

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

In re:

MASSACHUSETTS BAY  
TRANSPORTATION AUTHORITY,

KEOLIS COMMUTER SERVICES, LLC, and

DELAWARE NORTH CORPORATION

North Station Railroad Terminal  
NPDES Permit No. MA0028941

**PETITION FOR REVIEW OF NPDES PERMIT NO. MA0028941  
ISSUED TO MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,  
KEOLIS COMMUTER SERVICES, LLC, AND DELAWARE NORTH CORPORATION  
BY EPA REGION 1**

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2. EPA's Response to Public Comments, Reissuance of NPDES Permit No. MA0028941

## INTRODUCTION

Keolis Commuter Services, LLC (“Keolis”), by undersigned counsel, submits this Petition for Review under 40 C.F.R. § 124.19(a) regarding its National Pollutant Discharge Elimination System (NPDES) Permit No. MA0028941 (“Permit”). EPA Region 1 and the Massachusetts Department of Environmental Protection (“MassDEP”) jointly issued the Permit by certified mail on June 15, 2018. The Permit authorizes Keolis (and others) to discharge from an outfall in the North Station Railroad Terminal in Boston, Massachusetts to the Charles River.

This Petition challenges a single condition of the Permit. The challenged condition requires that as part of its Stormwater Pollution Prevention Plan (SWPPP), Keolis must “inspect and maintain the absorbent pads for track areas where locomotives stop (to capture incidental drips of oil from the trains) and the oil/water separator, both on a weekly basis.” Permit, at § I.B.9. The prior NPDES permit which EPA issued for this site required a lower frequency: monthly inspections and quarterly maintenance.

Boston’s North Station is a major regional transportation hub, with 220 daily MBTA and Amtrak trains carrying 47,000 passengers converging on the spot where the Charles River empties into the Boston Inner Harbor. Inspection and maintenance of absorbent pads alongside the tracks and the adjacent oil-water separator is a multi-day undertaking that affects rail traffic and maintenance schedules both within and outside of Keolis’ control. Keolis has operated the commuter rail system at North Station for four years, and EPA has never cited Keolis for noncompliance with the equivalent condition in the prior permit. EPA failed to address these circumstances when it sought to establish the accelerated weekly inspection and maintenance requirement for the pads and separator – meaning that the Board cannot meaningfully review EPA’s work, and that the Permit must be remanded and reopened for public comment.

## I. STATUTORY AND FACTUAL BACKGROUND

The Clean Water Act prohibits the discharge of pollutants into the waters of the United States from a point source, except where permitted – for example, by a permit issued under the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. § 1342 *et seq.*; *see also* 40 C.F.R. 122-25, 136 (NPDES implementing regulations). NPDES permits generally contain discharge limitations and establish monitoring and reporting requirements. *See, e.g., In re City of Pittsfield, Mass.*, 2009 WL 582577, \*1 (E.A.B. 2009) (citations omitted). Facilities subject to an NPDES stormwater permit must implement a stormwater pollution prevention plan (SWPPP). *In re Kmart Holding Corp.*, 2007 WL 1655226, \*6 (E.A.B. 2007). NPDES permits generally contain SWPPP requirements, including facility inspection and maintenance requirements.

EPA issued a NPDES permit for North Station to Keolis' predecessor on April 7, 2010. In July 2014, Keolis took over operation of the commuter rail under contract with the Massachusetts Bay Transportation Authority (MBTA), and has been the operator from that date to the present. EPA Region 1 and MassDEP jointly issued a new draft NPDES permit for North Station on October 27, 2017. Part I, Section B.9 of the draft permit provided:

The Permittees shall develop and implement site specific BMPs, consistent with the sector specific BMPs in Sector P (Land Transportation and Warehousing) of the [Multi-Sector General Permit]. At a minimum, Permittees shall inspect and maintain the absorbent pads for track areas where locomotives stop (to capture incidental drips of oil from the trains) and the oil/water separator, both on a weekly basis.

