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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35087[1]

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION—CONTROL—EJ&E WEST COMPANY

Decision No. 18

Decided: January 16, 2009

In Decision No. 16, served December 24, 2008 (Approval Decision)—which is scheduled to become effective on January 23, 2009—the Board approved, subject to numerous environmental mitigation and other conditions, the application of Canadian National Railway Company and Grand Trunk Corporation (collectively, applicants or CN) to acquire control of EJ&E West Company (EJ&EW), a wholly owned, noncarrier subsidiary of Elgin, Joliet and Eastern Railway Company (EJ&E), pursuant to 49 U.S.C. 11324(d).[2] EJ&EW will acquire all of the land, rail and related assets west of a certain boundary in Gary, IN, together with the EJ&E name, and become a rail carrier prior to CN acquiring control of it.

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[1] This decision also embraces Elgin, Joliet and Eastern Railway Company—Corporate Family Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 1); Chicago, Central & Pacific Railroad Company—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 2); Grand Trunk Western Railroad Incorporated—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 3); Illinois Central Railroad Company—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 4); Wisconsin Central Ltd.—Trackage Rights Exemption—EJ&E West Company, STB Finance Docket No. 35087 (Sub-No. 5); EJ&E West Company—Trackage Rights Exemption—Chicago, Central & Pacific Railroad Company, STB Finance Docket No. 35087 (Sub-No. 6); and EJ&E West Company—Trackage Rights Exemption—Illinois Central Railroad Company, STB Finance Docket No. 35087 (Sub-No. 7).

[2] That provision directs the Board to approve a control application unless it finds that: (1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and (2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

On January 5, 2009, the Village of Barrington, IL (Barrington) filed a petition asking the Board to stay the effectiveness of the Approval Decision[3] pending judicial review.[4] In addition, Will County, IL filed a petition for stay, on January 5, 2009, adopting the facts and arguments made by Barrington. United States Representatives Melissa Bean, Peter Visclosky, Donald Manzullo, Judy Biggert, Peter Roskam, Bill Foster, and Debbie Halvorson filed a petition for stay, on January 12, 2009, incorporating the reasons stated by Barrington and Will County. And the Village of Bartlett, IL (Bartlett), making similar arguments, asked the Board for a stay on January 13, 2009. On January 12, 2009, applicants filed a reply in opposition to the stay petitions of Barrington and Will County. On January 14, 2009, applicants filed a reply in opposition to Bartlett's stay petition.

In this decision, all of the petitions for stay are considered and denied.

BACKGROUND

As explained in more detail in the Approval Decision (slip op. at 2, 5), the EJ&E railroad currently operates about 200 miles of track in Northeastern Illinois and Northwestern Indiana, in an arc around Chicago. From 3 to 18 trains per day currently operate on that line. Under the transaction that has been approved, applicants will shift much of the rail traffic currently moving over CN's five rail lines in Chicago to the EJ&E rail line in order to improve the fluidity of CN traffic that must move to, from, or through Chicago, the nation's largest rail hub. As a result, rail traffic on the existing CN rail lines through Chicago will generally decrease, reducing congestion and providing environmental benefits to those living in or near Chicago. At the same time, however, the transaction will have adverse environmental impacts on communities along the EJ&E rail line.

In the Approval Decision (slip op. at 15), the Board found that the substantive standards of section 11324(d) had been met—a conclusion that no party challenges here. The Board also considered the potential environmental impacts and determined that the adverse environmental effects that some communities on the EJ&E line will experience are outweighed by the substantial transportation benefits that will result from making CN's rail service more efficient and the environmental benefits that will result from reducing congestion on CN's existing rail lines in Chicago. See Approval Decision, slip op. at 37. Nonetheless, the Board imposed extensive environmental mitigation conditions to minimize and in some cases eliminate potential adverse environmental impacts of the transaction.

