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July 13, 2006

VIA ELECTRONIC FILING

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 enclose for filing the Comments of the Commonwealth of Massachusetts on Whether the Surface Transportation Board Has Jurisdiction over the Proposed Solid Waste Processing Facility of New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway. The Comments are 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,

A handwritten signature in black ink, appearing to read "Siu Tip Lam".

Siu Tip Lam
Assistant Attorney General
Environmental Protection Division

cc: Service List in STB Finance Docket No. 34797 (by first-class mail)

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

COMMENTS OF THE COMMONWEALTH OF MASSACHUSETTS ON WHETHER THE
SURFACE TRANSPORTATION BOARD HAS JURISDICTION OVER THE PROPOSED
SOLID WASTE PROCESSING FACILITY OF NEW ENGLAND TRANSRAIL, LLC, d/b/a
WILMINGTON & WOBURN TERMINAL RAILWAY

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Dated: July 13, 2006

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

COMMENTS OF THE COMMONWEALTH OF MASSACHUSETTS ON WHETHER THE
SURFACE TRANSPORTATION BOARD HAS JURISDICTION OVER THE PROPOSED
SOLID WASTE PROCESSING FACILITY OF NEW ENGLAND TRANSRAIL, LLC, d/b/a
WILMINGTON & WOBURN TERMINAL RAILWAY

INTRODUCTION

This matter arises out of a Petition for Exemption from 49 U.S.C. § 10901 filed by New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway (“NET”), proposing to acquire, construct, and operate certain railroad tracks on a contaminated property located in Wilmington and Woburn, Massachusetts (“Olin Property”). Because as part of this project, NET proposes to construct and operate a solid waste processing facility (“Solid Waste Processing Facility” or “Facility”), replies to NET’s Petition from a number of interested parties raised questions about the Surface Transportation Board’s (“Board”) jurisdiction over NET’s Solid Waste Processing Facility and related activities. On June 13, 2006, the Board determined that it would review and resolve the jurisdictional issue before proceeding further with environmental review of NET’s Petition and requested comments from interested parties on “the extent to which NET’s proposed activities are part of rail transportation and thus qualify for exemption under 49 U.S.C. § 10501(b).” 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. 34797, at 2 (served June 13, 2006) (“June 13, 2006 Decision”). The Board also invited parties to discuss “what activities would normally be associated with MSW [municipal solid waste] and C&D [construction and demolition debris]

processing and would occur even absent rail transportation,” and “what activities would normally be associated with transloading and thus would be part of rail transportation.” Id.

The Commonwealth of Massachusetts, by and through the Massachusetts Department of Environmental Protection (“MassDEP”) and the Attorney General’s Office, submits the following comments in response to the Board’s June 13, 2006 Decision. The comments demonstrate that NET’s proposed activities are solid waste processing activities, not rail transportation, and should not qualify for exemption under 49 U.S.C. § 10501(b).

I. RECENT DECISIONS SUPPORT THE COMMONWEALTH’S POSITION THAT THE INTERSTATE COMMERCE COMMISSION TERMINATION ACT DOES NOT PREEMPT STATE AND LOCAL REGULATION OF SOLID WASTE PROCESSING FACILITIES.

On January 27, 2006, the Commonwealth submitted a Reply arguing that NET’s proposed Solid Waste Processing Facility, including a canvas building and solid waste equipment, and all related activities such as sorting, grinding and baling of solid wastes, are not rail-related activities and are not subject to the Board’s jurisdiction. Rather, they are subject to state and local regulation. The Commonwealth reasserts and incorporates herein by reference the arguments made in that Reply, a copy of which is attached hereto as Exhibit A. Since the Commonwealth submitted the Reply, two cases, one decided by the federal District Court for the Southern District of New York and the other by a New Jersey Superior Court, further support the Commonwealth’s position.

