

HARKINS CUNNINGHAM LLP

*Attorneys at Law*

Paul A. Cunningham  
202.973.7601  
pac@harkinscunningham.com

1700 K Street, N.W.  
Suite 400  
Washington, D.C. 20006-3804  
Telephone 202.973.7600  
Facsimile 202.973.7610

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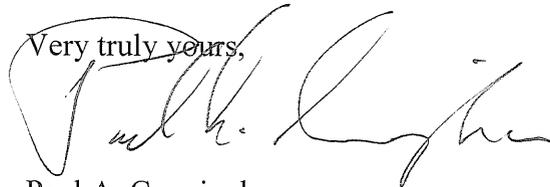
**BY E-FILING**

Anne K. Quinlan, Esq.  
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:

Enclosed for filing in the above referenced docket please find Applicants' Reply to Petitions of Village of Barrington and Will County to Stay Decision No. 16 (designated as CN-55).

Very truly yours,  


Paul A. Cunningham

Counsel for Canadian National Railway Company  
and Grand Trunk Corporation

Enclosure

cc: All parties of record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB Finance Docket No. 35087

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

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**APPLICANTS' REPLY TO PETITIONS OF VILLAGE OF BARRINGTON  
AND WILL COUNTY TO STAY DECISION NO. 16**

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Sean Finn  
CANADIAN NATIONAL RAILWAY  
COMPANY  
P.O. Box 8100  
Montréal, QC H3B 2M9  
(514) 399-5430

Theodore K. Kalick  
CANADIAN NATIONAL RAILWAY  
COMPANY  
Suite 500 North Building  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 347-7840

Paul A. Cunningham  
David A. Hirsh  
James M. Guinivan  
Matthew W. Ludwig  
HARKINS CUNNINGHAM LLP  
1700 K Street, N.W., Suite 400  
Washington, D.C. 20006-3804  
(202) 973-7600

*Counsel for Canadian National Railway Company  
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CANADIAN NATIONAL RAILWAY COMPANY  
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**APPLICANTS' REPLY TO PETITIONS OF VILLAGE OF BARRINGTON  
AND WILL COUNTY TO STAY DECISION NO. 16**

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Pursuant to 49 C.F.R. § 1115.5(a) and Decision No. 17 in this proceeding (served Jan. 8, 2009), Canadian National Railway Company and Grand Trunk Corporation (collectively, “Applicants” or “CN”)<sup>1</sup> hereby reply to the petitions filed by the Village of Barrington (BARR-7) and Will County (WILL-13) (collectively, “Petitioners”) on January 5, 2009, seeking a stay of Decision No. 16 in this proceeding (served Dec. 24, 2008).<sup>2</sup>

**BACKGROUND**

In Decision No. 16, the Surface Transportation Board (“Board”) granted final approval, pursuant to 49 U.S.C. §§ 11323-26, for CN’s acquisition of control of EJ&E West Company

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<sup>1</sup> Applicants incorporate by reference the short forms and abbreviations set forth in the Table of Abbreviations at CN-2 at 8-11.

<sup>2</sup> Will County’s petition “adopts and incorporates . . . the facts and arguments made by Barrington in its stay petition” (WILL-13 at 1), adding only a brief discussion of the alleged “specific irreparable environmental harm” that Will County alleges it will suffer in the absence of a stay (*id.* at 2-3). Accordingly, the discussion below refers to points appearing in Barrington’s petition as having been made by “Petitioners,” and provides grounds for denial of Will County’s petition as well as Barrington’s.

("EJ&EW"), a wholly owned, noncarrier subsidiary of Elgin, Joliet & Eastern Railway Company ("EJ&E"). As explained in detail in that Decision, the Board's action was taken after over a year of consideration by the Board's Section of Environmental Analysis ("SEA") of the potential environmental impacts of the proposed Transaction. The Board had determined that the Transaction study was required by the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), and implementing regulations of the Council on Environmental Policy ("CEQ"), 40 C.F.R. Parts 1500 *et seq.*, and the study was designed to meet the requirements of both ("NEPA Requirements").

SEA far exceeded NEPA Requirements. After issuing its notice of intent to prepare an environmental impact statement ("EIS") and draft scope of study on December 21, 2007, SEA held 14 scoping open house meetings at seven locations. By the time the scoping comment period ended on February 15, 2008, SEA had received over 3,400 comments, including comments from Petitioners and many individual residents of Barrington and Will County. On July 25, 2008, SEA served its 3,500-page Draft Environmental Impact Statement ("DEIS") and subsequently held public open houses in downtown Chicago and in seven communities located along the EJ&E line. SEA provided a 60-day comment period (15 days longer than NEPA Requirements) and received numerous comments on the DEIS, again including comments from Petitioners and individual residents of their communities. In the 3,100-page Final Environmental Impact Statement ("FEIS"), served on December 5, 2008, SEA addressed the issues raised in the comments on the DEIS, in some cases by undertaking additional analysis and in some cases by explaining why additional analysis was unnecessary.<sup>3</sup> At the conclusion of this thorough and

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<sup>3</sup> Even excluding its lengthy appendices and such portions as the List of Preparers, the substantive chapters of the FEIS filled 799 pages of detailed analysis and information. Given that CEQ regulations anticipate that "[t]he text of final environmental impact statements ... shall

lengthy process the Board issued a final decision, based upon SEA’s analysis, approving the proposed Transaction subject to 171 specific environmental mitigation conditions. The Board’s extensive public comment and lengthy review processes, and its detailed EIS and decisional documents, amply fulfilled the “hard look” mandate of NEPA.

## ARGUMENT

As the Seventh Circuit has noted, “[a] strong presumption of regularity supports any order of an administrative agency; a stay pending judicial review is a rare event and depends on a demonstration that the administrative process misfired.” *Busboom Grain Co. v. ICC*, 830 F.2d 74, 75 (7th Cir. 1987). The Board has recently reaffirmed the test it has long applied in reviewing petitions for such a stay: “the Board follows the traditional stay criteria by requiring a party seeking a stay to establish that: (1) there is a strong likelihood that it will prevail on the merits of any challenge to the action sought to be stayed; (2) it will suffer irreparable harm in the absence of a stay; (3) other interested parties will not be substantially harmed; and (4) the public interest supports the granting of the stay.” *Grand Elk R.R. – Lease & Operation Exemption – Norfolk S. Ry.*, STB Finance Docket No. 35187, slip op. at 2 (STB served Dec. 22, 2008) (citing *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 Petrol. Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). Parties seeking a stay carry the burden of persuasion on all of the elements required for such extraordinary relief. *Id.* (citing *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)). Petitioners have not met their burden on any of the elements required for a stay pending judicial review, and their petitions should therefore be

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normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages,” 40 C.F.R. § 1502.7, the suggestion that the Board somehow failed to satisfy NEPA Requirements and take the requisite “hard look” is unsustainable.

denied. We address below Petitioners' arguments and show that they have failed to demonstrate either (1) errors by the Board, or (2) that the irreparable harm they allege would result from the effective date of the Decision they seek to stay.