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[3] On January 6, 2009, CN filed a motion to strike Barrington's petition for stay because the petition exceeded the 10-page limit in 49 CFR 1115.5(c). In a decision served January 8, 2009, the Board denied CN's motion to strike and granted Barrington's request (filed January 7, 2009) for permission to exceed the page limitation for stay petitions. The Board also denied Barrington's request for expedited review.

[4] The Village of Barrington filed a petition for judicial review of the Approval Decision in the United States Court of Appeals for the District of Columbia Circuit in Docket No. 09-1002 on January 5, 2009.

The environmental mitigation conditions that were imposed (set out in full in Appendix A of the Approval Decision) include: two grade separations at street crossings (with applicants required to bear 67% of the cost of one and 78.5% of the cost of the other); installation of cameras to assist in the timely response of emergency providers; programs related to school and pedestrian safety; noise mitigation (including noise mitigation for Barrington); and a 5-year environmental reporting condition requiring applicants to file quarterly reports on the implementation of the environmental mitigation so that the Board will be kept apprised of the effectiveness of the conditions. In addition, the Board established a 5-year formal oversight period with detailed monthly reporting requirements imposed on applicants to allow the Board to closely monitor applicants' operations during the oversight period. Applicants also will be required to comply with their extensive voluntary environmental mitigation commitments and with negotiated agreements they have entered into with Amtrak and a number of communities in Illinois and Indiana containing tailored mitigation that applicants will provide.

These conditions were the product of a year-long extensive and thorough environmental review conducted under the National Environmental Policy Act, 42 U.S.C. 4321 et seq. (NEPA). That analysis involved the development of a comprehensive environmental record, based on substantial input from other agencies, affected communities, and the public at large, to consider and disclose the likely environmental effects of the transaction.

As explained in more detail in the Approval Decision (slip op. at 34-36), the Board first issued a Notice of Intent to Prepare an Environmental Impact Statement (EIS) and requested comments on a draft scope of study for the EIS. The Board held 14 open house meetings at seven locations in the project area on the draft scope and published a final scope of study for the EIS in the Federal Register. In addition to the public scoping meetings, the Board's Section of Environmental Analysis (SEA) consulted extensively with appropriate Federal, state, and local agencies in Illinois and Indiana throughout the preparation of the EIS.

On July 25, 2008, SEA issued a 3,500-page Draft EIS evaluating a broad range of environmental issues[5] and made it available for public review and comment for a 60-day period. In addition to soliciting written comments on the Draft EIS, SEA held 8 open house/public meetings throughout the Chicago area. SEA received over 9,500 comments on the Draft EIS, expressing both support for and opposition to the transaction.

In the 3,100-page Final EIS, issued on December 5, 2008, SEA addressed the issues raised in the comments on the Draft EIS; presented additional analysis; and evaluated new information provided or suggested by agencies and the public during the comment period. The Final EIS also contained SEA's final recommendations for environmental mitigation.

[5] The issues assessed included rail operations, safety, transportation systems (highways, railroads, waterways, and airports), hazardous waste sites, land use, socioeconomics, environmental justice, energy, air quality and climate, noise and vibration, biological resources, water resources, and cultural resources.

The Board then issued the Approval Decision approving the transaction on December 24, 2008. The Board was satisfied that the EIS took the requisite "hard look" at environmental issues required by NEPA. After carefully considering both the transportation-related aspects of the transaction and the results of the environmental analysis, the Board concluded that, given the substantial transportation benefits of the transaction to shippers and interstate commerce, the environmental mitigation being imposed would "provide appropriate safeguards to ensure that applicants maintain safe operations and protect the environment and the quality of life in affected communities to the extent practicable following applicants' acquisition of EJ&EW." Approval Decision, slip op. at 53.

DISCUSSION AND CONCLUSIONS

A party seeking a stay of a Board decision must establish that: (1) it will suffer irreparable harm in the absence of a stay; (2) there is a strong likelihood that it will prevail on the merits; (3) other interested parties will not be substantially harmed by a stay; and (4) the public interest supports granting the stay. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). On a motion for stay, "it is the movant's obligation to justify the . . . exercise of such an extraordinary remedy." Cuomo v. NRC, 772 F.2d 972, 978 (D.C. Cir. 1985). The party seeking a stay carries the burden of persuasion on all of the elements required for such extraordinary relief. Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 573 (5th Cir. 1974).

