

SURFACE TRANSPORTATION BOARD

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ORAL ARGUMENT

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IN THE MATTER OF ·

NEW ENGLAND TRANSRAIL,
LLC, d/b/a WILMINGTON &
WOBURN TERMINAL RAILWAY-
CONSTRUCTION, ACQUISITION
AND OPERATION EXEMPTION-
IN WILMINGTON AND
WOBURN, MA

STB Finance
Docket No.
34797

Surface Transportation Board
1st Floor Hearing Room
Patriots Plaza
395 E Street, S.W.
Washington, D.C.

Thursday, April 19, 2007
9:30 a.m.

BEFORE:

CHARLES D. NOTTINGHAM, Chairman
DOUGLAS BUTTREY, Vice Chairman
FRANCIS P. MULVEY, Commissioner

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:30 a.m.)

3 CHAIRMAN NOTTINGHAM: Good
4 morning. We have a brand-new microphone, and
5 this is an almost brand-new hearing room. It
6 seems to be working. I'll look for some head
7 nods if anyone has trouble hearing.

8 Welcome to the Surface
9 Transportation Board, and our hearing today in
10 the New England Transrail matter. We will
11 hear arguments today on the much-debated issue
12 of the scope of the agency's preemption
13 authority in this case. I'll have some
14 opening remarks momentarily, as will my
15 colleagues here on the Board.

16 We are, though, very privileged
17 this morning to have a very special guest with
18 us. And with the patience of my colleagues,
19 I'd like to go ahead and introduce Senator
20 Frank Lautenberg. Before I do, I will just
21 say that it's a remarkable moment for me
22 personally to be chairing a body with a

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1 witness this morning who spoke at my high
2 school graduation --

3 (Laughter.)

4 -- in his first year as a United
5 States Senator, first full year, and for whom
6 I interned for 10 plus weeks in 1985. And,
7 truly, that experience sparked my interest in
8 public service and also particularly in
9 environmental and transportation policy

10 So, Senator, bear with me if I get
11 or look nostalgic for a moment, but it's truly
12 an honor to have you here. You are always
13 welcome in our offices here at the Surface
14 Transportation Board. You have an excellent
15 staff we enjoy working with, and without
16 further ado I'll give you a chance to say your
17 piece. And thank you for being here today.

18 SENATOR LAUTENBERG: Thanks very
19 much, Mr. Chairman. I don't know whether each
20 of us has to recuse ourselves because of our
21 previous contact. The Chairman knows my
22 children and graduated with one of the four of

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1 them, so I guess we'll have to be objective,
2 though, here and I would hope that you'll be
3 objective with me, Mr. Chairman.

4 Mr. Chairman, and Commissioners,
5 thank you very much for having the opportunity
6 to express a point of view that we in New
7 Jersey are concerned about.

8 Now, I currently serve as Chairman
9 of the Subcommittee on Surface Transportation
10 and Merchant Marine of the Senate Commerce
11 Committee. Now, as all of you know, my
12 subcommittee has sole jurisdiction over the
13 railroads and the Surface Transportation
14 Board.

15 And while I'm interested in the
16 Board's action as that committee's chairman,
17 I'm particularly here as an advocate for New
18 Jersey's nine million residents. They've got
19 strong feelings about the issue before the
20 Board today. When it comes to ensuring safe
21 handling and processing of solid waste near
22 railroads, the ramifications of the case go

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1 beyond the Wilmington and Woburn Terminal
2 Railway Company in Massachusetts here that
3 you're reviewing today.

4 New Jersey wants to take care of
5 the responsibilities that we have to our
6 citizens to make sure that their health and
7 safety is protected. And so we want to do
8 that through effective regulation of solid
9 waste processing. And that's why our state
10 actively inspects solid waste processing
11 facilities and enforces our laws to make sure
12 that they meet safety, health, and
13 environmental standards.

14 The problem for New Jersey, and
15 for other states, is when a solid waste
16 processor sets up shop next to a railroad.
17 Now, in New Jersey, solid waste processors
18 have sought out railroads not just for ease of
19 transportation but because of an ambiguity in
20 the federal law. Some processors use this
21 ambiguity as a shield from state health,
22 safety, and environmental regulators. And as

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1 you will hear today, there is a concern about
2 this across this country

3 Now, I've introduced this
4 legislation to make it clear that solid waste
5 processing facilities, even if they're next to
6 a railroad line, are subject to state
7 regulation That's our view. My bill also
8 preserves the uniform federal regulation of
9 rail transportation that is so important to
10 interstate commerce.

11 Now, Senators from various states
12 support my bill, and there is companion
13 legislation in the House of Representatives.
14 But there is a faster solution to the problem,
15 and that solution, Mr. Chairman, is by actions
16 of this Board. The Board can clarify the
17 state's authority to regulate solid waste
18 authority to regulate solid waste processing
19 facilities at rail sites, and then there
20 wouldn't be any need for legislation

21 The bottom line is that states
22 should be allowed to regulate solid waste

1 processing. They know best what protections
2 are needed to safeguard the workers, the
3 residents, and the environment. Congress
4 never intended to set up a regulatory void for
5 some solid waste processors.

6 So I urge you to move quickly,
7 take action here. If not, I have no recourse
8 but to move legislation on this issue and
9 exercise my subcommittee's oversight
10 responsibility for the Surface Transportation
11 Board.

12 It really is hard to understand
13 why it is that a facility that has potentially
14 such an effect on the environment, the health
15 and the well being of people in the area, and
16 is offline -- to use the expression -- can't
17 permit this -- can't allow the states to do
18 their own regulation on the issue.

19 Now, I understand there is a
20 complication here, but that -- and, once
21 again, Mr. Chairman, thank you very much. And
22 I'm pleased that you were part of my office at

1 one time, and that you've advanced as far as
2 you have with knowledge and experience and
3 have made a career out of understanding
4 transportation issues. And you've done it
5 well.

6 But I do ask for your diligence in
7 considering this issue. I ask you and the
8 other Commissioners, please consider this
9 issue. And we look forward to its prompt
10 resolution, and I hope that's coming.

11 Thank you very much for the
12 opportunity to appear before you.

13 CHAIRMAN NOTTINGHAM. Thank you,
14 Senator Lautenberg, for your very articulate
15 testimony. And you can be assured we will be
16 handling this in an expeditious manner. It's
17 a very high priority for this body to see this
18 matter through. I can assure you also that,
19 since it has been 21 years since I worked for
20 you -- and I don't think I was actually
21 compensated, so I think the recusal --

22 (Laughter.)

1 -- situation can be easily
2 avoided, as any kind of statute of limitations
3 I think has long expired there. But I will --
4 I know all of us will be looking at this
5 matter with a completely open mind in a fair,
6 impartial manner. I know I will.

7 And thank you for your time this
8 morning. I'll yield to my colleagues, if
9 there is anything they would like to say.

10 COMMISSIONER MULVEY: No, I just
11 want to join the Chairman in thanking you for
12 coming and sharing your views with us. We're
13 very, very sensitive to this issue.

14 As you may know, I spent some
15 years myself in the solid waste area with the
16 State of New York and gained a lot of
17 familiarity with the problems of municipal
18 solid waste. So we're very, very sensitive to
19 these problems.

20 Thank you for coming, sir.

21 SENATOR LAUTENBERG: Thank you.

22 CHAIRMAN NOTTINGHAM: Vice

1 Chairman Buttrey?

2 VICE CHAIRMAN BUTTREY: I have no
3 questions, Senator, but I just want to tell
4 you how happy we are to have you here today
5 with us and to share your views with us about
6 the concerns of the citizens of New Jersey.

7 And I would add one little
8 personal note that I spent time with the
9 Commerce Committee myself as a staff member
10 myself --

11 SENATOR LAUTENBERG: I know.

12 VICE CHAIRMAN BUTTREY: -- for
13 about three years, and it was a wonderful
14 experience and one that I will never forget.

15 Thank you very much.

16 SENATOR LAUTENBERG: Thank you
17 all.

18 CHAIRMAN NOTTINGHAM: Thank you,
19 Senator. And you are, of course, welcome to
20 stay as long as you'd like, your staff. I
21 know, though, you have a tight schedule, so we
22 understand if you slip away And the large

1 photo you brought is certainly well noted,
2 too, and it's --

3 SENATOR LAUTENBERG: We have these
4 sites, and these are displays of what happens
5 in the State of New Jersey with this trash-
6 gathering mechanism here And this is quite
7 close to residential and economic and business
8 facilities. And if I may please, Steve, each
9 one of these -- and this is not a form of pop
10 art.

11 As a matter of fact, it's -- if
12 you look at it, it's -- I would say -- if I
13 was a reviewer of the picture I would say it's
14 disgusting, and that we ought to be able to --
15 Steve, to take care of this. We don't want to
16 stop the process. We want to control it, so
17 that it doesn't spread havoc and threat to the
18 nearby residents and people who visit in the
19 area. Each one of these pictures does -- goes
20 quite directly to the problems that we see
21 evolving.

22 We had a fire in one of these

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1 stations, and we asked that the facilities be
2 built safely, that we control any liquid
3 runoff, etcetera We're not saying, "Look,
4 don't stop doing this," because it's a part of
5 our economy and it's going to get to be an
6 even bigger part.

7 As we discussed, Mr. Chairman --
8 and forgive me this overrun, but as we
9 discussed inside that the capacity of rail
10 service is essential for our national well
11 being and functioning And so there isn't any
12 reason why it can't be done in a fashion
13 that's consistent with the well being of the
14 people who are affected by these things and to
15 move them I think -- I come from the corporate
16 world.

17 I think that it would be a lot
18 easier to have an ability to control the
19 environment in which these facilities operate
20 and get on with it and expedite -- expedite
21 the processing by having a functioning
22 infrastructure that also is appropriately

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1 nearby those who are -- who live in the area
2 and who reside -- who are there in the area
3 for other reasons.

4 So thank you again. Thanks for
5 the reminder about our art gallery here.
6 Appreciate it.

7 CHAIRMAN NOTTINGHAM: Thank you
8 very much, Senator. Thank you, Senator.

9 We will now proceed with opening
10 statements from Board members. I'll exercise
11 the privilege and begin, and then yield to the
12 Vice Chairman and then Commissioner Mulvey

13 New England Transrail, NET, has
14 sought authority from the Board to acquire and
15 construct a combined 7,500 feet of track on a
16 parcel of land in Massachusetts about 12 miles
17 from downtown Boston. NET plans to receive by
18 truck at the site and provide rail
19 transportation for a variety of commodities,
20 including sand and gravel, plastic resins and
21 liquids, and, at issue here today, municipal
22 solid waste, and construction and demolition

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1 debris.

2 NET asserts that it will operate
3 as a common carrier and will engage in
4 interstate commerce by connecting its rail
5 line to existing railroads. The Board is
6 being called on to determine whether NET is a
7 rail carrier, and, if so, whether its
8 activities at the facility are integral to
9 transportation, and thus preempted from most
10 state and local regulations

11 In reaching a decision in this
12 matter, I will be guided by two simple
13 premises -- first, that the STB must abide by
14 the clearly worded language contained in
15 federal statute; and, second, that the STB
16 must not allow Congress' broad grant of
17 preemption from state and local regulations to
18 compromise federal health and environmental
19 standards.

20 I believe that both of these
21 premises can be honored when applied to the
22 facts of this case.

1 Today's argument marks an
2 important juncture in a regulatory and
3 environmental review process that will likely
4 take many years before concluding. If the STB
5 finds that it has jurisdiction, this agency
6 will have a number of opportunities to protect
7 public health and the environment and to
8 accommodate the reasonable local, state, and
9 federal concerns consistent with federal law.

10 In the end, I can assure my
11 colleagues on the Board, and all interested
12 parties, that I will not approve a railroad
13 project that is allowed to evade federal
14 health and safety standards, or a project that
15 is allowed to operate free of inspection and
16 free of meaningful recourse for local, state,
17 or federal officials concerned about health
18 and environmental compliance.

19 I look forward to hearing today's
20 participants address the full range of issues
21 presented including, what did Congress mean in
22 the Interstate Commerce Commission Termination

1 Act, ICCTA, when it stated that the STB will
2 have exclusive jurisdiction over the
3 construction, acquisition, operation,
4 abandonment, and facilities of a rail carrier?

5 What provisions in the statute
6 would give the STB discretion to selectively
7 apply the broad grant of preemption to some
8 types of rail operations but not others?

9 Assuming that STB retains broad
10 jurisdiction to regulate operations by rail
11 carriers free of state or local regulation,
12 what measures, procedures, or conditions may
13 the STB impose to ensure that state and local
14 governments have a meaningful way to ensure
15 that appropriate health and environmental
16 inspections are made, and that prompt and
17 forceful STB intervention, or delegation of
18 that intervention, can be assured in cases
19 where carriers deviate from federal health and
20 environmental standards?

21 Additionally, if a specific
22 activity at a rail facility is clearly

1 integral to transportation, but also happens
2 to be a routine activity undertaken during
3 processing or manufacturing, does the STB have
4 the authority to ignore the transportation
5 nexus and thereby avoid applying the broad
6 statutory preemption provided for rail
7 operations?

8 If the STB has this authority,
9 what would prevent the STB from removing the
10 preemption status from a wide range of long-
11 standing rail operations that might fall out
12 of favor with local and state governments for
13 a variety of reasons, that may have nothing to
14 do with health or the environment?

15 And, finally, should the STB
16 consider the costs and benefits and public
17 policy issues raised by preempting rail
18 carriers' operations involving the
19 transportation of municipal solid waste, or
20 MSW? Should the STB promote rail
21 transportation of a lawful commodity that
22 contributes to highway congestion, and, in the

1 course of doing so, addressing public concern
2 over truck traffic?

3 As these questions indicate, I am
4 concerned that we adhere to Congress' clearly
5 stated statutory grant of preemption to
6 railroads, while also protecting the broad
7 public interest by ensuring that no rail
8 operation under our purview is able to
9 jeopardize public health or violate federal
10 environmental safeguards, simply because they
11 fall under the STB's regulatory purview and
12 are preempted from state or local regulation

13 Finally, I think it is important
14 to note that regardless of the arguments today
15 and the STB's decision in this matter, it is
16 unclear that NET's proposed project will clear
17 the U.S. EPA remedial investigation
18 feasibility study, or RIFS process, related to
19 the Olin Superfund site on which NET proposes
20 to operate.

21 And it is also unclear whether, if
22 we were to assert jurisdiction, the results of

1 the STB's environmental review process
2 required by the National Environmental Policy
3 Act, or NEPA, would allow NET to operate at
4 all, or perhaps operate only in a limited
5 manner.

6 The STB would, during the NEPA
7 process, carefully listen to and try to
8 accommodate all environmental concerns. U.S
9 EPA has recently notified the STB that it has
10 made no progress in 12 months towards
11 beginning the RIFS

12 The STB would be unable to
13 complete our environmental review until U.S.
14 EPA has completed that work. In sum, it
15 appears that we are many years away from the
16 completion of the environmental review process
17 required before any possible rail operations
18 may commence on the former Olin site. We will
19 have many opportunities to weigh in on this
20 project in the interim.

21 Just a few procedural notes
22 regarding the testimony itself. As usual, we

1 will hear from all the speakers on a panel
2 prior to questions from the Commissioners.
3 Speakers please note that the timing lights
4 are in front of my on the dais. You will see
5 a yellow light when you have one minute
6 remaining and a red light when your time has
7 expired.

8 Please do your best to keep the
9 time you -- keep to the time you have been
10 allotted I assure you that we have all read
11 your statements and comments in their
12 entirety, and there is no need to read the
13 entire statements here.

14 After hearing from the entire
15 panel, we will rotate with questions from each
16 Board member until we have exhausted the
17 questions. Additionally, just a housekeeping
18 reminder for everyone to please turn off your
19 cell phones

20 And now I would like to turn to
21 Vice Chairman Buttrey for his opening remarks.

22 VICE CHAIRMAN BUTTREY: Thank you,

1 Mr Chairman. I think we've all heard the old
2 saying about sunlight being the best
3 antiseptic, so I think I'm hopeful that
4 today's oral argument will shed some light on
5 the very important question of just how far
6 this Board's regulatory powers do go and do
7 not go.

8 The Constitution of the United
9 States, in Article 1, Section 8, specifies
10 that it's the Federal Government that has the
11 power to regulate commerce among the several
12 states. Accordingly, Congress has given the
13 Board exclusive jurisdiction over
14 transportation by rail carriers. This
15 preempts state and local authorities from
16 regulating in that area

17 The Tenth Amendment, however,
18 makes clear that all powers not delegated to
19 the United States with the Constitution are
20 reserved to the states respectively or to the
21 people This preserves the police powers of
22 states and localities, and their authority

1 over matters relating to the health and
2 welfare of their citizens, so long as they do
3 not intrude on matters that fall under
4 exclusive federal jurisdiction.

5 The question here is whether New
6 England Transrail's proposed activities, all
7 of them, some of them, or none of them, will
8 be found to be transportation by rail carrier
9 that is subject to the Board's exclusive
10 jurisdiction and shielded by federal
11 preemption as part of interstate commerce, or
12 whether all, some, or none of these proposed
13 activities will fall under state and local
14 regulation.

15 This distinction will have
16 significant repercussions, thus the high level
17 of interest in this proceeding. The
18 Interstate Commerce clause is an essential
19 part of our constitutional framework of
20 government. Federal preemption protects the
21 bona fide elements of our national rail
22 network from a patchwork of local regulation

1 that would hamper its efficient functioning

2 The question we must address is
3 just how far that protection extends. The
4 issues raised here will require our careful
5 analysis of the facts of this case. I hope
6 and trust that the parties have come prepared
7 to discuss in detail the questions that were
8 set out in the Board's decision of March 29th
9 and any other questions that my fellow Board
10 members and I will have for them today.

11 I look forward to the hearing and
12 the statements. Thank you, Mr Chairman.

13 CHAIRMAN NOTTINGHAM: Thank you,
14 Vice Chairman Buttrey. Now we'll turn to
15 Commissioner Mulvey.

16 COMMISSIONER MULVEY: Thank you,
17 Chairman Nottingham Good morning and welcome
18 to our panelists and other interested parties
19 I'd also like to acknowledge and thank our
20 staff who have spent a great dealt deal of
21 time wrestling with the record here and who
22 have assisted me in preparing for today's

1 hearing.

2 I'm glad we've convened this
3 proceeding to get answers to questions we
4 still have after numerous evidentiary filings
5 about the proposal before us. I come to this
6 argument with two views that I must reconcile.
7 First, I have always been a strong supporter
8 of preemption Congress and the courts have
9 long recognized the need to regulate railroad
10 operations at the federal level to avoid a
11 patchwork quilt of state and local
12 regulations

13 The Interstate Commerce Act is one
14 of the most pervasive and comprehensive
15 regulatory schemes among all of our laws The
16 ability to preempt state and local laws is one
17 of the prized benefits of receiving Board
18 authority to build and run a railroad. But
19 because we are empowered to interpret and
20 apply the Act, we are responsible for ensuring
21 that preemption is warranted as a consequence
22 of our decisions.

1 Second, I recognize that
2 preemption can jeopardize protection of the
3 public interest, especially health and safety.
4 I'm concerned about the regulatory gap that
5 can result from preemption. Indeed, I've been
6 concerned about it since I first dissented in
7 one of the cases that came before the Board
8 shortly after I joined the Surface
9 Transportation Board.

10 Who looks after the public
11 interest when federal preemption deprives
12 state and local governments from doing so? I
13 view this argument today and this case as
14 pivotal. What this case comes down to is a
15 need to distinguish between rail
16 transportation and other activities that would
17 occur even absent rail transportation.

18 There are a number of proposals
19 similar to that of the New England Transrail
20 case in various stages of development around
21 the country. So the answer to this question
22 will impact our citizens and communities

1 across the nation in a direct and visceral
2 manner. It is imperative that we get the
3 answer right and that we get it right quickly

4 I urge the parties today to focus
5 on the distinction between rail transportation
6 and other activities, as well as on the
7 questions we posed in preparation for this
8 argument. I am eager to take part in today's
9 debate amongst the parties.

10 Thank you, Chairman Nottingham. I
11 look forward to hearing the witnesses.

12 CHAIRMAN NOTTINGHAM: Thank you,
13 Commissioner Mulvey.

14 Our first panel will be comprised
15 of The Honorable Kirk Van Tine representing
16 New England Transrail, LLC, Mr. G. Paul Moates
17 representing the New York Susquehanna and
18 Western Railway Corporation, and Mr. Frank
19 DeMasi.

20 Mr. Van Tine has been allocated 45
21 minutes, Mr. Moates 20 minutes, and Mr. DeMasi
22 five. And if I could just take a moment to

1 give a special welcome to Mr. Van Tine. I had
2 the opportunity to observe his public service
3 close up while I was at the Federal Highway
4 Administration and he was upstairs in the
5 exalted territory of the tenth floor at DOT
6 headquarters serving as General Counsel and
7 also as Deputy Secretary.

8 And, Kirk, you're always welcome
9 here, and thank you for being here. It's good
10 to see you again.

11 MR VAN TINE: Thanks very much,
12 Mr. Chairman, and preliminarily I want to
13 assure you that we won't object to your
14 association with Senator Lautenberg, since our
15 association was more recent.

16 First, I want to thank Chairman
17 Nottingham, Vice Chairman Buttrey, and
18 Commissioner Mulvey for scheduling this
19 hearing. This is a real opportunity I think
20 for us to communicate directly to the Board
21 and with the other parties, and there has been
22 a lot of paper exchanged but I think a lot of

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1 that paper has been sort of passing in the
2 night. And it hasn't really been a dialogue,
3 and we would like to promote a dialogue. And
4 you have taken a great step forward in
5 scheduling this hearing.

6 Preliminarily, I want to say that
7 I listened to what Senator Lautenberg said,
8 and I couldn't think of anything that he said
9 that we disagree with, that we share his
10 concerns about public health and safety, and
11 we want to assure everyone here and everyone
12 who is not here that the facility that we
13 propose and the operations that we propose
14 will be mindful of the public health and
15 safety.

16 And I think the trick here, the
17 problem before the Board and before all the
18 parties, is how to protect public health and
19 safety while doing so in a way that is in
20 accordance with the existing law, the large
21 body of case law, and the fairly clear
22 statute, and do so in a practical way that

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1 involves cooperation between federal
2 authorities, state authorities, and the
3 regulated parties.

4 And just one more preliminary
5 thought for you to consider as you hear the
6 speakers today -- Commissioner Mulvey
7 mentioned the possibility of a regulatory gap,
8 and I would suggest to you for your
9 consideration that there really is not a
10 regulatory gap, that this is not a new issue.

11 This issue with regard to C&D
12 waste and MSW has arisen relatively recently,
13 but the issue of what activities are within
14 the Board's transportation jurisdiction and
15 what activities may be preempted is an old
16 issue, and it has been around for a long time.
17 And the Board has in many decisions, and the
18 courts have in many decisions, taken steps to
19 fill that regulatory gap with some content.

20 And I would suggest to you that if
21 you look to the past decisions there are
22 guidelines there that you can use to fashion

1 a solution that considers the interests of all
2 parties, and all the interests in these kinds
3 of cases as well

4 I'd like to, with the Board's
5 permission, divide my time, since we have both
6 the opening and the closing statements, devote
7 10 minutes to the opening and 35 minutes to
8 my closing. And if it's all right with the
9 Board, I'd like to proceed.

10 CHAIRMAN NOTTINGHAM: Please
11 proceed.

12 MR. VAN TINE Thank you. As I
13 said, I think that one of the problems to date
14 in this case is that the positions of the
15 parties seem to be set in stone, and the paper
16 pleadings pass almost unread. I think that a
17 lot of the facts that we have tried to put
18 forth in our pleadings seem to have been
19 missed by the parties on the other side.

20 And I want to, again, assure that
21 we understand all of the concerns of all the
22 parties to this proceeding We understand the

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1 Board's concerns, and we have never suggested
2 that the Board should ignore any of those
3 concerns or minimize them. But we believe
4 that there are ways to address all those
5 concerns, and, as I said, we have been trying
6 for some time to engage in a dialogue with the
7 parties to reach workable solutions.

8 I'm going to spend some time in my
9 closing statement to try and give you some
10 suggestions about how the Board might satisfy
11 everyone's concerns in a decision in this
12 case.

13 I want to -- before I go any
14 further, along those lines I want to make sure
15 the Board is aware that more than a year ago
16 we proposed in writing to enter into an
17 agreement with the Commonwealth of
18 Massachusetts and the Department of
19 Environmental Protection, and a copy of our
20 proposal is in the record.

21 And although we never received a
22 written response, we were told that

1 Massachusetts was not interested in talking,
2 at least at that time. Just this morning, we
3 filed a supplemental verified statement of Mr
4 Rob Jones, who is one of the principals of New
5 England Transrail, in which he reiterated that
6 we are still interested in discussing our
7 proposal with Massachusetts.

8 And in that statement he also
9 addressed several other issues that arose in
10 the briefs that were filed on Monday, and I'll
11 be referring to Mr Jones' statement on a
12 number of issues in the course of the day.

13 Right now, I would like to pass up
14 to the Board members copies of both the
15 proposal that we submitted to Massachusetts to
16 make sure that you have it in front of you,
17 and also in the package there is a copy of Mr.
18 Jones' verified statement that, as I said, we
19 filed just this morning.

20 We have served the verified
21 statement in accordance with the rules, and we
22 have also made an effort during the hour

1 before the hearing commenced to pass out the
2 verified statement to all of the participants
3 in the proceeding by hand in the hearing room
4 here. And if there is anyone in -- any
5 participant or anyone else who would like a
6 copy and has not received one, the copies will
7 be available before they speak, so they'll
8 have an opportunity to take a look at it.

9 As I said, I think thus far our
10 opportunities to engage in a dialogue have
11 been pretty much a one-way street, and there
12 seems to be an all or nothing attitude with
13 the opponents of the project. And we were
14 somewhat disappointed to see that attitude
15 again in their written responses to the
16 Board's questions that were filed on Monday.

17 I think the Board directly
18 addressed the issue by asking whether it is
19 possible to fashion a workable system in which
20 the states and the federal authorities and the
21 regulated parties work together. And,
22 unfortunately, a number of the parties took

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1 the position that it was not possible. As I
2 said, I'll be coming back to that again
3 shortly

4 I want to take just one minute now
5 to discuss a few of the facts about our
6 proposal that seem to have gotten lost in the
7 massive documents that have been filed
8 First, we're proposing to operate as a common
9 carrier for compensation. We're proposing to
10 connect to the national rail network. We're
11 proposing to enter into agreements with other
12 railroads. And we're proposing to build a
13 state-of-the-art transloading facility

14 We've done a lot of thinking and a
15 lot of engineering work, and we're going to
16 build this facility with the current best
17 practices, and we're going to manage it with
18 the current best practices. We are well aware
19 of the problems that have arisen in some other
20 locations, and we have tried to learn from
21 those experiences and figure out how to design
22 and operate New England Transrail in a way

1 that minimizes all of those problems.

2 I also want to point out that in
3 our filing on Monday we discussed in some
4 detail the backgrounds of the four principals
5 of New England Transrail. Collectively, they
6 have experience in rail issues, trucking
7 issues, freight movement, and environmental
8 issues, and these four people have had careers
9 in the transportation sector and they
10 understand very well how the proposed facility
11 would operate and how it fits into the
12 nationwide rail transportation network.

13 And I want to mention, too, that
14 two of those principals -- Mr. Rob Jones and
15 Mr. Ron Klempner -- are here with me today
16 And they'll be available to talk with anybody
17 who wants to talk to them about their
18 backgrounds or about any of the facts relating
19 to the project.

20 Now, one final word conceptually
21 about the project. We hear a lot in the
22 transportation sector about so-called last

1 mile infrastructure, and we hear that there is
2 a critical need in the United States for more
3 last mile infrastructure, connecting up things
4 that already exist. And I would just suggest
5 to you that conceptually this project is
6 exactly that.

7 This is almost literally the last
8 mile from existing rail facilities to the
9 surrounding area, and it would provide -- it's
10 clear that the area is underserved in the rail
11 area, and this facility would provide a
12 missing link.

13 I know the issues presented in
14 this case are important policy issues for the
15 Board. But as I said, they're not new ones.
16 The balance between local health and safety
17 concerns, local economic interests, and the
18 nationwide rail network has been a constant
19 issue, probably dating back to the day the
20 first railroad started operations.

21 As a consequence of that history,
22 though, the good thing is that we have almost

1 100 years of case law on the legal issues in
2 this case, and we have very explicit statutory
3 guidance from Congress. And I think it's
4 useful to point out that the opponents of the
5 project are essentially asking the Board to
6 ignore or overrule all of that case law and
7 ignore the express language of the statute.

8 Obviously, we don't think that's
9 the right approach And from what I
10 understood from the opening statements, I
11 sense that the Board is struggling with that
12 issue as well. We think the purposes of the
13 existing statute are very clear, and that they
14 are still valid.

15 We suggest that instead of
16 changing the law the parties should be
17 encouraged to resolve their differences in the
18 same way that railroads and local authorities
19 have tried to resolve their differences in the
20 past -- by reaching agreements that satisfy
21 valid health and safety concerns while not
22 imposing an unreasonable burden on rail

1 transportation.

2 There have been a number of
3 recurring misconceptions about this project,
4 and I'd like to take just a minute to
5 summarize our responses to some of the key
6 factual questions that have been raised. And
7 these points are all in the verified statement
8 of Mr. Jones that I just passed out.

9 First, neither New England
10 Transrail nor any of its principals, nor any
11 of their affiliates, is going to be acting as
12 a shipper or a receiver of the C&D waste and
13 MSW that are transloaded at the facility.

14 Second, the activities at the
15 facility would not add value to the C&D waste
16 or MSW. The purpose of those activities is to
17 facilitate loading into railcars, to prevent
18 damage to railcars, and to improve the safety
19 of rail transportation by providing for more
20 even weight distribution.

21 Third, New England Transrail will
22 not earn revenue as a result of the shredding

1 of C&D waste or the baling of MSW. Those
2 activities are intended to improve the
3 efficiency of loading those wastes into the
4 railcars.

5 And, finally, no wood or metal is
6 going to be removed from the waste stream
7 Large pieces of wood or metal will be
8 temporarily set aside and will be loaded
9 separately after the smaller pieces of C&D
10 waste. The purpose of setting those large
11 pieces aside temporarily is to allow more
12 complete loading of the railcars and to
13 prevent damage to the railcars.

14 Those activities all facilitate
15 transportation. And, again, all of the
16 foregoing facts are set out in the verified
17 statement of Mr. Jones that we filed this
18 morning.

19 I think that concludes my opening
20 statement. I'd like to reserve the remainder
21 of my time for my closing, but I'd be pleased
22 to answer any questions you may have.

1 CHAIRMAN NOTTINGHAM: Thank you,
2 Mr. Van Tine. We will hold back on questions
3 until the full panel has given their
4 statements. We will note that you have asked
5 that 35 minutes of your time be kept until --
6 for your closing, and you are very much on
7 that schedule. We will provide that to you.

8 I will note for the record, and
9 for those who are listening over the internet
10 through our webcast, that Mr. Van Tine has
11 distributed two documents. One is an October
12 14, 2005, letter to Ms. Susan Ruch of the
13 Office of General Counsel, Massachusetts
14 Department of Environmental Protection. This
15 letter is already in the record and is
16 available to view via the internet.

17 The second document is an April
18 19, 2007, letter to the STB's Secretary. This
19 was filed today and will be available on our
20 website as well, and Mr. Van Tine has already
21 been kind enough to say that they will be
22 distributing copies to anyone interested

1 today.

2 With that behind us, we'll now
3 turn to Mr. G. Paul Moates, representing the
4 New York, Susquehanna, and Western Railway
5 Corporation for no more than 20 minutes.

6 MR. MOATES: Thank you. Mr.
7 Chairman, Vice Chairman Buttrey, Commissioner
8 Mulvey, it's a pleasure to be here in your new
9 building. I, on this occasion, represent the
10 New York, Susquehanna, and Western Railway --
11 a regional railroad of the lines of New York
12 and New Jersey. I believe you're familiar
13 with it.

14 Before I go on, also greetings to
15 the staff. Good morning. You all look more
16 comfortable up there than you used to in the
17 old facility. I hope that's true.

18 I'm on a panel with Mr. Van Tine,
19 and I'm privileged to be here with him. But
20 obviously, I don't represent New England
21 Transrail. And, candidly, I know relatively
22 little about the proposal of the New England

1 Transrail beyond what I have read, as you
2 have, in the docket.

3 So the obvious question is: why
4 am I here? Why is the New York, Susquehanna,
5 and Western here? I think you have a pretty
6 good idea, but let me be clear about it. I'm
7 here because many of the issues raised in this
8 proceeding are of vital importance to the
9 Susquehanna and are squarely raised in
10 litigation in which my client and the New
11 Jersey Department of Environmental Protection
12 and the New Jersey Meadowlands Commission have
13 been involved for more than a year and a half
14 and which have now made their way to the
15 United States Court of Appeals for the Third
16 Circuit.

17 The Board should understand that
18 we are before the Third Circuit on an
19 expedited appeal from a decision issued on
20 February 21, 2007, by Judge Hayden of the U.S
21 District Court for the District of New Jersey
22 -- a decision that is a 37-page carefully

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1 written opinion that follows multiple
2 hearings, development of an extensive record,
3 a trial, and a complete briefing.

4 It is a very, very comprehensive
5 record. It's an enormous record. Having
6 spent some time in the last day or two just
7 trying to work with the appendix to go to the
8 Court of Appeals, take my word for it, there
9 is a massive record. It has been compiled in
10 what we refer to sometimes as the Jackson
11 litigation.

12 That District Court in Newark
13 squarely held that New Jersey's efforts to
14 invoke a claim of police powers to justify the
15 imposition of an extensive regulatory regime
16 on the Susquehanna's operation of several
17 construction and demolition, or C&D,
18 facilities in North Bergen, New Jersey, were
19 preempted by ICCTA.

20 And that is a decision that the
21 Third Circuit declined to stay,
22 notwithstanding New Jersey's filing with that

1 Court of a motion for an emergency stay in
2 which it said that the public will be badly
3 harmed, there will be irreparable harm if you
4 don't stay this decision.

5 The Court didn't see it that way.
6 It didn't stay. It did grant New Jersey's
7 alternative request that that appeal be
8 handled on an expedited basis, and it is.
9 And, indeed, New Jersey's opening brief is due
10 next Tuesday, the 24th of April, Susquehanna's
11 brief and reply in opposition is due just two
12 weeks later on May 8th, and New Jersey's reply
13 one week after that. So that case will be
14 fully briefed before the Third Circuit by May
15 15th

16 Will that Court hold an oral
17 argument? I would hope it would, but I don't
18 know. As we sit here today, we have not been
19 informed that it will, but the case will be
20 briefed to the Court by mid-May.

21 Why did Susquehanna initiate that
22 case? Frankly, it was forced to do so in

1 August of 2005 after the NJDEP, the New Jersey
2 Environmental Department, not only promulgated
3 extensive and very burdensome regulations
4 addressed -- this is important.

5 By definition only, by the very
6 terms of this Act, these regulations apply to
7 one thing and one thing only -- railroad
8 transloading facilities within the State of
9 New Jersey, and then it issued an
10 administrative order telling the Susquehanna
11 that it was in violation of a number of
12 aspects of these newly promulgated
13 regulations, and it assessed a \$2-1/2 million
14 fine.

15 And as the Board knows, however,
16 the NYS&W, while a real railroad, is a
17 relatively small railroad. It's 400 miles.
18 Its lines and facilities are exclusively
19 within the states of New Jersey and New York.
20 And, candidly, a fine of that magnitude not
21 only threatened operation of the transloading
22 facilities, it may well have threatened the

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1 railroad's very viability, especially with the
2 quite real threat that the state would
3 continue to assess more fines for other
4 claimed violations of its regulations.

5 So we initiated the Jackson case,
6 because, frankly, we were forced to do so by
7 the state's actions, and the state knew that
8 that would happen.

9 Now, we, the Susquehanna, take no
10 position on the merits of NET's exemption
11 petition, nor do we believe it would be
12 appropriate to comment on whether NET's
13 proposal demonstrates that it would, in fact,
14 be a bona fide rail carrier. That is a
15 question that you and your staff are very well
16 capable of answering. There are very clear
17 standards for determining whether a rail
18 carrier will come into existence, and you will
19 judge their petition accordingly.

20 But we do ask you to move very
21 carefully in this case to avoid making any
22 broad pronouncements about the scope of

1 Section 10501(b) preemption, in recognition of
2 the fact that there is a very well developed
3 record from the District Court in the Jackson
4 case now before the Third Circuit, and that
5 Court will be addressing many of the issues
6 mentioned in your notice for this oral
7 argument.

8 I would respectfully submit and
9 ask that the Board focus on two key points
10 about the New York-Susquehanna v. Jackson case
11 as you grapple with the issues raised in this
12 proceeding, and in connection with other
13 claimed railroad facilities to which the
14 preemption issue arises.

15 First, this is almost a truism,
16 but it's an important one, there is no
17 question that the Susquehanna is, and for a
18 considerable period of time has been, a
19 legitimate operating freight railroad. That
20 simple but crucial fact, which Judge Hayden
21 confirmed in her February 21 opinion,
22 distinguishes the NYS&W from other entities

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1 that have come before you invoking the
2 preemption as the grounds upon which to
3 contest state and local efforts to regulate
4 aspects of their operations and facilities.

5 In short, Susquehanna is not Hi-
6 Tech You're familiar with the decision,
7 you're familiar with the entity that sought to
8 use your exemption procedures there. We are
9 not Hi-Tech, and the persistent efforts,
10 candidly, of the New Jersey DEP and others to
11 claim otherwise are unavailing, and Judge
12 Hayden agreed with us on that point.

13 We believe, and I think other
14 railroads that have filed comments in this
15 proceeding, and the AAR have all indicated
16 that the Board can and should deal with the
17 so-called rogue operator problem, as it has
18 particularly evidenced itself in this
19 construction and demolition and municipal
20 solid waste area, by heightening your scrutiny
21 of entities which invoke the Board's exemption
22 procedures in an effort to be deemed rail

1 carriers.

2 That's the game that's afoot, and
3 we all know that. The game is to be deemed a
4 rail carrier, and then you cloak yourself in
5 the claim of preemption to fend off regulation
6 of a facility that be nothing more than a
7 facility at the end of a stub track or a side
8 track.

9 If your analysis of an exemption
10 filing leads you to conclude that a particular
11 entity would not actually provide rail
12 transportation, that finding alone ends an
13 illegitimate attempt by such entity to claim
14 the applicability of Section 10501 preemption
15 for its facilities and operations And you're
16 done, and they're done

17 Second, the other aspect of the
18 Jackson case I'd like to draw to your
19 attention is that she reached her careful and
20 reasoned conclusions both about the nature of
21 the Susquehanna's operations at the transload
22 facilities in North Bergen, and the nature of

1 the state's efforts to design and apply its
2 regulations in a manner that inevitably and on
3 purpose had a serious impact on transloading
4 and serves local concerns.

5 Those last words are not my words.
6 Those are Judge Hayden's words. She found the
7 state's efforts were to design and apply
8 regulations in a manner that "inevitably and
9 on purpose had a serious impact on
10 transloading and serves local concerns."
11 Those are the very kinds of concerns that
12 Congress had in mind when it enacted the
13 preemption provision in 10501(b).

14 Congress recognized, as I believe
15 you do, that there needs to be uniform
16 national application of laws affecting rail
17 carriers, true rail carriers and rail carrier
18 facilities, and is the classic NIMBY concern
19 that animates many of the otherwise what we
20 might agree on are appropriately understood
21 efforts by local municipalities, states,
22 regions, to try to deal with operations around

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1 and in rail facilities, and not just involving
2 C&D. And I'll come back to that point in a
3 minute.

4 We respectfully submit in these
5 circumstances -- that is, the circumstances I
6 have just described about Judge Hayden's
7 decision -- that the Board should not -- and
8 we ask you to be careful not to make any
9 broad-sweeping statements about the nature of
10 construction and demolition transloading
11 operations and facilities generally. And,
12 certainly, you ought to be very careful to
13 consider the impact of any ruling in this
14 matter on railroad transloading facilities and
15 operations broadly defined

16 Moreover, if the Board is inclined
17 for whatever reason to go beyond the specific
18 facts and circumstances of this case -- and we
19 would certainly urge you not to do that -- we
20 believe that the facts and circumstances of
21 each individual case involving these claims of
22 preemption are critical to the analysis.

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1 Judge Hayden agreed with that.

2 We strongly suggest that you defer
3 your determination in this matter until the
4 judicial proceedings in the Jackson case have
5 been concluded. You asked that as your first
6 question It is our view that you should
7 allow the Court to act. That may not be hard,
8 because, as I said, the case will be fully
9 briefed, literally within 30 days.

10 I don't know how long the Court
11 will take to decide the case, and if it will
12 schedule an argument when that argument would
13 be. But my belief is that the Third Circuit
14 has a pretty expeditious docket, at least
15 compared to some other courts of appeals.

16 Now, with your indulgence, in
17 order to help you better understand the nature
18 of the Susquehanna C&D facilities, and because
19 we have confronted from the first day of the
20 litigation in New Jersey, and again here today
21 with Senator Lautenberg's exhibits, photos
22 that are either photos of somebody else's

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1 facilities or might be photos of facilities
2 that existed several years ago and no longer
3 exist

4 I want to hand up at this time two
5 counsel's exhibits that consist of several
6 photographs taken in the last week or 10 days
7 that are, as you may know from the Susquehanna
8 litigation, about five facilities in North
9 Bergen that have been at issue there. These
10 are photos of just two of them.

11 I'd ask you again to bear in mind
12 these are very recent photos. You'll see the
13 dates on the cover. Maybe Mr. Hemmersbaugh
14 can pass the exhibits out to the rest of the
15 room while we talk about this.

16 These are very recent photos
17 showing the way these facilities look today.
18 I ask you, if you're shown more photos today,
19 and any photos you see as you go through the
20 record of this case, ask what the date of the
21 photograph is and ask what the facility is
22 you're being shown.

1 You know, if there is a solid
2 waste facility that is not a railroad facility
3 but happens to be, as the Senator said,
4 adjacent to a railroad, that doesn't transform
5 it into a rail transloading facility. It
6 doesn't make it a railroad facility. We have
7 to understand who owns and operates that
8 facility. Is it a railroad facility?

9 And if so, what is the photograph
10 showing you? Is it showing you conditions
11 that are current? Is it showing you something
12 in the -- that was there two years ago?

13 The first of these exhibits is
14 captioned NYS&W 83rd Street facility, and
15 these photos were taken on April 4th. And
16 just very briefly, if we go in order, these
17 are one of the construction and demolition
18 transloading facilities owned and operated by
19 the Susquehanna in North Bergen.

20 The first photo shows essentially
21 the entrance to the facility. There's a small
22 office building. There are scales on either

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1 side of the building. A loaded truck pulls
2 onto the scale, has its load weighed, is
3 issued a ticket. He then backs into the
4 building you see behind here. And there's
5 nothing sophisticated about this, and I'm sure
6 not going to try to suggest there is.

7 I've been to these facilities.
8 This is a very basic operation. We are
9 talking about the debris that comes out of
10 knockdowns of buildings from construction
11 sites, teardowns. It's -- you know, it's
12 brick, it's wallboard, it's lumber, it's all
13 the stuff you would expect to come out of a
14 demolition site.

15 These trucks, many of which are
16 coming from Manhattan, some from other parts
17 of New Jersey, transport the C&D to one of
18 these facilities, dump it on a cement floor.
19 And as you can see in the background there,
20 there's a front-end loader. There's probably
21 a better shot of here inside the building.

22 This simply pushes this into a

1 pile, and a grappler continuously picks the
2 pile up and starts loading it into railcars
3 And if you go to the third photo in this first
4 set you will see on the left side of the
5 building, you'll see a railcar sticking out.
6 That is the lead track coming back out of the
7 back side of the building, so the cars are
8 actually inside the building when the C&D is
9 put inside.

10 They are then covered with a
11 netting, and the car is pushed out, the next
12 car moved in for loading. Again, it's not
13 sophisticated, but I would submit, Mr
14 Chairman, this is a very important operation
15 for the people of New Jersey and New York.

16 Why? There is no landfill
17 capacity left in the State of New Jersey.
18 This stuff cannot be disposed of in New
19 Jersey. So if people say, "Leave it in the
20 truck and take it five miles down the road,"
21 no. This stuff is going to Ohio, some of it
22 is going, we're told, to Quebec, and other

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1 places, big landfills where there are
2 permitted facilities to dispose of this stuff.
3 It is going there by rail.

4 The Susquehanna, as you know,
5 doesn't go to Ohio, and it doesn't go to
6 Quebec, so these are actually, you know,
7 interline movements. And it is a significant
8 business for the Susquehanna. Quite candidly,
9 in 2006, approximately 40 percent of the
10 Susquehanna's traffic was from C&D. It's a
11 growing business, and it serves an important
12 public purpose.

13 You'll note that these facilities
14 don't have those large mounds that you saw in
15 the photograph the Senator put up there. That
16 condition existed. I will concede it did.
17 That kind of condition existed in 2005. By
18 the time we got in front of Judge Hayden,
19 those facilities are being closed down.

20 The last open air facility of the
21 Susquehanna was completely shut down and
22 cleaned up by December of 2005. She knew

1 that. Her decision talks about that. She
2 understood what the nature of these facilities
3 are today. These are railroad facilities.

4 The second exhibit, just very
5 briefly, simply to show you one other type of
6 facility the Susquehanna has, it is not
7 construction and demolition debris. This is
8 the facility that handles contaminated soils,
9 dirt if you will, from Superfund sites.
10 Usually -- often the stuff I'm told is -- has
11 very low-level radiation, and the like, and it
12 has to be disposed of obviously in a much more
13 careful and controlled manner.

14 That's why you see a ramp up to
15 the top of the building in that photograph.
16 The trucks back up there, that door is opened,
17 the railcar is pushed underneath. It has a
18 plaster liner that they refer to as a burrito
19 wrap. The soil is dumped in there. Once it
20 is dumped in, the burrito wrap is wrapped over
21 the car. The employees that are working in
22 there all have I think what we call moonsuits,

1 you know, the protective gear like you see
2 astronauts in. So this is a special kind of
3 an operation.

4 The state doesn't like this
5 operation. It says the only way, from their
6 perspective, that it would be acceptable is if
7 all of that dirt were put in a concealed
8 container, and container-to-container
9 movements were to occur. We don't believe
10 that the law properly requires that, nor do
11 EPA regulations require that. But that is the
12 state's position

13 So our primary message is the
14 Susquehanna did not purchase an old siting and
15 use your exemption procedures to become a rail
16 carrier. It's a legitimate railroad with a
17 long history of providing rail service. It
18 has pursued the development of C&D traffic by
19 developing these transloading facilities to
20 respond to a clear market demand for
21 transportation of these materials out of New
22 Jersey -- a demand that is most safely met by

1 rail service

2 In its work with NJDEP, the
3 Meadowlands Commission, and the localities in
4 which it operates to develop and operate these
5 facilities in an appropriate manner.
6 Incorporating systems, these buildings have
7 systems to deal with flow control of the
8 waste. The debris does not come out the front
9 door. If it gets to be too high, they stop
10 receipt until the railcars clear the waste
11 out

12 They deal with traffic concerns.
13 They deal with air and water runoff concerns.
14 That facility I just showed you has, you know,
15 runoff and settling ponds behind it. They
16 have misting systems installed in these
17 buildings to spray the debris to keep dust
18 down.

19 In short, what I'm trying to tell
20 you is we have attempted to work with the
21 localities to deal with their appropriate
22 safety and environmental concerns, as your

1 decisions make clear rail carriers should do.

2 But New Jersey persisted in
3 enacting a comprehensive regulatory regime, as
4 I said aimed solely at railroad transloading
5 facilities. It didn't deal with some broader
6 category of facilities -- railroad
7 transloading facilities, frankly -- in an
8 effort to discourage and ultimately shut down
9 these operations. New Jersey wants to control
10 this business itself

11 Judge Hayden recognized the anti-
12 railroad animus that drove New Jersey's
13 efforts. She quoted in her decision the then
14 -- and, unfortunately, because of Governor
15 Corzine's accident the again now-acting
16 Governor Codey, at a highly publicized press
17 conference in 2005 when he pledged that --
18 this is out of her decision at page 10, this
19 is the Governor, "We're going to harass the
20 hell out of them. We want them to know that
21 we're on their butt." And he was talking
22 about the railroads.

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1 This is precisely the sort of
2 local interference with railroad operations,
3 often unpopular railroad operations, that lie
4 behind Congress' inclusion of that broad
5 preemption provision in the Act.

6 I also want to draw your attention
7 to the submissions in this proceeding of the
8 AAR and the Class I carriers Norfolk Southern
9 and CSX, which point out in a number of
10 particulars numerous and significant types of
11 transloading activities which the rail
12 industry provides its customers in a variety
13 of contexts other than C&D.

14 Commodities as varied as setup
15 automobiles and lumber, aggregates, building
16 materials, grain, corn syrup, coal, chemicals,
17 intermodal equipment, and so on, have --
18 transloading of all of that has become very
19 common in the industry, and, indeed, railroads
20 are constantly being pushed by their customers
21 to do more of that and to be more innovative
22 and creative to be part of the ever more

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1 complicated logistic exchange that railroads
2 are part of.

3 And the Board should be very
4 mindful of this fact if it seeks to craft
5 broad principles and sweeping interpretations,
6 which, again, I urge you not to do, but, if
7 you do that, what may constitute transloading
8 or a rail facility.

9 And, of course, for that reason
10 and for the reasons we have identified in our
11 written comments here, emphasizing the
12 significance of obtaining all relevant facts
13 about a specific facility or activity to which
14 a preemption claim is being made, we urge you
15 to avoid making a decision in this case that
16 goes beyond the scope of the issues relating
17 to New England Transrail's specific proposal.

18 I guess I'd like to end with just
19 sort of a point that has almost become a
20 personal burr for me, and it shows -- I think
21 it's an illustration of why it is so important
22 to make sure you've got the facts and got the

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1 facts right about these facilities.

2 This hearkens back to a case in
3 which I represented the Susquehanna some years
4 ago. It's the Borough of Riverdale case,
5 which you and your staff are familiar with,
6 and which gets cited by many of these parties.
7 It hit me yesterday when I was reviewing the
8 comments here of the Raritan Baykeeper at page
9 20, when that commenter indicated that the
10 Riverdale -- he was giving examples of
11 processing facilities -- rail processing
12 facilities that were inappropriate

13 And he said, for example, in the
14 Borough of Riverdale case of the corn
15 processing plant -- well, that has become like
16 an urban legend. There isn't, and never has
17 been, a corn processing plant in Riverdale.
18 The Susquehanna never served a corn processing
19 plant at Riverdale That case was settled, so
20 there was never a final decision.

21 But if you actually go back and
22 look in the docket, and look at the pleadings,

1 including photographs that we submitted, what
2 that little facility was about was corn syrup.
3 And the Susquehanna had a chance to bring corn
4 syrup to a candy company in New Jersey, but
5 corn syrup is a very thick, viscous commodity.

