

## DEPARTMENT OF TRANSPORTATION

## Office of the Secretary

## 49 CFR Part 33

[Docket No. OST 2010–0298]

RIN 2105–AD83

**Prioritization and Allocation Authority Exercised by the Secretary of Transportation Under the Defense Production Act****AGENCY:** Office of the Secretary of Transportation (OST), DOT.**ACTION:** Confirmation of effective date.

**SUMMARY:** On October 1, 2012, the Department published a final rule requesting comment at 77 FR 59793 to clarify the priorities and allocation authorities exercised by the Secretary of Transportation (Secretary) under title I of the Defense Production Act of 1950 and to establish the administrative procedures by which the Secretary will exercise this authority. In the final rule, the Department requested comment on certain revised definitions found in 49 CFR 33.20. No comments were received by the comment closing date of October 31, 2012. As a result, this document confirms that the October 1 final rule will not be changed and its effective date is November 30, 2012.

**DATES:** *Effective Date:* This document confirms that the Department's final rule at 77 FR 59793 is effective on November 30, 2012.

**FOR FURTHER INFORMATION CONTACT:** Donna L. O'Berry, Office of the General Counsel, Department of Transportation, 1200 New Jersey Avenue SE., Room W96–320, Washington, DC 20590; telephone: (202) 366–6136; email: [donna.o'berry@dot.gov](mailto:donna.o'berry@dot.gov).

**SUPPLEMENTARY INFORMATION:** As the Department received no comments on its final rule published on October 1, 2012, we are making no changes to the rule and its effective date is November 30, 2012.

Issued in Washington, DC, on November 14, 2012.

**Ronald Jackson,***Assistant General Counsel for Operations.*

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## DEPARTMENT OF TRANSPORTATION

## Surface Transportation Board

## 49 CFR Part 1155

[Docket No. EP 684]

**Solid Waste Rail Transfer Facilities****AGENCY:** Surface Transportation Board, DOT.**ACTION:** Final rules.

**SUMMARY:** These final rules govern land-use-exemption permits for solid waste rail transfer facilities. The Clean Railroads Act of 2008 amended the U.S. Code to restrict the jurisdiction of the Surface Transportation Board over solid waste rail transfer facilities. The Act also added three new statutory provisions that address the Board's regulation of such facilities, which is now limited to issuance of "land-use-exemption permits" in certain circumstances. In 2009, as required by the Act, the Board issued interim rules. In 2011, based on the comments received and further evaluation, the Board revised the 2009 Rules and sought comments on the changes. After further evaluation and review of the comments received on the 2011 Rules, the Board now adopts the 2011 Rules as final rules with minor modification.

**DATES:** These rules will be effective on December 21, 2012.

**FOR FURTHER INFORMATION CONTACT:** Lucille Marvin, The Office of Public Assistance, Governmental Affairs, and Compliance, (202) 245–0238. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

**SUPPLEMENTARY INFORMATION:** The Clean Railroads Act of 2008, Public Law 110–432, 122 Stat. 4848, (CRA) 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 CRA 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. Under the CRA, 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 CRA, the Board issued interim rules in a decision served January 14, 2009. *Solid Waste Rail Transfer Facilities (2009 Decision)*, EP 684 (STB served Jan. 14, 2009). Those interim rules were published in the **Federal Register** on January 27, 2009 (74 FR 4714) (2009 Rules). Based on the comments received and further evaluation, the Board served a decision on March 11, 2011, which revised the 2009 Rules and sought comments on the changes. *Solid Waste Rail Transfer Facilities (2011 Decision)*, EP 684 (STB served Mar. 11, 2011). The revised interim rules were published in the **Federal Register** on March 24, 2011 (76 FR 16538) (2011 Rules). After further evaluation and review of the comments received on the 2011 Rules, the Board now adopts the 2011 Rules as final rules with minor modifications. The final rules are set forth below.

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), Public Law 104–88, 109 Stat. 803 (1995), provides that both "[t]he 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 or State law." Prior to enactment of the CRA, 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 CRA.<sup>1</sup> 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).<sup>2</sup>

### The Final Rules

The Board received comments on the 2011 Rules.<sup>3</sup> We now adopt final rules based on suggestions made in the parties’ comments and on the Board’s review of the revised interim regulations. We address the comments received on the 2011 Rules and our revisions made in response to the comments below. The final rules are in full below.