Most important, Petitioners have not established that correction of the errors they allege would prevent the occurrence of the harms alleged. To do that, Petitioners would have to show, based on the record, that the Board failed to impose, as a condition of approval of the Transaction, specific and reasonable mitigation that would prevent the harms they allege. In the absence of that showing, had the failures in the NEPA process alleged by Petitioners occurred, they would have been harmless. Because Petitioners have not even attempted to make this basic showing, the Board need not further consider their request for a stay.

**I. PETITIONERS HAVE NOT DEMONSTRATED ANY LIKELIHOOD OF SUCCESS ON THE MERITS.**

Petitioners do not challenge the Board's findings on the transportation merits of the proposed Transaction. They are concerned solely with the Board's consideration of environmental impacts, which they allege did not meet NEPA Requirements. They argue that the EIS issued by SEA failed to: consider all reasonable alternatives (BARR-7 at 2); fully analyze environmental benefits (*id.*); evaluate all reasonably foreseeable indirect effects (*id.* at 3-4); and respond adequately to various comments (*id.* at 4). "[A]n appellate court," however, "gives great deference to an agency determination regarding NEPA requirements," *City of Auburn v. United States*, 154 F.3d 1025, 1032 (9th Cir. 1998). Petitioners' arguments are unlikely to overcome that deference, because the Board has indisputably taken a "hard look" at the environmental impacts of the Transaction.

"NEPA ... does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (citations

omitted). NEPA requires only “that agencies take a ‘hard look’ at environmental consequences” of certain federal actions, *id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)), and there can be no serious question that the Board and SEA have done exactly that in this case. SEA’s process went well beyond NEPA Requirements, including an extensive public outreach effort to identify relevant environmental issues and inform the public of the proposed Transaction and potential impacts, lengthened public comment periods, and numerous public open houses (including one in Will County and one in Barrington). SEA ultimately reviewed and responded to over 9,500 public comments, addressing even more issues and concerns and, in response to those comments, conducted new analyses and evaluated new information provided by commenting agencies and the public, and reported its additional and revised findings in the FEIS, which filled four volumes and over 3,100 pages. Petitioners have not shown that the environmental analysis on which the Board relied was deficient.

Court review of agency compliance with NEPA is “deferential” and requires only that the agency follow a “rule of reason” in preparing an EIS. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195-96 (D.C. Cir. 1991). This is a “pragmatic standard which requires good faith objectivity but avoids ‘fly specking’” the document. *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000) (citations omitted). A court will defer to the “informed discretion of the responsible federal agencies” because of the “high level of technical expertise” required. *Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360, 377 (1989) (citing *Kleppe*, 427 U.S. at 412). A court will not substitute its own judgment in place of the agency’s where the agency has followed the appropriate procedures and reached reasonable conclusions. In other words, judicial review under NEPA is not a game of “gotcha” in which Petitioners are entitled to nullify the Board’s year-long study costing tens of millions of dollars, the Board’s decision, and the

public interest in the Transaction, if Petitioners can find a few comments out of almost 10,000 that they claim should have been addressed differently. The record here shows that the EIS met NEPA Requirements and that the Board acted reasonably in relying upon it.

A. The Board Did Not Fail to Consider Reasonable Alternatives to the Proposed Action.

“In commanding agencies to discuss ‘alternatives to the proposed action,’ ... NEPA plainly refers to alternatives to the ‘major *Federal* actions ...’ and not to alternatives to the applicant’s proposal.” *Busey*, 938 F.2d at 199 (quoting 42 U.S.C. § 4332(2)(C) (emphasis in court decision)). In this case, the federal action at issue was the licensing of the Transaction. The Board was required by statute to approve CN’s application unless it found that the Transaction would have substantial adverse impacts on competition in excess of the Transaction’s transportation benefits. 49 U.S.C. § 11324(d). Given that there was no evidence to support such a finding, the Board had no choice but to approve the Transaction, with such conditions as it might have the authority to impose. Disapproving the Application based on a preference for alternatives favored by Petitioners, such as expanded trackage rights or the Chicago Region Environmental and Transportation Efficiency (“CREATE”) program, was simply not an alternative available to the Board. The only alternatives available to it were approval, approval with conditions, and disapproval on the grounds specified in 49 U.S.C. 11324(d) – exactly the alternatives examined in the EIS and considered in Decision No. 16, *see* Decision No. 16, at 36.<sup>4</sup>

Petitioners assert that the Board failed to consider an appropriate range of options because it based its statement of the purpose of and need for the proposed action on CN’s statement of the purposes of the Transaction (BARR-7 at 12). In light of the nature of the

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<sup>4</sup> Disapproval would only be available if the Board could make the necessary factual findings. The record in this case did not permit such findings.

*federal* action at issue in this case, Petitioners’ argument about alternatives is entirely irrelevant, as none of the alternatives suggested by Petitioners was available to the *federal* actor, the Board.

Even assuming Petitioners’ premise that their suggested alternatives were available to the Board, Petitioners’ argument that the Board made the wrong choice has no basis in law or fact. Petitioners cite *Busey* for the proposition that “the agency itself, rather than the project proponent, ‘bears the responsibility for defining at the outset the objectives of an action.’” *Id.* at 10 (citing *Busey*, 938 F.2d at 195-96). But Petitioners have not appreciated or disclosed the full implications of that case. *Busey* states that “the agency should take into account the needs and goals of the parties involved in the application,” and that “Congress did not expect agencies to determine for the applicant what the goals of the applicant’s proposal should be.” 938 F.2d at 196, 199.<sup>5</sup> In enacting ICCTA in 1996, Congress reaffirmed its decision to leave to the individual railroads the initiative for transactions to restructure the nation’s rail system.<sup>6</sup> It was just as appropriate for the Board in this case to disregard “alternatives” that would not accomplish CN’s declared goals as it was for the FAA in *Busey* to disregard alternatives that would not accomplish the goals set by the applicant there.<sup>7</sup> Petitioners’ argument regarding

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<sup>5</sup> Petitioners fail to note that the court upheld the agency’s decision to examine only the applicant’s preferred and the no-action alternative (without even considering an alternative of approval with conditions such as SEA and the Board considered in this case).

