

**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 TOWN OF WILMINGTON
TO COMMENTS OF
ASSOCIATION OF AMERICAN RAILROADS
CONCERNING WHETHER THE SURFACE
TRANSPORTATION BOARD HAS
JURISDICTION OVER THE PROPOSED
SOLID WASTE PROCESSING FACILITY
OF NEW ENGLAND TRANSRAIL, LLC**

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Date: August 2, 2006

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The Town of Wilmington (“Wilmington”) submits this Reply to the Comments of the Association of American Railroads (“AAR”) (“Comments”), in connection with this Board’s June 12, 2006 request for further submissions concerning the issue of exclusive STB jurisdiction over the solid waste processing activities proposed by New England Transrail (“NET”).

As a preliminary matter, Wilmington incorporates by reference the discussion of the issue of preemption contained in its January 26, 2006 Reply to NET’s Petition for Exemption, which is attached. Wilmington has maintained, and reiterates, that:

- NET is not a “rail carrier” within the meaning of the ICCTA – it has no current hauling contracts, has not specified where its private spurs would connect to existing common carrier rail lines, and would reject certain cargoes even if they met DOT and NERC standards;
- the business efficiencies that NET attributes to the proposed solid waste processing do not equate to rail necessity, but instead reflect its desire to vertically integrate disparate operations;
- NET’s positions relevant to the claimed relationship between waste processing and rail transportation are contradictory; and
- NET’s decision not to propose - or to disclose - waste processing in its original petition demonstrates that such processing is not integral to a rail operation.

Evaluating NET’s claim that waste processing is integral to its rail operation, this Board has inquired whether the proposed activities are normally associated with solid waste processing and occur in the absence of rail transportation. The AAR urges the Board to jettison its analytical approach and instead focus on a distinction between rail transportation and sham operations, based on the specific circumstances. AAR does not identify any of the circumstances of this case, but refers to the “admittedly contentious facility,” the recent appearance of solid waste facilities in the rail setting, and controversies arising from abuse of STB processes.

As this Board observed in its May 3, 2005 decision dismissing NET’s prior petition for exemption, NET improperly withheld from the Board information that was and is relevant to the environmental assessment process. However, the Board should not, and need not, base a determination concerning the threshold issue of jurisdiction

exclusively on NET's abuse of STB procedures. The AAR Comments notwithstanding, this Board's inquiry is focused appropriately on the particular activities proposed by NET, and it is instructive to examine the relationship of those activities to the operations of the waste industry generally.

AAR is wary of a "sweeping ruling" on preemption that could apply to transloading generally in an environment where logistics chains are becoming "more sophisticated and integrated." This concern is misplaced, however, since the handling and processing of loose solid waste is so demonstrably unnecessary to its transportation by rail and so much its own business pursuit.

AAR cites other processes that take place at certain rail facilities but purportedly also occur elsewhere: truck chassis inspection and minor repairs; staging, sampling and weighing of coal; testing of potato flakes; and blending of petroleum-coke. However, unlike NET's proposed shredding and grinding of municipal solid waste and construction debris, none of those processes fundamentally transform the character of the commodities. Trash is a commodity that requires little, if any, manipulation for transportation after leaving its source but rises dramatically and uniquely in market value once it is ground, shredded and baled. The testing of potato flakes, inspection of truck chassis, weighing and sampling of coal, and blending of petroleum-coke apparently are not industries unto themselves. By contrast - as amply demonstrated by the recent comments and detailed declarations submitted by the Commonwealth of Massachusetts and its Department of Environmental Protection ("MA DEP"), the National Solid Waste Management Association, the environmental departments of Illinois, New Jersey and

Ohio, and others - the processing of MSW and C&D is a significant, lucrative, and closely regulated, industry.

NET's bid for preemption to process as well as transport solid waste is an attempt to reap the financial gain that comes of processing without the need to comply with the state and local permitting and regulation to which all other processors are subject. It simultaneously would disadvantage legitimate waste processors and wreak havoc on the local environment, including in this case the continued prudent management of an already troubled site. AAR's concern with the "whims of local regulation and control" is particularly inappropriate in the context of the NET project. Not only is the permitting and regulation of solid waste facilities inherently a state and local function, because the environmental impacts of those facilities are inherently local, but state and local involvement in this particular Olin Chemical site is long-standing and indispensable. Pre-existing conditions of contamination at the site have resulted in the closure of five of Wilmington's nine drinking water wells, inspired studies of childhood leukemia in the area, and, at local insistence, resulted in further critical investigation and remediation of the site by MA DEP and now US EPA. Moreover, proper site assignment in Massachusetts requires financial security for the maintenance of devices and measures to protect against leakage and contamination after waste operations are discontinued; without such institutional controls, a site like this already fraught with environmental hazards would be further degraded. In the context of this site especially, assertion of the traditional prerogative of state and local authorities over the siting and operation of a solid waste facility is hardly "whimsical."

AAR professes concern about the potential for local interference with “processes reasonable or necessary to the performance of the rail transload [function]. . .” Yet it urges the Board not to employ any particular criteria – such as the prevalence of waste processing independent of rails - for judging whether NET’s proposed waste processing is integral to rail transportation. How else may this Board defensibly judge whether state and local regulation of the proposed activities would improperly discriminate against rail operators or unreasonably burden interstate commerce?

Fortunately, the Board has received sufficient evidence concerning the essential operations and economics of the solid waste industry to support a clear demarcation of functions between solid waste processing and rail transportation. As noted by the Illinois EPA, NET’s proposed waste processing activities “describe the essence of all waste processing operations regardless of the method of transportation.” Preempted transloading of solid waste therefore should be restricted to the movement of waste in sealed containers. Any other result would invite repeated overreaching by unscrupulous entrepreneurs.

CONCLUSION

For the foregoing reasons, Wilmington 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, including site assignment permitting, 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,

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Dated: August 2, 2006

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Date: January 26, 2006

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The Town of Wilmington, Massachusetts respectfully submits this Reply to the Petition of New England Transrail, LLC (“NET”) 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 (“Petition”).

Wilmington also relies upon and incorporates by reference the report of its consulting engineer, GeoInsight, Inc., which forms Attachment “A” to this Reply (“GeoInsight Report”).

INTRODUCTION

The Surface Transportation Board should refuse NET readmission to the exemption review process. The petitioner has ignored the clear mandate of the Board’s May 3, 2005 decision dismissing NET’s first exemption petition (“May 3 Decision”).¹ NET fails to provide the “current,” “complete and accurate” information which this Board declared is necessary for cogent environmental review and for analysis of NET’s claim of regulatory preemption.

¹ See FD 34391.

NET again requests a green light to place its untested race car of a project onto a track full of potholes, blind curves, foundations under construction, and oncoming traffic. It seeks “expedited” review of a rail, transloading and solid waste processing facility that it would locate within and on top of an open Massachusetts Tier 1A hazardous waste site now undergoing Environmental Protection Agency (“EPA”) review for inclusion on the National Priorities List (“NPL”) as a Superfund site. NET would revive the proposal despite the fact that the Eames Street Site contaminants include known human carcinogens; migrating contaminant plumes have forced the closure of several municipal drinking water wells and inspired a study of childhood leukemia in the area; target contaminants have not yet been fully characterized; and the Massachusetts Department of Environmental Protection (“MADEP”) has suspended its review of NET’s construction-related abatement plan, the approval of which is a prerequisite to any redevelopment of the site and, which absent full site characterization, cannot be granted.