Comments on the draft permit were due on Saturday, November 25, 2017, and Keolis and its co-permittee, MBTA, timely submitted joint comments regarding § I.B.9 on Monday, November 27, 2017. Those comments noted:

MBTA and Keolis request that the current permit requirements be continued as established for the inspection and maintenance of absorbent pads and the oil/water separator. The draft permit

includes a new requirement to conduct weekly inspection and maintenance of the absorbent pads and oil/water separator. However, under the current permit, absorbent pads located where locomotives park and the oil/water separator are inspected monthly and maintained (at a minimum) quarterly.

Since Keolis assumed operations of the Commuter Rail in July of 2014, there have been no violations of the oil and grease effluent limit. Therefore, Keolis requests that the current maintenance procedures and frequency be continued. The Fact Sheet (Sec. V.B, p. 14) states that the inspection frequency increase to weekly is “due to the occasional high levels of oil & grease resulting in permit violations.” Specifically, the Fact Sheet refers to five (5) violations of the 15 mg/L effluent limit (20-230 mg/l, Attachment 1: Discharge Monitoring Data, p. 3). All of these permit violations occurred from March 2011 to September 2013, prior to Keolis’ operation of North Station.

*See* Attachment 1 (Public Comment Pursuant to Draft NPDES Discharge Permit MA0028941), at 4 (emphasis in original). In its Response to Public Comments document, EPA replied, in total:

The Agencies [EPA and MassDEP] do not believe that weekly inspection requirement of these areas is overly burdensome. More frequent inspections would serve to more quickly allow the co-Permittees to take appropriate action in the event of spills or other circumstances that could result in violations of permit limits or conditions. Therefore, the weekly inspection and maintenance requirement has been maintained in the Final Permit.

*See* Attachment 2 (Response to Public Comments, Reissuance of NPDES Permit No. MA0028941) (“EPA Response”) at 9. The Permit was finalized and issued June 15, 2018. The April 7, 2010 permit remains in effect pending this appeal. *See* 40 C.F.R. § 124.16(c)(2).

## **II. THRESHOLD PROCEDURAL REQUIREMENTS**

Keolis participated in the public comment period on the permit. *See id.* Accordingly, Keolis has standing to petition this Board under 40 C.F.R. § 124.19(a)(2) for review of the Permit. This Petition is timely filed within 30 days of the June 15, 2018 notice of issuance of the Permit, 40 C.F.R. § 124.19(a)(3), including the added three-day period because the notice was served by certified mail. *Id.* at § 124.20(d).

## ARGUMENT

### I. STANDARD OF REVIEW

Petitioner Keolis has the burden of demonstrating that its challenge to the Permit is based on (a) a finding of fact or conclusion of law that is clearly erroneous; or (b) an exercise of discretion *or* an important policy consideration that the Environmental Appeals Board should, in its discretion, review. 40 C.F.R. 124.19(a)(4)(i) (emphasis added).

EPA's rationale for its conclusions in the final permit must be adequately explained and supported in the record. *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, \*17, 2006 WL 3361084 (E.A.B. 2006) (citing *In re City of Moscow*, 10 E.A.D. 135, 142 (E.A.B. 2001), *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568 (E.A.B. 1998), *rev. denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999)). *See also id.* (quoting *In re Gov't of D.C. Mun. Separate Sewer Sys.*, 10 E.A.D. 323, 342-43 (E.A.B. 2002)) ("Without an articulation by the permit writer of his or her analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality.")

### II. THE PERMIT MUST BE REMANDED BECAUSE EPA'S ANALYSIS IS UNREASONED, CONCLUSORY AND UNREVIEWABLE FOR CLEAR ERROR.

In crafting the Permit's accelerated inspection and maintenance schedule for the oil/water separator and oil absorbent pads in the North Station track area, EPA's reasoning consisted of three paragraphs in its Fact Sheet on "Oil & Grease," along with a single short paragraph in its response to Keolis' comments. The analysis in these four paragraphs failed to grapple with three key problems, leaving the Permit fundamentally unreasoned – and thus unreviewable – on this particular condition.

