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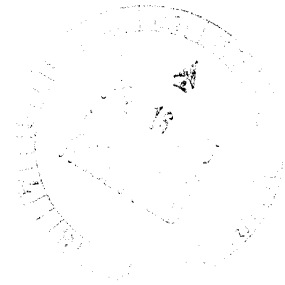
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February 15, 2005

**VIA FEDERAL EXPRESS**

**ENTERED**  
**Office of Proceedings**

**FEB 20 2005**

**Part of**  
**Public Record**

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

Re: New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway-  
Petition for Exemption- Construction, Acquisition and Operation as a Rail Carrier  
on Tracks and Lands Acquired from Olin Corp.  
FD No. 34391

Dear Secretary Williams:

Enclosed for filing with respect to the above referenced matter please find an executed original and 10 copies of a Petition for Declaratory Order, or in the Alternative, a Petition to Revoke Conditional Exemption and a Request for Informal Hearing, and a Verification Statement. The petition, request and verification are filed on behalf of the National Solid Wastes Management Association, et al. Pursuant to C.F.R. § 1104.3 (b)(1), electronic copies of the petition, which exceeds 20 pages in length, are also included on three 3.5-inch IBM-compatible floppy diskettes.

Although declaratory relief is sought, our understanding is that the petition may be considered under STB Finance Docket No. 34391 because the petition also seeks, in the alternative, revocation of the conditional exemption granted New England Transrail, LLC in that proceeding and requests an informal hearing. The fact that the Board has not yet rendered a final decision in that proceeding also strongly suggests consolidation would be appropriate for purposes of administrative efficiency and in order to facilitate the development of a clear record. Nevertheless, in the event the Board determines that a separate proceeding must be initiated for the petition, enclosed please find a check in the amount of \$1,400.00 to cover the filing fee. If no separate proceeding is deemed necessary, kindly return the check to my attention.

BEVERIDGE & DIAMOND, P.C.

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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FINANCE DOCKET NO. 34391

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NEW ENGLAND TRANSRAIL, LLC, D/B/A/  
WILMINGTON AND WOBURN TERMINAL RAILROAD CO.  
-CONSTRUCTION, ACQUISITION, AND OPERATION EXEMPTION-  
IN WILMINGTON AND WOBURN, MA

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NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL  
PETITION FOR DECLARATORY ORDER  
OR, IN THE ALTERNATIVE,  
PETITION TO REVOKE CONDITIONAL EXEMPTION  
AND  
REQUEST FOR INFORMAL HEARING

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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FINANCE DOCKET NO. 34391

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NEW ENGLAND TRANSRAIL, LLC, D/B/A/  
WILMINGTON AND WOBURN TERMINAL RAILROAD CO.  
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NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL  
PETITION FOR DECLARATORY ORDER  
OR, IN THE ALTERNATIVE,  
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AND  
REQUEST FOR INFORMAL HEARING

Preliminary Statement

The National Solid Wastes Management Association ("NSWMA"), the Solid Waste Association of North America, Massachusetts Chapter ("SWANA"), the Massachusetts Municipal Association ("MMA"), the Construction Materials Recycling Association ("CMRA"), the Integrated Waste Services Association ("IWSA"), American Ref-Fuel Company LLC, and New Bedford Waste Services (the "Petitioners") respectfully petition the Surface Transportation Board (the "Board"), pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 772, to terminate a controversy and/or to remove uncertainty, and to prevent irreparable harm, for either:

- (i) a Declaratory Order that the so-called "transload" solid waste processing facility proposed to be constructed by New England Transrail ("NET"):
  - A. is not within the exclusive jurisdiction of the Board under Section 10501(b) of the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (the "ICCTA") and is therefore not entitled to an exemption under Section 10502; and/or

- B. is subject to Massachusetts and local laws and regulations governing solid waste facilities because those laws and regulations are applied in a non-discriminatory manner and do not unreasonably burden interstate commerce, and are therefore not pre-empted under Section 10501(b); and/or
  - C. a clarification that the conditional exemption granted under the ICCTA does not apply to the so-called "transload" facility because the proposed solid waste processing, storage and handling activities described in NET's petition and supplemental submittals to the Board are common to the function of a broad category of solid waste management facilities that have no relationship to rail or rail transportation; or, in the alternative
- (ii) a revocation of the conditional exemption previously granted by the Board to NET under Section 10502 of the ICCTA because the Board does not have exclusive jurisdiction over NET's proposed solid waste facility and the proposal does not support the rail transportation policy.
  - (iii) In addition, Petitioners respectfully request that the Board schedule an informal hearing in accordance with the provisions of 49 CFR 1121.4 at or near the locus of the proposed site in order to receive oral comments from the many adversely affected parties on the issues addressed in this Petition and in other Petitions filed on this matter.<sup>1</sup>

NET's application to the Board seeks to abuse the Board's exclusive grant of authority to regulate railroads by impermissibly expanding the Board's jurisdiction. NET is attempting to engage the Board in a scheme to deny the entire waste management industry the level playing field that is the foundation of fair and open competition. If it succeeds, NET will undermine a large existing segment of the solid waste industry that currently utilizes rail, truck and barge transportation, but operates completely independent of Board jurisdiction, and it will destroy the fair and equal competitive solid waste business environment that currently exists in Massachusetts and throughout the nation. NET's application is nothing less than a blatant attempt to avoid compliance with state and local environmental laws and regulations in order to

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<sup>1</sup> To the extent it is applicable or required, Petitioners respectfully request to intervene pursuant to 49 C.F.R. § 1113.7 for the reasons set forth in this petition.

gain an unfair competitive advantage over responsible solid waste facility operators who comply with important state and local requirements.

The proposed so-called “transload” facility does not constitute “transportation by rail carrier”, nor is it “integrally related to the provision of interstate rail service”, as the Board has interpreted those terms. NET seeks to obtain an unfair competitive advantage in the marketplace by securing the benefit of the pre-emption provisions of Section 10501(b) in order to operate free from the costs, protections and limitations imposed by environmental and public health regulations that apply to every other solid waste management facility in the Commonwealth of Massachusetts.

The Board should recognize this application for what it is – a scheme to avoid reasonable state and local laws and regulations and discourage open and fair competition. This application has everything to do with promoting unfair and improper advantages and undermining the recycling industry in New England and nothing to do with regulating railroads and promoting the efficient operation of rail facilities.

