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CN-52

December 17, 2008

**BY E-FILING**

Anne K. Quinlan, Esquire  
Acting Secretary  
Surface Transportation Board  
Office of the Secretary  
395 E Street, S.W.  
Washington, DC 20423-0001

**Re: *Canadian National Railway Company and Grand Trunk Corporation Control-EJ&E West Company* (STB Finance Docket No. 35087)**

Dear Ms. Quinlan:

By letter dated December 15, 2008, Representatives Melissa L. Bean, Peter J. Visclosky, Donald A. Manzullo, Judy Biggert, Peter Roskam, and Bill Fowler (the "Commenters") have requested that the Surface Transportation Board reclassify the Final Environmental Impact Statement ("FEIS") prepared in this proceeding as a "revised-draft environmental impact statement." For the reasons set forth in the attached, their request should be denied.

The Commenters' proposal to re-designate the FEIS as a "revised-draft EIS" fails to recognize that what SEA has done in issuing the Draft Environmental Impact Statement ("DEIS"), and responding to comments on the DEIS in a final EIS, is exactly what is provided for under the rules of the Council on Environmental Quality ("CEQ") implementing the National Environmental Policy Act ("NEPA").

NEPA is a procedural statute that does not mandate particular results: it merely prescribes a necessary process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). So long as the agency complies with the procedural requirements of NEPA, it is in compliance with the law. One such procedural requirement is to solicit comments from federal and state agencies and the public. 40 C.F.R. § 1503.1. Those rules do not contemplate a potential endless cycle in which each environmental impact statement inspires a new round of comments, which is taken into account in the next statement, which gives rise to another round of comments. CEQ regulations require an agency to supplement a DEIS in two limited circumstances: when there

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are substantial changes in the proposal that affect the environmental impact, or when there are significant new circumstances or information that affect the proposed action or its environmental impact. 40 C.F.R. § 1502.9(c). The Supreme Court has held that “[i]f new information is sufficient to show that the remaining [federal] action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). But the FEIS contains no new information regarding any significant impacts not already identified in the DEIS.

CEQ, which is charged with ensuring that Federal agencies meet their obligations under NEPA, has published a guide to help citizens and organizations who are concerned about the environmental effects of federal decision-making to participate effectively in Federal agencies’ environmental reviews. According to that guide (which explains the application of CEQ’s rules implementing NEPA), the following procedure is to be followed by agencies after issuance of the DEIS:

When the public comment period is finished, the agency analyzes comments, conducts further analysis as necessary, and prepares the final EIS. In the final EIS, the agency must respond to the substantive comments received from other government agencies and from you and other members of the public. The response can be in the form of changes in the final EIS, factual corrections, modifications to the analyses or the alternatives, new alternatives considered, or an explanation of why a comment does not require the agency’s response. Often the agency will meet with other agencies that may be affected by the proposed action in an effort to resolve an issue or mitigate project effects. A copy or a summary of your substantive comments and the response to them will be included in the final EIS.

Council on Environmental Quality. *A Citizen's Guide to the NEPA. Having Your Voice Heard* 18 (2007)<sup>1</sup> (citing 40 C.F.R. § 1503.4) (“*Citizen's Guide*”). A leading environmental treatise on NEPA describes a similar process:

After preparation of the draft statement, the lead agency circulates the draft for comment, and a final environmental impact statement (FEIS) is prepared that responds to comments obtained in the commenting process. The final statement must address the comments by one of the following means: modifying the proposed action or alternatives; developing and evaluating new alternatives; supplementing, improving or modifying its analysis; or making factual

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<sup>1</sup> Available at [http://ceq.hss.doe.gov/nepa/Citizens\\_Guide\\_Dec07.pdf](http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf).

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corrections, or explaining why the comments do not warrant further response. All substantive comments received on the draft should be attached to the final statement. After the final statement is prepared, the statement is circulated in a fashion similar to the draft statement.

Daniel R. Mandelker, *NEPA Law and Litigation* § 7:13 at 7-59 (2d ed. 2008) (citing 40 C.F.R. § 1503.4). This, of course, is exactly what SEA has done in this case.

