

SERVICE DATE – APRIL 4, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35081

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.—CONTROL—DAKOTA,
MINNESOTA & EASTERN RAILROAD CORP., ET AL.

Decision No. 9

Decided: April 3, 2008

In Decision No. 4, served December 27, 2007, we accepted for consideration the application filed by Canadian Pacific Railway Corporation (CPRC), Soo Line Holding Company (Soo Holding), Dakota, Minnesota & Eastern Railroad Corporation (DM&E), and Iowa, Chicago & Eastern Railroad Corporation (IC&E), for Board authorization of the proposed acquisition of corporate control of DM&E and IC&E by Soo Holding (and indirectly, by CPRC). CPRC, Soo Holding, DM&E, and IC&E are referred to collectively as Applicants.

As pertinent here, in Decision No. 4, we also sought public comment on preliminary conclusions related to the environmental review process for this proceeding under the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA). Specifically, we preliminarily determined that an environmental and historic review of the proposed acquisition would not be warranted; that there is no need to conduct any further environmental review here of the rail lines recently considered in a rail construction case involving DM&E's Powder River Basin (PRB) rail construction project;¹ and that it would be appropriate to defer preparation of an Environmental Impact Statement (EIS)² addressing the possible future movement of DM&E PRB coal traffic over the IC&E and CPRC lines because sufficient information is not available to conduct a meaningful environmental review now. Should the Board ultimately decide to authorize the proposed transaction, it would impose conditions on the authorization precluding such movements pending completion of that EIS and the issuance of a final decision addressing the impacts of such coal operations and allowing such operations to begin, if appropriate.

Based on all of the available information, including the public comments on our preliminary conclusions and consultations with the Board's Section of Environmental Analysis

¹ See Dakota, Minnesota & Eastern RR Corp. Construction into the Powder River Basin, STB Finance Docket No. 33407 (STB served Feb. 15, 2006), *aff'd*, Mayo Foundation v. STB, 472 F.3d 545 (8th Cir. 2006) (referred to as DM&E PRB Construction).

² An EIS is the detailed written statement required by NEPA for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4532(2)(C).

(SEA), we find that the approach to environmental review set out in Decision No. 4 complies with NEPA and will ensure that the potential environmental impacts of transportation of DM&E PRB coal trains over the IC&E and CPRC lines are considered at the appropriate time.

BACKGROUND

As explained in more detail in Decision No. 4, Applicants contended in their application that the proposed acquisition of control would not result in any increases in rail traffic, rail operations, or yard activity that would exceed the Board's thresholds for environmental review in 49 CFR 1105.7(e)(5). Applicants therefore asserted that the proposed acquisition does not require the preparation of environmental documentation under the Board's environmental rules at 49 CFR 1105.6(b)(4). Applicants also explained that historic review under the National Historic Preservation Act, 16 U.S.C. 470f (NHPA), was not necessary here. Moreover, they indicated that they would prepare a Safety Integration Plan (SIP) under the Board's rules at 49 CFR 1106 and 49 CFR 1180.1(f)(3) setting out how they would ensure that safe operations are maintained throughout the acquisition-implementation process, if the proposed transaction is approved. Finally, applicants proposed that the Board defer any required analysis of the environmental impacts of DM&E PRB coal trains operating over the lines of IC&E and/or CPRC because Applicants have not yet made a decision to build the new DM&E line into the PRB authorized in DM&E PRB Construction, and definitive information regarding the likely volume, destination, and routing of DM&E coal trains beyond DM&E's existing line remains speculative.

The City of Winona, MN (Winona), Mayo Clinic (Mayo), and BNSF Railway Company (BNSF) filed comments on Applicants' proposed approach. Applicants replied to BNSF's comments.

In Decision No. 4, we preliminarily concluded that an environmental review for the proposed transaction would not be warranted, because it did not appear that the thresholds in the Board's environmental rules for triggering an environmental review would be met, and there was nothing in the available environmental information to indicate the potential for significant environmental impacts resulting from the proposed change in corporate control. We also preliminarily found that historic review under NHPA would not be warranted. In addition, we directed Applicants to file their proposed SIP with both the Board and the Federal Railroad Administration by February 4, 2008.³

With respect to the handling of DM&E PRB coal trains over the lines of IC&E and/or CPRC, we preliminarily concluded that: (1) there is no need to conduct any further environmental review here of the rail lines considered in DM&E PRB Construction and (2) that the Board should defer the preparation of environmental documentation on routing DM&E PRB

