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January 27, 2006

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 an Exemption from 49 U.S.C. § 10901 to Acquire, Construct and
Operate As a Rail Carrier on Tracks and Land in Wilmington and Woburn, MA
Finance Docket No. 34797

Dear Secretary Williams:

I attach for filing the Reply of the Commonwealth of Massachusetts to Petition of New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway For Exemption from 49 U.S.C. § 10901 in the above-referenced matter. The Reply is submitted jointly by the Massachusetts Department of Environmental Protection and the Massachusetts Attorney General's Office on behalf of the Commonwealth.

Please call me at x2418 if you have any questions on the enclosed document. Thank you for your consideration in this matter.

Very truly yours,

Siu Tip Lam
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BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

NEW ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON & WOBURN TERMINAL
RAILWAY – PETITION FOR AN EXEMPTION FROM 49 U.S.C. § 10901 TO ACQUIRE,
CONSTRUCT AND OPERATE AS A RAIL CARRIER ON TRACKS AND LAND IN
WILMINGTON AND WOBURN, MASSACHUSETTS

REPLY OF THE COMMONWEALTH OF MASSACHUSETTS TO PETITION OF NEW
ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON & WOBURN TERMINAL RAILWAY
FOR EXEMPTION FROM 49 U.S.C. § 10901

MASSACHUSETTS DEPARTMENT OF
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Dated: January 27, 2006

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

REPLY OF THE COMMONWEALTH OF MASSACHUSETTS TO NEW ENGLAND
TRANSRAIL, LLC, d/b/a WILMINGTON & WOBURN TERMINAL RAILWAY – PETITION
FOR AN EXEMPTION FROM 49 U.S.C. § 10901 TO ACQUIRE, CONSTRUCT AND
OPERATE AS A RAIL CARRIER ON TRACKS AND LAND IN WILMINGTON AND
WOBURN, MASSACHUSETTS

INTRODUCTION

New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway (“NET”) proposes to acquire, construct, and operate as a rail carrier certain tracks and facilities located on land owned by the Olin Corporation (“Olin Property” or “Property”). By its Petition for Exemption (“Petition”), NET seeks to claim common rail carrier status without having to comply with the licensing or prior approval requirements of 49 U.S.C. § 10901. NET proposes, among other things, to construct and operate of a solid waste processing facility on the Olin Property. NET’s proposed solid waste processing facility and related activities are not rail transportation and are not integrally related to NET’s proposed operation of a railroad. Therefore, the Board does not have jurisdiction to issue an exemption for the solid waste processing facility under Section 10502 of the Interstate Commerce Commission Termination Act of 1995 (“ICCTA”).

As the Commonwealth of Massachusetts (“Commonwealth”) has an interest in regulating solid waste processing facilities, the Commonwealth, by and through Attorney General Thomas F. Reilly and the Massachusetts Department of Environmental Protection (“MassDEP”), submits this reply to NET’s Petition for Exemption. The Commonwealth states that (1) to the extent that the Board issues an exemption for NET’s proposed project and finds NET to be a common rail

carrier, the scope of any such finding should extend only to rail-related activities and should exclude specifically the proposed solid waste processing facility and related activities such as sorting, grinding, and baling of solid wastes; (2) NET's proposed rail operations and solid waste processing activities and facility are subject to state and local laws designed to protect public health and safety, and the environment; (3) the Board should coordinate any environmental review with the United States Environmental Protection Agency ("EPA"), which has proposed to list the Olin Property, a contaminated site, on the National Priorities List pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"); and (4) NET's request for expedited consideration should be denied. In addition, the Commonwealth 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 interested persons, including the many significantly adversely impacted parties on the issues addressed in this Reply.¹

INTEREST OF THE COMMONWEALTH OF MASSACHUSETTS

The Commonwealth of Massachusetts has an interest in ensuring a clean and healthy environment for the citizens of the Commonwealth. See MASS. CONST., Art. 49 ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.") To regulate solid waste management and disposal for the protection of public health, safety, and the

¹ To the extent it is applicable or required, the Commonwealth respectfully requests to intervene pursuant to 49 CFR 1113.7 for the reasons set forth in this Reply.

environment, the Massachusetts Legislature enacted the Solid Waste Management Act, M.G.L. c. 111, § 150A, which requires site assignment and permits for all solid waste facilities. See American Friends Service Committee of Western Massachusetts & others v. Commissioner of the Department of Environmental Protection, 30 Mass. App. Ct. 457, 461 (1991) (stating “[i]n § 150A, the Legislature has made the determination that refuse treatment and disposal facilities are in every instance a potential threat to the public” and has required that the local board of health and, in some instances, the MassDEP, assign sites for all solid waste facilities in every case).

