

Packet from Charles Wallace

PROFESSIONAL RESUME

CHARLES F. WALLACE, JR., P.E.

PRESIDENT

Mr. Wallace is a Professional Engineer registered in the states of Maine, Massachusetts, New Hampshire, and North Carolina (formerly). He is a full member of the Institute of Noise Control Engineering and a Diplomate of the American College of Forensic Examiners. He earned a B.S. in Engineering Physics in 1965 and an M.B.A. in 1972, both from the University of Maine at Orono. He has been practicing since 1965. In 1970, he began to focus his career as an environmental professional. In 1977, Mr. Wallace formed the company now known as Resource Systems Engineering. Since that time, all company activities, computer system development, computer modeling, designs, permits, and studies have been completed under his direct supervision.

Mr. Wallace has been responsible for project management, detailed designs, and preparation of comprehensive environmental impact studies on major projects in Maine, Michigan, Minnesota, Wisconsin, Massachusetts, North Carolina, and Nova Scotia, Canada. In Maine alone, he has provided environmental engineering and full permit services for more than 40 projects, including seven biomass energy projects, three major waste-to-energy projects, and three bulky waste recycling facilities. Since 1974, Mr. Wallace has worked on a variety of projects in the pulp and paper industry and has experience with lumber and composition board mills. In each project, he has been responsible for process and project designs/reviews and the preparation or coordination of environmental studies including noise and visual impact analyses, air and water quality studies, water quantity evaluations, environmental site assessments, solid waste management, and associated analysis. Mr. Wallace has been the project manager senior engineer on bulk oil storage facilities. He also was the Project Manager and Service Engineer investigating the feasibility of a wood waste composite manufacturing plant and a starch from potato waste project. In several projects, Mr. Wallace's computer models and feasibility studies were used in support of multimillion-dollar financings. In other cases, his fatal flaw analyses led to successful project sitings and project redesigns to minimize environmental impacts.

Since 1973, Mr. Wallace has been responsible for the preparation of Oil Spill Prevention, Control, and Countermeasures (SPCC) Plans; Stormwater Pollution Prevention Plans; Integrated Spill Contingency Plans; and Facility Emergency Response Plans designed to protect human health and the environment from accidental releases of oil or chemicals. Mr. Wallace has completed hazard analyses and capability assessments for electric power generating facilities, waste management and disposal facilities, and hazardous waste treatment and storage facilities. Clients have included both private industry and government agencies. He has developed comprehensive environmental compliance programs and conducted compliance audits of major and minor facilities. These programs are designed to protect clients from untoward litigation and demonstrate good engineering practices applied to oil and chemical management. Mr. Wallace has also conducted several environmental site assessments for industrial and commercial properties including many underground storage tank removals. In some cases, these assessments lead to subsurface investigations of soil and groundwater contamination, site remediation, and recovery of eligible costs from Maine's Groundwater Protection Fund. He prepared Site Safety and Health Plans for this work. Mr. Wallace presented a seminar on SPCC planning at a workshop co-hosted by the Maine Department of Environmental Protection. He has conducted professional seminars on environmental noise control regulations and instructed training classes in hazardous waste operations and emergency response and pollution prevention in accordance with Occupational Safety and Health Administration and U.S. Environmental Protection Agency standards (40-hour and 8-hour HAZWOPER).

Mr. Wallace was responsible for site location, permits, and detailed design of a wood waste-to-fuel facility in Lewiston, Maine; three phases of a comprehensive, regional-scale, solid waste recycling facility targeted for Mexico, Maine; the Regional Waste Systems bulky waste recycling facility to serve at least 27 communities in the Greater Portland, Maine, area; and a 1,500 ton-per-day construction and demolition material recycling facility in Brockton, Massachusetts. The Regional Waste Systems facility was the first of its kind in Maine to integrate bulky waste and urban wood processing, composting, and landfilling all on one site. Although not constructed. It was also the first to be licensed under Maine's complex solid waste laws. He has also prepared visual impact assessments and alternative design and routing evaluations for a 5.5-mile, 115-kva transmission line in Stratton, Maine and a 5-mile, 115-kva transmission line in West Rockport, Maine. He was directly responsible for development of the Aroostook Valley Electric Company (formerly Fairfield Energy Venture) Ash Utilization Program, touted by the Maine Department of Environmental Protection as the best in Maine.

Mr. Wallace has assisted private individuals with the complex permit process of rebuilding residential structures in shore land zones, within 100-year floodplains, and on coastal sand dunes on substandard lots.

Mr. Wallace was retained as an expert witness in the field of environmental licenses on a major case involving development of a wind energy project in northwestern Maine. The case was settled out of court. Mr. Wallace has testified before the Maine legislature on environmental laws and worked with the Maine Department of Environmental Protection on a wide variety of environmental rules and regulations, including air quality, noise, solid waste, and licensing procedures. Mr. Wallace has also been retained by clients as an expert witness during arbitration proceedings and litigation involving project permits and after the fact impacts of substandard erosion and sediment controls associated with large scale subdivisions.

Mr. Wallace has attended courses, seminars, and workshops on stormwater and erosion control design, DEP Best Management Practices for Stormwater Management, water rights/allocation/and resource management, ethics for environmental professionals, above ground and underground storage tank technology, remediation of petroleum-contaminated sites, implementing the 1990 Clean Air Act, environmental liability, atmospheric dispersion modeling, and asbestos management.

Mr. Wallace is a lifetime member of Sigma Pi Sigma, a national physics honor society and served on the executive and legislative review committees of the Maine Association of Planners. He is a member of the Maine Resource Recovery Association; Air & Waste Management Association; American Consulting Engineers Council; American College of Forensic Examiners and Consulting Engineers of Maine. He served on the Maine Air Quality Advisory Committee as the Consulting Engineers of Maine representative to the Maine Department of Environmental Protection. He also served on the Maine Chamber & Business Alliance Environmental Committee. Other memberships include the Maine Chamber and Business Alliance, Natural Resources Council of Maine, and Friends of Casco Bay. Civic activities include commissioner of the Brunswick Parks and Recreation Department (two terms), Board of Directors of the Brunswick Golf Club (two terms, Chair of the Physical Plant Committee, Member of the Finance Committee), and coach and Boards of Directors of Brunswick's Youth Soccer and Youth Hockey Leagues where he was instrumental in finding and developing new soccer fields and construction of an outside ice arena. He served on the Executive Board of the Coastal Conservation Commission. He is also serving on the Brunswick Town Council's Citizens Advisory Board for an all-tide Public boat launch located in an economically sensitive coastal area. He was instrumental in focusing attention on good engineering practices applied to this premier coastal access project and prepared/presented testimony at several public workshops and regulatory hearings.

Charles F. Wallace, Jr., PE*, President
Resource Systems Engineering

Mr. Wallace has substantial experience guiding industry, municipalities and state agencies in the preparation and review of environmental noise policies and plans. His knowledge of environmental acoustics has been requested and utilized by a wide geographical range of clients and regulatory bodies. His engineering experience spans over forty-five years including thirty-six years experience in acoustics. Mr. Wallace has been the principal and Senior Engineer with RSE, having completed over three hundred sound level studies and noise mitigation plans.

The following are public and private sectors RSE/Charles F. Wallace, Jr. has assisted with environmental (indoor & outdoor) acoustic issues:

- **Wind Energy** – *utility, commercial, and residential scale studies, permits & compliance testing*
- **Communications** - *cellular telephone towers and facilities*
- **Construction** - *heavy industrial, commercial, & residential*
- **Defense** - *ship building, construction of new facilities, testing new fabrication methods*
- **Energy** - *natural gas pipelines, compressor stations, LNG facilities, electric substations*
- **Entertainment** - *outdoor concert and event facilities, indoor event facilities*
- **Manufacturing** - *heavy & light industrial*
- **Mining & Quarry** - *blasting, drilling, pumping, and excavation*
- **Municipalities** - *ordinance development, enforcement, peer reviews, workshops on physics of sound*
- **Power Generation** – *gas-fired plants, biomass plants and wind farms*
- **Pulp & Paper** - *paper and chipping mills, wood handling & storage facilities*
- **Recreation** - *raceways, sports facilities, public and private shooting ranges*
- **Recycling** - *transfer stations, material processing*
- **Regulatory Agencies** - *testimony, regulation development, acoustic seminars – local and state*
- **Solid Waste** - *landfills, incinerators, refuse-derived fuel facilities, waste to energy*
- **Metal Fabrication** - *smelting, foundries, recycling*
- **Transportation** - *road & highway design, air planes, helicopters, cargo terminals*
- **Wood Processing** - *sawmills, wood yards, mobile equipment*
- **Education** – *noise control engineering protecting residential neighborhoods from transportation noise*
- **Health Care** – *emergency rooms, Life Flight facilities, HVAC systems*
- **Residential/Housing** – *indoor and outdoor sound levels and mitigation*
- **Houses of Worship** - *indoor and outdoor sound levels and mitigation*

*Licensed Professional Engineer in four states (currently active in three) with broad based environmental engineering experience including a focus practice in environmental acoustics since 1974.



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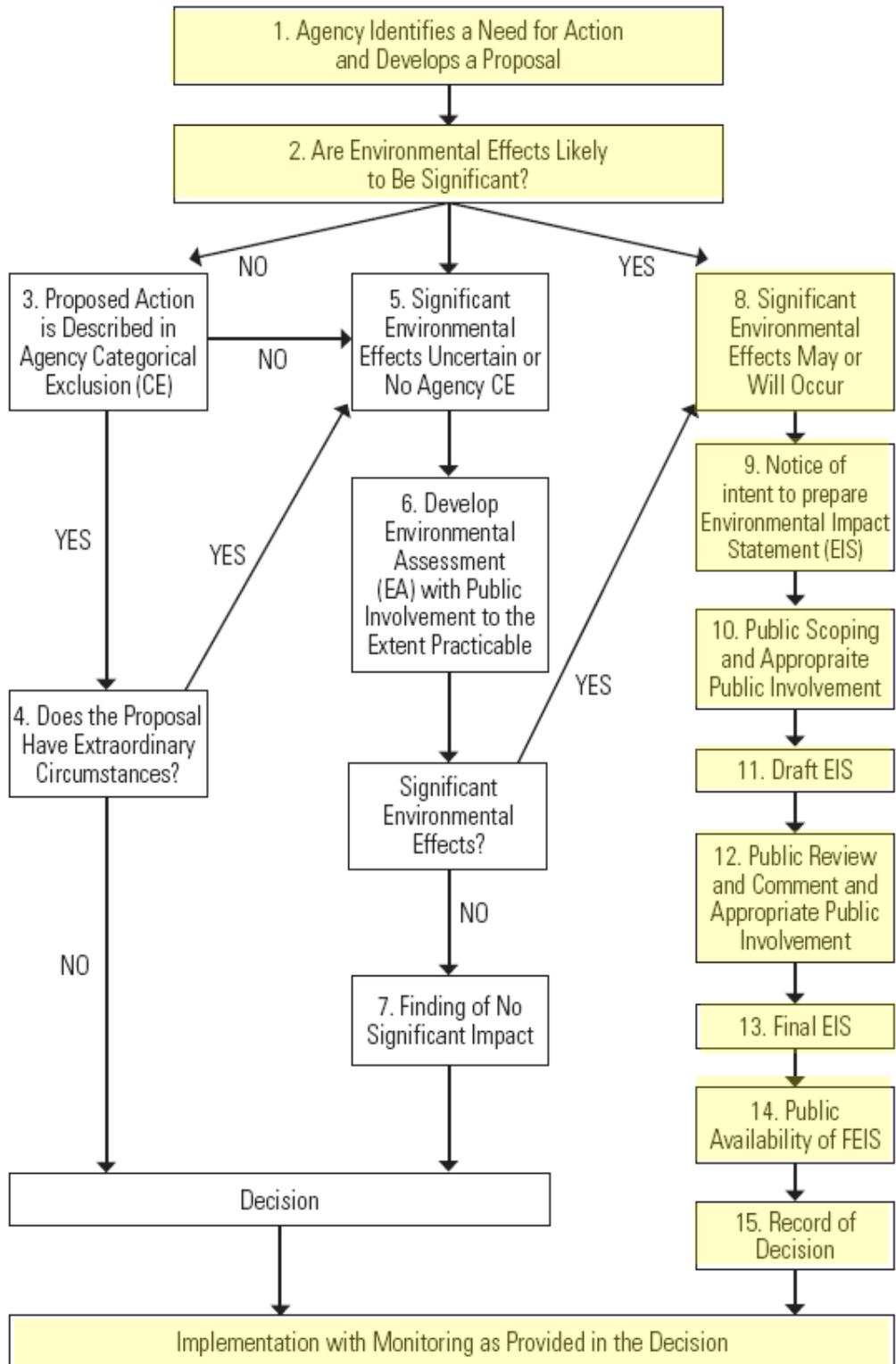
A Citizen's Guide to the NEPA

*Having Your
Voice Heard*



DECEMBER 2007

The NEPA Process



**Significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS or the Record of Decision (CEQ NEPA Regulations, 40 C.F.R. § 1502.9(c)).*

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This guide is based on research and consultations undertaken by the Council on Environmental Quality (CEQ) concerning the need for a Citizen's Guide to the National Environmental Policy Act (NEPA). Participants in the NEPA Regional Roundtables held in 2003-2004 clearly voiced the need for a guide that provides an explanation of NEPA, how it is implemented, and how people outside the Federal government — individual citizens, private sector applicants, members of organized groups, or representatives of Tribal, State, or local government agencies — can better participate in the assessment of environmental impacts conducted by Federal agencies (see <http://ceq.eh.doe.gov/ntf>). This guide is informational and does not establish new requirements. It is not and should not be viewed as constituting formal CEQ guidance on the implementation of NEPA, nor are recommendations in this guide intended to be viewed as legally binding.

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Environmental Quality NEPA Implementing
Regulations

List of Acronyms

CE:	Categorical Exclusion
CEQ:	Council on Environmental Quality
CFR:	Code of Federal Regulations
EA:	Environmental Assessment
EIS:	Environmental Impact Statement
EMS:	Environmental Management System
EPA:	The Environmental Protection Agency
FONSI:	Finding of No Significant Impact
NEPA:	The National Environmental Policy Act
NOI:	Notice of Intent
ROD:	Record of Decision

Purpose of the Guide

This guide has been developed to help citizens and organizations who are concerned about the environmental effects of federal decisionmaking to effectively participate in Federal agencies' environmental reviews under the National Environmental Policy Act (NEPA).¹ With some limited exceptions, all Federal agencies in the executive branch have to comply with NEPA before they make final decisions about federal actions that could have environmental effects. Thus, NEPA applies to a very wide range of federal actions that include, but are not limited to, federal construction projects, plans to manage and develop federally owned lands, and federal approvals of non-federal activities such as grants, licenses, and permits. The Federal Government takes hundreds of actions every day that are, in some way, covered by NEPA.

The environmental review process under NEPA provides an opportunity for you to be involved in the Federal agency decisionmaking process. It will help you understand what the Federal agency is proposing, to offer your thoughts on alternative ways for the agency to accomplish what it is proposing, and to offer your comments on the agency's analysis of the environmental effects of the proposed action and possible mitigation of potential harmful effects of such actions. NEPA requires Federal agencies to consider environmental effects that include, among others, impacts on social, cultural, and economic resources, as well as natural resources. Citizens often have valuable information about places and resources that they value and the potential environmental, social, and economic effects that proposed federal actions may have on those places and resources. NEPA's requirements provide you the means to work with the agencies so they can take your information into account.

¹ National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321-4347, available at www.nepa.gov.

History and Purpose of NEPA

Congress enacted NEPA in December, 1969, and President Nixon signed it into law on January 1, 1970. NEPA was the first major environmental law in the United States and is often called the “Magna Carta” of environmental laws. Importantly, NEPA established this country’s national environmental policies.

To implement these policies, NEPA requires agencies to undertake an assessment of the environmental effects of their proposed actions prior to making decisions. Two major purposes of the environmental review process are better informed decisions and citizen involvement, both of which should lead to implementation of NEPA’s policies.

Who is Responsible for Implementing NEPA?

Every agency in the executive branch of the Federal Government has a responsibility to implement NEPA. In NEPA, Congress directed that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in NEPA.² To implement NEPA’s policies, Congress prescribed a procedure, commonly referred to as “the NEPA process” or “the environmental impact assessment process.”

NEPA’s procedural requirements apply to all Federal agencies in the executive branch. NEPA does not apply to the President, to Congress, or to the Federal courts.³

Because NEPA implementation is an important responsibility of the Federal Government, many Federal agencies have established offices dedicated to NEPA policy and program oversight. Employees in these offices prepare NEPA guidance, policy, and procedures for the agency, and often make this information available to the public through sources such as Internet websites. Agencies are required to develop their own capacity within a NEPA program in order to develop analyses and documents (or review those prepared by others) to ensure informed decisionmaking.⁴ Most agency NEPA procedures are available on-line at the NEPA net website <http://ceq.eh.doe.gov/nepa/regs/agency/agencies.cfm>). Agency NEPA procedures are published in

² Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. §4332.

³ CEQ NEPA Regulations 40 C.F.R. §1508.12.

⁴ Council on Environmental Quality, “Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act” 40 C.F.R. section 1507.2, available at www.nepa.gov. Future references to the CEQ NEPA Regulations will be cited as : CEQ NEPA Regulations, 40 C.F.R. §1507.2.

National Environmental Policy Act Sec. 101
[42 USC § 4331]

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

the Federal Register for public review and comment when first proposed and some are later codified and published in the Code of Federal Regulations.⁵ If you experience difficulty locating an agency's NEPA procedures, you can write or call the agency NEPA point of contacts and ask for a copy of their procedures.⁶

To What Do the Procedural Requirements of NEPA Apply?

In NEPA, Congress recognized that the Federal Government's actions may cause significant environmental effects. The range of actions that cause significant environmental effects is broad and includes issuing regulations, providing permits for private actions, funding private actions, making federal land management decisions, constructing publicly-owned facilities, and many other types of actions. Using the NEPA process, agencies are required to determine if their proposed actions have significant environmental effects and to consider the environmental and related social and economic effects of their proposed actions.

NEPA's procedural requirements apply to a Federal agency's decisions for actions, including financing, assisting, conducting, or approving projects or programs; agency rules, regulations, plans, policies, or procedures; and legislative proposals.⁷ NEPA applies when a Federal agency has discretion to choose among one or more alternative means of accomplishing a particular goal.⁸

Frequently, private individuals or companies will become involved in the NEPA process when they need a permit issued by a Federal agency. When a company applies for a permit (for example, for crossing federal lands or impacting waters of the United States) the agency that is being asked to issue the permit must evaluate the environmental effects of the permit decision under NEPA. Federal agencies might require the private company or developer to pay for the preparation of analyses, but the agency remains responsible for the scope and accuracy of the analysis.

⁵ The draft agency implementing procedures, or regulations, are published in the Federal Register, and a public comment period is required prior to CEQ approval. Commenting on these agency regulations is one way to be involved in their development. Most agencies already have implementing procedures; however, when they are changed, the agency will again provide for public comment on the proposed changes.

⁶ See Appendices A and D for information on how to access agency points of contact and agency websites.

⁷ CEQ NEPA Regulations, 40 C.F.R. § 1508.18. Note that this section applies only to legislation drafted and submitted to Congress by federal agencies. NEPA does not apply to legislation initiated by members of Congress.

⁸ CEQ NEPA Regulations, 40 C.F.R. § 1508.23.

When Does NEPA Apply?

NEPA requires agency decisionmakers to make informed decisions. Therefore, the NEPA process must be completed before an agency makes a final decision on a proposed action. Good NEPA analyses should include a consideration of how NEPA's policy goals (Section 101) will be incorporated into the decision to the extent consistent with other considerations of national policy. NEPA does not require the decisionmaker to select the environmentally preferable alternative or prohibit adverse environmental effects. Indeed, decisionmakers in Federal agencies often have other concerns and policy considerations to take into account in the decisionmaking process, such as social, economic, technical or national security interests. But NEPA does require that decisionmakers be informed of the environmental consequences of their decisions.

The NEPA process can also serve to meet other environmental review requirements. For instance, actions that require the NEPA process may have an impact on endangered species, historic properties, or low income communities. The NEPA analysis, which takes into account the potential impacts of the proposed action and investigates alternative actions, may also serve as a framework to meet other environmental review requirements, such as the Endangered Species Act, the National Historic Preservation Act, the Environmental Justice Executive Order, and other Federal, State, Tribal, and local laws and regulations.⁹

Who Oversees the NEPA Process?

There are three Federal agencies that have particular responsibilities for NEPA. Primary responsibility is vested in the Council on Environmental Quality (CEQ), established by Congress in NEPA. Congress placed CEQ in the Executive Office of the President and gave it many responsibilities, including the responsibility to ensure that Federal agencies meet their obligations under the Act. CEQ oversees implementation of NEPA, principally through issuance and interpretation of NEPA regulations that implement the procedural requirements of NEPA. CEQ also reviews and approves Federal agency NEPA procedures, approves of alternative arrangements for compliance with NEPA in the case of emergencies, and helps to resolve disputes between Federal agencies and with other governmental entities and members of the public.

⁹ CEQ NEPA Regulations, 40 C.F.R. § 1502.25.

In 1978, CEQ issued binding regulations directing agencies on the fundamental requirements necessary to fulfill their NEPA obligations.¹⁰ The CEQ regulations set forth minimum requirements for agencies. The CEQ regulations also called for agencies to create their own implementing procedures that supplement the minimum requirements based on each agency's specific mandates, obligations, and missions.¹¹ These agency-specific NEPA procedures account for the slight differences in agencies' NEPA processes.

The Environmental Protection Agency's (EPA) Office of Federal Activities reviews environmental impact statements (EIS) and some environmental assessments (EA) issued by Federal agencies.¹² It provides its comments to the public by publishing summaries of them in the Federal Register, a daily publication that provides notice of Federal agency actions.¹³ EPA's reviews are intended to assist Federal agencies in improving their NEPA analyses and decisions.¹⁴

Another government entity involved in NEPA is the U.S. Institute for Environmental Conflict Resolution, which was established by the Environmental Policy and Conflict Resolution Act of 1998 to assist in resolving conflict over environmental issues that involve Federal agencies.¹⁵ While part of the Federal Government (it is located within the Morris K. Udall Foundation, a Federal agency located in Tucson, Arizona), it provides an independent, neutral, place for Federal agencies to work with citizens as well as State, local, and Tribal governments, private organizations, and businesses to reach common ground. The Institute provides dispute resolution alternatives to litigation and other adversarial approaches. The Institute is also charged with assisting the Federal Government in the implementation of the substantive policies set forth in Section 101 of NEPA.¹⁶

¹⁰ CEQ NEPA Regulations, 40 C.F.R. parts 1500-1508, available at www.nepa.gov.

¹¹ CEQ NEPA Regulations, 40 C.F.R. § 1507.3.

¹² Clean Air Act, 42 U.S.C. § 7609.

¹³ See Appendix B for information on the Federal Register.

¹⁴ For additional information see <http://www.epa.gov/compliance/nepa/index.htm>.

¹⁵ Environmental Policy and Conflict Resolution Act of 1998, 20 U.S.C. §§ 5601-5609.

