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August 29, 2007

VIA ELECTRONIC FILING

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423

**Re: New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway –
Petition for an Exemption from 49 U.S.C. § 10901 to Acquire, Construct and
Operate as a Rail Carrier on Tracks and Land in Wilmington and Woburn, MA -
Finance Docket No. 34797**

Dear Secretary Williams:

Enclosed for electronic filing is our reply to the Surface Transportation Board (the “Board”) on the above referenced matter in response to the New England Transrail Submittal of Supplemental Information, dated August 9, 2007.

This reply is submitted in accordance with the schedule established by the Board in its June 29, 2007 decision on this matter, and is filed on behalf of National Solid Wastes Management Association, Solid Waste Association of North America (National and Massachusetts chapters), Massachusetts Municipal Association, Construction Materials Recycling Association, Integrated Waste Services Association, and New Bedford Waste Services, LLC.

Respectfully,

A handwritten signature in black ink, appearing to read "Stephen M. Richmond", written over a rectangular stamp area.

Stephen M. Richmond

SMR:mjg
Attachment

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34797

**NEW ENGLAND TRANSRAIL, LLC, D/B/A WILMINGTON AND WOBURN
TERMINAL RAILWAY - PETITION FOR AN EXEMPTION FROM 49 U.S.C. § 10901
TO ACQUIRE, CONSTRUCT, AND OPERATE AS A RAIL CARRIER ON TRACKS
AND LAND IN WILMINGTON AND WOBURN, MA**

**REPLY TO PETITIONER'S SUBMITTAL OF SUPPLEMENTAL INFORMATION
OF NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,
SOLID WASTE ASSOCIATION OF NORTH AMERICA,
MASSACHUSETTS MUNICIPAL ASSOCIATION,
CONSTRUCTION MATERIALS RECYCLING ASSOCIATION,
INTEGRATED WASTES SERVICES ASSOCIATION, AND
NEW BEDFORD WASTE SERVICES, LLC**

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National Solid Wastes Management Association, et al.

August 29, 2007

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SURFACE TRANSPORTATION BOARD**

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INTEGRATED WASTES SERVICES ASSOCIATION, AND
NEW BEDFORD WASTE SERVICES, LLC**

INTRODUCTION

Pursuant to the June 29, 2007 decision of the Surface Transportation Board (the "Board") on jurisdictional issues (the "Jurisdictional Decision") concerning the petition of New England Transrail, LLC ("NET"), NET submitted supplemental information to the Board, dated August 9, 2007 (the "NET Submittal"). The Jurisdictional Decision provided for replies to the NET Submittal and this document constitutes the reply of the National Solid Wastes Management Association, Solid Waste Association of North America, Massachusetts Municipal Association, Construction Materials Recycling Association, Integrated Wastes Services Association, and New Bedford Waste Services, LLC (collectively, the "Coalition Parties").

NET seeks an exemption pursuant to 49 U.S.C. § 10502 from the certification and licensing requirements of 49 U.S.C. § 10901 for the acquisition and construction of railroad lines and operation as a rail carrier. To qualify for an exemption under § 10502, NET must satisfy the

Board that, *inter alia*, the application of the licensure requirements is not necessary to carry out the transportation policy of 49 U.S.C. § 10101. The NET Submittal fails to address many of these transportation policies. Instead, NET focuses exclusively on the three-part standard that the Board must use to consider applications to acquire or construct a rail line under 49 U.S.C. § 10901. The NET Submittal avoids the statute's directive to ensure that any exemption is in compliance with the overarching policy goals for railroad transportation, which NET's petition cannot meet, as demonstrated below.

ARGUMENT

Pursuant to 49 U.S.C. § 10901(a), a person may construct, extend, or operate a railroad line only upon the Board's issuance of a certificate pursuant to the standards established in 49 U.S.C. § 10901(c). The Board is directed to issue an authorizing certificate unless "the Board finds that such activities are inconsistent with the public convenience and necessity," 49 U.S.C. § 10901(c), and the implementing regulations establish a formal and detailed application procedure at 49 CFR Part 1150.

