

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 34797

NEW ENGLAND TRANSRAIL, LLC, d/b/a
WILMINGTON & WOBURN TERMINAL RAILWAY
—CONSTRUCTION, ACQUISITION AND OPERATION EXEMPTION—
IN WILMINGTON AND WOBURN, MASS.

Digest:¹ This decision lifts the deferral of environmental review previously instituted in this proceeding and directs New England Transrail, LLC to file an updated petition for exemption with detailed information about its current proposal.

Decided: May 12, 2016

On August 18, 2015, New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway (NET) filed a status report and request for clarification, asking the Board to lift its deferral of environmental review for NET's request for authority, submitted in 2005, to acquire, construct, and operate railroad track in Wilmington and Woburn, Mass. This decision grants NET's request and lifts the Board's deferral of environmental review, as described below. The Board will begin preparing an Environmental Impact Statement (EIS) for NET's proposed acquisition, construction, and operation of this track. For administrative convenience and to avoid confusion given the age of the project and issues that are now moot, NET also is directed to file, in a new sub-docket in this proceeding, a revised petition for exemption with complete information about its current proposal to give the Board, consulting agencies, and interested parties updated information about the project.

BACKGROUND

In a petition for exemption filed December 5, 2005,² NET sought authority from the Board to acquire 1,300 feet of existing track, construct 6,200 feet of new track, and operate as a

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The petition for exemption in this proceeding is a resubmission of a petition for exemption previously filed in 2003 in New England Transrail, LLC—Construction, Acquisition & Operation Exemption—in Wilmington & Woburn, Mass., Docket No. FD 34391.

rail carrier over the combined 7,500 feet of track on and adjacent to a parcel of land owned by the Olin Corporation (Olin) and located in Wilmington and Woburn, Mass. In its petition, NET stated that it intended to construct a facility at the Olin site to conduct certain activities, including segregating large pieces of wood and metal from construction and demolition debris (C&D), and shredding the C&D, as well as baling some of the municipal solid waste (MSW) it planned to receive by truck.

Following NET's filing of its petition, opposing parties argued that some or all of NET's planned activities would not constitute "rail transportation," and in 2006, a coalition of parties asked the Board to address the threshold issue of the extent of this agency's jurisdiction over the proposed project. Additionally in 2006, the U.S. Environmental Protection Agency (EPA) informed the Board that the Olin site, including the portion on which NET proposed to operate, had been formally added to the National Priorities List under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). EPA suggested that, in order to fully address the proposal's effect on potentially contaminated soil and groundwater, the Board defer issuing even a preliminary analysis under the National Environmental Policy Act (NEPA) of the potential environmental impacts of NET's proposal until EPA had completed the relevant portion of its Remedial Investigation and Feasibility Study (RI/FS) of the site.

In a decision served July 10, 2007, the Board found that, under the proposal, NET would, if authorized, become a rail carrier subject to the Board's jurisdiction and that therefore NET would need Board authority to acquire, construct, and operate this track. New Eng. Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass. (2007 Decision), FD 34797 (STB served July 10, 2007). The Board also addressed the extent to which NET's planned activities relating to the handling of C&D and MSW would come within the scope of the Board's jurisdiction. The Board noted that before it could address whether to authorize NET's proposal: the parties would need to submit evidence on the transportation merits of the proposal; EPA would need to complete its RI/FS; and the Board would need to complete its own environmental review. See 2007 Decision, slip op. at 2.

In July 2007, the Commonwealth of Massachusetts, through its Department of Environmental Protection (MassDEP) and Attorney General's Office, filed a petition asking the Board to reconsider or clarify a portion of its ruling. Before the issues raised on reconsideration could be adjudicated, however, Congress enacted the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (codified at 49 U.S.C. §§ 10501(c)(2), 10908-10910) (CRA), which largely removed from the Board's jurisdiction the regulation of solid waste rail transfer facilities such as the one planned by NET.

