

Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

# Department of Environmental Protection

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235712

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Secretary

ENTERED  
Office of Proceedings  
March 28, 2014  
Part of  
Public Record

DAVID W. CASH  
Commissioner

March 28, 2014

Via U.S. Mail

Ms. Cynthia T. Brown  
Chief, Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-000 1

Re: Petition for Declaratory Order of United States Environmental Protection Agency  
STB Finance Docket No. 35803  
Comments of the Massachusetts Department of Environmental Protection

Dear Ms. Brown:

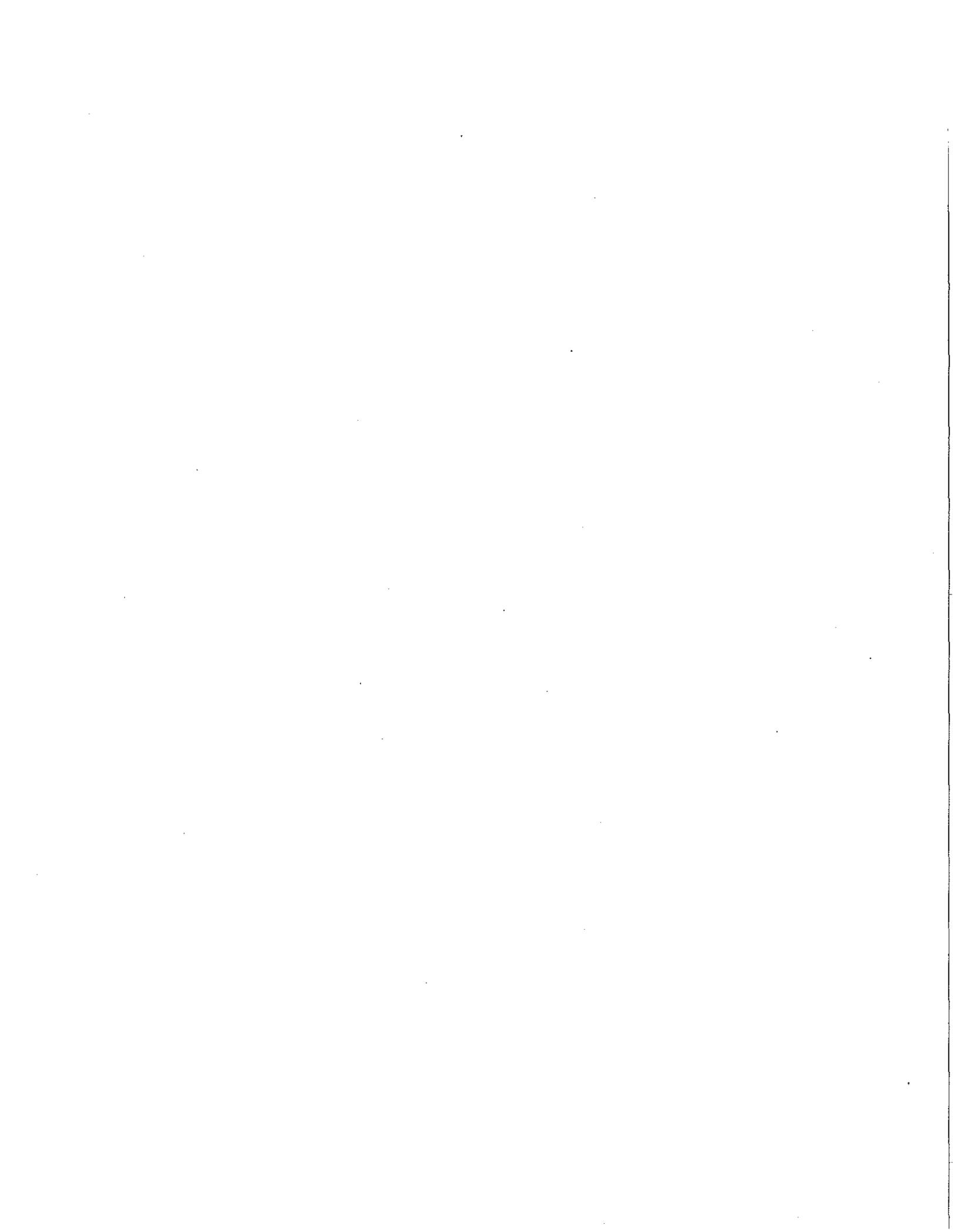
The Department of Environment Protection (the "Department") files these comments in the above-captioned action.

Please do not hesitate to contact me with any questions you may have. I may be reached at (617) 556-1155.

Thank you for your consideration.

Sincerely,

Laura Swain,  
Senior Counsel



BEFORE THE SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35803

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UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY—PETITION FOR DECLARATORY ORDER

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COMMENTS FILED BY THE COMMONWEALTH OF  
MASSACHUSETTS' DEPARTMENT OF ENVIRONMENTAL PROTECTION  
IN THE PETITION FOR DECLARATORY ORDER FILED BY  
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MASSACHUSETTS DEPARTMENT OF  
ENVIRONMENTAL PROTECTION

Nancy Kaplan, General Counsel and  
Laura Swain, Senior Counsel  
Department of Environmental Protection  
Office of General Counsel  
One Winter Street  
Boston, MA 02109  
(617) 654-6563

Dated: March 28, 2014

BEFORE THE SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35803

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COMMENTS FILED BY  
THE MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION  
IN THE PETITION FOR DECLARATORY ORDER  
FILED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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Introduction

The United States Environmental Protection Agency (“EPA”) filed a petition with the Surface Transportation Board (“Board”) to institute a declaratory order proceeding concerning California Rules 3501 and 3502, two rules promulgated by the California South Coast Air Quality Management District (“SCAQMD”) to address emissions of NO<sub>x</sub> (a precursor to ozone) and particulate matter emitted by diesel locomotives. See, United States Environmental Protection Agency – Petition for Declaratory Order, Reply of SCAQMD, STB Finance Docket 35803, pp. 6-8 (February 14, 2014). The SCAQMD sought to have EPA approve these two rules into California’s state implementation plan (“SIP”) in accordance with the federal Clean Air Act (“CAA”), 42 U.S.C. § 7410.

The Massachusetts Department of Environmental Protection (“DEP”) is interested in the EPA's petition because the EPA already approved into the Massachusetts SIP a locomotive anti-idling rule back in 1972. See 37 Fed. Reg. 23085 (Oct. 28, 1972). Massachusetts’s rule, 310 CMR 7.11, specifies that a person “owning or operating a diesel powered locomotive” may not “permit the unnecessary foreseeable idling of a diesel locomotive for a continuous period of longer than 30 minutes.” 310 CMR 7.11.

The CAA authorizes EPA to establish air quality standards, known as the National Ambient Air Quality Standards (“NAAQS”), for various pollutants. 42 U.S.C. §§ 7408 and 7409. Pursuant to the CAA, state and local agencies are required to develop state implementation plans to comply with the NAAQS to protect public health and welfare. 42 U.S.C. § 7410 and §7501 et seq. Each state, individually, determines how it will attain and maintain the NAAQS. 42 U.S.C. § 7502 and see, Concerned Citizens of Bridesburg v. United States EPA, 836 F.2d 777, 779 (3d Cir. 1987)(holding EPA may not unilaterally revise Pennsylvania’s SIP without complying with the process established in the CAA). “The SIP basically embodies a set of choices regarding such matters as transportation, zoning and industrial development that the state makes for itself in attempting to reach the NAAQS....” Id. at 780.

As part of the SIP approval process, EPA must determine whether the state can demonstrate that the state “is not prohibited by any provision of Federal or State law from carrying out such implementation plan.” 42 U.S.C. § 7410(a)(2)(E)(i). Therefore, in its petition, EPA posed the following question to the Board: whether California Rules 3501 and 3502, *if approved by EPA into the California SIP*, would be preempted by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101 et seq.. See, United States Environmental Protection Agency – Petition for Declaratory Order, EPA Petition for Declaratory Order, STB Finance Docket 35803, p. 5 (January 24, 2014)(“EPA Petition”)(emphasis added). Therefore, in order to properly consider the issue before it, the Board must restrict its review by assuming that EPA already has approved California Rules 2501 and 3502 in to the California SIP. See EPA Petition pp. 1 and 5.

It is important that the Board respond to the EPA's question by assuming that the EPA has approved the California Rules 3501 and 3502 into the California SIP. Such assumption means the Board's decision must focus on whether the ICCTA § 10501(b) preempts federal environmental law, specifically the Clean Air Act, and not state law. See, Safe Air for Everyone v. EPA, 488 F. 3d. 1088, 1091 (9<sup>th</sup> Cir. 2007)(stating that SIPs "have force and effect of federal law" in holding that EPA's approval of a SIP amendment contravened a CAA provision) and Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist., 622 F.3d 1094, 1098 (9th Cir. 2010)(observing that once these California Rules 3501 and 3502, governing the idling of locomotives, are incorporated into a SIP, they will have the force and authority of federal law).

