County, home to an old, little-used rail line. The Southern Railroad of New Jersey wants to build a transfer station there on a former parking lot.

Trucks would bring tons of construction debris, and perhaps other waste, to the station, and trains would move it off to Ohio landfills. The railroad says federal rail jurisdiction means state permits, local ordinances and the like don't apply.

But they do, at least enough to ensure that the health and safety of local residents aren't compromised. Federal pre-emption of local rules doesn't give railroads a complete pass on environmental rules or other local rules for church, school, public safety and health.

Just which local numbers fit within these categories is a matter of growing debate. Railroads and local authorities usually disagree. Bay Ridge is just the latest example of a local town's popping up across the country. Even in New Jersey, there are at least five railroad-related transfer stations in the Meadowlands, and plans for more.

All that has prompted acting Gov. Richard Codey, local officials and state Senate President Donald DiFrancesco to talk of changing the federal law. As appealing as the idea might seem, it's hard to see why that wouldn't create the very problem that Congress tried to prevent. For instance, if railroads on local or political whim, and Congress isn't going to change the law anyway.

That doesn't mean the requirement of local or state permits for rail yards is without merit. The state should use its health and safety powers as aggressively as possible to keep the railroad industry operating as good corporate citizens, as it urges every lawyer. That includes asking the Surface Transportation Board, the federal agency responsible for rail regulation, to officially spell out railroads' duty left in reasonable controls.

The board has preliminary findings down in a ruling that preclusion environmental or other claims are a product to get around Washington's back on local authority. But the board also says railroads should be cooperative and communication should be pragmatic.

That means railroads should abide by reasonable environmental and other regulations, including rules limiting the number of trucks and their operating hours. Residents, and, at times, the federal courts, have sometimes of rules would be being communicated debris to the tracks at a place.

Federal preclusion may mean the state Department of Environmental Protection or local officials usually can't punish power over railroads as they would like, but it still leaves them enough to guard the legitimate interests of New Jersey residents.

They should not be afraid to do so. National commerce is important. But so is local quality of life.

APPENDIX THREE:

Summary of the New Jersey Meadowlands Commission Position

Solid waste management has historically been the jurisdiction of state and local government. This is particularly true with regard to environmental oversight and police powers dealing with public health and safety. Though the federal government has some role with regard to solid waste management, it has delegated oversight of solid waste transfer facilities to states and localities.

Recently certain solid waste operators have emerged in a new form in New Jersey, Massachusetts, Rhode Island and New York establishing a new and novel claim that their operations fall under federal jurisdiction due to their proximity to or utilization of railway infrastructure, which in large part is governed by the federal Surface Transportation Board (STB) and therefore preempted from state and local solid waste management regulation. The STB has not, to date, claimed total jurisdiction over solid waste management issues, nor can it under federal statute that grants to the STB no regulatory authority over ancillary facilities. Accordingly, the STB has not taken over – nor does it have the resources to do so even if within the STB's authority – the responsibilities of states and local government with regard to ensuring public and environmental health and safety from solid waste operations.

The processors' claims of emerging preemption, if upheld, would place their waste operations in a regulatory blind spot, again, due to the lack of jurisdiction, regulatory authority, and resources associated at the federal level. Past incidents have shown the potential for abuse if this lack of oversight were allowed to become institutionalized.

Instances are highlighted by cases of outstanding litigation in the Northeast, where a construction boom is generating large amounts of waste in a region with tight environmental controls. If unchecked, the opportunity to conduct solid waste business without proper, if any, oversight – in effect outside the law – could easily draw these practices beyond the regional context they appear to occupy now.

Through the Resource Conservation and Recovery Act of 1976, Congress and the judiciary have repeatedly recognized local and state government's role in solid waste management. In a U.S. Supreme Court decision issued in April 2007 that upheld local control of solid waste processing, Chief Justice John Roberts reaffirmed that "waste disposal is both typically and traditionally a local government function." Furthermore, Chief Justice Roberts wrote that "Congress itself has recognized local government's vital role in waste management," and he quotes the Resource Conservation and Recovery Act, which states that "collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies."

The hearing committee should note that there are rail-side waste processing operators that do not claim to be exempt from local and state environmental, health and safety regulations and have been fully able to comply with local and state requirements. The committee should also be aware that several rail-side waste transfer facilities that operate, at least in part, according to local and state guidelines began to do so only after legal challenges were mounted against them.

Finally we must also note that railways are an important part of the process of transporting waste in the United States and particularly would seem to dictate that railways should continue to do so. The form of transportation is not the issue. What is the issue is the potential generation of a new exception never intended by Congress to generally accepted and long held standards meant to protect the public and their environmental resources.

Description of Outstanding Cases

What follows is an outline of some of the pending cases that illustrate problems inherent in the contention that the laws governing solid waste should be breached to create a new and unprecedented exception for facilities associated with railways. It is by no means an exhaustive survey, but rather a reference to pertinent examples.

There are several instances of rail-side solid waste transfer stations in New Jersey that have eschewed local oversight with adverse consequences to the public and the environment. The situation has improved at some facilities, but only after legal action was taken. In cases in New Jersey and elsewhere, judges have recognized the traditional oversight held by local and state agencies over solid waste transfer operations.

Township of North Bergen

• Five solid waste processing facilities situated along the New York Susquehanna & Western Railroad (NYS&W) emerged in the past five years in the form of large piles of debris placed directly on the ground and stored in place for considerable periods of time and without any significant environmental controls of any kind.
• Piles of construction and demolition debris as high as two stories had accumulated in the open-air facilities. Certain operations were closed and others put in place enclosed structures in which to store the debris. Enclosed structures that were eventually put in their place through the force of litigation were found packed beyond capacity with debris and constructed without regard for the International Building Code and without necessary fire suppression systems. Nearby wetlands were also found to have been filled illegally. The operations created serious fire safety and air and water quality hazards.
• The solid waste processing facilities argued that because of their proximity to or location on NYS&W property they were preempted from any local or state guidelines governing solid waste operations.
• The railroad has continued to litigate in support of that position. In the meantime conditions have improved without assurance of continued improvement to the necessary standards or appropriate observance of established standards.

Litigation:
• The New Jersey Department of Environmental Protection [NJDEP] fined NYS&W $2.5 million as a result of numerous and continuous violations of state environmental regulations at the open-air waste facilities which went unmitigated for more than six months. The railroad requested injunctive relief from the fines based on broad claims of preemption.
• A U.S. District Court permanently enjoined the NJDEP from enforcing its regulations and assessing any civil penalty as to the five facilities at issue.
• A U.S. Third Circuit Court of Appeals decision released on September 4th struck down that ruling.
• The ruling stated that the U.S. District Court decision was overly broad and that only those state regulations that discriminate against and unreasonably interfere with rail carriage are invalid.
• The case has been remanded to the U.S. District Court.

City of Passaic

• A rail-side waste processing facility has sought federal exemption from local and state oversight. Fires have broken out four times in the past four years. It is located in an urban, predominantly Hispanic and Polish residential neighborhood.
• Waste is processed in a structure located across the street from restaurants and dwelling units.
• Once waste is loaded, it is then transferred across a busy intersection while a single individual controls traffic.
• The rail cars are then assembled adjacent to a riverside playground and school yard.

City of Paterson

• NYSDOT informed the City in 2003 that it planned to build a "transload facility" adjoining residential backyards, but never submitted a full application to the Planning Board.
• In correspondence between the city and railroad planning officials repeatedly asked for more details about the structure.
• The railroad offered to appear before the Planning Board, but would not pay the fees required of applicants before the Board.
• The railroad filed a successful complaint to bar the city from interfering with construction. The company expected 12 to 15 trucks a day would use the facility.
• In May 2006 a 70-car freight train approaching a rail-side waste processing facility situated in a densely populated residential neighborhood derailed, destroying two commercial buildings and forcing the evacuation of 75 families.

Township of Freehold

• In August the federal Surface Transportation Board rejected an Ohio railroad's proposal to build a waste-transfer station in the township. The Board denied the plan because the railroad failed to answer specific questions about the proposed facility and could not rebut arguments made by opposing parties.
• The more followed strong bipartisan opposition to the project. Local and state officials feared that the materials the station would likely handle, and runoff from those materials, would pollute the air and water.

City of Pleasantville

• A judge rejected Southern Railroad's claim that a waste transfer station located within two feet of coastal wetlands was exempt from state regulations. The judge ruled that the federal law governing railroad facilities does not supersede state regulation of solid waste activities.

Township of Mullica Hill

• Magic Disposal planned to build a rail-side waste transfer station that it claimed would be exempt from state oversight in the federally-protected Pinelands National Preserve.
• A District Court judge found it likely that the facility would not be preempted from state regulations.

Township of Hammesport

• After choosing federal preemption and resisting state and local efforts to exercise proper oversight, a solid waste processor using an adjacent rail line has agreed to abide by state environmental rules, giving the Township construction official the power to make regular inspections of the railroad with written notice and make snap inspections in the event of emergencies.
• The Township is paid 50 cents per ton for waste processed at the facility.
• The facility has reportedly agreed not to process municipal solid waste.
• The facility retains the right to claim federal exemption. A clause in the contract also allows the company to opt out of the deal if the Township or a third party files suit contesting the right of the railroad to engage in solid waste processing.

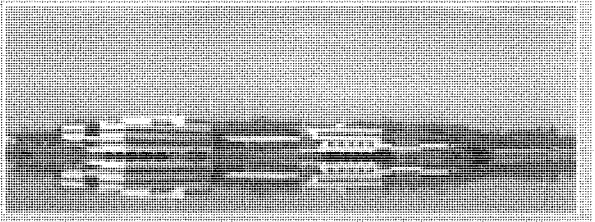
APPENDIX FOUR:

Description of the New Jersey Meadowlands Commission

The New Jersey Meadowlands Commission (NJMC) is the state zoning and planning authority for the 30.4 square mile Meadowland District, a region of marshes, industrial areas and residential areas five miles from Manhattan. In creating the agency in 1968, the New Jersey Legislature assigned the NJMC — in addition to the land use role — jurisdiction over the District's solid waste management plan and the responsibility of providing solid waste disposal sites. The agency provides an increasingly broad array of services to the 14 District municipalities as well as carrying out an aggressive environmental agenda. Currently the NJMC is implementing several broad and innovative initiatives which are summarized below.

Environmental Policy

The Meadowlands Master Plan and its enforcible regulations, approved in January 2004, call for the preservation of the entire 8,400-acre Meadowlands urban wetlands ecosystem. This is one of the largest urban wetland systems in the United States. Environmental projects underway include $20 million for a series of massive marsh restorations and the establishment of a network of passive recreation areas. Restoration of the 800-acre Richard P. Kane Natural Area and the creation of an adjoining public marina and park will receive $3 million. An additional $800,000 is targeted toward general trail system development in the District. Finally, a $340,000 fund is set aside for basic environmental research. The Meadowlands District hosts a remarkable bird population of 280 different species including 35 listed as endangered and threatened in New Jersey.



Renewable Energy

The NJMC announced in June the advancement of a two-kilowatt solar array that will satisfy half of the energy requirements of the NJMC campus. Next, the NJMC will work to facilitate the installation of solar energy on municipal and school-owned properties in the Meadowlands District. This year the NJMC will release its Renewable Energy Master Plan. The plan will facilitate the installation of at least 20 megawatts of renewable energy by 2020.

Flood Management

As part of its new drive to assist municipalities and businesses in the District, the NJMC pursues flood control strategies following the Hackensack Meadowlands Floodplain Management Plan of 2005. The plan brings agency resources to the aid of localities suffering from chronic flooding and was developed together with state and federal agencies, municipalities and property owners.

Municipal Support

Since 2003 the NJMC has established a highly developed system of support services for Meadowlands municipalities. This includes annual direct assistance to help communities purchase much-needed equipment that would otherwise require a hike in taxes. The NJMC's award-winning Meadowlands Environment Center is quickly expanding its educational offerings to Meadowlands school districts. Another example of the agency's unique expertise is the expansive Geographic Information System (GIS) outreach program which has produced digital mapping systems for each of the 14 municipalities in the District.

New Jersey Meadowlands Commission

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State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JON S. CORZINE
Governor

LISA P. JACKSON
Commissioner

October 31, 2007

Ms. Corrine Brown
Chairwoman
Subcommittee on Railroad, Pipelines,
And Hazardous Materials
US House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

Dear Chairwoman Brown:

Thank you for the opportunity to testify before your subcommittee at its Hearing on Railroad Owned Solid Waste Transfer Stations on October 16, 2007. Wolfgang Skacel, Assistant Commissioner of Compliance and Enforcement, New Jersey Department of Environmental Protection ("NJDEP") and Thomas Marturano, Director of Solid Waste and Natural Resources, New Jersey Meadowlands Commission ("NJMC") are pleased to submit the following answer to question four, presented by Congressman Rahall.

A brief history of the facilities that were the subject of the Bergen Record article is necessary to provide context and a foundation for our response. The three facilities are located on property owned or leased by The New York, Susquehanna & Western Railway Corp. ("NYS&W"). NYS&W is a railroad recognized by the Surface Transportation Board ("STB" or "Board") and therefore, not subject to the STB's jurisdiction when it wants to allow a facility or operation to be conducted on ancillary tracks. *See* 49 U.S.C. § 10906. Thus, when around late 2004-early 2005, waste began to be dumped, sorted, and ultimately loaded onto railcars all in the open air, the STB had no regulatory authority over these operations. The operations were not enclosed and there were no buildings. Rather, there was a concrete pad, and either stacked concrete blocks or metal shipping containers acting as "walls." No environmental controls existed to prevent or contain dust and other air contaminant emissions, contaminated stormwater runoff, or wastewater – that is, except for a garden hose sprayed on the waste as the sole means of dust control. Again, the STB had no regulatory authority over these operations, and when NJDEP attempted to assert its authority to compel some measure of control over the operations, NJDEP and NJMC were promptly sued in federal district court. The railroad's claim? Broad sweeping preemption, such that the railroad was subject to no state or local regulation. The basis for its claim? The Interstate Commerce Commission Termination Act of 1995. The district court restrained NJDEP and NJMC from implementing or enforcing its regulations, which include no permitting or preapproval requirements, against this railroad. The restraints continued until March 2007, when the district court permanently enjoined the State, allowing this railroad to determine whether to comply with *environmental* as well as other health and safety standards and safeguards. In other words, this railroad was given *carte blanche* to act outside the law.

The State's enforcement action (that was enjoined) was taken to carry out its responsibility to protect the health, safety of its citizens and the environment. Sampled stormwater at certain of the open air "facilities" showed excessive levels of four toxic metal pollutants – lead, arsenic, mercury and copper. The contaminated stormwater may very well have reached the ground water and adjacent surface waters, illustrating the danger posed by waste operations. The State's interest is to ensure, to the extent possible, that the threats posed by waste are not realized.

The State immediately appealed the district court's final order and permanent injunction and was granted an expedited appeal. In the meantime, the STB held a hearing on a Notice for Exemption petition by New England Transrail, which sought to become a rail carrier to construct and operate a "transload" facility that would handle, among other things, solid waste. The hearing garnered much attention and lasted a full day. Robert Ceberio, Executive Director of the NJMC, testified, expressing the Commission's continued frustration with certain interpretations of the reach of the ICCTA statute and the hazards posed by these facilities that failed to meet fire, building and other codes. In response to Mr. Ceberio's remarks, Chairman Nottingham stated with no uncertainty that a fire suppression system clearly concerns health and safety, and that fire officials would be on strong ground to compel compliance with fire codes.

In New Jersey, the Department of Community Affairs ("DCA") is responsible for enforcing the Uniform Construction Code. *N.J.S.A.* 52:27D-124. In this capacity, the DCA is authorized to require an unsafe building or structure to be vacated; a building or structure which constitutes a fire hazard or is otherwise dangerous to human life or the public welfare "shall be" deemed unsafe. *N.J.S.A.* 52:27D-132; *N.J.A.C.* 5:23-2.32(a). The DCA issued Notices of Unsafe Structure to NYS&W regarding three facilities for alleged violations constituting unsafe structure conditions, including the lack of automatic fire sprinkler systems, and ordered that the structures be vacated. To date, one of the facilities remains closed. The DCA was allowed to step in because only NJDEP and NJMC were permanently enjoined from enforcing the environmental and health and safety standards set forth in the 2D Regulations.

