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DW DEUTSCH | WILLIAMS

99 Summer Street
Boston, MA 02110-1213
617.951.2300
617.951.2323 fax

Daniel R. Deutsch
ddeutsch@dwboston.com

FILED

2005

January 25, 2005

VIA FEDERAL EXPRESS

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
1925 K Street, NW
Washington, DC 20423

RE: Petition for Exemption of New England Transrail, LLC
STB Finance Docket Number: 34391-0

Dear Secretary Williams:

On behalf of the Town of Wilmington, enclosed please find the following document:

Petition of Town of Wilmington to Remand Proceeding to Section of Environmental Analysis, to Reject the Post Environmental Assessment, or in the Alternative, to Revoke Exemption Based Upon Misleading Information (with Memorandum Incorporated).

Please do not hesitate to contact me with any questions you may have.

Thank you for giving this matter your careful attention.

Very truly yours,

Daniel R. Deutsch

DRD:lsc
Enclosure

cc: Town of Wilmington
Attn: Michael A. Caira, Town Manager
Victoria Rutson, Chief, Section of Environmental Analysis
John F. McHugh, Esq., Counsel for New England Transrail, LLC
Paul R. DeRensis, Esq.

ENTERED
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JAN 2005

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. FD34391

NEW ENGLAND TRANSRAIL, LLC, EXEMPTION FOR OPERATION
AS A CLASS III CARRIER OVER LINES OWNED BY
BOSTON AND MAINE RAILROAD

ENTERED
Office of Proceedings
FEB 01 2005
Part of
Public Record

**PETITION OF TOWN OF WILMINGTON
TO REMAND PROCEEDING TO SECTION OF ENVIRONMENTAL ANALYSIS,
TO REJECT THE POST ENVIRONMENTAL ASSESSMENT,
OR, IN THE ALTERNATIVE,
TO REVOKE EXEMPTION BASED UPON MISLEADING INFORMATION
(WITH MEMORANDUM INCORPORATED)**

The Town of Wilmington ("Wilmington") is an interested party and agency of record in these proceedings. Wilmington submits this petition and memorandum to the Surface Transportation Board ("STB" or "Board") to bring to its attention, and to request action on fundamental errors of law and procedural irregularities in the Post Environmental Assessment ("Assessment" or "Post EA") submitted by the Board's Section of Environmental Analysis ("SEA") in this proceeding. Specifically, SEA has applied an incorrect preemption standard to an inadequate factual record; improperly has allowed the applicant to modify its project after a draft assessment was issued; and has misapprehended Massachusetts law in adopting the applicant's proposals for mitigation. Wilmington petitions the Board to remand this proceeding to the SEA with instruction (i) to require the applicant to explain in full factual detail, subject to further public comment, the intended scope of its waste processing operations and whether and why they purportedly are integral to rail transportation, and (ii) to correct procedural and legal errors relevant to project mitigation.

Moreover, this Board should reject the SEA's conclusions and mitigation recommendations because they are against the weight of the evidence adduced during the environmental review process. The Assessment does not adequately respond to the technical and historical evidence that the proposed facility is inappropriately sited; the facility necessarily would impede on-going environmental investigation and remediation of this contaminated site (which have resulted in closure of five of Wilmington's nine drinking water wells), could compound the existing environmental problems at the site, and could make it harder to assign liability for those problems.

Finally, in the alternative, Wilmington seeks revocation of the Board's grant of a Conditional Exemption to the applicant, because the applicant's Petition for Exemption materially misrepresented that it would not engage in activities other than transportation and transloading, such as active waste processing.

INTRODUCTION

The Assessment is flawed in three important respects. First, the SEA precipitously has concluded that federal law preempts state and local regulation of the solid waste processing operations which the applicant, New England Transrail ("NET"), proposes to conduct at the proposed transloading facility. SEA has applied an incorrect legal standard by requiring only that NET's rail operations "involve" waste processing. SEA also has erred by relying upon a grossly inadequate factual record to decide the "fact-bound" question of preemption. NET's original filings, including its Petition for Exemption, proposed to reload construction and demolition waste from trucks into rail cars, without transforming that waste in any way. NET subsequently disclosed that its operations would include tipping, sorting and grinding activities.

Those operations are typical of a solid waste transfer station. Despite NET's perfunctory and unsupported assertion that they are "related to" the rail component of the project (purportedly to prevent cargo from shifting), those activities – particularly grinding - are not necessary to transfer waste from truck to train. They are incidental, not integral, to any rail function (NET did not propose them originally), require no STB permit (they are not inherently rail operations), typically occur at a non-rail facility permitted by state and local authorities, and may be regulated locally without precluding a rail transportation operation. Including waste processing in NET's proposal is calculated to exponentially multiply the applicant's profits without subjecting it to legitimate regulation.