The Massachusetts Department of Environmental Protection (“MassDEP”) is the agency entrusted with the authority to administer and enforce the Massachusetts Solid Waste Management Act and has promulgated regulations at 310 Code of Massachusetts Regulations (“CMR”) 16.00 et seq. and 19.000 et seq. to regulate the siting and operation of solid waste facilities for the protection of the public health and safety and the environment.

NET’s proposed construction and operation of a solid waste processing facility on the Olin Property is precisely the type of solid waste facilities subject to the Solid Waste Management Act. The Commonwealth has an interest in ensuring that NET’s solid waste processing facility is properly sited and permitted to operate in a manner for the protection of public health, safety and the environment.

PROCEDURAL HISTORY

This Petition is NET’s third attempt to seek exemption from the prior approval requirements of 49 U.S.C. § 10901 to become a rail carrier. NET initially filed a notice of exemption on June 19, 2003, to acquire and operate a portion of the tracks at issue in STB Finance Docket No. 34365, New England Transrail, LLC – Acquisition and Operation

Exemption – Lines of Boston and Maine Railroad Company (“NET I”). In that notice, which was filed under the abbreviated class exemption procedures at 49 CFR 1150.31, NET failed to disclose its proposed plans to operate a solid waste facility on the Olin Property next to the railroad tracks.² See NET I Notice of Exemption. See also New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Co. – Construction, Acquisition, and Operation Exemption – in Wilmington and Woburn, MA, STB Finance Docket No. 34391, at 2 (served May 3, 2005) (“NET II May 3, 2005 Decision”). Citing errors in its notice of exemption, NET later requested and obtained permission to withdraw its notice of exemption. See New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Co. – Construction, Acquisition, and Operation Exemption – in Wilmington and Woburn, MA, STB Finance Docket No. 34391, at 1 n.1 (served Mar. 2, 2004) (“NET II Mar. 2, 2004 Decision”).

On December 3, 2003, NET filed a petition for exemption from 49 U.S.C. § 10901 (“2003 Petition”), giving a little more detail on its proposal than it did in its notice of exemption in NET I. However, NET again failed to reveal its plans to operate a solid waste processing facility on the Property. NET II May 3, 2005 Decision at 1, 2. On March 2, 2004, the Board issued a decision conditionally exempting NET’s proposal from the prior approval requirements of 49 U.S.C. § 10901, subject to an environmental review by the Board’s Section of Environmental Analysis (“SEA”). NET II Mar. 2, 2004 Decision at 2-3.

On August 4, 2004, the Board’s SEA issued an Environmental Assessment of the potential impact of NET’s proposal. NET II May 3, 2005 Decision at 2. After SEA received

² NET minimally described the railroad tracks contained in its proposal and did not describe at all the so-called reload facilities it proposed to construct “as needed” on the Property. It also failed to describe how the proposed construction activities or locations would affect the clean up of the contamination that existed on the Olin Property. See NET I Notice of Exemption.

many comments concerning NET's plans to operate a solid waste processing facility on the Property, NET for the first time revealed its plans to the Board – that it planned to construct and operate a facility to sort, grind, bale and otherwise process solid waste on the Olin Property. Id. at 2. Based on information provided by NET, SEA prepared a detailed Post-Environmental Assessment on December 22, 2004, and recommended that the Board impose environmental mitigation measures to address the issues and concerns raised. Id.

More than a month before SEA issued its Post-Environmental Assessment, NET made modifications to its proposal as reflected in a Construction-Related Release Abatement Measure Plan and Focused Feasibility Study (“Construction RAM”).³ Yet, NET failed to submit the modifications to SEA to ensure that SEA had accurate and complete information before it issued the Post-Environmental Assessment. Id. at 2-3. Not until MassDEP and a number of other parties requested the Board for additional review of NET's proposal, did NET submit the modifications to SEA. Id. After review of the modifications, SEA determined that the description of NET's proposal in the Construction RAM differed “markedly from the project described in NET's petition and presented to SEA during the environmental review process.” Id. at 3.

Finding that “NET was not forthcoming” and that NET had not fulfilled its duty to keep the Board apprised of significant changes, the Board determined that because it was faced with “a project that appears to differ in material respects from the project [the Board was]... originally asked to authorize, [it]... could not evaluate it adequately. Id. at 4. The Board, therefore, dismissed NET's petition, without prejudice to NET's filing a new petition or application. Id.