First, while EPA cited five violations of daily maximum levels of oil and grease in the Charles River since March 2011, EPA failed to confront the fact that all five citations involved



the prior contract operator of the commuter rail line; all of these incidents occurred before Keolis took over operations in July 2014. Since assuming the operations of the commuter rail line, there have been no allegations of non-compliance with this condition and Keolis has maintained a perfect record of compliance.

Second, EPA asserted that its proposed accelerated inspection and maintenance schedule will not be “overly burdensome,” but without any analysis whatsoever of the burden of inspecting and maintaining equipment that operates alongside heavily-used and essential commuter rail tracks. In fact, the inspection and maintenance activity proposed by EPA is extremely burdensome as rail operations at North Station need to be suspended during this activity and EPA’s change to the schedule would have extremely adverse consequences.

Finally, EPA’s reasoning – to the extent it exists at all – was purely the generic principle that more frequent inspection and maintenance is better, without any analysis of why a weekly schedule *in this particular circumstance* protects the receiving waters more effectively than a monthly inspection schedule and quarterly maintenance schedule.

Without any analysis to review on these points, the Board cannot meaningfully evaluate the Permit – nor, for that matter, can Keolis, or the public. The Permit must be remanded.

**A. EPA failed to address Keolis’ argument that the challenged permit condition was improperly based on violations by a prior permittee, not Keolis.**

EPA’s primary reason for its accelerated inspection and maintenance schedule was that Discharge Monitoring Report (DMR) data, drawn monthly from samples in the Charles River, showed five violations of daily maximum oil and grease levels in the water since the data started being collected in March 2011.<sup>1</sup> Fact Sheet at 14. Specifically, EPA stated that “the draft permit

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<sup>1</sup> Notably, the Fact Sheet argues that daily maximum limit of 15 mg/L of oil and grease is based on EPA’s “Red Book – Quality Criteria for Water,” July 1976, which allegedly states that “a concentration of 15 mg/L is

increases this inspection frequency [of the oil/water separator and pads], due to the occasional high levels of oil & grease resulting in permit violations.” *Id.*

But this rationale ignores key analysis. First, the DMR data in question shows no exceedances of the 15 mg/L limit since September 2013, nearly five years ago. Since Keolis has been operating the commuter rail line and its facilities at North Station, beginning in July 2014, there have been no detected exceedances – nothing even close – and indeed only five instances (out of 21 monthly measurements) in which oil and grease were detected at all in the water, all below the permit limit. Keolis has maintained a perfect record of compliance with daily maximum limits of oil and grease, and is clearly doing something right with respect to this permit condition. If EPA now decides it wants to increase the tempo of inspection and maintenance, Keolis’ perfect record with the activity performed under the current permit further raises the burden on EPA to explain why.

Moreover, Keolis’ perfect compliance record in this area highlights the flaw in EPA’s core assumption, which is that prior violations of the oil and gas limits occurred because the trackside pads and oil/water separator were not inspected and maintained frequently enough. In fact, a more careful reading of the record suggests that the opposite is true. A change in operators at North Station in July 2014 improved compliance with this condition, even as the condition itself remained the same. This suggests that the problem between 2011 and 2014 was likelier to be operations-related rather than a function of the frequency of inspections and maintenance of the equipment. And a closer look at the DMR data partially bears this out: Two of the five exceedances that concerned EPA – by far the worst two – occurred in March and

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recognized as the level at which many oils produce a visible sheen and/or cause an undesirable taste in fish.” This proposition is not pin-cited, however, and undersigned counsel could not locate such a statement in the “Red Book.”