In order to reach attainment for certain NAAQS, California promulgated its locomotive anti-idling Rules 3501 and 3502 in 2006. Rule 3501 requires the railroads to retain basic records of idling events lasting 30 minutes or more. Rule 3502 limits the idling of unattended locomotive to 30 minutes under certain circumstances. This Rule is similar to the Massachusetts rule, at 310 CMR 7.11, to prevent excessive locomotive idling.<sup>1</sup> Massachusetts also limits the idling of motor vehicles and trucks as part of its SIP. See 310 CMR 7.11. Rhode Island also has promulgated a locomotive anti-idling rule which EPA approved into Rhode Island's SIP in 2008. See Code R.I. R. 12-031-045 and 73 Fed. Reg. 16203 (March 27, 2008). Rhode Island's rule prohibits unnecessary idling except when the engine idles for maintenance, state or federal inspection, servicing, repairing, or diagnostic purposes, if idling is required for such activity. Id. The efforts of California, Massachusetts,

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<sup>1</sup> The Board of Health in the town of Gardner has recorded many instances of locomotive idling in violation of the Massachusetts rule. See attached verified statement of Bernard Sullivan, Health Director. DEP employee Saadi Motamedi also has collected many complaints about locomotive idling. See attached verified statement of Saadi Motamedi. So, locomotive idling continues to be a problem in Massachusetts.

and Rhode Island, are intended to assist each state, individually, in reaching the NAAQS for which areas of each state is or has been in non-attainment. Each state's SIP is the individual state's determination how it will meet the NAAQS. 42 U.S.C. § 7502.

The EPA, through the authority granted to it in the CAA, also has established emission standards for locomotives. 42 U.S.C. § 7547(a)(5). EPA's rule applies to newly manufactured and remanufactured locomotives. 73 Fed. Reg. 37096 (June 30, 2008). The EPA's rule includes an evaluation of the emission reductions achievable through the application of technology which EPA determines will be available for the locomotive engines, giving appropriate consideration to the cost of applying such technology within the period of time available to manufacturers and to noise, energy, and safety factors associated with the application of such technology. 42 U.S.C. § 7547(a)(1). Thus, the addition of anti-idling device required by the EPA for new or remanufactured locomotive engines includes an analysis of the burden to railroads.

All four rules have the same basic requirements for locomotives- a restriction on idling that can be met in any number of ways (in addition to simply turning off the locomotive engine), such as anti-idling devices, auxiliary power, logistics software, and GPS location of trains for improving use of shared tracks. And, as evidenced by the many locomotives now equipped with anti-idling devices, these measures are not overly burdensome on the railroads. By way of example, the EPA settled anti-idling violations of the Massachusetts rule, 310 CMR 7.11, requiring the Massachusetts Bay Transit Authority to supply electric power at layover stations to prevent excessive idling and to install less polluting auxiliary engines on fourteen locomotives. See U.S. v. MBTA et al., civ. action no. 10-11311, final judgment (Oct. 10, 2010)(attached).

Argument:

1. The Board Must Harmonize Two Federal Statutes.

The Board is faced with two conflicting federal laws: the CAA and the ICCTA. As previously stated, the California Rules 3501 and 3502, once approved by the EPA into the California SIP have the “full force and effect of federal law.” Safe Air for Everyone, 488 F.3d. at 1091. Therefore the Board must consider the California Rules as if they were federal law. When faced with two conflicting federal statutes, the Board may not simply choose one statute over another. Kroske v. US Bank Corp., 432 F.3d 976, 986 (9th Cir. 2005), US Bank Corp. v. Kroske, 549 U.S. 822 (cert. denied) (2006). The Board must “read federal statutes ‘to give effect to each if [it] can do so while preserving their sense and purpose.’” Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives’ Ass’n, 491 U.S. 490, 510 (1989) (quoting Watt v. Alaska, 451 U.S. 259, 267 (1981)). In other words, the Board must harmonize the two statutes. It must give effect to both statutes by looking at the core purpose of each statute. Id. at 510.

2. The Purpose of the CAA is to Address Air Pollution.

The California SIP regulates air emissions of locomotives, motor vehicles and other sources to address air pollution under the authority of the CAA. 40 CFR 52.220 et seq. and 42 U.S.C. § 7410 and §7501 et seq.. The Clean Air Act, 42 U.S.C.A. §§ 7401 et seq., governs air quality and emissions standards throughout the United States. Congress created the Act “to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare.” 42 U.S.C. § 7401(b)(1). The authority granted to EPA to restrict air pollution to protection public health under the CAA is broad. The Clean Air Act “is a comprehensive program for controlling and improving the nation's air quality.” See 1000

Friends of Md. v. Browner, 265 F.3d 216, 220 (4th Cir. 2001)(denying a citizens group petition for judicial review of EPA's decision concerning Baltimore's ozone rules).

Congress enacted the CAA to require the EPA to curb air pollution and to "guarantee the prompt attainment and maintenance of specified air quality standards." Alaska Dep't of Env'tl. Conservation v. EPA, 540 U.S. 461, 469 (U.S. 2004)(citing Union Elec. Co. v. EPA, 427 U.S. 246, 249 (1976)). Congress specifically gave states "wide discretion" in creating their own individual SIPs. Id.

### 3. The Purpose of the ICCTA is to Prevent State Regulation of Rail Transportation.

In contrast to the broad purpose of the CAA, the purpose of the ICCTA is more limited. Congress enacted the ICCTA to reform economic regulation of transportation and to prevent state regulation of railroads. Fla. E. Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1337 (11th Cir. 2001)(holding that the city's application of local zoning and occupational licenses did not constitute "regulation of rail transportation" under § 10501(b) and therefore was not preempted). Although the ICCTA authority over rail transportation is broad, 49 U.S.C. § 10501(b)'s preemptory power remains limited to "regulation of rail transportation." Id. at 1329 ("[T]he text, history, and purpose of the statute reveal that, because [the ordinance in question]... does not constitute "regulation of rail transportation," 49 U.S.C. § 10501(b), the ICCTA does not pre-empt the City's actions.") Thus state "regulations having an incidental or remote effect on rail transportation are permitted; only those having the effect of managing or governing rail transportation are preempted." Id. at 1331; and see United States v. St. Mary's Ry. West, LLC., 2013 U.S. Dist. LEXIS 181015, at \*8 (S.D. Ga. Dec. 4, 2013)(holding that § 10501(b) of the ICCTA does not prevent the EPA from enforcing the CWA against a railroad). Specifically, in Fla. E. Coast Ry Co., 266

F. 3d. at 1338, the court found that laws that “do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation” will not be preempted. Both the courts and the Board have noted that the ICCTA does not preempt “state and local agencies” which “promulgate EPA-approved statewide plans under federal environmental law” because such conflicts may be harmonized. Boston and Maine Corp. & Town of Ayer- Joint Petition for Declaratory Order, FD 33971, April 30, 2001, p. 19; see United States v. St. Mary's Ry., 2013 U.S. Dist. LEXIS at 8, Green Mountain R.R. Corp. v. Vermont, 2003 U.S. Dist. LEXIS 23774, at \*23 (D. Vt. 2003)(holding that a local environmental regulation was preempted, but that federal regulation, like the CWA, must still be complied with), affirmed by Green Mt. R.R. Corp. v. Vermont, 2005 U.S. App. LEXIS 6164 (2d Cir. 2005). See also Borough of Riverdale - Pet. for Decl. Order, 4 S.T.B. 380, 386 (1999)(observing that Congress did not intend for 49 U.S.C. § 10501(b) to “preempt federal environmental statutes such as the Clean Air Act and the Clean Water Act”). Therefore, in view of the more limited core purposes of the ICCTA, the Board must conclude that ICCTA § 10501(b) does not preempt the broad purposes of the federal CAA to prevent air pollution and promote public health. And, the California rules, when approved by the EPA into California’s SIP are essentially part of the federal enforceable CAA.

The ICCTA preempts only the “regulation of rail transportation.” 49 U.S.C. § 10501(b). But, California Rules 3501 and 3502 are not “regulation of rail transportation.” Instead, these rules, along with the other parts of the California SIP, regulate air emissions of pollutants as required by the CAA. 42 U.S.C. § 7410 and §7501. The California SIP regulates the emissions of motor vehicles, marine vessels, trucks, all to ensure that California meets the NAAQS prescribed in the CAA. California Rules 3501 and 3502 may have an

incidental effect rail transportation: as a result of these rules the locomotives operating in California may adjust their schedules, add anti-idling or auto-shut off devices to their locomotives or make other changes to comply with the California Rules. However, these changes are not so significant that it could be said California is regulating rail transportation. This conclusion is in line with about rail crossings which typically involve state claims. See New Orleans & Gulf Coast Ry. Co. v. Barrois, 533 F.3d 321, 333 (5<sup>th</sup> Cir. 2008)(finding that rail crossing issue was not automatically preempted by ICCTA § 10501(b) because use of the crossing typically does not pose an unreasonable burden on a railroad).