In Buffalo Southern RR, Inc. v. Village of Croton-on-Hudson, ___ F. Supp. 2d ___, ___, 2006 WL 1650675, *1 (S.D.N.Y. 2006), a rail carrier, which operated a railroad in another part of the state, sought to expand its business by leasing a property (the “Yard”) in Croton-on-Hudson (the “Village”) and converting the Yard into a transloading facility. In anticipation of

the Village's proposal to take the Yard by eminent domain, the rail carrier sought a preliminary injunction to enjoin the Village from commencing any condemnation proceeding. Id. at *4. It argued that the ICCTA preempted state and local action against its railroad operations. Id. The court issued a preliminary injunction against the Village, but imposed a condition on the railroad not to engage in solid waste management and recycling operations at the Yard. Id. at *12-13. In issuing the condition, the court recognized the long history of litigation that the Village had with the prior lessee, who had operated a recycling and waste management center at the Yard, in violation of a solid waste permit issued by the Village. Id. See In re Metro Enviro Transfer v. Croton-on-Hudson, 7 A.D.3d 625, 626 (2d Dept. 2004), aff'd, Metro v. Croton-on-Hudson, 5 N.Y.3d 236, 241 (2005). The court further acknowledged that the Village had an interest in preventing the commencement of solid waste activities at the site after it had successfully stopped the prior lessee's operations through state court proceedings. The court stated that "[n]othing in the ICCTA require[d it] to ignore . . . the state courts['] . . . concern about the conduct of waste management and recycling operations in the Yard." Buffalo Southern RR, 2006 WL 1650675 at *14. The case demonstrates that while the ICCTA may preempt state and local regulation of a rail transloading facility, it does not necessarily preempt state or local regulation of solid waste management activities at such facilities.

In an Order for Preliminary Injunction in State of New Jersey v. J.P. Rail, Inc., Atlantic Superior Court Docket No. C-41-06 (Chancery Div. Jun. 22, 2006), the court enjoined a railroad carrier, which leased a property in Pleasantville, New Jersey, and a company in the business of solid waste management from the processing of solid waste at the property, including, but not limited to, "the disposal, sorting, processing, grinding, crushing, aggregating, segregating, and/or baling of solid waste prior to loading the waste into rail cars or containers for rail shipment."

Ord. for Prelim. Injunction (William C. Todd, III, J.), a copy of which is attached as Exhibit B, at

2. The court determined as a matter of law that the ICCTA does not preempt state and local regulation of the processing of solid waste.¹ Id. These cases, as well as those discussed in the Commonwealth's Reply, support the Commonwealth's position that the ICCTA does not preempt state or local regulation of solid waste processing activities. Furthermore, the type of activities NET proposes to conduct at its facility is, as demonstrated below, no different from activities conducted at a typical solid waste processing facility. Therefore, the Board should rule that NET's Solid Waste Processing Facility, and related equipment and activities, are not part of rail transportation and thus do not qualify for exemption under 49 U.S.C. § 10501(b).

II. SOLID WASTE HANDLING FACILITIES IN MASSACHUSETTS

In Massachusetts, solid waste management facilities include disposal facilities and handling facilities. Handling facilities, which do not dispose of waste, include processing facilities, transfer stations, and recycling facilities. (Verified Statement of David B. Ellis ["Ellis Statement"], attached as Exhibit C, ¶¶ 2, 7.) Generators of municipal solid waste ("MSW"), which includes residential and commercial solid waste, and construction & demolition debris ("C&D"), typically contract with waste haulers or solid waste management facilities that provide waste hauling services to take away and dispose of their waste. (Id. ¶ 6.) The generators usually do not dictate how the waste should be handled or processed or how or where it is disposed of, provided that the waste is handled, processed, and disposed of in compliance with the law and applicable regulations. (Id.) Once a hauler picks up the waste, it has the responsibility to

¹ The same rail carrier and solid waste company had filed an action in federal District Court seeking to enjoin a state agency, under the ICCTA, from interfering with the proposed construction of solid-waste transfer facility adjacent to rail tracks in the Pinelands National Reserve. In J.P. Rail, Inc. v. New Jersey Pinelands Comm'n, 404 F. Supp. 2d 636, 638, 643 (D. N.J. 2005), the court enjoined the rail carrier and solid waste company from construction of the proposed facility, holding that the facility would probably not involve "transportation by a rail carrier." See Commonwealth's Reply at 9-10.

properly dispense of the waste. (Id. ¶ 7.) The hauler may ship the waste to either a disposal facility or a handling facility. (Id.)