Pursuant to 49 U.S.C. § 10502, an applicant may seek an exemption from the licensure requirements of 49 U.S.C. § 10901. The Board is directed to exempt an applicant whenever:

the Board finds that the application in whole or in part of a provision of this part –

- (1) is not necessary to carry out the transportation policy of section 10101 of this title; and
- (2) either --
 - (A) the transaction or service is of limited scope; or
 - (B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10502(a).

Here, NET has requested and pursued an exemption from the requirements of 49 U.S.C. § 10901 pursuant to 49 U.S.C. § 10502. *See* NET’s Petition for Exemption, p. 2; Jurisdictional Decision, p. 16, n. 66. As a result, NET must demonstrate that the more elaborate and detailed review procedures imposed by 49 U.S.C. § 10901 are not necessary to carry out the rail transportation policy articulated in 49 U.S.C. § 10101 (the “RTP”). NET cannot satisfy this requirement.

The RTP provides a 15-point statement of the policy of the U.S. government in regulating the railroad industry. The NET Submittal, however, fails to address most of the RTP tenets. As demonstrated below, NET’s proposed project is anathema to four important components of the RTP. A grant of exemption to NET pursuant to 49 U.S.C. § 10502 would serve to thwart the clear policy intent of Congress, as enunciated in the RTP. The Board must therefore find that the full licensing procedures set forth in 49 U.S.C. § 10901 are necessary in this proceeding to protect, promote, and carry out the rail transportation policy of the United States.

The four RTP components that are undermined by NET’s proposal are as follows:

- 49 U.S.C. § 10101(2): to minimize the need for Federal regulatory control over the rail system;
- 49 U.S.C. § 10101(7): to reduce regulatory barriers to entry into the industry;
- 49 U.S.C. § 10101(8): to operate transportation facilities and equipment without detriment to the public health and safety; and
- 49 U.S.C. § 10101(11): to encourage fair wages and safe and suitable working conditions in the railroad industry.

Each of these components is addressed in the following sections.

I. NET’S PROPOSAL WILL NOT MINIMIZE THE NEED FOR FEDERAL REGULATORY CONTROL OVER THE RAIL TRANSPORTATION SYSTEM.

It is the rail transportation policy of the United States to “minimize the need for Federal regulatory control over the rail transportation system....” 49 U.S.C. § 10101(2). In the

Jurisdictional Decision, the Board concludes that many of the waste-handling activities proposed by NET are integrally related to rail transportation.¹ The record of this proceeding is overflowing with requests to the Board from state and local entities and government officials to recognize the important protections that state and local law provide with respect to the management of solid waste.²

If the Board is to implement its own Jurisdictional Decision, then it will proceed with the NET proposal on the basis that most of the NET solid waste activities are “covered by the section 10501(b) preemption,” *see* Jurisdictional Decision at 14, and that states and municipalities will not have jurisdiction over much of the waste management activity proposed for the site. Instead, there will be a nearly exclusive new federal role: the Board itself will be the sole government agency with jurisdiction over most of NET’s waste management activities. To fulfill this role, the Board will be required to evaluate large quantities of technical data to ensure that it imposes appropriate substantive conditions that address the many risks that have been documented in the record which exist at similarly unregulated solid waste rail sites and are likely to exist at the NET site as well. The Board clearly conceded as much when it discussed the next procedural steps in the Jurisdictional Decision. *Id.* at 16-17. Having announced that the Board “has broad discretion to impose environmental conditions (including monitoring and oversight

¹ As articulated in numerous filings and testimony before the Board, the Coalition Parties disagree with many of the Board’s conclusions concerning the extent of its jurisdiction and the scope of Federal preemption of state and local statutes, rules, and regulations and reserve their right to challenge the Board’s Jurisdictional Decision at the appropriate time.

