

EI-17530

FLETCHER & SIPPEL LLC

ATTORNEYS AT LAW

29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2832

Phone: (312) 252-1500
Fax: (312) 252-2400
www.fletcher-sippel.com

RONALD A. LANE
(312) 252-1503
rlane@fletcher-sippel.com

April 28, 2009

Ms. Victoria J. Rutson, Chief
Section of Environmental Analysis
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: R.J. Corman Railroad Company/Pennsylvania Lines, Inc. – Construction
and Operation Exemption -Clearfield County, PA
Finance Docket No. 35057

Dear Ms. Rutson:

This letter responds to your request dated March 16, 2009 for Petitioner's views with respect to the position taken by some commenters in this proceeding that the proposed landfill development near Gorton, PA should be treated as a connected action with the railroad reconstruction project. Treating the landfill development as a connected action would be contrary to the well-established precedent of the Surface Transportation Board and inconsistent with the legal principles developed under the NEPA.

People Protecting Communities ("PPC") contends that 40 C.F.R. §1508.25 requires this Board to consider the environmental impact of the proposed landfill as a "connected action" to the reconstruction proposal. The PPC then bootstraps this position into an argument that the Board must examine alternate disposal sites to the proposed landfill as a part of its environmental analysis of reconstructing the rail line.¹ The Board and the Supreme Court have already rejected this approach. Curiously, PPC fails to even mention prior Board or judicial precedent on this subject.

The Supreme Court provided the analysis to determine the scope of environmental consequences that must be considered by an agency under NEPA in *Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004) ("*Public Citizen*"). That case involved an action by the

¹ The draft Scope of Study already identifies the landfill as a potential subject of cumulative environmental impact of the line reconstruction, so the SEA already plans to address the incremental impact of reconstructing the line on the impact that the landfill would have without the rail line.

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Federal Motor Carrier Safety Administration to promulgate rules regulating Mexican motor carriers operating in the United States. The FMCSA completed a programmatic EA which did not consider any environmental effects caused by Mexican trucks entering the United States. Environmental opponents argued that the EA should have considered such effects.

The FMCSA's rules were needed because the President had recently lifted a moratorium on allowing Mexican trucks into the United States. This was a critical feature of the case because the FMCSA had no ability to mitigate the effects of the moratorium being lifted. According to the Court, the FMCSA's statutory mandate required that it promulgate rules for Mexican trucks once the moratorium was lifted.

The Court proceeded to reject a "but for" test in determining what potential effects must be considered, but instead found that NEPA requires agencies only to study effects that promote the purpose of the Act, which are to inform the agencies' decision-making and to make pertinent information available to the public. Those purposes are not served by requiring an agency to prepare an EIS due to the environmental impact of an action it could not regulate:

We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions the agency cannot be considered a legally relevant "cause" of the effect.

541 U.S. at 771. The limited statutory authority of the STB does not extend to requiring relocation of a landfill. Studying alternate locations could neither inform the Board nor provide the public with pertinent information.

This Board recently considered whether NEPA requires it to treat as a connected action to a line construction the environmental consequences of a shipper's project. In *Southwest Gulf Railroad -- Construction and Operation Exemption -- In Medina County, TX*, Finance Docket No. 34284, Decision served December 18, 2008, a proposed rail line would serve a proposed quarry. The Board concluded that the rail line and quarry were not connected actions, and its decision was based on three factors: (1) the Board had no jurisdiction over the quarry; (2) the quarry would proceed even without the rail line; and (3) the Board had no authority to mitigate harms from the quarry. Accord, *United States Department of Energy--Rail Construction and Operation--Caliente Rail Line in ... Nevada*, STB Finance Docket No.35106 (served April 11, 2008), p.3 ("The Board has not participated in the ongoing EIS process for the proposed geologic repository that the proposed new line would serve.")

