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July 8, 2003

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Please Reply to Milford

Via Facsimile and Federal Express

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

JUL 09 2003

Part of
Public Record

FD-34365

Re: New England Transrail - Notice of Exemption-Boston and Maine Railroad

Dear Secretary Williams:

Enclosed please find for filing the original and ten copies of the reply of New England Transrail, LLC to the Petition of the Town of Wilmington seeking to stay the exemption. Also, enclosed please find the submission on a 3.5" disk in Microsoft Word 6.0. Please note that the maps which are enclosed as Attachments A - E have not yet been placed on disk. I will provide them in this format as soon as they are available.

Thank you for your attention to this material.

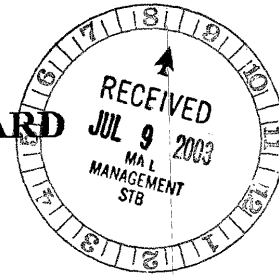
Sincerely,

Paul Jacobi

PJ/gm
Enclosure

cc: Michael J. Newhouse, Esq., Michael J. Newhouse & Associates, P.C.,
(w/enclosure), *Via Federal Express*
Paul DeRensis, Esq., Deutsch, Williams, Brooks, DeRensis & Holland, PC,
(w/enclosure), *Via Federal Express*

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SURFACE TRANSPORTATION BOARD**NOTICE OF EXEMPTION****FINANCE DOCKET NO. FD 34365****NEW ENGLAND TRANSRAIL, LLC, EXEMPTION FOR OPERATION AS A
CLASS III CARRIER OVER LINES OWNED BY THE BOSTON AND MAINE
RAILROAD COMPANY****REPLY OF NEW ENGLAND TRANSRAIL, LLC TO PETITION OF
TOWN OF WILMINGTON****ENTERED
Office of Proceedings****JUL 09 2003****Part of
Public Record**

The Notice of Exemption at issue describes the creation of a terminal railroad to serve a reload facility to be built on a brownfield site. The site is infamous, having been the site of a major environmental incident involving its former occupant. The site has undergone significant remediation to date and that process continues. However, local fears cause the Town of Wilmington (the "Petitioner") to seek to block any use of this property. While the applicant understands the local concerns and their source, brownfields are the only sites now available on which to build rail facilities needed to serve urban areas. Means must be developed to return these lands to use. It is respectfully submitted that the Massachusetts Executive Office of Environmental Affairs ("EOEA") and its subordinate agency the Massachusetts Department of Environmental Protection ("DEP"), and not the Petitioner, are the agencies charged under Massachusetts's law with oversight of this process.

Petitioner objects to the Exemption based upon a shopping list of potential hazards which the town claims are not adequately addressed in the submissions. The EOEA and DEP have not filed an objection to this development of a site it is supervising. Indeed, the EOEA did approve the prior warehouse development, generating twice the traffic as the Railroad's proposed plan. Petitioner does not point to any specific danger to the public arising from this project that have not already been addressed by the EOEA or DEP. Petitioner relies entirely on highly unlikely events.

Even under Massachusetts's law, which the Board is not required to follow if it impedes rail transportation, a town, objecting to a project, may not block the project just by pointing to deficiencies in the environmental submission. Under Massachusetts law it is not up to Petitioner to demonstrate that the facility "would not pose a danger." Rather, an application must be approved unless the Town's Board of Health finds that the facility "would constitute a danger." Massachusetts's Superior Court has found that speculative possible events, such as Petitioner outlines here, are insufficient to establish "a danger", See: Wood Waste of Boston v. Board of Health of the City of Everett, 1998 WL 1184154

(1998 Mass. Super.) (in which the Superior Court of Massachusetts dismissed claims similar to those raised here, and the local City therein also pointed to deficiencies in the environmental statement, as does Petitioner. The Court held this to be inadequate, as they do not show "a danger" in fact). As to the Board, the decision of these agencies must be persuasive.

The Board itself addressed similar issues of accidental spills in a rail yard overlaying a drinking water aquifer in Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971. In that case the Board determined that development of a rail yard over an aquifer could proceed because impermeable surfaces and catch basins would be installed to provide protection if fuel or oil leaks occurred. In response to concerns raised in meeting with Town officials, the Railroad has proposed a similar condition in all areas where hazardous materials may be handled which will be covered with impervious surfaces and appropriate curbing and/or other catchment mechanisms (See Item # 4, below). Consequently, Petitioners have not raised any issues herein that could warrant the Board's granting of a stay of the Board's decision.

The following discusses in detail on a point-by-point basis the claims raised in the Petition for Stay of Exemptions:

1. (Page 1) *...site which is undergoing environmental investigation and remediation without examining in any meaningful way the impact of the proposed facility on that investigation (including data collected) and on the already overburdened Site, adjacent dwellings and downstream water supply.* [Emphasis added]

The Railroad's proposed development and operations will have no impact on Olin's continuing remediation obligations in connection with the Property or the Site.

The DEP has determined that conditions at the Property are suitable for commercial development, provided that Olin meet the requirements of the DEP Policy No. WCS-00-425, *Construction of Buildings in Contaminated Areas* (Construction Policy).¹ In its Conditional Approval of the Part 1 RAM Plan, DEP established site-specific requirements for remedial action under the Construction Policy. These requirements have been substantially met by the response actions taken at the Property in 2000 and 2001, and by the on-going, post construction monitoring programs. The remaining response actions are related to the remediation of conditions that were caused by, identified during, and/or characterized as part of the RAM, or were specifically intended to be performed as part of the redevelopment of the Property.

The outstanding response actions include the removal of a limited quantity of oily soil in the vicinity of Central Pond, the excavation of a limited quantity of soil in the former Lake Poly Area, and the closure of the former bioremediation cell. As these additional response actions are scheduled to take place this summer prior to the redevelopment of the Property by the Railroad, it is the Railroad's opinion, and

¹ See DEP Conditional Approval of Part 1 Release Abatement Measure (RAM) Plan, dated June 23, 2000.

Olin's, that these response actions will not impact the development, nor will the development prevent, delay, or complicate the completion of further assessment or remedial actions that may be required to meet the requirements of the MCP.

The installation of a permanent cap over the DAPL containment area is planned as part of the redevelopment of the Property by the Railroad. A temporary cap is in place, and will be maintained by Olin until such time the permanent cap is installed.²

In its Conditional Approval, DEP also required that the level of No Significant Risk (NSR) be achieved prior to the occupation of the proposed building in the vicinity of Plant B. This requirement was based on a determination that *if* a building were constructed in the vicinity of Plant B, there could be a potential risk to the occupants of the building due to the accumulation of soil gas in the structure. Currently there are no structures (other than remediation structures) that occupy the area, and it has been determined that conditions in the area do not pose an unacceptable risk to workers or visitors to the Site. We note that under the new Railroad development plan proposed by the Railroad, no structure will be built, or occupied, in the vicinity of Plant B. Therefore, no unacceptable risk will exist in this area.

Finally, DEP's Conditional Approval references the pending closure of the Calcium Sulfate Landfill (Landfill). The Landfill is located at the southernmost portion of the Property, and is not located within the area that the Railroad proposes to develop. In its Conditional Approval, DEP acknowledges that the closure of the Landfill is being handled as a separate matter, and therefore, there were no specific requirements for addressing the landfill vis a vis the Construction Policy. The proposed development will not prevent, delay, or complicate the final disposition of the Landfill.

