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LEONARD M. SINGER

September 2, 2010

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Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, Southwest
Washington, DC 20024

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Office of Proceedings

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Re: STB Finance Docket # 35397
ABC & D Recycling, Inc.

Dear Ms. Brown:

Filed herewith is the *Verified Reply of ABC & D Recycling, Inc. to the Town of Ware's Verified Petition to Reject And/or Dismiss Verified Notice of Exemption and Request for Stay Of Effective Date of Exemption*. This deadline for this Reply is September 7. It is being filed early.

Please contact me if you have any questions regarding this filing. Thank you very much for your cooperation.

Very truly yours,



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BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35397

ABC & D RECYCLING, INC.

**LEASE AND OPERATION EXEMPTION OF A LINE
OF RAILROAD IN WARE, MASSACHUSETTS**

**VERIFIED REPLY OF ABC & D RECYCLING, INC. TO THE TOWN OF
WARE'S VERIFIED PETITION TO REJECT AND/OR DISMISS
VERIFIED NOTICE OF EXEMPTION AND REQUEST FOR STAY
OF EFFECTIVE DATE OF EXEMPTION**

Submitted by:

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ABC & D Recycling, Inc. (hereinafter "ABC &D") filed a Verified Notice of Exemption For Lease and Operation of a Rail Line Pursuant to 49 USC 10901 and 49 CFR 1150.31 (hereinafter the "Notice of Exemption" or the "Notice") on July 28, 2010. Notice was published in the Federal Register and the exemption was scheduled to go into effect on August 27. On August 17 the Town of Ware filed a Verified Petition to Reject And/or Dismiss Verified Notice of Exemption and Request for Stay of Effective Date of Exemption (hereinafter the "Motion"). On August 26 the Board granted ABC & D's request that it have until September 7 to file its response to the Town's Verified Petition and stayed the effective date of the exemption pending further order of the Board.

ABC & D hereby submits this Reply to the Town of Ware's Motion. For the reasons set forth in this Reply, ABC & D requests that the Board deny the Town of Ware's Motion and allow the exemption to become effective forthwith.

I. INTRODUCTION.

The central claim of the Town's Motion is that ABC & D's objective is to handle municipal solid waste and not to provide common carrier services and that ABC & D filed its

Notice of Exemption so that federal law would preempt the Town's refusal to grant ABC & D permission to handle municipal solid waste. The Town argues that ABC & D's filing is an attempt to use the class exemption process for non-rail purposes and that ABC & D has no intention to and is unable to provide common carrier services. The Town also argues that the transaction at issue is not the kind of routine transaction to which the class exemption procedure was meant to apply. Finally, it claims that ABC & D's Notice is false and misleading and should be declared void ab initio.

To the contrary, ABC & D is and has been ready, willing and able to provide common carrier railroad transportation. This is not a case in which a notice of exemption has been filed for non-rail purposes. ABC & D's present ongoing business is already virtually a common carrier railroad operation and, to the extent that it is not, can readily become one. Even any future handling of municipal solid waste is fully compatible with common carrier railroad transportation. Cases such as *Jefferson Terminal Railroad Company - Acquisition and Operation Exemption - Crown Enterprises, Inc.*, FD 33950 (March 15, 2001) and *Riverview Trenton Railroad Company - Acquisition and Operation Exemption - Crown Enterprises Inc.*, FD 33980 (February 14, 2002) are simply not on point.

Furthermore, ABC & D's Notice of Exemption does not present a complicated or controversial question. To be sure, handling municipal solid waste is controversial and a determination of whether handling municipal solid waste is consistent with the public convenience and necessity may well present complicated issues. But the controversial and complicated issues that attend municipal solid waste are not involved in and will not be resolved in either the class exemption proceeding currently before the Board or in a petition for individual

exemption or in an application to lease and operate a railroad line. Issues relating to municipal solid waste will be resolved in state law proceedings or in a petition pursuant to *Solid Waste Rail Transfer Facilities*, Ex Parte No. 684 (January 14, 2009) (hereinafter "Ex Parte 684"), the Board's interim regulations under The Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (hereinafter the "Clean Railroads Act"). Particularly in view of the voluminous attachments to the Town's Motion, all of the information that might be contained in a petition for individual exemption or application to lease and operate a railroad line are presently before the Board.

Finally, the Town's ongoing attempt to revoke the special permit under which ABC & D operates its existing construction and demolition debris business provides a compelling reason for the Board to allow the exemption to go into effect immediately. If the Town is successful in invalidating this special permit, the interstate railroad commerce presently emanating from ABC & D's facility will come to an end. Unless ABC & D becomes a common carrier railroad, it will have no opportunity to demonstrate that the special permit affects the siting of its facility or to demonstrate that its existing construction and demolition debris business is not detrimental to the public health, safety or welfare or to demonstrate that the invalidation of the special permit unreasonably burdens interstate railroad transportation.

II. ABC & D IS THE APPROPRIATE APPLICANT.

The Town makes a number of assertions designed to suggest that ABC & D is not, in fact, the petitioning party, that the Notice of Exemption is not authorized and that the agreements upon which the Notice is based are not, in fact, in effect. These assertions are, for the most part, inaccurate or misleading and, in any event, immaterial.

The Town asserts that the Notice of Exemption “purports” to be filed by ABC & D (Motion at page 2) but that ABC & D has ceded all operational duties, responsibilities and control to Valley Management Services, Inc., a company controlled by ABC & D’s potential purchaser. (Motion at page 3) The Town further alleges that there was no vote by the Board of Directors of ABC & D allowing the Notice of Exemption to be filed. (Motion at page 10, Footnote 16) The Town concludes that while the Notice of Exemption was filed in the name of ABC & D, that the management company, in fact, filed it for the benefit of the potential purchaser of ABC & D.¹ (Motion at page 3) Finally, the Town asserts that ABC & D has no enforceable lease agreement for its premises. (Motion at page 27)

First, there can be no question that the Notice of Exemption was filed on ABC & D’s behalf and that ABC & D is the appropriate entity. ABC & D has and continues to operate the construction and demolition debris business carried on at the premises. The fact that it is managed by Valley Management Services does not detract from the fact that it is the incumbent entity. Furthermore, the purchase and sale transactions will not change this fact. These transactions contemplate that Mr. Berardi will purchase all of the outstanding stock of ABC & D (see Exhibit 3 to the Motion). Upon consummation of that transaction ABC & D will still be the incumbent entity. Under the circumstances ABC & D is the appropriate entity to file the Notice

¹ The Town incorrectly asserts that ABC & D “presently exists and operates at the discretion of Country Bank for Savings.” (Motion at page 2) To the contrary, all of the relevant agreements were entered into by Richard C. O’Riley and Joan M. O’Riley, the principals of ABC & D and of the O’Riley Family Trust. (See Exhibits 2, 3 and 4 to the Motion) In light of those agreements, Country Bank for Savings agreed to forbear enforcement of its loan and security agreements. (See Exhibits 1 and 2 to the Motion). The Town’s assertion (Motion at page 3) that Mr. Berardi entered into agreements with the bank to purchase ABC & D is flat out incorrect. Those agreements were with the O’Rileys and the O’Riley Family Trust.

of Exemption and nothing about the proposed transactions is in any way inconsistent with its continued operation of the premises as a common carrier railroad or otherwise.

Second, there is no substantial question that the filing of the Notice of Exemption was authorized. The agreement for the purchase of the underlying real estate explicitly contemplates that a notice of exemption will be filed. It provides that buyer's obligation to purchase the premises is subject to and contingent upon approval from the Board to operate as a railroad. (See Exhibit 4 to the Motion at ¶ 25 (c)) This purchase and sale agreement is signed by Richard C. and Joan M. O'Riley and by Chris Berardi. The O'Rileys hold the entire interest in the underlying real estate and Richard O'Riley owns all the stock of ABC & D. Mr. Berardi (or his nominee) is the potential purchaser. Because these three individuals collectively hold all of the ownership interests in the entities involved in the transaction, the absence of a vote by ABC & D's Board of Directors is, at best, a formality.² Everyone involved understood that the Notice of Exemption would be filed and, indeed, it was specifically referred to in the agreements among them.

Finally, the fact that there is no presently existing *written* lease agreement is, at best, another technicality. Even assuming that, as the Town argues, an oral agreement to create a lease is unenforceable³, ABC & D is in possession of its premises and that gives it enforceable rights and certainly evidences that there is an agreement for it to lease the premises. More

² Although the approval of Country Bank for Savings is not required, the agreement between it and the O'Rileys also specifically contemplates the filing of the Notice of Exemption. (See Exhibit 2 to the Motion at ¶ 11)

³ The Town's characterization of Massachusetts law is questionable. There is a distinction between an agreement to lease and situations where the tenant is already in possession. In Massachusetts partial performance can be an exception to the Statute of Frauds.

fundamentally, ABC & D and the underlying real estate are both presently owned and controlled by the O'Rileys. If the purchase transactions are consummated, both ABC & D and the underlying real estate will be owned and/or controlled by Mr. Berardi. Under the circumstances, the lack of a written lease is nothing more than a formality. The obvious intention is that Mr. Berardi or his nominee, as owner of the land, will allow ABC & D to occupy the premises and carry out its business.

The situation presented here is very different from the situation in *Black Hills Transportation, Inc., dba Deadwood, Black Hills & Western Railroad - Modified Rail Certificate*, FD 34924 (January 26, 2010), where the Board revoked a notice of exemption granting a modified rail certificate because the petitioner did not have property rights in the right-of-way at issue. The Interstate Commerce Commission had authorized the abandonment of the line at issue in 1970 and, shortly thereafter, the track had been removed. As a result the line ceased to be a part of the national rail transportation system and the question of whether ownership of the underlying real estate had reverted to abutters became a matter to be determined under state law. Based upon South Dakota state court determinations that ownership of the property had, in fact, reverted, the Board concluded that Black Hills Transportation did not have a property interest in the real estate and the Board lacked the power to grant a modified rail certificate.

