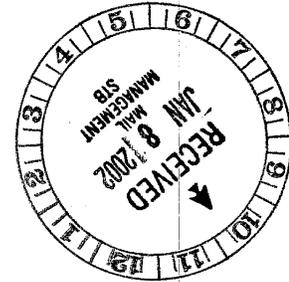




**THE COMMONWEALTH OF MASSACHUSETTS**  
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204387

November 5, 2001



BY FAX

Vernon A. Williams, Secretary  
Attn: Kenneth Blodgett  
Surface Transportation Board  
1925 K Street, NW  
Washington, D.C. 20423

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Office of the Secretary

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Re: Boston & Maine Corporation  
Application to Abandon and Discontinue Service – Suffolk County, MA  
STB Docket No. AB 32 (Sub No. 92)

Dear Mr. Blodgett:

This letter provides comments from the Massachusetts Office of Coastal Zone Management (CZM) on the Surface Transportation Board's (STB) Environmental Assessment, dated October 5, 2001, and the Boston & Maine (B&M) Corporation's application in the above-referenced matter. CZM has requested authority from the federal Office of Ocean and Coastal Resource Management (OCRM) to review the above referenced matter as an "Unlisted Activity" in accordance with 15 CFR 930.54: Unlisted federal license or permit activities, and 301 CMR 21.07(2)(b): Unlisted Activities. In letters dated October 10, October 18, and October 27, 2001, B&M has challenged CZM's authority to request or receive such jurisdiction. CZM will therefore review the matters of federal preemption and timeliness in this correspondence, as well.

As you will note, the points made in this letter were also made in CZM's October 29, 2001 letter to OCRM, however we feel that it is important to include them in the STB's public comment record as well.

#### Coastal Effects

B&M, from its perspective, has characterized the proposed abandonment and discontinuance of service as the loss to the port of a single, rather infrequent, train. From CZM's perspective, abandonment of the Mystic Wharf Branch, which could entail removal of the rail bed and sale of the property for non-transportation purposes, would be a significant loss of an important and scarce transportation resource.

A significant component of CZM's program, from its inception in 1976 through the present day, has been the Designated Port Area (DPA) program. Created to fulfill its Congressional mandate to promote economic uses of coastal resources and to make use

of existing marine industrial infrastructure, 12 port areas, including the Mystic River, were identified for inclusion in the DPA program in CZM's 1976 Draft Environmental Impact Statement and its 1978 Final Environmental Impact Statement and Program Plan. The primary state authority, which makes CZM's DPA policies enforceable under the CZMA, is M.G.L. Ch. 91: Public Waterfront Act and its implementing regulations at 310 CMR 9.00.

Designated Port Areas are the primary working waterfronts within the Commonwealth's developed coastal harbors. DPAs were founded on the premise that it makes both good environmental and good economic sense to encourage maritime business development within harbor areas that have already been altered extensively -- at great public expense -- to meet the special operational and physical requirements of port-related commerce. Thus, the central intent of the CZM Ports Policies is to preserve and enhance the capacity of DPAs to accommodate both existing and future water-dependent industrial use.

DPAs provide an effective and important statewide regulatory process for preserving and enhancing water dependent industrial uses in Boston and other ports in the state. The waterfront parcels initially identified as DPAs were either already in waterfront industrial use or exhibited characteristics such as deep-water access, landside access, and pier or wharf facilities necessary to maritime industrial uses. Protection of DPAs was and is considered important for two reasons:

1. At the time of their creation, Boston and other cities were rezoning most of the W-2 zone waterfront industrial areas and replacing them with other non-industrial zoning.
2. Increasing competition from non-water dependent uses within and adjacent to DPAs is threatening to irrevocably remove the waterfront property from maritime use.

DPAs comprise a kind of overlay zoning, which transcends neighborhood and city interests by considering the effects of maritime industry on the overall economy of the region and the state.

