

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

NEW ENGLAND TRANSRAIL, LLC,
d/b/a Wilmington & Woburn Terminal Railway
Petition for Exemption

STATEMENT OF POSITION OF
MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION

INTRODUCTION

This proceeding arises out of a Petition for Exemption from 49 U.S.C. § 10901 filed by a noncarrier, New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway ("NET"), proposing to acquire, construct, and operate a rail line and other activities on contaminated property (the "Olin Property") located in Wilmington and Woburn, Massachusetts. As part of its project, NET proposes to construct and operate a solid waste processing facility ("Facility") at which it would receive by truck municipal solid waste ("MSW") and construction and demolition debris ("C&D"). After receipt, NET states that it would sort, grind, crush, aggregate, segregate, and/or bale all of the C&D and some of the MSW before loading the processed materials onto rail cars or containers for rail shipment.

MassDEP acknowledges the value of solid waste processing as a means to recycle many of the materials included in solid waste, and in fact has approved the siting and operation of many solid waste processing facilities throughout the Commonwealth of Massachusetts. However, MassDEP opposes NET's Petition for Exemption to the extent

that NET seeks to operate such a solid waste processing facility without having to comply with uniformly applied solid waste site assignment and operational requirements that are specifically designed to protect human health, welfare and the environment. Although NET's proposed solid waste processing activities may incidentally benefit rail transportation, solid waste processing is generally performed to recover recyclable materials. NET's proposed solid waste processing activities are not integral to or necessary for rail transportation, and thus are not entitled to federal preemption under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA").

Accordingly, MassDEP respectfully requests that the Board determine that NET's proposed solid waste processing facility is not rail transportation and is therefore subject to state and local regulations designed to protect public health, safety and the environment. To the extent that the Board issues an exemption for NET's project, any such finding should extend only to rail-related activities and should specifically exclude the proposed solid waste processing facility and associated activities.

INTEREST OF MASSDEP

Massachusetts has an interest in ensuring a clean and healthy environment for its citizens. See Mass. Const., Art. 49 ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.") To ensure that solid waste management and disposal are conducted in a manner to protect public health, safety, and the environment, the Massachusetts Legislature enacted the Solid Waste

Management Act, M.G.L. c.111, §150A, which requires site assignment and permits for all solid waste facilities.

MassDEP is the agency entrusted with the authority to administer and enforce the Massachusetts Solid Waste Management Act and has promulgated regulations at 310 Code of Massachusetts Regulations (“CMR”) 16.00 et seq. and 19.000 et seq. to regulate the siting and operation of solid waste facilities for the protection of the public health and safety and the environment.

In its Petition, NET acknowledges that it will engage in solid waste processing activities at its proposed facility in Wilmington, Massachusetts. Specifically, NET proposes: to construct a canvas structure, the Solid Waste Processing Facility; to dump C&D waste onto the Facility’s tipping floor; to sort and segregate certain metal, wood and other materials; and to grind, crush or shred the C&D waste before loading it into containers to be placed onto rail cars. NET also proposes to process MSW within the Facility, where the MSW will be unloaded onto the tipping floor, sorted, baled and then placed into containers, which in turn will be loaded onto rail cars.

MSW and C&D are processed in just this fashion at facilities across Massachusetts, regardless of whether railroad is the mode of transporting the waste. Indeed, solid waste processing typically occurs at facilities in Massachusetts that are not located near rail lines.

NET’s proposed solid waste processing activities are critically different from the transloading of sealed containers of solid waste from a truck to a rail car. Massachusetts has submitted ample evidence in this proceeding to demonstrate two key points: (1) solid waste transloading does not require any processing of the waste; and (2) solid waste

processing activities can be and are routinely conducted at facilities across Massachusetts in the absence of rail transportation.

NET has not shown how denial of its Petition would preclude rail transport of solid waste from its proposed Facility, or prevent it from serving the needs of its customers.¹ NET's proposed solid waste processing activities are not necessary for the transfer of solid waste to rail cars, and thus are not integral to rail transportation.

