BEFORE THE SURFACE TRANSPORTATION BOARD

Docket No. FD 36909

TRANSLOADX RAILROAD COMPANY, INC. — ACQUISITION AND OPERATION EXEMPTION — CSX TRANSPORTATION, INC.

PETITION OF COMMUNITY LAND AND WATER COALITION TO REJECT THE NOTICE OF EXEMPTION AND, IN THE ALTERNATIVE, TO REVOKE THE EXEMPTION

312677

Filed by:

COMMUNITY LAND AND WATER COALITION, INC.

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Dated: October 9, 2026

ENTERED
Office of Chief Counsel
October 9, 2026
Part of
Public Record

I. PRELIMINARY STATEMENT

Community Land and Water Coalition, Inc. ("CLWC"), a Massachusetts 501(c)(3) non-profit organization, respectfully petitions the Board to **reject** the verified notice of exemption filed by TransloadX Railroad Company, Inc. ("TransloadX-RR") on March 17, 2026 in the above-captioned docket and, in the alternative, to **revoke** that exemption pursuant to 49 U.S.C. § 10502(d).

This Petition rests on three independent, mutually reinforcing grounds. Each shows that this transaction is not the routine, uncontroversial matter the class-exemption process under 49 C.F.R. § 1150.31 is designed for, and that regulation is necessary to carry out the national rail transportation policy of 49 U.S.C. § 10101:

> **Unfitness of the controlling principals.** The two individuals who own and control TransloadX-RR — Michael R. Milanoski and John P. De Waele, III — have been found by the Massachusetts Superior Court to have engaged in "unfair and inequitable conduct" and to have "intentionally violated" a preliminary injunction, and were held in contempt. That is a specific, adjudicated record of disregard for legal obligations, and it bears directly on these principals' willingness to honor the Board's orders and the common-carrier obligations that accompany rail operating authority.
>
> **No bona fide transportation purpose.** The Augusta and Bucksport Branches are dormant, without current customers or any identified traffic. On this record, TransloadX-RR seeks Class III carrier status not to provide common-carrier service in Maine, but to acquire the status that triggers federal preemption under

49 U.S.C. § 10501(b) — and to deploy that status against municipal and state oversight of its affiliated Massachusetts operations in Framingham and Middleborough. The Board has revoked authority obtained for exactly that purpose.

Integrity of the Board's processes and the public interest. Granting carrier status to manufacture preemption over off-line operations — rather than to serve a transportation need — would misuse the exemption process and is inconsistent with the § 10101 policies favoring honest and efficient rail management and operation of facilities without detriment to the public health and safety. The affiliated Middleborough Logistics Park threatens serious, documented, and largely irreversible harm to wetlands, a public and private water-supply resource area, and Priority Habitat of a state-listed species.

In support of the specific factual showings identified below, CLWC adopts the corresponding portions of the *Combined Petition for Stay and Petition to Revoke Exemption* of Chalmers Hardenbergh, filed March 27, 2026, and its supplement (the "Hardenbergh Petition"), Filing No. 311044. CLWC relies on those filings only to the extent of the documented facts set out herein.

The Board has already recognized the gravity of these concerns. On April 14, 2026, it postponed the effective date of the exemption "until further order" and found that "[a]dditional information is needed to determine whether this transaction is appropriate for class exemption." The threshold question whether this matter belongs in the class-exemption process at all thus remains open. CLWC submits this Petition to supplement the record and to urge rejection of the notice or, in the alternative, revocation of the exemption.

II. PARTIES

Petitioner. CLWC is a Massachusetts non-profit organization whose mission is to protect, preserve, and steward the land and water resources of Southeastern Massachusetts. More information is available at www.communitylandandwater.org. CLWC's members include residents and stakeholders of the Town of Middleborough, Massachusetts, who live and work near the proposed TransloadX-affiliated Middleborough rail-served facility and who are directly affected by the environmental, safety, and quality-of-life consequences of those operations.

Respondent. TransloadX Railroad Company, Inc. is a non-carrier that filed the Notice of Exemption in Docket No. FD 36909 on March 17, 2026, seeking authority as a Class III carrier to lease and operate approximately 37.1 miles of two branch lines of CSX Transportation, Inc. ("CSX") in Maine — the Augusta Branch and the Bucksport Branch. Its address is 360 Amherst Street, Nashua, NH 03063, and its representative of record is Thomas W. Wilcox, Law Office of Thomas W. Wilcox, LLC.

III. JURISDICTION, STANDING, AND STANDARD OF REVIEW

The Board has jurisdiction over this matter under 49 U.S.C. §§ 10502 and 10901. The Board may revoke an exemption, in whole or in part, when it finds that regulation of

the transaction is necessary to carry out the rail transportation policy of 49 U.S.C. § 10101, or where revocation is necessary to ensure the integrity of the Board's processes. **.**S. Plains Switching, Ltd. Co.--Acquisition Exemption--B.N.S.F. RailWay company, No. FIN 33753 (Sub-No. 1), 2006 WL 2644250 (Sept. 14, 2006)**.** A notice of exemption is void ab initio if it contains false or misleading information. *Yolo Shortline R.R. Co.-Lease & Operation Exemption-Port of Sacramento, Fed. Carr. Cas.* (CCH) 37117, 2003 WL 221558 (STB Jan. 31, 2003). A petition to revoke may be filed at any time, and the party seeking revocation bears the burden of showing that the revocation criteria of § 10502(d) have been met. 49 C.F.R. § 1121.4; *I & M Rail Link, LLC-Acquisition & Operation Exemption-Certain Lines of Soo Line R.R. Co. d/b/a Canadian Pac. Ry. Dennis Washington, et al.-Continuance in Control Exemption-I & M Rail Link, LLC Montana Rail Link, Inc.-Acquisition of Control Exemption-I & M Rail Link, LLC*, 2 S.T.B. 167, 1997 WL 151995 (1997)**.**

A petition to revoke is resolved on the substance of the showing, not on the petitioner's formal status. The Board "customarily address[es] matters brought before [it] on a written record, wherein all members of the public may express their views," and it routinely decides petitions to revoke filed by non-shipper members of the public, municipalities, and other interested persons. *I & M Rail Link*. It has instituted a revocation proceeding on petitions filed by a county and "other parties" raising environmental and jurisdictional objections to a class-exemption acquisition, *Riverview Trenton R.R. Co.-Acquisition & Operation Exemption-Crown Enters., Inc.,* No. 33980, 2001 WL 508470 (May 9, 2001). It has declined to reach standing objections where a petition can be resolved on its merits. *S. Plains Switching, Ltd. Co.--Acquisition Exemption--B.N.S.F. RailWay Company, No. FIN 33753 (SUB 1), 2006 WL 2644250* (Sept. 14, 2006). CLWC, an organization devoted to protecting the land and water resources directly threatened by the affiliated Middleborough project, raises precisely the kind of concrete, documented public-interest and integrity-of-process concerns the Board entertains.

The showing required is met here. A petition to revoke "must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and more detailed scrutiny of the transaction is necessary." *Middletown & New Jersey R.R., LLC--Lease & Operation Exemption--Norfolk S. Ry. Co.*, No. FD 35412, 2011 WL 4429048 (Sept. 22, 2011). The Board has revoked a class exemption — rather than deny revocation — where it found "substantial controversy and opposition to the transaction, including opposition from a number of public agencies," together with "substantial factual and legal issues ... including environmental issues." *Yolo Shortline at 3, citing Riverview Trenton RR.* This docket presents exactly that: opposition from Mr. Hardenbergh, the Brotherhood of Railroad Signalmen, the Brotherhood of Maintenance of Way Employes Division, and Cumberland & Knox Railroad; inquiry from a Massachusetts State Senator; adjudicated findings of misconduct against the controlling principals; and documented environmental harm. The Board's own April 14, 2026 postponement confirms that these concerns warrant the further scrutiny the class-exemption process is not designed to provide.

IV. BACKGROUND

A. TransloadX-RR, Its Controlling Principals, and the Affiliated TransloadX Entities Are Under Common Control.

TransloadX-RR is controlled by the same two individuals who control a family of affiliated "TransloadX" entities. TransloadX LLC is a Massachusetts entity managed by John P. De Waele, III and Michael R. Milanoski; TransloadX Logistics LLC is a Massachusetts entity for which De Waele is the sole manager. **Exhibit A.** Milanoski is also the proponent of the Middleborough Logistics Park and, in October 2026, personally represented South Coast Logistics Park LLC in the Middleborough permitting process. **Exhibit B.** These are not strangers to one another: they are the same principals, operating through successive entities. Because fitness turns on the character and conduct of the natural persons who will direct the applicant, the adjudicated misconduct and ongoing municipal violations of Milanoski and De Waele — described below — are directly attributable to TransloadX-RR, the vehicle those same principals created to hold the Maine authority.

B. The Principals' Connection to the Middleborough Logistics Park and Its Rail Spur.

Milanoski is the proponent of a 928,000 square-foot warehouse complex on an approximately 153-acre site at 678 Wareham Street in Middleborough, Plymouth County, Massachusetts, known as the Middleborough Logistics Park whose proponent is South Coast Logistics Park LLC. In October 2026, Milanoski appeared before the Middleborough Conservation Commission as the representative of South Coast Logistics Park LLC regarding the warehouse project. (“Michael Milanoski, who represents South Coast Logistics Park LLC” appearing regarding the warehouse project. (See, https://nemasket.theweektoday.com/article/conservation-commission-residents-push-back-unnecessarily-large-warehouse-proposal/159719); **Exhibit B.**

In 2024, a TransloadX entity partnered with the Town to obtain a $2.8 million Massachusetts MassWorks infrastructure grant associated with the Project, described in the Town's 2024 grant-award listing as funding a water-main extension down Route 28 into the site, extension of other site utilities, and construction of a commercial access road with improvements to the existing railroad crossing. **Exhibit C (**MassWorks Grant Awards: https://www.mass.gov/info-details/massworks-2024-awards (accessed 10.9.2026) The Town later represented, in a July 2025 Town Manager's Report, that the public project "now consists solely of the design and construction of a water main extension" — a material narrowing of the publicly described scope. **Exhibit I.** (available at: https://www.middleboroughma.gov/DocumentCenter/View/9109/July-Newsletter-2025

C. The Middleborough Project Is Subject to Extensive State and Municipal Environmental Review.

Because of its scale and resource impacts, the Middleborough Project is subject to state and municipal review under the Massachusetts Environmental Policy Act ("MEPA"), the Massachusetts Wetlands Protection Act, and the Massachusetts

Endangered Species Act, among other laws. That review includes an environmental impact report and a Notice of Intent proceeding before the Middleborough Conservation Commission. The Project is described in the March 17, 2025 Certificate of the Secretary of Energy and Environmental Affairs on the Supplemental Draft Environmental Impact Report, *South Coast Logistics Park, LLC*, EEA No. 13771 (the "MEPA Certificate"), attached as **Exhibit D.** The Project is proposed in two phases — a Phase 1 in the eastern part of the site and a Phase 2 — and is a substantial expansion of a dormant 2008 proposal (the approximately 392,000 square-foot "Sippican Commerce Park"), now consolidated into a single 928,000 square-foot warehouse. Rail service is integral to the Project; railroad tracks border the site's eastern boundary. The MEPA Certificate discloses:

> - Phase 1 includes a rail spur extending from the tracks along the property's eastern boundary, with a projected use of approximately three railcars per day;
> - A separate, parallel rail spur is contemplated for Phase 2, with associated Bordering Vegetated Wetland impacts estimated at approximately 33,000 square feet; and
> - The Project has received or will receive financial assistance from the Massachusetts Department of Transportation ("MassDOT") through the Industrial Rail Access Program ("IRAP"), which broadens MEPA jurisdiction over the Project.

The Project is also identified on a "CSX Massachusetts" State Fact Sheet as a "Select Site," and on an April 24, 2025 press release as a "Gold Level" property to receive "CSX Select Site designation under the industrial development program." **Exhibit E.**

D. The Middleborough Project's Documented Environmental Impacts.

The MEPA Certificate documents the scale of the harm the rail-served complex would cause. The entire Project site — both phases — lies within mapped Priority Habitat for the Eastern Box Turtle (*Terrapene carolina*), a state-listed Species of Special Concern. Bordering Vegetated Wetlands run north-south through the center of the site, a stream and associated Riverfront Area lie near Wareham Street, and the site contains Isolated Land Subject to Flooding and Isolated Vegetated Wetland, with the 100-year floodplain extending onto both phases.

By the SDEIR's own estimates, the combined Phase 1 and Phase 2 impacts include alteration of 85.5 acres of land, creation of 70.5 acres of impervious area, alteration of 37,430 square feet of Bordering Vegetated Wetland, and alteration of 29,940 square feet of Riverfront Area. Phase 1 alone would alter 53.1 acres of land, create 43.8 acres of impervious area, and generate 1,586 average daily trips, including 556 daily truck trips. The Project exceeds multiple mandatory environmental-impact-report thresholds and requires, among other approvals, a 401 Water Quality Certification from MassDEP, a Conservation and Management Permit from the Natural Heritage and Endangered Species Program ("NHESP"), and MassDOT access and railroad-crossing approvals. NHESP has determined that the Project will result in a prohibited "Take" of the Eastern Box Turtle through habitat loss and fragmentation, requiring conservation of

approximately 137.82 acres of habitat under the applicable 1.5:1 mitigation ratio. The Project also sits within five miles of six Environmental Justice populations.

E. The Board Has Already Found That Further Scrutiny Is Warranted.

On April 14, 2026, acting on the concerns raised by Mr. Hardenbergh, the Brotherhood of Railroad Signalmen, and Cumberland & Knox Railroad, the Board postponed the effective date of the exemption "until further order," directed TransloadX-RR to respond to the allegations by May 4, 2026, and found that "[a]dditional information is needed to determine whether this transaction is appropriate for class exemption." The fitness and public-interest concerns detailed below confirm that the matter should not proceed as a routine class exemption.

V. ARGUMENT

A. A Facially Complete Notice Does Not End the Board's Inquiry; the Board May Reject the Notice or Revoke the Exemption.

The class-exemption procedure under 49 C.F.R. § 1150.31 is designed for routine, uncomplicated transactions, and a facially complete verified notice does not end the Board's inquiry. Two distinct avenues of relief are available. First, the Board will reject a notice as void ab initio if it contains false or misleading information. *Yolo Shortline,* supra. That standard requires a **material** misstatement — one that, if corrected, would have disqualified the transaction from the class exemption; immaterial inaccuracies do not void a notice, and reviewing courts defer to the Board's materiality requirement. *Berkshire Scenic Ry. Museum, Inc. v. I.C.C.,* 52 F.3d 378 (1st Cir. 1995). The Board first tests the factual accuracy of the notice itself before treating a challenge as a petition to revoke. *Middletown & New Jersey R.R., LLC--Lease & Operation Exemption--Norfolk S. Ry. Co.,* No. FD 35412, 2011 WL 4429048 (Sept. 22, 2011). Second, and independently, the Board may revoke an exemption where regulation is necessary to carry out the § 10101 policy or to protect the integrity of the Board's processes. *South Plains Switching,* supra. The Board exercised its oversight authority here when it postponed the effective date and called for additional information.

B. The Controlling Principals' Adjudicated Record Demonstrates a Lack of Fitness.

An applicant for operating authority bears the burden of demonstrating its fitness, and where past violations appear on the record the agency must weigh them rather than presume future compliance. *Curtis, Inc. v. I.C.C.*, 662 F.2d 680 (10th Cir. 1981). Past illegality does not automatically bar new authority, but it is evidence that must be weighed case-by-case. *N. Am. Van Lines, Inc. v. United States*, 412 F. Supp. 782 (N.D. Ind. 1976). The Board applies that principle through its revocation standard: generalized doubts about a start-up Class III carrier are not enough, but a demonstrated history of misconduct is. In *Middletown & New Jersey Railroad*, the Board rejected a challenge that "a small carrier with unknown personnel" posed safety risks precisely because the petitioner had not shown that the carrier "has a history of unsafe operations or a history of negative impacts." *Middletown & New Jersey R.R., LLC--Lease & Operation Exemption--Norfolk S. Ry. Co.,* No. FD 35412, 2011 WL 4429048 (Sept. 22, 2011).

This record supplies the specific, adjudicated history that *Middletown* found missing. The Massachusetts Superior Court found that the controlling principals, Milanoski and De Waele, engaged in " and inequitable conduct" and "intentionally violated" a preliminary injunction, and held them in contempt. The court expressly discredited their testimony regarding compliance and held that its injunction bound them and those persons in active concert or participation with them. *Michael Milanowski et al. v. Jon Delli Priscolli et al*, Superior Court 2484 CV71-BLS2, 958-BLS2, and 2141-BLS2, *Memorandum and Order on Preliminary Injunction* (October 16, 2023); *Decision and Order on Summary Judgment*, January 9, 2024, page 11; *Memorandum and Order on Grafton and Upton Railroad Company's Motion for Attorney's Fees and Costs and Entry of Separate and Final Judgment under Rule 54(B),* October 5, 2024. In its January 9, 2024 decision, the Court found the record established that Milanowski and DeWaile "come to court with unclean hands." The Court decisions are **Exhibit F.** As explained in Part IV.A, those principals control TransloadX-RR, so their conduct is the applicant's conduct. A demonstrated willingness to disregard direct judicial commands bears directly on whether these principals have the willingness and ability to comply with the Board's orders and the common-carrier obligations that accompany rail operating authority. The § 10101 policy of encouraging "honest and efficient management of railroads" counsels strongly against extending that authority on this record.

C. The Principals Are Presently Operating in Violation of Local Law in Framingham and Past Compliance in Middleborough Is a Concern

The fitness concern is not merely historical. On September 29, 2026, the Building Commissioner of the City of Framingham issued an Order to Cease and Desist directed at the "Transload X operations" at 480 Hollis Street, finding — after meeting with Milanoski and De Waele and considering their written position — that the operation is a "storage and distribution facility" operating without the special permit required by the City's zoning ordinance. **Exhibit G.** The order rejects the principals' contention that their use is a mere "delivery service," determining that the open storage of building materials on-site makes the facility a storage-and-distribution use. The order is addressed to CSXT as the property owner and is directed expressly at the principals' operations, with copies to Milanoski and De Waele.

This September 29, 2026 determination is a formal municipal adjudication of an unpermitted use; it postdates and supersedes TransloadX's and CSXT's earlier characterization of the Framingham matter as a minor dumpster-storage issue. The order sets a compliance deadline of October 29, 2026, with fines accruing thereafter unless the principals appeal or pursue a special permit in good faith. As of this filing, the principals have neither ceased the use nor, so far as the record reflects, obtained the permit or appealed — consistent with a pattern of operating first and seeking authority later. A current, unresolved municipal determination of illegal operation is strong evidence bearing on the applicant's regulatory fitness — its willingness and ability to conform its conduct to applicable legal requirements — and the Board should not reward that conduct by conferring federal operating authority.

The Town of Middleborough reported in February10, 2025 that tree cutting at the Middleborough Project "was conducted without any permits and some of the cutting may

have occurred in the wetland resource area 100-foot buffer zone." **Exhibit D.** A demonstrated willingness to disregard permitting requirements bears directly on whether these principals have the willingness and ability to comply with the Board's orders and the common-carrier obligations that accompany rail operating authority. The policy of encouraging "honest and efficient management of railroads" counsels against extending that authority on this record. 49 U.S.C. § 10101.

D. The Affiliated Middleborough Project Threatens Serious and Irreversible Environmental Harm, Underscoring the Public-Interest Stakes.

The documented harms of the Middleborough Project matter are presented here not as a claim for the Board to adjudicate, but as evidence of the magnitude of the local oversight the principals are positioned to escape and of the motive for manufacturing preemption. The § 10101 policy requires that transportation facilities be operated "without detriment to the public health and safety," and the rail-served complex this exemption is designed to enable threatens precisely such detriment. The Buzzards Bay Coalition — a membership-supported nonprofit and a direct abutter that owns more than 2,000 acres of conservation land in its Sippican Headwaters Reserve immediately south and west of the site — has documented these harms in its September 24, 2026 comments. **Exhibit H.** The site sits at the top of the Sippican River watershed, a primary freshwater input to Buzzards Bay. The Coalition identifies four categories of serious, documented, and largely irreversible harm:

> **Wetlands destruction and increased flooding.** The Project would fill and eliminate a Bordering Vegetated Wetland and impact multiple Isolated Vegetated Wetlands, destroying habitat and increasing flooding and runoff within an Isolated Land Subject to Flooding area under the Massachusetts Wetlands Protection Act.
>
> **Degradation of water resources and water supply.** The Project would extend through multiple riverfront areas of the Sippican River, increasing stormwater runoff and downstream pollution, and sits directly within a large resource area for public and private water supply.
>
> **Harm to rare species.** The Massachusetts Natural Heritage and Endangered Species Program ("NHESP") has mapped the entire site as Priority Habitat for the Eastern Box Turtle and has determined that the Project will cause a prohibited "Take" of the species through habitat loss and fragmentation.
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> **Habitat fragmentation.** The Project would sever the connectivity of forest and wetland systems vital to biodiversity, segmenting multiple wetlands across the landscape.

These are the very land-and-water impacts the state and municipal review process exists to evaluate and mitigate. Conferring federal operating authority that would let TransloadX-RR invoke preemption to sidestep that review would be inconsistent with the

§ 10101 policy and would place these resources at risk precisely where the record shows the greatest need for scrutiny.

E. The Maine Application Seeks Pretextual Carrier Status to Manufacture Preemption, Not to Serve a Bona Fide Transportation Purpose.

The Board does not permit a party to obtain or keep rail-carrier authority as a device to shield unrelated operations from state and local law. In *James Riffin*, the Board **revoked** a party's acquisition authority because he appeared to be "attempting to use the cover of Board authority allowing rail operations ... to shield seemingly independent operations and construction [at a separate facility] ... from legitimate processes of state law." *James Riffin--Petition for Declaratory Ord., Fed. Carr. Cas.* (CCH), 2009 WL 2942969 (STB Sept. 15, 2009). The Board also set the governing test for carrier status: at a minimum, an entity must both (1) hold itself out as a common carrier for hire and (2) have the actual ability to carry for hire; mere Board authority — which is "permissive, not mandatory" — does not make one a rail carrier absent the ability and intent to provide service. (And a bona fide carrier must accept the full statutory common-carrier obligation under 49 U.S.C. § 11101; an applicant may not pick and choose the traffic it will carry. *Eric Strohmeyer & James Riffin-Acquisition & Operation Application Valstir Indus. Track in Middlesex & Union Ctys*., N.J., No. FD 35527, 2012 WL 1686170 (May 10, 2012).

TransloadX-RR's application bears the hallmarks of the pretext condemned in *Riffin*. The Augusta and Bucksport Branches are dormant; the record discloses no current customer on either branch, no identified prospective traffic, and no shipper commitment. Authority sought for lines with no customers and no identified traffic is difficult to explain as anything other than a device to obtain the carrier status that triggers preemption under § 10501(b) — the same strategy the principals pursued in Framingham, where they positioned a transloading operation as a "railroad" to resist local land-use enforcement, and the same strategy the Middleborough Project would replicate on a far larger scale: build a rail-served warehouse complex subject to intensive environmental review, then invoke federal rail-carrier status to preempt that review.

TransloadX-RR cannot escape this conclusion by pointing to the transloading-control cases. Whether a transloading facility is itself "transportation by rail carrier" is a fact-specific inquiry turning on the carrier's control over the activity. *Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 531 (5th Cir. 2012). A facility that is not operated by or under the control of a rail carrier is not within the Board's exclusive jurisdiction and is not preempted. *New York & Atl. Ry. Co. v. Surface Transp. Bd*., 635 F.3d 66, 72 (2d Cir. 2011). That doctrine cuts against TransloadX-RR in the alternative. In *Town of Smithtown* — a closely analogous pattern, in which a noncarrier affiliate's waste-and-debris transload facility was to be served by an affiliated Class III carrier — the Board held that where the noncarrier independently owns and operates the facility and the carrier neither controls it nor includes it in its common-carrier service, the transloading is **not** "transportation by rail carrier" and remains subject to state and local regulation; the carrier's common-carrier obligation "would impart no obligation" on the affiliate. *Town of Smithtown, N.Y.-Petition for Declaratory Ord., No. FD 36575 (SUB-1),* 2024 WL 757039 (Feb. 22, 2024). If the Massachusetts transloading is genuinely

independent of any carrier, then TransloadX-RR's carrier status would not lawfully preempt local oversight of it at all — which exposes the application as a pretext — and if TransloadX-RR instead intends to assert such preemption anyway, it confirms that the Maine authority is sought to manufacture a preemption defense rather than to serve a transportation purpose.

Requiring TransloadX-RR to demonstrate a bona fide transportation purpose imposes no hardship. The Maine lines are dormant, so maintaining the postponement disrupts no operation and harms no existing customer. The Board should require TransloadX-RR to come forward with concrete evidence of genuine common-carrier service — identified customers or traffic, a shipper commitment, or a service plan — before any authority issues.

F. Granting the Exemption Would Be Inconsistent With the Public Interest and the National Rail Transportation Policy.

The § 10101 policy directs that railroad management be "honest and efficient" and that facilities be operated "without detriment to the public health and safety." Both are implicated here, and both are sharpened by the public investment at stake. The Middleborough Project rests in part on a $2.8 million MassWorks grant whose 2024 award described an infrastructure package to serve the Logistics Park. See, https://www.middleboroughma.gov/952/Grant-Awards (accessed 10/7/2026)

The Town later represented, in a July 2025 Town Manager's Report, that the public project "now consists solely of the design and construction of a water main extension" — a material narrowing of the publicly described scope. **Exhibit I.**

The honesty-of-management concern is compounded by the principals' representations to obtain public funds: there are questions about whether TransloadX represented to MassDOT, in its IRAP grant application for the Framingham project, that it held required permits and was federally preempted, even though it was operating without the permits and is not a railroad. Massachusetts State Senator Ryan C. Fattman has inquired of the Board about the status of the application, stating that he is "working to determine whether the company has satisfied all requirements associated with grant funding." **Exhibit J** (Senator Fattman Letter and excerpt from TransloadX IRAP Grant Application for the Framingham project).

These same themes carry into the Middleborough Project's environmental filings, which obscure the central rail component. The SDEIR proposes rail spurs connecting to the existing railroad and estimates that approximately three railcars per day could serve the development, yet does not identify who owns the rail corridor, who controls the freight operating rights, or what carrier would actually provide service — even as the Project is promoted in part on the availability of rail service to reduce truck traffic. **Exhibit D.** The result is a record in which South Coast and TransloadX-RR effectively hold themselves out as already able to provide rail service, when in fact the exemption was filed only on March 17, 2026 and its effectiveness has been postponed.

The Board need not make specific findings on every policy factor to grant relief, because the class exemption was already found generally consistent with the § 10101 policy; but the burden rests on the petitioner to show that regulation is necessary, and

CLWC carries it here. *City of Ottumwa v. Surface Transp. Bd.,* 153 F.3d 879 (8th Cir. 1998). The concerns raised — adjudicated principal misconduct, an unresolved municipal violation, the absence of any bona fide transportation purpose, and documented threats to public water and wildlife resources — are concrete, specific, and documented. As the Board itself recognized in postponing the effective date, they warrant rejection of the notice, or revocation of the exemption, rather than streamlined approval.

VI. RELIEF REQUESTED

The Community Land and Water Coalition respectfully requests that the Board:

1. **Reject** the verified notice of exemption in Docket No. FD 36909 as unsuited to the class-exemption process and inconsistent with the public interest and the national rail transportation policy, including on the ground that any material misrepresentation in the notice — such as the representation of operational railroad status reflected in the ASLRRA directory listings, which if corrected would have disqualified the transaction from the class exemption — renders the notice void ab initio under 49 C.F.R. § 1150.32(c);
2. In the alternative, **revoke** the exemption pursuant to 49 U.S.C. § 10502(d) upon a finding that application of the statute is necessary to carry out the policy of 49 U.S.C. § 10101 or to protect the integrity of the Board's processes;
3. **Require** TransloadX Railroad Company, Inc. to respond to the fitness concerns raised herein and to demonstrate a bona fide transportation purpose for its application, including identified customers, traffic, or service commitments on the Maine lines;
4. **Maintain** the postponement of the effective date pending full review; and
5. Grant such other and further relief as the Board deems just and proper.

Respectfully submitted,

/s/ Margaret E. Sheehan, Esq.

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VERIFICATION

I, Margaret E. Sheehan, counsel for the Community Land and Water Coalition, Inc., verify under penalty of perjury that the documents attached hereto as Exhibits A through J are true and accurate copies of records that I obtained and reproduced and that the facts asserted herein are true and accurate to the best of my knowledge. I am authorized to submit this Petition on behalf of the Coalition.

Executed on October 9, 2026

EXHIBITS

Exhibit A MA Secretary of State Corporations Records

Exhibit B Nemasket Week Article

Exhibit C MassWorks 2024 grant-award listing and Middleborough Town Manager's Report (July 2025)

Exhibit D MEPA Certificate, EEA No. 13771 (March 17, 2025), including the Town of Middleborough's February 10, 2025 comments on the SDEIR

Exhibit E CSX "Massachusetts" State Fact Sheet and April 24, 2025 CSX press release (CSX Select Site designation)

Exhibit F — Massachusetts Superior Court rulings: Memorandum and Order on Preliminary Injunction (October 16, 2023); Findings of Fact and Conclusions of Law on Contempt (June 20, 2024); and Memorandum and Order on Attorneys' Fees (October 24, 2024); *Michael Milanowski et al. v. Jon Delli Priscolli et al*, Superior Court 2484 CV71-BLS2, 958-BLS2, and 2141-BLS2, Decision and Order on Summary Judgment, January 9, 2024.

Exhibit G City of Framingham Order to Cease and Desist, 480 Hollis Street (September 29, 2026)

Exhibit H Buzzards Bay Coalition comment letter (September 24, 2026)

Exhibit I Middleborough Town Manager's Report, July 2025: excerpt

Exhibit J Letter of Senator Ryan C. Fattman to the Surface Transportation Board (September 22, 2026)

/s/ Margaret E. Sheehan, Esq.

Margaret E. Sheehan, Esq.

CERTIFICATE OF SERVICE

I certify that on October 9, 2026, I served a copy of this Petition upon all parties of record in this proceeding by first-class mail and/or electronic mail, consistent with 49 C.F.R. § 1104.12(a), including the following:

Thomas W. Wilcox, Law Office of Thomas W. Wilcox, LLC, 1629 K Street, NW, Suite 300, Washington, D.C. 20006, tom@twilcoxlaw.com (Attorney for TransloadX Railroad Company, Inc.)

CSX Transportation, Inc., Attn: General Counsel, 500 Water Street, Jacksonville, FL 32202 (Transferring railroad)

/s/ Margaret E. Sheehan, Esq.

_____

Margaret E. Sheehan
Authorized Representative
Community Land and Water Coalition
Date: October 9, 2026

EXHIBIT A



Secretary of the Commonwealth of Massachusetts
William Francis Galvin

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Corporations

Business Entity Summary

ID Number: 001647714

Request certificate | New search

Summary for: TRANSLOADX, LLC

The exact name of the Domestic Limited Liability Company (LLC): TRANSLOADX, LLC	
Entity type: Domestic Limited Liability Company (LLC)	
Identification Number: 001647714	
Date of Organization in Massachusetts: 03-31-2023	**Date of Revival:**
	Last date certain:

The location or address where the records are maintained (A PO box is not a valid location or address):

Address: 8 CRESTWOOD DRIVE
City or town, State, Zip code, Country: BLACKSTONE, MA 01504 USA

The name and address of the Resident Agent:

Name: JOHN P. DEWAELE, III
Address: 8 CRESTWOOD DR.
City or town, State, Zip code, Country: BLACKSTONE, MA 01504 USA

The name and business address of each Manager:

Title	Individual name	Address
MANAGER	JOHN P. DEWAELE III	8 CRESTWOOD DR. BLACKSTONE, MA 01504 USA
MANAGER	MICHAEL R MILANOSKI	171 SOUTH MAIN ST COHASSET, MA 02025 USA USA

In addition to the manager(s), the name and business address of the person(s) authorized to execute documents to be filed with the Corporations Division:

Title	Individual name	Address
SOC SIGNATORY	JOHN P DEWAELE III	PO BOX 11 BLACKSTONE, MA 01504 USA USA
SOC SIGNATORY	MICHAEL R MILANOSKI	171 SOUTH MAIN ST COHASSET, MA 02025 USA USA



Secretary of the Commonwealth of Massachusetts
William Francis Galvin

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Corporations

Business Entity Summary

ID Number: 001813326

Request certificate | New search

Summary for: TRANSLOADX LOGISTICS, LLC

The exact name of the Domestic Limited Liability Company (LLC): TRANSLOADX LOGISTICS, LLC

Entity type: Domestic Limited Liability Company (LLC)

Identification Number: 001813326

Date of Organization in Massachusetts: 06-24-2024 **Date of Revival:**

Last date certain:

The location or address where the records are maintained (A PO box is not a valid location or address):

Address: 8 CRESTWOOD DRIVE

City or town, State, Zip coce, Country: BLACKSTONE, MA 01504 USA

The name and address of the Resident Agent:

Name: JOHN P. DEWAELE III

Address: 8 CRESTWOOD DRIVE

City or town, State, Zip coce, Country: BLACKSTONE, MA 01504 USA

The name and business address of each Manager:

Title	Individual name	Address
MANAGER	JOHN P DEWAELE III	8 CRESTWOOD DRIVE BLACKSTONE, MA 01504 USA USA

In addition to the manager(s), the name and business address of the person(s) authorized to execute documents to be filed with the Corporations Division:

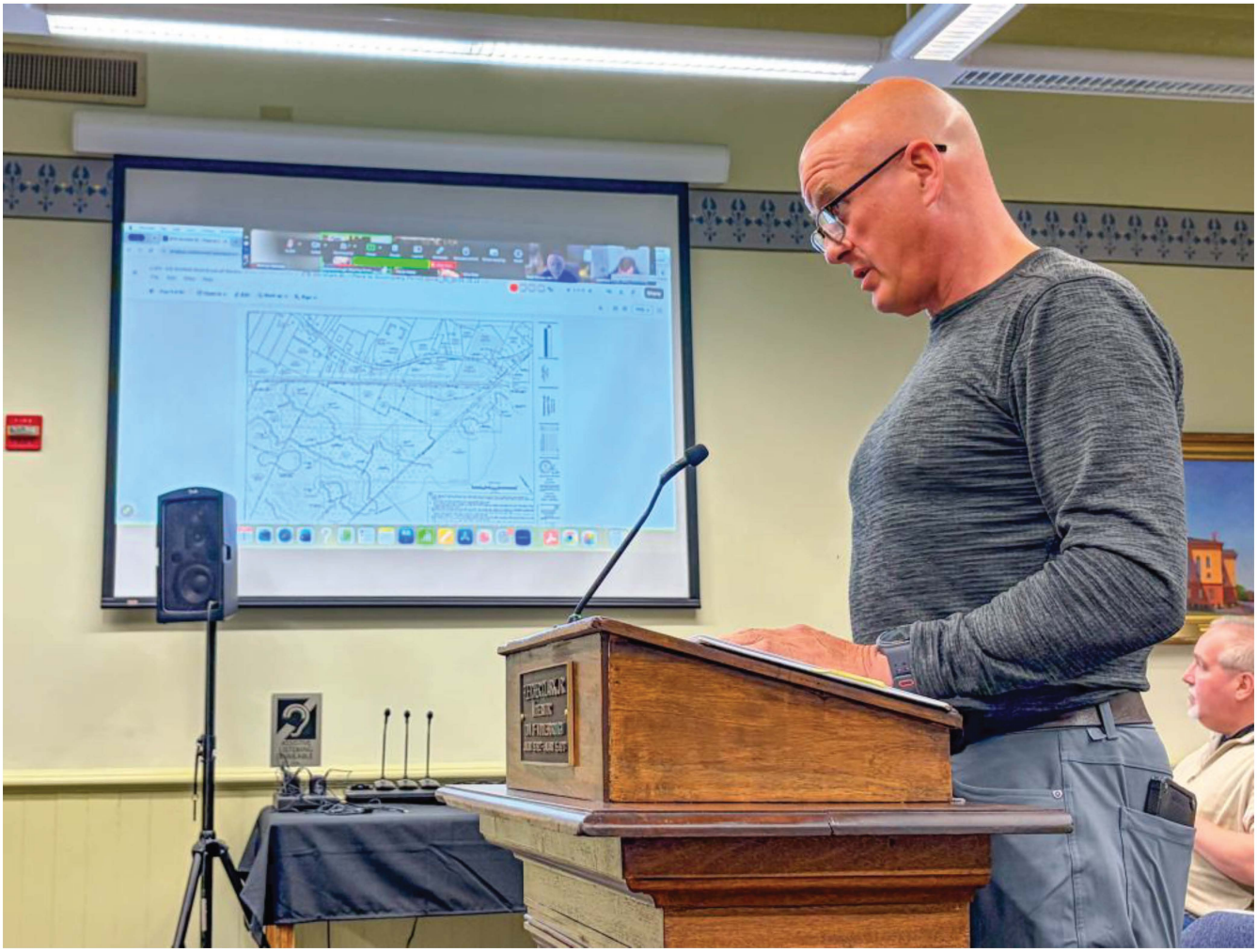
Title	Individual name	Address
SOC SIGNATORY	JOHN P. DEWAELE III	8 CRESTWOOD DRIVE BLACKSTONE, MA 01504 USA USA

The name and business address of the person(s) authorized to execute, acknowledge, deliver, and record any recordable instrument purporting to affect an interest in real property:

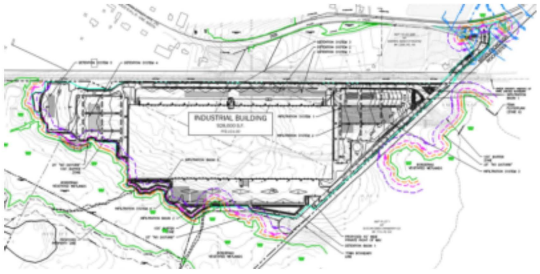
Title	Individual name	Address

EXHIBIT B

Conservation Commission, residents push back on ‘unnecessarily large’ warehouse proposal









Related Stories

Proposed 928,000-square-foot Wareham Street warehous...

EXHIBIT C

MassWorks 2024 Awards

The following is a list of cities and towns receiving MassWorks Infrastructure Grant Program awards during the 2024 Round. MWIP is now part of the Community One Stop for Growth.

Grant Recipients

	to Shaw Street, including culvert replacement.	
Middleborough	Project includes a 16-inch cement lined ductile iron water main 2,250ft extension along Rt 28. Utilities and water main to extend into the site include jacking sleeves under railroad crossing. The site access road will intersect Rt 28 at a divided entrance/exit lane with lanes separated by a raised median to improve safety and sight lines. The project also replaces the existing passive railroad crossing with modern warning signals and automated gates.	$2,800,000

EXHIBIT D

The Commonwealth of Massachusetts
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114

Maura T. Healey
GOVERNOR

Kimberley Driscoll
LIEUTENANT GOVERNOR

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SECRETARY

Tel: (617) 626-1000
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http://www.mass.gov/eea

March 17, 2025

CERTIFICATE OF THE SECRETARY OF ENERGY AND ENVIRONMENTAL AFFAIRS ON THE SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT REPORT

PROJECT NAME	: Middleborough Logistics Park
PROJECT MUNICIPALITY	: Middleborough
PROJECT WATERSHED	: Taunton River
EEA NUMBER	: 13771
PROJECT PROPONENTS	: South Coast Logistics Park, LLC
DATE NOTICED IN MONITOR	: January 8, 2025

Pursuant to the Massachusetts Environmental Policy Act (MEPA; M.G.L. c. 30, ss. 61-62L) and Section 11.08 of the MEPA regulations (301 CMR 11.00), I have reviewed the Supplemental Draft Environmental Impact Report (SDEIR) and hereby determine that it **adequately and properly** complies with MEPA and its implementing regulations. The Proponent may prepare and submit for review a Supplemental Final Environmental Impact Report (SFEIR). As detailed below, the SDEIR was filed in accordance with a Special Review Procedure (SRP) established on May 17, 2024, which provides a framework for MEPA review of this phased project.