4. Fear of Patchwork of State Regulations Addressed in Public Process.

Only Rhode Island, Massachusetts and now California, have promulgated SIP regulations concerning the idling of locomotives. All three states submitted their regulations to a public process in which the locomotive companies may participate. Furthermore, the EPA's approval process, which gives the state regulations the force of federal law, for including state regulations into a SIP, includes a lengthy public process in which the locomotive companies may participate. Such participation likely will result in a look at the regulations of other states to ensure that there will not be a patchwork of regulations. Although each state's regulation merely requires that the diesel locomotives curtail idling under certain situations, the railroad companies instead may choose to meet the idling restrictions with the same equipment such as anti-idling devices, auxiliary power units to provide heat and circulate cooling water and generate electricity, automatic engine start/stop device which restart locomotive engines to maintain proper brake pressure. Alternatively, all three regulations may be met with logistics and scheduling software to provide information about location of other trains and crew.

Conclusion.

Therefore, for the foregoing reasons, the Board should conclude that the California Rules 3501 and 3502, if approved by EPA into the California SIP, are not preempted by 49 U.S.C. 10501(b) because the California SIP may be harmonized with the ICCTA. Therefore, if EPA approves Rules 3501 and 3502 into California's SIP, the railroads must comply with the rules.

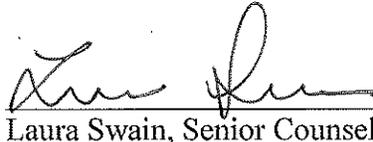
Respectfully submitted,

MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION

By its attorneys,



Nancy Kaplan, General Counsel  
Department of Environmental Protection  
Office of General Counsel  
One Winter Street  
Boston, MA 02109  
(617) 654- 6563



Laura Swain, Senior Counsel

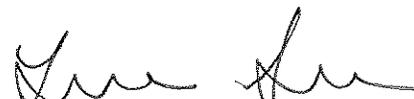
Dated: March 28, 2014

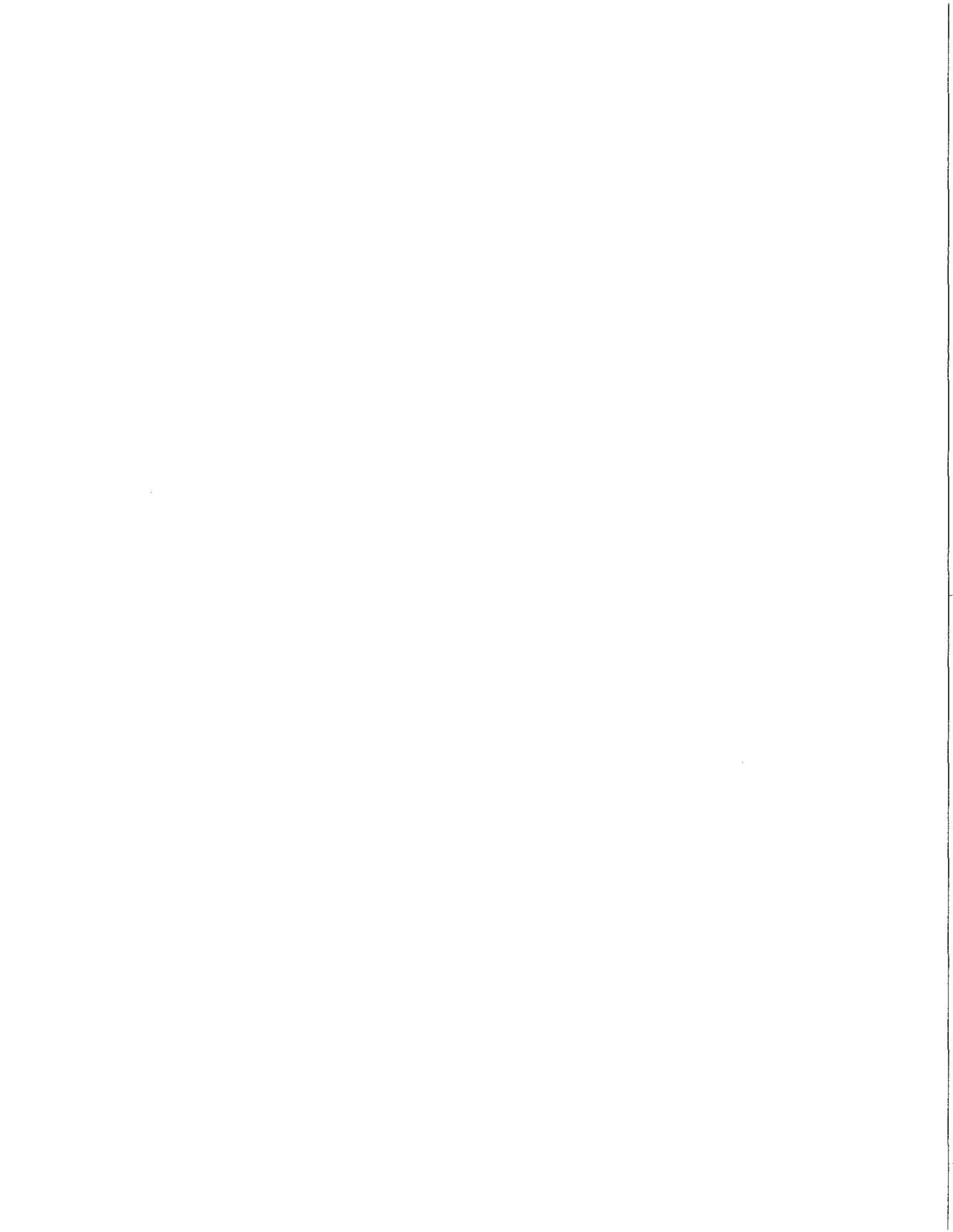
COMMENTS FILED BY  
THE MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION  
IN THE PETITION FOR DECLARATORY ORDER  
FILED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the Department of Environmental Protection's Petition to Intervene was served this day via first class mail or electronic mail after mutual agreement upon the parties of record on the attached list.

Dated: March 28, 2014

  
Laura Swain, Senior Counsel



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Union Pacific Railroad Company

Honorable Henry A. Waxman  
US House Of Representatives  
2125 Rayburn House Office Building  
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## VERIFIED STATEMENT OF BERNARD F. SULLIVAN

1. I am the Director of Public Health for the City of Gardner (the "City") Massachusetts. I have held this position since October 16, 2001.
2. It is my responsibility to investigate nuisances and other causes of sickness or conditions deleterious to the public health in Gardner Massachusetts.
3. As part of my responsibilities to investigate nuisances and other causes of sickness or conditions deleterious to the public health in Gardner Massachusetts I investigated a complaint received by the Gardner Police Department on October 5 2012 regarding excessive noise from an idling train near 115 Coburn Avenue in Gardner.
4. Upon arrival at 115 Coburn Avenue at 8:20 am on October 5, 2012 I found two locomotives idling unattended on the railroad right of way to the rear of the property. The locomotives were identified as Guilford Rail Systems engine 353 and Pan Am Railways 516. The sound level from the two locomotives was significantly above background sound levels at a distance of over one thousand feet from the edge of the railroad right of way. The sound levels from the locomotives made conversation impossible fifty feet from the edge of the railroad right of way.
5. A call was made to Pan Am Railways to report the idling train at 8:35 am. At 8:55 am the locomotives were still idling unattended. I requested Gardner Police personnel to monitor the site and report when the locomotives were moved or turned off. At 10:29 Gardner Police Department personnel reported the locomotives were still running.

6. At 11:35 am. Pan Am Railways reported that they have dispatched personnel to the scene to turn off the locomotives and they will report when they have done so.
7. At 12:38 pm Pan Am reported they have turned off the locomotives.

Verification:

I, Bernard F. Sullivan, certify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this affidavit.

Executed on March 28, 2014.

A handwritten signature in cursive script that reads "Bernard F. Sullivan".

Bernard F. Sullivan, Director of Public Health  
City of Gardner

## VERIFIED STATEMENT OF SAADI MOTAMEDI

1. I am the Compliance and Enforcement Section Chief in the Bureau of Waste Prevention at the Department of Environmental Protection's (the "Department") regional office in Springfield, Massachusetts. I have held this position since December 2000.
2. It is my responsibility to enforce the Massachusetts Air Quality regulations codified at 310 CMR 7.00. As part of these responsibilities, I oversee the receipt, management and response to complaints received from the public regarding noise, odor, nuisance conditions and conditions of air pollution as well as activities that are prohibited by the said regulations.
3. 310 CMR 7.11(2) states in part:
  - (2) Diesel Trains.
    - (a) No person owning or operating a diesel powered locomotive shall cause, suffer, allow, or permit said locomotive to be operated in a manner such as to cause or contribute to a condition of air pollution.
    - (b) No person shall cause, suffer, allow, or permit the unnecessary foreseeable idling of a diesel locomotive for a continuous period of time longer than 30 minutes. 310 CMR 7.00 shall not apply to diesel locomotives being serviced provided that idling is essential to the proper repair of said locomotive and that such idling does not cause or contribute to a condition of air pollution.
4. As per the Massachusetts General Laws (MGL) chapter 111 § 140A-O, the Department is authorized to implement regulation to prevent pollution or contamination of the atmosphere in order to protect human health and the environment.
5. The Department has received numerous complaints regarding unnecessary idling of locomotives from the public. These complaints allege locomotives parking near their residences, with the crew leaving behind the idling locomotive(s) for extended periods of time (up to 36 hours).
6. Some of the complaints that the Department has received are memorialized below:
  - a) Train engine idling just south of the bridge over Turners Falls Road for over three hours in Turners Falls on December 9, 2013.