Although the Railroad's development is not expected to materially affect the remaining assessments and remedial action that may be required at the Property and could proceed without DEP approval, the Railroad will not proceed with the redevelopment of the Property until it has received an opinion from a Licensed Site Professional (LSP), that conditions at the Property meet the requirements of the Construction Policy.

2. (Page 2) *Town residents substantially rely upon the drinking water supply down gradient from the Site, portions of which already have been closed due to contamination from past operations at the Site.*

It should be noted that there is an important distinction between the "Property", and the Olin Site. The Olin Site (the Site) is the entire geographical area affected

² Olin monitors the condition of the cap, and submits a report to DEP on a quarterly basis that summarizes the results on a monthly basis. In addition, the performance of the subsurface containment system is evaluated semi-annually.

by the historical releases of oil and hazardous materials from the Property at 51 Eames Street (the Property). The Property, which is the land that the Railroad proposes to develop, is only a small portion of the Site. A portion of the Site does in fact extend into the recharge area for the Town of Wilmington Water Supply Wells, and the Ipswich River Basin. However, the Property is located 1000 feet from the mapped recharge area, and over 3500 feet from the town wells. Additionally, most of the Property, and all portions of the Property that are to be developed by the railroad, are located within the mapped boundary of the Aberjona River Basin. Annual and quarterly groundwater monitoring, and detailed hydrogeologic modeling by Olin, clearly demonstrates that there is little, if any groundwater contribution from the Property to the recharge area to the Town Wells, and the Ipswich River Basin.³ Therefore, the existing environmental conditions at the Property, and the proposed development activities at the Property, will have no material impact on water quality in the recharge area to the Town Wells, or in the Ipswich River Basin. In fact, it is Olin's opinion that the proposed Railroad development will likely have minimal impact on groundwater even *at the Property itself*.

It should be noted that as a result of the response actions performed as part of the RAM in 2000 and 2001, most of the soil and groundwater contamination at the Property was either removed or contained. The very limited response actions that are scheduled to be completed this summer, will further reduce the levels of contamination in soil at the Property, and the continued operation of Plant B, and the maintenance of the DAPL containment area, ensure that little, if any remaining contamination at the Property could migrate in groundwater, away from the Property.

3. (Page 2) *there will be interference with the ongoing, yet incomplete, investigation and remediation of hazardous materials at the Site.*

The Railroad's development and operations will be on the Property, which is a small portion of the Site, and will not in any way interfere with the continued assessment or remediation of other portions of the Site.

The Railroad has agreed with Olin that it will comply with all orders issued by the DEP related to the Property which are deemed final and non-reviewable as they relate to investigations and remediation of the Property. As a result of its contractual obligations and undertakings, the Railroad's proposed development and operations will not interfere with any investigations or remediation of the Property or the Site.

³ A more detailed discussion of the extent to which groundwater at the Property contributes to the Aberjona River Basin, as opposed to the Ipswich, is presented in correspondence to DEP from GEI Consultants, Inc. dated June 27, 2000, which was referred to in Item 2 of Exhibit D to the Environmental Report, "Responses to Comments from Town of Wilmington on Environmental Assessment Form".

4. (Page 2) *the importation, possible storage, and transportation of such hazardous materials has not been heretofore considered by Applicant, DEP, the Olin Corporation, or any other party involved in remediation activities.*

As stated in Item 3 of Exhibit D to the Environmental Report, "Responses to Comments from Town of Wilmington on Environmental Assessment Form", hazardous materials will not be "imported" to or "stored" on the Property.

Olin and the Railroad have considered the potential impact of a release of hazardous material or oil at the Property. However, most of the residual contamination at the property is in groundwater, at depths generally greater than 10 feet below the ground surface, and is either contained within a capped subsurface containment area, or under paved surfaces. Additionally, under the development plan, most of the residual contamination in the Railroad's development area will be under paved or treated surfaces. Therefore, we do not anticipate that the accidental release of hazardous material or oil would pose a greater threat at this Property, than it would at any other commercial or industrial property.

The Railroad acknowledges that hazardous materials will be transported through and reloaded at the Property, and that these materials could include wastes generated by the remediation of the Olin Site. The Railroad is subject to state and federal laws governing the handling, storage, transportation, and disposal of hazardous materials, and has every intention of complying with these regulations. In consideration of the Town's concerns, however, the Railroad will take the following steps, whether or not they are required by law, to minimize the risk posed by these activities: (i) hazardous material or oil will not be stored on the Property; unless it is related to the remediation of the Olin Site. In this case, the storage of the material will be subject to the requirements of the Massachusetts Contingency Plan (MCP). (ii) hazardous materials will be reloaded either through pumping directly between railcars and tanker trucks, or lifting sealed intermodal containers between trucks and railcars; (iii) *all reloading of hazardous materials will occur on an impervious surface with appropriate curbing or other methods to capture any accidental leaks or spills*⁴; (iv) any such material which does leak or spill will be collected and discharged or taken to an appropriate treatment facility; and (v) the railroad will inform the Town Fire Chief as to the quantity and type of hazardous material to be transloaded prior to transloading the same. Consequently, even when handling hazardous materials, the railroad's activities will not have a material adverse impact on the investigation or remediation activities of the Property or the Site or on the contamination currently existing thereon.

⁴ See Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971, discussed above.

5. (Page 3) *The rail line which the Applicant proposes to use runs through numerous sensitive environmental areas...absolutely no information has been provided regarding any measures to prevent contamination of these areas by accidental releases, daily operations, or sabotage.*

The Railroad is unaware of any Areas of Critical Environmental Concerns ("ACEC") at or adjacent to the Property. Railcars bound for or dispatched from the Property will pass through many sensitive environmental areas in their travels to or from distant points as they do now whether traveling by highway or rail. Needless to say, the environmental effect of the Property and the surrounding Site will be de minimus, and off-Site will be a fraction of de minimus. As the Massachusetts Courts have held, such speculation does not establish a danger justifying rejection of any project, let alone a rail project.

6. (Page 3) *the Applicant does not have an enforceable purchase and sale agreement with the Olin Corporation... Therefore, the Applicant does not have...an interest*

The Railroad has entered into a memorandum of understanding with Olin, which sets forth the basic business terms between the parties, and the Railroad intends to purchase the Property pursuant to an Option and Purchase Agreement which it expects to finalize by July 11, 2003, the effective date of the Board's Order.

7. (Page 3) *With regard to the Olin Corporation, pursuant to M.G.L. c21E, it is liable for the complete remediation of historic and ongoing contamination both at, and emanating from, the property at 51 Eames Street. This obligation survives any potential sale to a third party purchaser. Furthermore, representatives of Olin Corporation have publicly stated on numerous occasions that it has both the intention and financial ability to meet this obligation...* [emphasis added]

By their own admission, Petitioner has conceded that the Olin obligation to investigate and remediate the Property and the Site will survive even after the Railroad has developed and operates the Property. The Railroad has obligated itself not to do anything which will impede Olin's obligations. Therefore, the proposed development cannot, by contract or operation of Massachusetts's law, interfere with remediation of the Property or the Site.

8. (Page 3) *On the other hand, once the exemption is effective, the Applicant could take certain actions that will further complicate the Olin Corporation's obligation to remediate the contaminated Site. In this regard, the stay would be in the interests of the Olin Corporation.*

This speculation can find no support in fact or in logic. In addition to contractual obligations forbidding this result, the Railroad has nothing to gain and much to lose by interfering with Olin's efforts. As stated above, the Railroad is under contractual obligation to Olin not to impede Olin's obligations to remediate the Site or the Property. Furthermore, as indicated in Item # 3 above, the Railroad

will under its agreement with Olin remain subject to any final and non-reviewable orders of the DEP in connection with remediation of the Property and Site.

