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SERVICE DATE – MARCH 24, 2011

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 684

SOLID WASTE RAIL TRANSFER FACILITIES

Digest:¹ This decision modifies the Board’s interim rules that govern land-use-exemption permits for solid waste rail transfer facilities. The modifications are intended to reduce the burden on applicants and respondents for the production of information, require generally that the most stringent environmental review accompany all applications, and increase efficiency in Board deliberations by combining elements of federally required environmental review with environmental aspects of the exemption permit review standards. The Board requests comments from interested parties on these proposals.

Decided: March 14, 2011

AGENCY: Surface Transportation Board.

ACTION: Revised Interim Rules with Request for Comments.

SUMMARY: The Clean Railroads Act of 2008 amended 49 U.S.C. § 10501(c)(2) to restrict the jurisdiction of the Surface Transportation Board (Board or STB) over solid waste rail transfer facilities. The Clean Railroads Act also added three new statutory provisions—49 U.S.C. §§ 10908-10910—that address the Board’s regulation of such facilities, which is now limited to issuance of “land-use-exemption permits” in certain circumstances. Upon receiving a land-use-exemption permit issued by the Board, a solid waste rail transfer facility need not comply with state laws, regulations, orders, and other requirements affecting the siting of the facility, except to the extent that the Board requires compliance with any of those requirements. The Clean Railroads Act provides that a solid waste rail transfer facility must comply with all applicable federal and state requirements respecting the prevention and abatement of pollution, the protection and restoration of the environment, and the protection of public health and safety, in the same manner as any similar solid waste management facility not owned or operated by or on behalf of a rail carrier, except for laws affecting the siting of the facility that are covered by the land-use-exemption permit. As required by the Clean Railroads Act, on January 14, 2009, the Board issued a notice of proposed rulemaking (NPRM) and interim rules that were published in

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

the Federal Register on January 27, 2009 (74 Fed. Reg. 4714-26) (2009 NPRM). Based on the comments received and further evaluation, the Board now proposes changes to the review process for land-use-exemption permits under the Clean Railroads Act and modifies other aspects of the 2009 NPRM, in the interest of clarity and efficiency. The Board issues this revised notice of proposed rulemaking to receive comments on the further changes. The revised rules, set forth in Appendix A, are being issued as revised interim rules and will apply to any application for a land-use-exemption permit that is filed with the Board, until final rules are adopted.

DATES: *Effective date*: March 24, 2011. Comments on the revised interim rules are due by May 23, 2011. Reply comments are due by June 22, 2011.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 684, 395 E Street, S.W., Washington, DC 20423-0001.

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn at (202) 245-0382. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Under 49 U.S.C. § 10501(a), the Board has jurisdiction over "transportation by rail carrier." Section 10501(b), as modified by the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (1995), provides that both "the jurisdiction of the Board over transportation by rail carriers" (which includes the carriers' rail facilities, see 49 U.S.C. § 10102(9)), and the "remedies provided under [49 U.S.C. §§ 10101-11908]" are "exclusive," and "preempt the remedies provided under Federal and State laws." Prior to enactment of the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (Clean Railroads Act or CRA), on October 16, 2008, the Board's preemptive jurisdiction extended to solid waste rail transfer facilities owned or operated by rail carriers. Accordingly, state permitting or preclearance requirements (including environmental, zoning, and often land-use requirements) that, by their nature, could be used to deny a railroad the right to conduct its operations or proceed with transportation activities at rail transfer facilities, including solid waste rail transfer facilities, as authorized by the Board, were preempted. See 49 U.S.C. § 10501(b); N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); Green Mountain R.R. v. Vermont, 404 F.3d 638, 641-43 (2d Cir. 2005). Other state actions related to these facilities were preempted if, as applied, they would have the effect of unreasonably burdening or interfering with transportation by rail carrier. See N.Y. Susquehanna, 500 F.3d at 252; Green Mountain, 404 F.3d at 643.

The CRA modified the Board's jurisdiction over solid waste rail transfer facilities. The CRA provides that solid waste rail transfer facilities, as defined in 49 U.S.C. § 10908(e)(1)(H), must now comply with all applicable federal and state requirements (including environmental requirements) that apply to similar solid waste management facilities that are not owned or operated by or on behalf of a rail carrier, except as otherwise provided in the Clean Railroads Act.² The CRA gives the Board the authority, if petitioned, to issue land-use-exemption permits that preempt state and local laws and regulations "affecting the siting" of such facilities (except to the extent that the Board requires the facility to comply with such provisions). 49 U.S.C. § 10909(f).³

THE REVISED RULES

The Board received numerous comments on the 2009 NPRM.⁴ We now propose revisions to the original rules to streamline the application process based on suggestions made in the parties' comments and on the Board's own review of the current interim regulations. The major revisions to the 2009 NPRM are discussed in Section I below. Section II addresses other comments received on the 2009 NPRM and revisions made in response to the comments.⁵ The attached Appendix A contains the revised interim rules in full.⁶ Interested parties should limit their comments regarding this NPRM to new issues raised by the revisions.

² The CRA does not affect the Board's jurisdiction, or the scope of federal preemption, over a rail carrier's transportation-related activities involving commodities other than solid waste. 49 U.S.C. § 10908(d).

³ The 2009 NPRM contains a more detailed discussion of the CRA and the Board's initial implementation of that act.

⁴ The Board received comments from the following: American Short Line and Regional Railroad Association (ASLRRA); Association of American Railroads (AAR); Atlantic County Utilities Authority (ACUA); Village of Croton-on-Hudson, New York (Croton-on-Hudson); Freehold Township, Monmouth County, New Jersey (Freehold); Fred Glasgow (Glasgow); Commonwealth of Massachusetts (Massachusetts); National Solid Wastes Management Association, et al. (NSWMA); New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission (collectively, NJDEP); New Jersey State League of Municipalities (NJLM); New York State Association for Solid Waste Management (NYSASWM); New York State Department of Environmental Conservation (NYSDEC); Kenneth John Patrick (Patrick); Salem Rail Logistics, LLC (Salem Rail Logistics); Suzanne M. Sullivan (Sullivan); Donna Thomas (Thomas); Veolia FS Solid Waste of NJ (Veolia); Kevin and Robin Voorhees (Voorhees); and Town of Wilmington, Massachusetts (Wilmington).

⁵ On December 17, 2009, in response to a comment on the original interim rules, the Board issued a decision providing more explanation for the Board's certification under 5 U.S.C. § 605(b) of the Regulatory Flexibility Act that the interim rules would not have a significant economic impact on a substantial number of small entities. We have received no comments on that decision.

⁶ The revised rules modify the original interim rules set forth in the 2009 NPRM and, although effective on an interim basis, are subject to revisions based on any further comments

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Good cause exists for the interim rules to become effective while further notice and comment proceeds. See 5 U.S.C. § 553(b)(3)(B). The CRA mandated that the Board quickly establish rules to provide a process for facilities to obtain a land-use-exemption permit pending the final rules. We therefore made our original proposed rules effective as interim rules. While we seek further comment on aspects of the regulations that were not part of the 2009 NPRM, we believe that all of the revisions should now be implemented as interim rules. The public would be better served by placing these refined regulations in effect on an interim basis, rather than leaving in place the rules issued in the 2009 NPRM, which were drafted without any input from industry and other interested parties. As discussed below, the revised interim rules provide the Board with a framework for a more informed decision-making process if the agency is called upon to decide whether to issue a land-use-exemption permit before final rules are issued. The Board will expeditiously move toward issuing final regulations following the public comment period.

I. Significant Revisions to the Application Process

We have made several significant revisions to the process set forth in the 2009 NPRM in order to streamline and improve the application process for a land-use-exemption permit. These revisions include: (a) eliminating the requirement to identify all laws that affect the siting of a facility; (b) incorporating the provisions of original⁷ § 1155.23 into other sections; (c) generally requiring a full Environmental Impact Statement (EIS)⁸ that includes an analysis of the environmental factors listed in 49 U.S.C. § 10909(d); and (d) providing a post-EIS comment period that would allow parties to use the information contained in the EIS to comment on whether the land-use-exemption permit should be granted and any conditions that could be imposed.⁹

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received. The revised rules contain some minor changes not discussed in the narrative of this decision.

⁷ The use of ‘original’ is to signify the C.F.R numbering as it appeared in the 2009 NPRM where the addition or subtraction of sections has required these interim rules to have a different numbering.

⁸ An EIS refers to the detailed written statement required by the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (NEPA), for a major federal action significantly affecting the quality of the human environment. The Board’s EIS process is described at 49 C.F.R. § 1105.10.

⁹ We also made changes that are not substantive, and were not precipitated by comments. First, we deleted original 49 C.F.R. § 1155.13(a) as redundant. Second, we moved the form notices previously found in original 49 C.F.R. § 1155.21 and original 49 C.F.R. § 1155.22(e) to appendices to revised 49 C.F.R. §§ 1155.20 and 1155.21, respectively. Third, we edited the title of 49 C.F.R. § 1155.28 to more accurately reflect the nature of the section. Finally, in accordance with the Board’s decision in Removal of Delegations of Authority to Secretary, EP

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A. *Identification of Laws Affecting the Siting*

We have removed the original requirement that applicants and interested parties cite to all laws that affect the siting of a facility. Upon further consideration, we believe that requiring the preparation of such a list is overly broad and unnecessary. There is no reason for the Board to require the identification of laws that may affect the siting of a facility if the applicant is not seeking an exemption from compliance with such laws. Instead, in revised 49 C.F.R. § 1155.21(a)(7) (original 49 C.F.R. § 1155.22(a)(8)), we have streamlined the process by requiring the applicant to identify only those laws affecting the siting for which the facility seeks an exemption. Ultimately, a land-use-exemption permit would only exempt a facility from complying with laws, regulations, and orders affecting the siting that are specified in the permit. The Board will require the applicant to comply with all other laws, regulations, orders, or other requirements affecting the siting of a facility. 49 U.S.C. § 10909(f).

We are also adding a new requirement that applicants and interested parties state whether the law affecting siting from which exemption is sought is an environmental, public health, or public safety standard that falls under the traditional police power of the state, and if not, to explain why not. This is necessary because 49 U.S.C. § 10910 and the Board's standard for review in revised 49 C.F.R. § 1155.26(b)(6) (original 49 C.F.R. § 1155.27(b)(4)) provide that a land-use exemption permit will not exempt a state requirement that a rail carrier comply with an environmental, public health, or public safety standard that falls under the state's police powers, unless the requirement unreasonably burdens interstate commerce or discriminates against rail carriers. Consequently, if the law affecting siting is a law covered by 49 U.S.C. § 10910, the Board will not issue a land-use exemption permit unless the applicant has shown that compliance with the law meets the unreasonable burden or discrimination test.

We have made the following revisions to the 2009 NPRM to reflect the modifications described above: (1) original 49 C.F.R. §§ 1155.22(a)(7), (11) and 1155.25(a)(1)(vi) have been deleted; (2) revised 49 C.F.R. § 1155.26(d) now states that “. . . [a] Board issued land-use-exemption permit will require compliance with such state laws, regulations, orders, or other requirements not otherwise expressly exempted in the permit.” (Emphasis added); and (3) the following sentence has been added at the end of revised 49 C.F.R. § 1155.21(a)(7): “The applicant shall state whether each law, regulation, order or other requirement from which an exemption is sought is an environmental, public health, or public safety standard that falls under the traditional police powers of the state. If the applicant states that the requirement is not such a standard, it shall explain the reasons for its statement.”

We also are requiring applicants to: explain how the facility comes within the Board's jurisdiction under 49 U.S.C. § 10501; identify who the owner and operator of the facility are; state the interest of the rail carrier in the facility; and explain how the facility meets the statutory

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685 (STB served Oct. 15, 2009), we replaced references in the rules to the “Secretary” with “the Chief, Section of Administration, Office of Proceedings.”

definition of a solid waste rail transfer facility. These requirements are reflected in revised 49 C.F.R. §§ 1155.21(a)(13)-(16). This additional information will allow the Board to determine whether the applicant is properly before the Board under the CRA and should not be time consuming for applicants to prepare.

B. Requirements When Filing After an Unsatisfactory Result from a State, Local or Municipal Authority Affecting the Siting of a Facility

Original 49 C.F.R. § 1155.23(a) requires that an applicant who files after receiving an unsatisfactory result from a state, local, or municipal authority with respect to a law affecting siting must petition the Board to accept its application. Original 49 C.F.R. § 1155.23(b) establishes a standard for review of the petition. We have concluded that the petitioning requirement and the separate standard for review of the petition are unnecessary. Instead, we will require applicants to state in their applications whether, prior to filing, they have received an unsatisfactory result from a state, local or municipal authority with respect to a law affecting siting. The standard for review in such situations will be addressed in the standard for review of applications set forth in revised 49 C.F.R. § 1155.26(b) (original 49 C.F.R. § 1155.27(b)). We have made several revisions to the 2009 NPRM to reflect the modifications described above. Original 49 C.F.R. § 1155.23 has been deleted and all subsequent sections have been renumbered accordingly. Under “Contents of Application” in 49 C.F.R. § 1155.21(a), a new paragraph (17) has been added, which provides as follows:

(17) A statement whether the applicant has sought permission from the applicable state, local, or municipal authority with respect to some or all of the property in the application and received an unsatisfactory result affecting the siting of the facility. The applicant shall provide information about the unsatisfactory result and shall include all relevant orders, decisions, or other notices of the denial.

