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ENVIRONMENTAL PROTECTION

COMPLIANCE AND ENFORCEMENT

County Environmental and Waste Enforcement

ENVIRONMENTAL REGULATION

Solid and Hazardous Waste Programs

Requirements for Rail Carriers that Transfer Non-containerized Solid Waste to or from Rail Cars

Adopted Amendments: N.J.A.C. 7:26-2.1 and 2D.1

Proposed: November 17, 2008 at 40 N.J.R. 6507(b)

Adopted: \_\_\_\_\_, 2009 by Mark N. Mauriello  
Acting Commissioner,  
Department of Environmental Protection

Filed: \_\_\_\_\_, 2009 as R. 2009 d. \_\_\_\_ with **substantive and technical changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3)

Authority: N.J.S.A. 13:1B-1 et seq.; 13:1D-1 et seq.; 13:1E-1-9

DEP Docket Number: 18-08-10/698

Effective Date: \_\_\_\_\_, 2009.

Operative Date: Upon publication.

Expiration Date: \_\_\_\_\_,

The Department of Environmental Protection (Department) hereby adopts amendments to the Solid Waste Rules that provide that rail carriers that transfer noncontainerized solid waste to and from rail cars are subject to the Department's permitting and operational requirements for solid waste facilities.

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The Clean Railroads Act of 2008, P.L. 110-432, 122 Stat. 4900 (CRA or Federal Act) contains provisions that limit the scope of the Interstate Commerce Commission Termination Act (ICCTA) preemption of state regulation of rail facility operations involving noncontainerized waste. It expressly authorizes states to regulate and permit solid waste rail transfer facilities (other than facilities that transfer only containerized waste) with limits and qualifications regarding the application of siting requirements for rail carrier transfer stations and the specific types of waste governed. For solid waste rail transfer facilities currently operating as of the effective date of the CRA, the CRA provides a transition period for state permitting.

Adopted new N.J.A.C. 7:26-2.1(d) requires new and existing rail carrier transfer operations that handle noncontainerized solid waste to come into compliance with the Department's solid waste facility permitting provisions at N.J.A.C. 7:26-2, and obtain A-901 approval pursuant to N.J.A.C. 7:26-16. New rail carrier transfer operations will also have to apply to the designated plan implementation agency for the purpose of seeking inclusion in the applicable District Solid Waste Management Plan pursuant to N.J.A.C. 7:26-6 (note that pursuant to N.J.S.A. 13:1E-19, each county in the State and the Hackensack Meadowlands District is designated a solid waste management district).

Adopted new N.J.A.C. 7:26-2.1(d) also requires an existing rail carrier that to date had been operating under and in compliance with N.J.A.C. 7:26-2D.1(d) (which is deleted by this adoption), to submit disclosure statements required under N.J.A.C. 7:26-16 and a complete application for a solid waste facility permit within 180 days of the effective date of this adoption. However, existing rail carriers that are in compliance with N.J.A.C. 7:26-2D.1(d) as of the effective date of the repeal of that provision will not be required to apply for inclusion in the applicable District Solid Waste Management Plan. Instead, these facilities will be treated as existing rail carrier facilities for purposes of the Solid Waste Management Act planning provisions. Accordingly, if the Department issues a solid waste facility permit to an existing rail carrier solid waste facility, the applicable Solid Waste Management District will be required, pursuant to N.J.S.A. 13:1E-21, to include the facility in its district plan. The adopted rules do not amend the provisions regarding transfer of containerized waste by rail carriers; transfer of containerized waste will continue to be regulated under N.J.A.C. 7:26-2D.1(c).

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The Department published the proposed amendments in the New Jersey Register on November 17, 2008. The comment period closed on January 16, 2009.

Summary of Hearing Officer Recommendations and Agency Response:

John Castner, Director of the Department's County Environmental and Waste Enforcement Program, served as the Hearing Officer at the December 15, 2008 public hearing held at the Department Headquarters Building, 401 E. State Street, Trenton, New Jersey. Ten individuals presented comments at the public hearing. The Hearing Officer recommended that the Department adopt the amendments as proposed, with the changes described in the responses to comments, below. The Department has accepted the Hearing Officer's recommendations. A record of the public hearing is available for inspection in accordance with the applicable law by contacting:

New Jersey Department of Environmental Protection  
Office of Legal Affairs  
Attn.: DEP Docket No. 18-08-10/698  
401 East State Street, P.O. Box 402  
Trenton, New Jersey 08625-0402

This adoption document can also be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules/>.

Summary of Public Comments and Agency Responses:

The following persons or entities timely submitted written and/or oral comments:

1. Steve Changaris, Manager, NJ Chapter, National Solid Waste Management Association
2. Steven Thomas, Hainesport
3. Armand Lembo, Chairman, NJ Chapter, National Solid Waste Management Association
4. Peter Ruble, Hainesport
5. Kevin and Robin Voorhees, Hainesport
6. Carolyn Mattern, Hainesport

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7. Fred Glasco, Hainesport
8. Virginia Cliver, Hainesport
9. Mary Ann Cliver, Committeewoman, Shamong Township and Freeholder Elect
10. Calvin McGavin, Secretary, New Jersey Shortline Railroad Association
11. Charles M. Norkis, P.E, Executive Director, Cape May County Municipal Utilities Authority
12. Gary S. Rosensweig, Archer & Grenier, P.C., on behalf of Salem Rail Logistics, LLC
13. Darryl S. Caplan, Hainesport Industrial Railroad, LLC
14. Nathan R. Fenno, President, The New York, Susquehanna and Western Railway Corporation
15. Catherine McNelis, Hainesport
16. Greg Lyons, Hainesport

The timely submitted comments and agency responses are summarized below. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

#### General

1. COMMENT: The commenters support the Department's rulemaking and hope it closes the loopholes used by rail carrier solid waste transfer operations to operate in their current manner. (1, 5)

RESPONSE: The Department appreciates the commenters' support of this rulemaking.

#### Comments Specific to a particular rail carrier solid waste transfer facility

2. COMMENT: Several commenters expressed concerns about the lack of or ineffectiveness of sound barriers, facility owner qualifications, location of facility adjacent to a residential area, operating hours, dust and debris, host community benefit fees, general operation, noise, odors, vibrations, and lowered property values and quality of life in relation to a particular rail carrier

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solid waste transfer facility. They request that the Department look into these matters. (5, 6, 7, 9, 16)

RESPONSE: The Department appreciates the commenters' concerns. However, since these concerns do not constitute comments on this rulemaking initiative, it is not appropriate for the Department to address them within the context of this rulemaking. The Department has taken these comments under advisement and will consider them during the solid waste facility permitting process for the particular facility.

#### Agreement between municipalities and solid waste facilities

3. COMMENT: Does a municipality have the authority to enter into an agreement with an existing or new rail carrier solid waste facility that supersedes or contains provisions that are in conflict with Federal and State laws governing the facility? Would such an agreement supersede what the Federal or State law says? (4)

RESPONSE: A rail carrier solid waste facility must comply with Federal and State laws; adherence to the terms of an agreement that conflict with those laws would necessarily result in a violation of those laws. Additionally, to the extent that the commenter is seeking a legal opinion rather than offering a comment on this rulemaking initiative, it is not appropriate for the Department to address that request; the commenter should seek the advice of his or her attorney.

#### Competition with County Facilities

4. COMMENT: Keeping more space in New Jersey landfills is a priority, but allowing rail carrier solid waste facilities to take business away from the county landfills is costing the tax payers higher municipal tipping fees and higher taxes. The county landfills should take construction debris material and recycle it. That would both reduce the amount of waste that is landfilled and produce income for the county from the sale of this recycled material, which could then be used by the county to help lower taxes. (7)

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5. COMMENT: The commenter is concerned about the effect existing rail carrier solid waste facilities, especially if expanded, will have on county and town recycling programs because rail carrier facilities are in direct competition with county and town recycling programs. (9)

RESPONSE to COMMENTS 4 and 5: Whether or not a county-owned solid waste facility has rights to all the waste generated within that county or whether other non-governmentally-owned waste facilities may compete with a county facility for that waste is county-specific. Landfill tipping fees are determined by a number of factors, including contractual arrangements between the landfill and neighboring municipalities, and prevailing market conditions. For example, some solid waste facilities lower their disposal fees to attract more business when waste tonnages fall. Moreover, if a county landfill fills up prematurely, this could result in a situation in opposite to that posited by the commenters, namely that it would be possible that township taxes and/or tipping fees would actually increase once that landfill fills up, as waste would have to be transported farther for disposal at an increased cost to taxpayers.