<sup>6</sup> In the Transportation Act of 1940, “[t]he [Interstate Commerce] Commission [(“ICC”)] was finally relieved of its duty to promulgate a national consolidation plan, and the power to initiate mergers and consolidations was left completely in the hands of the carriers.” *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 319 (1954) (footnote omitted). That remains so today, although the Board, as the ICC’s successor, has authority under ICCTA to review certain railroad initiatives, including, as here, acquisitions of control of another railroad. 49 U.S.C. § 11323(a)(3). The Board, however, does not have planning authority such as its predecessor had before 1940.

<sup>7</sup> SEA is not required to “explore alternatives that, if adopted, would not have fulfilled the project goals as defined by the [applicant]” and SEA had no “duty to analyze alternatives that were not germane to the proposed project itself.” *Mid States Coalition for Progress v. STB*, 345 F.3d 520, 546 (8th Cir. 2003).

alternatives calls upon the Board to engage in exactly the kind of second-guessing of CN's goals that the D.C. Circuit rejected in *Busey*, and it ignores the fact that "CEQ regulations oblige agencies to discuss only alternatives that are feasible, or (much the same thing) reasonable." *Busey*, 938 F.2d at 195 (citations omitted).

**B. The Board Neither Failed to Evaluate Beneficial Impacts of the Transaction Nor Uncritically Adopted CN's Statement of Those Benefits.**

Petitioners claim that the Board failed to analyze or evaluate the potential benefits of the proposed Transaction, and merely adopted CN's representations regarding those benefits. BARR-7 at 18. This claim ignores, among other things, the EIS's detailed analysis of vehicular delay at grade crossings where rail traffic would decrease (DEIS at 4.3-19—4.3-31, *id.* Attachment E1 at 35-85), its monitoring of noise along CN lines which would experience decreases in rail traffic (*id.* at 3.10-3—3.10-7), its identification of noise-sensitive receptors that would no longer be within the 65 dBA noise contour after implementation of the Transaction (*id.* at 4.10-6), and its estimate of decreases in frequency of accidents along CN's existing rail lines (*id.* at 4.2-1, 4.2-4, 4.2-18, 4.2-34). On several other points (*e.g.*, reduction of rail congestion within Chicago, *see* BARR-7 at 21), Petitioners' real objection appears to be that, although SEA examined benefits, it did not quantify them; yet Petitioners do not and cannot cite any authority for the proposition that NEPA requires quantification of the benefits of the federal action.

More important, Petitioners have misconstrued the purpose of examining benefits in an EIS. According to Petitioners, "[t]he preparing agency has the duty to compare the benefits and harms of the proposed action to the benefits and harms of all feasible alternatives in order to provide a clear basis for choice among options by the decision maker and the public." BARR-7 at 19 (citing 40 C.F.R. § 1502.14). But in a case such as this – where the "choice among options by the decision maker" is limited to approval (either unconditioned or with such conditions as

the agency is authorized to impose) and disapproval – detailed quantification of the benefits of the Transaction would not assist the Board in determining what action is appropriate. As CEQ regulations explain, “NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action.” 40 C.F.R. § 1500.1(c). The more detailed examination of environmental benefits that Petitioners urge would not have had any effect on the quality of the agency action required here – the decision whether to license the Transaction – but would only have exacerbated the already extraordinary costs (largely borne by CN) of SEA’s environmental review, and delayed completion of the NEPA process and the Board’s congressionally mandated decision.

Petitioners also fail to demonstrate that they were in any way harmed by the alleged failure of the Board to further quantify the benefits of the Transaction. Indeed, further examination of the Transaction’s benefits could only have served to reinforce the Board’s approval decision, and potentially to justify a reduction in the level of environmental mitigation the Board required of CN.

C. The Board Did Not Disregard Reasonably Foreseeable Indirect Effects.

While NEPA requires an analysis of reasonably foreseeable indirect effects of an action, Petitioners err in claiming that it is reasonably foreseeable either that CN will double-track the entire EJ&E or that other railroads will re-fill capacity on lines where CN plans to reduce traffic (BARR-7 at 28-31). The only basis suggested for this claim is the growth in rail traffic in and through Chicago that, Petitioners maintain, is inevitable. But SEA examined the issue much more directly by specifically reviewing reasonably foreseeable rail traffic growth on the EJ&E line, determining that the improvements proposed in CN’s operating plan would be adequate to handle those volumes without fully double-tracking the EJ&E line, and reporting those findings

to the Board. Petitioners' references to broad projections about potential growth of other rail carriers' traffic in Chicago – projections that were made before the current economic downturn and significant reduction in rail traffic<sup>8</sup> – fall far short of demonstrating that it is reasonably foreseeable that such traffic will ever materialize, or that, if it does, it would be routed on the EJ&E line or CN's other lines, as opposed to the lines of the other carriers themselves. And Petitioners certainly fail to demonstrate why CN would be expected to make the massive investment required to double-track the EJ&E line to handle non-CN traffic.

In any event, none of the general predictions of increased traffic cited by Petitioners appears to be based on CN's proposed acquisition of EJ&E. Rather, Petitioners appear to assume that increased traffic in and around Chicago is inevitable regardless of the Transaction. These predictions therefore – even assuming they could ever support a finding of reasonable foreseeability – fail to demonstrate that such potential added traffic would be causally related to – even as an indirect effect of – the proposed Transaction. However foreseeable, Petitioners' predictions therefore fail to demonstrate that the proposed Transaction will cause – even indirectly – the potential increased traffic about which they complain.

