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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 34797**

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**NEW ENGLAND TRANSRAIL, LLC, d/b/a/  
WILMINGTON & WOBURN TERMINAL RAILWAY  
PETITION FOR  
CONSTRUCTION, ACQUISITION AND OPERATION EXEMPTION  
IN WILMINGTON AND WOBURN, MA**

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**NOTICE**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Seventh Floor  
Washington, D.C. 20423  
(ELECTRONIC FILING)

Attached Certificate of Service  
(FIRST CLASS MAIL)

PLEASE TAKE NOTICE that I have today filed with the Surface Transportation Board the "Comments of the Illinois Environmental Protection Agency" in the above-title matter, a copy of which is herewith served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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DATE: July 13, 2006

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**COMMENTS OF THE  
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**

The Illinois Environmental Protection Agency ("Illinois EPA") submits its comments for the above-titled matter to the Surface Transportation Board ("Board") in accordance with the Board's decision dated June 12, 2006. In that decision, the Board summarized the petition of New England Transrail, LLC ("NET") for an exemption pursuant to Section 10502 of the Interstate Commerce Commission Termination Act ("ICCTA") from the prior approval requirements of Section 10901 of the ICCTA. 49 U.S.C. 10502, 10901. However, the Board noted that several parties have raised questions about the extent to which NET's proposed activities involving the management of solid wastes come within the Board's jurisdiction. The Board stated its intention to resolve the jurisdictional matter before proceeding with further review of the petition.

To assist in resolving the jurisdictional issues, the Board has invited comments from interested parties on the extent to which NET's proposed activities are part of rail transportation and thus qualify for preemption under Section 10501(b) of the ICCTA. 49 U.S.C. 10501(b). Specifically, the Board requested comment on what activities normally

would be associated with transloading and thus be part of rail transportation and what activities normally would be associated with MSW and C&D processing and would occur even in the absence of rail transportation. The Illinois EPA thanks the Board for the opportunity to comment on this matter.

## **I. INTEREST OF THE ILLINOIS EPA**

The Illinois EPA is an administrative agency in the executive branch of the government of the State of Illinois. It was created pursuant to Section 4 of the state's Environmental Protection Act ("Act"). 415 ILCS 5/4(a). The Illinois EPA has been designated as the state's lead agency for purposes of the implementation and administration of most state and federal environmental and pollution control laws. *Id.* at §§ 4(b) – (y). Among other duties, the Illinois EPA, through its Bureau of Land, regulates solid waste management facilities subject to the Environmental Protection Act and implementing regulations adopted by the Illinois Pollution Control Board. The regulation of solid waste management facilities is part of a unified state-wide program established under the Act to restore, protect, and enhance the quality of the environment and to ensure that wastes of all kinds are properly managed from collection through storage, treatment and/or disposal. *Id.* at §§ 1(b), 20.

Given its responsibilities to administer laws controlling the management of solid wastes in Illinois, the Illinois EPA is concerned that a determination by the Board that the waste handling activities proposed by NET constitute "transportation by a rail carrier" and are thus exempt from state and local environmental regulations would disrupt the state's unified program regulating solid waste management thereby creating potential threats to human health and safety and the environment. The precedent that would be

established in the event of such a decision could have immediate and long-term negative effects on the regulation of waste management facilities in Illinois and could disrupt the competitive balance that is achieved when all such facilities must adhere to the same laws as part of their operations.

The Illinois EPA notes that several parties and commenters have thoroughly discussed the legal merits of the several issues raised by the NET petition. Because the Illinois EPA does not have expertise in transportation law, these comments do not attempt to repeat or elaborate on those arguments. However, the Illinois EPA does have expertise in the regulation of waste transfer stations and waste treatment facilities for the purpose of environmental protection. Therefore, the Illinois EPA wishes to comment as requested by the Board on activities that normally would be associated with MSW and C&D processing and would occur even in the absence of rail transportation. Specifically, the comments will explain how the activities proposed by NET would be regulated under Illinois state environmental laws regardless of method of transport and briefly discuss potential consequences of allowing such activities to be performed without regulatory oversight.

## **II. COMMENTS ON WASTE TRANSFER AND TREATMENT ACTIVITIES**

### **A. Waste Management Activities Proposed by NET**

The Board has described the waste management activities proposed by NET as follows:

Upon commencement of rail operations, NET would receive at its proposed facility, and would provide rail transportation for, a variety of commodities, including, among others, . . . municipal solid waste (MSW), and construction and demolition debris (C&D).

