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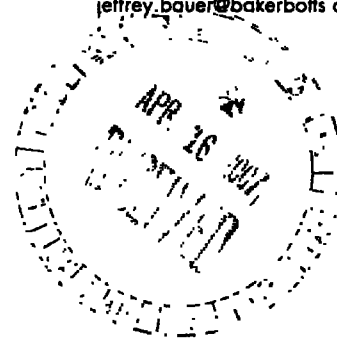
April 16, 2007

Via Hand Delivery

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
395 E. Street, SW
Washington, D.C. 20423

RE: New England Transrail, LLC
FD-34797

Jeffrey Bauer
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Dear Secretary Williams:

Enclosed for filing in Finance Docket Number 34797 are an original and ten (10) copies each of the Written Statement of New England Transrail, LLC. Please time-stamp the extra copies and return it to our messenger.

Thank you in advance for your consideration.

ENTERED
Office of Proceedings

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Public Record

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey M. Bauer".

Jeffrey M. Bauer

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34797

**New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Petition
For An Exemption From 49 U.S.C. § 10901 To Acquire, Construct And Operate As A Rail
Carrier On Tracks and Land in Wilmington and Woburn, Massachusetts**

WRITTEN STATEMENT OF NEW ENGLAND TRANSRAIL

On December 5, 2005, New England Transrail, LLC (“NET”) filed its Petition for an Exemption from the application requirements of 49 U.S.C. § 10901 (“NET Petition”). On March 3, 2006, the Board instituted this exemption proceeding under 49 U.S.C. § 10502(b) and directed the Section for Environmental Analysis (“SEA”) to commence its environmental review. On June 13, 2006, the Board—over NET’s objection—directed the SEA to discontinue its review pending the Board’s resolution of the jurisdictional question of whether the activities proposed to be undertaken by NET are subject to the Board’s exclusive jurisdiction. On March 29, 2007, the Board issued a Notice of Oral Argument, in which the Board set forth 13 different questions that it directed NET to address. NET hereby submits its Written Statement responding to those 13 questions.

In this Statement, NET will frequently refer to the NET Petition and other previous filings that are part of the Record in this proceeding. NET attached to the NET Petition the Verified Statements of Robert Jones (“Jones V.S.”), Margret Hanley (“Hanley V.S.”), John Ryan (“Ryan V.S.”), Tom Egan (“Egan V.S.”), and Stephen Graham (“Graham V.S.”). The facts set

forth in those sworn statements are unrebutted. On February 21, 2006, NET filed a Consolidated Reply to Comments filed in opposition to the NET Petition (“NET Consolidated Reply”). On August 2, 2006, NET filed a Reply to Selected Jurisdictional Comments filed pursuant to the Board’s June 13 Order¹ (“NET Reply to Jurisdictional Comments”). In both the NET Consolidated Reply and the NET Reply to Jurisdictional Comments, NET referred to points made in its original petition and accompanying verified statements. In this Statement, NET also will refer to points made in its Prior Filings and will expand upon those points as necessary to fully address the Board’s questions.

Q.1. Is it premature to issue a preliminary decision given the pending appeal in the United States Court of Appeals for the Third Circuit in the New York, Susquehanna and Western case and the ongoing Environmental Protection Agency remedial investigation and feasibility study under the Superfund laws on the property on which NET proposes to operate the business at issue in this matter?

A.1. No. As explained below, there is no basis for further delay. To the contrary, the Board was required by law to decide this matter within nine months, and has already violated that statutory requirement.

- a. It is not premature for the Board to issue a decision on the jurisdictional inquiry due to the pending appeal in NYS&W v. Jackson, No. 05-4010 (KSH), 2007 WL 57643 (D.N.J. February 20, 2007).**

Any suggestion that the Board—the agency uniquely equipped with the expertise to determine its own jurisdiction over transportation—should await further judicial guidance regarding the strictly legal issue of the Board’s own jurisdiction is entirely backwards. To the contrary, before making new law about the scope of the Board’s jurisdiction, the courts should

¹ NET will refer to all three of its previous filings collectively as the “Prior Filings.” In addition, NET will also refer to its Supplemental Verified Statement filed on March 23, 2007 (“NET Supplemental V.S.”), NSWMA’s Comments filed on January 27, 2006 (“NSWMA Comments”), and NSWMA’s Jurisdictional Comments filed on July 13, 2006 (“NSWMA Jurisdictional Comments”).

request the views of the Board, and should defer to its expertise. United States v. Western Pac. R. Co., 352 U.S. 59 (1956) (referring case to ICC under doctrine of primary jurisdiction doctrine because the question presented factors “‘the adequate appreciation of which’ presupposes an ‘acquaintance with many intricate facts of transportation’” and was “within the primary jurisdiction of the Interstate Commerce Commission.”); see also, Coastal Distribution LLC v. Town of Babylon, No. 06-0981-CV (2d Cir. February 7, 2007) (“Given the existing guidance from this Court and the STB, the district court did not abuse its discretion by issuing a preliminary injunction, but it is wholly appropriate that the parties should seek further guidance from the STB notwithstanding the pendency of litigation in federal court.”).²

The Jackson decision is thorough and well-reasoned, and is directly on point. However, it says nothing new. The decision in Jackson simply restates and applies legal principles that are already well-established. Obviously, the Board must consider Jackson carefully in deciding the jurisdictional issue in this case, but any departure from the settled legal principles discussed in Jackson would require the creation of new law. Because Jackson is entirely consistent with the existing precedent on the jurisdictional issue in this case, there is no need or justification for the Board to “wait and see” if the Third Circuit will somehow announce a different interpretation of the statute that ignores the Second Circuit, the many district courts that have addressed the question, and the clear precedent established by the Board.

It is well-established that, absent a judicial order granting a stay of enforcement, the pendency of an appeal has no effect on the validity and effectiveness of a lower court decision.

² In Coastal, the Second Circuit affirmed, by Summary Order, the decision of the U.S. District Court for the Eastern District of New York that the construction of a transload facility that would handle C&D and MSW was part of “transportation” under the ICCTA and subject to the Board’s exclusive jurisdiction.

Brill v. General Indus. Enterprises, Inc., 234 F.2d 465 (3d Cir. 1956). If the law were otherwise, the losing party could always obtain a de facto stay, of indefinite duration, perhaps lasting years, simply by filing an appeal. If the Board were to agree to wait for the Third Circuit's decision in Jackson, and the decision of the district court were upheld, NSWMA would no doubt demand that the Board await a decision from the U.S. Supreme Court. It is precisely to prevent such open-ended requests that the law in every federal circuit sets forth very stringent legal and factual tests that must be met before a stay can be granted. See, e.g., Susquenita School Dist. v. Raelee S., 96 F.3d 78, 80 (3d Cir. 1972). In Jackson, the defendant specifically requested a stay pending appeal, and the Third Circuit specifically rejected that request, thus finding that the legal and factual requirements for a stay were not met. See March 21, 2007 Order (attached hereto as Ex. A). It would be extremely odd, to say the least, if this Board were to impose a stay on itself, without any determination that the traditional legal and factual tests have been met, when the Third Circuit thoroughly considered the law and the arguments in support of the stay, and refused to grant it. Jackson is fully effective, and there is no reason why it should not be considered by the Board in determining the jurisdictional question in this case.

Jackson confirms the long-standing precedent holding that the Board's exclusive jurisdiction covers transloading operations that facilitate the transportation of various commodities, including waste, and the decision simply provides additional, cumulative support for the Board to conclude that NET's proposed operations constitute "transportation by rail carrier." Apart from Jackson, as more fully discussed in NET's Prior Filings, there is longstanding and ample Board precedent and judicial authority to support such a finding. NET Petition at 18-21; NET Consolidated Reply at 2-7; NET Reply to Jurisdictional Comments at 6-8. Courts that have interpreted the scope of the Board's jurisdiction under the ICCTA, and the

Board itself, have uniformly held that, when conducted by rail carriers, the types of intermodal transloading operations to be conducted at NET's proposed facility constitute "transportation" under the statute. Id.; Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 644 (2d Cir. 2005) ("[T]he proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the [Board's] exclusive jurisdiction over 'rail transportation.'"); Coastal Distribution LLC v. Town of Babylon, No. 05-CV-2032, slip op., 2006 WL 270252 (E.D.N.Y. January 31, 2006) aff'd, No. 06-0981-CV (2d Cir. February 7, 2007) (holding that C&D storage and transloading facility was part of rail transportation) ; Canadian National Railway, et al. v. City of Rockford, et al., 2005 WL 1349077 (E.D. Mich. June 2, 2005) (activities occurring at the C&D transload facility "appear to meet the definition of 'transportation by rail carrier,' which would cause [city's] regulations to be preempted."); Grafton & Upton R.R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 239 (D. Mass 2004); Norfolk Southern Ry. Co. v. City of Austell, 1997 WL 1113647, *6 (N.D. Ga. 1997) ("[T]he instant intermodal facility comes within the ICCTA's definition of 'transportation by rail carrier' over which the STB is given exclusive jurisdiction."); Green Mountain Railroad Corporation—Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002); Joint Petition for Declaratory Order—Boston and Maine Corporation and the Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001); Borough of Riverdale - Petition for Declaratory Order – New York Susquehanna and Western Railway Corporation, Finance Docket No. 33466, 1999 WL 715272 (STB served September 10, 1999); cf. Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ, STB Finance Docket No. 34192, at *5-6 (STB Served August 14, 2003) ("There is no dispute that Hi Tech's transloading activities [involving C&D] are within the broad definition of transportation."). To deny jurisdiction in this

case, the Board would have to reject the reasoning and the holding of every one of those prior decisions.

b. It is not premature for the board to issue a decision on the jurisdictional inquiry due to the ongoing RI/FS being conducted by the EPA.

There is also no basis for the Board to delay its decision on this preliminary jurisdictional question based on the EPA's ongoing RI/FS. Under the Board's June 13, 2006 Order, at the request of NSWMA, SEA was directed to suspend further environmental review of the NET Facility pending the Board's decision on the jurisdictional issue. Thus, the Board itself has already decided that its resolution of the jurisdictional issue does not turn on environmental concerns, and that the environmental issues should play no part in that decision. Accordingly, the Board cannot now reverse itself without any change in circumstances and allow NSWMA to use environmental procedural issues as another excuse to delay resolution of the jurisdictional question indefinitely.