D. SEA Adequately Considered All Comments on the DEIS.

Petitioners point to six instances in which, they claim, SEA failed to respond to comments on the DEIS, but examination shows that SEA *did* respond to those comments, albeit

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<sup>8</sup> The Board can take note of recent reports showing that rail freight traffic (measured by carloads originated) has declined 2.2% during 2008. Press Release, Association of American Railroads, 2008 U.S. Rail Freight Traffic Fourth-Highest in History, But Down Sharply in December and the Fourth Quarter (Jan. 8, 2009), *available at* [http://www.aar.org/Pressroom/PressReleases/2008/12\\_WTR/010809\\_HighestInHistory.aspx](http://www.aar.org/Pressroom/PressReleases/2008/12_WTR/010809_HighestInHistory.aspx). In recent months, the trend has worsened. *Id.* (noting that volume decreased 8.2% in the fourth quarter and 14.2% in December of 2008).

not in the way Petitioners would have preferred.<sup>9</sup> Petitioners object, for example, to the decision not to adopt some recommendations of the Environmental Protection Agency (“EPA”) (BARR-7 at 36-37, 39-40), U.S. Department of the Interior (“DOI”) (*id.* at 37-38), or Barrington (*id.* at 40-45). But an agency is not required to accept the recommendations or suggestions of other agencies,<sup>10</sup> or to adopt an alternative that a commenter might prefer.<sup>11</sup> And, while Congress may have wanted EPA to participate in the EIS process, the Board bears ultimate responsibility as the lead agency for preparing the EIS, and “it does not have to follow EPA’s comments slavishly – it just has to take them seriously.” *Busey*, 938 F.2d at 201.

#### 1. SEA Responded Adequately to Comments on Noise Mitigation.

Petitioners claim that “SEA did not respond” to the request of EPA to explain why noise mitigation at a specified level of loudness was unreasonable.” BARR-7 at 32. But the DEIS had already explained that “requiring mitigation for all of the noise-sensitive receptors predicted to experience an Ldn of 65 dBA or greater” could be unreasonable, “[g]iven that the EJ&E rail line travels through approximately 50 communities.” DEIS at 4.10-29.<sup>12</sup> Moreover, the Board did

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<sup>9</sup> *See, e.g.*, BARR-7 at 33-36 (stating that SEA’s response to a comment from EPA regarding noise was inadequate); *id.* at 37-38 (stating that SEA’s response to a comment from the U.S. Department of the Interior (“DOI”) regarding noise was inadequate); *id.* at 38-39 (SEA’s response regarding noise mitigation allegedly did not contain sufficient detail); *id.* at 39-40 (noting that SEA revised its air quality analysis, but did not follow specific request of EPA); *id.* at 41-45 (claiming that SEA’s “sophisticated” VISSIM analysis, “using the same traffic modeling software Barrington used” to analyze traffic impacts in Barrington, was inadequate to address Barrington’s concerns); *id.* at 45-49 (criticizing SEA for failing to respond adequately to Barrington’s “distinctive” situation).

<sup>10</sup> *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1036 (10th Cir. 2001); *Busey*, 938 F.2d at 201.

<sup>11</sup> *Geer v. FHA*, 975 F. Supp. 47, 61 (D. Mass. 1997) (citing *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980)).

<sup>12</sup> This is consistent with SEA’s finding in the Conrail Acquisition case that requiring mitigation of noise impacts of 65 dBA or more would be prohibitively expensive to the applicants. II Final Environmental Impact Statement at 4-69—4-70, *CSX Corp. – Control &*

respond to EPA's request (FEIS at 3.3-48), explaining that the 70 dBA threshold for mitigation was consistent with prior Board decisions and had been affirmed by the courts.<sup>13</sup> Having made that reasonable determination, the Board was under no obligation to justify specifically why it chose not to require mitigation down to even lower levels of noise, whether that be 65 dBA, 60 dBA, 55 dBA, or below.

Petitioners further claim that "EPA asked SEA to modify the proposed noise mitigation or add new noise mitigation measures in the FEIS" and that "SEA did not; nor did it explain why it did not." BARR-7 at 32. EPA's principal objection was its claim that noise mitigation should "be part of the DEIS process and not be developed at a later time as currently proposed." BARR-7 at 36 (quoting FEIS at E.3-3). That, however, is not required by NEPA. As the Supreme Court has explained, "[t]here is a fundamental distinction ... between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." *Robertson*, 490 U.S. at 352. It is simply not true that NEPA requires an EIS to include "a detailed explanation of specific measures which will be employed to mitigate the adverse impacts of a proposed action." *Id.* at 353 (quoting *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 819 (9th Cir. 1987) (emphasis omitted)).

Petitioners also claim that "SEA neither accepted the recommendation" of DOI regarding the use of noise barriers to mitigate impacts of increased rail traffic on wildlife, "nor did it provide any meaningful explanation of its decision to reject it." BARR-7 at 32. Petitioners are

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*Operating Leases/Agreements – Conrail Inc.*, STB Finance Docket No. 33388 (STB served May 29, 1998) (estimating that sound insulation to mitigate to the 65 dBA level would cost applicants \$421 million, "which [SEA] considers unreasonable").

<sup>13</sup> See, e.g., *Mid States Coalition for Progress*, 345 F.3d at 535-36.

apparently dissatisfied with SEA's response, which stated that "[t]he Board has considered noise walls and other barriers in prior Board proceedings and found them to often be prohibitively expensive and of marginal utility [for the protection of natural areas and wildlife], given the many 'gaps' such barriers would have to have to provide for vehicle crossings." FEIS at 3.3-28 (quoted in BARR-7 at 37). But that response belies Petitioners' assertion that "SEA has not responded to DOI's comments" (BARR-7 at 37). Petitioners may not agree with SEA's judgment, but SEA's response satisfies the requirement of CEQ regulations that the FEIS "[e]xplain why the comments do not warrant further agency response, citing the sources, authorities, *or reasons* which support the agency's position." 40 C.F.R. §1503.4(a)(5) (emphasis added) (quoted in BARR-7 at 31).

Petitioners claim that SEA failed to "explain the criteria for determining 'reasonability and feasibility' of noise mitigation." BARR-7 at 32. In fact, as noted above, the DEIS already contained a discussion of the level of mitigation that would be feasible (DEIS at 4.10-29). And as the response to the comment cited by Petitioners stated, chapter 2 of the FEIS did "clarif[y] the criteria for determining reasonability and feasibility" (FEIS at 3.4-291), by referring to "noise mitigation cost-effectiveness using criteria that Illinois DOT and Indiana DOT use to assess highway noise mitigation measures." FEIS at 2-110.