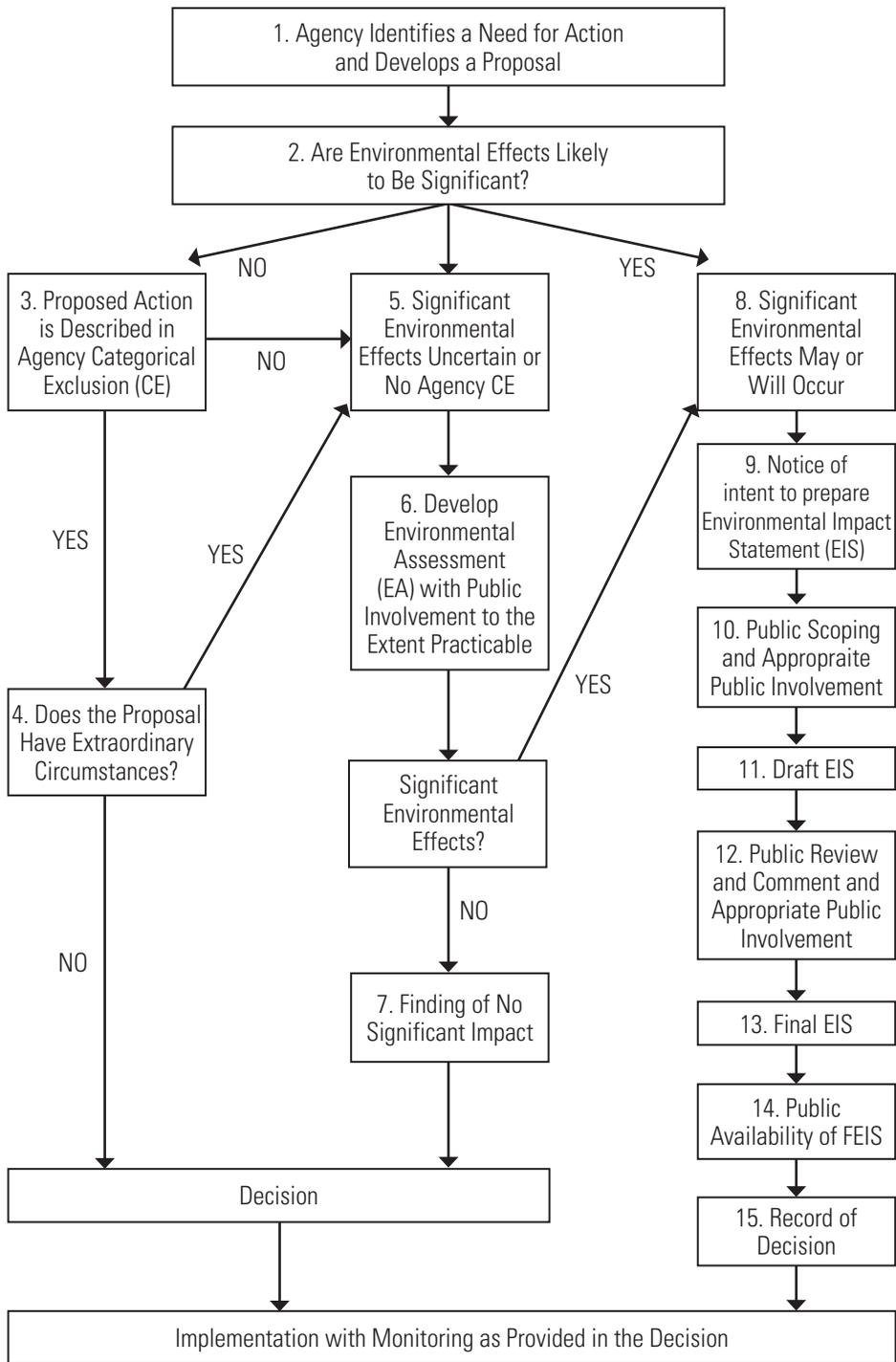
¹⁶ For a discussion of the relationship between Section 101 of NEPA and conflict resolution, including specific case examples and recommendations for strengthening that relationship see the National Environmental Conflict Resolution Advisory Committee, "Final Report — Submitted to the U.S. Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation," (April 2005), available at <http://www.ecr.gov> by clicking on "Resources" and "NEPA and ECR."

Navigating the NEPA Process

Each year, thousands of Environmental Assessments (EAs) and hundreds of Environmental Impact Statements (EISs) are prepared by Federal agencies. These documents provide citizens and communities an opportunity to learn about and be involved in each of those environmental impact assessments that are part of the Federal agency decisionmaking process. It is important to understand that commenting on a proposal is not a “vote” on whether the proposed action should take place. Nonetheless, the information you provide during the EA and EIS process can influence the decisionmakers and their final decisions because NEPA does require that federal decisionmakers be informed of the environmental consequences of their decisions.

This guide will help you better navigate through the NEPA process and better understand the roles of the various other actors. While reading the guide, please refer to the following flowchart, “The NEPA Process,” which details the steps of the NEPA process. For ease of reference, each step of the process is designated with a number which is highlighted in the text discussing that particular step. While agencies may differ slightly in how they comply with NEPA, understanding the basics will give you the information you need to work effectively with any agency’s process.

The NEPA Process



**Significant new circumstances or information relevant to environmental concerns or substantial changes in the proposed action that are relevant to environmental concerns may necessitate preparation of a supplemental EIS following either the draft or final EIS or the Record of Decision (CEQ NEPA Regulations, 40 C.F.R. § 1502.9(c)).*

The NEPA process begins when an agency develops a proposal to address a need to take an action.

The need to take an action may be something the agency identifies itself, or it may be a need to make a decision on a proposal brought to it by someone outside of the agency, for example, an applicant for a permit. Based on the need, the agency develops a proposal for action (Number 1 in Figure 1). If it is the only Federal agency involved, that agency will automatically be the “lead agency,” which means it has the primary responsibility for compliance with NEPA.

Some large or complex proposals involve multiple Federal agencies along with State, local, and Tribal agencies. If another Federal, State, local, or Tribal agency has a major role in the proposed action and also has NEPA responsibilities or responsibilities under a similar NEPA-like law¹⁷, that agency may be a “joint lead agency.” A “joint lead agency” shares the lead agency’s responsibility for management of the NEPA process, including public involvement and the preparation of documents. Other Federal, State, Tribal, or local government agencies may have a decision or special expertise regarding a proposed action, but less of a role than the lead agency. In that case, such a Federal, State, Tribal, or local government agency may be a “cooperating agency.”

A “cooperating agency” is an agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative). Thus, a “cooperating agency” typically will have some responsibilities for the analysis related to its jurisdiction or special expertise.

Once it has developed a proposed action, the agency will enter the initial analytical approach (Number 2 in Figure 1) to help it determine whether the agency will pursue the path of a Categorical Exclusion (CE), an Environmental Assessment (EA), or an Environmental Impact Statement (EIS).

¹⁷ About a quarter of the states have such laws; for example, New York, Montana, Washington, and California all have such laws. New York City also has such a law. A list with references is available at www.nepa.gov by clicking on “State Information” or directly at <http://ceq.eh.doe.gov/nepa/states.html>.

Special Situations

- ❖ On rare occasions, Congress may exempt an action from NEPA.
- ❖ If the agency needs to take an action that would typically require preparation of an environmental impact statement in response to an emergency, and there is insufficient time to follow the regular NEPA process, then the agency can proceed immediately to mitigate harm to life, property, or important resources, and work with CEQ to develop alternative arrangements for compliance with NEPA (40 C.F.R. §1506.11).
- ❖ The NEPA analyses and document may involve classified information. If the entire action is classified, the agency will still comply with the analytical requirements of NEPA, but the information will not be released for public review. If only a portion of the information is classified, the agency will organize the classified material so that the unclassified portions can be made available for review (40 C.F.R. §1507.3(c)).

Implementing the NEPA Process

Categorical Exclusions (CEs) (Number 3 in Figure 1)

A CE is a category of actions that the agency has determined does not individually or cumulatively have a significant effect on the quality of the human environment.¹⁸ Examples include issuing administrative personnel procedures, making minor facility renovations (such as installing energy efficient lighting), and reconstruction of hiking trails on public lands. Agencies develop a list of CEs specific to their operations when they develop or revise their NEPA implementing procedures in accordance with CEQ's NEPA regulations.

A CE is based on an agency's experience with a particular kind of action and its environmental effects. The agency may have studied the action in previous EAs, found no significant impact on the environment based on the analyses, and validated the lack of significant impacts after the implementation. If this is the type of action that will be repeated over time, the agency may decide to amend their implementing regulations to include the action as a CE. In these cases, the draft agency procedures are published in the *Federal Register*, and a public comment period is required. Participation in these comment periods is an important way to be involved in the development of a particular CE.

¹⁸ CEQ NEPA Regulations, 40 C.F.R. § 1508.4.

If a proposed action is included in the description provided for a listed CE established by the agency, the agency must check to make sure that no extraordinary circumstances exist that may cause the proposed action to have a significant effect in a particular situation. Extraordinary circumstances typically include such matters as effects to endangered species, protected cultural sites, and wetlands (Number 4 in Figure 1). If there are no extraordinary circumstances indicating that the effects of the action may be significant, then the agency can proceed with the action.

If the proposed action is not included in the description provided in the CE established by the agency, or there are extraordinary circumstances, the agency must prepare an EA or an EIS, or develop a new proposal that may qualify for application of a CE. When the agency does not know or is uncertain whether significant impacts are expected, the agency should prepare an EA to determine if there are significant environmental effects.

Environmental Assessments (EA) (Number 5 in Figure 1)

The purpose of an EA is to determine the significance of the environmental effects and to look at alternative means to achieve the agency's objectives. The EA is intended to be a concise document that (1) briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) aids an agency's compliance with NEPA when no environmental impact statement is necessary; and (3) facilitates preparation of an Environmental Impact Statement when one is necessary.¹⁹

An EA should include brief discussions of:

- ❖ the need for the proposal,
- ❖ alternative courses of action for any proposal which involves unresolved conflicts concerning alternative uses of available resources,
- ❖ the environmental impacts of the proposed action and alternatives, and
- ❖ a listing of agencies and persons consulted.²⁰

¹⁹ CEQ NEPA Regulations, 40 C.F.R. § 1508.9.

²⁰ CEQ NEPA Regulations, 40 C.F.R. § 1508.9(b).

Because the EA serves to evaluate the significance of a proposal for agency actions, it should focus on the context and intensity of effects that may “significantly” affect the quality of the human environment.²¹ Often the EA will identify ways in which the agency can revise the action to minimize environmental effects.

When preparing an EA, the agency has discretion as to the level of public involvement (Number 6 in Figure 1). The CEQ regulations state that the agency shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing EAs.²² Sometimes agencies will choose to mirror the scoping and public comment periods that are found in the EIS process. In other situations, agencies make the EA and a draft FONSI available to interested members of the public.

Some agencies, such as the Army, require that interested parties be notified of the decision to prepare an EA, and the Army also makes the EA publicly available. Some agencies keep a notification list of parties interested in a particular kind of action or in all agency actions. Other agencies simply prepare the EA. Not all agencies systematically provide information about individual EAs, so it is important that you read the specific implementing procedures of the proposing agency or ask the local NEPA point of contact working on the project about the process and let the appropriate agency representative know if you are interested in being notified of all NEPA documents or NEPA processes related to a particular type of action.

The EA process concludes with either a Finding of No Significant Impact (FONSI) (Number 7 in Figure 1) or a determination to proceed to preparation of an EIS. A FONSI is a document that presents the reasons why the agency has concluded that there are no significant environmental impacts projected to occur upon implementation of the action.²³ The EA is either summarized in the FONSI or attached to it.

In two circumstances, the CEQ regulations require agencies to make the proposed FONSI available for public review for 30 days. Those situations are:

- ❖ if the type of proposed action hasn’t been done before by the particular agency, or

²¹ CEQ NEPA Regulations 40 C.F.R. § 1508.27.

²² CEQ NEPA Regulations, 40 C.F.R. § 1501.4(e)(2).

²³ Government Printing Office Electronic Information Enhancement Act of 1993, 44 U.S.C. §§ 4101-4104.

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- ❖ if the action is something that typically would require an EIS under the agency NEPA procedures.²⁴

If this is the case, the FONSI is usually published in the *Federal Register*,²⁵ and the notice of availability of the FONSI will include information on how and where to provide your comments. If the requirement for a 30 day review is not triggered the FONSI often will not be published in the Federal Register. It may be posted on the agency's website, published in local newspapers or made available in some other manner. If you are interested in a particular action that is the subject of an EA, you should find out from the agency how it will make the FONSI available.

Environmental Impact Statements (EIS) (Number 8 in Figure 1)

A Federal agency must prepare an EIS if it is proposing a major federal action significantly affecting the quality of the human environment.²⁶ The regulatory requirements for an EIS are more detailed than the requirements for an EA or a categorical exclusion and are explained below.

Notice of Intent and Scoping (Numbers 9 and 10 in Figure 1)

The EIS process begins with publication of a Notice of Intent (NOI), stating the agency's intent to prepare an EIS for a particular proposal. (Number 9 in Figure 1). The NOI is published in the Federal Register, and provides some basic information on the proposed action in preparation for the scoping process (Number 10 in Figure 1).²⁷ The NOI provides a brief description of the proposed action and possible alternatives. It also describes the agency's proposed scoping process, including any meetings and how the public can get involved. The NOI will also contain an agency point of contact who can answer questions about the proposed action and the NEPA process.

The scoping process is the best time to identify issues, determine points of contact, establish project schedules, and provide recommendations to the agency. The overall goal is to define the scope of issues to be addressed in depth in the analyses that will be included in the EIS. Specifically, the scoping process will:

²⁴ 42 U.S.C. § 4332(C).

²⁵ Scoping is a NEPA term of art that describes one major public involvement aspect of the NEPA EIS process (CEQ NEPA Regulations, 40 C.F.R. § 1501.7).

²⁶ CEQ NEPA Regulations, 40 C.F.R. § 1501.7. More information on scoping can be found in CEQ's guidance on scoping at www.nepa.gov.

²⁷ Public hearings are run in a formal manner, with a recording or minutes taken of speakers' comments. Public meetings may be held in a variety of formats, and may be much more informal than hearings.

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- ❖ Identify people or organizations who are interested in the proposed action;
 - ❖ Identify the significant issues to be analyzed in the EIS;
 - ❖ Identify and eliminate from detailed review those issues that will not be significant or those that have been adequately covered in prior environmental review;
 - ❖ Determine the roles and responsibilities of lead and cooperating agencies;
 - ❖ Identify any related EAs or EISs;
 - ❖ Identify gaps in data and informational needs;
 - ❖ Set time limits for the process and page limits for the EIS;
 - ❖ Identify other environmental review and consultation requirements so they can be integrated with the EIS; and
 - ❖ Indicate the relationship between the development of the environmental analysis and the agency's tentative decisionmaking schedule.²⁸

As part of the process, agencies are required to identify and invite the participation of interested persons. The agency should choose whatever communications methods are best for effective involvement of communities, whether local, regional, or national, that are interested in the proposed action. Video conferencing, public meetings, conference calls, formal hearings, or informal workshops are among the legitimate ways to conduct scoping. It is in your interest to become involved as soon as the EIS process begins and to use the scoping opportunity to make thoughtful, rational presentations on impacts and alternatives. Some of the most constructive and beneficial interaction between the public and an agency occurs when citizens identify or develop reasonable alternatives that the agency can evaluate in the EIS.

²⁸ CEQ NEPA Regulations, 40 C.F.R. § 1501.7. More information on scoping can be found in CEQ's guidance on scoping at www.nepa.gov by clicking on "CEQ Guidance."

NEPA is About People and Places



Tent Rocks, Jemez Mountains.



Southern Regional NEPA Roundtable discussion on the NEPA Task Force report *Modernizing NEPA Implementation*



US District Courthouse, Sioux Falls, SD

From top left: Tent Rocks photo courtesy of Michael Dechter; Courthouse, Sioux Falls, South Dakota, photo courtesy of General Services Administration, <http://rmrpbs.gsa.gov/internet/PBSWeb.nsf/0/a704c21a7427f8d4872569b50079ac3d?OpenDocument>

Draft EIS (Number 11 in Figure 1)

The next major step in the EIS process that provides an opportunity for your input is when the agencies submit a draft EIS for public comment. The Environmental Protection Agency (EPA) publishes a Notice of Availability in the Federal Register informing you and other members of the public that the draft is available for comment (Number 12 in Figure 1). The EPA notices are also available at <http://www.epa.gov/compliance/nepa/eisdata.html>. Based on the communication plan established by the agency, websites, local papers, or other means of public notice may also be used. The comment period is at least 45 days long; however, it may be longer based on requirements spelled out in the agency specific NEPA procedures or at the agency's discretion. During this time, the agency may conduct public meetings or hearings as a way to solicit comments.²⁹ The agency will also request comments from other Federal, State, Tribal, and local agencies that may have jurisdiction or interest in the matter.

One key aspect of a draft EIS is the statement of the underlying purpose and need.³⁰ Agencies draft a "Purpose and Need" statement to describe what they are trying to achieve by proposing an action. The purpose and need statement explains to the reader why an agency action is necessary, and serves as the basis for identifying the reasonable alternatives that meet the purpose and need.

The identification and evaluation of alternative ways of meeting the purpose and need of the proposed action is the heart of the NEPA analysis. The lead agency or agencies must, "objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated."³¹ Reasonable alternatives are those that substantially meet the agency's purpose and need. If the agency is considering an application for a permit or other federal approval, the agency must still consider all reasonable alternatives. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant. Agencies are obligated to evaluate all reasonable alternatives or a range of reasonable alternatives in enough detail so that a reader can compare and contrast the environmental effects of the various alternatives.

²⁹ Public hearings are run in a formal manner, with a recording or minutes taken of speakers' comments. Public meetings may be held in a variety of formats, and may be much more informal than hearings.

³⁰ CEQ NEPA Regulations, 40 C.F.R. § 1502.13.

³¹ CEQ NEPA Regulations, 40 C.F.R. § 1502.14.

Agencies must always describe and analyze a “no action alternative.” The “no action” alternative is simply what would happen if the agency did not act upon the proposal for agency action. For example, in the case of an application to the U.S. Army Corps of Engineers for a permit to place fill in a particular area, the “no action” alternative is no permit. But in the case of a proposed new management plan for the National Park Service’s management of a national park, the “no action” alternative is the continuation of the current management plan.

If an agency has a preferred alternative when it publishes a draft EIS, the draft must identify which alternative the agency prefers. All agencies must identify a preferred alternative in the final EIS, unless another law prohibits it from doing so.³²

The agency must analyze the full range of direct, indirect, and cumulative effects of the preferred alternative, if any, and of the reasonable alternatives identified in the draft EIS. For purposes of NEPA, “effects” and “impacts” mean the same thing. They include ecological, aesthetic, historic, cultural, economic, social, or health impacts, whether adverse or beneficial.³³ It is important to note that human beings are part of the environment (indeed, that’s why Congress used the phrase “human environment” in NEPA), so when an EIS is prepared and economic or social and natural or physical environmental effects are interrelated, the EIS should discuss all of these effects.³⁴

CEQ NEPA Regulation Section 1508.8
[40 C.F.R. § 1508.8.]

“Effects” include:

- (a) Direct effects, which are caused by the action and occur at the same time and place.
- (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

³² CEQ NEPA Regulations, 40 C.F.R. § 1502.14(e).

³³ CEQ NEPA Regulations, 40 C.F.R. §§ 1508.7, 1508.8.

³⁴ CEQ NEPA Regulations, 40 C.F.R. § 1508.14.

In addition to the purpose and need, identification of reasonable alternatives, and the environmental effects of the alternatives, the draft EIS will contain a description of the environment that would be affected by the various alternatives.

The EIS will also have a list of who prepared the document and their qualifications,³⁵ a table of contents, and an index.³⁶ The agency may choose to include technical information in appendices that are either circulated with the draft or readily available for review.³⁷

Final EIS (Number 13 in Figure 1)

When the public comment period is finished, the agency analyzes comments, conducts further analysis as necessary, and prepares the final EIS. In the final EIS, the agency must respond to the substantive comments received from other government agencies and from you and other members of the public.³⁸ The response can be in the form of changes in the final EIS, factual corrections, modifications to the analyses or the alternatives, new alternatives considered, or an explanation of why a comment does not require the agency's response.³⁹ Often the agency will meet with other agencies that may be affected by the proposed action in an effort to resolve an issue or mitigate project effects. A copy or a summary of your substantive comments and the response to them will be included in the final EIS.⁴⁰

When it is ready, the agency will publish the final EIS and EPA will publish a Notice of Availability in the Federal Register. The Notice of Availability marks the start of a waiting period (Number 14 in Figure 1). A minimum of 30 days must pass before the agency can make a decision on their proposed action unless the agency couples the 30 days with a formal internal appeals process.⁴¹ This provides time for the agency decisionmaker to consider the purpose and need, weigh the alternatives, balance their objectives, and make a decision.

There is an additional (but rarely used) procedure worth noting: pre-decision referrals to CEQ.⁴² This referral process takes place when

³⁵ CEQ NEPA Regulations, 40 C.F.R. § 1502.17.

³⁶ CEQ NEPA Regulations, 40 C.F.R. § 1502.10.

³⁷ CEQ NEPA Regulations, 40 C.F.R. § 1502.18.

³⁸ CEQ NEPA Regulations, 40 C.F.R. § 1503.4.

³⁹ CEQ NEPA Regulations, 40 C.F.R. § 1503.4(a).

⁴⁰ CEQ NEPA Regulations, 40 C.F.R. § 1503.4(b).

⁴¹ CEQ NEPA Regulations, 40 C.F.R. § 1506.10. If the end of the 30 day wait period is less than 90 days after the notice of availability of the Draft EIS, was published in the Federal Register, then the decision must await the expiration of the 90 days.

⁴² CEQ NEPA Regulations, 40 C.F.R. part 1504.

EPA or another Federal agency determines that proceeding with the proposed action is environmentally unacceptable. If an agency reaches that conclusion, the agency can refer the issue to CEQ within 25 days after the Notice of Availability for the final EIS is issued. CEQ then works to resolve the issue with the agencies concerned. CEQ might also refer the agencies to the U.S. Institute for Environmental Conflict Resolution to try to address the matter before formal elevation.⁴³ There is no provision for citizens to formally refer an action to CEQ; however, CEQ typically provides an opportunity for public involvement in a referral.

Record of Decision (ROD) (Number 15 in Figure 1)

The ROD is the final step for agencies in the EIS process. The ROD is a document that states what the decision is; identifies the alternatives considered, including the environmentally preferred alternative; and discusses mitigation plans, including any enforcement and monitoring commitments.⁴⁴ In the ROD, the agency discusses all the factors, including any considerations of national policy, that were contemplated when it reached its decision on whether to, and if so how to, proceed with the proposed action. The ROD will also discuss if all practical means to avoid or minimize environmental harm have been adopted, and if not, why they were not.⁴⁵ The ROD is a publicly available document. Sometimes RODs are published in the Federal Register or on the agency's website, but if you are interested in receiving the ROD you should ask the agency's point of contact for the EIS how to obtain a copy of the ROD.

⁴³ The U.S. Institute reports disputes it is involved with to CEQ and requests concurrence from CEQ to engage in those disputes involving two or more federal agencies.

⁴⁴ CEQ NEPA Regulations, 40 C.F.R. § 1505.2.

⁴⁵ CEQ NEPA Regulations, 40 C.F.R. § 1505.2(c).

Environmental Management Systems (EMS)

Executive Order (EO 13423) and a subsequent memorandum issued from the Office of Management and Budget and CEQ direct all agencies to adopt an Environmental Management System (EMS). “An EMS is a systematic approach to identifying and managing an organization’s environmental obligations and issues that can complement many aspects of the NEPA review process.” (Boling, E.A. 2005. Environmental Management Systems and NEPA: A Framework for Productive Harmony. The Environmental Law Reporter. 35 ELR 10022. Environmental Law Institute). EMSs are typically used by organizations and agencies to set up the procedures that will help them comply with the specific requirements of environmental laws and regulations, such as air and water permits. EMSs can be particularly useful in NEPA in the context of post-decision monitoring and mitigation. Using the procedures provided by an EMS, agencies can better ensure they are proper implementation of mitigation measures and provide a mechanism for monitoring the actual effects of the mitigation. (CEQ, Aligning National Environmental Policy Act Processes with Environmental Management Systems — A Guide for NEPA and EMS Practitioners (April 2007) available at www.nepa.gov by clicking on “Aligning NEPA Processes with Environmental Mangement Systems.”

Supplemental EIS (Asterisk in Figure 1)

Sometimes a Federal agency is obligated to prepare a supplement to an existing EIS. An agency must prepare a supplement to either a draft or final EIS if it makes substantial changes in the proposed action that are relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. An agency may also prepare a supplemental EIS if it determines that doing so will further the purposes of NEPA.⁴⁶ A supplemental EIS is prepared in the same way as a draft or final EIS, except that scoping is not required. If a supplement is prepared following a draft EIS, the final EIS will address both the draft EIS and supplemental EIS.

⁴⁶ CEQ NEPA Regulations, 40 C.F.R. § 1502.9(c).

EPA's Review

EPA plays a critical role in other agencies' NEPA processes. EPA is required to review and provide comments on the adequacy of the analysis and the impact to the environment.⁴⁷ EPA uses a rating system that summarizes its recommendations to the lead agency (see Appendix C). If EPA determines that the action is environmentally unsatisfactory, it is required by law to refer the matter to CEQ.

The Office of Federal Activities in EPA is the official recipient of all EISs prepared by Federal agencies, and publishes the notices of availability in the Federal Register for all draft, final, and supplemental EISs. The publication of these notices start the official clock for public review and comment periods and wait periods.⁴⁸ In addition to the Federal Register, the notices and summaries of the EPA comments are available at <http://www.epa.gov/compliance/nepa/eisdata.html>.

