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John F. McHugh
Attorney at Law
6 Water Street, Suite 401
New York, NY 10004

FEB 7 2005
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Phone: (212) 483-0875
Fax: (212) 483-0876

Of Counsel
W. Patrick Quast
164 Franklin Tpk.,
Waldwick, N.J. 07463,
201-444-5990
Fax 201-444-5094

February 4, 2005

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

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Public Record

Re: New England Transrail, LLC, d/b/a Wilmington & Woburn
Terminal Railway-Petition for Exemption-Construction and
Operation as a rail carrier on tracks and lands acquired
from Olin Corporation.
FD 34391

Dear Mr. Williams:

Enclosed please find the original and ten copies of New England
Transrail's Reply to the Petition of Town of Wilmington to Remand Proceeding to
Section of Environmental Analysis etc. and 3 ½ disk containing the same documents.

Thank you for your attention to this matter.

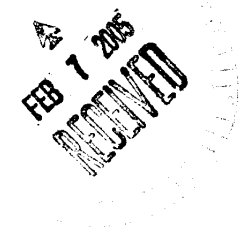
Very truly yours,

John F. McHugh

Cc: Daniel R. Deutsch
Deutsch Williams Brooks Derensis & Holland, P.C.
Attorneys for Wilmington, Massachusetts
99 Summer Street
Boston, MA 02110-1235

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34391

**NEW ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON AND WOBURN
TERMINAL RAILROAD CO. – CONSTRUCTION, ACQUISITION AND
OPERATION EXEMPTION- IN WILMINGTON AND WOBURN, MA**

PETITION OF TOWN OF WILMINGTON TO REMAND PROCEEDING TO
SECTION OF ENVIRONMENTAL ANALYSIS TO REJECT THE POST
ENVIRONMENTAL ASSESSMENT OR IN THE ALTERNATIVE TO REVOKE
EXEMPTION BASED UPON MISLEADING INFORMATION

REPLY OF NEW ENGLAND TRANSRAIL, LLC

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PRELIMINARY STATEMENT

Wilmington has repeatedly asserted the numerous arguments, again stated here, in its attempt to keep NET's rail-truck transload facility out of the town's "back yard." Wilmington's petition is disingenuous. According to a report in the Wilmington Advocate of January 27, 2005, the Town does not wish to stop development of this site, they wish to acquire the property for their own use:

Sources confirm that (Paul) DeRensis (the town counsel) revealed to the board of selectmen in executive session that the town has little, if any, chance of overturning a ruling made in December by the federal U.S. Surface Transportation Board that essentially cleared the way for New England Transrail to construct the transfer station.

Yet members of the board of selectmen are keeping a united front "We have to continue to fight this project," said Selectman Frank West on Tuesday. He believes that allowing the operation to go forward will deprive the town of several possible options in using and possibly purchasing the contaminated site from Olin.

"But we lose those chances if the [facility] is built," said West.

In keeping with the above, Wilmington's arguments here have been heard throughout the review process and have been extensively dealt with by the Section for Environmental Analysis (SEA). Each in its turn has been deemed to be invalid in the resulting Environmental Assessment (EA). Yet again Wilmington argues that:

- (i) NET's activities in loading waste materials into railcars is 'processing' thus, not within the exclusive jurisdiction of the Commission;
- (ii) the more specific information provided by NET in supplemental submissions to the SEA reflecting facts as the project evolved, should have been part of NET's initial Petition for Exemption, and therefore the Petition for Exemption should be denied;
- (iii) NET's development plans for the property will interfere with prior environmental remediation and ongoing environmental remediation and testing at the property and surrounding site; and
- (iv) voluntary mitigation measure proposed by NET to require a certificate from a Licensed State Profession ("LSP") to determine whether certain developmental plans or activities at the property meet certain objective standards is not appropriate.

NET, in its petition to become a new railroad and to build additional track on the Olin property, clearly sought to become a rail common carrier operating a rail truck transload terminal on the Olin property. This was, at all times, to be a facility open to any and all commodities normally handled as transload facilities and open to any customer seeking compatible transportation services. Indeed the petition listed twenty three such commodities including Solid Waste (SW) and Construction Debris (CDD) as possible commodities which the carrier might handle. However, as NET declared its intention to become a common carrier by rail which status, by its terms, requires NET to

accept for carriage on reasonable and non discriminatory terms any lawful commodity offered to it for transport.

SW and C&D are but two of several commodities for which strong indications of interest have been received from the service area. Others include salt, sand, lumber, construction materials, plastics, wood chips and mulch. Contrary to the City's assertions here, all these products were listed in NET's initial petition. Due to the comments received during the environmental process, the peculiar effects of handling waste products, the most controversial products of the twenty three, have been thoroughly evaluated, in sufficient detail, both by the SEA and by the State authorities. Additional design detail provided to State authorities to assure compliance with specific local standards which NET agreed to meet as mitigation measures listed in the EA were not a necessary submission to the SEA. SEA correctly may assume compliance with local standards. To provide added assurances to the SEA, NET volunteered as mitigation measures to have a Licensed State Professional or Licensed environmental engineer certify that these standards had been met in specific circumstances. Wilmington's assertion that Licensed State Professionals, used generally in Massachusetts to monitor environmental compliance, cannot be trusted, slanders an entire profession, assumes violation of professional standards, statutory and ethical obligations and is irrational.