I. Petitioners Have Not Demonstrated Any Likelihood of Success on the Merits.

None of the petitioners here challenge the Board's findings on the transportation merits. Rather, they claim that the EIS did not adequately address, evaluate, or mitigate the environmental effects of this acquisition. As both the Draft and Final EIS show, however, this agency took the "hard look" at environmental impacts required by NEPA, and the issues raised by petitioners have been considered adequately.

NEPA requires that the Board examine the likely environmental effects of proposed federal actions and inform the public concerning those effects. See 42 U.S.C. 4332; Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983). Under NEPA, the Board must consider the potential significant environmental effects in reaching its decision. NEPA's procedures are in place to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken." 40 CFR 1500.11(b). While NEPA prescribes the process that must be followed, it does not mandate a particular result. Robertson v. Methow, 490 U.S. 332, 350-51 (1989). Here, as discussed below, the Board fully complied with NEPA's requirements by preparing a detailed EIS evaluating and disclosing the environmental effects of this acquisition and providing a fair opportunity to interested persons, entities, and agencies to voice their concerns about the project.

A. The Board's Consideration of Alternatives Was Adequate.

The "proposed action" here was CN's application to acquire the existing EJ&E line. Therefore, as explained in the EIS and the Approval Decision, slip op. at 36-37, the alternatives examined were (1) granting the application as filed, (2) granting the application with conditions, or (3) denying the application.

Petitioners argue that the Board failed to consider a reasonable range of alternatives because the analysis of alternatives was based on CN's statement of the purpose and need for the acquisition. BARR-7 at 2, 10-17; Bartlett Pet. at 2. However, the Board conducted an appropriate analysis of alternatives, and none of the alternatives that petitioners say should have been considered were reasonable and feasible alternatives in this case.

An agency is required to consider alternatives that are feasible and reasonable, so as to prevent an EIS from becoming "an exercise in frivolous boilerplate." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551(1978); Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 199 (D.C. Cir. 1991) (Busey). Accord Missouri Mining, Inc. v. ICC, 33 F.3d 980, 984 (8th Cir. 1994) (Missouri Mining). An alternative is not reasonable "if it does not fulfill the purpose of the project." Mayo Foundation v. STB, 475 F.3d 545, 550 (8th Cir. 2006). See also Minnesota Mining, 33 F.3d at 984; Busey, 938 F.2d at 195. Thus, which alternatives are considered reasonable is to be determined by the project's goals. Mid States Coalition for Progress v. STB, 345 F.3d 520, 546 (8th Cir. 2003) (Mid States); City of New York v. DOT, 715 F.2d 732, 742 (2d Cir. 1983).

Petitioners fault the Board for taking CN's statement of purpose and need as the starting point for analysis of alternatives in the EIS. BARR-7 at 12. However, where, as here, the project involves an application by a private party for a license or approval, rather than an action proposed or sponsored by the government, courts have held that the project goals are to be determined by the applicant, not the agency. Nat'l Committee for the New River, Inc. v. FERC, 373 F.3d 1323, 1332 (D.C. Cir. 2004) ("[I]t was the prerogative of [the natural gas pipeline applying for a construction certificate] to determine the project's goals and the means of achieving them"); Busey, 938 F.2d at 199 ("An agency cannot redefine the goals of the proposal that arouses the call for action"). See also City of Grapevine v. DOT, 17 F.3d 1502, 1506 (D.C. Cir. 2004) (the agency's alternatives analysis should be based around the applicant's goals, including the applicant's economic goals).[6]

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[6] Accord City of Shoreacres v. Waterworth, 420 F.3d 440, 450-51 (5th Cir. 2005) (Under NEPA, Army Corps of Engineers must only consider alternatives relevant to the goals of the applicant for a dredging permit, "and the Corps is not to define what those goals should be"); Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041, 1046-47 (1st Cir. 1982) (EPA's choice of alternative sites for an oil refinery and deep water port was "focused by the primary objectives of the permit applicant"). See also Alliance for Legal Action v. FAA, 69 Fed. Appx. 617, 622 (4th Cir. 2003) (Project sponsor's goals play a large role in determining how the purpose and need is stated).