The irony of a law that is interpreted to allow state and local enforcement of building, fire and certain other codes such as plumbing and electrical, but not state environmental or solid waste regulation, should not be lost. Operations conducted in the open air such as the ones described above posed a great environmental and public health and safety hazard because of the lack of a building and other safeguards. Without a building, there are no codes that can be applied. Because the railroads argue, and many if not all courts have agreed, that rail carriers are subject to no preapproval or permitting requirements, the railroads can build at will, and the state and local authorities are forced to sit back and wait until a structure is actually built before they can do their job. This after-the-fact procedure hurts the public and the environment in the short run, and is less efficient and more costly for the railroads and the State in the long run.

Building codes do not address environmental impacts and harms. Building codes do not require proper stormwater management systems, wastewater systems, or air pollution control systems. Waste generates wastewater, dust and air contaminants, and stormwater runoff, all of which must be properly contained and disposed of. Building codes and environmental regulations are different without distinction. They are both vital parts of the state's police

powers. If a facility can be compelled to comply with building and fire codes – and forced to shut down until it does – why is the environment and the health of neighboring citizens any less important and deserving of protection? We submit that they are equally deserving of protection and equally enforceable, and simply remind the Subcommittee that building codes do not solve or even address the myriad of issues raised by waste activities.

Finally, to bring this full circle to date, the Court of Appeals for the Third Circuit vacated the district court's order permanently enjoining the State. The Third Circuit held that state and local regulation that affects rail carriage but does not discriminate against or unreasonably interfere with rail carriage is valid and not preempted by ICCTA. The Third Circuit found that the district court' s conclusions with respect to the 2D Regulations were unsupported and remanded for the court to consider each of the regulations individually. This hearing is pending. The regulations at issue are the same regulations that Chairman Nottingham, in his testimony before this Subcommittee on October 16, 2007, stated are "consistent with everything the Board has said about the
scope of the section 10501(b) preemption..." and opined that he would "not object to New Jersey implementing its 2D regulations...." The distinction between the direction that New Jersey has received from the courts and the direction it is only now receiving from the STB is yet another example of the need for Congress to affirm the states' longstanding authority over solid waste management, without exception.

The state's interest is the proper management and oversight of all solid waste activities. If the law is not clarified there will continue to be those who will argue that they cannot be governed by existing state regulations, to the detriment of our citizens and environment. The law must be clarified so that entities such as J.P. Rail, whose activities were the subject of testimony by the Honorable Kathy Chasey, the Mayor of Mullica Township in New Jersey, and the Honorable Joseph DiGirolamo, the Mayor of the Township of Bensalem in Pennsylvania, cannot simply move from town to town while persisting to claim it is subject to no state or local regulation. We would like to note that immediately following the hearing, J.P. Rail, Inc. submitted yet another Notice of Exemption, this time for a site in Carroll Township, PA. *See JP Rail, Inc.—Lease and Operation Exemption—NAT Industries, Inc.*, STB Finance Docket No. 35090 (filed October 17, 2007). No one can win when railroads, large and small alike, continue to push the envelope, taxing the states' limited resources while jeopardizing the public health and safety and environment. The benefit of clarifying the states' authority over the proper management of solid waste will be to all.

Sincerely,

Wolf Skabel
Assistant Commissioner
Compliance & Enforcement

Thomas Marturano
NJ Meadowlands Commission
Director of Natural Resources and
Solid Waste

New Jersey Meadowlands Commission

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October 31, 2007

Via Fax and Email

Honorable Corrine Brown
Chairwoman
Subcommittee on Railroads, Pipelines,
and Hazardous Materials
US House of Representatives
Washington, DC 20515

Dear Chairwoman Brown:

Thank you again for the opportunity to testify before your Committee on October 16, 2007 at its Hearing on Railroad Owned Solid Waste Transfer Stations. I have submitted an answer to Congressman Rahall's inquiry jointly with Assistant Commissioner Wolfgang Skacel of the New Jersey Department of Environmental Protection. Please accept this supplemental testimony that intends to clarify the existing misconception regarding why solid waste is different from other commodities transported by rail:

1. Health and safety concerns relative to solid waste are not the same as those related to the movement of paint, wine, ethanol, LNG, coal, and nuclear materials. These latter materials are commodities with an intrinsic value. They are produced by an industry or manufacturing process that is regulated separate and apart from the rail industry. If any of these materials are lost, a shipper would lose money. On the contrary, if a shipper were to lose solid waste, it would be enriched by not having to pay for disposal costs.

   In a similar vein, all of the commodities with value have consistent characteristics with known environmental impacts, if any, and the railroad and shipper are able to prepare for such impacts. With solid waste, however, the garbage coming out of the truck is unknown to all involved and potential environmental risks cannot be determined.

2. Hazardous commodities, for example, that are manufactured are strictly controlled, manifested and have value. Hazardous waste is thoroughly sampled and manifested prior to leaving the point of generation so the material in the truck is a known quantity. Likewise, the trucks hauling hazardous waste must be specifically licensed to transport the waste. Solid waste is often an unknown quantity and needs to be regulated on the local level where local intelligence can play a role, whether it is moved by truck, rail or some other means. When a train derails carrying solid waste, no local responders are adequately informed as to the quality of the waste since no such data exists.

3. No one has suggested that the STB restrict its jurisdiction over the transportation of solid waste. What has been suggested is that local regulation of this industry is also needed at the state and local level. New Jersey has several solid waste transfer stations that are fully regulated and ship by rail. They prove the viability of this option and the weakness of the arguments of those who protest that the states' position is untenable. Additionally, there are at least three more that are in the implementation stage. There is no economic reason not to treat all facilities the same and every environmental reason to do so.

Respectfully submitted,

Thomas R. Marturano, P.E., P.P.
Director of Solid Waste and
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United States House of Representatives
Committee on Transportation and Infrastructure

Subcommittee on Railroads, Pipelines, and Hazardous Materials
Railroad-Owned Solid Waste Transload Facilities
October 11, 2007

Testimony of
Freeholder Barbara McMorrow
Monmouth County, New Jersey

Thank you for the opportunity to speak on behalf of the residents of Monmouth County, NJ. I am Barbara McMorrow, an elected Freeholder.

This spring, Ashland Railroad Company in Monmouth County, applied to the Surface Transportation Board for an exemption to operate a solid waste transfer station on previously abandoned railroad tracks adjacent to a stream, and just a stone's throw from farms and homes. That stream, which parallels the train tracks, is a tributary of the Manasquan River, part of the watershed that comprises the drinking water for thousands of people. I was shocked to learn that a loophole in the law exists to allow railroad companies to operate solid waste transfer stations without any regulation by state or local governments.

I joined Congressman Pallone, DEP Commissioner Lisa Jackson and State Senator Ellen Karcher in April to protest the application to operate this unregulated solid waste transfer station, and offered my support as a county elected official in this fight to protect our residents and our environment.

Subsequently, Congressman Pallone and Senator Lautenberg shared with me information about their bill, the Clean Railroads Act of 2007. This bill would close the loophole in the federal law and would allow states to regulate solid waste stations regardless of proximity to rail lines. This bill must be passed, not only to protect the citizens of Monmouth County, New Jersey, but also the citizens of every county in every state in our country.

I have closely followed the application filed by Ashland Railroad Company, learning as much as I could from our County Solid Waste expert, Larry Zaayenga and a local citizen advocacy group, Sludge Busters We were together at a meeting in August when we learned that the Surface Transportation Board had dismissed the application of the Ashland Railroad Company to operate a solid waste transfer station in Freehold Township. This temporary respite does not mean that our fight is over because the Surface Transportation Board rejected "without prejudice" the application of Ashland Railroad. That means that Ashland Railroad can re-apply, using the lessons learned from their rejected application, gain an exemption, and operate an unregulated solid waste transfer station.

Unlike our state law that requires the Counties to include any solid waste facility in its County Solid Waste Plan before any application is accepted by the New Jersey DEP, there is nothing in the law that would require the Surface Transportation Board to even notify the township or the County if Ashland Railroad resubmits an application. That means if any of us who are advocates for the people and environment in Monmouth County blink, the opportunity to oppose this plan is missed.

It appears that the Surface Transportation Board does not have the interests of our residents foremost. I say this because, in June, the Surface Transportation Board issued a decision that refused to close the loophole that allows unregulated solid waste transfer

stations. In July, the Surface Transportation Board ruled that railroads that load, unload, handle and store solid waste do not have to be regulated by state or local agencies. I believe that all solid waste must be regulated at the state and local level, regardless of its proximity to railroad tracks.

New Jersey has suffered greatly from this loophole. We have had solid waste piles next to railroad tracks that have polluted the air, ground and water. These unregulated piles have grown so high that they have caused power blackouts! They emit arsenic and mercury, two dangerous chemicals that are otherwise strictly regulated under the law. These stations operate in open air, with no buildings, so the chemicals and particulates are airborne, wreaking more havoc on residents and the environment.

Furthermore, property values surrounding an unregulated solid waste transfer station plummet. The hundreds of trucks that will travel to and from these unregulated waste stations will cause additional pollution, hazards to citizenry and damage to roads. All of these issues are addressed and mitigated when solid waste transfer stations are under the jurisdiction of the local and state governments.

New Jersey law requires all solid waste transfer stations to be in closed buildings. If hazardous waste is detected, the buildings have to utilize negative air flow to protect the environment and citizens. Additionally, New Jersey law only allows solid waste to be at a transfer station for a maximum of 24 hours. Unregulated solid waste transfer stations, ones that are granted an exemption under the loophole in the law, can leave solid waste as long as they chose, allowing significant damage to the environment.

This is multi faceted issue. What is at stake is not only quality of life, but fundamental health and safety issues. As a Monmouth County Freeholder, I am entrusted to preserve the integrity of the environment for our future generations.

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. Congress intended such authority to extend only to transportation by rail, not the operation of facilities that are merely sited next to rail operations or have a business connection to a rail company. We can not allow hazardous waste to be unregulated due to a loophole in federal law.

How many members of this subcommittee would want to wake up one morning and find that they are living near an unregulated solid waste transfer station? That could happen because of the loophole in the law. This is why I am before you today to urge the passage of the Clean Railroads Act of 2007.

Before the
U.S. House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Railroads, Pipelines, and Hazardous Materials

October 11, 2007 Hearing
10:00 A.M.
2167 Rayburn House Office Building

Testimony of
Commissioner Francis P. Mulvey
Surface Transportation Board
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Good morning Chairwoman Brown, Ranking Member Shuster, and other Members. Thank you for this opportunity to testify on railroad-owned solid waste transload facilities.

This agency was last called to testify before the Subcommittee on this issue in May 2006, when Doug Buttrey chaired the Board. I want to commend Vice Chairman Buttrey on his testimony at that hearing. I would like to take this opportunity, however, to update the Subcommittee on developments that have transpired at the Board in the 17 months since that testimony. The Board has recently taken a more assertive stance toward cases involving waste, but we need to do more to prevent them from becoming cases in the first place. In a more proactive manner, we may need to exercise the full range of our powers to deal with the situations that confront us,[1] and there may be a need for clarification of the railroad preemption law by Congress.

[1] On occasion, a situation arises where an entity claims the benefit of federal preemption under the Interstate Commerce Act, yet has not come before the Board seeking any authority for its alleged rail-related activities. In such circumstances, the Board has general investigatory and enforcement powers. The Board may order compliance with the Act on complaint, and may specifically seek to enjoin a rail carrier from violating the construction, acquisition, and abandonment laws. 49 U.S.C. 11701(a) & 11702 (text reproduced at Attachment A). It may issue a "show cause" order to compel compliance with the Act, or a declaratory order to eliminate a controversy or remove uncertainty about an issue. 49 U.S.C. 11701(a); 5 U.S.C. 554(e); 49 U.S.C. 721 (text reproduced at Attachment A). The Board needs to continue to look creatively at its range of powers to determine how best to deal with each set of circumstances involving waste that comes before it.

In Attachment B to my testimony today, I have listed the various cases involving municipal solid waste (MSW) or construction and demolition (C&D) debris that have come before the Board during the past 17 months. The titles of these cases show that they come to the Board in many different guises, and that entities and their representatives will go to great lengths to obtain federal preemption of solid waste-related rail projects. A review of the Board's decisions confirms that we have become increasingly concerned about the tactics used in this bubble of cases and have become more cautious about permitting certain projects to move forward.

Indeed, just last week, the Board initiated a proceeding to examine whether more information might be warranted up front in situations where an entity seeking authorization from the Board intends to provide facilities for the transportation or transloading of municipal solid waste. See Attachment C, Information Required in Certain Notices of Exemption, Ex Parte No. 673 (STB served Oct. 4, 2007).

Next, as you are aware, the Board held an oral argument this past April in an important and controversial preemption case known as New England

Transrail.[2] It was highly unusual for the Board to hold such a hearing in a non-rate case. On July 10, 2007, the Board issued its decision on which of NET's proposed waste-related activities would be preempted from local regulation if NET were to be authorized as a railroad. I issued a strong dissent describing my views and reasoning. Let me further elaborate on those views today.

But let me first take a moment to reassure you that I am, and have always been, an ardent supporter of federal preemption.[3] Congress and the courts have long recognized the need to regulate railroad operations at the federal level to avoid a patchwork quilt of state and local regulations that could impede the efficient flow of commerce. The Act, especially as amended by the Interstate Commerce Commission Termination Act of 1995, is one of the "most pervasive and comprehensive of federal regulatory schemes."[4] The ability to preempt local laws is one of the prized benefits of receiving Board authority to build and run a railroad.

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[2] New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—in Wilmington and Woburn, MA, STB Finance Docket No. 34797.
[3] See, e.g., CSX Transp., Inc. – Petition For Declaratory Order, STB Finance Docket No. 34662 (STB served March 14, 2005).
[4] Chicago & N.W. Transp. v. Kalo Brick & Tile, 450 U.S. 311, 318 (1981); City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998).

In the rail transportation arena, the purpose of federal preemption is to protect the flow of interstate commerce. Commodities such as MSW, C&D debris, and hazardous materials must move by rail because of their physical characteristics. But because preemption applies in our rail universe only to "transportation by rail carriers,"[5] and because determination of what is "transportation" and who is a "rail carrier" is within the Board's discretion, we should be exceedingly careful of how we exercise that discretion. In considering the spectrum of MSW related activities an entity conducts, we have the discretion to determine at what point "transportation" – and thus preemption – begins. I regret that my colleagues and I disagreed about where this precise point was in New England Transrail, but I recognize that in any fact-bound determination such as that case, there may be disagreements at times.

My experience with the MSW industry and attendant handling and disposal issues spans the past two decades. In the mid-1980s, I was Director of Economic Research for the New York State Legislative Commission on Solid Waste Management. In that capacity, I undertook several economic analyses of the MSW sector and was instrumental in developing an annual

[5] 49 U.S.C. 10501(b) (text reproduced at Attachment A).

Commission-sponsored conference on solid waste management and recycling. In these efforts, I worked closely with Representative Maurice Hinchey of New York, when he chaired the New York State Legislature Commission on Solid Waste Management during his tenure in the New York State Assembly. Because of these experiences, I am conversant with the nature of MSW and the need for state and local control over its handling.

I dissented in New England Transrail not only on the facts of that particular case, but also on policy grounds. Based on the inherent qualities of MSW, I believe that its handling should not be accorded federal preemption as "integrally related" to rail transportation. MSW is an atypical commodity. A comprehensive scheme of state and local law exists to protect the environment and the health and safety of local populations in the vicinity of MSW's handling and disposal.[6] There is a critical reason that the power to regulate the handling of MSW has been delegated by the Environmental Protection Agency (EPA) to the states — and that is because states and localities are in the best position to protect the health and safety of their citizens and to understand the impacts of handling MSW in their area.

[6] See, e.g., United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.2d 245, 264 (2d Cir. 2001) (Calabresi, J., concurring) ("Waste disposal is both typically and traditionally a local government function."); USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1275 (2d Cir. 1995) ("For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States.").

For instance, nationally, paper and paperboard products are the largest component of MSW (36%), followed by yard trimmings (12%), food waste (11%), plastic (11%), metals (8%), wood (6%), glass (6%), textiles/rubber/leather (7%), and other materials (3%).[7] But as we all know from living in different parts of the metropolitan Washington, DC area and from the Members' respective districts, different jurisdictions have different rules about what commodities should be kept out of the MSW stream through recycling, or special collection and disposal of yard waste and appliances. These same governments, then, are in the best position to determine how to handle the MSW that is generated in their areas, and how to deal with non-compliant materials when rules are not followed. Unfortunately, while the Board typically harmonizes its interpretation and implementation of the Interstate Commerce Act with other federal laws,[8] there is no federal law to be harmonized here precisely because states have been delegated the authority and responsibility to regulate in the area of MSW handling.