6 And so what Susquehanna did was it
7 -- on its right of way it built a little --
8 for want of a better term -- a pad, you know,
9 paved area with a scale and some lights and a
10 side track, and it installed some hydrants
11 that were heaters, so that when -- you can
12 visualize this -- the truck -- a tank truck
13 would come into the facility, the guy would
14 weigh his truck, and then he'd go down next to
15 these little hydrants and plug his hose in,
16 and it heated the hose attached to the
17 railcar, heating up the corn syrup, making it
18 more viscous, and, therefore, easily -- more
19 easily transloaded into the truck. And that's
20 particularly important in New Jersey in the
21 wintertime.

22 That was the "corn processing

1 plant." That, I would submit, is a classic,
2 appropriate rail transloading facility. It
3 was integral to the transportation. It was
4 necessary to unload the product. And the
5 community didn't like it, because they didn't
6 want to have big lights and they didn't want
7 to have a truck scale, and they didn't want to
8 have trucks coming in and out.

9 At the end of the day, you
10 concluded there was a preemption there. And
11 as I say, that case was settled, so it never
12 -- it never got -- the corn processing never
13 made its way I guess into the ICC reports is
14 what I'm trying to say. But I would like to
15 use that as an example of how critically
16 important it is that you do get and understand
17 the facts in these particular cases.

18 And I see my red light is on, and
19 I will stop. Thank you.

20 CHAIRMAN NOTTINGHAM. Thank you,
21 Mr. Moates.

22 We'll now proceed with the final

1 member of this panel, Mr Frank DeMasi, who
2 has been allocated no more than five minutes.

3 Mr. DeMasi, welcome, and please
4 proceed

5 MR. DeMASI: Thank you, Mr.
6 Chairman. I'm here as a citizen advocate for
7 rail freight, and freight in particular. I
8 retired from the Defense Contract Management
9 Agency in Boston as a manager and a certified
10 Department of Defense acquisition
11 professional. I have worked for 34 years for
12 the Department of Defense. And in dealing
13 with Department of Defense issues, freight was
14 a really big issue in my environment

15 The rapid decline of freight rail
16 capability performance and access in the
17 Boston metro region became vividly apparent
18 during my oversight of Department of Defense
19 contracts in my area of responsibility in
20 Massachusetts and New England. Contractors
21 under my unit surveillance were engaged in
22 receiving and shipping millions of dollars of

1 goods and materials.

2 Beginning in the 1990s and until
3 my retirement from the Defense Department in
4 2002, virtually all the freight that had moved
5 on government bills of lading via rail and sea
6 shifted to truck because of a lack of adequate
7 rail and port infrastructure in the region.

8 Based on my professional
9 experience, there is an overwhelming demand
10 for a well-located rail transload facility
11 such as that proposed by New England
12 Transrail. The site is ideally located close
13 to the core metropolitan area, with easy
14 access to two of the regions major interstate
15 highways.

16 Recently, railroads in the
17 northeast, which owned extensive parcels of
18 land in eastern Massachusetts, especially in
19 the Boston urban area, used for transfer
20 terminals and other support functions,
21 realized the skyrocketing real estate values
22 in the Boston metropolitan area. And land use

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1 is a big issue in trying to site industrial
2 enterprises and transportation enterprises in
3 our area.

4 Having a lack of capital for
5 maintaining redundant track and facilities,
6 and with declining rail freight demand,
7 railroads in Massachusetts saw greater profits
8 in selling off these parcels for real estate
9 development than continue their use in
10 transportation functions.

11 These sales eventually hinder the
12 railroad's ability to transfer freight between
13 rails and trucks for local deliveries, which
14 furthered the decline in rail freight And,
15 in particular -- I'll wander a little bit from
16 my notes, but terminal rail operations and
17 branchline rail operations handle the kind of
18 interface between that last mile and the
19 larger regional -- Class I and regional
20 railroads who don't want to do that switching
21 and high-cost maintenance of railyards and
22 those facilities.

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1 So this kind of an operation
2 really fills a gap that the larger railroads
3 just aren't doing. This trend continues with
4 the current commercial retail and residential
5 development of a vital PanAm railyard across
6 from downtown Boston in Somerville,
7 abandonment of the Mystic Wharf branch rail
8 connections to the docks and terminals located
9 on the Mystic River, Chelsea Creek, sale of
10 land occupied by the Beacon Park railyard, CSX
11 owned -- sorry, leased in Alston to -- the
12 sale of that railyard was made to Alston -- in
13 Alston to Harvard University, and that will
14 further limit functions of that yard.

15 And there are disruptions of rail
16 connections to Connolly Terminal, which is the
17 Port of Boston, because of the big dig highway
18 project. So we have lost our port connections
19 by rail, and we see this kind of a transload
20 facility as replacing some of that lost
21 infrastructure.

22 The Federal Highway Administration

1 projects that if we do not change our
2 transportation system freight transported by
3 long-haul truck will increase by 63 percent in
4 the next dozen years over Massachusetts'
5 already congested highway system.

6 I've included some of the
7 statistical -- some of this data in an
8 appendix, which I provided to you earlier.

9 Clearly, the continued use and
10 rehabilitation of existing rail lines and
11 expansion of rail multi-modal transload
12 facilities are needed to sustain the economic
13 viability of Massachusetts as projected
14 increases in demand to move freight are
15 realized.

16 Reliance on trucking to move this
17 increased demand over the existing highway
18 system, with our constrained ability to add to
19 its capacity, is not a viable strategy. We
20 have about a \$19 billion shortfall over the
21 next 20 years just maintaining the existing
22 infrastructure in Massachusetts, and we have

1 no revenue stream as of yet to support that.
2 So the more we beat up our roads and highways,
3 the more we're going to be in trouble in
4 logistics and supply chain management.

5 NET's proposed enterprise is the
6 type of facility that will be required to
7 revitalize rail freight transportation in the
8 Boston metro area. This facility will handle
9 a wide range of in-bound and out-bound
10 products, materials from biofuels with its new
11 and rapidly-growing transportation
12 infrastructure demands, to more traditional
13 commodities like corn syrup, lumber, steel,
14 paper, and other bulk commodities in-bound
15 Since Eastern Massachusetts' major export is
16 waste products, waste will be a major
17 component of the terminal's out-bound freight.

18 Rail freight presents an
19 overwhelming pricing advantage over trucking
20 because of rail's inherent transportation
21 efficiencies, and diversion of freight to rail
22 will save Massachusetts and the municipalities

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1 tens of millions of dollars per year in waste
2 disposal costs.

3 In conclusion, to embrace an
4 economically-driven, multi-modal freight
5 transportation policy in Massachusetts, make
6 better use of and sustain available freight
7 rail capacity, improve the efficiency of
8 movement of freight in general, deal with the
9 rising and forecast unmet demands of moving
10 greater amounts of freight in the near future,
11 including enhancement of national security and
12 emergency response preparedness, the Surface
13 Transportation Board should expeditiously
14 grant NET's petition.

15 Thank you very much, sir, for
16 being able to testify. It's kind of a thrill
17 for a citizen to have this kind of access, and
18 I truly appreciate it Thank you.

19 CHAIRMAN NOTTINGHAM: Thank you,
20 Mr. DeMasi. We'll proceed with questions.
21 I'll begin, and I'll start with you, Mr.
22 DeMasi.

1 If I understood your statement
2 correct, you are appearing here as an
3 individual private citizen. You are not --
4 you have no financial interest in this
5 project?

6 MR. DeMASI: No, sir.

7 CHAIRMAN NOTTINGHAM: You don't
8 own any real estate adjacent to it that might
9 somehow benefit from it or --

10 MR. DeMASI: No, sir.

11 CHAIRMAN NOTTINGHAM: -- nothing,
12 paid to be here by anybody?

13 MR. DeMASI: No, sir.

14 CHAIRMAN NOTTINGHAM: And I think
15 we have -- we'll hear from other citizens
16 later today that -- in similar status, and I
17 commend all of you for taking time out at your
18 own expense to speak out on an important
19 issue, on all sides of this issue.

20 Now, granted, we didn't give you a
21 lot of time today, so I want to give you a
22 little bit of time during the questions

1 MR. DeMASI: Appreciate that.

2 CHAIRMAN NOTTINGHAM: And I think
3 we're all -- I know I certainly am sympathetic
4 to what it must be like for folks in the
5 community around this former Olin Superfund
6 site, Olin chemical site that is now a
7 Superfund site. They've put up with a lot.
8 They've -- presumably, they've been put
9 through a lot of fear and heartache and
10 perhaps worse.

11 And now comes development plans of
12 a -- you know, probably of a wide variety,
13 including New England Transrail's. Do you
14 have any suggestions for this Board about how
15 reasonable health, safety, and environmental
16 concerns might be addressed if we were to
17 eventually allow an operation such as this
18 transload operation go forward?

19 MR DeMASI: Well, you know, my
20 expertise -- and it's learned in the past
21 three years, five years of retirement, by
22 reading issues, taking part in public forums

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1 -- is more in the needs of the freight
2 industry in particular. And we're facing a
3 supply chain management issue in Massachusetts
4 because of the high cost of goods.

5 But I also served on a local
6 planning board for my town, and I realize that
7 with -- with any kind of development we look
8 for mitigation to the abutters. So in this
9 case, it's more than just mitigation from
10 noise and other issues. I realize the
11 importance of environmental issues, and
12 especially this community, which has borne a
13 tremendous cost to that issue.

14 But when I look at the proposal
15 from just a transportation point of view,
16 there seems to be willingness to comply with
17 local requirements, and to provide mitigation
18 in terms of a covered building, very
19 responsible engineering and development of the
20 site. The way the tracks are laid out, I'm
21 sure there's going to be some consideration
22 for the current issues that are under the

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1 ground, and whatever.

2 The problem is that there are so
3 few industrial sites available that are
4 economically viable to develop for transload
5 facilities, or even passenger facilities,
6 layover facilities, they are terrible things
7 to site.

8 So when a community is faced with
9 this kind of burden that is a regional benefit
10 but a definite local burden, we expect that
11 mitigation would be provided. That might be
12 in extraordinary oversight by the proper
13 people that are in charge of those issues and
14 recurring oversight, reasonable barriers,
15 visual barriers, and whatever it takes to
16 mitigate sound, noise, dust, those kinds of
17 issues.

18 So, you know, I think it's a joint
19 responsibility I also understand that local
20 regulators tend to overregulate, and in many
21 cases we have trouble bringing new industry in
22 or developers in because of the cost of

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1 permitting and those kinds of issues And we
2 are in real jeopardy of losing our jobs in the
3 state, we're in jeopardy of having an
4 antiquated infrastructure system, while all of
5 this other high tech goes on.

6 So there is kind of no middle to
7 this thing, and that's where my advocacy lies.
8 So I don't know if I'm answering your
9 question, but that's the best I think I can do
10 on that.

11 CHAIRMAN NOTTINGHAM: Thank you,
12 Mr DeMasi.

13 We'll hear from many folks who
14 might claim some degree of greater expertise
15 than you might claim in some of these matters,
16 but I think it's important to hear from folks
17 who just bring good common sense sometimes,
18 and you sound like you might be bringing some
19 of that to us today.

20 Just out of curiosity, if this
21 proposed operation was interested in bringing
22 in municipal solid waste by truck, dumping it

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1 onto a cement floor, scooping it up or
2 bundling it up and putting it into a railcar,
3 would you define that as integrally related to
4 transportation?

5 MR DeMASI. I believe it is. I
6 happen to live in a knockdown neighborhood in
7 Wellesley. There were like six knockdowns on
8 my street alone. Now, the way you knock down
9 a house is you mush it into the foundation,
10 and then you load it into a container, and
11 then it gets trucked out of your neighborhood
12 So this kind of loading, unloading, reloading
13 happens in our neighborhoods.

14 Now, I mean, what do you do with
15 this stuff? How do you handle it? So the way
16 it was explained to me -- and I've queried,
17 you know, the transrail folks, because I don't
18 want to do something that's stupid, but it
19 seems to me that what they're explaining is a
20 way of reasonably loading a railcar by
21 handling the material, separating some of it
22 out before it's put in the railcar in a

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1 certain sequence.

2 And that kind of is a logical way
3 to do loading of something that we need to get
4 rid of And the further away that site is,
5 the more trucking you have getting there. So
6 it's really good to have some locally, you
7 know, dispersed transload facilities to do
8 that kind of operation.

9 CHAIRMAN NOTTINGHAM: Thank you.

10 Mr. Moates, you're a veteran
11 railroad regulatory practitioner. You seem to
12 be well versed in much of the case law and
13 some of the precedent and some of the statutes
14 in this regard.

15 Let me ask you, if I could, first
16 of all, you talked of course about the case of
17 most interest to your client, which makes
18 sense. It's a case not before us today
19 directly. I personally don't propose to
20 interfere with the pending decisionmaking of
21 the Third Circuit or any Circuit Court of
22 Appeals. We look forward to seeing what they

1 have to say to help shed light on this matter.

2 But there are some -- perhaps some
3 distinctions -- important distinctions, if I
4 heard your statement correctly, between the
5 facts in your client's case in New Jersey, and
6 the facts here. You have been recognized by
7 a U.S. Federal District Judge as an
8 established rail carrier, if I heard you
9 correctly, and not a new entrant.

10 MR. MOATES: And by you.

11 CHAIRMAN NOTTINGHAM: Right.

12 MR. MOATES: Yes.

13 CHAIRMAN NOTTINGHAM: Minor
14 detail

15 MR. MOATES: Right.

16 CHAIRMAN NOTTINGHAM. And by this
17 body, probably before my personal tenure.
18 Should that matter? In other words, let's say
19 we wrestle with this case, do the best we can,
20 arrive at some -- we believe some reasonable
21 outcome to what is a new entrant case, this is
22 related to -- we're having a jurisdictional

1 hearing today related to eventually making a
2 licensing type decision for someone to become
3 a rail -- recognized rail operator.

4 Assume this case eventually is
5 behind us one way or another, and your client
6 or another established railroad decides to add
7 a line of rail operations, such as handling
8 municipal solid waste, receiving it, dumping
9 on a cement floor, picking it up and putting
10 it into railcars, and taking it away, or
11 perhaps routing for some reason chlorine
12 tanker cars, which are important, of course,
13 for drinking water purposes for a lot of
14 municipalities, maybe parking those chlorine
15 tanker cars for a period of time on the rail
16 property, nuclear waste occasionally passes
17 along the railroads, and things that are
18 probably less -- maybe less controversial but
19 could be of serious concerns to locals,
20 whether they be livestock, thousands of
21 automobiles coming -- getting ready to come
22 and go from a port in a parking lot

1 illuminated by bright lights for security
2 reasons, etcetera, what would our -- in your
3 view, what is this Board's role?

4 What is our jurisdiction in a
5 situation, any of the situations I just
6 described, assuming it is an established rail
7 carrier that is just deciding to add another
8 arguably traditional type of rail operation to
9 their business?

10 MR. MOATES: It's a complicated
11 question, Mr. Chairman, because you put a lot
12 of different scenarios there. I'll do my best
13 to respond. Yes, the first point is, yes, the
14 Susquehanna obviously is and has a long
15 history of being an operating freight
16 railroad, and the facilities that have been
17 subject to the litigation in New Jersey are
18 facilities that are sited on its existing
19 right of way.

20 There are -- as I tried to show on
21 those photographs, there are side tracks that
22 come off of the New York-Susquehanna main into

1 these facilities, and the facilities are
2 served by the Susquehanna, switch crews,
3 locomotives come in and place those cars and
4 pull them out.

5 Those facilities are on property
6 owned by the railroad, and the loaders at the
7 facilities, the people doing the loading of
8 those railcars are employees of a wholly-owned
9 Susquehanna subsidiary. Judge Hayden found
10 all this to be the case. It is a railroad
11 operation

12 If the Susquehanna or some other
13 railroad were to decide that it wanted to
14 build, you know, a new line as you posit or a
15 new track, again, I guess it would depend on
16 whether we're talking about something that
17 would require a construction application,
18 approval from this Board, or if it's
19 traditional exempts for a siting, you wouldn't
20 have jurisdiction over it -- you have noted
21 that a number of times -- the railroad could
22 build it.

1 Does the railroad build it in --
2 blissfully in lack of care or concern or
3 awareness of safety and environmental
4 considerations? Obviously not. And railroads
5 have, as you know, very sophisticated
6 engineering departments and operating
7 departments. They have environmental people
8 that deal with that.

9 If it's a construction application
10 or any kind of an action that requires them to
11 come here for authority, you obviously have
12 the ability to attach environmental or other
13 type conditions to your approval, if you give
14 it -- your authorization

15 But even when they build so-called
16 exempt side tracks and spurs, you know, the
17 railroads are very careful to comply with
18 appropriate local safety, public health,
19 environmental consideration.

20 The problem we had, candidly, in
21 this litigation -- as I try to point out, I
22 said it a couple of times -- is the State of

1 New Jersey had an agenda, or, more
2 specifically, the New Jersey Department of
3 Environmental Protection. and certain people
4 we believe in their Attorney General's office
5 had an agenda and they acted on an agenda.
6 The Governor was behind them, and the agenda
7 was to shut these facilities down. They don't
8 want them, they don't like them

9 New Jersey has a very
10 comprehensive and very active and vigorous
11 environmental enforcement department One of
12 the deputy attorneys general in charge of that
13 case is here today, and, you know, they are
14 well staffed and well able to represent their
15 interests vigorously and aggressively, and
16 they have in this case.

17 I would submit, and I have in open
18 court said this, and I've told Mr. Auerbacher
19 here this, I think they chose the wrong
20 target. We're very sympathetic with the so-
21 called Hi-Tech problem. And, again, I'm
22 saying nothing about New England Transrail.

1 I really don't know enough about their
2 operation. It sounds to me like they have
3 made a real effort to deal with the kinds of
4 considerations that have arisen in Hi-Tech and
5 similar cases

6 But, you know, again, we believe
7 -- and I think the AAR and Class I's that
8 filed are trying to tell you that there is a
9 problem, and the problem is with the abuse of
10 your exemption procedures for people trying to
11 be deemed to be rail carriers, so they can
12 then climb up the ladder and say, you know,
13 we're not subject to all of these local laws
14 and regulations.

15 I think the real problem here is
16 the oversight of the exemption process, and
17 hiding the scrutiny there I think would go a
18 long way towards resolving those kinds of
19 rogue operators', as they've been called,
20 problems.

21 That wasn't the Susquehanna's
22 problem. The Susquehanna had a problem with

1 the state's agenda, and, you know, as I say,
2 the federal court in Newark concluded at the
3 end of the day that the state had overreached
4 and that those regulations had one purpose and
5 one purpose only and that was to harass the
6 hell out of the railroads and to interfere
7 with rail operations.

8 States can't do that. That's what
9 the preemption provision is all about. Now,
10 we'll see if the Third Circuit agrees. I'm
11 guardedly optimistic that it will We shall
12 see.

13 One other thing about New Jersey
14 that I would say -- again, it's really
15 remarkable in a lot of ways. Even the state
16 government I think was not wholly of one mind
17 about these facilities, by which I mean the
18 New Jersey Department of Transportation on two
19 different occasions afforded cash grants to
20 the Susquehanna to help finance and build the
21 facilities that the Department of
22 Environmental Protection is trying to shut

1 down.

2 Well over a million dollars of New
3 Jersey taxpayer money went into those
4 facilities. So there are clearly a lot of
5 agendas here, a lot of enforcement agendas.
6 I respect very much Mr. Auerbacher and his
7 colleagues and the concerns they are trying to
8 deal with. We just really think they kind of
9 got it wrong.

10 The Susquehanna has worked very
11 hard to try to do what we believe to be
12 reasonably necessary, and, of course, there is
13 disagreement about what "reasonably necessary"
14 is. That's why we go to court. But we have
15 not ignored their concerns.

16 You saw those facilities. They
17 are not open dumps anymore, if they ever were.
18 They are -- the facilities are enclosed, they
19 have misting systems, they have water runoff
20 systems. You know, they have lights, they
21 have guards, all that --

22 CHAIRMAN NOTTINGHAM: Let me

1 interrupt you Sorry to do that, but I just
2 -- I'm interested in hearing certainly your
3 knowledge of the law and the regs, and
4 probably less -- I'm less interested, just
5 with all due respect, in hearing about the
6 Susquehanna case. It's just not before us
7 right now. It's -- you are perfectly within
8 your rights to try to educate us on it. You
9 have, and -- but let me try to just ask you
10 another question or two.

11 If I heard you correctly in your
12 answer just now, if it was on -- let's say an
13 existing rail carrier has existing siding that
14 is -- would be exempt, if I understand you
15 correctly, from regulation, and a railroad
16 decided to for the first time bring -- an
17 existing long-standing railroad, bring in
18 chlorine tanker cars or cars full of nuclear
19 waste that were otherwise consistent with
20 recent traditional railroad operating
21 practices around the country, park them for a
22 period of time, move them in commerce, that

1 this Board would have a lot of jurisdiction to
2 do something about that, not much, none?

3 MR MOATES: First of all, we
4 don't want that stuff. And I'm not speaking
5 for the Susquehanna, because they don't handle
6 nuclear waste or -- I'm not sure about
7 chlorine. I think you well know this is a
8 very thorny issue for the national railroad
9 industry right now, and we're not -- I don't
10 know of any railroad going out and trying to
11 garner chlorine business or nuclear waste
12 business.

13 But we have to handle it. We have
14 a common carrier obligation to --

15 CHAIRMAN NOTTINGHAM: I was going
16 to say you have a common carrier obligation.

17 MR. MOATES: So we have --

18 CHAIRMAN NOTTINGHAM: We have a
19 law

20 MR. MOATES: We have it, we have
21 to put it somewhere. It goes into a yard. In
22 fact, as I know you and your staff know, TSA

1 and the Department of Homeland Security have
2 new regulations that have been proposed, and
3 I don't believe have quite been adopted yet,
4 but would specify with a good deal more detail
5 than heretofore how that kind of traffic has
6 to be handled, how it has to be watched, even
7 guarded under the proposed regulations and
8 rail facilities.

9 Do you have jurisdiction over
10 that? I don't believe so. I think that, you
11 know, while we all understand the great
12 concern about chlorine and nuclear waste and
13 the like, in the context of what you're asking
14 the question of me, it's rail traffic. It's
15 traffic moving on the interstate rail system
16 and --

17 CHAIRMAN NOTTINGHAM: Thank you.
18 I think you've just answered my question.

19 Lastly, there is some interest in
20 this among some stakeholders -- in fact, I
21 think I heard it loud and clear from the
22 distinguished Senator this morning -- that we

1 use this opportunity with this New England
2 Transrail case to bring a -- what I would view
3 as a line of cases and a broad area of
4 controversy flowing in multiple states, bring
5 some closure to those controversies once and
6 for all.

7 And we're looking at that, to be
8 honest, but I can say personally I'm
9 struggling with how we -- how we do that. In
10 other words, just as soon as we think we've
11 gotten MSW rail regulation just right and
12 updated, modernized, what's the next case?

13 In other words, what's your read
14 of the federal preemption grant, and do you
15 see -- do you see a real possibility that this
16 Board could actually bring the broad area of
17 dispute to closure with this case? And, if
18 so, how, frankly? And if you don't want to
19 answer that question, you don't need to, but
20 --

21 MR MOATES: No, I'm not afraid to
22 try and answer it. I think the answer is no,

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1 you probably can't. And I also, further,
2 suggest that you probably shouldn't try in the
3 very broadest sense. And I say that with all
4 due respect.

5 Congress wrote 10501(b) .
6 Congress, as the Senator suggested, could
7 modify 10501(b). I'm not advocating that,
8 but, I mean, he is well aware of that, and he
9 has co-sponsors to his legislation, and that's
10 Congress bailiwick.

11 But for the Board to essentially
12 try to circumscribe or in some manner
13 interpret 10501(b) in a way that you,
14 obviously for the best of intentions, you were
15 trying to deal with the kinds of situations
16 that I'm suggesting seem to be coming
17 primarily out of your exemption process, I
18 think would not be appropriate. And at the
19 end of the day, I don't think it would
20 necessarily withstand judicial review if
21 someone were to challenge it. But that's my
22 personal take.

1 CHAIRMAN NOTTINGHAM: Thank you
2 Last question for you, Mr. Moates. In your
3 view, if in fact New England Transrail
4 actually operates as it proposes to,
5 interconnects a rail line into other rail
6 lines that serve -- that run through and are
7 part of interstate commerce, do you think we
8 have, as a Board, much flexibility to say,
9 "Nah, boy, this case would be a lot easier if
10 we just say you're not a railroad."

11 My read of the statute is that
12 rail carrier means a person providing common
13 carrier railroad transportation for
14 compensation, and it includes a switch, spur,
15 track, terminal, terminal facility, and a
16 freight depot yard, ground -- or ground use or
17 necessary for transportation, and
18 transportation includes a locomotive car,
19 vehicle, vessel, warehouse, facility -- I'm
20 skipping a few words here -- equipment of any
21 kind related to the movement of passengers or
22 property by rail, regardless of ownership,

1 etcetera.

2 Regardless of ownership is -- it
3 doesn't say you have to be a known and proven
4 entity. And services related to that movement
5 include -- including receipt, delivery,
6 elevation transfer in transit, refrigeration,
7 icing, ventilation, storage, handling, and
8 interchange of passengers and property.

9 How much discretion do you think
10 we have to just make this case in the eyes of
11 some a little easier and quicker to dispense
12 with by saying, "You're not a railroad
13 entity"?

14 I'll ask Governors this question,
15 too.

16 MR MOATES: Again, without in any
17 manner commenting on what I am not in a
18 position to comment on, which is the indicia
19 that NET may have brought forward to suggest
20 they meet the standards to qualify for your
21 exemption and to be a rail carrier, if you
22 were to conclude, based on your traditional

1 standards and your traditional analysis, that
2 they are not, then I think that would solve
3 this case.

4 It isn't going to solve the
5 broader problem, as I suggested to you, and it
6 may -- I understand, Mr. Chairman, you are
7 searching for the possibility of a broad
8 resolution or a way to break the Gordian knot
9 here, I don't think that you can do that.

10 That's why I said during my
11 opening remarks that it's critical for you to
12 have the specific correct facts and
13 circumstances about each one of these
14 proposals, because that's the way your case
15 law turns. It is very fact-specific, very
16 searching inquiry as to whether the indicia
17 and standards that have been identified in a
18 long, long line of cases are met in a
19 particular case.

20 Only other thing about your
21 reading of the statute that I would like to
22 say one thing about, talking about what a

1 common carrier really is, a common carrier
2 facility. That became an issue in the New
3 Jersey litigation. It could become an issue
4 here. I would only remind the Board that
5 there is another rich history of learning
6 about what a common carrier facility is.

7 And the fact, for example, that a
8 facility may be used by only one customer --
9 Ford Motor Company, Cargill, a waste company
10 -- does not render it not a common carrier
11 facility. And there is a long line of cases
12 that make that very clear. I think we have to
13 be a little bit cautious about, you know, the
14 terminology and trying to reinterpret some of
15 the terminology with all the learning that the
16 ICC and the Board have on some of these
17 concepts.

18 CHAIRMAN NOTTINGHAM: Thank you.
19 One last followup to that line. Are you
20 saying that there is anything in the statute
21 that gives us guidance or in case law that if
22 a railroad is kind of on the short side of

1 things as far as the track not being super
2 long, or a railroad not being a household
3 name, or perhaps a new entrant, that that --
4 we ought to use those factors to knock them
5 out and say they're not proposing to be a
6 railroad?

7 MR. MOATES: No, not at all. I
8 didn't mean to suggest that. I mean, I
9 suppose at one point the Union Pacific wasn't
10 a household name, so everybody starts
11 somewhere.

12 CHAIRMAN NOTTINGHAM: Thank you
13 Great. I've got plenty of questions for Mr.
14 Van Tine, but I want to defer to my
15 colleagues, give them a chance to ask some
16 questions.

17 Just from a procedural point of
18 view, if I could ask staff, will we have an
19 opportunity to question Mr. Van Tine after his
20 closing? Okay. This is my first hearing of
21 this nature, so I just want to make sure I
22 don't miss an opportunity, Mr. Van Tine,

1 because I want to -- I'm sure we'll have
2 another round of this panel, so bear with us.
3 But we'll now proceed in this first round, and
4 I would like to turn to the Vice Chairman, Mr
5 Buttrey

6 VICE CHAIRMAN BUTTREY: Thank you,
7 Mr. Chairman.

8 Mr. Moates, I had a few thoughts
9 while you were testifying about the Jackson
10 case and the facts of the case. The case
11 turns on the law and the facts. We have to
12 pay attention to the facts. So I was
13 wondering if you -- you said you had been out
14 to some of these facilities, and you're very
15 well aware of what goes on there.

16 I gather from your testimony so
17 far is that all of these facilities, let's say
18 the five main facilities, there's a sixth
19 that's sort of different, but certainly the
20 five that we're talking about focusing on, is
21 it correct to assume that at those facilities
22 basically the only thing that happens there is

1 that the construction debris or whatever is
2 brought in, nowadays it's put inside of an
3 enclosure of some kind, which is a huge
4 improvement, obviously, and then it is loaded
5 -- without doing anything else to this
6 material, it is loaded into a railcar that is
7 also apparently inside the building and netted
8 and pulled away.

9 Does that describe adequately what
10 happens inside those buildings?

11 MR. MOATES: Yes, with one
12 exception that I'm sure the State's
13 Representative will be quick to talk about.
14 And I think it is discussed in the NET
15 proposal, as well. And you ask, I hear you,
16 you put in the qualifier, nothing else is done
17 to it before it's put in the rail car. Yes,
18 something is done to it. There is a man who
19 will walk around, and when he sees so-called
20 non-compliant material, a piece of copper, a
21 washing machine, you'd be amazed at some of
22 the -- I've been to the facilities. You're

1 right, it's amazing what you find getting
2 dumped out of these trucks, things that would
3 either damage the rail car, or would be
4 rejected by the landfill because it's
5 something that's not compliant. That is
6 pulled out, put aside, now put in a dumpster.

7 Again, in our case, the State took
8 the position that we were engaged in
9 recycling. Well, what would the preference
10 be, to dump it over off the property over
11 here? I mean, the Susquehanna is not making
12 money from that. They get rid of the stuff,
13 when there's a dumpster load, they come and
14 have it removed and emptied, and the like.
15 That's the only change that I would suggest to
16 the way you described the process.

17 Again, Mr. Vice Chairman, this is
18 not a terribly sophisticated operation. I
19 mean, it is --

20 VICE CHAIRMAN BUTTREY: You're not
21 changing the size and weight, or the nature,
22 or the character of the debris.

1 MR MOATES: At these North Bergen

2 --

3 VICE CHAIRMAN BUTTREY: You're not
4 changing its chemical composition.

5 MR. MOATES: No.

6 VICE CHAIRMAN BUTTREY: You're not
7 changing it from a liquid into a solid, or a
8 solid into a liquid?

9 MR. MOATES No. And also, I
10 should say very clearly, Susquehanna does not
11 handle municipal solid waste. We keep
12 throwing those terms around. They're very
13 different concepts, and we understand that.
14 We're talking about construction and
15 demolition debris, not MSW, that is a
16 different game. But no, you're right. You've
17 described it correctly.

18 VICE CHAIRMAN BUTTREY: Okay Can
19 I go to anybody on the panel now? Okay Mr.
20 Van Tine, you've dropped off to us today a
21 surprise document. You know, on TV they just
22 throw these out. But, anyway, I think the

1 ruling is, is that even though it is a
2 surprise document, and a late filed document,
3 apparently, the Board's rules about accepting
4 these documents are very liberal, fairly
5 liberal, and my understanding is it's going to
6 be accepted and put in the docket.

7 If you could, for me, could you
8 just tell me what this is all about, what's in
9 this document, since we don't know. We
10 haven't had time to read it, we didn't see it
11 before the hearing, we have no idea what it
12 says. But you've given it to us, and
13 apparently you want us to consider it, and so
14 could you summarize for me what's in this
15 document?

16 MR. VAN TINE Yes, sir. I passed
17 up two documents, and I presume you're
18 referring to the statement of Mr. Jones.

19 VICE CHAIRMAN BUTTREY: The most
20 recent one, correct

21 MR. VAN TINE Yes, sir.

22 VICE CHAIRMAN BUTTREY: In the

1 first instance, correct me if my assumption is
2 correct, you have basically done everything
3 you possibly can to comply with New Jersey
4 regulations and laws, except technically
5 submit yourself to their jurisdiction.

6 MR. VAN TINE: Massachusetts, Mr.
7 Vice Chairman

8 VICE CHAIRMAN BUTTREY. Excuse me,
9 I'm sorry. I'm sorry. I was thinking about
10 the --

11 MR. VAN TINE: We're talking about
12 a different state.

13 VICE CHAIRMAN BUTTREY: It's still
14 very uppermost in my mind here.
15 Massachusetts, I'm sorry. You have done
16 everything -- it seems to me, if I'm correct,
17 and correct me if I'm incorrect, that you have
18 done everything that you could possibly do to
19 comply with whatever it is that the State of
20 Massachusetts wants you to do, except
21 technically submit yourself to their
22 jurisdiction. Is that accurate? And does

1 this document that you filed today bear on
2 that issue in any way, shape, or form?

3 MR. VAN TINE: I think that's a
4 fair statement, but again, in fairness, I want
5 to point out that the discussions that we had
6 with Massachusetts authorities began, but
7 didn't go real far I think that our position
8 is that, going back to my comment in my
9 opening, that I don't think that there is
10 truly a regulatory gap in the sense of a void.
11 There is a body of law that the Board and the
12 courts have developed to determine what kinds
13 of state activities would impose an
14 unreasonable burden on rail transportation
15 That's the test, whether they would impose an
16 unreasonable burden, and so this is not an all
17 or nothing proposition in terms of pre-
18 emption. There are some things that clearly
19 are pre-empted, there are some things that
20 clearly are not, according to the Board's past
21 decisions that categorically are pre-empted,
22 some things that aren't, but then there are a

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1 lot things in the middle that you sort of have
2 to work out and see what the regulation says.
3 And I think Mr. Moates referred to one of
4 those things in New Jersey that, as I read the
5 District Court decision in Jackson, it was not
6 so much the actual language of the regulation,
7 but the way it was being applied, and the
8 effect that the regulations might have on the
9 railroad.

10 In our case, what we have done so
11 far is read all the Massachusetts regulations
12 that we think might be applicable to this
13 operation, and propose that we comply with all
14 of them, except for the ones that the Board
15 has held are categorically pre-empted in the
16 past, like site assignment and pre-clearance
17 regulations. And so, to your point, have we
18 done all that we could possibly do? I think
19 that we would have -- we would envision, if
20 this process were to proceed with
21 Massachusetts, sitting down with the
22 Massachusetts authorities from the Attorney

1 General's office and the Department of
2 Environmental Protection, and going through
3 the list. Here's our list, here's what we
4 think applies. Do you think this is the right
5 list? Do you have anything you want to add to
6 the list? Is there anything that doesn't
7 apply, and work through that whole list and
8 make sure we're in agreement. The only things
9 we know about that we're not going to comply
10 with are the things that you've already
11 categorically pre-empted. I think that we're
12 in pretty good shape.

13 And there was one other thing, as
14 I recall, and I may be wrong about this, but
15 I believe that they may have some special
16 noise requirements that apply to railroads.
17 And we believe there are federal noise
18 requirements that apply to railroads, and we
19 would substitute those. But everything else
20 regarding health and safety, we have
21 conceptually agreed to comply with. Yes, sir.
22 And we would do that in writing.

1 I understand there's a practical
2 issue about enforcement, and how do you
3 coordinate state inspection, enforcement,
4 compliance efforts with federal jurisdiction?
5 And I understand the position of some of the
6 parties who have filed briefs on Monday,
7 saying that that's just too hard, and the
8 Board would be dragged into thousands of
9 proceedings all over the country.

10 My own opinion is that that's not
11 correct, that, as I said, this kind of
12 situation, conceptually, has been going on for
13 many, many years. And in many situations,
14 local communities and railroads have found
15 ways to co-exist through working out
16 agreements. And the federal authorities do
17 not get dragged into every dispute. And the
18 test, again, if everybody knows what the law
19 is, the law is that if it unreasonably burdens
20 rail transportation, then it's pre-empted. If
21 everybody knows that, then conceptually,
22 things that the state wants to do in the way

1 of enforcement or inspection that don't
2 "unreasonably burden" rail transportation, our
3 client certainly would have no problem with,
4 and would not argue about it.

5 The issue would arise only when
6 you get into the situation, as I understand
7 from the Jackson decision that Mr. Moates'
8 client found themselves in, where according to
9 the decision, the state was attempting to take
10 action through their health and safety
11 regulations that would unreasonably burden
12 rail transportation.

13 So short answer is, we still have
14 a ways to go with Massachusetts, but I'm
15 reasonably confident we could get to the point
16 of a signed agreement fairly quickly, if they
17 were willing to sit down and talk to us.

18 VICE CHAIRMAN BUTTREY: I sort of
19 got you off the original question. I
20 appreciate very much your response and your
21 answer, but could we go back to the document
22 itself.

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1 MR. VAN TINE: Yes, sir.

2 VICE CHAIRMAN BUTTREY: Is there
3 anything different in the document --

4 MR. VAN TINE: No.

5 VICE CHAIRMAN BUTTREY: -- that
6 you submitted to us today, and what you just
7 said?

8 MR. VAN TINE: First of all --

9 VICE CHAIRMAN BUTTREY: Can you
10 elaborate on that?

11 MR. VAN TINE: I apologize for the
12 so-called surprise. It was late, but the
13 problem that we saw in reading - I read all
14 the materials that were filed on Monday by all
15 the parties, and as I mentioned in my opening,
16 we see this sort of passing in the night,
17 where we say something, the other side says
18 something, it doesn't indicate that they've
19 even read what we filed. And Mr. Jones'
20 Supplemental Verified Statement is intended to
21 address some of the key points that we saw in
22 the filings on Monday; one of which is this

1 issue of whether we are willing to try and
2 work this out with the Commonwealth of
3 Massachusetts. That's point number one, and
4 the answer is yes, absolutely we are.

5 Another is, do we qualify as a
6 rail carrier? That hasn't gotten a lot of
7 attention in the past pleadings, but that's an
8 issue of interest that we saw in the briefing
9 on Monday. And we wanted to have in the
10 record in a Verified Statement the facts that
11 the Board has considered in past cases about
12 the indicia of who is a rail carrier.

13 Mr. Moates alluded to some of
14 those, and that is Part 2 of what's in Mr.
15 Jones' statement, the facts of what New
16 England Transrail's operation is going to be;
17 things like we're going to own the land, we're
18 going to own the rail cars, or lease them.
19 We're going to own an engine or lease it.
20 We're going to have our own employees, we're
21 not contracting out. The employees are going
22 to be eligible to be members of the applicable

1 rail unions. We're going to pay into the
2 Federal Railroad Retirement system. We're
3 going to comply with all the safety
4 regulations of the Federal Railroad
5 Administration. All the indicia of being a
6 rail carrier that you've heard in the past, or
7 that the Board has indicated make people
8 qualify as rail carriers, we're going to do.

9 The Chairman alluded to the
10 statutory test of common carrier for
11 compensation. Absolutely. The list of
12 shippers that have approached the principals
13 in this project has grown over the time since
14 this application has been pending, and I guess
15 that's the good thing about having
16 controversial projects. A lot of people hear
17 about it, but a lot of people would like to
18 use this facility to ship a variety of
19 commodities in and out of this particular
20 area, so that's Part 2.

21 Part 3 is, we were sort of
22 challenged in the Solid Waste Management

1 Association pleading to answer some questions,
2 and I presume the thought was that we were
3 trying to pull a fast one, or avoid giving
4 this Board the truth, somehow, and so just to
5 make the record absolutely clear, we didn't
6 want to let those questions hang out there
7 with no answers, and leave the implication
8 that we're afraid of those questions. And
9 that was the third purpose of filing the
10 Verified Statement.

11 We've answered the questions. The
12 questions are stated in the exhibit, and we
13 think they're clearly and directly answered.
14 And if there's any further question about the
15 answers, we're happy - we brought Mr. Jones
16 here. He can talk about those things, but I
17 think they're very simply, directly answered,
18 no attempt to evade anything. And we tried to
19 do it to minimize any ambiguity in the wording
20 that's used. So those were the purposes.

21 And, Mr. Vice Chairman, I just
22 want to repeat again that I understand that

1 this was late. I appreciate your suggestion
2 that the Board will accept it for what it's
3 worth. And I want to reiterate that we did
4 make a real effort in the hour before the
5 hearing commenced to reach as many of the
6 participants in the proceeding as possible,
7 and actually hand them a copy of it so they
8 would have an opportunity to read it before
9 they take their positions here and speak.

10 VICE CHAIRMAN BUTTREY: Mr.
11 Chairman, I may have other questions later.
12 I want to reserve the right to ask those
13 questions later, but in deference to Mr.
14 Mulvey here, our fellow Commissioner, I've
15 taken up a lot of time here, and I want to
16 defer to him now.

17 CHAIRMAN NOTTINGHAM: Thank you.
18 I'll just note that a number of things have
19 been shown, illustrated, photos, et cetera
20 today for the first time. I think that's why
21 we're having a hearing, and as long as all the
22 parties get it. We don't plan to make a

1 decision today. It's a priority case, we plan
2 to expedite it, but I think anything that
3 comes in appropriately today that's relevant
4 to the case, we are happy to receive.

5 With that, Commissioner Mulvey.

6 COMMISSIONER MULVEY: I'll ask
7 some questions, and then we'll go through
8 another round of questions.

9 To begin with, you mentioned that
10 you felt that there's no regulatory gap, but
11 in a sense, there are certain operations,
12 certain parts of railroads, as improvements in
13 a railroad processing facility that already
14 exists, that we would not regulate. For
15 example, the Susquehanna Railroad in New
16 Jersey, if it was to make an improvement in
17 some of its yards, et cetera, we would not
18 regulate that. And yet, any local rules and
19 regulations governing that yard would be pre-
20 empted.

21 Under 10906, we don't have the
22 jurisdiction to regulate the construction and

1 operation of a spur, industrial, or sidetrack.
2 This came up in the Staten Island case where
3 the Fresh Kills Landfill track was extended
4 into that area in order to bring out solid
5 waste. New York and New Jersey DEPs both
6 wanted to regulate that, and impose
7 environmental rules. We said that we pre-
8 empted, but then we said we have no
9 jurisdiction over sidetracks, so we pre-empted
10 the state, and did not do anything ourselves.
11 Would you consider that to be a regulatory -
12 I can think of another example in Minnesota,
13 also, where there was a yard where they were,
14 the railroad was storing containers. And,
15 again, there was no way for the community to
16 regulate what was going on in that yard. And
17 on the other hand, we did not have any
18 jurisdiction. Would you still say there's no
19 regulatory gap, given those examples?

20 MR. VAN TINE: Well, I'd say first
21 that that's not our situation, that we're in
22 a little bit different position.

1 COMMISSIONER MULVEY: You made a
2 broader statement, that --

3 MR. VAN TINE: Yes, sir. And I
4 probably over-stated, sort of a generalization
5 about the law there. First of all, I don't
6 pretend to be an expert in railroad law, and
7 I certainly am reluctant to offer opinions
8 about railroad law when you've got some
9 experts in that subject sitting directly
10 behind you. But I think that in the beginning
11 when the pre-emption statute was drafted, and
12 when the other aspects of rail regulation came
13 into being, there certainly was a regulatory
14 gap, and it was a void.

15 What I was trying to suggest is
16 that over the many years that those statutes
17 have been in existence, the rail carriers and
18 communities, and the ICC, and now this Board
19 have tried to fill that gap, and so my only
20 thought was that there is not a total void.
21 And that's an important thought, I would
22 suggest to you, Commissioner Mulvey, because

1 many of the pleadings that were filed on
2 Monday suggest that we are in the sham carrier
3 category, where we're trying -- the only
4 purpose of coming before this Board is to
5 avoid all state and local regulation. And
6 those pleadings have suggested to you that
7 there is still a total void, and my point is
8 that only that there is not a total void.
9 There may be areas that still need to be
10 addressed, and the area that you've mentioned
11 may well be one of them, but I would suggest
12 that in the space that we occupy, or would
13 like to occupy, the -- again, I'm not a
14 railroad law expert, but I have read
15 Effingham, and I have read all the subsequent
16 decisions, and I don't remember in any of
17 those decisions a factor that depends on how
18 long your track is. What I remember is the
19 intended use of the facility, and some of the
20 indicia of being a rail carrier, that I've
21 mentioned earlier.

22 So I think that in the space that

1 we would like to occupy as a rail carrier, I
2 think on the legal issues in this case, there
3 have been a number of decisions directly on
4 point, and Mr. Moates' decision is the most
5 recent, I suppose, but there have been several
6 other decisions about waste that touch on
7 various aspects of trying to fill the gap.
8 But then there is a long history of other
9 activities that rail carriers have provided
10 historically, and how they relate to rail
11 transportation. And I suppose that what the
12 Board has tried to develop over the years,
13 because the statutory term says that you have
14 exclusive jurisdiction over activities related
15 to rail transportation. And my assumption
16 from reading the cases is that what you've
17 tried to do over the years, is give some
18 content to how closely related the activities
19 have to be. And I presume that at some point
20 in the chain of activities that happens
21 between manufacturing a product, or growing
22 some agricultural commodity, and getting it to

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1 the end destination, there are a lot of steps.
2 And some are more closely related to rail
3 transportation than others. And my perception
4 is that what the Board has tried to do over
5 the years is try and work out some guidelines
6 about where on that spectrum of relationship
7 to rail transportation you have to be to
8 qualify. And what I'm trying to suggest about
9 our facility is that we're right at that
10 point, where we are the missing link, the next
11 step that enables the rail transportation to
12 occur.

13 COMMISSIONER MULVEY: It's been
14 suggested we narrow this hearing and try and
15 focus on the NET proposal, and I'd like to do
16 that, and ask some questions directly about
17 the NET proposal. First of all, how was this
18 project first conceived? And at what point in
19 the development of this project was the idea
20 for NET to become a railroad, and who proposed
21 it? What specific factors did the NET weigh
22 in deciding how to structure these operations

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1 and become a railroad? What led to that? The
2 concern, as you know, is that it was done in
3 order to evade the state and local
4 environmental laws.

5 MR. VAN TINE: Yes, sir. And I am
6 probably not the best person to address that
7 question. And, in fact, I'm sure I'm not,
8 because my association with the project
9 doesn't go back that far. I know that there
10 was a considerable -- I'll tell you what I do
11 know, that there was a considerable amount of
12 research done before any formal proposal was
13 made, that it was determined that this
14 particular site was an attractive location for
15 a rail facility because of the lack of rail
16 facilities in the area, that Mr. DeMasi has
17 mentioned, that within the Commonwealth of
18 Massachusetts, again as Mr. DeMasi mentioned,
19 there has been a steady decline in the
20 available rail facilities, in particular,
21 transloading facilities, and that there has
22 been a corresponding increase in truck

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1 traffic. All of that was part of the review
2 work that was done.

3 There was discussion with
4 railroads, there was discussion with potential
5 shippers of all kinds of commodities, and
6 there was, of course, the knowledge that there
7 was a possibility to ship C&D waste, and MSW,
8 because that is something that has been going
9 on now for a number of years, and it is well
10 known that Mr. Moates' client derives a good
11 deal of revenue from that. So that has always
12 been part of the concept, but it has also
13 always been part of the concept, as I
14 understand it, that the facility would be a
15 rail carrier, and would be common carrier for
16 compensation, and would transport both in and
17 out of the facility a wide variety of
18 commodities limited only by the number of
19 people, the kinds of people that want to ship
20 things. And with one other exception; I think
21 there has been a decision made, at least
22 preliminarily, that we're not going to deal

1 with HAZMAT because that gets you into a whole
2 different category.

3 So as far as I'm aware, the
4 concept has always been that the facility
5 would serve as a common carrier, because there
6 is a need for such a facility in the area.
7 And I don't have a lot of experience with the
8 Surface Transportation Board and rail
9 carriers, but from what experience I have had,
10 I know that if I had a choice between being a
11 shipper and a rail carrier, I think I'd rather
12 be a rail carrier in terms of just the
13 operation of this kind of a facility, and not
14 for the purpose of evading state or local
15 regulation, but just because of the way the
16 regulatory system operates with respect to
17 rail carriers in all other aspects of the
18 system.

19 COMMISSIONER MULVEY: Well, you
20 say in your opening statement that the Boston
21 & Maine Railroad, another railroad that serves
22 Massachusetts, was reluctant to develop the

1 Olin site itself for this type of project.
2 And why was that, why were they reluctant?
3 And what is the New England Transrail's
4 relationship with the Boston & Maine, and its
5 family of companies, if any?

6 MR. VAN TINE: Well, again, I'm
7 not the best person to address that question,
8 but I'll tell you my understanding of it. I
9 don't know, first of all, why they were
10 reluctant to develop. I presume that there
11 was economic reasons, that they did not want
12 to invest the money, or that they did not want
13 to get involved in what, at the time, was not
14 a superfund site, but was clearly a troubled
15 piece of property, and did not want to deal
16 with the community issues that would be
17 involved. I don't know, exactly.

18 As I understand it, the
19 relationship, at present, is that there have
20 been discussions with the railroad, and that
21 the discussions have reached a state where
22 there is some understanding about an agreement

1 that would be reached if the Board grants
2 approval.

3 Obviously, I can't hold up today a
4 signed agreement with the railroad, because
5 the railroad doesn't have anybody really to
6 agree with. But we have - the principals have
7 had discussions with the railroad, and if the
8 Board grants approval for New England
9 Transrail to operate as a common carrier, as
10 a rail carrier, we are confident that an
11 agreement will be forthcoming, a written
12 agreement will be forthcoming. And if there's
13 any concern about that on the Board's part, I
14 think the simple answer is that if the Board
15 were to grant approval, just condition the
16 approval on the production of a written
17 agreement.

18 COMMISSIONER MULVEY: You
19 mentioned other shippers. Would these other
20 shippers also be delivering their product to
21 the transrail facility, or would there be
22 other places, other online operations?

1 MR. VAN TINE: Well, my
2 understanding is limited to the facility. I
3 don't know about other online operations, and
4 I'm not sure I know what that means, exactly.

5 COMMISSIONER MULVEY: In other
6 words, another factory.

7 MR. VAN TINE: Oh, no, sir, not as
8 far as I know. I mean, as far as I know,
9 we're dealing with the operation that will
10 take place within the boundaries that are
11 shown on the drawing that has been filed as an
12 exhibit in this case.

13 COMMISSIONER MULVEY: Are any of
14 these other shipments, would any of them be
15 considered not waste of one sort or another?
16 I saw vegetable oils, for example, but those
17 could be coming from restaurants and things.

18 MR. VAN TINE: Yes, sir.

19 COMMISSIONER MULVEY: And they
20 could be used vegetable oils -- would these be
21 products other than things that would be
22 considered waste in form or another?

