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Denise M. Sheehan
Acting
Commissioner

November 16, 2005

VIA ELECTRONIC FILING

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Formal Comments by New York State Department of Environmental Conservation
Petition for Declaratory Order, National Solid Wastes Management Association, et al
FD-34776

Dear Secretary Williams:

Enclosed please find the comments of the New York State Department of Environmental Conservation on the Petition for Declaratory Order filed by the National Solid Wastes Management Association, et al, Finance Docket Number 34776.

Sincerely,

James H. Ferreira

James H. Ferreira
Deputy Commissioner and
General Counsel

Encl.
cc: service list

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34776

COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
ON THE PETITION OF
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
FOR DECLARATORY ORDER

James H. Ferreira, Deputy Commissioner and General Counsel
New York State Department of Environmental Conservation
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SURFACE TRANSPORTATION BOARD

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION
ON THE PETITION OF
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
FOR DECLARATORY ORDER

The New York State Department of Environmental Conservation (Department) submits the following comments to the Surface Transportation Board (STB) in connection with the Petition of the National Solid Wastes Management Association (NSWMA), et al., for a Declaratory Order, Finance Docket No. 34776 filed on October 27, 2005. Petitioners request that the Board confirm:

> (i) that the solid waste facility located at the [North Bergen] Site, and any similarly situated facility, is not within the exclusive jurisdiction of the Board because the solid waste management and processing operations conducted at the Site are not integrally related to the provision of rail transportation, and (ii) that state and local solid waste laws are therefore not preempted by the ICCTA, 49 U.S.C. §10501(b), as they apply to the solid waste activities at the Site and at similarly situated locations.

The Department has a specific interest in the issue of federal preemption of certain rail carrier activities, namely at solid waste transfer stations, since the Department is responsible for the regulation and permitting of solid waste transfer facilities in New York State. The Department questions whether the exclusive jurisdiction of the STB extends to solid waste transfer activities taking place next to rail lines, when those activities include tipping, processing, sorting, crushing and storage of non-containerized waste. These activities, when not

properly conducted, pose environmental hazards and threats to public health and safety and appear to go beyond the congressional intent behind the statutory preemption intended to facilitate the use of railroads for activities that are truly related to rail-haul. It is essential that states retain their traditional permitting/police power jurisdiction over operations of such facilities even if the facilities also ship wastes by rail.

Solid waste management facilities are regulated in New York State pursuant to Environmental Conservation Law (ECL) Article 27, Title 7 and 6 NYCRR Part 360 (Part 360). The Part 360 requirements for transfer stations were developed based on the Department's knowledge and experience with the proper design, construction, and operation necessary for these facilities to be protective of public health, safety and the environment. In most cases where solid waste collection companies transfer waste for subsequent shipment to a disposal facility, the transfer station must be constructed and operated in accordance with a Part 360 permit. Absent the requirement to obtain a permit, rail-haul transfer station operators would have the ability to construct and operate a facility as they see fit, and economic savings may outweigh an operator's health and safety concerns. The Department is not advocating against the use of railroads for hauling solid waste, but rather that any preemption of traditional state police powers, including permitting, be narrowly construed.

The Department also recognizes the inequity between a Part 360 permitted transfer station and a rail-haul transfer station that claims it can operate free from state oversight of all activities. When the transfer station is located next to a rail line or has a connection to a railroad, it is being argued that the federal preemption applies. Part 360 does not include specific provisions addressing the preemption of certain rail carrier activities. However, despite the fact

that the activities occurring at both a Part 360 permitted transfer station and a rail-haul transfer station often are nearly identical – the only difference being that a rail line is utilized to ship wastes off-site – some rail-haul operators claim the right to different treatment and freedom from all state oversight. Absent the issuance of a permit, the Department has significant concern over the unfair economic advantage given to rail-haul transfer stations exempt from all state regulation, as well as the potential impacts to public health and the environment from the unregulated handling of waste.

