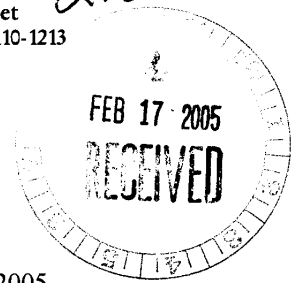




Daniel R. Deutsch
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February 16, 2005

VIA FEDERAL EXPRESS

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

ENTERED
Office of Proceedings

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Public Record

**RE: Response of Town of Wilmington to Reply of New England Transrail, LLC
STB Finance Docket Number: 34391**

Dear Secretary Williams:

On behalf of the Town of Wilmington, enclosed please find the *original* and ten (10) copies of the following document:

Response of Town of Wilmington to Reply of New England Transrail, LLC (with attachment).

Also enclosed please find a disk containing the above-named document.

Please do not hesitate to contact me with any questions you may have. Thank you for giving this matter your careful attention.

Very truly yours,

Daniel R. Deutsch

DRD:lsc
Enclosures

cc: Town of Wilmington
Attn: Michael A. Caira, Town Manager
Paul R. DeRensis, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. FD34391

NEW ENGLAND TRANSRAIL, LLC, EXEMPTION FOR OPERATION
AS A CLASS III CARRIER OVER LINES OWNED BY
BOSTON AND MAINE RAILROAD

**RESPONSE OF TOWN OF WILMINGTON
TO REPLY OF NEW ENGLAND TRANSRAIL, LLC**

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Judging from the length and complexity of NET's Reply, Wilmington has raised serious questions concerning the propriety of the proposed development, the way in which NET disclosed it, and the soundness of SEA's assessment. Even so, NET misses the mark in many respects.

In a gratuitous preface, NET asserts that Wilmington has an ulterior motive. Setting aside the unauthorized disclosure of an executive session meeting, there is no truth to NET's claim that Wilmington wants to acquire the project site. It would be absurd for the Town to acquire a property so environmentally troubled and fraught with liability. Wilmington's Board of Selectmen act only by vote, and their will is not reflected in the ad hoc comments of a single member taken out of context. Those comments were rhetorical and borne of frustration with the unwillingness of the property owner and its proposed developer to confront the environmental quagmire at this site. Wilmington's opposition to NET's proposal, legal position, and piecemeal disclosure of its intentions are well-founded. NET is grasping at straws.

Its Reply is disingenuous. In discussing the issues of preemption and full disclosure, NET repeatedly refers to the "handling" of materials instead of processing, which is what it truly

intends. The Reply attempts to build an argument around definitions of rail transportation in ICCTA and Railroad Retirement Board regulations (Reply, at pp 4 and 6). For good reasons, those regulations refer to sorting and handling but do not mention processing, fabrication or transformation of the goods to be shipped. Such activities are tantamount to manufacturing. NET sidesteps this distinction and disavows any manufacturing aspect of its proposed activities. However, the inescapable reality is that grinding of construction waste materially transforms and gives value to otherwise miscellaneous debris. In terms of the 1912 decision which NET cites, grinding solid waste is more akin to butchering cattle than to the sorting and feeding of cows which the court ruled was essential to transport them by rail.¹

NET posits a necessary relationship between the proposed processing activities and rail transportation by stating that grinding and baling “assur[e] that the cargo presented for shipment is the cargo contracted for . . .” That logic is patently self-serving. Just because NET enters into a contract to deliver goods in a particular form does not demonstrate that the transportation of those goods requires them to be processed into that particular salable form.

NET generalizes that “whatever services the railroad agrees to provide by contract or by tariff” fall within the Board’s exclusive jurisdiction (Reply, at p 6). The theme of these arguments – concerning not only preemption but also mitigation – is that decisions concerning the scope and impact of a project must be left to the project proponent. It is the prerogative and obligation of this Board to establish defensible limitations on jurisdiction and criteria for regulation. No applicant should be allowed to usurp that role.

¹ The proposed grinding and shipping of waste also would not, as SEA suggests, “result in a modest beneficial impact on the transportation of recyclable commodities.” Rather, NET could process and ship waste out-of-state landfills without the burden and expense of solid waste permitting or the benefit of recycling. *See* correspondence to SEA from Executive Director of the Construction Materials Recycling Association, dated January 6, 2004 [2005], annexed at Tab 1.

NET repeats this refrain when responding to Wilmington's argument that the proponent's Petition for Exemption and Environmental Report were misleading. NET's own argument affirms that it originally disclosed "handling," not processing, of materials. The proponent cites its indecision to excuse that omission and others: "evolution of the project from theory to dealing with specific commodities has been ongoing and disclosed as it occurred to the SEA." (Reply, at 11 [emphasis supplied]). Whether intentional or not, segmentation of a project is improper.

The proponent also argues that the Board did not need information on processing activities or construction plans at the outset of these proceedings and that SEA did not need it before issuing its Environmental Assessment. That position should offend the Board. A full and fair review of a project's necessity and environmental risks is not possible where even the basic scope of the project is "evolving" in the eyes of its proponent and on paper before the agency which must conduct that review. No project should be subjected to federal scrutiny until the proponent has reduced its "theory" to specifics.

