

SURFACE TRANSPORTATION BOARD

Finance Docket No. 35147

223171

Norfolk Southern Railway Company, Pan Am Railways, Inc., Et Al -Joint Control and Operating/Pooling Agreements-Pan Am Southern LLC

SPRINGFIELD'S COMMENTS, PROTESTS, REQUESTS FOR CONDITIONS, AND OTHER EVIDENCE AND ARGUMENT IN OPPOSITION TO THE PRIMARY APPLICATION REGARDING THE PROPOSED RAILROAD TRANSACTION.

In accordance with the Surface Transportation Board ("Board") Decision No. 2 in STB Finance Docket No. 35147 and the Procedural Schedule issued therein, the City of Springfield Massachusetts ("Springfield") submits the following comments, protests, requests for conditions, and other evidence and argument in opposition to the primary application the proposed railroad transaction described in the Primary Application and Related Filings.¹ Because the Transaction lacks the minimum environmental restraints

¹ The primary application and related filings were filed with the Board on May 30, 2008 ("filings"), however, service of the said documents was not actually received by Springfield until Friday, August 8, 2008. The filings were made by the Norfolk Southern Railway Company (Norfolk Southern), Pan Am Railways, Inc. (PARI) (a noncarrier railroad holding company), and two of PARI's rail carrier subsidiaries, Boston and Maine Corporation (B&M) and Springfield Terminal Railway Company (Springfield Terminal) (collectively, "Applicants"). The primary application seeks Board approval under 49 U.S.C. 11322 and 11323 of (1) the acquisition by Norfolk Southern and B&M of joint control and ownership of Pan Am Southern LLC (PAS), a new rail carrier to be formed; and (2) the agreements by which Springfield Terminal would operate the lines of PAS and establish rates for PAS. The agreements for which approval and authorization are being sought by the application and the related filings are referred to collectively as the "Transaction". If the Transaction is approved, PAS would own or operate over (through trackage rights) approximately 437 miles of track (PAS Lines). The PAS Lines consist of 238.3 miles of rail lines to be owned by PAS, as well as 198.4 miles of track over which PAS would have trackage rights. The west to east main line section of the PAS Line, called the Patriot Corridor, would be comprised of 139.7 miles of track to be owned by PAS extending from Mechanicville, NY to CPF-312, near Ayer, MA, as well as 15.8

necessary to protect the public health, safety and welfare in the impacted areas it must be either flatly rejected or subjected to very tight environmental controls consisting, at a bare minimum, of the conditions set forth herein

1. SPRINGFIELD'S COMMENTS

Springfield is concerned because the Transaction lacks adequate safeguards to protect the public interest. Federal law requires the Board to "take a hard look at the environmental consequences of the proposed courses of action."² Pursuant to this important Congressional expression of American public policy contained in the National Environmental Policy Act of 1969 ("NEPA"), the Board must not act arbitrarily and capriciously in determining whether to approve or disapprove the Transaction.³ To avoid an irresponsible administrative determination the Board must consider all foreseeable direct and indirect impacts of the Transaction. To properly ascertain the environmental consequences of the Transaction the Board should require, up-front, the preparation of a coherent and comprehensive environmental analyses of the Transaction. A "hard look"

miles of trackage rights over Massachusetts Bay Transportation Authority (MBTA) track between Fitchburg, MA and Willows, MA. The north-south section of the PAS Lines extending from White River Junction, VT to New Haven, CT would be comprised of: (1) 72.8 miles of trackage rights over New England Central Railroad (NECR) between White River Junction, VT and East Northfield, MA; (2) 49.7 miles of track to be owned by PAS on the Connecticut River Mainline between East Northfield, MA and Springfield, MA; and (3) 62.0 miles of trackage rights over the National Railroad Passenger Corporation (Amtrak) between Springfield, MA and New Haven, CT. The PAS Lines would also include several branch lines.

² *Colorado Off-Highway Vehicle Coalition v U.S.*, 505 F. Supp.2d 808, 815 (D. Colo. 2007) (citation and internal quotation marks omitted)

³ The Transaction is projected to improve track quality and customer service, boost train speed and reliability, and increase capacity on the routes involved.

requires a discussion of the adverse impacts of the Transaction without improperly minimizing its negative side effects. That necessitates an adequate study of the issues and the environmental consequences of the Transaction to identify, predict, evaluate and mitigate the biophysical, social, and other relevant effects of the Transaction before the Board makes the major decision whether or not to approve the Transaction.

There are many reasons to expect that the proposed Transaction will result in potentially significant environmental impacts warranting the preparation of further environmental documentation. The Environmental Appendix filed by the Applicants fails to provide any information whatsoever regarding the expected environmental impacts of the Transaction on soil contamination, ecology impacts including endangered species assessment, geological hazards assessment, noise health effects and water pollution impacts upon Springfield and its environs. A major purpose of the Transaction is to improve the rail which "on most sections can only handle cars of no more than 263,000 pounds, and some sections of the lines to be acquired by PAS are subject to FRA standards requiring Springfield Terminal to impose 'slow orders' limiting train speeds to 10 mph."⁴ The Environmental Appendix does not mention the critical topic of railroad trackside lubrication. The major purposes of the Transaction are to allow bigger, heavier rail cars, to go faster. Railroad tracks need frequent maintenance to remain in good order; the frequency increases with higher-speed or heavier trains. How does the Transaction deal with this basic fact? It doesn't. Bigger, higher-speed and heavier trains

⁴ Application, p. 17. The Transaction envisions benefits from the rail and track improvements enabling all customers to "utilize 286,000 pound railcars." Application, p. 29. The direct impact of the reconstruction of rail beds and other facilities raise a host of additional environmental questions about the work which need to be assessed before the STB acts on the Transaction.

