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SERVICE DATE – LATE RELEASE MAY 3, 2005

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34391

NEW ENGLAND TRANSRAIL, LLC, d/b/a
WILMINGTON AND WOBURN TERMINAL RAILROAD COMPANY
– CONSTRUCTION, ACQUISITION AND OPERATION EXEMPTION –
IN WILMINGTON AND WOBURN, MA

Decided: May 3, 2005

By petition filed December 3, 2003, New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railroad Company (NET) sought permission from the Board to construct, acquire, and operate certain track located on and adjacent to land owned by Olin Corporation (Olin) in Wilmington and Woburn, MA. To meet the Board's obligations under the National Environmental Policy Act (NEPA), the Board's Section of Environmental Analysis (SEA) commenced a detailed analysis of the potential environmental impacts of the proposed project. After more than a year's work, and the issuance of an Environmental Assessment (EA) and a Post-Environmental Assessment (Post-EA), however, new information has been obtained indicating that the project that NET now proposes differs substantially from the one NET presented to SEA during the environmental review process. These material differences have compromised SEA's environmental review and the Board's ability to adequately consider the potential environmental impacts of the proposed action. NET could have provided the new information to SEA much earlier. Consequently, we will dismiss this proceeding. The dismissal will be without prejudice, thereby permitting NET to file a new petition based on current and complete information.

BACKGROUND

NET filed a petition for an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 to construct approximately 2,700 feet of new rail line, to acquire 1,300 feet of existing track, and to provide common carrier rail service over approximately 4,000 feet of track located on and adjacent to the Olin-owned parcel. The land is classified under the federal Superfund Program as a "Tier 1" contaminated site, one that has suffered severe environmental degradation. As described in the petition, NET plans to make improvements to the property to be acquired from Olin, including the addition of a reload facility to facilitate the transload of various commodities between truck trailers and rail cars. The Board served a decision on March 2, 2004, tentatively finding that, subject to later consideration of environmental impacts, the proposal met the standards of 49 U.S.C. 10502. The decision noted that,

upon the completion of an analysis of the environmental aspects of the proposal, a final decision would be issued addressing environmental matters and determining whether to allow the exemption to go into effect.

SEA prepared, and on August 4, 2004, issued, an EA reflecting information provided by NET, consultations with appropriate agencies, comments from interested parties, and independent investigation and verification by SEA staff. SEA then invited public review and comment on all aspects of the EA. Many of those commenting expressed concerns about NET's plans to handle solid and construction waste on this degraded site. In supplemental information provided to SEA and the Massachusetts Department of Environmental Protection (MADEP) following the issuance of the EA, NET for the first time indicated that it plans to engage in certain solid waste and construction waste processing activities – such as grinding, baling and container-loading operations – which NET maintains would facilitate the transloading of those commodities from truck to rail.

Based on descriptions of the project provided by NET and the other information available to it at the time, SEA prepared a detailed Post-EA, which was served on December 22, 2004. The Post-EA responded to public comments on the EA, contained additional analysis in response to the comments, discussed SEA's conclusions about the project's environmental impacts, and recommended that the Board impose environmental mitigation measures addressing a broad range of issues. Normally, issuance of the Post-EA would terminate the environmental review process and the Board would then consider the EA, Post-EA, and all the comments received in rendering a final decision.

Soon after issuance of the Post-EA, however, a number of parties (petitioning parties) requested additional Board review of NET's proposed project. Specifically, the Town of Wilmington (Wilmington) on January 27, 2005, the National Solid Wastes Management Association, *et al.* (Associations) on February 16, 2005, and MADEP on February 2, 2005, submitted filings challenging NET's construction petition. The petitioning parties assert, among other things, that NET furnished SEA with inadequate, incomplete, and misleading information about its proposal and that, therefore, SEA's environmental analysis is incomplete. In particular, Wilmington points out that, while SEA was undertaking its environmental review, NET had substantially modified its proposal and had submitted the modified proposal to MADEP in a Construction-Related Release Abatement Measure Plan and Focused Feasibility Study (Construction RAM)¹ dated November 18, 2004, without notifying SEA that it had made these modifications. Although NET eventually provided SEA with both a copy of the Construction RAM (on

¹ The purpose of the Construction RAM is to get the state approval that is required for any construction and redevelopment in contaminated areas such as the Olin site.

February 7, 2005) and a supplement to it,² SEA did not have those materials until well after it had completed its environmental analysis and the Post-EA had been issued.

SEA has since reviewed NET's Construction RAM and related materials and has determined that the description of NET's project in the Construction RAM differs markedly from the project described in NET's petition and presented to SEA during the environmental review process. Specifically, NET appears to have modified its original proposal to now include: (1) a threefold increase in the number of planned rail segments to serve the reload facility (from rehabilitation of the one existing track to the construction of three new tracks); (2) the construction of three newly planned rail segments to be installed over the Dense Aqueous Phase Liquid (DAPL) containment area on the property; and (3) planned development of a previously undisclosed storage area on the DAPL containment area. Furthermore, SEA was unaware during the environmental review that NET intends extensive excavation of potentially contaminated soils within the project area to construct a vault and to remove or cap existing chemical pipelines.

