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EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
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Commissioner

February 17, 2005

Via U.S. Mail

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

ENTERED
Office of Proceedings

FEB 23 2005

Part of
Public Record

Re: Petition for Exemption of New England Transrail LLC
STB Finance Docket No. 34391-0
DEP Petition and Response

Dear Secretary Williams:

Enclosed for filing please find Massachusetts Department of Environmental Protection's Petition for Clarified Conditional Exemption or in the Alternative Petition to Revoke the Conditional Exemption and Response to Town of Wilmington's Petition and to New England Transrail LLC's Reply in the above-captioned action.

Please do not hesitate to contact me with any questions you may have.

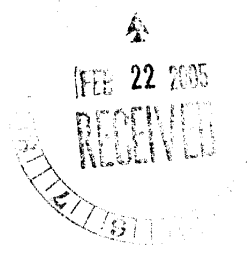
Thank you for your consideration.

Sincerely,

Margaret R. Stolfa,
General Counsel

cc. James Colman, Assistant Commissioner Massachusetts DEP
Victoria Rutson, Chief, Section of Environmental Analysis
James Milkey, Massachusetts Office of Attorney General

213386



BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34391-0

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

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
PETITION FOR CLARIFIED CONDITIONAL EXEMPTION OR IN THE
ALTERNATIVE PETITION TO REVOKE THE CONDITIONAL EXEMPTION AND
RESPONSE TO TOWN OF WILMINGTON'S PETITION AND TO
NEW ENGLAND TRANSRAIL LLC'S REPLY

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The Massachusetts Department of Environmental Protection ("DEP") is an interested party in these proceedings because it regulates solid waste facilities of the type proposed by New England Transrail, LLC ("NET") on a parcel of land owned by Olin Corporation in Wilmington, Massachusetts. The DEP respectfully submits this Petition and asks the Surface Transportation Board ("STB") either to clarify that its Conditional Exemption granted to NET is not applicable to solid waste activities, including NET's proposed grinding, compacting and baling or not to extend its Conditional Exemption to such solid waste activities. In the alternative, the DEP asks the STB not to allow the Conditional Exemption to become effective (revoking the Conditional Exemption to the extent necessary). This Petition is also in response to the Town of Wilmington's ("Wilmington") *Petition 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 ("Wilmington's Petition") and NET's *Reply*. The DEP agrees with many of the arguments in Wilmington's petition. The DEP disagrees with NET's Reply but will comment only on NET's first point. In addition, the DEP raises certain important legal issues that the STB should squarely address in this docket.

In addition, DEP respectfully requests that the Board schedule a local informal hearing in accordance with the provisions of 49 CFR 1121.4 in order to receive oral comments from the many significantly adversely impacted parties on the issues addressed in this Petition and in other Petitions filed on this matter.¹

1. STB's Conditional Exemption Does Not Extend to Recently Proposed Activities.

On December 3, 2003 NET filed with the STB a Petition for Exemption from formal application procedures for authority to construct 2700 feet of new rail line, acquire 1300 feet of existing track, and to operate approximately 4000 feet of track located on and adjacent to a parcel of land owned by Olin Corporation in Wilmington, Massachusetts. In that Petition, NET described its proposed activities to construct 2700 feet of new rail line, acquire 1300 feet of existing track, and to operate approximately 4000 feet of track and "to build facilities on the parcel to facilitate the transload of various commodities between the highway and rail modes." (NET Petition at 5.) The Petition then listed the types of cargoes anticipated but indicated only that NET would

¹ To the extent it is applicable or required, DEP respectfully requests to intervene pursuant to 49 C.F.R. section 1113.7 for the reasons set forth in this Petition.

“transload and consolidate” outbound loads. (See NET Petition at 5-6.) No further description of the activities to be conducted on the site was provided.

