

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT**

NORWALK HARBOR KEEPER, and FRED  
KRUPP,

*Plaintiffs*

v.

U.S. DEPARTMENT OF TRANSPORTATION,  
FEDERAL TRANSIT ADMINISTRATION,  
CONNECTICUT DEPARTMENT OF  
TRANSPORTATION, ELAINE L. CHAO, in her  
official capacity as Secretary of the U.S.  
Department of Transportation, MATTHEW  
WELBES, in his official capacity as Executive  
Director of the Federal Transit Administration,  
and JAMES P. REDEKER, in his official capacity  
as Commissioner of the Connecticut Department  
of Transportation,

*Defendants*

Case No.

ECF Case

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

## INTRODUCTION

1. This is a civil action by the conservation organization Norwalk Harbor Keeper and its members challenging the failure of the Defendants to conduct an adequate environmental review for a planned project to replace the Norwalk River Railroad Bridge (the “Walk Bridge,” or the “Bridge”) in Norwalk, Connecticut (the “Walk Bridge Replacement Project,” or the “Project”).

2. The Walk Bridge, constructed in 1896, is a railroad swing bridge which spans the Norwalk River. The Walk Bridge currently carries four railroad tracks of Amtrak’s Northeast Corridor and Metro-North Railroad’s New Haven Line, in addition to freight service by CSX and Providence & Worcester Railroad.

3. The Bridge is designed to carry rail traffic when in the closed position and to swing open to allow upriver access to tall vessels. The Bridge was designed to be moveable because at the time of its construction, the area upriver of the Bridge was an industrial center which produced significant maritime traffic. However, in recent years, such traffic has dwindled to a *de minimis* level.

4. In recent years, the swing mechanism of the Walk Bridge has experienced problems, interfering with the Bridge’s ability to open and close. These problems led to the initiation of the Walk Bridge Replacement Project by the Connecticut Department of Transportation (“CTDOT”) and the Federal Transit Administration (“FTA”) in 2015.

5. CTDOT and FTA had to, and must still, comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 431, *et seq.* for the Walk Bridge Replacement Project because the Project is reliant on federal funding from the U.S. Department of Transportation

(“USDOT”) and will require federal permits, including a Bridge Permit from the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act, 33 U.S.C. §§ 403, *et seq.*

6. On August 21, 2017, the CTDOT and FTA published their final determination regarding the environmental review of the Walk Bridge Replacement Project, the Finding of No Significant Impact (the “FONSI”) and Record of Decision (the “ROD”). The FONSI and ROD (1) determined that the Project will have no significant impacts on the environment and (2) selected as the final design choice a vertically-lifting moveable bridge design. Thereafter, in reliance upon the FONSI and ROD, USDOT and FTA did disburse, or will disburse, federal funding in furtherance of the Project.

7. However, the wrongful, inadequate NEPA analyses performed by Defendants in selecting a bridge design failed to consider the reasonable alternative of a fixed bridge at the level of the existing bridge (“Existing Level Fixed Bridge”) which would promote resiliency, shorten construction time, significantly reduce construction costs, and otherwise reduce environmental impacts. As such, the FONSI and ROD which rely on these inadequate analyses are invalid.

8. Defendants’ omission of an adequate resiliency analysis is particularly problematic due to the fact that substantial amounts of money for the Project will be drawn from federal funding sources that were designated, following Superstorm Sandy, to promote resiliency for long-term infrastructure in light of climate change and increasingly severe weather conditions.

9. Although Norwalk Harbor Keeper commented extensively during the public comment period, raising the exclusion of an Existing Level Fixed Bridge design alternative and other issues, Defendants have failed to correct the deficiencies in their review.

10. Norwalk Harbor Keeper's objective during the administrative proceedings, and in this litigation, is not to stop the replacement of the Walk Bridge but to cause Defendants to study the reasonable design alternative of a lower cost, more resilient, and more environmentally-compatible Existing Level Fixed Bridge.

### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this action pursuant to 28 U.S.C § 1331 (federal question), 28 U.S.C. §§ 2201-2202 (declaratory judgment), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act).

12. Venue in this Court is proper under 28 U.S.C. § 1391(e) because, *inter alia*, the Walk Bridge Replacement Project which is the subject of this action is located in this District and Plaintiffs reside in this District.

### **THE PARTIES**

#### **A. Plaintiffs**

13. Plaintiff Norwalk Harbor Keeper is a 501(c)(3) tax exempt Connecticut nonprofit corporation dedicated to safeguarding the ecological, recreational, aesthetic, and commercial integrity of the Norwalk River.

14. Norwalk Harbor Keeper's members frequently use the Norwalk River for a variety of purposes, including fishing, commerce, swimming, boating, wildlife observation and other recreation, and derive aesthetic enjoyment from its natural beauty.