Project Description

As described in the SDEIR, the project consists of the phased development of the site. Phase 1, which is the subject of this Certificate, involves development of a 74.2-acre lot in the eastern part of the site. Phase 1 includes demolition of two residences, followed by construction of a 928,000-sf warehouse and parking areas with 930 employee parking spaces, 165 loading docks, and 131 trailer parking spaces. Vehicular access to the site will be provided by a new roadway from Wareham Street. Phase 1 also includes construction of a rail spur, a fire suppression tank, a pump house, a stormwater management system, a water service connection to the site from the Town of Middleborough's (Town's) water main in Wareham Street, and a septic system; as noted below, the project's wastewater flows will ultimately

be directed to a treatment facility to be constructed in Phase 2.

Phase 2 includes development of the 78.7-acre western portion of the site, which is also owned by the Proponent. Access to the Phase 2 site will be provided by an extension of the driveway to be constructed in Phase 1. Phase 2 development is conceptual with no specific details on use, program, or timing of development; however, it is anticipated to be developed with commercial and industrial uses allowed by the underlying zoning. Development of Phase 2 will require MEPA review in accordance with the SRP, as summarized below.

Special Review Procedure

Because Phase 2 is at a conceptual level with no schedule for development, the SRP was established to allow for the assessment of cumulative impacts of both phases of the project in connection with review of Phase 1 and to set forth the conditions for review of Phase 2 when development details are available after MEPA review of Phase 1 has been completed. The SDEIR provided updated estimates of the impacts of Phase 2 compared to estimates provided in the SRP Request. Phase 2 will alter 32.4 acres of land, create 26.7 acres of impervious area, alter 33,000 sf (approximately 0.75 acres) of Bordering Vegetated Wetlands (BVW), use 9,373 gallons per day (gpd) of water, and generate 8,521 gpd of wastewater.

As detailed in the SRP, a Notice of Project Change (NPC) must be filed which provides a detailed description of proposed development, environmental impacts and mitigation measures for Phase 2, and an updated assessment of the cumulative impacts of the project. Because Phases 1 and 2, in combination, will generate over 10,000 gallons per day (gpd) of wastewater, an on-site wastewater treatment and effluent disposal system will be required in Phase 2 to treat wastewater from both phases of the project. The Phase 1 project will rely on a Title 5 septic system under local Town approvals. The Phase 2 NPC will provide a Transportation Impact Analysis covering both phases; an analysis of Greenhouse Gas (GHG) emissions associated with proposed buildings, transportation, and land clearing in Phase 2; and an analysis of the project's impacts on Environmental Justice (EJ) populations. As detailed below, the project as a whole (Phases 1 and 2) requires a 401 Water Quality Certification (WQC) and a Conservation and Management Permit (CMP), both of which must evaluate the cumulative impacts and mitigation measures of the project and be issued prior to commencement of Phase 1 construction.

Original Project Description and MEPA History

The original project consisted of the demolition of two residential buildings and construction of a ten-lot industrial/commercial business park containing approximately 392,000 square feet (sf) of floor space, an approximately 2,686-linear foot (lf) access road from Wareham Street, parking lots with a total of 980 parking spaces, a 673,000-gallon reservoir for fire protection water, and construction of a rail spur to provide cargo rail service to the site. The project was proposed on the eastern 67-acre portion of an approximately 147-acre site. An Expanded Environmental Notification Form (EENF) with a request for a Single EIR was submitted in April 2006. The Certificate on the EENF, which was issued on May 17, 2006, granted the request for a Single EIR and included a Scope requiring additional analysis of alternatives and the project's environmental impacts and mitigation measures. The Single EIR was submitted in May 2008, and the Certificate on the Single EIR was issued on June 13, 2008

determining that the project adequate and properly complied with MEPA. The Single EIR Certificate required the filing of an NPC if the development of the western 80-acre portion of the site were proposed in the future. Following the close of MEPA review, no part of the site has been developed in accordance with the previously reviewed plan; however, as noted below, a portion of the site has been altered due to logging operations.

The Expanded NPC (ExNPC) was filed in March 2024, and described a revised development plan for the project site. The ExNPC covers the same project site as reviewed in the original ENF and an additional approximately six acres of land that have been added to the site. A Certificate on the ExNPC was issued on May 17, 2024 requiring the filing of a SDEIR for Phase 1 with conceptual review of cumulative impacts of both phases of the project. As noted, an SRP was established on May 17, 2024 to establish conditions for review of Phase 2.

Changes Since the Filing of the ExNPC

According to the SDEIR, the layout of parking areas and internal site drives has been revised, resulting in an increase in trailer parking spaces from 112 as proposed in the ExNPC to 131 trailer spaces; an increase in loading spaces from 156 as proposed in the ExNPC to 165; and a reduction in parking spaces for employee vehicles from 937 as proposed in the ExNPC to 930 spaces. As a result of the change in layout of parking areas and internal site drives, impacts to BVW in Phase 1 have increased from 1,418 sf as proposed in the ExNPC to 4,430 sf; however, there is no net increase in impervious area due to offsetting changes in the layout of parking areas elsewhere on the Phase 1 site.

Project Site

The approximately 153-acre project site consists of the 74.2-acre Phase 1 site in the eastern part of the site and the 78.7-acre Phase 2 site of the project site. The 153-acre parcel is bordered to the east by railroad tracks; to the south by the Rochester municipal boundary, undeveloped land, and an electric transmission line; and to the north and west by undeveloped land. Approximately one acre of the project site (within the Phase 1 area) is located east of the railroad tracks and links the rest of the site to Wareham Street. An approximately 13-acre area in the southern part of the Phase 1 site has been cleared of trees due to logging operations.

Bordering Vegetated Wetlands (BVW) are located in a north-south orientation through the center of the 153-acre site within the western part of the Phase 1 parcel and eastern part of the Phase 2 site, and in the southwest portion of the Phase 2 site. A stream and associated Riverfront Area are located near Wareham Street. The project site also contains Isolated Land Subject to Flooding (ILSF) and Isolated Vegetated Wetland (IVW), including, potentially, ISLF and IVW within the Phase 1 site. As shown on the Federal Emergency Management Agency's National Flood Hazard Layer, the 100-year floodplain (Zone A) with no Base Flood Elevation determined extends onto the southwest portion of the Phase 2 site and the northern part of the Phase 1 site. According to the Natural Heritage and Endangered Species Program (NHESP), the entire project site (both Phase 1 and Phase 2) is located within mapped Priority Habitat for the Eastern Box Turtle (*Terrapene carolina*), which is designated as a Species of Special Concern.

The project site is located within five miles of six Environmental Justice (EJ) populations,

including five designated as Income (located in Carver and Wareham) and one designated as Minority (located in Marion). There are no EJ populations located within one mile of the site. While the original project was filed prior to the January 1, 2022 effective date of MEPA EJ protocols, the currently-proposed project essentially proposes a new development on the same (and expanded) project site. Therefore, the Proponent has agreed to abide by all EJ protocols currently in effect, and due to the extent of diesel truck traffic (556 daily truck trips in Phase 1 alone), the project is deemed to be within a Designated Geographic Area (DGA) of EJ populations[1] located in whole or in part within 5 miles of the project site as stated in 301 CMR 11.02 (definition of "DGA").

Environmental Impacts and Mitigation

The SDEIR provides updated estimates of the project's environmental impacts, which differ from those presented in the ExNPC; definitive estimates should be provided in the SFEIR. According to the SDEIR, combined environmental impacts associated with Phases 1 and 2 include alteration of 85.5 acres of land; creation of 70.5 acres of impervious area; alteration of 37,430 sf of BVW, and 29,940 sf of Riverfront Area; use of 19,603 (gpd) of water; and generation of 17,821 gpd of wastewater. No estimate of trip generation was provided for Phase 2; however, the combined trip generation of Phases 1 and 2 is expected to exceed 3,000 average daily trips (adt). The entire project site (including both phases) is located within Priority Habitat and therefore all project activities will impact rare species habitat. Greenhouse Gas (GHG) emissions and other air pollutants are associated with the burning of fossil fuels for onsite energy use and for vehicle trips generated by the project. Impacts associated with Phase 1 include alteration of 53.1 acres of land; creation of 43.8 acres of impervious area; alteration of 4,430 sf of BVW and 24,940 sf of Riverfront Area; generation of 1,586 adt, including 556 truck trips; use of 10,230 gpd of water; and generation of 9,300 gpd of wastewater.

Measures to avoid, minimize, and mitigate environmental impacts of Phase 1 include protection of rare species during the construction period; permanent conservation of rare species habitat, including forest and wetlands; replication of 8,860 sf of BVW; construction of a stormwater management system consistent with the Massachusetts Stormwater Management Standards (SMS); a hybrid heating and cooling system in the warehouse which relies primarily on electric air source heat pumps (ASHP) for heating and cooling; 48 electric vehicle (EV) charging stations; roadway improvements, including construction of a turning lane and implementation of signal phasing at the intersection of Route 28 and Route 58; and replanting trees and other landscaping. The SFEIR should finalize mitigation commitments for Phase 1, as well as any applicable commitments common to both phases such as wetlands (for 401 WQC permitting) and rare species habitat.

Jurisdiction and Permitting

The project is undergoing MEPA review and is subject to a mandatory EIR because it requires Agency Actions and meets/exceeds several mandatory EIR thresholds, based on the impact estimates provided above. Specifically, the project exceeds thresholds at 301 CMR 11.03(1)(a)(1) (alteration of 50 or more acres of land); 301 CMR 11.03(1)(a)(2), (creation of 10 or more acres of impervious area); 301 CMR11.03(3)(a)(1) (alteration of one or more acres of BVW); and 301 CMR 11.03(6)(a)(6) (generation of 3,000 or more adt on roadways providing access to a single location). The project is also required to

[1] "Environmental Justice Population" is defined in M.G.L. c. 30, § 62 under four categories: Minority, Income, English Isolation, and a combined category of Minority and Income.

prepare an EIR pursuant to 301 CMR 11.06(7)(b) because it is located within a DGA (5 miles) around one or more EJ Populations. The project exceeds ENF review thresholds at 301 CMR 11.03(2)(b)(2) (Greater than two acres of disturbance of designated priority habitat, as defined in 321 CMR 10.02, that results in a Take of a state-listed endangered or threatened species or species of special concern); 301 CMR 11.03(3)(b)(1)(d), (alteration of 5,000 or more sf of BVW or IVW); 301 CMR 11.03(6)(b)(14) (generation of 2,000 or more New adt on roadways providing access to a single location); 301 CMR 11.03(6)(b)(14) (generation of 1,000 or more New adt on roadways providing access to a single location and construction of 150 or more New parking spaces at a single location; and, 301 CMR 11.03(6)(b)(15) (construction of 300 or more New parking spaces at a single location). Additional thresholds may be identified in future filings associated with Phase 2.

Phase 1 exceeds the thresholds at 301 CMR 11.03(1)(a)(1) (alteration of 50 or more acres of land); 301 CMR 11.03(1)(a)(2), (creation of 10 or more acres of impervious area); 301 CMR 11.03(2)(b)(2) (Greater than two acres of disturbance of designated priority habitat, as defined in 321 CMR 10.02, that results in a Take of a state-listed endangered or threatened species or species of special concern); 301 CMR 11.03(6)(b)(14) (generation of 1,000 or more New adt on roadways providing access to a single location and construction of 150 or more New parking spaces at a single location; and, 301 CMR 11.03(6)(b)(15) (construction of 300 or more New parking spaces at a single location). Phase 1 requires a Vehicular Access Permit and a Railroad Crossing easement agreement from the Massachusetts Department of Transportation (MassDOT), a Conservation and Management Permit (CMP) from NHESP, and because the combined BVW impacts of Phases 1 and 2 exceeds 5,000 sf, a 401 Water Quality Certification (WQC) from the Massachusetts Department of Environmental Protection (MassDEP). Phase 2 is anticipated to require a Groundwater Discharge Permit from MassDEP, a Vehicular Access Permit from MassDOT, and potentially, an amended WQC and amended CMP. The project is subject to the MEPA GHG Policy and Protocol (GHG Policy).

In addition, each phase requires one or more Orders of Conditions from the Middleborough Conservation Commission (or in the case of an appeal, a Superseding Order of Conditions from MassDEP), a National Pollutant Discharge Elimination System (NPDES) Construction General Permit (CGP) from the U.S. Environmental Protection Agency (EPA), and review from the Massachusetts Historical Commission (MHC) in accordance with Section 106 of the National Historic Preservation Act of 1966 as amended (36 CFR 800) and M.G.L. c. 9 ss. 26-27C (950 CMR 71). A Section 404 Permit from the Army Corps of Engineers (ACOE) will be required for Phase 2 and potentially for Phase 1. Permitting requirements of Phase 2 will be described in future filings.

Because the project will receive Financial Assistance from the Massachusetts Department of Transportation (MassDOT) through the Industrial Rail Access Program (IRAP), MEPA jurisdiction is broad in scope and extends to all aspects of the project that are likely, directly or indirectly, to cause Damage to the Environment as defined in MEPA regulations.

Review of the SDEIR

The SDEIR was generally responsive to the Scope included in the ExNPC Certificate. It identified changes to the project design, and provided updated site plans, a transportation analysis, and a stormwater report. The SDEIR provided draft Section 61 Findings for Phase 1 and responses to comments received on the ExNPC; however, as noted by MassDEP, additional responses to its comment

letter on the ExNPC should be provided in the SFEIR. During the review period, the Proponent circulated a transportation memo that identified additional roadway improvements that the Proponent will construct in Phase 1 at the intersection of Route 28 at Route 58, as described below. For purposes of clarity, all supplemental materials provided by the Proponent are included in references to the "SDEIR," unless otherwise indicated.

Alternatives Analysis

The Proponent previously reviewed No Build, Original Project, and Reduced Build Alternatives in the ExNPC. The Scope included in the ExNPC required that the SDEIR provide a review of an alternative parking layout for Phase 1 that would minimize land alteration and impervious area. Because the Middleborough Zoning Bylaw requires one parking space per 1,000 sf of gross floor area, the SDEIR did not evaluate a site design with fewer proposed spaces; rather, it compared the impacts of the full buildout of parking, including 930 parking spaces and 165 trailer spaces (identified in the SDEIR as the "Phase 1 Reduced Impervious Area and Parking Alternative"), to an alternative design in which 95 vehicle spaces and 52 trailer parking spaces were land banked. Under the Phase 1 Reduced Impervious Area and Parking Alternative, the areas to be land banked would be constructed with subbase materials and utility infrastructure, but not paved. This alternative would minimize impervious area by approximately 2.4 acres compared to the Preferred Alternative, but would not reduce land alteration because the subbase of the land banked spaces would be constructed at the same time as the rest of Phase 1. As detailed below, the SFEIR should clarify whether the Proponent has committed to land banking vehicle and trailer parking spaces. Given the excessive parking supply, the SFEIR should review the feasibility of land banking additional parking spaces. As described above, the design of the trailer parking area in the Preferred Alternative has changed since the ExNPC, resulting in an increase of over 3,000 sf of BVW impacts.

In accordance with the Scope, the SDEIR also reviewed alternatives for minimizing impacts associated with construction of a driveway extension to the Phase 2 site. A linear BVW extending in a north-south direction separates the Phase 1 and Phase 2 sites. In the ExNPC, the Proponent estimated that construction of an extension of the driveway from the Phase 1 to the Phase 2 site would impact 85,750 sf of BVW; however, it did not provide a plan of the roadway extension. The SDEIR included an analysis of two route alternatives, the Alternative Route and the Preferred Route (included as part of the Preferred Alternative), for the extension of the driveway onto the Phase 2 site. The Alternative Route would follow the edge of the pavement along the southwest side of the Phase 1 site in a northerly direction, then bend sharply to the west to cross the BVW at the location of a former logging path. According to the SDEIR, this configuration would impact 22,100 sf of BVW. However, because a rail spur could not be constructed parallel to this driveway alignment due to its sharp bend, a separate rail spur to the Phase 2 site would have to be constructed. The rail spur would follow a more linear route between the Phase 1 and Phase 2 sites and cross through a narrow section of BVW, resulting in 15,000 sf of additional BVW impacts. Therefore, the Alternative Route would impact a total of 37,100 sf of BVW. The Preferred Alternative includes construction of both the driveway connection and a parallel rail spur in the alignment of the rail spur under the Alternative Route. The Preferred Route, which would impact 33,000 sf of BVW (about 4,100 sf less than the Alternative Route), was selected because it minimizes impacts to wetlands and habitat segmentation that would be caused by separate crossings for the driveway and rail spur.

Environmental Justice / Public Health

As noted above, the project site is located within five miles of six EJ populations, including five designated as Income (located in Carver and Wareham) and one designated as Minority (located in Marion). There are no EJ populations located within one mile of the site. Within the census tracts containing the above EJ populations within 5 miles of the project site, no languages were identified as languages spoken by 5% or more of residents who also identify as not speaking English very well.

Community Engagement

Prior to filing the ExNPC, the Proponent prepared an EJ Screening Form which was distributed to a list of community-based organizations (CBOs) and tribes/indigenous organizations (the "EJ Reference List") provided by the MEPA Office. In addition, the Proponent prepared flyers with information about the project and posted them in various locations throughout Middleborough. Since filing the ExNPC, the Proponent has generated a project website [2] with information about the project, the MEPA review process, and ways to request a meeting or additional information. Prior to filing the SDEIR, the Proponent prepared flyers about the project with a link to the website and information about ways to submit feedback. The flyers were posted throughout Middleborough, including in municipal buildings, the public library, a post office, a supermarket, and the YMCA, and in public libraries in Carver and Wareham. On January 6, 2025, the Proponent published notice of the filing of the SDEIR in the Taunton Daily Gazette; the notice included information on how to comment on the SDEIR. The Proponent has not received any requests in response to the flyers or newspaper notice requesting a meeting or additional information. The SDEIR did not describe measures the Proponent will continue to implement to inform the public about the project. The SFEIR should describe outreach activities since the SDEIR submittal, especially efforts made to inform and engage with the EJ Population in Wareham (Census Tract 5451, Block Group 1) located along project truck routes.

Baseline Assessment

The SDEIR included a baseline assessment of any existing "unfair or inequitable Environmental Burden and related public health consequences" impacting EJ Populations in accordance with 301 CMR 11.07(6)(n)(1) and the MEPA Interim Protocol for Analysis of EJ Impacts. The baseline assessment included a review of the data provided by the Department of Public Health (DPH) EJ Tool applicable to the DGA regarding "vulnerable health EJ criteria"; this term is defined in the DPH EJ Tool to include any one of four environmentally related health indicators that are measured to be 110% above statewide rates based on a five-year rolling average. At the community level, Middleborough, Carver, Marion, and Wareham meet the criteria for heart attack hospitalizations; Carver also meets the criteria for low birth weight, and Wareham meets the criteria for childhood asthma. None of the census tracts within the DGA meet the criteria for childhood blood lead or low birth weight.

The DEIR indicated that the following sources of potential pollution exist in EJ populations within the DGA, based on data available in the DPH EJ Tool:

- MassDEP major air and waste facilities: 11
- M.G.L. c. 21E sites: 6

[2] https://www.epsilonassociates.com/wareham-street-warehouse-aka-sippican-commerce-park/

- "Tier II" toxics use reporting facilities: 14
- MassDEP Public Water Suppliers: 12
- Underground storage tanks (USTs): 8
- EPA Toxic Release Inventory (TRI) sites: 2
- Road infrastructure: I-495, I-195, U.S. Route 6, and State Routes 25, 28, 58, and 105
- Other transportation infrastructure: Rail lines, including one on the project site
- Regional Transit Agencies: 6 bus stops operated by the Greater Attleborough-Taunton Regional Transit Agency (GATRA)
- Energy Generation and Supply: Transmission lines and 1 power plant lines

As required by the Scope included in the ExNPC Certificate, the Proponent reviewed data available in the EPA's EJ Screen to identify any air quality related indicators that are elevated at or above the 80th percentile of statewide rate. According to the SDEIR, ozone is the only air-related indicator that met this criterion over the 5-mile DGA, with values of 59.9 parts per billion (ppb) to 60.5 ppb within the DGA, compared to the state level of 56.7 ppb. The SDEIR indicates that the observed level of zone (59.9-60.5 ppb) is well below the health-based standard of 70 ppb established in the National Ambient Air Quality Standards (NAAQS), and no other air quality indicators, such as fine particulate matter ($PM_{2.5}$), diesel particulate matter (DPM), nitrogen dioxide (NO_2) or traffic proximity, are in the 80th percentile of statewide rates.

According to the output report from the Climate Resilience Design Standards Tool prepared by the Resilient Massachusetts Action Team (RMAT) (the "MA Resilience Design Tool") previously included in the ExNPC, the project site has a High exposure to urban and riverine flooding due to extreme precipitation and a High exposure to extreme heat. EJ populations near the site are likely also exposed to these climate risks.

Project Impacts

While the above indicators show some evidence of an existing "unfair or inequitable" burden impacting the identified EJ populations, the SDEIR asserts that the project will not have disproportionate adverse effects on EJ populations, which are located 1.3 miles or more away and separated from the site by undeveloped forest land, wetlands, and cranberry bogs. The project includes a stormwater management system that will be designed to minimize potential off-site flooding. The removal of trees and creation of impervious area may exacerbate heat island effects in and around the site. However, the Proponent will preserve approximately 138 acres of rare species habitat to mitigate the combined impacts of Phases 1 and 2 (including approximately 100 acres to mitigate Phase 1 impacts), which is likely to include land in the vicinity of the site. This habitat will contain forest and wetlands that could mitigate heat effects. Furthermore, based on MassDEP Cumulative Impact Analysis (CIA) data, none of the public schools (pre-K to 12) within the DGA experience rates of pediatric asthma above the statewide rate.

The SDEIR provided an assessment of potential air quality impacts on EJ populations caused by project-generated vehicles, including trucks, which will use roads passing through EJ populations. The air quality analysis estimated emissions of air pollutants using the EPA MOVES4 model and data from the traffic study. According to the SDEIR, all project-generated trucks will use Wareham Street (Route 28), which borders the site to the east, to provide access to and from I-495 via the intersection of Route 28 (also called Cranberry Highway in this section) and County Road (Route 58) which is located within

an EJ population (Census Tract 5451, Block Group 1) 1.75 miles south of the site. The I-495/Route 58 interchange, which is located within the same EJ population, is located approximately 0.3 miles northeast of the Route 28 at Route 58 intersection. All project-generated trucks will travel through the interchange to access I-495, and approximately 64% of all trucks will use I-495 north of the interchange and 36% will use I-495 south of the interchange. Approximately 2.4 miles of I-495 passes through Census Tract 5451, Block Group 1; however, no other EJ population within the DGA is located along any part of the truck route.

The analysis calculated emissions at the traffic study intersections based on the number of peak period vehicle trips through the intersection and traffic delay under Build 2031 conditions. The SDEIR identified the intersection with the highest emissions (the "worst-case intersection") as the Site Driveway at Wareham Street. Air dispersion modeling of emissions at the worst-case intersection indicated that the addition of project emissions to background concentrations will not exceed National Ambient Air Quality Standards (NAAQS). In addition, mesoscale air quality analysis (discussed in GHG Emissions section below) conducted over the traffic study radius showed a reduction in NOx, VOC, and DPM from Existing to future Build conditions, and a slight increase in PM_{10} levels. The SDEIR asserted that because emissions at the worst-case intersection will not exceed the NAAQS, other intersections with lower emission rates, including those in EJ populations, will also not exceed the NAAQS. However, during the review period, the Proponent provided the MEPA Office with a revised analysis which showed that the intersection of Route 28 at Route 58 is the worst-case intersection. As noted above, all project generated trucks are anticipated to pass through this intersection to access I-495, and the intersection is located within an EJ population. According to the revised analysis, the emission rate at the Route 28 at Route 58 intersection is unchanged from that provided in SDEIR. The SFEIR should include the revised analysis of the project's air quality impacts on EJ populations that was prepared during the review period, describe impacts to EJ populations, and identify mitigation measures.

Land Alteration and Stormwater

The SDEIR provided plans and calculations documenting proposed land alteration and land cover under proposed conditions. Construction of Phases 1 and 2 is estimated to alter a total of approximately 85.5 acres of mostly forested land, including approximately 53 acres in Phase 1 and approximately 32.5 acres in Phase 2, and will add 70.5 acres of impervious area, including 43.8 acres in Phase 1 and 26.7 acres in Phase 2. The Phase 1 site rises from an elevation of approximately 83 feet in the southeastern corner of the site to a large plateau with an elevation of approximately 95 ft to 105 ft. The project will create a large level area in the center of the site where the building will be located with a first-floor elevation of 101 ft NAVD 88. A total of 168,318 cubic yards of material will be excavated from higher parts of the Phase 1 site; this material, as well as an additional approximately 3,286 cy soil delivered to the site, will be used to establish the final site elevations. Upon completion of construction, the land uses on the Phase 1 site will include 43.8 acres of the buildings and impervious pavement; 15.5 acres of wetlands; 8.0 acres of meadow/sparse trees; 5.5 acres of forest; 1.4 acres of landscaping; and 0.01 acres of gravel road/compacted path. As detailed below, the Proponent should further evaluate measures to mitigate the project's tree clearing impacts.

Phase I will add 44 acres of impervious area. According to the SDEIR, separate stormwater management systems will be constructed for Phases 1 and 2, with no connection between the two. The SDEIR included a Stormwater Report that described the proposed stormwater management system for

Phase 1. The stormwater management system will be designed to meet the requirements of the Massachusetts Stormwater Management Standards (SMS), including additional requirements for land uses with higher potential pollutant loads (LUHPPLs). The system will include Best Management Practices (BMPs) such as deep-sump hooded catch basins, subsurface infiltration systems, and surface infiltration basins, to reduce post-development peak discharge rates for the 2-, 10-, 25-, and 100-year storm events in comparison to pre-development rates, and promote infiltration and groundwater recharge. The BMPs will be designed to remove 80% of Total Suspended Solids (TSS) in runoff prior to discharge; as required for LUHPPLs and discharges to critical areas, the system will include water quality units to remove 44% of TSS prior to discharge to an infiltration structure. As detailed below, the stormwater management system will be designed to have sufficient capacity to handle flows under future climate conditions.

Rare Species

The entire project site is located within mapped Priority Habitat for the Eastern Box Turtle. According to NHESP, the project requires a CMP because Phases 1 and 2 will result in a Take of Eastern Box Turtle due to the loss and fragmentation of suitable habitat, and interference with the feeding, breeding, over-wintering, and migratory activities of the species. According to NHESP, its review will evaluate the cumulative impacts of activities proposed in both phases.

According to the SDEIR, the project will impact 66.48 acres of rare species habitat on the Phase 1 site and 27.4 acres in Phase 2, for a total of 91.88 acres of impact. In the SDEIR, the Proponent asserted that a 56.2-acre portion of the Phase 1 site containing rare species habitat to be impacted by the project is not subject to review because the site had not been mapped as rare species habitat when the original project was proposed in 2006 Therefore, the SDEIR indicates that mitigation was required for only 14.77 acres of the 66.48 acres of rare species habitat impacts in Phase 1. Based on a habitat mitigation formula for Species of Special Concern of 1.5:1 (impact:mitigation), the SDEIR proposed to permanently conserve 22.16 acres of habitat as mitigation for Phase 1 impacts. The SDEIR did not assert that any that any part of the Phase 2 site similarly is not subject to review and therefore proposed to conserve 41.1 acres of land to mitigate Phase 2 impacts to 27.4 acres of habitat (based on the 1.5:1 ratio). The SDEIR indicated that two parcels under the Proponent's control totaling 44 acres could be provided as mitigation.

Based on consultation with NHESP during the review period, the Proponent has acknowledged that the entire project (Phases 1 and 2) are subject to MESA review and will be required to meet the current performance standards for issuance of a CMP.[3] According to NHESP, a total of 137.82 acres of habitat is required to be conserved based on the 1.5:1 mitigation formula. However, fragmentation impacts that would result from the two phases may also require mitigation and is not reflected in the habitat mitigation ratio. As noted below, the Proponent should continue to work with NHESP during preparation of the SFEIR to refine potential mitigation that will be required for the project (both phases) and provide additional details in the SFEIR.

[3] Email dated March 6, 2025, from David Hewett to Alex Strysky.

Biodiversity

Phase 1 includes impacts to 66.48 acres of rare species habitat, much of which is forested. This impact could contradict the interests of biodiversity conservation as set forth in Executive Order No. 618: Biodiversity Conservation in Massachusetts ("Biodiversity EO").[4] The site entire site is mapped as Core Habitat and Critical Natural Landscape in BioMap,[5] a tool to guide strategic protection and stewardship of lands and waters that are most important for conserving biological diversity in Massachusetts.

As required in the Scope included in the ExNPC Certificate, the SDEIR included an assessment of the project's impact on biodiversity in the Commonwealth. The SDEIR identified two Core Habitat components on the project site: Forest Core, which represents intact forests with the least impact from roads and development, and Rare Species Core, which includes areas critical to long-term conservation of vulnerable species and their habitats. According to the MassGIS BioMap datalayer, a portion of the site is also mapped as Wetland Core. The Phase 1 and Phase 2 sites also contain two Critical Natural Landscape components, including Wetland Core Buffers, which are areas of intact habitat surrounding wetland, and Landscape Blocks, which comprise large areas of intact lands and waters that provide habitat for wide-ranging species and support dynamic and resilient ecosystems.

The entire site (Phases 1 and 2) is mapped as Rare Species Core and as a Landscape Blocks; however, the Phase 1 project, which is located along the eastern side of the property adjacent to the railroad tracks, Wareham Street, and residential properties, appears to avoid mapped areas of Forest Core, Wetland Core, and Wetland Core Buffer. The Phase 2 site occupies the western part of the site, which abuts the Sippican Headwaters Wildlife Management Area and is part of a large area mapped as Forest Core that extends north, west, and south of the site. The SDEIR asserted that the project has been designed to minimize impacts to resource values as reflected in BioMap by minimizing habitat loss and fragmentation, and by providing mitigation for rare species impacts. As detailed below, the SFEIR should further review how the project will preserve biodiversity values and minimize habitat fragmentation.

Wetlands

The SDEIR included updated estimates of the project's (Phases 1 and 2) wetland impacts, including plans and additional details about wetland impacts and mitigation measures for Phase 1. In the ExNPC, the Proponent estimated combined impacts of Phases 1 and 2 to 85,750 sf of BVW, including 1,418 sf of impact in Phase 1, and to 18,334 sf of Riverfront Area (all of which would occur in Phase 1). According to the SDEIR, Phase 1 impacts were revised to include 4,430 sf of BVW and 24,937 sf of Riverfront Area, the latter of which includes an area of 8,927 sf that will be restored by removal of asphalt and revegetation. Impacts to BVW include filling of 1,555 sf in connection with the construction of the site driveway, and 2,875 sf to construct the loading apron and trailer parking southwest side of the building. The SDEIR included a conceptual plan of the extension of the site driveway to the Phase 2 site which would impact approximately 33,000 sf of BVW. According to the SDEIR, the site also contains Bank, Land Under Water (LUW) and Bordering Land Subject to Flooding (BLSF); however, neither Phase 1 nor Phase 2 activities will impact these resources areas. These impact estimates are based on

[4] https://www.mass.gov/executive-orders/no-618-biodiversity-conservation-in-massachusetts
[5] https://biomap-mass-eoeea.hub.arcgis.com/

delineations of the resource areas approved by the Middleborough Conservation Commission (MCC) in an Order of resource Area Delineation (ORAD) issued on June 26, 2024. The SDEIR included a plan showing an 8,860-sf BVW replication area, which will mitigate BVW impacts at a 2:1 ratio.

According to the SDEIR, Isolated Land Subject to Flooding (ILSF) and Isolated Vegetated Wetlands (IVW) are located on the site. The Proponent delineated an area of IVW on the Phase 2 site which also meets the criteria for classification as ILSF because it contains a volume of greater than the equivalent of one-quarter acre-foot of runoff and a depth greater than six inches. The SDEIR asserts that another 29,400-sf area of IVW, which is located within the footprint of the proposed Phase 1 warehouse, does not meet the criteria for ILSF; however, the ORAD issued by the MCC did not make a finding with respect to this area. The SDEIR acknowledged that additional mitigation would be required if the MCC were to find that the area meets the criteria for ILSF. The jurisdictional status of the IVW under the federal Clean Water Act is also uncertain. The Proponent indicates that the IVW is unlikely to be jurisdictional under federal regulations; however, the ACOE has not made a determination in response to a request filed by the Proponent. If the IVW is found to be jurisdictional, its filling must be approved by MassDEP in a WQC.

According to MassDEP, a WQC is required for greater than 5,000 sf of cumulative BVW, IVW, and LUW fill for a single and complete project; therefore, the Proponent must submit an application for a WQC prior to construction of Phase 1 regardless of whether the Phase 1 impacts alone are greater than 5,000 sf (currently estimated as 4,430 sf as noted above). Furthermore, if the ACOE finds that the IVW on the Phase 1 site is jurisdictional, then impacts associated with Phase 1 will exceed 5,000 sf. As detailed below, the FSEIR should provide an update on the jurisdictional status of the IVW/ILSF area, describe any changes to the project design and mitigation measures, if necessary, and review the project's conformance with the requirements of the Wetland Regulations and WQC regulations. The Proponent should consult with MassDEP prior to filing the SFEIR for guidance on preparing the WQC application given the lack of specifics for Phase 2.

Traffic and Transportation

The DEIR included a transportation study, limited to Phase 1, generally consistent with the EEA/MassDOT *Transportation Impact Assessment (TIA) Guidelines* issued in March 2014. It described existing and proposed roadway, pedestrian, and bicycle conditions, public transportation availability, roadway and intersection volumes and roadway safety issues. The analysis reviewed future conditions and vehicular operations under No Build and Build scenarios using a seven-year planning horizon. The TIA analyzed the transportation impacts of the project in a study area including the following intersections:

- Wareham Street (Route 28) at County Road (Route 25);
- Wareham Street (Route 28) at Locust Street;
- Wareham Street (Route 28) at Spruce Street;
- Wareham Street (Route 28) at Pine Street;
- Spruce Street at Locust Street; and,
- Wareham Street (Route 28) at Site Driveway.

Vehicular access to the site will be provided by a new driveway, to be constructed in Phase 1, with an approximately 56-ft wide curb cut on Wareham Street (Route 28). Vehicular access to the Phase 2 site will be provided by an extension of the site driveway from the Phase 1 site to the west.

Trip Generation

Based on trip rates published in the Institute of Transportation Engineers' (ITE) *Trip Generation Manual*, 11th edition, using Land Use Code (LUC) 150 (Warehousing), Phase 1 will generate 1,586 adt, including 556 daily truck trips; as noted above, these revised estimates are slightly lower than the estimates of 1,618 adt including 558 truck trips provided in the ExNPC. Phase 1 will generate 157 trips in the AM peak period (including 19 truck trips) and 167 trips in the PM peak period (including 27 trucks). The project includes construction of a rail spur from the tracks along the east side of the property so that goods can be delivered to and transported from the site by rail. The Proponent estimates that three rail cars, each with the capacity of four trucks, will service the site each day. This level of rail service would eliminate 12 truck trips per day; however, for purposes of the analysis, no truck trips were deducted.

Traffic Operations

The DEIR provided peak period capacity analyses and level-of-service (LOS) designations for through traffic and each turning movement at study area intersections. The LOS reflects the overall operations of an intersection, including traffic speed, delay, and capacity. For urban intersections, LOS D reflects an acceptable level of operations; LOS E or F reflect significantly congested conditions and long delays.

Existing 2024 conditions were established using data collected in March 2024, including turning movement counts (TMCs) collected at study area intersections and automatic traffic recorder (ATR) counts collected on Wareham Street (Route 28) north and south pf the site driveway. The No Build 2031 condition includes an annual background growth rate of 1.0 percent, compounded annually, and the trips to be generated by three development projects in the area. Build 2031 conditions include the addition of project-generated trips to the No Build scenario. Employee vehicle trips were distributed using U.S. Census Journey-to-Work data, while all truck trips are expected to travel to and from I-495 via the closest interchange to the site, which is located 1.75 miles southeast of the site at County Road (Route 58). According to the DEIR, all study area intersections operate, or will operate, at LOS C or better under Existing 2024, No Build 2031, and Build 2031 scenarios. Project-generated traffic will cause minimal increases in delays at all study area intersections, and only one turning movement (southbound turns from County Road in the PM peak period) will decrease in LOS from No Build 2031 to Build 2031 conditions (a change from LOS B to LOS C).

As required by the Scope included in the ExNPC Certificate, the DEIR provided an analysis of Stopping Site Distance (SSD) and Intersection Sight Distance (ISD) at the proposed Site Driveway which determined that the proposed intersection design will provide a greater SSD and ISD that required by the American Association of State Highway and Transportation Officials (AASHTO). The DEIR included a Traffic Signal Warrant Analysis (TSWA) and an Intersection Control Evaluation (ICE) to determine if a traffic signal or other traffic control measure (such as a roundabout or STOP sign) is necessary at the intersection of the Wareham Street (Route 28) at Site Driveway. According to the

DEIR, the intersection did not meet any of the three relevant warrants for a traffic signal based on the results of the TSWA; in addition, the ICE determined that a STOP sign at the Site Driveway approach to Wareham Street (Route 28) was the appropriate intersection control measure. Comments provided by MassDOT concur with the proposed traffic control measure at the Wareham Street (Route 28) at Site Driveway intersection.

Safety

As required in the Scope for the SDEIR, the Proponent analyzed MassDOT crash data for the period 2016-2020 to assess safety at the study area intersections. The signalized intersection of Wareham Street (Route 28) at County Road (Route 25) had a higher-than-average crash rate (0.92 per million entering vehicles or MEV) and is classified as a Top 5% crash cluster for 2018-2020. According to the SDEIR, the majority of accidents occur during left turns from the southbound County Road (Route 58) approach to the intersection. To enhance safety at this intersection, the Proponent will a new signal phasing plan that would give both the northbound and southbound Route 58 approaches a protective green phase. As presented in the DSEIR, the proposed signal phasing plan would address safety concerns at the intersection but increase delays and lower the LOS of the intersection from LOS B to LOS C in the AM peak period and from LOS B to LOS D in the PM peak period. After consulting with MassDOT during the review period, the Proponent has also proposed to construct an eastbound left turn lane at the intersection; this mitigation measure will improve operations at the intersection so that it operates at LOS C or better during both peak periods, with shorter delays compared to implementation of the signal phasing alone. As requested by MassDOT, the Proponent should conduct a Road Safety Analysis (RSA) at the Wareham Street (Route 28) at County Road (Route 25), and the SFEIR should review safety improvements to be implemented by the Proponent.

Parking

The project includes construction of 930 employee parking spaces, a reduction of seven spaces compared to the ExNPC, and 131 trailer parking spaces, an increase of 19 spaces from the 112 trailer parking spaces proposed in the ExNPC. According to the SDEIR, the ITE guidelines for LUC 150 (Warehouse) recommend 366 spaces; however, the Town's zoning requires 928 spaces. The SDEIR identifies areas which contain 95 employee parking spaces and 52 trailer spaces that can be land banked. The land banked spaces would be constructed with subbase materials and utility infrastructure; however, the spaces would not be paved, and a layer of topsoil would be placed over the subbase and seeded. The SFEIR should include a clear commitment to land bank these spaces.

Transportation Demand Management (TDM)

The SDEIR identified a Transportation Demand Management (TDM) program that will be implemented to minimize single occupant vehicle (SOV) trips to and from the site, including the following measures:

- Designate a Transportation Coordinator who will oversee the implementation of the TDM plan;
- Provide an employee rider matching/ridesharing program to encourage carpooling;
- Provide an emergency Guaranteed Ride Home program for employees who participate

in ridesharing;
- Provide materials about the TDM program to employees initially at their orientation and routinely through web-based information, print materials, and promotional events;
- Provide on-site amenities, such as breakrooms and lunchrooms fitted with refrigerators, coffee machines, and microwaves, to minimize the need for employees to travel off site during the workday.