In addition a new paragraph (5) has been added to revised 49 C.F.R. § 1155.26(b) (original 49 C.F.R. § 1155.27(b)) and original paragraphs (4) and (5) have been renumbered as (6) and (7) respectively in revised § 1155.26(b).¹⁰ The new paragraph (5) provides that:

(5) The Board will issue a land-use-exemption permit to an applicant that has received an unsatisfactory result from a state, local or municipal authority affecting the siting of the facility only if it finds that the laws, regulations, or other requirements affect the siting of the facility, on their face or as applied, either (1) unreasonably burden the interstate transportation of solid waste by railroad, or (2) discriminate against the railroad transportation of solid waste and a solid waste rail transfer facility. The Board also must make the determination in paragraph (1) above in order to issue the land-use-exemption permit.

¹⁰ A new paragraph (4) also has been added to 49 C.F.R. § 1155.26(b). See infra II.B. The Process to Come Before the Board.

C. EIS Requirements

As explained in the 2009 NPRM, the issuance of a land-use-exemption permit qualifies as a major federal action under NEPA. Though not specifically mentioned in the CRA, the issuance of a land-use-exemption permit requires that an appropriate environmental review be completed prior to the time a land-use-exemption permit may be granted. Pursuant to the Council on Environmental Quality's regulations regarding NEPA, specifically 40 C.F.R. § 1507.3(b), agencies should identify those classes of actions that normally require an environmental impact statement, an environmental assessment, or a categorical exclusion.

Upon re-evaluation of the 2009 NPRM and the comments of various parties, we have determined that our CRA rules should have environmental procedures tailored to developing the environmental record in land-use-exemption-permit-application proceedings. Because a significant factor in our consideration of land-use-exemption permit requests under the CRA will be environmental concerns (*see* 49 U.S.C. § 10909(d))¹¹ and because solid waste rail transfer facilities have the potential for significant environmental impacts, we now conclude that an EIS (which considers as part of its scope the standards set out at 49 U.S.C. § 10909(d)(1) through (5)) generally should be prepared for each land-use-exemption-permit application, and we have so provided in revised 49 C.F.R. § 1155.24. We note, however, that the Board's Office of Environmental Analysis (OEA)¹² has the authority to grant a waiver to reclassify the

¹¹ Section 10909(d) provides that:

When evaluating an application under this section, the Board shall consider and give due weight to the following, as applicable:

(1) the land-use, zoning, and siting regulations or solid waste planning requirements of the State or State subdivision in which the facility is or will be located that are applicable to solid waste transfer facilities, including those that are not owned or operated by or on behalf of a rail carrier;

(2) the land-use, zoning, and siting regulations or solid waste planning requirements applicable to the property where the solid waste rail transfer facility is proposed to be located;

(3) regional transportation planning requirements developed pursuant to Federal and state law;

(4) regional solid waste disposal plans developed pursuant to state or Federal law;

(5) any Federal and state environmental protection laws or regulations applicable to the site;

(6) any unreasonable burdens imposed on the interstate transportation of solid waste by railroad, or the potential for discrimination against the railroad transportation of solid waste, a solid waste rail transfer facility, or a rail carrier that owns or operates such a facility; and

(7) any other relevant factors, as determined by the Board.

¹² The Board recently reorganized what was previously the Office of Economics, Environmental Analysis, and Administration. As a result of the reorganization, the Section of

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environmental review process from an EIS to a less stringent analysis, depending on the circumstances presented. See 49 C.F.R. § 1105.6(d).

Further, we have built into the process an opportunity for parties to file comments on the results of the environmental review upon completion of the EIS (or other environmental documentation). Thus, parties could use the information developed in the EIS to make their final arguments regarding whether a land-use-exemption-permit application should be granted, and, if so, any conditions that should be attached to the Board's approval.

In addition, we intend to require the applicant to submit the requisite material for the Board to begin the environmental review at least 45 days prior to its initial filing on the merits, as opposed to the 20 days previously noted. See revised 49 C.F.R. § 1155.24(b). The earlier start should facilitate the scoping phase of the EIS process.

Pursuant to the usual EIS process under 49 C.F.R. § 1105.10, the Board would publish in the Federal Register a notice of its intent to prepare an EIS, with a description of the proposed action and a request for written comments on the scope of the EIS. The scoping process would include a meeting open to interested parties and the public, where appropriate. After considering the scoping comments, the Board would then publish in the Federal Register a notice of the final scope of study for the EIS. OEA would prepare a Draft EIS, which would address the environmental issues and concerns identified during the scoping process, including an analysis of the 5 factors listed in 49 U.S.C. § 10909(d)(1)-(5). The Draft EIS would also contain OEA's preliminary recommendations for environmental mitigation measures. Upon its completion, the Draft EIS would be made available for review and comment by the public, government agencies, and other interested parties (typically for 45 days). OEA would then prepare a Final EIS that considers comments on the Draft EIS, sets forth any additional analyses, and makes final recommendations to the Board on any appropriate mitigation measures.

To reflect the modifications noted above, we have revised 49 C.F.R. §§ 1155.2, 1155.20 (which includes original 49 C.F.R. § 1155.21 as an appendix), § 1155.21 (original 49 C.F.R. § 1155.22), and § 1155.26 (original 49 C.F.R. § 1155.27).

D. Post-EIS Comment Period

The revised interim rules provide for a post-EIS comment period giving interested parties 30 days to comment (termed "final comments" in the rules) on how the information developed during the environmental review bears on whether the facility would pose an unreasonable risk to public health, safety, or the environment, in light of the factors the Board must consider under

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Environmental Analysis (SEA) became the Office of Environmental Analysis. The 2009 NPRM predated this reorganization, and made reference to SEA. These interim rules refer to OEA.

49 U.S.C. § 10909(d).¹³ The parties would have an additional 15 days to respond to each other's comments. The Board would issue a decision on the merits within 90 days after the close of the record. In reaching its final decision on the merits, the Board would consider the information in the environmental record developed during the NEPA process, in addition to the application and responsive filings.

We have revised 49 C.F.R. §§ 1155.24 (original 49 C.F.R. § 1155.25) and § 1155.26 (original 49 C.F.R. § 1155.27) of the 2009 NPRM to reflect the modifications noted above.

II. The Board's Response to Other Comments on the Interim Rules in the 2009 NPRM

A. The Board's Jurisdiction Under the CRA

ASLRRA asserted¹⁴ that the CRA applies to facilities that are “owned or operated by or on behalf of a rail carrier,” which, it argued, is broader than the Board's general jurisdiction over “transportation by rail carrier” under 49 U.S.C. § 10501.¹⁵ The Board considered and rejected much the same argument in Town of Babylon—Petition for Declaratory Order, FD 35057 (STB served Oct. 16, 2009), pet. for review filed, sub nom. N.Y. & Atl. Ry. v. STB, No. 10-1490 (2d Cir. filed Apr. 21, 2010). As the Board explained there, the CRA resulted from concerns that the broad § 10501(b) preemption had allowed solid waste transfer facilities owned and operated by rail carriers to escape too much of the cradle-to-grave regulation that applies to non-rail solid waste transfer facilities, and with the CRA, Congress acted to close that loophole.¹⁶ Thus, the CRA does not apply to facilities that do not come within the Board's jurisdiction over rail transportation by rail carrier in § 10501(a). ASLRRA's view that the CRA expanded the facilities subject to the Board's jurisdiction would turn on its head Congress's intent in enacting the CRA.

NJDEP claimed that the Board overstated its jurisdiction over facilities that do not qualify as solid waste rail transfer facilities under the CRA. Specifically, on page 5 of the 2009

¹³ We do not view the post-EIS comment period as a vehicle to voice concerns about the adequacy of the environmental review already conducted; the opportunity to comment on that issue would have occurred during the EIS process.

¹⁴ ASLRRA's Comments 5.

¹⁵ The legislative history of the CRA shows that Congress intended the act to apply to “. . . facilities on property owned or controlled by railroads.” 153 Cong. Rec. S2371 (daily ed. Feb. 28, 2007) (statement of Sen. Lautenberg) (emphasis added).

¹⁶ See 153 Cong. Rec. S2311 (daily ed. Feb. 28, 2007) (statement of Sen. Lautenberg) (bill will close “loophole” that caused “proliferation” of unregulated facilities). This loophole was also recognized in a Board decision. New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Ry.—Constr., Acquis., & Operation Exemption—In Wilmington & Woburn, Mass., FD 34797, slip op. at 20 (STB served July 10, 2007) (Commissioner Mulvey, dissenting) (expressing concern about “up-tick” in new entrants to solid waste industry claiming preemption as rail carriers to evade state and local regulation).

NPRM, the Board noted that “assuming the facility, or portion thereof, meets the other necessary qualifications, it would be subject to the Board’s general jurisdiction over rail transportation and entitled to preemption from most state and local laws, including siting laws, under section 10501(b).” Our statement accurately summarized the scope of § 10501 preemption and was appropriately qualified.

B. The Process to Come Before the Board

NJDEP requested that where the state permitting process includes a siting determination, the state should be allowed to make its determination before the Board acts on the permit exemption.¹⁷ This suggestion conflicts with the language of the statute, which explains that a rail carrier that owns or operates a facility may come before the Board prior to seeking a siting determination from the state. See 49 U.S.C. § 10909(a)(1).

NJDEP also suggested that the only entity that the Board should allow to come before it is the rail carrier that either owns, operates, or has the facility operated on its behalf, not the facility itself.¹⁸ NJDEP expressed concern with 49 C.F.R. § 1155.20(a), which defines the applicant as “a solid waste rail transfer facility, or the rail carrier that owns or operates the facility.” However, Congress directed the Board, in 49 U.S.C. § 10909(b)(6), to develop procedures that address “the process for a solid waste rail transfer facility or a rail carrier that owns or operates such a facility” to apply for a land-use-exemption permit. To adopt NJDEP’s suggestion would directly contradict this statutory mandate.

Agreeing with the Board’s interpretation of 49 U.S.C. § 10909(a)(1) and the application procedures in original 49 C.F.R. §§ 1155.22-23, Massachusetts requested that we clarify that under original 49 C.F.R. § 1155.23 (now removed), non-railroad entities could only apply to the Board for a land-use-exemption permit after first receiving an unsatisfactory result from a state, local, or municipal authority affecting the siting of the facility.¹⁹ We agree with this comment, but we are adding a new subsection (4) to revised 49 C.F.R. § 1155.26(b), because original § 1155.23 is being removed as unnecessary. Revised § 1155.26(b)(4) provides that:

(4) The Board will reject an application from a person who is not a rail carrier, but is instead operating on behalf of a rail carrier unless (1) the applicant has sought permission from the applicable state, local, or municipal authority with respect to some or all of the property in the application and received an unsatisfactory result affecting the siting of the facility, or (2) the governor of the state has petitioned the Board to require the facility to apply under 49 C.F.R. § 1155 subpart B.

¹⁷ NJDEP’s Comments 5-6.

¹⁸ NJDEP’s Comments 6-7.

¹⁹ Massachusetts’ Comments 6-7.

Several parties also requested that we define what constitutes an “unsatisfactory result” or an “inordinate delay.”²⁰ We believe that the application of these terms could vary depending upon the circumstances and thus are best determined on a case-by-case basis.

C. The Scope of the Phrase “Affecting the Siting”

In the 2009 NPRM, the Board explained that the crux of the Board’s authority under the CRA and the scope of a land-use-exemption permit is the interpretation of the phrase “affecting the siting.” Under 49 U.S.C. § 10909(f), when the Board grants a land-use-exemption permit to a solid waste rail transfer facility, then “all State laws, regulations, orders, or other requirements affecting the siting” (emphasis added) of that facility are preempted, except to the extent the Board requires the applicant to comply with such laws as a condition of the permit. Instead of interpreting “affecting the siting” to include only traditional “siting” laws or regulations, such as zoning or land-use laws, the Board explained that it believed the phrase “affecting the siting” could include a wider scope of laws or regulations that, as applied to a particular facility, might affect its siting. The Board concluded, therefore, that a determination of what affects the siting would be made on a case-by-case basis.

Numerous commenters suggested that the Board should read the phrase “affecting the siting” narrowly, as limited to those laws that control the use of a parcel of land for a particular purpose and not to laws designed to protect the environment or the public health and safety.²¹ In similar comments, some parties requested that we establish criteria or guidance for determining which laws affect the siting and not simply make ad hoc determinations.²² At this point, we do not have sufficient experience with the various state laws regarding these types of facilities to identify appropriate exclusions. Therefore, we continue to believe the scope of what affects the siting is best developed on a case-by-case basis. We are concerned that too narrow a definition could create a situation in which laws that might not on their face appear to affect the siting are used to categorically exclude facilities from being placed on a particular parcel of land. Likewise, a general applicable broad definition could include laws that should not be preempted.

NYSDEC requested that we specifically define a “siting permit” in 49 C.F.R. § 1155.2 to exclude permit conditions that address where and how waste is managed on the site and how the site it utilized.²³ We do not believe a specific determination of what constitutes a “siting permit” is appropriate, and will address what constitutes a siting permit on a case-by-case basis.

²⁰ Massachusetts’ Comments 13; NJDEP’s Comments 9.

²¹ Massachusetts’ Comments 1-4; NSWMA’s Comments 4-5; NYSASWM’s Comments 1; NJLM’s Comments 1; Freehold’s Comments 1; Croton-on-Hudson’s Comments 1; NJDEP’s Comments 5; Wilmington’s Comments 2; Glasgow’s Comments 1; NYSDEC’s Comments 5-7.