Because of the enactment of the CRA and to update the progress of matters in this docket, the Board served a decision on July 23, 2010, directing NET to file a status update. On August 23, 2010, NET filed a status report stating that it planned to pursue its petition for exemption and that it would not transload solid waste at the facility unless it obtained all legally required approvals to do so in the future. NET continued to request that the Board complete its environmental review and approve NET's proposal. EPA and the Town of Wilmington, Mass. (the Town), filed responses in opposition to NET's request. In a decision served May 24, 2011, the Board concluded that, as EPA had not yet completed its investigation and study, the Board

would continue to defer its environmental analysis and decision on the petition until relevant reports had been issued by EPA. New Eng. Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass. (2011 Decision), FD 34797 (STB served May 24, 2011). The 2011 Decision also directed NET to file a second status report in 90 days, which NET did in August 2011. In that update, NET again requested that the Board complete its environmental review and grant the petition for exemption. EPA submitted a response, stating that the RI/FS process was still ongoing and therefore requesting that the Board continue to defer environmental analysis.

By decision served on June 20, 2012, the Board again continued its deferral of environmental review in response to requests from EPA. The Board also directed NET to file its third status report within 30 days of EPA’s publication of a Record of Decision for the Olin site. New Eng. Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass. (2012 Decision), FD 34797 (STB served June 19, 2012).

On August 18, 2015, NET filed a status report and request for clarification, asking that the Board lift the deferral of environmental review. In its filing, NET explained that significant additional work had been undertaken by Olin and EPA and that EPA no longer supported deferral of the Board’s environmental review. NET further explained that the scope of its proposed project “has not materially changed,” but that it has abandoned its plans to build a solid waste transfer facility and plans to reorient the planned facility to better accommodate remedial activities. (NET Status Report 3, Aug. 18, 2015.) NET also stated that, should the Board lift its deferral of environmental review, NET will file a supplemental petition for exemption describing “the current configuration of the project” and updating the proposal’s transportation merits. In response to NET’s status report and request for clarification, the Town, on September 8, 2015, and the Wilmington Environmental Restoration Committee, on October 7, 2015, separately filed comments, asking the Board to deny NET’s request to lift the deferral of environmental review.

On November 6, 2015, EPA submitted a letter to the Board’s Office of Environmental Analysis (OEA), expressing its view that the facts no longer support the continued deferral of the Board’s environmental review. The Board subsequently issued a decision accepting EPA’s letter into the formal record and informed interested parties so that they could have an opportunity to comment.³ In response to EPA’s November 6, 2015 letter, Olin filed a comment in support of lifting deferral of the environmental review, but opposed what it claims to be EPA’s position that certain areas of the site are not suitable for redevelopment. (See Olin Reply 1, Jan. 11, 2016.) The Town, Wilmington Environmental Restoration Committee, and MassDEP also raised concerns regarding EPA’s November 6, 2015 letter. The Town raised several arguments to explain why it believes EPA’s position that the Board’s environmental review can now move forward is “short-sighted.” (Town Reply 1, Jan. 14, 2016.) The Wilmington Environmental Restoration Committee primarily asserted that it is “premature” for EPA to recommend that the

³ New Eng. Transrail, LLC—Constr., Acquis., & Operation Exemption—in Wilmington & Woburn, Mass., FD 34797 (STB served Dec. 14, 2015). The deadline for comment was extended by decision served on December 30, 2015.

Board lift the deferral of environmental review in this case, and MassDEP stated that more information is needed about NET's proposed project and raised technical questions related to environmental review of the site.⁴ However, all three parties agreed with EPA that if the Board lifts its deferral of environmental review, it should prepare an EIS, rather than a more limited Environmental Assessment (EA).

DISCUSSION AND CONCLUSIONS

The issue before us is whether to lift the deferral of environmental review previously instituted in this proceeding. For the reasons below, the Board grants NET's request to lift the Board's deferral of environmental review. NET also is directed to file, in a new sub-docket in this proceeding, an updated petition for exemption to commence the Board's review of NET's current proposal on the transportation merits and the associated environmental review.