The following were the criteria for designation as a DPA of the subject area:

310 CMR 9.24(1)(a)(1985 revisions) To be eligible for designation as a port area, portions of a tideland must have the following characteristics:

1. Navigable channels of 200-foot depth or more at mean low water;
2. Tidelands and associated lands abutting such channels that by their topography, size, separation from residential neighborhoods, and/or local government zoning are suited for maritime-dependent industrial uses;
3. *Availability of road and/or rail links leading to major truck and arterial routes;* [emphasis added]

4. Availability of water and sewer services capable of supporting maritime-dependent industries;
5. Consistency with the CZM Program.

This special combination of attributes is found in a very limited portion of the coastal zone, and particularly few areas are of sufficient contiguous extent to invite concentrations of related businesses and/or large-scale facilities. Because economic, environmental, and social factors now virtually preclude further development of such an intensive nature, what remains of the industrialized coast should be preserved to the maximum extent practicable in order to meet the long term, cumulative space needs of water-dependent industries. As a matter of state policy, it is not desirable to allow these scarce and non-renewable resources of the marine economy to be irretrievably committed to, or otherwise significantly impaired by, non-industrial or nonwater-dependent types of development which enjoy a far greater range of locational options.

Within a DPA, the state's Department of Environmental Protection (DEP) can issue Ch. 91 licenses for only those project proposals that are maritime industries or which support maritime industry:

310 CMR 9.32(1) The Department has determined that in certain situations fill or structures categorically do not meet the statutory tests for approval under M.G.L. c. 91 or are otherwise not in keeping with the purposes of 310 CMR 9.00. Accordingly, a project shall be eligible for a license only if it is restricted to fill or structures which accommodate the uses specified below, within the geographic areas specified below.

(b) Tidelands Within Designated Port Areas (DPAs)

1. fill or structures for any water-dependent-industrial use, and accessory uses thereto, on previously filled tidelands;
2. fill or structures for water-dependent-industrial use on flowed tidelands, provided that, in the case of proposed fill, neither pile-supported nor floating structures are a reasonable alternative;
3. structures to accommodate public pedestrian access[...]
4. structures on filed tidelands to accommodate the following on a limited basis:
  - a. a use to be licensed in combination with water-dependent-industrial uses within a marine industrial park, as defined in 310 CMR 9.02; or
  - b. as supporting DPA use, as defined in 310 CRM 9.02; or
  - c. a temporary use, as defined in 310 CRM 9.02.

The use of filled tidelands in a DPA for the above purposes shall also be governed by the provisions of 310 CMR 9.15(1)(d)1 and 310 CMR 9.36(5).

Clearly, by placing such restrictions on the type of facility that can be licensed in a DPA, the Commonwealth is using the program to protect the maritime industrial uses for which the ports were designated.

In addition to the state's DPA program, the Commonwealth of Massachusetts has recognized the importance of rail service to the Port of Boston in a number of ways:

1. The 1989 State Rail Plan, prepared by the Massachusetts Executive Office of Transportation and Construction (EOTC), includes recommendations to encourage businesses to increase their use of rail services, preserve essential rail freight transportation services that would otherwise be abandoned, and preserve abandoned railroad rights-of-way having strong potential for future transportation or other public use. EOTC administers several programs for funding rail freight projects, which may be available to offer alternatives to abandonment of the Mystic Wharf Branch.

2. The Final Report of the Governor's Commission on Commonwealth Port Development, was published in October 1994, in preparation for the development and passage of the state's Seaport Bond bill. In the Vision, the report stated:

Boston can be a strong player in the international container trade, as the closest port to Europe, linked to low-cost transcontinental rail service. This will not only create direct jobs in the port and at inland rail centers, but will significantly lower costs for Massachusetts manufacturers and customers.

The report further noted:

Conflicts between industrial and other uses in all of the ports may either drive out industry or leave valuable swaths of property unused. Poor landside transportation links to the nation's rail and highway systems will hinder the ports' competitiveness [...]

A primary recommendation of that report is funding and implementing a double stack clearance program to link the port with interior cities

3. The Port of Boston Handbook and Directory, published by Massport in 1996 to describe the then proposed port consolidation plan, includes an entire section on the importance of intermodal transportation to the Port of Boston.

4. The Port of Boston Economic Development Plan, published by Massport in March 1996, identifies maintenance of rail access as a key component to the maintenance of port jobs and the preservation of essential port properties. Charlestown and Mystic Wharf are recognized as being:

well served by existing transportation infrastructure. Guilford Transportation provides direct on-dock rail service via a spur line running along Medford Street, providing transport for containers at Moran Terminal, general cargos at Mystic Pier 1, and bulk cargos at other piers.