On March 2, 2004, the STB issued a Conditional Exemption, subject to the STB's further consideration of anticipated environmental impacts of the project, exempting NET's construction of new rail line, acquisition of existing track and operation of the new and existing track from the full application procedure. In its March 2004 decision, the STB stated that “the proposed transaction would enhance competition by providing shippers in the greater Boston area with a new intermodal transportation option”, thus demonstrating that the STB believed the service NET described in its Petition was merely the transloading of intermodal containers and not solid waste activities such as the grinding, compacting and baling described by NET later in its comments to the Section of Environmental Analysis (“SEA”). (STB March 2, 2004 decision at 3.) Furthermore, NET even agrees in its Reply that the Petition explicitly stated the proposed facility would be “accepting cargoes for transload in *intermodal* transport” without additional description of the transloading activities. (emphasis added) (NET Reply at 10-11 and NET Petition at 8.)

On its face, the STB's Conditional Exemption issued in March 2004 does not apply to the newly proposed solid waste activities, which NET added to its proposal only through comments submitted to the SEA. In a letter to the SEA dated September 29, 2004, NET indicated that it now intends not only to transload containers and bales of cargo from trucks, but also to load loose solid waste onto rail cars as well as to grind and

bale construction and demolition debris prior to loading onto rail cars.² The STB has not had an opportunity to review these additional activities to determine whether in fact such activities fall under its jurisdiction as provided in 49 U.S.C. 10501(b) and the definition of transportation at 49 U.S.C. 10201(9). Therefore, the STB's previously issued Conditional Exemption extends only to the activities specifically described in the Petition, that is construction of a new rail line, acquisition of existing track and operation of the new and existing line and transloading of intermodal containers from trucks to rail. NET may not simply add new activities not even mentioned in its original Petition, to be incorporated in the STB's Conditional Exemption issued 6 months prior. The STB needs to consider whether the recently proposed solid waste activities, specifically the transfer of loose solid waste into hoppers and the grinding and baling of solid waste, constitute transportation by rail. The DEP believes after such review, the STB should conclude that they do not constitute transportation by rail.

² Five methods for transloading solid waste materials from trucks to railcars are proposed for the facility.

- A. Container transloading – direct transfer of filled, sealed shipping containers from trucks to rail cars.
- B. Bale transloading – lifting of baled waste from truck trailers and placed into rail cars.
- C. Loose material transloading – waste material will arrive in roll-off containers, dump trucks or compactor trucks. The waste material is dumped into a tipping area. Construction and demolition waste will be lifted by a material excavator and placed into a mechanical grinder, before being placed into rail cars.
- D. Other solid waste transloading – other solid wastes will be transloaded using two possible methods:
 - i. moved by conveyor system to a mechanical baler. Individual bales are lifted by a material handler and placed into a rail car; or,
 - ii. Dumped from a truck into a container located in a vault. After each load is deposited in the container, a material excavator will smooth out the material and tamp it down. When the container is filled it is lifted onto a rail car using a bridge crane.

(See letter from NET to SEA of Sept. 29, 2004.)

2. NET Solid Waste Activities Do Not Constitute Transportation by Rail Carrier Under Section 10501(b) of the ICCTA.

The jurisdiction of the STB applies to transportation by rail carriers. Such jurisdiction generally preempts regulation of the same activity by the states.³ Courts interpreting this statute have appropriately found that the STB's jurisdiction extends only to rail transportation activities.⁴ For example, in Hi Tech Trans, LLC v. New Jersey Department of Environmental Protection, 382 F.3d. 295 (3rd Cir. 2004), trucks arrived at the transload facility, discharged their contents (primarily construction and demolition waste) into a hopper provided by the operator and then the waste was loaded into rail cars from the hoppers. The appellate court rejected the railroad's claim of preemption because the proposed activity at most constituted transportation *to* a rail carrier and not transportation *by* a rail carrier. Id. at 308. NET proposed very similar activities in its September 29, 2004 letter to the SEA. If the loading of construction and demolition debris (a solid waste) into hoppers in Hi Tech Trans does not constitute transportation by a rail carrier, then the loading of solid waste by NET similarly does not. The fact that NET is a chartered rail carrier does not mean that they are automatically acting as a rail carrier no matter what activity they undertake.

³ Section 10501(b) of the ICCTA states that the "jurisdiction of the Board over ... transportation by rail carriers ... is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. 10501(b).

⁴ The DEP rejects NET's argument that the definition of rail transportation for the purposes of the Railroad Retirement Board at 20 CFR 202.7 is relevant.