NET proposes to subject all of the C&D and some of the MSW it receives to sorting, grinding, crushing, aggregating, segregating, and/or baling before being loaded into rail cars or containers for rail shipment. NET's construction plans include facilities to carry out these activities . . . .<sup>1</sup>

#### B. Regulation of Waste Transfer Stations in Illinois

Under Illinois law, the receipt of wastes for temporary storage or consolidation and further transfer to waste disposal, treatment or storage facilities makes the facility where wastes are received a transfer station.<sup>2</sup> 415 ILCS 5/3.500. This is true whether the incoming or outgoing mode of transportation is by rail carrier, motor vehicle, water carrier or any other means of transport.<sup>3</sup> *Id.* At a transfer station, the owner/operator may sort, aggregate and segregate wastes, but grinding, crushing, and baling are considered "treatment" and will be discussed further below. Clearly, under Illinois law, the proposed NET facility would be a transfer station even if it simply sorts, aggregates or segregates the wastes before further transfer. All transfer stations perform these types of activities, and they "occur even in the absence of rail transportation." There is no basis in Illinois law or in fact for finding that the activities are somehow peculiar to transfer stations operated and served by rail carriers.

To establish a transfer station, the facility owner/operator first must receive approval of the site location from the governing body of the municipality in which the

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<sup>1</sup> New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Company – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA, STB Finance Docket No. 34797 at 1 (June 12, 2006).

<sup>2</sup> The description of Illinois law provided in these comments is generally applicable in most cases. Statutory and regulatory exemptions and exclusions do exist under certain specified circumstances, but such exceptions will be noted here only if necessary to clarify the general discussion.

<sup>3</sup> Wastes in "transfer containers" (415 ILCS 5/3.495) may be received for further transfer without establishing a transfer station only if the wastes are not removed from the containers (i.e., not handled or processed in any way other than moving the containers from one conveyance to another). Thus, under Illinois law, "transloading" is limited to the on- and off-loading and temporary storage of wastes that must remain in shipping containers meeting statutory design standards. Also in Illinois, C&D is further divided into "general construction and demolition debris" and "clean construction and demolition debris" ("CCDD"). *Id.* at § 3.160. CCDD may be received for transfer in "open top units" without establishing a transfer station. *Id.* at § 3.500.

facility is to be located or the county if the facility is to be located in an unincorporated area. This procedure is established pursuant to Section 39.2 of the Act. *Id.* at § 39.2.<sup>4</sup> It is a comprehensive procedure that requires at least one public hearing and a demonstration by the owner/operator that the facility will satisfy statutory criteria including, but not limited to, need, health and safety considerations in both design and operation, compatibility with the surrounding area, traffic flow, and the applicant's prior experience and operating history. *Id.*

Before beginning construction, the owner/operator must obtain a development permit from the Illinois EPA. The Illinois EPA may not issue a development permit unless the owner/operator provides proof of having received the local siting approval. *Id.* at § 39(c). The facility is subject to certain design standards that are written into the development permit as permit conditions. *Id.* at § 39(a); 35 Ill. Adm. Code 807.201, 807.206. Once construction and development are complete, the owner/operator must obtain an operating permit authorizing operation of the facility in accordance with regulatory requirements and permit conditions. 35 Ill. Adm. Code 807.202, 807.206. Once the facility stops accepting waste, it must satisfy specific closure requirements. *Id.* at 807.Subpart E.

Thus, transfer stations that merely receive wastes for temporary storage and further transfer must comply with design standards, operating requirements, and closure requirements. Environmental regulation begins when the facility is in the planning stages and does not end until the facility has fulfilled all closure requirements. These standards and requirements are intended to ensure that the facilities are compatible with the

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<sup>4</sup> Some transfer stations handling C&D exclusively do not require local siting approval under state law but may have to satisfy local zoning requirements or other location restrictions such as residential setbacks.

residential and commercial fabric of the communities in which they operate, that nuisance conditions (e.g., vermin, vectors, contaminant-laden dust, noise, litter, odors) are not created by their operations, that the handling of the wastes does not result in releases of contaminants to the environment or that such releases are addressed when they occur, and that the facilities do not become a lingering source of environmental threats or a blight on the community once their operating life is over. The Illinois EPA sees no reason for concluding that transfer stations operated by rail carriers are any less susceptible than those served by other methods of transportation to the health and safety issues and environmental degradation the regulatory scheme is intended to prevent or address.