At a minimum, the Board should remand this aspect of the proceeding to the SEA with a mandate that it require NET to explain in full factual detail any justification for characterizing the solid waste handling, grinding and processing activity as inherently rail-related. Based upon the applicant's cursory statements and an incorrect legal standard, the Board otherwise would overextend its exemption and preclude appropriate state environmental review of non-rail activities in which it has a compelling interest.

Second, the Board should reject or meaningfully condition NET's belated modification of its proposed project. While SEA's analysis was underway, NET modified its proposal not only to add waste grinding and processing activities but also to increase significantly the size of the proposed building to house transloading operations; to include three, rather than one, rail spurs; to possibly construct a metal building with concrete foundation, rather than a removable "sprung" structure as originally proposed; to disclose the magnitude of subgrade concrete tipping vaults, that would extend many feet below grade and more than 100 feet in length; and to reconfigure surface and ground water controls. These modifications would exacerbate the project's effects on the Eames Street site, which is undergoing continued intensive investigation

and remediation due to decades of chemical contamination by its owner, Olin Chemical, and predecessors. It also would be procedural error to permit such belated project modification.

Third, SEA has misapprehended Massachusetts law relevant to project mitigation. The Board should reject SEA's unquestioning adoption of NET's proposal to retain in NET and its paid consultants the authority to decide whether additional mitigative measures are needed. For several environmental concerns, the applicant itself would decide the need for further regulation or protections. The Assessment relies on the status of NET engineers as licensed site professionals ("LSPs") to evaluate the need for mitigation, yet Massachusetts LSPs do not function as state-appointed evaluators in several of the substantive fields in which the Assessment would have them act. In those circumstances, the presumed objectivity of the decision-maker is illusory. Reliance on LSPs for mitigation is especially inappropriate for this project, because state environmental authorities have designated this site a Tier 1A site; unlike most waste clean-up sites, remediation of this site is supervised directly by the state and not largely self-directed by LSPs.

As an additional matter, the Board should reject the Assessment, require an Environmental Impact Statement, or permit no construction, as the Assessment fails to recognize the full environmental implications of the applicant's project. The project is uniquely inappropriate. Recent discovery of a known human carcinogen in the aquifer associated with the site has required additional work to investigate and characterize contaminants there. It would be foolhardy to permit a significant rail and transloading facility to be constructed and operated over and within the site before the troubles there have even been fully catalogued.

Finally, this Board would be justified in revoking its Conditional Exemption based upon misleading information. NET's Petition for Exemption did not disclose any intention to conduct waste processing activities at the site. Indeed, that Petition stated that NET would "provide

transload and transportation services only and will not take title to any products handled." Not until it responded to comments of Wilmington and state authorities on the SEA's draft Environmental Assessment – six months following the grant of a Conditional Exemption - did NET disclose that it would tip, grind and bale solid waste on site.

I. THE BALING AND GRINDING ACTIVITIES WHICH NET PROPOSES ARE NOT DEMONSTRABLY NECESSARY FOR RAIL TRANSPORTATION. WITHOUT A MORE COMPLETE FACTUAL RECORD, STATE AND LOCAL REGULATION OF THEM IS NOT PREEMPTED.

As its name implies, NET seeks authority to construct and operate a transloading facility, at which it would transfer material from trucks onto rail cars for transportation off-site. The applicant's Petition for Exemption did not disclose that it would transform any of the materials off-loaded from trucks before loading onto rail cars (*see* further discussion at Section III below). As the Assessment notes, NET simply stated that it would reload solid waste. It was only in response to comments from Wilmington and MADEP on SEA's draft Environmental Assessment ("EA") that NET on September 29, 2004 disclosed an intention to process some of that solid waste. In that forced disclosure, which SEA terms "supplemental information," NET stated that it would transload closed containers; move baled material from open trucks to rail cars (and bale some waste material on-site itself); and sort, grind and load loose waste material.

That NET did not originally disclose any processing activities is not surprising. A Board permit technically is not required for the reloading facility as a whole. SEA has included reloading activities in its environmental review, however, and, until challenged by Wilmington and SEA comments, NET saw no margin in being specific about the component of those activities that should generate the most environmental concern.