The Department's experience has shown that when more facilities are involved in environmentally responsible recycling, it is more likely for a material to be recycled. More facilities result in shorter transportation costs, and increased competition lowers facility processing fees. The Department's municipal recycling tonnage grant program ensures that additional recycling tonnage also results in additional money to the municipalities that undertake and report such recycling.

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With respect to proceeds from the recycling of construction debris, whether or not a county facility makes or loses money on the processing and marketing of recycled materials depends on market conditions. Hence, recycling of construction and demolition debris by county landfills may not generate proceeds to help lower taxes.

State, County and Local Governmental Responsibility with respect to Rail Carrier Solid Waste Transfer Facilities

6. COMMENT: What is a county's role with respect to existing or new rail carrier waste transfer operations? What authority will the State government, county government and local government and other agencies have to address problems with these facilities as they arise? (9)

RESPONSE : Pursuant to N.J.S.A. 13:1E-19, every county in the State and the Hackensack Meadowlands District is designated as a solid waste management district. As required by the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. and the Solid Waste Management rules at N.J.A.C. 7:26-6, each district is charged with planning with regard to new solid waste rail carrier facilities, both before a facility receives a solid waste facility permit from the Department and later, should the facility wish to expand its operations or otherwise make changes that were not addressed when the facility was initially added to a district's plan. During the planning process, the district considers the location of a solid waste facility, as well as other factors such as transportation routes and the district's district-wide disposal strategy. The district will continue this role pursuant to the SWMA for new rail carrier solid waste facilities.

On the other hand, the Department has determined not to compel existing rail carrier solid waste facilities that are in compliance with N.J.A.C. 7:26-2D.1(d) at the time of this adoption to apply for district plan inclusion. In 1975, when the planning provisions of the SWMA at N.J.S.A. 13:1E-19 et seq. were adopted, the Legislature recognized that it would be unfair to require existing solid waste facilities to apply for plan inclusion. Therefore, the Legislature simply required that they be included in the district solid waste management plans. Existing rail carrier

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solid waste facilities that are in compliance with N.J.A.C. 7:26-2D.1(d) at the time of this adoption will be treated as “existing solid waste facilities” for purposes of the planning provisions of N.J.S.A. 13:1E-19 et seq., and will be required to be inventoried and appraised pursuant to N.J.S.A. 13:1E-21a(3) and included in the district’s solid waste management plan as an existing facility if a permit is issued. See N.J.S.A. 13:1E-21a(3) and -21b(3). Accordingly, the Department has determined not to adopt the proposed provision at N.J.A.C. 7:26-2.1(d)2 that would require existing rail carrier solid waste facilities to apply for district plan inclusion. Counties, municipalities, and other interested parties (such as other governmental agencies) will have an opportunity to voice their concerns about a rail carrier solid waste facility and have those concerns addressed during the initial permitting process for the facility and any modifications thereafter.

Should the Department grant a solid waste facility permit to an existing or new rail carrier solid waste facility, the Department will enforce the provisions of that permit and other applicable State regulatory provisions. The district may also be directly involved through the Department’s County Environmental and Health Act (CEHA) program in enforcing the operating conditions and other environmental rules governing operation of the facility. Under the Department’s CEHA program, counties act as the Department’s agents in enforcing certain State regulatory provisions. Beyond those rules, the question posed by the commenter regarding the authority of the State, county and local municipality to address problems is a fact-sensitive question that is beyond the scope of this rulemaking. Issues that may arise may be directed to the Department for further guidance.

### Recycling Tax

7. COMMENT: Now that rail carrier solid waste transfer facilities are officially recognized as solid waste facilities, will they be required to pay the recycling tax, or will it still be paid by haulers that transport waste to these facilities? While the State Division of Taxation is responsible for collecting the tax, what is the Department’s position on whether it is a facility or hauler tax? (1)

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8. COMMENT: The commenter supports the Department's rulemaking but asks that the requirement for haulers to collect the recycling tax due on loads delivered to rail carrier solid waste transfer operations be eliminated. (3)

RESPONSE to COMMENTS 7 and 8: The Recycling Enhancement Act at N.J.S.A. 13:1E-96.5a(2) specifically levies the recycling tax on solid waste collectors that transport solid waste for transshipment or direct transportation to an out-of-State disposal site a recycling tax. Specifically, the Act states that "the recycling tax shall be levied on the solid waste collector at the rate of \$3.00 per ton on all solid waste collected for transportation to a railroad transfer station or other facility designed to transport waste on railroads or directly to an out-of-state disposal site" (emphasis added). Accordingly, the tax must be paid by the solid waste collector. Additionally the Act prohibits the tax from being imposed on the "owner or operator of a railroad transfer station or other facility designed exclusively to transport waste on railroads." See N.J.S.A. 13:1E-96.5a(1)(a). Therefore, the Department does not have the statutory authority to amend the rules as requested by the commenter.

#### Delayed Effective Date

9. COMMENT: Does the 180 day clock commence on the date the Department's proposed rules go into effect or is it still going to be relative to the 180 day period of the Federal act? (1)

RESPONSE: As the Department explained in its proposal concerning these amendments, the Federal Rail Safety Improvement Act of 2008, Pub. L. No 110-432 (of which the CRA is a part), gives solid waste rail transfer facilities currently operating as of the effective date of the Federal Act a transition period for state permitting. See 40 N.J.R. 6508. Specifically, existing solid waste rail transfer facilities that do not possess the required permit(s), other than a siting permit, are not required to possess any such permits to continue to operate the facility provided that, on or before 180 days after the effective date of the Federal Act, the facility has submitted a complete application for all required permits. Such a facility may continue to operate without

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the required permit(s) until the permit authority has either approved or denied the facility's application(s). The Federal Act became effective on October 16, 2008; therefore, 180 days from the effective date of the Federal Act is April 14, 2009.

However, since the Department is the permitting authority in New Jersey, the New Jersey Administrative Procedure Act (APA) and its implementing rules govern the effective date of amendments to the Department's rules. It is for this reason that new N.J.A.C. 7:26-2.1(d) requires rail carriers that are operating under and are in compliance with N.J.A.C. 7:26-2D to come into compliance with the aforementioned CRA requirements within 180 days of the effective date of the amendments. The Department proposed 180 days because that timeframe would be consistent with the timeframe established under the Federal legislation. That said, the APA provides that rule amendments are effective on the date that the adoption document is published in the New Jersey Register. See N.J.A.C. 1:30-6.6. Therefore, the 180 day clock runs from the publication date of this adoption in the New Jersey Register, notwithstanding the fact that 180 days from the effective date of the Federal Act was April 14, 2009.

#### Repeal of N.J.A.C. 7:26-2D.1(d)

10. COMMENT: The proposed rules for an existing rail-served solid waste facility require the facility to apply to become a permitted facility. Absent from the proposed rule making analysis is consideration of a railroad's existing environmental compliance. The primary distinction between the current subchapter 2D.1(d) requirements and the permit requirements is one of performance versus advanced documentary support. That is, both the existing and proposed rules seek to achieve the same environmental impact, but the 2D rules allowed the railroad to make the decision about the method of achieving compliance, while the permit process requires the applicant to demonstrate in advance and through expert reports whether compliance is likely to be achieved. If an existing rail-served facility is achieving the performance requirements set by the Department, why require the railroad to incur the significant cost to demonstrate anticipated compliance when actual inspections have already demonstrated real compliance?

