

July 18, 2006

Melissa Treers, P.E.
Division of Solid & Hazardous Materials
New York State Department
of Environmental Conservation
625 Broadway, 9th Floor
Albany, New York 12233-7253

Re: Comments on Proposed Section 362-2.3(c) -- Exemption of Rail Haul
Facilities from Individual Permit Requirement

Dear Ms. Treers:

This letter and its attachments provide comments on behalf of the Village of Croton-on-Hudson ("the Village") on the proposed text for 6 NYCRR Part 362-2.3(c), which exempts rail carriers operating waste transfer facilities from the individual permit requirements set out in 6 NYCRR Part 360.14 or current section 360-1.7. Rail carriers' operation of solid waste facilities has given rise to a pattern of serious environmental problems in the northeastern states. The Village therefore opposes the exemption of such facilities from the DEC's very important system of environmental permitting.

Masquerading as railroad operations, solid waste facilities throughout the northeastern states have been claiming federal preemption of state and local regulation under the Interstate Commerce Commission Termination Act (ICCTA). The facilities purport to operate free from environmental regulation and zoning laws and are thus able to subject surrounding communities to environmental ills, especially water and air pollution from contaminated runoff and dust. In 2005, the New Jersey Department of Environmental Protection ("NJDEP") reported that of the seven rail transfer facilities operating in the state there were handling solid waste, only one complied with environmental regulations. In North Bergen, a railroad operated an open-air waste transfer facility in an area occupied by restaurants and retail stores. The transfer facility operated without sprinklers and basic emergency equipment and violated state environmental regulations. When the NJDEP fined the railroad \$2.5 million for its environmental violations, the railroad sued the state for attempting to regulate in a federally preempted field.

Problems have also arisen at a rail haul facility in Passaic, New Jersey that caught fire in April 2006. The city government, lacking authority to oversee the facility, did not know the contents of the burning building and could not cite the facility for violations. A

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know the contents of the burning building and could not cite the facility for violations. A similar incident occurred in Ridgefield Park, New Jersey, where firefighters were not permitted to inspect a transfer station's rail car after a fire.

The pattern of environmental violations by railroad-owned waste facilities and the concomitant risks to local residents have attracted national attention. On May 23, 2006, the U.S. House of Representatives' Committee on Transportation and Infrastructure held a hearing on the impacts of railroad-owned waste facilities. Witnesses discussed the need to close the loophole that permits unregulated operation of solid waste facilities. Indeed, a broad coalition opposes abuse of ICCTA preemption. The coalition includes U.S. Senators and Representatives, state and local officials, the U.S. Conference of Mayors, the Solid Waste Association of North America (SWANA), and many other groups.

Notably, DEC itself has weighed in on this issue. In a ten-page comment dated November 15, 2005, DEC General Counsel James Ferreira stated that "[a]bsent the requirement to obtain a permit, rail-haul transfer station operators would have the ability to construct and operate a transfer station as they see fit, and economic savings may outweigh an operator's health and safety concerns." The comment thus pointed out that "[o]bviously," a solid waste facility not subject to the permitting process and related regulations may lack physical safeguards and opportunities for public comment. A copy of Mr. Ferreira's letter is attached, together with articles about some of the other incidents.

The Village of Croton-on-Hudson finds itself in the middle of this controversy. For several years a construction and demolition debris facility operated in the Village. It repeatedly and intentionally violated the environmental laws, and in early 2003 the Village ordered it to close. The facility sued; the case went up to the New York Court of Appeals, which ultimately ruled that the Village was well within its rights, and the facility closed in August 2005. Shortly thereafter, an entity appeared on the scene called "Northeast Interchange Railway" (NIR) -- really the subsidiary of a solid waste company -- claiming ICCTA preemption. We went to the Surface Transportation Board, the federal agency that implements ICCTA, and NIR backed away. But then an affiliate of NIR entered into a secret sublease with the Buffalo Southern Railroad (BSOR), which is now attempting to operate on the site without any state or local control. We are currently litigating against BSOR in several different forums.

It has become clear that subjecting rail transfer facilities to an individual permit requirement, as laid out in proposed 6 NYCRR Part 360.14 or current 360-1.7, is the best way to address the rampant environmental violations these facilities have demonstrated. The permit process's detailed requirements regarding construction and design, as well as monitoring, training, and contingency plans, help avoid environmental problems. Rail transfer facilities, no different from any other solid waste stations, must complete the

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permitting process to avoid endangering public health, worker safety, and the well-being of the natural environment.

The issue of the degree of ICCTA preemption of state and local control over these solid waste facilities is very much an open question. Congress is considering clarifying or modifying the relevant provisions of ICCTA. Several lawsuits are pending in the federal courts. It would be a serious mistake for DEC to concede defeat in advance and to issue a regulation that would grant this exemption to railroads. If ultimately Congress and the courts conclude that these railroad-facilities should be exempt from state laws, so be it; but DEC should not give up the fight before it is waged.

Sincerely,



Michael B. Gerrard

Enclosures