will need greater maintenance and necessarily entail lubrication systems to: reduce the material wear and tear of wheel and rail, and increase the durable life of the rail infrastructure (rails, track switches, etc) in order to minimize the life-cycle costs of the rail infrastructure. Railroad trackside lubrication helps prevent the climbing-up of the wheel flange on the rail flanks and/or tips of points. It thereby reduces the derailment risk and noise pressure level of wheel squeal particularly on sharp radius curves where noise pressure levels are typically excessive. The Environmental Appendix does not mention any mitigation measures such as trackside lubricators to significantly reduce noise, derailment risk and wheel/rail wear. This raises a number of unanswered questions, not addressed in the Environmental Appendix, which require analysis and/or study: Are the trackside lubricants biodegradable? What quantity of the trackside lubricants runoff into the public drinking water supply? What quantity of the trackside lubricants leach into the soil? How are the soil and water pollutants expected to be produced by the Transaction measured and quantified? How frequently will they be monitored and in what manner? What hazardous chemicals do the pollutants contain? What long term human health hazards are expected to result from the additional pollutants produced by the Transaction? How much additional rolling contact fatigue or rail grinding, will occur due to the bigger and heavier rail cars, where will the metal residue runoff go, what are its chemical characteristics, and what will be its expected environmental impact? What, if any, material will be used to protect the soil or ballast at track lubrication sites, bulk handling facilities and in equipment storage areas? How frequently and in what manner will the grease and other lubricants around the trackside be collected and disposed of? None of these environmental issues is addressed in the

Environmental Appendix. The potential safety and environmental impacts of the Transaction involving issues such as wheel-rail contact: wheel and rail wear, rolling contact fatigue, lubrication, curve radius, axle load, number of axles passed through rail segment, traffic intensity, speed, rail material, ballast, inspections and wear limits are important considerations in rail wheel degradation and can lead to increased operational risks. The Board and the public should not have to guess about any of these safety and environmental issues. They should be environmentally assessed, and, if needed studied, before the Board makes any decision on the Transaction.

Another major environmental impact of the Transaction, inadequately described although not completely ignored, in the Applicants' Environmental Appendix is air pollution. In terms of National Air Quality Standards Springfield is classified as a "nonattainment" area for eight hour ozone.⁵ "The Clean Air Act defines the term

⁵ "Ozone (O₃) is created by a chemical reaction between NO_x and VOCs that is generated by heat and sunlight. A large share of ozone-generating pollutants is produced by motor vehicles, although any fuel combustion source emits the pollutants that can contribute to ozone formation. Ozone is a major problem in many urban areas around the world where it can reduce lung capacity and increase susceptibility to respiratory illnesses, especially in children and the elderly. Control strategies may comprise a set of regulations that specify emission limits and/or control equipment that are deemed to be reasonable available control technology (RACT), best available control technology (BACT), or lowest achievable emission rates (LAER), depending on the severity of the nonattainment problem in the area. NO_x and VOC control equipment or programs may address specific industrial processes, or focus on on-road vehicles, nonroad equipment such as locomotives, and nonpoint sources such as small industrial boilers, dry cleaners, and consumer solvents. Pollution prevention measures such as use of non- or low-VOC content solvents and coatings can also be part of an effective ozone control strategy. On April 15, 2004, EPA designated 432 counties and 42 partial counties as nonattainment areas for the 8-hour ozone standard, and these areas face deadlines between 2007 and 2024 (depending on the severity of their ozone problem) for attaining that standard." NATIONAL ASSOCIATION OF CLEAN AIR AGENCIES, <
<http://www.4cleanair.org/TopicDetails.asp?parent=2>> visited on Monday, August 11, 2008.

'nonattainment area' for any air pollutant as an area which is shown by monitored data or which is calculated by air quality modeling [or other reliable methods] to exceed any national ambient air quality standard for such pollutant." Railroad operations negatively impact air quality due to locomotive diesel- fuel combustion. "Locomotive engines are significant contributors to air pollution in many of our nation's cities and ports. Although locomotive engines being produced today must meet relatively modest emission requirements set in 1997, they continue to emit large amounts of nitrogen oxides and particulate matter (PM), both of which contribute to serious public health problems."

The maintenance of railroad rights of way due to their aesthetic impacts for motorists and neighbors, and the benefits of noise reduction measures which protect residents from unwanted sound are important concerns to Springfield. The noise reduction benefits include lessened sleep disturbance, improved ability to enjoy outdoor life, reduced speech interference, stress reduction, reduced risk of hearing impairment, and reduction in blood pressure (improved cardiovascular health).

Springfield has a priority interest in the condition of the infrastructure in Springfield area, the detrimental impact of the degraded condition of the track rights of way, are a public health, safety and environmental hazard. As Norfolk Southern proceeds to infuse new capital into the system, the conditions of the existing infrastructure and its impact on Springfield and the other communities through which the rail system passes must be considered and attended to. In particular the Applicants failure to properly maintain a rail line segment running north-south immediate adjacent to the Connecticut

⁶ U.S. ENVIRONMENTAL PROTECTION AGENCY.
<<http://www.epa.gov/otaq/locomotiv.htm>> visited on Monday, August 11, 2008.

River, a national historic scenic waterway, must be rectified. The failures of the Applicants to adequately maintain this rail segment as it passes through Springfield creates a public health safety and environmental hazard.

2. SPRINGFIELD'S OTHER EVIDENCE

There is much to be learned from the past to help determine where we need to go in the future. The Applicants' past performance raises serious concerns which should raise red flags about the transaction. According to the Federal Railroad Administration ("FRA"), as of August 8, 2008, a summary by calendar year, (Jan-May) of the Ten Year Accident/Incident Overview by Railroad shows that the Pam Am Rwy/Guilford System [GRS] had accidents or incidents every year from 2000 thru August of this year. Some of those accidents/incidents involved fatalities, others involved derailments, some involved cars carrying hazardous materials. The total accidents/incidents⁷ per year are shown in the table below.