The proposed construction site thus is fraught with environmental problems and increased regulatory uncertainty. In addition, the project itself is still in flux. NET filed its first petition after filing and withdrawing a notice of exemption. In its May 3 Decision, the Board denied that petition without prejudice, finding that the project “appears to be constantly in flux” and that NET had subverted the review process by intentionally or incompetently submitting information concerning the scope, design and impacts of the proposed facility that was incomplete and inconsistent with NET’s submissions to other government agencies. This Board therefore appropriately required NET, in any new petition, to provide “current,” “complete and accurate” information. *See* May 3 Decision, at 1, 4.

NET has not complied with the May 3 Decision. The Petition does not identify significant recent developments involving regulation of the site; omits engineering data and opinions necessary to support a modified project; vaguely directs the Board to NET's prior, inadequate submissions; contains internally inconsistent information and representations; states that the location of important project features still is undecided; and offers no responsible business plan. While this Board refused to permit supplementation of the Environmental Assessment ("EA") and Post-Environmental Assessment ("Post-EA"), NET continues to insist on supplementation. It asserts that its new proposal is "very similar" to and "much more much like the description included in NET's original petition" [sic], and urges the Board to send the Section of Environmental Assessment ("SEA"), on an "expedited" basis, back to last year's drawing board.²

The Petition lacks necessary information not only for environmental review but also for an analysis of whether federal law preempts state and local permitting of NET's proposed solid waste facility. To begin with, it is unclear whether NET would operate as a common carrier so that it is subject to STB jurisdiction and therefore potentially entitled to preemption. However, even assuming that NET would function as a common carrier, the proposed processing operations are not integral to rail transportation. The processing operations are not integral if, as NET argues, they would improve the profitability, efficiency and safety of rail activities; that would not make them indispensable to the core rail operation. Moreover, NET's factual premise is unsupported. The proponent offers no numerical projections, objective data or industry literature in support of its claims that on-site processing would increase profitability, efficiency and safety. The affidavits which NET offers are conclusory and speculative. Its original petition included no waste

² See Petition, at 13-14.

processing whatsoever and therefore belies NET's current insistence that solid waste processing is essential to rail transportation. Finally, as detailed below, NET's preemption argument runs afoul of the facility modifications which it now proposes.

A. NET's Petition Is Premature and Inappropriate, In Light of the Recent Regulatory Developments Which It Has Failed to Disclose.

Since this Board dismissed NET's first petition, MADEP has referred the site to the EPA, has suspended several aspects of its review including NET's construction plans, and has rejected NET's modifications to the project. While these developments all are germane to this Board's consideration of the Petition, none of them is addressed in the Petition.³ And none of them favors NET's request for expedited review.

The site of the proposed project is extraordinarily, and increasingly, complex. In 1994, more than a decade ago, MADEP assigned the site Tier 1A status, a classification which is reserved for the most complicated and impacted disposal sites and requires direct oversight by MADEP of characterization and remedial activities. Site investigations proceeded during the 1990s. In 2002, a human carcinogen, N-nitrosodimethylamine, was detected in ground water affected by site conditions and in downgradient Town water supply wells. Sixty percent of Wilmington's wells therefore were deactivated. Data provided by Olin in November 2002 revealed that 162 compounds historically were identified at the Site, of which only 97 were generally included in its chemical analyses. Of the remainder, 38 have never been tested for in soil or ground water. As of November 2004, a total of 196 compounds were recognized as detected, 34 more than were previously identified. The list of chemicals of concern therefore is not complete and further characterization of impacts is required. This is so

³ NET alludes in passing to possible NPL listing, commenting only that it "should not prevent the development of the NET Facility. . ." Petition, at 14-15.

despite the installation of over 200 monitoring wells at multiple depths over an area of approximately 250 acres on and downgradient of the Site. *See* GeoInsight Report, at 3.

At MADEP's request, EPA last fall recommended the site for inclusion in its NPL list. The listing process involves completion of Hazard Ranking System (HRS) screening and public solicitation of and research concerning comments about the Site. Once the Site is NPL listed, EPA will conduct a Remedial Investigation/Feasibility Study ("RI/FS"). That process in turn involves several rounds of administrative and technical assessment: scoping, site characterization, development and screening of remedial alternatives, treatability investigations, and detailed analysis. (*See* GeoInsight Report, at 3-4; <http://www.epa.gov/superfund/whatissf/sfproces/rifs/scope.htm>.)

Now that EPA is involved, it must investigate independently the scope and nature of any further assessment and remediation and to oversee the additional work. For this reason, MADEP last month suspended much of its own review pending the NPL listing process. In a December 6, 2005 letter to Olin (copy annexed at Tab B), MADEP announced that it had suspended review of documents concerning six different investigations of environmental contamination on and off of the Site, even while related in-ground monitoring continues. Of particular significance to NET's Petition, MADEP has suspended its review of the Construction Release Abatement Measure Plan and Focused Feasibility Study ("CRAM") submitted by NET in connection with the proposed facility. NET acknowledged last year, and the aborted Post-EA required, that before it could proceed with any construction on the site, NET would have to receive approval of a CRAM Completion Report to document that sufficient remedial action has been

undertaken to achieve a condition of no significant risk.⁴ That CRAM approval requirement now is even less likely to be met than it was last spring. When SEA issued its Post-EA, CRAM submissions were continuing and MADEP was poised to address the matter. Now, however, there is no prospect of a decision. (As explained below and in the GeoInsight Report, three of the four substantive requirements for CRAM approval also cannot be met since characterization of target contaminants is incomplete.)

NET also does not mention that MADEP has rejected the project modifications which it proposes to this Board. NET approached MADEP in an unsuccessful attempt to gain its consent to the revised plans. The modifications to NET's CRAM identified in an October 14, 2005 letter to MADEP are essentially the same as those set out in the Petition.⁵

Environmental assessment and remediation of the Eames Street Site thus is straddling state and federal jurisdictions. The process therefore is proceeding more slowly and with greater uncertainty than it was just last year. In these unsettled circumstances, the Board should be reluctant to undertake further review of NET's proposal to build and operate a rail, transloading and waste processing facility. No STB approval or facility operation, however conditioned, could avoid complicating the pending environmental investigation.⁶

⁴ See Post-EA, at 1-6 (mitigation condition 35) and 2-20 (comment and response).

⁵ See Exhibit 1 to NET's Response to Motions for Extension of Time Filed by Massachusetts Department of Environmental Protection and National Solid Wastes Management Association ("NET Response to Motions to Extend Time, Exhibit 1").

⁶ While NET's licensed site professional opines that construction and operation of the proposed facility will not exacerbate any release of oil or hazardous materials at the site – itself a dubious proposition, since it is based on assumptions about a site that has not yet been fully investigated or characterized, and about a project that is still not finalized – he does not offer the opinion that construction and operation of the proposed facility would not interfere with or inhibit further investigation, assessment and remediation of the site.