The SEA, with the full support of the record before it, including a full review of each objection Wilmington raises again here, has determined that the NET project has complied with all Federal environmental laws and regulations and poses no significant threat to the human environment.

The arguments relating to the jurisdiction of the Board are contrary to well accepted law.

I

LOADING OF COMMODITIES ONTO RAIL CARS, INCLUDING ANY PROCESSING REQUIRED IS AN INTRAGUL PART OF THE TRANSPORTATION SERVICES TO BE OFFERD BY NET

20 CFR 202.7 defines rail transportation to be:

“The service rendered or the operation of equipment or facilities persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, if such service or operation is reasonably directly related functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. (emphasis added)

While this section is not a regulation of the Surface Transportation Board (the Board) but of the Railroad Retirement Board, the regulation reflects the Board’s view of that definition as articulated in the decision of the Office of Proceedings in Hi Tech Trans, LLC-Petition for Declaratory Order, FD-34192(Sub-No. 1). There, referring to activity nearly identical to those complained of by Wilmington here, the Office of Proceedings stated that, “to come within the preemptive scope of 49 U.S.C. 10501(b), these activities must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier.” The decision then goes on to state that “... There is no dispute that Hi Tech’s transportation activities are within the broad definition of transportation. The Board has constantly found those activities to be transportation under 49 U.S.C. 10102(9).” Id Page 5. Hi Tech, however, unlike NET, was not a rail carrier.

Wilmington asserts that the processes in issue are manufacturing and not transportation, as they normally take place at truck to truck transfer stations. Transfer stations perform largely the same function as the waste related transload facility at issue here. Transfer stations do not manufacture anything. They transfer a product from local trucks to long distance trucks as part of transportation from the source of the product to its destination. They are engaged in transportation, in most cases entirely by highway. Thus, the functions in issue are all related solely to transport, to fitting the cargo efficiently into transportation units for on carriage out of a local area and assuring that the cargo presented for shipment is the cargo contracted for.

NET will handle goods, waste or other goods, only pursuant to contracts of carriage with terms, rates and destinations governed by the type of cargo and such rates will include any services provided by NET at the Wilmington, facility. NET stated in its submissions to the SEA that the grinding of waste done on the cite is to efficiently and evenly load cars with CDD. This process, in addition to facilitating the easy handling of the cargo, also allows the carrier to avoid damage to the cars, delays due to loads of large pieces shifting, damage the railroad cars due to the effects of uneven loading as well to allow for greater ease of discharge at the end of the line haul. Thus, as with highway transport of the same types of commodity, grinding the material is integral to the transportation services offered by NET as it both increases the efficiency and the safety of the operation.

Bailing SW also makes the loading and unloading of rail cars more efficient. In particular, it allows bales to be removed from the cars without digging the commodity out of cars with grapples. This increases the speed of discharge, reducing delays and

increasing car use efficiency. It also reduces damage to the cars and particularly to the car's sills. As the cars handling these waste products will be sealed to protect the environment, preventing damage to the car sills will protect the integrity of the seal. Again, bailing the material is simply packaging for shipment and is again integral to the efficiency of the transportation operation.

The scope of railroad transportation has long been held to include services rendered as part of the contract of carriage. Indeed Rail transportation is also defined in the ICCTA so as to include, "services related to that movement, including **receipt, delivery, elevation, transfer,... handling** and interchange of passengers and property..." 49 USC §10102. (emphasis added). This language is simply a statement that activities within the well established obligations of common carriage are all within the scope of the Act's grant of exclusive jurisdiction to the Board. Indeed, this view of the scope of transportation services expected of a common carrier has been universally accepted by the Courts. "It is the duty of the carrier to furnish reasonable trackage facilities and means to serve the consignees at the particular station as measured by the volume of business handled in and out of the station. Each consignee and shipper at the station is entitled to the service which reasonable facilities ought to afford him." St. Louis, Southwestern Railway Co. v. Mays, 177 F. Supp. 182, 184-85 (D. Ark. 1959). Delivery into the railroad's possession at the designated station is deemed delivery for common carrier purposes even where the railroad must still load the cargo onto the rail car. See: Illinois Central Railroad v. Moore, 228 F.2d 873 (6th Cir. 1956). Common carrier service includes whatever services the railroad agrees to provide by contract or by tariff.

The duty of unloading carload freight ordinarily rests with the shipper or consignee. Pennsylvania R. Co. v. Kittaning Co., 253 U.S. 319, 323. But it is a transportation service within the meaning of the Interstate Commerce Act. Atchison, Topeka & Santa Fe Ry. Co. v. United States, 295 U.S. 193, 200, 55 S.Ct. 748, 752, 79 L.Ed. 1382; Barringer & Co. v. United States, 319 U.S. 1, 6, 729, 63 S.Ct. 967, 971, 87 L.Ed. 1171. Its cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge. Adams v. Mills, 286 U.S. 397, 410-415, 52 S.Ct. 589, 592-594, 76 L.Ed. 1184; Loading and Unloading Carload Freight, 101 I.C.C. 394; Berg Industrial Alcohol Co. v. Reading Co., 142 I.C.C. 161, 163-164; Livestock Loaded and Unloaded at Chicago, 213 I.C.C. 330, 336, 337. See, Haberman v. Pennsylvania R. Co., 234 I.C.C. 167, dealing with less-than-carload lots.

Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446, 453 (1946). Even significant services rendered prior to shipment by the railway and its agents are part of interstate commerce covered by federal law (requiring the publication of tariffs) was fully addressed in, United States v. Union Stock Yard and Terminal Co. 226 U.S.304-305 (1912).

Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act, and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier,...

In that case the commodity was live stock which needed to be sorted, fed, watered and then loaded onto rail cars. The carrier despite the numerous services rendered to the live stock, was deemed to be entirely a rail carrier and those services were found to be part of transportation.

All operations by railroads which connect their line haul services to those of other carries or connect their services to their customers, are well within the definition of rail transportation as that term has been understood,

As we have seen, the Commission has repeatedly held that, under the provisions of the original Interstate Commerce Act (part 1), it has jurisdiction over railroad

operation of terminal motor truck services as constituting terminal facilities within the meaning of section 1(3) of the act,

United States v. Motor Freight Express, 60 F.Supp. 288 (D.N.J. 1945). Therefore, no matter the ancillary services rendered by NET, a rail common carrier, to shippers and receivers at the facility, as it is performing those services within its Common Carrier obligations, the facility and the services conducted there are under the exclusive jurisdiction of the Surface Transportation Board. See, Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77, 78 (1958) (connecting contract independent bus service using public streets between rail terminals, handling through passengers, is exempt from local franchise regulations).

Wilmington cites the decision in Hi Tech Trans v. State of New Jersey, 382 F. 3d 295 (3rd Cir. 2004) for the proposition that these services are not transportation related. That is not the holding of that case. As stated above, the Office of Proceedings had ruled that as Hi Tech was not a rail carrier nor affiliated with a rail carrier, therefore Hi Tech's otherwise transportation operations were not exempt from State regulation. On the same facts, the Third Circuit agreed, again the operative fact being that Hi Tech was not a rail carrier. NET is a rail carrier.

Wilmington similarly cites Florida East Coast v. City of West Palm Beach, 266 F. 3d, 1324 (11th Cir. 2001). This case dealt with rail customer whose sole relationship to transportation was that it was a rail customer and had facilities located on land leased from the railroad. The Court determined that an aggregate dealer, which was clearly not a common carrier, whose only connection with the carrier was a lease, is not engaged in rail transportation.

Wilmington's citation of Flynn v Burlington Northern Santa Fe Corp. 98 F. Supp. 2d 1186 (E.D. Wash. 2000) is a mystery. In that case the BNSF did not seek STB approval of construction of a locomotive servicing facility. However, the railroad had submitted its plans to local authorities and had obtained their approval of the project. In that case there was no question that the facility was transportation related. The plaintiffs there sought a declaratory judgment that the project required STB and not local approval. They argued that the SEA was equipped to do an adequate environmental review but that the county was not. The Court dismissed the complaint for want of jurisdiction. However in dicta the Court opined that the plaintiffs did not have standing to complain of the project.

Plaintiffs' injury would occur only if the Hauser Facility is constructed, a leak or malfunction occurs, contaminants reached the aquifer, the contaminants reached Spokane, and Plaintiffs' drinking water is contaminated. The injury is clearly conjecture and hypothetical. Plaintiffs do not have standing in this case based on their failure to identify an injury in fact.

Id., 1191. The claims asserted by Wilmington here, that the NET project might cause damage if all the mitigation provided in the AE failed (including the incredible assumption that all state officials and licensed professionals would abrogate their legal responsibilities), is precisely the type of hypothetical and highly unlikely event which that Court deemed insufficient to state any claim.

Processing of goods by grinding or by bailing, as here, to fit them into rail cars and to facilitate ease of handling and for no other purpose is clearly needed to produce an efficient rail operation and is therefore part of that operation.

II

THE INFORMATION SUPPLIED TO THE SEA WAS SUFFICIENT FOR IT TO FULLY REVIEW NET'S PROPOSED ENVIRONMENTAL EFFECT

NET supplements its support for the scope and logic of the decision of the SEA with the detailed certification of ECS Marin, by Steve Graham (Licensed State Professional [LSP] and licensed environmental engineer) which addresses specific factual assertions made by Wilmington.

Wilmington's claim that NET did not disclose its proposed solid waste handling activities to the Board in its Petition for Exemption or to SEA is incorrect. The Petition includes the following list of potential commodities which the facility might handle:

b. The cargos anticipated include aggregates, sand & gravel, stone, lumber, plastics, steel, scrap steel, recycled paper and plastic, newsprint, paper products, clay, construction debris, brick, non-hazardous solid wastes, liquids and dry chemicals. The ratios of these commodities cannot be estimated at this time. The facility will not handle hazardous waste or other hazardous materials. The applicant will transload and consolidate outbound loads, including non-hazardous waste, but will provide transload and transportation services only and will not take title to any products handled. It is anticipated that the applicant will handle about twenty cars per day initially.

From the inception, NET listed transloading of Construction Debris and non-hazardous solid waste as potential products to be handled at the property. The petition also made it clear that this was to be a facility open to any commodity:

aa. Current effects: The facility serves the public convenience and necessity as it will be operated as a common carrier, accepting cargos for transload in intermodal transport and on carriage from any customer for a reasonable fee. It will provide access to the railway system for commodities which now have no practical access to any form of transport other than truck. ...