At page 2-17 of the Assessment, SEA notes MADEP's November 3, 2004 notification to

NET that, based upon NET's belated description of the proposed solid waste handling and processing activity, MADEP has determined that the grinding and baling of solid waste and loose material transloading are solid waste activities for which the facility should be required to obtain a site assignment from the local Board of Health and a solid waste permit to construct and operate pursuant to Chapter 111, Section 150A of the Massachusetts General Laws and regulations at 310 CMR 16.00 and 19.00.1 Such materials are likely to be contaminated with or contain asbestos, lead paint and arsenic, and grinding of them would pose threats to air and groundwater. Accordingly, like the New Jersey DEP, MADEP has a "well-recognized compelling state interest in the DEP's enforcement of its own environmental laws especially as to the uniquely vexing problem of solid waste facilities in a densely populated state that has suffered the scourge of unregulated solid waste facilities for decades." Hi Tech Trans, LLC v. State of New Jersey, Department of Environmental Protection, et. al., Third Circuit Court of Appeals, No. 03-2773 (September 2, 2004) (affirming order rejecting preemption claim of rail contractor).

However, SEA summarily concludes that site assignment and solid waste permitting of NET solid waste processing activities would be preempted by federal law. In the process, SEA misstates the standard for preemption according to federal case law and Board decisions, and finds a broad factual predicate in the applicant's unsupported assertion. In particular, SEA states that :

> In order to qualify for the broad express preemption, the activity in question must involve rail transportation or facilities involved in rail transportation, as defined in [49 U.S.C.]Section 10102(9). Here, the available information indicates that the proposed transloading of solid waste materials to or from trucks to railcars that would take place at the reload facility would be part of NET's railroad operations. As a result, NET would be exempt from traditional permitting, zoning, and land use processes for its proposed handling of solid waste materials.

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1 For months, NET had refused to respond to MADEP's direct request for specification of the proposed solid waste handling activities at the site. MADEP learned of the particulars only from its obligatory service copy of NET's response to the comments on the draft EA.

Post Environmental Assessment, at p. 2-18 (emphasis supplied).

Preemption by federal rail regulation requires more than bare involvement in rail transportation activity. A standard of involvement would exempt from "traditional permitting, zoning, and land use processes" any activity which the applicant decides to conduct at its rail yard, as long as that activity affects or is affected by the movement of cargo. Thus, a broad array of environmentally significant operations – including any manufacturing or pre-manufacturing of cargo between truck and train – would evade scrutiny by state and local officials, no matter how legitimate and essential their review and however inconsequential for legitimate rail operations. An applicant would only need to assert that the contemplated activity somehow facilitates rail transportation or makes it more profitable. This falls far short of showing that the activity is an integral part of rail transportation, such that regulation of that activity might possibly constitute impermissible regulation of rail transportation itself or interfere unreasonably with interstate commerce. As the SEA ultimately acknowledges, those are the effects which preemption is intended to prevent.

SEA leaves open the possibility of conditioning NET's waste processing activities on consultation with state agencies, inspections, standards, or operational review, "so long as they would not interfere with the railroad's right to conduct its operations." (Post Environmental Assessment, at p. 2-19). SEA's flat rejection of standard, statutorily-mandated site assignment review and solid waste permitting assumes that NET has a federal "right" to actively process waste as it is transloaded. SEA has not required the applicant to elaborate meaningfully on the purported connection between rail transportation and the baling and grinding of waste – and to explain why that activity could not be performed off-site by NET or others, as ordinarily occurs. Rather, the SEA presumes the validity of "available information" and the accuracy of NET's

assertion that it needs to grind and bale waste to transport it.

The factual predicate for preemption thus is unfounded. More fundamental is SEA's misapplication of the legal standard. The discussion of Board jurisdiction and preemption contained in the Executive Summary portion of the Assessment is essentially correct. It states that:

> In 1995, Congress enacted a broad Federal preemption provision, Section 10501(b), that expressly makes the Board's jurisdiction "exclusive" for all transportation by rail carrier, including the facilities and structures that are an integral part of that transportation. . . . the case law interpreting this provision consistently has found state and local permitting or preclearance requirements . . . to be wholly preempted where the railroad facility is an integral part of the railroad's operations. That is because permitting or preclearance requirements could give a local body the ability to deny the carrier the right to construct, develop, and maintain [rail] facilities or conduct operations, which would create an irreconcilable conflict with the Board's exclusive jurisdiction over those facilities and operations.

Post Environmental Assessment, at ES.1.2 (emphasis supplied).