Here, by contrast, there is no dispute as to ABC & D's property interests in the line at issue. Nothing in the Motion casts any doubt on the ownership interests in the underlying property. Nor does the Motion dispute the Board's power to permit ABC & D to become a common carrier by railroad on the property at issue.

III. THE NOTICE WAS NOT FILED FOR NON-RAIL PURPOSES.

Citing to cases such as *Jefferson Terminal Railroad Company - Acquisition and Operation Exemption - Crown Enterprises, Inc.*, FD 33950 (March 15, 2001)(hereinafter “*Jefferson Terminal*”) and *Milwaukee Industrial Trade Center, LLC, DBA Milwaukee Terminal Railway - Acquisition and Operation Exemption -Line Owned by Milwaukee Industrial Trade Center LLC DBA Milwaukee Terminal Railway*, FD 35133 (June 11, 2010) (hereinafter “*Milwaukee Terminal*”), the Town seeks to characterize the Notice of Exemption as being filed for non-rail purposes. To the contrary, the motivation for filing the Notice of Exemption is to preserve and protect the ABC & D’s existing rail operations and to enhance those operations. Unlike the situations in *Jefferson Terminal* and *Milwaukee Terminal* ABC & D has no motivations unrelated to railroad transportation.

In *Jefferson Terminal* a municipality argued that there was no federal interest in the property because it had not been used for rail transportation for at least 13 years and the proposed rail operations were a sham, designed solely to frustrate a condemnation proceeding by invoking preemptive federal jurisdiction. The Board revoked the exemption based upon evidence supporting the municipality’s allegation that the notice of exemption was “merely a device to acquire or retain property for non-rail purposes.”

Here, by contrast, there is no dispute as to the nature of the property at issue and that the operations at the property are actual, are bona fide and are not a sham. For several years ABC & D has received, processed and loaded construction and demolition debris onto rail cars for shipment in interstate commerce. These activities are precisely the kind of activities that can be, and frequently are, carried on by a common carrier railroad. Unlike the situation in *Jefferson*

Terminal, there is no attempt here to take a property long unused for a railroad purposes and convert it to a railroad property. ABC & D seeks to convert what is already essentially a railroad operation from an operation performed by a noncarrier to one performed by a carrier.

The situation in *Milwaukee Terminal* is also fundamentally different from the situation presented by the Notice of Exemption. In that case the Board pointed to substantial evidence that Milwaukee Terminal was using the exemption process to drive up the price for its property rather than to provide rail service. The Board was also concerned by evidence that Milwaukee Terminal intended to use its exemption authority to circumvent the local permitting process and title restrictions for purposes other than providing rail transportation.

In addition to evidence relating to the negotiations for the sale of the underlying real estate, the Board pointed to substantial evidence that Milwaukee Terminal never intended to become a rail carrier in the first place. That evidence included the facts that (1) the property had not been used in rail service since March 2006, (2) the locomotive on the premises was a hobby restoration project, that its windows were boarded up and it that it had not moved since it had been on the property and (3) the open top hopper cars purchased by Milwaukee Terminal were to be refurbished by an affiliate rather than to be used for railroad operations on the property.

The situation presented by the Notice of Exemption is entirely dissimilar from the situation presented in *Milwaukee Terminal*. ABC & D's tracks are not unused. To the contrary, for several years they have been regularly used to dispatch rail traffic in interstate commerce. Furthermore, there is no evidence whatsoever that ABC & D intends to use its status as a railroad carrier for any purpose other than providing railroad transportation.

The Town repeatedly argues that the actual purpose behind the Notice of Exemption is to

obtain permission to handle municipal solid waste by invoking federal preemption. That, however, does not make cases like *Jefferson Terminal* and *Milwaukee Terminal* applicable. The critical distinction between those cases and the situation presented here is that any use of federal preemption by ABC & D would be for the purpose of interstate railroad transportation of solid waste. Circumventing a local permitting process for the purpose of providing rail transportation is entirely appropriate. As the Board explicitly stated in *Milwaukee Terminal* “seeking Federal preemption is an appropriate action to protect transportation by rail carrier from state or local interference.” What is inappropriate is attempting to circumvent local processes for other purposes, such as for driving up the purchase price of the underlying real estate or of avoiding an eminent domain taking. That, manifestly, is not the situation here.

The Town characterizes the Notice of Exemption as “improper [],” a “scheme,” an attempt to put itself under a “cloak,” as “circumvent[ing]” Massachusetts law and as “an end run.” It is none of these things. Any effort by ABC & D to preempt any state or local requirement would be entirely consistent with and would advance the federal transportation policy as announced by Congress and as implemented and confirmed by court decisions and decisions of the Board itself.

Congress and the courts long have recognized the need to regulate railroad operations at the federal level. *City of Auburn v. U.S. Government*, 154 F.3d 1025, 1029 (C.A.9, 1998). “[T]here can be no divided authority over interstate commerce, and . . . the acts of Congress on that subject are supreme and exclusive.” *Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404. Indeed, “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” *CSX Transp. v. Georgia Public Service Comm’n*,

944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

The Board, itself, has repeatedly recognized that federal law is, in the first instance, applicable to interstate railroad transportation. “Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping. And, as particularly pertinent here, the courts have made it clear that state or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use permitting requirements) are categorically preempted.” *City of Creede, Co - Petition for Declaratory Order*, FD 34376 (May 3, 2005). “Congress broadly divested states and localities of a regulatory role over rail transportation.” *CSX Transportation, Inc. – Petition for Declaratory Order*, FD 34662 (March 14, 2005).

And the Board has recognized that federal preemption serves a salutary purpose. “The purpose of the federal preemption ... is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce.” *Borough of Riverdale – Petition for Declaratory Order*, FD 35299 (August 3, 2010) citing *Green Mountain R.R. v. Vermont*, 404 F.3d 638, 642 (2d Cir. 2005); *N.Y. Susquehanna & W. Ry. v. Jackson*, 500 F.3d 238, 252-55 (3d Cir. 2007). To the same effect is *Mark Lange - Petition for Declaratory Order*, FD 35037 (January 24, 2008).

Although the foregoing decisions do not reflect the impact of the Clean Railroads Act, they make it clear that, to the extent that the Board has the authority to regulate the transportation of solid waste, that authority preempts and supersedes state or local requirements. It remains true, as the Board observed in *Jefferson Terminal*:

Congress has made a determination that the national interest in the free flow of goods in interstate commerce should take precedence over the narrower interests of state and local jurisdictions.

Thus, should ABC & D seek to preempt any state or local requirement relating to solid waste by initiating a proceeding under Ex Parte 684, it would be doing precisely what Congress intended. It would be seeking the application of federal law, rather than state or local law, to interstate transportation. Seeking the application of federal law to interstate transportation can not be described as a scheme, circumvention or end run.

IV. THERE IS NO INCONSISTENCY BETWEEN ABC & D'S PRESENT OPERATION AND ITS OPERATION AS A COMMON CARRIER.

The Town incorrectly argues that ABC & D will not provide common carriage. Instead, the Town says ABC & D will operate a solid waste processing facility (Motion at pages 7 and 33-4). It further argues that ABC & D does not have the physical or legal ability to operate as a common carrier and has no intention of doing so. From a legal perspective the Town asserts that ABC & D must obtain the Massachusetts Department Environmental Protection's prior approval to become a common carrier because becoming a common carrier would be a material change in "design or activities." (Motion at page 20-1). From a physical perspective, the Town claims that ABC & D's operations are physically incompatible with common carrier service (Motion at page 21) and that ABC & D does not own any cars or locomotives (Motion at page 34) and has no agreement with Massachusetts Central Railroad Corporation (hereinafter "Massachusetts Central") to use or connect with its trackage (Motion at page 10).

To the contrary, there is no inconsistency between any aspect of ABC & D's present operation and its becoming a common carrier. Presently, ABC & D accepts construction and

demolition debris which it loads, inter alia., into railroad cars which it then dispatches to disposal facilities. Upon becoming a common carrier it is ABC & D's intention to hold itself out to the general public to provide this service. There are presently railroads which load construction and demolition debris into railroad cars on a common carrier basis. These railroads are no less common carriers because they may also process solid waste.⁴ There is no inherent inconsistency between the operations that ABC & D presently performs and being a common carrier.

The loading of the construction and demolition debris into railroad cars constitutes rail transportation. *New England Transrail, LLC, FD 34397* (June 29, 2007) at page 10 ("intermodal transloading operations and activities involving loading and unloading materials from rail cars and temporary storage of materials are part of rail transportation"). Under the circumstances, ABC & D is presently performing rail transportation with its existing equipment. To the extent it needs to move rail cars within its facility, it does so using a front loader and intends to continue doing so. In addition, it has recently leased 15 cars from American Rail Car Leasing.⁵

In point of fact, ABC & D's present operation is, in substance, already a common carrier operation. The construction and demolition debris for which ABC & D provides rail

⁴ The processing may or may not be railroad transportation. The Town apparently thinks it is significant that ABC & D will process as well as handle municipal solid waste. (Motion at page 25) Whatever the intentions of past management, ABC & D's present contemplation is to transload municipal solid waste as received. Nothing, however, turns on this distinction. Whether or to what extent ABC & D's present or future processing constitutes rail transportation is not at issue in this proceeding.

⁵ ABC & D will use these cars to move construction and demolition debris to a new disposal site. The transportation and other expenses in connection with this new disposal site are substantially less than the expenses in connection with the disposal site that ABC & D has used in the past. For this reason and for reasons relating to the unavailability of local disposal sites, ABC & D expects that a materially greater portion of its outbound loads will be by rail.

transportation comes from unaffiliated third parties. When ABC & D becomes a common carrier railroad it will, as a legal matter, hold itself out to third parties generally to perform the rail transportation it is already performing. As a result, ABC & D will meet the test of common carriage - a holding out to provide the public with rail transportation. See *New England Transrail, LLC*, FD 34397 (June 29, 2007).