NET's Petition for Exemption (the "Petition") followed the regulatory format set forth in 49 CFR §1150 et seq. and provided all required or relevant information. The petition stated that "(a)pproval of this petition should be conditioned upon approval of the report of The Section for Environmental Analysis."

To the extent that the handling of a specific product may have an environmental effect beyond that to be expected from the construction of a rail line itself, the proper place for its discussion is within the environmental review, not the petition. Here, the evolution of the project from theory to dealing with specific commodities has been ongoing and disclosed as it occurred to the SEA. This has allowed an extremely thorough review of the project as it had evolved as of each stage of the process.

Therefore, contrary to Wilmington's assertions here, the appropriate time and place for NET to describe in greater detail the methods of reloading materials, including waste materials, was as part of the environmental assessment process. In this regard, NET explained and provided SEA and its environmental consultants information as to methods and proposed location of reloading CDD and SW throughout the environmental assessment process—prior to the issuance of the Environmental Assessment ("EA") and again in more detail in response to comments requesting more information from the MDEP prior to the Post Environmental Assessment ("PEA"). These disclosures were made in a timely manner so as to permit SEA to make a thorough analysis of any potential environmental impacts from the proposed action. The SEA determined that the facts as disclosed did not have any potential environmental impact due to the appropriate mitigation NET agreed to after full disclosure of all material facts and after comments similar to those in the current petition were made to the SEA and fully reviewed. If SEA

believed that its decision making process was prejudiced by the timing of any information provided, it had the discretion to seek appropriate remedies or action in the SEA or otherwise. The SEA reaffirmed its findings in the PEA after a full review of all submissions including all of the various arguments put forth yet again here.

Wilmington goes on to assert that certain detailed information was submitted as part of NET's Construction Remediation Abatement Module Plan ("CRAM Plan") submitted to the MDEP, which was not submitted to the SEA and therefore was not part of the SEA's appropriate review. This assertion mischaracterizes the relationship between an environmental assessment and an enabling permit or construction related approval. The purpose of an environmental assessment is to determine whether a proposed action could have a potential significant impact on the environment. In making this determination, the reviewing agency must have enough information as to the type of construction or activity proposed. It can assume that the discharge of such activity will comply with the specifications and standards set forth in local laws and regulations particularly where the mitigation agreed to so requires. As local authorities retain their police powers to enforce such regulations, compliance is not preempted. See, Village of Ridgefield Park v. New York, Susquehanna & Western Railway Corp., 163 N.J. 446, 750 A.2d 57, 65-66 (2000), Cities of Auburn and Kent, Washington-- Petition for Declaratory Order--Burlington Northern Railroad Co.--Stampede Pass Line, 1997 WL 362017, STB Finance Docket No. 33200, p. 10 (7/1/97). Nothing in the Act precludes NET's agreement to comply with locally required specifications; The SEA does not therefore need to expend its resources to insure that the details of a construction project comply with local specifications. There is a clear distinction between the level of knowledge

required in an environmental review as opposed to acknowledging compliance with local standards. For example, if a local law requires machinery to operate within a certain noise level, the environmental reviewing agency must have sufficient facts to determine that with the engineering proposed such a noise level limit is achievable, but it does not need to know the details of which engineering methods will be utilized to achieve that result. Details of methods utilized to achieve that result would be necessary, however, for a local authority to determine if the levels will in fact comply with their requirements.

Such is the case with the CRAM Plan. Acceptance of the CRAM Plan by the MDEP is effectively a certification of compliance. While the SEA needs to determine that it is possible to build the project without negatively impacting the remediation efforts at the site, they correctly deferred to the MDEP, the local agency with greater knowledge and expertise regarding the site history and remediation efforts. The CRAM Plan provides the MDEP with information they need to evaluate whether the methods proposed for development at the property allows the MDEP to determine that the proposed construction will not negatively impact the ongoing site remediation efforts.¹

Wilmington then claims that minor modifications made to the project over the almost 1 ½ years of environmental review were not evaluated by the SEA and therefore the entire EA and PEA determination was defective. NET had discussed and presented these changes with the SEA and their environmental consultants prior to issuance of the EA who determined that they were all minor in nature and had no material impact on the

¹ At one point Wilmington claims that the CRAM Plan is “so deficient that MADEP may not be able to reach reliable and responsible conclusions about NET’s proposed abatement measures for construction at the site.” (p. 13). This is not the case. But even if it were so, MDEP would properly make that determination and reject the CRAM Plan or accept the CRAM Plan with conditions, and, as discussed above, SEA has indicated that construction cannot proceed with a CRAM Plan that has been reviewed and accepted by MDEP.

overall review. Determining that evolving facts do not require detailed review is within the SEA's discretion:

...an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decision making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. ... NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval..... Application of the "rule of reason" thus turns on the value of the new information to the still pending decision making process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains "major Federal action[n]" to occur, and if the new information is sufficient to show that the remaining action will "affect[t] the quality of the human environment" in a significant manner or to a significant extent not already considered,

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373 (1989)

First, Wilmington incorrectly states that "NET modified its proposal ... to increase the size of the building to house transloading operations". (p.3), (See also, p. 10). This is incorrect. As discussed above, the building as originally proposed was to be approximately 50,000 square feet. As Wilmington admits, the building as now proposed is only 46,800 square feet.