Typically, at a solid waste processing facility, truckloads of MSW and/or C&D, most probably from multiple generators, are dumped or tipped on the floor of the facility. (Id. ¶ 8.) The facility then inspects the waste and removes from it any hazardous waste, unacceptable materials and other waste materials, such as asbestos-containing material, which is not hazardous but that the MassDEP has determined to require specific management controls to prevent an adverse impact on human health and the environment. (Id.)

The solid waste processing facility processes C&D to generate materials that may be sold for recycling or reuse. It inspects the C&D for recyclable materials banned from disposal in Massachusetts. (Id. ¶¶ 8-9.) See 310 CMR 19.017. The banned or restricted materials, which include metal, wood, brick, asphalt (from pavement), and concrete, (collectively, “restricted materials”), once segregated, generate revenue because there is currently a strong recycling market for such material. (Id. ¶¶ 9-10.) Solid waste processing facilities typically sell the segregated restricted materials for recycling or reuse rather than pay to dispose of them out of state. (Id. ¶ 11.)

After the C&D is sorted, the processing facility then consolidates and grinds up the C&D with various types of grinding and shredding equipment or otherwise processes the waste. (Id. ¶¶ 12.) Such processing generates C&D residuals and fines, which are used for grading and shaping for the closure of old landfills and for daily cover material at existing landfills. (Id.) The processing facility then loads the remaining C&D waste onto containers or trucks to be hauled to another permitted handling facility and/or disposal facility. (Id.)

After MSW is sorted and recyclables are segregated, the processing facility loads the MSW into containers or trucks to be hauled to another handling facility and/or disposal facility. (Id. ¶ 13.) Generally, the processing facility consolidates and compacts the MSW during the loading process by tamping down the MSW with loading equipment. (Id. ¶¶ 13.)

The processing facility then pays to have the consolidated MSW and/or C&D taken to another handling facility or a disposal facility. (Id. ¶ 15.) MSW and C&D are processed in this typical fashion at facilities across Massachusetts regardless whether railroad is the mode of transporting the waste. (Id. ¶ 16.)

All solid waste processing facilities require a site assignment issued by the Board of Health and a permit issued by MassDEP in accordance with 310 CMR 16.00 and 19.000, respectively. Even where the solid waste handling facility is strategically located adjacent to railroad tracks to facilitate transportation of MSW or C&D waste by railcar, such Massachusetts facilities are required to be permitted by MassDEP and to comply with MassDEP regulations.

The MassDEP has permitted handling facilities located adjacent to railroads. For example, two facilities, the Champion City Recovery C&D Transfer Station and Trojan Demo Transfer Station, which are permitted to receive only C&D, operate similarly to the processes described above, except that they are not permitted to process the waste. (Id. ¶ 17-20.) These transfer stations dump or tip the C&D on the floors and sort them for hazardous waste and other unacceptable materials. (Id. ¶ 19.) Then after some minimal compaction by running trucks over the tipped, consolidated C&D, the C&D is loaded on to railcars to be shipped out of state. (Id. ¶ 20.) The MassDEP has also permitted a facility, Yarmouth-Barnstable Regional Transfer Station, to accept MSW. (Id. ¶ 18.) The MSW is dumped on the tipping floors, sorted, and then loaded onto railcars for disposal at an in-state incinerator. (Id. ¶¶ 18-20.)