15. Norwalk Harbor Keeper and its members have, in public statements, expressed significant concerns about the Walk Bridge Replacement Project. Notably, they have expressed

the concern that the failure to study an Existing Level Fixed Bridge design has led to the selection of a moveable bridge design that will cause unnecessarily large expenditures of public funds that could be better used on natural resource protection and needlessly protracted disruption to the recreational and aesthetic value of the Norwalk River.

16. With Defendants now poised to disburse federal funds, finalize bridge replacement design engineering, issue federal permits, and to begin more intensive construction activities, Plaintiffs turn to the Court for relief.

17. Plaintiff Fred Krupp is a member of Norwalk Harbor Keeper and serves as the President of its Board of Directors. Mr. Krupp has been a Norwalk resident for 4.5 years.

18. Mr. Krupp frequently visits, views, uses, and enjoys the Norwalk River. Mr. Krupp regularly rows on the Norwalk River, including under the Walk Bridge, and is a longtime member of the Maritime Rowing Club, which is based on the Norwalk River. Mr. Krupp has rowed on the Norwalk River at least 100 times per year during each year since 2000. In addition to his recreational uses, Mr. Krupp enjoys the aesthetic beauty of the Norwalk River.

19. Mr. Krupp's recreational and aesthetic enjoyment of the Norwalk River would be disrupted by an unduly protracted construction period and by the operations of a bridge with a more complex mechanism and larger footprint than necessary.

20. Mr. Krupp frequently travels over the Walk Bridge on Metro-North and Amtrak. Mr. Krupp's travel would be disrupted by a protracted period of construction. Mr. Krupp's travel would also be disrupted by reliability problems such as issues with the Bridge's opening and closing mechanism.

## **B. Defendants**

21. Defendant the U.S. Department of Transportation is an agency of the U.S. Government with responsibility for oversight of the Federal Transit Administration's activities, including ensuring its compliance with federal law, including NEPA and the APA.

22. Defendant Elaine L. Chao is Secretary of the U.S. Department of Transportation and is sued in that official capacity.

23. Defendant the Federal Transit Administration is an agency of the U.S. Government that operates under the U.S. Department of Transportation. The defective EA at issue in this litigation was issued by the Federal Transit Administration in conjunction with the Connecticut Department of Transportation.

24. Defendant Matthew Welbes is Executive Director of the Federal Transit Administration and is sued in that official capacity.

25. Defendant the Connecticut Department of Transportation is an agency of the State of Connecticut. The defective EA at issue in this litigation was issued by the Connecticut Department of Transportation in conjunction with the Federal Transit Administration.

26. Defendant James P. Redeker is Commissioner of the Connecticut Department of Transportation and is sued in that official capacity.

## **FACTUAL BACKGROUND**

### **A. The Norwalk River**

27. The Norwalk River is classified as federally-protected "waters of the United States" under the Clean Water Act, 33 U.S.C. §§ 1151, *et seq.*, and the Walk Bridge site is

surrounded on all sides by tidal wetlands. Walk Bridge EA, 3-57. The Norwalk River is a popular local destination for boating, swimming, fishing and oystering.

28. The navigable portion of the Norwalk River extends approximately one mile north of the Walk Bridge, whereupon it gradually terminates into a shallow, gravelly stream.

29. In the nineteenth century, at the time of the design and construction of the swing mechanism for the Walk Bridge, the one-mile stretch of the Norwalk River north of the Walk Bridge was a thriving hub of maritime commerce; thus, preserving unlimited navigational access to it was considered important.

30. However, in recent decades, maritime commerce and transportation to the upper Norwalk River has dropped precipitously. This is a result of a confluence of long-term trends, including deindustrialization of the upper Norwalk River, decreasing land transportation costs, and gentrification along the upper Norwalk River.

31. One of the only two remaining active commercial maritime uses of the upper Norwalk River is a gravel plant.

32. This gravel plant occasionally uses barges propelled by tug boats that may be too tall to fit under the Walk Bridge to bring gravel down the river, but more frequently employs trucks to transport gravel off-site.

33. Even this small-scale commercial use of the moveable bridge is unnecessary, however, as tug boats with a wider, but less tall, profile could be used for shipping gravel or other cargo under the Walk Bridge without requiring the Bridge to open.

34. The other remaining commercial use is a small marina located just past the Walk Bridge, which contains several sail boats with masts too tall to fit under the Walk Bridge.

35. This marina could be relocated to a site in Norwalk Harbor below the Walk Bridge, as no logistical or shipping considerations dictate its current location.

36. The current *de minimis* maritime commerce on the upper Norwalk River is a far cry from the booming industrial traffic in the 1800s which originally justified engineering a moveable bridge structure.

37. Defendants were aware of this lack of commerce from Plaintiffs' comments and other public sources. Norwalk's state representatives have concurred in this assessment. *See* CT State Rep. Fred Wilms and CT State Rep. Gail Lavielle, "More Thought Needed on Walk Bridge," *Nancy on Norwalk*, June 25, 2017 ("An honest assessment of the northern waterway acknowledges the entire area is gentrifying and that the old industrial uses are fading out. Maintaining the northern area for barges and large boats is more about the past and less about the future.").