Olin is in the best position to decide whether this is the case and it has deemed that it is in its best interest to allow the Railroad to proceed with development of the Property. The Railroad has a limited time in which to complete its due diligence regarding the Property, and if it decides not to purchase the Property, Olin would lose its only prospective purchaser, which would not be in Olin's best interest.

9. (Page 3) *...Town residents (who rely on the drinking water supply already affected by the contaminated Site), and residents of other municipalities who rely upon the Ipswich River Watershed, clearly would benefit to have meaningful input into the development of the Site. Indeed, elected representatives have affirmed the need to complete present investigation and remedial activities before the Site is assigned a new use.*

As stated above, the proposed development of the Property by the railroad will not impact the drinking water supply, or the Ipswich River Watershed. As indicated in Item # 2, above, ground water from the Property does not contribute significantly to groundwater flow into the Ipswich River Watershed. Government and private environmental experts and hydrological engineers have reached this conclusion after 17 years of detailed investigations. The determination of the DEP is persuasive of this issue.

Elected officials have publicly demanded that Olin not be allowed to develop the Property until all contamination is removed from the Property and the Site.⁵ This position is not consistent with DEP's Construction Policy, or with the Massachusetts Brownfield Act⁶ (Chapter 206 of the Acts of 1988), which is intended to facilitate the beneficial reuse of contaminated properties in a manner consistent with the MCP.

⁵ A prime example is the dispute involving the DAPL area of the Property. The DAPL area comprises more than 4 acres running a considerable depth to bedrock. Certain dense liquids have contaminated this area and have settled in a layer on the bottom area on top of the bedrock. The approach accepted by DEP was for Olin to construct a three foot thick concrete slurry wall which extends to bedrock so as to contain contaminants and prevent further water infiltration into the area, thus preventing any further impacts on surrounding groundwaters. The aforementioned 'officials' want all soil removed from the DAPL area, an undertaking which Olin refused to accept and the DEP determined would not be necessary under its regulations.

Wilmington Advocate, December 12, 2002, "There isn't enough outrage in this community. This company has made this place a living hell, and I'm not exaggerating," he said. They (Micelli and residents) want Olin to stop a pending sale of its property."

Lowell Sun, August 27, 2002, "He echoed demands to stop a sale and called Olin's refusal to pay for a town consultant suspicious."

⁶ Chapter 206 of the Acts of 1988, An Act Relative to the Environmental Cleanup and Promoting Redevelopment of Contaminated Properties.

Nothing could be further served by additional studies other than the Petitioner's goal to prolong the process indefinitely until the DEP and Olin accept Petitioner's demands regarding the Site, which are unrelated and irrelevant to the Railroad's development or operations of the Property, and have been studied at length. The determination of the DEP is persuasive of these issues.

10. (Page 4) *In short, the Town was never consulted in advance to afford its administrative officials an opportunity to have meaningful input with regard to the Applicant's formulation in its ER.*

The Railroad exceeded the notification requirements of 49 C.F.R. 1105.7. That Section calls for an Environmental Report to be sent out twenty days in advance of a submission to the Board. The Railroad, in fact, sent the report out on May 10, 2003, but did not file its Notice for Exemption until June 19, 2003—forty days later, or double the time required. In fact, the Railroad decided to delay its filing as a result of a request from the Town Manager, Michael Cairra, at a public meeting attended by the railroad on May 28, 2003.

Furthermore, 49 C.F.R. 1105.7(b) required the Railroad to notify the County and various State agencies 49 C.F.R. 1105.7(b)(1)-(11), but did not require the railroad to notify the Town directly. Nevertheless, as an accommodation to the Town and to provide the Town sufficient time to have input into the Environmental Report, the Railroad sent a copy of the report directly to the Town on May 10, 2003, and attended a public meeting on May 28, 2003 at the Town to discuss the Environmental Report.

As indicated in Exhibit E to the Environmental Report, the Railroad's representatives have continued to meet with elected officials. Since submitting its Notice for Exemption, the Railroad officials again met with concerned citizens on June 24, 2003 at the Wilmington Public Library and addressed many of the concerns previously brought out on the May 28, 2003, meeting and addressed in Exhibit D to the Environmental Report, "Responses to Comments From Town of Wilmington on Environmental Assessment Form".

As previously stated and as indicated by the vast majority of Petitioner's comments, which are unrelated and irrelevant to the railroad's development or operations of the Property, and have been studied at length. Petitioner's goal is to prologue the process indefinitely until the DEP and Olin accept the Petitioner's demands regarding the Site, as discussed in Item #9, above.

In an attempt to claim that the Railroad made material false and misleading statements, Petitioner has clearly mischaracterized the Railroad's statements and Petitioner has made its own false and misleading statements. These statements are discussed below.

11. (Page 5) *The Applicant noted, "The Site (51 Eames Street) is the closest available Site to downtown Boston and the inner Beltway (Interstate 95) serving the area" In fact, the company, CSX, Inc., owns a perpetual railroad easement at their Beacon Yards freight loading facility in Allston, MA... within minutes of the Massachusetts Turnpike (Interstate 90) and downtown Boston. [Emphasis added]*

First, the Railroad stands by its statement that the Property is the "closest available". This statement was made as part of the Railroad's discussion of its search for alternative locations for rail transloading facilities which are in short supply in the Boston Metropolitan area. The Allston Yard location referred to by Petitioner is already occupied by CSXT, Inc., and for that reason is not "available" for development by the Railroad as a new rail infrastructure in the area.

Second, the Railroad's statement was referring to the proximity to two key geographic locations; those being both downtown Boston and the Beltway (I-95), which is obviously desirable for local transportation. Petitioner erroneously suggests, that the Railroad was only referring to one geographic location—that being downtown Boston.

12. (Page 5) *Furthermore, the Eames Street Site is not 10 miles from downtown Boston as the Applicant has stated. In fact, the Site is approximately 20 miles from downtown Boston.*

Petitioner has made an egregiously inaccurate statement. First, the Railroad stated that the facility was "approximately ten miles from downtown Boston"—a rounding approximation. As the attached computer generated maps prove (see Attachment A), the south end of the facility is approximately 10.3 miles from the Allston area of Boston—a major commercial area, and 11.3 miles from the Fleet Center—well within the rounding approximation. Even when measuring road mileage from the northern end of the facility, the distance is only 13.5 miles (see Attachment B)—again within a meaningful approximation.

By contrast, Petitioner's claim that the facility is 20 miles from downtown Boston is absurd. As the attached computer generated map proves (Attachment C), a 20 mile radius from the facility goes completely beyond all of Boston—even beyond the separate towns of Quincy and Dedham to the south and Natick to the west.

13. (Page 5) *The Applicant also claims, "The next closest available location in Tewksbury, Massachusetts...comprises only 8 acres and is located approximately 30 miles from downtown Boston—more than double the distance to downtown Boston..." In fact, Tewksbury is an adjoining community immediately to the northwest of Wilmington and is by no means 30 miles from downtown Boston."*

Again, Petitioner is attempting to mislead the Board. First, while Tewksbury does adjoin Wilmington to the northwest, the Railroad's proposed facility is in the

southeast corner of Wilmington and the property which the Railroad examined in Tewksbury is in the northwest corner of that town—almost 9 miles distant. Second, as indicated on the attached computer generated map (Attachment D) the Tewksbury site measures 28 road miles to downtown Boston—within meaningful approximation of the Railroad's statement of "approximately 30 miles" (Attachment E).