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[7] "Municipal Solid Waste: Background," (Nov. 8, 2006), available at http://www.nswma.org, under "Frequently Asked Questions."; http://www.epa.gov/msw/facts.htm.
[8] Tyrrell v. Norfolk Southern Ry., 248 F.3d 517, 523 (6th Cir. 2001); Friends of the Aquifer, STB Finance Docket No. 33966, slip op. at 5 (STB served Aug. 15, 2001).

Finally, let me tell you what my New England Transrail dissent was not intended to do. My dissent focused narrowly on MSW. I did not object to the majority's findings with respect to C&D debris. The primary danger with that commodity is that it might contain asbestos, removal and disposal of which are governed by EPA and Occupational Safety and Health Administration regulations.[9] I also did not intend to disturb the delicate balance between local regulation and enforcement of health and safety laws, on the one hand, and federal preemption of other local laws, on the other -- except with regard to MSW.

In conclusion, I am troubled by the recent up-tick in assertions by entrants into the MSW industry that they are rail carriers subject to the Board's jurisdiction. What concerns me is these firms' attempts to blend the nature of their operations to offer both rail carrier service as well as waste processing, and to use their putative status as rail carriers to shield their waste processing operations from the reach of state and local environmental laws. This tactic is manipulative and abusive of the Board's jurisdiction and powers, and it highlights a method of evading the law that I cannot

[9] See, e.g., http://www.ehso.com/Asbestos/asbestreg.php.

support.[10] Either these entities are truly rail carriers providing transportation, so that their activities warrant federal preemption, or they do not have rail carrier status, and are subject to state and local regulation. They cannot have it both ways. If the Board's existing interpretation of the Act cannot stop this practice, then it is time for Congress to do so.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

[10] Preemption should not be used to jeopardize the public health and welfare. I am concerned about the regulatory gaps that can and do result from preemption, and have been so since I dissented from one of the first cases to come before me after I joined the Board. The New York City Econ. Dev. Corp.–Petition For Declaratory Order, STB Finance Docket No. 34429 (STB served July 15, 2004) (Vice Chairman Mulvey, dissenting). Who looks out for the public health and safety when federal preemption deprives state and local governments from doing so?

ATTACHMENT A

49 U.S.C. 11701. General authority

(a) Except as otherwise provided in this part, the Board may begin an investigation under this part only on complaint. If the Board finds that a rail carrier is violating this part, the Board shall take appropriate action to compel compliance with this part.

(b) A person, including a governmental authority, may file with the Board a complaint about a violation of this part by a rail carrier providing transportation or service subject to the jurisdiction of the Board under this part. The complaint must state the facts that are the subject of the violation. The Board may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Board may not dismiss a complaint made against a rail carrier providing transportation subject to the jurisdiction of the Board under this part because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Board under subsection (a) of this section is dismissed automatically unless it is concluded by the Board with administrative finality by the end of the third year after the date on which it was begun.

49 U.S.C. 11702. Enforcement by the Board

The Board may bring a civil action—

(1) to enjoin a rail carrier from violating sections 10901 through 10906 of this title, or a regulation prescribed or order or certificate issued under any of those sections;

(2) to enforce subchapter II of chapter 113 of this title and to compel compliance with an order of the Board under that subchapter; and

(3) to enforce an order of the Board, except a civil action to enforce an order for the payment of money, when it is violated by a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

5 U.S.C. 554. Adjudications

. . .

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

49 U.S.C. 721. Powers

(a) In general.--The Board shall carry out this chapter and subtitle IV. Enumeration of a power of the Board in this chapter or subtitle IV does not exclude another power the Board may have in carrying out this chapter or subtitle IV. The Board may prescribe regulations in carrying out this chapter and subtitle IV.

(b) Inquiries, reports, and orders.--The Board may--

(1) inquire into and report on the management of the business of carriers providing transportation and services subject to subtitle IV;

(2) inquire into and report on the management of the business of a person controlling, controlled by, or under common control with those carriers to the extent that the business of that person is related to the

management of the business of that carrier;

(3) obtain from those carriers and persons information the Board decides is necessary to carry out subtitle IV; and

(4) when necessary to prevent irreparable harm, issue an appropriate order without regard to subchapter II of chapter 5 of title 5.

(c) Subpoena witnesses.--(1) The Board may subpoena witnesses and records related to a proceeding of the Board from any place in the United States, to the designated place of the proceeding. If a witness disobeys a subpoena, the Board, or a party to a proceeding before the Board, may petition a court of the United States to enforce that subpoena.

(2) The district courts of the United States have jurisdiction to enforce a subpoena issued under this section. Trial is in the district in which the proceeding is conducted. The court may punish a refusal to obey a subpoena as a contempt of court.

(d) Depositions.--(1) In a proceeding, the Board may take the testimony of a witness by deposition and may order the witness to produce records. A party to a proceeding pending before the Board may take the testimony of a witness by deposition and may require the witness to produce records at any time after a proceeding is at issue on petition and answer.

(2) If a witness fails to be deposed or to produce records under paragraph (1), the Board may subpoena the witness to take a deposition, produce the records, or both.

(3) A deposition may be taken before a judge of a court of the United States, a United States magistrate judge, a clerk of a district court, or a chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any State, or a notary public who is not counsel or attorney of a party or interested in the proceeding.

(4) Before taking a deposition, reasonable notice must be given in writing by the party or the attorney of that party proposing to take a deposition to the opposing party or the attorney of record of that party, whoever is nearest. The notice shall state the name of the witness and the time and place of taking the deposition.

(5) The testimony of a person deposed under this subsection shall be taken under oath. The person taking the deposition shall prepare, or cause to be prepared, a transcript of the testimony taken. The transcript shall be subscribed by the deponent.

(6) The testimony of a witness who is in a foreign country may be taken by deposition before an officer or person designated by the Board or agreed on by the parties by written stipulation filed with the Board. A deposition shall be filed with the Board promptly.

(e) Witness fees.--Each witness summoned before the Board or whose deposition is taken under this section and the individual taking the deposition are entitled to the same fees and mileage paid for those services in the courts of the United States.

49 U.S.C. 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is--

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or

ATTACHMENT A

arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

...

ATTACHMENT B

PENDING AND RECENTLY DECIDED STB CASES INVOLVING MUNICIPAL SOLID WASTE OR CONSTRUCTION AND DEMOLITION DEBRIS

Pending Cases

The Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order, STB Finance Docket No. 35057.

- Parties permitted by U.S. Court of Appeals for Second Circuit to seek declaratory judgment as to whether C&D transload facility operations are within scope of Board's jurisdiction.

Norfolk Southern Railway Company—Abandonment Exemption—In Bergen County, NJ, STB Docket No. AB-290 (Sub-No. 288X).

- Pending request or motion to modify notice and exemption in response to "Offer of Financial Assistance" request; allegations about transload facility under consideration.

U S Rail Corporation—Lease and Operation Exemption—Shannon G., A New Jersey Limited Liability Company, STB Finance Docket No. 35042.

- Pending notice of exemption to lease and operate track in City of Paterson, NJ; allegations about transload facility under consideration.

New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—in Wilmington and Woburn, MA, STB Finance Docket No. 34797 (STB served July 10, 2007).

- Board found certain proposed activities to constitute rail transportation performed by a rail carrier, and therefore preempted from state and local law, and certain activities to be other than rail transportation performed by a rail carrier, and thus not preempted; construction, acquisition, and operation exemption remains pending.

Recently Decided Cases

Ashland Railroad, Inc.—Lease and Operation Exemption—Rail Line in Monmouth County, NJ, STB Finance Docket No. 34986 and G. David Crane—Continuance in Control Exemption—Ashland Railroad, Inc., STB Finance Docket No. 34987 (STB served Aug. 16, 2007).

- Board rejected (without prejudice) notice of exemption to lease and operate 1.5 miles of unused track due to insufficient information from project proponents.

J.P. Rail, Inc. d/b/a Southern Railroad Corporation of New Jersey—Lease and Operation Exemption—Alternative Energy Technologies SR, LLC, STB Finance Docket No. 35053 (STB served July 11, 2007).

- Board rejected (without prejudice) notice of exemption due to non-compliance with various filing requirements.

ATTACHMENT B

Northern and Bergen Railroad, L.L.C.—Acquisition Exemption—A Line of Railroad Owned by New York & Greenwood Lake Railway, STB Finance Docket No. 35020 (STB served June 25, 2007).

- Board investigated acquisition of existing common carrier line of railroad and existing transload facility, allowing acquisition to take effect.

Buffalo Southern Railroad, Inc.—Acquisition and Operation Exemption—Line in Croton-on-Hudson, NY, STB Finance Docket No. 34903 and Village of Croton-on-Hudson, New York v. Buffalo Southern Railroad, Inc., et al., STB Finance Docket No. 34905 (STB served June 6, 2007).

- Board discontinued proceedings involving proposed acquisition and operation of line and waste transfer facility following withdrawal of proposal.

Devens Recycling Center, LLC—Petition for Declaratory Order, STB Finance Docket No. 34952 (STB served Jan. 9, 2007).

- Board denied petition for declaratory order, finding it was clear that track at issue would be private track, and therefore did not require any authority from Board to build or operate.

ATTACHMENT C

38342
EB

SERVICE DATE – OCTOBER 4, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 673

INFORMATION REQUIRED IN CERTAIN NOTICES OF EXEMPTION

Decided: October 3, 2007

On June 7, 2007, six Class I rail carriers (the Coalition)[1] filed a petition to institute a rulemaking to amend the Board's regulations at sections 1150.33, 1150.34, 1150.43, and 1150.44 of Title 49 of the Code of Federal Regulations. The Coalition seeks to increase the information required in a Notice of Exemption and to have the Board reexamine certain precedent related to proposals to initiate new rail service. Several comments and notices of intent to participate in the proceeding were submitted to the Board.[2]

In the petition, the Coalition urges the Board to consider requiring more information in Notices of Exemption, such as whether the entity seeking authorization from the Board intends to provide facilities for the transportation or transloading of municipal solid waste or construction and demolition debris, and how the railroad facilities have been and will be operated. Additional information assertedly would enable the Board to better determine whether the filing entity is or will become a rail carrier intending to provide rail transportation or is a party whose primary objective is something else. The Coalition also argues that we should reconsider Board precedent insofar as it holds that track acquired by a new entrant rail carrier becomes a jurisdictional line of railroad even if it possesses characteristics that had made it a spur or siding.

The Coalition raises issues that warrant institution of a proceeding. The Board will therefore grant the petition requesting that we institute a rulemaking proceeding. Following further analysis of the suggestions made by the Coalition and those that have already

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[1] Those six Class I rail carriers are BNSF Railway Company, Canadian National Railway Company, Canadian Pacific Railway Company, CSX Transportation, Inc., Norfolk Southern Railway Company, and Union Pacific Railroad Company.

[2] The parties who submitted filings in support of the petition are Consolidated Rail Corporation, John D. Fitzgerald for United Transportation Union-General Committee of Adjustment (UTU/GO-386), American Short Line and Regional Railroad Association, Association of American Railroads, and New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission (jointly). Bergen Passaic Rail Corporation submitted a filing in partial support of the petition. United Transportation Union and Bulkmatic Railroad Corporation filed notices of intent to participate in the proceeding.

commented, and assessment of other related issues, we will prepare a Notice of Proposed Rulemaking, as the circumstances warrant, and will seek public comments on any such Board proposal.

It is ordered:

1. The petition to institute a rulemaking is granted.

2. This decision is effective on the date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary

Surface Transportation Board

FOR RELEASE
10/04/2007 (Thursday)
No. 07-33

Contact: Dennis Watson
(202) 245-0234
FIRS 1 (800) 877-8339
www.stb.dot.gov

SURFACE TRANSPORTATION BOARD BEGINS RULEMAKING ON INFORMATION REQUIRED FOR USE OF "CLASS EXEMPTION" FOR ACQUISITION, LEASE & OPERATION OF RAIL LINES

The Surface Transportation Board announced today that it has begun a rulemaking proceeding to consider whether to increase the amount of information required from parties seeking to use the abbreviated "class exemption" procedure to obtain authority to acquire, lease and operate rail lines.

The Board has heard a growing number of concerns in recent years from private citizens, local, state and federal officials, and others urging the Board to increase its oversight of individuals and businesses that seek to operate rail facilities under the Board's jurisdiction, exempt from various local and state laws and regulations.

In June 2007, six of the largest railroads asked the Board to institute a rulemaking to consider additions to the information currently required in notices filed under the Board's class-exemption regulations at 49 CFR Part 1150, Subparts D and E, such as whether the entity seeking authorization intends to provide facilities for the transportation or transloading of municipal solid waste or construction and demolition debris, and how the railroad facilities have been and will be operated.

The Board's decision today states that, following further analysis, the Board intends to prepare a Notice of Proposed Rulemaking and will seek public comment on any proposed changes to the current regulations.

In announcing this decision, Board Chairman Charles D. Nottingham stated: "It is my hope that by initiating this rulemaking process and receiving public comments, the Board will be able to identify and implement improvements that advance the public interest in this area of railroad regulation."

The Board issued its decision today, October 4, 2007, in the proceeding entitled

Information Required in Certain Notices of Exemption, STB Ex Parte No. 673. That decision is available for viewing and downloading via the Board's Web site, at http://www.stb.dot.gov, under "E-Library," then under "Decisions & Notices," beneath the date "10/4/07." A printed copy of the Board's decision also is available for a fee by contacting **ASAP Document Solutions, 9332 Annapolis Rd., Suite 103, Lanham, MD 20706, telephone (202) 306-4004** or via **asapdc@verizon.net.**

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TESTIMONY OF
CHARLES D. NOTTINGHAM
CHAIRMAN
SURFACE TRANSPORTATION BOARD
395 E STREET, SW
WASHINGTON, DC 20423
(202) 245-0200

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE'S

SUBCOMMITTEE ON RAILROADS, PIPELINES,
AND HAZARDOUS MATERIALS

AT A HEARING REGARDING

"RAILROAD-OWNED SOLID WASTE TRANSLOAD FACILITIES"

SUBMITTED

OCTOBER 9, 2007

Submitted
October 9, 2007

Testimony of Charles D. Nottingham
Chairman of the Surface Transportation Board before the
House Committee on Transportation and Infrastructure's
Subcommittee on Railroads, Pipelines and Hazardous Materials
Hearing regarding Railroad-Owned Solid Waste Transload Facilities

Good morning Chairman Brown and Members of the Subcommittee. My name is Charles Nottingham, and I am Chairman of the Surface Transportation Board (Board or STB). I appreciate the opportunity to appear before this Subcommittee today to address how the STB regulates rail-related solid waste transload facilities.

Although I testified before the full Committee two weeks ago for the hearing on competition, this is my first appearance before the Subcommittee since I became Chairman of the STB in August 2006. It has been an extraordinary year for me personally, and an unusually busy year for the Board. One of the most difficult issues facing the Board this year is how to improve the Board's ability to ensure effective regulation of rail operations involving solid waste; to protect public safety, health and the environment; to enable commerce to use the interstate rail network freely; and to take trucks that would otherwise transport these materials off local roads.

Before elaborating on the Board's efforts in this area in this written testimony, I will first provide the Subcommittee with an overview of the Board's role, and the role of state and local authorities, with regard to rail-related facilities. Next, I will discuss the state of the law on this complex issue. Finally, I will outline the steps the Board recently has taken to allow for effective regulation for rail-related facilities that will handle solid waste, consistent with the law.

The Scope of the Federal Preemption

As all of you are aware, the Board was created in the ICC Termination Act of 1995 (ICCTA). The express Federal preemption contained in the STB's governing statute at 49 U.S.C. 10501(b) gives the STB exclusive jurisdiction over "transportation by rail carriers." Thus, to qualify for preemption, two tests must be met: the operation must be rail transportation, and it must be transportation that is conducted by a rail carrier. I will focus on the "transportation" component in my written testimony today, because it has been the most controversial aspect of the preemption analysis.

