Written Testimony of Brian X. Foley, Supervisor of the Town of Brookhaven, New York

Before the Subcommittee on Railroad, Pipelines, and Hazardous Materials Committee on Transportation and Infrastructure United States House of Representatives

October 11, 2007

Chairwoman Brown, Ranking Member Shuster, honorable members of the Committee, my name is Brian Foley and I am the elected Supervisor of the Town of Brookhaven, New York. Brookhaven is a town with approximately 480,000 people located in central Long Island. In my capacity as Supervisor I am on the front lines of land use regulation and enforcement. Land use, zoning and environmental controls are critical tools in preserving the local environment and quality of life of the taxpayers of my town.

I appreciate the committee allowing me to speak on the important topic of railroad preemption and its effect on local municipalities. As I will describe shortly, the current loophole in law has allowed a land owner in our town to wreak environmental havoc under the alleged shield of railroad preemption. I have been advised that in many other localities local land use and environmental controls are being compromised by unscrupulous operators who illegitimately use the shroud of railroad preemption to open and operate waste transfer facilities.

The purpose of my testimony is to speak in favor of the legislation that has been proposed to close the loophole that has been used to try and avoid state and local controls for siting of waste facilities at rail yards.

I will supply the committee with local newspaper accounts that describe in detail what has come to pass in the Town of Brookhaven but as the saying goes, "a picture is worth a thousand words." I have with me enlarged aerial photographs of the 28-acre site in the Town of Brookhaven. As you can see from this photo, in July, 2007, prior to the owner of the property invoking the shield of railroad preemption, this was a pristine 28-acre parcel of land. Now 18 acres of this site have been clear-cut and newspaper accounts indicate that over 1,000 cubic yards of sand were mined without any environmental review under the National Environmental Policy Act or New York's State Environmental Quality Review Act.

That is correct, no level of government, federal, state or local have given any environmental approval for this work.

The owners of this property undertook this large-scale construction project, clear-cutting 18 acres of trees and mining thousands of cubic yards of sand based on their representations to the state and local government that they qualified for federal preemption because they were a railroad facility. They represented that they were exempt from local regulations and subject to the exclusive jurisdiction of the federal Surface Transportation Bureau ("STB"). Because of the uncertainty that currently exists in this area of the law, those representations were initially deemed to be credible. Yet, it was recently learned that they had never submitted their actions to the jurisdiction of the STB. Further a September 25, 2007 decision of the STB warned the owner not to commence rail construction activities at the site without STB approval. As a result of my Town's inquiry and the articles in Newsday, on October 4, 2007 the STB issued a letter to the rail carrier now involved directing then to stop all activities at the site and explain their conduct to the STB. More recently, we have received correspondence from representatives of the owner that leads us to believe that they intend to use this property as a solid waste transfer facility.

Since I anticipate that Brookhaven may be engaged in some sort of litigation or adversarial proceeding with the owners and operators of this property, I want to emphasize our position that these individuals have not followed the appropriate procedures to qualify for federal preemption and for that the owners and operators of this property will be held responsible for their crimes against the environment.
However, the current climate of uncertainty that exists in this area has emboldened unscrupulous operators in this area and led to the situation that the Town of Brookhaven now confronts. This uncertainty about the scope of federal preemption has allowed alleged railroad operators to claim that federal statute preempts all state and local laws that might apply to the construction of rail facilities, no matter how attenuated they are from actual railroad operations.

On Long Island, the railroad has traditionally meant our commuter railroad, the Long Island Railroad that brings Brookhaven residents into New York City for employment. We never envisioned that a company that adjoins a railroad and constructs a few hundred feet of railroad track could morph itself into a waste disposal facility that was free from all federal, state and local environmental review and permitting requirements.
Before I describe the role of these levels of government, we should be clear about what is at stake here and the significance of waste processing facilities. These facilities process garbage: usually either municipal solid waste or construction and demolition debris. These materials contain contaminants that can be harmful to the environment. For that reason, state and local governments have adopted comprehensive regulations that govern the way waste can be processed and often impose ongoing monitoring requirements to ensure that the waste disposal process does not cause harm to our environment.

Solid waste has traditionally been in the domain of state and local government. While Congress has adopted a legal framework for regulating solid waste, the federal government has never assumed a large role in this area and as a result there a very few

federal regulations that deal with solid waste transfer stations. Regulation in this area has been left to state and local governments, which have ably filled this regulatory gap.

For example, in the Town of Brookhaven, we have regulations that govern, among other things, the zoning and site plans for waste transfer facilities and attempt to ensure that they are sited in appropriate places and adequate mitigation measures are taken. Our role is complemented by the role of New York State and its so-called 360 regulations that review the environmental impacts of the operations of a transfer station.

In the case of waste facilities that invoke railroad preemption, they claim to be governed by the STB, a federal agency that does not have any type of permit application or site selection process. Additionally, the STB does not have the ability to conduct meaningful environmental or health impact review or to ensure compliance with engineering or design standards. As I understand it, the STB's staff is limited to no more that 150 employees by appropriation and only a small number of those employees are responsible for conducting environmental reviews.

What has resulted is a regulatory gap that I don't believe was ever really intended. A gap that creates a situation where no level of government is policing the activities of facilities that by their very nature pose significant risks to our environment. Given the risks to the environment posed by this regulatory gap, immediate and decisive actions is needed by Congress.

CONCLUSION

Given the scarce resources of the federal government in this area and the limited reach of federal laws involving waste transfer facilities, there must be a role for state and local government in the area of regulating waste transfer facilities.

The mere fact that owners and operators in these situations claim to be rail related facilities, or in some cases allegedly operate as short line railroads, should not establish that they are rail carriers or that they are integrally related to rail operations so as to invoke federal preemption. In almost all of the cases I have seen or heard of, including the situation that has evolved in my town, the rail activity is merely secondary or incidental to the primary business, which is the processing and storage of solid waste.

For that reason, I would respectfully urge you to adopt an amendment to the Interstate Commerce Commission Termination Act to provide that rail facilities that process solid waste are not entitled to federal preemption.