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August 2, 2006

VIA ELECTRONIC FILING

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

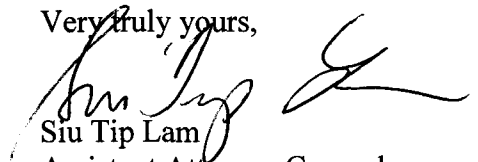
Re: New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway –
Petition for an Exemption from 49 U.S.C. § 10901 to Acquire, Construct and
Operate as A Rail Carrier on Tracks and Land in Wilmington and Woburn, MA
Finance Docket No. 34797

Dear Secretary Williams:

I enclose for filing the Reply Comments of the Commonwealth of Massachusetts on Whether the Surface Transportation Board Has Jurisdiction over the Proposed Solid Waste Processing Facility of New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway. The Reply Comments are submitted jointly by the Massachusetts Department of Environmental Protection and the Massachusetts Attorney General's Office on behalf of the Commonwealth.

Please call me at x2418 if you have any questions on the enclosed document. Thank you for your consideration in this matter.

Very truly yours,


Siu Tip Lam
Assistant Attorney General
Environmental Protection Division

cc: Service List in STB Finance Docket No. 34797 (by first-class mail)

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

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, MASSACHUSETTS

REPLY COMMENTS OF THE COMMONWEALTH OF MASSACHUSETTS ON
WHETHER THE SURFACE TRANSPORTATION BOARD HAS JURISDICTION OVER
THE PROPOSED SOLID WASTE PROCESSING FACILITY OF NEW ENGLAND
TRANSRAIL, LLC, d/b/a WILMINGTON & WOBURN TERMINAL RAILWAY

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Dated: August 2, 2006

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

REPLY COMMENTS OF THE COMMONWEALTH OF MASSACHUSETTS ON
WHETHER THE SURFACE TRANSPORTATION BOARD HAS JURISDICTION OVER
THE PROPOSED SOLID WASTE PROCESSING FACILITY OF NEW ENGLAND
TRANSRAIL, LLC, d/b/a WILMINGTON & WOBURN TERMINAL RAILWAY

In its comments, the Association of American Railroads suggests that so long as an activity or process is “reasonable or necessary to the rail transload,” it should constitute “transportation” by a “rail carrier” and fall within the Board’s jurisdiction. (See Comments of Association of Am. R.R., Jul. 13, 2006, at 5 (emphasis added).) That proposition goes too far.

Interpreting the definition of “transportation” at 49 U.S.C. § 10102(9), the Board has ruled that activities fall within the meaning of “transportation” and therefore within the Board’s jurisdiction only if they are “integrally related to the railroad’s ability to provide rail transportation services.” Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ, STB Finance Docket No. 34192, at 3 (served Nov. 20, 2002) (“Hi Tech I”). Thus, the activity or process has to be necessary, not just reasonable, affecting “the railroad’s ability to provide rail transportation services.” Id. (the transportation of C&D by truck from construction and demolition sites to the truck-to-rail solid waste transfer facility is not “closely related to providing direct rail service”). See Borough of Riverdale – Petition For Declaratory Order – The New York Susquehanna and Western Railway Corp., STB Finance Docket No. 33466, at 9 (served Sept. 10, 1999) (manufacturing and processing activities not necessary for rail transportation fall outside of the Board’s jurisdiction); Town of Milford, MA – Petition for Declaratory Order, STB Finance Docket No. 34444, at 1, 2 (served Aug. 12, 2004) (steel

fabrication activities, e.g., cutting and welding of shipped steel, fell outside the definition of railroad transportation). See also Growers Marketing Co. v. Pere Marquette Ry. Co., 248 I.C.C. 215, 227 (1941) (finding that “facilities provided for the display and sale of perishable produce delivered at the produce terminal are facilities for commercial transactions not part of transportation”); CFNR Operating Co., Inc. v. City of American Canyon, 282 F.Supp.2d 1114, 1118 (N.D. Cal. 2003) (denying preliminary injunction request to enjoin local regulation because the transfer of pumice and cement to customers from rail yard was not transportation within the Board’s jurisdiction).

Even in cases where the Board or the federal courts have found that a facility or proposed activities might constitute rail transportation, the facility or activities involved only transloading activities integrally related to the railroad’s ability to provide rail transportation service and did not involve any processing or manufacturing activities. See Norfolk Southern Ry. Co. v. City of Austell, 1997 WL 1113647 at *1, 6 (N.D. Ga. 1997) (intermodal facility found to be within the Board’s jurisdiction involved transferring containers or trailers of cargo between trains and tractor-trailer trucks); Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ, STB Finance Docket No. 34192 at 2, 6 (served Aug. 14, 2003) (“Hi Tech II”) and Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 299, 308-09 (3rd Cir. 2004) (“Hi Tech III”) (both cases describing the same C&D truck-to-rail facility that involved only unloading of C&D from trucks into a hopper at the facility and then loading of the C&D from the hopper to rail cars without any processing; both cases finding no preemption as the operator of the facility was not a railroad); Canadian Nat’l Ry. Co. v. City of Rockwood, 2005 WL 1349077 at *1, 6 (E.D. Mich. 2005) (C&D unloading facility used only for moving the C&D from rail cars onto trucks, which then hauled the C&D to a nearby facility for disposal); Coastal Distribution, LLC v. Town of

Babylon, 2006 WL 270252 at *6, 7 (E.D.N.Y. 2006) (the New York Department of Environmental Conservation found that the C&D facility involved only loading and unloading of C&D); Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, at 2-3, 10-11 (served May 1, 2001) (“Boston and Maine”) (facility used for unloading and transferring cars to motor carriers for distribution found to be a transloading facility within the meaning of rail transportation, but it involved no maintenance or fueling of the automobiles; and any repair would be done off site); Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 640 (2d Cir. 2005) (facility used for unloading bulk salt, nonbulk goods, such as steel pipes, and bulk cement arriving by rail, but involved no other processing or manufacturing activities).