B. NET's Petition Ignores the Board's Mandate to Provide Current, Complete and Accurate Information.

This Board explicitly required NET to include in any new submission “current,” “complete and accurate” information. It was the lack of such information, and certain misinformation, which led the Board to take the unusual step of dismissing NET’s first petition. Substantial STB resources already have been expended in an attempt to evaluate the project. Absent definitive information, NET should be denied further review.

Yet, accurate and complete information is absent. The Petition states that NET has not decided where to connect its proposed rail lines with the existing Massachusetts Bay Transportation Authority (MBTA) and Boston & Maine rail lines. It states only that the connections may be somewhere southeast of the site and that NET will let STB know when it makes that determination.⁷

More importantly, NET fails to provide any engineering data or opinions to support the proposed project modifications. While it implicitly has acknowledged the concerns of the Respondents and of this Board with placing rail lines directly over the Dense Aqueous Phase Layer (“DAPL”) area near the center of the Site, and has relocated them, NET offers no soil studies to substantiate the ability of a DAPL cap to support thousands of tons of stored “break bulk materials like sand or gravel” and “the vehicular traffic needed to load and unload materials that will be stored in that area.”⁸ None of NET’s submittals has addressed specific questions regarding the geotechnical stability of the cap and subsurface containment walls under anticipated live and static loads. *See* GeoInsight Report, at 5. Instead, NET asks the Board and SEA to take on faith the

⁷ *See* NET Petition, at 6, 8 n.10. The location at which NET hints may be in Woburn, Massachusetts. Woburn submitted comments to STB in the prior NET proceedings and is on the notice list in this matter. It was the site of the toxic waste contamination made famous by *A Civil Action*.

⁸ *See* NET Petition, at 9.

quantity of materials to be stored on the cap and the load bearing capacity of the existing slurry walls that keep the contaminated DAPL from migrating off site.⁹ Echoing its uncertainty about the eventual location of rail connections, NET also vaguely states that at some future date it might consider placing a “storage structure” on the DAPL area.¹⁰

What NET also does not disclose is that the only available soil density data for the DAPL containment area indicates that the proposed activities could exacerbate environmental conditions. The low density scores for the single boring so far advanced into the containment area indicate “relatively unconsolidated subsurface soil conditions offering limited structural support for a cap and traffic on top . . .” GeoInsight Report, at 5. Substantial storage of sand and cement or erection of storage buildings on that area could result in “unpredictable effects on the DAPL, changing hydraulic conditions” and “possible impacts on ground water outside the containment system.” *Id.* Because NET still has provided no relevant design specifics, an intelligent evaluation of environmental impacts is not possible.

Likewise, NET provides no details concerning groundwater levels. It merely asserts that the contaminated groundwater will not be encountered during the excavation of 17,600 cubic yards of soil and the installation of multiple concrete foundations and a subterranean vault on the “relatively small” site. Even then, NET’s statements are internally contradictory. NET and its engineer state that “[n]o excavation is anticipated at a depth greater than eight feet below the current surface grade. . . .” but that “groundwater . . . has been determined to be located at a depth of approximately six to nine feet below

⁹ NET’s design engineer merely states: “The cap will be engineered to support certain aspects of NET’s transloading operations, such as the storage of break bulk materials like sand or gravel. As such, the cap should be well suited for the vehicular traffic needed to load and unload break bulk materials that will be stored there.” See Graham Verified Statement, Appendix C to Petition, at ¶ 15.

¹⁰ See NET Petition, at 9-10.

the current surface grade across the NET Development Area.”¹¹ This contradiction and lack of essential data inspire no confidence that the Petition is accurate or complete, as required.

Ultimately, NET resorts to the materials and arguments which it submitted in 2004 and 2005. The Board allowed it to refer to the previous submittals instead of requiring that they be resubmitted. However, NET takes liberties with the Board’s logistical accommodation. Instead of identifying any particular data or language in the previous filings, NET asks STB to “go fish.” The proponent presumptuously asserts “that it is both fair and appropriate for SEA to begin its environmental review by first determining the extent to which the project description set forth in this resubmitted petition is consistent with the . . . original petition. Second, SEA should determine which portions of its prior analysis may be applicable . . .”¹² And on.

In the view of Wilmington’s engineers, this approach is “confusing, contradictory, and, in some instances, incomplete, [and] inhibits a complete analysis of its technical and environmental aspects.” GeoInsight Report, at 5. It is not the approach which, as this Board has made clear, is expected for a third submission from the proponent of a rail and industrial facility at a uniquely troubled and heavily investigated hazardous waste site.

C. NET Cannot Commit to a Complete Design, and the Viability of the Project Is In Doubt.

NET states that it “has now finalized its plans for the project.”¹³ However, rail connection locations are undetermined. Locations of the seven rail sidings and one through line are approximate. Additional storage buildings on the DAPL cap are still

¹¹ See Petition, at 8; Appendix C to the Petition, at ¶ 11 (emphasis supplied).

¹² Petition, at 14.

¹³ Petition, at 13.

under consideration. Segregated metal or wood will be shipped to an as yet unspecified facility or returned to a shipper. For the first time, NET states that fully one-half of the proposed waste processing would involve municipal solid waste. How the remaining waste processing capacity would be allocated between construction and demolition waste and assorted private materials is unclear.

Moreover, NET now announces that it would assume Olin's legal obligation to construct and monitor a DAPL cap at an estimated cost of \$1 million. In a fit of circular logic, NET argues that its voluntary assumption of that expense makes it only "reasonable" that it be permitted to store materials for shipping or waste processing on the capped containment area.¹⁴ That plea has no relation to, and no regard, for unanswered engineering questions concerning the capacity of a cap and subsurface containment structures to withstand the stresses of materials storage and accompanying vehicular traffic for years to come. It does, however, raise the question whether the storage of materials on the cap is necessary to make NET's project financially viable.

In addition, NET acknowledges that a redeveloped site would be subject to access and disturbance to permit on-going environmental assessment and remediation of the soon-to-be Superfund site. Indeed, NET has insisted that redevelopment is consistent with environmental clean-up because it would provide such access "even where such access requires relocation of NET's facilities." *See* NET Response to Motions to Extend Time, Exhibit 1. Future site assessment and remediation could require NET to remove and relocate the proposed "temporary" sprung structures and abandon their permanent concrete footings and subterranean concrete vault, resulting in a prolonged and uninsured disruption of rail shipments and processing activities. While NET has made no

¹⁴ *See* NET Petition, at 11.

allowance for those losses, they are likely, given the extensive investigative and remedial work.

For jurisdictional purposes, NET asserts that its annual revenues will be less than \$5 million. The fine print of the accompanying footnote remarks that “[i]f NET’s estimate of projected revenue is anticipated to exceed this amount, NET will promptly comply with the Board’s notice requirements at 49 C.F.R. § 1150.32(e).” NET Petition, at 5 n.7.

If NET’s revenue projection is too high, will construction be completed? Will NET leave at the Site a mess that only further complicates and delays environmental assessment, access to monitoring activities and remediation? What financial guarantees are in place to ensure that NET will follow through with the project or clean up that mess? Or fulfill its commitment, as a part of this proposal, to construct and monitor a DAPL cap?