Second, Wilmington incorrectly claims that the modifications "include three, rather than one, rail spurs..." (p. 3) (See also, p. 10). NET always showed two parallel rail tracks running through the center of the property, never just one rail spur. NET then modified its plans to add a third parallel rail track next to the previously shown tracks to provide additional run around access. This change is not material to the scope of the project or the environmental review. In this context, NET has always indicated to the SEA that as business at the rail yard grows, NET expects to add additional trackage to accommodate that growth.

Third, Wilmington claims that NET would “possibly construct a metal building with concrete foundation, rather than a removable “sprung” structure as originally proposed. (p.3), (See also, p. 10). Contrary to Wilmington’s inference, both the “sprung” structure and a pre-engineered metal building have near identical concrete foundations. Consequently, the difference between a “sprung” structure and pre-engineered metal structure is completely irrelevant to any environmental impacts at the property.

Fourth, Wilmington claims that NET failed “to disclose the magnitude of sub grade tipping vaults, that would extend many feet below grade”. (p.3), (See also, p. 10). This is incorrect. NET has always included tipping vaults in plans it has shown to the SEA. As NET conducted soil testing, it has made these vaults shallower so as not to come in contact with ground water at the property—thus avoiding the need for remedial measures regarding ground water during construction. Even if the vaults were not so modified, the determination of whether measures taken during construction of vaults into ground water would affect remediation efforts at the site would properly be deferred to the MDEP in its review of the CRAM Plan, as discussed above.

Finally, Wilmington claims that NET modified its plan “to reconfigure surface and ground water controls.” (p.3), (See also, p. 10). As discussed in connection with the CRAM Plan, designing surface and ground water controls is not a matter for detailed environmental review, but one of engineering designs in conformity with local requirements. As such, it was properly submitted as part of the CRAM Plan and its review will be performed by the MDEP to whose expertise the SEA deferred in this matter.

All of these issues were raised to the SEA during the review process. The SEA found in the exercise of its expertise and discretion that these modifications required as the actual needs of the day to day operation of the proposed railway developed, did not have a material effect nor an effect on the human environment. That determination is fully supported by the ample record before the SEA and well within the exercise of their sound discretion, Marsh v. Oregon Natural Resources Council, Supra.

III

PROPOSED DEVELOPMENT AND OPERATIONS AT THE PROPERTY WILL HAVE NO NEGATIVE IMPACT ON REMEDIATION EFFORTS AT THE SITE.

In complaining about the effect of the project on the mitigation ongoing at the site, Wilmington is inconsistent. In 2000 the Wilmington Planning Board approved truck-to-truck reload and warehouse facility with a 353,000 square foot concrete floored building footprint for this same property (the "Truck Warehouse Proposal"). As discussed in Section 3.8.2 of the EA, in 2003, reviewing the same arguments made by Wilmington here, the Massachusetts Executive Office of Environmental Protection (MEOEP) determined that the Truck Warehouse Proposal would not have an environmental impact, and the Wilmington Conservation Commission determined that the Truck Warehouse Proposal would not have an impact on their areas of their concern. In reviewing NET's proposal the MEOEP similarly determined that it would not have an environmental effect. Wilmington's argument has therefore been repeatedly heard, considered and rejected by State officials as well as the SEA. All found that NET's proposed development will not adversely affect any remediation effort at the site. It can not for the additional reason that NET is contractually bound not to disrupt such efforts and even its

structures must be moved, at NET's cost, if that is required due to some issue related to that clean up, including the discovery of additional problems.

Wilmington's position here is simply inconsistent with its own prior determinations as to the desirability of developing this site.

SEA and its environmental consultants have conducted an extensive review of this topic. They reviewed voluminous files of MDEP and of Olin and interviewed engineers for Olin's and MDEP personnel. All of the issues raised by Wilmington in Section IV of its Petition for Remand have been reviewed and dealt with by the SEA in the EA and PEA. The EA is thus fully supported by the record.

IV

A LICENSED STATE PROFESSIONAL IS FULLY QUALIFIED TO DETERMINE COMPLIANCE WITH CERTAIN MITIGATION MEASURES.

The SEA provided that compliance with mitigation measures agreed to was to be monitored by a LSP or an environmental engineer. The SEA as well as any governmental authority is entitled to assume that a licensed professional will comply with her or his legally imposed obligations. Wilmington's argument here that an LSP is too dishonest as to be trusted to monitor compliance, both mischaracterizes the SEA's recommendations and slanders all members of two professions.

The SEA does not just rely on an LSP, but refers to an "LSP/Environmental Engineer". The recommendation was structured this way so that if an LSP lacked sufficient expertise in a given area, a licensed engineer must undertake that review.

The suggestion, by Wilmington, that LSPs and licensed engineers cannot be trusted to manage or conduct such mitigation measures, by virtue of their employment by a private

party, runs counter to the widespread practice of reliance upon such professionals to perform such duties, by business, industry, and governmental agencies. LSPs and engineers licensed in the Commonwealth of Massachusetts (if not all other states) are subject to substantially the same professional standards for responsible conduct. In fact, the licensing requirements for both professions require that each applicant hold the safety, health, and welfare of the public paramount in the performance of their professional duties (See 250 CMR 4.01(1) and 309 CMR 4.03(1)). Licensed Engineers in Massachusetts, and LSPs, are required to notify their employer or client *and other authorities, as may be appropriate*, when her or his judgment is overruled by their client under circumstances where the safety, health, property, and welfare of the public is endangered (See 250 CMR 4.01(2)(a) and 309 CMR 4.03(4,5 and 6)).

