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Summary of Comments and Response to Comments on the Proposed Amendments to the Regulation and State Implementation Plan for Ozone

310 CMR 7.36:

Transit System Improvements

Regulatory Authority: M.G.L. c. 111, Sections 142A through 142M

October 2013

This information is available in alternate format. Call Michelle Waters-Ekanem, Diversity Director, at 617-292-5751. TDD# 1-866-539-7622 or 1-617-574-6868
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SUMMARY OF AND RESPONSE TO COMMENTS ON 310 CMR 7.36: TRANSIT SYSTEM IMPROVEMENTS

In the fall of 2012, The Massachusetts Department of Environmental Protection (MassDEP) proposed amendments to 310 CMR 7.36, Transit System Improvements, and the State Implementation Plan (SIP). The amendments proposed to delete the requirement that the Massachusetts Department of Transportation (MassDOT) complete the final design of the Red Line/Blue Line Connector from the Blue Line at Government Center to the Red Line at Charles Station by December 31, 2011. MassDEP conducted a public hearing and comment period of the proposed amendments in accordance with the public review process requirements of M.G.L. Chapter 30A, made the proposed amendments available for a 30-day public review, published notification of the amendments, and held a public hearing on September 13, 2012 to solicit public comment on the proposed regulation. The public comment period ended on September 24, 2012. Relevant comments are summarized and responded to below. A list of all parties who submitted oral and/or written testimony on the proposed amendments is included in Attachment 1.

- 1. Comment:** MassDEP received numerous comments opposing the Massachusetts Department of Transportation's (MassDOT's) request to MassDEP to remove the design of the Red Line/Blue Line Connector as a requirement in 310 CMR 7.36 and the State Implementation Plan (SIP). Those opposed to removing the requirement include Speaker of the House Robert DeLeo, State Representatives Carlo Basile and Kathi-Anne Reinstein, State Senator Anthony Petrucelli, Congressmen Michael Capuano and Edward Markey, A Better City, Conservation Law Foundation (CLF), the Metropolitan Area Planning Council (MAPC), John Vitagliano, (former Transportation Commissioner for the City of Boston), and individual citizens.

Response: MassDEP recognizes the support for the project. However, MassDEP's review is limited to MassDOT's request to determine whether the removal of the Red Line/Blue Line Connector design from 310 CMR 7.36 would have an impact on the air quality emission reductions calculated for the projects included in the regulation and approved by EPA as part of the SIP. MassDEP has determined that there are no air quality benefits associated with the design phase of the Red Line/Blue Line Connector project and that removal of this design requirement will not affect the total emission reductions achieved from the remaining projects included in the regulation and the SIP. Therefore, MassDEP's final regulation does not require MassDOT to complete the final design of the Red Line/Blue Line Connector.

- 2. Comment:** Numerous comments indicated that completion of the environmental review and final design for the Red Line/Blue Line Connector (the Project) is a legal requirement in the regulation and the SIP and that the Commonwealth should not be relieved of the obligation without substitution of other projects.

Response: 310 CMR 7.36 and the SIP do not require environmental review of the final design for the Red Line/Blue Line Connector. See 310 CMR 7.36 (3), Project Interim Deadlines. This subsection of the regulation contains the requirements for environmental review, which are not applicable to the Project.

The intent of the substitution provisions included in 310 CMR 7.36(5), Substitute Transit System Improvement Projects, as amended on December 1, 2006, is to ensure that the air quality benefits of the projects required to be built are achieved in the event a project needs to be substituted after the procurement process, environmental review, and other preconstruction processes are completed. The final design for the Red Line/Blue Line Connector has no associated air quality benefits and does not require substitution pursuant to 310 CMR 7.36(5).

- 3. Comment:** CLF commented that any immediate funding concerns could be addressed by amending the regulation to provide for a deadline extension.