Accordingly, petitioners are wrong in suggesting that the Board erred in eliminating from study in the EIS alternatives that would not meet applicants' stated purpose and need for the transaction, such as: (1) expanded trackage rights to CN; (2) implementation of the CREATE program; (3) acquisition of a different rail line within the Chicago metropolitan area; and (4) construction of a bypass outside of the EJ&E rail line well away from the Chicago area. As explained in the Draft EIS (at 2-65 to 2-69) and the Approval Decision (slip op. at 9-10 and 37 n.80), these are not reasonable alternatives because they would not give CN what it needs to make its rail transportation network as efficient as possible: full ownership of a continuous rail route around Chicago; access to the EJ&E rail yards; and an important supply line for North American steel, chemicals, and petrochemical industries, as well as for Chicago-area utilities and other shippers. Further, some of the alternatives advanced by petitioners would be more expensive and would adversely impact the environment more than the transaction.

For example, using trackage rights over suburban lines to free up intercity lines, if successful, could have the same potential adverse impacts as this transaction. The CREATE program, even if eventually fully funded and implemented, would not allow CN to obtain yards that it would not need to share with other carriers, which is one of the primary ways that the CN/EJ&E transaction will enable CN to significantly reduce its transit times through Chicago. (The CN/EJ&E project does not preclude CREATE from continuing to go forward in the future.) Assembling a patchwork of various lines to create an alternative to the EJ&E line within the Chicago area was not shown to be a reasonable and feasible option. And construction of a new rail line outside of the EJ&E arc would have far greater environmental impacts—albeit on other communities—than increased use of this existing line.

In short, the Board carefully considered which alternatives to study and acted within the agency's discretion in assessing alternatives. The Board therefore has done what NEPA requires. See Mid States, 345 F.3d at 546 (there is no requirement to "explore alternatives that, if adopted, would not have fulfilled the project goals as defined by the [applicant]," and there is no "duty to analyze alternatives that were not germane to the proposed project itself.")

B. The Board Critically Examined the Benefits of the Transaction.

Petitioners claim that the Board failed to analyze or evaluate the potential benefits of the transaction and merely adopted CN's representations regarding those benefits. BARR-7 at 18. That is not correct. The EIS did not accept uncritically applicants' assertions that the transaction will result in environmental benefits. For example, the EIS included a detailed technical analysis of vehicular delay at grade crossings at locations where rail traffic will decrease; undertook noise modeling to calculate the likely reduction in noise that will occur along CN lines that will experience reduced rail traffic; identified noise-sensitive receptors that will no longer be within the 65 dBA[7] noise contour after implementation of the transaction; and estimated decreases in

[7] "dBA" refers to decibels of noise on a "A" weighted scale (noise audible to the human ear).

frequency of accidents along CN's existing rail lines.[8] Moreover, the benefits of CN's project were discussed extensively and compared with adverse impacts throughout Chapter 4 of the Draft EIS.[9]

C. The Board Properly Evaluated Reasonably Foreseeable Indirect Impacts.

NEPA requires an agency to consider "reasonably foreseeable" indirect impacts. See 40 CFR 1502.16(b). To satisfy this requirement, the Draft EIS included a 26-page chapter that assessed indirect and cumulative effects on land use, commercial and residential development, and transportation systems along the EJ&E line, which was supplemented by Section 2.13 of the Final EIS. The Final EIS also responded to many comments on whether other potential indirect effects should have been studied. Final EIS at 3.4-364 to 3.4-371.