²² NYSDEC’s Comments 5-7; Massachusetts’ Comments 1-4, 9-10; NSWMA’s Comments 4-5; NJLM’s Comments 1; NYSASWM’s Comments 1; Freehold’s Comments 1; Croton-on-Hudson’s Comments 1; NJDEP’s Comments 5.

²³ NYSDEC’s Comments 3-4.

One group of commenters noted that our determinations of what affects the siting of a facility should be narrow because Congress intended that solid waste rail transfer facilities generally should be subject to the same regulatory requirements as non-rail solid waste management facilities.²⁴ See 49 U.S.C. § 10908(a). We believe Congress purposefully used the phrase “affecting the siting” of a facility to give the Board authority to exempt more than traditional zoning and land use laws. As the Board explained in the 2009 NPRM, other laws that are not traditionally considered “siting” laws could have an effect on the placement of a solid waste rail transportation facility. We do not believe Congress intended a state to be able to use such laws to exclude solid waste rail transfer facilities from certain locations without some recourse to the Board.

NYSDEC requested that we change original 49 C.F.R. § 1155.22(a)(12) of the 2009 NRPM (now revised 49 C.F.R. § 1155.21(a)(10)) to add after “not affecting siting” the phrase “including state solid waste management facility permits and all other state environmental permits.”²⁵ NYSDEC believes this addition is necessary to make clear that solid waste permits are required for facilities even though a land-use-exemption permit is requested for the facility.²⁶ We believe that the existing language is satisfactory. Adding the suggested language could create a conflict with the CRA, as it is conceivable that “state solid waste management facility permits and all other state environmental permits” could include requirements that “affect the siting” of a facility, and therefore constitute a law or regulation from which an applicant seeks to be exempt.

*D. Existing Facilities*²⁷

Commenting on the procedures for a state to petition the Board to require an existing facility to apply for a land-use-exemption permit under 49 U.S.C. § 10908(b)(2)(B) and 10909(b)(5), several parties suggested changes to 49 C.F.R. § 1155.10, “Contents of Petition.” Wilmington asked that we require a state to identify in its petition all laws that affect the siting of a facility.²⁸ However, as discussed above, we no longer require applicants seeking a land-use-exemption permit to identify all laws that affect the siting. Therefore, Wilmington’s proposal will not be adopted.

NYSDEC and Massachusetts asked that the information required by 49 C.F.R. § 1155.10 be submitted upon information and belief, or that the state be permitted to submit the petition on

²⁴ NSWMA’s Comments 3; NJLM’s Comments 1; NYSASWM’s Comments 1; Freehold’s Comments 1; Croton-on-Hudson’s Comments 1; Glasgow’s Comments 1.

²⁵ NYSDEC’s Comments 7.

²⁶ NYSDEC’s Comments 7.

²⁷ An “existing facility” refers to a solid waste rail transfer facility in existence on October 16, 2008.

²⁸ Salem Rail Logistics’ Comments 1-2.

the basis that good grounds exist for the request.²⁹ Some commenters requested that the information required under 49 C.F.R. §§ 1155.10(d)-(e)—which includes identification by a state of the name of the rail carrier that owns or operates the facility and a good-faith certification that the facility qualifies as a solid waste rail transfer facility—also be submitted on information and belief and/or based on good grounds for the submission.³⁰ We believe that these requests are reasonable. Therefore, we will delete the language “. . . and shall be attested to by a person having personal knowledge of the matters contained therein” from 49 C.F.R. § 1155.10. We note, however, that the Board’s rules at 49 C.F.R. § 1104.4(a)(3) provide that a signed filing with the Board constitutes a certification by the signing attorney or practitioner that there are good grounds for the filing.

With respect to 49 C.F.R. § 1155.11, “Filing and service of petition,” NJDEP requested that we either allow time for a defective petition to be cured or, at least, note that the petition is denied without prejudice.³¹ We have revised 49 C.F.R. § 1155.11(b) to explain that petitions are rejected without prejudice to refile, but we do not believe it is necessary to require the state to resubmit a completed petition within a particular timeframe.

The Board received several comments regarding 49 C.F.R. § 1155.12, “Participation in petition proceedings.” NJDEP requested that we revise 49 C.F.R. § 1155.12(a) to allow an interested party to challenge the specific facts set forth in a Governor’s petition.³² Salem Rail Logistics requested that we make clear that failure of a party to challenge the petition would result in forfeiture of the right to do so in the future.³³ In response, we have revised 49 C.F.R. § 1155.12(a) to allow an interested party to challenge any of the information required by 49 C.F.R. §§ 1155.10(c)-(e). However, we do not believe it is appropriate to state that one forfeits the right to challenge a petition if one does not do so in the allotted time frame. Classification as a solid waste rail transfer facility is a question of jurisdiction; we will not foreclose a party’s ability to object to our jurisdiction utilizing an appropriate Board process.

Salem Rail Logistics also requested that we enlarge the time period in original 49 C.F.R. § 1155.12(b)(1) (now revised 49 C.F.R. § 1155.12(c)(1)) for filing a reply to a petition from 20 days to 30 days³⁴ and that we change original 49 C.F.R. § 1155.13(b) (now revised 49 C.F.R. § 1155.13) to afford a facility 180 days, instead of 120 days, to file an application for a land-use-exemption permit.³⁵ Salem Rail Logistics has not shown that the time periods provided in the 2009 NPRM are insufficient.

²⁹ NYSDEC’s Comments 9-10; Massachusetts’ Comments 10.

³⁰ NYSDEC’s Comments 9-10; Massachusetts’ Comments 10; NJDEP’s Comments 10-11.

³¹ NJDEP’s Comments 11.

³² NJDEP’s Comments 11.

³³ Salem Rail Logistics’ Comments 2.

³⁴ Salem Rail Logistics’ Comments 2.

³⁵ Salem Rail Logistics’ Comments 3.

Some state entities expressed concern regarding the potential for abuse of the Board's processes by existing facilities.³⁶ The CRA precludes a state from enforcing any laws or regulations affecting the siting of an existing facility until the Board has approved or denied a land-use-exemption-permit application. 49 U.S.C. § 10909(e). Commenters argue that an applicant could identify laws in its application as laws affecting siting to delay state enforcement during the pendency of the application, regardless of whether those laws fall under the Board's jurisdiction.³⁷

When an application is filed under the CRA, the Board must determine whether a law affects the siting of a facility. This determination is made on a case-by-case basis, and as noted, the CRA expressly precludes states from acting on issues affecting the siting with regard to existing facilities while the application for a land-use-exemption permit is pending before the Board. It follows that state laws, regulations, or other orders that are being argued before the Board as affecting the siting of the facility as part of the land-use-exemption-permit application, are unenforceable until the Board has made a determination on the merits of the application. While we are sensitive to the concerns of the state parties, the Board must promulgate regulations in accordance with the governing statute. The Board has adequate rules in place to prevent abuse of its process.³⁸

NJDEP noted that the first paragraph on page 10 of the 2009 NPRM can be read to suggest that the CRA allows an existing facility to continue operations until the Board issues a final decision on the land-use-exemption-permit application, even if the facility is in violation of a requirement not affecting its siting.³⁹ This was not the Board's intent. We clarify here that a facility is subject to enforcement of a state law or regulation that does not affect the siting of the facility and is not included in the land-use-exemption-permit application (including possible shut-down), regardless of the fact that a Board proceeding may be pending under 49 C.F.R. pt. 1155.

³⁶ Massachusetts' Comments 4-5; NJDEP's Comments 4.

³⁷ Massachusetts' Comments 4-5; NJDEP's Comments 4. We note, however, that the CRA has been in effect since October 2008 without any such problems. The concern that existing facilities might abuse the law appears to be unfounded.

³⁸ For example, as a general matter, the Board's Rules of Practice direct "all persons appearing in proceedings before it to conform, as nearly as possible, to the standards of ethical conduct required of practice before the courts of the United States." 49 C.F.R. § 1103.11 (emphasis added). By presenting a pleading to a federal court (and by extension, to the Board), "an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," the document "is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P. 11(b)(1).

³⁹ NJDEP's Comments 4.

NJDEP further requested that we specifically allow a state to petition for a determination of whether a facility falls within the Board's jurisdiction.⁴⁰ We see no need to add such a provision to 49 C.F.R. pt. 1155, because an interested party may file a petition for declaratory order under 5 U.S.C. § 554 and 49 U.S.C. § 721 at any time to address potential jurisdictional issues.

Several parties suggested that the Board remove the requirement that the petitioning state must certify the facility's qualification as a solid waste rail transfer facility on both the enactment date and the petition date.⁴¹ The parties stated that they are concerned that an existing facility could operate sporadically to potentially evade review by the Board. The parties provided various suggestions for addressing this concern. Most suggested that the facility should have existed on the enactment date of the CRA and for a time period after the enactment, and request removal of the requirement that the state certify that the facility qualified as a solid waste rail transfer facility on the date of the petition.

We have modified our interim rules to address this concern, although in a slightly different way than suggested by the parties. We have revised 49 C.F.R. § 1155.10(e) to require only the certification that the facility qualified as a solid waste rail transfer facility on October 16, 2008, the date the CRA was enacted. We have also added a new subsection, 49 C.F.R. § 1155.12(b), which would allow a facility to acknowledge that it was a solid waste rail transfer facility on October 16, 2008, but no longer operates as such and therefore is not required to seek a land-use-exemption permit. Concurrently with this acknowledgement, a facility would be required to certify that if it plans to resume operations, it would seek a land-use-exemption permit as a proposed facility, or comply with all state laws, regulations, orders, other requirements, including those laws affecting the siting.

E. General Comments

With regard to the Board's discussion of the laws with which a facility must comply, Salem Rail Logistics requested that the Board revise the language on page 12 of the 2009 NPRM to "[a] solid waste [rail] transfer facility must comply, however, with all federal laws and with all other reasonable state laws regarding pollution . . ." (emphasis shows change).⁴² This change, however, would not be consistent with the language contained in § 10908(a).

Salem Rail Logistics also suggested that if a state is revising its non-siting permit application process, the Board should allow additional time for filing non-siting permit applications with state agencies by extending the compliance date from April 14, 2009 to "[April 14, 2009,] or within 180 days after the appropriate state agency adopts final rules

⁴⁰ NJDEP's Comments 11.

⁴¹ NSWMA's Comments 10, NJLM's Comments 1; NYSASWM's Comments 1; Freehold's Comments 1; Croton-on-Hudson's Comments 1.

⁴² Salem Rail Logistics' Comments 2.

regarding the non-siting application processes.”⁴³ However, the compliance date was established by statute in § 10908(b)(2)(A)(i). Thus, we are not free to change that date.

One commenter requested that Board staff perform a site visit in every case.⁴⁴ We instead will determine, on a case-by-case basis, whether a site visit is necessary.

Noting that the CRA exempts direct transfers of liquid waste from tank trucks to rail tank cars from compliance with state laws, Wilmington asked the Board to define such loading in a way that requires protective measures.⁴⁵ Wilmington’s proposal, however, is beyond the scope of the Board’s authority under the CRA.

Wilmington also noted that § 10909(e)(1)(H)(ii)(I) exempts rail transportation of solid waste after it has been loaded for shipment by rail. Wilmington requested that the Board clarify that loading for shipment that precedes this exempt transportation of solid waste is off-site loading.⁴⁶ No such clarification is necessary or appropriate. Under the CRA, the transferring of solid waste for rail shipment occurs, by definition, at a solid waste rail transfer facility. 49 U.S.C. § 10908(e)(1)(H)(i). Section 10908(e)(1)(H)(ii) exempts from the CRA’s purview those portions of a facility involved with the transportation of solid waste by rail after it has been loaded for shipment on a rail car.

Salem Rail Logistics suggested that the Board lower the filing fee for a land-use-exemption permit,⁴⁷ but did not suggest another amount or a method for determining a different amount. Massachusetts asked that the Board allow for time to permit commenters to develop facts in support of their case,⁴⁸ but gave no reason why the time period provided in the interim rules is insufficient. We therefore will not accept these changes.

Commenters also requested that the Board add provisions to the rules that are already addressed in other general Board rules. Wilmington asked that the Board add a requirement that allows for a public hearing on an application,⁴⁹ but this is unnecessary, as a party can request an oral hearing under 49 C.F.R. § 1112.10. We also clarify, at the request of Massachusetts, that filing may be done electronically in accordance with the regulations at 49 C.F.R. § 1104.1(e).

⁴³ Salem Rail Logistics’ Comments 2.

⁴⁴ Thomas’s Comments 1.

⁴⁵ Wilmington’s Comments 5.

⁴⁶ Wilmington’s Comments 5.

⁴⁷ Salem Rail Logistics’ Comments 1.

⁴⁸ Massachusetts’ Comments 12.

⁴⁹ Wilmington’s Comments 4.

F. Applications for a Land-Use-Exemption Permit

NJDEP requested that the Board revise 49 C.F.R. § 1155.20(a)(2)(ii), which identifies the entities that must be served with the notice of a land-use-exemption-permit application, to be consistent with 49 U.S.C. § 10909(b)(2). We agree, and we have modified our rules accordingly. The Board also has revised 49 C.F.R. § 1155.23(b) (original 49 C.F.R. § 1155.24(b)) to require that the same entities identified in revised 49 C.F.R. § 1155.20(a)(2)(ii) be served with a copy of the application.

Several parties suggested that additional information should be required in applications.⁵⁰ We have accepted these suggestions, in part. We have revised 49 C.F.R. § 1155.21(a) (original 49 C.F.R. § 1155.22(a)) to require the applicant to provide the following information as part of its application: (1) an explanation of how the Board’s jurisdiction under 49 U.S.C. § 10501 is met; (2) who the owner and operator of the facility are; (3) the interest of the rail carrier in the facility; and (4) an explanation of how it meets the definition of a solid waste rail transfer facility under 49 U.S.C. § 10909(e)(1)(H).

