



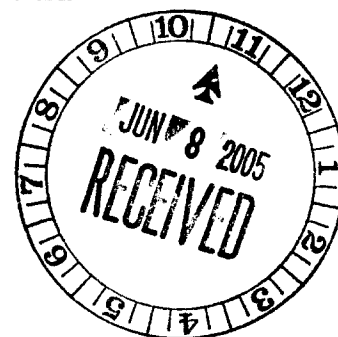
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Office of Proceedings

June 7, 2005



VIA FEDERAL EXPRESS

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

**RE: Reply of Town of Wilmington to New England Transrail, LLC's
Petition for Reconsideration
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: *Reply of Town of Wilmington to New England Transrail, LLC's Petition for Reconsideration*.

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: John McHugh, Esq.
Margaret Stolfa, Esq.
Stephen M. Richmond, Esq.
Town of Wilmington
Attn: Michael A. Caira, Town Manager
Paul R. DeRensis, Esq.

214152

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



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**REPLY OF TOWN OF WILMINGTON
TO NEW ENGLAND TRANSRAIL, LLC'S
PETITION FOR RECONSIDERATION**

The Town of Wilmington ("Wilmington") opposes New England Transrail ("NET")'s petition for reconsideration of this Board's May 3, 2005 decision dismissing NET's Petition for Exemption or for remand to SEA ("Petition").

The Petition underscores how desperate NET is to avoid thorough environmental review.¹ NET's contention that its omitted and revised project information was not environmentally significant contradicts its previous submissions and its preemption argument. Its claim of a private dispensation from full disclosure offends the public character of STB proceedings. Finally, like NET's previous submissions, the Petition obscures the features and effects of the proposed project. It regurgitates NET's positions on issues that have evaded meaningful review.

I. NET'S NON-DISCLOSURE AND PIECEMEAL DISCLOSURE OF PROJECT FEATURES COMPROMISED THE ENVIRONMENTAL REVIEW PROCESS.

This Board was justified in dismissing the Petition for Exemption without prejudice. That dismissal was based on a finding that NET compromised the review process by failing to timely disclose information that was environmentally significant. NET's argument to the contrary is unsupportable both procedurally and substantively.

¹ The length of the Petition and volume of its attachments reflect that anxiety. They also violate the 20-page page limit established by 49 CFR 1115.3(d).

A. NET ADMITTED THAT THE UNDISCLOSED OR REVISED PROJECT FEATURES WERE ENVIRONMENTALLY SIGNIFICANT WHEN IT PROPOSED ADDITIONAL CONDITIONS TO ADDRESS THEM.

The Petitioner takes issue with this Board's finding that project features not disclosed fully or at all in NET's original submissions were environmentally significant, such that the review was compromised by later disclosure. NET's position is hypocritical. When Wilmington and its environmental consultants brought the omitted facts to light after SEA issued the Environmental Assessment ("EA"), NET responded by proposing several additional conditions. *See* NET's letter response dated September 29, 2004, Section III ("Response to the Comments of the Town of Wilmington"), ¶¶ 16-24 ("mitigation measures"). SEA adopted those and other conditions. *See* Post-Environmental Assessment ("Post-EA"), *in passim*. Having acknowledged the need to somehow address the understated or undisclosed aspects of its project, the Petitioner now should not be permitted to argue that those project changes are not environmentally significant.

Pursuant to STB regulations, conditions are imposed on a Board authorization in order to address otherwise unresolved issues of environmental impact. *See* 49 CFR 1105.10 (f). Such conditions are not consistent with a Finding -- or NET's present argument -- of No Significant Impact. *Compare* 49 CFR 1105.10 (g).

All of this begs the question whether the self-policing and other modest measures which NET proposed would provide meaningful mitigation. The fact remains that the project changes warranted additional mitigation, even in the eyes of the Petitioner.

B. THE PROJECT CHANGES ARE MATERIAL AND ENVIRONMENTALLY SIGNIFICANT.

NET thus effectively admitted that the new information which it grudgingly supplied to SEA amounted to project changes that were environmentally significant. As a technical matter also, the changes were environmentally significant.

NET argues that its filing of a Construction Release Abatement Measure ("CRAM") Plan with the Massachusetts Department of Environmental Protection ("MADEP") ensures that redevelopment of the Olin site, including the changes at issue, will result in negligible impact. This is fallacious. First, it presumes that MADEP will approve NET's Plan, whereas no action has been taken. Second, it falsely assumes that the CRAM Plan fully and adequately addresses site impacts. In fact, a CRAM is premature, since MADEP and potentially USEPA have not fully defined the list of contaminants to be targeted for remediation at the site. Third, NET's CRAM Plan is deficient, as Wilmington's environmental engineering consultant advised MADEP; among other problems, it provides inadequate site data (e.g., soil penetration testing and classification) to support geotechnical analyses of the Dense Aqueous Phase Liquid ("DAPL") area cap under the stresses of NET's proposed rail spurs, truck traffic, and bulk product storage. Fourth, NET's proposed construction of permanent subsurface vaults and foundations beneath purportedly temporary structures would impede implementation of likely future response actions, which negates a condition for approval of the CRAM Plan. Finally, even MADEP approval of a CRAM would address only subsurface effects of the construction activities, not other environmental impacts such as dust, noise, traffic and the like.