Petitioners nonetheless contend that the Board failed to analyze "reasonably foreseeable" possibilities that CN might double-track the entire 200-mile EJ&E line to accommodate future growth in traffic and that CN or other rail carriers will meet increased demand that is inevitable by adding traffic to the lines on which CN plans to reduce traffic. BARR-7 at 28-31. But the EIS specifically reviewed the capacity of the EJ&E line to handle the projected traffic. And the Board determined that CN's planned improvements to the EJ&E line—which call for double-tracking approximately 19 miles (not the entire line)—will be sufficient to accommodate CN's operating plan through 2015, and that any attempt to make forecasts beyond that time horizon would not produce accurate and reliable projections. See Approval Decision, slip op. at 41.

Petitioners' references to broad projections about potential future growth of rail traffic in Chicago—whether by CN or other carriers—fail to demonstrate that CN would make the large investment necessary to double track the entire EJ&E line, even if such traffic materializes at some point in the future. As the EIS explained (Draft EIS at 2-22), railroads have various options to address increased freight demand, such as longer and/or heavier trains, instead of more trains, or improved signal systems. Therefore, it is not possible to reliably predict today how any increase in train traffic beyond 2015 would be routed (over the EJ&E line, the existing CN lines, or the lines of other carriers that operate in the Chicago area). See Draft EIS at 2-27. Accordingly, it was entirely appropriate for the Board to decide to address concerns about possible traffic increases in the Chicago area at some point in the future by imposing a 5-year formal oversight period, with detailed monthly reporting requirements on applicants' operations, and environmental reporting and monitoring conditions. This will allow the Board to take appropriate action if there is any substantial departure from the projected traffic levels on which the Approval Decision is based or any other unanticipated, substantially changed circumstances. See Approval Decision, slip op. at 42.

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[8] See Draft EIS at 4.3-19 to 4.3-31 and Attachment E1 at 35-85, 3.10-3 to 3.10-7, 4.10-6, 4.2-1, 4.2-4 to 4.2-5, 4.2-34.

[9] See, e.g., Draft EIS at 4.6-1 to 4.6-3, 4.7-4, 4.10-1, 4.10-6 to 4.10-7. See also Final EIS at ES-2 to 5, 20, and 2.4-58.

Finally, none of the general predictions of increased traffic presented by petitioners appears to be based on the transaction. Rather, petitioners appear to assume that increased train traffic in and around Chicago is inevitable regardless of the transaction. Their predictions, therefore, fail to demonstrate that such potential added traffic would be causally related to the transaction, even as an indirect effect.

For these reasons, petitioners fail to show that the consideration of indirect effects was inadequate or incomplete.

D. SEA's Comment Response Was Fully Adequate.

The Final EIS contained a 463-page chapter that responded to the 9,500 comments received on the Draft EIS. Moreover, in response to concerns raised in comments on the Draft EIS, the Final EIS presented additional analysis and discussion of issues such as quality of life in communities along the EJ&E line, commuter rail operations, emergency response, and school safety. See, e.g., Approval Decision, slip op. at 43, 48-50.

Petitioners nonetheless point to a number of instances in which they claim SEA, which prepared both the Draft EIS and the Final EIS, failed to respond to comments on the Draft EIS. In particular, petitioners assert that the Final EIS failed to respond to certain concerns raised by the United States Environmental Protection Agency (EPA) and the United States Department of the Interior. BARR-7 at 33-40. But, in fact, the Final EIS contains a 16-page response to EPA's comments (at 3.3-38 to 3.3-54) and SEA conducted additional analyses for both the Draft EIS and Final EIS to address EPA's concerns. Similarly, the Final EIS responded point by point to the Department of the Interior's concerns about potential wildlife impacts (at 3.3-6 to 3.3-31), and SEA conducted extensive additional consultation with the Department of the Interior's Fish and Wildlife Service, which resulted in the Fish and Wildlife Service's concurrence that the transaction will not adversely affect wildlife (see Approval Decision, slip op. at 52-53).

We now turn to the specific areas that petitioners claim were not addressed.