Transportation Monitoring Program

The Proponent will conduct an annual Traffic Monitoring Program (TMP) for a period of five years, beginning six months after occupancy of the full-build project. The goals of the monitoring program will be to evaluate the assumptions made in the EIR and the adequacy of the mitigation measures, as well as to determine the effectiveness of the TDM program. The TMP will include:

- Simultaneous automatic traffic recorder (ATR) counts at the site driveway for a continuous 24-hour period on a typical weekday;
- Weekday a.m. and p.m. peak period hour turning movement counts (TMCs) at the site driveway;
- Travel survey of employees at the site;
- Transit Ridership counts, if any; and
- Updates on the effectiveness of the TDM program.

Climate Change

Adaptation and Resiliency

As previously documented in the ExNPC, the MA Climate Resilience Design Standards Tool (the "MA Resilience Design Tool"), indicates that the project has a "High" exposure rating for urban and riverine flooding associated with extreme precipitation and for extreme heat based on the project's location. Based on the 50-year useful life identified for the project and the self-assessed criticality of the proposed building, the MA Resilience Design Tool report included in the ExNPC recommended a planning horizon of 2070 and a return period associated with a 10-year (10% annual chance) storm event when designing the project for extreme precipitation. According to the SDEIR, the proposed stormwater management system will be designed with the capacity to accommodate the current 24-hour, 100-year storm event with a precipitation depth of 8.78 inches; this exceeds the projected precipitation depth of the 2070 24-hour, 25-year storm event (7.9 inches) and is comparable to the precipitation depth of 8.9 inches of rainfall projected for a 2070 24-hour, 50-year storm event. According to the SDEIR, Phases 1 and 2 will have separate stormwater management systems; therefore, the proposed Phase 1 system will be designed only to accommodate runoff from the Phase 1 site.

The warehouse will have a first-floor elevation of 101 ft NAVD 88, the parking areas will be at elevation of 90 ft NAVD 88 or higher, and site driveways will be at a minimum elevation of 83 ft NAVD 88. The FEMA FIRM does not provide a BFE for the present-day floodplain; however, as mapped on plans included in the SDEIR, the floodplain boundary coincides with the 79- to 80-ft topographical contours on the existing conditions plans. Because of the difference in elevation between the Phase 1 project components and the present-day floodplain elevation, the Proponent indicates that

the project will not be subject to riverine flooding within its 50-year useful life. However, as current floodplain elevations may not fully capture future climate conditions, the Proponent is encouraged to consult best available data on anticipated future flood elevations.

The Phase 1 development will alter 53.1 acres, including 33.3 acres of tree clearing and creation of approximately 43 acres of impervious area. According to the SDEIR, the project will minimize urban heat island effect by leaving 21.1 acres of the 74.2-acre Phase 1 site in its current undeveloped condition. The 78.7-acre Phase 2 site will not be impacted by Phase 1 activities and will remain undisturbed until a project has been designed for that part of the site. The project will minimize tree removal by constructing a portion of the project within a 9.7-acre area which was previously logged and now consists of shrubs and saplings. The project includes replanting of 303 trees and 81 shrubs within the parts of the site that will be landscaped. In addition, the Proponent will conserve off-site rare species habitat.

Greenhouse Gas (GHG) Emissions

Stationary Sources

The SDEIR included an analysis of a proposed design of the warehouse with a propane-fueled heating system. During the review period, the Proponent committed to the use of a hybrid heating system, briefly described as Alternative 1 in the GHG analysis, in which electric air source heat pumps (ASHP) will be used to provide up to 25% of the peak space heating load, with propane heating used only for higher loads. In addition, the building will include ventilation energy recovery, low air infiltration, reduced lighting power density, enhanced building envelope with a weighted U value of vertical above-grade wall of 0.07, the use of ASHP to provide all space heating in office space in the warehouse, and construction of 80% of the roof to be solar ready. According to the Department of Energy Resources (DOER) no additional analysis of Phase 1 is necessary as long as these mitigation measures are incorporated into the project design. SFEIR should list all of the project's stationary source GHG mitigation commitments.

Mobile Sources / Air Quality

The SDEIR analyzed the project's mobile-source GHG emissions using the EPA's MOVES4 emissions model and data from the traffic study. The MOVES4 model calculates estimates of emissions for vehicles expressed in a volume per distance travelled. The analysis calculated GHG emissions in the transportation study area under 2024 Existing, 2031 No Build, 2031 Build, and 2031 Build with Mitigation scenarios. Under 2024 Existing conditions, GHG emissions from mobile sources in the transportation study area are 3,549 tpy; due to expected improvements vehicle emissions technology and increased use of electric vehicles, emissions under the 2031 No Build scenario are expected to be reduced to 3,140 tpy. Project-generated traffic as modeled in the 2031 Build scenario will increase GHG emissions by 19% (608 tpy) to 3,749 tpy, which would increase emissions above Existing conditions. The 2031 Build with Mitigation scenario includes the signal phasing at the Route 28 at Route 58 intersection proposed as roadway safety mitigation in the SDEIR. The signal phasing was designed to allow vehicles to make turns while oncoming traffic is stopped. Because the signal phasing would increase vehicle idling as vehicles are stopped at the signal, the analysis in the SDEIR showed that it would cause mobile-source GHG emissions to increase by 10 tpy compared to the 2031 Build scenario or approximately 210 tpy (6%) compared to 2024 Existing conditions. As noted above, the Proponent

has proposed to also construct a turning lane at the intersection of Route 28 at Route 58 which is anticipated to reduce delays. The SFEIR should review the effect of the turning lane on the project's mobile-source GHG emissions. I note that the SDEIR is inconsistent with respect to the Proponent's commitment to provide electric vehicle (EV) charging infrastructure. Project plans (Sheets C122 and C124) show a total of 48 EV charging stations; however, the text of the SDEIR refers only to 48 EV-ready parking spaces. The project's commitment to provide EV charging stations should be confirmed in the SFEIR. Given the project's significant GHG impacts due to land alteration and vehicle emissions, and its high parking supply, the Proponent should commit to provide the 48 EV charging stations shown on the project plans and an additional number of EV-ready spaces.

The SDEIR included the results of a mesoscale analysis of the project's mobile-source air emissions under 2024 Existing, 2031 No Build, 2031 and Build 2031 conditions using data from the transportation study. As shown below, project-generated vehicles will increase emissions of pollutants in the transportation study area by well below 1 tpy. Emissions of NOx, VOC, and DPM will be lower or equal under 2031 Build conditions than they are under 2024 Existing conditions; PM_{10} levels are shown to increase slightly from Existing conditions. As noted above, the SDEIR indicated that mobile source GHG emissions will increase above Existing conditions as a result of the project.

Table 1. Mesoscale Analysis Results (tpy)

Pollutant	Existing	No Build	Build	Project generated
NOx	2.5	1.1	1.4	0.3
VOC	1.9	1.6	1.8	0.2
PM_{10}	0.4	0.4	0.5	0.1
$PM_{2.5}$	0.1	0.1	0.1	0.02
DPM	0.1	0.03	0.04	0.01

Land Alteration

The project is subject to the MEPA GHG Policy because it exceeds thresholds for a mandatory EIR. Phase 1 of the project will alter approximately 53 acres of land, including approximately 33.3 acres of forested land. In accordance with the GHG Policy, projects that alter over 50 acres of land are generally required to analyze the carbon associated with land and soil disturbance during the construction period and loss of carbon sequestration to develop an estimate of GHG emissions associated with land alteration.

The SDEIR included an analysis of the carbon contained in above- and below-ground biomass and soil, and the loss of future carbon sequestration resulting from proposed land clearing. According to the SDEIR, the area to be disturbed includes 33.3 acres of forested land, 9.7 acres of land that was previously forested and now consists of shrubs and sparse tree growth, 2.19 acres of gravel paths, and 0.1 acres of existing impervious area. The Proponent used the U.S. Forestry Service's EVALIDator, which provides forestry data including estimates of carbon in forested areas, to estimate the carbon in above- and below ground tree biomass, soil, and dead woody matter in the forest at the site based on the prevalent forest type. As shown in Table 2, land alteration associated with the project will result in the one-time loss of 15,493 metric tons of carbon dioxide (MT CO_2).

Table 2. One-time loss of carbon due to land alteration (Table 9-10 in the SDEIR)

Land Cover	Area (acres)	$mTCO_2/Ac$	CO_2e (Tons)
Wooded (above and below ground)	33.3	160.04	5,329
Wooded (Soil)	33.3	226.8	7,553
Meadow/Sparse/Previously Logged (Soil)	9.7	226.8	2,200
Dead Woody Matter	43	9.54	410
Total			15,493

According to the SDEIR, the EPA's *Inventory of GHG Sinks and Emissions: 1990-2019* reports an average sequestration rate for forests of 2.26 MT CO_2 per acre per year. Based on the clearing of 33.3 acres of forest, the project will cause a loss of sequestration potential of 75 MT CO_2 per year, or 3,750 MT CO_2 over the 50-year lifespan of the project. Therefore, the project's total carbon impact over 50 years will be 19,243 MT CO_2.

According to the DEIR, the project will mitigate the loss of tree carbon and carbon sequestration potential by replanting 303 trees and 81 shrubs within the 5.9 acres of the site that will be landscaped. The SDEIR also identified the conservation of 22.16 acres of land to mitigate impacts to rare species habitat from Phase 1 as a mitigation measure that would preserve 3,069 MT CO_2 in existing trees and an additional 2,504 MT CO_2 over the 50-year lifespan of the project that would be sequestered in the 22.16 acres. This mitigation is insufficient to fully offset the 19,243 MT CO_2 impact estimated above. As noted above, the Proponent will be required to preserve approximately 138 acres of rare species habitat, including approximately 100 acres for Phase 1 impacts. The SFEIR should provide a revised estimate of the carbon sequestration to be provided by rare species habitat to be conserved by the Proponent. The SDEIR also indicated that previously-harvested wood from the site was used as lumber, and that the Proponent will encourage the construction contractor continue that practice and document the amount of wood that was reused. As detailed below, the SFEIR should identify additional measures to mitigate the project's carbon impacts, including tree plantings, land conservation, and facilitating reuse of wood from trees cleared at the site. The Proponent is encouraged to identify off-site locations that lack tree canopy, especially in EJ populations that are vulnerable to extreme heat effects, for additional locations for tree planting efforts. Higher commitments to EV trucking charging infrastructure, solar installation of warehouse rooftop, and contributions to land conservations programs established by the Commonwealth or conservation organizations to meet climate goals could be considered. The Proponent is encouraged to consult with MEPA and the EEA Land Team to solicit ideas for better mitigation to offset forest clearing impacts. Given the scale of land and forest clearing proposed, the SFEIR should also continue to study alternatives that minimize land alteration to the maximum extent practicable, with the aim of clearing mature trees to the minimum needed to construct the required building space and associated infrastructure while preserving existing tree canopy.

SCOPE

General

The SFEIR should follow Section 11.07 of the MEPA regulations for outline and content and provide the information and analyses required in this Scope. The Scope should not be addressed in isolation, but rather, in the context of the Review of the SDEIR section of this Certificate. It should clearly demonstrate that the Proponent will avoid, minimize and mitigate Damage to the Environment to the maximum extent practicable through project alternatives and design.

Project Description and Permitting

The SFEIR should include a table which provides an updated and definitive calculation of the project's environmental impacts for both Phases 1 and 2 (and also Phase 1 separately), including land alteration; impervious area; rare species habitat alteration; unadjusted and adjusted trip generation; parking supply; impacts to specific wetland resource areas; water use; and wastewater generation under proposed conditions, and explain any changes in the impact estimates provided in the ExNPC and SDEIR (such as whether the differing estimates reflect design changes or new measurements). The SFEIR should provide a final and definitive estimate of project impacts and consistently use these estimates to update discussion in all sections of the document.

The SFEIR should include updated site plans depicting existing and post-development conditions at a legible scale which identify site grades, buildings, impervious areas, stormwater and utility infrastructure, above- and below-ground structures, and resiliency and other mitigation measures. It should describe, and show on plans, any work or areas impacted in Phase 1 that will facilitate extension of the driveway to the Phase 2 site, and a conceptual route for a wastewater connection between Phase 1 and the treatment facility to be constructed in Phase 2. The SFEIR should identify any changes to the project since the filing of the SDEIR. The SFEIR should identify and describe State, federal and local permitting and review requirements associated with the project, analyze applicable statutory and regulatory standards and requirements, and provide a discussion of the project's consistency with those standards. The SFEIR should include responses to comments received on the SDEIR and provide draft Section 61 findings.

The information and analyses identified in this Scope should be addressed within the main body of the SFEIR, and not only in appendices, responses to comments, or by reference to information previously provided in the ExNPC or SDEIR. In general, appendices should be used only to provide raw data, such as traffic data and drainage calculations, that is otherwise adequately summarized with text, tables, and figures within the main body of the SFEIR. Information provided in appendices should be indexed with page numbers and separated by tabs, or, if provided in electronic format, include links to individual sections. The individual sections should be clearly identifiable and labeled in a manner that reflects the contents of the section. Any references in the SFEIR to materials provided in an appendix should include specific page numbers to facilitate review. The SFEIR should include a self-contained response to comments and the Scope and not simply cross-reference information previously provided in the ExNPC or SDEIR unless it is adequately restated or summarized in the SFEIR.

Alternatives Analysis

The SFEIR should evaluate the feasibility of reducing the number of proposed parking spaces and of land banking more than the 95 vehicle spaces and 52 trailer spaces evaluated in the SDEIR. As noted, the SFEIR should contain a clear commitment to land banking and specify the final number of spaces to be land banked.[6] As detailed below, the SFEIR should provide an alternatives analysis consistent with the requirements of the WQC Regulations that evaluate measures to minimize BVW impacts. The SFEIR should continue to study alternatives to minimize land and forest clearing, and clearly demonstrate that the project will engage in the minimum amount of clearing needed to construct required buildings and associated infrastructure while preserving tree canopy and associated carbon benefits to the maximum extent practicable. The SFEIR should discuss alternative site layout designs that could result in less forest clearing and identify reasons for dismissing any such alternatives.

Environmental Justice

The SFEIR should review public engagement measures conducted by the Proponent since the filing of the SDEIR and describe measures that will be implemented on an on-going basis through the construction period. The Proponent should describe efforts made to engage with the EJ Population located along project truck routes (Census Tract 5451, Block Group 1) to ensure previous engagement strategies (e.g., project flyer distribution, newspaper notices, etc.) adequately informed residents about the project's impacts with regards to increases in diesel truck traffic.

The SFEIR should provide the updated analysis of the project's impacts on air quality in EJ populations based on the revised data that was provided to the MEPA Office during the review period, but not distributed. The updated analysis indicated that the worst-case intersection is Route 28 at Route 58, which is located within an EJ population. The SFEIR should include the revised analysis of project-generated $PM_{2.5}$ and NOx emissions at study area intersections prepared during the review period. The SFEIR should provide an analysis of the air quality impacts to the EJ population in Census Tract 5451, Block Group 1, based on the revised analysis. It should also assess any reduction in emissions associated with the proposed addition of a turning lane and signal phasing that in combination are expected to reduce delays compared to Build 2031 conditions without mitigation. If increases in air pollutants are anticipated, this should be disclosed.

Notwithstanding mitigation proposed for traffic impacts, it is notable that 100% of project generated truck trips are anticipated to pass through the EJ population located near the Route 28 at Route 58 intersection, which is identified as the "worst case" intersection for traffic impacts and is the only roadway connecting to the I-495 interchange. At least one environmental indicator (ozone) appears elevated at this location as compared to the statewide rate, and multiple vulnerable health EJ criteria are implicated as show in the DPH EJ Tool. Given existing environmental burdens and the fact that 100% of trucks will traverse this location, the SFEIR should consider mitigation that specifically targets the EJ population at issue with measures such as additional tree plantings, public health contributions, and other community benefits measures to offset and mitigate the effects of added diesel emissions.

[6] I note that another project in Middleborough which recently completed MEPA review (EEA# 16824, Campus 44) included in its FEIR a commitment to land bank a significant number of parking spaces.

Rare Species and Biodiversity

The SFEIR should provide a revised assessment of the project's impacts to rare species habitat and required mitigation measures, consistent with full compliance of the MESA regulations and NHESP's comment letter. It should provide an update on proposed measures to meet the performance standards for a CMP, including construction-period turtle protection, habitat preservation, and other measures to achieve a long-term Net Benefit for Eastern Box Turtle. The SFEIR should include additional information about how each phase of the project may affect biodiversity values, as represented by all Biomap components present at the site, and how the project will be designed to maintain and enhance all of these values; the Proponent should consult with the MEPA office regarding this information prior to filing the SFEIR.

Wetlands

The FEIR should provide an updated estimate of the project's impacts to wetland resource areas subject to the Wetland Regulations or WQC Regulations based on design refinements, updated surveys or calculations, and jurisdictional determinations. The SFEIR should review the performance standards applicable to each project component that impacts wetlands and provide an analysis to demonstrate that the project will meet regulatory requirements. As requested by MassDEP, the SFEIR should include an analysis of alternatives that minimize impacts to BVW. Prior to filing the SFEIR, the Proponent should consult with MassDEP regarding the additional information about Phase 1 and Phase 2 that should be provided in the SFEIR and WQC application, and the process for amending the Phase 1 WQC or otherwise seeking approval for Phase 2 activities. The SFEIR should report on the result of such consultation and include appropriate Section 61 Findings that align with requirements for the WQC.

Traffic and Transportation

As requested by MassDOT, the Proponent should conduct an RSA at the intersection of Route 28 at Route 58, and commit to implement safety improvement measures identified in the RSA. The SFEIR should provide draft Section 61 Findings that align with the anticipated permitting of Phase 1 by MassDOT.

Climate Change

As noted above, the SFEIR should continue to study alternatives to minimize the extent of land and forest clearing. The SFEIR should evaluate additional mitigation measures to address the project's impervious area and tree clearing. It should evaluate additional measures to minimize increased heat and lost carbon sequestration caused by construction of new impervious area and land clearing; such measures may include conservation of land in excess of that required for rare species habitat mitigation, and increase tree planting efforts, including in additional off-site locations. The SFEIR should provide review measures that will be implemented to maximize the reuse of wood harvested from the site in a manner that provides long-term carbon sequestration. Higher commitments to EV charging infrastructure for trucks and autos, solar installation of warehouse rooftop, and contributions to land conservations programs established by the Commonwealth or conservation organizations to meet climate goals could be considered. The Proponent is encouraged to consult with MEPA and the EEA Land Team to solicit ideas for better mitigation to offset forest clearing impacts. The SFEIR should

provide a revised calculation of total carbon benefits associated with mitigation for land and forest clearing impacts, and indicate whether mitigation is sufficient to fully offset the 19,243 MT CO_2 impact estimated above. The SFEIR should review the effect of the proposed turning lane on the project's mobile-source GHG emissions The final GHG mitigation commitments, including design measures to minimize GHG measures from the warehouse heating and other systems, mobile-source emissions, and final percentage of cleared wood dedicated to reuse, should be reported in the GHG Self-Certification to be filed with the MEPA Office prior to construction.

Mitigation and Draft Section 61 Findings

The SFEIR should include a separate chapter summarizing all proposed mitigation measures, including construction-period measures for Phase 1, together with any common mitigation for both phases in accordance with any requirements of the WQC, CMP, or other permitting. This chapter should also include a comprehensive list of all commitments made by the Proponent to avoid, minimize and mitigate the environmental and related public health impacts of the project/Phase 1, and should include a separate section outlining mitigation commitments relative to EJ populations. The filing should contain clear commitments to implement these mitigation measures, estimate the individual costs of each proposed measure, identify the parties responsible for implementation, and contain a schedule for implementation. The list of commitments should be provided in a tabular format organized by subject matter (traffic, water/wastewater, GHG, EJ, etc.) and identify the Agency Action or Permit associated with each category of impact. Draft Section 61 Findings should be separately included for each Agency Action to be taken on the project, including any Partial Section 61 Findings that may be allowed in accordance with the SRP and individual permitting requirements. The filing should clearly indicate which mitigation measures will be constructed or implemented based upon project phasing to ensure that adequate measures are in place to mitigate impacts associated with each development phase.

The SFEIR should include a commitment to provide a GHG self-certification for Phase 1 to the MEPA Office upon construction of the building signed by an appropriate professional indicating that all of the GHG mitigation measures, or equivalent measures that are designed to collectively achieve identified reductions in stationary source GHG emission and transportation-related measures, have been incorporated into the project. If equivalent measures are adopted, the project is encouraged to commit to achieving the same level of GHG emissions (i.e., "carbon footprint") identified in the Preferred Alternative expressed as a volumetric measure (tpy) in addition to a percentage GHG reduction from Base Case. The commitment to provide this self-certification in the manner outlined above should be incorporated into the draft Section 61 Findings included in the SFEIR.

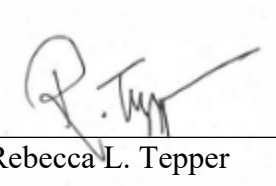
Responses to Comments

The SFEIR should contain a copy of this Certificate and a copy of each comment letter received on the SDEIR. The SFEIR should contain a direct response to the scope items in this Certificate and to comments received on the SDEIR. To ensure that the issues raised by commenters are addressed, the SFEIR should also include direct responses to comments to the extent that they are within MEPA jurisdiction. This directive is not intended, and shall not be construed, to enlarge the scope of the SFEIR beyond what has been expressly identified in this certificate.

Circulation

The Proponent should circulate the SFEIR to each Person or Agency who previously commented on the SDEIR, each Agency from which the project will seek Permits, Land Transfers or Financial Assistance, and to any other Agency or Person identified in the Scope. The Proponent may circulate copies of the SFEIR to commenters other than Agencies in a digital format (e.g., CD-ROM, USB drive) or post to an online website. However, the Proponent should make available a reasonable number of hard copies to accommodate those without convenient access to a computer to be distributed upon request on a first come, first served basis. A copy of the SFEIR should be made available for review in the Middleborough Public Library.

March 17, 2025
Date



Rebecca L. Tepper

Comments received:

02/06/2025 Buzzards Bay Coalition
02/10/2025 Middleborough Conservation Commission
02/24/2025 Massachusetts Department of Transportation (MassDOT)
02/24/2025 Grafton and Upton Railroad Company
03/04/2025 Natural Heritage and Endangered Species Program (NHESP)
03/07/2025 Massachusetts Department of Environmental Protection (MassDEP)- Southeast Regional Office (SERO)
03/07/2025 Massachusetts Department of Energy Resources (DOER)

RLT/AJS/ajs

February 6, 2025

Secretary Rebecca Tepper
Executive Office of Energy and Environmental Affairs
100 Cambridge Street
10th Floor
Boston, MA 02114
Attn: Alexander Strysky, Massachusetts Environmental Policy Act Office

Re: Middleborough Logistics Park - Supplemental Draft Environmental Impact Report, EEA #13771

Dear Secretary Tepper,

The Buzzards Bay Coalition ("Coalition") has reviewed the Supplemental Draft Environmental Impact Report ("SDEIR"), EEA #13771 for the Middleborough Logistics Park (the "Project") and offers the following comments for your consideration.

The Buzzards Bay Coalition is a membership-supported nonprofit organization dedicated to the restoration, protection and sustainable use and enjoyment of Buzzards Bay and its watershed including the headwaters of the Sippican River in Middleborough, Massachusetts. The Sippican River is a critical tributary to the Weweantic River. The Weweantic River is the largest freshwater source to all of Buzzards Bay and has been the site of major restoration and dam removal project.

Buzzards Bay is one of the most ecologically productive habitats in the Commonwealth. The Coalition works to improve the health of the Bay ecosystem for the public through education, conservation, research and advocacy.

Summary of Project

The Project currently under review proposes to construct a ~ 928,000 square foot warehouse on 153 acres in Middleborough, Massachusetts at the headwaters of the Sippican River. The Project is proposed in two phases. Phase 1 will create 44 acres of impervious surface and an additional 27 acres of impervious is anticipated in Phase 2. Phase 1 estimates a total wetland impact of 29,370 square feet and phase 2 estimates a total wetland impact of 33,000 square feet for a total project wetland resource impact of 62,370 square feet.

The entire project site is mapped Priority Habitat for the Eastern Box Turtle which is designated as a Species of Special Concern.

The Project will generate 17,821 new gallons of wastewater for on site disposal.

Previous Evaluations and Authorizations of Sippican Park are Irrelevant

Any approvals or designations secured for Sippican Park, a concept that is now nearly twenty years old, must not apply to the current Project. The SDEIR states that the project had received a previous Secretary's Certificate as the Sippican Park Development in 2008. The Sippican Park Development sought to create a 10-lot industrial/commerce business park with approximately 392,000 square feet of floor space. Phase 1 alone, of this current Project is nearly three times larger than Sippican Park. The magnitude of the impacts of this Project are much greater. Any prior conclusions made on Sippican Park are irrelevant.

This is particularly important when evaluating impacts to endangered species. Today, the entirety of the site is listed as Priority Habitat. The SDEIR incorrectly assumes that the 56.2 acres of Phase 1 is grandfathered because the site was subject to a previous filing nearly twenty years ago.

Resource Impacts from Both Phases Must Be Considered Together

The impacts of this Project will be substantial. Allowing the Project to separate the evaluation of resource impacts into smaller phases will allow the impacts to appear minimized. Instead, agencies must consider the comprehensive nature of the project and evaluate the cumulative impacts together. The following is a list of reasons why both phases must be considered together:

- Connectivity is critically important for biodiversity. Evaluating these projects in two phases threatens to segment and cause further impact.
- The total amount of wastewater generated requires a state groundwater discharge permit and not a local permit from the Middleborough Board of Health. The SDEIR indicates in Table 1-3 that a mere subsurface disposal system permit is required from the Middleborough Board of Health. This is in error. The combined wastewater generation at the facility will exceed 10,000 gallons per day and require a state groundwater discharge permit. This was confirmed in the Secretary's Certificate dated May 17, 2024. This permit will require a hydrogeo evaluation, enhanced nitrogen removal and nitrogen offsets as it is a new discharge of wastewater into a watershed of a nitrogen impaired waterbody, the Weweantic River.
- A comprehensive evaluation of wetland loss for both phases may show an impact to downstream water quality. Aggregating the wetland loss also impacts permitting.

Conclusion

For the above stated reasons, the Coalition requests that the Secretary ensure that this project is being evaluated independently from Sippican Park and that the cumulative impacts of all phases are assessed at this early stage to minimize resource loss.

Sincerely,



Korrin N. Petersen, Esq.
Vice President of Clean Water Advocacy
petersen@savebuzzardsbay.org

Cc: Massachusetts Department of Environmental Protection
Town of Middleboro Conservation Commission
Town of Middleboro Board of Health

Town of Middleborough

CONSERVATION COMMISSION

20 CENTRE STREET
MIDDLEBOROUGH, MASSACHUSETTS 02346

PHONE 508-946-2406
FAX: 508-946-2309

February 10, 2025

Rebecca Tepper, Secretary (via email)
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114
Attn: Alexander Strysky, Massachusetts Environmental Policy Act Office (via email)

RE: MEPA SDEIR: EEA#13771 – Middleborough Logistics Park - Off Wareham Street (Route 28) Middleborough, MA

Dear Secretary Tepper:

On behalf of the Middleborough Conservation Commission ("MCC"), I am submitting this letter regarding the above-mentioned Massachusetts Environmental Policy Act (MEPA) Supplemental Draft Environmental Impact Report (SDEIR) under EEA#13771.

We have the following comments and questions:

1) Phases I & II should both be included as part of this SDEIR to see the full scope of impacts on the wetlands and broader ecosystem.
2) The previous permits with the Middleborough Conservation Commission (MCC) for the proposed Sippican Commerce Park have since expired and should not be referenced in this SDEIR.
3) Under Table 1-3 there is a typo under the Order of Resource Area Delineation (ORAD) referenced – It says "SE220-16363" and instead should be labeled "SE220-1636". No Order of Conditions Permit has been issued as a Notice of Intent has not been filed with the MCC as of 2/10/2025.
4) The ORAD referenced under SE220-1636 only approves the following: bordering vegetated wetland (BVW), Isolated Land Subject to Flooding (ILSF) (D-Series), and Riverfront Area (Bank and Mean Annual high-water line (MAHW)). The Isolated Vegetated Wetland (IVW) (E-Series) depicted on plans was deemed inaccurate because our peer reviewer wanted additional information for a final determination if the area was Isolated Land Subject to Flooding. (See attached materials).
5) The IVW (E-Series) will need to be readdressed when a Notice of Intent is filed with the MCC.

6) It is suggested that the IVW (E-Series) should be shown on all the plans submitted under the SDEIR. It seems that not all the plans submitted under the SDEIR are showing this IVW.
7) Under Section 3.0: Land Alteration – The applicant should be aware that any material proposed to be taken off site will require an earth removal permit with the Middleborough Select Board.
8) Also, under Section 3.0 – There should be a plan showing the conditions prior to the tree cutting that took place and then a plan showing after the cutting. This cutting was conducted without any permits and some of the cutting may have occurred in the wetland resource area 100-foot buffer zone.
9) Under Section 3.2.1 Tree Conservation – It states that 246 deciduous trees, 57 evergreen trees and 81 shrubs however is there a planting plan with details for this?
10) Under Section 3.3 Site History of Logging - Note that historic logging roads were reviewed under a Request for Determination of Applicability in 2023 with the MCC so that some minor trimming could take place for the wetland scientist to conduct a wetland resource area delineation. It would be good to have more information on this historic logging.
11) Under Section 4.0 Rare Species – MEPA filing seems pre-mature without having the final Conservation Management Permit (CMP) from the Natural Heritage & Endangered Species Program (NHESP) under the Massachusetts Endangered Species Act (MESA).
12) Also, under Section 4.0 – The cutting of trees on site should include Phase I and II for the MESA filing/permit application.
13) Also, under Section 4.0 - Not sure that the grandfathering applies. This is a totally different project than what was proposed almost 20 years ago. Currently the SDEIR assumes 56.2 acres is grandfathered. We don't agree.
14) Also, under Section 4.0 – More than 4.55 Acres (1.5:1) and 14.77 Acres may need to be mitigated depending on the determination on grandfathering. It is speculative at this point in time without the MESA CMP.
15) Under Section 4.2 Rare Species Mitigation & Habitat Conservation – (M109, Lots 1932 & 4675) 44 Acres is not protected yet. In 2024 searching for other land to protect we gave the applicant the contact information of the Land Acquisition Agent for the Department of Fish & Game.
16) Also, under Section 4.2 – Still need to do a wildlife habitat evaluation for the Eastern Box Turtle (*Terrapene carolina carolina*).
17) Also, under Section 4.2 – "Multiple Open Space Parcels will be placed under permanent protection via a CR or deeded in fee to the Town of Middleborough." The MCC has not officially vote to accept. We are not aware of what portion of land this would include. The MCC would also need to do due diligence (Title Exam, ESA Phase I etc...) if they were to accept the land in fee.
18) Under Section 4.3 Biodiversity – Although no regulatory influence here, these mapped areas are important, especially when evaluating land protection and land development. Another reason to have a wildlife habitat evaluation.
19) Under Section 4.3.2 Critical Natural Land – This section does not mention actual acreage to be protected only "large amounts" of wetland and buffer zone. Actual acreage should be noted.
20) Under Section 4.3.3 Advancement of Natural Working Lands Goals – This section mentions protecting "at least 63+/- acres of existing forest, wetland and forested wetland" What is the breakdown of each land types in acres?

21) Under Section 5.0 Resource Areas – Please see the attached Order of Resource Area Delineation under DEP File # SE220-1636 and other supporting documentation. The MCC did not agree with IVW (E-Series), the MCC and their peer reviewer believe it is ILSF. Again, this will need to be re-evaluated during the Notice of Intent process.
22) On page 53 under Table 5-1 – FEMA Floodplain should also say Bordering Land Subject to Flooding per the MA Wetlands Protection Act regulations. Also, the ILSF (D-Series) should be flagged and not just labeled as such on the plan per the elevation. Again, the MCC did not approve IVW (E-Series) as being IVW in the ORAD.
23) Under Section 5.1.2 ILSF – The D-Series was flagged and in not noted as "approximate". The E-Series states that it did not meet the criteria for ILSF, however the MCC's peer reviewer disagreed and wanted more of the microtopography included. See attached peer review report. Per the MCC, the E-Series has not been agreed to yet.
24) Under Section 5.1.4 Riverfront Area – It states that 27% of the riverfront area is degraded. There will need to be either 1:1 Restoration or 2:1 Mitigation for this under 310 CMR 10.58(5)(f) and (g).
25) Under Section 5.2 Impact to Wetland Resource Areas – The MCC does not agree that the E-Series is IVW. This still need to be determined if ILSF. Also, this is shown as a potential vernal pool on the Natural Heritage & Endangered Species Program data layer for potential and certified vernal pools.
26) Also, under Section 5.2 – ILSF D-Series and IVW that is approximately shown on plans was approved under the ORAD issued by the MCC.
27) Also, under Section 5.2 – The proposed riverfront area impacts are 38%, over the 10% allowed for new construction.
28) Under Section 5.2.2 ILSF Impacts – The statement that there are no ILSF areas in Phase I is not accurate at this time.
29) Under Section 5.2.3 Riverfront Impacts – Should show in chart form – the existing degraded, proposed degraded and proposed restoration & mitigation data with the % of total riverfront area that exists on site. There is not enough information in Figure 5-2.
30) Also, under Section 5.2.3 – There is a statement made that this is redevelopment and improving the riverfront area. This should not be considered redevelopment.
31) Also, under Section 5.2.3 – Second to last paragraph on page 5-11 (page 62) it mentions that the Order of Conditions (OOC) under DEP File #SE220-1002 had a previously approved roadway connection. That OOC is expired and was before the 2008 stormwater management regulations so the new project should not be compared to this older project.
32) Also, under Section 5.2.3 – It is stated that 7% (8,260 s.f.) of the total riverfront area is going to be restored. This should be at a 1:1 ratio (24,940 s.f. of new disturbance with 8,260 s.f. of restoration does not equal a 1:1 ratio).
33) Also, under Section 5.2.3 – Page 5-12 (page 63) – still looking to do mitigation, this needs to be addressed per 310 CMR 10.58 (5) (f) or (g). Should show this information in chart form.
34) Also, under Section 5.2.3 – Page 5-13 (page 64) - Stated that no offsite or onsite mitigation is being proposed at this time but will seek mitigation opportunities. This should have been determined prior to applying under the MEPA process.

35) Under Plan Figure 5-3 – 2,875 s.f. of BVW is proposed to be filled for what reason? Under the limited project status? Plan also notes IVW (Non-JD) – this was not determined by the MCC and is still awaiting a determination from US Army Corps of Engineers.
36) Under Section 5.3 Mitigation for Wetland Impacts – 5.3.1 – Mitigation for BVW Impacts – It is agreed that Conservation Agent, Patricia Cassady stated to do 2:1 BVW mitigation rather than create cranberry bog to cranberry bog mitigation.
37) Also, under Section 5.3 – 5.3.1 – Any wetland mitigation proposed will need to be approved by the MCC under an OOC.
38) Also, under Section 5.3 – 5.3.1 – BVW mitigation for Phase I & II should be determined and detailed in the SDEIR.
39) Under Section 5.4 Consistency with Stream Crossing Standards – The applicant should still detail this in the SDEIR as the project should not be segmented.
40) Under Section 6.0 Stormwater Management – This will be further reviewed when a Notice of Intent is filed with the MCC. Typically, if they are also going to the local Planning Board and/or the Zoning Board of Appeals the MCC will rely on that peer review.
41) Under page 15-35 & 36 (Page 275) MCC Comment 10 – Should be state that it was an ORAD and not an OOC as mentioned for DEP File #SE220-1636.
42) Also, under age 15-36 (Page 275) MCC Comment 12 – IVW (E-Series) is a Potential Vernal Pool so this should be evaluated again through a Notice of Intent with the MCC.
43) Under the Stormwater Report – Again the project Phase I & II should be looked at together for the stormwater management and no segmented.
44) Stormwater Checklist will need to be stamped by a P.E. when submitted under the Notice of Intent to the MCC.

Sincerely,

Patricia J. Cassady, Agent
For the Middleborough Conservation Commission

Cc: Middleborough Department of Public Works/Water Division (All via email)
Middleborough Health Department
Middleborough Historical Commission
Middleborough Planning Board
Middleborough Select Board
Middleborough Zoning Board of Appeals

Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Monica Tibbits-Nutt, Secretary & CEO

massDOT
Massachusetts Department of Transportation

February 24, 2025

Rebecca Tepper, Secretary
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114-2150

RE: Middleborough: Middleborough Logistics Park – SDEIR
(EEA #13771)

ATTN: MEPA Unit
Alexander Strysky

Dear Secretary Tepper:

On behalf of the Massachusetts Department of Transportation, I am submitting comments regarding the Supplemental Draft Environmental Impact Report for the proposed Middleborough Logistics Park in Middleborough as prepared by the Office of Transportation Planning. If you have any questions regarding these comments, please contact J. Lionel Lucien, P.E., Manager of the Public/Private Development Unit, at (857) 368-8862.

Sincerely,

David J. Mohler
Executive Director
Office of Transportation Planning

DJM/jll

Ten Park Plaza, Suite 4160, Boston, MA 02116
Tel: 857-368-4636, TTY: 857-368-0655
www.mass.gov/massdot

cc: Jonathan Gulliver, Administrator, Highway Division
Carrie Lavallee, P.E., Chief Engineer, Highway Division
Mary Joe Perry, District 5 Highway Director
James Danila, P.E., State Traffic Engineer
Planning Board, Town of Middleborough
Southeast Regional Planning and Economic Development District (SRPEDD)

Maura Healey, Governor
Kimberley Driscoll, Lieutenant Governor
Monica Tibbits-Nutt, Secretary & CEO

massDOT
Massachusetts Department of Transportation

MEMORANDUM

TO: David Mohler, Executive Director
Office of Transportation Planning

FROM: J. Lionel Lucien, P.E, Manager
Public/Private Development Unit

DATE: February 24, 2025

RE: Middleborough: Middleborough Logistics Park– SDEIR
(EEA #13771)

The Public/Private Development Unit (PPDU) has reviewed the Supplemental Draft Environmental Impact Report (SDEIR) for the Middleborough Logistics Park (the "Project") in Middleborough prepared by Epsilon Associates, Inc. on behalf of South Coast Logistics Park LLC (the "Proponent"). The Project Site covers approximately 147 acres, including around 67 acres designated for development as Phase I and approximately 80 acres for Phase II.

The Project previously submitted an Expanded Notice of Project Change (ExNPC) which was duly noticed in the Environmental Monitor on April 10, 2024, for which the Secretary of Energy and Environmental Affairs issued a Certificate on May 17, 2024, requiring the Proponent to prepare a SDEIR. Additionally, the Proponent has requested a Special Review Procedure (SRP) to allow for a deferred review of Phase 2.

Since the last MEPA submission, the Proponent has acquired additional parcels, resulting in an expansion of the Project Site by about 5.85 acres. Consequently, the boundaries for both Phase I and Phase II have been modified from the initial review. The current proposed Project includes the construction of a single warehouse with approximately 928,000 square feet (sf) and parking for automobiles and trucks. The site layout has also been optimized, and the parking lots have been restructured to improve vehicle flow and maximize capacity. The total number of loading docks has increased by four, bringing the total to 160 loading docks. Although the optimization of the site layout and enhancements to the parking islands have resulted in a reduction of 21 parking spaces, trailer parking has increased slightly to a total of 136 spaces.