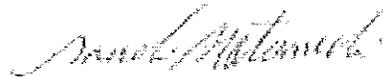
b) Resident complains of train idling near Rand Road in Buckland on October 13, 2013.

c) Fire Chief of Athol received complaints of trains idling in the downtown area during April and May 2013.

Verification:

I, Saadi Motamedi, certify under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this affidavit.

Executed on March 28, 2014.



---

Saadi Motamedi  
Compliance and Enforcement Section Chief  
Western Regional Office  
Department of Environmental Protection

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 10-11311
	)	
MASSACHUSETTS BAY	)	
TRANSPORTATION AUTHORITY	)	
	)	
and	)	
	)	
MASSACHUSETTS BAY	)	
COMMUTER RAILROAD	)	
COMPANY, LLC	)	
	)	
Defendants.	)	

CONSENT DECREE

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**WHEREAS**, Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed contemporaneously with the lodging of this Consent Decree a Complaint in this action ("Complaint") against Defendants, the Massachusetts Bay Transportation Authority ("MBTA") and the Massachusetts Bay Commuter Railroad Company, LLC ("MBCR"), alleging that the MBTA and MBCR (together, "Defendants") have committed numerous violations of the federally-enforceable Massachusetts locomotive idling regulation at commuter rail layover stations in Eastern Massachusetts;

**WHEREAS**, MBCR provides commuter rail operations and maintenance service on behalf of MBTA;

**WHEREAS**, the Plaintiff and Defendants (together, "the Parties"), without the necessity of trial regarding any issue of fact or law, and without any admission of liability by Defendants, consent to entry of this Consent Decree;

**WHEREAS**, the Parties agree, and the Court finds, that settlement of this action without adjudication or admission of facts or law is in the public interest and that entry of this Consent Decree without further litigation is an appropriate resolution of the claims alleged in the Complaint;

**THEREFORE**, it is adjudged, ordered and decreed as follows:

**I. JURISDICTION AND VENUE**

1. The Court has jurisdiction over the subject matter of this action and over the Parties to this Consent Decree pursuant to Section 113(b) of the Clean Air Act ("CAA"), 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1331, 1345 and 1355.

2. Venue properly lies in this district pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b), and 28 U.S.C. § 1395(a), because Defendants are located in the district, and because the violations alleged in the Complaint occurred there. For purposes of this Decree, or any action to enforce this Decree, Defendants consent to the Court's jurisdiction over this Decree and over Defendants and consent to venue in this judicial district.

3. For purposes of this Consent Decree, Defendants agree that the Complaint states claims upon which relief can be granted against Defendants pursuant to Section 113 of the CAA, 42 U.S.C. § 7413.

4. The United States has notified the Commonwealth of Massachusetts of the commencement of this action pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b).

## II. APPLICABILITY

5. The provisions of this Consent Decree shall apply to and be binding upon the United States on behalf of the EPA, and upon the Defendants and any successors, assigns, or other entities or persons otherwise bound by law.

6. No transfer of ownership by MBTA of its layover facilities and/or diesel locomotives, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve MBTA of its obligations to ensure that the terms of this Decree are implemented, or relieve MBCR of its obligations to ensure that the terms of this Decree are implemented to the extent that MBCR is continuing to provide commuter rail operations and maintenance to MBTA or its successors, assigns, or other entities or persons otherwise bound by law. If, at any time before termination of this Decree, MBTA seeks to transfer its layover facilities and/or diesel locomotives or if MBTA seeks to retain a party besides MBCR to contract to provide commuter

rail operations and maintenance service on behalf of MBTA, MBTA shall, at least thirty (30) days prior to such transfer or entrance into the contract, inform such party/parties of the ongoing requirements of this Decree by providing them a copy of this Consent Decree and MBTA shall simultaneously provide written notice of the prospective contractual relationship to the United States in accordance with Section XIII below. Any attempt by MBTA to transfer ownership of its layover facilities or diesel locomotives, or replace MBCR with another party to provide commuter rail operations and maintenance to MBTA, without complying with this Paragraph constitutes a violation of this Decree.

7. Defendants shall provide a true copy of this Consent Decree to all officers, managers, supervisors, and agents whose duties might reasonably include compliance with any provision of this Decree. Defendants shall also provide a copy of the Decree to any contractor retained to perform work required under this Consent Decree, and shall condition any such contract upon performance of the work in conformity with the terms of the Decree.

8. In any action to enforce this Consent Decree, Defendants shall not raise as a defense the failure by any of their officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

### **III. DEFINITIONS**

9. Terms used in this Consent Decree that are defined in the CAA or in regulations promulgated pursuant to the CAA shall have the meanings assigned to them in the CAA or such regulations, unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

- (a) "Consent Decree" or "Decree" shall mean this document and all attachments and appendices hereto;
- (b) "Day" shall mean a calendar day, unless otherwise specified;
- (c) "Defendants" shall mean the Massachusetts Bay Transportation Authority ("MBTA") and the Massachusetts Bay Commuter Railroad Company, LLC ("MBCR");
- (d) "Layover facility" shall mean any facility or location owned, leased or used by permission by Defendants where any of Defendants' diesel locomotives routinely lay over, currently or in the future, at any time of day or night during weekdays and weekends;
- (e) "Lay over" shall mean any time when Defendants' diesel locomotives and/or passenger cars are stationary and are i) not carrying passengers, or ii) unavailable to carry passengers;
- (f) "Massachusetts locomotive idling regulation" shall mean the federally-approved Massachusetts diesel locomotive regulation, set forth at 310 Code of Massachusetts Regulations ("CMR") 7.11(2);
- (g) "Parties" shall mean the United States on behalf of EPA, and the MBTA and MBCR;
- (h) "Paragraph," when followed by an Arabic numeral, shall mean the corresponding paragraph of this Consent Decree;
- (i) "Section," when followed by a Roman numeral, shall mean the corresponding section of this Consent Decree;
- (j) "EPA" shall mean the United States Environmental Protection Agency and any of its successor departments or agencies; and
- (k) "United States" shall mean the United States of America, acting on behalf of EPA.

#### IV. CIVIL PENALTY

10. Defendants shall pay a civil penalty of \$225,000, plus applicable interest, by no later than thirty (30) days after the date of entry of this Consent Decree ("Entry Date").

11. Defendants shall make the above-described civil penalty payments by FedWire Electronic Funds Transfer ("EFT") in accordance with written instructions to be provided to Defendants by the U.S. Department of Justice or the U.S. Attorneys Office for the District of Massachusetts. At the time of each payment, Defendants shall provide written notice of the payment via facsimile and mail to the United States in accordance with Section XIII below. The notice shall contain a copy of the EFT transaction record, together with a transmittal letter that shall state that the payment is for the case's civil penalty, reference the case's civil docket number and Department of Justice case number DJ# 90-5-2-1-09617, and explain the calculation of any interest included in the payment. Defendants shall also provide this same written notice by e-mail to [acctsreceivable.CINWD@epa.gov](mailto:acctsreceivable.CINWD@epa.gov), and by mail to the U.S. Environmental Protection Agency, Fine and Penalties, Cincinnati Finance Center, P.O. Box 979077, St. Louis, MO, 63197-9000.

12. If Defendants fail to make their penalty payment in full by its due date, Defendants shall pay 6% interest on the late amount, together with any nonpayment penalties and any governmental enforcement expenses incurred to collect the late payment in accordance with Section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5). Defendants shall also be liable for stipulated penalties in accordance with Section IX below.

13. Defendants certify that they shall not use any payments made pursuant to this Section, and any payments made pursuant to Section IX, in any way as, or in furtherance of, a tax deduction for Defendants, or any of their corporate affiliates, under federal, state or local law. Defendants specifically waive any confidentiality rights they have with respect to their

federal tax returns and return information under 26 U.S.C. § 6103, and on any state or local tax returns, as to the United States for the purpose of ensuring the accuracy of this certification.

**V. LOCOMOTIVE IDLING COMPLIANCE MEASURES**

**A. General Locomotive Idling Compliance**

14. Defendants shall at all times comply with the Massachusetts locomotive idling regulation, set forth at 310 CMR 7.11(2).