#### I. INTRODUCTION

Petitioner NSWMA is a trade association representing companies in North America that provide solid, hazardous and medical waste collection, recycling and disposal services. NSWMA’s members operate in all 50 states and the District of Columbia and share a common mission to promote the management of waste in a manner that is environmentally responsible, efficient, profitable and ethical, while benefiting the public and protecting employees.

Petitioner SWANA is the Massachusetts chapter of a national trade association representing municipalities and private sector businesses that provide solid waste and recyclables collection, processing, transfer and disposal. The Massachusetts chapter of SWANA also

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includes construction and demolition debris ("C&D Debris") collection, processing, transfer and disposal facilities throughout the Commonwealth. SWANA's mission is to educate and train its membership in sound solid waste management practices that are environmentally responsible, efficient, ethical and profitable while protecting the public health and safety and the environment.

Petitioner MMA is a non-profit, non-partisan association whose members include 347 of the 351 cities and towns in Massachusetts. MMA's affiliated organizations include associations of mayors, selectmen, municipal managers, and human resource professionals. MMA serves as the advocacy group that speaks on behalf of the interests of Massachusetts cities and towns on state and federal legislation and, on occasion, court cases.

Petitioner CMRA is a non-profit association that promotes the recycling and reuse of construction and demolition materials throughout North America.

Petitioner IWSA is a national trade group representing 67 of the 89 waste-to-energy facilities in 29 states around the country that generate approximately 2750 megawatts of power from the disposal of about 29 million tons of trash each year. IWSA members include 28 municipalities and an equal number of private companies. The seven waste-to-energy facilities operating in Massachusetts are represented by IWSA, including Haverhill Resource Recovery, Springfield Resource Recovery, Pittsfield Resource Recovery, SEMASS Resource Recovery, Wheelabrator Millbury Resource Recovery, Wheelabrator North Andover Resource Recovery, and Wheelabrator Saugus Resource Recovery.

Petitioner American Ref-Fuel Company LLC, through its subsidiaries, is the owner and operator of many permitted waste-to-energy facilities in the northeast, which process in excess of

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5 million tons of municipal solid waste (MSW) per year, and in Massachusetts either owns, operates or controls waste-to-energy facilities, transfer stations and a landfill.

Petitioner New Bedford Waste Services, LLC is the operator of a permitted solid waste management facility in New Bedford, Massachusetts.

Petitioners seek to prevent NET from using an improper claim to exclusive Board jurisdiction under the ICCTA to construct and operate a solid waste management facility without the environmental and public health protections, infrastructure and permitting required by state and local law. While NET indicates in its application for exemption that it may handle a wide variety of materials, the materials that are the primary focus of this proposal, and that present the most economic opportunity to NET, are the waste materials (including household garbage and C&D Debris) that NET proposes to process at its facility without the constraints of state or local regulation.

The NET proposal to construct a so-called “transload” facility (the “NET Solid Waste Facility”) is in substance no more than a proposal to construct a solid waste management facility that happens to be located adjacent to a rail line. The facility will receive waste materials in a variety of containers, and these materials will be processed, sorted, baled, subjected to grinding and potentially other treatment, aggregated, and containerized on site. Only after these solid waste management activities have been completed, will the material be stored and placed in containers for transloading to railcars for shipment off-site by an entity other than NET for further processing and disposal. (See New Bedford Waste Services, LLC and Jet-A-Way Verification Statement (“Verification”) at page 3).

The only function of the facility that is arguably integral to the operation of a railroad is the final storage and transloading of the containerized waste materials onto rail cars and the transportation of the waste materials by rail by an entity other than NET. All of the other above described activities that will occur at the NET Solid Waste Facility will be identical to those currently performed by a large network of waste handlers who have no integral nexus whatsoever with railroads. These activities are simply not part of the operation of a railroad.

The importance of the Board's decision in this matter cannot be overstated. Should the Board assert exclusive jurisdiction over the NET Solid Waste Facility simply because it is located on a rail spur, this will have enormous consequences for the solid waste industry and its regulatory oversight. Preemption and exclusive Board jurisdiction over this facility would:

- (i) supercede the complex network of state and local solid waste facility siting, construction and operating standards that currently exist in Massachusetts and other states to protect public health and the environment;
- (ii) create an unprecedented regulatory and environmental protection gap in an industry that is uniformly and heavily regulated in Massachusetts by state and local governmental bodies;
- (iii) undermine the economics of the solid waste management industry by creating an unfair competitive advantage for those who locate new facilities on rail spurs, immune to state or local laws and regulations; and
- (iv) severely undermine the recycling industry in New England and beyond, which relies heavily on feedstock from mandatory separation programs required only by state regulation.

The Board's extension of exclusive jurisdiction will penalize responsible solid waste operators who have invested hundreds of millions of dollars in creating safe and efficient waste management and disposal facilities and recycling facilities. These operators compete against each other on a level playing field where all businesses are subject to the same important and comprehensive requirements. The Massachusetts solid waste regulatory regime is typical of

state programs throughout the country. Thus, this is not simply an issue of introducing unwarranted distortion into the marketplace within Massachusetts, but the nation as a whole.

If the Board proceeds to apply its exclusive jurisdiction to solid waste management facilities that choose a location near a railroad, this will precipitate a “race to the bottom,” as new bare bones facilities are constructed to manage waste streams at far lower cost than the current environmentally protective facilities that exist. The new solid waste “rail facilities” will be far less costly to develop because they will be exempt from the comprehensive siting and permitting processes in state and local law in Massachusetts, far less costly to construct under state environmental regulations, and far less costly to operate under state and local operating requirements.

Solid waste processing facilities are controversial operations. Adjacent property owners, local governments, environmental groups, and citizens groups often offer stiff opposition due to the perception that various adverse impacts will result. The exploration of these impacts and the balancing of competing interests and needs are currently managed through the lengthy and highly technical facility siting and permitting processes that are administered under state and local environmental laws and regulations. Closure and post closure impacts are also addressed through requirements to post financial assurance mechanisms, which are adjusted throughout facility operational lives to reflect changing conditions. *See* 310 CMR 19.051; *Verification* at 4.