1. Noise Mitigation

Petitioners claim that the EIS did not respond to EPA's request to explain why it would be unreasonable to require noise mitigation at a 65 dBA level of loudness rather than at 70 dBA (as is the Board's practice). BARR-7 at 32. But the explanation in the Draft EIS (at 4.10-29)—that "requiring mitigation for all of the noise-sensitive receptors predicted to experience an Ldn[10] of 65 dBA or greater" could be unreasonable "[g]iven that the EJ&E rail line travels through approximately 50 communities"—reflects the Board's consistent position in cases where noise mitigation has been an issue that it would be unreasonably expensive for railroads to mitigate

[10] "Ldn" means average noise exposure over a 24-hour period, rather than a single noise-generating event such as the sounding of a horn. When calculating Ldn, night-time noise is typically weighed more heavily.

noise impacts down to 65 dBA.[11] Moreover, in the Final EIS, SEA did respond to EPA, explaining (Final EIS at 3.3-48) that the 70 dBA threshold for mitigation discussed in the Draft EIS was consistent with prior Board decisions and had been judicially affirmed in Mid States, 345 F.3d at 535-36.[12]

The Approval Decision imposes all of CN's voluntary noise mitigation, which will result in meaningful and appropriate noise reduction in this case (including constructing noise control devices such as noise barriers, installing vegetation or berms, or installing enhanced warning devices to allow communities to achieve quiet zone requirements). Also, the Board imposed additional noise mitigation in the Approval Decision, including a specific quiet zone condition for Barrington and noise mitigation for transaction-related construction activities. Thus, the concerns raised by EPA and other commenters about noise have been appropriately addressed.

Petitioners also assert that the Final EIS failed to respond to the Department of the Interior's recommendation that applicants construct wildlife noise barriers. BARR-7 at 32. To the contrary, the Final EIS did respond by explaining that noise barriers can be prohibitively expensive and of marginal utility for the protection of natural areas and wildlife. Final EIS at 3.3-28. The Final EIS (at 3.3-11) also thoroughly discussed noise impacts on birds, explaining that birds and other wildlife have been exposed to noise from passing trains on the EJ&E line for more than 100 years. Moreover, the Approval Decision included extensive wildlife mitigation measures imposed in this case to address the effects of transaction-related increases in train traffic on wildlife. See Approval Decision, slip op. at 72 (voluntary mitigation conditions 102-104), 79 (Board mitigation conditions 29-30).

2. Need to Assess Projected Emissions at Kirk and Joliet Yards

Petitioners object to the absence of a site-specific analysis of diesel particulate emissions at the Kirk and Joliet Yards, as requested by EPA. BARR-7 at 39-40. But, as petitioners acknowledge (BARR-7 at 40) in response to EPA's concerns, SEA conducted additional air quality analysis for the Final EIS of diesel particulate matter from locomotives projected to operate over the EJ&E line. See Final EIS at Chapter 2, section 2.10, and 3.3-41.

A more site-specific analysis of the Kirk and Joliet yards was not conducted because the information necessary for such an analysis was not available, as CN stated that it would not

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[11] In the Conrail merger case, for example, the Board concluded that requiring mitigation of noise impacts of 65 dBA or more would be prohibitively expensive. See CSX Corp. – Control – Conrail, Inc., et al., 3 S.T.B. 196, 361 (1998). Likewise, in Dakota, MN & Eastern RR – Construction – Powder River Basin, 6 S.T.B. 8, 29 (2002), aff'd, Mid States, 345 F.3d at 535-36, the Board adopted SEA's finding that the use of a standard lower than 70 dBA Ldn would require noise mitigation to so many additional noise receptors and would be so costly that it would unreasonably burden the carrier. See Final EIS at 12-16.

[12] There is no merit to petitioners' claim (BARR-7 at 32) that the EIS did not explain the criteria for determining "reasonability and feasibility" of noise mitigation measures. See Final EIS at 3.4-291.

develop specific plans for reconfiguring those yards until it had gained experience operating the EJ&E system and those yards.[13] Accordingly, any attempted analysis of those effects in the Final EIS would have been speculative. Of course, once it is clear how the yards will be used, any specific concerns can be brought to the Board's attention during the oversight period.