The Board has already violated the nine-month statutory deadline to complete this entire proceeding. See 49 U.S.C. Section 10502(b) ("Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.") (emphasis added). Rather than compound that violation of law by passively awaiting action by others, the Board should actively engage EPA officials in Washington regarding the issue of delay, inform the EPA of the statutory deadline for completing this proceeding, and strongly request the EPA to proceed more diligently to complete its RI/FS. If the Board says and does nothing, it is unlikely that the EPA will give this matter the priority that is appropriate.

As NET stated in the NET Petition and in the NET Consolidated Reply, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") does

not prohibit the redevelopment of contaminated properties that are listed on the National Priorities List ("NPL"). To the contrary, the Congress has developed policies that protect parties such as NET, who seek to redevelop contaminated properties in a manner that protects the public health, from certain liabilities under federal law.³ NET's redevelopment activities will meet those criteria.

The Olin Superfund Site consists of over 600 acres. However, the Property which NET will purchase consists of only 51 acres, and NET's operations will cover only 30 of those acres—with the remaining 21 acres of the Property being dedicated to a conservation easement/restriction. NET will not hinder current remedial activities, and NET will allow access to the property for ongoing remediation work. In fact, as described in the NET Petition, NET will actively assist in certain remediation activities. NET Petition at 9; Graham V.S. ¶¶ 14-15.

NET believes that the EPA will ultimately conclude that NET can proceed with the redevelopment of its small portion of the Olin Superfund site. When NET filed its petition, NET attached the verified statement of Margret Hanley, a Licensed Site Professional ("LSP") certified by the Massachusetts Board of Registered Hazardous Waste Site Cleanup Professionals. See NET Petition, Ex. 2. Ms. Hanley specifically addressed the potential inclusion of the Olin Site

³ The criteria for the redevelopment of contaminated properties, including NPL Sites, by "Bona Fide Prospective Purchasers," are described in Title II of H.R. 2869, entitled the "Brownfields Revitalization and Environmental Restoration Act of 2001" (the "Brownfields Act"), and are substantially the same as those criteria imposed on developers and operators of contaminated properties under the Massachusetts Department of Environmental Protection ("MaDEP") Construction Policy. 42 U.S.C. §§ 9601(40) and 9607(r)(1). Specifically, the Brownfields Act requires that in order to limit liability under CERCLA, the prospective purchaser of such property must demonstrate that it has taken, or will take, steps to stop any continuing release, to prevent any future release, and to prevent or limit human, environmental, or natural resource exposure to any hazardous substance previously released. Id. In addition, the prospective purchaser must demonstrate that it has complied with institutional controls and has granted access to parties conducting response actions. NET Consolidated Reply at 13.

on the NPL. Hanley V.S. at ¶¶ 30-31. Ms. Hanley concluded that the designation of the Site on the NPL “should not prevent the development of the NET Facility on the Property.” Id. Ms. Hanley also concluded that “the conditions of the property and the Site do not preclude the development and use of the NET Facility.” Id.

Most importantly, however, the Board will conduct its own environmental review and has the ability to require that NET conduct all construction and operation activities in compliance with any conditions that are imposed by the EPA. Finally, the Board has the power to condition its grant of an exemption in this proceeding on a written concurrence from the EPA that redevelopment may proceed on the portion of the site that is the subject of the NET Petition.

Q.2. What federal statutes and regulations are applicable to facilities where C&D and MSW are handled and to what extent is their administration delegated to the states?

A.2. Depending on where the facility is located, how it is constructed, and what activities are being conducted at the facility, numerous federal statutes and regulations may be applicable, and in many cases, the states have been delegated authority to administer or enforce the federal statutory requirements. A non-exclusive listing of the statutes and regulations that may be applicable is set forth below:

1. Clean Air Act, 42 U.S.C. §§ 7401-7671q
 - (i) 40 C.F.R. Part 51, State Implementation Plan requirements
 - (ii) 40 C.F.R. §§ 51.160-166 and 52.21, New Source Review and Prevention of Significant Deterioration rules
 - (iii) 40 C.F.R. Part 60, New Source Performance Standards
 - (iv) 40 C.F.R. Part 63, National Emissions Standards for Hazardous Air Pollutants
 - (v) 40 C.F.R. Part 68, Risk Management Planning and/or General Duty Clause requirements for regulated chemical substance storage/use

- (vi) 40 C.F.R. Part 70, State operating permit requirements
 - (vii) 40 C.F.R. Part 82, Protection of stratospheric ozone (CFC management requirements)
2. Clean Water Act, 33 U.S.C. §§ 1251-1387
 - (i) 40 C.F.R. Part 112, Spill Prevention Control and Countermeasure Plans
 - (ii) 40 C.F.R. Parts 122 and 124, Permits and related requirements for storm water discharges to surface water bodies
 - (iii) 40 C.F.R. Part 403, Discharges to public-owned treatment works
 3. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k
 - (i) 40 C.F.R. Part 243, Guidelines for collection and storage of residential, commercial and institutional solid waste
 - (ii) 40 C.F.R. Part 246, Source separation for materials recovery guidelines
 - (iii) 40 C.F.R. Parts 260-262, Standards for management, identification and generation of hazardous waste
 - (iv) 40 C.F.R. Part 263, Standards for transporters of hazardous waste
 - (v) 40 C.F.R. Part 266, Standards for management of recyclable materials
 - (vi) 40 C.F.R. Part 273, Standards for management of universal waste
 - (vii) 40 C.F.R. Part 279, Standards for management of used oil
 - (viii) 40 C.F.R. Part 280, Technical standards and corrective action requirements for underground storage tanks
 4. Comprehensive Environmental Response, Compensation, and Recovery Act, 42 U.S.C. §§ 9601-9675
 - (i) 40 C.F.R. Part 302, Emergency spill/release notification for reportable quantities of hazardous substances
 5. Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050
 - (i) 40 C.F.R. Part 355, Emergency planning and release notification requirements
 - (ii) 40 C.F.R. Part 370, Hazardous chemical reporting and community right-to-know requirements

6. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692
 - (i) 40 C.F.R. Part 761, PCB management and disposal
7. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y
 - (i) 40 C.F.R. Part 165, Pesticide storage, handling and disposal
8. Noise Control Act, 42 U.S.C. §§ 4901-4918
 - (i) 40 C.F.R. Part 205, Transportation equipment noise emission controls
9. Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127.
 - (i) 49 C.F.R. Part 100, Pipeline and Hazardous Materials Safety Administration.

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

A.3. Yes. The Board can—and should—address state environmental concerns associated with NET's proposal by conditioning its approval on NET's compliance with certain state and local health and safety regulations.

Since the very beginning of this proceeding, NET has repeatedly stated that it does not seek to avoid compliance with substantive health and safety regulations. NET Petition at 15; NET Consolidated Reply at 11-12. The Board has made it very clear that the ICCTA does not preempt substantive health and safety laws, including federal environmental laws, Joint Petition for Declaratory Order—Boston and Maine Corporation and the Town of Ayer, MA, STB Finance Docket No. 33971, at *9 (STB served May 1, 2001), and NET has already committed that it will fully comply with those legal requirements.

To ensure NET's performance, the Board has the authority to condition approval of the project on NET's compliance with substantive health and safety laws. In other similar situations in the past, the Board has resolved state and local concerns by approving pragmatic solutions that do not unreasonably interfere with interstate commerce. For example, in Joint Petition for Declaratory Order—Boston and Maine Corporation and Town of Ayer, STB Finance Docket No. 33971 (STB served May 1, 2001), the Board held that it could require railroads (1) to share their plans with affected communities when they are undertaking an activity for which another entity would be required to obtain a permit; (2) to use "best management practices" when constructing and operating railroad facilities; (3) to implement appropriate precautionary measures at the railroad facility; (4) to provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) to submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. Id.

In this case, NET has expressly stated that it intends to fully comply with all substantive health and safety regulations of the Commonwealth of Massachusetts. Petition at 15. Jones V.S. ¶ 16. NET listed examples of the applicable regulations in its Petition and made it clear that this listing was not exclusive.⁴ More than a year ago, NET offered, in writing, to agree to a voluntary compliance agreement that would allow MaDEP to enforce NET's commitment.⁵ The proposed written agreement would permit MaDEP to periodically inspect the facility, following the same

⁴ Id. "Other substantive state health and safety regulations pertaining to NET's operations with which NET expects to comply include the following . . ."

⁵ See Letter from J. Porter, Counsel to NET, to S. Ruch, MaDEP (October 14, 2005), attached as an exhibit to NET's December 16, 2005 response to MaDEP's and NSWMA's requests for an extension of time to file replies (attached hereto as Ex. B).

protocols and with the same regularity as MaDEP customarily applies to other similar facilities. MaDEP would be permitted to impose sanctions consistent with the types and degrees of sanctions MaDEP customarily imposes for similar infractions at similarly situated facilities. Pursuant to the conditions imposed in this proceeding, the STB would resolve any disputes. MaDEP has never provided any written response rejecting that agreement, but has not yet formally accepted it either.

NET's proposal provided for only two exceptions: the Massachusetts regulations regarding "Site Assignment" and the regulations commonly referred to as the "Waste Ban" regulations. These two state regulations are the types of state requirements that are specifically preempted by ICCTA. The Board has specifically held that "preclearance" requirements like the Massachusetts Site Assignment regulations are preempted, because otherwise, a community could impose so many permitting requirements on a project that it could never be built. Petition at 19 & n.25; see also City of Creede, CO - Petition for Declaratory Order, 2005 WL 1024483 (STB), *4, STB Finance Docket No. 34376, (STB served May 3, 2005) ("[S]tate or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use requirements) are categorically preempted."). It is also well-established that purely economic regulations—like the Massachusetts Waste Ban regulations—are preempted.⁶

⁶ See Id.; Page 5, supra. The stated purpose for the Waste Ban regulations is to create an economic base for a recycling industry within Massachusetts and to preserve in-state landfill capacity for the disposal of MSW. It is undisputed that the ICCTA preempts such economic regulations. Also, because NET is not a waste processing facility and, in any event, all of the waste materials NET intends to transport will be sent to landfills outside Massachusetts, there is no basis for applying that regulation to the NET Facility.

