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November 6, 2006

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Vernon A. Williams, Esq.
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

Re: Finance Docket No. **FD34952**

Dear Secretary Williams:

Please find enclosed for filing an original and ten copies of the captioned Petition, as well as a copy of the document on a CD. In addition, I am providing one extra copy to be returned file-stamped in the self-addressed, stamped envelope. We also enclose a check in the amount of \$1,400 as the filing fee for a petition for declaratory order.

Please call the undersigned if you have any questions about this filing.

Sincerely,

James L. Pray

JLP:hs

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EXPEDITED CONSIDERATION REQUIRED

Before the

Surface Transportation Board

Finance Docket No. FD34952



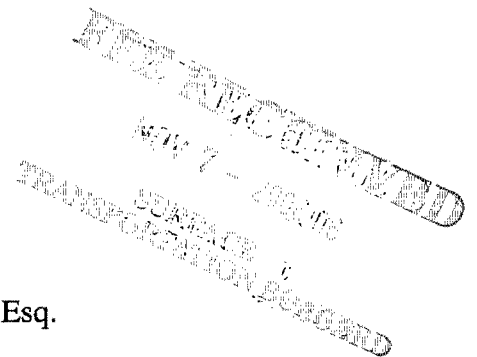
**DEVENS RECYCLING CENTER, LLC - SPUR TRACK EXEMPTION -
MASSACHUSETTS DEVELOPEMENT FINANCE AGENCY**

**PETITION OF DEVENS RECYCLING CENTER, LLC FOR EXPEDITED
DECLARATORY ORDER**

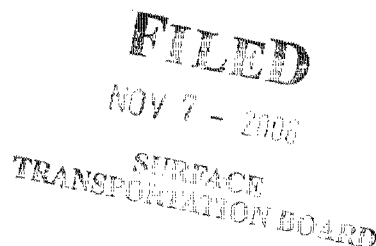
Filed on Behalf of Devens Recycling Center, LLC

By:

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Date: November 6, 2006



EXPEDITED CONSIDERATION REQUIRED

Before the Surface Transportation Board

Finance Docket No. _____

**PETITION OF DEVENS RECYCLING CENTER, LLC FOR EXPEDITED
DECLARATORY ORDER**

Petitioner Devens Recycling Center, LLC ("Devens"), respectfully petitions the Surface Transportation Board (the "Board"), pursuant to the Board's authority under 5 U.S.C. § 554(e) and the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 721(b)(4) to enter a declaratory order regarding status as a common carrier for both Petitioner and its Landlord and Grantor in order to terminate a controversy or remove uncertainty and to prevent irreparable harm.

Specifically, Petitioner seeks a declaratory order that the Spur Track proposed to be constructed by Devens is outside of the Board's jurisdiction, or is exempt, under 49 U.S.C. § 10906, from the prior approval requirements of 49 U.S.C. § 10901, as the Spur Track qualifies as an exempt spur track. Further, Petitioner seeks a declaratory order that, regardless of the classification of the Spur Track, the construction of the track will not result in either Massachusetts Development or Devens being deemed to be rail common carriers.

PROPOSED TRANSACTION

Devens is a Massachusetts Limited Liability Company, which is planning to construct and operate a construction and demolition recycling facility in Middlesex County, Massachusetts. Devens has sought and received all local, state and national approvals for the facility, as outlined below. Numerous public hearings have been held on the project and all governmental requirements have been obtained for the project to go forward. Devens has submitted the project to the jurisdiction of local, regional, and state bodies and is not seeking STB approval in order to avoid compliance with those laws and regulations. In addition, the project will be financed in part with tax-exempt bonds which impose limitations on the project in addition to the regulatory and permit restrictions imposed by local, regional, and state governments. The project itself would not be moving forward if it were not for the active assistance of Massachusetts Development Finance Agency, ("Massachusetts Development"), which is a Massachusetts body politic and corporate established and existing under Chapter 23G of the Massachusetts General Laws, successor in interest to the Government Land Bank under Chapter 289 of the Acts of 1998. In order to increase the efficiency and capacity of their Recycling Plant, Devens wishes to construct a Spur Track ("Spur Track") over a distance of approximately 1,462 feet from a mainline to its property boundary and then through its property for another

820 feet. To this end, Petitioner has purchased a lot from Massachusetts Development and entered into a Army Sublease and Easement Agreement and other related documents (collectively referred to as the "Transaction Documents"), with Massachusetts Development.

Massachusetts Development has sold, leased, subleased, or granted easement rights to Devens for the construction of a Spur Track that will connect Devens to the nearby main line owned and operated by Boston & Maine Corporation, Springfield Terminal Railway and/or Guilford Transportation Industries, Inc., a common carrier (collectively, "Guilford") (the "Existing Rail Line").

Under the Transaction Documents, Devens will be responsible for the construction of the Spur Track and will retain ownership of the structures that constitute the Spur Track.

REQUESTS FOR ORDER

1. Petitioner respectfully requests that the Board grant a Declaratory Order stating that the Board's prior authorization under 49 U.S.C. § 10901 is not required prior to construction of the Spur Track, as such Spur Track is an exempt spur track under 49 U.S.C. § 10906.

2. Petitioner also respectfully requests that in addition to the relief requested above that the Board simultaneously grant a Declaratory Order that neither Massachusetts Development nor Devens constitute rail common carriers in connection with the construction of the Spur Track by reason of the construction of the Spur Track and the execution of the various Transaction Documents described in this Petition.

STATEMENT AS TO EMERGENCY RELIEF

1. Devens has been given a deadline by Massachusetts Development of December 15, 2006 in order to meet certain criteria for bond financing, including a determination that "STB will not exercise authority over the Rail Spur Line and/or the Easement Area and confirming that the Seller [Massachusetts Development] is not a common carrier and has no common carrier responsibilities or liabilities in connection with the Rail Spur Line and/or the Easement Area." All other criteria have been met and this is the sole remaining obstacle to moving forward with this project.

STATEMENT OF FACTS

1. Devens is the owner of an 11.10 acre tract ("Devens Parcel") in the Devens Regional Enterprise Zone, Town of Ayer, County of Middlesex, Massachusetts. An integral part of Devens use of this parcel is the acquisition of the necessary rights to construct a spur track over an easement ("Devens Easement") connecting its desires to construct a spur track from the Devens Parcel to the Boston & Maine Corporation, Springfield Terminal Railway and/or Guilford Transportation Industries, Inc. main line.

2. The Devens Easement will be approximately 1,462 feet long as measured along the southern border of the easement from the point of connection on the Guilford line to the point where the easement abuts the Devens Parcel. The track will continue for a total of 820 feet through the northern portion of the Devens Parcel, with approximately 680 feet of double tracks for loading and unloading with one track inside the Devens building and one track alongside the building, and 140 feet of single track to the end of the track at the western boundary of the Devens property.

3. The Devens Parcel was purchased from Massachusetts Development Finance Agency, a Massachusetts body politic and corporate, established and existing under Chapter 23G of the Massachusetts General Laws, successor in interest to the Government Land Bank under Chapter 289 of the Acts of 1998. The deed from Massachusetts Development was filed on April 21, 2006 at Book 47318, Page 446 with the County Register of Deeds, Middlesex, Massachusetts.

4. Devens entered into a Devens Sublease for the Rail Line Located on Army Property ("Army Sublease") dated April 10, 2006 with Massachusetts Development for the construction, installation, maintenance, repair, replacement, use, removal, maintenance and operation of a Rail Spur Line connecting the Appurtenant Easement and the Southern Container Easement to the Guilford Rail Line. In the Army Sublease, Massachusetts Development agreed to make an effort to obtain a permanent non-exclusive easement for the Spur Track once the Spur Track was constructed.

5. The Department of the Army has consented to the construction of a rail spur to the Devens Parcel by a letter from Joseph M. Redlinger, Chief, Real Estate Division, Department of the Army, New England District, Corps of Engineers, 696 Virginia Road, Concord, Massachusetts, 01742-2751 dated February 17, 2006.

6. Devens entered into an Easement Agreement dated April 10, 2006 ("Easement Agreement") with Massachusetts Development whereby Devens was granted a non-exclusive easement over and across the interests of Massachusetts Development and the right to construct a "Rail Spur Line" connecting to the Guilford rail line. The Easement granted certain rights owned by Massachusetts Development, including a reservation set out in a deed from Massachusetts Development to Southern Container Corp. recorded at Book 31427, Page 248 with the Register of Deeds for Middlesex County. The Easement Agreement also provided that the "Rail Spur Line so constructed shall be the personal property of the Grantee, to be maintained and insured by the Grantee. The Easement from Massachusetts Development was filed on April 21, 2006 at Book 47319, Page 1 with the County Register of Deeds, Middlesex, Massachusetts.

7. Devens entered into a Post Closing Agreement on April 10, 2006 with Massachusetts Development setting forth certain closing requirements.

8. Devens entered into a First Amendment to Post Closing Agreement on September 11, 2006 with Massachusetts Development. Among other matters, the

Easement Agreement, Army Sublease, and a previous Post Closing Agreement were amended to include the following provisions relevant to this matter:

(ii) In addition, [Devens] shall take actions and execute documents necessary to protect Seller from and against any and all liability or classification as a "common carrier" under applicable federal and state law resulting from use of the Rail Spur Line. At a minimum [Devens] shall:

(a) obtain an order or decision issued by the United States Department of Transportation Surface Transportation Board ("STB"), confirming that the STB will not exercise authority over the Rail Spur Line and/or the Easement Area and confirming that the Seller is not a common carrier and has no common carrier responsibilities or liabilities in connection with the Rail Spur Line and/or the Easement Area; . . .

. . .

(c) enter into any agreements with Guilford as may be required by law or by Guilford to address, at a minimum, (i) responsibility for common carrier service, (ii) maintenance obligations imposed on common carriers under applicable federal and state law and regulations, (iii) management and control over the personalty comprising the Rail Spur Line to the extent necessary to operate, use, repair and maintain the Rail Spur Line for rail operations in accordance with applicable federal state law and regulations, and (iv) any easement rights in the Appurtenant Rail Rights and/or the Reserved Rail Easement necessary and appropriate to insure that Guilford is the operator of and common carrier on the Rail Spur Line. If the actions or documents described in this subparagraph (c) are not required by law and by Guilford, then Buyer shall have no obligation to perform such actions or to execute such documents.

9. Devens will enter into a standard form of agreement with Guilford whereby Guilford will switch railroad cars to and from the Spur Track in accordance with published tariffs of the Railroad which may be applicable. Guilford will serve as the common carrier for all shipments over and across the Spur Track.

10. Devens will own and operate a construction & demolition (C&D) material recycling facility that will obtain (by truck and possibly rail) construction debris and then process that debris for shipment out by truck and rail. The processing will take place inside the building and will involve Devens sorting and recycling wood, asphalt shingles, corrugated paper, metal, brick, and concrete. The proposed facility will consist of a building between 80,000 and 100,000 square feet which will include a totally enclosed material processing area, personnel and administrative offices, and an educational learning center and a truck-to-train transfer station. Capacity is limited by permits to 1,500 tons per day. The project is located on a vacant industrial zoned 11 acre site identified as Lot 9A on the north side of Independence Drive within the West Rail Industrial park.

11. The Lease Agreement, Army Sublease, and the Quit Claim Deed all executed on or about April 10, 2006 all have provisions which address the possible use of the Spur Track or easement for other parties in the Industrial Park area. The original Post-Closing Agreement recites those provisions in general terms. The provisions state as follows:

a. The Army Sublease provides that "The Subleased Premises and the Rail Spur Line may be used in common with others in the West Rail Development District, Devens Regional Enterprise Zone."

b. The Easement provides that it is "for the purpose of constructing, installing, replacing, removing, repairing, maintaining and operating a rail spur line(s), ties, tracks and switch(es) (the 'Rail Spur Line') connecting the Grantee's Property and other properties in the West Rail Industrial Park District, Devens Regional Enterprise Zone to the existing, active rail line owned and operated by [Guilford] (the 'Existing Rail Line') and using said Rail Spur Line for its intended purposes (the 'Permitted Uses')."

c. The Quit Claim deed provides that the Grantor Massachusetts Development reserves a "permanent, non-exclusive easement on, over, through and under the easement area shown on the Plan . . . for the purpose of construction, installation, maintenance, repair, replacement, use and operation of the Rail Spur Line to be located thereon for the purpose of providing rail spur service to and from the properties in the West Rail Industrial Park District, the Devens Regional Enterprise Zone and the Existing Rail Line, including but not limited to adjacent parcels and Parcels known as Lots 8, 8A, 9A and 10 (the 'Rail Easement')."