The new requirement to explain how the facility comes within the Board’s jurisdiction should address concerns that seem to drive many comments.⁵¹ The Board’s jurisdiction over transloading facilities has been at issue in recent Board proceedings,⁵² and is a threshold issue in land-use-exemption-permit proceedings. By adding this requirement, we have addressed the concern that the rules as originally set forth did not allow adequate time for inquiry regarding the rail carrier’s relationship to the owner/operator of the facility. The applicant now will provide its position on jurisdiction in its application and any opposition can be raised in the 45-day comment period on the application.

⁵⁰ NYSDEC’s Comments 11; Massachusetts’ Comments 11-12; NJDEP’s Comments 7.

⁵¹ NYSDEC’s Comments 10-11; Massachusetts’ Comments 11-12; NJDEP’s Comments 7.

⁵² See, e.g., Town of Babylon—Petition for Declaratory Order, FD 35057 (STB served Feb. 1, 2008 and Oct. 16, 2009); City of Alexandria, Va.—Petition for Declaratory Order, FD 35157 (STB served Feb. 17, 2009); Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, N.J., FD 34192 (Sub-No. 1), slip op. at 5 (STB served Aug. 14, 2003) (activities must be both “transportation” and “performed by, or under the auspices of, a rail carrier”).

While we have added these requirements to the application submission, we added only the requirement to include the name of the owner and operator to the application notice. The remaining new requirements would be cumbersome and beyond the purpose of a notice—to inform potentially interested parties of the bounds of an upcoming application. However, in accordance with NYSDEC’s suggestion, we have modified the notice to require the name of the rail carrier involved with the facility.⁵³

We have modified 49 C.F.R. § 1155.21(a)(19) and (20) (original 49 C.F.R. §§ 1155.22(a)(16) and (17)) to allow a larger size sheet of paper than 8x10 1/2 inches for the detailed map and drawing of the facility, at the suggestion of several commenters.⁵⁴ The revised rules allow these submissions on paper up to 11x17 inches. The size restriction is necessary so that the pleadings can be scanned for posting onto our website. Parties are free to submit multiple pages if one 11x17-inch sheet of paper is insufficient.

Wilmington requested that the Board modify 49 C.F.R. § 1155.22(a) (now revised 49 C.F.R. § 1155.21(a)) to require that applicants provide: the identity of and more descriptive information regarding all persons with a legal or financial interest in or operation of the facility; more specific detailed description of activities at the facility; more specific information in the map; and more specific regulations.⁵⁵ Wilmington also requested that certain information be added to 49 C.F.R. § 1155.22(b) (now revised 49 C.F.R. § 1155.21(b)), including: specific identification of the regulations⁵⁶ for which an exemption is sought; a description of the hardship imposed by those regulations; and a description of how the facility will comply with the objective of the regulation from which exemption is sought.⁵⁷ NJDEP requested that applicants be required to state how the facility will protect against damages to natural resources.⁵⁸ Massachusetts requested we allow a time for inquiry into disputes over who owns or operates the facility.⁵⁹ Commenters have not shown that these additions are necessary for the Board’s evaluation of a land-use-exemption-permit application, especially given that we are expanding the informational requirements in 49 C.F.R. § 1155.21(a) (original 49 C.F.R. § 1155.22(a)) in other ways, as discussed above.

⁵³ NYSDEC’s Comments 10.

⁵⁴ Wilmington’s Comments 4; Salem Rail Logistics’ Comments 3; AAR’s Comments 5.

⁵⁵ Wilmington’s Comments 3-4.

⁵⁶ Wilmington’s comments only speak in terms of requiring information and argument about regulations, not the statute’s broader language of “laws, regulations, order, and other requirements.”

⁵⁷ Wilmington’s Comments 4.

⁵⁸ NJDEP’s Comments 13.

⁵⁹ Massachusetts’ Comments 12.

Several parties commented on whether to allow applicants to include possible future expansion in their land-use-exemption-permit applications. NJDEP requested that any future expansion require justification by the applicant and that the expansion plans be subject to the same Board standard for review as the rest of the subject facility. NJDEP further asked that any future expansion rights be contingent on state law not changing and be limited to the same type of waste.⁶⁰ Massachusetts and NJDEP also argued that there should be time limitations on exercising permitted future expansion rights.⁶¹

In response, we have revised subparagraph, 49 C.F.R. § 1155.21(a)(18) (original 49 C.F.R. § 1155.22(a)(19)), which would require the applicant to provide a detailed justification for any planned future expansion. Our revised interim rule also provides that the expansion would be subject to the same standard for approval as the application for the facility itself. Furthermore, the revised rule provides that the approval of a future expansion included in a land-use-exemption permit will lapse unless the authority is exercised within 10 years of the Board's granting of the land-use-exemption application. Although some commenters suggested a 5-year exercise period, we believe that 10 years is needed to allow for both construction and operation of the facility before the owner or operator must determine whether to exercise its right to expand.

There were also many comments on the waiver provision of the application rules. NYSDEC requested that the Board require the same service and notice requirements in a petition for waiver as for an application.⁶² Massachusetts requested that interested parties be given notice of a waiver request and an opportunity to respond both to waiver requests of the application process, and the environmental review under 49 C.F.R. § 1105.7(g).⁶³ In response, the Board added a new subsection 49 C.F.R. § 1155.23(d)(4) (original 49 C.F.R. § 1155.24(d) contained waiver information) to require that a petition for waiver be served on the same parties that receive a notice of intent to apply for a land-use-exemption permit under 49 C.F.R. § 1155.20(a)(2).

Commenters also suggested that the Board should: specify the circumstances under which waiver can be sought; specify which provisions may be waived; enumerate the grounds for granting a waiver; and require petitioners to provide information on the hardship imposed by compliance with the regulation from which waiver is sought, together with a description of how the objective of the regulation will be met even if waiver is granted.⁶⁴ We reject these suggestions. The grounds for seeking a waiver will be case-specific, as is the practice in

⁶⁰ NJDEP's Comments 8-9.

⁶¹ NJDEP's Comments 8-9; Massachusetts' Comments 13.

⁶² NYSDEC's Comments 11.

⁶³ Massachusetts' Comments 11, 14.

⁶⁴ Wilmington's Comments 4; NYSDEC's Comments 11; Massachusetts' Comments 14; NJDEP's Comments 13-14.

abandonment cases,⁶⁵ because we see no reason to treat waiver requests in these cases differently.

Salem Rail Logistics also asked that we allow a brief period (7-10 days) for resubmission of an application if it is denied.⁶⁶ In response, we added language to 49 C.F.R. § 1155.22 (original 49 C.F.R. § 1155.24) that tracks our abandonment regulations at 49 C.F.R. § 1152.24(e)(3)-(4), and would allow for resubmission of an application within 60 days of a decision rejecting the application.

NJDEP asks the Board to state that the “permission,” as used with regard to the state’s authority from which facilities can request exemption, is for siting only and not other state regulatory authority.⁶⁷ However we are not prepared at this point to find categorically that certain types of laws do not affect siting. Salem Rail Logistics asked the Board to add a rule that states that failure to identify in the application laws that affect the siting could preclude raising those laws at a later date.⁶⁸ However, there is no basis to penalize an applicant for failure to raise particular laws at the outset, particularly since the Board is implementing a new regulatory process here that will be developed and refined through the individual cases that arise.

G. Modifications, Amendments, Revocations, and Transfers of a Land-Use-Exemption Permit

In 49 U.S.C. § 10909(b)(4), Congress directed the Board to develop an expedited timeline and procedure for petitions to modify, amend, or revoke a land-use-exemption permit that has been previously granted. In the 2009 NPRM, the process set forth at original 49 C.F.R. §§ 1155.26 and 1155.28 addressed these requirements. NYDEC and Massachusetts requested that the Board include a notification procedure in original 49 C.F.R. § 1155.26 (revised 49 C.F.R. § 1155.25) to ensure that states, interested parties, and the public are made aware of any proposed transfer or termination of a land-use-exemption permit.⁶⁹ We agree that states, municipalities, and the public should be included, and we have made revisions to accomplish this. When the transfer is part of the acquisition of a rail line under 49 U.S.C. §§ 10901, 10902, or 11323, revised 49 C.F.R. § 1155.25(a) would require an applicant to specifically advise the state and municipality, in which the facility is located, of the transfer. Additionally, to provide notice to the public, we have included in the Board’s Federal Register notice of the acquisition a

⁶⁵ See, e.g., Union Pac. R.R.—Aban.—In Lancaster & Gage Counties, Neb., & Marshall County, Kan., AB 33 (Sub-No. 140) (STB served July 27, 1999); Ind. Hi-Rail Corp., Debtor—Aban.—In Putman & Van Wert Counties, Ohio, & Adams County, Ind., AB 336 (Sub-No. 6) (STB served July 23, 1997); Mo. Pac. R.R.—Aban.—In Williamson County, Tex. (Georgetown Branch), AB 3 (Sub-No. 94) (ICC served Dec. 13, 1990).

⁶⁶ Salem Rail Logistics’ Comments 3.

⁶⁷ NJDEP’s Comments 9-10.

⁶⁸ Salem Rail Logistics’ Comments 1-2.

⁶⁹ NYSDEC’s Comments 12; Massachusetts’ Comments 14; NJDEP’s Comments 14.

statement that the acquisition includes a solid waste rail transfer facility with a Board-issued land-use-exemption permit. 49 C.F.R. § 1155.25(a). We also have revised 49 C.F.R. § 1155.25(b) to require the entity that received the land-use-exemption permit to notify the Board, the municipality, the state, and any relevant federal or state regional planning entity in the jurisdiction in which the solid waste rail transfer facility is located, of the intended transfer or termination of the facility.

In 49 C.F.R. § 1155.25(a), we have replaced a “should” with a “shall” to clarify that notification is required. The provision now reads: “shall specifically advise the Board” (emphasis added) of the intended transfer of the land-use-exemption permit.⁷⁰ However, we will not adopt Massachusetts’ proposal that the Board include a requirement in 49 C.F.R. § 1155.25 that the acquiring rail carrier submit a certification that the solid waste rail transfer facility will be operated by or on behalf of the acquiring rail carrier and that the rail carrier will comply with the land-use-exemption permit conditions.⁷¹ We do not believe that such a certification is necessary because an acquiring railroad will be subject to the conditions of the permit upon acquisition.

H. Board Determination Under 49 U.S.C. § 10909

Congress set forth in 49 U.S.C. § 10909 the factors that the Board must consider and the standard that the Board must apply in determining whether to approve an application for a land-use-exemption permit. Section 10909(c)(1) provides that the Board may issue a land-use-exemption permit to a solid waste rail transfer facility only if—after balancing the facility’s potential benefits to and adverse impacts on public health, public safety, environment, interstate commerce, and transportation of solid waste—it determines that the facility does not pose an unreasonable risk to public health, safety, or the environment. Congress also identified in § 10909(d) various factors for the Board to consider, including any unreasonable burdens on interstate transportation of solid waste by railroad and any potential discrimination against the railroad transportation of solid waste, a facility, or railroad owning or operating a facility. 49 U.S.C. § 10909(d)(6). While the phrases “unreasonable burden” and “discrimination” are also in § 10909(a)(1), their use in that section is different than as part of the considerations listed in § 10909(d). In § 10909(a)(1), “unreasonable burden” and “discrimination” are threshold findings required for certain types of applicants.

Several commenters read paragraphs 10909(a)(1) and (c) in conjunction to establish a two-part standard for review for all applications: first, a finding that a state law, regulation, or order unreasonably burdens interstate transportation of solid waste and discriminates against the rail transportation of solid waste and a solid waste facility (or rail carrier owning or operating such a facility) and, second, that the facility does not pose an unreasonable risk to public health, safety, or the environment.⁷² We disagree. As the Board explained in the 2009 NPRM, we read

⁷⁰ NJDEP’s Comments 14.

⁷¹ Massachusetts’ Comments 14.

⁷² NSWMA’s Comments 6; NJLM’s Comments 1; NYSASWM’s Comments 1; Freehold’s Comments 1; Croton-on-Hudson’s Comments 1; Massachusetts’ Comments 15.

the “unreasonable burden” and “discriminates” language in § 10909(a)(1) as criteria that must be met for particular applicants to obtain a land-use-exemption permit, rather than criteria that all applications must meet.⁷³ However, even where those criteria are not a threshold requirement for issuance of a land-use-exemption permit, the CRA utilizes them as important considerations in whether to grant a permit. See 49 U.S.C. § 10909(d)(6). Therefore, we have added language to revised 49 C.F.R. § 1155.21(b) to require that all applicants submit an explanation of whether the law(s) affecting siting from which exemption is sought unreasonably burdens the interstate transportation of solid waste by railroad or discriminates against the railroad transportation of solid waste and a solid waste rail transportation facility.

One commenter requested that we define the phrases “unreasonably burdens” and “discriminates against the railroad transportation of solid waste and a solid waste rail transfer facility.”⁷⁴ These phrases, however, are best defined on a case-by-case basis.⁷⁵

NJDEP requested that we add a statement to 49 C.F.R. § 1155.27, that the Board will deny an application if the Board determines that the applicant is seeking a permit to circumvent a state law with which the CRA requires compliance.⁷⁶ We do not believe that NJDEP’s proposed language is appropriate, as the Board’s rules of practice contain provisions to prevent abuse of process. By filing an application with the Board, the applicant attests, under 49 C.F.R. § 1104.4, that there are good grounds for the application and that it is not being filed to create delay. Also, the Board’s Rules of Practice direct “all persons appearing in proceedings before it to conform, as nearly as possible, to the standards of ethical conduct required of practice before the courts of the United States.” 49 C.F.R. § 1103.11.