If the Board proceeds to apply its exclusive jurisdiction to solid waste management facilities, then the Board will become the primary national regulatory body with responsibility for oversight and control of a vast network of controversial waste management facilities that are the subject of often significant state and local opposition. The Board will not only become the establisher of technical standards for these facilities, but also the arbiter of often bitter siting,

construction and operational permitting disputes. In addition, the Board will need to develop inspection and enforcement capabilities for the duration of these facilities' operational lives, and will need to address closure and post closure impacts currently regulated by state and local authorities.

One critical area where this new regulatory structure will have immediate economic impact is the recycling industry. Such facilities will be capable of, and are likely designed specifically for the purpose of, bypassing the waste separation and disposal ban requirements adopted by the Massachusetts Department of Environmental Protection ("MADEP") at 310 CMR 19.017. These requirements mandate the separation of recyclable materials from waste streams by prohibiting their transfer or disposal. *Verification* at 3. Because MADEP has imposed the waste separation requirement on transfer and disposal facilities, rather than on generators of waste materials, those facilities that claim exclusive Board jurisdiction will be capable of bypassing this expensive requirement, which acts to supply a steady stream of recyclables to recycling facilities throughout New England. Without this separation cost, new Board-regulated solid waste facilities will avoid the substantial costs of recyclables segregation and will likewise avoid the necessity of recycling. The impact on the recycling industry in the region will be significant and adverse. *Verification* at 5.

Massachusetts has a stated goal of achieving a 70% waste stream reduction rate by 2010. *See 3rd Annual Progress Report on the Beyond 2000 Solid Waste Master Plan*, MADEP, Sept. 2004, at i. Critical elements of the plan to achieve that goal are the above-referenced stringent source separation and recycling requirements that are uniformly applied to all solid waste management facilities across the state. MADEP's inability to regulate the NET Solid Waste

Facility and the other Board-regulated solid waste facilities that will inevitably follow will completely compromise the state's waste stream reduction goal. *Verification* at 2.

As another example of immediate economic impact, existing solid waste facilities in Massachusetts are traditionally subject to significant local control, including site suitability evaluations by MADEP and site assignment by municipalities, in accordance with G.L. c.111, §150A, special permitting and site plan review procedures in accordance with the state zoning act, G.L. c.40A, and the wetlands regulations pursuant to the Wetlands Protection Act, G.L. c.131, §40, and local by-laws. The ability to avoid this extensive permitting and approval process will allow new Board-regulated solid waste facilities to avoid the important negotiations with local authorities that precede facility construction and that result in host community agreements. These agreements provide substantial financial benefits to municipal governments to compensate for the costs and impacts of hosting these facilities. New facility operators will understand that by seeking exclusive Board jurisdiction they will bypass a critical cost component of developing and operating a solid waste facility in Massachusetts.

Allowing the NET Solid Waste Facility to proceed under a claim of exclusive Board jurisdiction will unnecessarily introduce distortion and discrimination in the solid waste management industry and open the door to nationwide circumvention of the long-standing state and local oversight of the storage, transfer and handling of solid waste. The consequence of such distortions in the marketplace will be the removal of state and local authority to regulate the solid waste industry and fulfill their missions of protecting the environment and public health, and the placement of that weighty responsibility directly in the hands of the Board.

A. Procedural History

NET filed a petition for exemption for construction, acquisition and operation as a rail carrier on December 3, 2003. On March 2, 2004, the Board conditionally granted an exemption and concluded that the Board will issue a final decision as to whether the exemption should be allowed to go into effect after completion of the environmental review process.

On August 4, 2004, the Section of Environmental Analysis ("SEA") issued an Environmental Assessment (the "EA") with respect to the proposal. Interested parties were allowed to submit comments on the EA through September 17, 2004. MADEP and others commented on the lack of detailed information regarding the nature of the solid waste activities that would occur on the site. NET significantly and materially altered the proposal by letter of September 29, 2004, after the close of the formal comment period. These alterations included, among other things, managing loose waste materials, storing loose waste materials, grinding different waste streams, segregating waste materials, baling waste materials, managing unspecified non-conforming waste materials, transporting waste materials on a conveyor system, and crushing waste materials using heavy mobile equipment. *Verification* at 3. Ancillary activities that NET states it will perform on site include truck maintenance, repair and fueling, and it is unknown whether the trucks serviced on site will include a fleet used to supply and ship waste materials.

On December 22, 2004, SEA issued a Post Environmental Assessment (the "Post EA"), which recommended that the Board grant the requested exemption subject to the mitigation conditions enumerated in the Post EA. As to solid waste, SEA noted the concerns of the MADEP, but rejected the argument that MADEP had jurisdiction to impose any permitting, consulting or notice requirements, stating that "the available information indicates that the proposed transloading of solid waste materials to or from trucks to railcars that would take place

at the reload facility would be *part of* NET's railroad operations." (emphasis added). *Post EA*, at p. 2-18.

B. The Massachusetts Solid Waste Regulatory Regime

Solid waste management facilities are uniformly and comprehensively regulated in Massachusetts pursuant to G.L. c.111, §150A and its implementing regulations at 310 CMR 16.00 and 310 CMR 19.000. These requirements divide the regulatory oversight function for these facilities between the MADEP, with its technical solid waste expertise, and the affected municipalities, with their focus on local concerns.

310 CMR 16.00, *et seq.* sets forth procedures and substantive criteria for determining whether a particular parcel of land is "suitable to serve as the site for a solid waste management facility." 310 CMR 16.01. General criteria specified for assessing sites include: (1) avoidance of agricultural lands; (2) traffic and access impacts; (3) wildlife/habitat impacts; (4) areas of environmental concern; (5) protection of open space; (6) air quality impacts; (7) nuisance avoidance; (8) existing facilities; and (9) regional participation. 310 CMR 16.40(4). In addition, consideration of other sources of contamination or pollution is required, which is of heightened concern for the NET proposal given the site's current contaminated status. *Id.* See also *Town of Wilmington, Petition for Stay of Exemption*, STB Finance Docket No. 34365 (STB served July 9, 2003) at 3-6. To construct a solid waste facility such as the proposed NET Solid Waste Facility, an applicant must receive separate siting approvals from both MADEP and the affected municipality's Board of Health.