## **B. The Walk Bridge Replacement Project and NEPA**

38. The Bridge provides approximately 16 feet of vertical clearance above the waterline for ships to pass underneath. The Walk Bridge is engineered to swing open horizontally to permit the passage of tall vessels that require greater vertical clearance.

39. In 2015, the Walk Bridge's increasing reliability problems led CTDOT and FTA initiated the Walk Bridge Replacement Project, a project via which CTDOT would receive federal funds from USDOT to replace the Walk Bridge with a more functional structure.

40. The first public scoping hearing for environmental review of the project was held on February 24, 2015, and an agency scoping meeting was held on March 5, 2015.

41. CTDOT and FTA recognized that they had to, and still must, comply with NEPA, 42 U.S.C. §§ 431, *et seq.* for the Walk Bridge Replacement Project because the Project is reliant



on federal funding from the USDOT and will require federal permits, including a Bridge Permit from the U.S. Coast Guard under Section 9 of the Rivers and Harbors Act, 33 U.S.C. §§ 403, *et seq.*

42. NEPA was enacted in 1970 and is the United States' "basic charter for the protection of the environment." 42 U.S.C. §§ 431, *et seq.* NEPA requires agencies to take a "hard look" at whether a proposed project will produce significant impacts on the environment and to study means of mitigating such impacts.

43. The goals of NEPA are: (1) to provide the decision maker with a rational basis for choosing amongst alternatives and (2) to enable the public and third parties to independently evaluate and make informed comments about agency actions under consideration in order to improve the quality of those decisions.

44. If an agency is uncertain as to whether a project will have significant impacts, it may begin the NEPA review process by preparing an Environmental Assessment ("EA"). The EA must: (1) define the project's purpose and need ("Purpose and Need"), (2) develop a reasonable range of design alternatives to fulfill that Purpose and Need, and (3) study the impacts of each alternative.

45. If the EA, once complete, indicates that the project will have significant impacts on the environment, the agency must prepare an Environmental Impact Statement ("EIS") to study those impacts in greater depth.

46. On the other hand, if the EA indicates that the project will not have significant impacts on the environment, the agency may issue a Finding of No Significant Impact ("FONSI"), select a design alternative, and construct the project.

### **C. The EA's Alternatives Analysis is Inadequate**

47. The EA for the Walk Bridge Replacement Project was published on September 6, 2016 (the "Walk Bridge EA" or, the "EA"), and it concluded that Project would have no significant impacts.

48. However, a critical flaw in the EA was that it failed to study a reasonable range of project design alternatives, a violation of NEPA which rendered the document invalid.

#### 1. The EA's Purpose and Need Screens Out Consideration of an Existing Level Fixed Bridge Alternative Without Rational Basis

49. A key factor contributing to this failure to study a reasonable range of alternatives was the EA's improperly formulated "Purpose and Need." The EA stated that the Project's "Purpose and Need" is:

- "to restore or replace the existing deteriorated bridge with a resilient bridge structure which will enhance the safety and reliability of rail service, offer operational flexibility and ease of maintenance, and provide for increased capacity and efficiencies of rail transportation along the New Haven Line/Northeast Corridor"; and
- "maintaining or improving navigational capacity and dependability for marine traffic in the Norwalk River." Walk Bridge EA, 1-4.

50. The EA "screened out" consideration of an Existing Level Fixed Bridge design alternative on the grounds that it did not meet the "maintaining or improving navigational capacity" component of the Project's Purpose and Need because an Existing Level Fixed Bridge would limit the access of tall vessels to the upper Norwalk River. Walk Bridge EA, 2-2.

51. Guided by its "Purpose and Need," the EA contained detailed review of four other different designs for a moveable bridge that could replace the Walk Bridge, as well as a "no build" alternative to provide a baseline for environmental impact review. *Id.*

52. However, the inclusion of the “navigational capacity” component in the Project’s “Purpose and Need” is without a rational basis. The EA provides no evidence that there is such significant navigational demand (now and during the future life of the Bridge) to access the upper Norwalk River as to justify wholly excluding study of an Existing Level Fixed Bridge alternative.

53. The EA itself notes that maritime traffic in the whole of Norwalk Harbor has fallen significantly in recent years. Walk Bridge EA, 3-19 (“Marine traffic in Norwalk Harbor has generally declined since 2008...Vessel trips in 2012, the most recent annual report, represented a decline in marine traffic of more than 30 percent from vessel trips reported in 2008.”).

54. The EA contains no empirical data concerning the rate or volume of commercial shipping specifically on the upper Norwalk River, that portion of the Norwalk River which extends north of the Walk Bridge. Instead, the EA relies solely on shipping data for traffic throughout all of Norwalk Harbor, almost all of which is south of the Walk Bridge, to claim that there is still non-*de minimis* commercial use of the upper Norwalk River. Walk Bridge EA, 3-18.