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Moreover, why require the Department to expend considerable time, money and effort reviewing permit applications when actual compliance is already known?

Additionally, the proposed rules abrogate all that has been achieved to date. The existing regulatory scheme was promulgated by the Department for the purpose of ensuring that there would be no negative impact on the environment. The subchapter 2D.1(d) rules were designed to ensure protection of the health, safety and welfare of the citizens of this State and were enforced by the Department. In the absence of compliance by a subject facility, the Department took appropriate enforcement and follow-up action, sometimes at considerable cost to the existing rail-served facilities. Both the Department and railroads expended time and effort to achieve environmental compliance. Why is the Department now abandoning all its efforts to date to now require that facilities currently in full compliance with all performance criteria be required to start from scratch, discounting years of conforming operations? In these challenging financial times, a less onerous and costly procedure for both the railroad and the Department should be created for existing facilities that have demonstrated a history of environmental compliance pursuant to the current 2D provisions. (13)

RESPONSE: The commenter assumes that existing rail waste facilities are in compliance with the State environmental, public health and safety requirements. However, certain rail carrier solid waste facilities have resisted coming into full compliance with N.J.A.C. 7:26-2D.1(d), by, for example, claiming federal preemption of State regulation, disputing the necessity of some of the requirements, and/or disputing the appropriateness of the Department's enforcement efforts. As a result, the benefits of a thorough review of a facility's construction and operation, along with clear permitting requirements if a permit is issued, far outweigh any time and expense incurred through the permitting process.

The Department has determined that the most effective way to ensure rail carrier waste facilities are operated in an environmentally sound manner is through the permitting process, which the CRA expressly authorizes. All non-rail solid waste facilities must comply with the rules with which rail carriers will now be required to comply under the Federal Act. The solid waste

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permitting and operational requirements will ensure that the public and environment are protected as fully as possible from the risks associated with solid waste. The permitting and operational requirements will allow the Department to review and approve facility design and operational standards up front. Existing rail carrier facilities that have made a legitimate effort to comply with N.J.A.C. 7:26- 2D.1(d), the requirements of which are derived from the operational standards set forth in N.J.A.C. 7:26-2, will be able to transfer much of the present design and operation information to the solid waste facility permit application. Thus, legitimate compliance efforts to date will not be “abandoned” in order to implement permitting for rail carrier facilities. As stated in the Social Impact statement of the proposal, requiring compliance with a permit that reflects the nature and limitations of each particular transfer station and with the other requirements of the Solid Waste rules will result in a significant increase in the Department’s ability to protect the public health and safety from the hazards posed by transfer station operations that include the handling of noncontainerized solid waste.

Moreover, as pointed out in the Federal Standards Statement in the proposal, New Jersey’s waste industry has historically been a target of organized crime. It is therefore particularly important for New Jersey to have a strong regulatory program governing the collection, transfer and disposal of solid waste. Existing Federal standards for transfer stations are, at most, minimal, because regulation of solid waste has traditionally been recognized as primarily a state rather than a Federal concern. The new Federal Act recognizes that the ICCTA, at least as interpreted by a number of courts and the Surface Transportation Board, unduly interfered with this longstanding understanding that State regulation of solid waste was primarily a State function. The adopted amendments will restore the ability of the Department to apply the Solid Waste Management Act, and the long-standing rules adopted pursuant to that Act, to rail carrier solid waste facilities that handle noncontainerized waste.

Proposed new N.J.A.C. 7:26-2.1(d) provides the timeframe by which rail carriers that to date have operated under the rules at N.J.A.C. 7:26-2D.1(d) must come into compliance with the Department’s permitting requirements. The Department does not believe that there will be a significant negative economic impact from these amendments on rail carrier solid waste

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facilities that handle noncontainerized solid waste, because the substantive requirements of N.J.A.C. 7:26-2D.1(d), which are modeled on the substantive provisions of N.J.A.C. 7:26-2, are similar to the permit requirements with which non-rail carrier solid waste facilities must comply.

Note that the Department will continue to regulate the transfer of containerized waste by rail carriers under N.J.A.C. 7:26-2D.1(c) as the Federal legislation and these adopted amendments do not affect those facilities.

### District Solid Waste Management Planning and Siting Issues

11. COMMENT: Will the Department delegate to the county the decision on whether or not to license/operate an existing rail carrier solid waste facility or will the Department make the decision as to siting? (7)

RESPONSE: The commenter seems to consider decisions as to whether to grant an operating permit for an existing rail carrier solid waste facility and decisions regarding siting as one and the same. However, that is not the case. A solid waste facility permit is not a siting permit. The Department, not the district, is authorized under the Solid Waste Management Act, N.J.S.A. 13:1E-5, to issue a solid waste facility permit for the operation of any solid waste facility, including an existing rail carrier solid waste facility, and this responsibility cannot be delegated to a district. With respect to siting of existing rail carrier solid waste facilities, the Department assumes the commenter is referring to district plan inclusion. As discussed in response to comment 6, new facilities will be required to apply for plan inclusion; however, existing rail carrier solid waste facilities that were in compliance with N.J.A.C. 7:26-2D.1(d) at the time of this adoption will not be required to apply for district plan inclusion.

12. COMMENT: The commenter requests that the language proposed at N.J.A.C. 7:26-2.1(d)2 be modified to change the word “amended” to the phrase “taken formal action considering the proposed amendment of.” As proposed, this language appears to require that the applicable Board of Chosen Freeholders (BOCF) or the New Jersey Meadowlands Commission (NJMC)

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incorporate existing rail haul facilities for non-containerized solid waste into the applicable district solid waste management plan (SWMP). Pursuant to the requirements of N.J.S.A. 13:1E-23, the BOCF or NJMC has the statutory power to consider and adopt or reject such amendments to the approved district solid waste management plan. Nothing in the Federal Act nor the New Jersey Solid Waste Management Act (SWMA) (N.J.S.A. 13:1E-1 et seq.) compels the amendment of a district SWMP to include such rail haul facilities. Rather, the application for inclusion of such facilities must be considered and evaluated in accordance with the policies, criteria, procedures and timeframes set forth in the district SWMP as approved by the Department. After such consideration, the applicable BOCH/NJMC can approve or reject the application for an amendment to the district SWMP. The SWMA also states that SWMP responsibility is to remain at the local level unless the district fails to comply with the requirements of the SWMA. Only in such event can the authority to adopt and amend a district SWMP be transferred to the Department. The Department must modify this proposed rule so that it is fully consistent with the district planning provisions of the SWMA as discussed above.

(11)

RESPONSE: As explained in response to comment 6 above, the Department has determined to not adopt the language proposed at N.J.A.C. 7:26-2.1(d)2. Therefore, there is no need to consider a modification to N.J.A.C. 7:26-2D.1(d)2.

13. COMMENT: The proposed rule fails to acknowledge a transloader's right to petition the Federal Surface Transportation Board ("STB") for a land-use exemption as clearly afforded by the Federal Act. It should be amended to both acknowledge a transloader's right to petition the STB, and to set forth any applicable notice requirements associated with the petition.

Additionally, the proposed rule sets forth requirements for transloaders to comply with New Jersey's Solid Waste Management Planning and District land use siting procedures. It should be amended to clearly set forth that transloaders that receive a land use siting exemption from the STB are exempt from compliance with these state planning and land use siting requirements.

(12)

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RESPONSE: The commenter utilizes but does not define the term “transloader,” such that the Department is unable to ascertain to whom the commenter refers. The Department interprets the CRA to authorize only rail carriers to apply for and receive land use exemption permits. The Department also notes that the CRA provides that existing rail carrier waste facilities need not obtain a siting permit; the CRA does not mention “land use siting procedures.” To the extent that the commenter refers to the right of a rail carrier to petition the STB under the CRA, it is the STB, and not the Department, that is the regulatory agency charged with promulgating applicable notice requirements associated with a land-use exemption petition. On January 27, 2009, the STB published these procedures as interim rules. (See 74 Fed. Reg. 4714). The Department disagrees that the adopted rules impose State planning and land use siting requirements from which a rail carrier would be exempt if a rail carrier receives a land use exemption from the STB. Therefore, it is unnecessary for the Department to amend the rules as suggested by the commenter. See also response to comment 6.