14. (Page 5) *the Applicant fails to note that the site is within ½ to ¾ of a mile from over 100 homes located on Eames Street, Main Street, Woburn Street, Morse Avenue, Woodside Avenue, Melrose Avenue, Denault Drive, Holt Street, Lawn Street, Brentwood Avenue, Argone Street and Verdun Road. Notably, a 132-Unit nursing home known as the Sunbridge Care & Rehabilitation Center for Wilmington is located on Woburn Street.*

The Railroad did not describe the aforementioned distant residences, first, just because they are so distant, and, second, because there are intense industrial as well as the Railroad freight and commuter activities between the Property and these residences. Both of these factors serve as buffers from any impacts from the proposed facility.

As discussed in Items # 20 and 23, below, except for less than a half dozen homes along already industrial trafficked Eames Street, truck traffic from the facility will not have a significant material impact on these residences because it will flow away from these areas. This issue was previously addressed by the DEP—See Item # 4 of Exhibit D to the Environmental Report, "Responses to Comments From Town of Wilmington on Environmental Assessment Form". The determination of the DEP is persuasive of this issue.

The Railroad accurately described the adjoining uses completely surrounding the Property. The aforementioned residential areas, as admitted by Petitioner, are a considerable distance to the northeast and southwest of the Property.

15. (Page 6) *It is the position of the Massachusetts DEP that redevelopment of the Site should not and cannot occur until remediation measures are complete.*

The foregoing is an untrue statement on several levels. First, DEP has not taken any position regarding the redevelopment of the "Site". DEP did, however, conditionally approve the redevelopment of the Property in 2000, provided certain conditions are met. As noted in the Railroad's response to Item # 1, these conditions have substantially been met, or will be met prior to or concurrent with the Railroad development. Second, DEP regulations and policy in fact permit the redevelopment of the contaminated land provided that the development activities do not result in an unacceptable risk to human health, and that the installation of permanent structures, or the use of those structures, would not interfere with the assessment and remediation that is needed to meet the requirements of the MCP.

As described in the Railroad's response to Item #1, the development is not expected to prevent, delay, or complicate the completion of further assessment or remedial actions that may be required to meet the requirements of the MCP.

Finally, we note again that the Commonwealth of Massachusetts has passed legislation that is intended to *encourage* the redevelopment of contaminated properties for beneficial reuse.

As previously stated, the Railroad will not proceed with development of the Property until it has obtained an opinion from an LSP that conditions at the Property meet the requirements of the Construction Policy, and the MCP. The determination of the DEP is persuasive of this issue.

16. (Page 6) *The Aquifer Protection Area overlays the northern part of the 51 Eames Street site and has been designated by the Massachusetts DEP as a Zone II Aquifer Recharge Area. The groundwater in this area contributes as a major source of the Town's drinking water.*

As described in the aforementioned correspondence to DEP from GEI Consultants, Inc. dated June 27, 2000, only a very small portion of the Property is located within a mapped Groundwater Protection District (GWPD). The portion of the Property within the GWPD is limited to an area, less than 5 acres, adjacent to Eames Street. This area is currently occupied, and will continue to be occupied in the future, by two remediation systems, consisting of a groundwater recovery and treatment system, and an air sparging and vapor extraction (AS/SVE) system. As a result, the Railroad has no plans to develop this portion of the property. It should also be noted that GEI, in its correspondence to DEP, demonstrates that the designation of this area as part of the GWPD for the Town Water Supply Wells located to the west of the Property is not supported by the site specific data developed by Olin and others. In fact, groundwater and runoff at this portion of the Property flows to the east, to the East Ditch, and drains into the Aberjona River Basin. The Petitioner (The Town of Wilmington) has been aware of the inaccuracy of the estimated boundary of the GWPD since July 2000, when GEI's letter, and DEP's response to that letter, were submitted to the Wilmington Building Department for consideration in Olin's request for a variance to the Town's by-laws related to the recharge of stormwater run-off.

Furthermore, as discussed in Item # 4 above, all loading and unloading will be performed on a protected and curbed impervious surface which will prevent contact with the soil in the event of accidental spills or leaks as a primary protective measure, together with an emergency response program which will be deployed as a secondary protective measure.

17. (Page 6) *In any case, over 10 years of investigation have concluded that contaminants disposed of at 51 Eames Street site have migrated into the Maple Meadow Brook Aquifer which feeds the Ipswich River Basin. These contaminants are highly likely to be responsible for the detection of N-nitrosodimethylamine (NDMA) in samples of groundwater obtained from 4 of the 5 municipal wells in south Wilmington.*

As discussed in Items # 1, 2, 3 and 7, above, the Railroad's development and operations at the Property will neither reverse nor contribute to this contamination, nor will it impede its remediation. Consequently, this fact is not relevant to the Railroad's proposed development or operations at the Property.

18. (Page 7) *The Applicant also incorrectly states ...that the Town has recently been approved a pipeline connecting the Town to the Massachusetts Water Resources Authority ("MWRA") which will allow the Town to cease drawing water from its aquifer wells. This statement is not only misleading, but actually deceptive. In fact, the Town has entered into an agreement with the Olin Corporation to enable the Town to make a connection to the MWRA water system. However, this connection is intended to be available for emergency purposes only. There is no agreement or plan to make a permanent connection...*

It is the Petitioner which is providing a misleading characterization of its own agreement, a copy of which it attached to its petition. A pipeline connection to the MWRA is currently being designed and installed by the Petitioner, and paid for in full by Olin. It is designed to be a permanent, hard connection. A determination as to whether the pipeline will be used to obtain water on a temporary or a permanent basis, has not been made, and is not relevant.

We understand that the Petitioner has elected to sign a 'temporary' agreement with the MWRA until the Petitioner can determine which parts of the Town to include within a 'permanent' intergovernmental agreement.

No matter which form of intergovernmental agreement the Petitioner eventually elects to execute with the MWRA, it is reasonable to assume that those portions of the Town whose well water has been affected by contaminants that previously migrated from the Property will be eligible to receive their water from the MWRA to the extent necessary.

For this reason, as well as the reasons cited in Items # 1, 2, 9, 16 and 17, above, the Railroad's proposed development and operations at the Property will have no material adverse impact on the drinking water supplies serving the Petitioner or its residences.

19. (Page 5) "*...the Applicant described the history of the Site by stating that Olin Corporation acquired the 51 Eames Street Site in 1967. In fact, the Olin Corporation acquired the property in 1980.*"

As a result of a clerical miscommunication between the Railroad and Olin, the Railroad misstated Olin's acquisition date, which was in fact in 1980. This misstatement was not intended to be misleading and is not material to the environmental review.

The only relevant facts are: Olin acquired the Property almost a quarter century ago; Olin is a financially sound entity and Olin has agreed to assume the obligations of the former owner for response actions under the MCP that are related to the historical release of Oil and Hazardous Material at the Property. Consequently, the inadvertent misstatement regarding the actual date of acquisition is not materially relevant to the analysis provided in the Environmental Assessment Form.