If NET’s revenue projection is too low, as it hints, why should it be indulged in a streamlined review of the project?

The Petition does more to raise concerns about the project than to resolve them.

D. Coherent Environmental Review Still Is Not Feasible.

The purpose of a new petition for exemption was to permit a review of environmental and jurisdictional matters that the previous filings precluded. However, the status of the Site and the Petition’s deficiencies make reliable environmental review impossible. Target contaminant characterization at the site is incomplete. CRAM approval is legally untenable. EPA analysis is just beginning. NET groundwater data is contradictory. The project is subject to change. Engineering information is incomplete.

SEA should not be asked to conduct an environmental review that cannot be conducted responsibly.

E. NET Has Not Demonstrated That Its Proposed Solid Waste Processing Facilities Are Entitled to Preemption from State and Local Permitting.

The second purpose of a new petition – analysis of preemption – also cannot be fulfilled. It is NET that asserts preemption, and NET has the burden of proving entitlement to it. The Massachusetts DEP has a “well-recognized compelling state interest in the DEP’s enforcement of its own environmental laws especially as to the uniquely vexing problem of solid waste facilities in a densely populated state that has suffered the scourge of unregulated solid waste facilities for decades.” Hi-Tech Trans, LLC v. State of New Jersey, et al., Third Circuit Court of Appeals, No. 03-2773 (September 2, 2004) (affirming order rejecting preemption claim of New Jersey rail contractor). Manufacturing activities and other facilities that are not “integrally related to a railroad’s provision of interstate rail service” are not subject to STB jurisdiction or subject to federal preemption. Flynn v. Burlington Northern Santa Fe Corp., 98 F.Supp.2d 1186, 1189 (E.D. Wash 2000), citing Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna & Western Railway Corp., 1999 WL 715272, STB Finance Docket No. 33466 at 10 (9/9/99) (“Borough of Riverdale”). Moreover, the determination whether non-rail facilities and operations are “integral” to rail transportation for purposes of preemption and whether a particular land-use restriction interferes with interstate commerce are fact-bound questions. See Borough of Riverdale, at 4-5. Accordingly, as this Board made clear in its May 3 Decision, it is

incumbent on NET to provide sufficient factual information to permit an analysis of the preemption claim.

It has not done so. Alternatively, the information which NET has provided does not support preemption from state site assignment requirements.¹⁵

1. It Is Not Clear That NET Would Function As A Common Carrier.

NET submits to STB jurisdiction and requests preemption assuming that it would have the status of a common carrier. There is some reason to question that status. The Board has jurisdiction over “transportation by rail carrier.” The term “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). As it stated in argument to the United States Supreme Court, pursuant to established common law and the legislative history of the Interstate Commerce Commission Termination Act, the Board lacks jurisdiction over private rail operations that are conducted over private track if they serve no shippers other than the operator. *See* Brief for the Federal Respondents in Opposition to Petition for Certiorari, Willis v. Surface Transportation Board, et al., U.S. Supreme Court Docket No. 02-1498; H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 179 (1995). It follows that “state and local laws and regulations are not federally preempted with respect to construction of private track.” *See* Testimony of Chairman Roger Nober, House Committee on Transportation and Infrastructure, Subcommittee on Railroads, March 5, 2004.

¹⁵ NET’s disregard for environmental considerations - and its eagerness for preemption - also is apparent in its statement that it need not comply with Massachusetts Waste Control regulations, 310 CMR 19.017. NET erroneously presumes that the waste ban/recycling regulations, as applied to its proposed operations, “accomplish only economic objectives and not the protection of health and safety.” Petition, at 15-16. In fact, non-compliance with the waste ban requirement to segregate recyclables would increase the municipal waste stream significantly and further burden the environment, in Massachusetts or elsewhere.

NET's proposal to process goods on-site before shipment raises a question whether the proposed rail lines, which it would own and operate on private property, in fact would serve shippers other than NET or simply would provide NET with a means to move materials which it has contracted to process. That NET maintains it would not accept any hazardous cargo raises further questions about its status as a common carrier. *See Akron, Canton & Youngstown R. Co. v. I.C.C.*, 611 F.2d 1162 (6th Cir. 1979), cert. denied 449 U.S. 830 (rail carrier could not refuse to haul any materials which meet DOT and NRC standards), citing 49 U.S.C. § 11101 (a).

2. Business Advantage Does Not Equate to Business Necessity.

Even assuming that NET would function as a common carrier, its proposed solid waste processing facility is not demonstrably preempted from state and local laws and regulations. NET argues that such processing is integral to core rail activities because processing goods before shipment would improve profitability, efficiency and safety. That position is overreaching and factually unsupported.

However desirable such incremental improvements may be, they are not indispensable. All businesses look to minimize production costs, increase the efficient use of resources, and reduce risks associated with their activities. This is a given. Doing so boosts profitability and may create marketing opportunities. However, it does not follow that every such undertaking is essential in order for a company to perform its core operations or to do so profitably and safely. No enterprise undertakes every available cost-cutting measure, efficiency improvement, or safety enhancement. This is particularly so where, as here, these measures involve entry into another field.

NET's preemption argument also is factually deficient. It has not shown that the improvements it presumes from solid waste processing would make or break the proposed rail operation, which is its ostensible core activity. The proponent has not even tried to quantify those impacts. NET's Petition does not project profit margins with and without the proposed grinding, shredding and baling of waste, perhaps because enhancement of an already substantial margin would disclose its primary motive for waste processing. Likewise, NET does not identify in any meaningful detail the purported impact of processing on its efficient use of the "relatively small" property, because rail operations could be conducted without the hoped-for processing. That point hardly requires comment, since the Petition increases from three to seven the number of rail sidings at the Site, as compared to NET's first petition for exemption, and because the first petition originally did not provide for any processing. Finally, NET offers no industry statistics, literature or other objective evidence to support the significance of waste processing for rail safety. Its rail consultant offers only speculation. *See Egan Affidavit*, ¶ 8 (voids in rail cars "can" collapse in transit, a car "may" be loaded unevenly, "increasing the potential" for derailments). A finding of preemption must be based on evidence, not speculation and generalizations.

3. The Cases On Which NET Relies Do Not Prove Its Point.

As in its previous submissions, NET cites a variety of older cases involving loading and unloading of goods, feeding of cattle, storage, and maintenance activities performed by rail carriers. *See* NET Petition, at 19-20. It hangs heavily on a more recent preemption decision, *Green Mountain Railroad Corporation v. Vermont*, 404 F.3d 638 (2d Cir. 2005) ("*Green Mountain*"). However, that decision is just as distinguishable.

Like the older cases, it involved loading, unloading and storage of goods, this time in a salt shed and in cement silos. *Id.* at 640. By contrast, NET proposes not simply to move and store materials, but also to grind, shred and bale them on-site. In the *Green Mountain* circumstances, and typically, processing is performed away from rail facilities. *Green Mountain*, at 640 (carrier transported goods “for processing elsewhere”).

As NET’s first petition without processing conclusively demonstrates, rail transportation in general – and for the proposed project - does not require on-site processing. Nor does NET, in its current submission, strain itself to demonstrate factually why waste processing is essential for it to perform the core function safely and profitably. Simply because NET wishes to engage in that extracurricular activity in the context and on the site of a rail transportation facility does not make the activity integral to the rail function and entitle it to regulatory preemption.