⁷³ As noted in our discussion under the heading “Identification of the Laws Affecting Siting”, in light of 49 U.S.C. § 10910, the requirement to show that the law, regulation or other requirement affecting the siting of the facility is unreasonably burdensome to interstate commerce or discriminates against rail carriers applies where the state or local requirement affecting the siting of the facility arises under an environmental, public health, or public safety standard that falls under the state’s traditional police power. It is also a threshold requirement where the applicant for a land-use-exemption permit sought permission from the applicable state, local, or municipal authority and received an unsatisfactory result affecting the siting of the facility.

⁷⁴ Sullivan’s Comments 2.

⁷⁵ That commenter also raised concerns that a small agency should not be empowered to make the determination in § 10909(a)(1), as to whether a state, local, or municipal law, regulation, order, or other requirement affecting the siting of such facility unreasonably burdens the interstate transportation of solid waste by railroad, or discriminates against the railroad transportation of solid waste and a solid waste rail transfer facility. Sullivan’s Comments 1-2. However, Congress specifically authorized the Board to make the findings required by the CRA in order to grant land-use-exemption permits.

⁷⁶ NJDEP’s Comments 10.

NJDEP asked that we clarify that, if a land-use-exemption-permit application is denied, the facility must comply with siting permit requirements and all other state laws.⁷⁷ To the extent the language on page 13 of the 2009 NPRM implied that a facility whose application was denied only had to “obtain the necessary siting permits for the applicable state authority” to operate, we clarify that a facility must also comply with all other applicable state laws, orders, regulations, and requirements.

Some commenters requested that the Board deny a land-use-exemption permit if the solid waste rail transfer facility is located or proposed for location next to a residential development.⁷⁸ The location of a facility near a residential area likely would be a factor in any Board decision on whether to grant a permit application in a specific case; but nothing in the statute suggests that we must adopt a categorical exclusion barring solid waste rail transfer facilities next to residential areas. We decline to do so, but rather will examine the issue on a case-by-case basis.

Salem Rail Logistics requested that we add an exception allowing existing facilities to be located on the lands specified in 49 C.F.R. §§ 1155.27(b)(2)-(3) if, subsequent to the facility beginning operations, the land was designated as a land of national interest.⁷⁹ Our interpretation of the statute is that 49 U.S.C. § 10909(c)(2) prevents the Board from granting an application for a proposed solid waste rail transfer facility on lands of national interest, but that an existing facility located on lands of national interest could apply for a land-use-exemption permit on its own or be the subject of a petition by the governor of the state in which it is located. The location of the facility and the history of the designation of the lands would be considered, along with other factors, when weighing the merits of an existing facility’s application for a land-use-exemption permit.⁸⁰

Two commenters requested that we modify or delete original 49 C.F.R. § 1155.27(b)(4) (revised 49 C.F.R. § 1155.26(b)(6)), which provides that a land-use-exemption permit will not exempt laws that arise out of a state’s traditional police powers.⁸¹ That section tracks the language of 49 U.S.C. § 10910, however, so any changes would be inappropriate. We note that, if a facility believes a law or regulation that affects siting and falls under traditional state police power unreasonably burdens interstate commerce or discriminates against rail carriers, the facility may argue for an exemption based upon those grounds.

⁷⁷ NJDEP’s Comments 5.

⁷⁸ Voorhees’s Comments 1; Thomas’s Comments 1.

⁷⁹ Salem Rail Logistics’ Comments 2.

⁸⁰ See 49 U.S.C. § 10909(d)(7).

⁸¹ Salem Rail Logistics’ Comments 2; NJDEP’s Comments 2-3. Section 1155.27(b)(4) provides that: “A land-use-exemption permit will not exempt a state requirement that a rail carrier comply with an environmental, public health, or public safety standard that falls under the traditional police powers of the state unless the requirement is unreasonably burdensome to interstate commerce or discriminates against rail carriers.”

Finally, several parties commented that 49 C.F.R. § 1155.27(b)(5) should be clarified to explain that, where only a portion of a law is deemed to “affect the siting” of a facility, the Board will exempt only the application of that portion of the law.⁸² The Board agrees and has included language in revised 49 C.F.R. § 1155.27(b)(5) providing: “A land-use exemption permit will only exempt state, local, or municipal laws, regulations, orders, other requirements, or portions thereof, affecting the siting of the solid waste rail transfer facility.” (Emphasis added.)

I. Environmental Comments

As previously noted, the issuance of a land-use-exemption permit is a major federal action subject to NEPA. In the 2009 NPRM, the Board stated it would conduct the appropriate level of environmental review for each land-use-exemption-permit proceeding, pursuant to the Council on Environmental Quality’s NEPA regulations, 40 C.F.R. §§ 1500-1508, and the Board’s own environmental regulations, 49 C.F.R. pt. 1105.

Eleven of the opening comments⁸³ and 5 of the reply comments⁸⁴ received on the 2009 NPRM addressed the environmental review procedures. The commenters offered a number of suggestions for clarifying and improving the environmental review procedures. In issuing these revised interim rules, the Board has taken into account all the concerns raised by the parties’ written comments, and is adopting several of the suggestions offered, including the requirement that a full EIS generally be prepared in these cases.⁸⁵

A number of commenters expressed concerns about the proposal to require environmental and historic reporting pursuant to 49 C.F.R. §§ 1105.7 and 1105.8. In particular, several parties argued that the Board’s regulations at 49 C.F.R. § 1105.7 do not adequately address the potential environmental impacts associated with solid waste management operations.⁸⁶ Specifically, they pointed out that the air thresholds listed in 49 C.F.R. § 1105.7(e)(5) are based on rail operations, not solid waste management operations, and that this

⁸² NSWMA’s Comments 5; NJLM’s Comments 1; NYSASWM’s Comments 1; Freehold’s Comments 1; Croton-on-Hudson’s Comments 1.

⁸³ We received environmental comments from: Wilmington; NJDEP; Massachusetts; NYSDEC; NSWMA; Croton-on-Hudson; Freehold; Salem Rail Logistics; Veolia; NJLM; and NYSAM.

⁸⁴ NSWMA, NJDEP, NJLM, ACUA, and AAR filed reply comments on the environmental review procedures.

⁸⁵ As previously noted, OEA may reclassify the EIS request if the circumstances warrant. 49 C.F.R. § 1105.6(d).

⁸⁶ NYSDEC’s Comments 8-9; Massachusetts’ Comments 8-9; Wilmington’s Comments 2-4; NSWMA’s Comments 7-10; NJLM’s Comments 1; NYSAM’s Comments 1; NJDEP’s Comments 13; Freehold’s Comments 1; Croton-on-Hudson’s Comments 1; Veolia’s Comments 1.

regulation does not take into account air impacts such as dust, odor, or vectors.⁸⁷ Others indicated that the Board's existing regulations do not consider stormwater management, state wetlands, endangered or threatened species and areas designated as critical habitat under state law, wildlife management areas, natural areas, or agricultural lands.⁸⁸ Commenters urged the Board to propose environmental rules that specifically address solid waste rail transfer facilities.⁸⁹

We agree that 49 C.F.R. § 1105.7 does not address issues specific to solid waste management, and we understand the concern that certain requirements potentially applicable to these facilities are not accounted for in the existing regulations. However, much of the information requested in the Board's environmental reporting rules does apply to solid waste rail transfer facilities.⁹⁰ Thus, we will continue to require applicants to comply with the environmental reporting requirements in 49 C.F.R. § 1105.7 to the extent applicable. In addition, as previously noted, we have revised our interim rules to require an applicant to provide information related to the environmental factors the Board must consider when determining whether to issue a land-use-exemption permit under 49 U.S.C. § 10909 (d)(1)-(5), in its environmental report. See 49 C.F.R. § 1155.25. The discussion of these five factors should include the types of environmental issues raised by commenters, such as stormwater management, state wetlands, air impacts resulting from solid waste management operations, etc., that are not specifically addressed in the Board's existing regulations. Any concerns about the omission of relevant environmental information in an environmental report also can be raised during public review and comment periods provided as part of the Board's environmental review process. See 49 C.F.R. § 1105.10.

In addition, we encourage applicants to consider use of third-party contractors to assist OEA in preparing the environmental documentation in land-use-exemption-permit proceedings. The use of third-party contractors would supersede the need for applicants to file environmental and historic reports. See 49 C.F.R. § 1105.10(d). The third-party contractor would need to be approved by OEA and would work under OEA's direction, control, and supervision. The Board explained its procedures for this practice in Policy Statement on Use of Third-Party Contracting

⁸⁷ Massachusetts' Comments 9; NSWMA's Comments 7-8; NJLM's Comments 1; NYSAM's Comments 1; Freehold's Comments 1; Croton-on-Hudson's Comments 1.

⁸⁸ Massachusetts' Comments 9; NJDEP's Comments 13; NYSDEC's Comments 9.

⁸⁹ In its reply, AAR argued that the interim rules already address this issue by requiring an applicant to provide environmental information pertaining to the facility for which it is seeking a land-use-exemption permit, including the environmental criteria otherwise applicable under state law affecting the siting of the facility. AAR suggested that the Board clarify the interim rules by requiring applicants to provide this information in the environmental report. AAR's Reply 10.

⁹⁰ Applicable information requested in § 1105.7(e) includes, but is not limited to, the following environmental resource categories: land use, noise, safety, biological resources, and water.

in Preparation of Environmental Documentation, EP 585 (STB served Mar. 19, 2001).⁹¹ With regard to an application for a land-use-exemption permit, even if the applicant fails to hire such a contractor, if the Board believes that use of a third-party contractor is necessary, the Board may hire a contractor and charge the costs to the applicant. See 49 U.S.C. § 10909(h).

Salem Rail Logistics suggested that the Board should use its own staff rather than third-party contractors, to minimize the expense associated with the land-use-exemption permit review process.⁹² As discussed in the Policy Statement, the Board has an established practice of augmenting its internal staff resources by using third-party contractors in environmental reviews, and Congress specifically authorized the Board to charge permit applicants the costs for third-party consultants in § 10909(h). As the Policy Statement explains, our third-party contracting process serves to expedite and facilitate independent, comprehensive environmental analyses that meet the requirements of NEPA and related environmental laws. Thus, it is to the applicant's benefit to use third-party consultants.

NJDEP and Massachusetts questioned why only new facilities would be required to comply with 49 C.F.R. § 1155.20(c). They argued that existing facilities should not be exempt from environmental review.⁹³ We agree that existing facilities that come before the Board in land-use-exemption-permit proceedings should be subject to environmental review, because issuing a permit is a major federal action subject to NEPA. Revised 49 C.F.R. § 1155.20(c) reflects this change.

Further, Wilmington and NJDEP commented that applicants in land-use-exemption proceedings should also be specifically required to comply with the Coastal Zone Management Act (CZMA), if applicable.⁹⁴ We agree. The revised rules include a reference to 49 C.F.R. § 1105.9, which addresses compliance with the CZMA.

PAPERWORK REDUCTION, REGULATORY FLEXIBILITY, AND ENVIRONMENTAL CERTIFICATIONS

Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3549, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3), the Board seeks

⁹¹ Wilmington pointed out that the original rules do not specify qualification criteria for third-party contractors. Wilmington's Comments 3. This information can be found in the Policy Statement and on the Board's website.

⁹² Salem Rail Logistics' Comments 2. NSWMA, NJDEP, NJLM, and ACUA argued in their reply comments that Salem Rail Logistics is presumably seeking no-cost environmental and historic reviews, which NSWMA states is inconsistent with federal law. NSWMA's Reply 5; NJDEP's Reply 1; NJLM's Reply 1; ACUA's Reply 1.

⁹³ NJDEP's Comments 12; Massachusetts' Comments 10-11. AAR, in its reply, concurred that existing facilities should be subject to environmental review. AAR's Reply 11.

⁹⁴ Wilmington's Comments 3; NJDEP's Comments 12. In its reply, AAR agreed that the Board should modify the interim rules to require compliance with the CZMA. AAR's Reply 11.

comments regarding: (1) whether the collection of information associated with the land-use-exemption-permit application in the proposed interim rules at 49 C.F.R. pt. 1155, and further described in Appendix B, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimate; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. Information pertinent to these issues is included in Appendix B. The collection of information associated with these proposed interim rules will be submitted to OMB for review as required under 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11.

In accordance with the Regulatory Flexibility Act at 5 U.S.C. § 605(b), we certify that the revised rules would not have a significant economic impact on a substantial number of small entities. The basis for this determination is as follows. While applicants for land-use-exemption permits could be small entities, as defined in 13 C.F.R. pt. 121, under neither the statute nor the revised rules could the Board, on its own, require a party to apply for a Board permit. See 49 U.S.C. §§ 10908(b)(2)(B), 10909(a). In general, that decision is solely within the control of the entity. The one exception is that a governor of the state in which an existing facility is located could petition the Board, under 49 U.S.C. § 10908(b)(2)(B) and 49 C.F.R. pt. 1155 subpart B, to require that facility to obtain a land-use-exemption permit in order for it to continue to operate. Even in that circumstance, the authority lies with the state governors—not the Board—to initiate the Board's processes. In all other scenarios, a party can avoid being subject to the Board's rules regarding land-use-exemption permits by complying with state requirements. Therefore, the revised rules will not circumscribe or mandate the conduct of a substantial number of small entities.