## 2. SEA Responded Adequately to Comments on Diesel Particulate Emissions.

Contrary to Petitioners' assertion (BARR-7 at 40), SEA also responded to EPA's comment on the need for an assessment of locomotive diesel particulates in its air quality analysis, especially projected diesel emissions at Kirk and East Joliet yards. *See* FEIS at 3.3-41. As Petitioners acknowledge, SEA "did modify its air toxics analysis to include diesel particulate matter in the FEIS." BARR-7 at 40. Petitioners object that the FEIS did not contain an analysis

of air quality impacts specific to Kirk and East Joliet yards, but the DEIS had already noted that increased switching activity at those yards would simply be a transfer of activity from other yards in the same airshed. DEIS at 4.9-25. No overall increase or decrease in emissions of diesel particulate matter at rail yards should therefore be expected.

With respect to the “hot spot” argument raised by Petitioners, CN notes that the methodology SEA used to analyze concentrations of mobile source air toxic (“MSAT”) pollutants (including diesel particulate matter) adjacent to rail yards was developed using source release parameters derived from model inputs for dispersion studies of rail yards (*see* FEIS at 2-92). Moreover, no specific plans have been developed for post-Transaction operations of Kirk and East Joliet yards, and absent such information, there is no ground for believing the effects adjacent to the yards would be materially greater than those adjacent to rail lines, and any attempted analysis of those effects would be speculative.

3. SEA Responded Adequately to Comments on Revised Fuel Consumption Estimates.

Petitioners claim that CN’s revised estimates of fuel use, on which SEA relied in the FEIS, are “not substantiated by the Applicants.” BARR-7 at 40. To the contrary, CN provided a detailed explanation of the basis for every modification of its initial estimates. *See* DEIS, Appendix Q (reprinting response dated May 23, 2008, to item no. 4 of SEA’s Data and Information Request No. 4).

4. SEA Responded Adequately to Comments on Traffic Analysis in Barrington.

Petitioners attack SEA’s vehicular traffic analysis (BARR-7 at 41-45), despite the fact that SEA conducted a detailed multi-part assessment of the effects of increased rail traffic on vehicles that is equivalent to or more rigorous than assessments used in the past. In addition, in response to Barrington’s comments advocating use of VISSIM software, SEA performed what

Petitioners admit was a “sophisticated” further analysis “using the same traffic modeling software that Barrington used” (BARR-7 at 41), which further study validated SEA’s prior findings by showing that the increase in train traffic would “not considerably worsen traffic congestion or mobility.” FEIS, Appendix A.5 at 47. Petitioners’ claims that SEA “completely ignored Barrington’s study and failed to respond to any of the questions raised regarding flaws in its analysis procedures” (BARR-7 at 41) are plainly wrong. SEA was not obliged to expend further time and resources probing Barrington’s own study, and it was reasonable for SEA instead to conduct its own independent re-study of traffic impacts using the software recommended by Barrington and then to compare those results to its original study.

Petitioners’ primary substantive objections to SEA’s analysis are that SEA focused on impacts during the peak vehicular traffic hours and that SEA’s model extended to traffic in a wider road network than did Barrington’s. BARR-7 at 44. But it was appropriate for SEA to focus on impacts at peak traffic hours, because those are the hours in which increased train traffic may be expected to have the greatest adverse effects. And, constructing a traffic model taking account of a wider road network does not, as Petitioners suggest, “dilute[] the impacts of additional trains on the area roadways,” BARR-7 at 44 (emphasis omitted), but rather provides a more realistic simulation of vehicular traffic over the relevant grade crossings, because the model takes into account how traffic farther away from those crossings may affect traffic at the crossings themselves.

Petitioners also assert that the FEIS does not address Barrington’s “distinctive” situation, *i.e.*, a “dense configuration of at-grade roadway and railroad crossings and the adverse effect of the increased frequency and duration of gate-down times on the response times of Barrington emergency (‘EMS’) responders.” BARR-7 at 45. SEA reasonably analyzed Barrington’s grade

crossings, however, by examining each grade crossing individually, using specific rail and vehicular traffic volumes for each, and taking relevant factors into account concerning the crossing configuration. *See* FEIS, Appendix A.5 at 2-13.

Finally, Petitioners cite statements by EMS responders regarding the alleged impact of the Transaction on Barrington. BARR-7 at 45-48. Those comments, however, provide no concrete evidence that emergency response providers will be significantly adversely affected. The commenters simply assume, without submitting any evidence, that emergency vehicles would be substantially impacted by delays at at-grade crossings. These unsubstantiated concerns are belied by the record. Indeed, SEA conducted an additional analysis in Barrington and found that, post-Transaction, vehicles in Barrington (including emergency response vehicles) would not be significantly delayed. FEIS, Appendix A.5 at 46-48. In any event, the concerns of such commenters were addressed by mitigation ordered by the Board in addition to that agreed to voluntarily by CN or otherwise provided for in the DEIS, including, importantly, the requirement that CN pay for installation of video cameras and monitors to allow EMS personnel to observe grade crossing conditions in real time.<sup>14</sup> Petitioners' disagreement with SEA's response does not make that response equivalent to no response at all, and does not demonstrate that Petitioners are likely to succeed on the merits. All the Board need do is "[e]xplain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position," 40 C.F.R. §1503.4(a)(5), and this it has done.

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<sup>14</sup> Barrington dismisses this practical and effective approach to EMS responder concerns, which the Board saw fit to extend to crossings all along the EJ&E line, and which numerous other communities have sought as part of mitigation, as providing no solution in the event that all five Barrington crossings are simultaneously blocked. BARR-7 at 49. But Applicant's operating plan does not call for stopping trains in Barrington, and Barrington has never shown that such a total blockage of all means of emergency response via all routes by all possible responders is anything more than a theoretical possibility that is unlikely to occur at all, much less for any appreciable time or with any regularity.

## II. PETITIONERS HAVE NOT DEMONSTRATED THAT THEY WILL SUFFER IRREPARABLE HARM IF THE TRANSACTION IS NOT STAYED.

Petitioners' vague and unsupported allegations of harm do not meet the high threshold for issuance of a stay, which requires that they demonstrate particularized irreparable injury to themselves that is "both certain and great," "actual and not theoretical," and "will directly result from the action" they seek to enjoin. *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). In this case, Petitioners allege supposedly concrete irreparable harm of two types – harm to wildlife and harm due to increased rail traffic to communities along the EJ&E (BARR-7 at 49-55).

