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April 14, 2007

BY ELECTRONIC FILING

The Honorable Vernon A. Williams
Surface Transportation Board
Attn: STB Finance Docket No. 34797
395 E Street, SW
Washington, DC 20423-0001

RE: STB Finance Docket Number: 34797
Position Statement of Town of Wilmington Re: Hearing
on Jurisdictional Matters

Dear Secretary Williams:

We enclose for filing, in both PDF and original Word formats, the following documents:

1. *Position Statement of Town of Wilmington Re: Hearing on Jurisdictional Matters;*
2. *Certificate of Service.*

We appreciate your continued attention to this matter. Please do not hesitate to contact us with any questions.

Very truly yours,

/s/ Daniel R. Deutsch

Paul R. DeRensis
Daniel R. Deutsch

DRD:es
Enclosures as stated

cc: Service List in STB Finance Docket No. 34797 (by first class mail)
Michael A. Caira, Town Manager, Town of Wilmington



Honorable Vernon Williams
April 14, 2007
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34797

**POSITION STATEMENT OF TOWN OF WILMINGTON
RE: HEARING ON JURISDICTIONAL MATTERS
RELATED TO NEW ENGLAND TRANSRAIL, LLC, d/b/a
WILMINGTON & WOBURN TERMINAL RAILWAY –
PETITION FOR AN EXEMPTION FROM 49 U.S.C.
§ 10901 TO ACQUIRE, CONSTRUCT AND OPERATE
AS A RAIL CARRIER ON TRACKS AND LAND
IN WILMINGTON AND WOBURN, MASSACHUSETTS**

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Date: April 14, 2007

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SURFACE TRANSPORTATION BOARD**

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The Town of Wilmington, Massachusetts has a unique interest in these proceedings. Wilmington is where, on an environmentally damaged tract of land - a Superfund site still under active investigation by the USEPA - petitioner New England Transrail (NET) proposes to locate a solid waste processing facility, and it is Wilmington's citizens who already have experienced a contamination of their drinking water, the closure of five of eight public water supply wells, and grave risks to their health and safety as a result of existing and unresolved environmental damage at that site.

Therefore, to protect its citizens from this ill-conceived project at a manifestly inappropriate location, the Town of Wilmington respectfully submits this statement of its position in advance of the Surface Transportation Board's April 19, 2007 hearing on jurisdictional issues.

INTRODUCTION

Any analysis of the Board's questions must begin with a full realization that the Eames Street Superfund site is the classic wrong location for this project.

NET proposes to use approximately 30 acres of the site formerly occupied and operated by Olin Chemical. The site has suffered decades of pollution, impacting both surface and ground water and soils. Despite more than ten years of formal studies, its many chemical constituents have not yet been fully characterized. However, discovery of a known human carcinogen at the site has forced the closure of a majority of town water wells. The Massachusetts Department of Environmental Protection classified the area as a Tier 1A site, such that it was subject to direct regulation instead of consultant management. After USEPA took over the site just more than one year ago, the site was placed on the National Priorities List. EPA review and negotiation with potentially responsible parties is just beginning. Yet, NET proposes to locate both a truck-to-rail facility and a solid waste processing plant, with tremendous live and active physical loads, directly above a capped contaminant layer and subterranean containment walls. The neighborhood surrounding the site contains sensitive receptors, including homes and nursing homes.

With the perspective that this is the wrong site for a substantial and risk-laden redevelopment project, including a waste handling and processing facility, all of the questions posed by the Board take on a different light: what legitimate purpose would be served by invoking railroad activity as a basis to preempt state and local permitting whose focus is on the suitability of this particular site for the proposed activities?

What result will produce the most appropriate and thorough analysis of the site-specific environmental issues that are relevant to deciding the suitability of the site, and therefore also ensure the best protection of the public health and safety and the least risk of further harm to the inhabitants of Wilmington?

NET, which originally omitted any reference to waste processing in its petition to this Board, now asks the STB to lower the regulatory and competitive bar for it to enter into the processing of wastes on a polluted, unremediated site. This would result in a financial windfall for NET and like enterprises, would confer a peculiar competitive advantage on them, would disable state and municipal authorities that ordinarily regulate and permit such activity, would burden an already beleaguered Superfund site, and would create novel policy and enforcement problems for the STB.

DISCUSSION

We address below certain questions posed by the Notice of Oral Argument. The numbering below corresponds to the order in which the issues are raised in the Notice.