III. SOLID WASTE TRANSLOADING FACILITY NOT REQUIRING ANY
PROCESSING OF THE WASTE

Processing of solid waste is not necessary for transloading the waste to a railcar. In fact, a solid waste transloading facility exists in Allston, Massachusetts, and demonstrates that processing of the waste is not integral to the transportation by rail. (Verified Statement of James Doucett, attached as Exhibit D, ¶ 8.) There, solid waste is shipped by truck in sealed, leak-tight containers to the transloading facility (“Allston solid waste transloading facility”). The waste is held in intermodal containers that are not opened at the rail terminal. (Id. ¶¶ 4-5.) The containers are simply moved from trucks onto railcars. (Id.) Such operations reduce the incidence of nuisance conditions and pollution and pose little threat to the environment because the MSW is held in sealed containers. (Id. at ¶ 5.) In contrast, NET’s proposed processing activities of sorting, grinding and baling the waste go beyond railroad transloading operations in which the containerized waste is merely moved from truck to rail.

IV. NET PROPOSES TO ENGAGE IN THE PROCESSING OF SOLID WASTE THAT
CAN AND DOES NORMALLY OCCUR EVEN ABSENT RAIL TRANSPORTATION
AND THAT IS NOT NECESSARY FOR OR INTEGRAL TO THE
TRANSPORTATION OF SOLID WASTE BY RAIL.

NET proposes to construct a canvas structure, the Solid Waste Processing Facility, with a recessed concrete area for solid waste processing equipment. Petition at 7-8. NET proposes to dump C&D waste onto the Facility’s tipping floor, to sort and segregate certain metal and wood or other materials, and to grind, crush or shred the C&D waste with grinding or shredding equipment within the Solid Waste Processing Facility. NET also proposes to process MSW within the Facility where the MSW will be unloaded on the tipping floor, sorted, baled and then loaded into containers, which are in turn loaded onto rail cars. Petition at 12. The sorting, segregating, grinding, crushing, shredding, and baling activities proposed by NET are normally

associated with solid waste processing, which, as demonstrated above, takes place in solid waste processing facilities across the state in the absence of rail transportation. See 310 CMR 19.006 (processing is the “use of any method, technique or process to reduce the volume or alter the physical characteristics of solid waste or recyclable or compostable materials through any means, including, without limitation, separating, baling, shredding, crushing or reworking”).

These processing activities proposed by NET are not necessary for the transloading or transportation of solid waste to rail cars and are therefore not integral to the rail transportation. The Allston solid waste transloading facility demonstrates that processing of solid waste is not necessary and not integral to rail transportation.

In an attempt to recharacterize its solid waste processing activities as part of transloading activities, NET claims that its proposal to sort and segregate metal, wood, and other material from the C&D waste is for the purpose of facilitating the transloading and minimizing the risk of damage by the C&D. Petition at 11. NET overstates that claim. The large pieces of metal generated in C&D debris 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 to Comm.’s Reply. See also, Ellis Statement ¶ 10.) Even NET acknowledges this point in its Petition. (See Verified Statement of John C. Ryan, attached to NET Petition, ¶ 5 (anticipating that NET would be receiving C&D “from construction or demolition of buildings after removal of some of the recyclable materials.”)) Any remaining metal in the C&D waste 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 McQuade Statement ¶ 7.) Based on the current strong recycling

market, the sorting and segregation of metal and wood from the C&D is more likely to generate revenue for NET. (See Id. ¶¶ 6-10 and Ellis Statement ¶¶ 10-11.)

NET also claims that the proposed baling of MSW minimizes damage to railcars and provides an environmental benefit of reducing fugitive odor and litter. However, it is not necessary for transportation of MSW by rail. In fact, NET concedes this point. It indicates that it may bale the MSW based on demand by its customers. (See Verified Statement of Robert W. Jones, III, attached to NET Petition, ¶ 15.) In addition, while baling is a process to densify MSW, the process creates messy bales, which may leak, have a high organic content and have a propensity for spontaneous combustion. (Ellis Statement ¶ 13.) Most solid waste processing facilities do not do baling unless requested by the disposal facility or the hauler. (Id.)