An applicant for a Part 360 permitted transfer station must submit a comprehensive permit application, which includes detailed engineering designs and reports prepared by a New York State licensed professional engineer describing the construction and design of the facility and its operation. The Department reviews these documents to ensure that the proposed facility meets criteria so as to operate in a manner that is protective of public health and safety and the environment. Additionally, most large transfer stations are typically required to obtain financial assurance for closure. For most Part 360 permit applications, there is also an environmental review pursuant to the State Environmental Quality Review Act (SEQRA), ECL Article 8. As a result of this review, additional operational requirements may be required to minimize and mitigate environmental impacts. Further, the SEQRA process also gives the public an opportunity to voice its concern regarding a proposed project. The Part 360 permit is not issued until public comments have been addressed and the Department is satisfied that the transfer station can be constructed and operated in a manner that will not pose a threat to public health and safety and the environment. Once the permit is issued, the applicant must comply with stringent operational requirements and the transfer station is regularly inspected by the Department. Obviously, when an operator of a solid waste facility is not subject to these state

requirements and procedures, not only is there a great likelihood that public will not have a forum in which to voice concerns, but the safeguards that can be built into a facility through pre-construction review and the permitting process may well be absent.

Solid waste handling, sorting, crushing and storage activities are separate and independent from transportation and the operation of the railroad, and these activities should be addressed within the jurisdiction of the Department. The handling of solid waste has long been a state and local issue usually addressed – and handled most efficiently – during a permitting process. The term "transportation" is broadly defined by the STB to include property and facilities related to the movement of passengers or property by rail; some STB decisions have stated, in broad language, that services related to that movement, including receipt, delivery, transfer, handling, and processing of property, also appear to fall within the definition of "transportation." See City of Crede, Co- Petition for Declaratory Order, STB Finance Docket No. 34367. The Department urges the STB to narrow this broad language and recognize the exercise of jurisdiction by state permitting agencies over solid waste activities, including the processing, sorting, crushing and storage of non-containerized waste. Such solid waste activities are not preempted from state regulation because they are not essential to the operation of rail-haul facilities.

When the "property" at issue is construction & demolition debris, putrescible waste, or even industrial waste, the opportunity for environmental concerns and disasters are significant. This is especially true if the Department can only rely on its police powers to control odor, noise and vermin complaints. The ability to regulate a facility pursuant to a Part 360 permit is critical when waste is being handled, since construction, design and operational requirements are

required for the protection of health and safety and the environment. Indeed, cleaning up after the environment has been damaged is much more difficult, expensive and often less successful than taking measures designed to prevent environmental injuries when designing, constructing and operating a facility.

Even in other areas where federal regulation preempts direct state regulation, the concept that the State's substantive requirements must be met is well established. This is perhaps most notable in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq., which requires that federal records of decision for activities undertaken through CERCLA must incorporate both federal and state "applicable or relevant and appropriate requirements" (ARARs). This excuses these activities only from administrative and procedural requirements of a state, but not from the applicable environmental standards. We strongly encourage the STB to consider the incorporation of ARARs into its regulatory scheme.

For the reasons described above, the Department is concerned with the potential for public health and safety and environmental issues arising from unpermitted rail-haul transfer stations that are deemed to be exempt from state regulatory oversight. Although the STB has broad jurisdiction over a number of railroad activities, the management and handling of solid waste should continue to be regulated by the Department. The Department is not persuaded that the STB can provide adequate, meaningful environmental regulation, oversight or control at unpermitted rail-haul transfer stations. Certainly, this has not been demonstrated in New Jersey, where a number of transfer stations claiming preemptions by the STB appear to have been operated poorly and with disregard for public health and safety and the environment. Of great

concern is that unpermitted rail-haul transfer stations will start handling putrescible waste, increasing the potential to cause even more adverse impacts to public health and safety and the environment. In sum, the Department believes that allowing rail-haul transfer stations, which handle, manage, and store waste, to claim the STB federal preemption not only creates an unlevel playing field among transfer stations, but also enhances the potential for serious health and safety problems in New York State. For the foregoing reasons, the Department urges the STB to grant NSWMA's Petition for Declaratory Order.

Respectfully submitted,

James H. Ferreira

James H. Ferreira
Deputy Commissioner and
General Counsel

I hereby certify that a true copy of the foregoing Comment was served this 16th day of November, 2005, upon the following by first class mail:

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