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June 8, 2005

Via U.S. Mail

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 No. 34391-0
Response of DEP to NET's Petition for Reconsideration

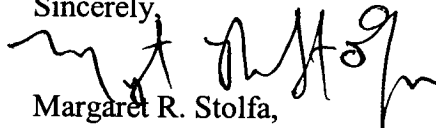
Dear Secretary Williams:

The Department of Environment Protection (the "Department") files this Response to New England Transrail LLC's Petition for Reconsideration in the above-captioned action.

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

Thank you for your consideration.

Sincerely,


Margaret R. Stolfa,
General Counsel



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cc. James Colman, Assistant Commissioner Massachusetts DEP
James Milkey, Massachusetts Office of Attorney General

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34391-0

NEW ENGLAND TRANSRAIL, LLC, D/B/A WILMINGTON AND
WOBURN TERMINAL RAILROAD CO.-- CONSTRUCTION,
ACQUISITION, AND OPERATION EXEMPTION--
IN WILMINGTON AND WOBURN, MA

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION'S REPLY TO
NEW ENGLAND TRANSRAIL LLC'S PETITION FOR RECONSIDERATION

The Massachusetts Department of Environmental Protection (the "DEP") respectfully submits this reply to New England Transrail, LLC's ("NET") petition for reconsideration of the Surface Transportation Board's (the "Board") decision to dismiss NET's petition to construct and operate a railway in Wilmington, Massachusetts. The DEP supports the Board's decision to dismiss NET's petition for exemption under 49 U.S.C. 10502 from prior approval requirements of 49 U.S.C. 10901 to construct a new rail line, acquire existing track, and to provide common carrier service. The DEP opposes both NET's request for reconsideration and NET's request that the Board remand the matter to the Board's Section of Environmental Analysis (the "SEA") to determine whether a supplemental Environmental Assessment is required. The DEP also supports the procedural arguments made by the National Solid Wastes Management Association.

Background

In its initial petition filed on December 3, 2003 to the Board, NET described its proposed activities to construct 2700 feet of new rail line, acquire 1300 feet of existing track, and to

operate approximately 4000 feet of track and “to build facilities on the parcel to facilitate the transload of various commodities between the highway and rail modes” (NET Petition for Exemption at 5). NET’s Petition for Exemption then listed the types of cargoes anticipated but indicated only that NET would “transload and consolidate” outbound loads (NET Petition at 5-6). To comply with the Board’s obligations under the National Environmental Policy Act, (“NEPA”), 42 U.S.C. §4331-5, and after many months of work, the Board’s SEA issued a detailed analysis of the potential environmental impacts of the proposed project in an Environmental Assessment on August 4, 2004. Then in response to comments on the Environmental Assessment (“EA”) from the DEP and the Town of Wilmington, NET provided further detail about its proposal, for the first time indicating that NET planned to engage in solid waste processing activities (see NET’s September 29, 2004 letter to the SEA). The SEA then issued a Post-Environmental Assessment (“Post-EA”) on December 22, 2004 in response to the comments received and the additional information NET provided. Finally, not until February 7, 2005¹ did NET provide the SEA with a copy of the Construction Release Abatement Measure Plan and Focused Feasibility Study (“Construction RAM”). But, the Construction RAM had been filed with the DEP on or about November 19, 2004 over a month prior to the SEA’s issuance of the Post-EA. In the Construction RAM, NET revised the original project proposal to include the following new components:

1. Construction of a newly planned rail segment through the proposed building (compare Figure 2 of the Construction RAM with Figure 1-2 of the EA);
2. Construction of three new rail segments to be installed over the Dense Aqueous Phase Liquid (“DAPL”) containment area (compare Figure 2 of the Construction RAM and p.10 of the Construction RAM which states that NET

¹ The SEA has indicated NET submitted a supplement to the Construction RAM on or about March 15, 2005.

plans to construct three rail spurs “that will bisect the containment area” with Figure 1-2 of the EA which does not show any rail segments over the DAPL containment area);

3. Planned development of previously undisclosed storage area on the DAPL containment area (compare p.10 of the Construction RAM which states that NET plans to conduct loading and storage of sand and gravel, rock salt, wood chips, mulch and lumber on the completed cap with NET’s original plans which do not describe any such activity on the DAPL containment area); and
4. Extensive excavation of potentially contaminated soils to construct vault and remove or cap existing chemical pipelines (compare pp.15-18 of the Construction RAM that describe the excavation of 15,500 cubic yards of soil for stormwater basins, building foundations, new rail sidings and utilities with p.ES-9 of the EA which indicates the general topography of the site will remain the same).