12. Despite these provisions, Petitioner is unaware of any plans by any third parties to use either the track easement or Spur Track. Devens has no plans to allow any third parties to have access to the Spur Track and its business plan does not include any such use. Inquires have been made with both adjoining property owners to the east and west and both have stated that they have no need for rail access. The property to the east, Southern Container Corp., is served by a side track on the east side of its building. The neighbor to the west, Kraft Foods has a building that blocks any further extension of the Spur Track to the west. Furthermore, the Kraft building is on a substantially different grade than the Spur Track and is constructed in such a way that allowing the track to enter the Kraft building would be impractical (pillar construction). The area to the north is wetlands, ponds, and drainage areas. In order to serve any lots to the south, a branch of the Spur Track would have to be built through existing or planned roads and tractor-trailer parking lots. No customers to the south are known to have any need for or plans for access to rail.

13. Petitioner has sought and received local, regional, state, and national approvals for this project. As the documents outlined below state, many of these approvals required numerous public hearings, notices and comment periods:

a. On February 17, 2006 the Department of the Army approved the request to install the rail spur over real estate owned by the Army and leased to Massachusetts Development (and subsequently subleased to Petitioner). See Exhibit A.

b. On March 14, 2005 the Montachusett Regional Planning Commission acknowledged receipt of a Notice of Project Change for the Construction and Demolition Material Recycling Facility in Devens and found that it was "in conformity with its regional goals of solid waste, environmental quality, transportation and economic development. See Exhibit B.

c. On November 14, 2005 the Commonwealth of Massachusetts, Executive Office of Environmental Affairs issued a Certificate on the Supplemental/Single Environmental Impact Report for the Construction and Demolition Material Recycling Facility. See Exhibit C.

d. On December 12, 2005 the Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Department of Environmental Protection, Central Regional Office found that "this site meets all site suitability criteria as set forth in 310 CMR 16.40(3)(d) and 16.40(4) of the Site Regulations. See Exhibit D.

e. On February 1, 2006, the Devens Enterprise Commission issued a "Notice of Decision, Solid Waste Facility Site Assignment, Devens Enterprise Commission" granting authority for the project to move forward. A record of decision was filed on March 28, 2006. See Exhibit E.

14. A copy of a map showing the layout is attached as Exhibit F.

ARGUMENT

I. The Spur Track is a spur track under 49 U.S.C. § 10906, for which the Board does not have authority over the construction and operation of such track, as the Spur Track will merely connect the recycling plant of Devens Recycling with an active line owned and operated by the Boston & Maine Corporation, Springfield Terminal Railway, and/or Guilford Transportation Industries, Inc. and all costs of construction and maintenance will be borne by Devens Recycling and shall be the personal property of Devens Recycling.

Petitioner Devens seeks a declaratory order that neither Massachusetts Development nor Devens must seek pre-approval from the Board under 49 U.S.C. § 10901, to construct a Spur Track over a distance of approximately 1,462 feet from a mainline to its property

boundary and then through its property for another 820 feet to connect the C&D plant of Devens to the Existing Rail Line owned and operated by Guilford, a common carrier. Such a declaratory order is supported by the fact that the Board should classify the Spur Track as a spur track which is exempted under 49 U.S.C. § 10906 from the applicable pre-approval requirements of 49 U.S.C. § 10901; 49 U.S.C. § 10906.

Under 49 U.S.C. § 10906, the Board does not have authority over the “construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.” 49 U.S.C. § 10906. The courts have had numerous opportunities to determine what constitutes a spur track. This issue was explored in Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 593 (3rd Cir. 1991). In that case, the court noted that “a track’s designation itself does not determine its character (extension or spur).” Id. At 612. However, the court noted that the track in question was local, ran only 14.5 miles, was located wholly intra-state, functioned as a route to unload and transfer shipments from a regular line, did not invade the territory of another railroad, and was only used by one railroad and served only one customer. Id. The Hughes decision was based in large part on the case of U.S. v. State of Idaho, 298 U.S. 105 (1936) where the Supreme Court upheld a district court determination:

The District Court concluded that the Talbot branch was constructed and has been maintained for the purpose of serving a single industry; that practically no other industry is served; that this trackage does not invade new territory; that its continued operation or abandonment is of local and not of national concern; that it is therefore a ‘spur’; and hence, that the order of the Interstate Commerce Commission was in excess of its jurisdiction.

298 U.S. at 107.

In addition to the courts in Hughes and State of Idaho, supra, the Board has discussed the factors used to determine the status of a particular piece of track. Such factors relate to the track’s history, physical characteristics and use. Brotherhood of Maintenance of Way Employees, et al. v. CP Rail Systems, et al., STB Finance Docket No. 32835 (1997) (“BMWE”). Because the Spur Track has not yet been constructed, it has no history of use that would prevent it from being considered an exempt spur track. Furthermore, the Spur Track’s physical characteristics and proposed use lead to the conclusion that it should be classified as an exempt spur.

i. The Spur Track has the physical characteristics of a spur track.

The Spur Track should be classified as a spur track within the meaning of 49 U.S.C. § 10906, as it will match the physical characteristics of a typical spur track. First, the Spur Track is merely a short spur off of a railroad line that will end at the Devens plant and does not connect to another main line. Service to another party would be difficult though not impossible given that the north boundary of the track will be a detention basin or property zoned for open space or recreational purposes and the southern boundary of the track will lie adjacent to two existing businesses, one of which

will be Devens and one of which will be Southern Container which already has rail access. Second, the Spur Track will be no longer than 2,290 feet (.43 miles), so it should not be considered a branch line. Third, the Spur Track does not invade the territory of another railroad, as the track will only be long enough to provide service to and from Devens' recycling plant. Finally, the line will be stub-ended and will not be designed to transport goods between different points of shipment. See Hughes and BMW.

ii. The Petitioner's use of the Spur Track is consistent with the use of a spur track.

In addition to the physical characteristics of a piece of track, the Board and the courts have evaluated the proposed use of the track in determining whether it should be classified as a spur track under 49 U.S.C. § 10906. See e.g., Hughes; State of Idaho; and Chicago, M., ST.P. & P.R. Co. v. Chicago & E.I.R.Co., 198 F.2d 8, 11 (1952). In past decisions by the courts and the Board, the following use characteristics have all weighed in favor of a particular track being classified as a spur track: (1) that the track will not provide passenger service; (2) that the track will not provide express or mail services; (3) that no stations, agents, loading platforms, nor telephone or telegraph service will be provided; (4) that all traffic will be inbound shipments to the end user of the track; (5) that the trackage would not have been constructed except for the end user of the track; (6) that the track would serve a single industry and practically no other industry is served; (7) that the carrier was requested by the customer to provide service; and (8) that none of its features evokes national concern. Hughes, 945 F.2d at 612; Chicago, 198 F.2d at 11; and BMW, STB Finance Docket No. 32835 at 3.

In this case, the Spur Track shares many of the same characteristics that the courts and the Board have previously used to classify tracks as spur tracks. First, it is clear that the Spur Track will not provide passenger service, as it is only .43 miles long and ends at the Devens recycling plant. Second, the track will not provide express mail services. Third, there will not be transfer stations, agents or loading platforms constructed along the Spur Track, and telephone service will not be provided. Fourth, all traffic will be inbound shipments to Devens, the end user of the track. Fifth, the Spur Track would not be constructed but for Devens, as Devens initiated the transaction and will be responsible for construction of the Spur Track. Sixth, the track is only planned to serve Devens for transportation of their goods to and from their recycling plant. Seventh, the carrier, Guilford, will be requested by Devens to provide service to and from their plant. Finally, none of the features of the Spur Track evoke a national concern, as the track is located wholly intra-state, is not designed to transport goods between different points of shipment, and does not invade the territory of another railroad. Thus, the Spur Track should be classified as a spur track, which is exempt from the Board's authority over the construction and operation of the track under 49 U.S.C. § 10906.

II. Petitioner Devens and Massachusetts Development should not acquire common carrier status as a result of the construction and use of the Spur Track as the Board lacks jurisdiction over private tracks, and lacks the authority over the construction and operation of spur tracks under 49 U.S.C. § 10906.

Petitioner Devens and Massachusetts Development have never been and have no intention of becoming common carriers as a result of the Proposed Transaction. Because the Board has no authority over the construction and operation of the Spur Track, the Board does not have the authority to classify Devens and/or Massachusetts Development as common carriers.

In fact, in Union Pacific R.R. Co. v. Coast Packing Co., 236 F.Supp.2d 1130 (C.D. Cal. 2002), the court held that the Surface Transportation Board cannot require a carrier to provide service over side tracks or award damages for failure of a carrier to recover the value of goods it was unable to unload from its tank cars due to the failure to maintain the track. Id. at 1135. It follows, then, that the Board would not have the authority to declare either Devens or Massachusetts Development common carriers merely due to Devens' ownership of the Spur Track and Massachusetts Development's ownership of the land on which the Spur Track will be built, as such track is outside of the Board's authority and/or jurisdiction.

III. Even if the Board determines the Spur Track is not an exempt spur track, pre-approval should not be required and Petitioner Devens and Massachusetts Development should not be given common carrier liability or status under the "State of Maine" Exemption.

Massachusetts Development is not considered a common carrier, nor is Devens Recycling, nor should they be classified as such upon completion of the proposed transaction. Neither are providing railroad transportation for compensation, within the meaning of 49 U.S.C. § 10102(20), and will not be providing such after the proposed transaction is complete. Massachusetts Development is merely a private landowner who has granted certain real estate rights and an easement to Devens Recycling for the physical construction of the Spur Track.

Likewise, Devens Recycling will not be providing railroad transportation for compensation once the Spur Track is complete. Rather, Devens Recycling intends to contract with Guilford, who is a common carrier, to transport their goods to and from their Recycling Plant on the Spur Track. Devens Recycling will merely own the physical assets that comprise the Spur Track.

In Maine, DOT, 8 I.C.C.2d 835 (1991), the Interstate Commerce Commission ruled that it did not have jurisdiction over a state agency's acquisition of a carrier's rail line because the carrier retained a permanent, unconditional easement to continue its common carrier freight service over the line. The Maine, DOT exemption continues to be interpreted by the Board, successor to the ICC, to relieve parties, who do not intend to operate rail lines and who do not obtain any such rights from other carriers, from the obligation to obtain formal approval if a different carrier retains or has that duty.

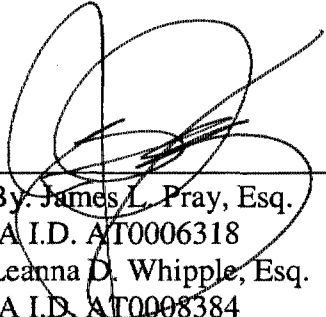
In Wisconsin, DOT, STB Finance Docket No. 34181 (2002), the Board cited Maine, DOT and stated that their prior approval to the acquisition of a freight rail service line is

not required when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred. In Wisconsin, DOT, the Wisconsin Department of Transportation (WisDot) acquired the physical components of the freight line, but the common carrier, Wisconsin Southern and Railroad Company (WSOR), retained all common carrier rights and obligations, as WisDot granted to WSOR a perpetual easement to continue to conduct rail freight operations on the property.

In BMWE, supra, the Board had determined that the track in question was not, in fact, an exempt spur. Nonetheless, the Board, citing Maine, DOT, stated that “the acquisition of the physical assets of a rail line does not necessarily require the exercise of our jurisdiction and does not always make the buyer a common carrier.” If a common carrier’s obligations will not be affected or impaired by the acquisition of the underlying assets, then the owner of the track will not be considered a common carrier. Id.

Here, the common carrier obligations of Guilford will not be affected or impaired. Rather, such common carrier will provide service over the Spur Track and Massachusetts Development did not have common carrier status and does not purport to convey any railroad common carrier obligations to Devens through the Transaction Documents. Thus, neither Massachusetts Development nor Devens should be given “common carrier” status as a result of the proposed transaction.

Wherefore, Petitioner requests that the Board issue a Declaratory Order as requested in this Petition.