⁷ The FRA classifies total accidents/incidents in several ways. It considers a train accident to be an event involving ontrack rail equipment that results in monetary damage to the equipment and track above a certain threshold which does not include lading, clearing costs, or environmental damage. It considers a highway-rail incident to be any impact between a rail and a highway user at a crossing site, regardless of severity, and they include motor vehicles and other highway/roadway/sidewalk users at both public and private crossings. Other incidents include events other than train accidents or crossing incidents, which caused a death or nonfatal condition to any person. Most fatalities in this category are to trespassers. Other events include such activities as getting on/off equipment, doing maintenance work, throwing switches, setting handbrakes, stumbling, tripping, etc. Passenger cases include all circumstances, including getting off/on standing trains, stumbling aboard trains, assaults, train accidents, crossing incidents, etc. FRA, *Accident/Incident Overview by State/Region*.

Pam Am Rwys/Guilford System [GRS]	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
TOTAL ACCIDENTS/INCIDENTS	12.0	15.0	8.0	3.0	15.0	6.0	8.0	10.0	12.0	5.0

In addition to the accident/incident information from the FRA, a number of other sources provide detailed information about some of the noise pollution problems, fire hazards, derailment, oil or hazardous materials releases, and air pollution, associated with the Applicants rail operations. That information is reviewed below.

1 Noise Pollution

A published report of Springfield Terminal's causing "*More Idling Irritation*" states that on:

"27 May, Andover. ST⁸ IS STILL LEAVING ENGINES TO IDLE FOR LONG PERIODS, according to one Andover resident, Brenda Shea. Trains last disturbed her at night on 21 April, when she filed a noise complaint with Andover police just before 2AM. The next night she stayed at a friend's house for fear of losing even more sleep

Andover Health Director Tom Carbone said his department has received only two complaints about the noise in six months, and Andover police Lieutenant Jim Hashem said few complaints have been filed. "We will get a call here and there about trains idling," said Hashem. "We probably get the same amount of complaints about noisy cars or loud music at (Merrimack) college."

Because the railroads are regulated by the federal government, Hashem said, the police department can do little when noise complaints are made.

The agreement In September 2006, ST agreed with Andover, Chelmsford, and Westover to install two auxiliary power units per month to reduce idling [see 06#08B].

⁸ "ST" is a common abbreviation used by ATLANTIC NORTHEAST RAILS & PORTS to mean the "Springfield Terminal Ry (leases three parts of Pan Am Systems: Maine Central RR, Portland Terminal RR, Boston & Maine)." ATLANTIC NORTHEAST RAILS & PORTS – (Weekly trade newsletter Issue 07#05B 1 (note) June 2007).

Carbone said no formal agreement existed, and he did not know how many of the devices have been installed. The town is free to take legal action if the company doesn't follow through. He is "pretty confident" the company is willing to listen to and address complaints of residents disturbed by the trains. "We still encourage people to call (the town) if there's a problem."

But, said Shea, she has not gotten results. "Right now everything's quiet. But the next time it happens you've got to start the whole process again. Who do you call? No one calls back." {Brian Messenger in Lawrence Eagle-Tribune 27 May 07}⁹

B Fire Hazards

Springfield Terminal's activities as a "*Fire Starter*" were the subject of another published report in a weekly trade newsletter which states that on:

29 May, Westminster. The Fire Chief Here Would Like Clear Authority To Halt ST Trains during times of high fire danger.

Financial compensation. In addition to halting train movements, MacAloney said Massachusetts law permits him to seek compensation from a person or entity whose negligence has started a fire. Burning embers from ST locomotives started fires recently.

The chief argues that ST's poor engine maintenance and failure to install equipment which would significantly decrease the production of embers constitutes negligence.

However, he has not had the chance to test that theory. In the only case brought by the Town of Westminster about fire costs, ST settled out of court. [See 07#01A Deerfield compensation.]...

The fire chronology:

- 23 April: ST locomotives started fires. ST's Ed Motte told Westminster ST will respond to requests to stop locomotive movements in the future.
- 4 May: Chief issued notice of Red Flag day, asked ST via faxed letter to 'cease all rail operations' between noon and 7PM.

⁹ 6 ATLANTIC NORTH-EAST RAILS & PORTS – (Weekly trade newsletter 07#05B 1 June 2007).

- 4 May: ST attorney Clinton Wright declined, citing federal law and the 'founding father's [sic] recognition of the importance of ensuring the uninterrupted flow of interstate commerce.'
- 8 May: Chief issued another notice of Red Flag day, asked ST to stop 'all west-bound trains in Fitchburg and checking the condition of the engine exhaust to ensure that they are maintained correctly to prevent hot particles from being emitted. This also includes using slow speeds on east-bound trains to prevent hot brake shoe particles from leaving the train.'
- 8 May: Wright again declines, citing the 'founding father's' and a 'myopic view with respect to interstate commerce....[P]lease be advised that if the Town of Westminster...continues to harass Pan Am by issuing orders that have no basis in applicable law, Pan Am will not hesitate to pursue legal remedies to put a stop to such harassment.' (emphasis added)
- Westminster seeks \$21,000 Following Chapter 160, section 241 of the Massachusetts General Laws, Chief MacAloney on 7 May billed ST \$21,172 for seven fires, three in 2006 and four in 2007. {text of letters from Westminster}¹⁰

C Derailment

A published report concerning Springfield Terminal's making "*Deerfield*

Unhappy" states that on:

8 May, Deerfield. In A Letter To Governor Deval Patrick, The Town Of Deerfield Board of Selectman and Board of Health listed complaints

Derailment costs

Deerfield noted that ST had a derailment in the Town of Buckland on 26 April, triggering an emergency response from Buckland and the state, though fortunately no hazardous materials were involved. Deerfield noted that ST 'will refuse to pay, contrary to the law, for the costs incurred both to the town and the state in responding to the incident, as they did with Deerfield' [see 06#11B].