³ NET submitted the Construction RAM to MassDEP to obtain the necessary response action approval for work in contaminated areas on the Property. NET II May 3, 2005 Decision at 2 n.1. See also 310 CMR 40.0442.

NET 2005 PETITION FOR EXEMPTION

On December 5, 2005, NET submitted the present Petition for Exemption. In this Petition, NET describes its proposed activities as demolition and removal of existing facilities, excavation and re-grading, replacing and realigning existing track, construction of new rail lines, and installation of new facilities. Petition at 7. NET specifically describes the excavation of up to 1,500 cubic yards of material for a foundation and construction of a “sprung-type” structure with a recessed concrete area for solid waste processing equipment. Petition at 7-8. While NET calls the structure, with its foundation and related equipment, the “Transloading Structure,” it is in fact a solid waste processing facility (“Solid Waste Processing Facility”) because NET proposes to unload, sort, grind, bale and otherwise process construction and demolition waste (“C&D”) and municipal solid waste (“MSW”) inside this structure.⁴ *Id.* at 11.

More specifically, NET proposes to unload C&D, to segregate certain metal and wood or other materials, and to grind the C&D in shredders on the north side within the Solid Waste Processing Facility. NET also proposes to process MSW on the south side within the Facility where the MSW will be unloaded on the concrete floor, sorted, baled and then loaded into containers, which are in turn loaded onto rail cars. Petition at 12.

NET seeks exemption status under 49 U.S.C. § 10502 for the entire project, including the Solid Waste Processing Facility. It asserts that the Solid Waste Processing Facility is part of its rail operations and that as such it is not subject to state or local regulation under section 10501(b) of the ICCTA.

⁴ MassDEP regulations define solid waste processing as “the use of any method ...to reduce the volume or alter the physical characteristics of solid waste ... through any means, including, without limitation, separating, baling, shredding, crushing or reworking.” 310 CMR 19.006.

ARGUMENT

- I. NET'S SOLID WASTE PROCESSING FACILITY DOES NOT CONSTITUTE TRANSPORTATION BY RAIL NOR IS IT INTEGRALLY RELATED TO RAIL TRANSPORTATION, AND THE BOARD, THEREFORE, HAS NO AUTHORITY TO EXEMPT THE FACILITY UNDER SECTION 10502 OF THE ICCTA.

Pursuant to 49 U.S.C. § 10502(a), the Board has the authority to exempt a person from prior approval requirements at 49 U.S.C. § 10901 for common rail carrier status. This authority is limited to "a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board." 49 U.S.C. § 10502(a). Because NET's proposed Solid Waste Processing Facility and its associated proposed sorting, grinding, and baling activities are not "a matter related to a rail carrier providing transportation," they are not subject to the Board's jurisdiction and any exemption issued by the Board under 49 U.S.C. § 10502(a) should exclude specifically both NET's proposed Solid Waste Processing Facility and the activities to occur in the Solid Waste Processing Facility.

The Board's jurisdiction over transportation by rail carriers generally preempts regulation of the same activity by the states. 49 U.S.C. § 10501(b). "Transportation" is defined in the ICCTA as

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, . . . transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9). But activities are considered rail transportation and therefore within the Board's jurisdiction only if they are "integrally related to the railroad's ability to provide rail

transportation services.” Hi Tech Trans, LLC, – Petition for Declaratory Order – Hudson County, NJ, STB Finance Docket No. 34192, at 3 (served Nov. 20, 2002) (“Hi Tech I”).

In Hi Tech I, the petitioner operated a truck-to-rail solid waste transfer facility, where C&D transported by trucks was unloaded and transferred to railcars. Id. at 2. The petitioner sought a declaratory order that the transportation of C&D by truck from construction and demolition sites to the truck-to-rail solid waste transfer facility were within the meaning of “transportation” and therefore exempt from state regulation. Id. The Board rejected Hi Tech’s arguments, and specifically found that while its jurisdiction might extend to certain activities and facets of transloading facilities, any such activities and facilities “must be closely related to providing direct rail service.” Id. at 3. The Board specifically determined that its jurisdiction did not extend so far as to include activities that occurred *before* a product was delivered to a rail carrier. Id. at 3. See also CFNR Operating Co., Inc. v. City of American Canyon, 282 F.Supp.2d 1114, 1118 (N.D. Cal. 2003) (denying preliminary injunction and holding that the transfer of pumice and cement to customers *after* the material arrived by rail was not transportation within the Board’s jurisdiction even though the transfer facility was located on rail property).