55. Critically, ships can reach the vast majority of Norwalk Harbor without going under the Walk Bridge, so data about shipping rates for all of Norwalk Harbor (which does not break out shipping destined for north of the Walk Bridge) is useless for studying the rate of shipping north of the Walk Bridge.

56. The only information concerning commercial maritime uses of the upper Norwalk River is a table entitled “Domestic Commercial Traffic and Commerce through Norwalk Harbor, 2008-2012,” which notes that as of 2012, 192 total vessel trips occurred in Norwalk Harbor (down from 288 trips in 2008). *Id.*

57. The EA then states that “[b]ased upon a review of existing land uses around Norwalk Harbor, it is likely that the majority of vessels carrying cargo in Norwalk Harbor pass through Walk Bridge, traveling to distribution points north of the bridge.” *Id.* No rational basis is furnished for this determination of “likelihood,” and no data supporting this determination was made public to enable public participation, review, and comment.

58. Instead, the EA simply proclaims that the conclusion is true based on an unspecified “review” of land use in Norwalk Harbor, which does not even disclose who conducted the review and whether this review was conducted in-person or whether maps were simply consulted. Walk Bridge EA, 3-18.

59. Public comments submitted by Norwalk Harbor Keeper explain the many factors which have driven, and will continue to drive, the decline in maritime shipping north of the Walk Bridge:

[A] variety of historical trends have combined to cause a significant decline in the level of river traffic in the past several decades. The first major trend is the wave of deindustrialization which hit Norwalk, and the greater Northeast, in the 1970s and 1980s. This resulted in almost all of the industrial manufacturing activity on the Upper Norwalk River relocating to locations with less regulation and lower labor costs. The second major trend is decreasing land transportation costs. At the time of the construction of the Walk Bridge, maritime shipping was the only practical means of efficiently transporting large quantities of materials. However, in the intervening decades, the expansion and improvement of rail networks and the advent of the automobile and the interstate highway system have resulted in dramatically decreased land transportation costs. Finally, there has in recent years been a trend of gentrification along the waterfront areas of the Upper Norwalk River, as the demand for walkable, riverfront housing has increased, which has led to rapidly rising land values. The demand for residential development, and the lucrative returns available on it, has functioned to "crowd out" waterfront industrial activities, which often have lower profit margins.

Public Comment Letter of Norwalk Harbor Keeper, 12/02/2016, p. 4, attached as Exhibit A.

60. Defendants failed to adequately address these comments or to study the actual rate of maritime shipping north of the Walk Bridge in a rational manner. This frustrates NEPA’s

purpose of enabling informed public comment and review in order to improve final agency decisions.

61. While maritime trade on the upper Norwalk River has significantly declined by any measure, railway traffic across the bridge has increased significantly. Walk Bridge EA, 1-1. From 1984 to 2014, Metro-North ridership on the New Haven Line, which crosses the Walk Bridge, increased by more than 72%. Today, the Amtrak and Metro-North rail lines across the Walk Bridge are among the heaviest-trafficked rail lines in the entire country, and ridership is only expected to increase. *Id.*

62. Although this documented juxtaposition of trend lines (increasing rail traffic and decreasing maritime traffic) is clear even on the face of the incomplete information furnished in the EA, the document nowhere engages with its implications for infrastructure planning. Given that a new bridge will likely be in use for at least 100 years into the future, the EA's failures in this regard are conspicuous.

63. The alternatives analysis is considered the linchpin of a NEPA document, and an inadequate alternatives analysis alone is sufficient grounds to invalidate such a document. In violation of this rule, CTDOT and FTA have improperly tailored the Walk Bridge EA's Purpose and Need statement to exclude consideration of an Existing Level Fixed Bridge alternative.

64. Further, CTDOT and FTA have also violated the NEPA rule that agencies must study reasonable project design alternatives even if they only partially accomplish the goals set forth in the Purpose and Need. NEPA requires such study because the tradeoffs involved in partial accomplishment of the goals may be worthwhile to the public if costs and impacts are lower.

## 2. The EA's Alternatives Analysis is Inadequate

65. In addition to the improper exclusion of the fixed bridge alternative, the analysis of design alternatives that the EA does contain is inadequate.

66. As the EA itself recognizes, a critical parameter for the evaluation of design alternatives is resiliency to climate change and severe weather events. Walk Bridge EA, 2-1. However, the EA fails to follow through with an adequate resiliency analysis of Project alternatives.

67. It is essential for agencies to incorporate resiliency planning into infrastructure because climate change is projected to cause extreme weather events to occur at increasing frequencies, including more severe heat waves, sea level rise, storm surges, and more intense precipitation. U.S. EPA, *Climate Impacts on Transportation*, 2016.