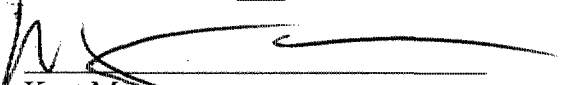


By: James L. Pray, Esq.
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**VERIFICATION OF KURT MACNAMARA
IN SUPPORT OF
PETITION OF DEVENS RECYCLING CENTER, LLC FOR EXPEDITED
DECLARATORY ORDER**

"I, Kurt Macnamara, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this pleading.

Executed on November 3rd, 2006.

By: 

Kurt Macnamara



REPLY TO:
ATTENTION OF:

DEPARTMENT OF THE ARMY
NEW ENGLAND DISTRICT, CORPS OF ENGINEERS
696 VIRGINIA ROAD
CONCORD, MASSACHUSETTS 01742-2751

RECEIVED

FEB 21 2006

February 17, 2006

Real Estate Division

Scott T. Fenton, Esq.
Bowditch & Dewey, LLP
311 Main Street
P.O. Box 15156
Worcester, MA 01615

Re: Installation of a rail spur over a portion
of Shepley Hill, located on the former
Fort Devens, MA

Dear Mr. Fenton:

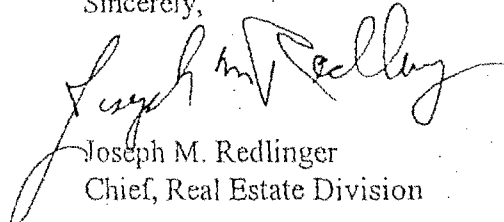
Reference is made to your request to install a rail spur over a portion of Shepley Hill, located on the former Fort Devens, Massachusetts. The location of the rail spur is shown on a concept plan prepared by ESS Group Inc., entitled, "W.K. MacNamara, Lot 9: Independence Dr., Deven, MA, Railroad Easement Plan for Lot 9A, Deven, MA", Drawing No. RE-1. A copy of the plan is attached

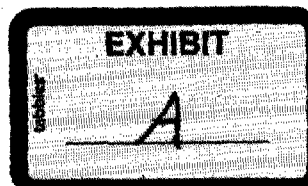
The Army has no objections to MassDev, their lessees or grantees, constructing, operating and maintaining the above described rail spur under the following conditions:

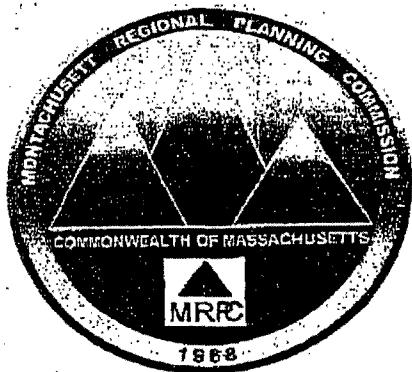
- the construction, operation and maintenance of the rail spur will comply with all applicable State regulations and permitting requirements;
- the landfill will not be disturbed by the construction of the rail spur;
- a permanent fence, at the same height and type as the existing fence, will be constructed along the northerly boundary line of the rail spur to prevent persons and vehicles from entering onto Shepley Hill.

If you have any questions, please call me at (978) 318-8585.

Sincerely,


Joseph M. Redlinger
Chief, Real Estate Division





MONTACHUSETT

REGIONAL PLANNING COMMISSION

R1427 Water Street Fitchburg, Massachusetts 01420
(978) 345-7376 FAX (978) 348-2490 Email: mrpc@mrpc.org

March 14, 2005

Secretary Ellen Roy Herzfelder
Executive Office of Environmental Affairs
100 Cambridge Street
Suite 900
Boston, MA 02114

RECEIVED

MAR 15 2005

MEPA

Attention: MEPA Unit

Dear Secretary Herzfelder:

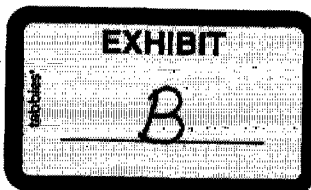
The Montachusett Regional Planning Commission reviewed Notice of Project Change for the Construction and Demolition Material Recycling Facility at Devens.

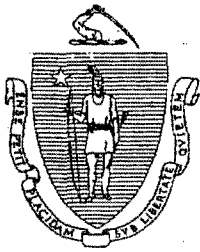
MRPC finds this proposal in conformity with its regional goals of solid waste, environmental quality, transportation and economic development.

Sincerely,

Laila Michaud
Executive Director

C: Devens
W. K. MacNamara Coportation





The Commonwealth of Massachusetts

Executive Office of Environmental Affairs

100 Cambridge Street, Suite 900

Boston, MA 02114-2524

MITT ROMNEY
GOVERNOR

KERRY HEALEY
LIEUTENANT GOVERNOR

STEPHEN R. PRITCHARD
SECRETARY

Tel. (617) 626-1000
Fax. (617) 626-1181
<http://www.mass.gov/envir>

November 14, 2005

CERTIFICATE OF THE SECRETARY OF ENVIRONMENTAL AFFAIRS ON THE SUPPLEMENTAL/SINGLE ENVIRONMENTAL IMPACT REPORT

PROJECT NAME : Construction and Demolition Material
Recycling Facility
PROJECT MUNICIPALITY : Devens (Ayer)
PROJECT WATERSHED : Nashua
EOEA NUMBER : 9116
PROJECT PROPONENT : W.K. MacNamara Corporation
DATE NOTICED IN MONITOR : October 8, 2005

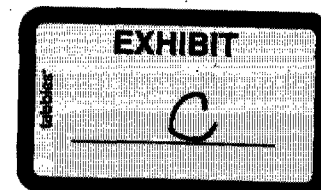
As Secretary of Environmental Affairs, I hereby determine that the Supplemental/Single Environmental Impact Report (SEIR) submitted on this project **adequately and properly complies** with the Massachusetts Environmental Policy Act (G. L. c. 30, ss. 61-62H) and with its implementing regulations (301 CMR 11.00).

Project Description

As described in the SEIR, The proposed project involves development of a construction and demolition (C&D) material recycling facility at Devens that is being designed to handle approximately 1,500 tons per day of C&D materials. The proposed project includes construction of a 90,000 square foot (sf) facility and associated infrastructure on an 11-acre site in the West Rail Industrial Area of Devens (lot 9-A), and construction of a rail spur on adjacent land (1.6 acres). The proposed project will involve alteration of approximately 12.6 acres of land, including approximately 7 acres of impervious area. Transportation impacts are estimated at a maximum of 400 vehicle trips per day (includes up to 300 truck trips) and creation of 95 parking spaces. A portion of the project site is located within Priority Habitat of state-listed rare species and the site is adjacent to the Squannassit Area of Critical Environmental Concern (ACEC).

Project MEPA History

A Final Environmental Impact Report (FEIR) for redevelopment of the former Fort Devens (Devens) was submitted in July 1995 and the Secretary issued a Certificate on the FEIR.



on September 14, 1995. The FEIR consists of the federal Environmental Impact Statement (EIS) and the MassDevelopment (formerly the Land Bank) FEIR. The Devens redevelopment project involves reuse of approximately 4,140 acres of land. As proposed in the FEIR, the Devens Reuse Plan includes 5,787,000 square feet of development and 282 housing units. The Certificate on the FEIR requires a NPC for projects requiring permits that could not be foreseen during the review process so the Secretary can determine if additional MEPA review is needed. The proposed C&D material recycling project requires solid waste facility permits and approvals that were not anticipated during the Devens FEIR review process and, therefore, a NPC was required. The proponent filed a NPC for the proposed C&D project in February 2005. The Certificate on the NPC, which was issued on March 25, 2005, required a Supplemental EIR and granted the proponent's request for a Supplemental/Single EIR.

Jurisdiction and Permits Required

The project is undergoing MEPA review pursuant to Section 11.10 because it involves a Project Change, and Section 11.03(9)(a) because it involves new capacity of 150 or more tons per day for storage and processing of solid waste. The project is also undergoing review pursuant to Section 11.03(2)(b) because it could potentially involve a "take" of a state listed rare species.

The project requires a Site Assignment Report Approval and Solid Waste Facility Authorization to Construct and Authorization to Operate Permits from the Department of Environmental Protection (DEP). Other DEP permits and approvals that may be required include a Beneficial Use Determination (BUD) and a Sewer Connection Permit. The project also requires a Site Assignment and a Unified Permit from the Devens Enterprise Commission (DEC) and may require an Order of Conditions from the DEC. The project will require a National Pollutant Discharge Elimination System (NPDES) Construction Activities Permit from the US Environmental Protection Agency (EPA).

The project involves land transfer from a state agency (MassDevelopment). Therefore, MEPA jurisdiction is broad and extends to all aspects of the project with the potential to cause significant Damage to the Environment. In addition, MEPA jurisdiction is broad due to the subject matter of state permits required.

Consistency with Policy, Plans and Regulations

The DEP has determined that the overall project supports the DEP's Solid Waste Master Plan and the implementation of new regulations which prohibit disposal of unprocessed wood waste at Massachusetts solid waste facilities. As further detailed by DEP in its comment letter, the proposed project facilitates regulatory compliance by the construction and demolition industries, promotes recycling of wood material, and conserves air space in landfills. The conceptual design of the proposed facility meets regulatory and policy requirements of the DEP and incorporates appropriate best management practices (BMPs). As further detailed in the SEIR, the proposed project will support local waste minimization efforts by facilitating the goals of the Devens Solid Waste and Recycling Program and participating in the DEC EcoStar Program. The Montachusett Regional Planning Commission has determined that the project conforms with its solid waste, environmental quality, and economic development goals.

Rare Species

Portions of the proposed project site are located within Priority Habitat of state-listed rare species. The Upland Sandpiper (*Bartramia longicauda*), Eastern Box Turtle (*Terrapene Carolina*), and the Houghton's Flatsedge (*Cyperus houghtonii*) has been documented near the project site. As required by the NPC Certificate, the proponent conducted a botanical survey for the Houghton's Flatsedge. The Division of Fisheries and Wildlife, Natural Heritage and Endangered Species Program (NHESP) has determined that Rare Species Botanical Report (dated 9/22/05) is adequate and that the project will not result in a "take" provided that the project adheres to mitigation measures as stated in the MEPA Certificate on the NPC. The SEIR includes clear commitments to implementing these mitigation measures. The proponent should ensure that pre-construction mitigation measures as outlined in the NPC are implemented in order to avoid a "take".

Facility Operations

As further described in the SEIR, the proposed facility will accept C&D materials including wood, gypsum wallboard, asphalt, shingles, corrugated paper, metal, brick, concrete and carpeting. The facility will not accept municipal solid waste (MSW), food waste, or hazardous materials. The project also includes an enclosed tipping area, which will preclude generation of industrial wastewater. The SEIR has proposed measures, including a Draft Asbestos and Hazardous Materials Inspection Protocol, to avoid and minimize potential problems relating to unacceptable materials. The proponent should continue to work with DEP and the DEC to finalize the inspection protocol during the permit process. The proponent should provide additional information to the Devens Enterprise Commission (DEC) to respond to its questions and comments regarding hours of operation, use of electric vehicles, storage of rejected loads, on-site inspection of asbestos materials, and the proposed HVAC system. The proponent should also provide additional information to the DEC regarding the temporary holding of materials and notification of contractors as requested in its comment letter.

Stormwater

The SEIR provided a detailed stormwater analysis and stormwater management plan as required by the NPC Certificate. The proponent has also consulted with Department of the Army, Base Realignment and Closure (BRAC) Environmental Office, MassDevelopment, DEP and the DEC regarding the stormwater system to ensure it is designed to meet regulatory requirements and address concerns of the Base Realignment and Closure Clean-up Team (BCT). As further detailed in the SEIR, the stormwater management system incorporates best management practices (BMPs) to protect groundwater and surface water resources on and adjacent to the project site and has been designed to meet the DEP Stormwater Management Policy. As further detailed in the SEIR, the system has been designed to treat at least the first 1.0 inch of rainfall and to incorporate other BMPs to avoid any impairment to adjacent ACEC resources. The proponent has committed to development of a Stormwater Pollution Prevention Plan and should provide this to DEP during the permitting process.

Air Quality and Noise

As further detailed by DEP in its comment letter on the NPC, the proposed facility will not require an air permit providing that the facility meets good engineering design requirements for prevention of air pollution (including requirements relating to equipment line power, indoor operations, and dust, noise and emission controls). The proponent has committed to BMPs prescribed by DEP including the use of low-emitting equipment, facility enclosure and other dust mitigation measures to avoid and minimize air quality impacts. The proponent has also committed to preparation of a noise impact analysis and development of noise mitigation measures to comply with DEP regulations and avoid nuisance conditions.

