

February 4, 2008

Victoria Rutson
Section on Environmental Analysis
Surface Transportation Board
395 E St., SW
Washington, D.C. 200423

By E-mail Filing

Re: Sierra Club's Comments on Environmental Issues
Canadian Pacific Railway Company, et al -
Control - Dakota Minnesota & Eastern Railroad Corporation, et al
STB Finance Docket No. 35081

Dear Ms Rutson:

Attached hereto are comments, submitted on behalf of the Sierra Club, that respond to the Board's request for environmental comments in the above-referenced proceeding.

The Sierra Club would prefer to provide and receive service copies by email. I can be reached at jimdoughertySTB@aol.com.

Sincerely,

/s/ James B. Dougherty

cc: service list

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35081

CANADIAN PACIFIC RAILWAY CO. *et al.*, - Control-
DAKOTA, MINNESOTA & EASTERN RAILROAD CORP, *et al.*

ENVIRONMENTAL COMMENTS OF THE SIERRA CLUB
AND THE SIERRA CLUB OF/DU CANADA

I. INTRODUCTION

These comments, submitted on behalf of the Sierra Club and the Sierra Club of/du Canada (hereinafter collectively “Sierra Club”), respond to the Surface Transportation Board’s (“Board’s” or “STB’s”) order of December 27, 2007 soliciting environmental comments regarding the application (hereinafter “Application”) by Canadian Pacific Railway Co. *et al.* for STB approval of the proposed merger of Canadian Pacific Railway with the Dakota, Minnesota & Eastern Railroad (hereinafter collectively “Applicants”). In the Application, Applicants ask the Board to bifurcate its environmental review into two phases - one addressing the impacts of the proposed merger if Powder River Basin (hereinafter “PRB”) coal is never transported over the newly-expanded rail network, and the other addressing the impacts of coal shipments. Applicants suggest that the first phase of the proposed review scheme will require no environmental review whatsoever, as it is subject to a “categorical exclusion” under NEPA. Application at 23. As to when the second phase of the proposed review scheme

is carried out, there is no way of knowing. In effect, Applicants seek a free pass from any NEPA review for an indefinite period.

In these comments the Sierra Club contends that this proposed approach to NEPA compliance is illegal according the case law and applicable regulatory provisions. This approach would also violate the requirements of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and § 106 of the National Historic Preservation Act, 16 U.S.C. 470(f).

II. NEPA'S "CUMULATIVE IMPACTS RULE" REQUIRES THAT BOTH PHASES OF THE PROPOSED MERGER BE CONSIDERED IN DETERMINING WHETHER PREPARATION OF AN EIS IS REQUIRED.

Bifurcation of its environmental review into two phases would violate the STB's obligation to consider these matters cumulatively. Under the NEPA regulations of the President's Council on Environmental Quality, in assessing whether preparation of an environmental impact statement (hereinafter "EIS") is required as to the first phase, the STB must consider "whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. 1508.27(7). The regulations stress that cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present and **reasonably foreseeable future** actions". 40 C.F.R. §1508.7 (emphasis added). *See generally Churchill County v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001); *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 180 (3d Cir. 2000) ("If the cumulative impact of a given project and other planned projects is significant, an

applicant can not simply prepare an EA for its project, issue a FONSI, and ignore the overall impact of the project ...").

The shipment of coal over the entire, expanded CP/DM&E network is clearly both “foreseeable” and “planned.” This is made clear by the language of the Application. See Application at, *e.g.*, 3, 10. *See also* the Green Statement at 5 (“The proposed transaction also presents a unique opportunity for CPR-DM&E to construct and operate a rail route to serve coal origins in Wyoming’s Power River Basin.”).

Indeed, the two phases of the proposed merger must also be viewed cumulatively with the impacts of the PRB construction project, FD-33407. Though the NEPA documentation for that license has been finalized, the action now pending before the STB is nothing more than an extension of that action. The impacts of the PRB Construction matter alone have already been determined by the Board to be “significant,” thus requiring preparation of an EIS. 6 STB at 15 (2002); *see also Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003). A similar determination has been made regarding DM&E’s proposed acquisition of the “IC&E” line. *Iowa, Chicago and Eastern Railroad Corp. – Trackage Rights Exemption*, FD-34177, Memorandum to Section Chief Victoria Rutson, January 30, 2007.

Under NEPA, these three actions must be viewed collectively. CEQ’s regulations call for unified NEPA evaluation of:

(2) *Cumulative actions*, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.
40 C.F.R. § 1508.25(a)(2).

See generally, Native Ecosystems Council v. Dombeck, 304 F. 3d 886 (9th Cir. 2002);

Western North Carolina Alliance v. North Carolina Dept. of Transp., 312 F. Supp. 2d 765 (E.D.N.C. 2002) (both interpreting NEPA to require a unified analysis of all actions that a part of an overall plan).

