Conservation Law Foundation

July 17, 2001

Christine Kirby, Chief
Transportation Management Programs
Department of Environmental Protection
One Winter Street
Boston, MA 02108

Dear Ms. Kirby:

The Conservation Law Foundation ("CLF") offers these comments on the June 15, 2001 submissions of the Executive Office of Transportation and Construction ("EOTC") and Massachusetts Bay Transportation Authority ("MBTA") regarding restoration of light rail service on the Arborway branch of the Green Line between Heath Street and Forest Hills.

These comments supplement the oral testimony given on behalf of CLF on this subject at the recent hearing. Our conclusion, supported by not only our testimony, but also the broad and deep comments and testimony of the many concerned citizens, organizations, elected officials and experts who have addressed you on this topic, is twofold:

- A finding that EOTC has "demonstrated infeasibility" by DEP would be completely unsupported by any sort of credible evidence and could be legitimately and successfully attacked in court as arbitrary, capricious and erroneous;
- EOTC is seeking to evade and reshape, a decade too late, the decision making process that the regulation requires DEP to follow.

I. EOTC'S Redefinition of "Infeasible"

As we emphasized in our oral testimony, CLF is asking DEP to treat EOTC and the MBTA like it would any other party. DEP should not show either prejudice or favor towards its sister state agencies and authorities, but should instead simply hold them to the same rules that everyone else is required to live by.

The question then becomes, what would DEP do when a private party came to it, a decade after a regulation was put in place and after multiple past applications had been made under that specific regulation by that party, and offered for the first time a new definition of a key term in the regulation that radically altered the manner and method of DEP decision making under the regulation? The answer is clear. The party would be told that Massachusetts (like the Federal government) interprets its statutes and regulations by first looking to their plain meaning and only looks to extrinsic sources like other statutes and regulations or legislative history when there is

ambiguity in the plain language.[1] This rule of construction points back to the clear dictionary definitions of feasible and infeasible offered at the hearing and in other written testimony. Those definitions and common sense make clear that "infeasible" means something very close to impossible- the EOTC/MBTA attempt to rewrite this standard as something more like "not preferred" would not be taken seriously if offered by a private party and should be treated the same here.

II. Conflation of the Infeasibility and Substitution Analyses

A legal memorandum written by EOTC General Counsel Robert A. DiAdamo was included in the June 15th submission by EOTC to DEP. That memorandum, among other things, argues that pieces of the substitution analysis found in 310 C.M.R. 7.36(4)(a)(1) should be read into the infeasibility analysis in the previous sentence of the regulation.

This conflation of the two steps in a simple two-part analysis is a clear misreading of the regulation. As the memorandum notes, 310 C.M.R. 7.36(4)(a) provides that:

> EOTC may substitute other transit improvement projects in place of those listed in 310 C.M.R. 7.36. To replace a project EOTC must demonstrate to the Department that a specific project listed in 310 C.M.R. 7.36 is infeasible due to adverse engineering, environmental or economic impacts.

The memorandum then, tellingly, omits the final sentence of the paragraph:

> An alternative project may be substituted in the following manner:

The regulation then goes on in 7.36(4)(a)(1) to create the specific air quality performance standard that any substitute project must meet.

This is a very familiar animal to DEP- a regulation that sets forth a clear threshold question and then offers a specific mechanism and performance standard for further action if the threshold question is answered in a specific way. One possible analogy would be to a DEP or local Conservation Commission finding that a specific place is a wetland. See e.g., Corcoran v. Planning Board of Sudbury 406 Mass. 248 (1989) *citing* Mass. G.L. c. 131 § 40 and 310 C.M.R.10.55(4)(b).

The legal principle here is very simple. The determination of infeasibility is completely separate from the substitution guidelines.

Let us take a hypothetical example. Suppose that EOTC were to discover that a re-routed river and a large new housing development created by others in the last year lay directly in the path of the Green Line extension to Medford required by this same regulation.[2] EOTC might well argue that completing that project was infeasible by pointing to the environmental disruption of the river

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[1] See generally, Salem Hospital v. Commissioner of Public Welfare 410 Mass. 625, 629 (1991); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 842-843 (1984).

[2] Because this is a fictional example we can ignore the question of how a river and a large apartment building might find their way onto a rail right of way,

this would involve as well as the economic and engineering challenges of running a light rail through the middle of large apartment building. EOTC would then have to "demonstrate" this "infeasibility" to DEP. Upon DEP determination that such project was infeasible EOTC could then submit a proposal for a substitute project which would be evaluated using the procedures and performance standards set forth in 310 C.M.R. 7.36(4)(a)(1)-(3). Similarly, if the MBTA had ceased operations of the Green Line as a whole during the last decade it might well be reasonable to argue that restoration of one piece of that system was now "infeasible."

We would submit that 310 C.M.R. 7.36(4)(a) was placed in the regulation to create flexibility in the face of changed circumstances. Unforeseen circumstances that now made the original project infeasible. Once that threshold determination of infeasibility was made the analysis moved on to consideration of the proposed substitute project, utilizing the performance standard from 310 C.M.R. 7.36(4)(a)(1).

This is not the situation we have before us. No demonstration of changed circumstances has been made. No genuine effort is made to clear the threshold of infeasibility without importing into that calculus irrelevant material about a potential substitution.