Moreover, there are no alternatives to the revised rules that would adequately achieve the objectives of the CRA. The only scenario in which a small entity might be compelled to avail itself of the new Board processes (when a state governor has properly petitioned the Board under 49 C.F.R. pt. 1155 subpart B) must be included in the new rules because it is specifically required under the CRA. 49 U.S.C. § 10908(b)(2)(B). Finally, we have provided a waiver provision that could mitigate any significant negative impact on small entities—an applicant may request a waiver of any particular part of the application procedures. See 49 C.F.R. § 1155.22(d)(4) (original 49 C.F.R. § 1155.24(d)(2)).

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The revised rules set forth in Appendix A are adopted as revised interim rules.
2. Comments on the revised rules are due by May 23, 2011, and replies are due by June 22, 2011.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of

Advocacy, U.S. Small Business Administration.

4. This decision is effective on its date of service.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey.

Appendix A

Code of Federal Regulations Revisions

For the reasons set forth in the preamble, the Surface Transportation Board revises part 1155 of title 49, chapter X, of the Code of Federal Regulations to read as follows:

PART 1155—SOLID WASTE RAIL TRANSFER FACILITIES

Subpart A—General

Sec.

- 1155.1 Purpose and scope.
- 1155.2 Definitions.

Subpart B—Procedures Governing Petitions to Require a Facility in Existence on October 16, 2008, to Apply for a Land-Use-Exemption Permit

- 1155.10 Contents of petition.
- 1155.11 Filing and service of petition.
- 1155.12 Participation in petition procedures.
- 1155.13 Board determination with respect to a Governor's petition.

Subpart C—Procedures Governing Applications for a Land-Use-Exemption Permit

- 1155.20 Notice of intent to apply for a land-use-exemption permit.
- 1155.21 Contents of application.
- 1155.22 Filings and service of application.
- 1155.23 Participation in application proceedings.
- 1155.24 Environmental review.
- 1155.25 Transfer and termination of the land-use-exemption permit.
- 1155.26 Board determinations under 49 U.S.C. § 10909.
- 1155.27 Petitions to modify, amend, or revoke a land-use-exemption permit.

APPENDIX A TO PART 1155—FORM NOTICE OF INTENT TO APPLY

APPENDIX B TO PART 1155—FORM FEDERAL REGISTER NOTICE

Authority: 49 U.S.C. §§ 721(a), 10908, 10909, 10910.

PART 1155—SOLID WASTE RAIL TRANSFER FACILITIES

Subpart A—General

1155.1 Purpose and scope.

49 U.S.C. § 10501(c)(2)(B) excludes solid waste rail transfer facilities from the Board's jurisdiction except as provided under 49 U.S.C. §§ 10908 and 10909. Sections 10908 and 10909 provide the Board authority to issue land-use-exemption permits for solid waste rail transfer

facilities when certain conditions are met. The regulations in this part concern land-use-exemption permits and the Board's standard for review.

1155.2 Definitions.

(a) Unless otherwise provided in the text of these regulations, the following definitions apply in this part:

(1) *Commercial and retail waste* means material discarded by stores, offices, restaurants, warehouses, nonmanufacturing activities at industrial facilities, and other similar establishments or facilities.

(2) *Construction and demolition debris* means waste building materials, packaging, and rubble resulting from construction, remodeling, repair, and demolition operations on pavements, houses, commercial buildings, and other structures.

(3) *Environmental Impact Statement or "EIS"* means the detailed written statement required by the National Environmental Policy Act, 42 U.S.C. § 4332(2)(c), for a major federal action significantly affecting the quality of the human environment.

(4) *Household waste* means material discarded by residential dwellings, hotels, motels, and other similar permanent or temporary housing establishments or facilities.

(5) *Industrial waste* means the solid waste generated by manufacturing and industrial and research and development processes and operations, including contaminated soil, nonhazardous oil spill cleanup waste and dry nonhazardous pesticides and chemical waste, but does not include hazardous waste regulated under subtitle C of the Solid Waste Disposal Act (42 U.S.C. § 6921 et seq.), mining or oil and gas waste.

(6) *Institutional waste* means material discarded by schools, nonmedical waste discarded by hospitals, material discarded by nonmanufacturing activities at prisons and government facilities, and material discarded by other similar establishments or facilities.

(7) *Municipal solid waste* means household waste, commercial and retail waste, and institutional waste.

(8) *Office of Environmental Analysis or "OEA"* means the Board staff that prepares the Board's environmental documents and analyses.

(9) *Solid waste* means construction and demolition debris; municipal solid waste; household waste; commercial and retail waste; institutional waste; sludge; industrial waste; and other solid waste, as determined appropriate by the Board, but not waste generated by a rail carrier during track, track structure, or right-of-way construction, maintenance, or repair (including railroad ties and line-side poles), or waste generated as a result of a railroad accident, incident, or derailment.

(10) *Solid waste rail transfer facility*—

(i) means the portion of a facility owned or operated by or on behalf of a rail carrier (as defined in 49 U.S.C. § 10102) where solid waste, as a commodity to be transported for a charge, is collected, stored, separated, processed, treated, managed, disposed of, or transferred, when the activity takes place outside of original shipping containers; but

(ii) does not include—

(A) the portion of a facility to the extent that activities taking place at such portion are comprised solely of the railroad transportation of solid waste after the solid waste is loaded for shipment on or in a rail car, including railroad transportation for the purpose of interchanging railroad cars containing solid waste shipments; or

(B) a facility where solid waste is transferred or transloaded solely from a tank truck directly to a rail tank car.

(11) *Sludge* means any solid, semi-solid, or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility exclusive of the treated effluent from a wastewater treatment plant.

(b) Exceptions. Notwithstanding paragraph (a) of this section, the terms *household waste*, *commercial and retail waste*, and *institutional waste* do not include yard waste and refuse-derived fuel; used oil; wood pallets; clean wood; medical or infectious waste; or motor vehicles (including motor vehicle parts or vehicle fluff).

(c) “*Land-use-exemption permit*” means the authorization issued by the Board pursuant to the authority of 49 U.S.C. § 10909(a) and includes the term “siting permit” in 49 U.S.C. § 10909(e).

(d) “*State laws, regulations, orders, or other requirements affecting the siting of a facility*,” as used in 49 U.S.C. § 10909(f) and 49 C.F.R. § 1155.27(d), include the requirements of a state or a political subdivision of a state, including a locality or municipality, affecting the siting of a facility.

(e) “*State requirements*” as used in 49 U.S.C. § 10908 does not include the laws, regulations, ordinances, orders, or other requirements of a political subdivision of a state, including a locality or municipality, unless a state expressly delegates such authority to such political subdivision.

Subpart B—Procedures Governing Petitions to Require a Facility in Existence on October 16, 2008, to Apply for a Land-Use-Exemption Permit

1155.10 Contents of petition.

A petition to require a solid waste rail transfer facility in existence on October 16, 2008, to apply for a land-use-exemption permit, submitted by the Governor of the state or that Governor’s designee, shall contain the following information:

- (a) The Governor’s name.
- (b) The state’s name and the name of any agency filing on behalf of the Governor.
- (c) The full address of the solid waste rail transfer facility, or, if not available, the city, state, and United States Postal Service ZIP code.
- (d) The name of the rail carrier that owns or operates the facility or the rail carrier on whose behalf the facility is operated.
- (e) A good-faith certification that the facility qualified as a solid waste rail transfer facility as defined in 49 U.S.C. § 10908(e)(1)(H) and 49 C.F.R. § 1155.2, on October 16, 2008.
- (f) Relief sought (that the rail carrier that owns or operates the facility be required to apply for a land-use-exemption permit).
- (g) Name, title, and address of representative of petitioner to whom correspondence should be sent.

1155.11 Filing and service of petition.

(a) When the petition is filed with the Board, the petitioner shall serve concurrently, by first class mail, a copy of the petition on the rail carrier that owns or operates the solid waste rail transfer facility and on the facility if the address is different than the rail carrier’s address. A copy of the certificate of service shall be filed with the Board at the same time.

(b) Upon the filing of a petition, the Board will review the petition and determine whether it conforms to all applicable regulations. If the petition is substantially incomplete or its filing otherwise defective, the Board will reject the petition without prejudice for stated reasons by order within 15 days from the date of filing of the petition.

(c) If the petition is rejected, a revised petition may be resubmitted, and the Board will determine whether the resubmitted application conforms with all prescribed regulations.

1155.12 Participation in petition proceedings.

(a) An interested person may file a reply to the petition challenging any of the information contained in the petition that is required by 49 C.F.R. §§ 1155.10(c)-(e) and may offer evidence to support its contention. The petitioner will have an opportunity to file a rebuttal.

(b) A facility can acknowledge that it was a solid waste rail transfer facility on October 16, 2008, but no longer operates as such and therefore is not required to seek a land-use-exemption permit. To do so, a facility must file with the Board a certification stating that it: (1) no longer operates as a solid waste transfer facility; (2) understands that by certifying that it no longer operates as a solid waste transfer facility, it no longer qualifies as a facility in existence on October 16, 2008 for purposes of the Clean Railroad Act and these regulations; and (3) understands that if it seeks a land-use-exemption permit in the future, it would be required to do so as a proposed facility.

(c) Filing and service of replies.

(1) Any reply shall be filed with the Board (the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423) within 20 days of the filing with the Board of the petition.

(2) A copy of the reply shall be served on petitioner or its representative at the time of filing with the Board. Each filing shall contain a certificate of service.

(3) Any rebuttal to a reply shall be filed and served by petitioner no later than 30 days after the filing of the petition.

1155.13 Board determination with respect to a Governor's petition.

The Board shall accept the Governor's complete petition on a finding that the facility qualified as a solid waste rail transfer facility, as defined in 49 U.S.C. § 10908(e)(1)(H) and 49 C.F.R. § 1155.2, on October 16, 2008. If the Board finds that the facility currently does not qualify for or require a land-use-exemption permit, any future use of the facility as a solid waste rail transfer facility would require an application for a land-use-exemption permit as a proposed facility and/or the proper state permits. In a decision granting the Governor's petition, the Board shall require that the rail carrier that owns or operates the facility, or the operator of the facility, file a land-use-exemption-permit application within 120 days of the service date of the decision.

Subpart C—Procedures Governing Applications for a Land-Use-Exemption Permit

1155.20 Notice of intent to apply for a land-use-exemption permit.

(a) Filing and publication requirements. An applicant (i.e., a solid waste rail transfer facility, or the rail carrier that owns or operates the facility) shall give its Notice of Intent to file a land-use-exemption-permit application by complying with the following procedures:

(1) Filing. Applicant must serve its Notice of Intent on the Board in the format prescribed in pt. 1155 Appendix A. The Notice of Intent shall be filed in accordance with the time requirements of paragraph (b) of this section.

(2) Service. Applicant must serve, by first-class mail (unless otherwise specified), its Notice of Intent upon:

- (i) The Governor of the state where the facility is located;
- (ii) The municipality, the state, and any relevant federal or state regional planning entity in the jurisdiction of which the solid waste rail transfer facility is located or proposed to be located; and
- (iii) The appropriate managing government agencies responsible for the groups of land listed in 49 U.S.C. § 10909(c)(2).

(3) Newspaper publication. Applicant must publish its Notice of Intent at least once during each of 3 consecutive weeks in a newspaper of general circulation in each county in which any part of the proposed or existing facility is located.

(b) Time limits.

(1) The Notice of Intent must be served on the parties discussed above at least 15 days, but not more than 30 days, prior to the filing of the land-use-exemption-permit application;

(2) The three required newspaper Notices must be published within the 30-day period prior to the filing of the application; and

(3) The Notice of Intent must be filed with the Board either concurrently with service on the required parties or when the Notice is first published (whichever occurs first).

(c) Environmental and Historic Reports. Applicant must also submit an Environmental and/or Historic Report containing the information described at 49 C.F.R. §§ 1155.25(b), 1105.7, and 1105.8, to the extent applicable, at least 45 days prior to filing an application. OEA may reject any report that it deems inadequate. The environmental and historic reporting requirements that would otherwise apply are waived, however, if the applicant or the Board hires a third-party consultant, OEA approves the scope of the consultant's work, and the consultant works under OEA's supervision to prepare an EIS or other environmental documentation. In such a case, the consultant acts on behalf of the Board, working under OEA's direction to collect the needed environmental information and compile it into an EIS or other appropriate environmental documentation. See 49 U.S.C. § 10909(h); 49 C.F.R. § 1155.25(c).

1155.21 Contents of application.

Applications for land-use-exemption permits for the facility, and any proposed future expansion within 10 years of the application date, shall contain the following information, including supporting documentation:

- (a) General.
 - (1) Exact name of applicant.
 - (2) Whether applicant is a common carrier by railroad subject to 49 U.S.C. Subtitle IV, chapter 105.
 - (3) Summary of why a land-use-exemption permit is being sought.
 - (4) The full address of the solid waste rail transfer facility, or, if not available, the city, state, and United States Postal Service ZIP code.
 - (5) The name of the rail carrier that owns or operates the facility or the rail carrier on whose behalf the facility is operated, the line of railroad serving the facility, the milepost

location of the facility, and the milepost and names of the stations that the facility is located between.

(6) Name, title, and address of representative of applicant to whom comments should be sent.