Traffic

The proponent has committed to a designated truck route from Route 2 at Jackson Gate to the facility (via Jackson road, Patton Road, and Saratoga Boulevard) to minimize impacts to residential areas and retail commerce centers, including the Barnum Gate area. The proponent has also committed to enforcement of the designated route using various measures including contractual agreements with trucking firms, communications with drivers, truck route monitoring, and establishment of a telephone hot-line for communications regarding traffic and other issues relating to facility operation. The proponent should consult with the DEC regarding design of the truck route monitoring program and provide the results of truck route monitoring activities to the DEC.

The proponent has committed to implementation of Transportation Demand Management (TDM) measures to reduce employee vehicle trips. Measures proposed include preferred parking spaces for employees using car pools and driving high efficiency/hybrid vehicles, and secure bicycle storage areas and shower/changing facilities. The proponent has also committed to participate in the Devens-wide TDM program once it becomes re-activated.

Sustainable Design

The proponent has committed to incorporating energy efficient lighting and heating/cooling systems, low water consumption devices, and to a facility recycling program. I encourage the proponent to also consider Leadership in Energy and Environmental Design (LEED) certification for the proposed facility. The proponent has committed to develop an educational center as an integral part of the project so that schools and civic groups, environmental organizations and others can view the facility, and learn about recycling and energy efficiency. I commend the proponent for its efforts in this regard, and encourage the proponent to continue its work to identify opportunities to further enhance the sustainability of project design and operations.

Based on a review of the SEIR, consultation with public agencies, and a review of the comment letters provided on the project, I hereby find that the SEIR adequately and properly complies with MEPA and its implementing regulations. The project may proceed to the state permitting agencies. I note that the SEIR refers to an additional 17,600 sf area north of the

proposed 90,000 sf building that may be used for future expansion of the facility. In the event that future expansion is being considered, the proponent should consult with the MEPA Office to determine if a Notice of Project Change will be required.

November 14, 2005

DATE



Stephen R. Pritchard, Secretary

Comments Received

10/27/05	Department of Environmental Protection, Central Regional Office
11/04/05	Devens Enterprise Commission
11/07/05	Montachusett Regional Planning Commission
11/08/05	Division of Fisheries and Wildlife, Natural Heritage and Endangered Species (NHESP) Program
11/08/05	Elizabeth Sorenson, Director ACEC Program, Department of Conservation and Recreation

SRP/AE/ae



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EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Central Regional Office, 627 Main Street, Worcester, MA 01608

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STEPHEN R. PRITCHARD
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ROBERT W. GOLLEDGE, Jr.
Commissioner

December 12, 2005

Kurt Macnamara
W.K. Macnamara Corporation
P.O. Box 1363
Waltham, MA 02454

Re: CERO – SWM - Devens, Determination of Technical Completeness, Transmittal
Number: W066335, Application for BWPSW01, Site Suitability Report for the W.K.
Macnamara Corporation Construction & Demolition Material Recycling Facility

Dear Mr. Macnamara:

The Department of Environmental Protection (the "Department" or "DEP") has completed the Technical Review of the Site Suitability Report Application – Construction & Demolition Material Recycling Facility submitted by ESS Group, Inc. on behalf of W.K. Macnamara Corporation, regarding the assignment of a site for the proposed C&D material recycling facility in Devens, Massachusetts. The Department received the site assignment application on July 20, 2005.

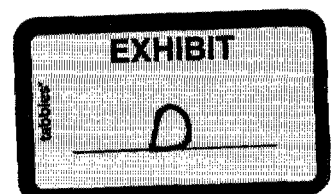
The proposed Construction & Demolition (C&D) material recycling facility will be capable within approximately five years of handling up to one thousand five hundred (1,500) tons per day of C&D waste material for sorting and recycling, including wood, asphalt shingles, corrugated paper, metal, brick and concrete. The proposed facility will consist of an approximately 90,000 square foot building, which will include a totally enclosed material processing area, personnel and administrative offices, and an educational learning center. The proposed project will be located on a vacant industrial zoned 11 acre site identified as Lot 9A on the north side of Independence Drive within the West Rail Industrial Park in Devens, which is currently under the control of the Massachusetts Economic Development Authority. A proposed railroad spur line will also be constructed at the facility on an additional 1.6 acres of adjacent land for the transport of processed material to end use markets. The project will be constructed in accordance with the requirements of 310 CMR 19.000 "Solid Waste Management Facility Regulations".

The Executive Office of Environmental Affairs MEPA unit issued a Certificate on the Supplemental/Single Environmental Impact Report (SEIR) EOE Number 9116, on

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November 14, 2005, that this project adequately and properly complies with the Massachusetts Environmental Policy Act (M.G.L. Chapter 30, Sections 61-62H) and with its implementing regulations (301 CMR 11.00).

The Department issued a Notice of Administrative Completeness of the Site Assignment Application on August 1, 2005 in accordance with the requirements of 310 CMR 16.10(3) of the "Site Assignment Regulations for Solid Waste Facilities" (the "Site Regulations"). The Public Notice appeared in the Groton Landmark, Harvard Hillside, Pepperell Free Press, The Public Spirit Ayer, Shirley Oracle and Townsend Times on August 5, 2005, in the Lowell Sun on August 15, 2005, and in the MEPA Environmental Monitor on September 7, 2005. The abutters were also notified by the Applicant by mail. Proof of Public Notice as required by 310 CMR 16.10(4) was received by this Office on September 28, 2005.

The public comment period of twenty-one (21) days has been completed. During the public comment period, the Department received comments from the Devens Enterprise Commission. All comments were considered in the determination on the Site Suitability Report Application.

The Site Assignment application contains sufficient data to allow the Department to determine the suitability of the site for the proposed C&D material recycling facility in Devens, Massachusetts. The Department has determined that this site meets all site suitability criteria as set forth in 310 CMR 16.40(3)(d), and 16.40(4) of the Site Regulations. The site suitability criteria pertinent to this site and the Applicant's response to the applicable criteria are presented in the Site Suitability Report. The Department hereby issues a positive determination of the suitability for the site assignment of the W.K. McNamara Corporation C&D material recycling facility in Devens, Massachusetts. The proposed C&D material recycling facility in Devens, Massachusetts will be subject to the provisions contained in the Site Suitability Report Application and the following conditions as part of this Approval:

Conditions:

1. As part of the Department's permitting process, the Applicant shall obtain a Solid Waste Management Facility Permit, BWP SW 05 Authorization to Construct (ATC) Permit and BWP SW 06 Authorization to Operate (ATO) Permit from the Department's Solid Waste Management Program, as well as any other applicable permit(s) from the Department.
2. When the Applicant applies for the ATC and ATO referenced in Condition 1, the Applicant shall satisfy the applicable requirements of the "Guidance for Conducting a Facility Impact Assessment for Solid Waste Facility Site Assignment and Permitting in Support of 310 CMR 16.00 & 19.000" dated February 2004. These requirements shall include but not necessarily be limited to implementing the Best Management Practices (BMPs) proposed in Section 4.0 Facility Impact Assessment portion of the Site Suitability Application, and as otherwise referenced in the application. Facility impact assessment requirements shall also include but not necessarily be limited to following all

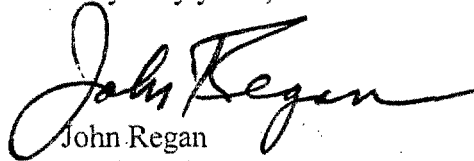
applicable provisions for monitoring, assessing, controlling and if necessary implementing appropriate mitigation measures at the facility.

3. The Department, in issuing the ATC and ATO referenced in condition 1, will require the Applicant to use all feasible means or measures to avoid or minimize adverse environmental impacts. Measures the Department deems necessary to mitigate or prevent harm to the environment are either included as conditions of this report, or are to be included in the MEPA Section 61 Finding that the Applicant shall prepare and submit to the Department, MEPA and others who have commented during the MEPA process, as part of Department's permitting process. Additional specific measures negotiated through the MEPA review process and any MEPA Certificate issued for this project, EOE # 9116, are hereby incorporated into the Site Suitability Report by reference.

Please be advised that, in accordance with 310 CMR 16.20 (7), the Board of Health shall commence a public hearing within 30 days of receipt of the Department's Report on Site Suitability. At least 21 days prior to the commencement of the public hearing, the board shall cause notice of the public hearing to be published in a daily, or if not possible, weekly newspapers of general circulation in the municipality. The notice shall give date, time and location of the public hearing. In addition, the notice shall contain the following statement: "The Department of Environmental Protection has issued a Report in which it determines that the above described place is a suitable place for the proposed facility. Copies of the Department's Report on Suitability and the site suitability criteria (310 CMR 16.00) are available for copying and examination along with the application."

If you have any questions or comments regarding this matter, please contact Stephen Bergstrom at 508-767-2708.

Very truly yours,



John Regan
Section Chief
Solid Waste Management Program

JR/scb

cc: Dammon M. Frecker, ESS Group, Inc., 888 Worcester Street, Suite 240, Wellesley, MA 02482

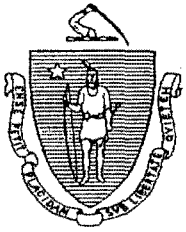
Peter Lowitt, Devens Enterprise Commission, 33 Andrews Parkway, Devens, MA 01434

Ayer Board of Health, 1 Main Street, Ayer, MA 01432

Harvard Board of Health, 13 Ayer Road, Harvard MA 01451

Paul Emond, DEP- BWP, One Winter Street- 8th floor, Boston, MA 02108

Suzanne Condon, Department of Public Health, Center for Environmental Health, 250
Washington Street, 7th Floor, Boston, MA 02108



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EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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Secretary

ROBERT W. GOLLEDGE, Jr.
Commissioner

August 1, 2005

Kurt Macnamara
W.K. Macnamara Corporation
P.O. Box 1363
Waltham, MA 02454

Re: CERO – SWM – Devens, Determination of Administrative Completeness, Transmittal Number: W066335, Application for BWPSW01, Site Suitability Report for the W.K. Macnamara Corporation Construction & Demolition Material Recycling Facility

Dear Mr. Macnamara:

The Department of Environmental Protection (the "Department" or "DEP") has completed its Administrative Review of the permit application listed above and has determined that the application is administratively complete. Accordingly, the Department will now begin its Technical Review.

Please be advised that this site assignment application has been assigned Report/Transmittal Number W066335, and this report number should be used in all future correspondence regarding this permit application. The Department has determined that the application fulfills the submission requirements as set forth in 310 CMR 16.00, the "Site Assignment Regulations for Solid Waste Facilities" ("Site Regulations").

Upon receipt of this Notice of Administrative Completeness, it is the Applicant's responsibility to comply with the public notice requirements set forth in Section 16.10 (4) of the Site Regulations. The Applicant must provide proof to the Department that the notification requirements of 310 CMR 16.10(4) have been satisfied. Mailing by Certified Mail – Return Receipt Requested is a recommended mechanism for proof of abutter notification.

According to 310 CMR 4.04, the Department would have a total of eighty-one (81) days (21 days Administrative Review and 60 days Technical Review) to issue a final decision to grant or deny the permit. Please be advised that in accordance with the requirements of 310 CMR 16.08(5)(d) 2, the Department will not be able to complete the Technical Review of the application until the Secretary of Environmental Affairs issues the final MEPA certificate on the

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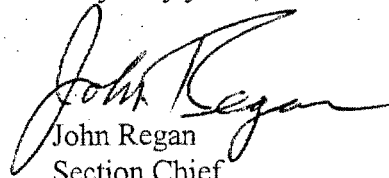
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project's fulfillment with the MEPA process.

Provided your application is technically adequate, and none of the contingencies outlined in 310 CMR 4.04 occur, the Department will issue a final decision within the timeframes listed above. You will be entitled to a refund of your application fee should the Department fail to complete its final review of your application and make a decision to grant or deny the permit within these timeframes.

If you have any further questions or comments regarding this matter, please contact Stephen Bergstrom at 508-767-2708.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Regan", written over a horizontal line.