In addition, NET argues that complete disclosure at the federal level was not necessary because the Board should presume that a project will comply with local requirements. This second rationalization contradicts NET's position on preemption. NET argues, and SEA would find, that state and local permitting requirements are preempted. If local control is limited to advice giving and enforcement then it is hypocritical to defer the consideration of engineering plans to local procedures.

NET announces that it may build yet more trackage "to accommodate the growth of the rail yard . . ." (Reply, at p 14) Apparently, the scope of the project, like the environmental condition of this troubled site, is subject to change without notice. The Board is being asked to approve a moving target.

On the subject of mitigation, NET distorts Wilmington's position regarding SEA's reliance on NET and its engineers. According to NET, Wilmington impugns the ethics of all engineers. Not so. The point, which NET has not grasped, is that a hired engineer inevitably has allegiances that may color his exercise of judgment. When asked to make a judgment regarding the necessity or extent of costly mitigative measures, he is likely to favor the interests of his paying client. The commentary of NET's engineers on their construction-related action measure (CRAM) plan, which is attached to the Reply, illustrates exactly this point. Even ostensibly independent professionals advocate positions that are at odds with those of other qualified professionals.

A first base coach who is paid, hired and fired by one team should never be asked to umpire a game. SEA's Post EA would surrender authority to NET and its consultants on a wide variety of compliance and mitigation matters, including several that vitally determine the impact of the proposed project on its surrounding environment. That is not the "hard look" at environmental effects which NEPA and the public interest require. Marsh v. Oregon National Resources Council, 490 U.S. 360, 373 (1989).

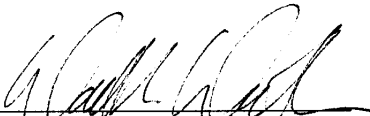
NET's Petition for Exemption foreshadowed the overarching concern with this project. In that document, NET stated "[T]he Board has rejected the argument that creation of a small railroad on former industrial tracks by a petitioner which is a non-rail operator for the purpose of obtaining the legal benefits of rail carrier status is a sham transaction." (Petition for Exemption, at 3 [citation omitted]). When that Petition was filed in November 2003, and approved by the Board in March 2004 subject to environmental review, NET had not yet fully disclosed the scope of this project, had not yet proposed to process waste at a "rail facility" without being subject to state permitting requirements, and had not yet proposed to leave the need for further mitigation

to its own engineers. At this juncture, however, it is hard not to view as a sham transaction the creation of a small railroad on former industrial tracks on environmentally unstable land by a non-rail operator for the purpose of obtaining the legal benefits of rail carrier status to avoid standard permitting for non-essential, profitable and polluting solid waste processing operations.

Wilmington reiterates the requests for relief set forth in its Petition.

Respectfully submitted,

TOWN OF WILMINGTON,
By their attorneys,



Paul R. DeRensis, BBO # 121000
Daniel R. Deutsch, BBO # 551744
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617-951-2300

Dated: February 16, 2005

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CERTIFICATION

I hereby certify that I have served a true and complete copy of the foregoing documents by first class mail, postage prepaid this 16th day of February, 2005 to the persons listed on the attached service list.

A handwritten signature in black ink, appearing to read "John McHugh", is written over a horizontal line.

SERVICE LIST

John McHugh, Esq.
Six Water Street, Suite 401
New York, NY 10004

DWL1B 167116v1
7605/00



Construction Materials Recycling Association
P.O. Box 122, Eola, IL 60519
630/585-7530 fax 630/585-7593

AB
E2
1317

January 6, 2004

Victoria J. Rutson
Chief
Section of Environmental Analysis
Surface Transportation Board
1925 K St. NW Ste. 500
Washington, DC 20423

Dear Ms. Rutson:

Recently I had the opportunity to review your office's post environmental assessment on the New England Transrail pre-emption application (finance docket no. 34391). While of course the rationale for this project boils down to the board's insistence that it controls all rail-related activities and anyone from U.S. Senators down has no power such as theirs, such politics are not our concern, recycling is. Related to that is this statement in the report:

"Implementation of the Proposed Action would result in a modest beneficial impact on the transportation of recyclable commodities."

As the leading national expert on the recycling of construction and demolition materials, I can categorically state that is a bald-faced lie. The intent of this project is to get around the Massachusetts DEP's efforts to promote recycling and to provide one company an unfair advantage in the marketplace. The facility will not be shipping these materials to a recycling facility, but to out-of-state landfills, some of which are poorly run and a danger to the public. It is a solid waste facility, not a railroad. Your report supports the additional mining and logging needed to make up for the loss of these natural resources to the recycling process, while adding to the ticking bomb that is a landfill. In short, this report helps a project that will do more environmental damage than an Appalachian coal mining operation. Was your agency's jurisdiction that important?

Sincerely,

William Turley
Executive Director
Construction Materials Recycling Association
Association Publisher
Construction & Demolition Recycling magazine