Before discussing these two areas of alleged harm, Petitioners suggest, quoting *dicta* from two Court of Appeals decisions,<sup>15</sup> that irreparable harm may be presumed or established here on the basis of Petitioners' alleged procedural violations of NEPA or, at a minimum, that their allegations of procedural NEPA violations somehow reduce their burden to show irreparable harm (*id.* at 49-50). The law, however, does not support that position.<sup>16</sup>

In the two cases Petitioners quote – *Realty Income Trust* and *D.C. Redevelopment Land Agency* – agencies undertook their own major construction or urban renewal projects without having timely prepared any NEPA analysis at all. When the courts in those cases considered enjoining those agency projects, a failure to comply with NEPA had already been established as a matter of law, the "procedural" violation involved a complete failure to timely assess any environmental impacts, and that failure went directly to the agency's own choice between major

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<sup>15</sup> *Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977); *Jones v. DC Redevelopment Land Agency*, 499 F.2d 502, 512 (D.C. Cir. 1974).

<sup>16</sup> In *Amoco Prod. Co. v. Village of Gambrell*, 480 U.S. 531, 555 (1987) (cited at BARR-7 at 50 nn.188-89) the Supreme Court held that presuming irreparable damage "when an agency fails to evaluate thoroughly the environmental impact of a proposed action" is "contrary to traditional equitable principles."

projects. It was in this starkly different context that those courts in *dicta* discussed possible rationales for injunctions and the possibility of irreparable harm. And in both cases, the court's actual holding was that injunctive relief must be denied.

The *dicta* in those cases have no bearing on the present petition to stay the Board's decision. In this case, there can be no claim that the Board's action was fundamentally in disregard of and therefore a *prima facie* violation of NEPA. Instead, the violations of NEPA alleged by Petitioners are at best technical and relatively minor and highly contestable. Moreover, even if Petitioners were ultimately able to make a case that the Board somehow disregarded some aspect of its obligation under NEPA, the matter at issue here is not an agency's choice between its own major projects, with significant and potentially starkly different environmental consequences flowing from that choice, but the Board's decision concerning the level of environmental mitigation to be imposed on a private transaction that the Board was required by law to approve. In any event, any possibility that these early NEPA cases from the 1970s stood for the proposition that mere "procedural injury" is sufficient to establish irreparable harm to a particular party did not survive the Supreme Court's later decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which determined that procedural injury under environmental statutes, in the absence of concrete injury, is insufficient even to confer Article III standing. If procedural injury is insufficient to show harm required to confer standing, it is surely insufficient to demonstrate irreparable harm. *Id.* at 571-73. Other cases, including those cited by Petitioners, require concrete irreparable harm.<sup>17</sup>

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<sup>17</sup> *Huntington v. Marsh*, 884 F.2d 648, 653 (2d Cir. 1989) ("a threat of irreparable injury must be proved, not assumed, and may not be postulated *eo ipso* on the basis of procedural violations of NEPA"); *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (procedural injury "cannot stand alone as the basis for a finding of irreparable harm"), *citing Fund for Animals v. Espy*, 814 F. Supp. 142, 151 n.10 (D.D.C. 1993)). *See also Fund for*

As for Petitioners' claims of concrete harm, they rely entirely on general statements and findings in the FEIS and, to a lesser extent, Barrington's own comments on the FEIS. As such, they are fatally flawed.

First, although Petitioners acknowledge that the second factor to be considered in evaluating a stay petition is "whether *petitioner* will be irreparably harmed in the absence of a stay," BARR-7 at 8 (emphasis added), they do not show how the harms they allege will harm *them*. Further, there are substantial questions regarding Petitioners' standing, because they have not alleged any harm to Barrington or Will County themselves as, respectively, village *qua* village and county *qua* county.. See *City of Olmsted Falls v. FAA*, 292 F.3d 261, 268 (D.C. Cir. 2002) (a municipality may not sue the federal government on behalf of its citizens as *parens patriae*).<sup>18</sup>

Second, by ignoring the fact that their request is for a stay pending judicial review only, Petitioners have failed to account for the fact (clearly shown in CN's Application), that CN plans to phase its re-routing of existing traffic in a three-step process over two construction seasons. See CN-2 at 215-16. Thus, during the pendency of judicial review, CN might at most have re-

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*Animals, Inc. v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) ("[m]erely establishing a procedural violation of NEPA does not compel the issuance of a preliminary injunction"; injunction denied although no EIS was timely produced for decisionmaking).

Petitioners also cite (BARR-7 at 49 n.184) two district court decisions as supporting their general arguments – *Atchison, T. & S.F. Ry. v. Callaway*, 382 F. Supp. 610 (D.D.C. 1974) and *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977) – but both preceded *Defenders of Wildlife* and are in any event distinguishable. Each involved injunctive proceedings (not stays) regarding major agency projects (a lock and dam on the Mississippi River and construction of a power plant, respectively) where those projects were found to lack Congressional authority as well as to violate NEPA.

<sup>18</sup> Likewise, Petitioners' speculation concerning possible harm to "towns around Barrington and all other towns along the EJ&E Line, and the environment itself" (*id.* at 49), while possibly relevant to the third stay factor (harm to third parties) or the fourth factor (the public interest), cannot establish the requisite irreparable harm to Petitioners.

routed a fraction of the traffic it would eventually plan to re-route. Rather than reviewing potential harm at those *interim* traffic levels, however, Petitioners rely upon FEIS projections of *long-term* rail and vehicular traffic growth. Potential long-term growth projected to occur long after a stay would likely expire provides no grounds for the stay.

Third, Petitioners have not shown a relationship between the merits of their claims – which do not call into question Board approval of the proposed Transaction (as Petitioners have not challenged the Board’s findings that the statutory criteria for approval have been met), but only the environmental mitigation imposed – and the harms they allege. Therefore, minor harms that cannot be avoided through reasonable mitigation, but would allegedly occur upon the implementation of the Transaction, are not a basis for stay based on Petitioners’ complaints about the inadequacy of the Board’s NEPA review or the insufficiency of its mitigation requirements. *See BARR-7* at 51 (“the transaction may have adverse environmental effects that cannot be fully mitigated,” quoting Decision No. 16 at 53).