³ Comments on the proposed SIP were due March 4, 2008. Applicants' response is due April 18, 2008.

coal trains over the rail lines of IC&E and/or CPRC (including the consideration of mitigation for Winona) until more information is available. We proposed that, if the Board should ultimately authorize the proposed acquisition, we would impose the following conditions on such authorization:

1. Applicants may not transport coal unit trains originating on the new rail line approved for construction in DM&E PRB Construction over lines currently operated by IC&E and/or CPRC until the Board has prepared an Environmental Impact Statement, and has issued a final decision addressing the environmental impacts of such coal operations and allowed such operations to begin.
2. Prior to commencing any construction of the new rail line approved in DM&E PRB Construction, Applicants shall notify the Board of Applicants' intent to begin construction, and shall submit to the Board reasonably foreseeable projections regarding the movement of DM&E PRB coal traffic on the rail lines of IC&E and/or CPRC, so that the environmental review can begin.

In Decision No. 4 we requested comments from all interested parties on these preliminary conclusions. The United States Department of Transportation filed comments supporting our preliminary approach. The Sierra Club and the Sierra Club of/Du Canada (Sierra Club), Mayo,⁴ Iowa Department of Transportation (Iowa DOT), the City of Dubuque, IA (Dubuque), and the Committee for a Safer Brookings (Brookings) filed timely comments raising concerns about our preliminary determinations. Applicants filed a Response to Environmental Comments (Response) addressing the issues the commenters had raised.

The Relevant Proceedings.

In this proceeding, Applicants seek Board approval of the acquisition of corporate control of DM&E and IC&E by Soo Holding (a wholly owned subsidiary of CPRC). In 2006, the Board granted DM&E authority to construct and operate a new 280-mile rail line extension to reach the PRB area of Wyoming in DM&E PRB Construction, following an extensive environmental review that encompassed both the proposed new line and the rehabilitation of DM&E's existing line in South Dakota and Minnesota. In the separate IC&E proceeding,⁵ the Board approved DM&E's acquisition of the rail lines now operated by IC&E from the former I&M Rail Link. In doing so, the Board imposed a condition (which remains in effect) that prohibits the movement

⁴ Mayo also raised potential safety concerns that it believes warrant specific environmental mitigation in its Argument and Request for Conditions filed March 4, 2008. We address these arguments below.

⁵ Iowa, Chicago & Eastern RR Corp.-Acquisition and Operation Exemption-Lines of I&M Rail Link, STB Finance Docket No. 34177 (STB served July 22, 2002), modified (STB served Oct. 18, 2006) (IC&E).

of DM&E PRB coal trains over IC&E lines until the Board has fully evaluated the potential environmental impacts of such new traffic.⁶ The environmental review process proposed in Decision No. 4 and adopted here essentially extends the condition imposed in IC&E by prohibiting DM&E PRB coal traffic from moving over the CPRC lines as well until the Board has also fully considered the potential environmental impacts of those movements.

The Commenters' Concerns & Applicants' Response.

Sierra Club argues that the preliminary approach outlined in Decision No. 4 would preclude evaluation of the cumulative impacts of non-coal and PRB coal traffic over the IC&E and CPRC lines and would improperly segment consideration of these issues.⁷ Sierra Club also claims that the Board should (1) consider extraterritorial environmental impacts in Canada, (2) analyze impacts on historic resources under the NHPA, and (3) engage in consultation with the U.S. Fish and Wildlife Service (FWS) under the Endangered Species Act (ESA).

BNSF maintains that the Board would not meet its NEPA obligations by deferring its environmental review of the effects of DM&E's PRB coal traffic moving over the IC&E and/or CPRC lines. BNSF asserts that the entire acquisition—both rail traffic moving now, and DM&E PRB coal traffic that might eventually move over IC&E and/or CPRC lines—should be examined together now.⁸

Mayo argues that the environmental mitigation measures imposed in DM&E PRB Construction do not address the potential danger resulting from a substantial increase in the movement of hazardous materials through Rochester, MN, where Mayo is located. Mayo contends that Applicants' proposed SIP would be inadequate if implemented without change, and requests that the Board impose specific safety-related and other environmental conditions on any decision approving the proposed change in corporate control. Mayo argues that these conditions are necessary because of the expected increase in ethanol shipments and other hazardous materials that would result from the proposed acquisition and the proximity of this line to Mayo. Mayo also argues that Applicants have not provided sufficient details about CPRC's plan to provide \$300 million over the next several years to rehabilitate DM&E's

⁶ See Decision No. 4 at 13; IC&E; STB Press Release No. 07-07, available on the Board's website at www.stb.dot.gov.