Among a number of recommendations related to rail access to the port is included:

19. Maintain on-dock rail access as a critical component of Boston Autoport and other maritime activity.

5. Again, in the December 1998 Final Report of the Port of Boston Competitive Task Force, rail service is recognized as being critical to the port. Recommendations include:

IV. The Commonwealth, the City and Massport should protect the South Boston and Charlestown marine industrial area for continued Port growth and diversity. The City, the Commonwealth and Massport should protect rail access to Moran/Mystic and Medford Street Terminals

V. The City, Massport and the Commonwealth should work together to develop and implement an Intermodal Vision for the freight transportation assets and industrial activities in South Boston and surrounding Boston Harbor.

VI. The Commonwealth of Massachusetts must proceed with securing and allocating the funding to commence the Double-Stack Clearance Project funded through the Seaport Bond Bill.

XII. Truck and rail access to Charlestown terminals should be controlled and protected. The Commonwealth, the City, Massport, and private companies should protect the existing rail line that serves this area, as bulk and automobile companies can both benefit from lower transportation costs by utilizing rail.

6. Most recently, the Boston MPO Transportation Plan, 2000-2025: Existing Conditions, prepared by the Boston Metropolitan Planning Organization, recognized the critical need for improved rail service and double stack clearance to the port.

To administer the state's Designated Port Area program, CZM developed several Port and Harbor Infrastructure Policies. Germane to the matter at hand is CZM's Ports Policy #3:

**PORTS POLICY #3 - Preserve and enhance the capacity of Designated Port Areas (DPAs) to accommodate water-dependent industrial uses, and prevent the exclusion of such uses from tidelands and any other DPA lands over which a state agency exerts control by virtue of ownership, regulatory authority, or other legal jurisdiction.**

CZM implements this policy through technical assistance to other public agencies, and review of project proposals in DPAs, proposed DPA boundaries, and DPA Master Plans. Federal consistency review of projects in DPAs, proposed DPAs, and DPA Master Plans is carried out in accordance with the state statutes and regulations.

The Boston and Maine's Mystic Wharf Branch is located on the Charlestown side of the Mystic River Designated Port Area. The Mystic River contains many of the deep-water slips available in the Port of Boston, including the recently dredged Moran Terminal. As a major portion of the Boston Harbor Navigation Improvement Project, the US Army Corps of Engineers (ACOE) and the Massachusetts Port Authority (Massport) are completing dredging the federal channel in the Mystic River and its approaches to -40 feet at a cost of approximately \$60,000,000. As the Boston & Maine has stated, it is currently the only DPA in Boston Harbor that is currently served by rail.

The Mystic River DPA includes a number of water dependent maritime industries including Diversified Auto, US Gypsum, Blue Circle Cement, and a lay-down area for the construction of the Sithe Mystic Power Plant across the river.

The Mystic Piers have long been the site of a number of bulk cargo industries. In the late 1990s, Massport reconfigured all freight handling in the Port of Boston. Moran Terminal became host to the region's Autoport and Medford Street wharfs, also in the Mystic River DPA and potentially served by the B&M track, became a dedicated facility for dry bulk cargos.

The B&M has pointed out, correctly, that there is currently only one customer for its Mystic Wharf Branch, however:

- The Autoport does not currently use rail service because of insufficient clearances for the specially designed rail cars currently used by the auto import industry. However, were those clearances available, the manager of the Autoport has stated that he would "absolutely" use rail.
- Were the Autoport to leave the Mystic Wharf site (it is currently operating on a ten year lease, so it is possible that it would leave) the major customers that have approached Massport for space are industries that depend on bulk deliveries such as cement companies.
- The Medford Street bulk cargo facility has the potential to attract tenants for which rail is the most efficient and cost-effective form of transport.
- While the Mystic Wharf Branch does not currently have double stack clearance, it is the line that is most likely to be adaptable to such clearances. As described below, rail service will eventually be restored to South Boston, however, the route under the Prudential Center may limit opportunities for double stack clearance.