NET originally proposed, according to its own Petition and the STB Conditional Exemption, to facilitate the transloading of intermodal containers. DEP agrees with the STB's Conditional Exemption that NET may accept sealed intermodal containers at its facility for transfer onto rail cars. Such activity does not need a solid waste site assignment and permit pursuant to M.G.L. c.111, s.150A. Now NET proposes not only to load solid waste onto rail cars like the Hi Tech Trans facility in which preemption was rejected, but also to grind and bale solid waste materials prior to loading such materials. Such grinding and baling of waste materials to compact the solid waste occurs prior to, and separate from the loading and thus cannot be said to be rail transportation.⁵

3. Proposed NET Activities Are Not Integrally Related to Rail Transportation.

The STB's jurisdiction extends only to rail transportation. Activities also may be considered rail transportation if they are integrally related to the provision of interstate rail service. See Borough of Riverdale- Petition for Declaratory Order- the New York Susquehanna and Western Railway Corp., STB Finance Docket 33466 at 10 (September 9, 1999) and Flynn v. Burlington Northern Santa Fe Corp., 98 F.Supp.2d 1186, 1189 (E.D. WA 2000). The Conditional Exemption issued by the STB to NET may apply only to the activities at the proposed terminal that are integral to railroad transportation. Transloading of intermodal containers is integral to rail transportation but solid waste processing activities conducted prior to and separate from loading rail cars are not.

⁵ In its Reply, NET argues that the grinding, compacting and baling of solid waste increase efficiency and safety of the transloading operation. (NET Reply at 5-6.) However, these solid waste activities have that effect whether the solid waste transportation is conducted by long haul truck or rail and therefore such activities cannot be rail transportation.

DEP's Response
FD No. 34391-0

Rather, the DEP has jurisdiction over such activities pursuant to M.G.L. c.111, s.150A which requires that solid waste facilities, including a "transfer station ... or any other works for treating, storing, or disposing of refuse," obtain a site assignment and permit. M.G.L. c.111, s.150A. Such site assignment and permit could allow NET to conduct solid waste activities, such as transloading loose solid waste and compacting, baling and grinding, to reduce bulk and therefore transportation costs (whether by rail, truck, barge or other mode), at its rail facility as part of the services offered to its customers.

The SEA acknowledges that the operation of reload activities fall outside the STB's regulatory control (SEA Post Environmental Assessment at 4-5) but states such activities are reviewed by the SEA because they are closely connected to the construction, acquisition and operation of the rail line. See 40 CFR 1508.25. The DEP agrees that the reload and solid waste activities are outside the STB's regulatory jurisdiction. Because these activities are outside the STB's regulatory control, the DEP may maintain its jurisdiction over such activities and require a site assignment and permit pursuant to M.G.L. c.111, s.150A for the operation of a solid waste handling facility even if the SEA reviews the activities in an environmental assessment. See Cities of Auburn and Kent, WA- Petition for Declaratory Order- Burlington Northern Railroad Co.- Stampede Pass Line, STB Finance Docket 33200 p. 16 (July 1, 1997)(granted preemption regarding the railroad's operation, maintenance and upgrading of the rail line stating "preemption does not deprive states of the power to regulate where the activity regulated is merely a peripheral concern of Federal law")(citations omitted).

4. State Regulation of Proposed Solid Waste Activities at Rail Terminal Does Not Unduly Restrict Rail Transportation or Unreasonably Burden Interstate Commerce.

A. State Regulation of Solid Waste Facilities Does Not Unduly Restrict Rail Transportation.

NET proposes not only to transload sealed intermodal containers of solid waste but also to conduct the solid waste activities of processing loose solid waste into hoppers, and grinding, compacting and baling solid waste all prior to loading the solid waste into rail cars at the proposed facility. The DEP agrees with the STB that the transfer of intermodal containers is transportation by rail and therefore asserts no jurisdiction over such activities. As argued above, NET's proposed solid waste activities (processing loose solid waste into hoppers, and grinding, compacting and baling solid waste) are not rail transportation. , In addition, under prior STB and circuit court decisions, state and local laws may impose reasonable and nondiscriminatory environmental restrictions on rail transportation activities provided such restrictions do not unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce. Boston and Maine Corp. v. Town of Ayer, 330 F.3d 12, 16 (1st Cir. 2003). In determining whether state and local laws may be imposed on rail transportation, "[t]he severity of the likely environmental impacts should be weighed against the severity of transportation impacts of compliance to determine whether and how the various Federal statutes can be accommodated. This is a case-specific and fact specific determination." Boston and Maine Corp. and Town of Ayer, Decision on Ayer's Petition for Reconsideration, STB Finance Docket