**B. System-Wide Electric Plug-In Stations**

15. Defendants shall install, operate, and maintain electric power plug-in stations ("plug-ins") at all of Defendants' layover facilities in Defendants' commuter rail system such that, at all times, there are sufficient plug-ins to fully supply electric auxiliary power to all diesel locomotives that lay over at Defendants' layover facilities. For purposes of this Consent Decree, an electric power plug-in station shall be deemed to fully supply electric auxiliary power to a diesel locomotive train when either (a) the plug-in supplies sufficient electricity to fully operate all electrically powered systems on the train's locomotive, and all the train's passenger cars, at the same time, or (b) the plug-in supplies sufficient electricity to fully operate all electrically operated systems on the train's locomotive, and on one or more of the train's passenger cars, at the same time, such that Defendants, using established protocols, are able to perform all train maintenance, service, or other lay over operations requiring only the use of electric power, without running the locomotive's diesel engines.

16. Defendants' layover facilities, and each facility's electric plug-in stations, are listed in Appendix II to this Consent Decree. By signing this Consent Decree, Defendants certify in accordance with Paragraph 39, that Appendix II lists all of Defendants' current layover

facilities, and accurately lists both the number of locomotives that routinely lay over at each facility and the number of available, fully operational electric plug-in stations at each facility. In addition, Defendants certify that currently there are sufficient plug-ins to fully supply electric auxiliary power to all diesel locomotives that lay over at all of Defendants' layover facilities except at the following facilities and locations:

(a) The Commuter Rail Maintenance Facility (a/k/a the Boston Engine Terminal), located in Somerville, Massachusetts, at the facility's West End Diesel House;

(b) The Widett Circle Commuter Rail Service and Inspection Facility ("Widett Circle facility"), located in South Boston, on tracks immediately adjacent to the facility's maintenance/storage building; and

(c) The South Hampton Main Yard (a/k/a the Big Yard), a property adjacent to the Widett Circle facility in South Boston.

17. Defendants shall install and commence full operation of two electric plug-in stations at the West End Diesel House at the Commuter Rail Maintenance Facility in Somerville by no later than September 30, 2010. The two new plug-in stations combined shall be capable of providing electric power to a total of eight locomotives on four tracks. On and after September 30, 2010, Defendants shall have sufficient electric plug-ins to fully supply electric auxiliary power to all diesel locomotives that lay over at the West End Diesel House.

18. Defendants shall install and commence full operation of one electrical plug-in station for outdoor tracks, known as Track 4 and the Runner Track, located immediately adjacent to the Widett Circle facility's maintenance/storage building in South Boston by no later than September 30, 2010. The new plug-in station shall be capable of providing electric power to two

locomotives. On and after September 30, 2010, Defendants shall have sufficient electric plug-ins to fully supply electric auxiliary power to all diesel locomotives that lay over on all outdoor tracks immediately adjacent to the Widett Circle facility's maintenance/storage building.

19. Defendants shall use their best efforts to work with Amtrak regarding the modification of four existing electric plug-in stations on various outdoor tracks located at the South Hampton Main Yard, a/k/a the Big Yard, which is adjacent to the Widett Circle facility. The Big Yard is owned by Amtrak but has been used by Defendants for diesel locomotive layovers. The four modified plug-stations combined will be capable of providing electric power to a total of eight locomotives on four tracks. Amtrak's modification of the plug-in stations at the Big Yard is currently scheduled to be completed in 2012. When these plug-in modifications are completed, Defendants shall have sufficient electric plug-ins to fully supply electric auxiliary power to all Defendants' diesel locomotives that lay over at the Big Yard. Until the modifications are completed, Defendants shall lay over no more than the number of diesel locomotives at the Big Yard for which there are electric plug-in stations that are operational and in use to fully supply the locomotives with electric auxiliary power.

**C. Use of All Available Electric Plug-In Stations**

20. Defendants shall use all available plug-ins located at Defendants' layover facilities, and at any other commuter rail stations, facilities or property owned or operated by Defendants, as necessary to fully comply with the Massachusetts locomotive idling regulation. For the purposes of this Paragraph, "available plug-ins" shall mean all operational electric plug-ins that can supply diesel locomotives with electric auxiliary power at any of the above-described locations.

**D. Temporary Electric Plug-In Stations at Widett Circle**

21. In addition to the Widett Circle layover locations discussed in Section V.B above, Defendants routinely lay over diesel locomotives adjacent to the Widett Circle facility on Amtrak-owned property identified as the South Hampton Front Yard, a/k/a/ the Front Yard.

22. On or before December 15, 2009, Defendants procured, installed and began full operation of a portable generator to supply electric auxiliary power for three temporary electric plug-in stations at the Front Yard. By signing this Consent Decree, Defendants certify in accordance with Paragraph 39 that these temporary electric plug-in stations, together with the electric plug-in stations already available and in use at and adjacent to the Widett Circle facility, will ensure that there are sufficient electric plug-in stations to fully supply electric auxiliary power to all diesel locomotives that lay over at and adjacent to the Widett Circle facility at all times. If Defendants cease to operate the portable generator and temporary plug-in stations for the Front Yard, Defendants shall also cease laying over diesel locomotives at the Front Yard unless Defendants have otherwise ensured that there are sufficient electric plug-in stations to fully supply electric auxiliary power to any diesel locomotives that lay over at the Front Yard.

**VI. HEAD END POWER UNIT REPLACEMENTS**

23. Defendants shall replace the Cummins KTA19 head-end power ("HEP") units with new HEP units on no less than 14 locomotives in the MBTA commuter rail fleet. The new HEP replacement units shall comply with Tier 2 emission standards for diesel engines under EPA's Locomotive Emissions Control Rules promulgated in 1997 and 2008.

24. The HEP replacements required by this Section shall be in addition to any HEP replacements funded or purchased by Defendants prior to the Year 2010.

25. Defendants shall purchase, install and commence full operation of the HEP replacement units on the schedule set out below. Defendants shall keep to this purchase and installation schedule regardless of the final cost to Defendants of the HEP replacement units and their installation.

26. Defendants shall procure, install and commence full operation of the at least 14 new HEP units on the following schedule: by no later than September 1, 2010, Defendants shall issue requests for proposals to procure the new HEP units; by no later than September 1, 2011, Defendants shall purchase and take delivery of the new HEP units; and by no later than December 31, 2012, Defendants shall install and commence full operation of the at least 14 new HEP units on Defendants' commuter rail locomotives.

27. Defendants shall supply HEP replacement progress reports to EPA as required by Section VIII below. Each report shall contain:

(a) a narrative description of the activities undertaken to implement the HEP replacements during the relevant reporting period, with specific reference to any implementation deadlines occurring in the reporting period;

(b) an explanation of any difficulties or delays regarding the HEP replacements; and

(c) a summary, with copies of supporting documentation, of the costs expended on the HEP replacements during the reporting period.

#### **VII. SUPPLEMENTAL ENVIRONMENTAL PROJECT**

28. Defendants shall perform and satisfactorily complete a supplemental environmental project ("SEP"), the Commuter Rail Clean Diesel SEP, as set out in this Consent Decree and Appendix I.

29. Defendants are responsible for the performance and satisfactory completion of the SEP in accordance with the requirements of this Consent Decree and Appendix I. Defendants may employ or work with contractors, consultants or other entities to plan and implement the SEP.

30. Defendants certify in accordance with Paragraph 39 to each of the following:

(a) that all cost information provided to EPA in connection with EPA's approval of the SEP is complete and accurate and that Defendants in good faith estimate that the price differential of fuel to implement the SEP is \$ 1,000,000;

(b) that, as of the date of executing this Consent Decree, Defendants are not required to perform or develop the SEP by any federal, state, or local law or regulation, and are not required to perform or develop the SEP by agreement, grant, or as injunctive relief awarded in any other action in any forum;

(c) that the SEP is not a project that Defendants were planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Consent Decree;

(d) that Defendants have not received and will not receive credit for the SEP in any other enforcement action; and

(e) that Defendants will not receive any reimbursement for any portion of the SEP from any other person.

31. Defendants shall supply SEP progress reports to EPA as required by Section VIII below. Each report shall contain:

(a) a summary of the current status of the SEP;

(b) a description of the activities undertaken to implement the SEP during the relevant reporting period, with specific reference to any implementation deadlines occurring in the reporting period;

(c) an explanation of any difficulties or delays in the implementation of the SEP;  
and

(d) a summary, with copies of supporting documentation, of the costs expended on the SEP during the reporting period.

32. Within thirty (30) days after the completion of the SEP, Defendants shall submit a SEP Completion Report to EPA. The SEP Completion Report shall contain the following information:

(a) a description of the SEP as implemented;

(b) a summary of all costs expended on the SEP;

(c) a certification of completion stating that the SEP has been performed and satisfactorily completed pursuant to the provisions of this Consent Decree; and

(d) a description of the environmental and public health benefits resulting from implementation of the SEP, including a quantification of the SEP's air pollutant reductions.

