COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

January 28, 2010

In the Matter of
Pan Am Railways/Boston & Maine

Docket No. 2007-080
DEP File No. UAO-WE-07-4002
Charlemont, Deerfield, Sterling, &
West Boylston, MA
***Consolidated with*:**
Docket No. 2007-081
DEP File No. PAN-WE-07-4002
Charlemont, Deerfield, Sterling, &
West Boylston, MA

MEMORANDUM OF DECISION AND ORDER GRANTING PARTIAL SUMMARY DECISION TO MassDEP ON LIABILITY

INTRODUCTION

These two consolidated appeals arise out of enforcement orders that the Western Regional Office ("WERO") of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued against the Petitioner Pan Am Railways a/ka/ Boston & Maine Corporation ("the Petitioner") on May 4, 2007. Specifically, the Petitioner appeals: (1) a Unilateral Administrative Order ("UAO"), and (2) a $59,746.50 Civil Administrative Penalty ("PAN") arising out of the Petitioner's discard or abandonment of railroad crossties along railroad tracks in the Central and Western Massachusetts communities of Charlemont, Deerfield, Sterling, and West Boylston. *See* Petitioner's Notice of Claim for Adjudicatory

Appeals, at p. 1.

The Department contends that the Petitioner's actions violate Massachusetts law governing the disposal of solid waste: G.L. 111, § 150A, 310 CMR 16.06 (Site Assignment Regulations for Solid Waste Facilities), and 310 CMR 19.014 (Solid Waste Management Regulations). UAO, at pp. 2-3; PAN, at pp. 2-3. In response, the Petitioner does not dispute the facts underlying the Department's claims,[1] but contends that the Department is barred from pursuing enforcement action against the Petitioner for the following reasons:

(1) that the Petitioner's railroad crosstie removal and placement practices do not violate G.L. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014; and

(2) that the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106, preempts G.L. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014, and, as a result, the Department is barred from issuing any enforcement orders under the state statute and regulations, including the UAO[2] and PAN.[3]

See Petitioner's Claim for Adjudicatory Appeals, at pp. 1, 7-11.

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[1] *See* Petitioner's Notice of Claim for Adjudicatory Appeals, at pp. 1-15. The undisputed facts are set forth on pp. 1-2 of the UAO and PAN, respectively, and below, at pp. 9-14.

[2] MassDEP's UAO directed the petitioner to:

A. [i]mmediately . . . cease [its] unauthorized disposal, burial, abandonment, or discarding of railroad ties and other solid waste in the Commonwealth[,] and . . . manage all of such materials in such [a] manner as to ensure compliance with [the Massachusetts solid waste statutes and regulations], including, but not limited to, ceasing the speculative accumulation of railroad ties for any purpose at any location for periods exceeding ninety (90) days;

B. [w]ithin 90 days [after the UAO's issuance,] . . . remove and properly dispose of all discarded or abandoned railroad ties from all of [the petitioner's] rail lines in . . . Deerfield [and] . . . Charlemont, Massachusetts, and along the railway which crosses Wachusett Reservoir in . . . West Boylston and Sterling, Massachusetts; and

C. [w]ithin one year [after the UAO's issuance], removed and properly disposed of all discarded or abandoned railroad ties along all of the petitioner's rail lines in Commonwealth. Id.

[3] With respect to the PAN, the petitioner also contends that the $59,746.50 civil administrative penalty that the Department has assessed against the Petitioner for its purported violations of G.L. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014 is excessive. *See* Petitioner's Claim for Adjudicatory Appeals, at pp. 1, 13-15.

The parties agree that all of the legal issues in this appeal, with the exception of whether the Department's $59,746.50 civil administrative penalty is excessive, can be resolved by cross-motions for summary decision in accordance with 310 CMR 1.01(11)(f). *See* Case Screening Conference Report and Order, August 20, 2007 ("PSC Report & Order"), at pp. 1-5.[4] The parties agree that the legal issues to be resolved on summary decision are the following:

(1) Based on the facts set forth on pp. 1-2 of the UAO and PAN regarding the Deerfield Rail Lines, did the Petitioner violate G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014?

(2) Based on the facts set forth on p. 2 of the UAO regarding the Charlemont Rail Lines, did the Petitioner violate G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014?

(3) Based on the facts set forth on p. 2 of the UAO and PAN regarding the Wachusett Reservoir Rail Lines, did the Petitioner violate G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014?

(4) If the Petitioner violated G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014, does the FRSA preempt the Department's enforcement of the state statute and regulations?[5]

Based on the materials that the parties have filed in support of their respective cross-

[4] The question of whether the penalty is excessive presents a question of fact, and, accordingly, is not suitable for summary decision. On this date, I have established a schedule for resolving that issue at an Adjudicatory Hearing. *See* below, at pp. 24-28.

[5] The Petitioner has attempted to litigate a fifth issue by contending that the Department "[has] subject[ed] the [Petitioner] to disparate treatment" in violation of the Federal Civil Rights Act, 42 U.S.C. § 1983 ("Section 1983"), because the Department purportedly has "selectively enforce[ed] its regulations against the [Petitioner] and to exclusion of similarly situated Massachusetts rail carriers." *See* Petitioner's Claim for Adjudicatory Appeals, at pp. 1, 11-13; Petitioner's Cross Motion for Partial Summary Decision, February 13, 2008, at pp. 15-16. As I indicated at the outset of this appeal, the Petitioner's Section 1983 claims against the Department are barred as a matter of law because States and state agencies are not "persons" subject to claims under the statute. Will v. Michigan Department of State Police, 491 U.S. 58, 70-71 (1989); Laubinger v. Department of Revenue, 41 Mass. App. Ct. 598, 601 (1996); Commonwealth v. Elm Laboratories, Inc., 33 Mass. App. Ct. 71, 75-76 (1992). Additionally, Section 1983 claims are judicial claims that can only be asserted in Massachusetts Superior Court or in federal court. Id. Moreover, the Petitioner has failed to support its Section 1983 claims with any sworn testimony and other admissible evidence demonstrating "disparate treatment" by the Department. *See* below, at pp. 9-14. Accordingly, the Petitioner's Section 1983 claims fail on summary decision even if they can be litigated in this administrative forum. Id.

motions for summary decision,[6] the Department is entitled to partial summary decision on the issue of liability for the following reasons:

(1) Based on the undisputed facts set forth on pp. 1-2 of the UAO and PAN regarding the Deerfield Rail Lines, the Petitioner violated G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014 by discarding or abandoning numerous railroad crossties on the ground along the railroad tracks of the Deerfield Rail Lines;

(2) Based on the undisputed facts set forth on p. 2 of the UAO regarding the Charlemont Rail Lines, the Petitioner violated G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014 by discarding or abandoning numerous railroad crossties on the ground along the railroad tracks of the Charlemont Rail Lines;

(3) Based on the undisputed facts set forth on p. 2 of the UAO and PAN regarding the Wachusett Reservoir Rail Lines, the Petitioner violated G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014 by discarding or

[6] The parties' materials are the following:

(1) Department['s] . . . Motion for Partial Summary Decision, February 1, 2008;

(2) Affidavit of Chester Yazwinski [In Support of Department's Motion for Partial Summary Decision], February 1, 2008;

(3) Affidavit of Mark Haley [In Support of Department's Motion for Partial Summary Decision], January 31, 2008;

(4) Affidavit of Craig Givens [In Support of Department's Motion for Partial Summary Decision], February 1, 2008;

(5) Affidavit of Vincent P. Vignaly [In Support of Department's Motion for Partial Summary Decision], January 31, 2008;

(6) Petitioner's Cross Motion for Partial Summary Decision, February 13, 2008;

(7) Affidavit of Donald Ponko [In Support of Petitioner's Cross Motion for Partial Summary Decision], February 7, 2008;

(8) Affidavit of John Steiniger [In Support of Petitioner's Cross Motion for Partial Summary Decision], February 12, 2008;

(9) Department's Reply to Petitioner's Cross-Motion for Summary Decision, February 21, 2008;

(10) Petitioner's . . . Legal Memoranda on Preemption Issue . . ., July 23, 2008; and

(11) Department's Supplemental Legal Memorandum on Preemption Issue, July 25, 2008.

abandoning numerous railroad crossties on the ground along the railroad tracks of the Wachusett Reservoir Rail Lines; and

(4) The FRSA does not preempt the Department's enforcement of G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014.

See below, at pp. 5-24.

APPLICABLE MASSACHUSETTS STATUTORY AND REGULATORY SCHEME

I. THE SOLID WASTE MANAGEMENT ACT, G.L. c. 111, § 150A

The provisions of G.L. c. 111, § 150A govern the disposal of refuse or solid waste. The statute defines "refuse" as:

> all solid or liquid waste materials, including garbage and rubbish, and sludge, but not including sewage, and those materials defined as hazardous wastes in [G.L. c. 21C, § 2] and those materials defined as source, special nuclear or by-product material under the provisions of the Atomic Energy Act of 1954.

The statute prohibits any party from operating a "a dumping ground for refuse or any other works for treating, storing, or disposing of refuse" without prior approval from the local Board of Health. G.L. c. 111, § 150A. Under the statute, such a dumping ground is considered a solid waste "facility" and the statute makes clear that:

> [a]ny *person* desiring to *maintain* or operate a site for a new facility or the expansion of an existing facility shall submit an application for a site assignment to the local board of health and simultaneously provide copies to [MassDEP] and the [Massachusetts] department of public health . . . .

Id. (emphasis supplied).[7]

The statute also provides that:

> [n]o facility shall be established, constructed, expanded, maintained, operated, or

[7] "Person" is defined as including "any individual, partnership, association, firm, company, [or] corporation . . . ." 310 CMR 16.02; 310 CMR 19.006. "Maintain" is defined as "establish[ing], keep[ing,] or sustain[ing] the presence of a facility on a site, whether or not such facility is in operation and whether or not such facility has been closed." G.L. c. 111, § 150A.

> devoted to any past closure as defined by regulation, unless detailed operating plans, specifications, a public health report, if any, and necessary environmental reports have been submitted to [MassDEP] and [MassDEP] has granted a permit for the facility, and notice of such permit is recorded in the registry of deeds, or if the land affected thereby is registered land in the registry section of the land court for the district wherein the land lies. . . . Said permit may limit or prohibit the disposal of particular types of solid waste at a facility in order to extend the useful life of the facility or reduce its environmental impact.

Id. The statute also requires that "[e]very person maintaining or operating a facility, . . . shall maintain and operate the same in such manner as will protect the public health and safety and the environment," and that "[n]o person shall dispose or contract for the disposal of solid waste at any place which has not been approved by [MassDEP] pursuant to the provisions of th[e] [statute] or other applicable law." Id.

II. THE SITE ASSIGNMENT REGULATIONS FOR SOLID WASTE FACILITIES UNDER 310 CMR 16.06

The provisions of G.L c. 111, § 150A also authorize the Department to adopt rules and regulations governing solid waste facilities, and to issue orders to enforce the statute. In accordance with its statutory authority, the Department has promulgated regulations at 310 CMR 16.00, *et seq.*, to regulate "the process for deciding whether a parcel of land is suitable to serve as the site for a solid waste management facility." 310 CMR 16.01(1); 310 CMR 16.01(2). The regulations provide that:

> [n]o place in any city or town shall be maintained or operated as a site for a facility unless such place has been assigned by the board of health or the Department, whichever is applicable, pursuant to M.G.L. c. 111, § 150A[,] [and that] [a]ny disposal of solid waste at any location not so assigned shall constitute a violation of said statute and of 310 CMR 16.00.