Q.4. If the C&D and MSW activities proposed by NET are determined not to be part of rail transportation, what impact would such a decision have on this proposal and on the transloading of other commodities by railroads?

A.4. If the Board were to conclude that the handling of C&D and MSW proposed by NET at the NET Facility was not part of rail transportation, the NET project would likely proceed, but the project may be less attractive to lenders and investors and may provide less efficient transportation throughout the entire haul.⁷ Such a conclusion by the Board would also be a startling departure from well-established federal law and would open the door to local interests in every state that would like to restrict the movement of virtually any commodity for their own economic benefit.

- a. The NET facility is designed and intended to handle multiple commodities, and NET has applied for authority to operate as a common carrier.**

Despite the narrow focus in this proceeding on NET's proposal to transload C&D and MSW, it is undisputed that NET was created to operate as a full service common carrier by rail. As NET has repeatedly explained in its Prior Filings, NET meets the Board's criteria to qualify as a common carrier by rail. Petition at 5, 17; Consolidated Reply at 2-4; NET Reply to Jurisdictional Comments at 4-6; see also, Riverview Trenton R.R. Co.—Petition for Exemption From 49 U.S.C. 10901 To Acquire And Operate A Rail Line in Wayne County, MI, STB Finance Docket No. 34040 (STB Served May 15, 2003). NET will hold itself out as a common carrier by rail to provide service to the general public. Petition at 5, 16, 17, Jones V.S. ¶¶ 2, 9, 20; NET Consolidated Reply at 2-4; Reply to Jurisdictional Comments at 4-6. NET will construct an intermodal terminal that will compete with other intermodal terminals owned by other railroads in the Boston area and will compete with common carrier truckers for local

⁷ The efficiencies associated with a viable backhaul business are more fully discussed in Answer 13b on page 37-38.

business.⁸ Id.; Jones V.S. ¶ 19. NET will acquire the necessary locomotives and equipment and will hire the appropriate personnel to operate over 7500 feet of track. Id. NET will use rail connections with both the MBTA line and the B&M line to interchange with the national rail system. Id. All of those facts are set forth in verified statements, are part of the formal Record in this proceeding, and are unrefuted by any evidence to the contrary. It is the express, formal policy of the U.S. Department of Transportation to encourage the development and construction of intermodal projects exactly like NET's,⁹ and there can be no serious debate that NET qualifies to become a rail carrier subject to the jurisdiction of the Board.

As explained in NET's Prior Filings, the NET Facility was specifically designed to transport a broad array of commodities. Petition at 10; Jones V.S. at ¶¶ 2, 4, 9, 11, 12, 13. At the time the Petition was filed, a number of shippers of commodities other than waste expressed in writing their desire to utilize the NET Facility to transload and transport their products. See generally, NET Supplemental V.S. While this proceeding has been pending, NET has continued to engage in discussions with those and other carriers and shippers who also have expressed an interest in utilizing the NET Facility. Id. In comments filed in this proceeding on July 13, 2006, the Association of American Railroads ("AAR") noted that "most if not all of the railroads

⁸ In the verified statement of Steven G. Changaris attached to the NSWMA Comments filed on January 27, 2006, Mr. Changaris testified that there are only two rail facilities in the Boston area that are equipped to ship waste by rail (only one of which transloads waste from trucks to rail cars, while the other requires an interim truck dray of over 15 miles through Boston). Changaris V.S. ¶ 10. The need for competition in this freight market is further evidenced by the January 26, 2006 and March 26, 2007 filings of Frank DeMasi, a member of the Boston area Regional Transportation Advisory Council Freight Committee.

⁹ See Department of Transportation Strategic Plan, Fiscal Years 2006-2011, September 2006, pp. 27, 29-30, 40; p. 4, National Freight Transportation Policy Statement, located at [http://ostpxweb.dot.gov/policy/Data/National%20Freight%20Transportation%20Policy%20State ment.pdf](http://ostpxweb.dot.gov/policy/Data/National%20Freight%20Transportation%20Policy%20Statement.pdf); Framework for a National Freight Policy, U.S. Department of Transportation, draft dated April 10, 2006, located at <http://www.dot.gov/freight/>; <http://www.fhwa.dot.gov/freightplanning/feb21transcript.htm>

operating under the Board's jurisdiction have facilities located on their systems that transload" some of the same types of commodities that NET has proposed to handle at its facility. See AAR Comments at 4. No opponent of the NET Facility has offered any verified statement that refutes the facts set forth in NET's verified statements.

The NET business plan was specifically designed to maximize efficiencies and reduce the risks associated with economic and seasonal swings that may negatively impact any single cargo type. Based on discussions with potential shippers, NET has learned that waste is a commodity that will provide a predictable revenue stream. In a recent article in Railway Age magazine, Keith Borman, Vice President and General Counsel of the American Short Line and Regional Railroad Association, discussed the important role that solid waste transloading and transportation plays in aiding short line and terminal railroads in obtaining capital investment and developing transloading interfaces between the national railway system and shippers. NET Reply to Jurisdictional Comments at 9, n.4, Ex. D. Consequently, a business plan that includes the transportation of waste makes the NET project more attractive to lenders and investors, because the revenue stream and cash flow are predictable, providing some assurance of a reliable source for debt service payments. If the Board were to eliminate an otherwise lawful cargo type, that decision would introduce increased economic risk and would impact NET's ability to maximize its efficiency by limiting back-haul opportunities and the creation of unit trains and larger car blocs, potentially limiting NET's access to lenders and investors.

- b. **A decision excluding a single type of commodity from the Board's exclusive jurisdiction would conflict with more than 100 years of precedent, and would introduce enormous uncertainty in the planning, financing, construction and operation of every transloading facility in the United States.**

As discussed in Answer 1 above and Answer 5 below, the ICCTA vests broad jurisdiction in the Board over rail transportation. Neither the statute nor the interpretive case law dilute that jurisdiction based on the type of commodity being transported. Just two years ago, the Board unequivocally stated that “[local regulation of] when and where particular products can be carried by rail . . . would not have merely incidental effects on rail operations . . . but would constitute direct regulation of a railroad’s activities.” CSX Transp., Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662 (STB Served March 14, 2005) (emphasis added). In that case, the District of Columbia City Council enacted a law (“D.C. Act”) that required a rail carrier to obtain a permit from the D.C. Department of Transportation before the carrier could transport hazardous materials within 2.2 miles of Washington, D.C. In effect, the D.C. City Council attempted to impose local regulation on a single class of commodity—hazardous materials—in disregard of the Board’s exclusive jurisdiction over rail transportation. In a detailed analysis of the scope of its own jurisdiction under the ICCTA that is directly applicable in this case, the Board concluded that the D.C. Act was preempted. If the Board now were to ignore that unequivocal decision, rendered just two years ago, and exclude a particular product from its jurisdiction, that decision would send shockwaves through the rail industry as well as the transloading industry, because it would open the door for state and local governments—or local interest groups—to challenge the Board’s exclusive jurisdiction over transportation of every other commodity and attempt to regulate – or prevent entirely – the rail transportation of those commodities.

In CSX, this Board rejected an attempt to impose local routing regulations on transportation of extremely hazardous toxic chemicals through a heavily populated metropolitan area not far from the Congress of the United States. The U.S. Court of Appeals for the D.C. Circuit reached the same conclusion in CXS Transp., Inc. v. Williams, 406 F.3d 667 (D.C. Cir. 2005), finding that the D.C. Act “unreasonably burden[ed] interstate commerce.” In light of those decisions, it is hard to imagine any justification for allowing local regulation of rail transportation of non-hazardous C&D and MSW, or any other particular commodity.

Q.5. In determining whether a facility is a rail transloading facility, must the activities that take place there be solely transportation activities?

A.5. Transportation is broadly defined under the ICCTA to include “(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” 49 U.S.C. § 10902(9) (emphasis added).

As discussed more fully in NET’s Prior Filings, NET Petition at 18-20, Consolidated Reply at 4-5, and NET’s Reply to Jurisdictional Comments at 6-8, Courts have uniformly recognized that the ICCTA is “among the most pervasive and comprehensive of federal regulatory schemes.” City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998) (quoting Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318 (1981)). The Board has confirmed that “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations’ than that contained in section

10501(b).” CSX Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662 (STB Served March 14, 2005) (quoting CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581-84 (N.D. Ga. 1996). “Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board’s jurisdiction or a railroad’s ability to conduct its operations.” Id. As demonstrated in NET Prior Filings and in Answer 1 above and Answer 6 below, both the Board and the Courts that have interpreted the scope of the Board’s jurisdiction have uniformly held that the types of intermodal transloading operations to be conducted by NET constitute “transportation” under the statute.

Q.6. In determining whether NET’s proposed activities would be part of rail transportation, would it be enough that an activity facilitates transportation, or must that activity be essential to the transportation?

A.6. The law on that question has been settled for more than 100 years, and is beyond debate. The U.S. Supreme Court, and virtually every other court that has examined the issue have held that the federal law preempts any attempt to impose local regulation on activities that facilitate transportation.

The text of the ICCTA includes in the definition of “transportation” many other services in addition to the interchange of property from one mode of transportation to another. See Answer 5, supra, page 12; 49 U.S.C. 10901(9) (“services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.”) (emphasis added). The core of that definition has remained unchanged since 1906. See Act of June 29, 1906, ch. 3591, 34 Stat. 584 (“services related to [the movement of goods], including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange.”) Historically, the definition

of transportation swept within the Board's jurisdiction other businesses, such as terminals, storage facilities, pipelines, ferries and others, under the jurisdiction of the Interstate Commerce Commission ("ICC"). See, e.g., Sec'y of Agric. v. U.S., 347 U.S. 645 (1954) (loading and unloading at pier terminals); United States v. Union Stockyards, 226 U.S. 286 (1912) (loading, unloading, and feeding of livestock); S. Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911). "Thus, Congress clearly recognized that services such as [grain elevators that processed, cleaned, mixed, and transloaded grain ancillary to the rail service] were services in transportation," although they were conducted by private grain companies. See ICC v. Diffenbaugh, 222 U.S. 42, 44 (1911); see also Cleveland, Cincinnati, Chicago, & St. Louis Ry. Co. v. Dettlebach, 239 U.S. 588, 594 (1916) ("[F]rom this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier."). That statement of the law is still true today.