1. Is it premature to issue a preliminary decision given the pending Third Circuit appeal of the New Jersey decision involving a different solid waste handling facility, and given EPA's on-going remedial investigation and feasibility study for the Eames Street site?

It is premature to decide the threshold issue of preemption.

This Board's efforts to respond to the issues presented by NET's project repeatedly have been plagued by inadequate information. NET filed and withdrew a Notice of Exemption. It then filed a first Petition for Exemption. SEA issued an improvident Environmental Assessment (EA) and Post-EA, and, on motion of Wilmington and others, this Board dismissed NET's

Petition because NET had withheld, knowingly or not, crucial information bearing on any environmental review. The withheld information included the very fact of solid waste processing.

A decision on preemption at this stage also would be ill-informed and improvident. Preemption would saddle the Board with huge responsibility and administrative burdens relative to this site and would have serious implications, some of them not yet entirely clear.

Under investigation by USEPA, the site must remain undisturbed for the time being, if not for decades to come, until it is safe and until the cancer rate of nearby residents drops. There are years of work ahead to address the problems already existing at this site, before any project, much less NET's intensive proposal, should be allowed. In its May 11, 2006 comment letter to this Board, the USEPA expressed concerns about the adequacy and timing of any SEA environmental review of the NET proposal before a remedial investigation and feasibility study (RI/FS) is conducted and completed under USEPA direction. Even without a developed understanding of the decades-old environmental issues at the site, USEPA has urged that any review involve an environmental impact study, rather than an environmental assessment. Yet, after reviewing NET's proposal and revisions of it, the SEA conducted only an environmental assessment and issued EA and Post-EA reports that would have conditionally approved the proposed facility. The review undertaken was deferential and ultimately incomplete. The implications of a facility, much less a solid waste processing facility, for this site and for the incomplete investigation and clean-up of the site are hard to fully grasp and have not been fully appreciated.

Meanwhile, no progress has been made toward the next stage of the Superfund investigation. In its May 2006 letter, USEPA expected that an administrative consent order with potentially responsible parties would be signed within weeks or that it would instead issue a unilateral administrative order or undertake its own RI/FS. In fact, as USEPA acknowledges in its April 6, 2007 letter for this hearing, a RI/FS has not even been commenced and the agency's "knowledge of the site has not changed materially" since last spring.

Yet, the issue of preemption is crucial. A finding of exclusive jurisdiction by STB in this case – and in like circumstances involving solid waste operations - would bring with it an involvement and role, and a responsibility for the interests of state and local constituents, to which the Board is unaccustomed and ill-suited. STB would have to undertake large-scale and particularly complex environmental review (site assignments in Massachusetts not infrequently consume several weeks of live hearings), and be prepared not simply to condition but to reject activities proposed by rail carriers in distant locales. Site review for solid waste facilities is a massive undertaking, which would require sufficient budget, staffing, expertise, and access to the site. As structured in Massachusetts, and in other states, it also requires public participation. Such involvement is unlikely to be achieved, as evidenced by the difficulty and expense for Massachusetts residents to participate directly in today's hearing.

Similarly, attention to state regulatory requirements is required for USEPA review, and it is imperative here. The National Contingency Plan (NCP) requires that EPA abide by applicable and relevant and appropriate regulations (ARARs) in addressing Superfund site issues. Thus, MADEP hazardous waste regulations are germane to remediation at this site, despite EPA's primary involvement. Among other things, those regulations prohibit redevelopment activities

on sites that are still in the remedial process, except under a set of very specific conditions that include complete characterization and appropriate remediation of areas to be redeveloped. It would be extraordinary for any federal agency to give short shrift to state requirements and interests in this context.

The outcome of the pending federal appeal of the *Jackson* decision in New Jersey is uncertain. Moreover, the case concerns a different facility and one that, unlike that before this Board today, already is in operation and is run by an established rail carrier. The New Jersey case also involves state regulations that specifically target railroads, whereas the Massachusetts regulations establish standards and a review process applicable to solid waste handling generally, with nothing specifically targeting the rail industry. In fact, no judicial decision is fully on point with the facts currently before this Board.

In short, the USEPA's recent involvement with the site of NET's proposed facility and its pending investigation counsel against a decision now, even on the issue of preemption. The uncertainties of the site and its future assessment and remediation, as well as the incompleteness of NET's proposal and data, indicate the need for caution. At the very least, any gray areas in determining what activities are merely incidental to the provision of rail transportation should be resolved against preemption.

2. What federal statutes and regulations apply to facilities that handle C&D and MSW? To what extent is their administration delegated to the states?

