

ITEM 40

BACK UP MATERIALS

THERE IS A SEPARATE  
BOUND REPORT



# Town of Brunswick, Maine

INCORPORATED 1739

OFFICE OF THE TOWN COUNCIL

28 FEDERAL STREET • BRUNSWICK, MAINE 04011

TELEPHONE 207-725-6659

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## DRAFT

April 7, 2014

The Honorable Joseph C. Szabo  
Administrator  
Federal Railroad Administration (FRA)  
1200 New Jersey Avenue, SE  
Washington, DC 20590

RE: EIS for the proposed Brunswick Maine Maintenance and Layover Facility

Dear Mr. Szabo:

On April 7, 2014, the Brunswick Town Council voted to support the Brunswick West Neighborhood Coalition's (BWNC) request for an Environmental Impact Statement (EIS) of the Northern New England Passenger Rail Authority's (NNEPRA) proposal to build a Maintenance and Layover facility to support the operations of the Amtrak Downeaster at the "Brunswick West" site.

We know that Governor LePage made a similar request just two weeks ago.

Sincerely,

Benet Pols  
Chair, Brunswick Town Council

Cc: Patricia Quinn, Executive Director, NNEPRA  
Brunswick West Neighborhood Coalition

Nancy W. McBrady  
nwalworth@preti.com  
Direct Dial: 207.791.3238

March 21, 2014

## VIA US MAIL & E-MAIL

John S. Eldridge  
Finance Director  
Town of Brunswick, ME  
28 Federal Street  
Brunswick, ME 04011

### **Re: Brunswick Layover Facility – Status of NEPA Review**

Dear John:

At your request, I have researched the status of Federal permitting of the passenger rail equipment layover facility (“Facility”) that has been proposed by the Northern New England Passenger Rail Authority (“NNEPRA”) to be sited in Brunswick, Maine. Because Federal funding is involved with the proposed project, an assessment of the Facility’s potential environmental impacts must be conducted under the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4321 *et. seq.* The Federal agency leading this NEPA review is the Federal Railroad Administration (“FRA”). This letter provides a brief overview of the types of Federal review conducted under NEPA, public involvement in the NEPA process, and discusses whether the opportunity for public comment to the FRA regarding the Facility has concluded.

### **Types of NEPA Review**

There are three possible avenues of NEPA review. The first is a categorical exclusion (“CE”) whereby an agency may promulgate limited exceptions to NEPA review for specific activities that have been deemed to not have adverse effects on the environment. 40 CFR §1508.4. Where a CE applies, no further review is necessary. However, if a CE does not exist, the remaining types of review that must be undertaken in situations where NEPA review is required are either an Environmental Assessment (“EA”) or an Environmental Impact Statement (“EIS”).

The less rigorous EA process is utilized to determine the significance of the proposed activity’s environmental impact and to review alternatives. It is a concise document that discusses the need for the proposed action, the environmental impacts of the proposed action and alternatives, and lists the agencies and persons consulted during the assessment. 40 CFR §1508.9. The EA’s importance is two-fold: (1) it meets the agency’s requirements under NEPA where no EIS is necessary; and (2) it facilitates the creation of an EIS if one is deemed required. If the EA concludes that the proposed action will not significantly impact the environment, the Federal agency will issue a Finding of No Significant Impact (“FONSI”). The FONSI presents

the reasons why the proposed actions will not significantly impact the environment, and must include the EA or a summary of the EA as supporting documentation. *Id.* at § 1508.13.

If an EA indicates that additional analysis is necessary, or if the project is one that, from the start, clearly will require an EIS (and thus the EA step can be skipped) an EIS will be prepared. An EIS is a significantly more detailed assessment of the purpose and need for the proposed action, alternatives, impacts, and consequences of the proposed action. 40 CFR § 1502.

### **NEPA Public Participation**

#### *a. Public Involvement Requirements*

The amount of public involvement required during an EA process is less stringent than what is required for an EIS. According to the Council on Environmental Quality<sup>1</sup> (“CEQ”), “when preparing an EA, the agency has discretion as to the level of public involvement.” CEQ, *A Citizens Guide to the NEPA*, 2007, pg. 12 (hereinafter, the “CEQ Guide”). NEPA does not require specific types of public involvement in the creation of EAs, although it does mandate that agencies involve the public “to the extent practicable” in preparing assessments (40 CFR §§ 1501.4(b)) and to provide notice of hearings and meetings “so as to inform those persons . . . who may be interested or affected.” 40 CFR §§ 1501.4(b), 1506.6. The FRA’s “Procedures for Considering Environmental Impacts” states that in the EA process, consultation with the public, “to the extent necessary,” should begin as early as possible. 64 FR 28550 (05/26/99).

In comparison, the regulations regarding public notice for an EIS are extensive, and require agencies to affirmatively solicit comments from the public. 40 CFR § 1503.1. Further, the agency must assess and consider comments provided to it, and respond to them in the final EIS. *Id.* at § 1503.4. The FRA’s procedures outline a specific section on citizen involvement in the EIS process, including developing a list of interested parties, publishing a notice of intent in the Federal Register, circulating the draft EIS to the public, publicizing the draft EIS by press release, and, “if necessary or desirable,” holding a hearing on the draft EIS. 64 FR 28549 (05/26/99).