20. (Page 7) *The Applicant's response to comment #4 suggests that, due to the approvals granted by Massachusetts DEP and the Town of a previous project that contained a larger footprint and greater volume of traffic than the project proposed by Applicant, that its current project should not present concerns for the town.*

The Railroad's aforementioned response to comment # 4 was directed to the fact that the Petitioner, and the EOE, previously determined that the redevelopment project proposed in 2000, which included a larger building and pavement footprint and greater volume of traffic than the railroad project proposed by the Railroad, would not create a material adverse impact as a result of traffic generated there from. *Ipsa facto*, the railroad's proposed project would also not create a material adverse impact as a result of traffic generated there from. The determination of the EOE, parent to the DEP, is persuasive of this issue.

The Railroad stands by and reiterates its position on this matter.

21. (Page 7) *In any event, the Conservation Commission issued an Order of Conditions that contained 58 conditions of the previous proposal.*

As discussed in Item # 5 of Exhibit D to the Environmental Report, "Responses to Comments From Town of Wilmington on Environmental Assessment Form", except as discussed in Item # 24 to 27, below, the aforesaid conditions of the Conservation Commission deal with the conduct of work in wetlands areas and are more in the nature of regulations governing such work, such as: filing notices with the Commission; surveying the area affected; placement of hay bales around wetlands while performing work; describing the type of drawings to be submitted regarding such work; having a professional engineer certify drawings regarding the work; requiring replanting of trees of a certain caliper if they are cut down

during the performance of such work; requiring refilling of any holes which are dug during the performance of such work; etc.

The Petitioner tries to make the so-called 58 conditions seem significant, when they are merely ministerial regulations relating to work in wetlands areas, and more specifically govern the conduct of professionals in the course of doing such work.

22. (Page 8) *The previous proposed developer was required to provide all necessary land taking(s) [regarding the intersection of Eames Street and Woburn Avenue].*

The Applicant has not made a detailed or firm commitment towards investing in the required improvements at the intersection.

The Railroad repeats its offer contained in Item 4 of Exhibit D to the Environmental Report, "Responses to Comments From Town of Wilmington on Environmental Assessment Form", namely that although the Railroad is projected to generate about one-half the amount of traffic as the previously approved proposal (which will include far fewer of the long-haul 53' truck trailers), it will nevertheless agree to place a sum of money (up to \$50,000) in escrow equal to the fair market value of a portion of the property on the southwest corner of Eames Street and Woburn Avenue for use by the Petitioner for the purpose of acquiring a portion of that piece of land necessary for widening that corner of the intersection, and will assist Petitioner in obtaining transportation funds available from the State for making the necessary paving, curbing and other traffic improvements thereto.

23. (Page 8) *The Applicant's proposal would more than double the volume of daily traffic [on Eames Street only].... Noise and vibrations from trucks traveling along Woburn and Eames Street late in the evening will have a direct and deleterious impact on residents in this section of the community.*

First and foremost, as discussed in Item # 4 of Exhibit D to the Environmental Report, "Responses to Comments From Town of Wilmington on Environmental Assessment Form", and acknowledged by Petitioner as discussed in Item # 20, above, the Petitioner and the EOEa determined that the previous proposed use of over a 353,000 square foot truck-to-truck terminal with almost double the amount of truck traffic as the Railroad's proposal will generate (quadrupling—as opposed to 'doubling' the current volume of daily traffic on Eames Street) did not constitute a material adverse impact. The determination of the EOEa, parent to the DEP, is persuasive of this issue.

Secondly, as the Railroad has stated on numerous occasions, truck traffic will occur during the day and the facility will be closed to such traffic 'late in the evening'.

Third, as discussed in Item # 4 of Exhibit D to the Environmental Report, "Responses to Comments From Town of Wilmington on Environmental Assessment Form" the flow of truck traffic will be south on Woburn Avenue (away from residential areas) to the closest and most accessible highway intersection, as opposed to traveling north on Woburn Avenue.

24. (Page 8) (1) Condition # 22 states that the applicant agreed to restrict development to 20.28 acres through a Conservation Restriction.

The Railroad is willing to provide a similar conservation restriction with appropriate modifications for access.

25. (Page 8) (2) Condition #45 references the potential need for a Section 404 Permit under the Federal Clean Water Act and a Water Quality Certificate from DEP

According to Olin, these conditions have been satisfied as part of the on-going RAM at the Property. Olin's compliance status under these permits is described in the semi-annual RAM Status Reports.

26. (Page 8) (3) Condition # 46 addresses the requirement for compensating wetlands

The Railroad will satisfy this condition if the need arises to modify an appropriately qualified wetland.

27. (Page 8) (Condition # 54 identifies the need for implementation of a Release Abatement Measure (RAM) pursuant to M.G.L. CMR 40.0000

A RAM Plan for remediation activities was in fact filed with the Wilmington Conservation Commission, to address Condition # 54 of the Order of Conditions. To the extent that the Railroad's development or operations require additional RAM Plans, either the Railroad or Olin will follow the applicable regulations and obtain the same.

28. (Page 8) Condition # 55 references mitigation measures ... including specifically the establishment of a \$50,000 fund by Olin Corporation for wetland projects

While this condition is not related to the Railroad's proposed development or operations, Olin has indicated that Olin will continue to meet its obligations under this condition.

29. (Page 7) *...the Applicant confirms that hazardous materials "will be moved [sic.] directly into or out of rail cars which will be scheduled to be interchanged on a daily basis." The Applicant does not provide any detailed information about the safeguards that they would implement to minimize the effects resulting from derailments, to reduce spills or other accidents during the "interchange" of products into or out of rail cars, and minimize the effects of such accidents on this sensitive area.*

With regard to each of these points:

a. The handling of hazardous materials.

Safety issues relating to the handling of hazardous materials are covered by the Hazardous Materials Transportation Act, and if and when the Railroad does handle such material, it will fully comply with the Act. Elsewhere, Petitioner's claim that nuclear materials will be handled at the Property is without basis. In addition to the Railroad's stated intention not to handle such materials, there currently is no source of nuclear materials in the area served by the Property.

b. Unattended defective railway equipment.

Petitioner refers to an incident relating to an "unattended" tank car leaking acid in Lowell, Massachusetts (Attachment #2 to the Petition) as an indication of the hazards they will face if this exemption is granted. The incident referred to in a newspaper article would be highly unlikely at the Property. The newspaper report of the Lowell incident states that the leaking acid car was sitting on a trestle, unattended. The Railroad's facility, described in the Notice of Exemption and in the extensive environmental submission, will be a short railroad serving a reload center. Rail cars will be placed at the Property to be loaded or unloaded in a facility with finite capacity. Not only will each rail car be attended by the facility staff, the rail car will also be attended by the owners of the cargo. These owners will have a limited time to load or unload the rail cars. There will be a charge per day for time used over prescribed maximums. Rail cars arriving will be inspected by the Railroad and cars departing will be inspected by Boston & Maine Railroad all within hours of the arrival or release of a car. Therefore, the gap in the safety system referred to by Petitioner, should be fully avoided, if indeed it exists nationally, simply by the nature of the proposed operations. The flaws in the system found by the GAO must be addressed by the Secretary of Transportation and not by this Board.

c. Derailments.

Petitioner also deems the Environmental Report inadequate due to failure to deal with the possibility of derailments and spills occurring when customers are moving cargos between rail cars and vehicles. This is to be a terminal operation. The train speeds will rarely exceed walking speed. As in any switching operation, there is little chance of a derailment that needs more attention than the re-railing frog. Absent highly unusual circumstances there is no chance of a cargo spill due to such a derailment.

d. Spills while handling cargos.