The SDEIR includes a Transportation Impact Assessment (TIA) prepared in conformance with the current *MassDOT/EOEEA TIA Guidelines*. The TIA includes a comprehensive assessment of the transportation impacts of the Project as well as intersection operations, safety, and bicycle, pedestrian, and transit modes. The TIA generally conforms to the scope of ExNPC and is generally responsive to MassDOT commentary.

Ten Park Plaza, Suite 4160, Boston, MA 02116
Tel: 857-368-4636, TTY: 857-368-0655
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Trip Generation

To estimate the trip generation for the Project, the TIA has considered several warehouse/industrial land use codes (LUC) from the Institute of Transportation Engineers' (ITE) *Trip Generation Manual (11th Edition)* because specific tenants for the Project have not yet been identified. Following consultation with MassDOT and a comprehensive review of similar projects, the Proponent has selected ITE LUC 150 (Warehouse) as the most appropriate to reflect the proposed site land use. Accordingly, Phase I of the Project is estimated to generate a total of 1,586 vehicle trips per day, which includes 1,030 auto and 556 truck trips. The total weekday morning peak hour trips are 157 and the total weekday evening peak hour trips are 167.

Prior to the commencement of any portions of Phase 2, the Proponent must file a Project Commencement Notice (PCN). The PCN shall include an updated trip generation and associated transportation analysis in conjunction with the development program.

MassDOT notes that the Project plans to construct a rail spur to enhance the efficient movement of goods to and from the site. However, the trip generation calculations assume that all goods will be transported by truck, resulting in a conservative (and higher impact) traffic assessment. The Proponent estimates that the Project could use three rail cars daily, with each rail car replacing four trucks. This could eliminate up to 12 trucks, translating to 24 truck trips (since each truck makes one trip in and one trip out), which represents approximately 4% of the Project's total estimated truck trips.

Trip Distribution

The Project Site will generate vehicle trips from employee cars and trucks transporting goods. Employee trip distribution is based on U.S. Census data and Google Maps travel times, while truck trip distribution assumes that the trucks would utilize the nearby Interstate 495 interchange with Route 58, about 1.75 miles southeast of the site. Vehicle trips were assigned throughout the study area, focusing on weekday morning and evening peak hours. These were combined with No-Build (2031) traffic volumes to establish Build (2031) Condition traffic volumes for both peak hours.

Study Area

Based on the trip distribution of the Project, the study area intersections include:

- Route 28 at Route 58;
- Route 28 at Locust Street;
- Route 28 at Spruce Street;
- Route 28 at Pine Street; and

- Spruce Street and Locust Street.

Safety

The Proponent analyzed crash data from MassDOT (2016-2020) to assess safety at the study area intersections. In MassDOT District 5, the average crash rates are 0.75 per million entering vehicles (MEV) for signalized intersections and 0.57 MEV for unsignalized intersections. Intersections with higher-than-average crash rates are recommended for further study. Among the study intersections, two unsignalized intersections (Route 28 at Spruce Street and Route 28 at Pine Street) had crash rates below the district average. However, the signalized intersection at Route 28 and Route 58 had a higher-than-average crash rate (0.92 MEV) and is classified as a Top 5% crash cluster for 2018-2020. To enhance safety, the Proponent is evaluating changes to the signal phasing and timing at this intersection. Additionally, the Proponent should conduct a Road Safety Audit (RSA) to confirm the feasibility of any low-cost improvements.

Traffic Operations

The TIA indicates that the Project will not significantly affect area operations. As mentioned above, the intersection of Route 28 and Route 58 has a higher-than-average crash rate compared to other signalized intersections in District 5. The current signal configuration includes two phases: one for the northbound/southbound Route 58 traffic with permissive signal timing, and another for the eastbound/westbound Route 28 traffic, with one lane assigned for each direction.

While no specific crash pattern has been identified, the majority of accidents occur during left turns from the southbound Route 58 approach. The Project is not expected to increase traffic for this turn, but to improve safety, the Proponent proposes a new signal phasing plan that would give both the northbound and southbound Route 58 approaches a protective green phase. This proposed change would result in increased delays and a worsening level of service (LOS), from B to C in the morning and from B to D in the evening peak hours.

MassDOT met with the Proponent during the review of the SDEIR to discuss these conditions and requested further analysis regarding mitigation at this intersection. Based on additional analysis provided, MassDOT concurs that adding an eastbound left turn lane is feasible and would improve operating conditions. Additionally, we recommend that the Proponent conduct an RSA as stated previously.

Transportation Demand Management (TDM)

Although the Project will not significantly affect traffic operations in the study area, the Proponent or its successors will implement a Transportation Demand Management (TDM)

plan to reduce the number of single-occupancy vehicles on the surrounding transportation network. The Proponent would require that the following TDM elements be adopted by the future tenant (s):

- Designate a Transportation Coordinator who will oversee the implementation of the TDM plan;
- Provide an employee rider matching/ridesharing program to encourage carpooling;
- Provide an emergency Guaranteed Ride Home program for employees who participate in ridesharing; and
- Provide materials about the TDM program to employees initially at their orientation and routinely through web-based information, print materials, and promotional events.

The Proponent would require the future tenant (s) to offer on-site employee amenities to minimize the need for employees to travel off-site during the workday. These amenities may include breakrooms and lunchrooms fitted with refrigerators, coffee machines, and microwaves. The Proponent will also continue to collaborate with the Town of Middleboro and MassDOT on the elements of the TDM plan.

Transportation Monitoring Program (TMP)

The Proponent will be required to conduct an annual Traffic Monitoring Program (TMP) for a period of five years, beginning six months after occupancy of the full-build project. The goals of the monitoring program will be to evaluate the assumptions made in the EIR and the adequacy of the mitigation measures, as well as to determine the effectiveness of the TDM program. The TMP will include:

- Simultaneous automatic traffic recorder (ATR) counts at the site driveway for a continuous 24-hour period on a typical weekday;
- Weekday a.m. and p.m. peak period hour turning movement counts (TMCs) at the site driveway;
- Travel survey of employees at the site;
- Transit Ridership counts, if any; and
- Updates on the effectiveness of the TDM program.

The SDEIR includes a revised Draft Section 61 Finding outlining the mitigation measures the Proponent has committed to implementing in conjunction with this Project. The FEIR should include an updated draft Section 61 Finding to reflect the revised mitigation at the Route 58/Route 28 intersection and the commitment to conduct an RSA at this intersection. The Proponent should continue consultation with the Town of Middleboro, and appropriate MassDOT units, including PPDU, Traffic Operations, and the District 5 Office during the preparation of the FEIR for the Project. If you have any questions regarding these comments, please contact William Simon at *William.M.Simon@dot.state.ma.us*.

Rebecca Tepper, Secretary
Executive Office of Energy and Environmental Affairs
100 Cambridge Street, Suite 900
Boston, MA 02114
Attn: Alexander Strysky, Massachusetts Environmental Policy Act Office

February 24, 2025

Re: Response to Supplemental Draft Environmental Impact Report (SDEIR)
Middleborough Logistics Park, Middleborough, MA 02346

Dear Secretary Tepper,

On behalf of the Grafton and Upton Railroad Company, Goddard Consulting offers comment on the Rare Species and Resource Areas sections provided in the Supplemental Draft Environmental Impact Report (SDEIR) for the proposed project known as "Middleborough Logistics Park".

1.0 Rare Species

The Project Site is mapped completely within Priority Habitat for a state-listed rare species, the Eastern Box Turtle (*Terrapene carolina)*. During the MEPA review for the Sippican project, the Project Site was not yet mapped as Priority Habitat by NHESP. The rare species impact analysis provided in the SDEIR assumes 56.2 acres of Phase I is grandfathered from MESA. For Phase I, 10.27 acres of new impacts are proposed by the Proponent. Additionally, the project must meet the Original Open Space Requirement by providing an additional 4.55 acres of mitigation. For Phase I, the Proponent has approximately 14.77 acres subject to MESA jurisdiction and will require a Conservation and Management Permit. Additionally, the Proponent must permanently protect land 1.5 times the alteration amount, or a total of 22.16 acres of mitigation for Phase I of permitting. Phase II involves 27.4 acres of land alteration, resulting in 41.1 acres of mitigation in the form of permanent land protection. In total, both phases require approximately 63.3 acres of mitigation.

At this time, the Proponent has failed to acquire the required off-site land for rare species mitigation. Currently, only 44 acres of nearby land owned by the Proponent is set aside for MESA land protection. According to 321 CMR 10.23(3), "if a conservation and management permit applicant is unable to demonstrate the long-term Net Benefit performance standard on the project site and the applicant has made every reasonable effort to avoid, minimize, and mitigate impacts to the State-listed Species on site, then the conservation and management plan may with the approval of the Director, be designed to meet the long-term Net Benefit performance standard by providing for financial and in-kind contributions toward the development and/or the implementation of an off-site conservation recovery and protection plan for the impacted species." In our opinion, the Proponent has not made every reasonable effort to avoid, minimize, and mitigate impacts to priority habitat of the Eastern Box Turtle. The SDEIR provides very little detail on rare species mitigation efforts. The Proponent states the project "will include a Conservation and Management Plan that will provide a long-term Net Benefit to the conservation of the Eastern Box Turtle. Mitigation will be proposed in the form of permanent land protection, which will benefit the species by protecting foraging, sheltering, over-wintering and nesting habitat." In other words, the only form of proposed mitigation is permanent land protection. As stated previously, only 41.1 acres of the minimum requirement of 63.3 acres of land is designated as permanently protected land for rare species mitigation. Based on the previous excerpt from 321 CMR 10.23(3), if the applicant has made every effort to avoid, minimize, and mitigate impacts to rare species on-site, the Proponent may meet the long-term Net Benefit performance standard by providing financial support for an off-site conservation project for the Eastern Box Turtle. This alternative is not acceptable for this

project due to lack of mitigation efforts and consideration of small-scale alternatives. The large scale of the project, including both Phase I and Phase II, will result in the long-term Net Loss of Eastern Box Turtle habitat.

The SDEIR utilizes BioMap GIS data layers to assess the habitat quality of the site. BioMap is a tool created by MassWildlife and the Nature Conservancy to identify land with high conservation value. According to BioMap, both Phase I and Phase II are located within an area characterized as a both a Core Habitat and a Critical Natural Landscape. This area is further mapped as both Rare Species Core and Forest Core habitat. According to MassWildlife, Rare Species Core represent "areas that are critical to the long-term conservation of rare and vulnerable species and their habitats." Forest Core include "forests least impacted by roads, residential, and commercial development, and other fragmenting features. The small subset of Massachusetts forests that meet the criteria of BioMap Forest Core (14%) capture the best and largest examples of intact forest interior habitat, maintain ecological conditions found only in unfragmented forests, and are critically important for species sensitive to forest fragmentation." Both of these features characterize the development land as crucial habitat to not only rare species but all species susceptible to the impacts of forest fragmentation. Phase I of the proposed development would result in approximately 53.1 acres of land alteration and Phase II would consist of a hypothetical 32.4 acres of land alteration. In other words, 85.5 acres of the total 152.9 acres of land would be permanently altered and degraded rare species habitat. The only apparent limitation of the development appears to be the wetland resource areas. For example, Phase I consists of 15.4 acres of wetlands, 38.8 acres of wooded areas, and 17.7 acres of meadow. Of the 56.5 acres of naturalized uplands, approximately 3 acres would be unaltered after Phase I. Phase II consists of 41.6 acres of wetlands and 36.9 acres of wooded areas. Assuming all wetlands are avoided, only 4.5 acres of upland would be left unaltered by Phase II of the proposed development. Overall, less than 8 acres of the naturalized upland areas, or less than 9%, would remain after the development of Phase I and Phase II. The Eastern Box Turtle is a terrestrial turtle that primarily utilizes upland habitats. These numbers do not demonstrate minimization of impacts to this rare species.

According to the SDEIR, the Proponent has undergone numerous pre-filing consultations with the Natural Heritage and Endangered Species Program (NHESP) to minimize impacts to the rare species. According to the SDEIR, following these consultations, a MESA project review checklist would be filed, and a formal determination of "take" or "no take" would be established for each Phase of the Project. After receiving a final MEPA Certificate, a CMP application will be submitted to NHESP. If a CMP is issued, the Project Site must have a Conservation and Management Plan including a NHESP-approved Turtle Protection Plan for before and during construction.

According to the NHESP review letter provided in the SDEIR, "the Division anticipates that the Project (Phase I & Phase II), will result in a prohibited Take (321 CMR 10.18 (2)(b)) of state-listed species due to the loss and fragmentation of suitable habitat, and interference with the feeding, breeding, over-wintering, and migratory activities of the Eastern Box Turtle." Any proposed project with an anticipated Take of a state-listed species may be permitted if the project meets the performance standards for a Conservation and Management Permit. For a project to qualify for a CMP, the Proponent must demonstrate the following: "(a) adequately assess alternatives to both temporary and permanent impacts to the state-listed species, (b) demonstrate that an insignificant portion of the local population will be impacted, and (c) develop and agree to carry out a conservation and management plan that provides a long-term net benefit to the conservation of the state-listed species." The NHESP will not issue a CMP until the MEPA review process and the associated public comment period is complete.

According to Table 1-3 in the SDEIR, the MESA review and approval has been received, but the permit is being amended for Phase I. This is contradictory to previous information that the CMP application would not be

submitted to NHESP until after the receipt of a final MEPA Certificate. We have requested additional materials from the NHESP to clarify the status of the CMP application.

2.0 Resource Areas

According to the SDEIR, the Project Site consists of Bordering Vegetated Wetlands (BVW), Bank/Mean Annual High Water (MAHW), Riverfront Area (RFA), Isolated Land Subject to Flooding (ILSF), and various non-jurisdictional Isolated Vegetated Wetlands (IVWs). An Order of Resource Area Delineation (ORAD) was issued on June 6th, 2024 by the Middleborough Conservation Commission for the previously mentioned resource areas (Reference Figure 5-1).

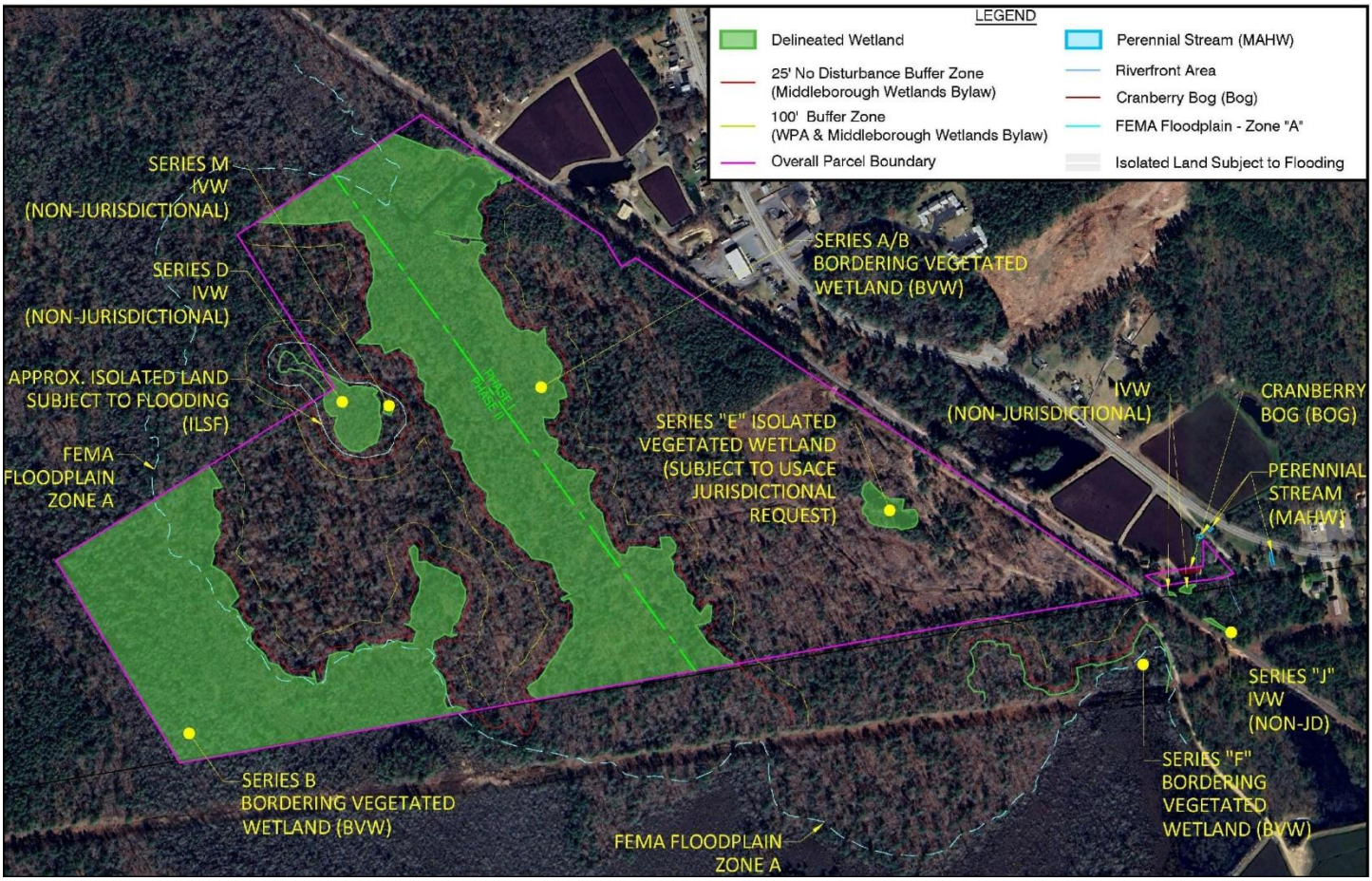


Figure 5-1. Resource Area Plan

2.1 Isolated Vegetated Wetlands

The isolated vegetated wetland labeled as Series E is under review by the United States Army Corps of Engineers regarding whether the areas is jurisdictional under the Clean Water Act as Bordering Vegetated Wetland. This series is located within the limit of work for Phase I. The jurisdiction request was filed on August 9th, 2024 and is awaiting final determination. A copy of the request is included as Appendix G in the SDEIR. If the IVW is jurisdictional under the Clean Water Act, an additional 29,400 sf of impact to BVW will require mitigation. The outcome of this determination would significantly alter the proposed Phase I plan.



Additionally, the same isolated vegetated wetland is mapped as a potential vernal pool by the Natural Heritage and Endangered Species Program. During the review process of the delineation, Ecosystem Solutions Inc. recommended "a formal vernal pool survey of the area to verify the existence of aquatic fauna breeding before an NOI is submitted." The photo on the left shows the isolated vegetated wetland on April 30th, 2024. This area appears to fill with water and may support a large population of vernal pool species. In our opinion, this potential vernal pool should be formally surveyed by a qualified wildlife biologist.

2.2 Riverfront Area

The Project Site has one unnamed perennial stream which splits in two distinct channels adjacent to the existing driveway to Wareham Street. The perennial stream has an associated 200-foot Riverfront area which is currently partially degraded by the existing development. The degradation consists of Wareham Street, a residential structure, and the existing access drive which crosses the channel of the perennial stream. Currently, approximately 32,971 sf is degraded, or 26.8% of the RFA.

The proposed development will impact 49,003 sf, or 38.2% of the RFA. In other words, the proposed project will result in an increase of 16,032 sf in RFA impacts. The Proponent is justifying the impacts with the Massachusetts Wetlands Protection Act (WPA) regulations regarding redevelopment of previously developed RFA. To qualify for this exemption, the Project Site must show evidence of degradation prior to August 7th, 1996. The Proponent provided this evidence in the form of historic aerial photography. The SDEIR addresses each Riverfront Area Performance Standard listed in 310 CMR 10.58(5). The Proponent proposes to restore the access drive and the residential structure for a total of 8,927 sf of RFA restoration. According to 310 CMR 10.58(5), alteration may be allowed notwithstanding the criteria of 310 CMR 10.58(5)(c), (d), or (e) if restoration of the degraded area is

restored at a at least 1:1 ratio (310 CMR 10.58(5)(f)) or if a mitigation area is proposed at a ratio of at least 2:1. The Proponent only proposes 8,927 sf of restoration, which is not nearly enough to meet the 1:1 ratio requirement.

The Proponent notes the proposed access drive follows the alignment of a previously approved project from 2007. The Middleborough Conservation Commission approved 18,334 lf of impervious area within RFA under MassDEP File #220-1002 issued on May 17th, 2007. The SDEIR failed to mention this past proposed project included 21,377 sf of existing impervious areas to be removed from the Riverfront Area. This value is over the 1:1 ratio for restoration to degradation included in the Riverfront Area Performance Standards. The current proposed project only proposes to remove and restore 8,927 sf of impervious area.

The Proponent must address the proposed impacts to Riverfront Area. Additional mitigation is necessary to meet performance standards outlined in the Massachusetts Wetlands Protection Act.

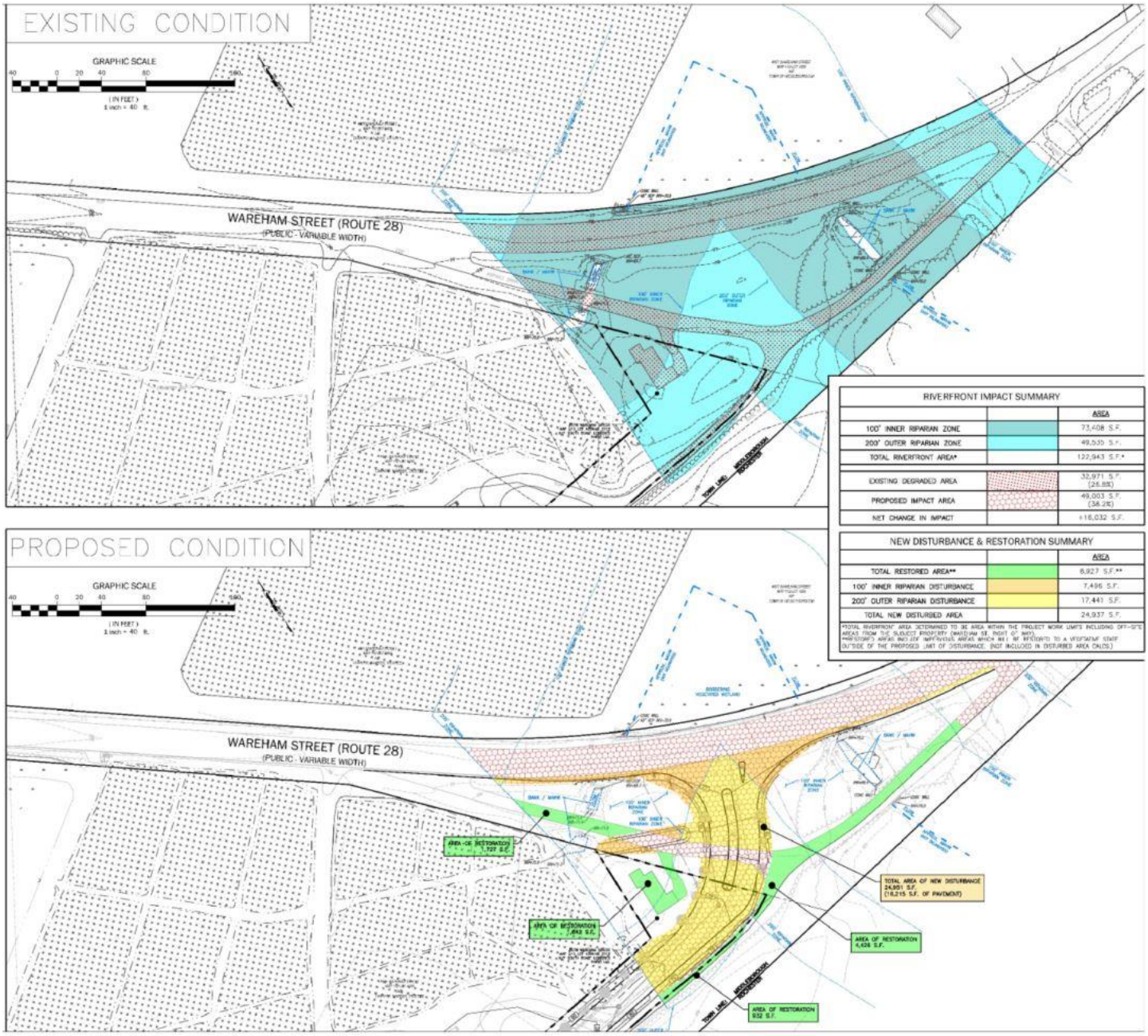


Figure 5-2. Riverfront Area Impact Plan

2.3 Bordering Vegetated Wetlands

Phase I of the proposed project will result in the filling of 1,555 sf of cranberry bog and 2,875 sf of Bordering Vegetated Wetlands (BVW). Following a conversation with the Middleborough Conservation Agent, the Proponent agreed to restore the cranberry bog as a BVW, and to mitigate all impacts at a 2:1 ratio. An 8,860-sf wetland replication area is proposed along with the Phase I development to mitigate for wetland alterations.

If the Series E Isolated Vegetated Wetland is determined to be jurisdictional under the Clean Water Act, an additional 29,400 sf of BVW impacts must be proposed for Phase I. Once again, a jurisdictional determination should be finalized prior to receipt of a final MEPA certificate.

For Phase II, the total amount of proposed impacts to BVW are to be determined. The second phase will consist of at least 33,000 sf of BVW impacts due to the construction of the access road and rail spur to the upland area (Reference Figure 1-4). The Middleborough Conservation Commission prefers 2:1 replication of all wetlands. The Proponent proposes four future development pods. Each of these developments may result in additional impacts to the adjacent BVW system. A potential 66,000 sf replication area for this large impact area has not been selected at this time. Prior to issuance of a final MEPA certificate, the Proponent should clarify the location of such a large replication area. The review team should consider the likelihood of success for such a large wetland replication project.

Also, the Proponent acknowledges a Water Quality Certification (WQC) will be required for the second phase due to the extent of wetland impacts. A WQC will be filed with MassDEP once Phase II has been completely designed. However, both MEPA and DEP provided comment on the ExNPC with concerns regarding the need for a WQC for Phase I alone. According to DEP, a 401 WQC is required to be submitted for greater than 5,000 sf of BVW and IVW fill. Regardless of the jurisdictional determination, Phase I proposes to fill 29,400 sf of IVW within the footprint of the proposed building. Additionally, under Section 404 of the Clean Water Act, an individual permit must be submitted to the Army Corps of Engineers.

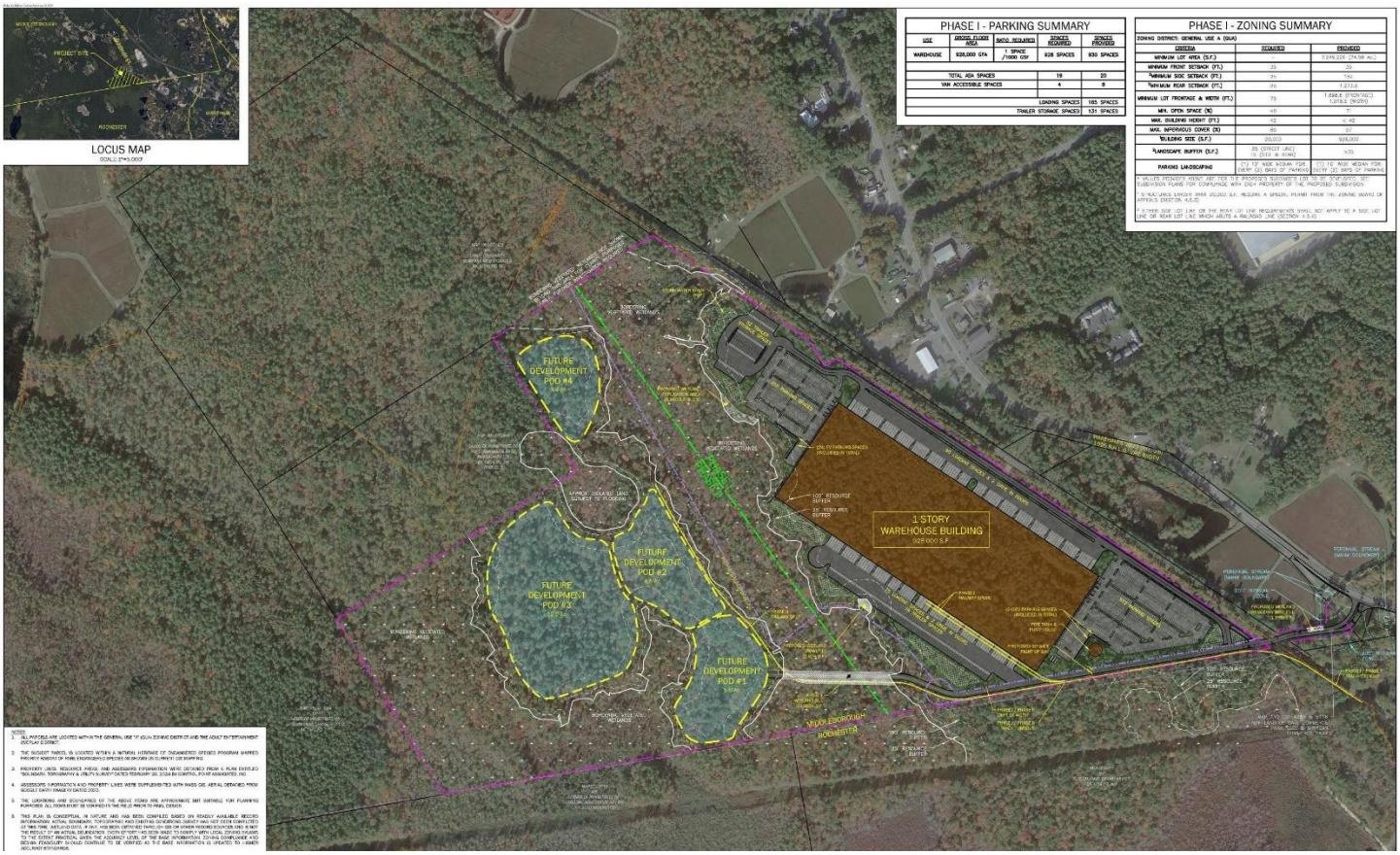


Figure 1-4. Proposed Project: Phase I and Phase II

Conclusion

Based on our initial review of the SDEIR, the most prominent issues with the proposed project relate to the following:

a) **Insufficient Amount of MESA Mitigation Land.** Only 44 acres of the required minimum of 63.3 acres of mitigation land has been accounted for off-site.
b) **Significant Degradation of Rare Species Habitat.** Approximately 91% of Eastern Box Turtle upland habitat will be permanently degraded, leaving only 8 acres of undisturbed upland post-development.
c) **Pending Jurisdictional Determination from the U.S. Army Corps of Engineers**. The proponent is awaiting a final determination for 29,400 sf of potential BVW fill within Phase I of the project.
d) **Filling of Potential Vernal Pool**. A large isolated vegetated wetland (Series E) is located within the footprint of the proposed warehouse. This wetland is a mapped vernal pool and has not been formally assessed following the ANRAD process.
e) **Non-compliance with the Riverfront Area Performance Standards.** Only 8,927 of Riverfront restoration is proposed with an increase of 16,032 sf of RFA impacts. The Proponent must provide significant amounts of additional mitigation to provide a 1:1 ratio of restoration to degradation.
f) **Access Issues to Phase II of the Development.** At least 33,000 sf of wetland alteration is proposed for Phase II. The Proponent has not provided any details regarding the logistics of this large-scale mitigation.
g) **No Water Quality Certification or 404 Individual Permit.** Both WQC and an individual permit is required for Phase I of the proposed project. The Proponent is not planning to file a WQC with MassDEP until the finalization of the design for Phase II.

On behalf of the Grafton and Upton Railroad Company, Goddard Consulting respectfully requests the MEPA Office consider the previously described comments in their review of the Rare Species and Resource Areas sections provided in the Supplemental Draft Environmental Impact Report (SDEIR) for the Middleborough Logistics Park.

If you have any questions, please do not hesitate to contact our office at (508) 393-3784.

Sincerely,

Goddard Consulting, LLC



Scott Goddard, PWS
Principal and Wetlands Specialist

MASSWILDLIFE

DIVISION OF
FISHERIES & WILDLIFE

1 Rabbit Hill Road, Westborough, MA 01581
p: (508) 389-6300 | f: (508) 389-7890
MASS.GOV/MASSWILDLIFE

March 4, 2025

Rebecca Tepper, Secretary
Executive Office of Energy and Environmental Affairs
Attention: MEPA Office
Alex Strysky, EEA No. 13771
100 Cambridge St.
Boston, Massachusetts 02114

Project Name:	*Middleboro Logistics Park*
Proponent:	*South Coast Logistics Park, LLC*
Location:	*678 Wareham Street, Middleborough*
Document Reviewed:	*Supplemental Draft Environmental Impact Report*
EEA No.:	*13771*
NHESP No.:	*23-7239*

Dear Secretary Tepper:

The Natural Heritage & Endangered Species Program of the Massachusetts Division of Fisheries & Wildlife (the "Division") has reviewed the above-noted submission to the MA Environmental Policy Act Office and would like to offer the following comments regarding state-listed species and their habitats.

According to the Massachusetts Natural Heritage Atlas (15th Edition), portions of the Project site are mapped as Priority Habitat for Eastern Box Turtle (*Terrapene carolina*). This species and their habitats are protected pursuant to the Massachusetts Endangered Species Act (MGL c.131A) and its implementing regulations (MESA; 321 CMR 10.00). All projects or activities proposed within Priority Habitat, which are not otherwise exempt pursuant to 321 CMR 10.14, require prior review through a direct filing with the Division for compliance with the MESA Regulations (321 CMR 10.18).

The MESA is administered by the Division and prohibits the "Take" of state-listed species, which is defined as "in reference to animals…harm…kill…disrupt the nesting, breeding, feeding or migratory activity…and in reference to plants…collect, pick, kill, transplant, cut or process…Disruption of nesting, breeding, feeding, or migratory activity may result from, but is not limited to, the modification, degradation, or destruction of Habitat" of state-listed species (321 CMR 10.02).

The SDEIR identifies that the former Sippican Commerce Park project, consisting of a 10-lot industrial/commerce business park (total of 392,000 sf of commercial space) with parking, has been modified to one-lot single warehouse facility (928,000 sf) with parking, now known as the Middleboro Logistics Park. The Middleborough Logistics Park, as detailed in the SDEIR requires review by the Division pursuant to the MESA (321 CMR 10.18 & 10.23) and its implementing regulations.
. In advance of a formal MESA filing, the Division anticipates that the Project (Phase I & Phase II), will result in a prohibited Take (321 CMR 10.18 (2)(b)) of state-listed species due to the loss and

fragmentation of suitable habitat, and interference with the feeding, breeding, over-wintering and migratory activities of the Eastern Box Turtle.

Projects resulting in a Take of state-listed species may only be permitted if they meet the performance standards for a Conservation and Management Permit (CMP; 321 CMR 10.23). In order for a project to qualify for a CMP, the applicant must demonstrate that the project has avoided, minimized and mitigated impacts to state-listed species consistent with the following performance standards: (a) adequately assess alternatives to both temporary and permanent impacts to the state-listed species, (b) demonstrate that an insignificant portion of the local population will be impacted, and (c) develop and agree to carry out a conservation and management plan that provides a long-term net benefit to the conservation of the state-listed species.

As detailed in the SDEIR, the Proponent intends to qualify for a CMP. According to the SDEIR, Phase 1 of the proposed project will impact approximately 66.48 acres. The Phase 2 development envelopes total approximately 25.4 acres. The Division notes that the impact calculations do not yet account for habitat fragmentation impacts that would result from the two proposed phases. Pursuant to 10.23(7)(a)(3), the habitat mitigation ratio for a Special Concern Species (1:1.5). Fragmentation aside, the Phase 1 and Phase 2 project impacts of 137.82 acres (66.48 + 25.4) acres would require 137.82 acres of mitigation to achieve a long-term Net Benefit for Eastern Box Turtle.

The Proponent should continue to coordinate with the Division in advance of the SFEIR to demonstrate how the Phase 1 and Phase 2 projects meet the performance standards for the issuance of a CMP and to develop a suitable net-benefit package that accounts for project impacts, including habitat fragmentation.

Please note 321 CMR 10.13(2)(a)(4) states, "*Projects or Activities for which an NPC that the Division determines would impact a state-listed species or its habitat is thereafter filed with MEPA are not exempt from MESA review and shall be subject to review by the Division pursuant to 321 CMR 10.18. The scope of the MESA review hereunder shall be limited to those aspects of the Project or Activity that would be materially modified by the NPC, as determined by the Division.*" The Middleborough Logistics Park Expanded Notice of Project Change and Single Environmental Impact Report have materially modified the former Sippican Commerce Park project represented in the June 13, 2008 MEPA Certificate. Thus, the provisions relating to 321 CMR 10.13 no longer appear applicable to the project.

The Division will not render a final decision until the MEPA review process and its associated public comment period is complete, and until all required MESA filing materials have been submitted by the Proponent to the Division. As the MESA review process is ongoing, no alteration to the soil, surface, or vegetation associated with the proposed Project shall occur until the Division has made a final decision relative to the CMP.

If you have any questions about this letter, please contact Tim McGuire, Endangered Species Review Biologist, at timothy.mcguire2@mass.gov, (508) 389-6366. We appreciate the opportunity to comment on the Project.

Sincerely,



Jesse Leddick
Assistant Director

Cc: South Coast Logistics Park, LLC
Epsilon Associates
Dan Wells, LEC Environmental Consultants

Commonwealth of Massachusetts
Executive Office of Energy & Environmental Affairs

Department of Environmental Protection

Southeast Regional Office • 20 Riverside Drive, Lakeville MA 02347 • 508-946-2700

Maura T. Healey
Governor

Kimberley Driscoll
Lieutenant Governor

Rebecca L. Tepper
Secretary

Bonnie Heiple
Commissioner

March 7, 2025

Rebecca L. Tepper
Secretary of Energy and Environment
Executive Office of Energy and
Environmental Affairs
100 Cambridge Street, Suite 900
ATTN: MEPA Office
Boston, MA 02114

RE: SDEIR Review. EOEEA 13771
MIDDLEBOROUGH. Middleborough
Logistics at 678 Wareham Street

Dear Secretary Tepper,

The Southeast Regional Office of the Department of Environmental Protection (MassDEP) has reviewed the Supplemental Draft Environmental Impact Report (SDEIR) for the Middleborough Logistics at 678 Wareham Street, Middleborough, Massachusetts (EOEEA #13771). The Project Proponent provides the following information for the Project:

South Coast Logistics Park, LLC (the "Proponent") proposes to construct an approximately 928,000 square foot (sf) warehouse on an approximately 153-acre parcel located off Wareham Street (Route 28) in Middleborough.

A previously proposed project on this site underwent MEPA review in 2008. In March 2024, the Proponent submitted an Expanded Notice of Project Change (ExNPC) describing the changes to the Project since 2008. Additionally, a Special Review Procedure (SRP) request was submitted to allow for Phase I, to proceed while plans for a future development on the western portion of the Site, which are still at a conceptual stage, are further developed. This Supplemental Draft Environmental Impact Report (SDEIR) responds to the May 17, 2024 Certificate issued by the Secretary of Energy and Environmental Affairs on the ExNPC. An SRP was established on May 31, 2024 for phased development of the Project Site and is described in more detail below.

The Site is located east of Wareham Street in Middleborough, along the Rochester Town line. The Site is mostly upland forest with bordering vegetated wetlands (BVW), Buffer Zone to wetland resources, and some potential areas of Land Subject to Flooding. In 2008, at the time of the initial MEPA review, the Project Site was approximately 147-acres, comprising approximately 67 acres which would be developed as Phase I and approximately 80 acres which would be developed as Phase II, see Section 1.3 for additional information. Since the conclusion of the previous MEPA review, the Proponent has acquired additional parcels, and the Project Site has expanded by approximately 5.85 acres with the Phase I and Phase II boundaries modified from the initial review. See Figures 1-1 shows an Aerial Locus showing the Phase I and Phase II Site boundaries.