3. Revised Fuel Consumption Estimates

Petitioners claim that CN's revised estimates of fuel use were not substantiated by applicants. BARR-7 at 40. To the contrary, CN provided a detailed explanation of the basis for every modification of its initial estimates. See Draft EIS at Appendix Q (containing response dated May 23, 2008, to item No. 4 of SEA's Data and Information Request No. 4).

4. Traffic Analysis in Barrington

There is no merit to petitioners' concerns about the adequacy of SEA's vehicular traffic analysis. BARR-7 at 41-45. The EIS contained a detailed analysis of the effects of increased rail traffic on vehicles and a thorough evaluation of potential mitigation strategies (including reasons why a grade separation in Barrington or other mitigation such as requests to place the EJ&E rail line in a trench in Barrington would not be practical or warranted). See Approval Decision, slip op. at 42-45 (summarizing the analysis, including the traffic model that SEA prepared in response to numerous comments on the Draft EIS about congestion in the Barrington area, which showed that, with the transaction, the Barrington area total delay time would increase by 4% to 5% during the AM and PM peak periods).[14] Thus, contrary to petitioners' charge, the Final EIS did address Barrington's "distinctive situation." BARR-7 at 45.

5. Emergency Service Response

Finally, there is no merit to Barrington's concern (BARR-7 at 45-48) that the Board ignored statements by emergency service responders regarding the alleged impact of the transaction on Barrington. As the Approval Decision explained (slip op. at 48-49), SEA performed additional analysis for the Final EIS to address concerns about emergency response raised in comments on the Draft EIS. The Board imposed mitigation for appropriate fire protection and for hospital facilities that might be substantially affected by the transaction in communities that have not entered into negotiated agreements with CN to minimize impacts on emergency response. The Board's mitigation requires applicants to install a real-time video monitoring (CCTV) system with video cameras at appropriate locations so that the movement of trains can be monitored and reasonably predicted. It also requires applicants to train two individuals from each affected emergency service provider to use the system.

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[13] See Draft EIS, Appendix Q, letter from CN to SEA dated Apr. 1, 2008, at 5 (item 22).

[14] SEA reasonably focused on impacts during the peak vehicular hours because those are the hours in which increased train traffic may be expected to have the greatest adverse effects.

Petitioners raise concerns about how grade-crossing cameras can help emergency responders and the people they are attempting to help if the cameras were to show, for example, that all area crossings are blocked. But the cameras can: (1) enable responders to avoid a blocked crossing; (2) facilitate prompt communication with the railroad when a train is stopped; and (3) help responders to know how long a train is and how long it might take to clear a crossing. With this better and more timely information, emergency dispatchers can assess whether to take pre-planned alternative routes or dispatch services from alternative facilities when appropriate. Moreover, CN has pledged not to permit a crossing to be blocked for more than 10 minutes and, if the blockage is likely to exceed this time, to cut the train to clear the crossing.[15] And as part of the Board's monitoring and oversight process, CN will report to the Board on the frequency and duration of train delays at crossings,[16] allowing the Board to take additional measures if warranted.

In short, petitioners have not shown that they will prevail in their argument that the EIS is inadequate. As the EIS and the Approval Decision show, the environmental effects of this transaction were thoroughly analyzed and considered, the Board responded to the comments received on the Draft EIS, and the Board's logic and methodology were fully explained. Petitioners thus have failed to make the "powerful showing of probable administrative error" required for a stay. Busboom Grain Co. v. ICC, 830 F.2d 74, 75 (7th Cir. 1987).