Similarly, activities that can take place elsewhere, away from the railroad, do not become “integrally related to the railroad’s ability to provide rail transportation services” by the mere fact that the activities are strategically located adjacent to a rail line. See Borough of Riverdale – Petition For Declaratory Order – The New York Susquehanna and Western Railway Corp., STB Finance Docket No. 33466, at 9 (served Sept. 10, 1999) (“Riverdale”) (stating that a corn processing plant located on railroad property would fall outside of the Board’s jurisdiction and like any non-railroad property would be subject to applicable state and local regulation). See also Town of Milford, MA – Petition for Declaratory Order, STB Finance Docket No. 34444, at

2, 3 (served Aug. 12, 2004) (steel fabrication activities, *e.g.*, cutting and welding of shipped steel, that occurred on railroad property after the steel was offloaded from railcars fell outside the definition of railroad transportation); Growers Marketing Co. v. Pere Marquette Ry., 248 I.C.C. 215, 227 (1941) (stating that “facilities provided for the display and sale of perishable produce delivered at the produce terminal are facilities for commercial transactions not part of transportation”). NET’s Solid Waste Processing Facility for sorting, grinding, and baling C&D and MSW is not akin to a transloading facility which must be located at a railroad facility and which is generally exempted from state regulation under the ICCTA. Norfolk S. Ry. v. City of Austell, 1997 U.S. Dist. LEXIS 17236 at 24 (N.D. Ga. 1997) (intermodal facility for transferring containers or trailers of cargo between trains and tractor-trailer trucks fell within Board’s jurisdiction) .

Here, the sorting, grinding, and baling of C&D and MSW that NET proposes to do are not “closely related to providing direct rail service.” See Hi Tech at 3. They can be done at a permitted processing facility anywhere in Massachusetts before the waste is hauled to and transloaded at NET’s facility to be transported by rail. Indeed, a federal district court has stated that a facility that sorts, segregates, and processes solid waste operates as a solid waste facility, “not as a transloading facility that involves the mere loading and unloading of materials.” See J.P. Rail, Inc. v. New Jersey Pinelands Comm’n, Civil Action No. 05-2755, at 12-13, 2005 WL 3529339 (D. N.J. 2005) (enjoining the construction of such a facility based on finding that the proposed facility would probably not involve “transportation by a rail carrier” and that the STB would not have exclusive jurisdiction over it). See also Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308 (3rd Cir. 2004) (describing the transloading of C&D waste to facility hopper and then from hopper to rail cars without processing); Hi Tech I at 3 (hauling of waste by truck to

railroad is not linked to transloading activities at railroad as one continuous intermodal rail movement); CFNR Operating Co. 282 F.Supp.2d at 1118-1119 (hauling of products from railroad after transloading activities is not rail transportation); Town of Milford at 3 (steel fabrication on rail property is not rail transportation).

In an attempt to recharacterize its solid waste processing activities as part of transloading activities, NET claims that it proposes to sort and segregate metal and wood from the C&D to facilitate transloading and to minimize the risk of damage by the C&D. Petition at 11. NET overstates that claim. The large pieces of metal generated in C&D that allegedly may cause damage to rail cars are generally sorted and removed at construction and demolition sites and sold for recycling because metal is a valuable commodity. See Verified Statement of James McQuade ¶ 7, attached hereto. Any remaining metal in the C&D that may be shipped to a processing facility is relatively small and/or flexible and is very unlikely to damage rail cars or loading equipment. See id. Contrary to NET's claims, the processing of C&D is not necessary for transloading C&D. The sorting and segregation of metal and wood from the C&D, however, will generate revenue for NET. Once sorted, NET can sell the metal and wood for recycling and reuse as solid waste processing facilities typically do. See id. ¶¶ 6-10.

Therefore, NET's proposed solid waste processing activities are distinct from and not integrally related to the rail transportation and are outside the Board's jurisdiction. As a solid waste processing facility, NET is subject to site assignment and permitting requirements under 310 CMR 16.00 and 19.000, and all other applicable performance requirements. NET should not avoid state and local laws, including site assignment and permitting requirements, aimed at protection of public health, safety and the environment, simply because its proposed solid waste processing activities will be located adjacent to rail lines.