² *See, e.g.,* Reply of Commonwealth of Massachusetts, January 27, 2006, at pp.13-19; Reply of State of New Jersey, January 27, 2006, at pp. 15-23; Reply of Town of Wilmington, January 26, 2006, at p. 13; Comment Letter from Senators Kennedy and Kerry and Congressmen Tierney and Markey, January 26, 2006; Comment Letter, State of Maine, July 11, 2006; Comment Letter, City of Middletown, NY, July 11, 2006; Comment Letter, City of Woburn, MA, July 12, 2006, at pp. 8-11; Comment Letter, State of Idaho, July 12, 2006; Comments of Commonwealth of Massachusetts, July 13, 2006, at pp. 4-9; Comment Letter, State of Colorado, July 13, 2006; Comment Letter, State of Ohio, July 13, 2006; and Comments of Illinois EPA, August 13, 2006, at pp. 4-11.

conditions)” and “has the discretion to fashion conditions that would require NET to allow MassDEP to carry out inspections and to monitor carrier activities to ensure compliance with Board-imposed conditions,” the Board specifically invited commenters to request that specific mitigation measures be imposed. *Id.*

This entirely new oversight responsibility, a deep and involved regulatory role, is simply inconsistent with the rail transportation policy of the United States to “minimize the need for Federal regulatory control over the rail transportation system....” 49 U.S.C. § 10101(2). By expanding its role to include the regulation of solid waste management, the Board is supplanting the traditional functions of state and local government and is assuming a significant new regulatory control responsibility for the federal government.³ A majority of the Board having now reached the conclusion that the Board should extend its reach and play this role, the NET site will of necessity require more, not less, federal regulatory control over the rail transportation system. As established by affidavits submitted by the Coalition Parties in this proceeding, there are many overlapping requirements which apply to solid waste facilities, and all of these requirements that apply to the NET operation are likely to be the subject of condition requests to the Board.⁴ This new expanded federal regulatory role over solid waste management facilities simply cannot be reconciled with the RTP to minimize the need for federal regulatory control.

³ Indeed, this new Board-created role is directly at odds with the role envisioned for states and municipalities in the recent U.S. Supreme Court case of *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1796 (2007), in which the Court stated “Congress itself has recognized local government’s vital role in waste management, making clear that ‘collection and disposal of solid waste should continue to be primarily the function of State, regional and local agencies.’ Resource Conservation and Recovery Act of 1976, 90 Stat. 2797, 42 U.S.C. § 6901(a)(4).”

⁴ See Verification Statements of Michael Camara, Jesse Jeter, and Steven Changaris, in Reply of Coalition Parties, January 27, 2006.

Further, there have been several steps in Congress recently that confirm the importance of this RTP as it applies to solid waste management facilities. U.S. Senators Frank Lautenberg and Robert Menendez have introduced legislation to clarify that rail-based solid waste facilities are outside of the jurisdiction of the Board, which would be consistent with the RTP. *See Clean Railroads Act of 2007, S. 719, H.R. 1248, 110th Cong. (2007).* The Senate Appropriations Committee approved a non-binding amendment on July 12, 2007, that directed the Board to stop preventing states and municipalities from regulating rail solid waste facilities. In addition, the U.S. House of Representatives Committee on Appropriations issued a committee report last year calling on the Board to clarify that rail-based solid waste facilities are subject to state and local law. *See H.R. Rep. No. 109-495 (2006).*

II. NET'S PROPOSAL WILL NOT REDUCE REGULATORY BARRIERS TO ENTRY INTO AND EXIT FROM THE INDUSTRY.

The RTP also provides that it is national rail transportation policy “to reduce regulatory barriers to entry into the industry.” 49 U.S.C. § 10101(7). Although NET fails to directly address this policy, it does argue that there is sufficient public need to justify the project. *See NET Submittal, p. 3.* NET states that a lack of rail infrastructure in eastern Massachusetts has caused a decrease in rail freight and thereby implies that its proposal is necessary to lift these barriers. *See NET Submittal, p.6.*