Presently, there are many processes undertaken by rail carriers at transload facilities like NET's that have been determined to be part of "transportation" subject to the Board's exclusive jurisdiction. See Answer 1, above; Answer 5, above. As AAR noted in its comments, "[o]ften there are processes taking place at rail transload facilities that occur at other facilities that: (1) load products onto a non-rail transportation mode or transload products between two non-rail transportation modes; and (2) that would occur even absent rail transportation." AAR Comments at 4. The AAR comments cited numerous examples and described how, when performed in the context of a rail transload operation, these processes facilitate rail transportation.¹⁰

¹⁰ "For example, at intermodal facilities, truck chassis must be inspected, and occasional spot repairs conducted, prior to release – processes that may not seem immediately to be "rail

Processes like those in the cited cases and those described by AAR are not “essential” to the actual interchange of property from one mode of transportation to another or to the actual movement of goods in interstate commerce. As shown by just a few of the many examples in the caselaw—and in AAR’s comments, it is not “essential” that livestock be fed by a railroad prior to being loaded on rail cars. It is not “essential” that grain be aggregated, mixed, processed, and cleaned by a railroad on-site. It is not “essential” that corn syrup be heated by a railroad before being loaded into a rail car. However, it is well-accepted and far beyond dispute that every one of those processes is a part of the “transportation” subject to the Board’s jurisdiction, because each process “facilitates” the movement of the goods by ensuring that the cargo is safe, that it is transported in accordance with the customer’s request, and that it is transported in the most efficient means possible.

Q.7. May a determination be based on the type of commodity involved? To what extent, if any, does it matter that the proposed facility would handle multiple commodities?

A.7. The law is settled that the federal law preempting local regulation of transportation does not depend in any way on the type of commodity being transported. There are no exceptions. The fact that the facility has been designed to handle multiple commodities is evidence that NET would be a common carrier.

transportation” but which are absolutely necessary to the rail transload function because the chassis should not leave the intermodal facility in an unsafe condition. At railroad docks on Lake Erie owned by NS and CSX (Ashtabula, Sandusky, and Toledo) coal is transloaded off of the rails and onto Lake vessels (and, in the case of Sandusky, into trucks) – coal that often must be staged on the ground, sampled and weighed before being transloaded. At NS’ Lamberts Point Docks in Norfolk, where coal is transloaded between rail cars and ocean going vessels, coals from various sources are mixed via the loading process in accordance with a customer’s request. At a potato flake transload facility on BNSF, product is transferred to and from sample containers via pneumatic tube, where the product is tested for quality and moisture content during the process of transloading to truck. At petroleum coke transload locations, petroleum-coke is tested and blended on-site for a particular sulphur content during the transload operations. At automotive transload facilities throughout the interstate rail system, vehicles are inspected both before entering the rail car and upon leaving the rail car.” AAR Comments at 4.

a. May a determination be based on the type of commodity involved?

No. A determination may not be based on the type of commodity involved. As discussed in Answer 4b above, the Board has already unequivocally rejected the argument that the Board's jurisdiction differs depending on the type of commodity. See CSX Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662 (STB Served March 14, 2005). That statement of the law is absolutely clear. There is absolutely no legal basis for the Board to treat other commodities any differently.

b. To what extent, if any, does it matter that the proposed facility would handle multiple commodities?

The fact that a facility is equipped to handle multiple commodities is relevant for two reasons. First, the fact that waste is only one of many commodities that NET intends to transport distinguishes the NET Facility from the facilities discussed in Hi-Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3d Cir. 2004), and New Jersey v. J.P. Rail, Inc., Atlantic Superior Court Docket No. C-41-06 (Chancery Div. June 22, 2006), the two cases on which NET's opponents rely.¹¹ In both of those cases, the transloading facility at issue was designed solely to transload solid waste. That is not true here. Second, the ability of a rail-based transloading facility to handle multiple commodities is also one of the factors on which the Board has relied in the past in determining that a facility is a railroad subject to the Board's jurisdiction rather than an industrial siding. See, e.g., NET Petition at 17, n.24. In those cases, the railroad was part of the

¹¹ The reasons that neither Hi-Tech nor J.P. Rail have application here are more fully discussed in NET's Consolidated Reply at 10 and NET's Reply to Jurisdictional Comments at 15. It should be noted here, however, that when the Board considered the issues in Hi-Tech, the Board correctly concluded that "[t]here is no dispute that Hi Tech's transloading activities are within the broad definition of transportation." Hi Tech Trans, LLC -- Petition for Declaratory Order -- Newark, NJ, STB Finance Docket No. 34192, at *5-6 (STB Served August 14, 2003) rev'd on other grounds, 382 F.3d 295 (3d Cir. 2004).

integrated operations of a company that that was affiliated with landfills or hauling companies. In contrast, NET will be a rail transportation common carrier without no such affiliation.

Q.8. Should C&D and MSW be considered differently from all other commodities and, if so, on what basis?

A.8. No. There is no basis to treat C&D and MSW differently than any other commodity transported by rail. As discussed in Answer 4a and Answer 7 above, the Board unequivocally rejected an attempt by the District of Columbia to treat hazardous materials differently from other commodities transported by rail. CSX Transportation, Inc.—Petition for Declaratory Order, STB Finance Docket No. 34662 (STB Served March 14, 2005). The Board's conclusion is consistent with the conclusion of the D.C. Circuit in CSX Transp. Inc. v. Williams, 406 F. 3d 667 (D.C. Cir. 2005). If there is no basis to exclude hazardous materials from the preemptive effect of the statute, there is no basis to exclude C&D and MSW either.¹² As between hazardous material and solid waste, the former presents the greater risk to health and safety. However, the Board held that, as a matter of law, any attempt to impose local regulation on the transportation of hazardous materials was preempted. Accordingly, there is no legal basis for excluding any one commodity from the statute's preemptive effect.

It is undisputed that waste is a freight commodity. Nuclear Diagnostic Laboratories, Inc., Contract Carrier Application, 131 ICC 578, 580 (1979). It is also undisputed that waste is a commodity that is currently shipped by rail. In the Railway Age article discussed in Answer 4a

¹² That proposition is supported by recent court decisions in NYS&W v. Jackson, No. 05-4010 (KSH), 2007 WL 57643 (D.N.J. February 20, 2007), Coastal Distribution LLC v. Town of Babylon, No. 05-CV-2032, slip op., 2006 WL 270252 (E.D.N.Y. January 31, 2006) aff'd, No. 06-0981-CV (2d Cir. February 7, 2007), and Canadian National Railway, et al. v. City of Rockford, et al., 2005 WL 1349077 (E.D. Mich. June 2, 2005) and by the Board's decision in Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ, STB Finance Docket No. 34192, at *5-6 (STB Served August 14, 2003) ("There is no dispute that Hi Tech's transloading activities [involving C&D] are within the broad definition of transportation.").

above, Mr. Borman discussed the importance of the ability to transload and transport waste to the viability of the short line and terminal railroads. NET Reply to Jurisdictional Comments at 9, n. 4, Ex. D.

As NET discussed in the NET Petition and the NET Reply to Jurisdictional Comments, many rail carriers that presently operate transload facilities handling solid waste crush C&D using excavating equipment, and force C&D into rail cars using grapplers and front end loaders. Ryan V.S. at ¶ 6; Egan V.S. at ¶ 5; Reply to Jurisdictional Comments at 10. In contrast, NET's shredding of C&D and baling of MSW will facilitate safer and more efficient transportation.¹³ NET's proposed handling techniques represent "best management practices" and are a marked improvement over those practices. Ryan V.S. at ¶¶ 2, 6, 10; Egan V.S. at ¶¶ 6-9.

Q.9. What is the source of the materials other than C&D and MSW that NET proposes to transport? Where are those shipments destined? Would those commodities be segregated from C&D and MSW? How would they be segregated, loaded and unloaded?

A.9. The answers to the four questions included within Question 9 are set forth below, and are more fully explained in the materials previously filed in the Record by NET.

¹³ See NET Reply to Jurisdictional Comments at 11. "Indeed, NET submits that its proposed practices should be encouraged – if not required – by the Board. At the very least, NET should not be penalized for seeking to engage in the best management practices for handling these materials. Nevertheless, if the Board determines that NET's proposed practices for unloading and loading C&D and MSW are not part of rail transportation, NET reserves the right to operate its facility in an antiquated manner by crushing C&D under excavators and by forcibly packing the C&D into rail cars and by forcibly packing MSW into rail containers."

a. What is the source of the materials other than C&D and MSW that NET proposes to transport?

As stated in NET's Supplemental Verified Statement, NET is not affiliated in any way with shippers, manufacturers, purchasers, or other carriers of commodities. NET Supplemental V.S. at ¶ 3. No shipment will originate from NET or be destined for NET. That fact distinguishes NET from the operators of industrial spurs. NET is seeking Board authority to operate as a common carrier by rail to facilitate the movement of goods from different points of origin to different destinations. NET has engaged in discussions with a number of shippers and carriers, within and outside of Massachusetts, who desire to utilize NET and the NET Facility to transport non-waste commodities in interstate commerce. Details of those conversations are set forth in NET's Supplemental Verified Statement. In general, NET has had discussions with shippers and carriers located in Massachusetts, Maine, New Hampshire, Illinois, Pennsylvania, Ohio, Michigan, New York, Kentucky, and Virginia.

b. Where are those shipments destined?

As discussed in Answer 9a above, the NET facility is not a final destination for any of the commodities that will be transloaded there. Rather, after transloading, all commodities received will be shipped to various other points within and outside of Massachusetts.

c. Would those commodities be segregated from C&D and MSW?