When and How to Get Involved

It Depends on the Agency

To determine the specific steps in the process where public involvement will be the most effective, it is very important to review the agency's NEPA implementing procedures. As previously mentioned, NEPA processes differ among agencies. For example, the Federal Highway Administration provides a 30 day comment period (with or without a public meeting) on all EAs that they develop before a FONSI is issued while some other agencies have no required comment periods for EAs.⁴⁹

In addition, new legislation can change the way NEPA is implemented in agencies. For example, after the passage of the "Safe, Accountable, Flexible, Efficient Transportation Equity Act", which is transportation legislation that Congress passed in August 2005, the Department of Transportation updated its NEPA processes to implement the new transportation legislation. The Federal Highway Administration and Federal Transit Administration have kept websites up to date and are tracking the evolving guidance at <http://www.environment.fhwa.dot.gov/strmlng/index.asp> by clicking on "SAFETEA-LU."

⁴⁷ Clean Air Act, 42 U.S.C. § 7609.

⁴⁸ CEQ NEPA Regulations, 40 C.F.R. § 1506.10.

⁴⁹ Federal Highway Administration NEPA Regulations, 23 C.F.R. § 771.119 (2005).

**Safe, Accountable, Flexible, Efficient
Transportation Equity Act:
A Legacy for Users
(SAFETEA-LU), Public Law 109-59**

Congress included some modifications to the regular NEPA process for proposed actions that require preparation of EISs in SAFETEA-LU. For example, SAFETEA-LU requires the lead agency to provide an opportunity as early as practicable during the environmental review process for the public to weigh in on both defining the purpose and need for a proposal and determining the range of alternatives to be considered. Congress provided for a process whereby some states could assume responsibilities for all environmental compliance, including NEPA. Congress also established a 180 day statute of limitations for lawsuits challenging agency approvals of projects.

If you are involved or anticipate becoming involved in the NEPA process for a proposed highway or federal mass transit proposal, you should become familiar with the specific requirements of SAFETEA-LU for the NEPA process. One good way to do this is check information on the Federal Highway Administration's website at www.fhwa.dot.gov/safetealu. By clicking on "Cross Reference" you will find both the requirements of the law and FHWA regulations and implementing guidance.

You should also be aware that in the context of highway planning, much work is done at a pre-NEPA stage through statewide, municipal, and rural planning processes. These processes often set the stage for the NEPA process and you should be aware of your opportunities to get involved at that earlier stage. You can learn more about these processes by going to the Federal Highway Administration's website listed above, or by obtaining a copy of "A Citizen's Guide to Transportation Decisionmaking", available at www.fhwa.dot.gov/planning/citizen/index.htm or by writing to the Federal Highway Administration at 1200 New Jersey Avenue, S.E., HEPP-20, Washington, D.C. 20590, Attention: Transportation Planning Capacity Building Team; or calling 202 366-0106. Another publication that may be of assistance is "The Metropolitan Transportation Planning Process: Key Issues. A Briefing Notebook for Transportation Decisionmakers, Officials, and Staff." That publication is being updated to reflect the changes in the SAFETEA-LU law, and should be available through the same website and addresses above.

Be Informed of Actions

Sometimes citizens are generally interested in actions taking place in a particular area (for example, in your community or in an ecosystem or a facility that affects you). If this is the case, you can inform the appropriate agency or agencies that you would like to be notified of any proposed action or any environmental impact analysis that might be prepared in that area. In addition, many agencies now have websites where they post notices for actions they are proposing.

Active Involvement

Being active in the NEPA process requires you to dedicate your resources to the effort. Environmental impact analyses can be technical and lengthy. Active involvement in the NEPA process requires a commitment of time and a willingness to share information with the decisionmaking agency and other citizens. You may participate as an individual, get involved by working with other interested individuals or organizations, or by working through your local, Tribal, or State government. For example, if an agency is taking an action for which your local, State or Tribal government has special expertise or approval authority, the appropriate State, local or Tribal agency can become a “cooperating agency” with the Federal agency.⁵⁰ This formal status does not increase their role in decisionmaking, but it does allow the governments to use their knowledge and authorities to help shape the federal decisionmaking.

Another way to participate is to check with local experts such as biologists or economists at a university to assist with your review of the NEPA analyses and documents. You can also form study groups to review environmental impact analyses and enlist experts to review your comments on the documents. There are many examples, such as the one in the following box, of situations where citizen groups have worked with agencies to develop an alternative to a proposal where the agency adopted that alternative.

⁵⁰ CEQ NEPA Regulations, 40 C.F.R. §§ 1501.6, 1508.5.

Forest Service Herbicide Use in the Pacific Northwest

In many cases, cooperation isn't the first experience that communities and agencies share with one another. In the case of aerial herbicide spraying by the Forest Service in the 1980's across Washington and Oregon, litigation gave way to collaboration that yielded a better decision for all parties.

At issue was the use of 2,4-D, a herbicide comprising half of the well known Agent Orange, which was being sprayed on large tracts of clear-cut forest in an effort to suppress competition with the replanted conifers from all other plants, including native trees and grasses. In 1984, as a result of a citizen lawsuit, a federal judge ordered the Forest Service to stop herbicide use until the agency addressed the problems associated with its use. The Forest Service decided to draft a new EIS for vegetation management and thereby opened the door for public involvement in their decision.

A coalition of tree planters, scientists, rural residents, and herbicide reform activists volunteered to work with the Forest Service to develop an alternative that didn't rely on herbicides for vegetation management. The group identified several simple alternatives such as planting two-year old trees rather than planting seedlings, because the trees are better able to deal with encroachment. Likewise, letting native red alders grow will actually benefit new conifer growth because the alders fix nitrogen in the soils. Much to the coalition's surprise the forest supervisor selected most of the "least-herbicide" approaches for implementation.

Through NEPA, citizens were able to educate and assist the decision-makers in developing their alternatives. Central to their approach was bringing to the table alternatives that met their goals of reducing herbicide use and the goals of the decision-maker to effectively manage vegetation.

Information taken from "Standing Up for This World" by Mary O'Brien in September/October 2004 issue of *Orion*, pages 56-64.

Your involvement in the NEPA process does not have to be confined to commenting on the analysis. If the agency adopts monitoring and mitigation in the ROD, upon request, it must make available to the public the results of relevant monitoring.⁵¹ It must also, upon request,

⁵¹ CEQ NEPA Regulations, 40 C.F.R. §1505.3(d).

inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.⁵² Community groups can also be involved in monitoring.⁵³

In summary, there are several opportunities to get involved in the NEPA process:

- ❖ when the agency prepares its NEPA procedures,
- ❖ prior to and during preparation of a NEPA analysis,
- ❖ when a NEPA document is published for public review and comment, and
- ❖ when monitoring the implementation of the proposed action and the effectiveness of any associated mitigation.

Other Processes that Require Public Involvement

When a proposed action is part of a permitting process there may also be opportunities to comment provided in the statute or regulations for that permitting process in addition to the NEPA public involvement opportunities discussed above. For example, public involvement is required by most Federal agency land use planning regulations. While this guide does not explore all of those additional possibilities for comment, the NEPA team working on a particular proposal will be familiar with the various comment periods and will be able to inform you of those opportunities. Note that the permitting and NEPA processes should be integrated or run concurrently in order to have an effective and efficient decisionmaking process.

⁵² CEQ NEPA Regulations, 40 C.F.R. §1505.3(c).

⁵³ See www.malpaiborderlandsgroup.org/science.asp for discussion of work undertaken by the Science Advisory Committee of the Malpai Borderlands Group in southeastern Arizona and southwestern New Mexico.

Public Comment Periods

Agencies are required to make efforts to provide meaningful public involvement in their NEPA processes.⁵⁴ Citizens involved in the process should ensure that they know how agencies will inform the public that an action is proposed and the NEPA process is beginning (via Federal Register, newspapers, direct mailing, etc.); that certain documents are available; and that preliminary determinations have been made on the possible environmental effects of the proposal (e.g., what level of analysis the agency will initially undertake).

Agencies solicit different levels of involvement when they prepare an EA versus an EIS. In preparing an EIS, agencies are likely to have public meetings and are required to have a 45 day comment period after the draft EIS is made available. In the case of an agency preparing an EA, the CEQ regulations require the agency to involve the public to the extent practicable, but each agency has its own guidelines about how to involve the public for EAs. In any case, citizens are entitled to receive “environmental documents”, such as EAs, involved in the NEPA process.⁵⁵

In terms of a specific agency, required public comment periods associated with an EA or an EIS can be found in its NEPA implementing procedures. In some cases, the draft EIS that an agency prepares may be extremely long. In such cases, an agency may grant requests to extend the comment period to ensure enough time for the public and other agencies to review and comment.

Citizens who want to raise issues with the agency should do so at the earliest possible stage in the process. Agencies are much more likely to evaluate a new alternative or address a concern if it is raised in a timely manner. And the Supreme Court has held in two NEPA cases that if a person or organization expects courts to address an issue, such as evaluating a particular alternative, the issue must have been raised to the agency at a point in the administrative process when it can be meaningfully considered unless the issue involves a flaw in the agency’s analysis that is so obvious that there is no need for a commentator to point it out specifically.

⁵⁴ CEQ NEPA Regulations, 40 C.F.R. §§ 1501.4(b), 1506.6(b).

⁵⁵ CEQ NEPA Regulations, 40 C.F.R. §§ 1506.6, 1508.10.

How to Comment

Comments may be the most important contribution from citizens. Accordingly, comments should be clear, concise, and relevant to the analysis of the proposed action. Take the time to organize thoughts and edit the document submitted.⁵⁶ As a general rule, the tone of the comments should be polite and respectful. Those reviewing comments are public servants tasked with a job, and they deserve the same respect and professional treatment that you and other citizens expect in return. Comments that are solution oriented and provide specific examples will be more effective than those that simply oppose the proposed project. Comments that contribute to developing alternatives that address the purpose and need for the action are also effective. They are particularly helpful early in the NEPA process and should be made, if at all possible, during scoping, to ensure that reasonable alternatives can be analyzed and considered early in the process.

In drafting comments, try to focus on the purpose and need of the proposed action, the proposed alternatives, the assessment of the environmental impacts of those alternatives, and the proposed mitigation. It also helps to be aware of what other types of issues the decisionmaker is considering in relationship to the proposed action.

Commenting is not a form of “voting” on an alternative. The number of negative comments an agency receives does not prevent an action from moving forward. Numerous comments that repeat the same basic message of support or opposition will typically be responded to collectively. In addition, general comments that state an action will have “significant environmental effects” will not help an agency make a better decision unless the relevant causes and environmental effects are explained.

Finally, remember that decisionmakers also receive other information and data such as operational and technical information related to implementing an action that they will have to consider when making a final decision.

⁵⁶ There are many reference books for how to research issues, review documents, and write comments. One in particular is “The Art of Commenting” by Elizabeth Mullin from the Environmental Law Institute (Mullin, Elizabeth D. 2000. *The Art of Commenting: How to Influence Environmental Decisionmaking with Effective Comments*, Environmental Law Institute. Washington, DC). Another useful reference for those involved in commenting on transportation projects is the American Association of State Highway and Transportation Officials (AASHTO) Practitioner’s Handbook 05-Utilizing Community Advisory Committees for NEPA Studies, December, 2006, available at <http://environment.transportation.org> or available through AASHTO’s Center for Environmental Excellence by calling (202) 624-3635.

What If Involvement Isn't Going Well?

For the purposes of this discussion, “not going well” means that you or your organization believes that the lead agency isn’t giving the public sufficient opportunity to get involved or isn’t using that involvement effectively. Perhaps you think that the agency should hold a public meeting, and it refuses to do so. Or you or your community or group has developed an alternative that you think meets the purpose and need of the proposed action and reflects the policies set forth in NEPA, but the agency says it won’t analyze it in the NEPA document. Maybe you want an extension of the comment period because the document is very lengthy, and you simply need more time to review it. Or maybe you feel that communications between your organization and the lead agency have, for some reason, not been constructive.

The most appropriate steps to take if you find yourself in these kinds of situations always depend, of course, on the particular people, timing and proposal at hand. Nonetheless, here are some possible factors and courses of action to consider.

Don't Wait Too Long

First, don’t wait too long to raise your concerns; raise them as soon as practicable. If you just sit back and hope that things will get “better” or that your comments will have greater effect later, you may hear that “you should have raised this sooner.” At times, waiting can be detrimental to you as well as to the rest of the public and the agency involved. For example, if you feel strongly that a particular alternative should be addressed and do not raise it during the scoping process, then it will not get the benefit of comparative analysis with the other alternatives. In addition, it could result in a more expensive and lengthy process (costing taxpayers, including yourself, more) if your delayed suggestion results in the agency deciding to issue a supplemental EIS analyzing that alternative. Or if you, or your organization, later go to court to argue that a certain alternative should have been analyzed in the NEPA document, the judge may find that the court won’t consider that information because you should have raised your concern earlier during the NEPA process.

Contact the Agency

Your first line of recourse should be with the individual that the agency has identified as being in charge of this particular process.

See if you can sit down with him or her to discuss your concern(s). You may be pleasantly surprised at the response.

Other Assistance

If, for some reason, you believe that the process ahead may be particularly contentious or challenging, given a past history of community conflict or deeply divided interests, consider raising with the lead agency the possibility of designing a collaborative process with outside assistance.

One source of such assistance is the U.S. Institute for Environmental Conflict Resolution. Located in Tucson, Arizona, as part of the Morris K. Udall Foundation, the Institute is a Federal entity that offers neutral environmental conflict resolution design, facilitation, education, training, and mediation. Anyone, whether in or out of government, can call the Institute and ask to speak to a professional staff person to discuss the potential for the Institute's involvement in a proposed federal action. You might want to look at its website at www.ecr.gov or contact the Institute to get a better sense of who they are and what they do.⁵⁷ There may also be an environmental conflict resolution office in your state that can provide assistance, and there are also many other individuals and organizations in the private sector that provide various types of conflict resolution services. The U.S. Institute also maintains a publicly accessible roster of environmental mediators and facilitators (available at www.ecr.gov by clicking on "Resources").

NEPA's Requirements

Perhaps your concern involves understanding a legal requirement. There are, of course, many ways to obtain the advice of lawyers knowledgeable about the NEPA process: the lead agency, private attorneys, and public interest attorneys. Build your own understanding by reading information on the NEPA net website at <http://www.NEPA.gov>. You may also call the General Counsel's office or the Associate Director for NEPA Oversight at the Council on Environmental Quality for assistance in interpreting NEPA's legal requirements or for advice and assistance if you have tried to work with the lead agency but feel those efforts have been unsuccessful (see Appendix D for contact information).

⁵⁷ The Institute can be contacted via mailing address: U.S. Institute for Environmental Conflict Resolution, 130 S. Scott Ave. Tucson, AZ 85701; phone: (520) 901-8501; or electronic mail: usiecr@ecr.gov. You might also be interested in reviewing the April 2005 report of the National Environmental Conflict Resolution Advisory Committee that discusses the linkages between NEPA's policies and environmental conflict resolution and is available at <http://www.ecr.gov> by clicking on "Resources" and "NEPA and ECR".

Remedies Available

Finally, of course, there are both administrative and judicial remedies available. A few Federal agencies, such as the Bureau of Land Management and the Forest Service, have an administrative appeals process. Each process is specific to that agency. If an appeal is available, you may find it beneficial to invoke it to try to resolve your concerns with the agency's decisions without the need for a legal challenge. Moreover, a statute or agency regulation may require you to exhaust such an appeal procedure before seeking judicial review. Citizens who believe that a Federal agency's actions violate NEPA may seek judicial review (after any required administrative appeals) in Federal court under the Administration Procedures Act. If you are represented by a lawyer, you should consult with him or her about appropriate options and about communicating with the Federal agencies.

Final Thoughts

This guide was developed to explain the National Environmental Policy Act (NEPA), how it is implemented, and how people outside the Federal government — individual citizens, private sector applicants, members of organized groups, or representatives of Tribal, State, or local government agencies — can better participate in the assessment of environmental impacts conducted by Federal agencies. To learn more about CEQ and NEPA, visit our web sites at <http://www.whitehouse.gov/ceq> and <http://www.nepa.gov> or contact the CEQ Associate Director for NEPA Oversight at (202) 395-5750. Your thoughts and comments on improving this Guide for future editions are always welcome and can be addressed to:

CEQ NEPA Citizens Guide
722 Jackson Place, NW
Washington, DC 20503

Appendix A

NEPAnet and How to Use It

NEPAnet
<http://www.NEPA.gov>

NEPAnet is the Council on Environmental Quality's NEPA website which is supported by the Department of Energy. It contains a wealth of information related to NEPA as it has developed over the years in agencies and through the courts. Guidance as well as studies and reports from CEQ can be accessed from the site; and information on NEPA training can also be found.

Under the "National Environmental Policy Act (NEPA)" section there are several useful links including:

- ❖ The NEPA Statute
- ❖ Executive Orders
- ❖ CEQ Regulations for Implementing NEPA
- ❖ Individual Federal Agency Procedures for Implementing NEPA*
- ❖ CEQ Guidance; topics include:
 - Environmental Conflict Resolution
 - Emergency Actions
 - Cumulative Effects Analysis
 - Cooperating Agencies

** The agency implementing procedures can be accessed here and are mentioned throughout the Citizen's Guide as an important part of the process.*

-
- Purpose and Need
 - Forest Health Projects
 - Environmental Justice
 - Transboundary Impacts
 - Pollution Prevention
 - Scoping
 - Forty Most Asked Questions Concerning CEQ's NEPA Regulations
 - Wetlands
 - Prime Agricultural Land
 - Wild and Scenic Rivers
 - ❖ Federal Agency NEPA Web Sites
 - ❖ Federal NEPA Contacts
 - ❖ State Information
 - ❖ Tribal Information

The other sections provide information about:

- ❖ CEQ NEPA Studies
- ❖ CEQ NEPA Reports
- ❖ Environmental Impact Statements
- ❖ Environmental Impact Analysis
- ❖ Environmental Impact Assessment Professional Organizations
- ❖ International Environmental Impact Assessments
- ❖ NEPA Litigation
- ❖ NEPA Case law
- ❖ NEPA Training Information

Appendix B

The Federal Register and How to Use It

<http://www.gpoaccess.gov/fr/index.html>

The Federal Register is the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents. It is updated daily by 6 a.m. and is published Monday through Friday, except Federal holidays.

This is where you'll find notices from Federal agencies regarding their NEPA actions. Information on the availability of documents, schedule of meetings, and notices of intent to prepare EISs are also published in the Federal Register. In addition, EPA publishes a list of EISs that they have received from agencies each week, and a summary of ratings on EISs that they have reviewed.

The easiest way to pull up notices is to have as much information as possible. Key words such as the name of the agency, location of the action, date or date ranges of the publication are all helpful in the search.

Appendix C

EPA's EIS Rating System

EPA's Environmental Impact Statement Rating System Criteria

<http://www.epa.gov/compliance/nepa/comments/ratings.html>

This website includes information about EISs that have been filed with EPA, EISs that are available for public comment, and information about EPA's review and rating of individual EISs.

EPA has developed a set of criteria for rating draft EISs. The rating system provides a basis upon which EPA makes recommendations to the lead agency for improving the draft EIS.

- ❖ Rating the Environmental Impact of the Action
- ❖ Rating the Adequacy of the Draft Environmental Impact Statement (EIS)

Rating The Environmental Impact of The Action

- ❖ **LO (Lack of Objections):** The review has not identified any potential environmental impacts requiring substantive changes to the preferred alternative. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposed action.
- ❖ **EC (Environmental Concerns):** The review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact.

❖ **EO (Environmental Objections):** The review has identified significant environmental impacts that should be avoided in order to adequately protect the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). The basis for environmental Objections can include situations:

1. Where an action might violate or be inconsistent with achievement or maintenance of a national environmental standard;
2. Where the Federal agency violates its own substantive environmental requirements that relate to EPA's areas of jurisdiction or expertise;
3. Where there is a violation of an EPA policy declaration;
4. Where there are no applicable standards or where applicable standards will not be violated but there is potential for significant environmental degradation that could be corrected by project modification or other feasible alternatives; or
5. Where proceeding with the proposed action would set a precedent for future actions that collectively could result in significant environmental impacts.

❖ **EU (Environmentally Unsatisfactory):** The review has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action must not proceed as proposed. The basis for an environmentally unsatisfactory determination consists of identification of environmentally objectionable impacts as defined above and one or more of the following conditions:

1. The potential violation of or inconsistency with a national environmental standard is substantive and/or will occur on a long-term basis;
2. There are no applicable standards but the severity, duration, or geographical scope of the impacts associated with the proposed action warrant special attention; or

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3. The potential environmental impacts resulting from the proposed action are of national importance because of the threat to national environmental resources or to environmental policies.

Rating The Adequacy of The Draft Environmental Impact Statement (EIS)

- ❖ **1 (Adequate):** The draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.
- ❖ **2 (Insufficient Information):** The draft EIS does not contain sufficient information to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the proposal. The identified additional information, data, analyses, or discussion should be included in the final EIS.
- ❖ **3 (Inadequate):** The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS.

Appendix D

Agency NEPA Contacts

*<http://www.NEPA.gov>
<http://ceq.eh.doe.gov/nepa/contacts.cfm>*

The list of Federal NEPA Contacts is maintained on NEPAnet (*<http://www.NEPA.gov>*) under the heading “National Environmental Policy Act (NEPA)” and is periodically updated.

The complete list is available via the link entitled “Federal NEPA Contacts” or available directly at *<http://ceq.eh.doe.gov/nepa/contacts.cfm>*. If you do not have computer access, call CEQ at (202) 395-5750 for assistance.

The CEQ NEPA Contacts are:

Council on Environmental Quality
722 Jackson Place, NW
Washington, DC 20503
Phone: 202-395-5750
Fax: 202-456-6546

Mr. Horst Greczmiel, Associate Director for NEPA Oversight
Ms. Dinah Bear, General Counsel
Mr. Edward (Ted) Boling, Deputy General Counsel

Appendix E

Some Useful Definitions from the Council on Environmental Quality NEPA Implementing Regulations

Excerpts from 40 CFR part 1508
http://ceq.eh.doe.gov/nepa/regs/ceq/toc_ceq.htm

Section 1508.4 Categorical exclusion.

“Categorical exclusion” means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (Sec. 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in Sec. 1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

Section 1508.5 Cooperating agency.

“Cooperating agency” means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment. The selection and responsibilities of a cooperating agency are described in Sec. 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

Section 1508.7 Cumulative impact.

“Cumulative impact” is the impact on the environment which results from the incremental impact of the action when added to other past,

present, and reasonably foreseeable future actions regardless of what agency (Federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

Section 1508.8 Effects.

“Effects” include:

- (a) Direct effects, which are caused by the action and occur at the same time and place.
- (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

Section 1508.9 Environmental assessment.

“Environmental assessment”:

- (a) Means a concise public document for which a Federal agency is responsible that serves to:
 1. Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
 2. Aid an agency’s compliance with the Act when no environmental impact statement is necessary.
 3. Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

Section 1508.11 Environmental impact statement.

“Environmental impact statement” means a detailed written statement as required by section 102(2)(C) of the Act.

Section 1508.12 Federal agency.

“Federal agency” means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes for purposes of these regulations States and units of general local government and Indian Tribes assuming NEPA responsibilities under section 104(h) of the Housing and Community Development Act of 1974.

Section 1508.13 Finding of no significant impact.

“Finding of no significant impact” means a document by a Federal agency briefly presenting the reasons why an action, not otherwise excluded (Sec. 1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (Sec. 1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

Section 1508.14 Human environment.

“Human environment” shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of “effects” (Sec. 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

Section 1508.16 Lead agency.

“Lead agency” means the agency or agencies preparing or having taken primary responsibility for preparing the environmental impact statement.

Section 1508.18 Major federal action.

“Major federal action” includes actions with effects that may be major and which are potentially subject to federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (Sec. 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (Secs. 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

1. Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements; formal documents establishing an agency’s policies which will result in or substantially alter agency programs.
2. Adoption of formal plans, such as official documents prepared or approved by Federal agencies which guide or prescribe alternative uses of federal resources, upon which future agency actions will be based.

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3. Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.
 4. Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

Section 1508.20 Mitigation.

“Mitigation” includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

Section 1508.22 Notice of intent.

“Notice of intent” means a notice that an environmental impact statement will be prepared and considered. The notice shall briefly:

- (a) Describe the proposed action and possible alternatives.
- (b) Describe the agency’s proposed scoping process including whether, when, and where any scoping meeting will be held.
- (c) State the name and address of a person within the agency who can answer questions about the proposed action and the environmental impact statement.