¹⁰ 6-7 ATLANTIC NORTHWEST RAILS & PORTS – (Weekly trade newsletter 07#05B 1 June 2007).

Other problems

'As a corporation, Pan Am Rail has a highly negative history where Massachusetts towns are concerned:'

- It owns Deerfield \$250,000 in back taxes and PILOT payments [see 06#11B].
- 'The City of Greenfield provides water to the railroad, which in turn sells water to the surrounding neighborhood in Deerfield, yet Pan Am routinely fails to pay fees owed to the city and responds only when a shutoff is threatened.'
- Poor maintenance is implicated in the derailments noted above, as well starting the fire in Westminster [see above].
- 'Another derailment in Charlemont resulted in latex materials being spilled, which flowed into the Connecticut River. – 'Undermining of the Greenfield Road Bridge in the Town of Montague '
- Lack of cooperation with MassHighway delaying repairs on I-91.
- A history of non-compliance at the Deerfield railyard about water pollution.
- 'The idling of trains that exceeds the 30-minute limit....'¹¹

D Oil or Hazardous Materials Pollution

On March 15, 2008, a Grand Jury in Middlesex County Massachusetts returned indictments against the Boston and Maine Corporation, the Springfield Terminal Railway Company, the Pan Am Railways, Inc. and another.¹² In connection with these criminal indictments, the Massachusetts Attorney General's Office filed a statement of the

¹¹ 7-8 ATLANTIC NORTHEAST RAILS & PORTS – (Weekly trade newsletter 07#05B 1 June 2007).

¹² The Maine Central Railroad Company.

Commonwealth's case "to aid the Court, defense counsel, and the probation department in assessing the general nature and circumstances of the crimes alleged." It states:

The Ayer Hill Rail yard located in Ayer, Massachusetts is owned and operated by Pan Am Railways and its subsidiaries. This rail yard is the site where a significant diesel fuel spill occurred from the MEC 506 locomotive engine on the night of August 8, 2006. Maine Central Railroad Company is the company that owns the MEC 506 locomotive engine Springfield Terminal Railway Company is the company that operates the MEC 506, as well as the company that operates the rail yard where the release occurred. Boston & Maine Corporation is the company that owns the rail yard where the release occurred. The principal office of these companies is located at Iron Horse Park in Billerica, MA. Pan Am Railways Incorporated (formerly known as the Guilford Rail System) is the umbrella corporation for each of these companies. Its corporate headquarters is located at 14 Aviation Avenue in Portsmouth, NH

Sometime during the evening of August 8, 2006 the MEC 506 locomotive engine began leaking diesel fuel that resulted in a diesel fuel spill at the Ayer Rail Yard. The spill was discovered at approximately 9:45pm. The Department of Environmental Protection was not notified of the spill when it was discovered. Nor was the Department notified in the hours following discovery, when the company had various personnel at the site attempting to clean the spill up. The Department was not notified until it received an anonymous phone call the following afternoon reporting a large spill at the Ayer Rail Yard that was covered up by fresh ballast stone. After the spill was finally reported, an investigation was conducted by the Ayer Fire Department, the Department of Environmental Protection and the Federal Railroad Administration. The investigation by the Federal Railroad Administration concluded that there was 947 gallons of fuel unaccounted for as a result of the spill incident

BACKGROUND FACTS

On August 8, 2006, at the Ayer Rail Yard, the night shift train crew, engineer Kevin Moore and conductor Jared Levangie were working in the yard pushing cars. At approximately 9pm they smelled a strong pungent smell of diesel fuel as they rode by the MEC 506. A radio call was made to the train dispatcher, Gary Munsey, informing him of the strong smell. The dispatcher was informed that it smelled as if fuel was leaking from the engine.

Moore and Levangie completed their assignment and returned back to the area of the smell. When they got off their engine and approached the MEC 506, Kevin Moore said that fuel was spilling down the sides of the engine, leaking out of the doors, down the wheels, onto the brakes. Jared Levangie witnessed the fuel pouring out of the sump tank and that it was pouring down the walkway on the side of the locomotive. He said the fuel had "risen up past the sill and came right

out of the engine compartment...like a waterfall, down the wheel trucks and pouring down the gas tank." Kevin Moore went over to the MEC 506 and hit the emergency fuel shut-off button that is located on the side of the engine to stop the pressure from the fuel pump. He witnessed fuel running down the sides of the engine. He witnessed a pool of diesel fuel completely around the locomotive on both sides of it.

Kevin Moore went to the on-site trailer and made another phone call to the dispatcher – Gary Munsey. Moore told the dispatcher that the MEC 506 "was leaking like crazy" and informed him that he had "hit the emergency fuel cut-off" and that it stopped the fuel from leaking, but that there was a puddle on the ground and it looked to [him] to be at least ..a couple hundred gallons." Moore said that the dispatcher again acknowledged the call and told him to call the company's Power Control Department. Moore stated that he called Power Control and repeated the same information including his visual field estimation that the leak was a couple of hundred gallons. Moore indicated that Power Control just acknowledged the phone call. The spill was not reported to the Department of Environmental Protection at this time.

That same night, August 8, 2006, John Collins, the Environmental Compliance Officer was paged by the dispatcher and informed that there was a fuel spill at the Ayer Rail yard. He went to the Ayer Rail yard and was accompanied by Michael Davis, the managerial engineer for the company's Central District Bridges & Building Department, a cleanup crew and a mechanic. Davis stated that he was at the site for about 4 – 4^{1/2} hours. The Department of Environmental Protection was not informed of the diesel fuel spill by any of the persons that responded to it on the night of August 8, 2006.