Yes. The NET Facility is specifically designed to segregate the non-waste commodities from the C&D and MSW. In connection with the SEA's April 7, 2006 Notice to Interested Parties, NET submitted information and drawings which identify specific locations for which various commodities are to be loaded and unloaded.

d. How would they be segregated, loaded and unloaded?

As explained in NET's Petition and Verified Statements, NET is prepared to transload a variety of commodities, depending on the market that develops for its services. Those commodities are expected to include the ones that were described in NET's Prior Filings and NET's Supplemental Verified Statement. Based on expressions of interest from potential shippers, the NET Facility is specifically designed to handle those and other commodities in three distinct areas of the NET Development Area. These areas are described in great detail in NET's Petition at 6-12. They are summarized below.

The northeastern area of the Property will be used to handle "pumpable" materials including, but not limited to, (1) liquid commodities (such as corn sweeteners and vegetable oil) that will be heated and pumped using portable equipment, and (2) pumpable dry materials (such as soda ash and plastic pellets) that will be transferred between trucks and rail cars using portable blower equipment. Jones V.S. at ¶ 11. The western area of the Property will be used to handle bulk materials including, but not limited to, lumber, salt, sand, gravel, aggregates and woodchips using portable equipment. All of the C&D and MSW will be handled in an enclosed Transloading Structure, which is located in the central area of the Property.

C&D will be unloaded from trucks onto the concrete floor of the north side of the Transloading Structure and each shipment will be inspected to ensure that it is consistent with the terms of its bill of lading and contains no hazardous waste. Jones V.S. at ¶ 13. The C&D will be conveyed to shredders that will reduce it to a maximum size that can be loaded into rail cars with conveyor belts. Id.; Ryan V.S. at ¶¶ 5-6.

MSW will be delivered by trucks through the south side of the Transloading Structure. Pre-baled MSW will be lifted from trucks within the Transloading Structure and loaded directly onto rail cars. Jones V.S. at ¶ 14. MSW arriving as a bulk material will be unloaded from trucks onto the concrete floor of the Transloading Structure where it will be inspected to ensure that it contains no hazardous waste or other materials which do not conform to a bill of lading.¹⁴ This MSW will be loaded into containers positioned in the Transload Equipment Area, which, once loaded, will be covered and lifted onto rail cars, or it will be baled and then loaded onto rail cars. Id. at ¶ 15. Some of the bales may be further wrapped in plastic to allow their shipment in certain types of cars. Id.

Q.10. Would NET's proposed activities at the transload facility 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 that have an impact on our determination here?

A.10. No. As described more fully below, and in NET's previous filings already in the Record, the proposed activities would not add value to the materials, they would not facilitate the disposal of the materials, and they would not serve any purpose other than to facilitate rail transportation.

a. Would NET's proposed activities at the transload facility with respect to C&D and MSW add value to the materials, or serve any purpose other than facilitating rail transport?

No. As described in detail in NET's Prior Filings, NET's proposed handling of C&D and MSW serves solely a transportation function because it is specifically designed and intended to accomplish three transportation objectives—to maximize transportation efficiency, to protect and

¹⁴ Jones V.S. at ¶ 15. As with items of hazardous waste discovered in shipments of C&D, NET will handle any item of hazardous waste discovered in a shipment of MSW in full compliance with applicable DOT requirements. Id.

preserve rail cars, and to promote safe transportation. The proposed activities have no other purpose.

NET attached to its Petition the verified statement of Mr. Thomas Egan, a 40 year veteran of the rail industry. Mr. Egan testified about the transportation function of shredding C&D and baling MSW. Mr. Egan's sworn statements have not been rebutted.

First, by shredding C&D before loading it, NET will greatly reduce (if not completely eliminate) the significant rail car damage that is now commonly experienced in C&D transportation by rail.¹⁵ Egan V.S. at ¶ 6. Obviously, this is an important factor to NET, which will own some of the rail cars, and to lessors of leased cars, many of whom specifically request that C&D be shredded. Jones V.S. at ¶ 13. Second, by minimizing void spaces in the cars caused by the bridging or tenting of large pieces of such materials, shredding allows operators to load cars to their full rated capacity. Egan V.S. at ¶¶ 5-7. This is particularly important for a small facility like this one. NET Reply to Jurisdictional Comments at 9. Third, shredding C&D minimizes the safety risks associated with unevenly loaded cars, which are more likely to derail than evenly loaded cars.¹⁶ *Id.* at ¶ 8.

¹⁵ Conceptually, shredding C&D is simply a step that allows the "raw" C&D that will typically be received at the facility in large pieces to be transloaded more easily, efficiently and safely from truck to rail. In this sense, the shredder serves a role similar to the heating facility which was considered by the Board in Borough of Riverdale - Petition for Declaratory Order – New York Susquehanna and Western Railway Corporation, Finance Docket No. 33466, 1999 WL 715272 (STB served September 10, 1999). Both the heating of corn syrup and the shredding of C&D facilitate the efficient transfer of cargos between modes of transport.

¹⁶ An analysis of data contained in a Federal Railroad Administration trend report of rail-related accidents occurring from 2003 through the first half of 2006 shows that seventy (70) accidents, including sixty-six (66) derailments, were a direct result of an improperly loaded car, placing that among the leading causes of railroad accidents not caused by human factors or track/mechanical

With respect to MSW, baling the material eliminates the need to pack it forcibly into rail cars or containers, which again minimizes damage to the cars and containers. Ryan V.S. at ¶. Baling MSW also maximizes the amount of material that can be transported in a single car and maximizes the types of rail cars that can be used to transport the MSW. *Id.* All three of these results relate directly to rail transportation.¹⁷ Those facts are undisputed.

With respect to both C&D and MSW, NET's handling objectives are the same. First, the shredding and baling will facilitate the transfer of these materials between trucks and rail cars. Second, it will minimize damage to containers and rail cars. Third, it will improve the capacity of containers and rail cars. Fourth, in the case of baling MSW, it will increase the number of cars available to ship that product. Finally, with respect to C&D, it will improve the safety of that product's shipment by rail. All of these objectives are necessary to facilitate rail transportation. See Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446 (1946) (loading, storing, and unloading services at a warehouse considered "transportation").

Contrary to the unsupported assertions of the opponents of the facility, none of NET's activities will be undertaken for the purpose of generating additional revenue from sales or recycling of "processed" C&D or MSW. NET will never take title to any of those materials, and will never "stockpile" or sell anything that comes in to the facility. NET's proposed handling of C&D and MSW will not "add value" in any way to the C&D or MSW itself, but will certainly be of economic value to NET in its business of providing transportation services, because it will

failure. In addition, forty-three (43) more accidents, including thirty-four (34) derailments, were a direct result of a load that shifted during transportation. See <http://safetydata.fra.dot.gov/OfficeofSafety/Query/Default.asp?page=incally1.asp>

¹⁷ Baling MSW results in the added environmental benefit of reducing fugitive odor and litter. Ryan V.S. at ¶ 11.

enable NET to perform that transportation function more efficiently and safely. That is entirely appropriate. There is an economic benefit by increasing the utilization of rail cars and minimizing damage to them. However, that is an economic benefit in reducing the costs of transportation, rather than the type of economic benefit that a solid waste or recycling facility realizes from C&D and MSW directly when it processes, stockpiles, and ultimately resells recycled materials directly in the marketplace.

b. Would NET's proposed activities at the transload facility with respect to C&D and MSW facilitate the disposal of the materials in a landfill or otherwise, or serve any purpose other than facilitating rail transport?

Again, the answer is no. The proposed handling of the C&D and MSW would not facilitate the disposal of materials in a landfill. For example, as described in NET's Reply to Jurisdictional Comments, NET will shred C&D only to a size that facilitates loading into rail cars (pieces about two feet long) for transportation, and would not "process" the C&D to produce a new "product" that is fine enough for use as a landfill cover or would otherwise facilitate the operations of the landfill. NET Reply to Jurisdictional Comments at 13, Ex. E. Consequently, the landfill will likely "process" the C&D by grinding and compacting the C&D to a smaller size before final disposition. In this regard, it makes no difference to the landfill whether it receives a piece of C&D material that is eight feet long or two feet long, since the landfill will most likely want to reduce the material to a 2 inch piece in an effort to facilitate air space preservation. Similarly, baled MSW is actually less functional for a landfill than loose MSW, since the landfill has to unload each 3000 lb. to 4000 lb. bale individually and cut the straps holding the bale together, rather than dumping a 20 ton truck load in one motion.

c. If so, should that have an impact on our determination here?

As explained in Answers 10a and 10b, NET's proposed handling activities serve only to facilitate the rail transportation of the C&D and MSW. Therefore, the Board is not presented with a case that requires a determination of whether activities that add value to the product being transported, as opposed to the transportation itself, are part of transportation. Since this case does not present that issue, the Board need not reach it, decide it, or comment on it in deciding this case, but should reserve an opinion on that issue for a future case in which it is directly presented by the facts. It is very important that the Board limit its decision to the undisputed facts that are in the Record of the case before it, rather than rendering a decision based on unsupported speculation.

Q.11. To what extent would NET's proposed handling of C&D and MSW be directed towards ensuring that the material would meet the requirements of the landfill, or other receiver, to which it would be transported?

A.11. As described in NET's Prior Filings and in Answer 10 above, the proposed handling of the C&D and MSW is not directed towards ensuring that the materials meet the requirements of any landfill or other receiver.¹⁸

The undisputed facts in the Record of this case demonstrate that NET's shredding and baling activities are not being undertaken to induce a biological, thermal or chemical change in solid waste materials in order to create a new product (e.g., compost) or to provide a separate business service (e.g., recycling).¹⁹ Jones V.S. at ¶ 18. In contrast to those kinds of activities,

¹⁸ NET will, like other common carriers, inspect all of its cargo to ensure that the material is consistent with the Bill of Lading and conforms to the requirements set forth in the Bill of Lading.