68. Such events, especially heat waves, will have particularly significant impacts on for rail infrastructure, as “high temperatures cause rail tracks to expand and buckle [and] [m]ore frequent and severe heat waves may require track repairs or speed restrictions to avoid derailments.” *Id.*

69. Critically, one of the key federal grants that FTA and CTDOT are relying on for the Project is money authorized in the wake of Superstorm Sandy to improve the resilience of public transportation assets. Walk Bridge EA, 4-1. The grant program specifically provides that “[e]ligible projects are capital projects that reduce the risk of damage to public transportation assets as a result of future natural disasters.” Notice of Funding Availability for Resilience Projects in Response to Hurricane Sandy, 78 FR 78486-01, at 78489.

70. As the grant program notice recognizes, “Both scientific evidence and recent history indicate that weather and climate-related disasters are a continuing threat. According to

the ‘Hurricane Sandy Rebuilding Strategy’ report, in the last year alone there were 11 different weather and climate disaster events with estimated losses exceeding \$1 billion each across the United States. Taken together, these 11 events resulted in more than \$110 billion in estimated damages.” *Id.* at 78488.

71. This grant was made available as part of a program to support “projects designed and built to address current and future vulnerabilities to a public transportation facility or system due to future occurrence or recurrence of emergencies or major disasters that are likely to occur in the geographic area in which the public transportation system is located; or projected changes in development patterns, demographics, or climate change and extreme weather patterns.” *Id.* at 78486.

72. Thus, the grant must be used for a project that would reinforce the resiliency of public transportation, such as the Walk Bridge’s Amtrak and Metro-North rail lines, to the effects of climate change, such as extreme weather events.

73. Additionally, recent news reports indicate that hot weather (temperatures greater than 85 degrees) compelled CTDOT to keep the Walk Bridge closed as the high temperatures caused the steel tracks to warp, preventing proper closure if the bridge were opened. *The Hour*, “Heat Stroke for Norwalk Bridge,” July 9, 2016.

74. This illustrates a challenge intrinsic to any moveable bridge design, the warping of steel in high temperatures preventing parts from properly joining together to achieve bridge closure.

75. A fixed bridge would completely avoid this issue, as the bridge components would not be required to lift and move and re-set into precise positions to ensure safe passage

across the bridge. A fixed bridge would likely be found to be more resilient than a moving bridge, since it does not require electrical power, staff, or motors to operate.

76. Notwithstanding the above, the EA offers no rational basis for its conclusion that an Existing Level Fixed Bridge alternative fails to qualify as a reasonable alternative warranting study. Indeed, the EA completely lacks any analysis comparing the resilience of different fixed and moveable Project alternatives. Fatally, the EA fails to evaluate the degree to which moveable bridge design alternatives may lack the resiliency to withstand climate change and severe weather events of the course of the Bridge's projected 100-year operational life.

77. The lack of a resiliency analysis comparing moveable bridge versus fixed bridge designs is a significant flaw, one which must be corrected to enable informed public comment on the full range of reasonable alternatives. This omission renders the EA invalid.

78. Perhaps even more critically, if the selected alternative for the Project is found not to advance public transit resiliency priorities as required by the Sandy grant program, those federal funds may be rescinded. *See* 49 U.S.C. §5324. The Grant Requirements section of the Sandy funding allocation stipulates that "Emergency Relief funds may only be used for eligible purposes as defined under 49 U.S.C. 5324 and as described in the Emergency Relief Program Rule (49 CFR part 602)." 79 FR 65764.

79. The funds may only be used for eligible purposes as defined in 49 C.F.R. § 602.13. The Project would presumably be categorized by CTDOT as a resilience project. However, a resilience project is one "designed and built to address existing and future vulnerabilities to a *public transportation facility or system* due to a probable occurrence or recurrence of an emergency or major disaster in the geographic area in which the public transportation system is located." (emphasis added) 49 C.F.R. § 602.6.



80. The relevant “public transportation facility or system” here is the Metro-North and Amtrak rails crossing the Bridge. Thus, the funds must be used to address existing or future vulnerabilities to the resiliency of the rail system. Selection of a moveable bridge design alternative would not address such vulnerabilities to the rail system, and could potentially even exacerbate them, as moveable bridges inherently create more risks for malfunction, especially in extreme weather events like high heat or severe storms.

81. The EA also fails to adequately analyze cost-effectiveness of Project alternatives. The EA itself recognizes that cost-effectiveness is a critical factor in evaluating and comparing potential Project alternatives. Walk Bridge EA, 2-1. More broadly, the U.S. Office of Management and Budget (“OMB”), in issuing regulations to guide the use of public monies by federal agencies, including the FTA, has recognized the importance of cost-effectiveness in project design. OMB guidelines encourage federal agencies to “increase cost-effectiveness,” defined as pursuing, “on the basis of life cycle cost analysis of competing alternatives...the lowest costs expressed in present value terms for a given amount of benefits.” 78 FR 78589; OMB Circular No. A-94 Revised.