14. COMMENT: The proposed siting modifications to the Department’s rules affecting railroads exceed those permitted by the Federal Act. The Federal Act specifically provides that an existing solid waste rail transfer facility “shall not be required to possess any siting permit to continue to operate or comply with any State land use requirements.” The proposed rule requires a railroad to apply, pursuant to the SWMA siting provision, to the county for approval or denial. The requirement for a railroad to seek county plan inclusion as a condition of permitting directly contradicts the express language of the Federal Act and thus exceeds that allowed by the Federal Act. The Federal Act is quite clear that the STB shall retain exclusive jurisdiction on the issue of siting and expressly identifies the recourse a Governor has in the event that Governor questions the appropriateness of the siting of an existing railroad; that recourse is to petition the STB for a land use review. The obligation that rail-served facilities obtain inclusion in the county SWMP should be eliminated, as that provision exceeds the authority granted by the Federal legislation.

(13)

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RESPONSE: As explained above in response to comments 6 and 13 the Department has determined to not adopt proposed N.J.A.C. 7:26-2D.1(d)2, which would have required an existing solid waste facility to apply to the applicable Board of Chosen Freeholders (or the New Jersey Meadowlands Commission) for district plan inclusion. The Department does not concur that the CRA explicitly prohibits states from subjecting existing rail carrier solid waste facilities to State solid waste planning provisions. However, the Department believes that any district planning issues for existing facilities can be addressed during the solid waste facility permitting process. The Department does agree that the Department may petition the STB through the Governor's office to require an existing rail carrier solid waste facility to undergo a land use exemption proceeding. For existing facilities that receive a solid waste facility permit from the Department, the Department will direct the applicable district to include the facility in the county plan with the requisite information pursuant to N.J.S.A. 13:1E-21a(3) and -21b(3).

15. COMMENT: The proposed rule could have the effect of restricting the ability of existing rail transfer operations to continue to function by requiring an after-the-fact siting process. Siting is ultimately a political decision. There may be no incentive for a county to accept the siting of a rail facility if it is viewed as competition for existing truck-based transfer operations or existing disposal facilities. The political decision involving after-the-fact siting and facility permitting of existing rail facilities is directly contrary to the State's needs to promote the most efficient mode of out-of-State transfer. The overriding need is for the State's SWMP and the proposed rules to embrace rail transfer as an integral component of its overall program. (13)

RESPONSE: The CRA expressly requires rail waste facilities to comply with all state environmental laws, including those requiring permits. By so doing, the CRA acknowledges the importance of State solid waste and other environmental and public health laws, and ensures that compliance with those laws does not conflict with efficient disposal or transportation.

The Department's solid waste facility permitting determinations are made in accordance with the SWMA and the implementing rules at N.J.A.C. 7:26. The Department does not believe that after-the-fact permitting is an impossible task. As already noted, for existing rail carrier solid waste facilities that have made a legitimate effort to comply with subchapter 2D of the Solid

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Waste rules, which are derived from the operational standards set forth in N.J.A.C. 7:26-2, much of the present design and operation of the facility may be transferable to the SWF permit. As to after-the-fact siting, see responses to comments 6, 13 and 14 above.

16. COMMENT: The language set forth at proposed new N.J.A.C. 7:26-2.1(d)2 will facilitate a rail carrier's efforts to comply with the amended rules and with all applicable solid waste rules. The commenter supports the language at proposed new N.J.A.C. 7:26-2.1(d)2 which allows a rail carrier to submit a complete application for plan inclusion that was previously submitted to the applicable Board of Chosen Freeholders ("Board") or the New Jersey Meadowlands Commission ("NJMC") to the Department if the applicable Board or NJMC fails to amend the relevant District Solid Waste Management Plan to include the rail carrier within six months of the rail carrier's submission. This provision will enable rail carriers to be proactive in their efforts to be included within District Solid Waste Management Plans. (14)

RESPONSE: The Department appreciates the commenter's support of this provision. However, the Department has determined to not adopt N.J.A.C. 7:26-2.1(d)2, as explained in the response to comment 6 above.

17. COMMENT: The Department's statements regarding the interplay of the CRA and the amended rules with respect to siting plan requirements should be clarified. The Department states in its proposal that "New Jersey's solid waste rules at N.J.A.C. 7:26 do not require a separate 'siting' permit. Siting of a solid waste disposal facility is addressed through the district solid waste management planning process and the solid waste facility permitting process." It is unclear whether the Department is admitting with this language that inclusion within a district solid waste management plan constitutes a *de facto* siting permit within the meaning of the Act. The language of the proposal and the amended rules should be revised to clearly state NJDEP's position on this issue and any applicable requirements to be imposed on solid waste rail transfer facilities with respect to that position. (14)

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RESPONSE: As explained in response to comments 6, 13 and 14 above, the Department is not adopting N.J.A.C. 7:26-2D.1(d)2. Rather, the Department has determined to treat existing rail carrier solid waste facilities that were in compliance with N.J.A.C. 7:26-2D.1(d) at the time of this adoption as “existing solid waste facilities” for purposes of the planning provisions of N.J.S.A. 13:1E-21 et seq. The adopted rules make clear that new rail carrier solid waste facilities must apply for and be included in a district solid waste management plan, apply for and obtain a solid waste facility permit, as well as all other necessary permits and approvals. The adopted rules also make clear that rail carrier solid waste facilities existing as of the effective date of the CRA and operating in compliance with N.J.A.C. 7:26-2D.1(d) at the time of this adoption do not need to seek county plan inclusion. Because the obligations of new and existing rail carrier solid waste facilities are clear, the Department does not believe the revision as suggested by the commenter is necessary.

#### Timeframe for submittal of permit and licensing applications

18. COMMENT: Given the substantial cost and complexity of the permit application processes required under the proposed rule, the time to submit applications for any required permits and licenses should be extended to at least twelve months or longer, depending on the required times for Departmental reviews after adoption of the final rule. This will provide time for transloaders to come into compliance with the vastly enhanced regulatory requirements imposed by the proposed rule. (12)

RESPONSE: The commenter utilizes but does not define the term “transloader,” such that the Department is unable to ascertain to whom the commenter refers. The adopted rules apply to rail carriers. Assuming the commenter intended to refer to rail carriers, the Department believes existing rail carrier solid waste facilities have been provided with sufficient time to submit solid waste facility permitting and A-901 documents. When the CRA was enacted on October 16, 2008, these facilities were put on notice that they would need to comply with the appropriate State requirements. In fact, in accordance with the CRA, existing facilities were given 90 days from the effective date of the CRA to comply with “all Federal and state requirements pursuant

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to subsection (a) other than those provisions requiring permits,” and 180 days to submit “a complete application for all permits, except siting permits, required pursuant to subsection (a) to the appropriate permitting agency authorized to grant such permits.” Therefore, if the Department did not already have rules applicable to these existing facilities (N.J.A.C. 7:26-2D.1(d) requirements), existing facilities would have had to submit their solid waste facility permit application to the Department on or before March 16, 2009. The Department is not requiring submittal of a complete permit application or A-901 approval application until 180 days after the effective date of these rules. Therefore, existing facilities have significantly more time than the CRA provided to submit the required applications. Additionally, the Department notes that the aforementioned rules at N.J.A.C. 7:26-2D.1(d), which prior to their repeal were applicable to these existing facilities, were adopted on October 4, 2004 (see 36 NJR 5098(b)) and were patterned after the solid waste facility permitting requirements codified at N.J.A.C. 7:26-2. Existing facilities that have made a legitimate effort to comply with subchapter 2D of the Solid Waste rules, which are derived from the operational standards set forth in N.J.A.C. 7:26-2, will be able to transfer much of the present design and operation information to the SWF permit application.

