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REGION I
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VIA E-FILE

January 26, 2006

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Comment on New England Transrail's Petition for Exemption
STB Finance Docket #34797

Dear Secretary Williams:

The Region I office of the United States Environmental Protection Agency ("EPA") respectfully submits this comment letter on the petition filed by New England Transrail, LLC ("NET") on December 5, 2005. The petition seeks an exemption from the Surface Transportation Board to build a truck-to-rails facility on property that is proposed by EPA for inclusion on the National Priorities List ("NPL") as a Superfund site (the "Site"). We write: (1) to inform the Board that the Site, which until recently was administered under the Massachusetts program for contaminated property, is now under EPA's Superfund jurisdiction; (2) to explain the process EPA generally uses to investigate and clean up Superfund sites; and (3) to advise the Board that EPA cannot consent to any activity at this Site until it makes its own determination that the Site is safe for human health and the environment, and that the proposed use will not exacerbate Site conditions or hinder EPA's remaining investigation and cleanup. Although EPA takes no position on how the Board should evaluate NET's petition, we are commenting now because we believe describing the Superfund process up front may aid the Board and the parties during any environmental review conducted by the Board.

1. The Site and EPA's jurisdiction

The petition seeks an exemption for construction of a truck-to-rails facility to be built by NET on part of a 53-acre parcel located in Wilmington, Massachusetts and currently owned by Olin Corporation ("Olin"). After decades of chemical use on the Site, this parcel became contaminated by hazardous waste materials in the soil, sediment, surface water and groundwater.

For many years, Olin investigated and cleaned up the property under the jurisdiction of the Massachusetts Department of Environmental Protection ("MassDEP"). Eventually Olin and MassDEP were unable to agree on how to address a liquid plume of hazardous substances (including a probable carcinogen) that had migrated off the

property and had contaminated the town's primary source of drinking water. In August 2004, MassDEP referred the Site to EPA. EPA determined that the overall threat posed by this plume was high, and proposed that the Olin property, the plume and other contaminated areas be included on the NPL as the "Olin Chemical" Superfund Site in September 2005.¹

With this proposed NPL listing, EPA took jurisdiction over the Site under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), more commonly known as the Superfund law.² The proposed listing makes the Site eligible for federal funding to assess the nature and extent of contamination and to evaluate the potential human health and ecological risks under CERCLA. On December 6, 2005, in deference to EPA's assumption of jurisdiction, MassDEP notified Olin that it was suspending its review of most reports, investigations, and proposals associated with the Site, including deliverables associated with the NET redevelopment proposal. EPA now has primary responsibility for determining the full extent of remaining contamination and evaluating any human health and ecological risks under CERCLA.

2. The CERCLA process in general

To carry out our responsibility to determine the presence of and address any unacceptable risks to people and the environment at the Site, on January 12, 2006 our office notified Olin and three prior owners of the property that they are potentially responsible parties ("PRPs") under CERCLA. With these notices, EPA commenced the comprehensive process prescribed by federal law by which EPA and the PRPs investigate and clean up Superfund sites. We outline this process here in general terms for the benefit of the Board; its expected application to the Olin Site in particular is described in the next section.

After the notice of liability, EPA and the PRPs generally undertake a "remedial investigation" and "feasibility study." The purpose of the remedial investigation is to determine the full nature and extent of contamination at the site and to assess potential human health and environmental risks. The feasibility study develops different ways of cleaning up the site, to the extent further cleanup is determined to be necessary. Once this remedial investigation and feasibility study are done, EPA issues a "proposed plan" that identifies its preferred cleanup method, and compares it to several alternatives. EPA then solicits public comments and seeks state concurrence with its proposal, and issues a "record of decision" that describes the remedy selected. This commences the "remedial

¹ 70 Fed. Reg. 54327 (Sept. 14, 2005). The comment period on the proposed listing closed in November 2005. Although EPA calculated the hazard ranking score for the Site (used to evaluate whether the overall threat of contamination is sufficient to warrant inclusion on the NPL) based solely on groundwater contamination, this does not mean that other media are not significantly contaminated. Other media and associated pathways of exposure (i.e., ingestion of soil) were not evaluated because it was determined that the groundwater contamination alone was sufficient to include the Site on the NPL. This single-media approach to calculating a hazard ranking score minimizes the resources needed to propose a site on the NPL, and does not indicate a lack of concern about exposures to other media.

² 42 U.S.C. § 9601 *et seq.*

design" phase, which produces a detailed plan for implementing the remedy. The cleanup itself is called "remedial action." The work involved in each phase of this investigation and cleanup is typically allocated between EPA and the PRPs in one of three ways: (1) PRPs do the work pursuant to settlement agreements negotiated with EPA (e.g., a settlement agreement requiring the PRPs to do a remedial investigation and feasibility study); (2) EPA issues an administrative order compelling the PRPs to do the work in question; or (3) EPA does the work itself, then sues the PRPs later to recover the Agency's costs.

Throughout this process EPA must develop a comprehensive plan for soliciting the views of the local community, through (for example) interviews, publications, technical assistance grants, information repositories, public comment periods, and public meetings.³ Typically an entire Superfund site (which at the Olin Site includes the 53 acres that NET proposes to acquire from Olin, adjacent drainage ditches, the town aquifer, and possibly downstream water bodies) is investigated and cleaned up as a single unit, although it is not uncommon for EPA to divide a more complex site into multiple "operable units," investigating and cleaning up discrete areas or media at different times.