#### A. Environmental Impact Statement (EIS) Notice

In the 2011 Decision, slip op. at 7–8, the Board concluded that an EIS generally should be prepared for each land-use-exemption-permit application. NSWMA argues that, consequently, the Board should add separate environmental notice procedures to the CRA rules to allow for full public participation during the early stages of the Board’s environmental review, including “scoping”—the process that determines the issues to be addressed in an EIS.<sup>4</sup> NSWMA points out that 49 CFR 1105.10(a) of the Board’s environmental rules requires an applicant for a Board action that warrants an EIS to give the Board’s Office of Environmental

Analysis (OEA) six months’ notice prior to filing its application, but does not require the applicant to serve the notice on affected state and local agencies or otherwise publish it.<sup>5</sup> NSWMA is concerned that, unless state and local officials are served with the § 1105.10(a) notice when it is filed at the Board, these public officials will lose the opportunity to participate meaningfully in “key EIS scoping proceedings” for projects seeking land-use-exemption permits.<sup>6</sup> NSWMA contrasts the absence of advance environmental notice in the interim and revised interim CRA rules with the advance notice that the Board requires for applications for a land-use-exemption permit.<sup>7</sup>

We reject NSWMA’s assertion that the Board’s procedures do not give regional, state or local officials a meaningful opportunity to participate at the early stages of the EIS process and that additional notice is necessary. The Board’s existing procedures provide that consultation letters are sent by the Board to potentially interested or affected Federal, state, and local agencies, soliciting their comments on possible environmental impacts, prior to publication of a Notice of Intent to Prepare an EIS. See *Policy Statement on Use of Third-Party Contracting in Preparation of EIS Documentation*, 5 S.T.B. 467 (2001); see also 40 CFR 1501.2(d)(2). Thus, the Board’s existing procedures give public officials the opportunity for early input into the process of developing the scope of the Draft EIS. But the opportunity for early participation in the environmental review process does not stop there. The Notice of Intent to Prepare an EIS, which includes a description of the proposed action and provides a period for written comments on the draft scope of the EIS, is then published in the

**Federal Register** and served. 49 CFR 1105.10(a)(2). The scoping process also typically includes a meeting in the project area that gives state and local officials and members of the public an opportunity to be heard. The Board issues a final scope of study for the EIS only after considering the scoping comments.<sup>8</sup> Therefore, we find that no additional notice is necessary.

NSWMA also is concerned that state and local officials and the public will not receive notice of requests submitted by applicants to OEA seeking to reclassify the requirement that an EIS be prepared in particular cases under 49 CFR 1155.24(a)<sup>9</sup> and 1105.6(d) because such requests are not published in the **Federal Register**.<sup>10</sup> We do not believe that **Federal Register** publication is necessary. Section 1105.6(d) of the Code of Federal Regulations has been in effect since 1991. See *Implementation of Env’tl. Laws*, EP 55 (Sub-No. 22A) (ICC served July 31, 1991); 56 FR 36104 (July 31, 1991). In recent years, OEA has received a number of reclassification requests. For example, rail construction cases normally require preparation of an EIS. Nevertheless, in certain rail construction cases where there is little potential for significant environmental impacts, applicants have requested that OEA reclassify the level of environmental review to allow for the preparation of a more limited Environmental Assessment rather than an EIS. Until now, however, we have not received any suggestions that

<sup>8</sup> Opportunities for public input on environmental issues continue throughout the duration of the proceeding. Following scoping, the Board prepares a Draft EIS, which is made available for review and comment by the public, government agencies, and other interested parties (typically for 45 days). Thereafter, a Final EIS is issued that considers comments on the Draft EIS, sets forth any additional analyses, and makes final environmental recommendations for the Board to consider in reaching its final decision. Finally, our CRA procedures specifically allow for final public comments following the conclusion of the environmental review on how the information developed during the environmental review should be weighed with transportation and other concerns. 49 CFR 1155.23(b).