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### Promoting Rail Transport of Solid Waste

19. COMMENT: The proposed rule does not address the desirable policy aspects of rail transfer of solid waste. Because the State relies on export of solid waste to meet its disposal needs, the Department has a responsibility to promote the use of rail as the most economical and environmentally sound mode of transportation to out-of-State facilities. The Department's most recent update of the State Solid Waste Management Plan, issued in 2006, discloses that the tonnage of waste exported (which peaked at 4 million tons/year in 1988) was still 3.9 million tons/year in 2006. The goal of in-State disposal, which was promoted in earlier Statewide plans, is no longer being emphasized. Since the late 1980's/early 1990's when major incinerators and landfills were sited and built, no new disposal facilities have been sited. The State has tacitly accepted that out-of-State disposal is a permanent feature of the State's plan. Of the 9.5 million tons of waste disposed in 2006, 3.9 million tons/year, or 41 percent, was exported.

As nearby Pennsylvania landfills reach capacity and have difficulty expanding, truck based export will become less and less feasible. Therefore, the Department must actively promote rail transfer, if for no other reason than because of environmental and health considerations. Truck transportation is expensive, polluting and dangerous. Many accidents, including some with fatalities, have occurred with transfer trucks over the 22 years since the State actively promoted transfer to out-of-State facilities. To move a ton of waste by rail, however, requires far less fuel. The industry standard is a ratio of 5 to 1 in favor of rail. Additionally, rail is safer and avoids heavy congestion as well as bridge and road deterioration.

In addition to economic, environmental, health and safety benefits, export of some waste types, particularly construction and demolition (C&D) waste, is a wise use of limited resources. C&D waste occupies more space per ton than municipal solid waste (MSW) and cannot be accepted by incinerators. To the extent that in-State landfills have limited capacity, it is wise to export the waste components, such as C&D wastes, that make inefficient use of the State's landfill resources, and the best way to export that waste is by rail. Other states with low population

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densities and a huge land base can far more efficiently accommodate C&D wastes than can New Jersey. (13)

20. COMMENT: The Department should include explicit and detailed descriptions of the benefits of transporting solid waste by rail carrier rather than by motor carrier within the “Economic Impact” and “Environmental Impact” sections of the proposal and within the language of the amended rules. The Department and other governmental agencies have acknowledged the economic and environmental benefits of hauling solid waste by rail rather than by truck. The Department should advocate and support waste transport by rail to bring about the environmental and economic benefits described above.

For example, a recent report for Essex County concluded that by using railroads to haul solid waste instead of trucks between January 2006 and May 2008, the county:

- avoided 35,366 truck trips to disposal sites;
- saved 2.2 million gallons of diesel fuel; and
- would, over five years, produce 8.7 million fewer pounds of carbon monoxide and 832,869 fewer pounds of nitrous oxide by using railroads rather than trucks to transport solid waste.

The benefits of transporting solid waste by rail were also set forth by NJDEP Assistant Commissioner Wolfgang Skacel in his testimony before the United States House of Representatives on October 11, 2007. During his testimony to the Subcommittee on Railroads, Pipelines and Hazardous Materials regarding railroad-owned solid waste transload facilities, Assistant Commissioner Skacel stated that “[t]here are clear advantages to public health, safety and environmental quality for this solid waste to move by rail; reduced traffic congestion on our roadways, and reduced fuel consumption and air emissions from diesel truck engines.”

The Department should advocate and support waste transport by rail in order to bring about the environmental and economic benefits described above. The commenter therefore recommends that the Department include language in its proposal and within the amendments to the subject

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rules that recognizes these benefits, and state that the purpose of these amendments is to encourage waste transport by rail. (14)

RESPONSE to COMMENTS 19 and 20: The hearing to which the commenter refers in Comment 20 took place on October 16, 2007. An official transcript of this hearing can be found at: <http://transportation.house.gov/hearings/hearingDetail.aspx?NewsID=311>. During this hearing Assistant Commissioner Skacel stated his support for the movement of waste by rail, but noted that, “[t]he issue is not moving the waste by rail. The issue is the nature and the way these facilities are operated in New Jersey. The issue isn’t the railroad. The issue is really the operators that . . . align themselves as railroad facilities.”

The Department recognizes that there are benefits to public health, safety, and environmental quality from moving solid waste by rail. The adopted rules do not address the movement of solid waste by rail, however. The amendments govern the rail carrier facilities that process and handle the waste prior to its transportation by rail. Thus, the summary and the economic, environmental and other impact statements in the proposal addressed the impacts of applying the permitting requirement and A-901 requirements to rail carrier facilities that transfer noncontainerized solid waste.

#### N.J.A.C. 7:26-2D.1(c) Rules for Containerized Solid Waste

21. COMMENT: If the proposed amendments are adopted, N.J.A.C. 7:26-2D.1(c)2.ii must be amended for purposes of application to solid waste rail facilities. The proposed amendments leave intact only those provisions of 7:26-2D.1 relating to the transfer of containerized solid waste to or from railcars. However, the remaining provisions do not address inspection of containers. N.J.A.C. 7:26-2D.1(c)2ii prohibits solid waste facilities from opening sealed solid waste containers other than those containing ID 72 liquid solid waste. Solid waste rail transfer facilities must be allowed to open sealed containers coming to the facility for inspection from time to time to ensure that the contents of the sealed container match the shipping papers that accompany them and to comply with the record-keeping requirements of N.J.A.C. 7:26-2.13.

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N.J.A.C. 7:26-2.D.1(c)2.ii should therefore be amended to allow solid waste rail transfer facilities to perform this task. (14)

RESPONSE: The Department understands that a facility may need to verify that the contents of a container match the description provided on the shipping papers and also understands that the rules as currently written expressly prohibit this practice, except for in the case of ID 72 waste. However, amending the rules to effect this purpose requires public notice and comment pursuant to the Administrative Procedure Act. The Department is continuing its efforts to compile a proposal that will contain extensive amendments to the Solid Waste Management rules, and as a part of that proposal, the Department will consider amending N.J.A.C. 7:26-2D.1(c)2ii and - 3.6(g)2 to allow the opening of containers solely for the purpose of verifying shipping contents such that no material may be added or removed from the container.

#### Solid Waste Facility Permitting Requirements as Applied to Rail Carriers

22. COMMENT: Certain existing solid waste rules that are now proposed to be applied to railroads should be amended to address solid waste rail transfer facility operations. The amended rules will eliminate operating requirements for solid waste rail transfer facilities set forth at N.J.A.C. 7:26-2D.1(d) and will instead require such facilities to comply with certain rules contained within:

- the “General Operational Requirements” at N.J.A.C. 7:26-2.11,
- the “Intermodal Container Facility” requirements at N.J.A.C. 7:26-3.6;
- the “Additional Engineering Design Submissions Requirements and Design Requirements for Transfer Stations and Materials Recovery Facilities” at N.J.A.C. 7:26-2B.5; and
- the “Additional Operational Requirements for Transfer Stations and Materials Recovery Facilities” at N.J.A.C. 7:26-2B.9 et seq.

None of the above rules consider the unique physical and operational requirements of rail

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transfer facilities. As set forth below, several of the requirements set forth in these sections require modification in order to make them applicable to solid waste rail transfer facilities.

N.J.A.C. 7:26-2B.9(b) and deleted N.J.A.C. 7:26-2D.1(d)1 require that operations at solid waste facilities take place “within the confines of an enclosed building [ ].” In the past, the Department has not interpreted this rule to require that doors be closed on the “enclosed building” or even that openings have doors, although the rule does not specifically so provide. For safety reasons, it is important that railroad cars on a siding serving a rail transfer facility remain coupled together, which would preclude closure of doors on the openings where railcars enter and exit the building. N.J.A.C. 7:26-2B.9(b) should therefore be amended to exempt solid waste rail transfer facilities from any requirement that would require closure of the facility over the railroad tracks on which the railcars move. (14)

RESPONSE: Every solid waste transfer facility is required to be designed and operated to prevent odors, dust, and lightweight waste materials from exiting the building within which all operations must occur. The rules do not specify the means to be utilized to meet this performance standard. Each facility may be designed with its own means of complying with the requirements of both the solid waste and air quality rules, which will be reviewed by the Department upon submittal of the solid waste and air permit applications.