While NET claims that it wants to process solid waste to promote efficient transportation of the waste, its proposal appears to contradict this claim. For example, its Petition indicated that “[n]on-conforming materials will be removed from shipments and will be disposed of appropriately either by returning them to the shipper, disposing of small items as waste or as unclaimed freight.” (Jones Statement ¶ 17.) As demonstrated above, the efficient processing and movement of solid waste require consolidation of the waste. It is unclear from NET’s proposal how it would identify which shipper unloaded waste containing the non-conforming material unless its proposal does not include consolidation of the solid waste. In addition, its Petition also suggested that the shippers’ disposal contracts would dictate the final destination of that shipper’s waste. (Id.) In the business of processing and transporting solid waste, that would be the most inefficient way of conducting business because a processing facility using the railroad to transport waste out of state could potentially be sending small loads of waste in railcars all over the country.

To promote efficiency or to minimize any damage to railcars, NET may contract to take waste that has already been processed. To the extent that it wishes to offer processing services to customers prior to transloading as a way to generate more revenue, then it is undertaking an extra service not integral to rail transportation and should be subject to state and local regulation

Like the transfer stations located adjacent to railroads that the MassDEP has permitted, NET's proposed Solid Waste Processing Facility requires a solid waste permit from the Department pursuant to 310 CMR 19.000 et seq. and a site assignment from the local Board of Health pursuant to 310 CMR 16.00 et seq. MassDEP closely regulates solid waste processing facilities and oversees their operations to prevent public health, safety, and environmental problems. Such facilities conduct their activities, in accordance with MassDEP regulations, inside solid structures with systems in place to reduce air and noise pollution, dust and odors, and water pollution through runoff. See 310 CMR 19.207. As a solid waste processing facility, NET's proposed activities may generate air, noise, and water pollution that must be controlled through regulation and oversight by MassDEP.

V. CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that (1) 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; and (2) 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 specifically should exclude the proposed solid waste processing facility and associated activities.

Respectfully submitted by,

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

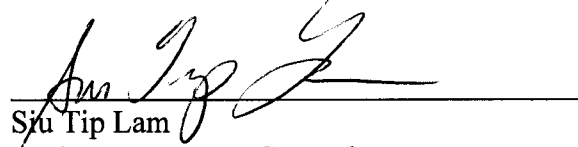
THOMAS F. REILLY
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By its attorney,

By his attorney,

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Dated: July 13, 2006

Dated: July 13, 2006

EXHIBIT A

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

Reply of Commonwealth of Massachusetts
STB Finance Docket No. 34797

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,

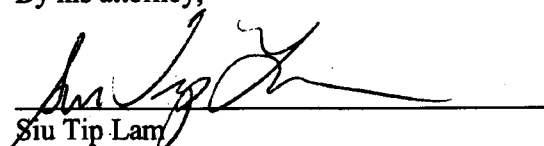
THOMAS F. REILLY
ATTORNEY GENERAL

By its attorney,

By his attorney,

Handwritten signature of Laura Swain in cursive script, followed by the text "(SIC)" in parentheses.

Laura Swain
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Handwritten signature of Siu Tip Lam in cursive script, followed by a horizontal line.

Siu Tip Lam
Assistant Attorney General,
Environmental Protection Division
Office of Attorney General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

Dated: January 27, 2006

Dated: January 27, 2006

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

EXHIBIT B

ZULMA V. FARBER
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Attorney for Plaintiff
State of New Jersey, Department of Environmental Protection

FILED

JUN 22 2006

William C. Todd III, P.J.Ch.

By: Christopher D. Ball
Deputy Attorney General
(609) 292-6945

THE STATE OF NEW JERSEY,
NEW JERSEY DEPARTMENT
OF ENVIRONMENTAL
PROTECTION,

Plaintiff,

v.

J.P. RAIL, INC., a Pennsylvania
Corporation, d/b/a SOUTHERN
RAILROAD COMPANY OF NEW
JERSEY, and SOUTHERN RAILROAD
OF NEW JERSEY LOGISTICS, and
MAGIC DISPOSAL, INC.