In addition to impugning the integrity of the engineering profession, Wilmington asserts, in its petition, that the role of the LSP is by definition, limited to those matters related to the investigation, response, and remediation of hazardous waste sites and releases. It is true that the LSP *certification* does not carry regulatory significance, and is in fact prohibited, for matters that are not described in or subject to the Massachusetts Contingency Plan (310 CMR 40.0000 [MCP]). The facts are, however, that all of the mitigation measures required at the property, which could materially affect soil or groundwater, will be subject to the requirements of the MCP, and LSP certification or consideration, by virtue of the location of the property within a confirmed Tier 1A disposal site. Specifically, mitigation measures that must be employed at the property during the development of the facility that could affect soil or groundwater, must be performed in accordance with a MDEP approved CRAM Plan, *under the direction of an*

LSP. Moreover, under its agreement with Olin, all activities conducted by NET that could disturb subsurface conditions at the property, during or after development, will be subject to a Notice of Activity and Use Limitation (Notice) *approved by an LSP*. Any future activity at the property, which is not consistent with the Notice, *must be evaluated, and supervised by an LSP* in accordance with the requirements of the MCP. It is anticipated that upon filing of a Response Action Outcome (RAO) Statement for the property, or portions of the property, that a final Activity and Use Limitation(AUL) *prepared by an LSP*, will be recorded, as required under the MCP.

It is acknowledged that certain mitigation measures may not be directly subject to the MCP (including the preparation, review, and implementation of regulatory compliance programs, design and management of material storage facilities, wetland protection, etc.), and will not require LSP certification. However, the use of an individual that is an LSP, or a licensed engineer, to provide these services is appropriate and reasonable. Many LSPs also are licensed as engineers and/or maintain appropriate qualifications to identify the need for, design, and manage the mitigation measures that may be required during the development, and future operation of the NET facility. Both LSPs and Engineers, are required under their respective licenses, and widely accepted professional standards², to make reasonable and appropriate inquiry of the facts prior to rendering opinions, and are not permitted to provide professional services outside of their area of competency, or to rely upon the technical assistance of others, unless it has been reasonably determined that such persons are qualified. (See 250 CMR 4.01(1) and (3) and 309 CMR 4.02(2)). It is therefore reasonable for the Board to conclude that it is the responsibility of the LSP,

² See the American Society of Civil Engineers **Guidelines to Practice Under the Fundamental Canons of Ethics** at <http://www.asce.org/professional/ethics>.

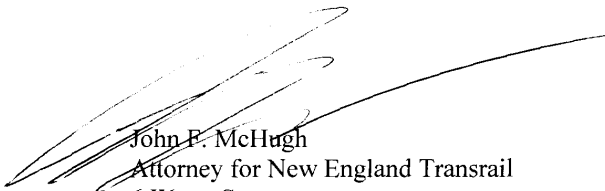
and/or the engineer employed by NET to recommend that NET seek the services of another qualified professional to review, assess, monitor, or monitor circumstances that could require mitigation, or to design, build, and operate mitigation programs that may be required, if the engineer or LSP is not personally qualified to provide such services.

Clearly, the SEA's reliance on an LSP and a professional engineer, as needed, to assure mitigation measures are complied with was entirely reasonable and within the discretion of the SEA. Wilmington's position would render any solution to any environmental problem impossible without the continued allocation of governmental resources, an irrational result.

CONCLUSION

The EA produced by the SEA is well reasoned and fully supported by the extensive record before it. The SEA's reliance on State authorities to assure that State imposed standards are complied with as to the specifics of construction activity and that licensed professions will comply with their legal and ethical responsibilities is reasonable. Determining that minor changes have no effect requiring additional review is within the SEA's reasonable discretion. Therefore, the EA of the SEA should be approved by the Board and Petitioner should be authorized to proceed as a common carrier.

Dated, New York, N.Y.
February 4, 2005



John P. McHugh
Attorney for New England Transrail
6 Water Street
New York, N.Y. 10005
212-483-0875

Certificate of Service

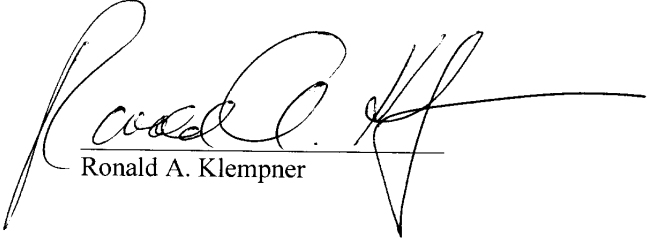
Ronald A. Klemptner certifies that he is a resident of Teaneck, N.J. and over
eighteen years of age and that on this 4th day of February, 2005 he served a copy of this

Reply upon:

Deutsch, Daniel R.
Deutsch Williams Brooks Derensis & Holland, P.C.
Attorneys for Wilmington, Massachusetts
99 Summer Street
Boston, MA 02110-1235

by regular United States Mail.