310 CMR 16.06. The regulations define the terms "disposal," "operator," "recyclable or

recyclable material," "recycle," "solid waste or waste," and "storage" as follows:

(_) disposal: the final dumping, landfilling or placement of solid waste into or on any land or water or the incineration of solid waste;

(_) operator: any person who has care, charge or control of a facility subject to 310 CMR 16.00, including without limitation, an agent, lessee of the owner or an independent contractor;

(_) recyclable or recyclable material: a material that has the potential to be recycled and which is pre-sorted and not contaminated by significant amounts of toxic substances;

(_) recycle: the means to recover materials or by-products which are: (a) reused; or (b) used as an ingredient or a feedstock in an industrial or manufacturing process to make a marketable product; or (c) used in a particular function or application as an effective substitute for a commercial product or commodity, but does not include recovery of energy from the combustion of a material;

(_) solid waste or waste: useless, unwanted or discarded solid, liquid or contained gaseous material resulting from industrial, commercial, mining, agricultural, municipal or household activities that is abandoned by being disposed or incinerated or is stored, treated or transferred pending such disposal, incineration or other treatment . . .;[8] and

[8] The definition of "solid waste or waste" does not include certain items not relevant here:

(a) hazardous wastes as defined and regulated by 310 CMR 30.000;

(b) sludge or septage regulated by 10 CMR 32.00;

(c) waste-water treatment facility residuals and sludge ash from waste-water treatment facilities that treat only sewage regulated by G.L. c. 83, §§ 6 & 7 and/or G.L. c. 21, §§ 26-53 and applicable regulations;

(d) septage and sewage as defined and regulated by 314 CMR 5.00, and G.L. c. 21, §§ 26-53 or 310 CMR 15.00, provided that 310 CMR 16.00 does apply to solid waste management facilities which co-dispose septage and sewage with solid waste;

(e) ash produced from the combustion of coal when reused in accordance with G.L. c. 111, § 150A;

(f) solid or dissolved materials in irrigation return flows;

(g) source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954;

(h) materials and by-products generated from and reused within an original manufacturing process; and

(_) storage: the "means the temporary containment of solid waste or compostable or recyclable materials in a manner which does not constitute disposal."

310 CMR 16.02.

III. THE SOLID WASTE MANAGEMENT REGULATIONS UNDER 310 CMR 19.014

Also in accordance with its statutory authority under G.L. c. 111, § 150A, the Department has promulgated regulations at 310 CMR 19.000, *et seq.*, to regulate "the storage, transfer, processing, treatment, disposal, use and reuse of solid waste in Massachusetts." 310 CMR 19.001; 310 CMR 19.002. The regulations are "intended to protect public health, safety and the environment[,]" 310 CMR 19.002, and prohibit a party from "establish[ing], construct[ing], operat[ing] or maintain[ing] a dumping ground[9] or operat[ing] or maintain[ing] a landfill in Massachusetts in such manner as to constitute an open dump." 310 CMR 19.014(1). This prohibition "include[s] without limitation, disposing or contracting for the disposal of refuse in a dumping ground or open dump." Id. The regulations also prohibit a person from "dispos[ing] or contract[ing] for the disposal of solid waste at any place in Massachusetts which has not been approved by the Department [,]" and "dispos[ing] or contract[ing] for the disposal of solid waste at any facility in Massachusetts that is not approved to manage the particular type of solid waste

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(i) compostable or recyclable materials when composted or recycled in an operation not required to be assigned pursuant to 310 CMR 16.05(2) through (6).

310 CMR 16.02.

[9] The regulations define a "dumping ground" as a "a facility or place used for the disposal of solid waste from one or more sources which is not established or maintained pursuant to a valid site assignment or permit in accordance with M.G.L. c. 111, § 150A, 310 CMR 16.00 or 310 CMR 19.000." 310 CMR 19.006.

being disposed." 310 CMR 19.014(2); 310 CMR 19.014(3).

THE UNDISPUTED FACTS OF THE UAO AND PAN

In support of their respective motions for partial summary decision, the parties submitted Affidavits from various individuals. The Department submitted five Affidavits: one Affidavit each from three of its inspectors; an Affidavit from an Environmental Engineer employed by the Massachusetts Department of Conservation and Recreation ("DCR"); and an Affidavit from the Deerfield Fire Chief.[10] As discussed below, at pp. 9-14, these five Affidavits corroborate the factual allegations of the Department's UAO and PAN.

In response, the Petitioner submitted two Affidavits: an Affidavit from Donald Ponko, General Manager of the Perma Treat Corporation Maine ("PTCM"), a private company that incinerates railroad crossties that the Petitioner has removed from its rail lines; and an Affidavit from John Steiniger, the Petitioner's Vice-President of Engineering.[11] These two Affidavits do not dispute the factual allegations of the UAO and PAN. Accordingly, the following facts regarding the Petitioner's discarding or abandonment of railroad crossties along three rail lines that Petitioner manages or operates in the Central and Western Massachusetts communities of Charlemont, Deerfield, Sterling, and West Boylston have been established.

I. THE DEERFIELD RAIL LINES

On May 3, 2005, Chester Yazwinski, the Deerfield Fire Chief ("Chief Yazwinski"), met with Mark Haley, a Department inspector ("Mr. Haley") and Shawn Bush, the Acting Fire Warden for the DCR's Bureau of Forest Fire Control ("Mr. Bush"). Affidavit of Chester Yazwinski, February 1, 2008 ("Yazwinski Affidavit"), ¶ 2; Affidavit of Mark Haley, January 31,

[10] *See* footnote 6, at p. 4 above.

[11] Id.

2008 ("Haley Affidavit"), ¶¶ 2-4 and Exhibit A to Haley Affidavit. Chief Yazwinski had requested the Department's assistance to obtain the Petitioner's clean up of several hundred railroad crossties that it had placed along its rail lines in Deerfield. Yazwinski Affidavit, ¶ 2. As part of maintaining its rail lines, the Petitioner stockpiled replacement crossties along the railroad right-of-way. Id. During its crosstie replacement activities, Petitioner removed the old crossties, cut them into thirds, and left them on the surface of the ground or partially buried them along the railroad right-of-way. Id. Chief Yazwinski was concerned for the safety of firefighters who responded to brush and railroad tie fires along the rail lines. Yazwinski Affidavit, ¶ 3. Because the railroad crossties contained creosote as a preservative, the firefighters were required to wear Self-Contained Breathing Apparatus ("SCBA"). Id. Since driving a fire truck on the railroad tracks would be both difficult and damage the fire truck, the firefighters were forced to fight the fires by hand, dousing each fire individually using chemically treated water. Id. These practices and conditions limited the firefighters' efficiency in suppressing the fire. Id.

During a dry spell in April of 2005, there were brush/railroad crosstie fires along two sections of the Deerfield Rail Lines. Yazwinski Affidavit, ¶ 4. The fires commenced when sparks from a train's brakes or gears ignited dry brush growing along the tracks. Id. The fire then spread to nearby railroad crossties that the Petitioner had removed from the railroad tracks and placed on the ground near the tracks. Id. Several nearby towns responded to the fires, and it was necessary to utilize a hazardous materials response team from Chicopee to assist in controlling the fires. Id.