Unlike the body of the Assessment which purportedly applies a preemption standard, this summary recognizes the preemption requirement that an exempt operation be "an integral part of the railroad's operations."2 Simply including an activity in a rail transloading operation does not make it an integral part of that operation. Indeed, an activity might be included for any number of reasons unrelated or only nominally related to transportation – to boost revenues by adding value to the transported product in the eyes of the shipping customer, to gain some economic efficiency (or regulatory advantage) by not conducting the activity away from the rail yard or by subcontracting the activity to a more directly regulated non-rail entity, or putting to convenient use equipment that otherwise might be inactive. All of these motivations are likely at play in NET's proposal to grind and bale construction and other waste at an Eames Street rail yard. The

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2 *See, e.g.,* Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp.2d 1186, 1189 (E.D. Wash. 2000) ("manufacturing activities and other facilities owned by railroads which are not integrally related to the railroad's provision of interstate rail service . . . are not subject to STB jurisdiction or subject to federal preemption"), citing Borough of Riverdale – Petition for Declaratory Order – The New York Susquehana & Western Railway Corp., 1999 WL 715272, STB Finance Docket No. 33466 at 10 (9/9/99) ("Borough of Riverdale").

only connection NET has posited between grinding and transloading is that it would prevent shifting of cargo in transit causing damage to rail cars. That assertion is suspect. Whether, how and when cargo might shift in rail cars – but not in the 400 trucks that would bring it to the site each day – is not addressed. What cargo could shift – lumber, aggregate, stone, gravel, newprint, plastics, cement, contaminated soil? NET proposes to transport - and potentially to grind and bale - any or all of these. (*See* Post Environmental Assessment, at p. 2-16) Would shifting make rail transport infeasible? Certainly not all loose waste is ground or baled before it finds its way onto rail cars.

This Board has recognized that not every rail construction project is within its jurisdiction or necessarily subject to federal preemption. *See* Borough of Riverdale, at 3 ("truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations" are examples). In general, state and local regulation is permissible where it does not interfere with interstate rail operations. *Id.* Moreover, "whether a particular land use restriction interferes with interstate commerce is **a fact-bound question**." *Id.*, at 4-5 (emphasis supplied). Thus, the issue of preemption of site assignment and solid waste permitting for NET's proposed waste processing activities cannot be decided without further examining those activities, their purported essential relationship to rail operations, and the impact of such regulation on a core rail operation.3

SEA's unquestioning acceptance of the applicant's bare assertion, its presumption that state4 regulation would unreasonably interfere with rail operations, and its misapplication of the legal standard, are reversible errors which this Board should correct.

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3 Qualification or even denial of a site assignment permit for solid waste processing at the Eames Street site would not preclude intermodal rail operations at that location, since transportation of solid waste does not necessarily entail waste processing.

4 Notably, at least one federal circuit has refused to extend express ICCTA preemption to local, as opposed to state, regulation. See Florida East Coast Railway Company v. City of West Palm Beach, 266 F.3d 1324, 1330 (11th Cir. 2001) (Section 10501(b), at issue here, expressly preempts only federal and state laws governing rail operations and not local zoning and similar laws of general applicability).

II. IT WOULD BE A PROCEDURAL IRREGULARITY AND REVERSIBLE ERROR TO PERMIT THE APPLICANT TO MATERIALLY MODIFY ITS PROJECT AFTER THE DRAFT ENVIRONMENTAL ASSESSMENT WAS ISSUED.

As noted, NET did not disclose its proposed solid waste processing activities to the Board in its Petition for Exemption or to SEA at any time before the draft Environmental Assessment was issued on August 4, 2004. When it made that disclosure in late September, NET also materially modified its proposal in several other respects. SEA did not consult the Board and require NET to file a new Petition. Rather, it treated NET's responsive comments as "supplemental information," passed lightly over those modifications, and adopted NET's mitigation proposals.

Through its comments on the draft assessment5, NET reconfigured the project to include a much larger building to house transloading operations; three rail spurs instead of one; a metal building with deep concrete foundations, instead of a removable "sprung" structure as originally proposed; subgrade concrete tipping vaults, extending many feet below grade and more than 100 feet in length; and newly designed surface and ground water controls. These modifications have important ramifications for any environmental assessment at this site.

For more than a decade, the Eames Street site has been undergoing intensive investigation and remediation of contamination caused by Olin Chemical and other industrial operations. That remedial work continues, even as new contaminants and carcinogens are discovered. Throughout its STB filings, NET has argued that its proposed construction and operations would not interfere with this environmental investigation and remediation, because the proposed structures would be temporary and removable and because its land acquisition agreement with Olin requires NET to cooperate. However, SEA has allowed the ground of its

5 Some details of these modifications were withheld from SEA and contained in NET's Construction-Related Release Abatement Measure Plan submission to MADEP in November 2004. *See* further discussion in section III of this memorandum.

assessment to shift beneath it. For reasons identified by Wilmington in the record, the more permanent and extensive buildings, vaults and rail spurs that NET now proposes are more likely to disturb the site and complicate subsurface investigation and remediation. Fundamental changes in the project must not be relegated to footnotes in an environmental review.