This information is available in alternate format. Please contact MassDEP at 617-292-5500.
TTY# MassRelay Service 1-800-439-2370
MassDEP Website: www.mass.gov/dep

Printed on Recycled Paper

The previously reviewed project ("Sippican Project" or "prior Project") involved the demolition of two existing residential structures to create a 10-lot industrial/commerce business park (Sippican Commerce Park) with 980 parking spaces on the eastern approximately 67 acres of the 147-acre Site. As previously proposed, the Commerce Park was to have eventually contained approximately 392,000 square feet (sf) of floor space on ten of the eleven subdivision lots. These commercial spaces were to be constructed separately from the project. The Sippican Project also included construction of a rail spur from the existing railroad line south of the Site, for use by potential tenants

General Comment

The Proponent did not provide comments on or acknowledge many MassDEP comments on the ExNPC. Some of the comments were regarding the construction period, while others were regarding the operational phase of the project. For example, an asbestos survey and other related requirements regarding the demolition of the existing building were ignored. Potential operational requirements include U.S. EPA industrial stormwater permit coverage, the generation of waste oil and/or hazardous waste from operational and maintenance activities such as the generation of waste oil from forklifts and/or compressors. Likewise, the unknown operations at the facility may generate industrial wastewater, such as vehicle washing, which cannot be disposed into the sanitary wastewater or stormwater disposal facilities. Air Quality permitting may be required for onsite generators particularly if the Proponent participates in a utility demand management program. MassDEP requests, at a minimum, acknowledgement of the comments and that continuing analysis of the construction and operation of the Project regarding the need of MassDEP and/or U.S. EPA notification, registration and permitting requirements. By reference, MassDEP reiterates its comments on the ExNPC that were not addressed in the SDEIR.

Bureau of Water Resources (BWR) Comments

Wetlands: The MassDEP SERO has reviewed the Supplemental Draft Environmental Impact Report (SDEIR) for the proposed construction of a warehouse, access road, and associated parking in Middleborough, Massachusetts. Portions of the work involve the fill of Bordering Vegetated Wetlands (310 CMR 10.55) and alteration of Riverfront Area (310 CMR 10.58).

The SDEIR breaks down the resource area impacts by phase. Phase I proposes 4,430 square feet of Bordering Vegetated Wetland (BVW) impacts associated with the driveway and loading apron/trailer parking and 24,937 square feet of Riverfront Area (RFA) impacts associated with the driveway. The SDEIR makes a distinction between Bordering Vegetated Wetland impacts and impacts to an existing cranberry bog. Cranberry bogs are a type of Bordering Vegetated Wetland, so the impacts should not be separated.

Phase II estimates 33,000 square feet of BVW impacts associated with an access drive and rail spur, but since no formal project design for Phase II has been finalized, those impacts are an estimate only.

The Proponent filed an Abbreviated Notice of Resource Area Delineation (ANRAD) with the Middleborough Conservation Commission and the Department on March 4, 2024, and the Department issued a file number (SE 220-1636). An Order of Resource Area Delineation (ORAD) was issued by Middleborough Conservation Commission on June 26, 2024, approving the boundaries of Bordering Vegetated Wetland, Riverfront Area (Bank and Mean Annual High Water Line), and Isolated Land Subject to Flooding (D-Series).

The ORAD stated that the boundaries of Isolated Land Subject to Flooding (E-Series) were determined to be inaccurate as described on the plans. The SDEIR states that there are no Isolated Land Subject to Flooding (ILSF) areas within Phase I, which is incorrect according to the ORAD issued by the Middleborough Conservation Commission, which did not approve the boundary of the E-series wetland nor make a determination whether it met the criteria for ILSF. The E-Series wetland boundary and status as ILSF will need to be confirmed by the Conservation Commission in subsequent filings prior to any work within that resource area, which may impact the total resource area impacts of the Project.

The E-series IVW also appears to be located in the middle of the proposed warehouse in Phase I, impacting 29,400 square feet of IVW during construction of that phase of the Project as identified in the SDEIR.

The SDEIR stated that a Jurisdictional Request regarding the E-series IVW was filed with the U.S. Army Corps of Engineers on August 9, 2024, and is awaiting a final determination. The SDEIR states that the Proponent maintains that the IVW is a non-jurisdictional area. If a written determination from the U.S. Army Corps of Engineers that filling of the E-Series IVW is not jurisdictional under the 401 WQC regulations is unable to be obtained, this impact will need to be included and quantified in any 401 WQC filing.

Notices of Intent will be required to be submitted to the Middleborough Conservation Commission, and a copy sent to the Department, for any work within an area subject to WPA jurisdiction. Phase I and Phase II currently both propose activities that would be subject to WPA jurisdiction, which the Proponent acknowledges.

A 401 Water Quality Certification (WQC) is required to be submitted for greater than 5,000 square feet of cumulative BVW, IVW, and Land Under Water (LUW) fill for a single and complete project. A 401 WQC application is subject to the criteria for Evaluation of Applications for the Discharge of Dredged or Fill Material in accordance with 314 CMR 9.06. The Department still remains concerned that the Proponents may be segmenting the Project. The 401 WQC application must include impacts, both temporary and permanent, to BVW, IVW, and LUW for all phases of the Project. Furthermore, the alternatives analysis under the 401 WQC regulations will need to address alternatives to resource area impacts for the whole Project, including avoiding, minimizing, and mitigating wetland impacts. Phase I and Phase II together represent greater than 5,000 square feet of BVW and IVW impacts. Additionally, Phase I may exceed the 5,000-square-foot threshold for BVW and IVW impacts should the USACE determine that the E-series IVW is jurisdictional. As such, no work within BVW and IVW on either phase of the Project can proceed until the Department issues a 401 WQC for the single and complete Project.

Phase I will result in approximately 44 acres of new impervious area. A Stormwater Management Report per 310 CMR 10.05(6)(k)-(q) and 314 CMR 9.06 (6)(a)-(f) was included in the SDEIR. However, the Checklist for Stormwater Report was not signed and stamped by a registered professional engineer, which will be required upon submittal of the 401 WQC and NOI. Additionally, any further commercial development of the site will require additional stormwater management in compliance with the Stormwater Management Standards.

Wastewater: The Proponent identified that Phase II of the Project may require a Groundwater Discharge Permit (GWDP) which would include a Wastewater Treatment Plant (WWTP). The wastewater system for Phase I should be designed so that the flow can be easily directed to the WWTP. The entire flow for the Project must be treated if the need for a GWDP is triggered.

Drinking Water: The purpose of the ExNPC comments were to provide the Project Proponent with an estimate for use by the Middleborough Water Department of the potential hook up connections that are possible with the extension of the new water line to Logistics Park so that the Water Department could estimate new drinking water demand that the Project may induce and plan for supplying that water. The information should be shared with the Water Department as the connection to the Project is discussed.

Stormwater:

NPDES Construction General Permit
The Proponent has identified the need for a NPDES Construction General Permit (CGP). MassDEP corrects the contact information for that CGP program as Meridith Finegan (finegan.meridith@epa.gov), or by phone at 617-918-1533.

Bureau of Waste Site Cleanup (BWSC) Comments

Based upon the information provided, the Bureau of Waste Site Cleanup (BWSC) searched its databases for disposal sites and release notifications that have occurred at or might impact the proposed Project area. A disposal site is a location where there has been a release to the environment of oil and/or hazardous material that is regulated under M.G.L. c. 21E, and the Massachusetts Contingency Plan [MCP – 310 CMR 40.0000].

No additional releases have been reported in the vicinity of the Project area since the submittal of the ExNPC. BWSC has no further comments or questions.

Interested parties may view a map showing the location of BWSC disposal sites using the MassGIS data viewer at MassMapper. Under the Available Data Layers listed on the right sidebar, select "Regulated Areas", and then "DEP Tier Classified 21E Sites". MCP reports and the compliance status of specific disposal sites may be viewed using the BWSC Waste Sites/Reportable Release Lookup at: https://eeaonline.eea.state.ma.us/portal/dep/wastesite/

The Project Proponent is advised that if oil and/or hazardous material are identified during the implementation of this Project, notification pursuant to the Massachusetts Contingency Plan (310 CMR 40.0000) must be made to MassDEP, if necessary. A Licensed Site Professional (LSP) should be retained to determine if notification is required and, if need be, to render appropriate opinions. The LSP may evaluate whether risk reduction measures are necessary if contamination is present. The BWSC may be contacted for guidance if questions arise regarding cleanup

Bureau of Air and Waste (BAW)

Underground Fuel Storage Tanks: In view of the large number of trucks that would be using this facility, the documents to date have been silent on the fueling of these trucks. Will there be a fuel depot and the use of underground fuel storage tanks at the site?

If underground storage tanks are anticipated, the Project Proponent is advised of the following requirements:

Underground Storage Tanks (USTs)
CMR 9.00 has been repealed and the revised Fire Code at 527 CMR 1.00 is now effective. Therefore, the applicant as Owner and/or Operator of underground storage tanks (USTs) that store regulated substances pursuant to M.G.L. c. 21O must comply with the requirements of M.G.L. c. 21O, 527 CMR 1.00, 527 CMR 5.06 and 310 CMR 80.00. These requirements include but are not limited to system design, construction, installation and maintenance, UST system registration, third party inspections, release reporting, recordkeeping and UST operator training.

Recent EPA Regulatory Changes
The U.S. EPA recently revised the Federal Underground Storage Tank regulations. These changes will be in effect at the time of construction of the Project and may or may not be incorporated in the Massachusetts regulations at the time of construction. The Proponent should review the regulations to ensure that the Project meets the new standards. Information on the new regulations can be found at http://epa.gov/oust/fedlaws/revregs.html.

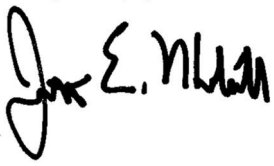
Solid Waste: MassDEP finds the response to the comments on the ExNPC acceptable.

Comments/Guidance

MassDEP has no additional comments other than the ones previously raised in review of the Expanded NPC letter of May 10, 2024.

The MassDEP Southeast Regional Office appreciates the opportunity to comment on this SDEIR. If you have any questions regarding these comments, please contact George Zoto at George.Zoto@mass.gov or Jonathan Hobill at Jonathan.Hobill@mass.gov
.

Very truly yours,



Jonathan E. Hobill,
Regional Engineer,
Bureau of Water Resources

JH/GZ

Cc: DEP/SERO

ATTN: Gerard Martin, Regional Director
John Handrahan, Deputy Regional Director, BWSC
Seth Pickering, Deputy Regional Director, BAW
Jennifer Viveiros, Deputy Regional Director, ADMIN
Maissoun Reda, Chief, Wetlands and Waterways, BWR

Whitney McClees, Wetlands, BWR
Brenden Mullaney, Chief, Waterways, BWR
James McLaughlin, Chief, Drinking Water, BWR
Michelle Regon, Drinking Water, BWR
Joseph Cerutti, Underground Injection Control, BWR/Boston
Daniel DiSalvio, Chief, Compliance and Enforcement, BAW
Mark Dakers, Chief, Solid Waste, BAW
Jennifer Wharff, Solid Waste Management, BAW
Jeffrey Hunter, Solid Waste Management, BAW
Angela Gallagher, Chief, Site Management, BWSC
Amanda Cantara, Site Management, BWSC
Colleen Ferguson, Chief, Asbestos, BAW

]

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF
ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENERGY RESOURCES
100 CAMBRIDGE ST., SUITE 1020
BOSTON, MA 02114
Telephone: 617-626-7300
Facsimile: 617-727-0030

Maura Healey
Governor

Kim Driscoll
Lt. Governor

Rebecca Tepper
Secretary

Elizabeth Mahony
Commissioner

7 March 2025

Rebecca Tepper, Secretary
Executive Office of Energy & Environmental Affairs
100 Cambridge Street
Boston, Massachusetts 02114
Attn: MEPA Unit

RE: Middleborough Logistics Park, Middleborough, MA, SDEIR

cc: Jo Ann Bodemer, Director of Energy Efficiency, Department of Energy Resources
Elizabeth Mahony, Commissioner, Department of Energy Resources

Dear Secretary Tepper:

We've reviewed the Supplemental Draft Environmental Impact Report (SDEIR) for the proposed project. The project consists of a 928,000 SF in warehouse including 156 loading docks. There will be approximately 951 parking spaces, with an additional 108 trailer parking spaces.

Mitigation Commitments

The project is committing to the following mitigation measures:

- Warehouse space: hybrid electric space heating with electric air source heat pump sized to 25% of peak load, and used for primary space heating;
- Office space: electric air source heat pump for 100% of space heating
- Ventilation energy recovery

- Performance energy index target (PEI) of 0.541. This includes the following C406 measures:
    - C406.3, reduced lighting power density
    - C406.8, enhanced envelope performance with a weighted U value of vertical above grade wall of 0.07
- Air infiltration of 0.35 CFM/sf
- 80% rooftop solar readiness

Sincerely,
Massachusetts Department of Energy Resources



Becca Edson
Decarbonization Architect



Paul F. Ormond, P.E.
Energy Efficiency Engineer

EXHIBIT E

MASSACHUSETTS



Advancing America

CSX delivers innovative freight transportation solutions that move America forward—safely, efficiently, reliably, and sustainably. We connect businesses and communities across our far-reaching rail network to the world marketplace, creating jobs and strengthening the economy.

CSX RAIL SERVICE
OPERATING AGREEMENT
SHORT LINE/REGIONAL CONNECTION

TRANSFLO | INTERMODAL TERMINAL | PORT | TDSI FACILITY | SELECT SITE

 # OF EMPLOYEES
240*

*Does not include employees of subsidiary companies

CAPITAL INVESTMENT
$44,590,192

COMMUNITY INVESTMENT
$345,097

GRADE CROSSINGS MAINTAINED (Private)
102

GRADE CROSSINGS MAINTAINED (Public)
258

TRACK MILES
550

CARLOADS
262,430

Operations

MAJOR COMMODITIES	AGRICULTURE AND FOOD	AUTOMOTIVE	CHEMICALS	COAL	INTERMODAL	METALS AND EQUIPMENT	MINERALS	PAPER AND FOREST PRODUCTS	PHOSPHATES AND FERTILIZERS
SHIPPED BY VOLUME	1%	0%	35%	0%	58%	1%	4%	1%	0%
RECEIVED BY VOLUME	9%	16%	8%	0%	48%	2%	4%	12%	0%

CSX SELECT SITES†	① SOUTH COAST LOGISTICS PARK	② TIMBERSWAMP ROAD SITE
	MIDDLEBOROUGH, MASSACHUSETTS COUNTY: PLYMOUTH	WESTFIELD, MASSACHUSETTS COUNTY: HAMPDEN

† CSX Select Sites are sites that are certified and ready for rapid development.

SHORT LINE PARTNERS			
	BAY COLONY RAILROAD CORP.	FORE RIVER TRANSPORTATION CORP.	GRAFTON & UPTON RAILROAD, CO.
	HOUSATONIC RAILROAD CO., INC.	MASSACHUSETTS CENTRAL RAILROAD CORP.	MASSACHUSETTS COASTAL RAILROAD, LLC
	NEW ENGLAND CENTRAL RAILROAD, INC.	PAN AM SOUTHERN, LLC	PIONEER VALLEY RAILROAD, CO.
	PROVIDENCE & WORCESTER RAILROAD, CO.	SPRINGFIELD TERMINAL RAILWAY, CO.	---

movewithcsx.com

Information reflects 2024 data.

DON'T GET BOXED IN >

CSX adds 18 rail served properties across 12 states to select site program

AJOT Newsroom | Apr 24 2025 at 11:58 AM | Intermodal

CSX Corporation today announced its latest group of high-ranking properties to receive CSX Select Site designation under the industrial development program. Eighteen sites across 12 states have earned a gold, silver, or bronze rating based on an evaluation of a wide range of site characteristics.

CSX worked with more than 29 communities to gather information and identify top candidates for the Select Site program, which connects expanding companies with highly desirable rail-served properties.

"Each Select Site reflects months of collaboration with landowners, counties, and utility partners that now represent a significant opportunity for economic growth," said Kellen Riley, CSX Senior Director of Industrial Development. "By bringing these sites to market with the right due diligence already in place, we're making it faster and easier for manufacturers to invest, build, and create jobs for local communities."

Since the last round of candidate sites were awarded in 2024, four existing Select Sites have increased their site readiness and have been upgraded to gold, silver, and bronze designations.
The Select Sites include:

Gold Level

• South Coast Logistics Park Operated by TransloadX– Middleborough, Massachusetts

• Montgomery Inland Logistics* – Montgomery, Alabama

Silver Level

• Eastport Logistics Park – Jacksonville, Florida

• Central Florida Integrated Logistics Park– Winter Haven, Florida

EXHIBIT F

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2384CV00071

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

JON DELLI PRISCOLI

Consolidated with

NO. 2384CV00958

JON DELLI PRISCOLI

vs.

MICHAEL MILANOSKI, JOHN DEWAELE, DANA RAILCARE, AND THE GRAFTON & UPTON RAILROAD COMPANY

and

NO. 2384CV02141

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

GRAFTON & UPTON RAILROAD COMPANY, FIRST COLONY GROUP, LLC, AND JON DELLI PRISOCOLI

MEMORANDUM AND ORDER ON GRATON & UPTON RAILROAD COMPANY'S MOTION FOR A PRELIMINARY INJUNCTION

In case No. 23-2141, Grafton & Upton Railroad Company ("GURR" or "GU"), in its capacity as plaintiff-in-counterclaim and in reliance on its verified counterclaim, moves for preliminary injunctive relief against Plaintiffs Michael Milanoski and John DeWaele, former GURR employees, who signed restrictive covenants while employed by GURR that purport to

prevent them from, among other things, competing with GURR, using its confidential information, or soliciting or encouraging its employees to leave or diminish their employment with GURR. GURR claims that Plaintiffs have disregarded the covenants pertaining to competition and employee solicitation, and that it will suffer irreparable harm to it from the Plaintiffs' disregard of these covenants, and seeks an order barring them from the following conduct:

> 1. Engaging in business agreements, relationships or dealings of any sort with Synagro Rail, either directly or as it may operate under the name Environmental Protection & Improvement Company (EPIC), including but not limited to business it is now or may plan to conduct in Allston, Massachusetts; and
>
> 2. Soliciting any customer or prospective customer of [GURR] with which/whom either [Plaintiff] had contact during their employment by [GURR] for transloading propane or other services or products that [GURR] provides or plans to provide to its customers, or to terminate any business relationship that a customer or prospective customer may have or plan to enter with it; and
>
> 3. Soliciting any employee, independent contractor or business partner to end, reduce or modify in any other way his/her/its business relationship with [GURR].

Motion at 1-2.

The posture of this case is unusual. As part of this sprawling litigation, Plaintiffs seek to buy GURR and thus profess no intention to harm its business. In furtherance of that position, they do not object to the entry of an order generally reflecting point two (at least as it relates to parties that had active business dealings with GURR at the time they were employed) or point three. Nor do Plaintiffs challenge the restrictive covenants in their employment agreements as overbroad. Instead, the parties' dispute concerns point one. Plaintiffs argue that Synagro/EPIC is not within the scope of the non-competition provisions. The Court disagrees, although it concludes the language of the order GURR has proposed is overbroad. Accordingly, for the reasons that follow, GURR's motion for preliminary injunction is **ALLOWED IN PART**.

BACKGROUND

A. Overview and Employment Agreements

GURR is a regional freight railroad. From approximately May 2017 to February 10, 2023, Milanoski was the President of GURR and the Manager of a related entity, First Colony Group, LLC ("First Colony"). From February 22, 2018, through March 27, 2023, DeWaele was the Senior Vice President of Railroad Operations and the General Manager of GURR.

On or about May 19, 2017, Milanoski entered into an Employment Agreement and a Commission Agreement with First Colony. He later entered into an Amended Employment Agreement ("AEC") and a Commission Agreement with GURR and First Colony (collectively, "the Companies") on or about April 17, 2020.

DeWaele entered into an Employment Agreement with GURR on February 22, 2018, and an Employment Agreement Restated ("EAR") with GURR on or about January 3, 2020.

For purposes of the instant motion, the AEC and EAR (collectively, the "Agreements") impose substantively similar restrictions against post-employment activities.[1]

Four aspects of the AEC are relevant.

Non-Competition: Under paragraph 8(b) of the AEC, Milanoski agreed to restrictions against soliciting or accepting business relating "in any manner to competing products or to products, processes or services of the Companies or the closely held companies it manages from any of the customers or accounts of the Companies and/or in the possession of the Companies" for 24 months following termination of his employment. "Competing product" is defined under paragraph 8(a)(i) to mean:

---

[1]: In their briefing and at the hearing, Plaintiffs suggested that the restrictive covenants in the Agreements are unenforceable because GURR materially breached the Agreements before Plaintiffs' employment ended. The Court cannot determine whether this argument has any merit on this limited record.

> any product, process, or service ... (A) which is identical to, substantially the same as, or an adequate substitute for, any product, process, or service of the Companies, in existence or under development, on which Milanoski works during the time of employment with [the] Companies [or] about which Milanoski acquires confidential information and (B) which is (or could reasonably be anticipated to be[ )] marketed or distributed in such a manner and in such a geographic area as to actually compete with such, product, process or, service of the Companies and/or any of the Companies which it manages.

Milanoski further agreed that the non-competition provision was fair and reasonable and reasonably required to protect the Companies' interests, and that if a court determined it to be unreasonable, the provision would be "construed in such a manner as to impose on Milanoski such restrictions as may then be reasonable and sufficient to assure the Companies the intended benefits of" this portion of the agreement. AEC, par. 8(c).

Confidentiality: Paragraph 6 of the AEC required Milanoski to sign a Confidentiality and Nondisclosure Agreement, a signed version of which is attached to the AEC as Exhibit B. This agreement prevents Milanoski from, among other things, "us[ing] Confidential Information for his own benefit or the benefit of others" (par. 2), "disclos[ing] or divulge[ing] either directly or indirectly the Confidential Information to others beyond that which is required for his job duties" (par. 3), or "commercially us[ing] Confidential Information for any purpose other than performance of his duties" (par. 4).

Non-Solicitation: Under paragraph 7 of the AEC, Milanoski agreed that he would not "for a period of twenty-four (24) months following termination of employment with the Companies for any reason, whether with or without cause, either directly or indirectly, solicit or encourage any employee or independent contractor or business associate of the Companies to end or diminish in any way his or her employment or other relationship with the Companies or any of the Companies it manages."

Injunctive Relief: Milanoski agreed that the Companies would be entitled to injunctive and equitable relief to enforce the provisions of the AEC and that violation of the non-disclosure, non-solicitation, and non-compete provisions of the agreement would cause irreparable injury to the Companies such that a remedy at law would be inadequate. AEC, par. 14.

The EAR that DeWaele signed has similar provisions:

Non-Competition: Under 8(b) of the EAR, DeWaele agreed to restrictions against soliciting or accepting business relating "in any manner to competing products or to products, processes or services of GU or the Companies from any of the customers or accounts of GU and/or at GU with which DeWaele had any contact during employment by GU" for 12 months following termination of his employment. "Competing product" is defined under paragraph 8(a)(i) similarly to that used in the AEC but limited to GU and any of the companies it manages. DeWaele agreed that the non-competition provision was fair and reasonable and reasonably required to protect GU's interests, and that if a court determined it to be unreasonable, the provision would be "construed in such a manner as to impose on [him] such restrictions as may then be reasonable and sufficient to assure GU the intended benefits of" this portion of the agreement. EAR, par. 8(c).

Confidentiality: Paragraph 6 of the EAR required DeWaele to sign a Confidentiality and Nondisclosure Agreement, a signed version of which is attached to the EAR as Exhibit B. This agreement is substantively identical to the one Milanoski signed.

Non-Solicitation: Under paragraph 7 of the EAR, DeWaele agreed that he would "not for a period of twelve (12) months following termination of employment with GU for any reason, whether with or without cause, either directly or indirectly, solicit or encourage any employee or

independent contractor or business associate of GU to end or diminish in any way his or her employment or other relationship with GU or any of the companies it manages."

Injunctive Relief: DeWaele agreed that GU would be entitled to injunctive and equitable relief to enforce the provisions of the EAR and that violation of the non-disclosure, non-solicitation, and non-compete provisions of the agreement would cause irreparable injury such that a remedy at law would be inadequate. EAR, par. 14.

B. Dispute Facts

Milanoski's employment with GURR was terminate on February 8, 2023. DeWaele resigned on March 13, 2023, effective March 27, 2023. Four days later, on March 31, 2023, DeWaele formed TransloadX, LLC ("TransloadX"), with him and Milanoski as managers. According to its certificate of organization, TransloadX was formed to "identif[y], permit[], and construct[] industrial real estate adjacent to the national freight rail system for transloading commodities" and to "provide[] consulting and integration of real estate and railroad services, for rail freight partners for achieving all their transloading and logistics needs."

Before DeWaele left GURR, DeWaele, in his capacity as General Manager of GURR, was involved in discussions with Synagro/EPIC for freight business through its representative, Elliot Pomeranz. Synagro/EPIC had no prior business dealings with GURR.

Specifically, on February 17, 2023, DeWaele spoke with Pomeranz about using GURR rail services to ship potentially contaminated soil from GURR's facility in Hopedale, Massachusetts, to a location closer to the ultimate disposal site in upstate New York. The soil originated from a site in the Allston neighborhood of Boston. It appeared that Synagro/EPIC would facilitate the transportation of the potentially contaminated soil from Allston to Hopedale; Synagro/EPIC did not inquire about GURR's ability to handle the work on-site in Allston.

CSX, another freight rail company, was working with Synagro/EPIC on the project, and on February 23, 2023, asked DeWaele and Milanoski[2] by email for a quote to help Synagro/EPIC move 75 carloads of contaminated soil from Hopedale to Fairport, New York. DeWaele acknowledged the request as General Manager of GURR and wrote that he had "been working with EPIC to get things going on this end."

On March 2 or 3, 2023, Pomerantz met with DeWaele about the project.

Synagro/EPIC did not finalize a contract with GURR by the time DeWaele resigned on March 13, 2023. DeWaele avers that he notified Pomeranz that he was leaving GURR and that Pomeranz would have to work with Eric Moffett, the recently appointed Senior Vice President at GURR, or another employee on the EPIC Project. DeWaele further avers that on March 16, 2023, he texted Moffett about the Synagro/EPIC project, called him about it at about the same time, and on March 16, texted another GURR employee, Brenda Johnson, about Synagro/EPIC's inquiry. On March 23, four days before his resignation took effect, DeWaele texted Pomeranz, "[c]hecking in to make sure you're getting the response you need from GU" and added, "[l]et me know if I can help with anything." DeWaele also concedes that Pomerantz told him at about that time that Synagro/EPIC had submitted a request for proposal to GURR.

Plaintiffs admit that after DeWaele left GURR, DeWaele communicated with Pomeranz about TransloadX's taking on part of the Synagro/EPIC project and providing on-site consulting services and transloading services in Allston, where the potentially contaminated soil is located. Plaintiffs also concede that TransloadX is currently providing consulting services, including managerial expertise and oversight, to Synagro/EPIC to facilitate the removal of the soil, and that TransloadX has hired independent contractors to perform the removal work and/or is performing

[2] Milanoski's employment with GURR had been terminated by this time.

the work itself using equipment provided by Synagro/EPIC. Synagro/EPIC uses its own railcars and containers and is responsible for directly working with a railroad other than GURR to deliver the railcars to a private siding located in Allston and thereafter transporting the soil closer to New York. Plaintiffs aver that Synagro/EPIC manages all aspects of the transloading operation.

Plaintiffs concede that GURR offers transloading services, but contends it only does so for customers using its rail line in in Grafton, Milford, Upton, and Hopedale. They further aver that while they were affiliated with GURR and First Colony, GURR did not provide the type of services that TransloadX is providing, let alone in Allston. DeWaele further avers that Pomeranz never discussed the provision of these types of services in Allston with him while he was employed by GURR, as this was not the type of service GURR provided.

On July 29, 2023, DeWaele texted a GURR employee "to see if you had anyone that would want to work in Cambridge driving a yard truck, operating a lift, scale house (dispatcher), or yard laborer."

DISCUSSION

"A preliminary injunction is an extraordinary remedy never awarded as of right," Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008), and "should not be granted unless the plaintiffs have made a clear showing of entitlement thereto." Student No. 9 v. Board of Educ., 440 Mass. 752, 762 (2004). Generally, "[t]he party seeking a preliminary injunction must show '(1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the [moving party's] likelihood of success on the merits, the risk of irreparable harm to the [moving party] outweighs the potential harm to the [nonmoving party] in granting the injunction.'" Garcia v. Department of Hous. & Cmty. Dev., 480 Mass. 736, 747 (2018), quoting Loyal Order of Moose, Inc., Yarmouth Lodge # 2270 v. Board of

Health of Yarmouth, 439 Mass. 597, 601 (2003). "Where the moving party has failed to demonstrate that denial of the injunction would create any substantial risk that it would suffer irreparable harm, the injunction must be denied, no matter how likely it may be that the moving party will prevail on the merits." Packaging Indus. Grp., Inc. v. Cheney, 380 Mass. 609, 621 (1980). "Economic harm alone ... will not suffice as irreparable harm unless 'the loss threatens the very existence of the movant's business.'" Tri-Nel Mgt., Inc. v. Board of Health of Barnstable, 433 Mass. 217, 227 (2001), quoting Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640, 643 (1987).

A. Likelihood of Success on the Merits

In Automile Holdings, LLC v. McGovern, 483 Mass. 797 (2020), the Supreme Judicial Court reiterated that "a restrictive covenant is only reasonable, and thus enforceable, if it is (1) necessary to protect a legitimate business interest, (2) reasonably limited in time and space, and (3) consonant with the public interest." Id. at 808. It also recognized that "[i]n the employer-employee context, the legitimate business interests that may be protected consist of trade secrets, confidential information, and good will." Id. at 810. The mere avoidance of lawful competition is not a legitimate business interest. See New England Canteen Serv. v. Ashley, 372 Mass. 671, 676 (1977); Robert Half Int'l, Inc. v. Simon, 2020 WL 1218988, at *4 (Mass. Super. Jan. 29, 2020) (Salinger, J.).

"An employer's good will [sic] is traditionally defined as the employer's positive reputation with its customers or potential customers, generated by repeat business with existing customers or by referrals to potential customers." William Gallagher Assocs. Ins. Brokers, Inc. v. Everts, 2001 WL 1334763, at *8 (Mass. Super. Sept. 6, 2001) (Hinkle, J.), citing Slate Co. v. Bikash, 343 Mass. 172, 175-176 (1961). "As a threshold matter," an employer seeking to

enforce a non-competition clause and arguing that its goodwill has or will be harmed "must establish that its business involves goodwill, and that the goodwill belongs to" it. Bowne of Bos., Inc. v. Levine, 1997 WL 781444, at *3 (Mass. Super. Nov. 25, 1997) (Burnes, J.).

The issue in this case is whether point one of the injunction sought by GURR properly protects its goodwill consistent with the principles reflected in Automile. Resolution of this issue boils down to three questions. First, is Synagro/EPIC a "customer" of GURR within the meaning of the noncompetition provisions in the Agreements (i.e., paragraph 8(b) of both the AEC and the EAR)? Second, if Synagro/EPIC is a customer, are the services Plaintiffs provide to it within the scope of these non-competition provisions? Third, if they are, is it reasonable to enforce the non-competition provisions under these facts to protect GURR's goodwill?

As to the first question, Plaintiffs assert that under paragraph 8(b) of both the AEC and EAR, the word "customer," which is not defined in the Agreements, does not include *prospective* customers. Based on this reading, they argue that Synagro/EPIC is not a "customer" for purposes of the Agreements because Synagro/EPIC only explored doing business with GURR and had not entered a contract with GURR by the time DeWaele left the company. This argument is unavailing. Under paragraph 8(b), the Plaintiffs agreed not to solicit or accept business relating "in any manner to competing products or to products, processes or services . . . from *any of the customers or accounts* of" of GURR (emphasis added). The use of the phrase "customers or accounts" reflects that a "customer" may not have an "account" – or, in other words, is a prospective customer. Cf. Robert Half Int'l, Inc. v. Buoncontri, 2003 WL 915181, at *5 n.7 (Mass. Super. Jan. 28, 2003) (Botsford, J.) ("It seems reasonably clear, from a reading of (a) the definition of the word 'Customer' in ¶ 7 of the Agreement and (b) the Agreement's use of the words 'candidate' and 'Customer' separately (see, e.g., ¶ 8), that a candidate is not included

within the definition of 'Customer'"). The facts in this case show that such a reading is reasonable – GURR provides a specialized freight rail service that requires GURR and a prospective customer to engage in a detailed examination of that prospective customer's needs before a contract is reached. It makes sense that it would seek to protect against the disruption of that process by former employees. See Alexander & Alexander, Inc. v. Danahy, 21 Mass. App. Ct. 488, 498 (1986) ("It was not unreasonable to include prospective customers within" a non-compete where the employer "had a legitimate interest in extending its business to them.").

Since the Court concludes that Synagro/EPIC is a customer of GURR, the next question is whether the services Plaintiffs provided to Synagro/EPIC are within the scope of the non-competition provisions of the Agreements. On this point, Plaintiffs contend that they are not providing the same services as GURR. Specifically, they argue that TransloadX is not offering transloading services or rail transportation itself (which GURR indisputably does) but rather is facilitating Synagro/EPIC's transloading conduct by providing on-site consulting services and removal of the potentially contaminated soil, which is transhiped and transported by a railroad other than GURR that Synagro/EPIC has chosen. They also argue they are providing services in Allston, where GURR does not have a presence. While it may be that under different facts, Plaintiffs' argument might be persuasive, it is not under the facts presented here, as Plaintiffs' argument ignores the facts of this case and the broad language of the restriction to which they are subject.

The Agreements do not simply prohibit Plaintiffs from supplying a service that directly competes with a GURR service, they also prohibit Plaintiffs from providing an "adequate substitute" for a GURR product, process, or service. Specifically, under paragraph 8(b) of the Agreements, Plaintiffs agreed not to accept business relating "in any manner to competing

products or to products, processes or services" of GURR. "Competing product" is defined under paragraph 8(a)(i) to mean "any product, process, or service … (A) which is identical to, substantially the same as, or *an adequate substitute for*, any product, process, or service of" GURR "on which [Milanoski or DeWaele] work[ed] during the[ir] time of employment with" GURR "and (B) which is (or could reasonably be anticipated to be[ )] marketed or distributed in such a manner and in such a geographic area as to actually compete with such, product, process or, service of" GURR. (Emphasis added). Here, Plaintiffs have accepted business from Synagro/EPIC, which in turn is utilizing rail services of a company other than GURR to transship and transport by rail the soil. Accordingly, Synagro/EPIC's project is a process or service that is substituting for GURR's service. Thus. while Plaintiffs are not themselves directly competing with GURR, they have accepted business that competes with GURR in its geographic area, between Allston and upstate New York, part of which is serviced by GURR. Indeed, Synagro/EPIC had been seeking a quote from GURR through DeWaele for this work. Plaintiffs' assertion that they are not themselves transloading or transporting the soil (the services GURR was negotiating to supply Synagro/EPIC), are only providing services in Allston, and that they are only facilitating Synagro/EPIC in substituting another rail carrier for GURR, does not change the analysis here. Plaintiffs agreed not to accept business relating "*in any manner* to competing products or to products, processes or services" offered by GURR, or adequate substitutes for them, in the same geographic area (emphasis added). Since Synagro/EPIC has engaged another rail carrier to effectively replace GURR to transport the soil between Allston and New York, the Plaintiffs have accepted business that, in a real manner, competes with GURR over its geographic area.

As to the third question, the Court concludes that based on the current record, it is reasonable to enforce the non-competition provisions as to the *specific engagement* between TransloadX and Synagro/EPIC, but not beyond that. GURR seeks an order prohibiting Plaintiffs from "[e]ngaging in business agreements, relationships or dealings *of any sort* with Synagro Rail, either directly or as it may operate under the name Environmental Protection & Improvement Company (EPIC), *including but not limited to* business it is now or may plan to conduct in Allston, Massachusetts." Motion at 1 (emphasis added). This language is overbroad. The record shows that Plaintiffs have taken a specific business opportunity with Synagro/EPIC from GURR that DeWaele had been negotiating for GURR with Synagro/EPIC. The analysis above demonstrates that this business is reasonably within the scope of the non-competition provisions of the Agreements. But GURR has not shown that Plaintiffs are prohibited from conducting *any* business with Synagro/EPIC. The Agreements do not bar them from conducting any business with GURR customers (leaving aside whether they would be enforceable had they done so), but only prohibit Plaintiffs from soliciting or accepting business relating "to competing products or to products, processes or services" of GURR. As shown above, whether a service Plaintiffs could offer Synagro/EPIC is competitive with a GURR product, process, or service is a fact-intensive inquiry. The broad injunction GURR seeks is neither consistent with the Agreements nor with the law.

The Court thus concludes that GURR is likely to succeed on the merits, albeit in a more limited manner than it seeks.

B. Irreparable Harm/Balance of Harms

GURR has demonstrated that unless Plaintiffs are enjoined from servicing Synagro/EPIC on their current transloading project, a significant business opportunity and the goodwill related

to it will be lost to its two former senior officers, who would then have an incentive to continue to violate the non-competition provisions of the Agreements, which GURR argues with some force is not compensable in damages. See Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996) ("If the plaintiff suffers a substantial injury that is not accurately measurable or adequately compensable by money damages, irreparable harm is a natural sequel"). See also Darwin Partners, Inc. v. Signature Consultants, LLC, 2000 WL 33159238, at *5 (Mass. Super. Mar. 24, 2000) (Burnes, J.) ("Such damage to goodwill is likely to be irreparable in that, once it occurs, it cannot be undone and its financial implications are almost impossible to measure."); Bowne of Bos., Inc., 1997 WL 781444, at *5 ("[T]the loss of goodwill has been recognized as being particularly hard to quantify, giving rise to the need for equitable relief"); National Eng'g Serv. Corp. v. Grogan, 2008 WL 442349, at *4 (Mass. Super. Jan. 29, 2008) (Hogan, J.), citing All Stainless, Inc. v. Colby, 364 Mass. 773, 779-780 (1974) ("A former employee with close association and relationships with an employer's customers is in a position to harm the employer's good will because the close relationship with the employer's customers may cause those customers to associate the former employee, and not the employer, with the product and services delivered to the customer through the efforts of the former employee.").

As to the balance of harms, while an injunction plainly has negative consequences for Plaintiffs, those harms are outweighed by the threat of irreparable harm to GURR. DeWaele was GURR's general manager and Milanoski its President. Permitting them to facilitate GURR's replacement with another rail carrier, as reflected here, would place GURR's goodwill in jeopardy. See also Kroeger v. Stop & Shop Cos., 13 Mass. App. Ct. 310, 319 (1982) (key employee's elevated bargaining status "enlarge[s] judicial tolerance of restraints by an employer which might be seen as unreasonable between parties of unequal bargaining strength").

Moreover, Plaintiffs ultimately seek to buy GURR and profess no intention to undermine its business. Properly protecting GURR's goodwill is thus in the long-term interests of both Plaintiffs and GURR. Lastly, while the enforced non-competition provisions temporarily deprive Plaintiffs of engaging in business with certain entities, it does not eliminate their ability to work entirely. See HealthDrive Corp. v. Chall, 2000 WL 33967781, at *5 (Mass. Super. Feb. 9, 2000) (Burnes, J.) ("This court recognizes that the [non-competition] Agreement imposes a significant restraint on [the defendant], but it does not prevent him from working in the dental field all together."). Thus, while an injunction will have a short-term negative impact on Plaintiffs, there is a potential long-term benefit to Plaintiffs if they succeed in the underlying lawsuit and ultimately purchase GURR.