Solid waste processing facilities pose a clear threat to public health, safety and the environment if not adequately regulated. NET's offers to employ voluntary measures to protect human health and safety are no substitute for state implementation of uniformly applied solid waste management regulations, particularly where, as here, the voluntary measures are proposed by an entity which is seeking immunity from state and local regulation.

RESPONSES TO ISSUES IDENTIFIED IN MARCH 29, 2007 NOTICE

In its March 29, 2007 Notice, the Board asked participants in the oral argument to respond to a number of issues germane to the Board's jurisdiction in this proceeding. While some of the questions call for information which can only be supplied by NET, MassDEP offers the following responses to other questions posed in the Board's Notice.

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?

¹ In a March 15, 2007 letter, NET boasts that no commenter has offered any rebuttal to its assertions that 50% or more of its proposed business will "ultimately involve" the transportation of commodities other than wastes. However, NET has more recently sought a protective order preventing those commenters from reviewing a document which "summarizes communications between NET and potential customers regarding NET's capability to transload a variety of commodities at the NET facility."

MassDEP believes that the Board should proceed to the merits in this case, despite the pending appeal in the United States Court of Appeals for the Third Circuit in the *NYS&W v. Jackson* matter, and despite the Environmental Protection Agency's ongoing investigation of the Olin Chemical Superfund Site where part of NET's proposed project will be located. EPA has recently informed the Board that it is still in negotiations with the potentially responsible parties regarding the Olin Site, and the remedial investigation and feasibility study ("RI/FS") has not even commenced. The result of EPA's investigation will not affect the Board's preemption analysis. NET's Petition has been pending for almost one year, the parties have submitted extensive comments, and there is sufficient judicial and Board precedent upon which to render a preliminary decision in this matter.

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?

There are no federal statutes or regulations specifically applicable to solid waste processing facilities. Certain aspects of such facilities, such as emissions from baling and shredding equipment, may be subject to federal regulation, and such equipment may require an air permit pursuant to MassDEP's air quality regulations at 310 CMR 7.00, which have been adopted as part of Massachusetts' State Implementation Plan as required by the Federal Clean Air Act.

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?

MassDEP respectfully submits that the foregoing arrangement would not be an adequate solution in this matter, from both legal and practical standpoints. First, the proposed arrangement does not address the critical role played by local and state authorities in the site suitability and site assignment process. Indeed, this review process establishes public health, safety and environmental performance standards that govern how the solid waste facilities would operate. The Board has consistently held that reasonable public health, safety and environmental performance standards are not preempted by the ICCTA. However, in the absence of such standards, state officials would lack the necessary guidelines for conducting an inspection. Second, while the proposed sanction of suspension or revocation of NET's authorization could address the more egregious violations, it does not address less serious violations which, by themselves or in combination, cause potential for significant harm to public health and the environment. MassDEP has more flexible enforcement options, such as notices of noncompliance, administrative penalties and administrative orders for situations that, while posing a risk of harm, may not necessitate shutting down the facility. Third, it is not evident to MassDEP that the Board has sufficient resources to address citizen complaints or public health threats as they arise, or to adjudicate disputes regarding violations. Fourth, the Board has stated that even if it finds that NET's solid waste processing facility falls within its jurisdiction, it does not have the authority to regulate such facilities. Accordingly, NET's proposed solid waste processing facility – which poses a potential threat to public health, safety and the environment - would be left free to operate in a regulatory vacuum.

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?

MassDEP has shown that solid waste processing is distinct from transloading; indeed, the two activities can be and are routinely conducted completely independently of one another. Massachusetts has implemented a uniformly applied regulatory scheme to ensure that solid waste processing facilities are sited and operated in a manner that will protect human health and safety. Thus, the solid waste processing activities as proposed by NET should not be considered part of rail transportation. Such a determination will not affect NET's proposal with respect to the transloading of other commodities. Moreover, since such a determination would be limited to the processing of solid waste, it would not have an impact on the transloading of other commodities by railroads.