Cargo spills that result from moving cargo between rail cars and trucks will be the obligation of the cargo owner. Appropriate protection (depending on the type of materials and methods of transloading) will be provided against such spills, as they are at all reload terminals of this type and the terminal will be designed with paving and curbing to avoid spills reaching the ground (See Item # 4, above). Most cargos will be moved between the rail mode and the highway mode via some sort of closed system. Most cargos will be dry. Cargo's handled in the open will not be allowed to create a nuisance. However, it must be pointed out that the hazard feared would be the same if the cargo were unloaded to a truck at this facility or at a shipper's loading dock a few blocks away, as they are now. Further, trucks operating entirely on the public highways have a much higher chance of having a serious accident than exists at a rail transfer terminal operation. The design of the facility, with pavement and curbs, as described in Item # 4, above, will also prevent spills from reaching the ground.

e. Effect on remote sensitive environmental regions.

Petitioner also notes that rail cars bound for or dispatched from the Property will pass through many sensitive environmental areas in their travels to or from distant points. They decry the fact that the Notice and the Environmental Report do not analyze the potential effect on each of these sensitive areas due to the passage of the traffic generated by the Property. Petitioner's argument underlines the need for the exclusive jurisdiction of the Board over rail transportation. The burden Petitioner's officials would impose on the use of rail transportation, if they had jurisdiction, would block all use of railways nationwide by rendering the approval process impossibly expensive. This issue was dealt with in Item # 5, above.

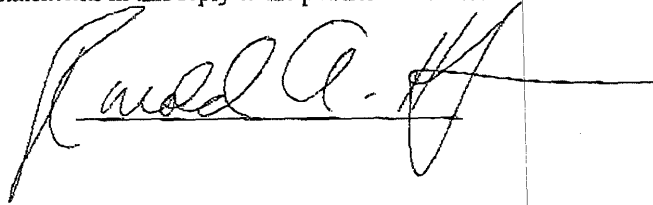
Dated: Milford, Connecticut
July 8, 2003

Respectfully submitted,


Paul Jacobi, Esq.

VERIFICATION

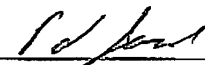
Ronald A. Klempner verifies under penalty of perjury under 28 U.S.C. 1746 that he is a manager of New England Transrail, LLC, the applicant herein, and as such is familiar with this matter and that the statements in this reply to the petition are correct to the best of his information and belief.

A handwritten signature in dark ink, appearing to read "Ronald A. Klempner", is written over a horizontal line. The signature is stylized with a large initial "R" and a long horizontal stroke extending to the right.

CERTIFICATE OF SERVICE

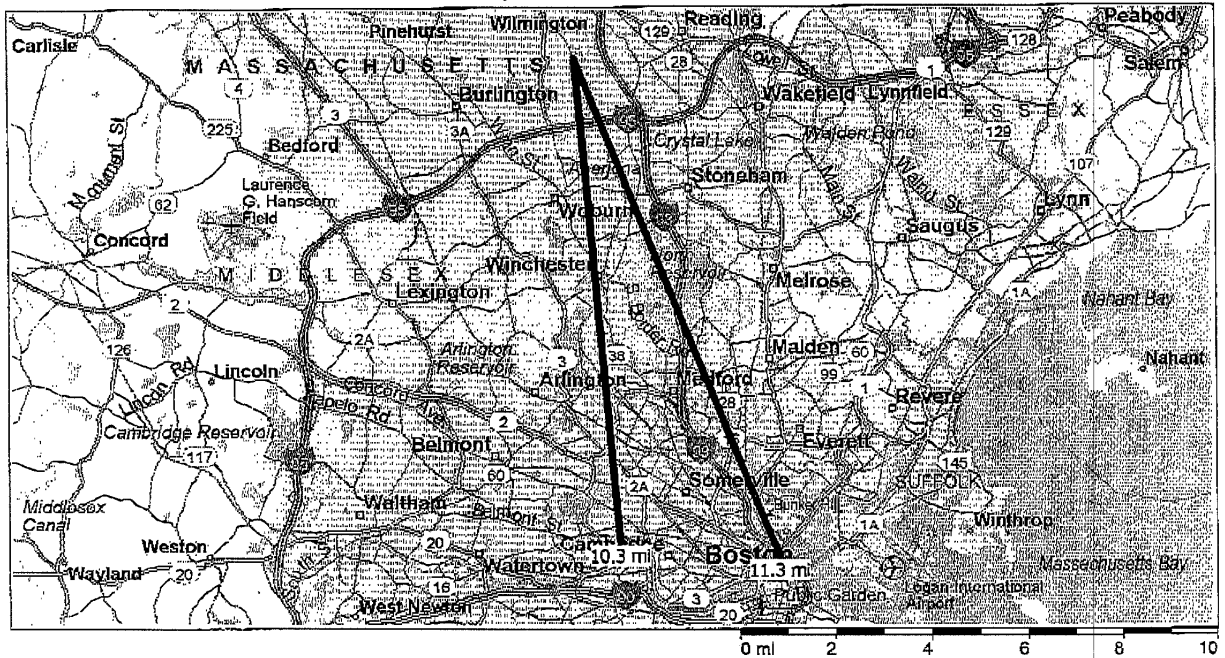
Paul Jacobi, Esq. certifies under penalty of perjury pursuant to 28 U.S.C. 1746 that on this 8th day of July, 2003, I served a copy of this Reply to the petition of the Town of Wilmington by regular United States mail on:

Dated: July 8, 2003
Milford, Connecticut



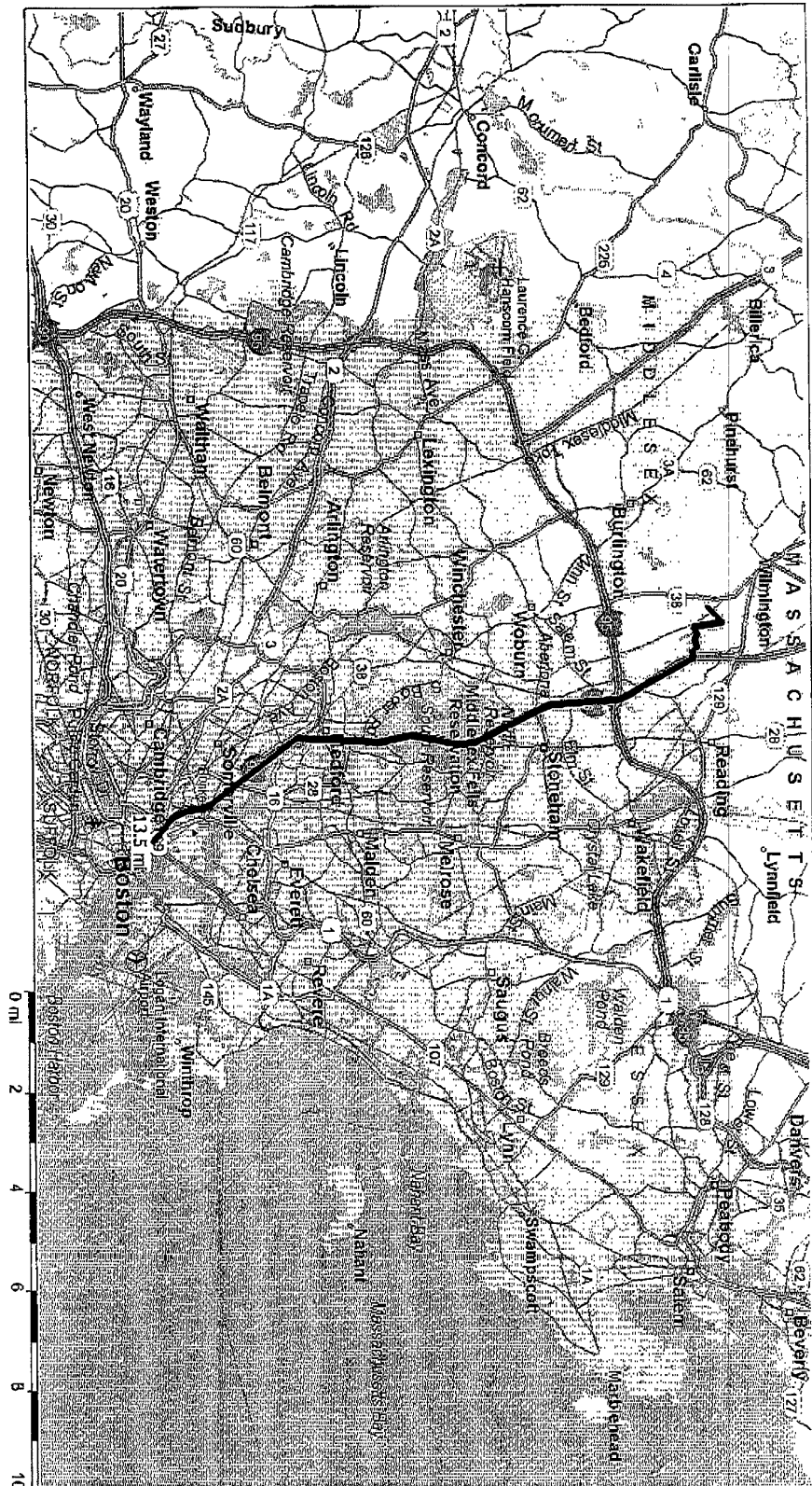
Paul Jacobi, Esq.