It is interesting to contrast the situation before us with the different but related substitution mechanisms created by the same agencies at about the same time into the "Vent Stack Certification" issued pursuant to 310 C.M.R. 7.38. That parallel set of obligations did not include a requirement that this "infeasibility" threshold be cleared before a substitute project was considered. DEP could have written the regulation at issue here in the same way. But it did not. EOTC and current DEP staff are bound by the regulation as written- that the legitimate decision making process requires a clear and separate consideration of infeasibility, something completely missing from this submission, before any consideration of substitute projects can commence.

III. The "Proposed Substitution" has far more feasibility questions than rail restoration

As CLF noted at the hearing on this question you are being asked to compare an apple to a pencil sketch of an orange when rail restoration is presented alongside very sketchy and vague plans for a 60 foot articulated CNG powered bus in the EOTC submission.

To put it mildly, we all have empirical evidence that light rail travel on the Arborway corridor functioned effectively in the recent past, hampered mainly by the track and wire maintenance issues that the original temporary closure was intended to address. We all have empirical evidence of the ridership that light rail on this corridor attracted in an era of generally lower transit ridership. No evidence has been presented to DEP that any change has occurred in the corridor that now makes such restoration infeasible. As was noted in the oral and written testimony of others it is patently silly to rely upon a computer model forecasting ridership below the levels historically enjoyed by this exact same trolley line in the past. A finding that EOTC has "demonstrated infeasibility" by DEP would be completely unsupported by any sort of credible evidence and could be legitimately and successfully attacked in court as arbitrary, capricious and erroneous.

Ironically, the scenario that is presented in the submission that raises the most "red flags" in terms of its feasibility is the 60 foot CNG bus from Forest Hills to Park Street. No analysis is given to whether such a bus could successfully negotiate the crowded streets of the Back Back, Beacon Hill and Downtown Boston, nor are the impacts of such a bus being injected into that traffic addressed. No mention is made of the fact that such a bus would have to contend not only with current traffic but the shuttle buses traveling between Back Bay hotels and the new BCEC. Similarly, no attention is paid to the fact that the outlined route overlaps with the route of the articulated 60 foot bus providing outbound "Silver Line" service between Temple Place and Stuart Street on Tremont Street.

It appears that this bus would have to negotiate the following intersections successfully: Belvedere/Huntington, Dalton/Boylston, Boylston/Charles, Arlington/Beacon, Beacon/Park, Park/Tremont, Tremont/Stuart, Stuart/Charles and Charles/St. James. A number of these intersections (particularly near the State House/Park Street and in Park Square) are difficult ones for large vehicles to travel through when there is no traffic at all; they are also among the busiest intersections in Boston (indeed in New England). It is very likely that it is far more difficult to move a 60 foot bus through these streets and intersections rapidly than it would be to move a trolley through the streets of Jamaica Plain.

IV. It is indeed about Air Quality, not Transit Planning

EOTC has implied in a number of documents at several points that DEP is attempting to usurp the rightful transportation planning powers of the MBTA and EOTC and is wandering too far afield from its role as the protector of air quality. Such suggestions should be looked in the face and rejected.

DEP's critical work to protect the quality of our air takes it into arcane questions of what is the "Best Available Control Technology"[3] and other technical issues that require critical analysis of a wide area of subject matter. All that DEP can do is adopt reasonable regulations, implement those regulations as written and let the chips fall where they may.

In this case, based upon solid evidence DEP made the reasonable judgement that restoration of electric trolley service on the Arborway line would have a positive impact on air quality and promulgated a reasonable regulation requiring that such restoration would occur. No lawsuit was brought attacking the validity of that regulation and it was referenced time and again by all interested parties in their reporting and planning activities. The time to legitimately mount collateral attacks on the regulation has long since past. The regulation requires a demonstration of infeasibility before another project can be substituted for the restoration. A submission has been made that boils down to a determination (supported by scanty evidence, presuppositions about a hypothetical bus service and computer modeling which clashes with the historical record) that the MBTA prefers not to restore rail service to the Arborway. DEP's obligations at this point are clear- to reject the submission as not meeting the regulatory standard.

[3] See e.g., 310 C.M.R. 7.02.

If however, DEP were to feel constrained to look at the vague and cursory air quality analysis presented in the submission it would find the case presented there to be just as unconvincing. No data is presented on forecasted emissions from the CNG buses, from the impact that such buses would have on the emissions of the other vehicles who would be stopped behind such buses as they meander on crowded surface streets through the heart of Boston. For that matter no information is given regarding actual emissions from power plants producing the electricity powering the trolleys (either from the current power plant fleet or the much cleaner power plant fleet that DEP is fighting to put in place in the near future). All we are given are emissions numbers from cars driven by hypothetical riders who mysteriously prefer to ride buses instead of trains.

Perhaps the saddest point in this entire sad business is the insistence in EOTC's submission that elimination of parking spaces is a bad thing. A very odd argument to make to an agency that is seeking to reduce hazardous air emissions by cars, especially odd when advanced on behalf of a transit agency. We can safely assume that EOTC's air quality modeling did not take into account reductions in emissions due to the reduction of parking spaces and the corresponding disincentive to car ownership and operation.

Finally, we would note the importance and relevance of the upsurge in community support for rail restoration presented to you during this process. The skewed and suspect ridership numbers presented in the submission assume that Jamaica Plain is a community that is fundamentally agnostic about trolleys vs. buses. The model assumes that tourists and residents from other neighborhoods are just as willing to travel into Jamaica Plain by bus as trolley and are willing to tolerate buses traveling through their neighborhoods. You have before you a very strong record to the contrary. We urge you to listen to the community. They are asking you to follow your own regulations and to reject the application of EOTC.

Thank you for your time and attention.

Sincerely,

Seth L. Kaplan
Staff Attorney

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