II. Petitioners Fail to Show They Will Suffer Irreparable Harm if the Approval Decision is Not Stayed.

A stay is an extraordinary remedy and should not be granted unless the requesting party can show that it faces irreparable injury that is "both certain and great," "actual and not theoretical," and "will directly result from the action" that would be enjoined. Wisconsin Gas v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

Petitioners here argue that, absent a stay, there will be irreparable harm to wildlife and communities along the EJ&E line will be exposed to the impacts of increased rail traffic. BARR-7 at 49-55. But the Approval Decision includes various mitigation measures that were developed in consultation with the Fish and Wildlife Service, and various state agencies and environmental protection organizations. See Final EIS, slip op. at 4-29 to 4-30. Moreover, as noted above, the Fish and Wildlife Service has concurred that "as conditioned, the transaction may proceed without adversely affecting listed, threatened or endangered species." See Approval Decision, slip op. at 52-53. In addition, the reporting, monitoring and oversight conditions in the Approval Decision will assure that the Board can take appropriate action if there is a material change in the facts or circumstances upon which the Board relied in imposing specific environmental conditions.

As for the mitigation provided for communities, the Board thoroughly explained in the Final EIS and Approval Decision why mitigation beyond that which was imposed would not be

[15] See Approval Decision at 63 (voluntary mitigation condition No. 35).

[16] Id. (voluntary mitigation condition No. 36).

warranted. Furthermore, as applicants state in their reply to the request for stay (at 19-20), CN expects to phase in its expected rerouting of traffic on the existing CN lines over a 3-year period. Thus, this is not a case where rail traffic over the EJ&E line—or vehicular traffic growth in the communities along that line—will immediately rise to the levels projected for 2015. Finally, it is worth noting that the EJ&E line is an active rail line today; thus, the current owners, as well as any carriers using that track pursuant to a trackage rights arrangement, could increase train traffic on that line at any time without Board approval and without any federal action triggering NEPA review or Board-imposed mitigation measures. See Approval Decision, slip op. at 38.

Petitioners suggest that violations of NEPA carry a presumption that injunctive relief should be granted. BARR-7 at 49-50. But as shown above, the Board has fully complied with NEPA here. Moreover, contrary to petitioners' assertion, even where an agency fails to evaluate thoroughly the environmental impact of a proposed action—which is not the case here—the Supreme Court has held that to presume irreparable injury is "contrary to traditional equitable principles." Amoco Production Co. v. Village of Gambrill, 480 U.S. 531, 555 (1987). Finally, the cases petitioners cite do not support their position that a stay is warranted in this case. The two principal cases upon which they rely—Realty Income Trust v. Eckerd, 564 F.2d 447, 456 (D.C. Cir. 1977), and Jones v. D.C. Redevelopment Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974)—are inapposite because in each of those cases the agency undertook its own major construction or urban renewal project without having prepared any NEPA analysis at all.

In short, petitioners have failed to show irreparable harm warranting a stay pending judicial review in this case.

III. A Stay Would Harm Applicants and the Public Interest.

In contrast, a stay pending judicial review would, at a minimum, delay the benefits of the transaction that would inure not simply to applicants and their shippers, but, given the importance of Chicago as a national rail transportation hub, to the interstate rail network generally. See Approval Decision, slip op. at 2, 5, 37. These benefits include more efficient and reliable CN rail service and reduced transit times through the Chicago bottleneck, as well as the environmental benefits of less rail traffic in the communities on the existing CN lines in the Chicago area where rail traffic will decrease. See Approval Decision, slip op. at 38. Moreover, in view of the time that the judicial review process can take, CN asserts that there is a significant risk that a stay would lead EJ&E to attempt to terminate the parties' stock purchase agreement, resulting in the permanent loss of the public benefits anticipated from the transaction, as well as the substantial amounts already expended by CN in this proceeding.[17] The concern about delay is a valid one, regardless of the terms of the parties' agreement, because the longer a transaction is delayed, the greater the risk that circumstances could arise that might cause a party to try to back out of it.

In sum, there is little likelihood that petitioners will prevail on the merits of a court challenge to the Board's environmental review in this case, and petitioners have not met their

[17] See CN Reply to Stay Petition at 23-24.

burden of showing that a stay pending judicial review is warranted. Accordingly, the stay requests will be denied.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petitions for stay pending judicial review are denied.

2. This decision is effective on the date of service.

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

Anne K. Quinlan
Acting Secretary