Defendants.

SUPERIOR COURT OF NEW JERSEY -
ATLANTIC COUNTY

CHANCERY DIVISION

DOCKET NO: C-41-06

ORDER FOR PRELIMINARY
INJUNCTION

THIS MATTER having come before the Court upon the application for preliminary injunction of the Plaintiff, New Jersey Department of Environmental Protection, on notice to Defendants J.P. Rail, Inc., SRNJ Logistics, Inc. and Magic Disposal, Inc.; and the Court on June 16, 2006 having considered the submissions of the parties and heard the arguments of counsel; and the Court having determined as a matter of law that

the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501 et seq., does not preempt state regulation of the processing of solid waste, and having concluded that issue as a matter of first impression; and the Court further having concluded that there is substantial risk of irreparable injury to the public interest should the restraints not be entered and good cause having been shown; and the Court having issued a ruling from the bench on June 16, 2006:

IT IS on this 17th day of JUNE 2006, ORDERED THAT:

1. Defendants J.F.Rail, Inc., SRNJ Logistics, Inc. and Magic Disposal are enjoined until further order of the Court from the processing of solid waste at the Facility located at 16 N. Franklin Boulevard, Pleasantville City, New Jersey (the "Facility"), including but not limited to the disposal, sorting, processing, grinding, crushing, aggregating, segregating, and/or baling of solid waste prior to loading the waste into rail cars or containers for rail shipment; and

2. Upon a motion for leave to appeal filed by Defendants pursuant to R. 2:5-6, this Order shall be stayed, becoming effective again thirty (30) days after either of the following actions taking place:

A. Entry of an Order by the Appellate Division denying Defendants' motion for leave to appeal.

B. Entry of a Final Decision by the
Appellate Division upholding the
preliminary injunction against
Defendants;

3. Absent a motion for leave to appeal, the
provisions of this Order shall be effective forty-five (45) days
from the date of the entry of this Order at 5:00 p.m. on August
4, 2006.

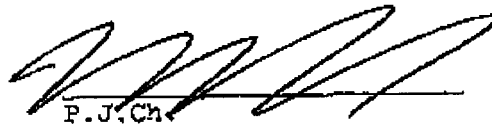

P.J. Ch.

EXHIBIT C

VERIFIED STATEMENT OF DAVID B. ELLIS

1. I am the Solid Waste Section Chief in the Bureau of Waste Prevention at the Southeast Regional Office of the Massachusetts Department of Environmental Protection ("MassDEP"). I have held this position since March 1993.

2. As Section Chief, I am responsible for administering and enforcing the Massachusetts Solid Waste Management Act and regulations promulgated thereunder. As part of my duties, I oversee the permitting program for solid waste management facilities located in southeastern Massachusetts. I review, and supervise the review of, site assignment and permit applications for solid waste management facilities, including solid waste processing facilities, transfer stations, recycling facilities, and disposal facilities.

3. I oversee the siting and permitting of proposed solid waste management facilities, and the regulation of existing (i.e. site-assigned and permitted) solid waste management facilities. This oversight includes the review of their operations and records to ensure compliance with the solid waste regulations. I also supervise enforcement actions and inspections of these facilities, to protect the public health, safety, and welfare, and the environment from the uncontrolled release of pollutants generated from the operation of these facilities.

4. As Section Chief, I also assist in the development of solid waste management policies and strategies for the state by collecting and maintaining data and information on solid waste management facilities and their operations in southeastern Massachusetts.

5. Through my work at MassDEP, I have become familiar with solid waste management facilities and their operations in Massachusetts.

6. Generators of municipal solid waste ("MSW"), which includes residential and commercial solid waste, and construction & demolition debris ("C&D"), typically contract with waste haulers or solid waste management facilities that provide waste hauling services to take away and dispose of their waste. The generators usually do not dictate how the waste should be handled or processed or how or where it is disposed of, provided that the waste is handled, processed, and disposed of in compliance with the law and applicable regulations.