Response: The current state of transportation funding makes this an especially bad time to spend an estimated \$50 million to design a project where the ultimate implementation of the project is uncertain and for which the design itself would have a limited shelf life. Allowing additional time for MassDOT to complete this SIP requirement will not alter the fundamental financial facts faced by MassDOT. The considerable construction cost of the Red Line/Blue Line Connector makes it unaffordable in the foreseeable future (e.g., within the 20 year timeframe of the current Long-Range Plan for the Boston region), not the costs of environmental review and design. Furthermore, even if Governor Patrick's proposed transportation financing plan (*The Way Forward: A 21st-Century Transportation Plan*)¹ is ultimately approved, the needs articulated by MassDOT in the finance plan do not include the construction of the Red Line/Blue Line Connector.

- 4. Comment:** CLF cited the air quality, public health, mobility, environmental justice, and economic development benefits associated with the Red Line/Blue Line Connector. Specifically, CLF commented that by including the project in the SIP, the Commonwealth recognized and relied on the associated air quality benefits and should be precluded from arguing that the Project has no calculable air quality benefits. CLF cited the 2006 air quality estimates for construction of the Project and indicated that although these calculations were not included in the revised SIP, it does not make the Project any less of an obligation. MassDOT's reference to the Project as "purely procedural requirement" raised the question why the Commonwealth would have included the Project in the revised SIP in the first place.

Response: In response to this comment, MassDEP is including the following information from the Background Document and Technical Support for the proposed regulation.

Reevaluation of the Three Remaining Transit Projects Required by 310 CMR 7.36

In 2005, MassDEP, MassDOT, and the Massachusetts Bay Transportation Authority conducted a public process to reevaluate the three outstanding projects required by 310 CMR 7.36 and whether these projects should be constructed. The outstanding projects that had not been completed were: 1) the Green Line Arborway Restoration; 2) the Red Line/Blue Line Connector²; and 3) the Green Line Extension to Ball Square/Tufts

¹ Available at http://www.massdot.state.ma.us/Portals/0/docs/infoCenter/docs_materials/TheWayForward_Jan13.pdf

² This project would connect the Red Line's Charles Street station to the Blue Line's Bowdoin Street station.

University. The purpose of MassDOT's reevaluation was to ensure that the best transportation projects be pursued while meeting its air quality commitments. As part of this process, MassDEP provided MassDOT with the air quality goal (i.e., the level of emission reductions) that any potential project substitutions would be required to meet under a revised regulation and the SIP. In response, MassDOT developed a *preferred alternative* to the outstanding projects, which included the following three projects:

1. Green Line extension beyond Lechmere to the West Medford and Union Square areas;
2. Fairmount Line improvements; and
3. 1,000 additional park and ride parking spaces serving commuter transit facilities in Boston MPO region.

Subsequently, MassDOT submitted a request to MassDEP to amend 310 CMR 7.36 and the SIP to include the three alternative projects. MassDEP agreed to propose amendments to the Transit regulation to include the alternative projects and delete the Red Line/Blue Line Connector project. MassDEP held a public hearing on the amendments on December 21, 2005.

Also in 2005, the Conservation Law Foundation ("CLF") filed a complaint against the Commonwealth for failing to complete transportation improvement projects required under the 1991 Transit regulations (310 CMR 7.36) and the SIP approved by US EPA in 1994.³ In its complaint, CLF alleged that the Commonwealth was in violation of the SIP because it failed to complete certain public transportation improvement projects, including completion of the Red Line/Blue Line Connector Project by December 31, 2011. In order to resolve the litigation, on November 28, 2006, the parties in *CLF v. Romney* entered into an out of court settlement agreement that allowed the Court to dismiss the case with prejudice. The relevant section of the settlement agreement required MassDEP to adopt final amendments to the Transit regulation that deleted the requirements for the original three transit projects, including the Red Line/Blue Line Connector, added the requirements for the three alternative transit projects and also required MassDOT to complete the design phase of the Red Line/Blue Line Connector by December 31, 2011. The settlement agreement did not require MassDOT to complete the construction of the Red Line/Blue Line Connector.

On December 1, 2006, in response to comments on the proposed amendments to the Transit regulations, and in accordance with the November 28, 2006 settlement agreement in *CLF v. Romney*, MassDEP promulgated amendments to the Transit regulation that included MassDOT's preferred alternative projects and required MassDOT to complete the design phase of the Red Line/Blue Line Connector project by December 31, 2011. MassDOT was no longer required to construct the Red Line/Blue Line Connector project.⁴

³ *CLF v. Romney, et al.* United State District Court for the District of Massachusetts Civil Action No. 05-10487 (hereafter referred to as *CLF v. Romney*)

⁴ See 310 CMR 7.36(2)(i) which became effective on December 1, 2006.