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 by allowing solid waste activities at rail facilities to avoid regulatory permitting requirements and state and local enforcement scrutiny simply by locating near railroads. If such facilities were to be exempted, the only government agency that would even be available to regulate such facilities and protect public health, safety, and the environment would be the Surface Transportation Board. Massachusetts believes that this would place a huge and long term regulatory and enforcement burden on the Board that it may not want to accept, be prepared to accept, or even have the authority to accept. Moreover, NET has not demonstrated that its vague offer to comply with some selective requirements in its Petition would close this enforcement loophole. Even if NET voluntarily enters into a contract with the state to comply with regulations it finds acceptable, enforcement of the voluntary agreement is problematic because the state would be unable to pursue statutory penalties that apply to other solid waste facilities.

Experience has well demonstrated, both in Massachusetts and across the country, that solid waste facilities that are not adequately regulated on a continuing and long term basis are prone to create severe public health, safety, and environmental problems for the area in which they are located. And, once created, such problems are often very difficult to assess and remediate. These are sound public policy reasons why solid waste facilities are closely regulated by state and local governments. The Board should decline to issue an exemption encompassing NET's Solid Waste Processing Facility and its associated activities.

II. BECAUSE NET HAS NOT DEMONSTRATED THAT IT WILL OPERATE AS A RAIL CARRIER, ITS PROPOSED PROJECT DOES NOT CONSTITUTE TRANSPORTATION BY A “RAIL CARRIER” AND IS NOT WITHIN THE BOARD’S JURISDICTION.

In order for NET to come within the Board’s jurisdiction, it must demonstrate that it is a rail carrier providing rail transportation for compensation within the meaning of the ICCTA. See 49 U.S.C. § 10102(5). It has failed to do so, however.

Other than stating that it plans to purchase the Olin Property, construct certain tracks, and construct a solid waste processing facility adjacent to the tracks, NET has provided no evidence as to whether it will be able to enter into interchange agreements with the Boston & Maine Railroad and/or the Massachusetts Bay Transportation Authority; hire engineers, trainmen, maintenance of way personnel or other railroad employees; provide and/or operate locomotives and other rail equipment; or otherwise show an intention to provide *bona fide* common rail carrier service. The Board should not approve NET’s request for rail carrier authority without such demonstration. As a nonrail operator, NET’s entire proposal, including the Solid Waste Processing Facility, falls outside of the Board’s jurisdiction and is subject to state and local regulation. See Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ, STB Finance Docket No. 34192, at 6 (served Aug. 14, 2003) (“Hi Tech II”) (even if transloading facility might be within the Board’s definition of “transportation,” its owner and operator was not a rail carrier; therefore, facility did not fall within Board’s jurisdiction and was subject to state and local regulation), aff’d, Hi Tech, 382 F.3d at 310.

III. THE PERFORMANCE REQUIREMENTS APPLICABLE TO SOLID WASTE PROCESSING FACILITIES DO NOT UNDULY INTERFERE WITH RAIL TRANSPORTATION OR UNREASONABLY INTERFERE WITH INTERSTATE COMMERCE AND THEREFORE APPLY TO NET'S PROPOSED SOLID WASTE PROCESSING FACILITY.

Even if the Board finds a facility or activity to be “transportation by rail,” preemption of state regulation of railroad activities under Section 10501 of the ICCTA is not absolute. Interpreting the ICCTA preemption provision, both the Board and federal courts have determined that while state and local authorities may not impose preclearance requirements such as permitting requirements, they may enforce reasonable and nondiscriminatory restrictions on rail transportation activities for the protection of public health, safety or the environment, provided such restrictions do not unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce. Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, at 8-9 (served May 1, 2001) (“Boston and Maine”); Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005) (agreeing that ICCTA is not a per se preemption provision and that public safety codes and environmental regulations enacted to protect the public health and safety would seem to withstand preemption). For example, interstate railroads are not exempt from local fire, health, safety and construction regulations and inspections, including electrical and building codes or fire and plumbing regulations. See Riverdale at 8-9.

Even were the Board to find improperly that the ICCTA preempts the siting and permitting requirements at 310 CMR 19.60 and 19.000, ICCTA preemption does not extend to any of the other regulations governing proper operation and maintenance of solid waste processing facilities. The Commonwealth promulgated those regulations to ensure that these facilities would not be operated in a manner that may endanger the public or the environment.