Section 1508.23 Proposal.

“Proposal” exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (Sec. 1502.5) so that the final statement may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

Section 1508.25 Scope.

“Scope” consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (Secs. 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

- (a) Actions (other than unconnected single actions) which may be:
 - (1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
 - (i) Automatically trigger other actions which may require environmental impact statements.
 - (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
 - (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.
 - (2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
 - (3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may

wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

- (1) No action alternative.
- (2) Other reasonable courses of actions.
- (3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.

Section 1508.27 Significantly.

“Significantly” as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park

lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

Section 1508.28 Tiering.

“Tiering” refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the

general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe.

Situation Report on NNEPRA Plan for Amtrak Maintenance & Layover Facility (MLF) in Brunswick

Charles F. Wallace

January 29, 2014

rse@rsemaine.com

(207) 725-7896

“Why We’re Here”

- Update Governor’s Office on status of NNEPRA plans for MLF Construction at Brunswick West location
- Characterize major concerns and risks to State and local interests
- Summarize actions recently taken by Brunswick West Neighborhood Coalition
- Suggest action plan/intervention to preclude injury to state and local interests
- Restructure plan to redirect energies for wider local, regional, and state-wide economic development
 - Possible “State of the State” relevance?

Situation is approaching critical mass; risk of opportunity loss and cost growth increasing rapidly; pervasive unknowns.

Major risks confront the town, region, and State

- The well-being, domestic tranquility, and property values of hundreds of families
- Millions in state funds, tens of millions in federal funds
- Possibility of economic development tied to multi-modal transportation center

All are opportunities to advance the agenda.

Discussion Topics

- Recent History
- Local Considerations
- Site Alternatives
- Site Considerations
- Environmental Certification Process
- Complaint Filing on Improper Process
- Brunswick Atmospheric
- Washington Delegation Involvement
- Benefits of Relocating
- Requested Actions
- Wrap-up

Recent History

- 25 March 2013: Cooperative Agreement Between MDOT and NNEPRA; \$12 million for MLF
- Meetings with Governor
 - 10 May 2013: Charlie Wallace
 - 13 August 2013: Dan Sullivan
- 12 September 2013: Finale Public Meeting of Mitigation Advisory Group in Brunswick
- 26 September 2013: NNEPRA 'hearing' (Environmental Assessment required by FRA)
- 2 October 2013: Memo handed to Governor
- 11 October 2013: BWNC submitted comments to NNEPRA and FRA on September 2013 Environmental Assessment
 - Cover letter prepared by BWNC Attorney
- 13 November 2013: MDEP issued a Stormwater Management Permit to NNEPRA
- 13 December 2014: BWNC files 80C Complaint in Cumberland County Superior Court challenging granting of Permit
 - First 80B Complaint filed 3 June 2011 re BZBA
- 14 January 2014: BWNC Attorney files letter to FRA Administrator Szabo summarizing EA flaws and withholding of information by NNEPRA
- Last two items recently provided to COS

MLF process is dangerously flawed

Local Considerations

- Pre-emption of local zoning regulations:
 - NNEPRA violated local procedures by going directly to Zoning Board of Appeals for dimensional variance from 20,000 sq ft to 39,560 sq ft
 - BWNC filed 80 B complaint, which initiated pre-emption issue
 - Town Attorney letter states NNEPRA exempt from local and state regs
 - Town officials backed off; continued to promote NNEPRA plan
 - Surface Transportation Board (DOT) Attorney found pre-emption letter invalid; second letter generated citing different statutes applying to Northeast Corridor; no legal challenge yet
 - NNEPRA behaving as if pre-emption exists, but still submitting some permit applications
- State involvement in spite of pre-emption premise:
 - Approved NNEPRA application for Stormwater Management Permit
 - Approved VRAP process re site contamination
 - Ignoring Air Discharge Permit requirement

Can't 'almost' have pre-emption

Site Alternatives

- Brunswick West site is flawed
 - Selected based on proximity to Brunswick Station; too small to accommodate multi-modal expansion
 - Severe and unmitigatable environmental and socio-economic impacts
 - Does not comply with zoning ordinance
- Brunswick Landing
 - Restore previous used track and roadbed
 - Accommodates logistics/multi-modal growth for region and base
 - Minimal environmental impacts
 - Zoning issues would have to be addressed
- Crooker Site (Brunswick East)
 - Property available; located in commercial/industrial area
 - Minimal environmental issues; better construction conditions
 - Adequate area for logistics/multi-modal growth as above
 - Zoning issues to address

No compelling arguments for Brunswick West;
two available, advantageous alternatives exist.

Site Considerations

- NNEPRA originally thought MLF at Brunswick West would cost \$4.5 M (exclusive of track work) and could be completed using available bond funds
 - Stunned when bids were opened; lowest offer 3 times expectation
- Poor soil conditions, contamination, high ground water, structural issues, and noise mitigation significantly drove cost upward
 - Soil and ground water conditions force floor elevation to be raised two feet
 - NNEPRA now claiming construction cost is \$12 M; not clear if track work included; not clear on total project costs
- NNEPRA could start work now with \$4.5 M bond funds on assumption FRA will issue a FONSI
 - Would permit use of CMAQ funds for remainder of work
 - If FONSI not issued, State would be liable for remainder of cost
- If NNEPRA terminates service north of Portland as threatened if MLF not built at Brunswick West, State could be required to reimburse \$38 M to Fed Gov.

Substantial risk of cost growth; substantial risk
of financial penalties to State

Environmental Certification Process

- Early in the MLF development process, NNEPRA splintered the project and received categorical exclusion from FRA for the MLF track work at the Brunswick West site
- On 23 August 2013, BWNC asked FRA Administrator Szabo to terminate the Environmental Assessment (EA) process and initiate the Environmental Impact Statement (EIS) process because of poor quality of draft EA prepared by NNEPRA
- NNEPRA's final Environmental Assessment (EA) was issued in September 2013, and BWNC comments (several hundred pages) were delivered to NNEPRA and FRA on 11 October 2013
- FRA must decide whether to issue Finding of No Significant Impact (FONSI) or require full EIS
 - Latest informal indication from FRA is that a decision will not be made until at least March

Regulatory entanglement costing excessive time and money

Complaint Filing on Improper Process

- 80 B complaint filed against Brunswick Zoning Board of Appeals for granting a variance.
 - Withdrawn without prejudice after NNEPRA failed to record the variance in the Cumberland County Registry of Deeds.
- 80 C complaint filed after MDEP issued a Stormwater Management Permit to NNEPRA; alleges MDEP failed to follow rules for Notification of Abutters.
 - Failure to provide notification 30 days prior to filing the permit application
 - Failing to notify abutters south of the Railroad Right-of-Way

NNEPRA continues to abuse due process

Brunswick Atmosphericics

- Major political capital & significant taxpayer capital invested in pre-train development and train service itself
 - Some ‘officials’ have benefited ‘directly’
- Bowdoin ownership of ‘Northern end of the intellectual corridor’
- “It’s out of the town’s hands”; pre-emption prevails
 - MLF is a “done deal”
- Prevailing view is that passenger service is a ‘major economic benefit’ to the community
 - Facts don’t support the view, but the PR machine is well oiled
 - No rigorous, definitive analysis to date; not even anecdotal data
 - Analysis will likely show more economic activity leaving town than coming in
 - Presumption is that virtually none understand underlying subsidy framework and true costs
- Town Council/Town Manager, with NNEPRA, hold to doomsday scenario that if MLF is not built as/where currently planned, Downeaster service to Brunswick & Freeport will necessarily die
 - Abject fear prevails that ‘the dream could be lost’
- Political changes at local level could possibly create opportunities

Zero interest shown in broader economic development potential: town, regional, state.

Washington Delegation Involvement

- Rep. Michaud staff has been very effective in facilitating access to Surface Transportation Board (DOT) to evaluate pre-emption letters issued by Brunswick Town Attorney
- Sen. King sent a letter to FRA Administrator Szabo asking for open and transparent environmental review process.
- Sen. Collins and Rep. Pingree have received copies of complaints to USDOT & EPA IG's
 - Have also been asked for assistance in obtaining sub-contract to Brunswick Taxi for transporting Amtrak crews

Benefits of Relocating

- Facilitates land-air-rail-sea freight transportation (LARS)
- Complements LARS development
- Provides springboard for regional multimodal development
- Enhances industrial, commercial & institutional development
- Creates jobs & increases economic development in the region
- Increases local taxes through economic development
- Provides appropriate location for logistical activities
- Provides substantial return on investment of public funds
- Prevents destruction of well-established residential neighborhoods
- Significant reduction in construction costs because only a single bay facility may be needed at Brunswick Landing or Crooker (Brunswick East) site

Win-win opportunity

Requested Actions

- Immediate intervention to ensure, at a minimum, that full FRA Environmental Impact Statement is required before any further actions taken to begin Brunswick West site work/construction
- Stop MLF work pending resolution of legal and siting issues
- Suspend all current funding/spending on Brunswick West MLF site
 - Includes state bonds and federal CMAQ
- Relocate MLF to a more appropriate and beneficial site such as Brunswick Landing or the Crooker Site ('Brunswick East') in the Cook's Corner area
 - Redirect funding to Brunswick Landing or Crooker Site
 - Revise MDOT contract to relocate and finance MLF
- Strengthen oversight of NNEPRA activities
 - Emphasize board focus on due process and return on investment
 - Full accounting of all past and future MLF costs

Realize full economic development potential;
end unwarranted threat to in-town domestic tranquility
and property values.

Wrap-up

- Provided 'up to the minute' update on all ongoing processes and activities.
- Clarified transgressions, inconsistencies, and outright misrepresentations of fact on the part of NNEPRA and others.
- Summarized substantial site/environmental/neighborhood consequences to continuing on current course to build on Brunswick West.
- Assessed available more suitable, more economically beneficial siting alternatives at Brunswick Landing or Brunswick East.
- Proposed relevant actions to redirect outcome for benefit of the State, the region, and Brunswick.
- Prepared to answer any further questions, provide additional data, and/or meet again as necessary to fully illuminate the evolution.

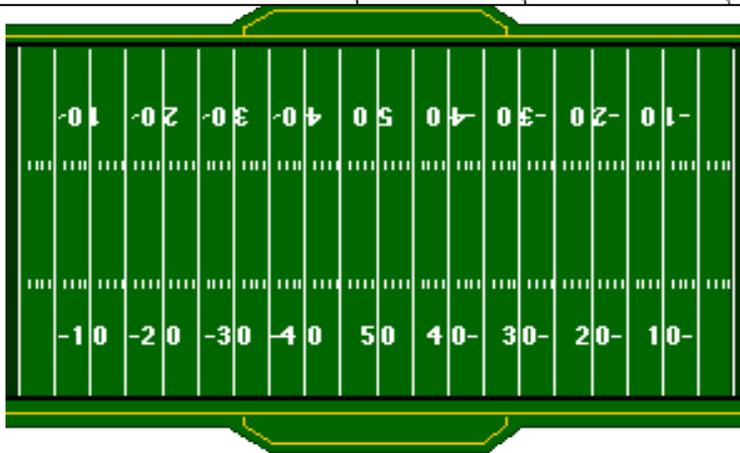
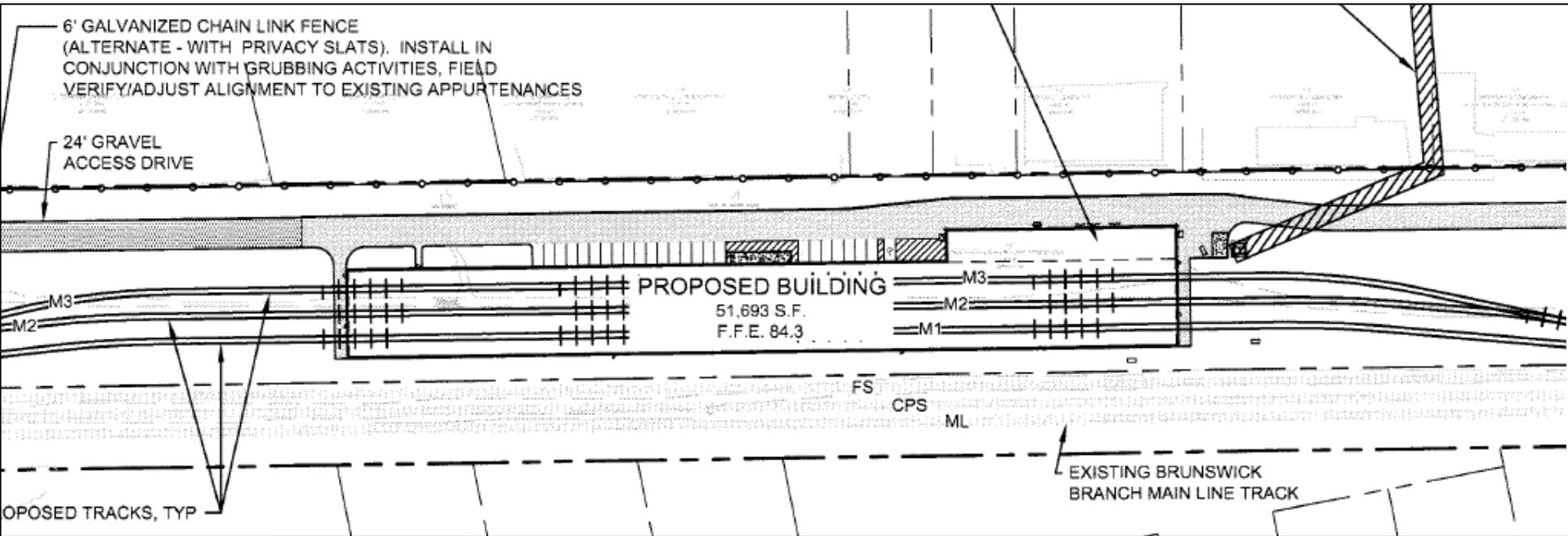
We appreciate your time, interest, and consideration.

Abbreviations/Acronyms

- BWNC: Brunswick West Neighborhood Coalition
- MLF: Maintenance & Layover Facility
- FRA: Federal Railroad Authority
- EA: Environmental Assessment
- EIS: Environmental Impact Statement
- FONSI: Finding of No Significant Impact
- NNEPRA: Northern New England Passenger Rail Authority
- VRAP: Voluntary Remedial Action Plan
- CMAQ: Congestion Mitigation and Clean Air Quality
- Northeast Corridor: Union Station Washington, DC to South Station Boston

Proposed Maintenance and Layover Facility (MLF) to be built at the Brunswick West Site, Brunswick, Maine

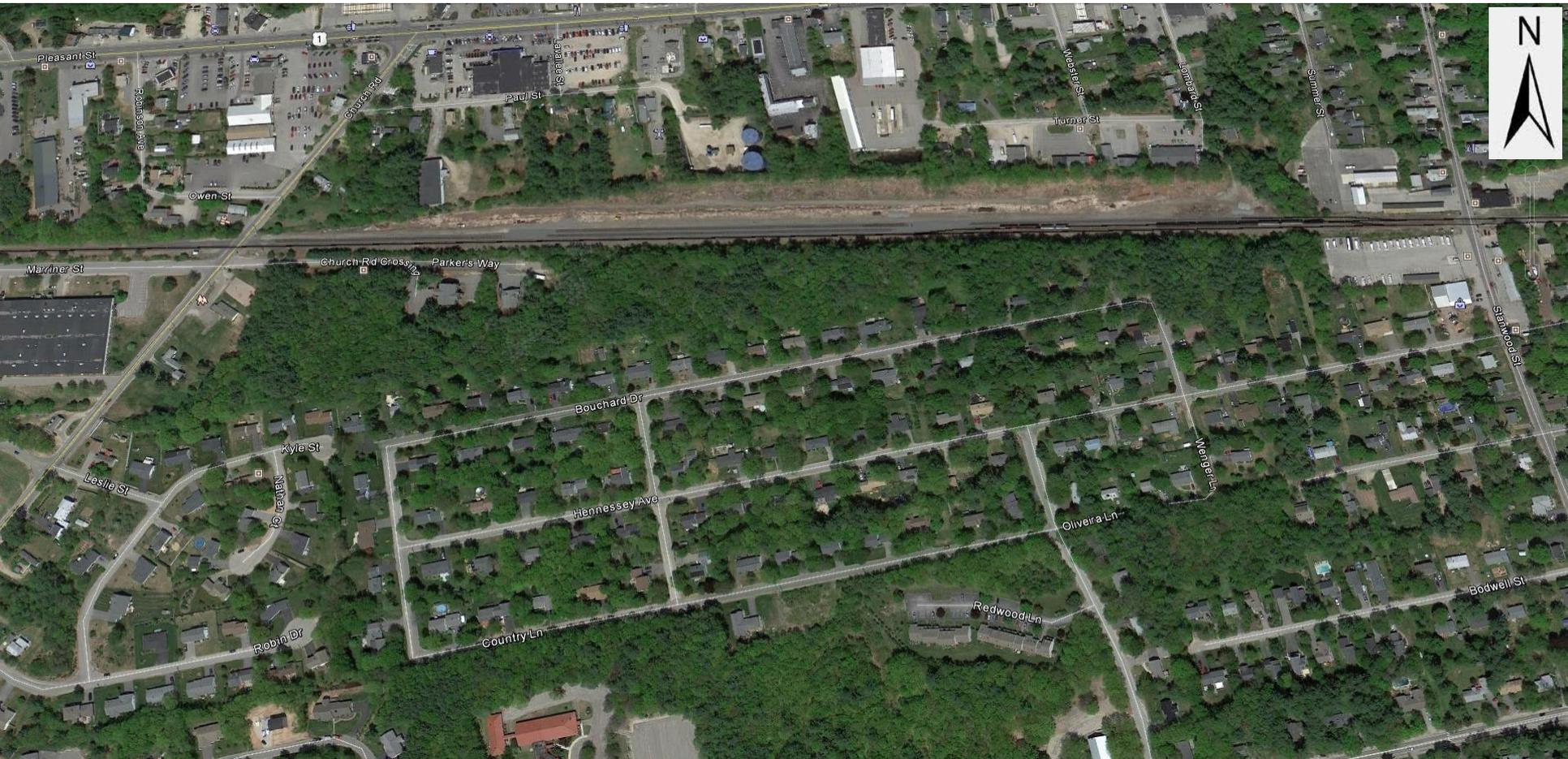
51,693 s.f.



The Building is the length of TWO
football fields!

The Project is the length of SEVEN
football fields!

Existing Brunswick West Neighborhood



Not to scale

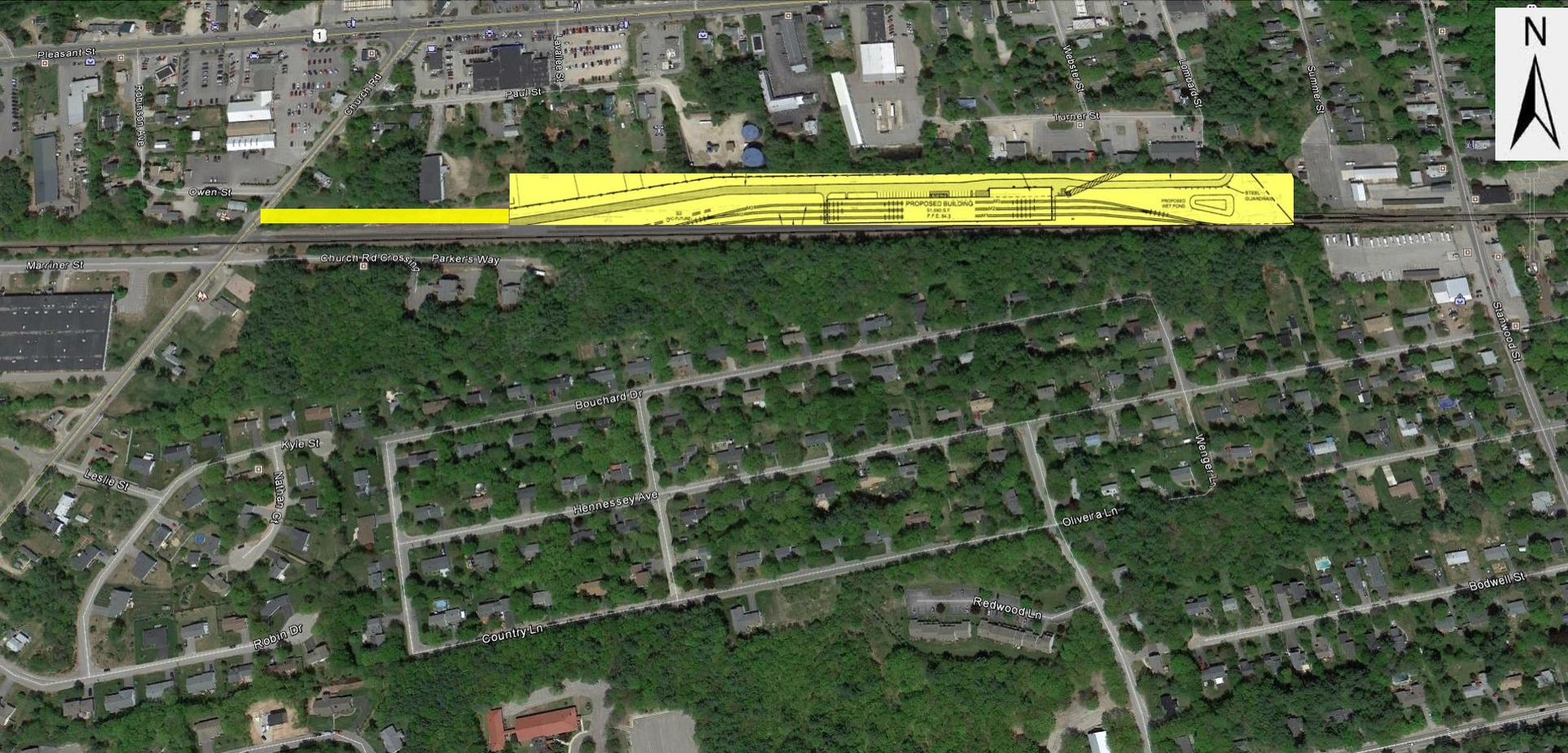


**NORTHERN NEW ENGLAND
PASSENGER RAIL AUTHORITY**



PERSPECTIVE VIEW OF NORTH AND EAST ELEVATIONS

Approximate New Proposed Location of Maintenance and Layover Facility in Relation to Impacted Areas Brunswick West Site



Not to scale

PUTTING THE MLF IN PERSPECTIVE

Approximately 10,875 sf
Almost 5 Lincoln Buildings



Approximately 6,765 sf
8 New Brunswick Police Stations



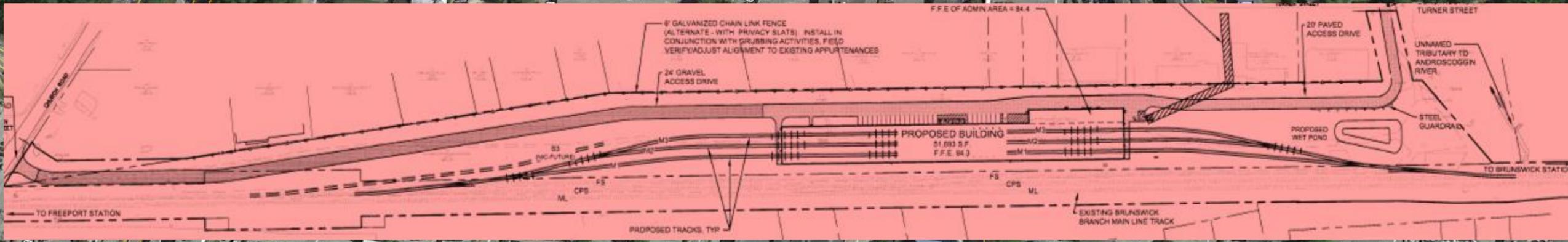
Approximately 2,400 sf
22 - 2 story office buildings



TOTAL AREA OF NNEPRA PROJECT APPROX. 2,650 FT.
(NTS)

FORT ANDROSS

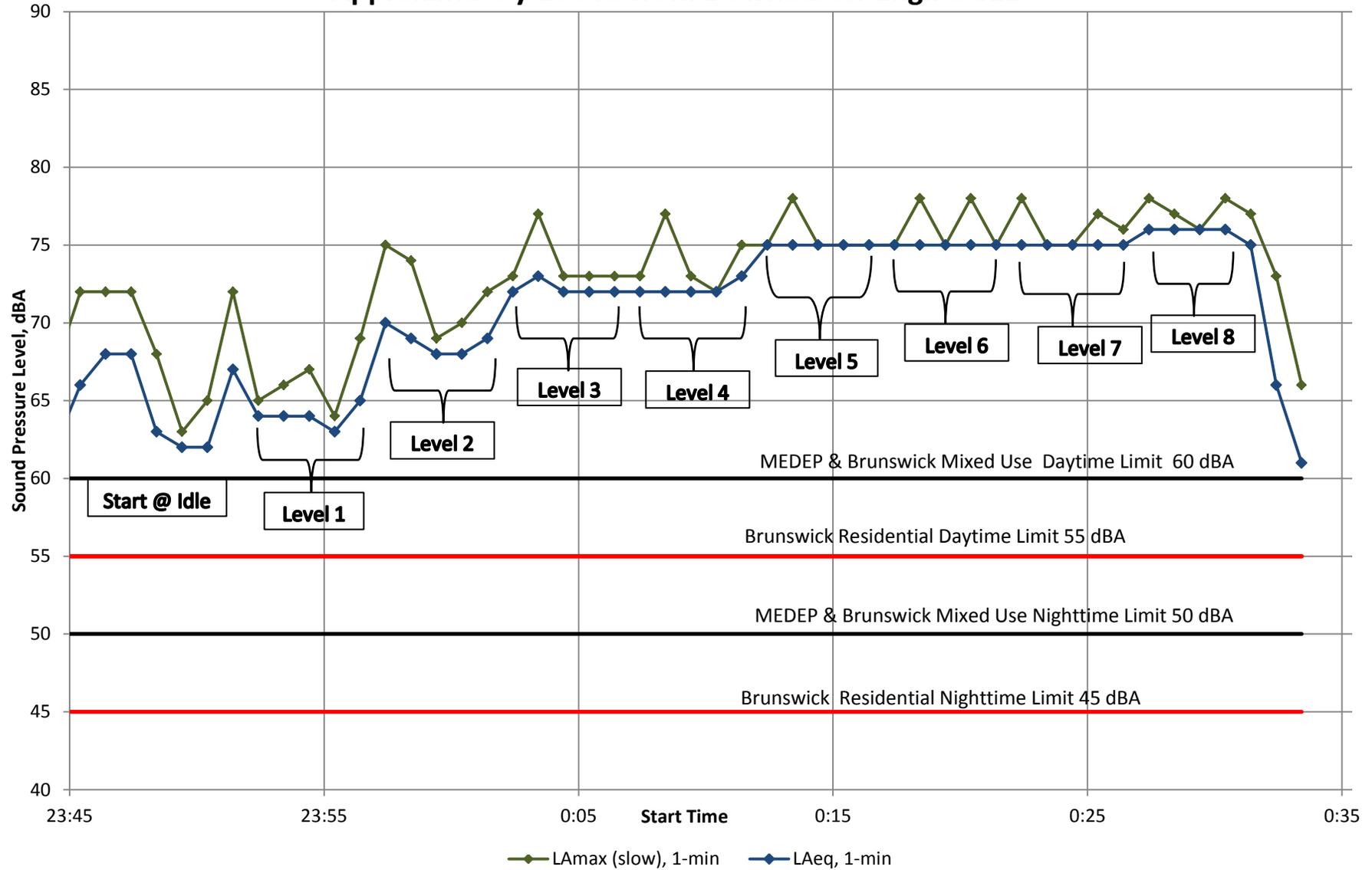
FITCH PL.