Together, these infirmities are fatal to Petitioners’ efforts to demonstrate that they would be irreparably harmed in the absence of their proposed stay. This is most obvious in the case of Petitioner’s claims regarding harms to wildlife, which are based on statements in the FEIS concerning minor instances of potential wildlife disturbance or mortality incidental to the operation of CN’s trains in certain limited locations or at certain times of the year.<sup>19</sup> Such impacts are no different than those caused by other moving vehicles, such as cars and trucks, and are not substantially different from effects currently caused by CN trains that would no longer move over its current routes to the extent the traffic shift upon which Petitioners’ claims are

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<sup>19</sup> *See, e.g., BARR-7* at 51 (“turtles and snakes ... may experience a proportional increase in mortality”). Further, as discussed above, these appear to be incidental harms that it may not be possible reasonably to mitigate and are therefore not a proper basis for Petitioners’ stay request.

premised occurs. Petitioners seek to analogize these incidental impacts to those which were recognized as warranting injunctive relief in other cases. But the analogy is false. The harms addressed in the cases cited by Petitioners flowed from exceptional federal actions specifically directed at wildlife – the controlled killing of bison<sup>20</sup> and hundreds of swans,<sup>21</sup> and the capture, relocation, and artificial infection of 10 to 60 wild pregnant bison.<sup>22</sup> Even with respect to such direct impacts on wildlife, the moving party seeking an injunction (or stay) must supply specific evidence as to how such injury to wildlife causes the party itself irreparable harm (for example, a showing that opportunities to photograph, interact with, or study the animals would be permanently lost).<sup>23</sup> Petitioners have failed to produce any such evidence.

Petitioners' arguments regarding rail traffic impacts in Barrington are likewise without merit. Their references to FEIS evidence do not support their claims but instead show that where the FEIS identified significant potential harm, mitigation was ordered, and that the remaining anticipated impacts on Barrington would not warrant mitigation when the Transaction is fully

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<sup>20</sup> *Fund for Animals v. Clark*, 27 F. Supp. 2d 8 (D.D.C. 1998).

<sup>21</sup> *Fund for Animals v. Norton*, 281 F. Supp. 2d 209 (D.D.C. 2003).

<sup>22</sup> *Fund for Animals v. Espy*, 814 F. Supp. at 151 n.10.

<sup>23</sup> *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (“[t]o equate the death of a small percentage of a reasonably abundant game species with *irreparable* injury without any attempt to show that the well-being of that species may be jeopardized is to ignore the plain meaning of the word” (emphasis in original)); *Fund for Animals v. Mainella*, 294 F. Supp. 2d 46, 58 (D.D.C. 2003) (no irreparable injury where six-day hunt of black bears was not designed to eradicate or even significantly reduce the black bear population, so plaintiffs’ aesthetic, spiritual, and cultural interests in observing, photographing, studying, and appreciating bears will not be irreparably injured); *Fund for Animals v. Babbitt*, 2 F. Supp. 2d 562, 566-67 (D. Vt. 1996) (questionable that any named plaintiff would suffer any injury as a result of moose hunt where the plaintiffs presented virtually no concrete evidence to support their contention that their ability to view or photograph moose would be impaired as a result of the proposed hunt); *S. Utah Wilderness Alliance v. Thompson*, 811 F. Supp. 635, 642 (D. Utah 1993) (holding that plaintiffs failed to establish that they would suffer irreparable injury since “the coyote population [would] remain viable. . . . This is not to say that the injuries plaintiffs assert are not real, but rather that this court finds that the injury is not irreparable.”).

implemented. Moreover, in relying on the FEIS analysis, Petitioners lose sight of the fact that the issue here must be the impacts absent a stay, and that those impact will necessarily be far less than the impacts upon full implementation that were analyzed in the FEIS. The impacts attributable to the stay are therefore even less than the harms the Board deemed insufficient to warrant mitigation; and yet the Petitioners have not made any independent showing as to the scope of those reduced harms or why they would warrant a stay. Finally, even if the impacts of rail traffic expected to pass through Barrington or Will County during the pendency of judicial review were significant and not mitigated, that traffic would by its very nature be transient, and its impacts would last only as long as the traffic itself. Thus, if Petitioners prevail on judicial review, any harm to them could be halted either by not allowing CN to move the re-routed trains over the EJ&E line, or by ordering additional action to mitigate any future impacts from traffic that continues to pass through their communities.<sup>24</sup> Thus, unlike in the scenario discussed in *Realty Income Trust*, the interim movement of modest numbers of trains over an existing rail line would not cause “irreversible effects on the environment” but would be, at most, a temporary problem.

### **III. A STAY OF THE EFFECTIVE DATE OF DECISION NO. 16 PENDING JUDICIAL REVIEW WOULD SUBSTANTIALLY HARM CN AND OTHER PARTIES.**

The stay of Decision No. 16 that Petitioners seek would delay consummation and implementation of the Transaction for the entire period of judicial review “and completion of the

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<sup>24</sup> Petitioners have asserted that “retention of the *status quo* pending appeal will not substantially harm third parties because any alleged benefits would only be postponed for *during* [sic] the pendency of judicial review and the subsequent proper review of the proposed transaction under NEPA.” BARR-7 at 56 (emphasis in original). For the same reason, any alleged harms to Petitioners would not be irreparable, but would be limited to the same time period. (On the other hand, as explained in part III, below, there is good reason to believe that the harm to shippers and other third parties resulting from a stay could last well beyond the completion of “proper review” and *would* be irreparable.)

NEPA process” (BARR-7 at 57), and thereby cause concrete and severe harm to CN and other interested parties.<sup>25</sup>

At a minimum, a stay of the Board’s decision would deny CN the substantial benefits of this transaction for the period of the stay, which benefits could not be recovered. CN has invested tens of millions of dollars prosecuting this Transaction, including the costs of SEA’s consultants; any delay in realizing the anticipated benefits of that investment would permanently deny CN a return on its significant investment during the period of the stay. Likewise, CN’s shippers would be irretrievably deprived of the benefits of increased efficiency and reliability and reduced transit times through the Chicago bottleneck during the period of a stay. More broadly, given the importance of Chicago as a national rail transportation hub, a stay would further delay the substantial and far-reaching benefits of the Transaction.<sup>26</sup>

In addition, while the harms that a stay would cause during its pendency suffice without more to compel denial of the stay here, there remains a danger of more long-term harms, because a delay in the effectiveness of approval could jeopardize the Transaction. Petitioners’ assertion that “a stay would not trigger a termination right of the Elgin, Joliet & Eastern Railway

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<sup>25</sup> Petitioners do not discuss the adverse impact of a stay on shippers or other railroads. (The United States Department of Transportation, in its comments on the DEIS, acknowledged that the Transaction would “provide significant benefits to businesses and consumers throughout the country, as well as to large numbers of residents in the Chicago area.” DOT-6 at 3.)