III. SEA'S RECOMMENDATIONS ERRONEOUSLY ASSUME THE OBJECTIVITY OF THE APPLICANT'S ENGINEERS, WHO WOULD BE ALLOWED TO DETERMINE THE NEED FOR FURTHER MITIGATION.

The Assessment adopts almost verbatim "voluntary" mitigation proposed by NET in its comments on the SEA's draft assessment. *Compare* Post Environmental Assessment, at 1.2, *with* September 29, 2004 Comment letter from Attorney McHugh. That mitigation largely consists of NET's undertaking to observe conventional practices and standards (at a site whose condition and status are unconventional) and to enlist its own "LSP/ Environmental Engineer" to review plans, determine compliance, and determine whether additional measures should be taken. Id. at 1.2, ¶¶ 20-38.

SEA recommends that the applicant's LSP not only address hazardous materials issues, but also:

- review NET's operational plans to ensure compliance with existing standards regarding discharge into local sewers (in connection with discharge from newly disclosed tipping, sorting and grinding operations) (Assessment, § 1.2, ¶ 27);
- review NET's plans for storage and handling of salt to prevent adverse effects on groundwater (Assessment, § 1.2, ¶ 28);
- review NET's staffing and operational programs for adequate management of potential impacts to groundwater (Assessment, § 1.2, ¶ 29);
- review NET's proposed containment systems and berms, and its operational plans, and determine that there would be no effect on Wilmington's water supply or aquifer

(Assessment, § 1.2, ¶¶ 30, 31);

- review any future NET plans to connect the rail line to an existing mainline to determine that they comply with wetlands protection requirements (Assessment, § 1.2, ¶¶ 32);
- to review all redevelopment plans and procedures for compliance with Best Management Practices (Assessment, § 1.2, ¶¶ 33);
- to review NET's excavation plans for compliance with groundwater regulations (Assessment, § 1.2, ¶¶ 35); and
- to review NET's training programs for compliance with the Assessment's mitigation measures (Assessment, § 1.2, ¶¶ 37).

SEA thus confers on the applicant itself discretion to determine compliance with the mitigation measures and a host of technical and legal standards. The only safeguard against self-serving determinations by the applicant would be the status of the consulting engineers as licensed site professionals, or LSPs. However, NET failed to advise SEA, and SEA erroneously has assumed, that Massachusetts law confers on LSPs authority to act for state authorities on matters unrelated to the investigation, response and remediation of hazardous waste sites and releases.

Legislation enacted in 1992 revised Chapter 21E of the Massachusetts General Laws to create a new type of private sector expert – the LSP - to develop and oversee all but the most complex or high-risk site cleanups. Pursuant to M.G.L. c.21E and its implementing regulations at 310 CMR 40.0000, the DEP's primary role at most sites is only to manage indirectly the decision-making and reports of the LSP. The LSP's role in this statutory scheme is restricted to the subject matter of Chapter 21E. That authority and pledge of objectivity – and the expertise of most LSPs - do not extend to sewer discharge, groundwater management, wetlands, facilities management, or the other matters whose review for this project the Assessment leaves to them.

Indeed, because MADEP has declared the Eames Street site a Tier 1A site, LSPs are not primarily responsible for oversight of the area within which NET proposes to construct and operate a transloading facility.

The only allegiance of NET engineers not acting as LSPs is to NET. SEA's appointment of NET's "LSP/Environmental Engineer" as environmental gatekeeper is based upon a misreading of applicable law or an unreasoned confidence that the applicant's retained engineers will give more priority to environmental protection than to the financial well-being of their principal.

There is particular reason to doubt that the applicant and its engineers would adequately serve the environmental interests implicated by their project. The SEA has noted that NET must obtain from MADEP a Construction-Related Release Abatement Measure ("CRAM") to proceed. The draft assessment emphasized the importance of the work plans for each step of the remedial response process for a site like this. In connection with NET's forthcoming CRAM, it stated:

> At each step of the remedial response process, plans for work are developed, the work is conducted in reports describing results and recommendations for the next step are prepared. The documents that describe each of these steps are the cornerstone of the remedial response action planning process, since they provide the information necessary to make decisions about how to clean up a site. (emphasis supplied)