Brunswick Landing in Vicinity with Crocker Site



PMP-3
February 15 to 16, 2012
Approximately 100 ft. from Downeaster Engine #12



TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
1960 to 1984	Termination of Passenger Rail Service, changes in Railroad equipment and reduction in Railroad traffic eliminated the need for a "Marshalling Yard" between Church Road and Stanwood Street.
03/31/1972	Times Record had a front and back page article indicating that a Planning Study conducted by William Dickson Associates recommended additional housing development between McKeen Street and the Railroad north of the Capehart Housing.
06/05/1984	Maine Central Railroad sold the Roundhouse and land to Lawrence S. Weed. The abutting property on Cedar Street and the Roundhouse had not been used for quite some time for railroad purposes and had been leased to Peterson Concrete for a concrete batch plant storage and parking of transit mix trucks.
07/24/1985	Times Record had a front page and page 12 article containing the following statement by Brandy L. Peters, Maine Central Railroad (MCRR) Vice President, pertaining to the Rockland Branch, Brunswick to Rockland. "Only 550 carloads were carried on the line in 1983 compared to 3,300 in 1982".
08/26/1985	MCRR filed an application to Interstate Commerce Commission (ICC) to abandon 52 miles of track between East Brunswick and Rockland known as the Rockland Branch.
10/01/1985	Interstate Commerce Commission issued Certificate of Abandonment to Maine Central Railroad for the Rockland Branch.
09 and 10/1988	All tracks except the Mainline, one relatively short freight rail siding and one very short spur were removed from the "Marshalling Yard". All Buildings were in removed in the same time frame. (Before & After Photographs)
1988	Brunswick Assessor historically placed all the value of the "Marshalling Yard" tracks on Parcel U26-15 while the "Marshalling Yard" included Parcel U26-15 and U23-93. As a "Marshalling Yard" The value of land on Parcel U26-15 was \$17,200 and Buildings (tracks) was \$234,600 in both 1986 and 1987. A re-evaluation took place in 1988 and land value was \$76,200 and the Building value (tracks) was zero. The Building value on Parcel U26-15 changed from \$8,600 in 1988 to zero in 1989. By this act, the Town of Brunswick agreed with MCRR and acknowledged that Parcels U23-93 and U26-15 were no longer a "Marshalling Yard".

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
02/26/1991	State of Maine purchased portions of Parcel U23-99 and U26-15 that contained the mainline, siding a spur track. The remainder of both these parcels are now vacant land previously associated with the discontinued "Marshalling Yard".
11/2004	Maine Department of Transportation prepared a Draft <i>Environmental Assessment (EA) for Portland North Passenger Rail Service Extension Project Portland to Brunswick</i> which evaluated Layover sites in Brunswick. This unpublished draft EA contained many misstatements, was never made a part of any public process and was never issued.
10/18/2008	Maine Central Railroad Co. Land Sale Plane Brunswick, ME. Submitted with NNEPRA's Brunswick Zoning Board of Appeals Application dated April 4, 2011. Documents were found in Attorney Sarah McDaniel's client file which was received on May 7, 2013.
06/30/2009	Northern New England Passenger Rail Authority (NNEPRA) issued an <i>Environmental Assessment and 4(f) Statement for the Downeaster Portland North Expansion Project Portland to Brunswick Cumberland County, Maine</i> . This EA assumed the Maintenance and Layover Facility (MLF) remained at the existing Portland site.
07/01/2009	Based on the NNEPRA EA for the Portland to Brunswick Rail upgrade project, USDOT/Federal Rail Authority issued a "Finding of No Significant Impact" (FONSI) for the expansion/upgrade project. There was no discussion or evaluation by FRA for relocating the existing Portland MLF 30 miles north to Brunswick into a predominantly residential neighborhood.
06/2010	ARRA Grant/Cooperative Agreement – Downeaster Portland North Project executed by FRA and NNEPRA for \$35 million. No mention was made of relocating the Portland MLF to a residential neighborhood in Brunswick.
12/09/2010	Announcement: USDOT Redirects \$1.195 billion in High-Speed Rail funds. Indicates Maine (NNEPRA) to receive up to \$3.3 million of the redirected High Speed Rail funds. This ARRA Grant effectively expanded and splintered the original ARRA. NNEPRA did not prepare an EA for the relocation of the Portland MLF to a residential neighborhood in Brunswick. FRA did not require preparation of an EA for the expanded and splintered project.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
04/2011 (Estimated date since Amendment No. 2 has never been provided by FRA or NNEPRA)	FRA approved Amendment Numbers 1 and 2 to the ARRA Grant/Cooperative Agreement between FRA and NNEPRA. Amendment Number 2 increased the funding and provided for construction of Maintenance and Layover work for the MLF at the Brunswick West site. The Brunswick West site is located on Tax Map Parcel U26-15 that was fully abandoned for any rail use since at least 1985. No EA or public notifications or public information was provided by either FRA or NNEPRA to fully disclose the environmental and socio-economic impact that results directly from splintering the upgrade project and moving the MLF 30 miles north to Brunswick.
04/04/2011	NNEPRA applied to the Town of Brunswick Zoning Board of Appeals (BZBA) for a dimensional variance to construct a building larger than allowed for the zone.
04/06/2011	Haley & Aldrich, Inc. submitted a proposal to MDOR to evaluate contaminated soil conditions on land subsequently purchased by NNEPRA.
04/11/2011	NNEPRA submitted application to Brunswick ZBA for dimensional variance.
04/12/2011	BZBA published NNEPRA's application for a dimensional variance and set a public hearing date for 4/21/11. All abutters were not notified.
04/21/2011	Brunswick Zoning Board of Appeals held a public hearing and approved NNEPRA's request for dimensional variance of 19,560 s.f to increase the maximum building footprint from 20,000 s.f. to 39,560 s.f.
05/16/2011	Town of Brunswick Attorney Patrick J. Scully provided Anna Breinich, Director of Planning and Development Town of Brunswick, an opinion that NNEPRA's development of a Train Maintenance Facility is Preempted from certain State and Local actions. No further action by Town of Brunswick based on Attorney Scully's opinion.
05/20/2011	Request for Qualifications Statements to construct the relocated MLF in Brunswick is due @11:00 a.m. local time
05/25/2011	NNEPRA's letter to Anna Breinich, AICP Director of Planning & Development Town of Brunswick. This was the first time NNEPRA claimed pre-emption over Local Authority in accordance with 49 U.S.C §24902(j). This document was found in Attorney Sarah McDaniel's client file which was received on May 7, 2013.
05/25/2011	Amendment No. 2, approved by the FRA , work product No. 7 provided track system for MLF with project limits.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
06/01/2011	MDOT awarded contract to Haley & Aldrich to evaluate contaminated soil conditions on land subsequently purchased by NNEPRA.
06/01/2011	E-mail from Trevor Gibson, FRA, to Steve Fortier concerning the Categorical Exclusion (CE) granted by FRA for some holding tracks in Brunswick and other information on the "New Maintenance Facility in Brunswick" and the "Existing Maintenance Facility near the Portland Station". This document was found in Attorney Sarah McDaniel's client file which was received on May 7, 2013.
06/01/2011	Conference call between Attorney Sarah McDaniel, representing the Brunswick West Neighborhood Group; Attorney Patrick Scully, representing the Town of Brunswick; and Attorney Nathaniel Rosenblatt, representing NNEPRA. During this conference call Nat Rosenblatt stated that NNEPRA was in the process of hiring a Design Engineering firm. This information was found in Attorney Sarah McDaniel's client file which was received on May 7, 2013. The information was confirmed in an exchange of emails between Sarah McDaniel and Bob McEvoy on May 16, May 17 and May 30, 2013.
06/03/2011	Attorney Sarah A. McDaniel representing neighborhood residents notifies both Town of Brunswick and NNEPRA of a complaint filed in Cumberland County District Court. Court action was not pursued because NNEPRA did not file the BZBA decision within the prescribed time limit in the Cumberland County Registry of Deeds.
06/23/2011	Senatorial Information Meeting scheduled by State Senator Stan Gerzofsky. Patricia Quinn, Executive Director NNEPRA, announced at this meeting that the footprint of the MLF Building was expanded from 39,560 s.f to 60,000 s.f. to accommodate a third train set.
07/14/2011	Senatorial Information Meeting scheduled by State Senator Stan Gerzofsky.
07/21/2011	Three members of the Brunswick West Neighborhood Coalition (Bob McEvoy, Bob Morrison and Mo Bisson) met with MDOT Commissioner David Bernhardt to discuss their concerns about the proposed Brunswick West MLF. They presented a prediction of a cost estimate to build the proposed MLF. The prediction was much higher than NNEPRA's expectation.
08/04/2011	Anna Breinich, AICP Director of Planning & Development Town of Brunswick sent a letter to NNEPRA concerning the Brunswick West site and the Brunswick East (Crooker) site with the 2008 Comprehensive Plan.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
08/09/2011	Haley & Aldrich submitted report to MDOT, Phase 1 & Limited Phase 2 evaluation of contaminated soil conditions on land subsequently purchased by NNEPRA
08/12 & 22/2011	NNEPRA and Maine Central Railroad (MCRR) signed the VRAP Application for Parcel 93 Map U-23 and Parcel 15 Map U-26.
08/15/2011	Anna Breinich, AICP Director of Planning & Development Town of Brunswick sent a letter to NNEPRA concerning the consistency of the “Industrial Park site” with the 2008 Comprehensive Plan.
08/18/2011	Special Meeting of the Northern New England Passenger Rail Authority Board, NNEPRA and Downeaster Layover Facility Project Siting report completed by Parsons Brinkerhoff was handed out.
08/22/2011	NNEPRA Board Meeting at Abromson Center, USM. Board voted to build the MLF at the Brunswick West site. Patricia Quinn, NNEPRA Executive Director, proposed creating an Advisory Group (AG) that would help guide the design of the facility and ensure impact on the neighborhood would be mitigated as much as possible. In light of FRA’s \$3.3M grant and CE in April 2011, this action perpetrated the SHAM of mitigation.
09/08/2011	Three Brunswick West Neighborhood residents met with Patricia Quinn NNEPRA Executive Director, Brian Beeler NNEPRA Passenger Services Manager and Steve Corcoran Amtrak Assistant Superintendent at the Portland Maintenance and Layover Facility and observed the arrival of a Downeaster Train.
09/12/2011	Maine DEP sent a No Action Assurance letter to NNEPRA and MCRR. The second paragraph of the Maine DEP 9/12/2011 letter discusses the site as follows “The approximately 8.15 acre site was used for railroad related activities from the 1850s to the 1980s; the site included railroad tracks and a maintenance facility. The site is currently unused. The property was reportedly swamp land prior to its current development.” (VRAP approved by MDEP)
10/04/2012	Maine Central Railroad Company Right-of-Way and track map dated June 30, 1916 shows the land was acquired and dates of acquisition by MCRR for what is known as Parcels 93 Map U-23 and 15 Map U-26. The MCRR acquired the land during the period of August 29, 1913 to December 17, 1913. The land to the mainline and two siding tracks was acquired in the 1848 to 1850 era. The land for the two parcels involved in the VRAP was not acquired by the MCRR until 1913. The now correct dates of railroad usage in the Maine DEP letter of 9/12/25011 would be 1913 to 1988.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
10/2011	NNEPRA submitted a Tiger III Discretionary Grant Application for a project estimated to cost \$25 million which included \$9 million for Brunswick West MLF. This Tiger III Grant Application cited Parsons Brinkerhoff's EA and noted the building was eligible for a CE. Purportedly, eligibility is derived from the April 2011 FRA CE for the MLF tracks funded by the \$3.3M Federal ARRA Grant. No proper NEPA process has been followed during the splintering that will cause severe noise, vibrations, air pollution and socio-economic impacts to established residential neighborhoods.
12/02/2011	NNEPRA Mitigation Advisory Group meeting
01/12/2012	NNEPRA Mitigation Advisory Group meeting
03/01/2012	NNEPRA Mitigation Advisory Group meeting
03/22/2012	E-mail: Dan Sullivan to Patricia Quinn, NNEPRA requesting copies of all completed CADNA/A Noise Model screens used in the NNEPRA noise analysis by Parsons Brinkerhoff.
03/29/2012	Brunswick Layover Facility. Design Basis Document, Volume 1.
04/19/2012	E-mail: Dan Sullivan to Patricia Quinn, NNEPRA pertaining to reproduction of CADNA/A Noise Model.
05/03/2012	E-mail: Patricia Quinn to Dan Sullivan and Anna Nelson pertaining to Downeaster to Brunswick.
05/04/2012	Conference call – Michael Longley, Colleen Vaughn and Trevor Gibson, FRA, Dan Sullivan and Bob McEvoy, Brunswick West Neighborhood Coalition (BWNC) and Advisory Group, & Charlie Wallace, Resource Systems Engineering (RSE). Colleen Vaughn assures BWNC of an open and transparent environmental assessment of all aspects of the MLF. This despite FRA's April 2011 \$3.3M ARRA Grant that funded the MLF tracks and the CE for those tracks that subverted the NEPA/EA.
05/08/2012	E-mail: Dan Sullivan to Patricia Quinn, NNEPRA pertaining to Noise and Vibration Issues.
05/09/2012	E-mail: Patricia Quinn, NNEPRA to Dan Sullivan pertaining to Noise and Vibration Issues.
05/09/2012	E-mail: Dan Sullivan to Patricia Quinn, NNEPRA pertaining to Noise and Vibration Issues.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
05/09/2012	Email: Michael Longley to Dan Sullivan pertaining to FRA-NNEPRA conference call. Re-iterated importance of Public Involvement in EA process.
05/10/2012	E-mail: Patricia Quinn, NNEPRA to Dan Sullivan pertaining to Noise and Vibration Issues.
05/14/2012	Downeaster train set stopped near Dan Sullivan's house. Noise & Vibration measurements were recorded as the train set arrived, idled in place and departed. Noise measurements show non-compliance with State and Local Standards. Vibration measurements and Evaluation show additional testing needed.
05/14 to 07/14/2012	E-mails pertaining to Preemption of State and Local Laws and Regulations. Gabe Meyer, Surface Transportation Board (STB), cites Federal Legislation specific to Amtrak and shows Amtrak/NNEPRA facilities are not exempt from State and Local Standards.
05/15/2012	E-mail: Dan Sullivan to Patricia Quinn, NNEPRA pertaining to excessive Idling Downeaster 12 noon to 5 pm.
05/15/2012	E-mail: Patricia Quinn, NNEPRA to Dan Sullivan pertaining to excessive Idling Downeaster 12 noon to 5 pm.
05/15/2012	E-mail: Dan Sullivan to Patricia Quinn, NNEPRA pertaining to excessive Idling Downeaster 12 noon to 5 pm.
05/16/2012	E-mail: Patricia Quinn, NNEPRA to Dan Sullivan pertaining to excessive Idling Downeaster 12 noon to 5 pm.
05/16/2012	E-mail: Dan Sullivan to Patricia Quinn, NNEPRA pertaining to excessive Idling Downeaster 12 noon to 5 pm.
05/16/2012	E-mail: Dan Sullivan to Michael Longley (FRA) transmittal meeting minutes (phone call summary) of the teleconference on 5/4/12.
05/17/2012	E-mail: Chuck Wallace (RSE) to Dan Sullivan pertaining to excessive Idling Downeaster 12 noon to 5 pm.
06/02/2012	E-mail from Dan Sullivan to MDOT Commissioner Bernhardt pertaining to an alternate site for the Brunswick MLF.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
06/08/2012	NNEPRA opened the Price Proposals for the Brunswick West MLF. The three price proposals were significantly greater than available funds.
06/18 & 19/2012	E-mails between John MacKillop, Michael Longley & Dan Sullivan attempting to acquire information on Amendment No's. 1, 2 & 3 and the EA for the MLF from both FRA and NNEPRA.
07/01/2012	E-mail from Dan Sullivan to Michael Longley, FRA, edited meetings minutes and follow up request for a copy of Amendment No. 2 and a request for a copy of Amendment No. 3.
07/05 to 07/24/2012	E-mails between Dan Sullivan, Patricia Quinn, Michael Longley and Marina Douglas pertaining to FRA/NNEPRA Agreement Number FR-HSR-0005-10-01-00 and Amendments, etc. Obtaining copies of Amendments has not been successful.
08/06/2012	NNEPRA mailed a copy of FRA/NNEPRA Agreement Number FR-HSR-0005-10-01-00 (without Amendments) and Capital Portion of the 2011 Budget to Dan Sullivan.
09/06/2012	Letter via e-mail from Dan Sullivan to Patricia Quinn requesting information which included Amendments to the FRA/NNEPRA Grant Agreement.
09/17/2012	E-mail from Marina Douglas to Dan Sullivan pertaining to Dan Sullivan FOIA request for information on 9/6/12. NNEPRA expects the response will take about seven weeks.
09/25/2012	E-mail from Trevor Gibson, FRA, to John MacKillop pertaining to the installation of a layover track at the Brunswick West MLF and a second Categorical Exclusion recently approved by FRA.
09/30/2012	E-mail from Dan Sullivan to Patricia Quinn pertaining to Downeaster Layover in Brunswick and the Categorical Exclusion recently approved by FRA.
10/01/2012	E-mail from John MacKillop to Charlie Wallace and Bob McEvoy with Trevor Gibson contact information.
10/02/2012	E-mail from Patricia Quinn to Dan Sullivan pertaining to Downeaster Layover in Brunswick and Layover track Designation. Train will be on idle during the entire layover time and a maintenance person may be present to do interior cleaning, inspections, etc. between runs.
10/9 and 10/11/2012	E-mails between Dan Sullivan and Trevor Gibson pertaining to the Downeaster Layover track and the Categorical Exclusion recently approved by FRA.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
10/18/2012	E-mail from Darek Grant, Maine Legislature, to Bob McEvoy pertaining to Senator Stan Gerzofsky's frustration with NNEPRA's response to his request for a copy of Amendment No. 2.
11/05/2012	NNEPRA forwarded Application & FRA approval for Categorical Exclusion (CE) for a yard track in Brunswick, ME in response to our 9/30/12 FOIA Request. (Document in 12/5/2012 Complaint to OIG's)
11/09/2012	E-mail John MacKillop to Dan Sullivan pertaining to P. Scully's letter on preemption.
11/15/2012	E-mail Dan Sullivan to NNEPRA requesting information originally requested in our 9/6/12 FOIA request.
11/16/2012	E-mail Bob McEvoy to John MacKillop pertaining to construction of Track S-3 and storage of Continuous Welded Rail (CWR) for tracks M-1, M-2 and M-3.
11/16/2012	E-Mail Charles Wallace to John MacKillop pertaining to local storage of CWR.
11/17/2012	E-mail John MacKillop to Bob McEvoy pertaining to on-line compliant filed with STB pertaining to preemption.
11/18/2012	E-mail Dan Sullivan to Patricia Quinn pertaining to documents requested in FOIA request of 9/30/12.
11/22/2012	E-mail Dan Sullivan to Patricia Quinn and Marina Douglas' 11/21/12 response to Dan Sullivan's request for documents.
11/26/2012	E-mail Bob McEvoy to Dan Sullivan pertaining to Marina Douglas' 11/21/12 response.
11/28/2012	Conference call Charles Wallace, Bob McEvoy, John MacKillop and Gabriel Meyer. Three e-mails sent to Gabriel Meyer, STB, during conference call.
12/01/2012	Portland Press Herald article by Matt Byrne. Patricia Quinn, Executive Director of NNEPRA continues to claim the Brunswick West site has historically been a Railroad Yard. She fails to acknowledge that the land NNEPRA purchased has been vacant land since October 1988. Railroad cars have been stored on the siding constructed in 1988 as well as the Mainline Tracks. Idling locomotives have not been stored daily until the Downeaster service started.
12/03/2012	Patrick Scully letter to Anna Breinich, AICP Town of Brunswick, ME.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
12/05/2012	Complaint to USDOT and EPA OIG pertaining to FRA approval of a Categorical Exclusion pertaining to a yard track in Brunswick, ME. (under separate cover, enclosed)
12/07/2012	Bob McEvoy picked up Patrick Scully's letter dated 12/3/12 at Town of Brunswick Planning Office.
12/08/2012	E-mail Dan Sullivan to Charles Wallace pertaining to Trevor Gibson's E-mail of 12/7/12.
12/10/2012	E-mail Bob McEvoy to Gabriel Meyer, STB, transmitting Patrick Scully's letter of 12/3/12.
12/12/2012	E-mail Gabriel Meyer, STB, to Bob McEvoy pertaining to a link to the Congressional Record for 49 USC §24902(j).
12/19/2012	E-mail transmitting Patrick Scully letter of 12/3/12 to John MacKillop.
01/03/2013	E-mail Dan Sullivan to Charlie Wallace pertaining to Holding Track Categorical Exclusion.
01/18/2013	E-mail Dan Sullivan to Patricia Quinn FOIA request pertaining to Taxi Service.
01/22/2013	E-mail Dan Sullivan to Trevor Gibson, FRA, pertaining to CE for Brunswick West Holding Track.
01/23/2013	E-mail Marina Douglas, NNEPRA to Dan Sullivan. NNEPRA's response to Dan Sullivan's FOIA request 1/18/13.
02/01/2013	E-mail John MacKillop to Dan Sullivan forwarding e-mails from Daniel Walls pertaining to preemption.
02/15/2013	E-mail John MacKillop to Charlie Wallace and Dan Sullivan forwarding e-mails from Daniel Walls pertaining to preemption.
03/05/2013	Nicole Vinal Harvie, Brunswick West Neighborhood Coalition, attended NNEPRA's March Executive Board Meeting. Nicole's email describes the highlights of the meeting.
03/05/2013	E-mail John MacKillop to Charlie Wallace and Dan Sullivan forwarding e-mails from Daniel Walls pertaining to preemption.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
03/07/2013	Bob McEvoy, Brunswick West Neighborhood Coalition, met with MDOT Commissioner David Bernhardt and Jeff Tweedie to discuss MDOT's opinion of cost differential for NNEPRA's Layover Facility between Brunswick West site and Industrial Park site. Consigli's bid data was not available so comparisons were difficult at best. Bob McEvoy asked for additional data.
03/11/2013	Bob McEvoy e-mail to Commissioner Bernhardt requesting MLF funding information.
03/11/2013	Bob McEvoy and Commissioner Bernhardt had a brief discussion about the 3/07/13 meeting. Commissioner Bernhardt indicated that terracing to obtain fill material was estimated to cost more than hauling in fill. Bob McEvoy informed Commissioner Bernhardt that he had asked the Brunswick Codes Officer to check the plans for the L.L. Bean building adjacent to the Industrial Park site for soil borings and foundation design.
03/12/2013	Lewiston Sun Journal article by Scott Taylor. Tony Donovan of the Maine Rail Transit Coalition is proposing passenger rail service from Portland to Auburn with stops in Falmouth, Yarmouth Village and Pineland Center with possible expansion to Bethel, Maine's Western Ski Resorts and Quebec.
03/12/2013	Michelle Edwards, American Lung Association of the Northeast, provided links to support materials including "Smokestacks on Rails" by the Environmental Defense.
03/12 to 03/18/2013	Lynne Cayting, Maine Department of Environmental Protection Air Bureau, provided information on "Locomotive Line Haul Emission Standards (g/bbhp-hr) and EPA brochure "Diesel Exhaust in New England" #EPA 901-F-07-002 April 2007.
03/18/2013	Chris Casey and Bob McEvoy, Brunswick Neighborhood Coalition, made statements on Amtrak at the Brunswick Planning Board meeting. Statements targeted Diesel Exhaust Emissions from "Downeaster" Amtrak Locomotives.
03/20/2013	Bob McEvoy met with Commissioner Bernhardt in Augusta to discuss funding of MLF and continued evaluation of the Industrial Park Site. Commissioner Bernhardt stated that the Industrial Park Site was no longer under consideration and the NNEPRA Board would be voting on 3/25/13 to proceed with the Brunswick West Site.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
03/22/2013	Bob McEvoy and Commissioner Bernhardt had a brief discussion. Bob McEvoy told Commissioner Bernhardt that the Brunswick Codes Officer had not yet responded about the L.L. Bean building Soils & Foundation information. Commissioner Bernhardt responded that the Industrial Park site was no longer under consideration by the NNEPRA Executive Board.
03/25/2013	Amtrak responded to John MacKillop's 3/12/2013 Request for Information about Crew Transportation between Portland, Maine and Brunswick, Maine by Taxi Service
03/25/2013	NNEPRA's March Executive Board Meeting. NNEPRA's Executive Board authorized their Executive Director to execute the Design-Build contract with Consigli Construction Company Inc. Charles Wallace and Bob Morrison, Brunswick West Neighborhood Coalition, attended the Executive Board Meeting and presented Senator Gerzofsky's March 25, 2013 letter. Charles Wallace requested a copy of the Draft EA that was submitted to FRA for review. Dana Connors, Vice Chairman of the NNEPRA Executive Board, assured Mr. Wallace that a copy of the Draft EA would be provided to him.
03/27/2013	Dan Sullivan and John MacKillop, Brunswick West Neighborhood Coalition sent a letter to Governor Paul LePage requesting a meeting concerning the proposed construction of the MLF at the Brunswick West site.
03/28/2013	Charlie Wallace request for meeting with Governor Lepage through Governor's website.
03/29/2013	Dylan Martin's article in "The Forecaster".
04/03/2013	Letter sent to Governor Lepage requesting an opportunity to discuss NNEPRA site selection for the MLF. (from Bob and Charlie through Pem Schaeffer)
04/03/2013	Letters sent to Environmental Defense Fund requesting their participation in the Brunswick West Neighborhood cause.
04/04/2013	Tom Bell's article in the Portland Press Herald
04/06/2013	Orlando Delogu memo to Nicole Vinal, Charles Wallace and Robert McEvoy pertaining to MLF in Brunswick, Maine.