Chief Yazwinski, Mr. Bush, and Mr. Haley inspected the two locations along the Deerfield Rail Lines where the fires occurred. Yazwinski Affidavit, ¶ 5. They observed several

hundred railroad crossties that had been removed from the Deerfield Rail Lines, cut into thirds and placed on the ground or buried every fifty feet or so along the railroad tracks. Id. Many of the crossties had been burned. Id. They also observed several railroad crossties that had been thrown down the slopes of ravines bordering the tracks. Id. Many of those crossties were partially buried. Id. According to Mr. Haley, the crossties appeared to have been present at the two locations for several years because they were rotting and many were covered with soil. Haley Affidavit, ¶ 4 and Exhibit A to Haley Affidavit. Chief Yazwinski estimates that most of the discarded railroad crossties he observed along the Deerfield Rail Lines had been there at least since 1971, when he joined the Deerfield Fire Department. Yazwinski Affidavit, ¶ 6.

On May 7, 2007, Mr. Haley returned to the locations along the Deerfield Rail Lines that he had inspected previously as described above, and took photographs of the areas. Haley Affidavit, ¶¶ 5-6 and Exhibit B to Haley Affidavit. The conditions of the areas were quite similar to those he had observed in 2005. Id. There were still several piles of cut railroad crossties along both rail lines; most of the crossties appeared to be broken, split, cracked or rotted. Id.[12]

II. CHARLEMONT RAIL LINES

On February 21, 2007, Craig Givens, a MassDEP inspector ("Mr. Givens"), received a complaint from the Greenfield Police Dispatcher regarding railroad crossties that the Petitioner had been left along the banks of the Deerfield River in Charlemont, Massachusetts. Affidavit of

[12] In their respective Affidavits, the Petitioner's witnesses, Mr. Ponko and Mr. Steiniger, did not dispute the Department's factual allegations set forth above concerning the Deerfield Rail Lines. Indeed, Mr. Steiniger corroborated the allegations by testifying "that in May of 2005, the Deerfield Fire Department (DFD) complained to MassDEP about two brush fires that occurred in April 2005 along railroad tracks owned and managed by [the Petitioner] in Deerfield, Massachusetts." Affidavit of John Steiniger, February 12, 2008 ("Steiniger Affidavit"), ¶ 3. Mr. Steiniger also testified that "[t]he brush fires spread to and engulfed railroad [cross]ties along the [Petitioner's] right of way." Id.

Craig Givens, February 1, 2008 ("Givens Affidavit"), ¶ 2. One week later, Mr. Givens visited the area and observed several piles of wooden railroad crossties that had been deposited over a distance of approximately 1.768 miles along the upper (south) bank of the Deerfield River next to the railroad tracks running adjacent to South River Road in Charlemont. Givens Affidavit, ¶ 3. The piles of railroad crossties had been deposited on the bare ground. Id. Each pile contained from twenty to thirty railroad crossties, the majority of which were broken, split, cracked or rotted. Id. According to Mr. Givens, the railroad crossties appeared to have been at that location for a number of years, based on the condition of the crossties and the vegetation that had grown around the piles of crossties. Givens Affidavit, ¶ 4.[13]

III. WACHUSETT RESERVOIR RAIL LINES

In September of 1999, Vincent Vignaly, an Environmental Engineer with DCR's Division of Water Supply Protection Office of Watershed Management ("Mr. Vignaly"), inspected a section of Petitioner's railroad line that runs within the watershed and along the shore of the Wachusett Reservoir between West Boylston and Sterling, Massachusetts. Affidavit of Vincent Vignaly, January 31, 2008 ("Vignaly Affidavit"), ¶ 2. The rail line traverses many tributaries that discharge directly into the Reservoir. Id. During Mr. Vignaly's inspection, he observed hundreds of railroad crossties, many of which were in piles, which had been discarded on the ground every 10-15 feet along the railroad tracks. Id. Some crossties had rolled down an embankment and were sitting in the ponds and tributaries adjacent to the rail line. Id. The

[13] Mr. Givens took several photographs during his site visit and those photographs are attached as Exhibit A to this Affidavit in support of the Department's motion for partial summary decision. Givens Affidavit, ¶ 5 and Exhibit A to Givens Affidavit. In his Affidavit, the Petitioner's witness, Mr. Steiniger, corroborated Mr. Givens' testimony by testifying "that in February 2007, pursuant to a complaint, MassDEP inspected rail lines along the South River Road in the town of Charlemont, Massachusetts and observed several piles of railroad [cross]ties on the upper banks of the Deerfield River." Steiniger Affidavit, ¶ 4.

crossties appeared to have been placed on the ground during railroad maintenance and repair activities. Id. The crossties were cracked, split or rotten, and there was brush growing around them, indicating that they had been there for years. Id.

Between 1999 and 2004, DCR attempted to convince the Petitioner to remove the crossties; during each of those years, Mr. Vignaly pointed out to the Petitioner's personnel and its consultant hundreds of discarded crossties that DCR believed the Petitioner should remove from the area. Vignaly Affidavit, ¶ 3. During the winter/spring of 2004, most of the crossties that had been placed on the ground along a three mile portion of the total 7.5 mile stretch of track had been removed. Id. During a meeting at the Department's Central Regional Office in March of 2004, the Petitioner's representatives stated that the Petitioner had removed over 2,000 railroad crossties from the three mile portion of the rail line. Id. Mr. Vignaly was informed that the Petitioner transported the crossties to Maine for incineration. Id. Mr. Vignaly estimates that based upon the density of the discarded crossties he has observed along the entire 7.5 mile stretch of track, the remaining 4.5 miles contain approximately 3,000 crossties. Id.