The Town seeks to characterize ABC & D's business as private carriage by claiming that ABC & D becomes the owner of the material it handles. ABC & D questions the extent to which the concept of ownership is applicable to solid waste. A more accurate description of the legal arrangements attendant to ABC & D's business is that it takes possession of construction and demolition debris and become responsible for its proper disposal. In any event if "ownership" is deemed inconsistent with common carriage, nothing prevents ABC & D from structuring its arrangement with its customers to avoid ownership.

This is not analogous to a situation where a manufacturer seeks common carrier status for its plant trackage. In that situation, the trackage serves only the manufacturer. Here, by contrast, ABC & D is already a transloader serving multiple customers.⁶

Finally, the Town's argument with respect to arrangements with the Massachusetts Central is both legally irrelevant and factually inaccurate. ABC & D has had discussions with Massachusetts Central about an interchange agreement. Although no arrangements have been finalized, Massachusetts Central has confirmed that it is willing to interchange traffic with ABC

⁶ Common carrier operations may be permissibly established even on trackage previously used to service only one customer. *Riverview Trenton Railroad Company – Petition for an Exemption From 49 U.S.C. 10901 to Acquire and Operate a Rail Line in Wayne County, MI*, FD 34040 (May 9, 2003).

& D. In any event, Massachusetts Central would be required to do so. *New England Transrail, LLC*, FD 34397 (June 29, 2007)(“should we decide to grant it the necessary authority to become a rail carrier, connecting carriers would then be required to provide for the interchange of traffic from NET. See 49 U.S.C. 10742. Thus, it does not matter that no interchange agreement is yet in place.”)

V. THE ISSUES PRESENTED ARE NEITHER CONTROVERSIAL NOR COMPLICATED.

The only issues presented by the Motion that are potentially controversial or complicated relate to the handling of solid waste. The Motion recites at length the controversy over the special permit for ABC & D’s existing construction and demolition debris business. The motion also points to the Town’s denial of a permit to handle municipal solid waste. However, none of the issues related to the handling of solid waste will be decided, one way or the other, by granting ABC & D common carrier authority.⁷

Pursuant to the Clean Railroads Act of 2008:

Each solid waste rail transfer facility shall be subject to and shall comply with all applicable Federal and State requirements, both substantive and procedural ... to the same extent as required for any similar solid waste management facility ... that is not owned or operated by or on behalf of a rail carrier.

Thus, ABC & D, as a rail carrier, will continue to be subject to all applicable state and local requirements presently applicable to it.

⁷ Based on an e-mail from Mr. Hannon (Exhibit 24 to the Motion), the Town suggests that ABC & D deliberately did not publicize its earlier notice of exemption in FD 35354. To the contrary, the e-mail reflects nothing more than Mr. Hannon’s understanding, as argued in this Reply, that the only controversial issue presented here - whether ABC & D should be permitted to handle municipal solid waste - will be determined in a later proceeding under Ex Parte 684.

The only way that ABC & D can avoid the applicability of any state and local requirements relating to solid waste is to institute a proceeding under Ex Parte 684. A proceeding under Ex Parte 684, as opposed to the proceeding presently before the Board, would involve the potentially complicated and controversial issues described in the Motion.

The Town, ignoring the provisions of the Clean Railroads Act, relies on the Board's decisions in *Riverview Trenton Railroad Company - Acquisition and Operation Exemption - Crown Enterprises Inc.*, FD 33980 (February 14, 2002) and *Northeast Interchange Railway, LLC - Lease and Operation Exemption - Line in Croton-On-Hudson, New York*, FD 34734 (November 17, 2005). These decisions, although superficially similar to the situation presented here, do not support the Town's argument that the notice of exemption procedure is inappropriate in the circumstances presented. The considerations that motivated the Board in those cases do not exist in this case because of the changes in federal preemption wrought by the Clean Railroads Act.

In *Riverview Trenton*, the Riverview Trenton Railroad Company filed a notice of exemption in furtherance of plans to establish an intermodal terminal for rail, motor, and barge traffic. The Board pointed out that the transaction would convert private carrier operations into for hire common carrier service, adding that this conversion would "[withdraw] the service and the property over which it operates from many aspects of local control." The Board noted that "the issue of local control over the property involved ... underlies much of the opposition to the proposed transaction" including opposition from public agencies, that the transaction had attracted. Under the circumstances, the Board concluded that closer scrutiny of the effect of the change from private operation to common carriage (the withdrawal of local control) was warranted.

Here, as in *Riverview Trenton*, ABC & D has filed a notice of exemption in furtherance of plans for an intermodal terminal. Here, as in *Riverview Trenton*, the transaction would convert private operations into for hire common carrier service. Here, as in *Riverview Trenton*, the issue of local control over the property underlies the opposition to the proposed transaction.

That, however, is where the similarities end. In *Riverview Trenton* the conversion to common carrier operation, without more, withdrew the property from important aspects of local control. That is simply not the case here. Any handling of solid waste by ABC & D, once it becomes a common carrier, must continue to comply with all applicable federal and state requirements respecting pollution prevention and abatement, environmental protection and restoration, and protection of public health and safety, to the same extent as any non-railroad solid waste management facility. Whereas in *Riverview Trenton*, the conversion to common carrier operation, without more, withdrew the proposed intermodal terminal for many aspects of local control, the conversion of ABC & D's trackage to common carrier operation will have no effect whatsoever on the applicability of local requirements to either its existing construction and demolition debris operation or to any future handling of municipal solid waste.

Under 49 USC §10901 permission for a noncarrier to operate a railroad line is to be granted unless it is inconsistent with the public convenience and necessity. In *Riverview Trenton*, the Board revoked the notice of exemption in order to make that determination. Because permission to operate as a common carrier removed the proposed intermodal terminal from local regulation, the Board had to weigh the environmental and other factors that would determine whether common carrier operation was consistent with the public convenience and necessity in connection with the application to become a common carrier. Here, Board approval

for common carrier operation does not displace any regulation of solid waste whatsoever. Under the circumstances, there is no need for the weighing that the Board deemed appropriate in *Riverview Trenton*. Whether ABC & D's present construction and demolition operations or any future operations involving solid waste are consistent with the public convenience and necessity is simply not at issue in connection with its becoming a common carrier.

The same considerations that render *Riverview Trenton* inapplicable to ABC & D's Notice of Exemption also render *Northeast Interchange Railway, LLC - Lease and Operation Exemption - Line in Croton-On-Hudson, New York, FD 34734* (November 17, 2005) inapplicable to ABC & D's Notice. In *Northeast Interchange* the applicant operated a construction and demolition operation at the site and had expressed an intent to expand the existing operation. The Board revoked the exemption in response to a request by the village of Croton-on-Hudson that the Board "examine the extent of the Board's jurisdiction over the proposed operations, and thus the extent to which state and local regulation of the handling of construction waste on the property would be preempted."

In light of the Clean Railroads Act there is no need for such an examination in ABC D's case. ABC & D's present construction and debris operation (and any future construction and demolition debris or municipal solid waste operation) will not be preempted and will remain fully subject to state and local regulation.

Because there is no need for any information relating to solid waste, the record presently before the Board is entirely adequate. Indeed, it is hard to imagine what further information might be presented in a petition for individual exemption or a full-blown application to lease and operate a railroad line. Already before the Board is a completely adequate description of the

ABC & D's construction and debris demolition business. (See the Comment of the Massachusetts Department of Environmental Protection at page 2) Already before the Board, in excruciating detail, are all the details of the proposed transaction with Mr. Berardi and the property interests at issue. ABC & D submits that any information nominally required by 49 CFR 1150 that is not presently before the Board has no substantial bearing on the public convenience and necessity of the transaction. Further proceedings will not be productive of any probative information.

As a result, the situation before the Board is fundamentally different from the situation presented in *Jefferson Terminal*. In that case there was a bona fide dispute as to whether a common carrier obligation attached to the property or whether the property had been properly taken out of service. If the property at issue had ceased to be part of the interstate railroad system, it arguably had been taken by eminent domain and Jefferson Terminal Railroad Company had no ownership interest in the property. Revoking the notice of exemption and requiring the petitioner to submit the material required in a non-exempt application under §10901 allowed for a record sufficient for the Board to decide the issues presented.

Here, by contrast, the property which ABC & D seeks to operate as a common carrier consists of existing trackage used in connection with interstate commerce. Nor is there any dispute that the O'Riley Family Trust owns the underlying real estate and that it has leased it to ABC & D. The issues relating to solid waste which are the basis for the Motion will not be elucidated by the material that would be presented in a nonexempt application under §10901. To the contrary, those materials are properly presented in a proceeding under Ex Parte 684. Vacating ABC & D's notice of exemption and requiring further proceedings under

§10901 will only delay the presentation of that material.

VI. THE INTERESTS OF INTERSTATE COMMERCE COUNSELS IN FAVOR ALLOWING THE EXEMPTION TO BECOME EFFECTIVE.

The long-standing policy to protect interstate commerce from local interference provides compelling reasons for not revoking the Notice of Exemption and for not delaying ABC & D's becoming a common carrier. Although simply becoming a common carrier will have no effect upon state and local regulation of ABC & D's existing or future solid waste operations, becoming a common carrier would enable ABC & D to seek a land-use-exemption permit. In contrast, if ABC & D is precluded from becoming a common carrier it will have no ability to seek a land-use-exemption permit.

Precluding ABC & D from seeking a land-use exemption is inconsistent with the policies that underlie the regulation of interstate commerce. Indeed, the Clean Railroads Act represents a recent and considered pronouncement by Congress as to the appropriate balance between federal and local regulation of facilities handling solid waste. That statute assigns to the Board responsibility (1) for determining whether a particular state or local regulation affects the siting of a facility; and (2) for determining whether the facility poses an unreasonable risk to public health, safety or the environment at the location.