TIMELINE

Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
04/14/2013	Lewiston Sun Journal Articles by Kathryn Skelton concerning possible Rail Passenger service to Lewiston-Auburn and Downeaster plans train to Twin Cities.....Eventually.
04/18/2013	Louis Fontaine, Maine Department of Environmental Protection (MDEP), Air Bureau responds to Complaint filed with MDEP.
04/23/2013	Chris Casey, Brunswick West Neighborhood Coalition (BWNC), article in the Brunswick Times Record in Response to a recent Times Record Editorial.
04/29/2013	John MacKillop's email forwarding the Connecticut Attorney Generals 10/30/01995 opinion on Federal Preemption.
04/30/2013	John MacKillop's email forwarding Gabriel S. Meyers Email of 4/30/2013. Colin's legal research pertained to 49 U.S.C. §24902(j).
05/01/2013	Dennis Bailey dba Savvy, Inc. retained by Brunswick West Neighborhood Coalition.
05/02/2013	Forecaster Article by Dylan Martin discussing diesel exhaust emissions from Downeaster Locomotives.
05/03/2013	FOIA request to NNEPRA for a copy of Operations Plan for Brunswick West Maintenance and Layover Facility.
05/03/2013	FOIA request to NNEPRA and MDOT for copy of Cooperative Agreement for Funding of Brunswick West Maintenance and Layover Facility.
05/03/2013	FOIA request to NNEPRA, MDOT and FRA for copy of March 2013 Draft Environmental Assessment.
05/07/2013	Bob McEvoy, BWNC, obtained a copy of the "Brunswick Neighborhood" client file from Attorney Sarah A. McDaniel.
05/07/2013	John MacKillop, BWNC, received an email from Trevor Gibson, FRA, in response to John's email of 4/22/2013 requesting a copy of NNEPRA's Draft EA.
05/10/2013	FRA acknowledged receipt of FOIA request (5/3/2013) for Draft EA for Brunswick West MLF.

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Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
05/10/2013	Charles Wallace, BWNC, met with Governor Paul LePage, Jonathan Nass, Chief Policy Advisor, and MDOT Commissioner David Bernhardt. Charles Wallace requested a copy of NNEPRA's March 2013 Draft EA and Governor LePage directed Commissioner Bernhardt to provide a copy of the EA to Mr. Wallace.
05/13/2013	Marina Douglass, NNEPRA, acknowledges receipt of 5/3/2013 FOIA requests.
05/14/2013	John MacKillop's email contains the comments from the Congressional Research Service, Legal Office, on Colin Morrow's legal research on 49 U.S.C. § 24902(j).
05/21/2013	FOIA request to Amtrak for information relating to exhaust emissions from General Electric Genesis P42DC Locomotives.
05/21/2013	FOIA request to NNEPRA for copies of documents pertaining to purchase of land, meeting minutes and Portland MLF.
05/22/2013	Letter from Senator Angus S. King, Jr. to Joseph C. Szabo, Administrator, FRA.
06/03/2013	FOIA request to NNEPRA for documents pertaining to the retaining of Parson Brinkerhoff for professional services on the proposed MLF in Brunswick, Maine.
06/04/2013	NNEPRA's response to the 5/21/25013 FOIA request.
06/10/2013	RSE's, Charlie Wallace, email to Jonathan Nass asking about the Draft EA that was promised at the meeting with Governor LePage on 5/10/2013.
06/11/2013	NNEPRA's response to the 6/3/2013 FOIA request.
06/11/2013	Dennis Bailey, Savvy, Inc., announced the launching of a new Brunswick West website.
06/12/2013	FOIA request to NNEPRA pertaining to a leased metal building on Thompson's Point, Portland, Maine.
06/12/2013	FOIA request to Crew Transportation Specialists, Inc. (CTS) of Wichita, KS pertaining to Amtrak Crew transportation between Portland, Maine and Brunswick, Maine by Taxi Service.
06/14/2013	David Bernhardt's email to RSE, Charlie Wallace, on status of the Draft EA.

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Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
06/19/2013	NNEPRA acknowledges FOIA request of 6/12/2013.
06/21/2013	RSE, Charlie Wallace, email to David Bernhardt asking about the status of the Draft EA.
06/24/2013	David Bernhardt's email to RSE, Charlie Wallace, stating that NNEPRA had mailed a copy of Draft EA to Bob McEvoy, BWNC.
06/24/2013	NNEPRA letter responding to the 5/3/2013 FOIA request. NNEPRA provided a copy of the March 2013 Draft EA and a copy of the Cooperative Agreement between MDOT and NNEPRA for funding to construct the Brunswick West MLF. NNEPRA also stated that the Operations Plan for the proposed Brunswick West MLF has not been developed.
06/25/2013	Bob Morrison and Bob McEvoy, BWNC, met with representatives of the Maine Green Party to discuss the Brunswick West MLF.
06/26/2013	Mary Heath's, Maine Green Party, email to Bob McEvoy pertaining to the 6/25/13 meeting.
07/07/2013	Portland Press Herald Train Riders Northeast Wayne Davis comments on continued Downeaster Layover Facility Controversy (also published in Brunswick Times Record 7/11/2013).
07/08/2013	NNEPRA second response to FOIA requests of 5/21/2013, 6/3/2013, and 6/13/2013.
07/09/2013	Amtrak's response to 5/21/2013 FOIA request pertaining to exhaust emissions and P42DC Locomotives.
07/09/2013	NNEPRA's Brunswick Layover Building Advisory Group Meeting Agenda and Draft Meeting Notes.
07/10/2013	Bob McEvoy's email to Patricia Quinn.
07/11/2013	Forecaster Article by Dylan Martin.
07/12/2013	Mailed via USPS FOIA request to Federal Railroad Administration requesting copies of review comments etc. on NNEPRA's Draft EAs submitted in March and June 2013.

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Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
07/14/2013	John MacKillop's email to Bob McEvoy and Charlie Wallace (RSE) pertaining to Connecticut's AG opinion on Amtrak's preemption
07/15/2013	Mary Heath's email to RSE for Bob McEvoy.
07/17/2013	NNEPRA's Draft Repsonse-2 nd Draft to FOIA request of 7/8/2013.
07/17/2013	NNEPRA's response to Information requested on 7/10/2013.
07/18/2013	John MacKillop's email to Bob McEvoy and Charlie Wallace (RSE) pertaining to Connecticut's Attorney General's opinion 1995-029 Amtrak's preemption.
07/19/2013	FRA sent letter to Bob McEvoy closing out the FOIA request of 5/3/2013 pertaining to the Draft EA of March 2013.
07/19/2013	FRA sent acknowledgement letter to Bob McEvoy pertaining to FOIA request for FRA comments on NNEPRA's Draft EA.
07/22/2013	Bob Morrison and Nicole Vinal Harvie, BWNC, attended NNEPARA's July Executive Board Meeting,
07/23/2013	Nicole Vinal Harvie distributed her NNEPRA Board Meeting (7/22/13) Notes.
08/13/2013	Dan Sullivan, BWNC, meeting with Governor LePage, Jon Nass and MDOT Commissioner Dave Bernhardt.
09/04/2013	Bob McEvoy sent e-mail to Dennis Bailey pertaining to Crew Transportation Specialists' failure to respond to Bob McEvoy's FOIA request to CTS on 6/12/13.
09/04/2013	Dennis Bailey sent e-mail to Kay Rand, Chief of Staff Senator Angus S. King, Jr., pertaining to CTS Taxi Contract.
09/04/2013	Kay Rand, Chief of Staff Senator Angus S. King, Jr., sent e-mail to Dennis Bailey pertaining to CTS Taxi Contract.
09/12/2013	NNEPRA Advisory Group Meeting at the Brunswick Town Council Chambers. The Stormwater Permit was discussed. Bob McEvoy requested copies of the Engineering drawing of the site plan as well as a copy of the Lighting Impact Analysis and off-site light pollution resulting from the Lighting Plan. Bob McEvoy also requested NNEPRA's schedule for obtaining a Clean Air Act Air Emission License for the MLF to meet NAAQS.

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Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
09/14/2013	NNEPRA Environmental Assessment (EA) open for public comment
09/16/2013	E-mail: Bob McEvoy to Patricia Quinn, NNEPRA, reminding Patricia Quinn that an electronic copy of the Site Plan requested at the 9/12/2013 AG meeting has not been received.
09/18/2013	Dennis Bailey sent email to Bob McEvoy forwarding Alex Porter's email to Dennis Bailey pertaining to CTS Taxi Contract. Mr. Porter requested communications between Amtrak and BWNC.
09/25/2013	E-mail: Bob McEvoy to Patricia Quinn, NNEPRA, reiterating the request made at the 9/12/2013 AG meeting for an electronic copy of the Engineering Drawing of the Site Plan and a copy of the Lighting Impact Analysis and off-site lighting pollution resulting from the lighting plan.
09/26/2013	NNEPRA holds a Public Hearing in Brunswick re September EA
09/27/2013	FOIA request to NNEPRA requesting copies, paper or electronic, of all Amendments subsequent to Amendment No. 2 pertaining to the Grant/Cooperative Agreement for the Downeaster- Portland North project.
10/03/2013	E-mail: Marina Douglass, NNEPRA, to Bob McEvoy in response to Bob McEvoy's e-mail of 9/25/2013. Marina Douglass responded that only one version of an electronic site plan is available and NNEPRA does not have a report on Lighting Impact Analysis and off-site light pollution resulting from the Lighting Plan. The version of an electronic site plan is not an Engineering Drawing and does not fulfill Bob McEvoy's request from 9/12/2013 and 9/25/2013.
10/04/2013	Marina Douglass of NNEPRA responded to the 9/27/2013 FOIA request and provided a copy of Amendment No. 3 between NNEPRA and FRA for the Downeaster-Portland North project.
10/08/2013	E-mails between Charles Wallace and Nicole Vinal pertaining to obtaining a copy of a current, scaled, Engineering Site Plan from NNEPRA. Nicole went to NNEPRA's office and spoke with Marina Douglass. Marina Douglass states that the only site plan they have is the one on the NNEPRA website. This is NOT an Engineering Scale Site Plan.
10/11/2013	E-mail from Moe Bisson stating that the BWNC EA comments package was delivered to NNEPRA's office at 3:52 p.m. today. The BWNC EA comments package included John B. Shumadine's transmittal letter dated 10/11/2013.
10/13/2013	Public Comment period ends on NNEPRA's EA.

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Portland to Brunswick Track Upgrade and Brunswick West Maintenance and Layover Facility (supporting documents available upon request)

<u>DATE</u>	<u>EVENT</u>
10/16/2013	John B. Shumadine forwarded the BWNC comments and supporting documents on NNEPRA's EA directly to the Federal Rail Administration to ensure that all BWNC material reached the FRA.
10/22/2013	Dennis Bailey sent e-mail to Bob McEvoy et al forwarding Alex Porter's e-mail to Dennis Bailey pertaining to CTS Taxi Contract. Mr. Porter stated this contract is not subject to a FOIA request because is between two private parties and is unavailable to Senator King's office.
10/29/2013	Attorney John B. Shumadine sent a letter to Maine Department of Environmental Protection (MDEP) concerning the Applicability of Site Location of Development Statute, 38 M.R.S.A. §481 et seq.
10/30/2013	Received Letter from MDEP to NNEPRA letter dated May 14, 2012 to NNEPRA claiming NNEPRA pre-emption from Maine Site Law.
11/15/2013	E-mail from Dennis Bailey to Eric Russell at Portland Press Herald pertaining to recently released ridership numbers released by NNEPRA.
12/02/2013	Times Record article about MDEP issuing NNEPRA a Stormwater Permit for the proposed Brunswick West MLF.
12/06/2013	Bob McEvoy took the Town of Brunswick Codes Enforcement copy of the NNEPRA Site Development Permit Plan set to Xpress Copy in Portland, ME for scanning. Permit plan set was returned to Brunswick Codes Enforcement office before the close of business on 12/6/2013. Site Development Permit Plan set are Engineering Scale Drawings completed on or before 8/14/2013. James Russell, NNEPRA Engineer, signed SWMP Application for NNEPRA on 8/14/2013.
12/06/2013	Bob McEvoy sent e-mail & letters to Senator Collins, Representative Michaud and Representative Pingree asking for help in getting a copy of the Crew Transportation Specialists Contract with Brunswick Taxi for transportation of Amtrak crews to and from Brunswick and Portland.
12/13/2013	Southern Abutters to NNEPRA's Project Filed 80C Appeal with the Cumberland County Superior Court requesting court to vacate SWMP.
12/17/2013	E-mail from Dan Sullivan transmitting 9/12/2013 NNEPRA Advisory Group Agenda Documents.

John B. Shumadine
jshumadine@mpmlaw.com
Direct: (207) 523-8225

January 14, 2014

VIA FEDERAL EXPRESS

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

RE: ***Environmental Assessment for the Proposed Brunswick Layover and
Maintenance Facility***

Dear Administrator Szabo:

This Firm represents the Brunswick West Neighborhood Coalition in addition to a number of individuals who live in the residential areas around Bouchard Drive, Hennessy Avenue, and Paul Street in Brunswick (collectively the “Coalition”). The Coalition is concerned about the location of the proposed Brunswick Layover and Maintenance Facility (the “Maintenance Facility”) that the Northern New England Passenger Rail Authority (“NNEPRA”) is planning to build in Brunswick. The residential areas around Bouchard Drive, Hennessy Avenue, and Paul Street abut one of the proposed locations of the Maintenance Facility – the so-called “Brunswick West” location.

At the current time, NNEPRA has prepared an Environmental Assessment of the Brunswick West location of the Maintenance Facility and has asked the FRA to issue a Finding of No Significant Impact based on that EA. In contrast, the Coalition has commented on the EA and pointed out the many deficiencies that should lead to the preparation of an Environmental Impact Statement.

Although the comment period on the EA has closed, the Coalition has recently received confirmation of something they had suspected: NNEPRA has not been forthcoming in providing materials requested by the neighbors. The neighbors have long perceived how difficult it has been to try to work with NNEPRA in the years since NNEPRA identified Brunswick West as NNEPRA’s preferred location for the

Maintenance Facility.¹ However, the Coalition recently learned that NNEPRA has withheld documents.

The issue is a simple one. The Brunswick West site is adjacent to the homes of the Coalition members. As such, it is understandable why they have sought information from NNEPRA about the Maintenance Facility. Nonetheless, many of those requests have been met with responses that either promise substantial and inexplicable delays² or that claim the requested information does not exist. It is the latter response that has proven the most troubling. In at least one instance, NNEPRA has actually possessed the information they told the Coalition did not exist.

That instance concerns the site plan for the Maintenance Facility. For obvious reasons, the Coalition has been interested in receiving a site plan that provides a full range of details about the Maintenance facility. However, NNEPRA only provided the Coalition and other neighbors a “site plan” that showed a general overview of the proposed Maintenance Facility. The document that NNEPRA was identifying as its “site plan” is attached to this letter as Exhibit B. The “site plan” in Exhibit B does not provide any of the details that would ordinarily be included in a true site plan prepared by an engineering or similar firm. For instance, there was no scale on the drawing, no dimensions were given, and the features of the project are not described in any detail.

Because of the deficiencies in the “site plan” provided by NNEPRA, the Coalition continued to ask NNEPRA for an engineering grade site plan. In early September, the Coalition, acting through Mr. McEvoy, requested that plan during an advisory committee meeting. At the meeting, NNEPRA told Mr. McEvoy they would send him the site plan. Mr. McEvoy followed up with an email on September 16, 2013, asking for the site plan. The next day, NNEPRA responded with a reference to a pdf file on their website. The pdf file was the exact same “site plan” that NNEPRA had already provided (Exhibit B) and that, as discussed above, lacked the detail that would ordinarily exist on a site plan.

On September 25, 2013, Mr. McEvoy followed up again. In that email, Mr. McEvoy specifically asked for an “electronic copy of the Engineering drawing of the site plan.” NNEPRA responded on October 3, 2013, again referencing the pdf it had already provided and unequivocally stating, “NNEPRA does not have any other electronic versions of the latest site plan for the Brunswick Layover Facility.” Copies of the

¹ I have attached as Exhibit A to this letter a timeline that goes over the history of the Brunswick West site in addition to the interactions between the Coalition and NNEPRA about that site.

² NNEPRA responded to at least one Freedom of Access Act request with an estimate of several weeks to provide the requested information.

September – October 2013 exchange between Mr. McEvoy and NNEPRA are attached as Exhibit C to this letter.

The Coalition followed up orally on at least two other occasions asking NNEPRA to provide a site plan with an engineering level of detail. On September 26, 2013, NNEPRA held a public hearing on its EA. At the conclusion of the hearing, Mr. McEvoy approached Patricia Quinn of NNEPRA and asked for a scaled site plan. Ms. Quinn told Mr. McEvoy that NNEPRA did not have such a plan. When Mr. McEvoy responded that it seemed likely that at least one of the construction and engineering companies NNEPRA had engaged to work on the Maintenance Facility would have such a plan, he was again told that NNEPRA did not have it and that the pdf that had already been distributed was the only site plan available. On October 8, 2013, another Coalition member, Nicole Vinal, asked Marina Douglas of NNEPRA if she could get a scaled site plan. Ms. Douglas responded that they could not provide such a site plan. According to Ms. Douglas, the only site plan NNEPRA had was the unscaled plan that had already been provided to Mr. McEvoy.

The Coalition has recently discovered that in early August, NNEPRA had filed a stormwater permit application with the Maine Department of Environmental Protection.³ NNEPRA included with that application a set of 29 plans. I have attached a set of the plans that NNEPRA included with its stormwater permit application as Exhibit D.⁴

As you can see, all of the plans in Exhibit D were drawn to engineering specifications. One of those plans – Plan C-3.0 – is entitled “Overall Site Plan.” Like all of the other plans, the “Overall Site Plan” is dated “June 2013.” The “Overall Site Plan” is precisely the same plan that the Coalition has been asking NNEPRA to provide and that NNEPRA was telling the Coalition and other neighbors did not exist.

The Coalition has attempted to work with NNEPRA. The history shows that the reverse is not true. NNEPRA has not been forthcoming in providing information to the people who will be most directly affected by the Maintenance Facility. The Coalition

³ The Coalition was not aware that NNEPRA had filed this application until after the DEP had granted it. NNEPRA did not send notification to anyone to the south of the project – where the Coalition members live. The Coalition believes that NNEPRA failed to comply with Maine DEP rules regarding notice with respect to the stormwater permit application. Four landowners to the south have filed an appeal in Maine Superior Court challenging the stormwater permit application due to that lack of notice. I have attached a copy of the appeal as Exhibit E.

⁴ The Coalition copied the plans from the Town of Brunswick. Currently, we only have electronic copies of the plans, which I have printed out on 11x17 paper. I would be happy to provide the FRA with full size plans if that would be of additional assistance.

suggests that NNEPRA's failure to deal openly with the neighbors raises serious doubts about NNEPRA's candor and credibility. NNEPRA's failure to provide documents such as an engineering site plan has also harmed the ability of the Coalition and others to participate in and offer comments on the EA. Accordingly, as the FRA reviews the EA that NNEPRA has submitted, it must keep in mind that NNEPRA has a history of concealing information from those who are entitled to know about it. The FRA should be wary of what NNEPRA might have knowingly omitted from its EA. The only way the FRA can be sure that the environmental concerns of the National Environmental Policy Act are satisfied is if it requires NNEPRA to prepare an EIS.

Thank you for your attention. Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "J.B. Shumadine". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

John B. Shumadine

JBS/kpm
Enclosures

cc: Brunswick West Neighborhood Coalition
NNEPRA - Nathaniel M. Rosenblatt, Esq.

October 11, 2013

VIA HAND DELIVERY

Ms. Marina Douglass
NNEPRA
75 West Commercial Street, Suite 104
Portland, ME 04101

Re: Environmental Assessment for the Proposed Brunswick Layover and Maintenance Facility

Dear Ms. Douglass:

This Firm represents the Brunswick West Neighborhood Coalition in addition to a number of individuals who live in the residential areas around Bouchard Drive, Hennessy Avenue, and Paul Street in Brunswick (collectively the "Coalition"). The Coalition is concerned about the location of the proposed Brunswick Layover and Maintenance Facility (the "Maintenance Facility") that NNEPRA is planning to build in Brunswick. The residential areas around Bouchard Drive, Hennessy Avenue, and Paul Street abut one of the proposed locations of the Maintenance Facility – the so-called "Brunswick West" location.