¹⁹ As a further example, NET attached to its Reply to Jurisdictional Comments as Exhibit E a chart showing the differences between the operation of C&D transfer facilities and MSW material recovery facilities and the operation at the NET Facility. As the chart demonstrates,

NET's shredding of C&D and baling of MSW do not change the underlying nature of these cargos. Id. Shredded C&D will still be C&D and baled MSW will still be MSW when those products are shipped out of the NET Facility in rail cars. The shredding and baling of materials will be done solely to (1) facilitate their transfer into railcars and their subsequent carriage to the end users in one continuous intermodal rail movement; (2) minimize damage to railcars; and (3) maximize the utilization and safety of railcars. Petition at 11-12; Jones V.S. at ¶¶ 13, 15; Ryan V.S. at ¶¶ 5-12.

Q.12. Does NET anticipate earning revenue as a result of any recycling activities, e.g., NET's proposed activities of inspection, sorting and reclaiming of reusable materials from the C&D and MSW at this facility?

A.12. No. As discussed in NET's Prior Filings and in NET's Answers to Questions 8-11 above, NET's proposed handling of C&D and MSW is only directed to facilitating transportation. NET has repeatedly stated, in verified statements, that it will never take title to any of the materials passing through the NET Facility, that it will not be in the business of "processing" the materials for resale into the local market, and that it will derive all of its revenue from its transloading/transportation activities. Petition at 12; Jones V.S. at ¶¶ 16, 19; Consolidated Reply at 9; Reply to Jurisdictional Comments at 13-14. The opponents of the NET facility have submitted no Verified Statement contradicting those facts, and they are therefore undisputed in the Record.

there are a number of significant differences. For example, typical solid waste processing facilities create increasingly finer types of aggregate from their grinding and screening of concrete materials, with some pieces being as small as a grain of rice. This grinding and screening practice is done for the sole purpose of creating and then selling these aggregate materials as commercial products. In contrast, NET intends to shred concrete and other materials into much larger pieces, typically averaging two feet in length. NET's sole purpose in shredding these materials is to facilitate their loading onto rail cars for transportation. Unlike solid waste processing facilities, NET will not be creating stockpiles of different types of commercial materials for the purpose of resale. Instead, NET will derive all of its revenue from its transloading and transportation activities. NET Reply to Jurisdictional Comments at 14, Ex. E.

Q.13. What is the background of each of the principals of NET? What is the extent of their prior and current involvement in (a) the railroad industry; (b) the trucking industry; (c) the MSW and C&D industries; and (d) environmental compliance issues? How was the NET project conceived?

A.13. As described in the NET Petition, the four principals of NET are Robert W. Jones, III, Ronald A. Klempner, Jack Lyon, and Carl D. Jones. NET Petition at 5, n.6; Jones V.S. at ¶ 1. Each individual owns a 25% interest in NET. Id. Each of these individuals have extensive experience in one or more of the industries mentioned above, and, collectively, they form a group that is uniquely qualified to construct and operate the NET Facility in a safe, efficient manner. Information regarding the extent of each individual's prior and current involvement with the railroad industry, the trucking industry, the MSW and C&D industries and environmental compliance is summarized below:

a. What is the background of each of the principals of NET?

1. Robert W. Jones, III.

Mr. Jones is a graduate of the University of Alabama where he obtained a degree in Petroleum Engineering. He is also a graduate of the Rutgers University Graduate School of Management where he obtained a Masters Degree in Business Administration. Mr. Jones has also studied at Stevens Institute of Technology in Hoboken, New Jersey. He has certifications from Georgia Institute of Technology and Texas A&M University in Underground Tank Storage, Cathodic Protection, and Industrial Fire Protection. He is a certified as a Hazardous Materials Technician, Hazardous Materials Instructor, and a Hazardous Materials Incident Commander.

Mr. Jones' has extensive experience in bulk transloading and transportation infrastructure development and operations. He was employed by Amerada Hess Oil Company as an Operations Manager in the Terminal Operations Division, which had responsibility for bulk

shipments of refined petroleum products and intermediary chemicals via pipeline, barge, and rail. In that role, his division was responsible for the oversight all aspects of the terminal operations.

Mr. Jones has also worked for Mr. Carl Jones, P.E. (also a principal of NET) at both Potomac Technologies and Prince George's Contractors. In that capacity, Mr. Jones was responsible for business development in the areas of bulk organic materials composting. Mr. Jones was instrumental in assisting both companies to develop logistics plans for complex transload operations using rail transportation as the primary means of shipping products into and out of the New York/New Jersey metropolitan area. In 2001, Mr. Jones was a founding member of Hi Tech Trans, LLC. which was the transload operating company for Canadian Pacific Railroad located in the Oak Island Yard in Newark, New Jersey. Hi-Tech is currently operating as Transload America in the same location.

Mr. Jones has also provided consulting services to some of the country's largest companies, including Vivendi/Companie Generale Des Eaux/PSG, Wheelabrator Clean Water, Legg Mason Wood Walker, and Compost America, which was then the parent company of Environmental Protection and Improvement Company (EPIC).

2. Ronald A. Klempner

Mr. Klempner graduated from the University of Michigan and received his law degree from the University of Michigan Law School, where he was an Associate Editor of the Michigan Law Review. While an attorney with both Paul, Weiss, Rifkin, Wharton & Garrison and Kassel, Neuwirth & Geiger, Mr. Klempner's practice focused on various aspects of freight rail transportation including project finance. In that capacity, Mr. Klempner advised the Penn Central Railroad on the sale of rail yard air-rights in New York City, and he developed and

negotiated bond financing on behalf of Marubeni Corp for the expansion of major rail-to-vessel grain transloading and storage facility Portland, Maine.

As counsel and business development officer to a small natural gas transmission and distribution company, Mr. Klempner provided legal counsel regarding railroad rights of way along the Bath Hammondsport Railroad in Hammondsport, NY. As counsel to Chem Rail, Inc. Mr. Klempner helped develop and negotiate the terms for the construction and operation of a hazardous waste truck-to-rail transloading facility. Mr. Klempner has also been the project manager responsible for overseeing the transloading operations and rail transportation of dewatered sludge, compost, ash, and harbor dredge spoils.

Mr. Klempner has also served as a rail consultant. In that capacity, Mr. Klempner has advised and has conducted a financial feasibility study of both the New York Cross Harbor Railroad and the Long Island Railroad (now held by NYARR). He has also advised numerous clients, both within the United States and abroad, on the transloading and rail transportation of recycled paper, solid waste, and hazardous materials. Along with Mr. Jones, Mr. Klempner was a founding member of Hi-Tech Trans, LLC and developing logistical plans for complex transloading operations using rail transportation as the primary means for shipping products into and out of the New York/New Jersey metropolitan area.

Mr. Klempner also served as counsel to the Commerce, Consumer and Monetary Affairs Subcommittee of the Government Operations Committee of the U.S. House of Representatives from 1975 to 1978. Mr. Klempner is currently a member both of the Transportation Research Forum, New York Branch, and the Transportation Committee of the New York City Bar Association.

3. **Jack Lyon**

Mr. Lyon is a graduate of West Virginia Wesleyan College and the American University Graduate School. He served in the United States Navy from 1943 to 1953.

For nearly 20 years, Mr. Lyon was president and principal owner of both a heavy construction firm, Lyon Construction Company, Inc., and a rail-served stone quarry, Excavation Construction Company, Inc. The construction company had 110 Mack dump trucks and also owned numerous loaders, graders, bulldozers, cranes, shovels, and a myriad of water and dewatering equipment used in dredging projects. The stone quarry produced over two million tons of aggregate annually, most of which was shipped by rail. The operation had 55 Mack dump trucks, employed the services of 20 independent truckers, and averaged loading 125 railcars per day, frequently requiring the transloading of unit cars. CSX provided the rail transport from the quarry and was a major ballast customer.

Mr. Lyon is presently Chairman of the Board of The Excel Institute, and until 2006, he served as Chairman of Parking Management Inc. Prior to becoming Chairman of Parking Management Inc., Mr. Lyon served as its President for 35 years. Mr. Lyon has served on the Board of Directors for The Washington Board of Trade, National Bank of Washington, Heroes Inc., Super Leaders, National Parking Association, Children's Choir of Maryland, and numerous other industry and charitable organizations..

4. **Carl D. Jones, P.E.**

Mr. Carl Jones is a graduate of Howard University. He is a registered Professional Engineer in the States of Alabama, Maryland, and in the District of Columbia.

From 1970 through 1972, Mr. Jones worked as Federal Grants Contract Manager for the U.S. Urban Mass Transportation Administration (“UMTA”), which is now the Federal Transit Administration within the U.S. Department of Transportation. His responsibility was to ensure that rail transit system grantees complied with the terms and conditions of grant contracts and that the quality of the grantees’ work was in accordance with sound engineering and construction practices. Mr. Jones worked with grantees in Philadelphia, PA, Northern NJ, and New York City, and specifically dealt with grants involving the commuter railroads into and out of New York City. He also worked on special mass transit projects in Boston, MA.

For nearly 20 years, Mr. Jones owned a road building company which included three asphalt manufacturing plants. Mr. Jones’ company included a staff of 100 employees and more than 100 trucks and other miscellaneous pieces of equipment. As a Professional Engineer and Heavy Civil Construction Contractor, Mr. Jones has designed and/or built five facilities affiliated with the Washington, DC METRO system, three more on the Baltimore, MD Metro system and one on Atlanta’s MARTA system. The projects included rock tunneling jobs, deep air shafts, retaining walls and bridge support systems, streets and roadway paving and restoration surrounding railway stations.

Mr. Jones has also been involved in numerous projects involving the transportation and processing of biosolids. Mr. Jones has financially participated and provided technical assistance to the predecessor of Synagro/EPIC (currently owned by Carlyle Group) in securing the transportation of New York City’s biosolids to land application sites in Arizona and Colorado. He is also part owner of and oversees transportation issues for JABB II, L.L.C., a joint venture formed to transport and land apply biosolids generated in Washington, DC and Maryland.

Mr. Jones continues to provide financial and technical assistance to Joseph Smith and Sons in the loading and receiving of scrap metal at its facility in Washington, DC. Joseph Smith and Sons is a large facility that ships approximately 1,000,000 tons of scrap metal per year via railroad.

Mr. Jones is a past Board Member of Columbia Bank of Maryland, Greater Southeast Hospital of Washington, D.C., and Cheney Enterprises. He is also past member of the Maryland Governor's Office of Minority Affairs.

b. How was the NET project conceived?