<sup>9</sup> We note that, contrary to AAR’s assertion in its reply brief, a written request to reclassify pursuant to §§ 1155.24(a) and 1105.6(d) is distinct from a petition for waiver pursuant to § 1155.22(d)(4). (See AAR’s Reply Comments 9 n.5.) A petition for waiver of regulations pertaining to applications for land-use-exemption permits must be issued by the Director of the Office of Proceedings. 49 CFR 1155.22(d)(4). Requests to reclassify the environmental review requirements must be decided by the Director of OEA. 49 CFR 1155.24(a) (“OEA may reclassify the environmental review requirements \* \* \*, pursuant to 49 CFR 1105.6(d).”); 49 CFR 1105.2 (“The [Director] of [OEA] \* \* \* is delegated the authority \* \* \* to render initial decisions on requests for waiver or modification of any of these rules for individual proceedings \* \* \*”).

<sup>10</sup> NSWMA’s Comments 3.

<sup>1</sup> 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).

<sup>2</sup> The 2009 Decision and the 2011 Decision contain further discussion of the CRA and the Board’s initial and subsequent implementation of the legislation.

<sup>3</sup> The Board received comments and replies from the following: Connecticut Department of Environmental Protection (CTEP); National Solid Wastes Management Association, et al. (NSWMA); Association of American Railroads (AAR); Atlantic County Utilities Authority (ACUA); New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission (collectively, NJDEP); and the Township of Bensalem, Bucks County, Pennsylvania (Bensalem). Additionally, after the deadline for initial comments, the Board received comments from the Rhode Island Resource Recovery Corporation (RIRRC). As no party would be prejudiced, we will accept this late filing.

<sup>4</sup> NSWMA’s Comments 2–4; CTEP’s Comments 1 (adopting NSWMA’s comments).

<sup>5</sup> We note that the 6-month prefiling requirement that NSWMA relies on is frequently waived. See 49 CFR 1105.10(c)(2); see, e.g., *Tongue River R.R.—Rail Construction & Operation—In Custer, Powder River & Rosebud Cntys., Mont.*, FD 30186, letter from Victoria Rutson, Director, Office of Environmental Analysis (Oct. 18, 2012); *R.J. Corman R.R.—Construction & Operation Exemption—In Clearfield Cnty., Pa.*, FD 35116, letter from Victoria Rutson, Director, Office of Environmental Analysis (Jan. 24, 2008). As a practical matter, many applicants do not have their projects adequately developed to allow the environmental review to begin months in advance of the filing of an application.

<sup>6</sup> NSWMA’s Comments 3.

<sup>7</sup> Pursuant to 49 CFR 1155.20(a)(2) and 1155.22(b) of the 2011 Rules, the Notice of Intent and Application must each be served on the governor, municipality, state, and any relevant Federal or state regional planning entity where the facility is located. The Notice of Intent must also be published at least once during each of three consecutive weeks in a newspaper of general circulation in the county in which the facility is located. 49 CFR 1155.20(a)(2).

**Federal Register** publication is needed to provide adequate notice of a request to reclassify the level of environmental review for a proposed action.

Our CRA rules are designed to give interested state and local officials and the public the ability to protect their interest in having the Board conduct an appropriate level of environmental review of applications for land use exemption permits. Sections 1155.20(a)(2) and 1155.22(b) will provide for notice to agencies and interested persons in the project area that an application for a particular land use exemption permit is to be filed. Once a case is docketed at the Board, interested persons and agencies can keep track of the status of the case, including requests to reclassify the level of environmental review and any responses, by checking the Board's Web site. Moreover, state and local environmental officials are likely to have advance notice of proposed solid waste rail transfer facilities because these facilities would have to comply with the same applicable Federal and state requirements as non-rail solid waste management facilities, except for laws affecting siting that are covered by the application for a land-use-exemption permit. Finally, even if a request for reclassification of the EIS requirement is granted, state and local officials and the public have numerous opportunities during the environmental review process to argue to the Board that the environmental impacts of the project will be significant enough to require the preparation of an EIS. *See supra* n.8. When information emerges during the environmental review process to indicate that a proposed action could result in potentially significant environmental impacts, the Board will heighten the level of environmental review as appropriate. *See Norfolk S. Ry.—Joint Control & Operating/Pooling Agreements—Pan Am S., LLC*, FD 35147 et al., slip op. at 2–3 (STB served Sept. 25, 2008) (suspending procedural schedule to prepare an Environmental Assessment in case where it had been originally determined that no environmental review was necessary).