33. Following receipt of the SEP Completion Report, EPA will do one of the following:

(a) provide written notice that it accepts the SEP Completion Report;

(b) reject the SEP Completion Report and provide written notice to Defendants of any deficiencies, and grant Defendants an additional thirty (30) days, or such other time as EPA may in its sole and unreviewable discretion conclude is reasonable, in which to correct the deficiencies; or

(c) reject the SEP Completion Report and provide written notice to Defendants of their failure to satisfactorily complete the SEP in accordance with the requirements of this Decree.

Defendants may invoke the procedures set forth in Section XI below to dispute EPA's determination the SEP was not satisfactorily completed in accordance with the requirements of this Decree.

34. For federal income tax purposes, Defendants agree that they will neither capitalize into inventory or basis nor deduct any costs or expenditures incurred in performing the SEP.

35. Any public statement, oral or written, in print, film, or other media, made by Defendants making reference to the Commuter Rail Clean Diesel SEP shall include the following language: "This project was undertaken as part of the settlement of a federal enforcement action taken against the MBTA and MBCR by the U.S. Environmental Protection Agency for alleged violations of the Clean Air Act."

36. Until the termination of this Consent Decree, Defendants shall retain legible copies of all records, data or other information used to prepare any reports submitted to EPA regarding the SEP, and Defendants shall provide any such records, data or information to EPA within ten (10) days of EPA's request for the information.

### **VIII. REPORTING REQUIREMENTS**

#### **A. General Reporting Provisions**

37. The reporting requirements of this Consent Decree do not relieve Defendants of any reporting obligations required by any federal, state, or local law, regulation, permit, or other requirement.

38. Any information provided by Defendants pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

39. All reports and other written information required by this Consent Decree to be sent by Defendants to the United States shall contain the following certification:

I certify under penalty of law that I have examined and am familiar with the information submitted in this document and all attachments to it, and that this document and its attachments were prepared either by me personally or under my direction or supervision in a manner designed to ensure that qualified and knowledgeable personnel properly gathered and presented the information contained therein. I further certify, based on personal knowledge or on my inquiry of those individuals immediately responsible for obtaining the information, that the information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing and willful submission of a materially false statement.

40. Defendants shall ensure that such certified statement is signed by a responsible corporate officer, such as a president, vice-president, secretary, treasurer, senior manager responsible for environmental policy-making and decision making, or other person responsible for a principal business function.

#### **B. Idling Compliance Reports**

41. Each calendar quarter, up to and including the quarter ending on June 30, 2012, Defendants shall provide to EPA a progress report regarding Defendants' compliance with the Massachusetts locomotive idling regulation. The reports shall be due within (ten) 10 days after the end of each calendar quarter, that is, by January 10th, April 10th, July 10th and October 10th. Defendants shall provide their first compliance report for the calendar quarter ending in September 2010, unless Defendants and EPA agree in writing to alter this date. Beginning in July 2012, Defendants shall provide the above-described reports semi-annually, with reports due by January 10<sup>th</sup> and July 10<sup>th</sup>.

42. Each report shall state whether Defendants were in compliance with the Massachusetts locomotive idling regulation during the relevant reporting period, and shall identify all instances where any of Defendants' diesel locomotives idled unnecessarily for a

continuous period of time longer than 30 minutes. Defendants shall include all instances in which a diesel locomotive idled in violation of any current policies, guidance or directives established by Defendants regarding locomotive idling, e.g., policies regarding idling in cold weather. For each such instance, the report shall identify the idling locomotive; the layover facility where the idling occurred; the date, time and entire duration of the idling; and the steps taken by Defendants to address and minimize the idling and ensure that it will not reoccur.

43. To prepare these reports, Defendants shall use all available written or electronic records, correspondence and data generated by Defendants containing information regarding locomotive layovers and idling, including but not limited to Defendants' daily layover logs.

#### **C. HEP and SEP Progress Reports**

44. Each calendar quarter, up to and including the quarter ending on December 31, 2012, Defendants shall provide to EPA Region 1 a progress report regarding the performance of the HEP replacements required by Section VI, and the Commuter Rail Clean Diesel Project required by Section VII and Appendix I. The reports, which may be combined, shall contain all information and documentation required by Sections VI and VII, and Appendix I. The reports shall be due on the same schedule as for the above-described idling compliance reports. Should Defendants be required to provide any progress reports after January 2013, the reports shall be provided semi-annually by July 10<sup>th</sup> and January 10<sup>th</sup>. Defendants shall continue to provide the progress reports until discontinued as specified in this Consent Decree.

#### **IX. STIPULATED PENALTIES**

45. Except as otherwise provided in this Consent Decree, Defendants shall be liable for stipulated penalties as set forth below in this Section.

46. **Late Payment of Civil Penalty:** If Defendants fail to timely pay any amount of the civil penalty set out in Section IV, Defendants shall be liable for the unpaid amount and for any interest or other charges as provided in Section IV, and for stipulated penalties as follows:

<u>Days of Failure to Pay</u>	<u>Penalty Per Day</u>
1 to 30 days	\$ 1,000
31 days and beyond	\$ 2,000

47. **Failure to Comply with Massachusetts Locomotive Idling Regulation:** If Defendants violate the Massachusetts locomotive idling regulation, Defendants shall be liable for stipulated penalties for each locomotive, for each violation, as follows:

<u>Duration of Excess Idling</u>	<u>Penalty Per Vehicle Per Occurrence</u>
1 to 30 minutes	\$ 500
30 to 60 minutes	\$ 1,500
60 to 120 minutes	\$ 2,500
120 minutes and beyond	\$ 5,000

48. **Failure to Perform Other Compliance Measures:** If Defendants fail to fully perform or fully comply with any of the requirements set out in Section V.B, V.C and V.D above, Defendants shall be liable for stipulated penalties for each violation of each such requirement, as follows:

<u>Days of Failure to Perform</u>	<u>Penalty Per Day</u>
1 to 30 days	\$ 1,000
31 to 60 days	\$ 2,500
61 days and beyond	\$ 5,000

49. **Failure to Perform HEP Unit Replacements:** If Defendants fail to fully perform or fully comply with any of the requirements set out in Section VI, Defendants shall be liable for stipulated penalties for each violation of each such requirement, as follows:

<u>Days of Failure to Perform</u>	<u>Penalty Per Day</u>
1 to 30 days	\$ 500
31 to 60 days	\$ 1,000
61 to 120 days	\$ 2,500
121 days and beyond	\$ 5,000

50. Failure to Perform Commuter Rail Clean Diesel SEP: If Defendants fail to fully perform or fully comply with any of the requirements set out in Section VII or Appendix I, Defendants shall be liable for stipulated penalties for each violation of each such requirement, as follows:

<u>Days of Failure to Perform</u>	<u>Penalty Per Day</u>
1 to 30 days	\$ 500
31 to 60 days	\$ 1,000
61 to 120 days	\$ 2,500
121 days and beyond	\$ 5,000

51. Failure to Provide Reports: If Defendants fail to timely provide any information required pursuant to Section VIII, Defendants shall be liable for stipulated penalties as follows:

<u>Days of Failure to Perform</u>	<u>Penalty Per Day</u>
1 to 60 days	\$ 500
61 to 120 days	\$ 1,000
121 days and beyond	\$ 2,500

52. Stipulated penalties arising under this Section shall begin to accrue on the day that the violation of this Consent Decree first occurs, and shall continue to accrue for each day until the day upon which the violation is fully corrected. Separate stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree. Stipulated penalties shall accrue regardless of whether the United States has notified Defendants that a violation of this Consent Decree has occurred.

53. Stipulated penalties shall become due and owing, and shall be paid by Defendants, not later than thirty (30) days after the United States issues Defendants a written demand for them. If any demanded stipulated penalties are not paid in full when due, Defendants shall pay the unpaid penalties and interest thereon. Such interest shall accrue from the date the penalties were due, and shall be calculated in accordance with 28 U.S.C. § 1961.

54. The United States, in an unreviewable exercise of its discretion, may reduce or waive stipulated penalties otherwise due it under this Consent Decree.

55. Defendants shall pay stipulated penalties owing to the United States in the manner set forth and with the written notices required by Paragraph 11, except that the transmittal letter shall state that the payment is for stipulated penalties and shall specify the violation(s) for which the penalties are being paid.

56. Stipulated penalties shall continue to accrue as provided in Paragraph 52 above during any dispute resolution for stipulated penalties, with interest on accrued penalties payable and calculated in accordance with 28 U.S.C. § 1961, but need not be paid until the following:

(a) If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendants shall pay accrued penalties determined to be owing, together with interest, to the United States within thirty (30) days of the effective date of the agreement or the receipt of EPA's decision;

(b) If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendants shall pay all accrued penalties determined by the Court to be owing, together with interest, within sixty (60) days of receiving the Court's decision or order, except as provided in Subparagraph (c), below;

(c) If any Party appeals the Court's decision, Defendants shall pay all accrued penalties determined to be owing, together with interest, within fifteen (15) days of receiving the final appellate court decision.