Yet, the CRAM Plan and engineering documentation which NET's consultants submitted to MADEP on November 19, 2004 were so deficient that MADEP may not be able to reach reliable and responsible conclusions about NET's proposed abatement measures for construction at the site.6 Those documents also contradicted or modified NET's submissions to SEA. The CRAM Plan proposed to increase the building to 46,800 square feet, to construct a more permanent metal building, to run three rail lines through it, to build subgrade vaults 118 feet long, 15 feet wide and requiring an 8-foot excavation, and to construct underground piping and related storm

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6 *See* correspondence from GeoInsight, Inc. to MADEP dated December 21, 2004 (attached hereto).

water structures. The CRAM Plan represented that "excavation for the storm water detention basins and building foundations, new rail siding, and utilities, may generate up to 15,500 cubic feet of excess soil." It characterized these as "several modifications . . . to the plan for the NET Development Area portion of the Property."

This history of inadequate and contradictory disclosures by NET on this very project makes it particularly inappropriate to leave determinations concerning vital mitigation measures entirely up to the applicant and its agents.

IV. THE CONCLUSIONS AND RECOMMENDATIONS OF THE POST ENVIRONMENTAL ASSESSMENT RUN COUNTER TO THE WEIGHT OF THE EVIDENCE BEFORE SEA AND THE BOARD.

SEA concludes that the project as conditioned will not result in any significant environmental impacts. *See* Post Environmental Assessment, at ES.5. This conclusion is fundamentally flawed. Like the draft assessment, the Post EA presumes that redevelopment of the Eames Street site is appropriate even though:

- that site is the most complex contaminated waste site in Massachusetts,
- MADEP has designated it a Tier 1A site,
- a decade of investigation and remediation has not resulted in complete characterization of the toxic constituents,
- a human carcinogen was discovered at the site recently, leading MADEP and USEPA to assess possible other contaminants and potentially requiring additional monitoring and identification efforts, and
- the site contamination has forced the temporary closure of more than half of Wilmington's public water wells because of contamination of the aquifer fed by the site.

The Post EA also ignores the site owner's failure to institute a required, perpetual conservation restriction for adjacent portions of the Eames Street site as mitigation for its

destruction of adjacent wetlands, although NET relied on that restriction in its submissions to SEA; the demonstrated inadequacy of municipal funds – after a modest $50,000 payment by NET - to re-engineer the overtaxed intersection through which NET proposes to route 400 trucks every day; the lack of groundwater flow analyses to support SEA's unspecified storm water plan; and the cumulative impact of the proposed development on a environment and population that already have been overburdened by environmental damage; among other circumstances. *See* September 19, 2004 Comments on Environmental Assessment submitted by GeoInsight, Inc. on behalf of Wilmington.

The Post EA therefore is flawed not only because its mitigation measures are inadequate but also because it rests on a demonstrably incorrect presumption that the Eames Street site should be subjected to major redevelopment at this time.

V. NET'S INITIAL FAILURE TO DISCLOSE ITS INTENDED WASTE PROCESSING ACTIVITIES RENDERS ITS PETITION FOR EXEMPTION MISLEADING.

NET's Petition for Exemption stated that it would "provide transload and transportation services only and will not take title to any products handled." As a legal matter, and for purposes of this Board's disclosure requirements, the advertised activities did not include solid waste processing. When NET ultimately disclosed the proposed grinding and baling of waste, it did so only after the SEA had issued a draft assessment. That was fully six months after this Board granted NET a Conditional Exemption based upon the original Petition for Exemption and applicant's Environmental Report.

While the omission might not be material to the exemption criteria, it clearly was material to the environmental analysis on which the exemption was conditioned. The Petition for Exemption therefore was misleading to the Board, to SEA, to the agencies of record, and to the public at large. The Board should not countenance that type of dissembling in its

proceedings, and should revoke its Conditional Exemption for this project.

CONCLUSION

For the foregoing reasons, Wilmington respectfully requests this Board to revoke its Conditional Exemption, remand this proceeding to SEA to correct legal errors, and/or require a full Environmental Impact Statement for the proposed rail operations legitimately within the Board's jurisdiction.

Respectfully submitted,

TOWN OF WILMINGTON,
By their attorneys,

Paul R. DeRensis, Esq.
Daniel R. Deutsch, Esq.
DEUTSCH WILLIAMS BROOKS
DeRENSIS & HOLLAND, P.C.
99 Summer Street
Boston, MA 02110-1235
(617) 951-2300

Date: January 25, 2005

CERTIFICATE OF SERVICE

I hereby certify that a true copy of Petition of Town of Wilmington to Remand Proceeding to Section of Environmental Analysis, to Reject the Post Environmental Assessment, or, in the Alternative, to Revoke Exemption Based Upon Misleading Information (with Memorandum Incorporated), was served this day via first-class mail upon the following:

John McHugh, Esq., Six Water Street, Suite 401, New York, NY 10004.