So NET revised its proposal for the site in each of the various submissions to the SEA. In fact, after the SEA had prepared a detailed Environmental Assessment and even the SEA’s Post-Environmental Assessment, NET still revised its proposal by submitting the Construction RAM to the SEA. The numerous changes and revisions to the project rendered the environmental review process and the SEA’s many months of work essentially meaningless.

1. The Board’s decision to dismiss NET’s petition was in accordance with NEPA and STB regulations.

The National Environmental Policy Act establishes a national environmental policy in which the federal government reviews (by preparing an Environmental Impact Statement) major federal actions that may have an impact on the environment. 42 U.S.C. §4321 et seq. and 40

CFR 1502.2. Federal agencies are required to promulgate regulations to implement NEPA. 40 CFR 1507.1 & 1507.3(a). Neither the Council for Environmental Quality's nor the Board's regulations set forth standards for preparing a supplemental EA. However, under Surface Transportation Board regulations governing procedures for environmental review of railroad activity, an "Environmental Impact Statement *may* be supplemented where necessary and appropriate to address substantial changes in the proposed action or significant new and relevant circumstances or information." 49 CFR 1105.10(a)(5)(emphasis added). There is no provision that a supplemental EIS is absolutely required. And, certainly the Board may reasonably conclude that a Supplemental EA would not be appropriate where the petitioner, NET, continually revised its proposal each time it made a submission to the SEA. Although NET cites Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) to support its request for a supplemental EA, that facts in NET's are different. In Marsh, two biologists submitted information indicating the proposed project might have a greater impact on the environment than concluded in the environmental impact statement. Marsh, 490 U.S. at 366. In contrast, in the case before the Board now, NET, the project proponent, is seeking the opportunity for a supplemental EA after it chose not to submit information about the design of the project until after the environmental review process was complete.

2. The Board's dismissal of NET's petition was not based on material errors of fact; there are significant changes to NET's project as reviewed by the SEA.

NET argues that the project details described in the Construction RAM are not changes to the original petition filed with the Board (or are merely design details required to support the risk assessment in the Construction RAM) and do not have any environmental impact (NET's Petition for Reconsideration p.5). However, the Board correctly identified four instances of significant new information provided in the Construction RAM provided to the SEA on February

7, 2005 and not in the original NET petition or any supplemental information provided in the SEA's environmental review process. The new information found in the Construction RAM relevant to environmental concerns and bearing on the proposed action or its impacts is described by the Board as follows:

1. An increase in the number of planned rail segments;
2. Construction of three newly planned rail segments to be installed over the Dense Aqueous Phase Liquid containment area;
3. Planned development of a previously undisclosed storage area on the DAPL containment area; and
4. Extensive excavation of potentially contaminated soils to construct a vault and removal or capping of existing chemical pipelines (Board's Dismissal of NET's petition p.3).

None of this information was provided in any of the previous documents filed by NET with the Board. (See NET petition and supplemental information and the SEA's EA and Post-EA which do not mention the activities described above.) In fact, the project as proposed by NET in its original petition, is vastly different from the project as proposed in the Construction RAM. And the Board correctly found that these changes were significant enough to warrant dismissal of NET's petition as discussed below.

3. The Board properly dismissed NET's petition without providing for a Supplemental Environmental Assessment because:

- a. the environmental review process was rendered nearly meaningless due to the significant and late changes to the project by NET;
- b. NET failed to fulfill its duty to notify the SEA of project changes in a timely manner; and

- c. NET's project is still in flux and therefore a Supplemental EA won't serve the intended purpose.

Additional review by the SEA through a Supplemental EA is not appropriate here where the environmental review process by the SEA was rendered practically meaningless by the significant changes to the project disclosed in the Construction RAM provided to the SEA in February 2005 long after the SEA had completed its Post-EA. NET failed to disclose to the SEA a complete description of its intended project despite having had multiple opportunities. In fact, NET did not fully disclose its project to the SEA until the SEA completed its Post-EA and the DEP and the Town of Wilmington had challenged NET's petition. At that point in time, the SEA received and reviewed the Construction RAM and determined that there had been significant changes to NET's proposal. NET failed to fulfill its duty in the environmental review process to provide the SEA with relevant notice of project changes. Furthermore, NET's project is still in flux 6 months after the SEA issued its Post-EA. For example, in response to a challenge filed by the Town of Wilmington, the DEP and the National Solid Wastes Management Association, NET stated that NET expects to add additional trackage as the business grows (NET Reply to Wilmington's Petition p.4). And again, in NET's Petition for Reconsideration NET states it retains the capability to move its transloading areas (NET's Petition for Reconsideration p.27). So, even if a Supplemental EA were completed, it wouldn't serve the intended purpose to evaluate new aspects of project because NET's project is ever changing. See 40 CFR 1502.9(c)(1)(ii) and 49 CFR 1105.10(a)(5).