310 CMR 19.000 applies to "all solid waste management activities and facilities" including solid waste processing, handling and transfer facilities. See 310 CMR 19.003. With respect to solid waste transfer stations, MADEP imposes specific and stringent requirements in

relation to facility equipment capabilities and maintenance, weighing facilities, fire protection, facility access, unloading, litter control, screening/fencing, bulky waste, recycling, dust control, insect/rodent control, accident prevention and safety and emergency plans. *See* 310 CMR 19.200, *et seq.* To construct a solid waste facility such as the NET Solid Waste Facility, an applicant must receive from MADEP an authorization to construct, imposing stringent construction standards, and an authorization to operate, imposing stringent operational standards, including mandatory waste disposal ban requirements. *See* 310 CMR 19.041 and 19.042.

C. NET Proposal

The facts that are presently known to the Board are as follows: NET has obtained an option to purchase a 53-acre parcel of industrial land in Wilmington, Massachusetts from Olin Corp. The parcel, formerly occupied by a chemical plant, is the subject of ongoing environmental remediation activity. NET proposes to acquire the parcel, restore 1300 feet of industrial track, construct approximately 2700 feet of new track, and construct improvements on the property. All of the track and rail operations will be confined to the parcel itself and, perhaps, to the Boston & Maine ("B&M") owned branch which abuts the western side of the parcel. NET itself will not be transporting solid waste into the interstate rail system, instead at most "allowing B&M trains to drop off and pick up cars . . ." *NET Petition* at 9. Notably, there is no express commitment by NET to load all, or even a specified portion, of the materials received onto rail cars for transportation. Indeed, most of the materials received at the NET Solid Waste Facility may leave by truck, not rail.

NET's petition for exemption stated that the proposed facility will "transload" a variety of commodities, including aggregates, contaminated soils, sand, gravel, stone, construction debris ("C&D debris"), non-hazardous solid waste, non-hazardous and non-explosive liquids and

dry chemicals, lumber, plastics, steel, scrap steel, recycled paper and plastic, newsprint, paper products, clay, coal and brick. (*Cond. Grant* at 2, and *Post EA* at ES-5).

However, the Board still does not know the ratios of these commodities or sufficient details concerning the methods and procedures for their storage, handling or processing other than that different types of transloading will occur. As NET admits in its Petition, “[r]atios of commodities cannot be estimated at this time.” *NET Petition* at 5. Many members of the Petitioners are involved in the operation of transfer stations and are acutely aware of the economics of material shipments. The economics of the solid waste industry suggest that the non-waste commodities identified as possible materials to be handled at the NET Solid Waste Facility are simply a diversion from the real purpose of this project. Instead, it is clear that the economic focus of NET’s Petition for exemption is to obtain approval for a solid waste management facility.

NET’s September 29, 2004 supplemental filing reveals that extensive solid waste management activities will occur at the facility. As described above, not only will NET transfer containers and bales of solid waste, it also will process, grind and transfer a variety of loose solid wastes. NET will manage and store loose waste materials, grind different waste streams, segregate waste materials, bale waste materials, manage unspecified non-conforming waste materials, transport waste materials on a conveyor system, and crush waste materials using heavy mobile equipment. NET’s supplement confirms that facility operations will be overwhelmingly dominated by solid waste handling activities.

## II. DISCUSSION

### A. The NET Solid Waste Facility Is Not Within The Board’s Exclusive Jurisdiction.

1. The NET Solid Waste Facility Does Not Constitute Transportation By Rail Carrier Under Section 10501 Of The ICCTA And Therefore Is Not Subject To The Board's Jurisdiction.

NET, contrary to its name, is not a rail carrier engaged in transportation and, therefore, its "transloading" facility does not fall within the statutory definition of "transportation." *See Town of Milford, MA, Petition for Declaratory Order*-STB Finance Docket No. 34444 (STB served Aug. 11, 2004). First, for transloading activities to qualify for an exemption under the Board's jurisdiction, they must be offered by a rail carrier. The B&M will transport processed wastes from this facility, not NET acting as a railroad. NET itself will not transport any processed wastes by rail. It will only make available to B&M the cars it has loaded with the wastes it has processed at the NET Solid Waste Facility. The fact that NET-processed waste is eventually transported by rail does not make its activities transportation by rail carrier. The U.S. Court of Appeals for the Third Circuit recently determined that a nearly identical facility providing only transloading and transfer from trucks to rail carrier did not involve transportation by rail carrier. *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004).

Second, the processing, handling, sorting, baling and grinding of solid waste does not constitute transportation by rail carrier. These activities, which are intended to occur at the proposed NET Solid Waste Facility have no nexus to the transportation function that is served by rail carriers. As the Board has previously determined, fabrication activities are not transportation and "many shippers that own and operate locomotives and transloading facilities are not considered to be rail carriers under the statute." *Town of Milford, supra* at 3.

The mere fact that NET claims to be a rail carrier does not establish that its activities constitute transportation by rail carrier. If this were the case, NET could just as readily propose to build a shopping center adjacent to a rail spur and claim that because some goods would be

shipped by rail the entire project falls under the exclusive jurisdiction of the Board. It could also propose to build a facility to dispose of nuclear wastes, or a slaughterhouse, or myriad other facilities that are difficult to site and subject to state or local laws and regulations, and claim that such facilities fall under the exclusive jurisdiction of the Board simply because it is a rail carrier and there might be some use of an adjacent rail spur.

NET's loading of commodities onto rail cars and placing them in a location so that they can be picked up by the B&M is *purely incidental* to its primary intended business of processing, storing and handling solid waste. That NET ultimately places its processed waste onto rail cars does not mean that it is engaged in the "transportation" by rail carrier. *See e.g. Hub City Foods, Inc. v. Commissioner of Internal Revenue*, 884 F.2d 320, 323-35 (7th Cir. 1989) (Food wholesaler who delivered its products, and other people's, by trucks was not in "transportation business").

Solid waste management facilities presently operating in Massachusetts are not engaged in rail "transportation", even though a substantial quantity of the solid waste they handle is delivered and shipped to railroads to reach a final destination. The primary purpose of these other facilities is to receive, separate, process and otherwise handle solid waste and then send it out into the stream of commerce, exactly as proposed by NET. *Verification* at 3-4. The NET Solid Waste Facility will have the primary purpose of receiving, separating, processing and handling of solid waste that is then carried into the stream of commerce. The mere fact that NET *may* ship waste by rail cars following the receipt, separation, processing and handling of solid waste, notwithstanding that it has not committed to using rail for these shipments, does not mean that it is acting as a rail carrier or that it is performing rail "transportation". *See H&M*

*International Transportation, Inc.- Petition for Declaratory Order*. STB Finance Docket 34277 (STB served Nov. 11, 2003).