In support of their argument to re-designate that FEIS, the Commenters have asserted that “the sheer volume of comments, issues and concerns is a clear indication of the seriously flawed nature of the original draft EIS.” But that only indicates that SEA succeeded in one of the procedural requirements under NEPA – soliciting comments from the public. Simply counting the number of comments does not in any way demonstrate the inadequacy of the DEIS, because it does not take into account whether the comments had any merit, or were simply form letters, duplicative, or indicated opposition without specifically raising issues with the analysis conducted by SEA, or even whether the comments were in support of the DEIS or the proposed Transaction, as many were. Indeed, CEQ has specifically warned that

Commenting is not a form of “voting” on an alternative. The number of negative comments an agency receives does not prevent an action from moving forward. Numerous comments that repeat the same basic message of support or opposition will typically be responded to collectively. In addition, general comments that state an action will have “significant environmental effects” will not help an agency make a better decision unless the relevant causes and environmental effects are explained.

*Citizen’s Guide* at 27. This is especially the case where, as here, there is evidence that community leaders encouraged their constituents to send duplicative or form letters in an effort to burden the agency and delay the transaction. See Stephanie Kohl, *Lake Zurich Joining Fight Against CN Purchase*, Lake Zurich Courier, June 5, 2008 (“In an effort to slow Canadian National’s acquisition of the Elgin, Joliet and Eastern Railway, Lake Zurich Trustee Jim Johnson encouraged residents to send letters to the Surface Transportation Board. According to Johnson, the letters are all read by STB members and staff. An abundance of letters that must be read and recorded could slow the acquisition process down.”). (Indeed, as far back as June, CN predicted that “the organized submission of largely redundant opposition comments may . . . be cited by opponents as demonstrating ‘unprecedented’ public interest in the proceeding.” CN-39 at 4.)

If mere volume of public comments were regarded as “a clear indication” of anything other than the level of public interest, that would provide a powerful incentive for people in future cases to create a “clear,” but possibly false, indication in favor of their desired outcome.

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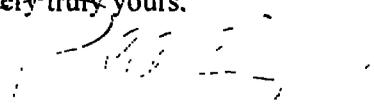
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not by presenting facts or argument, but merely by generating lots of comments. Thus, the fact that the FEIS "required an additional 463 pages to respond to the filed concerns" (comparable to the 420 pages taken in the FEIS in the Conrail Acquisition case for responses to comments on the DEIS in that proceeding) only indicates that the filed concerns were voluminous, and that SEA took seriously its obligation under CEQ rules (40 C.F.R. § 1503.4) to respond to comments.

Finally, the Commenters assert, without citing to any specifics, that the FEIS includes "substantially different findings and analysis" and "huge amount of new analysis." As CEQ's regulations make clear, however, modifying its analysis is an entirely appropriate agency response to a comment. *See* 40 C.F.R. § 1503.4(a)(3). And, although SEA conducted additional analyses between the DEIS and the FEIS in order to obviate any suggestion that it had overlooked potentially significant effects, those analyses arrived at substantially the same findings as those of the DEIS. Both the DEIS and the FEIS found that there will be both benefits and adverse impacts to the transaction. CN's unprecedented voluntary mitigation commitment (with or without the additional mitigation measures recommended by SEA in the FEIS) will adequately remedy any adverse impacts that are even potentially substantial.

The request made by Commenters in their December 15 letter should therefore be denied.

Very truly yours,

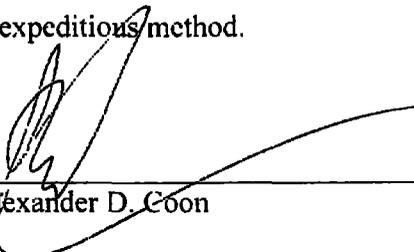


Paul A. Cunningham

cc: All parties of record

## CERTIFICATE OF SERVICE

I certify that I have this 17th day of December, 2008, served copies of the foregoing letter of Paul A. Cunningham, counsel for Applicants (designated as CN-52), responding to the letter of December 15, 2008, to Acting Secretary Quinlan from The Honorable Melissa L. Bean, The Honorable Peter J. Visclosky, The Honorable Donald A. Manzullo, The Honorable Judy Biggert, The Honorable Peter Roskam, and The Honorable Bill Fowler upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Alexander D. Coon