



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

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October 12, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Railroads, Pipelines, and Hazardous Materials
FROM: Subcommittee on Railroads, Pipelines, and Hazardous Materials Majority Staff
SUBJECT: Hearing on Railroad-Owned Solid Waste Transload Facilities

PURPOSE OF HEARING

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

BACKGROUND

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

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

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

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

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

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

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

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

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

THE GROWING CONCERN OVER RAILROADS AND WASTE DISPOSAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Addendum

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

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

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

EXPECTED WITNESSES

The Honorable W. Douglas Buttrey
Vice Chairman
Surface Transportation Board

The Honorable Kathy Chasey
Mayor
Mullica Township, New Jersey

The Honorable Joseph DiGirolamo
Mayor
Township of Bensalem, Pennsylvania

Mr. Brian X. Foley
Town Supervisor
Brookhaven, New York

Mr. Robert Jones
Managing Principal
New England Transrail, LLC

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

Ms. Barbara McMorrow
Freeholder
Freehold, New Jersey

The Honorable Francis P. Mulvey
Commissioner
Surface Transportation Board

The Honorable Charles D. "Chip" Nottingham
Chairman
Surface Transportation Board

The Honorable Gregory Schmidt
Mayor
Village of Croton-On-Hudson, New York

The Honorable Wolfgang Skacel
Assistant Commissioner
New Jersey Department of Environmental Protection