The Town is seeking to prevent and/or delay the Board from making the determinations assigned to it by the Clean Railroads Act. It is seeking to avoid a proceeding under Ex Parte 684. If ABC & D does not become a common carrier, there can be no proceeding under Ex Parte 684 and the Board will never be called upon to make the determinations committed to its discretion by the Clean Railroads Act. If ABC & D does not become a common carrier, the balance

between federal regulation and state or local regulation will be determined by default, without there ever being a presentation of the merits.

Furthermore, the motivations for exempting routine⁸ transactions governed by §10901 provide strong reasons for not delaying ABC & D's application to become a common carrier. The class exemption was meant to provide an expedited procedure that would facilitate continued rail service. The contemplation was that in most instances the transactions covered by the class exemption would involve resumed or continued rail service with no change in operations. See *Class Exemption - Acquisition and Operation of Railroad Lines under 49 USC 10901*, 1 I.C.C.2d 810 (1985).

Those considerations are applicable to ABC & D. Becoming a common carrier will not result in any physical changes in ABC & D's operation. Presently, it accepts construction and demolition debris from various customers, some of which it loads onto railroad cars for shipment on Massachusetts Central. That is what it will continue to do if it becomes a common carrier. Thus, the Notice of Exemption contemplates exactly the kind of transaction for which the class exemption was designed: providing an expedited procedure to facilitate continued rail operations without significant change.

Preventing ABC & D from initiating a proceeding under Ex Parte 684 by preventing it from becoming a common carrier would be particularly egregious given the nature of the controversies between ABC & D and the Town with respect to ABC & D's existing construction

⁸ ABC & D's becoming a common carrier *is* a routine transaction. What is not "routine" is any future handling of municipal solid waste. Issues relating to municipal solid waste, however, are properly the subject of a proceeding under Ex Parte 684, not a proceeding under §10901.

and demolition debris business. The Town is seeking to enjoin ABC & D from carrying on its business and to require it to remove its facility. (Motion at page 8). The Town claims that it is entitled to this relief because (1) ABC & D's 2001 special permit was approved by three, rather than four, members of the planning board; (2) the special permit lapsed in 2002 as a result of non-use; (3) the special permit was not properly recorded; (4) the permit contains a mistake in the book and page number of the property; (5) ABC & D did not have the required frontage when it applied for the special permit; and (6) certain fees have not been paid. (Motion at Exhibit 16 and 18).⁹

ABC & D submits that the disruption to interstate commerce sought by the Town is inconsistent with the long-standing policy to protect interstate commerce from local interference. The Town seeks to terminate ABC & D's interstate railroad business without providing it any opportunity to initiate a proceeding under Ex Parte 684 seeking a determination that the special permit is local regulation which affects the siting of its facility. The Town seeks to terminate ABC & D's interstate railroad business without providing it any opportunity to seek a determination that its facility does not pose an unreasonable risk to public health, safety or the environment.

If the services presently provided by ABC & D were, instead, provided by Massachusetts Central, the Board would readily determine that a proceeding under Ex Parte 684 was appropriate

⁹ In its March 17, 2010, Verified Petition to Reject And/or Dismiss Verified Notice of Exemption and Request for Stay of Effective Date of Exemption in FD 35356, the Town's sworn testimony was that ABC & D had a special permit. After the Town changed its position in May, ABC & D brought suit to enjoin any interference with its operation and the Town counterclaimed seeking removal of ABC & D's facility. The matter is presently being tried in Massachusetts Superior Court

to ensure the protection of interstate commerce. The only distinction between that hypothetical situation and ABC & D's situation is that Massachusetts Central is already a common carrier whereas ABC & D seeks to become one. ABC & D submits that that is a distinction of form, rather than substance. The interstate commerce that ABC & D provides is as much entitled to the protection mandated by Congress as that commerce would be if it were provided by Massachusetts Central.¹⁰

The Clean Railroads Act calls upon the Board, in connection with the interstate shipment of solid waste, to determine whether a local regulation affects the siting of the facility and whether the facility poses an unreasonable risk to public health, safety or the environment. The Town is seeking to prevent any opportunity for the Board to make those decisions. ABC & D requests the opportunity to present those issues in the forum and in the manner that Congress contemplated. That can only occur if ABC & D is permitted to become a railroad carrier.

VII. THE COMMENTS OF THE MASSACHUSETTS DEPARTMENTS OF ENVIRONMENTAL PROTECTION AND TRANSPORTATION ADD NOTHING TO THE TOWN'S ARGUMENTS.

Both the Massachusetts Department of Environmental Protection ("MDEP") and the Massachusetts Department of Transportation ("MDOT") submitted comments in support of the Motion. In substantial part these comments simply state that the two departments are in agreement with the positions taken in the Motion. As such, these comments are addressed

¹⁰ ABC & D is not suggesting that the distinction between services provided by a common carrier railroad and services provided by a third-party is immaterial. There is, however, nothing inappropriate about ABC & D's seeking to change the classification of its service so as to qualify for federal preemption. See *Borough of Riverdale – Petition for Declaratory Order*, FD 35299 (August 3, 2010)(change in contractual terms to ensure that operation would qualify as being by rail carrier).

elsewhere in this Reply. Moreover, neither comment identifies any significant concern of the departments themselves, as opposed to a desire that ABC & D address the Town's concerns. Both comments reflect the departments' desire that the Town's concerns be addressed. However, the inability to address the Town's concerns does not stem from any lack of effort on ABC & D's part.

A. The Comment of the Department of Environmental Protection.

MDEP prefaces its comment by outlining its statutory charter to protect the public health, safety and environment.¹¹ Significantly, however, MDEP's comment evidences that *it* does not have substantial concerns with either ABC & D's existing construction and demolition debris business or with its handling municipal solid waste.

With respect to the existing construction and demolition debris business, MDEP acknowledges that ABC & D obtained all required MDEP permits. Furthermore, MDEP concedes that ABC & D's 2005 permit application indicated that construction and demolition debris would be shipped out by rail and that it understood that the debris would be "brought to the facility." Manifestly MDEP understood that ABC & D intended to provide rail transportation to third parties, a service that is equivalent to, or substantially identical to, common carrier service.

In its comment MDEP also admits that it approved the handling of municipal solid waste at ABC & D's facility. That is, it admits that it issued "a site suitability report indicating that *it* believed that the criteria contained in 310 [Code of Massachusetts Regulations 16.40] were met."

¹¹ It, like the Town, ignores that the health, safety and environmental considerations attendant to the handling of solid waste are not involved in this proceeding.

(Emphasis supplied) That site suitability report is attached hereto as Exhibit 1.

Attached to the Motion as Exhibit 20 is the adverse site suitability report issued by the Town. The 19 questions addressed in each of these site suitability reports are identical. Although MDEP made favorable findings with respect to each of the questions, the Town made contrary and adverse findings to 5 of the questions and imposed additional conditions with respect to two of the questions.

B. The Comment of the Department of Transportation.

MDOT, like MDEP, prefaces its comment by outlining its statutory charter to promote adequate, safe, efficient and convenient rail transportation. And, like MDEP, MDOT fails to identify any inconsistency between these statutory objectives and ABC & D's desire to become a common carrier.

In addition, MDOT's discussion of the license between it and ABC & D (Exhibit 11 to the Motion (hereinafter the "License")) does not reveal any impediment to ABC & D's becoming a common carrier. First, MDOT says, incorrectly, that it owns a portion of the trackage upon which ABC & D seeks to operate as a common carrier. This is simply incorrect. ABC & D seeks to operate on 773 feet of track all of which is located on the property owned by the O'Riley Family Trust.

The 773 feet of track does connect to trackage located on property owned by MDOT and operated under lease by Massachusetts Central. Apparently MDOT believes that this connection may be severed based on the fact that the License is "revocable." To the contrary, Massachusetts Central, MDOT's lessee, is obligated to "construct, maintain, and operate, on reasonable conditions, a switch connection to connect that branch line or private side track with its railroad."

49 USC 11103.

MDOT also argues that the License does not “envision” common carrier services. ABC & D cannot speak for what the MDOT envisioned or expected. However, nowhere in the License’s 21 single-spaced pages is there any restriction on ABC & D’s activities on its own property. Furthermore, the License specifically contemplates that ABC & D will provide rail transportation - if only by loading railroad cars.

MDOT’s comment says it disagrees with the “approach” taken by ABC & D. In particular, MDOT states its belief that ABC & D should seek the support and cooperation of the Town. What MDOT ignores is that ABC & D has tried, unsuccessfully, to do just that.

On February 24, 2010 ABC & D filed an earlier Notice of Exemption (FD 35356) which, on March 26, it requested be withdrawn without prejudice because it had “determined that further discussions with interested parties [were] in order.” ABC & D did have substantive discussions with both MDEP and MDOT. In addition, both of those departments urged ABC & D to try to reach an accommodation with the Town and each undertook to try to identify the Town’s substantive concerns. Neither MDEP nor MDOT reported those concerns to ABC & D and the only response ABC & D received from the Town came in the form of the Town’s ongoing effort to terminate ABC & D’s construction and demolition debris business and a statement that it would not negotiate at all regarding with respect to municipal solid waste.

Although ABC & D agrees that controversial matters are generally best resolved by settlement (and understands that this is also the Board’s preference), when settlement is not possible, recourse is appropriate. Here, the appropriate recourse is a proceeding under Ex Parte

684.¹² It is not appropriate to allow the Town to unilaterally determine the balance between local interests and interstate rail transportation. That is the function of the Board.

VIII. THE NOTICE OF EXEMPTION IS NEITHER FALSE NOR MISLEADING.

Contrary to the Town's arguments, there is absolutely nothing in the Notice of Exemption that is false or misleading. To be sure, there are facts that are not contained in the Notice. None of these facts, however, are required to be included by the regulations at 49 CFR §1150.31.