(7) Copies of the specific state, local, or municipal laws, regulations, orders, or other requirements affecting the siting of the solid waste rail transfer facility from which the applicant requests entire or partial exemption, any publicly available material providing the criteria for the application of the state, local, or municipal laws, regulations, orders, or other requirements affecting the siting, and a description of any action that the state, local, or municipal authority has taken affecting the siting of the facility. The applicant shall state whether each law, regulation, order or other requirement from which an exemption is sought is an environmental, public health, or public safety standard that falls under the traditional police powers of the state. If the applicant states that the requirement is not such a standard, it shall explain the reasons for its statement.

(8) Certification that the laws, regulations, orders or other requirements from which the applicant requests exemption are not based on federal laws, regulations, orders, or other requirements.

(9) Certification that the facility complies with all state, local, or municipal laws, regulations, orders, or other requirements affecting the siting of the facility except for those from which it seeks exemption.

(10) Certification that the applicant has applied or will apply for the appropriate state permits not affecting siting.

(11) For facilities not in existence as of October 16, 2008, certification that the facility is not proposed to be located on land within any unit of or land affiliated with the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Trails System, the National Wild and Scenic Rivers System, a National Reserve, or a National Monument. For facilities in existence as of October 16, 2008, state whether the facility is located in any of these types of lands.

(12) For facilities not in existence as of October 16, 2008, certification that the facility is not proposed to be located on lands referenced in The Highlands Conservation Act, Public Law No. 108-421, for which a state has implemented a conservation management plan, or, that the facility is consistent with the restrictions implemented by the applicable state under The Highlands Conservation Act, Public Law No. 108-421, placed on its proposed location. For facilities in existence as of October 16, 2008, state whether the facility is located on any of these lands, and, if so, address whether the facility is consistent with the restrictions placed on the location by the applicable state under that law.

(13) An explanation of how the facility comes within the Board's jurisdiction under 49 U.S.C. § 10501.

(14) The owner and operator of the facility.

(15) The interest of the rail carrier in the facility.

(16) An explanation of how the facility meets the definition of a solid waste rail transfer facility at 49 U.S.C. § 10909(e)(1)(H).

(17) A statement whether the applicant has sought permission from the applicable state, local, or municipal authority with respect to some or all of the facility in its application and received an unsatisfactory result affecting the siting of the facility. The applicant shall provide

information about the unsatisfactory result and shall include all relevant orders, decisions, or other notices of the denial.

(18) A detailed description of the operations and activities that will occur/are occurring at the facility.

(19) Detailed map showing the subject facility on sheets not larger than 11x17 inches, drawn to scale, and with the scale shown thereon. The map must show, in clear relief, the exact location of the facility on the rail line and its relation to other rail lines in the area, highways, water routes, population centers and any geographic features that should be considered in determining whether the facility would pose an unreasonable risk to public health, safety, or the environment, pursuant to 49 U.S.C. § 10909(c)(1).

(20) Detailed drawing of the subject facility on sheets not larger than 11x17 inches, drawn to scale, and with the scale shown thereon. The drawing must show, in clear relief, the exact boundaries of the facility, structures at the facility, the location and type of the operations taking place at the facility, the proposed traffic configuration for the solid waste entering and leaving the facility, reasonable future expansion planned for the next 10 years that the applicant requests to be included in the land-use-exemption permit, any geographic features that should be considered in determining whether the facility would pose an unreasonable risk to public health, safety, or the environment, pursuant to 49 U.S.C. § 10909(c)(1), and any other information that the applicant believes would be relevant.

(21) A detailed justification for why any future expansion planned for the next 10 years should be covered by the land-use-exemption permit.

(b) Statement. A statement that sets forth, based on currently available information, the reasons why the Board should grant a land-use-exemption permit to the applicant under the standards in 49 U.S.C. §§ 10909(c), (d) and these regulations. Specifically, the applicant shall include an explanation of whether the laws, regulations, or other requirements affecting siting of the facility from which exemption is sought, on their face or as applied, unreasonably burden the interstate transportation of solid waste by railroad or discriminate against the railroad transportation of solid waste and a solid waste rail transfer facility, and, if so, why.

(c) Environmental impact. The applicant shall certify that it has submitted an environmental and/or historical report containing the information in 49 C.F.R. §§ 1155.25(b), 1105.7, and 1105.8, to the extent relevant, if an environmental and/or historic report is required.

(d) Additional information. The applicant shall submit such additional information to support its application as the Board may require.

(e) Draft Federal Register Notice. The applicant shall submit a draft notice of its application to be published by the Board. In addition to the regular number of copies that must be filed with the Board, the applicant must submit a copy of the draft notice as data contained on a computer diskette compatible with the Board's current word processing capabilities. The Board will publish the notice in the Federal Register within 20 days of the application's filing with the Board. The draft notice shall be in the form set forth in pt. 1155 Appendix B.

(f) Verification. The original application shall be executed and verified in the form set forth below by an officer of the applicant having knowledge of the facts and matters relied upon.

Verification

State of _____ ss.

County of _____

_____ (Name of affiant) makes oath and says that (s)he is the _____ (title of affiant) of the

_____ (name of applicant) applicant herein; that (s)he has been authorized by the applicant (or

as appropriate, a court) to verify and file with the Surface Transportation Board the foregoing application in Finance Docket No. __ (Sub-No. __); that (s)he has carefully examined all of the statements in the application as well as the exhibits attached thereto and made a part thereof; that (s)he has knowledge of the facts and matters relied upon in the application; and that all representations set forth therein are true and correct to the best of his/her knowledge, information, and belief.

(Signature)

Subscribed and sworn to before me _____ in and for the State and County above named, this __ day of __, 20__.

My commission expires

1155.22 Filings and service of application.

(a) The applicant shall tender with its application an affidavit attesting to its compliance with the notice requirements of 49 C.F.R. § 1155.20. The affidavit shall include the dates of service, posting, and newspaper publication of the Notice of Intent.

(b) When the application is filed with the Board, the applicant shall serve concurrently, by first-class mail, a copy on the Governor of the state where the facility is located; the municipality, the state, and any relevant federal or state regional planning entity of the jurisdiction in which the solid waste rail transfer facility is located or proposed to be located; and the appropriate managing government agencies responsible for the groups of land listed in 49 U.S.C. § 10909(c)(2). A copy of the certificate of service shall be filed with the Board at the same time.

(c) The applicant shall promptly furnish by first class mail a copy of the application to any interested person proposing to file a comment upon request. A copy of the certificate of service shall be filed with the Board at the same time.

(d)(1) Upon the filing of a land-use-exemption-permit application, the Board will review the application and determine whether it conforms to all applicable regulations. If the application is substantially incomplete or its filing otherwise defective, the Board shall reject the application for stated reasons by order within 20 days from the date of filing of the application. If the Board does not reject the application, notice of the filing of the application shall be published in the Federal Register by the Board, through the Director of the Office of Proceedings, within 20 days of the filing of the application.

(2) If the application is rejected, a revised application may be submitted and the Board will determine whether the resubmitted application conforms with all prescribed regulations. A properly revised application submitted within 60 days of the order rejecting the incomplete or improper application need not be subject to new notice and publication under section 1155.20, unless the defect causing the rejection was in the notice and/or publication. A revised application submitted after such 60-day period must be newly published and noticed.

(3) The resubmission of a complete and properly filed land-use-exemption-permit application shall be considered a de novo filing for the purposes of computation of the time periods prescribed in the regulations contained in this part (pt. 1155).

(4) An applicant may seek waiver of specific regulations listed in subpart C of this part by filing a petition for waiver with the Board. When the petition is filed with the Board, the applicant shall serve, by first-class mail, a copy on the Governor of the state where the facility is

located; the municipality, the state, and any relevant federal or state regional planning entity of the jurisdiction in which the solid waste rail transfer facility is located or proposed to be located; and the appropriate managing government agencies responsible for the groups of land listed in 49 U.S.C. § 10909(c)(2). A copy of the certificate of service shall be filed with the Board at the same time. A decision by the Director of the Office of Proceedings granting or denying a waiver petition will be issued within 30 days of the date the petition is filed. Appeals from the Director's decision will be decided by the entire Board. If waiver is not obtained prior to the filing of the application, the application may be subject to rejection.

1155.23 Participation in application proceedings.

(a) Initial comments. Interested persons may become parties to a land-use-exemption-permit proceeding by filing initial comments with the Board within 45 days of the filing of the application. Comments should contain the following information, as appropriate:

(1) Name, address, and organizational affiliation.

(2) A statement describing commenter's interest in the proceeding, including information concerning any organization or public interest it represents.

(3) Reasons, in general, why commenter supports or opposes the application, taking into account the standards for the Board's review and consideration set forth in 49 U.S.C.

§§ 10909(c), (d) and this part.

(4) Any rebuttal to the evidence and argument submitted by applicant.

(b) Final comments. Interested persons, including the applicant, within 30 days after the close of OEA's environmental review, may comment on how the information developed during OEA's environmental review concerning the considerations at 49 U.S.C. §§ 10909(d)(1)-(5) should be weighed with the remaining transportation and other relevant considerations at 49 U.S.C. §§ 10909(d)(6)-(7). The parties will have an additional 15 days to respond to other parties' arguments. All pleadings shall be limited to weighing the information developed during OEA's environmental review with transportation and other concerns, and should not be directed towards the adequacy of OEA's environmental review. (Interested persons may comment on the adequacy of OEA's environmental review during the normal comment period for the EIS as provided in 49 C.F.R. § 1105.10(a)(4). See 49 C.F.R. § 1155.24(a).) All comments under this paragraph shall contain the information required in paragraphs (a)(1)-(2) of this section.

(c) Filing and service of comments and replies (including evidence and argument).

(1) Initial comments shall be filed with the Board (addressed to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423) within 45 days of the filing with the Board of a land-use-exemption-permit application. An original and 10 copies of each comment shall be filed with the Board. A copy of each comment shall be served on applicant or its representative at the time of filing with the Board. Each filing shall contain a certificate of service.

(2) Final comments shall be filed and served on all parties within 30 days of the close of the environmental review. An original and 10 copies of such comments shall be filed with the Board. A copy of each comment shall be served on applicant or its representative at the time of filing with the Board. Each filing shall contain a certificate of service.

(3) Replies to final comments shall be filed and served on all parties no later than 45 days after the close of the environmental review. An original and 10 copies of such replies shall be filed with the Board. A copy of each reply to comments shall be served on applicant or its

representative at the time of filing with the Board. Each filing shall contain a certificate of service.

1155.24 Environmental review.

(a) A land-use-exemption permit generally will require the preparation of an EIS. OEA may reclassify the environmental review requirements of land-use-exemption proceedings on a case-by-case basis, pursuant to 49 C.F.R. § 1105.6(d).

(b) An applicant for a land-use-exemption permit must submit an environmental report, at least 45 days prior to filing a land-use-exemption-permit application, containing the information described at 49 C.F.R. § 1105.7 to the extent applicable to solid waste rail transfer facilities. Applicants shall concurrently file an historic report containing the information at 49 C.F.R. § 1105.8 if applicable. The environmental report must also contain a discussion of the five factors for consideration listed at 49 U.S.C. §§ 10909(d)(1)-(5) and address any associated environmental impacts as they relate to the facility for which a land-use-exemption permit is sought.

(c) The Board strongly encourages applicants to use third-party contractors to assist OEA in preparing the appropriate environmental documentation in land-use-exemption-permit proceedings. See 49 C.F.R. § 1105.10(d). The environmental reporting requirements outlined above that would otherwise apply are waived if an applicant hires a third-party contractor, OEA approves the scope of the contractor's work, and the contractor works under OEA's direct supervision. See 49 C.F.R. § 1105.10(d). If an applicant does not hire an independent third-party contractor, the Board may hire a third-party contractor and charge the costs for the contractor to the applicant. See 49 U.S.C. § 10909(h).

(d) The Board's procedures set forth in 49 C.F.R. § 1105.10 for implementation of environmental laws are controlling unless superseded by provisions in this Part.

(e) An applicant for a land-use-exemption permit must follow the Board's procedures at 49 C.F.R. § 1105.9 for compliance with the Coastal Zone Management Act, 16 U.S.C. §§ 1451-65, if that act is applicable.

1155.25 Transfer and termination of a land-use-exemption permit.

(a) A land-use-exemption permit may be transferred from a rail carrier to an acquiring rail carrier without the need for a new application for a land-use-exemption permit if the rail line associated with the solid waste rail transfer facility is transferred to another rail carrier or to an entity formed to become a rail carrier pursuant to authority granted by the Board under 49 U.S.C. §§ 10901, 10902, or 11323. When seeking Board authority under 49 U.S.C. §§ 10901, 10902, or 11323, the applicant(s) shall specifically advise the Board, the municipality, the state, and any relevant federal or state regional planning entity of the jurisdiction in which the solid waste rail transfer facility is located, of the intended transfer. The Federal Register notice concerning the acquisition shall include a statement that a solid waste rail transfer facility with a Board-issued land-use-exemption permit is included in the acquisition.

(b) When a carrier plans to cease using a facility as a solid waste rail transfer facility, or when a facility is transferred to any party in any manner other than that described in paragraph (a) of this section, the entity that received the land-use-exemption permit must notify the Board, the municipality, the state, and any relevant federal or state regional planning entity of the jurisdiction in which the solid waste rail transfer facility is located, in writing no later than 60 days prior to the proposed cessation or transfer. Upon receipt of that notice, the Board will

publish notice in the Federal Register that the land-use-exemption permit will be terminated on the 60th day unless otherwise ordered by the Board.

1155.26 Board determinations under 49 U.S.C. § 10909.

(a) Schedule. (1) The schedule in paragraph (a)(2) of this section shall govern the process for Board consideration and decisions in land-use-exemption-permit application proceedings from the time the application is filed until the time of the Board's decision on the merits:

(2) At least 45 days prior to filing of application—Environmental report (and/or historic report, if applicable) filed and environmental process initiated pursuant to 49 C.F.R. § 1155.24.