Daniel R. Deutsch, Esq.

Date: January 25, 2005

GeoInsight, Inc.
25 Sundial Avenue, Suite 515 West
Manchester, NH 03103
TEL 603-314-0820
FAX 603-314-0821
www.geoinsightinc.com

GeoInsight, Inc.
319 Littleton Road, Suite 105
Westford, MA 01886
TEL 978-692-1114
FAX 978-692-1115

GeoInsight, Inc.
Corporate Ten Center
1781 Highland Avenue, Suite 207
Cheshire, CT 06410
TEL 203-271-8036
FAX 203-271-8038

December 21, 2004 GeoInsight Project 3754-001

Christopher Pyott
Environmental Analyst
Bureau of Waste Site Cleanup
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108

RE: Construction-Related Release Abatement Measure (CRAM) Plan
Former Olin Corporation Property
51 Eames Street
Wilmington, MA
RTN 3-0471

Dear Mr. Pyott:

GeoInsight, Inc. (GeoInsight) prepared this letter at the request of the Town of Wilmington to comment on the CRAM plan referenced above that was prepared by Environmental Control Services, Inc. (ECS) and transmitted to you on November 19, 2004. In the transmittal letter and the plan, ECS states that the three requirements of the Massachusetts Department of Environmental Protection (MADEP) Construction Policy (the Policy) have been fulfilled for this site. GeoInsight does not concur with this assessment for reasons that are articulated more fully in the paragraphs that follow.

Incomplete Characterization of Site Conditions

The first requirement of the Policy is that there is an adequate level of characterization of disposal site conditions within the Property boundary to support the selection of appropriate remedial actions. As discussed in its letter to you dated November 23, 2004, the Town understands that the MADEP and the U.S. Environmental Protection Agency (USEPA) are still evaluating the list of contaminants of concern (COCs) for this site based upon a letter dated August 30, 2004 that MADEP transmitted to the Surface Transportation Board and that you signed. The Town believes that remedial decision-making for this site based upon the currently available information is premature because investigation of impacts associated with additional COCs that may be identified is not completed.

Site Redevelopment Impacts

The Construction Policy also requires that construction activities not result in exposure of surrounding human or ecological receptors to levels of oil or hazardous materials that could cause a significant risk. A conclusion about compliance with this element of the policy is not possible in the absence of final decisions regarding the list of COCs at the site and complete characterization of impacts associated with newly identified COCs.

GeoInsight and the Town are also concerned about proposed plans to re-construct the cap over the Dense Aqueous Phase Liquid (DAPL) and then locate three railroad sidings and bulk storage facilities for sand, gravel, salt, wood chips, lumber, etc., as described in the CRAM plan. These activities will subject the cap over the DAPL containment system to considerable live and static loads that are not described or analyzed in the CRAM plan. The design information presented in the CRAM plan (Item (i)(4) of Section 3.2 and drawings T-1, C-1 through C-9, and S-1) is not adequate for MADEP to review the ability of the cap to withstand the effects of the proposed trans-loading and bulk storage activities. Should the cap fail due to these activities, it is possible that infiltrating runoff will collect beneath the cap and within the containment area, changing the hydraulic conditions within the containment area. These changes, combined with the physical constraints of the wall, could result in unpredictable effects on the DAPL in the form of induced downward vertical flow gradients or outflow of impacted ground water through or over the wall, resulting in possible impacts on ground water outside the containment system with attendant potential exposures to human and ecological receptors.

As previously discussed, completion of this CRAM plan is premature because investigation of impacts associated with additional COCs that may be identified by MADEP and USEPA is not yet complete. Accordingly, the Town directed GeoInsight to not complete a detailed review of the DAPL containment area cap re-construction design at this time. Nevertheless, at the Town's request, GeoInsight has identified for MADEP's consideration several fundamental deficiencies in the design information presented in the CRAM plan. The identified items should not be considered an exhaustive list of possible design concerns. First, the design did not present an analysis of the dynamic and static loads on the cap that will be associated with proposed trans-loading and bulk storage activities to be conducted on its top nor was a stability analysis of the material underlying the current temporary cover liner presented. An analysis of potential cap settlement under the expected loads also was not presented, nor were settlement monitoring plates included in the design to facilitate evaluation of and response to potential settlement before cap failure occurs. Likewise, the design did not include analyses of the load-bearing capacity of the concrete mats to be installed above the slurry wall at the points where the railroad sidings and the truck access road cross the edge of the cap; these analyses are necessary to evaluate whether the integrity of the slurry wall will be adequately protected from the loads induced by rail and truck traffic.