Congress has defined the term "transportation" broadly, at 49 U.S.C. 10102(9), to include all of the facilities used for and services related to the movement of property by rail, expressly including "receipt, delivery," "transfer in transit," "storage," and "handling" of property. Thus, under our statute, "transportation" is not limited to the movement of a commodity while it is in a rail car, but includes activities such as loading and unloading material from rail cars and temporary storage. However, manufacturing and commercial activities that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not part of "transportation." Therefore, these activities do not qualify for Federal preemption and are subject to the full panoply of state and local regulation.

Even where the section 10501(b) preemption applies, the Board has made clear that there are limits. The Board has never interpreted the statute to mean that it preempts all other law. 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 regulatory schemes that are implemented in part by the states, such as the Solid

Waste Disposal Act, the Clean Air Act, and the regulation of rail safety under the Federal Railroad Safety Act.

Where states and localities are acting on their own, both the Board and the courts have found that certain types of actions are necessarily preempted, regardless of the context or basis of the action. This includes any form of permitting or preclearance requirements – such as zoning and environmental and land use permitting – that could be used to deny or defeat a railroad's ability to conduct its operations or to proceed with activities that the Board has authorized. Also, states and 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, state and local laws are preempted only if the particular action would prevent or unreasonably interfere with rail transportation. Thus, not all state and local regulation affecting rail carriers is preempted. Rather, states retain certain police powers to protect public health and safety. 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 comply with local fire, electrical, and building codes; allow a local government to inspect their facilities; and share their plans with the community when they are undertaking an activity for which a non-railroad entity would require a permit.

There are three ways in which issues involving the handling of solid waste at facilities proposed to be located along new or existing rail lines come before the Board: (1) proposals to build a new line into a new service area; (2) proposals that involve a new carrier or a small Class III carrier seeking to acquire and operate an existing line; and (3)

the construction of facilities ancillary to already-authorized rail lines. I will address each type of case.

1. New Rail Construction

If a project involves building a new rail line into what would be a new service area for the railroad, it requires a license from the Board. The Board's authorization may take the form of a "certificate of public convenience and necessity" issued under 49 U.S.C. 10901, or an exemption under 49 U.S.C. 10502 from the formal application procedures of section 10901. Regardless of how the authorization is sought, in a rail construction proceeding the Board routinely conducts a detailed environmental review under the National Environmental Policy Act (NEPA) as part of its licensing process. As part of the environmental review, Federal, state, and local agencies, communities, organizations and members of the general public have an opportunity to participate and to raise any environmental concerns they may have. And the Board has broad discretion to impose environmental conditions on any authority it grants to minimize any potential environmental impacts. These conditions may include, as appropriate, reporting, monitoring and oversight; a requirement that the rail carrier comply with specific state and local regulations; and inspections of the rail-related operations on the Board's behalf by appropriate state and local agencies, such as a state department of environmental protection (DEP).

2. Acquisition of an Existing Rail Line

If a project involves a new carrier seeking to acquire or operate an existing rail line, the new carrier must also obtain regulatory authority from the Board. As in the case of new construction, the new carrier may file an application for that authority under 49

U.S.C. 10901, or it may seek an exemption under 49 U.S.C. 10502 from the application requirements of section 10901, where abbreviated processes are adequate. Currently, most of these cases are handled under "class exemptions" at 49 CFR 1150 Subpart D and 49 CFR 1150 Subpart E that allow parties to use abbreviated, summary procedures for obtaining authority, subject to an after-the-fact Board review if objections are received.

NEPA applies to proposals for Board authority to acquire and operate an existing line, whether the authority is sought through an application or an exemption. Where there is a potential for significant environmental impacts in these cases, the Board conducts an environmental review similar to what takes place for rail construction projects.

3. Construction of Facility Ancillary to Already-Authorized Rail Line

Finally, under our governing statute, some activities, although part of rail transportation, may nevertheless not be subject to STB licensing. These activities include making improvements to existing railroad operations, such as adding track and/or facilities – including transload facilities where materials are transferred between truck and rail – at existing railroad locations, to better serve the needs of a railroad's service territory. They also include construction of ancillary spur, industrial, team, switching, or side tracks by an already-authorized rail carrier, since ancillary track and facilities of this nature are excepted by 49 U.S.C. 10906 from the Board's licensing authority.

Because no Board license is required in these types of cases, there is no occasion for the STB to conduct a formal environmental review or impose specific environmental conditions. However, as I have noted, Federal environmental laws continue to apply, and state and local police powers are not preempted entirely. Moreover, the Board

encourages railroads to work with localities to reach reasonable accommodations. 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 concerns.

Moreover, any interested party, community, or state or local authority concerned that the Federal preemption is being wrongly claimed to shield activities that are not included within the definition of "transportation by rail carrier" can ask the Board to issue a declaratory order under 5 U.S.C. 554(e) and 49 U.S.C. 721, addressing whether the particular operations constitute "rail transportation" by a "rail carrier." Alternatively, they can go directly to court to have that issue addressed. The Board has issued a number of declaratory orders clarifying the reach and applicability of the Federal preemption to particular situations. 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 operations did not actually constitute "rail transportation" or would not involve 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. It is worth noting 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 applicability of the preemption for particular activities and operations.

New England Transrail

There have been only a few cases that have come before the Board involving solid waste facilities. I would like to focus in my written testimony on New England Transrail, the most controversial and complex preemption case of this type to date. While this matter is still before the Board, I can discuss the issues raised and the events that led to issuance of the Board's preliminary decision on jurisdiction in July 2007.

New England Transrail (NET) plans to acquire existing track, construct new track and operate as a rail carrier over the combined trackage in Wilmington and Woburn, Massachusetts, to transport traffic by rail for about 1 mile for connection to other rail carriers that will carry the product to their final destination. In seeking Board authorization, NET stated that, upon commencement of rail operations, it would receive at its facility, and provide transportation for, a variety of commodities, including sand, gravel, plastic pellets, municipal solid waste (MSW), and construction and demolition debris (C&D).

In its written filings, NET argued that it would be a rail carrier and that all of its planned activities at the facility would facilitate the transportation of the MSW and C&D, and therefore would be integrally related to rail transportation. Opposing parties argued that NET would not be a rail carrier and that some or all of these activities would not be part of rail transportation, as they are no more than routine solid waste management and processing activities.

A coalition of parties headed by the National Solid Wastes Management Association asked the STB to address the threshold issue of the extent of the Board's

jurisdiction over the project. The Board agreed that it would make sense to first examine the extent to which NET's planned activities related to MSW and C&D would come within the scope of the Board's jurisdiction. The Board sought written comments from all interested parties, and in April 2007, held a full day of oral argument to further explore the issues. At the oral argument, a number of the witnesses who opposed the New England Transrail proposal acknowledged that some of the planned activities, such as loading, unloading, and temporary storage, would directly facilitate the rail transportation of C&D and MSW by making that transportation more efficient, more productive and safer. And one witness, the owner of a truck transload solid waste facility in Massachusetts, stated that the state permitting process for his facility had taken four and a half years.

In July 2007, the Board issued a preliminary decision announcing that the proposed transaction, if approved, would make NET a rail carrier, but that the part of NET's plan involving the shredding of C&D would extend beyond the scope of rail transportation. The Board also concluded that other proposed activities – such as loading, unloading, handling and storing – that are defined in Federal statute as being part of "transportation" – would fall within the Board's exclusive jurisdiction. But the Board emphasized that even as to those activities, its decision does not entirely limit the application of state and police powers and that Federal environmental laws would continue to apply.

Finally, the Board explained that NET will not be allowed to enter the rail business until extensive environmental, safety, public health, and other public interest considerations are fully addressed. Specifically, the Board will (1) await completion by

the United States Environmental Protection Agency of an ongoing remedial investigation and feasibility study of the site on which NET proposes to operate; (2) conduct a thorough environmental review pursuant to NEPA and impose any appropriate environmental or other conditions, which could include specific monitoring, inspection, and oversight by the Board or on the Board's behalf by Federal, state and/or local agencies; and (3) make its staff and resources available to facilitate negotiations between NET, Massachusetts, and local agencies to reach a mutually acceptable environmental mitigation plan.

Petitions for administrative reconsideration of the July 2007 decision are now pending before the Board, and a petition for judicial review of that preliminary decision has been filed by the Massachusetts DEP.

Other Recent Initiatives

The Board is not free to find, as some have urged the Board, that no handling or storage of any kind is part of "transportation," given the broad definition of "transportation" in our statute. The courts and the rail industry have consistently understood that transloading operations are part of rail transportation. For the Board to attempt to suggest otherwise could have far-reaching, disruptive implications for a host of other commodities (such as lumber, cement, and automobiles) for which rail carriers often perform transloading at the starting or ending point of the rail movement.

However, the Board recently has taken a number of initiatives to do what it can under the law to allow for effective regulation in this type of case. When, for example, a solid waste facility is involved in a proposal that involves building a new line into a new service area, the Board's existing environmental review processes are sufficient to allow

full consideration of the environmental and other issues that may be presented as part of the rail licensing process. I should point out that even when such projects involve a new carrier or a very small (Class III) carrier seeking to acquire and operate an existing line, regulatory authority is required and NEPA review can be triggered.

But it has become increasingly evident that the summary class exemption procedure under which most acquisition cases involving a solid waste facility are currently handled does not always provide enough information about the proposal to allow the Board to handle its regulatory responsibilities effectively and efficiently. On a number of occasions, the Board has found it necessary to stay the effectiveness of notices invoking a class exemption to allow a more searching inquiry and to solicit further evidence designed to elicit a more complete record before permitting the proposed action to go forward. For example, when the class exemption procedure was invoked to lease and operate 1,600 feet of track in Croton-on-Hudson, New York for use in transferring C&D waste between truck and rail, the Board stayed the proceeding to allow time to provide additional information and later rejected the request for Board authority. Recently, the Board held up the proposal of Ashland Railroad to lease and operate approximately 1.5 miles of currently unused track in Freehold, New Jersey and to develop a transload facility on the track so that the Board could obtain additional information. After Ashland failed to adequately respond to specific questions posed by the Board about the nature of the proposed operations and potential impacts to wetlands and water supply, Ashland's request for authority was rejected without prejudice.

Indeed, the Board has recently instituted a proceeding to consider whether to increase the information required from all of those seeking to use the class exemption

procedure to acquire, lease and operate rail lines. Six Class I rail carriers had asked the Board to institute a rulemaking to consider additions to the information required under the class exemption regulations, such as whether the entity seeking authorization from the Board intends to provide facilities for the transportation or transloading of MSW and C&D and how the railroad facility has been or will be operated. On October 4, 2007, the Board issued a decision stating that, following further analysis, it will prepare a notice of proposed rulemaking and seek public comment on possible proposed changes to the current regulations.

The Board also tries to be proactive where environmental concerns are brought to the Board's attention in cases where the Federal preemption applies but there is no requirement for a Board license and hence no opportunity for a NEPA review. In such cases, STB staff conducts site visits to rail facilities where MSW or C&D is handled, if appropriate. Staff also advises the parties that Federal environmental laws continue to apply and that local police powers are not preempted entirely and encourages rail carriers to work with localities to reach reasonable accommodations. Recently, I sent STB staff to visit a rail facility in Hainesport, New Jersey following allegations that there were huge piles of trash on the premises. Our staff found no exposed trash and consulted with New Jersey DEP, which confirmed that it too had inspected the facility after receiving complaints and had found no violation of any New Jersey DEP regulations. I also personally visited Freehold, New Jersey to meet with the local community to inform them of our denial of Ashland Railroad's request for authority for a rail transload operation there, and to discuss ideas for improving STB communications with local stakeholders.

Finally, some states have adopted regulations that accommodate Federal preemption under 49 U.S.C. 10501(b) but allow them to inspect and impose other requirements on rail related waste facilities under the police powers they retain. For example, New Jersey has regulations – known as the 2D regulations – that shield the carrier from the need to comply with zoning and other preconstruction environmental and land use permits but impose a number of other requirements on rail-related solid waste facilities that are meant to not impede the continued flow of interstate commerce. The Board has never been asked to formally address the New Jersey regulations, and we are not currently a party to the litigation pending in the Federal courts regarding which, if any, provisions of those regulations are preempted. However, it would be consistent with everything the Board has said about the scope of the section 10501(b) preemption that states can apply their regulations to rail-related waste facilities so long as the regulations are not applied in a discriminatory manner and the regulations do not unreasonably interfere with the railroad's right to conduct its operations. Therefore, I would not object to New Jersey implementing its 2D regulations, or to other states adopting and implementing similar regulations.

CONCLUSION

While the statutory and regulatory issues presented in these types of cases are quite complex, the public interest and public policy considerations involved in these controversies require policy makers to balance several important, and often conflicting, policies, including:

1. How do we promote and expand the national rail network when local property owners, competing solid waste facilities that are not located close to a railroad, and local and state governments seek to regulate rail operations?

2. How can rail service help our country meet a growing demand for the transportation of material that some might view as controversial or a nuisance?

3. How can reasonable state, local, and Federal health, safety, and environmental safeguards for this type of rail transportation be implemented and imposed?

4. And what protection should rail operators have if local, state, and Federal regulation becomes unreasonable and tantamount to zoning of the national rail network?

These are difficult issues to balance, and perfect results that leave all stakeholders satisfied are very rare indeed. The Board, however, will continue to work hard to identify and implement administrative and regulatory strategies that improve our ability to ensure effective regulation in this area.

I appreciate the opportunity to discuss these issues today, and look forward to any questions you might have.

Surface Transportation Board
Washington, D.C. 20423-0001

October 31, 2007

The Honorable Corrine Brown
Chairwoman
Subcommittee on Railroads, Pipelines and Hazardous Materials
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairwoman Brown:

We are writing to respond to three follow-up questions posed after the hearing on October 17, 2007, before the Subcommittee on Railroads, Pipelines and Hazardous Materials regarding "Railroad-Owned Solid Waste Transload Facilities."

Question 1: Aren't the "health and safety concerns" the same if the commodity was something other than solid waste, such as paint, cosmetics, wine, ethanol, LNG, gasoline, coal, nuclear materials, automobiles, etc.?

Answer: Concerns that local residents and local and state agencies may have regarding activities at rail facilities are routinely triggered by operations involving many types of commodities. Some commodities, such as automobiles, are less likely than municipal solid waste to cause health and safety concerns. Others, such as nuclear materials, fuels, and chemicals, often raise more intense health and safety concerns than those caused by rail operations involving solid waste. Noise, quality of life, neighborhood objections, land use, zoning, and myriad other local concerns are frequently triggered by a wide range of rail operations, not just those that involve the handling of solid waste.

Question 2: How are the local health and safety concerns addressed now?

Answer: If a proposal requires a license from the Board and an environmental review under the National Environmental Policy Act (NEPA), the Board's existing processes are sufficient to allow full consideration of local health and safety issues that may arise. As part of the NEPA process, state and local agencies, communities, and members of the general public have the opportunity to participate and to raise any environmental concerns they may have. And the Board has broad discretion to impose environmental mitigation on any authority it grants, including, as appropriate, reporting, monitoring and oversight conditions; a requirement that the rail carrier comply with specific state and local regulations; and inspections of the rail-related operations on the Board's behalf by state and local agencies, such as a state department of environmental protection.

In cases where no Board license is required, there is no occasion for the Board to conduct a formal NEPA review or impose specific environmental conditions. But other

Federal environmental laws (including those that are implemented in part by the states) continue to apply. State and local land use and zoning powers can not be imposed on rail operations, because otherwise the locality could deny the railroad the right to construct facilities or conduct its operations, or delay the process indefinitely. However, as the Board has repeatedly explained, state and local police powers are not preempted entirely. Thus, railroads can be required to comply with health and safety rules that do not unreasonably interfere with interstate commerce, such as fire and electrical codes. States and localities also can require a railroad to allow the locality to inspect the facility and to notify the locality when the railroad is undertaking an activity for which a non-railroad entity would require a permit. Moreover, railroads often voluntarily cooperate with reasonable state and local inspections and health and safety requirements. Also, Federal agencies such as the U.S. Environmental Protection Agency, the U.S. Department of Labor, and the Federal Railroad Administration may conduct inspections at the request of local and state agencies.

The Board also tries to be proactive where local environmental concerns are brought to our attention. STB staff conducts site visits to rail facilities where solid waste is handled, if appropriate, and encourages railroads to work with localities to reach reasonable accommodations. Finally, some states have adopted regulations, such as New Jersey's 2-D regulations, that accommodate Federal preemption but allow the states to inspect and impose other requirements on rail-related waste facilities to protect public health and safety under the police powers they retain.