Consequently, NET's proposal does not constitute transportation by rail carrier and therefore is not subject to the Board's exclusive jurisdiction.

2. The Proposed NET Solid Waste Facility Is Not Integrally Related To The Provision Of Interstate Rail Service And Therefore Is Not Subject To The Board's Exclusive Jurisdiction.

Even if the Board were to determine that NET is a rail carrier engaged in transportation, the Board's exclusive jurisdiction is limited to those facilities that are integrally related to a railroad's ability to provide transportation services, and even then, the Board does not necessarily have exclusive jurisdiction over the construction and maintenance of those facilities. *See Borough of Riverdale- Petition for Declaratory Order- The New York Susquehanna and Western Railway Corporation*, STB Finance Docket 33466 (STB served September 9, 1999). Manufacturing and other facilities owned by a railroad which are not integrally related to the railroad's provision of rail service are clearly not within the Board's exclusive jurisdiction. *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F.Supp.2d 1186 (E.D.Wa. 2000). Consequently, if a facility serves primarily a manufacturing or production purpose, then it is not within the exclusive jurisdiction of the Board and is subject to state and local law and regulations. *Riverdale, supra*.

The transfer, processing, aggregation and storage of solid waste is not integrally related to the provision of rail transportation because those activities are not related to NET's *ability* to provide transportation services. Rather, the rail service is at most incidental to and supportive of the processing business. That NET may choose to load some of its finished product onto rail cars

does not make the transfer, processing, aggregation and storage of solid wastes “integrally related” to rail service.

Indeed, as discussed above, NET has made no commitment that all, or even a substantial portion, of the materials it receives at the facility will be loaded onto rail cars. Thus, the transfer, processing, aggregation, storing, and other solid waste handling activities cannot be directly related to the activity of transportation. At best, NET proposes to transform the waste materials it receives before there is any connection to rail activities. It cannot be argued that this is a mere “transload” facility. This is not simply an operation that transfers goods already in shipment from one transport mode to another. The processing activities described by NET are not integrally related to the provision of rail service and are not within the exclusive jurisdiction of the Board.

B. The State Requirements For Solid Waste Facilities Are Not Pre-Empted By 49 U.S.C. § 10501(B).

Even if the Board were to determine that it had exclusive jurisdiction over the NET Solid Waste Facility, state and local environmental and public health laws are not pre-empted under Section 10501(B) of the ICCTA.

“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” *Florida East Coast Railway v. City of West Palm Beach*, 266 F.3d 1324, 1327 (11th Cir. 2001) (emphasis added). “The task is to identify the domain expressly pre-empted because an express definition of the pre-emptive reach of a statute supports a reasonable inference that Congress did not intend to preempt other matters.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

The preemption analysis begins with the language of the statute. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

(b) The jurisdiction of the [Surface Transportation Board] over-

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service , interchange, and other operating rules), practices, routes, services, facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located , or intended to be located, entirely in one state,

is exclusive. Except as other wise 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 and State law.

49 U.S.C. § 10501(b)

The ICCTA does not specifically address solid waste, but rather focuses on rail transportation and related activities. Thus, based on the admonition of the Supreme Court in *Lorillard*, the presumption must be that Section 10501 pre-emption is limited to the rail transportation portion of a project and is not intended to reach and include solid waste management activities because relationship between the two is indirect at most. *See Lorillard*, 533 U.S. at 541.

This is especially so in light of the Federal-State partnership that exists in the solid waste management area as established pursuant to the Resource Conservation and Recovery Act, ("RCRA") 49 U.S.C. § 6902(7). RCRA contains a mandate that the states must establish and implement solid waste management plans. *See* 49 U.S.C. §§ 6942-48. Congress specifically provided in RCRA that the states would play the primary role in the management and regulation of hazardous and solid waste. *See Resource Investments, Inc. v. U.S. Army Corps of Engineers*, 151 F.3d 1162, 1164 (9th Cir. 1998); *Clean Harbors of Braintree, Inc. v. Board of Health of Braintree*, 409 Mass 834, 840, 570 N.E.2d 987, 990 (1991).

Federal courts have been cautioned not to apply pre-emption language too broadly. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company*, 514 U.S. 645, 655 (1995). Section 10501(b) does not state that laws “affecting” or “having an effect on” permitting or operation of rail transportation are pre-empted. Instead, Congress established a narrow area of exclusive jurisdiction: *with respect to regulation of rail transportation*. That phrase must be understood within the context of the statute. See *Id.* at 656.

The focus of the ICCTA was to remove direct state regulation of railroads, which was previously permitted for intrastate rail transportation. See, e.g. *Burlington N. Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288 (D. Mont. 1997) (ICCTA pre-empts Montana law authorizing state agency to exercise regulatory authority over railroad agencies in Montana); *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F.Supp. 1573 (N.D.Ga. 1996) (ICCTA pre-empts state regulatory authority over railroad closings); *Burlington Northern Railroad Co. v. Paige Grain Co.*, 249 Neb. 821, 545 N.W.2d 749 (1996) (After ICCTA, State Public Service Commission no longer had jurisdiction over discontinuance of Railroad service agency).

Where state and local laws do not directly regulate railroads and their transportation function, they are not preempted. The Eleventh Circuit Court of Appeals recently held that local zoning and licensing ordinances were not regulations *with respect to regulation of rail transportation* and, therefore, did not fall under the express pre-emption provision of the statute. *Florida East Coast Railway v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001). Similarly, Massachusetts and local solid waste management laws and regulations are not regulations “with respect to regulation of rail transportation.” The solid waste processing aspect of the proposed NET Solid Waste Facility performs the same non-transportation related services as many other facilities in Massachusetts that are not located on a rail spur and are not owned by

a rail carrier. These are the same type and manner of non-transportation services as were before the Eleventh Circuit in *Florida East Coast*. Although the *Florida East Coast* court declined to address whether local zoning laws could limit the solid waste transfer operations if the railway operated the facility, the Board should embrace the *Florida East Coast* interpretation of the limitation of pre-emption by its terms and should determine that non-discriminatory state and local solid waste regulations are not pre-empted by the ICCTA.