ORDER

For the foregoing reasons, the Court **ORDERS**:

1. Plaintiffs are enjoined from further engaging in business with Synagro Rail, either directly or as it may operate under the name Environmental Protection & Improvement Company (EPIC), related to its transshipment project in the Allston neighborhood of Boston, Massachusetts;

2. Until February 10, 2025, for Milanoski, and until March 27, 2024, for DeWaele, Plaintiffs are enjoined from:

(a) Soliciting or accepting business relating in any manner to competing products or to products, processes, or services from any of the customers or accounts of the Companies and/or in the possession of the Companies. "Competing product" means any product, process, or service (A) which is identical to, substantially the same as, or an adequate substitute for, any product, process, or service of the Companies, in existence or

under development, on which Milanoski and/or DeWaele worked during the time of employment with the Companies or about which Milanoski and/or DeWaele acquired confidential information and (B) which is (or could reasonably be anticipated to be) marketed or distributed in such a manner and in such a geographic area as to actually compete with such, product, process or, service of the Companies and/or any of the Companies which they manage; and

(b) Either directly or indirectly, soliciting or encouraging any employee or independent contractor or business associate of the Companies to end or diminish in any way his or her employment or other relationship with the Companies or any of the Companies they manage, including by contacting GURR employees with job opportunities with TransloadX.

SO ORDERED.

/s/ Michael D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

Date: October 16, 2023

61

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2384CV00071

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

JON DELLI PRISCOLI

Consolidated with

NO. 2384CV00958

Notice of Findings of Fact & Conclusions of Law emailed to Counsel of Record 6/24/24

JON DELLI PRISCOLI

vs.

MICHAEL MILANOSKI, JOHN DEWAELE, DANA RAILCARE, AND THE GRAFTON & UPTON RAILROAD COMPANY

and

NO. 2384CV02141

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

GRAFTON & UPTON RAILROAD COMPANY, FIRST COLONY GROUP, LLC, AND JON DELLI PRISØCOLI

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON GRAFTON & UPTON RAILROAD COMPANY'S COMPLAINT FOR CONTEMPT AGAINST MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III, AND MEMORANDUM AND ORDER ON MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III'S MOTION TO RECONSIDER AND GRAFTON & UPTON RAILROAD COMPANY'S MOTION FOR ATTORNEYS' FEES AND COSTS,

In this hard-fought case, the Grafton & Upton Railroad Company ("GURR") has filed a complaint for contempt pursuant to Mass. R. Civ. P. 65.3 against Michael R. Milanoski and John

P. DeWaele, III (collectively, "Defendants"), alleging that they violated this Court's October 16, 2023 preliminary injunction order ("Order"). GURR also filed a motion for attorney's fees and costs incurred in obtaining the Order. The Defendants have filed a motion to reconsider the Order.

On April 3, 2024, trial was held on GURR's complaint for contempt. The Court considered the complaint and the Defendants' answer, Defendants' Memorandum Relative to Grafton & Upton Railroad Company's Complaint for Contempt, GURR's Motion for Assessment of Legal Fees and Costs against Michael Milanoski and John DeWaele, with a supporting affidavit, as well as the opposition to that motion by Milanoski and DeWaele.

Also on April 3, the Court heard argument on the Defendants' Motion for Reconsideration of Decision on Motion for Preliminary Injunction filed in November 2023, and considered Defendants' supporting memorandum and materials, GURR's opposition to that motion filed in November, GURR's supplement to its opposition filed in December 2023, and GURR's Memorandum of Law on Clarification of the Courts October 16, 2023 Preliminary Injunction filed on April 1, 2024.

For the reasons discussed below, the Court concludes that Milanoski and DeWaele intentionally violated paragraph 1 of this Court's Order, and therefore are **HELD IN CONTEMPT** and **ORDERED** to pay the reasonable attorney's fees and costs incurred by GURR in bringing the contempt action.

As to the motion for reconsideration, the Court heard the motion primarily to determine whether its Order was overbroad in its analysis and thus erroneous as a matter of law. The Court concludes that it was, but only with respect to a portion of paragraph 2 (a), a provision of the Order not at issue in the contempt proceeding. Accordingly, the motion and the Defendants'

related request to be relieved from their assent to the entry of paragraph 2 are **ALLOWED IN PART**, and paragraph 2 (a) as it applies to Milanoski is amended to excise the phrase "and/or in the possession of the Companies."

GURR's motion for attorney's fees incurred in obtaining the injunction is **ALLOWED IN PART** pending a more detailed breakdown on the fees claimed.

FINDINGS OF FACT[1]

A. Overview

The Defendants are plaintiffs in case 2384CV02141. Paragraph 1 of the Court's Order, issued October 16, 2023 in that case, states:

> Plaintiffs are enjoined from further engaging in business with Synagro Rail, either directly or as it may operate under the name Environmental Protection & Improvement Company (EPIC), related to its transshipment project in the Allston neighborhood of Boston, Massachusetts.

The Defendants received notice of the Order on October 16, and filed an emergency motion for a stay on or about that date, which was denied. Answer, ¶ 3.

Despite receiving the Order, both the Defendants personally and through an LLC they formed to perform work for EPIC, called TransloadX, willfully and intentionally violated the Order by further engaging in business with EPIC related to the transshipment of contaminated soil from the Allston rail yard (hereinafter, "the Project"). Indeed, the work continued unchanged until EPIC terminated its agreement with TransloadX on December 18, 2023 in response to GURR's threatening EPIC with a lawsuit.

[1] At the outset of the hearing, the parties stipulated to the admission of Exhibits 1 through 24, and the Court accepted Exhibit 25 during the hearing.

B. Detailed Findings

Jean Mongui, an employee of a GURR affiliate, testified. I credit his testimony. Mongui traveled to the Allston site at approximately 11 A.M. on October 18, 2023 with Jon Delli Priscoli, one of the parties in this case, and observed containers being loaded onto railcars using cranes and Milanoski driving a yard truck.

Shaun Keefe, who is not employed by GURR, testified. I credit his testimony. Keefe went to the Allston rail yard on November 29, 2023, and saw containers bearing EPIC logos being loaded onto rail cars using cranes. He asked a crane operator about the work, who referred Keefe to the manager. In the trailer for the manager, Keefe saw both Milanoski and DeWaele. Keefe had known Milanoski from his work with GURR, and knew that DeWaele had formerly served as general manager for GURR. Keefe spoke with Milanoski and DeWaele and learned that they had left GURR, formed their own company, and were involved in loading contaminated soil onto rail cars at the Allston site for transport and disposal. Milanoski gave Keefe his card, which identified him as an employee of TransloadX.

DeWaele testified. As detailed below, I do not credit most of his testimony.

DeWaele testified that, in or about January 2023, while serving as the general manager of GURR, he started his own consulting company (Exhibit 18) to consult in the railroad industry.

Also while serving as general manager of GURR, and in furtherance of GURR's business, DeWaele met with Elliot Pomeranz, Vice President of EPIC, at GURR's Hopedale site on March 2, 2023 to discuss GURR's role in the Project.

On March 6, 2023, again while employed as GURR's general manager, DeWaele reached out to EPIC by email (Exhibit 19) to solicit, on behalf of himself and Milanoski, transloading

services in Massachusetts and Maine. Milanoski was copied on the email. DeWaele signed the email as a representative of his consulting company.

DeWaele resigned from GURR on March 13, 2023. He testified that he was owed money under his employment contract with GURR at the time he resigned and that the failure to pay him was a material breach of his employment contract, which meant he was no longer bound by the non-solicitation and other covenants in it. As was the case when Defendants opposed the preliminary injunction, the Defendants produced no information to support this theory other than DeWaele's own testimony.

On March 17, 2023, four days after he resigned from GURR, DeWaele sent another e-mail to Pomeranz (Exhibit 20), again as a representative of his consulting company, regarding the Project. He copied Milanoski on the e-mail. Among other things, DeWaele noted that he and Milanoski could work with local railroads to fulfill any contract, exactly the role that GURR was in a position to play in the Project.

TransloadX was subsequently formed by the Defendants, who became its sole managers. DeWaele testified that Pomeranz contacted him in April, after TransloadX was formed, seeking the same services as he sought from GURR, but from a different location. The project under discussion in April between DeWaele and Pomerantz was the same project the two discussed earlier, when DeWaele was general manager of GURR.

In August 2023, TransloadX contracted with EPIC (hereinafter, "the August Agreement") to provide personnel and personnel management for Project at the Allston rail yard on behalf of EPIC. Exhibit 21. DeWaele signed the contract as TransloadX's manager. This was TransloadX's first project. To fulfill it, the company, through the Defendants, bought equipment

and hired, trained, and licensed workers. TransloadX began providing services under the August Agreement in September 2023.

The Order was issued on October 16, 2023. DeWaele testified that he understood the Order to only require that he and Milanoski stop working on the Project, and that TransloadX, the entity they ran, could continue to do so. In other words, DeWaele claimed he understood that the Project could continue in the same manner despite the Order, so long as he and Milanoski did not personally perform the work, even though they had not personally performed the work before the Order was entered. This testimony was illogical and incredible. It was unsupported by any objective evidence, and undercut by the Defendants' motion for reconsideration. Simply put, there would have been no need to move to reconsider if DeWaele believed this improperly narrow reading of the Order.

DeWaele also testified that he removed himself from the Project and that he stopped daily operations on behalf of TransloadX. However, the evidence shows that both Defendants continued working on the Project after the Order. DeWaele admitted that after October 16, when the Order was issued, he went to the Allston site with Milanoski and performed work for the Project, and as noted above, Keefe witnessed both at the site on November 29. DeWaele also admitted that, a week after the Order was entered, Milanoski was still running TransloadX.[2] Several emails, moreover, reflect DeWaele and Milanoski's involvement in the Project on or after October 16. See Exhibits 1-7, 9-16, 19-20 (DeWaele); Exhibits 2, 3, 5, 7, 9, 11-13, 15, 16, 19, 21 (Milanoski). For example, the record contains an email dated October 23, 2023 from

[2] DeWaele refused to concede that Milanoski continued to work for EPIC at the Allston site. Instead, he claimed that Milanoski was not there every day, and testified that he did not think Milanoski was regularly on site from October to December. This testimony was not credible and even if it were credible, would have been unconvincing. Milanoski's regular appearance at the Allston site was irrelevant to whether he further engaged in any further business for EPIC after the Order was entered.

Milanoski to Pomeranz reporting rail car movements, Exhibit 3, as well as an October 24, 2023 e-mail from "John DeWaele" to Pomeranz and others at EPIC stating that a railcar was ready to be shipped for the second time, "reconfigured" and with "heavier loads." Exhibit 4.[3] Additionally, in an email from Milanoski to EPIC dated November 19, 2023 (Exhibit 13), Milanoski explained that he and DeWaele would "continue to not bill our time" because of the Order, implicitly confirming that both were still working on the Project more than a month after the Order was entered. It is of no moment that DeWaele worked on other business at the site, as he claimed, or that he personally received no compensation, as the Order forbade the Defendants from further engaging in any business with EPIC in connection with the Project. Further, the record contains an invoice sent from milanoski@transloadx.com to EPIC dated October 29, 2023, reflecting work for the week ending October 28, 2023. See Exhibit 6. The Court concludes that Milanoski sent that e-mail.

DeWaele additionally testified that he and Milanoski took steps promptly after the Order was entered to transfer its employees to EPIC. This testimony was not credible, and the documentary evidence shows that this was not true. Although DeWaele testified that he discussed with EPIC winding down TransloadX in October, the December 11, 2023 agreement ("December Agreement") between EPIC and TransloadX (Exhibit 17), in which they agreed to terminate the August Agreement on December 18, 2023, makes clear that a transfer did not

[3] DeWaele testified that multiple people had access to the e-mail address used and refused to concede that he was present at the Allston site that day or sent the e-mail. The underlying claim, that DeWaele was not knowledgeable about and responsible for the content of the emails that bore his name, was not credible. Only one e-mail, a status report sent to EPIC on November 1, 2023 (Exhibit 8), was arguably sent by someone else, and the evidence reflects that Milanoski sent it. DeWaele conceded this email could have been sent by Milanoski, and offered no testimony suggesting that someone else named Michael could have sent the e-mail. The Court infers that Milanoski sent the email. I further note that DeWaele admitted that he had not stopped working for EPIC as of October 24, 2023, the date of the e-mail contained in Exhibit 4.

happen until December 2023.[4] Moreover, DeWaele admitted that EPIC (not TransloadX, DeWaele or Milanoski) initiated the termination of the August Agreement because GURR threatened EPIC with litigation. The transfer was not the product of any affirmative action by the Defendants, and no evidence shows that the Defendants took prompt and effective steps to come into compliance with the Order. To the contrary, the fact that the Defendants discussed compliance with the Order promptly after its issuance showed that the Defendants understood it and how to comply with it, but chose not to do so for months. Further, the fact that the Defendants took no concrete steps to transfer the business to EPIC until December renders thoroughly incredible DeWaele's assertion that the emails he sent were to keep the Project on a sound footing while it was being transferred to EPIC.

DeWaele additionally claimed that disengaging from EPIC was complicated by the fact that TransloadX had loaded hazardous materials onto railcars and was responsible for them until they arrived at their ultimate destination, a process that requires 30 days or so. But he failed to testify as to whether that responsibility could have been transferred to EPIC or some other entity such that DeWaele could have complied with the Order.

Milanoski testified. As detailed below, I do not credit most of his testimony.

Milanoski, similar to DeWaele, testified that GURR owed him in excess of $800,000 in wages at the time of his termination in February 2023. He claimed that GURR's chief financial officer confirmed this with its auditor, and that therefore his contract had been breached and he

[4] Pursuant to the December Agreement, TransloadX agreed that EPIC could hire TransloadX's seven employees currently working at the Allston site, and EPIC agreed that if the injunction was removed, it would revive the August Agreement. The agreement was countersigned by both Milanoski and DeWaele. The signatures were dated December 12, 2023.

was no longer bound by the restrictions in his employment agreement. He, however, provided no further support for the claim that he was owed wages under the contract.

Milanoski also testified that while at GURR, he had no contact with Pomeranz, and that his first contact with Pomeranz was through DeWaele in April 2023, after he was terminated from GURR. He admitted on cross, however, that he was copied on the March 6, 2023 e-mail (Exhibit 19) sent from DeWaele to Pomerance in which DeWaele told Pomeranz that "we" – the Court infers that "we" refers to DeWaele and Milanoski – wanted to work with EPIC on transloading in Massachusetts and Maine. He also conceded that he saw the March 17, 2023 e-mail from DeWaele to Pomeranz (Exhibit 20), on which he was copied, providing prospective hourly rates and other details for the Project. The email was sent three days before he and DeWaele established TransloadX.

Milanoski claimed he was confused by the language in the Order because it was not clear whether it required him to terminate the contract, especially in light of TransloadX's environmental responsibility for the contaminated soil while it was in transit. This testimony incredible – as noted above, soon after the Order was issued, Milanoski and DeWaele discussed terminating the contract with EPIC and transferring TransloadX's employees, showing that they understood the Order. Further, it was also unsupported by the record. For instance, in the memorandum in support of the Defendants' motion for reconsideration, Defendants' counsel did not contend that the Order was unclear or confusing. In any event, these claimed issues did not prevent compliance, which he and DeWaele belatedly effected in December, two months after the Order issued, notably at EPIC's insistence.

Milanoski further testified that there were safety issues in terminating the business immediately and that he began the process of winding down the company when the Order was

issued. This testimony was not credible. The Court finds that the safety issue was the environmental responsibility DeWaele claimed TransloadX bore for the contaminated soil while in transit. Milanoski testified that it took approximately 30 days to dispose of the contaminated soil, and that TransloadX was responsible under the applicable regulations for that soil, but Milanoski did not claim it was impossible to transfer that responsibility elsewhere, such as to EPIC, which presumably occurred after the December Agreement, or explain why this supposed obligation prevented compliance going forward with shipments that were not in transit as of the date of the Order. Moreover, the evidence does not reflect that he began the process of winding down the company when the Order was issued. Milanoski continued going to the Allston site and continued billing EPIC for TransloadX's work, and admitted seeing both Keefe and Mongui at the Allston site. Indeed, after the injunction was issued, Milanoski sent the Order to Pomeranz, agreed with Pomeranz to continue the business of TransloadX at the Allston site as usual, and discussed with Pomerantz EPIC's hiring of TransloadX's staff to continue to work *if* TransloadX could no longer manage them. This makes clear that Milanoski could have complied with the Order but chose to continue to operate TransloadX despite it.

CONCLUSIONS OF LAW

A. Contempt

"[A] civil contempt finding [must] be supported by clear and convincing evidence of disobedience of a clear and unequivocal command." In re Birchall, 454 Mass. 837, 853 (2009).

The first question is: was paragraph 1 of the Order clear and unequivocal? The Court concludes that it was.

Paragraph 1 of the Order, issued October 16, 2023, states:

> Plaintiffs are enjoined from further engaging in business with Synagro Rail, either directly or as it may operate under the name Environmental Protection & Improvement

Company (EPIC), related to its transshipment project in the Allston neighborhood of Boston, Massachusetts.

This portion of the Order is clear and unequivocal. Nothing in this record suggests the Defendants failed to comply with paragraph 1 of the Order because of any confusion as to what it meant. Indeed, their motion for reconsideration raised no claim of ambiguity, and in December 2023, the Defendants eventually complied with the Order by transferring its employees to EPIC. Both of the Defendants testified they began discussing the transfer in October as a method to comply with the Order but inexplicably failed or refused to undertake it until prompted by EPIC.

The only potential ambiguity to which the Defendants point is the phrase "engaging in business." In essence, they argue that because they did not take any compensation for their work on the Project, they were no longer engaging in business with EPIC. This argument fails for at least two reasons.

First, the Defendants' overly-narrow reading of the Order to limit its application to their personal profit-making makes little sense given the factual context in which the preliminary injunction was sought. The Defendants did not personally contract with EPIC to do any work on the Project in the first place, and instead engaged in business with EPIC through TransloadX, an entity they solely owned and controlled. The Order thus plainly prohibited them from "further" engaging in business with EPIC through TransloadX.

Second, the Defendants' argument that they could have continued business through TransloadX is meritless as a matter of law. Although expressly directed at the Defendants, TransloadX itself was also subject to the injunction. Under Mass. R. Civ. P. 65(d), an injunction is binding not only upon the parties to the action, but "upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

Cf. Bird v. Capital Site Mgmt. Co., 423 Mass. 172, 178–179 (1996) ("A person who was not a party to an action in which an order was entered may in certain circumstances be found to be in contempt of that order. 'Any person ... though not a party to the cause, who counsels or aids a party in disobeying a decree, is himself punishable.' Commonwealth v. Hudson, 315 Mass. 335, 347 (1943). … The concept is reflected in the Massachusetts Rules of Civil Procedure. See Mass. R. Civ. P. 71 … [and] 65(d)[.]").

To the extent that the Defendants argue that the Order was unclear because compliance was impossible, that contention is baseless. The Defendants concede that, after the Order was issued, they discussed with EPIC winding down TransloadX's operations by transferring its employees to EPIC. That is exactly what they did in December, at EPIC's insistence, not theirs. They inexcusably failed to effect this method of complying with the Order, and failed to take any other steps to comply with the Order, until then. If nothing else, the December Agreement demonstrates plainly that compliance was not impossible.

The second question is: is there clear and convincing evidence of disobedience? There is. The evidence before the Court clearly and convincingly reflects that the Defendants willfully refused to comply in any respect with the Order from October 16, 2023, when it was issued, to December 18, 2023, when the August Agreement was terminated. Instead, the Defendants, personally and through their company, TransloadX, continued to engage in business with EPIC in connection with the Project as per usual, despite the Order. The Defendants' arguments to detract from this conclusion are meritless.

The Defendants argue that their motion for reconsideration somehow suspended the Order. It did not. First, that motion was immediately denied. Second, they offer no support for the theory that they could ignore a court order because they believed they might eventually be

relieved from complying with it. The law is directly to the contrary. "Even if erroneous, a court order must be obeyed, and until it is reversed by orderly review, it is to be respected. Only where the court lacks jurisdiction to make an order or where an order is transparently invalid on its face may a party ignore a court order and attempt to evade sanctions by litigating the validity of the underlying order." Mohamad v. Kavlakian, 69 Mass. App. Ct. 261, 264 (2007) (internal citations and quotations omitted). See also, e.g., D.A.C. v. L.M.C., 93 Mass. App. Ct. 1109, 2018 WL 2106863, at *3 (2018) (Rule 1:28 decision) (a party cannot unilaterally ignore an order in the hopes of obtaining other relief).

The Defendants also claim they needed time to comply with the Order. This argument is also meritless. The record in this case shows that the Defendants failed to comply *at all* with the Order until EPIC forced the issue, not that they failed to *promptly* comply. Further, Fortin v. Commissioner of Massachusetts Dep't of Pub. Welfare, upon which the Defendants rely, does not hold that needing time to comply is a defense; to the contrary, it holds that good faith is not a defense to civil contempt, only impossibility is. 692 F.2d 790, 796 (1st Cir. 1982). Here, as noted above, compliance was not impossible. Even had a short period of time been necessary to transfer operations from TransloadX to EPIC, the evidence shows that the Defendants did not even attempt immediate and prompt compliance.

Since the Court concludes that the predicates for contempt have been established, the third question is: what sanctions are appropriate?

"[T]he purpose of civil contempt is remedial." Sodones v. Sodones, 366 Mass. 121, 129–130 (1974). While punitive fines are available in criminal contempt convictions, the Court in a civil contempt proceeding is only authorized to impose compensatory fines for the actual loss caused by the contemptible action and attorney's fees and costs. Town of Manchester v.

Department of Env't Quality Eng'g, 381 Mass. 208, 215 (1980), abrogated on other grounds by In re Birchall, 454 Mass. 837 (2009) ("[A] punitive fine cannot be imposed upon a contemnor in a civil contempt proceeding. Where a fine is imposed in a civil contempt proceeding it must not exceed the actual loss to the complainant caused by the contemnor's violation of the order in the main case, plus the complainant's reasonable expenses in enforcing his rights.") (internal citation omitted); Labor Relations Comm'n. v. Fall River Educators' Assn., 382 Mass. 465, 475 (1981) (both compensatory and coercive orders are appropriate remedies in civil contempt proceedings). See also Giannetti v. Thomas, 32 Mass. App. Ct. 960, 961 (1992) ("there is no question that counsel fees and costs are allowable in determining a compensatory fine payable to the prevailing party in a civil contempt proceeding"); Demoulas v. Demoulas Super Mkts., 424 Mass 501, 571 (1997) ("As a matter of law, the awarding of attorney's fees and costs is an appropriate element of a successful civil contempt proceeding ... This award is proper regardless of whether the court has considered the violation of the underlying order to be wilful, and it is within the court's discretion to formulate a remedy in a civil contempt proceeding.").

There is no basis to assess actual losses suffered by GURR other than reasonable attorneys' fees and costs in bringing the contempt action. The Court will award those reasonable attorneys' fees and costs.

B. Reconsideration

The Defendants seek reconsideration of both paragraphs 1 and 2 of the Order, two extraordinary requests, particularly given that they assented to the restrictions contained in paragraphs 2 (a) and 2 (b) of the Order at the original hearing on GURR's motion for the preliminary injunction. As to paragraph 2, they are, in essence, requesting to be relieved from that agreement as to those provisions.

Under the Business Litigation Session's Formal Guidance Regarding Motions to Reconsider ("Formal Guidance"), "[a] motion for reconsideration should only be filed when there has been an intervening change in the law, newly discovered evidence that was not previously available, or a clear error of law." This is consistent with Rule 9D of the Superior Court Rules, which provides that:

> A Motion for Reconsideration shall be based on (1) newly discovered evidence that could not be discovered through the exercise of due diligence before the original motion was filed; (2) a change of relevant law; or (3) a particular and demonstrable error in the original ruling or decision. A Motion for Reconsideration shall otherwise raise no new grounds for relief not raised in the original motion or opposition and shall not reiterate previously advanced arguments.

The Formal Guidance is also consistent with case law holding that "[a] motion for reconsideration 'should specify (1) "changed circumstances" such as (a) newly discovered evidence or information, or (b) a development of relevant law; or (2) a particular and demonstrable error in the original ruling or decision.'" Commonwealth v. Charles, 466 Mass. 63, 84 (2013), quoting Audubon Hill S. Condominium Ass'n v. Community Ass'n Underwriters of America, Inc., 82 Mass. App. Ct. 461, 470 (2012).

The Defendants do not point to newly discovered evidence, but rather seek to present evidence that could have been submitted during the original motion for a preliminary injunction or to re-present unsuccessful arguments they made earlier, such as GURR's alleged breach of their employment agreements, an argument they insufficiently supported. This is improper. They also seek to relitigate the Court's interpretation of the word "account" in their employment agreements. The Defendants point to no new authority supporting its position on this point or any error of law in the Court's interpretation of that word.

The only potential demonstrable error of law the Defendants raise concerns whether the Court's order was overbroad. They argue that the Order improperly enforced the non-compete provisions of their employment agreements, which GURR did not seek, presumably to avoid conflict with the Non-Compete Act, G. L. c. 149, § 24L.[5] That statute sets forth the minimum requirements for an enforceable "non-competition agreement." See G. L. c. 149, § 24L (b). A "noncompetition agreement" within the scope of the statute includes "an agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended." Id. at § 24L (a). It also "include[s] [a] forfeiture for competition agreement[ ]." Id. However, "(i) covenants not to solicit or hire employees of the employer [and] (ii) covenants not to solicit or transact business with customers, clients, or vendors of the employer" are not considered noncompetition agreements. Id.

The Order, at 11-12, relies on the non-competition language of the employment agreements, not the non-solicitation language. This non-competition language does not meet the minimum standards set out in the statute. The non-competition restriction in Milanoski's contract is overlong – 24 months rather than 12 months. See id. at § 24L (b) (iv). Both employment agreements do not state that the employee has the right to consult with counsel, and there is no mention or no evidence of a 10-day consideration period. See id. at § 24L (b) (ii). The agreements also contain no geographic limit (§ 24L (b) (v)), are not limited to services provided during the last two years of employment (§ 24L (b) (vi)), and include no garden leave

[5] GURR concedes that it did not and does not seek to enforce any non-competition provisions.

clause (§ 24L (b) (vii)). Therefore, to the extent the Court's analysis relied on enforcing the non-competition language of the agreements, it was in error.

However, paragraph 1 is still valid. The Court had before it, and considered, the non-solicitation provisions, which are exempt from the scope of § 24L (b). See G. L. c. 149, § 24L (a). Moreover, as GURR argues, the evidence shows DeWaele, while still employed by GURR and on behalf of himself and Milanoski, violated these restrictions by soliciting business from EPIC, a former GURR customer, as reflected in the March 6, 2023 email (Exhibit 19). Therefore, paragraph 1 of the Order, which only prohibits the Defendants from continuing business with EPIC, falls within the carve-out to § 24L. Accordingly, the Defendants motion for reconsideration as to this paragraph of the Order is denied.

That leaves paragraph 2. It states:

> Until February 10, 2025, for Milanoski, and until March 27, 2024, for DeWaele, Plaintiffs are enjoined from:
>
> (a) Soliciting or accepting business relating in any manner to competing products or to products, processes, or services from any of the customers or accounts of the Companies and/or in the possession of the Companies. "Competing product" means any product, process, or service (A) which is identical to, substantially the same as, or an adequate substitute for, any product, process, or service of the Companies, in existence or under development, on which Milanoski and/or DeWaele worked during the time of employment with the Companies or about which Milanoski and/or DeWaele acquired confidential information and (B) which is (or could reasonably be anticipated to be) marketed or distributed in such a manner and in such a geographic area as to actually compete with such, product, process or, service of the Companies and/or any of the Companies which they manage; and
>
> (b) Either directly or indirectly, soliciting or encouraging any employee or independent contractor or business associate of the Companies to end or diminish in any way his or her employment or other relationship with the Companies or any of the Companies they manage, including by contacting GURR employees with job opportunities with TransloadX.

Under the Order, the restrictions against DeWaele expired in March. Thus, as to DeWaele, there is no reason to allow the Defendants' request to be relieved of their assent to these provisions or the motion for reconsideration.

Nor is there any reason to allow this unusual request as to Milanoski with respect to paragraph 2 (b), as "covenants not to solicit or hire employees of the employer" are another type of non-solicitation provision that are exempted from § 24L (b). See G. L. c. 149, § 24L (a)

That leaves paragraph 2 (a) as it applies to Milanoski. The language in that paragraph is based on Section 8(b) of Milanoski's employment agreement in which he agreed to restrictions against soliciting or accepting "business relating in any manner to competing products or to products, processes or services … from any of the customers or accounts of the Companies and/or in the possession of the Companies" for 24 months following termination of his employment.[6] As noted above, the statute exempts "covenants not to solicit or transact business with customers, clients, or vendors of the employer." G. L. c. 149, § 24L (a). Accepting business from a customer or account, as reflected in the agreement, is the functional equivalent of transacting business, a restriction allowed under the statute. Thus, the contractual provision is consistent with the statutory carve out if the Court eliminated the phrase "and/or in the possession of the Companies," which arguably applies beyond GURR's customers, as it would prohibit soliciting or accepting business relating in any manner to competing products or to products, processes, or services then in the possession of the Companies. Under the agreements and the statute, the Court has discretion to reform or revise the agreements to render them valid and enforceable to the extent necessary to protect legitimate business interests. See id. at § 24L (d). Were the phrase "and/or in the possession of the Companies" excised, paragraph 2 (a) would

[6] DeWaele's agreement had similar language.

be valid. The Court thus partially allows the Defendants' request to be relieved of their agreement and their motion for reconsideration, amending paragraph 2 (a) of the Order as it applies to Milanoski to excise the phrase "and/or in the possession of the Companies."

In the agreements, parties agreed the GURR would be entitled to "recover any attorneys' fees and costs incurred in obtaining [injunctive] relief," but that "[o]therwise, in connection with any action to enforce the terms of this Agreement, each party shall bear such parties own costs and expenses including without limitation, attorneys fees related to such enforcement." GURR is thus entitled to reasonable attorney's fees and costs for obtaining the original injunction, and not for the subsequent litigation, such as with respect to the motion to reconsider. See, e.g., Citizens Bank of Massachusetts v. Travers, 69 Mass. App. Ct. 174, 176-177 (2007) (award of attorney's fees expressly permitted under a contract limited to those that are fair and reasonable).

ORDER

For the foregoing reasons, as to the Complaint for Contempt, the Court finds Defendants Michael Milanoski and John DeWaele **IN CONTEMPT**, and **ORDERS** them to pay GURR its reasonable attorneys' fees and costs in bringing the contempt action.

As to the Defendants' Motion for Reconsideration, that motion and related request to be relieved from their assent to entry of paragraph 2 the Order is **ALLOWED IN PART** in that the phrase "and/or in the possession of the Companies" as it applies to Milanoski is excised from paragraph 2 (a) of the Order.

GURR's motion for attorney's fees incurred in obtaining the injunction is **ALLOWED IN PART**.

Ten days from the docketing of this decision, GURR, after compliance with Superior Court Rule 9C, shall serve on the Defendants pursuant to Superior Court Rule 9A a motion and

full support for any claim it seeks to make for reasonable attorney's fees and costs incurred in obtaining the original injunction and/or arising from litigation of the contempt complaint.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Chief Justice of the Superior Court

Dated: June 20, 2024

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 2384CV00071

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

JON DELLI PRISCOLI

Consolidated with

NO. 2384CV00958

JON DELLI PRISCOLI

vs.

MICHAEL MILANOSKI, JOHN DEWAELE, DANA RAILCARE, AND THE GRAFTON & UPTON RAILROAD COMPANY

and

NO. 2384CV02141

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

vs.

GRAFTON & UPTON RAILROAD COMPANY, FIRST COLONY GROUP, LLC, AND JON DELLI PRISCOLI

MEMORANDUM AND ORDER ON GRAFTON & UPTON RAILROAD COMPANY'S MOTION FOR ATTORNEYS' FEES AND COSTS AND DELLI PRISCOLI'S MOTION FOR ENTRY OF SEPARATE AND FINAL JUDGMENT UNDER RULE 54 (B)

In this hard-fought case, case 23-2141, the Grafton & Upton Railroad Company ("GURR") filed and prevailed upon a complaint for contempt pursuant to Mass. R. Civ. P. 65.3 against Michael R. Milanoski and John P. DeWaele, III (collectively, "Defendants") for violation of this Court's October 16, 2023 preliminary injunction order ("Order"). Present before the

10/25/2024 parties notified by email TBB

Court is GURR's motion for attorney's fees and costs incurred in obtaining the Order. Docket No. 36. Additionally, in case in 23-071, John Delli Priscoli has filed an unopposed motion for entry of separate and final judgment under Rule 54 (b) on Count I. Docket No. 65.

For the reasons given below, in 23-2141, GURR's request for $30,741.25 in attorney's fees for the contempt litigation, $90 in costs, and $1,381.25 in fees incurred in preparing the fee request against Michael Milanoski and John Dewaele, jointly and severally, is **ALLOWED**. Milanoski and Dewaele shall pay this amount within 30 days of the date of this order.

Delli Priscoli's request for separate and final judgment under Rule 54 (b) on Count I in 23-071 is also **ALLOWED**.

DISCUSSION

A. Legal Fees

In the agreements underlying this dispute, the parties agreed that GURR would be entitled to "recover any attorneys' fees and costs incurred in obtaining [injunctive] relief," but that "[o]therwise, in connection with any action to enforce the terms of this Agreement, each party shall bear such parties own costs and expenses including without limitation, attorneys fees related to such enforcement." GURR is thus entitled to reasonable attorney's fees and costs for obtaining the original injunction, and not for the subsequent litigation. See, e.g., Citizens Bank of Massachusetts v. Travers, 69 Mass. App. Ct. 174, 176-177 (2007) (award of attorney's fees expressly permitted under a contract limited to those that are fair and reasonable).

Separately, the Court previously concluded that Milanoski and Dewaele were in contempt for violating the Court's Order, and that the Court in such a civil contempt proceeding is authorized to impose compensatory fines for the actual loss caused by the contemptible action and attorney's fees and costs. Town of Manchester v. Department of Env't Quality Eng'g, 381

Mass. 208, 215 (1980), abrogated on other grounds by In re Birchall, 454 Mass. 837 (2009) ("[A] punitive fine cannot be imposed upon a contemnor in a civil contempt proceeding. Where a fine is imposed in a civil contempt proceeding it must not exceed the actual loss to the complainant caused by the contemnor's violation of the order in the main case, plus the complainant's reasonable expenses in enforcing his rights.") (internal citation omitted); See also Giannetti v. Thomas, 32 Mass. App. Ct. 960, 961 (1992) ("there is no question that counsel fees and costs are allowable in determining a compensatory fine payable to the prevailing party in a civil contempt proceeding"); Demoulas v. Demoulas Super Mkts., 424 Mass 501, 571 (1997) ("As a matter of law, the awarding of attorney's fees and costs is an appropriate element of a successful civil contempt proceeding ... This award is proper regardless of whether the court has considered the violation of the underlying order to be wilful, and it is within the court's discretion to formulate a remedy in a civil contempt proceeding."). "Attorney's fees and costs in a contempt proceeding are the court's means of compensating the plaintiff for legal expenses and costs incurred as a consequence of the defendant's violation of the court order." DeMoulas, 424 Mass. at 571.

Defendants do not contest these legal principles, but instead argue that some of the fees incurred by GURR were unrelated to the injunction or the contempt complaint and are therefore unreasonable under the parties' agreements. The Court disagrees with both arguments and concludes that the fees and costs sought in this case are entirely reasonable and appropriate under either the parties' agreements or contempt principles. GURR seeks $30,741.25 in attorney's fees for the contempt litigation, $90 in costs, and $1,381.25 incurred in preparing the fee request. In his supporting affidavit, counsel for GURR recognized that in some instances, billings included time for work that would not qualify for fee reimbursement and properly struck non-

reimbursable time and reduced the time and billing accordingly. Defendants' request that the Court reduce the bill by a further 10 to 15 hours is unpersuasive. Defendants also complain that GURR included in its claim for fees time incurred with respect to the answer and counterclaim in this case. But since the counterclaim also sought injunctive relief, relief that the Court ultimately granted in the Order and was the subject of the contempt finding, these claims are appropriate. Accordingly, the Court determines that the entirety of the request made by GURR is appropriate.

Further, the Court finds that the number of hours incurred by the GURR's counsel, a total of approximately 79 hours, and the hourly rate charged, between $395 to $425 an hour, were fair and reasonable in light of the issues in this case under the "lodestar" factors. See, e.g., Hyannis Anglers Club, Inc. v. Harris Warren Commercial Kitchens, LLC, 91 Mass. App. Ct. 555, 563–564 (2017) ("Factors that bear on the determination of a reasonable award of fees are 'the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation, and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases'"). This matter involved the flagrant violation of the Court's Order, which was a matter of not only private interest but also one of public significance. The nature of the case and the issues presented were thus significant and counsel's performance professional and effective. Further, the hourly rates charged are well below market in the Court's experience in commercial litigation cases over the past several years.

Defendants' request for 90 days to pay this amount is denied. They shall pay this amount to GURR within 30 days from the date of this Order.

B. Rule 54(b)

Rule 54(b) allows issuance of a partial judgment under very limited circumstances – only where the Court makes an "express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Thus, a separate and final judgment on only some of the pending claims "is proper where (1) an action involves multiple claims or multiple parties; (2) there has been a final adjudication as to at least one but fewer than all of the claims; (3) there is an express finding that there is no just reason for delaying an appeal until the remainder of the case is resolved; and (4) the entry of judgment is expressly directed." O. Ahlborg & Sons, Inc. v. Massachusetts Heavy Indus., Inc., 65 Mass. App. Ct. 385, 392 (2006). Rule 54 (b) is a remedial device that should be considered a "special dispensation" to be used "sparingly." Id., quoting Long v. Wickett, 50 Mass. App. Ct. 380, 387, 389 (2000). "Whether multiple claims exist and whether there has been a final adjudication as to any claim are questions of law upon which [appellate] review of the [trial] judge's decision is de novo. On the other hand, review of '[t]he determination of the presence or absence of a just reason for delay ... is left to the sound discretion of the trial judge and is subject to reversal only for an abuse of that discretion.'" Id. (citations omitted).

The showing necessary under Rule 54(b) is high because issuing a separate judgment on only some claims can create confusion and complication on appeal. Here, where summary judgment on Count I was unopposed, there is no such risk. Indeed, there is no just reason for delay entry of final judgment on Count I of the Plaintiffs' complaint in this action.

ORDER

For the foregoing reasons, GURR's motion for $30,741.25 in attorney's fees for the contempt litigation, $90 in costs, and $1,381.25 in fees incurred in preparing the fee request

against Michael Milanoski and John Dewaele, jointly and severally, is **ALLOWED**. Milanoski and Dewaele shall pay this amount within 30 days of the date of this order.

Delli Priscoli's request for separate and final judgment under Rule 54 (b) on Count I in 23-071 is **ALLOWED**. As there is no just reason for delay, the Court therefore directs entry of final judgment on Count I of the Plaintiffs' complaint in favor of Delli Priscoli.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Chief Justice of the Superior Court

Dated: October 24, 2024

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

2384CV00071-BLS2
2384CV00958-BLS2
2384CV02141-BLS2

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

v.

JON DELLI PRISCOLI

JON DELLI PRISCOLI

v.

MICHAEL MILANOSKI, JOHN DEWAELE, DANA RAILCARE, AND THE GRAFTON & UPTON RAILROAD COMPANY

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

v.

GRAFTON & UPTON RAILROAD COMPANY; FIRST COLONY GROUP, LLC; AND JON DELLI PRISCOLI

Counsel Notified via email 1/9/24. BNL Asst Clerk

DECISION AND ORDER GRANTING SUMMARY JUDGMENT UPHOLDING DANA RAIL CARE'S RIGHT OF FIRST REFUSAL

Michael R. Milanoski and John P. DeWaele, III, allege that they entered into a binding agreement to purchase Grafton & Upton Railroad Company ("GURR") from Jon Delli Priscoli. But Dana Transport, Inc., which has done business under the name Dana RailCare ("Dana"), contends that it is entitled to enforce a contractual right of first refusal and buy GURR.