1 MR. VAN TINE: Absolutely.
2 Absolutely. And that's, again, been an
3 evolving process over the course of this
4 proceeding. I think that the original concept
5 always has been that there would be other
6 commodities. And over the course of the
7 proceeding, a wide variety of contacts have
8 been made, and a wide variety of shippers want
9 to ship things in and out of this particular
10 location.

11 The examples that Mr. Jones has
12 talked about in his previous -- he's been
13 involved directly with the potential shippers,
14 and Mr. Klempner has, too. And the examples
15 that we have given are, for instance,
16 shipments of wood chips, and salt, and most
17 recently, potentially, biofuels, or ethanol
18 into the area, shipments out of a wide variety
19 of things that are definitely not waste
20 products. They are products that would be
21 sold by whoever is having them shipped.
22 They'd be received, or sent out, and then when

1 they receive their ultimate destination, be
2 sold.

3 COMMISSIONER MULVEY: Could you
4 please describe the nature of Mr. Klempner's
5 and Mr. Jones' involvement with the Hi-Tech
6 project? Were they investors in that project,
7 were they principals?

8 MR. VAN TINE: That's a subject on
9 which I have no knowledge beyond what's in the
10 brief that we filed on Monday, where we, I
11 think, pointed out that Mr. Klempner had been
12 involved in the Hi-Tech project. And I think
13 that's -- I don't know how the Board views
14 that past association, but I think it
15 certainly is some evidence that he knows
16 something about the subject. And I think that
17 the way that the project, this project has
18 developed, certainly indicates that there have
19 been lessons learned from that experience.
20 And I think that it would -- I hope that the
21 Board would not disregard the facts of this
22 particular project. And I think that that

1 project was a one set of facts, and one
2 factual situation. There were various reasons
3 why the Board decided that pre-emption did not
4 apply in that case, but not to comment
5 adversely on Mr. Moates' client's project, but
6 in that case, it's pretty clear that the
7 facility was operated by a rail carrier, not
8 by a contractor, and there wasn't any sham
9 transaction going on. It was operated by a
10 rail carrier. Some things that probably
11 shouldn't have happened, happened, and as Mr.
12 Moates points out, they've been cleaned up,
13 and pre-emption clearly does apply. So I
14 think it would be a mistake for the Board to
15 generalize, and this goes back to one of the
16 questions the Chairman asked Mr. Moates. I
17 think it would be a mistake for the Board to
18 generalize about what kinds of transactions or
19 fact situations are good or bad, and I think
20 that it really does require a case-by-case
21 analysis.

22 COMMISSIONER MULVEY: Thank you.

1 I have more questions, but I'll turn it back
2 to you, Mr. Chairman.

3 CHAIRMAN NOTTINGHAM: Thank you,
4 Commissioner Mulvey. Let's just take another
5 look at the submission for the record in this
6 case from the Norfolk Southern Railroad. They
7 chose not to appear in person, but they did
8 submit a statement for the record. It talks
9 about the railroad industry's general concerns
10 in this matter. My understanding is that they
11 don't take a position on what this Board
12 should do vis a vis the NET application, per
13 se, but they are concerned about any broad
14 conclusion we might reach that could then be
15 applied to other traditional areas of what
16 they view as railroad operations.

17 They talk about, that it's pretty
18 common in the railroad industry for rail
19 facilities to transload coal - I'm reading
20 from page 5 of their statement - chemicals,
21 intermodal containers and trailers,
22 automobiles, grain, lumber, and numerous

1 commodities. Each of these facilities is
2 unique and is necessarily responsive to the
3 commodity being transloaded. The particular
4 requirements of the location and the need to
5 the customers, taking place at these
6 facilities is a myriad of associated and
7 ancillary processes that when examined in
8 isolation may appear not to be transportation,
9 but that are reasonable or necessary when
10 examined in the entirety of the transloading
11 and transportation effort.

12 They then go on in a footnote to
13 describe an example. At intermodal
14 facilities, truck chassis must be inspected,
15 and occasionally spot repairs conducted prior
16 to release, processes that may not seem
17 immediately to be rail transportation, but
18 which are absolutely necessary to the rail
19 transload function, because the chassis should
20 not leave the intermodal facility in an unsafe
21 condition. These same processes are as
22 necessary to a ship-to-truck, or truck-to-ship

1 transload as it is to a truck-to-rail, or
2 rail-to-truck transload.

3 Later they talk about automotive
4 facilities on page - make sure I'm reading -
5 actually, I'm reading now from the CSX
6 Railroad submission, page 4 references
7 "automotive unloading facilities where
8 vehicles are inspected and prepped. Certain
9 equipment, e.g., tires or batteries, may be
10 installed or replaced, and minor repairs may
11 be conducted." On and on, I won't read the
12 whole thing, but clearly, the reason I point
13 those out is, in a normal non-railroad
14 operation, all these types of issues, fueling
15 yards, most rail yards have fuel farms to fuel
16 their locomotives, automotive repair,
17 facilities perhaps -- typically, if you just
18 plop something like that down in a
19 neighborhood and it's not a rail operation,
20 it's going to be regulated, of course, by
21 state and local authorities, and so that
22 brings us here at the NET application.

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1 One of my concerns is that in
2 finding the right conclusion or outcome to
3 this case, we not do irreparable harm to
4 interstate commerce in this country, and to
5 other seemingly more routine, more innocuous,
6 less controversial today, perhaps, but in a
7 certain neighborhood at a certain time,
8 perhaps no less controversial. And so help
9 me, if you could, Mr. Van Tine.

10 Your client proposes, amongst
11 other things, to undertake activities, if I
12 read the record correctly, that would include
13 with regard to MSW and C&D material, baling,
14 storing, crushing, sorting, grinding, perhaps
15 cutting into smaller sizes. Why should we
16 interpret those activities as integrally
17 related to transportation?

18 MR. VAN TINE: Let me say first,
19 Mr. Chairman, that the comments at the
20 beginning of your question about the Norfolk
21 Southern filing and the wide variety of
22 activities that occur in rail operations today

1 is a good example of why - how difficult it is
2 to create some kind of a bright line rule in
3 this area, and why it's probably not a good
4 idea to try; that there's so much going on out
5 there already, that you can't possibly know
6 everything that happens, and you don't want to
7 know everything that happens, unless it
8 becomes controversial. And it may be that you
9 cannot deal with everything that is, or
10 possibly could be related to rail activity in
11 a rule, and you certainly don't want to do it
12 in this proceeding. I think you have to deal
13 with the facts that you've got before you.

14 In answer to your question about
15 the activities that are going to happen at
16 this site, you read off a list of things, and
17 I've seen that list in the Board's orders
18 before, and I've seen it mainly in the filings
19 by the parties opposed to the project, but
20 it's not exactly the list of what's going to
21 happen at the site.

22 Let me just sort of cut through

1 the words that have been misinterpreted, I
2 think, in the past, and tell you exactly
3 what's going to happen with respect to C&D
4 waste, and MSW, as simply as I can. It's not
5 complicated, and as Mr. Moates said, it's not
6 a very sophisticated operation. With respect
7 to C&D waste, a load comes in on a truck, the
8 load gets dumped. The only sorting activity
9 that goes on is going to be, as I mentioned
10 earlier, to take large pieces of lumber or
11 metal, set them aside temporarily, not send
12 them off to sell, or recycle, or anything
13 else, just set them aside temporarily right at
14 the location, then take the remaining chunks
15 of material, run it through a shredder, and
16 the shredder is not for the purpose of
17 grinding things up into little pieces, into
18 pebbles or dust, or something that could be
19 used at a landfill, or sold as some other
20 product. The shredder will reduce things to
21 a reasonably uniform size, about two feet in
22 length. That's the concept. A two foot piece

1 of something is not a commercially salable
2 product, and that's not the intention of the
3 shredding. The shredding is simply to prevent
4 the phenomenon that I'm sure you can imagine,
5 that if you put a large chunk of a flat object
6 in a rail car and it goes in sort of crooked,
7 and it's leaning up against the side of the
8 car, there's an empty space under it, and you
9 can't fill that space with anything. Or if
10 you put a large chunk of concrete in the rail
11 car and you drop it from a height, it's going
12 to be a big dent in the bottom of the car, so
13 the shredding activity is just to reduce the
14 size and the weight of the C&D waste to
15 something that's manageable, that can loaded
16 efficiently, and that won't produce an
17 unreasonable amount of damage to the rail car.
18 And I believe Mr. Moates was - he didn't talk
19 about shredding, but he expressed those same
20 kinds of concerns about loading a rail car.

21 The other purpose is to make sure
22 that the car is loaded in a way that will

1 allow it to be hauled safely, that uneven
2 weight distribution is a problem in all rail
3 transportation. You want to try and make sure
4 that you get the car loaded with as even
5 weight distribution as you can, so if you can
6 eliminate those voids in the car, make sure
7 that the car is fairly uniformly loaded, that
8 produces a car that is easier to pull. So
9 what we have so far is unloading, temporarily
10 setting aside large chunks, and shredding,
11 then first the shredded material will be
12 loaded in the car, then the large pieces of
13 lumber or metal that have been temporarily set
14 aside will be loaded in the car, and then it
15 all goes. It all goes to a landfill
16 somewhere, and I think preliminary
17 conversations have been had with a landfill in
18 Ohio that has indicated they're willing to
19 take this kind of material. And I think the
20 bottom line is, what comes in will go out.
21 There's no recycling going on, there's no sale
22 of lumber or metals. And, again, as Mr.

1 Moates indicated, the only activity, the only
2 exception to that is that if there is some
3 HAZMAT comes in, for example, in a form that's
4 identifiable, or if a refrigerator happens to
5 be in the load, and there are rules about
6 sending refrigerators to landfills, and you
7 can't do that without some certification. So
8 things like that will be segregated, and
9 either sent back to the shipper, or disposed
10 of, or the shipper will be called to come pick
11 them up. But, again, what comes in will go
12 out, and not in any revenue-generating way to
13 New England Transrail.

14 With respect to MSW, there are a
15 variety of things that could happen to MSW in
16 the sense of how the MSW gets loaded on the
17 cars. It could be just picked up and dumped,
18 raw MSW just dumped in the car. It could be
19 compacted in a way that forms a sort of a bale
20 that allows it to be loaded more efficiently,
21 meaning fill up more empty space, or it could
22 be baled, and then wrapped in some kind of a

1 plastic wrap to contain it better, and make
2 sure that it doesn't blow away, and those
3 kinds of activities. But what's definitely --
4 and I should point out that baling MSW allows
5 it to be transported in a wider variety of
6 rail cars, so there is, in addition to the
7 purpose of making the filling of the rail car
8 more efficient, it enables the MSW to be
9 transported in different kinds of rail cars.

10 So what's not going to happen with
11 respect to MSW is the kind of thing that
12 happens at a solid waste processing facility,
13 where people pick through the solid waste, and
14 pick out things that might be valuable for
15 recycling purposes, or otherwise. That's not
16 part of the process, and it can't be, as we
17 point out, because New England Transrail is
18 not going to have title to anything ever that
19 comes in this facility. It's all going to be
20 shipped by somebody else, received by somebody
21 else, and New England Transrail's function is
22 to get it from the trucks to the train, and

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1 get it into the interstate rail network. And
2 that, I think, is the best description I can
3 give you, sir.

4 CHAIRMAN NOTTINGHAM: Thank you.
5 That's helpful. How many rail cars would you
6 anticipate, or your client anticipate coming
7 in in one unit at one time? These would look
8 something like truck chassis, or be similar in
9 size to a intermodal truck chassis-type size
10 car, and how many would - you're talking 20,
11 30, 40 cars at a time, 15?

12 MR. VAN TINE: Well, Mr. Klempner
13 and Mr. Jones are sitting here, and I can see
14 they're eager to say something. With your
15 permission, Mr. Chairman, I think that that's
16 a subject that they could just answer directly
17 your question without any other comment, if
18 that's all right.

19 CHAIRMAN NOTTINGHAM: I'd like,
20 with the permission of my colleagues, to
21 invite anyone you feel is instrumental in
22 shedding light on this case, to come forward

1 and please identify themselves.

2 MR. VAN TINE: Let me give up my
3 chair for 30 seconds.

4 CHAIRMAN NOTTINGHAM: WE have
5 extra chairs, too, we can slide around. I
6 think there are wheels underneath them.

7 MR. KLEMPNER: My name is Ron
8 Klemper. I'm a principal of New England
9 Transrail. In answer to your question, as to
10 C&D, MSW, we'd expect between 10 to 15 cars
11 coming in on a daily basis. Overall, we would
12 expect around 30 to 40 cars coming in,
13 including the C&D and MSW cars.

14 CHAIRMAN NOTTINGHAM: Is your
15 business in seeking to attract those 10 to 15
16 cars, did I hear you say that there would be
17 a combined total per day of both MSW and C&D?

18 MR. KLEMPNER: Correct.

19 CHAIRMAN NOTTINGHAM: In pursuing
20 that objective, are you somehow involved with
21 generating that traffic? In other words, if
22 you fold up after today's hearing for some

1 reason, decide not to pursue this, what's
2 going to happen to those 10 to 15 cars? Do
3 they disappear? Are you somehow creating that
4 demand with this business plan, or is that
5 demand already in existence, and going to go
6 somewhere in the economy over the
7 transportation network somehow, it's just a
8 question of how?

9 MR. KLEMPNER: Yes, that material
10 will go by truck, and come into Massachusetts
11 by truck. In terms of the C&D and MSW, it
12 will continue to go out by truck.

13 CHAIRMAN NOTTINGHAM: And so it's
14 fair to say, 10 to 15 cars would be 10 to 15
15 more trucks each day?

16 MR. KLEMPNER: No, it would be
17 around five times that many trucks.

18 CHAIRMAN NOTTINGHAM: So you're
19 talking about 10 to 15 trains full of multiple
20 cars?

21 MR. KLEMPNER: No, 10 or 15 cars.

22 CHAIRMAN NOTTINGHAM: Okay.

1 MR. KLEMPNER: And about five
2 trucks to a car.

3 CHAIRMAN NOTTINGHAM: Okay,
4 because as a result --

5 MR. KLEMPNER: Five truck loads
6 would go into a car, or would be equivalent of
7 one car.

8 CHAIRMAN NOTTINGHAM: The cars are
9 either the rail cars --

10 MR. KLEMPNER: Let me state it
11 another way. One car would hold the
12 equivalent of what five trucks would hold.

13 CHAIRMAN NOTTINGHAM: And that is
14 because why?

15 MR. KLEMPNER: A car, you can put
16 100 tons, approximately, in a car, and you can
17 put maybe 20 to 22 tons in a truck.

18 CHAIRMAN NOTTINGHAM: Okay. Is
19 that also the result of any type of handling
20 or processing that you would do to the
21 material, the grinding, the cutting?
22 Actually, I don't know if I heard you say

1 cutting, Mr. Van Tine, but the dumping, the
2 shredding, the compacting, the baling, the
3 wrapping, is that actually -- does that
4 actually help you get more material onto fewer
5 rail cars?

6 MR. KLEMPNER: Yes, it does.

7 CHAIRMAN NOTTINGHAM: And so,
8 again, we're looking at roughly five times
9 that, so somewhere between 50 and 75 truck
10 cars, trucks would be actually taken off the
11 highways. Obviously, they've got to get to
12 you, so they're on the highways for some level
13 of time, but presumably they're not going to
14 meander through on their way to Ohio, going
15 through dozens, and dozens, and dozens of
16 communities.

17 MR. KLEMPNER: Correct.

18 CHAIRMAN NOTTINGHAM: Okay. Let
19 me pause, while we have Mr. Klempner before
20 us, let me pause and ask if the Vice Chairman,
21 and then I'll ask Commissioner Mulvey if you
22 want to have any questions that you might be

1 uniquely positioned to answer.

2 VICE CHAIRMAN BUTTREY: Who is
3 your customer?

4 MR. KLEMPNER: The shipper of --
5 which materials are you referring to, the
6 C&D?

7 VICE CHAIRMAN BUTTREY: You have a
8 developer who also develops something, so he
9 has to tear something down to be able to
10 develop something, and so he creates all this
11 waste, and so he's paying a company to
12 demolish the building, he's paying somebody to
13 take it away. Are you the person who takes it
14 away, or somebody else takes it away and
15 brings it to you?

16 MR. KLEMPNER: No, a demolition
17 company, or a container rental company would
18 be the person that takes away, and they would
19 be our shipper.

20 VICE CHAIRMAN BUTTREY: They would
21 be your shipper.

22 MR. KLEMPNER: They would be our

1 shipper.

2 VICE CHAIRMAN BUTTREY: The
3 developer is not your shipper.

4 MR. KLEMPNER: Correct.

5 VICE CHAIRMAN BUTTREY: Okay. So
6 the developer is paying you a fee. They're
7 going to bring it to you, then they're going
8 to pay you a fee to make it disappear.

9 MR. KLEMPNER: The developer pays
10 the demolition company.

11 VICE CHAIRMAN BUTTREY: Right.

12 MR. KLEMPNER: Or the container
13 company.

14 VICE CHAIRMAN BUTTREY: Right.

15 MR. KLEMPNER: And then they pay
16 us a fee to transport the material to the
17 destination that they select.

18 VICE CHAIRMAN BUTTREY: Okay.
19 Which includes, I presume, some type of
20 payment to a Class I carrier to take it off of
21 your property, to pull the train, to pull the
22 cars that you position for them off your

1 property, and take it to its final
2 destination.

3 MR. KLEMPNER: Correct.

4 VICE CHAIRMAN BUTTREY: So your
5 business plan is basically to take a fee from
6 the debris transportation company, and then
7 pass that fee on, or pass part of that revenue
8 on to the Class I carrier.

9 MR. KLEMPNER: Correct.

10 VICE CHAIRMAN BUTTREY: Take into
11 consideration the cost of all the stuff that
12 you have to do to it to get it ready to go.

13 MR. KLEMPNER: Correct.

14 VICE CHAIRMAN BUTTREY: And part
15 of that fee also includes the payment to the
16 Class I carrier to get it from Point A to
17 Point B.

18 MR. KLEMPNER: Correct.

19 VICE CHAIRMAN BUTTREY: Okay.
20 Just curious about how that works, connect the
21 dots, as it were.

22 CHAIRMAN NOTTINGHAM: Any

1 additional questions, Vice Chairman Buttrey?

2 VICE CHAIRMAN BUTTREY: Not at the
3 moment, no.

4 CHAIRMAN NOTTINGHAM: Commissioner
5 Mulvey.

6 COMMISSIONER MULVEY: I have a
7 couple of questions. Could you please detail
8 your experience in the solid waste management
9 area, as opposed to your experience with
10 railroading?

11 MR. KLEMPNER: In the solid waste
12 management area --

13 COMMISSIONER MULVEY: Solid waste
14 processing area.

15 MR. KLEMPNER: I became involved
16 in a medical waste incinerator for a couple of
17 years. It was purchased by BFI. I worked for
18 BFI for two years, and in working for BFI, I
19 was basically involved in arranging rail
20 transportation for them.

21 COMMISSIONER MULVEY: Okay.

22 MR. KLEMPNER: That was up until

1 1997. Since then, I've done some consulting,
2 a variety of consulting jobs involving both
3 waste and non-waste materials on rail.

4 COMMISSIONER MULVEY: As a former
5 Massachusetts resident, I probably should know
6 the answer to this question, but I'll ask it
7 anyway, and that is, does Massachusetts have
8 a recycling law right now, that people
9 separate their household materials before they
10 get picked up by collectors?

11 MR. KLEMPNER: I'm not a
12 Massachusetts resident, so I could not answer
13 that.

14 COMMISSIONER MULVEY: I guess my
15 question is, would you be handling mixed MSW,
16 or would it be pre-separated, and pre-
17 segregated when it comes to your facility, or
18 do you know that?

19 MR. KLEMPNER: We don't know that.
20 We don't have our MSW customers yet.

21 VICE CHAIRMAN BUTTREY: Mr.
22 Chairman, may I ask one more question?

1 COMMISSIONER MULVEY: I will say,
2 I think I have a hunch that there are
3 witnesses later who can answer those
4 questions.

5 VICE CHAIRMAN BUTTREY: A
6 statement was made earlier, I think by Mr. Van
7 Tine; although, I think he may have prefaced
8 his answer by saying he may not be the best
9 person to answer that question. Maybe there's
10 someone else here from the company that is the
11 best person to answer that question, or maybe
12 you didn't say that, Mr. Van Tine. I'm not
13 quite sure. But, anyway, I was curious, one
14 of the questions that was asked in the
15 documents preparing for this hearing, asked by
16 us, to ask you to prepare for this hearing,
17 was - and it was answered, I think, somewhat
18 unequivocally by you, Mr. Van Tine - and that
19 is, as far as you know, there are no
20 requirements of the receiving landfill
21 facility that requires you to do some of the
22 things you do to this material before you put

1 it in the rail car. Is that accurate?

2 I mean, it sounded like a very
3 unequivocal statement to me, that that is,
4 indeed, the case. And I think we need to get
5 on the record whether you do some of the
6 things you do to this debris and waste, et
7 cetera, you do that because if you don't do
8 that, the landfill just won't take it, and
9 they're going to send it back. Is that -- can
10 someone answer that question? I know we do
11 have witnesses later that may be able to
12 answer that question, but since it was a
13 statement that was made somewhat unequivocally
14 by you, by your witness, I'd like to get some
15 clarification on that. And if you just don't
16 know, you just don't know, but I'm just
17 curious.

18 MR. KLEMPNER: Nothing we do to
19 the material is done as a result of a
20 requirement of the landfill, other than make
21 sure that materials that aren't acceptable to
22 the landfill, such as hazardous waste we may

1 find, does not go into the rail car to go to
2 them.

3 VICE CHAIRMAN BUTTREY: And
4 nothing as a part of the processing, if you
5 will, of the material, is something that you
6 -- none of the processing that you do is the
7 result of some requirement of the landfill
8 itself.

9 MR. KLEMPNER: No.

10 VICE CHAIRMAN BUTTREY: Okay.

11 MR. VAN TINE: Mr. Vice Chairman,
12 if I could just add, I think that what you're
13 referring to is my remarks in connection with,
14 for instance, the refrigerator example. There
15 are some things that landfills, by law, they
16 just can't take, unless there's a
17 certification that the fluorocarbons have been
18 removed and that kind of thing. And as the
19 operator of the facility, the receiver of the
20 materials, if something like that comes in
21 that we know by law can't be shipped to a
22 landfill, then it comes out, but there's no

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1 unique requirement of the landfill that will
2 be facilitated at this facility.

3 VICE CHAIRMAN BUTTREY: Thank you.

4 COMMISSIONER MULVEY: I have one
5 more question, also.

6 CHAIRMAN NOTTINGHAM: Commissioner
7 Mulvey.

8 COMMISSIONER MULVEY: Solid waste
9 processing, this was solid waste processing,
10 one of the value-added aspects of it is the
11 recovery of recyclables, especially metal,
12 aluminum cans, and the like. And you're
13 claiming that you're not going to do any of
14 that separation at the site. And my question
15 to you is, why wouldn't you, since that would
16 be a source of revenue for you to do that
17 separation?

18 MR. KLEMPNER: We don't have the
19 space for that, and it's just not part of our
20 business model.

21 COMMISSIONER MULVEY: Thank you.

22 CHAIRMAN NOTTINGHAM: I have a

1 question or two for Mr. Van Tine now. I think
2 we can temporarily, at least, dismiss the
3 other two witnesses. Thank you.

4 Mr. Van Tine, I think these
5 questions are very important to me, so I just
6 call your attention to them. I know it's been
7 a long morning. Thank you for your patience.
8 This is important, though.

9 If, and it's a big if, but if this
10 Board were to decide we had jurisdiction in
11 this matter as a result of today's hearing and
12 the other evidence in the record, and assuming
13 that we have some pretty strong concern about
14 making sure public safety, health, and the
15 environment are protected, as you, I would
16 assume, expect us to have, how can we assure
17 that there is accountability, that there is a
18 mechanism put in place that ensures that your
19 client's operation, because unfortunately,
20 Kirk Van Tine is not going to be the forklift
21 operator, I don't believe that Baker & Botts
22 will excuse you to do that, so you're not

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1 going to be out there two years from now,
2 three years from now. It's going to be the
3 good people we just heard from, and probably
4 won't even be them, it'll be their employees.
5 And we like to think that everyone will have
6 the best public interests at heart at all
7 times, but let's face it, these facilities are
8 not what you see in "Better Homes & Gardens".
9 In fact, frankly, no major rail intermodal-
10 type facility I've been to does look like
11 that. But what can we do - let me give you an
12 example - if we were to enter into a series of
13 strong conditions with your client, a
14 conditional approval of this type of
15 operation, that would come later, of course.
16 We would do a full environmental impact
17 statement, so assuming your client cleared our
18 NEPA process, which would be full, of course,
19 of public comments and response actions to
20 public, and state, and local concerns,
21 assuming the EPA ever completes - assuming
22 they ever begin, which they haven't done yet,

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1 the RIFS, and we decide we want to enter into
2 a strong set of conditions that would be self-
3 executing and almost, in a way that would be
4 very clear to the parties what type of
5 inspections would be done, and ultimately,
6 that the Board would have the very swift
7 opportunity and requirement, really, to come
8 in at the request of the state, for example,
9 and actually issue an injunction, or shut your
10 client's business down temporarily to get to
11 the bottom of a good-faith environmental,
12 safety, or health concern that was raised
13 based on a state inspection, for example.
14 Would your client be willing to enter into
15 that kind of a binding arrangement, or do you
16 have other suggestions for us?

17 MR. VAN TINE: First, let me say
18 that it would probably be a lot more fun to be
19 the forklift operator than what I'm doing now,
20 but I think there are a number of things that
21 I'd like to say in response to that question.

22 First, I think we don't want to

1 delay this proceeding, but on the other hand,
2 we have read everything that's happened in
3 this industry for the last few years. We
4 understood the good, the bad, and the ugly,
5 and we want to be the good. And we have
6 designed this facility to operate in a way
7 that will not cause problems for the local
8 community. And we're not afraid to talk to
9 people about what exactly will happen, and how
10 it will be carried out. And we have always
11 said that we're willing to enter into an
12 agreement that would permit Massachusetts
13 authorities to inspect the facility, and
14 permit them to enforce their state laws, as
15 long as they don't unreasonably burden rail
16 transportation, with the understanding that
17 what unreasonably burdens rail transportation
18 is for this Board to decide, ultimately, or in
19 appropriate cases it may be that the court
20 could decide that, but we, in concept, believe
21 that it is possible to arrive at the kind of
22 an agreement and understanding. And I think

1 that what we would suggest, and I think you're
2 sort of stealing my closing here, Mr.
3 Chairman, but what we would suggest is that to
4 work out the details of how such an agreement
5 might be entered into, or phrased, or framed,
6 we would be happy to be the test case, and the
7 model case. And I think that just a
8 suggestion, what you might want to do is have
9 your General Counsel and the General Counsel's
10 office, and your professional staff, sit down
11 with us, and with the Massachusetts
12 authorities, and perhaps with other people who
13 have some expertise, and some knowledge in
14 this area, and work through some of the issues
15 in a less formal setting, but have some give
16 and take about what should be included, what
17 shouldn't be. And, again, without wanting to
18 prolong or delay this proceeding any more than
19 it has been, set up some kind of a procedure
20 like that where we could, without any
21 obligation on your part that it would be
22 binding in all further proceedings, but just

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1 a sort of guidance and model agreement that
2 might satisfy everybody's concerns. And we'd
3 be happy to participate in that. And if the
4 Board decides that it's best for the private
5 parties and the states to work that out by
6 themselves, we'd be happy to do that, too.

7 And I think that, finally, even if
8 I'm not driving the forklift, Mr. Klempner and
9 Mr. Jones have been very well educated about
10 the law in this area, so far, and they're
11 going to have good legal advice from us, or
12 from somebody. And we have a sense of who, or
13 what kinds of activities unreasonably burden
14 rail transportation, have been held
15 unreasonably burden to rail transportation in
16 the past. And I think that the operation of
17 the facility will be governed and constrained
18 by the practical consideration that you know,
19 if you know the law, you know what will be
20 upheld, and what won't be upheld, likely, and
21 so you're not going to argue about the little
22 things. You're going to - if there are rats

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1 running around, you don't want rats running
2 around, and you're going to clean up the
3 little things, because you know that if you
4 were to challenge those little things, you
5 ultimately would lose. And it's the things
6 that would shut down the operation that you're
7 going to worry about. And I think those are
8 the general answers to your questions, Mr.
9 Chairman.

10 CHAIRMAN NOTTINGHAM: Thank you.
11 You have certainly responded. I do want to
12 try to pin you down if I could a little bit on
13 what I view as a very important - and I'm just
14 one board member here, I'm not speaking for my
15 colleagues. They will speak for themselves
16 very ably. But I'm envisioning the
17 possibility of having those kind of
18 discussions, leading up to ultimate decisions,
19 which could go against your client completely,
20 or partially, or not at all. So, again, just
21 a reminder that today is a very early step in
22 the total time line of the life of this

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1 project, if we were to even assert
2 jurisdiction. But if we were to do so, one of
3 the things I would want to explore very firmly
4 and very clearly is, how Massachusetts state
5 authorities can inspect your facility as our
6 delegates? We don't have a large staff, we
7 don't have badges, and guns, and we don't have
8 expertise in the ground operations of
9 transload facilities, so we would need to
10 delegate that to somebody. I guess, we could
11 subcontract out to some expert, or presumably,
12 work with the state, who, presumably, has some
13 of that expertise.

14 They're going to want to know, I'm
15 quite confident, and I'll ask them, of course,
16 in a few minutes, what happens when they find
17 a violation? What do they do, and how long
18 will it take for corrective action to be
19 taken? And my answer to them would be, I
20 believe, you let the STB know, and within 72
21 hours we will shut that place down until we
22 find out what's going on. And so that would

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1 be based on a verified statement, not just
2 some random rumor in the neighborhood, but
3 some verified statement that an officer of the
4 Commonwealth saw something very specific, and
5 it violated the following provisions, and we
6 would need to see the operation, in my
7 personal view, speaking as one commissioner,
8 shut down temporarily until we get to the
9 bottom of it, and then figure out what other
10 law enforcement or other officials need to be
11 brought in. Is that the kind of arrangement
12 that your client is willing to enter into,
13 because I think that's going to be a key, and
14 very understandable concern, if you're
15 representing the people of Massachusetts,
16 which we'll hear from these representatives
17 soon. Where's the recourse? How does this
18 work, if there is a problem? We can't just go
19 on trust and hope, and so I'll pause there and
20 let you respond to that.

21 MR. VAN TINE: I think
22 conceptually, Mr. Chairman, that's absolutely

1 what we are interested in talking about. I
2 think that our concept has always been the
3 state would be allowed to inspect We would
4 discuss the violation with them. We would try
5 and take corrective action. If there is a
6 major disagreement, that disagreement would be
7 resolved by the STB, would be taken to the
8 STB, and resolved by the STB.

9 Now when you say "shut down within
10 72 hours", I would hope that there's some
11 spectrum of violations that wouldn't
12 necessarily justify a shut down, but in an
13 appropriate case, conceptually, that would be
14 something that we would be happy to talk
15 about.

16 One of your questions started with
17 the issue of how practically such a system
18 could be set up, and one of the questions that
19 you asked us to answer in the pleading on
20 Monday seemed to be going in that direction,
21 a request to list the federal statutes, which
22 included some - which might be applicable, and

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1 which included some delegation to the states
2 for enforcement purposes. And I think what we
3 listed was mostly environmental statutes, but
4 the thought that occurred to me, which I'm
5 sure will be familiar to all of the Board
6 members, is that there are a number of
7 programs that are run by the U.S. Department
8 of Transportation, where there's federal
9 authority, and federal jurisdiction, for
10 instance, in the HAZMAT area, or the pipeline
11 safety area, which is exclusive jurisdiction.
12 But, for instance, just taking pipeline safety
13 as an example, the Federal Office of Pipeline
14 Safety has developed regulations and criteria
15 for delegating inspection authority, and some
16 enforcement authority to state officials. And
17 if states do the required things to qualify
18 for that delegation, they are delegated the
19 authority to send out their inspectors. And,
20 in concept, I don't see any reason why you
21 couldn't set up a workable program that
22 embodies the same structure.

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1 CHAIRMAN NOTTINGHAM: Thank you.

2 My final question will be on the question of
3 whether - we've heard in the record some
4 different characterizations of the activities.
5 Well, first I'll say, going back to the last
6 question, bear with me, that in the record,
7 and in your testimony today, I've heard you
8 talk about your client's concerns about not
9 yielding unfettered discretion to state and
10 local authorities in the areas of site
11 assignment, pre-clearance, and noise. And
12 let's put noise aside, that's a pretty well
13 trodden area. There are federal noise
14 regulations, a lot of case law and recent regs
15 in that area.

16 Site assignment, if local or state
17 folks want to tell you where you should put
18 your warehouse, where you should position
19 something, basically run your - in your view,
20 kind of make business operational decisions
21 for you?

22 MR. VAN TINE: Yes. Before I

1 answer the question, I think that the concepts
2 of site assignment and pre-clearance
3 requirements have been discussed in a number
4 of Board decisions and court decisions. And
5 they, I believe - again, I'm not truly an
6 expert in this area, but according to the
7 cases I've read, they've been categorically
8 pre-empted. The reason for that is, that not
9 so much that the local authorities will try
10 and shape the project to make it comply with
11 health and safety, or environmental
12 requirements, but because those kinds of site
13 assignment and pre-clearance requirements can
14 be used to block a project entirely for any
15 reason, or no reason, basically. There are a
16 few criteria that apply in some cases, and
17 they may not be fairly applied in other cases.
18 So I think that is where the legal line is
19 drawn, and I think that's the line that we
20 would say should be drawn in this case.

21 CHAIRMAN NOTTINGHAM: And I guess
22 similar thoughts would relate to pre-

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1 clearance.

2 MR. VAN TINE: Yes, sir.

3 CHAIRMAN NOTTINGHAM: That it's a
4 pretty general thing that could be used to
5 really --

6 MR. VAN TINE: Yes, sir. I'm
7 sorry to interrupt you.

8 CHAIRMAN NOTTINGHAM: -- string
9 out the project hearing.

10 MR. VAN TINE: Same answer.
11 That's the reason for -- that's one of the
12 reasons the pre-emption requirement exists, so
13 that the states and local authorities will not
14 be able to block a project that is important
15 to the rail transportation network.

16 CHAIRMAN NOTTINGHAM: So to sum
17 up, with the exception of site assignment,
18 pre-clearance, and noise, which are areas that
19 have a pretty extensive set of precedent and
20 experience before this Board, everything else
21 is on the table, so to speak. In other words,
22 if we were to grant jurisdiction today, or

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1 after today, everything else regarding the
2 activities at your operation, your proposed
3 operation are, basically, negotiable between
4 the Board and your client, with the
5 appropriate involvement, periodically, of
6 other state and local agencies that have
7 expertise in certain areas.

8 MR. VAN TINE: Yes, Mr. Chairman.
9 I would suggest that the Massachusetts
10 authorities are the ones who really need to be
11 at the table. We don't pretend to be experts
12 on Massachusetts law, and we've tried to
13 identify those Massachusetts statutes and
14 regulations that we think would be applicable.
15 And, again, as I said earlier, in concept, we
16 don't disagree that a certain number of those
17 would be applicable. And I think the three
18 exceptions that you mentioned are the only
19 ones that we've identified.

20 We would, of course, want to make
21 sure that we have a meeting of the minds with
22 the Massachusetts authorities about whether

1 there is anything else out there that we
2 haven't identified, and we need to talk about.

3 CHAIRMAN NOTTINGHAM: And, of
4 course, when I described that hypothetical,
5 it's all within the bounds that I believe this
6 Board would always stay within a realm of
7 reasonableness, or we would not be asking any
8 railroad to proffer some hospital construction
9 project, or a college scholarship fund, or
10 something, because if you have other hopes and
11 desires that have nothing to do with your
12 project, so within a realm of reasonableness
13 that relates to your project and its impacts.
14 Everything else would be on the table, if I
15 hear you correctly.

16 MR. VAN TINE: We support
17 reasonableness.

18 CHAIRMAN NOTTINGHAM: That
19 concludes my questioning of Mr. Van Tine. I
20 want to defer to the Vice Chairman, seeing a
21 nod. Mr. Mulvey, any final words?

22 COMMISSIONER MULVEY: I'm sorry,

1 yes. In Massachusetts Dep's Statement of
2 Position, they argue that if the Board were to
3 authorize the New England Transrail's
4 proposal, we should only do so to the extent
5 of doing Transrail's rail-related activities,
6 and not to its solid waste processing
7 activities. How practical would that be,
8 given the proposed rerouting of the tracks
9 through the sprung structures in which the
10 waste would be handled? Would it be practical
11 to separate the two, where we would regulate
12 the rail transportation, but not regulate the
13 processing facility itself?

14 MR. VAN TINE: Well, the
15 assumption of your question is that there is
16 a processing facility, in the sense of a solid
17 waste processing.

18 COMMISSIONER MULVEY: Let me add
19 to that a little bit, this is all about
20 siting. Is this anything to do with how the
21 facility is operated, or is mostly about
22 siting the facility? And that what the issue

1 is whether you could actually put this
2 facility where you want to put it? If we
3 presume that we give you the license to build
4 a railroad, and then I presume that you can
5 build any kind of facility you want on that
6 property, and then the State of Massachusetts
7 would regulate how that property is operated
8 with regarding to handling municipal solid
9 waste and construction and demolition waste.
10 Is that a feasible outcome?

11 MR. VAN TINE: I'm not sure. It
12 sounds to me as though you're suggesting that
13 the commodities to be transloaded that are not
14 waste or waste-related, could be transloaded
15 at the site, but C&D or MSW would have to be
16 handled somewhere else. And I don't think
17 that's --

18 COMMISSIONER MULVEY: It could
19 still be handled there, but they would have to
20 be handled under existing Massachusetts DEP
21 regulations. Massachusetts DEP would have the
22 right to impose the regulations and conditions

1 as to how they are processed consistent with .
2 the way those are in other facilities similar
3 to your's around the state. You wouldn't have
4 the exemption.

5 MR. VAN TINE: Well, I think
6 that's part of what I've been discussing with
7 the Chairman, that I think the -- in concept,
8 the idea that we're proposing is that the
9 Massachusetts authorities would have the right
10 to inspect and apply Massachusetts law to
11 everything that goes on at the site, and the
12 test that the Board has laid out is whether
13 the state law unreasonably burdens rail
14 transportation. And so, we would propose an
15 agreement with the state about what state laws
16 would be applied at the site, and once we
17 reach that understanding, I think there's no
18 reason why the concept that I think you're
19 suggesting couldn't happen.

20 I would say again, though, that
21 nothing that happens at this site is solid
22 waste processing. We would say, and we

1 believe truly, that it is directly connected
2 to the process of rail transportation in that
3 it all relates to the loading of the materials
4 into rail cars.

5 COMMISSIONER MULVEY: Let's split
6 the difference and call it solid waste
7 handling, so we don't have processing versus
8 loading, but all solid waste handling. But
9 under pre-emption, we would pre-empt
10 Massachusetts law as regard to their
11 regulating your operation there. You're
12 suggesting that we can somehow delegate that
13 responsibility to the state, and that the
14 state would have enforcement authority to
15 enforce its rules and regulations, even
16 though, theoretically, we pre-empt the state
17 law with regard to a railroad operation?

18 MR. VAN TINE: I think the pre-
19 emptio - this goes to the question of the
20 regulatory gap, again, and I think that you're
21 implying that there is either a complete pre-
22 emptio, or no pre-emptio, and maybe

1 something in the middle. And I think that
2 legally, there is not complete pre-emption,
3 there is pre-emption of those activities that
4 unreasonably burden rail transportation, and
5 so it's for the Board to decide what local
6 regulation, state or local regulations
7 unreasonably burden rail transportation. And
8 so, I would suggest that the question of
9 whether a particular local or state regulation
10 is pre-empted doesn't arise until the state
11 tries to apply that particular regulation.
12 And what we're suggesting is that we work out
13 in advance what regulations would be
14 applicable to the statute, so there's no
15 misunderstanding about that point, and so we
16 don't get into the situation where the
17 facility is constructed and in operation, and
18 then the state pops up with a regulation that
19 we didn't think of, which the Board ultimately
20 holds is not pre-empted, and results in
21 shutting us down.

22 COMMISSIONER MULVEY: Well, I'm

1 not a lawyer, but you're suggesting that you
2 and the State of Massachusetts can decide
3 which laws apply to you in an agreement. Is
4 that true, that you can confer through
5 agreement what laws would apply to you?

6 MR. VAN TINE: I think that we
7 probably can reach an agreement. I think that
8 to make it binding, valid, the Surface
9 Transportation Board should see that
10 agreement, understand what's in it, and
11 understand what the process is going to be.
12 And the Board does not have to formally
13 approve such an agreement, or be a signatory
14 to it, but it -- I would conceptually think
15 that it would be more like an item of evidence
16 in this proceeding. And the enforcement of
17 the agreement could be through a variety of
18 mechanisms to say we can talk about that, and
19 work that out.

20 COMMISSIONER MULVEY: There is
21 concern that this is not an isolated case.
22 There are many of these potentially around the

1 country. As I know very well, landfills are
2 filling up all over, and there's a lot more
3 transloading and shipping, processing, what
4 have you, of municipal solid waste and C&D
5 waste. And there is some concern that we
6 would wind up being flooded with a lot of
7 cases. If these things were to go through,
8 eventually there was some concern about what
9 was agreed to and what the legitimate role of
10 the state is in regulating these things, these
11 things will be coming back to the Board over,
12 and over, and over again. And there are some
13 limitations as to what our abilities are to do
14 so, and to handle these, and what our
15 expertise is.

16 We have expertise in handling
17 environmental issues regarding the
18 transportation, when people build a new
19 railroad or abandon a railroad, we have an
20 environmental review process to make sure that
21 water quality, et cetera, the historic markers
22 and all that are preserved, but we generally

1 don't deal with the environmental issues
2 associated with the operation of railroad
3 facilities. As I said, it's a regulatory gap.
4 So we are concerned about whether or not this
5 is opening up some sort of Pandora's box for
6 us, as well. That's all I have.

7 CHAIRMAN NOTTINGHAM: I'll just
8 follow-up, just to clear up any potential
9 confusion, because, Mr. Van Tine, you did
10 mention earlier that you're not a day-to-day
11 railroad regulation and law practitioner. Mr.
12 Moates, you may be able to offer something on
13 this. You may know, Mr. Van Tine, and I'll
14 say it for the record, that on almost a daily
15 basis here at this Board, certainly on a
16 weekly basis, we issue what I would call
17 routine decisions regarding things like
18 abandonments, and in most of those
19 abandonments, those routine decisions, we
20 include conditions. And more often than not,
21 those conditions - and these are in the most
22 routine matters, but abandonments, of course,

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1 are spelled out as one of the items that are
2 protected under pre-emption and statute. We
3 tell the railroad applicant seeking to abandon
4 to make sure they get state approval to remove
5 a geodetic marker, to make sure if they're
6 disturbing any land, there are no burial
7 remains that might be historically -- so we
8 are very accustomed to very detailed, in the
9 most non-controversial low-impact
10 environmental-type transactions, deferring
11 with and working with states and making sure
12 the right thing happens. And I would just say
13 as one commissioner, since we're talking about
14 a higher-impact, potentially, project on a
15 superfund site, in a community that's had to
16 go through an awful lot in its history, I
17 personally would, obviously, look at this, as
18 you say a test case, to have a very creative,
19 very specific, very lengthy, very detailed,
20 and very reassuring to the Commonwealth and
21 its citizens, set of conditions that would
22 trigger prompt and immediate action that would

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1 protect the public interest. It doesn't mean
2 that you, necessarily, today would subscribe
3 to be underneath every single law or
4 regulation of the Commonwealth, because what
5 I'm hypothesizing here is that federal pre-
6 emption may apply, but nevertheless, this
7 Board would then have a public interest
8 responsibility to make sure the right thing
9 happened, just as we do in the most routine
10 cases.

11 With that said, I'll let you
12 respond. And, Mr. Moates, if anything I've
13 said sounds familiar to you in your years of
14 railroad practice.

15 MR. VAN TINE: Do you want to go
16 first? I would just say that in concept,
17 everything you just said is fine with us. We
18 would be happy to -- we anticipate that there
19 will be mitigation conditions, for instance,
20 in connection with environmental review. And
21 we understand that, and we understand the
22 concept of conditions. And we would like to

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1 be able to discuss the conditions that are
2 necessary before they're imposed with Board
3 staff and with Massachusetts authorities.
4 And, again, make sure that the conditions are
5 reasonable and directed towards the health and
6 safety purposes that we all agree are
7 important. And we are hopeful - you know, you
8 can't guarantee everything in life, but I
9 think that in this project, we're trying to do
10 the right thing. We're trying to be, again,
11 on the good side of - have a quality operation
12 that does not create problems for the
13 community, does not exacerbate environmental
14 problems at the site. And so, conceptually,
15 the idea of conditions is not something that
16 we would be afraid of. We would be happy to
17 talk about conditions in the order, and we
18 understand the concept very well.

19 CHAIRMAN NOTTINGHAM: Mr. Moates,
20 do you have anything to add?

21 MR. MOATES: Well, I do, and I
22 don't want to make things more difficult for

1 you, but I can't entirely agree with your
2 proposition. Your staff does have the
3 expertise you describe, and as you say, Mr.
4 Chairman, on a routine basis, those kinds of
5 issues are dealt with, for example, on
6 abandonments. The statute gives you,
7 obviously, express jurisdiction over railroad
8 abandonments. And it's in connection with an
9 abandonment application, that you append those
10 conditions.

11 We're talking about exemptions.
12 Exemption, in this particular case, the class
13 exemption, I guess, to become a rail carrier,
14 to be deemed to be a rail carrier, I think
15 there's much more question about your legal
16 authority to condition an exemption. I do
17 think you've touched on something, though,
18 that is very critical here, and that is the
19 very unique nature of this particular
20 proposal.

21 I am not at all sure, Commissioner
22 Mulvey, that there are going to be dozens of

1 these proposals coming from all over the
2 country. I would hope there aren't for your
3 sake, but if there are - I know I sound like
4 a broken record here, but I think it's a
5 record I'm playing for the whole rail
6 industry, in a sense. We feel that most of
7 the problems that have been identified in
8 recent years in this area have come from the
9 exemption procedure, and perhaps the Board not
10 having as much information from entities that
11 are invoking the exemption procedure as to
12 what the nature of their actual operations are
13 going to be, who their principals are, what
14 their sources of financing are, what are they
15 really planning to do?

16 I think there's a lot you can do
17 in that area, and you already have done that
18 to some degree. You've slowed that procedure
19 down, and I think that's a great first step,
20 and there'll be more public participation, so
21 that communities like the one, as you say, Mr.
22 Chairman, here that has been through a lot -

1 just as a personal point, I graduated from
2 high school in an adjoining town to this town.
3 I know what this site is. I remember it when
4 I was a kid, and it has a rich history. I
5 think we all know that. Hopefully, a lot of
6 that rich history, and the fact that this is
7 a superfund site, and all the complexities
8 that brings is something that you might well
9 invoke to try to do something here that would
10 go beyond what I think you normally should or
11 could do in a regular exemption proceeding.

12 You made one other comment a
13 minute ago, Mr. Mulvey, if I could just - or
14 at least part of your question, maybe you had
15 a comment, that I might be able to help on -
16 the idea of, can they enter into an agreement
17 with Massachusetts to agree to be bound by
18 certain laws. I think they can, and while,
19 unfortunately, this has not got a real happy
20 history either, my client, the Susquehanna,
21 has entered into a couple of years ago an
22 agreement with the New Jersey Meadowlands

1 Commission, which is the other entity in the
2 Jackson litigation that has jurisdiction over
3 the New Jersey Meadowlands, which are the - I
4 think you know where that area is. You can
5 see it in some of those photographs, if you
6 ever watch the opening scenes in "The
7 Sopranos", that's the New Jersey Meadowlands,
8 but there is a commission that has
9 jurisdiction over that. And my client entered
10 into a contract, a private agreement to settle
11 some litigation with the New Jersey
12 Meadowlands Commission, and that agreement
13 commits the railroad to do certain things in
14 connection with, for example, construction
15 within the Meadowlands area. Now the
16 Meadowlands Commission and the railroad have
17 disagreements about what's requirement, and
18 dare I say it, they're in state court in New
19 Jersey litigating over that agreement. But it
20 is an agreement, and there are -- I mean,
21 these are complex issues, and there are ways
22 to address them, and that might be one. I

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1 could imagine an agreement that would be
2 between the Commonwealth and NET that might
3 not require your being intimately involved to
4 deal with issues that arise under it, they
5 could put in provisions to have Massachusetts
6 state courts, or even conceivably an
7 arbitrator deal with it.

8 CHAIRMAN NOTTINGHAM: Mr. Moates,
9 I'm mindful of time. The rest of the
10 witnesses have been very patient, and I
11 appreciate that. Let me just make sure I
12 understand your response.

13 You did recognize, if I heard you
14 correctly, that conditions are a routine part
15 of the Board's business, conditional approvals
16 of various applications. Not in your client's
17 fact pattern, but in the pattern before us
18 here, the NET, we're talking about a new
19 entrant applying to be recognized as a
20 railroad for regulatory purposes, and other
21 purposes, so wouldn't you agree that we have
22 a sniffing more authority to entertain and

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1 enter into conditions under the facts
2 presented in the NET case?

3 MR. MOATES: I absolutely would,
4 and I'm sorry I was -- my mind was kind of
5 ranging over a whole variety of possible
6 exemptions that I could think of, and I just
7 wanted to be a little -- inject a note of
8 caution.

9 CHAIRMAN NOTTINGHAM: Thank you.

10 MR. MOATES: Not all exemptions
11 are the same.

12 CHAIRMAN NOTTINGHAM: That
13 concludes my questions. Any concluding --

14 COMMISSIONER MULVEY: I have one
15 more. I have a note here that -- is it
16 correct that we have less or no power to
17 impose conditions in an exemption petition,
18 than if the project were proposed by a full
19 10901 application, and counsel behind us says
20 no, that's not true, that we don't have less.

21 I have one more question for you,
22 though, Mr. Moates, if you would. Do you

1 think we should distinguish between the case
2 where an existing railroad starts loading
3 solid waste on its previously owned property,
4 from a case where a railroad is proposed in
5 order to haul that material specifically for
6 that purpose? Do you think we should make a
7 distinction between those two?

8 MR. MOATES: I think the statute
9 does, so I think the answer is yes. I mean,
10 there's nothing before you with respect to
11 your hypothetical of an existing railroad
12 starting to conduct that sort of operation, if
13 I've got you right, on its existing right-of-
14 way, within its right-of-way, like the
15 Susquehanna did.

16 COMMISSIONER MULVEY: Yes.

17 MR. MOATES: That doesn't require
18 the railroad to come to you for any kind of
19 authority or approval, or to seek an
20 exemption, so I don't think there would be any
21 occasion for you to act.