On March 4, 2004, Mr. Vignaly toured the Wachusett Reservoir Rail Lines with Michael Penny, a MassDEP inspector ("Mr. Penny"). Vignaly Affidavit, ¶ 4; Affidavit of Michael Penny, January 30, 2008 ("Penny Affidavit"), ¶ 2. During the inspection, they observed numerous (Mr. Vignaly estimates over 1,000) railroad crossties on the ground within 10-15 feet of the railroad tracks. Vignaly Affidavit, ¶ 5; Penny Affidavit, ¶ 3. Some of the crossties had rolled down the slope away from the tracks and had come to rest in tributaries to the Reservoir. Id. The crossties appeared to be broken, split, cracked or rotted. Id. According to Mr. Vignaly, it did not appear that the Petitioner had made a significant effort to remove any additional

crossties beyond those removed from that three mile segment of track earlier in 2004. Vignaly Affidavit, ¶ 6. According to Mr. Penny, the crossties he observed on March 4, 2004 appeared to have been there for many years, given the presence of vegetation which had grown around many of the piles. Penny Affidavit, ¶ 4.

Mr. Vignaly reinspected the Wachusett Reservoir Rail Lines on June 23, 2005 and took photographs, noting that no further railroad crosstie removal work had occurred since 2004. Vignaly Affidavit, ¶ 7 and Exhibit A to Vignaly Affidavit. Mr. Vignaly revisited the area twice more, on June 26, 2007 and January 11, 2008. Vignaly Affidavit, ¶ 8 and Exhibit B to Vignaly Affidavit. Mr. Vignaly took photographs during his January 2008 inspection. Id. On both occasions, Mr. Vignaly observed hundreds of railroad crossties that appeared to be in the same locations as those he had observed previously in 2004 and 2005. Id.[14]

DISCUSSION

I. THE SUMMARY DECISION STANDARD

It is well settled that a motion for summary decision in an administrative appeal such as this case is similar to a motion for summary judgment in a civil suit. In the Matter of Roland Couillard, OADR Docket No. WET-2008-035, Recommended Final Decision, at 4 (July 11, 2008), adopted as Final Decision (August 8, 2008); In the Matter of Lowe's Home Centers, Inc.,

[14] In his Affidavit, the Petitioner's witness, Mr. Steiniger, admitted "that in the Spring of 1999, [DCR] . . . complained to MassDEP regarding railroad [cross]ties along approximately 7.5 miles of track operated by [the Petitioner] in the towns of West Boylston and Sterling, Massachusetts." Steiniger Affidavit, ¶ 5. Mr. Steiniger also admitted that "[s]ome [cross]ties ha[d] been removed [from the area] by [the Petitioner] after notification." Id. Although he did not indicate where the Petitioner transported the removed crossties, Mr. Steiniger did corroborate Mr. Vignaly's Affidavit testimony that the Petitioner transported a number of removed crossties to PTCM in Maine for incineration. Steiniger Affidavit, ¶¶ 5, 9-10. According to Mr. Steiniger, the Petitioner uses PTCM to incinerate removed crossties "as a source of fuel generation and the conservation of energy . . . ." Id., at ¶ 9. Mr. Ponko, testified that "[a]pproximately ninety percent (90%) of all product accepted by PTCM is from [the Petitioner]." Affidavit of Donald Ponko, February 7, 2008 ("Ponko Affidavit"), ¶ 10.

OADR Docket No. WET-2009-013, Recommended Final Decision, at 6 (June 19, 2009), adopted as Final Decision (June 30, 2009). Under 310 CMR 1.01(11)(f):

> [a]ny party [to an administrative appeal] may move with or without supporting affidavits for a summary decision in the moving party's favor upon all or any of the issues that are the subject of the . . . appeal. . . . The decision sought shall be made if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decision in its favor as a matter of law. . . .

"This standard mirrors the standard set forth in Rule 56 of the Massachusetts Rules of Civil Procedure" governing the resolution of civil suits in Massachusetts trial courts. Couillard, supra, at 4; Lowe's, supra, at 6-7.[15]

As the summary decision rule provides, "[a] party seeking a summary decision must demonstrate that there is no genuine issue of material fact and that the party is entitled to a final decision as a matter of law." Couillard, supra, at 4; Lowe's, supra, at 7. The moving party must make the demonstration based "solely on the basis of evidence admissible in Massachusetts courts." 310 CMR 1.01(11)(f); cf. Mass. R. Civ. P. 56(e).[16] If the moving party meets this

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[15] Mass. R. Civ. P. 56(c) provides in relevant part that:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and responses to requests for admission[,] . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[16] Mass. R. Civ. P. 56(e) provides in relevant part that:

> [s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. . . .

Rule 56(e) also provides that:

> [w]hen a motion for summary judgment is made and supported as provided in th[e] rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in th[e] rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

burden, the opposing party "may not rest upon the mere allegations or denials of [its] pleading, but must respond, by affidavits or as otherwise provided in 310 CMR 1.01, setting forth specific facts showing that there is a genuine issue for hearing on the merits." 310 CMR 1.01(11)(f); In the Matter of William and Helen Drohan, OADR Docket No. 1995-083, Final Decision, 1996 MA ENV LEXIS 67, at 4 (March 1, 1996); Lowe's, supra, at 7; cf. Mass. R. Civ. P. 56(e);[17] Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (summary judgment properly awarded to defendant); Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-37 (2007) (same).

II. THE DEPARTMENT HAS DEMONSTRATED THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT ON THE ISSUE OF LIABILITY.

Here, as previously discussed above at pp. 9-14, the factual allegations of the Department's UAO and PAN concerning the Petitioner's discarding or abandonment of railroad crossties along railroad racks in the Massachusetts communities of Charlemont, Deerfield, Sterling, and West Boylston have not been disputed by the Petitioner. Accordingly, the Department has passed the first hurdle of the summary decision standard by demonstrating the absence of a genuine issue of material fact. The next hurdle that the Department must overcome is demonstrating that it is entitled to partial summary decision on liability as a matter of law. As discussed in the next two sections below, at pp. 16-24, the Department has met that burden as well.

III. BASED ON THE UNDISPUTED FACTS, THE PETITIONER HAS VIOLATED G.L. c. 111, § 150A, 310 CMR 16.06, AND 310 CMR 19.014 AS A MATTER OF LAW.

The provisions of G.L. 111, § 150A; 310 CMR 16.06; and 310 CMR 19.014 are discussed in detail above at pp. 5-9. Based on the undisputed facts, the Petitioner has violated

[17] See footnote 16, at p. 15 above.

those provisions as a matter of law by, among other things, discarding or abandoning numerous railroad crossties on the ground along the railroad tracks of the three rail lines that the Petitioner owns and operates: the Deerfield Rail Line, the Charlemont Rail Line, and the Wachusett Reservoir Rail Line.