Loss of the Mystic Wharf Branch would preclude any of the above uses.

In addition to its significance to actual and potential Massport customers at the Mystic Piers, Moran Terminal is the only facility in the Port of Boston able to handle hazardous cargos that is connected to the interstate rail system. Even when rail access is restored to South Boston, the route travels under the Prudential Center. Certain cargos cannot be handled because of existing regulations that prohibit the transport of some cargos under buildings.

In requesting authority to review the proposed abandonment of the Mystic Wharf Branch, CZM is seeking a discussion of possible feasible alternatives. For example:

1. Massport, in a letter dated October 16, 2001 to Vernon A. Williams, requested consideration of the public use provisions of the STB statute and regulations. Under this proposal, Massport would acquire B&M's right-of-way to preserve it as a transportation corridor to the Mystic Piers. Massport is working with EOTC to identify funding for this project.
2. The Central Artery/Tunnel Project (CA/T) is committed to restoring rail service to Black Falcon Pier in South Boston, once the disruption caused by CA/T construction is in that area. In order to maintain the opportunity for rail access to the Port of Boston, B&M might consider maintaining service to Charlestown until South Boston service is restored.
3. EOTC maintains several programs to fund preservation of freight rail service. To CZM's knowledge, the programs have not been discussed with B&M and therefore B&M has not had an opportunity to discuss incentives that would make it feasible for it to maintain service to the Mystic Piers.

In its letter to OCRM dated October 18, 2001, B&M raised a number of specific challenges to CZM's assertion that the proposed abandonment would have foreseeable effects on coastal uses and resources. CZM offers the following responses to these points.

B&M opened its letter by suggesting that "CZM offers no real support for these blanket assumptions" of coastal effects. CZM's October 2, 2001 letter responded to a number of blanket statements in B&M's Environmental/Historical Report, which were themselves only minimally supported:

- The sole existing customer *will* have to transport material by truck if there is no rail service – if there is no rail service, they will have to find some means of acquiring the raw materials for their product and the only other option presently available to them is by truck.
- Local marine industries will *not* have access to rail service if there is no rail service available to them.

- Truck traffic *does* generate air pollution, whether in the coastal zone or elsewhere, and whether caused by rail abandonment or any other traffic increase.
- Truck traffic does generate noise, no matter where the trucks are located. In the Mystic River DPA, the rail line goes through the center of the industrialized area and residential structures are somewhat shielded from noise by the surrounding buildings, where as the truck routes do run between the industrial and residential areas and there is therefore less noise buffer.

These points illustrate the larger issue at hand -- the long-term viability of the Mystic River DPA.

With regard to the Commonwealth's actions at Moran Terminal, before the consolidation, container customers were not using rail service and traffic was approximately 400 trucks/day. Since the consolidation, daily truck trips have decreased from 400 trucks/day to the present 100 trucks/day. There is no rail service to South Boston at the present moment due to the disruptions caused by the construction of the Central Artery/Tunnel (CA/T) Project. However, the CA/T Project is maintaining the CSX line to the Boston Marine Industrial Park (BMIP) in South Boston and CSX will restore service when construction is completed in the area in late 2003. Massport and EOTC are completing plans to extend rail service to the South Jetty area in South Boston, where potential tenants have requested rail service. It is true that there is no direct rail service to Conley Terminal -- there was service, which was abandoned and paved over. Studies have suggested that it would cost tens of millions of dollars to restore that service -- an important lesson in the costs of abandoning rail service to the port.

While, for a number of reasons, the state has been slow to implement double stack clearances for rail service, any bridge that is repaired by the Massachusetts Highway Department must include double stack clearance. Today, the Commonwealth has achieved double stack clearance at 25 -- 30 bridges.

The issue is not, as B&M has attempted to characterize it, "less than one truck per day", but the integrity of the federally approved Designated Port Area program and the need for rail access to a deep water port in Boston. At present, the Mystic Wharf Branch is the only rail line serving the deep-water port. B&M characterizes its proposed activity as "mere cessation of service" which "does not necessarily foreclose rail service in the future." In fact, B&M has asked to be allowed to *abandon* and discontinue service on the Mystic Wharf Branch. Abandonment can be expected to lead to salvage and sale of the property. A parcel-by-parcel sale would effectively foreclose rail service in the future.