John Regan
Section Chief
Solid Waste Management Program

cc: Dammon M. Frecker, ESS Group, Inc., 888 Worcester Street, Suite 240, Wellesley, MA 02482

Peter Lowitt, Devens Enterprise Commission, 33 Andrews Parkway, Devens, MA 01434

Harvard Board of Health, 13 Ayer Road, Harvard MA 01451

Ayer Board of Health, Ayer Town Hall, 1 Main Street, Ayer, MA 01432

Suzanne Condon, Department of Public Health, Center for Environmental Health, 250 Washington Street, 7th Floor, Boston, MA 02108

Paul Emond, DEP- BWP, One Winter Street- 8th floor, Boston, MA 02108



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Mr. Kurt Macnamara
W.K. Macnamara Corporation
P.O. Box 1363
Waltham, Ma. 02454

February 24, 2006

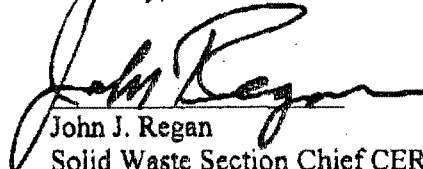
Re: FAM

Dear Mr. Macnamara,

The Mass Department of Environmental Protection (MassDEP) reviewed your request for a determination whether your proposed construction and demolition debris processing facility and transfer station, to be located at lot 9A on the north side of Independence Drive within the West Rail Industrial Park at Devens, needs a Financial Assurance Mechanism (FAM) as required by Mass DEP Regulation 310 CMR 19.051. The MassDEP has determined that a FAM is not required for your facility at this time based on our understanding of your business plans.

This letter does not obviate the Department's authority under the provisions of 310 CMR 19.051 (b) to require a FAM for the facility in the future should on-site conditions necessitate the need for financial assurances. If you have any questions about this determination, please feel free to call John McMichael of my office at (508)- 767-2833.

Sincerely,


John J. Regan
Solid Waste Section Chief CERO
Bureau of Waste Prevention

W:\swm\towns\DevensFAMltr(02-23-02)

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Devens Enterprise Commission

**33 Andrews Parkway
Devens, MA 01433**

Phone: (978) 772-8831 Fax: (978) 772-1529

TO: *Interested Parties*

From: *Peter Lowitt / Mary Quinn*

Date: Feb. 1, 2006

Pages including this cover page: 1

Comments: Publication Dates

Nashoba Pub Feb. 3, 2006

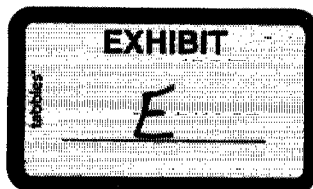
Devens Enterprise Commission

**NOTICE OF DECISION
SOLID WASTE FACILITY SITE ASSIGNMENT
DEVENS ENTERPRISE COMMISSION**

Notice is hereby given that on January 31, 2006 the Devens Enterprise Commission (the "DEC") issued a final decision, approving with conditions, the application of the W.K. Macnamara Corporation, P. O. Box 1363, Waltham, MA 02454, for a site assignment under Massachusetts General Laws ("M.G.L.") Ch. 111, sec. 150A, 310 Code of Massachusetts Regulations ("CMR") 16.00 and 974 CMR 8.03, to construct, maintain and operate a construction and demolition material ("C&D") recycling facility on an approximately 11-acre parcel at Lot 9A, Independence Drive, Devens in the West Rail Industrial Park. The facility will be capable of handling up to 1500 tons per day of C&D materials, including wood, asphalt shingles, corrugated paper, metal, brick and concrete. These materials will be sorted to facilitate recycling for beneficial end uses. The final decision of the DEC is available for inspection and copying during normal business hours at the DEC office at 33 Andrews Parkway, Devens.

Any person aggrieved by the decision of the DEC may, within 30 days of publication of this Notice of Decision, appeal under the provisions of M.G.L. c. 30A, § 14.

DEVENS ENTERPRISE COMMISSION



DEVENS ENTERPRISE COMMISSION
SERVING AS THE DEVENS BOARD OF HEALTH

In the Matter of:

W.K. MACNAMARA CORPORATION
Lot 9A, Independence Drive

Site Assignment Application

DECISION

INTRODUCTION

The Devens Enterprise Commission acting as the Board of Health of the Devens Regional Enterprise Zone ("the DEC"), held a public hearing, upon due notice, on the application of W.K. Macnamara Corporation ("Applicant") for a site assignment for a Construction & Demolition Material Recycling Facility ("the Facility") to be located at Lot 9A, Independence Drive, Devens, Massachusetts (the "Application"). By a vote taken on January 31, 2006 and after considering the record of the hearing, and subject to the conditions set forth below, the DEC has determined that the siting of the Facility on property located at Lot 9A, Independence Drive, in the Devens Regional Enterprise Zone ("the Site") will not constitute a danger to the public health, safety or the environment and therefore grants the site assignment. The DEC finds that it is necessary to impose certain conditions as set forth in this decision to ensure the protection of public health, safety, and the environment, taking into account the specific siting criteria which the DEC applied in this proceeding.

THE PROPOSED FACILITY

The Applicant proposes to develop a construction and demolition material recycling facility, with both truck and rail service. The Facility will be located on an approximately 11-acre parcel on Independence Drive in the West Rail Industrial Park which is in the Devens Regional Enterprise Zone. The project will involve the construction of approximately 90,000 square feet of structures, which structures will include material processing and office space, an educational center and associated parking areas and a railroad spur line from the Boston and Maine rail line to the Site. Access to the Site will be via paved roads from Independence Drive. ESS, Site Suitability Report Application, DEP Transmittal No. W 066335, p. 1 (the "Application").

The Facility, will be able to receive up to 1500 tons per day. It will receive construction and demolition materials from Devens and the surrounding region, which materials will be transported to the Facility by trucks or rail and sorted in the Facility to facilitate the recycling of the materials. All processing will take place within the enclosed Facility. The Application, p.1. The plans for the Facility, including the Site Layout Plan, the Land Use Site Plan, and the Water Resources Site Plan are part of the Application. Application, Figures 2, 3 and 4. The Facility

will accept construction and demolition material for sorting and recycling, including wood, asphalt shingles, corrugated paper, metals, brick and concrete. The Facility will not accept putrescible materials. Application, p.5.

PROCEDURES

On July 20, 2005 the Applicant submitted to the Department of Environmental Protection ("DEP") a Site Suitability Report Application DEP Transmittal #W 066335 for the development of the Facility (which report is dated July 18, 2005). On September 29, 2005 the Applicant filed its Single Environmental Impact report EOE File No. 9116, which report was approved by the Secretary of the Executive Office of Environmental Affairs on November 14, 2005. The DEP issued its Notice of Administrative Completeness on August 1, 2005. The DEP issued its determination of technical completeness and positive site suitability report on December 12, 2005.

The DEC hired attorney Ed Selig as the hearing officer for the hearing, caused the hearing to be duly posted and published in accordance with 310 CMR 16.20(7). The site assignment hearing commenced on January 10, 2006 and closed that same night, except that the hearing officer ordered the record to be held open for seven days for purposes of allowing the Applicant to submit a list of site suitability conditions which it found acceptable. The DEC heard testimony from the Applicant and its consultants and from the DEC's consultants.

On January 31, 2006, at a duly posted meeting, the DEC deliberated on the Application and voted to issue the site assignment, subject to the conditions listed below.

STANDARD FOR DECISION

As set forth in 310 CMR 16.20(10)(k)(2) a board of health shall determine that a site is suitable for assignment as a site for a new solid waste facility unless it makes a finding, supported by the record of the hearing, that the siting thereof would constitute a danger to the public health, safety or environment, based on the siting criteria set forth and established under 310 CMR 16.40.

FINDINGS CONCERNING SITE SUITABILITY CRITERIA

In the following section, the DEC sets forth its findings, based upon the Application and the evidence in the Record of this proceeding, with respect to the compliance of the Site with the specific site suitability criteria for a solid waste handling facility set forth in 310 CMR 16.40(3)(d), the general site suitability criteria set forth in 310 CMR 16.40(4), the DEC siting criteria set forth at 974 CMR 8.03(2) and the siting criteria set forth in MGL c. 150A ½.

I. Compliance with Specific Site Suitability Criteria for Solid Waste Handling Facilities (310 CMR 16.40(3)(d))

- A. **No site shall be determined to be suitable or be assigned as a solid waste handling facility where the waste handling area would be within the Zone I of a public water supply.**

The Record contains evidence demonstrating that the Zone I of the closest public water supply well to the Site, Grove Pond Well #1, is approximately 2,300 feet to the east-northeast of the Site, placing it far outside the waste handling area of the proposed facility. *See, e.g.,* Application at p. 8 and Figure 3; Vollmer Report at p. 2. Both the Applicant and DEC's consultant agree that the waste handling area would be outside any Zone I of a public water supply. As a result, the DEC finds that the Site complies with this siting criterion.

- B. **No site shall be determined to be suitable or be assigned as a solid waste handling facility where the waste handling area would be within the Interim Wellhead Protection Area (IWPA) or a Zone II of an existing public water supply well within a proposed drinking water source area, provided that the documentation necessary to obtain a source approval has been submitted prior to the earlier of either the site assignment application, or if the MEPA process does apply, the Secretary's Certificate on the Environmental Notification Form or Notice of Project Change, or where applicable, the Secretary's Certificate on the EIR or Final EIR, unless restrictions are imposed to minimize the risk of an adverse impact to the groundwater; and either (a) the proponent can demonstrate to the satisfaction of the Department that the facility cannot reasonably be sited outside the IWPA or Zone II; or (b) there would be a net environmental benefit to the groundwater by siting the facility within the Zone II or the IWPA where the site has been previously used for solid waste management activities.**

The Record contains evidence demonstrating that the Zone II for the Grove Pond Wells is located no less than 390 feet from the entrance to the Site, placing the waste handling area of the Site outside the Zone II for the Grove Pond Wells and any other nearby wells. *See, e.g.,* Application at p. 8 and Figure 3; Vollmer Report at p. 2. Both the Applicant and the DEC's consultant agree that the waste handling area would be outside any Zone II or Interim Wellhead Protection Areas of a public water supply. As a result, the DEC finds that the Site complies with this siting criterion.

- C. **No site shall be determined to be suitable or be assigned as a solid waste handling facility where the waste handling area would be within the Zone A of a surface drinking water supply.**

The Record contains evidence demonstrating that the closest surface drinking water supply to the Site is Nagog Pond located almost 8 miles to the southeast of the Site. *See, e.g.,* Application at p. 8 and Figure 3. Both the Applicant and the DEC's consultant agree that the waste handling area would not be within the Zone A of that drinking water supply. *See* Vollmer Report at p. 2. As a result, the DEC finds that the Site complies with this siting criterion.

- D. **No site shall be determined to be suitable or be assigned as a solid waste handling facility where the waste handling area would be within 500 feet upgradient, and where not upgradient, within 250 feet, of an existing or potential private water supply well existing or established as a Potential Private Water Supply at the time of submittal of the application, provided however, the applicant may show a valid option to purchase the restricted area including the well and a guarantee not to use the well as a drinking water source, the exercise of which shall be a condition of any site assignment.**

The Record contains evidence demonstrating that the solid waste handling area is not located within 500 feet upgradient, or otherwise within 250 feet, of an existing or potential private water supply well existing or established as a Potential Private Water Supply at the time this decision was written. The closest known private drinking water supply well is at Red Tail Golf Course, located approximately 4,500 feet from the proposed entrance to the Site. See, Water Resources Protection District CAD drawing, VA Report, page 2. Both the Applicant and the DEC's consultant have agreed that the waste handling area of the Site is not within 500 feet upgradient or otherwise within 250 feet of that well. See Vollmer Report at p. 4. As a result, the DEC finds that the Site complies with this siting criterion.

- E. **No site shall be determined to be suitable or be assigned as a solid waste handling facility where the waste handling area of a transfer station that proposes to receive more than 50 tons per day of solid waste is 500 feet from (i) an occupied residential dwelling or (ii) a prison, health care facility, elementary school, middle school or high school, children's preschool, licensed day care center, or senior center or youth center, excluding equipment storage or maintenance structures.**

The Record contains evidence demonstrating that there is no prison, health care facility, licensed day care center, senior center or youth center within one-half mile of the Site. See, e.g., Application at p. 9; Vollmer Report at pp. 2-3. The closest school is the Francis W. Parker Charter School located approximately 2,000 feet to the west of the Site. *Id.* The closest residences are located a similar distance to the west. *Id.* The Applicant and the DEC's consultant agreed that the prison-owned maintenance facility at Devens is not operated as a prison. See Vollmer Report at p. 3. The Applicant and the DEC's consultant agree that there are no such facilities within 500 feet of the waste handling area of the Site. As a result, the DEC finds that the Site complies with this siting criterion.