Recent developments in and around the area of NET's proposed facility undermine its arguments. Of greatest import is the recent opening of a construction and demolition recycling facility with direct rail access and a capacity of 1,500 tons per day of waste materials in the West Rail Industrial Park in Devens, Massachusetts. It is interesting that NET's many filings purporting to establish the dire lack of access to rail in Massachusetts do not mention this development, which was before the Board last year. The Devens facility is connected to the

Boston & Maine rail line by industrial spur and has obtained state and local permits necessary to commence solid waste processing operations, including state and local solid waste site assignments and a local use permit. *See Site Assignment Application Decision for W.K. MacNamara Corp. by Devens Enterprise Commission, January 31, 2006, attached at Tab 1; see also Devens Recycling Center, LLC – Petition for Declaratory Order, STB Finance Docket No. 34952 (STB Served January 10, 2007).*

Further, as previously established by affidavit of Steven Changaris, the Coalition Parties have demonstrated that there is a substantial amount of solid waste shipped by rail in Massachusetts from existing facilities in Boston and Brockton. *See Verification Statement of Steven Changaris (“Changaris Aff.”), ¶ 10 (January 26, 2006), in Reply of Coalition Parties (January 27, 2006).* State and local regulations do not inhibit the operation of the Boston and Brockton facilities, nor did they prevent the proper permitting and construction of the Devens facility. It is false to claim that there is a lack of current rail infrastructure for loading waste in Massachusetts, and the several existing facilities, which are all ignored by NET in its submittals, undercut NET’s argument that there is both public need and demand for its own facility, at least with respect to waste materials. There is no demonstrated regulatory barrier in this area.

III. NET’S PROPOSAL WILL CAUSE OPERATION OF TRANSPORTATION FACILITIES AND EQUIPMENT THAT IS DETRIMENTAL TO THE PUBLIC HEALTH AND SAFETY.

The RTP provides that it is rail transportation policy “to operate transportation facilities and equipment without detriment to the public health and safety.” 49 U.S.C. § 10101(8). NET proposes to combine a waste transfer station with proposed rail operations which, as a result of the Jurisdictional Decision, are not subject to the extensive state or local permitting requirements and health and safety regulations that govern all other waste facilities. States and municipalities

have long recognized the inherent threat to public health and safety that solid waste operations can present. The resulting network of permitting regulations in the siting and operation of such facilities has been developed to address these concerns. *See, e.g.,* Changaris Aff, ¶ 4; *see also* state comment letters, *supra* note 2. Through detailed permitting and regulatory controls, new solid waste facilities not located on rail lines are generally required to make substantial investments in safety and public health infrastructure, including such protections as enclosed buildings with real walls where waste processing operations occur, high efficiency particulate filters and elaborate dust suppression systems, extensive groundwater modeling and groundwater recharge systems. Changaris Aff., ¶ 6. In addition, these facilities often must install expensive odor control systems to minimize or eliminate odor impacts. *Id.* Permits routinely address issues related to waste flows, volumes, and residency times, rodents, and other direct health and safety protections.

The proposed NET facility is not materially different from these same heavily regulated waste management facilities. *See* Verification Statement of Michael A. Camara (“Camara Aff.”), ¶ 12 (January 26, 2006). However, as a result of the Jurisdictional Decision, the delivery, dumping, sorting, processing, bailing, and loading of waste by NET may not be subject to this web of protective requirements. Absent direct Board involvement, there will be no prohibitions to prevent wastes from blowing onto adjacent properties, for controlling water and leachate from running off piles of waste, or to keep the odor of municipal solid waste from spreading into adjacent areas. Local requirements to ensure inspections of incoming loads by competent trained professionals to screen out asbestos and other materials that create public hazards have been preempted and may not be applied. Changaris Aff., ¶ 7.

