



COMMONWEALTH OF MASSACHUSETTS
 EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
 DEPARTMENT OF ENVIRONMENTAL PROTECTION

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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, Southwest
Washington, DC 20423

FD 3 5397

August 9, 2010

Re: Comments of the Massachusetts Department of Environmental Protection to ABC & D Recycling, Inc.'s Verified Notice of Exemption for Lease And Operation of a Rail Line Pursuant to 49 USC 10901 and 49 CFR 1150.31 and the Town of Ware's Response

Dear Ms. Brown:

The Massachusetts Department of Environmental Protection ("MassDEP") is writing to express its opposition to ABC&D Recycling, Inc.'s Notice of Exemption for Lease and Operation of a Rail Line pursuant to 49 USC 10901 and 49 CFR 1150.31. MassDEP also expresses its support for the Town of Ware's ("Ware") Verified Petition to Reject. As MassDEP has an interest in regulating solid waste processing facilities, MassDEP submits these comments in response to the Notice of Exemption ("Notice") filed by ABC&D Recycling, Inc. ("ABCD") and in support of Ware's filing.

MassDEP's interest in solid waste processing facilities is based on M.G.L. c. 111, §§ 150A and 150A½. To regulate solid waste management and disposal for the protection of public health, safety, and the environment, the Massachusetts Legislature enacted the Solid Waste Management Act, M.G.L. c. 111, §§ 150A¹ and 150A½, which require site assignment and permits for all solid waste facilities. See American Friends Service Committee of Western Massachusetts & others v. Commissioner of the Department of Environmental Protection, 30 Mass. App. Ct. 457,

¹ Recent revisions to M.G.L. c. 111, § 150A provide that the local Board of Health determines whether a proposed site meets the site suitability criteria at M.G.L. c. 111, § 150A½ and 310 CMR 16.40 and removes MassDEP from the siting process by eliminating its authority to issue a site suitability report.

461 (1991) (stating “[i]n § 150A, the Legislature has made the determination that refuse treatment and disposal facilities are in every instance a potential threat to the public” and has required that the local board of health assign sites for all solid waste facilities in every case). The MassDEP is the agency entrusted with the authority to administer and enforce the Massachusetts Solid Waste Management Act and has promulgated regulations at 310 to regulate the siting and operation of solid waste facilities for the protection of the public health and safety and the environment. The site assignment, issued by the local board of health pursuant to Code of Massachusetts Regulations (“CMR”) 16.00 et seq., and the permit, issued by MassDEP pursuant to 310 CMR 19.000 et seq., together ensure that both the location and the operation of the facility will adequately protect the public health, safety and the environment. M.G.L. c.111, § 150A.

As background to MassDEP’s opposition over ABCD’s Notice, ABCD has constructed and been operating a solid waste processing facility in Ware, Massachusetts since 2006 and never indicated to MassDEP during that time that ABCD wished to provide common carrier service by rail. In order to construct and operate a solid waste processing facility, ABCD first obtained a revised site assignment from the Town of Ware to operate a construction and demolition (“C&D”) waste processing facility on June 18, 2004. ABCD then filed a permit application with MassDEP to obtain a permit to construct the facility, which permit MassDEP issued on January 25, 2005. Finally, on February 13, 2006, MassDEP issued a permit authorizing ABCD to operate a 750 tons per day (“tpd”) C&D processing facility. Although ABCD indicated in its permit application that some processed C&D would be shipped out from the facility by rail, it did not indicate that it wished to provide common carrier service, too. Since 2006, ABCD has been operating a C&D waste processing facility which sorts, grinds and crushes C&D waste at the site. ABCD uses electrically powered processing equipment including a shredder, a C&D residual grinder, and a trammel screen, along with a picking station, magnets and conveyor belts to sort, crush, and grind the C&D waste that is brought to the facility. ABCD has been shipping loads of processed C&D from the facility by truck and rail. At no time during the past 4½ years of operation has ABCD ever indicated a desire or a plan to operate a railroad and provide common carrier service along with the C&D waste processing facility. And in its Notice, ABCD has not adequately shown that it can provide such service with locomotives, engineers and all the other activities necessary for providing common carrier service.

MassDEP is concerned that the Surface Transportation Board (“STB”) may not have all the relevant facts while reviewing ABCD’s Notice. Although ABCD indicated in its Notice to the STB that it knows it needs to obtain all state and local permits necessary to handle municipal solid waste (“MSW”), it failed to indicate that it has already sought a revision to its site assignment to modify its facility to include the processing of MSW. Although MassDEP issued a site suitability report indicating MassDEP believed the siting criteria at 310 CMR 16.40 were met, on February 21, 2008, the Ware Board of Health (“BOH”) denied ABCD’s site assignment to handle MSW at its C&D waste processing facility. ABCD appealed the decision of the Ware BOH to the Superior Court but the court affirmed the decision of the Ware BOH to deny the site assignment revision to ABCD for MSW, a fact also not disclosed by ABCD to the STB. ABCD lacks the appropriate site assignment and the subsequent MassDEP permit to process MSW at its facility. The site assignment would assure that the location of the facility will not pose a threat to the public health, safety and the environment; yet, ABCD has been denied such site

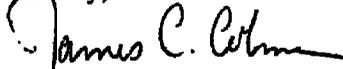
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assignment. Based on the omission of these important facts, MassDEP urges the STB to deny the Notice for Exemption.

ABCD is using the common rail carrier exemption only to seek a subsequent land use exemption available to common carriers to avoid the siting issues with the Town of Ware. ABCD has not indicated it plans to change its business and hold itself out as a common carrier. It simply has failed to reach agreement with the town of Ware regarding siting and thus seeks to avoid the statutory siting process pursuant to M.G.L. c. 111, § 150A applicable to all solid waste processing facilities through the land use exemption available to legitimate common rail carriers.

MassDEP has reviewed the filing by the Town of Ware and supports such filing in opposition to ABCD's Notice of Exemption for the reasons stated above and the reasons expressed in the Town of Ware's filing. Specifically, ABCD's filing to the STB is misleading. Second, ABCD fails to meet the definition of common rail carrier. And finally, ABCD's filing to become a common rail carrier is disingenuous because ABCD is using the common carrier status merely to obtain an exemption from the siting requirements of M.G.L. c.111, §§ 150A and 150A½. MassDEP requests that the STB reject ABCD's Notice of Exemption.

Sincerely,



James Colman
Deputy Assistant Commissioner

cc. (via email)

Jamey Tessler, Esq., MassDOT
Leonard Singer, Esq., Counsel for ABCD Recycling, Inc.
David Wojcik, Esq., Counsel for Town of Ware