- F. **No site shall be determined to be suitable or be assigned as a solid waste handling facility where the waste handling area would be within the Riverfront Area as defined at 310 CMR 10.00.**

The Record contains evidence demonstrating that the closest Riverfront Area is associated with Willow Branch and is located nearly one-half mile to the west of the Site. See, e.g., Application at p. 9 and Figure 3. Both the Applicant and the DEC's consultant agree that the waste handling area of the Site would not be within a Riverfront Area. See *id.*; Vollmer Report at p. 3. As a result, the DEC finds that the Site complies with this siting criterion.

- G. **No site shall be determined to be suitable or be assigned as a solid waste handling facility where the maximum high groundwater table would be within two feet of the ground surface in areas where waste handling is to occur unless it is demonstrated that a two-foot separation can be designed to the satisfaction of the Department.**

The Record contains evidence demonstrating that the Applicant performed sub-surface investigations of the Site, including the installation of monitoring wells, and determined that the depth to groundwater was in excess of 25 feet. *See, e.g., Application at pp. 9-10.* Both the Applicant and the DEC's consultant agree that the maximum high groundwater table will not be within two feet of the ground surface on the Site. *See Vollmer Report at p. 3.* Consequently, the DEC finds that the Site complies with this siting criterion.

II. **Compliance with General Site Suitability Criteria for Solid Waste Management Facilities (310 CMR 16.40(4))**

- A. **Agricultural Lands.** No site shall be determined to be suitable or be assigned as a solid waste management facility where:

1. the land is classified as Prime, Unique, or of State and Local Importance by the United States Department of Agriculture, Natural Resources Conservation Service; or
2. the land is deemed Land Actively Devoted to Agricultural or Horticultural Uses, except where the facility is an agricultural composting facility; and
3. a 100-foot buffer would not be present between the facility and those lands classified at 310 CMR 16.40(4)(a)1. or 2.

The Record contains evidence demonstrating that the Site is not classified as Prime, Unique, or of Local Importance by the U.S. Department of Agriculture, Natural Resources Conservation Service or deemed Land Actively Devote to Agricultural or Horticultural Uses, and that the closest private agricultural land is located 1.3 miles to the east of the Site, while the closest designated horticultural lands are Holy Hill and Westward Orchards, each approximately 2 miles from the Site. *See, e.g., Application at p. 10.* The Site is not within (or within 100 feet of) the designated agricultural lands. Both the Applicant and the DEC's consultant agree that the Site meets this criterion. *See Vollmer Report at p. 3.* As a result, the DEC finds that the Site complies with this siting criterion.

- B. **Traffic and Access to the Site.** No site shall be determined to be suitable or be assigned as a solid waste management facility where traffic impacts from the facility operation would constitute a danger to the public health, safety, or the environment taking into consideration the following factors:

1. traffic congestion;
2. pedestrian and vehicular safety;

3. road configurations;
4. alternate routes; and
5. vehicle emissions

The Record contains evidence demonstrating that the Site will not create traffic impacts that will constitute a danger to the public health, safety, or the environment taking into consideration each of the factors listed above, (*See, e.g.*, Application at pp. 10-13; Single Environmental Impact Report at §§ 5.1, 5.2, and 9.4; Affidavit of Eric B. Eby, P.E.; Affidavit of Peter H. Guldberg, CCM at ¶6(a)), and contains evidence of an analysis of traffic impacts from the proposed project that identifies no significant concerns with traffic congestion, pedestrian or vehicular safety, road configurations, haul routes, and vehicle emissions. *See id.* Both the Applicant and DEC's consultant agree that the Site meets this criterion. *See Vollmer Report* at pp. 3-7. As a result, the DEC finds that the Site complies with this siting criterion.

C. Wildlife and Wildlife Habitat. No site shall be determined to be suitable or be assigned as a solid waste management facility where such siting would:

1. have an adverse impact on Endangered, Threatened, or Special Concern species listed by the Natural Heritage and Endangered Species Program of the Division of Fisheries and Wildlife in its database;
2. have an adverse impact on an Ecologically Significant Natural Community as documented by the Natural Heritage and Endangered Species Program in its database; or
3. have an adverse impact on the wildlife habitat of any state Wildlife Management Area.

The Record contains evidence demonstrating, through review of the 2003 Natural Heritage Atlas and the Botanical Survey Report and consultations with staff at the Massachusetts Natural Heritage and Endangered Species Program and U.S. Fish and Wildlife Service, that the siting would not have an adverse impact on (i) Endangered, Threatened, or Special Concern species listed by the Natural Heritage and Endangered Species Program of the Division of Fisheries and Wildlife in its database and (ii) an Ecologically Significant Natural Community as documented by the Natural Heritage and Endangered Special Program in its database, or (iii) the wildlife habitat of any state Wildlife Management Area. *See, e.g.*, Application at pp. 13-15; Single Environmental Impact Report at Appendix D. Both the Applicant and DEC's consultant agree that the Site meets this criterion. *See Vollmer Report* at p. 7. As a result, the DEC finds that the Site complies with this siting criterion.

D. Areas of Critical Environmental Concern. No site shall be determined to be suitable or be assigned as a solid waste management facility where such siting:

1. would be located within an Area of Critical Environmental Concern (ACEC), as designated by the Secretary of the Executive Office of Environmental Affairs; or
2. would fail to protect the outstanding resources of an ACEC as identified in the Secretary's designation if the solid waste management facility is to be located outside, but adjacent to the ACEC.

The Record contains evidence demonstrating that the nearest ACEC to the Site is the Squannassit ACEC, which is located approximately 1,300 feet to the north and northeast. *See, e.g.,* Application at p. 15 and Figure 4. As a result, the Applicant and the DEC's consultant agree that the Site is not within an ACEC. The Record contains evidence that the only potential adverse impact of the Facility and the Site on the ACEC is associated with stormwater runoff and contamination. These potential impacts should be mitigated in the Storm Water Pollution Prevention Plan and the design and implementation of stormwater best management practices. *See* Application at pp. 15-16. Both the Applicant and the DEC's consultant agree that the Site is not within an ACEC and will not fail to protect the Squannassit ACEC's outstanding resources. *See* Vollmer Report at p. 8. Consequently, the DEC finds that the Site complies with this siting criterion.

E. **Protection of Open Space.** No site shall be determined to be suitable or be assigned as a solid waste management facility where such siting would have an adverse impact on the physical environment of, or on the use and enjoyment of:

1. state forests;
2. state or municipal parklands or conservation land, or other open space held for natural resource purposes in accordance with Article 97 of the Massachusetts Constitution;
3. MDC reservations;
4. lands with conservation, preservation, agricultural, or watershed protection restrictions approved by the Secretary of the Executive Office of Environmental Affairs; or
5. conservation land owned by private non-profit land conservation organizations and open to the public.

The Record contains evidence demonstrating that the closest areas to the Site that fall within the categories specified above are Pirone Park (which is located more than one-half mile to the northeast of the Site on the opposite side of Grove Pond), Phelps Park (which is located more than one-half mile to the east of the Site on the southern shore of Grove Pond), and the Nashua River Conservation Land (which is located more than one-half mile to the northwest of the Site). *See, e.g.,* Application at pp. 16-17, Table 1, and Figure 4. Record evidence also indicates that the facility and its operations will not have impacts to the environment or enjoyment of these protected areas. *Id.* The Applicant and the DEC's consultant agree that the Site meets this criterion. *See* Vollmer Report at p. 8. As a result, the DEC finds that the Site complies with this siting criterion.

F. **Potential Air Quality Impacts.** No site shall be determined to be suitable or be assigned as a solid waste management facility where the anticipated emissions from the facility would not meet required state and federal air quality standards or criteria or would otherwise constitute a danger to the public health, safety or the environment, taking into consideration:

1. the concentration and dispersion of emissions
2. the number and proximity of sensitive receptors; and
3. the attainment status of the area.

The Record contains evidence demonstrating that the anticipated emissions from the Site will meet state and federal air quality standards or criteria, taking into account each of the factors listed above. *See, e.g.,* Application at pp. 17-19; Affidavit of Peter H. Guldberg, CCM; Air Quality Study for the W.K. Macnamara C&D Material Recycling Facility, Devens, Massachusetts (dated December 5, 2005) ("Air Quality Study"). The Record also contains evidence demonstrating that the Air Quality Study was performed in accordance with the DEP requirements and industry standards. Both the Applicant and the DEC's consultant agree that the anticipated emissions from the Facility will meet applicable standards and will not constitute a danger to public health, safety, or the environment. *See* Vollmer Report at pp. 8-11. Consequently, the DEC finds that the Site complies with this siting criterion.

G. **Potential for the Creation of Nuisances.** No site shall be determined to be suitable or be assigned as a solid waste management facility where the establishment or operation of the facility would result in nuisance conditions which would constitute a danger to the public health, safety or the environment taking into consideration the following factors:

1. noise;
2. litter;
3. vermin such as rodents and insects;
4. odors;
5. bird hazards to air traffic; and
6. other nuisance problems.

The Record contains evidence demonstrating that neither the establishment nor operation of the Facility will result in nuisance conditions that would constitute a danger to the public health, safety, or the environment taking into the factors detailed above. *See, e.g.,* Application at p. 19; Sound Study for the W.K. Macnamara C&D Material Recycling Facility, Devens, Massachusetts (dated November 21, 2005) ("Sound Study"); Affidavit of Peter Guldberg, CCM. With respect to noise, the Record contains the Sound Study performed by Applicant's consultants. The Applicant and the DEC's consultant have agreed that the Facility will not cause a nuisance that would constitute a danger to the public health, safety, or the environment with respect to noise. The Record also contains evidence relative to the other five factors demonstrating that no nuisance conditions that would constitute a danger to the public health,

safety, or the environment will be created with respect to these concerns. *See, e.g.,* Application at p. 19. Both the Applicant and the DEC's consultant have determined that with respect to these factors the Facility will not result in nuisance conditions that constitute a danger to the public health, safety, or environment. *See* Vollmer Report at pp. 13-14. As a result, the DEC finds that the Site complies with this siting criterion.

- H. **Size of Facility.** No site shall be determined to be suitable or be assigned as a solid waste management facility if the size of the proposed site is insufficient to properly operate and maintain the proposed facility. The minimum distance between the waste handling area or deposition area and the property boundary shall be 100 feet, provided that a shorter distance may be suitable for that portion of the waste handling or deposition area which borders a separate solid waste management facility.

The Record contains evidence demonstrating that the size of the Site is sufficient to properly operate and maintain the Facility and that the minimum distance between the waste handling area and the property boundary shall be at least 100 feet. *See, e.g.,* Application at p. 20. The Record demonstrates that the 90,000-square-foot Facility is proposed for a Site of approximately 11 acres. The Applicant and the DEC's consultant have agreed that the size of the Site is sufficient to properly operate and maintain the Facility. In addition, the Record contains evidence demonstrating that the distance between the property boundary and the waste handling area shall be at least 100 feet. *See, e.g.,* Application at pp. 19-20; Correspondence from ESS Group, Inc. regarding Vollmer Associates Report (dated December 30, 2005 and marked as Exhibit 13 at the Hearing). Both the Applicant and the DEC's consultant agree that the required 100-foot distance will be maintained. *See* Vollmer Report at p. 14. As a result, the DEC finds that the Site complies with this siting criterion.

- I. **Areas Previously Used for Solid Waste Disposal.** Where an area adjacent to the site of a proposed facility has been previously used for solid waste disposal the following factors shall be considered by the Department in determining whether a site is suitable and by the board of health in determining whether to assign a site:

1. the nature and extent to which the prior solid waste activities on the adjacent site currently adversely impact or threaten to adversely impact the proposed site;
2. the nature and extent to which the proposed site may impact the site previously used for solid waste disposal; and
3. the nature and extent to which the combined impacts of the proposed site and the previously used adjacent site adversely impact on the public health, safety and the environment; taking into consideration:
 - a. whether the proposed site is an expansion of or constitutes beneficial integration of the solid waste activities with the adjacent site;

- b. whether the proposed facility is related to the closure and/or remedial activities at the adjacent site; and
- c. the extent to which the design and operation of the proposed facility will mitigate existing or potential impacts from the adjacent site.