Moreover, the Board has repeatedly stated “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 CWA and the SDWA, unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.” *Green Mountain Railroad Corporation- Petition for Declaratory Order*, STB Finance Docket No. 34052-0 (STB served May 24, 2002); *Boston & Maine Corp, Joint Petition for Declaratory Order*, STB Finance Docket No. 33971 (STB served May 1, 2001) at 9. The Board further stated: “Whether a particular Federal environmental statute, local land use restriction or other local regulation is being applied so as to unduly restrict the RR from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question.” *Id.*

In this case, at the direction of Congress, state and local laws and regulations in Massachusetts, and similar non-federal laws and regulations throughout the United States, operate in lieu of federal solid waste requirements under RCRA. As they apply to the NET

proposal, there is nothing in the record that suggests these laws and regulations would impose an unreasonable burden on interstate commerce.<sup>2</sup>

Moreover, as discussed above, pre-empting such laws would dramatically distort the current marketplace, and result in discrimination against all other solid waste transfer stations that are subject to state and local solid waste management laws and regulations. Therefore, the burden rests squarely on NET to demonstrate why application of Massachusetts and local solid waste management laws and regulations “would unduly restrict” NET from conducting its operations, or “unreasonably burden interstate commerce.”

Petitioners do not seek to deny NET the ability to construct any particular facility, and do not seek to apply state or local law to the regulation of the placement or construction of tracks and switches, or to interfere with trackage rights. Petitioners request only that NET comply with the same state and local solid waste laws and regulations as required by all other waste processing facilities in Massachusetts.

If the Board were to find that state and local solid waste laws and regulations do not apply to the solid waste management activities proposed to be conducted by NET at the NET Solid Waste Facility, this would introduce distortion and discrimination into the marketplace -- the very same impact that the Board is mandated to prevent. This distortion and discrimination in the marketplace would impose a much greater burden on interstate commerce than compliance with non-discriminatory solid waste laws and regulations.

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<sup>2</sup> It does not appear that the Board could disagree with this proposition based on the limited facts supplied by NET about its proposed facility and operations. No discriminatory impact could be shown. *Borough of Riverdale- Petition for Declaratory Order- The New York Susquehanna and Western Railway Corporation* STB Finance Docket 33466. (STB served September 9, 1999).

Thus, the Board should determine that the state and local solid waste management laws and regulations applicable to the NET Solid Waste Facility do not unreasonably burden interstate commerce, and do not impose an unreasonable burden on interstate transportation solely because the carrier is a railroad, and therefore are not pre-empted. In the alternative, the Board should reserve any decision on this issue until all the relevant facts on the proposed facility are disclosed.

D     The Board Should Revoke The Conditional Exemption Because It Does Not Have Jurisdiction Over NET's Proposed Solid Waste Facility And the Proposal Does Not Support The Rail Transportation Policy.

Under 49 U.S.C. § 10502(d), the Board may revoke an exemption if regulation is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101. The party seeking revocation must express reasonable, specific concerns to demonstrate that revocation of the exemption is warranted. Under section 10901(c) the Board is required to issue the exemption unless it finds affirmatively that the exemption would be “inconsistent with the public convenience and necessity”. Therefore, to revoke the exemption the Board must find that NET’s commencement of operations would be inconsistent with the provisions of the rail transportation policy that relate to the public convenience and necessity, without regard to other provisions.

*See Bulkmatic Railroad Corp., supra* at 6.

As noted above, the Board should conclude that it does not have exclusive jurisdiction over the NET Solid Waste Facility and that the requested exemption, if granted as to any portion of the NET proposal, should not encompass any solid waste handling activities at the facility. Even if the Board does assert exclusive jurisdiction, Massachusetts and local law and regulations governing solid waste facilities are not pre-empted by the ICCTA. Moreover, NET’s

unregulated solid waste facility is inconsistent with the public convenience and necessity and is contrary to the rail transportation policy in Section 10101.

Further, contrary to the Board's decision granting NET a conditional exemption, the NET proposal does not foster competition with other *modes of transportation*. See Section 10101(4). Instead, as discussed above, it inhibits competition in the solid waste industry and discriminates against properly regulated solid waste facilities. Nor does the proposal foster sound economic conditions in transportation as required by Section 10101(5). Granting the exemption proposed by NET and insulating the facility from otherwise applicable state and local laws will upset the fair and competitive economic balance in the solid waste industry in Massachusetts and throughout the United States. The rail service option already exists and is currently employed in the solid waste industry.

The regulatory barriers to entry that NET seeks to avoid are entirely unrelated to transportation. NET seeks to avoid solid waste requirements enacted and enforced by state and local governments to protect the public health, safety and welfare, and the environment. See Section 10101(7). These requirements simply reflect the cost of competing in a fair and open market.

The Board's assertion that "[n]othing in the current record indicates that other aspects of the rail transportation policy would be adversely affected" is based on an inadequate record concerning the operation of the solid waste processing facility and should be reconsidered, especially in regard to the recent rail transportation concerns related to national security and environmental protection. This conclusion does not adequately consider the impacts of unregulated solid waste facilities being sited, constructed and operated in communities throughout the country, processing large volumes of waste materials without local or state

control, oversight, and responsibility. For this reason, the grant of an exemption for the entire facility is inconsistent with the public welfare.

The Board therefore should revoke its conditional exemption.

### III. REQUEST FOR HEARING

In addition to the relief sought above, Petitioners respectfully request that the Board schedule an informal hearing in accordance with the provisions of 49 CFR 1121.4 at or near the locus of the proposed site in order to receive oral comments from the many adversely affected parties on the issues addressed in this Petition and in other Petitions filed on this matter. A hearing is necessary so that the Board may fully understand the importance and far reaching consequences of its decision on NET's petition as it will affect not only this site, this proposed facility, and the Petitioners, but also the entire solid waste industry in the Commonwealth of Massachusetts and throughout the nation.

### IV. CONCLUSION

For the forgoing reasons, Petitioners respectfully request that the Board issue a Declaratory Order that the proposed NET Solid Waste Facility is (i) not within the exclusive jurisdiction of the Board under Section 10501(b) of the ICCTA and is therefore not entitled to an exemption under Section 10502; or (ii) is subject to Massachusetts and local laws and regulations governing solid waste facilities because those laws and regulations are applied in a non-discriminatory manner and do not unreasonably burden interstate commerce, and are therefore not pre-empted under Section 10501(b); or (iii) is not entitled to the conditional exemption previously granted because the proposed solid waste processing, storage and handling activities are integral to the function of a broad category of solid waste management facilities that have no relationship to rail or rail transportation.