The Coalition is not opposed to the expansion of the Amtrak Downeaster service to Brunswick. To the contrary, the Coalition views that expansion as a generally positive development for Brunswick and the other towns along the expanded route. The Coalition also recognizes there may be a need for a maintenance facility in Brunswick. However, the Coalition parts company with NNEPRA when it comes to the location of that maintenance facility.

There are several possible locations within Brunswick for the Maintenance Facility. Most of those locations are within commercial or industrial areas – in other words, areas where another industrial use such as the Maintenance Facility would fit with the locality and otherwise minimize the disruption and impacts upon neighbors. However, of those locations, NNEPRA has chosen the only one it currently owns – the Brunswick West location. In contrast to the other options, the Brunswick West site is surrounded in close proximity by residential neighborhoods. In other words, the Brunswick West site is the worst location in terms of adverse environmental and other impacts on neighbors. The Coalition has repeatedly tried to explain the negative impacts of choosing the Brunswick West site, with little indication that NNEPRA has either heard or cared about either the Coalition's concerns or the negative impacts.

October 11, 2013

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NNEPRA has now issued an Environmental Assessment for the Maintenance Facility (the "EA"). In keeping with its practice, the EA focuses primarily upon the Brunswick West site and attempts to minimize the impacts the Maintenance Facility will have on the Coalition and surrounding neighborhoods in the hopes that the Federal Railroad Administration (the "FRA") will issue a Finding of No Significant Impact ("FONSI") and allow the Maintenance Facility to go forward without further environmental analysis.

Contrary to NNEPRA's contentions, it would be inappropriate to issue a FONSI and allow the Maintenance Facility to go forward. Several members of the Coalition have analyzed the EA that NNEPRA has prepared for the Maintenance Facility. Please find enclosed with this letter five binders of materials analyzing the EA. The materials show that the EA is deficient in numerous areas. Those deficiencies mean that the EA has not fully and accurately analyzed the impact the Maintenance Facility will have on the people surrounding the Brunswick West location.

The Coalition respectfully requests that the FRA conclude that if the Maintenance Facility is constructed in the Brunswick West location, it will have a significant impact on the quality of the human environment. The enclosed materials show that those impacts are foreseeable and substantial. In light of those impacts, the FRA should require the preparation of an Environmental Impact Statement ("EIS") in order to fully analyze and address all of the myriad environmental impacts that will occur if the Maintenance Facility is located at Brunswick West.

There is one other matter. I want to take a moment to discuss the zoning status of the Brunswick West location – and in the process correct an omission within the EA that NNEPRA has prepared. The Brunswick West location is within the Mixed Use 2 Zoning District. Brunswick has determined that large buildings are inconsistent with this location. The Brunswick Zoning Ordinance mandates that the "Maximum Building Footprint per Structure" within the Mixed Use 2 zone is only 20,000 square feet. In contrast, the Maintenance Facility will be over 50,000 square feet. At the least, this discrepancy points to a significant mismatch between the proposed Brunswick West location and the Maintenance Facility. Such a mismatch will directly contribute to the significant impacts the Maintenance Facility will have on the local human environment.

Of course, NNEPRA has pointed out in its EA that it did receive a variance from that dimensional standard. *Brunswick Layover Environmental Assessment* (September 2013) at 3. NNEPRA failed to include in its EA the fact that shortly after it received the variance, the variance was appealed by members of the Coalition to the Maine Superior Court. As is discussed in more detail below, the appeal was ultimately voluntarily dismissed after it became moot when NNEPRA allowed the variance to expire. However, if the appeal had

continued, it is my opinion that it was extremely likely that the Superior Court would have found in favor of the Coalition and reversed the grant of the variance. Both Maine law and the Brunswick Zoning Ordinance limit the grant of variances to extremely limited circumstances. Among other things, a party seeking a variance must show “[t]hat the land in question cannot yield a reasonable return unless a variance is granted.” Brunswick Zoning Ordinance § 703.2.A.1. Maine courts have repeatedly held that the “reasonable return prong of the undue hardship test is met where strict application of the zoning ordinance would result in the practical loss of all beneficial use of the land.” *Toomey v. Town of Frye Island*, 2008 ME 44, 943 A.2d 563, 567. “Reasonable return is not the ‘maximum return’ that could be afforded by a property.” *Id.*

Thus, the “reasonable return” standard is an extremely high one. NNEPRA was unlikely to be able to show the Superior Court that it met that standard. The Brunswick West site currently has a beneficial use in that it is currently being used for rail transit. It also could have other beneficial uses that would not require the large structure proposed as part of the Maintenance Facility. In light of those facts it is difficult to understand what possible argument NNEPRA could have to show that it was deprived of “all beneficial use of the land” if it could not build a 50,000+ square foot building.

NNEPRA no doubt saw the writing on the wall with respect to its variance request. The Town intervened and asked its attorney to circulate an opinion to the effect that the local zoning regulations were pre-empted by federal law. As is discussed in more detail in the attached documents, the Town Attorney’s opinion is in error. Nonetheless, NNEPRA decided that it would rely on that opinion rather than the variance. Under Maine law, a variance must be recorded in the relevant Registry of Deeds “within 90 days of the date of the final written approval of the variance or the variance is void.” 30-A M.R.S.A. § 4353(5). Moreover, the “variance is not valid until recorded as provided in this subsection.” *Id.* NNEPRA declined to record the variance, rendering the appeal moot and – more importantly – the variance void.

At the least, this history means that the Maintenance Facility is inconsistent with local zoning. The Coalition understands the FRA is not charged with enforcing local zoning or with resolving the dispute over whether local zoning is or is not pre-empted by federal law. However, even if NNEPRA were correct in its assertion that it does not need to get permits under the Brunswick Zoning Ordinance – a position the Coalition disputes – the FRA should still consider the Brunswick Ordinance in the context of deciding whether to require the preparation of an EIS.

Local zoning such as the Brunswick Zoning Ordinance represents the municipality’s legislative judgment about what size and quality of development is an appropriate fit for the particular zone in question. These judgments are made outside of the political pressures that

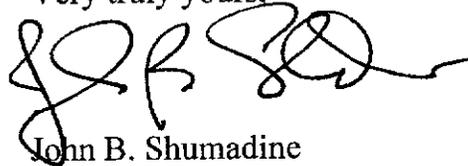
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often arise around specific projects such as the Maintenance Facility. With respect to the Mixed Use 2 District, the Town of Brunswick has determined that the construction of a facility larger than 20,000 square feet will have an adverse effect on the people who live and work within that district. Brunswick's determination on this point should weigh heavily in favor of a finding that an EIS is required.

For these reasons and the reasons outlined in the attached documents, the Coalition respectfully requests that the FRA find that the Maintenance Facility will have a foreseeable substantial impact on the human environment. As such, the Coalition requests that the FRA order the creation of an EIS for the Maintenance Facility.

Very truly yours,

A handwritten signature in black ink, appearing to read 'JBS', with a long horizontal flourish extending to the right.

John B. Shumadine

JBS/kpm
Enclosures

cc: Brunswick West Neighborhood Coalition
Federal Railroad Administration

FARRELL, ROSENBLATT & RUSSELL

ATTORNEYS AT LAW
61 MAIN STREET
P.O. BOX 738
BANGOR, MAINE 04402-0738

ANGELA M. FARRELL
NATHANIEL M. ROSENBLATT
THOMAS A. RUSSELL
JON A. HADDOW
GREGORY P. DORR
ROGER L. HUBER

TELEPHONE (207) 990-3314
TELECOPIER (207) 941-0239
e-mail: info@frrlegal.com

February 14, 2014

Via e-mail (michelle.fishburne@dot.gov) and U.S. Mail

Michelle W. Fishburne, Environmental Protection Specialist
United States Department of Transportation
Federal Railroad Administration
Office of Railroad Policy and Development
1200 New Jersey Avenue SE, W36-428
Washington, DC 20590

Re: **NNEPRA/Brunswick, Maine Layover Facility**

Dear Michelle:

Please accept this response to John Shumadine's letter to Administrator Szabo, dated January 14, 2014, as requested by the FRA. In his letter, Mr. Shumadine claims that NNEPRA withheld documents from the Brunswick West Neighborhood Coalition; in particular, the site plan accompanying NNEPRA's State of Maine Stormwater Permit application. The facts demonstrate that NNEPRA has been fully responsive to requests for the layover facility site plan.

A. Background

Site plans for complex public projects are commonly used for a variety of purposes, including informational, permitting, construction, and financing. Generally speaking, the appropriate level of detail set forth on any given site plan is dependent upon the intended use of that plan. For example, a site plan containing detailed construction features (e.g. slope of a detention pond) would likely be of little use to a financing entity primarily concerned with the overall scope of the project.

In this case, there are four relevant versions of the project site plan. All of them are based on the same underlying site information, and all of them are enclosed with this letter. Importantly, all of the plans describe the exact same project. The earliest of the four site plans (Exhibit A) was prepared for inclusion with the Environmental

FEB 18 2014

Assessment. This site plan is dated June 2013. This site plan shows the project at a level of detail necessary for EA purposes, but it does not contain near the level of detail of the later versions. As an active participant in the EA process, the Coalition has had access to this site plan since well before the submission of the final EA.

The second site plan (Exhibit B) is dated July 10, 2013, and was included with schematics for the project prepared, primarily, for general design and public informational purposes. Notwithstanding the purpose for which that site plan was initially prepared, it remains the most detailed of the four site plans. The only *substantive* difference between this second site plan and the first site plan is that it shows the building relocated 20' to the east and 12' to the south. The plan also does not show the holding track that was initially proposed because that particular feature was eliminated from the project before the plan was prepared. NNEPRA posted this site plan on its public website in July 2013. The Coalition admits that it received this site plan. (Shumadine letter, pg. 2.)

The third site plan (Exhibit C) was included with NNEPRA's Stormwater Permit application filed with the Maine Department of Environmental Protection in August 2013. The project, as shown on this site plan is identical, in all material respects, to the project as shown on the prior site plans. The level of detail, however, is tailored specifically to meet the needs of the agency reviewing the Stormwater Permit application. Importantly, it contains *less detailed information than the version NNEPRA posted on its website in July 2013*. This is the site plan Mr. Shumadine claims NNEPRA withheld from the Coalition. He contends that the Coalition was not aware of NNEPRA's Stormwater Permit application and (we assume), therefore, not aware of the site plan that accompanied the application. As explained below, and notwithstanding the Coalition's claim to the contrary, the Coalition *was* aware of NNEPRA's Stormwater Permit application.

Finally, there is a version of the site plan (Exhibit D) that continues to evolve as part of the negotiated "design-build" construction process between NNEPRA and NNEPRA's design-build contractor, Consigli. This site plan, like the design-build contract negotiations themselves, is not final. With the caveat that this site plan may be further modified as negotiations proceed, we are sharing it with you (and with Mr. Shumadine by copy of this letter) so that NNEPRA is not further criticized for withholding information. The project as shown on this plan is identical in all material respects to the project as depicted on prior site plans. No substantive changes to the project are expected at this late stage.

Again, it is important to keep in mind that all of the above-described site plans, while containing varying amounts of detailed information, describe the exact same project.

B. Mr. Shumadine's Complaint

Mr. Shumadine contends that the Coalition repeatedly asked for plans "drawn to engineering specifications" and that NNEPRA rebuffed those inquiries by simply directing the Coalition to the plans NNEPRA posted on its website in July 2013 (i.e. Exhibit B). He attempts to prove his point by noting that the site plan accompanying NNEPRA's Stormwater Permit application (i.e. Exhibit C) "is precisely the same plan that the Coalition has been asking NNEPRA to provide and that NNEPRA was telling the Coalition . . . did not exist." (Shumadine letter, pg. 3.)

First, by its own admission and despite claims to the contrary, the Coalition was aware of NNEPRA's Stormwater Permit application at least as early as September 12, 2013.¹ As evidence of that fact, we note that in his letter to Administrator Szabo, Mr. Shumadine acknowledges that Bob McEvoy attended the September 12, 2013 meeting of the Brunswick Layover Advisory Group on behalf of the Coalition. (Shumadine letter, pg. 2.) Other members of the Coalition were also in attendance, including Dan Sullivan. The timeline Mr. Shumadine submitted with his letter to Administrator Szabo includes an entry for the September 12, 2013 meeting acknowledging that "the Stormwater Permit was discussed." (Shumadine timeline, pg. 16.) Indeed, at the meeting, Mr. McEvoy stated, "[w]e understand you're in the process of getting a DEP stormwater license or putting in an application for a license" ² Whether or not the Coalition's representative, Mr. McEvoy, shared his knowledge of the application with the Coalition, we cannot be certain. But, his failure to do so should not be held against NNEPRA.

Second, the site plan that Mr. Shumadine argues NNEPRA knowingly withheld and that provides the level of engineering requested (i.e. Exhibit C) is actually *less detailed* than the plan NNEPRA posted on its website and to which NNEPRA kept directing the Coalition (i.e. Exhibit B). In fact, given that the site plan being negotiated with Consigli under the design-build contract remains a "work-in-progress," the second site plan (i.e. Exhibit B) represents the *most detailed* of the three completed site plans (i.e. Exhibits A, B, and C). NNEPRA responded properly to the Coalition's request for a detailed site plan by directing the Coalition to the site plan posted on its website.

Finally, the Coalition's claim that NNEPRA was withholding documents is seriously undercut by the fact that NNEPRA actually published public notice of its Stormwater Permit application in the Brunswick *Times Record* on August 15, 2013. That notice made clear that the application was available for review both at the Maine DEP regional office and at the town office in Brunswick. (See Exhibit E.) Thus, according to its own admission, the Coalition was aware of the Stormwater Permit

¹ / The final Environmental Assessment was submitted the next day, September 13, 2013.

² / A video recording of the September 12, 2013 Advisory Group meeting is available online at: <http://www.brunswickme.org> under the link "Brunswick TV3."

February 14, 2014
Page Four

application at least as early as the September 12, 2013 meeting and, more likely, as early as August 15, 2013. In either event, the Coalition was aware of the application *before* NNEPRA submitted its final Environmental Assessment. The Coalition's apparent failure to review the application should not be charged to NNEPRA.

We are reasonably certain that to the extent there is any real confusion about who provided what, when, that confusion stems from a verbal exchange between NNEPRA representatives and Bob McEvoy, a Coalition representative, immediately following the September 12, 2013 Brunswick Layover Advisory Group meeting. After that meeting, Mr. McEvoy asked NNEPRA representatives for something in addition to the site plan that was posted on NNEPRA's website. NNEPRA understood Mr. McEvoy's request to be for an electronic set of plans with layers that could be moved around or otherwise manipulated – and not simply a PDF. NNEPRA simply did not (and does not) have the kind of electronic plans that Mr. McEvoy said he was looking for, and NNEPRA so notified him. NNEPRA also understood subsequent requests from Mr. McEvoy for electronic copies of site plans to, again, be for something other than PDFs (i.e. to be for electronic plans with layers that could be moved around or otherwise manipulated). Nicole Vinal's verbal request on October 8, 2013 referenced back to the conversation with Mr. McEvoy that took place after the September 12, 2013 meeting and was understood to be a follow-up to that earlier request.

As a quasi-governmental agency, NNEPRA is required by state law to be transparent and forthcoming in all its dealings. NNEPRA takes that obligation very seriously and is especially proud of its record in that regard. NNEPRA also takes seriously any claim that it has acted to the contrary. We appreciate this opportunity to set the record straight. If you would like any further information in response to Mr. Shumadine's letter, please do not hesitate to contact me.

Sincerely yours,

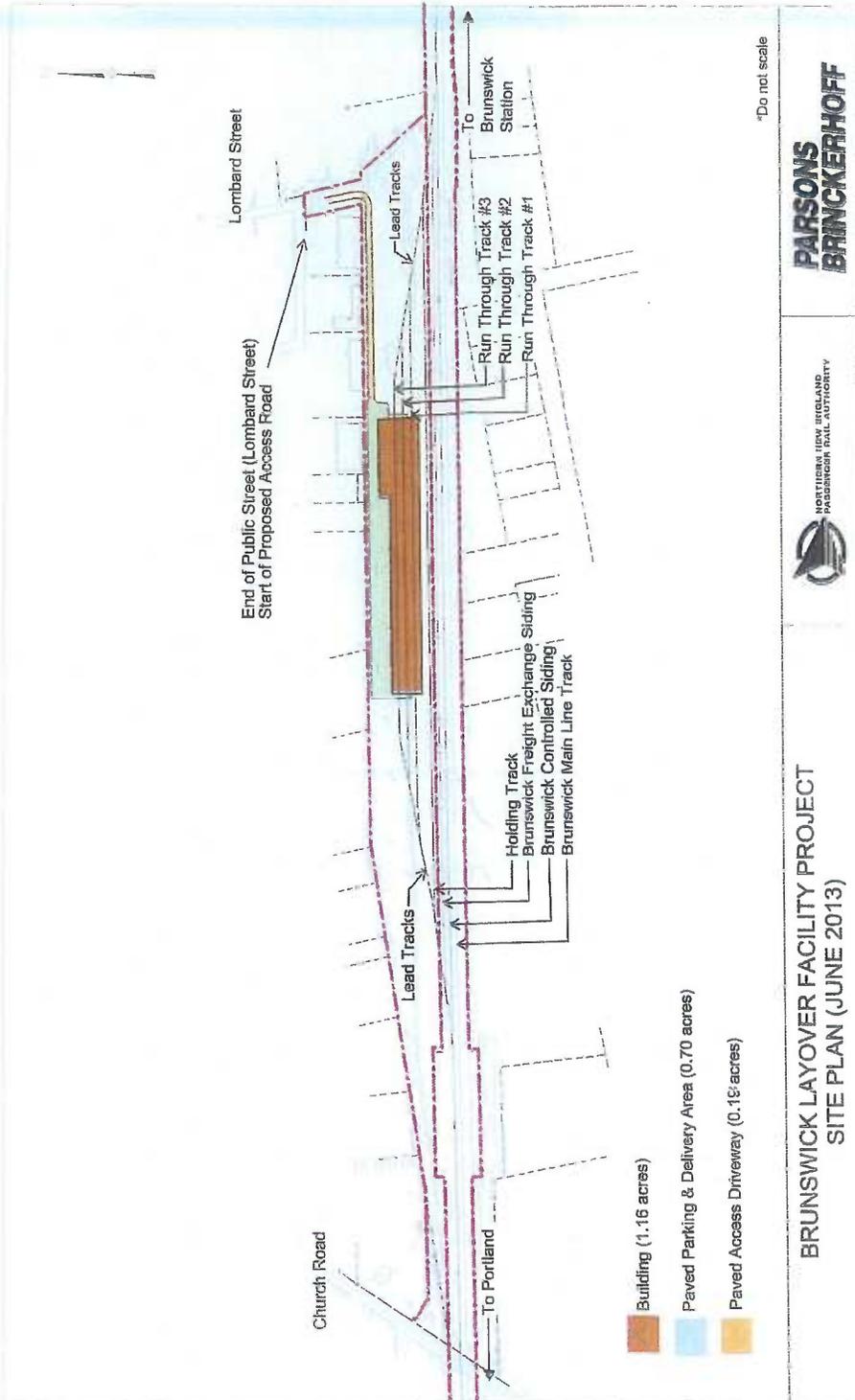


Nathaniel M. Rosenblatt

Enclosures

cc (w/ enclosures): John B. Shumadine, Esq. (via U.S. Mail) ✓

Exhibit 4: Proposed Site Layout of Build Alternative



NNEPRA - LAYOVER FACILITY SITE LAYOUT

- Site Layout

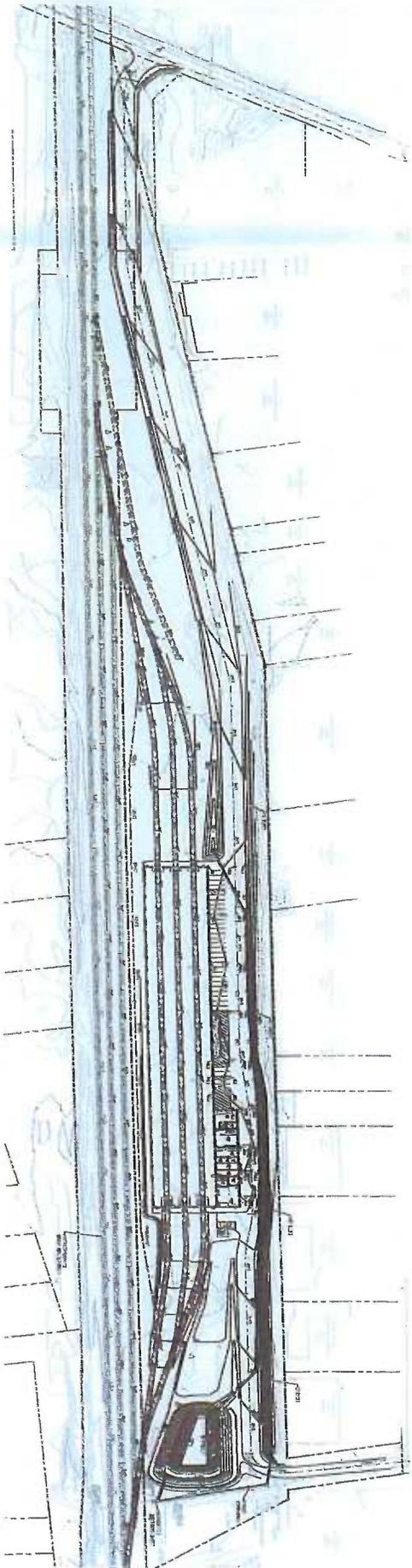


EXHIBIT
B

7/10/2013

3



CONSIGLI
Est. 1905

THE TIMES RECORD
3 BUSINESS PARKWAY
SUITE 1
BRUNSWICK ME 04011-1302



ORDER CONFIRMATION (CONTINUED)

Salesperson: VALERIE OUELLETTE

Printed at 08/14/13 11:25 by vouel

Acct #: 212165

Ad #: 186034

Status: N

**NOTICE
PUBLIC NOTICE:
NOTICE OF INTENT
TO FILE**

Please take notice that:
Northern New England
Passenger Rail Authority
(NNEPRA) Attn: James
Russell 75 West Commer-
cial Street, Suite 104 Port-
land, Maine 04011 (207)
780-100 is intending to file
a Stormwater Law permit
application with the
Maine Department of En-
vironmental Protection
pursuant to the provi-
sions of 38 M.R.S.A. § 420-
D on or about August 9,
2013.

The application is for:
The Brunswick Layover
Facility located at the
Brunswick West Rail
Yard between Church
Road and Stanwood Street
(approximately 0.6 miles
west of Brunswick Station
in Brunswick, Maine.

A request for a public
hearing or a request that
the Board of Environmen-
tal Protection assume ju-
risdiction over this
application must be re-
ceived by the Department
in writing, no later than
20 days after the applica-
tion is found by the De-
partment to be complete
and is accepted for pro-
cessing. A public hearing
may or may not be held at
the discretion of the Com-
missioner or Board of En-
vironmental Protection.
Public comment on the
application will be accept-
ed throughout the pro-
cessing of the application.

For Federally licensed,
permitted, or funded ac-
tivities in the Coastal
Zone, review of this appli-
cation shall also consti-
tute the State's
consistency review in ac-
cordance with the Maine
Coastal Program pur-
suant to Section 307 of the
federal Coastal Zone Man-
agement Act, 16 U.S.C. §
1456.

The application will be
filed for public inspection
at the Department of En-
vironmental Protection's
office in Portland during
normal working hours. A
copy of the application
may also be seen at the
municipal offices in
Brunswick, Maine.

Written public com-
ments may be sent to the
regional office in Portland
where the application is
filed for public inspection:

MDEP, Southern Maine
Regional Office, 312 Can-
co Road, Portland, Maine
04108

John B. Shumadine
jshumadine@mpmlaw.com
Direct: (207) 523-8225

March 13, 2014

VIA FEDERAL EXPRESS

Michelle W. Fishburne, Environmental Protection Specialist
United States Department of Transportation
Federal Railroad Administration
1200 New Jersey Avenue SE, W26-428
Washington, DC 20590

RE: ***Environmental Assessment for the Proposed Brunswick Layover and
Maintenance Facility***

Dear Ms. Fishburne:

Please accept this letter as the Brunswick West Neighborhood Coalition's response to Attorney Rosenblatt's February 14, 2014 letter to the FRA. In that letter, Attorney Rosenblatt argues that NNEPRA has been "fully responsive to requests for the layover facility site plan." This claim is not correct.