#### B. EIS Requirements

NJDEP argues that 49 CFR 1155.21(c) does not reflect the Board's determination in 49 CFR 1155.24(a) that an EIS generally should be prepared for each land-use-exemption-permit application.<sup>11</sup> Section 1155.21(c) states that an "applicant shall certify that it has submitted an Environmental and/or

Historic Report \* \* \* if an Environmental and/or Historic Report is required." 49 CFR 1155.21(c).<sup>12</sup> NJDEP asks that the Board remove the clause "if an Environmental and/or Historic Report is required" from this section.

It would be inappropriate to grant NJDEP's request. As the Board specifically stated in the *2011 Decision*, slip op. at 25–26 (citing 49 CFR 1105.10(d)), applicants need not file Environmental and/or Historic Reports describing the potential environmental impacts of their proposals if third-party contractors are used to assist the environmental staff in preparing the Board's environmental documentation, which generally will be an EIS. Thus, the 2011 Rules properly made clear that, even when a third-party contractor is used and Environmental and/or Historic Reports are not required from the applicant, the Board can still prepare an EIS.

NJDEP also argues that the clause in § 1155.21(c) stating "if an Environmental and/or Historic Report is required" conflicts with 49 CFR 1155.20(c). The latter section states that "[a]pplicant must also submit an Environmental and/or Historic Report containing the information described at 49 CFR 1155.[24](b),<sup>13</sup> 1105.7, and 1105.8, to the extent applicable, at least 45 days prior to filing an application." Although § 1155.20(c) does not include the language "if an Environmental and/or Historic Report is required," it does specifically acknowledge later in that section that the "reporting requirements that would otherwise apply are waived \* \* \* if the applicant or the Board hires a third-party consultant." Thus, there is no conflict between the two sections. Nevertheless, for clarity, we will add a reference in § 1155.21(c) to § 1155.20(c).

<sup>12</sup> We have made minor editorial changes to the 2011 Rules, including capitalizing "Environmental Report" and "Historic Report" consistently throughout.

<sup>13</sup> The 2011 Rules inadvertently cited to 49 CFR 1155.25(b) rather than 49 CFR 1155.24(b). We have revised the final rules to cite the correct regulation. *See infra* note 31 and accompanying text.

<sup>14</sup> In response to several comments on the 2009 Rules, the Board noted in the *2011 Decision* that, although 49 CFR 1105.7 does not address issues specific to solid waste management, much of the information in the environmental reporting rules does apply to solid waste rail transfer facilities. Thus, the Board concluded that it would "continue to require applicants to comply with the environmental reporting requirements in 49 CFR 1105.7 to the extent applicable." *2011 Decision*, slip op. at 25. Several provisions of these rules also contain the proviso that Environmental Reports should contain the information described at § 1105.7, to the extent applicable. 49 CFR 1155.20(c), 1155.24(b). We have revised § 1155.21(c) to add "to the extent applicable" to comport with § 1155.20(c), § 1155.24(b) and our discussion in the *2011 Decision*.

#### C. Interpretation of 49 U.S.C. 10910

In the *2011 Decision*, the Board added a procedural 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 powers of the state, and if not, to explain why not. *2011 Decision*, slip op. at 5; 49 CFR 1155.21(a)(7). The Board reasoned that this information was necessary because of 49 U.S.C. 10910 and the Board's standard for review in revised 49 CFR 1155.26(b)(6),<sup>15</sup> and stated that, if a law affecting siting is 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 that law meets the unreasonable burden or discrimination test. *2011 Decision*, slip op. at 5