In the alternative, Petitioners respectfully request that the Board revoke the conditional exemption previously granted by the Board on the basis that the Board does not have exclusive jurisdiction over the facility and the proposal does not support the rail transportation policy.

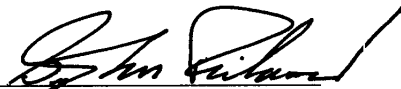
Petitioners also respectfully request that the Board schedule an informal hearing in accordance with the provisions of 49 CFR 1121.4 at or near the locus of the proposed site in order to receive oral comments from the many adversely affected parties on the issues addressed in this Petition and in other Petitions filed on this matter.

Respectfully submitted,

NATIONAL SOLID WASTES MANAGEMENT  
ASSOCIATION  
and  
SOLID WASTE ASSOCIATION OF NORTH  
AMERICA - MASSACHUSETTS CHAPTER  
and  
MASSACHUSETTS MUNICIPAL ASSOCIATION  
and  
CONSTRUCTION MATERIALS RECYCLING  
ASSOCIATION  
and  
NEW BEDFORD WASTE SERVICES, LLC

By their attorneys,

BEVERIDGE & DIAMOND, P.C.

By: 

Stephen M. Richmond, Esq.  
Michael Murphy, Esq.  
Paula Schauwecker, Esq.  
45 William Street, Suite 120  
Wellesley, Massachusetts 02481-4004

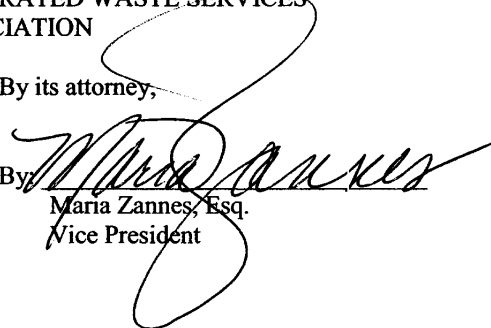
David Biderman, Esq., General Counsel  
NATIONAL SOLID WASTES MANAGEMENT  
ASSOCIATION  
4301 Connecticut Avenue, Suite 300  
Washington, D.C. 20008

and

INTEGRATED WASTE SERVICES  
ASSOCIATION

By its attorney,

By

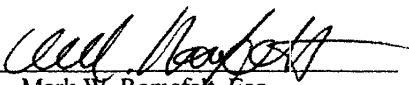
  
Maria Zannes, Esq.  
Vice President

and

[Signatures Continued on Next Page]

Beveridge & Diamond, P.C.

AMERICAN REF-FUEL COMPANY LLC

By:   
Mark W. Romefelt, Esq.  
Vice President, General Counsel

VERIFICATION

I, Stephen M. Richmond, declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief. Further, I certify that I am qualified and authorized to file this petition. Executed on this \_\_\_\_ day of February, 2005.

\_\_\_\_\_  
Stephen M. Richmond, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Petition of the National Solid Wastes Management Association, et al. was served this day via first class mail upon the following: John McHugh, Esq., Six Water Street, Suite 401, New York, NY 10004.

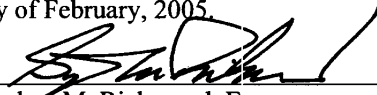
\_\_\_\_\_

AMERICAN REF-FUEL COMPANY LLC

By: \_\_\_\_\_  
Mark W. Romefelt, Esq.  
Vice President, General Counsel

VERIFICATION

I, Stephen M. Richmond, declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief. Further, I certify that I am qualified and authorized to file this petition. Executed on this 15<sup>th</sup> day of February, 2005.

  
\_\_\_\_\_  
Stephen M. Richmond, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Petition of the National Solid Wastes Management Association, et al. was served this day via first class mail upon the following: John McHugh, Esq., Six Water Street, Suite 401, New York, NY 10004.

 2-15-05

I hereby certify that a true copy of the Petition of the National Solid Wastes Management Association, et al. was served this day via first class mail upon the following: Daniel R. Deutsch, Esq., Deutsch Williams Brooks Derensis & Holland, P.C., 99 Summer Street, Boston, MA 02110-1235.

 2-15-05

I hereby certify that a true copy of the Petition of the National Solid Wastes Management Association, et al. was served this day via first class mail upon the following: Margaret Stolf, Esq., General Counsel, Department of Environmental Protection, One Winter Street, Boston, MA 02108

 2-15-05

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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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

---

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL  
PETITION FOR DECLARATORY ORDER  
OR, IN THE ALTERNATIVE,  
PETITION TO REVOKE CONDITIONAL EXEMPTION  
AND  
REQUEST FOR INFORMATION HEARING

**Verification Statement**

New Bedford Waste Services, LLC is a party to a Petition to the Surface Transportation Board (the "Board") relating to an application for exemption filed by New England Transrail, LLC ("NET") under Section 10501(b) of the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (the "ICCTA"). Jet-A-Way, Inc. is one of many members of the National Solid Wastes Management Association ("NSWMA"), which association is also a party to the above referenced Petition to the Board. (Collectively, New Bedford Waste Services, LLC and Jet-A-Way, Inc. are referred to herein as the "Industry Parties").

The Industry Parties contend, among other things, that NET's proposed solid waste facility is not integrally related to the provision of interstate rail service and they provide this verified statement to supplement and explain in further detail the operations of their facilities, the

solid waste industry in Massachusetts, and the relationship between their facilities and the offering of transportation services.

The Industry Parties operate permitted solid waste management facilities in Massachusetts, one in New Bedford and one in Boston. Both of their solid waste management facilities are operated in accordance with permits issued by the Massachusetts Department of Environmental Protection ("DEP"), the local boards of health, and in most cases the local conservation commissions, and further are subject to state and local regulatory requirements designed to protect the environment and public health. As such, these facilities are required to comply with detailed permitting conditions and regulatory standards governing the receipt, processing, handling, aggregating and loading of solid waste.