22 COMMISSIONER MULVEY: It's also

1 considered to be part of the regulatory gap
2 that some people do, so --

3 MR. MOATES: I understand.

4 COMMISSIONER MULVEY: Thank you
5 very much. That's all I have. Mr. Chairman.

6 CHAIRMAN NOTTINGHAM: Thank you.
7 We'll release this panel. We appreciate your
8 patience. Thank you. You're dismissed. We
9 will bring up our next panel, which is
10 Massachusetts representative James R. Micelli.
11 And as he comes up, we will take a five-minute
12 very limited break to allow our recorder time
13 to stretch his legs, allow us the same. And
14 then our plan is - my plan is to, after
15 Representative Micelli breaks, we will have a
16 short recess for lunch, and then resume.
17 Thank you.

18 (Whereupon, the proceedings went
19 off the record at 12:26:55 p.m., and went back
20 on the record at 12:33:58 p.m.)

21 CHAIRMAN NOTTINGHAM: We will
22 reconvene with our second panel, the Honorable

1 Representative James R. Micelli. Welcome,
2 sir. You've been very patient this morning.
3 We know you need to get home and do your job
4 for your people. We thank you for being here,
5 and please proceed.

6 REP. MICELLI: Thank you, Mr.
7 Chairman, and I appreciate what you're doing
8 this morning. I'm in my 16th term in the
9 Massachusetts legislature and chair a
10 committee, too, so I was sitting back
11 observing this morning, and not trying to
12 inflate anyone's ego, but very professional,
13 very well done. And we've been in contact
14 with a lot of your staff over the period of
15 months leading to this date, and I want to
16 thank you for holding this hearing, because I
17 know this isn't mandatory, so this means a lot
18 to us.

19 In fact, some of the folks that my
20 office dealt with, and I'm going to get these
21 names wrong, a woman and a gentleman named
22 Dettmar, is it? I probably butchered that

1 one, too, but seriously, I'm trying to frame
2 this, and I don't want to take up a lot of
3 your time because I know you have a lot of
4 other witnesses, but I think I'm going to
5 avail myself of the 10 minutes.

6 The gentleman, and I applaud him,
7 too, who spoke to you earlier, Mr. DeMasi,
8 just to frame where he lives, versus where we
9 are. He lives in Wellesley, one of the most
10 wealthy communities in the State of
11 Massachusetts. When he talks about
12 knockdowns, those aren't commercial buildings,
13 those are homes so that they can put a \$3
14 million home in their place. Wilmington and
15 Tewksbury, the two towns I represent, and I'm
16 not trying to set anyone up as a elitist, just
17 to show you the geography, is about 25 miles
18 away. If you propose something like this in
19 Wellesley, you'd have 20 attorneys today who
20 are residents of the community and work for
21 some of the prestigious law firms in Boston,
22 so it's easy to say - and I don't doubt his

1 motivation, I think it's extremely honest -
2 but it's easy to say gee, yes, we should do
3 this, we should advance the rail lines, and
4 Wilmington might not be a bad place to do
5 this. But Wilmington and Tewksbury are blue
6 collar communities. I have the distinct
7 advantage or disadvantage of having a
8 superfund site in each community. And the
9 Olin Chemical site, if you were looking at a
10 site that was least suited for this kind of
11 operation, it would be the Olin Chemical site.
12 There's a river of contaminates, literally a
13 river, which has knocked out half of our
14 drinking water supply, and has forced us to go
15 to the state begging in order to tap into the
16 state's reservoir, so to speak, which services
17 many other cities and towns, so we are in an
18 emergency situation.

19 As you read, and I don't want to
20 be redundant, you read earlier a letter from
21 the EPA. They're so far away from concluding
22 or even beginning their investigation, and

1 it's going to take years to get to the point
2 in time where they really know what's going
3 on. And I've sat with them, had them out to
4 Wilmington and Tewksbury, and so we haven't
5 even begun that. So the site itself - and
6 somebody said gee, they're not here to discuss
7 the site, but they're here to discuss the
8 railroad aspect of this. The site itself
9 isn't suited for this. And these are two
10 communities, and I'm doing what Senator
11 Lautenberg did earlier, talking on behalf of
12 the district that I represent. They've had
13 more than their share of grief in this
14 Commonwealth of Massachusetts. And I think
15 you'll hear from the DEP a little later on,
16 and they'll tell you how much of an effort, or
17 lack thereof, NET has made relative to this
18 date that we're arriving at today. They have
19 done nothing to-date to solidify their
20 argument with the Commonwealth.

21 In fact, they portray themselves
22 as babes in the woods. You know, we're trying

1 to meet with them, but they won't listen to
2 us. They have hired two of the best lobbying
3 firms. If I were in Massachusetts looking for
4 a lobbying firm, it would be Mintz Levin, and
5 that's who they have hired. And Mintz Levin
6 has a lot of their folks working for them,
7 formerly in the position of appointing some of
8 these people in the regulatory agencies to
9 their positions. And I'm not saying there's
10 anything wrong with that; however, they're not
11 babes in the woods. They've gone about it in
12 a proper manner, as far as trying to lobby
13 this situation through, so they've been
14 working with the Commonwealth.

15 You know, you hit upon, is New
16 England Transrail a rail carrier? And I don't
17 think we've beaten that to death. I don't
18 think we can say enough about that. And your
19 questions have been very pointed, and beyond
20 what I expected this morning. You hit on
21 areas that myself and some of our attorneys
22 haven't even begun to touch. But are they

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1 rail carriers defined under the STB regulatory
2 requirements? No. They're proposing to
3 reactivate a rail spur. You'd have to see
4 this, that will service them, and only them.
5 Is this really a rail operation with public or
6 other private railroad access? No. And New
7 England Transrail has offered nothing to
8 indicate otherwise.

9 This last minute handout this
10 morning reminded me of a Perry Mason trial,
11 where someone gets up and says she did it, but
12 we've seen nothing like this, and I even
13 question the sincerity of that this morning.

14 Does this contribute to the
15 railroad infrastructure? No. This process
16 only financially benefits New England
17 Transrail. And I'm a great believer in the
18 capitalist system. It undermines
19 environmental laws. Will New England
20 Transrail really ever connect with the MBTA
21 line? New England Transrail has offered no
22 evidence, except that document this morning.

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1 And I, on my own, and some of my staff have
2 called some of the carriers in the area, some
3 of the carriers who would have locomotives and
4 rail cars available, and as of recently, they
5 haven't heard from them. This latest
6 document, as I said, catches us all by
7 surprise.

8 Is New England Transrail's
9 proposal - and I'll say it - they keep
10 alluding to it - oh, we want to do this to
11 avoid all of the rumors that are there.
12 Simply a smoke screen to what they actually
13 are, which is a private freight yard operating
14 private spurs designed to sort and bale
15 various types of solid waste. That's what
16 they're going to be doing, and boy, you've got
17 your work cut out for you, and I don't know -
18 and I thought your points were well made about
19 making sure that the DEP has oversight in this
20 situation. And I'm hoping this is not
21 approved.

22 Principals of New England

1 Transrail who are or were principals of
2 American Marine Rail, have had many
3 controversial attempts in New Jersey and New
4 York for proposed truck-to-rail and barge-to-
5 rail solid waste facilities. This clearly is
6 an attempt to sidestep environmental
7 regulations, review, and public scrutiny that
8 has been headache to them in the past at the
9 Fresh Kills landfill, South Bronx, and
10 Bayonne, New Jersey. Never mind the now
11 defunct Compost America of Englewood, New
12 Jersey, that suffered from serious financial
13 problems.

14 I'm going to offer some other
15 items in an addendum rather than go through
16 them, and I won't bore the Board with reading
17 the specifics of the regs, and I can just
18 leave those.

19 We've had people here representing
20 our governors, Governor Mitt Romney, who is
21 currently a candidate for President, and Frank
22 Mitchell, who is Director of State and Federal

1 Relations in Washington, D.C. And back then,
2 and if he were here now, would probably say
3 the same thing - spoke very strongly in
4 opposition to this, and sent notification to
5 my office saying they would do whatever was
6 needed to defeat this application.

7 The new Director of State and
8 Federal Regs with Governor Deval Patrick's
9 D.C. office, Caroline Powers, is reiterating
10 what Governor Romney's folks said. "It is
11 well documented that New England Transrail's
12 past filings were incomplete, and had changed
13 from the original filing. This was not
14 incidental. New England Transrail's
15 deliberate attempt to hide the solid waste
16 handling proponent of this operation
17 undermines their credibility."

18 There are several jurisdictional
19 issues, and I think you covered those, within
20 the New England Transrail petition for
21 exemption. Does the Surface Transportation
22 Board have jurisdiction over the site and

1 operations of solid waste transfer facilities?
2 I won't go into that. I think you did a
3 better job on that than I could.

4 The most recent site plan
5 submitted in the filing by New England
6 Transrail claims trains will enter via the
7 north, and exit via the south. If this is
8 true, then why is there a run-around track
9 dead-ended at the southern-most region of the
10 site? It is my understanding a run-around
11 track is a pair of switches arranged on
12 parallel tracks and a yard ladder that lets
13 the engine get by the train that just pulled
14 in.

15 Another thing they mentioned
16 earlier while I was sitting out there was the
17 number of cars that they would have per day,
18 another good question. They're talking about
19 a minimum of 400 trucks a day into that site.
20 And as I said, I wish I had done what Senator
21 Lautenberg had done, and had a picture of the
22 site for you. It's going to be interesting

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1 getting into that small site, and 400 trucks
2 a day, we felt they were under-estimating the
3 number of trucks. Our understanding was they
4 had discussions with the City of Boston
5 relative to their solid waste. Nothing was
6 consummated, but discussions. It would take
7 more than 400 trucks a day to transport that
8 waste into Wilmington.

9 Why is the connection to the MBTA
10 line, and that's the Massachusetts Bay Transit
11 Authority, not shown on the site plan? Will
12 there ever really be a connection? There are
13 just more examples of the vagueness, and I
14 know they tried talking about specifics, but
15 I didn't hear any. They have more examples of
16 the vagueness of New England Transrail and
17 their smoke and mirrors approach.

18 What constitutes a rail carrier?
19 Are they actually a rail carrier? Are they
20 operating a railroad or rail spur? And they
21 were very vague about who they were going to
22 contract with, and whether it was going to

1 builders, and who was going to ship it. All
2 we know is their first proposal showed all of
3 the demolition material baled and ready for
4 shipment, and then you caught that in your
5 preliminary hearings, meetings, and sent it
6 back. And now they're talking about dumping
7 solid waste on the site, lifting it up,
8 putting it on rail cars, and transporting it
9 out. Because most of the above questions have
10 been identified by various comments from
11 several parties, and you did a great job of
12 that this morning, these issues must first be
13 addressed and foremost by the Surface
14 Transportation Board. These concerns, as I
15 said, those that you discussed this morning
16 are not only shared by those in Wilmington,
17 and by our neighbors in Woburn, will also be
18 affected by these unregulated solid waste
19 activities and operations.

20 But not to get overly dramatic,
21 but for our country as a whole, this case is
22 being watched by, as you said yourself, by a

1 wide spectrum of the political and private
2 sector. This exemption has evolved into a
3 precedent setting case, and could have the
4 affect of backtracking environmental
5 protection laws designed to safeguard public
6 health and the environment. State, local, and
7 federal environmental laws are also
8 challenged, and these have been legislatively
9 enacted to regulate the handling of waste from
10 cradle-to-grave for good reason.

11 It is clearly stated that waste
12 cannot be removed from one segment of the
13 population, and in turn burdening another
14 segment of the population. And unregulated
15 solid waste transfer station would do just
16 that, unfairly burden the segment of the
17 population it is sited in. This has already
18 occurred in exempted facilities in New York
19 and New Jersey.

20 CHAIRMAN NOTTINGHAM:
21 Representative Micelli, if I could ask you
22 just to wrap-up now.

1 REP. MICELLI: Yes. Oh, the red
2 light. I have a habit of --

3 CHAIRMAN NOTTINGHAM: I'll give
4 you 30 seconds to wrap-up.

5 REP. MICELLI: I will.

6 CHAIRMAN NOTTINGHAM: Your oral
7 statement will be in the record, and I'm sure
8 we'll have some questions.

9 REP. MICELLI: Thank you very
10 much.

11 I really want to repeat what you
12 said this morning. I came here expecting a
13 lot, but I got more than I expected. You did
14 an outstanding job. You really did. As I
15 said, you hit on questions and some of the
16 items that we hadn't even discussed in our
17 many meetings back in Wilmington, so I have
18 faith in you, trust in you, and I know you
19 have a hard job. And I hope that you will
20 follow this through thoroughly. And once
21 again, I know you will.

22 CHAIRMAN NOTTINGHAM: Thank you,

1 Representative Micelli. I've got just a
2 couple of questions for you, but I'd like to
3 give Commissioner Mulvey a chance to start off
4 this round.

5 COMMISSIONER MULVEY: Thank you.
6 You mentioned the MBTA connection, and that
7 would not occur. What is the importance of
8 the MBTA connection that you're claiming,
9 whether they would have it or not?

10 REP. MICELLI: Where are you going
11 with this? In other words, we talked to the
12 MBTA, and I'll be honest with you, we talked
13 to Gilford Industries. They're the people who
14 bought out the Boston & Maine, and on my last
15 conversations with them, they hadn't even been
16 approached, so I would think you would have at
17 least met with these folks. And I notice
18 nothing was produced in evidence this morning
19 to show that they had. You would at least get
20 something in writing saying yes, we've spoken
21 with these folks, and they're willing to do
22 business with us, providing we get the

1 approval today, but they've done nothing. So
2 there was nothing to check how many cars would
3 they need, what equipment would they need?
4 And it's all be vagueness, and that's why I
5 mentioned the MBTA.

6 COMMISSIONER MULVEY: And you
7 mentioned in one of your addenda about
8 NIMBYism and that's always the accusation.

9 REP. MICELLI: Right.

10 COMMISSIONER MULVEY: But there is
11 a list of restricted materials in your
12 addenda, Addendum A, about all of the things
13 that are restricted from going to landfills,
14 and from being incinerated, et cetera. And
15 this pretty much includes virtually everything
16 that would be in the solid waste stream, lead
17 batteries, leaves, tires, white goods, other
18 yard wares, containers, metal, glass, plastic,
19 recyclable papers, et cetera.

20 Now when it says here that there's
21 a ban on disposal, incineration, or transfer
22 for disposal at a solid waste disposal

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1 facility, I'm not sure --

2 REP. MICELLI: DEP could elaborate
3 on that, but that's my understanding, so they
4 haven't answered any of those questions.
5 These are all the things that are exempted.
6 And everything with them has been a catch-all,
7 they don't want to approach the solid waste
8 question. But I think the DEP could answer
9 those specifically, because that's right in
10 their regs. But I did submit that as part of
11 the addenda.

12 COMMISSIONER MULVEY: Where is it
13 going to go? I mean, what happens to it?
14 This is waste and it has to be moved somehow
15 or another?

16 REP. MICELLI: Let me shift my
17 argument back. The two communities that I
18 represent, we're talking about Wilmington now.
19 Wilmington has had everything handed to it.
20 Not only do we have the Olin site, we have the
21 Spinazola Landfill, which is now called Maple
22 Meadow Landfill.

1 COMMISSIONER MULVEY: It sounds --

2 REP. MICELLI: Use the word
3 "Meadow". Yes, it does. And they were
4 trucking waste in from the big dig, and I
5 think we all know what that was or is.
6 Trucking waste in from the big dig, and trying
7 to cap the site, which I feel they've created
8 another dump, another landfill with that. And
9 let me tell you, I'm a very reasonable
10 individual. I've served in office for a
11 number of years, and I'm very realistic about
12 the situation. I'm just seeing that, NIMBY -
13 maybe I should qualify that. Just Wilmington
14 has taken more than it can handle. It's got
15 more problems, and it's beginning to address
16 it, but it's far from solving any of this.
17 But I just feel that it isn't NIMBY, because
18 there are other sites around Massachusetts
19 that would be better suited for this.

20 COMMISSIONER MULVEY: But this is
21 a ban on all disposal in -- I'm just trying to
22 understand what this ban means when it says,

1 "A ban on transferring for disposal at a solid
2 waste facility", this transfer facility that
3 -- this transloading facility they're
4 proposing would be a solid waste facility,
5 would it not, under the law?

6 REP. MICELLI: Yes.

7 COMMISSIONER MULVEY: And,
8 therefore, it prohibits transfer of any of
9 these materials?

10 REP. MICELLI: But if they get, it
11 does. But if you give them an exemption,
12 that's the point I was trying to make. I
13 think that's what they're looking for, because
14 they don't want to really respond to the DEP.

15 COMMISSIONER MULVEY: And my
16 question is, if we didn't give them the
17 exemption, what would happen to this material?

18 REP. MICELLI: Somebody would have
19 to solve that problem, and that would be the
20 DEP.

21 COMMISSIONER MULVEY: Thank you.

22 CHAIRMAN NOTTINGHAM: Vice

1 Chairman Buttrey.

2 VICE CHAIRMAN BUTTREY: I'd just
3 like to thank the witness for appearing today,
4 and coming all the way down here to be with us
5 from the State. I know it's not a short trip.
6 I appreciate you being here very much and
7 sharing your views with us.

8 REP. MICELLI: Thank you very
9 much. I appreciate that, and I appreciate
10 what you folks are doing, too. And I'm not
11 going to stay for the complete hearing, and
12 it's not because I'm not interested in
13 listening to what anyone else has to say.
14 It's because I'm running for a vacant
15 Congressional seat or about to be vacant by
16 Marty Meehan, so I've got a campaign function
17 this evening, so I'm trying to grab an earlier
18 flight. So I thank you very much, and I thank
19 you for listening to me. And I know you'll do
20 the right thing. Thank you.

21 CHAIRMAN NOTTINGHAM: Thank you.
22 Mr. Micelli, if I could just --

1 REP. MICELLI: Yes, by all means.

2 CHAIRMAN NOTTINGHAM: I'll just
3 ask briefly. First of all, you mentioned -
4 obviously, your constituents have a lot of
5 concerns. Please let them know just from one
6 commissioner, the Chairman's perspective, that
7 we are a long way off from something happening
8 on this property that would be rail-related
9 that they should be concerned with. There
10 will be a lot of procedural safeguards. Even
11 if assuming, that's a big assuming on the
12 hypothetical that we were to assert our
13 jurisdiction and say that we have the prime
14 jurisdiction here, and then go forward and
15 work with everyone on going forward, you
16 describe concerns about, perhaps, this
17 applicant not being a railroad. Please know
18 that there are safeguards in our procedures
19 that if somebody misrepresents themselves in
20 an application, in a filing, we have various
21 remedies and avenues of recourse to make sure
22 that they're not allowed to go on auto pilot

1 and just do whatever they want to do, and one
2 day tell us that they're a railroad, the next
3 day just decide to be a truck freight yard, or
4 other concern. So just please do know that.
5 I feel pretty strongly that there are good
6 safeguards for that, for that kind of concern.

7 Let me ask you, what's your vision
8 for this property? I'm just curious. We're
9 all familiar with the concept of the
10 Brownfields, of trying to take a superfund
11 site and make it into a productive useful part
12 of the community again. What do you see
13 happening on this property?

14 REP. MICELLI: What I hope,
15 eventually, on this property, once the EPA
16 gets through with what they're doing on the
17 site, and once all the other regulatory
18 agencies have bowed out, they would restore it
19 and set it up probably as an industrial park.
20 And it would generate revenue, and it would be
21 something - it's in the section of the town
22 where that kind of thing would be probably

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1 more readily accepted.

2 CHAIRMAN NOTTINGHAM: So you are
3 envisioning primarily industrial uses.

4 REP. MICELLI: That's what I would
5 hope.

6 CHAIRMAN NOTTINGHAM: And that's
7 quite typical in my experience of the
8 superfund sites and Brownfields, and turning
9 them around.

10 REP. MICELLI: And even on a state
11 level, we've funded a lot of the Brownfields
12 development, and have been conversing in the
13 Massachusetts legislature with some of the
14 folks there about, we're replenishing the
15 monies that maybe that we could look down the
16 road and do something with that site.

17 CHAIRMAN NOTTINGHAM: Now if in
18 your vision of an industrial site at this
19 property, if one of the future tenants under
20 your vision were to see the benefit of having
21 a rail line come in, maybe could be
22 hypothetically a Wal-Mart wanting to have a

1 distribution center. Be a lot of traffic,
2 presumably, probably wouldn't be loved by
3 every constituent, but are you open to the
4 possibility of rail being a viable part of
5 your vision?

6 REP. MICELLI: If it were
7 something, and we went through the normal
8 process, and if it was something that went
9 hand-in-hand, as you say, a Wal-Mart, I might
10 not have a problem.

11 CHAIRMAN NOTTINGHAM: Okay.
12 Recognizing even though the normal process
13 would be minimal state and local regulation if
14 it were a Wal-Mart distribution center
15 bringing in trains full of containers and
16 trucking them out.

17 REP. MICELLI: And I know that
18 isn't a trick question, because that's a big
19 difference when you're talking about this
20 site, putting it on a fast track, to kind of
21 develop it so that you can haul hazardous
22 waste, not hazardous, solid waste out of

1 there.

2 As I said before, this town has
3 just been overwhelmed with all negatives, and
4 industrial park - we would hope there wouldn't
5 have to be a rail line, probably. We would
6 hope that we'd get - right now Biotech is the
7 big thing in Massachusetts, and is really
8 expanding. We would hope it would be an
9 industrial park of that nature.

10 CHAIRMAN NOTTINGHAM: This is my
11 last question. I appreciate your patience.
12 If a future tenant in what you envision as a
13 good industrial site were to want to bring in
14 municipal solid waste, or
15 construction/demolition material, but only do
16 it in sealed truck containers, and then place
17 those sealed containers, never opened at the
18 facility, onto a rail car to be brought to a
19 facility in Ohio, for example, would you be
20 able to support that, be neutral, or would you
21 have strong concerns still with that?

22 REP. MICELLI: I'd have concerns.

1 CHAIRMAN NOTTINGHAM: Okay. And I
2 understand. I respect that. I'm trying to
3 get a sense of where you're coming from.

4 REP. MICELLI: Right.

5 CHAIRMAN NOTTINGHAM: And what
6 your vision is, because you do represent the
7 people there. And it's important to us to
8 hear that.

9 REP. MICELLI: You know, Senator
10 Lautenberg had that picture, and I can't get
11 that out of my mind either, earlier. And that
12 picture - you know, they say a picture is
13 better than a thousand words, and I think it
14 spoke volumes.

15 I can envision that kind of
16 situation occurring on this site under the
17 present conditions.

18 CHAIRMAN NOTTINGHAM: Now you've
19 had a lot of discussions, it sounds like, with
20 EPA, as I would guess you would.

21 REP. MICELLI: Yes. I had them
22 into my office a few months back, many months

1 back, spoke with them recently, and they said
2 the letter stands on its own. They feel that
3 they just don't want to see anything happen
4 there for a while.

5 CHAIRMAN NOTTINGHAM: And we
6 appreciate you putting the letter in the
7 record. It's Addendum D, and this is the
8 April 6th letter from Region I, EPA. And I'll
9 just quote briefly from it. It says that,
10 "EPA does not intend to participate in today's
11 oral argument. However, this letter will
12 update the Board." And then it says, "EPA is
13 still in negotiations with the potentially
14 responsible parties for the performance of a
15 remedial investigation, feasibility study at
16 the Olin site. Thus, the RIFS has not
17 commenced, and EPA's knowledge of the site has
18 not changed materially since May 11th, 2006."

19 You're there every day keeping in
20 touch with EPA. This has got to be a top tier
21 issue for your constituents.

22 REP. MICELLI: We keep in touch

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1 with them about once a week.

2 CHAIRMAN NOTTINGHAM: Is this on -
3 are they handling this as a high-priority fast
4 track matter? When do you think we'll see the
5 RIFS started and finished, just in your --

6 REP. MICELLI: In my estimation?
7 Not for a while.

8 CHAIRMAN NOTTINGHAM: Like months,
9 years?

10 REP. MICELLI: I want to say
11 years. And I stand to be corrected, because
12 they're not here this morning, but I think
13 it's a long ways off.

14 CHAIRMAN NOTTINGHAM: And do you
15 think that Region I has as its top priority
16 advancing the economic development of this
17 property, or is their top priority making sure
18 they do their environmental work?

19 REP. MICELLI: Making sure they do
20 their environmental work. That's what they're
21 looking at, and I don't like speaking for them
22 but that's what I would assume. And as I said

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1 earlier, EPA has a site five miles down the
2 road in the next town I represent. They have
3 wonderful names, Rocco's Landfill, and they're
4 just now tracing the responsible parties in
5 that one, too.

6 CHAIRMAN NOTTINGHAM: Well, thank
7 you for your time today.

8 REP. MICELLI: My pleasure.

9 CHAIRMAN NOTTINGHAM: Any
10 additional questions from colleagues? Hearing
11 none, have a safe trip home.

12 REP. MICELLI: Thank you.

13 CHAIRMAN NOTTINGHAM: And we wish
14 you well, and please keep in touch if we can
15 of any assistance.

16 REP. MICELLI: Appreciate it.
17 Thank you very much, Mr. Chairman. Thank you,
18 members.

19 CHAIRMAN NOTTINGHAM: We will now
20 take a 45-minute, and we will be strict on
21 that 45-minute lunch recess. Lunch locations
22 are somewhat limited in the community, so we

1 encourage you to grab something quickly, come
2 back. Mr. Van Tine, are you asking to be
3 recognized now?

4 MR. VAN TINE: Yes, Mr. Chairman.

5 CHAIRMAN NOTTINGHAM: Yes.

6 MR. VAN TINE: Before everybody
7 adjourns, I think it's important, I'd like to
8 have permission to take 30 seconds to make an
9 important amendment to one of my answers to
10 your earlier questions. And it's not in
11 response to anything that Mr. Micelli said.

12 CHAIRMAN NOTTINGHAM: Would you
13 like to do that now, or during your closing?

14 MR. VAN TINE: Yes, sir. I think
15 it's important to get it in the record right
16 now, so that everybody has time to think about
17 it.

18 CHAIRMAN NOTTINGHAM: As the
19 lawyer for the applicant, we'll give you the
20 ability to do that. Please proceed.

21 MR. VAN TINE: This was triggered
22 by Commissioner Mulvey's question of Mr.

1 Micelli about the waste disposal laws in
2 Massachusetts, and I was reminded by my
3 lawyers here that I forgot to mention in our
4 discussion of what Massachusetts laws we would
5 agree are applicable, and which we would take
6 the position are not applicable. There is a
7 waste ban law in Massachusetts that requires
8 that recyclables, specified recyclables not
9 leave the State of Massachusetts, that they
10 not be shipped out of state to landfills, that
11 they be recycled in Massachusetts. As we've
12 indicated, we are not going to be a recycling
13 facility, and we believe that as a matter of
14 law, that waste ban law is an economic
15 regulation. It is intended to encourage
16 recycling in Massachusetts, and encourage the
17 development of a recycling industry in
18 Massachusetts. And as a matter of law, that
19 is one of the things that the Board, the kind
20 of thing that the Board in the past has held
21 is pre-empted. And since we are not going to
22 be a recycling facility, and not going to be

1 engaged in recycling, that is one of the
2 things that we would need to be exempted from.
3 And I wanted to get that out now before
4 everybody breaks for lunch.

5 CHAIRMAN NOTTINGHAM: So you would
6 add that to your pre-certification, and the
7 others, noise, and the three conditions we
8 talked about earlier.

9 MR. VAN TINE: Yes, sir.

10 CHAIRMAN NOTTINGHAM: Okay. So
11 there's four now areas that would not be
12 negotiable really, from your client's
13 perspective. Okay. Is that it, Mr. Van Tine?

14 MR. VAN TINE: Yes, sir. Thank
15 you very much.

16 CHAIRMAN NOTTINGHAM: All right.
17 We will reconvene in 45 minutes.

18 (Whereupon, the proceedings went
19 off the record at 1:02:56 p.m., and went back
20 on the record at 1:46:46 p.m.)

21 CHAIRMAN NOTTINGHAM: On the
22 record. Good afternoon. We'll now resume our

1 hearing in the New England Transrail matter.
2 We will proceed with our third panel. Before
3 doing so, I do want to mention that
4 Representative Miceli who just spoke in Panel
5 2 did ask me to put in the record that he
6 expresses his appreciation to his staff,
7 particularly Suzanne Sullivan, who assisted
8 extensively with his preparation for the
9 hearing. So I did assure him I would put Ms.
10 Sullivan's name in the record.

11 Now moving to Panel 3, we are
12 delighted to have with us from the
13 Commonwealth of Massachusetts and the State of
14 New Jersey the following individuals: Ms. Siu
15 Tip Lam from the Massachusetts Office of the
16 Attorney General who has been allocated no
17 more than 15 minutes; Mr. James C. Colman also
18 from Massachusetts but the Department of
19 Environment Protection and also for no more
20 than 15 minutes; Mr. David K. Monroe from the
21 New Jersey Department of Environmental
22 Protection and the New Jersey Meadowlands

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1 Commission for no more than 20 minutes; and
2 finally, along with Mr. Monroe sharing the
3 time is Mr. Robert Ceberio from the New Jersey
4 Meadowlands Commission. Welcome and I believe
5 we will start with Ms. Lam.

6 MS. LAM: Thank you, Mr. Chairman.
7 I am here to speak on behalf of Massachusetts
8 Attorney General Martha Coakley and thank you
9 for the opportunity for us to discuss this
10 very important issue relating to NET's
11 proposal.

12 Before I begin, I would like
13 address an issue that was brought up by Mr.
14 Moates regarding deferral. I don't believe we
15 should defer the termination in this matter
16 until the First Circuit rules. First, we
17 believe the District Court in the Jackson case
18 was wrongly decided and that decision is not
19 binding on this Board and it's now on appeal.
20 The parties have briefed the issues and we
21 believe the matter is now ripe for decision.

22 The issue before the Board is

1 whether or not the solid waste processing
2 facility as proposed by NET is integrally
3 related to rail transportation. And before I
4 begin, the layout of the site, the project,
5 the only facility activities that we are
6 challenging is the solid waste processing
7 facility and the activities that are happening
8 in the center portion of the development area.
9 They also propose transporting other
10 commodities and other portions of the site and
11 that we're not here to address those. We're
12 not expressing an opinion on the merits of
13 those activities. We're only addressing the
14 facility in the center of this development
15 area. And a determination on this issue
16 relating to this facility will not affect
17 NET's proposals with regard to other
18 commodities. I think I would like to address
19 that as one of the answers to your questions.

20 And also we're just asking the
21 Board for a determination on the processing
22 activities, solid waste processing activities,

1 and we don't believe a decision in this
2 instance would have any effect on activities
3 typically conducted by other railroads.

4 This Board has passed decisions
5 and also the courts have said that
6 transloading is also integrally related to
7 rail transportation and we have examples of
8 transloading of solid waste in Massachusetts
9 that do just that. They transload. They
10 unload containers of municipal solid waste
11 from the truck onto the railcars without
12 dumping, without sorting, without baling or
13 shredding any of that waste and that facility
14 is located in Alston, Massachusetts and the
15 Commonwealth has not asserted a jurisdiction
16 in which they have to get a permit. So that
17 facility was allowed to proceed as a
18 transloading facility. We have not asserted
19 that they should get a permit for that. So
20 transloading of solid waste can be done
21 without all the processing activities that are
22 being proposed here.

1 The proposal here is to dump the
2 waste onto a floor, manipulate it, sort it and
3 then segregate parts of it and then shred the
4 rest of it and then maybe even bale some of
5 it. That type of activity as you will hear
6 from the industry group is being done
7 typically by solid waste processing facilities
8 throughout Massachusetts and the other states
9 also and they are heavily regulated. Why?
10 Because they generate problems like rats,
11 vectors, litter, odor, emissions and a whole
12 host of other nuisance problems that could
13 potentially be harmful to the public health
14 and safety and the environment.

15 So Massachusetts, in order to
16 become a solid waste facility, you have to
17 satisfy solid waste site requirements and that
18 is there will be a local, local meaning the
19 local board of health, and the Department of
20 Environmental Protection and we'll be jointly
21 reviewing this whether or not the site is
22 actually suitable for this facility. They

1 need to look at the needs of the community.
2 They need to look at whether or not there are
3 actually sensitive receptors around the area.
4 That's the first step.

5 Then the second step is the
6 permitting process. The permitting process is
7 the key process in which precautionary
8 measures are actually being developed during
9 this process. They look at the construction
10 and design of the building to see whether or
11 not that building can handle this type or
12 amount of waste that's being proposed to be
13 processed there. They also look at whether or
14 not there are sufficient controls on runoffs.
15 They look at also whether or not there's any
16 kind of emission controls or odor controls
17 that should be installed. They also develop
18 conditions during this permitting process that
19 would set forth the terms by which they
20 should, the facility should, be operated.

21 These regulations are key to
22 ensuring that these facilities will be

1 conducted in a manner that's protective of
2 public health and safety and the environment.
3 NET right now in their proposal is saying that
4 the proposed activity because it's located
5 near a railroad, adjacent to a railroad, and
6 it facilitates rail transportation that it
7 should not be subject to any of these laws.
8 We argue that near facilitation is not
9 standard in looking at whether or not an
10 activity is integrally related to the ability
11 to transport by rail because that goes too
12 far.

13 That would allow facilities like a
14 manufacturing facility, it would allow
15 possibly a production facility, to be
16 springing up along these railroad lines simply
17 because the process, the manufacturing process
18 or the production process, could simply
19 facilitate the transport. That type of
20 reasoning has been, the facilitation reasoning
21 has been, rejected in Hi-Tech where Hi-Tech
22 tried to get C&D trucking activities to be

1 within the jurisdiction of the Board and the
2 Board has rejected that. That has gone too
3 far.

4 We argue that the integrally
5 related test has to be more than just
6 facilitation. Here we have shown that the
7 transloading of solid waste does not need to
8 be processed. You could transload containers
9 of solid waste from the truck to the rail.

10 And also this type of separation
11 of the waste into different waste streams is
12 really akin to manufacturing and processing.
13 If you -- This is sort of very -- It's key to
14 the solid waste processing type industry is
15 that you separate the waste because they need
16 to be handled differently. Once you've
17 separated them, once you've processed them,
18 the requirements that you need to be --
19 handled differently. Like even earlier in
20 the morning, some of the requirements will be
21 facilitating actually the disposal of it at
22 the landfill. So that is necessary for the

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1 disposal of this solid waste. It's not
2 necessary for transport.

3 Throughout this process, we raised
4 an issue that they actually generate revenue
5 by separating and segregating and they
6 actually generate revenue through recycling.
7 During this whole entire process going back,
8 I don't know, two or three years ago when they
9 first came to before this Board in the first
10 notice for exemption they submitted, they
11 never mention anything about waste. When they
12 withdrew that notice and they actually
13 submitted a petition for preemption, that was
14 the first petition before this Board, they
15 never mentioned about waste.

16 As a result, this Board issued a
17 conditional authorization for them to proceed
18 conditioned on the review by the section of
19 the environmental analysis. It's only during
20 that review process did they find out or did
21 the community learn that there was actually
22 going to be processing of waste material there

1 and as a result of that, the Board dismissed
2 the petition.

3 Now this is the third time they
4 come before the Board and throughout this
5 whole issue and in discussion with the state,
6 they have never said they're not going to
7 recycle the material. It's at the eleventh
8 hour they file a surprise response indicating
9 they won't be recycling. I really ask the
10 Board to look into that and see if there is
11 any truth to it because I think it's kind of
12 incredible for them to take the time to
13 separate out the valuable steel, you know,
14 metal pieces and the wood so just in that case
15 they can ship it to a landfill to be disposed
16 of.

17 In any event whether or not they
18 recycle, this process really, the process of
19 dumping it onto the ground, separating it,
20 sorting it and shredding it and baling it is
21 not integrally related because solid waste can
22 be transloaded without this processing

1 activity. And they should be subject to state
2 regulation.

3 The Board has asked several
4 questions in the notice of oral argument
5 suggesting if the Board -- dealing with mainly
6 the scope of preemption. I would argue that
7 there is no preemption here and that it will
8 be considered preemption. The scope of it, I
9 should say, the questions that were posed
10 raised a whole host of issues about protection
11 of public health and safety and environment
12 issues.

13 First, one of the questions asked
14 was were not there any kind of Federal laws
15 that apply to processing facilities, solid
16 waste processing facilities. There aren't any
17 despite the fact that the Petitioners have
18 listed a number of regulations. None of those
19 apply specifically to solid waste processing
20 facilities. It's the Solid Waste Disposal
21 Act, the Federal Solid Waste Disposal Act, but
22 that deals mainly with landfills, not

1 processing facilities and there may be some --
2 For instance, the Federal Air Act, that apply
3 to certain specific aspects of what they do,
4 but it is no substitute for the siting and the
5 permitting requirements that the state has to
6 protect public health and the environment.

7 In addition, the Board asked if
8 you find preemption, you set up this procedure
9 by which you could set conditions in the
10 authorization to the Petitioner and have the
11 State do inspections. That raised several
12 questions. I mean, in terms of first is there
13 authority. You know, is there authority for
14 the Board to delegate some of these
15 enforcement issues to the states?

16 Second, what standards are the
17 states going to be measuring this facility
18 against when they go and do the inspections?
19 Are they going to be standards that the Board
20 is going to be developing? If it's going to
21 be the state standards, then it doesn't really
22 work with preemption analysis and if it's

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1 really the state standards, why shouldn't the
2 state just do the enforcement?

3 Then also if we do find violations
4 and you suggested maybe based on a call from
5 the state that you could suspend the license
6 or the authority to operate, I would ask on
7 what level of violation can that trigger that
8 suspension because there could be a whole host
9 of violations that may not trigger a shutdown
10 of a facility, but it still would cause a
11 potential for great harm to the environment
12 and the public.

13 It raises a lot of issues in this
14 arena of enforcement if we do actually have --
15 if you actually find that there is preemption
16 and I also would say that the volunteer
17 agreements will raise the same issues when the
18 state does not have the power to sanction to
19 ensure compliance.

20 I would end with if the Board were
21 to determine that there is preemption and this
22 is -- as you know, many, many more of this

1 solid waste processing facilities will set up
2 shop next to railroads and there will be many
3 more that will go unregulated to the detriment
4 of public health and safety and the
5 environment. And that is contrary to the
6 stated transportation policies that are set
7 out in ICCTA. Thank you.

8 CHAIRMAN NOTTINGHAM: Thank you,
9 Ms. Lam. We appreciate you staying right on
10 schedule. We will now proceed with Mr.
11 Coleman.

12 MR. COLMAN: Good afternoon.
13 Thank you very much. I am Jim Colman, the
14 Assistant Commissioner at Mass Department of
15 Environmental Protection and as such, I'm
16 responsible for the programs that regulate
17 solid waste facilities as well as a variety of
18 other things.

19 Mass DEP has been involved in this
20 case from the beginning for two very simple
21 reasons. First as Ms. Lam has explained, we
22 do not believe that solid waste processing is

1 integral to rail transportation and therefore
2 should not be preempted and second, as a
3 practical, on-the-ground matter, if you
4 determine that solid waste processing is
5 preempted, then in my view there will be no
6 government agency in a position to protect the
7 citizens of Wilmington, Wilburn and by
8 extension, Massachusetts residents and other
9 states should this occur in other states from
10 the potential risks inherent in solid waste
11 processing and I would like to focus my
12 remarks on this point.

13 I want to first though emphasize
14 that Mass DEP is not opposed to rail
15 transportation or even transporting solid
16 waste by rail. As Ms. Lam pointed out, we
17 have recognized the right of railroads to
18 transport solid waste and the rail preemption
19 in the case of true intermodal transportation
20 such as the Alston case. However, solid waste
21 processing as is proposed here is a completely
22 different situation.

1 A little bit of background on
2 solid waste processing facilities in
3 Massachusetts. We have 11 currently permitted
4 C&D waste processing facilities, several of
5 which do have access to rail. These 11
6 facilities processed about 1.2 million tons of
7 C&D in 2006. Three additional facilities are
8 going through the permitting process now. All
9 of the C&D processing facilities are permitted
10 to handle C&D waste by dumping waste on a
11 tipping floor and then processing the waste by
12 use of various methods, trommel screens,
13 shredders, hand picking, etc.

14 These processing activities yield
15 a variety of recycle materials and I raise
16 this because in the previous incarnations of
17 this proposal, recycling was a very important
18 part. It's this morning that we learned that
19 suddenly it's not but various recycling
20 materials such as asphalt, brick, concrete,
21 metal, wood and then the finds that come out
22 when all this is mixed up are used as daily

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1 cover for grading and shaping materials at
2 landfills and that's another revenue source.
3 In addition, C&D processes pull out as was
4 mentioned this morning things like propane
5 tanks, cathode-ray tubes which are your old
6 television tubes or computer tubes which are
7 ban from disposal in Massachusetts.

8 As a result of these processing
9 activities, the amount of material requiring
10 disposal is greatly reduced and a number of
11 commodities with value such as metal and wood
12 are generated which reduces the Commonwealth's
13 dependence on landfills. I would reiterate
14 what Ms. Lam said that it does strain the
15 credibility to think that this facility would
16 separate out the metal which can be a very
17 high economic value and then put it back in
18 the trash and send it to a landfill. I don't
19 know of any other facility that would do such
20 a thing.

21 We permit our facilities by having
22 a site assignment and permitting regulations

1 which apply to all processing facilities and
2 we have a clear set of rules that everybody
3 understands and allows the facility to operate
4 in a manner which will protect human health
5 and safety and the environment. While C&D
6 facilities provide a valuable waste management
7 service, Mass DEP has stringent regulations to
8 ensure they do not cause public health, safety
9 or environmental problems from dust, odors,
10 vectors, traffic, management of runoff, etc.
11 They must also properly manage asbestos
12 materials which when you take materials
13 particularly in an old housing stock like in
14 Massachusetts, there is a lot of asbestos in
15 the C&D materials which when it's dumped and
16 processed comes out into the air which is bad
17 for the workers and bad for any neighbors,
18 asbestos is a known carcinogen, there are very
19 serious potential consequences of this not
20 being properly regulated.

21 We also have an inspection program
22 which includes regular ordered inspections to

1 ensure that the facilities are operating in a
2 manner which protects public health. I would
3 also add that in Massachusetts we have a fee
4 program that all permanent facilities pay an
5 annual compliance fee which supports our
6 inspectors. So for us as was hinted this
7 morning to get in the business of starting to
8 inspect facilities that don't pay a fee does
9 have some potential impacts on our budget.

10 Our concerns are not theoretical.
11 While many facilities maintain good compliance
12 due, I would argue to our strict oversight.
13 Some do not. For example, at one C&D waste
14 processing facility which was just recently
15 constructed in Massachusetts in 2002, we have
16 in the first two years already received
17 complaints, 11 complaints, from neighbors and
18 local officials. We performed 17 inspections
19 at that facility. We observed stockpiling of
20 unacceptable materials that were not allowed
21 to be brought in, failure to inspect or sample
22 incoming loads for impermissible items,

1 failure to maintain records and creating
2 nuisance conditions including dust, noise,
3 odor, including hydrogen sulfide which is that
4 rotten egg smell which not only smells bad but
5 actually can have serious health impacts. So
6 facilities much as they may promise aren't
7 always in compliance.

8 In such cases, we have a variety
9 of tools short of shutting down a facility to
10 bring the facility back into compliance.
11 First, we have notices of noncompliance which
12 is essentially like a traffic ticket which
13 says you were not in compliance and you have
14 to come back into compliance within a certain
15 amount of time. That does take care of most
16 cases. If that doesn't work, we can have
17 administrative consent orders or
18 administrative consent orders with a penalty.
19 Massachusetts does have the authority to --
20 Mass DEP does have the authority to impose
21 administrative penalties when violations are
22 not corrected and if the facility

1 owner/operator does not agree, they have the
2 right to appeal or we can issue an order which
3 they can also appeal.

4 I have gone into such detail to
5 illustrate the key policy and practical reason
6 why a Federal preemption of state and local
7 oversight is so important to us. If we are
8 prevented from regulating solid waste
9 processing facilities, who will? Who will
10 hold NET, for example, accountable?

11 I do not, with all due respect to
12 this Board, believe that the STB is equipped
13 to do so. I do -- As far as I know, the STB
14 does not have standards or regulations
15 specifically for solid waste facilities. As
16 far as I know you do not have staff to go out
17 and perform inspections or take enforcement
18 actions when necessary. And as I understand
19 your role, it does not encompass strictly
20 regulating such activities.

21 So the question becomes for me as
22 a regulator and responsible for protecting

1 public health and the environment and
2 protecting our citizens, whose role is it if
3 state and local governments are preempted? In
4 the case I described, who would the neighbors
5 and local officials complain to? Who would
6 assist them preventing noise, dust, odors,
7 etc.? Who would protect their right to a safe
8 place to live and work? Unfortunately, I
9 think should this be preempted, the answer is
10 there would be nobody.

11 In theory, states would maintain
12 their policy power, however, with no clear
13 standards and a complete lack of
14 administrative remedies. The only recourse
15 would be to refer a case to the Attorney
16 General and go to court which this would only
17 make sense in the most egregious situations,
18 not for the run-of-the-mill nuisance that is
19 so common. In most cases, a notice of
20 noncompliance or an order solves the problem
21 and the facility does not have to shut down.

22 On the other side, what rules

1 would NET use to know if they were operating
2 properly? Assuming NET wants to be a good
3 neighbor which I do, what rules do they follow
4 without inspectors who confirms whether or not
5 they're doing it? While we would like to,
6 I've been in the environmental regulatory
7 business for 30 years, we have all learned
8 that we cannot rely merely on promises.

9 Mass DEP is not trying to regulate
10 rail transportation or transloading activities
11 that don't involve activities such as solid
12 waste processing would pose risk to public
13 health and the environment. We know, "we"
14 know, how solid waste processing facilities
15 are supposed to operate. We know the problems
16 that can arise. We know how to help the
17 owner/operator fix them and we have the
18 enforcement tools to get them back into
19 compliance if necessary. We don't oppose this
20 project per se. We want to make sure that we
21 can do our job, the job the government has, to
22 protect the public health and welfare and the

1 environment of our citizens.

2 I wanted to just cover a couple of
3 things. That's the end of my remarks that I
4 was going to give that we talked about this
5 morning. Then I want to put our view up
6 first. As was said this morning, NET did
7 offer an arrangement. We did meet with them.
8 I was at that meeting and they claim that they
9 made an offer and we never responded. That is
10 incorrect.

11 In my view, they made a offer that
12 was very vague. They sent it in writing. We
13 responded to the attorney who sent it to us
14 orally over the phone. When we asked them how
15 would such an arrangement be enforced, they
16 had no idea how to do that. They just didn't
17 have any answer and we certainly didn't know
18 how outside of our regulatory framework such
19 an arrangement sort out there in the
20 atmosphere would ever been enforceable.

21 Some comments were made with
22 regard to how perhaps NET's proposals had been

1 misunderstood and we need to be corrected on
2 what they really do. My only response to that
3 would be how can we understand a proposal that
4 changes so often. We've tried our best and we
5 spent a lot of time trying to understand each
6 proposal. I believe this is the third
7 iteration of their proposal. That makes it
8 very hard for us to have a reasonable
9 conversation with a proponent that's a moving
10 target.

11 I'm sorry. Back to the offer to
12 come into some agreement, they made several
13 promises of good behavior but they offered no
14 way by which NET could be held accountable.
15 Essentially, they refused to be held
16 accountable to their own promises and again
17 for us as an environmental regulators, this is
18 a key question.

19 There are -- I should point out
20 that there are several C&D facilities that
21 ship out of state by rail. So I'm not sure.
22 The question was asked this morning whether or

1 not their facility would replace trucks and
2 NET, I believe, asserted that it would. I
3 would say this may or may not replace trucks.
4 It may well compete with other rail
5 facilities. I don't think that's possible to
6 project or predict at this point in time.

7 And finally, in response to a
8 question about whether other facilities will
9 also try this exemption if you approve it, I
10 think many will. Why would anyone in any
11 state go through the local authorities and
12 state authorities which are quite rigorous
13 which is not to say you're not rigorous, but
14 you're not necessarily so rigorous about solid
15 waste issues, if they can come to you and get
16 a preemption? And that's my big concern. I
17 do think there's this case, may set a
18 precedent. I know. I've already heard about
19 other facilities in, other entities in,
20 Massachusetts that may want to pursue this
21 route and I worry that the Board may be
22 getting a lot of requests for this and get

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1 into a whole area. That's your choice to get
2 into it, obviously not mine to say. But I can
3 tell you that overseeing solid waste
4 facilities is not an easy job. Thank you very
5 much for this opportunity.

6 CHAIRMAN NOTTINGHAM: Thank you,
7 Mr. Colman and now we'll turn to Mr. David K.
8 Monroe from the New Jersey Department of
9 Environmental Protection.

10 MR. MONROE: Thank you, Mr.
11 Chairman. Mr. Ceberio is going to speak first
12 for the New Jersey Meadowlands Commission.

13 CHAIRMAN NOTTINGHAM: Welcome Mr.
14 Ceberio. Please proceed.

15 MR. CEBERIO: Thank you, Mr.
16 Chairman, members of the Commission. My name
17 is Bob Ceberio. I'm Executive Director of the
18 New Jersey Meadowlands Commission. It seems
19 to me that the issue that you have before you
20 today has less to do with rail transportation
21 and it has all to do with solid waste
22 processing and whether it is regulated or not.

1 This has very serious considerations and
2 consequences for the Meadowlands region. Five
3 miles outside of Manhattan, this 32-square
4 mile area hosts one of the largest urban
5 wetlands in the country and primarily on the
6 east coast. Contrary to what the attorney
7 said from NYS&W, it is not the opening credits
8 from "The Sopranos" but it is home to the
9 Frank Lautenberg Rail Station that recently
10 opened up.

11 Unfortunately, what we have today
12 wasn't like this 40 or 50 years ago. The
13 Meadowlands region before the Meadowlands
14 Commission came on was heaps and mountains of
15 garbage, burning garbage, nasty runoffs and
16 scars upon the land that are still there
17 today. Since then, the state has been able to
18 come in, adopt uniform regulations to govern
19 these sorts of facilities and have exercised
20 their police power that have brought those
21 days to a close.

22 My agencies, for instance, was

1 given the responsibility in 1960 to preserve
2 the delicate balance of nature, right to
3 ensure proper solid waste management and the
4 implementation of health and safety standards
5 including building codes. Unfortunately, this
6 has been undercut in recent years by new solid
7 waste hauling operations springing up along
8 the NYS&W rail tracks, throwing up immense two
9 story high piles of steaming debris, without
10 any discernable protections for workers,
11 sending up dusty clouds containing unknown
12 materials and leaking liquid wastes that were
13 found to contain excessive levels of lead,
14 arsenic, mercury and copper.