Dated, Teaneck, N.J.
February 4th, 2005



Ronald A. Klemptner



February 4, 2004

LAKESIDE OFFICE PARK
607 NORTH AVENUE, SUITE 11
WAKEFIELD, MA 01880
781-246-8897
FAX: 781-246-8950
WWW.ECSCONSULT.COM

Mr. Ronald A. Klempner, Managing Principal
New England Transrail, LLC
843 Red Road
Teaneck, New Jersey 07666

Mr. Robert Jones, III, Managing Principal
New England Transrail, LLC
24 River Road, Suite 19
Clifton, New Jersey 07014

Subject: Response to Petition by the Town of Wilmington to the Surface Transportation Board
Redevelopment of Former Olin Corporation Facility
51 Eames Street
Wilmington, Massachusetts

Dear Messrs. Klempner and Jones:

The undersigned certifies, pursuant to 28 USC1746, that the following is true to the best of our knowledge and belief, signed and dated this fourth day of February 2004 in Wakefield, Massachusetts.

Environmental Compliance Services, Inc (ECS) has prepared this letter, for submittal by New England Transrail, LLC (NET), to the Surface Transportation Board in response to a Petition made by the Town of Wilmington.

1. The Town's petition challenges the finding of the Surface Transportation Board's Section of Environmental Analysis (SEA) that the project as conditioned will not result in any significant environmental impact.

The petition presents several conditions and circumstances that, in the Town's opinion, undermine SEA's finding that the project as conditioned will not result in any significant environmental impact. These conditions /circumstances, and our rebuttal to the Town's assertions, are as follows:

- a. The petition states "that site is the most complex contaminated waste site in Massachusetts".*** This assertion is subjective, and irrelevant. There are other complex sites in Massachusetts where industrial redevelopment has occurred concurrent to environmental site assessment and remediation. For example, several such developments have been completed in towns abutting Wilmington within the past several years and involving significantly higher environmental concerns. Although the complexity of a site may affect the level of effort required to assess or mitigate site-wide conditions, it does not preclude development or the use of any portion of a site, provided that

HADDAM, CT
COLUMBUS, OH

TAMPA, FL
MARION, NY

AGAWAM, MA
BRATTLEBORO, VT

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BOW, NH

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development and use does not pose an unacceptable risk to human health, or exacerbate environmental conditions at the site, or increase the cost or complexity of cleanup. Massachusetts Department of Environmental Protection (MADEP) policies establish specific requirements for construction activities at contaminated properties which NET has committed to follow as part of its mitigation measures.

- b. ***"MADEP has designated it a Tier 1A Site"***. This statement is also irrelevant. The Site encompasses 168 acres of which NET's property is only 53 acres (approximately 30 acres is available for development of any kind). Designation as a Tier 1A Site does not necessarily preclude the redevelopment or use of any property.
- c. ***The Town states that "a decade of investigation and remediation has not resulted in complete characterization of the toxic constituents"***. Complete characterization of the site is not required in order to achieve MADEP requirements for construction at a portion of a site. The MADEP permits construction and use of land within a Site, provided that 1) the area where the construction is to take place has been sufficiently characterized to assess the nature and extent of contamination that would be affected, support the evaluation of risks to construction workers and others during and after construction activities and the selection of an appropriate remedy, 2) the work is performed under one of the response action vehicles (for example, a Release Abatement Measure), and 3) remedial measure that are required to protect public health or the environment, or to otherwise comply with the MCP, are employed prior to the placement of any permanent structure and/or the placement of permanent structures at the Property will not prevent or impeded the implementation of additional response actions, should they be necessary. It should be noted that extensive investigations, including a focused site characterization (FSC), and a focused risk assessment (FRA) were prepared for the development area, and were submitted to MADEP for review, in November 2004. It is intended that the FSC and FRA support MADEP's consideration of the Construction Related Release Abatement Measure (CRAM) Plan for the proposed NET development.
- d. ***The petition states "a human carcinogen was discovered at the site recently, leading MADEP and USEPA to assess possible other contaminants and potentially requiring additional monitoring and identification efforts."*** The human carcinogen referred to in the Petition is understood to be N-nitrosodimethylamine (NDMA), which was detected at low levels in groundwater to the west of the NET development area, over two years ago. Since then, an extensive investigation of the extent of NDMA, and several other additional compounds at the Site, including the NET facility area, have been completed. The information regarding the concentrations of these compounds in soil, groundwater, surface water, and sediment at the 51 Eames Street Property, were considered in the FRA. The FRA concluded that the levels of NDMA and other compounds in environmental media within the NET project area, do not pose an unacceptable risk to construction workers, employees, or visitors to the NET facility, under the conditions proposed by NET. The current assessment of possible *other* contaminants by MADEP and USEPA, is focused on the tentative identification of very low concentrations of

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organic compounds in groundwater historically used for potable purposes in the Maple Meadow Brook Aquifer, to the west of the development area (Note: The Aquifer lies under only a portion of the overall Site, but it does not lie under the NET Property). The Petition fails to note that these evaluations are being performed to address conditions affecting a drinking water resource area that is located in a different watershed. The proposed use of the NET facility is not expected to have a significant impact on groundwater, or to result in the exposure of workers or site visitors to groundwater. In addition, land use restrictions are planned for the Property to limit, or prevent, as necessary, contact with groundwater, in the future.

- e. **The petition states "the site contamination has forced the temporary closure of more than half of Wilmington's public water supply wells because of contamination of the aquifer fed by the site."** The Petition fails to make the distinction between the NET development area, and the aquifer that is used by Wilmington as a water supply. As previously reported, the NET facility area is located in a different watershed than the affected water supply, and the use of the facility, as proposed by NET, will not have any impact on the future water quality in the aquifer. Moreover, the use of portions of the 51 Eames Street Property by NET, will have no impact on the further assessment or remediation of conditions that are currently affecting the water supply wells.