The Record contains evidence demonstrating that the Shepley's Hill Landfill located adjacent to the Site will not adversely affect the Site, the Facility will not adversely affect the landfill, and the combined impacts of the Facility and Shepley's Landfill will not adversely impact public health, safety, and the environment. Record evidence demonstrates that the Site is bordered on the north by the now-closed and capped Shepley's Hill Landfill, *see, e.g.*, Application at p. 20, groundwater from the landfill flows away from the Site toward the north, any Site runoff will be contained and channeled in the stormwater detention basin and conveyance system, which has been designed not to impact the groundwater flow of the area, and the construction and operation of the facility will not impact Shepley's Hill Landfill in any way. Record evidence also demonstrates that the Site is also sufficiently distant from the landfill to not impede any landfill remediation activities, including improvements to the landfill cap. Both the Applicant and the DEC's consultant agree that Shepley's Landfill will not adversely impact the Site, the Site will not adversely impact Shepley's Landfill, and the combined impacts of the proposed facility and Shepley's Landfill will not adversely impact public health, safety, and the environment. *See Vollmer Report at pp. 14-15.* As a result, the DEC finds that the Site complies with this siting criterion.

- J. **Existing Facilities.** In evaluating proposed sites for new solid waste management facilities the Department and the board of health shall give preferential consideration to sites located in municipalities in which no existing landfill or solid waste combustion facilities are located. This preference shall be applied only to new facilities which will not be for the exclusive use of the municipality in which the site is located. The Department and the board of health shall weigh such preference against the following considerations when the proposed site is located in a community with an existing disposal facility:

- 1. the extent to which the municipality's or region's solid waste needs will be met by the proposed facility; and
- 2. the extent to which the proposed facility incorporates recycling, composting or waste diversion activities.

The Record contains evidence that there are no currently operating landfills or waste incinerators in the communities surround the proposed project. *See, e.g.*, Application at p. 20. In addition, Record demonstrates that there are no construction and demolition material recycling facilities within any of the communities around Devens. Both the Applicant and the DEC's consultant agree that the Site meets the requirements of this criterion. *See Vollmer Report at p. 15.* As a result, the DEC finds that the Site meets this siting criterion in that the DEC has given preferential consideration to the siting of this Facility.

- K. **Consideration of Other Sources of Contamination or Pollution.** The determination of whether a site is suitable and should be assigned as a solid waste management facility shall consider whether the projected impacts of the proposed facility pose a threat to public health, safety or the environment, taking into consideration the impacts of existing sources of pollution or contamination as defined by the Department, and whether the proposed facility will mitigate or reduce those sources of pollution or contamination.

The Record contains evidence that the projected impacts from the proposed use of the Facility will not pose a threat to public health, safety, or the environment, taking into consideration the impacts of existing sources of pollution or contamination. The Record demonstrates that the closed Shepley's Hill Landfill will not adversely impact the Site and that the Site and its operations will not adversely impact Shepley's Hill Landfill. *See, e.g.,* Application at p. 20. Both the Applicant and the DEC's consultant agree that impacts from the the Facility will not pose a threat to public health, safety, or the environment, taking into consideration the impacts of existing sources of pollution or contamination. *See* Vollmer Report at pp. 15-17. As a result, the DEC finds that the projected impacts of the Facility do not pose a threat to public health, safety, or the environment taking into consideration the impacts of existing sources of pollution or contamination and that the Site meets this siting criterion.

- L. **Regional Participation.** The Department and the board of health shall give preferential consideration to sites located in municipalities not already participating in a regional disposal facility. The Department and the board of health shall weigh such preference against the following considerations when the proposed site is located in a community participating in a regional disposal facility:

1. the extent to which the proposed facility meets the municipality's and the region's solid waste management needs; and
2. the extent to which the proposed facility incorporates recycling, composting, or waste diversion activities.

The Record contains evidence that the proposed project is necessary for the management of the Devens area's future construction and demolition recycling needs as well as the broader needs of the community as regulations regarding waste separation and recycling are implemented. Record evidence demonstrates that the community does not participate in a regional disposal facility. Both the Applicant and the DEC's consultant agree that the Site meets the requirements of this criterion. *See* Vollmer Report at p. 17. As a result, DEC finds that the Site meets this siting criterion and must be granted preferential consideration for site assignment.

III. Compliance with DEC Siting Criteria (974 CMR 8.03(2))¹

- A. **If the DEC finds that topography, vegetation, or other natural features, or existing structures do not produce sufficiently protective conditions, including visual screening and/or necessary environmental mitigation, the DEC may require separation (from the solid waste facility to sensitive receptors) or other dimensional requirements that are more stringent than those set forth in 310 CMR 16.00.**

The Record contains evidence that the topographical, vegetative, and other natural features as well as the existing structures provide sufficiently protective conditions, including visual screening; with respect to sensitive receptors. *See Vollmer Report at p. 18.* As a result, the DEC finds that the Site meets this siting criterion.

Minimum separation or other dimensional requirements shall be measured from the closest edge of a waste deposition area, in the case of a landfill, to the closest point of the sensitive receptor. In the case of a processing or combustion facility, the measurement shall be from the closest edge of the principal structure to the closest point of the sensitive receptor.

The Record contains evidence that the Facility meets this criterion using the measurement methodology required by 310 CMR 16.40. *See, e.g., Application at pp. 8-21.* Both the Applicant and DEC's consultant agree that the Site meets this criterion. *See Vollmer Report at p. 18.* As a result, the DEC finds that the Site meets this siting criterion.

- B. **The criteria set forth on Chapter 111, Section 150A ½,**

The Record contains evidence that the criteria set forth in G.L. c. 111, § 150A ½, are met. Both the Applicant and DEC's consultant agree that the Site meets this criterion. *See Vollmer Report at pp. 17-18.* As a result, DEC finds that the Site meets this siting criterion.

CONDITIONS FOR SITE ASSIGNMENT

As used in the conditions set forth below:

"Applicant" means W. K. Macnamara Corporation, its successors and assigns. Applicant also includes a designee, so that a condition that requires that the Applicant perform, means that the Applicant, while retaining responsibility for that performance, may cause someone else to perform it.

¹ The Applicant has filed an Objection to Consideration of DEC Site Suitability Criteria. The DEC notes the Applicant's objection, overrules it and requires compliance with the DEC regulations. The DEC also notes that the Applicant is seeking to preserve its right to make this objection in subsequent proceedings concerning this Site Assignment.

"DEC" includes the Devens Enterprise Commission, and its successors.

1. The Facility shall be completely enclosed with all recycling operations being conducted within the building.
2. The Applicant shall maintain the Facility in compliance with 974 CMR 8.03 (3) of the DEC Regulations.
3. The Applicant shall obtain all necessary permits, approvals and modifications prior to the commencement of operations.
4. Prior to commencement of operations and thereafter, the Facility shall comply with all applicable OSHA requirements.
5. The Applicant shall train employees as necessary, on the safe operation of the equipment that they operate or maintain on the Facility.
6. The DEC shall have the right to perform unscheduled inspections of the Facility during operational hours or at any reasonable time requested by the DEC, for purposes of confirming compliance with the conditions of this Site Assignment.
7. The Facility shall have fire suppression systems that meet the applicable Massachusetts Building Code and the requirements of the Devens Fire Department in existence upon the issuance of the building permit.
8. The Facility shall accept no more than 1500 tons per day of solid waste materials.
9. The Facility shall not knowingly accept hazardous, chemical, medical, radioactive, or other special waste as defined by the Department of Environmental Protection. The Applicant shall provide or cause to be provided prompt (no more than within 24-hours of discovery) notification to the DEC and the DEP of receipt of any prohibited material in accordance with this Site Assignment and 310 CMR 19.207(9).
10. This Facility shall not accept septage waste.
11. This Facility shall follow and enforce all stormwater management conditions approved as part of this Application or as required by law.
12. As described in the Application, all doors to the Facility shall be closed except when it is necessary for a truck to enter or leave the building, for maintenance purposes, or for pedestrian and rail access and egress.
13. The Applicant shall promptly repair any building damage that compromises the performance or ability of the Facility to contain noise and fugitive dust.
14. High performance particulate filters shall be maintained and replaced in accordance with manufacturer's specifications and/or Facility test demonstrations.

15. The Applicant shall take or cause to be taken, those measures necessary to prevent littering and/or the accumulation of debris on the site, any sidewalk, public way, or adjacent property including but not limited to maintaining adequate staff to ensure compliance with this condition.
16. The contents of any truck or other vehicle (including rail cars) using the Facility to deliver or remove solid waste and recyclables shall be covered either by a canvas tarpaulin or other equivalent method to ensure that all materials are covered.
17. Prior to commencement of operations the Applicant shall retain the services of a professional pest controller or other such professional licensed in the Commonwealth of Massachusetts and provide a copy of the contract to the DEC. The contract shall require the firm to inspect the site for vermin, including but not limited to birds, rats, and insects at least once per year and if evidence of same exists, to notify the DEC and to undertake appropriate actions to eliminate the vermin immediately.
18. The Applicant shall not store recyclables on-site for more than one hundred and eighty (180) consecutive days.
19. The Applicant shall instruct all truck traffic traveling to and from the Facility to use the preferred truck route (Jackson Gate from Route Two shall be the primary means of truck access to and from the site on a permanent basis, with other gates to be used only in an emergency situation when Jackson is unavailable). The Applicant shall use Jackson Gate to the maximum degree feasible and shall take measures to monitor and control truck access/egress, except to the extent modified by the DEC, or by any public safety agency (e.g., in an emergency).
20. In accordance to 974 CMR 8.03, vehicular traffic shall not be allowed to park or queue outside the bounds of the Site.
21. Overnight queuing of trucks is not permitted on the Site access road.
22. In accordance to 974 CMR 8.03, no vehicle shall be left in an idling state within the Site for more than one (1) hour, with (ten) 10 minutes being typical.
23. Hours of operation for receiving and processing materials in the facility and on the site of the Facility shall be from 7 AM to 5 PM Monday-Friday with no deliveries accepted outside of these hours. The loading or unloading of railroad cars shall be limited to the same hours of operation as vehicles. Delivery of railroad cars is not restricted by these conditions. These hours of operation shall not be increased without the advance written approval of the DEC.
24. All floor drains in the Facility and on the Site shall be kept free and clear of debris.
25. The DEC may modify, suspend or terminate this Site Assignment in accordance with the provisions of M.G.L. c. 111, Section 150 A, 310 CMR 16.22 and 974 CMR 8.03 for failure

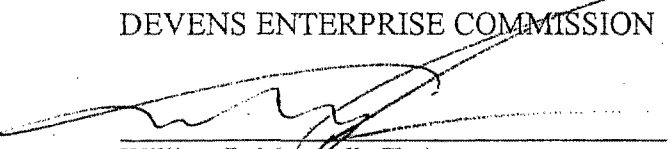
to comply with the conditions described herein, and further, in its discretion, may take any other enforcement or remedial action available in law or equity.

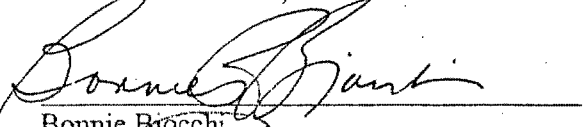
26. The Applicant shall submit for review and approval by the DEC both the operations and maintenance plan and the Facility's Asbestos and Hazardous Materials Inspection Protocol prior to issuance of a certificate of occupancy.
27. Prior to issuance of a certificate of occupancy, the Applicant shall provide the DEC with sample (they may be redacted) hauling (truck) contract(s) language demonstrating that the haulers have been advised of the Devens designated truck route and said contract(s) are subject to revocation upon repeated non-use of said route.
28. This Site Assignment shall take effect when executed by all signatories and recorded in the Middlesex County Registry of Deeds and after a certified copy of the same from the Registry of Deeds is provided to the DEC, with all recording fees and charges paid by the Applicant.
29. Prior to the grant of a Unified Permit, the Applicant shall demonstrate, to the satisfaction of the DEC, compliance with 310 CMR 16.40(4)(h).