15 Contrary to the argument of Mr.
16 Moates this morning, after years of litigation
17 and every opportunity to meet the
18 International Building Code and abide by
19 environmental standards, one of the
20 Meadowlands facilities still under the NYS&W
21 still does not even have a fire suppression
22 system, does not have proper air quality

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1 measures and worst of all under NYS&W's
2 argument, they could choose to allow waste
3 processors on their land to revert back to
4 open piles they formerly presided over and
5 even with further lack of safeguards in each
6 and every one of those situations.

7 The question that you are being
8 asked today is whether these operations
9 constitute rail operations. We believe they
10 do not. The NYS&W position is clear. Provide
11 us a way for solid waste processing to be
12 carried out so that environmental and building
13 code standards can be disregarded. I would
14 also like to point out just as a comment the
15 characterization of these facilities, I would
16 say, their descriptions were very charitable
17 this morning in the descriptions of the
18 conditions of these facilities.

19 But make no mistake. They're
20 asking you to return us, the people of the
21 Meadowlands, back to a day when waste handling
22 existed in a sort of regulatory black hole.

1 There are real consequences to this: for the
2 emergency responders who may have to rush into
3 a burning facility that has not complied with
4 the building code or the workers that are in
5 that facility, this is a fire trap and may
6 have very dire human consequences if something
7 should happen; for the neighbors that are left
8 to ponder the potential dangers of the dust
9 that settles on their houses and gardens; and
10 for the environment with the runoff and the
11 pollution that has been reported from these
12 sites. That's why today we appreciate your
13 consideration in this matter and the potential
14 you have to bring clarity and rationality to
15 this issue. Thank you. I'll turn it over to
16 David now.

17 MR. MONROE: Thank you, Mr.
18 Chairman and the Board. I'd like to address
19 a couple of subjects and I'll tell you what
20 they are. I know my time is limited and I'll
21 try to move through them quickly, but the
22 first I'd like to discuss just briefly the

1 nature and the scope of the problem that we're
2 facing. There have been a lot of comments
3 about them, but I think the Board needs to
4 know what's really happening out in the states
5 like New Jersey and Massachusetts and other
6 places. Second, I would like to address some
7 of the comments that have been raised by other
8 parties and, in particular, some comments made
9 earlier in the hearing. Third, I'd like to
10 address some of the Board's questions and, in
11 particular, the idea that has been articulated
12 by the Chairman that it would be possible to
13 solve this problem by the application of
14 Federal environmental law with the help of the
15 states. Finally, I would like to suggest what
16 the Department of Environmental Protection in
17 New Jersey thinks is a solution to this
18 problem which balances the issues, the
19 importance of the preemption of the Commerce
20 Clause with the state's police powers and
21 which also balances the legitimate interests
22 of railroads with the public health and safety

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1 and which, I think, has the benefit, two
2 additional benefits, one that is based upon
3 the Board's already existing precedents
4 regarding preemption and also would address
5 the issue of the regulatory gap which was
6 referenced earlier in the hearing.

7 But let me start with the problem.
8 New Jersey has had the dubious honor of being
9 in the forefront of the issue of rail solid
10 waste facilities. New Jersey was involved in
11 the Hi-Tech cases which were before the Board.
12 I'm sure you'll recall. New Jersey has been
13 involved in extensive litigation with the
14 NYS&W, the Susquehanna, over five individual
15 solid waste facilities. Seven, in fact, have
16 been opened. Has been involved in other
17 litigation with other solid waste entities
18 which sought to construct and to operate solid
19 waste facilities that basically have no
20 fundamental protections for the environment,
21 for health and safety, and I point you to that
22 picture. That's the picture that Mr. Moates

1 who spoke this morning on behalf of the
2 Susquehanna referenced that he knew he would
3 put up that picture and that's my favorite
4 picture because that tells you and that shows
5 you what we're talking about.

6 The problem is that solid waste
7 facilities are being built which have
8 absolutely no controls or very few controls
9 and they're being built and operated by
10 people, by entities, who claim that they are
11 subject to total preemption under Federal law
12 and, in particular, preemption under 10501(b).
13 And because they say they're subject to total
14 preemption, they say they do not have to
15 comply with any state law, not state
16 environmental law, not state health and safety
17 law, any law. That is the position that
18 they've taken and these are the kinds of
19 facilities that are being built.

20 Now this facility as Mr. Moates
21 noted has been closed. It was closed during
22 dependency of the Jackson case. It was closed

1 after the judge was shown this picture and the
2 judge was not happy. But as we know and it
3 was discussed this morning, the Jackson case
4 found that New Jersey at least with respect to
5 some of these facilities New Jersey's health
6 and safety regulations for solid waste
7 facilities is preempted. So now we're back to
8 the same situation that the Susquehanna
9 thought they were in when built this facility
10 and if they want, they can build another
11 facility just like this or open this one.
12 That's the problem that we face.

13 Now this is not a problem that's
14 limited to New Jersey. In New Jersey alone
15 approximately 15 of these rail solid waste
16 facilities have been built and more are coming
17 and the same kind of facilities are going to
18 be built in other states as well. It's a
19 national problem. It's a national problem
20 that threatens to undermine and destroy 40
21 years of regulation of solid waste by the
22 states because there is no federal regulation

1 of solid waste by the Federal Government, only
2 by the states.

3 Now the problem of these rail
4 solid waste facilities is not limited to new
5 entrants. It is not limited to -- A big
6 problem is that solid waste facilities have
7 figured out that if we can call ourselves the
8 railroad and claim total preemption, we don't
9 have to do anything. We don't have to comply
10 with any law and there have been a number of
11 those applications made to this Board and the
12 Board has noted the problem with those
13 applications and the abuse of the preemption
14 process.

15 But that's not the total story
16 because the problem extends beyond new
17 entrants. It also includes existing railroads
18 because that facility in that photo, that was
19 constructed by an existing railroad, the
20 Susquehanna Railroad. It was constructed with
21 full knowledge that there were state
22 requirements which provided for substantive

1 health and safety requirements to protect the
2 environment and the people who work there and
3 live around there. But they ignored those.
4 They ignored those because they said we don't
5 have to do that and because we don't have to
6 do that, we're not going to do that.

7 A number of the commentators and
8 particularly the rail parties in this case
9 have filed comments in which they've said this
10 is a new entry problem and the Board can
11 address this problem by perhaps rethinking
12 Effingham or by tightening up its exemption
13 procedures and New Jersey certainly agrees
14 that both of those suggestions would be
15 something for the Board to consider. But that
16 will not solve the problem because if the
17 Board is able by those measures to squeeze off
18 what we call these "sham railroads" from
19 forming to becoming railroads simply to avoid
20 state and local regulations, these solid waste
21 facilities and their operators are not just
22 going to go away.

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1 What they're going to do is
2 they're going to partner with existing
3 railroads and when they started partnering
4 with existing railroads, then the Board will
5 still have the same problem we have today,
6 only because in 10906, the Board is going to
7 have very limited ability as far as we can
8 tell to do anything about it. Because as Mr.
9 Moates who was speaking this morning on behalf
10 of the Susquehanna was very candid about, the
11 existing railroads believe that the Board has
12 no power whatsoever to attach any conditions
13 or to impose any kind of regulation on so-
14 called 10906 facilities and while the Board
15 may and as it has been suggested could attach
16 conditions to the granting of a license or
17 authorization to a new facility, it can't do
18 that with an existing facility. That's the
19 regulatory gap that Commissioner Mulvey
20 mentioned in this dissent in the Staten Island
21 case and as far as we can tell, no existing
22 railroad, particularly not the Susquehanna,

1 has ever applied to the Board for any
2 authorization to build any of these facilities
3 including the facility that's in this picture.

4 They also say that we must deal
5 with these issues on a case-by-case basis and
6 there is some -- Obviously, the Board itself
7 has said the issue of preemptions has to be
8 dealt with on a case-by-case basis, but the
9 Board can and in our view, must, take a stand
10 here and issue guidance because this is a
11 problem that is going to -- It's not going
12 away. It's not going away for the states
13 certainly and it's not going away for the
14 Board either. The Board will embroiled in
15 these kinds of cases for a long period of time
16 unless it makes a ruling of general guidance
17 so that people know what the law is. So we
18 urge, New Jersey urges, the Board not to take
19 these cases on a case-by-case basis, but to
20 the extent possible and we think it is
21 possible, to issue broad guidance as to what
22 is preempted and what is not.

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1 Let me -- It is very difficult not
2 to reply to the very many things that were
3 said about the Jackson case and, in
4 particular, that the state has a vendetta
5 against railroads or that it has an agenda or
6 that it's seeking to keep rail facilities from
7 opening and that is just silly because the
8 State of New Jersey actually promulgated
9 special regulations for railroads, special
10 regulations that exempted railroads from the
11 licensing and permitting provisions that were
12 otherwise applicable to all other solid waste
13 facilities and instead only applied the same
14 substantive requirements to rail facilities as
15 it does to everybody else. It is not
16 discriminatory, it does not require permitting
17 and it does not interfere with rail
18 operations. It doesn't say -- It's not a --
19 situation. It doesn't say you can't put your
20 solid waste facility here. It says if you do,
21 be responsible and operate it in a responsible
22 manner.

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1 Now I can see my time is up and I
2 would like to at some point and perhaps I
3 would invite a question as to what we think
4 the solution to this issue is. But I will not
5 impose on the Board by going beyond my time at
6 this point. Thank you very much.

7 CHAIRMAN NOTTINGHAM: Thank you,
8 Mr. Monroe and panelists. I'm sure we have
9 questions. I want to give the Vice Chairman
10 the floor to start if you would like. Vice
11 Chairman Buttrey.

12 VICE CHAIRMAN BUTTREY: This
13 morning we heard testimony from the NET
14 witness that they had made numerous attempts
15 or some attempts, some number of attempts, to
16 get some kind of response from the State of
17 Massachusetts on their issues in trying to
18 create a dialogue if you will. If I heard you
19 correctly, you said that that was inaccurate,
20 that that statement was inaccurate and then
21 you enumerated, I think, then what you had
22 done to try to be responsive to their

1 requests. Can you enlighten us a little bit
2 on what it was that they were proposing to you
3 that was causing you trouble at the time?

4 MR. COLMAN: Let me just be clear.
5 It is -- We did have discussions. They did
6 approach us. What I meant to say that was
7 incorrect was that we never responded. We did
8 respond. We did respond with a meeting, at
9 least one meeting, and in follow-up telephone
10 conversations between our attorney who
11 received the letter of October 14th and with
12 the attorney who wrote it.

13 Our concern with what they had
14 offered was frankly twofold. One was since we
15 felt that they were not exempt it wasn't clear
16 to us how far we should go in having a
17 conversation assuming they would be exempt
18 which is obviously what they wanted to assume.
19 That's one. And even if it turns out that we
20 are preempted, our concern was how would you
21 ever enforce such an agreement and what we
22 asked them was give us a proposal, give us a

1 framework, give us a structure, where if we go
2 out and conduct an inspection and we find a
3 violation of whatever is in the agreement how
4 do we get that fixed? What tools does the
5 Commonwealth have? In every other case, we
6 have tools such as notice of noncompliance.
7 We have administrative penalties. We have
8 administrative consent orders.

9 They did not come back with "Well,
10 here's a framework where we would be
11 accountable and here's how we would hold
12 ourselves accountable." They made a promise
13 that they would do a good job but they didn't
14 come forth with any mechanism, any tools, by
15 which they would be held accountable.

16 VICE CHAIRMAN BUTTREY: Does
17 Massachusetts have any kind of moratorium in
18 effect now in terms of permitting new solid
19 waste facilities?

20 MR. COLMAN: No. No, we do not.

21 VICE CHAIRMAN BUTTREY: You do not
22 have a moratorium in effect?

1 MR. COLMAN: No.

2 VICE CHAIRMAN BUTTREY: How many -

3 -

4 MR. COLMAN: I'm sorry. We do
5 have a moratorium on usable waste combusters.

6 VICE CHAIRMAN BUTTREY:
7 Incinerators?

8 MR. COLMAN: Yes.

9 VICE CHAIRMAN BUTTREY: Okay. So
10 there's a moratorium on those.

11 MR. COLMAN. Yes

12 VICE CHAIRMAN BUTTREY: No
13 moratorium on non-incinerating facilities.

14 MR. COLMAN: No. In fact we have
15 as I pointed out 11 permitted C&D processors
16 and three more in the process right now.

17 VICE CHAIRMAN BUTTREY: You have
18 three permits pending at the moment.

19 MR. COLMAN: Correct.

20 VICE CHAIRMAN BUTTREY: But they
21 are not adjacent to a railroad.

22 MR. COLMAN: I don't know where

1 they are.

2 VICE CHAIRMAN BUTTREY: And
3 they're not claiming to be a railroad.

4 MR. COLMAN: No.

5 VICE CHAIRMAN BUTTREY: Okay.
6 That's it for the moment, Mr. Chairman.

7 CHAIRMAN NOTTINGHAM: Mr. Mulvey,
8 do you want to proceed?

9 COMMISSIONER MULVEY: Sure. In
10 the case of Massachusetts and the NET
11 facility, there is this issue of siting this
12 facility and Representative Miceli was saying
13 that they don't want this facility in Woburn
14 or the Wilmington area. They want it
15 someplace else and is that the view of Mass
16 DEP also that this facility should not be
17 built here. It should be built someplace else
18 and is that really what this is all about,
19 where it's being sited?

20 MR. COLMAN: No, that is not our
21 view. We have a process whereby a facility,
22 an entity, that wants to site a solid waste

1 facility comes forth with a plan and a
2 proposal and the first step in the process is
3 an application to the local board of health.
4 Every city and town in Massachusetts has a
5 board of health. When they make that
6 application to the board of health, they
7 submit to the Department at the state level
8 what's called a site suitability report which
9 explains sort of are there sensitive receptors
10 nearby, are there wetlands, sort of all those
11 site related things, not the specific
12 operations of the facility, but sort of to the
13 site.

14 The Department then issues a site
15 suitability report, an answer, whether we say
16 either yes, we believe it's suitable or no, we
17 do not. If we believe it is suitable, then it
18 goes to the board of health for a public
19 hearing. If the board of health approves it,
20 it gets what's called a site assignment at the
21 local level and then it comes through the
22 Department for a permit to operate.

1 Our view of this facility like any
2 facility is if and when they ever made an
3 application to us we would take a look at it
4 and make a decision on its merits as to
5 whether or not this was a good site or not a
6 good site. Mass DEP absolutely does not have
7 any kind of prejudgment as to the suitability
8 of this proposal at this location from a site
9 suitability perspective.

10 COMMISSIONER MULVEY: But it would
11 be a state decision, not a local decision
12 ultimately. It will be a Mass DEP decision

13 MR. COLMAN: It's both. If the
14 board of health says it is -- If the board of
15 health denies the site assignment, then I
16 believe the recourse is to court.

17 COMMISSIONER MULVEY: Okay. New
18 England Transrail has said that while they are
19 willing to comply with all the conditions that
20 you would impose on how they operate the
21 facility, would it be possible for us to
22 bifurcate this thing and say we will regulate,

1 we will preempt, the rail aspect of this, the
2 pure rail aspect of it, but the things that go
3 on inside of these sheds, the floor, the
4 dumping floor and all of that, that would be
5 regulated by Mass DEP and that they would be
6 subject to all your regulations. Would we be
7 able to delegate enforcement authority to Mass
8 DEP or would they have to come back and get
9 enforcement authority from us if there are
10 problems?

11 MR. COLMAN: I'm not an attorney.
12 So I can't answer that. It sounds like a
13 legal question to me.

14 COMMISSIONER MULVEY: I'm not an
15 attorney either.

16 MR. COLMAN: Maybe we should
17 decide. I guess I would ask the question in
18 that situation how we would be able to take
19 enforcement action. If they were in
20 noncompliance, what would the recourse be?
21 Would we have to come to the Surface
22 Transportation Board every time we had a

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1 disagreement and come down here to a hearing
2 with you and you would adjudicate whether our
3 inspector was right or whether their claims
4 are right? I don't know.

5 I can't -- I'm having a lot of
6 trouble sort of grasping in my mind exactly
7 how that would work. I suppose if you went in
8 that direction, and I don't suppose, we would
9 absolutely try and work with you on it, but I
10 don't see the framework and maybe an attorney
11 here could provide a framework of what holds
12 them accountable.

13 COMMISSIONER MULVEY: The Attorney
14 General is next to you.

15 MS. LAM: I just want to clarify
16 if I understand your question correctly. You
17 would be preempting the rail operations.

18 COMMISSIONER MULVEY: In other
19 words, the operation of the railroad itself.
20 The loading of, the movement of, the railcars
21 and those parts of the operation. You
22 wouldn't be regulating that, but you would be

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1 regulating what goes inside the sheds.

2 MS. LAM: In other words, we won't
3 be preempted, that we'll be able to enforce
4 our regulations. I don't see any problem with
5 that scenario at all and if they choose to
6 proceed with the project then they will have
7 to comply with state regulations. If they
8 choose not to, I mean, that's up to them. But
9 the preemption issue should not be reliant
10 upon what they choose to do.

11 COMMISSIONER MULVEY: If they
12 were, it would be something along the lines of
13 when the cars can be loaded, when the cars can
14 move, those kinds of regulations that
15 sometimes these parties try to put on the
16 railroad which do affect interstate commerce
17 and the movement of the cars. That would be
18 preempted, but what goes on in terms of the
19 way the floor is maintained, the health
20 standards, the safety standards and all of
21 that, we would not preempt that. Is it
22 possible to make that kind of a division do

1 you think?

2 MS. LAM: I believe so because the
3 way they have proposed the project is very
4 specific that they will only do processing
5 within this one central area and we believe
6 that that could be --

7 COMMISSIONER MULVEY: The other
8 thing that the New England Transrail has said
9 they could never sign onto is this whole waste
10 ban and there was a long list given to us by
11 Representative Miceli about all of these
12 commodities, all of these materials, which the
13 State of Massachusetts is trying to recycle
14 and has said that these cannot be transferred
15 at waste disposal facilities which I think is
16 the kind of facility they would be operating.
17 So would you be precluding all of these
18 materials from coming into this transfer
19 station for this transloading session? I
20 mean, it's quite a long list of materials,
21 everything from batteries to wood to -- I
22 forget. I don't have the whole list in front

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1 of me, but it was quite a long list of
2 commodities that would be precluded.

3 MS. LAM: Not necessarily
4 precluded. I mean if they are proposing to do
5 processing within this facility and they
6 receive this type of material in complying
7 with the waste band regulation, they would
8 just have to pick those materials out and then
9 recycle them.

10 COMMISSIONER MULVEY: So they
11 would have to do the sorting and processing
12 and recycling by law at the facility. They
13 said they're not going to do that. They're
14 just going to take the materials and then bale
15 or shred it and then put it onto railcars so
16 that they can load the cars more efficiently.
17 But they're not going to do any sort of
18 separation for creating value-added and --

19 MR. COLMAN: May I respond to
20 that?

21 COMMISSIONER MULVEY: Yes.

22 MR. COLMAN: First of all, back to

1 your first question, on the premise that you
2 elicited with Ms. Lam that we would not -- I
3 believe you could separate out just the waste
4 processing piece from the rest. We're not
5 interested in the railcars, where they move,
6 how they move. We're interested in the
7 potential impacts from the waste being brought
8 in and handled.

9 To your second question, the way
10 waste bands tend to work is that facilities,
11 solid waste facilities, can either sort them
12 or they can tell people bringing the materials
13 don't bring us that. So, for example, we have
14 all the other solid waste facilities do
15 inspections of trucks coming in and say this
16 truck has over -- Like cardboard is a banned
17 material. If your truck comes in and it's 80
18 percent cardboard, they say we can't take it
19 and they send it back. There is no reason why
20 that couldn't be done at this facility as
21 well. We're not saying that NET has to do the
22 sorting. They can put that requirement on

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1 whoever is contracting with them like all the
2 other solid waste facilities do and say here's
3 a list of materials. You can't bring in loads
4 with more than de minimis amounts of those
5 materials in them.

6 COMMISSIONER MULVEY: Okay. To
7 New Jersey, I'm sure you're familiar with
8 Senator Lautenberg's amendment to our statute.
9 Do you support that as a solution to this
10 problem where he would exempt municipal solid
11 waste from the processing, from the activities
12 to be preempted?

13 MR. MONROE: Yes, we would
14 certainly support that and we think that would
15 likely solve the problem. But I think there
16 is a solution that the Board has already --
17 And the Board has for a long time found that
18 preemption under 10501(b) is not total, that
19 the states retain their police powers to
20 regulate on health and safety issues so long
21 as those regulations don't act as a bar to
22 rail transportation or unduly interfere with

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1 it. So, for instance, the Board has clearly
2 said you can't have health and safety
3 regulations that require a permit or
4 preclearance because that basically gives you
5 the chance to say the railroad can't do what
6 it wants to do. So in New Jersey, for
7 instance, under New Jersey's Solid Waste 2D
8 regulations, there are no such preclearance
9 permitting requirements for railroads.
10 Railroads can set up a solid waste transload
11 if they want.

12 The Board has also said that so
13 long as the health and safety regulations are
14 not discriminatory and they don't interfere or
15 unduly burden rail transportation that they
16 should be complied with and that certainly
17 makes a lot of sense. I mean we don't say
18 that railroads don't have to comply with the
19 criminal laws and the driver license laws and
20 all other kinds of common state laws which
21 apply to everybody and have nothing to do with
22 rail transportation and don't interfere with

1 rail transportation.

2 Now there are obviously -- And I
3 believe that's what the, I forget his name,
4 counsel for NET, I think, was talking about.
5 There doesn't have to be a regulatory gap
6 because the way in our minds, the way this
7 should work, trams should work, is that
8 railroad should be required to comply with
9 normal, everyday state regulations that
10 everybody else complies with unless there's a
11 reason not to be and in this proceeding and in
12 all the papers that I've seen, no one to my
13 mind has ever described why a railroad can't
14 comply with these very basic health and safety
15 "don't dump mercury in the ground or in the
16 groundwater" and "don't pollute the air."
17 Everybody else in the state who operates
18 similar kinds of facilities are able to comply
19 with it. Why is the railroad -- Is there a
20 transportation reason the railroad cannot do
21 that? I don't know of one.

22 COMMISSIONER MULVEY: The

1 railroads are different in lots of areas.
2 They don't have to follow the Worker's
3 Compensation Laws. They have their own
4 compensation law system. There are a whole
5 bunch of things. The Railroad Labor Act
6 differs from the National Labor Relations Act.
7 I mean railroads are treated differently from
8 other industries for all kinds of reasons.

9 MR. MONROE: That is true but --

10 COMMISSIONER MULVEY: Is it also
11 true that municipal solid waste is also
12 somewhat unique? There is a real concern that
13 if we move away from preemption in this area
14 that could threaten the ability for railroads
15 to operate their networks efficiently in other
16 areas and other things would also be
17 challenged. Other transloading operations
18 will also be challenged or are you arguing
19 that municipal solid waste transloading is
20 different because of the health and
21 environmental reasons?

22 MR. MONROE: It's different for

1 two reasons, one because of the severe and
2 serious health implications and environmental
3 implications. But it's also true because
4 unlike some of the areas that you just
5 mentioned this is an area that Congress has
6 left to the states. There are no Federal
7 solid waste laws. If the Board is going to
8 rely on Federal law to regulate solid waste
9 stations, there's nothing there. Congress
10 left this entire area to states to handle and
11 the states have handled it for the last 30 or
12 40 years and they've done a pretty good job of
13 cleaning up places across the country which
14 looked a lot like that, that photo
15 (Indicating).

16 So, yes, solid waste is
17 fundamentally different and I read the
18 comments from a number of parties and
19 interveners in this matter that suggest that
20 if the Board does anything with respect to
21 preemption it's going to endanger transloading
22 of coal or sugar or ore or anything else and

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1 I don't see how that -- No one has explained
2 how that would happen. The fact of the matter
3 is the reason this is before the Board now and
4 it's been before the Board before and it's
5 been before the courts in various places is
6 because this is a serious problem that has not
7 come up before and I think the Board's
8 existing precedent which basically says that
9 railroads should be good citizens and should
10 comply with the law unless there is a reason
11 for them not to, a transportation reason, that
12 that's what they should do and I think that's
13 the answer to the whole preemption issue.

14 COMMISSIONER MULVEY: Thank you.

15 CHAIRMAN NOTTINGHAM: Thank you,
16 Commissioner Mulvey. I have a few questions.
17 First, let me just recognize and thank Mr.
18 Ceberio for being here. I grew up in South
19 Orange, New Jersey

20 MR. CEBERIO: Okay.

21 CHAIRMAN NOTTINGHAM: And spent a
22 lot of time around the Meadowlands. I can't

1 actually say I've waded in them but certainly
2 enjoyed passing them and seeing them and
3 certainly the work that your commission has
4 done to restore the Meadowlands has been a
5 great success. I have close family members
6 who spend a lot of time in the environmental
7 movement in New Jersey and I appreciate the
8 work you've done.

9 MR. CEBERIO: Thank you.

10 CHAIRMAN NOTTINGHAM: Let me just
11 put something to rest for you because I think
12 Mr. Monroe basically answered one of your
13 biggest concerns about fire suppression. To
14 me, that's a classic example of police powers.
15 This Board has long recognized the importance
16 of police powers being exempt from preemption.
17 No one has ever been able to really
18 successfully challenge that supposition. So
19 we take that as black letter law and in my
20 view, a good faith reasonable fire suppression
21 system is directly related to protecting human
22 life and safety would be a classic item under

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1 there. If you have any situation in New
2 Jersey where there is not fire protection at
3 a rail facility that you're concerned about,
4 I strongly encourage you to figure out how to
5 fix that and let us know how we can help you
6 because there's nothing here that should stand
7 in the way of that.

8 MR. CEBERIO: Thank you.

9 CHAIRMAN NOTTINGHAM: So we should
10 just put that aside.

11 MR. MONROE: Mr. Chairman, could I
12 just mention something.

13 CHAIRMAN NOTTINGHAM: Sure.

14 MR. MONROE: The pictures of the
15 later facilities, after this one was closed,
16 some additional facilities were built with
17 building. Those buildings, those pictures of
18 the clean sites or they look like clean sites,
19 they don't have fire suppression equipment or
20 capacity. They were built that way because of
21 the railroad that build them felt that they
22 were subject to preemption and they don't have

1 to do that.

2 CHAIRMAN NOTTINGHAM: Well, I
3 can't give legal advice to your constituents,
4 but I would just say talk to your fire marshal
5 or your fire officials. If they have a good
6 faith reasonable concern that human life,
7 etc., property is not protected against fire,
8 I would say personally you have a strong
9 police power exemption and I would think you
10 would fare quite well in protecting your
11 interest there.

12 MR. MONROE: But, Mr. Chairman,
13 any statement from the Board if the Board were
14 to address that would certainly be helpful
15 because there is real uncertainty about the
16 scope of preempting and whether it even
17 includes fire suppression and if the Board
18 were to give some guidance even on something
19 as narrow as that, that would make a big
20 difference because we do have facilities now
21 today in New Jersey that do not have fire
22 suppression equipment and as you know, that

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1 not only endangers the surrounding community
2 and the workers but the fire fighters who have
3 to respond to fires.

4 CHAIRMAN NOTTINGHAM: I will say
5 this is the first I've heard of active concern
6 about lack of fire suppression at facilities.
7 I've certainly been to a number of rail
8 facilities. I've seen, while not there as a
9 fire marshal inspecting for fire suppression,
10 I've certainly seen and had explained to me
11 that railroads typically for their own
12 business reasons and insurance reasons have a
13 lot of incentive to protect their assets and
14 their people by installing fire suppression.
15 So if you have a concern there but you're
16 hearing from the Chairman of the Board right
17 now that the police power exemption to the
18 strong doctrine of preemption that Congress
19 enacted and that to answer your question about
20 what a wonder it is as to how we could be at
21 this state of affairs, I do commend your
22 attention to the statutes and the Congress

1 because the law is according to the City of
2 Auburn 9th Circuit case and other significant
3 cases in this area talk about these strong
4 statutory language and the importance of
5 acknowledging the plain meaning of the
6 statutory language and the words "solid waste
7 exemption" just aren't there. It doesn't mean
8 that we can't potentially figure out a way to
9 get to an outcome here that you might be able
10 to live with. But it's a struggle, but
11 certainly if you have a situation where there
12 is a problem with fire and legitimate police
13 powers and fire suppression being obstructed
14 due to someone saying the word "preemption"
15 please let us know.

16 MR. MONROE: Thank you.

17 CHAIRMAN NOTTINGHAM: And we'll
18 work with you to get to the bottom of it.

19 Moving along, I guess it was Mr.
20 Colman. You mentioned the importance of, and
21 we can appreciate this because we operate
22 largely under a fee collection system here.

1 I hazard a guess that this case is not earning
2 -- It's not paying for itself because whatever
3 fee we might have gotten from NET I think
4 we've well exceeded that. So we're
5 sympathetic to the importance of being able to
6 collect fees and do your job.

7 That being said though, this
8 really isn't about fees in your mind, is it?
9 I mean, you go after people presumably that
10 don't pay fees all the time because they're
11 rogues and they're operating out of the
12 system. That's what the taxpayers pay you to
13 do. Correct?

14 MR. COLMAN: That's correct, but
15 one of the things we do do is if we find a
16 rogue we have the ability to issue penalties
17 and bring them into the system in which case
18 they have to pay the fees they didn't pay.
19 But you're right. I don't mean to hold that
20 out as a major issue here. It was just
21 another example of what preemption could mean.

22 CHAIRMAN NOTTINGHAM: And

1 similarly is it fair to say if, and I'm not
2 speaking for them, NET in this case were to
3 offer to ante up whatever fees you would
4 normally collect, your concerns would not go
5 away. Correct?

6 MR. COLMAN: That's correct.

7 CHAIRMAN NOTTINGHAM: So it's
8 really not about fees, is it?

9 MR. COLMAN: No. To me, to us,
10 the key issue is who is accountable and how do
11 you hold them accountable.

12 CHAIRMAN NOTTINGHAM: Right.
13 Accountability. I understand.

14 MR. COLMAN: Right.

15 CHAIRMAN NOTTINGHAM: Do you have
16 any idea how many rail facilities in
17 Massachusetts actually ship municipal solid
18 waste or C&D material by rail? I just don't
19 know. It's not a trick question. I was just
20 wondering if you knew.

21 MR. COLMAN: I can think of at
22 least four that ship by rail. I don't know if

1 -- There are probably more, but I know of at
2 least four. I know that about 15 percent of
3 our solid waste is shipped out of state. I
4 would imagine most of that goes by rail. Not
5 much by truck would be my guess

6 CHAIRMAN NOTTINGHAM: And are all
7 of those -- The other ones that operate by
8 rail, are they all sort of what I would
9 describe as sealed container placed onto a
10 rail track, never opened or are they more
11 complicated than that?

12 MR. COLMAN: One is often sealed
13 containers put on the rail. Two of them
14 actually have site assignment and permits,
15 went through the process and they have a
16 contract with landfills in Ohio and they ship
17 out the waste to Ohio by rail. So there's no
18 issue there because they didn't request any
19 kind of preemption.

20 CHAIRMAN NOTTINGHAM: Okay. And
21 obviously as someone has dedicated your career
22 as it appears you have to protecting the

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1 environment, I want to ask you from a macro-
2 environmental perspective assuming all other
3 laws are being followed, do you think it's
4 better generally for the environment to have
5 more freight including waste shipped by rail
6 rather than by truck, thinking about sulfur
7 and diesel emissions that come out of multiple
8 trucks and rail typically is run by one engine
9 pulling a number of cars?

10 MR. COLMAN: Absolutely. Among
11 the other programs I run are our air program
12 and our automobile inspection and maintenance
13 program and diesel idling reduction program.
14 So certainly I'm aware that the more cars and
15 trucks we can get off the road the better off
16 we are which is why one of the reasons I said
17 in my opening remarks was we're not opposed to
18 rail transportation by any means.

19 CHAIRMAN NOTTINGHAM: Okay. Thank
20 you. A couple more questions. Bear with me.
21 Mr. Colman, I imagine, in fact I know, but
22 I'll ask anyway, does the Commonwealth of

1 Massachusetts host any U.S. Defense Department
2 facilities?

3 MR. COLMAN: Yes.

4 CHAIRMAN NOTTINGHAM: Do you have
5 unfettered regulatory authority over all the
6 activities of those facilities?

7 MR. COLMAN: We have actually
8 quite a bit of authority over those
9 facilities. I can't go into detail but I know
10 that we certainly have authority over the
11 clean-up when they are their own equivalent of
12 Superfund/CERCLA sites and we are working with
13 some of them on what to do with their -- A big
14 one on the Cape is they have a lot of water
15 pollution from explosives and from lead from
16 their practice range that we regulate them on.
17 In fact, we just had a large issue with the
18 Department of Defense over our level for
19 quarry contamination water from comes from
20 explosives. So we have a fair amount of
21 regulatory authority over Defense facilities.

22 CHAIRMAN NOTTINGHAM: . And

1 typically is your interaction with the Defense
2 Department more often than not a collaborative
3 one where you sit down and work out an
4 agreement because they certainly have certain
5 sovereignty protections. Correct?

6 MR. COLMAN: We try to make it
7 more often than not. It varies. Sometimes
8 it's more often. Sometimes it's not. But
9 right now, it's more often.

10 CHAIRMAN NOTTINGHAM: But they
11 enjoy certain sovereign immunity protections
12 that are based in statute and not unlimited
13 obviously --

14 MR. COLMAN: I couldn't enumerate
15 them but I'm sure they do.

16 CHAIRMAN NOTTINGHAM: And
17 similarly if you had a concern about
18 something, commercial air traffic. If you
19 didn't like the direction that a flight was
20 coming in to Logan, the state has pretty
21 limited ability to say we want that plane to
22 land at 2:30 p.m., not 2:45 p.m. It's

1 bothering us.

2 MR. COLMAN: My department has
3 nothing to do with air transportation. So I
4 have no knowledge about that.

5 CHAIRMAN NOTTINGHAM: I guess the
6 point is, I'm not trying to be cute, there's
7 the whole zone of activities that Congress in
8 its wisdom has decided is so important and for
9 other reasons that they should be regulated
10 primarily at the Federal level and rightly or
11 wrongly because I wasn't in Congress when
12 these laws were enacted, they are on the books
13 and we need to deal with them. Courts will
14 interpret them. This case may well be
15 appealed one way or the other and we have to
16 be real careful the way when we handle it that
17 we've not just wasted taxpayer money and time
18 by just walking into a loser appeal situation
19 and we are trying to figure out a way through
20 this thicket.

21 MR. COLMAN: That's certainly
22 fair. There are a lot of competing forces

1 here.

2 CHAIRMAN NOTTINGHAM: Now you
3 mentioned that Massachusetts has not yet
4 received an actual application from NET and,
5 of course, I'm sure their supposition would be
6 if they're preempted or protected by
7 preemption then an application in the
8 traditional sense wouldn't necessarily be
9 forthcoming. But isn't that -- I guess the
10 point I wanted to explore is we are pretty
11 early in the process. Right? Because I know
12 when I ask our staff here, what exactly is
13 going to go on at this proposed facility, they
14 point me to the record. I've gone through the
15 record. There's a lot of information in the
16 record. As you've pointed out, the record has
17 changed. The plans have evolved apparently.

18 But really what I'm getting to is
19 NEPA and the National Environmental Policy Act
20 and maybe I'll let Ms. Lam have an
21 opportunity. Ms. Lam, would you describe the
22 National Environmental Policy Act as a light-

1 handed environmental law or one that has some
2 pretty significant requirements to it and is
3 probably as I would describe it one of the
4 most useful laws for citizens and states and
5 localities to avail themselves when there is
6 a federal action involved that might impact
7 the environment?

8 MS. LAM: Yes. As I understand
9 NEPA if it's similar to the Massachusetts
10 equivalent, they don't actually deal with
11 permitting issues. They deal with, they're
12 looking at a facility or a site and they take
13 a look at all the environmental issues that
14 that's involved in that project and then they
15 look at each one and see how that would affect
16 the activities, the proposed activities, will
17 affect the environment there. But it doesn't
18 say in Massachusetts anyway -- I think it's
19 equivalent or similar to the NEPA. It doesn't
20 say -- They don't look at it in detail, in
21 such a detailed way, as such a permitting
22 process where they say this facility can be

1 permitted and say they will do this and they
2 will do that. They will only look at just
3 generally if they satisfy, if they actually
4 looked at, all the environmental issues and
5 try to address them. They don't actually look
6 at whether or not it actually adequately
7 addressed them. I think I see a difference in
8 just plainly relying on the NEPA analysis or
9 NEPA review of permitting a solid waste
10 facility.

11 I also wanted to just address
12 briefly your question to Mr. Colman earlier
13 about solving immunity issues dealing with the
14 Defense facilities and that there are certain
15 areas where the Federal Government has carved
16 out for them to be regulating, for example,
17 flyovers, you know, aviation. We're not
18 trying to -- We're not proposed to -- We're
19 not trying to intrude into the jurisdiction of
20 the Board here. We're not trying to regulate
21 transloading. We're not trying to regulate
22 the movement of railcars.

1 We are trying to regulate
2 processing of solid waste which is very, very
3 different and we're not trying to intrude into
4 an area that the Board is already regulating.
5 The Board, in fact, does not regulate over
6 solid waste processing facilities. So I think
7 that's one issue I want to point out.

8 And I also wanted to address that
9 there is going to be an environmental gap here
10 even if you're going to be reviewing this
11 partially under NEPA. After you look at all
12 the environmental issues and see what are the
13 environmental issues involved in this site,
14 you still need to look at for permitting
15 process whether or not -- what type of
16 controls they should have in protecting the
17 public and the environment. I don't believe
18 NEPA does that. I don't believe that the NEPA
19 process actually says you need to put in this
20 odor control here and you need to put in this
21 emission control here and you need to conduct
22 a number of inspections over a number of

1 months so that you are ensuring that you're
2 not going to create situations like litter or
3 rats. I don't think that NEPA can replace
4 this or be a substitute to state regulation
5 under the siting and the permitting
6 requirements. That's why we're here today.

7 CHAIRMAN NOTTINGHAM: Well, I know
8 Massachusetts has a lot of experience working
9 in and around NEPA. I will say we also have
10 a lot of experience working in and around
11 NEPA, major cases such as the DM&E Railroad
12 case that went up to the Circuit Court of
13 Appeals and we were in the end affirmed. We
14 win a lot more than we lose in that area. We
15 have a good team of expert lawyers and
16 practitioners in that area. I've worked with
17 NEPA in a number of jobs over the past years.

18 A key part of NEPA is, of course,
19 you get the public comment involved. You
20 actually talk about what the Federal action is
21 and what environmental consequences might
22 follow from that action and I guess I

1 described this is not to give a lecture on
2 NEPA, but to say that we don't know exactly
3 what is proposed for this project right now.
4 It's not actually the point in the procedural
5 process where we would naturally know every
6 detail. That's not to say we don't need to
7 know those details. We certainly do. Both
8 the states need to know. We need to know and
9 there's a time for that and it will come
10 through the NEPA process largely.

11 There will be especially in a case
12 like this a significant discussion and
13 inclusion of mitigation as part of any NEPA
14 process assuming we even get there because, of
15 course, NEPA could result in a no-action or a
16 no-approval finding before we even get to
17 mitigation and we will need to find the least
18 environmentally damaging, practicable
19 environmental alternative if we can even
20 approve one.

21 At that point is when I think we
22 would, I would submit if we were to assert

1 jurisdiction here, sit down with the parties
2 of interest, the proposer, NET, the state and
3 talk through right down the whole list of
4 concerns, what needs to happen, talk about
5 conditions and then decide whether those
6 conditions are just impossible for this Board
7 to oversee and we need to somehow under this
8 hypothetical yield preemption protection
9 altogether and just turn everything over to
10 the state or retain the preemption
11 jurisdiction and then delegate as much as
12 possible to the state. I heard the proposer
13 say there were about four fairly defined areas
14 that they see as largely nonnegotiable You
15 heard the list, the noise, because of the
16 overlapping Federal requirements. I think
17 there is the precertification and the site
18 selection review and then the recycling issue
19 which if I get it right they view as largely
20 economic regulation in nature and not of any
21 real public health concern whether they send
22 things to Ohio to get recycled or somewhere

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1 else.

2 But as I say, if the challenge to
3 the Board today to reject this application
4 because we don't know everything there is to
5 know about the proposal, that's an impossible
6 standard or level for any reasonable, I think,
7 proposer in the early stages of a project to
8 me in my personal view.

9 And I guess I want to talk about
10 the process. There have been statements on
11 the record from multiple parties about
12 attempts to have discussions. Mr. Colman, you
13 mentioned a return phone call to a lawyer.
14 How was that left and elaborate for me if you
15 can on your office's openness to actually
16 discussing which from Mr. Van Tine's
17 testimony, I heard him say loud and clear
18 everything is on the table for his client to
19 possibly sign on to and agree to with the
20 exception of possibly those four discrete
21 areas.

22 MR. COLMAN: I think as I said

1 earlier since we're caught in a little bit of
2 a bind there since we believe that this type
3 of activity should not be preempted. It would
4 be premature of us, I think, to sit down with
5 NET and work about -- and try and find out a
6 workaround to how we would deal with the
7 issues under preemption scenario.

8 So if the Board determined that we
9 were preempted, we would certainly sit down.
10 Then we would know what the rules of the game
11 are and we'd go forward and try and work out
12 the best way we can. But I think until the
13 Board -- until it's clear to us whether they
14 are in or out we're a little bit negotiating
15 against ourselves by sitting down with them to
16 figure out how it would work assuming that
17 they're correct and we're not and I think
18 that's how we left it.

19 CHAIRMAN NOTTINGHAM: Okay. Now
20 the state representative, Representative
21 Miceli, was here earlier mentioned his concern
22 that his constituents he believes and he spoke

1 for himself would not feel comfortable
2 whatsoever and not be supportive or would want
3 approval of what I'll call "a containerized
4 transload operation" with no dumping or
5 sorting or exposure to the air in any open way
6 of solid waste or C&D. Is that the position
7 of the state DEP that a container-to-
8 container, taking a container off a truck and
9 putting it onto a railcar and taking it out
10 into interstate commerce is unacceptable?

11 MR. COLMAN: No, in fact we have
12 in the Alston case we had discussions with
13 them. They explained what they were doing and
14 we determined that we had no jurisdiction
15 because that to us was clearly on the side of
16 being preemptive and if that's what a
17 proponent wants to do at this location, I'm
18 not sure other than if there were other issues
19 involved like wetlands or whatever, just
20 general construction things came up, we
21 wouldn't have any jurisdiction at all. So
22 that's not our issue.

1 CHAIRMAN NOTTINGHAM: One of the
2 things we're wrestling with is, this came up
3 earlier, just the reality that for many
4 decades if not over hundred years items that
5 are put in commerce that are basically lawful
6 items which I guess would include generally
7 speaking MSW and C&D but also lumber, bricks,
8 just name the whole list, very often get
9 dumped out of a truck onto the ground, maybe
10 lay in storage for a day or two until the
11 train comes and then get picked up in some
12 fashion or another and put onto a railcar and
13 taken away and I'm not aware of any case
14 anywhere that's actually found that any of
15 those activities are not integral to rail
16 transportation. So it's a struggle. The
17 question I guess that's being put to us and I
18 don't want to put words into your mouth but it
19 sounds to me as that might be true but we need
20 to find, this Board needs to find, today or
21 coming out of state hearing an exception to
22 that long-standing practice for MSW and C&D

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1 and only MSW and C&D and that it's a discrete
2 and defined activity that it would be
3 reasonable to just segregate and that the
4 statute allows us to do that. Is that -- I
5 don't want to state your view for you. Does
6 anybody want to -- I'll let anybody on the
7 panel jump in on that.

8 MR. MONROE: Well, Mr. Chairman --

9 MS. LAM: I --

10 MR. MONROE: I'm sorry. Go ahead.

11 MS. LAM: Go ahead. I would like
12 to say that we're not asking the Board to
13 create an exception out of what other railroad
14 facilities typically do. I think when -- as
15 proposed here and I think we have enough
16 information for the Board to make a
17 determination, they essentially process the
18 waste. They don't just put it in the -- They
19 dump it onto -- They don't just transload.
20 They dump it onto the ground. They manipulate
21 it. They sort it. And they actually
22 segregate materials and then they shred it.

1 They change the consistency. They change the
2 waste stream into processed waste versus
3 unprocessed waste versus material that could
4 be recycled and all of this material needs to
5 be handled differently.

6 In our view, we're not asking you
7 to create a new exemption or a new exception
8 for solid waste here, but to just look at the
9 facts of this case to make a ruling on whether
10 or not the processing activities.

11 CHAIRMAN NOTTINGHAM: I'm not an
12 expert on the operations on any of these
13 transload facilities, but we've heard a lot
14 about it today and maybe by the end of the
15 day, I'll be almost an expert. But let's just
16 talk through this because it doesn't sound
17 that complicated.

18 A truck pulls up, pulls into a
19 building, dumps a bunch of miscellaneous
20 construction and demolition debris onto a
21 concrete floor and it sits there for 12 hours.
22 Somebody comes by with some type of, a piece

1 of equipment, maybe looks like that red piece
2 of Daewoo equipment in the picture there and
3 picks up the material and deposits it a
4 railcar for transportation. Nothing else is
5 done to the material. Is that waste
6 processing in your view?

7 MS. LAM: Under Massachusetts
8 regulation, it is waste processing.

9 CHAIRMAN NOTTINGHAM: Just
10 strictly the depositing on the ground is
11 processing or is it the picking up or is the
12 fact that -- Help me understand. Why is that
13 processing?

14 MS. LAM: It's a handling facility
15 and in Massachusetts, when you handle waste,
16 the regulation governs how you handle the
17 waste, whether or not it increases dust. So
18 when we regulate, we want to make sure that it
19 doesn't create too much dust. So when an
20 activity creates that kind of condition, a
21 nuisance condition, it falls within
22 Massachusetts regulations.

1 CHAIRMAN NOTTINGHAM: And so if
2 the next thing the proposer wanted to do was
3 once the material is deposited on the ground
4 to immediately wrap it in some type of plastic
5 coatings in order to both make it easier to
6 move, but also to protect it from blowing out
7 or falling out of a railcar, to basically
8 contain it for transportation adding no value
9 to the material, is that processing in your
10 view and that could include baling, I guess,
11 or some type of -- or wrapping.

12 MS. LAM: Yes. I mean if it's
13 baling the municipal solid waste we argue that
14 it is part of processing. First, they don't
15 need to do that in transloading. They can
16 just dump it into the railcars. There is no
17 need for baling.

18 And I guess the example you gave
19 really depends on how they do it. If they're
20 going to wrap -- If they dump it into a rail
21 -- If they transload the material from the
22 truck to the railcars and then covers it up

1 which is controlling the dust, that sort of
2 goes as part of your example, I think that
3 would be transloading. But if they manipulate
4 it in certain ways, I believe that would be
5 processing.

6 CHAIRMAN NOTTINGHAM: If I hear
7 you correctly, Ms. Lam, you have kind of an
8 almost necessity test. In other words, if you
9 go to a rail transload facility or rail yard,
10 there is probably a number of ways different
11 commodities can be moved. They can be moved
12 like one piece of wood at a time or bundled
13 up. Obviously, railroads are interested in
14 economies of scale and bundling up commodities
15 and making sure that they can put the most
16 material possible into a car and then taking
17 it out. It seems to make sense from a
18 business proposition.

19 If I hear you correctly since it's
20 per se scientifically required to bundle or
21 bale because everything could just be dropped
22 somehow, although it can't be dropped on the

1 ground if I heard you correctly, but it could
2 be potentially a claw could come down. Let me
3 ask you this. If the situation was the piece
4 of equipment, that red Daewoo equipment in the
5 picture there, reached into the truck cargo
6 contained, plucked out without dropping a
7 single piece of paper or anything else a bunch
8 of MSW or C&D and put it into a train car
9 without dropping a thing, is that processing?

10 MS. LAM: No, that is not
11 processing.

12 CHAIRMAN NOTTINGHAM: That's not
13 processing because it wasn't disturbed or
14 touched or how is that different from being
15 placed on the ground for a little while and
16 then being put in?

17 MS. LAM: I guess when you put it
18 on the ground it creates a lot of nuisance
19 issues, pollution issues and one of the things
20 I think Mr. Monroe mentioned that this is as
21 a policy matter you need to consider the
22 nature of solid waste in this analysis and it

1 creates such a nuisance condition that is
2 traditionally regulated by the state. That is
3 one of the facts that you need to look at.

4 In terms of -- I mean going back
5 to your example of just leaving it there, I
6 think if the Board conditions, if you
7 authorize this project, conditions, put some
8 conditions on how long they can leave it there
9 and controlling nuisance issues I think our
10 position is that as long as they don't do any
11 kind of processing and manipulating it and
12 sorting it and grinding and shredding it that
13 we would concede that it would constitute
14 transloading.

15 CHAIRMAN NOTTINGHAM: I'm sorry.
16 Could you repeat that? What would constitute
17 transportation or inherent to transportation?

18 MS. LAM: If they do not process
19 in such way that they manipulate it, grind it,
20 segregate it, sort it or even bale it, I would
21 think that as long as they're just doing it
22 for temporary storage and then moving it onto

1 the railcars, I think we can grant that that
2 is actually transloading.

3 CHAIRMAN NOTTINGHAM: Okay. So if
4 it's temporarily stored, if it's put on the
5 ground and temporarily stored and then picked
6 up and -- I'll ask that for the third time
7 because I'm getting some different answers
8 here.

9 MR. COLMAN: Well, I mean, we're
10 really parsing through obviously what --

11 CHAIRMAN NOTTINGHAM: This is what
12 it's all about though.

13 MR COLMAN: I understand and
14 exactly where the line falls is difficult. I
15 think I might give slightly different
16 emphasis. In Massachusetts, we have transfer
17 stations and we have processing stations.

18 Transfer stations bring in the
19 waste. They don't do anything to it. They
20 move it from one container to another
21 container. It generally is consolidation,
22 which was suggested here. And it moves

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1 usually by truck.

2 I think we would probably make a
3 distinction between transfer and processing on
4 a case-by-case basis. Exactly where that line
5 would draw would be a little bit -- I wouldn't
6 want to necessarily do that in the abstract.
7 I mean, but clearly there is a line there
8 somewhere.

9 And if it were what I would call
10 transferring, we would probably have to -- we
11 would probably concede that that is not
12 processing. We would concede that is not
13 processing. There is a difference.

14 I don't know if this is helping
15 you or confusing you more. But --

16 CHAIRMAN NOTTINGHAM: Well, it's
17 helping me because I think it gives me a
18 little more full appreciation of what it must
19 be like to actually make an application
20 frankly before you. I mean this would be very
21 frustrating if I were a legitimate, honest
22 business person.

1 These would be the questions I
2 would have, right? I'm trying to follow the
3 law. If I'm going to put this lawful material
4 that for hundreds of years have been laid on
5 the ground for a period of time and picked up
6 and put on, you know, is that transportation?
7 Or is that processing?

8 And I'm getting multiple answers
9 from two people on the same team. And it is
10 -- and that's what this case is really all
11 about, right? I mean this is what -- you
12 aren't surprised to get these questions, are
13 you?