(Follow up) How is the local regulation of the transloading of hazardous commodities (or any commodity) any different from non-hazardous solid waste?

Answer: From the Board's perspective, there is no difference. "Transportation" is broadly defined in the Interstate Commerce Act to encompass not only the movement of a commodity while it is in a rail car, but also activities such as loading and unloading material from rail cars and temporary storage. Accordingly, the Board has found that our statute does not permit different legal standards for addressing the applicability and reach of the Federal preemption to particular rail-related activities and operations, based on the particular commodity involved or whether a commodity is considered hazardous.

(Follow up) If the concerns are the same, why not exempt all commodities? Why single out solid waste?

Answer: Exempting rail activities like transloading (i.e., transferring materials to or from rail and trucks) from the definition of transportation could have far-reaching, disruptive implications for a host of commodities (such as lumber, cement, brick, stone, and automobiles) for which rail carriers often perform transloading at the starting or ending point of the rail transportation of the movement. Transloading is important to interstate commerce and beneficial to the environment because it alleviates highway congestion and air pollution from large trucks and allows commodities to be transported in a safer, more productive, and more efficient manner.

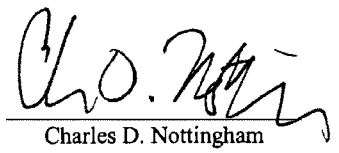
Rail operations involving the handling of solid waste have been singled out for a number of reasons, including: (1) nearby residents often do not want to live near a solid waste facility; (2) competing waste handling businesses do not want more competition; (3) some rail-related facilities have wrongly claimed to be exempt from state and local regulation of every sort (even such laws as fire suppression); and (4) in some cases, solid waste businesses have located close to a railroad and claimed to be a rail facility that qualifies for Federal preemption, even though the operations did not actually constitute "rail transportation" or would not involve a "rail carrier."

Question 3. If you are going to restrict the Board's jurisdiction over the transloading of solid waste (on the basis of local health and safety), wouldn't it follow that you would restrict the Board's jurisdiction over any of these other commodities (for the same reason)?

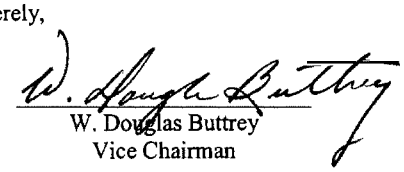
Answer: It could.

We hope this information will be helpful to you and Members of the Subcommittee. If you have any further questions or concerns, please contact us, or your staff may contact Matthew Wallen, Director of the STB's Office of Governmental and Public Affairs, at (202) 245-0238.

Sincerely,



Charles D. Nottingham
Chairman



W. Douglas Buttrey
Vice Chairman

Statement of Gregory J. Schmidt

Mayor, Village of Croton-on-Hudson, New York

Before the

Subcommittee on Railroads, Pipelines, and Hazardous Materials

Committee on Transportation and Infrastructure

U.S. House of Representatives

Hearing on Railroad-Owned Solid Waste Transload Facilities

October 11, 2007

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Statement of Gregory J. Schmidt

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Thank you, Mr. Chairman and members of the Committee. My name is Dr. Gregory Schmidt. I am the mayor of the Village of Croton-on-Hudson, New York. We are a small village in the northern suburbs of New York City. with a population of about 8,000 people and an area of less than five square miles. Despite our small size, we find ourselves besieged with solid waste operators masquerading as railroads and abusing federal law to prevent us from protecting the health and safety of our residents.

For many years, a ten-acre parcel in our village has been used for various materials handling operations. About ten years back, one of the solid waste operating companies leasing the property built a 1600 foot rail siding on it to enable it to directly load rail cars after processing the waste. This 1600 feet of track is the linchpin of various solid waste companies' efforts to avoid state and local regulation of their waste hauling operations by taking advantage of the exemption from state and local regulations enjoyed by railroad operations.

The 10-acre parcel is owned by Greentree Realty LLC, whose primary owner is the estate of an associate of the Genovese organized crime family. In 2000 Greentree leased the land to a company known as Metro Enviro Transfer, for use as a construction and demolition debris transfer station. The transfer station required a special permit from the Village, which regulated the hours of operation, types of waste that could be accepted, capacity limits, and required training of personnel. Metro Enviro accumulated an appalling compliance record – for exceeding waste limits, falsifying records, accepting industrial and municipal waste, and failing to train personnel – and in January 2003 we ordered it to close. In July 2005, after two and a half years of litigation that cost the Village 3/4 of a million dollars, the state's highest court upheld the Village's 2003 order, and the facility closed.

Now that Metro Enviro Transfer could no longer operate at the site, Greentree entered into a lease with an entity called Northeast Interchange Railway (NIR). Despite its name, NIR is not a railroad; it's a solid waste company. Another 2-1/2 years of litigation ensued among the Village, Greentree and NIR – and it's still ongoing. A New York State Supreme Court judge barred NIR from operating a waste transfer station at the site without first obtaining a permit from the Village. He ruled that "the Village has the right to impose conditions necessary to prevent harm to the community and the environment."

NIR then attempted to evade that requirement by filing with the Surface Transportation Board a Notice of Exempt Transaction, stating that it planned to become a common carrier by rail and to lease and operate its 1,600-foot "rail line" for the transloading of C&D waste and other materials. The Village – which was not notified of

the filing and learned about it purely by accident – filed with the STB and demonstrated that NIR had not shown it was practically, or legally, able to transform the 1,600-foot private spur track into a rail line operated by a common carrier. The STB rejected the notice and ruled that NIR would have to make a full filing with the STB.

Now, both the New York State Supreme Court and the STB had ruled that NIR must file applications before the Village and the STB in order to operate at the site.

The Village expected to see these applications, but never did. Instead, late one afternoon in May 2006, the Village Attorney received a phone call from the lawyer for NIR who said he was now also representing a company called Buffalo Southern Railroad (BSR) and saying that BSR was suing the Village in federal court, and that a temporary restraining order hearing would be held the next morning.

Prior to this telephone call, no Village official had ever heard of BSR – which we later learned was a small railroad with a total of 32 miles of track running from Buffalo to Jamestown, New York, 300 miles away from Croton-on-Hudson. It turns out that an NIR affiliate had entered into a two-year sublease with BSR, and that BSR was claiming that Village authority over the site was preempted by the Interstate Commerce Commission Termination Act.

Never mind that BSR's real operation was at the other end of the state and that it was just fronting for NIR's waste hauling and processing operations. The federal court granted BSR's motion for a preliminary injunction against the Village, preventing us from interfering with BSR operations. We were completely stymied.

BSR threatened a massive operation with solid waste and lots of other materials, all under cover of federal law that would prevent the Village from having any control

over it. With a railroad as a cover for the waste hauling and processing operations, the Village could not zone out the use altogether; it could not regulate the hours of operation even though the site shares an access road with the Village's 2000 plus space commuter parking lot; it could not monitor the types of waste being trucked through Village streets to the transfer station; and it would have no enforcement power over any limitations that might be put on the operation by other agencies, such as the STB or the federal Environmental Protection Agency. Fortunately, for business reasons that were never clear to us, the BSR operation never got off the ground and earlier this year BSR cancelled its lease.

The Village's fears are far from resolved, however. In the course of negotiating with the property owner over the Village's possible acquisition of the property, Greentree told us that they have other railroads waiting in the wings to move back in and handle solid waste.

Mr Chairman, the Village, the County of Westchester and the State of New York have worked together for decades to remove the influence of organized crime from the waste industry and to make sure that solid waste facilities are operated with environmental safeguards. Our efforts have been successful. This has resulted in a waste industry that is properly regulated by local, county and state governments, each regulating a different facet of the industry. Allowing railroads (or waste operators masquerading as railroads) to perform the handling of waste would completely undermine the gains we have made.

Mr. Chairman, our little village has already spent $1.2 million in legal fees to defend itself from these solid waste operators who are disguising themselves as

railroads and who are claiming federal immunity from our control. We don't think that's what Congress had in mind when it created the STB, and we call upon Congress now to amend the law to make that perfectly clear.

United States House of Representatives
Committee on Transportation and Infrastructure

Subcommittee on Railroads, Pipelines, and Hazardous Materials
Railroad-Owned Solid Waste Transload Facilities
October 11, 2007

Testimony of
Wolfgang Skacel, Assistant Commissioner
New Jersey Department of Environmental Protection

Thank you Chairwoman Brown and members of the committee for inviting me to testify on rail-affiliated solid waste transfer facilities and the State of New Jersey's efforts to ensure that such facilities are operated safely and with minimum impact to public health and the environment. I want to commend all the committee members on both sides of the aisle for holding this hearing and taking the steps necessary to address the severe negative environmental and health impacts of railroad-owned solid waste transload facilities. My name is Wolfgang Skacel, and I am the Assistant Commissioner for Compliance and Enforcement in the New Jersey Department of Environmental Protection. Let me start by saying that New Jersey fully supports the movement of solid waste by rail. With shrinking in-state capacity for solid waste disposal, and new solid waste facilities virtually impossible to site in and around our urban areas, solid waste must be transported longer distances for proper final disposal. There are clear advantages to public health, safety, and environmental quality for this solid waste to move by rail; reduced traffic congestion on our roadways, and reduced fuel consumption and air emissions from diesel truck engines. We firmly believe, however, that these environmental benefits can – and must – be had without the current detrimental effects of an unbridled industry.

New Jersey has a long history in solid waste management. Haphazard, unregulated, indiscriminate dumping without consideration of engineering controls and impacts to public health and environmental quality as well as the influence of criminals historically entrenched in the trash business has led to countless contaminated sites. Many of these sites have required cleanup with public funds under the federal Superfund and our own state level cleanup programs. In response, New Jersey over the years has implemented a strong regulatory program that ensures that industry and waste disposal no longer create new contaminated sites as a matter of routine. However, solid waste operators and railroads transporting solid waste have been abusing the preemption provisions of the Interstate Commerce Commission Termination Act (ICCTA) by arguing that public health and environmental regulations do not apply to them. In addition, the Courts and the Surface Transportation Board (STB) have incorrectly interpreted the

preemptive effect of ICCTA. The result in New Jersey has been a step backward in environmental protection and a return to open dumps, something State regulatory officials were charged with closing or upgrading over twenty-five years ago. This is a direction in which none of us as responsible public officials and charged with protecting the public interest can afford to go.

While there are strong federal programs addressing air and water pollution, solid waste regulation has traditionally been and continues to be the purview of the States. The STB simply does not have the expertise, staff, or regulatory tools available to address the diverse and serious consequences of mismanaging solid waste. Trash is not innocuous; it often contains hazardous, toxic and even radioactive materials which can not be ascertained until the trash is unloaded from its containers. Consider, for example, what is in municipal solid waste and construction and demolition debris. Building lumber has been treated with copper and arsenic. Our homes and businesses have been treated with pesticides and rodenticides. Even the bright colors in our paints, ceramic tiles and fixtures come from a myriad of toxic materials. PCBs (polychlorinated biphenyls) were used for many years in sealants and adhesives. Asbestos was used not only in insulation, but in roofing and siding materials as well. We have all heard the experts talking about the health effects suffered by the responders and clean-up workers at ground zero from breathing the dust from the World Trade Center. Construction and demolition waste are materials these rail-affiliated transfer facilities are handling today. How long before one of these facilities attempts to handle municipal solid waste or animal waste, septic tank and cesspool waste, and of course sewage sludge.

Consider also that while the STB has exclusive jurisdiction over transportation by rail carriers, it does not have any direct regulatory role over rail related facilities once the railroad is established. As a result, once established, a rail carrier may build rail related facilities such as transload facilities with no STB oversight at all and no state or local permits. This is problematic since establishing a new railroad is not difficult. Under ICCTA and existing STB rules, such as the Notice of Exemption process, short line railroads can be established as virtual railroads, with no actual ownership of track, railroad cars, locomotives, or trackage rights agreements with other rail carriers. This not

only opens the door for sham railroad operations, but undermines existing solid waste facility operations that do comply with environmental and public health regulations.

Lastly, we believe the STB's exemption process as applied to the solid waste industry is insufficient to protect public safety and may unintentionally act as a magnet for persons with organized crime or other criminal backgrounds, or repeat major environmental offenders to enter the rail industry. New Jersey's experience regulating solid waste collection, transport and disposal shows how organized crime is able to infiltrate this industry, resulting in murder, extortion, arson, and price-fixing. New Jersey addressed this threat through a program called A-901, which requires a detailed background investigation of principals of solid waste entities, and allows NJDEP to exclude such entities from the industry if they are found to have organized crime connections, disqualifying felony convictions, or a poor environmental compliance history. Several other jurisdictions, including New York City, Westchester County in New York, Vermont, and Ohio, have adopted similar statutes. This background investigation is much more extensive than the review provided in connection with the STB's Notice of Exemption procedure, and is necessary to protect the public safety by keeping out dangerous and irresponsible elements.

When we first learned of ICCTA and our apparent inability to require public safety and environmental controls through our traditional permit processes, and saw how railroad-owned solid waste transload facilities were being conducted, we began a process to establish minimum baseline criteria for their construction and operation. We drafted regulations, commonly known as the "2D regulations"; sought out stakeholder input including from rail carriers; and adopted environmental, health and safety standards applicable to railroad owned and operated facilities to guard against harmful releases to air, land and water resources and to ensure public health and safety. The railroads would like you to believe these are onerous standards but we submit that they are the minimum measures that must be followed to protect against hazardous dust from polluting the air that we all must breathe, toxic metals and chemicals from contaminating our drinking water supplies, necessary wetlands, flood plains and other important natural resource lands from being wantonly destroyed, rats and other vermin from being attracted in hordes, and increased risk of fire endangering our citizens, nearby businesses and our

community assets. In fact, even though all waste transfer facilities in New Jersey must comply with these same standards and more, the rail-affiliated transfer facilities have refused to abide by these minimal requirements by claiming broad preemption. (See attached declaration of John A. Castner concerning the historical status of compliance with the 2D regulations by the NYS&W facilities located in North Bergen.)

The real dangers posed by solid waste are documented in our history of regulating the trash industry and seen in examples manifested by these so-called railroad operations. Unregulated waste transfer stations, rail carrier operated or otherwise, present many risks to human health and the environment. Stormwater runs off through the piles of waste collecting contaminants and then entering nearby surface waters and wetlands. Garbage, dust, and odors contaminate developed areas and wetlands as well. Waste that is allowed to sit creates large piles that decompose, smolder, catch fire, and/or attract rats and other disease carrying vermin. Improper storage of hazardous materials found in waste endanger public health and the environment. And these are only some of the problems that have been presented by the railroad-affiliated solid waste transload facilities in our State.

Incredibly, a handful of these facilities actually began operations as open air dumps – these are depicted in the photographs in your package of materials. It was only after we threatened a $2.5 million penalty that rudimentary structures were constructed. Walls and a roof, however, are not enough. Systems to control air pollution and manage or capture stormwater runoff, leachate, and wastewater are necessary but still lacking at the rail waste facilities. Moreover, a building does not mean that the waste is handled inside of the building. We have seen facilities consistently dump or spill waste outside because the facility was not designed to, and therefore cannot handle, the volume of waste being dumped at the facility. Waste heaped high above the walls of open top gondola cars regularly spills over the sides onto tracks littering our communities. Numerous fires have occurred and clouds of dust spew from the building openings, covering the grounds surrounding the operation and nearby neighborhoods. Examples of rail affiliated transfer facilities that continue to operate in an environmentally unsound manner are also among the materials provided. Also included is an inventory of current

and proposed rail affiliated transfer facilities in New Jersey – at least the ones of which we are aware.

New Jersey's legal efforts to address these serious environmental and public health issues at rail transfer facilities stretch back five years and are still ongoing. Over the last five years, New Jersey DEP and the New Jersey Meadowlands Commission have been embroiled in numerous lawsuits and legal proceedings before the STB and the courts in multiple jurisdictions to defend our authority to regulate solid waste activities undertaken by or in conjunction with rail carriers. The decisions rendered in these proceedings have been inconsistent, confusing and done little to resolve the issue. In fact, the only light we have seen at the end of this tunnel, is the oncoming train loaded with trash.