As stated in the Background Document and Technical Support, MassDEP included the design phase of the Red Line/Blue Line Connector project as part of the 2006 Settlement Agreement. Now, for the reasons stated above, and included in MassDOT's request, MassDEP is finalizing the Transit System Improvement regulations without the design phase of the project.

Comment: The Conservation Law Foundation (CLF) commented that the Commonwealth's legal obligation to complete the design phase of the Red Line/Blue Line connector is binding under the federal Clean Air Act pursuant to the settlement agreement in *CLF v. Romney*.

Response: The settlement agreement does not legally bind MassDEP's authority to adopt and amend regulations to prevent pollution or contamination of the atmosphere. For the financial reasons stated in MassDOT's request to delete the design phase requirement, and the fact that the design phase will not achieve any air quality benefits, MassDEP believes that amending the transit regulations to delete the design phase is not in violation of the settlement agreement.

- 5. Comment:** CLF, ABC, and others suggested that MassDOT exaggerated the costs of the Project compared with other transit projects, including the South Coast Rail Project, to justify the proposal to amend the regulation. Since potential federal funding for construction is increasingly inclined to shovel-ready projects, it follows that a transit project must be designed for it to be constructed.

Response: Based on MassDEP's conversations with MassDOT's Office of Transportation Planning, this is not correct, in several ways. The cost projections for final design and construction of the Red Line/Blue Line Connector were prepared by a capable team of technical professionals as part of the development of the Draft Environmental Impact Report for the project. This work represented the first time in more than two decades that the costs for the project had been estimated in a detailed and comprehensive way; previous estimates had simply been inflations of earlier estimates, crudely projected into the future. The current cost estimate for the Red Line/Blue Line Connector may seem high to those who are accustomed to earlier estimates, but they reflect contemporary professional standards and a clearer understanding of the technical challenges of the project. The Red Line/Blue Line project – a subway project, requiring an underground tunnel to be bored in one of the densest corridors of downtown Boston – is a completely different project than is the South Coast Rail project. Furthermore, the experience of MassDOT and the MBTA indicates that many projects can come in over their original cost estimates, not under. MassDOT did not manipulate the process of estimating the costs.

While the comment about shovel-ready projects was an accurate statement about many of the discretionary grant programs available under the American Recovery and Reinvestment Act instituted in 2009, it overstates and incorrectly generalizes the case. The size, complexity, and cost of the Red Line/Blue Line Connector project makes it an unlikely candidate for a quick-turnaround, small-dollar discretionary grant program like Transportation Investment Generating Economic Recovery (TIGER). The more likely source of federal funds for a project of this size will continue to be the Federal Transit Administration's New Starts

program, which still employs a more incremental approval process in which MassDOT would actually be penalized for moving ahead with design too quickly.

6. **Comment:** Several comments indicated that the proposed Suffolk Downs casino will become a major destination raising a greater need for transit service connections, specifically the Red Line/Blue Line Connector. Several commented that the proposed Suffolk Downs casino developers should also contribute significantly to the Project.

Response: The casino proposal at Suffolk Downs is one of at least three proposals for a new casino in the Greater Boston/Worcester region, and only one of the proposing teams will ultimately receive a casino license. While it is likely that the Red Line/Blue Line Connector would make casino-oriented trips better for some customers/employers traveling to a potential casino facility at Suffolk Downs, no analysis has been conducted to determine how significant the benefits would be of the Red Line/Blue Line Connector given the particular origins/destinations and timing of casino-bound trips. In addition, MassDEP does not have the authority to require the Suffolk Downs casino developers to contribute to the cost of the project if it was moving forward.

7. **Comment:** Congressmen Capuano and Markey and several legislators refer to binding agreements made in 1990 to expand transit service following the completion of the Central Artery/Tunnel Project (CA/T).