For example, MassDEP regulations at 310 CMR 19.205 and 19.206 require that a solid waste facility construct and maintain stormwater controls and operate with proper waste handling equipment. These regulations are nondiscriminatory and do not unduly burden rail transportation. They are similar to performance or “best management practices” or “appropriate precautionary measures” that the Board has found to be reasonable and not preempted. See Boston and Maine at 11-12. Indeed, even NET acknowledges this fact and has indicated that it would comply with these regulations, including 310 CMR 7.11(1) and (2) (idling provisions for motor vehicles and trains) and certain solid waste regulations at 310 CMR 19.061(2) and (3) (governing special waste) and 310 CMR 19.205 through 19.212 and 19.216 through 19.219 (regulating solid waste transfer stations).⁵ NET’s agreement “reflect[s its] own determination and admission that the [regulations] would not unreasonably interfere with interstate commerce.” Township of Woodbridge v. Consol. Rail Corp., Inc., STB Finance Docket No. 42053, at 5-6 (served Dec. 1, 2000) (declining to find preemption of those local requirements with which railroad agreed to comply).

NET, however, has specifically asserted that 310 CMR 19.017, the “Waste Bans” regulation, is preempted under the ICCTA. Because the Waste Bans serve a legitimate state purpose of waste reduction and promotion of recycling of wastes to conserve natural resources and to minimize pollution associated with waste disposal and because the provision is nondiscriminatory and reasonable, it applies to NET’s Solid Waste Processing Facility and is not preempted under ICCTA.

⁵ Sections 19.205 through 19.221 of 310 CMR have recently been amended, and sections 19.208 through 19.221 now appear with some changes under subsections of the amended Section 19.207.

The Waste Bans regulation at 310 CMR 19.017 prohibits the disposal or transfer for disposal of certain wastes and requires the segregation of such wastes from the waste stream before disposal or transfer for disposal. The goals of the Waste Bans are to divert wastes that may endanger the public or adversely affect the environment when landfilled or combusted, reduce waste, conserve the capacity at existing solid waste disposal facilities, minimize the need for construction of new disposal facilities, and promote the recycling of waste to conserve natural resources. These are legitimate state goals.

The Waste Bans will not unreasonably burden rail transportation or interfere with interstate commerce. To comply with the Waste Bans, a solid waste facility must simply monitor incoming truckloads to identify and remove as many prohibited materials as feasible; conduct periodic inspections of incoming loads; and respond to inappropriate loads (i.e. loads containing banned materials). Because NET already has indicated it intends to sort the waste for metal and wood, which are banned materials under the Waste Bans regulation (effective July 1, 2006), and inspect wastes that are dumped in the proposed Solid Waste Processing Facility, further complying with the Waste Bans would not unreasonably burden its operations. See Township of Woodbridge, at 5-6 (agreement reflects admission that regulation is not unreasonable). Furthermore, the possibility that it may expend some capital to comply with the Waste Bans does not automatically render the regulation unreasonable or unduly burdensome on interstate commerce. See Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern Railroad Co. – Stampede Pass Line, STB Finance Docket No. 33200 at 9-10 (served July 2, 1997) (requiring a railroad to bear costs of complying with regulations that are a reasonable exercise of local police power would not be an unreasonable burden on or interfere with interstate commerce); Florida E. Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324,

1338 n.11 (11th Cir. 2001) (recognizing that “at some level, all regulation places constraints on firms’ profit-maximizing behavior,” but that “the profit-maximizing priorities of individual railroad companies” does not “subsume all local regulation”).

Any ICCTA preemption of Massachusetts regulations applicable to NET’s Solid Waste Processing Facility, therefore, does not extend to those performance regulations that governs the operation and maintenance of the Facility, including the Waste Bans.

IV. 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, at 9. NET’s proposal would interfere with MassDEP’s implementation of the Clean Air Act. The baling and shredding operations NET has proposed probably will use diesel engines for power. Based on MassDEP’s experience in permitting shredders at other solid waste facilities, these units are likely to need an air permit pursuant to MassDEP’s air quality regulations, 310 CMR 7.00, promulgated pursuant to the Massachusetts Clean Air Act and adopted as part of Massachusetts State Implementation Plan as required by the Federal Clean Air Act. To comply with the Commonwealth’s implementation of the Federal Clean Air Act, NET must comply with 310 CMR 7.02, and apply for a plan approval if appropriate, 7.11 related to idling engines, 7.09 relating to dust and odors, and 7.15 relating to asbestos. NET has selectively offered to comply with only portions of MassDEP regulations.⁶ NET’s refusal to comply with 310 CMR 7.15, concerning proper the handling of asbestos-containing material, is particularly troubling because

⁶ NET indicated it would comply with 310 CMR 7.02(2), though not necessarily the plan approval requirements of 7.02, and with 7.11(1) and (2) but not 7.09 and 7.15. Petition at 15.