One additional aspect of the CERCLA process bears mentioning. With the "Brownfields Amendments" to CERCLA, the statute is now expressly designed to encourage redevelopment of Superfund sites. Before these amendments, all owners of a site were potentially liable regardless of when they acquired the property, and without regard to fault. Under the amended law, a developer can buy property that is already part of a Superfund site without incurring liability under CERCLA so long as the developer does the following:

- makes appropriate inquiries into prior uses of the property before buying the property;
- gives proper notice of any hazardous substances the developer discovers or releases on the property;
- exercises appropriate care with respect to hazardous substances by taking reasonable steps to stop any continuing releases, prevent any threatened future release, and prevent or limit exposure to any previously released hazardous substances;
- "provides full cooperation, assistance, and access" to persons carrying out EPA's investigation and cleanup;
- complies with EPA's information requests; and
- "does not impede" EPA's investigation and cleanup.⁴

These requirements and others give EPA significant control over the developer's activity at a site.⁵ EPA will generally not concur with any activity at a site unless it determines

³ See, e.g., 40 C.F.R. § 300.430(c).

⁴ The full list of prerequisites is at 42 U.S.C. § 9601(40) and 42 U.S.C. § 9607(r)(1).

⁵ Another relevant authority is 42 U.S.C. § 9622(e)(6). It says that, once a remedial investigation has been initiated, a potentially responsible party may not "undertake any remedial action," i.e., perform

that the site is safe for human health and the environment, and that the proposed use will not exacerbate site conditions or hinder EPA's investigation and cleanup.

3. The CERCLA process at this Site

This Site comes to EPA after Olin and NET have invested significant resources investigating and cleaning up at least part of the Site for MassDEP. Olin and NET met with EPA on Thursday, January 19th to emphasize this point and their willingness to work with EPA going forward. One significant question faced by everyone interested in the Site is how this prior work for MassDEP affects the CERCLA process described above.

As with any other site we expect to conduct a remedial investigation. This remedial investigation may be different from a typical remedial investigation, at least as far as the part of the property proposed for development is concerned, because EPA has the benefit of the data already collected under MassDEP requirements. But CERCLA standards differ from state standards, and additional investigations and cleanups may be warranted beyond those already carried out under state programs. One of our first tasks will be to evaluate this large volume of existing data, to determine whether it is in a form EPA can use to make decisions – i.e., is the data sufficiently rigorous with regard to density and quality to satisfy federal standards. Once any data gaps are identified and filled, we must interpret the data to make our own determinations as to whether there are any unacceptable risks in the area to be redeveloped, and whether construction and operation of the proposed development will exacerbate existing conditions or interfere with any further investigation and cleanup. If EPA determines that there are unacceptable risks, then EPA must select an appropriate cleanup action to deal with the risk. It will then look to the PRPs to perform the cleanup pursuant to a settlement agreement. (This settlement agreement might also delegate performance of part of the cleanup to NET, if NET and the PRPs were interested in such an arrangement.) This cleanup could be documented with a feasibility study, a proposed plan, a record of decision, and a remedial design, or possibly in a more streamlined process. In addition, EPA's investigation and any cleanup must satisfy CERCLA's public participation requirements, including any applicable requirements for public comment.

Given the documented presence of contamination at this Site, redevelopment cannot proceed before our investigation of the area to be developed has been completed.⁶ Our plan to do a remedial investigation before any redevelopment proceeds is not based on a bias against this or any other development proposal for the Site. On the contrary, EPA's policy is to design cleanup plans that encourage environmentally sound

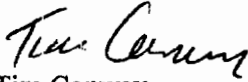
any cleanup, unless that remedial action has been authorized by EPA. This section makes clear Congress's expectation that, once EPA has begun investigating a Superfund site, owners of the site are not to try to clean it up unless that cleanup has been expressly authorized by EPA.

⁶ From a practical point of view, if NET were to break ground before completion of the remedial investigation, this activity (which under NET's proposal would involve extensive excavation and installation of foundations, concrete pads and paved areas) could change the soil profile and alter the Site's hydrology, potentially affecting our ability to use much of the existing data that everyone hopes will streamline the investigation.

redevelopment of Superfund sites. But our primary mission under Superfund is to ensure that a site is properly investigated and, as deemed necessary, remediated to a safe level for both human health and the environment. Doing this job requires us to know that a Superfund site is safe to use according to standards prescribed by federal law, and to know it by fulfilling the remedial investigation obligations imposed by federal law. As we begin this remedial investigation process, we look forward to working with all the interested stakeholders at this Site.

We appreciate the Board's consideration of our comments, and hope that the Board finds our outline of the CERCLA process to be useful. If the Board should have any questions, please contact the Site Remedial Project Manager, Jim DiLorenzo, at (617) 918-1247, or Wesley Kelman of my legal staff at (617) 918-1540. We also request that the Board and the parties serve us (attention: Jim DiLorenzo; dilorenzo.jim@epa.gov) with copies of future filings and decisions in this proceeding.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Tim Conway".

Tim Conway
Chief, Superfund Legal Office, EPA Region I

CERTIFICATE OF SERVICE

I certify that on this 26th day of January, 2006, I have caused a copy of the foregoing to be sent to the following persons by e-mail and first-class mail:

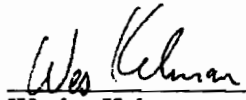
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