As noted above, because the NET solid waste facility is proposed to be located within a Superfund site, the NCP is applicable, and the NCP implicates state hazardous waste regulations that strictly limit such redevelopment.

Even apart from the Superfund issue in this case, the handling of C&D and MSW in general triggers federal environmental laws relevant portions of which are administered by the states.

The Massachusetts site assignment regulations for solid waste facilities, 310 CMR 16.000 *et seq.*, are strongly related to and dependent upon the following Massachusetts regulations: 310 CMR 30.00 Hazardous Waste Regulations, 310 CMR 19.00 Solid Waste Regulations, 314 CMR 12.00 Waste Water Treatment Residuals Facilities, 310 CMR 22.000 Drinking Water Regulations; 105 CMR 480.000 Department of Public Health, State Sanitary Code; 310 CMR 40.0000 Massachusetts Contingency Plan; 314 CMR 6.00: Ground Water Quality Standards; 314 CMR 3.00: Surface Water Discharge Permit Program; 310 CMR 6.00: Ambient Air Quality Standards; 310 CMR 10.00: Wetlands Protection; and 310 CMR 11.00 MEPA Regulations.

The common theme among these regulations is the charge of the Massachusetts Department of Environmental Protection to protect health, safety, public welfare and the environment. Many of these regulations are derived from federal statutes:

- 310 CMR 30.000 and CMR 19.000 are construed to effectuate the purposes of the federal Resource Conservation and Recovery Act (RCRA), 42 USC § 6901 (1976);
- 314 CMR 12.00, CMR 10, and CMR 3.00 are construed to effectuate the purposes of the Federal Water Pollution Control Act (Clean Water Act), 33 USC § 1251 (1972) ;
- 310 CMR 6.00 is construed to effectuate the purposes of the federal Clean Air Act, 42 USC § 7401 (1970); and
- 310 CMR 22.00 is construed to effectuate the purposes of the federal Safe Drinking Water Act, 42 USC § 300f (1974).

For each of these regulations, state regulations are accepted (and encouraged) as the mechanism to implement federal statutes. The use of state regulations to implement federal statutes is commonplace across the country. The fact that these federal regulations are administered through state control acknowledges and demonstrates that solid waste management and associated protection of air, surface water, and ground water are best served by state regulation.

RCRA in particular explicitly focuses on state and local governments as the primary planning, regulating, and implementing entities for the management of non-hazardous solid waste, such as household garbage and non-hazardous industrial solid waste. EPA provides the state and local agencies with information, guidance, policy and regulations through workshops and publications to help states and the regulated community make better decisions in dealing with waste issues, to reap the environmental and economic benefits of source reduction and recycling of solid wastes, and to require upgrading or closure of all environmentally unsound

disposal units. In order to promote the use of safer units for solid waste disposal, EPA developed federal criteria for the proper design and operation of municipal solid waste landfills and other solid waste disposal facilities. As noted, Massachusetts, like many states, has adopted these criteria into their solid waste programs. (See discussion at EPA's web site:

<http://www.epa.gov/region02/waste/dsummary.htm>)

USEPA has identified the following goals for RCRA implementation:

- describe the law;
- provide regulations to establish a legal mechanism to enforce the RCRA standards;
- develop guidance and policy regarding the regulations;
- involve federal, state, regional, Native American, industry, and public participation;
- minimize waste;
- streamline regulations;
- develop federal and state partnerships;
- provide demonstrable results;
- allow public participation; and
- facilitate environmental justice.

Because public participation, state involvement and environmental justice are essential objectives of the RCRA program and that program is the foundation of the Massachusetts solid waste and site assignment regulations, 310 CMR 16.00 and CMR 19.00, it is hard to conceive any federal intention that that program's requirements, as implemented by the individual states, be subordinated to or diluted by another mechanism, including the STB regulations.

3. Could the Board address state environmental concerns by conditioning any authorization of NET's proposal on NET permitting periodic inspections by state officials? If so, could the Board provide for the suspension or revocation of NET's authorization on the recommendation of state officials based on unsatisfactory inspection, provided that NET has some due process recourse to the Board?

For many reasons, such a conditional grant of preemption would be inappropriate and ineffectual.

Any environmental review must give priority to safety and health, and in particular the health of the citizens of Wilmington, who are in fact citizens of the United States. The concept of “conditional preemption” misses this point, because it fails to provide any mechanism, should STB take jurisdiction, to prohibit risky redevelopment at inappropriate sites.