33971 p.3 (Oct. 5, 2001). The burden on interstate rail transportation imposed by Massachusetts' solid waste regulations on these solid waste activities is minimal. Transportation of solid waste by rail can occur after NET has obtained a site assignment and permit. Should the facility fail to succeed in obtaining such permits, transloading of sealed intermodal containers onto rail cars may continue at the site. Even in this scenario, grinding, compacting and baling of waste can occur at a different site prior to shipment by rail. In fact, there are numerous solid waste transfer and processing facilities around Massachusetts that grind, bale and compact solid waste prior to long-haul shipment, whether by rail or other modes, providing evidence that these processing activities are not integral to rail transportation and that the burden on interstate rail transportation is minimal.

B. State Regulation Does Not Unreasonably Interfere with Interstate Commerce.

Any burden on interstate commerce imposed by Massachusetts' environmental regulation of the solid waste activities proposed by NET also is minimal. The Massachusetts site assignment and permitting requirements apply to all solid waste activities whether the waste is then shipped by rail, truck, barge or otherwise, in-state or out-of-state. NET has proposed to conduct the solid waste processing activities of grinding, compacting and baling at the proposed rail facility as a convenience for its customers. But, it was never the intent of the ICCTA drafters to extend preemption to activities that just happen to occur at rail facilities. See

Florida East Cost Railway v. City of West Palm Beach, 266 F.3d 1324, 1327-28 (11th Cir. 2001). Solid waste facilities, like the one proposed by NET, can and do occur separate and apart from rail facilities. In fact, allowing rail facilities to circumvent Massachusetts siting and permitting requirements for solid waste activities they plan to conduct but which the ICCTA was never meant to regulate would place an undue burden on *existing* solid waste facilities that have met and complied with siting and permitting requirements of M.G.L. c.111, s.150A and the underlying regulations.

The ICCTA was intended to protect rail lines from state regulation to provide “federal uniformity in the regulation of rail transport.” *Id.* at 1337. Extending preemption of state law to solid waste activities that are conducted at a rail facility would transform the solid waste industry in Massachusetts and around the country because solid waste activities at rail facilities could avoid regulatory permitting requirements and state enforcement scrutiny. Currently, solid waste facilities in Massachusetts must complete a thorough siting and permitting process designed to protect human health, safety and the environment. If rail terminals may construct and operate similar solid waste facilities without first obtaining the site assignment and permit as otherwise required, the solid waste facility industry may relocate to rail facilities to avoid Massachusetts’s siting and permitting process. In this scenario, the only government agency that would even be available to regulate such facilities and protect public health, safety, and the environment would be the STB. Massachusetts believes that this would be place a huge regulatory and enforcement burden on the STB that it may not want to accept, be prepared to accept or even have the authority to accept.

C. State Regulation Reasonably and Nondiscriminatorily Protects Public Health, Safety and the Environment.

The protection of human health, safety and the environment is a compelling state interest that will be compromised without state regulation and oversight of the solid waste activities at rail facilities. As discussed above, it is likely that many solid waste facilities will choose to relocate adjacent to rail facilities to avoid regulation by the DEP. Yet, the DEP's regulations strike a reasonable balance between solid waste facility development and protection of the public health, safety and the environment. For example, siting of solid waste facilities is allowed where the facility will not pose a threat to schools, hospitals, and drinking water supplies. See 310 CMR 16.40. The conditions recommended by the SEA do not address Massachusetts' concerns regarding the protection of public health, safety and the environment. Local and state authorities implementing their permitting authority are in the best position to ensure that local and state health, safety and environmental concerns will be addressed.