The Petitioner has not challenged the personal observations made by all of the Department's witnesses regarding both the condition of the railroad crossties along the three rail lines at issue and the amount of time that the crossties have remained at those locations. The observations of the Department's witnesses demonstrate the Petitioner's violations of G.L. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014.

Specifically, Deerfield Fire Chief Yazwinski and Department inspector, Mr. Haley, observed that most of the railroad crossties along the Deerfield Rail Lines appear to have been at the Site for several years, because they are in poor condition and many have been partially buried. According to Chief Yazwinski, the majority of the crossties along the Deerfield Rail Lines have been there since at least 1971, when he first joined the Deerfield Fire Department. Similarly, according to Department inspector, Mr. Givens, the majority of the railroad crossties he observed along the Charlemont Rail Lines appear to have been at that location for a number of years because they are broken, split, cracked or rotted, and vegetation has grown around them. Lastly, both DCR engineer, Mr. Vignaly, and Department inspector, Mr. Penny observed that the majority of railroad crossties along the Wachusett Reservoir Rail Line are broken, split, cracked or rotted, and many have been partially buried in the ground or submerged in tributaries of the Wachusett Reservoir.

Although the Petitioner may have removed as many as 2,000 railroad crossties from a

three mile stretch of the Wachusett Reservoir Rail Line in 2004, Mr. Vignaly, estimates that an additional 3,000 ties have remained at other locations along this rail line since at least 1999. The undisputed evidence demonstrates that the vast majority of the railroad crossties that have been discarded or abandoned along all three rail lines are in poor condition and have been at the sites for many years. On at least one occasion, the Petitioner apparently transported a portion of the railroad crossties from the Wachusett Reservoir Line out of state to be incinerated at the PTCM facility in Maine.

Any plans by the Petitioner to transport the remainder of the railroad crossties offsite for incineration does not change the conclusion that all of the crossties at issue are "solid waste" pursuant to 310 CMR 16.02. Such plans would indicate the Petitioner's belief that the crossties are no longer useful for their intended purpose and are being stored pending incineration.

Moreover, pursuant to 310 CMR 16.02, incineration of the crossties would constitute "disposal" and not "recycling" under the Regulations. Thus, by discarding or abandoning the railroad crossties along the railroad tracks of the Deerfield, Charlemont, and Wachusett Reservoir Rail Lines and keeping them there for several years pending transfer out of state for disposal by incineration, the Petitioner has operated and/or maintained, and continues to operate and/or maintain, separate facilities for the storage, handling and/or transfer of solid waste without a site assignment from any local Board of Health or the Department, where applicable, in violation of both G.L. c. 111, § 150A and 310 CMR 16.06. *See* In the Matter of William T. Matt, Trustee, 5 DEPR 185, 1998 MA ENV LEXIS 934 (October 7, 1998) (Final Decision) (Property owner's failure to remove solid waste deposited by prior owner constituted storage and operation of solid waste facility without site assignment, in violation of G.L. c. 111, §150A, 310

CMR 16.06, and 310 CMR 19.014); Board of Health v. Hagopian. 37 Mass. App. Ct. 174, rev. den., 418 Mass. 1108 (1994) (Property owner who demolished structures and who failed to remove all debris maintained un-permitted solid waste facility/dumping ground in violation of G.L. c.111, § 150A). The Petitioner has also violated 310 CMR 19.014 because the undisputed evidence demonstrates that the vast majority of railroad crossties that the Petitioner has discarded or abandoned along the railroad tracks of the Deerfield, Charlemont and Wachusett Reservoir Rail Lines are in poor condition and not suitable for reuse as railroad crossties, and have been there for long periods of time dating as far back as 1971.

IV. THE FRSA DOES NOT PREEMPT THE DEPARTMENT'S ENFORCEMENT OF G.L. c. 111, § 150A, 310 CMR 16.06, AND 310 CMR 19.014.

The Department is also entitled to partial summary decision on liability because the FRSA does not preempt the Department's enforcement of G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014 with respect to the Petitioner's discarding or abandonment of the railroad crossties at issue in this case. This conclusion is based on well established federal law preemption principles, the provisions of the FRSA, and the provisions of 49 CFR 213.109, which the Petitioner contends preempt the Department's enforcement of G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014.

With respect the federal law preemption principles, the Department's summary decision briefs more than aptly summarize those principles.[18] The principles boil down to the rule that "State law must give way to Federal law" only where:

> (1) Congress has explicitly withdrawn the power of the State to regulate the subject matter at issue; or

[18] *See* (1) Department['s] . . . Motion for Partial Summary Decision, February 1, 2008, at pp. 13-14;
(2) Department's Reply to Petitioner's Cross-Motion for Summary Decision, February 21, 2008, at pp. 4-5; and
(3) Department's Supplemental Legal Memorandum on Preemption Issue, July 25, 2008.

(2) Congress has implicitly withdrawn the power of the State to regulate the subject matter at issue "by creating a regulatory system so pervasive and complex that it leaves 'no room' for the states to regulate"; or

(3) "it is impossible to comply with both State and federal law"; or

(4) State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Boston Housing Authority v. Garcia, 449 Mass. 727, 733 (2007) (federal law requiring written lease provisions authorizing federally assisted public housing authorities to terminate tenant's lease for crimes committed by tenant's household members, even where the tenant had no knowledge of and was not at fault for the household member's criminal activity, preempted Massachusetts law governing tenancies in public housing developments).

Here, as discussed below, the Department has demonstrated in its summary decision papers the following:

(1) in enacting the FRSA, Congress did not explicitly withdraw the power of the States to regulate the subject matter that is the subject of the Department's UAO and PAN in this proceeding;

(2) the FRSA did not implicitly withdraw the power of the States to regulate the subject matter of the Department's UAO and PAN;

(3) it is possible for the Petitioner to comply with both the FRSA, and the Massachusetts statutory and regulatory requirements of G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014;[19] and

(4) the Massachusetts statutory and regulatory requirements of G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014 "[do not] stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of [the FRSA]."