Furthermore, none of the omitted facts are relevant or material to whether ABC & D's becoming a common carrier is consistent with the public convenience and necessity. None of the omitted facts are necessary to render anything contained in the Notice of Exemption not misleading.

The Town's first claim is that ABC & D failed to disclose that it has never engaged in common carriage. (Motion at page 2) To the contrary, ABC & D disclosed "that it is not and has never been a common carrier." (Notice at footnote 2)

Next, the Town argues that ABC & D should have disclosed that the Town had already denied it a permit to handle municipal solid waste and that the Town had retracted its earlier concessions that ABC & D had all the permits it needed to handle construction and demolition debris.¹³ The details concerning the status of the various permits to handle solid waste are simply not material to this proceeding. Allowing the Notice of Exemption to become effective will not affect the grant, the denial or the validity or the invalidity of any permit relating to the

¹² In the context of a proceeding under Ex Parte 684, the Town would have to identify why handling solid waste is or would be a threat to the health, safety or environment. In the context of that specification, settlement discussions might be fruitful.

¹³ In its Notice of Exemption ABC & D specifically disclaimed any representation as to what permits it has or does not have. (Notice at footnote 5)

handling of solid waste. The facts concerning these permits are simply irrelevant and, therefore, there is nothing misleading about any failure to include them in the Notice of Exemption.

ABC & D even questions whether facts relating to the existence of local permits would be relevant in a proceeding under Ex Parte 684. Ex Parte 684 contemplates that a carrier may seek a land-use exemption from the Board either before it has applied for state or local permits or after those permits have been denied. Compare “[the Clean Railroads Act] allows a rail carrier to petition the Board for a land-use-exemption permit without first receiving an unsatisfactory result from a state agency” with “[a]fter receiving an unsatisfactory result from the state, a solid waste rail transfer could apply to the Board for a land-use-exemption permit.” (Ex Parte 684 at page 8)

IX. THE TOWN HAS NOT DEMONSTRATED THAT IT IS ENTITLED TO A STAY.

The standards governing disposition of a petition for stay are: (1) that there is a strong likelihood that the movant will prevail on the merits; (2) that the movant will suffer irreparable harm in the absence of a stay; (3) that other interested parties will not be substantially harmed; and (4) that the public interest supports the granting of the stay. *Keokuk Junction Railway Company – Feeder Line Acquisition – Line of Toledo Peoria and Western Railway Corporation Between La Harpe and Hollis, IL*, FD 34335 (November 23, 2004). It is the Town’s burden to establish that it is entitled to a stay.

For the reasons stated in the preceding portions of this Reply, the Town has not shown that it is likely to prevail on the merits. Furthermore, nothing in the Motion points to any irreparable harm that the Town will suffer in the absence of a stay. Finally, there is a real danger that ABC & D will be harmed if it is delayed in becoming a common carrier. If the Town is

successful in invalidating ABC & D's special permit, ABC & D would be exposed to the irreparable harm of having its existing construction and demolition debris business terminated.

CONCLUSION

ABC & D requests that the Town's Motion be denied and that its Notice of Exemption be declared effective forthwith.

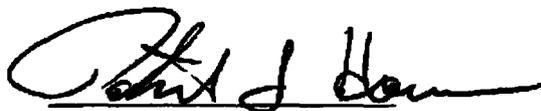
Respectfully Submitted:

/s/ Leonard M. Singer
Leonard M. Singer
Office of Leonard M. Singer
101 Arch Street, Ninth Floor
Boston, Massachusetts 02110
617-737-7670
LeonardMSinger@gmail.com

Counsel for ABC & D Recycling, Inc.

VERIFICATION

I, Patrick J. Hannon, being duly sworn, hereby depose and say that I am authorized to make this Verification, that I have read the foregoing document and the attachments thereto, and that I know the facts asserted therein are true and accurate as stated, to the best of my knowledge, information and belief.

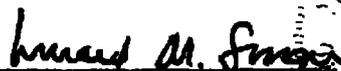


Patrick J. Hannon, Valley Management Services, Inc pursuant to Management Agreement with ABC & D Recycling, Inc. and O'Riley Family Trust dated February 18, 2010

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

Personally appeared before me, a notary public in the Commonwealth of Massachusetts, Patrick J. Hannon, known to me, and acknowledged the foregoing to be his free act and deed and the free act and deed of ABC & D Recycling, Inc., on September 1, 2010.



My Commission Expires: 10/12/10



CERTIFICATE OF SERVICE

I, Leonard M. Singer, hereby certify that I served the foregoing on all parties. Such service was made by electronically mailing the foregoing to David A. Wojcik, Counsel for the Town of Ware, Jamey Tesler, counsel for the Massachusetts Department of Transportation and Laura Swain, Counsel for the Massachusetts Department of Environmental Protection on September 2, 2010.

/s/ Leonard M. Singer
Leonard M. Singer

Exhibit 1



COMMONWEALTH OF MASSACHUSETTS
 EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
 DEPARTMENT OF ENVIRONMENTAL PROTECTION
 WESTERN REGIONAL OFFICE
 486 Dwight Street • Springfield, Massachusetts 01103 • (413) 784-1100

DEVAL L. PATRICK
 Governor

IAN A. BOWLES
 Secretary

TIMOTHY P. MURRAY
 Lieutenant Governor

LAURIE BURT
 Commissioner

DEC 1 0 2007

Ware Board of Health
 Quabbin Health District
 Town Hall
 126 Main Street
 Ware, MA 01082
 Attention: Judy Metcalf, Director of Public Health

re: Site Suitability Report Modification
 Application for: BWPSW38
 SITE ASSIGNMENT MODIFICATION
 MSW/C&D Handling Facility

at: ABC&D Recycling, LLC
 198 East Street
 Ware, MA 01082
 DSWM File # 07-309-005
 Transmittal Number: W146097

Dear Ms. Metcalf:

The Department of Environmental Protection (the Department) has reviewed the Site Suitability Report (SSR) application (the application) for modification of the Site Assignment at the existing ABC&D Recycling, LLC (ABC&D) construction & demolition (C&D) material processing and handling facility (the Facility) located at 198 East Street (Route 9) in Ware, MA. The application was prepared by Green Seal Environmental (Green Seal) of Sandwich, MA, and bears the seal and signature of Gary D. James, Massachusetts-registered P.E. #32531, and the signature of Garret Keegan, both of Green Seal. The application was submitted on behalf of the applicant, ABC&D, and the application was signed by Richard C. O'Riley, president of ABC&D.

The application proposes to modify the existing Site Assignment for the Facility, to allow the Facility to also accept, handle and transfer municipal solid waste (MSW), as well as C&D waste, without increasing the existing Facility tonnage limit of 750 tons per day of solid waste. The original SSR application (the original SSR) for the Facility was approved by the Department on May 23, 2003, and the final, original Site Assignment was issued by the Ware Board of Health on June 18, 2004. Modification of the Site Assignment is required as part of the Permit Application process, pursuant to 310 CMR 16.21 and 310 CMR 19.020. This letter represents

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the Department's Report on Site Suitability pursuant to 310 CMR 16.13, as amended on June 8, 2001. The Report Number for the application is 309-007-A.

On September 21, 2007, the Secretary of the Massachusetts Executive Office of Environmental Affairs (EOEA) issued a Certificate which reviewed the Notice of Project Change (NOPC) for the proposed modification to site operations in accordance with the Massachusetts Environmental Policy Act (MEPA) regulations at 301 CMR 11.00, and determined that an Environmental Impact Report (EIR) was not required.

The application contains sufficient information to allow the Department to determine whether the modifications to operations at the site meet the criteria listed in 310-CMR 16.40 (3)(d) entitled Criteria for Solid Waste Handling and Processing Facilities and 16.40 (4) entitled General Site Suitability Criteria. Department personnel have inspected the site on numerous occasions.

The Department has determined that the proposed modification to the existing site meets each of the site suitability criteria for a solid waste transfer, handling and processing facility set forth in 310 CMR 16.40(3)(d) & 16.40(4). The Commissioner's Office of the Department previously granted a waiver of the criterion at 310 CMR 16.40 (4)(h), as described in this approval. Therefore, the Department is of the opinion that the proposed site is suitable for use as a Handling Facility for both Municipal Solid Waste (MSW) and Construction & Demolition (C&D) Waste.

The Record for this site assignment application consists of the application, this report which includes statements of fact by the Department pertaining to site suitability criteria, and all correspondence, notices and written comments which have been submitted in accordance with 310 CMR 16.00.

On October 11, 2007 the Department received proof of the public notice of application in the local newspaper (the October 4, 2007 edition of the Ware River News) and certified mail receipts for public notice to abutters and other parties, pursuant to 310 CMR 16.10(4)-(5). The certified mail receipts documented that the public notice was mailed to the abutters and other required parties, including the Ware Board of Health, on October 9, 2007. No comments were received by the Department during the public comment period.

Proposed Facility Description

Outlined in this section is a summary of the Site Assignment Modification application proposal ("the application") submitted by Green Seal on behalf of the applicant, ABC&D.

The Project Site is located in the east-central area of Ware. The site is zoned Highway Commercial and is currently developed and actively used as Roboso Used Auto Parts (an auto salvage yard), and ABC&D Recycling, LLC. The site is bounded to the east by Route 9, to the south by abutting undeveloped property, to the west by the Ware River and an abandoned rail

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right-of-way, and to the north by a trailer home. The Massachusetts Central Railroad, also known as the Ware River Secondary Track, which is located on property owned and controlled by the Commonwealth of Massachusetts, Executive Office of Transportation and Construction (BOTC), bisects the site.