In conclusion, New Jersey's efforts to regulate and hold accountable rail-side solid waste transfer facilities resulted in our strong belief that a legislative solution is necessary to resolve this issue. The goal of effective competition between modes of transportation through ICCTA has been lost. In its place, states such as New Jersey are faced with a tidal wave of solid waste facilities linked to railroads, claiming preemption from the very public health and environmental regulations with which their competitors in the solid waste industry have complied for decades. History has shown the risks of leaving any aspect of the solid waste industry unregulated, and intervention by Congress is warranted to reaffirm the States' primary responsibility for solid waste management, the States' authority to regulate solid waste activities, and the States' ability to address the problems attendant with waste management.

I thank the Subcommittee for its continued interest in and efforts on this pressing issue and for the invitation to testify today. Given the serious nature of this issue, I respectfully request that the committee keep the testimony open so that we may submit additional comments at a later date. I am happy to answer any questions the committee may have.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW YORK, SUSQUEHANNA AND WESTERN RAILWAY CORPORATION, Plaintiff, v. BRADLEY M. CAMPBELL, in his official capacity as Commissioner of the New Jersey Department of Environmental Protection, NEW JERSEY MEADOWLANDS COMMISSION, et al., Defendants/Counterclaimants/Third Party Plaintiffs, v. MHF LOGISTICAL SOLUTIONS, INC.; SLANE RAIL TRANSPORT, LLC; PRECISE CONSTRUCTION CONTRACTING, INC.; RAIL-TECH, LLC; HUDSON-NATIONAL, LLC; CARDELLA TRUCKING CO., INC.; ON TRACK LOADING COMPANY, INC.; X-PRESS RAIL TRANSFER, LLC d/b/a	CIVIL ACTION No. 05-4010 (KSH) ELECTRONICALLY FILED **DECLARATION OF JOHN CASTNER CONCERNING THE CURRENT STATUS OF COMPLIANCE WITH THE 2D REGULATIONS BY THE NYS&W FACILITIES LOCATED IN NORTH BERGEN**

94TH STREET RAIL TRANSFER, LLC; :
SCOTT EXCAVATING, LLC; and :
SUSQUEHANNA BULK SYSTEMS, INC.,:
:
Third Party Defendants. :
:

I, John Castner, make this declaration upon personal knowledge:

1. I submit this declaration to bring to this Court's attention certain conclusions I have made following my examination of reports from recent compliance inspection at five New York Susquehana and Western Railroad (hereinafter "NYS&W") transfer stations (hereinafter the "facilities") conducted between November 9, 2004 and December 5, 2005, and plans submitted by NYS&W detailing proposed construction activities at the facilities. The above referenced inspection reports were compiled by the New Jersey Department of Environmental Protection (hereinafter the "Department" or "DEP") in the normal course of the Bureau of Solid Waste Compliance and Enforcement's business of inspecting solid waste facilities to determine compliance with New Jersey's Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq.

2. I am the Director of the Division of County Environmental and Waste Enforcement within the DEP. I am licensed as a professional engineer, as a professional planner, have a Bachelor of Science in Civil Engineering, and have worked for DEP since 1976. Since 1976, I have served in a variety of staff and (primarily) supervisory capacities relating to solid and hazardous waste enforcement and permitting, including solid waste facility permitting. Solid waste facilities include landfills, incinerators, material recovery facilities, and transfer stations. My supervisory responsibilities have included being a Supervising Environmental

Specialist in the Engineering Bureau, which regulates solid waste transfer station permitting; the Chief of the Bureau of Landfill Closure; and the Chief Engineer of two bureaus which regulated, respectively, solid waste transfer stations, compost facilities and landfills. From 1996 through October 2004, I served as the Executive Assistant to the Director of DEP's Division of Solid and Hazardous Waste and as acting or permanent Director of DEP's Division of Solid & Hazardous Waste. In those capacities, I supervised solid waste facility permitting. I also briefly served during this time as a liaison for DEP to the New Jersey Legislature on solid waste matters. In March 2005, I assumed my current position as the Director of DEP's Division of County Environmental and Waste Enforcement, which oversees DEP's solid waste and hazardous waste compliance and enforcement efforts, including ensuring compliance with solid waste regulations and the rail carrier regulations at N.J.A.C. 7:26-2D.1. As part of my current position with the DEP I regularly review facility inspection reports and facility design plans to determine compliance with the applicable Solid Waste regulations.

3. On November 9, 14, 16, and 23, and December 5, 2005, James Scully, an employee of the DEP's Bureau of Solid Waste Compliance and Enforcement and an inspector assigned to the subject facilities located in North Bergen, Hudson County, New Jersey at 2480 Secaucus Road, 16th Street, 43rd Street, 5800 West Side Avenue, and 94th Street, conducted inspections of these facilities. Following his inspections Mr. Scully prepared investigation reports which detail his observations while at the facilities and describe any violations of the applicable solid waste regulations located at N.J.A.C. 7:26-2D.1 (hereinafter the "2D regulations"). On November 28, 2005, Bahram Salahi, also an employee of the DEP's

Bureau of Solid Waste Compliance and Enforcement and an inspector assigned to the subject facilities, conducted inspections of the above mentioned facilities. Following his inspections Mr. Salahi prepared investigation reports which detail his observations while at the facilities, and describe any violations of the 2D regulations. I have reviewed all of the above mentioned inspection reports in detail.

4. I have also reviewed design plans (hereinafter "the plans") submitted by NYS&W which detail proposed construction activities at the above referenced facilities. The plans were submitted to the DEP between February 3, 2005 and September 8, 2005.

5. Following my review of the inspection reports and plans for the facility located at 94th Street, and based on my knowledge of solid waste facilities and solid waste regulations in general, I have concluded as follows:

   a. Based on the reported observations that waste loading activities are still being conducted at the 94th Street facility in the open air, and not in an enclosed building, this facility is in violation of the 2D regulations (N.J.A.C. 7:26D.1(d)1). This is in spite of the fact that the outside walls of the facility have been erected around the dumping area. In addition, it has been observed that the facility intermittently uses a water hose to control dust emissions, however, this measure is inadequate. Dust is still sometimes observed being emitted off-site from the dumping area during operations where it can settle out into surface water bodies or be inhaled by nearby residents. This constitutes a further violation of the 2D regulations (N.J.A.C. 7:26D.1(d)7). Lastly, it was observed that the roadways at the facility were not properly paved in violation of the 2D regulations (N.J.A.C. 7:26D.1(d)12).

b. All of the violations of the 2D regulations discussed above in paragraph 5a could cause actual harm to the environment and the health and safety of workers and nearby residents.

c. The plans submitted for the 94th Street facility were deficient in several ways and, thus, their implementation will fall far short of bringing the facility into compliance with the 2D Regulations. Most importantly, the plans do not depict any fire control measures, an air pollution control system, or an adequate drainage system for stormwater or waste water as required by the 2D regulations. These items are critical features under the 2D regulations. The plans also do not show how delivery truck traffic will be routed at the facility. This is essential because there will likely be vehicle congestion within the building, and such vehicle congestion can cause serious health and safety issues.

6. Following my review of the inspection reports and plans for the facility located at 5800 Westside Avenue, and based on my knowledge of solid waste facilities and solid waste regulations in general, I have concluded as follows:

a. Based on the reported observations, the 5800 Westside Avenue facility is not currently conducting waste loading activities, however, the building on-site is not entirely enclosed. Thus, this facility, should it resume operations would be in violation of the 2D regulations (N.J.A.C. 7:26D.1(d)1). Operation of waste loading activities such as this in partially enclosed building allows dust to be emitted into the outside atmosphere and off-site where it can settle out into surface water bodies or be inhaled by nearby residents. Although no loading activities were observed during

these inspections, dust emissions have been observed in the past and it is my opinion that the building in its current condition will allow future dust emissions.

b. All of the violations of the 2D regulations discussed above in paragraph 6a could cause actual harm to the environment and the health and safety of workers and nearby residents.

c. The plans submitted for the 5800 Westside Avenue facility were deficient in several ways and, thus, their implementation will fall far short of bringing the facility into compliance with the 2D Regulations. Most importantly, the plans do not depict any fire control measures or any drainage system for stormwater or waste water as is required by the 2D regulations. In addition, the plans do not indicate how the currently insufficient dust control system will be improved to prevent future migration of dust containing waste material and possible contamination to the outdoor air. These items are critical features under the 2D regulations. Traffic flow at the facility was illustrated on the plans, however, the pattern was not followed at the site. Further, if the illustrated pattern is implemented, there will likely be congestion at the scales. Finally, the plans do not illustrate a flow pattern that will assure outbound trucks will be weighed.. This is essential because there have been vehicle congestion issues at this facility in the past. If not remedied, such vehicle congestion will continue to cause serious health and safety issues.

7. Following my review of the inspection reports and plans for the facility located at 2480 Secaucus Road, and based on my knowledge of solid waste facilities and solid waste regulations in general, I have concluded as follows:

a. Based on the reported observations that waste loading activities are still being conducted at the Secaucus Road facility in the open air, and not in an enclosed building, and that the facility does not have tipping floors capable of ensuring proper containment and channeling of wastewater to sanitary sewer connections or a system to collect, store and properly dispose of wastewater, this facility is in violation of the 2D regulations (N.J.A.C. 7:26D.1(d)1, and 3). Conduct of these waste loading activities in the open air has allowed rain water to contact and mix with the waste. Furthermore, lack of a proper collection or containment system has allowed this water to pond, increasing the contact time with the waste, and eventually to migrate as storm runoff into storm sewers or directly into surrounding surface waters or ground water. Compounding the problem, the facility intermittently uses a water hose to control dust emissions. The waste water from this activity also runs into the surrounding surface waters and/or ground water. Lastly, intermittent use of a water hose to control dust emissions is inadequate. Dust is still sometimes observed being emitted off-site from the dumping area during operations where it can settle out into surface water bodies or be inhaled by nearby residents. This constitutes a further violation of the 2D regulations (N.J.A.C. 7:26D.1(d)7).

b. All of the violations of the 2D regulations discussed above in paragraph 7a could cause actual harm to the environment and the health and safety of workers and nearby residents.

c. The plans submitted for the Secaucus Road facility were deficient in several ways and, thus, their implementation will fall far short of bringing the facility into

compliance with the 2D Regulations. Most importantly, the plans do not depict scales, a fire control system, an air pollution control system, or any drainage system for stormwater or waste water as are required by the 2D regulations. These items are critical features under the 2D regulations. Lastly, the size of the vehicle access doorway is likely insufficient for waste vehicle usage.

8. Following my review of the inspection reports and plans for the facility located at 16th Street, and based on my knowledge of solid waste facilities and solid waste regulations in general, I have concluded as follows:

   a. Based on the reported observations that until December 5, 2005 there was waste at the 16th Street facility which had been stored in the open air for over 24 hours, and that the facility does not have tipping floors capable of ensuring proper containment and channeling of wastewater to sanitary sewer connections or a system to collect, store and properly dispose of wastewater, this facility was until December 5, 2005 in violation of the 2D regulations (N.J.A.C. 7:26D.1(d)1, 3 and 4). The storage of waste in the open air for over 24 hours allowed rain water to remain in contact with waste for a prolonged period of time. This is the case even though the waste was removed as of December 5, 2005. Furthermore, lack of a proper collection or containment system allowed this water to pond, further increasing the contact time with the waste. This stormwater eventually migrated as storm runoff into storm sewers or directly into surrounding surface waters or the ground water.

b. All of the violations of the 2D regulations discussed above in paragraph 8a could have caused (or if the facility should be reopened could cause) actual harm to the environment and the health and safety of workers and nearby residents.

c. The plans submitted for the 16th Street facility were deficient in several ways and, thus, their implementation will fall far short of bringing the facility, should it be reopened, into compliance with the 2D Regulations. Most importantly, the plans do not depict scales, a fire control system, an air pollution control system, or any drainage system for stormwater or waste water as are required by the 2D regulations. Similarly, the plans fail to detail stormwater management, utility plans, and do not indicate how the facility will comply with the applicable fire, health, plumbing, safety, and construction regulations. These items are critical features under the 2D regulations.

9. Following my review of the inspection reports and plans for the facility located at 43rd Street, and based on my knowledge of solid waste facilities and solid waste regulations in general, I have concluded as follows:

a. Based on the reported observations that waste loading activities are still being conducted at the 43rd Street facility in the open air, and not in an enclosed building, and that the facility does not have tipping floors capable of ensuring proper containment and channeling of wastewater to sanitary sewer connections or a system to collect, store and properly dispose of wastewater, this facility is in violation of the 2D regulations (N.J.A.C. 7:26D.1(d)1, and 3). Conduct of these waste loading activities in the open air has allowed rain water to contact and mix with the waste.

Lack of a proper collection or containment system has allowed this water to migrate as storm runoff into storm sewers or directly into surrounding surface waters or ground water. Compounding the problem, it has been observed that the facility intermittently uses a water hose to control dust emissions. The waste water from this activity also potentially runs into the surrounding surface waters and/or ground water. Lastly, the intermittent use of a water hose to control dust emissions is inadequate. Dust is still sometimes observed being emitted off-site from the dumping area during operations where it can settle out into surface water bodies or be inhaled by nearby residents. This constitutes a further violation of the 2D regulations (N.J.A.C. 7:26D.1(d)7).

b. All of the violations of the 2D regulations discussed above in paragraph 9a could cause actual harm to the environment and the health and safety of workers and nearby residents.

c. The plans submitted for the 43rd Street facility were deficient in several ways and, thus, their implementation will fall far short of bringing the facility into compliance with the 2D Regulations. Most importantly, the plans do not depict scales, a fire control system, an air pollution control system, or any dust control measures as are required by the 2D regulations. These items are critical features under the 2D regulations. The plans also do not show how delivery truck traffic will be routed at the facility. This is essential because there will likely be vehicle congestion within the building, and such vehicle congestion can cause serious health and safety issues.

10. In conclusion, the inspection reports and plans I reviewed indicated that the facilities are currently not in compliance with the 2D regulations. Moreover, the plans that were submitted to the DEP by NYS&W, even if fully implemented, will not bring the facilities into compliance with the 2D regulations.

11. Under the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., companies which charge rates for handling solid waste must apply for and obtain a Certificate of Public Convenience and Necessity from the Department. Parties operating transfer stations must file a registration statement and engineering design application and obtain approval thereof from the Department; obtain a certificate of public convenience and necessity from the Department; and file an initial tariff or contract for solid waste transfer operations and obtain approval thereof from the Department, which tariff or contract shall include the formulas to be used to determine the charges, rates, or fees to be charged for the utilization of the transfer station. N.J.S.A. 48:13A-6.2. The Department can also review the rates charged by companies collecting solid waste in New Jersey. N.J.S.A. 48:13A-7.6. Accordingly, the companies which charge rates for bringing solid waste to the North Bergen transfer stations (MHS Logistical Solutions, Slane Rail Transport, Rail-Tech, Cardella Trucking and X-Press Rail Transfer d/b/a 94th Street Rail Transfer, LLC) must comply with the above portions of the SWUCA.

Pursuant to 28 U.S.C. §1746, and under penalty of perjury, I declare that the foregoing is true and correct to the best of my knowledge. Executed on December 6, 2005

John Castner

Cardella 43rd Street, North Bergen, NJ

- This is an example of open dumping. Note the absence of environmental controls.
- This site was subsequently shut down.