III. NEPA's "SEGMENTATION RULE" REQUIRES BOTH PHASES OF THE PROPOSED MERGER TO BE EVALUATED CONCURRENTLY

Under NEPA, segmentation of multi-part projects into discrete units is illegal. *Sierra Club v. Callaway*, 499 F. 2d 987 (5th Cir. 1974). This is so even where one part of the action is imminent and awaiting agency approval, and the other is merely planned. *Sierra Club v. Marsh*, 499 F. 2d 983, 999 n. 19 (5th Cir. 1981).

Evaluating the coal and non-coal phases of the proposed merger separately from one another would be a classic case of "segmentation." Virtually since NEPA's enactment in 1970, agencies have attempted to minimize the environmental significance of related actions by describing them as "not interdependent," and the courts have consistently required concurrent evaluation.¹

¹ See, e.g., *Daly v. Volpe*, 376 F. Supp. 987 (W.D. Wash. 1974), aff'd, 514 F.2d 1106 (9th Cir. 1975); *Named Individual Members of San Antonio Conservation Soc. v. Texas Highway Dept.*, 446 F.2d 1013 (5th Cir. 1971), cert. denied, 406 U.S. 933, 92 S. Ct. 775, 32 L. Ed.2d 136 (1972); *Swain v. Brinegar*, 542 F.2d 364 (7th Cir. 1976); *Swain v. Brinegar*, 517 F.2d 766 (7th Cir. 1975); *Indian Lookout Alliance v. Volpe*, 484 F.2d 11, 16 (8th Cir. 1973); *Ecology Center of Louisiana v. Coleman*, 515 F.2d 860 (5th Cir. 975); *Sierra Club v. Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972); *Dickman v. City of Santa Fe*, 724 F. Supp. 1341 (D.N.M. 1989); *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 114 (D.N.H. 1975); *Conservation Society of Southern Vermont v. Secretary of Transportation*, 362 F. Supp. 627 (D. Vt. 1973), aff'd, 508 F.2d 927 (2d Cir. 1974), vacated on other grounds, 423 U.S. 809, 96 S. Ct. 19, 46 L. Ed.2d 29 (1975); *Thompson v. Fugate*, 347 F. Supp. 120 (E.D. Va. 1972); *Committee to Stop Route 7 v. Volpe*, 346 F. Supp. 731 (D. Conn. 1972); *Citizens Expressway Coalition v. Lewis*, 523 F. Supp. 396 (E.D. Ark. 1981).

The proposed merger will also help CP/DM&E build infrastructure for hauling vast quantities of ethanol throughout Iowa, Missouri, Minnesota, South Dakota, and elsewhere along the merged rail network. In 1996, 1999, and 2004, new ethanol plants were built along DM&E's tracks in South Dakota and Minnesota (at Huron, Aurora, and Claremont). Today, these three plants annually produce a total of about 174 million gallons of ethanol. Another ethanol plant will open near the DM&E line – in Marion, South Dakota -- in 2008, with a projected output of 100 million gallons per year. See <http://www.ksfy.com/Stories/Story.cfm?SID=7372>. At an August 25, 2006 public hearing held in Rochester, Darrel Trom, spokesperson for Al-Corn Clean Fuels in Claremont, MN, noted that ethanol production along the DM&E railroad is expected to expand from 500 million gallons to one billion annually in 2010.² This is roughly the equivalent of 33,000 rail tank cars. The Applicants are well aware of this. "A combination of [our] larger network, plus rising demand for coal and ethanol has created the perfect storm for us,' [DM&E President] Schieffer said." (Reuters; June 30, 2006). Accordingly, foreseeable increases in shipments of ethanol must be considered by the STB when judging whether the cumulative effects of the proposed merger are "significant" under NEPA.

² Rochester Post-Bulletin, August 26, 2006.

IV. NEPA REQUIRES EVALUATION OF EXTRATERRITORIAL IMPACTS

The STB must consider the environmental impacts of the proposed merger within Canada as well as the United States. The cases defining NEPA's "extraterritorial reach" suggest that if the environmental impacts of a proposed action fall exclusively within a foreign jurisdiction or in an area over which the United States has no legislative control, NEPA does not apply. In *Natural Resources Defense Council v. NRC*, the Court of Appeals for the D.C. Circuit found that NEPA does not "impose[] an . . . EIS requirement . . . with respect to impacts falling exclusively within foreign jurisdictions." *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 208 U.S. App. D.C. 216, 647 F.2d 1345, 1347-48 (D.C. Cir. 1981). In *Basel Action Network v. Maritime Admin.*, the district court determined NEPA did not apply to agency action occurring on the high seas because the United States does not have "legislative control over the high seas." *Basel Action Network v. Maritime Admin.*, 370 F. Supp. 2d 57, 71-72 (D.D.C. 2005).