In fact, there may be reasons for concluding that the threats are greater at rail carrier facilities, especially those receiving wastes that have been in transit for a considerable length of time. Illinois has not had the recent experiences with rail carrier transfer/treatment operations described by other government parties or commenters in this proceeding.<sup>5</sup> However, Illinois' most serious brush with a transfer station operated by a rail carrier occurred in 1992 when a rail carrier was enjoined by the circuit court from operating a transfer station in violation of several provisions of state law. MSW originating in New York was to be off-loaded to trucks at the Rose Lake rail yard in Fairmont City, Illinois for transport to a disposal facility. Putrescible wastes nearly 30 days old were observed to have remained at the Illinois facility for three to four days before the transfer to trucks occurred. With certain limited exceptions, putrescible wastes may not remain at Illinois transfer stations more than 24 hours. The facility was found to

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<sup>5</sup> See "Reply of the Commonwealth of Massachusetts," STB Finance Docket No. 34797 (Jan. 27, 2006); "Comments of the New Jersey Department of Environmental Protection and the New Jersey Meadowlands Commission," STB Finance Docket No. 34797 (Jan. 27, 2006).

be endangering public health and safety by operating an unpermitted transfer station, creating odors, allowing leachate to spill and leak to soil, and attracting and providing breeding areas for swarms of flies, all inside the required residential setback. The injunction under state law withstood the rail carrier's challenges on several grounds including preemption by the Interstate Commerce Act and Commerce Clause violations.<sup>6</sup>

C. Regulation of Waste Treatment Facilities in Illinois

The Board's decision also states that NET proposes to perform grinding, crushing and baling of wastes at its facility. If performed at transfer stations at all, these activities usually are performed for the consolidation of wastes, but they also may be performed to make the wastes more amenable for recycling or disposal. Under Illinois law, changes to the physical composition of wastes that reduce volume constitute "treatment" of wastes. 415 ILCS 5/3.505 (listing several actions that constitute treatment of wastes). Thus, in addition to being a transfer station subject to the requirements described in Section IIB above, the NET facility also would be a treatment facility requiring separate local siting approval as a treatment facility and separate or combined permits authorizing development and operation in accordance with specific design standards, operating requirements and closure requirements appropriate for the treatment activities. Depending on the treatment activities performed, the Illinois EPA's Bureau of Air also might be involved in the regulation of the facility to ensure proper control of emissions.

Transfer stations that perform treatment activities as part of their operations must comply with requirements for treatment facilities as well as for transfer stations. When transfer stations treat wastes, the treatment must be conducted in a manner that ensures

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<sup>6</sup> People v. Conrail Corp., 613 N.E.2d 784 (Ill.App. 5 Dist. 1993), *appeal denied* 622 N.E.2d 1214 (Ill. 1993).

wastes remain within specifications dictated by the receiving waste management facilities. Often, the proposed treatment activities are not performed at transfer stations. Rather, they are performed at the receiving recycling or disposal facilities where further transfer of the processed materials as waste is not at issue. This is further evidence that the waste management activities proposed by NET are not "integrally related" to transportation by rail. Again, the Illinois EPA sees no reason to distinguish between treatment of wastes performed at facilities operated and served by rail carriers and those operated by other carriers or served by other methods of transport. Treatment for consolidation may provide certain value-added economic benefits to the processor of the wastes, but these benefits are not limited to rail carriers. Moreover, all transfer stations or other facilities performing treatment activities have the same potential for environmental degradation, and, under Illinois law, all are subject to similar requirements. None of the environmental standards and requirements originates in the way in which the wastes are transported to or from the facility.

#### D. Potential Consequences from Unregulated Facilities

On the one side of the coin, it is clear that the waste management activities proposed by NET would occur at waste transfer/treatment facilities or other types of facilities even in the absence of rail transportation. Illinois law defines transfer stations based on several of these activities and regulates the conduct of such activities. Looking at the other side of the coin, it also seems clear that the regulatory controls placed on such activities are just as necessary at facilities operated by rail carriers and using rail transportation as they are to other owner/operators using other modes of transportation or not at all concerned about further transportation.

As noted above, the design, operating and closure standards and requirements imposed under Illinois law are intended to ensure that the facilities are compatible with the communities in which they operate, that nuisance conditions are not created by their operations, that the handling of the wastes does not result in releases of contaminants to the environment or that such releases are addressed when they occur, and that the facilities do not become a lingering source of environmental threats or a blight on the community once their operating life is over. Unregulated waste management easily can result in a host of health, safety and environmental problems costing large sums of money to address. These costs sometimes get transferred to the public in the absence of responsible owner/operators.

The following is a partial list of standards and requirements that apply to municipal solid waste transfer station owner/operators in Illinois. A simple review of the list combined with a little imagination will reveal a multitude of ways in which improperly located, designed, operated or closed facilities might result in negative impacts to communities and the environment.

*Location Restrictions:*

Local siting approval as described in Section IIB above for health, safety and compatibility.