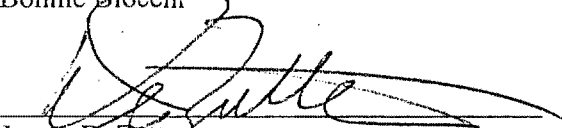
RIGHT OF APPEAL

Any person aggrieved by this decision may, within thirty (30) days of publication of the Notice of Decision, appeal under the provisions of G.L. c. 30A, § 14.

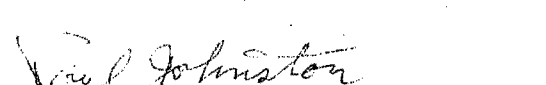
DEVENS ENTERPRISE COMMISSION Signatures

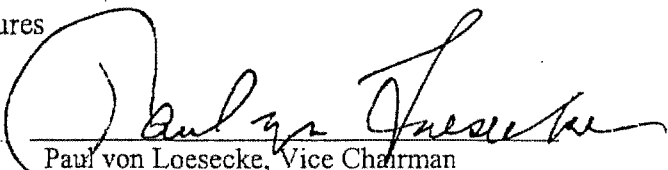

William P. Marshall, Chairman

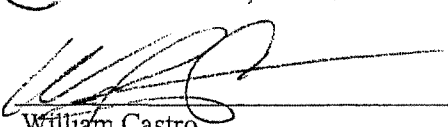

Bonnie Brocchi

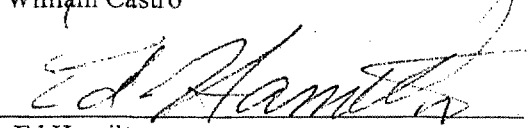

James DeZutter

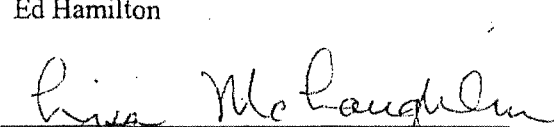

Martin Poutry


Paul Johnston


Paul von Loesecke, Vice Chairman


William Castro


Ed Hamilton


Lisa McLaughlin

Dated this 31st day of January, 2006

RECORD OF EXHIBITS*

Exhibit #	Document
1	Notice of Project Change for Construction & Demolition Material Recycling Facility by ESS Group, Inc. (February 15, 2005)
2	Correspondence from ESS Group, Inc. Regarding Proof of Public Notifications (September 27, 2005)
3	Single Environmental Impact Report for Construction & Demolition Material Recycling Facility by ESS Group, Inc. (September 29, 2005)
4	Site Suitability Report Application for Construction & Demolition Material Recycling Facility by ESS Group, Inc. (July 18, 2005)
5	Certificate of the Secretary of Environmental Affairs on the Supplemental/Single Environmental Impact Report (November 14, 2005)
6	Determination of Technical Completeness/Site Suitability Report for the W.K. Macnamara Corporation Construction & Demolition Material Recycling Facility (December 12, 2005)
7	Proof of Public Notice of Site Assignment Hearing Under 310 CMR 16.20(7)(b) (various dates)
8	Affidavit of Dammon M. Frecker (December 30, 2005)
9	Affidavit of Peter H. Guldberg, CCM (December 13, 2005)
10	Affidavit of Eric B. Eby, P.E. (December 21, 2005)
11	Sound Study for the W.K. Macnamara C&D Material Recycling Facility, Devens, Massachusetts (November 21, 2005)
12	Air Quality Study for the W.K. Macnamara C&D Material Recycling Facility, Devens, Massachusetts (December 5, 2005)
13	Correspondence from ESS Group, Inc. regarding Vollmer Associates Report (December 30, 2005)
14	Correspondence from Southern Container Corp. (November 17, 2005)
15	Affidavit of John T. Hannigan, P.E. (January 3, 2006)
16	Affidavit of Douglas L. Sheadel (January 3, 2006)
17	Report of Vollmer Associates LLP – C&D Material Recycling Facility - Lot 9A, Independence Drive (January 3, 2006)
18	Applicant's Response to Proposed Conditions (January 13, 2006)

*Exhibits 1-17 were submitted during the hearing, # 18 was submitted after the hearing and pursuant to the order of the Hearing Officer.

Attachment A

Proposed Conditions For Site Assignment

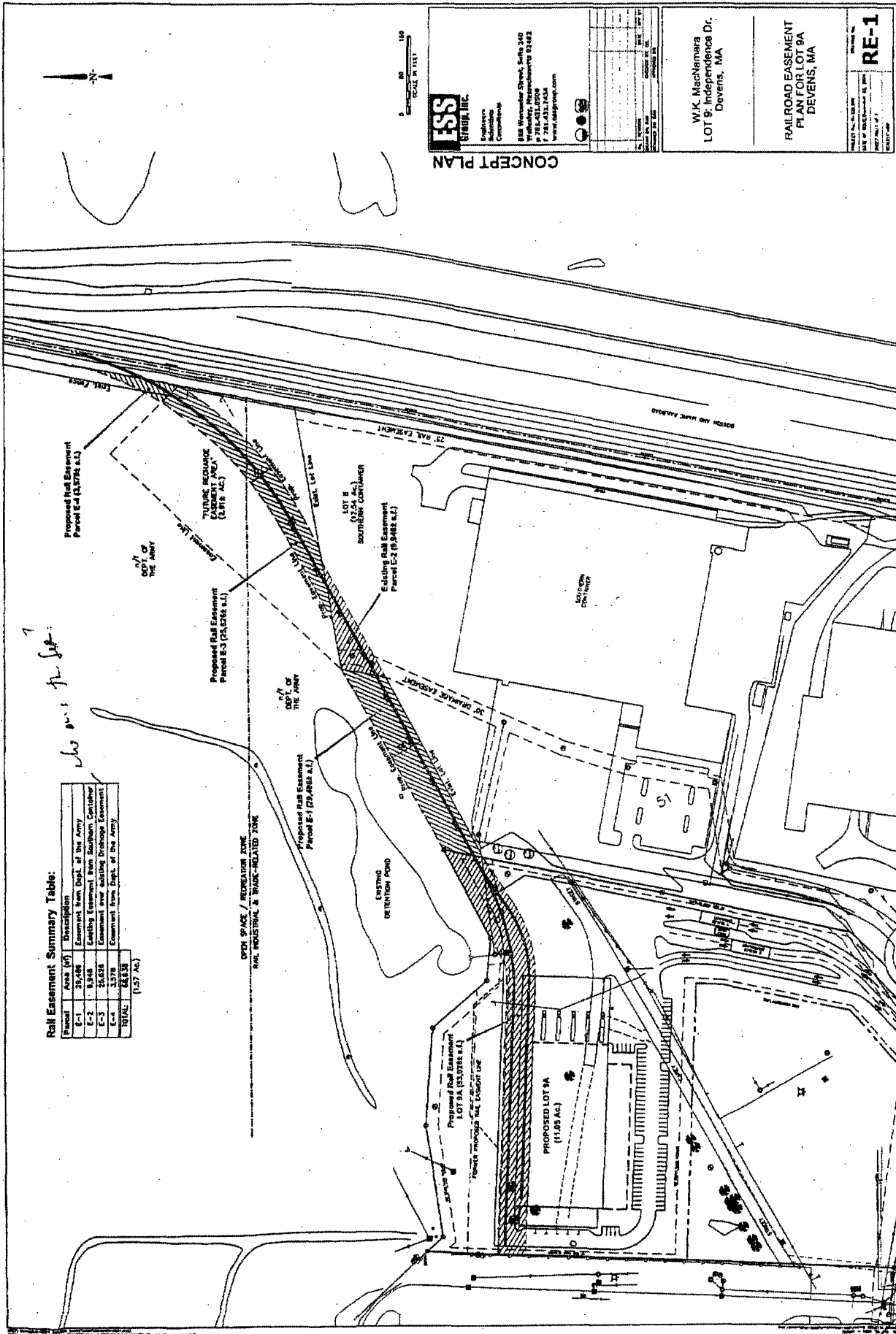
1. The facility shall be completely enclosed with all recycling operations being conducted within the building.
2. The applicant shall maintain the facility in compliance with 974 CMR 8.03 (3) of the DEC Regulations.
3. All necessary permits, approvals and modifications shall be obtained prior to the commencement of operations.
4. The facility owner shall comply with all applicable OSHA requirements.
5. Employees shall be trained as necessary, on the safe operation of the equipment that they operate or maintain on the facility.
6. The DEC and its designee(s) shall have the right to perform unscheduled inspections of the facility during operational hours or at any reasonable time requested by the DEC, for purposes of confirming compliance with the conditions of this site assignment.
7. The facility shall have fire suppression systems that meet the applicable Massachusetts Building Code and the requirements of the Devens Fire Department in existence upon the issuance of the building permit.
8. The facility shall accept no more than 1500 tons per day of solid waste materials.
9. The facility shall not knowingly accept hazardous, chemical, medical, radioactive, or other special waste as defined by DEP. Prompt (no more than within 24-hours of discovery) notification shall be given to the DEC and the DEP of receipt of any prohibited material in accordance with this Site Assignment and 310 CMR 19.207(9).
10. This facility shall not accept septage waste.
11. This facility shall follow and enforce all stormwater management conditions approved as part of this application or as required by law.
12. As described in the application, all doors to the facility will be closed except when it is necessary for a truck to enter or leave the building, for maintenance purposes, or for pedestrian and rail access and egress.
13. Any building damage that compromises the performance or ability of the facility to contain noise and fugitive dust will be promptly repaired.
14. High performance particulate filters will be maintained or replaced in accordance with manufacturer's specifications and/or facility test demonstrations.

15. The applicant shall take or cause to be taken, those measures necessary to prevent littering and/or the accumulation of debris on the site, any sidewalk, public way, or adjacent property including but not limited to maintaining adequate staff to insure compliance with this condition.
16. The contents of any truck or other vehicle using the facility to deliver or remove solid waste and recyclables; shall be covered either by a canvas tarpaulin or other equivalent method to ensure that all materials are covered.
17. Prior to commencement of operations the applicant shall retain the services of a professional pest controller or other such professional licensed in the Commonwealth of MA and provide a copy of the contract to the DEC, the contract shall require the firm to inspect the site for vermin, including but not limited to birds, rats, and insects at least once per year and if evidence of same exists, to notify the DEC and to undertake appropriate actions to eliminate the vermin immediately.
18. The applicant shall not store recyclables on-site for more than one hundred and eighty (180) consecutive days.
19. The applicant shall instruct all traffic traveling to and from the facility to use the preferred truck route and shall take measures to monitor and control truck access/egress, except to the extent modified by the DEC, or by any public safety agency (e.g., in an emergency).
20. In accordance to 974 CMR 8.03 (3)(b)(6b), vehicular traffic shall not be allowed to park or queue outside the bounds of the site.
21. No overnight queuing of trucks is permitted on the site access road.
22. In accordance to 974 CMR 8.03 (3)(b)(6c), no vehicle shall be left in an idling state within the site for more than 1 hour, with 10 minutes being typical.
23. Hours of operation for receiving and processing materials shall be from 7 AM to 5 PM Monday-Friday with no deliveries accepted outside of these hours. The loading or unloading of railroad cars shall be limited to the same hours of operation as vehicles. Delivery of railroad cars is not restricted by these conditions.
24. All floor drains shall be kept free and clear of debris.
25. The DEC may modify, suspend or terminate this Site Assignment in accordance with the provisions of M.G.L. c. 111, Section 150 A, 310 CMR 16.22 and 974 CMR 8.03 for failure to comply with the conditions described herein, and further, in its discretion, may take any other enforcement or remedial action available in law or equity.

26. The applicant shall submit for review and approval both the operations and maintenance plan and the facilities Asbestos and Hazardous Materials Inspection Protocol prior to issuance of the certificate of occupancy.
27. Prior to issuance of a certificate of occupancy, the applicant shall provide the DEC with sample (they may be redacted) hauling (truck) contract(s) language demonstrating that the haulers have been advised of the Devens designated truck route and said contract(s) are subject to revocation upon repeated non-use of said route.

Park Easement Summary Table:

Parcel	Area (sq)	Description
E-1	29,446	Essement from Dept. of the Army
E-2	8,948	Existing Essement from Southern Company
E-3	25,626	Essement over existing Dropchop Essement
E-4	1,578	Essement from Dept. of the Army
TOTAL	65,598	(1.57 Ac.)



EXHIBIT