57. The stipulated penalty provisions of this Section shall be in addition to all other rights reserved by the United States pursuant to Section XII below. Nothing in this Section shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek other remedies or sanctions available by virtue of any violation by Defendants of this Consent Decree or of the statutes, regulations or permits referenced within it.

**X. FORCE MAJEURE**

58. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes entirely beyond the control of Defendants, or any entity controlled by Defendants, or of Defendants' contractors, that delays or prevents the full performance of or full compliance with any obligation of this Consent Decree subject to stipulated penalties despite Defendants' best efforts to perform the obligation. "Best efforts" include using best efforts to anticipate any potential force majeure event and to address the effects of any such event (a) as it is occurring; and (b) after it has occurred, such that the nonperformance is minimized to the greatest extent possible. Force majeure does not include Defendants' financial inability to perform the obligations of this Consent Decree. Stipulated penalties shall not be due for the number of days of nonperformance caused by a force majeure event as defined in this Paragraph, provided that Defendants comply with the terms of this Section.

59. If any event occurs which causes or may cause nonperformance of or noncompliance with any obligation of this Consent Decree subject to stipulated penalties, whether or not caused by a force majeure event, Defendants shall provide written notice to EPA as soon as possible, but not later than seven (7) days after the time Defendants first knew of the event, or by the exercise of due diligence should have known of the event. The notice shall

describe the noncompliance or expected nonperformance, including its causes and expected duration; describe the measures taken and to be taken by Defendants to prevent or minimize the nonperformance or expected nonperformance; provide a schedule for carrying out those actions; and state Defendants' rationale for attributing any nonperformance or expected nonperformance to a force majeure event. Failure to provide timely and complete notice in accordance with this Paragraph shall preclude Defendants from asserting any claim of force majeure with respect to the event in question.

60. If EPA agrees that nonperformance or noncompliance with or potential nonperformance of or potential noncompliance with an obligation of this Consent Decree is attributable to force majeure, EPA will notify Defendants of its agreement and the length of the extension granted to perform the obligation. Stipulated penalties shall not accrue with respect to such obligation during the extension provided by EPA for performance. An extension of time to perform the obligation affected by a force majeure event shall not, by itself, extend the time to fully perform or fully comply with any other obligation under this Consent Decree.

61. If EPA does not agree that a force majeure event has occurred or does not agree to the extension of time sought by Defendants, EPA will notify Defendants in writing of EPA's position, which shall be binding unless Defendants invoke dispute resolution under Section XI below no later than fifteen (15) days after receipt of EPA's written notice. In any such dispute, Defendants shall bear the burden of proving, by a preponderance of the evidence, that each claimed force majeure event is a force majeure event as defined by this Section; that Defendants provided the written notice required by Paragraph 59; that the force majeure event caused any

nonperformance or noncompliance Defendants claim was attributable to that event; and that Defendants exercised their best efforts to prevent or minimize any nonperformance or noncompliance caused by the event.

#### **XI. DISPUTE RESOLUTION**

62. Unless otherwise provided in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the United States to enforce obligations of Defendants that have not been disputed in accordance with this Section.

63. Informal Dispute Resolution: Any dispute subject to dispute resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendants provide written notice to EPA describing the nature of the dispute and requesting informal negotiations to resolve it. The period of informal negotiations shall not exceed twenty (20) days beyond the date that EPA receives Defendants' written notice unless EPA and Defendants agree in writing to a longer period. If the parties cannot resolve a dispute by informal negotiations, then the position advanced by EPA shall be considered binding unless, within fifteen (15) days after the conclusion of the informal negotiation period, Defendants invoke formal dispute resolution procedures as set forth below.

64. Formal Dispute Resolution: Defendants shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by providing written notice to the United States containing a statement of position regarding the matter in dispute.

The statement of position shall include, but may not be limited to, any factual data, analysis, or opinion supporting Defendants' position and any supporting documentation relied upon by Defendants.

65. The United States shall provide written notice containing its own statement of position to Defendants within forty-five (45) days of receipt of Defendants' statement of position. The United States' statement of position shall include, but may not be limited to, any factual data, analysis, or opinion supporting that position and all supporting documents relied upon by the United States. The United States' statement of position shall be binding on Defendants, unless Defendants file a motion for judicial review of the dispute in accordance with the following Paragraph.

66. Defendants may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIII, a motion requesting judicial resolution of the dispute. The motion must be filed within ten (10) days of receipt of the United States' statement of position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendants' position on the matter in dispute, including any supporting factual data, analysis, opinion or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree. Defendants' motion to the Court shall not raise new issues or submit new facts that were not previously presented to the United States during formal dispute resolution.

67. The United States shall respond to Defendants' motion within the time period provided in the local rules of the Court, unless the parties stipulate otherwise. Defendants may file a reply memorandum to the extent permitted by the local rules or the parties' stipulation, as applicable.

68. In any judicial proceeding pursuant to this Section's formal dispute resolution procedures, Defendants shall bear the burden of demonstrating that their position clearly complies with, and furthers the objectives of, this Consent Decree and the CAA, and that Defendants are entitled to relief under applicable law. The United States reserves the right to argue that its position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious or otherwise not in accordance with law.

69. The invocation of dispute resolution procedures under this Section shall not extend, postpone, or affect any obligation of Defendants under this Consent Decree not directly in dispute, unless the final resolution of the dispute so dictates. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first day of nonperformance, but payment shall be stayed pending resolution of the dispute as provided in this Section. If Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section IX above.

70. The assessment of stipulated penalties pursuant to Paragraph 46 regarding Defendants' failure to timely pay their civil penalty shall not be subject to dispute resolution under this Section. For such assessments, the United States' determination regarding the lateness of the civil penalty and any stipulated penalties assessed as a result shall be unreviewable and final.

**XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

71. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging of this Consent Decree. This Consent Decree does not limit any rights or remedies available to the United States for any criminal violations.

72. Except as expressly provided in this Section, this Consent Decree shall not be construed to prevent or limit the rights of the United States to obtain penalties or injunctive relief under the CAA, any regulations or permits issued pursuant to the CAA, or any other federal or state laws, regulations, or permits.

73. This Consent Decree is not a permit, or a modification of any permit, under any federal, state, or local laws or regulations, and in no way relieves Defendants of their responsibility to comply with all applicable federal, state, and local permits, laws and regulations. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendants' compliance with any aspect of this Consent Decree will result in compliance with the provisions of the CAA, or with any regulations or permits issued thereunder.

74. This Consent Decree does not limit or affect the rights of Defendants or of the United States against any third parties not party to this Consent Decree, nor does it limit the rights of third parties not party to this Consent Decree against Defendants, except as otherwise provided by law.

75. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

76. Except as expressly provided in this Consent Decree, the United States reserves all legal and equitable remedies available to enforce the provisions of the Decree. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health, welfare or the environment arising at or posed by any of Defendants' facilities, whether related to the violations addressed in this Consent Decree or otherwise.

### **XIII. NOTICES**

77. Unless otherwise specified herein, whenever written notifications, information or reports are required by this Consent Decree, they shall be sent to the individuals and addresses specified below:

As to the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Attn: Brad L. Levine  
bradley.levine@usdoj.gov

Steven J. Viggiani  
Senior Enforcement Counsel  
U.S. Environmental Protection Agency, Region 1  
Mail code OES04-3  
5 Post Office Square, Suite 100  
Boston, Massachusetts 02109-3912  
viggiani.steven@epa.gov

As to Defendants:

Janis O. Kearney  
Director of Environmental Compliance  
Massachusetts Bay Transit Authority  
Ten Park Plaza  
Boston, Massachusetts 02116-3974  
JKearney@MBTA.com

Marie Breen  
General Counsel  
Massachusetts Bay Commuter Railroad Company  
89 South Street, 8th Floor  
Boston, Massachusetts 02111  
marie.breen@mbr.net

78. Any party may, by written notice to the other parties, change its designated notice recipient or notice address provided above.

#### **XIV. COSTS**

79. Each party shall bear its own costs, disbursements and attorneys' fees in this action, and specifically waives any right to recover such costs, disbursements or attorneys' fees from the other parties pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, or other applicable law. However, the United States shall be entitled to collect its costs, disbursements and attorneys' fees incurred in any action necessary to collect any outstanding penalties due under this Consent Decree or to otherwise enforce the Decree.

#### **XV. MODIFICATION**

80. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by the Parties. Where the modification constitutes a material change to any term of this Consent Decree, it shall be effective only upon approval by the Court.

81. Any disputes concerning modification of this Decree shall be resolved pursuant to Section XI, provided, however, that instead of the burden of proof provided by Paragraph 68, the

party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

**XVI. INTEGRATION**

82. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

**XVII. SIGNATORIES/SERVICE**

83. Each party certifies that at least one of their undersigned representatives is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

84. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis.