Indeed, as documented in many prior filings with the Board in this matter, unregulated rail-waste facilities have been cited for a variety of safety and health concerns and have been the cause of dangerous accidents. *See, e.g.*, Verification Statement of John Castner (“Castner Aff.”), ¶¶ 13, 20, 21 and photographs attached as Exhibit B-1 – B-5 (January 26, 2006), in Comments of the New Jersey Department of Environmental Protection and the New Jersey Meadowlands Commission (January 26, 2006) (“The majority [of the fifteen unregulated rail-based waste transfer stations in New Jersey] ... conduct their operations in violation of even the basic health and safety measures governing the operation of rail carrier facilities, mandated by New Jersey [regulations].”). As recently as August 23, 2007, a section of roof collapsed at an unregulated rail-waste transfer station in Hainesport, New Jersey, causing significant damage. *See* Richard Pearsall, *Roof Collapse Forces Trash Transfer Station to Close*, COURIER-POST (Cherry Hill, New Jersey), Aug. 23, 2007, attached at *Tab 2*.

The safety and health issues associated with facilities of this sort are underscored by the location and condition of the site of NET’s proposed facility. The site is proposed to be built in a dense urban area near residential properties and other sensitive receptors. The property proposed for use is a former chemical manufacturing site at which the U.S. Environmental Protection Agency (“US EPA”) has stated that the management practice prior to 1970 was to dispose of liquid wastes directly into unlined pits and ponds on the property. US EPA has concluded that on-site waste disposal practices resulted in on-site and off-site subsurface contamination and the closure of municipal drinking water supply wells. On April 18, 2006, US EPA listed the property on the National Priorities List under the Comprehensive Environmental Response, Compensation and Liability Act.

The grant of an exemption to NET to allow operation of rail-waste facilities in the absence of the complex matrix of state and local regulations that govern similarly situated non-rail based solid waste facilities will directly violate the national rail policy to avoid detriment to the public health and safety.

IV. NET'S PROPOSAL WILL NOT ENCOURAGE SAFE AND SUITABLE WORKING CONDITIONS IN THE RAILROAD INDUSTRY.

The RTP also provides that it is the policy of the United States “to encourage fair wages and safe and suitable working conditions in the railroad industry.” 49 U.S.C. § 10101(11). However, the same lack of health and safety protection resulting from federal preemption and the absence of federal regulatory oversight will also endanger workers at the NET facility. State and local regulations governing solid waste facilities and designed to protect the public health and safety target both the protection of the general public and those who work daily at these facilities. In the absence of restrictions governing, for example, the heights of waste piles, the amount of time waste may remain on site, and rodent, pest, and noxious dust control, the working conditions at the NET facility will be less safe or suitable and will fail to satisfy another rail transportation policy by placing employees in jeopardy.

CONCLUSION

For all of the foregoing reasons, the Coalition Parties respectfully request that the Board deny NET's request for an exemption pursuant to 49 U.S.C. § 10502 as NET has failed to demonstrate that the granting of an exemption would be consistent with rail transportation policy of 42 U.S.C. § 10101. As the Coalition Parties have argued previously, the NET facility should be subject to the same regulatory requirements as all other solid waste facilities in Massachusetts. However, even if the Board does not agree with us on this point, it must find that

the NET proposal does not satisfy several rail transportation policies established by Congress as a predicate to the grant of an exemption and therefore the NET proposal is not eligible to use the exemption procedures in 49 U.S.C. § 10502.

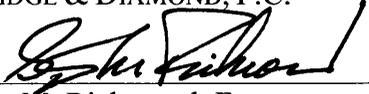
DATED:
Wellesley, Massachusetts
August 29, 2007

Respectfully submitted,

NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION
and
SOLID WASTE ASSOCIATION OF NORTH AMERICA
and
SOLID WASTE ASSOCIATION OF NORTH AMERICA -
MASSACHUSETTS CHAPTER
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 2007, I served the foregoing Reply by causing a copy to be delivered by first class mail, postage prepaid, to the parties on the service list for the New England Transrail proceeding, FD 34797, as of the current date.



Stephen M. Richmond