Cardella, 43rd Street, North Bergen, NJ

- Uncontrolled open air dump
- Note total lack of environmental controls

Cardella, 43rd Street, North Bergen, NJ

- Lack of safety controls
- Site was shut down by railroad after NJDEP enforcement action

Cardella, 83rd Street, North Bergen, NJ

- **Photo taken on 3/27/07**
- **Volume of waste received at site exceeds capacity to manage**
- **Building lacks air and wastewater pollution controls**

Cardella, 83rd Street, North Bergen, NJ

- **Stormwater retention pond**
- **Notes lack of liner and further controls. Contaminants are simply allowed to overflow along track.**

Canadian Pacific Railroad Site, Newark, NJ

- Former Hi-Tech operation
- Note lack of air and stormwater controls

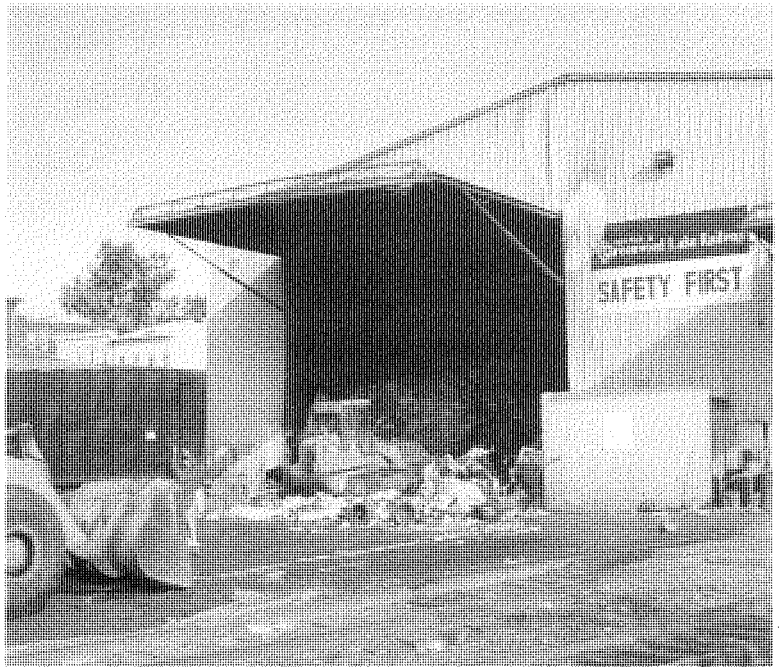
New York & Greenwood Lake Railway, Paterson, NJ

- **Facility temporarily shut down due to fire**
- **Note top of rail cars**
- **Building does not have sprinkler system**

New York & Greenwood Lake Railway, Paterson, NJ

- Front view of the building after fire

New York & Greenwood Lake Railway, Paterson, NJ

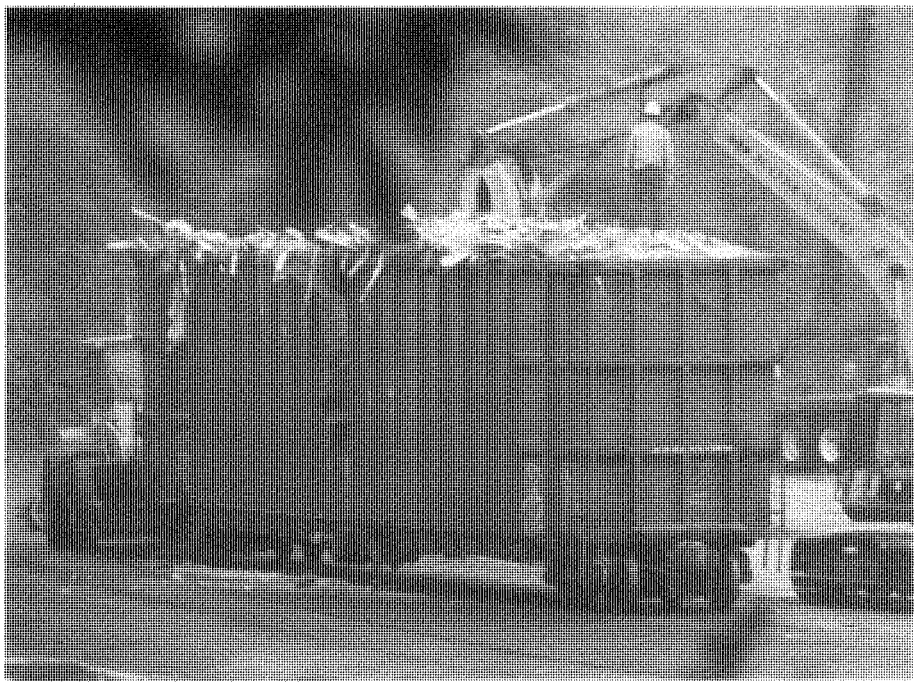


- **Photo taken on 9/26/07**
- **Dumping outside of building**
- **Poor Condition of Roadway**
- **Lack of Stormwater Control**

JP Rail, Pleasantville, NJ

- Partially enclosed structure
- No air pollution controls

Hainesport Industrial Rail Facility, Hainesport, NJ



- Over loaded rail car

"Rail" Waste Transfer Facility Inventory
October, 2007

OPERATING Transfer Facilities With Tipping

New York Susquehanna & Western Railroad Corporation/Consolidated Environmental Waste d/b/a Royal Rail
3700 Westside Avenue, North Bergen, Hudson County, NJ
NJEMS Program Interest Number: U1133

New York Susquehanna & Western Railroad Corporation/Total Quality Service, MHF Logistics
5800 West Side Avenue, North Bergen, Hudson County, NJ
NJEMS Program Interest Number: U638

New York Susquehanna & Western Railroad Corporation/ Cardella Trucking
83rd Street, North Bergen, Hudson County, NJ
NJEMS Program Interest Number: 266015

New York Susquehanna & Western Railroad Corporation/94th Street Rail Transfer/Scott Excavating
94th Street, North Bergen, Hudson County, NJ
NJEMS Program Interest Number: U932

New York Susquehanna & Western Railroad Corporation
4th Avenue & 13th Street, **Paterson**, Passaic County, NJ
NJEMS Program Interest Number: U1132

Canadian Pacific Railway/Hi Tech Trans LLC, Transload of America
91 Bay Avenue, Newark, Essex County, NJ
NJEMS Program Interest Number: U934

NY & Greenwood Lake Railway/ Hudson Logistics Inc./Steel Wheels Transport LLC
95-105 Passaic Street, Passaic, Passaic County, NJ
NJEMS Program Interest Number: 253473

Southern Railroad Company of New Jersey/JP Rail, Magic Disposal, Steve Waszen
16 North Franklin Boulevard, **Pleasantville** City, Atlantic County, NJ
NJEMS Program Interest Number: 279524

Hainesport Industrial Railroad, LLC
Hainesport Industrial Park
Hainesport, Burlington County, NJ
NJEMS Program Interest Number: 286283

PROPOSED Transfer Facilities With Tipping

US Rail
Montgomery Street
Paterson, Passaic County, NJ
NJEMS Program Interest Number 423600

New York Susquehanna & Western Railroad Corporation
2438 Secaucus Road, North Bergen, Hudson County, NJ

New York Susquehanna & Western Railroad Corporation/Westside Transload, LLC
43rd Street, North Bergen, Hudson County, NJ

Eftek Corporation/New Brook LLC/Penn East Railroad/Southern Railroad Company of New Jersey/Pennsylvania Reading Railroad Lines Railroad/Phil Vinch
324 New Brooklyn Road/122 AC Moore Drive
Winslow Township, Gloucester County, NJ
NJEMS Program Interest Number: U299

Advanced Enterprises Recycling Incorporated
540 Doremus Avenue
Newark, Essex County
NJEMS Program Interest Number: 238466

Red Bank Recycling Auto Wreckers
79 Central Avenue
Red Bank, Monmouth County
NJEMS Program Interest Number: 287565

Ashland Railroad, Inc./Grems-Kirk/G. David Crane
Freehold , Monmouth County, NJ

CURRENTLY CLOSED Transfer Facilities With Tipping

New York Susquehanna & Western Railroad Corporation/Slane Rail Transport, Precision Construction
2480 Secaucus Road, North Bergen, Hudson County, NJ
NJEMS Program Interest Number: U939

New York Susquehanna & Western Railroad Corporation/Rail Tech, Phoenix Industries
16th Street, North Bergen, Hudson County, NJ
NJEMS Program Interest Number: U320

New York Susquehanna & Western Railroad Corporation/On Track Loading, Cardella
43rd Street, North Bergen, Hudson County, NJ
NJEMS Program Interest Number: U930

OPERATING Transfer Facilities Without Tipping

NJ Rail Carrier
65 Central Avenue, Kearny, Hudson County, NJ
NJEMS Program Interest Number: U397

CSX Railway
Julia Street, Elizabeth, Union County, NJ

New York New Jersey Rail, LLC
Formerly known as **New York Cross Harbor Railroad**
6 Linden Avenue, Jersey City, Hudson County, NJ
NJEMS Program Interest Number: 173409

Township of Bensalem

Joseph DiGirolamo
Mayor

October 5, 2007

The Honorable Corrine Brown, Chair
Subcommittee on Railroads, Pipelines and Hazardous Materials
Committee on Transportation and Infrastructure
U.S. House of Representatives
Washington, DC 20515

Dear Congresswoman Brown:

Thank you for your kind invitation to testify before the Committee on Transportation and Infrastructure's Subcommittee on Railroads, Pipelines and Hazardous Materials in regard to Railroad-Owned Solid Waste Transload Facilities. As I present this testimony, such a facility is attempting to locate within the Township of Bensalem, Pennsylvania, and as the Mayor of Bensalem for the past 14 years, I know, first-hand, the impact that this proposed facility will have on my community, specifically on our plans to redevelop and revitalize our waterfront along the Delaware River.

A little over two years ago, plans were submitted to the Township for the construction of a trash transfer station. This proposed facility was to be located on property that is a little more than a thousand feet from the Delaware River, and fronts on S.R. 09001, a single-lane roadway known as "State Road." [i] To the rear of the proposed facility are the Northeast Corridor rail tracks, and the plan proposed the extension of a rail spur from those tracks to serve this facility. This proposed facility, which would accept up to 2,000 tons per day of construction and demolition debris, would be visited by up to 26 trash trucks per hour (each arriving and leaving the site) on this single-lane roadway for up to 12 hours a day (6:00 AM – 6:00 PM), with waste loading activities involving rail cars occurring for 16½ hours a day (4:00 AM – 8:30 PM). The trucks traveling to and from the trash facility are projected to haul up to 10 tons of debris each, and they will be traveling along our riverfront, past historic mansions, residential homes and the new housing, restaurants and public parks to be located within the Riverfront Revitalization District in which this proposed trash facility would be located.

As you will see and hear, the facility and its planned operations are wholly in conflict with years of planning involving our Township waterfront, and are wholly in conflict with the Township Zoning Ordinance, the Township Land Development and Subdivision Ordinance, the Bucks County Municipal Waste Management Plan and

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various Statutes and Regulations of the Commonwealth of Pennsylvania and the Pennsylvania Department of Environmental Protection.

The proposed facility was never approved by the Township, and the required permit for the facility was denied by the Pennsylvania Department of Environmental Protection. [ii] The proposed facility is at the center of appeals pending before the Township Zoning Hearing Board, the Court of Common Pleas of Bucks County, and the Commonwealth Court of Pennsylvania, and has also been the subject of a hearing before the Pennsylvania Environmental Hearing Board.

In June, 2007, the Township learned that a Verified Notice of Exemption had been filed with the Surface Transportation Board by an entity identified as J.P. Rail, Inc. d/b/a Southern Railroad Company of New Jersey ("SRNJ"). This Notice of Exemption stated that SRNJ was in the process of developing a transportation terminal transloading facility located on a line of railroad in Bensalem Township, and further stated that they had an Operating Agreement and Property Lease for the very same property that is the subject of the pending trash transfer application, i.e., the site on State Road.[iii] I was told that, simply because this facility may now be owned or leased by a rail carrier, it will be allowed to locate in my community and operate almost completely unregulated, even though this facility will violate numerous State and local regulations pertaining to its operation.

As you will hear, this is not simply a case of a town saying "not in our back yard," but rather, is a disheartening and very real slap in the face to a community that has undertaken a thoughtful study of how to best redevelop and revitalize a significant natural and economic resource, our Delaware River Waterfront, and that has invested significant resources, financial and otherwise, in a redevelopment plan that is, as I speak, underway, but in danger of being completely "derailed" by the operator of this transload facility and its rail carrier partner, as they attempt to exploit existing Federal laws and do an end run around years of planning and opposition to this facility at every level of State and local government.

The Township of Bensalem is located in Bucks County, Pennsylvania. Our community of nearly 60,000 residents and 23 square miles in Southeastern Pennsylvania has approximately four miles of waterfront along the Delaware River. In the first half of the 20th century, our waterfront, much like those in Philadelphia and extending north toward the former U.S. Steel Fairless Hills Steel Works, was largely developed for manufacturing, industry, and shipping. Beginning in the 1970's, and continuing to today, our region's economy has transitioned away from heavy industry; the Fairless Hills Steel Works shut down; major industrial businesses along the Delaware Riverfront throughout Bucks County have either scaled back operations or completely shut down or relocated; and the Delaware Riverfront in Bucks County, and especially in Bensalem Township, is today little used for freight and shipping purposes. Today, few, if any, large cargo vessels ever travel to the Bucks waterfront.

Recognizing this change in the economy, and witnessing first-hand the gradual but steady loss of industry along our Delaware Riverfront, Bensalem Township began to analyze how to best redevelop and revitalize this riverfront area. As early as the Township's 1988 Comprehensive Plan, the Township stated that:

> *"The final purpose of the Proposed Land Use Plan is to recognize the Township's abundant natural resources, opportunities, and amenities, and to capitalize on these resources. The Plan proposes the development and redevelopment of the Delaware River-riverfront land, the redevelopment of the Lower Street Road Area, and the phasing out of existing heavy and light industrial zoning in portions of the industrial corridor south of I-95 and north of Station Avenue.*

The Comprehensive Plan goes on to state that:

> *"[T]he trend towards smaller family size and two-wage earner families seeking more luxurious surroundings, oftentimes in high density, high amenity surroundings is anticipated to continue.*
>
> *"A number of undeveloped sites in Bensalem Township lend themselves to this form of housing, which generally involves a mix of residential dwelling unit types, including townhouses, cluster single-family, attached and detached dwellings surrounded by substantial amounts of common open space, dining, clubhouse, and other similar types of sports and recreational facilities.*
>
> *"Also included in this category of developments are more luxurious mid-rise developments appropriately located adjacent to recreation facilities."*

Finally, our 1988 Comprehensive Plan goes on to state, as part of a detailed investigation of the area in which the trash transfer facility is proposed:

> *"This large area, located on both sides of Street Road extends from I-95 to the Delaware River. The area is locally known as the Lower Street Road Area of Bensalem Township, and it is an area with numerous problems and vast potential.*
>
> *"A range of difficulties presently exist within the area, including inadequate thoroughfares with a heavy volume*

of traffic which utilizes the Lower State Road and Street Road Corridor and extreme tensions between inappropriate land uses, including residential single-family and mobile home juxtaposed to heavy and light industrial and commercial development. Other portions of the area are impacted by wetlands.

"Several large undeveloped properties exist in the industrial area which extends from the mainline Conrail/Amtrak system to State Road. To the south of State Road is located a mix of land uses which include large-lot, single-family residential development fronting on the Delaware River, a small office complex with river frontage, a light industrial trucking facility, and an aging summer resort-private country club composed of individually owned single and multi-family vacation dwellings.

"In terms of potential, this Planning Area contains strategic locational resources rarely found in an urban area. Within the Lower Street Road Corridor is the potential for riverfront development on the Delaware River within close proximity to a major East Cost regional limited access highway (I-95). Commuter rail and a passenger railroad stop exists at the Street Road Amtrak station location.

"Finally, the difficulties cited above, the street pattern, along with the condition of buildings within some portions of the district lend themselves to redevelopment and would qualify the area as a State redevelopment project should the Township elect to pursue the redevelopment of the entire Lower Street Road area.

"This entire planning area is recommended for detailed site planning with the objective of assembling land for new more intensive development purposes than presently exist. It is doubtful that the objectives of transforming land uses and providing a Delaware River riverfront development can be accomplished without public financial and land assemblage participation and precise detailed site and land use planning.

"The Comprehensive Plan suggests that the Township establish mechanisms which will provide for the public acquisition of property and the assemblage of land and provisions of improvements to the area, including street widening, thoroughfare relocation, intersection redesign, and the creation of buffer spaces between industrial and nonindustrial uses.