Here, the Solid Waste Processing Facility and related activities proposed by NET are not necessary for or integrally related to a railroad’s ability to transport solid waste by rail. As demonstrated by a solid waste transloading facility located in Allston, Massachusetts, solid waste can be transloaded in containers without tipping the waste onto the tipping floor, sorting, grinding, crushing, aggregating, segregating, and/or baling before being loaded into rail cars or containers for shipment by rail. (See Verified Statement of James Doucett, attached as Ex. D to Commonwealth’s Jul. 13, 2006, Comments, ¶¶ 4-5, 8.) See Hi Tech II at 2, 6 and Hi Tech III, 382 F.3d at 299, 308-09; Canadian Nat’l Ry, 2005 WL 1349077 at *1, 6; Coastal Distribution, 2006 WL 270252 at *6, 7 (all cases concerning C&D loading and unloading facility that involved no processing activities).

All of the solid waste activities proposed by NET can and do take place at permitted handling facilities. Many of the activities, such as sorting, segregation, and processing of certain waste materials, are necessary and in fact required of solid waste handling facilities by state or

local regulation as part of a comprehensive program of strict controls to protect public health, safety and the environment. (See Comments of the New Jersey Dep't of Env'tl. Protection and New Jersey Meadowlands Comm'n, Jan. 27, 2006, at 9-10, 12; Verified Statement of Charles G. Johnson, attached to Comments of State of Colorado Attorney Gen.'s Office, Jul. 13, 2006, ¶ 5; Comments of Illinois Env'tl. Protection Agency, Jul. 13, 2006, at 8; Comments of Ohio Env'tl. Protection Agency, Jul. 13, 2006, at 2; and Comments of National Solid Wastes Mgmt. Ass'n, Jul. 13, 2006, at 12.) The comprehensive program has created recycling programs that give the solid waste industry financial incentives for complying with many of the regulations. (See Verified Statement of David B. Ellis, attached as Ex. C to Commonwealth's Jul. 13, 2006, Comments, ¶¶ 8-11.) While NET does not propose to conduct these solid waste handling activities to comply with state regulation, it will take advantage of these incentives in providing solid waste processing services for its customers. Indeed, it seeks to do so on a proposed rail development site and argues that its strategic business decision to operate the facility next to a rail line renders the facility necessary for providing rail transportation services. NET's arguments is not supported by law. (See Commonwealth's Reply, Jan. 27, 2006, at 7-17.)

Moreover, extending preemption of state law to solid waste activities simply because they are conducted at a rail facility would create solid waste facilities that are not adequately regulated on a continuing and long term basis. In fact, certain solid waste facilities located adjacent to or on railroad property that have sought preemption protection from state and local regulation have led to severe public health, safety, and environmental problems for the area in which they are located. (See Johnson Statement attached to Comments of Colorado Attorney Gen.'s Office ¶ 6; Comments of Illinois Env'tl. Protection Agency at 6-7, 8-10; Comments of Ohio Env'tl. Protection Agency at 3; Comments of State of Idaho Dep't of Env'tl. Quality, Jul. 12,

2006, at 1-2; Comments of Raritan Baykeeper, Inc. (d/b/a NY/NJ Baykeeper) and Hackensack Riverkeeper, Inc., Jul. 12, 2006, at 3-4, and attached exs.; and Comments of Association of Am. R.R. at 5 n.7.) And, once created, these problems are often very difficult to assess and remediate. Thus, it is imperative that NET comply with not only solid waste facility performance standards – standards that impose reasonable and nondiscriminatory restrictions for the protection of public health, safety or the environment and that are not preempted even were the Board to assert jurisdiction, see Boston and Maine, at 9; Green Mountain R.R., 404 F.3d at 643 – but also site assignment and permitting requirements, which may be considered preclearance requirements preempted if the Board asserted jurisdiction.

CONCLUSION

Regulation is necessary because of the inherent problems associated with MSW and C&D that may not exist with the other commodities NET proposes to handle. Where the Board has indicated that it may not have regulatory authority on NET's proposed Solid Waste Processing Facility, (see SEA Env'tl. Assessment, Aug. 4, 2004, Finance Docket No. 34391 at ES-2), preemption would indeed leave "these activities in a virtual 'no-mans land' of regulatory jurisdiction wherein the public health and environment are left at risk." (Comments of Idaho Dep't of Env'tl. Quality at 2.) Therefore, the Board should not assert jurisdiction over NET's proposed Solid Waste Processing Facility and related activities as a matter of law and public policy.

Respectfully submitted by,

MASSACHUSETTS DEPARTMENT OF
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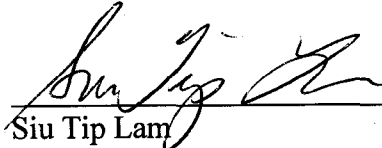
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Dated: August 2, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2006, I served the foregoing Reply Comments of the Commonwealth of Massachusetts on Whether the Surface Transportation Board Has Jurisdiction Over the Proposed Solid Waste Processing Facility of New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway by causing a copy thereof to be delivered via first class mail, postage prepaid, to:

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STB Finance Docket No. 34797

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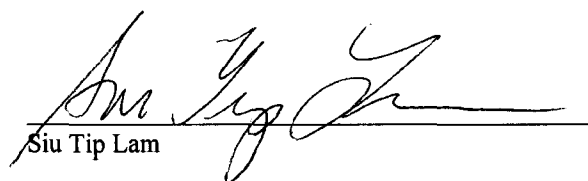
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