#### *b. Judicial Review of Agency NEPA Decisions*

A comment period’s purpose “is to allow interested members of the public to communicate information” and criticisms to an agency. *Connecticut Light & Power v. Nuclear Regulatory Commission*, 673 F.2d 525, 530 (D.C. Cir. 1982). A party challenging a Federal agency’s NEPA action is obliged to raise its challenge before the agency “at a time when the [agency] could have taken any necessary corrective action without undue delay . . .” *Commonwealth of Kentucky ex rel. Beshear v. Alexander*, 655 F.2d 714, 718 (6th Cir. 1981). “The time to complain is at the comment stage, not after the agency has completed its decision

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<sup>1</sup> Congress established the CEQ within the Executive Office of the President as part of the NEPA statute. Among its responsibilities, CEQ ensures that federal agencies comply with NEPA.

making process.” *Karst Env. Ed. and Protection, Inc. v. Fed. Highway Admin.*, 2014 U.S. App. LEXIS 4877, at \*10 (6th Cir. March 12, 2014) (citing *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978)). A party’s claim must be presented during the administrative process and the party must structure its “participation so that it alerts the agency of the [party’s] position and contention, in order to allow the agency to give the issue meaningful consideration.” *Forest Guardians v. U.S. Forest Service*, 495 F.3d 1162, 1170 (10th Cir. 2007)(quoting *Dep’t. of Transp. v. Pub. Citizens*, 541 US 752, 746 (2004)(internal quotations omitted).

Although the FRA’s own NEPA policies do not specifically address public comment periods, it is informative to look at another agency’s policies relating to length of public comment periods. The U.S. Forest Service’s regulations specifically limit public comments to 30 days for an EA. 36 CFR 215 Appeal Handbook, FSH 1509.12. at § 11.5. Further, timely submission of comments is required. *Id.*

In a case directly addressing whether public involvement was adequate with respect to the issuance of an EA, the court found that NEPA regulations require that the public be provided:

as much environmental information as is practicable, prior to completion of the EA, so that the public has a sufficient basis to address those subject areas that the agency must consider in preparing the EA. Depending on the circumstances, the agency could provide adequate information through public meetings or by a reasonably thorough scoping notice. The way in which the information is provided is less important than that a sufficient amount of environmental information — as much as practicable — be provided so that a member of the public can weigh in on the significant decisions that the agency will make in preparing the EA.

*Sierra Nevada Forest Prot. Campaign v. Weingardt*, 376 F. Supp 2d 984, 991 (E.D. Cal. 2005).

These cases indicate that while Federal agencies are obliged to provide opportunities for public involvement during the NEPA process, and the public ordinarily should participate during the identified timeframe, there is no prohibition on submitting comments any time before the decision-making process is completed by the Federal agency.

*c. Layover Facility Public Participation*

The FRA’s Procedures for Considering Environmental Impacts do not specifically outline public notice requirements for EA efforts. 64 FR 28545 (5/26/99). However, both the FRA and NNEPRA posted copies of the EA on their respective websites. The FRA specifically stated on its website that the EA was “available for public review and comment through October 13, 2013.”<sup>2</sup> The EA document included the contact information of the person who “may be contacted for information on the Environmental Assessment.” *See* Brunswick Layover EA,

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<sup>2</sup> <http://www.fra.dot.gov/Page/P0669>, last visited March 19, 2014.

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John S. Eldridge

March 21, 2014

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cover page. The EA document also summarized three public meetings that had been held in Brunswick to discuss the proposed activity and to “solicit public feedback.” *Id.* at pg. 43. An advisory group consisting of “officials from the Town of Brunswick, the Brunswick Town Council, the MaineDOT, Amtrak, and members of the Brunswick community” was also formed in December 2011 and met three times. *Id.* A public hearing on the EA itself was noticed on the FRA’s and NNEPRA’s websites and held on September 26, 2013.

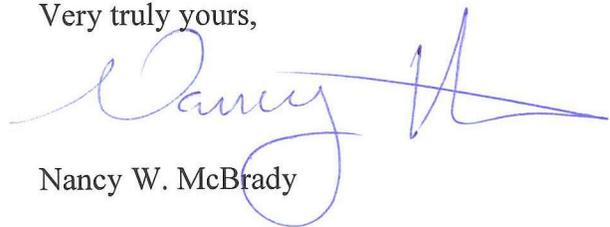
### Conclusion

NEPA and FRA regulations regarding public involvement in the EA process are not as stringent as those required for an EIS; however, it is clear that some amount of public involvement is necessary. The process leading up to the release of the EA for the proposed Facility included three public meetings. After the release of the EA, there was a public comment period noticed to the public, and a public hearing was also held. The public comment period closed on October 13, 2013. A review of NEPA-specific case law indicates that the courts require adequate opportunity for public comment (which clearly was done here) and that, once so offered, the public is ordinarily required to participate during that timeframe, but not later. As a practical matter, however, comments received very close to the time a decision is made (unless game-changing) will necessarily receive less consideration.