In addition, the 1 percent drainage grade proposed for the cap is substantially less than the 3 to 5 percent grade range that is typical practice for engineered caps. The suitability of high-density polyethylene (HDPE) as a cap material cannot be reliably evaluated in the absence of a settlement analysis (MADEP cap design guidance does not recommend use of HDPE for barriers that are susceptible to differential settlement). The CRAM plan did not present specifications for

the capping materials and grading soils nor for their placement, compaction, and quality control criteria and testing. Further, the design did not include an analysis of the need for a gas collection and venting system under and through the cap. It should also be noted that Section 1.2 of the CRAM Plan indicated that a third ramp onto the cap would be constructed at its southwest corner; however, the design drawings show only two ramps and do not illustrate the location or construction details of the third ramp. The adequacy of the design of this ramp to protect the slurry wall and cap over which it must pass cannot be evaluated from the design information presented.

The analytical protocol proposed to evaluate the acceptability for discharge to the ground surface of collected ground water is not adequate. Testing for pH and specific conductivity will not identify the presence of other COCs that may react with materials present in ground water in other areas of the site to produce new compounds in shallow ground water with potential adverse impacts on human and ecological receptors. In citing this possible concern, GeoInsight notes that one of the postulated (and as yet unconfirmed) sources of N-nitrosodimethylamine (NDMA) was as a product of the reaction of other organic substrates in ground water at the site. Accordingly, mixing of ground water from different areas of the site may be imprudent in the absence of more complete analyses of its quality.

Interference with Implementation of Response Actions

The Policy requires that construction activities not prevent or impede implementation of additional response actions that may be required to achieve a condition of no significant risk. As previously discussed, characterization of potential impacts at the site is not complete. In the absence of complete characterization, the need for and scope of response actions cannot be reliably foreseen, and it is not, therefore, possible to evaluate whether the proposed redevelopment will interfere with necessary response actions.

The redevelopment plan refers frequently to disturbance of contaminated soil and excavation (to depths of as much as 4 to 8 feet below grade) and re-grading that will be required for redevelopment; ECS estimates that as much as 15,500 cubic yards of excess soil will be generated from these activities. Given stated plans to reuse soil on the site where practicable, it appears that more than this amount of soil may be disturbed. Disturbance and re-location of large volumes of soil around the site will impede the characterization of the nature and extent of impacts by additional COCs that may be identified by USEPA and MADEP; it will be substantially more difficult to interpret the locations of potential source areas using data collected from disturbed and re-located soil.

Moreover, MADEP initiated the process of listing the Olin site as a National Priorities List (NPL) site in a letter to USEPA Region 1 dated August 23, 2004. It is possible that additional site characterization will be required to accomplish remediation under the National Contingency Plan. Completion of NCP-related characterization also will be impeded by the disturbance and re-location of impacted soil.

In apparent support of the assessment that the CRAM will not impede future response actions, the Plan defines the structures to be constructed on the site as "temporary." However, the Plan

describes construction of a concrete vault that is 8 feet deep, 15 feet deep, and 118 feet long with a concrete floor 18 inches thick. This structure is to be overlain by a 46,800-square foot, pre-engineered metal or sprung structure building constructed on foundations (presumably concrete although the plan does not describe the construction material) 4 feet deep and approximately 180 feet by 260 feet. These structures would inevitably impede characterization and response actions that may be undertaken when a final list of COCs is determined by MADEP and USEPA.

The proposed construction activities would impede not only site characterization and response actions, as outlined above, but also efforts in progress to determine responsibility and attendant liability for at least some of the environmental contamination at the proposed project site. Re-development construction described in the CRAM plan may impede access by investigators as they attempt to collect necessary information. That interference could make it more difficult to identify responsible parties and bring them to account for the full extent of their liabilities, by creating new scientific uncertainties and fueling disputes about the allocation of liability and contribution. There is an obvious risk that CRAM and redevelopment activities will further complicate an already complex site investigation and remediation and potentially interfere with the identification and allocation of responsibility for historical and, possibly, future impacts.

The Town appreciates MADEP's consideration of these comments. If you have questions regarding the contents of this letter, please contact me at 603-314-0820 or Town Manager Michael Caira at 978-658-3311.

Sincerely,

John A. Gilbert, P.E.
Principal

cc: M. Caira, Town of Wilmington
D. Deutsch, Deutsch Williams
P. Johnson-Ball, Surface Transportation Board