The STB's analysis in these cases is buttressed by another recent case, *Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 547 F.Supp.2d 1033 (D.Ariz. 2008)("Fort Yuma Reservation"). The Tribe challenged a Bureau of Reclamation

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("BOR") decision to transfer federal lands to a utility district. A private company then sought to develop an oil refinery on the transferred lands. Plaintiffs argued that BOR did not adequately examine the effects of the oil refinery in the EIS.

Citing *Public Citizen*, the court rejected a "but for" test to determine whether the refinery was a connected action to the land transfer. The court noted that BOR had no ability to prevent the effects of the refinery because BOR had no authority over the location or construction of the refinery. Even though future changes in land use, like the refinery, could not occur without the title transfer, BOR had no duty to consider the effects of the refinery. The court upheld BOR's findings that the refinery and title transfer were not connected actions because: (i) the Title Transfer does not automatically trigger the refinery project, (ii) the refinery project may proceed on private land with or without the Title Transfer and (iii) the Title Transfer and refinery are not interdependent parts of a larger action. The court went on to note that the refinery would be subject to a separate environmental review, and forcing BOR to conduct its own, separate review would not serve NEPA's purpose.

Based on *Public Citizen*, SEA in the *Southwest Gulf* case articulated a test to determine if the effects of a related action, apart from analysis as a cumulative or indirect effect, must be considered. Such effects need only be considered if:

1. The action for which agency approval is sought can reasonably be said to cause the related action(s); and
2. The agency has the authority to prevent the related actions (and thus any effects caused by the related actions) from taking place.

Environmental Impact Statement, pp.2-2 thru 2-7. Under this test, and consistent with prior Board and judicial precedents, development and operation of the proposed landfill is not a connected action with reconstruction of the rail line.

Reconstruction will not cause the opening of the proposed landfill

Operation of the proposed landfill cannot proceed without a Waste Management Permit issued by the Pennsylvania Department of Environmental Protection, and as PPC points out, it is not certain that the agency will issue such a permit. This Board has no way to know what standards may be applied by the Pennsylvania DEP, and it should not try to guess. Moreover, the Pennsylvania DEP cannot approve a permit without conducting its own environmental assessment of the proposal. Like the oil refinery in *Fort Yuma Reservation*, STB approval of this line reconstruction cannot "automatically trigger" operation of the landfill.

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The Board has no authority over Resource Recovery's proposed landfill

The only jurisdictional action before the Board is RJCR's petition for construction and operation of the rail line. Resource Recovery is not a rail carrier and will not operate on behalf of any rail carrier. The Board has given no financial aid to Resource Recovery, and the STB lacks authority over any aspect of Resource Recovery's proposal.²

As articulated by SEA, the proposed landfill cannot be considered a connected action because, "the agency [does not have] the authority to prevent the related actions (and thus any effects caused by the related actions) from taking place." *Southwest Gulf EIS*, p.2-6.

The Board has no control over Resource Recovery's landfill

Also like *Southwest Gulf*, development and operation of the landfill could proceed regardless of the Board's decision on reconstruction and operation of the rail line.

PPC's assertion, that if rail access is denied the landfill will not be opened, is nonsense. Landfills have historically been served by truck, and this one could easily follow the usual pattern. The Verified Statement of Ed Abel filed last July plainly explains the several transportation options available for the landfill portion of the development:

As part of our plan for this project, transportation access is a critically important consideration. From the inception of our project, we have recognized that providing appropriate and environmentally acceptable transportation to and from the landfill site will depend upon using a combination of transportation modes, principally motor carrier and rail. At present, our plans for transportation access anticipate use of the existing local highway system for motor carrier transport to and from the landfill site and the improvement of road facilities within the landfill site to accommodate that mode of transport. In addition, we have proposed the construction of a separate, new interchange facility on Interstate 80 which would

² It is not even clear the STB could refuse to approve the construction petition because of the impact of a shipper developing a non-jurisdictional landfill. 49 U.S.C. §10901(c) provides that the Board "shall issue a certificate authorizing activities ... unless the Board finds that such activities are inconsistent with the public convenience and necessity." Only if construction of the rail line is contrary to the public interest can the Board deny or condition issuance of authority. See *Illinois Central Railroad Company—Construction and Operation Exemption—In East Baton Rouge Parish, LA*, Finance Docket No. 3387(STB served Oct.25, 2001) p.4("[it is] well settled that a showing of public need is not a prerequisite under 49 U.S.C. 10901 and 10502"). Operation of a landfill is not one of "such activities" referred to in §10901.