14 MR. COLMAN: No, I think that
15 someone coming to us and applying for a
16 permit, there is generally not much confusion
17 about what they are doing. It is pretty much
18 the same permit.

19 I think in this context by getting
20 -- and rightfully so, getting to such a --
21 parsing so carefully through the difference
22 between transferring and processing, we raise

1 all these questions out in the real world with
2 real people doing -- putting up these
3 facilities, it really doesn't come up that
4 much.

5 We don't have a lot of -- other
6 than this context, a lot of discussion or
7 disagreement about whether someone is a
8 transfer station or a processing station.

9 CHAIRMAN NOTTINGHAM: If you
10 assume -- let's just work with me here --
11 assume that it is no longer a real
12 disagreement that in a hypothetical case we're
13 talking about a rail carrier. Let's just put
14 that part of this controversy to the side for
15 the time being.

16 So we're talking about a
17 universally agreed, recognized rail carrier.
18 And do you recognize that federal law treats
19 legitimate rail carriers quite differently
20 than rank and file businesses out in the
21 community that are not rail carriers?

22 MR. COLMAN: Yes, absolutely.

1 CHAIRMAN NOTTINGHAM: And that's
2 something you all just emanate from things
3 this Board has made up? That's mostly rank
4 and statute? Case law?

5 MR. COLMAN: Yes.

6 CHAIRMAN NOTTINGHAM: Good because
7 I'm going to ask you a few questions here and
8 I think you will see the hopefully the logic
9 why I would ask because a lot of activities
10 happen at rail yards. They are relevant to
11 rail transportation. It's not just trains
12 moving through in sealed containers. These
13 are like industrial parks unto themselves.

14 Let me give you an example. I
15 imagine out in the economy, the general non-
16 rail economy of Massachusetts, Mr. Colman, the
17 DEP keeps an eye on or maybe a sister agency
18 on something -- a business such as a fuel
19 yard.

20 If somebody had a bunch of fuel
21 tanks and was regularly filling up vehicles
22 with diesel fuel and had a lot of fuel lying

1 around in storage and stuff, that is something
2 that is probably regulated to some degree,
3 isn't it at the state level?

4 MR. COLMAN: Correct.

5 CHAIRMAN NOTTINGHAM: Okay. Large
6 engine repair facilities where battery acid is
7 potentially exposed, oils, fluids, coolants,
8 would large commercial engine repair and
9 service facilities be regulated by your agency
10 or another agency?

11 MR. COLMAN: By my agency only to
12 the extent that they generate hazardous waste
13 or air emissions. We would not otherwise
14 regulate them as just an industrial activity.

15 CHAIRMAN NOTTINGHAM: Partially
16 regulate them, I guess, maybe?

17 MR. COLMAN: Well, to the extent
18 they have air emissions that are subject or to
19 the extent that they are a small or large
20 quantity hazardous waste generator, we would
21 regulate them.

22 CHAIRMAN NOTTINGHAM: If a non-

1 railroad business wanted to store a chlorine
2 tanker container somewhere, would somebody in
3 the State of Massachusetts governmental regime
4 have something to say about that? Off
5 railroad property?

6 Let's say it was a water plant
7 that used chlorine for legitimate purposes
8 but, you know, do you have storage and
9 handling requirements for things like chlorine
10 gas or chlorine?

11 MR. COLMAN: I'm not aware that we
12 do. We don't at Mass DEP we don't.

13 CHAIRMAN NOTTINGHAM: Nuclear
14 waste, if something came down from New
15 Hampshire or something and was stopped at a
16 private non-rail facility in a truck or
17 something, some state level of environmental
18 concern or regulation?

19 MR. COLMAN: I don't think so.

20 CHAIRMAN NOTTINGHAM: I'm
21 surprised to hear that actually. Anyway --

22 MR. COLMAN: Not by us. I can't

1 speak for other agencies.

2 CHAIRMAN NOTTINGHAM: I ask these
3 questions not to be cute or difficult. It is
4 just there are a whole gambit of long-standing
5 I would say controversial for sure, troubling
6 in many respects to many people, but actually
7 in protected and legitimate activities when
8 done in the course of rail transportation.

9 And it doesn't mean states
10 shouldn't be concerned about them. You
11 absolutely should. And you are. And there
12 are other venues and other controversies in
13 this town and bills and things we need to
14 discuss are being had.

15 But I just point this out because
16 let's say we get this case just right and all
17 the parties go away happy somehow miraculously
18 -- the state especially -- and then we have
19 the next case. And it is not solid waste but
20 it is something else that is being moved in
21 rail transportation that the state has got a
22 legitimate reason to not be happy about.

1 Where do we go? Does this Board
2 really have the ability, the discretion to
3 just pick and choose which ones we think
4 Congress meant not to include when they said,
5 and I'll quote, from the Ninth Circuit, a
6 Circuit certainly not known for its
7 insensitivity to the environment, City of
8 Auburn case not too long ago, 1998, We find
9 that the plain language of the two sections of
10 the ICCTA [Interstate Commerce Commission
11 Termination Act] explicitly grant the STB
12 exclusive authority over railway projects....

13 "Section 10501 of the ICCTA, which
14 governs the STB's jurisdiction, states the
15 Board will have exclusive jurisdiction over
16 'the construction, acquisition, operation,
17 abandonment, or discontinuance of spur,
18 industrial, team, switching, or side tracks or
19 facilities,' even if the tracks are located,
20 or intended to be located, entirely in one
21 State."

22 "The same section states that

1 'the remedies provided under this part with
2 respect to regulation of rail transportation
3 are exclusive and preempt the remedies
4 provided under Federal or State law....The
5 section unambiguously states: 'The authority
6 of the Board under this subchapter is
7 exclusive.'"

8 The case goes on to say there is
9 nothing in the ICCTA that shows that Congress
10 intended only to preempt economic regulation.
11 It is a significant case but I just -- this
12 what we're struggling with. And I'll invite
13 any of the witnesses here to try to help me
14 sort this out.

15 MR. MONROE: Well, Mr. Chairman,
16 I'd like to comment on that because I think it
17 was in the Auburn case, in the Board
18 proceeding in the Auburn case where -- I think
19 it was the Board and I could be confused on
20 the case but I know the Board has said that,
21 for instance, whereas states have no ability
22 to permit or to require preapprovals on rail

1 construction projects -- that's within the
2 exclusive jurisdiction of the Board -- the
3 states do have authority to penalize and fine
4 or otherwise stop railroads from, for
5 instance, and I think in the Auburn decision,
6 said that they were dumping things into a
7 waterway.

8 That's a distinction which I think
9 is relevant to the solid waste situation.
10 From our perspective, it is not a question of
11 whether it is rail transportation or not so
12 much as it is a question of -- you know
13 municipal solid waste and C&D waste and other
14 kinds of waste are a dangerous commodity.

15 And at least in New Jersey, New
16 Jersey does not claim that it has the power to
17 say you cannot have a solid waste transload
18 station here. Or you cannot have one at all.
19 It doesn't take that position.

20 Quite the contrary. It enacted
21 its 2D regulations which said, you know, when
22 you do this, just do it safety. And so it

1 doesn't really matter where you draw the line
2 on transportation, whether it is, you know,
3 whether you dump it on the ground or you don't
4 dump it on the ground. So long as you do it
5 safety, there shouldn't be a problem.

6 And with respect to --

7 CHAIRMAN NOTTINGHAM: Can I just
8 jump in -- I'll let you finish --

9 MR. MONROE: Sure.

10 CHAIRMAN NOTTINGHAM: -- but just
11 while you are on that thought -- so in New
12 Jersey, it might be allowable to bring in by
13 truckload C&D or other material, deposit it on
14 the floor of a building and then pick it up
15 and put it on to a railcar to be delivered, it
16 might be allowable if it is done safely in
17 your view?

18 MR. MONROE: Well, it is
19 allowable.

20 CHAIRMAN NOTTINGHAM: Okay.

21 MR. MONROE: I mean that is what
22 the 2D regulations say. The 2D regulations

1 say, you know, if you want to have a transload
2 station where you are handling solid waste,
3 you have to -- basically you have to follow
4 the same substantive standards that everybody
5 else does.

6 Make sure it doesn't pollute the
7 air, have an air pollution system. Make sure
8 that if there is storm runoff or waste runoff
9 water, it doesn't run off the pad and into the
10 soil or into the nearby streams. It's not --
11 make sure you have a fire suppressant system.
12 Make sure that your building meets building
13 codes.

14 CHAIRMAN NOTTINGHAM: And let's
15 follow -- let's continue with just the typical
16 transactions that we are talking about because
17 there weren't that many earlier today when we
18 were talking -- hearing from the proposer what
19 types of activities they have in mind
20 potentially.

21 It was the depositing on the
22 ground and picking up. I heard baling. I

1 heard potentially wrapping. Are those things
2 unto themselves, baling and wrapping, does
3 that amount to processing in your mind? That
4 takes this out of the ambit of transportation
5 and puts it in the ambit of processing?

6 MR. MONROE: I think we think it
7 probably does. But in New Jersey it doesn't
8 make any difference because if your facility
9 -- if you are a rail carrier, a recognized
10 rail carrier, and your facility is a safe
11 facility and it meets the very fundamental --
12 and these are minimum requirements, these are
13 not, you know, special requirements, the
14 minimum requirements for handling solid waste
15 so that you don't pollute the environment, you
16 don't pollute your employees or the
17 surrounding neighborhood, and they are
18 applicable to everybody else, if you do that,
19 then you are fine.

20 New Jersey does not have an
21 agenda, as was suggested earlier, or a
22 vendetta against rail transfer stations or

1 rail transload stations. Quite the contrary.
2 Everybody I think sitting at this table and
3 probably anybody who has a brain realizes
4 that, you know, transporting solid waste by
5 rail is a lot better than having, you know,
6 five times as many trucks on the road.

7 And New Jersey does not want those
8 trucks on the road. All New Jersey wants is
9 for railroad, if they want to be in this
10 business, if they to transload, to create a
11 transload, just do it safely.

12 CHAIRMAN NOTTINGHAM: We have a
13 number of people presumably following this
14 proceeding both here in the room that I can
15 see and also over the webcast. If a law
16 abiding, well-intentioned business person
17 thinking about getting involved with rail
18 transportation or adding a line of business of
19 rail transportation were listening today, do
20 you think that person should come away feeling
21 that Massachusetts and New Jersey are
22 completely on the same page with how they

1 would answer questions such as the ones I
2 posed about depositing C&D material on the
3 ground temporarily? And then picking it up
4 and putting it -- is that processing or not?

5 Because I heard a different answer
6 from you. And, of course, states have a right
7 to have a different answer. You are speaking
8 for your state. I respect that. I just want
9 to understand, though. There doesn't seem to
10 be a one-size-fits-all approach that each
11 state is comfortable accepting on this.

12 MR. MONROE: I really don't know
13 what Massachusetts law is. And I can't speak
14 for them.

15 CHAIRMAN NOTTINGHAM: Well, we
16 have the Attorney General here. She gave us
17 a pretty clear -- well, I don't know if it was
18 clear but she gave us several responses to the
19 very same questions.

20 MR. MONROE: But I guess what I
21 would say to Mr. Chairman that in New Jersey
22 -- New Jersey has dealt with the situation in

1 an entirely different way. New Jersey looked
2 at the Board's precedents with respect to
3 preemption and said look, we understand that
4 our normal permitting and preauthorization
5 requirements are not going to apply to
6 railroads. They are going to be preemptive.

7 And so rather than worrying about
8 that, they crafted a set of regulations which
9 apply to substance standards and meets what we
10 understood to be the Board's very established
11 precedent that so long as it doesn't require
12 preapproval, so long as it is a health and
13 safety regulation pursuant to police power, so
14 long as it is not discriminating against
15 railroads or interstate commerce, and so long
16 as it is not interfering with rail
17 transportation, it is not preempted.

18 And there is no reason why -- from
19 our perspective, there is no reason why it
20 should be. It doesn't really matter in New
21 Jersey where you draw the line in terms of
22 whether it is processing or not. If you are

1 doing it safely, it doesn't matter.

2 CHAIRMAN NOTTINGHAM: Okay. I do
3 want to get to my colleagues. And I do
4 appreciate their bearing with me. And this
5 will be my last question.

6 To Massachusetts, to Mr. Colman, I
7 heard reference to a requirement in
8 Massachusetts for sorting for recycling
9 material. How does that work? In other
10 words, if a truckload of MSW pulled up to an
11 otherwise lawful facility but had some
12 recycling material in there and the operator
13 wanted to follow -- if I heard this correctly
14 -- the mandate to sort for recycling, how do
15 they do that in the course of transportation
16 without automatically stumbling into the
17 processing trap?

18 MR. COLMAN: I'm not sure about
19 the processing trap situation but they come in
20 to say a municipal solid waste or C&D
21 processing facility or a landfill. If that
22 truck has more than a de minimis amount of a

1 waste -- a banned material, then they have a
2 couple of choices.

3 They can -- if it is not
4 completely mixed in -- when it gets dumped on
5 the floor, they can separate it out, and they
6 do and they put it off to the side and they
7 put it aside for recycling

8 They can tell that particular
9 hauler that they won't take that load. Or if
10 in the practical situation they let it go and
11 give a report to us and then we try and get in
12 touch with the generator and encourage the
13 generator to separate the material at the
14 source.

15 CHAIRMAN NOTTINGHAM: So to follow
16 that mandate, they would have to, practically
17 speaking, probably have to dump the stuff out.
18 It is kind of hard to reach in from the top of
19 the truck and really find everything. Dump it
20 out on the ground. Make a good faith effort
21 to sort out the recycling. And then scoop the
22 stuff up and put it in the train.

1 If they did that all in lickety
2 split -- you know about as sanitary an
3 environment as possible, if I follow this
4 description, that is still processing. And I
5 hate to use the word trap but, you know, trap
6 is when you get ensnared in something that you
7 didn't see because it is sort of hard to
8 recognize.

9 And based on the -- you know, it
10 almost has the trappings of a trap. I mean
11 how does one engage in transportation if they
12 want nothing to do with processing. They have
13 no intent to be a processor. They just want
14 to abide by different standards that they have
15 entered into presumably.

16 If we go down the route of
17 conditional approval, if we were to do that or
18 delegating some authority to the state to help
19 us with this, how do they meet their recycling
20 set aside requirements and not dump something
21 out and do a little bit of sorting, which, Ms.
22 Lam says, instantly puts you into processing.

1 MR. COLMAN: Well, for example, in
2 the Austin situation, they bring it in in
3 sealed containers and it goes off. And we --

4 CHAIRMAN NOTTINGHAM: But they
5 don't sort, they just -- they don't know if
6 there is any recycling concealed.

7 MR. COLMAN: Right. It is our job
8 to get back to the -- at some point, it got
9 into a sealed container. And was brought to
10 the rail yard. So at some point at the site
11 of generation or at the site of consolidation,
12 in that case I don't know where it exactly
13 comes from, either the generator or the hauler
14 is responsible for reducing to the maximum
15 extent possible the sending of recycled
16 materials for disposal.

17 CHAIRMAN NOTTINGHAM: And so if
18 the hauler wanted to in a good faith manner
19 abide by that and actually separate out, how
20 could he or she do that without being
21 classified as a processor under Ms. Lam's
22 definition?

1 MR. COLMAN: By working with his
2 customers before he picks up and say okay, I
3 want three bins here. I want one bin for the
4 MSW. I want one bin for the non-recyclable
5 C&Ds. And I want another bin for everything
6 that is recyclable.

7 And now I'll get three trips
8 instead of one. And I'll take the recyclables
9 and sell them. And I'll take this other part
10 for disposal.

11 It works very well. We really
12 don't have a problem with it.

13 CHAIRMAN NOTTINGHAM: Okay. I'll
14 yield. I appreciate the patience of my
15 colleagues.

16 Vice Chairman Buttrey?

17 MS. LAM: If I may, Mr. Vice
18 Chairman?

19 VICE CHAIRMAN BUTTREY: Ms. Lam,
20 certainly.

21 MS. LAM: Sorry. I just want to
22 clarify my confusing answer earlier. I just

1 want to make sure that we understand that when
2 I say processing activities, and that's
3 governed by state law, there is several --
4 solid waste is handled many different ways.

5 There's the transfer of the solid
6 waste. And the transfer station is also
7 governed under Massachusetts law. And then
8 there is a processing facility that is also
9 governed under Massachusetts law.

10 As proposed, the project is
11 proposing to process. They did not propose it
12 in such a way they would just dump it, store
13 it, and then package it. And then ship it
14 off. That is not the project that we are
15 looking at.

16 I mean if we were to look at
17 another project where they just put it --
18 temporarily store it -- and perhaps if they
19 temporarily store it and then put a -- load it
20 on to railcars, yes, you may say that we may
21 not have jurisdiction.

22 But going back to what Mr. Monroe

1 said is that even if we don't have
2 jurisdiction, we still have, you know, they
3 just have to comply with the public health and
4 safety regulations. They still have to comply
5 with the law.

6 So I just want to clarify, you
7 know, when I said processing, when they dump
8 it on to floors and then start manipulating
9 it, that is processing. It is not integrally
10 related to rail transportation. That is where
11 we say we don't -- our law should not be
12 preempted.

13 If you change a scenario, if they
14 are changing the project today and telling you
15 that they won't be doing any of that stuff and
16 they are only dumping on to ground and then
17 putting on to the railcars, we may be
18 preempted. You may rule that we are
19 preempted.

20 But we are still saying that they
21 should comply with public health and safety
22 regulations.

1 CHAIRMAN NOTTINGHAM: So not it is
2 your statement that taking it out of a truck
3 container, putting it on the ground, and then
4 placing it on to a railcar could very well be
5 protected under the preemption doctrine as
6 integrally-related transportation?

7 MS. LAM: That is correct.

8 CHAIRMAN NOTTINGHAM: Okay.

9 MS. LAM: It could very well be.
10 But -- and I second what Mr. Monroe said, they
11 should still be doing it safely.

12 CHAIRMAN NOTTINGHAM: This is
13 important. These aren't just intellectual or
14 trick questions I'm asking. We might, in this
15 case or another case, have to seriously look
16 at conditional approval.

17 And that is why these questions
18 are so important because if we think we are
19 conditionally approving something and then you
20 come back and say well, actually I meant that
21 it is not transportation. That is processing,
22 too. We're are sort of back in a never-ending

1 circular dispute here.

2 Mr. Colman?

3 MR. COLMAN: I just want to --
4 just for the sake of illustrating what Ms. Lam
5 is saying, I think gets to your point, in
6 Massachusetts, as I said, we have 11 permitted
7 C&D processing facilities where they process
8 the material. We have three under permitting.
9 We have 203 municipal and commercial transfer
10 stations where all they do is they transfer
11 the waste from smaller vehicles to larger
12 vehicles.

13 I think where Ms. Lam is going,
14 where I would be going, is that the transfer
15 station scenario is much closer in our minds
16 to something that would be preempted by you
17 than the processing scenario would be.

18 I think we're a little taken aback
19 by the proposal -- by the material that came
20 in this morning because that is not how we had
21 understood what the proposal was. And it
22 seems like NET is constantly -- has been, over

1 the last several years, shrinking its
2 processing -- what we would term processing --
3 smaller and smaller in order to deal with this
4 preemption issue, which is fine.

5 So I think we were clearly trying
6 to dance around that. But I think it is a
7 little clearer now.

8 CHAIRMAN NOTTINGHAM: Thank you.

9 Vice Chairman Buttrey?

10 (No response.)

11 CHAIRMAN NOTTINGHAM: Mr. Mulvey?

12 COMMISSIONER MULVEY: Just very
13 briefly. We appreciate your patience. Is New
14 Jersey the only state to promulgate the
15 special type or category of solid waste
16 regulations, your so-called 2D regulations?
17 And if other states have as well, have they
18 been challenged in the courts?

19 MR. MONROE: To my knowledge, I
20 think -- and I think this was in our statement
21 of position that we filed on Monday, I believe
22 Vermont and Ohio -- do I have that right -- I

1 think Vermont and Ohio have similar -- and I
2 haven't looked at them so I don't know if they
3 are exactly the same but similar types of
4 programs for making accommodations for rail
5 preemption but still requiring compliance with
6 health -- basic health and safety standards.

7 I think there are also similar
8 types of local requirements, I think, in New
9 York City and perhaps in Westchester County as
10 well. Whether they are exactly like the New
11 Jersey model, I can't tell you.

12 But I think that there have been
13 other attempts by -- I'm sorry, I have -- I
14 was thinking of another program, which is the
15 A901 Program, which I think we mentioned in
16 our papers, which is goes to background checks
17 for people are involved in the solid waste
18 industry based upon a long history of
19 infiltration by organized crime.

20 But in terms of the 2D, no, I
21 don't know that there has been any other state
22 or other programs that are similar to that.

1 COMMISSIONER MULVEY: One final
2 question for the panel from me and that is
3 what is your budget for the 2D province for
4 inspecting and solid waste facilities? And in
5 the case of Massachusetts, what is the fee
6 that you charge? How much is that fee?

7 MR. COLMAN: I don't have that
8 number with me. I don't know.

9 COMMISSIONER MULVEY: No?

10 MR. MONROE: And I do not know it.

11 MR. COLMAN: Maybe someone from
12 the Massachusetts industry may be on a later
13 panel could tell you what the fee is. I just
14 don't remember what all the fees are.

15 COMMISSIONER MULVEY: Okay. Thank
16 you very much.

17 CHAIRMAN NOTTINGHAM: Any
18 additional questions for this panel?

19 (No response.)

20 CHAIRMAN NOTTINGHAM: Thank you,
21 Dave. You have been very patient. But this
22 is a critical panel. You are on the front

1 lines looking after the environmental and
2 safety protections for your people. We
3 appreciate the work you do, your service, your
4 dedication to public service. And we will
5 dismiss you now. Have a safe trip home. You
6 are welcome to stay as long as you want to of
7 course.

8 MR. MONROE: Thank you very much.

9 CHAIRMAN NOTTINGHAM: The next
10 panel will be Panel 4, Mr. Stephen Richmond
11 from the Coalition Parties, Mr. Steven
12 Jangaris of the National Solid Waste
13 Management Association, Ms. Dana Huff with the
14 Solid Waste Association of North America, Mr.
15 David Bayer of the Massachusetts Municipal
16 Association, Mr. Scott Peterson of the
17 Integrated Waste Services Association, and Mr.
18 Michael Camara of the New Bedford Waste
19 Services, LLC. Welcome.

20 You have a combined total of 30
21 minutes. And we will start with Mr. Richmond.

22 MR. RICHMOND: Thank you, Mr.

1 Chairman.

2 Let me start by saying that we
3 have abbreviated our panel participants so
4 there will just be two of us today.

5 CHAIRMAN NOTTINGHAM: And all the
6 statements will, of course, be kept in part of
7 the record, and it will be considered.

8 MR. RICHMOND: Thank you.

9 And I also want to say that we
10 eagerly await your questions.

11 Chairman Nottingham, members of
12 the Board, thank you for the opportunity to
13 speak before you today. This is a very
14 important debate and we really appreciate the
15 attention and the focus that you brought to
16 this hearing.

17 My name is Stephen Richmond. I'm
18 with Beveridge & Diamond. This is Mike Camara
19 who is with New Bedford Waste Services here
20 with me. And it is an honor for us to be able
21 to speak to you on behalf of a number of
22 organizations and entities.

1 And those entities are the
2 National Solid Waste Management Association,
3 the Solid Waste Association of North America,
4 the Massachusetts Municipal Association, the
5 Integrated Waste Services Association, the
6 Construction Materials Recycling Association,
7 and New Bedford Waste Services.

8 We speak to you today on behalf of
9 solid waste companies, solid waste facility
10 owners, and operators, both government and
11 private sector, and most of the municipalities
12 in the Commonwealth of Massachusetts.

13 It is unusual for industry and
14 government to speak with one voice on the
15 subject of regulatory authority. But on this
16 issue, we have strong agreement. There is a
17 business that conducts solid waste management
18 and there are government regulators who
19 regulate that business. And that business and
20 those regulatory activities are not a
21 transload operation.

22 The rail industry has great

1 importance in America and that value is
2 clearly recognized by all of the folks who we
3 speak for today. We do not seek to create any
4 barriers for transloading operations nor do we
5 seek to cause any problems for the rail
6 industry.

7 We have reviewed the comments
8 submitted recently by Norfolk Southern, CSX,
9 and the Association of American Railroads, and
10 I think there is common ground here. The
11 Board can issuance guidance under the facts of
12 this case related to proposed C&S and MSW
13 processing. And I think even New York
14 Susquehanna has agreed in its comments that
15 Board guidance would be helpful in this area.

16 We do not want a ruling that
17 generically addresses all transloading
18 activities. We simply want to ensure that the
19 business of solid waste management is
20 recognized as a separate business from rail
21 transportation so that waste management
22 continues to be subject to state and local

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1 law.

2 We think you can make this
3 determination with the confines of your past
4 decisions on the reach of the Board's
5 exclusive jurisdiction under ICCTA. From the
6 government perspective, solid waste is
7 potentially dangerous and must be regulated to
8 protect public health, safety, and the
9 environment as you have heard from the past
10 panel.

11 State and local governments
12 regulate solid waste because improperly run
13 facilities can cause serious problems and
14 you've heard some of those problems from past
15 speakers today. Rats, insects, disease
16 vectors, air and water pollution, odors, other
17 nuisance conditions, these are serious
18 concerns.

19 Ensuring the safe management of
20 solid waste is a classic government function.
21 And simply put, we think if you strip local
22 government of its jurisdiction in this area,

1 you put the American public at risk.

2 From the private sector
3 perspective, solid waste management is a
4 business. Companies use heavily-regulated
5 facilities to transform the value of mixed
6 waste streams. They have developed a special
7 expertise in managing difficult materials and
8 they perform admirably.

9 These activities are completely
10 separate, we believe, from the business of
11 transloading, transporting wastes. From both
12 the government and industry perspectives, this
13 case presents the same glaring problem. We
14 believe NET is trying to blur the lines of
15 distinction between the highly-regulated waste
16 business and the deregulated rail business.

17 We think NET is attempting to
18 vertically integrate these two activities.
19 Why? You've heard some of that today. And we
20 will provide you more information on this.

21 Waste management is expensive.
22 And that is due to the cost of regulatory

1 programs. If you strip out these programs,
2 you save a lot of money. There is no question
3 about that.

4 You can undercut legitimate solid
5 waste operators by offering your service for
6 a lot less. You don't need to do this to ship
7 waste by rail. And that is evidenced by the
8 large intermodal waste transfer facility that
9 you have heard about in Boston. And there are
10 several others that Mr. Colman mentioned that
11 exist in Massachusetts. We have no problem
12 with those operations.

13 We think the Board would agree
14 that ICCTA was not intended to deregulate the
15 solid waste industry. To do so would
16 undermine public health, safety, and the
17 environment and would profoundly change the
18 relationship between communities and the rail
19 carriers. And there are rail carriers in
20 every state where waste management is heavily
21 regulated.

22 And it would threaten the many

1 billions of dollars of investments that
2 legitimate companies have made in creating a
3 protective infrastructure.

4 There's really no delicate way to
5 say this. We think there is a serious
6 credibility gap in this case. The facts do
7 not seem to fit. And they keep changing. NET
8 has previously described several activities
9 that it intends to perform that we know to be
10 waste processing. And we know to be value
11 creation activities and not transportation
12 activities.

13 We heard a whole bunch of new
14 information today from Mr. Van Tine and those
15 things included NET will only pick out large
16 pieces of metal and wood. NET will only
17 temporarily set aside these materials and then
18 will send them to a landfill.

19 NET will only shred to a two-foot
20 specification and not smaller, which,
21 incidentally, is probably consistent with the
22 requirements of landfills in Ohio which would

1 reject material that is less than two feet in
2 length.

3 And NET will be loading these
4 materials into the same railcar, I heard Mr.
5 Van Tine say, shredded material on the bottom,
6 larger pieces on the top.

7 In today's submittal, we also
8 heard that large pieces of metal and wood
9 would be set aside temporarily and then loaded
10 separately into the railcars going to the
11 landfill. Prior statements have been
12 inconsistent.

13 To begin with, the letter that NET
14 submitted into the record just a week ago and
15 which it had submitted previously from NET's
16 lawyer to the Massachusetts DEP October 14,
17 2005, said NET will segregate certain metal
18 and wood or other materials which may damage
19 NET's loading equipment and railcars. Any
20 segregated material will be transported to an
21 appropriate receiving facility or returned to
22 the shipper. This is not consistent with what

1 they said today.

2 In the verified statement by
3 Robert Jones dated November 30th, 2005, NET
4 said all of the C&D and MSW consigned to NET
5 will be shipped to landfills or processing
6 facilities outside of Massachusetts. He also
7 said in that same statement NET will inspect
8 all cargos received for shipment.
9 Nonconforming materials will be removed from
10 shipments and will be disposed of
11 appropriately either by returning them to the
12 shipper, disposing of small items as waste or
13 as unclaimed freight.

14 This project keeps evolving and as
15 we just heard from the last panel, we are in
16 agreement with the statement that it seems to
17 evolve in order to try to reduce the
18 likelihood that there would be an adverse
19 ruling in this very proceeding.

20 Now that is a problem because that
21 same problem led to the dismissal of the
22 previous NET petition when their project

1 changed so much that there was not basis that
2 the Board found to continue.

3 We think NET's activities will
4 create marketable products, some that are
5 extremely valuable. We think that they will
6 create segregated streams of waste materials
7 that have a different value than the mixed
8 streams which arrived at their facility.
9 These activities, we feel, do not fall within
10 the statutory definition of transportation.

11 What we are asking this Board to
12 do is to make a decision which we think could
13 be consistent with your past decisions that
14 clarifies when NET's handling of waste would
15 be integrally related and when those
16 activities would not be. This issue cries out
17 for clarity.

18 Merely adjusting requirements to
19 be recognized as a rail carrier while helpful,
20 will not do it. In other words, if you simply
21 focus on the question of what constitutes a
22 rail carrier as some parties to this

1 proceeding have suggested, that may solve some
2 of the problem. But that won't provide the
3 guidance that we think is so critically needed
4 about what constitutes and integral
5 relationship in this particular business.

6 We want the Board to determine
7 that waste extraction, segregation, shredding,
8 and baling activities, as proposed by NET, are
9 separate solid waste business activities and
10 do not constitute transportation under ICCTA.

11 What I'd like to do next is to
12 turn to some of the issues that were raised by
13 the Board in its March 29th notice. The Board
14 had asked whether it is premature to issue a
15 preliminary decision given the pending Third
16 Circuit appeal and the ongoing EPA RIFS
17 process.

18 And we're pleased to report on
19 this issue, at least this very first issue, we
20 are in complete agreement with NET. We think
21 there are compelling reasons why the Board
22 should not delay its decision. Those are in

1 our written statement. I don't think I need
2 to repeat them here.

3 But importantly, we urge the Board
4 not just to act but to issue a final decision
5 on this jurisdictional issue. We believe it
6 serves all the parties to this proceeding if
7 there is a binding interpretation. And if
8 there is going to be an appeal by any party,
9 it should not be delayed by your issuing a
10 preliminary decision.

11 The Board has also asked if NET's
12 waste activities are determined not to be part
13 of rail transportation, what impact would this
14 have on the NET proposal and on the
15 transloading of other commodities by railroad.

16 As Mr. Camara will discuss in a
17 minute, the Board need not treat waste any
18 differently from other commodities. A
19 determination that NET's waste activities are
20 not rail transportation should, therefore,
21 have not impact on other transload operations.
22 In each case that is presented to this Board,

1 activities should be evaluated under the
2 Board's integral relationship tests.

3 Where rail carrier activities are
4 necessary for rail operations, they constitute
5 transportation under ICCTA. If, for example,
6 coal is staged and sampled and weighed as an
7 integral part of a rail shipment or if a
8 product is quality tested during transloading
9 for purposes integral to the rail shipment.
10 Or if a product is heated to allow for the
11 transfer in shipment, those activities are
12 going to constitute transportation under
13 ICCTA. I don't think are difficult decisions.

14 The Board has also asked in
15 determining whether a facility is a rail
16 transload must its activities be solely
17 transportation activities? And may a
18 determinated be based on the type of commodity
19 involved. Does it matter that the proposed
20 facility would handle multiple commodities?

21 The labeling of a facility should
22 not determine its status. Commission Mulvey's

1 suggestion that you could bifurcate this issue
2 I think is a very sound one. It's the
3 activities and who conducts the activities at
4 a facility that are critical.

5 The Board has previously
6 determined that you can reach different
7 conclusions about separate activities at a
8 single facility, essentially the bifurcation
9 concept. In the town of Milford, for
10 instance, this Board found that a rail carrier
11 was conducting transportation when it
12 delivered railcars into a facility built
13 across a track.

14 But then the company that unloaded
15 those railcars and then fabricated steel
16 structures in the same facility was not
17 conducting transportation.

18 A facility can therefore be
19 subject to different statutory obligations
20 when different activities occur. And
21 activities that constitute transportation by
22 rail are entitled to ICCTA preemption.

1 Activities at the same facility that don't,
2 are not so entitled.

3 The Board has also asked in
4 determining whether NET's proposed activities
5 would be part of rail transportation, would it
6 be enough that an activity facilitates
7 transportation? Or must that activity be
8 essential to transportation?

9 I think most of the commenters to
10 this hearing, not all but most, have agreed,
11 as we do, that this Board has repeatedly used
12 and should continue to use the integral-
13 relationship test. And that would determine
14 whether an activity constitutes
15 transportation.

16 The test, as you know, appears in
17 numerous Board decisions and has been adopted
18 by many federal courts. As this Board said,
19 in Hi-Tech, to come within the preemptive
20 scope of 10501(b), activities must be
21 integrally related to the railroad's ability
22 to provide rail transportation services.

1 It is, therefore, simply not
2 enough, in our view, that an activity merely
3 facilitates transportation. Such a test opens
4 the door to abuse. And we would argue that
5 that is the exact door we are looking through
6 today. Many manufacturing activities could be
7 said to facility transportation but would not
8 be integrally related to providing rail
9 service.

10 As examples, consider sawmills,
11 slaughterhouses, sand and gravel operations,
12 any other business that produces products that
13 are easier to ship than the raw feed stocks
14 that they first receive. NET's waste
15 processing is not integrally related to
16 proposed transport services.

17 The extraction of metals and
18 woods, the shredding of waste is economically
19 motivated and we will speak to that in just a
20 moment. And would be performed for separate
21 business reasons. Even if some incidental
22 benefit for rail transport is conferred, these

1 activities do not pass the integral-
2 relationship test.

3 I would like at this point to turn
4 the microphone over to Mr. Camara for a
5 discussion of the Board's questions regarding
6 whether C&D and MSW should be considered
7 differently from other commodities. And
8 whether NET's processing would add value to
9 incoming materials.

10 MR. CAMARA: Thank you, Steve.

11 Mr. Chairman, members of the
12 Board, thank for providing this opportunity
13 for me to speak with you today. My name is
14 Michael Camara. I'm the President of New
15 Bedford Waste Services and Vice President of
16 ABC Disposal. I'm also the Chairman of the
17 Massachusetts Chapter of the National Solid
18 Waste Management Association.

19 The issues in this case are
20 literally life and death issues -- my family's
21 business. That's why I felt it was so
22 important for me to visit with you today

1 personally to make sure you understand the
2 impacts of your decision.

3 Our business is family owned. We
4 started it from scratch 40 years ago. We now
5 have over 200 employees that provide waste
6 management services throughout southern New
7 England. We have one of the largest C&D
8 recycling facilities and MSW transfer
9 facilities in the region.

10 This case scares us. It does so
11 because NET seeks to change the rules to
12 create an uneven playing field. This case is
13 really a question of whether the laws of this
14 country will allow a company to engage in our
15 business, the solid waste management business,
16 without being forced to comply with the
17 expensive legal requirements that apply to the
18 rest of us.

19 To me, this case is about whether
20 the laws protect those of us who play by the
21 rules, thrive on competition, or whether the
22 laws will be applied to protect those who seek

1 to avoid legal requirements and to allow them
2 to compete unfairly.

3 I want to address the Board's
4 questions relating to whether C&D and MSW
5 should be considered differently from other
6 commodities. And whether NET's proposed
7 activities with respect to C&D and MSW would
8 add value to these materials.

9 To do this, I need to describe for
10 you what I do in my solid waste business and
11 what NET says it intends to do. And compare
12 them. You could then judge whether what we do
13 and what they do is the same business. I am
14 totally convinced that it is.

15 And I'd like to point out that
16 when I built my facility, I did so with a
17 revenue bond because we were considered a
18 manufacturing facility. And also we didn't
19 have to pay taxes on our equipment because we
20 were considered a manufacturing facility.

21 Recycling facilities employ basic
22 processes to separate incoming mixed waste

1 into different streams. The purpose of this
2 separation is to take the commingled waste
3 stream and divide it into segregated parts
4 that have either lower disposal costs or some
5 market value.

6 For example, you can pick large
7 pieces of wood out of a waste load and shred
8 them to create chips that are marketable as a
9 fuel. Shredded wood currently has a low
10 market value. You basically get paid what it
11 costs to transport it to the user. But by
12 separating the wood out of the waste stream,
13 you avoid a 70- to 90-dollar-per-ton disposal
14 cost.

15 Another much more lucrative
16 example is metal. Construction and demolition
17 waste can have a high metals content. When a
18 building is demolished, there are appliances,
19 siding, pipes, wires, beams, fixtures, and the
20 like.

21 When these materials arrive at a
22 site mixed into a demolition waste load, all

1 you have is a 70- or 90-dollar-per-ton
2 liability. When they are separated, they have
3 significant value. Our job is to extract the
4 metal to create that value.

5 The scrap metal markets have gone
6 berserk in the last few years. To give you an
7 example of how lucrative this can be, the
8 price of nickel has just hit 50,000 dollars
9 per ton. The price of tin is now around
10 15,000 dollars per ton. And copper is nearly
11 8,000 per ton. When you pull a piece of metal
12 out of a waste stream, you can resell these
13 metals for extraordinary value creation.

14 Our recycling facility works like
15 this, trucks filled with construction debris
16 or industrial waste unload their waste onto
17 our facility's concrete floor. An excavator
18 with a large grapple hook attached grabs piles
19 of debris and feeds it into an industrial
20 shredder. The ground material is transferred
21 to a conveyor belt which helps us to see the
22 materials to be sorted.

1 Larger materials are separated
2 from the waste stream by hand. Metals and
3 wood are removed as well as cardboard, brick,
4 concrete, and asphalt. We recycle all
5 materials we have a market for and we dispose
6 of what is left over in different locations
7 depending on the cost of the particular
8 stream.

9 Some materials can be used as
10 daily cover at landfills. This can be
11 disposed of very cheaply as a substitute for
12 dirt. Other materials can be sent to plants
13 to be crushed and used for a road base.
14 Whatever cannot be sent to the landfill or
15 these low-cost outlets actually get sent to
16 landfills and to combustion facilities for
17 disposal.

18 Compare what we do to the proposed
19 NET facility. NET described in its November
20 2005 filing with the Board that it would
21 segregate certain metal and wood and other
22 materials that may damage NET's loading

1 equipment and railcars. Any segregated
2 material would be transported to appropriate
3 receiving facilities.

4 NET also said it would use
5 shredders and conveyor belts. C&D would
6 convey to shredders that would reduce it to
7 the maximum size that be loaded into railcars
8 with conveyor belts.

9 Members of the Board, why do you
10 think NET wants to go to the trouble of
11 shredding its incoming waste? I shred waste
12 just like NET proposes. Shredders are loud.
13 They create continuous maintenance problems.
14 I know exactly what that is all about.

15 They have to be fed with a
16 constant stream of material and they use a
17 tremendous amount of electricity. They can
18 also be dangerous.

19 A shredder operated at a waste
20 energy facility in Massachusetts recently
21 exploded and caused a fire that took 150
22 firefighters to put out. Fortunately, no one

1 was killed. The entire facility has been out
2 of service all month, forcing the diversion of
3 3,000 tons of waste per day.

4 What is the purpose of shredding
5 material that arrives packed into trucks,
6 material they can crush with a loader if you
7 want to densify it? The answer is that you
8 don't need to use a shredder to pack a railcar
9 but you need to shred it if you want to
10 convert a liability into an asset.

11 You can take a 70- or a 90-dollar-
12 per-ton liability and turn it into a commodity
13 by shredding it. You are literally creating
14 money out of trash.

15 Other uses for shredders is to
16 create a fuel from MSW. The same trash
17 handling facility I just mentioned receives
18 waste by both rail and truck from many
19 communities on Cape Cod and surrounding
20 communities. And it shreds its waste prior to
21 burning it.

22 This is clearly a transportation-

1 related function since it occurs after the
2 transportation is completed. Also, why do you
3 think NET wants to use conveyor belts to
4 transport waste in such a small facility?
5 This is not a large plant where a conveyor
6 belt is necessary to cover a distance.

7 . Using a conveyor in such a small
8 operation provides access to materials for
9 segregation. And to load materials once you
10 have completed your processing. NET would
11 have you believe it will segregate wood and
12 metals only to prevent damage to railcars.

13 Let me ask you a question. Do you
14 believe that NET designed its facility so
15 there would be easy access to waste streams
16 but that it intends to sit by and watch those
17 pieces of metal with a value of up to 50,000
18 dollars per ton pass by destined for a
19 landfill?

20 Do you believe that it will only
21 pick out pieces of metal that are easily
22 accessible from the waste stream. And if they

1 are too large, then they will damage the
2 railcar? Yet the rest of value material that
3 passes right under their noses they will send
4 to a landfill for disposal.

5 How many tens of thousands of
6 dollars will they literally be throwing in the
7 garbage? This defies logic. It makes no
8 sense. And you should not view it as
9 credible.

10 Notice that NET admitted they will
11 pull both metal and wood of its waste stream
12 and send it to appropriate receiving
13 facilities, whatever those are. Only to
14 protect railcars. To protect railcars? Why
15 would they need to protect railcars when most
16 of the scrap metal in this country is moved
17 via railcars?

18 Why does NET need to pick out wood
19 if it has shredders? The purpose of a
20 shredder is to reduce the size of the
21 material. Of course once you admit that you
22 are shredding wood or picking out valuable

1 metals, you admit that you have changed the
2 waste into a marketable commodity. And they
3 wouldn't want to admit that.

4 There is not need to treat C&D and
5 MSW differently from other commodities that
6 are shipped by rail. Instead, we ask that you
7 treat them the same.

8 The Board does not have exclusive
9 jurisdiction of automobile manufacturing or
10 metal foundries or scrap yards for that
11 matter. For the same reason, you should not
12 find that the Board has exclusive jurisdiction
13 over the value creation activities of solid
14 waste management activities.

15 We see no difference. The
16 manufacturing process is not a rail
17 transportation. And a manufacturing facility
18 is not a rail facility.

19 I'm asking the Board to see what
20 is blatantly obvious to me as a lifelong
21 member of the solid waste management
22 community. The processing activities

1 described by NET are designed to be solid
2 waste management activities.

3 They intend to transform incoming
4 mixed waste streams into valuable products and
5 they are planning to profit handsomely by
6 this. Whether the profit is taken by NET, by
7 its contract loader, or by the shipper, it
8 doesn't matter. There is significant profit
9 to be made in this operation. And that profit
10 is from activities that are not integrally
11 related to providing rail service.

12 NET has asked you to allow the
13 operation of a solid business that competes
14 with mine but without being subject to
15 extensive state and local controls. This is
16 not fair. And you should see through this.

17 I'm not afraid to compete with NET
18 in the solid waste management business. But
19 you need to make sure the competition is fair.
20 You also need to know that wood with a value
21 of 17 dollars a ton and metal with a huge
22 value will not be going to a landfill.

1 Thank you.

2 CHAIRMAN NOTTINGHAM: Thank you,
3 Mr. Camara and Mr. Richmond.

4 We'll commence with questions.
5 Commissioner Mulvey, would you like to start?

6 COMMISSIONER MULVEY: Because NET
7 does claim that it is going to pass up on the
8 economic value of recyclables from the solid
9 waste stream, if they were to do so, how would
10 they operate profitably?

11 What would be their margin from
12 simply taking the waste from trucks that drop
13 it on the tipping floor and then loading it on
14 to railcars. How profitable would that be for
15 them compared to say recycling some of that
16 material?

17 MR. RICHMOND: I think that is a
18 question of what the tariff would be that is
19 set. What we are saying is we find it very
20 difficult to comprehend that they would
21 extract valuable materials from their incoming
22 waste stream and then put them in the same

1 railcars that are going to landfills. That
2 just doesn't make sense.

3 COMMISSIONER MULVEY: What are the
4 criteria for membership in your trade
5 association? And are any railroads members of
6 your trade association right now?

7 MR. RICHMOND: Right now I'm
8 speaking for four different trade associations
9 which have hundreds and hundreds of members.
10 And I don't know the answer to that question.

11 MR. CAMARA: I'm not sure.

12 COMMISSIONER MULVEY: In your
13 January 2006 reply, you argued that ICCTA does
14 not preempt a state's solid waste
15 requirements. If not, why do you think NET is
16 trying so hard today to get Board authority
17 and thus preemption? Isn't this view on their
18 part contradicted by our precedent and that of
19 the courts?

20 MR. RICHMOND: Yes, absolutely.
21 We think it is.

22 CHAIRMAN NOTTINGHAM: Doug?

1 VICE CHAIRMAN BUTTREY: Well, I
2 have no questions for this panel.

3 COMMISSIONER MULVEY: Oh, wait.
4 Let's see here, Mr. Richmond, can you quantify
5 how much less operating costs are if an entity
6 does not need to comply with a state
7 regulatory scheme? What order of magnitude
8 would it be? Fifty percent? Less? Or more?
9 What percentage of your operating costs are,
10 in fact, caused by state regulatory
11 requirements?

12 MR. RICHMOND: I'm not going to be
13 able to give you figures. Mike may be better
14 able since he is a current operator. But
15 before I hand it over to Mike, let me just say
16 that the NET proposal is for a fabric-walled
17 and roofed structure with essentially no
18 siting costs.

19 So there are two advantages to
20 proceeding under a claim of exemption. The
21 first is that they avoid the -- well, actually
22 there are three advantages. The first is that

1 they avoid the time that it takes to get
2 permits for a solid waste facility, which can
3 be substantial.

4 The second is they avoid the
5 capital costs involved in building a facility
6 that would be considered state of the art by
7 the state regulators. And the third would be
8 the ongoing operating costs of complying with
9 the regulations.

10 And Mike maybe could speak to some
11 of those.

12 MR. CAMARA: Well, first of all,
13 in the permitting process to develop our
14 facility, it took four-and-a-half years. It
15 cost 450,000 dollars. To finally develop our
16 facility and do it to meet all the regulations
17 and do it in a first class way cost nine
18 million dollars. And we truly have a state-
19 of-the-art facility, protecting the
20 environment.

21 No concerns about the oversight.
22 We understand what it is for and what it is

1 doing. And we support it.

2 MR. RICHMOND: And if I may, just
3 to emphasize a point here, we are not
4 suggesting that it should take anyone four-
5 and-a-half years to install a transload
6 facility. That can happen overnight.

7 What we are suggesting is the add-
8 on activity which changes the value of
9 incoming goods. That is the activity that
10 takes a lot of time to permit and tremendous
11 costs to build.

12 VICE CHAIRMAN BUTTREY: Well, in
13 fact, this has already -- this proposal, this
14 petition has already taken quite enough time
15 whether it is transload facility or a
16 processing facility. It is also true that the
17 New England transload says that its facility
18 is -- I believe I'm quoting from Mr. Van Tine
19 -- state of the art.

20 But why would a facility that was
21 simply taking material from trucks on to a
22 floor and then on to a railcar need to "state

1 of the art" if, indeed, that was all it was
2 doing. When you say state of the art, you are
3 referring, of course, to the processing,
4 separation, sorting, and recovering of
5 valuable resources, correct?

6 MR. RICHMOND: Correct. Correct.

7 MR. CAMARA: Our property has the
8 proper stem water controls. We have drains in
9 our building that go through a oil/water
10 separation system before it is sent out to the
11 local sewer systems.

12 We have dust control systems,
13 order control systems, and a lot of other
14 systems in place to protect the environment as
15 required by the state and the local community
16 that we are in.

17 COMMISSIONER MULVEY: Thank you.

18 CHAIRMAN NOTTINGHAM: Vice
19 Chairman Buttrey, question?

20 (No response.)

21 CHAIRMAN NOTTINGHAM: Mr. Camara,
22 tell me about your association. Are you

1 exclusively truck-related business members?
2 Or do you have a members association who
3 engage in waste management but with a railroad
4 component to it

5 MR. CAMARA: Yes, we have.

6 CHAIRMAN NOTTINGHAM: You use
7 both?

8 MR. CAMARA: Yes.

9 CHAIRMAN NOTTINGHAM: Breakdown
10 roughly, I mean it would be like 90 percent
11 what I would call more traditional truck
12 based, ten percent rail?

13 MR. CAMARA: Yes, absolutely.

14 CHAIRMAN NOTTINGHAM: Something
15 like that?

16 MR. CAMARA: Yes.

17 CHAIRMAN NOTTINGHAM: Okay.

18 MR. RICHMOND: Mr. Chairman,
19 virtually all of the facilities are "truck
20 based" because they are fed by trucks. But
21 then several of the facilities have rail
22 access. And so those obviously use the rail

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1 for shipping material out.

2 CHAIRMAN NOTTINGHAM: Mr. Camara,
3 you mentioned your family's competitive
4 concerns and that is certainly a legitimate
5 concern. I don't blame you for being
6 concerned about that.

7 Would those concerns be the same
8 if someone was just going to do a transload --
9 a pure transload container gets picked up,
10 never opened, from a truck, placed on a rail
11 bed and taken away? If that is what the
12 proposal transformed into or some other
13 proposal down the street from you, you know,
14 in your competitive market were to enter into?

15 MR. CAMARA: We compete against
16 facilities like that now and it doesn't
17 concern us.

18 CHAIRMAN NOTTINGHAM: Okay.

19 Mr. Camara, there has been a lot
20 of discussion of shredding. And how small do
21 you shred? You described the shredding that
22 takes place in your operations. Is it done to

1 a particular size? Or does it depend on what
2 you are shredding?

3 Because we heard some testimony
4 earlier about shredding that NET might want to
5 do. They tried to, I think, say that it
6 wasn't to add value. It was just to make it
7 easier to transport. Tell me about your
8 shredding.

9 MR. CAMARA: We have three
10 different shredders in our facility. There is
11 a primary shredder that is used to size the
12 material down to 24 inch minus. This allows
13 us to, when we get in the activity of watching
14 the materials go over our conveyor belts, we
15 have better access of the size, able to pick
16 out the recyclable items.

17 But also due to concerns with the
18 local landfills, we have a shredder that
19 reduces and recycles mattresses, box springs,
20 and furniture.

21 On the back end of our operation,
22 because we make a product on the back end that

1 is used for landfill cover material. We have
2 a shredder that reduces it down to a three
3 inch minus.