On August 9, 2006, the Train Master for the Ayer rail yard, Walter Scott, called the dispatcher at about 2am to check in on a job. The dispatcher at that time told him that a fuel spill had occurred on track 10 at the Yard. The Train Master arrived at the Ayer Yard at about 3:30am to assess the situation. The Train Master observed white pads soaked with fuel all around the engine and wetness on the ground between track 10 and the surrounding tracks. The Train Master said there was a strong smell of diesel fuel. The Train Master stated that the pads and wetness surrounded the MEC 506 in about a 30-foot circumference. Early during the morning of August 9, 2006, Richard Anderson, the day shift engineer arrived on site. He saw the soaked pads and the area of wetness around the engine. Anderson was asked to move the MEC 506 engine, but refused to move it because he believed if it was moved in its condition it would result in additional spillage and contamination to the area.

John Collins arrived back at the site the morning of August 9, 2006 at about 7am. Clean-up activities continued at the Ayer rail yard under the direction of Collins and Davis during that morning. The cleanup was done by hand shoveling the contaminated surface area and placing it into five or six 55-gallon

drums. Then three front end loader buckets full of new ballast was spread over the cleanup area. The defendants did not inform the Department of Environmental Protection of the diesel fuel spill during the morning of August 9, 2006 as all this activity was occurring.

On August 9, 2006 at 2:45pm Robert Dunne at the DEP received an anonymous phone call notifying the Department of a spill of diesel fuel that occurred the preceding night at the Ayer Rail yard. The caller, who only identified himself as a railroad union representative in Springfield, MA, indicated that he was making the notification because his members were fearful of retribution from the rail road company if they reported the spill directly. The caller informed the DEP that railroad employees had knowledge of a spill at the Ayer Rail Yard and that they were convinced that the spill was much greater than the reportable quantity. The caller indicated that the railroad was alleging the spill was less than 10 gallons, but that witnesses stated that the spill was significantly greater than 10 gallons. The caller indicated that he had the impression that the railroad was knowingly attempting to hide the spill and avoid its detection by covering the spill area with fresh ballast stone.

The Ayer Fire Department made an initial inspection and reported to the DEP that there was a large area of fresh ballast stone (measuring about 20 feet by 40 feet) that was recently replaced and that the area looked larger than what would be expected for a small spill of less than 10-gallons. The DEP sent, Dino DelleChiaie, a member of its Emergency Response team to investigate. When DelleChiaie approached the cleanup area, he could smell the odor of fresh diesel and observed a wet dark area of soil along the edge of the new gray stone ballast. DelleChiaie picked up the impacted soil and reported that it was ripe with fresh diesel fuel. DelleChiaie kicked the new stone ballast off the soil in a few areas and saw wet dark soil under the stone.

Peter Lapre, an inspector for the Federal Railroad Administration (FRA) was also on site. When Lapre inspected the MEC 506 engine he noted there was approximately 1000 gallons of fuel remaining in the tank. Lapre called the railroad's Dispatcher's Office and checked on the locomotives recent travel history. Peter Lapre, accompanied by DEP's Dino DelleChiaie, did a detailed inspection of the MEC 506 the evening of August 9, 2006. Based on available data, time, distance traveled, consumption rates and capacities he ultimately determined that 947 gallons of fuel was unaccounted for. The MA DEP referred the matter to the Environmental Crimes Strike Force for further investigation.

M.G.L. 21E §7 requires that as soon as an owner or operator of a site has knowledge of a release or threat of release of oil or hazardous material, it shall immediately notify the Department of Environmental Protection thereof. After a grand jury investigation, the company was indicted on two counts of violating the Oil & Hazardous Material Release Prevention Act, specifically the notice of

release or threat of release requirement found at M.G.L. 21E §7. Each day such violation occurs is considered a separate violation. M.G.L. 21E §11.

The Environmental Crimes Strike Force is an interagency unit that includes prosecutors from Attorney General Martha Coakley's Office, Environmental Police Officers assigned to Attorney General Coakley's Office, and investigators, engineers and attorneys from the Department of Environmental Protection. The Strike Force investigates and prosecutes crimes that harm the state's water and air, and that pose a significant threat to human health. The Strike Force is overseen by Attorney General Coakley, DEP Commissioner Laurie Burt, and Energy and Environmental Affairs Secretary Ian A. Bowles."

E Air Pollution

Springfield is a "serious ozone nonattainment area"¹³ which means the air is unhealthy to breathe.¹⁴ Adding more diesel exhaust to this blanket of unhealthy air will degrade it further and must not be allowed. The Senate long ago observed that a.

¹³ "EPA is proposing approval of rate-of-progress (ROP) emission reduction plans submitted by the Commonwealth of Massachusetts for the Springfield serious ozone nonattainment area as revisions to the Commonwealth's SIP.... [S]ections 182 (b)(1) and (c)(2) of the Federal Clean Air Act (the Act). require states containing certain ozone nonattainment areas to develop strategies to reduce emissions of the pollutants that react to form ground level ozone.... Massachusetts was required to develop plans to reduce ozone precursor emissions because it contains a serious ozone nonattainment area. A final rule published by EPA on November 6, 1991 (56 FR 56694) designated four counties in the western part of the State a serious ozone nonattainment area. The four counties included are Berkshire, Franklin, Hampden, and Hampshire counties, and the area is referred to as the Springfield, Massachusetts serious ozone nonattainment area. Sections 182 (b)(1) and (c)(2) of the Act require that serious ozone nonattainment areas develop ROP plans to reduce ozone forming pollutant emissions in the nonattainment area. As stated above, two provisions of the Act make achieving these emission reductions necessary. ENVIRONMENTAL PROTECTION AGENCY, *Approval and Promulgation of Air Quality Implementation Plans, Massachusetts, Rate-of-Progress Emission Reduction Plans*, 64 FR 51943, 51944, 64 FR 51943, 51944 (1999).

