



Testimony

Before the

Committee on Transportation & Infrastructure

Subcommittee on Railroads

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The Problem of Unregulated Waste Management Facilities on Rail Property

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

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

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

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

### **What is the Cause of the Problem?**

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

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

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

This phenomenon is fueled by several converging events:

1. The U.S. Environmental Protection Agency does not have any substantive regulatory program for these solid waste management facilities, leaving the regulation of this industry nearly exclusively to the individual states.
2. In the populous Northeast, the solid waste industry is very heavily regulated by state and local governments, and these regulatory programs impose high costs and long permitting processes for those wishing to construct and operate solid waste management facilities. It is not unusual for the environmental permitting of a new solid waste facility to take 3 - 4 years, if not longer.
3. Congress has granted the STB exclusive jurisdiction over the rail industry and its transportation related functions, thereby preempting many of the regulatory programs administered by state and local governments.
4. Limited disposal options due to stringent state and local regulations have created significant interest in the siting of new solid waste management facilities.

### **What’s the Law on this Issue?**

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

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

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

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

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

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

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

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

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

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

### **Who Cares and Why?**

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

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

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

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

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

### **Conclusion and Request for Action**

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

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

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

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

1. Amend ICCTA to provide that the rail facilities entitled to claim preemption from state and local law do not include solid waste management facilities. This proposal is currently pending in Congress as H.R. 3577 and S. 1607 and we support this amendment as a solution to the problem; or,
2. Failing that or in the interim, urge STB to issue a binding determination that solid waste management facilities will not be considered rail facilities, and that any facilities engaged in sorting, grinding, aggregating, baling, separating and/or storing wastes will fall outside of the STB's exclusive jurisdiction and will therefore be subject to full regulation by states and municipalities. This determination would be helpful, although it would be subject to appeal to a U.S. Circuit Court of Appeals, which would delay its effect. A court decision would aid in providing clarity, but would only be binding in the circuit in which the court has jurisdiction.

Thank you for the opportunity to provide this testimony.