

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34797

**OBJECTION AND COMMENTS OF TOWN OF WILMINGTON
TO NEW ENGLAND TRANSRAIL, LLC'S STATUS REPORT**

The Town of Wilmington, Massachusetts, an interested party in this proceeding, submits this objection and comments in response to the August 23, 2010 Status Report of Petitioner, New England Transrail, LLC ("NET") ("Status Report").

The Status Report is an affront to the Surface Transportation Board and to the need for responsible review of NET's now seriously outdated Petition for Exemption ("Petition"). This Board dismissed the Petition without prejudice in May 2005 because NET had misrepresented the scope of its proposed activities. NET supplemented its submission, though inadequately, prior to the Board's hearing of the federal preemption issue and the enactment of the Clean Railroads Act of 2008 ("CRA"), which changed the course of these proceedings. However, NET now again misrepresents matters essential to any further review. This time, NET mischaracterizes the status of the EPA-supervised investigation and remediation of the Superfund site on which it proposes to establish the transload facility. Petitioner portrays the EPA process as nearly complete, whereas it is in its still early stages. NET thus has misled the Board on a matter on which it was required to report. EPA recently has filed comments with the Board to point out NET's factual misstatements and premature conclusions.

NET's misleading submittal alone should lead this Board to dismiss the Petition, require NET to file a new Petition for Exemption for any project, and engage in a fresh environmental assessment. STB should not treat the August 2010 misrepresentations less seriously than those of 2005. Dismissal and a new filing are warranted because (i) NET has misrepresented information crucial to review, (ii) NET's previous "resubmission" of its Petition unreasonably called on the Section of Environmental Assessment (SEA) to compare the re-described project to the project originally reviewed and to then "adjust" its environmental review, and (iii) NET's August 2010 Status Report does not rule out the processing of construction and demolition debris, which may implicate the CRA, and surreptitiously changes the project by including hazardous materials in the list of materials to be transloaded, whereas NET had ruled that out in 2005.

If the Board does not dismiss the Petition outright, it should refuse to proceed. There are several reasons why further review is not feasible. As EPA has explained, it will take years of continued investigation and planning before remediation can be undertaken at this complex site. Given that and the related engineering considerations outlined below, it is not possible to assess the impacts of development on the site for the foreseeable future.

Not only is environmental work at the site nowhere near completion, but NET has not provided the Board with useful information concerning the "revised" project. Temporarily at least, NET would jettison the centerpiece of its project, namely the processing of municipal solid waste ("MSW"). MSW processing was integral to NET's earlier description of the project's features and financial prospects and became the focus of these proceedings. While NET would dramatically reconstitute the project, it does not

provide new design drawings; explain how it could accommodate a future MSW processing plant; identify the anticipated volume of non-MSW shipments; locate the new features in relation to existing and potential subsurface environmental structures (such as the slurry wall that contains a dense aqueous phase layer of contaminants); explain the impacts of construction and operation on the surrounding environment; or explain how the revised project would be financially viable.

It would be a waste of public resources to act at this time, either by addressing the preliminary issue of rail necessity or by conducting an environmental assessment. NET has put this Board in an untenable position. The project is poorly articulated, inadequately documented, and advanced on the basis of statements that this Board's sister agency has demonstrated to be material misrepresentations.

1. NET Has Not Provided Meaningful Detail About How the Project Would Be Reconfigured, Constructed, and Operated.

NET asks this Board to review, and permit on a complex Superfund site, a project for which it has not submitted current schematic drawings or construction details. Among the missing data are: a new layout of the improvements and transloading infrastructure omitting MSW processing, including hard structures such as concrete pads, warehouses, loading docks, and rail lines; updated drainage information; anticipated volumes of materials to be stored and transloaded (given the greater bulk and weight of steel and other contemplated materials than MSW); potential vibration loads imposed by those materials and rail cars on the subsurface environmental structures; the boundaries of the facility in relation to those structures; and precisely whether and how a "reserved" MSW processing facility could be built and operated "separate, distinct, and in addition to NET's other transloading facilities" on the modestly sized project site.

In addition, it is unclear from NET's enumeration of the non-MSW materials whether it proposes to accept virgin, discarded, or recycled materials and whether it would accept construction and demolition debris (C & D). "[S]and, gravel, soil, lumber, plastics, steel, [and] paper . . ." may well include C & D. Likewise, what "some types of hazardous materials" would be accepted, and how they would be sorted, handled, stored, and transloaded is unspecified. The precise nature and mix of materials is relevant to both the environmental impact of a project and the applicability of the CRA and other regulations.

NET's multiple, glaring omissions make responsible project review impossible.

2. NET's Report (including Olin's Summary) on the Status of Site Investigation and Remediation Is Inadequate and Grossly Misleading.

Petitioner's proposal to build on a Superfund site would be fraught with complications, even if the information it provided were accurate and complete. Because NET's project information is deficient, its environmental information are inaccurate, and its conclusions are premature, the project is untenable.

Even a modest review of the documents submitted by NET in August 2010, conducted by those familiar with the actual site investigation process, yields these unresolved environmental concerns:

1. As outlined in EPA's September 9, 2010 comment letter, the Olin Superfund site is still at the Remedial Investigation/Feasibility Study (RI/FS) stage and many components of the RI/FS process remain to be completed. Those incomplete steps include fully characterizing the nature and extent of the contamination (including addressing data gaps); completing a quantitative human health risk assessment; completing a quantitative ecological risk assessment; completing the detailed RI report,

completing a detailed screening of remedial technologies and alternatives; and a feasibility study. NET's report implies that EPA has achieved consensus with Olin concerning these tasks. That is belied by the EPA comment letter. Finally, the RI/FS process also includes a public comment phase for stakeholders to participate in the process, which has yet to be undertaken.