4. NET Is Caught In A Web of Contradictions.

NET contradicts itself at each turn of its preemption argument.

If, as NET claims, the efficient operation of a rail facility on a “relatively small” property requires on-site waste processing, how can the site support the four additional rail sidings which NET has added to its original plans? As NET has not yet fixed the locations of its rail sidings or the connection of a through line to existing rail lines, how can it reliably evaluate requirements for the efficient use of the site?

Where NET expresses uncertainty about its customer mix and inspires doubts about the profitability of the proposed facility, how can it credibly assert that waste processing is essential to operate profitably?

Where NET states that more than 400 trucks will ferry materials to the rail facility through the streets of Wilmington, without incident, each and every day,¹⁶ how can it credibly assert that processing of the same material is necessary to permit the safe transportation of those materials by rail? Either on-site processing is not necessary or the facility presents an undisclosed and substantial risk of harm to the safety and welfare of Wilmington's inhabitants and the local environment.

Having originally proposed to construct and operate the same rail facility without any provision for on-site waste processing, how can it now credibly demonstrate that processing is essential to operate such a facility safely, profitably and efficiently?

CONCLUSION

The Surface Transportation Board has given New England Transrail repeated opportunities to present a case for project review and for a finding of preemption. NET repeatedly has failed to meet its burden. In the many respects illustrated above, it again submits incomplete, contradictory, and inaccurate information about the proposed project and the evolving regulatory status of the Eames Street site. NET's preemption argument likewise is overreaching, factually deficient, and irreconcilable with its original petition.

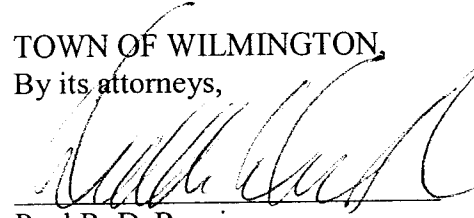
For all of these reasons, the Town of Wilmington respectfully requests that this Board deny NET's Petition for Exemption. Alternatively, Wilmington requests that the Board, if it were to issue a conditional exemption to NET, (1) expressly exclude from such exemption the proposed waste processing facility and operations, and (2) find and declare that NET's proposed waste processing facility is subject to state and local

¹⁶ See Post-EA, at page 2-4.

regulations designed to protect public health and safety and the environment, including
Massachusetts site assignment regulations.

Respectfully submitted,

TOWN OF WILMINGTON,
By its attorneys,

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

Paul R. DeRensis
Daniel R. Deutsch
DEUTSCH WILLIAMS BROOKS
DeRENSIS & HOLLAND, P.C.
99 Summer Street
Boston, MA 02110-1213
(617) 951-2300
ddeutsch@dwbboston.com

Date: January 26, 2006.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the following attorney of record for each party by *first-class mail* on this date.

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Beveridge & Diamond, P.C.
45 William Street, Suite 120
Wellesley, MA 02481-4004

Margaret R. Stolf, Esq.
General Counsel
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Commonwealth of Massachusetts
One Winter Street
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1/26/06

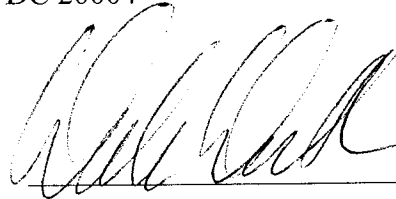
A handwritten signature in black ink, appearing to read "Jeffrey M. Bauer", is written over a horizontal line.

EXHIBIT A



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January 26, 2006

GeoInsight Project 4455-007

Daniel R. Deutsch, Esq.
Deutsch, Williams, Brooks, DeRensis and Holland, PC
99 Summer Street
Boston, Massachusetts 02110-1213

RE: New England Transrail, LLC
Surface Transportation Board Finance Docket No. 34797
Former Olin Corporation Property
51 Eames Street, Wilmington, Massachusetts
MADEP RTN 3-0471

Dear Mr. Deutsch:

GeoInsight, Inc. (GeoInsight) prepared this letter to summarize its evaluation of environmental issues associated with the New England Transrail, LLC (NET) petition submitted to the Surface Transportation Board (STB) on December 5, 2005 (STB Finance Docket No. 34797). STB Finance Docket No. 34797 is the latest petition filed by NET for exemption from the formal application procedures of United States Code (U.S.C.) §10901 that would otherwise apply to the acquisition, construction, and operation of rail lines and facilities at the Olin Corporation (Olin) property located at 51 Eames Street in Wilmington, Massachusetts (the Property).

GENERAL

This review was performed in the context of STB's findings in its May 3, 2005 dismissal of NET's petition for exemption, which, among other requirements, cited the need for future submittals to be "accurate and complete." The proposal to redevelop this particular Property is complicated, and may be premature, due to a number of factors that include:

- a sensitive environmental setting within the wellhead protection area (Zone II under Massachusetts Department of Environmental Protection [MADEP] regulations) of a Town of Wilmington's (the Town) water supply well field;
- its location on the former Olin chemical manufacturing Property with constituent impacts that are not yet fully characterized, as well as important remedial systems and structures that require protection to ensure they continue to function properly;

- the presence of identified impacts that are not yet fully remediated;
- an environmental impact characterization and remedial process that is not only incomplete, but is also in the midst of a change in regulatory authority from the MADEP to the United States Environmental Protection Agency (USEPA); and
- a redevelopment proposal that appears to be incomplete, is presented in a confusing and contradictory manner, and seeks to avoid certain environmental requirements for regulated solid waste activities.

This letter presents additional information regarding these factors in the sections that follow.

ENVIRONMENTAL SETTING

The Property is located southeast and, based upon ground water flow direction and quality data, hydraulically upgradient of the Maple Meadow Brook Aquifer (MMBA). The Property is also located within the protective Zone II of Town supply wells drawing from this aquifer. The Town formerly withdrew approximately 60 percent of its water supply from five pumping wells located in the aquifer. Ground water flow and quality data obtained from the investigations performed to date identified significant impacts to the aquifer and at the supply wells by the number of constituents detected as a result of releases from the Olin Property that led to shutdown of the municipal wells drawing from this aquifer and an agreement between Olin and the Town for Olin to fund a connection to the Massachusetts Water Resources Authority (MWRA) water supply system pending remediation of the disposal site. It is clear that this aquifer is an important and sensitive Town drinking water resource with a direct effect on public health and welfare, an assessment that is underscored by the fact that an investigation currently in progress of a potential cancer cluster in the Town is evaluating, among other possible causative factors, exposures to constituents present in the aquifer originating from sources on the Property.

PROPERTY CONDITIONS

Industrial activity (primarily chemical manufacturing) began at the Property in the early 1950s and continued through its acquisition by Olin in 1980. Olin produced chemical blowing agents, stabilizers, antioxidants, and other specialty chemicals for the rubber and plastics industry. Olin operated the manufacturing facility at the Property until 1986, at which time the existing facilities were closed. Since that time, the Property has not been used for manufacturing, and much of the manufacturing equipment and many buildings have been dismantled and removed.