Delli Priscoli filed suit seeking a declaratory judgment as to whether Dana's ROFR is enforceable. Milanoski and DeWaele contend that the letter of intent containing Dana's ROFR was never enforceable and Dana should be estopped from contending it is enforceable, or the letter of intent was terminated and Dana's ROFR did not survive the termination, or the letter of intent was superseded by later contracts. Dana, GURR, and Delli Priscoli contend that Dana's ROFR is enforceable and was properly invoked by Dana. The parties seem to agree that the material facts are not in dispute, and ask the Court to resolve the issue on summary judgment.

The Court will **allow** Dana's motion for declaratory relief, **deny** the motion by Milanoski and DeWaele to enforce their contract with Delli Priscoli, and order

that final judgment shall enter declaring that Dana's ROFR is valid, still in effect, and enforceable, and that Dana made a proper and timely exercise of its right to purchase GURR.

Dana is entitled to declaratory relief in its favor because there is an actual controversy about whether Dana's ROFR is valid and enforceable, Milanoski and DeWaele have standing to challenge the validity of this ROFR, all necessary parties have been joined as parties in civil action 2384CV00958-BLS2,[1] and the undisputed material facts demonstrate that Dana's ROFR is valid and enforceable as a matter of law.[2]

The Court concludes that Milanoski and DeWaele have standing to assert that Dana's ROFR is invalid and may not be enforced, but that their challenge to this ROFR is without merit. The Court finds and concludes that the letter of intent containing Dana's ROFR is an enforceable contract, Dana is not estopped by prior statements from asserting that this ROFR is enforceable, Dana's ROFR was not terminated, and subsequent contracts with affiliates of Dana did not supersede this ROFR. Furthermore, Delli Priscoli's agreement to sell GURR to Milanoski and DeWaele triggered Dana's ROFR, and Dana gave prompt and timely notice of its intent to exercise its ROFR. Since Dana's ROFR is valid and enforceable, allegations that Dana has somehow colluded with GURR and Delli Priscoli to protect its legal rights are beside the point.

1. **Undisputed Factual Background.** The summary judgment record shows that the following facts are true.

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[1] Delli Priscoli filed his declaratory judgment action in Worcester Superior Court on January 10, 2023. It was docketed as civil action 2385CV00022. The case was then transferred to the Suffolk Business Litigation Session, and assigned the new docket number 2384CV00958-BLS2.

Though Delli Priscoli's complaint names "Dana RailCare" as a defendant, Dana Transport, Inc., answered the complaint, representing that Dana RailCare is a trade name used by Dana Transport, Inc. The parties have all treated Dana Transport, Inc., as being a party to this civil action, and seem to agree that it was also party to the letter of intent between GURR and "Dana RailCare," which is discussed below.

[2] See generally *Buffalo-Water 1, LLC*, v. *Fidelity Real Estate Co., LLC*, 481 Mass. 13, 18–20 (2018) (requirements for declaratory judgement claim); *Bortolotti* v. *Hayden*, 449 Mass. 193, 206 (2007) (party seeking to enforce right of first refusal was entitled to summary judgment and entry of declaration that right was valid and enforceable).

1.1. **Dana's ROFR**. Starting in 2008, GURR and Dana discussed working together to grow GURR's rail business by having Dana develop mostly vacant industrial land pit in Upton, Massachusetts, into a rail yard. They entered into a letter of intent in January 2009 (the "Dana LOI") that gave Dana the right to lease and an option to purchase the property. The Dana LOI identified the property that Dana was leasing, and had an option to purchase, as comprising roughly 33 acres of industrial land located on Maple Avenue, Upton, Massachusetts, as shown on a plan by Allen Engineering dated June 3, 2008.

The Dana LOI included the price terms of the lease arrangement and the purchase option, and contemplated that a more detailed lease or license agreement would be negotiated and executed within a month. The price terms in the Dana LOI were as follows:

- Dana was required to make a down payment of $50,000 upon signing the Dana LOI.
- Once Dana installed the first two lengths of rail track infrastructure, which was expected to be complete by around June 1, 2009, Dana was required to start making GURR's mortgage loan payments of roughly $3 million per month and to start making monthly lease payments.
- The monthly lease payment started at $3,500, would increase to $7,500 once the new rail yard achieved a weekly average of 35 railcar transloadings, and would increase to $15,000 once there was a weekly average of 75 railcar transloadings.
- Dana could exercise an option to purchase the property for $6 million on April 1 of 2010, 2011, 2012, or 2013. The initial $50,000 downpayment would be credited toward the purchase price; the monthly mortgage and lease payments would not.

This agreement required Dana to develop the leased premises as a rail yard, and to perform all necessary design and construction work at its own risk, subject to GURR's approval of all plans. And it also required Dana to use its best efforts to develop new rail business for GURR at the Upton Rail Yard, and permit GURR to use the planned facility for its rail transportation activities.

In addition, the Dana LOI provided that GURR and Dana would enter into "standard sidetrack and switching agreements governing rail operations and

service at the Upton Rail Yard," that would authorize Dana to act as GURR's agent "for purposes of transloading or other rail transportation activities."

Finally, the Dana LOI gave Dana "the right of first refusal to purchase or operate the GURR if there is a change of control of the GURR from the current owner, Jon Delli Priscoli, or if he chooses to cease rail operations at the Upton Rail Yard." It provided that Dana's ROFR would survive Dana's option to purchase the rail yard property.

1.2. **Implementation of the Dana LOI**. There is no evidence that GURR and Dana entered into a more detailed lease of the Upton Rail Yard property. But the summary judgment record establishes that GURR and Dana treated the Dana LOI itself as constituting an enforceable lease of the property.

Dana paid the $50,000 down payment required in the Dana LOI. It also made the monthly lease payments to GURR that were required in the Dana LOI; at some point the lease payment amounts rose to $15,000 per month. As discussed below, however, for a time Dana was late in making these payments.

Dana developed the land that it was leasing into the Upton Rail Yard and proceeded to have an affiliate operate that facility for GURR. Dana says that it invested closed to $50 million to do so.

GURR entered into a Terminal Transloading Agreement with Grafton Upton Railcare LLC in December 2010; this LLC is an affiliate of Dana. At the same time, GURR entered into a Purchase and Sale Agreement regarding the Upton Rail Yard property with Equipment Care Center of Grafton, LLC, which is another affiliate of Dana. This P&S was drafted to implement Dana's option to purchase the property for $6 million.

1.3. **Milanoski and DeWaele's Purchase Agreement**. In late 2022, Milanoski and DeWaele agreed to buy and Delli Priscoli agreed to sell to them his 100 percent ownership interest in GURR and all of GURR's assets except for Delli Priscoli's 50 percent ownership interest in Upton Development Group. On December 1, 2022, all three of them executed and entered into a restated letter of intent (the "2022 Restated LOI"), in which they agreed upon the material terms of a future purchase and sale agreement.

Milanoski and DeWaele agreed to pay Delli Priscoli $36 million and to assume roughly $6 million in debt to acquire GURR and most of its assets, including the Upton Rail Yard. The 2022 Restated LOI requires Delli Priscoli to deliver his

interest in GURR "free and clear of all liens with clear title" aside from certain specified debt.

1.4. **Dana's Exercise of its ROFR**. Delli Priscoli notified Dana about his acceptance of Milanoski's and DeWaele's offer to purchase GURR.

Dana responded by promptly notifying GURR that it intended to exercise Dana's ROFR. On December 28, 2022, Ron Dana sent an email to Jon Delli Priscoli that said, "It is my intent to move forward to exercise my right of first refusal on the purchase of the Grafton and Upton Railroad." On January 5, 2023, an attorney representing Dana sent a letter to an attorney representing Delli Priscoli, reiterating that "Dana hereby exercises its right of first refusal to purchase GURR on the terms set forth in the offer Mr. Priscoli received to sell his ownership interest in GURR."

2. **Analysis**. The undisputed material facts show that Dana's ROFR was and still is enforceable. Dana is therefore entitled to summary judgment in its favor declaring its rights under the binding right of first refusal. See *Bortolotti* v. *Hayden*, 449 Mass. 193, 206 (2007).

2.1. **Standing**. Milanoski and DeWaele have standing to challenge the validity and enforceability of Dana's 2009 ROFR. The assertion by GURR that they lack standing is without merit.

A party that has entered into a contract to purchase specific real estate has standing to challenge a purported right of first refusal on that property that is claimed by a third-party. See *Bortolotti, supra*, at 196–198.

As discussed above, Milanoski and DeWaele entered into a binding letter of intent to purchase GURR and most of its assets from Delli Priscoli for $36 million plus the assumption of roughly $6 million in debt. That gives Milanoski and DeWaele "a cognizable legal interest in the validity" of the Dana ROFR, "and that is enough to confer standing." *Id.* at 198.

2.2. **The Dana LOI Was a Binding Contract**. Milanoski and DeWaele contend that the Dana LOI was never an enforceable contract because it "contemplates the execution of subsequent formal agreements," does not include all material terms, and does not expressly state that the parties intended the document to be binding. They also contend that Dana should be estopped, by prior testimony before the Federal Surface Transportation Board, from asserting that the Dana LOI was and is an enforceable contract. The Court disagrees.

2.2.1. **Material Terms and Intent to be Bound**. The Dana LOI was and is an enforceable contract, even though it contemplated that "GURR & Dana will enter into a fuller detailed Lease/License agreement" and into a separate contract to govern transloading and other rail transportation activities.

"[T]o create an enforceable contract, there must be agreement between the parties on the material terms of the contract, and the parties must have a present intention to be bound by that agreement." *K&K Development, Inc.*, v. *Andrews*, 103 Mass. App. Ct. 338, 344 (2023), quoting *Situation Mgmt. Sys., Inc.* v. *Malouf, Inc.*, 430 Mass. 875, 878 (2000).

"A purported contract which is no more than an agreement to agree in the future on essential terms, or one which does not adequately specify essential terms, ordinarily will be unenforceable." *Air Tech. Corp.* v. *Gen. Elec. Co.*, 347 Mass. 613, 626 (1964).

But an agreement will be enforceable even if it "anticipates a more formal writing," so long as the parties "have agreed upon either the material terms, or upon the 'formulae and procedures' that will provide the material terms at some future date." *K&K Development, supra*, quoting *Frishman* v. *Maginn*, 75 Mass. App. Ct. 103, 110–111 (2009). Where the parties "have agreed upon all material terms," but contemplate the further execution of a final written agreement, it is reasonable to infer "that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract." *McCarthy* v. *Tobin*, 429 Mass. 84, 87 (1999) (accepted offer to purchase real estate was binding contract, even though it contemplated further purchase and sale agreement), quoting *Goren* v. *Royal Invs., Inc.*, 25 Mass. App. Ct. 137, 140 (1987) (same).

The Dana LOI was much more than a mere "agreement to agree." It contained all material terms of the lease of the planned rail yard site to Dana, of Dana's option to purchase the site, and of Dana's ROFR to purchase GURR if Delli Priscoli were to decide to relinquish control of the company or cease rail operations at the Upton Rail Yard.

The material terms of the **lease arrangement** are set forth in the Dana LOI. As discussed above in more detail, this contract identified the premises to be leased by reference to a specific plan, specified the payment terms, and required Dana to build out and operate the leased premises.

The parties made clear that they intended to be bound by these terms, not only by agreeing to them, but also by following these terms even though the parties never entered into a more detailed lease agreement. Where contract language is ambiguous, "[t]here is no surer way to find out what parties meant, than to see what they have done." *Brigade Leveraged Capital Structures Fund Ltd.* v. *PIMCO Income Strategy Fund*, 466 Mass. 368, 378 (2013), quoting *Brooklyn Life Ins. Co. of New York* v. *Dutcher*, 95 U.S. 269, 273 (1877).

The Dana LOI also contained all material terms regarding Dana's **option to purchase** the Upton property. It specified the price, and the four specific dates when Dana was entitled to exercise the option.

In any case, **Dana's ROFR** was valid and enforceable as written, whether other provisions of the Dana LOI were contractually binding or not.

Dana's ROFR was enforceable because it contained all material terms. No price or timing term was required, because the ROFR merely gives Dana the right to purchase at the right offered by a third-party, if and when Delli Priscoli decided to accept any such offer. See *Bortolotti*, 449 Mass. at 201.

A right of first refusal involving real estate "becomes operational when the 'owner has decided to accept a third person's outstanding and enforceable offer and the holder of the right has been informed of the details of that offer and has had a reasonable time to meet it.' " *Id.* at 200, quoting *Roy* v. *George W. Greene, Inc.*, 404 Mass. 67, 71 (1989). "At the time of a third-party offer that the owner has decided to accept, the right of first refusal ripens into an option to purchase according to the terms of the third-party offer." *Id.* at 201.

Dana's ROFR was contractually binding because the material terms of that right were spelled out; and it remains contractually binding even if other parts of the Dana LOI were nothing more than an unenforceable agreement to negotiate further about other issues. See *Schwanbeck* v. *Federal-Mogul Corp.*, 412 Mass. 703, 705–707 & n.2 (1992). In *Schwanbeck*, the parties entered into a letter of intent in which they agreed to "negotiate in good faith" over the terms for the purchase and sale of a business division of the defendant corporation, and also agreed that the potential buyer would have a right of first refusal if any third-party made a firm offer to purchase the business. *Id.* at 705 n.2. The Supreme Judicial Court held that, although the "negotiate in good faith" provision was not contractually binding, the separate right of first refusal was nonetheless enforceable (though it was not triggered because there was not a firm offer that complied with the Statute of Frauds). *Id.* at 705–710.

Though the Dana LOI did not contain terms of the transloading agreement that GURR later entered into with Grafton Upton Railcare LLC ("GU Railcare"), which is an affiliate of Dana, that is beside the point. Since the Dana LOI was an enforceable contract with respect to the property lease, Dana's option to purchase the property, and (most importantly) Dana's ROFR, it does not matter that the parties contemplated entering into additional business arrangements the material terms of which were not included in the Dana LOI.

2.2.2. **Estoppel Argument**. Milanoski and DeWaele argue that the Court "must hold Mr. Delli Priscoli and Mr. [Ron] Dana to their prior testimony" in affidavits submitted in 2012 and 2013 to the Federal Surface Transportation Board about the relationship between GURR and Dana, and bar them from "provid[ing] contradictory testimony here."

In other words, Milanoski and DeWaele are asking the Court to apply the doctrine of judicial estoppel, even though they do not use the term and do not cite or address any of the relevant case law.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position that it had previously asserted in another proceeding." *Mullins* v. *Corcoran*, 488 Mass. 275, 286 (2021), quoting *Otis* v. *Arbella Mut. Ins. Co.*, 443 Mass. 634, 639–640 (2005). "A successful claim of judicial estoppel generally requires the showing of two core elements: (1) the party to be estopped is asserting a position that is 'directly contrary' to a position asserted in a prior case, and (2) that party 'succeeded in convincing the court to accept its prior position.' " *Spinosa* v. *Tufts*, 98 Mass. App. Ct. 1, 5 (2020), quoting *Otis, supra*, at 641. With respect to the second of these elements, it is not enough to show that the party prevailed in the prior proceeding; instead there must be evidence that the prior tribunal adopted the position that allegedly is contrary to the party's position in the current litigation. See *Mullins*, 488 Mass. at 287.

"Application of the equitable principle of judicial estoppel to a particular case is a matter of discretion." *Otis*, 443 Mass. at 639–640. "The Supreme Judicial Court has 'decline[d] to construct a categorical list of requirements or to delineate each and every possible exception.' " *Spinosa*, 98 Mass. App. Ct. at 6, quoting *Otis, supra*, at 642. "Instead, judges are to 'use their discretion, and their weighing of the equities, and apply judicial estoppel where appropriate to serve its over-all purpose" of safeguarding the integrity of the courts. *Spinosa, supra*, at 6, quoting *Otis, supra* at 642.

The Court declines to estop Dana from asserting that the Dana LOI was and is an enforceable contract. It does so for four reasons.

First, Milanoski and DeWaele do not cite to any Massachusetts case law applying estoppel in a civil action based on allegedly inconsistent statements made before an administrative agency, rather than in a court proceeding. The Court "is not aware of any case in Massachusetts that directly applies the doctrine of judicial estoppel to positions adopted in administrative proceedings," see *Trustees of Boston College* v. *Boston Academy of the Sacred Heart, Inc.*, 103 Mass. App. Ct. 83, 93 (2023), though it recognizes that a number of federal courts have done so, see, e.g., *Rissetto* v. *Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996) (collecting cases, and cited in *Boston Academy of the Sacred Heart, supra.*)

Since Milanoski and DeWaele have not provided any substantive argument in support of their position that judicial estoppel can be applied in the circumstances of this case, the Court considers that legal argument to have been waived. Cf. *Halstrom* v. *Dube*, 481 Mass. 480, 483 n.8 (2019) (argument raised "in a cursory fashion without citation to supporting legal authority" is waived); *Commonwealth* v. *Johnson*, 470 Mass. 300, 319 (2014) (trial court acted "well within" its discretion in declining to consider unsupported and undeveloped argument). Milanoski and DeWaele have filed a motion seeking summary judgment in their favor as to the enforceability of Dana's ROFR. In the Superior Court, moving parties are required by rule to file a written memorandum that includes "a statement of reasons, with supporting authorities, why the motion should be granted." Sup. Ct. Rule 9A(a)(2). Parties therefore waive issues and arguments that they do not raise and develop in their written memoranda.

Second, Milanoski and DeWaele have not shown that the STB adopted the statements in Mr. Dana's affidavits about Dana Transport's relationship with GURR.

The Court is troubled that Ron Dana seems to have made sworn statements to the STB that are directly contrary to his assertions in this case, and are directly contrary to the plain meaning of the Dana LOI signed in early 2009. Mr. Dana told the STB that (i) none of the Dana Companies leased the Upton Rail Yard from GURR, and (ii) although the Dana affiliate Grafton Upton Railcare, LLC ("GU Railcare") provided transloading services for GURR, Dana Transport had no contractual relationship with and did not perform any services for GURR.

But Milanoski and DeWaele have not met their burden of proving that the STB adopted Dana's position about its legal relationship with GURR.

The STB's decision in the matter in which Mr. Dana submitted the affidavits cited by Milanoski and DeWaele make clear that the STB did **not** adopt or in any way rely upon Mr. Dana's representations that no Dana company other than GU Railcare had any contractual relationship with GURR and that Dana never leased the rail yard. The STB held that GU Railcare's was conducting transloading activities at the Upton facility on behalf of GURR, that these activities fell within the statutory definition of "transportation" and were performed under the auspices of a "rail carrier," and that federal law therefore preempted local regulation of those activities. See *Del Grosso*, STB Docket No. FD 35652, 2014 WL 6852990, at *1–*4, slip. at 1–5 (STB Dec. 4, 2014).[3] The Board noted that, since "the relevant issue ... is whether *GU Railcare's* transloading activities are part of rail transportation, it would "not address ... alleged activities by *other* companies" (emphasis in original). *Id.* 2014 WL 6852990, at *9, slip op. at 11.[4]

Since the STB did not adopt Mr. Dana's stated positions regarding the legal relationship between GURR and Dana affiliates other than GU Railcare, and instead stated that it did not have to reach the issue, there is no basis for estopping Dana from taking a potentially inconsistent position in these civil actions. See *Mullins*, 488 Mass. at 287.

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[3] The STB makes its decisions available at its website. See stb.gov/proceedings-actions/decisions/.

[4] Though the petitioners in that STB proceeding sought judicial review of the Board's determination that the activities at the transloading facility constitute rail "transportation," they did not seek review of the Board's that GU Railcare was acting on behalf of GURR and thus that the transloading activities were being performed by a "rail carrier." See *Del Grosso* v. *Surface Transp. Bd.*, 804 F.3d 110, 117 & 120 (1st Cir. 2015). The First Circuit held that the Board applied the wrong standard in deciding whether the transloading activities constituted transportation. *Id.* at 118–120. On remand, the STB held that the activities that GU Railcare was undertaking for GURR constitute transportation that is within the Board's statutory jurisdiction, which means that local regulation of those activities was preempted by federal law. *Del Grosso—Petition for Declaratory Order*, FD 35652, slip op. at 11 (STB served July 31, 2017). The First Circuit affirmed. *Del Grosso* v. *Surface Transp. Bd.*, 898 F.3d 139 (1st Cir. 2018).

Third, Mr. Delli Priscoli's statements to the STB could not estop Dana, even if the doctrine of judicial estoppel applied in these circumstances.

Fourth, even if Milanoski and DeWaele had shown that the doctrine of judicial estoppel would otherwise be applicable, which they have not, the Court would exercise its discretion not to estop Dana from arguing that the 2009 Dana LOI was and is an enforceable contract because it finds that Milanoski and DeWaele make that request with unclean hands.

Since judicial estoppel is an equitable doctrine, a judge may exercise their discretion not to apply it if the party seeking judicial estoppel "comes to the court with unclean hands." *Spinosa* v. *Tufts,* 98 Mass. App. Ct. 1, 8 (2020), quoting *Galaz* v. *Katona,* 841 F.3d 316, 326 (5th Cir. 2016). The unclean hands doctrine allows a judge to deny equitable relief to someone who has acted in bad faith or otherwise engaged in unfair or inequitable conduct. See *Thayer Co.* v. *Binnall,* 326 Mass. 467, 483 (1950); *Murphy* v. *Wachovia Bank of Delaware,* 88 Mass. App. Ct. 9, 15 (2015). "The question whether to deny relief based on 'unclean hands' is committed to the broad discretion of the trial judge." *Reilly* v. *Local 589, Amalgamated Transit Union,* 31 Mass. App. Ct. 633, 639 (1991).

The summary judgment record establishes the following, which indicates that Milanoski and DeWaele come to court with unclean hands.

- Delli Priscoli decided to sell GURR in September or October of 2022.
- Milanoski was the President of GURR. DeWaele also worked for GURR. When they learned that Delli Priscoli had decided to sell the company, they asked for an opportunity to buy GURR.
- Milanoski was well aware of Dana's ROFR. When Milanoski began working for GURR in 2017, Stan Gordon (who was GURR's Vice President) emailed a copy of the Dana LOI to Milanoski and specifically noted Dana's ROFR in his summary of the terms of that agreement. Then, in September 2022, Milanoski forwarded that Gordon email from Milanoski's email address at First Colony Development to Milanoski's email address at GURR.
- While the Milanoski and DeWaele were negotiating with Delli Priscoli to buy GURR soon thereafter, Delli Priscoli asked Milanoski about that status of Dana's ROFR in the 2009 Dana LOI.

- Milanoski told Delli Priscoli that Dana's ROFR had been "taken care of" and was no longer valid or enforceable. Milanoski made this representation on behalf of himself and DeWaele.

- Delli Priscoli accepted Milanoski's representation as true, because he knew that as President of the company Milanoski had complete access to GURR's books and records.

- But Milanoski knew his representation that Dana's ROFR had been terminated was **not** true. Milanoski sent an email on December 8, 2022, to his contact at the bank that Milanoski had asked to finance his purchase of GURR that said in part, "We are going to resolve the ROFR with Ron Dana from an old Letter of Intent and get signoff satisfactory to Bank's attorney."

- When Delli Priscoli's attorney reviewed the 2022 Revised LOI with Milanoski and DeWaele, the attorney followed up by asking Milanoski about Dana's ROFR, and telling Milanoski that he would not be able to get a bank loan to finance a purchase of GURR without providing evidence that Dana's ROFR had been terminated. Delli Priscoli's attorney knew that in 2020, when the limited liability company that owns the site of the Upton Rail Yard was seeking a bank loan, Milanoski provided the bank with documentation that included the Dana LOI.

- Milanoski responded by sending a number of documents to the attorney. None of them demonstrated that Dana's ROFR had been terminated. After Dana gave notice that it was exercising its ROFR, Milanoski sent additional documents to the attorney. They did not show that Dana's ROFR had been terminated either.

- Delli Priscoli met with Milanoski and DeWaele, and said he could not sell GURR to them unless Dana agreed to waive or not exercise Dana's ROFR. Milanoski did not respond. DeWaele said, "Well, let us think about it."

- Delli Priscoli's attorney concluded that there was an actual controversy about whether Dana's ROFR was enforceable, and advised Delli Priscoli to file an action seeking a declaratory judgment to resolve the issue. Which he did.

The Court finds and concludes that Milanoski and DeWaele engaged in unfair and inequitable conduct by telling Delli Priscoli that Dana's ROFR had been "taken care of," even though they must have known that Dana was likely to take the position that Dana's ROFR was valid and still enforceable. In essence, Milanoski and DeWaele tricked Delli Priscoli into selling GURR to him and signing the 2022 Restated LOI, without exploring a possible sale to Dana, by giving Delli Priscoli a misleading and knowingly incomplete assurance that Dana's ROFR was no longer valid or enforceable. The Court credits Delli Priscoli's representation, in his legal memorandum, that he would not have agreed to sell GURR to Milanoski and DeWaele if Milanoski had not assured him that Dana's ROFR was no longer valid.

In the exercise of its discretion, the Court concludes that Milanoski and DeWaele have come to court with unclean hands, and that it would therefore be inequitable for them to obtain any advantage in this litigation through application of the equitable doctrine of judicial estoppel.

2.3. **GURR Did Not Terminate the Dana LOI.** The summary judgment record establishes that, although GURR said it was terminating the Dana LOI in late 2010, GURR and Dana then resolved their differences and thereafter GURR treated the Dana LOI as being in effect.

GURR, its owner Mr. Delli Priscoli, and Dana all agree that, although conflicts arose between GURR and Dana in 2009 and 2010 as their business relationship was developing, and for a time Dana was not making lease payments required by the Dana LOI, they ultimately resolved their disputes. They also agree that the Dana LOI was not terminated, Dana proceeded to invest roughly $50 million to develop the Upton property based on the terms of the Dana LOI, and GURR continued to carry out its obligations under the Dana LOI. The undisputed factual record supports the parties view that the Dana LOI remained and remains in effect.

It follows that the Dana LOI was and still is enforceable. Where one party commits a material breach of contract, but the other party elects to continue performing, the contract remains in effect and both parties are bound by its terms. See *Kass* v. *Todd*, 362 Mass. 169, 175–176 (1972). "An injured party may refuse to consider a breach as a material one and elect to keep the contract alive. The contract then continues for the benefit of both parties[.]" *Lander* v. *Samuel Heller Leather Co.*, 314 Mass. 592, 598 (1943).

During 2010, GURR was getting increasingly concerned that Dana was not implementing and fully complying with the Dana LOI. In September 2010, GURR's Vice President Stan Gordon sent a letter to Dana's attorney complaining that Dana had repeatedly breached the Dana LOI, and taking the position that as a result the Dana LOI was "no longer in effect" and was "null and void." A month letter, Gordon sent a letter with the subject line "Notice of Default" and stating that "Dana are hereby formerly [sic] notified of their default under the LOI and that the LOI is hereby formerly [sic] terminated."

But it is undisputed that soon thereafter Mr. Delli Priscoli, Mr. Dana, Mr. Gordon and others met and resolved their issues. Thereafter both GURR and Dana considered the Dana LOI as remaining in effect. Both GURR and Dana continued to invest and work together to develop the Upton property based on that shared understanding. At the end of December 2010, GURR entered into a Terminal Transloading Agreement with GU Railcare, as contemplated in the Dana LOI, and also entered into a Purchase and Sale Agreement for the Upton party with Equipment Care Center of Grafton, LLC ("Equipment Care," another Dana affiliate) consistent with the purchase option contained in the Dana LOI. That is consistent with the undisputed evidence that GURR and Dana had resolved their differences and GURR was no longer terminating the Dana LOI.

When Milanoski began working for GURR in 2017, Gordon sent him an email attaching a copy of the Dana LOI, and describing Dana's ROFR. Gordon did not suggest had been terminated. Instead, it appears that Gordon was providing Milanoski with a copy of a key contract that continued to govern the relationship between GURR and Dana with respect to the Upton property.

In February 2020, an attorney representing GURR drafted an agreement with Dana (never executed) that was intended "to consolidate and supersede" some of the agreements between GURR and Dana or Dana's affiliates. The draft included a provision that would have expressly terminated the Dana LOI from 2009. This confirms that GURR understood that the Dana LOI was still in force. There would be no need to ask Dana to terminate its LOI if GURR had already terminated that agreement years earlier.

It is undisputed that Dana continues to pay monthly rent to GURR for the Upton Rail Yard. GURR's continued acceptance of that rent, and continued performance by allowing Dana to help run the Upton property, establishes that the Dana LOI remains in effect. See *Kass* and *Lander, supra.*

2.4. **Subsequent Contracts Did Not Supersede Dana's ROFR.** Milanoski and DeWaele also contend that Dana's ROFR was "fully integrated into" and thus eliminated by the subsequent contracts that GURR entered into with GU Railcare and Equipment Care. This argument is without merit.

The Terminal Transloading Agreement between GURR and GU Railcare provides in § 7.D:

> This Agreement constitutes the entire agreement between the Parties as to the subject matter hereof, and supersedes all previous oral or written understandings, agreements and commitments as to the subject matter hereof.

Though the term "Parties" is capitalized, it is not defined in the contract. But the only parties to this agreement were GURR and GU Railcare.

The Purchase and Sale Agreement between GURR and Equipment Care provides in the first sentence of ¶ 13:

> This Agreement embodies the entire agreement between the parties hereto with respect to the purchase and sale and operation of the Property and supersedes any and all prior negotiations, agreements and understandings, written or formal , all of which are deemed to be merged herein.

Neither of these integration clauses had the effect of eliminating Dana's ROFR from the Dana LOI. By their terms, these clauses only defined the agreements that GURR entered into with GU Railcare and Equipment Care. They did not affect, alter, or limit the prior contract that GURR had entered into with Dana, because Dana was not a party to the transloading agreement or to this P&S. Furthermore, the subject matter of Dana's ROFR was outside the subject matter of the transloading agreement, and did not concern the sale of property to or operation of property by Equipment Care.

If GURR and Dana had intended to terminate Dana's ROFR when GURR executed the transloading agreement and this P&S, they would have had to enter into a new contract or amend the Dana LOI to do so. Dana Transport, Inc., is a "separate and distinct" legal entity; integration clauses defining the contractual rights of its affiliates GU Railcare and Equipment Care did not affect Dana's ROFR. See generally *Scott* v. *NG US 1, Inc.*, 450 Mass. 766, 766 (2008) (separate corporations or LLCs are generally "regarded as separate and distinct entities," even if there are "relationships between or among them.").

2.5. **Dana Exercised Its Right of First Refusal.** Dana properly exercised its ROFR after learning that Milanoski and DeWaele had made a bona fide offer to purchase the Upton property, as reflected in the 2022 Restated LOI that Milanoski, DeWaele, and Delli Priscoli executed on or about December 1, 2022. Dana promptly informed Delli Priscoli that it intended to exercise Dana's ROFR. It did so by email on December 28, 2022, and in a follow-up letter to Delli Priscoli's attorney on January 5, 2023.

The assertion by Milanoski and DeWaele and Delli Priscoli and Dana engaged in "collusion" in order torpedo the 2022 Restated LOI is without merit.

GURR had a contractual obligation to inform Dana about the bona fide offer by Milanoski and DeWaele to purchase the property. A right of first refusal is "a limitation on the owner's ability to dispose of property without first offering the property to the holder of the right at the third party's offering price." *Uno Restaurants, Inc.* v. *Boston Kenmore Realty Corp.*, 442 Mass. 376, 383 (2004). "The owner's obligation under a right of first refusal is to provide the holder of the right seasonable disclosure of the terms of any bona fide third-party offer." *Id.* at 383–384.

And, since Dana's ROFR was valid and enforceable, Dana did nothing improper by exercising that right.

3. **Separate and Final Judgment.** Though civil action 2384CV00958-BLS2 was previously consolidated with civil actions 2384CV00071-BLS2 and 2384CV02141-BLS2, the Court finds that there is no just reason for delaying the entry of declaratory judgment in Dana's favor on the issues that the Court has now decided regarding the enforceability of Dana's ROFR. It will therefore order that separate and final declaratory judgment shall enter forthwith in civil action 2384CV00958-BLS2. Cf. Mass. R. Civ. P. 54(b).

ORDERS

The motion by Dana Rail Care for declaratory relief in civil action 2384CV00958-BLS2 is **allowed**. The motion by Michael Milanoski and John P. DeWaele, III, to enforce their December 2022 letter of intent with Jon Delli Priscoli is **denied**.

The clerk's office shall enter separate and final judgment in civil action 2384CV00958-BLS2, stating as follows:

This action for declaratory relief came before the Court (Salinger, J.) on cross-motions for summary judgment. Having decided those motions and resolved the controversy among the parties regarding the enforceability of a particular right of first refusal, the Court hereby declares the parties' rights as follows:

(1) The right of first refusal that Grafton & Upton Railroad Company ("GURR") granted to Dana Rail Care (a trade name used by Dana Transport, Inc.) in a Letter of Intent that these parties entered into on or about January 23, 2009, was and still is an enforceable contract.

(2) This January 2009 Letter of Intent was not terminated by GURR.

(3) Under this Letter of Intent, Dana has a right of first refusal to purchase or operate GURR if Jon Delli Priscoli decides to sell or otherwise give up control of GURR. This right of first refusal is valid and enforceable.

(4) The agreement to Michael Milanoski and John DeWaele to purchase GURR and most of its assets from Mr. Delli Priscoli is a firm offer that triggered Dana's right of first refusal to purchase GURR.

(5) Dana made a timely and proper exercise of its right of first refusal by giving notice of its intent to purchase GURR soon after Mr. Delli Priscoli agreed to sell that company to Mr. Milanoski and Mr. DeWaele.

(6) Now that Dana has exercised its legal right to purchase GURR on the terms offered by Mr. Milanoski and Mr. DeWaele, it follows that Mr. Milanoski and Mr. DeWaele may not enforce the December 2022 revised letter of intent in which Mr. Delli Priscoli had agreed to sell GURR to them.

Kenneth W. Salinger
Justice of the Superior Court

9 January 2024

EXHIBIT G

CITY OF FRAMINGHAM
Inspectional Services Division
Department of Building Inspection

Fred Bray 508-532-5500 **MEMORIAL BUILDING**
Director/Building Commissioner **150 Concord Street room 203, Framingham**

September 29, 2026

To: CSX Transportation, Inc.
Attn: Karen Clark
500 Water Street, J180
Jacksonville, FL 32202

Re: 480 Hollis Street Order to cease and desist Transload X operations

Dear Owner(s):

You are ordered to cease and desist all Transload X operations at 480 Hollis Street in accordance with Framingham zoning ordinance 435-7, 6, M, operation of a "storage and distribution facility" without the required special permit.

On September 17, 2026, I met with Michael Milanoski and John DeWaele of Transload X regarding their business operations at CSX property at 480 Hollis Street Framingham. The discussion primarily revolved around the classification of the use within the Framingham zoning ordinances table of uses. I had previously requested in writing for Transload X to provide a description of their business to assist with this classification. I explained that as Building Commissioner, I am required to determine what the closest use in the table is when considering a zoning complaint. I further explained that I would soon make a determination on that use with or without any input from them as they had not yet provided any sort of description, despite being requested to do so on multiple occasions. At the conclusion of the meeting, I was advised by Milanoski and DeWaele that they would follow up with a written response regarding the use of the property at 480 Hollis Street.

I am in receipt of a letter from John DeWaele in support of Transload X operations dated September 21, 2026. This response to that letter should not be construed as agreement with all statements made in that letter. I am only addressing the relevant portions concerning the zoning violation. DeWaele asserts that the proper categorization for Transload X at 480 Hollis Street is a "delivery service". What DeWaele leaves out of his description in his letter is the storage component of their operation. Building materials are openly stored on-site until distributed somewhere else. My determination is that the operation of Transload X at 480 Hollis Street is best categorized as a "storage and distribution facility", and therefore subject to a special permit as shown in the table of uses (435-7, 6, M). It is important to note that it states, in section 435-7, in pertinent part, "No building, structure, or land shall be used...in any manner other than as permitted as set forth in the table of uses...". Therefore, Dewaele's claim in his letter that this could not be considered a facility due to the lack of a structure at the site is factually incorrect. It is also important to note that DeWaele emphasizes in his letter that "storage and distribution facility" is not defined in the ordinance; he fails to mention that "delivery services" is also undefined in the ordinance, though he goes on to "define" delivery services as "the physical transfer of a commodity from one mode of transportation to another." The source of his definition is unknown, and is not accepted by me as the definition of that term in the ordinance in considering this violation.

To obtain a special permit to operate the storage and distribution facility, please reference Framingham zoning ordinance 435-46, special permits. To start the process, you will need to have a registered Massachusetts land surveyor provide a proposed site plan detailing the proposal (the site plan should indicate the proposal within the "M" zone on the lot, not in the "G" or general residential zone also on the lot). This should be submitted to me in accordance with 435-46, B, 1.

Failure to cease and desist these operations as ordered by October 29th, 2026, shall result in $300 fines issued daily in accordance with Framingham ordinance 435-42, B. Fines would be suspended with the application for appeal with the Zoning Board of Appeals, or with written statement that you will be pursuing a special permit (adequate time would be provided for good faith effort in pursuing the required special permit).

The Framingham Zoning Board of Appeals shall hear and decide appeals of any person aggrieved by an enforcement action from the Building Commissioner in accordance with 435-45, B, 1, a, 1.

Sincerely,

Fred Bray
Building Commissioner

CC: Maurice O'Connell; CSX Regional Vice President
Ned Bartlett; Esq.
Robert B. Culliford; Assistant General Counsel
Marion Kelly; Secretary of the Council
Michael Milanoski; Transload X
John DeWaele; President, Transload X

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

2384CV00071-BLS2
2384CV00958-BLS2
2384CV02141-BLS2

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

v.

JON DELLI PRISCOLI

JON DELLI PRISCOLI

v.

MICHAEL MILANOSKI, JOHN DEWAELE, DANA RAILCARE, AND THE GRAFTON & UPTON RAILROAD COMPANY

MICHAEL R. MILANOSKI AND JOHN P. DEWAELE, III

v.

GRAFTON & UPTON RAILROAD COMPANY; FIRST COLONY GROUP, LLC; AND JON DELLI PRISCOLI

Counsel Notified via email 1/9/24. BNL Asst Clerk

DECISION AND ORDER GRANTING SUMMARY JUDGMENT UPHOLDING DANA RAIL CARE'S RIGHT OF FIRST REFUSAL

Michael R. Milanoski and John P. DeWaele, III, allege that they entered into a binding agreement to purchase Grafton & Upton Railroad Company ("GURR") from Jon Delli Priscoli. But Dana Transport, Inc., which has done business under the name Dana RailCare ("Dana"), contends that it is entitled to enforce a contractual right of first refusal and buy GURR.

Delli Priscoli filed suit seeking a declaratory judgment as to whether Dana's ROFR is enforceable. Milanoski and DeWaele contend that the letter of intent containing Dana's ROFR was never enforceable and Dana should be estopped from contending it is enforceable, or the letter of intent was terminated and Dana's ROFR did not survive the termination, or the letter of intent was superseded by later contracts. Dana, GURR, and Delli Priscoli contend that Dana's ROFR is enforceable and was properly invoked by Dana. The parties seem to agree that the material facts are not in dispute, and ask the Court to resolve the issue on summary judgment.

The Court will **allow** Dana's motion for declaratory relief, **deny** the motion by Milanoski and DeWaele to enforce their contract with Delli Priscoli, and order

that final judgment shall enter declaring that Dana's ROFR is valid, still in effect, and enforceable, and that Dana made a proper and timely exercise of its right to purchase GURR.