23. COMMENT: N.J.A.C. 7:26-2B.5(b)1 and 3 require that solid waste transfer facilities maintain tipping floors and systems that properly contain, transport and dispose of stormwater and wastewater at the facility in compliance with applicable rules. These provisions are too broad to be applied generally to all solid waste rail transfer facilities because each facility has unique characteristics, such as the presence of railroad tracks in the building or the lack of any public sewerage facilities. N.J.A.C. 7:26-2B.5(b)1 and 3 should therefore be amended to allow solid waste rail transfer facilities to work with the Department to devise facility-specific stormwater and wastewater systems, including holding tanks for wastewater and on-site handling of stormwater. (14)

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RESPONSE: N.J.A.C. 7:26-2B.5(b)1 requires facilities to be designed with a system capable of collecting, storing, treating and disposing of wastewater generated during normal operations, in compliance with applicable rules regarding wastewater and stormwater management at N.J.A.C. 7:14A. N.J.A.C. 7:26-2B.5(b)3 requires facilities to be designed with concrete or equivalent tipping floors or ramps to ensure proper containment and channeling of wastewater, in compliance with the applicable rules regarding wastewater discharge and utilization of holding tanks at N.J.A.C. 7:14A- and 7:14B. Neither provision specifies the specific means to be used to comply with these referenced requirements. The solid waste facility application will specify how the facility will comply these rules and the Department will review the information to ensure the proposed systems will meet the requirements of the rules, taking into consideration any site-specific limitations or characteristics.

24. COMMENT: N.J.A.C. 7:26-2.11(b)1 requires that facility operators clean each area where waste has been deposited at least once within each 24-hour period. Because railcars may not be available for loading due to unforeseen circumstances, solid waste rail transfer facilities may need to hold waste on-site for more than 24 hours before it is loaded onto railcars and transported from the site, and they may be unable to move the material during this time due to space constraints at the facility. Therefore, N.J.A.C. 7:26-2.11(b)1 should be amended to make clear that that solid waste rail transfer facilities are not required to empty areas where waste is deposited or stored during a 24-hour period, but only to clean all such areas within each 24-hour period. (14)

25. COMMENT: The Department should provide clarification of the requirements at N.J.A.C. 7:26-2D.1(d)4. Does the requirement for the operator of the facility to clean each area where waste has been deposited or stored within each 24-hour period mean the waste that is there must be removed within 24 hours, or does it mean that the area around the waste must be cleaned? It would be difficult to get everything in and out within a 24-hour period, seven days a week. (10)

RESPONSE to COMMENTS 24 and 25: N.J.A.C. 7:26-2D.1(d)4 is being deleted on the adoption of these amendments and therefore will no longer apply. All rail carriers that transfer non-containerized solid waste to or from rail cars are subject to the Department's permitting and

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operational requirements for solid waste facilities, codified in subchapter 2 of the Solid Waste rules. N.J.A.C. 7:26-2.11(b)1 requires that within each 24-hour period, the operator of a solid waste facility clean each area where waste has been deposited or stored. An operator cannot just clean around waste on the tipping floor. Cleaning of the areas where waste has been deposited is necessary to control odors and vectors.

Solid waste rail transfer facilities must make provisions for the transport of solid waste if rail cars are not available. The solid waste facility application must include alternate transport methods if rail cars are unavailable. For example, a rail carrier could contract with a hauling company to be used in emergencies. A rail facility may not stockpile waste for extended periods of time, even if rail cars are not available.

26. COMMENT: N.J.A.C. 7:26-2.11(b)7 requires solid waste facilities to maintain on site or have readily available an adequate water supply and adequate firefighting equipment “to extinguish any and all types of fires.” Compliance with this overly broad requirement is impossible. N.J.A.C. 7:26-2.11(b)7 should therefore be amended to require that solid waste rail carrier facilities maintain or have readily available adequate water supply and firefighting equipment to extinguish any and all types of fires associated with the operations conducted at the facility. (14)

RESPONSE: N.J.A.C. 7:26-2.11(b)7 applies to all solid waste facilities, not just solid waste rail carrier facilities. Pursuant to this rule, solid waste transfer facilities (including rail carrier facilities) must have adequate materials on-site to extinguish any fires that may arise, regardless of whether those fires are a direct result of the facility’s operations. The operations at solid waste transfer facilities and rail carrier facilities are similar or the same, and create the same potential fire hazards. Therefore, the rule is necessary to protect the public health and welfare to the same degree for all waste transfer facilities.

27. COMMENT: N.J.A.C. 7:26-2.11(c)2 requires that solid waste facilities designate a location under the facility’s control that is a safe distance from the tipping area for the unloading of solid

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waste from vehicles that are exempt from the registration requirements of N.J.A.C. 7:26-3.3 or those that must be manually unloaded because they contain bulky items or recyclable materials. Because of the scale of operations at solid waste rail transfer facilities and the unavailability of necessary space at the facilities, N.J.A.C. 7:26-2.11(c)2 should be amended to allow solid waste rail transfer facilities to unload these types of materials within facility buildings when no other tipping by other solid waste vehicles is occurring therein. (14)

RESPONSE: The solid waste transfer station application must include an operations and maintenance manual that must include proposed methods to be used to meet the requirements of N.J.A.C. 7:26-2.11. See N.J.A.C. 7:26-2.10(b)9. Therefore, the application, through the operations and maintenance manual, must specify how the facility proposes to handle exempt vehicles and vehicles that must be manually unloaded. During the review of the application, the Department will evaluate whether the proposed methods of handling such loads meet the intent of this rule. The intent of N.J.A.C. 7:26-2.11(c)2 is to ensure the safety of smaller vehicles and vehicles requiring special attention, as well as the safety of those operating the vehicles and performing the unloading operations.

28. COMMENT: N.J.A.C. 7:26-3.6(g)4 requires intermodal container facilities to maintain effective security measures at the facility. This provision is overly broad, inconsistent with Federal security requirements applicable to railroads, and unnecessary for a facility that only handles intermodal containers. It should be amended to state that solid waste intermodal rail transfer facilities will be considered to be in compliance with security requirements if these facilities implement measures that are in compliance with Federal rail security requirements. (14)

RESPONSE: N.J.A.C. 7:26-3.6, including N.J.A.C. 7:26-3.6(g)4, applies to solid waste intermodal facilities. An intermodal container facility is defined at N.J.A.C. 7:26-1.4 as a facility where containerized solid waste is transferred from one mode of transportation to another, or from one vehicle to another within one mode of transportation. N.J.A.C. 7:26-3.6(a)1 states that the requirements of section 3.6 do not apply to rail carriers that transfer containerized solid waste. This is because rail facilities that transfer containerized waste are subject to the

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provisions of N.J.A.C. 7:26-2D.1(c). N.J.A.C. 7:26-2D.1(c)2iv states that, “All solid waste containers staged or stored at the facility shall be secured at all times in a manner that prevents unauthorized access to the containers and their contents.” The Department does not believe this rule conflicts with any federal rail security requirements.

29. COMMENT: N.J.A.C. 7:26-3.6(g)8 requires intermodal container facilities to maintain effective security measures and to report any onsite releases or discharges to the appropriate authorities. This provision is overly broad and should be amended to state that solid waste rail transfer facilities will be considered in compliance with these reporting requirements if they immediately report any release or discharge of any solid waste that would harm human health and the environment. (14)

RESPONSE: N.J.A.C. 7:26-3.6(g)8 applies to solid waste intermodal facilities, and not to rail facilities that are transferring containerized waste. As stated above, rail facilities that transfer containerized waste are subject to the provisions of N.J.A.C. 7:26-2D.1(c). N.J.A.C. 7:26-2D.1(c)2.xi requires that any release or discharge of any solid waste that would harm human health and the environment must be immediately reported to the Department’s Emergency Response Hotline.