82. A fixed bridge, which has no motorized mechanism that needs to be operated or maintained, and no 24-7 crew to oversee operations, would almost certainly have a much lower initial and life-cycle cost, while having higher resiliency to extreme weather and only minimal impacts on maritime traffic. Indeed, as the EA itself indicates, an Existing Level Fixed Bridge at the same height as the current Walk Bridge is less expensive than the moveable bridge options. Walk Bridge EA, 2-6; 2-11; 2-15; 2-19, estimating the cost of constructing an Existing Level Fixed Bridge at the current height of the Walk Bridge at between \$290 and \$340 million, compared to the moving bridges which were estimated to cost between \$330 and \$365 million

(Bascule Bridge, Option 4S), \$380 and \$415 million (Vertical Lift Bridge, Option 8A) and, for CTDOT and FTA's preferred design alternative, \$425 and \$460 million (Vertical Lift Bridge, Option 11C).

83. The EA also fails to provide a breakdown of the cost estimates identifying the components of the estimates, issuing only lump sum total estimates for the construction costs and yearly operational costs. Such an opaque approach prevents public evaluation and comment on how those estimates were reached. It is impossible to determine, for example, whether the cost of staff to operate the moveable bridge mechanism is included in the lifecycle costs for the moveable bridge alternatives. Walk Bridge EA, 2-6; 2-21. Additionally, while for the moveable bridge options, the EA specifies that the "year basis" for the cost estimates is 2020 dollars, there is no such specified year basis for the cost estimates for the fixed bridge options, rendering it impossible to perform a consistent side-by-side comparison of the alternatives.

84. To sum, the EA contains only incomplete and opaque information on cost estimates for the different alternatives screened, which frustrates NEPA's goal of facilitating informed public comment on project alternatives. Walk Bridge EA, 2-6; 2-21. Indeed, informed members of the public believe that the cost-effectiveness of an Existing Level Fixed Bridge at current height may be even greater than indicated on the face of the EA, as a true and complete cost estimate comparing the fixed bridge at current height to moveable bridge options would likely indicate even greater savings than reflected in the EA.

85. Finally, as the EA itself recognizes, the safety of a railway bridge, especially in a bridge crossing over a waterbody, is a priority in designing and constructing such a bridge. Walk Bridge EA, 2-5. Yet the EA alternatives analysis completely fails to assess the relative railway safety implications of swing and lift bridges as opposed to an Existing Level Fixed Bridge.

86. The FTA's NEPA implementing regulations direct that "[a]lternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for *safe* and efficient transportation." 23 C.F.R. § 771.105(b) (emphasis added).

87. Moreover, the Federal Railroad Administration, which oversees railroad bridge safety, including the safety of the Walk Bridge, has recognized "safety as the highest priority" in carrying out its duties. 49 U.S.C. § 103(c) ("In carrying out its duties, the [Federal Railroad] Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation.").

88. Amtrak and commuter trains in the Northeast region have recently experienced numerous deadly crashes resulting in fatalities due to human error or inoperable moving parts. *See New York Times*, "Hoboken Train Crash Kills 1 and Injures Over 100," September 29, 2016; *NBC News*, "Human Error and High Speed Blamed for Deadly Philadelphia Amtrak Crash" May 17, 2016; *New York Post*, "Fatal crash leaves Metro-North riders wary of the front car," February 6, 2015.

89. Additionally, malfunctioning moving bridges have historically been the cause of numerous serious, multiple-fatality accidents. *New York Times*, "U.S. Inspectors Seeking Flaws in Rail Bridges," November 26, 1996 (misaligned rail on a moving bridge across the Hackensack River resulted in derailment of an Amtrak train into a marsh in Secaucus, N.J.); *New York Times*, "Barge Pilot Blamed in Fatal Amtrak Wreck," June 22, 1994 (towboat struck a swing bridge, knocking it out of alignment by one meter, causing rails to kink and leading to the derailment of an Amtrak train killing 47); Edgar A. Haine, *Railroad Wrecks*, Associated University Presses

(1993) p. 134 (Commuter train in Bayonne, New Jersey ran a stop signal and was derailed and plunged forty feet into the Newark Bay, killing 44); *New York Times*, “Fearful Railroad Accident.; A Train on the Grand Trunk Railroad Runs off a Bridge,” June 30, 1864 (in the highest-fatality train disaster in Canada, a train failed to observe a red signal and ran through an open swing bridge into the Richelieu River, killing 99); *see also The Times-Picayune*, “NOPD Officer Killed After Car Careened from Open Industrial Canal Drawbridge,” May 20, 2008 (Driver on vehicular bridge drove off a raised vertical lift bridge into a canal in New Orleans).

90. Furthermore, the safety of critical infrastructure, including railway bridges, is likely to be increasingly compromised due to climate change. Climate change is expected to cause more frequent extreme weather events, including very high and low temperatures, which poses safety issues for travelers on a moveable bridge. For railways, high temperatures could cause rail tracks to expand and buckle. This could cause significant issues for the alignment of the rail lines on a moveable bridge, which are constantly split and rejoined as the bridge moves.