The petitioning parties also assert that NET primarily would function as a processor of construction waste and solid waste, not as a rail carrier, and that NET's petition should therefore be rejected or denied. The petitioning parties further argue that, even if the Board finds that NET properly invoked the Board's processes and would be a rail carrier, NET's on-site processing of construction waste and solid waste would not be integrally related to rail transportation and, therefore, should not be preempted from state and local regulation. Finally, they argue that, even if NET's construction waste and solid waste processing activities fall within the broad definition of rail "transportation" in 49 U.S.C. 10102(9), those activities could nevertheless be regulated by the state and localities under their retained police powers.

NET filed timely responses to each of these petitions,³ arguing, among other things, that the additional design details in its Construction RAM did not need to be submitted to SEA because the information it had earlier supplied to SEA was sufficient.

² The supplement (which SEA received on or about March 15, 2005) is NET's response to Wilmington's comments on the Construction Study.

³ In response to NET's replies to each, both Wilmington and the Associations submitted additional filings. Under the Board's rules, however, replies to replies are generally not permitted. 49 CFR 1104.13(c). These additional filings will therefore not be considered.

DISCUSSION AND CONCLUSIONS

As with any project to construct, acquire, and operate a rail line, the Board must weigh the possible transportation benefits of NET's project and its potential environmental impacts. SEA must prepare environmental documentation so that the Board can fulfill its responsibilities under NEPA. Thus, we must have complete and accurate information about the project. Here, NET did not provide SEA with important details about the project until after SEA had completed its environmental review and had issued its Post-EA. In short, in its petition and the supplemental information provided to SEA during the course of the environmental review, NET presented a version of the project that is fundamentally different from the modifications that it submitted to MADEP as part of the Construction RAM.

If NET had provided SEA with the project details contained in NET's Construction RAM at the same time NET provided them to MADEP, SEA could have considered the information in its environmental analysis. But NET was not forthcoming, and so SEA was unable to consider whether the modifications would affect SEA's analysis and conclusions and the proposed mitigation measures in the Post-EA.

It is not uncommon for the specifics of a project to change somewhat as details are worked out while the environmental review is progressing. Where SEA is kept apprised of material modifications, it can adjust its review to take those changes into account before issuing final environmental documentation. In this case, however, either NET changed its plans after SEA completed its environmental analysis or NET did not fully disclose its plans to SEA in the first instance. In either event, the project before us now is not the same project upon which SEA had based its EA and Post-EA. Therefore, neither document can serve its intended purpose.

Accordingly, we cannot grant NET's petition for exemption on the basis of the record now before us. Furthermore, because we are now faced with a project that appears to differ in material respects from the project we were originally asked to authorize, we could not evaluate it adequately without adding to an already prolonged environmental review process. The Board has an obligation to move forward and complete its proceedings in a timely fashion. If, as is the case here, a petition is modified to the point that analysis already performed by the Board becomes substantially deficient and would therefore require extensive revision, it is appropriate to terminate the proceeding. We will do so here and dismiss NET's petition, without prejudice to NET's filing a new petition or application based on the proposed project it evidently now seeks to undertake.

We are reluctant to dismiss a pending matter. Here the matter has been in the environmental review process for a considerable period of time, and we recognize that dismissal will set back consideration of whether the project should be approved. An agency is required to supplement an Environmental Impact Statement (EIS) when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" (40 CFR 1502.9(c)(1)(ii)). At the same time, parties have a duty to keep the agency apprised of significant changes.

Chemical Weapons Working Group, Inc. v. United States Department of the Army, 935 F. Supp. 1206, 1217 (D. Utah 1996) (“The duty to make certain that decision makers are presented with all relevant information is an ongoing one which does not end when an initial EIS is prepared.”). The applicant here has not fulfilled its duty to keep the Board informed of significant changes in the project, and the project appears to be constantly in flux. Therefore, we have no confidence that a supplement would result in the review NEPA requires. Accordingly, dismissal without prejudice is an appropriate remedy.

Should it file a new petition or an application, we expect NET to be as forthcoming as possible with all project details. For example, to eliminate the current confusion and uncertainty about the specifics of this project, NET should provide information such as the length and location of all trackage to be constructed, the exact types of structures to be built, the degree to which such construction would involve excavation or the movement of any soil, and the locations where specific commodity transloading activities would take place. Moreover, the information provided to the Board should be wholly consistent with the information that NET presents to other agencies. In the event of a new filing, NET should also describe in detail the proposed grinding, baling, and other processes to which construction waste and solid waste could be subjected at the Olin site, as well as NET’s basis for asserting that those activities should be considered part of rail transportation. Such information will enable the Board to conduct its NEPA analysis and to address the questions that have been raised about the scope of the Board’s jurisdiction, if any, over those activities. Because we will dismiss NET’s petition without prejudice, it is not necessary at this time to further address the issues raised by the various petitioner parties in this proceeding, or NET’s request for a protective order.⁴

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NET’s petition for exemption is dismissed without prejudice.
2. This decision is effective on its service date.

By the Board, Chairman Nober, Vice Chairman Buttrey, Commissioner Mulvey.

Vernon A. Williams

Secretary

⁴ On March 7, 2005, NET requested a protective order (opposed by MADEP) to govern documents included in NET’s reply to the Associations’ pleading.