Respectfully, the record so far in this proceeding suggests that STB is ill equipped to address the issue of site suitability for solid waste operations. The SEA's Post-EA recommended permitting construction and operation of the proposed rail and solid waste processing facilities, subject to removing or suspending portions of the facilities if they later appeared to impede the environmental assessment and clean-up of the Superfund site. As Wilmington commented in response to the Post-EA, since such environmental impacts are reasonably foreseeable, a wait-and-see approach with regard to environmental impacts would be inappropriate and inconsistent with the National Environmental Policy Act (NEPA), 42 USC § 4321 (1969), which mandates the consideration of certain environmental factors in the federal agency decision making.

An approach that gives the project "the benefit of the doubt" is likewise inappropriate for the threshold issue of preemption. It is the proponent's burden to justify the relief it seeks in this forum, as before state and local permitting authorities. This Board consistently has held that the preemption determination is fact-specific. Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna & Western Railway Corp., 1999 WL 715272, STB Finance Docket No. 33466 at 10 (9/9/99), at 4-5. As the Board has observed, the determination turns on the nature of the proposed non-rail activities and their relationship to rail transportation or to NET's other economic objectives. A conditional authorization would put the cart before the horse. It would gloss over the question whether the waste activities are integral to the rail

activities – the hard question at issue – in favor of after the fact enforcement for non-compliance with state standards.

Unlike a finding that railroad-sponsored solid waste processing is subject to state permitting requirements, a conditional grant of preemption also would undermine environmental protection interests. In the case of solid waste processing, after-the-fact monitoring and possible suspension of operations is not an adequate substitute for permitting. Like Congress, Massachusetts courts maintain that solid waste handling and processing are inherently threatening to human safety and the environment unless they are subject to review if the type required by applicable state law. Substantial damage may be done after a problem develops on site and before any remedial action is taken.

Among other concerns, MSW contains materials that meet the definition of hazardous waste but are exempt from hazardous waste regulations because they are characterized as "household" waste due to their origins and quantities. Improper management of such waste poses risks to the underlying soil and groundwater.

Failure to construct a storage facility with proper containment systems to begin with would expose the site to further impacts from chemicals entrained in the waste stream, e.g., household petroleum products, oil-based paints and varnishes, chemical cleaning agents and solvents, as well as the dissolved organic carbon associated with MSW. If released in sufficient quantities, these substances can make underlying ground water a reducing condition leading to solubilization and release of other substances such as arsenic, iron, and manganese that may be naturally present in soil. Some of these metals present maintenance problems for a municipal water system and adverse impacts on at least aesthetic water quality (taste and odor), potentially

leading to the need for treatment, which can be costly depending upon concentrations and flows involved; arsenic, which is present at many landfills, obviously has the potential for adverse health effects at relatively low concentrations.

Likewise, failure to properly manage air emissions from such a facility to begin with can result in a nuisance odor problem, an issue that local permitting is designed to assess and manage up front. If the project were not subject to the normal local/state permitting processes, the STB, state authorities and Wilmington's residents would be confronted with a facility that has been constructed and in operation before these problems came to light. With respect to ground water issues, there would likely be a delay, perhaps of a considerable time, without monitoring wells immediately adjacent to the facility. Similarly, odor issues could arise after operations commence.

In that situation, there would be a compelling economic interest to keep the facility operating (due to concerns with a lost investment, lost future profits, and the like). This would motivate significant legal action to forestall or mitigate the effect of any after-the-fact enforcement.

A conditional grant of preemption also devalues local resources. In Massachusetts, the siting and regulation of solid waste facilities involve determinations by both state and municipal governments, giving recognition to the importance of local knowledge and local impacts. A provisional state approval is subject to application, hearings and decision at the municipal level on the basis of detailed submittal requirements and substantive considerations. As do the Commonwealth of Massachusetts and many other states, the STB should recognize the

limitations of a remote governmental agency and the superior position of local governments to regulate solid waste facilities. After all, it is the local communities that best know local conditions and will have to live with the consequences.

Were the Board inclined to consider a conditional grant of preemption, state inspections and recommendations to suspend or terminate solid waste operations at an NET facility should be strictly adopted. Applying anything other than Massachusetts standards would defeat the purpose and effect of the regulations, both state and federal, that are most applicable to solid waste processing.