While it is undisputable that Congress enacted the FRSA in 1970 to "promote safety in

[19] The Petitioner failed to present any sworn testimony and other admissible evidence demonstrating that it is not possible for the Petitioner to comply with the both the FRSA and the Massachusetts statutory and regulatory requirements at issue.

every area of railroad operations and to reduce railroad-related accidents and incidents," 49 U.S.C. § 20101, and granted the U.S. Secretary of Transportation ("Transportation Secretary") broad authority "to prescribe regulations and issue orders for every area of railroad safety," 49 U.S.C. § 20103, Congress did not abrogate the State's right to exercise its traditional police powers to protect local health and safety through enactment and enforcement of well-defined public health statutory and regulatory requirements. The FRSA's preemption provision states that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable,"[20] but the statute also provides that "[a] State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the [Transportation] Secretary . . . prescribes a regulation or issues an order covering the subject matter of the State requirement."[21] The FRSA also provides that:

> [a] State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> **(A)** is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> **(B)** is not incompatible with a law, regulation, or order of the United States Government; and
>
> **(C)** does not unreasonably burden interstate commerce.[22]

Here, the Department has demonstrated in its summary decision papers that G.L. c. 111,

[20] 49 U.S.C. § 20106(a)(1).

[21] 49 U.S.C. § 20106(a)(2).

[22] Id.

§ 150A, 310 CMR 16.06, and 310 CMR 19.014:

> **(1)** are necessary to eliminate or reduce an essentially local safety or security hazard caused by the Petitioner's practice of removing and then discarding or abandoning railroad crossties along the railroad tracks of the Petitioner's Deerfield, Charlemont, and Wachusett Reservoir Rail Lines;
>
> **(B)** are compatible with the FRSA; and
>
> **(C)** do not unreasonably burden interstate commerce.[23]

Moreover, the Petitioner's contention that 49 CFR 213.109 preempts the Department's enforcement of G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014 is without merit as revealed by the provisions of 49 CFR 213.109.

The regulations of 49 CFR 213.109 are part of the set of FRSA regulations that the Transportation Secretary has promulgated at 49 CFR 213.1-213.369 governing the structure of railroad tracks, including railroad crossties. *See* 49 CFR 213.101-213.143. The railroad crosstie regulations are at 49 CFR 213.109 and provide that "[c]rossties shall be made of a material to which rail can be securely fastened,"[24] and that each 39 foot segment of track must have "[a] sufficient number of crossties which in combination provide effective support" for the track.[25] The regulations categorize railroad track as "Class 1," Class 2," "Class 3,""Class 4," and "Class 5."[26] The regulations at 49 CFR 213.109 require that each 39 foot segment of Class 1 track to have five crossties; each 39 foot segment of Class 2 and 3 tracks to have eight crossties; and each

[23] The Petitioner failed to present any sworn testimony and other admissible evidence on this issue as well.

[24] 49 CFR 213.109(a).

[25] 49 CFR 213.109(b)(1).

[26] 49 CFR 213.109(b)(2)-213.109(b)(3); 49 CFR 213.109(c).

39 foot segment of Class 4 and 5 track to have 12 crossties, which are not:

(1) broken through;

(2) split or otherwise impaired to the extent the crossties will allow the ballast to work through, or will not hold spikes or rail fasteners;

(3) so deteriorated that the tie plate or base of rail can move laterally more than1/2inch relative to the crossties; and

(4) cut by the tie plate through more than 40 percent of a ties' thickness.

See 49 CFR 213.109(c)-213.109(g).

In sum, the railroad crosstie regulations 49 CFR 213.109 deal with maintaining the safety and integrity of rail lines, and are silent regarding the subject matter of the Department's UAO and PAN: the handling, storage, transfer, and disposal of railroad crossties which have been deemed unsafe and which have been removed from the railroad tracks and deposited along the tracks. Additionally, the Department's UAO and PAN, and the Massachusetts Solid Waste Act and regulations upon which they are based, do not deal with the safety and integrity of rail lines. Specifically, the Massachusetts statutory and regulatory requirements at issue do not regulate when, or under what criteria, the Petitioner must remove and replace the railroad crossties from the railroad tracks. Because 49 CFR 213.109 does not regulate what the Petitioner must do with the railroad crossties after removing them from the railroad tracks, the regulation does not cover or subsume the subject matter of the Department's UAO and PAN, and thus does not divest the Department of authority to enforce the provisions of G.L. c.111, §150A, 310 CMR 16.06, and 310 CMR 19.014. Simply stated, the Department's UAO and PAN are not expressly preempted

by the FRSA.

ADJUDICATORY HEARING TO RESOLVE REMAINING ISSUE IN APPEALS

With the liability issue resolved in the Department's favor on summary decision, the remaining issue to resolved in these appeals is whether the $59,746.50 civil administrative penalty that the Department assessed against the Petitioner for its violations of G.L. c. 111, § 150A, 310 CMR 16.06, and 310 CMR 19.014 is excessive. Specifically, the issue is whether the Department properly assessed the penalty pursuant to the Massachusetts Civil Administrative Penalties Act, G.L. c. 21A, § 16, and the Administrative Penalty Regulations at 310 CMR 5.00. This issue will be resolved in an Adjudicatory Hearing ("Hearing") that I will conduct at the Department's Central Regional Office in Worcester, Massachusetts on **Friday, April 9, 2010,** unless these appeals are settled by agreement of the parties by that time.

If the Hearing goes forward, its purpose will be the cross-examination of witnesses who have filed sworn written Pre-filed Testimony on behalf of a party in the case according to the schedule that I have established below at **pp. 27-28;** 310 CMR 1.01(12)(f).[27] The Pre-filed Testimony will be the witnesses' Direct Examination Testimony, and, perhaps, their Rebuttal

[27] 310 CMR 1.01(12)(f) provides in relevant part that:

> The Presiding Officer may order all parties to file within a reasonable time in advance of the hearing the full written text of the testimony of their witnesses on direct examination, including all exhibits to be offered in evidence. Failure to file pre-filed direct testimony within the established time, without good cause shown, shall result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner. The Presiding Officer may exclude direct testimony offered at the hearing that was not included in the pre-filed direct testimony but was reasonably available at the time it was filed. The Presiding Officer may also require the filing of written rebuttal testimony within a reasonable time after the filing of the direct testimony. All pre-filed testimony shall be subject to the penalties of perjury. . . .

Testimony at the Hearing. Id.