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directly serve the landfill site thereby removing virtually all motor carrier traffic from the local road network. This application is currently pending on deferred consideration by the Centre County Metropolitan Planning Commission pending approval and permitting of the landfill operation by the Pennsylvania Department of Environmental Protection

[T]he extent to which the project must rely on motor carrier transportation is directly related to our ability to provide rail access to and from the landfill site. Rail access is RRLLC's preferred mode of transport because it provides the most environmentally friendly, fuel efficient means of transporting the commodities to be processed at the landfill and industrial park in sufficient volume to achieve the desired economy's [*sic*] of scale and scope for this project. We will, of course, develop our project based on whatever level of transportation access is authorized by the STB and state authorities. However, we have determined that rail access will provide the best means for accomplishing project objectives while at the same time minimizing the impact of transportation access on the environment, surrounding communities and highway infrastructure.

Abel Verified Statement, pp.4-5 (emph. added). Thus truck transportation, whether exclusively over surface roads or partially over Interstate 80 is the "default" mode of transportation access, not rail. When the FHWA declined conceptual approval for a new I-80 interchange, the agency concluded that existing interchanges and/or local roads and streets were not inadequate to serve the facility.³ The viability of the landfill does not depend on the line being reconstructed; rather, the rail line is a preferable alternative that provides the most benefit for the greatest number of people.

The Board does not hold any trigger switch for the location or operation of a landfill at Gorton. Reactivation of the Beech Creek branch line cannot "reasonably be said to cause the related actions(s)" of landfill operation at Gorton. See *Southwest Gulf EIS*, p.2-6.

³ In February 19, 2009 comments submitted to the SEA by the Pennsylvania Division of the FHWA, the agency quoted its earlier determination:

The POA document failed to demonstrate that the "existing interchanges and/or local roads and streets in the corridor can neither provide the necessary access nor be improved to satisfactorily accommodate the design year traffic demands while at the same time providing the access intended by the proposal."

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Resource Recovery's landfill is not critical to rail line reconstruction and operation

Not only can Resource Recovery operate its landfill without rail service, RJCR can feasibly reconstruct and operate the Beech Creek line even if the landfill never comes to fruition. The property controlled by Resource Recovery exceeds 5750 acres and holds substantial mineral resources and other development potentials. Further, there are tens of millions of tons of coal reserves in the immediate area that can be served by the proposed line.

The idea of reactivating the Beech Creek branch line had its genesis in the planning for the Resource Recovery landfill. However, over the years that have now transpired since that idea surfaced and RJCR decided to undertake the reconstruction project, numerous other traffic opportunities have presented themselves both on the Resource Recovery property and on other property along the proposed line.

Robindale Energy Systems and its affiliates control millions of tons of coal reserves in Central Pennsylvania, including the right to remove some 100 million tons of coal to be "re-mined" from areas on the Resource Recovery property that were previously strip mined and abandoned. In addition, Robindale Energy Systems is developing deep mine coal reserves near Winburne and controls property adjacent to the former Beech Creek right of way where it plans to load the coal into railcars. Together, RES now expects to ship as much as 30,000 to 50,000 tons per month⁴ from those locations on the reactivated Beech Creek Branch Line. Attachment A.