The alternatives available to the Board if it assumed exclusive jurisdiction may be unpalatable: (i) to mitigate the risk that citizens would continue to risk cancer, it would have to develop and conduct a massive pre-clearance permitting process at least as rigorous as that in place at the state level, or (ii) it might formally abstain and leave permitting to the states, or (iii) it might adopt rules and regulations delegating to the states the job of passing on the appropriateness of proposed locations for solid waste use, subject to STB review. Alternatively, this Board simply may decline to find exclusive jurisdiction over solid waste facilities like that proposed and instead allow for the permitting of such facilities by state and local governments, which are in the best position to provide for the public safety.

The following inquiries by the Board are closely related, hence we respond to them jointly:

- 4. What impact would a decision against preemption have on this proposal and on the transloading of other commodities?**
- 7. May a determination be based on the type of commodity involved?**
- 8. Should C&D and MSW be considered differently from all other commodities and, if so, on what basis?**
- 9. Would NET's proposed activities with respect to C&D and MSW add value to the materials, facilitate the disposal of the materials in a landfill or otherwise, or serve any purpose other than facilitating rail transport? If so, should this have an impact on the determination here?**

A distinction can, and should be made, between solid waste and other types of commodities. Solid waste is a unique commodity and the Board should consider it differently. Waste has value only when disposed of. Waste processing, as proposed by NET, materially transforms discarded material into a marketable commodity. It is the marketing and profitable sale, not the feasible transportation, of waste that necessitates its transformation. As we noted early in this proceeding, NET did not include waste processing (which it now asserts is so "integral" to transportation) in its original filings with this Board. This inescapable omission demonstrates the fallacy of NET's current position on the preemption issue.

Processing waste as proposed - sorting, grinding, baling - is tantamount to manufacturing, not simply packaging or assembly of raw materials that have intrinsic value. Waste handling, in order to be economical, entails processing. Active processing therefore has the unique potential to be improperly conflated with "sorting and handling" that "facilitate" rail operations. It is too tempting to suggest that since stockpiling is necessary to transload waste, so too is sorting it, and baling it, and grinding it. There is a self-fulfilling aspect to this: if we transport waste, then we

should sort it to improve the efficiency of transporting it; and if we sort waste, then we are exposing material and it should be baled or ground to contain and more efficiently move what we have exposed. NET would lead this Board down that slippery slope in order to preempt state and municipal permitting of a full-fledged waste processing operation. The baling, compacting and grinding of waste are processes too attenuated from the provision of rail transportation - and too commonly performed independently of it - to be fairly characterized as "integral" to it.

NET previously has cited a variety of older court cases involving loading and unloading of goods, feeding of cattle, storage, and maintenance activities performed by rail carriers. It has relied heavily on a more recent preemption decision, *Green Mountain Railroad Corporation v. Vermont*, 404 F.3d 638 (2d Cir. 2005) ("*Green Mountain*"). However, like the older cases, that case involved loading, unloading and storage of goods, in a salt shed and in cement silos. *Id.* at 640. By contrast, NET proposes not simply to move and store materials, but also to grind, shred and bale them on-site. In the *Green Mountain* circumstances and typically, as NSWMA and SWANA members attest, processing is performed away from rail facilities. *Green Mountain*, at 640 (carrier transported goods "for processing elsewhere").

Waste operations also have unique environmental implications. Because waste handling is dirty work, it may be more likely than other transloading activities to occur at sites, like the Olin Chemical site, that already are environmental disasters. Regulation of waste processing must, and in Massachusetts in cases like this does, involve careful advance review of the impact of the activity on its immediate environment.

CONCLUSION

Applicable federal laws look to state and local governments to develop and implement standards for regulating solid waste facilities. Involvement of state and municipal agencies in the permitting of waste processing, particularly at a contaminated site, is essential. Few, if any, other bodies have the same knowledge of a proposed waste handling site and the incentive to investigate fully the site and the proposed activity. It was, for example, the insistence of Wilmington that led to the discovery of human carcinogens at the Eames Street site where NET proposes to locate a C&D and municipal solid waste facility.

It would be bad policy to make the federal regulation of rail operations a basis for eliminating state and local permitting. That unnecessarily would encourage irresponsible would-be rail carriers and investors to exploit STB jurisdiction and STB's lack of resources to adequately investigate solid waste sites nationwide, so that those actors could conduct cheap, irresponsible and environmentally damaging operations beneath the radar of traditional permitting applicable to their non-rail competitors, with far-reaching economic, environmental and public health consequences.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel R. Deutsch, hereby certify that on April 14, 2007, I served the foregoing *Position Statement of Town of Wilmington Re: Hearing on Jurisdictional Matters* by causing a copy thereof to be delivered via first class mail, postage prepaid, to:

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