The procedural requirement in § 1155.21(a)(7), and the Board's substantive standard of review found at § 1155.26(b)(6), were based on the Board's interpretation of § 10910, which provides that "[n]othing in section 10908 or 10909 is intended to affect the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health, and public safety standards that are not unreasonably burdensome and do not discriminate against rail carriers." When the 2009 Rules and 2011 Rules were issued, the Board read § 10910 as confirming judicial and Board precedent establishing that, notwithstanding the express Federal preemption in 49 U.S.C. 10501(b), state and local bodies nonetheless retain police powers to protect the public health and safety, so long as the state and local regulations do not serve to regulate railroad operations or unreasonably interfere with interstate commerce. *E.g., N.Y. Susquehanna*, 500 F.3d at 252–55; *Green Mountain*, 404 F.3d at 643. Consistent with this precedent, the Board, notwithstanding the separate express preemption provisions of § 10909, interpreted the CRA as preserving the state's historic police powers to protect public health and safety where the law in question does not unreasonably burden interstate

<sup>15</sup> Section 1155.26(b)(6) of the 2011 Rules, which was also located in the Board's 2009 Rules at 49 CFR 1155.27(b)(4), states 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."

<sup>11</sup> NJDEP's Comments 3.

commerce or discriminate against rail transportation.

AAR, however, argues that the Board misinterpreted 49 U.S.C. 10910 and that the Board can issue a land-use-exemption permit under section 10909 even if the law affecting siting falls under the state's traditional police powers and the requirement does not unreasonably burden interstate commerce or discriminate against rail carriers.<sup>16</sup> AAR points to the balancing of interests contemplated by section 10909(c) and (d), which, it claims, suggests that no single factor, such as the absence of an undue burden on interstate commerce, requires denial of a land-use-exemption permit. It further argues that section 10909(f) provides the Board with express authority to preempt "all" state laws affecting siting of a solid waste rail transfer facility, including those that might otherwise fall under the traditional police powers of the state. Arguing that the specific provisions of § 10909 dictate the proper interpretation of section 10910, AAR believes that section 10910 should be read to state that "[Other than with respect to state laws and requirements affecting siting, nothing in section 10908 or 10909 is intended to affect the traditional police powers of the State to require a rail carrier to comply with State and local environmental, public health, and public safety standards that are not unreasonably burdensome and do not discriminate against rail carriers." <sup>17</sup>

We find that both AAR's interpretation of section 10910 and the one originally adopted by the Board are plausible readings of the statute. The statute is ambiguous, and the Board has struggled to interpret a number of its provisions, including section 10910. At this juncture, however, we need not resolve the statutory ambiguity by definitively choosing one interpretation of section 10910 over the other. We do not need to interpret section 10910 definitively in order to effectively carry out the intent of Congress in the CRA. As AAR acknowledges, the Board has the discretion *not* to preempt a law affecting siting.<sup>18</sup> Therefore, the difficult question regarding the preemptive effect of section 10910 would only arise in the event that an applicant for a land-use-

exemption permit were to make a persuasive case that the Board should preempt a law affecting siting promulgated under the state's traditional police powers that does not impose an unreasonable burden on interstate commerce and was not being used to discriminate against a rail carrier. We cannot predict whether this scenario will come before the Board. Should the situation described above arise in the future, the Board will, as appropriate, examine the meaning of section 10910 in the context of that specific factual dispute and the particular state law in question. Accordingly, we will remove interim rule § 1155.26(b)(6) from our final rules.<sup>19</sup>

With respect to the procedural requirement in § 1155.21(a)(7) of our interim rules, the information requested in that rule would assist the Board in deciding whether to issue a land-use-exemption permit. The CRA specifically permits the Board to "consider and give due weight to" six enumerated factors, as well as "any other relevant factors, as determined by the Board." 49 U.S.C. 10909(d). Although AAR disagreed with the statutory interpretation of section 10910 in the *2011 Decision*, it did not specifically object to the imposition of a procedural requirement requesting information on whether the law from which exemption is sought is a public health or safety standard that falls under the traditional police powers of the state. In fact, AAR acknowledged that the extent of the burden placed on interstate commerce, and whether the law discriminates against rail carriers, are factors in deciding whether to issue a preemptive land-use-exemption permit.<sup>20</sup> We will thus continue to require the information requested in 49 CFR 1155.21(a)(7).