Dana is entitled to declaratory relief in its favor because there is an actual controversy about whether Dana's ROFR is valid and enforceable, Milanoski and DeWaele have standing to challenge the validity of this ROFR, all necessary parties have been joined as parties in civil action 2384CV00958-BLS2,[1] and the undisputed material facts demonstrate that Dana's ROFR is valid and enforceable as a matter of law.[2]

The Court concludes that Milanoski and DeWaele have standing to assert that Dana's ROFR is invalid and may not be enforced, but that their challenge to this ROFR is without merit. The Court finds and concludes that the letter of intent containing Dana's ROFR is an enforceable contract, Dana is not estopped by prior statements from asserting that this ROFR is enforceable, Dana's ROFR was not terminated, and subsequent contracts with affiliates of Dana did not supersede this ROFR. Furthermore, Delli Priscoli's agreement to sell GURR to Milanoski and DeWaele triggered Dana's ROFR, and Dana gave prompt and timely notice of its intent to exercise its ROFR. Since Dana's ROFR is valid and enforceable, allegations that Dana has somehow colluded with GURR and Delli Priscoli to protect its legal rights are beside the point.

1. **Undisputed Factual Background.** The summary judgment record shows that the following facts are true.

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[1] Delli Priscoli filed his declaratory judgment action in Worcester Superior Court on January 10, 2023. It was docketed as civil action 2385CV00022. The case was then transferred to the Suffolk Business Litigation Session, and assigned the new docket number 2384CV00958-BLS2.

Though Delli Priscoli's complaint names "Dana RailCare" as a defendant, Dana Transport, Inc., answered the complaint, representing that Dana RailCare is a trade name used by Dana Transport, Inc. The parties have all treated Dana Transport, Inc., as being a party to this civil action, and seem to agree that it was also party to the letter of intent between GURR and "Dana RailCare," which is discussed below.

[2] See generally *Buffalo-Water 1, LLC*, v. *Fidelity Real Estate Co., LLC*, 481 Mass. 13, 18–20 (2018) (requirements for declaratory judgement claim); *Bortolotti* v. *Hayden*, 449 Mass. 193, 206 (2007) (party seeking to enforce right of first refusal was entitled to summary judgment and entry of declaration that right was valid and enforceable).

1.1. **Dana's ROFR**. Starting in 2008, GURR and Dana discussed working together to grow GURR's rail business by having Dana develop mostly vacant industrial land pit in Upton, Massachusetts, into a rail yard. They entered into a letter of intent in January 2009 (the "Dana LOI") that gave Dana the right to lease and an option to purchase the property. The Dana LOI identified the property that Dana was leasing, and had an option to purchase, as comprising roughly 33 acres of industrial land located on Maple Avenue, Upton, Massachusetts, as shown on a plan by Allen Engineering dated June 3, 2008.

The Dana LOI included the price terms of the lease arrangement and the purchase option, and contemplated that a more detailed lease or license agreement would be negotiated and executed within a month. The price terms in the Dana LOI were as follows:

- Dana was required to make a down payment of $50,000 upon signing the Dana LOI.
- Once Dana installed the first two lengths of rail track infrastructure, which was expected to be complete by around June 1, 2009, Dana was required to start making GURR's mortgage loan payments of roughly $3 million per month and to start making monthly lease payments.
- The monthly lease payment started at $3,500, would increase to $7,500 once the new rail yard achieved a weekly average of 35 railcar transloadings, and would increase to $15,000 once there was a weekly average of 75 railcar transloadings.
- Dana could exercise an option to purchase the property for $6 million on April 1 of 2010, 2011, 2012, or 2013. The initial $50,000 downpayment would be credited toward the purchase price; the monthly mortgage and lease payments would not.

This agreement required Dana to develop the leased premises as a rail yard, and to perform all necessary design and construction work at its own risk, subject to GURR's approval of all plans. And it also required Dana to use its best efforts to develop new rail business for GURR at the Upton Rail Yard, and permit GURR to use the planned facility for its rail transportation activities.

In addition, the Dana LOI provided that GURR and Dana would enter into "standard sidetrack and switching agreements governing rail operations and

service at the Upton Rail Yard," that would authorize Dana to act as GURR's agent "for purposes of transloading or other rail transportation activities."

Finally, the Dana LOI gave Dana "the right of first refusal to purchase or operate the GURR if there is a change of control of the GURR from the current owner, Jon Delli Priscoli, or if he chooses to cease rail operations at the Upton Rail Yard." It provided that Dana's ROFR would survive Dana's option to purchase the rail yard property.

1.2. **Implementation of the Dana LOI**. There is no evidence that GURR and Dana entered into a more detailed lease of the Upton Rail Yard property. But the summary judgment record establishes that GURR and Dana treated the Dana LOI itself as constituting an enforceable lease of the property.

Dana paid the $50,000 down payment required in the Dana LOI. It also made the monthly lease payments to GURR that were required in the Dana LOI; at some point the lease payment amounts rose to $15,000 per month. As discussed below, however, for a time Dana was late in making these payments.

Dana developed the land that it was leasing into the Upton Rail Yard and proceeded to have an affiliate operate that facility for GURR. Dana says that it invested closed to $50 million to do so.

GURR entered into a Terminal Transloading Agreement with Grafton Upton Railcare LLC in December 2010; this LLC is an affiliate of Dana. At the same time, GURR entered into a Purchase and Sale Agreement regarding the Upton Rail Yard property with Equipment Care Center of Grafton, LLC, which is another affiliate of Dana. This P&S was drafted to implement Dana's option to purchase the property for $6 million.

1.3. **Milanoski and DeWaele's Purchase Agreement**. In late 2022, Milanoski and DeWaele agreed to buy and Delli Priscoli agreed to sell to them his 100 percent ownership interest in GURR and all of GURR's assets except for Delli Priscoli's 50 percent ownership interest in Upton Development Group. On December 1, 2022, all three of them executed and entered into a restated letter of intent (the "2022 Restated LOI"), in which they agreed upon the material terms of a future purchase and sale agreement.

Milanoski and DeWaele agreed to pay Delli Priscoli $36 million and to assume roughly $6 million in debt to acquire GURR and most of its assets, including the Upton Rail Yard. The 2022 Restated LOI requires Delli Priscoli to deliver his

interest in GURR "free and clear of all liens with clear title" aside from certain specified debt.

1.4. **Dana's Exercise of its ROFR**. Delli Priscoli notified Dana about his acceptance of Milanoski's and DeWaele's offer to purchase GURR.

Dana responded by promptly notifying GURR that it intended to exercise Dana's ROFR. On December 28, 2022, Ron Dana sent an email to Jon Delli Priscoli that said, "It is my intent to move forward to exercise my right of first refusal on the purchase of the Grafton and Upton Railroad." On January 5, 2023, an attorney representing Dana sent a letter to an attorney representing Delli Priscoli, reiterating that "Dana hereby exercises its right of first refusal to purchase GURR on the terms set forth in the offer Mr. Priscoli received to sell his ownership interest in GURR."

2. **Analysis**. The undisputed material facts show that Dana's ROFR was and still is enforceable. Dana is therefore entitled to summary judgment in its favor declaring its rights under the binding right of first refusal. See *Bortolotti* v. *Hayden*, 449 Mass. 193, 206 (2007).

2.1. **Standing**. Milanoski and DeWaele have standing to challenge the validity and enforceability of Dana's 2009 ROFR. The assertion by GURR that they lack standing is without merit.

A party that has entered into a contract to purchase specific real estate has standing to challenge a purported right of first refusal on that property that is claimed by a third-party. See *Bortolotti, supra*, at 196–198.

As discussed above, Milanoski and DeWaele entered into a binding letter of intent to purchase GURR and most of its assets from Delli Priscoli for $36 million plus the assumption of roughly $6 million in debt. That gives Milanoski and DeWaele "a cognizable legal interest in the validity" of the Dana ROFR, "and that is enough to confer standing." *Id.* at 198.

2.2. **The Dana LOI Was a Binding Contract**. Milanoski and DeWaele contend that the Dana LOI was never an enforceable contract because it "contemplates the execution of subsequent formal agreements," does not include all material terms, and does not expressly state that the parties intended the document to be binding. They also contend that Dana should be estopped, by prior testimony before the Federal Surface Transportation Board, from asserting that the Dana LOI was and is an enforceable contract. The Court disagrees.

2.2.1. **Material Terms and Intent to be Bound**. The Dana LOI was and is an enforceable contract, even though it contemplated that "GURR & Dana will enter into a fuller detailed Lease/License agreement" and into a separate contract to govern transloading and other rail transportation activities.

"[T]o create an enforceable contract, there must be agreement between the parties on the material terms of the contract, and the parties must have a present intention to be bound by that agreement." *K&K Development, Inc.*, v. *Andrews*, 103 Mass. App. Ct. 338, 344 (2023), quoting *Situation Mgmt. Sys., Inc.* v. *Malouf, Inc.*, 430 Mass. 875, 878 (2000).

"A purported contract which is no more than an agreement to agree in the future on essential terms, or one which does not adequately specify essential terms, ordinarily will be unenforceable." *Air Tech. Corp.* v. *Gen. Elec. Co.*, 347 Mass. 613, 626 (1964).

But an agreement will be enforceable even if it "anticipates a more formal writing," so long as the parties "have agreed upon either the material terms, or upon the 'formulae and procedures' that will provide the material terms at some future date." *K&K Development, supra*, quoting *Frishman* v. *Maginn*, 75 Mass. App. Ct. 103, 110–111 (2009). Where the parties "have agreed upon all material terms," but contemplate the further execution of a final written agreement, it is reasonable to infer "that the purpose of a final document which the parties agree to execute is to serve as a polished memorandum of an already binding contract." *McCarthy* v. *Tobin*, 429 Mass. 84, 87 (1999) (accepted offer to purchase real estate was binding contract, even though it contemplated further purchase and sale agreement), quoting *Goren* v. *Royal Invs., Inc.*, 25 Mass. App. Ct. 137, 140 (1987) (same).

The Dana LOI was much more than a mere "agreement to agree." It contained all material terms of the lease of the planned rail yard site to Dana, of Dana's option to purchase the site, and of Dana's ROFR to purchase GURR if Delli Priscoli were to decide to relinquish control of the company or cease rail operations at the Upton Rail Yard.

The material terms of the **lease arrangement** are set forth in the Dana LOI. As discussed above in more detail, this contract identified the premises to be leased by reference to a specific plan, specified the payment terms, and required Dana to build out and operate the leased premises.

The parties made clear that they intended to be bound by these terms, not only by agreeing to them, but also by following these terms even though the parties never entered into a more detailed lease agreement. Where contract language is ambiguous, "[t]here is no surer way to find out what parties meant, than to see what they have done." *Brigade Leveraged Capital Structures Fund Ltd.* v. *PIMCO Income Strategy Fund*, 466 Mass. 368, 378 (2013), quoting *Brooklyn Life Ins. Co. of New York* v. *Dutcher*, 95 U.S. 269, 273 (1877).

The Dana LOI also contained all material terms regarding Dana's **option to purchase** the Upton property. It specified the price, and the four specific dates when Dana was entitled to exercise the option.

In any case, **Dana's ROFR** was valid and enforceable as written, whether other provisions of the Dana LOI were contractually binding or not.

Dana's ROFR was enforceable because it contained all material terms. No price or timing term was required, because the ROFR merely gives Dana the right to purchase at the right offered by a third-party, if and when Delli Priscoli decided to accept any such offer. See *Bortolotti*, 449 Mass. at 201.

A right of first refusal involving real estate "becomes operational when the 'owner has decided to accept a third person's outstanding and enforceable offer and the holder of the right has been informed of the details of that offer and has had a reasonable time to meet it.' " *Id.* at 200, quoting *Roy* v. *George W. Greene, Inc.*, 404 Mass. 67, 71 (1989). "At the time of a third-party offer that the owner has decided to accept, the right of first refusal ripens into an option to purchase according to the terms of the third-party offer." *Id.* at 201.

Dana's ROFR was contractually binding because the material terms of that right were spelled out; and it remains contractually binding even if other parts of the Dana LOI were nothing more than an unenforceable agreement to negotiate further about other issues. See *Schwanbeck* v. *Federal-Mogul Corp.*, 412 Mass. 703, 705–707 & n.2 (1992). In *Schwanbeck*, the parties entered into a letter of intent in which they agreed to "negotiate in good faith" over the terms for the purchase and sale of a business division of the defendant corporation, and also agreed that the potential buyer would have a right of first refusal if any third-party made a firm offer to purchase the business. *Id.* at 705 n.2. The Supreme Judicial Court held that, although the "negotiate in good faith" provision was not contractually binding, the separate right of first refusal was nonetheless enforceable (though it was not triggered because there was not a firm offer that complied with the Statute of Frauds). *Id.* at 705–710.

Though the Dana LOI did not contain terms of the transloading agreement that GURR later entered into with Grafton Upton Railcare LLC ("GU Railcare"), which is an affiliate of Dana, that is beside the point. Since the Dana LOI was an enforceable contract with respect to the property lease, Dana's option to purchase the property, and (most importantly) Dana's ROFR, it does not matter that the parties contemplated entering into additional business arrangements the material terms of which were not included in the Dana LOI.

2.2.2. **Estoppel Argument**. Milanoski and DeWaele argue that the Court "must hold Mr. Delli Priscoli and Mr. [Ron] Dana to their prior testimony" in affidavits submitted in 2012 and 2013 to the Federal Surface Transportation Board about the relationship between GURR and Dana, and bar them from "provid[ing] contradictory testimony here."

In other words, Milanoski and DeWaele are asking the Court to apply the doctrine of judicial estoppel, even though they do not use the term and do not cite or address any of the relevant case law.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position that it had previously asserted in another proceeding." *Mullins* v. *Corcoran*, 488 Mass. 275, 286 (2021), quoting *Otis* v. *Arbella Mut. Ins. Co.*, 443 Mass. 634, 639–640 (2005). "A successful claim of judicial estoppel generally requires the showing of two core elements: (1) the party to be estopped is asserting a position that is 'directly contrary' to a position asserted in a prior case, and (2) that party 'succeeded in convincing the court to accept its prior position.' " *Spinosa* v. *Tufts*, 98 Mass. App. Ct. 1, 5 (2020), quoting *Otis, supra*, at 641. With respect to the second of these elements, it is not enough to show that the party prevailed in the prior proceeding; instead there must be evidence that the prior tribunal adopted the position that allegedly is contrary to the party's position in the current litigation. See *Mullins*, 488 Mass. at 287.

"Application of the equitable principle of judicial estoppel to a particular case is a matter of discretion." *Otis*, 443 Mass. at 639–640. "The Supreme Judicial Court has 'decline[d] to construct a categorical list of requirements or to delineate each and every possible exception.' " *Spinosa*, 98 Mass. App. Ct. at 6, quoting *Otis, supra*, at 642. "Instead, judges are to 'use their discretion, and their weighing of the equities, and apply judicial estoppel where appropriate to serve its over-all purpose" of safeguarding the integrity of the courts. *Spinosa, supra*, at 6, quoting *Otis, supra* at 642.

The Court declines to estop Dana from asserting that the Dana LOI was and is an enforceable contract. It does so for four reasons.

First, Milanoski and DeWaele do not cite to any Massachusetts case law applying estoppel in a civil action based on allegedly inconsistent statements made before an administrative agency, rather than in a court proceeding. The Court "is not aware of any case in Massachusetts that directly applies the doctrine of judicial estoppel to positions adopted in administrative proceedings," see *Trustees of Boston College* v. *Boston Academy of the Sacred Heart, Inc.*, 103 Mass. App. Ct. 83, 93 (2023), though it recognizes that a number of federal courts have done so, see, e.g., *Rissetto* v. *Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996) (collecting cases, and cited in *Boston Academy of the Sacred Heart, supra.*)

Since Milanoski and DeWaele have not provided any substantive argument in support of their position that judicial estoppel can be applied in the circumstances of this case, the Court considers that legal argument to have been waived. Cf. *Halstrom* v. *Dube*, 481 Mass. 480, 483 n.8 (2019) (argument raised "in a cursory fashion without citation to supporting legal authority" is waived); *Commonwealth* v. *Johnson*, 470 Mass. 300, 319 (2014) (trial court acted "well within" its discretion in declining to consider unsupported and undeveloped argument). Milanoski and DeWaele have filed a motion seeking summary judgment in their favor as to the enforceability of Dana's ROFR. In the Superior Court, moving parties are required by rule to file a written memorandum that includes "a statement of reasons, with supporting authorities, why the motion should be granted." Sup. Ct. Rule 9A(a)(2). Parties therefore waive issues and arguments that they do not raise and develop in their written memoranda.

Second, Milanoski and DeWaele have not shown that the STB adopted the statements in Mr. Dana's affidavits about Dana Transport's relationship with GURR.

The Court is troubled that Ron Dana seems to have made sworn statements to the STB that are directly contrary to his assertions in this case, and are directly contrary to the plain meaning of the Dana LOI signed in early 2009. Mr. Dana told the STB that (i) none of the Dana Companies leased the Upton Rail Yard from GURR, and (ii) although the Dana affiliate Grafton Upton Railcare, LLC ("GU Railcare") provided transloading services for GURR, Dana Transport had no contractual relationship with and did not perform any services for GURR.

But Milanoski and DeWaele have not met their burden of proving that the STB adopted Dana's position about its legal relationship with GURR.

The STB's decision in the matter in which Mr. Dana submitted the affidavits cited by Milanoski and DeWaele make clear that the STB did **not** adopt or in any way rely upon Mr. Dana's representations that no Dana company other than GU Railcare had any contractual relationship with GURR and that Dana never leased the rail yard. The STB held that GU Railcare's was conducting transloading activities at the Upton facility on behalf of GURR, that these activities fell within the statutory definition of "transportation" and were performed under the auspices of a "rail carrier," and that federal law therefore preempted local regulation of those activities. See *Del Grosso*, STB Docket No. FD 35652, 2014 WL 6852990, at *1–*4, slip. at 1–5 (STB Dec. 4, 2014).[3] The Board noted that, since "the relevant issue ... is whether *GU Railcare's* transloading activities are part of rail transportation, it would "not address ... alleged activities by *other* companies" (emphasis in original). *Id.* 2014 WL 6852990, at *9, slip op. at 11.[4]

Since the STB did not adopt Mr. Dana's stated positions regarding the legal relationship between GURR and Dana affiliates other than GU Railcare, and instead stated that it did not have to reach the issue, there is no basis for estopping Dana from taking a potentially inconsistent position in these civil actions. See *Mullins*, 488 Mass. at 287.

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[3] The STB makes its decisions available at its website. See stb.gov/proceedings-actions/decisions/.

[4] Though the petitioners in that STB proceeding sought judicial review of the Board's determination that the activities at the transloading facility constitute rail "transportation," they did not seek review of the Board's that GU Railcare was acting on behalf of GURR and thus that the transloading activities were being performed by a "rail carrier." See *Del Grosso* v. *Surface Transp. Bd.*, 804 F.3d 110, 117 & 120 (1st Cir. 2015). The First Circuit held that the Board applied the wrong standard in deciding whether the transloading activities constituted transportation. *Id.* at 118–120. On remand, the STB held that the activities that GU Railcare was undertaking for GURR constitute transportation that is within the Board's statutory jurisdiction, which means that local regulation of those activities was preempted by federal law. *Del Grosso—Petition for Declaratory Order*, FD 35652, slip op. at 11 (STB served July 31, 2017). The First Circuit affirmed. *Del Grosso* v. *Surface Transp. Bd.*, 898 F.3d 139 (1st Cir. 2018).

Third, Mr. Delli Priscoli's statements to the STB could not estop Dana, even if the doctrine of judicial estoppel applied in these circumstances.

Fourth, even if Milanoski and DeWaele had shown that the doctrine of judicial estoppel would otherwise be applicable, which they have not, the Court would exercise its discretion not to estop Dana from arguing that the 2009 Dana LOI was and is an enforceable contract because it finds that Milanoski and DeWaele make that request with unclean hands.

Since judicial estoppel is an equitable doctrine, a judge may exercise their discretion not to apply it if the party seeking judicial estoppel "comes to the court with unclean hands." *Spinosa* v. *Tufts,* 98 Mass. App. Ct. 1, 8 (2020), quoting *Galaz* v. *Katona,* 841 F.3d 316, 326 (5th Cir. 2016). The unclean hands doctrine allows a judge to deny equitable relief to someone who has acted in bad faith or otherwise engaged in unfair or inequitable conduct. See *Thayer Co.* v. *Binnall,* 326 Mass. 467, 483 (1950); *Murphy* v. *Wachovia Bank of Delaware,* 88 Mass. App. Ct. 9, 15 (2015). "The question whether to deny relief based on 'unclean hands' is committed to the broad discretion of the trial judge." *Reilly* v. *Local 589, Amalgamated Transit Union,* 31 Mass. App. Ct. 633, 639 (1991).

The summary judgment record establishes the following, which indicates that Milanoski and DeWaele come to court with unclean hands.

- Delli Priscoli decided to sell GURR in September or October of 2022.
- Milanoski was the President of GURR. DeWaele also worked for GURR. When they learned that Delli Priscoli had decided to sell the company, they asked for an opportunity to buy GURR.
- Milanoski was well aware of Dana's ROFR. When Milanoski began working for GURR in 2017, Stan Gordon (who was GURR's Vice President) emailed a copy of the Dana LOI to Milanoski and specifically noted Dana's ROFR in his summary of the terms of that agreement. Then, in September 2022, Milanoski forwarded that Gordon email from Milanoski's email address at First Colony Development to Milanoski's email address at GURR.
- While the Milanoski and DeWaele were negotiating with Delli Priscoli to buy GURR soon thereafter, Delli Priscoli asked Milanoski about that status of Dana's ROFR in the 2009 Dana LOI.

- Milanoski told Delli Priscoli that Dana's ROFR had been "taken care of" and was no longer valid or enforceable. Milanoski made this representation on behalf of himself and DeWaele.

- Delli Priscoli accepted Milanoski's representation as true, because he knew that as President of the company Milanoski had complete access to GURR's books and records.

- But Milanoski knew his representation that Dana's ROFR had been terminated was **not** true. Milanoski sent an email on December 8, 2022, to his contact at the bank that Milanoski had asked to finance his purchase of GURR that said in part, "We are going to resolve the ROFR with Ron Dana from an old Letter of Intent and get signoff satisfactory to Bank's attorney."

- When Delli Priscoli's attorney reviewed the 2022 Revised LOI with Milanoski and DeWaele, the attorney followed up by asking Milanoski about Dana's ROFR, and telling Milanoski that he would not be able to get a bank loan to finance a purchase of GURR without providing evidence that Dana's ROFR had been terminated. Delli Priscoli's attorney knew that in 2020, when the limited liability company that owns the site of the Upton Rail Yard was seeking a bank loan, Milanoski provided the bank with documentation that included the Dana LOI.

- Milanoski responded by sending a number of documents to the attorney. None of them demonstrated that Dana's ROFR had been terminated. After Dana gave notice that it was exercising its ROFR, Milanoski sent additional documents to the attorney. They did not show that Dana's ROFR had been terminated either.

- Delli Priscoli met with Milanoski and DeWaele, and said he could not sell GURR to them unless Dana agreed to waive or not exercise Dana's ROFR. Milanoski did not respond. DeWaele said, "Well, let us think about it."

- Delli Priscoli's attorney concluded that there was an actual controversy about whether Dana's ROFR was enforceable, and advised Delli Priscoli to file an action seeking a declaratory judgment to resolve the issue. Which he did.

The Court finds and concludes that Milanoski and DeWaele engaged in unfair and inequitable conduct by telling Delli Priscoli that Dana's ROFR had been "taken care of," even though they must have known that Dana was likely to take the position that Dana's ROFR was valid and still enforceable. In essence, Milanoski and DeWaele tricked Delli Priscoli into selling GURR to him and signing the 2022 Restated LOI, without exploring a possible sale to Dana, by giving Delli Priscoli a misleading and knowingly incomplete assurance that Dana's ROFR was no longer valid or enforceable. The Court credits Delli Priscoli's representation, in his legal memorandum, that he would not have agreed to sell GURR to Milanoski and DeWaele if Milanoski had not assured him that Dana's ROFR was no longer valid.

In the exercise of its discretion, the Court concludes that Milanoski and DeWaele have come to court with unclean hands, and that it would therefore be inequitable for them to obtain any advantage in this litigation through application of the equitable doctrine of judicial estoppel.

2.3. **GURR Did Not Terminate the Dana LOI.** The summary judgment record establishes that, although GURR said it was terminating the Dana LOI in late 2010, GURR and Dana then resolved their differences and thereafter GURR treated the Dana LOI as being in effect.

GURR, its owner Mr. Delli Priscoli, and Dana all agree that, although conflicts arose between GURR and Dana in 2009 and 2010 as their business relationship was developing, and for a time Dana was not making lease payments required by the Dana LOI, they ultimately resolved their disputes. They also agree that the Dana LOI was not terminated, Dana proceeded to invest roughly $50 million to develop the Upton property based on the terms of the Dana LOI, and GURR continued to carry out its obligations under the Dana LOI. The undisputed factual record supports the parties view that the Dana LOI remained and remains in effect.

It follows that the Dana LOI was and still is enforceable. Where one party commits a material breach of contract, but the other party elects to continue performing, the contract remains in effect and both parties are bound by its terms. See *Kass* v. *Todd*, 362 Mass. 169, 175–176 (1972). "An injured party may refuse to consider a breach as a material one and elect to keep the contract alive. The contract then continues for the benefit of both parties[.]" *Lander* v. *Samuel Heller Leather Co.*, 314 Mass. 592, 598 (1943).

During 2010, GURR was getting increasingly concerned that Dana was not implementing and fully complying with the Dana LOI. In September 2010, GURR's Vice President Stan Gordon sent a letter to Dana's attorney complaining that Dana had repeatedly breached the Dana LOI, and taking the position that as a result the Dana LOI was "no longer in effect" and was "null and void." A month letter, Gordon sent a letter with the subject line "Notice of Default" and stating that "Dana are hereby formerly [sic] notified of their default under the LOI and that the LOI is hereby formerly [sic] terminated."

But it is undisputed that soon thereafter Mr. Delli Priscoli, Mr. Dana, Mr. Gordon and others met and resolved their issues. Thereafter both GURR and Dana considered the Dana LOI as remaining in effect. Both GURR and Dana continued to invest and work together to develop the Upton property based on that shared understanding. At the end of December 2010, GURR entered into a Terminal Transloading Agreement with GU Railcare, as contemplated in the Dana LOI, and also entered into a Purchase and Sale Agreement for the Upton party with Equipment Care Center of Grafton, LLC ("Equipment Care," another Dana affiliate) consistent with the purchase option contained in the Dana LOI. That is consistent with the undisputed evidence that GURR and Dana had resolved their differences and GURR was no longer terminating the Dana LOI.

When Milanoski began working for GURR in 2017, Gordon sent him an email attaching a copy of the Dana LOI, and describing Dana's ROFR. Gordon did not suggest had been terminated. Instead, it appears that Gordon was providing Milanoski with a copy of a key contract that continued to govern the relationship between GURR and Dana with respect to the Upton property.

In February 2020, an attorney representing GURR drafted an agreement with Dana (never executed) that was intended "to consolidate and supersede" some of the agreements between GURR and Dana or Dana's affiliates. The draft included a provision that would have expressly terminated the Dana LOI from 2009. This confirms that GURR understood that the Dana LOI was still in force. There would be no need to ask Dana to terminate its LOI if GURR had already terminated that agreement years earlier.

It is undisputed that Dana continues to pay monthly rent to GURR for the Upton Rail Yard. GURR's continued acceptance of that rent, and continued performance by allowing Dana to help run the Upton property, establishes that the Dana LOI remains in effect. See *Kass* and *Lander, supra.*

2.4. **Subsequent Contracts Did Not Supersede Dana's ROFR.** Milanoski and DeWaele also contend that Dana's ROFR was "fully integrated into" and thus eliminated by the subsequent contracts that GURR entered into with GU Railcare and Equipment Care. This argument is without merit.

The Terminal Transloading Agreement between GURR and GU Railcare provides in § 7.D:

> This Agreement constitutes the entire agreement between the Parties as to the subject matter hereof, and supersedes all previous oral or written understandings, agreements and commitments as to the subject matter hereof.

Though the term "Parties" is capitalized, it is not defined in the contract. But the only parties to this agreement were GURR and GU Railcare.

The Purchase and Sale Agreement between GURR and Equipment Care provides in the first sentence of ¶ 13:

> This Agreement embodies the entire agreement between the parties hereto with respect to the purchase and sale and operation of the Property and supersedes any and all prior negotiations, agreements and understandings, written or formal , all of which are deemed to be merged herein.

Neither of these integration clauses had the effect of eliminating Dana's ROFR from the Dana LOI. By their terms, these clauses only defined the agreements that GURR entered into with GU Railcare and Equipment Care. They did not affect, alter, or limit the prior contract that GURR had entered into with Dana, because Dana was not a party to the transloading agreement or to this P&S. Furthermore, the subject matter of Dana's ROFR was outside the subject matter of the transloading agreement, and did not concern the sale of property to or operation of property by Equipment Care.

If GURR and Dana had intended to terminate Dana's ROFR when GURR executed the transloading agreement and this P&S, they would have had to enter into a new contract or amend the Dana LOI to do so. Dana Transport, Inc., is a "separate and distinct" legal entity; integration clauses defining the contractual rights of its affiliates GU Railcare and Equipment Care did not affect Dana's ROFR. See generally *Scott* v. *NG US 1, Inc.*, 450 Mass. 766, 766 (2008) (separate corporations or LLCs are generally "regarded as separate and distinct entities," even if there are "relationships between or among them.").

2.5. **Dana Exercised Its Right of First Refusal.** Dana properly exercised its ROFR after learning that Milanoski and DeWaele had made a bona fide offer to purchase the Upton property, as reflected in the 2022 Restated LOI that Milanoski, DeWaele, and Delli Priscoli executed on or about December 1, 2022. Dana promptly informed Delli Priscoli that it intended to exercise Dana's ROFR. It did so by email on December 28, 2022, and in a follow-up letter to Delli Priscoli's attorney on January 5, 2023.

The assertion by Milanoski and DeWaele and Delli Priscoli and Dana engaged in "collusion" in order torpedo the 2022 Restated LOI is without merit.

GURR had a contractual obligation to inform Dana about the bona fide offer by Milanoski and DeWaele to purchase the property. A right of first refusal is "a limitation on the owner's ability to dispose of property without first offering the property to the holder of the right at the third party's offering price." *Uno Restaurants, Inc.* v. *Boston Kenmore Realty Corp.*, 442 Mass. 376, 383 (2004). "The owner's obligation under a right of first refusal is to provide the holder of the right seasonable disclosure of the terms of any bona fide third-party offer." *Id.* at 383–384.

And, since Dana's ROFR was valid and enforceable, Dana did nothing improper by exercising that right.

3. **Separate and Final Judgment.** Though civil action 2384CV00958-BLS2 was previously consolidated with civil actions 2384CV00071-BLS2 and 2384CV02141-BLS2, the Court finds that there is no just reason for delaying the entry of declaratory judgment in Dana's favor on the issues that the Court has now decided regarding the enforceability of Dana's ROFR. It will therefore order that separate and final declaratory judgment shall enter forthwith in civil action 2384CV00958-BLS2. Cf. Mass. R. Civ. P. 54(b).

ORDERS

The motion by Dana Rail Care for declaratory relief in civil action 2384CV00958-BLS2 is **allowed**. The motion by Michael Milanoski and John P. DeWaele, III, to enforce their December 2022 letter of intent with Jon Delli Priscoli is **denied**.

The clerk's office shall enter separate and final judgment in civil action 2384CV00958-BLS2, stating as follows:

This action for declaratory relief came before the Court (Salinger, J.) on cross-motions for summary judgment. Having decided those motions and resolved the controversy among the parties regarding the enforceability of a particular right of first refusal, the Court hereby declares the parties' rights as follows:

(1) The right of first refusal that Grafton & Upton Railroad Company ("GURR") granted to Dana Rail Care (a trade name used by Dana Transport, Inc.) in a Letter of Intent that these parties entered into on or about January 23, 2009, was and still is an enforceable contract.

(2) This January 2009 Letter of Intent was not terminated by GURR.

(3) Under this Letter of Intent, Dana has a right of first refusal to purchase or operate GURR if Jon Delli Priscoli decides to sell or otherwise give up control of GURR. This right of first refusal is valid and enforceable.

(4) The agreement to Michael Milanoski and John DeWaele to purchase GURR and most of its assets from Mr. Delli Priscoli is a firm offer that triggered Dana's right of first refusal to purchase GURR.

(5) Dana made a timely and proper exercise of its right of first refusal by giving notice of its intent to purchase GURR soon after Mr. Delli Priscoli agreed to sell that company to Mr. Milanoski and Mr. DeWaele.

(6) Now that Dana has exercised its legal right to purchase GURR on the terms offered by Mr. Milanoski and Mr. DeWaele, it follows that Mr. Milanoski and Mr. DeWaele may not enforce the December 2022 revised letter of intent in which Mr. Delli Priscoli had agreed to sell GURR to them.

Kenneth W. Salinger
Justice of the Superior Court

9 January 2024

EXHIBIT H

September 24th, 2026

Patricia J. Cassidy
Conservation Agent
Middleborough Conservation Commission
20 Center Street
2nd Floor
Middleborough, MA 02346

RE: Middleborough Logistics Park – Notice of Intent (NOI), DEP #SE220-

Dear Ms. Patricia Cassidy,

The Buzzards Bay Coalition ("Coalition") has reviewed the Notice of Intent for the Middleborough Logistics Park (the "Project") and offers the following comments.

Impacted Interests of the Buzzards Bay Coalition
We are direct abutters to the Project site, owning more than 2,000 acres of conservation land immediately to the south and west in our 'Sippican Headwaters Reserve.' This complex of forests, wetlands, and streams sit at the top of the Sippican River watershed which is one of the primary freshwater inputs to Buzzards Bay.

The Buzzards Bay Coalition is a membership-supported nonprofit organization founded in 1987 and is dedicated to the restoration, protection, and sustainable use and enjoyment of Buzzards Bay and its watershed, including the headwaters of the Sippican River in Middleborough where this Project is located. Our members and supporters use and enjoy the natural resources of this area of the watershed, and we have invested heavily over the past decade in its protection and restoration.

The Project site, while in private ownership, contains all of these same high ecological values. Values that will be degraded by the construction of the proposed Middleborough Logistics Park.

Summary of Project
The Project under review proposes constructing a 928,000 square foot (~21 acre) warehouse on 153 acres. The Project's location is at the headwaters of the Sippican River. The impacts of this project would be substantial, resulting in the degradation of several critical natural resources, including but not limited to, wetlands, perennial streams, and other river front areas. The Project would also greatly impact wildlife, including Species of Special Concern.

Wetlands Impact
The Project would fill and eliminate a Bordering Vegetated Wetland and impact multiple Isolated Vegetated Wetlands. Elimination of Bordering Vegetated Wetlands would cause destruction of critical habitat and increase flooding and runoff.

Impact to multiple Isolated Vegetated Wetlands would also increase runoff and decrease natural floodwater absorption.

Notably, the Project is also located within an Isolated Land Subject to Flood area, as defined by the Massachusetts Wetlands Protection Act. Therefore, any decrease in natural floodwater absorption would negatively impact the surrounding habitat.

Water Impact

The Project would extend through multiple riverfront areas of the Sippican River. Impact of riverfront area would cause an increase in stormwater runoff and downstream pollution.

The Project would also be located directly in a large resource area for public and private water supply.

Endangered Species Impact

The Natural Heritage and Endangered Species Program has mapped the vast majority of the Project location as Priority Habitat of Rare Species. Areas of Priority Habitat can include rare species as defined by the Massachusetts Endangered Species Act. Specifically, the Project would impact habitat for the Eastern Box Turtle, which has been designated as a Species of Special Concern.

The Project would also cause a vast disconnect of habitats. Connectivity of forest and wetland systems is vital for biodiversity, and the Project would segment multiple wetlands, creating a large disconnect in biodiversity.

Conclusion

For the above stated reasons, the Buzzards Bay Coalition urges the Middleborough Conservation Commission to deny the Project as presented in order to protect the waters and wildlife of the Sippican River and Buzzards Bay.

Sincerely,

Julia Meskis

Julia Meskis, Esq.
VP Clean Water Advocacy

cc: Middleborough Select Board

Rochester Select Board

Rochester Conservation Commission

EXHIBIT I

MIDDLEBOROUGH

TOWN MANAGER'S REPORT



July 2025







WELCOME TO THE TOWN MANAGER'S REPORT

In our July edition of the "Town Manager's Report," we give a brief summary of what's happening around town right from the Town Manager's desk, included are ongoing projects, job openings, welcome to new employees, openings on Town boards and committees, and pages of upcoming events for the month of July.

~ Town Manager James McGrail



THE REPORT WITHIN THE REPORT

Each week, the Town Manager gives updates to the Select Board regarding important issues and highlights Town projects, committee updates, personnel recruitment, and other relevant items that need Select Board and resident attention. In The Report within the Report, we highlight several items that Town Manager has brought to recent Select Board meetings.



- *MassWork Water Main Grant:* The Town has revised the scope of work and signed the grant agreement for the 2024 MassWorks grant award for the Water Main Project in South Middleborough in the amount of $2.8M. The Town will manage this public project that now consists solely of the design and construction of a water main extension, which will feature the extension of a new 16-inch cement lined ductile iron water main from its current terminus in front of Stonebridge Condominiums southerly approximately 5,300 feet along Route 28 to the Rochester town line. The water main would provide future water connections to two potential large commercial properties, Middleborough Logistics Park and SEMASS. In addition, the project will stub service connections for the remaining parcels along the 1-mile corridor. The Town anticipates the completion of this project by 9/30/2026.

- *48 Wareham Street Public Park:* Significant progress has been occurring on the planning of the new Pubic Park at the site of the Old DPW on Wareham Street. In the last month, the design of the skate park has been finalized and the design and permitting of the public park has been completed. The IFB for the construction of the public park and demolition of the old DPW building was issued on June 18, and we are on target to start construction in July with an estimated completion in June 2026. After careful review of the options with the Old DPW Building, I will be applying for a demolition permit for the entire structure and looking to build a new restroom facility as Phase 2 in the future. The costs and risk associated with trying to salvage the back garage portion of the building exceed $1.5M, with the cost of a new restroom facility under $500K. I will be applying for a demolition permit in the next few weeks which will need Historic Commission approval as well. Following the demolition of the building the site work and river front restoration will begin, followed by the construction of the skate park in winter/spring 2026. At this point the project is fully funded barring cost estimate issues when the IFB is awarded. I would like to thank the public for their participation in the skate park design and feedback on the project.

EXHIBIT J

The Commonwealth of Massachusetts
State Senate
State House, Boston, MA 02133-1054

RYAN C. FATTMAN
STATE SENATOR

WORCESTER HAMPDEN DISTRICT
STATE HOUSE, ROOM 213-A
TEL. (617) 722-1420
Ryan.Fattman@masenate.gov

September 22, 2026

Surface Transportation Board
Office of Public Assistance, Governmental Affairs, and Compliance
395 E Street SW
Washington, DC 20423

Re: TRANSLOADX RAILROAD COMPANY, INC.--ACQUISITION AND OPERATION EXEMPTION--CSX TRANSPORTATION, INC. - FD_36909

Dear Honorable Board:

I am writing to respectfully request an update on the status of the application submitted by TransloadX Railroad Company, Inc., currently pending before the Surface Transportation Board under Docket Number FD_36909. As a Massachusetts State Senator, I have direct interest in this matter because TransloadX Railroad Company has received substantial state funding to develop a transload facility on property located in my district. I am working to determine whether the company has satisfied all requirements associated with state grant funding. To date, I have not yet been able to obtain complete responses to several outstanding questions regarding their compliance and progress.

As TransloadX Railroad Company pursues expansion beyond Framingham, Massachusetts and into additional states, it is important for us to maintain transparency about the issues still under review here in Massachusetts. An update on the status of their application would assist greatly in ensuring that state and federal processes remain aligned and that public funds are being used appropriately.

Thank you very much for your attention to this matter. I appreciate the Board's work and look forward to receiving information regarding the status of this application.

Sincerely,



Ryan C. Fattman
State Senator
Worcester & Hampden

TransloadX – IRAP Grant Application