30. COMMENT: The Department should provide clarification of the requirements at N.J.A.C. 7:26-2D.1(d)7. What section(s) in the rules codify the methods that a facility must employ to effectively control dust to prevent migration outside enclosed buildings and off site? (10)

RESPONSE: N.J.A.C. 7:26-2D.1(d)7 is being deleted on the adoption of these amendments and therefore will no longer apply. All rail carriers that transfer non-containerized solid waste to or from rail cars are subject to the Department's permitting and operational requirements for solid waste facilities, codified in subchapter 2 of the Solid Waste rules. Dust control is an operational requirement that must be met for all solid waste facilities and that will also apply to rail carriers that transfer non-containerized solid waste to or from rail cars upon the effective date of these amendments. Specifically, N.J.A.C. 7:26-2.11(b)4 requires that methods of effectively

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controlling dust be implemented in order to prevent offsite migration. The rules do not specify the methods to be implemented because the methods may vary from site to site. The solid waste facility permit application must address the dust control methods to be employed at the site and the Department will review those methods to ensure they are adequate to prevent dust migration, after taking into consideration the specific characteristics of the site and the waste material to be accepted at the site.

### A-901 Issues

31. COMMENT: Proposed new N.J.A.C. 7:26-2.1(c)2 should be clarified to communicate the Department's position regarding exempting solid waste rail transfer facilities that transfer only containerized solid waste but do not engage in solid waste collection from the requirement to obtain A-901 approval.

Despite language in the preamble, proposed new N.J.A.C. 7:26-2.1(c)2 exempts from A-901 a rail carrier that does not engage in the business of solid waste collection (as defined by N.J.S.A. 13:1E-3) by other means of transportation within the State, even if that rail carrier transfers non-containerized waste to or from railcars. The commenter supports such an exemption. (14)

RESPONSE: The Department believes that N.J.A.C. 7:26-2.1(c)2 is clear. Rail carriers do not need A-901 approval merely for transport of solid waste by rail, or transfer of containerized waste to or from rail cars. They are required to obtain A-901 approval for other solid waste activities, such as the collection and transfer of non-containerized solid waste, or the operation of a transfer station.

### Transport of Hazardous Waste by Rail

32. COMMENT: The Department should make clear within its proposal and within the language of the amended rules that the CRA does not apply to the transport of hazardous waste by rail, and

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that the Department therefore cannot require rail carriers to comply with New Jersey hazardous waste rules that are inconsistent with Federal hazardous waste rules.

Revision of the proposed rule is necessary to avoid confusion regarding federal pre-emption of State law, such as the kind that occurred with respect to the interplay of the Federal Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 110101 *et seq.* (“ICCTA”), and New Jersey rules. The Department should take advantage of this opportunity to preclude such confusion in this instance by clearly stating in its proposal and in language to be added to the rules at issue that the scope of the rules does not encompass transport of hazardous waste by rail carriers. (14)

RESPONSE: The Department does not believe that the rules should be amended as suggested by the commenter, because the Solid Waste rules, to which the transfer of uncontainerized solid waste by a rail carrier is now subject, specifically do not apply to hazardous waste. The definition of solid waste at N.J.A.C. 7:26-1.6 provides at subsection (d) that “the definition of solid waste contained in this section applies only to wastes that are not also hazardous for purposes of the Department’s hazardous waste regulations set forth at N.J.A.C. 7:26G.” Additionally, the general solid waste permitting rules at N.J.A.C. 7:26-2.1(a) specifically identify subchapters 2, 2A, 2B, 2C, & 2D as governing the disposal of nonhazardous solid wastes, while N.J.A.C. 7:26-2.1(b) clearly states that subchapter 2 does not apply to hazardous waste.

#### Regulatory Compliance During Transition Period

33. COMMENT: The Department should make clear within its proposal and within the language of the amended rules that a rail carrier’s compliance with the rules set forth at N.J.A.C. 7:26-2D.1(d)1-27 during the period between repeal of these rules and issuance of a solid waste facility permit constitutes compliance with the transfer station rules set forth at N.J.A.C. 7:26-2.1 *et seq.*

The amended rules will eliminate operating requirements for solid waste rail transfer facilities set forth at N.J.A.C. 7:26-2D.1(d)1-27 and will instead require such facilities to comply with the

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transfer station rules at N.J.A.C. 7:26-2.1 et seq. However, neither the Department's proposal nor the amended rules set forth requirements applicable to such a facility that is complying with the current rules at N.J.A.C. 7:26-2D.1(d)1-27 after they are repealed but prior to the facility's receipt of a solid waste facility permit. The amended rules should include language stating that compliance with the rules at N.J.A.C. 7:26-2D.1(d)1 through 27 by an existing solid waste rail transfer facility shall constitute compliance with that facility's obligations under the transfer station rules at N.J.A.C. 7:26-2.1 et seq., and that after issuance of the facility's solid waste facility permit, the transfer station must comply with the requirements therein. (14)

34. COMMENT: The Department should make clear within its proposal and within the language of the amended rules that a solid waste rail transfer facility may be operated after 180 days from the effective date of the CRA. The summary to the Department's proposal states that existing solid waste rail transfer facilities that do not have permits required by CRA may continue to operate provided that they submit a complete application for all required permits within 180 days of the CRA's effective date (i.e., by April 16, 2009). The summary continues that "[s]uch a facility may continue to operate without the required permit(s) until the permit authority has either approved or denied the facility's application." Proposed new N.J.A.C. 7:26-2.1(d) does not include similar language granting an existing solid waste rail transfer facility the ability to operate while its permit application is being reviewed by the Department and it should be revised to do so. Furthermore, proposed new N.J.A.C. 7:26-2.1(d) should include language which makes clear that existing solid waste rail transfer facilities have 180 days to submit appropriate permit applications in order to comply with the amended rules irrespective of the federal deadline of April 16, 2009. (14)

RESPONSE to COMMENTS 33 and 34: The Department does not believe the suggested amendment is necessary because the rule states that existing rail carrier facilities that are in compliance with N.J.A.C. 7:26-2D.1(d)1 through 27 as of the date of repeal (i.e., the effective date of this amendment) have 180 days from such date to submit A-901 disclosure statements and a complete application for a solid waste facility permit. Therefore, provided that the existing rail facility is in compliance with N.J.A.C. 7:26-2D.1(d)1 through 27 at the time of this

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amendment, and submits the required information and application within 180 days from the effective date of this amendment, the facility may continue to operate until a final determination is rendered on those applications. From the effective date of this amendment to the date a final determination is rendered on the applications, the facility will be subject to the full solid waste facility permitting and operational requirements in N.J.A.C. 7:26, including the operating requirements of N.J.A.C. 7:26-2.11, 2B.9, and other provisions applicable to solid waste facilities, as required by the CRA and the Department's rules. Pursuant to State and Federal law, any existing facility that fails to submit the required application and information in a timely manner will no longer be able to operate.

#### Transfer of Solid Waste at a Facility other than a Rail Facility

35. COMMENT: The Department should make clear within its proposal and within the language of the rules at issue that the requirements therein do not apply to situations in which transfer of solid waste takes place at a location other than a solid waste rail transfer facility.

The summary of the Department's proposal states that "[t]he [Act] expressly authorizes states to regulate and permit solid waste transfer facilities" (emphasis added). However, the language of the amended rules fails to constrain the scope of the rules' effect to such facilities. For example, from the language of the rules, it would appear that the requirements described therein apply to the location of an overturned railcar, the contents of which are being re-loaded into another railcar. Such an absurd effect is not intended by the amended rules. Language should therefore be added to the amended rules to clarify the fact that, in accordance with the Act, the amended rules shall only apply to the location of permitted solid waste transfer facilities. (14)

RESPONSE: The Department does not believe that it is necessary to amend the rules as suggested by the commenter. With the adopted rules, rail carrier waste facilities are no longer exempted from permitting requirements, and the solid waste rules specifically define "solid waste facility" to exclude the situation described by the commenter. See N.J.A.C. 7:26-1.4.