Given that EPA states that the facts no longer support deferral and that it now has "no objection to the Board lifting its deferral, and re-opening, the NET proceeding," we see no basis for continuing to further delay environmental review. Although commenters raise specific concerns related to development of the site,⁵ we find that these issues are not grounds for a further postponement and would be more appropriately addressed during the Board's environmental review process.⁶ Therefore, we will lift the deferral of environmental review in this proceeding allowing the Board's environmental review of NET's proposal to commence upon issuance of this decision.

Additionally, as requested by EPA, the Town, the Wilmington Environmental Restoration Committee, and MassDEP, an EIS will be prepared for NET's proposed project. We

⁴ MassDEP commented on the bearing capacity of a slurry wall on the site and also asked EPA to clarify an issue related to NET's liability for remediation of the site. Other commenters also raised concerns related to the slurry wall. (See Wilmington Environmental Restoration Committee Reply 3-4, Jan. 14, 2016.)

⁵ See, e.g., supra note 4.

⁶ The Board's EIS will be based on NET's updated petition for exemption. The Board's EIS process involves a number of steps, and all interested parties, affected communities and members of the general public will have ample opportunity to participate in the Board's environmental review and to comment on all aspects of the environmental analysis. When an EIS is prepared, the Board first issues for public review and comment a notice of intent to prepare an EIS and a draft scope of study. Following scoping, a Draft EIS is prepared assessing potential environmental impacts and recommending appropriate mitigation conditions to address environmental concerns. After further opportunity for public comment, a Final EIS is issued responding to comments and typically recommending that the Board impose environmental conditions to mitigate potential environmental impacts resulting from the transaction. The Board then weighs the transportation merits and the environmental record and determines whether to grant the authority, deny the authority, or grant the authority subject to conditions.

believe that an EIS is more appropriate than an EA given the history of the site and the potential environmental concerns that have been raised throughout this proceeding. See, e.g., 2007 Decision, slip op. at 1-2.

With respect to the transportation merits of NET's proposal, NET is directed to file, within 90 days of issuance of this decision, an updated petition for exemption in a sub-docket of this proceeding so that the Board may appropriately evaluate whether to authorize NET's proposed activities.⁷ In addressing whether the transportation merits of this project meet the criteria for exemption, NET should fully describe its current proposal for the acquisition, construction and operation of track, terminal facilities, or any other activities that it anticipates will take place on the site. The Board will not rely on information contained in NET's previous petitions or previously submitted comments in conducting its environmental review or evaluating the transportation merits of NET's current proposal. We believe a complete and updated petition, filed in a new sub-docket, as opposed to a supplemental petition, is warranted given the age of this case and issues that are now moot, as well as for administrative ease and to avoid confusion to consulting agencies and the public. Although NET states in its 2015 status update that the scope of its proposed project has not materially changed, NET also states that it has abandoned its plans to build a solid waste transfer facility, and it concedes that it will have to update the Board on the current configuration of the project and the transportation merits of its proposal. In addition, more than 10 years have passed since NET filed its petition for exemption in this docket,⁸ and, as we have previously noted, this site has a "troubled history." 2007 Decision, slip op. at 1.

NET should file its updated petition for exemption within 90 days of the service date of this decision. Once NET files its updated petition, the Board will issue a further procedural schedule.

The Board's decision today is only a determination that deferral of environmental review is no longer warranted in this proceeding. As noted above, there are still many steps to be taken before we can decide whether to authorize NET to acquire, construct, and operate railroad track on and adjacent to the Olin site. Therefore, no project-related acquisition, construction or operation may begin unless and until the environmental review is completed and NET has received Board approval.

⁷ Because NET is directed to file an updated petition in a sub-docket of this proceeding, the petition for reconsideration filed in July 2007 in this proceeding by the Commonwealth of Massachusetts, through MassDEP and the Attorney General's Office, is moot. Parties may raise any remaining concerns they have by filing in response to NET's updated petition.

⁸ See also supra note 2.

It is ordered:

1. The deferral of environmental review in this proceeding is hereby lifted.
2. By August 15, 2016, NET is directed to file an updated petition for exemption in a sub-docket of this proceeding containing the information described above.
3. NET may not begin project-related acquisition, construction or operation until the Board has authorized NET to conduct such activities following the completion of the Board's environmental review.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.