The NET project has a rail-based history. Because of their familiarity with the rail industry and infrastructure development in the Northeast, and their significant relationships with shippers and other carriers, Mr. Jones and Mr. Klempner discovered a need for rail transloading facilities in the Boston area. There was low freight rail penetration into Eastern Massachusetts and there was a shortage of well-located transload facilities in that market. NET used its railroad contacts to inquire about the economic feasibility of new rail-operated transload facility.

In preliminary discussions with both The Guilford Rail System (now Pan Am Railway) and Canadian Pacific Railway, marketing personnel confirmed the types of commodities that they would expect to be handled at such a transload facility in that market. The mix of products included sand and gravel, salt, plastic pellets, corn syrup, C&D and MSW. At that time, Mr. Jones and Mr. Klempner concluded that the ability to transload and transport C&D would make the project more attractive to lenders and other investors and would enable them to obtain initial financing for the project while a steady and reliable volume of other commodity traffic was developed. They also believed that transporting C&D was important because C&D was the

primary commodity shipped west-bound out of the Boston area in gondola cars. The returning gondola cars would provide an opportunity to develop a valuable back-haul business, which would lower the overall transportation costs of all carriers involved in the haul. The backhaul business would also increase car availability. Mr. Jones and Mr. Klempner knew that this opportunity would provide them with a key economic advantage over competitors.

In 2002, Mr. Jones and Mr. Klempner began looking in the Boston area for potential sites that were large enough to accommodate the various types of commodities that NET expected to handle. Many of the sites examined by NET were either too small to accommodate multiple commodities, too far from the center of the metropolitan area, or too expensive to make the project economically feasible.

An employee of the Boston & Maine Railroad ("B&M") (a subsidiary of The Guilford Rail System—now Pan Am Railway) suggested that the Olin Site might be ideally suited for the development of such a rail transloading facility. The site was located in close proximity to Boston, and near the interchange of the two major interstate highways serving that area—I-93, the north/south highway running from downtown Boston through New Hampshire; and I-95, the inner beltway around Boston and leading Northeast to the "Downeast" region of Massachusetts. In addition, the site included an existing Y-shaped set of tracks that was formerly used to service a chemical manufacturing operation. The Wilmington-Woburn-West Medford branch line of the B&M runs along the west side of the property, and the Boston-Concord line belonging to the MBTA runs along the east side of the property. NET Petition at 6. B&M was reluctant to develop the property itself.

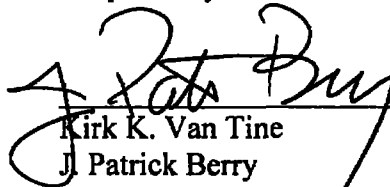
NET was formed and began developing its business plan. As described in NET's Prior Filings, from the outset the facility was designed to handle multiple commodities, with the ability to expand and shift between commodities as markets dictate. In addition, the NET Facility was designed in consultation with B&M to facilitate switching and interchanging rail cars from the NET Facility as well as B&M's cement customer across the street, and to enhance their ability to provide service on a line that is primarily used for commuter traffic.

Once NET established its business plan and began marketing the NET Facility, numerous potential customers contacted NET. The nature of these discussions is set forth in the NET Petition and in NET's Supplemental Verified Statement. It soon became apparent that NET would need to add track and increase flexibility to meet the strong demand for various commodities. During the time that this proceeding has been pending, NET has continued to engaged in discussions with other shippers and carriers who desire to use NET and the NET Facility to transload and transport their products. The interest of a wide variety of shippers in using the facility is very strong, evidencing both the transportation need in the region, and the obvious transportation purpose of the facility.

CONCLUSION

For the reasons set forth above, and as explained in more detail in the NET filings and Verified Statements in the Record, the proposed facility and all of the activities that will take place there will serve an essential transportation purpose. There can be no serious question regarding the interpretation and applicability of the federal law preempting local regulation in this case. NET therefore respectfully requests that the Board approve its Petition without further delay, subject to such conditions as the Board deems appropriate to protect health and safety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kirk K. Van Tine", is written over a horizontal line.

Kirk K. Van Tine

J. Patrick Berry

Jeffrey M. Bauer

BAKER BOTTS LLP

1299 Pennsylvania Avenue, N.W.

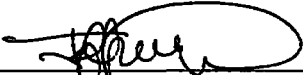
Washington, DC 20004

(202) 639-7700

Attorneys for New England Transrail, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2007, I served a copy of the foregoing by causing a copy to be delivered by first class mail, postage prepaid, to each person listed on the STB Service list for Finance Docket No. 34797.



Jeffrey M. Bauer

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

March 21, 2007

ECO-38-E

No. 07-1675

NY Susquehanna and Western Railway Corp

v.

Lisa P. Jackson, et al.

Appellants

(U.S. District Court for the District of NJ (Newark): No. 05-cv-04010)

Present: **AMBRO and FUENTES, Circuit Judges**

1. Emergency Motion by Appellants for a Stay of a Portion of the District Court's Order Pending Appeal, or in the Alternative to Expedite Appeal, with Exhibits.
2. Response by Appellee, The New York, Susquehanna and Western Railway Corp., In Opposition to Appellant's Motion for A Stay Pending Appeal, or in the Alternative to Expedite Appeal.
3. Response by Appellees, Cardella Trucking Co., Inc. and On-Track Loading, Co., Inc., to Appellant's Motion for A Stay Pending Appeal, or in the Alternative to Expedite Appeal.

/s/ Phyllis Ruffin

Case Manager: 267-299-4918

ORDER

The foregoing motion is denied as to the request to stay the pending appeal. In the alternative, the motion to expedite the appeal is granted. The Clerk is directed to issue an expedited briefing schedule which will allow the case to be brought before the next available panel.



Marcia M. Waldron

Marcia M. Waldron, Clerk

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: April 2, 2007

par/cc: K. P. A., Esq. G.P.M., Esq. C.D.P., Esq. J.M.S., Esq.

October 14, 2005

BY COURIER

Susan Ruch, Esquire
Office of General Counsel
Massachusetts Department of Environmental Protection
One Winter Street
Boston, Massachusetts 02108

Re: New England Transrail, LLC

Dear Susan:

Thank you again for arranging the meeting between representatives of New England Transrail, LLC (NET) and the Department on September 20. We very much appreciate the courtesy and thoughts shared at that meeting. As we agreed then, we are providing the following information requested by the Department: (1) a draft plan depicting NET's proposed improvements to the site; (2) aerial photographs showing the site vicinity and demonstrating the absence of sensitive receptors in that vicinity; (3) the proposed hours of operation of the NET facility; (4) a conceptual description of the construction and operations anticipated at the site and the DEP health and safety requirements we agree are applicable to those activities; and (5) information regarding structures of the sort to be constructed on the site.

1. **Plan Depicting NET's Proposed Improvements**

I have enclosed as Exhibit A a color copy of the draft plan we discussed at our meeting. Although this is the most current draft plan, it is only a draft and, therefore, subject to further changes. For example, this draft plan does not show the exact point of connection of the NET rail lines with the rail lines operated by the MBTA and the B&M Railroad. However, the approximate location and configuration of the rail lines are not expected to change (including the absence of any rail lines on the so called "containment area"). Of course, we would be happy to provide you with future revisions of this plan in connection with the dialogue we hope will continue between the Department and NET.

2. **Aerial Photographs Demonstrating Absence of "Sensitive Receptors"**

I have enclosed as Exhibits B and C two aerial photographs of the site and the vicinity. Exhibit B more clearly shows the homes closest to the site (on the far side of the industrial buildings to the west) described by Mr. Pyott at our meeting as being located approximately 800 feet from the area where the transloading of MSW and C&D will occur. Exhibit C more clearly

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shows the proximity of the site to Interstate 93. Both Exhibits B and C clearly show the current site conditions, including the so-called "containment area".

3. Hours of NET Operations

NET expects to operate Monday through Friday from 5:00 a.m. to 6:30 pm, Saturdays from 7:00 am to 5:00 pm and Sundays from 7:00 am to 12:00 pm. NET will not operate on January 1, July 4, Labor Day, Thanksgiving Day and Christmas Day.

4. Conceptual Description of Construction and Operations and Applicable DEP Requirements

A. Construction Activities

As requested when we met, the following is a recounting of our discussion of NET's construction activities which will consist of demolition of the buildings and railroad tracks currently on the site, limited excavation in connection with the construction of new rail lines and NET's transloading facilities, and the construction of those rail lines and transloading facilities.

NET will demolish the so-called West Warehouse, East Warehouse and Office Building formerly part of the Olin Corporation facilities on the site. The existing railroad tracks will also be removed. The existing underground utilities (including abandoned in-place chemical process pipelines) will be removed or capped in place. Existing asphalt and concrete roadbeds on the site will be removed or used as the base for new roadways.

NET's excavation activities will include (i) excavation in connection with the installation of new underground utilities (involving approximately 1,500 cubic yards of excavated material), (ii) excavation in connection with the construction of new rail lines (involving excavation to a depth of approximately 3 feet below the current grade surface and approximately 10,250 cubic yards of excavated material), (iii) excavation in connection with the construction of the foundation of the waste transloading structure (involving excavation to a depth of up to approximately 5 feet below the current grade surface in the location of the concrete substructure that will house the facility's loading and conveyance equipment and approximately 1,500 cubic yards of excavated material), and (iv) excavation in connection with the construction of the NET facility's storm water management system (involving approximately 3,000 cubic yards of excavated material). No excavation is anticipated at a depth greater than 8 feet below the current grade surface. Groundwater is located at a depth of approximately 6 to 9 feet below the current grade surface.

NET will install two siding tracks in the northeastern area of the site (for transloading pumpable products such as plastic resins and liquids), two siding tracks in the central area of the site for transloading C&D and MSW, three siding tracks in the western area of the site for transloading bulk materials such as sand, gravel and wood chips, and one main track (which will run between the two siding tracks in the central area of the site) that will connect the MBTA

lines on the east side of the site and the B&M line on the west side of the site. The approximate locations of all of these rail lines are depicted in Exhibit A.