NET also contends that the CRAM Plan simply presented design details for work that had been described in its initial filings with STB. Yet, as NET notes, its original exemption petition was vague. For example, the initial filing suggested only the possibility of future break-bulk

operations in areas south and west of the existing rail spurs. It was not clear until the CRAM Plan was filed that such operations and bulk storage would occur on top of the DAPL area cap and would involve truck and rail traffic onto and off the cap. For purposes of meaningful environmental review, the later presentation was not mere discussion of design details.

Even now, the Petitioner is noncommittal regarding future operations at the site. The more NET comments on its project, the more uncertain one becomes of its ambitions and intentions.

II. NET'S DISSEMBLING AND WITHHOLDING OF VITAL INFORMATION WAS TANTAMOUNT TO FRAUD AND, IN ANY EVENT, DISTORTED THE REVIEW PROCESS. ITS DEFENSE OF THIS PIECEMEAL DISCLOSURE ALSO CONTRADICTS ITS POSITION ON PREEMPTION.

NET withheld essential information until after the EA was complete. Additional information was not provided until after the Post-EA was issued, even though NET had developed that information for the CRAM it filed with MADEP before the Post-EA was issued. This Board should not countenance the argument that some of that information was implicit in the original project description. SEA and interested parties cannot be expected to divine a proponent's intentions. Nor are they required to illuminate gaps in the record. It was incumbent on the Petitioner to identify specifically each proposed activity and physical feature of the facility in a meaningful way.

NET's belated disclosure of waste processing activities is particularly troublesome. NET disclosed an intention to load loose solid waste onto rail cars and to grind and bale construction and demolition debris only in response to Wilmington's and MADEP's comments on the EA. Those features of the operation could not reasonably have been overlooked when NET made its original disclosures. In support of its position on federal preemption of state and local solid waste permitting, NET characterizes these same grinding and baling activities as essential to the

efficiency and safety of its railroad activities and therefore “integral” to the transportation function.

If waste processing activities are essential to the rail facility, then they cannot simply have been overlooked when NET first presented the project to this Board. If instead those activities were an afterthought, they hardly can be considered integral to the rail function. In either event, NET had an affirmative obligation to disclose them promptly, since they implicate environmental concerns different from those raised by the remainder of the project.²

III. NET’S EXCUSE FOR WITHHOLDING CERTAIN INFORMATION IS AN EX-PARTE AND UNINFORMED COMMUNICATION WITH A CONSULTANT PAID BY NET.

To blunt criticism that it withheld information by design, NET refers to its purported conversation with an environmental consultant.³ Under STB regulations, that consultant worked at NET’s expense but under SEA’s direction, and its product took the place of an independent environmental report. *See* 49 CFR 1105.10. Communicating with the consultant, rather than directly with SEA, improperly bypassed the decision-making agency.

Moreover, since there is no indication that NET advised the consultant of the relevant details, any comment by the consultant was uninformed. Finally, environmental review by SEA is intended to provide a public forum. Board regulations afford multiple opportunities for comment by affected populations and interested agencies. NET had no license to defer meaningful disclosure of important project information based on a private conversation with the environmental consultant whose services it funded.

² NET’s prolonged failure to disclose the processing of waste suggests that it sought to gain a conditional exemption and to then leverage that exemption in favor of waste processing. NET’s December 3, 2003 Petition for Exemption foreshadowed that segmentation of its presentation. NET there observed that the creation of a small railroad on former industrial tracks by a non-rail operator to obtain the legal benefits of rail carrier status may not be a “sham transaction.” *See* Petition for Exemption, at p. 3. While it announced plans to “transload and consolidate outbound loads,” *id.* at p. 5, the Petition said nothing of processing, grinding or baling.

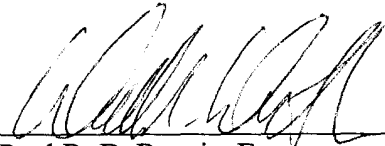
³ That excuse presumably doubles as the explanation required by the Board’s regulations in order to introduce new evidence in a Petition for Reconsideration. *See* 49 CFR 1115.3(c).

CONCLUSION

For all of the foregoing reasons, and those cited in the Replies of the Massachusetts Department of Environmental Protection and the National Solid Wastes Management Association, the Town of Wilmington requests that the Surface Transportation Board deny Petitioner's Motion for Reconsideration.

Respectfully submitted,

TOWN OF WILMINGTON,
By their attorneys,

A handwritten signature in black ink, appearing to read 'Paul R. DeRensis', is written over a horizontal line.

Paul R. DeRensis, Esq.
Daniel R. Deutsch, Esq.
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Date: June 7, 2005

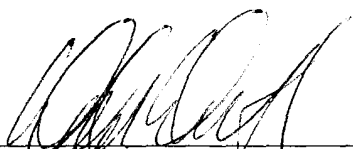
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply of Town of Wilmington to New England Transrail LLC's Petition for Reconsideration, was served this day via first-class mail upon the following:

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Date: June 7, 2005

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