7. Once a hauler picks up the waste, it has the responsibility to properly dispose of the waste. The hauler can ship the waste to either a disposal facility or a handling facility, which is not a disposal facility and includes processing facilities, transfer stations, recycling facilities and composting facilities.

8. Typically, at a solid waste processing facility, truckloads of MSW and/or C&D most probably from multiple generators are dumped or tipped on the floor of the facility. As required by applicable regulations, the facility inspects the waste for the presence of hazardous waste, unacceptable materials and other waste materials, such as asbestos containing material, which is not hazardous but that MassDEP has determined to require specific management controls to prevent an adverse impact on human health and the environment. According to solid waste regulations (and hazardous waste regulations) once discovered, any such hazardous waste and/or unacceptable materials must be segregated and properly disposed. The facility also inspects the waste for the presence of recyclable materials banned from disposal in Massachusetts by MassDEP regulation.

9. For C&D waste, effective July 1, 2006, MassDEP regulations prohibits the disposal of metal, wood, brick, asphalt (from pavement), and concrete (collectively, "restricted materials") at solid waste disposal facilities in Massachusetts. Thus, disposal facilities as well as

processing facilities and transfer stations are required to sort and segregate these materials for recycling or reuse.

10. Once segregated, the restricted materials generate revenue because there is currently a strong recycling market for such material. Metal is very valuable for recycling. Wood can be sold to a facility permitted to burn wood to generate energy. Brick, asphalt and concrete, once shredded and grinded up, become valuable and can be used as aggregate for making cement or structural fill. In fact, because of the value of these materials, construction sites generally sort and segregate these materials from the C&D loads before the loads are hauled to the processing facilities.

11. Solid waste processing facilities typically sell the segregated restricted materials for recycling or reuse rather than pay to dispose of them.

12. After the C&D is sorted, the processing facility would then grind up the C&D with various types of grinding and shredding equipment or otherwise process the waste. Such processing generates C&D residuals and fines, which are used for grading and shaping for the closure of old landfills and for daily cover material at existing landfills. The processing facility then loads the remaining C&D waste into containers or trucks to be hauled to another permitted handling facility and/or disposal facility.

13. After the MSW is sorted and recyclables are segregated, the processing facility likewise loads the MSW into containers or trucks to be hauled to another handling facility and/or disposal facility. Generally, MSW is densified or compacted during the loading process. While baling is a process to densify MSW, a processing facility generally would not bale MSW unless requested by the disposal facility or the hauler because such bales are messy, may leak, have a high organic content and have a propensity for spontaneous combustion.

14. At the solid waste processing facility, MSW is consolidated for shipping or disposal similar to C&D waste.

15. The processing facility then pays to have the consolidated MSW and/or C&D residuals taken to another handling facility and/or a disposal facility.

16. MSW and C&D are processed in this typical fashion at facilities across Massachusetts regardless whether or not a railroad is the mode of transporting the waste.

17. MassDEP has permitted solid waste handling facilities that were designed to be located at or adjacent to railroads, and used the railroads to haul the waste to other handling facilities or disposal facilities either in state or out of state. Each of these handling facilities are located on properties that have been granted a solid waste site assignment pursuant to M.G.L. c. 111, §§ 150A and 150A1/2 and the regulations 310 CMR 16.00 et seq., and a permit granted pursuant to the regulations at 310 CMR 19.000 et seq.

18. These permitted handling facilities include Champion City Recovery C&D Transfer Station and Trojan Demo Transfer Station (located in Brockton), which are permitted to receive only C&D, and the Yarmouth-Barnstable Regional Transfer Station, which is permitted to accept MSW.

19. At these facilities, typical of operations in all transfer stations across Massachusetts, C&D or MSW is dumped or tipped on the floors at these transfer stations. The waste is then inspected and sorted for hazardous waste and restricted materials (metal, wood, brick, asphalt from pavement and concrete).