The B&M argument regarding federal coordination mischaracterizes CZM's authority under federal consistency and mischaracterizes the reviews conducted by the STB and the US Army Corps of Engineers. In fact, the STB did *not* provide any report

on this matter to the Massachusetts Office of Coastal Zone Management, as suggested by B&M. The STB finding of no environmental impact was (a) issued before the close of public comment and before it had received CZM's properly filed comments; and (b) is a proposed finding that is currently available for public review and comment. The letter provided by the Army Corps of Engineers on this matter is not a review of the proposed action as the Army Corps of Engineers has no jurisdiction over the proposed abandonment. In fact, to date there have been no federal agency findings of no environmental impacts of the proposed abandonment.

B&M has asserted that CZM is applying its policies inconsistently. In fact, the only discontinuance of rail service to occur in recent years was in South Boston, when the CA/T proposed to disrupt CSX service to the South Boston DPA. The CA/T project and CSX have entered into an agreement specifying the restoration of service to that line. This was information that CZM relied on for its federal consistency review.

#### Federal Preemption

B&M asserts that CZM does not have jurisdiction to review the abandonment and discontinuance of this rail line pursuant to the Coastal Zone Management Act (CZMA), and states "any attempt by CZM to regulate in this area is preempted." B&M cites a ninth-circuit decision as support for this conclusion. *City of Auburn v. United States*, 154 F.3d 1025 (9<sup>th</sup> Cir. 1998). In citing this case, however, B&M completely miscasts the nature of CZM's role and the underlying legal authorization. The cited case concerns federal preemption of state and local regulation under the Interstate Commerce Commission Termination Act of 1995 (ICCTA), particularly the provision cited by B&M in 49 U.S.C. § 10501(b). The instant matter concerns CZM's regulatory role acting not under state or local regulation but pursuant to a clear statement of Congress under another federal law for a joint federal-state management system for coastal resources, and as such no real state or local preemption issue exists at all. *Southern Pacific Transportation Co. v. California Coastal Commission*, 520 F.Supp 800, 804. Further, nothing in the ICCTA expressly or by implication would repeal the CZMA, and accordingly, the two statutes should be harmonized to give effect to both. *Id.* At 805; *United States v. Brien*, 617, F.2d 299, 310 (1<sup>st</sup> Cir. 1980). The STB has clearly accepted the proposition that such statutes need to be harmonized and accommodated. *Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer MA – STB Finance Docket No. 33971*, STB served: October 5, 2001 (cited in B&M's letter dated October 18, 2001 to Charles Ehler, Acting Director, OCRM).

The STB, itself, recognizes that the CZMA must be harmonized with the ICCTA and has incorporated provisions into its regulations for federal consistency review. The STB's "Procedures for Implementation of Environmental Laws" are rules "designed to assure consideration of environmental and energy factors in the Board's decisionmaking process pursuant to the National Environmental Policy Act...[and] the Coastal Zone Management Act." 49 CFR § 1105.1. The STB's rules require that the "applicant [B&M] must comply with the consistency requirements of 15 CFR 930" and that "the Board will withhold a decision, stay the effective date of a decision, or impose a

condition delaying the consummation of the action, until the applicant has submitted a consistency certification and either the state has concurred in the consistency certification, or an appeal to the Secretary of Commerce...is successful.” 49 CFR § 1105.9 Accordingly, CZM believes that not only should the CZMA requirements and the ICCTA be harmonized and implemented, and the consistency review provisions respected, the STB’s regulations require this and expressly expect this of B&M’s application. This office believes the requirements of 49 CFR § 1105.9 are very instructive as to the role of the CZMA, and we point this out as B&M’s omission of this significant regulatory provision in its letter (dated October 18, 2001 to Charles Ehler, Acting Director, OCRM) may deprive you of relevant information that bears directly upon your consideration of this matter.

The Coastal Zone Management Act of 1972, as amended, (16 U.S.C. 1451 *et seq.*) gave states with federally approved coastal zone management programs broad jurisdiction over federal activities affecting the land and water resources or uses of the states' coastal zone:

§ 307 (c)(1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of the State management programs. A Federal activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).