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

MassDEP believes that the appropriate inquiry is whether the activities at a particular facility are necessary for, and thus integral to, rail transportation. The mere fact that NET's proposed processing activities may have incidental benefits to the rail transportation facets of NET's business does not equate those activities with transloading, nor does it make those activities integral to rail transportation. MassDEP has introduced evidence in this proceeding regarding a solid waste transloading facility in Allston, Massachusetts. There, solid waste is shipped by truck in sealed, leak-tight containers to the transloading facility. The waste is held in intermodal containers that are not opened at the rail terminal. The containers are simply moved from trucks onto railcars. Such operations reduce the incidence of nuisance conditions (e.g., dust, odor, litter, rats and other so-called "vectors") and pollution, and thus pose little threat to the environment

because the waste remains at all times in sealed containers. In contrast, NET's proposed processing activities of sorting, grinding and baling go beyond railroad transloading operations in which the containerized waste is simply transferred from truck to rail.

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?

MassDEP believes, consistent with Board precedent, that the proposed activity must be deemed necessary or integral to rail transportation. The mere fact that a proposed activity may "facilitate" transportation is not enough for purposes of determining whether that activity should be exempt from state and local health and safety regulations.

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 determination should be based on whether the activity or facility is integrally related to rail transportation. The type of commodity is relevant in determining whether the activity is necessary for rail transportation. Here, the commodity at issue is C&D and MSW. MassDEP has shown that these commodities can be transloaded without the need to do any processing. Unlike the transloading activities at the Allston, Massachusetts facility, solid waste processing produces dust, odor, litter, rats and vectors and thus constitutes a risk to human health, welfare or the environment. And unlike the transloading activities at the Allston facility, the processing of solid waste would be subject to state regulation.

It does not matter that a facility would handle multiple commodities. If the Board finds that the processing of solid waste is not preempted, NET would be required to

comply with all state and local laws and regulations concerning its solid waste processing activities.

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

While the preemption analysis does not treat C&D and MSW differently, the nature of the commodity is relevant to the analysis of whether the proposed processing activities are integral to the rail transportation of C&D and MSW. The processing of solid waste is not necessary for transportation but is necessary for transforming the waste into processed recyclables and processed solid waste for handling and disposal purposes. Because solid waste generates nuisance and pollution problems and creates a risk to human health, welfare or the environment. if not handled properly, Massachusetts has promulgated a comprehensive and uniformly applied program that regulates solid waste from point of generation to final disposal.

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?

Although NET's proposed solid waste processing activities would change the unprocessed waste stream into processed waste and recyclable material, thus adding value to the material and facilitating disposal at designated landfills, these additional services have nothing to do with transportation. These processing activities are not integral to or necessary for rail transportation, and Massachusetts should not be preempted from regulating them.

CONCLUSION

MassDEP fully understands that the Board's role is to ensure that railroads, which are necessary to ensure a healthy economy, are not unduly restricted by state and local authorities. However, MassDEP firmly believes that there are limits to what activities really are "integral" to rail transportation. Solid waste processing is simply not integral to being a railroad. Solid waste processing facilities are closely regulated across the country for a very good reason: they are inherently risky if not properly managed. Good management requires both good stewardship by the facility owner/operator and strong oversight by government. The ICCTA was not drafted to promote the growth of unregulated solid waste facilities or to impose upon the Board new burdens of regulating public health, safety and the environment. Accordingly, MassDEP asks the Board to find that NET's proposed solid waste processing facility and associated activities are not integrally related to rail transportation and that Massachusetts' regulation of those activities is not preempted by ICCTA.

Respectfully submitted by,

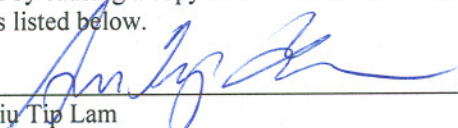
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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2007, I served the foregoing Statement of Position of Massachusetts Department of Environmental Protection by causing a copy thereof to be delivered via first class mail, postage prepaid, to the individuals or entities listed below.


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