#### D. Effect of Land-Use-Exemption Permit

NJDEP believes that 49 CFR 1155.26(d) of the 2011 Rules does not reflect the Board's intent. Specifically, NJDEP points to the Board's statement in the *2011 Decision* that "[u]ltimately, 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." *2011 Decision*, slip op. at 5. NJDEP argues that this statement conflicts with § 1155.26(d) of our 2011

Rules, which states in relevant part 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 unless the Board determines otherwise." 49 CFR 1155.26(d). NJDEP believes that the qualifier at the end of this section should be removed. We agree that the language of this section does not reflect the fact that a land-use-exemption permit will exempt only those laws specified in the permit, and will reword that section in order to clarify the effect of a permit. Section 1155.26(d) will now state as follows: "If the Board grants a land-use-exemption permit for a solid waste rail transfer facility, such permit would only exempt a facility from complying with state laws, regulations, orders, or other requirements affecting the siting of a facility that are specified therein. The permit will require compliance with all other state laws, regulations, orders, or other requirements not otherwise expressly exempted in the permit."

#### E. The Process To Come Before the Board

CTEP and NSWMA request that the Board require, as a prerequisite, that an applicant seek state or local approval under the challenged laws and rules before they can be included on the list to be preempted under 49 CFR 1155.21(7), unless it is ineffective or demonstrably futile to do so.<sup>21</sup> This request was also adopted by ACUA, Bensalem, and RIRRC.<sup>22</sup>

As the Board previously explained in the *2011 Decision*, slip op. at 10, this suggestion conflicts with the language of the CRA, 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). Thus, we will not adopt the proposed change.

#### F. Definition of "State Requirements"

ACUA notes that, pursuant to 49 CFR 1155.2(e), "[s]tate requirements \* \* \* 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."<sup>23</sup> ACUA states that "it should be noted that in New Jersey, and perhaps other states, delegation of state authority may be to

<sup>16</sup> AAR also claims that our interpretation of section 10910 in the *2011 Decision* conflicts with our interpretation of that section in the *2009 Decision*. (AAR's Comments 4.) Given our decision here, there is no need to address this argument.

<sup>17</sup> AAR's Comments 6 n.5, 20 n.12.

<sup>18</sup> AAR's Comments 6 n.5 (*citing* 49 U.S.C. 10909(f) ("An exemption may require compliance with such State laws, regulations, orders, or other requirements.")).

<sup>19</sup> Former § 1155.26(b)(7) is now renumbered as § 1155.26(b)(6) in the final rules.

<sup>20</sup> AAR's Comments 14–15.

<sup>21</sup> CTEP's Comments 1; NSWMA's Comments 4.

<sup>22</sup> ACUA's Comments 1; Bensalem's Comments 1; RIRRC's Comments 1.

<sup>23</sup> ACUA's Comments 1.

an entity other than a 'locality or municipality' and that a utility authority may \* \* \* constitute a political subdivision."<sup>24</sup> Section 1155.2(e) mirrors the language of 49 U.S.C. 10908(e)(3), the plain language of which indicates that a political subdivision of a state includes a locality or municipality, but may also include other entities. We will continue to follow the language of the statute.

ACUA also states that "entities such as County Utilities Authorities in New Jersey which have been designated as the implementation agency for the State Solid Waste Management Plan should be entitled to notice at each level of the process."<sup>25</sup> In response to the comment, we will broaden the list of entities that are required to receive service of applications for land-use-exemption permits and related Notices of Intent to include any agency designated as the implementation agency for the solid waste management plan of the state in which the solid waste rail transfer facility is located or proposed to be located. We have adjusted 49 CFR 1155.20(a)(2)(ii), 1155.22(b), 1155.22(d)(4), 1155.25(a), and 1155.25(b) accordingly.

#### G. Other Comments

AAR suggests that we add language to 49 CFR 1155.2(a)(10)(ii)(B). Specifically, AAR argues that instead of stating "a facility where solid waste is transferred or transloaded solely from a tank truck directly to a rail tank car," that section should read "to or from a tank truck directly to a rail tank car."<sup>26</sup> The language of that section, however, mirrors the language of 49 U.S.C. 10908(e)(1)(H)(ii)(II).<sup>27</sup> We will continue to follow the language of the statute.