⁷ A filing dated March 4, 2008 submitted by Jay L. Schollmeyer for and on behalf of the United Transportation Union – General Committee of Adjustment also suggests that we should prepare a complete EIS at this time. We address this issue below in response to comments filed by Sierra Club and BNSF.

⁸ BNSF (and Winona) filed comments on the environmental approach proposed in the Application and did not file additional comments in response to Decision No. 4. We have taken those comments into account in reaching our decision here, as Decision 4 stated we would do.

existing line, and that \$300 million is insufficient to address the significant deficiencies in DM&E's existing track and structures. In addition, Mayo claims that Applicants' assertion that no decision has been made to proceed with the new line into the PRB approved in DM&E PRB Construction is inconsistent with actions being taken by DM&E to acquire land in South Dakota and Wyoming, and that various cumulative impacts of the proposed transaction should be evaluated before the Board decides whether to approve the proposed transaction.

Winona requests that the Board impose environmental mitigation for Winona as part of this acquisition proceeding. Alternatively, it asks that we impose mitigation for Winona in connection with the deferred analysis of the movement of DM&E PRB coal trains over the lines of IC&E and/or CPRC.

Iowa DOT and Dubuque state that they do not oppose the Board's preliminary approach to environmental review. However, Iowa DOT asks that the Board provide to interested parties and communities in Iowa along the IC&E lines the same opportunity for environmental review and mitigation that the Board provided to affected South Dakota and Minnesota communities in DM&E PRB Construction.⁹ Dubuque suggests that the Board should limit any increase in train traffic over the IC&E through Dubuque to 5 to 8 trains per day until the deferred EIS is completed. Finally, Brookings expresses concerns about the location of the DM&E lines in light of the growth of Brookings over the last 15 years.

In their Response, Applicants urge the Board to affirm the preliminary approach to environmental review set out in Decision No. 4 as appropriate and lawful, given the circumstances presented here.

DISCUSSION AND CONCLUSIONS

1. The Proposed Change in Corporate Control.

None of the comments has persuaded us that an environmental review of the proposed acquisition of corporate control of DM&E and IC&E by Soo Holding (and indirectly, by CPRC) is warranted. We remain satisfied that this transaction would not result in an increase in train traffic or rail yard activity in excess of the thresholds for environmental review contained in our rules, and there is nothing in the available environmental information that would indicate a

⁹ In comments and requests for conditions filed by the Wisconsin Department of Transportation (WisDOT) on March 4, 2008, WisDOT asks us to confirm that the deferred EIS will consider the effects on lines and communities in Wisconsin. All potentially affected communities on the IC&E and/or CPRC lines will be considered during the future EIS process.

potential for significant environmental impacts resulting from the proposed change in corporate control itself.¹⁰ See Decision No. 4 at 10-12, 14.

2. The Lines Assessed in DM&E PRB Construction.

In addition, we see no need to conduct any further environmental review of the rail lines already considered in DM&E PRB Construction. We have already thoroughly examined the environmental impacts of constructing the PRB extension and the transportation of PRB coal over the DM&E lines, including DM&E's existing lines in South Dakota and Minnesota, in connection with our authorization of DM&E PRB Construction.¹¹ Before authorizing construction and operation of the new PRB line, we conducted an extensive environmental review that included ample opportunity for public participation, and in our decision approving the new line, we imposed extensive environmental mitigation to reduce or eliminate potential impacts, including mitigation for Mayo, Rochester, and other communities on DM&E's existing line. On judicial review, the court affirmed in all respects our decision authorizing the project. See Mayo Foundation v. STB. Thus, the suggestions of Mayo and Brookings that the Board should revisit the potential impacts of increases in train traffic on Rochester, Brookings, or Mayo ignore the thorough environmental review that has taken place, and are untimely.¹²

¹⁰ Historic review of the proposed acquisition of control also is not warranted, for the reasons discussed below and in Decision No. 4 at 12.