85. Defendants agree to accept service of process by mail with respect to all matters arising under this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable local rules of this Court including, but not limited to, service of a summons. Defendants agree that the following agents are authorized to accept the above-described service of process on Defendants' behalf:

Janis O. Kearney  
Director of Environmental Compliance  
Massachusetts Bay Transit Authority  
Ten Park Plaza  
Boston, Massachusetts 02116-3974

Marie Breen  
General Counsel  
Massachusetts Bay Commuter Railroad Company  
89 South Street, 8th Floor  
Boston, Massachusetts 02111

Defendants shall notify the United States as specified in Section XIII above of any change in the identity or address of Defendants, their agents for service, or their counsel.

#### **XVIII. PUBLIC PARTICIPATION**

86. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if, upon consideration of any comments received regarding the Consent Decree, the United States concludes that the Consent Decree is inappropriate, improper, or inadequate. Defendants consent to entry of the Consent Decree without further notice or proceedings. Defendants agree not to withdraw from or oppose the entry of the Decree or to challenge any of the Decree's provisions, unless the United States has notified Defendants in writing that it no longer supports entry of the Decree.

87. If, for any reason, this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party, and the terms of the agreement may not be used as evidence in any litigation between the parties.

**XIX. EFFECTIVE AND TERMINATION DATES**

88. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

89. Defendants may provide the United States with a written request for termination of this Consent Decree after Defendants have (a) completed the requirements of Sections V.B, V.C, V.D, VI and VII, and Appendix I, of this Consent Decree, (b) maintained compliance with Section V.A of this Consent Decree for a period of two (2) years after the Decree's Effective Date, and (c) paid the civil penalty and any stipulated penalties required by this Consent Decree. The request for termination shall state that Defendants have satisfied the above requirements, and shall include any necessary supporting documentation.

90. Following receipt by the United States of Defendants' request for termination, the Parties shall confer informally concerning the request and any disagreement that the Parties may have as to whether Defendants have satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Consent Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Consent Decree.

91. If the United States does not agree that the Consent Decree may be terminated, Defendants may invoke dispute resolution under Section XI above. However, Defendants shall not seek such dispute resolution until sixty (60) days after service of their request for termination.

**XX. RETENTION OF JURISDICTION**

92. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, or effectuating or enforcing compliance with the terms of this Decree.

**XXI. FINAL JUDGMENT**

93. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendants.

Judgment is hereby entered in accordance with the foregoing Consent Decree this 6<sup>th</sup>  
day of October 2010.

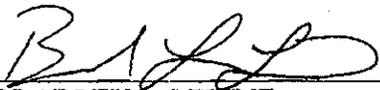
  
UNITED STATES DISTRICT JUDGE

UNITED STATES V. MBTA and MBCR CONSENT DECREE

For Plaintiff, UNITED STATES OF AMERICA:

  
IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

7/27/10  
Date

  
BRADLEY L. LEVINE  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

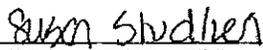
7/27/10  
Date

CARMEN M. ORTIZ  
United States Attorney  
District of Massachusetts

GEORGE B. HENDERSON, II  
Assistant U.S. Attorney  
John J. Moakley U.S. Courthouse  
1 Courthouse Way, Suite 9200  
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UNITED STATES V. MBTA AND MBCR CONSENT DECREE

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

  
\_\_\_\_\_  
SUSAN STUOLIEN  
Director  
Office of Environmental Stewardship  
U.S. Environmental Protection Agency,  
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5 Post Office Square, Suite 100  
Boston, Massachusetts 02109-3912

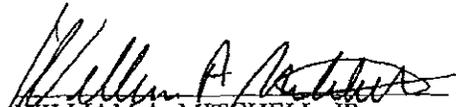
09/21/10  
Date

  
\_\_\_\_\_  
STEVEN J. VIGGIANI  
Senior Enforcement Counsel  
Office of Environmental Stewardship  
U.S. Environmental Protection Agency,  
Region I  
Mail Code OES04-3  
5 Post Office Square, Suite 100  
Boston, Massachusetts 02109-3912

7/20/10  
Date

UNITED STATES V. MBTA AND MBCR CONSENT DECREE

FOR Defendant, MASSACHUSETTS BAY TRANSIT AUTHORITY

  
WILLIAM A. MITCHELL, JR.  
General Counsel  
Massachusetts Bay Transit Authority  
Ten Park Plaza  
Boston, Massachusetts 02116-3974

6-16-10  
Date

UNITED STATES V. MBTA AND MBCR CONSENT DECREE

FOR Defendant, MASSACHUSETTS BAY COMMUTER RAILROAD COMPANY

Donald L. Saunders

DONALD L. SAUNDERS

Acting General Manager

Massachusetts Bay Commuter Railroad Company

89 South Street, 8th Floor

Boston, Massachusetts 02111

7-2-2010

Date

**APPENDIX I – COMMUTER RAIL CLEAN DIESEL PROJECT**

1. The Commuter Rail Clean Diesel Project, a supplemental environmental project (“SEP”), will reduce harmful air pollutants in the greater Boston metropolitan area from diesel locomotive exhaust by supplying all commuter rail locomotives in Defendants’ commuter train fleet with ultra-low sulfur diesel fuel.

2. Currently, Defendants’ commuter rail locomotives use “low sulfur” diesel fuel, which has a sulfur content of no more than 500 parts per million (“ppm”). Ultra-low diesel fuel has a sulfur content of no more than 15 ppm.

3. Defendants shall purchase and commence supplying ultra-low sulfur diesel fuel to all of their commuter rail locomotives by no later than June 1, 2010. After this date, only ultra-low sulfur diesel fuel shall be used in all of Defendants’ commuter rail locomotives.

4. At all times, Defendants shall continue to perform this SEP by purchasing and using ultra-low sulfur diesel fuel in all their commuter rail locomotives until at least June 1, 2012 and thereafter until the effective date of federal regulations (“non-road diesel fuel regulations”) requiring the use of ultra-low sulfur diesel fuel in locomotives.

**APPENDIX II – MBTA/MBCR LAYOVER FACILITIES AND LOCATIONS**

(ATTACHED CHART)

### MBTA/MBCR Layover Facilities and Locations

Location	Address	Number of Electric Plug-In Stations	Number of Electric Plug-in Stations Operational	Maximum Number of Locomotives Stored at One Time	Notes
Bratford Layover Facility	86 Railroad Avenue Bratford, MA 01835	4	4	4	Overnight Storage
Commuter Rail Maintenance Facility (aka Boston Engine Terminal): Yard 14	70 Rear Third Avenue Somerville, MA 02143	10	10	10	
Commuter Rail Maintenance Facility: West End Diesel House	70 Rear Thrd Avenue Somerville, MA 02143	2 (proposed)	0	8 (proposed)	Each new plug-in station will supply electric power to four locomotives on two tracks; work to be completed by 9/1/10.
Fitchburg Layover Facility	110 Summer Street Lunenburg, MA 01462	5	5	5	Overnight Storage
Franklin Layover Facility	110 Depot Street Franklin, MA 02038	3	3	3	Overnight Storage
Greenbush Layover Facility	New Driftway Road Scituate, MA 02066	4	4	4	Overnight Storage
Kingston Layover Facility	60 Marion Drive Kingston, MA 02384	4	4	4	Overnight Storage
Middleboro Layover Facility	65 West Clark Street Middleboro, MA 02346	4	4	4	Overnight Storage
Needham Layover Facility	130 West Street Needham, MA 02492	3	3	3	Overnight Storage
Newburyport Layover Facility	9 Newburyport Turnpike Newbury, MA 01951	4	4	4	Overnight Storage
North Station Terminal	135 Causeway Street Boston, MA 02114	10	10	0	

Pawtucket Layover Facility	5 Access Road Pawtucket, RI	6	6	6	Overnight Storage
Readville Mechanical Coach Maintenance Facility	41R Wolcott Court Hyde Park, MA 02136	11	11	0	
Rockport Layover Facility	5 Station Square Rockport, MA 01966	4	4	4	Overnight Storage
South Hampton Front Yard (aka Front Yard)	2 Frontage Road South Boston, MA 02118	3	3	3	Overnight storage on Amtrak property; power supplied by temporary generator.
South Hampton Main Yard (aka Big Yard)	2 Frontage Road South Boston, MA 02118	4	0	8	Amtrak property; modification of existing plug-ins scheduled for 2012; each modified plug-in will supply electric power to two locomotives.
South Station Terminal	Summer Street Boston, MA 02110	13	13	0	Amtrak Property
Widett Circle Commuter Rail Service and Inspection Facility ("Widett Circle"): Maintenance/Storage Building	110 Widett Circle South Boston, MA 02118	2	2	2	
Widett Circle Facility: Track 4 & Runner Track	110 Widett Circle South Boston, MA 02118	1 (proposed)	0	2 (proposed)	New plug-in station will supply electric power to two locomotive on these tracks; work to be completed by 9/1/10.
Worcester Layover Facility	45 Shrewsbury Street Worcester, MA 01604	4	4	4	Overnight Storage