2. **Extent to which proposed development work will impede or prevent the future assessment and/or remedial action at the property.**

The Petition asserts that MADEP may be unable to reach reliable and responsible conclusions about NET's proposed abatement measures for construction at the Site, because the Construction Related Release Abatement Measure (CRAM) plan submitted to MADEP by NET was deficient.

The Petition refers to a letter to MADEP dated December 22, 2004, in which GeoInsight alleges that the CRAM is deficient because there is an inadequate level of characterization of disposal site conditions to support the selection of appropriate remedial actions. GeoInsight mentions the ongoing investigation of COCs at the site by MADEP and USEPA, as evidence of the need for further characterization. GeoInsight also alleges that the future use of the containment area, as described in the RAM, could result in a failure of the proposed cap, and possibly affect the hydrologic performance of the containment area, and cites several "fundamental deficiencies" in the design information presented in the CRAM (while also stating that it has not completed a detailed review of the final cap design). GeoInsight's final concern is that the proposed development and use of the NET facility will interfere with the implementation of response actions that may be required to achieve a condition of No Significant Risk under the MCP, and other investigations that may be required by USEPA, in the future. GeoInsight also suggests that the disturbance of the property during redevelopment will prevent the potential identification of additional source areas in the future.

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It should be noted that MADEP has not completed its review of the CRAM Plan and related submittals, and the opinions regarding the deficiencies of the CRAM which are cited in the Petition, are those of consultants retained by the Town (GeoInsight, Inc.), and not MADEP.

We disagree with GeoInsight's finding that there has been an inadequate level of characterization. Extensive investigations have been performed site wide, and within the proposed NET facility area, over the last two years to identify the presence and extent of several additional contaminants of concern (COCs). The data from these investigations were considered in the FRA.

As noted above, the current assessment of possible additional contaminants by MADEP and USEPA is based on the tentative identification of very low concentrations of organic compounds in groundwater that has been used for potable purposes, in the Maple Meadow Brook Aquifer, which lies outside (to the west) of the development area.

As demonstrated in the FRA (which was apparently not reviewed by GeoInsight), and the CRAM, the potential presence of additional COCs in groundwater at the Site is not a significant concern for the proposed NET development because the future use of the property, as proposed by NET, will not have a significant impact on groundwater, or result in exposures to groundwater or surface water, or soil gas, by site workers or visitors. The potential presence or absence of additional compounds of concern in soil in areas where subsurface soils may be disturbed, has been investigated to the extent feasible, and may be confirmed, with confirmatory sampling and analysis during construction. If subsurface conditions encountered during redevelopment are different from those reported, or a condition that could pose a significant risk to workers or others is observed, MADEP will be notified and an assessment will be made at that time as to what measures should be taken before construction activities proceed.

GeoInsight's concerns regarding the design of the permanent cap are contrived. First, it is NET's intent to install a permanent cap over the containment area that will meet the requirements established by MADEP for reduced infiltration, and which will also be suitable to withstand all uses that may be considered by NET. This approach is consistent with the future use conditions that have been anticipated for the 51 Eames Street Property since 2000. It will be NET's obligation to inspect and maintain the permanent cap, in accordance with MADEP approval or policy. Additionally, long term monitoring plans for the cap and nearby areas at the Property have been incorporated into a Post Construction Monitoring Plan, which is subject to MADEP approval, and cannot be modified without MADEP approval. It must be noted that the permanent cap is proposed only to substantially limit the infiltration of water into containment area. The cap is not required to prevent contact with soils within the containment area.

Secondly, the NET CRAM presented construction details for the permanent cap that are appropriate to support MADEP review and approval of the overall CRAM Plan. It is understood that MADEP may, as part of its review, request additional design elements, and

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geotechnical analysis, of the permanent cap, prior to issuing a final approval of the cap design.

We find that GeoInsight grossly overstates the extent to which proposed structures would interfere with future investigations. The presence of the proposed reload facility, or any other structure, at the property will not preclude the further assessment or remediation of groundwater conditions at the Property. In fact, it is anticipated that the current groundwater monitoring programs that are being implemented at the property will be maintained during, and after construction of the NET facility.

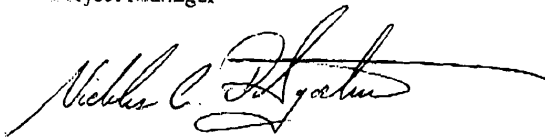
The additional subsurface investigations that GeoInsight envisions at the Property, or the basis for believing that there are additional source areas beyond those already identified, were not identified by GeoInsight. With the possible exception of the foundations to the transloading structure (beneath which the soil has been extensively characterized, and as noted above, will be re-evaluated upon excavation), all other structures are intended to be temporary and/or moveable, and NET understands that future assessment and/or remediation efforts required by MADEP or USEPA, including soil and groundwater testing or removal, could temporarily interrupt the use, or require the relocation of, these structures. The excavation and relocation of fill at the property will be within a well-defined area, and will be subject to a testing program approved by MADEP.

If you have any questions, please do not hesitate to call.

Sincerely,
Environmental Compliance Services, Inc.



Stephen J. Graham, PE, LSP
Project Manager



Nicholas C. D'Agostino, PE
Senior Geotechnical Engineer