NET's grinding of C&D materials could potentially release carcinogenic asbestos fibers. The Commonwealth also is concerned about dust and odors at the site and seeks compliance with 310 CMR 7.09, relating to operations which generate dust or odors, and the plan approval requirements, if applicable at 310 CMR 7.02. In short, as NET has not agreed to comply with all the necessary elements of Massachusetts State Implementation Plan, NET's proposal would be in violation of the federal Clean Air Act.

V. GIVEN NET'S FAILURE TO FULLY DISCLOSE ITS PLANS IN THE PREVIOUS PETITION, A CURSORY AND EXPEDITED REVIEW OF NET'S CURRENT PETITION IS NOT APPROPRIATE, AND THE BOARD AND THE SEA ARE ENTITLED TO FULL REVIEW OF THE PETITION.

As the Board has expressly found in its decision denying NET's 2003 Petition, "NET was not forthcoming" and its failure to keep the Board informed about significant project changes in its 2003 Petition compromised the environmental review. Now that NET has submitted the current Petition, with new information on its project, the Board is entitled to review it in due course.

Contrary to NET's assertion that the two petitions are similar, the new Petition describes a different project from the one proposed in the 2003 Petition. For example, in addition to the new information about the proposed Solid Waste Processing Facility, which was not at all described in the 2003 Petition, the current Petition now adds new siding tracks to the project. Compare 2003 Petition at 6-7 with Petition at 8. The Petition also described the anticipated excavation of approximately 17,600 cubic yards of material not included in the 2003 Petition. Petition at 7-8. See 2003 Petition at 6-8. Such excavation is significant at the contaminated Property as excavated material will need to be adequately characterized before it is used for re-

grading activities. In short, it is obvious, despite NET's claims, that the current Petition differs in significant respects from the 2003 Petition and warrants full review.

Moreover, even now, certain aspects of NET's proposed project in the Petition are not final. For example, NET has not determined exactly where the tracks will be installed. Petition at 8. The Board specifically had asked NET to provide this information. See NET II May 3, 2005 Decision at 5. And NET may yet install a storage structure on the Dense Aqueous Phase Liquid ("DAPL") Containment Area. Petition at 9-10. Such proposed uses for the DAPL Containment Area should be reviewed to determine whether they might result in any unintended impacts. Finally, any development at the Olin Site needs to be coordinated with the Environmental Protection Agency's review of the site investigation and remediation. See Section VI, *infra*. NET's request for expedited review should be denied.

In addition, NET's Petition has generated much community interest. In such circumstances, expedited review is not appropriate. See Northeast Interchange Railway, LLC – Lease and Operation Exemption – Line in Croton-On-Hudson, NY, STB Finance Docket No. 34734, at 4-5 (served Nov. 18, 2005) (rejecting notice of exemption filed under abbreviated class exemption procedure at 49 CFR 1150.31 for lease and operation of track; where the proposed transaction, which included operation of C&D transloading activities, was controversial and raised important issues that required more scrutiny and the development of a more complete record, the filing of a petition for exemption or a full application would be more appropriate).

VI. THE BOARD SHOULD COORDINATE ENVIRONMENTAL REVIEW OF NET'S PETITION WITH EPA'S ASSESSMENT OF THE SITE INVESTIGATION AND REMEDIATION ACTIVITIES AT THE OLIN PROPERTY.

On September 14, 2005 the United States Environmental Protection Agency (EPA) proposed the Olin Chemical Site ("Olin Site") for inclusion on the National Priorities List (NPL)

pursuant to CERCLA. National Priorities List for Uncontrolled Hazardous Waste Sites, Proposed Rule No. 43, 70 Fed. Reg. 54,328 (2005) (proposed Sept. 14, 2005). Under CERCLA, in the likely event that the Olin Site is added to the NPL, EPA will be the lead regulatory authority with respect to response actions conducted at the Olin Site while MassDEP will have a support agency role. EPA will assess site investigation and remediation and worker safety in conducting any construction work at the site, and depending on the response actions selected by EPA, EPA may restrict certain future uses of and activities at the site that EPA may determine pose an unacceptable risk to human health or the environment. Therefore, NET must consult and coordinate with EPA before initiating construction activities at the Olin Site. In addition, to maintain any liability protection afforded under CERCLA and M.G.L. c. 21E, the Massachusetts Superfund law, NET must provide full cooperation, assistance and access for site investigation and cleanup and must not impede this investigation and cleanup. At this point, EPA has only just begun its review of existing site investigation documents to evaluate the quality and extent of the existing data and to determine what, if any, additional investigation and remediation activities on the Olin Site may be necessary. It is premature to ask EPA to opine on whether NET's proposed excavation and site development would pose any unacceptable risk to human health or the environment or impede EPA's site investigation and related remediation activities. The Board and the SEA should coordinate their review of the Petition with the EPA.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that (1) to the extent that the Board issues an exemption for NET's proposed project and makes a finding that NET is a common rail carrier, the scope of any such finding should extend only to rail-related activities and should exclude specifically the proposed solid waste processing facility and associated

activities; (2) the Board rule that NET's proposed solid waste processing facility is not rail transportation and is not integrally related to rail transportation and therefore is subject to state and local regulations designed to protect public health and safety and the environment; (3) the Board should coordinate any environmental review of NET's proposal with EPA; and (4) the Board deny NET's request for expedited consideration.