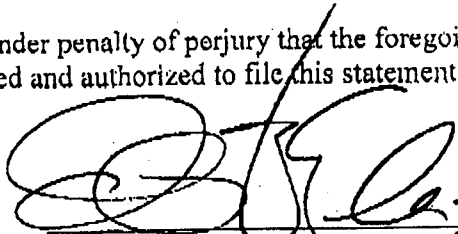
20. Then after some minimal compaction by running trucks over the tipped, consolidated C&D, the C&D is then loaded onto railcars to be shipped out of state. MSW is loaded onto railcars for disposal at an in state incinerator.

21. The operations at these facilities are typical of all transfer stations without regard to whether the station was located at or adjacent to railroads or whether railroad was the mode of transporting the waste.

Verification:

I, David B. Ellis, certify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this statement.

Executed on July 13, 2006.

A handwritten signature in black ink, appearing to read 'D. B. Ellis', is written over a horizontal line.

David B. Ellis, Solid Waste Section Chief, Southeast
Massachusetts Department of Environmental Protection

EXHIBIT D

VERIFIED STATEMENT OF JAMES DOUCETT

1. I am the Deputy Director of the Regulatory Standards Unit within the Business Compliance Division of the Bureau of Waste Prevention at the Massachusetts Department of Environmental Protection ("MassDEP") in Boston, Massachusetts. I have held this position since 1997.

2. As part of my duties as Deputy Director, I assist in developing and supervising the promulgation of regulations, including regulations under the Massachusetts Solid Waste Management Act, G.L. c. 111, § 150A. I am also responsible for responding to inquiries on the interpretation of MassDEP's regulations.

3. On or about March 1998, I responded to inquiries from ECDC Environmental L.C. concerning certain operations that ECDC Environmental had proposed to conduct at Conrail's rail yard located in Allston, Massachusetts ("Allston rail yard").

4. ECDC Environmental had proposed to use the railroad to transport sealed, leak-tight containers of municipal solid waste ("MSW") out of state for disposal. It planned to bring leak-tight containers, which were designed for hauling on trucks and rail cars, to permitted solid waste transfer stations where the containers would be loaded with MSW and then sealed with solid covers. ECDC Environmental would then transport these sealed, leak-tight containers of MSW by truck to the Allston rail yard to be transloaded onto rail cars for transportation out of state.

5. MassDEP determined that the proposed transloading of the sealed, leak-tight containers of MSW at the Allston rail yard from trucks onto railcars was not a waste handling operation pursuant to 310 CMR 16.00 and 310 CMR 19.000 because no containers would be opened at the rail yard, no transferring of the MSW out of these containers into another would occur, and the operation would not require contact with the waste and would not expose waste to

the environment. In addition, the operation would not generate pollution such as air pollution, runoff or leaks and it would not attract vectors because the containers of MSW would remain sealed.

6. Therefore, MassDEP determined that ECDC Environmental's proposed operation at the Allston rail yard would not require site assignment pursuant to 310 CMR 16.00 et seq. or a solid waste facility permit pursuant to 310 CMR 19.000 et seq.

7. MassDEP considers the type of operation, proposed and described by ECDC Environmental at the Allston rail yard, as a transportation related activity.

8. ECDC Environmental is currently operating the solid waste transloading facility at the Allston rail yard.

Verification:

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

Executed on July 13, 2006.


James Doucett, Deputy Director
Regulatory Standards Unit, Business Compliance Division
Bureau of Waste Prevention
Department of Environmental Protection

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2006, I served the foregoing Comments of the Commonwealth of Massachusetts Concerning Whether the Surface Transportation Board Has Jurisdiction Over the Proposed Solid Waste Processing Facility of New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway by causing a copy thereof to be delivered via first class mail, postage prepaid, to:

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Comments of the Commonwealth of Massachusetts
STB Finance Docket No. 34797

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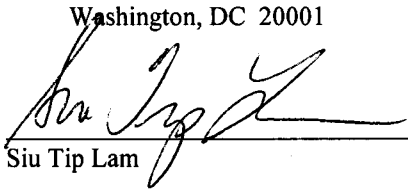
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