*Design standards include but are not limited to:*

Correlation between physical capacity and expected waste throughput;  
Standards for waste handling areas such as tipping floor and storage area composition;  
Protection of wastes from precipitation, run-on and run-off;  
Leachate collection;  
Security features such as fencing, gates and lighting;  
Surface water control and drainage;  
Containment structures for liquid wastes;  
Traffic flow;

Control of nuisance factors (e.g., vermin, vectors, contaminant-laden dust, noise, litter, odors).

*Operating requirements include but are not limited to:*

Limitation of waste through-put to the physical capacity of the facility;  
Trained management and employees;  
Designated operators with decision-making authority present during operating hours;  
Security;  
Leachate collection;  
Control of nuisance factors;  
Traffic control; .  
Waste screening and load checking for unauthorized wastes;  
Storage restrictions such as segregation of incompatible wastes;  
Waste retention limitations;  
Contingency planning for fires, explosions, releases of contaminants to the environment.

*Closure requirements include but are not limited to:*

Timely removal of all off-site and on-site generated wastes and leachate;  
Cleaning or removal of all structures in contact with wastes;  
Draining and removal or proper abandonment of storage tanks;  
Inspections for releases of contaminants and corrective action where necessary.

These standards and requirements have nothing to do with rail carriers per se and everything to do with operating a well-run municipal solid waste transfer facility no matter the method of transport. Standards applicable to C&D are not quite so stringent, but neither are these wastes benign, especially when processed as proposed by NET. Dust, noise, regulated asbestos materials and other unauthorized wastes, and clean closure are concerns at C&D facilities. As the Board reviews the jurisdictional issues raised by the NET petition, it should carefully consider the public policy factors supporting comprehensive regulation of waste management activities before reaching its final determination. The performance of these activities by rail carriers is not so unique to transportation by rail as to inspire confidence that such operations have no need for the types of oversight described above.

### **III. CONCLUSION**

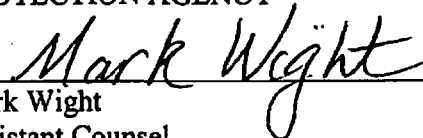
Once again, the Illinois EPA wishes to express its concern that a decision by the STB finding the solid waste management activities proposed by NET are integrally related to the railroad's ability to provide transportation service would entitle NET to operate entirely free of state and local environmental regulations under the preemption provisions of 49 U.S.C. 10501(b). An expansive interpretation of the phrase "transportation by rail carrier" in Section 10501(b) would set a precedent seriously undermining the ability of state and local governments throughout the nation to control solid waste management activities within their borders for the health and safety of their residents. Rather than using the preemption provision of the ICCTA to ensure a level playing field for rail carriers involved in interstate commerce, such a decision would create functional and economic advantages favoring interstate rail carriers operating waste management facilities over owner/operators of waste management facilities who must comply with state and local regulations.

If a decision adopting NET's position is served, one would expect to see the proliferation of similar rail carrier-operated facilities much to the detriment of owner/operators disadvantaged by the decision and state and local governments charged with protecting the health and safety of their residents under the preempted laws. The Illinois EPA believes many Illinois communities have unused facilities along active rail corridors that could be purchased and converted to waste transfer and treatment facilities without regard to environmental controls and local siting approval. Further, one would expect to see the precedent expanded to other types of wastes and waste handling activities.

It is the Illinois EPA's opinion that a narrow interpretation of the phrase "transportation by rail carrier" excluding the waste management activities proposed by NET from the preemption provision of the ICCTA is justified by the facts and public policy arguments. Transloading of wastes should be restricted to the movement of wastes in environmentally safe containers from one conveyance to another. The waste management activities proposed by NET describe the essence of all waste transfer station operations regardless of the method of transporting wastes. Nothing about the proposed activities is unique to rail carriers, and nothing about rail carriers suggests they are less in need of environmental regulation than other transfer/treatment facilities performing the same operations. Therefore, the Illinois EPA urges the Board to find that the activities proposed by NET are nothing more than the activities of a rail carrier proposing to enter the waste treatment and transfer business rather than activities that are integral to its business as a rail carrier of wastes.

Respectfully submitted by,

ILLINOIS ENVIRONMENTAL  
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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of July, 2006, I served a copy of the "Comments of the Illinois Environmental Protection Agency" in Surface Transportation Board Finance Docket No. 34797 by causing a copy to be delivered by first class mail, postage prepaid, to:

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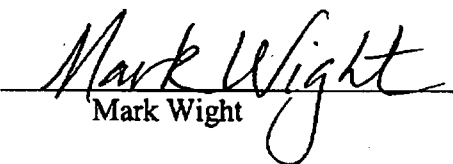
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