¹¹ The Board's EIS used a tiered approach that assessed the potential environmental effects of 3 levels of increased coal traffic on the affected communities on the DM&E line: 20 million tons of coal transported per year, 50 million tons annually, and 100 million tons annually (the highest potential train traffic levels that DM&E said might move through Rochester).

¹² Sierra Club notes that new ethanol plants were built along DM&E's existing line in South Dakota and Minnesota between 1996 and 2001. But that new traffic was unrelated to the possible extension of DM&E's line into the PRB. Thus, neither Sierra Club, Mayo nor any other interested party asked the Board to consider movements of ethanol during the EIS process in DM&E PRB Construction. Moreover, railroads have both a right and responsibility to transport whatever traffic is tendered to them on their existing lines, without the need for additional Board authorization. See Lee's Summit, Mo. v. STB, 231 F.3d 39, 42-43 n.3 (D.C. Cir. 2000); Union Pacific R.R.—Pet. For Decl. Order—Rehabilitation of Missouri—Kansas—Texas R.R., STB Finance Docket No. 33611 (STB served Aug. 21, 1998). The commenters' arguments also fail to take into account the need for finality in the environmental review process. To require reconsideration of environmental matters for every new circumstance "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-374 (1989); 40 CFR 1502.9(c)(1)(ii). Accord Western Coal Traffic League v. ICC, 735 F.2d 1408, 111 (D.C. Cir. 1984) (agency cannot be expected to "behave like Penelope unraveling each day's work to start the web again the next day"); Arkansas Wildlife v. (cont.)

Mayo complains about the prospect for substantial increases in traffic through Rochester resulting from the proposed transaction, or inherent growth that will take place on DM&E's lines, allegedly resulting in an immediate threat to Rochester and Mayo. But as explained in Decision No. 4 and Applicants' Response, Applicants project no more than 1 additional train per day along any segment of the combined CPRC-DME system by 2012. Even if projected growth in rail traffic that would occur regardless of the proposed transaction is taken into account, there would still be only a small increase in traffic, which would be well below the 3- or 8-trains-per-day or gross-ton-mile thresholds for environmental scrutiny contained in the Board's environmental rules.

In its Argument and Request for Conditions Mayo asserts that the potential for derailment of rail cars containing hazardous materials, including ethanol, being transported through Rochester is far greater than Applicants have indicated and therefore request numerous safety-related conditions should the acquisition be approved. However, Mayo assumes, without adequate basis, that all of the increased traffic, including anticipated growth in ethanol shipments that would result from the proposed transaction, would be routed over DM&E's line through Rochester. There are numerous transfer points to other railroads on DM&E's existing system. And in their Response, Applicants specifically state that all of the anticipated growth in ethanol traffic will either move west (to interchange with BNSF) or via IC&E's lines to the Chicago gateway. Thus, according to Applicants, none of that traffic is expected to be transported through Rochester to the end of DM&E's existing line at Minnesota City, near Winona.

Mayo's concerns about safety due to potential increased ethanol traffic through Rochester do not warrant preparation of NEPA documentation of the proposed acquisition, supplemental environmental documentation in the DM&E PRB Construction case, or the imposition of additional environmental conditions should the proposed transaction be approved. Safety was a paramount concern in the environmental analysis in DM&E PRB Construction, and 24 of the environmental conditions imposed by the Board in that case will adequately address the potential safety concerns raised during the EIS process if DM&E decides to build into the PRB. Moreover, the mitigation imposed in DM&E PRB Construction is not at issue here. Mayo has already had a full and fair opportunity to comment upon and seek review of those measures.¹³

Mayo also fails to recognize that DM&E, like any other railroad, must comply with all Department of Transportation regulations covering transportation safety, security, and the handling of hazardous materials on its existing line, which goes through Rochester. Mayo

Corps of Engineers, 431 F.3d 1096, 1104 (8th Cir. 2005) (reassessments must end at some point or NEPA simply becomes a tool to stall new projects indefinitely).