¹⁴ "Ozone has adverse effects on human health. It can irritate the respiratory system, causing wheezing and coughing, and irritate the eyes and nose. Ozone can affect lung function, reducing the amount of air that can be inhaled and limiting the maximum rate of respiration, even in healthy individuals. Exposure to ozone can also increase the frequency and severity of asthma attacks, resulting in more emergency room visits, medication treatments and lost school or workdays. Other possible short-term effects

majority of Americans are still breathing air that does not meet the Federal health-based air quality standards.

Our knowledge about the adverse effects of exposure to air pollution has increased since 1965. Researchers have demonstrated adverse effects at levels of exposure previously presumed to be safe. Illnesses of no traumatic origin are now linked to air pollution. In some areas, for example, residents who do not smoke may have lungs as damaged as the lungs of heavy smokers, due to exposure to air pollution.

Air pollution can silently damage our lungs and heart or act swiftly in the case of exposure to toxic air pollutants. Rigorous regulation of toxic air pollutants is needed to avoid risk of serious, irreversible damage to human health

We are routinely exposed to thousands of different air pollutants emitted every day. Exposure to this mix of pollutants can produce more adverse health effects than exposure to each of the individual pollutants. These synergistic effects must be considered if we are to adequately protect public health. In addition, there are many pathways of exposure to hazardous pollutants and contaminants. Exposure to polluted outdoor and indoor air, contaminated water and soil can combine to produce greater risks than exposure through only one source

In testimony before the Subcommittee on Environmental Protection, public health leaders acknowledged the continuing health threat posed by air pollution. The American Lung Association, the American Public Health Association and the American Academy of Pediatrics all testified that we are facing a public health crisis due to air pollution. Reductions in emissions of sulfur dioxide and oxides of nitrogen are warranted based on health considerations alone. This conclusion does not address the myriad of other pollutants of concern. With regard to a graph of ozone pollution in the Northeast States for 1987 and 1988, one researcher from the American Lung Association stated:

from exposure to high levels of ozone include aggravation of symptoms of emphysema, bronchitis and chronic obstructive pulmonary disease and increased susceptibility to respiratory infections. Health studies raise the concern that repeated short-term exposure to ozone might lead to permanent damage in lung function, especially in children. Recent analysis of health research in the U.S. and Europe has also found a strong linkage between increases in ozone and risk of premature death. Recent studies also indicate that ozone may contribute to cardiac morbidity. These relationships indicate that the costs and health consequences of not reducing ozone pollution are far higher than previously realized." MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION *State Implementation Plan (SIP) to Demonstrate Attainment of the National Ambient Air Quality Standard for Ozone* <<http://www.mass.gov/dep/air/priorities/sipo/1 doc>> visited on Monday, August 11, 2008.

...Most States went up significantly between 1987 and 1988 and Massachusetts tripled its ozone violation days up to 28 for that particular summer of 1988. Maine and New Hampshire tripled their violation dates in one year. Vermont appears on the graph for the first time in 1988. I consider this graph frightening, hair-raising, and truly a crisis.

A Harvard researcher testified before the Subcommittee that "In every epidemiologic investigation that we have performed over the past 6 years, we have repeatedly found a 2 to 5 percent air pollution effect on human mortality and morbidity. We find it very difficult to reject these consistent findings..." (June 17, 1987).

In a separate study, the past President of the American Public Health Association found that "...air pollution is one of the greatest risks to public health in the United States. Its causes, contributes to, or aggravates a long list of disease and dysfunction-chronic bronchitis, lung cancer, nervous disorders and heart disease. As many as 50,000 premature deaths may be caused by single air pollutants or a combination of pollutants." He further clarified his points by saying that "If further Congressional action, or voluntary action by polluters, is not taken to reduce human exposure to a broad range of toxic air pollutants, then we can expect substantial increases in the incidence of air-pollution provoked disease, dysfunction, and premature deaths. A two- to three-fold (at least) increase, or 100,000 to 150,000 premature deaths per year would not be an unrealistic estimate. It is in fact a most conservative estimate."

The health problem is serious and it is pervasive. There is no choice but to breathe the air, whether it is clean or polluted. Air is inhaled regardless of its quality. This is a national resource that should be protected as our parks and national monuments are protected.

To protect this resource a strong national control strategy is needed. Air pollution recognizes no State or international borders. Aggressive controls in downwind areas will do little to improve air quality if the quality of air entering the region is poor. Because States have limited resources and many additional responsibilities, both the State and Federal Government should work together to assure implementation of programs that improve air quality.¹⁵

The Board should require the Applicants to immediately implement, on every rail segment within the Transaction, improved emission control technologies to prevent the

¹⁵ SENATE REPORT No. 101-228, 1990 U.S.C.C.A.N. 3385, 3388-89 (1989).

generation of toxic or other air pollutants in the first instance. Environmental pollution can have very adverse effects upon people, water quality, forests, materials, crops, and other terrestrial and aquatic systems, and the whole ecosystem. The effects of air pollution on particularly susceptible populations, such as asthmatics, elderly, and the young, are not good. Pollution prevention strategies and technologies would focus on ways to reduce the sources of air emissions rather than simply trapping such emissions at the end of the pipe. The Environmental Protection Agency (EPA) has adopted a comprehensive program to dramatically reduce pollution from locomotive diesel engines.¹⁶ The controls apply to all types of locomotives, including line-haul, switch, and passenger. The near-term emission standards for newly-built engines will phase in starting in 2009. The near-term program also includes new emission limits for existing locomotives that apply when they are remanufactured, and take effect as soon as certified remanufacture systems are available, as early as 2008. The long-term emissions standards for newly-built locomotives are based on the application of high-efficiency catalytic aftertreatment technology. These standards begin to take effect in 2015 for locomotives. EPA estimates that particulate matter (PM) reductions of 90 percent and nitrogen oxides (NOX) reductions of 80 percent from engines.