However, if the agency action occurs within the United States and its impact will be felt in the United States extraterritorially, courts have held that NEPA applies. *See, e.g., Greenpeace USA v. Stone*, where the district court stated NEPA "may require a federal agency to prepare an EIS for action taken abroad, especially where United States agency action abroad has direct environmental impacts within this country..." *Greenpeace USA v. Stone*, 748 F. Supp. 749, 758 (D. Haw. 1990).³

³ *Cf. Environmental Defense Fund v. Massey*, 300 U.S. App. D.C. 65, 986 F.2d 528, 529 (D.C. Cir. 1993) (NEPA applies "where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect" will be felt in a sovereignless area, such as Antarctica, over which the United States has "a

Without doubt the proposed merger portends significant increases in shipments of coal and other materials, some hazardous (e.g., ethanol) over the expanded CP/DM&E rail network – both in this country and in Canada. These impacts must be considered by the Board in determining whether to prepare an EIS, and in fixing the scope of the EIS that, the Sierra Club contends, is required by law.

V. THE STB MUST COMPLY WITH THE NATIONAL HISTORIC PRESERVATION ACT

Under the National Historic Preservation Act, (“NHPA”), the STB must assess the likely impact of the proposed merger project on historic structures that lie along the route of the CP/DM&E rail network, as well as on rail bridges along the tracks. Section 106 of the NHPA requires federal agencies to "take into account the effect" a federal undertaking will have on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" and to "afford the Advisory Counsel on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking." *16 U.S.C. 470(f)*. *See also* 36 C.F.R. § 800.2(a)(3).

Just as the STB devoted substantial resources to evaluating the likely adverse effects on historic bridges along the DM&E tracks in the PRB Construction proceeding, it must similarly consider the implications of bridge upgrades that will be necessitated along the CP/DM&E network. Additionally, where historic buildings are located near the tracks, a “constructive use” can occur because of the increased noise and vibration

great measure of legislative control.”).

associated with the movement of unit trains. Such impacts must be evaluated under section 106.

VI. THE STB MUST INITIATE “CONSULTATION” WITH THE U.S. FISH & WILDLIFE SERVICE (“FWS”) UNDER THE ENDANGERED SPECIES ACT

Section 7 of the Endangered Species Act (“ESA”) requires each federal agency to engage in “consultation” to “insure that *any action authorized, funded, or carried out* by [the agency] . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” 16 U.S.C. § 1536(a)(2). In *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978), the Supreme Court observed that the ESA commands that section 7 applies to “all . . . actions authorized, funded, or carried out” by federal agencies and that “this language admits of no exception.”

The consultation required in the context of this proceeding is essentially the same as that which was conducted by the STB in 2000, except that the geographic scope must be larger than it was in 2000, given the quintupling in size of the CP/DM&E rail network. The larger geographic scope of the required inquiry is significant in several respects, not the least of which is that given the additional thousand rail miles that must be considered, **different species of plants and animals are likely to be implicated**. In addition, even with regard to the 880 mile-long project that was evaluated by the STB, different species within the impact area may have been added to or removed from the endangered species list over the past seven years.

The first step in the consultation process is statutorily prescribed: “To facilitate compliance with the requirements of subsection (a)(2), each Federal agency shall ... request of [FWS] information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. Once FWS and the STB have agreed on the list of species that may be affected by the proposed merger, the consultation may proceed. *See generally* 50 C.F.R. § 402.

The timeliness of this consultation is critical to the integrity of the process. FWS’s regulations go to great lengths to ensure that if any significant changes are made to the scope of the project, the “action agency” must return to FWS to “reinitiate consultation.”⁴ This is confirmed by the “Reinitiation Notice” included in the

⁴ See the pertinent FWS regulation, 50 C.F.R. § 402.16:

Sec. 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be

consultation report (“Biological Opinion”) prepared by FWS in connection with the STB’s licensing decision. *See* the FEIS prepared for the DM&E proceeding, App. H at p. 33.

requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

The expanded geographic scope of the proposed new rail network compels a geographically-expanded environmental review under the ESA. Federal law provides that where an agency narrows the scope of the consultation process so that it addresses only part of an overall action, it is legally deficient.⁵ By expanding the scope of its proposal, the Applicants have extended the zone of likely impacts, changed the nature of those impacts, and perhaps increased them – should it move more coal than previously anticipated.

Respectfully submitted,

Dated: February 4, 2008

/s/James B. Dougherty

Counsel for the Sierra Club and
Sierra Club of/du Canada

⁵ The consultation process must extend to "all phases" of the "entire agency action." *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988) (emphasis in original). In *NRDC v. Houston*, 146 F.3d 1118 (9th Cir. 1998), where the Bureau of Reclamation had failed to consult over certain aspects of its proposed renewal of long-term water delivery contracts, the court granted the remedy of contract rescission. 146 F.3d at 1128-29.

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Comments was served this 4th day of February, 2008, by first-class mail, postage pre-paid, on all Parties of Record as of this date.

/s/ James B. Dougherty