91. Warping of rail lines on a moveable bridge can raise significant safety issues. This problem arises where heat causes a rail line on a bridge to warp while separated from the main rail line, which then fails to properly realign when the bridge is rejoined to the main line. This was the cause of a derailment of an Amtrak train into the Hackensack River in Secaucus, N.J., discussed *supra*. The rail lines of a moving bridge there had warped, and one rail line, which had been pulled up vertically to create a clearance for the bridge to move, ended up on top of the rail line it was supposed to rejoin and created a ramp, which the train passed over and into the river.

92. A former president of the Metro-North Railroad, Howard Permut, also spoke out during his tenure as president on the serious safety risks of moveable bridges, including the Walk Bridge:

“In the case of the four-track Walk bridge, a failure to close brings service to a standstill, Permut said...The broader issue is the New Haven Line is the lifeblood of Connecticut and Fairfield County and the busiest rail line in the United States yet we are saddled with four moveable bridges that have the potential to disrupt tens of thousands of people every time they are lifted...Besides finding the money to fix them *we are always looking to do what we can to reduce the risk to tens of thousands of travelers.*”

“Older rail spans prone to problems,” *Connecticut Post*, April 23, 2012 (emphasis added).

93. The EA’s lack of a railway safety analysis is a particularly unreasonable omission in light of the harsh winters experienced in the Northeast and the increasing frequency of extreme heat and cold events due to climate change, which hold the potential for significant interference with the moving mechanism of a moveable bridge. If such a moveable bridge mechanism were to jam open, this could pose significant safety risks on the busy Amtrak and Metro-North lines crossing the bridge. The EA provides no analysis of these issues, a defect which must be remedied.

### 3. CTDOT and FTA Have Failed to Adequately Address Public Comments Requesting Study of a Fixed Bridge Alternative

94. Norwalk Harbor Keeper commented extensively on the EA during the public comment period. This included oral comments at a public hearing on November 17, 2016, a public comment letter, and a legal analysis memorandum prepared by counsel, the latter both submitted on December 2, 2016.

95. In its comments, Norwalk Harbor Keeper identified a number of problems with the EA’s environmental review. Notably, Norwalk Harbor Keeper stated that in light of declining

maritime traffic on the upper Norwalk River, the EA failed to provide a rational basis for including in the Project's purpose the objective of preserving upriver access for tall vessels. Since the inclusion of this goal in the Project purpose was the sole reason for excluding study of the Existing Level Fixed Bridge alternative, the EA also consequently lacked a rational basis for excluding study of that alternative.

96. In light of the shorter construction period, smaller footprint, and great resiliency of an Existing Level Fixed Bridge design versus a moveable bridge design, the EA's failure to study an Existing Level Fixed Bridge alternative is a violation of NEPA that has significant environmental stakes.

97. The obvious need for study of an Existing Level Fixed Bridge design alternative was also brought to the attention of CTDOT and FTA by the news media and local politicians. *See, e.g.* Robert Koch, "Replacement of Norwalk's Walk Rail Bridge Raises Concerns," *The Norwalk Hour*, November 17, 2016 ("There is a persistent uncertainty and concern that perhaps the fixed bridge options have not adequately been explored," said state Rep. Gail Lavielle."); Jim Cameron, "A Cheaper Fix for the Walk Bridge," *The Connecticut Post*, October 3, 2016 ("Why not just replace the old bridge with a new, fixed bridge that doesn't raise or lower for passing boats and barges?...There are only a few companies left on the two-mile Norwalk riverfront — a concrete company, an idle asphalt plant and a small marina. They could be bought out with money saved by building a cheaper fixed bridge that doesn't raise or lower. That option, however, is not even discussed in the voluminous Environmental Assessment Report.").

98. In response to public criticism about the EA's omission of an Existing Level Fixed Bridge alternative, CTDOT published in October 2016 a four-page memorandum purporting to

explain why an Existing Level Fixed Bridge alternative was not studied (the “CTDOT Memorandum”). CTDOT Memorandum, attached as Exhibit B.

99. The CTDOT Memorandum contained a great deal of recycled text from the EA, but no additional data or analysis. With respect to the EA’s failure to study an Existing Level Fixed Bridge alternative, the CTDOT Memorandum simply stated, in a conclusory fashion, that fixed bridge alternatives “actually fair much worse” [sic] than moveable bridge designs. No explanation for this conclusion was supplied. CTDOT Memorandum, attached as Exhibit B, at p. 4.<sup>1</sup>

#### **D. The EA Engages in Unlawful Segmentation**

100. Norwalk Harbor Keeper’s comments also pointed out that the EA engaged in unlawful segmentation, thereby obscuring the true scope of the Project by arbitrarily excluding from the Walk Bridge EA study of connected and related infrastructure work.

101. In its discussion of Project costs and impacts, the EA states that removal and relocation of high-voltage electricity transmission towers located adjacent to the Bridge will need to be removed for any of the moveable bridge options under consideration. Walk Bridge EA, 2-21, stating that “[t]he three options for replacing the Walk Bridge all require the removal of the two existing high towers[.]”