NET will install a "sprung-type" structure in the central area of the site for transloading C&D and MSW. It is within this structure that the concrete substructure (the "Transload Equipment Area") discussed above will be located.

NET will reinstall underground utilities, construct a storm water management system, new roadways, transloading equipment and gravel ground cover, all as depicted in Exhibit A.

Finally, NET will install an Engineered Barrier as proposed by Olin Corporation, and agreed by the Department, in the so-called "containment area". As we discussed when we met, this Engineered Barrier will be engineered to support certain aspects of NET's operations, such as the storage of bulk materials and the movement of vehicles associated with such storage. However, no rail lines will be constructed in this area.

B. Transloading Operations

NET expects to receive and transload a wide range of commodities. However, as we discussed when we met, and as is discussed below, NET will not receive and transload any shipments of any material that is defined as a hazardous waste by applicable federal and state laws and regulations.

NET presently expects to receive and transload different categories of material in three distinct areas of the site.

The northeastern area of the site will be used to handle "pumpable" materials including, but not limited to, liquid commodities (such as corn sweeteners and vegetable oil) that will be heated and pumped using portable equipment; and pumpable dry materials (such as soda ash and plastic pellets) that will be transferred between trucks and rail cars using portable blower equipment.

The western area of the site will be used to handle other "bulk" materials" (including, but not limited to, lumber, salt, sand, gravel, aggregates and woodchips) that will be stored and transloaded using portable equipment.

The central area of the site will be used to handle C&D and MSW.

C&D will be unloaded from trucks onto the concrete floor of the transloading structure discussed above. Each shipment of C&D will be inspected to ensure that it is consistent with the terms of its bill of lading and contains no hazardous waste. NET will segregate certain metal and wood or other materials which may damage NET's loading equipment and rail cars. Any segregated material will be transported to an appropriate receiving facility or returned to the shipper. C&D will be conveyed to shredders that will reduce it to a maximum size that can be loaded into rail cars with conveyor belts.

Susan Ruch, Esquire

October 14, 2005

Page 4

Generally speaking, there are two ways in which MSW will be transloaded. MSW will be delivered to the site pre-baled (but not wrapped in plastic). Such pre-baled waste will be removed from trucks in the transloading structure and directly loaded into rail cars. Each shipment of MSW that has not been pre-baled will be unloaded from trucks onto the concrete floor of the transloading structure where it will be inspected to ensure that it contains no hazardous waste or other materials which do not conform to a bill of lading. The remaining unbaled MSW will be transloaded onto rail cars in one of the following three ways: (i) it will be loaded into containers positioned in the Transload Equipment Area, which, once loaded, will be covered and lifted onto rail cars; (ii) it will be baled (but not wrapped in plastic) and then loaded into rail cars; or (iii) it will be baled and wrapped in plastic and then loaded into rail cars.

C. Compliance with Applicable DEP Health and Safety Requirements

As we discussed at our meeting, NET intends to comply fully with all applicable substantive state health and safety regulations governing NET's construction and operations.

More specifically, NET expects to conduct the construction activities described above pursuant to a Construction Release Abatement Measure (CRAM) plan as specified by the Massachusetts Contingency Plan, 310 CMR 40.0000, *et seq.* We were glad to hear that the Department believes that a CRAM can sufficiently account for the presence of any hazardous materials that may be encountered in the course of NET's construction activities and we will present a revised CRAM to the Department to that end. As we move forward, we want to better understand those conditions on the site that the Department believes may interfere with the attainment of a Permanent Solution to releases at, as opposed to from, the site so that NET can work with Olin Corporation and DEP to achieve a Permanent Solution to those conditions prior to commencing operations at the site, if possible. However, as we discussed when we met, NET will provide whatever access to the site Olin needs to conduct further response actions in accordance with its obligations to the federal and state governments even where such access requires the relocation of NET's facilities.

Other substantive state health and safety regulations pertaining to NET's operations with which NET expects to comply include:

- the Department's standards relating to air pollution (310 CMR 7.02(2)) and idling of vehicles (310 CMR 7.11(1) and (2));
- the Department's performance, design, operation and maintenance standards for transfer stations as set forth in 310 CMR 19.205 through 19.212 and 19.216 through 19.219; and
- the Department's standards regarding the rejection and appropriate disposition of "hazardous wastes", as defined by 310 CMR 30.00, and "special wastes", as defined by 310 CMR 19.061(2) and (3), including radioactive waste, asbestos-containing material, infectious waste, bio-hazardous waste, or other wastes

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

Susan Ruch, Esquire

October 14, 2005

Page 5

designated by the Department as requiring special management to protect public health, safety and the environment based on their physical, biological or chemical properties.

We offer these citations in the hope that by doing so we clarify NET's intent, not to provide a comprehensive list of the Massachusetts regulations applicable to NET's operations.

5. Information Regarding "Sprung" Structures

Enclosed as Exhibit D is information regarding "sprung" structures of the sort that NET intends to use on the site. As we discussed at our meeting, one advantage of such structures is that they can be easily relocated if necessary. As is discussed above, NET plans to install at least one of these structures in the central area of the site to be used for the transloading of MSW and C&D and may install others for the storage of other bulk materials.

We hope that the information provided herein eliminates any confusion over NET's proposed construction and operational activities, or the sort of DEP requirements that NET agrees will govern those activities. If the Department has any additional questions, please let me know. Otherwise, we'll look forward to hearing the Department's thoughts on how NET and the Department might memorialize NET's agreement to abide by the regulations governing its activities in a manner that secures the Department's ability to enforce that agreement.

NET will return to beneficial use an industrial site that I am sure the Department will agree has been idle for far too long. This use will bring jobs and tax revenue to the Town of Wilmington and a much needed transportation alternative to the Commonwealth that will reduce the amount of truck traffic on our highways. We look forward to working with the Department toward these ends.

Very truly yours,

Jeffrey R. Porter

cc: Mr. Robert Jones
J. Patrick Berry, Esquire
Marilyn Newman, Esquire

MINTZ LEVIN

Jeffrey R. Porter | 617 348 1711 | jporter@mintz.com

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December 6, 2005

BY COURIER

Susan Ruch, Esquire
Office of General Counsel
Massachusetts Department of Environmental Protection
One Winter Street
Boston, Massachusetts 02108

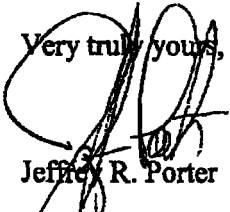
Re: New England Transrail, LLC

Dear Susan:

As you requested when we last spoke, please find enclosed copies of New England Transrail, LLC's petition relating to the proposed Wilmington facility (which was filed at the Surface Transportation Board yesterday) and the STB's waiver of the six-month pre-filing notice generally required for railroad-related construction projects with respect to the STB's consideration of the petition.

Needless to say, my client was very disappointed to learn that the Department of Environmental Protection has, for now, decided not to continue its conversation with New England Transrail about how New England Transrail and the Department might memorialize New England Transrail's agreement to abide by the state regulations governing its proposed activities in Wilmington. We hope that the Department will reconsider this decision after it reviews New England Transrail's petition to the STB and considers how federal law, as applied by the STB and interpreted by the federal courts, will govern that petition. Of course, if you have any questions or concerns regarding New England Transrail's petition to the STB in the meantime, please do not hesitate to contact me.

Very truly yours,


Jeffrey R. Porter

cc: Mr. Robert Jones, New England Transrail
J. Patrick Berry, Esquire, Baker Botts

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Susan Ruch, Esquire

December 6, 2005

Page 2

bcc: Stephen P. Tocco, ML Strategies
Stephen J. Silveira, ML Strategies

SURFACE TRANSPORTATION BOARD

Washington, DC 20423

Office of Economics, Environmental Analysis, and Administration

November 10, 2005

J. Patrick Berry, Esq.
Baker Botts LLP
1299 Pennsylvania Avenue, NW
Washington, D.C. 20004-2400

**Re: New England Transrail Proposed Acquisition and Construction and
Operation in Wilmington and Woburn, Massachusetts; Request for a
Waiver of the Six-Month Prefiling Notice**

Dear Mr. Berry:

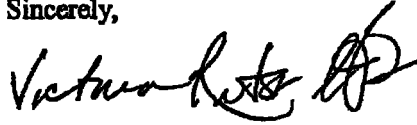
Pursuant to 49 CFR 1105.10(c), we are granting your request of November 2, 2005 for a waiver of the six-month prefiling notice generally required for rail line construction projects under 49 CFR 1105.10(a)(1).

In your waiver request, you explain that New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railroad Company (NET) previously sought permission from the Surface Transportation Board to construct, acquire, and operate certain track located on and adjacent to land owned by Olin Corporation in Wilmington and Woburn, MA. In a decision dated May 3, 2005, the Board dismissed NET's petition because, as relevant here, NET's proposal appeared to have changed substantially from that presented by NET to the Board's Section of Environmental Analysis (SEA) for its environmental review. The Board's decision specifically permitted NET to reapply for authority to the Board, providing NET submitted accurate and updated information to SEA.

SEA met with you and Ms. Marlene Carlucchi in July, August and September. At these consultation meetings, you explained certain modifications to NET's proposal and provided SEA with maps depicting the project area, a description of projected operations, a list of commodities to be carried, documentation describing ongoing consultation activities with the Massachusetts Department of Environmental Protection, and a preliminary assessment of some potential environmental impacts associated with the updated project. SEA staff provided you with a general overview of the Board's environmental review process should NET again seek Board authority, SEA's role in conducting the environmental review, and the role of third-party contractors. In addition, SEA discussed with you the importance of adequate public outreach, as well as the role of the public, including Federal, state and local agencies, parties of record, communities and other interested parties in the environmental review process.

Based on SEA's discussions with you at these recent meetings, and the fact that SEA is already familiar with the nature of this project, as a result of the earlier proceeding, SEA believes that the six-month profiling notice requirement can be waived. If we can be of further assistance, please feel free to contact me or Phillis Johnson of my staff at 202-565-1530.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria Rutson", followed by a large, stylized flourish or initial.

Victoria Rutson
Chief
Section of Environmental Analysis