The witnesses' Pre-filed Testimony must contain evidence that is relevant to resolution of the penalty assessment issues in the case. 310 CMR 1.01(13)(h)1.[28] The Pre-filed Testimony must also include the originals or true copies of all documents cited by the Testimony as supporting the witnesses' testimony and a party's positions in the case. 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)2. Specifically, the Pre-filed Testimony must include "all exhibits to be offered in evidence," 310 CMR 1.01(12)(f), and "[a]ll evidence, including any records, investigative reports, documents, and stipulations, which is to be relied upon in a final decision [in the appeal]. . . ." 310 CMR 1.01(13)(h)2. Any Pre-filed Testimony that fails to include that documentary evidence is incomplete and untimely. 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)2.

Under 310 CMR 1.01(12)(f), a party's "[f]ailure to file pre-filed direct testimony within the established time, without good cause shown, [will] result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner." Id. Indeed, "a petitioner's failure to file written direct testimony is a serious default," and "the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live." In the Matter of Gerry Graves, OADR Docket No. 2007-149, Recommended Final Decision, 2007 MA ENV LEXIS 66, at pp. 2-3 (November 26, 2007), adopted as Final Decision (February 22, 2008).

[28] 310 CMR 1.01(13)(h)1 provides that:

> [u]nless otherwise provided by any law, the Presiding Officer need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. The weight to be attached to any evidence in the record will rest within the sound discretion of the Presiding Officer. Unduly repetitious or irrelevant evidence may be excluded.

Under 310 CMR 1.01(10) a party's failure to file proper Direct Examination or Rebuttal Testimony is subject to sanctions for "failure to file documents as required, . . . comply with orders issued and schedules established in orders[,] . . . [or] comply with any of the requirements set forth in 310 CMR 1.01." Under 310 CMR 1.01(10), the Presiding Officer may "issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner.[29]

The cross-examination of witnesses at the Hearing will be subject to time limits or other limits set by the Presiding Officer. 310 CMR 1.01(13)(d); 310 CMR 1.01(13)(f).[30] Moreover,

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[29] Possible sanctions under 310 CMR 1.01(10) include, without limitation:

(a) taking designated facts or issues as established against the party being sanctioned;

(b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;

(c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);

(d) striking the party's pleadings in whole or in part;

(e) dismissing the appeal as to some or all of the disputed issues;

(f) dismissing the party being sanctioned from the appeal; and

(g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e) above, under 310 CMR 1.01(11)(a)2.f, a "Presiding Officer may [also] summarily dismiss [an appeal] sua sponte," when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Officer's appellate pre-screening authority under 310 CMR 1.01(5)(a)15 which authorizes the Officer to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions."

[30] 310 CMR 1.01(13)(d) provides in relevant part that:

> **1.** Absent agreement of the parties to time limits for the hearing acceptable to the Presiding Officer, the Presiding Officer may establish a limit on the amount of time allotted to each party to present its case and examine witnesses. This time shall be allocated equally among opposing parties, unless the Presiding Officer orders otherwise for good cause. . . .

the Adjudicatory Rules mandate that "[i]f a witness is not available for cross-examination at the hearing, the written testimony of the witness shall be excluded from the record unless the parties agree otherwise." 310 CMR 1.01(12)(f); 310 CMR 1.01(13)(h)3.

The Adjudicatory Rules also do not permit the re-direct examination of witnesses following their cross-examination unless authorized by the Presiding Officer. 310 CMR 1.01(13)(h)3. "If redirect examination is allowed by the Presiding Officer, it shall be limited to the scope of cross-examination." Id. Hence, if a party chooses not to cross-examine a witness, the witness may not provide oral Re-direct Examination Testimony at the Hearing. Id. There is also no requirement that a party cross-examine its opponent's witnesses at the Hearing. Id.

The schedule for the parties to file Pre-filed Testimony and memoranda of law on the penalty assessment issue is as follows:

Action	**Deadline or Date Scheduled**
Department's Pre-filed Direct Testimony and supporting memorandum of law on penalty assessment issue	**5:00 p.m., Thursday, February 18, 2010;**
Petitioner's Pre-filed Direct Direct and Rebuttal Testimony and supporting memorandum of law on penalty assessment issue	**5:00 p.m., Thursday, March 18, 2010;**

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3. The Presiding Officer may grant a request for modification of time limits only for good cause. In determining whether to grant a request to modify time limits, the Presiding Officer may consider: whether or not the requesting party has used the time since the commencement of the hearing in a reasonable and proper way and has complied with all orders regulating the hearing; the requesting party's explanation as to how the requested added time would be used and why it is necessary to ensure a fair hearing; and any other relevant and material facts the requesting or opposing party may wish to present in support of or opposition to the request.

Under 310 CMR 1.01(13)(f), the Presiding Officer may "[limit] the number of witnesses that parties may offer [at the Adjudicatory Hearing] and may exclude the testimony of any witness which would be duplicative, irrelevant, or otherwise unnecessary."

[continued next page]
[continued from preceding page]

The Department's Pre-filed Rebuttal Testimony (limited to matters asserted in Petitioner's Pre-filed Testimony)	**5:00 p.m., Thursday, April 1, 2010;**
Hearing	**On Friday, April 9, 2010, from 9 a.m. to 4 p.m. at the Central Regional Office of the Department of Environmental Protection, 627 Main Street, Worcester, MA; **Hearings are electronically recorded unless the parties make arrangements to have the Hearing recorded by a certified court stenographer/reporter; the parties are encouraged to arrange for stenographic recording of the Hearing by a certified court stenographer/reporter at the parties' expense;**
Parties' Proposed Findings of Fact, Rulings of Law, and Proposed Final Decision on penalty assessment issue	**5:00 p.m., Friday, April 23, 2010**
Recommended Final Decision on all issues	**On or before Monday, May 24, 2010;**
MassDEP Commissioner's Final Decision	**On or before Wednesday, June 23, 2010.**

Date: _____

_____
Salvatore M. Giorlandino
Chief Presiding Officer

SERVICE LIST

In The Matter Of: Pan Am Railways/Boston & Maine

Docket No. 2007-080 File No. UAO-WE-07-4001
Docket No. 2007-081 File No. PAN-WE-07-4002

Representative	Party
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Dan Hall MassDEP – Western Region Office 436 Dwight Street Springfield, MA 01103 Date: June 20, 2008	DEPARTMENT