4 CHAIRMAN NOTTINGHAM: Okay. And
5 what is the commercial value added in
6 shredding C&D, which is, as described by NET
7 today, to two foot by two foot sizes.

8 MR. CAMARA: In doing that, it
9 makes it a lot easier to pull valuable pieces
10 of metal off the waste stream. It's at a size
11 that can easily move via conveyor. I mean
12 picture this. If you try to take some large
13 pieces of wood and move them via conveyors,
14 they get jammed up. It causes problems in the
15 system.

16 To shred it down and take it down
17 to that 24 inch minus, the material will move
18 very easily over a conveyor system. But it
19 also allows the ability of someone to spot
20 materials that add value. And they will take
21 those materials off the conveyor belt.

22 MR. RICHMOND: And if I may add to

1 that, NET has admitted that they will be
2 segregating out some wood, wood as a separate
3 commodity, separated from a C&D stream has
4 inherent value. It's used as a fuel at
5 combustion facilities and shredding it will help
6 to prepare it for use as that fuel. So you're
7 taking a material that you would otherwise have
8 to dispose of, separating it out, shredding it so
9 that it is more likely to be useable as a fuel
10 and then you have a product which can be sold.
11 And there's a market for that today in New
12 England.

13 CHAIRMAN NOTTINGHAM: Mr. Camara,
14 this is helpful. You're one of the few people
15 here today who actually works in this field day
16 in and day out. We have people here who would
17 like to maybe or do something related. Others --
18 but you're actually out there and doing this and
19 you know how it works.

20 MR. CAMARA: Forty years worth of
21 experience.

22 CHAIRMAN NOTTINGHAM: So let me ask

1 you how -- what about in your view if someone
2 says they want to bale something so they can more
3 easily and more efficiently get into a rail car,
4 is that processing in your eyes?

5 MR. CAMARA: Absolutely.

6 CHAIRMAN NOTTINGHAM: Explain that to
7 me. I'm not an expert on this and it -- you
8 know, when I first saw it, I said, yeah, it makes
9 sense. You've got to get into the car and it's a
10 whole bunch of pieces of stuff. I guess you're
11 going to bale it. What value added is baling? I
12 mean, when it gets to the destination, is the
13 landfill operator glad to see the bale? I mean,
14 what is it about that makes that process?

15 MR. CAMARA: Well, you have to look
16 at the two different ways that you can load
17 material in railcars. In many cases it's lower
18 the grapple as you see in that picture there, and
19 it's loaded over the top of a rail car. In this
20 case here, by processing it, manipulating it,
21 baling it, it gives you access to different types
22 of railcars especially if you wrap it. You could

1 have a freight car that might come into the
2 community that might be carrying a specific
3 commodity like a food product and you couldn't
4 just take raw waste bales and put it into that
5 car because it would cause odors and problems
6 that could permeate into those food products.

7 Bale it and wrapping it gives you an
8 opportunity to process it and make it into a
9 commodity that you could actually put into a
10 railcar that might be used for different types of
11 processes that you couldn't typically put loose
12 waste into.

13 CHAIRMAN NOTTINGHAM: So if I hear
14 you correctly, one of the benefits of baling
15 and/or wrapping would be it allows you to use
16 your railcar for other purposes more easily
17 because, you know you have less -- perhaps less
18 of a smell or odor, so in that respect, I guess,
19 you know, you didn't say this but I'll say it, it
20 advances multiple transportation purposes
21 potentially. It allows more efficient loading
22 onto the railcar but also allows your railcar to

1 be turned around and put back into commerce
2 quicker at the end of it all, which are two, I
3 would say, pretty reasonable transportation
4 purposes but let me let you respond to that.

5 MR. CAMARA: It actually -- that is a
6 benefit and you could also put it into transport
7 trailers that might have brought refrigerated
8 waste, food products, rather, into the area. You
9 could send it out that way because it would
10 protect the different types of transportation
11 that you use. But also you have to look at the
12 fact that bringing that waste in, MSW waste, I
13 handle a lot of it every single day. I have a
14 permit to handle 15 tons of waste per day. A lot
15 of liquid waste come in with those loads that has
16 to be dealt with to protect the environment. A
17 lot of odors are generated with that waste,
18 especially in the summer months. It gets very
19 hot and humid and it can be pretty horrific to
20 deal with.

21 There is the issue, and I'm glad you
22 spoke of, fire protection because that's very

1 important. I could point to the fact that we had
2 a fire in a couple of years ago and within
3 seconds that fire suppression system knocked the
4 fire out, so I'm glad you're taking a good hard
5 look at that. But more importantly, you have to
6 look at, you know, in a typical transload
7 facility, movement of material into a tipping
8 floor, it gets loaded into a railcar and it's out
9 -- it's off to wherever it's going to go.

10 In this case here there is processing
11 taking place because you are manipulating.
12 You're shredding, conveying, and you have to
13 convey into a baler.

14 CHAIRMAN NOTTINGHAM: So you see a
15 difference in your mind between -- a transload
16 facility doesn't have to be a processing
17 facility. So where is the line? We heard
18 earlier when I talked about, and I was doing all
19 the talking, about the dumping out on the ground
20 and then the scooping up with a piece of
21 equipment as in that photo there. Is that
22 processing in your mind, that's all they're

1 doing? Let me ask Mr. Camara, he's in the field
2 I'll let you have a chance to answer it as well.

3 MR. RICHMOND: Yeah, I think -- are
4 you asking from a legal perspective on --

5 CHAIRMAN NOTTINGHAM: No, I'm asking
6 from a practitioner's perspective. He's in the
7 field. He's speaking as a practitioner. You're
8 not speaking as a lawyer, are you?

9 MR. CAMARA: Yes, no, not at all.

10 CHAIRMAN NOTTINGHAM: Right, we've
11 got a lot of lawyers here. I'm a lawyer, Mr.
12 Buttrey is a lawyer. Half the audience is
13 probably lawyers, plenty of us, someone said too
14 many. I'm glad to hear someone who actually does
15 this for a living, knows how -- is the dumping on
16 the ground and the just picking up and dropping
17 into a rail car, is that processing in the
18 business?

19 MR. CAMARA: Let me just clarify. In
20 Massachusetts -- and I can only speak on behalf
21 of Massachusetts, when a permit is issued to a
22 facility, you either permit a small waste

1 handling facility or a large waste handling
2 facility. It doesn't make a difference what you
3 do. The only difference would be is the
4 description of the activity that's going to
5 happen at a small waste handling facility or a
6 large waste handling facility. They all get
7 permitted.

8 In our case, because we're -- we have
9 a 15,000-ton per day facility, we're considered a
10 large waste handling facility. In our facility,
11 now only do we process wastes but we do transload
12 waste. So it's a mixed waste facility. We
13 handle both construction and demolition debris.
14 We also handle MSW. But I'd also like to say
15 that a lot of the MSW loads that we bring in, if
16 they have recyclables, we don't put them in
17 railcars or put them in tractor trailers to be
18 hauled off the property. It all gets processed.
19 It all gets recycled.

20 CHAIRMAN NOTTINGHAM: So try to put
21 yourself in our shoes. We're trying to figure
22 out what the difference is, if there is one,

1 between transportation and integral to
2 transportation and processing and sort of
3 understand where that line might be. Mr.
4 Richmond, I'll give him a chance to respond to
5 the material. He encouraged us to try to draw
6 some lines, right?

7 MR. RICHMOND: Yes.

8 CHAIRMAN NOTTINGHAM: And we've had
9 different people say different things about where
10 those lines should draw. If someone -- if we're
11 interested in trying to allow something that
12 looks more traditionally like a transportation
13 operation, it's more like a transload operation
14 in your mind, go forward but we're not interested
15 in approving or sanctioning preemption for some
16 type of waste processing, but someone says,
17 "Well, what we want to do is dump municipal solid
18 waste and/or C&D on the floor, scoop it right up
19 and drop it into the car of a train and have it
20 leave. Is that processing in your mind as a
21 practitioner?

22 MR. CAMARA: I can easily answer that

1 question.

2 CHAIRMAN NOTTINGHAM: Please.

3 MR. CAMARA: I know you're anxious
4 for the answer. If all you're going to do is 100
5 percent pick that material up with an excavator
6 or a payloader and load it into a railcar, it's
7 not processing, but I don't know of anyone that
8 does that. Every facility that I go to, they
9 will use that excavator and they will pull out
10 large pieces of metal and they'll pull out other
11 valuable items before it goes into the rail car
12 and that's processing.

13 CHAIRMAN NOTTINGHAM: Okay, thank
14 you.

15 MR. RICHMOND: Mr. Chairman.

16 CHAIRMAN NOTTINGHAM: Mr. Richmond.

17 MR. RICHMOND: Yes, excuse me. Our
18 position is that activities which change the
19 value of the incoming material constitute
20 processing. So we don't believe that bringing in
21 waste and dumping it on the floor and picking it
22 up and putting it into a railcar changes the

1 value of that material and we think that's a
2 pretty easy call. We do think that the states
3 will have police power authorities to regulate
4 that activity. We can quibble about whether they
5 have permitting authority but certain policy
6 power authority because you're taking a material
7 that's waste and you could be putting it on the
8 ground.

9 So the question for us is what is the
10 value of the material when it comes in and what
11 is the value of the material at each step of the
12 process. And when we talk about the state's
13 definition of processing, which was a topic of
14 some discussion in the last panel, I would submit
15 to you respectfully that that may be the wrong
16 question because at the point at which the
17 state's regulations apply in terms of what's
18 processing, what's handling, is not the relevant
19 inquiry.

20 I believe the relevant inquiry is
21 what is integrally related to the transportation
22 function. And once you determine what's

1 integrally related, everything prior to that
2 point would become subject to state jurisdiction,
3 but where the state draws the line in its
4 permitting regulations, is not relevant.

5 CHAIRMAN NOTTINGHAM: So, Mr.
6 Richmond, following your line of reasoning, if a
7 local or state government were to be concerned
8 about coal transportation and different coal
9 activities that take place frequently at rail
10 facilities, if they can make the case to us that
11 something is done to that coal that actually adds
12 value to it, for example separating out you know,
13 a certain grade of coal or fly ash and putting it
14 in different cars so that it sells easier at a
15 higher value at the destination, that that's
16 actually processing?

17 MR. RICHMOND: No, no, I think your
18 question is not -- is not analogous to the
19 situation we're dealing with --

20 CHAIRMAN NOTTINGHAM: But you said
21 that anything that adds value is processing.

22 MR. RICHMOND: I said you need to

1 look at the value adding activity. Anything that
2 adds value --

3 CHAIRMAN NOTTINGHAM: Not anything
4 that adds value equals processing. It's adding
5 value could equal processing. Is that what
6 you're saying.

7 MR. RICHMOND: Correct, correct.
8 This Board has not used a --

9 CHAIRMAN NOTTINGHAM: That's very
10 different -- you have to make a very different
11 proposition between the always and the possible
12 or the could.

13 MR. RICHMOND: Yes, that's correct.
14 I mean, this Board has looked at whether there's
15 an integral relationship. If there's an integral
16 relationship and there's some value added, I
17 think it's fully within your rights to determine
18 that that falls within preemption but you need to
19 look at both of those things and I think that the
20 value that's being added in a processing activity
21 is a critical inquiry that has been missing
22 heretofore.

1 CHAIRMAN NOTTINGHAM: Okay, Mr.
2 Camara, I'm going to put you in a different line
3 of business, okay, just hypothetically. You are
4 in the truck business focused on delivering brand
5 new cars from large distribution points, like
6 ports and rail yards, et cetera, to dealerships
7 and that's your business. You've got to get the
8 cars there in good shape and you got, you know,
9 special rigs, truck rigs that chassis that deal
10 with that.

11 And in comes a railroad and a
12 railroad has a yard nearby and they decide to
13 pave over part of their yard in order to unload
14 brand new cars that they deliver from the port,
15 let's say it's the Port of LA, Long Beach or
16 something, onto the rail property and then sort
17 out the cars. They put all the Hondas in some
18 cars. They put all the Toyotas in other cars
19 because it makes a lot of business sense for them
20 to drop -- make different drop-offs as they take
21 the train out into the marketplace.

22 And all of a sudden, your business is

1 suffering because that's exactly the kind of
2 thing you did and you had a lot of different
3 regulations you had to deal with. You had to get
4 a CDL license, et cetera. Is that -- would that
5 be processing in your mind of new cars at a rail
6 facility? You don't need to answer that, Mr.
7 Richmond can but I say it because I think that
8 happens a lot actually in routine rail
9 operations. The automotive industry is a very
10 sort of core bread and butter part of the rail
11 industry and I just want to make sure we're -- as
12 we think through this how we have some
13 consistency. I'll let Mr. Camara answer it and
14 then Mr. Richmond.

15 MR. CAMARA: It seems to me is that
16 that is just a straight railroad activity, moving
17 commodities across this country. It happens all
18 the time. And so we -- I notice that in
19 traveling I've seen freight cars with cars
20 traveling across this country and I understand
21 the benefit of that happening.

22 CHAIRMAN NOTTINGHAM: Mr. Richmond?

1 MR. RICHMOND: We do not have a
2 problem with auto transloading, auto storage. We
3 don't have a problem with diesel engine repair
4 facilities. We don't have a problem with
5 maintenance activities that occur which are
6 necessary for rail activities. These -- I do not
7 see these as difficult cases. They're integrally
8 related and I think this Board would agree with
9 that. The question is whether the activity of
10 processing waste is integrally related and what I
11 think we're trying to provide you with
12 information on is that there is a business out
13 there that conducts this activity for profit and
14 the application which is in front of you has been
15 devoid of information about that industry and
16 about that profit motive today.

17 CHAIRMAN NOTTINGHAM: Thank you.
18 Vice Chairman Buttrey, any additional questions?
19 Mr. Mulvey?

20 COMMISSIONER MULVEY: Well, one
21 question and a point; isn't the difference we're
22 talking about here is municipal solid waste and

1 coal, or automobiles is that municipal solid
2 waste is something that is traditionally
3 regulated by state and local governments as part
4 of their police power to protect the public
5 health and welfare?

6 MR. RICHMOND: That certainly has
7 been true.

8 COMMISSIONER MULVEY: But that's not
9 true of the other materials, like coal or
10 automobiles. I mean, these are not regulated
11 normally for the public health and welfare. I
12 mean, certainly, one could consider that if you
13 found, for example, in the activities that
14 railroads were doing in processing coal and
15 mixing coal, all coal is not the same. They mix
16 it for different plants and things like that.

17 If it were found that the process of
18 mixing the coal was causing fugitive dust to get
19 into the atmosphere and causing high rates of
20 cancers in communities nearby those facilities,
21 then it may very well be true that that would be
22 something that the states might want to and

1 legitimately could regulate. But that isn't the
2 case. But in municipal solid waste, there's lots
3 of evidence that these operations historically
4 have caused problems with groundwater, have
5 caused problems with air quality and have,
6 therefore, been regulated. Is that not true?

7 MR. RICHMOND: I think that is true.
8 I would caution the Board, however, that relying
9 on police powers for a resolution to this entire
10 issues, in my humble opinion, will not get you
11 there, because the police powers reservation has
12 been focused on health and safety requirements
13 and the railroads have made a very clear
14 demarcation between what they believe is a health
15 and safety requirement and what may be an
16 environmental requirement.

17 And I think it's only duress in this
18 particular instance that NET has offered that it
19 will submit to some environmental requirements
20 but we don't know which, and what I heard them
21 say today was that they would consider anything
22 reasonable. Well, that may be true but the devil

1 is in the details here and when we talk about
2 some of the requirements that are applied under
3 Massachusetts law, in deciding requirements,
4 Massachusetts law is not set up to provide
5 performance standards. It's set up to provide
6 permitting processes in which performance
7 requirements are established.

8 So there are setback requirements,
9 for instance, assuming enclosed structures with
10 real walls. What is the DP going to do when it
11 sits down in a negotiation with NET who wants to
12 put a fabric hut up and they look at set-back
13 requirements. I know what I would do if I were
14 NET. I'd say, "There's no hard and fast
15 requirement in your law that says I must be set
16 back a certain amount. That would be a
17 preclearance requirement". And that will come
18 back to the Board.

19 What's going to happen when we look
20 at through-put limits. The DP in virtually every
21 case establishes through-put limits. They're not
22 requirements of the law. There's no law that

1 says or regulation that says you can only have a
2 certain amount of tonnage per day, but every
3 permit has that and it's a fundamental attribute
4 of a state solid waste permit.

5 What is NET going to do when DEP
6 says, "We need a through-put limit"? That's
7 going to come back to you, too. Waste type
8 limitations, activities limits, hours of
9 operation, I could list 50 things that are going
10 to come up where I would imagine a railroad,
11 assuming NET is a railroad, would fight back and
12 say, "These are not reasonable restrictions".

13 COMMISSIONER MULVEY: Thank you very
14 much.

15 CHAIRMAN NOTTINGHAM: Just a final
16 question, Mr. Richmond. You mentioned the
17 desirability and the need for this Board to
18 identify a bright line test that would help
19 resolve cases such as the disputes and
20 controversies such as this. You talked about
21 looking to see whether something is being done to
22 increase the value of a commodity in

1 transportation. Then we talked a little bit
2 about that. That's not -- that wasn't really the
3 bright line test. That was a consideration we
4 should look at, if I follow you correctly.

5 I don't want to put words in your
6 mouth. What is the bright line test? Let me try
7 to hear you say it one more time.

8 MR. RICHMOND: Actually, what I had
9 hoped to convey in my opening comments was that
10 it seemed that there was a consensus that
11 guidance from this Board would be very helpful on
12 this issue and I'm perfectly happy to talk about
13 guidance. And I think if you were to say that
14 value added activities create a per se
15 presumption and the Board is going to scrutinize
16 those closely to determine whether they are
17 integrally related to rail or if they're in fact
18 related to some other business function, that
19 that would be helpful guidance.

20 CHAIRMAN NOTTINGHAM: And if
21 something actually, hypothetically, let's just
22 say, if an activity was widely viewed as

1 integrally related to transportation but it
2 actually also coincidentally, is an activity that
3 happens very commonly in another setting like MSW
4 processing, what do you advise that we do? We
5 have a law that tells us as soon as we see
6 something that's integrally related to
7 transportation, it doesn't tell us to go explore
8 what else -- how we could ignore that fact if we
9 can find it's actually the same activity that's
10 found present in another transaction or
11 operation.

12 MR. RICHMOND: I'm afraid I can't
13 answer that in the abstract but I'm happy to
14 answer it with a concrete example.

15 CHAIRMAN NOTTINGHAM: Okay, let's do
16 concrete example. Let's say we hypothetically we
17 stipulated that -- this is not really
18 hypothetical but we stipulate that the depositing
19 of -- would your client help me understand more,
20 your colleague, excuse me, Mr. Camara, municipal
21 solid waste is taken out of a truck, deposited on
22 a concrete floor, and then picked up, no

1 separation or anything else, no baling and
2 deposited in the back in a container for rail
3 transportation. That sounds to me could be --
4 and let's just -- that could or could not be --
5 that could definitely arguably be integral
6 transportation.

7 Depending who you ask, it could be
8 waste processing but I think I heard Mr. Camara
9 said he's never seen it happen by itself, but if
10 it did happen by itself, he didn't think it
11 really would be processing. But then you add in
12 let's say they want to bale it up so they can fit
13 a little more onto the railcar for more efficient
14 transportation purposes. They're not baling it
15 up so they can somehow extract profit later down
16 in the stream or they're not really adding value
17 other than just, you know, to get more stuff onto
18 the transportation, integral transportation.

19 There, I heard Mr. Camara say and
20 others say, "Well, that's process, baling is
21 process", but couldn't a reasonable person say,
22 "Well, it's also an integral to transportation".

1 MR RICHMOND: Mr. Chairman, when you
2 were asking Mr. Camara those questions, you were
3 asking him about processing generically and
4 you'll remember I jumped in and I asked, are you
5 asking for a legal conclusion. And that's
6 because of this precise problem. When an
7 operator in Massachusetts hears processing,
8 they're thinking what is subject to DEP
9 permitting under the DEP processing requirements
10 and I believe that's fundamentally different than
11 your jurisdiction and the questions that are
12 before this Board.

13 So we would look at value creation
14 and I don't see value creation in the chain of
15 activities that you just discussed. I do think
16 baling may have a different analysis associated
17 with it because a lot of material NET has
18 admitted will come to it baled or some material
19 will come to it baled. And therefore, it's more
20 of a packaging issue and the question I would ask
21 is whether manufacturers of computers could send
22 their individual computers to a transload

1 facility and ask them to box the computers,
2 whether that would be subject to your exclusive
3 jurisdiction.

4 My thought is, you would have some
5 question about whether that's integrally related
6 to rail transportation. I don't know that it's
7 an easy answer but I pose that as a question. So
8 when I look at baling, that's the analysis I do.
9 I don't see value creation.

10 CHAIRMAN NOTTINGHAM: Baling and did
11 I hear you say some types of wrapping might not
12 be value enhancing as well?

13 MR. RICHMOND: I guess I see the
14 baling and the wrapping as similar, yes.

15 CHAIRMAN NOTTINGHAM: Okay, so baling
16 and wrapping are not necessarily value creating.
17 So presumably, they shouldn't raise too many
18 alarm bells about not being integral to
19 transportation. So they would be integral to
20 transportation and since they don't add value, we
21 don't even necessarily following that logic, need
22 to worry about those discrete transactions.

1 There are a lot of others here at issue in this
2 case being processing.

3 MR. RICHMOND: Well, no, under the
4 value creation argument, that's correct. I still
5 think there's this question about whether baling
6 is appropriately a packaging activity which is
7 typically done by the shipper or whether it is a
8 -- it is done primarily by the transloader for
9 purposes of facilitating the rail shipment. That
10 I don't have an answer to. You'd need more facts
11 on that.

12 CHAIRMAN NOTTINGHAM: So if somebody
13 is just wrapping something up so that it can use
14 the car later quicker because they won't smell as
15 much, and also so that it can
16 -- more of it can fit efficiently into a railcar
17 and then when it gets to a landfill, it's just
18 dumped with everything else in the landfill.
19 There's no added value once it's at the landfill
20 being baled or wrapped. If that were the case,
21 you'd have transportation activity with no
22 processing element, correct?

1 MR. RICHMOND: If that were the case,
2 yes.

3 CHAIRMAN NOTTINGHAM: Okay, I think
4 we're starting to make a little progress here as
5 to our understanding. I appreciate you bearing
6 with me on that. These are important questions.

7 MR. RICHMOND: Absolutely.

8 CHAIRMAN NOTTINGHAM: We've had a lot
9 of different answers by a lot of smart people, so
10 I'm just trying to really understand it. That's
11 all I have. Any other questions for this panel?

12 COMMISSIONER MULVEY. No, thank you.

13 CHAIRMAN NOTTINGHAM: Seeing none,
14 thank you very much. Mr. Camara?

15 MR. CAMARA: One more comment. We
16 built that facility back in 2002 and before we
17 built it, I traveled all over the country looking
18 at facilities. And another business that I own,
19 which is the odor control business, visited a lot
20 of transfer stations and similar facilities who
21 provide services for odor control. And in
22 visiting all those facilities, all different

1 types of facilities, in every single case, people
2 were pulling materials out that had value.

3 I never visited a facility that
4 strictly took material from the tipping floor,
5 loaded it into a car and sent it away. It just
6 didn't make economic sense.

7 CHAIRMAN NOTTINGHAM: Okay, thank you
8 for sharing that. Thank you, panel. You're
9 dismissed. You're welcome to stay as long as you
10 like today and observe.

11 We will move forward to the next
12 panel. And that would be Panel 5, Mr. Daniel
13 Deutsch of the Town of Wilmington for 15 minutes.
14 Kathleen M. Barry of the Wilmington/Woburn
15 Collaborative, Susan Cleaver, both for five
16 minutes, Ms. Barry and Ms. Cleaver and for 10
17 minutes, Mr. Carter H. Strickland, Jr. from the
18 Raritan Baykeeper and Hackensack Riverkeeper
19 organizations. Welcome, you've been very patient
20 today and we very much appreciate your
21 participating. I think we're going to start with
22 Mr. Deutsch. Whenever you're ready, please

1 proceed.

2 MR. DEUTSCH: Thank you very much,
3 Mr. Chairman, thank you. I'd like to thank you
4 for the opportunity for us to appear before you
5 in person. We value the process and believe that
6 it's essential to your decision making and has
7 implications as we will note in the course of our
8 argument for the concerns that we all have with
9 the preemption issue and the proper role of state
10 and local governments in regulating solid waste
11 as well.

12 I'd like first of all to introduce my
13 partner Paul Durnezas, who is Town Council for
14 the Town of Wilmington, also of the first
15 Duetsch, Williams, Brooks, in Holland and Boston.
16 Also with us today is John Gilbert of the
17 engineering firm of Geoinsight, Incorporated,
18 which is the engineering consultants for the Town
19 of Wilmington and Michael Kira, who is the Town
20 Manager for the Town of Wilmington and therefore,
21 charged with speaking with us on behalf of the
22 town.

1 We have essentially here two sets of
2 tracks, regulatory tracks, that threaten to
3 converge. And they threaten to converge here in
4 Washington before this Board and in Wilmington,
5 Massachusetts. If they were to intersect, it
6 would create huge problems, we maintain, for this
7 Board as well as in Wilmington, but they need not
8 conflict. I would maintain that only a finding
9 of no preemption would keep them parallel.

10 The two bodies of federal law are
11 ICCTA which grants to this Board exclusive
12 jurisdiction over, as folks have noted all day,
13 rail transportation and those operations that are
14 legitimately integral to the ability of the
15 carrier, the legitimate rail carrier, to provide
16 rail transportation on the one hand and RCRA
17 Subtitle D regulating solid waste and other
18 federal laws concerning directly and indirectly
19 the management of solid waste, all of which as
20 some commentators here, but not all, have noted
21 focus on state and local governments as
22 Commissioner Mulvey has noted as well, as the

1 primary entities to plan, regulate and enforce in
2 that field and this is an essential distinction
3 that essential feature that distinguishes C&D and
4 MSW from other commodities.

5 Regulating public health and safety
6 is at the core of historically state functions.
7 Some here are necessarily prone to view the
8 issues before this Board through the lens of rail
9 activity. In fact, interestingly, early in
10 today's hearing the transrail representative, Mr.
11 Van Tine, said, "This is the last mile, last mile
12 of track to connect existing rail service to the
13 community of Wilmington". That would be viewed
14 through the railroad lens.

15 Viewed through the lens, however, of
16 the effected site and the effected community of
17 citizens, and the effected community of state and
18 local regulatory bodies, this would be the first
19 mile of railroad for this site. Railroad is a
20 new venture here; whereas, waste issues have
21 persisted and continue at this site.

22 And as the Chairman has made clear,

1 what we're dealing with is a -- not merely
2 picking up and putting waste down but New England
3 Transrail proposes to dump, sort, segregate,
4 shred, grind, bale, a full panoply of waste
5 processing operations. Waste processing is not
6 railroading. Likewise the site permitting
7 process is a distinct body of law independent of
8 transportation.

9 It addresses the suitability of a
10 particular land for use in waste processing. It
11 is about the use or abuse of land in connection
12 with a very particular and environmentally risky
13 business operation. It's not about the who, we
14 maintain, but about the where and the how. And
15 this contrasts with the Washington, DC ordinance
16 which was the subject of Board proceedings some
17 years ago, that required a permit for the passage
18 of hazardous cargos within or near the district
19 limits.

20 Unlike those regulations, the site
21 regulations, the site assignment process, at
22 issue here do not presume to restrict rail

1 transportation. Viewed in its simplest terms,
2 some sites may not be suited to certain
3 industrial activities. This portion of the Olin
4 Chemical site is a superfund hazardous waste site
5 with at least 196 chemical constituents and a
6 human carcinogen, NDMA. It has subterranean
7 contaminant cell with containment walls, lies
8 directly above an aquifer that is a primary
9 source of local drinking water and its
10 contamination has forced the closure of 60
11 percent of the town's wells.

12 It's barely within the early stages
13 of EPA investigation study, which is proceeding
14 very slowly and with uncertain funding and
15 timeline, although it is EPA's province and
16 prerogative to insure that the environmental
17 problems raised here are fully vetting and
18 appropriate necessary measures are implemented.
19 But it is this site that Transrail has selected
20 to construct and operate among other facilities,
21 a plant to engage in all of these solid waste
22 processing activities, activities involving solid

1 waste which itself contains hazardous components.
2 And having looked primarily to the state and
3 local governments to regulate and implement
4 standards in this field, it's inconceivable, we
5 believe, that Congress intended to have them take
6 a backseat in such circumstances just because the
7 proponent of those activities which is to
8 incorporate it into a business plan that also
9 would include rail transportation there, two
10 regulatory fields are distinct and that
11 distinction can and should be preserved.

12 Transrail has said that it intends to
13 comply with all substantive health and safety
14 laws except it says, for site assignment,
15 permitting and the waste ban laws. In fact, Mr.
16 Tine's statement in response to the Vice
17 Chairman's question whether he -- whether
18 Transrail was, in effect, doing everything it
19 could to address health and safety issues other
20 than submitting to the state's jurisdiction. The
21 site assignment process is, in fact, the guts,
22 the main course of regulation, federally

1 delegated to the states in the area of health and
2 safety laws when it comes to waste processing.

3 We believe that the question of
4 preemption and of any burden on interstate
5 commerce may be answered in a way that is
6 specific to the very unusual circumstances here
7 and it leaves only a modest footprint on the
8 field of rail regulation. It's a fact based
9 determination that requires careful examination
10 of the regulatory environment as well as the
11 details of the proposed activity itself. Those
12 unusual circumstances are, first of all, this
13 proponent seeks to enter the rail field and under
14 that umbrella to enter another distinct field of
15 waste processing. Since there is no history here
16 of railroading authorization, there is no
17 existing railroad activity that must be
18 accommodated or facilitated.

19 Number 2, this petitioner seeks to
20 bring rail activity to a location where there
21 presently is none but here is other activity.
22 There is activity in investigating and

1 remediating hazardous waste that implicates a
2 whole another body of law. Since there is no
3 active railroading here, no active railroad
4 presence at the site, there's no expectation of
5 rail activity or of other activities that
6 purportedly facilitate rail transportation.

7 The third distinction, Transrail
8 would undertake not only one activity, but a
9 sequence of waste handling and processing
10 operations which it does not recognize as adding
11 value to the material, rather only facilitating
12 what it says purportedly is its sole rail mission
13 but which non-rail solid waste processors like
14 Mr. Camara, recognize as their bread and butter
15 and which the municipal authorities recognize as
16 such.

17 So whatever they may possibly to do
18 improve the efficiency or the economies of
19 proposed rail transportation, those activities
20 also comprise and established non-rail business
21 enterprise as distinguished from, for example,
22 Mr. Moates referred to this morning, heating corn

1 syrup, inspecting car chassis or mixing grain.

2 Fourth, the operations here are of a
3 type that are primarily and best regulated by
4 state governments and by extension of local
5 governments who have an intimate knowledge of the
6 relevant circumstances, knowledge of -- recognize
7 the essential role and a knowledge of the
8 location of wetlands, aquifers and sensitive
9 environmental receptors.

10 So there is a precedent for state and
11 local regulation in the field in question here.
12 And not only a precedent, but a mandate for it
13 and a practice of it. And finally consistent
14 with that delegation of solid waste regulating
15 authority to the states, Massachusetts has a
16 longstanding, rail neutral regulatory process to
17 evaluate in advance, the suitability of solid
18 waste activities for a particular site. As I
19 eluded to at the beginning, opening, this is a
20 public process. It's neither arbitrary nor
21 discriminatory but requires adherence to
22 established standards and careful consideration

1 of enumerated factors to which Mr. Richmond began
2 to elude, which he said he could count 50. These
3 are not rogue regulations. This is not potshots
4 being taken at the rail industry. All of this,
5 of course, does not account for the serious
6 problems inherent in this particular site or the
7 fact that this proponent was not forthcoming in
8 its original submissions to this Board on the
9 very issue of waste processing.

10 And we agree with certain other
11 parties here that Transrail has repeatedly
12 strained to clarify even today, or adapt its
13 proposal to more easily come within some concept
14 of preemption. And this has occurred only in
15 response to questions and concerns raised by the
16 various participants and by this Board.

17 So its contentions on this issue
18 should even now be viewed with some considerable
19 skepticism and yet Transrail has the burden on
20 this aspect of its petition. Building on this
21 unusual constellation of circumstances I've
22 described, we believe this Board may consider

1 ruling along the following lines. That
2 interstate commerce is not unduly burdened and
3 that federal railroad laws do not preempt
4 railroad neutral state and local site suitability
5 analysis and permitting, when a rail carrier, if
6 indeed Transrail is such, proposes to create new
7 rail access to a location and to conduct there,
8 among other activities, a sequence of solid waste
9 handling or processing activities that ordinarily
10 are subject to such existing railroad neutral
11 permitting. The very tangible interests and the
12 health of the citizens who live in Wilmington,
13 Massachusetts should not be sacrificed or
14 shortchanged for the sake of principles of rail
15 efficiency which are not even clearly fulfilled
16 here inasmuch as Transrail's representatives
17 today have acknowledged that at most, their best
18 case is on the periphery of this preemption
19 analysis because at most the -- in their view,
20 the solid waste operations in which they would
21 engage, facilitate and not more, facilitate rail
22 transportation.

1 And those interests need not be
2 sacrificed because this Board can draw the line
3 on its exclusive jurisdiction in a way that
4 serves legitimate regulatory needs with respect
5 to both railroad transportation and solid waste
6 processing. A few additional comments that I
7 believe are important and of use to the Board.

8 Some of these related to the
9 presentations of others earlier today, in
10 particular Transrail and I don't recall the
11 gentleman's name, Mr. -- it may have been Mr.
12 Klempner, in principle stated that, "We'd
13 segregate substances for solid waste -- from
14 solid waste because landfills with not accept
15 them, such as refrigerator coolants, light
16 ballasts and so forth". Landfills won't take
17 those substances because the landfills are
18 regulated. And yet, Transrail asks this Board to
19 rule in a way that would preempt, dispense with
20 such regulatory processes applicable to the very
21 business of sorting, shredding, grinding and
22 baling those materials at this site.

1 Additionally, counsel for Transrail
2 this morning made a point that some overtures
3 have been made to establish a dialogue with the
4 parties. No dialogue was ever engaged in with
5 the Town of Wilmington. In fact, initiatives
6 made by the town and its representatives failed
7 because our calls weren't returned. There has
8 been no discussion or dialogue on that point.
9 This is an evolving proposal, evolving
10 presentation and one that is rife with
11 inconsistencies and inaccuracies.

12 Mr. DeMai earlier today expressed a
13 concern that local regulators tend to over-
14 regulate. In this case, certainly there is not a
15 risk of over-regulation. The pre-clearance
16 permitting at issue here is a site assignment
17 process that involves the application of existing
18 detailed standards according to extended formal
19 public hearings with a public participation
20 component at which we can only stream today. It
21 does not lend itself to arbitrary decision making
22 or over-regulation. It, itself, is regulated.

1 It's been suggested that perhaps this
2 Board might conditionally approve or grant
3 preemption conditional upon subsequent recurrent
4 inspections and compliance after the fact with
5 enforcement measures. We say this would be too
6 little too late. It's not enough to give a
7 speeding ticket to a runaway train in a busy
8 neighborhood. In this case, solid waste, solid
9 waste processing can cause great damage,
10 irretrievable damage before any action might be
11 taken to suspend that activity. The ability to
12 monitor may have been lost. Monitoring wells may
13 not have been required installed and there's a
14 double threat there. Not only the release of
15 hazardous materials into this already
16 contaminated environment but also the release of
17 substances that may alter the characteristics,
18 alter the solubility for example, of existing
19 contaminants.

20 And there is the economic component.
21 An established facility with economic incentives,
22 to challenge every attempt to police violations

1 after the fact causing delays, inefficiencies and
2 uncertainty in the results in the outcome.

3 CHAIRMAN NOTTINGHAM: If you could
4 wrap up, please.

5 MR. DEUTSCH: Yes, thank you.

6 CHAIRMAN NOTTINGHAM: Thirty seconds.

7 MR. DEUTSCH: Yes. In short, as the
8 Chairman has noted early on, Wilmington, more
9 than most communities, has been subject to more
10 than its share of environmental damage and
11 burdens on it presented by abuse of land and of
12 unregulated activities or activities that have
13 been dealt with only after the fact. There is no
14 adequate substitute for preclearance permitting
15 in the case of solid waste from the environmental
16 standpoint and from a regulatory standpoint. The
17 federal laws that apply have specifically
18 delegated that role to the states. In that
19 sense, a municipal solid waste and C&D are a
20 different commodity and this Board is in a
21 position to reconcile its concerns. Thank you.

22 CHAIRMAN NOTTINGHAM: Thank you, Mr.

1 Duetsch. We'll now hear from Ms. Kathleen Barry.

2 MS. BARRY: Thank you very much. I
3 represent the Wilmington/Woburn Collaborative.
4 My name is Kathleen Barry. I'm a resident of
5 Wilmington. We have been actively involved with
6 this site since 2002 when a C&D facility prior to
7 NET came in to Wilmington to try to redevelop
8 this site.

9 We were -- I don't know how
10 successful we were but the C&D facility pursuit
11 at that time was declined by the present Olin
12 Chemical Corporation. I'm here to give a
13 community face on all of this. I'm pretty much
14 very honored to be representative of the
15 community and the -- and to give that voice to
16 you and put that face to you.

17 When I first learned last week that
18 we were a non-party of record, I filed an appeal
19 with you and I thank you very much for allowing
20 me to appear. It was surprising to me because
21 when this proposal was brought forward to the
22 community in a very local -- a handful of

1 residents met with Mr. Klempner and Mr. Jones.
2 We filed -- in the community filed over 700 to
3 1,000 petitions based on the rail reload facility
4 only.

5 They came to us, they described to us
6 what they were going to do and we objected, and
7 we still object to that. I'd like to make three
8 main points here today. I would like to point
9 out the site incompatibility. I would also like
10 to talk about the EPA as they -- as far as we're
11 concerned has the jurisdictional governing
12 authority. And I'd also like to talk about when
13 the project was first presented to us.

14 Regarding site incompatibility; this
15 site, as previously stated, has a long sordid
16 history of contamination. It has effected two
17 watersheds, the Attagona going down into Woburn
18 and the Ipswich Watershed in Wilmington. And in
19 particular, it has effected our drinking water
20 wells and our drinking water supply in our
21 aquifer. We have lost 60 percent of our drinking
22 water supply because of this site.

1 Ammonia and nitrogen compounds and
2 its exposure to be public could have been over or
3 up to 20 years. We have a childhood cancer study
4 going on in the -- by the Department of Public
5 Health that has identified an occurrence of over
6 two and a half times the normal.

7 We have in our activities we were
8 fortunate enough to forge a relationship between
9 Tufts University and the Department of Public
10 Health so that they can look at the exposure
11 patents from the Olin property to the drinking
12 water wells, out to the homes, to determine
13 exactly how much, when the contamination may have
14 gotten to each of the homes.

15 This is a formidable study. It is a
16 very serious study. When we were going through
17 that study, I met up with Assistant Commissioner
18 of the Department of Public Health. At that time
19 we were also fighting bringing a soils and
20 contaminated material into a landfill and she
21 told me, "Kathy". We were looking at the
22 precautionary principle. And she said, "Kathy,

1 you don't know. You people shouldn't be bringing
2 things into your community. You should be taking
3 it out". We say that and you've heard insult to
4 injury. We think that this is much more like
5 pouring salt into an open seeping wound.

6 In the literal sense this operation
7 will certainly exacerbate the severely damaged
8 and highly sensitive environment. I find it
9 quite poignant and somewhat ironic that you would
10 have this hearing today exactly one year later
11 after the EPA has determined that this site meets
12 its bar for Superfund.

13 We sat and talked to the Superfund
14 folks and they detailed the process of doing
15 their remedial investigation, their site
16 assessments, their feasibility studies and so on
17 and so forth. And I spoke directly to one of the
18 people there at that level and I said, you know,
19 "Has this ever happened before where you had a
20 proponent coming in prior to your analysis"? And
21 she said, no, in Region 1. She was the woman who
22 did the study for and the hazardous ranking score

1 proposal for the Superfund site. So this is
2 tremendously precedentting (sic). We feel that
3 the EPA should have unfettered access. We feel
4 that they should be the authority. They should
5 have the jurisdictional authority.

6 Tim Conway of the -- I sent this to
7 you in Region 1 commented and he said, "The EPA
8 cannot consent to any activity at this site until
9 it makes its own determination that the site is
10 safe for human health and the environment and
11 that the proposed use will not exacerbate site
12 conditions or hinder the EPA's remaining
13 investigation."

14 We feel that they should be the final
15 word on redevelopment, on who goes in there, what
16 goes in there and that should be on their time
17 frame. And lastly, I'd like to just quickly if I
18 may beg the Board for additional time, the
19 Wilmington/Woburn Collaborative is addressing the
20 question of the Board on how the project was
21 conceived. We met with Mr. Klempner and Mr.
22 Jones in 2003 at the behest of John Tierney.

1 He's our United States Representative. At that
2 time they told us it was going to be a rail to
3 truck reload facility only. Everything would be
4 in sealed containers, just as you have described.
5 There would be transloading of those containers
6 onto trucks using a one-sprung structure with no
7 holding areas.

8 The only thing that was going to be
9 dumped on the ground was lumber and that it would
10 occur in the wee hours of the morning, between
11 1:00 and 6:00 a.m. The presentation was weak, it
12 was unprofessional. The application was fraught
13 with error, calling names of streets incorrectly,
14 showed that they had no intention of working in
15 the community to find out who we were and what
16 kind of impact it would have on us.

17 We asked about C&D fines because we
18 had just stopped a C&D facility going in there.
19 The answer was, "No, we have no intention". We
20 just heard that they have no intention of being a
21 recycling facility. We heard that same no about
22 it being a C&D -- having C&D operations in solid

1 waste.

2 We asked about nuclear waste. The
3 answer there was more unclear. They said they
4 couldn't say no. They touted themselves as a
5 small, startup railroad company and their
6 intention was for transloading only.

7 CHAIRMAN NOTTINGHAM: Ms. Barry, if
8 you could wrap up now.

9 MS. BARRY: Okay. They needed to
10 expedite their project at that time. They said
11 that they would move on in nine months if it
12 hadn't been approved. Four years later we're
13 here before you. A final comment here, we were
14 wondering whether we had a role here because we
15 didn't know if we were main principals, but we
16 are the main principals. It is our health and it
17 is our welfare that is threatened.

18 You talked about NEPA. NEPA has put
19 it very plainly. It says, "In order to carry out
20 the policies set forth in NEPA, it must assure
21 for all Americans safe, healthful, productive,
22 aesthetically and culturally pleasing

1 surroundings". We ask you to adhere -- look at
2 us as a community, look at the damage that we
3 have, look at the children with cancer, look at
4 the site. The site is incompatible for this
5 operation. Thank you.

6 CHAIRMAN NOTTINGHAM: Thank you, Ms.
7 Barry. We'll proceed with Ms. Cleaver.

8 MS. CLEAVER: Thank you very much for
9 having me here today to speak. I have family
10 that lives in Massachusetts and I've done -- and
11 I've been recognized for doing extensive
12 environmental work, especially in some solid
13 waste sites and I'd like to commend Kathleen
14 Barry for what she's bringing up and that's the
15 reason why I'm here is so we don't end up with
16 more sites like Olin. And that's why I feel we
17 need to have the EPA or DEC in my case, I'm from
18 New York. We need to have that oversight because
19 it is health and safety. And the gentleman from
20 New Jersey was kind enough to stay to leave his
21 picture here and I'd like you guys to look at
22 that. Somebody brought up from NET, I think

1 about this was a case of NIMBY. Well, if it's a
2 case of NIMBY, I'm guilty.

3 I don't want that in my backyard. I
4 don't want that in my neighbor's backyard. And
5 would you want it in your backyard and would you
6 want your drinking well underneath that lump. Of
7 what if it's a sole source aquifer? Those are
8 things that really need to be addressed here.
9 And I'm hoping that this
10 -- at least there will be some guidance set up
11 for this.

12 In Middletown, which is right next to
13 us, we had almost the same thing, I would
14 imagine. Middletown, New Jersey Railroad with
15 Chertwell is still -- I'm not sure where that has
16 settled about preexemption and I also have to
17 question what happens if there is a landfill at
18 the end of this railroad, is that going to fall
19 under preexemption too? Who is going to have
20 jurisdiction there?

21 If they start polluting, who am I
22 going to go to if there's leche (phonetic)

1 leaking out into a river? These are serious
2 issues and also who's going to pay to clean up
3 the pollution when it does happen? Is it going
4 to be on the back of the taxpayers? Is there
5 going to be bonding that's going to put up for
6 this site to cover any pollution that's there?
7 Now, I'm going to go back to what I had I
8 written.

9 It seems like it can take a day to
10 pollute a site and contaminate it and then it
11 takes 10 years to clean it up. I know I've
12 worked with Congressman Hinchey down to our
13 Country Executive, to the EPA on Superfund sites
14 and we're still going through -- we're ahead of
15 them but it's a lot of work and that's just one
16 site. And this has a potential to be national.
17 It could happen anywhere. It has to have some
18 type of guidance so people know what they can do
19 and what they can't do and things like that don't
20 happen.

21 It also -- for all the work and the
22 people that work in the environmental field, I

1 think great strides have been made. From elected
2 officials on down, they realize the problem with
3 contamination, the problem with health issues
4 that surround things like this. This to me sets
5 it back. It's putting us in reverse because how
6 are we going to deal with all of this? Are you
7 going to have enough people?

8 Kirk Van Tine indicated no site
9 assessment pre-clearance. Well, that sounds good
10 in theory but first, the EPA, they have different
11 levels, at least my understanding and it's a
12 shame they're not here, that as to how far a site
13 will get cleaned up. Sometimes they'll say that
14 you can't build anything on it. There could be
15 volatile vapors end up going off of these
16 Superfund sites and it's hazardous to your
17 health. So how can you waive and say no site
18 assessment? What about the workers on this site?
19 Are they going to be using water from -- where
20 are they going to get water from? I think baling
21 and stuff, at least in our local transfer
22 stations require water as a usage. Are they

1 going to be using water from contaminated wells?

2 I mean, there's a lot of issues here
3 that really need to be addressed and I see my
4 time is up and thank you for today.

5 CHAIRMAN NOTTINGHAM: Thank you, Ms.
6 Cleaver. And be assured, your entire statement
7 will be put in the record. We now turn to Mr.
8 Carter H. Strickland, Jr. from the Raritan
9 Baykeeper and the Hackensack Riverkeeper.

10 MR. STRICKLAND: Thank you, Chairman
11 and Commissioners. I should clarify, I work at
12 the Rutgers Environmental Law Clinic and Raritan
13 Baykeeper and Hackensack Riverkeeper are clients
14 of mine that we represent in the suit against New
15 York Susquehanna and Western. That's our
16 interest here. I have represented another
17 client, Pinelands Preservation Alliance in
18 another case in New Jersey, in the JP Rail matter
19 which was able to shut down a facility. I raise
20 our interest in New York Susquehanna and Western
21 case for two reasons.

22 One, it was only as a result of our

1 case, plus the state's action that finally and
2 belatedly forced this kind of condition to be
3 changed. I'm not saying they're compliant now
4 but this railroad was very reluctant to comply at
5 all and that's relevant because that will be the
6 inevitable result of preemption of laws. That is
7 the lowest common denominator. That's what these
8 sites will evolve to.

9 The second reason I raise our
10 litigation is that we, unlike the state, we raise
11 federal claims, under RCRA. I agree with
12 everybody who said, and our submission reflects
13 this, that state law is the primary law that
14 applies to solid waste facilities. RCRA does
15 apply at a baseline level but it's important
16 because the Commission has suggested that -- or
17 the Board has suggested that federal law somehow
18 might be an escape and it's not. And if you
19 look, and I'm going to direct my remarks to the
20 text of the section in ICCTA and the legislative
21 history and rely on our submissions to address
22 the specific questions the Board had.

1 But the text of the statute speaks of
2 preempting federal and state law. It doesn't
3 draw a distinction, so what the Board rules here
4 also will apply by the Texas statute to federal
5 laws. Solid waste is regulated by states under
6 their traditional police powers it's true and we
7 certainly support permits as a key regulatory
8 tool. Without a permit, you've heard it
9 described very well, police powers are
10 essentially toothless.

11 What the court or what the Board
12 rules today will also be relevant to other types
13 of activities. Make no mistake about it,
14 Susquehanna and Western for example, in the
15 regulatory submissions to New Jersey has said
16 that quoting, "Preemption applies equally to
17 hazardous waste, medical waste and recycling
18 facility permits and approvals. The Brotherhood
19 of Locomotive Engineers suggested that it would
20 also apply to radioactive waste in this
21 proceeding and there's really no principled
22 reason if solid waste facilities like this are

1 preempted, that regulations over landfills would
2 not also be preempted.

3 Well, I would like to focus on ICCTA
4 and for this reason, I think it's fundamental to
5 have a good understanding of that law and the
6 very limited purposes that Congress had in mind
7 when it passed it. And you don't have to take my
8 word for it. I'm looking at the statute now,
9 Section 10501(b). It has this language in it and
10 it can't be superfluous, Congress meant every
11 word of it, "Except as otherwise provided in this
12 part, the remedies provided under this part with
13 respect to regulation of rail transportation are
14 exclusive and preemptive remedies provided under
15 federal or state law".

16 What does that mean? It means that
17 if the Board has jurisdiction over matter, has
18 regulatory powers, then other federal and state
19 agencies do not. This is very clear from the
20 initial House report. I'm quoting from House of
21 Representatives Report 104-311. It said, "States
22 retain the police powers preserved by the

1 Constitution". It's also very clear, it's
2 crystal clear in the joint report adopted by the
3 conference committee which talks about the
4 exclusivity of federal remedies and quote,
5 "Exclusivity is limited to remedies with respect
6 to rate regulation, not state and federal law
7 generally".

8 For example, "Criminal statutes
9 governing anti-trust matters are not preempted by
10 this Act and laws defining such criminal offenses
11 as bribery and extortion remain fully applicable
12 because they do not generally collide with the
13 scheme of economic regulation and deregulation
14 of rail transportation." That's House of
15 Representatives Conference Report 104-422.
16 That's key language.

17 The 11th Circuit in the Florida East
18 Coast Railway case picked up on this, these two
19 important limitations. It said, "Look ICCTA
20 preempts laws only with respect to regulation of
21 rail transportation". That is something very
22 different from all laws that incidentally or

1 tangentially touch upon rail, generally
2 applicable laws. Those are not preempted.

3 Second, Congress specifically limited
4 the STB's ability to preempt laws in situations
5 where there are some remedies under Part A of
6 Subtitle 4, Title 49. The statutory remedies
7 provided to the STB cover rate levels and such
8 issues as economic, anti-discrimination,
9 licensing abandonment, sale of railroad property,
10 operations, open track rights, financial matters,
11 including mergers and acquisitions and taxes.
12 All of these substantive powers relate to
13 economic regulation. We pointed in our
14 submission to a 3rd Circuit case, Union Railroad
15 Company v. United Steel. There Union was
16 precluded from bringing claims under the NLRB
17 against the railroad because ICCTA provided an
18 explicit remedy before the STB as the
19 Commissioner pointed out.