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### Regulatory Status of Rail Carrier Agents

36. COMMENT: The Department should make clear within its proposal and within the language of the rules at issue its acknowledgement that agents of rail transfer facilities may operate those facilities and that such agents are subject to the requirements contained in the rules.

Solid waste rail transfer facilities are routinely operated by agents of the facilities' owners, but neither the current rules nor the proposed amendments thereto address this fact. The Department's proposal and the proposed amendments to the rules should therefore contain language setting forth the Department's position regarding requirements and obligations of facility owners' agents with respect to the operation of solid waste rail transfer facilities. (14)

RESPONSE: In the proposal summary, the Department stated that rail carrier solid waste transfer facilities will be subject to the same rules as other solid waste transfer facilities. Where a solid waste facility, including a rail carrier solid waste facility, is owned by one entity and operated by another, both are responsible for proper operation of the facility. See, for example, N.J.A.C. 7:26-2.8(p).

### Economic Impact on Rail Carriers

37. COMMENT: The economic impact of the Department's proposed amendments on rail carriers will be negative, and the Department's assertion that the adoption of the amended rules will result in lower costs to the public is erroneous.

The negative economic impact to rail carriers that will result from adoption of the amended rules will be substantial. The Department's proposal itself states that the potential initial costs incurred by rail carriers to comply with the new rules will likely total more than \$170,000 in application costs and related fees, and that rail carriers will likely incur at least \$31,500 in annual fees, going forward. These costs and fees are egregious and should be reduced to promote compliance with the amended rules by rail carriers. The Department also fails to acknowledge

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the additional, substantial costs that rail carriers will incur in preparing the applications for solid waste management plan inclusion, solid waste facility permits and the A-901 approval. Further, the Department fails to acknowledge the substantial time delay (in years) between the submission of permit applications and final action on a permit application, and the impact that this delay will have on the development of any new rail transfer facilities in the State. The Department's final statement that "applying the planning requirements of the Solid Waste Management Act to such transfer stations will allow solid waste management districts to engage in rational planning to deal with solid waste issues in their respective districts, resulting in lower costs to the public" is unsupported and not credible. In fact, application of the requirements in the Solid Waste Management Act to rail carriers will result in higher costs to the public as a result of the costs noted above. Additionally, governmental authorities will need to hire additional solid waste management district personnel and these personnel will have to familiarize themselves with the new requirements, develop methods for their enforcement, engage in discussions with rail carriers pertaining to them and enforce the requirements. The Department should include language in its proposal that sets forth an accurate assessment of the time and costs that will be required to implement the amended rules in order to give rail carriers and the public a true understanding of the impact of these amendments. (14)

RESPONSE: While there may be upfront costs as the commenter notes, the costs incurred by rail carriers will be offset by the societal and environmental benefits of compliance with the Solid Waste rules. The Department's experience has shown that properly designed and operated solid waste facilities actually lower public costs, as the public ultimately bears the cost of cleaning up contaminated sites and attendant health issues that can result from improperly designed and operated facilities. Additionally, since the subchapter 2D.1(d) rules for rail carrier solid waste facilities were derived from the solid waste permitting design and operating requirements, there will be few additional requirements with which governmental authorities must become familiar. Moreover, by requiring all facilities that transfer non-containerized solid waste to comply with the same Solid Waste rules and pay the same fees and costs, thereby leveling the playing field, all such facilities will be better able to compete, possibly lowering disposal costs for the general public.

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As to the Department's solid waste facility permit application and annual compliance monitoring and associated fees, the Department is statutorily authorized to charge fees for services rendered. See the Department's most recent fee rulemaking adopted effective January 7, 2008 (40 NJR 1339a) for an explanation of how solid waste permitting and compliance fees are calculated including an assessment of staff time spent and attendant costs. The Department has determined there is no reason to lower the fees for rail carrier solid waste facilities, since the amount of hours to process such permits and monitor compliance are expected to be the same as that for other solid waste facilities.

Lastly, the Department did not characterize costs to existing rail carrier solid waste facilities as minimal. The Department delineated the compliance and permitting costs involved and concluded that such costs would not represent "a significant negative economic impact." The Department believes that many of the design and operation of existing rail carrier solid waste facilities would be transferrable to the facility's solid waste permit, thereby reducing overall costs for existing rail carrier solid waste facilities. Additionally, the Department acknowledged in the Regulatory Flexibility Analysis that some rail carrier solid waste facilities may need to hire consultants and/or engineers to handle the planning and facility design requirements of the rules. Notwithstanding the costs that may be incurred, as stated above, the Department believes that such costs are offset by the significant benefits to society and the environment as a result of compliance with the Solid Waste rules.

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### Federal Standards Statement

N.J.S.A. 52:14B-1 et seq. and Executive Order No. 27 (1994) require State agencies that adopt, readopt, or amend State rules that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. Existing Federal standards for transfer stations are, at most, minimal, because rule of solid waste has traditionally been recognized as primarily a state rather than a Federal concern. See 42 U.S.C. § 6901(a)(4) (recognizing that although Federal guidance was required, the rule of solid waste disposal “should continue to be primarily the function of state, regional and local agencies”); Old Bridge Chemicals, Inc. v. New Jersey Dep’t of Env’tl. Prot., 965 F.2d 1287, 1292 (3d Cir. 1992) (“[A]lthough Congress recognized the need for Federal rule, it stated that ‘the collection and disposal of solid wastes should continue to be primarily the function of the State.’”); Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc., 48 F.3d 391, 398 (9th Cir. 1995) (“Congress has explicitly found that the field of solid waste collection is properly subject to state rule”).

New Jersey’s statutory and regulatory scheme to regulate the collection, transfer, and disposal of solid waste conforms to this Federal expectation that the collection, transfer and disposal of solid waste remain primarily a State function. The new Federal Act recognizes that the ICCTA, at least as interpreted by a number of courts and the Surface Transportation Board, unduly interfered with this longstanding understanding that State rule of solid waste was primarily a State function. Therefore, the Federal Act was drafted to restore to states the authority to exercise their traditional right to regulate the collection, transfer and disposal of solid waste at rail carrier transfer stations that handle noncontainerized solid waste. Enactment of this Federal Act allows that Congressional intent to be implemented, and restores in large part the traditional right of the states to regulate solid waste at noncontainerized rail carrier transfer stations that handle noncontainerized solid waste.

New Jersey is one of the most densely populated states in the nation and is highly industrialized. Its waste industry has historically been a target of organized crime. It is therefore particularly important for New Jersey to have a strong regulatory program governing the collection, transfer and disposal of solid waste. The adopted amendments will restore the ability of the Department to apply the Solid

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Waste Management Act, and the long-standing rules adopted pursuant to that Act, to rail carrier transfer stations that handle noncontainerized solid waste.

**Full text** of the proposal can be found in the New Jersey Register, 40 N.J.R. 7.

**Full text** of the adopted amendments follows (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from proposal indicated in brackets with asterisks **\*[thus]\***):

## SUBCHAPTER 2. DISPOSAL

### 7:26-2.1 Scope and applicability

(a) – (c) (No change from proposal.)

(d) A rail carrier as defined at (c)1 above that transfers noncontainerized solid waste to or from rail cars that is in compliance with N.J.A.C. 7:26-2D.1 as of (the effective date of **\*[the]\*** these amendments), shall submit the following documents within 180 days of (the effective date of these amendments):

1. The disclosure statements required under N.J.A.C. 7:26-16; **\*and\***

**\*[2. an administratively complete application consistent with all State and local requirements to the designated plan implementation agency for the purpose of seeking inclusion in the applicable District Solid Waste Management Plan. If the applicable Board of Chosen Freeholders, or the New Jersey Meadowlands Commission, as the case may be, has not amended the District Solid Waste management plan to include the facility pursuant to the requirements of N.J.S.A. 13:1E-23 et seq. within six months after receiving an administratively complete application for plan inclusion, the rail carrier shall submit same to the Department requesting plan inclusion; and]\***

3. Recodify as 2. (No change from proposal.)