



Commonwealth of Massachusetts  
Executive Office of Energy & Environmental Affairs

# Department of Environmental Protection

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DEVAL L. PATRICK  
Governor

RICHARD K. SULLIVAN JR.  
Secretary

KENNETH L. KIMMELL  
Commissioner

ENTERED  
Office of Proceedings  
February 14, 2014  
Part of  
Public Record

February 14, 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 20423-0001

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

Dear Ms. Brown:

The Department of Environment Protection (the "Department") files this Petition to Intervene 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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PETITION TO INTERVENE 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: February 14, 2014

BEFORE THE SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 35803

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PETITION TO INTERVENE FILED BY THE COMMONWEALTH  
OF MASSACHUSETTS IN THE PETITION FOR DECLARATORY ORDER  
FILED BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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The Massachusetts Department of Environmental Protection (the "MassDEP") respectfully submits this petition to intervene in the petition for declaratory order filed by the United States Environmental Protection Agency's (the "USEPA") on January 24, 2014.

Background.

The USEPA filed a petition with the Surface Transportation Board (the "Board") to institute a declaratory order proceeding. The purpose of the USEPA's petition is to seek the Board's advice as to whether two rules concerning locomotive idling issued by the California's South Coast Air Quality Management District (the "District") would be preempted by the Interstate Commerce Commission Termination Act (the "ICCTA"), 49 U.S.C. § 10101 et seq., if those rules were incorporated into the California State Implementation Plan (the "SIP"), under the Clean Air Act (the "CAA"), 42 U.S.C. § 7401 et seq.

One of the District's rules, which the District requested of USEPA to incorporate into the California SIP, rule 3502, requires railroads to limit idling of unattended locomotives to 30 minutes or less in certain circumstances. Alternatively, railroads can equip their locomotives with anti-idling devices, or submit an emissions equivalency plan to the District for approval. The rule also provides specific exemptions from the idling limitations, which are intended to

ensure that shutting down a locomotive would not interfere with railroad operations. The District's rule provides penalties for noncompliance.

MassDEP's Interest in EPA's Petition.

The MassDEP seeks to intervene in the action filed by the USEPA before the Board. The MassDEP has an interest in this action because the MassDEP has a rule at 310 CMR 7.11 concerning locomotive idling which already has been incorporated into the Massachusetts SIP. The MassDEP's idling rule, at 310 CMR 7.11(1) generally prohibits any motor vehicle from unnecessary idling for more than five minutes (the rule allows certain exceptions) and at 7.11(2) prohibits unnecessary foreseeable idling of a diesel locomotive for a continuous period of time longer than 30 minutes but provides an exception for a locomotive being serviced provided that idling is essential to the proper repair of the locomotive and that such idling does not cause or contribute to a condition of air pollution. The MassDEP rule is enforceable via penalties for violations. See M.G.L. c.21 s. 16, M.G.L. c. 111, s.142A and 310 CMR 7.52. The USEPA approved this rule for inclusion into the Massachusetts SIP on May 31, 1972.

The MassDEP is interested in the Board's decision on whether the District's similar locomotive idling rules, if approved for incorporation into the California SIP by the USEPA, is preempted by the ICCTA. Any decision in this proceeding will have repercussions in Massachusetts and other states which have a locomotive idling rule already included in their SIPs. The MassDEP intends to argue in a reply brief that state locomotive idling rules that have been incorporated into a state SIP approved by EPA are not preempted by the ICCTA and can be harmonized with the ICCTA preemption rules because prohibiting unnecessary idling provides a clear public benefit with little to no burden on the railroads.

MassDEP's Intervention will not Broaden the Issues raised in USEPA's Petition.

MassDEP's intervention in USEPA's petition for declaratory order will not broaden the issues raised before the Board. The Association of American Railroads, BNSF Railway Company, and Union Pacific Railroad Company (collectively, "the Railroads") which have challenged the District's rules, have argued in federal court that the District's rules are preempted under ICCTA's preemption provision, 49 U.S.C. § 10501(b). See, Association of American Railroads v. South Coast Air Quality Management Dist., 622 F.3d 1094 (9th Cir. 2010). When the MassDEP attempts to enforce its locomotive idling rule against any railroad in Massachusetts, the railroad informally makes the same argument. But neither the courts nor the Board have ruled that the locomotive idling rule in the Massachusetts SIP is preempted by 49 U.S.C. § 10501(b). The Board, in analyzing whether the District's rules, if incorporated into California's SIP, will determine whether it believes the District's locomotive idling rule is preempted by the ICCTA preemption provision, 49 U.S.C. § 10501(b). A Board ruling on this matter would assist the MassDEP in resolving any enforcement actions against the railroads for violation of 310 CMR 7.11 because the analysis would be nearly the same if the Board was reviewing the MassDEP's locomotive idling rule. Therefore, the participation of the MassDEP in this proceeding will not broaden the issues before the Board.

MassDEP's intervention will not disrupt the Board's schedule.

The MassDEP's petition to intervene should not disrupt the Board's schedule in this proceeding. The USEPA filed its petition with the Board on January 24, 2014. The MassDEP is seeking to intervene 19 days later. Although the USEPA has indicated that the USEPA must act on the District's request to add its idling rules to the California SIP by February 28, 2014, the MassDEP believes a thorough review of the facts and the law is necessary. In addition, the

MassDEP believes that other parties may want to participate in this proceeding. In any event, the MassDEP will be able to file its brief in accordance with any schedule that the Board orders.

Conclusion.

For the reasons stated above, the MassDEP hereby petitions the Board that the MassDEP be accorded the opportunity to present its position in a brief in accordance with whatever schedule the Board determines is appropriate.

PETITION TO INTERVENE FILED BY THE  
COMMONWEALTH OF MASSACHUSETTS'  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

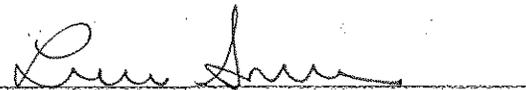
Respectfully submitted by,

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: February 14, 2014

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 upon the following parties of record:

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Dated: February 14, 2014

  
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Laura Swain, Senior Counsel