102. The EA also notes that the towers also currently carry cables used for Metro-North communications, and if the towers are removed, such cables will need to be rerouted. This will likely involve embedding them at the bottom of the river, which would require significant sediment disturbance with requisite environmental impacts to water quality. Walk Bridge EA, 2-21.

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<sup>1</sup> Available at <http://www.walkbridgect.com/pdf/walk%20bridge%20fixed-span%20summary.pdf>.

103. The EA states that although the Project will require the removal and relocation of the towers for all project alternatives under consideration, the environmental review for the removal and location of the towers will be performed separately in the future. *Id.*

104. CTDOT has also stated publicly<sup>2</sup> that the following connected infrastructure projects, though related to and part of the Walk Bridge Replacement Project, will be the subject of separate environmental review at some unspecified future date:

- Replacement of the nearby Fort Point Street Bridge;
- Replacement of one half-mile of tracks and ballast, replacement of overhead catenary and supports, and signal equipment;
- The Danbury Dockyard Project, a \$30 million project to construct a new dockyard to facilitate rail operations during the Walk Bridge reconstruction process; and
- The CP243 Interlocking Project, which will upgrade Metro North track infrastructure to facilitate continued operations during the Walk Bridge reconstruction process.

105. Such piecemeal environmental review is explicitly and emphatically forbidden by law, as it enables project planners to disregard potential impacts in their decision-making, avoid disclosing potential impacts to the public, and evade the requirement to make a single evaluation of a proposed project's true and complete footprint. It frustrates NEPA's purpose of enabling the public to review and comment on the full scope of a proposed project and to fully consider all alternatives.

#### **E. Defendants Have Refused to Correct the EA's Deficiencies**

106. CTDOT and FTA have declined to produce a revised EA to correct these problems and have thereby prevented informed public comment on a reasonable range of alternatives and the full scope of the Project's impacts.

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<sup>2</sup> CTDOT, Walk Bridge Program Factsheet 2016, available at [http://www.walkbridgect.com/pdf/2016\\_factsheet\\_03.pdf](http://www.walkbridgect.com/pdf/2016_factsheet_03.pdf), attached as Exhibit C.



107. On August 21, 2017, the CTDOT and FTA published their final determination regarding the environmental review of the Walk Bridge Replacement Project, the Finding of No Significant Impact (“FONSI”) and Record of Decision (“ROD”). The FONSI and ROD (1) determined that the Project will have no significant impacts on the environment and (2) selected as the final design choice a vertically-lifting moveable bridge design.

108. Thereafter, in reliance upon the FONSI and ROD, USDOT and FTA did disburse, or will disburse, federal funding in furtherance of the Project.

109. Since the EA is fatally defective, the FONSI and ROD which rely on it are invalid. In their determination to proceed without correcting the flaws of the EA, Defendants have violated, and are violating, NEPA.

#### **CLAIMS FOR RELIEF**

110. Plaintiffs hereby re-allege and incorporate by reference the allegations contained in paragraphs 1-109 herein.

111. The EA is defective because it improperly tailors the Project’s Purpose and Need to exclude the reasonable alternative of an Existing Level Fixed Bridge and fails to study a reasonable range of alternatives.

112. The EA is also defective because it engages in segmentation and fails to study the true scope of the Project’s impacts.

113. Defendants have violated NEPA by preparing a defective EA and issuing a FONSI and ROD, without rational basis, in reliance on that defective EA.

114. USDOT and FTA have disbursed or will disburse federal funds to CTDOT, in violation of NEPA, to advance the Walk Bridge Replacement Project without having completed an adequate environmental review under NEPA.

115. Unless the FTA and CTDOT prepare an adequate EA, Plaintiffs and the region will suffer irreparable harm.

116. Defendants have violated the APA by making the arbitrary and capricious determination to ignore the Existing Level Fixed Bridge design alternative and to select a bridge design that is more expensive and inconsistent with sustainability, environmental, and safety criteria.

117. If this arbitrary and capricious determination is not reversed, Plaintiffs and the region will suffer irreparable harm.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request that this Court enter a judgment:

1. Declaring that the FONSI violates NEPA and the APA and is therefore invalid;
2. Declaring that the ROD violates NEPA and the APA and is therefore invalid;
3. Declaring that the EA violates NEPA and the APA and is therefore invalid;
4. Ordering FTA and CTDOT to prepare an adequate EA;
5. Enjoining FTA and USDOT from disbursing any federal funds in furtherance of the Project until an adequate EA is completed;
6. Enjoining CTDOT from using any federal funds already disbursed in furtherance of the Project until an adequate EA is completed;

7. Awarding Plaintiffs their costs and reasonable attorney fees incurred in prosecuting this action; and
8. Ordering such other relief as the Court may deem just and proper.

Dated: Middlebury, CT  
January 17, 2018

Respectfully submitted,

\_\_\_\_\_/s/ CT 18890\_\_\_\_\_  
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