(i) Day 0—Application filed.

(ii) Day 20—Due date for Notice of Application to be published in the Federal Register.

(iii) Day 45—Due date for initial comments.

(iv) 30 days after the Final EIS (or other final environmental documentation) is issued by OEA—Due date for final comments.

(v) 45 days after the Final EIS (or other final environmental documentation) is issued by OEA—Due date for replies to final comments.

(3) A decision on the merits will be due 90 days after a full record is developed.

(b) Standard for review.

(1) The Board will issue a land-use-exemption permit only if it determines that the facility at the existing or proposed location would not pose an unreasonable risk to public health, safety, or the environment. In deciding whether a solid waste rail transfer facility that is or proposed to be constructed or operated by or on behalf of a rail carrier poses an unreasonable risk to public health, safety, or the environment, the Board shall weigh the particular facility's potential benefits to and the adverse impacts on public health, public safety, the environment, interstate commerce, and transportation of solid waste by rail.

(2) The Board will not grant a land-use-exemption permit for a solid waste rail transfer facility proposed to be located on land within any unit of or land affiliated with the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Trails System, the National Wild and Scenic Rivers System, a National Reserve, or a National Monument.

(3) The Board will not grant a land-use-exemption permit for a solid waste rail transfer facility proposed to be located on land within any unit of or land affiliated with lands referenced in The Highlands Conservation Act, Public Law No. 108-421, for which a state has implemented a conservation management plan, if operation of the facility would be inconsistent with restrictions placed on such land.

(4) The Board will reject an application from a person who is not a rail carrier, but is instead operating on behalf of a rail carrier unless;

(i) the applicant has sought permission from the applicable state, local, or municipal authority with respect to some or all of the property in the application and received an unsatisfactory result affecting the siting of the facility, or

(ii) the governor of the state has petitioned the Board to require the facility to apply under 49 C.F.R. § 1155 subpart B.

(5) The Board will issue a land-use-exemption permit to an applicant that has received an unsatisfactory result from a state, local or municipal authority affecting the siting of the facility only if it finds that the laws, regulations, or other requirements affect the siting of the facility, on their face or as applied, either;

(i) unreasonably burden the interstate transportation of solid waste by railroad, or
(ii) discriminate against the railroad transportation of solid waste and a solid waste rail transfer facility.

(6) A land-use-exemption permit will not exempt a state requirement that a rail carrier comply with an environmental, public health, or public safety standard that falls under the traditional police powers of the state unless the requirement is unreasonably burdensome to interstate commerce or discriminates against rail carriers.

(7) A land-use-exemption permit will only exempt state, local, or municipal laws, regulations, orders, other requirements, or portions thereof, affecting the siting of the solid waste rail transfer facility.

(c) Considerations. As required by 49 U.S.C. § 10909(d), the Board will consider and give due weight to the following, as applicable:

(1) the land-use, zoning, and siting regulations or solid waste planning requirements of the state or state subdivision in which the facility is or will be located that are applicable to solid waste transfer facilities, including those that are not owned or operated by or on behalf of a rail carrier;

(2) the land-use, zoning, and siting regulations or solid waste planning requirements applicable to the property where the solid waste rail transfer facility is proposed to be located;

(3) regional transportation planning requirements developed pursuant to federal and state law;

(4) regional solid waste disposal plans developed pursuant to federal or state law;

(5) any federal and state environmental protection laws or regulations applicable to the site;

(6) any unreasonable burdens imposed on the interstate transportation of solid waste by railroad, or the potential for discrimination against the railroad transportation of solid waste, a solid waste rail transfer facility, or a rail carrier that owns or operates such a facility; and

(7) any other relevant factors, as determined by the Board.

(d) Permits. If the Board grants a land-use-exemption permit for a solid waste rail transfer facility, all state laws, regulations, orders, or other requirements affecting the siting of a facility are preempted with regard to that facility. Inasmuch as the Board has discretion to require compliance with state requirements affecting the siting of a facility pursuant to 49 U.S.C. § 10909(f), a Board-issued land-use-exemption permit will require compliance with such state laws, regulations, orders, or other requirements not otherwise expressly exempted in the permit unless the Board determines otherwise.

1155.27 Petitions to modify, amend, or revoke a land-use-exemption permit.

General rule. Petitions to modify, amend, or revoke land-use-exemption permits shall be decided in accordance with the Board's normal standard of review for petitions to reopen administratively final Board actions at 49 C.F.R. § 1115.4. The petition must demonstrate material error, new evidence, or substantially changed circumstances that warrant the requested action, and is subject to these additional conditions:

(a) An entity that petitions for a modification or amendment requesting an expansion of federal preemption or the facility's operations or physical size is subject to the notice and application requirements in this subpart C. The language of the notifications shall be modified to note that the petition is for a modification or amendment.

(b) The Board will approve or deny petitions to modify, amend, or revoke a land-use-exemption permit within 90 days after the full record for the petition is developed.

APPENDIX A TO PART 1155—FORM NOTICE OF INTENT TO APPLY

Docket No. FD ____ (Sub-No. ____)

Notice of Intent to apply for a land-use-exemption permit for a solid waste rail transfer facility.

(Name of Applicant) gives notice that on or about (insert date application will be filed with the Board) it intends to file with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423, an application for a land-use-exemption permit for a solid waste rail transfer facility as defined in 49 U.S.C. § 10908(e)(1)(H) and 49 C.F.R. § 1155.2. The solid waste rail transfer facility, owned by (name of owner), and operated by (name of operator), is located at (full address, or, if not available, provide city, state, and United States Postal Service ZIP code). The solid waste rail transfer facility is located on a (name of rail carrier) line of railroad known as _____ at milepost _____ between (station name) at milepost _____ and (station name) at milepost _____.

The reason(s) for the proposed permit application is (are) _____ (explain briefly and clearly the activities undertaken, or proposed to be undertaken, by the applicant at the solid waste rail transfer facility. Describe the specific state and local laws, regulations, orders or other requirements affecting siting from which the applicant requests entire or partial exemption and any action that the state, local, or municipal authority has taken affecting the siting of the facility. Also, if applicant is not the rail carrier, provide the name of the rail carrier that owns or operates the facility or has the facility operated on its behalf.)

(Include this paragraph for facilities not in existence on October 16, 2008). Applicant certifies that, based on information in its possession, the facility is not proposed to be located on land within any unit of or land affiliated with the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Trails System, the National Wild and Scenic Rivers System, a National Reserve, or a National Monument. Applicant further certifies that the facility is not proposed to be located on lands referenced in The Highlands Conservation Act, Public Law No. 108-421, for which a state has implemented a conservation management plan (or, The facility is consistent with the restrictions implemented by (state) under The Highlands Conservation Act, Public Law No. 108-421, placed at its proposed location). Any relevant documentation in the railroad's possession on these issues will be made available promptly to those requesting it.

(For facilities already in existence on October 16, 2008, address the extent to which the facility is or is not located in any of these types of lands, and to the extent that it is so located address any relevant criteria, and so certify.)

The application containing the information set forth at 49 C.F.R. § 1155.21 will include the applicant's case for the granting of the land-use-exemption permit. Any interested person, after the application is filed on (insert date), may file with the Surface Transportation Board initial comments concerning the application within 45 days after the application is filed.

The party's initial comments should contain that party's initial arguments in support or opposition based on the information available at that point including the following, as appropriate:

(1) Name, address, and organizational affiliation.

(2) A statement describing commenter's interest in the proceeding, including information concerning the organization or public interest the commenter represents.

(3) Specific reasons why commenter supports or opposes the application, taking into account the standards for the Board's review and consideration provided in 49 U.S.C. § 10909(c), (d) and the Board's regulations at 49 C.F.R. § 1155.27.

(4) If the applicant files under 49 C.F.R. § 1155.22, specific reasons why commenter supports or opposes the Board's accepting the application.

(5) Any rebuttal of material submitted by applicant.

The parties' initial comments will be considered by the Board in determining what disposition to make of the application. Parties seeking further information concerning the filing of comments should refer to 49 C.F.R. § 1155.24.

Interested persons also will have the opportunity to provide detailed comments during the Board's environmental review under the National Environmental Policy Act. 49 C.F.R. § 1105.10 and 49 C.F.R. § 1155.25. Questions concerning the environmental review process or potential environmental issues may be directed to the Board's Office of Environmental Analysis (OEA). After the close of the environmental review, interested parties may file final comments on how the information developed during the environmental review should be weighed by the Board in determining whether to grant the requested land use exemption permit. See 49 C.F.R. pt. 1155 for details on these processes.

All comments should indicate the proceeding designation Docket No. FD ____ (Sub-No. ____). Initial comments must be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423, no later than (insert the date 45 days after the date applicant intends to file its application). A copy of each comment shall be served upon the representative of the applicant (insert name, address, and phone number). Except as otherwise set forth in 49 C.F.R. pt. 1155, each document filed with the Board must be served on all parties to the land-use-exemption-permit proceeding. See 49 C.F.R. § 1104.12(a).

Persons seeking further information concerning land-use-exemption-permit procedures may contact the Surface Transportation Board or refer to 49 U.S.C. §§ 10908, 10909, and the full land-use-exemption-permit regulations at 49 C.F.R. pt. 1155.

A copy of the application will be available for public inspection on or after (insert date the land-use-exemption-permit application is to be filed with Board) and will be available on the Board's website at <http://www.stb.dot.gov>. The applicant shall furnish a copy of the application to any interested person proposing to file a comment, upon request.

APPENDIX B TO PART 1155—FORM FEDERAL REGISTER NOTICE

Docket No. FD ____ (Sub-No. ____)

Notice of Application for a land-use-exemption permit for a solid waste rail transfer facility

On (insert date application was filed with the Board) (name of applicant) filed with the Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423, an application for a land-use-exemption permit for a solid waste rail transfer facility. The solid waste rail transfer facility, owned by (name of owner), and operated by (name of operator), is located at (full address, or, if not available, provide city, state, and United States Postal Service ZIP code). The solid waste rail transfer facility is located on a line of (name of rail carrier) railroad known as

_____ at milepost _____ between (station name) at milepost _____ and (station name) at milepost _____. The application explains why applicant believes its request for a land-use-exemption permit should be granted.

(Include this paragraph for facilities not in existence on October 16, 2008). The facility is not proposed to be located on land within any unit of or land affiliated with the National Park System, the National Wildlife Refuge System, the National Wilderness Preservation System, the National Trails System, the National Wild and Scenic Rivers System, a National Reserve, or a National Monument. The facility is not proposed to be located on lands referenced in The Highlands Conservation Act, Public Law No. 108-421, for which a state has implemented a conservation management plan (or, The facility is consistent with the restrictions implemented by (state) under The Highlands Conservation Act, Public Law No. 108-421, placed on its proposed location). Any relevant documentation in the railroad's possession will be made available promptly to those requesting it.

(For facilities already in existence on October 16, 2008, address the extent to which the facility is or is not located in any of these types of lands, and to the extent that it is so located address any relevant criteria, and so certify.)

Any interested person may file with the Surface Transportation Board initial comments concerning the application within 45 days of the filing of the application. Persons seeking information concerning the filing of initial comments should refer to 49 C.F.R. § 1155.23.

All comments should indicate the proceeding designation Finance Docket No. ____ (Sub-No. ____). Initial comments must be filed with the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423, no later than (insert the date 45 days after the date applicant intends to file its application). A copy of each comment shall be served upon the representative of the applicant (insert name, address, and phone number). Except as otherwise set forth in 49 C.F.R. pt. 1155, each document filed with the Board must be served on all parties to the land-use-exemption-permit proceeding. 49 C.F.R. § 1104.12(a).

Persons seeking further information concerning land-use-exemption-permit procedures may contact the Surface Transportation Board or refer to 49 U.S.C. §§ 10908, 10909, 10910 and the Board's implementing land-use-exemption-permit regulations at 49 C.F.R. pt. 1155.

A copy of the application is available for public inspection. The applicant shall furnish a copy of the application to any interested person proposing to file a comment, upon request.

Questions concerning the environmental review process or potential environmental issues may be directed to the Board's Office of Environmental Analysis (OEA). After the close of the environmental review, interested parties may file final comments on how the information developed during the environmental review should be weighed by the Board in determining whether to grant the requested land use exemption permit. See 49 C.F.R. pt. 1155 for details on these processes.

APPENDIX B

The additional information below is included to assist those who may wish to submit comments pertinent to review under the Paperwork Reduction Act:

DESCRIPTION OF COLLECTION

Title: Solid Waste Rail Transfer Facilities.

OMB Control Number: __-__.

STB Form Number: None.

Type of Review: New Collection.

Respondents: Any applicant seeking a land-use-exemption permit, whether compelled by a Governor's petition or through its own accord.

Number of Respondents: Unknown; none mandated by the Board.

Estimated Time Per Response: 160 hours.

Frequency: 1.

Total Burden Hours (annually including all respondents): 160 hours.

Total "Non-hour Burden" Cost: An estimated cost of \$200,000 to hire an environmental consultant to work with Board staff on the required environmental report.

Needs and Uses: The information collected from applicants develops the record in land-use-exemption-permit proceedings, a process mandated by Congress in the CRA. The information gathered under the interim regulations is intended to permit the Board to accurately assess the merits of a permit application.

Retention Period: Information in this report will be maintained on the Board's website for a minimum of 1 year and will be otherwise maintained permanently.