AAR also proposes that we modify the language of 49 CFR 1155.20(a) and 1155.22(a) so that an applicant need not file a Notice of Intent if it is required to submit an application due to a governor's petition pursuant to 49 CFR 1155.13. AAR argues that the petition would provide sufficient notice of intent.<sup>28</sup> As such, AAR requests that the Board revise the language of § 1155.20(a) to "Except where an application is required by Subpart B, [a]n applicant \* \* \* shall give its Notice of Intent to file a land-use-exemption-permit application by complying with the following

procedures \* \* \*." Similarly, AAR requests that the Board revise the language of § 1155.22(a) to "Except where an application is required by Subpart B, [t]he applicant shall tender with its application an affidavit attesting to its compliance with the notice requirements of 49 CFR 1155.20." We decline to adopt AAR's proposed changes. We believe that all applicants, including those who are required to file an application pursuant to a governor's petition, should comply with the application procedures, including the Notice of Intent provisions, provided in Subpart C. A Notice of Intent under Subpart C provides broader notice than a petition under Subpart B,<sup>29</sup> and it also serves to notify the Board and all parties that the application process is commencing.

AAR also notes that the schedule in 49 CFR 1155.26(a)(2) omits the deadlines for the Notice of Intent.<sup>30</sup> We will add language to § 1155.26(a)(2) to account for the deadlines for the Notice of Intent.

Both AAR and NJDEP accurately note that certain references in the revised interim rules to 49 CFR 1155.25 are in error.<sup>31</sup> Section 1155.21(c) should read "[t]he applicant shall certify that it has submitted an Environmental and/or Historic Report containing the information in 49 CFR 1155.24(b), 1105.7, and 1105.8 \* \* \* ." Similarly, the first sentence of § 1155.20(c) has been revised to read "[a]pplicant must also submit an Environmental and/or Historic Report containing the information described at 49 CFR 1155.24(b), 1105.7, and 1105.8 \* \* \* ." Finally, the citation at the end of § 1155.20(c) has been changed to 49 CFR 1155.24(c).

ACUA poses a question regarding 49 CFR 1155.12(b), which pertains to facilities which were in existence on October 16, 2008, but have since ceased operations. Assuming a facility can prove it was operating as a solid waste

rail transfer facility on October 16, 2008, and has since ceased operations, ACUA wonders whether § 1155.12(b) would render the facility, should it seek to restore operations, subject to review as a proposed facility. ACUA also asks under what circumstances, if any, a facility which "no longer operates as such" may allege continuous operations to maintain its exemption. We will not address those issues in this proceeding because the answers would depend on the factual circumstances of the particular case.

#### Paperwork Reduction, Regulatory Flexibility, and Environmental Certifications

In the *2011 Decision*, published in the *Federal Register* at 76 FR 16538 on March 24, 2011, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3549, and Office of Management and Budget (OMB) regulations at 5 CFR 1320.11, regarding: (1) Whether the collection of information associated with the land-use-exemption permit application 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 estimates; (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. No comments related to these questions were received.

The proposed rules were submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11. No comments were received from OMB, which approved the collection, titled "Applications for Land-Use-Exemption Permits," and assigned it Control No. 2140–0018. Unless renewed, OMB approval expires June 30, 2014. The display of a currently valid OMB control number for this collection is required by law. Under the PRA and 5 CFR 1320.11, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

In accordance with the Regulatory Flexibility Act at 5 U.S.C. 605(b), we certify that the final rules will 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 CFR part 121,

<sup>24</sup> ACUA's Comments 1.

<sup>25</sup> ACUA's Comments 1.

<sup>26</sup> AAR's Comments 20.

<sup>27</sup> Section 1155.2(a)(10)(ii)(B) of the 2011 Rules erroneously quoted the CRA with respect to the word "solely." We are correcting that here so that the final rule mirrors the CRA.

<sup>28</sup> AAR's Comments 20.