4. The changes described in NET's Construction RAM may impose a significant environmental impact.

The SEA reviewed NET's Construction RAM after finally receiving a copy on February 7, 2005 and concluded that the project described in the Construction RAM differed markedly

from the project reviewed in the EA and Post-EA. NET argues repeatedly in its Petition for Reconsideration that the DEP's approval of the Construction RAM demonstrates that the project, as currently proposed does not impose a significant environmental impact (NET Petition for Reconsideration pp.6, 10, and 14). However, the DEP has not yet completed its review of the Construction RAM and therefore has not made any such conclusion. When the DEP completes its review and issues a decision on the Construction RAM, the DEP may approve the Construction RAM, impose conditions to ensure the integrity of the remediation activity or deny the Construction RAM. Furthermore, approval by the DEP of the Construction RAM indicates that the project proponent may proceed with the remediation or cleanup of the site, not that there is no environmental impact from the proposed project built on top of the cap. See 310 CMR 40.0440 et seq.

5. The Board may dismiss NET's petition and not seek a Supplemental EA even if fraud is not involved.

NET argues that in order for the Board to dismiss NET's petition, the Board must find that NET committed fraud. NET's position is incorrect. NET revised its project or at least failed to disclose significant elements of its project until after the environmental review process was complete even though it had in fact already filed the Construction RAM with the DEP in November 2004 prior to the SEA's Post-EA. NET did not provide sufficient detail in its original petition to the Board and then when pressed to provide the SEA with greater details, described in the Construction RAM, NET responds by arguing that the details were contemplated in the original petition (NET's Petition for Reconsideration p. 20). Such lack of forthright disclosure in the original petition and NET's failure to provide timely information to the SEA about the changes, when such changes were already included in the Construction RAM filed with the DEP, may provide reason to call NET's motives into question. But, those motives are ultimately

beside the point because, as stated above, NET's late changes to the project rendered the environmental review process nearly meaningless; NET failed to fulfill its duty to notify the SEA of project changes in a timely manner; and NET's project is still in flux and therefore a Supplemental EA won't serve the intended purpose.

6. NET's proposed project constitutes solid waste processing requiring a solid waste site assignment and permit pursuant to M.G.L. c.111, §150A.

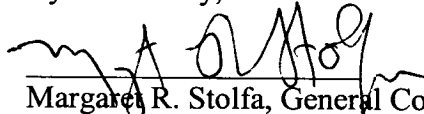
The Board, in its dismissal correctly did not review substantive issues brought by the parties because it dismissed NET's petition without prejudice. NET nevertheless addresses the substantive arguments brought by the Town of Wilmington, the DEP and the National Solid Wastes Management Association, that its project is not a railroad project but rather is a solid waste processing facility. DEP stands by its original response opposing NET's petition (DEP Response to NET's petition pp.2-7). The DEP reiterates in this reply that the grinding and baling proposed by NET are solid waste activities and are not part of rail transportation. In addition, reaching the conclusion that such activities are part of rail transportation could allow some generators of construction and demolition waste to avoid solid waste disposal bans.

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Conclusion

For the foregoing reasons, the DEP respectfully requests that the Board deny NET's petition for reconsideration and NET's request to remand the decision to the SEA for preparation of a Supplemental EA because of NET's failure to fully engage in the environmental review process by not timely submitting elements of its proposal until after the SEA's post-EA. A Supplemental EA is not appropriate where NET appears to have manipulated the process seemingly for its own advantage.

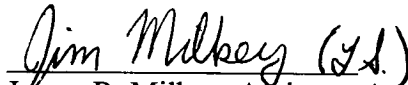
Respectfully submitted,
Department of Environmental Protection,
By its attorney,



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The Office of the Attorney General assisted in the preparation of this filing and supports the positions set forth herein.

Massachusetts Office of Attorney General



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CERTIFICATE OF SERVICE

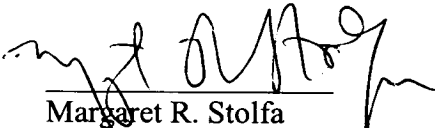
I hereby certify that a true copy of the Massachusetts Department of Environmental Protection's Reply to New England Transrail LLC's Petition for Reconsideration was served this day via first class mail upon the following:

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Dated: June 8, 2005



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