April 2011, with measurements of 230 and 110 mg/L, respectively. But Figure 2 to the Fact Sheet provides the key context: There was a 50-gallon diesel fuel release from a train at the North Station terminal in March 2011. These exceedances did not occur because the oil absorbent pads under the tracks and the oil-water separator were inspected only monthly instead of weekly, and a weekly schedule would not have changed the outcome.

EPA's analysis of the Permit includes none of this.

**B. EPA has no basis or rationale for asserting that a weekly inspection requirement is not overly burdensome for Keolis.**

EPA's first sentence in its response to Keolis' comment on this issue is to assert: "The Agencies do not believe that [the] weekly inspection requirement of these areas is overly burdensome." EPA Response, at 9. But EPA offers no reason or analysis to support this belief.

The inspection and maintenance required by the Permit necessitates track closures, which are a burden not just on Keolis but on the entire northern half of the rail system that the public uses. North Station is the terminus of the northern commuting route into Boston and continuous train traffic to this location is extremely important to the area economy. Trains at North Station must be coordinated intricately to manage traffic through a nearby drawbridge, and the window for track-area maintenance is only a few hours each night. Due to these limitations, the inspection and maintenance required by the Permit to be done on a weekly basis actually requires three days to complete – a significant share of the entire window for weekly maintenance at North Station. Because the oil-absorbent pads that must be inspected and maintained weekly under the Permit are beneath the area where the trains park while they pick up and drop off passengers, the record is clear that inspection and maintenance of this equipment will impact train and track operations.

EPA has not offered any explanation of why it has concluded that the accelerated inspection and maintenance schedule would not be “overly burdensome,” apparently because EPA has not grappled with the issue of burden at all. The Board cannot review EPA’s analysis on this critical point because there is none. And if the Board cannot review the analysis, it cannot conclude that the analysis is rational. *In re Dominion Energy Brayton Point*, 12 E.A.D. 490, \*17 (citations omitted).

**C. EPA’s attempts to justify its change from monthly to weekly inspections on the generic ground that “more is better,” and not on any fact specific to this permit, are insufficient.**

EPA justifies its accelerated inspection and maintenance requirement by asserting that “[m]ore frequent inspections would serve to more quickly allow the co-Permittees to take appropriate action in the event of spills or other circumstances that could result in violations of permit limits or conditions.” EPA Response at 9. There are two problems with this analysis.

First, EPA does not explain *why* more frequent inspections allow quicker spill-response times. It is generally accepted that spill *planning* – such as the planning required by EPA’s Spill Prevention, Control and Countermeasures program, 40 C.F.R. 112 – improves spill response performance. But the same is not necessarily true of the frequency of inspection and maintenance schedules for all equipment. So long as inspection and maintenance schedules are *adequate*, it cannot be assumed that *faster* schedules improve spill response in a linear way, particularly when the added time and expense of the faster schedule is factored in.

This disconnect highlights the more serious problem with EPA’s deficient analysis. Even if it were true that a more frequent inspection and maintenance schedule were better in general, EPA’s analysis cannot simply stop there. After all, if faster is better, why didn’t EPA order a *daily* inspection and maintenance schedule? Or hourly? Of course, it is obvious that EPA did not do so because there are trade-offs to consider. But EPA did not evaluate those trade-offs



**STATEMENT REQUESTING ORAL ARGUMENT**

Oral argument is respectfully requested.

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*/s/ Eric L. Klein*  
Eric L. Klein



## CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of July, 2018, I caused to be served the foregoing Petition for Review in the matter of Massachusetts Bay Transportation Authority, Keolis Commuter Services, LLC, and Delaware North Corporation, NPDES Permit No. MA 0028941, by first-class mail, postage prepaid, on:

Region 1  
Environmental Protection Agency  
5 Post Office Square - Suite 100  
Boston, MA 02109-3912

Massachusetts Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

Massachusetts Bay Transportation Authority  
10 Park Plaza  
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Boston, MA 02116-3974

Delaware North Corporation  
100 Legends Way  
Boston, MA 02114

        /s/ Eric L. Klein                  
Eric L. Klein