Investigations of environmental conditions at the Property were initiated in the middle to late 1980s. Based upon the results of a Comprehensive Site Assessment completed in 1993, the Property was classified by the MADEP as a Tier 1A priority disposal site in 1994, a classification reserved for the most complicated impacted disposal sites requiring direct oversight by the MADEP of characterization and remedial activities. Supplementary investigations were performed after 1994, culminating in a Supplemental Phase II Report (Phase II) issued in June 1997.

Illustrating the complexity of the disposal site, the compound N-nitrosodimethylamine (NDMA) was detected in ground water affected by Property conditions and in downgradient Town water supply wells located in the MMBA after completion of the supplementary Phase II Report. In the fall of 2002, the Town temporarily deactivated its municipal wells located in the MMBA, due to the presence of NDMA in the aquifer above MADEP drinking water guidelines.

Comprehensive investigations and regular monitoring have continued to further evaluate subsurface conditions and remedial options for the entire disposal site. Data provided by Olin's consultants revealed that approximately 162 compounds have historically been identified at the disposal site. Information summarized by the MADEP in a letter submitted to Olin in November 2002 indicated 97 of the 162 compounds were generally included on the chemical analyses conducted at the Property. Of the 65 remaining compounds identified, 38 have never been tested for in soil and/or ground water. The MADEP, in conjunction with the USEPA, completed a chemical evaluation of ground water in the MMBA (Report dated November 4, 2004). Approximately 196 organic compounds were recognized as being present in the samples collected (an additional 34 compounds than previously identified). Although not conclusive, the distribution compounds among the sampling sites appeared to correlate with chemical usage at the Property. Based upon this information, it is evident that the list of chemicals of concern (COCs) is not complete and further characterization of impacts associated with unidentified COCs is required. In the absence of complete characterization, risks associated with impacts at the Property cannot be assessed and the location and scope of necessary remedial actions cannot be reliably identified.

Conditions at the Property and in downgradient areas are complex, as indicated by the historical identification of a number of potential sources that include unlined pits formerly used for chemical disposal (now identified as "Dense Aqueous Phase Liquid [DAPL] Containment Area"), a former tank farm and nearby production area (identified as "Plant B" area), subsurface drum disposal areas, former lined lagoons, and a former industrial waste landfill. In addition, several surface drainage ditches (Off Property West and East Ditches) were impacted as a result of liquids discharged during manufacturing operations. Principal constituents associated with the Property include: ammonia, chloride, sodium, sulfate, chromium, and NDMA. Constituents in the aquifer extend approximately 0.75 miles west from the Property and include a complex mixture of inorganic and 196 presently known organic chemicals. The migration of released materials from the Property has also resulted in the presence of DAPL west of the Property that serves as a continuing source of dissolved constituents in ground water. The fact that over 200 monitoring wells have been installed at multiple depth intervals over an area of approximately 250 acres on and downgradient of the Property illustrates the magnitude and complexity of environmental impacts associated with the disposal site.

REGULATORY STATUS

The complexity and sensitivity of Property conditions is underscored by the fact that the MADEP assigned this disposal site a Tier 1A classification under the Massachusetts Contingency Plan (MCP), the state regulatory program that governs characterization and remediation of impacted disposal sites. This classification requires that the MADEP actively review and approve disposal site characterization and remedial design/action plans and reports identified in 310 CMR 40.0550(2) and 40.0550(4)(a)(1) of the MCP. In a letter dated

July 2, 2003, the MADEP affirmed that the disposal site continued to be subject to the full range of review and approval requirements despite changes to the MCP lifting certain requirements for Tier 1A disposal sites, further indicating the sensitivity and severity of conditions at the Property and in downgradient areas.

As a Tier 1A disposal site, plans to redevelop the Olin Property have to be reviewed by the MADEP in the form of a Construction Release Abatement Measure (CRAM) Plan. The Plan must describe the nature and extent of impact in areas proposed for redevelopment and the proposed measures and designs to address constituents encountered during construction. Accordingly, the MCP establishes four criteria that must be met for a site to be eligible for redevelopment under a CRAM Plan. The Olin Property is not able to meet three of the four criteria because of the recent issue of a more extensive list of target constituents that have yet to be characterized, as previously discussed. In particular, it cannot be demonstrated that the nature and extent of Property impacts have been fully delineated, risks to Property workers during construction and future occupants have been fully characterized, and planned remedial actions will adequately manage the identified risks.

Based upon earlier investigation results, but prior to issue of the expanded list of target constituents, Olin submitted a Phase III Remedial Action Plan (RAP) for the MMBA in December 2002. The RAP proposed to slowly recover DAPL, a source of dissolved constituents migrating toward the Town well field, from impacted areas over an extended period of time. In its review, the MADEP expressed concerns regarding the remedial action alternative because it did not adequately address remedial goals established for the MMBA. Further investigation and regular monitoring have continued to further evaluate the disposal site. However, negotiations between the MADEP and Olin regarding the scope and implementation of remedial actions have stalled, and the MADEP concluded that it was necessary to transition the disposal site to the National Priority List (NPL) to appropriately characterize and remediate the Property. On September 14, 2005, the USEPA included the Olin disposal site on its list of proposed NPL sites, designating the site with Comprehensive Environmental Response, Compensation and Liability Information System (CERCLIS) identification number MAD001403104.

After its decision, the MADEP suspended its MCP review process for a number of documents for the disposal site, including the NET CRAM Plan and a modification of the CRAM Plan, pending transition to USEPA regulatory oversight. Under these circumstances, without an approved CRAM Plan, redevelopment of the Property cannot be undertaken. It should be noted that the absence of an approved CRAM Plan effectively prevents NET from complying with mitigation condition No. 35 in the Boards Section of Environmental Analysis (SEA) Post-Environmental Assessment (EA).

When the Olin Property is included on the NPL, the USEPA will take the lead in decision making regarding additional investigation and remediation. The first step in USEPA's process will be to review the data obtained and work completed to date preparatory to completing a scoping of response actions that will outline investigations to be completed in support of eventual remedial action. In light of the uncertainty in the regulatory environment outlined herein, proceeding with redevelopment activities at the Olin Property is premature and runs the

risk of significantly hampering efforts to fully characterize Property impacts and appropriately remedy them.

REDEVELOPMENT PROPOSAL

NET reportedly prepared its December 5, 2005 submittal to the STB in compliance with instructions from the STB in its May 3, 2005 decision that future submittals include an “accurate and complete” description of the proposed project. In its submittal, however, NET specifically included by reference the earlier submittals, along with the SEA EA and Post-EA Reports. This approach to presentation of the proposed project is confusing, contradictory, and, in some instances, incomplete, which inhibits a complete analysis of its technical and environmental aspects. These constraints persist despite receipt of several sets of comments from the Town, MADEP, and other interested parties identifying such issues and seeking clarification. NET’s descriptions of its proposed project have changed with successive submittals to the STB, a fact that the STB noted in its May 3, 2005 decision. Accordingly, the inclusion by reference of the earlier submittals in the present one necessarily introduces conflicts and lack of clarity in the proposal. Technical review of the environmental aspects of the proposed project are significantly complicated by the need to sort through multiple submittals, clarifying information from NET presented only in the EA and Post-EA Reports, and incorporating multiple amendments and revisions to the project description. For example, the volumes and locations of impacted soil to be removed have changed multiple times as the planned redevelopment of track and associated structures have changed. In the current submittal alone, the volume of impacted soil to be managed during rail line construction is identified as 11,600 cubic yards and 10,250 cubic yards, an apparent contradiction that is not resolvable from the information provided.