Massachusetts, United States, North America



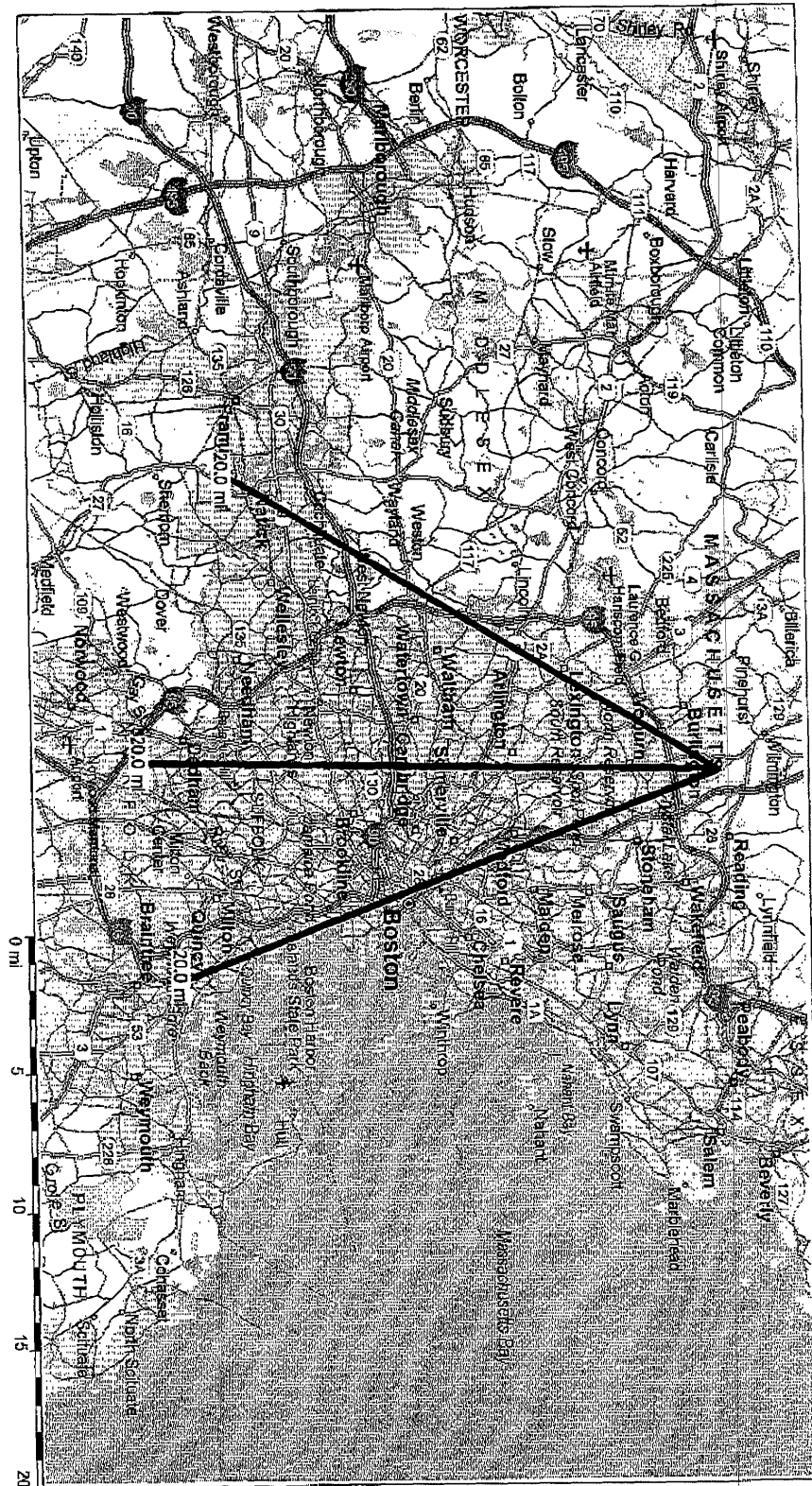
ATTACHMENT— A

Massachusetts, United States, North America



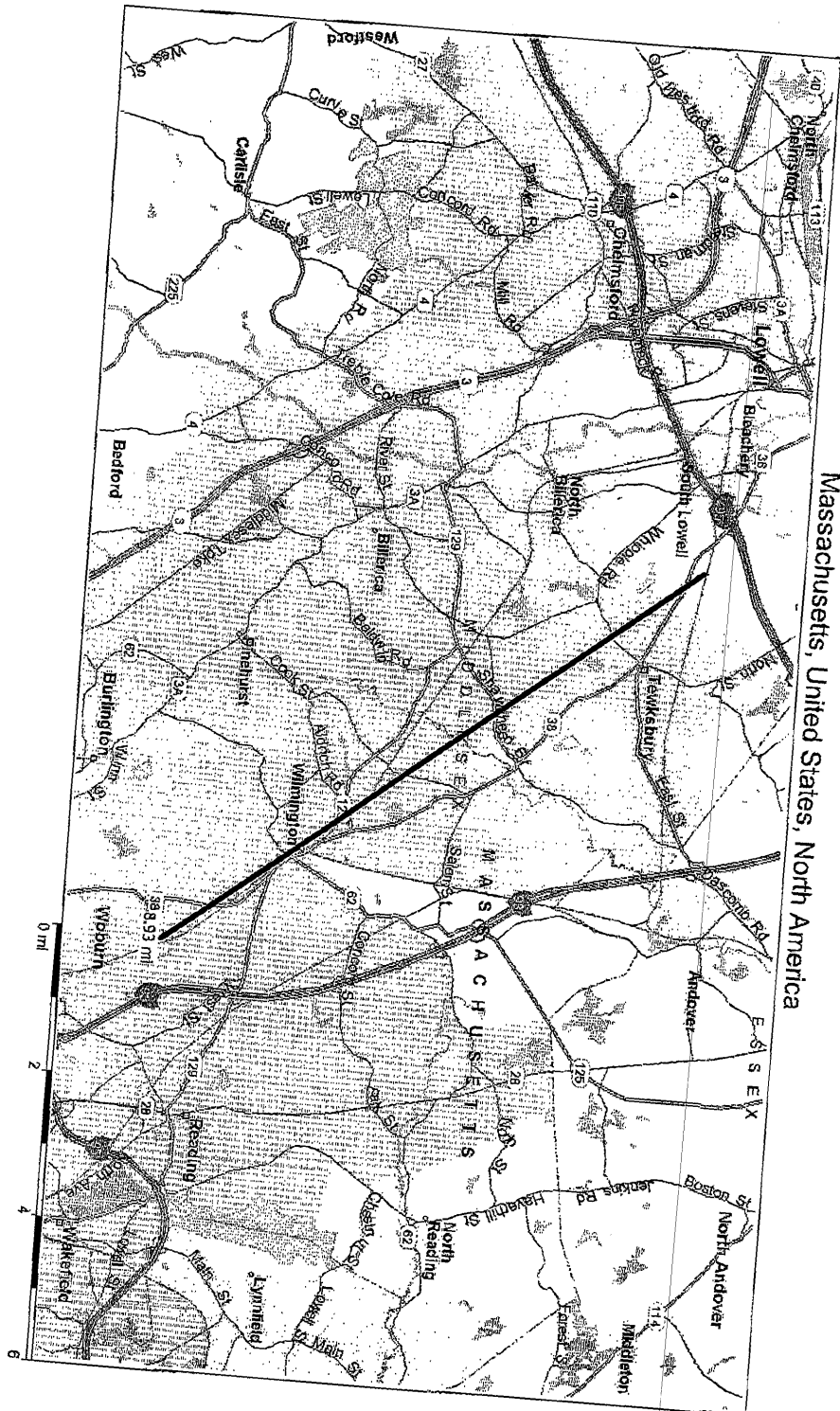
ATTACHMENT... B

Massachusetts, United States, North America



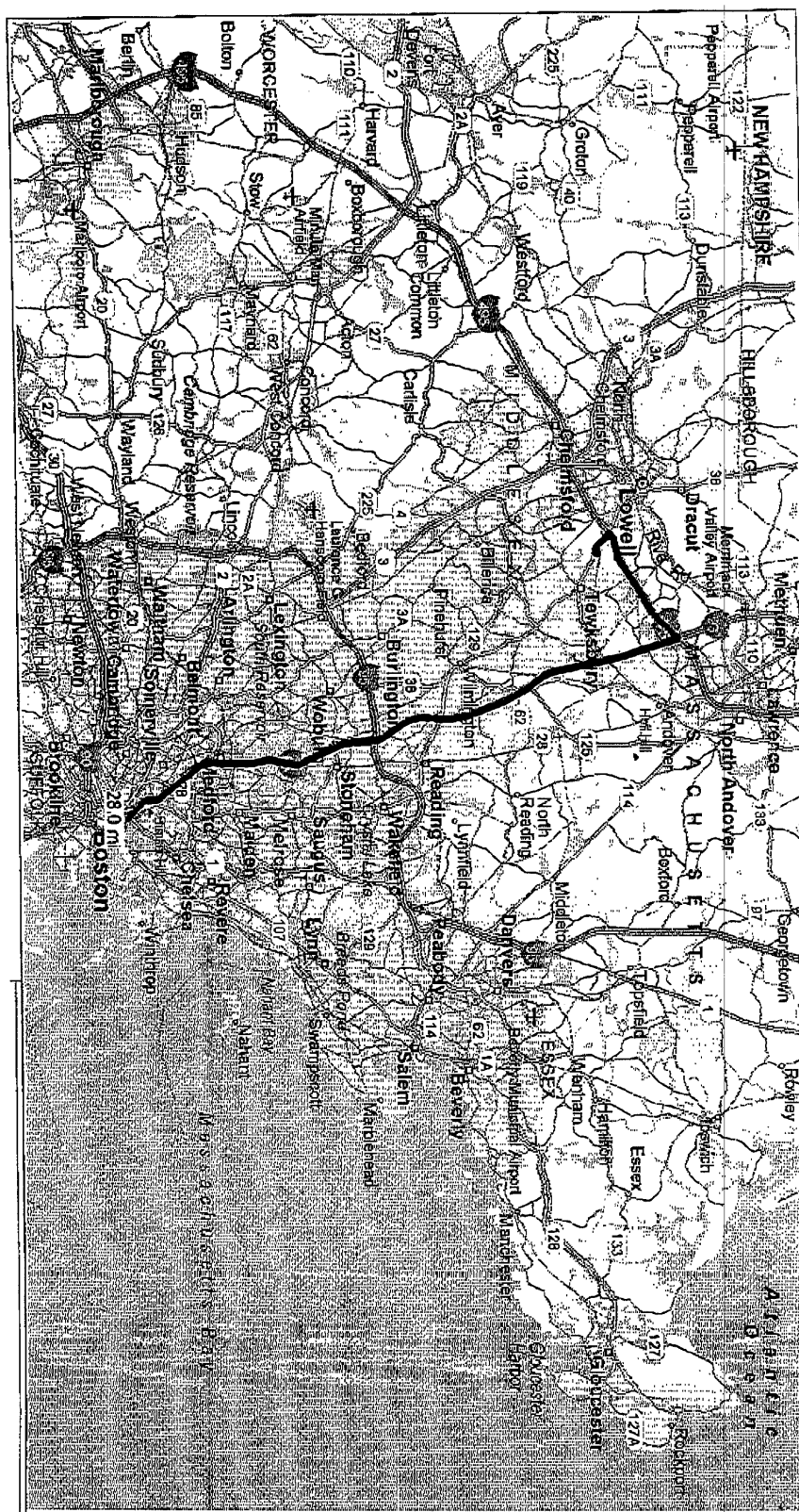
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Massachusetts, United States, North America



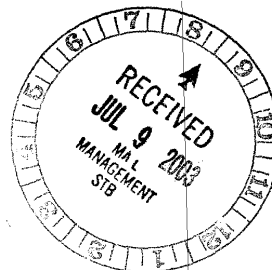
ATTACHMENT---D

Massachusetts, United States, North America



ATTACHMENT... E

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**FACSIMILE COVER SHEET**

Date: July 8, 2003
Facsimile: 202/565-9004
No. of Pages to be transmitted (plus cover sheet): 26

To: The Honorable Vernon A. Williams
Firm: Secretary, Surface Transportation Board
cc: Michael J. Newhouse, Esq.
Paul DeRensis, Esq.
RE: New England Transrail – Notice of Exemption
Finance Docket No. FD 34365
From: Paul Jacobi

Message: See Attached.

HARD COPY TO BE MAILED ☒ YES ☐ NO

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