At some or all of their facilities, the Industry Parties accept deliveries of solid wastes and construction and demolition debris ("C&D Debris"), aggregate these wastes, sort and segregate them, grind and densify the materials, and remove recyclables as required by state law. Following such processing, the remaining materials are transported from the facilities for distribution in commerce, either for disposal, further processing, or recycling.

Pursuant to the requirements of M.G.L. c. 16, Section 21, DEP has established a formal policy framework for solid waste management in Massachusetts under which solid waste is to be diverted from disposal to recycling outlets in order to protect public health, safety and the environment. The stated objective of the policy framework is to shift the waste industries' role from providers of primary waste disposal to providers of broader waste management services, including processing, separating and recycling. This policy framework is set forth in DEP's solid waste master plan, Beyond 2000: Solid Waste Master Plan, A Policy Framework, EOE, December 20, 2000.

DEP has implemented its master plan through a regulatory program that applies uniformly to all waste handlers, regardless of whether they transport waste materials from their facilities to in-state locations or out-of-state locations, and regardless of whether they transport these materials using truck, rail or barge. DEP requires these waste handlers to divert from disposal numerous wastes generated in Massachusetts in order to promote recycling and waste reduction. This diversion program is implemented through waste separation and disposal ban requirements. The disposal of unsegregated waste materials containing recyclable materials, and the transfer for disposal of such waste materials, is prohibited by state law and regulation. See 310 CMR 19.017. Consequently, the disposal, and the transfer for disposal, of wastes that are subject to the waste bans is illegal in Massachusetts, and is subject to civil or criminal prosecution. See G.L. c.111 §150A. There is no such prohibition under federal law.

The Industry Parties' facilities, as well as many other solid waste facilities in Massachusetts, perform the exact same functions as the facility proposed by NET, except the facilities constructed by the Industry Parties contain state-of-the-art pollution controls required by state and local laws in order to protect public health and the environment. In addition, the Industry Parties are required to post financial assurance mechanisms with the DEP to assure that there are sufficient funds available to safely close their facilities.

NET proposes to "transload" a variety of "commodities", including aggregates, solid wastes, C&D debris, plastics, steel, lumber, paper products, and bricks. Upon further development of the administrative record, NET admitted that its so-called "transload" activities involve storing, segregating and baling loose waste materials, grinding C&D Debris and other waste streams, transporting waste materials on a conveyor system and crushing waste materials

using heavy mobile equipment. These activities are integral to the operation of a waste transfer facility, but are not integral to rail transport.

The Industry Parties all operate facilities that perform these same activities as an integral component of their solid waste management activities. These facilities store, segregate loose waste materials, grind C&D Debris and other waste streams, transport waste materials on conveyor systems and crush waste materials using heavy mobile equipment. It is only after these solid waste management activities have been completed that material is actually transloaded, that is, the final shipping containers full of wastes are stored and loaded for off-site transport.

For the Industry Parties' facilities, the removal of recyclables from solid waste and C&D Debris is required by DEP permit and regulations and the failure to process solid waste and C&D Debris in accordance with such permits and regulations would be a violation of law. Consequently, the Industry Parties have invested heavily in equipment and/or personnel to sort wastes to remove recyclables from the waste stream.

The only substantive difference between the activities proposed by NET and those of the Industry Parties is that NET's solid waste processing would take place under a claim of preemption from state and local law because it would occur close to a rail spur. While the Industry Parties need to satisfy complex and detailed state and local requirements to conduct their operations, NET seeks to use preemption under the ICCTA to avoid such requirements.

In addition to the facilities owned or operated by the Industry Parties, there are many other facilities in Massachusetts with similar processing operations. If NET's facility is allowed to proceed without DEP restrictions on waste bans and without regard to the DEP Solid Waste Master Plan, tipping fees would drop dramatically and DEP's goals for recycling and establishing of necessary infrastructure and outlets would be entirely undercut and unattainable.

The Industry Parties would lose out on their significant investment in processing equipment and there would be a significant resulting loss of jobs. By their participation in this motion, the Industry Parties seek only to assure that all facilities providing substantially similar waste management services are subject to the same protective environmental requirements with respect to public review and permitting.

For the foregoing reasons, the Board should determine that the activities proposed by NET are not an integral part of interstate operations of a railroad, and are therefore outside the jurisdiction of ICCTA, and that the preemption of state and local laws provided by Section 1050(1) of the ICCTA does not apply to the proposed facility.

**Verification Statements Attached**

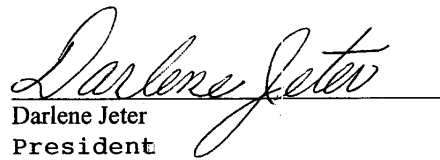
# VERIFICATION STATEMENT

I, Michael A. Camara, President of New Bedford Waste Services, LLC, verify under penalties of perjury that I have reviewed the foregoing statement and state that the facts set forth therein as they related to New Bedford Waste Services, LLC and the solid waste industry in Massachusetts are true and correct based upon my personal knowledge, and that I have authorized counsel for NSWMA to file the foregoing statement with the Surface Transportation Board. Signed on this 15<sup>th</sup> day of February, 2005.

  
Michael A. Camara, President

VERIFICATION STATEMENT

I, Darlene Jeter, President of Jet-A-Way, Inc., verify under penalties of perjury that I have reviewed the foregoing statement and state that the facts set forth therein as they related to Jet-A-Way, Inc. and the solid waste industry in Massachusetts are true and correct based upon my personal knowledge, and that I have authorized counsel for NSWMA to file the foregoing statement with the Surface Transportation Board. Signed on this 14<sup>th</sup> day of February, 2005.

  
Darlene Jeter  
President

Respectfully Submitted,



Stephen M. Richmond, Esq.  
(BBO# 546206)  
Beveridge & Diamond, P.C.  
45 William Street, Suite 120  
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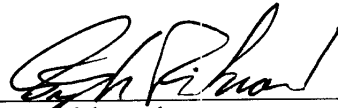
**CERTIFICATE OF SERVICE**

I hereby certify that I have this 15th day of February, 2005 served copies of the foregoing upon the following parties of record in this proceeding by first class mail, postage pre-paid, in accordance with the rules of practice of the Surface Transportation Board:

John F. McHugh, Esq.  
6 Water Street, Suite 401  
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Boston, MA - Massachusetts | MA 02108



Stephen M. Richmond