<sup>29</sup> Under Subpart C, 49 CFR 1155.20 provides that an applicant shall serve its Notice of Intent on the Board; the governor of the state where the facility is located; the municipality, state, and any relevant political subdivision of a state or federal or state regional planning entity in the jurisdiction of which the facility is located; and the appropriate managing government agencies responsible for the groups of land listed in 49 U.S.C. 10909(c)(2). Additionally, the applicant must publish its Notice of Intent at least once during each of three consecutive weeks in a newspaper of general circulation in each county in which any part of the facility is located. By contrast, under Subpart B, 49 CFR 1155.11 provides that a petition filed by the governor be filed with the Board; served on the rail carrier that owns or operates the facility; and served on the facility, if its address is different than that of the rail carrier's.

<sup>30</sup> AAR's Comments 21.

<sup>31</sup> AAR's Comments 20; NJDEP's Comments 4.

under neither the statute nor the final 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 CFR part 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 final rules will not circumscribe or mandate the conduct of a substantial number of small entities.

Moreover, any burdens imposed on small entities come from the plain language of the CRA and the requirements that Congress has imposed on this agency. In revising our 2009 Rules and 2011 Rules, we have attempted to simplify the process wherever possible. Finally, we have provided a waiver provision that could mitigate any negative impacts on small entities. Our rules specifically provide that an applicant may request a waiver of any particular part of the application procedures. See 49 CFR 1155.22(d)(4).

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

*It is ordered:*

1. The rules set forth below are adopted as final rules.
2. Notice of this decision will be published in the **Federal Register**. The final rules will be effective on December 21, 2012.
3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

#### List of Subjects in 49 CFR Part 1155

Administrative practice and procedure.

Decided: November 14, 2012.

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

**Jeffrey Herzig,**  
Clearance Clerk.

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 a 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 solely transferred or transloaded 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 CFR 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 requirement*, 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 CFR 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 is 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 CFR 1155.10(c) through (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 SW., 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 CFR 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 Appendix A to this part. 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 political subdivision of a state or 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 CFR 1155.24(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 CFR 1155.24(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 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 the regulations in this part. 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 Historic Report containing the information in 49 CFR 1155.24(b), 1105.7, and 1105.8, to the extent applicable, if an Environmental and/or Historic Report is required. See 49 CFR 1155.20(c).

(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 Appendix B to this part.

(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 CFR 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 political subdivision of a state or 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 is 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 § 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.

(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 political subdivision of a state or 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) through (5) should be weighed with the remaining transportation and other relevant considerations at 49 U.S.C. 10909(d)(6) through (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 CFR 1105.10(a)(4). See 49 CFR 1155.24(a).) All comments under this paragraph shall contain the information required in paragraphs (a)(1) through (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 SW., 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 CFR 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 CFR 1105.7 to the extent applicable to solid waste rail transfer facilities. Applicants shall concurrently file a Historic Report containing the information at 49 CFR 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) through (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 CFR 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 CFR 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 CFR 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 CFR 1105.9 for compliance with the Coastal Zone Management Act, 16 U.S.C. 1451 through 1465, 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 political subdivision of a state or 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 political subdivision of a state or 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 CFR 1155.24. Within 30 days prior to filing of application—Notice of Intent filed with the Board pursuant to the deadlines and requirements described in 49 CFR 1155.20(b)(3).

(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 subpart B of this part.

(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 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, such permit will only exempt a facility from complying with state laws, regulations, orders, or other requirements affecting the siting of the facility that are specified therein. The permit will require compliance with all other state laws, regulations, orders, or other requirements not otherwise expressly exempted in the permit.

#### **§ 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 CFR 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 SW., 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 CFR 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 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 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 CFR 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 CFR 1155.27.

(4) If the applicant files under 49 CFR 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 CFR 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 CFR 1105.10 and 49 CFR 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 CFR part 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 SW., 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 CFR part 1155, each document filed with the Board must be served on all parties to the land-use-exemption-permit proceeding. See 49 CFR 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 CFR part 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 Web site 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 SW., 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 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 CFR 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 SW., 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 CFR part 1155, each document filed with the Board must be served on all parties to the land-use-exemption-permit proceeding. 49 CFR 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 CFR part 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 CFR part 1155 for details on these processes.

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