¹³ For the same reasons, Brookings' objection to the adequacy of existing mitigation measures to address PRB coal issues is untimely and unpersuasive.

questions whether CPRC's plan to provide \$300 million to rehabilitate DM&E's existing line over the next several years would be adequate. CPRC, however, reaffirms that it is committed to assuring safe rail operations. Thus, approval of the proposed transaction would likely lead to improvements that would enhance the safety of train traffic through Rochester and elsewhere on the existing DM&E system, whether or not the new PRB line is built. Moreover, any concerns that Mayo or others might have regarding potential safety issues can be directed to the ongoing review of Applicants' proposed SIP, which sets out how Applicants intend to ensure that safe operations are maintained throughout the acquisition implementation process. While comments on the proposed SIP have already been filed, the terms that Applicants would have to meet under the Final SIP have not yet been determined. As explained in Decision No. 4, the SIP review process will take place here whether or not environmental documentation is prepared for the proposed transaction at this time. If the Board should approve the proposed transaction and adopt the SIP, the Board will require compliance with the SIP as a condition to its approval. See 49 CFR 1106.

3. Deferred Environmental Review of Projected Traffic Over the IC&E and CPRC Lines.

With respect to the handling of DM&E PRB coal trains over the lines of IC&E and/or CPRC, we are satisfied that the preparation of environmental documentation on routing DM&E PRB coal traffic over the rail lines of IC&E and/or CPRC (including the consideration of mitigation for Winona and Dubuque and other Iowan communities) can and should be deferred until more definitive information is available. This approach should not harm interested persons, communities, or the environment because, to preserve the environmental status quo, should we authorize the proposed acquisition, we will impose conditions precluding Applicants from carrying this traffic over IC&E and/or CPRC lines until an EIS has been prepared and the Board has addressed the potential environmental impacts.

The assertion of some of the commenters that the Board should address now the potential environmental effects of running DM&E PRB coal trains over the IC&E and/or CPRC lines ignores the fact that applicants state that they have not yet made a decision to build the new PRB line authorized in DM&E PRB Construction and that sufficient information regarding likely shippers, routings, and destination points for the PRB coal to be carried by DM&E—information that is needed to conduct a meaningful environmental review—is not currently available.

Mayo contends (comments at 10) that DM&E's ongoing efforts to secure the necessary right-of-way in South Dakota and Wyoming belie Applicants' contention that no decision has yet been made to construct or operate the new PRB line.¹⁴ However, as noted in Applicants'

¹⁴ See also Sierra Club comments at 3 (asserting that the shipment of coal over the entire expanded CPR/DM&E network is both foreseeable and planned).

Response, several preconditions must be satisfied before the PRB project could be justified,¹⁵ and DM&E's actions to secure land is simply the first of several steps that must be taken. Unless the necessary land can be acquired, no construction can possibly take place. DM&E's actions thus are not inconsistent with Applicants' assertion that no final decision has yet been made to go forward with the project, and that meaningful information on the likely shippers, routings, and destination points for DM&E PRB coal remains unavailable.

Accordingly, it is reasonable and appropriate here to defer consideration of the possible future movement of DM&E PRB coal over the IC&E and/or CPRC lines until better information is available, while preserving the environmental status quo with the conditions proposed in Decision No. 4. See, e.g., Weinberger v. Catholic Action, 454 U.S. 139, 146 (1981), citing Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 20 (1976) (NEPA does not require an agency to consider the possible environmental effects of less imminent actions that may be contemplated); City of Riverview v. STB, 398 F.3d 434 (6th Cir. 2005) (NEPA does not require evaluation of adding river barge service to an intermodal facility authorized by the Board where (1) the barge service is only a long-range possibility; (2) without more details, any environmental analysis would be based solely on conjecture; and (3) the potential impacts of adding barge traffic will be evaluated later); Crouse Corp. v. ICC, 781 F.2d 1176 (6th Cir. 1986) (upholding deferral of environmental review of contemplated projects that were not part of a proposed merger and plans were not developed enough to permit meaningful environmental analysis); Park County Resource Council v. Agriculture, 817 F.2d 609 (10th Cir. 1987) (EIS at leasing stage of oil drilling permit not required because "full field development" is typically a tentative possibility, at best, at the leasing stage); Colorado River Water District v. United States, 593 F.2d 907 (10th Cir. 1977) (NEPA review of contract for transportation of water not required when no plan existed for that transportation; consideration of impacts would have been speculative; and there would be an environmental review later); Sierra Club v. FERC, 754 F.2d 1506, 1510 (9th Cir. 1985) (no EIS required for preliminary permit for hydroelectric project on federal land where permission from other agencies (and NEPA review) would be required later); South Dakota v. Andrus, 614 F.2d 1190 (8th Cir. 1980) (EIS not required prior to the issuance of a mineral patent where further permits would be required before the mine was built).