<sup>26</sup> This case thus presents a situation similar to that regarding UP’s 1999 notice of exemption for trackage rights over the EJ&E line between Waukegan and Joliet. In that case, the Board denied petitions seeking a stay of the notice of exemption. Addressing the issue of harm to other parties, the Board noted that the proposed trackage rights “are designed to reduce rail traffic congestion in the Chicago area” and that “delay in implementing the rights will delay the realization of these benefits.” *Union Pac. R.R. – Trackage Rights Exemption – Elgin, J. & E. Ry.*, STB Finance Docket No. 33821, slip op. at 3 (STB served Dec. 6, 1999); see also *San Jacinto Rail Ltd. Constr. Exemption – Build-Out to the Bayport Loop near Houston, Harris County, TX*, STB Finance Docket No. 34079, slip op. at 11 (STB served July 9, 2003) (denying stay on ground that, among other things, it would delay “strengthening of the critical rail infrastructure in Houston”).

Company” (BARR-7 at 55-56) is speculative and beside the point. As the Board is aware, EJ&E has asserted that its Stock Purchase Agreement (“SPA”) with GTC gives it the right to terminate the SPA at any time after December 31, 2008, if closing has not taken place by then, and EJ&E has rejected CN’s request for an extension of the contractual termination date. *See* CN-49 at 8. Even though EJ&E has not invoked its claimed termination right, less than two weeks have passed, and there is no assurance that it would not invoke it in the event of a stay that would prevent closing for an uncertain or extended period of time pending judicial review. Thus, there is a very significant risk that a stay would lead EJ&E to attempt to terminate the SPA, resulting in the permanent loss of the benefits anticipated from the Transaction, not to mention the substantial amounts already expended by CN on the Board’s review of the Transaction, including the more than \$20 million paid by CN for SEA’s environmental consultants. If that came to pass, further irreparable harm to CN and third parties could ensue.

Finally, the stay should be denied because of the fundamental lack of balance between the potential harms and benefits of a stay. If a stay is denied but the reviewing court concludes that the Board violated NEPA, any harms created by that putative violation will be fully remediable by means of a corrected further NEPA process and any appropriate additional mitigation requirements. But if a stay is granted and, as is much more probable, the Board’s decision is upheld on judicial review, even assuming that the Transaction ultimately proceeds, there will be no remedy for the millions of dollars in transportation benefits lost by CN and shippers, and the loss of environmental benefits to communities along the current CN lines, as well as deferral of a return on CN’s substantial investment.

#### **IV. THE PUBLIC INTEREST FAVORS DENIAL OF A STAY.**

The proposed Transaction would bring significant transportation and other benefits, not merely to CN and the shippers it serves, but to the Chicago region and the nation at large. The

Board acknowledged those benefits in Decision No. 16, which explained that the Transaction would: greatly improve rail transportation through Chicago and bring environmental benefits to those living in and near that city (Decision No. 16 at 2); enable CN to improve service to many companies in the Chicago metropolitan area shipping or receiving goods by rail and to those shipping products through Chicago (*id.* at 5); and benefit shippers through decreased transit time and more reliable service by adding capacity (*id.*).<sup>27</sup> These benefits are also amply demonstrated by the hundreds of shippers and other parties who have directly and indirectly expressed their support for the proposed Transaction through their letters and other filings with the Board.

In cases where significant public benefits would merely be delayed by a stay (*e.g.*, the UP trackage rights and Bayport Loop cases cited in note 26, above, the Board's examination of the public interest element of the *Hilton/Holiday Tours* test has led it to deny the stay. Here, where the realization of those benefits would certainly be delayed and could be lost entirely, denial of a stay is even more plainly warranted.

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<sup>27</sup> In addition, a recent study commissioned by Chicago Metropolis 2020 (an organization of civic and business leaders seeking solutions to regional economic and social problems in the Chicago metropolitan area) concluded that the Transaction would contribute \$60 million annually to the region's Gross Regional Product and result in the net creation of 649 jobs. Economic Research Development Research Group, Inc., and Carl Martland, Final Report: Regional Economic Benefits from CN's Acquisition of the EJ&E iii (Nov. 25, 2008), *available at* <http://www.chicagometropolis2020.org/documents/RegionalEconomicBenefitsfromCNAcquisitionoftheEJandE-Fullreport.pdf>.

CONCLUSION

The Board should deny the petitions for stay filed by the Village of Barrington (BARR-7) and Will County (WILL-13).

Respectfully submitted,



Paul A. Cunningham

David A. Hirsh

James M. Guinivan

Matthew W. Ludwig

HARKINS CUNNINGHAM LLP

1700 K Street, N.W., Suite 400

Washington, D.C. 20006-3804

(202) 973-7600

Sean Finn  
CANADIAN NATIONAL RAILWAY  
COMPANY  
P.O. Box 8100  
Montréal, QC H3B 2M9  
(514) 399-5430

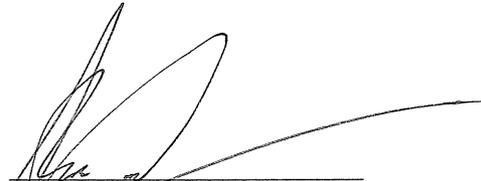
Theodore K. Kalick  
CANADIAN NATIONAL RAILWAY  
COMPANY  
Suite 500 North Building  
601 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(202) 347-7840

*Counsel for Canadian National Railway Company  
and Grand Trunk Corporation*

January 12, 2009

## CERTIFICATE OF SERVICE

I hereby certify that I have this 12th day of January, 2009, served copies of Applicants' Reply to Petitions of Village of Barrington and Will County to Stay Decision No. 16 (designated as CN-55) upon all known parties of record in this proceeding by first-class mail or a more expeditious method.



Alexander D. Coon