3. SPRINGFIELD'S ARGUMENT IN OPPOSITION TO THE PRIMARY APPLICATION

The "declared public policy of the United States" is "to protect and preserve the national environment 'to the fullest extent possible.' That public policy "is a value

¹⁶ EPA Final rule, Summary: <http://www.epa.gov/EPA-AIR/2008/May/Day-06/a7999a.htm> visited on Monday, August 11, 2008

judgment by the Congress that in order to 'foster and promote the general welfare' each generation of Americans must, beginning now, act 'as trustee of the environment for succeeding generations.'"¹⁷ The Board must comply with this vital American public policy when considering whether to approve, deny, or condition the Transaction Enhancement of the rail infrastructure along the routes proposed, which are the primary rail arteries for rail traffic moving into, through, and out of New England, must yield to the congressionally structured priority to protect and preserve the national environment to the fullest extent possible. The Board in considering the Transaction must act objectively with respect to evaluation of environmental impacts. That requires, as a minimum, that the Board make a good faith effort to comply with the provisions of NEPA. A good faith effort precludes consciously slanted or biased impact assessments and statements wherein material omissions are made or attempted. The Board must perform its independent oversight responsibility to the American public by faithfully fulfilling its role as the trustee of the environment for succeeding generations in order to foster and promote the general welfare. The Board, in acting upon the Transaction, must take a hard look at its environmental impacts and ensure that the Transaction furthers our national policy to protect our environment, rather than irreparably damaging it to the detriment of the American public and future generations. The Supreme Court has wisely observed that:

NEPA promotes its sweeping commitment to "prevent or eliminate damage to the environment and biosphere" by focusing Government and public attention on the environmental effects of proposed agency action. By so focusing agency

¹⁷ *Arlington Coalition on Transp v Volpe*, 458 F.2d 1323, 1326 (4th Cir. 1972) (citations omitted).

attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct."¹⁸

The evidence and other information provided herein reveal a deplorable record of multiple misdeeds and irresponsible rail operation in the areas impacted by the Transaction. In light of this record the Board should refuse to write the Applicants a blank check by rubber stamping approval of the Transaction. Instead the Board should take a hard look at the Transaction and only approve it if appropriate measures, such as those requested by Springfield below, are imposed upon the Transaction. Simply stated the Transaction must be restricted by the Board to protect the public interest.

4. SPRINGFIELD'S PROTEST

Springfield protests the Applicants' primary application and filings on both procedural and substantive grounds.

From a procedural perspective, Springfield protests the apparent effort to rush through the Applicants filings without providing the public with adequate notice of the issues and a reasonable opportunity to respond to them. The public deserves better. The law requires more. Specifically Springfield protests the Procedural Schedule established by the Board on the grounds that it lacks even a pretense of fundamental due process. The Applicants motion to establish a procedural schedule was filed with the Board on May 30, 2008. No notice of the motion was given to each town and city impacted by the Transaction. Although the Applicants did apparently notify the governors of various states that is not notice to the impacted cities and towns any more than notice to the

¹⁸ *Marsh v Oregon Natural Resources Council*, 490 U.S. 360, 371, 109 S. Ct. 1851, 1858 (1989) (citations omitted).

President is notice to the STB. Nearly a month later, on June 26, 2008, the Board issued the Procedural Schedule in this matter.¹⁹ Nearly a month after that, on July 24, 2008, the Board issued a notice providing that “[e]ach person actively participating as a Party of Record in this proceeding must, by August 4, 2008, serve a copy of all filings submitted so far in this proceeding on each Party of Record (designated on the attached service list as ‘Party of Record’) to the extent such filings have not previously been served upon such other parties.”²⁰ The Applicants apparently made service of the said documents upon the Parties of Record and their motion to establish a procedural schedule which had been filed with the Board on May 30, 2008, was included among the mass of documents served upon the parties on August 8th. Consequently the Applicant’s motion was not actually received by Springfield until Friday, August 8, 2008, several months after it had been filed with the STB, after it had been acted upon by the STB and after the procedural schedule had been issued by the STB. Springfield protests the manner in which this was done. “The touchstone of procedural due process” is the requirement that a party “be given the opportunity to be heard in a meaningful manner.”²¹ Procedural due process must be provided to the public by the STB. That means, among other things, that parties are entitled to notice and an opportunity to be heard *before* the STB acts; not notice months *after* the action has been taken.

¹⁹ Decision No. 2 in STB Finance Docket No. 35147, *Notice of Acceptance of Primary Application and Related Filings, Issuance of Procedural Schedule*.

²⁰ Decision in STB Finance Docket No. 35147, Service Date – late release July 24, 2008. *Notice*.

²¹ *O'Donnell v. Brown*, 335 F Supp.2d 787, 809 (W.D. Mich. 2004) (citation and internal quotation marks omitted)

Substantively Springfield protests the primary application and filings made by the applicant in support of the Transaction because they lack an environmental assessment and an environmental study, they do not contain sufficient protection of the public interest in protecting and preserving the environment. Springfield urges the Board to specifically condition its approval of the Transaction upon stringent environmental conditions which are necessary to protect the public interest. Those conditions include all the requests for conditions set forth by Springfield in the next section.

5. SPRINGFIELD'S REQUESTS FOR CONDITIONS

Springfield requests that the Board, as a condition of approving the Transaction, impose and strictly enforce all the conditions set forth below. To guarantee that the Applicants comply therewith, Springfield requests the Board to retain permanent oversight regarding the Applicants compliance with the conditions and impose upon the Applicants significant monetary fines for every violation of any of the conditions

A. Threshold Requirement

As an initial matter, the Board should order an environmental assessment of the Transaction followed by a detailed environmental impact study of the Transaction. This threshold requirement is essential to comply with America's national environmental policy which is designed to encourage the:

productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation....²²

²² 42 U.S.C.A. § 4321 (stating purpose of national environmental policy).