C. NET's Proposed Activities Interfere with Massachusetts's Implementation of the Federal Clean Air Act.

The STB has stated that "nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act, the Clean Water Act and the Safe Water Drinking Act...." Boston and Maine Corp. and Town of Ayer, STB Finance Docket 33971 p.3 (May 1, 2001). The

baling and shredding operations NET has proposed probably will use diesel engines for power. Based on the DEP's experience in permitting shredders at other solid waste facilities, these units are likely to need an air permit pursuant to DEP's air quality regulations, 310 CMR 7.00, promulgated pursuant to the Clean Air Act and adopted as part of Massachusetts State Implementation Plan as required by the Clean Air Act. But no mention of the permitting of these air emission sources has been included in the SEA's Environmental Assessment.

5. Proposed Mitigation Measures are Inadequate to Protect Human Health, Safety and the Environment.

On August 4, 2004, the SEA issued an Environmental Analysis based on NET's description of its activities in its original Petition. The SEA received many comments during a subsequent public comment period. In response to comments submitted by the DEP and Wilmington, NET submitted the September 29, 2004 letter regarding its proposed activities.⁶ On December 22, 2004 the SEA issued a Post Environmental Assessment that included many conditions relating to the environmental impacts of the proposed project. But for conditions relating to solid waste transloading and processing, the SEA recommended to the STB that the DEP have 30 days after STB's final decision to consult with the SEA. In the event the STB decides to make the Conditional Exemption effective, DEP intends to submit more thorough comments in accordance with the procedure set forth in Condition Number 13 of the Post Environmental Assessment.

⁶ The DEP also sent the attached letter of November 3, 2004 to the SEA during the comment period. It is not clear whether this letter was included in the record, please include it.

DEP believes the mitigation measures proposed in the Post Environmental Assessment are inadequate to protect human health, safety and the environment. The DEP's future detailed comments would address various issues, including the following:

- A. air emissions for diesel (or other fuel) engines to power on-site stationary equipment such as grinders;
- B. air emissions from mobile equipment (i.e., front-end loaders, cranes and lifts) used on-site with diesel retrofits and use of ultra low sulfur fuel;
- C. asbestos waste or asbestos containing materials that may be found in loads of construction and demolition waste through inspection, sampling and analysis or load rejection procedures;
- D. noise issues incorporating DEP's noise policy;
- E. dust control;
- F. minimum setback distances to protect abutters, sensitive receptors and public water supplies; and
- G. waste ban provisions of the DEP solid waste regulations at 310 CMR 19.017.

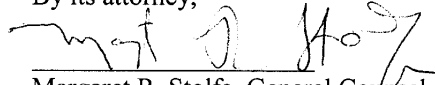
Most importantly, the SEA recommendation to the STB does not describe how any mitigation measures will be enforced to ensure that NET complies.

6. Conclusion

For the foregoing reasons, the DEP respectfully requests that the STB clarify that the Conditional Exemption applies only to construction of a new rail line, acquisition of existing track and operation of the new and existing line and transloading of intermodal containers from trucks to rail but does not apply to solid waste activities conducted by NET at the site. In the alternative, the DEP asks the STB not to allow the Conditional Exemption to become effective revoking the Conditional Exemption to the extent necessary. If the STB issues an exemption to NET, the DEP will submit detailed comments after the STB's final decision as provided in the SEA's Post Environmental Assessment.

DEP's Response
FD No. 34391-0

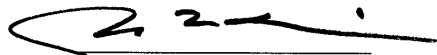
Respectfully submitted,
Department of Environmental Protection,
By its attorney,



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The Office of the Attorney General assisted in the preparation of this filing and supports the positions set forth herein.

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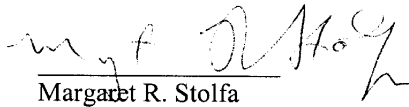
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Massachusetts Department of Environmental Protection's Petition for Clarified Conditional Exemption or in the Alternative Petition to Revoke the Conditional Exemption and Response to Town of Wilmington's Petition and to New England Transrail LLC's Reply was served this day via first class mail upon the following:

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Dated: February 17, 2005


Margaret R. Stolfa
General Counsel