Glen O. Hawbaker, Inc. ("Hawbaker") expects to mine some 200,000 tons of sand and gravel annually from the Resource Recovery site. Hawbaker already has an exploratory permit to remove those materials and is using Gorton Road for access. PPC makes much of the fact that Hawbaker's permit is currently limited to 10,000 tons per year. However, the current permit is only an "exploratory permit" for the purpose of exploring the quality and extent of the gravel deposits and the feasibility of marketing this material. The material extracted at the site is trucked to a rock crusher where its marketability is determined. After the rail line is reconstructed, Hawbaker will be able to amend the permit for commercial production quantities.

Rex Energy Corporation is currently drilling for natural gas in the nearby Marcellus Shale fields in Central Pennsylvania. Rex Energy is seeking to permit a facility for processing "frac water" used in the gas extraction process in the immediate area of the Beech Creek Branch

⁴ The letter dated April 22, 2009 from Mr. Kroh of Robindale Energy Systems erroneously stated his anticipated volume in tons per year; it should have been tons per month, as stated in this text. A corrected letter is being sent to the Board properly reflecting his anticipated volume at 30,000 to 50,000 tons per month.

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Line. Rex Energy estimates that it could potentially be shipping and receiving 250 to 300 carloads of water per month over the line. Attachment B

Also, A.W. Long, who owns a small strip mine operation and who approached the railroad about the alternative route to Winnburne (along which his facility is located), expects to ship by rail some 50 cars a month of frac water and coal. (Long also operates a garbage collection service in Snow Shoe that would likely haul trash by truck to the Resource Recovery landfill when it is opened.) Attachment C.

RJCR has every confidence that the landfill will be opened. However, if the opening of the landfill is delayed or denied, reactivation of the Beech Creek branch line may be warranted for service to other Resource Recovery operations and to other shippers. The decision whether to go forward with line construction without the landfill could only be made at the time that all necessary approvals and preconditions have been met, and it would depend upon the economic circumstances prevailing at that time. However, the opportunities along the reactivated line may realistically warrant reconstruction even absent approval of the landfill. PPC's blanket assertion that the rail line is not commercially feasible without the landfill is simply unfounded.

The landfill is not a connected action

No sanitary landfill can be operated in Pennsylvania without a Waste Management Permit issued by the Pennsylvania Department of Environmental Protection ("DEP"). Resource Recovery has applied for a Waste Management Permit premised on truck access via a new interchange on Interstate 80. When the FHWA determined not to allow construction of the interchange, the DEP suspended review of that application. When the STB decides whether or not to approve the reconstruction and operation petition, Resource Recovery will amend the permit application for either rail access or truck access via local streets and highways. If the rail line will be restored, one set of environmental consequences and potential mitigation requirements will be involved; if the STB denies the petition or imposes infeasible conditions, so that it appears that the line will not be reactivated, then a different set of consequences and mitigation will be involved. The Pennsylvania DEP has already performed extensive review of the environmental consequences of the proposed landfill. Once the manner of transportation access is resolved, Pennsylvania DEP will consider the environmental impact of the landfill as it will be operated. Pennsylvania DEP will impose whatever mitigation conditions it deems necessary in accordance with its jurisdiction and authority. In no event will the Board's decision in this docket determine whether the DEP will issue a permit or what the terms of that permit will be.

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PPC is pursuing the familiar tactic of raising every conceivable environmental issue in the hope that there might be some justification somewhere for stopping, or at least delaying, a proposed change in its members' backyard. In doing so, PPC simply puts its own NIMBY-ism ahead of the public interest in efficient, modern waste disposal for the larger population, to say nothing of the Robindale coal mines, the Hawbaker quarry, the Rex Energy water treatment plant and all the jobs, tax revenue and development opportunities that will accompany reconstruction of the line. *Public Citizen* and the Board's own precedents require that the Board decline PPC's invitation to "study this project to death" by examining the economics and structure of waste disposal on the East Coast of America. RJCR respectfully requests that SEA complete its study promptly and allow this important rail project to move forward.

Very truly yours,

A handwritten signature in cursive script that reads "Ronald Lane". The signature is written in dark ink and is positioned above the printed name.

Ronald A. Lane

RAL:dg
Enclosure