Response: In December 1990, the Executive Office of Transportation and Construction (EOTC) (now MassDOT), the Massachusetts Department of Public Works (MDPW) (now MassDOT, Highway Division) and the Conservation Law Foundation (CLF) signed a Memorandum of Understanding (MOU), which committed the transportation agencies to implement air quality mitigation measures for the CA/T project. Among these measures was a list of transportation system improvement projects designed to maximize the use of mass transit. The MOU was endorsed by the Boston MPO as a proposed amendment to the SIP and was subsequently submitted to MassDEP. In response, MassDEP promulgated 310 CMR 7.36 and submitted the regulation to EPA as a SIP Revision. EPA approved the SIP revision in October of 1994.

MassDEP notes that many of the projects required by 310 CMR 7.36 were completed on schedule. However, other commitments were delayed and/or not completed by the regulatory deadlines. Many of these issues were addressed in an Administrative Consent Order (ACO) between MassDEP and the transportation agencies. The ACO required MassDOT to complete the projects included in the regulation, as well as other projects required to help offset the emissions experienced during the delay of the projects. Other issues were addressed in a revision to 310 CMR 7.36, effective December 1, 2006, and the SIP (approved by EPA on July 31, 2008).

8. **Comment:** Congressmen Capuano and Markey, several legislators, and others noted that the Red Line/Blue Line Connector Project will serve the North Shore communities and Cambridge, provide enhanced job and housing access, increase transit service to Logan

Airport, and decrease subway congestion. For these reasons, the Project deserves to be fully funded. The comments urge MassDEP to keep the Project requirement in place.

Response: Based on MassDEP's conversations with MassDOT's Office of Transportation Planning, the Red Line/Blue Line Connector project would have many benefits, including those articulated in these comments. However, the requirement to complete the Red Line/Blue Line Connector Project is not part of the existing Transit System Improvement regulations. In addition, MassDOT does not currently have the capacity to fund the project over the next two decades covered by financially constrained Long-Range Plan for the Boston region. MassDOT's recently released finance plan - *The Way Forward: A 21st-Century Transportation Plan* – argues that, while the Commonwealth should continue to pursue critical expansion projects, it also recognized that not all worthy projects could be funded even with additional resources. *The Way Forward* did not identify the Red Line/Blue Line Connector as one of the recommended expansion projects.

9. **Comment:** Partners HealthCare comments include support for the Project and recommends that the Project be included as part of the transportation system's future capital needs planning required by section 13 of Chapter 132 of the Acts of 2012.

Response: MassDOT submitted the finance plan required under section 13 of Chapter 132 of the Acts of 2012. *The Way Forward: A 21st-Century Transportation Plan* did not identify the Red Line/Blue Line Connector project as one of the recommended expansion projects for the MBTA system.

Attachment 1

<u>Name</u>	<u>Affiliation</u>
1. Honorable Carlo Basile	State Representative
2. Honorable Michael E. Capuano	U.S. Congressman
3. Honorable Robert DeLeo	Speaker of the House
4. Honorable Edward J. Markey	U.S. Congressman
5. Honorable Anthony Petrucelli	State Senator
6. Honorable Kathi-Anne Reinstein	State Representative
7. John Antonellis	citizen
8. August Blake	citizen
9. Atwon Bo	citizen
10. Richard Carr	A Better City
11. Carla Ceruzzi	citizen
12. Mathew Danish	citizen
13. Richard Dimino	A Better City
14. Marc Draisen	MAPC
15. Brian Gannon	citizen
16. Tina St. Gelais	citizen
17. Steven Gone	citizen
18. Tanya Hahnel	citizen
19. Scott Kane	citizen
20. Kenneth J. Krause	citizen
21. John Kyper	Sierra Club
22. John Leahy	citizen
23. Chris Marchi	citizen
24. Rafael Mares	Conservation Law Foundation
25. Evelyn Morash	citizen
26. Ryan Murphy	citizen
27. Karen O'Donnel	Sierra Club
28. Donna Segreti Reilly	citizen
29. Ellin Reisner	citizen
30. Ryan "student"	citizen
31. Jean Staropoli	citizen
32. John Vitagliano	citizen
33. John Walky	citizen
34. Mary Ellen Welch	citizen
35. Kaththyn E. West	Partners HealthCare