As another example, the nature and scope of activities planned to occur on top of a planned cap over the DAPL Containment Area have changed several times, but none of the submittals addressed specific questions regarding the geotechnical stability of the cap and containment wall under the anticipated live and static loads. There are data from only a single boring advanced into the containment area that indicates relatively unconsolidated subsurface soil conditions offering limited structural support for a cap and traffic on top; design information for the cap addressing this limitation has not been presented. As an illustration of the significance of this issue, should the cap fail, it is possible that infiltrating runoff will collect beneath the cap and within the containment area, changing the hydraulic conditions within the containment area. These changes, combined with the physical constraints of the wall, could result in unpredictable effects on the DAPL in the form of induced downward vertical flow gradients or outflow of impacted ground water through or over the wall, resulting in possible impacts on ground water outside the containment system with attendant potential impacts to the Town well field located downgradient of this location.

As has been discussed more fully in earlier comments by the Town, the proposed construction activities associated with redevelopment would impede not only Property characterization and response actions, but also efforts in progress to determine responsibility and attendant liability for at least some of the environmental impacts at the proposed project site. Redevelopment construction described in the CRAM Plan may impede access by investigators as they attempt to

collect necessary information. That interference could make it more difficult to identify responsible parties and bring them to account for the full extent of their liabilities by creating new scientific uncertainties and fueling disputes about the allocation of liability and contribution. There is an obvious risk that CRAM and redevelopment activities will further complicate an already complex investigation and remediation and potentially interfere with the identification and allocation of responsibility for historical and, possibly, future impacts.

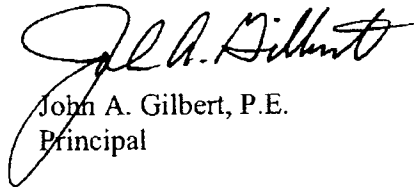
Redevelopment of impacted properties is typically a positive event in the eyes of a community. However, redevelopment of such sites must carefully consider impacts and close coordination with remedial planning. This approach ensures that development does not proceed in a manner that impairs full and appropriate remediation of the site. Given the evident uncertainties regarding environmental issues associated with the redevelopment proposed by NET, which, as currently documented, is premature, exemption from regulatory processes and requirements designed to ensure protection of human health and welfare would be imprudent.

Please contact us at (603) 314-0820 if you have questions or comments regarding the contents of this letter.

Sincerely,
GEOINSIGHT, INC.



Jeffrey R. LaCroix, P.G.
Senior Geologist



John A. Gilbert, P.E.
Principal

cc: M. Caira, Town of Wilmington

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EXHIBIT B



COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
NORTHEAST REGIONAL OFFICE

205B Lowell Street, Wilmington, MA 01887 978-694-3200

MITT ROMNEY
Governor

KERRY HEALEY
Lieutenant Governor

STEPHEN R. PRITCHARD
Secretary

ROBERT GOLLEDGE
Commissioner

DECEMBER 6, 2005

Olin Corporation
P.O. Box 248
1186 Lower River Road, NW
Charleston, TN 37310

RE: Wilmington
Olin Chemical
51 Eames Street
RTN 3-0471

Notice of Suspension of MassDEP Review

ATTN: Stephen Morrow

Dear Mr. Morrow:

On September 14, 2005 the United States Environmental Protection Agency (EPA) proposed the Olin Chemical Site for listing on the National Priorities List (NPL). As a result, the Massachusetts Department of Environmental Protection (MassDEP) has suspended its review of a variety of documents related to the Olin Chemical Site while the EPA listing process proceeds. DEP will continue to oversee and review response actions that are considered time critical and which we determine cannot wait for the NPL designation. In the event that the Olin site is included on the NPL, EPA will take the lead in the decision making process on issues related to site investigation and remediation. This letter discusses the status of various documents that have been submitted to DEP and specifics which document reviews are being suspended and which will continue.

MAPLE MEADOW BROOK AQUIFER

Review Suspended

DEP believes that additional groundwater monitoring wells are needed in the Maple Meadow Brook Aquifer (MMBA) and that annual sediment sampling needs to be completed in the Maple Meadow and Sawmill Brooks, in order to better monitor for potential future migration of the Olin Chemical plume. DEP believes that this work is necessary because hydrogeologic and contaminant transport conditions are significantly different since the MMBA was closed indefinitely as a drinking water resource area in February 2003, due to the identification of N-nitrosodimethylamine in the groundwater above drinking water guidelines.

Olin believes that the existing monitoring program is sufficient to monitor potential plume migration and potential future impacts to Maple Meadow Brook, Sawmill Brook, and downstream portions of the Ipswich River. Olin's consulting team has submitted the documents listed below to support this position. Review of these documents is suspended:

This information is available in alternate format. Call April McCabe, ADA Coordinator at 1-617-556-1171. TDD Service - 1-800-298-2207.

DEP on the World Wide Web: <http://www.mass.gov/dep>



Printed on Recycled Paper

Geomega. February 18, 2005. Technical Information Supporting Proposed Stage I Environmental Screening/Recommendation to Modify Maple Meadow Brook Aquifer Monitoring Program.

GeoInsight. March 30, 2005. Comments on document listed above that were completed by GeoInsight on behalf of the Town of Wilmington.

Mactec Engineering and Consulting. April 2005. Western Bedrock Valley Ground-Water Monitoring Report, June 2003 – December 2004.

Geomega. August 4, 2005. The 2004 Western Bedrock Valley Statistical Report, 51 Eames Street Site, Wilmington, MA.

Review Continues

The existing MMBA groundwater and surface water monitoring program must continue during the NPL listing process along with the annual inductance logging and multi-level piezometer sampling events. Summary reports must continue to be submitted to DEP using the previously agreed upon schedules

DEP believes it is important to proceed with all pre-remedial investigations in the Maple Meadow Brook Aquifer. In September and October of 2005 a monitoring well triplet was installed in the Southern Bedrock Channel and a multi-level piezometer was installed in the Western Bedrock Valley. Groundwater samples have been collected from these locations. In a scope of work and schedule update letter dated September 16, 2005, Mactec Engineering and Consulting indicated that a report summarizing the results of the pre-remedial investigation can be completed within 90 days from the receipt and validation of all the sampling data. DEP approves of this schedule and expects to receive a summary report by February/March 2006.

DEP believes it is prudent for Olin to continue to investigate the potential toxicity of selected organic compounds that have been identified in groundwater in the Maple Meadow Brook Aquifer Study Area while the listing process proceeds. These compounds were identified in a EPA report entitled "A Study of Organic Chemical Compounds Present in Water Samples from the Town of Wilmington's Maple Meadow Brook Aquifer Study Area" dated November 4, 2004. Therefore, review of the scope of work listed below will continue, but has been delayed while DEP provides the Town of Wilmington's consultant, GeoInsight, an opportunity to provide comments. GeoInsight has notified DEP that comments on the scope of work should be submitted by December 16, 2005.