20 There is some power to govern labor
21 relations. Therefore, there's a remedy that's
22 preemptive. Well, what does that mean in an

1 environmental context? Let's look at what the
2 STB can do. It can do very little. Of course --
3 and I don't want to belabor this point, but it's
4 fundamental to understand its limitation on
5 regulating existing railroads under 10906.
6 That's been well discussed by everybody, but it's
7 important because, as you see with the principles
8 here, these principles were involved in Hi-Tech.
9 When that kind of operation was shut down, their
10 reconstituting themselves as an existing railroad
11 to try to seek the preemption knowing full well
12 that as an existing railroad under 10906, there's
13 very little licensing authority the board has.

14 The board does review acquisitions or
15 major federal actions and decisions approving an
16 acquisition under NEPA, but that's -- that
17 happens at the outset. There can be conditions
18 on NEPA, but it does very little, I would submit,
19 to control the ongoing operations from a facility
20 like this with the dust and water runoff that
21 certainly concerns my clients. These upland
22 facilities and the solid waste that comes off

1 them are clogging up the wetlands and dirtying
2 the streams, and that's just not right.

3 But NEPA review is limited. We
4 pointed out the testimony of then Chairman
5 Buttrey on June 21st, 2006. That pointed out
6 that the staff -- the overall staff of the STB is
7 limited by Appropriations to more -- no more than
8 150 employees. Only a small number of those are
9 responsible for NEPA review, and if you look at
10 just a state like Massachusetts, they didn't say
11 how big their program staff was, but if it's
12 anything like New Jersey, it's about that just
13 for solid waste alone. So the board just doesn't
14 have the capability -- they're not set up to
15 oversee environmental laws and the inspections
16 and enforcement that would be necessary to do so.

17 In short, Congress did not intend for
18 the Surface Transportation Board to effectively -
19 - to shape the solid waste industry, didn't give
20 it any remedies to do so, and because there's no
21 remedies under the terms of 10501(b) itself,
22 there's simply no preemption.

1 I want to address very briefly the
2 City of Auburn case. I'd be happy to take some
3 questions on it. That case is a case about
4 overlapping remedies. That case involved the
5 city trying to revisit a NEPA determination made
6 by the board. It's really a res judicata
7 decision.

8 I want to briefly address the three
9 solutions that have been floated by various
10 parties and the board. One, bona fide railroads
11 limiting preempting to such railroads doesn't do
12 anything, certainly from New York Susquehanna
13 situation doesn't do anything, if indeed NET is a
14 bona fide railroad, simply because of the
15 limitations of 10906 and the board's decision in
16 the Riverdale and other cases. In fact, the STB,
17 to my knowledge, has never authorized or
18 controlled or approved any waste stations built
19 by existing railroads.

20 The second solution floated as a
21 closer scrutiny of exemption petitions. Again,
22 what will the Surface Transportation Board do

1 with that information and what standards will
2 apply? We submit that there's too many open
3 questions for that to be effective.

4 And the third one, and of course this
5 is the railroads favorite suggested remedy -- NET
6 said it today very well and very candidly -- they
7 want to pick and choose the state law that they
8 will apply with, what they deem -- what we think
9 applies -- that's a direct quote as I wrote down
10 -- what they think are the substantive rules. I
11 would submit to you that if they're truly
12 concerned about a patchwork of laws, this is the
13 ultimate patchwork. Each railroad negotiating
14 what it things will apply to it is the ultimate
15 patchwork, and it puts -- it belies the logic of
16 the patchwork argument. Plenty of Fortune 500
17 companies that comply with state environmental
18 law s-- in fact, the railroads themselves comply
19 with various laws. This concept of voluntary
20 compliance seems to be running like wildfire
21 through environmental laws.

22 CHAIRMAN NOTTINGHAM: If you could

1 wrap up?

2 MR. STRICKLAND: I will -- 36, Mr.
3 Chairman. We don't talk about it yet with taxes.
4 It certainly was burdensome for me on Tuesday to
5 pay taxes. We're not yet talking about letting
6 the railroads off for taxes or not pay stamps on
7 their postage, but that's the ultimate logic. If
8 anything is burdensome, it's economic regulation.
9 That's simply not the law. Thank you.

10 CHAIRMAN NOTTINGHAM: Thank you, Mr.
11 Strickland. Thank you, panelists. Mr.
12 Strickland, I'll start with a couple of questions
13 for you if I could. Clearly, you're well -- you
14 are well read in the law. We appreciate your
15 participation today. I know you're familiar with
16 the case I mentioned earlier, the City of Auburn
17 Ninth Circuit case. You did raise the issue of
18 the -- of an interpretation of ICCTA whereby it -
19 - the board may only really need to worry about
20 economic regulation, if I understand your
21 comment. That was an issue that was explored in
22 the City of Auburn case by the Ninth Circuit.

1 MR. STRICKLAND: Right.

2 CHAIRMAN NOTTINGHAM: And in there,
3 the Court stated in its decision -- in fact,
4 there is nothing in the case law that supports
5 Auburn. Auburn was arguing the same. Auburn's
6 argument that through the ICCTA, Congress only
7 intended preemption of economic regulation of the
8 railroads. All the cases cited by the parties
9 find a broad reading of Congress's preemption
10 intent, not a narrow one. We're going to have to
11 wrestle with that, obviously, as we decide what
12 to do here.

13 You did point out some -- would you -
14 - I'll give you a chance to speak to that. Is
15 that a minor consideration that quote from the
16 Ninth Circuit or how would you reconcile that
17 with your view?

18 MR. STRICKLAND: We think it's not
19 warranted by the text of the statute and
20 certainly the legislative history, which does
21 focus not only in terms of the remedies but in
22 the whole purposes of the act, which was to free

1 railroads to compete on an equal level, not
2 burdened by their -- restrictions and whatnot,
3 with other modifications of transportation. In
4 fact, that's -- really, the sad thing here is
5 that there's many missed opportunities for
6 environmental groups which do support rail to
7 make common cause with them. We would like to
8 see rails -- rail taking out solid waste. Make
9 no mistake about it, if they're on the same -- if
10 they're playing by the same rules as the other
11 companies, this gentleman who invested \$9 million
12 dollars of his own money in a facility that's
13 protective, we certainly want to encourage that
14 kind of investment as necessary to protect the
15 public.

16 City of Auburn did consider -- I
17 think it's dicta if you look at what the decision
18 really had to say about res judicata and the
19 ability to revisit of a -- City of Auburn to
20 revisit a board's prior decision regarding the
21 scope of its NEPA review. City of Auburn does
22 seem to suggest in language that again, we

1 consider dicta that all environmental regulations
2 are somehow economic. Well, that can't be
3 squared with the Congress's reservation of police
4 power rights to states and the very limited
5 remedies provided to the board.

6 CHAIRMAN NOTTINGHAM: Mr. Strickland,
7 I will also note that the City of Auburn case was
8 considered by the Supreme Court and it was denied
9 cert. The same proposition was that ICCTA is not
10 limit -- does not limit preemption to only
11 economic regulations. It was also held in the
12 Second Circuit case, Green Mountain. The -- you
13 do point out a very serious concern, which is our
14 authority over active railroads, not as opposed
15 to potential new entrants such as the one before
16 us today, is rather limited. And do you propose
17 that we somehow -- there has been some statements
18 to this affect today -- that we figure out a way,
19 through this case, to settle the field of
20 controversy surrounding active railroads that may
21 be involved with activities such as what we've
22 talked about today, handling municipal solid

1 waste to C&D or strictly address what we have
2 before us today, which is a situation of a new
3 entrant? Because a new entrant, obviously, we
4 have a lot more authority. We have the ability
5 to do a lot of conditions, delegate our
6 authorities to folks who have the wherewithal. I
7 agree with you we are a small agency with some
8 limitations in staff and budget. We're not
9 proposing to send our employees all across the
10 country to, you know, arrest people or -- so we
11 would need to delegate that somehow or contract
12 out. And I hadn't, you know, thought that
13 through entirely. How do you -- what do you
14 propose we do with this case today, And do you
15 think it's reasonable And possible to actually
16 settle the whole field of controversy surrounding
17 rail transportation And municipal solid waste And
18 C&D material And survive appeal.

19 MR. STRICKLAND: We do. And I think
20 it's going to be appealed one way or the other,
21 so I don't know that you can avoid that. But as
22 we said in our -- in direct response to the first

1 few questions posed by the board in their notice
2 of this very hearing whether we think the board
3 should wait or not, And I think implicit in that
4 was whether the board should limit its ruling to
5 this case or really address the fundamental
6 problem that is causing a lot of pain in
7 communities that are subject to these unregulated
8 waste stations.

9 I think the board should. It
10 certainly would resolve a number of issues that
11 are taking up a lot of time And, frankly, causing
12 a lot of harm to the environment. These kind of
13 operations were in place for the better part of a
14 year, if not more than a year, before they were
15 stopped when -- certainly more than a year,
16 actually, now that I think about it -- by two
17 lawsuits that were brought on. This is a big
18 problem. And as I said earlier, I think drawing
19 the line on transportation will nip in the bud
20 what's going to come down the line, which is the
21 question of unregulated landfills, the question
22 of unregulated hazardous waste transfer And

1 disposal facilities. Certainly, if this is
2 permissible, there's no logical stopping point
3 for those. So we do think the board -- we do
4 hope the board, in the discharge of its public
5 interest responsibilities, does address those
6 larger questions.

7 CHAIRMAN NOTTINGHAM: Ms. Barry,
8 thank you for being here today. And we do
9 appreciate having someone directly from the
10 community. It means a lot to us. I know it's no
11 small effort for an individual to come all the
12 way down here, sit through this whole day.

13 MS. BARRY: I appreciate that. Thank
14 you.

15 CHAIRMAN NOTTINGHAM: We're delighted
16 you are part of this process. Let me ask you are
17 -- we heard from the state representative that he
18 envisions industrial development of some nature,
19 some type on this facility. Are you -- what's
20 your vision for this property And -- And would
21 some other railroad type of operation be within
22 your realm of comfort level but --

1 MS. BARRY: No.

2 CHAIRMAN NOTTINGHAM: No railroads
3 whatsoever?

4 MS. BARRY: No railroad. I envision
5 what he envisions. We have really have had
6 enough. I don't know if I stressed that enough
7 with you. We have two landfills that are close
8 by. We have a Superfund site on the site. We
9 have another one about three miles away. We have
10 been overburdened by trash. We have been
11 overburdened by these unsightly -- these types of
12 operations. We need to improve the quality of
13 our life And our environment. We have an
14 opportunity. EPA is in there. They're going to
15 remediate to a level that we can then be
16 accepting of. We work very closely with the EPA.
17 We've met with them quite a number of times in
18 their public involvement. We were involved, up
19 to this point, with the Massachusetts -- the EP
20 on the site.

21 So we have a very strong desire to
22 change the course of what is going on down in

1 South Wilmington And North Woburn. We need to
2 make it more inhabitable, more pleasurable, more
3 aesthetically acceptable.

4 And it is -- I can say that nothing -
5 - And that's -- the initial railroad proposal
6 that was brought to us, even though it has
7 changed threefold, was never really brought to
8 the community. And that's one thing I didn't
9 point out to you is that we have not had a public
10 involvement open meeting. The community itself
11 has no idea what it's facing. New England
12 Transrail has never come for an open meeting to
13 meet our community in the public. We'd stress
14 that. I don't know if you could actually
15 recommend that, but we --

16 CHAIRMAN NOTTINGHAM: Actually, we
17 would require that if we were to -- as part of
18 the NEPA process. If we were to assert
19 jurisdiction --

20 MS. BARRY: Yes.

21 CHAIRMAN NOTTINGHAM: -- we would be
22 the lead agency in the NEPA, And we would

1 actually -- that would get -- And that would get
2 much more of the details, And that's --

3 MS. BARRY: When Representative
4 Miceli says he envisions this, it's not just
5 because he envisions it, it's because he's heard
6 it from the communities of both Woburn And
7 Wilmington members. I can tell you that it'll
8 come out threefold to oppose any rail reload
9 facility as we did in the past And certainly this
10 proposal. This goes -- this is way over the top.
11 This is -- we can't accept this.

12 CHAIRMAN NOTTINGHAM: I understand.
13 You've made that loud And clear.

14 MS. BARRY: Thank you.

15 CHAIRMAN NOTTINGHAM: Mr. Deutsch, if
16 this were to transform again -- you talked about
17 a transforming setting here of the applicant, in
18 your view, changing its plans over time. If this
19 were to transform into strictly a container
20 operation, no one loading or sorting, just a
21 truck container being placed onto a rail
22 container but filled with MSW And C&D, is that

1 something that the town could acquiesce to, or
2 would we expect to see a lot of complaints from
3 the town about that kind of operation?

4 MR. DEUTSCH: It would not be
5 acceptable And in -- on two levels. And the
6 first is that this site has got to be left alone
7 sufficiently so that it can be -- all the
8 environmental issues affecting the site can be
9 thoroughly vetted. And that is the role, that is
10 the obligation And the prerogative of the EPA.

11 And we are disappointed the EPA is
12 not present today, but they have made quite clear
13 in their written submissions to this board their
14 insistence that they be allowed that opportunity
15 And underscored the inadequacy of the somewhat
16 cursory environmental review, environmental
17 assessment that was conducted in the midst of the
18 first petition And then dismissed -- which was
19 then dismissed.

20 The EPA has to -- the contaminants at
21 this site have not even been fully characterized,
22 so we don't know entirely what we're dealing

1 with. And those charged with regulating And
2 cleaning up the site don't know.

3 In addition, the rail activity of the
4 sort And intensity that is currently proposed by
5 New England Transrail could have very serious
6 implications for destabilizing the remedial --
7 the remedial steps that have so far been
8 implemented at the site. There is -- Transrail
9 has proposed to locate this transloading facility
10 and solid waste facility directly on top of a cap
11 that it says it would construct for Olin, would
12 take over that role for Olin. It would construct
13 the cap without providing the kind of detailed
14 engineering data that's essential to evaluate
15 whether the site And that cap could withstand the
16 active loads of as many as 400 truckloads a day
17 And 2100-ton rail cars a day of -- on -- directly
18 above it, And this site with sensitive aquifer
19 beneath that's already been jeopardized. So
20 absolutely no, that would not be acceptable under
21 any of the --

22 CHAIRMAN NOTTINGHAM: Thank you, Mr.

1 Deutsch --

2 MR. DEUTSCH: -- current --

3 CHAIRMAN NOTTINGHAM: If you could
4 answer briefly -- if EPA concluded its work
5 someday And did not object to a sealed container
6 transload operation, would the town acquiesce
7 with that or still have problems?

8 MR. DEUTSCH: A sealed -- well --

9 It is speculative, that is to say
10 it's quite a hypothetical that the EPA would
11 someday -- we don't know when given funding
12 constraints And the lack of progress made so far
13 -- I mean this site has been undergoing
14 investigation on some level for 12 years. And it
15 is the Town of Wilmington And its residents who
16 have been instrumental in bringing to the
17 attention of the authorities, including the Mass
18 DEP, the existence of carcinogens, human
19 carcinogens, at the site And in the water supply
20 which were not previously acknowledged. And so
21 we've got a very, very long way to go before we
22 can get to the point of evaluating the soundness

1 of that. If I might add, though, this site --

2 CHAIRMAN NOTTINGHAM: Let me just
3 understand that. I asked the question.

4 MR. DEUTSCH: Yes.

5 CHAIRMAN NOTTINGHAM: You prefer not
6 to answer it because it's speculative. I respect
7 that And Lord knows a town or city does not need
8 to just go along with the EPA or being of
9 harmony. You have every right to object to any
10 land use if you want to.

11 MR. DEUTSCH: Well --

12 CHAIRMAN NOTTINGHAM: It's a free
13 country. I just -- I'm just trying to understand
14 the depth of your hostility --

15 MR. DEUTSCH: Yes.

16 CHAIRMAN NOTTINGHAM: -- to rail
17 operations, because we --

18 MR. DEUTSCH: Well, it's not
19 hostility to rail operations. It's an overriding
20 fundamental concern with the use to which this
21 site may be put. And site assignment which is
22 the process that Massachusetts law requires be

1 undertaken in respect to solid waste, which is
2 what we're talking about here, is indispensable
3 because there is got to be, for a site And
4 activity like this, some process, some
5 opportunity to screen sites initially for the
6 appropriateness. And if this board granted
7 preemption, found that such regulation was
8 preempted, respectfully, it would be in a
9 position of having to pre-clear sites in a
10 similar fashion assuming a burden or delegating
11 to the states the burden of doing so.

12 CHAIRMAN NOTTINGHAM: Let me
13 interject here. That's very important. Please
14 understand we are not proposing this agency to
15 pre-clear in advance of EPA's completion of its
16 RIFS work. That is not something -- I said very
17 clearly at the beginning today And throughout --
18 hope it was heard loud And clear -- this is one
19 juncture today And what could, if we asserted
20 some level of jurisdiction, a very long process
21 that may or may not result in any rail operation
22 ever getting approved. So just please understand

1 this is -- we are not proposing pre-clearing in a
2 way that would interfere with or stand in the
3 shoes of the EPA or supplant EPA's jurisdiction.

4 MR. DEUTSCH: Right. I may have
5 misspoken And just so that I might be clear And
6 you can fully understand my point, what I meant
7 to suggest is that it would then fall to this
8 board to make a determination as to the
9 suitability of those activities for this site as
10 a threshold matter.

11 CHAIRMAN NOTTINGHAM: Thank you.
12 Vice Chairman Buttrey, any questions?

13 VICE CHAIRMAN BUTTREY: I don't have
14 any questions for the panel, but I'd just like to
15 applaud the involvement of the individuals who
16 came down here today. It's one thing to come
17 here And get paid a fee to come here. It's
18 something else again to come down here on your
19 own nickel so to speak all the way from
20 Massachusetts or New Jersey or wherever to appear
21 before the board And I applaud the Chairman And
22 permitting you to come And be witnesses today And

1 applaud your efforts to come down here. It's
2 great to see people who don't pick up And move
3 away And say, I'm out of here. It's good to see
4 people are going to stand And fight And for
5 whatever that -- for whatever you're fighting
6 for. It doesn't necessarily mean, you know, this
7 issue but any issue. It's very encouraging to
8 see that civic involvement And civic interest on
9 an individual level And I applaud you for doing
10 that.

11 MS. BARRY: Thank you.

12 VICE CHAIRMAN BUTTREY: Thank you
13 very much.

14 MR. DEUTSCH: Thank you.

15 CHAIRMAN NOTTINGHAM: Commissioner
16 Mulvey?

17 COMMISSIONER MULVEY: Yes. I would
18 join Doug in congratulating you for coming on
19 down here and standing up for your towns. Let me
20 ask you one question, though. Where does the
21 solid waste produced by the Cities of Wilmington
22 and Woburn go today? You produce so much of it

1 and it has to go someplace. Where does it go
2 right now?

3 CHAIRMAN NOTTINGHAM: Have the Town
4 Manger answer that?

5 COMMISSIONER MULVEY: Where does your
6 solid waste go right now? You don't recycle all
7 of it obviously, so.

8 MR. KIRA: Thank you. Michael Kira,
9 the Town Manager from Wilmington. The solid waste
10 goes to a facility in North Andover, an
11 incinerator in North Andover. That's where our
12 waste goes.

13 COMMISSIONER MULVEY: It goes to a
14 waste to energy plant then?

15 MR. KIRA: Waste energy plant, right.

16 COMMISSIONER MULVEY: Is that fully
17 permitted and is that something that is
18 threatened to be closed down any time in the
19 future or --

20 MR. KIRA: No.

21 COMMISSIONER MULVEY: -- do they have
22 problems --

1 MR. KIRA: It's fully permitted. It
2 was initially permitted back in the early to mid-
3 1980's. Twenty-three different communities
4 formed something called NESWC, the Northeast
5 Solid Waste Committee, And all those communities
6 that drop their trash at that location. That
7 organization has since to operate, but many of
8 those communities now independently go to that
9 particular operation, probably 21 of them.

10 COMMISSIONER MULVEY: Is that
11 operation at full capacity now or could it handle
12 some more of this -- some more of the materials
13 that are proposed to go to New England Transrail
14 or --

15 MR. KIRA: It's my understanding that
16 it could handle more because it actively markets
17 --

18 COMMISSIONER MULVEY: Energy?

19 MR. KIRA: -- to other communities --
20 And energy -- but actively markets the sale of
21 tonnage to other entities, other communities,
22 other organizations that produce trash.

1 COMMISSIONER MULVEY: Thank you very
2 much.

3 MR. KIRA: Thank you.

4 CHAIRMAN NOTTINGHAM: Seeing no
5 further questions, we'll dismiss this panel with
6 our gratitude for your participation. That's
7 been very helpful. You're welcome to stay as
8 long as we're here today And safe journeys home.
9 I will call forward our final panel today. Mr.
10 Gordon MacDougall And, of course, we do have
11 closing remarks, I will note, by NET at --
12 afterwards.

13 Mr. MacDougall, you've been very
14 patient. Thank you. Welcome again. You are no
15 stranger to this board. You are always welcome
16 here And please proceed.

17 MR. MacDOUGALL: To answer the vice
18 president, I'm paid to be here, going late And
19 it's overtime.

20 CHAIRMAN NOTTINGHAM: good for you.

21 MR. MacDOUGALL: I'm here for John
22 Fitzgerald, General Chairman on the UTUNSF, And

1 there are no Western railroads that have been
2 involved in this yet. You don't see the Union
3 Pacific here, And you don't see the Burlington
4 Northern here. It's now an Eastern problem. Mr.
5 Fitzgerald is worried that the malaise -- he's
6 hopeful that malaise doesn't -- does move West.
7 That's how he got in this case several years ago,
8 not in a big way, but just filing papers when
9 papers were due. And take no position on the
10 transportation -- we're here for this bogus
11 railroad issue. And three railroads that have
12 submitted statements in the East have mentioned
13 this. And Mr. Moates today, when provoked,
14 mentioned it.

15 And that's the reason I'm here today,
16 because it's -- this is a bogus operation. What
17 do we mean bogus operation? It means it's
18 accepted transportation. In other words, the
19 issue before you is under 10901. Is this a
20 transaction under 10901? That depends on what
21 it's -- if it's a Lionel Railroad on the one hand
22 or whether it's accepted track on the other. If

1 it's a Lionel Railroad, you got a rail carrier.
2 If it's the accepted track, it's not a rail
3 carrier.

4 Unfortunately, not by rule making but
5 by adjudication, your staff And yourselves have
6 adopted an absolute rule that if any non-carrier
7 purchases a single foot of track, it's a carrier.
8 And that's disturbing everybody in the railroad
9 industry. That's why we call it bogus And why
10 it's got to stop. We just think it's going to
11 have to stop, just like the old overcharge-
12 undercharge thing was stopped. Unfortunately, it
13 caused the demise of the old ICC. And hopefully,
14 we can stop it some other way.

15 As you know, this track is either
16 spurt, industrial switching, team or side tracks.
17 True, 49 U.S.C. 10502(b) talks about this
18 accepted track And its jurisdiction, but it does
19 not give you authority. And the Court -- the
20 Seventh Circuit said you got to look at 10502(b)
21 on the one hand And 10906 on the other hand. So
22 as long as we have jurisdiction, you don't have

1 authority. A Court of Appeal has ruled on that
2 And your staff knows that.

3 Unfortunately, I looked at the Code
4 Annotates. That case isn't in there. I put it
5 in my February-March. It's 183 Fed3d, I believe.
6 And I think that's the reasons Jones comes in now
7 with an affidavit. They're afraid some of the --
8 may be afraid that your Effingham Rule may not
9 hold up, And therefore they're putting in the
10 type of evidence, some of it, that you wouldn't
11 have before you had this absolute rule when you
12 had to take a number of factors into
13 consideration to determine whether it was Lionel
14 Railroad on the one hand or accepted track on the
15 other. And that's the Frankie case situation.
16 And you looked at things such as the volume of
17 traffic, the weight of the rail, the history of
18 construction in the area, the number of shippers,
19 all of that. And so they're trying to do that
20 now, the day of the argument.

21 I think worried because if you look
22 at their application, they thought this was an

1 automatic rail carrier. Decided Effingham and
2 Bulkmatic And stopped there And didn't put in the
3 traditional evidence. I still don't think they
4 put in traditional evidence. I still urge you to
5 say that this is not within your effective
6 jurisdiction. You're not authorized to approve
7 this because this is a bogus rail under 10906.
8 And that's, frankly, our position.

9 I would think you might open to the
10 parties opportunity to comment on this filing of
11 today, which supplemented some other things they
12 said on Monday. You know, whereas they had gone
13 along with this automatic, you know, automatic
14 carrier thing, which the railroad industry and I
15 call bogus. You know, they want all of it but
16 now they're worried, so they're coming in with
17 the type of things which would allow you to say
18 it is really not a railroad, not proper, it
19 should be dismissed.

20 CHAIRMAN NOTTINGHAM: Thank you, Mr.
21 MacDougall. Vice Chairman Buttrey, any questions
22 for Mr. MacDougall?

1 VICE CHAIRMAN BUTTREY: No questions.

2 CHAIRMAN NOTTINGHAM: Commissioner
3 Mulvey?

4 COMMISSIONER MULVEY: You're saying
5 on the 10906 that it's a stub track or it's not a
6 line of railroad, correct.

7 MR. MacDOUGALL: It's accepted.
8 People use the --

9 COMMISSIONER MULVEY: I don't -- but
10 we would still pre-empt the operation with regard
11 to the environmental issues or -- which is what
12 we did --

13 MR. MacDOUGALL: You should leave it
14 alone And leave it up to the courts like the
15 NYS&W. In other words, if this operation wants
16 to build track, let them build track. You don't
17 have any authority over them.

18 COMMISSIONER MULVEY: But in Staten
19 Island, we preempted the environmental laws And
20 said it was an accepted line of railroad. And so
21 while we preempted the --

22 MR. MacDOUGALL: That was a long time

1 ago. That was before ICCTA.

2 COMMISSIONER MULVEY: No. I'm
3 talking about when I first came here three years
4 ago --

5 MR. MacDOUGALL: Yes, well --

6 COMMISSIONER MULVEY: -- one of the
7 first cases I dealt with was this Staten Island
8 case where we preempted the New Jersey and New
9 York State DEPs from imposing conditions dealing
10 with the -- what would happen to the wetlands in
11 that area, but then turned around and also said
12 it was an excepted, and so therefore we had no
13 authority.

14 MR. MacDOUGALL: Right.

15 COMMISSIONER MULVEY: That struck me
16 as a problem at that time, And I --

17 MR. MacDOUGALL: It's not a problem.
18 You just -- you don't have any jurisdiction --
19 any effective jurisdiction over yard track, spur,
20 industrial switching And team.

21 COMMISSIONER MULVEY: But we still --

22 MR. MacDOUGALL: You want to make it

1 all not a railroad.

2 COMMISSIONER MULVEY: But we still
3 have the authority to preempt the local --

4 MR. MacDOUGALL: You know, yes. In -
5 - this is only, by the way, for a construction
6 acquisition operation, abandonment or
7 discontinuance under Chapter 109. Other features
8 of ICCTA don't have this. In other words, they
9 have to give -- if the shipper wants a siting,
10 got to give them a siting, embargos, all those
11 things, Mr. Clemens come down And help. You
12 know, this only applies to 10901 transactions

13 COMMISSIONER MULVEY: Okay. Thank
14 you.

15 CHAIRMAN NOTTINGHAM: Thank you, Mr.
16 MacDougall. We appreciate your participation,
17 And that concludes our panels today. We now
18 invite Mr. Van Tine And anyone else he has on his
19 team representing NET. It is the custom of this
20 board, I'm told, to give the applicant the final
21 word, And that's what we're doing now. And my
22 notes indicate that you had reserved 35 minutes.

1 You're welcome to use all of that, but you're
2 certainly welcome not to. I'm going to leave
3 that up to you. Please proceed.

4 MR. VAN TINE: I've been spending a
5 lot of time thinking about whether I should
6 blatantly curry favor with the board by waiving
7 my closing, but I'm afraid there are a couple of
8 things that I've got to say.

9 My colleagues over here have given me
10 all these note cards, the points that I really
11 need to make, And I will make a concession by
12 putting all those cards over here And not making
13 any of them. Sorry, guys.

14 First, let me say that now I know
15 that I'd rather be a forklift operator. I didn't
16 know that exactly this morning. I thought I was
17 being funny but now I'm sure.

18 There -- seriously, though, I'm sorry
19 that the delegation from the Towns of Wilmington
20 And Woburn is not here to hear this, but we --
21 oh, I'm sorry. I'm sorry. I was looking for Ms.
22 Barry And Ms. Cleaver. But we do take their

1 concerns seriously. I want to address their --
2 just one of their points first. Mr. Deutsch said
3 that we hadn't reached out And that we had not
4 called And talked to them. Ms. Barry made the
5 same point late, but she did indicate in the
6 beginning of her testimony that she was present
7 at a meeting in 2003 with Mr. Klempner And Mr.
8 Jones which wasn't very professional, she said.

9 I am told this was before our
10 involvement in this case, but I'm told there were
11 three meetings, one in March of '03, one about a
12 month later, And one in June of '03, And there
13 was an advertisement in the local newspapers.
14 There was -- the entire Town Council of
15 Wilmington attended one of the meetings. At the
16 meeting Ms. Barry attended, Mr. Miceli also had a
17 representative present And so there was an
18 attempt early on in this project to reach out to
19 the constituency in Wilmington in a serious way.
20 And maybe it wasn't good enough And we apologize
21 for that. Maybe there should have been more of
22 it And we apologize for that.

1 But we're happy to do it now And
2 we're here now. It's 2007. It's not 2003. And
3 we're happy to do whatever community reach out
4 And involvement is appropriate And talk about the
5 details of the project.

6 That leads me to my next point which
7 is concerns that Mr. Deutsch expressed,
8 particularly about changes in the project scope
9 And how we had just revealed that we're going to
10 be handling waste, And I believe I heard similar
11 concerns throughout the day. I don't want to
12 read from our pleading, but I'm holding our
13 petition filed in December 2005. And this is the
14 ships passing in the night phenomenon that I
15 mentioned this morning.

16 Beginning on page 11 of the petition,
17 there's a discussion of C&D waste And how it's
18 going to be handled. There's almost a whole page
19 on MSW And how it's going to be handled. There
20 is a discussion on page 15 -- And this is 2005 --
21 there's a discussion on page 15. It begins both
22 the board And SCA can be assured that NET intends

1 to comply fully with all applicable substantive
2 state health And safety regulations governing
3 NET's construction And operations And then
4 there's a whole page of NEDP code sections that
5 we say we will comply with.

6 Then on page 18, there's a heading in
7 bold at the top of the page -- the waste handling
8 activities proposed by NET are part of rail
9 transportation. And there are six pages of
10 description of the activities at the site having
11 to do with waste handling And tying those
12 activities in with transportation.

13 Now just two specifics. Mr. Camara,
14 in his presentation, questioned why we were
15 shredding And that shredding is only necessary if
16 you're going to sort the materials. Mr. Camara
17 did state, though, that there's going to be a
18 transcript. You could look at the transcript,
19 but I'm pretty sure I heard him say that
20 shredding facilitated the movement of the waste
21 on a conveyor belt. And his purpose on moving it
22 on a conveyor belt was so that someone could

1 stand in front of the conveyor belt And pick
2 material, metal And others, out of it. But I
3 just want to say that I think he said that 24
4 inch minus or 24 inch plus was the size that was
5 necessary to move on a conveyor belt.

6 In NET's filing in December '05 on
7 page 11, the last sentence on the page says, C&D
8 will be conveyed to shredders that will reduce it
9 to a maximum size that can be loaded into rail
10 cars with conveyor belts. That's why we want to
11 move it on conveyor belts, so we can load it into
12 the rail cars. That's why we want it to be 24
13 inches. He wants it to be 24 inches so he can
14 move it on the conveyor belts And sort it. We
15 want it to be 24 inches to move it on the
16 conveyor belts And put it in the rail cars.

17 So, sure, the description of the
18 projects has changed since what Ms. Barry heard
19 in 2003. There's no doubt about it. It's been
20 four years. That's one of the problems here.
21 We've learned a lot. They've learned a lot.

22 Some things have changed, but a lot

1 of things haven't changed, And not a lot has
2 changed since December 2005 when we filed this
3 proceeding. There is a reference in this
4 document in 2005, as well, to the board's order
5 dismissing the prior proceeding. And in that
6 reference, quoting from the board's order,
7 there's a reference to the waste issue. So even
8 before we got involved, even before 2005, the
9 issue was in the proceeding.

10 So I just -- And I don't mean to
11 criticize anyone who has commented on the changes
12 in the project. I just suggest that perhaps
13 there is a need to pay a little more attention to
14 exactly what it is we're talking about, what it
15 is we're proposing And if things change, maybe
16 that's not bad. Maybe that means that we're
17 getting closer to some agreement.

18 Now just quickly, let me comment on
19 something Mr. Coleman said. He characterized the
20 -- I can't remember exactly what he said about
21 the reasons why Massachusetts did not get back to
22 New England Transrail, but I think he indicated

1 that they never indicate -- they never told New
2 England Transrail that they wouldn't agree And
3 that the ball was sort of in our court And they
4 were waiting to hear from us. They were waiting
5 for the phone to ring.

6 I want to pass up to the board
7 members, if I may, a copy of a letter that's in
8 the record, And it was attached as the last page
9 to Exhibit A to our filing on Monday, And that's
10 the follow-up letter to the letter that I passed
11 up earlier. The first letter that I passed up
12 this morning was the letter making the proposal
13 to Massachusetts Department of Environmental
14 Protection.

15 This letter memorializes the fact
16 that Massachusetts has told New England
17 Transrail's lawyers that they do not wish to
18 pursue this at this time, which I believe is
19 pretty close to exactly what I said this morning.
20 And it also says call us if you change your mind,
21 essentially, at the end.

22 And so in our view -- I mean maybe

1 there's a misunderstanding And we're sorry about
2 that -- but in our view, the ball was in their
3 court And they chose not to call us. And I will
4 suggest -- I'm not here to question anybody's
5 motives, but I'll suggest that Mr. Colman explain
6 to you why they didn't call us. He said in
7 response to one of your questions, Mr. Chairman,
8 that why should they try to work out any
9 conditions, that it wasn't appropriate for them
10 to try And work out any conditions with us, that
11 what they wanted was for you to rule that their
12 regulation was not preempted, And until you made
13 that ruling, they were not going to talk to us.
14 And that's, we believe, exactly what happened.

15 Now there was some concern expressed
16 by Mr. Colman And Ms. Lam, I think, as well about
17 -- And maybe others -- about how do we know
18 exactly what they're talking about, how do we
19 know what NET will agree to And what they won't
20 agree to. And the first answer is we don't know
21 exactly what we'll agree to until we sit down
22 with somebody And actually talk about it And talk

1 about specific regulation section.

2 But as I pointed out in our 2005
3 petition initiating this proceeding, we did
4 specifically cite some Massachusetts Code
5 provisions would be applicable that we would be
6 willing to comply with. In October 2005, at the
7 time of the offer to Massachusetts Department of
8 Environmental Protection to sit down And talk
9 with them, we prepared a listing of the kinds of
10 things that we would be willing to talk about.
11 And not to say that, at this point, we're willing
12 to agree with everything on this list, but this
13 is the list And it's five pages long.

14 And one of the items on this list
15 that jumped out particularly to me when, I
16 believe it was Mr. Colman was talking -- maybe it
17 was Ms. Lam -- about tonnage limits or weight
18 limits under Massachusetts law And what would
19 happen when the weight limit issue came up, what
20 would we do. Well, the answer is I don't know
21 what we would do when it comes up, but it's on
22 the list. It's one of the Code sections that's

1 on the list of things that we said we would be
2 willing to talk to them about And we wanted to
3 discuss with them And they never did.

4 Again, not to blame anybody or
5 criticize anybody, but it's now time to, we
6 think, get over the all or nothing approach And
7 sit down And talk about the list. And we're
8 ready to do that.

9 Just one more thing in the nature of
10 completing the record. There's been some concern
11 that the story changes And how do we know that
12 New England Transrail is really going to do what
13 they said in the verified statement of Mr. Jones
14 that was filed this morning. Well, all I can say
15 -- I just got a couple of things to say.

16 First, And this was from Solid Waste
17 Management Association, I think. First, they
18 challenged us in their brief on Monday to respond
19 to specific questions. It would have been
20 misleading if we didn't respond to those
21 questions. We responded to those questions in
22 this verified statement in plain language, direct

1 words. And at the end of the verified statement
2 is the verification which Mr. Jones verifies
3 under penalty of perjury under the laws of the
4 United States the forgoing is true And correct.

5 That's some assurance that they're
6 going to do what they say they're going to do. I
7 think Mr. Jones knows what perjury means And I'm
8 going to talk to him about it after this -- about
9 that after this hearing. And if he didn't know
10 what it meant, we'll tell you but I'm pretty sure
11 he does And I don't think he would have said
12 ita unless he meant it.

13 But you don't -- still don't have to
14 take his word for it. I think that the answer is
15 what you've suggested earlier, Mr. Chairman, that
16 you put conditions in the grant of approval if
17 you decide to grant approval, And those
18 conditions specifically outline what can And
19 can't be done on the site to whatever degree of
20 detail is appropriate in the circumstances And
21 reasonable. And I think the test -- the basic
22 test that everybody has to pass is whether it

1 unreasonably burdens rail transportation. We
2 know that And hopefully the people who have
3 concerns understand that as well.

4 Now I'd like to move sort of from the
5 negative to the positive And try And be
6 constructive for a little bit here. And I
7 promise I won't take too long. I'll try And talk
8 fast. Maybe that'll help.

9 I think there has been a lot said
10 today And the whole process is helpful. And I
11 want to thank you again for convening the
12 hearing. It has been helpful for us to hear it
13 And helpful for you, I hope, to hear it as well.
14 But right now I think rather than try to respond
15 to everything that everybody said, it would be
16 more useful to you if I tried to give you my
17 framework for thinking about these issues in
18 trying to reach a result that gives due weight to
19 everybody's concerns.

20 It seems to me there are three legal
21 issues And two practical issues that you'll need
22 to address, And I want to walk through those

1 pretty quickly, because I'm sure you know what
2 they are. I want to give you my views about how,
3 procedurally, to address them. First -- the
4 first legal issue is does New England Transrail
5 qualify to become a rail carrier. The second
6 legal issue do the activities at the site
7 constitute transportation under the statute.

8 And on the first issue about status
9 as a rail carrier, this one's of concern to our
10 railroad friends, CSX, Norfolk Southern, AR, And
11 my colleague, Mr. Moates And Susquehanna. First,
12 I just want to point out that their position is
13 interesting. On the one hand, in all of their
14 pleadings, they urge that you do not announce any
15 broad change in the law on the transportation
16 issue. But at the same time, they are suggesting
17 that you do announce a broad change in the law on
18 the rail carrier issue. And I don't want to say
19 that that's internally inconsistent, but it is
20 interesting that they're concerned about new
21 entrants.

22 And I would say that there is some

1 motivation there in trying to limit new entrants
2 in the industry. I think the law in the rail
3 carrier issue right now is perfectly clear under
4 Effingham And the subsequent decisions. And
5 there's no doubt that New England Transrail's
6 operations would qualify it to be a railroad
7 under those decisions.

8 They're asking that you reverse
9 Effingham or modify it in some way, adopt some
10 new standard. And we don't take a position on
11 that except to say that we don't think it would
12 be fair to do it in this case after three years
13 in without warning when we have proceeded under
14 Effingham And the board has not given any
15 indication that it's going to change that rule.
16 So we would ask that you apply Effingham in this
17 case on that issue.

18 On the second issue about the law
19 about what constitutes transportation, again, as
20 I said this morning, this is not a new question.
21 The issue of what kinds of activities fall within
22 the statutory definition has been litigated for

1 man years, somebody said a hundred years. I'm
2 not sure whether that's exactly true, but it's
3 pretty close to a hundred I think.

4 The biggest problem, it seems to me,
5 on the transportation issue is, And this, I
6 think, was evident during the discussions today -
7 - it's not the law. The law is out there And it
8 is what it is And anybody can read it. It's the
9 semantics. It's well, what word did you use in
10 your filing. Did you call it sorting. Oh, no,
11 we can't have sorting. Well, wait a minute. All
12 I meant was I was going to take it out And put it
13 on the ground for a minute. I didn't mean I was
14 going to send it to the recycling when I used the
15 word sorting, but people read into words the
16 things that are really not there.

17 And I'm -- what I was trying to do
18 this morning in simplifying the wording of all
19 this is to get through the semantics And get to
20 the facts about what's really going on. And I
21 think that's the important thing, And that's what
22 this hearing has helped bring out. And I think

1 it's what a further session -- I don't know what
2 you would call it -- a settlement conference or a
3 -- I don't know what you would call it -- but a
4 further session for the parties to discuss, avoid
5 the labels And get down to what is actually going
6 on And figure out what's okay And what's not
7 okay.

8 But I think that's a big problem in
9 the transportation issue, what you call things
10 And then how people understand those things. And
11 I think we have discussed that at some length
12 today, And I -- I'm not sure we have anything
13 more to add except to say that I think that, as
14 we discussed today, there -- our view is that
15 what we're doing is loading -- unloading things
16 from a truck And loading them onto rail car And
17 that's it. And we're not earning any revenue
18 from anything else. We're -- you know, there
19 were a lot of concerns expressed by Mr. Camara
20 And others that why would we do this if we
21 weren't going to earn revenue.

22 Well, number one, our costs are a

1 whole lot lower than his because of the mode of
2 transportation, not because of we're free of
3 regulation but because we're using rail cars that
4 can haul five trucks worth of what it -- he has
5 to pay the truck driver to haul one truck's
6 worth, And we can haul five of this in a rail
7 car. Our transportation costs are half of his
8 And that's, I'm sure, a concern to him.

9 He pointed out that we're -- or he
10 alleged that we're trying to escape burdensome,
11 costly hazardous -- or I'm sorry -- solid waste
12 processing regulation. As I said this morning,
13 though, we're not trying to escape it, And we
14 have said And we have offered to comply with
15 almost all of the same provisions that he
16 complies with right now. And I don't know which
17 -- whether he would say that these are not the
18 costly ones or not, but that's something we'd be
19 happy to discuss later on.

20 But I -- I think he, on the one hand
21 says we're trying to escape the burdensome
22 regulation so we can take advantage of lower

1 costs. On the other hand, he questions why we
2 would give up the opportunity to recycle wood or
3 metal. Well, wait a minute. If we're escaping
4 the lower cost, then we don't have to recycle the
5 wood or metal, right, And we come out in the same
6 place. I -- well, I don't think I need to
7 belabor that point.

8 I just want to reiterate that
9 contrary to all the speculation we heard, there's
10 not going to be any recycling, And there is an
11 allusion to that in our December '05 pleading,
12 too, at the very beginning. We're not going to
13 be recycling or selling anything that comes into
14 the site. Everything that happens is designed to
15 make it go out of the site more easily And with -
16 - safely And without damage to the rail car.

17 And I think that -- we believe it
18 would be a major change in the law if the board
19 were to hold that a particular commodity were to
20 be treated differently from other commodities for
21 purposes of the preemption analysis under the
22 statute. I think that there was some talk today

1 -- I think I heard people saying -- maybe this
2 was the non-lawyers talking about how we're
3 asking for a change in the law or take advantage
4 of some loophole in the law. But I think it's
5 actually the opposite, that the law is pretty
6 clear And what they're asking for would be a very
7 significant change in the law And the law that
8 this board has announced over the past few years.
9 It's not old law. It's -- goes right up to the
10 present day.

11 That leads you to the third legal
12 issue which is whether you have the option to
13 make that kind of a dramatic change in the law
14 right now in the context of this case. And like
15 the issue of a change in law in the rail carrier
16 issue, I think the answer is clearly no, not
17 without running the risk of being reversed by a
18 review in court. As I said, we're now three
19 years into this matter, And I think changing the
20 law about what is transportation at this point
21 would be a serious matter, And I don't know that
22 you could do that in this case.

1 I want to talk now about the -- a
2 couple of the practical issues. The first
3 practical issue which hasn't received a lot of
4 attention today until the last hour or so but is
5 how to address the environmental concerns about
6 the site. We understand those concerns. Those
7 concerns are real. We recognized those since the
8 very beginning, And we've never tried to hide
9 them or minimize them. But the answer to those
10 concerns for this board, for the three of you, is
11 relatively straightforward. It's not simple but
12 it's straightforward.

13 First of all, your staff is going to
14 be doing their own environmental review as
15 they're required to do And as they started doing,
16 you know, some time ago. And we are more than
17 happy to work with them. We did work with them
18 cooperatively. The first go around, we
19 understand there was some misunderstanding about
20 what was going on at the site, And we've tried to
21 correct all that. We've met with them before
22 filing the second petition, met with them And

1 tried to understand all the concerns And make
2 sure we disclosed everything that was going to
3 happen on the site. And we're more than happy to
4 work closely with the staff, with the consultants
5 to do whatever is necessary for your staff to
6 complete it's own environmental review.

7 And once the results of that review
8 are in, you do have the opportunity to impose
9 mitigation conditions And require New England
10 Transrail to do whatever your environmental staff
11 believes is appropriate to mitigate any
12 environmental impacts on the portion of the site
13 that we're planning to occupy. And I think it's
14 important to understand, and I hope you all
15 understand, that the portion of the site that New
16 England Transrail is proposing to buy from Olin
17 is not the same portion of the site that is the
18 cause of the EPA's current concerns about the
19 water plume And the carcinogens in the drinking
20 water, those kind of concerns.

21 I don't -- another thing I'm not an
22 expert in is environmental law And I don't

1 pretend to understand all of that, but I do
2 understand that the -- there is -- it is possible
3 that under environmental law that one portion of
4 the site could be developable, buildable,
5 salvageable, I guess, And another portion of the
6 site might not be. And what we are hoping is
7 that when the EPA concludes its review, when your
8 staff concludes their review, everyone will
9 figure out that the portion of the site that
10 we're talking about is potentially suitable for
11 development subject to appropriate mitigation
12 conditions.

13 Then with respect to the EPA's
14 review, again, we've heard talk about the idea
15 that that's going to take a long time. There is
16 the possibility of imposing a condition that
17 requires concurrence from the EPA that the --
18 this portion of the site is developable or some
19 formulation in the nature of a condition that
20 does not make your order effective until the
21 environmental concerns have been resolved.

22 Now getting down to the final point,

1 which is the last practical issue, And that is
2 what I started with this morning -- how do you
3 resolve this case in a way that's consistent with
4 existing precedent but still protects the public
5 health And safety And addresses the kinds of
6 concerns that we heard from the people of
7 Wilmington And Woburn. And I think that -- my
8 view is that's not an either/or proposition. You
9 don't have to follow the law at the detriment of
10 public health And safety, And you don't have to
11 defer to public health And safety to the
12 detriment of your existing precedents.

13 And I recognize that this is an
14 important political issue And I don't want to
15 minimize that aspect of it. Somebody once told
16 me that I wasn't enough of a politician, I was
17 too much of a lawyer. But I do think that you
18 must consider, you're not free to consider this
19 without regard to the law, And you can't resolve
20 just on the basis of political concerns or how
21 you feel about it. There is a long line of cases
22 on both the legal issues.

1 So I'd suggest that the starting
2 point for the board is -- these are not new
3 questions. Your professional staff is the
4 institutional memory of the board. They have
5 seen these questions come up before, And I would
6 suggest the starting point in resolving this case
7 is to listen to your lawyers And your other
8 professional staff And see what they have to
9 suggest.

10 I would suggest that the optimum
11 solution in most contested proceedings is a
12 resolution that all the parties agree to, And
13 that's we would like to do. We don't want to
14 litigate this case to the Supreme Court in five
15 years. One of the principles of this project is
16 in his 70's, And he'd like to live to see the
17 project in operation.

18 And it's -- I think we would like to
19 sit down And talk to people about what their
20 concerns are. Don't talk generalities. Let's
21 talk specifics about what are your concerns And
22 what can we do to resolve them. And I think this

1 hearing has gone a long way towards starting that
2 process. I think your questions -- the questions
3 from each of you have been excellent questions
4 And put everybody on the hot seat a little bit
5 And raised everybody's awareness of some of the
6 weaknesses in their own cases, And I don't except
7 our case from that, either.

8 But I think that it's helpful to make
9 everybody aware that there are constraints under
10 which this case will be decided And that a --
11 there -- it is in everybody's interest to try to
12 reach an agreement because if, in our view, if an
13 agreement is not reached, the law is pretty clear
14 that state regulation that would unreasonably
15 burden rail transportation is preempted. End of
16 story. And the question is whether we can reach
17 agreement on what is reasonable And what's not
18 reasonable.

19 So going back to my opening again And
20 my general theme throughout is that we would like
21 to resume, I guess, the dialogue with the
22 Massachusetts authorities And we'd be willing to

1 do that. I had hoped we'd be willing to start
2 today, but it's a little late today. But just to
3 make it clear, we'll be happy to call them. We
4 don't insist on them calling us.

5 I think all it takes is some
6 encouragement from the board, perhaps on
7 facilitation in the way of providing of meeting
8 place where people can talk And board staff
9 present who can sort of facilitate the process.
10 But I think we'd be willing to give it a shot.

11 And I think with that, if anybody
12 still has enough energy for questions, I'd be
13 happy to answer any more.

14 CHAIRMAN NOTTINGHAM: Thank you, Mr.
15 Van Tine. Vice Chairman Buttrey, any questions?

16 VICE CHAIRMAN BUTTREY: In the
17 interest of the hour of the day And the time of
18 day, I think we've -- I've certainly heard what I
19 wanted to hear today, And so I'm going to -- as
20 far as I'm concerned, I'm going to excuse the
21 witness.

22 CHAIRMAN NOTTINGHAM: Commissioner

1 Mulvey?

2 COMMISSIONER MULVEY: I normally
3 would have questions, but again, the hour of the
4 date And I will pass And thank you very much for
5 your time And your efforts.

6 MR. VAN TINE: Well, I thank you all
7 And I thank the board staff, And I really believe
8 this hearing has been helpful. And I hope that
9 we can work together to find a way to resolve
10 this. Thank you very much.

11 CHAIRMAN NOTTINGHAM: Thank you, Mr.
12 Van Tine. That concludes today's hearing And we
13 appreciate everyone's participation.

14 (Whereupon, at 6:19 p.m., the
15 forgoing matter was concluded.)
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CERTIFICATE

This is to certify that the foregoing transcript
in the matter of: New England Transrail, LLC
Oral Argument

Before: Charles D. Nottingham, Douglas
Buttrey, and Francis P. Mulvey

Date: April 19, 2007

Place: Washington, D.C

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.


Tobias Walter