Despite the public comment period closing over five months ago, no prohibition was found in either NEPA or FRA regulations barring members of the public from providing additional input to the FRA after the close of the public comment period but before the decision-making process is completed by the FRA. Hence, if a member of the public chose to provide the FRA with additional input at this point in time, they certainly can do so.

Please contact me with any questions.

Very truly yours,



Nancy W. McBrady

NWM:

cc: Stephen E.F. Langsdorf

# Petition

## Coalition to Preserve Our Neighborhood!

We, the undersigned residents, neighbors, and friends of Bouchard Drive, Hennessey Ave, Turner St, Country Lane, Scott St., Baribeau St., and Lombard Streets, oppose the proposed Amtrak "Layover" Maintenance Station at 2 Turner St. Brunswick, ME.

We believe that the harm to our neighborhood from such a project will far outweigh the benefits to anyone. It will cause many years of noise, vibration, fumes, and diminished property values. It significantly alters the essential character of the locality, and will reduce our quality of life for many years to come.

Signature	Print Name	Address	Email
Natane Brun	Natane Brun	9 Hovey Lane	naturebrun@gmail.com
Marlette McLeod	Marlette McLeod	27 Misty Hollow	Wilton, ME
Denise McLeod	Denise McLeod	6 Hennessey Ave	denise.mcleod@me.com
Denise McLeod	Denise McLeod	6 Hennessey Ave	denise.mcleod@me.com
Alma McLeod	Alma McLeod	2 Bouchard Dr	
Julie Howard Jr	Julie Howard Jr	17 Bouchard	
Corinne McLeod	Corinne McLeod	17 Bouchard	corinnemc@me.com
Mary Lou Zeman	Mary Lou Zeman	30 Hennessey Ave	MaryLouZeman@me.com
Brian Zeman	Brian Zeman	30 Bouchard Dr	brian.zeman@me.com
Rhina Davies	Rhina Davies	50 Bouchard	
Rita Allen	Rita Allen	60 Bow St. Freeport	
Russ Meneghe	Russ Meneghe	31 Bouchard Dr	
Corinne McLeod	Corinne McLeod	9 Hennessey Ave	corinnemc@me.com
Abby McLeod	Abby McLeod	17 Hennessey	
Michelle Christy	Michelle Christy	3 Hennessey	
Michelle Christy	Michelle Christy	31 Bouchard	MichelleChristy@me.com
John G. Jones	John G. Jones		
John G. Jones	John G. Jones	2 Bouchard, Georgetown	john.g.jones@me.com

Please return completed forms to Coalition to Save Our Neighborhood, c/o Steve and Kristen Fortier, 18 Bouchard Dr. Brunswick, ME

















# Petition

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Signature	Print Name	Address	Email
	ROBERT R. HASC	11 ...	...
	Terre Gouve	26 ...	...
	M. P. ...	15 Hennessey Ave	...
	Mary Parsons	33 Bouchard Dr.	...
	Dale ...	31 ...	...
	ROBERT A. MORRISON	37 Bouchard Dr.	nestame@guin.net
	Kristen Fortier	18 Bouchard Dr.	traveltips@ptd.com
	Steve Fortier	18 Bouchard Dr.	"
	Harriet Smith	24 ...	...
	GERARD BERNIER	43 ...	...
	Jennifer May	47 ...	...
	Deborah Tracy	79 ...	...
	WILLIAM RUSSELL	13 ...	...
	...	...	...
	Anna Nelson	13 Bouchard Dr.	annelson_42@guin.net
	...	...	...
	Matt Miller	12 Bouchard	...
	...	...	...
	NESTA MORRISON	37 Bouchard Dr.	nestame@guin.net
	DOROTHY MCEVEY	31 Bouchard Dr.	vx, n @ guin.net
	...	...	...
	Judson Roper	11 ...	...
	BARBARA TAYLOR	15 COUNTRY LN	...
	Anne Serra	14 Bouchard Dr.	...

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Alex Cornell  
Petition

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Signature	Print Name	Address	Email
	ROBERT A. MORRISON	37 Bouchard Dr	roberta@me.com
	Steve Fortier	18 Bouchard Dr	stevefortier@me.com
	Kristen Fortier	18 Bouchard Dr	kfortier@me.com
	Howard Smith	34 Bouchard Dr	hsmith@me.com
	EDWARD BENNETT	43 Bouchard Dr	edwardbennett@me.com
	Simon May	47 Bouchard Dr	simonmay@me.com
	David Taylor	72 Bouchard Dr	dtaylor@me.com
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	Andrew Nelson	13 Bouchard Dr	andrewnelson@me.com
	Matt Miller	12 Bouchard Dr	mmiller@me.com
	NESTA MORRISON	33 Bouchard Dr	nesta@me.com
	DEROTHY MCEYOY	31 Bouchard Dr	dorothy@me.com
	Cathleen Morrison	12 Bouchard Dr	cathleen@me.com
	Emma Russell	51 Bouchard Dr	emma@me.com
	Barbara Fortier	5 Country Lane	barbara@me.com
	Anne Smith	14 Bouchard Dr	anne@me.com

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