Respectfully submitted by,

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

THOMAS F. REILLY
ATTORNEY GENERAL

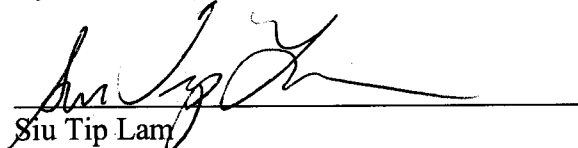
By its attorney,

A handwritten signature in cursive script, appearing to read "Laura Swain", followed by the initials "(STC)" in parentheses. The signature is written over a horizontal line.

Laura Swain
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Dated: January 27, 2006

By his attorney,

A handwritten signature in cursive script, appearing to read "Siu Tip Lam", followed by a horizontal line.

Siu Tip Lam
Assistant Attorney General,
Environmental Protection Division
Office of Attorney General
One Ashburton Place
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Dated: January 27, 2006

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2006, I served the foregoing Reply of the Commonwealth of Massachusetts to New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway – Petition for an Exemption from 49 U.S.C. § 10901 to Acquire, Construct and Operate as a Rail Carrier on Tracks and Land in Wilmington and Woburn, Massachusetts, by causing a copy thereof to be delivered via first class mail, postage prepaid, to:

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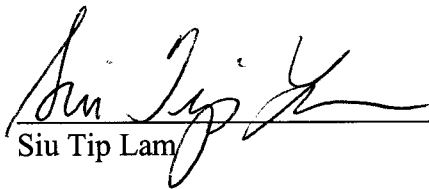
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Siu Tip Lam

VERIFIED STATEMENT OF JAMES MCQUADE

1. I am a Regional Planner in the Bureau of Waste Prevention at the Department of Environmental Protection (the "Department"). I have held this position since December 2000.
2. I am the chair of the Department's Construction and Demolition Debris (C&D) Subcommittee of the Solid Waste Advisory Committee. The Subcommittee has approximately 150 members and consists of industry groups, including C&D processing facilities, landfills, transfer stations, municipal waste combustors, solid waste haulers, trade associations, and municipalities.
3. The Subcommittee was formed to provide input to Department on its development of policies and programs related to C&D management.
4. As chair, I am responsible for coordinating the activities of the Subcommittee. I conduct routine C&D Subcommittee meetings, develop and supervise C&D pilot projects demonstrating cost-effective C&D recycling techniques, analyze solid waste/recycling processing needs and foster new facility development with an emphasis on C&D recycling. In addition, I participated in writing amendments to the Department's solid waste regulations banning the disposal of certain materials found in the C&D waste stream.

5. In my capacity as the C&D Subcommittee chair, I have visited C&D processing facilities throughout the state and visited C&D projects/sites. I am familiar with the operations of C&D haulers and processing facilities.
6. C&D waste typically contains metals and wood.
7. Because metal is a valuable commodity, structural or large pieces of metal is typically sorted at the construction and demolition sites and diverted to metal recycling operations. Other metal, which generally consists of smaller pieces that could not be sorted at the construction and demolition sites, may be included in mixed C&D loads delivered to solid waste facilities. The smaller pieces of metal in mixed C&D loads are relatively small and flexible.
8. Solid waste processing facilities also separate and divert metal from C&D loads to recycling or reuse operations.
9. Wood, when sorted from other C&D materials, also has an economic value. Such wood may be sold to a facility permitted to burn such wood to generate energy.
10. During the course of my job, I frequently speak with businesses that accept wood for recycling or reuse that has been sorted from other C&D material. One energy recovery facility, that uses C&D wood as a fuel, discussed with me its plans to facilitate the acceptance of C&D wood via rail from both existing and proposed Massachusetts solid waste facilities with access to rail.

Verification:

I, James McQuade, certify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this affidavit.

Executed on January 26, 2006.


James McQuade, Regional Planner
Department of Environmental Protection