The application seeks to modify the existing site assignment of 8.9 acres of the total 26.78 acres of the property, to allow the Facility to also accept, handle and transfer municipal solid waste (MSW), as well as C&D waste, without increasing the existing Facility tonnage limit of 750 tons per day of solid waste. The existing Site Assignment and Department Solid Waste permits (Authorization-to-Construct and Authorization-to-Operate) for the Facility are for use of the site assigned area as a handling, processing and recycling facility for C&D material. The existing 21,600 square foot (sf), fully enclosed building will remain in use, to provide cover for all tipping, processing, and truck and rail loading activities for MSW and C&D material. The Facility will be serviced by rail and truck for transport of MSW, reclaimed materials and C&D process residuals. Clean, pre-sorted materials such as asphalt, brick and concrete (ABC), as well as clean wood, will continue to be tipped, stored or processed in designated outdoor areas. The outside ABC holding areas will continue to be walled with moveable pre-cast retaining walls and partitions and 15-foot mesh litter control fencing.

The maximum capacity at the facility is proposed to remain at the existing limits of 750 tons per day (TPD) and 214,500 tons per year of total solid waste accepted and handled at the Facility, which would include both MSW and C&D material, including ABC and clean wood. The proposed maximum yearly capacity is based on 750 TPD on weekdays and 500 TPD on Saturdays, at 52 weeks per year. Asbestos wastes, and hazardous wastes will not be accepted at the facility. There are no proposed changes to the existing, permitted hours of operation for the facility of Monday through Friday, 7:00 AM to 4:00 PM, and Saturday 7:00 AM to 1:00 PM (as approved in the local "Decision on Site Plan Approval by Ware Planning Board", dated November 7, 2001).

The existing processing equipment and procedures within the Facility building will remain the same for the acceptance, handling, processing and loading of C&D materials. MSW will be tipped within the building on the eastern side of the tipping floor, and C&D will be tipped on the western side. Following inspection for any banned materials, MSW will be directly loaded within the building into rail cars, which will be covered before leaving the building. Following inspection, C&D materials will either be processed by the existing C&D processing line prior to loading, or loaded directly into rail cars and then covered. ABC&D proposes to store an unspecified number of full, covered MSW-rail cars on the rail spur outside the building, and to continue to store full, covered C&D rail cars on the rail spur, awaiting transport off-site by the rail company. Mobile equipment to be used at the Facility will be the same as presently, including trucks, a wheeled loader, Bobcat loader, concrete crusher, concrete screener, and an excavator. Outdoor processing will continue to include periodic crushing and screening of ABC material and grinding of clean wood.

The exterior footprint of the existing Facility building is not proposed to be changed in any manner. The existing building meets the setback of a minimum of 500 feet from any existing

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residential building and also from any residential building lots with building permit applications already submitted to the Town of Ware. The Facility building is located approximately 770 feet from the nearest existing residence (to the southeast) and over 500 feet from the nearest potential residence in the Edgewood Estates Development expansion across the Ware River (which has a Preliminary Subdivision Plan on file with the Ware Planning Board). The Facility building is located over 1,000 feet from the closest point of the Town of Ware's Grenville Municipal Park, located southwest of the facility, across the Ware River. A separate and apparently unused parcel of land labeled as Grenville Park is located to the south of the Facility, on the same side of the Ware River; this property is approximately 800 feet from the Facility building.

The Facility building, and all associated pavement, roadways and storage areas are located at least 100 feet from the property line, except that the Facility building is closer than 100 feet to the property line of the Massachusetts Central Railroad Line, which will service the facility. In accordance with 310 CMR 16.40(6), on May 19, 2003, the Commissioner's Office of the Department granted a waiver request for a waiver of the site suitability criteria at 310 CMR 16.40(4)(h) for the 100-foot setback to the property line of the Massachusetts Central Railroad Line, for the original SSR for the Facility. The Department has determined that the May 19, 2003 waiver remains valid, therefore another waiver is not necessary for the proposed Site Assignment modification to accept MSW at the Facility.

The Facility is outside the 100-year floodplain boundary, and outside of the 200-foot Riverfront Area to the Ware River. Currently, there are 3.2 acres of paved area at the Facility, and the paved areas and other features of the site will not change with the proposed Modification. The existing storm water management system at the Facility incorporates catch basins, grassed swales, and detention basins. As noted earlier, only clean ABC material and clean wood will continue to be tipped or processed outside the Facility building. Any water that comes into contact with C&D material (other than clean ABC material and clean wood) or MSW will be treated as industrial wastewater, and will be collected within the Facility building in the existing permitted, tight tank, for off-site disposal at a permitted wastewater disposal facility. The existing Facility building has a bathroom, with a separate, on-site, permitted septic system, which is only for sanitary wastes from the bathroom.

Noise Studies were performed by Green Seal in accordance with the Department's ATC and ATO permitting requirements for the existing Facility. The Noise Studies concluded that the maximum cumulative noise level at the property line under worst-case conditions, with the outside concrete crusher operating, was 58.0 decibels, which was 6.4 decibels above background. Operation of the outside ABC grinder and wood shredder will continue to be occasional. The application states that the measured noise levels at the property line were consistent with Department standards and the standards of the Ware Zoning Bylaw.

The facility will continue to be serviced by the Town of Ware public water supply system. Water will be used for dust suppression inside the building above the screening unit, wood grinder, and on tipping and loading areas inside the building. Additional dust suppression will occur on a periodic basis outside the buildings on roadways and on concrete prior to its crushing. The amount of water to be used will be limited to the amount required to adequately wet the target

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areas. Green Seal proposes to add a citrus-based, essential oil deodorizing agent to the water used in the existing misting system, to mitigate potential odors from the acceptance and handling of MSW. Green Seal states that the quick-closing fabric doors will be closed immediately after each vehicle enters or leaves the building, so that odor potential outside the building would be mitigated. The existing steel doors would continue to be closed each night when the Facility is not in operation.

As required by the Department, a Level 1 Qualitative Impact Evaluation, or Facility Impact Assessment (FIA) study was performed by Green Seal for the proposed facility, in accordance with the Department's guidance document entitled "Guidance for Conducting Facility Impact Assessments for Solid Waste Facility Site Assignment", revised March, 2006 ("the FIA Guidance Document"). The FIA study made the following conclusions:

- The proposed capacity of the Facility is greater than 150 TPD;
- The Facility is proposing to utilize Best Management Practices (BMPs) to minimize fugitive dust emissions, odors and diesel emissions, as outlined in the FIA Guidance Document;
- There are no known volatile organic compound (VOC) sources which total more than 50 tons per year (TPY) within one mile of the proposed facility; and
- The facility should therefore receive a Positive Report for the FIA analysis.

The BMPs proposed for the Facility include the following:

- The Facility building is fully enclosed, with operating doors, and will also include the quick-close fabric doors described previously, to control fugitive dusts, odors, and noise;
- Stationary equipment within the Facility building is electrically powered, to control diesel emissions, odors, and noise;
- Water-misting systems will be used within the building to minimize dusts, and a water spray truck will be used as needed on roadways and during outside ABC crushing operations. A citrus-based, essential oil deodorizing agent will be added to the water of the misting system to mitigate potential odors associated with MSW handling;
- All diesel-powered equipment, such as loaders and excavators, is of new (low-emission) construction, to control diesel emissions;
- Roadway surfaces have been paved to control fugitive dusts, and roadway sweeping will be performed as needed;
- Stormwater controls are currently in place in accordance with the Department's Bureau of Resource Protection (BRP) applicable regulations and policies;
- Any fuel storage for Facility equipment includes secondary containment; and
- Only clean ABC material and clean wood will be tipped or processed outside the Facility building, within designated areas.

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During its technical review of the submitted site assignment application, the Department has made the following findings pursuant to 310 CMR 16.40.

Criteria for Solid Waste Handling and Processing Facilities

No site shall be determined to be suitable or be assigned as a solid waste handling and processing facility where:

Criterion #1:

A waste handling or processing area would be within the Zone I of a public water supply well.

Department's Finding:

Based on the information contained in the application, the Department has found that the proposed Facility's waste handling or processing area would not be located within the Zone I of an existing public water supply well. The application states, and the Department has verified, that there are no existing or potential public water supply wells in the vicinity of the site.

Criterion #2:

A waste handling or processing area would be within the Interim Wellhead Protection Area (IWPA) or a Zone II of an existing public water supply well within a proposed drinking water source area, provided that the documentation necessary to obtain a source approval has been submitted prior to the earlier of either the site assignment application, or if the MEPA process does apply, the Secretary's Certificate on the Environmental Notification Form.

Department's Finding:

Based on the information contained in the application, the Department has found that the waste handling and processing area of the proposed Facility would not be located within the Interim Wellhead Protection Area (IWPA) or a Zone II of an existing or proposed public water supply well.

The application states, and the Department has verified, that the site is not within an existing or proposed IWPA or Zone II of a public water supply well.

Criterion #3:

The waste handling or processing area would be within the Zone A of a surface drinking water supply.

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Department's Finding:

Based on the information contained in the application, the Department has found that the proposed waste handling or processing area of the Facility would not be within the Zone A of a surface drinking water supply. The application states, and the Department has verified, that there are no existing or potential surface water supplies in the vicinity of the site.

Criterion #4:

The waste handling or processing area would be within five hundred (500) feet upgradient, and where not upgradient, within two hundred fifty (250) feet, of an existing or potential private drinking water supply well existing or established as a Potential Private Water Supply at the time of submittal of the application, provided, however, the applicant may show a valid option to purchase the restricted area including the well and a guarantee not to use the well as a drinking water source, the exercise of which shall be a condition of any site assignment.

Department's Finding:

Based on the information contained in the application (Inserts 2 & 3), the Department has determined that the proposed waste handling or processing area of the Facility would not be within five hundred (500) feet upgradient, and where not upgradient, within two hundred fifty (250) feet, of an existing or potential private drinking water supply well, existing or established as a Potential Private Water Supply at the time of submittal of the application.

The application states that there are no known private water supply wells in the vicinity of the site, and that the site property is serviced by the Town of Ware's public water system. The nearest existing residence is over 700 feet from the Facility building. Proposed residences on the opposite side of the Ware River would be located over 500 feet from the Facility building.