4. Issues Involving Cumulative Effects and Segmentation.

Sierra Club, Mayo, and BNSF suggest that this deferred approach would prevent consideration of cumulative impacts of non-coal and PRB coal traffic over the IC&E and/or CPRC lines or unlawfully segment the environmental analysis. But their arguments fail to take into account the limited environmental effects that would result from the proposed change in

¹⁵ According to Applicants, 3 preconditions must be satisfied: (1) acquisition of the right-of-way; (2) contracts with utilities for PRB coal; and (3) agreements for mine access.

corporate control and the fact that the Board’s approach will simply defer, and does not avoid, the environmental analysis they request.¹⁶

NEPA requires environmental review of major federal actions significantly affecting the environment. 42 U.S.C. 4332(C). The only action requiring Board review in this case is the proposed acquisition of corporate control of DM&E and IC&E by Soo Holding (and indirectly, by CPRC), and it is the environmental impacts resulting from that control—which no commenter has shown warrants preparation of environmental documentation—that NEPA requires the Board to examine here.

Deferring environmental analysis of the movement of DM&E PRB coal trains over the lines of IC&E and/or CPRC will not preclude consideration of any cumulative impacts of DM&E PRB coal traffic and the projected increase in rail traffic activity resulting from the proposed acquisition. Rather, as Applicants recognize, when (and if) DM&E decides to construct its new line, and the EIS on the DM&E PRB coal traffic that would move over the IC&E and/or CPRC lines is prepared, the EIS will necessarily take into account as the baseline the amount of non-PRB traffic on the IC&E and/or CPRC lines at that time.¹⁷

Nor will the Board’s approach result in improper segmentation of the environmental review process. Contrary to Sierra Club’s claims, there are not two “phases” of a single action or project here that need to be considered together. The Council on Environmental Quality (CEQ)

¹⁶ As Sierra Club notes (comments at 4), most of the unlawful segmentation cases that have come before the courts have involved attempts by agencies to divide major federal actions into smaller components to avoid the application of NEPA to some of its segments. See O’Reilly v. United States, 479 F.3d 225, 236 (5th Cir. 2007) (O’Reilly). But this is not that type of case. The Board prepared a full EIS and imposed extensive environmental mitigation in DM&E PRB Construction. The Board makes clear here that a full EIS also will be prepared, and that appropriate environmental mitigation (including mitigation for potentially affected communities along the IC&E and/or CPRC lines) will be considered, before DM&E could route any PRB coal trains over the lines of IC&E and/or CPRC.

¹⁷ Mayo’s suggestion that the impacts of Canadian National Railway’s proposed acquisition of control of the Elgin, Joliet & Eastern Railroad in STB Finance Docket No. 35087, Canadian National Ry. and Grand Trunk Corp.—Control—EJ&E West Company (EJ&E), would need to be considered as part of the cumulative impact analysis is premature. Issues relating to rail traffic in Chicago (assuming that DM&E PRB coal would be routed through Chicago) are matters to be appropriately explored and assessed when preparation of the deferred EIS begins. The extent to which that review would encompass the potential impacts of traffic changes resulting from the proposed EJ&E acquisition would depend upon Applicants’ projections on how DM&E PRB coal traffic would be routed, how much of that traffic is expected to move through Chicago and/or on the EJ&E lines, and the status of the proposed EJ&E acquisition at the time.

regulations implementing NEPA call for actions that are related to each other closely enough to be, in effect, a single course of action, to be analyzed in one NEPA document. 40 CFR 1502.4(a). But CPRC's proposed acquisition of control of DM&E and IC&E and the potential future transportation of PRB coal over the IC&E and/or CPRC lines are not related closely enough to be, in effect, a single course of action. Id.

As explained by CEQ, actions are connected if they: (1) automatically trigger other actions which may require environmental documentation; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification. 40 CFR 1508.25(a)(1). None of these circumstances is present here. The proposed control transaction will not automatically trigger the construction of the line previously authorized in DM&E PRB Construction or the movement of PRB coal over the lines of IC&E or CPRC. Nor will it trigger the need to prepare an EIS addressing the movement of DM&E PRB coal traffic over the IC&E lines; that requirement already exists. Moreover, neither the proposed control transaction nor the DM&E PRB Construction project is dependent on the other taking place, and they are not interdependent parts of some larger action. Accordingly, the two actions are not connected actions within the meaning of the CEQ regulations and do not require integrated environmental review. See Highway Citizens Group v. Mineta, 349 F.3d 938, 962-63 (7th Cir. 2003); Native Ecosystems Council v. Dombeck, 304 F.3d 886, 894-95 (9th Cir. 2002); O'Reilly, 477 F.3d at 237-38.