Based upon the dearth of pertinent environmental information provided by the Applicants in their Environmental Appendix it is impossible for the Board to identify and evaluate the direct, indirect, and cumulative environmental impacts of the Transaction. That work should include, among other things, biological surveys for threatened and endangered species; cultural resource surveys for archaeological sites and historic structures, and the gathering and analysis of extensive data on air quality, crossing safety and potential delays, railroad and vehicular traffic volumes, wetlands and aquatic resources, noise receptors, wildlife migration, and potential impacts to ranching operations. Since the Board is legally required to take into account the environmental impacts of its actions, including the direct, indirect and cumulative impacts of its actions and the Environmental Appendix is practically useless in that regard, the Board must require that an Environmental Assessment or an Environmental Impact Statement be prepared for the Transaction so that the Board and the American people have sufficient information about the Transaction to adequately and fairly consider the environmental impacts of the Transaction before any determinative action is taken by the Board on the Transaction

B Air Pollution Mitigation Condition

Springfield requests that the Board, as a precondition for approval of the Transaction, order the Applicants to mitigate the major potential source of air pollution in connection with the Transaction by requiring, as a precondition for Board approval of the Transaction, that all diesel locomotives, directly or indirectly operated on any track segment involved in the Transaction, immediately comply with the EPA Tier 3 emission standards for newly-built locomotives, provisions for clean switch locomotives, and idle

reduction requirements for new and remanufactured locomotives, and that by 2009 all diesel locomotives, directly or indirectly, operated on any track segment involved in the Transaction, meet the EPA Tier 4. standards for newly-built engines based on the application of high-efficiency catalytic after treatment technology.

C. Noise Pollution Mitigation Condition

Springfield requests that the Board, as a precondition for approval of the Transaction, order the Applicants to mitigate the increased noise pollution produced by the Transaction by installing modern noise barriers to reduce sound pollution from heavier, faster, trains moving through Springfield. For safety reasons railroads use a loud audible horn warning at crossings.²³ Generally the horn frequency combinations for three chime horn systems range from 255 to 494 Hz; while the frequency combinations for five chime horn systems range from 255 to 622 Hz. Congress found “that inadequately controlled noise presents a growing danger to the health and welfare of the Nation’s population, particularly in urban areas”²⁴; that one of the “major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce”²⁵; and that “Federal action is essential to deal with major noise sources in

²³ “The use of a horn as audible warning at railroad grade crossings dates back to the era of steam locomotives when the audible warning sound was a whistle produced by a column of steam resonating in a metal tube. This resonating column of steam produced a very distinctive sound which is the basis for the sound of conventional horn systems. Conventional locomotive horn systems consist of a group of horns which operate using compressed air to vibrate a metal diaphragm. The first compressed-air powered horn systems incorporated five horns operating at five distinct frequencies to replicate the sound of a steam whistle. It was later found that three horns could also approximate this sound. The prevalent convention is to call each horn which comprises the assembly a ‘chime’. Thus, a three-chime is comprised of three separate horns and a five-chime is comprised of five separate horns. It has been found that domestic railroads still use either three or five chimes in the horn systems used on road locomotives.” Amanda S. Keller and Edward J. Rickley, FRA: *Study of the Acoustic Characteristics of Railroad Horn Systems* <<http://www.fra.dot.gov/downloads/Research/ord9325.pdf>> visited on Monday, August 11, 2008 (footnote omitted).

²⁴ 42 U.S.C.A. § 4901(a)(1).

²⁵ 42 U.S.C.A. § 4901(a)(2).

commerce control of which require national uniformity of treatment.”²⁶ The FRA has railroad noise emission compliance regulations²⁷ but the Environmental Appendix failed to discuss the issue of noise reduction in the area impacted by the Transaction. That is unacceptable. It defies the Congressional declaration of “the policy of the United States” which is “to promote an environment for all Americans free from noise that jeopardizes their health or welfare.”²⁸

D. Maintenance and Safety Conditions

Springfield requests that the Board Order the Applicants, as a precondition for approval of the Transaction, to maintain and inspect, on a monthly basis, the rail line and rights of way to ensure that they are clear of all brush, debris and trash; monitor and cleanup all spills thereon; and properly maintain its security devices. In lieu thereof, with appropriate clearances and safety protocols, the Applicants should be required to provide Springfield with a permanent license to enter onto the railway rights of way, whenever after notice the Applicants have failed to do so, for the purpose of clearing the brush, debris and trash; securing the safety devices and protecting the integrity of the public water supply and environment. All the said work shall be performed at the Applicants’ sole expense. The Applicants shall reimburse Springfield within one week of completion of the said work and the Applicants shall be fined \$100/day for every day full payment is not made to Springfield. “Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that

²⁶ 42 U.S.C.A. § 4901(a) (3).

²⁷ 49 C.F.R. § 210.1 et seq ; *see also* 42 U.S.C. § 4916 (mandating railroad noise emission standards).

²⁸ 42 U.S.C.A. § 4901 (b).

particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."²⁹ The public should not be subjected to the visual pollution on railroad rights of way littered with junk, rubbish and trash. The public deserves better and Springfield is calling upon the Board to use its public power in connection with the Transaction to force the Applicants to clean up the unsightly mess strewn along the tracks.

Sincerely

Harry P. Carroll
Harry P. Carroll, Esq.
Senior Legal Counsel

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Domenic J. Sarno, Mayor
David B. Panagore, Chief Development Officer
Edward M. Pikula, City Solicitor
File

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document has been served via first-class, postage pre-paid mail upon all Parties of Record on the service list promulgated by

²⁹ *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S. Ct. 1361, 1366 (1972).

the Surface Transportation Board in its Decision of July 24, 2008 in STB Docket No.
35147 which is incorporated herein by reference.

Harry P. Carroll
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