Criterion #5:

The waste handling area of any transfer station or handling facility that proposes to receive more than 50 tons per day of solid waste would be within five hundred (500) feet of an occupied residential dwelling, prison, health care facility, elementary school, middle school or high school, children's pre-school, licensed day-care center, or senior center or youth center, excluding equipment storage or maintenance structures.

Department's Finding:

Based on the information contained in the application and site inspections, the Department has found that the proposed waste handling or processing area of the Facility would not be within five hundred (500) feet of an occupied residential dwelling, prison, health care facility, elementary school, middle school or high school, children's pre-school, licensed day-care center, or senior center or youth center, excluding equipment storage or maintenance structures.

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Inserts 2 and 3 of the application, and site inspections by Department personnel, verify that the Facility building is greater than 500 feet from nearby residences (the closest residence is at a distance of approximately 700 feet).

Criterion #6:

The waste handling area would be within the Riverfront Area as defined at 310 CMR 10.00.

Department's Finding:

Sheet 1 and Insert 2 of the application, and site inspections by Department personnel, verify that the Facility building is not within the Riverfront Area as defined at 310 CMR 10.00.

Criterion #7:

The maximum high groundwater table would be within two (2) feet of the ground surface in areas where waste handling is to occur unless it is demonstrated that a two (2) foot separation can be designed to the satisfaction of the Department.

Department's Finding:

The application states that groundwater depths at the proposed location of the Facility building are greater than 2 feet. Based on the information contained in the application (Insert 4) and the Department's site inspections, the Department has found that the maximum high groundwater table would not be within two (2) feet of the ground surface in the proposed area where waste handling or processing is to occur.

General Site Suitability Criteria

The following Site Suitability Criteria shall apply to all types of solid waste management facilities.

Criterion #8:

Agricultural Lands. No site shall be determined to be suitable or be assigned as a solid waste management facility where:

1. the land is classified as Prime, Unique, or of State and Local Importance by the United States Department of Agriculture, Natural Resources Conservation Service; or
2. the land is deemed Land Actively Devoted to Agricultural or Horticultural Uses, except where the facility is an agricultural composting facility; and
3. a 100 foot buffer would not be present between the facility and those lands as classified at 310 CMR 15.40(4)(a)1 or 2.

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Department's Finding:

The Department has determined (based on Inset 3) that:

1. the land is not classified as Prime, Unique, or of State and Local Importance by the United States Department of Agriculture, Natural Resources Conservation Service; or
2. the land is not deemed Land Actively Devoted to Agricultural or Horticultural Uses, except where the facility is an agricultural composting facility; and
3. a 100 foot buffer would be present between the Facility and those lands as classified at 310 CMR 16.40(4)(a)1 or 2.

Criterion #9:

Traffic and Access to the Site. No site shall be determined to be suitable or be assigned as a solid waste management facility where traffic impacts from the facility operation would constitute a danger to the public health, safety, or the environment taking into consideration the following factors:

1. traffic congestion;
2. pedestrian and vehicular safety;
3. road configurations;
4. alternative routes; and
5. vehicle emissions.

Department's Finding:

Based on the information contained in the application, the Department has found that operation at the proposed site should not constitute a danger to the public health, safety, or the environment when taking into consideration the following traffic impact and safety factors:

1. traffic congestion;
2. pedestrian and vehicular safety;
3. road configurations;
4. alternative routes; and,
5. vehicular emissions.

The application contained the traffic analysis which was previously included in the MEPA FEIR report for the original SSR and Facility Site Assignment. That traffic analysis had concluded that the increase to traffic on Routes 9 & 32 for the original, permitted operation of the Facility at 750 TPD of C&D waste was estimated to be less than a one percent (1%) increase, and there should be no increased traffic to side streets. Section 6.6 of the FEIR (Traffic Mitigation) contained several recommendations for traffic mitigation measures, which should continue to be followed. Based on the original traffic analysis and the MEPA FEIR Certificate, the Department had determined, in its original SSR review, that the Facility could be designed and operated in accordance with normal and accepted safety factors. The Department has determined that the proposed modification to the Site Assignment (to include MSW in the 750 TPD maximum permitted tonnage limit for the Facility) should not result in any significant changes to the

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projections or conclusions reached in the original traffic study and the MEPA FEIR Certificate or report, as the total permitted tonnage of incoming solid waste is the same.

Criterion #10:

Wildlife and Wildlife Habitat. No site shall be determined to be suitable or be assigned as a solid waste management facility where such siting would:

1. have an adverse impact on Endangered, Threatened, or Special Concern species listed by the Natural Heritage and Endangered Species Program of the Division of Fisheries and Wildlife in its database;
2. have an adverse impact on an Ecologically Significant Natural Community as documented by the Natural Heritage and Endangered Species Program in its database; or
3. have an adverse impact on the wildlife habitat of any state Wildlife Management Area.

Department's Finding:

Based on the information contained in the application, the Department has concluded that the proposed site would not have an adverse impact on the following:

1. Endangered, Threatened, or Special Concern species listed by the Natural Heritage and Endangered Species Program of the Division of Fisheries and Wildlife in its database;
2. an Ecologically Significant Natural Community as documented by the Natural Heritage and Endangered Species Program in its database; or
3. the wildlife habitat of any state Wildlife Management Area.

The application included a letter dated July 8, 2007 from the Massachusetts Division of Fisheries and Wildlife, Natural Heritage and Endangered Species program (NHESP) which states that there are known populations of Endangered, Threatened, or Special Concern species or Ecologically Significant Natural Communities in the vicinity of the site, but that certain sites are exempt from Massachusetts Endangered Species Act (MESA) review according to 321 CMR 10.14. Insert 3 of the application shows that there is a NHESP Priority Habitat area within the river adjacent to the site, but that the Priority Habitat does not extend into the developed area of the site. The application states that the Modification project is exempt from MESA review according to 321 CMR 10.14 (2), which exempts expansions or additions to existing industrial buildings within existing paved areas, when the expansion or addition is less than 20% of the existing footprint of the building. The Department agrees with this conclusion, as the proposed Modification involves no (0%) expansion of the existing footprint of the building. The application states, and the Department has verified, that there are no state Wildlife Management Areas in the vicinity of the site.

Criterion #11:

Areas of Critical Environmental Concern. No site shall be determined to be suitable or be assigned as a solid waste management facility where such siting:

1. would be located within an Area of Critical Environmental Concern (ACEC), as

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designated by the Secretary of the Executive Office of Environmental Affairs; or
 2. would fail to protect the outstanding resources of an ACBC as identified in the Secretary's designation if the solid waste management facility is to be located outside, but adjacent to the ACBC.

Department's Finding:

Based on the information contained in the application, the Department has found that the proposed Facility would not:

1. be located within an Area of Critical Environmental Concern (ACBC), as designated by the Secretary of the Executive Office of Environmental Affairs; or
2. be located adjacent to an ACBC and would not fail to protect the outstanding resources of an ACBC as identified in the Secretary's designation.

The application states, and the Department has verified, that there are no ACBCs in the vicinity of the site.

Criterion #12:

Protection of Open Space. No site shall be determined to be suitable or be assigned as a solid waste management facility where such siting would have an adverse impact on the physical environment of, or on the use and enjoyment of:

1. state forests;
2. state or municipal parklands or conservation land, or other open space held for natural resource purposes in accordance with Article 97 of the Massachusetts Constitution;
3. MDC reservations;
4. lands with conservation, preservation, agricultural, or watershed protection restrictions approved by the Secretary of the Executive Office of Environmental Affairs; or
5. conservation land owned by private non-profit land conservation organizations and open to the public.

Department's Finding:

All tipping, processing, and truck and rail loading activities for MSW and C&D material will be performed in the fully enclosed Facility building, which should eliminate fugitive dust emissions from C&D processing and handling activities and nuisance odors from MSW handling. The Facility building is located over 1,000 feet from the closest actual portion of Grenville Park across the Ware River (the Facility building will be approximately 800 feet from the apparently unused Grenville Park property just south of the O'Riley Family Trust property). Only clean pre-sorted materials such as asphalt, brick and concrete (ABC), as well as clean (i.e., not painted, treated or stained) wood, will continue to be tipped or processed in the designated outdoor areas of the Facility, which will be over 600 feet from the closest portion of Grenville Park across the Ware River. ABC crushing and clean wood grinding will continue to only be performed

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occasionally outside of the facility building, and water sprays will be used to suppress dusts as needed.

The noise studies performed as part of the Department's permitting process concluded that the existing Facility meets the Department's Division of Air Quality Noise Policy DAQC 90-001 (no more than 10 dB above background at the property line) and the noise standards of the Ware Zoning Bylaw, even under worst-case conditions with the outside concrete crusher operating. The acceptance and handling of MSW at the Facility should not increase noise generation levels.

Based on the fact that all MSW and C&D acceptance and handling operations will be performed in the existing fully enclosed building (including the use of quick-close fabric doors and deodorizing agent in the misting system), and the significant distance from the Facility to Grenville Park, the Department has determined that the proposed acceptance, handling and transfer of MSW at the Facility should not have an adverse impact on the physical environment of, or on the use and enjoyment of those interests referenced in this criterion, including the use and enjoyment of the Town of Ware's Grenville Park.

Criterion #13

Potential Air Quality Impacts. No site shall be determined to be suitable or be assigned as a solid waste management facility where the anticipated emissions from the facility would not meet required state and federal air quality standards or criteria or would otherwise constitute a danger to the public health, safety or the environment, taking into consideration:

1. the concentration and dispersion of emissions
2. the number and proximity of sensitive receptors; and
3. the attainment status of the area.

Department's Finding:

Based on review of the Facility Impact Assessment (FIA) submitted as part of the application, the Department has determined that the FIA meets the requirements outlined in the Department's FIA Guidance Document and that the Best Management Practices (BMPs) as proposed for the Facility as part of the FIA should ensure that the anticipated emissions from the facility would not constitute a danger to public health, safety, or the environment.