Mactec Engineering and Consulting. May 2, 2005. Scope of Work - Toxicological Risk Assessment of Selected Organic Compounds in Groundwater in the Maple Meadow Brook Aquifer Study Area.

OFF-PROPERTY WEST DITCH

Review Suspended

DEP believes that a single recovery well will not be sufficient to remediate the Off Property West Ditch (OPWD) Study Area. DEP believes that a network of recovery wells will be necessary to maximize DAPL removal in a time-efficient manner, and additional remedial measures will be necessary to contain and control the migration of contaminated groundwater to the OPWD and downstream water bodies. In

addition, DEP believes that sediment contamination in the OPWD presents a Substantial Hazard to ecological receptors, and must be remediated.

Olin believes that additional remedial measures beyond DAPL removal are not necessary to remediate the OPWD Study Area. Olin's consulting team has submitted the documents listed below to support this position. Review of these documents is suspended during the NPL listing process.

Sleeman, Hanley, and DeNitto. July 28, 2005. Cover Letter for Scope of Work for Additional Investigation, The Off Property West Ditch Recovery Prove-Out Test Release Abatement Measure Plan.

Mactec Engineering and Consulting. November 2, 2005. Phase III Remedial Action Plan, Off Property West Ditch Study Area.

Review Continues

DEP and Olin agree that the necessary first step in defining an appropriate remedial strategy for the Off-Property West Ditch Study Area is completion of a DAPL Removal Pilot Study. Efforts to complete this work are underway and have been previously approved by DEP in letters dated February 1, 2005 and March 21, 2005. All DAPL removal pilot test activities should continue at previously agreed upon schedules. DEP has received 2 submittals related to the DAPL removal pilot study, and DEP's responses are discussed below.

In the letter dated March 21, 2005 DEP stated that a plan of action for how the results of the DAPL removal pilot study will be used to design a network of recovery wells to optimize DAPL removal in a time efficient and complete manner must be received by August 1, 2005. DEP also stated that timeframes for scaling the pilot test up to a full-scale system must be included in this document. DEP received this plan of action from Olin's consulting team on July 28, 2005. No public comments were received.

The pilot test will be initiated and the information will be used to help develop a numerical groundwater flow and contaminant transport model for the Off Property West Ditch Study Area. The optimum DAPL extraction strategy will be identified through numerical modeling, which will be used to test various recovery well networks. The modeling information will be used to identify locations for additional recovery wells, which will be investigated by drilling boreholes at select locations. This information will be used to complete a final design recommendation report. Olin does not anticipate being able to initiate the modeling activities until the early summer of 2008. The appropriateness of this schedule will be evaluated by DEP/EPA as the DAPL Prove-Out Test proceeds.

In a letter dated October 5, 2005, Olin's consulting team requested a schedule extension for completion of the seismic survey due to delays in obtaining property access to the 6 Jewel Drive property. The goal of the seismic survey is to identify the deepest area in the bedrock depression in order to define the optimum location for placement of the DAPL Removal pilot test recovery well. DEP was involved early on in these property access negotiations. DEP believes that the delay in obtaining a signed access agreement is justified, and therefore extends the deadline for completion of a seismic survey report until December 17, 2005.

OLIN PROPERTY

Review Suspended

Olin has completed a Construction Release Abatement Measure for the 51 Eames Street Property and is involved in negotiations to sell the property to New England Transrail (NET). NET proposes to construct a rail-to-truck reload facility on the northern portion of the Olin property, and has submitted a Construction Release Abatement Measure Plan to DEP for approval. Several documents listed below have been submitted to DEP which relate to future property development. Review of these documents is suspended during the NPL listing process.

Environmental Compliance Services, Inc. November 19, 2004. Construction Release Abatement Measure Plan and Focused Feasibility Study for Redevelopment of Former Olin Corporation Facility.

GeoInsight. December 21, 2004. Comments on document listed above that have been completed by GeoInsight on behalf of the Town of Wilmington.

Environmental Compliance Services, Inc. February 3, 2005. Response to Town of Wilmington Comments Construction Related RAM Former Olin Corporation Facility.

Mactec Engineering and Consulting, Inc. June 23, 2005. Kempore Material, 51 Eames Street, Wilmington, MA.

Martha Stevenson. September 21, 2005. Public Comments related to Kempore and future development of the Olin property.

Levine Fricke. October 17, 2005. Modification of Construction Related Release Abatement Measure (RAM) Plan, 51 Eames Street Property, Wilmington, MA

GeoInsight. October 31, 2005. Comments on MACTEC's Response DEP Regarding Kempore.

Review Continues

Surface water quality and sediment quality conditions in the previously remediated portions of the South Ditch, which flows from west to east across the central portion of the Olin property, have deteriorated since the installation of the containment wall in the summer of 2000. All activities associated with the investigation of South Ditch conditions must proceed, so that the source of the problem can be identified, and appropriate solutions can be implemented. In a report dated June 15, 2005 entitled "Environmental and Human Health Risk Assessment for the South Ditch," Olin's consulting team concludes that the recontamination of the South Ditch does not result in a risk to human and ecological receptors. DEP's Office of Research and Standards is in the process of evaluating this report.

All sampling activities and summary reports associated with the Post Construction Monitoring Plan must also continue during the listing process.

EAST DITCH

Review Suspended

Olin believes that surface water and sediment quality conditions in the East Ditch do not result in risk to ecological receptors. Olin's consultants have submitted the reports listed below to support this conclusion. DEP does not believe that sufficient information has been collected to support this conclusion, but has suspended review of these reports during the listing process.

Mactec Engineering and Consulting, Inc. August 2004. Phase II Focused Environmental Risk Characterization.

Mactec Engineering and Consulting, Inc. August 5, 2005. Phase II Focused Environmental Risk Characterization Addendum East Ditch and Downstream Area.

NORTH POND

Review Suspended

DEP believes that further investigation is necessary in the North Pond Study Area to determine if releases from the Olin site have impacted this area. Olin believes that the North Pond has not been impacted from the releases at the Olin property. The report listed below has been submitted to DEP to support this conclusion. DEP has suspended its review of this document.

Mactec Engineering and Consulting, Inc. October 17, 2005. North Pond Investigations.

CONCLUSION

DEP believes that it is prudent to suspend the review of the various documents identified in this letter, because Olin's consulting team and DEP have different technical opinions on how the investigation and remediation should proceed in some parts of the site. By suspending the review of these documents, EPA experts can become part of the decision making process. DEP believes that the unresolved issues discussed in this letter are not time critical, so the resolution of these issues can wait until the NPL listing process is complete, which could be as early as April 2006. If the site is listed on the NPL, EPA experts will take the lead on resolving these issues and developing a plan for future investigation and remediation for all portions of the site.

If you have any questions regarding this matter, please contact Christopher Pyott at (978) 694-3353 or at the letterhead address.

Sincerely,

This final document copy is being provided to you electronically by the Department of Environmental Protection. A signed copy of the original document is on file at the DEP office listed on the letterhead.

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Environmental Analyst

Stephen M. Johnson
Acting Deputy Regional Director

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