2. Olin and EPA have executed an administrative Settlement Agreement and Order to conduct the RI/FS for the Olin Chemical Superfund Site. By that document, Olin has agreed to complete characterization, risk, and remedial alternative evaluation activities at the Site. However, Olin has not agreed to conduct remedial actions at the Site. Such agreement will need to be negotiated after the Record of Decision (ROD) is issued. By referencing a settlement agreement in its Status Report, NET implies that Olin has agreed to perform remedial work at the Site. If Olin does not agree with the ROD that EPA selects, Olin might "walk away" from the site. In light of the duration of the RI/FS process to date and the extended duration for Olin to agree to requests for further sampling from the USEPA, the RI/FS activities are not likely to be completed for at least two or three years. A clear understanding of likely remedial actions and their implications for restricted site use is not likely to be developed for several years.

3. NET stated that at a June 29, 2010 meeting with USEPA, the Massachusetts Department of Environmental Protection, and Olin concerning the results of property surface and subsurface soil testing, "a qualitative review of the validated data collected from the property determined that the constituents and concentrations detected are similar to previous sampling data and that the prior Risk Assessment remains valid." In its comment letter to STB, EPA states that that statement is premature and has not

been reviewed or confirmed. It appears that data gaps still exist for the property itself, and off-site sampling of ground water, surface water, and sediment has not been completed. NET's statement cannot be made until a thorough review of the site data is completed and documents such as the Risk Assessment are reviewed for their current applicability. Since access issues are still unresolved, some off-site sampling will not be completed until at least 2011.

4. The tasks identified in Olin's Scope of Work summary are incomplete. Additional work includes sampling of the residential potable wells, integrity testing of the slurry wall, recovery of the Dense Aqueous Phase Liquid, and the North Pond investigation.

5. The list of work completed for each Operable Unit of the Superfund site is inaccurate. Many of the listed activities are not complete, not started, and/or have not been accepted by the EPA. Olin's last bulleted item for Operable Unit 3 – ground water - indicates that data is under review to determine locations of additional off-property wells. This indicates that ground water impacts may extend farther to the south and east of the Olin facility.

6. The NET Status Report borrows terminology from Olin that is subjective and open to interpretation, such as, "an Addendum to close minor data gaps", "the Temporary Cap on the Slurry Wall is still serviceable", and "a contractor has been selected to perform testing on the Slurry Wall to confirm integrity." The use of the terms "minor" and "serviceable" are subjective, based on a review of actual data and the agreement of EPA. The contractor performing testing on the crucial subsurface slurry retaining wall is completing a limited integrity test as stated by Olin. More slurry wall

assessment may be required to assess the integrity of the wall at the bedrock interface. As the integrity of the wall is in doubt, further ground water monitoring wells may be required and their results could lead to significant construction that would take precedence over any transrail facility.

7. The EPA identified significant deficiencies in past reports submitted by Olin for the Site. The current round of field investigations are intended to assess these deficiencies. However, EPA may require yet further investigations once it reviews the data from ongoing investigation activities.

8. For a number of investigation tasks, access agreements have delayed the sampling. It is the responsibility of Olin to obtain access to representative locations for sampling and the delays may extend into 2011.

9. The following statements in NET's Status Report are premature, for the reasons stated:

- That the constituents and concentrations detected are similar to previous sampling data – this has not yet been reviewed and confirmed;
- That a qualitative review of the 2010 data complements the Risk Assessment previously conducted for the NET redevelopment – this has not been reviewed or approved by EPA;
- That the previously completed NET Risk Assessment is still appropriate – it may not be compliant with CERCLA, and the new data has not been reviewed and validated;
- That, if a remedy is required for OU-2 Surface Water and Sediment, an NET project would not impact that area or the ability to conduct a remedy – a staging area might be necessary;
- That the installation of impervious paving over the slurry wall area would be beneficial to further reduce infiltration - storm water infrastructure and site processing areas for an NET project could interfere with access to the slurry wall area;

- That if a remedy is required for OU-3, an NET project would not interfere with its implementation – this is uncertain, particularly since known carcinogens have been found in two nearby private wells; and
- That, if the Plant B Treatment Facility needs to remain operational, it could remain in operation despite an NET project – NET has not configured the site.

10. NET has committed that it will comply with all substantive health and safety laws for the Site, including state and federal environmental regulations. OSHA Health and Safety laws affect on-site workers. However, NET also would be required to comply with environmental protections for the community and abutting properties, such as dust, noise, chemical exposure, spill protection, and storm water controls. NET's statements do not address those matters.

CONCLUSION

In support of this transrail project, NET repeatedly has provided the Board with materials that are incomplete, contradictory, and misleading. It has omitted information about additional rail spurs and proposed MSW processing, and now basic data concerning the layout, construction and operation of a newly morphed project. In response to the Board's request for updated environmental data, Petitioner also has grossly misrepresented investigation and remedial activities on the long-standing Superfund site where it proposes to build and operate a rail facility.

Instead of clarifying NET's intentions, the August 2010 Status Report raises new questions about the viability and impacts of a project. It underscores the Petitioner's unwillingness to level with this Board on matters important to federal rail regulation and the environment. In these circumstances, the Board should not merely defer action on NET's Petition but should dismiss it as in 2005, and this time require that any project be

the subject of a new Petition for Exemption, a new filing fee, and a new environmental assessment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Daniel R. Deutsch, hereby certify that on September 28, 2010, I served the foregoing *Objection and Comments of Town of Wilmington to New England Transrail, LLC's Status Report* by causing a copy thereof to be delivered via first class mail, postage prepaid, to:

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