In short, the deferred EIS contemplated here would be prepared before any DM&E PRB coal traffic could move over the lines of either IC&E or CPRC, and would be based on more meaningful information regarding the likely volume and routing of DM&E PRB coal trains than the speculative information that is currently available. That deferred EIS would be sufficiently broad and comprehensive under NEPA and would consider as a baseline the amount of non-PRB traffic on the IC&E and/or CPRC lines.¹⁸ No improper segmentation would occur, and foreseeable increases in shipments of ethanol that result from the proposed acquisition of control transaction could be appropriately assessed at that time.

5. Other Environmental Issues.

Sierra Club (comments at 6-7) asks the Board to consider the environmental impacts of the proposed acquisition within Canada as well as the United States. Sierra Club (comments at 7) also asks the Board to assess the likely impact of the proposed transaction on historic structures that lie along the route of the CPRC/DM&E rail lines, and on railroad bridges, pursuant to the NHPA. Further, Sierra Club (comments at 8-9) seeks to ensure that the Board will initiate timely consultation with FWS in accordance with section 7 of ESA.

¹⁸ This should satisfy the concerns of Mayo and Iowa DOT about the reliability of the traffic estimates that Applicants have provided to date.

But Sierra Club has presented no evidence to show that the proposed change in corporate control would have enough potential for environmental impacts to warrant the preparation of environmental documentation of that transaction pursuant to NEPA, NHPA or ESA.¹⁹ Accordingly, its concerns are really about what the scope should be of the environmental issues addressed in the EIS that would be prepared in the future on the potential impacts of routing DM&E PRB coal trains over the lines of IC&E and/or CPRC (assuming that DM&E decides to construct the new line). It would be premature to attempt to address the scope of the issues that would be considered in this future EIS at this point.²⁰ When DM&E advises the Board that it wishes to go forward with DM&E PRB Construction, the Board will initiate the EIS process. In determining the appropriate scope of the EIS and preparing the Board's environmental documentation, SEA will decide such issues as (1) whether it could or should extend its analysis to evaluate environmental impacts in Canada; (2) the extent to which the EIS should address the impact on historic structures of any new routing of coal traffic over the IC&E and/or CPRC lines; and (3) whether consultation with FWS regarding the possible impact of expanded rail traffic over the IC&E and/or CPRC lines on endangered species is warranted.

Finally, Dubuque's request that we restrict now the number of trains running through Dubuque to an additional 5 to 8 trains per day above current levels is unwarranted. DM&E will not be able to route any PRB coal trains over the IC&E line through Dubuque (or any other communities on IC&E lines) until an EIS is prepared and the routing restriction imposed in IC&E is lifted. Furthermore, Applicants anticipate only a small increase of any other traffic through Dubuque as a result of this proposed control transaction, which does not warrant our imposing a restriction at this time.

In sum, the commenters have failed to show that deferring an EIS addressing the future movement of DM&E PRB coal traffic over the IC&E and/or CPRC lines until it is clear that the new PRB line will be built, while prohibiting such movements pending completion of an EIS addressing such movements, would be inappropriate or unlawful. Therefore, we adopt here the preliminary approach to environmental review set out in Decision No. 4.

¹⁹ Sierra Club fails to identify any impacts from the proposed control transaction that could conceivably trigger NHPA, and presents no evidence that the proposed acquisition of control would affect any threatened or endangered species.

²⁰ When SEA begins the EIS process, it solicits public comments on a Draft Scope of Study for the EIS, and then issues a Final Scope of Study for the EIS. SEA then prepares a Draft EIS that evaluates the direct, indirect and cumulative impacts of the proposed action; addresses the range of issues deemed appropriate during scoping; and recommends appropriate environmental mitigation. After the Draft EIS is made available for public review and comment, a Final EIS is issued addressing the public comments, including further environmental analysis, if appropriate, and providing SEA's final recommendations for mitigation. The Board then considers the entire environmental record in issuing its final decision in the case.

It is ordered:

1. The preliminary approach to environmental review set out in Decision No. 4 is adopted, for the reasons set forth above.
2. This decision is effective on the service date.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Anne K. Quinlan
Acting Secretary