Paragraph (2) addresses Federal development projects. The proposed abandonment is not a Federal development project. Paragraph (3)(B) addresses offshore development, which is not applicable to the proposed abandonment.

Paragraph (c)(2) addresses applications for federal licenses or permits. Federal licenses or permits are defined as 15 CMR 930.51(a). The paragraph states, in relevant part:

§ 307 (c)(3)(A) After final approval by the Secretary of a state's management program, any applicant for a required federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data.

The CZMA requires that any applicant for any required federal license or permit must provide a federal consistency certification to the federal permitting agency and to the state's coastal zone management agency. The CZMA does not exempt any federal agency licensing or permitting process from this requirement. The pending action of the

Surface Transportation Board is a federal permitting activity and is therefore subject to federal consistency review under the CZMA.

Even if STB approvals were exempted from the CZMA, B&M further argues that *City of Auburn v. United States* and *Boston and Maine Corp. and Town of Ayer, MA – Joint Petition for Declaratory Order* minimize environmental review of rail abandonment decisions, as such decisions are essentially economic matters. In fact, under the federal CZMA, in §§ 302 and 303, Congress broadly defined the national interest in coastal zone management to include both the protection and the development of the coastal zone. Specific to the matter at hand:

§ 303 the Congress “finds and declares that it is the national policy- [...]

(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values *as well as the need for compatible economic development*, which programs should at least provide for- [emphasis added]

(D) *priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists.* [emphasis added]

To implement Congressional policy, CZM developed, as part of its federally approved management plan, Port and Harbor Infrastructure Program Policies. CZM's Port's Policy #3, as discussed above under “Coastal Effects”, is very clearly a policy that implements its Congressionally-mandated responsibility to promote economic uses of coastal resources, and to support existing development with its associated infrastructure.

With regard to B&M's contention that this application is exclusively about abandonment, and not post-abandonment activities (over which they concede that CZM may have jurisdiction), B&M's Application to Abandon and Discontinue Service, in (a)(6) Detailed statement of reasons for filing application, suggests that “the underlying value of this property for development consistent with other uses in this area is significant.” As permission to abandon is required before B&M can salvage and/or sell the property, this application would imply that B&M intended to salvage the rail bed and sell the right-of-way for development, thus precluding future rail use.

CZM is concerned that B&M's correspondence to OCRM suggests, if not expresses, a belief that (1) environmental review by a governmental agency is inappropriate because B&M believes so, as it has apparently decided that the “potential environmental impacts are minimal” and (2) CZM's motives are “suspect” and “it is likely that CZM will either not allow abandonment, or will so condition the exercise of abandonment authority as to make it impractical for B&M to pursue.” We express

concern as this suggests the office will abuse its discretion and has predetermined the outcome of any potential consistency review.

B&M has contended that there are no state laws that support CZM's review of the proposed abandonment. CZM believes, based on its federally approved enforceable Port and Harbor Infrastructure Policies, that it has the authority to invoke M.G.L. Ch. 91: Public Waterfront Act and 310 CMR 9.00: Waterways Regulations, both of which implement the national interest of promoting economic uses of coastal resources through the Designated Port Area program. The Mystic Wharf Branch is within the Mystic River Designated Port Area, and the presence of the rail line was a factor in the DPA designation. B&M is attempting to cast CZM's interests as pertaining only to the limited number of trains that currently use the track. In fact, the "reasonably foreseeable impact" to Massachusetts coastal uses and resources is the loss of rail service to the Mystic River DPA and to the Port of Boston.