To the contrary, Attorney Rosenblatt's letter only confirms that NNEPRA has not been forthcoming when asked for information. For instance, Attorney Rosenblatt has attached four site plans to his letter. Of those site plans and by his own admission, only two (Exhibits A and B) were shared with the Coalition. Those plans differ from the site plan that NNEPRA enclosed with its Stormwater Permit application (Exhibit C) and the newest site plan provided in the letter (Exhibit D) in at least one important detail. Exhibits A and B are not drawn to scale, while Exhibits C and D are. NNEPRA provided A and B to the Coalition, but withheld C and D.

However, the Coalition hopes the FRA does not get sidetracked into an extensive comparison between the various site plans. Such a comparison would only serve to obscure another important point in Attorney Rosenblatt's letter. Although Attorney Rosenblatt does not explicitly say so, the plain import of his letter is that NNEPRA did not provide Exhibit C, the Stormwater Permit site plan, to the Coalition. Attorney Rosenblatt then engages in an extensive discussion about the public notice NNEPRA gave of the Stormwater Permit application. The apparent purpose of that discussion is to imply that the Coalition should have found the Stormwater site plan itself.

March 13, 2014

Page 2

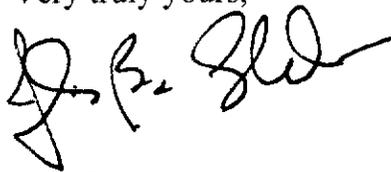
That discussion is designed to divert attention from NNEPRA. In doing so, Attorney Rosenblatt is asking the FRA to ignore the email communications between Robert McEvoy and NNEPRA's representative. Those communications were attached to my original letter and are attached to this letter again. In those communications, Mr. McEvoy asked for an engineering site plan. In response, NNEPRA told Mr. McEvoy that "NNEPRA does not have any other electronic versions of the latest site plan for the Brunswick Layover Facility."

As Attorney Rosenblatt's letter implicitly concedes, NNEPRA's representative was – to say the least – inaccurate. At the same time that NNEPRA's representative was saying that Attorney Rosenblatt's Exhibit B was the only site plan available, NNEPRA also had in its possession or control Attorney Rosenblatt's Exhibit C. For whatever reason, NNEPRA not only did not provide that Exhibit C to the Coalition, it also denied that it existed.

It is that denial that is the crux of the Coalition's complaint here. It does not matter whether the Coalition might have been able to get the information in another way. What matters is that the Coalition asked for and was explicitly denied information. These actions show that NNEPRA has hardly been "transparent and forthcoming in all its dealings." Against that background, the only way the FRA can be sure that the environmental concerns of the National Environmental Policy Act are satisfied is if it requires an EIS to be prepared.

Thank you for your attention. Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

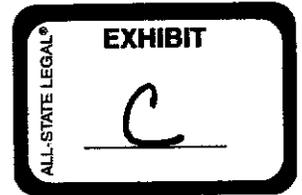
A handwritten signature in black ink, appearing to read "John B. Shumadine". The signature is fluid and cursive, with the first name "John" being the most prominent.

John B. Shumadine

JBS/kpm
Enclosures

cc: Brunswick West Neighborhood Coalition
NNEPRA

Electronic Copy of the latest Site Plan for the Brunswick West MLF Project



From: **Bob McEvoy** (bobmcevoy@hotmail.com)

Sent: **Mon 9/16/13 4:20 PM**

To: **Patricia Quinn** (patricia@mnepra.com)

Patricia,

I have not received the electronic copy of the site plan that was requested at the Advisory Group meeting last Thursday Sept. 12, 2013.

Please send this information as soon as possible.

Thanks,
Bob

Bob McEvoy
40 Bouchard Drive
Brunswick, Maine 04011
(207)721-9343

Information Request

From: **Marina Douglass** (Marina@nnepra.com)

Sent: Tue 9/17/13 9:27 AM

To: bobmcevoy@hotmail.com (bobmcevoy@hotmail.com)

Cc: Patricia Quinn (Patricia@nnepra.com); Marina Douglass (Marina@nnepra.com)

Dear Mr. McEvoy:

This is in response to your electronic request for information dated September 16, 2013 made under the Maine Freedom of Access Act, 1 MRSA §§ 401 et seq. This is the same document request received by you on July 10, 2013 and responded to by NNEPRA on July 17, 2013.

Electronic copy of the site plan for the Brunswick Layover Facility.

The latest electronic version of the document is available at
<http://www.nnepra.com/sites/default/files/NNEPRA%20Advisory%20Board%20Presentation%207-9-13.pdf>.

If you have any questions, please contact me.

Marina Douglass

Manager of Budget and Administration

Northern New England Passenger Rail Authority

75 West Commercial St., Suite #104

Portland, ME 04101

207-780-1001 Fax

Notice: Under Maine law, documents - including e-mails - in the possession of NNEPRA that are received or prepared for use in connection with NNEPRA's business may be public records. There are very few exceptions. As a result, please be advised that what is written in an e-mail could be released to the public and/or the media if requested.

Requested Info

From: **Bob McEvoy** (bobmcevoy@hotmail.com)
Sent: Wed 9/25/13 10:37 AM
To: **Patricia Quinn** (patricia@meptra.com)
Bcc: **Resource Systems Engineering** (rse@rsemaine.com)

Patricia,

During the September 12, 2013 Advisory Group meeting I requested an electronic copy of the latest site plan. The .pdf sent earlier does not serve our needs. An electronic copy of the Engineering drawing of the site plan is needed. I also requested a copy of the Lighting Impact Analysis and off-site light pollution resulting from the Lighting Plan. And I have not received the requested Lighting Impact Study.

I look forward to receiving these documents as soon as possible.

Thanks,
Bob

Bob McEvoy
40 Bouchard Drive
Brunswick, Maine 04011
(207)721-9343

Information Request

From: **Marina Douglass** (Marina@nnepra.com)

Sent: Thu 10/03/13 3:17 PM

To: bobmcevoy@hotmail.com (bobmcevoy@hotmail.com)

Cc: Patricia Quimm (Patricia@nnepra.com); 'Nat Rosenblatt (nmr@firlegal.com)' (nmr@firlegal.com)

Dear Mr. McEvoy:

This is in response to your electronic request for information dated September 25, 2013 made under the Maine Freedom of Access Act, 1 MRSA §§ 401 et seq. for:

An electronic copy of the site plan for the Brunswick Layover Facility.

The latest electronic version of the document is available at

<http://www.nnepra.com/sites/default/files/NNEPRA%20Advisory%20Board%20Presentation%207-9-13.pdf>.

NNEPRA does not have any other electronic versions of the latest site plan for the Brunswick Layover Facility.

A Lighting Impact Analysis and off-site light pollution resulting from the Lighting Plan.

NNEPRA does not have a report in response to this request.

A Brunswick Layover Facility Lighting Impact Study.

NNEPRA does not have a report in response to this request.

If you have any questions, please contact me.

Marina Douglass

Manager of Budget and Administration

Northern New England Passenger Rail Authority

75 West Commercial St., Suite #104

Portland, ME 04101

207-780-1000 x 107

207-780-1001 Fax

207-699-8038 Cell

Notice: Under Maine law, documents - including e-mails - in the possession of NNEPRA that are received or prepared for use in connection with NNEPRA's business may be public records. There are very few exceptions. As a result, please be advised that what is written in an e-mail could be released to the public and/or the media if requested.

MAINTENANCE and LAYOVER FACILITY (MLF)

1. A WELL ESTABLISHED, QUIET, IDEAL RESIDENTIAL NEIGHBORHOOD OF OVER 300 HOMES IS CURRENTLY TARGETED FOR NNEPRA'S MLF. (See photos)
2. THE MLF IS A GIANT INDUSTRIAL FACILITY COMPLETELY OUT OF CHARACTER WITH ANY RESIDENTIAL AREA. (See Photos)
3. COSTS TO DEVELOP THIS GIANT INDUSTRIAL COMPLEX AT THE TARGETED LOCATION IN BRUNSWICK ARE OUT OF CONTROL.
4. FUNDING FOR THE MLF IS 100% SUBSIDIZED BY THE PUBLIC'S TAX DOLLARS.
5. BY ITS SHEAR MAGNITUDE, THE MLF ITSELF WILL CAUSE PERMANENT, SEVERE, ADVERSE, ENVIRONMENTAL AND SOCIO-ECONOMIC IMPACTS.
6. THE MOST SEVERELY IMPACTED RESIDENTS ARE HONEST, HARD WORKING TAX-PAYING CITIZENS.
7. THE IMPACTED, RESIDENTS HAVE CONSISTENTLY BEEN DENIED ACCESS TO DUE PROCESS NORMALLY ASSOCIATED WITH INDUSTRIAL FACILITIES OF THIS MAGNITUDE.
- 8. THE BRUNSWICK MLF WILL NOT CREATE JOBS, LOWER TAXES OR INCREASE ECONOMIC DEVELOPMENT IN THE REGION.**
- 9. CONTAMINATED, FORMERLY TAXABLE LAND IS NOW NON-TAXABLE AND THE STATE OF MAINE'S RESPONSIBILITY TO CLEAN UP – NOT CURRENTLY REFLECTED IN PROJECT COSTS.**

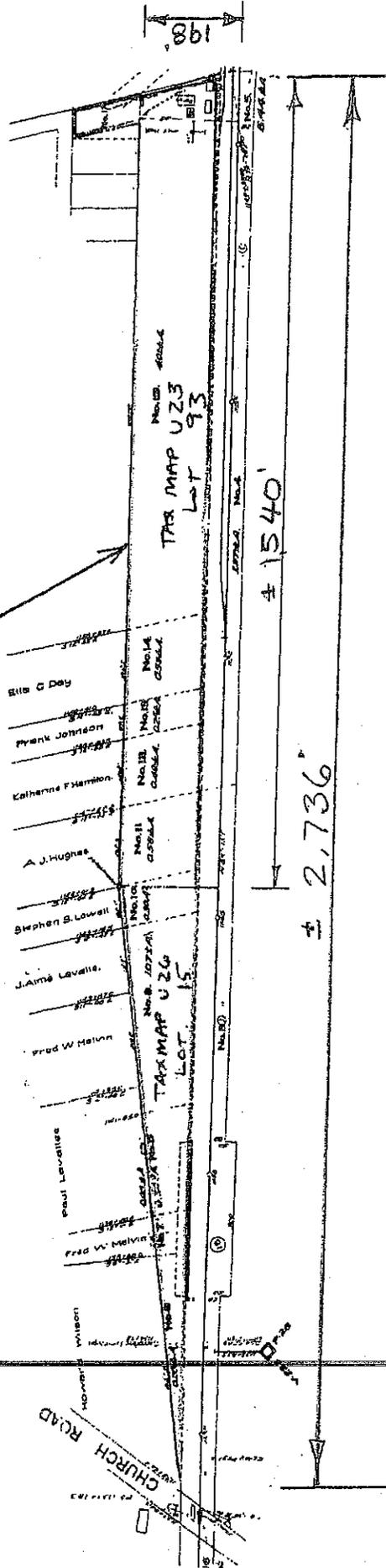
THE 300 ADVERSELY IMPACTED RESIDENTS ARE ASKING YOU FOR HELP TO GET THIS RIGHT *BECAUSE THERE ARE VIABLE ALTERNATIVE SOLUTIONS.*



TO ROYAL JUNCTION

TO BRUNSWICK

PARCEL AREA = 351,000± S.F.
(8.06± ACRES)



MAINE CENTRAL RAILROAD CO.	
OFFICE OF THE VICE PRESIDENT - ENGINEERING	
LAND SALE PLAN BRUNSWICK, ME	
LINE : BRUNSWICK BRANCH	
V.S. 1	MAP 22
MILEPOST : 15.0	
SCALE : 1" = 300'	DATE : 10/18/08
DRAWN BY : M.S.	CHECKED BY : V.C.M.
	APPROVED BY : M.A.T.

S#1447

APPEAL

CASE# 2321
DATE 4/4/11

BRUNSWICK ZONING BOARD OF APPEALS

APPELLANT (PRINT OR TYPE) <i>Northern New England Passenger Rail Authority (NNEPRA)</i>	ADDRESS (PRINT OR TYPE) <i>75 West Commercial St. Portland, ME 04101-4631</i>	PHONE # <i>(207) 780-1000 ext. 104</i>
PROPERTY OWNER (PRINT OR TYPE) <i>Maine Central Railroad Company Roland Theriault, Real Estate Services</i>	ADDRESS (PRINT OR TYPE) <i>Ironhorse Park North Billerica, MA 01862</i>	PHONE # <i>(508) 663-1129</i>

PROPERTY DESCRIPTION (ADDRESS, MAP & LOT) *U23/93*
Maine Central Railroad property located on the north side of the existing Brunswick Branch Railroad Track mainline between Church Rd, and Stanwood St. in Brunswick

TYPE OR APPEAL

- DIMENSIONAL VARIANCE (703.2.A)
- DIMENSIONAL VARIANCE-SINGLE FAMILY DWELLING SETBACK (703.2.C)
- DISABILITY VARIANCE (703.2.B)
- REQUEST FOR SPECIAL EXCEPTION (703.3)
- ALLEGED ERRONEOUS DECISION/INACTION OF PLANNING BOARD (703.1)
- ALLEGED ERRONEOUS DECISION/INACTION OF VILLAGE REVIEW BOARD (703.1)
- ALLEGED ERRONEOUS DECISION/INACTION BY CODES ENFORCMENT OFFICER (703.1)
- NATURAL RESOURCE ZONE (703.2.D)

JUSTIFICATION

STATE THE SPECIFIC GROUNDS FOR THIS APPEAL

(CONTINUE ON ADDENDUM IF NECESSARY)

See Attachment A

APPELLANT SIGNATURE *[Signature]* DATE *April 4, 2011*

BERNSTEIN SHUR

COUNSELORS AT LAW

207-774-1200 main
207-774-1127 facsimile
bernsteinshur.com

100 Middle Street
PO Box 9729
Portland, ME 04104-5029

Patrick J. Scully
207 228-7201 direct
pscully@bernsteinshur.com

May 16, 2011

Anna Breinich, AICP
Director of Planning and Development
Town of Brunswick
28 Federal Street
Brunswick, ME 04011

Re: Proposed Train Maintenance Facility

Dear Anna:

You have asked for guidance regarding a proposal by Northern New England Passenger Rail Authority ("NNEPRA") to develop a train maintenance facility in Brunswick. Specifically, you have asked whether the Town has authority to require NNEPRA to obtain site plan approval or comply with local zoning or code requirements. We have researched the question and concluded that federal law preempts the Town's ability to exercise local control over this project, with some extremely limited exceptions.

The Surface Transportation Board ("STB") is the federal agency responsible for overseeing the railroad industry. The Interstate Commerce Commission Termination Act ("ICCTA") is the federal law governing most aspects of railroad operations. The STB's general jurisdiction is described in Title 49 of the United States Code, in Section 10501. Under 49 U.S.C. 10501(b), the STB has exclusive jurisdiction over "transportation by rail carriers." Section 10102(9) defines "transportation" broadly to include all of the related facilities and activities that are an integral part of rail transportation. Facilities such as the one proposed for development in Brunswick fall under the STB's jurisdiction.

According to the STB, federal law categorically preempts two types of state and local actions: (1) any form of state and local preclearance or permitting that, by its nature, could be used to deny or defeat the railroad's ability to conduct its operations, and (2) state or local regulation of matters directly regulated by the STB (such as licensing and environmental review). Otherwise, a municipality must assess the facts related to a proposed development to determine whether the application of local ordinances would

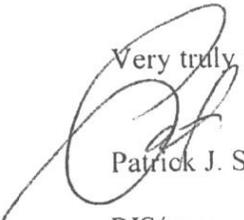
prevent or unreasonably interfere with railroad transportation. Notwithstanding 49 U.S.C. § 10501(b), a municipality may apply local requirements such as building, fire and electrical codes to railroad facilities so long as the application is not discriminatory. In applying these codes, however, a municipality may not require a railroad to obtain a building permit, as that would be considered a preempted preclearance requirement.

Court decisions provide further guidance regarding the scope of Brunswick's authority over NNEPRA's project. It is a well-established principle of law that preemption applies to proposals to build or acquire ancillary facilities that assist a railroad in providing its existing service, even in instances where the STB lacks licensing authority over the project. There are some instances, however, in which courts have upheld the right of municipalities to impose conditions on a railroad's proposed development. For example, courts have held that municipalities may require railroads to (1) share their plans with the community when undertaking an activity for which another entity would require a permit; (2) use state or local best management practices when constructing railroad facilities; (3) implement appropriate precautionary measures at railroad facilities, so long as the measures are fairly applied; (4) provide representatives of the railroad to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. Additionally, the STB has instructed railroads to allow municipalities to access railroad facilities to conduct reasonable inspections.

In summary, Brunswick is entitled to approach the railroad and ask it to engage with the Town in participating in some level of review or interaction related to the proposed train maintenance facility. The Town may not require that the railroad go through site plan review or apply for building permits. The Town may, however, require the facility to comply with building, fire and electrical codes, so long as the railroad is not required to obtain a permit prior to building or operating its facility.

I hope that you find this letter helpful. Please do not hesitate to contact me with questions.

Very truly yours,



Patrick J. Scully

PJS/aam

BERNSTEIN SHUR
COUNSELORS AT LAW

207-774-1200 main
207-774-1127 facsimile
bernsteinshur.com

100 Middle Street
PO Box 9729
Portland, ME 04104-5029

Patrick J. Scully
(207) 228-7201 direct
pscully@bernsteinshur.com

December 3, 2012

Anna Breinich, AICP
Director of Planning and Development
Town of Brunswick
28 Federal Street
Brunswick, ME 04101

Re: Proposed Train Maintenance Facility

Dear Anna:

I am writing to further clarify my opinion regarding whether the Town has authority to require the Northern New England Passenger Rail Authority (“NNEPRA”) to obtain a site plan approval or comply with local zoning or code requirements in order for NNEPRA to construct and operate its proposed train maintenance facility in Brunswick. In my letter dated May 16, 2011, I concluded that federal law preempts the Town’s ability to exercise local control over the project. After speaking with attorneys from the Surface Transportation Board and NNEPRA, I continue to conclude that federal law preempts application of local zoning, subdivision, land use or other codes to the proposed facility.

Although my May 16th letter cited federal laws related to the Surface Transportation Board, there is stronger federal authority that specifically preempts the Town’s local ordinances here. Under 49 U.S.C.A § 24902(j), “[n]o state or local building, zoning, subdivision, or similar or related law . . . shall apply in connection with the construction, ownership, use, operation, financing, leasing, conveying, mortgaging or enforcing a mortgage of (i) any improvement undertaken by or for the benefit of Amtrak as part of, or in furtherance of . . . chapter 241, 243, or 247 of this title or (ii) any land (and right, title or interest created with respect thereto) on which such improvement is located and adjoining, surrounding or any related land.”

Of the various provisions in Chapter 247 of Title 49, Section 24702(a) provides that “Amtrak may enter into a contract with a State, a regional or local authority, or another person for Amtrak to operate an intercity rail service or route not included in the national rail passenger transportation system upon such terms as the parties thereto may agree.” 49 U.S.C.A. § 24702(a) (West 2012).

Anna Breinich, AICP

December 3, 2012

Page 2

NNEPRA is such a regional authority and has contracted with Amtrak to provide the Downeaster intercity rail service and route. NNEPRA's proposed train layover would be an improvement undertaken for the benefit of Amtrak in furtherance of an intercity rail service or route that is not otherwise included in the national rail passenger transportation system.

Accordingly, the State's and the Town's laws relating to building, zoning, subdivisions, and similar or related laws—including the zoning dimensional requirements and the Brunswick ordinance's site plan requirement at issue here—shall not apply. 49 U.S.C.A §§ 24902(j); 24702(a); *see, e.g., National R.R. Passenger Corp. v. Caln Township*, 2010 WL 92518 (E.D. Pa. Jan. 8, 2010) (concluding that federal statutes preempted application of local vegetation control ordinance against Amtrak and noting that Section 24902(j) "broadly covers not only land within the railroad roadbed, or immediately adjacent property, but also covers 'surrounding' or 'related' land").

I hope that this additional clarification is helpful. Please let me know if you have any additional questions.

Sincerely,



Patrick J. Scully

PJS

From: Gabriel.Meyer@stb.dot.gov [<mailto:Gabriel.Meyer@stb.dot.gov>]
Sent: Thursday, July 05, 2012 1:02 PM
To: Gerzofsky, SenStan
Cc: Jamie.Rennert@stb.dot.gov
Subject: Amtrak layover facility

Dear Senator Gerzofsky:

Per our conversation, this email will provide an overview of the effect of federal preemption, under the Surface Transportation Board's (STB) governing statute, upon state and local regulation of railroad activities as related to the construction and operation of the planned passenger train layover facility in Brunswick, Maine.

The rule of thumb is that a state or local law is preempted if: (1) it regulates or unreasonably interferes with activities that are integrally related to transportation; and (2) such activities are conducted by an STB-licensed rail carrier or its agent. Transportation activities generally include the movement of equipment and goods by rail, and activities with a direct connection to such operations (i.e., construction of rail lines, facilities, and other activities directly related to rail operations). Based on my understanding of the facts related to the Brunswick layover facility, it does not appear that the construction and operation of the facility, is subject to preemption under the STB's governing statute—the Interstate Commerce Commission Termination Act of 1995 (ICCTA).

As I understand, there are two entities involved in the construction and planned operation of the facility: Northern New England Passenger Rail Authority (NNEPRA) and Amtrak. It does not appear that the STB, or its predecessor, the Interstate Commerce Commission, has ever recognized NNEPRA as a rail carrier. As a result, NNEPRA's activities appear not to be subject to preemption under ICCTA. With respect to Amtrak, although it is a rail carrier, unlike rail-freight carriers and certain other rail-passenger operators it is not subject to 49 U.S.C. § 10501, which provides the basis for preemption of rail activities subject to STB jurisdiction.

Additionally, I understand that the facility will be built on land not owned by a railroad, nor will it be used by a railroad subject to ICCTA preemption. These factors also suggest that state and local regulation of the facility is not preempted under ICCTA.

While it appears that construction and operation of the layover facility is not subject to preemption under ICCTA, it could be subject to preemption under other federal statutes not administered by the STB. Since we spoke, I have learned that NNEPRA has received approximately \$38 million in grants administered by the Federal Railroad Administration (FRA) in 2010 to pay for the extension of Amtrak service from Portland to Brunswick. The funds for these grants were originally made available through the American Recovery and Investment Act of 2009. Some of the FRA-administered grant money is being used to pay for the railroad tracks that will serve the layover facility, and the FRA is the lead agency in the ongoing environmental assessment associated with the facility. Hence it is possible that some state and local laws could be preempted due to the FRA's involvement. However, proper determination of any FRA-related preemption requires consultation with the FRA. I would be happy to direct you to an appropriate contact at the FRA if you would like.

Please understand that the analysis in this email is based upon my understanding of the facts and circumstances related to the Brunswick layover facility. There could be additional information that I am unaware of that could change the analysis.

The STB can only issue a formal opinion on the basis of a fully developed factual record. To obtain a formal opinion, a party with an interest in the construction of the layover facility would need to file a pleading with the STB called a Petition for Declaratory Order. This is basically a request that the STB rule on a legal question. Once the petition is filed, the opposing side (and any other interested parties) would have 20 days to file a reply (although the STB can grant extensions). All evidence is submitted through paper filings and there are typically no oral arguments or hearings. Once the STB has received all of the

evidence, it would issue a decision. There are no statutory deadlines governing the issuance of decisions in declaratory order matters, and it can take the STB several months, or longer, to issue a decision. Alternatively, a party could seek a formal STB ruling by seeking injunctive relief, which is a request that the STB order a party to stop doing something—i.e., order NNEPRA to cease construction of the layover facility until it complies with state and local laws and procedures. However, injunctions are generally granted only when there are extenuating circumstances. Similar relief may also be available by filing an appropriate action in court.

If you have any further questions, or would like additional information on how to obtain a formal opinion on the issues of STB preemption, please let me know.

Sincerely,
Gabriel S. Meyer
Surface Transportation Board | Attorney-Advisor
Office of Public Assistance, Governmental Affairs & Compliance
Rail Customer & Public Assistance program
1-866-254-1792
(202) 245-0245 (Board Mainline)
(202) 245-0150 (direct)

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