The Department's Findings for Criterion #12 also address potential fugitive dust emissions. Facility operations, including the operation of the ABC crusher and clear wood waste grinder, must comply with the applicable air quality regulations at 310 CMR 7.01, 7.06, 7.09, and 7.10, and the Department's Division of Air Quality Noise Policy DAQC 90-001. Asbestos wastes and ACM will not be accepted, handled, or processed at the facility. Department requirements will remain the same for the inspection and sampling of incoming C&D loads for the presence of asbestos, as well as any outgoing materials for reuse. Inspection and sampling will continue to be required to be performed by personnel with appropriate training and certification, as well as by independent third party consultants, and the results of inspection and sampling will continue to be required to be submitted to the Department on a regular basis.

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Based on the reasons outlined above, the Department finds that the proposed Facility meets this criterion.

Criterion #14:

Potential for the Creation of Nuisances. No site shall be determined to be suitable or be assigned as a solid waste management facility where the establishment or operation of the facility would result in nuisance conditions which would constitute a danger to the public health, safety or the environment taking into consideration the following factors:

1. noise;
2. litter;
3. vermin such as rodents and insects;
4. odors;
5. bird hazards to air traffic; and
6. other nuisance problems.

Department's Finding:

Based on the information contained in the application and site inspections, the Department has determined that the proposed operation of the Facility, if performed in compliance with the Department's regulations and requirements for the operation and maintenance of the Facility, should not result in nuisance conditions that would constitute a danger to the public health, safety, or the environment. The Department's Findings for Criterion #12 and #13 address potential fugitive dust emissions, nuisance odors and noise. Facility operations, including the operation of the ABC crusher and clean wood waste grinder, must comply with the applicable air quality regulations at 310 CMR 7.01, 7.06, 7.09, and 7.10, and the Department's Division of Air Quality Noise Policy DAQC 90-001.

As part of its ATC and ATO permitting process for the proposed Facility modification, the Department will make the following determinations:

- If an air-quality permit will be required in accordance with the regulations at 310 CMR 7.00 through the Department's Division of Air Quality, for the mitigation of potential odors due to the acceptance, handling and transfer of MSW;
- If additional odor-control equipment and procedures will be required for the Facility building beyond those proposed in the application (i.e., beyond the quick-closing doors and the addition of the deodorizing agent to the existing misting system); and
- If storage of MSW-filled rail cars will be allowed on the rail spur outside the building, and if so, what conditions would be placed on such storage.

The Department is of the opinion that proper operation of the Facility, in accordance with Department regulations and the requirements of the ATC and ATO permits should not create nuisance odor, litter or vermin conditions. Therefore, the Department finds that the site meets this criterion.

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Criterion #15:

Size of Facility. No site shall be determined to be suitable or be assigned as a solid waste management facility if the size of the proposed site is insufficient to properly operate and maintain the proposed facility. The minimum distance between the waste handling area or deposition area and the property boundary for the facility shall be 100 feet, provided that a shorter distance may be suitable for that portion of the waste handling or deposition area which borders a separate solid waste management facility.

Department's Finding:

The Department has determined that the size of the proposed site is sufficient to properly operate and maintain the proposed Facility and that the minimum distance between the waste handling area and the property boundary for the facility is greater than 100 feet, in all cases except that the Facility building is closer than 100 feet to the property line of the Massachusetts Central Railroad Line, which will service the facility. In accordance with 310 CMR 16.40(6), on May 19, 2003, the Commissioner's Office of the Department granted a waiver request for a waiver of the site suitability criteria at 310 CMR 16.40(4)(h) for the 100-foot setback to the property line of the Massachusetts Central Railroad Line, for the original SSR for the Facility. The Department has determined that the May 19, 2003 waiver remains valid, therefore another waiver is not necessary for the proposed Site Assignment modification to accept MSW at the Facility. Therefore, the Department finds that the proposed Facility Modification meets this Criterion.

Criterion #16:

Areas Previously Used for Solid Waste Disposal. Where an area adjacent to the site of a proposed facility has been previously used for solid waste disposal the following factors shall be considered by the Department in determining whether a site is suitable and in determining whether to assign a site:

1. the nature and extent to which the prior solid waste activities on the adjacent site currently adversely impact or threaten to adversely impact the proposed site;
2. the nature and extent to which the proposed site may impact the site previously used for solid waste disposal; and
3. the nature and extent to which the combined impacts of the proposed site and the previously used adjacent site adversely impact on the public health, safety and the environment; taking into consideration:
 - a. whether the proposed site is an expansion of or constitutes beneficial integration of the solid waste activities with the adjacent site;
 - b. whether the proposed facility is related to the closure and/or remedial activities at the adjacent site; and
 - c. the extent to which the design and operation of the proposed facility will mitigate existing or potential impacts from the adjacent site.

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Department's Finding:

The Department has determined that this criterion does not apply for this site. The site has previously been used as part of the Rocoso Auto Parts auto salvage yard, with the area of the proposed facility used for storage of automobile shells. The storage and recycling of auto shells or other scrap metal above ground as part of the operation of a licensed salvage or scrap yard does not constitute solid waste disposal as long as the storage does not represent speculative accumulation. The application states that there has been no prior disposal (i.e. - burial) of solid waste at the site, and the Department's site inspections did not reveal evidence of any solid waste burial at the site. A 21B assessment was previously submitted to the Department for review by the BWSC, and did not indicate the presence of any buried wastes on-site.

Criterion #17:

Existing Facilities:

1. In evaluating proposed sites for new solid waste management facilities the Department and the board of health shall give preferential consideration to sites located in municipalities in which no existing landfill or solid waste combustion facilities are located. This preference shall be applied only to new facilities which will not be for the exclusive use of the municipality in which the site is located. The Department and the board of health shall weigh such preference against the following considerations when the proposed site is located in a community with an existing disposal facility:

- a. the extent to which the municipality's or region's solid waste needs will be met by the proposed facility; and
- b. the extent to which the proposed facility incorporates recycling, composting or waste diversion activities.

Department's Finding:

The Department has determined that the provision of granting preferential consideration to the proposed site by the Department and the board of health does apply under this criterion because there is no other, existing solid waste facility in the Town of Ware. The Department also acknowledges that the Facility incorporates recycling and waste diversion activities.

Criterion #18:

Consideration of Other Sources of Contamination or Pollution. The determination of whether a site is suitable and should be assigned as a solid waste management facility shall consider whether the projected impacts of the proposed facility pose a threat to public health, safety or the environment, taking into consideration the impacts of existing sources of pollution or contamination as defined by the Department, and whether the proposed facility will mitigate or reduce those sources of pollution or contamination.

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Department's Finding:

The Department has considered whether the projected impacts of the proposed Facility Modification pose a threat to public health, safety or the environment, taking into consideration the impacts of existing sources of pollution or contamination as defined by the Department. The proponent has proposed to mitigate and reduce their potential sources of pollution or contamination associated with the operations of the facility, as outlined in Department Findings for Criteria 12, 13 & 14. The Department has determined that the Facility Modification, as proposed, does not pose a threat to public health, safety or the environment.

Criterion #19

Regional Participation. The Department and the board of health shall give preferential consideration to sites located in municipalities not participating in a regional disposal facility. The Department and the board of health shall weigh such preference against the following considerations when the proposed site is located in a community participating in a regional disposal facility:

1. the extent to which the proposed facility meets the municipality's and the region's solid waste management needs; and
2. the extent to which the proposed facility incorporates recycling, composting, or waste diversion activities.

Department's Finding:

The Department has determined that the provision of granting preferential treatment to the proposed site by the Department and the board of health does apply under this criterion because the proposed Facility Modification will be located within a community which is not currently participating in a regional disposal facility, and:

1. the proposed Facility will help enable the municipality and region to meet its solid waste management needs, and
2. the proposed Facility will incorporate significant recycling, composting, or waste diversion activities.

CONCLUSION

The Department hereby issues a Positive Determination of Site Suitability for the proposed modification to accept MSW at the existing C&D Processing and Handling Facility at 198 East Street, Ware, MA, proposed by ABC&D, LLC, under the authority of Massachusetts General Laws (MGL) Chapter 111, section 150A and 150A1/2, as amended, and 310 CMR 16.00. According to the provisions of MGL Chapter 111, section 150A and 150A1/2, as amended, and 310 CMR 16.00, the Ware Board of Health shall proceed with a public hearing pursuant to 310

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CMR 16.20 for the purpose of deciding whether or not to grant a site assignment for the parcel of property which is the subject of this Report.

Pursuant to MGL Chapter 111, section 150A and 310 CMR 16.20(7), the Ware Board of Health shall commence a public hearing pursuant to 310 CMR 16.20 within 30 days of their receipt of the Department's Site Suitability Report. At least 21 days prior to commencement of the public hearing the Ware Board of Health shall cause notice of the public hearing to be published. Such notice shall be published in daily, or if not possible, weekly newspapers of general circulation in the municipality.

The notice shall give the date, time and location of the public hearing; a description of the proposed facility modification including the type of facility, proposed tonnage limits, proposed hours of operation, the identity and mailing address of the applicant; the public location within the community and hours where the application may be inspected; the time period for written comment on the application to the board and the address to which comments should be mailed. In addition the notice shall contain the following statement: "The Department of Environmental Protection has issued a Report in which it determines that the above described place is a suitable place for the proposed facility modification. Copies of the Department's Report on Suitability and the site suitability criteria (310 CMR 16.00) are available for copying and examination along with the application."

If you have any questions or comments relative to this matter, please contact Larry Hanson of this office at (413) 755-2287.

Sincerely,



Daniel Hall
 Section Chief, Solid Waste Management
 Bureau of Waste Prevention

DH/gh

W: wareabcdssmod1107

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 Ware Board of Selectmen
 Ware Planning Board
 Ware Conservation Commission
 Department of Public Health, Bureau of Environmental Health Services, 150 Tremont
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DEP/Boston - Paul Emond