#### Untimely Notification

B&M filed its application for abandonment and discontinuance of service with the STB on June 29, 2001 (AB 32 (Sub. No. 91)). As part of this filing, B&M served pursuant to 49 CFR § 1152.20(c) the "Environmental/Historical Report" required by 49 CFR § 1105.7. In this situation, 49 CFR § 1105.7(b) and 49 CFR § 1152.20 require service at least 20 days prior to the filing of the application with the STB. B&M failed to provide actual notice, as required, within the time frames of this provision and improperly certified the same to the STB. B&M's service list in this matter states a mailing address for CZM that is over a year out of date. Certainly, B&M bears the responsibility of ensuring that it appropriately serves its filings. Further, verifying the accuracy of its service list is not a burdensome task as our address can be easily verified through a telephone call or with reference to our website. CZM was drafting comments to the STB on this filing, including its belief that the Environmental/Historical Report was inaccurate, however, B&M's application was rejected by the STB on August 8, 2001. At that time, CZM did not file a request with OCRM for consistency review as it believed that the matter was rendered moot by the rejection of the application and that staff members believed that the defective service of notice would require B&M to re-serve the application for any subsequent filing.

B&M did submit a new application to the STB on August 31, 2001. B&M, however, did not serve CZM with any documentation because it asserts that its resubmission complied with 49 CFR § 1152.24(e)(3) and therefore did not require resubmission of the "Environmental/Historical Report" to CZM under 49 CFR § 1152.20. However, while trying to justify the exclusion of CZM under this regulatory provision, B&M did take the inconsistent action of providing notice to other parties listed in this same provision as part of its second filing. Accordingly, as B&M never made any communication to CZM on its second filing, one could reasonably conclude that B&M made a concerted effort to evade potential environmental review by hiding, in part, behind the text of 49 CFR § 1152.24(e)(3). We raise this point now only to question

B&M's attempt to take the equitable high ground by suggesting that CZM's request for consistency review was late and that review would be unfair to B&M.

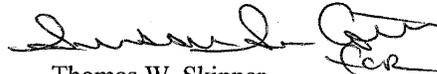
Even if B&M complied with the requirements of 49 CFR § 1152.20 and 49 CFR § 1152.24(e)(3) – a point CZM does not concede – CZM asserts that 49 CFR § 1105.9(a)(2) and 15 CFR § 930.54(a) require *actual* notice to CZM. Separate from the filing and publication service requirements of 49 CFR § 1152.20, 49 CFR § 1105.9(a)(2) required B&M to provide actual notice of its proposal *at least 40 days* before the effective date of the requested action. In this case, CZM asserts that the term “proposal” must mean the subsequent application with the STB in “Sub. No. 92”, and not “Sub. No. 91”, as each differs in substance. Also, the term “requested actions” must concern separate requests for action on different submissions. Accordingly, B&M failed to comply with this requirement. Likewise, 15 CFR § 930.54(a) required actual notice within 30 days of B&M's initial permit application. Even if B&M had not erred in its service distribution, its 20-day service window failed to meet these two regulatory provisions.

In a letter to OCRM dated October 18, 2001, B&M claimed that CZM had received actual notice of its intent to abandon on or about July 3, 2001 and constructive notice of its intent to abandon and discontinue service by a notice in the Boston Globe placed for three successive weeks being June 28, 2001. In its October 29, 2001 letter to OCRM, B&M now contends that CZM got constructive notice from a Federal Register notice published September 24, 2001. Under this construction, CZM, by its letter to OCRM dated October 2, 2001, is well within any and all timeframes published by either the STB or OCRM.

It should not be construed that CZM is attempting to hide any alleged failure to act by getting bogged down in technical day-counting, but we must do so to show that B&M is incorrect in its regulatory time calculations and, therefore, in its attempt to bar potential review through a procedural maneuver. CZM believes that its request for consistency review is timely and appropriate in this situation. CZM had no knowledge of the subsequent refiling that occurred after the original STB denial. Once CZM became aware of this application, it moved quickly to notify OCRM of its request for consistency review. Given the important consideration of coastal resources embraced in the CZMA and as assured by the STB in its regulations at 49 CFR 1105, CZM requests that the STB take these comments into consideration in reaching its final ruling on this matter.

Thank you this opportunity to provide these comments. Please contact Jane W. Mead, CZM Project Review Coordinator, at 617-626-1219 if you have questions regarding this letter.

Sincerely,



Thomas W. Skinner  
Director

TWS/JWM

Cc: David Kaiser, Federal Consistency Coordinator  
Office of Ocean and Coastal Resource Management  
Joelle Gore, Assistant Team Leader  
Office of Ocean and Coastal Resource Management  
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