> *"The total building of Lower Street Road from the I-95 off/on ramp to State Road is recommended in the form of a landscaped urban boulevard. The rebuilding of the Street Road and State Road intersection is proposed, and the development of the land fronting on the Delaware River for mixed use office, marina, mid-rise housing, restaurant, and recreation complex surrounded by specialty shops is envisioned for the riverfront portion of the Lower Street Road Corridor.*
>
> *"The development of vacant land in the area into light industrial flex space and office use is proposed and the redevelopment through public acquisition of properties in the Clive Avenue and Moore Avenue portions of this Planning Area is recommended, Along with the acquisition and reorganization of residential and Nonresidential land uses fronting on State Road.*
>
> *"The achievement of the planning recommendations for this area encompassing all of Lower Street Road and portions of State Road is of vital importance to the Township since the tax ratables which are envisioned from new office mixed use and light industrial development would provide a significant stabilization of the Township's tax base.*
>
> *"Only through detailed planning and the establishment of a process which will resolve the existing deficiencies in the area and capture the locational advantages which exist can the Township achieve the significant benefits of this development proposal."*

In 2002, the Township updated its Comprehensive Plan. In its updated Comprehensive Plan, the Township referenced a report entitled *A Blueprint for the Future.* This Report was issued in February, 1997, by the Bucks County Economic Development Task Force, and was summarized as follows:

> *"One of the concerns outlined was the over-reliance on efforts at attracting large-scale industrial and manufacturing firms, many of which have left Bucks County. The new challenge is to encourage a mix of industries and commercial ventures in concert with maintaining the commitment to maintaining the County's environmental features and open space. This commitment goes hand-in-hand with the desire to revitalize abandoned and under-utilized industrial and commercial parcels throughout the County."*

The 2002 Comprehensive Plan also referenced the Township's 1996 Open Space Land Acquisitions Plan, noting that, among the goals outlined in that Open Space Plan,

are the protection of critical habitats along the Delaware River and the development of strategies to create greenway corridors throughout the Township.

The Comprehensive Plan also describes the existing residential development south of the proposed trash transfer site on the Delaware Riverfront as follows:

> *"Along the Delaware River waterfront are a variety of residential uses. The southwestern corner of the Township, where Poquessing Creek and the Delaware River meet, is Salem Harbour, an upscale apartment development with a marina and recreational open space. Also near the waterfront is a mix of small close-knit communities such as Torresdale Manor, Cornwells Manor and Echo Beach. ... Torresdale Manor and Cornwells Manor provide modest single-family residences, ... [and Echo Beach] is characterized by smaller single-family residence lots. Between Torresdale Manor and Echo Beach is a large area of estates. Many of these properties were built in the mid- to late-1800s.*
>
> *"A mix of residential and industrial uses characterizes the Delaware River waterfront. This area offers potential to provide a variety of housing units, both senior citizen and commuter-oriented, to take advantage of this resource and its location in the region. Any development of the waterfront must preserve existing residential neighborhoods and their existing character, which contributes to the suburban atmosphere of Bensalem."*

In referencing back to the 1988 Comprehensive Plan, the 2002 Comprehensive Plan states as follows:

> *"The 1988 Plan also recommended utilizing Bensalem's physical amenities, especially the Delaware River waterfront. The goal was to provide greater accessibility while preserving the environment and natural resources. These recommendations were designed to capitalize on the Township's location and to develop underutilized parcels in a manner sympathetic to the environment of Bensalem Township.*
>
> *"Several of the issues outlined in the 1988 Plan are relevant to the present. Determining the development and redevelopment of parcels along the Delaware River waterfront is a primary issue for the Township. Bensalem also continues to have the goal of shifting the tax burden away from residential property owners to commercial development. Open space and recreation issues discussed in this Plan were cited in 1988, declaring the need to preserve the environment and natural resources along*

the Delaware River. Now this goal is relevant to the whole Township."

Under the goals and objectives set forth in the 2002 Comprehensive Plan are the following:

> *"4. The Township should encourage the preservation of open space in environmentally sensitive areas, including the Delaware River waterfront. Development that allows greater accessibility to these resources in concert with preserving the environment should be encouraged. ...*
>
> *"8. Expand the existing recreation zoning district to include parks, public commercial recreation facilities, waterfront and stream corridors, greenways and other protected open space. Currently, the above land uses are scattered among various zoning districts."*

In February, 2005, the *Bucks County Waterfront Revitalization Plan* was completed and presented to the Redevelopment Authority of Bucks County, the Bucks County Planning Commission, the County of Bucks, and six municipalities that share and adjoin the Delaware Riverfront in Lower Bucks County, including Bensalem Township. The Plan was formulated following over a year's worth of meetings, interviews, work sessions and public forums, and it provides a vision, plan of action and concrete implementation steps for the enhancement of the Delaware Riverfront and adjacent land to lead to a "rebirth" of the Riverfront. As background, the Plan states as follows:

> *"The Delaware River plays a number of important roles in the lives of the waterfront communities in Lower Bucks County. It is a vast natural resource that supports diverse natural habitat and recreational pursuits. The river also has a historic and contemporary identity as a maritime and economic resource that helped to create prosperous communities and an extensive array of manufacturing and heavy industrial uses on the riverfront. In recent years, however, this industrial image of the river has begun to change. A shrinking national manufacturing sector has reduced the viability, number and intensity of heavy industrial uses, leaving behind large tracks of vacant and underutilized land – some of which may have significant industrial contamination.*
>
> *"This Plan seeks to improve access to the riverfront and promote targeted economic development in the study area. The study area includes portions of Bensalem Township, Bristol Borough, Bristol Township, Falls Township, Morrisville Borough, and Tullytown Borough."*

One focus of the Waterfront Revitalization Plan is to "enliven the river's edge by increasing and improving public access to the Delaware River. One key sector along the riverfront is in Bensalem Township, from Pen Ryn Manor to the Neshaminy State Park. It should note that the proposed transfer station is located within this area. The Plan proposes the construction of a ribbon park that would include a public riverwalk, consisting of bicycle/pedestrian path and appropriate furniture and amenities along the length of the Delaware River. To date, the Township has already begun plans for such a riverwalk, including Ordinance provisions that require developers to provide space for a riverwalk within any riverfront development plan. Several proposed plans already include this riverwalk. The Plan also recommends enhanced riverfront gateways, corridors and wayfinding systems, and again, all approved or proposed plans for development of the riverfront, at this time, include local riverfront corridors for public access to the river, public parking for riverfront access and river vistas visible from State Road and Street Road in the Township. Finally, in regard to public access to the river, the Plan proposes additional community parks, open space, active recreation, public marinas and boat ramps along the riverfront Again, plans already approved or proposed to the Township include public marinas, dedicated open space and park/recreation facilities along the river's edge.

The area identified in the Waterfront Revitalization Plan as the "Bensalem Township Opportunity Area" includes the area of the proposed trash transfer facility. The Plan states, in part, as follows:

> *"This plan envisions a waterfront development stretching from the Echo Beach neighborhood to Neshaminy State Park, composed primarily of mixed residential development. Parcel consolidation is recommended and needed to implement this plan. A new 300-slip marina will be the focal point, surrounded by the mixed-use development. Special design treatments will give Street Road a "boulevard" identity. A new public park at the end of Street Road would enhance public access to the Delaware River, and a riverwalk will offer recreational access along the entire shoreline. This park concept should be incorporated into proposed developments for this area.*
>
> *"This area should be redeveloped with mixed density residential units. Mixed-use office and commercial units should be located along State Road. State Road and Street Road should be remade into address streets. The recommendations under "Incorporate Design with Development" on pages 26-27 describe these address streets, architectural and height guidelines, and parcel consolidation recommendations that development in the Bensalem Opportunity Area should incorporate.*

"The Bensalem Zoning Ordinance currently provides for R-55 - Planned Residential Community District. This district appears to permit a mix of residential uses and densities. It also permits 'clubs, clubhouses, marinas, dining and lodging facilities...parking and security facilities, and such other conditional uses as may be necessary to promote the overall purpose of the R-55 district.' This district may be a good starting place for Bensalem Township, but it will need modifications.

In September, 2005, the Township followed the advice of the Waterfront Revitalization Plan and did, in fact, revise and rename the existing R-55 Zoning District to the R-55 Riverfront Revitalization District. At the same time, the Township rezoned approximately 500 acres of area along and adjacent to the Delaware River Waterfront to this R-55 zoning classification. The subject property was included in this rezoning. The rather daunting task of rezoning approximately 500 acres, consisting of over 250 different properties and tax parcels, was begun by the Township almost immediately following the issuance of the Riverfront Revitalization Plan in February, 2005, and was completed in September, 2005.

In 2006, a new Zoning District, our MXD-Mixed Use Development District, was also implemented to foster Delaware Riverfront Development. This Zoning Classification was put in place following nearly two-year's worth of study, drafting and revision, and it is being utilized today for the development of approximately 40 acres of waterfront property into the "Waterside" Project. Waterside is a great example of the redevelopment I have been speaking about. In the late 1990's, Elf Atochem closed its chemical manufacturing facility that was situated on 20 acres of Delaware Riverfront property. Bensalem Township and the Bucks County Redevelopment Authority knew that if this site was resold for industrial use, all plans for the redevelopment of the waterfront would be lost. Thanks to the actions of the Township and County, the site was purchased by Mignatti Company, who, in cooperation with the EPA, PaDEP, the County Redevelopment Authority, and the Township, among others, undertook a nearly $7,000,000.00 clean-up of this environmentally hazardous site. Mignatti obtained surrounding land, as well, and underwent a lengthy planning and approval process with the Township Council, the Township Planning Commission and the County Planning Commission. Today, they are preparing to break ground on the Waterside project, which will include approximately 500 units of townhouse and condominium housing on the Waterfront (including a seven-story mid-rise building), retail shops, restaurants, and a marina. Most importantly, the site will have all of its land on the water's edge open to the public, as approximately 10 acres of open space and greenway have been set aside on the site for public access and use.

Sadly, the Waterside site is directly across State Road from the proposed trash transfer station, and will be the greatest (though not the only) beneficiary of all the truck traffic and noise pollution the proposed facility will generate.

I should note also that in 1989, in response to Commonwealth Act 101 of 1988, the Bucks County Commissioners adopted the Bucks County Municipal Waste Management Plan. This Plan was approved by the Pennsylvania Department of Environmental Protection in March of 1991. The Plan was intended as a 10-year plan to provide guidance for solid waste management in the County. An update and revision of the Plan was begun in May, 2003, and following review and input from all of the municipalities in the County, the Plan revision was approved by the Bucks County Commissioners and by the Pennsylvania DEP in 2006. The Plan neither authorizes, nor provides for, the proposed trash transfer station, nor any similar facility, within Bensalem Township, particularly along the Delaware River Waterfront.

It is also important to note that this proposed trash facility is within 300 yards of Holy Ghost Preparatory School , in violation of restrictions set forth under Pennsylvania Statutes and the Pennsylvania Code. Similarly, while not within the 300-yard siting prohibitions of the Pa DEP, the facility is also within close proximity to the Andalusia historic homes, including the Andalusia Mansion and Pen Ryn Mansion, both of which are national historic landmarks, and to the St. Katharine Drexel Shrine, a significant tourist and pilgrimage destination on the grounds of the Sisters of the Blessed Sacrament Convent, founded by St. Katharine Drexel.

I give you all of this lengthy (and perhaps, repetitive) background to drive home the point that Bensalem Township's opposition to the proposed railroad solid waste transload facility is not a "knee-jerk" reaction, but one that results from years and years of study, planning and implementation for our waterfront, the results of which are now coming to fruition.

All of these efforts, however, suddenly face the possibility of being for naught. I am told that under the current state of the law, SRNJ and its affiliates can operate the proposed trash facility free and clear of all local and state regulation by virtue of their claimed status as a rail-carrier. The years of planning and implementation set forth at length, above, our local land use regulations, the County Solid Waste Management Plan and various Pennsylvania Statutes and Environmental Protection Regulations are, we are told, all meaningless if this rail-carrier wishes to construct the trash transfer facility that has, up to this point, been properly denied. I am not advocating any specific, pending bills or any specific amendments to existing Federal laws, but rather, I am pleading with Congress to please take whatever actions are needed to stop this "travesty of justice" from happening in, and to, my community.

It is important for me to stress that I am not, nor have I ever been, opposed to the presence of the rail facilities located in Bensalem Township. The Township and the railroads have been long and good neighbors. In fact, I am an advocate for public transportation, including commuter rail transportation.

I am the founder and President of "TMA Bucks," the Bucks County Transportation Management Association. I fought hard to maintain and continue the presence of an Amtrak stop in my Township, at the Cornwells Heights Train Station,

when it was in danger of being discontinued last year. The Cornwells Heights Station is also the site of one of the largest park-and-ride facilities in the region, and is utilized by commuters to Philadelphia, Trenton and New York City. TMA Bucks further provides "reverse commute" bus service, picking up passengers at commuter rail stations throughout Bucks County and carrying them to jobs at business parks and other locations not immediately adjacent to rail service.

Quite simply, my concern remains with changes to policies, laws and regulations that allow any entity that owns a section of track to declare itself a rail-carrier and, thus, in the process, be completely exempted from compliance with carefully thought-out zoning and land use controls and regulations in the establishment of a trash facility that will put hundreds of tractor trailers on a road that cannot handle them and will all but destroy years of planning for the reclamation and redevelopment of 500 acres of unused and underused waterfront property .

In closing, you hold the fate of my community and its residents in your hands. This is not hyperbole. Rather, it is a fact. As I have testified, years of planning are just now beginning to come to fruition, and a renaissance is underway. This reclamation, redevelopment, and revitalization of the Delaware River Waterfront is at a crossroads with the emergence of this rail-operated trash transfer facility. If it can locate in my Township, unregulated and free and clear of any zoning or land use controls, years and years of hard work will be lost. Millions of dollars of investment into the redevelopment and cleanup of contaminated lands, and hundreds, if not thousands, of man hours of study, planning and, most importantly, caring, about the future of Bensalem will have been spent for nothing. This certainly cannot be what the law intends, but it is what the law allows. Please do what ever is necessary to keep this from happening in my community, and others who face a similar fate.

On behalf of the proud residents of Bensalem Township, thank you for your kind consideration of my testimony, and for the welfare of my community.

Respectfully,

Honorable Joseph DiGirolamo
Mayor
Bensalem Township, Pennsylvania

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[i] In June 2005, HJH, LLC submitted an application to the Township of Bensalem for preliminary land development, subdivision and conditional use approval of a proposed trash transfer facility to be located at

2522 State Road in Bensalem Township. A permit application for a municipal waste transfer station for this site was submitted to the Pennsylvania Department of Environmental Protection in May, 2005. A sister company, Waya Ventures, LP, was, at the time of the application for the trash transfer station, already operating a trash container business from this site without valid permits or zoning approval from the Township. The container business is, at this time, the subject of a pending appeal before the Township Zoning Hearing Board.

Based upon the testimony of the witnesses presented by HJH and the documents submitted in support of their application, it is anticipated that the proposed trash transfer facility would have construction and demolition debris brought to the facility by truck. The trucks would be weighed, would then dump their loads, and then would proceed out the same driveway they came in, exiting by the same road they came in, State Road. State Road is the only road that serves this facility, and it is located in the middle of the Riverfront Revitalization District, where at some points the road is less than 1,000 feet from the River's edge. After the construction and demolition debris is dumped, it would then be sorted and loaded onto rail cars that would be stacked on a rail spur serving the trash transfer facility, until such time as those rail cars are hauled away to their ultimate destination.

[ii] In May 2006, the Pennsylvania Department of Environmental Protection suspended review of the permit application and issued a letter to HJH as a pre-denial of its permit application based on siting criteria. This suspension was tantamount to a denial of the permit, and the suspension was appealed by the property owner to the Pennsylvania Environmental Hearing Board. At the hearing before the Pennsylvania Department of Environmental Protection, the Township opposed the issuance of a permit to HJH because of the impact it will have on the Township. Among the reasons cited was the fact that the proposed facility is located within 300 yards of a school, park or playground, in violation of 53 P.S. §4000.511 and 25 Pa. Code §279.202(a)(6). The proximity of this facility to Holy Ghost Preparatory School, as well as its conflict with our local comprehensive plans and zoning ordinances, particularly the Riverfront Revitalization District and the Waterfront Revitalization Plan, were the basis of the requested denial of the permit. The Environmental Hearing Board upheld the suspension by PA DEP.

[iii] The Verified Notice of Exemption and Notice of Lease and Operation of Rail Line was filed before the Surface Transportation Board at FD-35053, and is captioned J.P. Rail, Inc. d/b/a/ Southern Railroad Company of New Jersey

> to our jurisdiction or subject to federal preemption. According to the Borough, [Susquehanna] has established a corn processing plant. If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. Our jurisdiction over railroad facilities, like that of the former [Interstate Commerce Commission], is limited to those facilities that are part of a railroad's ability to provide transportation services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities. *See Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 227 (1941). *We cannot determine from the current record whether this facility is actually a corn processing plant or some sort of transloading operation (for the transfer of corn syrup, for example) that is related to transportation services.*

Id. (emphasis added). In other words, the Board distinguished "manufacturing," which is not sufficiently related to transportation by rail, and "transloading," which is.

Accepting the factual findings of the District Court in our

○